No.

IN THE

Supreme Court of the United States

MICHAEL A. DEEM, PETITIONER,

v.

LORNA M. DIMELLA DEEM

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The trial judge in Petitioner's divorce and custody dispute appointed an attorney for the children (AFC) over Petitioner's objections and despite the unequivocal fact that his children were not abused or neglected. The AFC actively litigated against Father's interests and the expressed wishes of his children, to continue their relationship with their father. Father was compelled to subsidize a portion of the AFC's legal fees and expenses under threat of imprisonment.

The intermediate appellate court denied Father's appeal and his motion to supplement the record on appeal. Father appealed to the New York Court of Appeals (NYCA) and also argued that the intermediate court violated his due process rights by ignoring unequivocal facts and all of Father's legal arguments. The NYCA denied the appeal for lack of finality and denied his motion to reconsider, despite ongoing irreparable harm to Father's rights to free speech and parental relations.

1. DOES APPOINTMENT OF AN ATTORNEY FOR THE CHILDREN OVER A FIT FATHER'S OBJECTION VIOLATE HIS RIGHT TO PARENTAL RELATIONS?

2. DOES COMPELLED SUBSIDIZATION OF A COURT APPOINTED ATTORNEY FOR THE CHILDREN VIOLATE A FIT FATHER'S RIGHT TO FREE SPEECH?

3. DOES COMPELLED COOPERATION WITH A COURT APPOINTED ATTORNEY FOR

THE CHILDREN VIOLATE A FIT FATHER'S RIGHT TO FREE SPEECH?

4. DOES A COURT APPOINTED ATTORNEY FOR THE CHILDREN RAISE THE RELATIVE VOICE OF A PARTY OPPONENT BY LITIGATING AGAINST THE INTERESTS OF A FIT FATHER AND FOR THE INTERESTS OF HIS ESTRANGED WIFE IN A CUSTODY DISPUTE?

5. DOES COMPELLED SUBSIDIZATION OF A COURT APPOINTED ATTORNEY FOR THE CHILDREN VIOLATE THE TAKINGS CLAUSE?

6. MAY THIS COURT REVIEW AN ORDER OF THE HIGHEST COURT OF NEW YORK STATE WHEN THERE ARE FURTHER PROCEEDINGS YET TO OCCUR, BUT ALL NEW YORK STATE COURTS ENFORCE WRITTEN POLICIES, CUSTOMS AND PRACTICES THAT VIOLATE RIGHTS PROTECTED BY THE FEDERAL CONSTITUTION AND A LITIGANT AND HIS CHILDREN WILL SUFFER IRREPARABLE HARM IF CERTIORARI IS NOT GRANTED?

LIST OF PARTIES

Petitioner

MICHAEL ANTHONY DEEM

Respondent[1]

ARLENE GOLD WEXLER, ESQ.

STATEMENT OF RELATED CASES

I. *Deem v. DiMella-Deem*, 68616/2017, New York State Supreme Court, Westchester County. Action for divorce. Decision and Judgment After Trial entered on March 5, 2021.

Deem v. DiMella-Deem, 2021-4089, New York State Supreme Court Appellate Division, Second Department (Second Department). Order to Show Cause seeking to vacate an order of protection *fraudulently* entered "Upon Default" by the trial judge, Gretchen Walsh, in Petitioner's divorce action; and a motion to strike AFC Wexler's opposition to Petitioner's moving papers.

II. *Deem v. Walsh*, 2021-4385, Second Department. An original combined action for declaratory judgment and proceeding pursuant to CPLR article 78, seeking to prove, *inter alia*, that the

[1] The defendant in the underlying divorce action, Lorna M. DiMella-Deem, defaulted in the instant matter at the state intermediate appellate level.

trial judge in Petitioner's divorce action *falsified* the trial transcripts and whose oath to a secret society, club or cabal creates an irreconcilable conflict with her duties as a judicial officer in the New York State Unified Court System. As a suspected member of the secret organization Walsh wrongfully separates fit parents, mostly fathers, from their children, homes, property and money. In short, "justice" is for sale in her courtroom and those of other jurists that have taken oaths to secret societies, clubs or cabals. Petitioner was compelled to file this matter to rebut the presumption of regularity in the appeals of her decisions in the underlying divorce action. Fully briefed. Awaiting discovery order or dismissal.

III. *People v. Deem*, No. 21060070, Mount Pleasant Town Court, New York State. Arrested and jailed for violating an order of protection *fraudulently* entered "Upon Default" by the trial judge, Gretchen Walsh, in Petitioner's divorce action. All requests for discovery, *Brady* material, to dismiss and for a trial were ignored by the Briarcliff Manor Village Justice, Stuart Halper, who subsequently recused himself due to bias and prejudice against Defendant-Father. Westchester County District Attorney Miriam Rocah had the matter transferred to Mt. Pleasant, where she continues to pursue a Misdemeanor, Class A charge that is baseless and the People cannot prevail on as a matter of law.

IV. *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, dismissing petition *sua sponte* based on the Domestic Relations Exception Doctrine, which is invoked in unreported 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. Motion for Rehearing *en banc* denied December 11, 2019.

Deem v. DiMella-Deem, et al., No. 19-1111, U.S. Supreme Court. Petition for Writ of Certiorari to the U.S. Second Circuit Court of Appeals. *Cert. denied.*

V. *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, based on fabricated allegations, which are permitted to be filed pursuant to the Rules of the Chief Administrative Judge of New York, 22 NYCRR § 130-1.1(a)-(c).

Deem v. DiMella-Deem, No. 2018-7055, Second Department. Order entered June 18, 2018, denying order to show cause to vacate no contact restraining order entered without any justification.

