NO. 04-50390

CHARLES EDWARD LINCOLN, III, Individually and as next friend of Charles Edward Lincoln, IV
Plaintiff - Appellant
v.
ELENA KOUREMBANA LINCOLN; LAURIE J NOWLIN; J RANDALL GRIMES; MICHAEL JERGINS, Honorable
Defendants - Appellees

CHARLES EDWARD LINCOLN, III, Individually and as next friend of Charles Edward Lincoln, IV
Plaintiff - Appellant
v.
WILLIAMSON COUNTY TEXAS; MICHAEL JERGINS, Honorable; ELENA KOUREMBANA LINCOLN; LAURIE J NOWLIN; J RANDALL GRIMES
Defendants - Appellees

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

BRIEF OF APPELLEE HON. MICHAEL JERGINS

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JANUARY 14, 2005

CERTIFICATE OF INTERESTED PERSONS

As a governmental party, the Appellee is not required by Fifth Circuit Local Rule 28.2.1 to furnish a Certificate of Interested Persons.

JAMES C. TODD
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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary. The record is not unmanageably voluminous and most of it needs little attention. The issues are matters of well settled law.

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STATEMENT OF JURISDICTION

The defendant/appellee Hon. Michael Jergins ("Judge Jergins") agrees that this Court has jurisdiction over the consolidated appeal under 28 U.S.C. § 1291. However, for the reasons explained in part II-C of the Argument, the district court correctly determined that it did not have jurisdiction over the plaintiff's suits below.

STATEMENT OF THE ISSUES

1. Whether the trial court plainly erred in holding that the plaintiff's suits are jurisdictionally barred under the *Rooker-Feldman* doctrine.
2. Whether the trial court plainly erred in abstaining pursuant to *Younger* principles of equitable restraint.
3. Whether the trial court plainly erred in dismissing the plaintiff's claims without discovery or an evidentiary hearing.
4. Whether, if the substantive claims are reached, the trial court would have plainly erred had it dismissed the plaintiff's claims on their merits.
    a. Whether the plaintiff can surmount Judge Jergins' absolutely immunity to the plaintiff's claims for damages.
    b. Whether the plaintiff has a viable claim for violation of his son's right to petition for redress of grievances.
    c. Whether the plaintiff has a viable claim for violation of his right to

freedom of speech.

d. Whether the plaintiff has a viable claim for deprivation of his liberty without due process.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

"Again, we confront an irate former husband bringing attempted civil rights actions arising from his divorce: one against his former wife, one against a state judge, and various ones against assorted counsel connected with his divorce and child custody case." *Brinkmann v. Johnston*, 793 F.2d 111, 112 (5th Cir. 1986) (per curiam). "A suitor who lost a domestic relations action in state court seeks redress in a claim for damages against the state trial judge and his wife's lawyer on the basis that they violated his civil rights . . ." *Arsenaux v. Roberts*, 726 F.2d 1022, 1023 (5th Cir. 1982).

This is a consolidation of two appeals, from the dismissal of two nearly identical lawsuits. In his initial suit, the plaintiff, Charles Edward Lincoln III ("Lincoln"),[1] sued Hon. Michael Jergins (395th District, Williamson County, Texas),

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[1] This brief will refer to the plaintiff/appellant in the singular, although Lincoln purports to sue both on his own behalf and as "next friend" of his minor son. Judge Jergins disputes Lincoln's assertion that he is acting as "next friend" of his son Charles Lincoln IV, over whom Lincoln does not have custody or any other basis for claiming to act in the child's legal interests.

the state district judge presiding over the continuing litigation concerning the custody of Lincoln's minor child. He also sued the mother of the child, her lawyer, and the child's court-appointed ad litem attorney. In his second suit, based on the same allegations but seeking only declaratory relief, Lincoln sued the same defendants plus Williamson County.

Lincoln claims that certain orders and rulings by Judge Jergins in the state family court litigation violated his minor child's First Amendment right to petition for redress of grievances, Lincoln's First Amendment right to free speech, and his right to due process.[2] Lincoln asserts his claims under 42 U.S.C. § 1983,[3] seeking a declaratory judgment, a preliminary and permanent injunction, and monetary relief – actual and punitive damages, attorney fees, and prejudgment interest.

"No court can provide a tidy ending to the sad happenings that gave rise to this lawsuit." *McWilliams v. McWilliams*, 804 F.2d 1400, 1400 (5th Cir. 1986). "Looking at the plaintiff's federal claim for what it really is, it is one for the custody of the [Lincoln child], a matter that was purportedly put to rest in appropriate proceedings

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[2] His lawsuits asserted other rights under the federal and state constitutions but these are the only ones he has presented on appeal.

[3] In the court below, Lincoln also asserted claims under 42 U.S.C. §§ 1985(3), 1988, and the Texas Constitution art. I §§ 8, 27, and 29. The plaintiff purported to sue Judge Jergins "in his official and individual capacities," but did not differentiate for purposes of relief. So far as the pleadings disclose, Lincoln has sued Judge Jergins individually and in his official capacity for all relief requested under each claim.

in the appropriate forum, subject to review by the Texas appellate courts." *Id*. at 1402.

II. Course of Proceedings and Disposition in the Court Below

Lincoln filed his first lawsuit, civil action no. 03-CV-407, on June 24, 2003. Record for No. 04-50390, volume 1, pages 1-31 (1R.[390] 1-31). In lieu of an answer,[4] Judge Jergins moved to dismiss the suit. 1 R. [390] 32-54. On August 29, 2003, instead of seeking leave to amend his original suit, Lincoln filed a virtually identical complaint, civil action no. 03-CV-610, adding one defendant and seeking declaratory relief. Record for No. 04-50402, volume 1, pages 1-36 (1 R.[402] 1-36). Again, Judge Jergins moved to dismiss under Fed. R. Civ. Pro. 12(b). 1 R.[402] 110-23.

The trial court, Hon. Lee Yeakel, U.S. District Judge, referred all dispositive motions in both of Lincoln's suits to U.S. Magistrate Judge Robert Pitman for report and recommendation. 6 R.[390] 1303-04; 2 R.[402] 457-58; Appellants' Record Excerpts tabs 2 and 15-18 (R.E. 2, 15-18). On January 13, 2004, Judge Pitman entered his report recommending that all of Lincoln's claims against all defendants be dismissed in each suit. 6 R.[390] 1315-26; 3 R.[402] 622-38; R.E. 3, 19.

Pursuant to this Court's requirements, each report advised the parties that:

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[4] Fed. R. Civ. Pro. 12(a)(4).

> A party's failure to file written objections to the proposed findings and recommendations contained in this Report within ten (10) days after the party is served a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of the unobjected-to proposed factual findings and legal conclusions accepted by the District Court.

6 R. [390] 1326; 3 R. [402] 638; R.E. 3 at 17, 19 at 12. Lincoln acknowledged receipt of the reports on January 14th and 15th. Docket sheet (entries for 1/20/04 in the first suit and 2nd 1/15/04 in the second).

