No. 19-1111

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.,

Respondents.

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

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Robert A. Berns
Counsel of Record
KAUFMAN DOLOWICH
& VOLUCK, LLP
Attorneys for Respondent Faith G. Miller, Esq.
25 Main Street,
Suite 500
Hackensack, New Jersey 07601
201-488-6655
rberns@kdvlaw.com

April 8, 2020

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Second Circuit Court of Appeals correctly affirmed the dismissal of Petitioner's claims pursuant to the Domestic Relations Abstention Doctrine articulated in *American Airlines, Inc. v. Block*?
2. Whether the Domestic Relations Abstention Doctrine is consistent with this Court's precedent, including *Ankenbrandt v. Richards*?

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

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PRELIMINARY STATEMENT

This brief is submitted on behalf of Respondent FAITH G. MILLER, ESQ. ("Ms. Miller"), in opposition to Petitioner Michael Deem's ("Petitioner") petition for a writ of certiorari to the United States Supreme Court. Petitioner is requesting that this Court grant review of the United States Court of Appeals for the Second Circuit's Judgment dated October 30, 2019, which affirmed the United States District Court's dismissal of Petitioner's claims in this action. Petitioner, an admitted attorney, filed a federal lawsuit seeking review of actions undertaken in an underlying state court child custody proceeding. Despite Petitioner's protests to the contrary, the District Court properly dismissed Petitioner's claims, as against all respondents, pursuant to the Domestic Relations Abstention Doctrine.

In a well-reasoned decision, the Second Circuit affirmed the District Court's dismissal, holding that the District Court properly invoked the Domestic Relations Abstention Doctrine. In so holding, the Second Circuit rejected Petitioner's argument that the Domestic Relations Abstention Doctrine articulated in *American Airlines v. Block* could never be applied as long as a plaintiff purports to raise a federal question in their case. The Second Circuit further rejected Petitioner's argument that the invocation of the Domestic Relations Abstention Doctrine violated this Court's ruling in *Ankenbrandt v. Richards,* a case which involved the separate and distinct Domestic Relations

Exception Doctrine. The Second Circuit noted that while the Domestic Relations Exception did not apply in this case, because Petitioner's case was not based solely upon diversity jurisdiction, the Domestic Relations Abstention Doctrine nevertheless was properly utilized by the District Court.

Petitioner now seeks this Court's review following the Second Circuit's denial of Petitioner's request for a rehearing *en banc*. For these reasons and for the reasons discussed below, the Petition for a Writ of Certiorari should be denied.

STATEMENT OF THE CASE

A. Factual Allegations in the First Amended Complaint

On November 7, 2017, Petitioner commenced an action for divorce in New York State Supreme Court, Westchester County, on November 7, 2017. Petitioner's wife, Respondent Lorna DiMella-Deem ("Mrs. Deem"), filed an Answer in the divorce action seeking, *inter alia*, sole custody of their two children and apparently accused Petitioner of suffering from mental illness.

On March 16, 2018, Mrs. Deem obtained a temporary order of protection against Petitioner in Westchester County Family Court on the grounds that Petitioner had been diagnosed with Paranoid Personality Disorder (PPD). Subsequently, on April 13, 2018, Petitioner alleges that an anonymous complaint of suspected child neglect was filed with

the New York State Central Registry asserting that Petitioner was engaged in erratic behavior and exhibiting signs of PPD. Petitioner contends that this report was false and was made at the behest of Mrs. Deem. As a result of this report, the Westchester County Department of Social Services began an investigation and the Westchester County Family Court issued a temporary order of protection that limited Petitioner's contact with his two children.

On May 15, 2018, the New York state court judge presiding over the Family Court proceeding, Hon. Arlene Gordon-Oliver, appointed Ms. Miller as Law Guardian/Attorney for the Children (AFC).[1] Petitioner alleges that in her role as AFC, Ms. Miller filed an emergency application with the Family Court to suspend all contact between Petitioner and the children. Judge Gordon-Oliver granted Ms. Miller's application. Petitioner claims that Ms. Miller's application did not accurately represent the wishes of the children. (Petition, at p. 8).

