

No. _____

In The
Supreme Court of the United States

—◆—
ARTHUR MANN, *et al.*,

Cross-Petitioners,

v.

MARY DOE,

Cross-Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

—◆—
**CONDITIONAL CROSS-PETITION
FOR A WRIT OF CERTIORARI**

—◆—
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QUESTION PRESENTED

Whether 28 U.S.C. § 1331 and the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963, authorize the lower federal courts to review and invalidate final state court judgments in child custody proceedings involving Indian children, or whether such review is barred by the *Rooker-Feldman* doctrine.

PARTIES TO THE PROCEEDINGS

The cross-petitioners are: the honorable Arthur Mann, in his official capacity; the honorable Robert L. Crone, Jr., in his official capacity; and the Lake County Superior Court. The cross-respondent (plaintiff below) is Mary Doe. Other parties may include (defendants below) the Department of Social Services, Lake County; Mr. D.; Mrs. D.; and Jane Doe.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT	6
REASONS FOR GRANTING THE CROSS-PETITION ..	7
A. The Ninth Circuit's Decision is in Conflict with this Court's Decisions in <i>District of Co- lumbia Court of Appeals v. Feldman</i> and <i>Rooker v. Fidelity Trust Co.</i>	8
B. The Ninth Circuit's Erroneous Interpretation of § 1914 is of National Import.....	11
CONCLUSION.....	12

TABLE OF AUTHORITIES

	Page
FEDERAL CASES	
<i>ASARCO Inc. v. Kadish</i> , 490 U.S. 605 (1989).....	7, 8
<i>District of Columbia Court of Appeals v. Feldman</i> , 460 U.S. 462 (1983)	6, 7, 8, 10, 11
<i>Moore v. Sims</i> , 442 U.S. 415 (1979)	9
<i>Rooker v. Fidelity Trust Co.</i> , 263 U.S. 413 (1923)	6, 7, 8, 10, 11
<i>Younger v. Harris</i> , 401 U.S. 37 (1971).....	9
FEDERAL STATUTES	
25 U.S.C. § 1901	2
25 U.S.C. § 1911	2, 6, 7, 8, 9
25 U.S.C. § 1912	<i>passim</i>
25 U.S.C. § 1913	2, 7, 8, 9, 10
25 U.S.C. § 1914	<i>passim</i>
25 U.S.C. § 1915	2, 6
25 U.S.C. § 1963	2
28 U.S.C. § 1331	i

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Petitioners Arthur Mann, Robert L. Crone, Jr., and the Lake County Superior Court (collectively, "the Superior Court"), respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, but only if the opening petition for a writ of certiorari is first granted.¹



OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-70a) is reported at 415 F.3d 1038. The District Court's opinion (Pet. App. 71a-97a) is reported at 285 F. Supp. 2d 1229.



JURISDICTION

The judgment of the court of appeals was entered on July 19, 2005. (Pet. App. 1a.) The court denied a petition for rehearing on September 19, 2005. (Pet. App. 98a-99a.) The opening petition for a writ of certiorari was filed on December 19, 2005, and docketed on December 28, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



¹ The cross-petitioners have opposed the opening petition in a concurrently filed brief in opposition.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963, are more fully set forth in the brief in opposition to the opening petition for a writ of certiorari, which is filed concurrently with this cross-petition. However, the following sections of ICWA are of particular relevance to the question presented here:

§ 1911. Indian tribe 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 who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. 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.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days

after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the

breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.



