No. 19-778

IN THE

Supreme Court of the United States

EDWARD A. WEINHAUS, PETITIONER

v.

ILLINOIS ET AL.

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

PETITION FOR WRIT OF CERTIORARI

EDWARD "COACH" WEINHAUS, ESQ.
pro se

Lecturer, UCLA Anderson School of Management
10859 Picadily Sq. Dr.
Creve Coeur, MO 63146
(314) 580-9-580
Coach@Appellors.com

CURRY & TAYLOR ♦ 202-350-9073

QUESTION(S) PRESENTED

I. Is There a Domestic-Relations Exception to Federal Question Jurisdiction?

II. Are Rule 38 Sanctions for "frivolous appeal" warranted when the appeal earned redress and only failed for a jurisdictional issue subject to a circuit split?

PARTIES TO THE PROCEEDING

Petitioner, who was Plaintiff-Appellant below, is: Edward A. Weinhaus. Respondents, who were Defendants-Appellees below, are: the State of Illinois, Barry Chernawsky and Steven Cohen, and the State of Illinois.[1]

STATEMENT OF RELATED CASES

None.

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1 Prior Defendants-Appellees are not Respondents: Adrienne Chernawsky and Natalie Cohen as noticed on October 1, 2019 filing, fn. 1&2.

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PETITION FOR A WRIT OF CERTIORARI

Edward A. Weinhaus petitions for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, or in the alternative, summary reversal of the court of appeals' sanctions order.

Introduction

This case is about a disagreement among the courts of appeals about the scope of federal-question jurisdiction. The disagreement is recognized by the lower courts and the academic literature, and has thoroughly percolated: all the courts of appeals have considered it, and six have firmly resolved the question. At this point, the disagreement has persisted for many years, such that only this Court's intervention seems likely to resolve it—and because the disagreement is outcome-determinative, it is not the sort of stale-but-tolerable issue that can be left alone.

The disagreement is this. This Court has recognized an (atextual, but well-settled) "domestic relations" exception to federal diversity jurisdiction—cases arising under 28 U.S.C. § 1332. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 20 (2004) (Rehnquist, C.J. concurring) ("The domestic relations exception is not a prudential limitation on our federal jurisdiction. It is a limiting construction of the statute defining federal diversity jurisdiction, 28 U.S.C. § 1332..."). [28 USCS § 1332]. (It is closely related to the "probate exception." *Marshall v. Marshall*, 547 U.S. 293, 308 (2006).) But this Court has never said whether that exception also limits federal jurisdiction where the claim arises under federal law, 28 U.S.C. § 1331. Petitioner's case arose in the Seventh Circuit, which

has held that the exception does apply in those circumstances, and so his suit was dismissed. But the Seventh Circuit is a decided minority: the Third, Fourth, Fifth, Ninth and the Eleventh Circuit courts have said that the exception does *not* apply to federal-question cases. If Petitioner had filed in Los Angeles, instead of Chicago, he would have survived.

This case is a clean vehicle for resolving this question. Despite governing Seventh Circuit precedent, petitioner preserved the issue below and the court of appeals decided it. In addition, the court of appeals grounded its judgment solely on jurisdiction—it made no comment on the merits. And although the court below also invoked the *Rooker-Feldman* doctrine as a basis to decline jurisdiction, that holding was closely intertwined with the domestic-relations question and so might well come out differently in the event of a remand.

Whether or not a person may complain about violations of federal rights in federal court is an exceptionally important question in all cases, but never more so than when the dispute touches family life. This Court should grant the petition to resolve the answer.

OPINIONS BELOW

The court of appeals' unpublished opinion for the disposition of the case on jurisdictional grounds, modifying the district court's judgment, is unreported. 773 Fed. Appx. 314. App. 1-7. The opinion of the United States District Court for the Northern District of Illinois dismissing petitioner's complaint on the merits and jurisdictional grounds is unreported and unpublished. App. 8-11.

JURISDICTION

The court of appeals entered judgment on July 16, 2019. App. 1. On October 8, 2019, Justice Kavanaugh extended the time for filing a certiorari petition to and including December 13, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Article III Section 2 of the United States Constitution provides in relevant part:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;..."

Section 1331 of Title 28 of the United States Code provides:

> "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Section 1332 of Title 28 of the United States Code provides in relevant part:

> "(a)The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1)citizens of different States;..."