Deem v. DiMella-Deem, No. 2018-9179, Second Department. Order entered August 23, 2018, denying order to show cause to vacate no contact

restraining order entered without any justification.

Deem v. DiMella-Deem, No. 2018-14227, Second Department. Order entered January 9, 2019, denying order to show cause to vacate no contact restraining order entered without any justification.

VI. *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, challenge to Child Protective Service's lack of investigation into allegations of, *inter alia*, pedophilia and improper guardianship by Lorna M. DiMella-Deem. Dismissed for lack of standing.

VII. *Matter of the Pistol License of Deem*, No. 800073/2018, New York State County Court, Westchester County. Judgment entered May 28, 2019, dismissing Westchester County's application that Petitioner lacked the character and fitness to hold a pistol license, even though the license had expired and he was not in possession of his handguns.

VIII. *People v. Deem*, No. 18110057, Briarcliff Manor Village Court, New York State. Judgment entered June 12, 2019, dismissing misdemeanor complaint for failure to prosecute the violation of an *ex parte* temporary order of protection that was *falsified* by Hal B. Greenwald, then Family Court Judge, now New York State Supreme Court (Dutchess County).

IX. *Deem, et al. v. DiMella-Deem, et ano.*, No. 69596/2019, New York State Supreme Court, Westchester County. Judgment entered January 13, 2020, writ of *habeas corpus* regarding a Family Court Order of Protection that was unlawfully entered at the secretive direction of Gretchen Walsh, J.S.C., and which exceeded the maximum statutory period by 15 months. Walsh affirmatively misrepresented the relatedness of the family court and divorce proceedings to the Court Clerk in order to have the writ reassigned to her before denying it.

Deem, et al. v. DiMella-Deem, et ano., No. 2020-1113, Second Department. Appeal of denial of writ of *habeas corpus* regarding a Family Court Order of Protection. Denied.

X. *Deem, et al. v. DiMella-Deem, et ano.*, No. 2020-204, Second Department. Appeal of denial of writ of *habeas corpus* regarding matrimonial action. Abandoned after trial judge affirmatively misrepresented the relatedness of the family court and divorce proceedings to have the matter assigned to her.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes and Rules

OPINIONS BELOW

Deem v. DiMella-Deem, 2021-454, New York Court of Appeals, September 15, 2021. Summary Order denying motion to reconsider *sua sponte* dismissal, despite meritorious grounds for an exception to the finality rule – ongoing harm to Father's rights to free speech and parental relations. (1a)

Deem v. DiMella-Deem, 2021-333 (SSD 21), New York Court of Appeals, April 29, 2021. *Sua sponte* summary order dismissing appeal for lack of finality. (2a)

Deem v. DiMella-Deem, 2019-10687, Second Department, December 14, 2020. Decision and Order denying appeal of order appointing the AFC. Published. Before Mark C. Dillon, J.P., Sylvia O. Hinds-Radix, Valerie Brathwaite Nelson and Paul Wooten, JJ. (3a)

Deem v. DiMella-Deem, 2019-10687, Second Department, February 26, 2020. Decision and Order denying motion to supplement the record on appeal to rebut the affirmative misrepresentations of the AFC. Published. Before Cheryl E. Chambers, J.P., John M. Leventhal, Valerie Brathwaite Nelson, Paul Wooten, JJ. (6a)

Deem v. DiMella-Deem, 68616/2017, New York State Supreme Court – Commercial Part (Westchester County), March 22, 2019. Order appointing AFC. (7a)

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257(a) and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-84, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1973).

RELEVANT PROVISIONS INVOLVED

a) First Amendment, U.S. Constitution provides,

> Congress shall make no law … abridging the freedom of speech.

b) Fifth Amendment, U.S. Constitution provides,

> …nor shall private property be taken for public use, without just compensation.

c) Fourteenth Amendment, U.S. Constitution provides,

> …nor shall any state deprive any person of life, liberty, or property, without due process of law.

d) 28 U.S.C. § 1257(a) provides,

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari [] where any title, right, privilege, or immunity

> is specially set up or claimed under the Constitution [] of [] the United States.

e) Article I, § 17, N.Y. Constitution provides,

> Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed.

STATEMENT

Petitioner is a fit father. He has never abused or neglected his two children, daughter now 16 and son 15.[1] Father has always enjoyed an excellent relationship with his children. Despite those unequivocal facts the trial judge, Gretchen Walsh,[2] appointed Arlene Gold Wexler, Esq. as the AFC for both children over Father's objections.

Wexler conceded on the record that the children want to continue their relationship with Father. Yet, Wexler actively litigated against their and Father's interests, and for DiMella-Deem's interests, at every turn; the subsequent trial, motions, writs of habeas corpus and appeals below. Wexler did so in clear violation of her legal and ethical obligations,[3] and with

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[1] Both children were adopted. They were newborn and five days old, respectively, when they came into the lives of Father and his ex-wife. Petitioner is the only father they have ever known.

[2] Walsh served as the Law Clerk to Alan D. Scheinkman, Supervising Judge, 9th Judicial District, for nearly eight years, before he was elevated to Presiding Justice, Second Department.

[3] *See*, 22 NYCRR § 7.2 (AFC "must zealously advocate the child's position"), § 1210.1 (must post statement of client's rights), and §

Walsh's acquiescence, in violation of the rules governing judicial conduct.[4]

Wexler did not merely elevate the relative voice of Father's party opponent – his now former wife DiMella-Deem – but wholly coopted it as DiMella-Deem defaulted on the instant matter at the intermediate appellate level below (2019-10687, Dkt. Sheet). Walsh compelled Father to subsidize a portion of Wexler's fees and expenses (8a-9a) under threat of imprisonment. Wexler continues to send Father billing statements for legal fees due in opposing the instant appeal.

