No.

IN THE
Supreme Court of the United States

MICHAEL A. DEEM, PETITIONER,

v.

LORNA DIMELLA-DEEM, ROBERT J. FILEWICH, PHD, ANGELINA YOUNG, ROLLIN AURELIEN, ROBIN D. CARTON, ESQ., FAITH G. MILLER, ESQ., ANGELA DIMELLA, ARLENE GORDON-OLIVER, F.C.J.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, a fit parent that exceeded minimum standards of care for both of his children (then 11 and 12 years old), filed federal-question claims against Respondents for, *inter alia*, effectively terminating his parental and associational rights with his children, based on fabricated allegations and denial of any semblance of due process. The District Court summarily dismissed the complaint pursuant to a circuit specific domestic relations *abstention* doctrine and judicial immunity, and certified that any appeal would not be taken in good faith. The Second Circuit affirmed and awarded costs.

1. DOES A FEDERAL COURT HAVE A RIGHT TO DECLINE THE EXERCISE OF JURISDICTION OVER FEDERAL-QUESTION CLAIMS?

2. IS A JUDGE IMMUNE FOR ACTIONS, THOUGH JUDICIAL IN NATURE, TAKEN IN THE COMPLETE ABSENCE OF ALL JURISDICTION?

3. MAY A FEDERAL COURT USURP THE RIGHT OF NEW YORK STATE TO DETERMINE ITS OWN COMPELLING STATE INTERESTS AND THE MEANS OF PROTECTING THEM?

LIST OF PARTIES

Petitioner

MICHAEL A. DEEM

Respondents

LORNA M. DiMELLA-DEEM,

ROBERT J. FILEWICH, PhD,

ANGELINA YOUNG,

ROLLIN AURELIEN,

ROBIN D. CARTON, ESQ.,

FAITH G. MILLER, ESQ.,

ANGELA DiMELLA, and

ARLENE GORDON-OLIVER, F.C.J.

STATEMENT OF RELATED CASES

Deem v. DiMella-Deem, et al., No. 18-2266, U.S. Court of Appeals for the Second Circuit. Judgment entered October 30, 2019. Published. Before Ralph K. Winter, Rosemary S. Pooler and Richard J. Sullivan, Circuit Judges.

Deem v. DiMella-Deem, et al., No. 18-cv-6186 (NSR), U.S. District Court for the Southern District of New York. Judgement entered July 24, 2018.

Deem v. DiMella-Deem, et al., No. 18-2266, U.S. Court of Appeals for the Second Circuit. Judgment entered December 11, 2019.

Deem v. DiMella-Deem, et al., No. 18-2266, U.S. Court of Appeals for the Second Circuit. Judgment entered December 16, 2019.

Deem, et al. v. Scheinkman, et al., No. 18-cv-10777 (CS), U.S. District Court for the Southern District of New York. Judgment entered December 18, 2018.

Deem v. DiMella-Deem, et al., No. 18-11889 (KMK), U.S. District Court for the Southern District of New York. Judgement entered May 2, 2019.

Deem v. DiMella-Deem, et al., No. 19-1630, U.S. Court of Appeals for the Second Circuit. Appeal of Summary Order of Dismissal. Calendared for April 3, 2020, on submission.

Deem v. DiMella-Deem/DiMella-Deem v. Deem, File No. 153622, White Plains Family Court, New York State. *Ex Parte* Default Order entered June 7, 2019, denying all contact with Respondent-Petitioner DiMella-Deem and the parties' two children until June 7, 2021.

Matter of Deem, et al. v. Westchester County Dept. of Soc. Srvcs., et al., No. 2368-2018, Supreme Court of the State of New York, Westchester County. Judgment entered December 14, 2018, denying review of Child Protective Service's investigation into Respondent DiMella-Deem for lack of standing to speak for the children.

Deem v. Deem, No. 2018-7054, New York State Supreme Court Appellate Division, Second Department. Order entered June 18, 2018, denying application to vacate no contact restraining order.

Deem v. Deem, No. 2018-7055, New York State Supreme Court Appellate Division, Second Department. Order entered June 18, 2018, denying application to vacate no contact restraining order.

Deem v. Deem, No. 2018-9179, New York State Supreme Court Appellate Division, Second Department. Order entered August 23, 2018, denying order to show cause to vacate no contact restraining order.

Deem v. Deem, No. 2018-9852, New York State Supreme Court Appellate Division, Second Department. Order entered September 25, 2018, denying motion to stay court ordered forensic evaluation.

Deem v. Deem, No. 2018-14227, New York State Supreme Court Appellate Division, Second Department. Order entered January 9, 2019, denying order to show cause to vacate no contact restraining order.

People v. Deem, No. 18110057, Briarcliff Manor Village Court, New York State. Judgment entered June 12, 2019, dismissing misdemeanor complaint on default.

Matter of the Pistol License of Deem, No. 800073/2018, New York State County Court, Westchester County.

Judgment entered May 28, 2019, dismissing application to revoke pistol license.

Deem, et al. v. DiMella-Deem, et ano., No. 69596/2019, New York State Supreme Court, Westchester County. Judgment entered January 13, 2020, denying petition for writ of *habeas corpus* regarding Family Court Order.

Deem, et al. v. DiMella-Deem, et ano., No. 2020-1113, New York State Supreme Court Appellate Division, Second Department. Pending appeal for denial of writ of *habeas corpus* regarding Family Court Order.

Deem, et al. v. DiMella-Deem, et ano., No. 2020-204, New York State Supreme Court Appellate Division, Second Department. Denial of petition for writ of *habeas corpus* regarding restraint by matrimonial court, dated January 4, 2020.

Deem, et al. v. DiMella-Deem, et ano., No. 2020-____, New York State Court of Appeals. Pending appeal of denial of writ of *habeas corpus* regarding Family Court Order.