STATEMENT

Factual Background

Although the principal question presented in this petition is a pure one of law, a brief factual background is provided for the sake of context. In October 2014, the Cook County Circuit Court entered a judgment that (as relevant here) declared Petitioner a joint custodian of his five children and issued a divorce decree on April 15, 2015. Compl. ¶1, 8-10. Subsequent to the custody and divorce decrees, the individual Respondents began implementing a Banishment[1] requiring Petitioner, as a

[1] Banishment, "compelling a person to quit a city, place, or country, for a specified period of time, or for life, has long been considered a unique and severe deprivation, and was specifically outlawed by [the] twelfth section of the English *Habeas Corpus Act...*" *United States v. Ju Toy*, 198 U.S. 253, 269-270 (1905) (J. Brewer dissenting, internal quotes omitted); *Olim v. Wakinekona*, 461 U.S. 238, 252 n.1 (1983) (Marshall, J. dissenting); *see Smith v. Doe*, 538 U.S. 84, 98 (2003). It "is a punishment that can follow only a judicial determination in due process of law," *Moy Suey v. United States*, 147 F. 697, 699 (1906), since the *Magna Carta. Rhinehart v. Schuyler*, 7 Ill. 473, 519-22 (1845). The condition of Banishment in settlement is, as a matter of Illinois law, unconscionable, unreasonable even with due process, and unconstitutional. *People v. Harris*, 238 Ill. App. 3d 575, *582-83 (1992) (where probationer chose it between two conditions of probation, "leaving the state" is unreasonable and separable). A threat of Banishment by itself is "obnoxious." *Trop v. Dulles*, 356 U.S. 86, 102 (1958). The Second Circuit has held that Banishment, even where it is still an acceptable, if severe, part of the Indian punishment system, justifies *habeas* review, and in so doing describing it as "more primitive than torture." *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996) (crediting Warren, C.J. in *Trop* at 101). Even the threat of Banishment was enough to "put the

condition of access to his own children, to leave the State of Illinois. Compl. ¶¶ 144-45. Subsequently, the state court entered an order enshrining Banishment (the "Banishment Order") during six periods of visitation (reasoning that Petitioner was not a resident of Illinois and so would be required to travel during such periods regardless). Compl. ¶ 49; App. 2 ("One modification provided that [Petitioner's] parenting time on certain weekends and school breaks 'shall' be exercised outside of Illinois.") Petitioner has moved for modification of this requirement in the relevant state court, which was once modified by the state court *sua sponte*; that motion remains pending, and no hearing has yet been held. Compl. ¶¶ 79, 83, 91, 93-95,104-05. In the meantime, the individual Respondents have continued to threaten to withhold and withheld access to Petitioner's children even in circumstances not contemplated by the state court's order. Compl. ¶¶ 77(e), 144-45.

Proceedings in Federal Court

In April 2018, Petitioner filed a complaint in the Northern District of Illinois alleging violations of the Due Process Clause by four individual defendants and the State of Illinois. Compl. Counts I-IV. The complaint did not seek any modification to the custodial status of either parent, and seeks no relief at all under state law. *Id.* Both the individual and State Respondents filed motions to dismiss; in response, Petitioner contested the motion on the merits and in the alternative sought leave to amend. In September

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petitioner in custody." *Resendiz v. Kovensky*, 416 F.3d 952, 957 (9th Cir. 2005) (discussing *Poodry*'s holding).

2018, the district court granted the motions to dismiss without leave to amend, on both jurisdictional and non-jurisdictional grounds. App. 8-11.

The Seventh Circuit affirmed exclusively on jurisdictional grounds, and amended the district court judgment to remove any other ground for dismissal. App. 6. The court of appeals concluded that the complaint fell within the "domestic relations" exception to federal subject-matter jurisdiction, and rejected (on the basis of circuit law) Petitioner's argument that this exception was limited to suits grounded in diversity of citizenship. App. 4. ("[Petitioner] argues that the domestic- relations exception applies only to diversity-jurisdiction cases, not to federal-question cases, like his. But it applies in both types of suits."). Upon motion by the individual defendants (and not Respondent Illinois), the Seventh Circuit granted sanctions against Petitioner under Federal Rule of Appellate Procedure Rule 38 for a frivolous appeal. App. 6-7. On October 8, 2019, Justice Kavanaugh granted an extension of time to file this petition to December 13, 2019. This petition timely followed.

