United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 3, 2023
Lyle W. Cayce
Clerk

No. 21-51040
Summary Calendar

ROBERTO CARLOS MENDIVES, SUI JURIS, and *on behalf of his four minor children*, R.C.M. II, M.A.M., G.L.M., E.F.M., (*minor children*),

Plaintiff—Appellant,

versus

BEXAR COUNTY, *et al.*; STATE OF TEXAS, *et al.*; ANGELA ROSE WOOTEN, (*in err*); DEPARTMENT OF HEALTH AND HUMAN SERVICES, *o/b/o*; DEPARTMENT OF JUSTICE, *o/b/o*; ATTORNEY VELIA JUDITH MEZA,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:21-CV-356

Before CLEMENT, SOUTHWICK, and HIGGINSON, *Circuit Judges*.

PER CURIAM:*

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

Roberto Carlos Mendives moves for leave to proceed in forma pauperis (IFP) in this appeal from a judgment dismissing his lawsuit as frivolous or malicious under 28 U.S.C. § 1915(e)(2)(B)(i). We review the district court's dismissal under § 1915(e)(2)(B)(i) for an abuse of discretion. *See Shakouri v. Davis*, 923 F.3d 407, 410 (5th Cir. 2019); *Geiger v. Jowers*, 404 F.3d 371, 373 (5th Cir. 2005). By moving to proceed IFP on appeal, Mendives has challenged the district court's certification that the appeal is not taken in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). Our inquiry into whether the appeal is taken in good faith "is limited to whether the appeal involves legal points arguable on their merits (and therefore not frivolous)." *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983) (cleaned up).

An action may be dismissed as frivolous or malicious if it duplicates claims raised by the same plaintiff in a previous or pending litigation. *See Pittman v. Moore*, 980 F.2d 994, 994-95 (5th Cir. 1993); *Wilson v. Lynaugh*, 878 F.2d 846, 850 (5th Cir. 1989); *Bailey v. Johnson*, 846 F.2d 1019, 1021 (5th Cir. 1988). The district court noted that Mendives's lawsuit was duplicative of five federal actions he had previously filed and found that the lawsuit was frivolous and malicious on this basis. Mendives has not shown that he will raise a nonfrivolous issue regarding the dismissal of his complaint for purposes of § 1915(e)(2)(B)(i). *See Pittman*, 980 F.2d at 994-95; *Wilson*, 878 F.2d at 850; *Bailey*, 846 F.2d at 1021.

Because Mendives has not shown that he will raise a nonfrivolous issue on appeal, his motion for leave to proceed IFP is DENIED, and the appeal is DISMISSED as frivolous. *See Baugh*, 117 F.3d at 202 n.24; *Howard*, 707 F.2d at 220; 5TH CIR. R. 42.2. Mendives's motion to expedite his appeal is DENIED as moot. Finally, his motion for judicial notice and all other outstanding motions are DENIED.

United States Court of Appeals for the Fifth Circuit

No. 21-51040

ROBERTO CARLOS MENDIVES, SUI JURIS, and *on behalf of his four minor children*, R.C.M. II, M.A.M., G.L.M., E.F.M., (*minor children*),

Plaintiff—Appellant,

versus

BEXAR COUNTY, *Et al.*; STATE OF TEXAS, *Et al.*; ANGELA ROSE WOOTEN, (*in err*); DEPARTMENT OF HEALTH AND HUMAN SERVICES, *o/b/o*; DEPARTMENT OF JUSTICE, *o/b/o*; ATTORNEY VELIA JUDITH MEZA,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:21-CV-356

ON PETITION FOR REHEARING EN BANC

Before CLEMENT, SOUTHWICK, and HIGGINSON, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active

service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERTO CARLOS MENDIVES, SUI JURIS, AND ON BEHALF OF HIS FOUR MINOR CHILDREN, R.C.M. II, M.A.M., G.L.M., E.F.M., (MINOR CHILDREN);	§	5-21-CV-00356-JKP-RBF
Plaintiff,	§	
vs.	§	
BEXAR COUNTY, *ET AL.*,	§	
Defendants.	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

To the Honorable United States District Judge Jason K. Pulliam:

This Report and Recommendation concerns Plaintiff Roberto Carlos Mendives's *pro se* Applications to Proceed in District Court without Prepaying Fees or Costs and proposed civil Complaint, Dkt. Nos. 1-2. The Applications were automatically referred for disposition pursuant to 28 U.S.C. § 636(b) and the October 8, 2019, Standing Order regarding Court Docket Management of Cases Involving Applications to Proceed In Forma Pauperis for the San Antonio Division of the Western District of Texas. Authority to enter this Order and Recommendation stems from 28 U.S.C. § 636(b).

