

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

**Civil Case No. 04-80443-CIV
CIV-RYSKAMP
Assigned To: Magistrate Judge Vitunac**

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STEWART GREENBERG
Plaintiff, pro se

vs.

JAMES ZINGALE, Chairman, Executive Director
Florida Department of Revenue,
in his official capacity and,

FLORIDA DEPARTMENT OF REVENUE and,

FIFTEENTH JUDICIAL CIRCUIT COURT OF FLORIDA,
The Honorable Edward Fine, Chief Judge
Defendants.

PLAINTIFF'S MEMORANDUM OF LAW TO DENY MOTION TO DISMISS

"It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty.' "Chief Justice Marshall in Cohen v. Virginia, 6 Wheat. 264-404, 5 L. ed. 257-291 cited in Ex Parte Young, 209 U.S. 123, 143, 1908.

NON-COMMERCIAL LITIGATION L.R. 6/11/04

TABLE OF CONTENTS

STATEMENT OF THE CASE

3

MEMORANDUM OF LAW

4

Motion to Dismiss

4

ARGUMENT

5

28 U.S.C. 2201

5

jurisdiction v authority

5

controversy-present and future

5

28 U.S.C. 1331

6

McKinney Rule

7

Equal Protection

9

suspect, quasi-suspect class

9

fundamental right

9

statutory discriminatory classification

10

class of one

12

Thirteenth Amendment

13

Rooker-Feldman

14

review of state court decisions

14

general challenge

14

inextricably intertwined

15

res judicata

15

collateral estoppel

16

Younger Abstention

17

proceedings are final

18

important state interest

18

adequate opportunity to raise the federal questions

20

comity

21

Ankenbrandt Domestic Relations Exception

22

Circuit Court and Chief Judge

24

proper defendants

24

sovereign immunity

25

CONCLUSION

26

PRAYER FOR RELIEF

27

CERTIFICATE OF SERVICE

28

STATEMENT OF THE CASE

The Plaintiff accepts the Defendants characterization of the case with the following exceptions.

1. "Plaintiff avers jurisdiction based on28 U.S.C. § 2201" is not accurate. Pleadings #18 (hereinafter P #) Plaintiff invokes the authority not the jurisdiction of the court under the declaratory judgment statute.
2. "The gravamen of the Plaintiff's allegation pertain to his dissolution of marriage..." is not accurate. The gravamen of the complaint is a state statute impermissibly infringing the Plaintiff's and all Floridians' Liberty Interest and Constitutional Rights. The details of the Plaintiff's state legal trauma are offered not only as a basis for relief but more importantly to afford him standing in his general federal and state claims.
3. Defendants did not acknowledge, defend or argue the claim that the

challenged statute conflicts with the Florida Supreme Court ruling in Connor v. Southwest, 668 So. 2d 175 (Fla. 1995) and the public policy therein effected. It is unknown if this is a planned or unplanned concession on this claim.

MEMORANDUM OF LAW

Motion to Dismiss

“[A] complaint should be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted ‘only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.’”

Gorski v. N.H. Dep’t of Corr., 290 F.3d 466, 473 (1st Cir. 2002) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984)).

“The factual allegations of the complaint are to be accepted as true, and all reasonable inferences that might be drawn from them are indulged in favor of the pleader.” Id.

See Hart v. Mazur, 903 F. Supp. 277, 279 (D.R.I. 1995) (when considering motion to dismiss, court must determine whether complaint states a valid claim for relief under any legal theory).

The burden for a motion to dismiss is heaviest when the Plaintiff is pro se. P #23,

23. Because the Plaintiff is pro se, the Court has a higher standard when faced with a motion to dismiss. White v. Bloom, 621 F.2d 276 makes this

point clear and states: "A court faced with a motion to dismiss a pro se complaint alleging violations of civil rights must read the complaint's allegations expansively, *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 596, 30 L. Ed. 2d 652 (1972), and take them as true for purposes of deciding whether they state a claim." *Cruz v. Beto*, 405 U.S. 319, 322, 92 S. Ct. 1079, 1081, 31 L. Ed. 2d 263 (1972).

Moreover, "the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." *Bonner v. Circuit Court of St. Louis*, 526 F.2d 1331, 1334 (8th Cir. 1975) (quoting *Bramlet v. Wilson*, 495 F.2d 714, 716 (8th Cir. 1974)).

Thus, if this court were to entertain any motion to dismiss this court would have to apply the standards of *White v. Bloom*. Furthermore, if there is any possible theory that would entitle the Plaintiff to relief, even one that the Plaintiff hasn't thought of, the court cannot dismiss this case.

ARGUMENT

28 U.S.C. 2201

jurisdiction v authority

Defendants first argue that 28 U.S.C. 2201 is discretionary and does not constitute a separate basis alone for federal jurisdiction. Plaintiff concurs.

