

05-0592-CV

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Harold L. Rosenberger

Plaintiff-Appellant,

vs.

New York State Office of Temporary and Disability Assistance,
Robert Doar, Commissioner, Office of Temporary and
Disability Assistance, in his official capacity, and,
Ulster County Family Court

Defendants-Appellees.

APPELLANT'S INITIAL BRIEF

On an Appeal of Right from the the United States District Court in the
Northern District of New York, Albany, New York
Order of Hon. Gary L. Sharpe pursuant to Federal Civil Rule 59(E)
Journalized January 28th, 2005 in Case No. 1:04-CV-0475

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

*Rosenberger v.
New York Office of Temporary and Disability Assistance, et al.*

Case No. 05-0592-CV

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal.

Cynthia B. Cashman	Former Spouse of Appellant
Robert Doar	Defendant, Commissioner, New York Office of Temporary and Disability Assistance, in his official capacity
Hon. David R. Homer	United States District Magistrate
Harold L. Rosenberger	Appellant
Hon. Gary. L. Sharpe	United States District Judge
Lisa Ullman	New York State Attorney General's Office
Ulster County Family Court	Defendant

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STATEMENT REGARDING ORAL PRESENTATION

Pursuant to Federal Rules of Appellate Procedure 34, Appellant respectfully requests 15 minutes of oral argument of the questions presented for review with 5 minutes of this time reserved for rebuttal. The basis for this request derives from the fact that the questions presented require clarification of the district court's conclusions dismissing the Appellant's claims under *Rooker-Feldman* Doctrine.

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction of this case pursuant to 28.U.S.C. § 1291 and to review this appeal from the final judgment entered by the district court on January 28, 2005. (R1:25). Appellant timely filed his Notice of Appeal. (R1:26).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court erred when it granted a motion to dismiss under the *Rooker-Feldman* doctrine because it concluded the claims raised were inextricably intertwined with a state court judgment?

II. Whether the district court erred by dismissing the Appellant's claims because it erroneously characterized the claims as subjects of domestic relations belonging to the laws of the states?

STATEMENT OF THE CASE

The Appellant, Harold L Rosenberger, was the *pro se* Plaintiff in the district court and will be referred to by name, or as Appellant. The Defendants, Robert Doar, in his official capacity as Commissioner of the New York Office of Temporary and Disability Assistance, the New York Office of Temporary and Disability Assistance, and Ulster County Family Court, will be referred to as Appellees.

The record will be noted by the reference to the volume number, document number, and page number(s) of the Record on Appeal as prescribed by the rules of this court. At the time of this appeal, the Clerk of Court had not yet divided the record into volumes, so the undersigned has referred to the entire record as one volume. There was not an evidentiary hearing, so there is no transcript in the Record.

A. Course of Proceedings Below

After a New York Family Court set the Appellant's child support obligation at \$325.69 per week and was directed to pay 73% of all unreimbursed health expenses, the Appellant brought an action in federal court. In his Verified Complaint, the Appellant alleges that, on its face, New York's Family Court Act §413 (hereinafter "FCA"), Domestic Relations

Law §240 (hereinafter, “DRL”), and Civil Practice Laws and Rules §§5241 and 5242 (hereinafter “CPLR”) impermissibly infringe the fundamental Federal Right to Privacy in the Privacy Protected Zone of Parenting. (R1:1). Attached to the Complaint were three exhibits: 1) DRL §240, 2) Findings, Decision and Order of the Ulster County Hearing Magistrate dated January 24th, 2002. and 3) Wage Execution dated March 21st, 2002. (R1:1:Exhibits 1-3).

On May 7th, 2004 Hon. David R. Homer, magistrate judge acknowledged the Appellant stated a valid claim and ordered the Defendants to respond Recognizing that the Appellant had stated a valid claim upon which relief could be granted. The order stated, *inter alia*, that, “Rosenberger does not seek to overturn the decision of the state court giving rise to this controversy.” (R1:3).

