No. 04-1544

IN THE
Supreme Court of the United States

VICKIE LYNN MARSHALL,
Petitioner,

v.

E. PIERCE MARSHALL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE HEIRS, INC. IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICI CURIAE

The HEIRS® organization, a Pennsylvania non-profit, was founded in 1992 to support the interests of beneficiaries of trusts and estates by improving the administration of trusts and estates. HEIRS® generally believes that beneficiaries' interests would be better supported if given the option of a federal forum for equity cases, or for claims raised against estates in the interest of getting fair and equitable resolution of their complaints.

SUMMARY OF ARGUMENT

Trust beneficiaries often face serious problems in defending their interests involving trust management. With the consolidation of the banking industry, many small institutions have been acquired by multi-state bank holding companies. Instead of a local institution with trust officers familiar with a family and the circumstances

of beneficiaries, the beneficiary is confronted with a new trustee, often in a different state, and administration conducted through call centers in some remote jurisdiction. Instead of the familiar trust officer, one gets a call center operator with no background in the purposes or terms of the trust, and no ready access to information other than current financial information about investments. Litigating disputes at the place of administration in Long Beach, Las Vegas, South Dakota, Wyoming or other call-center administrative sites, can be a difficult problem for the beneficiary living in other parts of the United States.

Moreover, mobility of trust beneficiaries often leaves children or grandchildren of settlors living far from the situs of the trust, with no personal interface with trust personnel. This often makes it difficult to deal with administration problems, or to get the attention of trust administrators. The beneficiary living in another State than the situs of trust administration thus frequently finds herself with a hostile forum in the local probate court. On the other hand, the probate judge may know the trust personnel who appear for annual accountings, appear at trust company programs, and be on a first-name basis with the local trust officers. Indeed, trust companies often hire every qualified trust and estate practitioner in the situs, in an effort to conflict out attorneys who might otherwise represent a beneficiary in a dispute over trust administration. The beneficiary with a serious problem often cannot find qualified local counsel, because every experienced practitioner has represented the trust company in fiduciary and administrative matters, and has a vested interest in protecting this source of future business. Furthermore, the income or remainderman from another State has limited access to counsel with experience in the local probate court.

There is another aspect to the problem. Many local probate courts have little experience with trust administration problems. The average probate judge has enormous experience in ordinary probates of wills, will contests, conservatorships and guardianships. Such judges typically deal with conflicts of interest and improper conduct with individual fiduciaries. But most specialized probate courts have little experience with complex trust or investment or tax disputes. On the one hand, probate judges in major metropolitan areas, particularly those in States where inter vivos trusts are frequently used as estate planning devices, may have experience in such complex trust disputes. But the bulk of probate or orphans court or surrogate judges likely have little exposure to the intricacies of the Uniform Prudent Investor Act and modern portfolio theory, or with the subtle conflicts involved in the indiscriminant and wholesale conversion of common trust funds and individual portfolios into proprietary mutual funds by corporate trustees.

The structure of probate courts varies greatly. There are several States with elected lay probate judges, although these courts generally defer to general jurisdiction courts for disputed matters. Others States have dedicated probate courts, many have general jurisdiction courts where a judge may sit in probate jurisdiction generally or only by occasional assignment, and a few have both probate and equity courts.

The strictures of court staffing may leave many of these probate judges with little time to hear complex estates. Often the probate judge sits as a divorce or family court judge, and some sit as juvenile court judges as well. When a large case involving a trust appears, the case may be sent to a general law and motion department for motions, or in some courts the probate judge handles these

initial matters herself. But in a large number of jurisdictions, the probate judge cannot spend a week or more in trial. For example, in San Francisco, a disputed matter which takes more than two afternoons to try will be sent out to the presiding judge for trial before the first available Superior court judge. The judge likely will have no exposure to complex trust or investment issues, particularly in dealing with the complexities of modern portfolio theory.

Beneficiaries have frequently used diversity jurisdiction to obtain a neutral forum for resolution of trust disputes. Federal judges increasingly deal with complex trust disputes, dealing with ERISA cases, class actions involving corporate trustees, the duties of bankruptcy judges, investment duty cases where the parties have fiduciary duties, indenture trustee cases, Indian trust disputes, and disputes between beneficiaries and/or trustees from different States. The quality of federal judges and their clerks, and the ability to get a single-assignment judge, provide a better forum for resolution of trust disputes by trustees than is afforded in many State jurisdictions. Most importantly, the federal forum provides a neutral trier of fact for the out-of-state beneficiary when a dispute with a local individual or corporate trustee in the jurisdiction is involved. Article III, Section 2 was designed to protect citizens from just the type of bias and appearance of bias which beneficiaries face in seeking to protect their rights involving trusts. Many of these disputes, particularly surcharge cases, are *in personam*, and interfere with no existing *in rem* jurisdiction. To the contrary, most States now seek to avoid court supervision and mandatory review of accounts, allowing access to courts only in cases of disputes or potential disputes. The rise of the use of inter vivos trusts as estate planning vehicles and the surrender

of court supervision by local probate courts means that most disputes between trustees and beneficiaries will not interfere with any existing assertion of jurisdiction by some supervisory court.

