UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

JOHN R. SHOTTON, an individual,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
HOWARD F. PITKIN, in his individual and official capacity as the former Commissioner of the Department of Banking; and **BRUCE ADAMS**, in his individual and official capacity as Acting Commissioner of the Department of Banking,	)	**No. CIV-15-241-L**
	)	
Defendants.	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' OPENING MOTION TO DISMISS

Submitted by:
Stuart D. Campbell, OBA #11246
Jon E. Brightmire, OBA #11623
David H. Herrold, OBA #17053
Michael J. English, OBA #21502
DOERNER, SAUNDERS, DANIEL & ANDERSON, L.L.P.
Two West Second Street, Suite 700
Tulsa, Oklahoma 74103
Tel. (918) 582-1211| Fax (918) 925-5242
E-mail: scampbell@dsda.com
jbrightmire@dsda.com
dherrold@dsda.com
menglish@dsda.com

Attorneys for the Plaintiff, JOHN R. SHOTTON

Dated: April 24, 2015

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

Other Authorities

I. INTRODUCTION AND FACTUAL BACKGROUND

The Otoe-Missouria Tribe of Indians, Oklahoma (the "Tribe") is a federally-recognized Indian tribe headquartered in Red Rock, Oklahoma, and has been since 1881 ("Tribal Lands"). In accordance with the Tribe's Constitution promulgated in 1983, the Tribe operates at the direction of the Tribal Council which consists of six members and a Chairman, all of whom are elected by the Tribal members for three year terms. The Tribal Chairman only has voting rights in the event of a tie on the Tribal Council. Plaintiff, John R. Shotton is the current duly-elected Chairman of the Tribal Council ("Chairman Shotton").

The Tribal Council established the Tribal Limited Liability Companies Act and the Tribal Corporations Act providing for the formation of Tribal corporations and limited liability companies under Tribal law. The Tribal Council also passed into law the Tribe's Consumer Finance Services Regulatory Commission and granted it broad oversight with the sole responsibility for the regulation of the Tribe's Consumer Finance Services operations. It was under the aforementioned Acts, and agency oversight, that Great Plains Lending, L.L.C. ("Great Plains") was established in May 2011, and Clear Creek Lending, a d/b/a of American Web Loan, Inc. ("Clear Creek"), was established in February 10, 2010.

Great Plains and Clear Creek (collectively, "Tribal Lenders") are in the lending business, having their principal places of business on Tribal Lands. Consistent with Congress' directives promulgated in 25 U.S.C. § 4301(a)(6), the Tribal Lenders further the Tribe's interest in self-sufficiency by making consumer loans. Chairman Shotton serves as secretary/treasurer of the Tribal Lenders as determined by the Tribal Council, but he neither directs nor is involved in the day-to-day operation of their businesses.

In late 2014, the Connecticut Department of Banking (the "Department") determined that a few Connecticut residents had applied for and were given "payday loans" by the Tribal Lenders. Rather than work with the Tribe's Consumer Finance Services Regulatory Commission, the Department commenced an administrative process against the Tribal Lenders, and, with woefully inadequate notice and in direct contravention of the Tribe's sovereignty, issued civil penalties or fines against the Tribal Lenders in the amount of $700,000 each. Not only did the Department inflict this damage, but it made it worse by also involving Chairman Shotton – investigating him, issuing injunctive orders and assessing a separate $700,000.00 fine (the "Illegal Orders") against him as well. These acts, undertaken illegally, in violation of Chairman Shotton's civil rights and Tribal sovereignty, are why he filed this action.

Defendants' *Opening Motion to Dismiss* **[Dkt #12]** (the "Motion"), seeks dismissal of Chairman Shotton's § 1983 *Complaint* on various grounds under Fed.R.Civ.P. 12(b). Each of the bases for which dismissal is sought is without merit, and the Motion should be summarily denied.

II. ARGUMENTS & AUTHORITIES

A. *YOUNGER ABSTENTION IS NOT REQUIRED OR PERMITTED*

The three arguments Defendants present to support their request for *Younger* abstention stretch that abstention doctrine well beyond its defined boundaries and ignore Supreme Court precedent obliging this Court to hear and to decide this case. The result Defendants seek is actually contrary to established *Younger* abstention law and effectively imposes upon Chairman Shotton an impermissible exhaustion requirement. Although they

rely upon *Sprint Communications, Inc. v. Jacobs*, 134 S.Ct. 584 (2013), Defendants omit its forceful teaching that "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Id.* at 591 (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). Nor do they discuss the observation from *Sprint Communications* that, "Federal courts…have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Id*. at 591 (citing *Cohens v. Virginia*, 5 L.Ed 257 (1821)). The Court should reject Defendants' expansive *Younger* abstention arguments in the light of the rule in *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*"), that "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *Id*. at 358.

Defendants first argue that "the pending action in the Connecticut Superior Court raising effectively the same claims…deprives this Court of jurisdiction"[1] but they do not explain why this is so. Motion at p.1. Implicitly, they argue that *Younger* abstention is required because the subject matter in that state-court appeal mirrors the subject matter in this case; yet they omit to discuss key differences. Here, Chairman Shotton seeks damages and equitable relief for Defendants' violation of his personal rights under 42 U.S.C. § 1983, whereas in the pending Connecticut appeal, Great Plains and Clear Creek join him in appealing a final administrative determination rendered by the Department.

[1] The failure to note in the Civil Cover Sheet the pending state court appeal brought by Chairman Shotton and two tribal lenders was an inadvertent oversight, but otherwise harmless in the sense that this action and the Connecticut state court appeal are two quite disparate proceedings, as further shown herein. Defendants' intimation of a wrongful purpose in omitting the Connecticut state court action is simply a red herring.

Defendants offer no authority to suggest that under *Younger*, a state-court action appealing similar facts or claims somehow deprives a federal court of jurisdiction to hear a case involving § 1983 claims, and they ignore Supreme Court pronouncements flatly rejecting this suggestion. "Abstention is not in order simply because a pending state-court proceeding involves the same subject matter." *Sprint Communications*, 134 S.Ct. at 588 (citing *NOPSI*, 491 U.S. at 373). Similarly, the "pendency of an action in [a] state court is no bar to proceedings concerning the same mater in the Federal court having jurisdiction." *Sprint Communications*, 134 S.Ct at 588 (quoting *Colorado River Water Conserv. Dist.*, 424 U.S. at 817). Defendants take a position contrary to the law in maintaining that this Court cannot hear Chairman Shotton's § 1983 claims simply because he is a party to a state-court appeal concerning similar subject matter. Indeed, the S*print Communications* decision they rely upon makes clear that "[p]arallel state-court proceedings do not detract from" a federal court's "virtually unflagging" obligation to decide cases. *Id*. at 591.

Defendants next argue that *Younger* abstention is required because "the underlying Connecticut case…is a quintessential example of a civil enforcement proceeding."[2] (Motion at p.6). First, this position is completely contrary to that taken by Defendants in their own

[2] Defendants cite *Rocky Mountain Gun Owners v. Gessler*, 2014 WL 7177383 (D.Colo.), but miss the crucial distinction. *Rocky Mountain Gun Owners* applied *Younger* abstention where federal plaintiffs interrupted an ongoing state administrative action involving election reporting violations by seeking "an order enjoining the [government actors] from proceeding with the December 17, 2014, hearing and mandating a stay of the state administrative proceeding until this court can address the constitutional claims of the plaintiffs." *Id*. at *1. Thus, Abstention was appropriate because the plaintiffs called upon a federal court to intervene in an ongoing civil enforcement proceeding. In contrast, Chairman Shotton's § 1983 in no way interrupts an "ongoing proceeding." It simply seeks to vindicate Chairman Shotton's rights that stem from civil rights violations occurring during the course of a completed enforcement proceeding. *Rocky Mountain Gun Owners* demonstrates why abstention is improper here.

administrative proceeding in Connecticut. Defendant Pitkin's ruling, denying Plaintiff's motion to dismiss the temporary cease and desist order, was based on his claim that the proceeding was one seeking only compliance, not enforcement and, therefore, not subject to tribal sovereign immunity. Defendant Pitkin's ruling recognized that enforcement would require a separate action in the Connecticut state courts.

