

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 26-1265 (L) & 26-1404 (M)

Caption [use short title]

Motion for: Panel Reconsideration and
Reconsideration En Banc

Smith & Dees v. D'Agostino et al

Set forth below precise, complete statement of relief sought:

Vacatur of the Courts September 18, 2026

order; Reinstatement of Appeal Nos. 26-1265

and 26-1404 for ordinary merits review; and

withdrawal or appropriate narrowing of the

prospective leave-to-file warning.

MOVING PARTY: Ethan Smith / Jennifer Dees

OPPOSING PARTY: _____

☐ Plaintiff

☐ Defendant

☒ Appellant/Petitioner

☐ Appellee/Respondent

MOVING ATTORNEY: Pro-Se

OPPOSING ATTORNEY: _____

[name of attorney, with firm, address, phone number and e-mail]

16 Grant Hill Rd. Clifton Park, NY 12065

E- 518-817-7718; J- 720-799-6190

Ethan.Smith@gmail.com

MommaBearJenny@gmail.com

Court- Judge/ Agency appealed from: U.S. District Court for the Northern District of N.Y. / Judge Vacca

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):

☐ Yes

☒ No (explain): Movants are Pro Se

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND
INJUNCTIONS PENDING APPEAL:

Has this request for relief been made below?

☐ Yes

☐ No

Has this relief been previously sought in this court?

☐ Yes

☐ No

Requested return date and explanation of emergency: _____

Opposing counsel's position on motion:

☐ Unopposed

☐ Opposed

☒ Don't Know

Does opposing counsel intend to file a response:

☐ Yes

☐ No

☒ Don't Know

Is the oral argument on motion requested?

☒ Yes

☐ No (requests for oral argument will not necessarily be granted)

Has the appeal argument date been set?

☐ Yes

☒ No If yes, enter date: _____

Signature of Moving Attorney: Jenni Dees

Date: 09/24/2026

Service: ☐ Electronic ☒ Other [Attach proof of service]

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Appeal No. 26-1265 (Lead) & Appeal No. 26-1404 (Member)

ETHAN D. SMITH and JENNIFER L. DEES,
Plaintiffs-Appellants,

v.

MAE A. D'AGOSTINO, et al.,
Defendants-Appellees.

**APPELLANTS' MOTION FOR PANEL RECONSIDERATION AND
RECONSIDERATION EN BANC PURSUANT TO FRAP 40 AND LOCAL
RULE 40.2**

This proceeding presents questions of exceptional constitutional and public importance and warrants panel reconsideration and reconsideration en banc because the September 18, 2026, Order conflicts with controlling Supreme Court and Second Circuit precedent governing frivolousness, appellate review, judicial petitioning, access to the courts, and neutral adjudication. The Order used a threshold “no arguable basis” determination to terminate direct § 1291 appeals before merits briefing despite multiple preserved federal questions grounded in precedent and record evidence, then counted those terminated appeals among “unsuccessful” proceedings supporting a warning against future “duplicative, vexatious, or clearly meritless” filings. The resulting questions extend beyond Appellants: whether an arguable federal claim may be denied ordinary appellate review, whether independent federal injuries may be collapsed into the label of an

underlying domestic-relations dispute, and whether that very denial of review may then become part of the predicate for restricting future judicial petitioning. Those questions implicate the First Amendment right to petition, due process, federal appellate jurisdiction, and public confidence in an impartial judiciary.

This motion is timely because it is filed within 14 days of the Court's September 18, 2026, Order. See LR 27.1(g); LR 40.2.

First, the Order presents a fundamental question concerning the limits of threshold appellate disposition under the appellate jurisdiction Congress expressly vested in this Court through 28 U.S.C. § 1291, because it dismissed these direct appeals as “lack[ing] an arguable basis either in law or in fact.” Congress provides that courts of appeals “shall have jurisdiction” over final district-court judgments. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821), holds that federal courts may not decline jurisdiction lawfully conferred. *United States v. Davis*, 598 F.3d 10, 13–14 (2d Cir. 2010), describes disposition without full merits briefing as a “rare exception,” and *United States v. Fleming*, 5 F.4th 189, 194–95 (2d Cir. 2021), confirms that even an “uphill battle” may not be summarily terminated unless it truly “lacks an arguable basis either in law or in fact.”