THE ARGUMENT

This Court has discussed the proper approach to dealing with the probate exception to diversity jurisdiction in *Exxon Mobil Corporation v. Saudi Basic Industries Corp.*, 125 S. Ct. 1517(2005). As this Court held there, "When there is parallel state and federal litigation, *Rooker-Feldman* is not triggered simply by the entry of judgment in state court. This Court has repeatedly held that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'"125 S. Ct. at 1526-27. In the few cases where there are parallel proceedings, the *Saudi Basic* holding can permit diversity jurisdiction and resolve the merits on preclusion law. In most cases, however, there is no pending State proceeding with *in rem* or other jurisdiction over the trust in question, and diversity jurisdiction should be permitted as a matter of right. The Ninth Circuit in *Marshall* improperly looked to the possibility of exclusive jurisdiction over a trust as a basis for denying diversity jurisdiction. This is an impermissible attack of Article III, section 2. This Court has consistently held that the States cannot, by their assertion of exclusive jurisdiction, preclude or limit federal diversity jurisdiction.

In *Golden v. Golden*, 382 F.3d 348 (3rd Cir. 2004) the court provided a detailed discussion of the probate exception and its inapplicability in trust cases. For a similar analysis, see *Sianis v. Jensen*, 294 F. 3d 994 (8th Cir. 2002). However, in *Marshall v. Marshall*, 392 F.3d

1118 (9th Cir.2004), the Court held that the probate exception applied to a counterclaim brought in a bankruptcy proceeding where the claim duplicated issues raised in a Texas probate proceeding and where such claim had been held to be a compulsory crossclaim under Texas law. Since this interfered with the in rem jurisdiction of the State Court which conducted the probate litigation, the claim in a bankruptcy proceeding was held to be barred by the probate exception.

In choosing a forum, the ability to utilize federal courts should not be overlooked where diversity jurisdiction is feasible in trust matters. *See*, *e.g.*, *Jefferson Nat'l Bank v. Central Nat'l Bank in Chicago*, *supra* 700 F.2d 1143. "The standard for determining whether federal jurisdiction may be exercised is whether under state law the dispute would be cognizable only by the probate court. If so, the parties will be relegated to that court. But where the suit merely seeks to enforce a claim *inter partes* enforceable in a state court of general jurisdiction, federal jurisdiction will be assumed." *Lamberg v. Callahan*, 455 F.2d 1213, 1216 (2d Cir. 1972); *Sianis v.* Jensen, 294 F.3d 994, 298 (8th Cir. 2002) (same); Markham *v. Allen*, 326 U.S. 490, 494 (1946). However, where the matter is administration of a matter of purely local jurisdiction, such as probate of a will, federal jurisdiction will not be available. *Celentano v. Furer*, 602 F.Supp. 777, 779 (S.D.N.Y. 1985); *Weingarten v. Warren*, 753 F.Supp 491, 493 (S.D.N.Y. 1990).

The existence and extent of a "Probate Exception" to federal diversity jurisdiction is one of the most perplexing issues of litigation. In *Markham v. Allen*, 326 U.S. 490 (1946), the Supreme Court articulated a probate exception to federal diversity jurisdiction looking, as it were, to the language of the judiciary Act of 1789 which conferred

jurisdiction in "suits of a civil nature at common law or in equity." This analysis was based on the 'fact' that "matters of probate and administration were, in 1789, within the exclusive jurisdiction of the English ecclesiastical courts and outside the reach of the High Court of Chancery and the common law courts." *Rice v. Rice Foundation*, 610 F2d 471, 475 (7th Cir 1979). As Justice Frankfurter observed: "legal history still has its claims." *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 609 (1942)(Frankfurter, J., concurring).

As Judge Posner pointed out in *Dragan v. Miller*, 679 F.2d 712, 713 (7th Cir. 1982):

> One does not have to be an expert historian to spot the flaws in this reasoning. First, there was no ecclesiastical court in America, and it is not obvious why the language of the Judiciary Act of 1789 should be taken to refer exclusively to English rather than American courts. Someone should investigate the jurisdiction of American equity courts in the eighteenth century relative to that of any specialized probate courts that might have corresponded to the ecclesiastical court in England; no one has.