B. Procedural History in the District Court

Displeased with the outcome of his state court proceedings, Petitioner commenced the instant action in the District Court with the filing of a

[1] Petitioner's assertions that Ms. Miller, and her law firm, Miller, Zeiderman, Wiederkehr & Schwartz LLP, were "politically connected" have no relevance to the issues raised by this Petition and appear to be nothing more than an attempt to disparage Ms. Miller. They should not be considered by the Court. (Petition, at pp. 6 n.1; 7, n.2, 33).

Complaint on or about July 9, 2018. Petitioner filed a First Amended Complaint (FAC) on or about July 20, 2018. Petitioner's FAC alleged the following causes of action as against Ms. Miller: (1) violation of Petitioner's First Amendment right to intimate association with his children; (2) malicious prosecution and abuse of process in violation of the Fourth Amendment; (3) violation of Petitioner's Fourteenth Amendment right to parental relations and custody of his children; (4) violation of the Equal Protection Clause of the Fourteenth Amendment; and (5) conspiracy to violate Petitioner's Constitutional rights pursuant to 42 U.S.C. § 1985. In addition to damages, Petitioner's FAC sought injunctive and declaratory relief against all Respondents.

On July 24, 2018, the District Court declined to exercise subject matter jurisdiction over Petitioner's claims in the FAC as against Ms. Miller and all of the other respondents, determining that abstention was warranted pursuant to the domestic relations abstention doctrine articulated in *American Airlines, Inc. v. Block*, 905 F.2d 12, 14 (2d Cir. 1990). The District Court held that under this doctrine it would abstain from exercising jurisdiction over Petitioner's claims because Petitioner's claims "are, or [were] on the verge of being, about child custody," and Petitioner had "alleged no facts indicating that there [was] any 'obstacle to [a] full and fair determination [of his child custody issues] in state courts.'" *Deem v. DiMella-Deem*, 941 F.3d 618, 620 (2d Cir. Oct. 30, 2019).

On July 25, 2018, the District Court issued a Judgment dismissing this action pursuant to the July 24, 2018 Order.

C. Procedural History in the Second Circuit

Petitioner filed a notice of appeal from the District Court's Judgment on July 31, 2018. After full briefing on the merits and oral argument, the Second Circuit issued an opinion on October 30, 2019, affirming the District Court's dismissal of this action.

The Second Circuit reviewed the question of whether the District Court properly elected to abstain from exercising subject matter jurisdiction under *American Airlines*. In its well-reasoned opinion, the Second Circuit first considered whether the Domestic Relations Exception applied and, second, if not, whether abstention was warranted in this case. On the first question, the Second Circuit held that the Domestic Relations Exception did not apply because Petitioner had invoked federal question jurisdiction, not diversity. On the question of abstention, the Second Circuit agreed with the District Court that Petitioner's claims were, at a minimum "on the verge of being matrimonial in nature" and that "there [was]no obstacle to their full and fair determination in state courts." *Id*. at 623.

The Second Circuit then conducted a thorough analysis as to whether the Domestic Relations Abstention Doctrine set forth in *American Airlines,*

Inc. v. Block, 905 F.2d 12 (2d Cir. 1990) remained good law in light of the Supreme Court's subsequent decision in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992). On this point, the Second Circuit stated:

> *Ankenbrandt*, the intervening Supreme Court decision most relevant to *American Airlines'*s abstention holding, neither overruled that holding nor cast doubt on it to the extent that we are free to chart a new course here. As we have explained, *Ankenbrandt* was not a federal-question case and thus did not squarely address the issue presented in *American Airlines* or this case.
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> * * *
>
> [T]he existence of a distinct abstention doctrine for certain domestic relations disputes is supported by the Supreme Court's longstanding recognition—in a non-diversity case involving a child custody dispute—that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States."
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> * * *
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> Therefore, in the absence of a clear statement from the Supreme Court precluding an abstention doctrine like the one in *American Airlines*, we discern no conflict, incompatibility, or inconsistency between that case and intervening Supreme Court law that would

> render prior Circuit precedent not binding on us.

