Oglala Sioux v. Fleming (On appeal to 8th Cir.)
A Case Summary

Parties:

(1) Plaintiffs

- Oglala Sioux Tribe and Rosebud Sioux Tribe are Indian tribes officially recognized by the U.S. with reservations located within South Dakota. Both tribes have treaties with the federal government.
- Plaintiffs Madonna Pappan and Lisa Young reside in Pennington County, South Dakota, and are members of the Oglala Sioux Tribe and the Standing Rock Sioux Tribe respectively. The court has certified these individual plaintiffs as class representatives for all similarly situated Indian parents.

(2) Defendants

- Lynne Valenti is the Secretary of the South Dakota Department of Social Services (DSS).
- Lisa Fleming is an investigator for the DSS Child Protection Services (CPS) in Pennington County, South Dakota.
- Mark Vargo is the duly elected State's Attorney for Pennington County.
- Craig Pfeifle is the presiding judge of the Seventh Judicial Circuit Court of the State of South Dakota, having replaced Judge Davis.

Facts:

- Since January 2010, approximately one-hundred 48-hour hearings involving Indian children[1] are held each year in Pennington County.
- Children were removed from their homes without their parents or tribes getting timely, fair, and adequate hearings, as required by law. Some parents were waiting months for their hearing, while others were told they did not have rights to such a hearing.
- Three Indian parents and two tribes in South Dakota filed a class-action lawsuit in 2013 over repeated violations of their fundamental rights during the separation process of children from their families by state officials.
- In January 2014, the district court ordered the Defendants to "provide Plaintiffs with a complete list of 48-hour ICWA hearings from January 1, 2010, to the present."
- In March 2014, Plaintiffs filed a motion to compel, which claimed five judges from the Seventh Judicial Circuit were refusing to sign the order to obtain the ICWA 48-hour transcripts.
    - The district court ordered the Defendants to respond to the motion to compel and gave the aforementioned judges two weeks to either abide by the order or explain why they won't comply.
- In May 2014, the chief judge from the district court subpoenaed the court reporters from the 48-hour hearings to produce the transcripts by June 1.
- In July 2014, Plaintiffs filed a motion for partial summary judgment regarding the Defendants' violations, and included a statement of undisputed facts.
    - Plaintiffs contended that the Defendants allowed no testimony, evidence, or cross-examinations at the 48-hour hearings and often the only questions asked of the parents were for purposes of identification.
    - Plaintiffs further contended that the Defendants never conducted the hearings required by 25 U.S.C. § 1922.
    - Often, the length of time it took to complete the hearings was under four minutes, some even about 60 seconds.
- Plaintiffs later filed a second motion for partial summary judgment for due process claims, seeking to protect the parent-child relationship from unnecessary government intrusion.

[1] Indian children, as defined by 25 U.S.C. §1903(3).

- Plaintiffs claimed that Defendants have denied the parents the opportunity to present evidence, cross-examine witnesses, counsel, and denied testimony and explanation.
- 48-hour hearings are intended to be evidentiary hearings.

- In August 2014, the Department of Justice (DOJ) filed an amicus brief to protect the U.S.'s interest in ensuring that state courts and agencies consistently adhere to ICWA and the due process clause when Indian children are removed from their families and tribes and taken into state custody. The district court granted the DOJ's motion.
  - This is the first time the DOJ has intervened in a federal district court case involving ICWA.
- In March 2015, the court granted the motions for partial summary judgment, holding that the facts from the hearing transcripts are undisputed, and parents were denied due process.
- In April 2015, Judge Davis and DSS filed a motion to reconsider, which was later denied the following year. In May of 2015, Judge Davis was replaced by Judge Pfeifle as head of the Seventh Circuit Court.
- In December 2015, the Plaintiffs' request for declaratory judgment was granted and injunctive relief was granted in part. The court held that there is a "right to adequate notice, right to present evidence, right to cross-examine, right to counsel, right to a decision based on the evidence presented at the hearing" … and that a 48-hour hearing must use the § 1922 standard, and DSS must use the same standard when determining when to return an Indian child to a home.
- In January 2017, Defendants appealed the orders and the permanent injunction. Mark Vargo filed a motion to stay portion of the permanent injunction pending appeal, to which the other Defendants joined in.
- In February 2017, the court denied the motion to stay, holding that the Defendant did not carry his burden[2] to warrant a stay of the declaratory judgment order or the permanent injunction.
- The appeals were then transferred to the Eighth Circuit Court of Appeals, and the parties filed subsequent briefs for appeal.
- In June 2017, proposed amicus curiae was filed for the Cherokee Nation of Oklahoma, Navajo Nation, ICWA Law Center, National Congress of American Indians, and the National Indian Child Welfare Association.
- The 8th Circuit scheduled arguments for this case that took place on February 13, 2018.

