UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-35928

JERRY O'NEIL, et al.,

Plaintiffs-Appellants,

v.

STATE BAR OF MONTANA, et al.,

Defendants-Respondents.

Appeal from the United States District Court
for the District of Montana

INITIAL BRIEF FOR PLAINTIFFS-APPELLANTS

Jerry O'Neil 985 Walsh Road Columbia Falls, Montana 59912 406-892-7602; 406-892-7603 (fax) oneil@centurytel.net	Dennis & Melina Woldstad 1 Wonkie Road PO Box 525 Trego, Montana 59934 406-882-4563
Gordon Sellner 39715 c/o Montana State Prison 700 Conley Lake Road Deer Lodge, Montana 59722	Michael McBroom 18 Olney Loop Road PO Box 94 Olney, Montana 59927 406-881-2701

CORPORATE DISCLOSURE STATEMENT

This statement is made pursuant to Federal Rule of Appellate Procedure 26.1. None of the Plaintiffs are corporate entities or have any parent corporation, subsidiaries or affiliates that have issued shares to the public.

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JURISDICTIONAL STATEMENT

The court below had jurisdiction to entertain this matter because all claims brought herein related to alleged violations of the United States Constitution and various federal statutes, including: 42 U.S.C. Chapter 21, §§1981, 1983, & 1988(a), as well as by 25 U.S.C. Chapter 38, § 3601, 28 U.S.C. Chapter 28, §§2201, 2202; & Chapter 85, §§ 1331, 1337(a), 1343(a) and 1367(a); 15 U.S.C. Chapter 1, §§ 4, 15 & 26 and Article III of the United States Constitution.

The Ninth Circuit Court of Appeals has jurisdiction to entertain this appeal pursuant to 28 U.S.C. § 1291. Final Judgment was rendered on the 9/17/2009 [docket entry nos. 113 & 114 for #: 9:08-cv000091-DWM-JCL] and Plaintiffs/Appellants Dennis Woldstad, Melinda Woldstad, Michael McBroom & Jerry O'Neil filed a timely notice of appeal on the 10/15/2009 [docket entry #115]. Plaintiff/Appellant Gordon Sellner signed on to the appeal on 10/21/2009 [docket entry #119]. An extension of time for Appellants to file their initial brief on or before 12/30/2009 was granted on 11/16/2009.

NINTH CIRCUIT LOCAL RULE 28-2.6 STATEMENT

Plaintiffs/Appellants have no knowledge of any cases pending before the Ninth Circuit Court of Appeals related to the issues herein. The Ninth Circuit Court of Appeals previously dismissed without prejudice Appellant O'Neil's action to

declare MCA § 37-61-210 unconstitutional.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. The Rooker-Feldman doctrine holds that lower United States federal courts should not sit in direct review of state court decisions, leaving such review to the U.S. Supreme Court, unless Congress has specifically authorized such relief. In short, a federal court, other than the U.S. Supreme Court, must not become a court of appeals for a state court decision.

Petitioner/Appellant O'Neil's original petition sought a declaration that he is validly licensed to practice law before the Blackfeet Tribal Court and requesting permission to practice before the federal courts and administrative agencies as permitted by federal law. The state court judgment did not explicitly address these issues. The state court did not have jurisdiction to address these issues! Was O'Neil's original petition barred by Rooker-Feldman preclusion? Appellants submit that the answer to this is "no". Appellants maintain that attorneys licensed to practice law before tribal courts do not have to beg to any **state** court for permission to practice before the United States **federal** court system. A district court's application of the Rooker-Feldman doctrine is *de novo*. *Noel v. Hall*, 341 F.3d 1148, 1154 (9th Cir. 2003).

II. Do Plaintiffs/Appellants Gordon Sellner, Dennis & Melina Woldstad and Michael McBroom have the right to have a tribally licensed attorney apply for admission to represent them in the federal court system? Appellants submit that the answer to this is "yes." Under principles of comity, litigants in federal courts should be allowed to appear in federal courts with tribally licensed attorneys.