Id. at 623-24 (internal citations omitted). Moreover, the Second Circuit noted that the circuit courts that have addressed the issue—the First, Sixth and Seventh Circuits—all recognize a distinct domestic relations abstention doctrine post-*Ankenbrandt*. *Id.* at 624. The Clerk of the Second Circuit Court of Appeals entered judgment affirming the District Court's dismissal on October 30, 2019.

Petitioner filed a petition for rehearing *en banc* before the Second Circuit on November 8, 2019. Following the denial of his petition on December 11, 2019, Petitioner filed his Petition for a Writ of Certiorari with this Court on March 6, 2020. This matter was placed on the Court's docket on March 10, 2020. Accordingly, the instant brief in opposition is timely.

SUMMARY OF ARGUMENT

Ms. Miller respectfully submits that the Second Circuit correctly affirmed the District Court's dismissal of Petitioner's federal claims pursuant to the Domestic Relations Abstention Doctrine articulated by the Second Circuit in *American Airlines, Inc. v. Block*, 905 F.2d 12, 14 (2d Cir. 1990). First, the Domestic Relations Abstention Doctrine was correctly applied to the facts of this case, as Petitioner's claims against Ms. Miller (and the other respondents) were clearly matrimonial in nature or

"on the verge" of being matrimonial in nature. Likewise, Petitioner provided no reason as to why his claims could not be fully and fairly litigated in the underlying state court proceedings.

Second, the Second Circuit's October 30, 2019 opinion is consistent, and not in conflict with, the prior precedent of this Court. *Ankenbrandt* was not a federal question jurisdiction claim and, thus, did not squarely address the issue presented in this case nor the Second Circuit's long-standing precedent set forth in *American Airlines*. As the Second Circuit correctly noted, *Ankenbrandt* neither overruled nor cast doubt on the Domestic Relations Abstention Doctrine and, thus, *American Airlines* remains good law. Accordingly, there is no reason for this Court to grant the Petition and review the Second Circuit's opinion as it does not conflict with this Court's precedent, nor does it raise any other significant issues requiring this Court's review.

ARGUMENT

THE SECOND CIRCUIT CORRECTLY APPLIED THE DOMESTIC RELATIONS ABSTENTION DOCTRINE

A. Abstention Was Warranted

The Second Circuit correctly affirmed the District Court's decision to abstain from exercising jurisdiction over Petitioner's FAC and the federal causes of action under the Domestic Relations Abstention Doctrine. Under the Domestic Relations

Abstention Doctrine, "[a] federal court presented with matrimonial issues or issues 'on the verge' of being matrimonial in nature should abstain from exercising jurisdiction so long as there is no obstacle to their full and fair determination in state courts." *American Airlines, Inc. v. Block*, 905 F.2d 12, 14 (2d Cir. 1990) (*quoting Bossom v. Bossom*, 551 F.2d 474, 475 (2d Cir. 1976) (per curiam)); *see also Martinez v. Queens County DA*, 596 Fed. Appx. 10 (2d Cir. 2015) (summary order); *Keane v. Keane*, 549 Fed. Appx. 54 (2d Cir. 2014) (summary order). In addition to matrimonial issues, the Domestic Relations Abstention Doctrine also applies to actions "challenging the results of domestic relations proceedings." *Martinez, supra,* at *12 (affirming dismissal of § 1983 civil rights action brought against Family Court judge).