The Appellees failed to respond in a timely fashion. After motion for default and motion to deny default and dismiss on December 20th, 2004 the Hon. Gary L. Sharpe concluded the state “statutes are ‘inextricably intertwined’ with Rosenberger’s state court judgment” and that “Rosenberger’s claims fall squarely within the *Rooker-Feldman* doctrine.” (R1:19).

Appellant's motion for reconsideration was denied January 28, 2005.
(R1:25).

B. Statement Of Facts

The material facts are clearly recited in the Complaint and the Orders entered by the district court. (R1:1, 3, 19, 25).

Harold L. Rosenberger, the Appellant, is the natural father of three children, Stacey Lynn, born May 18th, 1987, Kelley Anne, born May 18th, 1987, and Amy Michele, born June 9th, 1992. Interested party, Cynthia B. Cashman (formerly Cynthia B. Rosenberger), is their natural mother. Mr. Rosenberger and Mrs. Cashman were married on March 17th, 1986 and divorced on June 17th, 1999.

In the winter of 2001, interested party Cynthia B. Cashman filed a petition with Defendant Ulster County Family Court seeking an increase in child support. Pursuant to a (R1:1:Exhibit 2). Appellant's child support obligation was increased to \$325.69 per week and he was directed to pay seventy-three percent (73%) of all unreimbursed health expenses. Pursuant to New York CPLR §§5241 and 5242 and FCA §440, Ulster County Child Support Enforcement Unit, the county arm of Defendant OTDA, enforced the order via an automatic wage execution dated March 21st, 2002. (R1:1:Exhibit 3).

C. Standards of Review

This court reviews jurisdictional issues and other questions of law de novo. *Scherer v. Equitable Life Assurance Soc'y*, 347 F.3d 394, 397 (2d Cir. 2003); *Elder v. Holloway*, 510 U.S. 510, 516 (1994).

SUMMARY OF THE ARGUMENT

The district court erred by applying the *Rooker-Feldman* doctrine to the Appellant's federal claims. The claims raised relate to a general (facial) statutory constitutional challenge and for its enforcement via an automatic wage garnishment without due process. Claims raised in conjunction with a general (facial) constitutional challenge and with an enforcement proceeding or lack thereof are not inextricably intertwined with a state court judgment. *Texaco Inc. v. Pennzoil Co.*, 481 U.S. 1 (1987) *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1170 (10th Cir. 1998).

The district court erred when it characterized this action as a Domestic Relations action. This is a Federal Constitutional Question action pursuant to 28 U.S.C. 1331 based on the U.S. Constitution 14th Amendment substantive due process, Liberty Interest and Fundamental Right of Privacy of personal decisions relating to child rearing.

ARGUMENT AND CITATIONS OF AUTHORITY

The liberty interest at issue in this case-the interest of parents in the care, custody, and control of their children-is perhaps the oldest of the fundamental liberty interests recognized by this Court... As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a "better" decision could be made. –

Troxel v. Granville, 530 U.S. 57; 120 S.Ct. 2054 (2000).

Standing

The Appellant has standing to raise a general (facial) constitutional challenge to the New York State "income based" child support statutes because he fulfills all criteria for standing. The test for standing provided in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992) is completely met here by the Appellant and standing is proper to make the general challenge.

First, the Appellant must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as

opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992) (citations, footnote, and some internal marks omitted).

(a) Injury in Fact

The Appellant's injury is concrete, actual, particularized, prospective and ongoing. He has his wages garnished on a weekly basis. Pursuant to a Findings, Decision and Order of the Ulster County Hearing Magistrate dated January 24th, 2002, Appellant's child support obligation was set at \$325.69 per week. (R1:1:Exhibit 2). The Findings, Decision and Order of the State court prove that the Appellant has suffered real injury and thus has standing. The complaint specifically stated the relief sought is not to have the district court review, alter, or modify the state judgment. (R1:1¶12).

