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 THE PHILANTHROPY ROUNDTABLE AS *AMICUS CURIAE* SUPPORTING THE RESPONDENT

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INTEREST OF AMICUS [1]

The Philanthropy Roundtable is a non-profit organization of 500 philanthropic foundations and individual donors. The Philanthropy Roundtable is committed to preserving donor intent and to helping philanthropists ensure that their intentions are followed. Members of The Philanthropy Roundtable are affected by legal rules that govern the ability of donors to direct (and of charitable foundations to receive) charitable gifts and bequests. Amicus has a substantial stake in promoting legal rules that enhance the security of charitable gifts and bequests, that reduce opportunities for litigation over such gifts in multiple fora, that reduce the costs associated with litigation over gifts and bequests, and that allow donors to know the law that will govern disposition of charitable gifts.

The question before this court—when federal courts will find jurisdiction over matters that are at the core of probate determinations—affects these interests. Expanding federal jurisdiction in the manner advocated by Petitioner would increase the probability of multiple suits respecting charitable bequests, of forum-shopping by parties seeking to contest such bequests, and of extended delays in finalizing bequests. It also would reduce the certainty of the law governing charitable bequests. Amicus and the philanthropic foundations and donors it represents support continuation of this Court's traditional respect for state probate determinations.

STATEMENT

Stripped to its essentials, this case is a simple will contest. The questions that were central to the resolution of the claims

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[1] The parties to this case have filed with the Clerk of this Court written letters giving blanket consent to the filing of amicus briefs. This brief was not authored in whole or in part by counsel for any party, and monetary support for the preparation and submission of this brief has been provided entirely by *amicus curiae*, its members, and its counsel.

presented in federal court were virtually identical to those presented in state probate court: Was there a valid will? Did the decedent have the requisite capacity to execute the estate planning documents? Was there fraud in the creation or alteration of these documents? Whose signature was on the documents? Was an enforceable promise made to the surviving spouse that should have been the basis for a transfer of property to her from the decedent's estate? Both the state and federal claims turn on the answers to these questions.

Resolution of the legal issue before this Court, thus, must be rooted in understanding that, after all is said and done (and, during more than a decade of litigation, a great deal has been said and done), this is at its core a straightforward contest over the will of J. Howard Marshall II (J. Howard). Petitioner, Vickie Lynn Marshall (better known by her stage name, Anna Nicole Smith), seeks to invalidate J. Howard's will which left his substantial estate to several relatives and to selected charities, but not to Vickie, his wife for the last fourteen months of his life. Pet. App. 3, 11, 30. Respondent, E. Pierce Marshall (Pierce), J. Howard's son and principal heir, seeks to uphold the will. Pet. App. 11. The issues in the case all revolve around this contest.

The case is complicated by three facts. First, J. Howard's will was not the sole—indeed, not the primary—estate planning document. A living trust was the principal vehicle for disposing of his assets following his death. Pet. App. 4.

Second, in addition to challenging the will and associated trust directly, Vickie has styled some of her complaints as tort actions for interference with an expected gift. Jt. App. 28; Pet. App. 12-13, 31-33. These claims are directed against Pierce, who is both the primary heir to J. Howard's estate and also the executor of the estate, and cannot be resolved without addressing the same questions Vickie raises in challenging the will and trust directly. Pet. App. 10-13.

Third, after Vickie filed actions in state probate court in Texas (as a resident of Harris County, Texas) to contest J. Howard's estate plan, Jt. App. 26; Pet. App. 11, 41, 150, she also filed a voluntary bankruptcy petition in California, claiming to be a resident of that state. Pet. App. 2, 12. Her asserted reasons for filing were the need to satisfy a default judgment obtained by her own personal assistant and her failure to inherit from J. Howard's estate. Pet. App. 41(n.3), 150-151(n.3), 202. The primary debt that Vickie claimed required the bankruptcy filing later was settled for an amount that made the proceeding unnecessary. Pet. App. 41(n.3), 150-151(n.3), 202(n.3).

Pierce did, however, ask the bankruptcy court to declare that bankruptcy would not discharge obligations that might arise from potential defamation claims against Vickie, and Vickie then asserted a panoply of claims against Pierce mirroring those made in the Texas probate litigation. Pet. App. 12, 42-43, 152. These included assertions that Pierce held J. Howard against his will, forged J. Howard's signature, altered testamentary documents, and generally interfered with Vickie's expectancy that J. Howard would execute a new provision for transferring monies to her to take effect on his death. Jt. App. 23-24; Pet. App. 5, 12-13. State and federal courts gave directly conflicting answers to the questions raised in both proceedings. Pet. App. 2.

The Texas probate court, after a five-month trial before a jury, concluded that J. Howard's will was valid, that the trust amendment was valid, that the signatures were valid and not forged, that J. Howard had intended to dispose of his assets in accord with the terms of the trust and will, and that he did not intend to give a gift or bequest to Vickie beyond the roughly $6 million transferred to her, through a signed document executed by J. Howard, as consideration for her marrying him. Jt. App. 54-62, 93, 125-26, 129-30; Pet. App. 5-6, 18-21. These conclusions were based on a unanimous jury

verdict, including specific findings of fact. Jt. App. 118; Pet. App. 19. Prior to the entry of judgment in the probate case, the bankruptcy court had reached opposite conclusions on virtually every point. Pet. App. 15-17, 43-44, 153-55. The bankruptcy court's conclusions were based largely on adverse inferences drawn from its determination that Pierce had not complied with discovery orders. Jt. App. 240-45; Pet. App. 14, 44, 46, 153. Pierce was not permitted to introduce contrary evidence on these points. Pet. App. 14-15, 44, 46, 153.