Arguments/Claims:

1) 11th Amendment immunity is inapplicable[3] here.

- The 11th Amendment bars suits against states for money damages in federal court, but plaintiffs can seek prospective relief against state officials in their official capacities.
- The *Ex Parte Young* exception to the 11th Amendment immunity rests on the premise that "when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes."[4]
- "A court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'"[5]

[2] According to the Federal Rules of Appellate Procedure, Rule 8, (2)(A) states that the "motion must: (i) show that moving first in the district court would be impracticable; or (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action. (2)(B) states that the "motion must also include: (i) the reasons for granting the relief requested and the facts relied on; (ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and (iii) relevant parts of the record.

[3] *Hans v. Louisiana,* 134 U.S. 1, 20-21 (1890), but under *Ex parte Young,* 209 U.S. 123 (1908), that immunity does not extend to a suit filed against state officials in their official capacities seeking only prospective relief.

[4] *Virginia Office for Protection and Advocacy v. Stewart,* 563 U.S. 255 (2011).

- The 8th Circuit has rejected 11th Amendment immunity defenses in the past[6], because the purpose of the Plaintiffs' lawsuit was "to bring the State's regulatory scheme into compliance with federal law". Here, the purpose of the Plaintiff's lawsuit is not to eliminate the State of South Dakota's regulatory power over child welfare, but only to bring that regulation into compliance with federal law.

2) *The District court was correct in not abstaining.*

- The Defendants Vargo and Pfeifle argued that the district court should have abstained from exercising its jurisdiction over the Plaintiffs' petition for prospective relief.
- Mr. Vargo argued that under the *Rooker-Feldman*[7] doctrine, the court should have abstained from deciding whether he had created policies and was implementing practices that violated the Plaintiffs' federal rights.
    - The *Rooker-Feldman* doctrine recognizes that, with the exception of habeas corpus petitions, lower federal courts lack subject matter jurisdiction over challenges to state court judgments.
    - The doctrine forecloses straightforward appeals of state court judgments and also indirect attacks that are "inextricably intertwined" with specific claims already adjudicated in state court.
    - Generally, only the United States Supreme Court may conduct that review.
    - The Supreme Court has clarified[8] that the doctrine "is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments."
- Here, the Plaintiff's federal action was not brought by the parties who lost the original case[9] in question, and the relief sought in the Plaintiffs' federal action would not nullify the judgment rendered in that case.
    - The federal Plaintiffs here did not lose in *Cheyenne River*. The Oglala Sioux and Rosebud Sioux Tribes have no connection to the Plaintiffs in that case.
    - The relief sought in *Cheyenne River* was retrospective, whereas the tribe requested a writ of prohibition or mandamus that would reopen one particular custody case to allow for further proceedings.
    - This present case only seeks prospective relief and challenges policies that apply to all removal cases generally, contending that they violate ICWA and the Due Process Clause of the 14th Amendment.
- Cases are unanimous in holding that the *Rooker-Feldman* doctrine does not apply where the state case involved an application of a policy and the federal case challenges that policy generally.
- Where Honorable Craig Pfeifle argues that the district court should have abstained from addressing the Plaintiffs' constitutional and ICWA claims due to the *Younger*[10] abstention doctrine, that contention lacks merit and the court was correct.
    - The *Younger* abstention doctrine bars federal courts from hearing civil rights tort claims brought by a person who is currently being prosecuted for a matter