STATEMENT OF THE CASE

This is an action that was brought before the U.S. District Court for the District of Montana for declaratory and injunctive relief and for resolution of a conflict of laws between the Montana Eleventh Judicial District Court and the Blackfeet Tribal Court of Appeals. Appellant O'Neil is seeking a declaration that he is validly licensed to practice before the Blackfeet Tribal Court and for permission to represent those who are otherwise unable to obtain representation before the U.S. District Court for the District of Montana and administrative agencies and tribunals as allowed by federal law. (This could include the Social Security Administration and the United States Court of Appeals for Veterans Claims.)

There is a conflict between the State of Montana and the Blackfeet Indian Nation, with the State ruling in dicta that O'Neil **is not** licensed to practice as an attorney before the Blackfeet Tribal Courts and the Tribe ruling that O'Neil **is** licensed to practice as an attorney before the Blackfeet Tribal Courts.

The relief sought is based upon O'Neil's license to practice law before the Blackfeet Tribal Court System, federal statutes and federal case law. The rest of the Petitioners/Appellants are seeking O'Neil's help in their federal court cases, that being the only representation available to them.

STATEMENT OF THE FACTS

On September 24, 1984, upon passing the tribal bar examination, Appellant O'Neil received his license to practice law before the Blackfeet Tribal Court System.

On January 7, 2005, the Montana Eleventh Judicial District Court entered a *Judgment and Permanent Injunction* that ordered:

> [O'Neil] is hereby enjoined and restrained from performing, directly or indirectly, [any] of the following acts within the State of Montana or with an effect upon the people of the state:
> 1. [O'Neil] may not engage in the practice of law.
> 2. Engaging in the practice of law is defined by MCA § 37-61-201.
>
> - - -

Case 9:08-cv-00091-DWM-JCL, Document 55-1

When the Montana court enjoined O'Neil from practicing law, such order was necessarily limited to venues under the jurisdiction of the Montana Supreme Court and practice under Montana law. The Montana court did not have jurisdiction over the Blackfeet Tribal Court, the United States federal courts or federal agencies.

They never specifically ordered that O'Neil could not practice before the federal courts or anywhere else he was permitted to practice pursuant to federal law. If they said anything that gave this impression it was without jurisdiction and therefore null and void. The injunction should be narrowly applied. When ruling to enjoin O'Neil from practicing law, the State Court said:

> You've indicated and provided proof to the court that the Tribal -- the Blackfeet Tribal Court does authorize you to appear before them as an advocate and a counselor. And as I've indicated throughout this proceeding, they have the authority to authorize people to practice before them, and I am not going to restrict that.

Transcript of Proceedings, Montana Supreme Court Commission on the Unauthorized Practice of Law v. Jerry O'Neil, pg 359 [see Appendix]

Petitioners/Appellants filed a *Second Amended Complaint for Declaratory and Injunctive Relief* in this case on 1/12/2009. Similar to the original complaint it sought permission for O'Neil to represent otherwise unrepresented litigants before the U.S. District Court for the District of Montana and administrative agencies and tribunals as allowed by federal law. [**Case 9:08-cv-00091-DWM-JCL, Doc 37-1**]

In this amended complaint O'Neil was joined by the other petitioners who are federal court litigants who need O'Neil's help. This *Second Amended Complaint for Declaratory and Injunctive Relief* fleshed out the conspiracy and the farce of the Montana courts and the integrated [or unified] bar. It also requested a:

declaratory judgment to limit the state action exception to the application of

> antitrust laws articulated in ***Parker v. Brown,*** 317 U.S. 341 (1943), which often goes by the name of "the ***Parker*** doctrine," to state action involving conduct which does not arise from or otherwise involve "legislation [which] appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth - - -."

