13-1447

No.

IN THE

Supreme Court of the United States

LANA E. MARCUSSEN, PETITIONER

v.

KATHLEEN SEBELIUS, Secretary of Health and Human Services, in her official and personal capacity; THOMAS C. HORNE, Attorney Generl of the State of Arizona, in his official and personal capacity; JULIE P. NEWELL, Commissioner, in her official and personal capacity; STEPHEN M. KLUMP, Acting Director of the New Mexico Child Support Enforcement Division, in his official and personal capacity; MICHAEL D. FONTANAROSA, as the real party in interest

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the Rooker Feldman doctrine should be overruled for denying all judicial relief by removing the subject matter jurisdiction of the federal courts to hear any civil action brought against federally mandated statutes enforced in the state courts.
2) Whether Congress has the authority to adopt laws intended to be primarily or exclusively enforced in the state courts.

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JURISDICTION

The Judgment of the Ninth Circuit was entered on February 24, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Court also has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT PROVISIONS INVOLVED

The Indian Child Welfare Act (ICWA), 25 U.S.C. §1901-1963, and specific statutes of the Temporary Assistance to Needy Families (TANF), Title IV-D child support program, 42 U.S.C. § 451 et seq., are alleged to be unconstitutional as violating separation of powers principles and federalism because Congress legislated procedures and conditions in family law that state courts must apply.

STATEMENT

This case involves the important issue of whether a parent may be deprived of her constitutional right to be heard in federal court under the Rooker Feldman doctrine when her harm was caused by state courts applying federally mandated laws and procedures set by Congress. Plaintiff alleges in her complaint that applying ICWA to her was unconstitutional. Similarly she alleges that specific statutes of the TANF Title IV-D program are

unconstitutional for violating due process and equal protection of all parents classified as "noncustodial" and for violating principles of federalism. Plaintiff argued below that either an exception to the Rooker Feldman doctrine must be carved out to allow state court proceedings that are based solely on federally mandated laws to be heard or alternatively that the Rooker Feldman doctrine should be reconsidered so that it does not deprive the federal courts of subject matter jurisdiction to review the constitutionality of the federal laws being enforced in the state courts.

While this case was proceeding below, this Court was hearing *Adoptive Couple v. Baby Girl*, 133 S.Ct 2552 (2013) that contained issues that overlap several of the merits issues in this case. Specifically, the application of the ICWA to a child and a parent that are almost completely non-Indian[1] and the interplay of the ICWA to the federal child support mandates of the TANF Title IV-D program. Judge Martone did specifically acknowledge in his order of February 12, 2013 that the *amicus curiae* brief petitioner was writing for the Citizens Equal Rights Foundation in the *Adoptive Couple* case was entitled to judicial notice. That *amicus* brief was signed by Attorney James Devine of New York because petitioner's license to practice law was suspended because of her "non-compliance with the New Mexico child support orders."

Petitioner had no choice but to go to the federal court for a remedy for the total deprivation of her due

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[1] Petitioner's maternal ancestors settled in Virginia in the 1640's. One of them married a woman in Pocahontas's tribe. To petitioner's knowledge this is her only Indian ancestor. This makes her even less an Indian by blood than was the Baby Girl who was 3/256ths Cherokee. Petitioner's ex-husband's grandparents all emigrated from Italy.

process and equal protection rights because Congress and New Mexico removed any possibility of petitioner appealing these issues in the state courts. The New Mexico Court of Appeals ruled in 1995 that petitioner and her son could be treated as "Indians" and that this classification did not violate any laws or rights. When the New Mexico Supreme Court denied review she had exhausted all state court remedies.

Unlike the *Adoptive Couple* petitioners, she had no idea how or why New Mexico claimed the authority to ignore its own statutes and apply ICWA to her and her son to change custody. Her only information was from a New Mexico District Court Judge in Gallup, New Mexico who told her in confidence in a closet under the stairs in the Gallup courthouse that he had been approached with a plan the Navajo Nation had put together to combine ICWA and the new child support mandates. His district had turned down the idea but he had heard that the Albuquerque District Court had accepted it.

The terms the New Mexico District Court used for appointing specialists to help the judge change custody were from ICWA. ICWA was never mentioned to petitioner or her attorney in any of the change of custody proceedings opened on the motion of the judge. Petitioner challenged the application of ICWA to her and her son as described above and decided it was better to wait and not petition this Court until she had an argument and facts to be able to explain why she could not be treated as an "Indian." This case still exists because the child support award set in the court order changing custody of her son using the ICWA has been continually enforced by the New Mexico Child Support Enforcement Division (NMCSED).

Petitioner believes there must be a remedy to her deprivation of due process and equal protection rights and for the damage being done to the state courts. This Court's review of the Rooker Feldman doctrine and separation of powers considerations will determine whether there is any individual right to be heard to challenge the constitutionality of federal laws required to be enforced in the state courts.

A. Statutory Framework

In passing the ICWA in 1978, the Congress claimed the authority to set the standards for child custody proceedings and the processes state courts were required to follow for any child that might be considered an "Indian." Congress passed the ICWA with the objective of preserving and maintaining tribal governments by keeping all children eligible to be tribal members subject to the jurisdiction of the tribe. Congress specified that it is the "national goal" to preserve and promote tribal sovereignty that requires Indian children to be treated as "resources" of the tribe and not as "children" entitled as a matter of state law to have courts decide their custody based on the best interests of the child standard. *See* ICWA, 25 U.S.C. § 1901(2) and (3).