The district court for the Central District of California, taking up these matters after the Texas probate court decision, determined that the matters in controversy between Vickie and Pierce were not part of the core bankruptcy proceeding. Pet. App. 171-173, 186. The district judge vacated the bankruptcy court's judgment (Pet. App. 186) and treated the bankruptcy judge's decision as stating merely proposed findings of fact and conclusions of law, conducting the proceeding before the district court *de novo*. Pet. App. 130(n.42), 156. The judge made his own review of evidence also introduced in the far lengthier probate court trial, made his own findings respecting Pierce's actions and their effect on the validity of the testamentary documents at issue in the probate proceeding, and rendered his own conclusions respecting issues such as the validity of J. Howard's will and J. Howard's intentions respecting further gifts to Vickie. Pet. App. 6, 22-23, 46, 123-27, 128(n.41), 129, 136. Those findings and conclusions were directly at odds with the findings and conclusions that had been reached by the Texas probate court. Jt. App. 54-62, 93, 119, 124; Pet. App. 5-6, 22-23, 32-33.

Pierce moved for dismissal on the ground that the matters in controversy were within the jurisdiction of the Texas probate court and outside the scope of the district court's jurisdiction. Pet. App. 21. In the alternative, Pierce urged the

district court to find that the matters had been disposed of by the Texas court in a proceeding in which the petitioner participated fully and decisions from that court were *res judicata* on the matters before the district court. Pet. App. 21, 45. The district court denied those motions. Pet. App. 22, 45, 159.

On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed, concluding that the issues involved in the controversy between Pierce and Vickie are integrally related to the probate proceeding in Texas and only tangentially related, if at all, to the bankruptcy proceeding. Pet. App. 35. The court specifically noted that the district court's judgment rested on conclusions, essential to its decision, that the amended testamentary trust which the Texas court had entered into probate was forged and fraudulent—and, therefore, necessarily invalid—all "in direct and irreconcilable conflict with the Texas probate court's judgment." Pet. App. 30. See also Jt. App. 119, 124. The court of appeals held that the case fell within the "probate exception" to federal jurisdiction. The court did not reach arguments respecting issue preclusion, claim preclusion, abstention, and other matters that might independently support the result below. Pet. App. 37.

SUMMARY OF ARGUMENT

The decision that this action is barred by the probate exception to federal jurisdiction is consistent with decisions of this Court. The Court has, for more than a century, recognized an exception to federal jurisdiction for matters within the special competence of state probate courts. The matters at issue in this case are squarely within the ambit of those held previously to be excepted from federal jurisdiction. See, *e.g.*, *Markham v. Allen*, 326 U.S. 490, 494 (1946); *Harris v. Zion Savings Bank & Trust Co.*, 317 U.S. 447, 450 (1943).

The decision below is also consistent with considerations of judicial economy and consistency that support the probate exception to federal jurisdiction. Contests over the assets of decedents generate special problems. In part because the critical evidence of the intention of the decedent cannot be had through live testimony, spurious claims against the assets of decedents are common. Further, many different parties in many jurisdictions potentially can advance claims against a decedent's estate.

For those reasons, contests over decedents' estates generally have been required to be brought within the exclusive jurisdiction of probate courts. Those courts have developed special expertise in dealing with the issues presented in these contests. Committing the contests to a single forum serves to promote consistency as well as judicial economy. Although individual claimants in particular cases will prefer a different forum, as a class donors, charities, and other beneficiaries of gifts and bequests are best served by continued recognition of the exclusive jurisdiction of probate courts.

That exclusive jurisdiction extends to claims that are drafted in language intended to avoid the appearance of contesting a will as well as to more directly pled will contests. It extends equally to claims that are brought into federal court under federal diversity jurisdiction and those that are appended to other federal claims. See *Harris*, *supra*, at 450. In this case, all of the controverted claims are state law claims that are within the exclusive jurisdiction of the state's probate courts.

Recognition of the priority of state probate court jurisdiction over claims such as those at issue here does not in any way infringe federal sovereignty. Congress consistently has chosen not to extend federal judicial jurisdiction to the full extent permitted by the Constitution. In interpreting federal statutory grants of jurisdiction, this Court is giving effect to federal interests. If Congress chooses to draw the lines around

federal judicial jurisdiction differently, it is free to do so. Congress has not, however, expressed a decision to overturn the long-standing judicial construction of an exception to federal jurisdiction for matters within the exclusive domain of state probate courts. Enactment of legislation conferring federal jurisdiction over bankruptcy matters does not direct a contrary result.

The decision below is consistent with decisions of other circuits of the court of appeals. Despite slight variations case to case, the decision below finds support in decisions of the first, second, third, fourth, fifth, sixth, seventh, eighth, tenth, and eleventh circuits. The circuit courts have held that probate contests over testamentary trusts are treated no differently from contests over wills. They have said, as well, that labeling an action as a suit in tort, rather than a direct attack on a testamentary document, does not alter the analysis of the scope of probate court and federal court jurisdiction. No circuit has held that federal jurisdiction extends to core probate matters. One circuit has held that such matters lie outside the scope of a civil rights law. One circuit's bankruptcy appeals panel has held that matters committed to state probate courts are outside federal bankruptcy jurisdiction. Only one circuit decision, from the eleventh circuit, would conflict with the result here, and the conflict with that decision is entirely with *dicta*, not with the court's holding.

Concerns about the scope of the exception as it was articulated by the court below are not relevant to disposition of this case. This case does not involve claims of the United States. It does not involve claims that are within the core competence of bankruptcy courts. Instead, it involves a controversy within the core competence of state probate courts and on which the probate court in Texas had rendered decision prior to the decision of the federal district court.