Plaintiff does not rely on 28 U.S.C. 2201 for jurisdictional standing but as a statutory authority for this court to review the claims after it finds jurisdiction. (P #18, #11 and #12)

This court also has jurisdiction under 28 U.S.C. 1367, supplemental jurisdiction, to hear all state claims made in addition to the federal claims.

controversy-present and future

The Defendants argue there is no actual controversy, continuing controversy or a definite threat of future injury.

Plaintiff disagrees.

P #3 demonstrates personal injury sustained by the Plaintiff because of the challenged statute exercised by the defendants at the request of his then spouse. P#24 and

#92 state the Plaintiff is currently under the jurisdiction of the defendants and the restraints on his fundamental rights imposed by the challenged statutes and all Defendants. P #24 states the Plaintiff is still subject to the statutes with enforcing power statutorily granted to the Defendants. P# 88 indicates the future injury to the Plaintiff exists until either he dies, his former spouse dies or she remarries. P#81 states the wife is in good healthy. It is a reasonable inference she and the plaintiff are alive.

The parties here are adversaries disputing the federal and state constitutionality of a state statute that the Defendants as adversaries are enforcing against the Plaintiff. The application and enforcement of the statute impacts the Plaintiff's Federal Liberty Interest, Federal and state Constitutional Basic and Civil rights as well as property right now and in the future.

Contrary to Defendants' position that the Plaintiff seeks "purely an advisory opinion" he has pled and documented past, current and future injuries (i.e. loss of and continuing loss of federal and state fundamental rights, and loss of property rights) because of the challenged statutes thus creating an actual controversy. (P #3)

His pled past, current and future injuries give the plaintiff standing to make his general and particular claim of a federal and state constitutional challenge to a state statute.

28 U.S.C. 1331

Herein the Defendants argument moves away from the tenets of a motion to dismiss and to the elements for a summary judgment on the merits.

The Defendants also states the Plaintiff "makes conclusory allegations of constitutional deprivations which are factually and legally unsupportable."

Plaintiff disagrees.

The pleadings are replete with factual statements about the Plaintiff's property being taken by the defendants and redistributed to his former spouse (P #84, #86), the Defendants exercising and enforcing civil contempt proceedings against the Plaintiff depriving him of his Liberty interest and the fundamental right to make an unencumbered personal decision relating to his marriage, and mandating he work, till he dies or his former spouse dies or she remarries, for the sole benefit of his former spouse contrary to U.S. Constitution Thirteenth Amendment and the Florida Constitution Article I Section 2 Basic Rights (P #88, #90, #92).

The pleading must be accepted as true and accurate. Furthermore, they are validated by the accompanying complaint exhibit of Plaintiff's Final Judgment of Dissolution.

All factual and legal allegations are stated and supported in the pleadings.

McKinney Rule

Defendants argue that the Plaintiff had and has an opportunity to have his claims adjudicated in state court with a prospect of an adequate remedy.

Plaintiff disagrees.

The Defendants rely on McKinney v. Pate, 20 F.3d 1550, 1557 (11th Cir. 1994) (quoting Zinermon v. Borch, 494 U.S. 113, 126 (1990)) and particularly as used in Horton v. Board of County Comm'rs of Flagler County, 202 F.3d 1297, 1300 (11th Cir. 2000) "The McKinney rule looks to the existence of an opportunity—to whether the state courts, if asked, generally would provide an adequate remedy for the procedural deprivation...if state courts would, then there is no federal procedural due process

Contrary to Defendants' representation, the Plaintiff has not conceded there are adequate state remedies. In fact, there are none as proven by the above noted attempts to exhaust them on the issue and as they are noted in the pleadings.

The Federal Constitution grants this court authority and jurisdiction to hear this lawsuit on its merits, the state has already proven not to be a suitable or willing forum and therefore the motion to dismiss should be denied on these grounds.

Equal Protection

The Plaintiff argues four categories of equal protection law under which he is entitled to prevail on his federal claim. Two categories qualify the claim for strict scrutiny analysis, i.e. Plaintiff is a member of a suspect or quasi-suspect class, and second the claim effects a fundamental right infringed by the challenged statute. Two categories qualify the claim for the rationally related to a state interest test, i.e. discrimination as a "class of one", and second the statute creates a discriminatory classification without a rational basis.

suspect, quasi-suspect class

The Plaintiff has pled that marital status has reached the status of a suspect class in other contexts. (P# 49) The concept of marital status as a protected class continues to evolve as noted in the pleadings. The Plaintiff requests the court consider marital status as a suspect class to which discriminatory equal protection law applies sufficient to survive a motion to dismiss and to be reviewed on the merits.

fundamental right

The United States is on record in international law in The United States Report Under The International Covenant on Civil and Political Rights July 1994 Article 2-Equal Protection of Rights in the Covenant stating the official United States position as a Ratifier of the Covenant in 1992 on the issue of lack of need for a suspect class when a fundamental constitutional right is challenged,

“The general rule is that legislative classifications are presumed valid if they bear some reasonable relation to a legitimate governmental purpose. McGowan v. Maryland, 366 U.S. 420, 425-36 (1961).

