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District Court Magistrate Decision

(March 11, 2024)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JENNIFER LYNN DEES and
ETHAN DAVIS SMITH,

Plaintiffs,

v.

1:24-CV-0001
(MAD/DJS)

MICHAEL ZURLO, *et al.*,

Defendants.

APPEARANCES: **OF COUNSEL:**

JENNIFER LYNN DEES
Pro se Plaintiff
Clifton Park, New York 12065

ETHAN DAVIS SMITH
Pro se Plaintiff
Clifton Park, New York 12065

DANIEL J. STEWART
United States Magistrate Judge

REPORT RECOMMENDATION and ORDER

I. INTRODUCTION

The Clerk has sent to the Court a Complaint filed by pro se Plaintiffs Jennifer Lynn Dees and Ethan Davis Smith. Dkt. No. 1, Compl. Plaintiffs have not paid the filing fee, but have submitted Motions to Proceed *In Forma Pauperis*. Dkt. Nos. 2 & 3. Also pending are requests for leave to file electronically. Dkt. Nos. 4 & 5. For the reasons outlined below, the Court recommends that the Complaint be dismissed in its

entirety. Given that recommended disposition, the Motions for leave to file electronically are denied.

In their 170-page pro se Complaint, Plaintiffs Jennifer Lynn Dees and Ethan Davis Smith collectively assert 30 federal and state claims against 53 individual and municipal Defendants. Compl. In sum, Plaintiffs make conclusory claims against virtually every judge, prosecutor, social service worker, private attorney, private party, witness, or medical professional that was involved in a long-running custody and/or support dispute between Plaintiff Ethan Smith[1] and Defendant Veronica Smith. The matter is presently being litigated in Saratoga County Supreme and/or Family Court. The Complaint alleges federal RICO claims (claims 1-2); claims under 42 U.S.C. §§ 1983 & 1985, alleging violations of procedural due process, substantive due process, First Amendment retaliation, equal protection, abuse of process, *Brady* violation, failure to intervene, and a claim under *Monell*, (claims 3-14); a claim under the American with Disabilities Act (claim 15); and numerous state law claims (claims 16-30). Plaintiff's summary of the allegations contained in the Complaint is as follows:

> The plaintiffs allege a conspiracy to violate both state and federal constitutional rights, encompassing acts of deprivation of rights, misconduct, negligence, collusion, malpractice, and discrimination, extending to claims of wrongful death. Furthermore, the plaintiffs assert instances of malicious prosecution, selective prosecution, due process violations, failure to intercede, and point to issues of supervisory and municipal liability, alongside infringements under (RICO). The defendants engaged in fraudulent practices, illicit negotiations, and extortion tactics to enforce compliance with illegal orders. The Plaintiffs have been targeted with false accusations, such as felony theft involving

[1] While Jennifer Lynn Dees was not a party to this legal proceeding, it is alleged that she was involved in certain aspects of the litigation and was impacted by the issuance of various protective orders. *See*, e.g., Compl. at p. 10.

II. Factual Statement and Procedural History

Plaintiff Ethan Smith and Defendant Veronica Smith were married and have three children together. The Smiths separated and, on or about June of 2020, a divorce proceeding was commenced. Compl. at ¶ 113. The matter was assigned to Judge Paul Pelagalli, who was a Family Court Judge in Saratoga County but was, at the time, an acting Supreme Court Judge. As part of that proceeding issues involving custody and support were litigated. The parties were represented by counsel, and the three children also had assigned counsel. The Court issued various orders and decrees in connection with the proceeding, including orders of maintenance and support. Plaintiffs disagree with the orders and rulings that were issued by the Court. Plaintiffs maintain that Defendant Veronica Smith submitted false financial information regarding both her assets, as well as Plaintiff Smith's finances, resulting in a fraudulent support order. This caused significant financial difficulty, resulting in negative actions being taken against Plaintiff Smith for being in arrears of his support obligations, including having his license suspended. Plaintiff Smith alleges that the support order was issued without due process or a sufficient hearing.

Plaintiffs also alleged that numerous orders of protection, or temporary orders of protection, were erroneously issued against them by either Family Court or Supreme Court. Compl. at ¶ 138. Conversely, their request for orders of protection were not granted, or were delayed, and this represented an unequal application of the law as to them. Compl. at ¶¶ 73, 180. Further, Court hearings were held, during which time it is alleged that the involved attorneys improperly advocated for their clients, or in the case

of Plaintiff Smith, did not represent him with the required level of skill. Compl. at ¶¶ 49, 61, 65, & 85. Witnesses allegedly lied, or obfuscated, or covered up for other witnesses. Compl. at ¶¶ 136, 164, 348. The Court itself was biased against the Plaintiff Ethan Smith and did not treat him properly. Compl. at ¶¶ 39, 308. Ultimately a divorce decree was granted on or about August 31, 2023, but Plaintiff Smith appears to allege that the decree was improper because there was no jury trial. Comp. at ¶¶ 155 & 170

During the same time period, it is alleged that the Defendant social service workers and school officials did not properly investigate claims of abuse and neglect by Defendant Veronica Smith, or her significant other, against the Smith children. Compl. at ¶¶ 56, 76. It is alleged that police officers did not provide the level of protection that the Plaintiffs were entitled to, and failed to intervene in the conduct of private parties and/or Defendant Smith. Compl. at ¶¶ 264-266. The alleged failure of public officials to protect the Plaintiffs resulted in severe emotional stress, which in turn is said to be the cause of Plaintiff Dees having a miscarriage. Compl. at ¶ 53.

III. DISCUSSION

A. Standard of Review

Section 1915(e) of Title 28 of the United States Code directs that, when a plaintiff seeks to proceed in forma pauperis, "the court shall dismiss the case at any time if the court determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B).

Thus, it is a court's responsibility to determine that a plaintiff may properly maintain his complaint before permitting him to proceed with his action.

In reviewing a pro se complaint, this Court has a duty to show liberality toward pro se litigants, *see Nance v. Kelly*, 912 F.2d 605, 606 (2d Cir. 1990), and should exercise "extreme caution . . . in ordering sua sponte dismissal of a pro se complaint *before* the adverse party has been served and both parties (but particularly the plaintiff) have had an opportunity to respond." *Anderson v. Coughlin*, 700 F.2d 37, 41 (2d Cir. 1983) (emphasis in original) (citations omitted). Therefore, a court should not dismiss a complaint if the plaintiffs have stated "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. at 556). Although the court should construe the factual allegations in the light most favorable to the plaintiff, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (*citing Bell Atl. Corp. v. Twombly*, 550 U.S. at 555). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]'–'that the pleader is entitled to relief.'" *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)). Furthermore, Federal Rule of Civil Procedure 8 "demands more than an unadorned, the-defendant-

unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. at 555). Thus, a pleading that only "tenders naked assertions devoid of further factual enhancement" will not suffice. *Id.* (internal quotation marks and alterations omitted). Allegations that "are so vague as to fail to give the defendants adequate notice of the claims against them" are subject to dismissal. *Sheehy v. Brown*, 335 F. App'x 102, 104 (2d Cir. 2009).

"Ordinarily, a court should not dismiss a complaint filed by a pro se litigant without granting leave to amend at least once 'when a liberal reading of the complaint gives any indication that a valid claim might be stated.'" *Bruce v. Tompkins Cnty. Dep't of Soc. Servs. ex rel. Kephart*, 2015 WL 151029, at *4 (N.D.N.Y. Jan. 7, 2015) (quoting *Branum v. Clark*, 927 F.2d 698, 704-05 (2d Cir.1991)). However, where the grounds for dismissal offer no basis for curing the defects in the pleading, dismissal with prejudice is appropriate. *Kunz v. Brazill*, 2015 WL 792096, at *3 (N.D.N.Y. Feb. 25, 2015).

B. Jurisdiction

It is well settled that a federal court, whether trial or appellate, is obligated to notice on its own motion the basis for its jurisdiction. *City of Kenosha, Wisconsin v. Bruno*, 412 U.S. 507, 512 (1973); *see also Alliance of Am. Ins. v. Cuomo*, 854 F.2d 591, 605 (2d Cir. 1988) (challenge to subject matter jurisdiction cannot be waived); Fed. R. Civ. P. 12(h)(3) (court may raise basis of its jurisdiction sua sponte). When subject matter jurisdiction is lacking, dismissal is mandatory. *United States v. Griffin*, 303 U.S. 226, 229 (1938); Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it

lacks subject-matter jurisdiction, the court must dismiss the action."). In light of the Plaintiffs pro se status, the Court will sua sponte assess whether subject matter jurisdiction is present in this case. *LeClair v. Vinson,* 2019 WL 1300547, at *4 (N.D.N.Y. Mar. 21, 2019), *report and recommendation adopted,* 2019 WL 2723478 (N.D.N.Y. July 1, 2019).

In the present case, Plaintiffs cite to violations of federal constitutional law, and seeks redress under the civil rights statute, 42 U.S.C. §§ 1983 & 1985, the American with Disabilities Act, and 18 U.S.C. §1964(a). The federal courts would normally have original jurisdiction under 28 U.S.C. § 1331 to hear such a case; however, because of the precise allegations of the claims, the Court must also consider two additional well established jurisdictional rules.

1. The Rooker-Feldman Doctrine

A dismissal pursuant to the *Rooker-Feldman* doctrine is for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *Remy v. New York State Dep't of Tax'n and Fin.*, 507 F. App'x 16, 18 (2d Cir. 2013). This doctrine divests the federal court of jurisdiction to consider actions that "seek to overturn state court judgments." *Fernandez v. Turetsky*, 2014 WL 5823116, at *3 (E.D.N.Y. Nov. 7, 2014) (citing *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005)). The doctrine also bars the federal court from considering claims that are "inextricably intertwined" with a prior state court determination. *Id.* (quoting *Johnson v. Smithsonian Inst.*, 189 F.3d 180, 185 (2d Cir. 1999)).

There are four requirements to the application of *Rooker-Feldman*: (1) "the federal-court plaintiff must have lost in state court"; (2) the plaintiff's injuries must have been caused by a state court judgment; (3) the plaintiff must be asking the federal court to review and reject the state court's judgment; and (4) the state-court judgment must have been rendered prior to filing the federal court action. *Hoblock v. Albany Cty. Bd. of Elections*, 422 F.3d 77, 85 (2d Cir. 2005). A challenge to "the validity or enforcement of [a] child support order itself" constitutes an injury "caused by a state court judgment." *Sykes v. Bank of Am.*, 723 F.3d 399, 404 (2d Cir. 2013); *Davis v. Westchester Cnty. Fam. Ct.*, 2017 WL 4311039, at *8 (S.D.N.Y. Sept. 26, 2017) ("Courts have repeatedly invoked *Rooker-Feldman* in cases in which plaintiffs challenge family court decrees setting child support arrears."). In the present case, Plaintiff Smith seeks to overturn various orders issued by the state courts, having been unsuccessful in doing so by way of their Article 78 action, and accordingly such claims are effectively barred by *Rooker-Feldman*. *Errato v. Seder*, et al, 2024 WL 726880, at *2 (2d Cir. Feb. 22, 2024); *Sims V. Kaufman,* 2024 WL 757338, at *4 (S.D.N.Y. Feb. 14, 2024) ("Inasmuch as Plaintiff criticizes any final child support decision of the New York Family Court, Bronx County, in an effort to request that this Court overturn that final decision, the *Rooker-Feldman* doctrine bars this Court from granting Plaintiff such relief.").[2]

[2] Dees, who was not a party to those proceedings, would clearly lack standing to assert claims challenging the outcome of them.

2. Younger Abstention

In *Younger v. Harris*, the Supreme Court held that federal courts must abstain from exercising jurisdiction over claims, seeking declaratory or injunctive relief, that implicate ongoing state proceedings. 401 U.S. 37, 43-44 (1971). The Supreme Court held that when there is a parallel criminal proceeding in state court, the federal court must refrain from enjoining the state prosecution. *Id.* *Younger* abstention is triggered only by three categories of state court proceedings: (1) state criminal prosecutions; (2) "civil proceedings that are akin to criminal proceedings"; and (3) civil proceedings that "implicate a State's interest in enforcing the orders and judgments of its courts." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72-73 (2013). In *Sprint*, the Court used state-initiated custody proceedings as an example of civil proceedings which are akin to criminal proceedings. *Id.* at 79 (citing *Moore v. Sims*, 442 U.S. 415, 419-420 (1979) (state-initiated proceeding to gain custody of children allegedly abused by their parents)); *see also Davis v. Baldwin*, 594 F. App'x 49, 51 (2d Cir. 2015) (same).

While it is true that *Younger* abstention does not apply to claims for monetary damages, such as the present one, the doctrine does dictate that "a stay of the action pending resolution of the state proceeding may be appropriate." *Kirschner v. Klemons*, 225 F.3d 227, 238 (2d Cir. 2000). This is particularly the case in matters involving divorce, alimony, and child custody. This "domestic relations" abstention is based upon a policy dictating that the states have traditionally adjudicated marital and child custody disputes, developing "competence and expertise in adjudicating such matters, which the federal courts lack." *Thomas v. N.Y. City*, 814 F. Supp. 1139, 1146 (E.D.N.Y. 1993); *see*

also Am. Airlines, Inc. v. Block, 905 F.2d 12, 14 (2d Cir. 1990) (When a case calls for a federal court to interpret state domestic relations law or "immerse itself in domestic relations matters," the court must abstain from proceeding with the case due to the state courts' "greater interest and expertise" in that field.). Therefore, "to the extent that Plaintiff is asking the Court to grant injunctive and declaratory relief with respect to ongoing Family Court and Supreme Court proceedings, including any post-judgment proceedings, the Court must abstain from hearing those claims under the *Younger* abstention doctrine." *Stampfl v. Eisenpress*, 2024 WL 37075, at *4 (S.D.N.Y. Jan. 3, 2024).

C. RICO Claims

Plaintiffs' first two federal claims are that Defendants allegedly violated, and conspired to violate, provisions of the Racketeering Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1962 *et seq*. As noted by the Second Circuit, "[t]o establish a RICO claim, a plaintiff must show: (1) a violation of ...18 U.S.C. § 1962; (2) an injury to business or property; and (3) that the injury was caused by the violation of Section 1962." *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 120 (2d Cir. 2013) (quoting *DeFalco v. Bernas*, 244 F.3d 286, 305 (2d Cir. 2001)). To establish a violation of section 1962, a plaintiff must show "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). "Racketeering activity," in turn, is defined to include any "act" indictable under various specified federal statutes, including the mail and wire fraud statutes and the obstruction of justice statute. *See* 18 U.S.C. § 1961(1) (defining

"racketeering activity" to include offenses indictable under 18 U.S.C. §§ 1341 (relating to mail fraud), 1343 (relating to wire fraud), and 1503 (relating to obstruction of justice)). A "pattern of racketeering activity" is defined by the statute as "at least two acts of racketeering activity" within a ten-year period. 18 U.S.C. § 1961(5).

Courts generally approach RICO claims with a cautious eye, and with the understanding that Congress' goal in enacting RICO was to prevent legitimate businesses from becoming infiltrated by organized crime. *See United States v. Porcelli*, 865 F.2d 1352, 1362 (2d Cir. 1989). "Because the mere assertion of a RICO claim has an almost inevitable stigmatizing effect on those named as defendants, courts should strive to flush out frivolous RICO allegations at an early stage of the litigation." *Schmidt v. Fleet Bank,* 16 F.Supp.2d 340, 346 (S.D.N.Y. 1998) (internal quotation marks omitted).

As noted above, the present case outlines a contentious and lengthy custody and support dispute, and the Court is not unmindful of the stress that results from such proceedings. However, to allow the racketeering law to be utilized to create parallel federal litigation because a party is dissatisfied with the outcome of a pending family/supreme court matter, is both unjustified and unwise.