The ICWA applies only to actions brought in state and tribal courts. Before the ICWA Congress had never claimed it could legislate for the state courts. Tribal courts are under Congress' Article I jurisdiction as territorial courts of the United States. *See Talton v. Mayes*, 163 U.S. 376 (1898).

In 1955, Congress had placed the Indian Health Service under its predecessor the Department of Health, Education and Welfare. 68 Stat. 674. This

placed the Secretary of HHS in a direct trust relationship with the Indian tribes. Passage of the ICWA extended the authority of the Secretary of Health and Human Services into state court proceedings involving any child that could be called an "Indian." The authority for the ICWA is claimed to be the Indian Commerce Clause, Art. 1, Sec. 8, Cl. 3 and Congress' plenary power over Indian affairs. 25 U.S.C. § 1901(1).

The Omnibus Budget Reconciliation Act of 1993 (P.L. 103-66) was the act that applied child support requirements on all parents, not just the parents of children receiving benefits under the Aid to Families with Dependent Children (AFDC) part of the Social Security program. It is most known for greatly expanding paternity establishment procedures.

The Uniform Interstate Family Support Act was adopted by the American Bar Association in 1993. The UIFSA is not actually a federal act at all. It is model act prepared by a lobbying group named the National Conference of Commissioners on Uniform State Laws situated in Washington D.C. The UIFSA according to its own history was drafted to federally preempt state court decisions protecting the rights of parents to due process and equal protection in child custody and child support situations. The 1993 UIFSA introduced the concept of one child support order and continuing exclusive jurisdiction.

In 1996 Congress passed the Personal Responsibility and Work Reconciliation Opportunity Act (PRWORA) (P.L. 104-193) requiring all jurisdictions to adopt the UIFSA. This act eliminated the AFDC program and established the Temporary Assistance to Needy Families Program (TANF). It also greatly increased the enforcement requirements of the

state child support agencies and their powers. PRWORA also established a direct correlation between the amount of federal funds a state receives for its needy families and the state's performance in child support enforcement. Under PRWORA, all states receive a block grant to fund the TANF programs. To be eligible for a TANF block grant, a state must operate a child support enforcement program meeting federal requirements. Also, states can receive additional incentive funding depending upon their collections and performance levels in five measured areas: paternity establishment, support order establishment, collections on current support, collections on past-due support (arrearages), and cost-effectiveness. These laws apply to all state and tribal child support agencies.

The specific sections alleged to be unconstitutional by petitioner in TANF Title IV-D are:

42 U.S.C. § 654(20)(a) requires states to have in effect all of the laws to improve child support enforcement required in 42 U.S.C. § 666 and to implement the procedures proscribed in or pursuant to such laws.

42 U.S.C. § 656(a)(1) requires the state child support enforcement division to take title to support obligations as a condition for the receipt of federal TANF funding.

42 U.S.C. § 666 is the enforcement provision. Petitioner alleges the whole provision is unconstitutional for applying these drastic mechanisms only to the non-custodial parents. Protecting only "custodial" parents directly discriminates against the parental rights of all non-custodial parents and greatly interferes with changes of custody between parents

when circumstances change. 42 U.S.C. § 666(f) requires the adoption of the UIFSA.

The ICWA and TANF Title IV-D programs overlap because both apply to Indian children as well as non-Indian children. Today, deciding who is an Indian and who is not is as much a political decision as a racial one, as this case aptly demonstrates. *Morton v. Mancari*, 417 U.S. 535 (1974). The overlay of ICWA and the federal child support mandates came to light in the *Adoptive Couple v. Baby Girl* case last term when the child's natural father tried to use the TANF child support provisions to reestablish his parental rights over the child he had given up for adoption before she was born. He could not make the ICWA claim without some means of reestablishing his parental rights.

B. Factual Background

In 1993, Appellant was awarded primary custody of her son in the regular divorce proceedings. The New Mexico state district court judge on her own motion reopened the custody proceeding in May 1994 and applied the procedures of the Indian Child Welfare Act (ICWA) to change custody of the child in violation of the state laws of New Mexico. Neither appellant or her son are Native Americans or are eligible to become members of any Indian tribe. New Mexico claimed authority to apply the ICWA to all custody proceedings in the state courts through a federal "demonstration project" under the federal Department of Health and Human Services that integrated the ICWA to the federal child support mandates of the AFDC program.

The order to change custody states that the child was removed because appellant has a "thought disorder" for believing she had written a new

federalism argument. Appellant was the third year law student who wrote the new federalism argument to prevent the Secretary of the Department of Energy from opening the Waste Isolation Pilot Project before an act of Congress was passed and signed by the President. *See New Mexico v. Watkins*, 783 F. Supp 628 (D.D.C. 1991); 969 F.2d 1122 (D.C.Cir. 1992). The state judge who moved to change custody was married to a senior physicist and project manager employed by the Department of Energy.

Petitioner's vision of federalism is founded on the structure of the constitution but is not just a reassertion of the old dual federalism. Her vision makes the constitutional structure enforceable to protect individual rights by reverse incorporation of the Fourteenth Amendment through the Fifth Amendment to limit federal power. She wrote the draft of this argument for the Mountain States Legal Foundation for the case of *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

Appellants due process and equal protection rights were non-existent from the moment the state district court judge initiated the change of custody. The judge announced from the bench at the beginning of every hearing that "there are no rights in my courtroom." The end result was a court where the judge did whatever she wanted with evidence and testimony without regard to any due process or regard to the best interests of the child as detailed in the complaint. As part of this process the judge set a child support obligation on the appellant of $356.00 per month without any hearing, testimony or evidence. The judge was aware from the divorce proceedings that appellant was legally disabled because of her left knee and unable to work in a regular office setting.