Having considered the Applications and documentation provided by Mendives, the Court **GRANTS** the request to proceed in forma pauperis ("IFP"). *See* Dkt. Nos. 1-2. It is recommended, however, that this case be **DISMISSED** pursuant to 28 U.S.C. § 1915(e) as frivolous and malicious. Mendives should also be **WARNED** that initiating further frivolous or malicious cases may result in the imposition of sanctions.

Factual and Procedural Background

This is the sixth lawsuit filed by *pro se* Plaintiff Roberto Carlos Mendives in which he challenges certain rulings and judgments issued in a state court divorce and custody matter, as well as allegedly fraudulent actions allegedly undertaken by his ex-wife and her attorney in connection with those underlying proceedings. Mendives first appeared in this court in January 2016 when he attempted to improperly remove his state court original divorce and custody proceeding. *See Mendives v. Mendives*, No. 5-16-cv-15-RP (W.D. Tex. filed Jan. 8, 2016). That case was remanded for lack of subject matter jurisdiction. *See id.*, Dkt. No. 6.

Before the case could be remanded, Mendives opened a new case seeking relief—in the form of a Petition for Writ of Mandamus and Petition for Writ of Quo Warranto—against his ex-wife, her lawyers, and various state court judges for allegedly violating his constitutional and federal rights during the aforementioned divorce and custody proceeding. *In Re: The Matter of the Marriage of Angela Rose Mendives and Roberto Carlos Mendives*, No. 5-16-cv-82-RP (W.D. Tex. filed Jan. 25, 2016). On April 20, 2016, the District Court dismissed this second case for lack of jurisdiction and, further, for failing to state a claim on which relief may be granted. *See id.,* Dkt. No. 7. In doing so, the District Court observed that either *Younger* abstention or the *Rooker-Feldman* doctrine, as well as the domestic-relations exception to federal jurisdiction, prohibited the Court from entertaining claims arising out of Mendives's state court proceedings. *See id.*

From 2016 through 2018, Mendives initiated three new cases against his ex-wife, her attorneys, various Bexar County Judges, the Bexar County District Court, and the Office of Child Support Enforcement in Texas—again complaining his rights were violated in various ways during those state court proceedings. *See Mendives v. Mendives*, No. 5-16-cv-1022-OLG

(W.D. Tex. filed Oct. 13, 2016); *Mendives v. Wooten*, No. 5-17-cv-1120-DAE (W.D. Tex. filed Nov. 3, 2017); *Mendives v. Wotten*, No. 5-19-cv-4-FB (W.D. Tex. filed Dec. 28, 2018). Those cases were all dismissed for lack of subject matter jurisdiction. *See Mendives*, No. 5-16-cv-1022-OLG, Dkt. No. 15, *adopted by* Dkt. No. 18; *Mendives*, No. 5-17-cv-1120-DAE, No. 5-17-cv-1120-DAE, Dkt. No. 8; Mendives, No. 5-19-cv-4-FB, Dkt. No. 8.

On April 8, 2021, Mendives—proceeding *in forma pauperis* ("IFP")—initiated the instant action on behalf of himself and his four minor children against the following named Defendants: (1) Bexar County; (2) the State of Texas; (3) his ex-wife; (4) the Department of Health and Human Services; (5) the Department of Justice; and (6) his ex-wife's attorney. In a lengthy, hard-to-follow proposed original complaint (133 pages in length) and amended complaint (64 pages in length), each styled "Complaint for Intervention Qui Tam Claim," Mendives again complains that his ex-wife lodged certain false statements of domestic violence and rape in the underlying state custody proceeding. Those statements, according to Mendives, resulted in the state court improperly depriving Mendives of his parental rights, unfairly and inappropriately dividing the marital property, and garnishing his wages.[1] Mendives further