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Deem v. DiMella-Deem, et al., 18-2266 (2d Cir. Oct. 30, 2019). Decision affirming summary dismissal of federal-question claims. (1a)

Deem v. DiMella-Deem, et al., 18-cv-06186 (NSR) (S.D.N.Y. Jul. 24, 2018). Order of Dismissal. (14a)

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1). The Second Circuit denied a motion for rehearing *en banc* on December 11, 2019. (26a)

RELEVANT PROVISIONS INVOLVED

U.S. Constitution, Article III, § 2 provides,

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution [and] the laws of the United States[].

New York State Judiciary Law, § 14 provides,

> A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he [] is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree.

22 NYCRR § 100.3(E)(1)(a)(i) provides,

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: the judge has a personal bias or prejudice concerning a party.

U.S. Constitution, Amendment X provides,

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

STATEMENT

Petitioner filed for divorce in New York State. He also sought a restraining order in family court directing his estranged wife to stop physically assaulting him and engaging in certain sexual conduct while in the presence of their two children. Petitioner's wife responded by filing fabricated allegations against him with, *inter alia*, Child Protective Services and the family court. Respondent Filewich, Petitioner's former marriage counselor, disseminated a fabricated diagnosis. Petitioner replied with specific facts and circumstances, supported by exhibits, that proved his wife's and marriage counselor's allegations were fabricated. The co-respondents perpetuated Respondent DiMella-Deem's fabricated allegations, held Petitioner's pleadings and exhibits against him, and effectively terminated Petitioner's associational and parental rights with both of his children, without providing a deprivation hearing. To date, Petitioner has

had no contact with his children since June 9, 2018, at 2:00 p.m., after the last court ordered supervised visit, even though there is no question his children are neither abused nor neglected.

Petitioner filed federal-question claims in federal district court. The District Court summarily dismissed all claims based on the domestic relations *abstention* doctrine enunciated in *American Airlines, Inc. v. Block*, 905 F.2d 12 (2d Cir. 1990), and absolute judicial immunity. Petitioner was denied the opportunity to explain controlling state law that stripped Respondent Gordon-Oliver of all jurisdiction. The Second Circuit affirmed holding, "Our decision today is consistent with our unbroken practice of citing *American Airlines* when upholding, in unpublished decisions, the dismissal of both federal-question and diversity cases involving domestic relations disputes." (13a (fn. 1)) The Second Circuit neither discussed nor applied controlling federal and state law for the claim against Respondent Gordon-Oliver.

The decision below violates prior decisions of this Honorable Court regarding the exercise of jurisdiction. It violates the Tenth Amendment and prior decisions of this Court regarding the structure of our Government established by the Constitution by moving the line drawn by New York State as to when jurisdiction of state judges ends.

Procedural History

On July 9, 2018, Petitioner filed a complaint in the Southern District of New York pursuant to 28 U.S.C. §§ 1331 and 1343, 42 U.S.C. §§ 1983 and 1985,

and the First, Second, Fourth and Fourteenth Amendments, U.S. Constitution. *Deem v. DiMella-Deem, et al.*, 18-cv-6186 (NSR) (S.D.N.Y.).

On July 12, 2018, Respondent Gordon-Oliver informed the parties that she had recused herself from the underlying family offense proceedings, and extended the restraining order denying Petitioner all contact with his children to September 13, 2018.

On July 20, 2018, Petitioner filed a first amended complaint as of right, adding a claim against Respondent Gordon-Oliver in her individual capacity for extending the no contact restraining order in the absence of all jurisdiction.

On July 24, 2018, the District Court summarily dismissed the first amended complaint. (14a-25a)

On October 30, 2019, the Second Circuit affirmed the District Court's summary dismissal of the first amended complaint. (1a-13a)

On December 11, 2019, the Second Circuit denied Petitioner's motion for rehearing *en banc*. (26a)

On December 16, 2019, the Second Circuit awarded costs to Respondents. (27a)

Facts

On November 7, 2017, Petitioner filed for divorce seeking joint custody of his two children and equitable distribution. His estranged wife answered seeking sole

custody of their two children and separate property claims.

In about January or February 2018, Respondent DiMella-Deem repeatedly demanded that Petitioner take $ 10,000 as his share of the marital estate, "[o]r you'll be sorry. You'll have no home, no money, no family. Nothing!"

On March 12, 2018, Petitioner filed the first family offense petition, under F.C.A., Art. 8, seeking a restraining order directing Respondent DiMella-Deem to refrain from physically assaulting him and refrain from masturbating in the presence of the children.

On March 16, 2018, Respondent DiMella-Deem filed a family offense petition containing fabricated allegations that Petitioner was "delusional" and diagnosed with paranoid personality disorder.

In March and April 2018, Respondent DiMella-Deem repeatedly told Petitioner that he would be leaving the marital home.

From March 16 through July 20, 2018, no less than eight restraining orders were issued against Petitioner. A post-deprivation hearing was required within fourteen days of each restraining order pursuant to New York State Family Court Act (F.C.A.), § 842-a(7). To date, Petitioner has been denied all post-deprivation hearings. Each restraining order invoked 18 U.S.C. § 2265, 2266, compelling all State, tribal or territorial courts to give full faith and credit to the referenced restraining orders because Petitioner "has or will be afforded reasonable notice and opportunity to

be heard in accordance with state law sufficient to protect his rights," when in fact he was not.

On April 13, 2018, Respondent DiMella-Deem caused an anonymous complaint of improper guardianship to be filed with Child Protective Services based on the aforementioned fabricated allegations.

On April 18, 2018, Respondent Filewich, Petitioner's former marriage counselor, made fabricated statements to CPS. He stated Petitioner "was exhibiting [] escalating paranoia," "became explosive and violent," "is now delusional," and "may be schizophrenic," which was all false.

On April 19, 2018, Petitioner was removed from the marital home by CPS by an *ex parte* pre-petition application pursuant to F.C.A., § 1029, which contained additional fabricated allegations. CPS did not file a formal petition.

On April 25, 2018, Respondent Gordon-Oliver[1] granted Petitioner supervised visitation "until [CP]S is able to conclude their investigation."

