15-705

United States Court of Appeals for the Second Circuit

JEFFREY PITRE, RR. And AWENHA PITRE, Individually and on behalf of their children DP, SK, DP, SP, EP and JP,

Appellants-Plaintiffs,

vs.

LORRIE A. SHENANDOAH; JAMES DOOLEY; ONONDAGA SOCIAL SERVICES DEPARTMENT; OSWEGO SOCIAL SERVICES DEPARTMENT; and the ONONDAGA NATION,

Appellees-Defendants.

BRIEF ON BEHALF OF APPELLEES/DEFENDANTS LORRIE A. SHENANDOAH, JAMES DOOLEY and ONONDAGA NATION

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Appellants-Plaintiffs

-v-

LORRIE A. SHENANDOAH; JAMES DOOLEY;
ONONDAGA SOCIAL SERVICES DEPARTMENT;
OSWEGO SOCIAL SERVICES DEPARTMENT; and
the ONONDAGA NATION

Appellees-Defendants

QUESTIONS PRESENTED

1. Whether the *Rooker-Feldman* doctrine required the dismissal of the Complaint?

2. Whether the Indian Child Welfare Act required the dismissal of the Complaint?

STATEMENT

This case is an appeal by both parents of six Indian children, from the District Court's dismissal of their custody Complaint. This dismissal was not only

proper, but it was required under both the Indian Child Welfare Act (ICWA) and the *Rooker-Feldman* doctrine.

BACKGROUND

In the early summer of 2012, both parents were arrested and incarcerated due to allegations of severe sexual abuse made by their then 14 year old daughter that the father had raped her with the assistance of the mother while both parents were smoking bath salts. On June 27, 2012, the father signed a two page confession, in which he admitted that while he "was screwed up on bath salts" he had oral and vaginal intercourse with the then 14 year old daughter, with the active participation of the mother. He also admitted having oral sex with the daughter on at least one other occasion. Further, he wrote a note of apology to the daughter. (Onondaga Co. App. pp. A066-A068).

As a result, all of these children were the subject of a Severe Abuse Petition filed against both parents, in Oswego County Family Court, in 2012. Within that proceeding and due to the parents's incarceration, the children were removed from the parental home and placed, by the Oswego County Department of Social Services, in Onondaga Nation foster homes in the summer of 2012. At this juncture, the Family Court's placement decision was between an Onondaga Nation foster home and a non-Indian foster home.

This foster care placement was made within the Oswego County abuse case against the parents when they were both represented by counsel. The parents did not object to the foster care placements, partially because the foster parents were relatives of the mother. The children have remained in the same, stable Nation foster homes for three years, where they have enjoyed interactions with extended family members and have been involved the culture, ceremonies and language of the Onondaga Nation.

In February of 2013, Oswego County Family Court properly recognized that ICWA applied and that exclusive jurisdiction over these Indian children was with the Onondaga Nation. The Permanency Hearing Order, dated February 6, 2013, concluded by recognizing "***the transfer of the proceedings to the jurisdiction of the Onondaga Nation***." (Onondaga Co. App. p. A061). The foster care placements of the children did not change in February of 2013 and the same service plan for visitation and reunification of the family was offered to the parents by the Nation as had been offered by Oswego County Department of Social Services.

This transfer of jurisdiction was made after notice to the parents, who were still represented by counsel. The parents did not object and they did not appeal.

JURISDICTION

The jurisdiction over these Indian children was properly transferred to the Nation, pursuant to ICWA, 25 USC § 1911 (b). Neither parent objected to this proper transfer of jurisdiction. No appeal was filed to challenge this transfer of jurisdiction. The children have been in stable Nation foster homes for three years.

The jurisdiction over these Indian children remains properly with the Onondaga Nation. The exclusivity of that jurisdiction is clearly mandated in 25 USC § 1911:

> **25 U.S.C. § 1911. Indian tribe[1] jurisdiction over Indian child custody proceedings**
>
> **(a) Exclusive jurisdiction**
>
> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child. . . . Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

Moreover, in the absence of good cause or objection by either parent, ICWA mandates the transfer of "any State court proceeding for the foster care placement of . . . an Indian child not domiciled or residing within the reservation of the Indian child's tribe" to the jurisdiction of that Indian nation. *Id.* § 1911 (b).