This principle was articulated by the Second Circuit in the case of *Kim v. Kimm*, 884 F.3d 98 (2d Cir. 2018). The *Kim* plaintiff was a restaurant owner and a defendant in a trademark infringement suit. After the trademark case was dismissed at the summary judgment stage, the plaintiff sued his opponent under RICO, alleging that the initial lawsuit was simply an extortion attempt. *Id.* at 101. The plaintiff further claimed that

false legal documents were used to mislead the court, all of which constituted both mail fraud and a pattern of racketeering activity. *Id.* The District Court dismissed the lawsuit for failure to state a claim, noting that conduct during the course of litigation cannot constitute predicate acts for purposes of RICO. *Id.* at 99. The Second Circuit affirmed, concluding that "the allegations of frivolous, fraudulent, or baseless litigation activities—without more—cannot constitute a RICO predicate act." *Id.* at 104. The Second Circuit further set forth the following basis for this ruling:

> [T]here are compelling policy arguments supporting this rule. First, "[i]f litigation activity were adequate to state a claim under RICO, every unsuccessful lawsuit could spawn a retaliatory action," which "would inundate the federal courts with procedurally complex RICO pleadings." Dist. Ct. Op. at 10–11, Appellant App'x at 266–67; *see also Nora F. Engstrom, Retaliatory RICO and the Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. 639, 696 (2017) (permitting RICO suits based on prior litigation activities would "engender wasteful satellite litigation"). Furthermore, "permitting such claims would erode the principles undergirding the doctrines of res judicata and collateral estoppel, as such claims frequently call into question the validity of documents presented in the underlying litigation as well as the judicial decisions that relied upon them." Dist. Ct. Op. at 11, Appellant App'x at 267; see also *Gabovitch [v. Shear]*, 1995 WL 697319, at *3, 1995 U.S. App. LEXIS 32856 [(1st Cir. 1995)] ("In essence, simply by alleging that defendants' litigation stance in the state court case was 'fraudulent,' plaintiff is insisting upon a right to relitigate that entire case in federal court.... The RICO statute obviously was not meant to endorse any such occurrence."). Moreover, endorsing this interpretation of RICO "would chill litigants and lawyers and frustrate the well-established public policy goal of maintaining open access to the courts" because "any litigant's or attorney's pleading and correspondence in an unsuccessful lawsuit could lead to drastic RICO liability." Dist. Ct. Op. at 11, Appellant App'x at 267 (quoting *Curtis & Assocs.*, 758 F.Supp.2d at 173); *see also Engel v. CBS, Inc.*, 182 F.3d 124, 129 (2d Cir. 1999) (noting the "strong public policy of open access to the courts for all parties and [the need] to avoid ad infinitum [litigation] with each party claiming that the opponent's previous action was malicious and meritless" (internal quotation marks and citations omitted) (second brackets in original)).

Id.

For the reasons cogently summarized in *Kim*, the present RICO allegation, arising out of the state court litigation, fails to set forth a cognizable RICO claim.

D. Claims Under 42 U.S.C. §§ 1983 & 1985

As to Plaintiffs claims under the Civil Rights Act, *see* Compl. at ¶¶ 207-298 (claims 3-14), an initial review discloses that these claims are also barred by principles of immunity, as well as the failure of the Plaintiffs to allege the essential elements of such claims.

1. Absolute Judicial Immunity

The claims under 42 U.S.C. §§1983 and 1985 against the judges who are, or had been, involved in the state court case, are barred by the doctrine of absolute judicial immunity. Judicial Immunity is applicable to conduct taken by the court as part of its judicial power and authority, and its absolute protection extends to all judicial acts except those performed in the clear absence of all jurisdiction. *See Pierson v. Ray*, 386 U.S. 547, 554 (1967). The Supreme Court has emphasized that the scope of a judge's jurisdiction must be construed broadly. *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (citing *Bradley v. Fisher*, 80 U.S. 335, 351 (1871)). Generally, "acts arising out of, or related to, individual cases before [a] judge are considered judicial in nature." *Bliven v. Hunt*, 579 F.3d 204, 210 (2d Cir. 2009). "[E]ven allegations of bad faith or malice cannot overcome judicial immunity." *Id.* at 209. This is because "[w]ithout insulation from liability, judges would be subject to harassment and intimidation...." *Young v. Selsky*, 41 F.3d 47, 51 (2d Cir. 1994).

Allegations of unconstitutional conduct are made in the Complaint against the following judicial officers, members of their staff, and court-appointed experts: acting Saratoga Supreme Court Judge Paul Pelagalli; Saratoga Supreme Court Judges John Ellis and Diane Freestone; City Court Judge Jeffrey Waite; Saratoga County Court Judge James Murphy; Administrative Judge for the Fourth Judicial District Judge Felix Catena; Appellate Division Justices Elizabeth Garry and Christine Clark; Court Attorney Karla Conway; and Court-appointed experts Jaqueline Bashkoff and Dr. Mary O'Conner. A summary of their conduct is important in deciding the validity of those allegations.

Acting Saratoga County Supreme Court Judge Pelagalli was initially assigned to the *Smith v. Smith* case. The claims against Judge Pelagalli arise out of acts taken in his judicial capacity. These acts include the October 20, 2020, issuance of an Order of maintenance and child support, and then reiterating that Order on April 27, 2022, all allegedly done without a proper hearing or due process. Compl. at ¶ 119. Further, Plaintiffs allege Defendant Pelagalli misused his judicial power by negligently or inappropriately issuing, or failing to issue, orders of protection and/or temporary orders of protection; improperly handling proceedings before him, including but not limited to, not providing Plaintiff Smith with a copy of an evaluation by Dr. Bashkoff of the children, excluding Plaintiff Dees from the courtroom, not allowing Dees to testify at a proceeding, threatening to hold Dees in contempt, not signing certain trial subpoenas, and having ex parte communications with witnesses; labeling Plaintiff Smith in a decision as a "narcissist" without having a medical degree; imposing an order of

protection that would not allow Plaintiff Dees to be present during overnight visitation by Plaintiff Smith's children, which according to Plaintiffs, led to a miscarriage; and granting a divorce decree on August 31, 2023 without a jury trial. Compl at ¶¶ 31-33, 138-171.

John Ellis is a Saratoga County Supreme Court Justice and replaced Judge Pelagalli on the *Smith v. Smith* matter in October 2023. Compl. at ¶ 38. According to the Plaintiffs, Judge Ellis has mirrored the approach of the previous judge, neglected evidence of fraud, child abuse, and assault, and has not taken the time to rectify the situation to the Plaintiffs' satisfaction. Compl. at ¶¶ 38-39.

Judge Jeffrey Wait is a Saratoga Springs City Court Judge and Acting County Court Judge. Plaintiffs' Complaint against Judge Wait relates to his alleged bias against the Plaintiffs; the failure to provide adequate safeguards following a November 8, 2023, assault by Defendant Smith; issuing an illegal stay-away order; declining to recuse himself; failing to issue an order of protection in the Plaintiffs' favor, which is said to have contributed to the November 8, 2023 assault; improperly dismissing Plaintiff Smith's custody petition; presiding over a December 19, 2023, court proceeding where there was misconduct, including having Plaintiff Dee (Plaintiff Smith's alleged in-court ADA notetaker) leave the courtroom due to a court-mandated parenting schedule; and, overall, abusing his judicial authority. Compl. at ¶¶ 34, 36, 37, 176, 179, 185.

The Hon. Felix Catena is the Administrative Judge for the Fourth Judicial Department and is sued in that position. According to Plaintiffs, Judge Catena is in charge of assigning judges in the Saratoga Courts and, despite being notified on 30

occasions regarding the conduct of judges under his supervision, he failed to take appropriate action, or to conduct independent investigations to ascertain the presence of fraud. Compl. at ¶¶ 24, 43, 45, 145, 306.

Supreme Court Judge Dianne Freestone was assigned to handle the Plaintiffs' Article 78 Petition challenging the conduct that occurred during the ongoing divorce and custody proceedings, and she is sued because she "prematurely" dismissed the Plaintiffs' Article 78 proceeding. Compl. at ¶ 44. Similarly, Elizabeth Garry, Chief Justice of the Appellate Division, and Christine Clark, Associate Justice of the Appellate Division, are also sued for upholding the dismissal of the Article 78 proceeding. *Id.* *See Smith v. Pelagalli*, 2023 WL 6801376 (3d Dep't 2023). An appeal of that decision was dismissed by the New York State Court of Appeals. *Smith v. Pelagalli*, 40 N.Y.3d 1060 (2023).

James Murphy holds the position of County Court Judge for Saratoga County. The Complaint alleges that Judge Murphy, "in his capacity as an appellate judge for Saratoga, failed to fulfill his judicial responsibilities by ignoring crucial evidence. . ." Compl. at ¶ 46. As a result, Plaintiff Smith is said to now face trial on fraudulent charges. *Id.*

As summarized above, the present Complaint against the judges relates to alleged misconduct or improper decisions by Family Court, Supreme Court, and County Court Judges in Saratoga County, as well as members of the Appellate Division, Third Judicial Department. *See* Compl. This misconduct includes how those judges conducted their proceedings and hearings; issued or failed to issue orders of protection;

analyzed legal matters and drafted their decisions and orders; controlled discovery; assigned counsel and experts; and generally handled cases. That conduct is, without doubt, judicial in nature. The Plaintiffs' arguments that the Justices were wrong in their conclusions because they were biased, misinformed, malicious, or incompetent, simply miss the mark. In construing such immunity, the reviewing courts look to the nature of the act, not the act itself. "If judicial immunity means anything, it means that a judge will not be deprived of immunity because the action he took was in error ... or was in excess of his authority. *Mireles v. Waco*, 502 U.S. 9, 12-13 (1991) (internal quotations and citations omitted). Accordingly, courts must evaluate the nature and function of the act, rather than the act itself. *Id.*

Finally, as amended in 1996, 42 U.S.C. § 1983 provides that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated, or declaratory relief was unavailable." 42 U.S.C.S. § 1983. There is no allegation in the Complaint regarding the violation or unavailability of such a declaratory decree.

For these reasons, Plaintiffs claims against the above-named Judicial Defendants are dismissed.[3] *See Caroselli v. Curci*, 371 F. App'x 199, 202 (2d Cir. 2010) (summary order) ("With respect to the state court judges, insofar as [the plaintiff] seeks money damages, such claims are barred by absolute judicial immunity. Insofar as [the plaintiff]

[3] The Judicial officers named in this suit are also protected under the doctrine of sovereign immunity. *In Gollomp v. Spitzer*, the Court held that the New York Unified Court System is an "arm of the State" and affirmed the dismissal of a § 1983 claim against a judge under sovereign immunity. 568 F.3d 355, 365–68 (2d Cir. 2009). That holding was just recently reaffirmed by the Second Circuit. *Bythewood v. New York*, 2023 WL 6152796, at *1 (2d Cir. Sept. 21, 2023) ("The New York State Unified Court System is "unquestionably an arm of the state" that shares in New York's immunity to suit.").

seeks injunctive relief against the state court judges, such relief is statutorily barred." (citations omitted)).

Next, Plaintiffs sue Karla Conway, Judge Pelagalli's court attorney, who is said to have participated with the Judge in the issuance of fraudulent orders, defamed Plaintiffs in and out of court, falsified statements in Court, and generally was biased. Compl. at ¶¶ 24, 40, 41, 42, 119, 122. These litigation related claims fail because absolute judicial immunity, as discussed above, also applies to a judicial law clerk, who is considered at law to be an extension of the judge at whose pleasure she serves. *Oliva v. Heller*, 839 F.2d 37, 40 (2d Cir. 1988).

2. Quasi-Judicial Immunity

Dr. Mary O'Connor and Dr. Jacquelyn Bashkoff were appointed by Judge Pelagalli to perform psychological assessments regarding the Smith Family. Compl. at ¶ 91. Plaintiffs take issue with the O'Connor and Bashkoff Reports and maintain that they are not impartial evaluations and contributed to the "wrongful separation of the children from Plaintiff [Smith]". Compl. at ¶¶ 91, 95, 96. Plaintiff also maintains that the fact that Bashkoff did not finish her report and did not testify, "hints at collusion." Compl. at ¶ 98.

The claims against Drs. O'Conner and Bashkoff are likewise barred by quasi-judicial immunity. "[A]bsolute immunity may attach to non-judicial officers and employees where the individual serves as an arm of the court or where the individual conducts activities that are inexorably connected with the execution of court procedures and are analogous to judicial action." *McKnight v. Middleton*, 699 F. Supp. 2d 507, 527

(E.D.N.Y. 2010); *see Cherner v. Westchester Jewish Cmty. Servs., Inc.*, 2022 WL 17817882, at *1 (2d Cir. Dec. 20, 2022) (family court ordered Defendants to conduct a forensic evaluation and to prepare a report to aid that court's decision in a child custody suit. These acts are "integrally related to an ongoing judicial proceeding" and therefore entitled to quasi-judicial immunity). The fact that Dr. Bashkoff did not ultimately testify does not affect her entitlement to immunity. *Di Costanzo v. Henriksen*, 1995 WL 447766, at *2 (S.D.N.Y. July 28, 1995) ("The doctrine of witness immunity bars an action against [clinical psychologist and medical doctor who provided medical and psychological evaluations to the court] even if they did not formally testify as witnesses in the proceedings, since their role in the proceedings would have been essentially that of witnesses.").

A large majority of the Plaintiff's allegations are leveled against various private attorneys who represented parties in the divorce, custody, and support matters. This group includes the attorneys who were appointed to represent the interest of the children; Jessica Vinson of Vella Carbone, LLP; Denise Rest-Tobin; Elena Tastensen; and Heather Corey-Mongue. Compl. at ¶ 48. Courts in this circuit have concluded that such court appointed counsel are entitled to quasi-judicial immunity from suit. *McKnight v. Middleton*, 699 F. Supp. 2d 507, 528 (E.D.N.Y. 2010), *aff'd,* 434 F. App'x 32 (2d Cir. 2011); *Yapi v. Kondratyeva*, 340 F. App'x 683, 684-85 (2d Cir. 2009) (law guardian entitled to quasi-judicial immunity when acting as an arm of the court); *see also Zavalidroga v. Hester*, 2020 WL 210812, at *8 (N.D.N.Y. Jan. 14, 2020), *report and recommendation adopted*, 2020 WL 633291 (N.D.N.Y. Feb. 11, 2020).

3. Government Attorney Immunity

The Court must also dismiss Plaintiffs' section 1983 & 1985 claims for damages against the government attorneys who were representing governmental agencies at the proceedings. Samuel Maxwell and Emily Williams were Deputy District Attorney's involved in the custody and support case. Compl. at ¶ 14. It is generally alleged that they acted in unison with all other Defendants to submit deceptive and counterfeit affidavits with various courts and clerks. Compl. at ¶ 361. As to Defendant Williams, it is specifically alleged that there may be questions regarding her adherence to discovery obligations, including *Brady* obligations. Compl. at ¶¶ 186, 291.

Michelle Granger and Michael Hartnett were Saratoga County attorneys, and provided guidance to the Saratoga child support enforcement agency, and in that role they are alleged to have neglected numerous fraud complaints regarding Defendant Veronica Smith and failed to investigate and correct wrongdoing. Compl. at ¶ 71, 215, 268.

Government attorneys are immune from suit under section 1983 for damages "when functioning as an advocate of the state in a way that is intimately associated with the judicial process." *Mangiafico v. Blumenthal*, 471 F.3d 391, 396 (2d Cir. 2006). This immunity applies to government attorneys who perform functions "'that can fairly be characterized as closely associated with the conduct of litigation or potential litigation' in civil suits." *Id.* (quoting *Barrett v. United States*, 798 F.2d 565, 572 (2d Cir. 1986)); *see also Cornejo v. Bell*, 592 F.3d 121, 128 (2d Cir. 2010) ("[A]n attorney for a county Department of Social Services who 'initiates and prosecutes child protective orders and

represents the interests of the Department and the County in Family Court' is entitled to absolute immunity.").

Moreover, "the common law precedents also extend absolute immunity to [government attorneys] participating in the administrative process." *Bloom v. New York State Comm'r of Health*, 573 F. Supp. 2d 732, 740 (E.D.N.Y. 2004) (citing *Butz v. Economou*, 438 U.S. 478, 509-10 (1978).

4. Witness Immunity

Several Defendants are being sued based upon their testimony at various court hearings, or in connection with testimony provided to the Court via some other method. With regard to Deputy Jillian Knox, for example, Plaintiffs allege that she testified at a court hearing on November 16, 2023, but her testimony was inconsistent, and she may have potentially coordinated her story with others. Compl. at ¶¶ 186, 190. Defendant Veronica Smith is said to have testified and have provided false testimony in legal proceedings and introduced "misleading" evidence. Compl. at ¶¶ 100, 127. Defendant Tedesco testified and was cross examined by Plaintiff, Compl. at ¶¶ 187-188, and while Defendant Bashkoff did not testify, she did submit reports to the state court for its review and consideration, Compl. at ¶ 98. Further, a report and/or psychological evaluation prepared by Dr. O'Connor was utilized as the basis of the proceedings against Plaintiff, and she was cross examined in Court. Compl. at ¶¶ 93, 98, 150. Finally, the Complaint indicates that Attorney Tobin testified. Compl. at ¶ 162.