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[1] Respondent Gordon-Oliver was elected as a Family Court Judge in November 2017. Prior to that she practiced bankruptcy law for over 20 years and had limited experience in family law. Respondent Miller's law firm, Miller, Zeiderman, Wiederkehr & Schwartz LLP, was active in Respondent Gordon-Oliver's election campaign. Miller's firm was one of the biggest donors to Gordon-Oliver's election campaign. *See*, Campaign Financial Disclosure Provided by the New York State Board of Elections, *Judge Gordon-Oliver for Family Court*, at https://cfapp.elections.ny.gov/ords/plsql_browser/CONTRIBUTORA_COUNTY?ID_in=C06861&date_From=1/1/2017&date_to=12/31/2018&AMOUNT_From=1&AMOUNT_to=1000000&ZIP1=&ZI

From April 25 through June 9, 2018, Petitioner engaged in supervised visits with his children. No allegations of inappropriate conduct arose from said visits.

On June 1, 2018, Respondent Gordon-Oliver appointed Respondent Miller[2] as attorney for the children (AFC), in violation of blackletter law.

On June 4, 2018, Petitioner met with Respondent Miller, before she met with Respondent DiMella-Deem or the children. Petitioner expressed his concerns regarding his estranged wife. Respondent Miller replied, "If you're right, she won't get custody either." *Fait accompli* for Petitioner not getting custody.

On June 12, 2018, CPS "unfounded" the complaint of improper guardianship against Petitioner, did not recommend any services, and closed the file.

On June 13, 2018, Petitioner filed a violation petition against Respondent DiMella-Deem in family court. It was supported by a 48-page affidavit with exhibits rebutting Respondent DiMella-Deem's allegations in her family offense petition. Subsequently,

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P2=&ORDERBY_IN=N&CATEGORY_IN=ALL, retrieved on February 22, 2020.

[2] Respondent Miller is widely viewed to be "politically connected." *See*, Page Six, *Divorcing Rudy and Judith Giuliani demand to know each other's net worth*, 4/6/2018 (retrieved at https://pagesix.com/2018/04/06/rudy-giulianis-estranged-wife-demands-to-know-his-net-worth/, on 1/26/2020) ("Giuliani's hired politically connected attorney Faith Miller to represent him in the split. Miller's husband is Alan Scheinkman, a top state appeals court judge.").

both Respondent Gordon-Oliver and Respondent Miller held Petitioner's allegations against him. They claimed sending Respondent DiMella-Deem's clothing to a scientific laboratory for DNA testing was "bizarre" and raised issues of his mental fitness, even though three independent laboratory test results supported Petitioner's position, refuted Respondent DiMella-Deem's allegations and proved she filed false documents under oath.

Later that day, Respondent Miller filed an emergency order to show cause seeking to prevent a scheduled supervised visit between Petitioner and his children, and terminate all contact between Petitioner and his children until the court appointed forensic evaluator in the matrimonial action could finish his examination or therapeutic supervised visitation could be arranged. Respondent Miller's affirmation was not supported by any exhibits or affidavits. The New York Court of Appeals has repeatedly held that an attorney's affirmation is not evidence – it must be supported by demonstrative or testimonial evidence. Respondent Miller's application was in direct contrast to the children's wishes to see their father. The application was granted a few hours later.

On June 25, 2018, Respondent Gordon-Oliver held a conference, invited CPS to make recommendations on how to proceed and adopted them, despite CPS' repeated admissions on the record that it had a conflict of interest with Petitioner.

On July 9, 2018, Petitioner filed a complaint in the Southern District of New York alleging federal-question claims.

On July 12, 2018, Respondent Gordon-Oliver informed the parties that she had recused herself from the underlying family offense proceedings, and extended the restraining order denying Petitioner all contact with his children to September 13, 2018.

On July 20, 2018, Petitioner filed a first amended complaint adding a claim against Respondent Gordon-Oliver in her personal capacity for actions in the absence of all jurisdiction, specifically extending the no contact restraining order after she decided to recuse herself.

On about February 14, 2019, the matrimonial action was reassigned from the Matrimonial Part to a judge in the Commercial Part. That judge served as the law secretary for 7.5 years for Respondent Miller's husband, Alan D. Scheinkman, before he was elevated to a supervising judge.

On March 22, 2019, the matrimonial court appointed another AFC. To date, that AFC has failed or refused to advocate for the children's wishes – to see their father. She has conditioned visitation on Petitioner consenting to supervised therapeutic visitation.

On June 7, 2019, the Family Court entered a default restraining order against Petitioner, holding that he violated Penal Law, § 240.26, Harassment, 2d Degree (a Violation), against his estranged wife, only, not the children. Yet, the restraining order denies Petitioner all contact with his children until June 7, 2021.

On June 26, 2019, Petitioner's mental health expert in the matrimonial trial testified that "[Petitioner] is not a threat to himself or anyone else." That testimony remains unrebutted.

Both the matrimonial court and family court have conditioned visitation with the children on Petitioner consenting to supervised therapeutic visitation. Petitioner's consent to supervised therapeutic visitation would moot the instant federal claims against Respondent Miller.

On February 25, 2020, the matrimonial court stated the need for supervised therapeutic visitation is that Petitioner has not seen his children for such a long period of time.

Petitioner has not had any contact with his children since June 9, 2018, at 2:00 p.m., after the last supervised visit, due to fabricated allegations and denial of any semblance of due process. He has "no home, no money, no family," just as Respondent DiMella-Deem said would happen.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT HAS NO RIGHT TO DECLINE THE EXERCISE OF JURISDICTION OVER FEDERAL-QUESTION CLAIMS.

Federal courts, it was early and famously said, have no more right *to decline the exercise of jurisdiction which is given*, than to usurp that which is not given. Jurisdiction existing, this

> Court has cautioned, a federal court's obligation to hear and decide a case is virtually unflagging.

Sprint Communications, Inc. v. Jacobs, 571 U.S. 69, 134 S.Ct. 584, 590-91, 187 L.Ed.2d 505 (2013) (internal citations omitted) (emphasis added); *see, Marshall v. Marshall*, 547 U.S. 293, 298, 126 S.Ct. 1735 (2006).