As with the original complaint it sought permission for O'Neil to represent litigants [who otherwise would be unrepresented] before the U.S. District Court for the District of Montana and administrative agencies and tribunals as allowed by federal law, and for the other Plaintiffs/Appellants to request the federal court to allow O'Neil to help them in their federal court cases.

In the early part of 2009, Plaintiffs realized the U.S. District Court was going to dismiss their complaint as long as it complained about the dishonesty of the state courts and as long as it prayed for a "declaration that the ***State of Montana v. O'Neil*** is a void judgment on account of farcical denial of due process and extrinsic fraud." Therefore on 3/2/2009 they submitted their *Third Amended Complaint for Declaratory and Injunctive Relief.* [**Case 9:08-cv-00091-DWM-JCL, Doc 66-1**]

In this proposed third amended complaint, Plaintiffs/Appellants dropped their requests to have the district court overturn the state court judgment and limited their prayer to having the U.S. District Court declare O'Neil's attorney status with the Blackfeet Tribal Court, to allow O'Neil to represent otherwise unrepresented litigants before the U.S. District Court for the District of Montana and

administrative agencies and tribunals as allowed by federal law, and to allow the other Plaintiffs/Appellants to request O'Neil be allowed to represent them in their federal court cases.

Plaintiffs' complaints to the United States District Court for the District of Montana have consistently alleged that O'Neil is validly licensed by the Blackfeet Tribal Court and requested that he be allowed to help litigants before the federal court and various administrative agencies and tribunals on par with state-licensed attorneys as allowed under federal law and that they be permitted to request O'Neil's representation in their federal court cases.

SUMMARY OF ARGUMENT

When it became apparent to the litigants in the lower court that the court was not allowed to make a ruling chastising the state court for its dishonesty, the federal district court should have accepted for filing Appellants' ***Third Amended Complaint for Declaratory and Injunctive Relief*** that dropped Plaintiffs/Appellants' prayer for a:

> declaration that the *State of Montana v. O'Neil* is a void judgment on account of farcial denial of due process and extrinsic fraud. See: ***U.S. v. Beggerly***, 524 U.S. 38 (1998) and ***Loubser v. Thacker***, 440 F.3d 439 (2006)."

Appellant O'Neil's request to practice before the federal courts and

administrative agencies as allowed by federal law, and Appellants Woldstads', Sellner's and McBroom's requests to have the federal district court allow them to have O'Neil's help in the federal court system was an original proceeding exclusively within the purview of the federal district court and therefore should not have been dismissed under the ***Rooker-Feldman Doctrine***.

Although the U.S. District Court improperly dismissed Appellant's claim presented in their *Second Amended Complaint for Declaratory and Injunctive Relief* under the federal civil rights statutes where the farcical state court proceedings trampled on Appellants' fundamental constitutional rights, even if it was proper to dismiss that claim, it still should have heard the other claims that were properly presented to it.

ARGUMENT

1. THE U.S. DISTRICT COURT SHOULD HAVE ACCEPTED FOR FILING APPELLANTS' *THIRD AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF*.

In his dissent in *Lathrop v. Donohue,* Justice Black pointed out that it is the policy of the U.S. Supreme Court to allow one to amend their complaint to "shape" the issues in a manner that would be acceptable to the U.S. Supreme Court. In *Lathrop* Justice Black said:

> The plurality decision to affirm the judgment of the Wisconsin courts on the ground that the issue in the case is not "shaped . . . as leanly and as sharply as judicial judgment upon an exercise of . . . [state] power requires" is, in my judgment, wrong on at least two grounds. First of all, it completely

