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.,

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

REPLY BRIEF

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ADDITIONAL REASONS TO GRANT THE PETITION

The only thing necessary for the triumph of evil is for good men [and women] to do nothing.[1]

I. HOUSEKEEPING

A. Petitioner's factual assertions are unrebutted.

Respondent Miller does not dispute that, *inter alia*:

- On June 4, 2018, she stated to Petitioner that he would not get custody of the children in the divorce action, "before she met with Respondent DiMella-Deem or the children" (Petition, p. 7, ¶ 3);

- She "failed or refused to advocate for the children's wishes – to see their father" (Petition, p. 9, ¶ 4);

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[1] This quotation has been attributed to Edmund Burke. It is believed the longer version is, "When bad men [and women] combine, the good must associate; else they will fall, one by one, an unpitied sacrifice in a contemptable struggle." Edmund Burke, *Thoughts on the Cause of the Present Discontents 82-83 (1770)*, *Select Works of Edmund Burke*, vol. 1, p. 146 (Liberty Fund ed. 1999). This quotation has also been attributed to John Stuart Mills. "**Let not any one pacify his conscience by the delusion that he can do no harm if he takes no part, and forms no opinion. Bad men [and women] need nothing more to compass their ends, than that good men [and women] should look on and do nothing**." John Stuart Mills, Inaugural Address: Delivered to the University of St. Andrews, Feb. 1, 1867, (London: Longmans, Green, Reader and Dyer, 1867), 24.

- The children were neither abused nor neglected." (Petition, p. 32, ¶ 2);

- "On June 7, 2019, the Family Court entered a default restraining order against Petitioner, holding that he [committed a Violation] against his estranged wife, only, not the children." (Petition, p. 9, ¶ 5);

- "Respondent Gordon-Oliver's extension of the "no contact" restraining order [] was based exclusively on the unsupported affidavit of Respondent Miller." (Petition, p. 32, ¶ 3); and

- "Petitioner has not had any contact with his children since June 9, 2018, at 2:00 p.m., after the last supervised visit." (Petition, p. 10, ¶ 4).

A fit father not having any contact with his children when they want to have a relationship with each other, can only occur in the face of a complete breakdown of the adversarial process, and complete denial of due process, equal protection and First Amendment rights. The scales of justice were not merely tipped in favor of Petitioner's legal opponent. Each respondent stood on those scales in favor of Respondent DiMella-Deem and against Petitioner and his children. The denial of his federal constitutional rights is at issue, not custody. Petitioner seeks, *inter alia*, remuneration for said damages, past and future.

B. The underlying family court proceedings do not involve child custody.

Respondent Miller asserts in her opposition brief:

> Petitioner, an admitted attorney, filed a federal lawsuit seeking review of actions undertaken in an underlying state court *child custody* proceeding.

Opposition to Petition for a Writ of Certiorari (Opposition), p. 1, ¶ 1, l. 10 (emphasis added).

> While Petitioner makes conclusory assertions that he cannot obtain a "full and fair determination" of his *child custody* claims in state court [].

Opposition, p. 10, ¶ 2, l. 1 (emphasis added).

> [I]t is clear that [] Petitioner had a full and fair opportunity to raise his *child custody* claims in th[e family court] proceeding.

Opposition, p. 10, ¶ 3, l. 1 (emphasis added).

Respondent Miller's assertions that the underlying family court proceedings pertained to child custody is patently false. At oral argument, Petitioner explained that he was involved in two state court proceedings: matrimonial court, where divorce, equitable distribution and child custody were at issue; and family court, where family offense proceedings were at issue. *See*, Oral Argument Audio at 01:00 to

01:43 (retrieved at http://www.ca2.uscourts.gov/decisions/isysquery/0f990bb6-5c43-44f9-877b-4f9cd246cbf3/371-380/list/, Docket # 18-2266).

Petitioner further explained at oral argument that his retained attorney, when he could afford one, argued to the family court that it did not have jurisdiction to enter a child custody order because Petitioner filed the action for divorce before he filed the very first petition in family court seeking a restraining order against his estranged wife. *See*, Oral Argument Audio at 01:41 to 03:48, *supra*; Restraining Order issued by N.Y.S. Family Court against Respondent DiMella-Deem dated March 13, 2018; Restraining Order issued by N.Y.S. Family Court against Petitioner dated March 16, 2018. Therefore, counsel argued, the family court lacked jurisdiction to enter a child custody order. (12sa).

