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 OF *AMICUS CURIAE* ERIC YOLLICK, DEPENDENT ADMINISTRATOR OF THE ESTATE OF HERBERT CLINTON SISCO IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

The *Amicus Curiae* is a solo practitioner attorney in The Woodlands, Montgomery County, Texas, whom County Court at Law Number Three of Montgomery County, Texas, a state court with probate jurisdiction, appointed to serve as personal representative of the Estate of Herbert Clinton Sisco in 2002. The *Amicus* is deeply interested in this case, because of the important effect its outcome could have on the validity of state probate proceedings in general and on the Herbert Clinton Sisco Estate probate proceeding in particular. The *Amicus* files this brief to offer analysis to the Court as the Court considers whether Congress intended to usurp the jurisdiction of state courts to probate decedent's estates when it conferred jurisdiction on bankruptcy courts.

The *Amicus* urges the Court to continue to hold that the probate exception to federal jurisdiction constitutes a recognition of the fact that the Constitution and the Congress intended to allocate jurisdiction over probate estates to the state courts. This brief focuses on the issue by analyzing the historical and rational nature of the federalist allocation of jurisdiction between state and federal courts and by analyzing Congressional intent during the enactment of the Bankruptcy Code with respect to probate matters.

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1. Eric Yollick, Dependent Administrator of the Estate of Herbert Clinton Sisco, authored the brief in whole and made all monetary contributions to the preparation and submission of the brief. The Amicus files this brief with the written consent of both parties, which such consents are on file with the Clerk.

SUMMARY OF ARGUMENT

The Court should not condone the invocation of bankruptcy as a tool to usurp the jurisdiction of state courts over probate estates. The probate exception to federal jurisdiction is a recognition that, under our federalist system of government, certain areas of judicial responsibility lie solely within the province of state courts. In The Federalist No. 82 (Alexander Hamilton), state courts clearly retained their primitive jurisdiction, unless the Constitution took that jurisdiction away in one of the enumerated modes. Likewise, because the states are independent sovereigns in the federal system, this Court has long presumed that Congress did not cavalierly pre-empt traditional state regulation of a particular field of law unless Congress has made such an intention clear and manifest. *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788, 1801 (2005).

Both this Court and many commentators have recognized the historical basis of the probate exception to federal jurisdiction, to wit, that federal courts should not interfere in state court probate proceedings. This historical basis arises from Congressional action in the creation of federal jurisdiction in the Judiciary Act of 1789 and from the rationality of divergent approaches to problems of public policy at the state level in our federal court system.

In the instance of the Bankruptcy Code and the bankruptcy courts, the probate exception is also the result of clear Congressional intent. Congress was cognizant of the probate exception to federal jurisdiction during its passage of the Bankruptcy Code in 1978. Bankruptcy Code of 1978, Pub. L. 95-598 (codified as amended in 11 U.S.C. and in 28 U.S.C. § 1334). Nevertheless, Congress' statutory

codification of the Bankruptcy Code did not work a change in the probate exception, as Congress did not clearly express such an intent. *See Keene Corp. v. United States*, 508 U.S. 200, 209 (1993).

If the Court were to overrule longstanding precedent to determine that the invocation of bankruptcy jurisdiction trumped the probate jurisdiction of the states, this Court would encourage forum shopping by heirs and legatees who were unhappy with the direction of state probate proceedings. Bankruptcy courts would become the probate courts of America.

ARGUMENT

1. The Court has long recognized that Congress intended to except probate jurisdiction from the federal courts.

A federal court has no jurisdiction to probate a will or administer a probate estate. *Markham v. Allen*, 326 U.S. 490, 494 (1946). The reason for this probate exception to federal court jurisdiction is that the equity jurisdiction, which the Judiciary Act of 1789, 1 Stat. 73 and section 24(1) of the Judicial Code, conferred, did not extend to probate matters. *Id.*; *Sutton v. English*, 246 U.S. 199, 205 (1918); *O'Callaghan v. O'Brien*, 199 U.S. 89, 101-10 (1905); *In re Broderick's Will*, 88 U.S. 503, 510-15 (1874).

It is well-established that a federal court may not interfere with state court probate proceedings, may not assume general jurisdiction of the probate, and may not assume control of the property in the custody of a state probate court. *Markham*, 326 U.S. at 494.