Second, to the extent that *Younger* requires abstention from certain "civil enforcement proceedings," *Sprint Communications*, 134 S.Ct. at 591, that deference applies only while such proceedings are "ongoing." *See, e.g., Brown ex rel. Brown v. Day*, 555 F.3d 882, 887 (10th Cir.2009). For this reason, a *Younger* analysis must determine "whether there is an ongoing proceeding in a case." *Id.* at 884; *see also NOPSI*, 491 U.S. at 370 (noting the two previous Supreme Court cases applying *Younger* abstention to administrative proceedings, *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) and *Middlesex County Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423 (1982) each involved "situations in which the proceeding was not yet at an end"). Defendants, however, wrongly suggest that *Younger* deference prevents federal courts from reviewing such civil enforcement proceedings once completed.

Younger abstention is improper here because there is no "ongoing" proceeding. Even assuming, *arguendo*, that the Department's administrative action involving Chairman Shotton and the two Tribal Lenders could be considered a "civil enforcement proceeding" (contrary to Defendants' own determination in Connecticut), abstention is neither required nor permitted because that enforcement proceeding is not "ongoing." It ended January 6, 2015 when Commissioner Pitken issuing the final *Order to Cease and Desist and Order*

Imposing Civil Penalty. Chairman Shotton has not triggered *Younger* by asking this Court to intervene in an ongoing state enforcement proceeding. Rather, he asks this Court to vindicate his personal, civil rights that were violated through the course of a completed administrative action by the Department.

The action presently pending in the Connecticut courts is not an enforcement of the Department's cease and desist order. Under Connecticut law, any enforcement of such a civil penalty and restitution order must be brought by the State under Conn. Gen. Stat. § 36-50(b) in a particular court. The presently pending action, in contrast, is brought under Conn. Gen. Stat. § 4-183, initiated by aggrieved parties seeking to appeal an administrative order. Under § 4-183(f), the court may only affirm, modify or overturn the administrative order. The court has no authority to order enforcement. Under Connecticut law enforcement and appeal of administrative orders are completely separate.

Defendants' erroneous suggestion that the pending state-court administrative appeal is a continuation of a "civil enforcement proceeding," and therefore subject to *Younger* deference, is contrary not only to Connecticut statute but also to U.S. Supreme Court. The Supreme Court has at times assumed but never decided that "an administrative adjudication and the subsequent state court's review of it count as a 'unitary process' for *Younger* purposes." *Sprint Communications*, 134 S.Ct. at 592; *see also Brown*, 555 F.3d at 884 (acknowledging that it is an "open question whether the *Younger* doctrine compels a federal court to decline jurisdiction over a federal cause of action initiated to challenge a state administrative agency's final decision when appeal to state court was possible.").

NOPSI disposes of Defendants' contention that the "onging Connecticut proceedings"

require *Younger* abstention through its holding that "there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." *Id*. at 373.[3] In urging *Younger* abstention based upon a pending state-court administrative appeal, Defendants ask this Court to adopt a new doctrine meaningfully expanding the scope of *Younger* abstention far beyond its current limits and *NOPSI*'s teachings.

Abstention here would also effectively impose a new "exhaustion" requirement upon Chairman Shotton by forcing him to litigate the administrative appeal, which is completely voluntary, through the Connecticut court system before ever bringing his § 1983 claims to the federal courthouse, with the applicable statute of limitations running all the while. Such a requirement would not only violate Supreme Court teachings, but it would denigrate the spirit of 42 U.S.C. § 1983 and settled § 1983 law holding that a § 1983 action "does not

[3] The Tenth Circuit in *Weitzel v. Div. of Occupational & Prof'l Licensing of Dep't of Commerce of State of Utah*, 240 F.3d 871 (10th Cir.2001), did find *Younger* abstention proper where a suspended physician filed a federal lawsuit contesting suspension of his medical license on constitutional grounds but then "filed a complaint in the Utah Third District Court seeking relief identical to that sought in federal district court." *Id*. at 876. "Although *Younger* abstention may have been inappropriate prior to the filing of Dr. Weitzel's action in state court, it is appropriate now. Clearly the pending state proceeding is an ongoing state action. It is also beyond dispute that the Utah state judiciary provides an adequate forum for Dr. Weitzel to assert his constitutional claims." *Id.*

However, *Weitzel* does not support *Younger* abstention in this case for three reasons. First, the *Weitzel* Court relied heavily upon a three-part *Middleton* test called into question, if not invalidated, by *Sprint Communications*. *Id.* at 593. Secondly, *Weitzel* applied *Younger* abstention in part because the state-court action was "seeking relief identical to that sought in federal court," whereas, here, Chairman Shotton's § 1983 action seeks damages that are not sought and are arguably unavailable in the Connecticut state-court action; and neither are the two actions "identical" in terms of the parties. Finally, *Weitzel* is inconsistent with *NOPSI*, which makes clear that *Younger* abstention does not require deference simply because a state judicial proceeding reviewing an enforcement proceeding is available or even pending. *Id*. at 374.

require exhaustion at all." *Jones v. Bock,* 549 U.S. 199, 212 (2007); *See also Pittsburg Cnty. Rural Water Dist. No. 7 v. City of McAlester,* 358 F.3d 694, 710 (10th Cir.2004)("due to Congress's desire to provide a federal forum for the vindication of federal rights, § 1983 contains no exhaustion requirement;" citing *Patsy v. Bd. of Regents of State of Fla.,* 457 U.S. 496 (1982)).

Defendants' third argument misapplies authority in asserting that the tangential appearance of a bond order in the Connecticut action deprives this Court of its ability to hear Chairman Shotton's § 1983 claims and requires *Younger* abstention. It does nothing of the kind. The third *Younger* category includes "pending 'civil proceedings involving certain orders…uniquely in furtherance of the state courts' ability to perform their judicial functions.'" *Sprint Communications,* 134 S.Ct. at 591. Citing *Penzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987), Defendants argue the Connecticut order requiring a bond "falls squarely within the third *Younger* category." Motion at p.7. However, *Penzoil* applied *Younger* abstention in holding that lower federal courts had erred in not abstaining from the merits of a judgment debtor's allegation that a state courts' order to post an appeal bond in excess of $13,000,000,000 was unconstitutional. The *Penzoil* Court found that lower courts "failed to recognize the significant interests harmed by their unprecedented intrusion into the Texas judicial system." *Id.* at 1525. Chairman Shotton's § 1983 claim does not ask this Court to consider the propriety of a state-court bond order that would place this case within the third *Younger* category. Moreover, the bond ordered by the Connecticut court was not a prerequisite for the appeal as in *Penzoil*. Rather, the bond order arose solely out of Plaintiff's separate request for a stay of enforcement of the civil penalties. *See* Conn. Gen.

Stat. § 4-183(f). In any event, that request for a stay has been withdrawn, mooting any requirement for a bond.

Additionally, Defendants fail to mention that *Younger* abstention operates only to stay damages claims "until state proceedings are final." *Chapman v. Barcus*, 372 F. App'x 899, 902 (10th Cir.2010). However, no stay is required because Chairman Shotton has not triggered *Younger* abstention by asking this Court to interfere in an ongoing civil enforcement action, and the Supreme Court has never announced a "doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." *NOPSI*, 491 U.S. at 367. For these reasons, *Younger* abstention is impermissible.