Respondent Miller concedes that she knows what Petitioner stated at oral argument. Opposition, p. 9, ¶ 2. And, she was "served with all pleadings" in family court pursuant to the order appointing her. (4sa). Therefore, she has personal knowledge that child custody was not at issue in family court.

If Respondent Miller is willing to make affirmative misrepresentations to this Honorable Court, which are so easily proven to be affirmative misrepresentations, it gives reason to question the accuracy of her statements regarding *ex parte* communications with Petitioner's children and other third parties, to state judges that she helped get elected and are supervised by her husband.

Petitioner challenges Respondent Miller to produce the order where the family court allegedly awarded custody to Respondent DiMella-Deem.

C. The underlying complaint could not have been used to challenge the results of the state court proceedings.

Respondent Miller asserts, "[I]t is clear that the instant action seeks to challenge the results of the Family Court proceeding. Opposition, p. 10, ¶ 3. The underlying complaint was filed on July 20, 2018. Petition, p. 9, ¶ 2. The family court proceedings concluded on June 7, 2019. Petition, p. 9, ¶ 5. It is impossible to be "unhappy with the results of [] state court proceedings" (Opposition, p. 10, ¶ 2), eleven months before the results of those proceedings came to fruition.

D. Respondent Miller was not appointed as a law guardian.

"On [May 15],[2] 2018, Respondent Gordon-Oliver appointed Respondent Miller as attorney for the children (AFC), in violation of blackletter law." Petition, p. 7. On June 1, 2018, Respondent Miller was appointed as the AFC in the divorce/custody action filed by Petitioner in the state matrimonial court. (7sa) The matrimonial court's appointment of Respondent Miller also violated blackletter law because the matters were "private pay" – the parties had means to pay the fees of an AFC and forensic evaluator.[3]

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[2] The Petition provided June 1, 2018. The correct date is May 15, 2018. (4sa).

[3] Respondent Miller is precluded from accepting private pay cases because she is married to Alan D. Scheinkman, Presiding Justice, New York State Supreme Court Appellate Division, Second Department. *Taxes: No accountability on lawyers for kids*, The Journal News (Apr. 7, 2015), (retrieved at

Respondent Miller now asserts that the family court appointed her "as Law Guardian/Attorney for the Children." Opposition, p. 3, ¶ 2. This is the first reference ever made to Respondent Miller serving as a "law guardian." The distinction is significant.

> Historically, the definition of the role of the attorney for the child has engendered a great deal of confusion. Many attorneys, and indeed many Judges, have viewed the role of the attorney for the child to be in the nature of a guardian ad litem. It is clear, however, that the role of the attorney for the child is very different from that of a guardian ad litem. A guardian ad litem, who need not be an attorney, is appointed as an arm of the Court to protect the best interests of a person under a legal disability. In contrast, the role of the attorney for the child is to serve as a child's lawyer. The attorney for the child has the responsibility to represent and advocate the child's wishes and interests in the proceeding or action.

Ethics for Attorney's for Children, New York State Supreme Court Appellate Division, Fourth Department, Attorneys for Children Program, General Policy Considerations, retrieved at http://www.nycourts.gov/courts/ad4/AFC/AFC-ethics.pdf, p. 3; *see*, 22 NYCRR § 7.2(d).

Apparently, Respondent Miller seeks to grant herself greater discretion in her statements and omissions to the family court regarding her clients'

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https://www.lohud.com/story/news/investigations/ 2015/04/05/law-guardians-accountability/70861238/).

wishes and greater discretion in her legal arguments to this Court, *nunc pro tunc*.

E. Petitioner Engaged in Sound Advocacy.

Respondent Miller attempts to avert this Court's attention from a *prima facie* § 1983 claim by asserting it is "nothing more than an attempt to disparage [her]." Opposition, p. 3 (fn. 1).