> denies the appellant an opportunity to amend his complaint so as to "shape" the issue in a manner that would be acceptable to this Court. Appellant's complaint was dismissed by the Wisconsin courts, without giving him a chance to amend it and before he had an opportunity to bring out the facts in the case, solely because those courts believed that it would be impossible for him to allege any facts sufficient to entitle him to relief. The plurality now suggests, by implication, that the Wisconsin courts were wrong on this point and that appellant could possibly make out a case under his complaint. Why then is the case not remanded to the Wisconsin courts in order that the appellant will have at least one opportunity to meet this Court's fastidious pleading demands? The opinions of the Wisconsin courts in this case indicate that the laws of that State -- as do the laws in most civilized jurisdictions -- permit amendments and clarifications of complaints where defects exist in the original complaint which can be cured. And even if Wisconsin law were to the contrary, it is settled by the decisions of this Court that a federal right cannot be defeated merely on the ground that the original complaint contained a curable defect.

Lathrop v. Donohue, 367 U.S. 820, 869 (1961)

In *Lathrop*, Justice Black was referring to ***Brown v. Western R. of Alabama***, 338 U.S. 294, 298 (1949), where the U.S. Supreme Court stated:

> Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Davis v. Wechsler, supra, at 24. Cf. *Maty v. Grasselli Chemical Co.*,303 U.S. 197. Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved. See *Brady v. Southern R. Co.*,320 U.S. 476, 479.

It would be in contravention of the foregoing reasoning for the District

Court to refuse Plaintiffs' request to amend their complaint and thus allow them to drop their challenge to the farcical State Court judgment in order to avoid *Rooker-Feldman* abstention.

II. EVEN WITHOUT ACCEPTING APPELLANTS' THIRD AMENDED COMPLAINT, THE DISTRICT COURT SHOULD HAVE HEARD THE ISSUES THAT WERE NOT "INEXTRICABLY ENTWINED" WITH THE STATE COURT JUDGMENT.

In ***District of Columbia Court of Appeals v. Feldman*** 460 U.S. 462 (1983), 460 U.S. 462, the court, while reiterating that one can only seek review of a state court's final judgment in a bar admission matter to the U.S. Supreme Court, allowed that general challenges to the Constitutionality of the state's general rules and regulations governing admission may be challenged to the U.S. district courts. This demonstrates that *Rooker-Feldman* preclusion is not an all or nothing preclusion.

Justice Marshall, concurring in ***Pennzoil Co. v. Texaco Inc.***,481 U.S. 1 (1987), gives some light to what is and what is not inextricably intertwined with a state-court judgment:

> As we have said, "[i]f the constitutional claims presented to a United States district court are inextricably intertwined" with the merits of a judgment rendered in state court, "then the district court is in essence being called upon to review the state-court decision. This the district court may not do." District of Columbia Court of Appeals v. Feldman, supra, at 483-484, n. 16. While the question whether a federal constitutional challenge is inextricably

> intertwined with the merits of a state-court judgment may sometimes be difficult to answer, ***it is apparent, as a first step, that the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.*** (emphasis added)

Pennzoil Co. v. Texaco Inc.,481 U.S. 1, 25 (1987)

In the case at bar the state court did not decide, rightly or wrongly, on whether O'Neil can practice before the Blackfeet Tribal Court, the U.S. District Court(s), administrative agencies when allowed by federal law, or whether litigants may petition the U.S. District Court for permission to have a tribally licensed attorney represent them in a U.S. District Court. Therefore Appellants claims on those issues are not inextricably intertwined with the state-court judgment.

III. THE STATE COURT WAS WITHOUT JURISDICTION TO BAR AN ATTORNEY LICENSED BY AN INDIAN TRIBE FROM PRACTICING LAW BEFORE THE FEDERAL COURTS.