The federal child support mandates have deliberately altered the common law doctrine of comity that generally applies to domesticating a court order from another state. See A.R.S. § 25-1201 et seq. and 42 U.S.C. § 666(f). Under these laws the Arizona state courts had no authority whatsoever to review what New Mexico had done to create the child support obligation. Petitioner did object to the domestication of the New Mexico child support order in the Superior Court. The state court found it had no jurisdiction and quoted the Arizona statute that complies with the federally mandated law that they have no jurisdiction to review a child support order from another state.

The state courts sole function per the federal mandates is to enforce child support obligations just like any administrative agency. The federally mandated laws are considered federally preemptive to displace all normal state procedures. In addition, the state courts are prohibited by the case of *Ableman v. Booth*, 62 U.S. 506 (1859) to declare federal laws unconstitutional. Similarly, no federal court would readily accept subject matter jurisdiction even though federal question jurisdiction is available to challenge the federally mandated laws because a child support case by definition involves a child custody determination that triggers the domestic relations exception articulated in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992). The Rooker Feldman doctrine also makes federal judicial review impossible because the ICWA and federal child support mandates are solely enforced by the state or tribal courts. Any federal court order affecting these laws could affect the state court enforcement orders.

C. Proceedings Below

It is the continued enforcement of the New Mexico child support orders not sent to Arizona until November 2011 after appellant had already resided in Arizona for 12 years that is the basis of this case.

Appellant had moved to Arizona prior to the only child support hearing ever held in New Mexico in January 1999 for reasons not contested by the New Mexico courts or child support enforcement authority. She returned to New Mexico for the hearing. It was at that hearing that she was finally allowed to question her ex-husband as to how their son was doing in his custody. The attorneys for the New Mexico Child Support Enforcement Division (NMCSED) and the hearing officer were appalled by her ex-husband's testimony and wary of her constitutional arguments against the constitutionality of the federal child support mandates being intermixed with ICWA custody procedures. A Child Support Hearing Officer Report was negotiated between the attorneys for the child support division and petitioner that afternoon and signed by all attorneys and the child support hearing officer. Appellant took an original signed copy of the Report that was supposed to be entered as the court order with her back to Arizona that afternoon.

A year later, appellant received notice from the New Mexico Supreme Court that her license to practice law was about to be suspended because she had been placed on the non-compliance list by the NMCSED. It is uncontested that appellant had made all the $100 per month child support payments required by the order she had agreed to. The order had been designed to require her ex-husband, real party in interest Michael Fontanarosa, to go back into the state court where she

could require the judge to hear the motion to change custody that had then been pending for 2 years.

The motion to change custody was based entirely on a psychological report produced by the Albuquerque Public Schools own psychologists detailing how the child was being harmed by being in his father's custody. The state district court judge had refused to hear the motion to change custody until appellant consented to all of the procedures the judge had used to change custody and paid all the fees created by the judge to punish the plaintiff for contesting her authority. These requirements were all hand written out on a minute order that under the New Mexico rules could not be appealed except back to the district court itself.

Without any notice to petitioner, the district court judge hand altered the wording of the Hearing Officer's Report after it was signed by petitioner, counsel for child support and the child support hearing officer. The changes to the Hearing Officer's Report which strike words through and inserts new words was required by state law to be sent to petitioner who was supposed to have the right to contest the changes. It is an undisputed fact that no notice of the changes was ever sent. The Hearing Officer's report as altered was filed as the final child support order in the New Mexico case on March 23, 1999. It incorporates the original child support order from the change of custody per the ICWA. The motion to change custody was never heard.

Appellant contested that her license should be suspended and requested a hearing before the New Mexico Supreme Court. Under NMRA 17-203(c) her suspension was automatic if NMCSED placed her on the non-compliance list. The New Mexico Supreme Court held a hearing to determine whether they could or should hold a hearing to allow plaintiff to contest her

automatic suspension. Plaintiff was allowed to present her evidence of the altered order of March 23, 1999. This is the New Mexico child support order sent to Arizona for enforcement. The New Mexico Supreme Court has concluded in four hearings that they cannot allow plaintiff to have a hearing to actually contest her license suspension without having a certificate of compliance from the NMCSED. The New Mexico Justices however did modify plaintiff's license suspension allowing her to continue to act as a legal consultant as long as she does not sign the pleadings. The New Mexico Supreme Court ordered their chief counsel to investigate and verify the facts presented about the March 23, 1999 child support order and denial to hear the motion to change custody. This report was submitted to the New Mexico Supreme Court and verifies the facts as stated in petitioner's complaint.

Appellant filed two previous federal actions before this action to develop her legal theory after she moved to Arizona. The first case referred to in the District Court proceedings as the "test case" established that it was possible to sue a state judge or state official for acting as a "federal administrator" waiving judicial and sovereign immunity. Arizona Federal District Court No. CIV 02-2633 PHX JWS. The case was dismissed for lack of jurisdiction because NMCSED had not taken any action against petitioner in Arizona. That case was intentionally incorporated as part of this case.