A week afterward, Lincoln requested a thirty day extension to object to the Magistrate Judge's recommendations. 6 R.[390] 1327-29; 3 R.[402] 639-41. Simultaneously, Lincoln's attorney informed the trial court that he was taking a vacation. 6 R. [390] 1330-31. Judge Yeakel granted the requests, ordering that "objections . . . must be submitted no later than February 16, 2004." 6 R. [390] 1332; 3 R. [402] 642; R.E. 4, 20. Lincoln did not file any objections on or before February 16th – or at any time thereafter.

On Saturday February 13, 2004, Lincoln submitted a motion for withdrawal of his counsel, Francis Montenegro, in the second lawsuit but not in the first. 3 R. [402] 714-18. Buried in the motion was a request that "all proceedings in this cause, including . . . the filing of Plaintiffs' Objections and Response to the Report & Recommendation of the United States Magistrate Judge, be abated and suspended

until new counsel can be appointed . . ." 3 R. [402] 717.

Judge Yeakel accepted Judge Pitman's report and recommendations in the first suit on February 24, 2004, and in the second two days later. 6 R. [390] 1387-88; 3R. [402] 732-35; R.E. 5, 22. The trial court entered its judgments on February 24th and 27th, dismissing all of Lincoln's claims against all of the defendants. 6 R. [390] 1389; 3R. [402] 736-37; R.E. 6, 23. All other pending motions were dismissed as moot. [6R. [390] 1388b[5]; 3R. [402] 735.

On March 17, 2004, Judge Yeakel denied Lincoln's motions to alter or amend the judgments in the two suits. 6 R[390] 1413-15b; 3R. [402] 756-57; R.E. 7, 24. Lincoln filed his notices of appeal on April 16th and his amended notices three days later. 6 R [390] 1416-18, 1419-21; 4R [402] 758-60, 761-63; R.E. 8-9, 25-26. This Court consolidated the two appeals by order dated September 3, 2004.

STATEMENT OF FACTS

Contrary to 5TH CIR. L. R. 28.2.3, Lincoln provides no record references for most of the allegations in his Statement of Facts. Brief of Appellants ("Br. App.") at 5-11. The only record citations he provides in the factual narrative are to matters outside his pleadings, including evidence he submitted in support of a motion for

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[5] Pages such as this one, which are not paginated in the record on appeal, are identified by the number of the preceding page followed by "b."

partial summary judgment. Br. App. 6, 8.

The relevant allegations in Lincoln's pleadings, which are the only proper factual matters in an appeal from dismissals under FED. R. CIV. PRO. 12(b) – *see* the Argument below at II-E – are appropriately paraphrased by Judge Pitman. 6 R. [390] 1317-19; 3 R. [402] 624-26; R.E. 3 at 3-5, 19 at 3-5. Lincoln alleges as follows:

Elena Lincoln and Charles Lincoln III are the parents of Charles Lincoln IV. (1 R.[390] 2 (¶¶ 4-6); 1 R. [402] 1-2 (¶¶ 1, 4) . The three lived together as a family continuously from August 23, 1992 until August 22, 1995. 1 R. [390] 4 (¶11). Elena Lincoln and Charles Lincoln III were divorced in 1999. 1 R. [390] 7 (¶23). Nonetheless, Lincoln alleges that he lived with Elena Lincoln intermittently from December 7, 1999 through July 25, 2002. 1 R. [390] 5 (¶11). During July and August 2002, a state district judge in Williamson County entered a series of protective orders against Elena Lincoln, in favor of the plaintiff.1 R. [390] 4 (¶13). As a result, Lincoln says he and his son moved to Travis County. 1 R. [390] 5 (¶14).

Lincoln alleges that, following their move, defendant Grimes, on behalf of his client Elena Lincoln, filed a motion to modify, in September 2002, in a Travis County suit affecting the parent-child relationship. 1 R. [390] 5 (¶15). Grimes, again on behalf of Elena Lincoln, simultaneously filed a motion to modify the protective orders in the Williamson County court. 1 R. [390] 5-6 (¶16). According to Lincoln, both motions failed to state that Elena Lincoln and Charles Lincoln III had been living together as common law man and wife since December 1999. 1 R. [390] 6 (¶17).

Hearings on the motion to modify the Williamson County protective order were held by Judge Jergins on September 18, 2002, January 6, 2003, and February 19, 2003. 1 R. [390] 6 (¶19); 1 R. [402] 6, 9-10 (¶¶ 27, 51) . As a result of these hearings, Judge Jergins enjoined Charles Lincoln III from discussing the custody case with his son. 1 R. [390] 6-7 (¶¶20-21). Lincoln alleges that Judge Jergins also "suppressed" a statement from Charles Lincoln IV expressing his desire to reside with his father. 1 R. [390] 6-7(¶21). Lincoln refers to these orders as the "gag order."

On October 30, 2002, as the result of allegations by Elena Lincoln and Grimes concerning the predominant residence of the parties, the Travis County suit affecting the parent-child relationship was transferred to Williamson County. 1 R. [390] 7 (¶22). However, as of November 25, 2002, Lincoln had satisfied the ninety day jurisdictional requirement for residence in Travis County as a result of his return to the parties' original home. 1 R. [390] 7-8 (¶25). That day, he filed an action in Travis County seeking a divorce in his alleged common-law marriage to Elena Lincoln. 1 R. [390] 7-8.

On December 13, 2002, based on the newly filed Travis County divorce action, Lincoln moved to transfer venue of the suit affecting the parent-child relationship back to Travis County, from Williamson County. 1 R. [390] 8 (¶26). Because the transfer is mandatory, according to the plaintiff's legal conclusion, Lincoln asserts that the Williamson County District Court, and Judge Jergins, immediately lost jurisdiction over the matter. 1 R. [390] 8 (¶27).

Despite the alleged loss of jurisdiction, Judge Jergins continued to take judicial action as to the suit affecting the parent-child relationship. 1 R. [390] 8 (¶28). Among the actions taken by Judge Jergins was the appointment of defendant Nowlin as a guardian *ad litem* for Charles Lincoln IV. 1 R. [390] 8 (¶29). According to Lincoln, Nowlin and Jergins also continued to enforce the "gag order" against him. 1 R. [390] 9 (¶¶ 30-31).

SUMMARY OF THE ARGUMENT

Because Lincoln failed to object to the magistrate judge's recommended findings and conclusions in either suit, and has failed to offer a satisfactory excuse for his failure, the trial court's rulings may be reviewed only for plain error. Under this standard, Lincoln is unable to show that the district court's decisions were erroneous; that if they were, the error was clear or obvious under current law at the time of the decision; and/or that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Four of Lincoln's seven putative issues are premised on the contention that the 1996 amendment to 42 U.S.C. § 1983 undermined judicial immunity and made declaratory and injunctive relief more available against judges for official acts. On the contrary, both the language and legislative history of the amendment show that it strengthened judicial immunity, made injunctive relief less available, and did not "alter the landscape of declaratory relief."