B. *THIS COURT POSSESSES PERSONAL JURISDICTION*

Defendants seek dismissal for a claimed lack of personal jurisdiction. They argue that because Defendants' acts were made in the course of their government employment, this Court may not exercise personal jurisdiction over them in their individual capacities. Motion at p.10. They also urge that personal jurisdiction does not exist in this case because their contacts were insufficient to establish either individual or official capacity personal jurisdiction. Id.[4]

[4] Defendants also seek dismissal from this action in their *individual* capacities because they never acted outside the scope of their governmental positions vis-à-vis Plaintiff and the Tribal Lenders and, therefore, did not establish minimum contacts with Oklahoma on a personal basis. Motion at p.10. They cite *Muhammad v. United States*, 2010 WL 551413 at *9 (D.Colo.), for this proposition; however, *Muhammad* in no way established or noted some case-made rule that a governmental official can avoid suit in another jurisdiction because he never acted outside of his office. They also attempt to extend a 'fiduciary shield' doctrine, that used to protect officers or employees who acted on behalf of their corporate employers, *Berrett v. Life Ins. Co. of the Southwest*, 623 F.Supp. 946, 951-52 (D.Utah 1985), to governmental actors. However, *Calder* eviscerated the fiduciary shield doctrine insofar as

In 1984 the U.S. Supreme Court decided *Calder v. Jones*, 465 U.S. 783 (1984). There, it determined personal jurisdiction requirements were satisfied when citizens of one state directed tortious acts at, and knew the brunt of the injury would be felt in, another state where the plaintiff resided.

> [Defendants'] intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the *National Enquirer* has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297…; *Kulko v. Superior Court*, 436 U.S. 84, 97-98… (1978); *Shafer v. Heitner*, 433 U.S. 186, 216… (1977). An individual in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.

Calder, 465 U.S. at 789-90 (emphasis added). The Court then held that "jurisdiction over [the defendants] in California is proper because of their intentional conduct in Florida

---

tortious acts of the corporate officers or employees are concerned. *Id.* (citing *Calder*, 104 S.Ct. at 1487).

"A suit brought against a state officer for acting unconstitutionally '[strips the official] of his official representative character and [subjects him] in his person to the consequences of his individual conduct."" *West v. Holder*, 2014 WL 3834713 at *4 (D.D.C.)(citing *Ex Parte Young*, 209 U.S. 123, 160 (1908)). The court in *West* noted it is an unanswered question "whether…a court may exercise personal jurisdiction over an official sued under *Ex Parte Young*," since "[t]he suit could still…be considered to be against the state for the purpose of personal jurisdiction," or "[o]n the other hand, an official who is 'stripped of his official or representative character' might be viewed as an individual for the purposes of personal jurisdiction" *Id.* As another court noted in another suit involving federal officials, "[t]o bring an action against the individual defendants in their personal capacities [Plaintiff] must establish that the individual defendants…are subject to the personal jurisdiction of the district court." *Eveland v. Director of Central Intelligence Agency*, 843 F.2d 46, 50 (1st Cir.1988).

calculated to cause injury to respondent in California." *Id.* at 791.[5]

The Tenth Circuit has applied *Calder* to find personal jurisdiction over nonresident defendants in the tort context. In *Dudnikov v. Chalk & Vermillion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir.2008), the Court reversed a lower court's dismissal of claims raised by plaintiffs whose eBay auction of fabrics out of their Colorado home was suspended as a result of the actions of foreign defendants sending notice to eBay of infringement and threatening plaintiffs with suit. The Tenth Circuit distilled *Calder* to three essential components: "(a) an intentional action…, that was (b) expressly aimed at the forum state…, with (c) knowledge that the brunt of the injury would be felt in the forum state…." *Id.* at 1072. It found the first component satisfied by the defendants' "intentional action of sending a [notice] specifically designed to terminate plaintiffs' auction and…followed that act with an express threat to sue…." *Id.* at 1074. It found the second component satisfied by the fact that, although the transmission of notice was sent to eBay in California, "it can be fairly characterized as an intended means to the further intended end of cancelling plaintiffs' auction in Colorado…[;] defendants intended to send the [notice] to eBay in California, but they did so with the ultimate purpose of cancelling plaintiffs' auction in Colorado. Their 'express aim' thus can be said to have reached into Colorado…." *Id.* at 1075. It found the third component fulfilled because "they *intended* to cause the cancellation of plaintiffs'

[5] The *Calder* effects test applies in § 1983 actions. *See Jaipaul v. Pliant Corp.*, 2008 WL 2746291 at *3 & n.3 (E.D.Pa.)("'effects test' promulgated in *Calder* has been applied in cases involving 'statutory, civil rights tort[s];'" quoting *Wright v. Xerox Corp.*, 882 F.Supp. 399, 406 (D.N.J.1995), and citing *Scott v. NASCAR*, 2008 WL 217049 (S.D.N.Y.)); *Barclay v. Hughes*, 462, F.Supp.2d 314, 317 (D.Conn.2006)("a § 1983 or other federal statutory violation constitutes a tort for purposes of a state's long-arm statute;" citing *Davis v. United States*, 2004 WL 324880 at *5 (S.D.N.Y.)); *El-maghraby v. Ashcroft*, 2005 WL 2375202 at *9-10 (E.D.N.Y.)).

auction, and it is that precise alleged harm that plaintiffs seek to have redressed through this suit." *Id.* at 1077 (emphasis in original). Citing *Finley v. River North Records, Inc.*, 148 F.3d 913, 916 (8th Cir.1998), the Court noted on this point, "actions that 'are performed for the very purpose of having their consequences felt in the forum state' are more than sufficient to support a finding of purposeful direction under *Calder*." *Id.* at 1078.[6]

The decisions cited by defendants in support of their argument are distinguishable. Neither *Wise v. Lindamood*, 89 F.Supp.2d 1187 (D.Colo.1999), nor *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir.2008), nor *Omaha Tribe of Neb. v. Barnett*, 245 F.Supp.2d 1049 (D.Neb.2003), deal with the exact situation here: a foreign state agency's levy of a $700,000 fine and injunctive orders against a Tribal Chairman domiciled on Tribal Lands in Oklahoma, subjecting him and his property, also on Tribal Lands in Oklahoma, to risk for the alleged violations of Connecticut law by wholly separate Tribal entities.

Here, personal jurisdiction is easily established. Consistent with *Calder* and *Dudnikov*, Chairman Shotton has shown that Defendants' actions were: (a) intentional, (b) expressly aimed at him and his interests in Oklahoma, and (c) with certainty that the brunt of the injury would be felt in Oklahoma. *Dudnikov*, 514 F.3d at 1072. The Illegal Orders were

---

[6] *See also Oriental Trading Co. v. Firetti*, 236 F.3d 938, 943 (8th Cir.2001)("The lack of physical presence in a state cannot alone defeat jurisdiction. [*Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)]…. The litigation in this case arises in this case out of what the jury found to be appellants' intentional tortious acts directed at residents of Nebraska where the brunt of the harm was felt. *See Calder*…"); *N.C. Mut. Life Ins. Co. v. McKinley Fin. Serv., Inc.*, 386 F.Supp.2d 648, 655 (M.D.N.C.2005)("[W]here a corporate officer actually commits a tort in the forum state, "it is unimportant…whether he was acting at the time in his corporate or personal role." [*Columbia Briargate Co. v. First Nat'l Bank*, 713 F.2d 1052, 1065 (4th Cir.1983)]. Therefore, in cases where the officer commits the tort in the forum state, that officer is subject to personal jurisdiction in the state where the tort was committed").

directed to Chairman Shotton and the Tribal Lenders in Oklahoma and directly affected them and their business activities being conducted in Oklahoma. *See* Declaration of John R. Shotton, attached as Exhibit "1," ¶¶ 2-10. Just as in *Dudnikov*, the ultimate purpose of Defendants' actions was to effectuate a cessation of business activity on Tribal Lands within Oklahoma's borders. *See id*. The Illegal Orders specifically bound Chairman Shotton from taking certain actions within Oklahoma and on Tribal Lands and imposed a civil penalty of $700,000 upon him and the Tribal Lenders which affects Chairman Shotton's personal and property rights within the State. *See id.* This evidences Defendants clearly intended to reach into Oklahoma by taking action. Finally, Defendants through the Illegal Orders, intended for them to have consequences and be felt in the State of Oklahoma by Plaintiff and the Tribal Lenders, which in the meantime deprived Chairman Shotton of his constitutional rights and violated Tribal sovereignty, which may be redressed through § 1983. *See id.*