REASONS FOR GRANTING THE PETITION

The judgment in this case squarely implicates an entrenched circuit split regarding the scope of federal subject-matter jurisdiction, and this Court should resolve it. Whether or not there is a "domestic relations" exception to federal-question jurisdiction is extremely important, and this case is a clean vehicle for its resolution. But at a minimum, this Court should exercise its supervisory authority to summarily reverse the entry of sanctions against Petitioner, lest it become

impossible for future litigants to preserve and pursue this issue.

I. Is There a Domestic-Relations Exception to Federal Question Jurisdiction?

In *Barber v. Barber*, this Court held that the federal district courts did not have diversity jurisdiction over suits for divorce or allowance of alimony. 62 U.S. 582, 584 (1858). But *Barber* did not announce a Constitutional rule; as this Court has explained, it involved "a construction of the diversity statute." *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992). In *Ankenbrandt*, this Court clarified that the exception is quite narrow: substantively, it applies *only* to "the issuance of a divorce, alimony, or child custody decree." *Id.* at 704. Thus, *Ankenbrandt* held that the exception was inapplicable to a tort suit between two spouses alleging abuse of their children. *Id.* at 706.

Like the "so-called ... 'probate' exception" of which it is a close cousin, the domestic-relations exception is neither compelled by the text of the statute nor the Constitution, and is largely grounded in "misty understandings of English legal history." *Marshall v. Marshall*, 547 U.S. 293, 299 (2006). Thus, although the existence of the exception is well-settled, this Court has cautioned that its scope ought to be understood with due regard for the general rule recognized by Chief Justice Marshall: "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." *Id.* (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)).

Barber, this Court has explained, was an interpretation of the diversity jurisdiction statute. *Ankenbrandt*, 504 U.S. at 703. It was also decided before the enactment of the Jurisdiction and Removal Act of 1875, which extended federal-question jurisdiction to the district courts for the first time. 18 Stat. 470 (1875). *Barber* thus had no occasion to decide, and this Court has not decided since, whether there is a "domestic relations" exception to that later statute also. That is an important question, but as will be explained, the courts of appeals have reached intractable disagreement on it.

A. There is a well-recognized circuit split as to whether the domestic relations exception to federal jurisdiction includes cases involving a federal question.

The court below is the only one to hold, since *Ankenbrandt*, that the domestic-relations exception applies to cases arising under federal-question jurisdiction. The Sixth Circuit so held before *Ankenbrandt*, but has not revisited the question. By contrast, five courts of appeals have held to the contrary, and five others have not squarely addressed the issue (though some have noted the confusion).

As the court of appeals noted in its opinion below, the Seventh Circuit has squarely held that the domestic exception applies in federal-question cases. *Kowalski v. Boliker*, 893 F.3d 987, 995 (7th Cir. 2018) ("[t]he domestic-relations exception ... applies to both federal-question and diversity suits."). The Sixth Circuit reached the same conclusion prior to *Ankenbrandt*, *Tonti v. Petropoulous*, 656 F.2d 212, 215-

16 (6th Cir. 1981). But it has not revisited that conclusion since, and has significantly narrowed the scope of the exception even in diversity suits, such that it would not have barred the action here. *Catz v. Chalker*, 142 F.3d 279, 291 (6th Cir. 1998) (the exception does not apply when a Constitutional claim does not seek to change parental or marital status); *Alexander v. Rosen*, 804 F.3d 1203, 1206 (6th Cir. 2015) (exception does not apply to suit for abatement of child support or nullification of a divorce)

By contrast, the Third, Fourth, Fifth, and Ninth Circuits have held that the exception does *not* apply to cases where jurisdiction is founded on the existence of a federal question, and the Eleventh Circuit has reached that conclusion with respect to the closely related probate exception. *Flood v. Braaten*, 727 F.2d 303, 308 (3d Cir. 1984) ("... the domestic relations exception does not apply to cases arising under the Constitution or laws of the United States"); *Fake v. Pennsylvania*, 2018 U.S. Dist. LEXIS 48435 *17 (M.D. Pa. 2018) (noting continued vitality of the *Flood* rule); *Turja v. Turja*, 118 F.3d 1006, 1008 (4th Cir. 1997) (describing the exception, in a diversity suit, as a "jurisprudential limit on diversity jurisdiction"); *United States v. Johnson*, 114 F.3d 476, 481 (4th Cir. 1997) (noting the exception has "no generally recognized application as a limitation on federal question jurisdiction");[2] *Heartfield v. Heartfield*, 749 F.2d 1138, 1141 (5th Cir. 1985)

[2] The Fourth Circuit also does not apply the exception at all if the state courts had general subject-matter jurisdiction over the matter. *Foster v. Carlin*, 200 F.2d 943, 947 (4th Cir. 1952) ("As to matters... which may be determined in a separate action *inter partes* in the courts of general jurisdiction of the state, the federal courts do have jurisdiction if the requisite diversity of citizenship exists.").