At bar, it is clear that Petitioner's claims against Ms. Miller arise entirely out of an underlying Family Court proceeding (and actions undertaken by Ms. Miller in her role as the AFC therein) and that this action seeks to "challenge the results" of that proceeding. Among other things, Petitioner contends that Ms. Miller supposedly misrepresented the children's wishes to see and communicate with Petitioner. (Petition, p. 8). Indeed, when Petitioner was questioned at oral argument before the Second Circuit as to why the Second Circuit should not abstain under the Domestic Relations Abstention Doctrine, he could not provide a viable explanation as to how his purported federal claims were not simply re-cast state family law claims attempting

to invoke federal court jurisdiction and get another proverbial "bite at the apple."

While Petitioner makes conclusory assertions that he cannot obtain a "full and fair determination" of his child custody claims in state court, he provides nothing to support his argument. Rather, Petitioner merely copies sections of his FAC with conspiracy theories and contentions of purported courthouse corruption and improper appointment of judges. (Petition, at pp. 11-14). It was Petitioner's obligation to demonstrate why the Domestic Relations Abstention Doctrine should not apply, and he failed to do so. The allegations in the FAC are plead in conclusory fashion and demonstrate nothing other than the fact that Petitioner is unhappy with the results of the state court proceedings. (Petition, at pp. 11-14).

Accordingly, it is clear that the instant action seeks to challenge the results of the Family Court proceeding, and that Petitioner had a full and fair opportunity to raise his child custody claims in that proceeding, and therefore abstention was appropriate.

B. The Domestic Relations Abstention Doctrine Does Not Conflict with *Ankenbrandt*

As the Second Circuit noted in its October 30, 2019 opinion, *American Airlines* involved a federal question case arising from the parties' dispute over the distribution of alimony payments. 905 F.2d at 15. In *American Airlines*, before reaching the ques-

tion of abstention, the Court first concluded that the case did not fall within the exception to subject matter jurisdiction recognized by this Court in earlier precedent, and noted, without deciding, that the exception may not apply in federal question cases. *Id*. at 14 n.1. The Second Circuit then considered, notwithstanding the fact that federal courts had subject matter jurisdiction over the case, whether it was appropriate to abstain from exercising such jurisdiction. Specifically, the Second Circuit stated:

> Nevertheless, even if subject matter jurisdiction lies over a particular matrimonial action, federal courts may properly abstain from adjudicating such actions in view of the greater interest and expertise of state courts in this field. A federal court presented with matrimonial issues or issues "on the verge" of being matrimonial in nature should abstain from exercising jurisdiction so long as there is no obstacle to full and fair determination in state courts.

Id. at 14.

The Second Circuit concluded that abstention was appropriate because the dispute over alimony was on the verge of being matrimonial in nature, and there was no obstacle to a full and fair determination of the dispute in state court. *Id*. at 14-15.

By contrast, this Court's subsequent decision in *Ankenbrandt* involved application of the Domestic Relations Exception Doctrine in the context of

diversity jurisdiction cases, not abstention in the context of federal question. 504 U.S. at 699-704. In *Ankenbrandt*, this Court held that the Domestic Relations Exception Doctrine was an implied exception to Congress's grant of diversity jurisdiction. *Id.* at 699, 700-03. As noted in the opinion below by the Second Circuit, *Ankenbrandt* did not involve claims brought pursuant to the federal courts' federal question jurisdiction; rather, it was a diversity case. *Id.* at 691. As this Court noted, "[t]hat Article III, § 2, does not mandate the exclusion of domestic relations cases from federal-court jurisdiction, however, does not mean that such courts necessarily must retain and exercise jurisdiction over such cases." *Ankenbrandt*, 504 U.S. at 697.

Nevertheless, this Court in *Ankenbrandt* recognized that even if a federal court has jurisdiction over a case, and thus the *exception* doctrine does not apply, *abstention* from exercising such jurisdiction may be appropriate in certain circumstances. *Id.* at 705. Specifically, this Court stated in *Ankenbrandt*:

> It is not inconceivable, however, that in certain circumstances, the abstention principles developed in *Burford v. Sun Oil Co.*, might be relevant in a case involving elements of the domestic relationship even when the parties do not seek divorce, alimony or child custody.