STATEMENT²

This action was brought by Cross-Respondent, Mary Doe ("Cross-Respondent"), as a collateral federal challenge to the final judgment of the Superior Court in a child custody proceeding involving her daughter, Jane Doe ("Jane"). Among other things, she alleges violations of the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1911 and 1912. The decision below followed appeal of the District Court's final judgment, dismissing only Cross-Respondent's first cause of action, in which she claims that the Superior Court improperly infringed upon the exclusive jurisdiction of the Tribe by exercising its own concurrent jurisdiction over Jane, in violation of 25 U.S.C. § 1911(a).³ However, the District Court also denied a motion to dismiss brought by the Superior Court on the ground that lower federal court subject matter jurisdiction over this action was barred by operation of the *Rooker-Feldman* doctrine. Although both the District Court and the Ninth Circuit acknowledged that the action would ordinarily be barred by the *Rooker-Feldman* doctrine, as an attempt to undo a final state court judgment through collateral federal review, both courts nevertheless concluded that in 25 U.S.C. § 1914, Congress created an exception to the *Rooker-Feldman* doctrine and authorized such review.

² For a more detailed Statement, the Court is referred to pages 13 through 18 of the brief in opposition to the opening petition for a writ of certiorari.

³ Still pending before the District Court are Cross-Respondent's three other causes of action, including the second cause of action which alleges that the Superior Court proceedings failed to adhere to various procedural requirements of ICWA, in violation of 25 U.S.C. § 1912. Claims brought under 25 U.S.C. § 1915 have also been dismissed, but were not the subject of the appeal, below.

REASONS FOR GRANTING THE CROSS-PETITION

If the opening petition is granted, this Court should also grant this cross-petition to allow review of the Ninth Circuit's holding that ICWA provides federal courts authority to invalidate final state court judgments. (Pet. App. 21a.) This cross-petition is not intended to stand independently of the petition. Because ICWA provides no such authority, the Ninth Circuit's decision is in conflict with the *Rooker-Feldman* doctrine, named after this Court's decisions in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), which together are understood to stand for the proposition that federal district courts lack subject-matter jurisdiction over actions that "attempt to obtain direct review of the [state court's judicial] decision in the lower federal courts." See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 622-23 (1989). Accordingly, the Ninth Circuit's failure to follow the *Rooker-Feldman* doctrine in this case undermines the uniform application of the *Rooker-Feldman* doctrine and ICWA.

The Ninth Circuit's decision is also truly of national importance because it fails to give due regard to the federalism concerns that are the foundation of the *Rooker-Feldman* doctrine. Moreover, it implicates the judgments of state courts in every jurisdiction where an Indian child might be found in need of court protection. Ironically, the Ninth Circuit's decision also undermines the important purposes of ICWA by bringing new uncertainty to the dependency status of Indian children who will be subjected to years of continuing litigation in unwarranted and

unintended collateral federal review of state judgments, as has Jane in this case.

A. The Ninth Circuit's Decision is in Conflict with this Court's Decisions in *District of Columbia Court of Appeals v. Feldman* and *Rooker v. Fidelity Trust Co.*

The Ninth Circuit's decision is in conflict with the *Rooker-Feldman* doctrine, which provides that federal district courts lack subject-matter jurisdiction over actions that "attempt to obtain direct review of the [state court's judicial] decision in the lower federal courts." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 622-623 (1989); see *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). Below, the Ninth Circuit held that while this case "falls within the traditional boundaries of the *Rooker-Feldman* doctrine" (Pet. App. 10a), because Congress has granted authority to the lower federal courts to invalidate state court "actions" in violation of §§ 1911, 1912, or 1913 of ICWA, the District Court's exercise of subject matter jurisdiction in this case was proper. (Pet. App. 21a.) However, if Congress had intended such a profound effect upon the finality of state court judgments, in such a sensitive area of traditional state court jurisdiction, it would have stated this intention expressly.

Section 1914 provides:

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such

action violated any provision of sections 1911, 1912, and 1913 of this title.

25 U.S.C. § 1914. On its face, the statute creates only an exception to the rule precluding federal court interference with ongoing state proceedings. *Younger v. Harris*, 401 U.S. 37 (1971). See *Moore v. Sims*, 442 U.S. 415, 423 (1979) (*Younger* abstention appropriate in context of state child removal proceedings due to allegations of child abuse). The statute speaks in the present tense of a child who *is* the subject of an action for foster care placement or for termination of parental rights, not who *was* the subject of such an action at some time in the past, and the statute authorizes that child to bring an action to invalidate the challenged state-court proceedings. Also authorized to bring such an action is an Indian custodian from whose custody "*such child*" – *i.e.*, a child who is *presently* the subject of a state-court action for foster care placement – was removed, and that child's tribe. There is no mention of judgments in the section; the statute does not speak in terms of retrospective invalidation.