Second, the Order conflicts with Supreme Court precedent distinguishing unsuccessful litigation from genuinely baseless litigation. *Neitzke v. Williams*, 490 U.S. 319, 325–30 (1989), and *Coppedge v. United States*, 369 U.S. 438, 444–48

(1962), distinguish losing claims from truly frivolous ones and require an independent determination whether any nonfrivolous appellate issue remains. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387–88 (2011), *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741–49 (1983), and *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 524–33 (2002), likewise protect reasonably based judicial petitioning and recognize that litigation does not become baseless merely because it fails.

Third, characterizing these matters as “related to Appellant Smith’s divorce or custody proceedings” presents an exceptional federal-jurisdiction, Petition Clause, and courthouse-access question. Appellants alleged independent constitutional injuries outside the matrimonial proceeding, and Dees was never a party to that action, yet her claims were swept into the same domestic-relations history and prospective filing warning. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284, 292–94 (2005), *Skinner v. Switzer*, 562 U.S. 521, 531–33 (2011), *Ankenbrandt v. Richards*, 504 U.S. 689, 701–05 (1992), and *Hoblock v. Albany County Board of Elections*, 422 F.3d 77, 85–88 (2d Cir. 2005), require examination of the actual source of the federal injury, not categorical relabeling. Because the Order also aggregated distinct matters as “unsuccessful” while warning of a possible leave-to-file sanction, *Safir v. U.S. Lines, Inc.*, 792 F.2d 19, 24–25 (2d Cir. 1986), and *Moates v. Barkley*, 147 F.3d 207, 208–09 (2d

Cir. 1998), make individualized consideration and procedural safeguards directly relevant.

Fourth, the appeals preserved an independently arguable neutral-tribunal question. *In re Murchison*, 349 U.S. 133, 136 (1955), *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 858–62 (1988), *Liteky v. United States*, 510 U.S. 540, 548–56 (1994), and 28 U.S.C. § 455(a) establish that due process protects not only actual impartiality, but public confidence in the appearance of neutral adjudication. Because § 455(a) turns on whether impartiality “might reasonably be questioned,” the preserved cumulative appearance issue did not require proof of actual bias to be legally arguable. It therefore presented a distinct question for ordinary appellate review, not one having “no arguable basis.”

Fifth, the sua sponte vacatur of eight materially different Clerk-entered defaults presented an independently arguable Rule 55 and due-process question. *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 95–98 (2d Cir. 1993), and *SEC v. McNulty*, 137 F.3d 732, 738–40 (2d Cir. 1998), require consideration of willfulness, prejudice, and a meritorious defense—necessarily defendant-specific inquiries. Vacating all eight defaults together, including seven never challenged under Rule 55(c), without individualized analysis presented a preserved question under this Court’s own precedent, not one having “no arguable basis.”

Taken together, these preserved questions were not inarguable or fanciful. They were concrete federal issues grounded in precedent and record evidence and therefore entitled to ordinary appellate review.

ARGUMENT

I. TERMINATING THESE § 1291 APPEALS BEFORE ORDINARY MERITS REVIEW THREATENS THE APPELLATE STRUCTURE CONGRESS CREATED

Congress expressly provides that courts of appeals “shall have jurisdiction” over appeals from final district-court decisions. 28 U.S.C. § 1291. These were direct appeals from final federal judgments—not discretionary certiorari proceedings or mandamus requests. *Cohens* supplies the corresponding structural principle: federal courts have “no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given.” Jurisdiction lawfully conferred is therefore not merely formal or optional.