ARGUMENT

I. CONGRESS DID NOT EXTEND FEDERAL JURISDICTION TO MATTERS WITHIN THE SPECIAL COMPETENCE OF STATE PROBATE COURTS.

A. Precedents recognize the absence of federal jurisdiction over matters specially given to state probate courts.

This Court for more than a century has held that federal judicial jurisdiction does not extend to matters that are within the special competence of state probate courts and are committed by the state exclusively to those courts. See, *e.g.*, *Sutton v. English*, 246 U.S. 199, 205, 207-08 (1918); *Farrell v. O'Brien*, 199 U.S. 89, 110-11 (1905); *In re Broderick's Will*, 88 U.S. (21 Wall.) 503, 511-12 (1875). This Court's decisions draw a distinction between matters that a state commits exclusively to its probate courts (including matters ancillary to probate) and matters that a state authorizes to be brought within the general law or equity jurisdiction of courts not specifically limited to probate and probate-related matters. *Sutton v. English*, *supra*, 246 U.S., at 205; *Farrell v. O'Brien*, *supra*, 199 U.S., at 110. Actions not required under state law to be brought under the exclusive jurisdiction of probate courts, and which would not interfere with the essential functions of probate, are within federal jurisdiction even if they involve similar matters. See, *e.g.*, *Sutton v. English*, *supra*, 246 U.S., at 205-08.

The form of the claim, however, is not dispositive. Claims are not within federal jurisdiction if their disposition turns on adjudication of matters within the exclusive competence of state probate courts, even if they are in the form of suits in tort, bankruptcy, or other causes. See, *e.g.*, *Harris v. Zion Savings Bank & Trust Co.*, 317 U.S. 447, 450-53 (1943).

The two most recent decisions of this Court addressing the relationship between federal jurisdiction and state probate law

illustrate the distinction. *Harris v. Zion Savings Bank & Trust Co.*, *supra*, began as a bankruptcy case. Anna Harris, a farmer, filed for bankruptcy, asked for a composition of debts, then died while the bankruptcy petition was pending. After her death, the bankruptcy court stayed its proceedings, and the Zion Savings Bank later foreclosed on property owned by her. The administrator of her estate sought to revive the bankruptcy proceeding, but the state courts in her home state, Utah, held that her administrator did not have the authority under Utah probate law to petition the bankruptcy court to revive its proceedings.

A provision in federal bankruptcy law (then Section 75 of the Bankruptcy Act), however, specifically stated that representatives of deceased farmers could petition for a composition on behalf of the decedent. Mrs. Harris' administrator asked the federal courts to rule that this provision governed his capacity to make such a filing.

This Court held that the provision did not, contrary to the most direct reading of its terms, confer authority on the administrator that was denied by state probate law. The Court observed that the federal courts historically had read federal law to prevent conflicts or potential conflicts with state probate:

> [T]he federal courts have no probate jurisdiction and have sedulously refrained, even in diversity cases, from interfering with the operations of state tribunals invested with that jurisdiction. . . .

Id., at 451. The Court then explained that a potential conflict between federal bankruptcy law and state probate law existed. Bankruptcy's object is to discharge debts, while probate's object is to distribute proceeds of an estate to rightful claimants. These objects at times might run at cross purposes. The best reading of the federal law, then, as with construction of federal jurisdiction, was one that would prevent a conflict between federal bankruptcy law and state probate law. *Id.*, at

452-53. The Court read the bankruptcy law as implicitly requiring approval from state probate court for the administrator of an estate to petition the bankruptcy court to revive a proceeding. In this way, the potential for conflict was eliminated.

Markham v. Allen, *supra*, presented a very different situation. Under the federal Trading with the Enemy Act, 50 U.S.C. App. §1 et seq., the Alien Property Custodian claimed the right to stand in the place of German citizens who were legatees of a decedent resident of California. Other prospective heirs claimed that German citizens were not eligible to inherit under California law. This Court determined that the question presented was a straight-forward question of federal law that could be decided without interference with the operation of the state probate court. The federal courts could determine the rights of the Alien Property Custodian under the federal statute, irrespective of California law.

In contrast to the present case and other cases held to fall outside federal jurisdiction, *Markham* did not involve questions of will validity or estate administration within the exclusive province of the state probate courts. Nor was there a finding that the issue brought into court by the Custodian presented a conflict with essential determinations of the probate courts.

The test articulated in *Markham* was that federal courts could adjudicate rights in suits between parties so long as the federal court proceeding "does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." 326 U.S., at 494. The critical part of this test is the interference prong.

This part of the *Markham* test distinguishes that case from the majority of cases that come before the federal courts and from the instant case. The question in *Markham* respecting the Custodian's right to claim the property bequeathed to

German heirs could be decided without conflicting with state probate court proceedings. That is not the case where claims, such as assertions of interference with an expected gift, require courts to assess core issues of probate law. And, as the Ninth Circuit concluded below, it is manifestly not so in the instant case.

Here, Petitioner Vickie Marshall asked the federal court to find the testamentary documents fraudulent and hence invalid, as essential parts of her claim that Pierce tortiously interfered with her expectancy. Pet. App. 42-43. Although decision on that issue is not tantamount to administering the probate estate, and so often will be referred to as a decision that is "ancillary" to the "pure probate" function, it goes to core determinations made by state probate courts. Core probate questions include whether a will was signed by the testator and whether the testator was of sound mental capacity or was subject to undue influence when executing the document(s) being entered into probate.[2] Vickie's claim put these very questions in issue. See, *e.g.*, Jt. App. 119.

Looking past the labels, the test for interference is whether claims require adjudication of issues that lie within the special competence of state probate courts. As Vickie's claims require adjudication of each of the issues noted here as essential determinations of state probate court, her claims fall outside federal jurisdiction under the *Markham* test.

B. Circuit court precedents also support the absence of federal court jurisdiction over matters specially given to state probate courts.

Perhaps uncharacteristically, the Ninth Circuit is in quite good company with its sister circuits in its construction of the

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[2] Rejecting similar claims, the Fourth Circuit observed, "we have not located, a single case in which a federal court has found jurisdiction to invalidate a will due to lack of testamentary capacity or undue influence." *Turja v. Turja*, 118 F.3d 1006, 1009 (4th Cir. 1997).

scope of federal jurisdiction in this case. In assessing whether a federal proceeding would interfere with probate proceedings, the circuits of the court of appeals, in keeping with the approach taken below, have not given primacy to the form of the claim. Instead, they have asked whether the claim in federal court would require the court to address issues that are within the special competence of state probate courts, whether those issues are labeled "ancillary," "pure," or something else. As the circuit decisions cited in this section make plain, claims requiring resolution of issues, such as will validity, that are within the special competence of state probate courts are not within federal jurisdiction.