By urging this Court to "limit or abandon" the *Rooker-Feldman* doctrine, Lincoln tacitly concedes that *Rooker-Feldman* is an insurmountable barrier to his claims. At the heart of Lincoln's challenge is the propriety of state court orders enforcing the custody provisions of the divorce decree – i.e., prohibiting communications by Lincoln designed to alienate the child from the custodial parent.

Federal district courts lack jurisdiction to entertain collateral attacks on state judgments, even when those challenges, cast in the form of civil rights suits, allege that the state court's action was unconstitutional. The bar extends to suits seeking "review of state court *actions*," and "in which the constitutional claims presented in federal court are inextricably intertwined with *the state court's grant or denial of relief*." Whether or not the suit formally seeks to invalidate a state judgment, *Rooker-Feldman* applies if "the federal claim succeeds only to the extent that the state court wrongly decided the issues before it."

Because the state has an important interest in regulating family law matters and the state proceedings provide an adequate opportunity to raise constitutional challenges, *Younger* "abstention" is proper for the plaintiff's attack on orders issued in the pending state court action. Longstanding federal judicial policy discourages federal court intervention in state domestic relations cases. Neither *Hawaii Housing Authority v. Midkiff*, in which, unlike this case, state court proceedings had not

commenced when the federal lawsuit was filed; nor *Mitchum v. Foster*, in which the Supreme Court did "not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding," stands in the way of *Younger* abstention in this case.

Because the trial court did not base its dismissal for lack of jurisdiction on the resolution of disputed facts, but instead, accepted the plaintiff's specific factual pleadings, exclusive of mere conclusory allegations, as if they were true, it did not abuse its discretion when it refused to allow discovery or hold an evidentiary hearing.

Because the trial court correctly determined that it lacked jurisdiction, this Court need not reach the merits of Lincoln's claims. But if it does, dismissal is proper under FED. R. CIV. PRO. 12(b)(6).

Judge Jergins enjoys absolute judicial immunity to Lincoln's § 1983 claims for damages. Making rulings and announcing orders from the bench are functions "normally performed by a judge" and the parties, including Lincoln, indisputably "dealt with the judge in his judicial capacity."

Lincoln's state-law-based argument that, because his petition in Travis County to dissolve his alleged post-divorce common law remarriage deprived Judge Jergins of jurisdiction under the Texas Family Code, the defendant is stripped of his judicial immunity, has been rejected by the Austin Court of Appeals. Moreover, even if it

were valid it falls short of the clear absence of all jurisdiction standard.

Alleged abuses equivalent to and well in excess of Lincoln's hyperbolic charges against Judge Jergins have been held insufficient to overcome judicial immunity.

Lincoln has no viable claim for violation of his son's right to petition for redress of grievances. Under the First Amendment, the right to petition has never been extended to testimony.

Lincoln has no viable claim for violation of his right to freedom of speech. Federal law governing "gag orders" on the press during a public trial does not abrogate the discretion of a state family law judge to limit the communications of the parties in the interest of enforcing the child custody provisions of the divorce decree.

Lincoln has no viable claim for deprivation of his liberty without due process. In his pleadings, Lincoln does not allege that had no notice of time, place, and subject matter of the hearings; nor does he contend that he did not attend and participate in the proceedings. The allegation that Judge Jergins granted relief which neither his ex-wife nor the ad litem attorney had requested fails to state a claim for denial of due process.

ARGUMENT

I. STANDARDS OF REVIEW

Because, as shown in II-A below, Lincoln forfeited his entitlement to de novo review, the trial court judgments are reviewed only for plain error. If the Court chooses to overlook the plaintiff's lack of diligence, the standards of review would be de novo.

"We review a district court's decision to dismiss for lack of jurisdiction de novo." *Liberty Mut. Ins. Co. v. Brown*, 380 F.3d 793, 796 (5th Cir. 2004). Likewise, "we review a district court's decision to abstain for abuse of discretion, provided that the elements for *Younger* abstention are present." *Texas Ass'n of Business v. Earle*, 388 F.3d 515, 518 (5th Cir. 2004). "Dismissals for failure to state a claim under FRCP 12(b)(6) are reviewed de novo." *United States ex rel. Bain v. Georgia Gulf Corp.*, 386 F.3d 648, 653 (5th Cir. 2004).

II. ARGUMENTS AND AUTHORITIES FOR AFFIRMING DISMISSAL

Lincoln's claims all fail, regardless of the standard of review employed. Ordinarily, it would be preferable to address the appellant's issues in the order in which they are presented in his brief. But Lincoln's arguments are so incoherent and illogically organized that, unfortunately, to make sense of the issues in this appeal, it is necessary to approach them in a different order. For example, because Lincoln's

issue VII relates to the standard of review, it should be addressed first.

A. The Plaintiff May Not Challenge The Trial Court Decisions Except For Plain Error

1. The Plaintiff's Failure to Object to the Magistrate's Recommendations is not Excusable.

As shown in the Statement of the Case, Lincoln completely failed to object to any of the recommended findings and conclusions of the magistrate judge. As his grounds for excuse, Lincoln blames the defendants for filing motions for sanctions while his counsel was on "a short, one-week long vacation." Br. App. 28. These motions, Lincoln says, created a "conflict of interest and threat to the attorney-client privilege," which led his attorney Montenegro to seek to withdraw from representing Lincoln. *Id.* at 29. This explanation is insufficient to justify Lincoln's forfeiture.

First, Lincoln is characteristically incorrect about the timing of the defendants' motions. Montenegro announced to the trial court that he would be on vacation from January 22 to 31, 2004. 6 R.[390] 1330-31. In the first lawsuit, defendant Nowlin filed her motion for sanctions on February 5th. 6 R.[390] 1333-78. In the second suit, defendants filed sanctions motions on February 2nd (Nowlin), 9th (Jergins), and 12th (Grimes and Williamson County). 3 R. [402] 643-86, 690-700, 702-07, 708-13. No defendant filed anything while Montenegro was on vacation.

Second, Lincoln offers no explanation for how the sanctions motions created

a conflict of interest between himself and Montenegro, much less how any such conflict prevented counsel from filing a request for extension prior to two business days before the (already extended) deadline for objections. Nor does Lincoln explain why a set of objections (which could have been drafted from his responses to the motions to dismiss) could not have been drawn up between February 1st, when Montenegro returned from vacation, and February 16th, notwithstanding any alleged conflict with respect to issues in the sanctions motions.

2. Consequently, the Plaintiff's Appeal Must be Limited to Review for Plain Error.

Lincoln is precluded from challenging the final judgments on any basis other than the plain error standard. *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir. 2000) (citing *Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1428 (5th Cir. 1996) (en banc)). "Under the recently-clarified plain error standard, appellate courts have discretion to correct unobjected-to (forfeited) errors that are plain ('clear' or 'obvious') and affect substantial rights." *Douglass*, 79 F.3d at 1424. But "'the court should not exercise that discretion unless the error seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Delgado v. Reef Resort Ltd.*, 364 F.3d 642, 646 (5th Cir. 2004) (quoting *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 1777 (1993)).