(exercising jurisdiction in a federal-question suit seeking a custody determination); *Shipula v. Tex. Dep't of Family Protective Servs.*, 2011 U.S. Dist. LEXIS 52632 *68 n.50 (S.D. Tex. 2011) (citing a case which itself cited *Flood*); *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 947 (9th Cir. 2008) ("We therefore join the Fourth and Fifth Circuits in holding that the domestic relations exception applies only to the diversity jurisdiction statute"); *Goerg v. Parungao (In re Goerg)*, 844 F.2d 1562, 1565 (11th Cir. 1988) (holding that the coterminous probate exception "has no bearing on federal question jurisdiction") (footnote omitted); *accord Hughes v. United States (In re Estate of Hughes)*, 2010 U.S. Dist. LEXIS 51232 *5 (M.D. Fla. 2010) (adhering to *Goerg* rule).

The Second Circuit adheres to a somewhat more complex rule: in general, the exception does not apply in federal-question cases, unless the underlying federal claim is frivolous. *Hernstadt v. Hernstadt*, 373 F.2d 316, 318 (2d Cir. 1967) (district court may assume jurisdiction in suits presenting a "question of constitutional law ... even if the question arises out of a domestic relations dispute," unless the claim is "frivolous"). But the Second Circuit has also approved discretionary abstention "if the action is 'on the verge' of the exception," though it is unclear whether that abstention power is appropriately exercised in cases not founded on diversity of citizenship. *Bossom v. Bossom*, 551 F.2d 474, 475 (2d Cir. 1976).

Other courts, while not squarely resolving the issue, have either implicitly assumed one or the other answer, or simply noted the confusion. See, *e.g.*, *Mandel v. Town of Orleans*, 326 F.3d 267, 271 (1st Cir. 2003) ("However, the courts are divided as to whether the doctrine is limited to diversity claims and this court has

never decided that issue"); *Ruffalo v. Civiletti*, 702 F.2d 710, 718 (8th Cir. 1983) ("It is unclear whether the domestic-relations exception applies to cases brought under the federal-question statute."); *Vaughan v. Smithson*, 883 F.2d 63, 64 n.3 (10th Cir. 1989) ("Since this case is based only on federal diversity jurisdiction, we have no occasion to determine the applicability of the domestic relations exception in the context of any other source of federal jurisdiction."); *Johnson v. Rodrigues*, 226 F.3d 1103, 1111 n.4 (10th Cir. 2000) ("The parties have not addressed this distinction [between diversity and federal question applicability of the exception] and we do not feel it advisable or necessary in our disposition of the instant case to do so.").

At this point, the circuit split is sufficiently entrenched that it has attracted comment in the academic literature. Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 Wash. & Lee L. Rev. 131, 146-48 (2009) ("The First, Third, Eighth and Tenth Circuits have acknowledged a split among the courts regarding whether the exception is limited to diversity jurisdiction, while Judge Posner in the Seventh Circuit has expressly advocated extending the exception to federal questions."). There is no serious reason to believe that the Seventh Circuit is likely to revisit the matter, and therefore only this Court can supply uniformity.

B. Limitation to Article III courts' jurisdiction over federal questions in the area of fundamental rights affecting so many people is an important issue that this Court should resolve.

The question presented affects a large number of cases. There are two million people who will divorce in the United States every year. Krista Payne, "Charting Marriage and Divorce in the U.S.: The Adjusted Divorce Rate" Bowling Green, OH: National Center for Family & Marriage Research (2018) (https://www.bgsu.edu/content/dam/BGSU/ college-of-arts-and-sciences/NCFMR/documents/RBT/ charting-us-divorce-rate-2008-2017.pdf last visited November 23, 2019). The question presented affects every one of those two million people, because it determines whether they have any federal forum to complain of a violation of federal rights arising out of those matters. Moreover, because the exceptions are generally understood to be coterminous, the question presented at least potentially affects all *probate* cases, too.