[1] *See, e.g.*, Dkt. No. 1-1 at 6 ("The Defendant(s) Ms. Wooten along with her attorney Velia Judith Meza, and the Bexar county Court have prevented Mr. Mendives from seeing his children for over five years due to their fraudulent and wrongful behavior in violation of the law and depriving Mr. Mendives of his fundamental rights, under the laws of the United States, to be a father to his children."); *id.* at 49 ("The gravamen of this Remonstrance is to seek relief, including damages, from a long, unfounded and fraudulent campaign perpetuated by Ms. Angela Rose Wooten (Ms. Wooten) along with her attorney Judge Velia Judith Meza weaponizing the Courts of the State of Texas improperly 1) to prevent Mr. Mendives from seeing his children . . . (3) to make false and fraudulent allegations against Mr. Mendives, which have rendered no criminal investigation and no findings by any administrative body of any wrongdoing . . . 7) to improperly garnish his wages without authority; 8) to unlawfully utilize the Court system to ultimately hold four children hostage from their father for over five [5] years . . ."); Dkt. No. 1-2 at 8 ("The Protective Order, which was executed fraudulently and unlawfully two years, prevented Affiant from being anywhere near either the children and/or Ms. Wooten. Next, because of Ms. Wootens [sic] false claims and untruths, the Court ordered an unenforceable

argues that the State of Texas was "without justification" to issue its custody determination and faults the Bexar County Court for failing to protect him and his four minor children. Finally, Mendives claims that his ex-wife and her attorney made certain false claims in their application for child support and, therefore, the United States "must intervene and assume control of [her] actions under 31 U.S.C. § 3730(b)(4)." *Id.* at 31. Mendives raises claims against Defendants including for (1) "theft of property"; (2) violations of the False Claims Act, 31 U.S.C. § 3729; (3) common law fraud; (4) "Payment Under Mistake of Fact; (5) unjust enrichment; (5) negligent misrepresentation; (6) breach of contract; (7) breach of the covenant of good faith and fair dealing; and (8) violation of his Fourteenth Amendment rights to due process and liberty.

Shortly after instituting this action, Mendives filed a Motion to Set Aside Judgment and two separate "Emergency" Motions for Declaratory Judgment. *See* Dkt. Nos. 5-7. In his first emergency motion, Mendives requests the Court declare that: (1) The 2017 Divorce Decree is "invalid, unlawful and unenforceable"; (2) "the 2015 Protective Order was entered upon fraud and untruths and is invalid, unlawful and unenforceable as a matter of law"; and (3) "the assignation of Mr. Mendives as a Vexatious Litigation [sic] is improper and therefore should be removed"; Dkt. No. 6 at 34-35. In his latest "emergency" motion, Mendives claims that he no longer has confidence in the Bexar County judges and therefore, demands that the U.S. Justice Department immediately remove the underlying state court custody proceeding to this District Court. *See* Dkt. No. 7 at 5. Removal is necessary, according to Mendives, given the "Kafkaesque [scheme] perpetuated by Ms. Angela Rose Wooten and her attorney to defraud the United States government of federal fundings." *Id.*

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divorce decree in early 2017 ("2017 Decree"), an improper division debt, an unsuitable division of property, an inappropriate division of financial assets, and a protective order improperly against Mr. Mendives preventing him from interacting with his children in the course of two years.").

Analysis

A. IFP Application

All parties instituting any civil action, suit, or proceeding in a district court of the United States, except an application for a writ of habeas corpus, must pay a filing fee of $350. *See* 28 U.S.C. § 1914(a). The District Court also generally imposes an administrative fee of $50.00.[2] The Court, however, may waive the initial filing fee and costs where a plaintiff submits an affidavit indicating that he or she is unable to pay these fees and costs. *See* 28 U.S.C. § 1915(a)(1); *Hayes v. Scott*, 116 F.3d 137, 140 (5th Cir. 1997) (finding that 28 U.S.C. § 1915(a)(1) is intended to apply to both prisoners and non-prisoners). When evaluating a request to proceed IFP, a court must examine the financial condition of the applicant to determine whether the payment of fees would cause an undue financial hardship. *Prows v. Kastner*, 842 F.2d 138, 140 (5th Cir. 1988). Such an examination "entails a review of other demands on individual plaintiffs' financial resources, including whether the expenses are discretionary or mandatory." *Id.* A district court exercises discretion in determining whether to extend the privilege of IFP status to plaintiffs who are unable to pay filing fees. *See Startti v. United States*, 415 F.2d 1115, 1116 (5th Cir. 1969).