Pursuant to New York CPLR §§5241 and 5242 and FCA §440, Ulster County Child Support Enforcement Unit, the county arm of Defendant OTDA, issued a wage execution dated March 21st, 2002. (R1:1:Exhibit 3). This wage execution proves that the Appellant has suffered real injury and thus has standing.

While the Appellant has asserted injury due to the aforementioned statutes, his complaint did not seek relief to correct the application of said statutes to his specific case, but instead he raised a general (facial)

constitutional challenge to the statutes. The relief he seeks – declaratory judgment – is prospective in nature and aimed at creating new laws and procedures, which would subsequently be used by New York State to determine child support.

(b) Causal Connection ...

The injury – wage execution – is directly traceable to the Defendants actions.

(c) Likelihood the injury will be favorably redressed

This court’s declaring the New York’s “income-based” child support statutes as impermissibly infringing a Liberty Interest and fundamental right without a compelling state interest minimally applied will prevent the enforcement of the statute against all New Yorkers and the Appellant. There is no speculation about this result.

I: Whether the district court erred when it granted a motion to dismiss under the *Rooker-Feldman* doctrine because it concluded the claims raised were inextricably intertwined with a state court judgment?

A. Appellant’s Federal Claims

The Appellant has raised a “general challenge to the constitutionality of New York State FCA and DRL and the provisions of applicable sections

of New York State Law that mandate child support based on combined parental income...” (R1:1:¶¶ 11, 13).

The Appellant’s federal claim is that New York State’s “Income Based” child support statutes, New York State FCA §413 and DRL §240, impermissibly infringe the fundamental Federal Right to Privacy, in the Privacy Protected Zone of Parenting. (R1:1:¶¶ 1, 5, 11, 34, 42).

B. Rooker-Feldman Doctrine

“...Rooker-Feldman may be a dubious ground for a refusal to exercise federal jurisdiction over a case (like this one) that falls within the statutory grant of subject matter jurisdiction under 28 U.S.C. § 1331.” *Hachamovitch v. Debuono*, 159 F.3d 687 (2d Cir. 1998)

The Appellant pled he was not seeking to overturn, alter, modify or enter a state court judgment. (R1:1:¶12).

The standard for determining if a Appellant’s federal claims are “inextricably intertwined” with a prior state court judgment is set forth in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25,

While the question whether a federal constitutional challenge is inextricably intertwined with the merits of a state-court judgment may sometimes be difficult to answer, it is apparent, as a first step, that the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a

conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

Pennzoil v. Texaco Inc., 481 U.S. 1 (1987) also represents the U.S. Supreme Court's view that *Rooker-Feldman* is inapplicable to a constitutional challenge arising from a post judgment enforcement action.

The Supreme Court's reasoning in *Pennzoil* indicates that if the purpose of a federal action is 'separable from and collateral to' a state court judgment, then the claim is not 'inextricably intertwined' merely because the action necessitates *some* consideration of the merits of the state court judgment. Moreover, on its facts, *Pennzoil* demonstrates that asking a federal court to enjoin post-judgment collection procedures that allegedly violate a party's federal rights is distinguishable from asking a federal court to review the merits of the underlying judgment.

Kiowa Indian Tribe of Oklahoma v. Hoover, 150 F.3d 1163, 1170 (10th Cir. 1998) (Emphasis not added)

In *Pennzoil* at 481, Texaco filed a federal lawsuit challenging the Texas lien and bond statute which was to be applied against it when it lost a jury verdict to Pennzoil in a state court action. The U.S. Supreme Court held that the Younger abstention applied. (With dissenting opinion). More importantly, the Second Circuit Court as well as Justices Powell, Scalia, O'Connor, Brennan, Marshall and Blackmun, all of whom specifically wrote, concluded that the *Rooker-Feldman* doctrine was inapplicable. *Pennzoil* at 481, 8, 17, 21, Footnote 3. See also *District of Columbia Court of Appeals v. Feldman*, at 483.