Petitioner identified several federal-question claims that the Second Circuit's Domestic Relations Abstention Doctrine (DRAD) prevents from being heard, even though those claims have nothing to do with divorce, alimony or child custody. *See*, Petition, p. 17, ¶ 2 through p. 22, ¶ 2. One of those claims is the denial of due process by "opponents' lawyers using their political clout to turn the state judges against him." *See, e.g., Brokaw v. Weaver*, 305 F.3d 660, 665 (7th Cir. 2002); *Ernst v. Child & Youth Servs.*, 108 F.3d 486, 491-92 (3d Cir. 1997).

This Honorable Court specifically found that in New York State judges are selected by "political party bosses." *See, N.Y.S. Bd. of Elections v. Lopez Torres*, 522 U.S. 196, 128 S.Ct. 791, 799, 169 L.Ed.2d 665 (2008). The "no contact" restraining order was based exclusively on Respondent Miller's statements to a trial judge she helped get elected to the bench, and who is supervised by Respondent Miller's husband. Her political clout is abundantly clear.

Articulating specific facts and circumstances to support a federal-question claim against Respondent Miller is not disparaging. It is sound advocacy in seeking redress for constitutional misconduct: misconduct that is accurately described as tyrannical and evil. Prohibiting all contact between loving, loved,

caring and cared for children and their fit father can never be justified and is always harmful to the children and father.

II. THE DOMESTIC RELATIONS ABSTENTION DOCTRINE VIOLATES THE SEPARATION OF POWERS DOCTRINE.

Respondent Miller presses the distinction between the Domestic Relations Abstention Doctrine and the Domestic Relations Exception Doctrine. The former springs from decisions of the Second Circuit. The latter transcends from decisions of this Court.

The Second Circuit's explanation of the DRAD is,

> [E]ven 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 their full and fair determination in state courts.

(6a).

First, the Second Circuit expressly refers to a "matrimonial action." However, Respondent Miller concedes, "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]." Opposition, p. 9, ¶ 2.

Respondent Miller does not have, nor has she ever had, a matrimonial/domestic relationship with Petitioner. Therefore, Petitioner is incapable of ever seeking to prosecute a "matrimonial action" in any court. The DRAD should not apply by its own terms.

Second, Respondent Miller concedes that Petitioner's claims against her are all federal civil rights claims. Opposition, p. 4, ¶ 1. They include claims for violation of the First Amendment, malicious prosecution, abuse of process, parental relations, and equal protection. The rationale for abstaining under the DRAD is "the greater interest and expertise of state courts in this field."

However, the New York State Family Court is a court of limited jurisdiction. *Compare*, N.Y. Const., Art. VI, § 7(a) ("The supreme court shall have general jurisdiction"), *with*, § 13(b), (c) (enumerating the classes of actions, proceedings and matters over which the family court has jurisdiction, and omitting federal civil rights claims). Therefore, the family court does not have any interest, let alone a greater interest, in Petitioner's federal civil rights claims.

Third, presumably the term "matrimonial issues" has the same definition as "domestic relations"; "divorce, alimony or child custody." *See*, *Ankenbrandt v. Richards*, 504 U.S. 689, 703, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992). As stated, *supra*, Respondent Miller does not have, nor has she ever had, a domestic relationship with Petitioner. Therefore, Petitioner is incapable of ever presenting matrimonial issues involving Respondent Miller to any court, including the District Court and family court.

Fourth, the term "issues 'on the verge' of being matrimonial in nature" encompasses federal civil rights claims that: do not seek divorce, alimony or child

custody; against respondents that do not have, nor have ever had, a domestic relationship with Petitioner. As such, any federal-question claim comes within this term.

Finally, the Second Circuit explains, a federal court "should abstain from exercising jurisdiction so long as there is *no obstacle to their full and fair determination in state courts*." (emphasis added) As explained, *supra*, federal civil rights claims cannot be heard in family court – a court of limited jurisdiction – as a matter of New York State constitutional law. *Compare*, N.Y. Const., Art. VI, § 7(a), *with*, § 13(b), (c). As explained, *supra*, Petitioner does not have, nor has he ever had, a domestic relationship with Respondent Miller. Petitioner's claims against Respondent Miller, and several other respondents, cannot be heard in family court as a matter of New York State constitutional law. *Id.* Therefore, there are two insurmountable state constitutional obstacles to the full and fair determination of Petitioner's claims against, *inter alia*, Respondent Miller in family court.