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[5] *Verizon Maryland Inc. v. Public Serv. Comm'n of Maryland,* 533 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 296 (1997).
[6] *Mille Lacs Band of Chippewa Indians v. Minnesota,* 124 F.3d 904 (8th Cir. 1997).
[7] *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 476 (1983); *Rooker v. Fidelity Trust Co*., 263 U.S. 413, 416 (1923).
[8] *Exxon Mobil Corp. v. Saudi Basic Indus. Corp*., 544 U.S. 280 (2005).
[9] *Cheyenne River Sioux Tribe v. Davis,* 822 N.W. 2d 62 (S.D. 2012).
[10] *Younger v. Harris,* 401 U.S. 37 (1971).

arising from that claim in state court. It has been extended[11] to state civil proceedings in aid of and closely related to state criminal statutes, administrative proceedings initiated by a state agency, or situations where the state has jailed a person for contempt of court.
    - Younger asks whether the remedy requested by the federal Plaintiff would interfere with an ongoing state proceeding, not whether that remedy might require changes in a future proceeding.
    - There are three exceptions to the *Younger* doctrine: (1) Where the prosecution is in bad faith; (2) Where the prosecution is part of some pattern of harassment against an individual; or (3) Where the law being enforced is utterly and irredeemably unconstitutional.
    - Judge Pfeifle concedes that the first and third exceptions do not apply here, but only discusses the second. However, there was no civil proceeding pending against any Plaintiff at the time this suit was filed or when the district court ruled on the Defendants' motion to abstain, so this second exception is also inapplicable.
    - This doctrine should be rejected because state custody proceedings would not provide the Plaintiffs with an adequate opportunity to raise their constitutional claims.
- Furthermore, abstention is not justified where the state policy or practice being challenged is "flagrantly and patently violative of express constitutional prohibitions" or where "danger of irreparable loss is both great and immediate." *Younger,* 401 U.S. at 53.
- The Plaintiffs maintain that the district court had a duty to consider their substantial constitutional and ICWA claims, so the court appropriately decided not to abstain from exercising jurisdiction.

3) *All of the Defendants are policymakers liable under 42 U.S.C. § 1983.*

- The district court previously found that all four Defendants are policymakers for purposes of liability under 42 U.S.C. § 1983, which the Defendants challenge.
    - Under *Monell v. Department of Social Serv.,* 436 U.S. 658 (1978), a municipal government can be held liable under Section 1983 if a plaintiff can demonstrate that a deprivation of a federal right occurred as a result of a "policy" of the local government's legislative body or of those local officials whose acts may fairly be said to be those of the municipality.
    - Governmental liability under § 1983 attaches where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."[12]
    - Additionally, a challenged policy need not be written to create liability, according to *Monell.*
    - Whether an official had final policymaking authority is a question of state law.
- Under state law, when a child is removed from the home on an emergency basis and the state wishes to retain custody, a hearing must be held within approximately 48-hours, and it is precipitated by the filing of a petition for temporary custody (PTC).
- Mr. Vargo's policy was to withhold the PTC he filed in court from the parents, so the result was the parents going through the entire hearing without being able to see the PTC.
    - Plaintiffs secured a representative sample of hearings conducted by all of the judges who presided over cases during that period of time and shows what policies Mr. Vargo pursued through the discovery request for the transcripts from January 1, 2010, to the present.

[11] *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975); *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 627 n.2, 91 L. Ed. 2d 512, 106 S. Ct. 2718 (1986); Judice v. Vail, 430 U.S. 327 (1977).
[12] *Pembaur v. City of Cincinnatti,* 475 U.S. at 469, 483 (1986).

- Mr. Vargo also effectually created a policy of failure to give parents notice of the ICWA § 1922 standard. ICWA was not cited anywhere in his PTCs.
- During the remedies hearing, Mr. Vargo stated that the reason he did not comply was because there was no need for him to cite the § 1922 standard since the county court notifies parents of the correct legal standard during the hearing.
- Plaintiffs maintain that Mr. Vargo made a choice to not supply the parents with notice, and therefore governmental liability under 42 U.S.C. § 1983 attaches to him.