"[D]istrict courts have original jurisdiction of all civil actions arising under the Constitution, laws, or treatises of the United States." 28 U.S.C. § 1331. In the instant matter, the Second Circuit held, "this case [] is before this Court on federal-question jurisdiction, not diversity." (8a).

"The courts of appeals [] have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. However, the Second Circuit affirmed the District Court's summary dismissal of the complaint because "[Petitioner's] claims are, at a minimum, on the verge of being matrimonial in nature and that there is no obstacle to their full and fair determination in state courts." (9a) (internal quotations omitted). *Ipse dixit.*

First, the district and circuit courts clearly had jurisdiction of Petitioner's claims and appeal, respectively, but refused to exercise it.

Second, the ruling below "that there is no obstacle to the[] full and fair determination [of Petitioner's claims] in state courts," (9a), is woefully inaccurate. Petitioner expressly pleaded in the first amended complaint,

77. [] Judge Gordon-Oliver scheduled the [] proceedings for [] a date and time that she knew plaintiff's attorney was engaged in New York City. Judge Gordon-Oliver informed Mrs. Deem's attorney of the new court date but failed or refused to inform Plaintiff or his attorney of the new and rescheduled court dates.

81. But for Plaintiff's good fortune of stumbling onto the court date [], the Article 8 and 10 proceedings would have been heard *ex parte* as, on information and belief, Judge Gordon-Oliver intended.

96. [] ACA Grasso stated on the record, "[Ms. Young reviewed the video.] There's no *definitive* proof that [Mrs. Deem] was masturbating in front of the children." The legal standard to determine if a report of suspected child neglect or inadequate guardianship should be indicated is "some credible evidence."

107. Judge Gordon-Oliver granted the ["no contact" restraining order on June 13th]. There was no basis in fact, law, policy or reason to request or grant the application as Plaintiff hadn't seen or contacted his children since June 9th and CPS "unfounded" the report of suspected child neglect on June 12th without recommending any services. Also, there were no credible allegations that Plaintiff engaged in inappropriate conduct during visits and new facts did not exist.

108. [A] conference was held in Family Court for the underlying Family Offense proceedings. Judge Gordon-Oliver, *sua sponte*, conferenced in ACA Grasso by phone "to see what [the County] has to say," even though ACA Grasso admitted to having a conflict of interest against Plaintiff, CPS unfounded the report against Plaintiff without recommending any services, and there were no applications pending against Plaintiff by Westchester County.

109. At ACA Grasso's suggestion, Judge Gordon-Oliver ordered a second Court Ordered Investigation (COI). The possibility of new facts and circumstances to justify a COI did not exist. Judge Gordon-Oliver ordered a second COI because the she didn't like the results of the first COI, that Plaintiff did not neglect his children.

119. During the June 25th court appearance Judge Gordon-Oliver argued for and put words in the mouth of Ms. Miller, which Ms. Miller ratified, to justify why Ms. Miller was refusing to advocate for her clients' wishes, to see and communicate with their father, and advocating a position hostile to their wishes, to suspend all contact between them and their father, Plaintiff.

120. Judge Gordon Oliver renewed the "no contact" TOP without any basis in fact, law, policy or reason to continue to deny plaintiff access to his children, property or home, and ordered Plaintiff to surrender all firearms to local police.

> 130. Judge Gordon-Oliver *sua sponte* extended the "no contact" TOP entered on June 25, 2018 without any basis in fact, law, policy or reason, and further alienated Plaintiff from his children, home and property. Judge Gordon-Oliver did so [] in clear absence or in excess of all jurisdiction.
>
> 131. The proceedings before Judge Gordon-Oliver were "judicial" in name only. They were in fact sham proceedings used maliciously, willfully and deviously to deny Plaintiff his rights to parental relations, due process and property.

These facts plausibly allege that Petitioner faced significant "obstacle[s] to the[] full and fair determination [of his claims] in state courts." However, the courts below did not "accept all factual allegations in the [first amended] complaint as true and draw all reasonable inferences in plaintiff['s] favor." *Hayden v. Paterson*, 594 F.3d 150, 160 (2d Cir. 2010).

Furthermore, in six trips to the Second Department, Petitioner was denied the opportunity to argue directly to the assigned judge. Not once was he allowed to be present when opposing counsel – including Respondent Miller – made their arguments to the assigned judge or court attorney. And, Ms. Miller's name continues to be invoked by current counsel, to capitalize on her political influence.

Finally, the Second Circuit explained, "Our decision today is consistent with our unbroken practice of citing *American Airlines* when upholding, in unpublished decisions, the dismissal of both federal-

question and diversity cases involving domestic relations disputes." (13a (fn. 1)). The Court below took pains to distinguish a domestic relations *exception* from a domestic relations *abstention*. Respectfully, the distinction is one with no difference – federal-question plaintiffs are denied access to federal courts without cause.

The Second Circuit's "unbroken practice" is in direct violation of this Honorable Court's decisions in *Ankenbrandt* v. *Richards*, 504 U.S. 689, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992), *Marshall*, 547 U.S. at 298, and *Sprint Communications*, 134 S.Ct. at 590-91.

"[This Honorable Court] emphasized in *Ankenbrandt* that the [domestic relations] exception covers only a narrow range of domestic relations issues." *See, Marshall*, 547 U.S. at 307. "Ankenbrandt's complaint sought damages for the defendants' alleged sexual and physical abuse of the children." *Id.*, at 305. Here, Petitioner seeks damages for violations of, *inter alia*, his fundamental constitutional rights to free speech, free exercise of religion, intimate association with his children and parental rights.

In *Marshall*, this Honorable Court explained, "the District Court improperly refrained from exercising jurisdiction over Ankenbrandt's tort claim." *Id.* The *Ankenbrandt* Court "f[ound] no Article III impediment to federal-court jurisdiction in domestic relations cases." *Id.*, at 306. The *Marshall* Court "not[ed] that some lower federal courts had applied the domestic relations exception well beyond the circumscribed situations posed by *Barber* [*v. Barber*, 21 How. 582, 16 L.Ed. 226 (1859)] and its progeny, [and]

clarified that only divorce alimony, and child custody decrees remain outside federal jurisdictional bounds," but only in diversity cases. *See*, *Marshall*, 547 U.S. at 307-08.