The Second Department subsequently denied Father's appeal and failed to address, let alone distinguish, compelling case law from this Court and the NYCA.

The New York Court of Appeals dismissed Father's appeal and motion to reconsider. In doing so, the NYCA protected its own rules, 22 NYCRR Part 36, which are in direct conflict with blackletter law, its own prior decisions, and the decisions of this Court. Appointments pursuant to Part 36 are not random and are a significant source of income for "court insiders," and presumably the political "party bosses" referenced in *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 205, 128 S.Ct. 791, 169 L.Ed.2d 665 (2008).

Wexler continues to violate Father's free speech and parental rights, and his children's commensurate rights, by actively opposing Father's appeal of an order

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1400.2 (client in domestic relations matter "entitled to an attorney who … will represent you zealously").

[4] *See*, 22 NYCRR § 100.3(D)(2) ("A judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Rules of Professional Conduct (22 NYCRR Part 1200) shall take appropriate action).

of protection that, as a matter of law, was *fraudulently* entered "Upon Default" by Walsh (68616/2017, *Compare*, Dkt. 521, Notice of Settlement, *and*, Dkt. 522, Affirmation in Opposition to Notice of Settlement for Order of Protection, *with*, Dkt. 523, Order of Protection Upon Default, dated June 2, 2021).[5] Wexler continues to actively litigate for continuing the "no contact" order of protection against Father.

Father has not had any contact with his children for nearly four years. His parental rights have been effectively terminated as a direct result of the interplay between Wexler and Walsh.

Procedural History

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

On February 14, 2019, the Supervising Judge of the Matrimonial Part assigned the trial of Father's divorce and custody dispute to Walsh, who was assigned to the Commercial Part.

On March 22, 2019, Walsh appointed Wexler as the AFC over Father's objections. (7a).

On September 16, 2019, Father filed his brief in the underlying appeal.

On October 18, 2019, the AFC filed her opposition brief.

On October 31, 2019, Father filed his reply brief and motion to supplement the appendix in the underlying appeal.

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[5] *See*, Statement of Related Cases, I and II, *supra*.

On February 26, 2020, the Second Department summarily denied Father's motion to file a supplemental appendix. (6a).

On December 2, 2020, Father filed a supplemental affidavit in support of his appeal.

On December 14, 2020, the Second Department denied Father's underlying appeal. (3a).

On about April 20, 2021, Father appealed as of right to the NYCA.

On about April 23, 2021, Wexler opposed Father's appeal by arguing lack of finality.

On April 29, 2021, the NYCA dismissed Father's appeal *sua sponte* for lack of finality. (2a).

On September 15, 2021, the NYCA dismissed Father's motion to reconsider. (1a).

Facts

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

In February 2018, DiMella-Deem "insisted that [Father] take $10,000 as [his] marital share. When [he] refused, she hit the roof. She said, yeah, you better back off, Michael. You don't think I'll throw my money at this? Huh? You don't think I'll throw my money at this? You'll have nothing. No home, no family, nothing." (2019-10687, A-024, l. 12).

On June 1, 2018, Faith G. Miller, Esq. was appointed as the AFC for both children in the underlying divorce, and the parties were ordered to pay her legal fees and expenses ("private pay").

On August 17, 2018, the application of Robin D. Carton, Esq., to be relieved as retained council for

DiMella-Deem was granted. Carton's malpractice carrier directed her to withdraw (68616/2017, Trans. dated February 13, 2019, p. 9, l. 10).

On September 26, 2018, Miller's application to be relieved as the AFC was granted due to a conflict of interest. Miller was prohibited from accepting "private pay" cases due to her marriage to Alan D. Scheinkman, then Presiding Justice of the Second Department (*see*, https://www.lohud.com/story/news/investigations/2015/04/05/law-guardians-accountability/70861238/, retrieved on December 7, 2021). Miller's malpractice carrier compelled her to withdraw. (68616/2017, Trans. dated February 13, 2019, p. 9, l. 12).

On November 9, 2018, DiMella-Deem's application to appoint another AFC was denied by the pre-trial judge (68616/2017, So Ordered Trans. dated November 9, 2018, p. 20, l. 4).

On February 14, 2019, the Supervising Judge of the Westchester County Matrimonial Part assigned Walsh to conduct the trial in the underlying divorce, even though she sat in the Commercial Part and there were four other judges assigned to the Matrimonial Part.

On March 21, 2019, a conference was held at which Walsh's justification for appointing an AFC was; "At a bare minimum, I will need an attorney for the children because I will have to do an *in camera* with the children" (2019-10687, A-008, l. 23), and "I have to get an attorney for the children appointed first, to get the lay of the land" (2019-10687, A-044, l. 2). Walsh's appointment of an AFC violated the law of the case doctrine.

On March 22, 2019, Walsh appointed Wexler as the AFC. (7a).

On March 29, 2019, Wexler sent Father a settlement offer (2019-10687, Supp. Aff. of Father, Ex. 1) that required Father to undergo "therapeutic supervised visitation with both children," at Father's expense. Wexler was to have permission to speak with the therapeutic supervisor. Father would be permitted to attend school functions and athletic events, which "would not involve interaction with either child." Father "would have the right to respond to e-mail communication initiated by the children…at reasonable hours for reasonable periods of time." Wexler never had any communication with Father before extending the above terms.