Mendives declares under penalty of perjury that he currently receives $3,453.60 in gross pay bi-monthly. But due to his ex-wife's alleged fraudulent statements in the underlying divorce proceedings, Mendives claims, his wages are "illegally garnished" such that he only takes home $1,077 twice a month. According to Mendives, he only has $100 in a checking or savings account and owns no property of value. At the same time, Mendives claims to have monthly expenses totaling $2,219 and an unspecified amount in credit card debts. Accordingly, the

[2] *See* https://www.txwd.uscourts.gov/court-information/fee-schedule/.

information provided demonstrates that denying Mendives IFP status in this case would result in undue hardship to him.[3]

B. Dismissal of Mendives's Claims

Pursuant to 28 U.S.C. § 1915(e), the Court is required to screen any civil complaint filed by a party proceeding IFP to determine whether the claims presented are (1) frivolous or malicious; (2) fail to state a claim on which relief may be granted; or (3) seek monetary relief against a defendant enjoying immunity from such relief. *See* 28 U.S.C. § 1915(e)(2)(B). An action is frivolous where there is no arguable legal or factual basis for the claims. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

"A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as if the complaint alleges violation of a legal interest which clearly does not exist." *Harper v. Showers*, 174 F.3d 716, 718 (5th Cir. 1999) (quotation marks omitted). A claim is also legally frivolous when the court lacks subject matter jurisdiction over it. *Bibbs v. Harris*, 578 F. App'x 448 (5th Cir. Aug. 20, 2014); *Nixon v. Attorney Gen. of Tex.*, 537 F. App'x 512 (5th Cir. Jul. 31, 2013)). A complaint is factually frivolous when "the facts alleged are 'fantastic or delusional scenarios.'" *Eason v. Thaler*, 14 F.3d 8, 9 n.5 (5th Cir. 1994) (quoting *Neitzke*, 490 U.S. at 327-28).

To avoid dismissal under Rule 12(b)(6), and hence § 1915(e)(2)(B), "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its

[3] *See, e.g., Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 338-40 (1948) (explaining that an affidavit is generally sufficient to support an IFP application if it represents that the litigant, because of poverty, is unable to pay court fees and costs or to support and provide necessities for herself and her dependents); *Watson v. Ault*, 525 F.2d 886, 891 (5th Cir. 1976) ("[A]s here, where the in forma pauperis affidavit is sufficient on its face to demonstrate economic eligibility, the court should first docket the case and then proceed to the question presented under Section 1915(d) [currently Section 1915(e)] of whether the asserted claim is frivolous or malicious.").

face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 570 (2007)). These factual allegations need not be highly detailed but "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. A conclusory complaint—one that fails to state material facts or merely recites the elements of a cause of action—may be dismissed for failure to state a claim. *See id.* at 555-56.

"A case may be dismissed as malicious if it duplicates claims that the same plaintiff has raised in previous or pending litigation." *Lewis v. Sec'y of Pub. Safety & Corr.*, 508 F. App'x 341, 343 (5th Cir. Jan. 21, 2013). "A case is duplicative if it involves the same series of events and allegations of many of the same facts as an earlier suit." *Id.* (quotation marks omitted). The Fifth Circuit has specifically explained that "when a successive in forma pauperis suit is duplicative, the court should insure that the plaintiff obtains 'one bite at the litigation apple—but not more.'" *Id.* (citing *Chambers v. Stalder*, 999 F.2d 1580 (5th Cir. 1993) (quoting *Pittman v. Moore*, 980 F.2d 994, 995 (5th Cir. 1993)).

"[A] district court is 'vested with especially broad discretion' in determining whether . . . a dismissal [under § 1915(e)(2)(B)(i)] is warranted." *Id.* (quotation marks omitted). "A district court may dismiss an IFP proceeding for frivolousness or maliciousness at any time, before or after service of process and before or after the defendant's answer." *Green v. McKaskle*, 788 F.2d 1116, 1119 (5th Cir. 1986).

This case is subject to dismissal as frivolous due to a lack of subject matter jurisdiction. Under the *Rooker-Feldman* doctrine, federal courts generally lack jurisdiction to review, modify, or nullify final orders of state courts. *Liedtke v. State Bar of Tex.*, 18 F.3d 315, 317 (5th Cir.1994) ("Absent specific law otherwise providing, that doctrine directs that federal district courts lack jurisdiction to entertain collateral attacks on state court judgments."). Here, to the

extent Mendives's state custody and divorce proceedings are final, Mendives's claims in this litigation are barred by the *Rooker-Feldman* doctrine because they "invite district court review and rejection of the state child support [garnishment and custody] judgment [as well as the divorce decree]." *Mosley v. Bowie County Texas*, 275 Fed. App'x 327, 329 (5th Cir. 2008) (quoting *Exxon Mobile Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005)); *see also Bell v. Valdez*, 207 F.3d 657 (5th Cir. 2000) ("A plaintiff cannot avoid the *Rooker-Feldman* doctrine simply by casting his complaint in the form of a civil rights action.").