Granting defendants'/appellees' rule 12(b)(1) motion to dismiss was inappropriate because the *Rooker-Feldman* doctrine does not divest the federal courts from hearing original actions that arise exclusively under federal law. In a case like ***District of Columbia Court of Appeals v. Feldman***, 460 U.S. 462 (1983), that deals with a state's prerogative to license whoever they want to allow to

practice before the state courts under state law, the allowed appeal may be exclusively to the U.S. Supreme court. But in this case we are not dealing with anyone's right to practice before state courts under state law; instead we are dealing with the authority of tribal courts to license those who are allowed to practice before these tribal courts and the ability of those thus licensed to apply to practice before the federal court system. In ***Chambers v. Nasco, Inc.***, 501 U.S. 32 (1991), the U.S. Supreme Court followed existing case law that gives the federal courts the power to control admission to practice before them. The Court there said:

> Prior cases have outlined the scope of the inherent power of the federal courts. For example, the Court has held that a federal court has the power to control admission to its bar and to discipline attorneys who appear before it. See *Ex parte Burr*, 9 Wheat. 529, 531 (1824).

Chambers v. Nasco, Inc., 501 U.S. 32 (1991).

Appellant Jerry O'Neil is validly licensed to practice law on the Blackfeet Indian Reservation. This is evidenced by the *Opinion and Order* that was entered by the Blackfeet Tribal Court of Appeals for the Blackfeet Indian Reservation *In the Matter of the Admission to Practice of Jerry O'Neil* on August 27, 2007 [Case 9:08-cv-00091-DWM-JCL, Document 87-1]. The Blackfeet Tribal Court System was acting within their sovereign power when they licensed O'Neil to practice before their courts in 1984.

Under the United States Codes regarding Indian tribal justice support, **Title 25,**

Chapter 38, Section 3601:

> The Congress finds and declares that –
> (1) there is a government-to-government relationship between the United States and each Indian tribe;
> (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government;
> (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes;
> (4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems;
> (5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments;

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), requires the federal courts to ascertain and follow what the state law is if the state decisions are sufficiently conclusive, definite and final. **But the Erie rule excepts "matters governed by the Federal Constitution or by Acts of Congress."** Practice of law before tribal and federal courts, and the establishment of tribal justice systems are either acts of congress or acts of the individual Indian tribes and are not a matter of state law. Therefore it is not a matter of state law if O'Neil can represent his clients from his Blackfeet law practice, or anyone else, including before the Federal Court System!

IV. NO MONTANA COURT HAS RULED WHETHER OR NOT O'NEIL CAN PRACTICE LAW BEFORE THE FEDERAL COURTS.

In the *Judgment and Permanent Injunction* that was entered in the Flathead

County Montana Eleventh Judicial District Court in Cause No. DV 02-378B, it was ruled that:

> Respondent is hereby enjoined and restrained from performing, directly or indirectly, an[y] of the following acts within the State of Montana or with an effect upon the people of the state:
>
> 1. Respondent may not engage in the practice of law.
> 2. Engaging in the practice of law is defined by MCA § 37-61-201.
> 3. The court shall consider the following as indicia of the practice of law:
>
> - - -
>
> c. Appearing, or attempting to appear, as a legal representative or advocate for others **in a court of this state**.
>
> - - - (emphasis added)

Case 9:08-cv-00091-DWM-JCL, Document 55-1

The Montana court, having no jurisdiction to do so, did not find that O'Neil could not practice before the tribal court system, the federal court system, or administrative agencies when allowed by federal law. On the contrary, in the state court proceedings held on November 29, 2004, the Honorable Kim Christopher said to O'Neil:

> You've indicated and provided proof to the court that the Tribal -- the Blackfeet Tribal Court does authorize you to appear before them as an advocate and a counselor. And as I've indicated throughout this proceeding, they have the authority to authorize people to practice before them, and I am not going to restrict that. . . .

Transcript of Proceedings, Cause No. DV-02-378(B), 11/29/2004, pg 359, included in Appendix

The State Court, being without jurisdiction to determine who can practice

before Tribal Courts, was also without jurisdiction to determine whether tribally licensed attorneys can practice before Federal Courts.

Therefore, since the *Rooker-Feldman* doctrine does not divest the federal courts from hearing cases that arise exclusively under federal law, the District Court should have denied Appellees' Rule 12(b)(6) motion to dismiss.