By contrast, the courts have not read the Constitution’s Equal Protection clauses to require compelling justifications for classifications based on property or economic status, San Antonio School District v. Rodriguez, 411 U.S. 1 (1973);

Thus, distinctions based on such characteristics will be assessed against less stringent standards but may still be found to violate the equal protection doctrine when not rationally related to a legitimate governmental purpose.

Fundamental Interest. Where a so-called "fundamental interest" is at stake, the Supreme Court has subjected legislative classifications to "strict scrutiny" despite the absence of a suspect classification. This explains why, in the cases involving the right to vote (including fair apportionment) and the due process cases (right to counsel, etc.), the Court has found invidious discrimination even though the basis for that discrimination is not race, national origin, sex, or any other suspect class. What makes a right "fundamental" is not always clear. The fundamental rights are not necessarily those found in other provisions of the Constitution; indeed, those other rights can be protected without reference to equal protection. More likely, the rights are the ones not found in the Constitution except by inference, such as the right to procreation.”

The fundamental right placed at issue here, “personal decisions relating to marriage” has a litany of recitation in support of its fundamental nature as noted in the Pleadings. (P #13). Therefore a suspect class is not a requirement for the application of strict scrutiny when a fundamental right is impermissibly infringed by a statute.

statutory discriminatory classification

The Plaintiff has pled and he can prevail by showing that there is no rational

relationship or legitimate state goal between the statutory classification of a spouse to be divorced and a spouse still married. (P #53) He has also pled and can prevail by showing that there is no rational relationship or legitimate state goal between the statutory classification of different spouses divorcing. (P #53, #54) as to the application of 2¹⁷ factors determinative of whether and what amount he should be required to support a former spouse. The Plaintiff relies on E & T Realty v. Strickland, 830 F.2d 1107,1112 (11th Cir. 1987) citing Hooper v. Beralilo County Assessor, 472 U.S. 612, 618 (1985) and Dandridge v. Williams, 397 U.S. 471, 485 (1970) for the existence of this first category of equal protection where the Plaintiff is challenging “a classification created on the face of the statute. In such a case they could prevail by showing that the classification is not rationally related to a legitimate state purpose.”

The statute creates at least 2¹⁷ different classes of divorcing spouses.

Intentional discrimination is not an element needed to be pled or to prevail for this equal protection category.

The Eleventh Circuit in E.T. Realty at 1115 adds, “To succeed on their equal protection claim the plaintiffs must demonstrate that they were treated differently as the result of action that did not rationally advance a reasonable and identifiable governmental objective, Shweiker v. Wilson, 450 U.S. 221, 235 (1981). Plaintiff has pled these necessary elements adequately. (P #52-56) The state has never advanced a reasonable and identifiable governmental objective for the alimony statute other than the Purposes offered in Florida Statutes §61.001.

The Plaintiff is a victim. Because of the challenged statute he has been mandated to appear in State court to protect his property and future earnings and his Liberty and

personal freedom because of the challenged statute. The Pleadings allege how the Statute with 2¹⁷ permutations cannot treat all Floridians equally when they choose to dissolve their marriage. The Defendants do not treat all similarly situated divorcing spouses the same but have a statutorily granted standard of equity with broad abuse of discretion powers to apply the 2¹⁷ permutations. (P # 41-43)

class of one

The Plaintiff further claims equal protection under the doctrine of a “class of one” as expressed in Village of Willowbrook v Olech, 120 S. Ct. 1073 (2000),

“Our cases have recognized successful equal protection claims brought by a “class of one,” where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. See Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923); Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty., 488 U.S. 336 (1989). In so doing, we have explained that “[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” Sioux City Bridge Co., supra, at 445 (quoting Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 352 (1918)).” Justice Breyer Concurring.

The challenged statute treats the Plaintiff and all divorcing Floridians differently without a rational basis for the difference in treatment.

The Pleadings on the equal protection claim are adequate to survive a motion to dismiss and to justify this court’s review of the equal protection claim on the merits, and even to prevail on the merits.

Thirteenth Amendment

The Defendants argue the Thirteenth Amendment claim raised in this lawsuit “is not the type of subject matter of the Thirteenth Amendment and accordingly, should be

dismissed with prejudice."

The Defendants cite 19th century case law and fail to discuss the expanded scope of the Thirteenth Amendment's involuntary servitude concept announced in , United States v. Kozminski, 487 U.S. 931, (1998).