Id. at 705. Nothing in *Ankenbrandt* could be read to suggest that federal courts cannot properly exer-

cise their discretion to abstain from federal question cases involving domestic relations issues. With respect to abstention, the Supreme Court concluded that abstention under *Younger v. Harris*, 401 U.S. 37 (1971) was not appropriate because "there were no pending state court proceedings" nor under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), because the "status of the domestic relationship ha[d] been determined as a matter of state law, and in any event ha[d] no bearing on the underlying torts alleged." *Id.* at 705-06. In fact, as noted by Justice Blackmun in his concurring opinion in *Ankenbrandt*, "[i]n my view, the longstanding, unbroken practice of the federal courts in refusing to hear domestic relations cases is precedent at most for continued discretionary abstention rather than mandatory limits on federal jurisdiction." *Id.* at 707.

In accordance with that line of reasoning, the Second Circuit explicitly noted in this case that "the existence of a distinct abstention doctrine for certain domestic relations disputes is supported by the Supreme Court's longstanding recognition—in a non-diversity case involving a child custody dispute—that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." *Id.* at 624.

Moreover, *Ankenbrandt* was not a federal-question case and thus did not address the issue presented in *American Airlines* or the case at bar. As the Second Court held, "in the absence of a clear

statement from the Supreme Court precluding an abstention doctrine like the one in *American Airlines*, we discern no conflict, incompatibility, or inconsistency between that case and intervening Supreme Court law that would render prior Circuit precedent not binding on us." *Id.* at 623-24 (internal citations omitted).

Finally, the Second Circuit's affirmance was in accord with other circuit courts that have addressed the issue. *Id.* at 624.

Petitioner improperly conflates the exception and abstention doctrines in an attempt to argue that the Second Circuit's opinion violated *Ankenbrandt*, stating that the abstention and exception doctrines are a "distinction without a difference." (Petition, p. 15). Petitioner's reliance on *Marshall v. Marshall*, 547 U.S. 293 (2007) is without merit. As in *Ankenbrandt*, *Marshall* involved the domestic relations *exception* doctrine, not abstention. *Id.* at 305-08. Moreover, *Marshall* was not a federal question case, unlike here. Rather, jurisdiction in *Marshall* was premised on 28 U.S.C. § 1334, which provides federal district courts in bankruptcy cases. Nothing in *Marshall* addresses the abstention doctrine at issue in this case or casts doubt on *American Airlines* as good law.

Petitioner next contends that the Second Circuit's "refusal" to exercise jurisdiction over his federal claims "raises grave questions regarding plaintiff's rights to petition, equal protection, access to courts, and due process." (Petition, p. 16). Indeed,

in an attempt to bring his claims outside the Domestic Relations Abstention doctrine, Petitioner improperly raises several new arguments for the first time in his Petition regarding New York State family court procedures, asserting that he was improperly denied discovery in the state court action, and was denied hearings after his parental rights were terminated. (Petition, pp. 19, 21). Yet as the Domestic Relations Abstention Doctrine recognizes, the proper forum to raise such questions, to the extent they have any merit, lies in state court, not in a separate federal court proceeding.

Accordingly, for all the reasons stated above, the Second Circuit correctly affirmed the District Court's dismissal of the FAC and all federal causes of action asserted therein as against Ms. Miller pursuant to the Domestic Relations Abstention Doctrine.

CONCLUSION

WHEREFORE, Respondent FAITH G. MILLER, ESQ., respectfully requests that this Court deny Petitioner's Petition for a Writ of Certiorari.

Dated: Hackensack, New Jersey
April 8, 2020

Robert A. Berns
Counsel of Record
KAUFMAN DOLOWICH
& VOLUCK, LLP
Attorneys for Respondent
Faith G. Miller, Esq.
25 Main Street, Suite 500
Hackensack, New Jersey 07601
201-488-6655
rberns@kdvlaw.com

Of Counsel:

Brett A. Scher
Andrew A. Lipkowitz