Although omitted from the Motion, the *reasonableness* of this Court's exercise of personal jurisdiction is also apparent. *See OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1091 (10th Cir.1998)(noting the second prong of the personal jurisdiction analysis requiring the court to consider "whether the exercise of personal jurisdiction over the defendant offends 'traditional notions of fair play and substantial justice;'" citing *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 (1987)). In determining whether the exercise of jurisdiction is so unreasonable as to violate "fair play and substantial justice," a district court must consider: "(1) the burden on the defendant, (2) the forum state's interest in resolving the dispute, (3) the plaintiff's interest in receiving convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient

resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies." *OMI Holdings*, 149 F.3d at 1095 (citing *Asahi*, 480 U.S. at 113).

Application of these factors demonstrates that this Court's exercise of jurisdiction over Defendant's would be reasonable. First, the burden on Defendants of litigating in Oklahoma is certainly no greater than the burden they placed upon Chairman Shotton when they purported to require him to defend himself in Connecticut, and in many respects it is even less so. Secondly, Oklahoma has a significant interest in the resolution of this dispute in light of its strong tradition of encouraging tribal development and autonomy and because of its policy of promoting cooperative, constructive relationships between tribes and state agencies. Also, Oklahoma has an interest in seeing that other States do not bully Tribal members and Oklahomans and issue arbitrary and capricious fines that harm them personally, and within the State of Oklahoma, simply to make political points. Indeed, Oklahoma has "an important interest in providing a forum in which [its] residents can seek redress for injuries caused by out-of-state actors." *Id*. Thirdly, Chairman Shotton has a compelling interest in "receiving convenient and effective relief" because the Department may at any time seek enforcement of its $700,000 fine upon him. Moreover, its orders interfere with his ability to lead the Tribe free from coercion and attempted intimidation. Fourthly, Oklahoma is the most efficient place to litigate Chairman Shotton's § 1983 claims. Chairman Shotton resides in Oklahoma on Tribal Lands. The employees and records of the Tribal Lenders and their conduct that resulted in the Department's actions occurred principally in Oklahoma.

Finally, Oklahoma has a far greater interest than Connecticut in "furthering fundamental substantive social policies" at issue in action. Oklahoma is home to a uniquely diverse group of sovereign tribes, and the history of this State in large measure is the story of how State and Tribal interests have diverged, intersected and more recently coincided to form a mutually-respectful relationship that preserves Tribal sovereignty while promoting economic growth in the State and within the Tribes. Oklahoma's critically important relationship between State and Tribe is truly undermined when foreign State actors reach across the country to attempt to scare and coerce an Oklahoma Tribal Chairman to abrogate his solemn responsibilities as the chief executive of a sovereign people. The Connecticut Defendants do not appear to appreciate the importance of Oklahoma's delicate yet crucial relationship between Tribe and State, and their actions harm that relationship and conflict with Oklahoma's public policy of encouraging Native American growth and tribal independence. Oklahoma has a far greater interest than Connecticut in seeing federal review of the Department's arbitrary and capricious actions involving Chairman Shotton.

C. *CHAIRMAN SHOTTON'S PROCEDURAL DUE PROCESS CLAIM IS RIPE*

Defendants seek dismissal of Plaintiff's procedural due process claim as unripe because of the voluntary appeal of the Illegal Orders to Connecticut state court. Because the state court appeal is underway, Defendants contend this action must be dismissed as unripe. Defendants' conclusions about ripeness miss the mark, and the due process claim is ripe.

The doctrine of ripeness is derived directly from federal subject matter jurisdiction conferred by Article III of the U.S. Constitution. *See United States v. Wilson*, 244 F.3d 1208, 1213 (10th Cir.2001). It is "intended to forestall judicial determinations of disputes

until the controversy is presented in clean-cut and concrete form." *Id.* Two issues are analyzed in determining ripeness: "(1) the fitness of the issue for judicial resolution and (2) the hardship to the parties of withholding judicial consideration." *Wilson*, 244 F.3d at 1213. In performing this analysis, the Court may consider:

> (1) whether the issues in the case are purely legal; (2) whether the agency action involved is "final agency action" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 704; (3) whether the action has or will have a direct and immediate impact upon the plaintiff; and (4) whether the resolution of the issues will promote effective enforcement and administration by the agency.

Id.

In connection with administrative action, "The ripeness doctrine prevents judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Lauderbaugh v. Hopewell Twp.*, 319 F.3d 568, 575 (3d Cir.2003). Agency action is, thus, "final" if it "mark[s] the 'consummation' of the agency's decisionmaking process,…[and] is not…merely tentative or interlocutory in nature[, a]nd…[is] one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow…'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

> The well-settled rule in administrative law is that a "final agency action" is one that "mark[s] the consummation of the *agency's* decisionmaking process." … It means a "final determination" in a case by an administrative agency; that is, whether the agency rendered its last word on the matter…. *Only* after an agency's final action may courts review the agency's decision.

Omnipoint Holdings, Inc. v. City of Cranston, 586 F.3d 38, 46 (1st Cir.2009). State court review of an agency's decision does not affect ripeness of such a decision:

> Of course, an aggrieved party may appeal for judicial review. A claim is 'final,' however, after the board has rendered a decision. Finality does not require state court review of the board's decision.

Taylor Invest., Ltd. v. Upper Darby Twp., 983 F.2d 1285, 1293 & n.12 (3d Cir.1993)(noted by *R&J Holding Co.*, 165 Fed.Appx. at 180, as "holding that *Williamson*'s finality requirement applies to § 1983 alleging violations of equal protection, procedural due process, and substantive due process"); *see also Behavioral Inst. of Indiana, LLC v. Hobart City of Common Council*, 406 F.3d 926, 930 & n.2 (7th Cir.2005)("Generally, § 1983 plaintiffs are not required to exhaust state remedies before filing in federal court;" citing *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496 1982)).[7]

[7] Defendants' reliance on Judge Eagan's opinion in *Anderson v. City of Miami, Okla.*, 2011 WL 2792300 (N.D.Okla.), is misplaced. *Anderson* involved the administrative appeal of a police department employment termination to a "board of review [appointed to] hear appeals concerning the discharge of eligible police officers," ultimately assigned to the city manager. *Id.* at *1 & n.1. As the appeal-authorizing statute provides, "No member may be discharged except for cause. Any member who is discharged may appeal to the board of review herein provided. Appeals from decisions of said board of review may be taken in the manner provided for in this article…." Okla. Stat. tit. 11, § 50-123(B); *see also id.* § 50-129 (appeals from "the decision of the State Board" to Oklahoma County District Court). During the plaintiff's administrative appeal of his termination, he instituted suit under § 1983, which precipitated a ripeness issue. *Id.* The appeal in *Anderson* was at the *administrative* level, meaning **no** final administrative action had been taken, leaving the plaintiff in the position of not having "yet received the allegedly deficient post-termination review by the City…." *Id.* at *4. Quite the contrary in this action, the acts of the subject administrative agency, the Connecticut Department of Banking, are a *fait accompli*, even if subject to review in state court.

Defendant's reliance on *Zinermon v. Burch*, 494 U.S. 113 (1990), as supporting dismissal of this action based upon ripeness, is also misplaced. The *Zinermon* Court did find that "The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process" (*id.* at 126); however, it also noted that in determining whether a constitutional violation occurred, "it is necessary to ask what process the **State** provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law." *Id.* (emphases added). The *ripeness* doctrine never appears once in the opinion and is outside its analysis, in which it determined the trial court's dismissal of the case for failure to state a claim for which relief could be granted.