Davis and *Fleming* define the narrow boundary for terminating the appellate process before ordinary merits briefing. *Davis* describes such disposition as a “rare exception” and procedural “short-cut,” distinguishing appeals that may be easy to reject from those that are genuinely “inarguable or fanciful.” *Fleming* confirms that even where the result appears obvious and the appellant faces an “uphill battle,” summary disposition remains improper unless the appeal “lacks an arguable basis either in law or in fact.” Although those cases arose on summary affirmance, their

importance here is structural: they establish this Court's own distinction between an appeal likely to lose and one so devoid of arguable support that ordinary appellate consideration may be bypassed.

That distinction is critical because the Order employed that exact “no arguable basis” standard. Yet these appeals arose from a substantially litigated federal action involving service, appearances, Rule 12 practice, oppositions, unresolved motions, eight Clerk-entered defaults, reconsideration, postjudgment proceedings, and multiple preserved federal questions. The issue was therefore not whether Appellants had already proved entitlement to reversal, but whether the preserved appellate questions were so devoid of legal or factual support that the ordinary reviewing process could lawfully be bypassed altogether.

The question of exceptional importance is:

Whether Congress's grant of direct appellate jurisdiction under § 1291 permits final-judgment appeals presenting preserved, legally arguable federal questions grounded in precedent and record evidence to be terminated before ordinary merits review—or whether doing so converts threshold screening into a substitute for appellate adjudication and leaves § 1291 jurisdiction formally intact while eliminating its reviewing function in practice.

The danger extends beyond these appeals. If threshold screening turns on whether the Court expects an appellant to lose, *Davis* and *Fleming*'s distinction between losing and inarguable appeals collapses. Immunity, jurisdictional complexity, governmental defendants, or a domestic-relations background may make an appeal difficult; they do not erase the appellate function Congress created.

Where reasoned federal questions remain, § 1291 cannot become a paper right to file an appeal while meaningful review ends at the threshold.

II. THE ORDER'S EXPRESS NEITZKE DETERMINATION CONFLICTS WITH THE VERY STANDARD IT INVOKED

The Order denied IFP status and dismissed both appeals because they “lack[] an arguable basis either in law or in fact,” expressly invoking *Neitzke* and 28 U.S.C. § 1915(e). That is not merely a prediction that Appellants would lose. It is a determination that the appeals were so legally or factually deficient that ordinary appellate adjudication was unnecessary.

Neitzke draws that line deliberately, distinguishing unsuccessful claims from those resting on indisputably meritless legal theories or fanciful factual allegations. *Coppedge* applies the same principle at the appellate stage: good faith exists when **any** issue is nonfrivolous; probable success is unnecessary; and the appellate court must independently determine whether the appeal is so devoid of merit that it would be dismissed even if the litigant could pay. The governing inquiry was therefore not whether Appellants would ultimately prevail, but whether every preserved appellate issue was genuinely beyond reasoned legal or factual argument.

Yet the Order identifies **no** preserved issue it found indisputably meritless, **no** factual contention it found fanciful, and **no** record evidence it found incapable of supporting an arguable appellate question. It does not explain why the complete-

absence-of-jurisdiction immunity issue, the eight defaults, the postjudgment evidentiary rulings, the source-of-injury questions, the First Amendment issues, or the neutral-tribunal challenge crossed the line from potentially unsuccessful to wholly inarguable.

The record itself demonstrates why a categorical “no arguable basis” determination required more. The District Court acknowledged that judicial immunity, *Rooker-Feldman*, and *Younger* could not then be applied “with precision.” Appellants alleged that Judges Wait and Versaci acted in the complete absence of jurisdiction, invoking the recognized limitation on judicial immunity reflected in *Mireles*, *Stump*, and *Bradley*. Later official material included Wait’s statements that “it does not appear the Court has jurisdiction” and that the orders were “not valid.” Whether those facts ultimately satisfy the immunity exception is a merits question; their existence makes the issue capable of reasoned legal and factual dispute.

Appeal No. 26-1404 presented a separate threshold question. Appellants contend that transcript evidence offered to establish jurisdictional facts, continuing alleged retaliation, and appellate good faith was struck before good faith was adjudicated. Whether evidence offered to establish an appeal’s factual foundation may be excluded and the resulting appeal then dismissed as lacking an arguable factual basis is itself an appellate question capable of reasoned adjudication.