The second case was an enforcement of two separate but related Freedom of Information Act (FOIA) requests to the Department of the Interior and to the Department of Health and Human Services filed in the New Mexico Federal District Court, No. 04-1429 JB/DJS. Appellant did not know how the state district

court judge in New Mexico had been allowed to apply the ICWA in the custody proceedings or how the child support mandates were being integrated with ICWA to create a complete deprivation of all constitutional due process and equal protection rights. Most of the facts contained in this case regarding the combining of the ICWA and federal child support mandates were produced in the FOIA suit.

When NMCSED finally sent the New Mexico child support order to Arizona in November 2011 petitioner objected and briefed why the New Mexico order is not valid to the Arizona Superior Court. New Mexico had been sending appellant monthly statements since her son turned 18 showing that she owed $0.00. New Mexico had not followed the federally mandated procedures required to preserve the back child support after the child turned 18 that required a hearing and would have allowed appellant to raise her objections and constitutional arguments against the earlier New Mexico court orders.

It did not matter how appellant objected in Arizona because under the terms of the federal child support mandates no state receiving an order from another state has any authority to modify or alter that order. See A.R.S. § 25-1201 et seq. and 42 U.S.C. § 666(f). According to the UIFSA no matter how the out of state order was obtained it is valid and enforceable in the state requested to assist the forum state. The fact that all due process of law was denied appellant in the state courts of New Mexico and were flagrant violations of her rights did not give her any ability to contest the enforcement of those orders in Arizona or before the New Mexico Supreme Court.

When appellant challenged whether the UIFSA, a model act, could be preemptive of state law the tenor

of the proceedings escalated. In the end the Arizona court ruled it had no authority or jurisdiction to address any of appellants objections and ruled to enforce the New Mexico child support order.

No child support payment was set at the hearing accepting the New Mexico order. A subsequent hearing was set for July 2012 to set a payment requirement. When appellant appeared at this hearing she realized she had walked into a set up to send her to jail. Appellant had with her a letter from her knee doctor excusing her from jury service because her left knee must be elevated to prevent constant swelling. Not only would the Commissioner Newell not accept the letter on the doctor's letterhead into evidence, the trial judge completely ignored appellant's testimony that incarcerating her would cause her extraordinary pain and potential further damage to her knee as detailed in the complaint. Appellant was jailed causing major harm to her knee and requiring her to use a wheelchair while incarcerated without having ever missed any payment on child support to Arizona. The payment amount and schedule were established after she was released from jail. Petitioner's husband had paid solely from his own money $50,000 in cash against the claimed child support arrearages to get her released to prevent further damage to her left knee.

Appellant filed this suit the same day the child support obligation of $100 was set by the Arizona Accountability Court after she was released from jail. This special court is another federal demonstration project for the enforcement of the TANF child support mandates that is not required to follow the normal procedures of the rest of the Arizona courts.

Following the child support hearing in Arizona before the Accountability Court on May 9, 2013 the

NMCSED did send appellant 2 certificates of compliance. These certificates were issued with appellant paying $100 per month child support exactly as she was paying when NMCSED placed her on the non-compliance list in New Mexico in February 2000. Appellant petitioned the New Mexico Supreme Court for reinstatement shortly after the opening brief for the Ninth Circuit was filed. The New Mexico Supreme Court denied her petition on November 4, 2013 because she refused to physically appear at the hearing in Santa Fe.

Petitioner had requested that she be allowed to appear telephonically and volunteered to answer any and all written questions. Chief Disciplinary Counsel even supported her motion for reinstatement.

Even after almost two full years of petitioner coming into total compliance with Arizona's child support orders, her New Mexico license to practice law, her long ago relinquished New Mexico driver's license, her ability to renew her passport and all other remedies available under 42 U.S.C. § 666 are still being used by NMCSED to disrupt petitioner's life even though the child support orders are being enforced by Arizona. Petitioner has reason to fear physically appearing in any court hearing in New Mexico.

At the November 2013 child support hearing, the Commissioner hearing the child support case asked if Petitioner would pay an additional $20.00 per month so that the payment would be slightly higher than the accruing interest. The additional $20.00 would meet the incentive requirements of the federal regulations for child support enforcement. Petitioner agreed to the additional $20.00 per month. Arizona at the last child support hearing in April 2014 released her from the Accountability Court for her continued compliance.

A major part of her non-compliance according to NMCSED is her claim that she has the right to challenge the constitutionality of these federally mandated laws as they were applied and continue to be applied to her. The NMCSED Director's Motion to Dismiss or for Summary Affirmance included an argument that petitioner should not have been allowed to proceed in the Ninth Circuit as a *pro se* appellant when it is because of NMCSED that her law license is suspended.

The federal defendant Secretary joined this motion but then presented her own motion for summary affirmance and dismissal using their own arguments as to why the appeal should be dismissed for lack of subject matter jurisdiction.

The Motions raised many of the other issues raised by Judge Martone in the District Court. Petitioner after seeing Judge Martone's vehement dismissal order finally looked up his background on the internet. Frederick Martone had been the consulting counsel to the American Indian Policy Review Commission and an attorney for the House Committee of Interior and Insular Affairs. *See* footnote 1, 54 Notre Dame L. 829 1978-1979. The policy review commission report recommended the passage of a bill to keep Indian children part of the tribe that became the ICWA.

Petitioner's motion for reconsideration accused Judge Martone of judicial bias citing *Krechman v. County of Riverside*, 723 F.3d 1104 (9th Cir. 2013), and asked him to reconsider his findings. He denied the motion for reconsideration without addressing the bias issue. See App. 3a. Petitioner, in her opening brief to the Ninth Circuit alleged that Judge Martone was biased and that his errors on determinations as to

proper service, application of sovereign immunity doctrines and all of his other reasons for dismissing each defendant were tainted by his bias. Judge Martone rejected the truth of the allegations of her complaint that claims the ICWA and child support mandates were being overlaid as "not plausible" as argued in detail to the Ninth Circuit in the opening brief.