On April 16, 2019, Walsh permitted Wexler to continue to litigate against Father's interests and against the expressed wishes of his children. (2019-10687, SA-092, l. 1 ("That's not [what] the issue is, Your Honor. The issue is whether or not Ms. Wexler can even make that argument. She's supposed to be advocating for the wishes of the children. I'm sure the children said nothing about whether or not Dr. Evans should or shouldn't testify, or parental alienation, or the case [Wexler] had up in Putnam County."); SA-092, l. 9 ("The Court: Look Mr. Deem, I'm running this – I'm running this trial, I'm running this case."); SA-095, l. 6 ("Wexler: Mr. Deem is correct about something, his children want to have a relationship with him.")).

From May to June 2019, Father paid Wexler $ 2,000 for legal services allegedly provided to his children (2019-10687, SA-092, l. 18; Letter from Father to Wexler dated May 19, 2019 regarding payment plan), as ordered by Walsh under threat of imprisonment (2019-10687, SA-092, l. 14 ("Do you want to be thrown in jail over how much money you owe?" … "Is it worth

it?" … "Does it make sense at all?" … "You need to pay your *pro rata* share.").

On September 16, 2019, Father filed his brief in the underlying appeal.

On October 18, 2019, Wexler filed her opposition brief in the Second Department. It contained affirmative misrepresentations that were clearly exposed as such by transcripts at the trial level.

On October 31, 2019, Father filed his reply brief and supplemental affidavit with exhibits in the underlying appeal. Father also filed a motion to supplement the appendix to rebut Wexler's affirmative misrepresentations with trial transcripts.

On February 26, 2020, the Second Department summarily denied Father's motion to file a supplemental appendix. (6a).

On July 6, 2020, Wexler filed a post-trial brief in Father's underlying divorce and custody dispute that concluded,

> [I]t is respectfully requested that the Court grant Mother sole legal and sole physical custody of the subject Children, order that the Father have only therapeutic supervised access with the Children, issue Orders of Protection with full stay away language on behalf of both Children through their eighteenth birthdays.

*(*2019-10687, Supp. Aff. of Father, Ex. 2)

On December 2, 2020, Father filed a supplemental affidavit in support of his appeal in the Second Department, containing Wexler's above referenced offer of settlement and conclusion in her post-trial brief.

On December 14, 2020, the Second Department denied Father's underlying appeal. (3a). The Second Department ignored all of Father's legal arguments, unequivocal facts, and controlling federal and state case law.

On April 29, 2021, the NYCA dismissed Father's appeal *sua sponte* for lack of finality. (2a).

On September 15, 2021, the NYCA dismissed Father's motion to reconsider, despite ongoing violations of Father's constitutional rights to free speech and parental relations, and his children's commensurate rights. (1a).

Father continues to be opposed in the instant appeal exclusively by Wexler.

Wexler continues to send billing statements to Father for "legal services" allegedly rendered to her clients, Father's children, even though she is arguing in direct contravention to the expressed wishes of the children. (Billing Statements dated, *inter alia*, July 15, August 19, September 22, 2021).

Father has never been found to be unfit.

Father has exceeded the minimum standard of care.

Father's children have never been found to be abused or neglected.

REASONS FOR GRANTING THE PETITION

I. APPOINTMENT OF AN ATTORNEY FOR THE CHILDREN OVER FATHER'S OBJECTION VIOLATED HIS RIGHT TO PARENTAL RELATIONS.

"[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects

the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

"[T]he best interests of the child" is not the legal standard that governs parents' or guardians' exercise of their custody: So long as a parent adequately cares for his children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel v. Granville*, 530 U.S. at 68 (internal quotations omitted). "So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves." *Reno v. Flores*, 507 U.S. 292, 304, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1992).

Here, there is no question that Father adequately cared for his children and is fit. Indeed, Child Protective Services "unfounded" a complaint of "inadequate guardianship" against Father on June 12, 2018. Father did not have any contact with his children – electronically, telephonically, in person or otherwise – between the time CPS unfounded the complaint and when Wexler was appointed. There was no basis to believe CPS' determination was stale. Therefore, Father's right to parental relations, specifically to control who interacted with his children, continued through the pendency of the custody dispute.

> *Meyer*[*v. Nebraska*]*'s* repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially

> compelled [or prohibited] visitation by any party at any time a judge believed [s]he could make a better decision than the objecting parent had done. The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character. Whether for good or for ill, adults not only influence but may indoctrinate children, and a choice about a child's social companions [including AFCs] is not essentially different from the designation of the adults who will influence the child in school. Even a State's considered judgment about the preferable political and religious character of schoolteachers is not entitled to prevail over a parent's choice of private school. [] It would be anomalous, then, to subject a parent to any individual judge's choice of a child's associates [including court appointed AFCs] from out of the general population merely because the judge might think h[er]self [or the AFC] more enlightened than the child's parent. To say the least (and as the Court implied in *Pierce)*, parental choice in such matters is not merely a default rule in the absence of either governmental choice or the government's designation of an official with the power to choose for whatever reason and in whatever circumstances.

Troxel v. Granville, 530 U.S. at 78 (Souter, J. concurring) (internal citations and quotations omitted). The reasoning of both the majority and Justice Souter's concurring opinion control the instant matter.

Walsh's stated justification for appointing an AFC was, "At a bare minimum, I will need an attorney for the children because I will have to do an *in camera* with the children." (Tr. March 21, 2019, p. 2, l. 2). Walsh's justification violated this Court's rulings in *Reno* and *Troxel*, as well as the leading state case of *Bennett v. Jeffreys*, 40 N.Y.2d 543, 545, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976).