In *Dragan v. Miller*, 679 F.2d 712 (7th Cir. 1982), cert. denied, 459 U.S. 1017 (1982), for example, the Seventh Circuit held that diversity jurisdiction did not extend to a suit for the tort of intentional interference with an expectancy of a bequest because the arguments necessary to success on such a claim inevitably would implicate issues (such as whether defendant had exercised undue influence over the testator) that are within the special competence of the Illinois probate courts. *Id.*, at 715-17.

The Seventh Circuit again addressed the question of federal jurisdiction over probate-related matters in *Storm v. Storm*, 328 F.3d 941 (7th Cir. 2003). The claim in *Storm* was that defendant tortiously interfered with plaintiff's inheritance expectancy by exercising undue influence over the decedent, persuading her to amend an inter vivos trust. The court, consistent with the decisions of other federal courts, rejected plaintiff's contention that because a trust rather than a will was in issue, the case was not strictly a matter for state probate courts. *Id.*, 328 F.3d at 947 ("causes of action involving trusts are treated under the probate exception in the same way as actions involving wills"). The court also rebuffed plaintiff's argument that a suit for tortious interference with an inheritance expectancy was not strictly a matter for state probate courts. *Id.*, 328 F.3d at 945-47.

In *Moser v. Pollin*, the Second Circuit held that diversity jurisdiction did not extend to tort claims of fraudulent concealment and constructive fraud, even though there was no exclusive jurisdiction in the New York state court that commonly administered probate, because the claims were "in substance nothing more than a thinly veiled will contest." 294 F.3d 335, 340-41 (2d Cir. 2002). The conclusions that would support the claim there would also have had the effect of undermining the validity of the will. Because that issue was being contested in the state court charged with probate of the will, construing federal jurisdiction as extending to the equivalent claim would impermissibly interfere with the state court's proceeding. Even if in form the state probate court could retain jurisdiction over the distribution of the estate, it would not decide a critical matter normally adjudicated in probate court. According to the circuit court, turning "a state probate court proceeding into a rubber-stamping enterprise exemplifies the kind of jurisdictional conflict that is to be avoided by means of the interference prong of the probate exception." *Id.*, at 342-43 (footnote omitted).

In the case before this Court, as in the *Moser* case, *supra*, the validity of testamentary documents is at issue in both the federal court proceeding and state probate court proceeding. The claims that the district court here thought fell within its competence could not be resolved without findings that go directly to the issue of document validity, which is also a core element of the state probate proceeding. See Pet. App. 30. See also *Blakeney v. Blakeney,* 664 F.2d 433, 434 (5th Cir. 1981) (claim that testator "lacked capacity to make a will goes to the validity of the will itself"); *McKibben v. Chubb*, 840 F.2d 1525, 1530 (10th Cir. 1988) ("when a claim is brought charging undue influence or fraud in the execution of a will, that action is ancillary to the challenge of the will and belongs in the Kansas probate proceedings, not in federal court").

The findings of the district court are in clear conflict with the findings of the state probate court. The risk of such conflict is present whenever a federal court endeavors to answer questions that are within the core competence of state probate courts and inevitably will be decided in that context.

The Ninth Circuit's decision here is consistent with other circuit court decisions, establishing: that actions challenging matters within the special competence of state probate courts are outside federal jurisdiction, even if the suit is cast as a tort action, *Lepard v. NBD Bank*, 384 F.3d 232, 237-38 (6th Cir. 2004); *Golden ex rel. Golden v. Golden*, 382 F.3d 348, 359-63 (3d Cir. 2004); *Storm, supra*, 328 F.3d, at 945-47; *Rienhardt v. Kelly*, 164 F.3d 1296, 1300-01 (10th Cir. 1999); *Turja v. Turja*, 118 F.3d 1006, 1009-10 (4th Cir. 1997); that the interference prong of *Markham* is to be interpreted with an eye to practical notions of interference rather than a narrow, technical view of probate administration, *Lepard, supra*, 384 F.3d, at 237-38; *Golden, supra*, 382 F.3d, at 357-60; *Sianis v. Jensen*, 294 F.3d 994, 998-99 (8th Cir. 2002); *Moser, supra*, 294 F.3d, at 341-43; *Breaux v. Dilsaver*, 254 F.3d 533, 535-37 (5th Cir. 2001); *Mangieri v. Mangieri*, 226 F.3d 1, 2-3 (1st Cir. 2000), cert. denied, 531 U.S. 1080 (2001); *Glickstein v. Sun Bank/Miami*, 922 F.2d 666, 673 (11th Cir. 1991); and that the use of trusts rather than wills as the instrument for distribution of estate assets does not render a suit subject to federal jurisdiction, *Lepard, supra*, 384 F.3d, at 237; *Golden, supra*, 382 F.3d, at 359-63; *Storm, supra*, 328 F.3d, at 947; *Georges v. Glick*, 856 F.2d 971, 974 (7th Cir. 1988), cert. denied, 489 U.S. 1097 (1989).

These courts all have been quite clear that the matters excluded from federal jurisdiction are not merely the mechanical aspects of probate administration but all decisions on matters within the special competence of the state probate courts that implicate core issues such as will validity, even if the challenge is presented in a form designed to mask that relation. The circuit courts also have declared that federal

jurisdiction does not attach to such matters, whether the probate action is pending or is completed, where the federal claim amounts to either a substitute for or a collateral attack on determinations critical to the validity issues committed to state probate courts. See, *e.g.*, *Rienhardt v. Kelly*, *supra*, 164 F.3d, at 1301; *Turja v. Turja*, *supra*, 118 F.3d, at 1008-10; *Blakeney v. Blakeney*, *supra*, 664 F.2d, at 434; *Starr v. Rupp*, 421 F.2d 999, 1003-07 (6th Cir. 1970).