The Court must also dismiss all of Plaintiffs' §§ 1983 & 1985 claims for damages that arise from any of the Defendants' testimony, either in person or by

affidavit or other means, in the County Court or the Family Court proceedings. Grand jury and trial court witnesses are absolutely immune from liability under section 1983 for damages arising from their testimony, even if that testimony was false. *See Rehberg v. Paulk*, 566 U.S. 356, 366-69 (2012); *Briscoe v. LaHue,* 460 U.S. 325 (1983). The Supreme Court reasoned that without such immunity, "[a] witness's apprehension of subsequent damages liability might induce ... self-censorship," either by making witnesses reluctant to come forward in the first place or by distorting their testimony, which would then deprive the finder of fact of candid and objective evidence. *Briscoe v. LaHue*, 460 U.S. at 333. This immunity has been extended to witnesses in Family Court proceedings. *See Buchanan v. Ford*, 638 F. Supp. 168, 171 (N.D.N.Y. 1986). This witness immunity extends to providing information by way of affidavit on issues such as support obligations. *Hart v. Shmayenik*, 2023 WL 7164975, at *5 (S.D.N.Y. Oct. 30, 2023). Nor can Plaintiffs attempt an end run around this immunity by alleging a conspiracy with other individuals to present false testimony. *Rehberg v. Paulk*, 566 U.S. at 369. Accordingly, all claims arising out of a witness's testimony are subject to dismissal.

5. State Action and Conspiracy

To state a claim under section 1983, a plaintiff must allege both that (1) a right secured by the Constitution or laws of the United States was violated, and (2) the right was violated by a person acting under the color of state law, or a "state actor." *West v. Atkins,* 487 U.S. 42, 48-49 (1988). Private parties generally are not state actors and therefore are not usually liable under section 1983. *Sykes v. Bank of Am.*, 723 F.3d 399,

406 (2d Cir. 2013); *see also Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 323 (2d Cir. 2002) ("[T]he United States Constitution regulates only the Government, not private parties.").

Plaintiffs have named the following private individuals and entities as Defendants: Sarah Wood, Donnellan Law, Saratoga Center for the Family, Jessica Vinson, Vella Carbone LLP, Denise Resta-Tobin; Elena Tastensen, Heather Corey-Mongue, Marc Greenwald, Lisa Proskin, Proskin Law, JoAnne Coughtry, Wende Tedesco, Rebecca Baldwin, Marriet M. West Child Advocacy, Saratoga Center for the Family, Dr. O'Connor, Dr. Bashkoff, NP Julia Gross, Veronica Smith, James Bennett and Sharon Bennett. Plaintiffs have alleged no facts showing that any of these Defendants has acted as a state actor in any relevant respect, or that their conduct is fairly attributable to the state. *Elmasri v. England*, 111 F. Supp. 2d 212, 221 (E.D.N.Y. 2000) (dismissing § 1983 claims where defendants, including plaintiff's ex-wife, "acted purely as private individuals in connection with the state court [divorce and child custody] proceedings").

Further, the allegations of fact that Victoria Smith went to family court, filed claims for support and custody, and requested protective orders does not establish that Ms. Smith, a private citizen, was acting "under color of state law" for the purposes of § 1983 liability for the alleged constitutional violations. *Jacobs v. Jacobs*, 2023 WL 4503766, at *3 (2d Cir. July 13, 2023). "Under our precedents, the fact that [defendant] sought the protection of family court does not mean [s]he was acting under color of state law." *Id.*; *see also Serbalik v. Gray*, 27 F. Supp. 2d 127, 131 (N.D.N.Y. 1998) (A

private party does not act under color of state law when she merely elicits state aid or invokes the exercise of the state official's authority); *Taylor v. Nichols*, 558 F.2d 561, 564 (10th Cir. 1977) ("The acts of filing a claim and testifying at trial do not constitute state action. These are private acts.").

Plaintiffs do allege that all of the Defendants conspired with each other to violate their federal constitutional rights. The Court understands these allegations as attempting to state a claim under section 1983, as well as 42 U.S.C. section 1985(3) ("section 1985"), which applies specifically to conspiracies. But because Plaintiffs' allegations are vague and lack supporting facts, they fail to state a claim of conspiracy under either section 1983 or section 1985(3). *See Wang v. Miller*, 356 F. App'x 516, 517 (2d Cir. 2009); *Sommer v. Dixon*, 709 F.2d 173, 175 (2d Cir. 1983) (noting that section 1985 claims must be dismissed where they contain "only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights"). The Supreme Court has noted that "merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." *Dennis v. Sparks*, 449 U.S. 24, 28 (1980); *see also Deem v. DiMella-Deem*, 2019 WL 1958107, at *8 (S.D.N.Y. May 2, 2019) (allegations of a conspiracy to violate civil rights must be pleaded with specificity, and "[a]n otherwise invalid [§] 1983 claim cannot survive a motion to dismiss merely by mentioning the word 'conspiracy'"); *Parent v. New York*, 786 F. Supp. 2d 516, 540 (N.D.N.Y. 2011) (Private attorney for wife during divorce proceedings was not liable under § 1983 for allegedly conspiring to violate husband's constitutional rights, despite husband's allegations that attorney engaged in ex parte

conversation with judges, where there was no evidence suggesting concerted action between attorney and any state actor to deprive husband of his civil rights)

6. No Affirmative Duty

The claims against the Saratoga County police officials center on their alleged failure to provide protective services to the Plaintiffs, or the more generalized failure to provide supervision. In particular, on November 8, 2023, it is alleged that Saratoga County Deputies Connor Houle and Tyler Stank were dispatched to the Plaintiffs' home on a report of an incident involving Defendant Veronica Smith. After they arrived at the scene, it is alleged that their Supervisor, Capt. David Huestis, instructed the two Deputies to leave the scene without ensuring the safety and security of the Plaintiffs, and further, that after the Deputies left the scene, Plaintiffs were assaulted by Defendant Smith. Compl. at ¶ 18. Later in the day when Defendant Smith reported that the Plaintiffs had in fact attacked her, her claim was accepted without consideration of the Plaintiffs' version of events. *Id.*

Similarly, the day before Father's Day in 2022, police were called to the Plaintiffs' residence, in which point Defendant Smith's mother, Sharon Bennett, and stepfather James Bennett had been in the driveway. Compl. at ¶ 20. The New York State Police were present, and Christopher Hollenbeck and Scott Carpenter, Supervisors from the Saratoga County Sheriff's Office, arrived and consulted with the State Police. As result of that conversation, it is alleged that the police officers who were present did not offer protection to the Plaintiffs, nor compel the Bennetts to vacate the driveway. Compl. at ¶ 15.

On October 12, 2023, Plaintiff Smith alleges that he approached Defendant William Heid, with the Saratoga County Sheriff's Office, to make a complaint of parental interference by Defendant Veronica Smith. Lt. Hyde, noting that the Sheriff's Department policy is not to press charges for parental interference, refused to provide protection to the Plaintiffs. Compl. at ¶ 175.

Defendant Michael Zurlo is the Saratoga County Sheriff, and Jeffrey Brown is the Undersheriff. Compl. at ¶ 14. They are being sued by Plaintiffs because of their failure to respond and hold Defendants Bennett and Veronica Smith accountable for their actions. Compl. at ¶¶ 14, 16, 21. They are alleged to be final policymakers for the Sheriff's office, and in that role they created a culture of neglect. Compl. at ¶¶ 16, 21, 22.

Also listed as Defendants are individuals who are employed by either Saratoga County or Warren County Department of Human Services. These include Defendants Christine Zimmerman, Conceta HMura, Carlye Magnusen, Ashley Callahan and Marlo Norton. Compl. at ¶ 72. Callahan and Norton were caseworkers, and the remaining social service workers were their supervisors. Plaintiffs allegations are that the DHS Defendants did not refer 11 false allegations by Defendant Smith out to law enforcement, nor did they conduct any internal investigation; they disregarded significant evidence of educational, medical, and dental neglect; they failed to adhere to their internal guidelines; and that the Plaintiffs reached out to the supervisors on numerous occasions making complaints, but without those supervisors making any rectification of the alleged violations. Compl. at ¶¶ 72, 74, 131, 233, 271, 322. The

Plaintiffs rely upon the fact that Rensselaer County DSS "indicated" a report of abuse by Defendant Veronica Smith as evidence that the investigations of Warren and Saratoga County were faulty.

Also sued in the Complaint are Kevin Kolakowski and Meghan Warren, respectively, the Superintendent and the Administrator of the Mechanicville School District. Plaintiff Smith alleges that those Defendants failed to address reports of educational neglect involving the Smith children, who were being homeschooled; they relied on Defendant Veronica Smith's fraudulent reports of the children's education, rather than accede to Plaintiff's request to have the children independently tested; and they generally fostered a pattern of neglect and failed to take remedial action. Compl. at ¶ ¶ 79, 81, 271, 332. The City of Mechanicville is sued because it is, or should be, responsible for the School District.

In sum, Plaintiffs' claims rest on the alleged failure of the courts, police, social service staff and school officials to better intervene and prevent misconduct of private parties against them or the Smith children. This lack of diligent action by the local officials is said to have, *inter alia*, violated the Plaintiffs' due process rights.

Such a theory of constitutional liability, however, has already been rejected by the United States Supreme Court. In *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, Social Services had received information that the child was being abused by his father but ultimately released him back to his father's custody upon the finding that there was insufficient evidence of abuse. 489 U.S. 189, 192 (1989). It turned out that the father continued to abuse the child, resulting in permanent brain damage to the child,

Joshua. *Id.* at 193. The Supreme Court rejected the mother's claim on behalf of the child and held that the failure of Social Services to remove Joshua from his father's custody, despite the defendants' alleged knowledge of abuse, did not constitute a violation of the due process clause because the person causing injury was a private citizen, and not a state actor. *Id.* at 202. The Court noted that there was no affirmative obligation on the part of the state to provide protective services. *Id.* at 196-97.

Thereafter, the Supreme Court held that there was no due process right regarding the negligent enforcement of an order of protection by the police. *Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748, 768-69 (2005) ("[T]he benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its "substantive" manifestations. ... Although the framers of the Fourteenth Amendment and the Civil Rights Act of 1871, 17 Stat. 13 (the original source of § 1983), did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented, the people of Colorado are free to craft such a system under state law.").

Based upon the above stated precedent, the claims against the police officers, their supervisors, the school staff, social services employees and supervisors, predicated on their failure to properly investigate claims of abuse or custodial or parental interference; report and investigate false claims of abuse; or enforce or issue orders of protection, are without legal merit and do not survive initial review. To the extent Plaintiffs attempt to predicate their procedural due process claim on the Saratoga and

Warren County Defendants' alleged failure to report abuse or neglect, as required under New York Social Services Law, that claim also fails to survive Court review. Although New York State law requires that mandated individuals report instances of suspected child abuse or maltreatment, such reporting is not constitutionally required. *Jones v. Nickens*, 961 F. Supp. 2d 475, 493 (E.D.N.Y. 2013). "State child protection legislation, even with procedural requirements "for the immediate classification and evaluation of child abuse reports, the timely initiation of an investigation, and the conduct of the investigation," does not create protected property or liberty interests when the statutory scheme "invest significant discretion in the [child protective workers] to determine both whether an investigation is warranted and what remedial action, if any, to pursue based on the results of the investigation." *Hilbert S. v. Cnty. of Tioga*, 2005 WL 1460316, at *11 (N.D.N.Y. June 21, 2005) (internal quotations and citations omitted).

7. Monell Liability and Supervisory Liability

In addition to their substantive claims, the Plaintiffs attempt to assert liability pursuant to *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658 (1978), against Warren and Saratoga County, and the City of Mechanicville. To demonstrate *Monell* liability, a plaintiff must allege a violation of constitutional rights by employees of the municipality and "(1) the existence of a municipal policy or custom ... that caused his injuries beyond merely employing the misbehaving officer[s]; and (2) a causal connection - an affirmative link - between the policy and the deprivation of his constitutional rights." *Harper v. City of New York*, 424 F. App'x. 36, 38 (2d Cir. 2011) (internal quotations and citations omitted). A fundamental requirement of a *Monell*

claim is the establishment of an underlying constitutional violation. *City of Los Angeles v. Heller*, 475 U.S. 796, 799, (1986); *see also Segal v. City of New York*, 459 F.3d 207, 219 (2d Cir. 2006) ("Because the district court properly found no underlying constitutional violation, its decision not to address the municipal defendants' liability under *Monell* was entirely correct."). In the present case the Court is recommending the dismissal of all the federal claims and, as such, also recommends that any *Monell* claim be likewise dismissed.

For similar reasons the Court recommends the dismissal of claims against the Defendants that are premised upon supervisory liability. That would include the claims against Hallenbeck, Carpenter, Zurlo, Heggen, Brown, Zimmerman, H'mura, Norton, Granger, and Hartnett. Compl. at ¶¶ 14, 16, 2, 72, 268. At the onset, it is important to note that the term 'supervisory liability' is a misnomer insofar as it implies respondeat superior liability; rather, to succeed, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Tangreti v. Bachmann*, 983 F.3d 609, 618 (2d Cir. 2020) (*quoting Ashcroft v. Iqbal*, 556 U.S. at 676. Again, as the Court has recommended dismissal of the underlying federal claims for failure to state a claim, the causes of action against any supervisors necessarily fail as well.

E. Claims under the ADA and the Rehabilitation Act

The final federal claims alleged by Plaintiff Ethan Smith allege a violation of his rights under the Americans with Disabilities Act ("ADA"), 42 U.S.C. 12131, *et seq.*, and § 504 of the Rehabilitation Act, 29 U.S.C. § 794. Plaintiff alleges that he suffers

from various disabilities, including ADHD and Auditory Processing Delay, and that he was entitled to various accommodations during his court proceedings such as an ADA compliant notetaker, but that while he was initially granted that accommodation, it was latter revoked by Judge Pelagalli. Compl. at ¶ 300. When Plaintiff, during a proceeding, attempted to explain his auditory problems, Judge Wait's response was said to be dismissive and insensitive. Compl. at ¶ 178. Further, during a December 19, 2023 hearing , Judge Wait had Smith's notetaker (Plaintiff Dees) leave the courtroom. Compl. at ¶ 185. While the Complaint references Defendant Heggen and Williams in connection with this claim, it makes no specific factual allegations against them.

The Plaintiff's ADA and Rehabilitation Act claims, which arise out of in-court conduct and decisions regarding the regulation of judicial proceedings, are barred by the *Rooker-Feldman* doctrine, judicial immunity, and by §1983's requirement that injunctive relief against a judge is barred unless a declaratory decree was violated, or declaratory relief was unavailable. *Richter v. Connecticut Jud. Branch*, 2014 WL 1281444, at *10 (D. Conn. Mar. 27, 2014), *aff'd*, 600 F. App'x 804 (2d Cir. 2015). Additionally, neither statute provides for individual liability. *See Goe v. Zucker*, 43 F.4th 19, 35 (2d Cir. 2022) (citing *Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98, 107 (2d Cir. 2001)).

F. State Court Claims

A district court may decline to exercise supplemental jurisdiction over state law claims when it "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). Generally, "when the federal-law claims have dropped out of the

lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988). Having recommended dismissal of the federal claims over which the Court has original jurisdiction, the Court also recommends that the District Court decline to exercise its supplemental jurisdiction over any state law claims Plaintiffs may be asserting.

III. CONCLUSION

For the forgoing reasons, the Court recommends that the Plaintiffs claims seeking to review and reject state court judgments that were rendered prior to the filing of the federal court action, be dismissed due to lack of jurisdiction pursuant to the *Rooker-Feldman* doctrine.

Next, the Court recommends that the District Court abstain from deciding issues related to the ongoing Family Court and Supreme Court proceedings pursuant to *Younger v. Harris*.

Third, the Court recommends dismissal of the claims alleging a violation of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. 1962, or a conspiracy to do the same.

Fourth, the Court recommends that the claims against the following individuals be dismissed, **with prejudice**, on grounds of judicial immunity or quasi-judicial immunity: Judge Paul Pelagalli; Saratoga Supreme Court Judges John Ellis and Dianne Freestone; City Court Judge Jeffrey Wait; Saratoga County Court Judge James Murphy; Administrative Judge for the Fourth Judicial District Judge Felix Catena; Appellate

Division Justices Elizabeth Garry and Christine Clark; Court Attorney Karla Conway; and Court-appointed experts Jaqueline Bashkoff and Dr. Mary O'Connor; and the private attorneys appointed by the Court to represent the Smith children - Jessica Vinson of Vella Carbone, LLP; Denise Rest-Tobin; Elena Tastensen; and Heather Corey-Mongue.