In *Williamson County Reg. Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), a land-use case involving the ripeness of administrative decisions, the Supreme Court made a clear distinction between finality of such a decision and exhaustion of administrative remedies, in terms of the ripeness doctrine.

> [T]he Supreme Court…held that "there is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action. The question of whether administrative remedies must be exhausted is conceptually distinct, however, from the question of whether an administrative action must be final, before it is judicially reviewable." *Id.* at 192…. "While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the *initial* decisionmaker has arrived at a definitive position on the issue that inflicts an actual concrete injury…." *Id.* … The policy requiring finality, as opposed to exhaustion, is that resolution of the extent of the injury "depends in significant part, upon an analysis of the effect" of the contested government activity allegedly causing plaintiff harm. *Id.* at 200…. "That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property." *Id.*

R&J Holding Co. v. Redevel. Auth. Of the County of Montgomery, 165 Fed.Appx. 175, 179-80 (3d Cir.2006)(quoting *Williamson*).[8]

In line with this authority, the ripeness doctrine, concerning a governmental fine, turns on whether "'the governmental entity charged with implementing the regulations' [has] reached a 'final decision regarding the application of the regulations to the property at issue.'" *Marfut v. City of North Port, Florida*, 2009 WL 79011 at *4 (M.D.Fla.)(citing *Tari v. Collier County*, 56 F.3d 1533, 1535 (11th Cir.1995), itself quoting *Williamson*, 473 U.S. at 186). Thus, "[a] decision becomes final when the initial decisionmaker takes a definitive

[8] Although *Williamson* is assumed to set forth specific ripeness requirements for land use disputes (*see Witt v. Village of Mamaronek*, 992 F.Supp.2d 350, 357 (S.D.N.Y. 2014)), it has otherwise been found to "appl[y] to takings claims that have nothing at all to do with real property." *TZ Manor, LLC v. Daines*, 2009 WL 2242436 at *6 & n.3 (S.D.N.Y.)(citing *Ford Motor Credit Co v. N.Y. City Police Dep't.*, 394 F.Supp.2d 600, 619 (S.D.N.Y.2005), *aff'd*, 503 F.3d 186 (2d Cir.2007)).

position that inflicts the actual, concrete injury." *Id.*; *see also United States v. Grose*, 687 F.2d 1298, 1300 (10th Cir.1982)(*en banc*; addressing constitutionality of statute as not premature since the plaintiff "would be faced immediately with the alternative of paying the fine or going to prison").

There is no doubt that Chairman Shotton's state-court appeal in Connecticut in no way renders the agency's Illegal Orders to be "non-final" or still in process. Most compelling on this point is Defendants' own admission of the finality of the Department's action, by acknowledging Conn. Gen. Stat. § 4-183 as the basis for the appeal. Such provision clearly provides the right to an appeal to Superior Court belongs to one "**who has exhausted all administrative remedies** within the agency **and** who is **aggrieved by a final decision**…." *Id.* (emphases added). Defendants' admission confirms ripeness.

Notwithstanding that fact, the ripeness test in *Wilson* is otherwise met. This action deals with only the due process deprivations and sovereignty violations committed by Defendants in issuing the Illegal Orders. Those deprivations and violations are culminated in the § 1983 claim Chairman Shotton has raised in this case. As the Illegal Orders are final administrative decisions, the question of their propriety is certainly fit for judicial resolution, as the agency action is "final agency action," having a direct and immediate impact on Chairman Shotton.[9] Withholding judicial consideration of such propriety would work a

[9] This prong of the analysis requires the Court to ask the question "whether concrete legal issues are presented by the case in its present posture…[*i.e.*,] whether further agency action would result in a more clearly developed presentation of the relevant issues to the court." *Diversified Chems. & Propellants Co. v. Fed. Energy Admin.*, 432 F.Supp. 859, 863 (N.D.Ill.1977)(cited with approval by *McCombs v. FERC*, 705 F.2d 1177, 1181 (10th Cir.1980), *opinion vacated and cause dismissed*, 710 F.2d 611 (10th Cir.1983)).

substantial hardship for Plaintiff,[10] unlawfully obligated under those Illegal Orders to refrain from acting, to perform certain acts in favor of the State of Connecticut, and to remit $700,000 to the State of Connecticut. Complaint at pp. 8-12, ¶¶ 25-42. Ripeness of the underlying Connecticut Illegal Orders is unquestionable in this § 1983 action so this Court can determine if the past (and final) decisions of the Connecticut Defendants were constitutionally sound.

D. *THE ELEVENTH AMENDMENT DOES NOT BAR CHAIRMAN SHOTTON'S § 1983 CLAIMS*

Chairman Shotton's claims against Defendants in their official capacity are fully consistent with the Eleventh Amendment. They do not seek official capacity monetary damages *per se*, and the declaratory relief they do seek is not barred. Defendants cite *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, Inc., 506 U.S. 139 (1993), to incorrectly argue that the Eleventh Amendment absolutely prohibits "judgments against state officers declaring that they violated federal law in the past." *Id*. at 146. In fact, that prohibition is not absolute. *See Alden v. Maine*, 527 U.S. 706, 747 (1999)(recognizing that "certain suits for declaratory or injunctive relief against state officers must be permitted if the Constitution is to remain the supreme law of the land"); *Kentucky v. Graham*, 473 U.S. 159, 169 (1985)(noting that in "injunctive or declaratory action grounded on federal law, the State's immunity can be overcome by naming state officials as defendants" and that even monetary relief is sometimes appropriate when "ancillary" to injunctive relief).

[10] This prong of the analysis looks at whether the agency decision will cause the claimant to suffer "great harm to its business relations by risking agency enforcement." *Diversified Chems.*, 432 F.Supp. at 863-64.

This Court has jurisdiction to hear Chairman Shotton's request for declaratory relief because it is "ancillary" to the injunctive relief he seeks. In *Smith v. Dep't of Human Servs.*, 232 F.3d 902, 2000 WL 1480259 (10th Cir.2000) (unpublished), the Court considered a defendant's identical contention that "the district court lacks jurisdiction over plaintiff's § 1983 claim because she seeks only a declaratory judgment. In fact, plaintiff seeks a declaratory judgment that defendants' actions were unconstitutional; general, special, and punitive damages; and prospective injunctive relief." *Id.* at *1. In affirming the district court's exercise of jurisdiction, the *Smith* Court held that while a district court "lacks jurisdiction to enter a declaratory judgment alone in a § 1983 action, [it] has jurisdiction to hear a § 1983 claim for prospective injunction relief, and may enter an ancillary declaratory judgment in such a case." *Id.* (citing *Johns v. Stewart*, 57 F.3d 1544, 1553 (10th Cir.1995)). Under *Smith*, Chairman Shotton's request for declaratory relief ancillary to injunctive relief fully comports with the Eleventh Amendment.

Defendants are correct in maintaining, consistently with *Peterson v Martinez*, 707 F.3d 1197 (10th Cir.2013), that Defendant Pitkin is no longer a proper official capacity defendant because he no longer has "some connection with the enforcement of the act…" by virtue of his retirement. *Id.* at 1205. In contrast, although Defendant Adams may no longer serve as Acting Commissioner, as alleged in the Motion at p.17, he maintains that requisite "connection" in his resumed role as General Counsel of the Connecticut Department of Banking. Complaint at ¶¶ 41-42. Fed.R.Civ.P. 25(d)(1) does not "automatically" substitute Commissioner Perez for Defendant Adams because as the Complaint alleges, Adams is a proper defendant in his own right.