> Absent extraordinary circumstances, narrowly categorized, it is not within the power of a court, or, by delegation of the Legislature or court, a social agency [or AFC], to make significant decisions concerning the custody of children, merely because it could make a better decision or disposition. The State is *parens patriae* and always has been, but it has not displaced the parent in right or responsibility. Indeed, the courts[, AFCs] and the law would, under existing constitutional principles, be powerless to supplant parents except for grievous cause or necessity. Examples of cause or necessity permitting displacement of or intrusion on parental control would be fault or omission by the parent seriously affecting the welfare of a child, the preservation of the child's freedom from serious physical harm, illness or death, or the child's right to an education, and the like.

Bennett v. Jeffreys, 40 N.Y.2d at 545-46.

Walsh gave no special weight to Father's decision regarding his children or to the law of the case and appointed Wexler as the AFC. At all times relevant Wexler was a state actor. *See*, *Dennis v. Sparks*, 449 U.S. 24, 28, 101 S.Ct. 183, 66 L.Ed.2d 185

(1980) ("Private persons, jointly engaged with state officials in the challenged action, are acting under color of law for purposes of § 1983 actions.").

The trial court subordinated the right of Father to provide for and protect the interests of his children – to protect them from a mother he knows to suffer from grave mental illness and bi-polyamorous sex addiction, including incest and pedophilia (68616/2017, Trans. dated April 16, 2019, p. 31, l. 22) – to the naive and whimsical desires of then 12 and 14-year old children. In doing so, the trial judge impermissibly restructured the family by placing the children at the apex of the decision-making pyramid for the family and relegating Father to its base. Walsh gave "no special weight at all to [Father]'s determination of his [children]'s best interests." *Troxel v. Granville*, 530 U.S. at 69.

Furthermore, Walsh did so exclusively of her own accord "based solely on the judge's determination" and despite the fact she admitted that appointing an AFC was not in the children's best interests. (2019-10687, A-020, l. 16) ("I have to get an AFC appointed, which I will do. I don't think that this is in the best interests of your children"). No statute was cited in the order requiring an *in camera* with the court, or the presence of an AFC during an *in camera*. No statute was cited in the order authorizing the appointment of an AFC. (7a). No such statutes exist for the instant facts.

In fact, appointing an AFC when the children are neither abused nor neglected, or when a parent is not deemed to be unfit, is contrary to existing black letter law governing the appointment of AFCs. New York State Domestic Relations Law, § 240 provides for the appointment of AFCs when certain facts are present. The instant fact pattern – when children are

not neglected or abused, and Father has met minimum standards of care and is not unfit – is omitted from the statute. "Where the legislature has addressed a subject and provided specific exceptions to a general rule – as it has done [with the appointment of an AFC] – the maxim *expressio unius est exclusio alterius* applies." *Kimmel v. State*, 2017 NY Slip Op 03689, *5 (*citing* McKinney's Consolidated Laws of NY, Book 1, Statutes § 240, p. 412-413) ("where a statute creates provisos or exceptions as to certain matters the inclusion of such provisos or exceptions is generally considered to deny the existence of others not mentioned").

As such, the trial court lacked authority under state law to appoint an AFC.

The order appointing an AFC must be overruled.

II. COMPELLED SUBSIDIZATION OF THE COURT APPOINTED ATTORNEY FOR THE CHILDREN VIOLATED FATHER'S RIGHT TO FREE SPEECH.

> As Justice Jackson memorably put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein*."

Janus v. AFSCME, 585 U.S. ___, 138 S.Ct. 2448, 2463, 201 L.Ed.2d 924 (2018) (emphasis in original).

> Compelling a person to *subsidize* the speech of other private speakers raises similar First

> Amendment concerns. As Jefferson famously put it, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." …
> Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed.

Id., at 2464.

Here, the trial court ordered the father to pay a *pro rata* share of the court appointed AFC's legal fees and expenses. (8a, ¶¶ 3-8). Doing so compelled Father to propagate opinions he disbelieves and abhors. Specifically, Father was ordered to subsidize speech that argued for sole physical and legal custody of his children being awarded to someone he knew to have exhibited the majority of criteria associated with the diagnosis of borderline personality disorder, antisocial personality disorder and narcissistic personality disorder, and whom he firmly believes to suffer from bi-polyamorous sex addiction, including incest and pedophilia (Trans. dated April 16, 2019, p. 31, l. 22).

Put another way, Father was ordered to subsidize content based private speech in a public forum that was contrary to his firmly held Catholic beliefs. Walsh even went so far as to threaten Father with incarceration if he did not pay thousands of dollars to Wexler for legal fees. (2019-10687, SA-092, l. 14 ("Do you want to be thrown in jail over how much money you owe?" … "Is it worth it?" … "Does it make sense at all?" … "You need to pay your *pro rata* share."). Father complied rather than go to jail (2019-10687, SA-092, l. 18; Letter from Father to Wexler dated May 19, 2019

regarding payment plan). This was "sinful and tyrannical." *Janus v. AFSCME*, 138 S.Ct. at 2463.

The order appointing an AFC must be overruled.

III. COMPELLED COOPERATION WITH THE COURT APPOINTED ATTORNEY FOR THE CHILDREN VIOLATED FATHER'S RIGHT TO FREE SPEECH.

The order appointing the AFC (7a) also provided,

> d. the parties and counsel shall cooperate with the Attorney for the Child[ren] in providing any documents, papers or information requested, including executing releases permitting the Attorney for the Child[ren] to speak with, or receive information from, any mental health professionals, social service workers or agencies, physicians, schools, or other persons or entities having material and necessary information regarding the parties or the children.

Compelling Father to cooperate with and provide releases and information to Wexler violated Father's right to free speech. *Janus v. AFSCME*, 138 S.Ct. at 2463 ("We have held time and again that freedom of speech includes both the right to speak freely and the right to refrain from speaking at all.") (citing cases) (internal quotations omitted).

The order appointing an AFC must be overruled.