Even if the divorce and custody proceedings were ongoing, there would be ample reason for this Court to decline to move forward with Mendives's present action. The domestic-relations exception and *Younger* abstention counsel against a federal court exercising jurisdiction over claims that essentially challenge the validity of a state child-custody or support order or divorce decree. *See Rykers v. Alford*, 832 F.2d 895, 900 (5th Cir. 1987) (explaining that "[i]f the federal court must determine which parent should receive custody, what rights the noncustodial parent should have, how much child support should be paid and under what conditions, or whether a previous court's determination on these matters should be modified, then the court should dismiss the case" pursuant to the domestic relations exception); *Younger v. Harris*, 401 U.S. 37 (1971) (recognizing that a federal court must abstain from interfering in a state proceeding by granting equitable relief where: (1) the dispute involves an "ongoing state judicial proceeding"; (2) the subject matter of the state proceeding implicates an important state interest; and (3) the state proceedings afford an adequate opportunity to raise constitutional challenges). Child-support awards, custody and divorce decrees, and wage garnishment to satisfy a state child-support order are important state interests. And there is no reason to conclude—other than Mendives's unsupported assertions—that Mendives can't adjudicate his claims in state court. In

sum, whatever the status of the underlying state-court proceedings, this Court cannot entertain claims arising out of them.

Several different District Judges have already considered substantially similar issues presented by Mendives in prior lawsuits and found subject-matter jurisdiction lacking. Accordingly, this litigation should also be dismissed as duplicative of those previous actions. *See Lewis*, 508 F. App'x at 343.

C. Recommended Warning.

Given that this is the six frivolous lawsuit instituted by Mendives since 2016 regarding the same subject matter, he should be **WARNED** that continuing to institute new actions based on conduct in his state divorce or child custody proceedings may result in the imposition of sanctions, including but not limited to monetary sanctions and the imposition of a prefiling injunction or prospective denial of IFP status. *See Hurt v. Soc. Sec. Admin.*, 544 F.3d 308, 310 (D.C. Cir. 2008) ("When the number, content, frequency, and disposition of a litigants filings show an especially abusive pattern, we think a court may deny IFP status prospectively.") (quotations omitted); *Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 189 (5th Cir. 2008) (discussing a court's authority to enter a pre-filing injunction to deter vexatious filings).

Conclusion and Recommendation

For the reasons discussed above, the Court **GRANTS** Mendives's requests to proceed IFP. *See* Dkt. Nos. 1-2. To the extent, however, Mendives seeks any relief in those documents, other than waiver of prepayment of court costs and fees, the request is **DENIED**.

Further, it is recommended that this case be **DISMISSED** pursuant to 28 U.S.C. § 1915(e) as frivolous and malicious. Assuming the District Court adopts this Report and Recommendation, all pending motions, including but not limited to Dkt. Nos. 5-7, should be

DISMISSED AS MOOT. Finally, Mendives should be **WARNED** that initiating further frivolous or malicious cases may result in the imposition of sanctions.

Having considered and acted upon all matters for which the above-entitled and numbered case was referred, it is **ORDERED** that the above-entitled and numbered case is **RETURNED** to the District Court for all purposes.

Instructions for Service and Notice of Right to Object/Appeal

The United States District Clerk shall serve a copy of this report and recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the clerk of court, or (2) by mailing a copy by certified mail, return receipt requested, to those not registered. Written objections to this report and recommendation must be filed **within fourteen (14) days** after being served with a copy of same, unless this time period is modified by the district court. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The objecting party shall file the objections with the clerk of the court, and serve the objections on all other parties. A party filing objections must specifically identify those findings, conclusions, or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusory, or general objections. A party's failure to file written objections to the proposed findings, conclusions, and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. *Thomas v. Arn*, 474 U.S. 140, 149-52 (1985); *Acuña v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to timely file written objections to the proposed findings, conclusions, and recommendations contained in this report and recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual

findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

IT IS SO ORDERED.

SIGNED this 23rd day of June, 2021.

RICHARD B. FARRER
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERTO CARLOS MENDIVES
sui juris, and on behalf of his four minor children, R.C.M. II, M.A.M., G.L.M., E.F.M.,

Plaintiff,

v. **No. SA-21-CV-0356-JKP**

BEXAR COUNTY, et al.,

Defendants.

ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Before the Court is a *Report and Recommendation of United States Magistrate Judge* (ECF No. 8) ("R&R"), filed on June 23, 2021. The Magistrate Judge recommends that the Court (1) dismiss this action as frivolous and malicious under 28 U.S.C. § 1915(e) and (2) warn Plaintiff that initiating further frivolous or malicious cases may result in sanctions. Plaintiff has timely filed objections to the R&R. *See* ECF No. 12.[1]

The District Court has reviewed *de novo* those portions of the recommendation to which objection was made and reviewed the remaining portions for clear error. Finding no error, the Court **ACCEPTS** the Report and Recommendation of the United States Magistrate Judge. While much of 54-page filed objections does not warrant express consideration, the Court does address certain matters.

First, after the time for filing objections passed, Plaintiff made six filings (each docketed as an Advisory to the Court). The first asks the Court to take judicial notice of various matters.

[1] Although the docket reflects the filing of a Notice of Appeal (ECF No. 11), the Fifth Circuit returned the filing, *see* ECF No. 13, and staff notes indicate that Plaintiff intended to file ECF No. 11 as an attachment to ECF No. 12. The Court thus treats ECF No. 11 as an attachment to Plaintiff's objections. The face of the objections confirms Plaintiff's intent to attach ECF No. 11 to his objections.

See ECF No. 14. The second is titled, Estoppel of No Confidence, and includes a July 20, 2021, letter to the Deputy Secretary of the State of Texas, with exhibits. *See* ECF No. 15. The third and fourth are titled the same and include August 1, 2021 letters to the Inspector General of Defense Logistics Agency and to the Inspector General of the Department of Justice. *See* ECF Nos. 16 & 17. The fifth is titled, Estoppel by Silence, and includes a demand for disclosure. *See* ECF No. 18. And the most recent is titled as a Petition for Writ of Certiorari to the United States Court for the Fifth Circuit. *See* ECF No. 19. To the extent that any of these filings or portion thereof qualify as an objection to the R&R, the Court finds them untimely and will not further consider them[2]

According to his objections, Plaintiff lost custody of his four minor children five years ago on false allegations of domestic abuse and rape. *See* ECF No. 12 at 5-7. In large part, his objections focus on the concept of being innocent until proven guilty. *See id.* at 6-8. His initial objections concern a lack of empathy and sympathy on the part of the Magistrate Judge. *See id.* at 8, 42. But such emotional matters have no place in determining whether Plaintiff's complaint is subject to dismissal through statutory screening procedures. The Court is to apply the law to the facts without regard to personal sympathies for or biases against a particular litigant. Neither bias nor sympathy should factor into a Court's decision. As a parent, Plaintiff is understandably upset as to what allegedly transpired with respect to his children. According to Plaintiff, they were taken away five years ago based on false statements and misrepresentations. *See* ECF No. 12 at 8. And, as Plaintiff states so emphatically, he "has been fighting as much [as] he can, to demand justice, to personally raise and care for his children as every responsible man would do."

[2] Furthermore, after the Court commenced its review of the R&R, Plaintiff filed a *Notice of Appeal* (ECF No. 20). In general, such filing "strips the district court of jurisdiction, but this rule is inoperative for nonappealable orders." *Butler v. Denka Performance Elastomer LLC*, 806 F. App'x 271, 275 n.5 (5th Cir. 2020) (per curiam). Because the Court has yet to issue an appealable order in this case, the Notice of Appeal does not divest this Court of jurisdiction to consider the R&R or otherwise proceed with this case.

See id. He submits that his "demands for justice are not frivolous and malicious," instead, he pursues justice "[w]ith a sense of ethical anger, with a justified righteous indignation." *See id.*

Plaintiff further objects that the *Rooker-Feldman*[3] doctrine is inapplicable. *See id.* at 11, 18-19. He contends "*Rooker-Feldman* simply does not apply where a state-court litigant brings an independent action in federal court attacking a state court judgment as void for lack of jurisdiction or fraud." *Id.* at 18. However, Plaintiff has not shown the *Rooker-Feldman* doctrine to be inapplicable. Courts "must presume that a suit lies outside this limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum." *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001). And such burden includes showing that the *Rooker–Feldman* doctrine does not divest the Court of jurisdiction it might otherwise have. *See McMullen v. Cain*, No. A-17-CA-0103-LY, 2017 WL 4510594, at *2 (W.D. Tex. Feb. 23, 2017) (recommendation of Mag. J.) *accepted by* 2017 WL 4506814 (W.D. Tex. June 22, 2017).