The Kozminski court defined the term involuntary servitude as a compulsory condition "in which a person lacks liberty especially to determine one's course of action or way of life." Id at 942. (P #57)

The same court further held that involuntary servitude "necessarily means a condition...in which the victim is forced to work for [another] by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." (P #58)

The expanded scope of the involuntary servitude amendment is applicable to the claim raised in this lawsuit, i.e. a state statute coerces a Floridian, and the Plaintiff, to work for the benefit of another under threat of legal action simply because he makes the personal decision to marry, stay married for a period of time then become a defendant in a lawsuit dissolving his marriage.

The Pleadings contain all necessary elements, adequately pled, for a Thirteenth Amendment claim under involuntary servitude to be decided on the merits and prevail.

Rooker-Feldman

review of state court decisions

Defendants argue that the Rooker-Feldman doctrine should apply because this

lawsuit “presents this court with the issue of whether it may exercise its power to review a state court’s civil proceedings,” and “that federal courts do not have jurisdiction to review decisions of state courts.”

Plaintiff disagrees.

The Rooker-Feldman doctrine(District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, (1983), Rooker v. Fidelity Trust Co., 263 U.S. 413, (1923)) does not apply because the Plaintiff lucidly states “Plaintiff is not requesting that a state court judgment be overturned, altered, modified, or entered by this Court. P #16. The Plaintiff specially states he is not asking this court to review a state court decision.

general challenge

Rooker-Feldman is also inapplicable because the Plaintiff raises a general constitutional challenge to the state statutes.

“Separately, and in addition to, Plaintiff presents a general challenge to the constitutionality of Florida Statutes Chapter 61 ‘Dissolution of Marriage’ alimony provisions (§61.08 et al.)” P #14

“The federal district courts do have jurisdiction ‘over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state court judgment in a particular case.’ District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983).

The latter portion of Plaintiff’s case comes within the distinction clearly noted in Doe v. Pringle, 550 F.2d at 599, that ‘a federal district court may exercise review of alleged federal constitutional due process or equal protection deprivations in the state’s adoption and/or administration of general rules governing admission.’ Thus in light of the general challenge by Plaintiff Johnson to the Utah Adoption laws it was error to dismiss Plaintiff’s complaint in toto since that portion of his complaint need not be construed as an attempt to appeal a particular adoption decree.” Johnson v Rodriguez et al., 226 F.3d 1103, 1108, (10th Cir. 2000)

The general challenge to the constitutionality of a state statute makes Rooker-

Feldman inapplicable.

inextricably intertwined

The claims present here cannot be inextricably intertwined with a state court proceeding because there is no state court proceeding between the parties and in the state court dissolution of marriage proceeding a Final Judgment has been entered.

res judicata

The Defendants assert that the action is barred by the concept of *res judicata*.

Plaintiff disagrees.

“Res judicata, a legal determination which we review de novo, bars relitigation of matters decided in a prior proceeding. See Israel Discount Bank, Ltd. v. Entin, 951 F.2d 311, 314 (11th Cir. 1992). ‘Specifically, it will bar a subsequent action if: (1) the prior decision was rendered by a court of competent jurisdiction; (2) there was a final judgment on the merits; (3) the parties were identical in both suits; and (4) the prior and present causes of action are the same.’ *Id.* (citing Citibank, N.A. v. Datalease Fin. Corp., 904 F.2d 1498, 1501 (11th Cir. 1990); In re Justice Oaks II, Ltd., 898 F.2d 1544, 1550 (11th Cir. 1990)).” Jang v United Technologies, 206 F. 3d 1147, 1149 (11th Cir.2000)

The pleadings offer no evidence that any of the four elements above exist, let alone all four. In fact, none of the four elements exist. The Defendants offer no evidence of any of the four elements let alone all of the elements. Therefore the res judicata argument fails.

Further “Where there is a final state court judgment, a federal court looks to that state's rules of res judicata to determine the preclusive effect of that judgment. Town of Deerfield, N.Y. v. FCC, 992 F.2d 420, 429 (2d Cir. 1993) (citing 28 U.S.C. § 1738).” Ambase Corp v. City Investing Co. Liquid. Tr., 326 F.3d (2nd Cir.2003).

The Florida Supreme Court iterated the res judicata doctrine in State v. McBride, 848 So.2d 287, 290 (Fla. 2003),

“A judgment on the merits rendered in a former suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.” Juliano, 801 So. 2d at 105 (quoting Kimbrell v. Paige, 448 So. 2d 1009, 1012 (Fla. 1984))...

Thus, under res judicata, a judgment on the merits bars a subsequent action between the same parties on the same cause of action.”

Applying this rule the Defendants still fail.

collateral estoppel

The Defendants assert that the action is barred by the concept of collateral estoppel.

Plaintiff disagrees.