E. *DEFENDANTS FAIL TO MEET THEIR BURDEN OF ESTABLISHING ABSOLUTE IMMUNITY*

An official "seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993). Defendants have failed to meet their burden and the cases they cite are inapposite. In *Guttman v. Khalsa*, 446 F.3d 1027 (10th Cir.2006), the Tenth Circuit upheld prosecutorial immunity for two members of the New Mexico Board of Medical Examiners who acted as "hearing officer" and "administrative prosecutor" during a three-day hearing which resulted in the revocation of a medical license. *Id*. at 1033. Similarly, the Court in *Horowitz v. State Bd. of Med. Examiners*, 822 F.2d 1508 (10th Cir.1987), held that members of the Colorado State Medical Examiners Board serving as "hearing officers served a quasi-judicial function and, hence, …were protected by absolute immunity from a suit alleging that one of their decision violated federal law." *Guttman v. Khalsa*, 446 F.3d at 1033 (citing *Horwitz v. State Bd. of Med. Examiners*, 822 F.2d at 1513). Here, however, Defendants performed no such role.

Chairman Shotton acknowledges the holding from *Butz v. Economou*, 438 U.S. 478 (1978), that "agency officials… who are responsible for the decision to initiate or continue a proceeding are entitled to absolute immunity from damages liability for their parts in that decision," but maintains that Defendants nonetheless lack absolute immunity. *Id*. at 516. Prosecutorial immunity is unavailable for actions "taken in the complete absence of all jurisdiction" or where a prosecutor "acts with a complete and clear absence of authority." *Lyghtle v. Breitenbach*, 139 Fed.Appx. 17, 20 (10th Cir.2005)(citing *Mireles v. Waco*, 502

U.S. 9, 11-12 (1991)). As shown below, Defendants lacked any jurisdiction or authority to violate Chairman Shotton's Tribal officer immunity and illegally fine him, acting in a wholly arbitrary and capricious manner. For this reason, they may not attempt to cloak themselves with prosecutorial immunity.

F. *CHAIRMAN SHOTTON'S PROCEDURAL DUE PROCESS CLAIM SHOULD NOT BE DISMISSED*[11]

Chairman Shotton's procedural due process claim must survive the Motion because his *Complaint* has certainly "nudged [that claim] across the line from conceivable to plausible." *U.S. ex rel. Boggs v. Bright Smile Family Dentistry, P.L.C.*, 2012 WL 530092, at *3 (W.D.Okla.). Defendants myopically fixate on procedural aspects of Connecticut's banking law while ignoring the elephant in their room—under Connecticut and established federal law, their imposition of a fine upon Chairman Shotton in his individual capacity for his official conduct as a Tribal officer of a sovereign Tribe is illegal and contravenes constitutional principles. *See* e.g., *Chayoon v. Sherlock*, 89 Conn.App. 821, 828, 877 A.2d 4, 9 (2005) (holding that a "claim for damages against a tribal official lies outside the scope of tribal immunity only where the complaint pleads – and it is shown – that a tribal official acted beyond the scope of his authority to act on behalf of the [t]ribe"). They ask this Court to rule that Chairman Shotton's due process claim is not even plausible; yet they fail to show

[11] Defendants seek dismissal of Chairman Shotton's procedural due process claims based upon Fed.R.Civ.P. 12(b)(6). Motion at p.18. However, they have based this request upon exhibits outside the *Complaint*. *See id.* at p.20 & n.11 (Exhibit 3); at p.22 (Exhibit 6). Reliance upon these matters outside the *Complaint* should serve to convert the Motion into one for summary judgment. Fed.R.Civ.P. 12(d). Chairman Shotton has not addressed this proposition pursuant to Fed.R.Civ.P. 56, but requests that either the Court exclude Exhibits 3 and 6 from consideration of the Motion or it give the parties notice of the conversion of the Motion to Defendant's one-time summary judgment motion and afford Chairman Shotton time to fully respond thereto in accordance with Rule 56 requirements.

how any amount of procedural process could possibly be adequate when the object and result of that process is blatantly illegal.

Again, they offer inapplicable holdings from cases considering inapposite facts. They cite *Coffey v. Schewiker*, 559 F.Supp. 1375, 1377 (D.Kan.1983), and *White v. Schweiker*, 725 F.2d 91 (10th Cir.1984), for the proposition that "the denial of an untimely hearing request in no way violates due process" (Motion at p.21); yet those cases encountered distinguishable facts and their holdings depended on the content of specific Social Security rules and regulations in 42 U.S.C § 405. They chide Chairman Shotton for not availing himself of his "options" after the unlawful deprivation but ignore the principle that, "[w]here predeprivation process is constitutionally required but not provided, no amount of postdeprivation process' can cure an otherwise infirm deprivation." *Seabourn v. Indep. School Dist. No. I-300 of Woodward Cnty.*, 775 F. Supp. 2d 1306, 1312 (W.D.Okla.2010)(citations omitted); *see also Kirkland v. St. Vrain Valley Sch. Dist. No. Re-1J*, 464 F.3d 1182, 1191-92 (10th Cir.2006).

In arguing derisively that "Plaintiff chose not to make a timely request" for a hearing, Defendants unfairly castigate the leader of a sovereign Tribe for not thoughtlessly rushing headlong into an administrative hearing he feared would jeopardize his individual Tribal officer immunity and waive the sovereign immunity of the Tribe, for which he bears ultimate responsibility. Defendants trivialize Chairman Shotton's legitimate concern that he not unwittingly waive the Tribe's sovereign immunity. The purpose of his November 10, 2014 Memorandum was to explain to the Department that "Respondents retain and have not waived their sovereign immunity from the current administrative enforcement proceeding."

Complaint at Ex.3 **[Dkt #1–3]**. It was reasonable and proper for Chairman Shotton to first address his and his Tribe's legitimate concern over its immunity and the Department's lack of jurisdiction before submitting to an administrative hearing which might waive both. It was unreasonable for the Department to ignore those concerns and his request to postpone its final decision until after the issues of jurisdiction and tribal immunity had been resolved.

Where Defendants stake their claim on hyper-technical ground, Chairman Shotton asks this Court apply the keystone decision of *Mathews v. Eldridge* 424 U.S. 319 (1976) to the unique and difficult position he faced in late 2014. *Matthews* set out a three-pronged procedural due process inquiry:

> …[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail

Id. at 334-35.

Chairman Shotton's "interest" was certainly significant, for it included not only the Department's imposition of significant fines upon him personally, but also his concern that the Department lacked jurisdiction and that his submission to a contested hearing might result in an immunity waiver. The "risk of an erroneous deprivation" occurring during the minimal "procedures used" was also great because any monetary fine imposed upon Chairman Shotton in his individual capacity would be manifestly illegal under federal and Connecticut law. Further, the "probable value, if any, of additional or substitute procedural safeguards" was very high because a reasonable postponement of a hearing or final decision

would have given Chairman Shotton further opportunity to demonstrate to the Department or to a state court that any fine upon him in his individual capacity would be illegal, and he might also have developed safeguards that would have permitted his participating in a hearing without waiving any immunity. Finally, any "fiscal and administrative burdens" the Department would have felt by complying with Chairman Shotton's reasonable request for postponement would have been miniscule, particularly when weighed against the enormous penalty ultimately imposed. Each of these *Matthews* factors militate strongly in favor of Chairman Shotton's procedural due process claim.