The same is true of *Fitzgerald*. The District Court relied on it to support sua sponte frivolousness dismissal, yet this was a fee-paid action that had proceeded through service, appearances, Rule 12 practice, unresolved motions, defaults, and postjudgment proceedings; the court also acknowledged that the action was “not identical” to Appellants’ earlier cases. Whether *Fitzgerald* extends to that materially developed posture may be resolved against Appellants; that does not make the question legally inarguable.

The constitutional significance is broader. *Guarnieri* recognizes resort to courts and governmental forums for resolution of legal disputes as protected petitioning; *Bill Johnson’s* protects ordinary adjudication where genuine factual or legal issues remain; and *BE&K* makes the distinction especially clear: reasonably based but unsuccessful litigation remains constitutionally significant because “the genuineness of a grievance does not turn on whether it succeeds.” Here, Appellants sought continued federal redress while alleging continuing retaliation, new injuries, and later-developed evidence. The constitutional line therefore runs between genuinely baseless litigation and reasoned judicial petitioning—not between litigation that wins and litigation that loses.

The question of exceptional constitutional and public importance is:

Whether a Court may invoke *Neitzke* to dismiss direct § 1291 appeals as lacking any arguable basis in law or fact without identifying what preserved legal theories were indisputably meritless, what factual contentions were fanciful, or why multiple questions supported by precedent and record

evidence were beyond reasoned dispute—or whether such a determination collapses the line *Neitzke*, *Coppedge*, and the Petition Clause precedents preserve between losing litigation and genuinely baseless litigation, allowing threshold IFP screening to substitute for ordinary appellate adjudication and cut off continued judicial petitioning.

III. INDEPENDENT FEDERAL INJURIES CANNOT BE COLLAPSED INTO A “DIVORCE OR CUSTODY” LABEL AND THEN USED TO BUILD A PREDICATE FOR RESTRICTING FUTURE JUDICIAL PETITIONING

The matrimonial action was part of the factual background, but it was not the source of every federal injury alleged here. Appellants asserted constitutional and statutory claims against judicial officers, attorneys, police, CPS/OCFS, school officials, medical providers, governmental officials, corporations, and private individuals—many of whom were not parties to the matrimonial action and whose alleged conduct occurred outside the matrimonial courtroom and outside the adjudication of divorce or custody itself.

Dees makes the overbreadth unmistakable. She was never a party to Smith’s matrimonial action, yet her independent claims were nevertheless swept into the same characterization as matters “related to Appellant Smith’s divorce or custody proceedings” and into the same prospective filing warning. A divorce existing in the background does not transform alleged constitutional violations by police, CPS, schools, medical providers, attorneys, or other outside actors into domestic-relations claims. Under *Exxon Mobil*, *Skinner*, *Hoblock*, and *Ankenbrandt*, the

controlling inquiry is the actual source of the alleged federal injury and the relief sought—not whether a matrimonial dispute appears somewhere in the history.

The chronology is critical. Appellants commenced *Matter of Smith v. Versaci*, CV-25-0188¹, on February 4, 2025, directly challenging Versaci's jurisdiction and authority and the authority of publicly funded appointed attorneys acting in the matrimonial proceeding. They also sought emergency CPLR 7805 relief to preserve the status quo; the AD3 declined to sign the proposed OSC. On February 22, the AG advised that Versaci had elected not to appear pursuant to CPLR 7804(i); AFC Vinson filed the only Answer, and Appellants' March 2, 2025, Reply fully submitted the Article 78. No merits determination followed. Instead, Versaci continued exercising the very authority under challenge and advanced the matter toward trial while Appellants alleged escalating retaliation and continuing constitutional injury.

