IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Roanoke Division

WESLEY C. SMITH Plaintiff	)	
v.	)	Case No: 7:07-CV-00117
CHERI SMITH, IGOR BAKHIR, et al; Defendants	)	

#3 - PLAINTIFF'S MEMORANDUM IN OPPOSITION TO ATTORNEY GENERAL MOTION TO DISMISS

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Power is the great evil with which we are contending. We have divided power between three branches of government and erected checks and balances to prevent abuse of power. However, where is the check on the power of the judiciary? If we fail to check the power of the judiciary, **I predict that we will eventually live under judicial tyranny**. - Patrick Henry

INTRODUCTION

1. The Plaintiff, Wesley C. Smith, hereby responds to Defendants' Motion to Dismiss filed by the Attorney General Of Virginia on behalf of the Judges and Prince William Circuit Court.

2. The Defendants' present no affidavits or facts contrary to those claimed by the Plaintiff but their position rests solely on legal arguments about failure to state a claim of action, and claims of immunity.

3. It is shown below that valid claims of action have been made, that the Defendants' acted without jurisdiction, have no judicial immunity and thus their Motion To Dismiss should be denied.

ALICE IN WONDERLAND

4. The motions to dismiss that have been filed (no response yet from 2 defendants) paints a picture of the "Justice System" as a trip thru Wonderland where nothing makes sense and the Constitution is unrecognizable to completely worthless.

5. The U.S. Constitution explicitly grants the Plaintiff certain rights. Without doubt many of those Rights have been violated by the Defendants. Congress has passed laws providing for civil actions to provide redress for those violations. Yet the private citizens, public servants, and the state claim the laws don't apply to them. If the Civil Rights Laws doesn't apply to private citizens, doesn't apply to public servants, and doesn't apply to the state then they are meaningless.

6. The Constitution claims to be the Supreme Law of the land but is ignored in Virginia and instead Defendants are arguing this or that irrelevant case allows them to violate the Constitution with impunity, when in fact no case can overrule the Constitution.

7. State officials who swore to uphold the U.S. and Virginia Constitutions are now crying foul at the possibility of being ordered to follow the Constitution.

8. The Constitution prohibits the state from certain actions but the state claims it is immune from enforcement of the prohibitions both in terms of damages and injunctions and declarations, making the prohibitions and Bill Of Rights totally meaningless.

9. The Attorney General's motion basically is asking the Federal Court to rule that the state courts can ignore the Constitutions and federal laws with impunity. But if the Federal Court rules that courts don't have to follow the Constitution, then the Federal Court would also be free to follow the example of the state courts and ignore the Constitution, in which case it could ignore the 11th Amendment state immunities, judicial immunity, etc and grant the Plaintiff whatever damages he desired (say a Billion or Two, or perhaps a county or two… I'd like Warren County and Pulaski county thank you) and perhaps injunctions and declarations making me governor or king of Virginia.

10. Really the whole thing is quite absurd. To grant the Defendant's motions would be to rule against the Rule Of Law in Virginia, yet if done would also mean the Federal Court could deny the motions with the same impunity.

11. Typically a discussion of the suing the state and state officials revolves around Federal verses States rights. There are good points to be made on both sides and certainly no shortage of conflicting cases to cite. However neither position adequately accounts for the explicitly specified rights reserved to the people or the Natural Rights, or, perhaps more appropriately, "Civil Liberties" which are constitutionally protected are not actually rights, but are immunities, or restraints on government.

12. Generally overlooked in the power grab by both sides is that the fact that the People also have rights immunities and sovereignty conferred by the constitution. There are 3 groups that are sovereign not two. The first paragraph make it clear that all power in the Constitution comes from We The People, not the states. The state likes to claim it is sovereign and it is but only within its own sphere, the Constitution in the Bill of Rights and other amendments puts some definite limits on that sovereignty.

13. Typically overlooked is Amendment Nine that reserves unspecified rights to the People **not the State**. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Supreme Court has made it clear that Parental Rights are included in those rights reserved to the people and removed from the States sphere of sovereignty for fit parents.

14. So I'd like to suggest that the court dispense with the largely useless weighing of Federal/State issues based on conflicting cases and theories all of which seem to just ignore one or another part of the constitution, and instead request that the court develop its own precedent setting ruling balancing the Constitutional issues of Federal, State, and Citizen Rights.

15. For example the state clearly has 11th amendment immunity. However if the state is allowed to exercise that immunity in a broad sense it completely nullifies rights conferred in the Bill Of Rights and the 14th amendment. On the other hand a pro citizen interpretation of the 14th

amendment could completely nullify the 11th amendment. Clearly **there are more appropriate solutions than simply ignoring the rights of the people** or the state. I don't claim to have the answer but I will make one suggestion, you can replace it with a better one.

16. Balance the Rights of the People to enforce their Constitutional Rights and Right to seek redress with the Immunity of the state by allowing the state to choose whether or not to assert immunity but not as it does now with no consequence. Require the state to choose at the start of the action if the Defendants were properly fulfilling their duty or if they acted on their own contrary to the wishes of the state. If the Defendants were properly fulfilling their duty to the state the state could choose to represent them and accept full liability for their actions. If the Defendants were acting on their own, violating their duty to the state, the state could (and should) assert its own immunity but refuse to defend or accept liability for their actions. Since a state can't authorize its officials to violate the constitution and in fact must require them to follow the constitution it shouldn't accept liability for or afford protection to those who violate the constitution.

17. The resulting effect should be that officials properly doing their job are represented by the state and should win their case and those that are not doing their duty will be hung out to dry. A solution such as that would see overnight dramatic improvement in the Virginia courts vastly reducing the number of Constitutional violations that state officials are involved in.

18. The above suggestion does not involve any violation of any of the Constitutional provisions. The state has immunity if it wants it or it can choose to waive its immunity but either way it has consequences that will cause both the state and state officials to make a valid attempt to comply with the Constitution.

19. In addition the state should be barred from ever arguing against an injunction, declaration, or other remedy needed to get it into compliance with the Constitution. Given the state has no

authority to violate the constitution its arguments should be limited solely as to what it thinks is or is not constitutional.

20. Concept such as Judicial Immunity and Qualified Immunity should be done away with and ruled unconstitutional. Either the judges and officials are attempting to perform their duties in which case the state should waive its immunity to protect them, or if they are not doing their duties they are unworthy of any immunity and indeed immunity for one intentionally violating the constitution is repugnant to not just the constitution but the entire concept of rule of law. Impeachment rather than immunity is a more appropriately applied to officials intentionally violating the constitution.

21. As I doubt this court is willing to make a significant presidential ruling to dump the morass of conflicting case rulings and Federal laws. I'll go ahead an argue it on those terms, but again I'll point out its silly, as pretty much no matter which ruling the court makes, it will not make common sense, it won't be fair, and it won't respect the constitutional rights of all the parties.

Violation Of Constitutional Rights

22. The Defendants' claim "Nowhere in his complaint does the plaintiff inform this Court how defendants' alleged acts, if they occurred, are a violation of his constitutional rights." (page 2) This statement by the Senior Assistant Attorney General is clearly in error. On page 6 of the complaint the Plaintiff states that the Defendants violated his First Amendment Right to free speech by issuing and then refusing to vacate the illegal unconstitutional orders.