“Collateral estoppel prevents relitigation of an issue resolved in a prior judicial proceeding, provided that (1) the identical issue has been fully litigated, (2) by the same parties, and (3) a final decision has been rendered by a court of competent jurisdiction. See Essenson v. Polo Club Assocs., 688 So.2d 981, 983 (Fla. 2d DCA 1997).

The pleadings offer no evidence that any of the three elements above exist, let alone all three. In fact, none of the three elements exist. Therefore the collateral estoppel argument fails.

Also, Federal courts, Florida and other state courts have held that the collateral estoppel doctrine does contain a manifest injustice exception. See, e.g., Comm'r of Internal Revenue v. Sunnen, 333 U.S. 591, 599 (1948); Thompson v. Schweiker, 665 F.2d 936, 940 (9th Cir. 1982); Tipler v. E.I. duPont deNemours & Co., 443 F.2d 125, 128 (6th Cir. 1971); Dowling v. Finley Assocs., Inc., 727 A.2d 1245, 1249 n.5 (Conn. 1999); Kansas Pub. Employees Ret. Sys. v. Reimer & Koger Assocs., Inc., 941P.2d 1321, 1333 (Kan. 1997); State v. Harrison, 61 P.3d 1104, 1109 (Wash. 2003).

It would truly be a manifest injustice for this court to not exercise its jurisdiction to

adjudicate these claims. To send Daniel back to the Defendants state court lion's den wherein the challenged statute is itself applied against the Plaintiff with only a standard of equity, permitting 2¹⁷ permutations of determination, administered with broad abuse of discretion standards would be the kind of manifest injustice contemplated by the above exceptions. It is also why the abstention doctrines are to be only used in exceptional cases.

Younger Abstention

Defendants argue the Younger abstention should apply. (Younger v. Harris, 401 U.S. 37 (1971)).

Plaintiff disagrees.

The Younger abstention doctrine scope and elements--that abstention is the exception and reserved for exceptional cases--are succinctly summarised in Foster Children v. Bush, 329 F. 3d 1255, 1274 (11th Cir.2003),

"The Supreme Court has said that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." Col. River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246 (1976). But "virtually" is not "absolutely," and in exceptional cases federal courts may and should withhold equitable relief to avoid interference with state proceedings. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359, 109 S.Ct. 2506, 2513 (1989).

... As the Middlesex Court framed the issue, 'The question . . . is threefold: first, do [the proceedings] constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

The three prong test for the Younger abstention espoused in Middlesex County Ethics Committee v. Garden State Bar Assn., 457 U.S. 423, 431 (1982) do not exist here, .i.e. (1) the state proceedings are *not* ongoing (they are final), (2) the proceedings do *not*

implicate an important state interest, (3) the state proceedings do *not* provide an adequate opportunity to raise federal questions.

proceedings are final

The dissolution of marriage and its appeals are final. As noted above the pleadings Exhibit a Final Order of Dissolution . The state statutory provision for modification does not create an open on going proceeding. The modification statute (F.S. § 61.14) only permits increase or decrease of alimony, not termination. The Final Order of Dissolution points out the terms of alimony termination. The Final order states the only way alimony will cease is the death of the Plaintiff, the death of his former spouse or her remarriage. None of those events have occurred.

important state interest

The Eleventh Circuit in Rindley v. Gallagher, 929 F.2d 1552 (11th Cir. 1991) stated the scope of the Younger application in civil cases,

“The Younger doctrine, based upon the principle of comity, has subsequently been extended to civil proceedings, but ‘has been limited to those civil actions in aid of criminal jurisdiction or involving enforcement-type proceedings in which vital interests of the state *qua* state are involved.’ Cate v. Oldham, 707 F.2d 1176, 1183 (11th Cir. 1983). See, e.g., Pennzoil Co. v. Texaco, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987) (state interest in execution of state judgments); Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982) (important state interest in maintaining and assuring the professional conduct of attorneys it licenses).”

The Eleventh Circuit outlined its view of what constitutes an important state interest in First Ala Bank, Montgomery v. Parsons Steel, 825 F.2d 1475, 1483 (11th Cir. 1987),

“Our consideration of this threshold inquiry leads us to conclude that Younger abstention is not appropriate in this case because the state court

action enjoined by the district court does not implicate any important government interest of the State of Alabama. The importance of a state interest may be demonstrated by the fact that the proceedings sought to be enjoined are noncriminal proceedings bearing a close relationship to criminal proceedings or by the fact the proceedings are necessary for the vindication of important state policies or the functioning of the state judicial system. Middlesex Ethics Comm'n, 457 U.S. at 432, 102 S.Ct. at 2521. Alabama is not a party to the action enjoined in this case, nor was that action brought to vindicate important interests of that State. Similarly, the action does not implicate the State's 'important interests in administering certain aspects of [its] judicial system[.]' Pennzoil, 107 S.Ct. at 1527. The state court action involved in this case was merely a private action between private parties in which the State of Alabama had no interest beyond 'its interest as adjudicator of wholly private disputes.' *Id.* at n. 12. Therefore, we find that the Younger doctrine did not require that the district court abstain from issuing the injunction against further state court proceedings."