"[A]ppellate review of plain error in civil cases 'is not a run-of-the-mill remedy and will occur only in exceptional circumstances to avoid a miscarriage of justice.'" *Crawford v. Falcon Drilling Co., Inc.*, 131 F.3d 1120, 1123 n. 3 (5th Cir.1997). "[T]he plain-error exception to the contemporaneous-objection rule is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *Douglass*, 79 F.3d at 1428 (quoting *United States v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038, 1046 (1985)).

Accordingly, this Court has identified "four criteria for finding [plain] error: (1) there must be an error, i.e., a deviation from a legal rule, absent a valid waiver; (2) the error must be plain, i.e., clear or obvious, and clear under current law at the time of trial; (3) the error must affect substantial rights, i.e., it must be prejudicial and affect the outcome of the proceedings; and (4) upon finding these elements, we have discretion to correct such forfeited errors if they seriously affect the fairness, integrity, or public reputation of judicial proceedings." *United States v. Ulloa*, 94 F.3d 949, 952 (5th Cir. 1996) (internal quotation marks omitted).

The rulings attacked by Lincoln certainly "affect[ed] the outcome of the proceedings" (criterion 3). However, the discussion that follows shows that (1) the district court's decisions were not erroneous; (2) if they were, the error was not clear or obvious under current law at the time of the decision; and (4) the trial court did not

commit any error that seriously affects the fairness, integrity, or public reputation of judicial proceedings.

B. The Trial Court Correctly Declined To Adopt The Plaintiff's Interpretation Of The 1996 Amendments To 42 U.S.C. § 1983.

As a preliminary matter, Lincoln's contentions as to how the Federal Courts Improvement Act of 1996 altered liability, immunity, and remedies under the Civil Rights Act of 1871, 42 U.S.C. § 1983, undergirds four of his seven putative issues. Br. App. 12-14 (regarding issue I), 16 (in the wording of issue II, unelaborated in the text), 19-21 (issue V), 23 (issue VI). When this premise is eliminated, his arguments collapse.

1. The 1996 Amendment to § 1983 did not Weaken Judicial Immunity.

Lincoln argued in the trial court that the 1996 amendment – adding to § 1983 the words "except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable," accompanied by the Senate Report's language, "conduct 'clearly in excess' of a judge's jurisdiction" – effectively overruled cases such as *Mireles v. Waco*, 502 U.S. 9, 11-12, 112 S.Ct. 286, 288 (1991), which hold that absolute judicial immunity is available unless the judge acts with "a complete absence of all

jurisdiction."[6]

Lincoln seems to be the only to have noticed the revolutionary change allegedly wrought by the 1996 amendment to § 1983. Instead, federal courts have uniformly continued since 1996 to adhere to the *Stump*/*Mireles* standard of "complete absence of all jurisdiction." *E.g.*, *Penn v. U.S.*, 335 F.3d 786, 789 (8th Cir. 2003); *Stern v. Mascio*, 262 F.3d 600, 607 (6th Cir. 2001); *Gallas v. Supreme Court of Pennsylvania*, 211 F.3d 760, 769 (3rd Cir. 2000); *Harvey v. Waldron*, 210 F.3d 1008, 1012 (9th Cir. 2000).

As late as November of 2004, more than eight years after the addition of the amended language, the Sixth Circuit declared, "Acts done 'in the clear absence of all jurisdiction' for which no immunity is afforded, should be distinguished from those actions in 'excess of jurisdiction' which fall within the ambit of immunity protection." *Brookings v. Clunk*, 389 F.3d 614, 623 (6th Cir. 2004) ("Because we conclude that Judge Clunk did not act in complete absence of all jurisdiction, his actions are protected by absolute judicial immunity"). *See also Ledbetter v. City of Topeka, Kan.*, 318 F.3d 1183, 1188 (10th Cir. 2003) ("A judge is immune from suit

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[6] Because it concluded that Lincoln's claims are barred by the *Rooker-Feldman* doctrine and *Younger* equitable restraint, the trial court did not have to reach the issue of whether Lincoln's claims for damages against Judge Jergins personally are barred by absolute judicial immunity. On appeal, Lincoln appears to still contest Judge Jergins' immunity to his § 1983 damages claims, though not in a coherent manner and not as a separately stated issue. *See, e.g.,* Br. App. 10-11, 18.

under 42 U.S.C. § 1983 for acts in excess of his jurisdiction, so long as the acts themselves were judicial").

As for Lincoln's selective excerpts from the Senate committee report, it is not appropriate to "look to legislative history when the statute is clear on its face." *Thompson v. Goetzmann*, 337 F.3d 489, 495 (5th Cir. 2003). Even if the amendment were ambiguous, which it is not, a more responsible examination of the legislative history further exposes the fallacy of Lincoln's contentions.

The Senate committee declared that the added language "restores the doctrine of judicial immunity to the status it occupied prior to the Supreme Court's decision in *Pulliam v. Allen* . . ."[7] 1996 U.S.C.C.A.N. 4216. Sections 1983 and 1988 "are now amended to preclude awards of costs and attorney's fees against judges for acts taken in their judicial capacity, and to bar injunctive relief unless declaratory relief is inadequate." *Id*. at 4217.

After the passage quoted by Lincoln (Br. App. 11), concerning "conduct 'clearly in excess' of a judge's jurisdiction," the report concludes that the amendment

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[7] *Pulliam v. Allen*, 466 U.S. 522, 104 S.Ct. 1970 (1984), relied on by Lincoln in his appellate brief at 14, 21, held simply "that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." *Id.* at 541-42, 104 S.Ct. at 1981. But the Court went on in the next sentences to explain that it "express[ed] no opinion as to the propriety of the injunctive relief awarded in this case." *Id.* at 542-43, 104 S.Ct. at 1981. Consequently, *Pulliam* does not stand for the proposition that a plaintiff may sue a state district judge under § 1983 for injunctive relief without overcoming the *Rooker-Feldman* barrier.

"restores the full scope of judicial immunity lost in *Pulliam* and will go far in eliminating frivolous and harassing lawsuits which threaten the independence and objective decision-making essential to the judicial process." *Id.*

2. The 1996 Amendment to § 1983 did not Expand the Availability of Declaratory and Injunctive Relief Against Judges.

The legislative history also declares that the Act "amends 42 U.S.C. 1983 to bar a Federal judge from granting injunctive relief against a State judge, unless declaratory relief is unavailable or the State judge violated a declaratory decree." *Id*. Even as to declaratory relief, the 1996 amendment did not expand a plaintiff's entitlement to sue judges under § 1983 for judicial acts. "The [1996] amendment's purpose was to overrule the Supreme Court's decision in *Pulliam v. Allen* (holding that judicial immunity was not a bar to awards of attorney's fees and costs or to demands for injunctive relief), not to alter the landscape of declaratory relief." *Brandon E. ex rel. Listenbee v. Reynolds*, 201 F.3d 194, 197 (3rd Cir. 2000) (citation omitted).