In determining the applicability of the Rooker doctrine, federal courts “cannot simply compare the *issues* involved in the state-court proceeding to those raised in the federal-court plaintiff’s complaint,” but instead “must pay close attention to the *relief* sought by the federal-court plaintiff.” *Bianchi v. Rylaarsdam*, 334 F.3d 895, 900 (9th Cir. 2003) (quoting *Kenmen Eng ’g v. City of Union*, 314 F.3d 468, 476 (10th Cir. 2002) Here the Appellants’ pleadings and relief sought do not request altering the state court final judgment or interacting with the state court judgment.

The Appellant offers that the district court has made a clear error of law by failing to apply the standard set forth in *Pennzoil Co. v. Texaco, Inc.* to the *claims* asserted. Instead, the court erroneously substituted the *state statutes* for the Appellant’s federal claim. “First, it is clear that the FCA and DRL statutes are “inextricably intertwined” with Rosenberger’s state court judgment...” (R1:19:p.17).

Furthermore, for the Appellant’s federal claims to be “inextricably intertwined” with the state court judgment the relief requested, if it were to be granted, would have to have the effect of nullifying or voiding his state court judgment. *Focus v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 840 (3d Cir. 1996) (quoting *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 (8th Cir. 1995)). The Appellant is only seeking declaratory

relief from the federal district court. (R1:1:¶¶ 16, 24, 42, 48.) He is not seeking injunctive relief or damages.

In determining the applicability of the *Rooker-Feldman* doctrine, federal courts 'cannot simply compare the *issues* involved in the state-court proceeding to those raised in the federal-court Appellant's complaint,' but instead 'must pay close attention to the *relief* sought by the federal-court Appellant.'" *Hood v. Keller*, 341 F.3d 593, 597 (CA6 2003) (quoting *Bianchi v. Rylaarsdam*, 334 F.3d 895, 900 (CA9 2003)); *Kenmen*, 314 F.3d, at 476.

The Appellant has raised a general constitutional challenge to state statutes and asserts that, on their face, the relevant provisions of the DRL and FCA are unconstitutional. The relief he seeks – declaratory judgment – is prospective in nature and aimed at creating new laws and procedures, which would subsequently be used by New York State family courts to determine child support. If such relief were to be granted by this court or by the district court the impact on the Appellant's current state court judgment would be nil. Such a challenge is not barred by the *Rooker-Feldman* doctrine:

The Supreme Court drew a distinction--potentially critical in the present case--between a challenge to the rule governing bar admission and a challenge to a judgment of a state court applying that rule. Because promulgation of a rule is a non-judicial act, a federal court would have jurisdiction over a general challenge to state bar rules." *Hachamovitch v. Debuono*, 159 F.3d 687, 694 (2d Cir. 1998).

A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind.

D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983), citing *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908).

In addition, the district court has an unflagging obligation to exercise the jurisdiction given it. "...virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976) Further, "[T]he courts of the United States are bound to proceed to judgment and afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." *Id.*

In light of that mandate, "abstention . . . is the exception, not the rule." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 14 (1983) Indeed, abstention is "an *extraordinary* and *narrow* exception to the duty of a District Court to adjudicate a controversy properly before it." *Colorado River* at 424, 813 (emphasis included). "Abstention 'is the exception, not the rule.'" *Ankenbrandt v. Richards*, 504 U.S. 689, 705

(1992) "Abstention is, of course, the exception and not the rule." *City of Houston*, 482 U.S. 451, 467 (1987) See also 28 U.S.C. § 1334(c).

Finally, judicial economy mitigates against abstention. If this court applies *Rooker-Feldman* abstention, *England v Medical Examiners*, 375 U.S. 411 (1964) will permit the Appellant to have his state claims adjudicated again in state court and with a proper reservation of his federal claims return to this court if the state court rules adversely on his state claims. *England* 375, *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299, 1303 (11th Cir. 1992); *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir. 1976).

II: Whether the district court erred by dismissing the Appellant's claim because it erroneously characterized the claims as subjects of domestic relations belonging to the laws of the states?