In addition to affecting a large *number* of cases, the question presented also affects each case in a large *way*. In many cases, such as this one, "the liberty interest" of how one relates to one's children when in custody is not an ordinary right, but "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion). And this Court may well recall that its recent pronouncements in a fundamental area of family law generated substantial public concern, along with universal recognition of the importance of the issues at stake (along with an equally universal absence of any suggestion that an atextual domestic-relations exception was in play). *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Precisely because of the importance of the issues this question affects, the states and Congress have gone to extraordinary lengths to ensure jurisdictional issues are clear and resolvable over such an important issue as

the family via the Parental Kidnapping Prevention Act ("PKPA") and the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). 28 U.S.C. § 1738A; *See In re A.A.*, 51 Kan. App. 2d 794, 804 (2015) (noting only Massachusetts has failed to adopt the UCCJEA). However, depending on where a parent lives, she may not have access to federal courts over an issue of fundamental rights pertaining to her children. The circuit split and haphazard application of the exception allows arbitrarily closed courtrooms depending on how the UCCJEA and the PKPA determine the state of jurisdiction involved in an initial dispute. Given modern life and the changing character of families, including multi-state families, arbitrary and perverse results are likely to result from the split, denying justice to some on crucial issues of the family.

If the domestic relation exception applies to federal questions, then a person may be deprived of fundamental constitutional rights and yet have no federal-court remedy, which is very unusual. Especially in the absence of Constitutional or explicit statutory restriction. It certainly is not what Chief Justice Marshall had in mind regarding a court's obligation. *See Cohens* at 404, *supra.*

C. This case is an ideal vehicle to decide the question because it was decided solely upon jurisdictional grounds, the parents are divorced, both are custodial, and the underlying issue implicated is clearly federal question.

First, the decision below rests solely on jurisdictional grounds. Petitioner had requested leave to amend the original complaint, which was denied on

both jurisdictional and the merits by the district court. App. 8-11. When given the opportunity to affirm the merits reached by the district court, the circuit court took the deliberate step to remove any merits holdings of the district court. App. 6 ("...the judgment is to be modified to be for lack of subject-matter jurisdiction."). The crux of the domestic relations exception thus squarely grants Petitioner relief or closes the courthouse to him in this case.

Second, the question presented was squarely raised and decided so there is no question of waiver or forfeiture. App. 6 ("[Petitioner] argues that the domestic-relations exception applies only to diversity-jurisdiction cases, not to federal-question cases, like his."). The court below did not resolve or comment on the merits of the federal question, and instead, simply relied on the issue at hand, subject to a split among circuits where it now sits alone since the Sixth Circuit's shift *in Catz*.

Although the decision below also invoked the *Rooker-Feldman* exception to federal jurisdiction, that is no barrier to this Court's review for this case. App. 5 ("Based on [Petitioner's] last contention—that the domestic-relations case is over—the *Rooker-Feldman* doctrine also precludes our review.") *Rooker-Feldman* bars federal lawsuits "brought by state-court losers" seeking to revisit those judgments, and applies only to final orders entered after all state proceedings have ended. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 291 (2005). In this case, the court below held *Rooker-Feldman* applicable *solely* because Petitioner argued (in the alternative) that there was no longer an ongoing domestic-relations suit in state court, such that the domestic-relations exception did not apply. App. 5. Even assuming that the existence of

federal subject-matter jurisdiction can turn on a *pro se* litigant's perceived concession on an unrelated issue, matters would be different if this Court reversed on the domestic-relations question; in that instance, Petitioner's alternative argument against the applicability of the exception would not be pressed. The court of appeals' invocation of *Rooker-Feldman* was also quite brief, and it is dubious whether the court of appeals would genuinely sustain the dismissal on that ground alone. For one thing, the court's own judgment concedes that the state circuit court's involvement in the case is anything but over—a motion to modify the relevant order is still pending. App. 3; App. 5 (noting case is "under continuing supervision of the state courts"); see *Malhan v. Sec'y United States Dep't of State*, 938 F.3d 453, 460 (3d Cir. 2019) (noting the requirement of "practical finality" prior to applying *Rooker-Feldman*). For another, the complaint seeks relief for harms caused by the individual Respondents that are alleged to exceed anything the state courts authorized.