In *Lefkowitz v. Bank of New York*, the Second Circuit cited *Marshall* in holding, "if jurisdiction otherwise lies, then the federal court may, indeed must, exercise it." 528 F.3d 102, 106 (2d Cir. 2007). However, the Second Circuit continues to distinguish this Honorable Court's decisions at its leisure. The Second Circuit refuses to exercise Article III jurisdiction "when upholding, in unpublished decisions, the dismissal of both federal-question and diversity cases involving domestic relations disputes." (13a (fn.1)).

The Second Circuit provides no explanation of the criteria for deciding which decisions will be unpublished or how federal-question plaintiffs can meet them, if at all. Conceivably, certain claims, issues or defendants have been fenced. This raises grave questions regarding plaintiffs' rights to petition, equal protection, access to courts and due process. It creates an impression that some litigants are more worthy than others, regardless of the underlying merits of federal-question claims.

The Second Circuit's domestic relations *abstention* doctrine is no different than the domestic relations *exception* doctrine that "some lower federal courts had applied well beyond the circumscribed situations posed by *Barber* and its progeny." *Marshall*, 547 U.S. at 308. It prevents lower federal courts from reviewing state policies and practices that impinge fundamental rights, in some of the most well-heeled counties in the nation, in situations where incentive to

violate fundamental rights, create animosity and increase fees is quite high.

For example, prosecuting fabricated allegations violates a respondent's right to due process. *See*, *e.g.*, *McDonough v. Smith*, 898 F.3d 259, 266 (2d Cir. 2018), *rev'd on other grounds*, 588 U.S. ___, 139 S.Ct. 2149, 204 L.Ed.2d 506 (2019); *Heck v. Humphrey*, 997 F.2d 355 (7th Cir. 1993), *aff'd*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). Yet, 22 NYCRR § 130-1.1(a) expressly excludes frivolous conduct from "proceedings in the Family Court commenced under Article 3, 7 or 8 of the Family Court Act." "[C]onduct is frivolous if: [] it asserts material factual statements that are false." 22 NYCRR § 130-1.1(c)(3). The statute appears to be unconstitutional as written. Petitioner's complaint alleged federal-question claims that arose from proceedings pursuant to Article 8, of the Family Court Act.

This Honorable Court has held, "Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed." *Janus v. AFSCME*, 585 U.S. ___, 138 S.Ct. 2448, 2464, 201 L.Ed.2d 924 (2018). Yet, litigants in contested child custody disputes in, *inter alia*, the Appellate Division, Second Department are compelled to subsidize the speech of court appointed AFCs, forensic evaluators and others, without caps. *See*, *Plovnick v. Klinger*, 10 A.D.3d 84, 781 N.Y.S.2d 360 (2d Dep't 2004) (*citing* Judiciary Law, § 35(3)). Judiciary Law, § 35(3) is silent on the source of payment and sets a $4,000 cap. The Appellate Division, Third Department rejected private pay of court appointed actors. *See*, *Redder v. Redder*, 17 A.D.3d 10, 15, 792 N.Y.S.2d 201

(3d Dep't 2005) (*citing* Judiciary Law, § 35(5)) ("All expenses for compensation and reimbursement under this section shall be a state charge to be paid out of funds appropriated to the administrative office for the courts for that purpose."). The Chief Judge of New York State formalized private pay of court appointed actors through rulemaking in 22 NYCRR § 36. Hourly rates of the court appointees are set by the assigned judges at the whim of the judge. The hourly rates can be twice the market rate, without caps as to the sum charged per case. *See*, *Deem v. DiMella-Deem*, No. 68616-2017 (N.Y. Sup. Ct. Jun. 5, 2018) (Dkt. 21). Litigants are even compelled to pay the fees of a court appointed AFC in opposing a motion to have the AFC disqualified because she refuses to comply with her ethical obligation to "zealously advocate the [unabused and unneglected] child's position" – to see their fit father. *See*, 22 NYCRR § 7.2(d); *Cf.*, *Deem v. DiMella-Deem*, 68616-2017 (Dkt. 334) (Order awarding court appointed AFC additional fees for, *inter alia*, opposing Plaintiff's appeal of order appointing AFC.

This Honorable Court has held, "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Parties in divorce proceedings have statutory and constitutional rights to discovery. *See*, N.Y.S. Const. Art. I, § 9 ("nor shall any divorce be granted otherwise than by judicial proceedings"); C.P.L.R., § 101 ("The [C.P.L.R.] shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges"); C.P.L.R., §§ 3101-3140 Disclosure; C.P.L.R., § 3101(a) ("There shall

be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.").

Yet, in the New York State Supreme Court Appellate Division, Second Department, litigants in contested custody disputes are denied all custodial discovery. *See, Deem v. DiMella-Deem*, No. 68616-2017 (N.Y. Sup. Ct. Jun. 5, 2018) (Dkt. 21); *accord, Deem v. Colangelo, et al.*, No. 2018-15017 (2d Dep't Jan. 7, 2019), *transferred, Deem v. Colangelo, et al.*, No. 528205 (3d Dep't Apr. 5, 2019), *appeal dismissed*, *Deem v. Colangelo, et al.*, No. SDS 26 (N.Y.C.A. Jun. 6, 2019), *cert. denied*, *Deem v. Colangelo, et al.*, No. 19-590 (S.Ct. Jan. 13, 2020). Mental health practitioners are appointed by matrimonial courts to conduct forensic examinations of the parties and their children. *Id.* Parties have no voice as to who is chosen, how the examination is conducted, what evidence is obtained or considered, or what recommendations are made. *Id.* Litigants' right to be heard is severely impinged and the voice of court appointed forensic examiners, non-parties, are elevated. And, litigants and their children are compelled to cooperate with the forensic examinations despite their First Amendment right not to speak. *See, Janus v. AFSCME*, 138 S.Ct. at 2463. Litigants in the Third and Fourth Departments are allowed full discovery.