Petitioner admits that finding a way to sue over being classified as an "Indian" in light of this Court's decision in *Morton v. Mancari*, has been very difficult and is not complete.

The Arizona Attorney General filed a response brief and the petitioner replied, fully developing the issues in the Ninth Circuit.

The Ninth Circuit ruled applying its Rooker Feldman precedent of *United States v. Hooton*, 693 F.2d 857, 858 to grant summary affirmance. The Ninth Circuit did rule all other motions moot in the final order. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

I. THIS IS THE ONLY COURT THAT HAS JURISDICTION TO RESOLVE WHETHER THE ROOKER FELDMAN DOCTRINE IS NECESSARY TO PROTECT FEDERALISM OR IS NOW BEING APPLIED TO PROTECT FEDERALLY MANDATED PROGRAMS AGAINST INDIVIDUAL RIGHTS

A. The Ninth Circuit decision granting summary affirmance on the Rooker Feldman Doctrine expedited this case to the only court that can resolve the conflict between the doctrine and the fact that the challenged federal statutes are all enforced in state courts.

Appellant by her federal complaint did not request the district court to "review" the state court child support orders. The complaint clearly alleges that specific child support mandates are unconstitutional and that the ICWA could not and cannot constitutionally be applied to the non-Indian appellant over the custody of her non-Indian son. Most importantly, plaintiff argued that the ICWA was being deliberately combined and/or intertwined to the federal child support mandates to alter state court jurisdiction. Federal question jurisdiction under 28 U.S.C. § 1331 clearly applies for a federal court to review the constitutionality of federal laws.

Petitioner has readily acknowledged that the Rooker Feldman doctrine controls this case until and unless this Court changes the law. This is the only court with subject matter jurisdiction to resolve the conflict

between the federally mandated statutes of ICWA and TANF against the Rooker Feldman doctrine. Not only did this Court create the Rooker and Feldman decisions, it is the only court with jurisdiction to review how a state court has applied these federally mandated statutes. See 28 U.S.C. § 1257(a).

The claim of 28 U.S.C. § 1257(a) jurisdiction goes directly to the constitutional separation of powers question as to the exclusive authority of this Court to review the application of federal laws by the state courts. Preserving this Court as the only federal court that can review a state court decision is a critical separation of powers consideration. Importantly, this protects both the horizontal separation of powers that ensures this Court's role as the ultimate arbiter of the law against the elected federal branches and protects the vertical separation of powers we call federalism.

Just the week before this petition was due this Court issued *Petrella v. MGM*, Docket No. 12-1315, 572 U.S. _____ (May 19,2014) limiting the application of the doctrine of laches to prevent federal courts from applying it against the statutory remedies available under copyright law. This Court seems to be aware that old doctrines limiting judicial review and access to remedies need to be reexamined. No old doctrine needs to be reconsidered more than Rooker Feldman.

Under *Rooker*, district courts have no appellate jurisdiction to review state court decisions. *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 415-16 (1923). This Court has treated the *Rooker* decision as generally protecting state court jurisdiction and federalism. So did petitioner until in preparing this petition she realized the meaning of the Catch-22 sentence in the decision.

The basis for the *Rooker* Court's reasoning was "If the constitutional questions stated in the bill

actually arose in the cause, it was the province and duty of the state courts to decide them, and their decision, whether right or wrong, was an exercise of jurisdiction." *Id.* at 215. The *Rooker* Court knew that the case of *Ableman v. Booth* had specifically ruled that the state courts had no jurisdiction to hear any constitutional claim challenging a federal statute. *Rooker* reads like it was protecting state jurisdiction when in reality the result is to prevent individuals from being able to raise constitutional questions in a federal court when those same questions could have been raised but not heard in the state courts. *Rooker* denies any possible remedy for an individual to bring an action against a federal law being enforced in a state court. *Rooker* should be reconsidered and overruled.

The *Feldman* decision expands on *Rooker* by including the debate over whether an action below was subject to 28 U.S.C. § 1257 jurisdiction or came under the normal 28 U.S.C. § 1254 federal appellate court process. *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The case concerned whether two attorneys from other jurisdictions could take the District of Columbia bar examination. The District of Columbia Court of Appeals which had been reclassified by Congressional statute to be equivalent to a state supreme court had adopted a new rule changing the requirements of admission adding the provision that all applicants had to be graduates of accredited law schools. Neither had graduated from an accredited law school.

The *Feldman* court cites that it is applying the *Rooker* case as precedent to begin the analysis. *Feldman* at 476. This Court determined it could not review the decision of the Columbia Court of Appeals denying their bar applications if it was a judicial

decision except under 28 U.S.C. § 1257. Neither applicant had directly appealed the Court of Appeals ruling to this Court. Instead, both had appealed to the District of Columbia District Court to review the constitutionality of the new rule that prohibited them from taking the bar exam.

After deciding that the District Court could exercise federal question jurisdiction over the administrative decision of adopting the rule, this Court went on to specifically state that on remand the District Court should examine the *res judicata* issue. Since this Court had already decided that the Court of Appeals decision was subject only to 28 U.S.C. § 1257 jurisdiction it had already determined that any review of that decision below would be *res judicata*. This Court in 1983 used the same Catch 22 tactic this Court had used in 1923. *Feldman* should be overruled for the same reasons as *Rooker*, it precludes any possible remedy for an individual to bring an action against a federal law being enforced in a state court.