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[1] "Tribe" is not a term used by Onondaga or the other Haudenosaunee Nations, because they are Nations and the 1784, 1789 and 1794 treaties which they hold with the United States recognize them as Nations, not tribes. This brief will use the term Nation, except when directly quoting the federal laws in which the term tribe is used

The District Court noted that the parents "*do not dispute that the children are "Indian children" within the meaning of ICWA.*" (Onondaga Co. App. p. A152, n.7).

The Oswego County Family Court case was clearly a "child custody proceeding" as defined in ICWA under 25 USC § 1903 (1), because these children had been removed from the abusive home of the parents. See:

> **25 U.S.C. § 1903. Definitions**
> For the purposes of this chapter, except as may be specifically provided otherwise, the term–
> (1) "child custody proceeding" shall mean and include–
> (I) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home . . .

Once these children were recognized as wards of the Onondaga Nation, the Nation had, and continues to maintain, exclusive jurisdiction; and the Nation has exercised its exclusive jurisdiction with the children in Indian foster homes, under Nation supervision. Three of the children have been placed in the Defendant Lorrie A. Shenandoah's Indian foster home. Ms. Shenandoah is the maternal aunt of the mother. Another child has been placed in the James and Guyyuh Dooley Indian foster home, where the foster mother is the sister of the mother.

THE CHILDREN'S PROGRESS SINCE PLACEMENT:

Under the Nation's jurisdiction and supervision for the past three years, all of these Indian children have been able to take part in the Nation's culture, language and ceremonies and to be regularly involved with many extended family members. The Supplemental Affidavit of Laverne Lyons, a member of the Nation's Council of Chiefs and Director of the Nation's Office of Family Services, documented how these children have been exposed to and involved in the Onondaga language, by attending the Nation school or by attending the Nation's summer language programs. (Onondaga Co. Ap. pp. 31).

Mr. Lyons also detailed that these children have been able to attend ceremonies at the Nation's Longhouse, and that they have been given Onondaga names. Finally, this Supplemental Affidavit related that these children have been able to be visited by many extended family members and to attend extended family gatherings.

All of these aspects of these children's lives, while in the Nation's foster homes, for the past three years, have been in the best interests of the children, their well being and to their cultural ties to the Nation; as well as to the Nation and its community.

ACCESS AND COMMUNICATION: THE PARENTS' NEED FOR SERVICES:

The Nation has not denied access to or communications with the children, but it has mandated that the parents agree to services to address their severe parenting failures. The Nation has offered a visitation plan with supervised visits, drug testing, substance abuse treatment and counseling, sexual offender treatment and counseling, domestic violence treatment and counseling, and parenting education and counseling. See: May 19, 2014 letter from Nation General Counsel to the parents' attorney, which repeated the Nation's proposed service plan, annexed to Heath Affirmation. (Onondaga Co. App. p. A074). This is the same litany of services that were set forth as necessary by the Oswego County Department of Social services in its January 25, 2013 letter to the parents. (Onondaga Co. App. p. A077).

Unfortunately, the parents has refused to cooperate with the Nation or engage in the necessary services. See July 22, 2014 Affidavit of Laverne Lyons, ¶ 18 and 29. (Onondaga Co. App. pp. A029-30). Instead, the parents claim the right to decide what services are needed and that they can select the service provider. The Nation has agreed to review any responsible service plan from the parents, as long as it is supervised by a qualified agency. No such alternative

service plan has been proposed by the parents.

STANDARD OF REVIEW

This Court reviews *de novo* the District Court's dismissal of an action for lack of subject matter jurisdiction under Rule 12 (b) (1), *e.g., Rivers v. McLeod*, 252 F. 3d 99, 101 (2nd Cir. 2001) and *Moccio v. New York State Office of Court Admin.*, 95 F. 3d 195, 198 (2nd Cir. 1996). Because the parents' challenge is to subject matter jurisdiction, this Court may consider materials extrinsic to the Complaint. *United States v. Vazquez*, 145 F. 3d 74, 80 (2nd Cir. 1998). Parties asserting subject matter jurisdiction have the burden of proving by a preponderance of the evidence that it exists. *Markarova v. United States*, 201 F. 2d 110, 113 (2nd Cir. 2000). If subject matter jurisdiction is lacking, the action must be dismissed in its entirety. Fed. R. Civ. P 12 (h) (3).