Fifth, the Court recommends dismissal **with prejudice** of the claims against the government attorneys involved in the court proceedings or that were integral to the litigation process: Samuel Maxwell, Emily Williams, Michelle Granger, and Michael Hartnett.

Sixth, the Court recommends that the claims involving the following Defendants be dismissed **with prejudice** on the grounds of witness immunity, insofar as the claims against them are based upon their testimony or information provided to the Court: Jillian Knox; Dr. Bashkoff; Dr. O'Connor; Veronica Smith; and Denise Rista-Tobin.

Seventh, the Court recommends that all other federal claims against the remaining Defendants be dismissed for the reasons set forth above.

Eighth, the Court recommends that the District Court decline to exercise supplemental jurisdiction over the remaining state law claims.

Unless specifically stated otherwise, several of the above recommendations of dismissal are based primarily on pleading deficiencies and not necessarily on the viability of the claims intended to be stated. Although the Court recommends dismissal of such claims and Defendants, alternatively, in light of Plaintiffs' pro se status, the Court recommends that on those claims not subject to dismissal with prejudice, the

Court should afford Plaintiffs the opportunity to file an amended complaint if they desire to proceed. Should Plaintiffs be directed by the District Judge to file an amended complaint, I offer the following guidance. Any such amended complaint, which shall supersede and replace in its entirety the original Complaint filed by Plaintiffs, must contain a caption that clearly identifies, by name, each individual that Plaintiffs are suing in the present lawsuit and must bear the case number assigned to this action. The body of Plaintiffs' amended complaint must contain sequentially numbered paragraphs containing only one act of misconduct per paragraph. Thus, if Plaintiffs claim that their civil and/or constitutional rights were violated by more than one defendant, or on more than one occasion, they should include a corresponding number of paragraphs in the amended complaint for each such allegation, with each paragraph specifying (i) the alleged act of misconduct; (ii) the date on which such misconduct occurred; (iii) the names of each and every individual who participated in such misconduct; (iv) where appropriate, the location where the alleged misconduct occurred; and, (v) the nexus between such misconduct and Plaintiff's civil and/or constitutional rights.

Importantly, any such pleading must be "*concise and direct.*" Fed. R. Civ. P. 8(d) (emphasis added).

Plaintiffs' amended complaint shall also assert claims against each and every defendant named in such complaint; any defendant not named in such pleading shall not be a defendant in the instant action. Plaintiff is further cautioned that no portion of any prior complaint shall be incorporated into their amended complaint by reference. Plaintiffs shall state in the single amended complaint all claims that they wish this Court

to consider as a basis for awarding Plaintiff relief herein; and their failure to file such a pleading will result in dismissal of this action without further Order of the Court.

WHEREFORE, it is hereby

RECOMMENDED, that the Complaints be **DISMISSED** as set forth above; and it is

ORDERED, that the Motions for Leave to File Electronically are **DENIED**; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Report-Recommendation and Order upon the parties to this action.

Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen (14) days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN (14) DAYS WILL PRECLUDE APPELLATE REVIEW**. *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir. 1993) (citing *Small v. Sec'y of Health and Human Servs.*, 892 F.2d 15 (2d Cir. 1989)); *see also* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72 & 6(a).

SO ORDERED.

Dated: March 11, 2024
Albany, New York

Daniel J. Stewart
U.S. Magistrate Judge

APPENDIX E

District Court Decision

(May 21, 2024)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JENNIFER LYNN DEES and ETHAN DAVIS SMITH,

Plaintiffs,

vs. **1:24-CV-1 (MAD/DJS)**

MICHAEL ZURLO, et al.,

Defendants.

APPEARANCES: **OF COUNSEL:**

JENNIFER LYNN DEES and ETHAN DAVIS SMITH
16 Grant Hill Road
Clifton Park, New York 12065
Plaintiffs, *pro se*

Mae A. D'Agostino, U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

On January 2, 2024, Plaintiffs Jennifer Lynn Dees and Ethan Davis Smith commenced this action, *pro se*, against fifty-three Defendants. *See* Dkt. No. 1. In their 170-page complaint, Plaintiffs allege that Defendants have deprived them of various constitutional rights because of Defendants' roles and involvement in state-court custody, support, and/or criminal disputes. *See id.* Plaintiffs submitted applications to proceed *in forma pauperis* ("IFP") and for leave to file electronically. *See* Dkt. Nos. 2, 3, 4, 5.

On March 11, 2024, Magistrate Judge Daniel J. Stewart issued an Order granting Plaintiffs' IFP motions. *See* Dkt. No. 11. Magistrate Judge Stewart also issued a Report-

Recommendation and Order reviewing Plaintiffs' complaint pursuant to 28 U.S.C. § 1915(e) and recommending that the complaint be dismissed. *See* Dkt. No. 12. He also ordered that Plaintiffs be denied leave to file electronically. *See id.*

Plaintiffs objected to every single aspect of the Report-Recommendation and Order. *See* Dkt. No. 13.[1] "Generally, when a *specific* objection is made to a portion of a magistrate judge's report-recommendation, the Court subjects that portion of the report-recommendation to a *de novo* review." *Boice v. M+W U.S., Inc.*, 130 F. Supp. 3d 677, 683 (N.D.N.Y. 2015) (citing FED. R. CIV. P. 72(b)(2); 28 U.S.C. § 636(b)(1)(C)). "To be 'specific,' the objection must, with particularity, 'identify [1] the portions of the proposed findings, recommendations, or report to which it has an objection and [2] the basis for the objection.'" *Id.* (quoting N.D.N.Y. L.R. 72.1(c)) (footnote omitted). "When only a *general* objection is made to a portion of a magistrate judge's report-recommendation, the Court subjects that portion of the report-recommendation to only a *clear error* review." *Id.* at 684 (citations omitted). "Similarly, when an objection merely reiterates the same arguments made by the objecting party in its original papers submitted to the magistrate judge, the Court subjects that portion of the report-recommendation challenged by those arguments to only a *clear error* review." *Id.* (footnote omitted). After the appropriate review, "the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

As Plaintiffs are proceeding *pro se*, the Court must review their complaint under a more lenient standard. *See Govan v. Campbell*, 289 F. Supp. 2d 289, 295 (N.D.N.Y. 2003). The Court

[1] Plaintiffs' objections are thirty-eight pages. *See* Dkt. No. 13. Local Rule 71.2(c) instructs that "[o]bjections may not exceed twenty-five (25) pages without the Court's prior approval." N.D.N.Y. L.R. 72.1(c). The Court will consider the entirety of Plaintiffs' objections because they are proceeding *pro se*. However, the Court warns Plaintiffs that future compliance with the Federal Rules, the Court's Local Rules, and the undersigned's Individual Rules is required.

must "make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training." *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983). Thus, "a document filed *pro se* is 'to be liberally construed,' and 'a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'" *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). "Although the court has the duty to show liberality towards pro se litigants, . . . there is a responsibility on the court to determine that a claim has some arguable basis in law before permitting a plaintiff to proceed with an action in forma pauperis." *Moreman v. Douglas*, 848 F. Supp. 332, 333-34 (N.D.N.Y. 1994) (internal citations omitted).

II. BACKGROUND

Plaintiffs summarize their claims at the beginning of their complaint as allegations against "a broad spectrum of governmental entities and private defendants" including judges, attorneys, family members, the Saratoga County Sheriff's Office, district attorneys' offices, departments of social service, Warren County, Saratoga County, and the City of Mechanicville. Dkt. No. 1 at ¶ 2. The complaint concerns New York State Family Court and County Court proceedings and events related to custody and supervision of Plaintiff Smith's children. The proceedings are primarily between Plaintiff Smith and Defendant Veronica Smith—the mother of his children. Plaintiff Dees is Plaintiff Smith's partner. Plaintiffs allege that the Defendants engaged in a conspiracy to violate their constitutional rights as well as Plaintiff Smith's rights under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131, *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

For a fuller recitation of the relevant background information, the Court refers to Plaintiffs' complaint and Magistrate Judge Stewart's Report-Recommendation and Order. *See generally* Dkt. No. 1; *see also* Dkt. No. 12 at 4-5.

III. DISCUSSION

A. *Rooker-Feldman* Doctrine

In his Report-Recommendation and Order, Magistrate Judge Stewart first addressed the *Rooker-Feldman* doctrine, under which federal courts are divested of jurisdiction over claims that seek to overrule state court determinations. *See* Dkt. No. 12 at 8-9; *see also Green v. Mattingly*, 585 F.3d 97, 101 (2d Cir. 2009). Magistrate Judge Stewart concluded that because Plaintiffs' complaint seeks to overturn state-court custody and support decisions, the Court's review of Plaintiffs' claims is barred by the *Rooker-Feldman* doctrine. *See* Dkt. No. 12 at 8. Plaintiffs object, arguing that because they have appealed the state court decisions, and those appeals have not been decided, the *Rooker-Feldman* doctrine does not apply. *See* Dkt. No. 13 at 1-3.

"The Supreme Court has explained that *Rooker-Feldman* bars 'a party losing in state court . . . from seeking what in substance would be appellate review of the state judgment in a United States district court.'" *Hunter v. McMahon*, 75 F.4th 62, 67 (2d Cir. 2023) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994)). "*Rooker-Feldman* 'is confined to cases of the kind from which the doctrine acquired its name: 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.'" *Id.* at 67-68 (quotation omitted). "The doctrine 'does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions.'" *Id.* at 68 (quotation omitted).

The doctrine "'applies only in limited circumstances where a party in effect seeks to take an appeal of an unfavorable state-court decision to a lower federal court.'" *Id.* (quoting *Lance v. Dennis*, 546 U.S. 459, 466 (2006)). In adopting "the unanimous position of every other circuit court to address it[,]" the Second Circuit in *Hunter* held that "[i]f a federal-court plaintiff's state-court appeal remains pending when she files her federal suit, the state-court proceedings have not ended and *Rooker-Feldman* does not apply." *Id.* at 70 (quoting *Butcher v. Wendt*, 975 F.3d 236, 246 (2d Cir. 2020) (Menashi, J., concurring in part and concurring in the judgment)).

In their objections, Plaintiffs list eight "currently pending" appeals. Dkt. No. 13 at 1-2. The relevant inquiry is whether those appeals were pending when they filed their complaint with this Court on January 2, 2024. *See* Dkt. No. 1; *see also Hunter*, 75 F.4th at 71 (quoting *E.R. Squibb & Sons, Inc. v. Lloyd's & Cos.*, 241 F.3d 154, 163 (2d Cir. 2001)) ("[F]ederal courts 'assess[ ] jurisdiction . . . as of the moment the complaint was filed'"). Upon the Court's review of the state court dockets, seven of the eight appeals that Plaintiffs list were pending at the time they filed their complaint in this Court. *See Smith v. Smith*, CV-23-1726 (3d Dep't 2023); *Smith v. Smith*, CV-23-1805 (3d Dep't 2023); *Veronica LL. v. Ethan LL.*, CV-23-1874 (3d Dep't 2023); *Smith v. Smith*, CV-23-1265 (3d Dep't 2023); *Smith v. Smith*, CV-23-1642 (3d Dep't 2023); *Matter of Smith v. Smith*, CV-23-2087 (3d Dep't 2023); *Matter of Smith v. Smith*, CV-23-2195 (3d Dep't 2023); *Matter of Ethan LL v. Veronica LL*, CV-24-0306 (3d Dep't 2024). Plaintiffs also contend that their "Article 78 action CV-23-1727, against multiple defendants still remains open." Dkt. No. 13 at 2. Upon the Court's search of that case number in the New York State Unified Court System Electronic Filing System, it appears that the final entry is an "order" dated November 21, 2023. *See Ethan Smith et. al. v. Karen Heggen et. al.*, CV-23-1727 (3d Dep't

2023), Dkt. No. 36. The Court is unable to view the document as it is sealed. *See id.* Plaintiffs do not contend that they appealed this "order" from the Appellate Division.

To the extent Plaintiffs have not appealed Supreme Court, Family Court, or Appellate Division decisions, and such decisions are final, the *Rooker-Feldman* doctrine precludes the Court's consideration of the decisions in which Plaintiffs lost. Insofar as appeals are pending in the Appellate Division from Supreme Court or Family Court decisions, Plaintiffs are correct that the *Rooker-Feldman* doctrine does not apply. *See Hunter*, 75 F.4th at 67-71. However, even where the *Rooker-Feldman* doctrine does not apply, as thoroughly set forth in Magistrate Judge Stewart's Report-Recommendation and Order, Plaintiffs' complaint must be dismissed on numerous other grounds.

B. *Younger* Abstention

Magistrate Judge Stewart next addressed the *Younger* abstention doctrine which mandates that federal courts abstain from interfering in claims seeking declaratory or injunctive relief over ongoing state proceedings. *See* Dkt. No. 12 at 10 (citing *Younger v. Harris*, 401 U.S. 37, 43-44 (1971)). Magistrate Judge Stewart explained that *Younger* abstention does not apply to claims seeking only monetary relief, as Plaintiffs do in this case, but noted that the doctrine implicates "domestic relations" abstention, which "is based upon a policy dictating that the states have traditionally adjudicated marital and child custody disputes, developing 'competence and expertise in adjudicating such matters, which the federal courts lack.'" Dkt. No. 12 at 10 (quoting *Thomas v. N.Y. City*, 814 F. Supp. 1139, 1146 (E.D.N.Y. 1993)).

Plaintiffs objected, arguing that they are not seeking declaratory or injunctive relief, so *Younger* abstention does not apply. *See* Dkt. No. 13 at 5. Plaintiffs contends that "[t]he principle of Younger abstention typically applies in scenarios where significant state interests are at stake

and does not extend to precluding federal jurisdiction merely due to possible inconsistencies with state court rulings." *Id.* at 6.

Younger demands that

> federal courts [] decline to exercise jurisdiction in three [] exceptional categories of cases: "First, *Younger* preclude[s] federal intrusion into ongoing state criminal prosecutions. Second, certain civil enforcement proceedings warrant[ ] abstention. Finally, federal courts [must] refrain[ ] from interfering with pending civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions."

Trump v. Vance, 941 F.3d 631, 637 (2d Cir. 2019), *aff'd and remanded*, 591 U.S. 786 (2020) (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013)). "*Younger* abstention is [] an 'exception to th[e] general rule' that 'a federal court's obligation to hear and decide a case is virtually unflagging,' . . . and the doctrine is also subject to exceptions of its own in cases of bad faith, harassment, or other 'extraordinary circumstances.'" *Id.* (quotations omitted). "[T]he *Younger* doctrine is inappropriate where the litigant seeks money damages for an alleged violation of § 1983." *Rivers v. McLeod*, 252 F.3d 99, 101-02 (2d Cir. 2001).

The Second Circuit, in *American Airlines, Inc. v. Block*, 905 F.2d 12, 14 (2d Cir. 1990), explained that "[a]lthough matrimonial actions may ordinarily be instituted in federal court on diversity grounds, the Supreme Court in *Barber v. Barber*, 62 U.S. . . 582, 584 . . . (1859), went so far as to disclaim all federal subject matter jurisdiction for some classes of matrimonial actions." *Id.* This is known as the domestic relations exception to federal jurisdiction, *i.e.*, federal courts should not exercise jurisdiction over matrimonial actions brought under diversity grounds. "[H]owever, the scope of this matrimonial exception to federal jurisdiction is 'rather narrowly confined,' . . . only 'where a federal court is asked to grant a divorce or annulment, determine support payments, or award custody of a child' does it generally decline jurisdiction pursuant to

the matrimonial exception." *Id.* (quotations omitted). The Second Circuit, in *American Airlines*, expanded the domestic relations exception, noting that "even if subject matter jurisdiction lies over a particular matrimonial action, federal courts may properly abstain from adjudicating such actions in view of the greater interest and expertise of state courts in this field." *Id.* "A federal court presented with matrimonial issues or issues 'on the verge' of being matrimonial in nature should abstain from exercising jurisdiction so long as there is no obstacle to their full and fair determination in state courts." *Id.* (citations omitted). This is known as the domestic relations abstention doctrine. *See Deem v. DiMella-Deem*, 941 F.3d 618, 621 (2d Cir. 2019) ("Although the domestic relations '*exception*' to subject matter jurisdiction . . . does not apply in federal-question cases, the domestic relations *abstention* doctrine articulated in *American Airlines* does").