B. This Petition should be granted to reconsider the Rooker Feldman Doctrine.

There is no question that the complaint, pleadings below, the opening brief and the reply to the Arizona appellees' response brief all make clear that appellant is challenging specific federal child support statutes as unconstitutional. There is also no question that the enforcement of the federal child support statutes caused and continue to cause her real harm. These facts vest federal question subject matter jurisdiction in the federal courts pursuant to 28 U.S.C. § 1331 and Article III, Sec. 2. *See Osborn v. Bank of United States*, 22 U.S. 738, 821-6 (1824). As *Osborn*

makes clear, unless something happened that changes the constitutional rights of the appellant that allows her not to be treated as a citizen with all the rights of the constitution, she must be allowed to sue in federal court against the federal laws that have harmed her. *Id.* at 827-8.

Petitioner's legal theory for her complaint and basis for her argument against the Rooker Feldman doctrine below were based on claiming that the state courts when enforcing the federally mandated child support laws and the federally preemptive ICWA are acting as federal administrators and not in a state judicial capacity. As argued below, under ICWA the state courts are treated just like Article I tribal or territorial courts under the direct control of Congress. Similarly, because the child support mandates were written by Congress to be enforced by either the state courts or tribal and territorial courts the same reasoning applies.

It is a fact that all administrative courts subject to the Administrative Procedures Act (APA), 5 U.S.C. § 701 et seq., are by definition Article I courts. Petitioner's complaint was filed as an APA case.

Petitioner is arguing that the distinction between "administrative" and "judicial" as discussed in *Feldman* is a red herring. The real issue to protect individual rights and the right of the people to hold their government accountable as discussed in *New York v. United States*, is where the power comes from that is used to make the decision.

This is an expansion on the concept that a decision actually based on state law passed by the state legislature using only state authority by a state court is not subject to review even under 28 U.S.C. § 1257. It is considered beyond the authority of Congress to grant

review over purely state law judicial decisions. This is based on the fundamental federalism principle that states and the federal government are separate sovereigns under the structure of the constitution.

The *Feldman* case hinges on the fact that Congress by statute equated the District of Columbia Court of Appeals to be the same as the highest court of a state. *Feldman* at 464. Neither party nor this Court questioned the authority of Congress to enact such a statute. This statute reclassified the District of Columbia Court of Appeals from being a federal court subject to review by this Court under 28 U.S.C. § 1254 into a sometimes state court only subject to review under 28 U.S.C. § 1257. This is the actual holding in *Feldman. Id.* at 479.

The real issue in *Feldman* was whether Congress had the authority to reclassify the District of Columbia Court of Appeals as being like the highest court of a state. This is no different than being able to treat a state court like a territorial or tribal court. ICWA and the TANF child support mandates specifically treat states and territories as being under the same authority of Congress. Petitioner has argued many times in *amicus curiae* briefs to this Court for the Citizens Equal Rights Foundation in Indian law cases how dangerous to the structure of the constitution this is.

It is the source of the jurisdictional power being used by the tribunal that should determine whether the decision was administrative or judicial. Because the District of Columbia Court of Appeals was basing its authority on a statute Congress passed under its Article I and Article IV, Sec. 3, Cl. 2, Property Clause authority the action it took was purely federal whether

it was administrative or judicial subjecting it to this Court's review like any other federal court decision.

Similarly, if a state court hears a federal civil rights challenge to a state law passed by the state legislature as an independent act not compelled or coerced by a federally mandated law the source of its jurisdiction derives from state law. Because the federal statute is being applied by the state court it subjects only the portion of the ruling applying the federal law to review under 28 U.S.C. § 1257.

The Rooker Feldman doctrine prevents any ability to challenge this asserted authority of Congress to reclassify personal and property rights if the application of the reclassification is in a state court or a court reclassified by Congress as a state court like in *Feldman.*

This Court has questioned the Rooker Feldman doctrine. *See Exxon Mobil v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005). *Exxon Mobil* limited the Rooker Feldman doctrine to applying only when (1) a state court loser is requesting that the federal court overturn or declare void a state court order over which (2) the state court exercised its own jurisdiction and rendered decisions precluding further judicial proceedings.

Neither of these requirements for dismissal can be met if the allegations of the complaint are accepted as true. First, the plaintiff is not requesting any review of the state court orders that changed the custody of her son and established the child support award. Appellant's son is now a grown man not subject to any custody determination. All that is left of these New Mexico orders is the continued enforcement of the child support obligation established with the change of custody.

Additionally, the complaint and subsequent pleadings all say over and over that the New Mexico courts were not acting under their own authority but were acting under federal authority from the ICWA to change custody and then a combination of ICWA and the federal child support statutes to establish and enforce the orders.

Attempting to alter the requirements of the Rooker Feldman doctrine does not solve the major problem that the doctrine is directly against the concept that an individual citizen should be able to hold their government accountable for the laws it passes. Even an attorney could not figure out without extensive research and information requests what happened to her or even whose law was being applied to take away her parental and due process rights. The fact is that to protect individual rights from federally mandated discrimination being enforced in the state courts the Rooker Feldman doctrine needs to be overruled and a different means found to protect the separation of power concerns.

This Court found the separation of powers solution when it ruled the Defense of Marriage Act unconstitutional.