ARGUMENT

POINT I

THIS COMPLAINT IS A DIRECT ATTACK ON THE ORDER OF THE OSWEGO COUNTY FAMILY COURT AND IS BARRED BY THE *ROOKER/FELDMAN* DOCTRINE:

The Complaint below asked the District Court to essentially vacate the February 6, 2013 Order of the Oswego County Family Court, which recognized Nation jurisdiction. The parents were represented by counsel, but did not object to that Order at the time and they have not appealed that Order in state court. It was this transfer of jurisdiction to the Onondaga Nation's exclusive jurisdiction that deprived the District Court of jurisdiction and that mandated dismissal, under Rule 12 (b) (1).

In their request for custody in the District Court, the parents were essentially asking the Court to vacate the Order of Oswego County Family Court and return the issue of custody and placement of the children to state court.

Additionally, when the father filed a custody petition in Onondaga Family Court in August of 2013, it was dismissed due to lack of subject matter jurisdiction, because the Oswego County Family Court had previously transferred the jurisdiction to the Onondaga Nation, pursuant to ICWA. (District Court Decision and Order at pp. 4 and 5).

Even in circumstances where a federal question may be found in a well-pleaded complaint–which was not the case here–it is well settled that district courts have no authority to hear challenges to existing state court judgments. See: *Rooker v. Fidelity Trust Co.*, 263 US 413, 416 (1923); *District of Columbia Court*

of Appeals v. Feldman, 460 US 462, (1983). The Ninth Circuit explained the *Rooker/Feldman* doctrine as follows:

> If claims raised in the federal court action are "inextricably intertwined" with the state court ruling or require the district court to interpret the application of state laws or procedural rules, then the federal complaint must be dismissed for lack of subject matter jurisdiction. *Bianchi v. Rylaarsdam,* 334 F. 3d 895. 898 (9th Cir. 2003).

A federal court must focus on the nature of the relief sought. *Id.* at 900. If a disgruntled plaintiff seeks to undo a state court's decision, a federal court cannot hear the action even though her claims may not have been fully and fairly litigated in state court. *Id.* at 901.

The District Court properly applied the *Rooker/Feldman* doctrine in this matter and properly dismissed the Complaint.

POINT II

THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION BECAUSE THE ONONDAGA NATION MAINTAINS EXCLUSIVE JURISDICTION, PURSUANT TO THE INDIAN CHILD WELFARE ACT:

It is a fundamental precept that federal courts are courts of limited jurisdiction. *Owen Equipment & Erection Co. V. Kroger*, 437 US 365, 374 (1978). Subject matter jurisdiction must be specifically authorized by statute.

The burden of demonstrating that the requirements of federal subject matter jurisdiction have been met rests with these parents, as the parties asserting this claim of custody. *Kokkonen v. Guardian Life Insurance Co.*, 511 US 376, 377 (1994). Further, there is a presumption against subject matter jurisdiction. *Id.*

28 USC § 1331 may authorize subject matter jurisdiction over a cause of action, but it does not, by itself, defeat a well-founded assertion of sovereign immunity. *High Country Citizens Alliance v. Clarke*, 454 F. 3d 1177, 1181 (10th Cir. 2006). These parents failed to meet their burden of pleading subject matter jurisdiction. The District Court lacked subject matter jurisdiction for at least two fundamental reasons; the *Rooker-Feldman* doctrine and the exclusive jurisdiction provisions of the Indian Child Welfare Act.

A. The Care and Custody of the Subject Children Was Properly Awarded to the Onondaga Nation, Pursuant to ICWA and it Followed the Substantive Standards Set Forth in 25 USC § 1915:

¶ 15 of the Complaint under the title: " Cause of Action", stated that the Plaintiff parents "assert that the Defendants, individually and collectively, wrongfully hold custody of the Children . . . ." (Onondaga Co. App. p. A010). Therefore, the subject matter of the Complaint below was the care and custody of these children.