IV. THE COURT APPOINTED ATTORNEY FOR THE CHILDREN RAISED THE RELATIVE VOICE OF FATHER'S PARTY OPPONENT BY LITIGATING AGAINST HIS INTERESTS AND FOR THE INTERESTS OF HIS ESTRANGED WIFE IN A CUSTODY DISPUTE.

"[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, 14, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

Walsh's other justification for appointing an AFC was, "I have to get an attorney for the children appointed first, to get the lay of the land" (Tr. March 21, 2019, p. 38, l. 2). Walsh's statement constitutes a judicial admission that she intended to give at least some weight, if not greater weight, to the AFC's statements than to those of at least Father, if not both parties. Unless the AFC argued exclusively for Father's interests and exactly for his stated interests, the AFC would raise the relative voice of Father's party opponent. Blackletter state law foreclosed the opportunity for the AFC to argue for Father's interests.

In New York State, when a child is the subject of a proceeding, the AFC "must zealously advocate the child's position." 22 NYCRR § 7.2 (Rules of the Chief Judge). "If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests." *Id.*, 7.2(d)(2). Any overlap between Father's interests and the

children's wishes would be happenstance and likely lead to impermissibly raising or lowering of Father's relative voice to that of his then estranged wife.

This is especially true because DiMella-Deem pled for sole legal and physical custody in her Answer. Father sought to amend his original request for joint custody in light of the fraud and depraved indifference displayed by DiMella-Deem to the children's well-being during the course of the litgation.

This question is no longer hypothetical. Wexler repeatedly raised the relative voice of Father's party opponent in the divorce action he filed by, *inter alia*: 1) offering to settle custody on terms that were detrimental to Father's parental and free speech rights, and his children's commensurate rights (2019-10687, Supp. Aff. of Father, Ex. 1); 2) actively litigating against him (2019-10687, SA-092, l. 1 ("That's not [what] the issue is, Your Honor. The issue is whether or not Ms. Wexler can even make that argument. She's supposed to be advocating for the wishes of the children. I'm sure the children said nothing about whether or not Dr. Evans should or shouldn't testify, or parental alienation, or the case [Wexler] had up in Putnam County."); and 3) recommending to the trial court that sole legal and physical custody be granted to Father's party opponent *(*2019-10687, Supp. Aff. of Father, Ex. 2).

At all times relevant, Wexler was a government actor. *See*, *Dennis v. Sparks*, 449 U.S. at 28. "Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994)., "[Orders] of this sort[, the order appointing

Wexler (7a), and 22 NYCRR Parts 36, 623 and 680,] pose the inherent risk that the Government seeks not to advance a legitimate [] goal, but to suppress unpopular ideas or information or manipulate the [] debate through coercion rather than persuasion." *Id.* "These [orders] raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Id.* "For these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance [Wexler's] control over the content of messages expressed by [Father or his children]." *Id.* (internal quotations omitted).

The order appointing an AFC must be overruled.

V. COMPELLED SUBSIDIZATION OF THE COURT APPOINTED ATTORNEY FOR THE CHILDREN VIOLATED THE TAKINGS CLAUSE.

"The pertinent words of the Fifth Amendment of the Constitution of the United States are the familiar ones: nor shall private property be taken for public use, without just compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980) (internal quotations omitted). "The Fifth Amendment's guarantee … was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.*, at 163.

Father was ordered to pay the AFC's legal fees and expenses from his separate property. Money is property and protected by the Fifth Amendment. *See,*

DeJesus v. DeJesus, 90 N.Y.2d 643, 647, 687 N.E.2d 1319, 665 N.Y.S.2d 36 (1997) (defining property as "all things of value" including "intangible interests"). The trial court provided no authority by which it ordered Father to pay the AFC's legal fees and expenses.

The Bill of Rights in the New York State Constitution expressly provides, "Labor of human beings is not a commodity nor an article of commerce and shall *never* be so considered or construed." Art. I, § 17 (emphasis added).

Therefore, the trial court was prohibited from using Wexler's labor as compensation, let alone "just compensation," for taking Father's money.

The order appointing an AFC must be overruled.

VI. THIS COURT MAY REVIEW AN ORDER OF THE HIGHEST COURT OF NEW YORK STATE WHEN THERE ARE FURTHER PROCEEDINGS YET TO OCCUR, BUT ALL NEW YORK STATE COURTS ENFORCE WRITTEN POLICIES, CUSTOMS AND PRACTICES THAT VIOLATE RIGHTS PROTECTED BY THE FEDERAL CONSTITUTION AND FATHER AND HIS CHILDREN WILL SUFFER IRREPARABLE HARM IF CERTIORARI IS NOT GRANTED.

28 U.S.C. § 1257(a) provides this Court with appellate jurisdiction for,

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari [] where any title, right,

> privilege, or immunity is specially set up or claimed under the Constitution [] of [] the United States.

"[I]t has been a marked characteristic of the federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 123, 65 S.Ct. 1475, 89 L.Ed.2d 2092 (1945). Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. *Id.*, at 124.

"There are now at least four categories of [] cases which th[is] Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of additional proceedings anticipated in the lower state courts." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1973). "In most, if not all, of the cases in these categories, [] immediate rather than delayed review would be the best way to avoid the mischief of economic waste and of delayed justice." *Id.*, at 477-78.

Here, as "[i]n the first category [described by the *Cox* Court,] there are further proceedings [] yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 479. The reason the federal issue is conclusive or the outcome of further proceedings preordained in the matter at bar is because the official policies of the New York State Unified Court System, specifically the formal rules of the New

York Court of Appeals and the formal rules and decisions of the Second Department, are in direct conflict with the compelling decisions of this court governing the constitutionally protected rights to parental relations, free speech and the takings clause.