and in Cate v. Oldham, 707 F.2d 1176 (11th Cir. 1983),

"Application of the Younger doctrine to ongoing state civil proceedings has been limited to those civil actions in aid of criminal jurisdiction or involving enforcement-type proceedings in which vital interests of the state *qua* state are involved. See Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982); Moore v. Sims, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979); Juidice v. Vail, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975). Accord O'Hair v. White, 675 F.2d 680, 695 (5th Cir. 1982) (en banc); Gresham Park Community Organization v. Howell, 652 F.2d 1227, 1244-48 (5th Cir. 1981)."

The Defendants do not offer an important state interest for the alimony statute.

Instead they offer a mere generic state interest as "guaranteeing the ability of its courts to protect the rights of its citizens who invoke the state court process, including domestic relations matters."

The Plaintiff argues that as far as the constitutionality of the alimony statute the state has not fulfilled its duty to its stated interest in the Barna Case as an example and there is no reason to believe it can do so in the very court where the adjudicator has been

the Defendant here.

Furthermore, the citizen invoking the state court is doing so based solely on a statute, the alimony statute, to which the Plaintiff offers this court a constitutional statute challenge. Experience has shown the state court system choss to sidestep the issue.

The State Court has demonstrated its failure to fulfill the important state interest it expresses to Floridians in Barna and to the Plaintiff.

The State of Florida, through its agents should offer a state interest it believes is compelling for the challenged statute and this court should decide whether the interest offered is compelling, applied in the least intrusive manner and if in fact the statute furthers the state interest. That is all the Plaintiff asks.

adequate opportunity to raise the federal questions

The true measure of whether Younger applies in this case is "If the state forum is an *adequate* one in which [Justice See] may raise his constitutional challenge, then federal courts must abstain." Butler v. Alabama Judicial Inquiry Commission, 261 F.3d 1154, 1156 (11th Cir. 2002) As offered above, the experience with the issue in the Florida Judiciary creates a reasonable doubt as to the adequacy of the state forum to have the issues properly adjudicated. The Plaintiff believes he has met his burden to show that state courts are inadequate for him to have the federal question raised here decided.

The state forum is family court, a court in chancery, where in the standard of judicial review is simple equity and the judicial opinions are reviewed with a broad standard of abuse of discretion. As the Plaintiff has pled, such is not a forum to subject federal Liberty Interest, Federal fundamental Rights, nor even state constitutional rights.

(P #44)

The above argument is powerful enough to make the Younger abstention inapplicable. Additionally, there are growing policy concerns which further weaken the underpinnings upon which the United States Supreme Court has ruled in favor of deference to state court in exceptional situations, i.e. comity.

comity

The basis for Younger, Rooker Feldman, and other abstention doctrines is predicated on comity. Scholars now challenge the legal validity of the role of comity usurping the Constitutionally delegated authority and mandate to the Federal Judiciary.

Because the Plaintiff is not asking for this court to intervene in a state proceeding this court is not violating the Federal courts' desire to fulfill the tenet of comity.

Daniel C. Norris in The Final Frontier of Younger Abstention: The Judiciary's Abdication of the Federal Court Removal Jurisdiction Statute, 31 Fla. St. U. Law Review 193, 229 (2003) states the error of allowing the notion of comity for states to supercede the jurisdiction granted to the federal courts by the Constitution and the U.S. Congress as well as the error of using abstention for docket clearing. Though speaking in the context of removal and diversity the words are equally true in the context of this case.

“It is entirely uncertain from the Court’s extensive abstention jurisprudence why the interests of comity are constitutionally sufficient to repudiate the jurisdiction which Congress has placed upon them through the exercise of its Article III powers. This is particularly true in light of the Court’s numerous observations regarding the duty of federal courts to exercise the jurisdiction that Congress has given to them. While some commentators have rejected the notion that federal courts have an absolute duty to exercise their jurisdiction, even the Court’s own abstention cases make it clear that a refusal to exercise jurisdiction should not be undertaken lightly. While some extraordinary cases may require a district court to refuse the exercise of its jurisdiction, it seems almost axiomatic that such refusals must not rise to the level of repudiating an entire area of jurisdiction that was created by a clear and unequivocal act of Congress. While many scholars have expressed great disdain for diversity jurisdiction, federal courts must not