The abstention doctrine has been utilized across the country by federal courts removing themselves from considering a state court domestic relations matter. *See Deem*, 941 F.3d at 623 (collecting cases) (citing, *inter alia*, *DeMauro v. DeMauro*, 115 F.3d 94, 99 (1st Cir. 1997) ("[A]bstention by use of a stay may be permissible where a RICO action is directed against concealment or transfer of property that is the very subject of a pending divorce proceeding")); *see also Falco v. Justs. of the Matrimonial Parts of Supreme Ct. of Suffolk Cnty.*, 805 F.3d 425, 427 (2d Cir. 2015) (quotation omitted) ("[W]e independently conclude that Falco's case presents circumstances that qualify as 'exceptional' under *Sprint* and that *Younger* abstention was therefore warranted. Falco's federal lawsuit implicates the way that New York courts manage their own divorce and custody proceedings—a subject in which 'the states have an especially strong interest'").

Here, "the domestic relations *exception* clearly does not apply to this case because it is 'before this Court on federal question jurisdiction, not diversity.'" *Deem*, 941 F.3d at 623 (quoting

Williams v. Lambert, 46 F.3d 1275 (2d Cir. 1995)) (emphasis added). However, *abstention* is appropriate because Plaintiffs' complaint concerns family court disputes over custody, visitation, and protective orders. *See Reeves v. Reeves*, No. 22-CV-2544, 2022 WL 1125267, *1 (S.D.N.Y. Apr. 14, 2022); *Stumpf v. Maywalt*, 605 F. Supp. 3d 511, 518 (W.D.N.Y. 2022); *Dasler v. Knapp*, No. 2:21-CV-135, 2023 WL 8354441, *9 (D. Vt. Oct. 13, 2023).

Plaintiffs are correct that abstention is usually exercised in scenarios where significant state interests are at stake. *See* Dkt. No. 13 at 6; *see also Sprint*, 571 U.S. at 72-73. This is such a case because states are traditionally tasked with addressing domestic matters. *See Deem*, 941 F.3d at 624 (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890) ("[T]he existence of a distinct abstention doctrine for certain domestic relations disputes is supported by the Supreme Court's longstanding recognition — in a non-diversity case involving a child custody dispute — that '[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States'"); *see also Amato v. McGinty*, No. 1:17-CV-593, 2017 WL 9487185, *10 (N.D.N.Y. June 6, 2017). Thus, the Court will abstain from exercising jurisdiction over Plaintiffs' complaint insofar as it concerns state court domestic relations matters.

C. RICO Claims

Magistrate Judge Stewart concluded that Plaintiffs failed to set forth a cognizable claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, because, as explained in *Kim v. Kimm*, 884 F.3d 98 (2d Cir. 2018), RICO cannot be used to address litigation activity. *See* Dkt. No. 12 at 11-14. Plaintiffs object, arguing that *Kim* is inapplicable because that case involved a single instance of litigation activity, whereas their case concerns "actions [that] have been concertedly executed over a period of four years." Dkt. No. 13

at 7. Plaintiffs rely on Fifth and Eleventh Circuit caselaw to argue that their claims support a RICO violation. *See id.* at 6-7. Plaintiffs also contend that Magistrate Judge Stewart's decision supports their assertion of corruption in the judiciary because he took sixty-nine days to issue his Report-Recommendation and Order "as opposed to the swifter resolutions typically observed in cases under the same magistrate." *Id.* at 8.

As an initial matter, Plaintiffs' reliance on out-of-circuit case law is not binding on this Court. *See Goldstein v. Pro. Staff Cong./CUNY*, 643 F. Supp. 3d 431, 443, n.6 (S.D.N.Y. 2022), *aff'd*, 96 F.4th 345 (2d Cir. 2024) (discussing "vertical stare decisis"). Further, the Court finds no error in the time Magistrate Judge Stewart took to issue his Report-Recommendation and Order. Magistrate Judge Stewart was tasked with reviewing a 170-page complaint and a forty-eight-page RICO statement. *See* Dkt. Nos. 1, 9. A two-month time frame to do so is not inappropriate, let alone conspiratorial, where Magistrate Judge Stewart must balance a heavy case load.

As to the substance of Plaintiffs' RICO claims and their objections, Plaintiffs are correct that *Kim* concerned one federal litigation alleged to be conspiratorial. *See Kim*, 884 F.3d at 101-02. In that case, the Second Circuit specifically "decline[d] to reach the issue of whether all RICO actions based on litigation activity are categorically meritless." *Id.* at 105. Rather, the Second Circuit held only that "where . . . a plaintiff alleges that a defendant engaged in a single frivolous, fraudulent, or baseless lawsuit, such litigation activity alone cannot constitute a viable RICO predicate act." *Id.*

The Second Circuit distinguished *Sykes v. Mel Harris & Assocs., LLC*, 757 F. Supp. 2d 413 (S.D.N.Y. 2010) wherein the court allowed a RICO claim to proceed because the plaintiff pled "a pattern of racketeering activity that included 'at least twenty allegedly fraudulent statements and eighteen acts involving use of the mail and wires over three years, in furtherance

of the alleged fraud.'" *Kim*, 884 F.3d at 105 (quoting *Sykes*, 757 F. Supp. 2d at 425). This court has also noted that "the Second Circuit decision in *United States v. Eisen*, 974 F.2d 246 (2d Cir. 1992), allows RICO claims based on abusive litigation tactics involving conduct external to any of the particular disputes between the litigants in improperly filed and litigated civil actions." *Carroll v. U.S. Equities Corp.*, No. 1:18-CV-667, 2020 WL 11563716, *9 (N.D.N.Y. Nov. 30, 2020).

The Court concludes that *Kim* does not automatically preclude Plaintiffs' purported RICO claim just because Plaintiffs' complaint concerns litigation activity as the alleged activity is conduct occurring over four years and dozens of individuals. However, Magistrate Judge Stewart did not state that such preclusion was automatic. Rather, he applied the "reasons" and "principle[s]" set forth by *Kim* to Plaintiffs' complaint. Dkt. No. 12 at 12-13. The Court agrees with such application.

"To state a claim for RICO conspiracy under § 1962(d), the plaintiff must also 'allege the existence of an agreement to violate RICO's substantive provisions.'" *Butcher v. Wendt*, 975 F.3d 236, 241 (2d Cir. 2020) (quoting *Williams v. Affinion Grp., LLC*, 889 F.3d 116, 124 (2d Cir. 2018)); *see also First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159, 164 (2d Cir. 2004) (concluding that where the plaintiffs failed to "adequately allege a substantive violation of RICO," the district court properly dismissed allegations of "a RICO conspiracy in violation of 18 U.S.C. § 1962(d)"); *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1064 (2d Cir. 1996), *as corrected*, 93 F.3d 1055 (2d Cir. 1996) ("Since we have held that the prior claims do not state a cause of action for substantive violations of RICO, the present claim does not set forth a conspiracy to commit such violations").

"To state a claim of a substantive RICO violation under § 1962(c), a plaintiff must allege, among other things, two or more predicate acts 'constituting a pattern' of 'racketeering activity.'" *Butcher*, 975 F.3d at 241 (quoting *Williams*, 889 F.3d at 124). "The RICO statutory scheme defines 'racketeering activity' to include 'a host of criminal offenses, which are in turn defined by federal and state law.'" *Curtis & Assocs., P.C. v. L. Offs. of David M. Bushman, Esq.*, 758 F. Supp. 2d 153, 168 (E.D.N.Y. 2010), *aff'd*, 443 Fed. Appx. 582 (2d Cir. 2011) (quoting *Cofacredit, S.A. v. Windsor Plumbing Supply Co. Inc.*, 187 F.3d 229, 242 (2d Cir. 1999)). "Specifically, the RICO statute defines 'racketeering activity' as including any 'act' indictable under various specified federal statutes, including the mail and wire fraud statutes." *Id.* (quoting 18 U.S.C. § 1961(1)). "'Pattern' is defined by the statute as 'at least two acts of racketeering activity' within a ten-year period." *Id.* (quoting 18 U.S.C. § 1961(5)).

In their RICO statement, Plaintiffs allege that Defendants violated 18 U.S.C. §§ 1341 (relating to mail fraud), 1343 (relating to wire fraud), 1344 (relating to financial institution fraud), 1503 (relating to financial institution fraud), 1510 (relating to obstruction of criminal investigations), 1513 (relating to retaliating against a witness, victim, or an informant), and 1951 (relating to interference with commerce, robbery, or extortion). *See* Dkt. No. 9 at 18-19.

Plaintiffs' complaint and statement fail to sufficiently allege these predicate acts. Plaintiffs allege that Defendants committed mail fraud "by a series of fraudulent support collection letters" which "were issued despite knowledge of fraud and without proper investigation into the claims." Dkt. No. 9 at 22. They contend that Defendants committed wire fraud and financial institution fraud by sending bills and enforcing child support collection orders. *See id.* Plaintiffs state that they have been mailed fraudulent protection orders. *See id.* at 23. They aver that they were e-mailed "fraudulent legal documents including affirmations, affidavits, and protection orders." *Id.*

at 25. Plaintiffs also allege that "Defendants each obstructed justice by interfering in state court matters ostensibly to undermine the plaintiffs' federal court case and hinder U.S. attorneys' investigations." *Id.* at 19. They state that Defendants have obstructed justice by "tampering with trial proceedings and witnesses, failing to file pertinent motions into the court record, and deliberately withholding compliance with legally mandated FOIL requests." *Id.* at 20-21. Plaintiffs allege that Defendants "engaged in coercive and illicit practices to extort payments from the plaintiff. The purported extortion involved the utilization of duress, public denigration, threats of incarceration, the manipulation of child custody, tolerance of ongoing abuse, initiation of vindictive charges and protective orders, unlawful intimidation, and the fabrication of federal crime accusations." *Id.* at 21.

Although *Kim* concerned only a single litigation, the principles underlying the Second Circuit's decision are applicable to Plaintiffs' claims because their claims stem entirely from state family and criminal court proceedings. Allowing such claims to be the base underlying RICO violations "would erode the principles undergirding the doctrines of res judicata and collateral estoppel, as such claims frequently call into question the validity of documents presented in the underlying litigation as well as the judicial decisions that relied upon them." *Kim*, 884 F.3d at 104 (quotation omitted).

The allegations in Plaintiffs' complaint and RICO statement are similar to those in cases which have not allowed a RICO claim to proceed where the allegations concern only litigation activity. Plaintiffs have not alleged any conduct that is unrelated to state-court litigation. *See Wang v. Yien-Koo King*, No. 18-CV-8948, 2019 WL 1763230, *7 (S.D.N.Y. Apr. 22, 2019) ("[B]ecause the Court has held that [the p]laintiffs have not adequately alleged RICO claims premised on the sale of restrained artwork or the proceedings in probate court, [the p]laintiffs'

RICO claim would be rooted solely in litigation-related mail or wire fraud predicates -- specifically, the use of mail and wires in filing legal documents"); *Weaver v. New York State Off. of Ct. Admin.*, No. 22-CV-559, 2023 WL 2500390, *9 (N.D.N.Y. Mar. 14, 2023); *Rajaratnam v. Motley Rice, LLC*, 449 F. Supp. 3d 45, 69 (E.D.N.Y. 2020); *Robinson v. Vigorito, Barker, Patterson, Nichols & Porter, LLP*, No. 19-CV-2914, 2019 WL 13417190, *3 (E.D.N.Y. July 31, 2019); *Verschleiser v. Frydman*, No. 22-CV-7909, 2023 WL 5835031, *13 (S.D.N.Y. Sept. 7, 2023) (citing, *inter alia*, *Curtis & Assocs., P.C. v. L. Offs. of David M. Bushman, Esq.*, 758 F. Supp. 2d 153, 174 (E.D.N.Y. 2010); *Daddona v. Gaudio*, 156 F. Supp. 2d 153, 161-62 (D. Conn. 2000)).

Plaintiffs' complaint is also distinguishable from cases where RICO claims have been permitted to proceed. For example, in *Carroll*, the plaintiff alleged that the defendants initiated thousands of lawsuits against the plaintiff and unnamed individuals for fraudulent debts in order to recover monetary default judgments. *Carroll*, 2020 WL 11563716, at *3. The court noted that many acts as alleged by the plaintiff "involved matters beyond proper legal representation and went beyond any of the particular disputes between the litigants" "such as buying uncollectable debts that lacked proof that the debts were owed, conspiring to use a process serving firm that engaged in sewer service to ensure that defendants would not contest the debt-collection actions, using an individual who filed false affidavits of merit in every case, and pressuring defendants to compromise on illegally obtained default judgments were actions external to the individual suits in the state courts." *Id.* at *9. The court concluded that the "case is more closely aligned with *Sykes* than *Kim*." *Id.* In *Sykes*, "[t]he gravamen of [the] racketeering activity was not so much litigation activities, as it was the use of courts to obtain default judgments en masse against defendants who had not been served. The 'litigations' in *Sykes* were mere perfunctory steps to

cash in on a portfolio of defaulted debts." *Rajaratnam*, 449 F. Supp. 3d at 71; *see Sykes*, 757 F. Supp. 2d at 425.

Here, the gravamen of Plaintiffs' complaint concerns state court litigation. There are no allegations in either the complaint or RICO statement that are entirely unrelated to litigation. The Defendants are judges, attorneys, law firms, or the mother of Plaintiff Smith's children—who is the primary adversary in the state court cases. Allowing a RICO violation to proceed under these circumstances would, as the Second Circuit cautioned against, "'chill litigants and lawyers and frustrate the well-established public policy goal of maintaining open access to the courts' because 'any litigant's or attorney's pleading and correspondence in an unsuccessful lawsuit could lead to drastic RICO liability.'" *Kim*, 884 F.3d at 105 (quotation omitted). Thus, the Court concludes that Plaintiffs' complaint fails to state a cognizable RICO claim.

D. Absolute Judicial Immunity

Plaintiffs seek to bring claims under 42 U.S.C. §§ 1983 and 1985 for alleged constitutional violations against numerous state court judges: Defendants Paul Pelagalli, John Ellis, Jeffrey Wait, Felix Catena, Dianne Freestone, James Murphy, and Elizabeth Garry. *See* Dkt. No. 1 at ¶¶ 24-47. Magistrate Judge Stewart correctly explained that judges are typically immune from such actions. *See* Dkt. No. 12 at 14. Plaintiffs object, arguing that the judicial Defendants' conduct, as outlined in the complaint, constitutes "a significant departure from their judicial responsibilities." Dkt. No. 13 at 11.

"Absolute immunity for judges is 'firmly established' for acts 'committed within their judicial jurisdiction.'" *Peoples v. Leon*, 63 F.4th 132, 138 (2d Cir. 2023) (quoting *Cleavinger v. Saxner*, 474 U.S. 193, 199-200 (1985)). "Absolute immunity for a judge performing his or her judicial functions is conferred in order to insure 'that a judicial officer, in exercising the authority

vested in him shall be free to act upon his own convictions, without apprehension of personal consequences to himself.'" *Libertarian Party of Erie Cnty. v. Cuomo*, 970 F.3d 106, 123 (2d Cir. 2020), *abrogated on other grounds by New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022) (quoting *Bliven v. Hunt*, 579 F.3d 204, 209 (2d Cir. 2009)). "Entitlement to absolute immunity does not depend on the individual's title or on the office itself. . . . A judge may perform tasks that are not essentially judicial, such as supervising and managing court employees, which do not warrant absolute immunity . . .; on the other hand, such immunity may be warranted for a person who is not a judge but whose duties are quasi-judicial." *Id.* at 124 (citations omitted). "Judicial acts principally involve adjudication of particularized, existing issues." *Id.* "Thus, some functions may be viewed as judicial acts when performed in the context of a particular case but as administrative when performed for the purpose of overall management in anticipation of future cases." *Id.*

"In determining a jurisdictional issue that depended on 'whether a particular proceeding before another tribunal was truly judicial,' . . . the Supreme Court stated that the form of the proceeding is less significant than the proceeding's nature and effect." *Id.* (quoting *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 n.13, 478 (1983)). "Judicial immunity is overcome in only two circumstances: (1) 'a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity'; and (2) 'a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction.'" *McCluskey v. Roberts*, No. 20-4018, 2022 WL 2046079, *5 (2d Cir. June 7, 2022) (quoting *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991)).