Appellants then commenced *Smith v. Fisher*, No. 1:25-cv-00199, seeking federal intervention concerning that continuing exercise of allegedly unauthorized

¹ Appellants respectfully request judicial notice under Fed. R. Evid. 201 of the existence and procedural histories of *Matter of Smith & Dees v. Versaci*, No. CV-25-0188; *Smith v. Fisher*, No. 1:25-cv-00199; and *Matter of Smith & Dees v. Wait*, No. EF20262707, solely to establish their existence, timing, and procedural posture, not the truth of disputed allegations contained therein. See *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008); *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991).

judicial and attorney power. By June 2025, *Fisher* too was fully briefed. As of this filing, **neither proceeding has adjudicated the underlying jurisdiction and authority questions.** Thus, Smith had placed those threshold issues before both the state appellate court and the federal court before Versaci continued toward trial, yet the challenged power continued to be exercised without either court determining whether it lawfully existed.

The Wait proceedings sharpen the point. Appellants alleged that Wait was already retaliating because of prior federal litigation; after he was named in this action, the certified September 17, 2025, transcript filed at ECF 17 and relied upon in 184 recorded him calling the federal suit an “end-around,” stating Appellants had no right to sue him again, invoking prior immunity rulings, and saying such protection would “presumably” continue. Wait further acknowledged service was incomplete and no alternative-service order existed yet declared the orders effective “regardless of whether there’s been service” and discussed enforcement and registry entry. Appellants allege those unserved orders were then entered and maintained in state and federally accessible law-enforcement systems despite unresolved service and jurisdiction defects.

On April 28, 2026, eight months later, Wait acknowledged that there was no “good service,” that he lacked jurisdiction, and that the TPO’s were not valid. But the February 27 extensions were not immediately removed: on May 13 the Family

Court represented that they remained “active,” and on May 19 the Chief Clerk confirmed that the Court had “no executed service records” for those extensions. Appellants then commenced Matter of Smith & Dees v. Wait, Index No. EF20262707. On August 18, 2026, Supreme Court found that the Article 78 sought review of “the entire jurisdiction and/or legitimacy of the underlying Family Court proceedings” and stayed the identified matters under CPLR 7805 “pending further Order of this Court.”

That history defeats characterizing these claims as merely “divorce or custody” litigation. Appellants alleged that the challenged actors exercised governmental power without lawful jurisdiction or authority. If so, the resulting acts are independent exercises of state power by actors who allegedly had no lawful power to act. They therefore implicate the complete-absence-of-jurisdiction exception to judicial immunity and independent First Amendment, due-process, ADA, family-integrity, and access-to-courts injuries. The controlling question is whether the officials had lawful authority to act at all. That is why Appellants pleaded § 1983, civil-RICO, and conspiracy claims: multiple actors allegedly acted under color of law and in concert to cause independent federal injuries outside any lawful grant of authority.

The warning compounds the constitutional problem. The Court counted “seven unsuccessful appeals or petitions” and warned that future “duplicative,

vexatious, or clearly meritless” filings related to Smith’s divorce or custody proceedings could trigger a leave-to-file sanction. But seven docket numbers were not seven repetitive merits adjudications. Nos. 24-1574 and 25-1270 arose from one federal action at different stages, with No. 24-1574 orally argued. Nos. 25-692 and 25-1642 arose from the still-pending Smith v. Fisher, one interlocutory and one never perfected. Nos. 25-2500, 26-1265, and 26-1404 arose from this action, with No. 25-2500 seeking extraordinary mandamus and the present direct appeals dismissed before merits briefing. Those seven dockets arose from only three federal actions, and the District Court acknowledged this action was ‘not identical’ to the earlier cases.

Safir and *Moates* make that distinction constitutionally significant. *Safir* requires examination of the actual litigation history, objective good faith, burden, and lesser alternatives; *Moates* requires procedural safeguards before an actual filing injunction may issue. A numerical count of “unsuccessful” docket numbers cannot substitute for that individualized inquiry where proceedings differ in posture, some remain unresolved, and later filings concern continuing conduct, new injuries, and new evidence.