Although "the *Rooker–Feldman* doctrine . . . is confined to . . . cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments," *Exxon Mobil Corp. v. Saudi Basic Indus.*, 544 U.S. 280, 284 (2005), the instant case appears to fall within the jurisdictional bar of *Rooker-Feldman* at least to some extent. The doctrine removes jurisdiction from the lower federal courts "to review matters 'inextricably intertwined' with a state judgment." *Gross v. Dannatt*, 736 F. App'x 493, 494 (5th Cir. 2018) (per curiam) (quoting *Feldman*, 460 U.S. at 486-87). Stated succinctly, "the doctrine applies" when "a party in effect seeks to take an appeal of an unfavorable state-court decision to a lower federal court." *Lance v. Dennis*, 546 U.S. 459, 466 (2006) (per curiam).

[3] *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Dist. of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983).

Plaintiff is a state-court loser who complains of injuries caused by a state court judgment related to the custody of his children and other matters of family law. At least some of his varied claims appear inextricably intertwined with a state judgment that is not reviewable by this Court. The Court need not consider whether the *Rooker–Feldman* doctrine bars all claims in this action, because the Magistrate Judge did not rely solely on that doctrine to recommend dismissal of this action.

The meat of the recommendation in this case centers on finding the instant action frivolous and malicious due to five prior federal cases that were resolved adversely to Plaintiff on various grounds. Each of the prior actions were found to be jurisdictionally deficient at least to some extent. It is within a court's discretion to dismiss an action as frivolous due to jurisdictional defects. *See Humphries v. Various Fed. USINS Emps.*, 164 F.3d 936, 941 (5th Cir. 1999) (citing *Oltremari v. Kan. Soc. & Rehabilitative Serv.*, 871 F. Supp. 1331, 1333 (D. Kan.1994) ("A complaint is frivolous within the meaning of § 1915(d) [now § 1915(e)], if its subject matter is outside the jurisdiction of the court."); *Johnson v. E. Band Cherokee Nation*, 718 F. Supp. 6, 6 (N.D.N.Y. 1989) ("When a court does not have jurisdiction to hear an action, the claim is considered frivolous.")).

Furthermore, through the preliminary screening process of 28 U.S.C. § 1915(e)(2), courts may appropriately dismiss an action filed in forma pauperis ("IFP") upon finding the complaint "frivolous or malicious" or if it "fails to state a claim upon which relief may be granted." A court may dismiss an IFP action as frivolous when it "seek[s] to relitigate claims which allege substantially the same facts arising from a common series of events which have already been unsuccessfully litigated by the IFP plaintiff." *Wilson v. Lynaugh*, 878 F.2d 846, 850 (5th Cir. 1989). Similarly, the Fifth Circuit has long held that filing successive IFP actions which duplicate claims made in previous lawsuits qualifies as malicious under the screening statute. *See*

Bailey v. Johnson, 846 F.2d 1019, 1021 (5th Cir. 1988). That the prior cases may have involved different defendants does not affect the maliciousness of a successive action. *See id.* Likewise, the assertion of a new claim that arises from the same allegations of a prior action does not affect the malicious or duplicative nature of the successive action. *See Potts v. Texas*, 354 F. App'x 70, 71 (5th Cir. 2009) (per curiam). In short, "[a] case is duplicative if it involves 'the same series of events' and allegations of 'many of the same facts as an earlier suit.'" *Lewis v. Sec'y of Pub. Safety & Corr.*, 508 F. App'x 341, 344 (5th Cir. 2013) (per curiam) (quoting *Bailey*, 846 F.2d at 1021). Additionally, that prior dismissals were largely or entirely based on jurisdiction does not make a successive case any less malicious or frivolous.

The Magistrate Judge summarized Plaintiff's five prior lawsuits: (1) an attempted removal of his state court divorce and custody proceeding (*Mendives v. Mendives*, No. 5:16-cv-15-RP (W.D. Tex. filed Jan. 8, 2016) (resulting in case being remanded for lack of jurisdiction)); (2) a Petition for Writ of Mandamus and Petition for Writ of Quo Warranto against his ex-wife, her lawyers, and various state court judges for allegedly violating his constitutional and federal rights during the aforementioned divorce and custody proceeding (*In Re: Marriage of Angela Rose Mendives and Roberto Carlos Mendives*, No. 5:16-cv-82-RP (W.D. Tex. filed Jan. 25, 2016) (resulting in dismissal for lack of jurisdiction and failure to state a claim)); (3) three other cases against his ex-wife, her attorneys, various Bexar County Judges, the Bexar County District Court, and the Office of Child Support Enforcement in Texas—again complaining his rights were violated in various ways during those state court proceedings (*Mendives v. Mendives*, No. 5:16-cv-1022-OLG (W.D. Tex. filed Oct. 13, 2016) (civil action resulting in jurisdictional dismissal); *Mendives v. Wooten*, No. 5:17-cv-1120-DAE (W.D. Tex. filed Nov. 3, 2017) (civil action resulting in dismissal under *Rooker-Feldman*); *Mendives v. Wooten*, No. 5:19-cv-4-FB (W.D. Tex. filed Dec. 28, 2018) (petition for writ of habeas corpus dismissed for lack of juris-

diction)). Plaintiff's divorce and other family law proceedings lie at the center of each of these five prior cases. And this case shares that same focal point.