II. PARTICULAR CONCERNS WITH MATTERS SPECIALLY GIVEN TO STATE PROBATE COURTS SUPPORT DECISION THAT THERE IS NO FEDERAL JURISDICTION.

A. Special concerns attach to disposition of decedents' assets.

Particular concerns affecting the matters within the exclusive jurisdiction of state probate courts counsel against construing federal jurisdiction to reach these matters. Probate matters generally concern the intention of one who is deceased and, thus, cannot clear up any questions concerning his intention. This fact may account for the frequency of contests over the estates of decedents.

A second complication arises from the fact that planning for disposition of one's assets on death almost inevitably occurs well in advance of the time of death. The plan, thus, must be made in the understanding that many unforeseen events could alter the effect of the plan. Although estate planning documents are drafted and executed with that understanding, the passage of time inevitably provides additional grist for arguments over the meaning of those documents.

Third, the set of persons who have close connections to a decedent and who might hope for some tangible recognition of that connection in the estate plan often will be large and encompass individuals living in many different jurisdictions.

Often potential claimants will be found in foreign nations as well as in many different states within the United States.

Individuals who are planning for the disposition of their assets and wish to have that disposition carried out in accordance with their intentions—whether they are persons of great wealth or of modest means—are concerned with giving effect to their intent. Those concerns are central to the creation and operation of amicus.

B. Interests in legal consistency and judicial economy support special jurisdiction of state probate courts.

The special problems attached to the disposition of assets at death help explain the survival of special legal forms and tribunals for addressing probate related matters. In order to provide greater certainty and finality to the disposition of decedents' assets, states commonly provide for a single proceeding to bring into court decedents' assets and to dispose of all claims to those assets. Without such a proceeding, questions respecting the disposition of a decedent's assets could stretch over many years in many disparate locales.

By centralizing all claims in a single court and providing a specialized body of judges to dispose of the claims, states accomplish three goals.

First, states achieve a measure of judicial economy. Issues that will have to be addressed in contests over the disposition of probate assets can be handled by judges who develop expertise in those matters. These include not merely the mechanical and administrative aspects of probate, but more importantly the issues related to contests over the disposition of the assets. So, for example, states commonly require that claims relating to trust instruments designed to take effect on the death of the grantor and claims relating to allegedly tortious conduct interfering with the realization of expectancies for gifts or bequests must be brought in probate court.

See, *e.g.*, Tex. Prob. Code §5A. States do not allow such claims to be used in collateral attacks on probate judgments. See, *e.g.*, *Thompson v. Deloitte & Touche*, 902 S.W.2d 13 (Tex. App. 1995).

Second, states provide greater assurance of consistency in the law. The commitment of matters to a select set of judges who deal with the same issues repeatedly accomplishes that end.

Third, states also provide greater assurance that decedent's wishes will be given effect. This is accomplished both by increasing the consistency of decisions and by bringing all matters before a set of tribunals that have expertise in the relevant legal issues of the particular jurisdiction whose law should govern disposition of a given decedent's estate.

Individuals plan the disposition of their assets in reliance on provisions in a particular state's law. The ability to plan is advanced when the individuals and those who draft documents for them can know which state law will apply to questions respecting the disposition and know as well that the judges most familiar with the particular body of law will be interpreting and applying it.

These considerations support the states' decisions to vest exclusive jurisdiction over issues critical to probate in the specialized probate courts. See, *e.g.*, Mich. Comp. L. Ann, §700.1302; Oh. R.C. §2101.21; Tex. Prob. Code §5A. The considerations also explain why states routinely require that matters such as claims of tortious interference with an inheritance expectancy must be brought in probate court. The requirement avoids the conflicts, delays, and inconsistencies that are more likely to attend litigation of matters in different courts, even within a single state.

C. Considerations of legal consistency and judicial economy support the probate exception to federal jurisdiction.

The very same considerations support the historic interpretation of federal jurisdiction as excluding matters within the exclusive province of state probate courts. For example, Judge Posner, writing for the Seventh Circuit, after questioning the historicist explanation for exclusion of probate matters from federal jurisdiction, even in diversity cases where some fear of bias against non-resident parties might attach, explains that considerations of judicial economy and consistency support the exclusion. *Dragan v. Miller*, *supra*, 679 F.2d, at 714-16. See also *Lepard v. NBD Bank*, *supra*, 118 F.3d, at 237. Indeed, the Seventh Circuit in *Dragan* thought that these arguments against the exercise of federal jurisdiction were powerful enough to support the exclusion of core probate matters from federal jurisdiction even where the state did not have separate, specialized probate courts.[3] *Id.*, at 715-17.

An alternative approach to the protection of interests in consistency and judicial economy—invocation of doctrines of claim preclusion, issue preclusion, and *res judicata*—fails to provide the same protection of these interests. Respondent in the instant case, Pierce Marshall, raised these doctrines in the alternative, and the doctrines do, indeed, provide some protection to interests in consistency and economy. Application of these doctrines, however, frequently raises difficult issues, and parties cannot rely with certainty on these doctrines adequately to protect interests in consistency and economy.

Beyond that point, there is a more serious problem with this approach. By making the first determination on the

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[3] This Court similarly found that considerations of judicial economy supported the judicial construction of a "domestic relations" exception to federal jurisdiction. See *Ankenbrandt v. Richards*, 504 U.S. 689, 703-04 (1992).

merits dispositive, reliance on these doctrines encourages the sort of forum-shopping and race-to-judgment that undermines certainty and predictability critical to meaningful planning for disposition of estates.

The risk of forum-shopping is illustrated by the instant case. Vickie filed claims in Texas as a Texas resident only a few months before filing a bankruptcy petition in California as a California resident. Jt. App. 26; Pet. App. 11-12, 41. The bankruptcy petition on its face states that the filing is prompted by her failure to inherit from J. Howard and by a debt that was not contested by her prior to the bankruptcy petition but that was subsequently settled between the parties after invoking bankruptcy jurisdiction. These facts together give the proceeding the clear appearance of manipulating bankruptcy in an effort to find a friendly forum for a second chance at contesting core probate issues.