be allowed to unilaterally act to eliminate that entire area of jurisdiction for the purpose of clearing their dockets. However, this is precisely what the modern developments in the Younger abstention doctrine have done. By essentially eliminating the right party to remove a case to federal court on diversity grounds, and to a lesser extent on federal question grounds, the Court has substantially interfered with the Article III prerogatives of Congress.” Citing Hart & Wechsler, The Federal Courts and the Federal System ch. 7, § 3, at 1043 (2d ed. 1973), ch. 8, § 5, at 1257 (canvassing the Court’s decisions requiring the exercise of jurisdiction and its opinions that call for abstention and discussing the apparent contradiction of these two positions) and Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996); Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992); New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359 (1989); Deakins v. Monaghan, 484 U.S. 193, 203 (1988); Murray v. Carrier, 477 U.S. 478, 519 (1986); Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 15 (1983); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817-18 (1976); England v. La. State Bd. of Med. Exam’rs, 375 U.S. 411, 415 (1964).”

Ankenbrandt Domestic Relations Exception (Ankenbrandt v. Richards, 504 U.S. 689 (1992))

Defendants argue, “to the extent that Plaintiff is seeking this Court’s review of the state court divorce decree...Barber and Ankenbrandt ...deprive this Court of subject matter jurisdiction.”

Plaintiff disagrees.

To repeat, the Plaintiff specially pled he is not asking for a review of a state court decision. P #15, #16 He also succinctly pled a general challenge to the state alimony statute.

Stone v. Wall, 135 F.3d 1438, 1440 (11th Cir. 1998) discussed the requirement to prevail under the Ankenbrandt abstention doctrine. Again the movants cannot prevail.

“The Supreme Court in Ankenbrandt v. Richards, 504 U.S. 689 (1992), reaffirmed the ‘domestic relations exception’ to exercising diversity jurisdiction and noted that this exception ‘divests the federal courts of power to issue divorce, alimony, and child custody decrees.” 504 U.S. at 703. In addition, the Court wrote that even when subject-matter jurisdiction might be proper, sufficient grounds may exist to warrant a

court's abstention from the exercise of jurisdiction. Id. at 704. The Court suggested that abstention in family-law disputes might be appropriate when 'the suit depended on a determination of the status of the parties.' Id. at 706. But, according to the Court, '[i]t is axiomatic . . . that abstention from the exercise of federal jurisdiction is the exception, not the rule Abstention rarely should be invoked, because the federal courts have a virtually unflagging obligation . . . to exercise the jurisdiction given them.' Id. at 705 (internal quotations and citations omitted)."

The current lawsuit simply does not fit the domestic relations exception. This court is not requested to issue, modify, amend, or void a divorce, alimony, or child custody decree. The status of the parties is irrelevant and not at all at issue.

Stone further said, "We pointed out that the main point was whether the litigation would mandate an inquiry into the 'marital or parent-child relationship.'" Id. at 1441 citing Ingram V. Hayes, 866 F. 2s 368 (11th Cir. 1988).

In this case there is no need nor is there a request to inquire into the marital or parent-child relationship.

The case before this court involves third parties, i.e. a Floridian and state officials, not the parties in the marital proceedings in state court, therefore the Ankenbrandt doctrine does not apply.

This case simply does not fit the domestic-relations-exception precedents and therefore cannot be relied upon by the Defendants.

Circuit Court and Chief Judge

proper defendants

The Plaintiff reiterates his Pleadings at #29,

The Florida Attorney General cites, and we rely upon him and the authority he offers as to the proper defendant for a constitutional challenge to a statute, Walker v. President of the Senate, 658 So. 2d 1200, 1200 (Fla. 5th DCA 1995) "it is the state official designated to enforce (it) who is the proper defendant, even when that party has made no attempt to enforce

(it).":American Civil Liberties Union v. The Florida Bar, 999 F. 2d 1486, 1491 (11th Cir. 1993) "Under the Supreme Court precedent, when a plaintiff challenges the constitutionality of a rule of law, it is the state official designated to enforce that rule who is the proper defendant, even when that party has made no attempt to enforce the rule. [Citing] Diamond v. Charles, 476 U.S.54, 64, 106 S. Ct. 1697, 1704, 90 L.Ed. 2d 48 (1986)."

When the Defendants offer the Department of Revenue as the proper and sole Defendant they error in their reading of the statute. Florida Statutes Chapter 61 defines the term support to be child Support. Plaintiff agrees with Defendants that the definition of Department is the Department of Revenue. However, the Department is only given statutory authority to enforce Federal Title IV child support and other child support. The Department is not designated to enforce alimony (or its synonym maintenance meaning spousal maintenance) except in unusual circumstances such as to be reimbursed from an obligor for welfare payments it paid to a obligee of alimony.