As noted above, on February 6, 2013 the Oswego County Family Court transferred the jurisdiction over these Indian children to the Nation. The parents did not object at that time, nor did they appeal. Therefore, the exclusive jurisdiction over the care and custody of these Indian children remains with the Nation; and the District Court lacked subject matter jurisdiction. Dismissal by the District Court for lack of subject matter jurisdiction was proper and mandatory.

In Paragraphs 8 and 11 of their Complaint, the parents claimed that the Nation has maintained jurisdiction and custody "without lawful authority." (Onondaga Co. App. p. A009). Aside from the fact that this claim ignores the reality of the father's abusive behavior, it also ignores the fact that the summer 2012 placements by the Oswego County Department of Social Services in the Nation foster homes of maternal relatives and properly followed the mandates for placements under 25 USC § 1915.

The rulings of the New York State Appellate Division, First Department in *Baby Boy C*, 27 AD 3d 34, (1st Dept. 2005), are clear on this point:

> Finally, 25 USC § 1915 provides substantive standards for placements of Indian children. . . . 25 USC § 1915 (a) . . . states: . . ."[A] preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families. These preferences have been described by the Supreme Court as "[t]he most

> important substantive requirements imposed on state courts" *(Holyfield*, at 36,) [109 S.Ct. 1597]. 27 AD 3d 34, 41.

At the time of the placement of these Indian children, in September of 2012, the children were properly placed with relatives of the mother and no good cause to the contrary was raised.

Additionally, in October of 2012, the mother requested that the Nation take jurisdiction over the children and then the exclusive jurisdiction over these children was transferred to the Nation by the Oswego County Family Court in February of 2013. (Onondaga Co. App. p. A134).

1. This Transfer of Jurisdiction to the Onondaga Nation Mandates That its Decisions Be Given Full Faith and Credit:

As clearly mandated in 25 USC § 1911, the exclusive jurisdiction over these Indian children remains properly with the Onondaga Nation. Further, § 1911 (d) mandates that: "*The United States . . . shall give full faith and credit*" to that exclusive jurisdiction and the Nation decisions pursuant thereto.

2. Pursuant to ICWA, 25 USC § 1911 (a) the Onondaga Nation has Exclusive Jurisdiction of these Indian Children:

As noted above, the provisions of the Indian Child Welfare Act are unambiguous with regards to jurisdiction. Specifically, 25 USC § 1911 (a)

provides for exclusive jurisdiction with the Nation: "*Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.*"

The critical importance of Indian nations' exclusive jurisdiction over Indian children, within ICWA was recognized by the United State Supreme Court in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 US 30 (1989), when they ruled:

> At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings. § 1911 lays out a dual jurisdictional scheme. §1911 (a)establishes exclusive jurisdiction in the tribal courts for proceedings concerning an Indian child "who resides or is domiciled within the reservation of such tribe," as well as for wards of tribal courts regardless of domicile, § 1911 (b), on the other hand, creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation: on petition of either parent or the tribe, state-court proceedings for foster care placement or termination of parental rights are to be transferred to the tribal court, except in cases of "good cause," objection by either parent, or declination of jurisdiction by the tribal court. *Id.*, p. 36.

The importance of the jurisdictional provisions of ICWA was also recognized by the 9th Circuit when it relied upon *Holyfield*, in *Native Village of Venetie IRA Council v. Alaska*, 944 F. 2d 548 (9th Cir. 1991):

> As the primary mechanism for advancing its objectives in the Act, Congress created a comprehensive jurisdictional scheme

> for the resolution of custody disputes involving Indian children. This scheme expanded the role of tribal courts and correspondingly decreased the scope of state court jurisdiction. . . . In the case of Indian children who do not reside or are not domiciled on their tribe's reservation, state courts may exercise jurisdiction concurrent with tribal courts. However, the state court must refer the dispute to the appropriate tribal court unless good cause is shown for the retention of state court jurisdiction. *See id.* § 1911(b); *see also Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 35, 109 S.Ct. 1597, 1601, 104 L.Ed.2d 29 (1989) ("§ 1911(b) ... creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation...."). Most importantly, whether such tribal jurisdiction is concurrent with or exclusive of state jurisdiction, all courts in the United States must give full faith and credit to the child-custody determinations of tribal courts to the same extent that full faith and credit are given to the decisions of any other entity. *See* 25 U.S.C. § 1911(d). *Id.*, p. 555.