23. It is perhaps quiet telling as to the state of the "Justice System" in Virginia that a **Senior Assistant Attorney General doesn't recognize Freedom Of Speech or Due Process, or Equal Protection as a Constitutional Rights** even though they are explicitly stated in the Constitution.

24. It should come as no surprise then that neither the defendant judges nor Senior Assistant Attorney General recognize "the care, custody, and control of their children" as Constitutional Right

even though it has been recognized as such by the United States Supreme Court. The Supreme Court has repeatedly reaffirmed the existence of a constitutional right to the maintenance of a parent-child relationship. In Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981), the Court declared it "**plain beyond the need for multiple citation**" that a natural parent's "desire for and **right to the companionship, care, custody and management** of his or her children is an interest far more precious than any property right."

25. Apparently this is one case where the Supreme Court was clearly wrong. In Virginia anyway "multiple citations" about the right to the companionship, care, custody and management of children are not only still needed, but insufficient - bull horns, political intervention, and protests are needed to get the judges to recognize let alone follow these Supreme Court rulings.

26. The Supreme Court has noted that family life is one of the liberties **protected by the Due Process Clause of the Fourteenth Amendment.** Cleveland Bd. of Educ. v. LaFluer, 414 U.S. 632, 639-40 (1974). Further, the Court has noted that family life has been afforded **substantive and procedural due process protection**. Smith, 431 U.S. at 842

27. In Troxel v. Granville, 530 U.S. 57, 65-66 (2000) (plurality opinion of O'Connor, J.), the Supreme Court described the liberty interest at issue - "the **fundamental right** of parents to make decisions concerning the care, custody, and control of their children" as perhaps "**the oldest of the fundamental liberty interests recognized by this Court**." This right to familial association has been recognized by the Court and protected in numerous others cases. See, e.g. Lehr v. Robertson, 463 U.S. 248, 258 (1983); Santosky v. Kramer, 455 U.S. 745, 753 (1982). There, as here, no court found the parent to be an unfit parent.

> A natural parent who has demonstrated sufficient commitment to his or her children is thereafter **entitled to raise the children free from undue state interference**. As Justice White explained in his opinion of the Court in Stanley v Illinois, 405 US 645 (1972) [other cites omitted]:

> "The court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' Meyer v Nebraska, ... '**basic civil rights of man**,' Skinner v Oklahoma, 316 US 535, 541 (1942), and '[r]ights **far more precious ... than property rights,**' May v Anderson, 345 US 528, 533 (1953) ... The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v Nebraska, supra." **The Court leaves no room for doubt as to the importance and protection of the rights of parents**.
>
> The forced separation of parent from child, **even for a short time (in this case 18 hours); represent a serious infringement upon the rights of both**. J.B. v. Washington County (10th Cir. 1997)

28. In Troxel v. Granville, 530 U.S. 57 (2000) the United States Supreme Court issued a landmark opinion on parental liberty. The U.S. Supreme Court ruled that the Washington statute "**unconstitutionally interferes with the fundamental right of parents to rear their children**." The Court went on to examine its treatment of parental rights in previous cases: In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children...Wisconsin v. Yoder, 406 U.S. 205, 232, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and This case clearly upholds parental rights. In essence, this decision means that the government may not infringe parents' right to direct the education and upbringing of their children **unless it can show that it is using the least restrictive means to achieve a compelling governmental interest**.

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state ... When the state moves to destroy weakened familial bonds, **it must provide the parents with fundamentally fair procedures**. [emphasis supplied] Santosky v. Kramer, 455 US 745, 753 (1982)

29. In Hodgson v. Minnesota, 497 U.S. 417 (1990) the Court found that parental rights not only **are protected under the First and Fourteenth Amendments** as fundamental and more important than property rights, but that they are **"deemed essential."** The family has a privacy interest in the upbringing and education of children and the intimacies of the marital relationship

which is **protected by the Constitution against undue state interference**. See Wisconsin v Yoder, 7 406 US 205 ... **The stateist notion that governmental power should supersede parental authority in all cases** because some parents abuse and neglect children **is repugnant to American tradition**."

30. Yet even though the Supreme Court declared it "**plain beyond the need for multiple citation**" and in spite of the Plaintiff providing multiple case citations these defendant judges and Senior Assistant Attorney General still refuse to accept parental rights as protected by the Constitution. The actions as such are an intentional violation of the Supremacy Clause.

31. Given that the Defendants' position either the Senior Assistant Attorney General is totally unaware of the Bill Of Rights contained in the Constitution, or the 14th Amendment, or that he does not consider any of the following (claimed on page 10) to be violations of Due Process:

a. Proceeding with the case in spite of lack of service of process on the Plaintiff

b. Issuing orders without subject matter or personal jurisdiction

c. Issuing orders contrary to Constitution and VA laws.

d. Depriving the Plaintiff of visitation with no claim or finding of harm to the child.

e. Illegally quashing subpoenas in order to hide adultery by Cheri Smith.

f. Refusing to compel discovery, refusing to impose sanctions for refusal to comply.

g. Allowing Cheri Smith to plead the 5th when unwarranted (no realistic possibility of prosecution).

h. Repeatedly ruling in favor of the mother in spite of statue and case law that indicate the ruling should favor the father.

i. Enforcing Court rules against the pro se father and refusing to enforce the same rules against the mother who has an attorney.

j. Holding hearings without adequate notice to the Plaintiff.

k. Granting a Divorce on grounds contrary to accepted case precedence in VA.

l. Refusing to grant a divorce on grounds of adultery by Cheri Smith in spite of photos and other evidence to support it and Cheri Smith admitting to committing adultery under oath.

m. Holding Ex Parte Hearings

n. Refusing to state any compelling state interest to justify in interfering with the Plaintiff's Constitutionally protected rights.

o. Refusing to limit interference in Plaintiff's Constitutionally protected rights to the minimum necessary to meet a compelling state interest.

p. Allowing hearsay testimony.

q. Refusing to allow the Plaintiff to make Proffers for appeal.

r. Refusing to allow the Plaintiff to record hearings.

32. Or perhaps the Senior Assistant Attorney General recognizes the above as violations of Due Process and is just disputing if or when those occurred, in that case the Motion To Dismiss is improper and instead he should have filed a motion asking for clarification of the specific violations.

Judicial Immunity

33. The Defendants' claim judicial immunity. While certainly this concept has a long history and makes judges feel all warm and fuzzy (or feel like God). The Defendants' raising the issue here is so inappropriate and so contrary to established case law as to risk sanctions per Rule 11.

34. Judges have **given themselves** judicial immunity for their judicial functions. However Judges have **no judicial immunity for criminal acts, aiding, assisting, or conniving with others who perform a criminal act, or for their administrative/ministerial duties**. When a judge has a duty to act, he does not have discretion - he is then not performing a judicial act, he is performing a ministerial act.

35. The Defendants' erroneously claim that the Defendants' were acting in a judicial capacity. The exact opposite is the case, the Plaintiff has alleged that the Defendants' never had jurisdiction of the divorce/custody case, thus were unable to act in a judicial capacity. Furthermore the Complaint states that the Defendant's were made aware of the lack of jurisdiction and that they failed to cease their abuse of process and violations of the Plaintiff's right to Due Process. It is impossible for the Defendants' to be acting in a judicial capacity without jurisdiction.