Plaintiffs' allegations against the judicial Defendants stem entirely from the judge's orders and decisions or conduct in controlling their courtroom. *See* Dkt. No. 1 at ¶¶ 24-47. Although

Plaintiffs disagree with the judge's actions or inactions related to protective orders, custody orders, and court proceedings, those actions are entirely within the scope of the judges' jurisdiction. Plaintiffs have not presented more than conclusory allegations to establish that the judicial Defendants were acting absent all jurisdiction. They are, therefore, entitled to absolute immunity for that conduct. *See, e.g.*, *King v. New York State*, No. 23-CV-3421, 2023 WL 5625440, *4 (E.D.N.Y. Aug. 31, 2023); *Wilkins v. Soares*, No. 8:20-CV-00116, 2020 WL 5238598, *4 (N.D.N.Y. May 27, 2020); *Viola v. Bryant*, No. 3:17-CV-00853, 2017 WL 2676407, at *4 (D. Conn. June 21, 2017); *Topolski v. Wrobleski*, No. 5:13-CV-0872, 2014 WL 2215761, *5 (N.D.N.Y. May 29, 2014).

1. Sovereign Immunity

As an alternative to absolute judicial immunity, Magistrate Judge Stewart explained in a footnote that the judicial Defendants were also protected by sovereign immunity. *See* Dkt. No. 12 at 18, n.3. Plaintiffs object to the application of sovereign immunity because "their allegations are distinctly targeted at the defendants in their personal capacities." Dkt. No. 13 at 21.

"The Eleventh Amendment states: 'The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.'" *Gollomp v. Spitzer*, 568 F.3d 355, 365 (2d Cir. 2009) (quoting U.S. Const. amend. XI). "[T]he Eleventh Amendment means that, 'as a general rule, state governments may not be sued in federal court unless they have waived their Eleventh Amendment immunity,' or unless Congress has 'abrogate[d] the states' Eleventh Amendment immunity when acting pursuant to its authority under Section 5 of the Fourteenth Amendment.'" *Id.* at 366 (quoting *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 236 (2d Cir. 2006)).

"The Unified Court System, or 'UCS,' is the name for the entire New York State judiciary." *T.W. v. New York State Bd. of L. Examiners*, 996 F.3d 87, 95 (2d Cir. 2021). "[A] lawsuit against the Unified Court System is 'in essence one for the recovery of money from the state, [so that] the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit.'" *Gollomp*, 568 F.3d at 368 (quotation omitted). As Magistrate Judge Stewart explained, the Second Circuit has recently reaffirmed the application of Eleventh Amendment sovereign immunity to New York State judges. *See* Dkt. No. 12 at 18, n.3 (citing *Bythewood v. New York*, No. 22-CV-2542, 2023 WL 6152796, *1 (2d Cir. Sept. 21, 2023) ("We agree with the district court that Bythewood's claims against the State of New York and the Judicial Defendants are barred by Eleventh Amendment sovereign immunity")).

As the Court has already concluded that the judicial Defendants were acting within their roles as judges, the Court concludes that they are entitled to sovereign immunity. To the extent Plaintiffs argue that they seek to sue the judicial Defendants in only their individual capacities, such claims "are [] barred by absolute judicial immunity." *Bythewood*, 2023 WL 6152796, at *2.

2. Court Attorney

Magistrate Judge Stewart concluded that Defendant Karla Conway, Judge Pelagalli's court attorney, is also entitled to absolute judicial immunity. *See* Dkt. No. 12 at 19. In Plaintiffs' objections, they state that Conway was "acting beyond her judicial capacity and outside her jurisdiction by orchestrating these unauthorized hearings and issuing void orders when she had no legal authority to do so." Dkt. No. 13 at 14.

Law clerks and court attorneys are entitled to absolute immunity. *See Jackson v. Pfau*, 523 Fed. Appx. 736, 737-38 (2d Cir. 2013) (affirming dismissal of Section 1983 claims against judicial law clerk, the N.Y.S. Chief Administrative Judge, court attorneys, and the Chief Clerks of

several state courts, finding that the "defendants were entitled to judicial immunity[] because [the] allegations against each of them concerned actions that were judicial in nature or closely related to the judicial process"); *see also Gollomp,* 568 F.3d at 365; *Fishman v. Off. of Ct. Admin. New York State Cts.*, No. 18-CV-282, 2020 WL 1082560, *6 (S.D.N.Y. Mar. 5, 2020), *aff'd*, No. 20-1300, 2021 WL 4434698 (2d Cir. Sept. 28, 2021).

Plaintiffs' allegations against Conway relate solely to "orders and statements in court." Dkt. No. 1 at ¶ 122. Although Plaintiffs argue otherwise, their allegations relate entirely to work performed as an extension of Judge Pelagalli such that Conway is entitled to absolute immunity.

E. Quasi-Judicial Immunity

Magistrate Judge Stewart next addressed the claims against court-appointed psychologists—Defendants O'Connor and Bashkoff, and court-appointed attorneys for Plaintiff Smith's children—Defendants Carbone, Tastensen, and Corey-Mongue. *See* Dkt. No. 12 at 19-20. Magistrate Judge Stewart concluded that the psychologists and attorneys were entitled to quasi-judicial immunity. *See id.*

Plaintiffs argue that the psychologists should not be entitled to immunity because of "their active participation in a conspiracy." Dkt. No. 13 at 22. Similarly, Plaintiffs contend that the attorneys should not be afforded immunity because of "their repeated violations of constitutional rights and legal statutes." *Id.* at 23. Plaintiffs state that the "attorneys actively campaign and participate in fundraisers for judges who oversee their appointments and approve their billings." *Id.*[2]

[2] Magistrate Judge Stewart also addressed court-appointed attorney Defendant Tobin. *See* Dkt. No. 12 at 19-20. Plaintiffs clarify that Defendant Tobin was not an attorney for a child. *See* Dkt. No. 13 at 23. Rather, Tobin represented Defendant Smith. *See* Dkt. No. 1 at ¶¶ 58-59, 162. Insofar as Tobin was retained counsel, "defense attorneys—even if court-appointed or public defenders—do not act under color of State law when performing traditional functions of counsel."

"A private actor may be afforded the absolute immunity ordinarily accorded judges acting within the scope of their jurisdictions if his role is 'functionally comparable' to that of a judge, . . . or if the private actor's acts are integrally related to an ongoing judicial proceeding." *Mitchell v. Fishbein*, 377 F.3d 157, 172 (2d Cir. 2004) (quoting *Butz v. Economou*, 438 U.S. 478, 513, (1978); citing *Scotto v. Almenas*, 143 F.3d 105, 111012 (2d Cir. 1998); *Dorman v. Higgins*, 821 F.2d 133, 136-38 (2d Cir. 1987)) (additional quotation marks omitted).

The Second Circuit has affirmed application of quasi-judicial immunity to a "law guardian and her director." *Yapi v. Kondratyeva*, 340 Fed. Appx. 683, 685 (2d Cir. 2009). This is because law guardians or attorneys for children serve "serve[] as an 'arm of the court,' or act[] as an 'integral part[ ] of the judicial process.'" *Holland v. Morgenstern*, 12-CV-4870, 2013 WL 2237550, *4 (E.D.N.Y. May 20, 2013) (quoting *Scotto v. Almenas*, 143 F.3d 105, 111 (2d Cir. 1998)). The same can be said for court-appointed psychologists. *See Vargas v. Mott*, No. 21-CV-6165, 2022 WL 3236744, *3 (W.D.N.Y. July 13, 2022) ("[P]sychiatrists who perform court-ordered examinations enjoy absolute quasi-judicial immunity"). Because these Defendants were appointed by the court and performing court-related functions, they are afforded quasi-judicial immunity. *See Cherner v. Westchester Jewish Cmty. Servs., Inc.*, No. 20-CV-8331, 2022 WL 596074, *4 (S.D.N.Y. Feb. 28, 2022), *aff'd*, No. 22-642, 2022 WL 17817882 (2d Cir. Dec. 20, 2022); *Wilson v. Wilson-Polson*, No. 09-CV-9810, 2010 WL 3733935, *7 (S.D.N.Y. Sept. 23, 2010), *aff'd*, 446 Fed. Appx. 330 (2d Cir. 2011); *Thomas v. Martin-Gibbons*, No. 19-CV-7695, 2020 WL 5026884, *7 (S.D.N.Y. Aug. 25, 2020).

F. Government Attorney Immunity

Krug v. McNally, 488 F. Supp. 2d 198, 200 (N.D.N.Y. 2007), *aff'd*, 368 Fed. Appx. 269 (2d Cir. 2010). Therefore, Plaintiffs' claims against Tobin must be dismissed for failure to plead state action.

Magistrate Judge Stewart addressed the immunity typically afforded to government attorneys when acting as an advocate of a state. *See* Dkt. No. 12 at 21. He concluded that such immunity should apply to Defendants Samuel Maxwell, Emily Williams, Michelle Granger, and Michael Hartnett as district and county attorneys. *See id.* Plaintiffs contend that Defendants William and Maxwell are not entitled to immunity because they engaged in malicious prosecution. *See* Dkt. No. 13 at 23-24. As to Hartnett and Granger, Plaintiffs argue that immunity should not be afforded because their "alleged conduct represents a severe misuse of their positions and constitutes active participation in a broader conspiracy to violate the plaintiffs' rights." *Id.* at 25. Plaintiffs assert that the attorneys requested illegal protective orders, withheld evidence, revoked Plaintiff Smith's drivers license, and refused to investigate Plaintiffs' allegations of fraud. *See id.* at 23-25.

"Absolute immunity protects government officials from suit arising out of acts associated with their 'function as an advocate.'" *Jeanty v. Sciortino*, 669 F. Supp. 3d 96, 108 (N.D.N.Y. 2023) (quoting *Buari v. City of New York*, 530 F. Supp. 3d 356, 378 (S.D.N.Y. 2021)). "Absolute immunity extends to 'government attorneys defending civil suits' and 'government attorneys who initiate civil suits.'" *Id.* (quoting *Spear v. Town of West Hartford*, 954 F.2d 63, 66 (2d Cir. 1992)). "In determining whether an official is entitled to absolute immunity, courts employ a 'functional' approach, 'looking at "the nature of the function performed, not the identity of the actor who performed it."'" *Id.* (quoting *Mangiafico v. Blumenthal*, 471 F.3d 391, 394 (2d Cir. 2006)) (additional quotation omitted). "The principle applies to 'functions of a government attorney "that can fairly be characterized as closely associated with the conduct of litigation or potential litigation" in civil suits—including the defense of such actions.'" *Id.* (quotations omitted). "'[O]nce a court determines that challenged conduct involves a function covered by absolute

immunity, the actor is shielded from liability for damages regardless of the wrongfulness of his motive or the degree of injury caused.'" *Id.* (quoting *Bernard v. County of Suffolk*, 356 F.3d 495, 503 (2d Cir. 2004)).

"Post-arraignment, pre-trial 'acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity.'" *Werkheiser v. Cnty. of Broome*, 655 F. Supp. 3d 88, 101 (N.D.N.Y. 2023) (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993)). "In contrast, pre-arraignment actions—such as interviewing a witness to obtain probable cause for an arrest—are not entitled to the protections of absolute immunity." *Id.* (citing *Hill v. City of New York*, 45 F.3d 653, 658, 661 (2d Cir. 1995)). "Additionally, 'absolute immunity may not apply when a prosecutor is not acting as "an officer of the court," but is instead engaged in other tasks, say, investigative or administrative tasks.'" *Id.* (quoting *Van de Kamp v. Goldstein*, 555 U.S. 335, 342 (2009)) (additional quotation omitted). "Investigative tasks beyond the scope of absolute immunity are those 'normally performed by a detective or police officer.'" *Id.* at 102 (quoting *Buckley*, 509 U.S. at 273).

Plaintiffs' allegations against government attorneys stem entirely from these Defendants' functions as counsel for the state. *See* Dkt. No. 1 at ¶¶ 67-71. These Defendants are entitled to absolute immunity for such conduct, even where Plaintiffs contend that the conduct was improperly motivated or "unbecoming." Dkt. No. 13 at 23; *see also Bernard*, 356 F.3d at 504 ("Where . . . a prosecutor's charging decisions are not accompanied by any such unauthorized demands, the fact that improper motives may influence his authorized discretion cannot deprive him of absolute immunity"). Moreover, Plaintiffs' allegations of a conspiracy do not save these claims. *See Pinaud v. Cnty. of Suffolk*, 52 F.3d 1139, 1148 (2d Cir. 1995) (quotations omitted)

("As this Court and others circuits have repeatedly held, since absolute immunity covers 'virtually all acts, regardless of motivation, associated with [the prosecutor's] function as an advocate,' . . . when the underlying activity at issue is covered by absolute immunity, the 'plaintiff derives no benefit from alleging a conspiracy'"). Thus, the claims against government attorneys are dismissed.

G. Witness Immunity

Plaintiffs' complaint alleges constitutional violations based on various Defendants providing testimony. Magistrate Judge Stewart recommended dismissing any such claims based on absolute witness immunity. *See* Dkt. No. 12 at 22-23. Plaintiffs object, "grounding their objection in the assertion that the corruption, conspiracy, and collusion among the defendants have led to fraudulent activities within court proceedings." Dkt. No. 13 at 26.

"It is well established that testifying witnesses, including police officers, are entitled to absolute immunity from liability under [Section] 1983 based on their testimony." *Rolan v. Henneman*, 389 F. Supp. 2d 517, 519 (S.D.N.Y. 2005) (citing *Briscoe v. LaHue*, 460 U.S. 325 (1983)) (collecting cases). "As explained in *Briscoe*, absolute immunity for witness testimony in [Section] 1983 cases is rooted in the belief that '[a] witness's apprehension of subsequent damages liability might induce two forms of self-censorship." *Id.* "First, witnesses might be reluctant to come forward to testify. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability.'" *Id.* (quoting *Briscoe*, 460 U.S. at 333). "Such absolute immunity applies to witnesses, 'whether governmental, expert, or lay witnesses' in Family Court proceedings." *Santos v. Syracuse Police Dep't*, No. 5:22-CV-1102, 2022 WL 16949542, *7 (N.D.N.Y. Nov. 15, 2022) (quoting *Storck v. Suffolk Cnty. Dep't of Soc. Servs.*, 62 F. Supp. 2d 927, 945 (E.D.N.Y. 1999)).

"In this Circuit, however, absolute witness immunity does not extend to allegations of conspiracy." *Cipolla v. Cnty. of Rensselaer*, 129 F. Supp. 2d 436, 451 (N.D.N.Y.), *aff'd*, 20 Fed. Appx. 84 (2d Cir. 2001) (citing *Dory v. Ryan*, 999 F.2d 679 (2d Cir. 1994); *San Filippo v. U.S. Trust Co.*, 737 F.2d 246, 254 (2d Cir. 1984)); *see also Coggins v. Buonora*, 362 Fed. Appx. 224, 225 (2d Cir. 2010). The Supreme Court, in *Rehberg v. Paulk*, 566 U.S. 356 (2012), "held that grand jury witnesses, like trial witnesses, are entitled to absolute immunity if a plaintiff's claim is based on their allegedly perjurious testimony." *Gonzalez v. Baart*, No. 5:21-CV-01379, 2023 WL 8818302, *3 (N.D.N.Y. Dec. 20, 2023). The Supreme Court stated that "this rule may not be circumvented by claiming that a grand jury witness conspired to present false testimony or by using evidence of the witness' testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution." *Rehberg*, 566 U.S. at 369. "Courts have distinguished presenting false testimony and soliciting false testimony from others and creating fabricated evidence." *Gonzalez*, 2023 WL 8818302, at *4 (collecting cases).

Plaintiff contends that psychological reports that were used as evidence during hearings were false or unfinished, and that various Defendants either refrained from testifying or testified falsely. *See* Dkt. No. 1 at ¶¶ 93-94, 96, 98, 100-01, 127, 162, 186, 190. Insofar as Plaintiffs allege that witnesses testified falsely, such testimony is protected by absolute immunity. To the extent Plaintiffs allege that some of the Defendants conspired to present false testimony, the claims might not automatically be subject to dismissal on witness immunity grounds. *See Cipolla*, 129 F. Supp. 2d at 451; *Gonzalez*, 2023 WL 8818302, at *4. However, Plaintiffs have not provided enough information concerning non-testimonial actions used to create fabricated testimony, beyond their assertions of a conspiracy-at-large. Even assuming not all witness

Defendants are entitled to absolute immunity, the claims must be dismissed for failure to sufficiently plead state action or a conspiracy.