The Court concluded that "however shoddy the historical underpinnings of the probate exception, it is too well established a feature of our federal system to be lightly discarded...." *Ibid.*

In fact, probate matters were not exclusively litigated in the Ecclesiastical Courts of England, let alone in the General Courts of the American governors and their councils. The Ecclesiastical Courts did not deal with real property--the result of Henry VIII's effort to free real

real property from the ungodly grasp of the monasteries and bishops. These Courts did admit wills to probate, but their administration was limited to the disposition of personal property. Simes and Basye, "The Organization of the Probate Court in America: I", 42 Mich. L. R. 965, 968 (1944). Since orders of these courts were normally enforced by excommunication unless Chancery intervened, pagans, Catholics, Jews and unAnglicans had little to worry about in this world from Ecclesiastical Courts if they ran off with the decedent's goods.

The probate of real property and disputes over any type of property by necessity were litigated in the Courts of Law and Chancery. Chesnin and Hazard, "Chancery Procedure and the Seventh Amendment: Jury Trial of Issues in Equity Cases Before 1791," 83 Yale L. J. 999 (1974) and Simes, *supra.* Hence the historical premise of the exception was illusory. As Judge Posner notes, "Rigid historicist interpretations of the Constitution have not been much in vogue for generations." *Dragan, supra,* 679 F.2d at 714. Posner, however, looks to other issues of policy to support such a limitation, including the judicial economy of having specialized probate judges, continuous jurisdiction over various aspects of an estate or trust, and questions of primary jurisdiction where a State court has begun adjudication of a dispute. Considerations of comity and abstention predominate in such analysis rather than rigid historicist interpretations. The cases on the probate exception show a variety of outcomes, with some courts reciting the flawed historical arguments, others looking to comity considerations, and yet others asserting an unfettered right to litigate trust disputes.

"State legislatures can not impose restraints on federal jurisdiction by creating probate courts and vesting them with jurisdiction over similar issues." *Waterman v. Canal-*

Louisiana Bank & Trust Company, 215 U.S. 33, 40, 30 S.Ct. 10, 11, 54 L. Ed. 80 (1909)." *Bryden v. Davis*, 522 F. Supp. 1168, 1171 (E.D. Mo. 1981). *Waterman* cited in its decision the case of *Hess v. Reynolds*, 113 U.S. 73. 79 (1885) holding that "the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of states which prescribe modes of redress in their courts, or which regulate the distribution of their judicial powers." *Hess* held that Michigan could not grant exclusive powers to its courts over controversies which would eliminate the rights of a citizen to seek diversity jurisdiction. In *Gross v. Weingarten*, 217 F. 3d 308, 221 (4th Cir. 2000), the Court held that "The Supreme Court has repeatedly and unequivocally rejected the deputy receiver's contention that a state may oust the federal courts of jurisdiction by creating an exclusive forum for claims against an estate."(citing *Hess*). The equitable jurisdiction of federal courts to hear disputes involving trusts cannot be impaired by state legislation seeking to vest exclusive jurisdiction. Once exclusive jurisdiction has vested because of registration of a trust and the initiation of litigation, the State court may have *in rem* jurisdiction precluding a competing action. *Matter of Trust Created by Hill*, 728 F. Supp. 564 (D. Minn. 1990). However, a beneficiary or trustee should have the choice of federal jurisdiction if there is no action pending since the States have no authority to reduce Article III, Section 2 power of Congress to provide for diversity jurisdiction. Federal courts have long-standing expertise in fiduciary disputes, including the obligations of the United States as trustee for Indian tribes, *Cobell v. Norton*, ___F.Supp. 2d___, 2005 WL 2665629; the fiduciary duties of bankruptcy trustees, *In re Moon*, 258 B.R. 829 (N.D. Fla., 2001); and the general common law of trusts, including the fiduciary duties of ERISA trustees, *Harris Trust and Savings Bank*

v. Salomon Smith Barney, Inc, 530 U.S.238, 120 S. Ct. 2180 (2000), *Meyer v. Berkshire Life Insurance Company*, 250 F.Supp.2d 544 (D. Md. 2003), *aff'd*, 372 F.3d 261 (4th Cir. 2004), *In re Worldcom, Inc. ERISA Litigation*, 2005 WL 221263 (SDNY Feb. 1, 2005), and class actions involving trust departments. In recent years, federal courts have taken the lead in developing the law involving fiduciary investments: *Nickel v. Bank of America NTSA*, 991 F. Supp. 1175, *rev. on other grounds*, *Nickel v. Bank of America*, 290 F.3d 1134 (9th Cir. 2002), *Harley v. Minnesota Mining and Mfg. Co.*, 42 F.Supp.2d. 898 (D. Minn. 1999), mod. *Harley v. Minnesota Mining and Manufacturing Co.*, 284 F.3d 901 (8th Cir. 2002), *Williams v. J.P. Morgan & Co.*, 296 F. Supp. 2d 453, (SDNY 2003).