All statutory authority referencing the enforcement of the alimony statute provision (§ 61.14, § 61.16 (1), § 61.17, § 61.18) are vested in the circuit court. P # 25

Therefore as the statutorily designated state agent authorized to enforce the challenged statute the Circuit Court and its Chief Judge are proper defendant. The Plaintiff acknowledges this is unusual, but the statute itself creates the anomaly. The Defendants offer no opposing caselaw or statutes to counter Plaintiff's position.

sovereign immunity

"suits challenging the constitutionality of a state statute or its enforcement are not considered suits against the state for purposes of sovereign immunity." Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 690-91 (1949).

Plaintiff cannot express the inapplicability here of sovereign immunity under Ex

Parte Young, 209 U.S. 123, (1908) better than did The Honorable Carol J. Kenner,

“Absent waiver or abrogation of the Commonwealth's Eleventh Amendment immunity, the Debtor can proceed on the requests that affect the Commonwealth only to the extent permitted by Ex parte Young. The Young doctrine carves out a "necessary exception" to Eleventh Amendment immunity to 'ensure[]that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law.' P.R. Aqueduct & Sewer Authority v. Metcalf & Eddy, 506 U.S. 139, 113 S. Ct. 684, 688, 121 L. Ed. 2d 605 (1993). The doctrine is based on the theory (or legal fiction) that when a state officer violates federal law in the course of discharging his or her duties to the state, he or she is acting *ultra vires* and therefore not as the state or its agent. On this basis, Young held that the Eleventh Amendment does not apply to a suit against an officer of the state to enjoin the officer's continuing violation of federal law. But the Young exception is narrow. Under it, a federal court's jurisdiction is limited to requests for prospective declaratory and injunctive relief. P.R. Aqueduct & Sewer Authority v. Metcalf & Eddy, 113 S. Ct. at 688; Idaho v. Couer d' Alene Tribe of Idaho, 521 U.S. 261, 117 S. Ct. 2028, 2034, 138 L. Ed. 2d 438 (1997) (describing the Young exception as one for "certain suits seeking declaratory and injunctive relief against state officers in their individual capacities"); Strahan v. Coxe, 127 F.3d 155, 166 (1st Cir. 1997) (the doctrine limits a federal court's jurisdiction to hear a case involving a state defendant to one in which a plaintiff brings suit against a state official, seeking only prospective injunctive relief to end a continuing violation of federal law). The court's jurisdiction does not extend to requests for retrospective or legal remedies, whether against the states or their officers. P.R. Aqueduct & Sewer Authority v. Metcalf & Eddy, 506 U.S. 139, 113 S. Ct. 684 at 688, 121 L. Ed. 2d 605; Strahan v. Coxe, 127 F.3d at 166. And Young does not permit judgments against state officers declaring that they violated federal law in the past. P.R. Aqueduct & Sewer Authority v. Metcalf & Eddy, 113 S. Ct. at 688.”

Plaintiff here requests merely declaratory relief and no retrospective remedy. The Defendant is the statutorily designed state agent and the Honorable Chief Judge stand in the shoes of that state agent. Here, yes, the Plaintiff names both in their official capacity and not the Honorable Chief Judge in his individual capacity.

Defendants do not argue sovereign immunity afforded the Defendant Circuit Court though they add it in their Title Heading IV. They offer no case law for the proposition.

Plaintiff should prevail on this point as Defendants do not bear their burden on this point and caselaw under Ex Parte Young supports the Plaintiff's pleadings.

CONCLUSION

This Court has jurisdiction to hear these federal questions and supplemental state questions as a constitutional challenge to a state statute impermissibly infringing Liberty Interest and fundamental Federal and State rights for the Plaintiff and all Floridians.

Attempt to have a judicial analysis on the merits in state court have failed. This demonstrates the premise the state courts did not provide an adequate remedy. No open procedures exist in state court. This court will not interfere in the proceedings of a state. It is not asked to review state court proceedings or a ruling. It is simply asked to assume it's Constitutional duty to render a declaratory judgment on whether Florida's alimony statute impermissibly infringes Federal and State Liberty Interest and Fundamental Rights and conflict with Florida public policy and the ruling in Florida Supreme Court Connor v. Southwest. Nothing more.

PRAYER FOR RELIEF

WHEREFORE for the above stated reasons the Plaintiff requests this Court to

- a. take subject matter jurisdiction,
 - b. declare abstention doctrines inapplicable,
 - c. declare the Circuit Court and the Honorable Chief Judge are proper defendants,
 - d. declare sovereign immunity inapplicable and,
 - e. deny Motion to Dismiss
-

Respectfully submitted,



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Dated: July 13, 2004

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above Memorandum of Law has been sent this 13th day of July, 2004 by U.S. Mail to counsel for the defendants and independently to Valerie J. Martin, Assistant State Attorney, Office of the Attorney General, 1515 N. Flagler Boulevard, Suite 900, West Palm Beach, Florida, 33401.



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