The Court finds that Plaintiff pursues claims in this action that arise out of the same facts and circumstances as his prior cases and there is no apparent reason that he could not have pursued any new claims asserted in this case in his prior civil actions. Consequently, the Court finds the instant action malicious and frivolous within the meaning of 28 U.S.C. § 1915(e). By making such finding, the Court is not attributing malicious intent to Plaintiff. Nor is it belittling or disparaging the underlying merits of any asserted claim by finding this action frivolous. Finding this action malicious and frivolous relates to the duplicative and successive nature of this case. This Court has no need to reach the merits of any asserted claim.

Finding no error upon a *de novo* review of those portions of the recommendation to which objection was made and reviewing the remaining portions for clear error, the Court **ACCEPTS** the Report and Recommendation of the United States Magistrate Judge. It **DISMISSES** this action as malicious and frivolous as recommended and will finalize such dismissal with a separate judgment dismissing this case. Furthermore, as recommended by the Magistrate Judge, the Court **WARNS** Plaintiff that future abuses of the litigation process, such as initiating a frivolous or malicious case, may result in the imposition of sanctions up to including a monetary sanction payable to the Court, entry of a prefiling injunction to preclude instituting new actions based on the conduct leading to this case and his prior ones, and/or preventing him from proceeding in forma pauperis except by leave of court.

Despite the dismissal of this action and the sanction warning, the Court understands Plaintiff's determination to right the wrong that he perceives was inflicted upon him through the state court family law proceedings. But continued federal litigation is not the proper means to that end. And continued efforts to further litigate the alleged wrongs in federal court may lead to

the imposition of sanctions. The Court further notes that to the extent Plaintiff attempts to bring this action on behalf of his minor children, he may not do so without representation of counsel. *See McGee v. Isiah*, No. 3:16-CV-200-B-BH, 2016 WL 2642105, at *1 (N.D. Tex. Apr. 11, 2016) (recommendation of Mag. J.) *accepted by* 2016 WL 2622294 (N.D. Tex. May 9, 2016); *Oltremari*, 871 F. Supp. at, 1361.

The frivolous and malicious nature of this action also compels the Court to consider 28 U.S.C. § 1915(a)(3). That subparagraph provides: "An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." Because Plaintiff has been granted permission to proceed with this action in forma pauperis, he "may proceed on appeal in forma pauperis without further authorization," except in certain circumstances, including when "(A) the district court – before or after the notice of appeal is filed – certifies that the appeal is not taken in good faith . . . and states in writing its reasons for the certification." Fed. R. App. P. 24(a)(3)(A). "Good faith" within the meaning of § 1915(a)(3) "must be judged by an objective standard" and an appeal is taken in good faith if a litigant seeks appellate review of any non-frivolous issue. *Coppedge v. United States*, 369 U.S. 438, 445 (1962).

For the reasons stated in the R&R and this Order, the Court hereby **CERTIFIES** that any appeal by Plaintiff in this action is not taken in good faith. Although the Court has certified that any appeal in this action is not taken in good faith under 28 U.S.C. § 1915(a)(3) and Fed. R. App. P. 24(a)(3), Plaintiff may challenge this certification by filing a separate motion to proceed in forma pauperis on appeal with the Clerk of Court, United States Court of Appeals for the Fifth Circuit, within the time frame prescribed by Fed. R. App. P. 4. *See Baugh v. Taylor*, 117 F. 3d 197. 202 (5th Cir. 1997). Absent a challenge to the certification, Plaintiff must "pay the full filing fee and any relevant costs" to proceed on appeal. *See id.*; *accord Skiba v. Jacobs Ent., Inc.*, 587 F. App'x 136, 138 (5th Cir. 2014) (per curiam) ("When a district court certifies that an

appeal is not taken in good faith under § 1915(a)(3) . . . the litigant may either pay the filing fee or challenge the court's certification decision.").

It is so ORDERED this 8th day of October 2021.

JASON PULLIAM
UNITED STATES DISTRICT JUDGE