> The . . . amendatory language to § 1983 does not expressly authorize suits for declaratory relief against judges. . . . The language is not an express authorization of declaratory relief, but simply a recognition of its availability or unavailability, depending on the circumstances, which the statute does not delineate.

Id.

C. The Trial Court Correctly Held That The Plaintiff's Suits Are Jurisdictionally Barred Under The *Rooker-Feldman* Doctrine.

"Dismissal for lack of subject matter jurisdiction arises when it appears certain that the plaintiffs cannot prove any set of facts in support of their claim which would entitle them to relief." *Bank One Texas v. U.S.*, 157 F.3d 397, 403 (5th Cir. 1998) (brackets and internal quotation marks omitted). "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Mississippi, Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1009 (5th Cir. 1998).

Judge Pitman correctly concluded that under the *Rooker-Feldman* doctrine the district court lacked jurisdiction to entertain Lincoln's lawsuits. 6 R. [390] 1323-25; 3 R. [402] 633-37; R.E. 3 at 12-16, 19 at 9-11. In his issues II-III, Lincoln attacks the trial court's application of the *Rooker-Feldman* doctrine to his cases. In issue V, Lincoln asks this Court to "limit or abandon" the doctrine, which he characterizes as the product of "extreme judicial activism to undercut civil rights laws and otherwise controvert the will of Congress." Br. App. 18, 20 n. 3.

If the *Rooker-Feldman* doctrine is to be limited or abandoned, it must be by the Supreme Court, which fashioned it in the first place. *D.C. Court of Appeals v. Feldman*, 460 U.S. 462,103 S.Ct. 1303 (1983); *Rooker v. Fid. Trust Co.*, 263 U.S.

413, 44 S.Ct. 149 (1923). In more than five years since the Notre Dame symposium touted by Lincoln (Br. App. 19-20), the Supreme Court has not accepted the invitation for the "partial or complete abandonment of the *Rooker-Feldman* doctrine." As shown in the preceding section, Lincoln's argument, that the effect of the 1996 amendment to § 1983 was to "abolish or severely modify the doctrine construction now routinely offered in this Circuit" (Br. App. 21), is vacuous.

Lincoln's issue V is a tacit admission that, as heretofore applied by this Court, *Rooker-Feldman* is an insurmountable barrier to his claims. At the heart of Lincoln's challenge is the propriety of state court orders enforcing the custody provisions of the divorce decree – i.e., prohibiting communications by Lincoln designed to alienate the child from the custodial parent.

"[F]ederal district courts lack jurisdiction to entertain collateral attacks on state judgments." *U.S. v. Shepherd*, 23 F.3d 923, 924 (5th Cir. 1994). "A federal complainant cannot circumvent this jurisdictional limitation by asserting claims not raised in the state court proceedings or claims framed as original claims for relief." *Id*. Consequently, "federal courts do not have subject matter jurisdiction over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." *Musslewhite v. State Bar of Texas*, 32 F.3d 942, 946 (5th Cir.

1994).

It follows that "federal courts do not have the power to modify or reverse state court judgments." *American Airlines, Inc. v. Department of Transp.*, 202 F.3d 788, 801 n. 9 (5th Cir. 2000). "[A] lengthy line of decisions in our court holds that litigants may not obtain review of state court actions by filing complaints about those actions in lower federal courts cast in the form of civil rights suits." *Brinkmann v. Johnston*, 793 F.2d 111, 113 (5th Cir. 1986) (per curiam).

Instead, "judicial errors committed in state courts are for correction in the state court systems." *Matter of Reitnauer*, 152 F.3d 341, 343 n. 9 (5th Cir. 1998). *Rooker-Feldman* especially applies to state court orders "which may never take final effect because they remain subject to revision in the state appellate system." *Hale v. Harney*, 786 F.2d 688, 691 (5th Cir. 1986).

"*Rooker-Feldman* applies whether or not the federal and state causes of action are technically the same for purposes of claim preclusion or whether all of the familiar conditions for issue preclusion are met." *Mandel v. Town of Orleans*, 326 F.3d 267, 271 (1st Cir. 2003). "It is not necessary that the federal action formally seek to invalidate the state judgment; it is enough [for *Rooker-Feldman*] if 'the federal claim succeeds only to the extent that the state court wrongly decided the issues before it.'" *Mandel*, 326 F.3d at 271. *See also Newman v. State of Ind.*, 129

F.3d 937, 942 (7th Cir. 1997).

The policy behind the doctrine – that "[e]rrors committed by state judges in state courts are for correction in the state court system," *Brinkmann*, 793 F.2d at 113 – logically extends to interlocutory orders by state trial judges. Thus, "litigants may not obtain review of state court *actions* by filing complaints about those actions in lower federal courts cast in the form of civil rights suits." *Id*. (emphasis added). The *Rooker-Feldman* "principles are not limited to actions which candidly seek review of the state court decree; they extend to others in which the constitutional claims presented in federal court are inextricably intertwined with *the state court's grant or denial of relief*." *Id*. (emphasis added; brackets and internal quotation marks omitted).

Lincoln twice sought intermediate state appellate review of the orders by Judge Jergins that he attempts to challenge in this case.[8] Br. App. 10-11, 25-26 & n. 7 (citing *In re Lincoln*, 114 S.W.3d 724 (Tex. App. – Austin 2003, no pet. his.)). If the Austin Court of Appeals erred (which it did not), Lincoln's remedy was to seek review by the Texas and, if necessary, U. S. Supreme Court, rather than to bring a §

[8] "This is the second mandamus proceeding Lincoln has filed in this Court arising from his divorce case. On June 12, 2003, this Court denied his other petition for writ of mandamus [in which] Lincoln complained . . . of alleged venue and freedom of speech violations by Judge Jergins." *In re Lincoln*, 114 S.W.3d 724, 725 n. 1 (Tex. App. – Austin 2003, no pet. his.).

1983 action in federal district court. *Matter of Reitnauer*, 152 F.3d at 343 n. 8.

D. The Trial Court Correctly Abstained Pursuant To *Younger* Principles Of Equitable Restraint.

Judge Pitman correctly found "that the second and third requirements for abstention are clearly met in this action."[9] 6 R. [390] 1321; 3R. [402] 631; R.E. 3 at 10, 19 at 7. While noting some uncertainty regarding the "ongoing" nature of the proceedings at issue, the first requirement, nevertheless, "[t]o the degree the Plaintiffs are attacking orders issued in a pending state court action, the Court conclude[d] the *Younger* abstention doctrine applies to bar consideration of Plaintiffs' claims." 6 R. [390] 1322,1325; 3 R. [402] 629, 632; R.E. 3 at 8 & 11, 19 at 8 & 11. Lincoln challenges this ruling in his issues III, IV, and VI.