3. The Placement of These Indian Children in Nation Foster Homes in Which the Foster Parents Are Extended Family Members Also Complies with ICWA:

The initial placement of these Indian children, by the Oswego County Family Court, in the Onondaga Nation foster homes, in the summer of 2012, was made pursuant to and in full compliance with 25 USC § 1915 (b), which provides that:

> In any foster care . . . placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with–
>
> (I) a member of the Indian child's extended family;
>
> (ii) a foster home licensed, approved, or specified by the

Indian child's tribe;

These Indian children were placed in Onondaga Nation approved and supervised foster homes, with relatives of the mother–her sister and her aunt.

The importance of placement with extended family members has been recognized by the Supreme Court, in *Holyfield*:

> One of the particular points of concern was the failure of non-Indian child welfare workers to understand the role of the extended family in Indian society. The House Report on the ICWA noted: "An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights." House Report, at 10, U.S.Code Cong. & Admin. News 1978, at 7532. At the conclusion of the 1974 Senate hearings, Senator Abourezk noted the role that such extended families played in the care of children: "We've had testimony here that in Indian communities throughout the Nation there is no such thing as an abandoned child because when a child does have a need for parents for one reason or another, a relative or a friend will take that child in. It's the extended family concept." 1974 Hearings, at 473. . . .
>
> The most important substantive requirement imposed on state courts is that of § 1915(a), which, absent "good cause" to the contrary, mandates that adoptive placements be made preferentially with (1) members of the child's extended family, (2) other members of the same tribe, or (3) other Indian families.
> 490 US 30, 35, fn.4 and 37.

Additionally, this placement in the Nation's foster homes was in full compliance with the "Congressional declaration of policy" in 25 USC § 1902:

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes by . . . the placement of such children in foster . . . homes which will reflect the unique values of Indian culture . . . .

The importance of keeping Indian children in Indian foster homes, particularly with extended family was emphasized in the House of Representatives legislative history:

> In addition to the trauma of separation from their families, most Indian children in placement or in institutions have to cope with the problems of adjusting to a social and cultural environment much different than their own. . . .
>
> The concept of extended family maintains its vitality and strength in the Indian community. By custom and tradition, if not necessity, members of the extended family have definite responsibilities and duties in assisting in childrearing. . . .
>
> This subsection . . . establish[es] a Federal policy that, where possible, and Indian child should remain in the Indian community. . . . H. R. Rept. No. 95-1386, pp. 9, 20 and 23.

It is in the children's best interest to remain in these stable Nation foster homes, with their extended family members. The children have been able to attend the Nation school, to learn the Onondaga language, to be given Onondaga names and to attend Onondaga ceremonies. (Onondaga Co. App. p. A031).

B. The Nation's Interest in this Proceeding and Concern for These Children:

The Nation is deeply concerned about two fundamental aspects of this litigation: (a) that the safety and well being of these children would be seriously at risk if these parents were awarded custody; and (b) that any custody order issued would have violated the Nation's recognized exclusive jurisdiction and the full faith and credit mandate of the Indian Child Welfare Act.

The Nation's interest in these children, may best be illustrated by the Congressional findings which are found in 25 USC 1901 (3) :

> **[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children** and that the United States has a direct interest . . . in protecting Indian children who are members[2] of or are eligible for membership in an Indian tribe;
>
> (4) that an alarmingly high percentage of Indian families are broken up by the removal . . . of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
>
> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize **the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian**

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[2] "Member" is also not a term used by Onondaga, because they refer to their "members" as citizens of the Nation, as their sovereignty and separate citizenship was also recognized in the Treaties of 1984, 1789 and 1794. This brief will use the term citizen, except when directly quoting from federal laws.

communities and families. Emphasis added.