At any rate, even if *Rooker-Feldman* ultimately bars review in this case, this case is still a suitable vehicle to decide the domestic-relations question. Federal courts always have "jurisdiction to decide whether they have jurisdiction," and so even if *Rooker-Feldman* deprives federal courts of authority to decide the case on the merits, it does not and cannot deprive them of authority to decide the scope of the domestic-relations exception to subject matter jurisdiction. *See* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 2.9.1 (6th ed. 2019).

This is not a case, in other words, where doubts about subject-matter jurisdiction under *Rooker-Feldman* could endanger this Court's ability to decide

the question presented—that is impossible by definition. And *Rooker-Feldman* is particularly likely to come up in any case where the domestic relations exception is implicated post-decree. Domestic relations cases post-decree include myriad issues not squarely adjudicating the status between the parties. As the court below demonstrated, courts are likely to find an intertwining of the two exceptions to jurisdiction due to the ongoing, non-final nature of post-decree activity. The trend of the exceptions' relatedness is growing, even as this Court seeks to narrow both jurisdictional bars. In a legal database search of Appellate and Supreme Court cases including the "domestic relations exception" between the *Ankenbrandt* and *Exxon Mobil* decisions, 25% also include "*Rooker-Feldman.*"[3] After *Exxon Mobil*, which was a narrowing principle on *Rooker-Feldman*, half of the cases invoking the domestic relations exception included a reference to "*Rooker Feldman.*"[4] Not only did the rate of coincidence between the two types of cases double but the number of cases per year doubled as well. The growing correlation of courts finding multiple jurisdictional bars to dismiss cases argues precisely for taking this question.

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[3] Petitioner searched Lexis from June 16, 1992 through March 30, 2005 for the coincidence of cases at the circuit and at this Court having first only the "domestic relations exception" contained therein (76) and then additionally containing "Rooker Feldman" (19) – yielding a 25% inclusion rate, and an annual rate of approximately 1.5 cases per year.

[4] Petitioner searched Lexis from March 31, 2005 through December 9, 2019 using the same parameters as the footnote above. "Domestic relations exception" yielded 96 cases total and 48 with "Rooker Feldman" yielding a 50% inclusion rate. The rate of coincident cases increased to more than 3 per year.

D. The court of appeals' conclusion is wrong because the domestic relations exception is limited to matters of issuing divorce, alimony and custody decrees under state law in diversity and not to federal questions.

Finally, the court of appeals' conclusion is incorrect. This Court has examined the reasoning behind the domestic relations exception, finding it to be one of the Court's diversity jurisdiction. *Ankenbrandt* at 698-99; *id.* at 700-01 ("Congress' apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948... Rather, the origins of the exception lie in the statutory requirements for diversity jurisdiction.") [emphasis added]. This Court has instructed the circuits that the exception should be defined narrowly. *Marshall v. Marshall* at 305, 307 (citing *Ankenbrandt* at 701). However, this Court's reference to the basis of the exception being one of diversity jurisdiction has not stopped the court below from extending the narrow exception to issues of federal question and leaving multiple courts of appeal questioning the matter.

The court below's reasoning is flawed in its extension of the domestic relations exception to a case of federal question. The "narrow" types of rulings to which the exception applies are absent in the analysis of the court below. See *Ankenbrandt* at 703 & n.6 (for the "better reasoned" circuit court opinions on the exception). The court below denied federal jurisdiction because states retain power over children until maturity. That logic bars any federal question pertaining to the children, even if only tangential to the minority of the children because they are "under

continuing supervision of the state courts." App. 5. The court below reasons simply that a state court can perform any federal civil rights violation relating to children so long as it somehow relates to a custody order, well after the granting of divorce or the issuance of custody. The court below would allow a state court to abolish civil rights – of any kind to any degree – because children are under the state court's supervision post-divorce, post custody decree. That is an absurd outcome, and it leads to how, without addressing the case's merits, a state court could think it can Banish another state's citizen from its borders without due process.

The court below also made no mention of whether the state court actually had specialized proficiency over the subject matter at hand. It made no examination of the state court which was one of general jurisdiction. Ill. Const. 1970, art. VI, § 9. The state court had no specialized proficiency as has historically been required for the exception to apply. *Foster v. Carlin* at 947. The court below's logic then denies federal question jurisdiction even to matters of general jurisdiction, so long as it somehow relates to a custody order.