In light of the above, the Second Circuit's DRAD is unconstitutionally vague and overbroad, and violates the separation of powers doctrine. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 357-358, 103 S.Ct. 1855, 75 L.E.d2d 903 (1983); *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). It effectively rewrites the Constitution by granting Article III courts the authority to determine for themselves what claims they will hear.

III. THE SECOND CIRCUIT'S DOMESTIC RELATIONS ABSTENTION DOCTRINE VIOLATES PRIOR DECISIONS OF THIS COURT.

Respondent Miller asserts, "Nothing in *Ankenbrandt* could be read to suggest that federal courts cannot properly exercise their discretion to abstain from federal question cases involving domestic relations issues." Opposition, p. 12, ¶ 3. However, in *Ankenbrandt* this Court expressly wrote,

> The *Barber* Court thus did not intend to strip the federal courts of authority to hear cases arising from the domestic relations of persons unless they seek the granting or modification of a divorce or alimony decree. The holding of the case itself sanctioned the exercise of federal jurisdiction over the enforcement of an alimony decree that had been properly obtained in a state court of competent jurisdiction.

Ankenbrandt v. Richards, 504 U.S. at 701-702 (*citing Barber v. Barber*, 21 How. 582 (1859)).

Without question the Second Circuits' DRAD violates the ruling in *Barber*, which the *Ankenbrandt* Court left undisturbed.

Respondent Miller also asserts, "Nothing in *Marshall* addresses the abstention doctrine at issue in this case or casts doubt on *American Airlines* as good law." Opposition, p. 14, ¶ 3. The argument is surreal.

The *Marshall* Court wrote,

> In *Cohens v. Virginia*, Chief Justice Marshall famously cautioned "it is most true that this

> Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should….We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."

Marshall v. Marshall, 547 U.S. 293, 298, 126 S.Ct. 1735, 164 L.Ed.2d 480 (2006) (*citing* 6 Wheat. 264, 404 (1821)).

Respondent Miller fails to explain why a nearly 200-year rule from this Court prohibiting federal courts from declining the exercise of jurisdiction does not apply to federal civil rights cases that arise during state court proceedings and do not seek divorce, alimony or child custody decrees.

She also fails to explain why the Second Circuit's DRAD permits the denial of a federal forum for claims that are not in fact or 'on the verge' of being matrimonial in nature, when the *Barber* Court, as recognized in *Ankenbrandt* and *Marshall*, provided a federal forum for a claim that was in fact matrimonial – "the enforcement of an alimony decree." *Ankenbrandt v. Richards*, 504 U.S. at 702.

Respondent Miller fails to address the Second Circuit's ruling in *Lefkowitz v. Bank of New York*, 528 F.3d 102, 106 (2d Cir. 2007). There, the Second Circuit cited *Marshall* in holding, "if jurisdiction otherwise lies, then the federal court may, indeed must, exercise it."

The Second Circuit, like the Ninth Circuit in *Marshall*, "had no warrant from Congress, or from decisions of this Court, for its sweeping [rule that denies federal-question plaintiffs a federal forum]." *See*, *Marshall v. Marshall*, 547 U.S. at 299-300.

IV. RESPONDENT MILLER'S OPPOSITION EXEMPLIFIES THE FRUIT BORNE BY THE DOMESTIC RELATIONS ABSTENTION DOCTRINE.

Astoundingly, Respondent Miller asserts as part of her own defense,

> 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).
>
> [Said temporary order of protection] limited Petitioner's contact with his two children.
>
> Ms. Miller filed an emergency application with the Family Court to suspend all contact between Petitioner and [his] children.

Opposition, pp. 2-3.

Her assertions appear to support a *prima facie* claim under the Americans with Disabilities Act: Petitioner was regarded as having a disability; he was otherwise capable of associating safely with his children; his right to associate with his children was denied in whole, after CPS unfounded the anonymous complaint and did not recommend any services for Petitioner or his children; and said denial was the result of him being regarded as having a disability. *See*, 42 U.S.C. § 12132 (2000).

The unabashed ease with which Respondent Miller recites, in her brief to this Court, the events in family court is a classic example of the ills that triumph

when federal courts "look on and do nothing" for decades.

CONCLUSION

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

Respectfully submitted,

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