36. The statement that the "Plaintiff has not alleged acts that deprive the Judges of judicial immunity" is frivolous and baseless argument that should be sanctioned.

37. Judicial immunity can be overcome if the judge has acted outside the scope of his or her judicial capacity or in the "complete absence of jurisdiction." Id.. In the present case, the Plaintiff clearly stated in his complaint that he was never served with process thus the Judges never acquired jurisdiction.

38. When the Plaintiff's wife filed for divorce she neglected to serve the Plaintiff with process as required by statute for him. Thus the court did not have subject matter nor personal jurisdiction to hear the case. See Janove v. Bacon, 6 Ill. 2d 245, 249, 218 N.E. 2d 706, 708 (1953

> …**if a statute provides for constructive service, the terms of the statute authorizing it must be strictly followed or the service will be invalid**…" Khatchi v. Landmark Rest. Assoc., 237 Va. 139, 142, 375 S.E.2d 743, 745 (1989) (citations omitted).
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> It is the "process" which must reach the defendant to vest the court with jurisdiction**. Without service of the "process," the court acquires no jurisdiction.** LIFESTAR v VEGOSEN, Court Of Appeals Of Virginia Record No. 031376 (2004).
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> "A court acquires no jurisdiction over the person of a defendant until process is served in the manner provided by statute, and a judgment entered by a court which lacks [personal] jurisdiction over a defendant is void as against that defendant." Slaughter v. Commonwealth, 222 Va. 787, 791, 284 S.E.2d 824, 826 (1981).

39. Subject-matter Jurisdiction in a divorce case is by statute thus the failure to comply with the statues for service of process results in a failure of subject-matter jurisdiction.

> "**Jurisdiction in a divorce suit is purely statutory**, Watkins v. Watkins, 220 Va. 1051, 1054, 265 S.E.2d 750, 752 (1980), and does not encompass broad equitable powers not conferred by statute." 2 Va. App. at 19, 340 S.E.2d at 580.

40. When the circuit court's power to act is controlled by statute, the circuit court is governed by the rules of **limited jurisdiction** and must proceed within the statute's strictures. Any action taken by the circuit court that exceeds its jurisdiction is void and may be attacked at any time.

> "Though a court be one of general jurisdiction, when its power to act on a particular matter is controlled by statute, the court is governed by the rules of limited jurisdiction."); In re M.M., 156 Ill.2d 53, 619 N.E.2d 702 (1993)

> "**When a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way**." Grigg v. Commonwealth, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982). See also Commonwealth v. Brown, 259 Va. 697, 704-05, 529 S.E.2d 96, 100 (2000).

> "the legislature prescribes that a court's jurisdiction to hear and determine controversies involving a statutory right is limited in that certain facts must exist before a court can act in any particular case."); Keal v. Rhydderick, 317 Ill. 231 (1925)

41. The Plaintiff also pointed out various Due Process violations, and rulings well beyond that allowed by law, which would have destroyed jurisdiction if it had ever existed. Actions by the judges such as Judge Potter refusing to let the Plaintiff make proffers, Judge Millette refusing to let the Plaintiff present evidence, Judge Alston suspending visitation in an Ex Parte hearing when not allowed by law are all examples of acts that would have deprived the court of jurisdiction should it have ever acquired jurisdiction.

42. Another example would be the requirement for ground for divorce to have occurred prior to filing for divorce. In this case Judge Potter ruled that the parties were separated 6 months when Cheri Smith filed for divorce, thus he lacked jurisdiction to enter decree of divorce based on one-year separation.

43. Without jurisdiction there can be no judicial immunity. Hence the Judicial Immunity argument is no warranted by existing law and is a frivolous argument.

Void judgment. One which has no legal force or effect, invalidity of which may be asserted by any person whose rights are affected at any time and at any place directly or collaterally. Reynolds v. Volunteer State Life Ins. Co., Tex.Civ.App., 80 S.W.2d 1087, 1092. One which from its inception is and **forever continues to be absolutely null, without legal efficacy, ineffectual to bind parties or support a right, of no legal force and effect whatever, and incapable of confirmation, ratification, or enforcement in any manner or to any degree**. Judgment is a "void judgment" if court that rendered judgment lacked jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process. Klugh v. U.S., D.C.S.C., 610 F.Supp. 892, 901

A void judgment is one that has bee procured by extrinsic or collateral fraud, or entered by court that did not have jurisdiction over subject matter or the parties, Rook v. Rook, 353 S.E. 2d 756 (Va. 1987).

When a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes expressly depriving him of jurisdiction, **judicial immunity is lost**. *Rankin v. Howard,* (1980) 633 F.2d 844, cert den. *Zeller v. Rankin,* 101 S.Ct. 2020, 451 U.S. 939, 68 L.Ed 2d 326.

If a judge does not fully comply with the Constitution, then his orders are void, In re Sawyer, 124 U.S. 200 (1888), he/she **is without jurisdiction, and he/she has engaged in an act or acts of treason.**

"We should, of course, not protect a member of the judiciary "who is in fact **guilty of using his powers to vent his spleen upon others**, or for any other personal motive not connected with the public good." at 564 ". . .the judge who knowingly turns a trial into a "Kangaroo" court? Or one who intentionally flouts the Constitution in order to obtain conviction? **Congress, I think, concluded that the evils of allowing intentional, knowing deprivations of civil rights to go unredressed far out weighed the speculative inhibiting effects which might attend an inquiry into a judicial deprivation of civil rights**." at 567 SANTIAGO V. CITY OF PHILADELPHIA, 435 F.Supp. 136

"When a judge acts intentionally and knowingly to deprive a person of his constitutional rights, he exercises no discretion or individual judgment; he acts no longer as a judge, but as a "minister" of his own prejudice." PIERSON V. RAY, 386 U.S. 547 at 567 (1967)

"There was no judicial immunity to civil actions for equitable relief under Civil Rights Act of 1871. 42 U.S.C.A. 1983 Shore v. Howard. 414 F.Supp. 379

"We should, of course, not protect a member of the judiciary "who is in fact guilty of using his power to vent his spleen upon others, or for any other personal motive not connected with the public good." GREGOIRE V. BIDDLE, 177 F.2d 579, 581.

Immunity is defeated if the official took the complained of action with malicious intention to cause a deprivation of rights, or the official violated clearly established statutory or constitutional rights of which a reasonable person would have known. McCord

v. Maggio, (5th Cir. 1991)

When a judicial officer acts entirely without jurisdiction or without compliance with jurisdiction **requisites he may be held civilly liable** for abuse of process even though his act involved a decision made in good faith, that he had jurisdiction. *State use of Little v. U.S.Fidelity & Guaranty Co.,* 217 Miss. 576, 64 So. 2d 697.