A review of §§ 1911, 1912 and 1913, the violation of which support a petition under § 1914, reveals that these sections concern intermediate issues that arise during the course of a child custody proceeding: the assertion of adjudicatory jurisdiction (§ 1911(a)); the transfer of proceedings to tribal courts (§ 1911(b)); intervention in pending state court proceedings (§ 1911(c)); full faith and credit to tribal proceedings (§ 1911(d)); notice, appointment of counsel, and examination of documents (§ 1912(a)-(c)); and evidentiary standards in foster care and parental rights

determinations (§ 1912(e)-(f)).⁴ If § 1914 is to be understood to create a federal cause of action to interfere with state court child custody proceedings, this interference should be limited to “actions” within pending child custody proceedings.

That such a construction is more consistent with the intent of ICWA is illustrated by the circumstances presented in this case, and the troubling outcome the Ninth Circuit’s ruling would permit. In the underlying child custody proceedings, the Superior Court entered orders for foster care placement, termination of parental rights, and Jane’s adoption. By its terms, § 1914 allows review only to invalidate an “action” for foster care placements or the termination of parental rights. But on its face, § 1914 does not reach state-court *adoption* proceedings. Thus, by interpreting § 1914 to allow federal review of the Superior Court’s final judgment terminating Cross-Respondent’s parental rights, the Ninth Circuit has created the untenable circumstance under which that termination could be nullified in the ongoing District Court proceedings, while Jane’s adoption by Mr. and Mrs. D. would remain untouched. This is a result Congress could not have intended.

⁴ Section 1913 concerns the voluntary termination of parental rights, and so is not implicated in this case. It is perhaps significant to an understanding of ICWA’s legislative scheme, however, that § 1913 provides the only express authority for the termination of a final adoption. 25 U.S.C. § 1913(d). However this authority is restricted to instances of fraud, and requires the petition to be filed *in state court* within two years of the final adoption order. 25 U.S.C. § 1913(d). Although the result could be the overturning of a final state court judgment, *Rooker-Feldman* considerations are not implicated because the petition is to be filed in state court.

The conclusion that Congress intended to permit district court review of final state court judgments is premised upon an expansive interpretation of the statutory language that is unwarranted considering the significant impact on federalism that will result, and the need for finality in Indian child custody proceedings. The Ninth Circuit's decision is erroneous, and § 1914 creates no exception to the *Rooker-Feldman* doctrine.

B. The Ninth Circuit's Erroneous Interpretation of § 1914 is of National Import

The Ninth Circuit's holding that § 1914 authorizes collateral lower federal court review of final state court judgments has national implications for state courts and for Indian children who have an interest in the finality of state court judgments concerning their dependency status. Unlike the question presented in the opening petition, the question presented here is truly of national scope because the Ninth Circuit's ruling on the applicability of the *Rooker-Feldman* doctrine is not limited to PL-280 states, but will effect every court in every state in the nation. Under the Ninth Circuit's ruling, there is no way to determine when a state court decision concerning the dependency status of an Indian child will be final and binding.⁵

⁵ We note that ICWA provides no statute of limitations, or other procedural safeguards governing the application of § 1914 to invalidate state court judgments. Ordinarily, a federal court would look to an analogous state statute to determine the applicable limitations period. Here, it is difficult to imagine what state statute of limitations would apply to a collateral attack on a final state court judgment. These uncertainties lend support to the contention that § 1914 has been misconstrued by the Ninth Circuit.

CONCLUSION

For the reasons stated, the Court is requested to grant the cross-petition for writ of certiorari in the event it also grants the opening petition.

DATED: January 27, 2006

Respectfully submitted,

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