It bears repeating that the probate setting presents special reasons for concern. The individual who is planning the disposition knows he will be unable to testify in person during any contest over his disposition. He will be unable after a contest to revise his legal instruments to give effect to his intentions or otherwise to adjust to possible misinterpretations of his intent. In these circumstances, predictability and certainty are especially important concerns. The commitment of matters to a particular, specialized forum uniquely safeguards the interests of the testator.

The construction of federal jurisdiction as excluding matters within the special competence of state probate courts protects these interests. It harmonizes federal and state interests in accord with the historic understanding of the role courts in each jurisdiction have properly performed. Amicus is especially concerned that this Court preserve a construction of law that allows donors to plan with some certainty the disposition of their assets.

III. ABSENCE OF JURISDICTION FOR MATTERS SPECIALLY GIVEN TO STATE PROBATE COURTS IS CONSISTENT WITH OTHER DOCTRINES.

A. Federal jurisdiction is limited and does not extend to all possible causes.

Far from being an extraordinary construction of federal jurisdiction, this Court's cases respecting probate issues are in keeping with other decisions respecting jurisdiction, the exercise of federal judicial power, and the exercise of other federal powers. Arguments that begin with the assumption that federal judicial jurisdiction must, absent the clearest instruction to the contrary, be interpreted to extend to its fullest possible reach misstate the law. To be sure, this Court has determined that the Congress cannot constitutionally constrict the exercise of the Court's original jurisdiction, but the remainder of the federal court's jurisdiction lies within the power of the political branches to authorize or withhold. See, *e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-75 (1803); *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514-15 (1869).

Although Congress historically has granted federal courts authority over substantial portions of the potential federal judicial jurisdiction, it has never granted full authority over that jurisdiction. The decision not to grant federal courts jurisdiction over the full extent of potential federal cases is illustrated by the courts' diversity jurisdiction, which from the Judiciary Act of 1789 to the present has been restricted to cases with a given dollar amount in controversy. See, *e.g.*, 28 U.S.C. §1332(a).

B. Doctrines require courts to avoid unnecessary interference with state proceedings.

Not only is the scope of federal judicial power constrained, it also is not mandatory that courts exercise the full extent of

their statutorily granted jurisdiction. Even when jurisdiction clearly exists, this Court has found that prudential considerations counsel withholding decision. Notwithstanding occasional dicta to the contrary, numerous holdings of this Court direct the federal courts to stay their hand, temporarily or permanently, because proceedings implicate matters within the special competence of state courts. Under various abstention doctrines, for example, federal courts withhold decision on matters that might unduly infringe on decisions of state courts or might unnecessarily draw federal courts into constitutional questions. See, *e.g.*, *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-20 (1976); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

The abstention doctrines reveal this Court's concerns for both judicial economy and the consistency of the law. Those concerns justify withholding the exercise of federal jurisdiction that is conceded to exist in order to reduce the potential costs of multiple proceedings, the potential conflicts between tribunals considering duplicative claims, and the potential inconsistencies in legal rulings that might attach to disposition of matters within the core competence of state courts by federal courts. The same considerations support the construction of federal jurisdiction as not reaching matters within the special competence of state probate courts, as discussed above in Part II of this Argument. Similarly, concerns of federalism and comity counsel leaving matters within the special competence of state probate courts to those tribunals, just as those considerations argue for abstention in the cases noted above. See, *e.g.*, *Golden ex rel. Golden v. Golden*, *supra*, 382 F.2d, at 358 n.10; *Moore v. Graybeal*, 843 F.2d 706, 710 (3d Cir. 1988).

C. Aspects of state law often affect the scope of federal rights and federal jurisdiction.

The Solicitor General, in his amicus brief in this case, suggested that the decision of the Ninth Circuit below is inconsistent with the law because it would make the scope of federal jurisdiction turn in part on state law. *Brief for United States as Amicus Curiae Supporting Petitioner*, at 12-13. The exact pedigree of this complaint it is not clear.

As a starting point, it cannot be disputed that federal law often makes the effective scope of federal rights and obligations turn on aspects of state law. To take one example, federal tax law allows deductions for certain state tax payments. See, *e.g.*, 26 U.S.C. §§164(a), 164(b). The value of the deduction obviously varies according to the level and nature of state tax payments, matters entirely within the control of the states. This fact has never been deemed to raise any question of sovereignty, as the decision to allow state law to affect what is paid to the federal government is a decision of federal law.

There is no reason to view the decision to withhold federal jurisdiction from disposition of core issues committed to the special competence of state probate courts—any more than the decision to allow decisions of state tax law to affect federal tax payments—as a threat to federal sovereignty. See, *e.g.*, *Sutton v. English*, *supra*, 246 U.S., at 205-06, 207-08; *Ellis v. Davis*, 109 U.S. 485, 494, 499 (1883); *In re Broderick's Will*, *supra*, 88 U.S., at 511-12. The same should be said of the abstention doctrines noted above, and indeed the United States admits that these doctrines properly preclude federal courts from taking certain actions that would undermine the operation of state probate court jurisdiction. *Brief for United States*, *supra*, at 15-16.

The decision of the federal government to allow matters to be decided in state courts when interests in judicial economy and consistency support withholding federal jurisdiction is in

no way at odds with the supremacy of national law. National supremacy is no more in issue when jurisdiction is withheld as a matter of interpretation of the scope of a statutory grant of jurisdiction than where the decision rests on prudential considerations within the discretion of a court. In either case, although showing respect for state law, the decision is one of the national government.

The states could not, of course, constrict federal judicial jurisdiction by overriding a federal law. State grants of exclusive jurisdiction to the probate courts would not, independent of the construction of federal law, constrain the judicial power of the federal courts. See, *e.g.*, *Hess v. Reynolds*, 113 U.S. 73, 77 (1885). However, the fact that a state's decisions—including decisions on the scope of matters committed to the special jurisdiction of its probate courts—affect the ambit of federal judicial jurisdiction as a matter of federal law does not provide any reason to question the decision below.