"It is not a judicial function for judge to commit intentional tort, even though tort occurs in courthouse." YATES V. VILLAGE OF HOFFMAN ESTATES, ILLINOIS, 209 F.Supp. 757

"**The language and purpose of the civil rights acts, are inconsistent with the application of common law notions of official immunity**. . . " JACOBSEN V. HENNE, 335 F.2d 129, 133 (U.S. Ct. App. 2nd Circ. - 1966) Also see" ANDERSON V. NOSSER, 428 F.2d 183 (U.S. Ct. App. 5th Circ. - 1971)

Immunity fosters neglect and breeds irresponsibility, while liability promotes care and caution, which caution and care is owed by the government to its people." RABON V. ROWEN MEMORIAL HOSP., INC, 269 NSI. 13, 152 S.E.2d 485, 493 (1967)

But an act done in complete absence of all jurisdiction cannot be a judicial act. Piper v. Pearson, id., 2 Gray 120. It is no more than the act of a private citizen, pretending to have judicial power which does not exist at all. In such circumstances, **to grant absolute judicial immunity is contrary to the public policy expectation that there shall be a Rule of Law.**

The U.S. Supreme Court, in Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 1687 (1974) stated that "when a state officer acts under a state law in a manner violative of the Federal Constitution, he "comes into conflict with the superior authority of that Constitution, and he is in that case **stripped of his official or representative character** and is subjected in his person to the consequences of his individual conduct. **The State has no power to impart to him any immunity** from responsibility to the supreme authority of the United States." [Emphasis supplied in original].

Qualified Immunity

44. Qualified Immunity applies only to individual acts done in their individual capacity. A state official is not allowed to assert Qualified Immunity for intentional illegal or unconstitutional acts. As this case revolves around the illegal and unconstitutional actions of the justices Qualified Immunity does not apply.

State law cannot provide immunity from suit for Federal civil rights violations. State law providing immunity from suit for child abuse investigators has no application to suits under § 1983. Wallis v. Spencer, (9th Cir. 1999)

The U.S. Supreme Court, in *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 1687 (1974) stated that "when a state officer acts under a state law in a manner violative of the Federal Constitution, he "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. **The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."**

If the law was clearly established at the time the action occurred, a police officer is not entitled to assert the defense of qualified immunity base on good faith since a reasonably competent public official should know the law governing his or her conduct. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)

Individuals **aren't immune for the results of their official conduct** simply because they were enforcing policies or orders. Where a statute authorizes official conduct which is patently violation of fundamental constitutional principles, an officer who enforces that statute is not entitled to qualified immunity. Grossman v. City of Portland, (9th Cir. (1994)

Case worker who intentionally or recklessly withheld potentially exculpatory information from an adjudicated delinquent or from the court itself was not entitled to qualified immunity. Germany v. Vance, (1st Cir. 1989)

11th Amnendment Immunity

45. A state can not authorize its officers to violate federal law

11th Amendment immunity does not prevent an action in federal court against a state official for *ultra vires* actions beyond the scope of statutory authority, or pursuant to authority deemed to be unconstitutional. Pennhurst, supra, 465 U.S. at 101-102, n. 11; Scham v. District Courts, 967 F. Supp 230, 232-233 (S.D.Tex. 1997).

11th Amendment does not bar suit against state officials in their individual capacities, even if arising from their official acts, Hafer v. Melo, 502 U.S. 21, 30-31 (1991), unless the claim will "run to the state treasury" under state law. Reyes v. Sazan, 168 F.3d 158, 162-163

"**Government immunity violates the common law maxim that everyone shall have remedy for an injury done to his person or property**." FIREMAN'S INS/ CO. OF NEWARK, N.J. V. WASHBURN COUNTY, 2 Wis.2d 214, 85 N.W.2d 840 (1957)

Under the *Ex Parte Young* exception, **there will be no immunity** if the claim challenges the constitutionality of actions against state officials and seeks only prospective, non-monetary damages, such as an injunction. 209 U.S. at 150-60; *See Ernst v. Roberts*, 379 F.3d 373, 379, n.

Domestic Relations Exception

46. Plaintiff hereby incorporates by reference the statements made in #2 - Plaintiff's Memorandum In OppositionTo Smtih & Bakhir Joint Motion To Dismiss.

47. On Page 2 #7 of the Complaint the Plaintiff specifically stated he is "not asking the federal court to rule on the merits of the underlying divorce and custody case ", furthermore this case can be adequately resolved without having to debate those issues in this case. Thus the Domestic Relations Exception has no application, as this case will not involve Domestic Relation issues.

> **A decision by a federal court not requiring the adjustment of family status or establishing familial duties or determining the existence of a breach of such duties, does not contravene the domestic relations exception to federal diversity jurisdiction**. Kelser v. Anne Arundel County Dept. of Social Services, 679 F.2d 1092 (4th Cir. 1982)

48. The Plaintiff is **not asking the district court to involve itself in the sort of questions attendant to domestic relations** that are assumed to be within the special expertise of the state courts -- for instance, the merits of a divorce action; what custody determination would be in the best interest of a child; what would constitute an equitable division of property; and the like. Instead, the Plaintiff **asks the court to examine whether certain judicial proceedings, which happened to involve a divorce, comported with the federal constitutional guarantee of due process. This is a sphere in which the federal courts may claim an expertise at least equal to that of the state courts**. See Catz v Chalker, 142 F.3d 279, 281 (6th Cir. 1998)

49. This case is very similar to Catz v Chalker, in that the Plaintiff is not asking the Federal Court to rule on the merits of the underlying divorce case but rather on the unconstitutional manner in which the in which the Virginia state court proceeding was conducted. The topic of the underlying case is largely immaterial. This case is about the Constitution and procedure, not about who is the better parent or who deserves what percentage of the marital assets, as those are issues the Plaintiff has specifically asked to be left to the state courts if he wins this case.

> Parent who is wrongfully deprived of physical custody of **children without due process has cause of action** under 42 USCS 1983; **domestic relations exception to federal**

diversity jurisdiction over custody dispute is inapplicable. Hooks v Hooks (1985, CA6 Tenn) 771 F2d 935 See Also Elam v Montgomery County 573 F Supp 797

50. It should also be noted that if the Plaintiff's claim is correct that **"the divorce judgment were unconstitutionally obtained, it should be regarded as a nullity"** and thus a ruling by this district court recognizing the order as void "would change nothing at all".

51. Thus the Plaintiff is neither asking this court to change a state court ruling, nor to make a divorce or custody ruling, so clearly the Domestic Relations Exception does not apply.

Rooker-Feldman Doctrine

52. Plaintiff hereby incorporates by reference the statements made in #2 - Plaintiff's Memorandum In OppositionTo Smtih & Bakhir Joint Motion To Dismiss.

53. As noted above and in the referenced Memorandum, the Plaintiff is not asking this court to review the state court ruling and has explicitly stated in the complaint that he was not asking the court to make any divorce or custody ruling. Thus the Rooker-Feldman doctrine does not apply. Indeed if the Plaintiffs claim of a void order is correct there is **no state court decision to even ask this court to review**.

54. The Plaintiff has also made "general challenge" to various state laws which does not contravene the heart of the *Rooker-Feldman* doctrine, the prohibition of reviewing the substance of state court judgments.