Even in the rare cases when federal courts have concluded that *Rooker-Feldman* did not bar a federal court challenge to a state family court ruling, they have applied *Younger* equitable restraint principles to such a suit. *H.C. ex rel. Gordon v. Koppel*, 203 F.3d 610, 613 (9th Cir. 2000) (citing cases). "[F]ederal courts consistently have shown special solicitude for state interests in the field of family and

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[9] Citing *Wightman v. Texas Supreme Court*, 84 F.3d 188, 189 (5th Cir. 1996) ("the Supreme Court set out a three-part test describing the circumstances under which abstention was advised: (1) the dispute should involve an 'ongoing state judicial proceeding;' (2) the state must have an important interest in regulating the subject matter of the claim; and (3) there should be an 'adequate opportunity in the state proceedings to raise constitutional challenges.'") (citing *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521 (1982)).

family-property arrangements." *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 512, 102 S.Ct. 3231, 3237 (1982) (internal quotation marks omitted). Consequently, federal courts regularly reject "challenges based on alleged constitutional defects collateral to the actual custody decision [as] an unprecedented expansion of the jurisdiction of the lower federal courts." *Id.* at 512, 102 S.Ct. at 3237-38.

Pursuant to this policy, even where diversity of citizenship is satisfied, federal courts decline jurisdiction over family law disputes.

> Abstention from the exercise of diversity jurisdiction in cases involving intrafamily relations is a policy of long standing in the federal courts. . . . The reasons underlying this policy of abstention include the strong state interest in domestic relations matters, the competence of state courts in settling family disputes, the possibility of incompatible federal and state court decrees in cases of continuing judicial supervision by the state, and the problem of congested dockets in federal courts.

Congleton v. Holy Cross Child Placement Agency, Inc., 919 F.2d 1077, 1078 (5th Cir. 1990) (internal quotation marks omitted). "The decisive factor, we have said, is not the formal label attached to the claim (tort, contract, etc.), but . . . . whether hearing the claim will necessitate the court's involvement in domestic issues, i.e., whether it will require inquiry into the marital or parent-child relationship." *Id.* at 1079 (internal quotation marks omitted).

These considerations apply with special force to the attempt, under the aegis

of § 1983, to induce a federal court to intervene in state family court proceedings. "Even when brought under the guise of a federal question action, a suit whose substance is domestic relations generally will not be entertained in a federal court." *Firestone v. Cleveland Trust Co.*, 654 F.2d 1212, 1215 (6th Cir. 1981). *See Mann v. Conlin*, 22 F.3d 100, 106 (6th Cir.1994) (holding that *Younger* abstention was appropriate in a § 1983 action alleging that a state court judge violated the plaintiff's due process rights in a custody battle).

"Modern federal constitutional law is so encompassing, however, that parties to domestic relations disputes are sometimes tempted to try to transform a routine domestic relations dispute into a federal case by clothing it in a federal constitutional garb, unmindful of the subtle doctrines that have evolved to prevent that kind of federal power grab." *Newman*, 129 F.3d at 939. *See also Congleton*, 919 F.2d at 1078-79 ("federal courts should be vigilant to discern the essential nature of a dispute, not permitting parties to avail themselves of a federal forum for their domestic claims by cloaking them in the trappings of a . . . tort proceeding").

A federal court is not to entertain a § 1983 suit "seeking pre-appeal interference with a state judicial proceeding" premised merely "on the assumption that state [appellate] judges will not be faithful to their constitutional responsibilities." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611, 95 S.Ct. 1200, 1203 (1975). *Younger*

principles cannot be evaded "merely because the losing party in the state court of general jurisdiction believes that his chances of success on appeal are not auspicious." *Id*. at 610, 95 S.Ct. at 1203.

If Lincoln could support even a portion of his conclusory assertions, he would have grounds for mandamus from a Texas court of appeals. *In re CSX Corp.*, 124 S.W.3d 149, 151 (Tex. 2003) (orig. proc.). The Austin Court of Appeals has shown itself willing to grant mandamus relief against a trial court's unreasonably abusive order in a suit affecting the parent-child relationship. *E.g.*, *see In re Vernor*, 94 S.W.3d 201, 209-12 (Tex. App. – Austin 2002, no pet.). That Lincoln has failed to persuade that court of the merits of his arguments is no justification for federal court intervention into state family law proceedings.

Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 104 S.Ct. 2321 (1984), does not diminish the application of *Younger v. Harris* for this case, as suggested by Lincoln. Br. App. 23. The *Midkiff* decision did not alter the law on *Younger* abstention; it simply found it inapplicable to that case. The significant distinction between *Midkiff* and Lincoln's suits – aside from the fact that the former was not a domestic relations case – is that at the time the *Midkiff* suit was filed in federal court, "no state judicial proceedings were in process." *Id.* at 238, 104 S.Ct. at 2328.

In *Midkiff*, the Court noted that in its prior decisions finding *Younger*

abstention inappropriate, "state judicial proceedings had not been initiated at the time proceedings of substance took place in federal court." *Id.* "Since *Younger* is not a bar to federal court action when state judicial proceedings have not themselves commenced, abstention for HHA's administrative proceedings was not required." *Id.* at 239, 104 S.Ct. at 2328 (citations omitted). It is undisputed that state judicial proceedings had long been in progress when Lincoln filed his suits.

The one case in which this Court has examined the *Midkiff* holdings on *Younger* abstention[10] recognized this distinction. Properly characterized, the relevant holding in *Midkiff* is "that if substantial proceedings have occurred in federal court, that court need not abstain. . . . Where substantial [federal] proceedings have begun, the federal court is allowed to proceed to prevent the state from employing abstention as a means to delay litigation." *Royal Insurance Co. of America v. Quinn-L Capital Corp.*, 3 F.3d 877, 886 (5th Cir. 1993) (discussing *Midkiff*, 467 U.S. at 238, 104 S.Ct. at 2328). That, of course, is the opposite of the situation in Lincoln's case. Moreover:

> [I]n the case of *Younger* abstention, the Court was concerned with federal court interference with a state's ability to function. By blocking proceedings involving state governments, federal courts could interfere unduly with the state's ability to govern. These federalism concerns are

[10] Other decisions from this Court have discussed *Midkiff*'s rulings on *Pullman* abstention and takings claims.

> implicated no matter when the federal and state suits are filed: A state's ability to conduct proceedings is compromised if the officials conducting those proceedings are involved in discovery in federal court.