The danger reaches every litigant whose federal injuries arise against the background of a divorce, custody, or other state proceeding. *Guarnieri* protects resort to courts for legal redress; *Bill Johnson’s* distinguishes genuine disputes

from baseless litigation; and *BE&K* rejects equating unsuccessful litigation with baseless litigation. If independent federal claims may be absorbed into a domestic-relations label, then later efforts to seek redress can themselves become the basis for restricting future access to court. That danger is acute here because these direct appeals were dismissed under Neitzke’s “no arguable basis” standard before merits briefing and then counted as “unsuccessful” matters supporting the warning.

“Unsuccessful” is not synonymous with “duplicative,” “vexatious,” or “clearly meritless.”

The question of exceptional constitutional and public importance is:

Whether independent federal injuries—including claims by a litigant never party to the matrimonial action and claims arising from unresolved jurisdictional and authority challenges—may be collapsed into a “divorce or custody” label, procedurally distinct proceedings aggregated as “unsuccessful,” and that aggregate used to threaten restrictions on future judicial petitioning.

IV. THE PRESERVED NEUTRAL-TRIBUNAL QUESTION WAS INDEPENDENTLY ARGUABLE AND REQUIRED APPELLATE REVIEW

Appellants’ neutrality concerns were preserved before dismissal, renewed through reconsideration, and placed before this Court in mandamus while the District Court proceedings were still active. After the originally assigned NDNY judges recused, Judge Vacca—newly appointed to the federal bench after service in the N.Y. Unified Court System—was designated to preside over a federal RICO and civil-rights action alleging systemic misconduct by N.Y. judicial,

governmental, attorney, and related actors. Her prior state service alone did not establish bias. But it made the cumulative appearance question constitutionally significant once the specific relationships and institutional overlaps were placed on the record.

The Versaci relationship was central. Justice Versaci was a principal judicial actor in the challenged matrimonial proceedings, while his wife, Tina Versaci, was simultaneously a named defendant in this federal action and a Director of the NDNY Federal Court Bar Association. Appellants preserved conflict and disclosure concerns involving Tina and her counsel at ECF 158 and 159, including asserted trustee and board roles within the same federal bar-association structure. Her Clerk-entered default remained unresolved while she continued substantive participation, including merits motion practice, reconsideration opposition, and later requests concerning appellate good faith.

Appellants raised recusal and reassignment from the outset, and Judge Vacca declined to step aside. On October 5, they sought mandamus—more than two months before the December 9 sua sponte dismissal. While that recusal challenge remained active, publicly documented October and November 2025 judicial and bar events placed Judge Vacca alongside named Defendants Chaudhry and Singh, including programs she moderated and photographs documenting their joint participation. ECF 183 and 184. Thus, the appearance-of-impartiality issue was not

manufactured after dismissal; it preceded it, was actively before this Court, and was materially reinforced by events occurring while the case and recusal challenge were still pending.

The constitutional question was never whether former state service, a professional organization, a public judicial event, or any single relationship proved actual bias. It was whether the cumulative circumstances could cause a reasonable observer to question the appearance of impartial adjudication before the Court sua sponte dismissed the action.

The related Smith v. Fisher action, involving overlapping authority issues, was also assigned to Judge Vacca and remained unresolved. Denial of mandamus did not extinguish the preserved § 455(a) issue on direct appeal.

Section 455(a), *Liljeberg*, *Murchison*, and *Liteky* make the inquiry objective: whether impartiality “might reasonably be questioned.” Actual bias need not be proved.

The question is:

Whether the cumulative circumstances preserved here presented an arguable § 455(a) and due-process issue requiring ordinary appellate review. Where the constitutional standard turns on the appearance of impartiality, that issue cannot be dismissed as having “no arguable basis.”

V. THE SUA SPONTE VACATUR OF EIGHT DISTINCT DEFAULTS PRESENTED AN INDEPENDENT RULE 55 AND DUE-PROCESS QUESTION

The eight Clerk-entered defaults did not involve similarly situated defendants. Seven defendants never sought Rule 55(c) relief. Tina Versaci did: default was entered at ECF 121, she moved to vacate at ECF 142, and Appellants opposed at ECF 172, but no order granted relief before final judgment. She nevertheless continued litigating the merits, including through ECF 168 and 189; Appellants objected at ECF 193, and Versaci acknowledged at ECF 197 that her vacatur motion remained pending. Defendant SmileLodge followed that lead and answered without first obtaining relief from default.