55. Case precedence also allows cases such as this to go forward in spite of *Rooker-Feldman:*

> See Sun Valley Foods Co. v. Detroit Marine Terminals, Inc., 801 F.2d 186, 188-89 (6th Cir. 1986). There, we noted that although a district court
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> "has no authority to review final judgments of a state court in judicial proceedings," Feldman, 460 U.S. at 482, . . . [a] **federal court "may entertain a collateral attack on a state court judgment which is alleged to have been procured through fraud, deception, accident, or mistake** . . . ." Resolute Insurance Co. v. State of North Carolina, 397 F.2d 586, 589 (4th Cir. 1968).
>
> Sun Valley, 801 F.2d at 189. See also Lewis v. East Feliciana Parish Sch. Bd., 820 F.2d 143, 146 (5th Cir. 1987) (**due process challenge to state proceedings not barred by Feldman doctrine**)

56. The “Rooker-Feldman Doctrine” does not prevent this court from having jurisdiction and hearing the case on the merits. This is amply demonstrated by *Catz v. Chalker*, 142 F.3d 279, 281 (6th Cir. 1998), Where the Plaintiff asked the Federal Court to recognize as void a state court divorce decree and the defendant invoked both the “Rooker-Feldman Doctrine” and the “Domestic Relations Exception” and yet the Federal Appeals Court ruled that neither of those arguments prevented the District Court from having jurisdiction and hearing the case on the merits (merits of the constitutional violations not the merits of the divorce). This case is about the unconstitutional acts of the Defendants not about the merits of Divorce/Custody that would need to be litigated in state court if this action is successful.

> Our disagreement with the district court comes down to the question of whether Catz's action is a "core" domestic relations case, seeking a declaration of marital or parental status, or a constitutional claim in which it is incidental that the underlying dispute involves a divorce. We conclude that the case is best described as the latter. True, the remedy Catz seeks -- a declaration that the Pima County divorce decree is void as a violation of due process -- would seem to "directly impact the marriage status and rights between the husband Plaintiff and his wife." On the other hand, **if the divorce judgment were unconstitutionally obtained, it should be regarded as a nullity**, see Phoenix Metals Corp. v. Roth, 284 P.2d 645, 648 (Ariz. 1955), and **any decree so stating would change nothing at all**. Further, the declaration Catz seeks would not itself address the merits, or ultimately dispose, of Chalker's divorce petition; she would be free to relitigate her marital status in state court. Finally, Catz is **not asking the district court to involve itself in the sort of questions attendant to domestic relations** that are assumed to be within the special expertise of the state courts -- for instance, the merits of a divorce action; what custody determination would be in the best interest of a child; what would constitute an equitable division of property; and the like. Instead, Catz **asks the court to examine whether certain judicial proceedings, which happened to involve a divorce, comported with the federal constitutional guarantee of due process. This is a sphere in which the federal courts may claim an expertise at least equal to that of the state courts**. *Catz v. Chalker*, 142 F.3d 279, 281 (6th Cir. 1998)

57. Further Rooker-Feldman has no application at all to this case. The Plaintiff has plainly stated his claim that the state court “order” is null and void. A void order is without any force or effect and is the same as a blank sheet of paper. Thus there is no state court ruling upon which to apply the “Rooker-Feldman Doctrine”

Younger Abstention Doctrine

58. "Under the Younger abstention doctrine, federal courts should not 'interfere with state court proceedings by granting equitable relief - such as injunctions of important state proceedings or declaratory judgments regarding constitutional issues in those proceedings -' when a state forum provides an adequate avenue for relief." Weitzel v. Div. of Occupational and Prof'l Licensing, 240 F.3d 871, 875 (10th Cir. 2001)

59. Given the rampant gender based discrimination in Virginia courts, this is quite possibly the most ludicrous argument I've ever read in a court document. It is the functional equivalent of the infamous statement **"Let Them Eat Cake".**

60. State courts should not be trusted to protect federal rights, since the state judges are dependent on the state legislatures for salary, whereas federal judges are not and hopefully will be more likely to rule on the merits of the case. The federal judges also have greater experience with U.S. Constitutional issues. State law is not adequate when there is a claim that the state law itself violates the Constitution - See Staub v. Baxley

61. In Virginia Fathers are discriminated as a class with no hope of getting anything resembling "adequate relief" in the state courts. According to the state itself Females get custody 96% of the time to 4% for males. See The Virginia General Assembly Interim Report: Child Support Enforcement (http://jlarc.state.va.us/Reports/Rpt248.pdf)

62. I really doubt the Defendants' would have had the guts to even mention the Younger Abstention Doctrine if the discrimination had been race based instead of gender. Can you imagine the Attorney General's office making any claim that "adequate relief" could be obtained for a Black Plaintiff if court statistics showed Whites winning 96% of the time and Blacks winning 4% of the time?

63. The suggestion is so absurd as to suggest complete and total ignorance of the "Justice System" in Virginia or deserve sever sanctions. The reality that "adequate relief" cannot be obtained is acknowledged by attorneys, sheriffs, magistrates, etc. When the Plaintiff contacted attorneys to handle his case the attorneys stated that a father could not get custody unless the mother had beat the child enough to require hospitalization. That no facts relating to parenting was going to affect the ruling. In fact one attorney broke out into a long stream of obscenities when he found out Judge Potter was handling the case.

64. In short the position the Plaintiff finds himself is that of a "Legal N-word". Having exactly the same opportunity for "adequate relief" from the state court as a Black man would have in the past with a members of the Ku Klux Klan on the bench hearing his case. Indeed the civil rights laws that were passed to protect African Americans from corrupt judges are appropriately applied to a similar situation today.

65. It should be noted that the Plaintiff has not rushed into Federal Court without giving the state courts a chance. The Defendant's started interfering with his constitutionally protected rights as a parent in 2002 and with the specific judicial defendants being involved since 2003. The Plaintiff has given them 4 years to correct the problems and they have refused. The Virginia Court Of Appeals has refused to rule on the merits of the case.

66. By any reasonable interpretation the Plaintiff has exhausted the procedures provided in the state courts and has appropriately resorted to the Federal Courts to enforce his federally protected rights.

67. What the Defendants' didn't mention is that Younger Abstention should be rarely exercised.

> recognizing that abstention "**is the exception, not the rule**." Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992). "**It should be 'rarely . . . invoked**, because the federal courts have **a virtually unflagging obligation . . . to exercise the jurisdiction given them**.'" Roe #2 v. Ogden, 253 F.3d 1225, 1232 (10th Cir. 2001) (quoting Ankenbrandt, 504 U.S. at 705).

> ... District Court does have jurisdiction under 28 USCS 1331 to review **due process** claims and claims of **noncompliance** with statutory directives or applicable regulations. Virginia ex rel. Commissioner, **Virginia** Dept. Of Highways & Transp. v Marshall (1979, CA4 Va) 599 F2d 588.

68. The Defendants' cite the 3 criteria to be used for Younger Abstention but fail to mention that this case does not meet any one of the criteria let alone all three.

69. (1) This case will not interfere with any ongoing state judicial proceeding. Given that the state court order is null and void, a district court recognizing that would have no legal impact. Other than the void issue, **this case does not involve any of the merits of the underlying state case** that is of division of property, custody, etc. If hell froze over and the state court changed it's ruling, it would have no impact on the merits or outcome of this case. There has been no change in the status of this case since June 2006, for all practical purposes, the state case has concluded.