Royal Insurance, 3 F.3d at 886 (footnote omitted).[11]

Mitchum v. Foster, 407 U.S. 225, 92 S.Ct. 2151 (1972) (Br. App. 14), also is of no help to Lincoln. In that decision, the Supreme Court did "not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Regions Bank of Louisiana v. Rivet*, 224 F.3d 483, 495 (5th Cir. 2000) (quoting *Mitchum* at 243, 92 S.Ct. at 2162). "[T]he cases cited in *Mitchum* make clear that the federal courts will not casually enjoin the conduct of pending state court proceedings . . ." *Cousins v. Wigoda*, 409 U.S. 1201, 1206, 92 S.Ct. 2610, 2614 (1972).

Thus, "*Mitchum v. Foster* . . . does not approve unlimited federal intervention in pending state court proceedings." *American Radio Ass'n v. Mobile S.S. Ass'n, Inc.*, 483 F.2d 1, 6 (5th Cir. 1973). "Even though an action brought under § 1983 . . . is within those exceptions [recognized by] *Mitchum v. Foster*, the underlying notions of federalism which Congress has recognized in dealing with the relationships between federal and state courts still have weight." *Rizzo v. Goode*, 423 U.S. 362,

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[11] Likewise, other circuits have not construed *Midkiff* as minimizing the reach of *Younger*. *E.g.*, *see Doe v. State of Conn., Dept. of Health Services*, 75 F.3d 81, 84-86 (2nd Cir. 1996); *Lebbos v. Judges of Superior Court, Santa Clara County*, 883 F.2d 810, 813-16 (9th Cir. 1989).

379, 96 S.Ct. 598, 608 (1976) (citation omitted). "[T]he concepts of comity and federalism teach that we should be hesitant to enjoin state court proceedings, for such injunctions create federal-state friction and inject delays, duplication and added expense into the litigation process." *American Radio Ass'n*, 483 F.2d at 7.

E. The Trial Court Correctly Dismissed The Plaintiff's Claims Without Discovery Or An Evidentiary Hearing.

In his issues I, III, IV, and VI, Lincoln complains that it was error for the trial court to dismiss his claims without allowing discovery or considering the evidence he offered in support of three motions for partial summary judgment. Lincoln's argument that the 1996 amendment of § 1983 created "an unflagging duty . . . to hear and consider evidence whether declaratory relief alone will be inadequate" – Br. App. 13 (emphasis omitted) – is refuted in II-B above.

"A district court has 'broad discretion in all discovery matters', and 'such discretion will not be disturbed ordinarily unless there are unusual circumstances showing a clear abuse.'" *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 855 (5th Cir. 2000).

"In ruling on a motion to dismiss for lack of subject matter jurisdiction, a court *may* evaluate (1) *the complaint alone*, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts

plus the court's resolution of disputed facts." *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 424 (5th Cir. 2001) (emphasis added). It is only "[w]hen the court bases its decision on its resolution of disputed facts [that] it must give the plaintiff an opportunity for discovery and a hearing that is appropriate to the nature of the motion to dismiss."[12] *Trans Chem. Ltd. v. China Nat'l Mach. Import & Export Corp.*, 161 F.3d 314, 319 (5th Cir.1998) (adopting *In re Arbitration Between Trans Chem. Ltd. & China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. 266, 274 (S. D. Tex. 1997)).

In this case, the trial court did not base its dismissal for lack of jurisdiction on the resolution of disputed facts. Instead, it accepted the plaintiff's specific factual pleadings, exclusive of mere conclusory allegations, as if they were true. 6 R. [390] 1320; 3 R. [402] 629-30; R.E. 3 at 8-9, 19 at 6.

F. The Trial Court Could Correctly Have Dismissed The Plaintiff's Claims On Their Merits.

"[T]he court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits." *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001) (internal quotation marks omitted). Because the trial court correctly determined that it lacked jurisdiction, it did not reach the merits of Lincoln's claims,

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[12] Even then, "the 'court is given . . . the discretion to devise a method for making a [factual] determination with regard to the jurisdictional issue." *Id.*

nor need this Court. Nevertheless, because Lincoln asserts the substantive merits in his appeal, Judge Jergins, out of prudence, will do so as well.

Under FED. R. CIV. PRO. 12(b)(6), "[t]he court may dismiss a claim when it is clear that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief," that is, when "the plaintiff would not be entitled to relief under any set of facts or any possible theory that he could prove consistent with the allegations in the complaint." *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir.1999). "When deciding a motion to dismiss under Rule 12(b)(6), the district court must accept the plaintiff's factual allegations as true and resolve doubts as to the sufficiency of the claim in the plaintiff's favor." *Vulcan Materials Co. v. City of Tehuacana*, 238 F.3d 382, 387 (5th Cir. 2001). "However, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *United States ex rel. Bain v. Georgia Gulf Corp.*, 386 F.3d 648, 653 (5th Cir. 2004).

In the court below, Lincoln asserted a bewildering array of constitutional claims, including, for example, those for alleged breaches of his constitutional right to obtain a divorce, of the constitutional guarantee of a republican form of

government,[13] and of the constitutional protection against bills of attainder. But on appeal he has chosen to assert only three: for alleged deprivations of rights to (1) petition for redress of grievances, (2) free speech, and (3) due process. Br. App. 25.

1. Judge Jergins is Absolutely Immune to Lincoln's § 1983 Claims for Damages for the Alleged Deprivations.

Even if Lincoln could surmount the obstacles of *Rooker-Feldman* and *Younger*, and even if he could support his allegations of the foregoing constitutional deprivations, his claims for damages against Judge Jergins would still have to be dismissed. "[J]udicial officers enjoy absolute immunity from liability for damages for acts performed in the exercise of their judicial functions." *Krueger v. Reimer*, 66 F.3d 75, 77 (5th Cir. 1995) (per curiam).

Lincoln argues that because his petition in Travis County to dissolve his alleged post-divorce common law remarriage deprived Judge Jergins of jurisdiction under the Texas Family Code, the defendant is stripped of his judicial immunity to Lincoln's § 1983 claims for damages. As acknowledged by Lincoln (Br. App. 26 n. 7), the Austin Court of Appeals was unpersuaded by Lincoln's jurisdictional argument. Consequently, abrogation of Judge Jergins' immunity would require a

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[13] *See Hanson v. Town of Flower Mound*, 679 F.2d 497, 503 (5th Cir. 1982) (citing *Baker v. Carr*, 369 U.S. 186, 218-26, 82 S.Ct. 691, 710-14 (1962)); *O'Hair v. Hill*, 641 F.2d 307, 310 (5th Cir. 1981) (citing *Luther v. Borden*, 48 U.S. 1 (7 How. 1) (1849), *affirmed in relevant part*, 675 F.2d 680, 683 & n. 5 (5th Cir. 1982) (en banc).

federal court to second guess a Texas court of appeals on a question of Texas law.

Moreover, "the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge." *Stump v. Sparkman*, 435 U.S. 349, 356, 98 S.Ct. 1099, 1105 (1978). So long as Judge Jergins was conducting the sort of proceedings he was "generally empowered to conduct" as a state district judge, he was acting within his jurisdiction for purposes of immunity. *Holloway v. Walker*, 765 F.2d 517, 523 (5th Cir. 1985). As noted in II-B-1 above, judicial immunity law distinguishes between acts that are merely in excess of the judge's jurisdiction, which are immunized, and acts that are "in the *clear* absence of *all* jurisdiction." *Stump*, 435 U.S. at 357 n. 7, 98 S.Ct. at 1105 n. 7) (emphasis added).