For example, the First and Second Departments have published a joint Mental Health Professionals Handbook (https://nycourts.gov/courts/ad2/pdf/2013%20Mental%20Health%20Professionals%20Handbook.pdf, retrieved on December 7, 2021), pursuant to 22 NYCRR Parts 623, 680. Page 16 provides, "In private pay cases, where the court has determined that the expert shall be paid privately by the parties, the expert should contact the parties or the parties' attorneys forthwith, to arrange for the manner of payment. If a party refuses to pay, the expert should notify the court."

Pages 23, 24, 31 have boilerplate language "For Use In Private Pay Cases," when the supreme court orders litigants to pay the fees of the appointed mental health practitioner. Pages 24, 25, 32 have boilerplate language "For Use In Mixed Indigent/Private Pay Cases."

Pages 27, 28, 35 have boilerplate language "For Use In Private Pay Cases," when the family court orders litigants to pay the fees of the appointed mental health practitioner. Pages 28, 29, 36 have boilerplate language "For Use In Mixed Indigent/Private Pay Cases."

The Second Department alone comprises over 50% of New York State's population. Two of the four judicial departments of New York State's intermediate court, which comprise approximately 75% of New York State's population, have a formal written policy that on its face violates this Court's rulings regarding the God

given rights to parental relations (Point I, *supra*) and free speech (Points II-IV, *supra*).

New York State's policy is not merely academic. "Attorneys for the children are not only appointed for abuse and neglect cases. They're appointed when custody is an issue frequently." (68616/2017, So Ordered Trans. dated November 9, 2018, p. 16, l. 18. Colangelo, J.)

In February 2006, the Matrimonial Commission published its Report to the Chief Judge of the State of New York (http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/matrimonialcommissionreport.pdf, retrieved on December 7, 2021). Footnote 39 provides, "The regulatory process for monitoring and reporting the fees of the privately-paid attorney for the child is set forth in Part 36 of the Rules of the Chief Judge." Footnote 51 provides, "A small minority of the Commission believes that each of the four Appellate Divisions should be permitted to continue to chart its own course – both administratively and with respect to its view of the law – on the issue of privately paid attorneys for the child." Put another way, a large majority of the Commission believed the system that existed then, regarding privately paid attorneys, should be changed based on their view of the law. That system continues today.

Father attempted to challenge the Second Department's system regarding the appointment of privately paid actors. He alleged violations of no less than five constitutionally protected rights in his petition. The Second Department transferred the matter to the Third Department, where it was summarily denied. The New York Court of Appeals dismissed the appeal "*sua sponte* upon the ground that

no substantial constitutional question is directly involved" (Order dated June 6, 2019).

Clearly, the New York Court of Appeals, at least three of the four Judicial Departments of the Appellate Division, and the Westchester County Supreme Court, Matrimonial and Commercial Parts, have demonstrated an ongoing refusal to address the constitutionality of the New York State Unified Court System's custom and practice of denying fit parents their God given rights, and their children's commensurate rights.

Moreover, "the process to appoint attorneys to individual cases can be relatively random" and "some lawyers have used it to add as much as $100,000 or more to their annual earnings, according to an analysis of state Office of Court Administration records" (https://www.lohud.com/story/news/investigations/2015/04/05/law-guardians-accountability/70861238/, retrieved on December 7, 2021). Concerns about these two factors compound exponentially in light of New York's practice of political "party bosses" selecting judges. *See, N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. at 205.

Further, if *certiorari* is not granted, Father and his children will continue to suffer irreparable harm to their rights of parental relations and free speech. Father filed for divorce on November 7, 2017. The Decision & Order After Trial was rendered on January 11, 2021. A final Judgment of Divorce did not issue until March 5, 2021. Father has appealed several decisions by the trial judge, and asked the Second Department to stay his appeals pending resolution of his petition against Walsh to determine as a matter of law that she did in fact falsify the trial transcripts of the underlying divorce, why she refused to state on the record if she was a member of a secret society, club or cabal that targeted Father, and who provided her with facts and

evidence from Father's family court proceedings, which she reviewed but did not inform the parties of such. Discovery is needed to determine those issues, followed by motion practice and appeals and a new trial. That proceeding alone is likely to take another four years to resolve before Father can return to the appeals in his divorce. Those appeals are likely to take at least another year or two. Father's children will have reached the age of majority before then and the instant federal issues will be moot.

The Second Department gives no consideration to the length of a divorce. Even a divorce that lasted 19 years did not prompt that court to move. *See*, *York v. York*, 98 A.D.3d 1038, 1039, 950 N.Y.S.2d 911 (2d Dep't 2012) (Austin, J., Dissenting) (A divorce that "has festered on the Supreme Court's docket, in one form or another, for more than 19 years" and "[t]he divorce trial ended more than five years ago, and still no decision has been rendered," supports a motion for mistrial and new trial before a different judge.). Father's children will age out in approximately one and a half, and three years, respectively.

Even public protests in front of the Westchester County Courthouse by another fit father[6] has failed to correct the unconstitutional customs and practices within the New York State Unified Court System.

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[6] The protestor stated to Father that David Rosoff, Esq., the husband and law partner of Robin D. Carton, Esq., DiMella-Deem's second lawyer, also obtained a "no contact" order of protection without him being provided a hearing. The "6" on the sign subsequently was changed to a "7" in about June 2019. Carton's malpractice carrier compelled her to withdraw. (68616/2017, Trans. dated February 13, 2019, p. 9, l. 10).

Father and the pictured protesting father are not the only fit parents that are being erased from the lives of their children. "In North America, over 25 MILLION PARENTS are being erased from their children's lives after divorce and separation." https://erasingfamily.org/, retrieved on December 7, 2021).