70. Also all the Defendant Judges who could have potentially had further interaction have recused themselves form future involvement. So this case will have no impact on their handling of any state case.

71. (2) There are no important state interests affected. Indeed the Plaintiff has filed motions requesting the state indicate a compelling state interest and no specific state interest had been claimed. The Defendants' say important state interests are affected but fail to specify what this imaginary state interest is. The only apparent state interest is that of continuing to deprive the Defendant of his Constitutionally protected rights by attempting to deprive him of access to a Federal remedy just as the state has deprived him of any valid access to a state remedy.

72. (3) There is not adequate opportunity to present federal claims. The Circuit court refuses to pay any attention to Constitutional arguments and refused to allow adequate time to argue them. The Appeals court has refused to make any ruling whatsoever on the merits of the case, dismissing the case instead on state procedural rules.

73. The Plaintiff has not received any rulings on merits of his constitutional claims in state court. For example when the Plaintiff made motions about the violation of his First Amendment rights the court refused to vacate the order, or to justify it in terms of the Constitution, rather the Circuit Court simply told the opposing party not to try and enforce the order. Thus the third element for *Younger* abstention has not been established.

74. The Defendants' also failed to mention that the Plaintiff will "suffer irreparable injury if denied equitable relief". The loss of parental rights is not something that the state can make up for later should imaginary state action wish to do so. Justice delayed is justice denied especially as it relates to the care and companionship of a minor child. The child grows up during the time the courts are dragging their feet. Four years is more than past time to address the Constitutional violations of Due Process that have occurred.

75. It should also be noted that since the order is void the order can't even be appealed. At most the only action the Virginia Court Of Appeals could take would be the exact same as requested here, recognize the order is null and void and leave the parties to file a new divorce action in state circuit court without making any ruling about divorce/custody. It wouldn't be able to rule on any of the Constitutional issues, as a void order can't be appealed.

> Courts have also held that, since a void order **is not a final order**, but is in effect no order at all, **it cannot even be appealed**. Courts have held that a void decision is not in essence a decision at all, and never becomes final. Consistent with this holding, in 1991, the U.S. Supreme Court stated that, "Since such jurisdictional defect deprives not only the initial court but also the appellate court of its power over the case or controversy, to permit the appellate court to ignore it. …[Would be an] unlawful action by the appellate court itself." Freytag v. Commissioner, 501 U.S. 868 (1991); Miller, supra. Following the same principle, it would be an unlawful action for a court to rely on an order issued by a judge who did not have subject-matter jurisdiction and therefore the order he issued was Void ab initio.

76. A court should not abstain from exercising its jurisdiction based merely on the presence of parallel state and federal suits. See, e.g., Green v. City of Tucson, 255 F.3d 1086, 1097-99 (9th Cir. 2001).

77. The Defendants' also claim that exhausting other potential remedies. Besides the fact no realistic remedies are available, exhaustion is not required. Exhaustion is not required if violated the plaintiff's constitutional rights by acting because of bias, by distorting or ignoring facts, or by failing to apply state constitutional standards. Also not required if the remedy is inadequate or futile;

> It is settled that the plaintiff in a civil rights action need not exhaust judicial remedies, and it would be inappropriate to require exhaustion of administrative remedies where the issue is the constitutionality or validity of the statute that the agency must enforce, since the expertise of state administrative agencies does not extend to issues of constitutional law. Bowen v Hackett (DC RI) 361 F Supp 854

> The short answer is that **there is no general exhaustion requirement** that governs cases under § 1983—a proposition the Supreme Court has recognized for many years. See, e.g., Zinermon v. Burch, 494 U.S. 113, 125 (1990) (once a wrong has properly been characterized as a constitutional tort, the fact that it may also be redressable under state law does not bar the victim from bringing an action under § 1983); Patsy v. Bd. of Regents of State of Fla., 457 U.S. 496, 516 (1982) (no administrative exhaustion requirement for § 1983 claims).

DUE PROCESS CLAIMS

78. The Defendants' state that substantive due process runs only to state action so arbitrary and irrational, so unjustified by the circumstance or governmental interest as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post deprivation state remedies. That accurately describes the situation in this case. There was no pre-deprivation procedure offered to the Plaintiff. In Sept of 2003 the Plaintiff went to court for a motion on the house and Judge Potter awarded Cheri Smith temporary sole custody without any notice that custody would be awarded at the hearing and without Cheri Smith having asked for temporary custody. Thus the Plaintiff **was denied both notice and an opportunity to present**

evidence and witnesses. Judge Potter awarded custody on the basis of gender, as is his standard practice. Subsequently their have been no meaningful post-deprivation remedies offered, as the Plaintiff is unable/unwilling to change his gender and the state courts, in practice, do not offer basis other than gender to on which to base a remedy.

79. The record discloses that the trial court improperly prevented the presentation of evidence and argument, thereby denying the parties a fair trial and forestalling the ends of justice.

80. The Defendants erroneously claim on page 12 that "Because such a fundamental interest is not at stake in this case…" That is clearly contrary to U.S. Supreme Court rulings, that make it clear that "substantive due process" is required and that no amount of process is enough that the only way to provide that is to **forbid the deprivation.**

> The "narrow range of liberty interests" protected by substantive due process are "those aspects of liberty that we as a society traditionally have protected as fundamental." Id. Thus, substantive due process protections generally apply only "to matters relating to marriage, family, procreation and the right to bodily integrity." Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807, 812 (1994).
>
> (The doctrine of "substantive due process," when applied to the states, derives from the Due Process Clauses contained in the 14th Amendment. Under the Due Process clauses, certain state actions that deprive persons of life, liberty or property must be accompanied by certain processes; for instance, some deprivations of property cannot occur without prior notice and a hearing. But for certain state actions, the Court has ruled**, no amount of process is enough. Here, the Court has said, the way to honor due process is, substantively, to forbid the deprivation**.) Bowers v. Hardwick

81. When Judge Alston suspended visitation in January of 2005 again it was done without proper notice and opportunity to present evidence. Judge Alston held an ex parte hearing when the Plaintiff was out of state. Judge Alston then scheduled a follow up hearing at a time he knew the GAL would be unable to attend, making it quite clear the hearing was only for show not a genuine opportunity to remedy the situation. This was amplified by Judge Millette at the hearing refusing to let the Plaintiff present evidence that Cheri Smith and Loretta Vardy lied in their motion. Judge Millette went so far as to threaten the Plaintiff with jail if he persisted in presenting evidence of

fraud by Loretta Vardy. Such as her fraudulent statement about how the Plaintiff was served, which was proven false by the Plaintiff bringing in the original post office record that contradicted her statements.

82. The ruling to continue the suspended visitation by Judge Millette was also arbitrary and irrational as it was based on the GAL's report where he was upset that about the Plaintiff pursuing grounds of adultery in the divorce case, while admitting that the child wanted to be with his father and that the father could properly care for him. Thus Judge Millette's actions not only deprived the Plaintiff of Due Process but also based his ruling on something completely irrational and unrelated to visitation. The ruling was contrary to state law, state case precedence and state interests. The states interests would have been best served by keeping both parents involved in caring for their handicapped child. As a result of this ruling the child developed depression and required treatment.