Tenth Circuit precedent does not favor Defendants' technical approach and rejects their position that non-compliance with the strict letter of state regulations automatically precludes a procedural due process claim. The Court in *Kirkland v. St. Vrain Valley Sch. Dist. No. Re-1J*, 464 F.3d 1182 (10th Cir.2006), noted that, "i[t] is by now well established that due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Rather, it is flexible and calls for such procedural protections as the particular situation demands." *Id*. at 1191-92 (citing *Gilbert v. Homar*, 520 U.S. 924, 930 (1997)); *see also Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

Similarly, in *Ward v. Anderson*, 494 F.3d 929 (10th Cir.2007), the Court noted that, "both parties focus their procedural due process arguments on the provisions of the Wyoming statutes and the DFS regulations that provide for hearings" and found, "these arguments are a red herring; the question raised in a procedural due process challenge is

whether the level of process afforded to the Wards passed constitutional muster, not whether DFS followed statutes or regulations." *Id*. at 934-35 (citing *Hennigh v. City of Shawnee,* 155 F.3d 1249, 1256 (10th Cir.1998))("[A] failure to comply with state or local procedural requirements does not necessarily constitute a denial of due process; the alleged violation must result in a procedure which itself falls short of standards derived from the Due Process Clause."). The level of process Defendants afforded Chairman Shotton prior to imposing a clearly illegal $700,000 fine upon him does not pass constitutional muster. It cannot be said that Chairman Shotton's procedural due process claim is not plausible on its face.

G. *DEFENDANTS' VIOLATION OF CHAIRMAN SHOTTON'S PERSONAL RIGHTS STATES A VALID § 1983 CLAIM*

Defendants penalized Chairman Shotton in his individual capacity, not for his individual conduct, but merely because he served as the Chairman of the Otoe-Missouria Tribe of Indians. This was clearly illegal. Tribal immunity "extends to tribal officials, so long as they are acting within the scope of their official capacities." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1153-54 (10th Cir.2011). Defendants "may not avoid the operation of tribal immunity by suing tribal officials." *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.,* 546 F.3d 1288, 1296-97 (10th Cir.2008).

Defendants ask this Court to find that § 1983 does not give Chairman Shotton redress for their illegal imposition of a $700,000 penalty upon him in his personal capacity. It certainly does. Defendants misstate the holdings of *Inyo Cnty., Cal. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701 (2003), which are merely that a tribe may not seek to vindicate its sovereign rights because it is not a "person" for purposes of § 1983 and that § 1983 was not designed "to advance a sovereign's prerogative

to withhold evidence relevant to a criminal investigation." *Id*. at 711-12. Defendants unduly expand that decision's narrow holding in arguing that this Court cannot vindicate an illegal deprivation of a citizen's individual rights under federal law.

Chairman Shotton is not asking this court to vindicate the sovereign immunity of the Tribe. Rather, he properly asks this Court to vindicate his own personal rights under § 1983, which protects "any citizen of the United States or other person within the jurisdiction thereof [from] the deprivation of any rights, privileges, or immunities secured by the Constitution and laws…" 42 U.S.C. § 1983. He is a citizen of the United States, and Defendants have deprived him of his personal, individual right to be free from excessive and malicious monetary penalties imposed upon him personally for the sole reason that is a tribal officer. Federal law unequivocally gives Chairman Shotton the *personal* right of immunity, for tribal officers are immune "from claims made against them in their official capacities." *Native Am. Distrib.*, 546 F.3d at 1296-97.

Defendants cite *Winnebago Tribe of Nebraska v. Kline*, 297 F.Supp.2d 1291 (D.Kan.2004), but its holding, that tribal members could not maintain a § 1983 action to contest a state's right to collect motor vehicle fuel taxes from tribally-operated business, was premised on *Inyo County*'s rule that § 1983 was "designed to secure private rights against government encroachment." *Id*. at 1298 (citing *Inyo County*, 538 U.S. at 712). *Winnebago's* tribal member plaintiffs attempted to "characterize the proposed claims as an attempt to vindicate private rights… [but they] have no independent ownership interest in the property seized by the state…" *Id*. In contrast, Chairman Shotton has an "independent ownership interest" in the $700,000 of his own personal assets that Defendants have given notice of

their intent to seize.

Defendants argue that Chairman Shotton's tribal officer immunity is not a personal right, but will he not surely feel the loss of $700,000 in a deeply personal way? Defendants rely on *dicta* from a concurring opinion in asking this Court to hold what apparently no other court has held - that a tribal officer may not bring a § 1983 action to vindicate his personal rights under federal law to be free from a State's illegal seizure of his private property. Section 1983 enables courts to vindicate precisely this sort of *personal, individual right.*

H. *VENUE IS PROPER IN THIS JUDICIAL DISTRICT*

Defendants seek dismissal of this action for improper venue based entirely upon *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979), and *Stafford v. Briggs*, 444 U.S. 527 (1980), and their venue analyses. However, they overlook the fact that the applicable venue statute, amended significantly since those cases were decided,[12] actually provides for appropriate venue in this Court under a post-Amendment analysis.

Claims based upon 42 U.S.C. § 1983 are governed by the general venue statute, 28 U.S.C. § 1391(b). *Schlottman v. Unit Drilling Co.*, 2009 WL 414054 at *2 (W.D.Okla.). This subsection provides venue is appropriate:

[12] MOORE'S discusses *LeRoy*, noting "Before the 1990 amendment, in *LeRoy*…, the Supreme Court had indicated that a claim might arise in more than one district only in unusual cases. The court identified various factors to be considered in determining the locus of a claim, including availability of witnesses and evidence and the convenience of the defendant. Because it is no longer necessary to determine the best venue, these factors that compare venues will have less significance. … Instead, the statutory language requires the court to determine the locus of any substantial part of the events or omissions on which the claim is based. "Substantiality," for this purpose, is more a qualitative inquiry. Courts measure it by assessing the overall nature of the plaintiff's claims and the nature of the specific events or omissions in the forum. …" 17 MOORE'S FED. PRACT.3d § 110.04[1] at pp.110–39 to 110–41 (Matthew Bender 05/2012)(citations omitted).

> only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

In analyzing venue, it is the Court's obligation to determine "'whether the forum activities played a substantial role in the circumstances leading up to the plaintiff's claim,'" *Crowe & Dunlevy*, 609 F.Supp.2d at 1221 (citing *Multi-Media Int'l, LLC v. Promag Retail Serv.*, 343 F.Supp.2d 1024, 1033 (D.Kan.2004)), and if the "selected district's contacts are 'substantial,' it should 'make no difference that another are more so, or the most so.'" *Id.*; *see also Employers Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1166 (10th Cir. 2010)("Under § 1391(a)(2),[13] venue is not limited to the district with the *most* substantial events or omissions"); *Monument Builders of Greater Kan. City, Inc. v. Am. Cemetery Ass'n of Kan.*, 891 F.2d 1473, 1479 (10th Cir.1989)(venue can be proper in multiple districts). "Section 1391(a)(2) instead 'contemplates that venue can be appropriate in more than one district…[and] permits venue in multiple judicial districts as long as a substantial part of the underlying events took place in those districts.'" *Id.* (quoting *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 356 (2d Cir.2005)).

In determining whether venue is appropriate under § 1391(b)(2), the Court "should

---

[13] The venue analysis under § 1391(b)(2) should be the same as under § 1391(a)(2) since the statutory language is the same. *See, e.g., Hamel-Schwulst v. Negrotto*, 2010 WL 54318 at *5 & n.3 (N.D.Fla.); *Sabilia v. Richmond*, 2011 WL 7091353 at *4 (S.D.N.Y.)(citing *First of Mich. Corp. v. Bramlet*, 141 F.3d 260, 264 (6th Cir.1998)); *S.L. Sakansky & Assocs., Inc. v. Allied Amer. Adjusting Co.*, 2006 WL 948055 at *3 & n.8 (M.D.Fla.); *Woodke v. Dahm*, 873 F.Supp. 179, 197 (N.D.Iowa 1995); *Open Solutions Imaging Systems, Inc. v. Horn*, 2004 WL 1683158 at *4 & n.8 (D.Conn.).

look at the entire progression of the underlying claim," not just the matters giving rise to the filing of the action. 17 MOORE'S FED. PRACT.3d § 110.04[1] at p.110–41; *Employers Mut. Cas. Co.*, 618 F.3d at 1166. For example, in a contract case "courts must consider not only the place of performance but all relevant events such as where the contract was negotiated or executed, where the alleged breach occurred, and where the alleged harm occurred, in order to determine whether some substantial part of these events occurred in the forum state." *Id.* (citing *Etienne v. Wolverine Tube, Inc.*, 12 F.Supp.2d 1173, 1180-81 (D.Kan.1998)).[14] A liberal interpretation of § 1391(b)(2) was intended by Congress (*id.* § 110.04[2] at p.110–43), and the 1990 amendments to the statute were designed to broaden the number of places where venue might be proper, it being "no longer necessary to find 'the' district where the most activity occurred, but rather any district in which a substantial part of the case arose." *Id.* (citing *First of Mich. Corp. v. Bramlet*, 141 F.3d 260, 263-64 (6th Cir.1998)).