CONCLUSION

When it became apparent to the litigants in the lower court that the court was not interested in hearing about the state courts' dishonesty, the U.S. District Court should have accepted for filing Appellants' *Third Amended Complaint for Declaratory and Injunctive Relief* that dropped reference to such dishonesty.

Appellant O'Neil's request to practice before the federal courts and administrative agencies when allowed under federal law, and Appellants Woldstads', Sellner's and McBroom's request to have the U.S. District Court allow them to have O'Neil's help in the federal court system were exclusively within the purview of the federal district court and should not have been dismissed under the *Rooker-Feldman Doctrine* and these requests should be reinstated.

The Federal District Court also improperly dismissed Appellant's claim for declaratory and injunctive relief under the federal civil rights statutes where the farcical state court proceedings trampled on Appellants' fundamental constitutional

rights.

Respectfully submitted,
DATED: December 30, 2009

s/ Jerry O'Neil
Jerry O'Neil

DATED: December 30, 2009

s/ Dennis Woldstad
Dennis Woldstad

DATED: December 30, 2009

s/ Melina Woldstad
Melina Woldstad

DATED: December 30, 2009

s/ Michael McBroom
Michael McBroom

DATED: _____

_____
Gordon Sellner, #39715

APPENDIX

Transcript of Proceedings

MONTANA ELEVENTH JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF FLATHEAD

Cause Number DV-02-378(B)

MONTANA SUPREME COURT COMMISSION ON THE UNAUTHORIZED PRACTICE OF LAW,

Petitioner,

-vs-

JERRY O'NEIL, ON BEHALF OF HIMSELF, HIS CLIENTS AND HIS CONSTITUENTS,

Respondents.

TRANSCRIPT OF PROCEEDINGS
Held Before the hon. Deborah Kim Christopher

Taken at Flathead County Justice Center
920 South Main Street
Kalispell, Montana 59901
Monday, November 29, 2004
Tuesday, November 30, 2004

APPEARANCES:

DAVID A. HAWKINS, ESQ.
Special Deputy County Attorney
Commission on unauthorized practice of Law
P.O. Box 577
Helena, Montana 59624
Appeared on behalf of Petitioner

JERRY O'NEIL
985 Walsh Road
Columbia Falls, Montana 59912
Appeared Pro Se

Reported by: Nancy Skurvid, RPR
Official Court Reporter (406) 758-5666

You've indicated and provided proof to the court that the Tribal -- the Blackfeet Tribal Court does authorize you to appear before them as an advocate and a counselor, And as I've indicated throughout this proceeding, they have the authority to authorize people to practice before them, and I am not going to restrict that. I have significant concerns, though, that you have taken your ability to appear before them and extended that into your practice before this court and other courts. You indicated that you created the program that you utilize for creating, drafting documents that were filed in dissolutions for purposes of the Tribal Court. And certainly you have the authority to do that as long as those papers are going to be -- go before the court that you created them for. The court has significant concerns when those papers begin turning up in dissolutions that are filed before this court.

I do find that it's absolutely critical that, in the course of drafting the documents and selecting the appropriate documents, that you -- that you must engage

CERTIFICATE OF SERVICE

Today I mailed a copy of the foregoing *Initial Brief for Plaintiffs-Appellants* to:

Chris D. Tweeten J. Stuart Segrest Assistant Attorneys General PO Box 201401 Helena, Montana 59520-1401	Donald R. Murray Kimberly S. More CROWLEY, HAUGHEY, HANSON PO Box 759 Kalispell, Montana 59903-0759

DATED: December 30, 2009

s/ Jerry O'Neil
Jerry O'Neil

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is Proportionately spaced, has a Times New Roman typeface of 14 points or more and contains 4,558 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

DATED: December 30, 2009

s/ Jerry O'Neil
Jerry O'Neil