> Absent extraordinary circumstances, a parent has a liberty interest in familial association and privacy that cannot be violated without adequate pre-deprivation procedures. **An exparte hearing based on misrepresentation and omission does not constitute notice and an opportunity to be heard**. Malik v.Arapahoe Cty. Dept. of Social Services, (10th Cir. 1999)
>
> Post-deprivation remedies do not provide due process if pre-deprivation remedies are practicable. Bendiburg v. Dempsey (11th Cir. 1990)

83. It should be noted that after the unconstitutional order by Judge Millette in January of 2005 Judge Potter refused repeated motions to remedy the situation until May of 2006 when the child himself came to court and begged to see his father. At which point visitation was allowed again, prior to a court order being entered, with no requirement on the Plaintiff to take any action, no parenting class, no supervision, not even a requirement to keep the child within the state. Clear evidence there was no valid reason to suspend visitation for 17 months.

84. The act of Judges Alston, Millette, and Potter in depriving a young child with Down Syndrome access to his father, a father who prior to court action has been the child's primary care giver, and when the child begs weekly to see his father, becomes depressed due to being deprived access to his father, requiring treatment for depression, is certainly an act that shocks the conscience.

85. The Plaintiff believes that the 17 months of suspended visitation was inflicted by the justices is retaliation for the Plaintiff not complying with their unconstitutional order prohibiting his free speech. The justices knowing their order was illegal and lacking the balls to try and enforce it looked for other ways to get even with the Plaintiff for exercising his First Amendment Rights.

86. With the lack of notice, lack of opportunity to present evidence, major punishment without any rational justification for it, specifically without even an allegation of harm to the child, and refusal to remedy the situation for 17 months is clearly an intentional violation of substantial due process.

> The forced separation of parent from child, even for a short time (in this case 18 hours); represent a **serious infringement upon the rights** of both. J.B. v. Washington County (10th Cir. 1997)

EQUAL PROTECTION

87. The Defendants' claim on page 12 that the Plaintiff did not state a claim for equal protection. This is blatantly untrue. The Plaintiff clearly pointed out that the state courts discriminate based on gender. The Plaintiff even cited the states own statistics that show men lose in custody cases 96% of the time. The Plaintiff showed that the courts are biases against fathers in custody cases and nobody disputes that the Plaintiff is a member of the class "father in a custody cased".

88. The 96% to 4% ratio that was ignored by the Defendants' should give this court significant reason to recognize the blatant and efficient discrimination as practiced by the Virginia courts.

89. Most people accept the fact that Nazi Germany discriminated against Jews based on their race. Yet at one of their concentration camps Jews only made up 90% of those exterminated. In other words the Virginia Courts are significantly more efficient at their gender-based discrimination than the Nazi's were in the race-based discrimination.

90. The Equal Protection violations didn't just occur in the ruling but also in the procedure used. Cheri Smith's counsel was allowed to ignore the notice requirements and still have her motions heard promptly even if the Plaintiff was not able to attend the hearing. Yet motions filed by the pro se Plaintiff in compliance with the notice requirement were frequently delayed several months before hearing. When Loretta Vardy would 'win' a ruling she would be allowed to write the order and slant it in her favor. On the rare occasions when the court ruled in favor of the Plaintiff he was not allowed to write the order but instead the opposition was still allowed to write the order and tweak the terms. On the ruling to compel, which was 'won' by the Plaintiff, Loretta Vardy wrote the order but never had the order entered, thus depriving the Plaintiff of the ability to enforce the ruling. The Court would allow Loretta Vardy to talk to the Judge and clerk about scheduling her motions but would not allow the Plaintiff the same ability.

91. Attorneys are allowed to record the hearings but the court refused to let the Plaintiff record hearings. The Plaintiff has ADD, provided the court with evidence of the diagnoses of this disability and asked the court to make a reasonable accommodation and let him record the hearings; the Court refused to grant this accommodation or to provide any alternative accommodation.

92. The Prince William County Circuit Court itself demonstrated its own bias by setting the password on the law library computers to "Mother5x" as well as putting gender biased materials in the clerks office. The Court also refused to allow the Plaintiff acting pro se to take his cell phone into the courthouse but imposed no similar restriction on Loretta Vardy.

93. The Defendants' also erroneously state that Virginia Constitution does not require a Jury Trial in this case. The text of the Constitution clearly states otherwise.

94. The Virginia Constitution of 1971, ARTICLE I, Bill of Rights, Section 11 states:

> **Jury Trial in civil cases**
>
> That in controversies respecting property, and in suits between man and man, **trial by jury is preferable to any other, and ought to be held sacred**. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

95. The dictionary contains the following definition of the word sacred: "regarded as too important or valuable to be interfered with" thus making it clear the Constitution of Virginia considers a Jury Trial in a Civil case a right too important to be interfered with by the legislature or the courts.

96. The matter in question is a civil suit, is a controversy respecting property, and between two people, thus this case is exactly the situation referred to above in the Constitution of Virginia.

97. Since the Constitution of Virginia by unambiguous language grants the Defendant the right to a jury trial neither the Court nor the legislature have any authority to make a law or ruling to the contrary.

> "A primary rule of statutory construction is that courts must look first to the language of the statute. If a statute is clear and unambiguous, **a court will give the statute its plain meaning**." Loudoun County Dep't of Social Servs. v. Etzold, 245 Va. 80, 85, 425 S.E.2d 800, 802 (1993) (citation omitted).
>
> "Therefore, we **must accept its plain meaning and not consider rules of statutory construction, legislative history, or extrinsic evidence**." Perez v. Capital One Bank, 258 Va. 612, 616, 522 S.E.2d 874, 876 (1999) (citation omitted).
>
> "Courts must give effect to legislative intent, **which must be gathered from the words used**, unless a literal construction would involve a manifest absurdity." HCA Health Servs. of Virginia, Inc. v. Levin, 260 Va. 215, 220, 530 S.E.2d 417, 420 (2000).

98. In a case requiring "substantive due process", rather than following the Virginia Constitution requirement to provide a Jury Trial the Court routinely denies them. It shouldn't come as much of a surprise the 96% vs 4% ratio is by judicial intent and a Jury is unlikely to be that biased.

CONSPIRACY

99. Contrary to the Defendants' claim that the Plaintiff complaint did indicate he was a member of a class that is discriminated against in cases involving custody, did claim that the Defendants acted intentionally to deprive him of his rights and that they did actually deprive him of some rights and interfere in the exercise of other rights.

> A civil conspiracy is an agreement between two or more persons to injure another by unlawful action. Express agreement among all the conspirators is not necessary to find the existence of a civil conspiracy. Each conspiracy need not have known all the details of the illegal plan or all of the participants involved. **All that must be shown is that there was a single plan that the alleged co-conspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant.** *Hooks v. Hooks,* 771 F.2d 935, 943-944 (6th Cir. 1985).