In his Verified Complaint, the Appellant presents a question of constitutional law. The issue at hand is the Fundamental Federal Right to Privacy in the Privacy Protected Zone of Parenting. How much a parent spends on his child is a parenting decision as long as no harm befalls the child.

Such an issue does not fall within the Domestic Relations exception as announced in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992); *Thomas v.*

New York City, 814 F.Supp. 1139 (E.D.N.Y. 1993). Appellant is not asking the district court or this court for a change or modification of custody, for a divorce decree or alimony, or for child support. (R1:1:¶ 12).

The district court's reliance on *Neustein v. Orbach*, 732 F.Supp. 333, 339 (E.D.N.Y. 1990) is misplaced because the issue at hand is not a Domestic Relations Issue, but does arise from a Domestic Relations dispute.

The district court's reliance on *Hernstadt v. Hernstadt*, 373 F.2d 316, (2d Cir. 1967) in fact supports the Appellant's claims. "When a pure question of constitutional law is presented, this Court has suggested that the District Court may assume jurisdiction even if the question arises out of a domestic relations dispute..." *Ibid.* at 316.

Lastly, district court's reliance on *Stanley v. Illinois*, 405 U.S. 645 (1972) is again misplaced. In *Stanley*, the Supreme Court declared unconstitutional an Illinois State statute that presumed an unmarried father was an unfit parent. As in the instant case, this was a case that arose out of a Domestic Relations dispute and which involved a constitutional protected Liberty Interest:

The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect

lacking when appeal is made to liberties which derive merely from shifting economic arrangements.’

Stanley v. Illinois, 405 U.S. 645, 651 (1972), citing *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).

Furthermore, the district court’s reliance on *Stanley* for the authority that child support is a “shifting economic arrangement” is in error. This is a misinterpretation of the *Stanley* decision. If one goes back to the original citation from whence the *Stanley* cite is derived, a much different picture emerges. In *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring), the complete citation is,

Therefore, in considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. Accordingly, Mr. Justice Holmes was far more ready to find legislative invasion where free inquiry was involved than in the debatable area of economics.

Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).

Mr. Justice Frankfurter was discussing the philosophy of Mr. Justice Holmes when it came to free speech verses economic legislation. As such, he believed that rights that are derived from economic legislation do not come to the court with the same momentum for respect as those “liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society.”

The Liberty Right to Free Speech; the Liberty Right to an Abortion; the Liberty Right to “establish a home and bring up children”¹; the Liberty Right “to control the education of their own”²; the Liberty Right to “the care, custody and management of their child”³, which the Appellant assert includes how much and to what extent a parent provides financially for their child. These Liberty Rights not derive from economic arrangements or from economic legislation, nor are they subservient to such legislation. They exist independently and stand alone.

¹ *Meyer v. Nebraska*, 262 US 390, 399 (1923)

² *Meyer v. Nebraska*, 262 US 390, 401 (1923)

³ *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)

CONCLUSION

Appellant's federal claims are not "inextricably intertwined" with the state court judgment and are not barred by the *Rooker-Feldman* doctrine.

Appellant has properly pled a general (facial) constitutional challenge to New York State law.

Appellant has properly stated a claim and requests declaratory relief that New York's statutory child support scheme, Family Court Act §413 and Domestic Relations Law §240, be found unconstitutional.

Appellant meets all of the federal requirements to proceed to the merits.

For all the aforementioned reasons, this court should REVERSE the district court's dismissal of the Appellant's claim and REMAND the case to the district court for a decision on its merit.

CERTIFICATE OF COMPLIANCE

I hereby certify to the best of my knowledge that the principal brief complies with the type-volume limitation submitted under Federal Appellate Rule 32(a)(7)(B) pursuant to the computer processing system used to prepare the brief. This brief contains 3562 words as computed by Word and contains Times New Roman, 14 point typeface. The undersigned has also prepared to download the file to the Second Circuit Court of Appeals when permission is received from the court.

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 16th day of March, 2005 served a true and accurate copy of this brief, by depositing a copy thereof, prepaid, in the Federal Express Mail, properly addressed upon,

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