II. THE SECOND ISSUE PRESENTED PROPOSES THIS COURT IMPOSE A LIMITATION ON CONGRESS ADOPTING LAWS TO BE ENFORCED IN THE STATE COURTS TO PROTECT AND SOLIDIFY THIS COURT'S ROLE UNDER THE SEPARATION OF POWERS DOCTRINE

A. Expanding on Windsor v. United States

The liberal majority of this Court ruled that Congress cannot interfere with state domestic relations law without creating discrimination in overturning as unconstitutional the Defense Of Marriage Act (DOMA). *United States v. Windsor*, 133 S. Ct 2675 (2013). This Court drew a line that Congress cannot pass laws to preempt state domestic relations law that traditionally resided in the states. Now this Court needs to develop a rationale that the public and legal scholars can understand.

Expanding on *Windsor* will allow this Court to overrule the Rooker Feldman doctrine. Congressional interference with the state courts disrupts this Courts sole authority to review state court decisions that apply federal law under 28 U.S.C. § 1257. This means that Congress cannot write laws intended to be enforced in the state courts.

This also solves the problem of the Executive branch cherry picking different federally mandated requirements from different acts of Congress like ICWA and the TANF Title IV-D mandates and twisting them together to alter the laws Congress actually passed. The solution is to strike down as unconstitutional the federal laws that interfere with the domestic relations authority of the states and

jurisdiction of the state courts. This also allows this Court to use a scalpel instead of a sledgehammer in declaring specific statutes unconstitutional instead of whole federal programs.

This certainly works with the federal child support mandates of TANF Title IV-D. Only the statutes that change the jurisdiction of the state courts and cause discrimination between parents need to be struck down. The Court has no reason to stop federal assistance in helping enforce child support programs as long as the federal requirements do not preempt state law and the separate sovereignty of the state. It will also put the *parens patriae* doctrine back under the states. This will be discussed further in the last part of this brief.

The Supreme Court has already made clear in *Adoptive Couple* that ICWA is in this category and the clock is ticking on how long it will be allowed to continue. Declaring ICWA unconstitutional requires this Court to completely end the authority of the Congress and Executive Branch to continue the plenary war powers assumed during and after the Civil War. This Court just began this process with its ruling in *Shelby County v. Holder.*

B. Expanding on Shelby County v. Holder

The conservative majority limited Congressional authority by preventing the Congress from continuing to treat the Southern States as unequal sovereigns over voting laws in *Shelby County v. Holder*, 133 S. Ct 2612 (2013). *Shelby County* struck down as unconstitutional the Voting Rights Act provision requiring preclearance. The Majority ruled that the Fourteenth and Fifteenth Amendments cannot be used to deny

equal rights to the voters of Alabama even if there was a prior history of voting discrimination. The Chief Justice did not go into the long legal history of how the Property Clause was allowed to continue to be used in conjunction with the Fourteenth and Fifteenth Amendments and other war powers to be plenary authority. The Court did prohibit the Property Clause from being applied with the Civil War amendments in the future by requiring equal sovereignty for all states.

The Property Clause is the only legal basis for the federal government to be able to treat a sovereign state unequally by citing how it was admitted to the Union or retroactively changing how it was admitted. It is undeniable that the United States imposed different conditions on admission for different territories. Generally, the later a state was admitted the more territorial powers were reserved to the United States. This also applied to the readmitted Southern States following the Civil War. Requiring readmission of the Southern States as a part of Reconstruction was directly rejected by President Lincoln when he vetoed the first set of Reconstruction Acts just hours before he was shot. President Lincoln understood the potential problems of Congress having the authority to reclassify the personal and property rights of persons by changing their homelands from states back into territories.

Whether this Court likes it or not land status has been a critical element of deciding when constitutional rights exist since the *Dred Scott* decision. *See Dred Scott v. Sandford*, 60 U.S. 393 (1857). This territorial separation also allows the Indian and tribal rights to be defined separately and ultimately to be defined as not being subject to the Constitution itself. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). This is also the

power to allow the federal government to make any racial classification itself and broaden it or narrow it as is politically expedient. No wonder the ICWA could be applied against a non-Indian mother and child in the New Mexico state courts under federal law.

Not allowing Congress to discriminate against a Southern State's County indefinitely on voting actually separates the Property Clause from the application of the Civil War Amendments. It is a significant constitutional structural correction that can be used to finally apply the substance of those amendments to the federal government. More importantly it will change the authority of the United States to enforce the Civil War Amendments against the states. What it will end is the power of the United States to require states to discriminate. In politically correct language this ends the power to make a federally created racial preference enforceable against the states. In fact, this Court just reinforced *Shelby County* in the way it decided *Schuette v. BAMN*, Docket No. 12-682, 572 U.S. ____(April 22, 2014) and upheld the Michigan proposition to stop all discrimination.

As this Court bluntly opined in *Shelby County* it is long past time for Congress to end this discrimination left over from the Civil War. More importantly, in order to allow the Fourteenth Amendment to become the great equalizer it was hoped to be, the residual plenary or war powers of the federal government must be curtailed.

It is now the federal government discriminating to keep its classification power. Nowhere is this more visible than federal Indian policy. Unfortunately, Congress and this President seem more interested in preserving these old war powers than allowing us to progress as a people. This Court has begun to limit

Congress and it needs to continue. Petitioner hopes that the prejudices on this Court to preserve the bizarre separateness of the federal district itself will not interfere with this process. The prejudice over the land status of the federal district undeniably comes from the Civil War.