100. The Federal Courts have in the past found judges to be corrupt, which would be an appropriate finding in this case.

> The United States Supreme Court recently acknowledged the judicial corruption in Cook County, when it stated that Judge "Maloney was one of many dishonest judges exposed and convicted through 'Operation Greylord', a labyrinthine federal investigation of judicial corruption in Chicago". *Bracey v. Gramley*, 519 U.S. 1074, 117 S.Ct. 726 (1997).
>
> Since judges who do not report the criminal activities of other judges become principals in the criminal activity, 18 U.S.C. Section 2, 3 & 4, and since no judges have reported the criminal activity of the judges who have been convicted, the other judges are as guilty as the convicted judges.

101. Contrary to the Defendants' claim the Plaintiff's complaint did allege overt acts such as depriving him of visitation without proper legal grounds, awarding custody on the basis of gender, issuing unconstitutional orders, etc.

102. Under 42 USCS 1986, every person who, having knowledge that any of the wrongs mentioned in 42 USCS 1985 is about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects, or refuses so to do, is liable to the party injured,

if the wrong is committed, for all damages caused by the wrong, which, by reasonable diligence, he could have prevented.

103. The various judges in this case were aware of the acts of the other judges, could have taken action to prevent the wrongs and/or limit their effect and refused to do so. For example when Judge Potter quashed a subpoena due to no claim of adultery being made, and granted permission to amend to include a claim of adultery, Judge Alston later quashed another subpoena not on the basis of any legal argument but as he stated he didn't want to do anything different from Judge Potter. His expressed desire was to make his ruling conform to Judge Potters wishes not to the law. Another example would be when Judge Alston improperly suspended visitation, Judge Millette hear a motion to restore visitation, was aware of the illegal conduct of Judge Alston but chose to continue rather than end the unconditional violation of parental rights. Judge Potter was also aware and refused to correct the injustice for 17 months.

Declaratory Relief

104. The Plaintiff has asked for prospective Declaratory Relief. For some reason the Defendants' chose to deny this and also to claim they are exempt from it. I find it absolutely amazing that the Attorney General Robert McDonnell who swore an oath to uphold the Constitution now has his staff objecting to relief requiring Judges to follow the Constitution.

Virginia Constitution Article 7:
"I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the Commonwealth of Virginia, and that I will faithfully and impartially discharge all the duties incumbent upon me as ....., according to the best of my ability (so help me God)."

105. Isn't objecting to being required to follow the Constitution pretty much an admission by the Defendants' that they do not now follow the Constitution in their court and that they have no intention of doing so in the future?

106. The refusal by the Attorney General to follow the Constitution is an act of treason that the Federal Court absolutely must address.

> The U.S. Supreme Court has stated that "**No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it**.". ***Cooper v. Aaron***, 358 U.S. 1, 78 S.Ct. 1401 (1958).
>
> Any judge who does not comply with his oath to the Constitution of the United States wars against that Constitution and engages in acts in violation of the Supreme Law of the Land. The judge is engaged in acts of **treason**.

107. What makes this objection even more comical is that unless the Judges comply with the demands made by the Plaintiff (whether required to by the Federal Court or not) then the "orders" they issue are null and void and unenforceable. In effect the Defendants' are arguing against being required to make legal court orders as opposed to void orders.

> **If a judge does not fully comply with the Constitution, then his orders are void**, *In re Sawyer*, 124 U.S. 200 (1888), he/she is without jurisdiction, and he/she has engaged in an act or acts of treason.

108. Mr. Ingold, who drafted the motion, seems like a nice guy so I'll look for a possible less seditious interpretation. Perhaps he is objecting to the use of the word 'injunction' instead of 'declaration'. I must admit I don't see much difference between the two terms and perhaps used the wrong one. With the exception of item #2 of the relief requested I'm not sure it makes much difference, as the actions I've asked for an injunction to prevent/end unconstitutional actions that the judges have no authority to be doing now. The difference between ordering judges that they must stop violating the constitution vs telling them they should stop violating the constitution is a silly one to argue about, as judges are not supposed to be violating the constitution with or without an injunction or declaration.

109. In any event I think its clear that I have a right to ask for injunctions. Per 28 USCS 2281 a three judge panel should hear injunction sought on the grounds of the statutes' unconstitutionality.

> Persons who denied rights guaranteed to them under federal law may vindicate them in appropriate cases by various remedies in federal courts, such as direct review by the United States Supreme Court, **obtaining an injunction** or habeas corpus, bringing suit for damages under 42 USCS 1983, or invoking criminal sanctions under 18 USCS 241, 242. Greenwood v Peacock, 384 US 808, 16 L Ed 2d 944, 86 S Ct 1800.

110. The basis for any injunctive relief in the federal courts has always been irreparable injury that applies to this case, and the inadequacy of legal remedies, which again applies to this case. The statewide statistics show that the Virginia Court Of Appeals has refused to correct the problem on a statewide basis, confirmed by its refusal to rule on the merits of the divorce appeal. Issuance of an injunction is an inherently equitable, and, therefore, discretionary exercise of power by the district court. See Amoco Prods. Co. v. Vill. of Gambell, 480 U.S. 531, 542 (1987); Ctr. for Biological Diversity v. Pirie, 201 F. Supp. 2d 113, 116 (D.D.C. 2002).

The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, '**whether that action be executive, legislative, or judicial**.' Ex parte Virginia, 100 U.S., at 346, 25 L. Ed. 676. In carrying out that purpose, Congress **plainly authorized the federal courts to issue injunctions in § 1983 actions**, by expressly authorizing a 'suit in equity' as one of the means of redress... § 1983 is an Act of Congress that falls within the 'expressly authorized' exception of [§ 2283]. Mitchum v. Foster, 407 U.S. 225, 242-43 (1972).

111. For either issuing an injunction or declaration requiring the Defendants' to follow the Constitutional, that is something they have already sworn an oath to do, where they have no legal authority to do otherwise, can hardly be called an extraordinary remedy. Were the Defendants' men of integrity or honor, such relief would be to them a non-event and something they would agree to, not object to.

STANDARD FOR DISMISSAL

112. The standard for reviewing the sufficiency of the allegations in a complaint for an action under these sections was noted in *Brooks v. American Broadcasting Cos.*, 932 F.2d 495, 497 (6th Cir. 1991), quoting *Jones v. Duncan*, 840 F.2d 359, 361 (6th Cir. 1988). [d]ismissals of complaints under the civil rights statutes are scrutinized with special care. **A complaint need not set down**

in detail all the particularities of a plaintiff's claim against a defendant. Rule 8(a)(2) simply requires 'a short and plain statement of the claim showing that the pleader is entitled to relief...' Fed. R. Civ. P. 8(a)(2). All a complaint need do is afford the defendant 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.

113. Pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers and **can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts** in support of his claim that would entitle him to relief.'" Estelle v. Gamble, 429 U.S. 97, 106 (1976) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

114. The official court record alone will provide sufficient evidence to prove many of the claims.

CONCLUSION

For the foregoing reasons, the Defendants' motion to dismiss, pursuant to F.R.Civ.P. 12(b)(1) and (6), should be denied, and plaintiff afforded the opportunity to proceed to discovery and develop a factual record in support of his claims. Plaintiff respectfully requests a hearing on this motion.

Respectfully Submitted,
Wesley C. Smith

_____ May 1st, 2007

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