That broadening is worse than it reads in its application. In this case, the court below applied the exception to a federal question when the state court order even agreed with the Petitioner and his claims were against individuals helping to violate a state court order. The court below's sole basis for doing so was that the children are "...under continuing supervision of the state courts, so the domestic relations exception applies." App. 5. The court below's application of the exception to a federal question in that case would bar <u>any claim</u> in federal court related to children of a past

divorce. *Ankenbrandt* holds otherwise for torts. *Ankenbrandt* at 706.

Understanding how the court below came upon its expansion of the exception is instructive. *Jones v. Brennan*, 465 F.3d 304, 306 (7th Cir. 2006) ("holding it applicable to [federal question cases]...we think it applicable.") (citations omitted). In *Jones*, the application of the probate exception referred to an original property disposition in a probate case. It had nothing to do with post-disposition orders. *Id.* at 305. Nothing extended its holding to "post-decree" proceedings. The *Jones* court holding of "we think it applicable" was ignored in the year following *Jones* in an unpublished opinion: "Whether there is such a generic exception to all federal jurisdiction is doubtful. The Supreme Court has consistently described this doctrine as an interpretation the diversity jurisdiction..." *Mannix v. Machnik*, 244 Fed. App'x. 37, 38 (7th Cir. 2007) (unpublished). The *Jones* language is what the *Kowalski* and the court below rely upon. App. 4. *See Kowalski* at 995.

The court below's broad expansion of the domestic relations exception in a case of federal question is both wrong as a matter of law and of policy. Exercising jurisdiction is a "virtually unflagging obligation" of the federal courts. *Ankenbrandt* at 705 (citations omitted). Without proper redress in federal courts, federal civil rights violations find only a home in state courts, which, as in this case, can be part of the problem. Federal questions have a home in federal courts. The court below was wrong to deny jurisdiction in federal courts for an issue that is "under continuing supervision" of the state courts that involves a federal question. That is an improper expansion of the domestic relations exception.

II. Are Rule 38 Sanctions for "frivolous appeal" warranted when the appeal earned redress and only failed for a jurisdictional issue subject to a circuit split?

In the alternative, even if this Court does not grant plenary review to resolve the circuit split, it should summarily reverse the court of appeals' judgment imposing sanctions.

A. Courts below are given broad latitude to issue sanctions for "frivolous appeal" pursuant to Rule 38 plenary discretion.

Courts below have plenary authority to issue Rule 38 sanctions. *Burlington N. R. Co. v. Woods*, 480 U.S. 1, 6-7 (1987). They may do so either upon motion of a party or on their own volition. Fed. R. Civ. Proc. 38. Such discretionary choices are not without oversight; they must be conducted according to "sound legal principles." *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (citing Marshall, C.J. in *U.S. v. Burr*, 25 F. Cas. 30, 35 (1807)).

Sanctions are warranted for a frivolous appeal when satisfying a two-part test. First an appeal must actually be "frivolous." Second, the sanctions must be warranted. *Mays v. Chicago Sun-Times*, 865 F.2d 134, 138 (7th Cir. 1989). A frivolous appeal is often, like obscenity before it, in the eye of the court below. *WSM, Inc. v. Tennessee Sales Co.*, 709 F.2d 1084, 1088 (6th Cir. 1983). The literature notes the problem with a subjective definition, that "...the courts of appeals have dealt with frivolous appeals by doing little more than describing what they see and labeling it as frivolous."

Robert J. Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 Duke L.J. 845, 850 (1984).

After determining frivolity, a court below determines whether sanctions are warranted. The court below has already described its standard to determine whether sanctions are warranted in *Hartz*, when "the appeal was prosecuted with no reasonable expectation of altering the district court's judgment and for purposes of delay or harassment or sheer obstinacy." *Hartz v. Friedman*, 919 F.2d 469, 475 (7th Cir. 1990) (citing *Reid v. United States*, 715 F.2d 1148, 1155 (7th Cir. 1983)).

Without further standards or oversight from this court, courts below may grossly abuse discretion with arbitrary and capricious sanctions not bound my sound legal principles, including their own.

B. Allowing courts below to find sanction when redress was earned and the matter is otherwise subject to a circuit split is a gross abuse of discretion.