D. Even under the narrowest construction of the probate exception, federal jurisdiction would not attach in this case.

Although the test for federal jurisdiction over probate matters advocated by the Solicitor General is narrower than the test adopted by this Court—and narrower than the test used in any circuit court—the decision in the instant case actually fits within the ambit of cases the United States agrees fall outside a proper exercise of federal jurisdiction. The state probate proceeding in this case was concluded before the decision of the district court was rendered,[4] and the district

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[4] The district court vacated the judgment of the bankruptcy court following the conclusion of the probate court proceeding in Texas. Pet. App. 186. The final judgment in probate court was December 7, 2001. Pet. App. 106-40. The federal district court did not enter its final judgment until March 7, 2002. Pet. App. 141-42.

court's decision here—like the decisions addressed in cases such as *Sutton v. English*, *supra*—was clearly in conflict with the already rendered judgment of the state probate court and would have the effect of invalidating the very instruments that the state court declared valid.[5] Pet. App. 30. As eleven circuits of the court of appeals have recognized, in such instances the proper understanding is that Congress has decided not to authorize the exercise of federal jurisdiction. See cases cited, *supra*, in Part I.b.

IV. BANKRUPTCY JURISDICTION DOES NOT IMPOSE A DIFFERENT RULE FROM DIVERSITY JURISDICTION.

The considerations that support this Court's—and all of the circuit courts'—construction of federal jurisdiction as excluding matters within the special competence of state probate courts apply equally to federal diversity jurisdiction and other sources of federal jurisdiction. The overwhelming majority of cases raising the issue of the relation of federal jurisdiction and state probate jurisdiction are diversity cases. Courts and commentators, hence, often refer to the absence of federal jurisdiction as "the probate exception to diversity jurisdiction." See, *e.g.*, *Golden ex re. Golden v. Golden*, *supra*, 382 F.3d, at 357; *Dragan v. Miller*, *supra*, 679 F.2d, at 713; Note, *A Prudential Exercise: Abstention and the Probate Exception to Federal Diversity Jurisdiction*, 104 Mich. L. Rev. 134 (2005).

However, nothing in the nature of the exception or in the considerations of legal consistency and judicial economy that support the exception is limited to the exercise of diversity jurisdiction.[6] Federal court determinations on core probate

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[5] The district court found three pages of the probated trust to be fraudulent, including the signature page for the trust. Pet. App. 126.

[6] Judge Frank Easterbrook, writing for the Seventh Circuit, reached a similar conclusion respecting application of the domestic relations

matters such as the validity of a will, whether made under diversity jurisdiction, bankruptcy jurisdiction, or general federal question jurisdiction, work the same interference with interests in consistency and judicial economy.

On the rare occasions when matters within the special competence of state probate courts have come forward under bases for federal jurisdiction other than diversity, the courts have recognized that federal law should be interpreted to avoid conflict with the state probate determinations. *Harris v. Zion Savings Bank*, *supra*, quite clearly evidences this recognition. This Court expressly interpreted bankruptcy law to avoid conflict with state probate court determinations, despite the fact that the bankruptcy filing antedated the probate filing and a specific provision in the bankruptcy law addressed the very matter in issue. 317 U.S., at 451-53.

When this Court declared that federal courts "have sedulously refrained, *even in diversity cases*, from interfering with the operations of state tribunals invested with" probate jurisdiction, *id.*, at 451 (emphasis added), it clearly signaled that the same considerations apply outside the diversity context. Indeed, the implication in that statement is that the considerations apply more outside the diversity context, as diversity jurisdiction is justified in large measure by concerns about local court bias, concerns that do not similarly support other bases of federal jurisdiction. See, *e.g.*, *Bank of the United States v. Deveaux*, 5 Cranch (9 U.S.) 61, 87 (1809).

If there was any question about the conclusion that the Court was deciding that probate jurisdiction did—and bankruptcy jurisdiction did not—obtain to determine matters

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exception to cases arising under federal question jurisdiction. See *Hickey v. Duffy*, 827 F.2d 234, 238-39 (7th Cir. 1987). While the scope of that exception differs from the scope of the probate exception, similar considerations support the conclusion that the exclusion from federal jurisdiction does not apply solely to diversity jurisdiction.

within the special competence of the probate tribunal, the Court put that to rest when it added:

> The probate court, not the bankruptcy court, is the appropriate forum for weighing the respective benefits or detriments to those who share in the equity of the decedent's estate.

317 U.S., at 452.

Similarly, in *Tonti v. Petropoulous*, 656 F.2d 212 (6th Cir. 1981), the court of appeals for the Sixth Circuit held that it lacked jurisdiction over claims respecting probate matters that were committed to and had been resolved in the probate court of Ohio. The basis for jurisdiction claimed in *Tonti* was federal question jurisdiction over claims of civil rights violations, brought under 42 U.S.C. §1983. Plaintiff alleged fraud, collusion, and denial of fair trial rights due to state judges' bias. The circuit court declared that, under the precedents of this Court and the circuit courts, probate matters are not within federal jurisdiction. *Id.*, 656 F.2d, at 215. The court's flatly stated conclusion applies the same rule to federal question jurisdiction as to diversity jurisdiction.