1. The 2012 Oswego County Abuse Case Against These Parents and the Extreme Abuse Contained Therein:

As noted above, all of these children were the subject of a Severe Abuse Petition filed against these parents, in Oswego County Family Court, in 2012; and within that proceeding, the children were removed from the parental home and placed in foster care. This Severe Abuse Petition alleged that the father, Jeffrey Sr., raped an older sibling of these children, when she was 14 years old, in the presence of the mother. The father confessed. This and other acts of sexual abuse were contained in the Severe Abuse Petition as well as evidence of drug usage with an older sibling, and problems of domestic violence by the father.

The allegations in the Severe Abuse Petition were so dangerous for the children that the parents were both arrested and incarcerated and the children were removed from the home and placed in foster care.

With this removal, this Severe Abuse Petition was clearly a "child custody proceeding" as defined in ICWA under 25 USC § 1903 (1), as noted above.

Since 2012 both the Oswego County Department of Social Services and the Nation have attempted to engage the parents in identical service plans that would begin to address their multiple parenting problems. For instance, on January 25,

2013, the Oswego County Department of Social Services sent letters to each parent from, which reflected their parenting problems. The Nation has also offered services to these parents, but they have refused this assistance.

2. A Fundamental Purpose of ICWA is to Protect Indian Children and an Indian Nation's Interests in Retaining its Children in its Society and Culture.

ICWA's stated purpose is

> to protect the best interests of Indian children and to promote the stability and **security of Indian tribes** and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the **unique values of Indian culture**. 25 USC § 1902. [Emphasis added].

The focus of ICWA is on the interests of the child and the child's nation, and less so on parents. *See, e.g.*: 25 USC § 1901 (3).

According to the House Report accompanying ICWA, the Act "*seeks to protect the* ***rights of the Indian child as an Indian and the rights of the Indian community and the tribe in retaining its children in its society***." (H.R. Rep. No. 95-1386, pp. 23-24 [1978], U.S. Code Cong. & Admin. News 1978, pp. 7530, 7546). [Emphasis added].

The New York State Appellate Division First Department has further

explained this principle of ICWA, by citing to the United States Supreme Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 US 30 (1989): "*ICWA seeks to achieve this goal by establishing 'a Federal policy that, where possible, an Indian child should remain* ***in the Indian community***' ". *In re Baby Boy C.*, 27 AD 3d 34, (1st Dept. 2005). [Emphasis added].

3. Indian Nation Jurisdiction Under ICWA Was Not Meant to Be Defeated by Individual Nation Citizens or Parents:

Paragraph 10 of the Complaint claimed that the Nation maintains custody and jurisdiction "without lawful authority" and "over the objection of the parents", (Onondaga Co. App. p. A009). The Complaint further claimed that: "*there is no provision of the Indian Child Welfare Act that permits such conduct by the Onondaga Nation or its agents*" and that, therefore, ICWA does not apply to these Indian children. (Onondaga Co. App. pp. 53). Once again, this assertion is wrong and is not supported by federal or state law, as explained by the First Department in *Baby Boy C*:

> [T]he Supreme Court's discussion in *Holyfield* regarding the relative interests of the parents, the child and the tribe in the application of ICWA has great significance. In rejecting the notion that ICWA could be avoided by the fact that the parents has "voluntarily surrendered" the child, the *Holyfield* court stated that **tribal jurisdiction was not meant to be defeated by the actions of individual tribe members or parents**, "for

> Congress was concerned not solely about the interest of Indian children and families, *but also about the impact on the tribes themselves of the large number of Indian children adopted by non-Indians.*" (Id. at 49, 109 S.Ct. 1587 [emphasis added], citing 25 USC § 1901 [3] ["**there is no resource that is more vital to the continued existence and integrity of Indian tribes that their children**"])
>
> The *Holyfield* court also emphasized that a major concern of Congress was the "detrimental impact" on the Indian children themselves of being placed outside their culture in non-Indian homes (*Id.* at 49-50, 109 S.Ct. 1597). To this end, Congress made ICWA's jurisdiction and placement provisions applicable not only to involuntary removals of Indian children, but also to voluntary adoptions involving placement with non-Indian families "**because of concerns going beyond the wishes of individual parents.**" (*Id.* at 50, 109 S.Ct. 1597). 27 AD 3d at 43. [Emphasis (in bold) added, Italics are in the original].