Leroy, decided under pre-Amendment § 1391(b)(2), is no longer instructive. The Court's focus under the *then-current version of the statute*[15] was to determine venue primarily based upon "convenience of litigants and witnesses." *See Leroy*, 443 U.S. at 184, 187. The Court determined the "bulk of relevant evidence and witnesses…is also located in

[14] "A fine, penalty, or forfeiture accrues in the district where the actions took place on which the fine, penalty or forfeiture is based." 17 MOORE'S FED. PRACT.3d § 110.34[2].

[15] The operative language of former § 1391(b)(2) was where "the claim arose," not where "a substantial part of the events or omissions giving rise to the claim occurred…," as § 1391(b)(2) now provides. *See, e.g., Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 356 (2d Cir.2005); *Database Amer., Inc. v. Bellsouth Advertising & Pub. Corp.*, 825 F.Supp.1216, 1225 & n.14 (D.N.J.1993). The pre-amendment language "left considerable doubt as to whether…venue could plausibly lie in more than one jurisdiction." *Gulf Ins. Co.*, 417 F.3d at 356. Much of the ambiguity of the former statute was removed by Congress in amending it to lay venue "in 'a'–not 'the'–'judicial district in which a *substantial part* of the events….occurred." *Id.* (emphasis in original).

the State [of Idaho]," and that, coupled with the challenge to the constitutionality of an Idaho statute, made Idaho, not Texas, where the claim "arose." *Id.* at 185-87. Contrary to what the Motion may proffer, the *Leroy* Court came nowhere near fashioning some case-made rule that where a claim arises out of enforcement of state law against a foreigner, "venue is proper only in the enforcing state." Motion at p.24.

Stafford, also based upon pre-Amendment § 1391, is of no help either. *Stafford* involved an action brought against *federal* officials, triggering a venue analysis under the "Mandamus and Venue Act of 1962," 28 U.S.C. § 1391(e). The Court's decision was solely within the framework of venue in actions brought against officers or employees of the United States or its agencies, and in no way implicated State citizens acting in their individual or official capacities within the States in which they were employed, affecting citizens of other States.

Here, the allegations in the *Complaint* satisfy § 1391(b)(2), and the lawsuit has been brought in the proper forum.[16] A substantial part of the due process deprivations and sovereignty violations had their effect in Oklahoma, where Plaintiff is located, and were undertaken by Connecticut agency actors based upon the lending activities of the Tribal Lenders that emanated from and occurred within this Oklahoma federal judicial district. As detailed in the *Complaint*, communications were sent by Defendants to Oklahoma. Complaint at p.8, ¶ 26. The October 24, 2014 *Temporary Order to Cease and Desist; Order*

[16] "In opposing a Rule 12(b)(3) motion, Plaintiff is entitled to rely on the well-pleaded facts of the Complaint, to the extent they are uncontroverted and any affidavits or evidence submitted." *Casino Entertainment Unlim., Inc. v. Ives*, 2009 WL 1751815 at *2 (W.D.Okla.)(citing *Pierce v. Shorty Small's of Branson, Inc.*, 137 F.3d 1190, 1192 (10th Cir.1998)).

to Make Restitution; Notice of Intent to Issue Order to Cease and Desist; Notice of Intent to Impose Civil Penalty was transmitted and delivered to Plaintiff on trust land in Oklahoma. Id. at p.9, ¶¶ 30-31; *see also* Exhibit 1, ¶¶ 6-7. The Order was clearly premised upon the actions of the Tribal Lenders and Plaintiff's status as Chairman of the Tribe and its Tribal Counsel, having approved of the operating agreement of one of the Tribal Lenders and serving as the other's secretary/treasurer. Id. **[Dkt #1–2]** at p.4, ¶¶ 1-3; *see also id.* at pp.4-5, ¶¶ 7-14 (detailing the Tribal Lenders' lending activities), Exhibit 1, ¶¶ 2-7. The Order then purported to impose upon Plaintiff, sitting in Oklahoma, duties and obligations, enjoining him from engaging in actions in Oklahoma. Id. at pp.9-10, ¶¶ 32-33 and **[Dkt #1–2]** at pp.7-14; *see also* Exhibit 1, ¶¶ 6-7.

On January 6, 2015, Defendants followed these unlawful acts by issuing an *Order to Cease and Desist and Order Imposing Civil Penalty*, purporting to require Plaintiff to cease and desist from engaging in certain activity within Oklahoma and ordered Plaintiff to pay a $700,000 civil penalty to the State of Connecticut, without adducing any evidence supporting such sum or why Plaintiff, personally, was being penalized. Id. at pp.10-11, ¶¶ 36-38; *see also* **[Dkt #1–6]** at pp.1-7, Exhibit 1, ¶¶ 8-9, 10. The latter Order certain affects Plaintiff directly, in Oklahoma, and his personal and property interests within this State and purportedly, albeit unlawfully, subjects such to execution or forfeiture by Connecticut authorities but in any event requires such property be paid over to the State of Connecticut. Id. at **[Dkt #1–6]** at pp.6-7, ¶¶ 3-4; *see also* Exhibit 1, ¶ 10. Based upon the allegations of the *Complaint* and record documents attached thereto, and Chairman Shotton's Declaration (Exh.1), it simply cannot be said that a substantial part of the events or omissions giving rise

to Plaintiff's claims did not occur within this judicial district, and venue here is proper.

III. CONCLUSION.

WHEREFORE, Chairman Shotton prays this Court will deny the Motion, grant him the attorneys' fees and costs expended by him to defend against the Motion, and grant him such other and further relief deemed to be just and proper.

Respectfully submitted,

s/Stuart Campbell

Stuart D. Campbell, OBA #11246
Jon E. Brightmire, OBA #11623
David H. Herrold, OBA #17053
Michael J. English, OBA #21502
DOERNER, SAUNDERS, DANIEL & ANDERSON, L.L.P.
Two West Second Street, Suite 700
Tulsa, Oklahoma 74103
Tel. (918) 582-1211| Fax (918) 925-5242
E-mail: scampbell@dsda.com
jbrightmire@dsda.com
dherrold@dsda.com
menglish@dsda.com
Attorneys for the Plaintiff, JOHN R. SHOTTON

CERTIFICATE OF SERVICE

The undersigned certifies that s/he caused a true and correct copy of the foregoing instrument to be uploaded and e-filed with the CM/ECF System maintained by the U.S. District Court for the Western District of Oklahoma on April 24, 2015, which is understood by the undersigned to serve electronic 'Notice of Electronic Filing' of the same to the following counsel who have consented to electronic service in this civil action:

Amy J Pierce apierce@corbynhampton.com, sarahh@corbynhampton.com

David H Herrold dherrold@dsda.com, preed@dsda.com

Joe M Hampton jhampton@corbynhampton.com, sarahh@corbynhampton.com

Jon E Brightmire jbrightmire@dsda.com, dsimpson@dsda.com

Michael J English menglish@dsda.com, atipton@dsda.com

Robert J Deichert Robert.Deichert@ct.gov, rjdeichert@hotmail.com

Stuart D Campbell scampbell@dsda.com, cpalmer@dsda.com, dbaker@dsda.com

s/Stuart Campbell