Appellants expressly preserved the issue at ECF 202, requesting resolution of every claim against every defendant, including those in default. ECF 204 then sua sponte vacated all eight defaults together and immediately dismissed every claim with prejudice. That procedure presented an independently arguable question under *Enron* and *McNulty*, which require consideration of willfulness, prejudice, and a meritorious defense before setting aside default. Those factors turn on the particular defendant's conduct and defenses, not a global assessment of the lawsuit.

The question is:

Whether eight distinct Clerk-entered defaults—seven never challenged by the defaulting defendants themselves—may be vacated sua sponte in a single dispositive ruling without defendant-specific Rule 55 analysis, and the resulting direct appeal then dismissed as having “no arguable basis.”

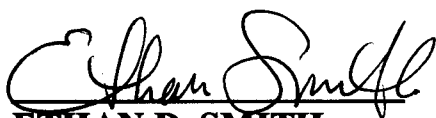
CONCLUSION

These appeals presented multiple preserved federal questions grounded in precedent and record evidence. *Coppedge*, *Neitzke*, and *Davis* preserve a critical distinction: a claim that may ultimately fail is not the same as one having no arguable basis. The issue extends beyond these appeals—whether arguable federal claims may be denied merits review and then counted as “unsuccessful” proceedings to justify restricting future access to the courts.

Appellants therefore respectfully request panel reconsideration and reconsideration en banc, vacatur of the Order, reinstatement of Appeal Nos. 26-1265 and 26-1404 for ordinary merits review, and withdrawal or narrowing of the prospective filing warning.

Dated: September 24, 2026

Respectfully submitted,



ETHAN D. SMITH
Plaintiff-Appellant, Pro Se
16 Grant Hill Rd
Clifton Park, NY 12065
518-817-7718
Ethan.Smith@gmail.com



JENNIFER L. DEES
Plaintiff-Appellant, Pro Se
16 Grant Hill Rd
Clifton Park, NY 12065
720-799-6190
Mommabearjenny@gmail.com

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned certify that this Combined Motion for Panel Reconsideration and Reconsideration En Banc complies with the type-volume limitation of Federal Rule of Appellate Procedure 40(d)(3)(A).

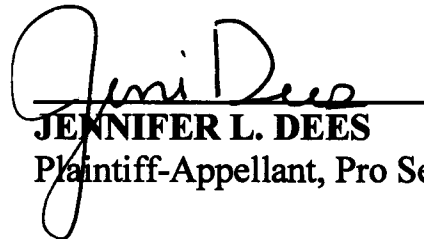
This motion contains 3,887 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f), as determined by Microsoft Word's word-count function.

This motion also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and 32(a)(6) because it was prepared in a proportionally spaced typeface using 14-point Times New Roman.

Dated: September 24, 2026

A handwritten signature in black ink, appearing to read "Ethan D. Smith", written over a horizontal line.

ETHAN D. SMITH
Plaintiff-Appellant, Pro Se

A handwritten signature in black ink, appearing to read "Jennifer L. Dees", written over a horizontal line.

JENNIFER L. DEES
Plaintiff-Appellant, Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2026, the foregoing **APPELLANTS' MOTION FOR PANEL RECONSIDERATION AND RECONSIDERATION EN BANC PURSUANT TO FRAP 40 AND LOCAL RULE 40.2** was served by United States Mail, first-class postage prepaid, upon counsel of record at the following addresses:

Mary L. D'Agostino	Hancock Estabrook LLP 1800 AXA Tower I 100 Madison Street Syracuse, New York 13202
Rhiannon Ineva Gifford	Pattison, Sampson, Ginsberg & Griffin PLLC 22 First Street P.O. Box 208 Troy, New York 12180
Stephen M. Groudine	Murphy Burns Groudine LLP 407 Albany Shaker Road Loudonville, New York 12211
Corey A. Ruggiero	FitzGerald Morris Baker Firth, P.C. 68 Warren Street Glens Falls, New York 12801
Shawn F. Brousseau	Napierski, VanDenburgh, Napierski & O'Connor LLP 296 Washington Avenue Extension Albany, New York 12203
Paul Gerrard Ferrara	Costello, Cooney & Fearon, PLLC 211 West Jefferson Street Syracuse, New York 13202
Gregg Tyler Johnson	The Laws Group PLLC 646 Plank Road, Suite 205 Clifton Park, New York 12065

Kelly Ann Kline

Maynard, O'Connor, Smith & Catalinotto, LLP
4 Tower Place, 3rd Floor
Albany, New York 12203

Daniel S. L. Rubin

Girvin & Ferlazzo, P.C.
20 Corporate Woods Boulevard
Albany, New York 12211

Christopher A. Guetti

Smith Dominelli & Guetti, LLC
1031 Watervliet Shaker Road
Albany, New York 12205

Andrea P. Demers

Burke, Scolamiero & Hurd, LLP
7 Washington Square, Suite 101
P.O. Box 15085
Albany, New York 12212

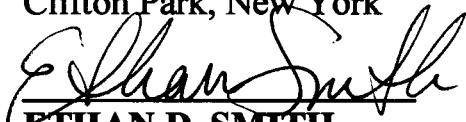
**William Thomas
McCaffery**

L'Abbate, Balkan, Colavita & Contini, L.L.P.
3 Huntington Quadrangle, Suite 102S
Melville, New York 11747

By electronic mail, as previously agreed, upon:

Sarah Rosenbluth, Assistant Solicitor General
NYS Office of the Attorney General
Appeals & Opinions Bureau
Sarah.Rosenbluth@ag.ny.gov

Executed on September 24, 2026.
Clifton Park, New York


ETHAN D. SMITH
Plaintiff-Appellant, Pro Se


JENNIFER L. DEES
Plaintiff-Appellant, Pro Se

N.D.N.Y.
25-cv-1265
Vacca, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of September, two thousand twenty-six.

Present:

John M. Walker, Jr.,
Michael H. Park,
Circuit Judges,
Philip M. Halpern,
*District Judge.**

Ethan Davis Smith, Jennifer L. Dees,

Plaintiffs-Appellants,

v.

26-1265 (L),
26-1404 (Con)

Mae A. D'Agostino, et al.,

Defendants-Appellees.

Appellants, proceeding pro se, move for in forma pauperis ("IFP") status, a briefing extension, and restoration of their ACMS e-filing privileges in these appeals. Upon due consideration, it is hereby ORDERED that the IFP motion is DENIED and the appeals are DISMISSED because they "lack[] an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); see 28 U.S.C. § 1915(e). It is further ORDERED that Appellants' remaining motions are DENIED as moot.

These are two of seven unsuccessful appeals or petitions that Appellants have filed in this Court related to Appellant Smith's divorce and custody proceedings, including the matters docketed under 24-1574, 25-692, 25-1270, 25-1642, and 25-2500. Accordingly, Appellants are hereby warned that the continued filing of duplicative, vexatious, or clearly meritless appeals or petitions

* Judge Philip M. Halpern, of the United States District Court for the Southern District of New York, sitting by designation.

related to Appellant Smith's divorce or custody proceedings could result in the imposition of a leave-to-file sanction that would require Appellants to obtain this Court's permission before filing any further appeals or petitions related to Appellant Smith's divorce or custody proceedings. *See In re Martin-Trigona*, 9 F.3d 226, 229 (2d Cir. 1993); *Sassower v. Sansverie*, 885 F.2d 9, 10–11 (2d Cir. 1989) (per curiam).

FOR THE COURT:

Andrew Barnes, Chief Deputy Clerk of Court

A handwritten signature in black ink, appearing to read 'A. Barnes', with a long horizontal flourish extending to the right.