The Uniform Probate Code limits jurisdiction over inter vivos trusts to circumstances where the trust has been registered under §7-102-03. Where the trust is not registered, a proceeding by a trust beneficiary against a trustee "is subject to the personal jurisdiction of a court in which the trust could have been registered." (UPC §7-104). Uniform Trust Code §202 (c) provides that "This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust." Hence if the action has been initiated in federal court under diversity, no question of exclusive State jurisdiction could arise, even if the State were deemed to have the power to preclude diversity jurisdiction.

"The probate exception to diversity jurisdiction does not apply to trusts." *Weingarten v. Warren*, 753 F. Supp. 491, 494 (S.D. N.Y. 1990), *Georges v. Glick*, 856 F.2d 971, 997 (7th Cir. 1988) Questions of comity may, however, restrict assertion of such jurisdiction where a

State court has assumed jurisdiction, *Ibid.* and *Norton v. Bridges*, 712 F.2d 1156 (7th Cir. 1983) (removal held improper where state court had exercised jurisdiction over the trust), *Bassler v. Arrowood*, 500 F.2d 138 (8th Cir. 1974), *Matter of Trust Created by Hill*, 728 F. Supp. 564 (D. Minn. 1990).

"Because the probate exception is a judicially-created limitation on our jurisdiction, not one mandated by Congress, we construe it narrowly." *Georges*, 856 F.2d at 973. Many, if not most, courts have held that the probate exception does not apply to actions involving trusts. See Peter Nicholas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court* Jurisdiction, 74 S. Cal. L. Rev. 1479, 1493-94 & n. 70 (2001) (gathering and discussing cases)." *Sianis v. Jensen*, 294 F.3d 994, 999 (8th Cir. 2002). *See also* J. Winkler, "The Probate Jurisdiction of the Federal Courts," 14 Probate Law Journal 77.

Federal courts sitting in diversity have handled matters involving accounting actions against trustees, *Hamilton v. Nielsen*, 678 F2d 709 (7th Cir. 1982); and *Jefferson Nat'l Bank v. Central Nat'l Bank in Chicago*, 700 F.2d 1143 (7th Cir 1983); actions to remove trustees, *Denis v. R.I. Hosp. Trust Nat. Bank*, 744 F.2d 893 (1st Cir. 1984); collusion with a trustee, *Weingarten, supra*; interference with trust inheritance, *Georges, supra*, and *Glickstein v. Sun Bank/Miami, N.A., 922 F.2d 666 (8th Cir. 1991);* conversion claims, *Bryden, supra*, *Tarlton v. Townsend*, 337 F. Supp. 888 (N.D. Miss.), and *Hudson v. Abercrombie*, 682 F. Supp. 1218 (N.D. Ga 1987); and questions of interpretation of a trust, *National Audubon Society, Inc. v. Marshall*, 424 F. 2d. 717 (5th Cir. 1970). A claim of undue influence in obtaining an assignment of an interest in an estate was held to be "a garden variety

type in federal diversity jurisdiction, and it neither involves a 'controlling or obscure question of state law' nor requires special state expertise." *Giardina v. Fontana*, 733 F.2d 1047, 1051 (2nd Cir. 1984).

CONCLUSION

A recent case which HEIRS® believes would have been concluded cost-effectively in Federal court was the sizable and complicated Estate of Edmund J. McCormick sited in Westchester County, New York. Consisting in part of income producing real property located in four (4) states and administered by a corporate executor along with four individual co-executors (one of whom was seriously conflicted), a bank spokesperson admitted that its administration failed because quote – "It's so freakin' complicated." Curiously, during sixteen years of unsuccessful litigation and still unsettled, one Surrogate Judge was discovered to be a former bank VP and subsequently recused himself under pressure. The plaintiff, a principal beneficiary who was unaware and unadvised of the risks involved in her dual role as a co-executor not only lost a major portion of her inheritance but faces substantial legal charges incurred by the bank in defending its stewardship. In this case at least, HEIRS® believes that she would have been better served under Federal rather than local jurisdiction.

In general, the States should not be permitted to preclude a beneficiary or trustee from seeking a remedy in federal court where the parties are from different States, simply by offering a State proceeding for trusts registered there. The constitution was designed to protect citizens from bias in the courts of other states. Much has changed in the US since 1787, but the need for an unbiased court to review disputes between persons or entities in different

states remains constant. Time and modernity have not repealed basic human nature, and beneficiaries or trustees should have recourse to federal courts to protect their interests as the Constitution recognized.

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