Federal and state courts throughout this nation require expert testimony to meet either the *Daubert* or *Frye* tests. Yet, court appointed mental health practitioners in, *inter alia*, New York are directed to conduct forensic examinations of families and make recommendations regarding custody and visitation,

even though there is no "standard of practice" for such examinations, only "guidelines," *Guidelines for Child Custody Evaluations in Divorce Proceedings*, APA, February 21, 2009. Recommendations regarding custody and visitation are outside their field of expertise – mental health. Their recommendations regarding custody and visitation, which impact fundamental rights of multiple individuals, amount to nothing more than "junk science." And litigants are ordered to pay handsomely for that junk science, adding to the $50-billion dollar divorce industry. *See, New Documentary Sheds Light On $50-Billion Divorce Industry*, Jan. 25, 2014 (https://www.huffpost.com/entry/divorce-documentary_n_4550450, retrieved on February 2, 2020).

In *N.Y.S. Bd. of Elections v. Lopez Torres*, this Honorable Court upheld New York State's system of selecting judges by political "party bosses." 522 U.S. 196, 128 S.Ct. 791, 799, 169 L.Ed.2d 665 (2008). In a concurring opinion, Justice Stevens, joined by Justice Souter, quoted Justice Marshall's oft repeated remark: "The Constitution does not prohibit legislatures from enacting stupid laws." *Id.*, at 801. Clearly, Justice Stevens was intimating "the broader proposition that the very practice of electing judges is unwise," *id.*, because it renders a judiciary ripe with potential for political influence. Justice Stevens' concurrence was prescient. During the underlying proceedings in state court, Petitioner repeatedly observed a man standing in front of the Westchester County Courthouse with signs asserting he had been denied all contact with his daughters for over seven years, without being provided a pre or post deprivation hearing. The husband and

wife law firm that obtained the summary no contact restraining orders against him is the same law firm that obtained the summary no contact restraining orders against Petitioner. The Second Circuit's abstention doctrine precludes Petitioner from determining whether the effective termination of constitutional association and parental rights of fit parents was the result of political influence. Respectfully, there can be no other basis for the summary categorical termination of those rights and refusal to provide statutorily mandated post-deprivation hearings. Any plaintiff in that position has a meritorious federal-question claim. *See*, *e.g.*, *Brokaw v. Weaver*, 305 F.3d 660, 665 (7th Cir. 2002) (Allegation that "opponents' lawyers using their political clout to turn the state judges against him" pleaded meritorious § 1983 claim); *Ernst v. Child & Youth Servs.*, 108 F.3d 486, 491-92 (3d Cir. 1997) (claim alleging defendants violated plaintiff's due process rights by making biased recommendations to the state court pleaded meritorious § 1983 claim). And it would call into question the constitutionality of New York State's system of selecting judges, at least for domestic relations matters.

This Honorable Court has held, "Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State supports its allegations by at least clear and convincing evidence." *Santosky v. Kramer*, 455 U.S. 745, 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1981). Yet, New York State may "by a fair preponderance of the evidence," F.C.A., § 832, deny a fit parent all contact with his children "for a period not in excess of two years," F.C.A., § 842, for committing a violation, P.L., § 240.26 ("Harassment in the second degree is a

violation"), even when the Family Court makes no findings of a violation or worse against the children, but a violation – the equivalent of a parking ticket – against the mother/wife, only. *See*, *Deem v. DiMella-Deem/DiMella-Deem v. Deem*, File No. 153622 (Family Ct, Jun. 7, 2019); *cf.*, *Nicholson v. Scopetta*, 3 N.Y.3d 357, 375, 820 N.E.2d 840, 787 N.Y.S.2d 196 (2004) (Holding CPS may not separate children from their parents even when one parent commits battery on the other parent in the presence of the children.").

Juxtaposing settled federal constitutional principles with the oddities in New York State domestic relations matters demonstrates,[3] one would hope, the need to subject those oddities to the adversarial process and truth-seeking function of federal courts. The Supremacy Clause does not stop at the door to domestic relations courts, just as it does not stop at the door to local criminal courts.

The petition should be granted because the Second Circuit's abstention doctrine imposes an "Article III impediment to federal-court jurisdiction in domestic relations cases," which this Honorable Court repeatedly held is impermissible.

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[3] For a more detailed description of the challenges fit parents, predominantly fathers, face in domestic relations matters in New York State, *see, Deem v. DiMella-Deem, et al.*, 19-cv-1630 (2d Cir.) (Dkt. 96).

II. A JUDGE IS NOT IMMUNE FOR ACTIONS, THOUGH JUDICIAL IN NATURE, TAKEN IN THE COMPLETE ABSENCE OF ALL JURISDICTION.

In *Mireles v. Waco*, this Honorable Court affirmed "that, generally, a judge is immune from a suit for money damages." 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991). This Court reasoned, "[I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." *Id.*, at 10.

New York State law and policy comports with this Court's decisions regarding judicial immunity. The New York Court of Appeals has held,

> [E]ven applying strict scrutiny review, the rules [governing disqualification of a judge] are constitutionally permissible because they are narrowly tailored to further a number of compelling state interests, including preserving the impartiality and independence of our state judiciary and maintaining public confidence in New York State's court system.

Matter of Raab, 100 N.Y.2d 305, 312, 793 N.E.2d 1287, 763 N.Y.S.2d 213 (2003).

> [L]itigants have a right guaranteed under the [state's] Due Process Clause to a fair and impartial magistrate and that the State, as the steward of the judicial system, has the obligation

> to create such a forum and prevent corruption and the appearance of corruption including political bias or favoritism. [] The state has an overriding interest in the integrity and impartiality of the judiciary.

Raab, 100 N.Y.2d at 313.

> The ability to be impartial is an indispensable requirement for a judicial officer. Equally important is the requirement that a Judge conduct himself in such a way that the public can perceive and continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property.