For the rulings of a judge to constitute "non-judicial acts" sufficient to deprive him of immunity, it is not enough to show (if the plaintiff could) that they are erroneous or unauthorized. "A judge's acts are judicial in nature if they are 'normally performed by a judge' and the parties affected 'dealt with the judge in his judicial capacity.'" *Boyd v. Biggers*, 31 F.3d 279, 284 (5th Cir. 1994) (quoting *Mireles*, 502 U.S. at 12, 112 S.Ct. at 288 (quoting *Stump*, 435 U.S. at 362, 98 S.Ct. at 1107)). "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority . . ." *Mays v. Sudderth*, 97 F.3d 107, 110 (5th Cir. 1996) (quoting *Stump*, 435 U.S. at 356-57, 98 S.Ct. at 1105

(quoting *Bradley v. Fisher*, 13 Wall (80 U.S.) 335, 351 (1872)).

Alleged abuses equivalent to and well in excess of Lincoln's hyperbolic charges against Judge Jergins have been held insufficient to overcome judicial immunity. *See, e.g., Brandley v. Keeshan*, 64 F.3d 196, 200-01 (5th Cir. 1995) (surveying cases). Judge Jergins is immunized because making rulings and announcing orders from the bench are functions "normally performed by a judge" and the parties, including Lincoln, indisputably "dealt with the judge in his judicial capacity." It would not matter if the plaintiff had a plausible argument (which he does not) that the specific orders in question were not normal judicial functions. *See Mireles*, 502 U.S. at 12-13, 112 S.Ct. at 288-89.

2. The Plaintiff has no Viable Claim for Violation of his Son's Right to Petition for Redress of Grievances.

Lincoln asserts that the trial court's alleged refusal to take the testimony of his minor son denied the child his right under the First Amendment and TEX. CONST. art. I §§ 27 and 29[14] to petition government for redress of grievances. At the outset, for the reasons presented in note 1 above, Lincoln lacks standing to assert his son's constitutional rights.

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[14] Note that article I § 29 merely states a self-evident truism, that official acts contrary to the Bill of Rights are invalid. 12A TEX. JUR. 3d Constitutional Law § 129 (citing *Faulk v. Buena Vista Burial Park Ass'n*, 152 S.W.2d 891, 894 (Tex. Civ. App. – El Paso 1941) ("This section is so plain that construction thereof is unnecessary")).

Under the First Amendment, the right to petition has never been extended to testimony; much less has it been a vehicle for federal courts to intrude on a state trial court's discretion as to what testimony to hear. Under the Texas Constitution, the right to have officials "consider" a "petition" "does not entitle [plaintiff] to any specific due process." *Graham v. Texas Bd. of Pardons and Paroles*, 913 S.W.2d 745, 752 (Tex. App. – Austin 1996, writ dismissed w.o.j.). A constitutional right to testify has been recognized only for criminal defendants.[15] *Sayre v. Anderson*, 238 F.3d 631, 634 (5th Cir. 2001).

3. The Plaintiff has no Viable Claim for Violation of his Right to Freedom of Speech.

Lincoln charges that the orders he characterizes as "the gag order" (*see* Statement of Facts) infringed his First Amendment freedom of speech. But he has offered no authorities holding that the First Amendment bars a state family court judge from restricting a non-custodial parent's communications and interactions with his minor child when they are calculated to subvert the court-ordered custody arrangements.

Instead, Lincoln has relied on cases concerning prior restraint on the press,

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[15] "This circuit has not yet decided the full reach of a criminal defendant's right to testify or what degree of substantiation is required in a . . . right-to-testify claim to trigger a hearing." *U.S. v. Martinez*, 181 F.3d 627, 628 (5th Cir. 1999).

which has been distinguished from "gag orders" on parties and attorneys. *See U.S. v. Brown*, 218 F.3d 415, 424 (5th Cir. 2000) ("The Supreme Court and other Courts of Appeals have recognized a 'distinction between participants in the litigation and strangers to it,' pursuant to which gag orders on trial participants are evaluated under a less stringent standard than gag orders on the press"); *Levine v. U.S. Dist. Court for Cent. Dist. of California*, 764 F.2d 590, 595 (9th Cir. 1985) ("The Supreme Court has suggested that it is appropriate to impose greater restrictions on the free speech rights of trial participants than on the rights of nonparticipants").

In this case, Judge Jergins prohibited communications that might tend to undermine the custody provisions of the final divorce decree. *See* Judge Debra H. Lehrmann, *The child's voice: An analysis of the methodology used to involve children in custody litigation*, 65 TEX. B. J. 882, 886 (2002) ("Psychologists have told us for years that children should not be put in the middle of conflict between divorcing spouses"). Consequently:

> Accepting [the plaintiff's] argument would require us to direct the trial judge in the practical management and operation of his courtroom, a course we are loath to take in any but the most extreme circumstances. . . . Second, on this inquiry we remain in a poor position from which to second guess the trial judge on the relative costs and benefits to the efficient administration of justice of [alternative] protective measures.

Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 432 (5th Cir. 1981).

4. The Plaintiff has no Viable Claim for Deprivation of his Liberty Without Due Process.

Apart from his substantive due process claim for abridgement of free speech, Lincoln contends that because the prohibited communications had not been "raised as an issue by either party" in the family court proceedings, therefore "Jergins' orders lacked due process notice or opportunity to object." Br. App. 25. In his pleadings, Lincoln does not allege that had no notice of time, place, and subject matter of the hearings; nor does he contend that he did not attend and participate in the proceedings. Instead, he complains merely that Judge Jergins granted relief which neither his ex-wife nor the ad litem attorney had requested.

Texas trial courts have broad discretion to fashion appropriate remedies, regardless of what a prevailing party has requested as relief. *E.g., see Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 721 (Tex. 2003); *Storms v. Reid*, 691 S.W.2d 73, 75 (Tex. App. – Dallas 1985, no writ). Lincoln offers no authority suggesting that such discretion is unconstitutional.

"As long as an individual receives notice and a hearing that satisfies federal due process, any [alleged] violations of state law are completely irrelevant to constitutional analysis." *Ramirez v. Ahn*, 843 F.2d 864, 867 (5th Cir. 1988). "We emphasize, as we have before, that the Constitution does not mandate error-free

decision making." *Id.*, 843 F. 2d at 869.

CONCLUSION

In view of all the foregoing, the defendant/appellee Judge Jergins respectfully urges that the judgments below be in all things affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument has been sent, via United States Mail, to all counsel of record on this the 14th day of January, 2005.

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of Fed R. App. P. R. 32(a)(7).

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