Continuing to confine the Congress to the plain meaning of the Civil War Amendments and not allowing those amendments to be mixed with the plenary powers is the key to reimposing the constitutional structural limitations on the elected branches. If this Court continues to end discrimination as it did in *Windsor* and simultaneously continues to separate the Civil War Amendments from the plenary powers left over from the Civil War as it did in *Shelby County* it will rebalance the Constitution. This will do far more to protect this Court's constitutional role and right to judicial review and federalism than the Rooker Feldman doctrine ever did.

III. FEDERALISM WAS SUPPOSED TO HELP PROTECT INDIVIDUAL RIGHTS.

A. The Problem of Trust Relationships

Petitioner realizes that this last section of this petition is going beyond the Rooker Feldman doctrine discussion. But to fully implement her proposed substitution to that doctrine this Court must be comfortable with the end result.

The Congress and the President assert the same powers used to protect slavery before the Civil War that they now assert as the plenary authority to promote tribal sovereignty. The essence of the problem is so fundamental to how our constitution was designed

that we have not realized how we have allowed a cancer to grow that has greatly limited our liberty and is now threatening the integrity of the constitution itself.

The whole structure of the constitution is based on the Framers' concept of popular sovereignty. Slavery and the *Dred Scott* opinion altered this definition into the sovereign people and twisted the Framers' logic into allowing the national government to define property and individual rights by creating new classifications. Definition "sovereign people," Black's Law Dictionary, 5th Edition.

The result is subtle but absolutely critical if our constitution is going to remain viable as the contract between all of the people and their government. The Framers' notion of popular sovereignty was based on each individual deciding to align their personal interests with other persons to create a government that was better for everyone. It was based on the free will of a free people with inherent natural rights choosing to be bound by a constitution and laws that were only legitimate if within the powers granted to the government. The whole concept of judicial review--that a court can declare a law unconstitutional for exceeding the authority granted by the people in the constitution is based on this concept of popular sovereignty.

Trying to explain the difference between popular sovereignty and sovereign people to the general public and as a reason to limit the elected branches is probably untenable today. But this case presents a way to accomplish this result that everyone can understand.

There can only be one political trust relationship between the national government and the people and it must be the constitution itself. It is the constitutional role of this Court to protect this critical political trust

relationship between the people and their government. This is the reason to enforce the structural limitations.

This will also put the *parens patriae* trust back under the states by prohibiting all other federal trust relationships. Any federal trust relationship can be turned into a political trust relationship as happened with the Indian trust in *Morton v. Mancari*, 417 U.S. 535 (1974).

This would have greatly affected affirmative action programs but this Court has already eliminated almost all of them. In fact, it even improves the rationale for doing so.

It does mean confronting the Indian trust relationship. But this Court realized last year in *Adoptive Couple* that this confrontation was inevitable.

B. Modifying New York v. United States

To successfully impose limitations on the elected branches also requires federalism to be better explained. This Court came very close in *New York v. United States*, 505 U.S. 144 (1992) with its declaration that the federal statute that compelled or coerced a state to "take title" to low level radioactive waste was unconstitutional under principles of federalism to realizing that it was the reclassification of the title of the waste as property of the state that exceeded Congressional and Executive authority.

It would take just one case to modify the holding in *New York v. United States* to explain that it is the claimed authority to reclassify the title that was beyond the authority of Congress.

As already explained above, the asserted power to reclassify personal and property rights by altering the territorial status was granted by this Court to

Congress in the infamous decision of *Dred Scott v. Sandford*, 60 U.S. 393 (1857) to forever preserve slavery. The Constitution as the Framers' wrote it contained express limitations against preserving slavery. Essentially the power to reclassify personal and property rights is the power to rewrite the historical definitions into how Congress or the Executive or sometimes this Court want them to be just as Chief Justice Taney did in *Dred Scott* or this Court did later in *Oneida County v. Oneida Indian Nation* in 1974 and again in 1985. *Id.* at 414 U.S. 661 (1974); 470 U.S. 226 (1985). It is usually the *Oneida* decisions that are cited today.

Why this Court has resisted acknowledging that the power to reclassify personal and property rights is based on the Property Clause and the manipulation of territorial land status has perplexed the petitioner. *See Nevada v. Hicks*, 533 U.S. 353 (2001). In fact, the major difference between the decisions in *New Mexico v. Watkins* and *New York v. United States* is the fact that by addressing the land status issue of the nuclear waste facility head on the Congress was required to enact legislation to permanently dispose of the federal territorial public domain land and create a federal enclave in New Mexico.

This not only solved the jurisdictional problems because federal enclave law is well defined but prevented any reclassifications that could undermine New Mexico's authority to protect the general public as an inherent part of its state police powers. When the Waste Isolation Pilot Program actually leaked radioactive gas earlier this year, New Mexico and the surrounding community were able to hold the federal officials accountable.

This Court has realized the constitutional consequences of allowing Congress to reclassify land it has given to a state back into being federal territory. This Court has already ruled that Congress has no authority to alter grants of territorial land made to States and warned about the significant constitutional issues raised by such a claim of power. In *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 176 (2009), this Court stated the Congressional Act at issue "would raise grave constitutional concerns if it purported to 'cloud' Hawaii's title to its sovereign lands more than three decades after the State's admission to the Union."

The way to protect this Court's role and federalism is not by continuing the Rooker Feldman doctrine. This Court has already set its feet on the better path that it has no reason to fear. This case is ideal for overruling the Rooker Feldman doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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