H. State Action

Plaintiffs bring their suit against numerous private parties, including Defendant Smith, Plaintiff Smith's stepfather and mother, a nurse, and private lawyers and law firms. *See* Dkt. No. 1 at ¶¶ 82-89, 99-111. Magistrate Judge Stewart recommended that those claims be dismissed because the private Defendants are not state actors: a prerequisite to bringing Section 1983 and 1985 claims. *See* Dkt. No. 12 at 24-25. Plaintiffs object to that conclusion because the private individuals "orchestrated their actions in unison with state actors." Dkt. No. 13 at 27.

"'Because the United States Constitution regulates only the Government, not private parties, a litigant claiming that his constitutional rights have been violated must first establish that the challenged conduct constitutes state action.'" *Fabrikant v. French*, 691 F.3d 193, 206 (2d Cir. 2012) (quoting *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 186 (2d Cir. 2005)). "'A plaintiff pressing a claim of violation of his constitutional rights under § 1983 is thus required to show state action.'" *Id.* (quoting *Tancredi v. Metro. Life Ins. Co.*, 316 F.3d 308, 312 (2d Cir. 2003)). "'[S]tate action requires both an alleged constitutional deprivation "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and that "the party charged with the deprivation must be a person who may fairly be said to be a state actor."'" *Id.* (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999)) (additional quotation omitted). "'Conduct that is formally "private" may become so entwined with governmental policies or so impregnated with a governmental character that it can be regarded as governmental action.'" *Id.* (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 847 (1982)).

"'To state a claim against a private entity on a section 1983 conspiracy theory, the complaint must allege facts demonstrating that the private entity acted in concert with the state actor to commit an unconstitutional act.'" *Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 324 (2d Cir. 2002) (quoting *Spear v. Town of West Hartford*, 954 F.2d 63, 68 (2d Cir. 1992)). "Put differently, a private actor acts under color of state law when the private actor 'is a willful participant in joint activity with the State or its agents.'" *Id.* (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970)). "A merely conclusory allegation that a private entity acted in concert with a state actor does not suffice to state a § 1983 claim against the private entity." *Id.*

Plaintiffs state in their objections that the attorneys for the children conspired with state actors because their hours are approved by the state court judicial Defendants and their positions are dependent on state funding. *See* Dkt. No. 13 at 28-29. Plaintiffs contend that they "personally observed 'meetings of the mind' occurring during off [the] record court proceedings and informal gatherings, like lunches, where conspiratorial strategies were devised and later executed in court." *Id.* at 29.

These contentions and the allegations in Plaintiffs' complaint are insufficient to hold the private Defendants out to be state actors. It is well-settled that "'[t]he fact that a private entity uses the state courts does not transform the private party into a state actor.'" *Rice v. City of New York*, 275 F. Supp. 3d 395, 403-04 (E.D.N.Y. 2017) (quoting *Graham v. Select Portfolio Servicing, Inc.*, 156 F. Supp. 3d 491, 516 (S.D.N.Y. 2016)); *see also Malave-Sykes v. Endicott Police Dep't*, No. 3:23-CV-1215, 2023 WL 6847684, *5 (N.D.N.Y. Oct. 17, 2023) (quotation omitted) ("[P]roviding false information to the police does not make a private individual a state actor and liable under § 1983'"); *Parent v. New York*, 786 F. Supp. 2d 516, 538 (N.D.N.Y. 2011), *aff'd*, 485 Fed. Appx. 500 (2d Cir. 2012) ("[A]lthough appointed by the state, an attorney for the

children or law guardian is not a state actor because he or she must exercise independent professional judgment on behalf of the clients they represent"); *Milan v. Wertheimer*, 808 F.3d 961, 962-64 (2d Cir. 2015) (affirming dismissal of claims against children's grandmother for initiating protective services investigations because grandmother was not a state actor).

Because Plaintiffs have stated no more than conclusory allegations that the private Defendants conspired with state actors, the Court dismisses the complaint against those private Defendants for failure to state a claim under Section 1983.

I. Affirmative Duty

In Magistrate Judge Stewart's Report-Recommendation and Order, he next addressed Plaintiffs' claims against Saratoga County police officers, county departments of social services, and school district administrators. *See* Dkt. No. 12 at 26-30. Magistrate Judge Stewart summarized the allegations against those various entities and individuals as resting on the failure "to better intervene and prevent misconduct of private parties against [Plaintiffs] or the Smith children." *Id.* at 28. He explained, however, that the Supreme Court has rejected claims of an affirmative duty to act under Section 1983. *See id.* at 28-29 (citing *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 192 (1989); *Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748, 768-69 (2005)).

Plaintiffs object and "express confusion and disagreement with Magistrate [Judge] Stewart's ruling, which concluded that the officers had no affirmative duty, a decision that contradicts the policies stated by the plaintiffs in their original complaint." Dkt. No. 13 at 30. Plaintiffs "characterize" the police officers' conduct "as a sustained campaign of retaliation and a persistent failure to provide protection, spanning four years." *Id.* at 32. Plaintiffs also "highlight Magistrate [Judge] Stewart's failure to assert qualified immunity for the officers as further

evidence that their claims warrant progression in the legal process. This stance underscores their belief in the seriousness of their allegations and the need for judicial scrutiny of the officers' actions." *Id.* at 31.

First, there is no requirement that a court address every single potential ground for dismissal where it is clear that a claim should be dismissed. *See, e.g., Curtis v. Greenberg*, No. 22-252-CV, 2023 WL 6324324, *2, n.3 (2d Cir. Sept. 29, 2023) ("Because we affirm the dismissal of the RICO claims based on the failure to adequately plead a RICO enterprise, we need not address the district court's alternative grounds for dismissal"); *Cusamano v. Sobek*, 604 F. Supp. 2d 416, 441 (N.D.N.Y. 2009) ("[B]ecause the Court has found adequate grounds on which to adopt Magistrate Judge Lowe's Report-Recommendation, . . . the Court does not address th[e] alternative recommendation . . . ."). Therefore, the Court takes no issue with Magistrate Judge Stewart's decision not to address qualified immunity.

Second, it is well settled that police officers do not have an affirmative duty to investigate alleged crimes to the extent and in the way that a complainant or arrestee requests. *See Buari*, 530 F. Supp. 3d at 389 (quotation omitted) ("'[A] police officer's failure to pursue a particular investigative path is not a constitutional violation'"); *Brown v. City of New York*, No. 12-CV-3146, 2014 WL 5089748, *5 (S.D.N.Y. Sept. 30, 2014) ("Police officers do not have an affirmative duty to investigate allegations made by a complaining witness prior to effectuating an arrest"); *Curley v. Vill. of Suffern*, 268 F.3d 65, 70 (2d Cir. 2001) ("Although a better procedure may have been for the officers to investigate plaintiff's version of events more completely, the arresting officer does not have to prove plaintiff's version wrong before arresting him. . . . Nor does it matter that an investigation might have cast doubt upon the basis for the arrest").

Third, insofar as Plaintiffs allege that the officers violated their First Amendment rights, there are insufficient allegations in Plaintiffs' complaint to state such a claim. *See* Dkt. No. 13 at 31; *see also* Dkt. No 1. Plaintiffs summarily allege that Defendant police officers brought false charges and protection orders against Plaintiffs in retaliation for Plaintiffs' "legal challenges against governmental grievances." Dkt. No. 1 at ¶ 250. Plaintiffs' contention that "the officers" retaliated against them by "levying fraudulent harassment charges," Dkt. No. 13 at 31, cannot stand because criminal charges are brought by a prosecutor, not police officers. *See Mortimer v. Wilson*, No. 15-CV-7186, 2020 WL 3791892, *8-9 (S.D.N.Y. July 7, 2020).

As to social services and the school district, Plaintiffs contend that "[i]ndividuals in these positions are expected to respond to, and report, any instances of wrongdoing, unethical behaviors, or legal violations." Dkt. No. 13 at 32. Specifically, Plaintiffs rely on a school or administrator's mandatory reporting requirements for suspected child abuse. *See id.* at 33.

As Magistrate Judge Stewart aptly explained, "[a]lthough New York State law requires that mandated individuals report instances of suspected child abuse or maltreatment, such reporting is not constitutionally required." Dkt. No. 12 at 30. In other words, violation of a state law does not create a cognizable Section 1983 claim. *See Jackson v. Pfau*, No. 9:10-CV-1484, 2011 WL 13127988, *15 (N.D.N.Y. May 12, 2011), *aff'd*, 523 Fed. Appx. 736 (2d Cir. 2013) ("[A] Section 1983 claim brought in federal court is not the appropriate forum to assert violations of state law or regulations"). Thus, the Court agrees with Magistrate Judge Stewart that Plaintiffs' claims concerning a school's mandatory reporting obligations does not create a cognizable Section 1983 claim. As such, those claims are dismissed.

J. *Monell* and Supervisory Liability

Plaintiffs seek to bring municipal and supervisory liability, or *Monell*, claims in count nine of their complaint. *See* Dkt. No. 1 at ¶¶ 267-73. Magistrate Judge Stewart addressed Plaintiffs' *Monell* claims. *See* Dkt. No. 12 at 30-31. He noted that Plaintiffs are required to plead that each Defendant violated the Constitution through their own acts and that Plaintiffs failed to do so. *See id.* at 31. Magistrate Judge Stewart also explained that because Plaintiffs failed to state any underlying constitutional violations, the *Monell* claims were required to be dismissed. *See id.*

Plaintiffs objected and listed the ways in which they believe their complaint established *Monell* liability. *See* Dkt. No. 13 at 33-34. In doing so, Plaintiffs contend that their constitutional rights were violated through every possible route for supervisory liability: "a specific policy," "actions undertaken by policymaking officials," "pervasive practices by subordinate officials," and "a notable failure by these policymakers to adequately train or supervise municipal employees." *Id.* at 34.

"'It is well settled in this Circuit that personal involvement of defendants in the alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.'" *Forrest v. Cnty. of Greene*, 676 F. Supp. 3d 69, 78 (N.D.N.Y. 2023) (quoting *Johnson v. Miller*, No. 9:20-CV-622, 2020 WL 4346896, *9 (N.D.N.Y. Jul. 29, 2020)). "As to supervisory liability, there is no 'special test,' and 'a plaintiff must plead and prove "that each Government-official defendant, through the official's own individual actions, has violated the Constitution."'" *Id.* (quoting *Tangreti v. Bachmann*, 983 F.3d 609, 616 (2d Cir. 2020) (additional quotation omitted). "'To establish a violation of § 1983 by a supervisor, as with everyone else, then, the plaintiff must establish a deliberate, intentional act on the part of the defendant to violate the plaintiff's legal rights.' . . . It is not sufficient to plead that an official was 'conceivably personally involved.'" *Id.*

(quoting *Tangreti*, 983 F.3d at 615-16, 618). "'*Tangreti* makes clear that, after *Iqbal*, [a p]laintiff can no longer succeed on a § 1983 claim against [a d]efendant by showing that a supervisor behaved knowingly or with deliberate indifference that a constitutional violation would occur at the hands of his subordinates, unless that is the same state of mind required for the constitutional deprivation.'" *Lalonde v. City of Ogdensburg*, 662 F. Supp. 3d 289, 322 (N.D.N.Y. 2023) (quotation, quotation marks, and emphasis omitted); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

"'Thus, an official's conduct in making and executing policy, or failing to make or execute policy, may satisfy *Iqbal*'s requirement of personal involvement if such conduct meets the elements required to establish an underlying constitutional violation and is undertaken with the required state of mind.'" *Lalonde*, 662 F. Supp. 3d at 322 (quotation omitted). Importantly, "if the plaintiff cannot show that his or her constitutional rights were violated by any individual defendants, the *Monell* claim will also fail." *Oliver v. City of New York*, 540 F. Supp. 3d 434, 436 (S.D.N.Y. 2021); *see also Segal v. City of New York*, 459 F.3d 207, 219 (2d Cir. 2006) ("Because the district court properly found no underlying constitutional violation, its decision not to address the municipal defendants' liability under *Monell* was entirely correct").

Plaintiff's contentions closely track the pre-*Tangreti* standards for supervisory liability. *See Hendrix v. Annucci, et al.*, No. 9:20-CV-0743, 2021 WL 4405977, *6 (N.D.N.Y. Sept. 27, 2021) (quoting *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995)) ("[T]he Second Circuit's general rule was that a supervisory official's personal involvement could have been proven by showing any five factors: '(1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional

practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring'"). Plaintiffs' complaint does not set forth personal involvement in a constitutional violation against every single Defendant.

Regardless, Plaintiffs' *Monell* claims cannot proceed because their underlying constitutional claims fail for the reasons set forth in this decision—abstention, immunity, lack of state action, and failure to state a claim. *See Segal*, 459 F.3d at 219. Thus, without underlying constitutional violations, Plaintiffs' *Monell* claims must be dismissed.

K. ADA and Rehabilitation Act Claims

Plaintiffs set forth an ADA and Rehabilitation Act claim. *See* Dkt. No. 1 at ¶¶ 299-301. Plaintiffs refer to themselves in the plural form when discussing these claims, but it appears that Plaintiff Smith is the individual with alleged disabilities of "ADHD, Auditory Processing Delay, and a Written Learning Disability." *Id.* at ¶ 300; *see also id.* at ¶¶ 178, 185. Plaintiffs allege that Defendant Judge Wait denied Plaintiff Smith "an ADA-complaint note-taker for court hearings" and that Defendant Wait made derogatory and demeaning comments about Plaintiff Smith's disabilities. *See id.* at ¶¶ 178, 185, 300.

Magistrate Judge Stewart recommended dismissing these claims as "barred by the *Rooker-Feldman* doctrine, judicial immunity, and by §1983's requirement that injunctive relief against a judge is barred unless a declaratory decree was violated, or declaratory relief was unavailable." Dkt. No. 12 at 32. He also noted that neither the ADA nor Rehabilitation act provide for individual liability. *See id.*

Plaintiffs summarily object, stating that the ADA claim does not fall under the *Rooker-Feldman* doctrine and does not qualify for immunity. *See* Dkt. No. 13 at 33. Plaintiffs contend that "the ADA violations were not only discriminatory but also strategic, serving as a means for the defendants to shield themselves from exposure related to their corruption and malfeasance." *Id.*

The Second Circuit has explicitly applied the *Rooker-Feldman* doctrine to ADA claims. *See DiLauria v. Town of Harrison*, 64 Fed. Appx. 267, 270 (2d Cir. 2003). Similarly, "[c]ourts in this Circuit and others have found judicial immunity to extend to claims under the ADA." *Brooks v. Onondaga Cnty. Dep't of Child. & Fam. Servs.*, No. 5:17-CV-1186, 2018 WL 2108282, *4 (N.D.N.Y. Apr. 9, 2018) (collecting cases). Thus, the Court finds no clear error in Magistrate Judge Stewart's applications of these rules of law to Plaintiffs' ADA and Rehabilitation Act claims.[3] Importantly, as Magistrate Judge Stewart explained, and to which Plaintiffs do not respond, "neither statute provides for individual liability." Dkt. No. 12 at 32 (citing *Goe v. Zucker*, 43 F.4th 19, 35 (2d Cir. 2022)); *see also Lalonde v. City of Ogdensburg*, 662 F. Supp. 3d 289, 327 (N.D.N.Y. 2023) (quoting *Fera v. City of Albany*, 568 F. Supp. 2d 248, 259 (N.D.N.Y. 2008)) ("[T]o the extent that Plaintiffs are suing the individual Defendants in their individual capacities, 'neither Title II of the ADA nor § 504 of the Rehabilitation Act provides for individual capacity suit . . . .'"). Plaintiffs' ADA and Rehabilitation Act claims are therefore dismissed.

L. State Claims

Because Magistrate Judge Stewart recommended dismissing all of Plaintiffs' federal claims, he also recommended dismissing Plaintiffs' state-law claims. *See* Dkt. No. 12 at 32-33.

[3] Insofar as Magistrate Judge Stewart addressed the injunctive relief issue, the Court reiterates Plaintiffs' contention that they do not seek injunctive or declaratory relief, and request only monetary damages.

Plaintiffs object, arguing that their federal claims are meritorious and should not be dismissed which would save their state-law claims. *See* Dkt. No. 13 at 35.