The Court can take notice that an appeal that earns redress by modifying a district court judgment in the Appellant's favor fails a "frivolous" test. That is, if the Appellant earns a modification to a district court judgment through his appeal, then the appeal is not frivolous; the Appellant won something. However, even if the court below wanted to find that a particular argument in the appeal was frivolous while still modifying the district court judgment, the redress earned would bar sanctions as not being "warranted." *Hartz* at 475. An appeal which "alter[s] the district

court judgment" and that earns the Appellant redress cannot meet the *Hartz* standard of "no reasonable expectation" of redress. The purpose for an appeal, especially when redress is gained by the Appellant, cannot be solely ascribed by the court below as "delay or harassment or sheer obstinacy." *Id.* Even if related to domestic relations.

Turning back towards the definition of "frivolous," the courts below have guidance. Matters of first impression to a court below cannot be frivolous assuming they have a colorable legal claim. *Carpenters Health & Welfare Trust Funds v. Robertson (In re Rufener Constr.)*, 53 F.3d 1064 (9th Cir. 1995) ("It would be a gross abuse of our discretion under F.R.A.P. 38 to penalize litigants for raising colorable legal claims simply because they are ones of first impression.") (emphasis added).

If matters of first impression cannot be subject to Rule 38 sanction, there is no case for prosecuting with sanctions the advancement of an issue subject to circuit split. Doing so would change the math on how issues are presented to the Court. Parties such as Petitioner, unlucky enough to be in an adverse circuit, would not be able to bring circuit split matters to this Court's attention without first risking sanction.

Litigants appealing to protect issues to present to this Court is in line with this Court's holdings, safe from sanction for doing so. The Court has already determined that preserving issues for this Court, with or without circuit splits is not sanctionable – even when a split was not apparent. *McKnight v. GM Corp.*, 511 U.S. 659, 660 (1994) (sanctions vacated "if the only basis for the order imposing sanctions on petitioner's attorney was that his retroactivity argument was

foreclosed by Circuit precedent, the order was not proper.").

In the case of either redress for an Appellant or the preservation of issues for this Court – particularly when there is a circuit split - courts below grossly abuse their discretion when issuing Rule 38 sanctions. Allowing them to do so would close the courthouse to countless litigants seeking this Court's review and to penalize even successful Appellants. If to delay justice is to deny justice, then punishing its pursuit through sanction in one circuit for a winning position another is not within a court's discretion. See *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 672 (1953) (Black, J. dissenting).

C. The court below ruled improperly on the matter of sanctions.

The decision below rested entirely on matters subject to a circuit split on the domestic relations exception. Petitioner argued the jurisdictional issues below and preserved them for this Court. *McKnight* at 660 ("Filing an appeal was the only way petitioner could preserve the issue pending a possible favorable decision by this Court."); App. 5 ("[Petitioner] argues that the domestic-relations exception applies only to diversity-jurisdiction cases, not to federal-question cases, like his.").

Strikingly, Petitioner also won modification of the district court judgment in the appeal. The court below removed any merits findings, leaving only a jurisdictional basis for ruling. App. 6. Then, after granting redress, it deemed the jurisdictional basis frivolous and granted sanction even though it is subject to circuit split. App. 6-7.

In so doing, the court below ignored its own standard in *Hartz* requiring "no reasonable expectation" of redress before sanctions are warranted. The modification to the district court judgment granted significant redress to the Petitioner. His original, unamended complaint had been dismissed with prejudice on the merits in the district court. App. 8-11. Therefore, he was barred by *res judicata* from bringing the same claims in a court of competent jurisdiction. *Torcasso v. Standard Outdoor Sales, Inc.*, 157 Ill. 2d 484, 490 (1993). When the court below modified the district court's judgment to dismiss the complaint based only on jurisdiction, it granted Petitioner two forms of redress. First, he was able to re-file in state court immediately, no longer barred by *res judicata*. *Id.* Second, he was now able to take advantage of Illinois' Savings Statute granting him one-year to re-file in state court from the time of the court below's judgment. 735 ILCS 5/13-217.

Petitioner was granted "keys to the courthouse" by the court below - that seems no small redress to most people seeking justice. Petitioner requests the Court reverse the issuance of sanctions as in *McKnight*, *supra*, and offer the circuit courts any further guidance it deems appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Edward "Coach". Weinhaus
pro se
10859 Picadily Square Dr.
St. Louis, Missouri 63146
eaweinhaus@gmail.com
314-580-9580