Sardino v. Judicial Comm., 58 N.Y.2d 286, 291, 448 N.E.2d 83, 461 N.Y.S.2d 229 (1983); *see Oakley v. Aspinwall*, 3 N.Y. 547, 549-50 (1850).

However, judicial immunity is neither omnipresent nor ubiquitous. "[I]mmunity is overcome in only two sets of circumstances. First, a judge is not immune from liability for nonjudicial actions, i.e.: actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Mireles*, 502 U.S. at 11 (internal citations omitted). Petitioner presses the latter.

In the Second Circuit,

> [A] judge will be denied immunity only where it appears, first, that the judge acted in the clear

> absence of jurisdiction, and second, that the judge must have known that he or she was acting in the clear absence of jurisdiction.

Tucker v. Outwater, 118 F.3d 930, 934 (2d Cir. 1997) (*citing Maestri v. Jutkofsky*, 860 F.2d 50, 53 (2d Cir. 1988)).

In the decisions below, neither the Second Circuit nor the District Court addressed how "[federal courts] look to state law to determine whether [a judge] acted within [her] jurisdiction." *Huminski v. Corsones*, 396 F.3d 53, 76 (2d Cir. 2004) (c*iting, Stump v. Sparkman*, 435 U.S. 349, 357, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978)). Neither the Second Circuit nor the District Court addressed the controlling state law cited in Petitioner's brief and reply brief: *Wilcox v. Royal Arcanum*, 210 N.Y. 370, 104 N.E. 624 (1914); *Cummings v. Christensen*, 439 N.Y.S.2d 825 (2d Dep't 1981); and 22 NYCRR § 100.3(E)(1)(a)(i).[4]

Controlling New York State law is unequivocal. "In this state the statutory disqualification of a judge deprives h[er] of jurisdiction." *Wilcox*, 210 N.Y. at 377.

New York State blackletter law provides,

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: the judge has a personal bias or prejudice concerning a party.

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[4] Respondent Gordon-Oliver also failed to squarely address in her brief the controlling state law regarding disqualification of a judge.

22 NYCRR § 100.3(E)(1)(a)(i). Remittal is not available if the judge is disqualified for personal bias or prejudice concerning a party. 22 NYCRR § 100.3(F).

> A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which [s]he [] is interested, or if [s]he is related by consanguinity or affinity to any party to the controversy within the sixth degree.

Judiciary Law, § 14.

Moreover, in New York "[a] judge has an obligation not to recuse [] herself, even if sued in connection with [] her duties, unless [] she is satisfied that [] she is unable to serve with complete impartiality, in fact or appearance." *Silber v. Silber*, 84 A.D.3d 931, 923 N.Y.S.2d 131 (2d Dep't 2011).

Respondent Gordon-Oliver recused herself *sua sponte*. She did not remit her recusal to the parties.

Therefore, when Respondent Gordon-Oliver's "duty to sit" is juxtaposed with her *sua sponte* recusal, the only reasonable conclusion is "she [wa]s unable to serve with complete impartiality, in fact or appearance." *Connor v. New York State Com'n on Judicial Conduct*, 260 F.Supp.2d 517, 523 (N.D.N.Y. May 9, 2003) (*citing* 22 NYCRR § 100.3(E)(1)(a)(i)).

Finally, neither the Second Circuit nor the District Court applied controlling state law to the facts alleged in the pleading.

The District Court held,

> [Deem] also asserts Judge Gordon-Oliver was either "in clear absence or in excess of *all* jurisdiction" when, *upon recusing herself*, she extended a previously issued temporary order of protection, which prohibited him from having contact with the children, until September 13, 2018[]. Judges are immune from claims arising from decisions made in excess of their jurisdiction, as opposed to decisions made in the clear absence of their jurisdiction. Thus, this Court will not decide whether these decisions were made in error. And [Deem] has alleged no facts showing that Judge Gordon-Oliver was in clear absence in her jurisdiction when she made these decisions.

(13a (fn. 1)) (emphasis added).

The District Court clearly failed to apply controlling federal and state law to the allegations in the complaint. Indeed, it conceded it did not even attempt to do so and denied Petitioner the opportunity to be heard on that issue.

Yet, the Second Circuit held, "We affirm the dismissal of Deem's claims against Judge Gordon-Oliver substantially for the reasons set forth in the district court's well-reasoned decision." (4a). It stands reason on its head to assert a decision is well-reasoned when the decision itself concedes controlling law was not applied to the facts alleged.

The court below has pinned "a badge or emolument of exalted office," *Barr v. Matteo*, 360 U.S. 564, 572, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), on judges, that have been selected by political "party bosses," *N.Y.S. Bd. of Elections v. Lopez Torres*, 522 U.S. 196, 128 S.Ct. 791, 799, 169 L.Ed.2d 665 (2008), even when those judges have conceded their lack of impartiality, but nonetheless intentionally or recklessly inflict injury on a loving, loved, caring and cared for father and his children. This, the Constitution forbids. *See*, *Mireles*, 502 U.S. at 11*; Barr*, 360 U.S. at 572; *see, also*, *Scheuer v. Rhodes*, 416 U.S. 232, 237-38, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) ("Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself."); *Ford Motor Co.* v. *Dept. of Treasury of Ind.*, 323 U.S. 459, 462, 65 S.Ct. 347, 89 L.Ed. 389 (1945) (same). *Cessante ratione legis cessat ipsa lex*.

"Whether one views the [Second Circuit's extension of immunity] as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the [extension] is inconsistent with the federal structure of our Government established by the Constitution." *New York v. United States*, 505 U.S. 144, 177, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

The petition should be granted because the decision below violates prior decisions of this Honorable Court.

III. NEW YORK STATE HAS A RIGHT TO DETERMINE ITS OWN COMPELLING STATE INTERESTS AND THE MEANS OF PROTECTING THEM.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const., Amend. X.

> By splitting the atom of sovereignty, the Founders established two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens. When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government.