C. The Parents' Constitutional Rights Have Not Been Violated in this Matter:

The parents Brief, on page 11, incorrectly makes the claim that the parents' constitutional rights have been violated, because these children were removed from their home "without due process." Federal case law does recognize that parents enjoy a constitutionally protected interest in their family integrity. However, this right is not absolute, as recognized in *Tenenbaum v. Williams*, 193 F. 3d 581, 593 (2d Cir. 1999), and in subsequent 2nd Circuit decisions. In *Demtchenko v. Tuffarelli*, 408 Fed. Appx. 448, 2011 WL 294023 (2d Cir. 2011),

the Court reviewed the limits to this parental rights and the circumstances when due process is not necessary:

> Although parents enjoy a constitutionally protected interest in their family integrity, this interest is counterbalanced by the compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves. In general, parents cannot be deprived of custody of their children without a pre-deprivation court proceeding. *See Tenenbaum v. Williams,* 193 F.3d 581, 593 (2d Cir.1999). However, in "emergency circumstances, a child may be taken into custody by a responsible State official without court authorization or parental consent." *Id.* at 594 (internal quotation marks and citations omitted). "Emergency circumstances mean circumstances in which the child is immediately threatened with harm." *Id.* If "there is reasonable time consistent with the safety of the child to obtain a judicial order, the 'emergency' removal of a child is unwarranted." *Id.* at 596. We require defendants to offer "objectively reasonable" evidence that harm was imminent. *Nicholson v. Scoppetta,* 344 F.3d 154, 171 (2d Cir.2003).

In this matter, these children were properly removed from the parents home and under the supervision of the Oswego County Family Court, in the summer of 2012, while both parents were in jail, due to their severe abuse. This was obviously an emergency situation that required removal of the children.

Subsequently, in October of 2012, the mother requested that the Nation take jurisdiction over the children. (Onondaga Co. App. p. A134). The exclusive jurisdiction over these children was then transferred to the Nation by the Oswego

County Family Court in February of 2013.

The parents were afforded all rights of due process when these children were removed from their home, when these children were placed in the Nation foster homes and when the exclusive jurisdiction was transferred to the Onondaga Nation. Each of these events took place within the Severe Abuse Case in the Oswego County Family Court when the parents were represented by counsel and when they were given the opportunity to be heard and object.

The parents did not object to the placement of the children by the Oswego County Department of Social Services in the Nation foster homes. In fact, in October of 2012, the mother requested that the Nation take jurisdiction. The parents did not object to the transfer of jurisdiction, pursuant to ICWA, by the Oswego County Family Court in February of 2013; and they did not appeal.

CONCLUSION

The District Court's dismissal of this Complaint should be upheld, because the District Court properly applied the Rooker/Feldman doctrine. The parents are seeking custody of these Indian children, but the jurisdiction over these children and their foster care was transferred to the Onondaga Nation by the Oswego County Family Court. To grant the parents the relief requested this Court would have to set aside the Oswego County Family Court's decision. This Court would

also have to set aside the Onondaga County Family Court's dismissal of the father's custody Petition, which was based on lack of subject matter jurisdiction.

Further, the District Court's dismissal of this Complaint should be upheld because the District Court properly recognized that jurisdiction over these Indian children had been properly granted to the Onondaga Nation by the Oswego County Family Court; and that the provisions of ICWA make that jurisdiction exclusive and entitled to full faith and credit.

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Dated: July 29, 2015

UNITED STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 15-705

JEFFREY PITRE, SR. and AWENHA PITRE,
Individually and on behalf their children
DP, SK, DP, SP, EP and JP
Appellants-Plaintiffs

-v-

LORRIE A. SHENANDOAH; JAMES DOOLEY;
ONONDAGA SOCIAL SERVICES DEPARTMENT;
OSWEGO SOCIAL SERVICES DEPARTMENT; and
the ONONDAGA NATION

Appellees-Defendants

CERTIFICATE OF COMPLIANCE WITH FRAP 32 (a) (7)

The undersigned attorney, Joseph J. Heath, hereby certifies that this brief complies with the type-volume limitations of FRAP 32 (a) (7). According to the word processing system used by this office, this brief, exclusive of the title page, table of contents, table of authorities and any certificates of counsel contains 5502 words.

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