The bankruptcy appeals panel for the Eighth Circuit, in *In re Litzinger*, 322 B.R. 108 (8th Cir. BAP (Mo.) 2005), raised the issue of its jurisdiction sua sponte. In doing this, the Panel determined that the probate exception applied to bankruptcy proceedings just as it does to proceedings based on other provisions for federal jurisdiction. Holding that the *Markham* test applied to bankruptcy proceedings before it without qualification, the court remanded the case to the bankruptcy court with instructions to vacate its order and consider the application of the interference prong of *Markham*. 322 B.R., at 116-17. The wife of decedent's nephew had filed for bankruptcy while probate proceedings were pending. The Appeals Panel found that a critical predicate for the bankruptcy court order was determination of

ownership of certain assets. Depending on the outcome of that determination, these assets might be included within the decedent's probate estate or excluded from it. 322 B.R., at 117. The Panel therefore held that the bankruptcy court needed to determine if decision of the controversy before it would impermissibly interfere with state probate proceedings. If so, that matter was outside the jurisdiction of the bankruptcy court. *Id.*

The application of this Court's *Markham* test to bankruptcy proceedings is consistent with the Court's precedents and also with the concepts that underlie those precedents. See, *e.g.*, William L. Norton, Jr., *Norton Bankruptcy Law and Practice 2d* §4:71 (2006). Construction of federal jurisdiction as excluding matters that go to essential aspects of probate law—to matters that are committed exclusively to probate courts or that functionally are placed within their special competence—promotes legal consistency and judicial economy just as much when bankruptcy jurisdiction is at issue as when diversity jurisdiction is at issue.

Nothing in the bankruptcy law is to the contrary. The bankruptcy code includes an express provision for abstention to allow resolution of issues related to bankruptcy in state court proceedings. 28 U.S.C. §1334(c). That provision does not speak to probate proceedings directly or in any way signal a design to alter the rule that federal jurisdiction does not attach to claims within the special jurisdiction of state probate courts. The abstention provision of §1334(c) addresses a broad range of possible state court actions that might better be resolved apart from bankruptcy and allows district courts to determine whether abstention would be "in the interest of justice, or in the interest of comity with State courts or respect for State law." 28 U.S.C. §1334(c)(1). See also 28 U.S.C. §1334(c)(2). So, for example, abstention might be requested to allow a contract dispute between parties to be resolved in state court, see, *e.g.*, *In re Casual Male Corp.*, 317 B.R. 472 (S.D.N.Y. 2004), or to allow prosecution of contempt

proceedings arising out of a domestic relations dispute, see, *e.g.*, *In re Moon*, 211 B.R. 483 (S.D.N.Y. 1997). This provision indicates Congressional concern over matters related to comity and federalism, and arguably is supported by the sort of concerns with consistency and judicial economy that support exclusion of issues within the special competence of probate courts from federal jurisdiction.

The abstention provision in the Bankruptcy Code, however, does not reverse that exclusion. It solely addresses circumstances in which there is admitted federal jurisdiction over a claim. It does not discuss the historic construction of federal jurisdiction as excluding matters within the special competence of probate courts and does not suggest a design to supersede probate court determinations of core probate issues, such as the validity of testamentary documents. If the law's drafters had intended that result, it is reasonable to expect that they would have said so directly. In short, nothing in the Bankruptcy Code itself provides sufficient ground to overcome the long-standing construction of federal jurisdiction as excluding such matters.

The one case that expresses a contrary conclusion is *Goerg v. Parungao*, 844 F.2d 1562, 1565 (11th Cir. 1988), cert. denied, 488 U.S. 1034 (1989). This case does not, on inspection, provide any basis for that conclusion. The *Goerg* case is a contest not between U.S. bankruptcy and probate jurisdiction, but between foreign and U.S. jurisdiction. The question in *Goerg* was whether the trustee of a foreign citizen was a "debtor" within the meaning of Section 304 of the U.S. Bankruptcy Code, 11 U.S.C. §304, a provision dealing with disposition of assets related to a foreign bankruptcy proceeding. Goerg, the German bankruptcy trustee, sought to enjoin U.S. proceedings and to include decedent's assets in the German proceeding. In passing, the Eleventh Circuit stated that the probate exception affects only the scope of diversity jurisdiction. *Id.*, 844 F.2d at 1565. The issue was not essential to the decision of the case. It was not the ground

on which the bankruptcy court had ruled that it lacked authority to issue the injunction sought by Goerg. The dictum in *Goerg* is in conflict with authority of this Court, with other lower court decisions,[7] and with the legal concepts that underlie this Court's interpretation of the scope of federal jurisdiction.

V. NO SPECIAL CIRCUMSTANCE COUNSELING LIMITATION ON THE PROBATE EXCEPTION IS IN ISSUE.

The brief of the Solicitor General argues that there is a special circumstance when claims of the United States, or claims against the United States, are in issue and special reasons to allow a federal forum for such claims. Concerns respecting forum-shopping (and related conduct designed to divert matters from a potentially unfavorable state probate venue) seem to apply solely to private parties and not to the United States. That observation would seem to support a different rule at least for claims by the United States. That issue, however, need not be addressed, as this case does not involve either claims by the United States or against the United States.

Although the Solicitor General questions the provenance and historic scope of the probate exclusion from federal jurisdiction, even judges who have shared those concerns have concluded that "it is too well established a feature of our federal system to be lightly discarded." *Dragan v. Miller*, *supra*, 679 F.2d, at 713. See also *Moser v. Pollin*, *supra*, 294 F.3d, at 340; *Ashton v. Josephine Bay & C. Michael Paul Found., Inc.*, 918 F.2d 1065, 1072 (2d Cir. 1990). Congress

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[7] The opinion also conflicts with the Eleventh Circuit's decision in *Glickstein v. Sun Bank/Miami*, *supra*, which applied the *Markham* analysis to a RICO action, finding that there would be no interference because there was no issue of will interpretation or will validity and no prospect of interfering with probate proceedings. 922 F.2d, at 673.

has adopted numerous provisions respecting federal jurisdiction in the more than 125 years that this exclusion has been recognized without once declaring it to be an incorrect reading of federal statutes or indicating an intent to alter that construction of federal law. Precedents of this Court give weight to congressional re-enactments of law that do not alter prior constructions. See, *e.g.*, *Ankenbrandt v. Richards*, 504 U.S. 689, 703-04 (1992).

As explained above, the exclusion is supported by strong public interests and by long history in this and other courts. Even if there were compelling reason for that to be changed, the initiative should lie with Congress, not the courts, to do so.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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