The hopes for reunification of Father, his children and millions of Americans rest on intervention by this Court, to address ongoing irreparable harm to parental and free speech rights resulting from the

unscrupulous practices thriving within the New York State Unified Court System.

The decision below is final within the meaning of 28 U.S.C. § 1257(a).

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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Court of Appeals of New York.

Michael A. **DEEM**, Appellant,
v.
Lorna M. DIMELLA-**DEEM**, Respondent.
2021-454

September 15, 2021

Present, Hon. Janet DiFiore, Chief Judge, presiding.

Appellant having moved for reconsideration of this Court's April 29, 2021 dismissal order in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion for reconsideration is denied.

Judges Singas and Cannataro took no part.

Court of Appeals of New York.

Michael A. **DEEM**, Appellant,
v.
Lorna M. DIMELLA-**DEEM**, Respondent.

April 29, 2021

Opinion

Appellant having appealed to the Court of Appeals in the above title;

Upon the papers filed and due deliberation, it is

ORDERED, that the appeal is dismissed without costs, by the Court sua sponte, upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution.

Supreme Court, Appellate Division, Second Department, New York.

Michael A. **DEEM**, appellant,
v.
Lorna M. DIVELLA–**DEEM**, respondent.

2019-10687(Index No. 68616/17)

Argued—December 14, 2020January 27, 2021

MARK C. DILLON, J.P., SYLVIA O. HINDS-RADIX, VALERIE BRATHWAITE NELSON, PAUL WOOTEN, JJ.

DECISION & ORDER

In an action for a divorce and ancillary relief, the plaintiff appeals from an order of the Supreme Court, Westchester County (Gretchen Walsh, J.), dated March 22, 2019. The order, inter alia, appointed an attorney for the children and directed the parties to pay pro rata shares of the attorney for the children's fees and disbursements, subject to reallocation at trial.

ORDERED that on the Court's own motion, the notice of appeal from the order is **deemed** to be an application for leave to appeal, and leave to appeal is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the order is affirmed, without costs or disbursements.

The parties were married in 2001. There are two children of the marriage, born in 2005 and 2006, respectively. In November 2017, the plaintiff commenced this action for a divorce and ancillary relief. The defendant counterclaimed for divorce and sought

sole custody of the children. Prior to trial, in an order dated March 22, 2019, the Supreme Court appointed an attorney for the children (hereinafter AFC) and directed the parties to pay pro rata shares of the AFC's fees and disbursements, subject to reallocation at trial. The plaintiff appeals.

The plaintiff's challenges to the appointment of an AFC, and to the direction that he pay a pro rata share of the AFC's fees and disbursements, are unpreserved for appellate review (*see Ambrose v. Ambrose*, 176 A.D.3d 1148, 1151, 113 N.Y.S.3d 106). In any event, they are without merit. Representation by an AFC in a contested custody matter "remains the strongly preferred practice" and is within the sound discretion of the trial court (*id.* at 1151 [internal quotation marks omitted]; *see* Family Ct Act § 249[a]; Judiciary Law § 35[8]; 22 NYCRR 7.2[a]; *Matter of Quinones v. Quinones*, 139 A.D.3d 1072, 1074, 32 N.Y.S.3d 607). Given the children's ages and the highly contested nature of this custody matter, the Supreme Court providently exercised its discretion in appointing an AFC to "zealously advocate the child[ren's] position" (22 NYCRR 7.2[d]; *see* Family Ct Act § 241; *Silverman v. Silverman*, 186 A.D.3d 123, 125, 129 N.Y.S.3d 86), and to be present during in camera interviews with the children (*see Eschbach v. Eschbach*, 56 N.Y.2d 167, 173, 451 N.Y.S.2d 658, 436 N.E.2d 1260; *Matter of Masiello v. Milano*, 180 A.D.3d 683, 685, 118 N.Y.S.3d 739; *Matter of Lopez v. Reyes*, 171 A.D.3d 1179, 1180–1181, 99 N.Y.S.3d 93).

Additionally, "[c]ourts are authorized to direct that a parent who has sufficient financial means to do so pay some or all of the [AFC's] fees" (*Matter of Young v. Young*, 161 A.D.3d 1182, 1182, 74 N.Y.S.3d 499 [alterations and internal quotation marks omitted]; *see* 22 NYCRR 36.4; Judiciary Law § 35[3]; *Pascazi v.*

Pascazi, 65 A.D.3d 1202, 1203, 885 N.Y.S.2d 735; *Matter of Plovnick v. Klinger*, 10 A.D.3d 84, 89, 781 N.Y.S.2d 360). The Supreme Court providently exercised its discretion in directing the plaintiff to pay a pro rata share of the AFC's fees and disbursements.

The plaintiff's remaining contentions are without merit.

DILLON, J.P., HINDS–RADIX, BRATHWAITE NELSON and WOOTEN, JJ., concur.

Supreme Court, Appellate Division, Second Department, New York.

Michael A. **DEEM**, appellant,
v.
Lorna M. DIVELLA–**DEEM**, respondent.

2019-10687(Index No. 68616/17)

2/26/20

CHERYL E. CHAMBERS, J.P. JOHN M. LEVENTHAL, VALERIE BRATHWAITE NELSON, PAUL WOOTEN, JJ.

DECISION & ORDER

Motion by the appellant for leave to serve and file a supplemental appellant's appendix on an appeal from an order of the Supreme Court, Westchester, County, dated March 22, 2019, containing certain material.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

CHAMBERS, J.P., LEVENTHAL, BRATHWAITE NELSON and WOOTEN, JJ., concur.