- DSS Defendants created three unconstitutional "official policies."
  - The statements above can be echoed here.
  - The DSS Defendants were presented with choices on matters within their final discretion and the Plaintiffs maintain that in each instance the Defendants chose to inflict a constitutional injury rather than avoid one.
  - The DSS failed to provide parents with a copy of the ICWA Affidavit at the 48-hour hearings. The burden of proof at one such hearing is on the state to justify the need for continued removal of a child. The purpose of the hearing is to determine if a sufficient risk of future injury exists to warrant keeping the child in state custody.
  - The DSS Defendants used the wrong legal standard in determining continued removal of Indian children, set forth in 25 U.S.C. § 1922. The Defendants instead were using the state's standard, which is less strict than ICWA.
  - The DSS Defendants acquiesced in and adopted the county court's decision to deny parents of adequate notice, and used the "best interests" standard to determine the hearing's outcome.
- Defendant Pfeifle created unconstitutional "official policies."
  - Judge Davis was responsible for upholding policies that violated ICWA and due process rights of the parents at the hearings.
  - The violations at the 48-hour hearings denied parents of the right to be informed of the allegations against them and the legal standard governing removal, to present evidence, to cross-examine the state's witnesses, to counsel, and to a decision based on evidence presented in open court.
  - Although the violations themselves occurred under Judge Davis, Judge Pfeifle did maintain that the procedures used above were not unconstitutional, and thus believes that the Plaintiffs suffered no cognizable injuries.
  - Plaintiffs also maintain there is evidence that Judge Pfeifle continued with the same procedures Judge Davis used, including fourteen hearings alone in 2013, as discovered in 2015.

4) Section 1922 limits the court's consideration at 48-hour hearings to evidence of imminent physical damage or harm

- Defendants employed a "best interests of the child" standard, rather than the § 1922 standard required by ICWA. This directly barred the parents from challenging a 48-hour hearing, and granted continued removal based on a caseworker's belief.
- Plaintiffs maintain that Congressional intent must prevail in statutory interpretation, and § 1922 must be interpreted to mean that continued removal of an Indian child at the 48-hour hearing must be based on evidence of physical injury and not emotional injury. Reasoning behind this supposition includes:
  - The plain language of § 1922 uses the words "imminent physical damage or harm."
  - When a statute creates multiple standards, a court must give effect to each one. Defendants' construction of § 1922 contradicts the principle of Congressional intent.
  - Allowing continued removal at 48-hour hearings to be based on emotional injury is inconsistent with the overarching purpose of ICWA.
  - Defendants' own interpretation would produce and has produced due process violations.

5) *Defendants' 48-hour hearings violated the Due Process Clause*

- Statements in the above claims can be echoed here.
- The violations at the 48-hour hearings denied parents of the right to be informed of the allegations against them and the legal standard governing removal, to present evidence, to cross-examine the state's witnesses, to counsel, and to a decision based on evidence presented in open court.
- Plaintiffs maintain that the right to familial integrity is a fundamental liberty interest, and therefore government officials have an affirmative duty to provide a hearing which follows due process of law.

6) *The District Court issued appropriate remedies*

- The burden is on the Defendant to prove "that there is no reasonable expectation that the wrong will be repeated."[13]
    - Plaintiffs provide the example that: Defendant Pfeifle cannot avoid a remedy for the unconstitutional policies that he and Judge Davis pursued in their own 48-hour hearings unless he could prove that neither of them could reasonably be expected to once again preside over a 48-hour hearing.
- The remedies ordered correlate with ICWA's purpose by ensuring that Indian children, their parents, and their tribes will receive a fair and meaningful hearing based on correct legal standards.
- The remedies ordered are appropriate and restrained according to the Plaintiffs, given the many years in which the Defendants' unconstitutional policies existed, the assertions by the Defendants' that all of those policies were valid.

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For more information relating to this summary, please contact NICWA Government Affairs Director David Simmons at desimmons@nicwa.org or ICWA Specialist Shanna Knight at sknight@nicwa.org.

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[13] *W.T. Grant Co.*, 345 U.S. at 633