Alden v. Maine, 527 U.S. 706, 730, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (internal citations and quotations omitted).

"[I]t has long been held that [New York State] statutes requiring disqualification on the basis of interest or bias, are jurisdictional." *Casterella v. Casterella*, 65 A.D.2d 614, 615 (2d Dep't 1978) (*citing Oakley v. Aspinwall*, 3 N.Y. 547, 550 (1850)). "While the statute[s are] in part directed at protecting innocent litigants, [their] primary purpose is to insure the

dignity of the judiciary." *Casterella*, 65 A.D.2d at 615. "Thus, the urgency of a particular case is not so much to be regarded as the elevation and honor of courts of justice, whose dignity and purity constitute a main pillar of the state." *Id.*

The Second Circuit held, "[E]ven assuming that Judge Gordon Oliver erred in extending the temporary protection order against Deem shortly after recusing herself, any such error falls far short of an act taken in the complete absence of all jurisdiction." (4a) (internal quotations omitted). *Ipse dixit.*

The Second Circuit moved the line drawn by the New York State legislature, and recognized by New York State's highest court, as to when jurisdiction of its own judiciary ends. The decision below violates the Tenth Amendment by asserting "authority over a State's most fundamental political processes," specifically rewriting New York State's statutes regarding disqualification of New York State judges. *See, e.g., Alden*, 527 U.S. at 754; *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) ("It is obviously essential to the independence of the States, and to their peace and tranquility, that their powers to prescribe the qualifications of their own officers … should be exclusive, and free from external interference.").

The decision below "strikes at the heart of the political accountability so essential to our liberty and republican form of government," *New York*, 505 U.S. at 177, by asserting authority over New York State's right to determine when jurisdiction of its own judiciary ends. This violates the Tenth Amendment.

See, e.g., *Alden*, 527 U.S. at 706; *Gregory*, 501 U.S. at 463 ("the authority of the people of the States to determine the qualifications of their most important government officials [] is a power reserved to the States under the Tenth Amendment and guaranteed [] to every State in this Union [by] a Republican Form of Government.") (*citing* U.S. Const., Art. IV, § 4).

The decision below "is an invasion of the authority of [New York] State and, to that extent, a denial of its independence." *Alden*, 527 U.S. at 754. It fails to "[r]ecognize[] and preserve[] the autonomy and independence of [New York] State[] – independence in [its] legislative and independence in [its] judicial departments." *Id.* "Supervision [by the Second Circuit] over either the legislative or the judicial action of [New York] State[] is in no case permissible [because said supervision is not] by the Constitution specifically authorized or delegated to the United States." *Id.* Thus, the decision below violates the Tenth Amendment. *See, Id.*; *Gregory*, 501 U.S. at 463.

The decision below denies New York State its sovereign right "to further a number of compelling state interests, including preserving the impartiality and independence of [the] state judiciary and maintaining public confidence in New York State's court system." *See, Matter of Raab*, 100 N.Y.2d at 312. By moving the line drawn by New York State as to when jurisdiction ends, the decision below violates the Tenth Amendment. *See, e.g.*, *Alden*, 527 U.S. at 754; *Gregory*, 501 U.S. at 463.

The decision below denies New York State "litigants [the] right guaranteed under the [state's] Due

Process Clause to a fair and impartial magistrate and [usurps New York] State['s right], as the steward of [its] judicial system, [to fulfill its] obligation to create such a forum and prevent corruption and the appearance of corruption including political bias or favoritism," *See, Matter of Raab*, 100 N.Y.2d at 313. It interferes with New York State's "overriding interest in the integrity and impartiality of [its] judiciary." *See, Id.* This violates the Tenth Amendment. *See*, *Alden*, 527 U.S. at 754; *cf.*, *Sprint Communications*, 134 S.Ct. at 590-91 ("Federal courts, it was early and famously said, have no more right to decline the exercise of jurisdiction which is given, *than to usurp that which is not given*.").

Moreover, only by assumption can it be said that Respondent Gordon-Oliver "erred" in extending the "no contact" restraining order. There never was a valid basis to sever all contact between Petitioner and his children. *See, Nicholson*, 3 N.Y.3d at 375 ("*A fortiori*, [] in many instances removal may do more harm to the child[ren] than good."); *Matter of Parris v. Wright*, 170 A.D.3d 731, 732 (2d Dep't 2019) ("[A] court may not order counseling as a condition of future parental access or re-application for parental access."). The children were neither abused nor neglected. It is axiomatic that severing all contact between a father and his children is warranted only in the most severe cases of abuse. No such facts were ever alleged in any matter.

Respondent Gordon-Oliver's extension of the "no contact" restraining order was no mere error. Suspension of all contact was based exclusively on the unsupported affidavit of Respondent Miller. Miller was prohibited by law from being appointed in private pay

cases. Gordon-Oliver and Miller knew this. Miller violated her legal and ethical obligations to her clients by not zealously advocating for contact between the children and their father. Miller actively supported Gordon-Oliver's election campaign just a few months earlier, and is married to Gordon-Oliver's supervisor's supervisor. Miller brings to bear significant political influence. Gordon-Oliver ignored Petitioner's evidence that rebutted Respondent DiMella-Deem's allegations, if not proved they were fabricated. These facts combined with summary denials of all post-deprivation hearings smacks of graft. This is precisely what New York State seeks to prevent in fact or appearance. *See, e.g.*, *Casterella*, 65 A.D.2d at 615*; Matter of Raab*, 100 N.Y.2d at 313.

In support of its ruling the Second Circuit cited two cases: *Mireles*, 502 U.S. at 11; and *Brandley v. Keeshan*, 64 F.3d 196, 201 (5th Cir. 1995). Neither of those cases reference the Tenth Amendment. And, unlike the decision below, the *Mireles* court specifically relied on state law in rendering its decision. *Mireles*, 502 U.S. at 12 (*citing* Cal. Civ. Proc. Code Ann. §§ 128, 177, 187).

The petition should be granted because the decision below violates the Tenth Amendment and prior decisions of this Honorable Court.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that this Honorable Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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