It is well settled that the Court is not required to retain jurisdiction over state-law claims if the Court dismisses all federal claims. *See Hyman v. Cornell Univ.*, 834 F. Supp. 2d 77, 83 (N.D.N.Y. 2011), *aff'd*, 485 Fed. Appx. 465 (2d Cir. 2012). Indeed, "[a] district court usually should decline the exercise of supplemental jurisdiction when all federal claims have been dismissed at the pleading stage." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 266 (2d Cir. 2006). "'Dismissal of the pendent state law claims is not, however, "absolutely mandatory" even where the federal claims have been dismissed before trial. . . .'" *Hyman*, 834 F. Supp. 2d at 83 (quoting *Marcus v. AT & T Corp.*, 138 F.3d 46, 57 (2d Cir. 1998)).

All of Plaintiffs' federal claims are subject to dismissal for the reasons set forth in this Memorandum-Decision and Order. As such, the Court declines to exercise jurisdiction over the state-law claims and they too will be dismissed.

M. Leave to Amend

"[P]laintiffs object to the dismissal of any claims without first being given the opportunity to amend them. As pro se litigants, they request that the court allows them the chance to revise their claims if necessary, emphasizing the importance of this consideration in the context of self-representation." Dkt. No. 13 at 37.

Magistrate Judge Stewart recommended dismissal of Plaintiffs' complaint against the following Defendants with prejudice and without leave to amend: Judge Paul Pelagalli; Saratoga Supreme Court Judges John Ellis and Dianne Freestone; City Court Judge Jeffrey Wait; Saratoga County Court Judge James Murphy; Administrative Judge for the Fourth Judicial District Judge Felix Catena; Appellate Division Justices Elizabeth Garry and Christine Clark; Court Attorney

Karla Conway; Court-appointed experts Jaqueline Bashkoff and Dr. Mary O'Connor; the private attorneys appointed by the Court to represent the Smith children - Jessica Vinson of Vella Carbone, LLP; Elena Tastensen; and Heather Corey-Mongue; Samuel Maxwell, Emily Williams, Michelle Granger, Michael Hartnett; Jillian Knox; Veronica Smith; and Denise Rista-Tobin. *See* Dkt. No. 12 at 33-34. Magistrate Judge Stewart recommended as such because the claims against those individuals are barred by judicial, quasi-judicial, government attorney, and/or witness immunities. *See id.* He recommended that Plaintiffs be given leave to amend all other claims. *See id.* at 34-35.

"'Sua sponte dismissal of *pro se* [] petitions which contain non-frivolous claims without requiring service upon respondents or granting leave to amend is disfavored by'" the Second Circuit. *Collymore v. Krystal Myers, RN*, 74 F.4th 22, 27 (2d Cir. 2023) (quoting *Moorish Sci. Temple of Am., Inc. v. Smith*, 693 F.2d 987, 990 (2d Cir. 1982)). "In the § 1983 context, such dismissals are 'inappropriate' – regardless of the merits – if the complaint alleges that '(1) the defendant was a state actor . . . when he committed the violation and (2) the defendant deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States.'" *Id.* (quoting *Milan v. Wertheimer*, 808 F.3d 961, 964 (2d Cir. 2015)). However, courts often dismiss claims barred by immunity without leave to amend because better pleading cannot dure the deficiency, *i.e.*, amending a complaint does not destroy immunity. *See Clay v. Bishop*, No. 1:22-CV-0983, 2023 WL 3352903, *7 (N.D.N.Y. Feb. 7, 2023) (collecting cases); *Woods v. Vermont*, No. 2:22-CV-00008, 2023 WL 2624352, *2 (D. Vt. Mar. 24, 2023); *Burdick v. Town of Schroeppel*, No. 5:16-CV-01393, 2017 WL 5509355, *9 (N.D.N.Y. Jan. 31, 2017), *aff'd*, 717 Fed. Appx. 92, 93 (2d Cir. 2018).

Because the deficiency in Plaintiffs' claims against judges, court staff, witnesses, government attorneys, and court-appointed individuals are substantive and cannot be cured by better pleading, the Court dismisses those claims with prejudice and without leave to amend. However, the Court will permit Plaintiffs to otherwise amend their complaint. Plaintiffs are informed that any amended complaint will replace the existing complaint and must be a wholly integrated and complete pleading that does not rely upon or incorporate by reference any pleading or document previously filed with the Court. *See Jeanty*, 669 F. Supp. 3d at 118.[4]

N. Electronic Filing

Plaintiffs ask that Court "reconsider and override" Magistrate Judge Stewart's decision to deny their request to file electronically. Dkt. No. 13 at 38; *see also* Dkt. No. 12 at 36. Because Plaintiffs' complaint is being dismissed, their request to file electronically is moot. The Court will not reconsider it at this time.

IV. CONCLUSION

After carefully the Plaintiffs' submissions, Magistrate Judge Stewart's Report-Recommendation and Order, and the applicable law, the Court hereby

ORDERS that Magistrate Judge Stewart's Report-Recommendation and Order (Dkt. No. 12) is **ADOPTED in its entirety** for the reasons set forth herein; and the Court further

ORDERS that Plaintiffs' complaint (Dkt. No. 1) is **DISMISSED**; and the Court further

ORDERS that the claims against Judge Paul Pelagalli; Saratoga Supreme Court Judges John Ellis and Dianne Freestone; City Court Judge Jeffrey Wait; Saratoga County Court Judge James Murphy; Administrative Judge for the Fourth Judicial District Judge Felix Catena;

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[4] The Court directs Plaintiffs to the instructions outlined in Magistrate Judge Stewart's Report-Recommendation and Order. *See* Dkt. No. 12 at 35-36.

Appellate Division Justices Elizabeth Garry and Christine Clark; Court Attorney Karla Conway; Court-appointed experts Jaqueline Bashkoff and Dr. Mary O'Connor; the private attorneys appointed by the Court to represent the Smith children - Jessica Vinson of Vella Carbone, LLP; Elena Tastensen; and Heather Corey-Mongue; government attorneys Samuel Maxwell, Emily Williams, Michelle Granger, Michael Hartnett; and testifying witnesses Jillian Knox and Veronica Smith be **DISMISSED WITH PREJUDICE AND WITHOUT LEAVE TO AMEND**; and the Court further

ORDERS that all other claims be **DISMISSED WITHOUT PREJUDICE** with leave to file an amended complaint within thirty (30) days of the date of this Order; and the Court further

ORDERS that, if Plaintiffs fail to file an amended complaint within **thirty (30) days** of this Order, the Clerk of the Court shall enter judgment in Defendants' favor and close this case, without further order of this Court; and the Court further

ORDERS that Plaintiffs request to reconsider Magistrate Judge Stewart's denial of leave for electronic filing is **DENIED**; and the Court further

ORDERS that the Clerk of the Court serve a copy of this Order upon Plaintiffs in accordance with Local Rules.

IT IS SO ORDERED.

Dated: May 21, 2024
Albany, New York

Mae A. D'Agostino
U.S. District Judge

APPENDIX L

Second Circuit Rehearing Denial Order

(March 28, 2025)

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of March, two thousand twenty-five.

Jennifer Lynn Dees, Ethan Davis Smith,

Plaintiffs - Appellants,

v.

Jillian Knox, Samual Maxwell, Emily Williams, Paul Pelagalli, Dianne Freestone, Karla Conway, Jeffrey Wait, Michelle Granger, Michael Hartnett, Dr. Jacqueline Bashkoff, Dr, Mary O'Connor, Felix Catena, Elizabeth Garry, John T. Ellis, Christine Clark, James A. Murphy, Veronica Smith,

Defendants - Appellees,

Michael Zurlo, Jeffrey R. Brown, Christopher Hallenbeck, William Heid, Scott Carpenter, Connor Houle, David Huestis, Tyler Strenk, Kevin Kolakowski, Meghan Warren, Karen Heggen, Donnellan Law, PLLC, Julia Gross, Carlye Magnusen, James Bennett, Saratoga Center for the Family, County of Saratoga, N.Y., City of Mechanicville, N.Y., Kristine Zimmerman, Concetta H'Mura, Ashley Callahan, Marla Norton, Vella-Carbone LLC, Denise Resta-Tobin, Marc Greenwald, Joann Coughtry, Sarah Wood, Proskin Law Firm, (Lisa Proskin), Wende Tedesco, Rebecca Baldwin, Sharon Bennett, Harriet M. West Child Advocacy Center, County of Warren, N.Y., Jessica Vinson, Elena Tastensen, Heather Corey-Mongue,

Defendants.

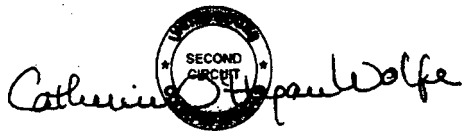
ORDER

Docket No: 24-1574

Appellants Jennifer Lynn Dees and Ethan Davis Smith filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPENDIX I

Second Circuit Summary Order

(February 13, 2025)

24-1574-cv
Dees v. Knox

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of February, two thousand twenty-five.

PRESENT:

BARRINGTON D. PARKER,
JOSEPH F. BIANCO,
WILLIAM J. NARDINI,
Circuit Judges.

JENNIFER LYNN DEES, ETHAN DAVIS SMITH,

Plaintiffs-Appellants,

v. 24-1574-cv

JILLIAN KNOX, SAMUAL MAXWELL, EMILY WILLIAMS, PAUL PELAGALLI, DIANNE FREESTONE, KARLA CONWAY, JEFFREY WAIT, MICHELLE GRANGER, MICHAEL HARTNETT, DR. JACQUELINE BASHKOFF, DR. MARY O'CONNOR, FELIX CATENA, ELIZABETH GARRY, JOHN T. ELLIS, CHRISTINE CLARK, JAMES A. MURPHY, VERONICA SMITH,

Defendants-Appellees,

MICHAEL ZURLO, JEFFREY R. BROWN, CHRISTOPHER HALLENBECK, WILLIAM HEID, SCOTT CARPENTER, CONNOR HOULE, DAVID HUESTIS, TYLER STRENK, KEVIN KOLAKOWSKI, MEGHAN WARREN, KAREN HEGGEN, DONNELLAN LAW, PLLC, JULIA GROSS, CARLYE MAGNUSEN, JAMES BENNETT, SARATOGA CENTER FOR THE FAMILY, COUNTY OF SARATOGA, N.Y., CITY OF MECHANICVILLE, N.Y., KRISTINE ZIMMERMAN, CONCETTA H'MURA, ASHLEY CALLAHAN, MARLA NORTON, VELLA-CARBONE LLC, DENISE RESTA-TOBIN, MARC GREENWALD, JOANN COUGHTRY, SARAH WOOD, PROSKIN LAW FIRM, (LISA PROSKIN), WENDE TEDESCO, REBECCA BALDWIN, SHARON BENNETT, HARRIET M. WEST CHILD ADVOCACY CENTER, COUNTY OF WARREN, N.Y., JESSICA VINSON, ELENA TASTENSEN, HEATHER COREY-MONGUE,

Defendants.

FOR PLAINTIFFS-APPELLANTS: JENNIFER LYNN DEES, ETHAN DAVIS SMITH, *pro se*, Clifton Park, New York.

FOR DEFENDANTS-APPELLEES: No appearance.

Appeal from a judgment of the United States District Court for the Northern District of New York (Mae A. D'Agostino, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court, entered on May 21, 2024, is **AFFIRMED**.

Plaintiffs-Appellants Jennifer Lynn Dees and Ethan Davis Smith filed a suit against 53 defendants, raising 30 claims under various provisions of federal and state law. After Appellants each filed a motion to proceed *in forma pauperis*, Magistrate Judge Daniel J. Stewart screened the complaint pursuant to 28 U.S.C. § 1915(e)(2)(B) and filed a report and recommendation,

recommending that the complaint be dismissed because many of the defendants were immune from suit, and the complaint otherwise failed to state a claim. *See generally Dees v. Zurlo*, No. 24-CV-1 (MAD/DJS), 2024 WL 1053237 (N.D.N.Y. Mar. 11, 2024). On May 21, 2024, District Judge Mae A. D'Agostino adopted the report and recommendation over Appellants' objections, dismissed the complaint with prejudice as to the defendants entitled to immunity, and granted leave to amend the complaint against the remaining defendants within 30 days. *See generally Dees v. Zurlo*, No. 24-CV-1 (MAD/DJS), 2024 WL 2291701 (N.D.N.Y. May 21, 2024). Appellants did not submit an amended complaint and instead filed this appeal, arguing that the complaint should not have been dismissed. They have also filed a motion to remand to the district court and recuse the district court and magistrate judges, as well as a motion to supplement the record. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision to affirm.

As an initial matter, we have jurisdiction over this appeal. Generally, "[a] dismissal with leave to amend is a non-final order and not appealable." *Slayton v. Am. Express Co.*, 460 F.3d 215, 224 (2d Cir. 2006). Nonetheless, "an appeal may be pursued where the plaintiff disclaims any intention to amend or where, as here, the district court sets a deadline for amending and the plaintiff does not amend within the deadline." *Salmon v. Blesser*, 802 F.3d 249, 252 n.2 (2d Cir. 2015); *see also Slayton*, 460 F.3d at 224 n.7 ("Even where the appellant does not explicitly disclaim intent to replead, we will treat a premature appeal from a judgment granting leave to amend as an appeal from a final judgment if the deadline for amendment has passed."). The time for Appellants to file an amended complaint has passed, and they chose to appeal rather than amend. Accordingly, we treat the appeal as being from a final judgment.

We review *de novo* a district court's dismissal of a complaint under 28 U.S.C. § 1915(e)(2)(B). *McEachin v. McGuinnis*, 357 F.3d 197, 200 (2d Cir. 2004). Under Section 1915(e)(2)(B), a complaint brought *in forma pauperis* must be dismissed if the district court determines that it is frivolous, malicious, fails to state a claim, or seeks monetary relief against a defendant who is immune from such relief. A complaint fails to state a claim when, accepting the offered facts as true and drawing all reasonable inferences in the plaintiff's favor, there is no plausible claim for relief. *Sharikov v. Philips Med. Sys. MR, Inc.*, 103 F.4th 159, 166 (2d Cir. 2024).

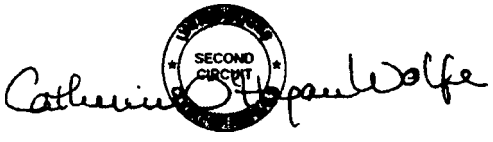
After careful review of Appellants' complaint, objections to the report and recommendation, and appellate brief, we affirm for substantially the same reasons set forth in the district court's order. Many of the defendants—such as state judges, government and court attorneys, and witnesses—are entitled to immunity from suit. *See Rehberg v. Paulk*, 566 U.S. 356, 367 (2012) (witness immunity); *Warney v. Monroe Cnty.*, 587 F.3d 113, 121 (2d Cir. 2009) (prosecutorial immunity); *Rodriguez v. Weprin*, 116 F.3d 62, 66–67 (2d Cir. 1997) (court personnel immunity); *Oliva v. Heller*, 839 F.2d 37, 39 (2d Cir. 1988) (judicial immunity). In addition, the defendants who are private individuals, as opposed to state actors, are not subject to suit under 42 U.S.C. § 1983. *See Meadows v. United Servs., Inc.*, 963 F.3d 240, 243 (2d Cir. 2020); *Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 324 (2d Cir. 2002) ("A merely conclusory allegation that a private entity acted in concert with a state actor does not suffice to state a § 1983 claim against the private entity."). The complaint otherwise fails to allege a plausible claim for relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). For example, the claims asserted under the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1962 *et seq.*, were properly dismissed because Appellants rely exclusively on allegations of fraudulent activities

directly related to the initiation or continuance of legal proceedings to support their RICO claims. Indeed, Appellants concede that the alleged fraudulent racketeering activities "manifest within or adjacent to judicial proceedings." Appellants' Br. at 15, ¶ 46. We have refused to recognize such RICO claims, holding that "allegations of frivolous, fraudulent, or baseless litigation activities—without more—cannot constitute a RICO predicate act." *Kim v. Kimm*, 884 F.3d 98, 104 (2d Cir. 2018); *see also id.* (noting that to allow such RICO claims "would chill litigants and lawyers and frustrate the well-established public policy goal of maintaining open access to the courts because any litigant's or attorney's pleading and correspondence in an unsuccessful lawsuit could lead to drastic RICO liability" (internal quotation marks and citation omitted)).

* * *

We have considered Appellants' remaining arguments and conclude they are without merit. Accordingly, we **AFFIRM** the judgment of the district court. Appellants' pending motions are **DENIED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



APPENDIX J

Second Circuit Motions Order

(February 13, 2025)

SAME ORDER AS APPENDIX I

APPENDIX K

Petitioner's Petition for Rehearing/rehearing

En Banc

(Feb. 27, 2025)

Additional material from this filing is available in the Clerk's Office.