Similarly, a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state probate court. *Id.*

This Court has excepted probate jurisdiction from bankruptcy courts as well as other federal courts. *Harris v. Zion Sav. Bank & Trust Co.*, 317 U.S. 447, 450-53 (1943).

2. Congress clearly intended to continue the probate exception to federal jurisdiction when Congress enacted the Bankruptcy Code in 1978.

This Court does not presume that a statutory codification worked a change in the underlying substantive law, unless Congress clearly expressed an intent to make such a change. *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993).

The Court assumes that Congress is aware of existing law when it passes legislation. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Congress is presumed at the time of statutory enactments to have been cognizant of the law, which the Supreme Court has pronounced. *Cary v. Curtis*, 44 U.S. 236, 240 (1845). It is always appropriate to assume that our elected representatives, like other citizens, know the law. *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). The Court is especially justified in presuming that those elected representatives were aware of the prior interpretations of statutes. *Id.* at 697.

This Court presumes that Congress expects its statutes to be read in conformity with the Supreme Court's precedents. *United States v. Wells*, 519 U.S. 482, 495 (1997).

Congress was explicitly cognizant of the probate exception to federal court jurisdiction during its enactment of Bankruptcy Code in 1978.

Congress established the Commission on the Bankruptcy Laws of the United States by Public Law 91-354 (84 Stat. 468), effective July 24, 1970. On July 30, 1973, the Commission filed its Report with the President, the Congress, and the Chief Justice of the United States as part of the consideration leading to the enactment of Public Law 95-598, the Bankruptcy Code of 1978. A&P H.R. Doc. 93-137 *v (July 30, 1973).

The Commission reported the following with respect to the probate exception to federal bankruptcy court jurisdiction:

> In light of the tradition of federal deference to state control of administration of decedents' estates and the complications and potential for increased litigation and increased costs arising from any change, substantial need should exist before any extension of federal legislation to cover insolvent decedents' estates is proposed . . . The defects in states probate protections for creditors are not new and the gap in federal law in relation to insolvent decedents' estates has existed throughout the history of our bankruptcy rules. Still . . . . no statistical studies . . . suggest that creditors are being disappointed in relation to collection from estates. Further, representatives of commercial creditors remained totally silent during the seven years of preliminary discussions and drafting that went into the Uniform Probate Code . . . ***Based on the lack of evidence of serious concrete problems under***

> ***the existing law and the promise of genuine reform at the state level as a result of the widespread adoption of the Uniform Probate Code, the Commission recommends that the Bankruptcy Act not be extended to administration of decedents' estates other than to the extent necessary to wind up the administration of the estates of debtors who die after the date of the petition.***

Id. at 184-85 (emphasis added).

The failure of Congress to alter or amend a statutory section, notwithstanding a consistent construction by the jurisdiction charged with its enforcement, creates a presumption in favor of the interpretation, to which the Court should give great weight, even if the Court doubted the correctness of the interpretive ruling. *See Costanzo v. Tillinghast*, 287 U.S. 341, 345 (1932).

During statutory construction, the Court will consider that there is no evidence of any intent to repudiate a longstanding construction of a statute. *Haig v. Agee*, 453 U.S. 280, 297-98 (1981).

The Commission's Report clearly recommended that Congress follow longstanding statutory construction of the jurisdictional statutes for bankruptcy courts with respect to the probate exception to federal jurisdiction.

Nowhere in the legislative history of the Bankruptcy Code of 1978 (which included amendment of the provisions of 28 U.S.C. § 1334) did Congress evince an intent to change the longstanding law, which this Court had pronounced.

Congress' explicit cognisance of the probate exception during its consideration of the enactment of the 1978 Bankruptcy Code, its failure to show any interest in rejecting the recommendations of the Commission, and its cognisance of the probate exception as a matter of statutory construction law support the presumption that Congress expected the Bankruptcy Code's jurisdictional provisions to be read in conformity with the Supreme Court's longstanding precedents with respect to the probate exception. *Wells*, 519 U.S. 482, 495 (1997).

3. The historical basis of our federalist court system supports the probate exception.

In our federalist court system, state courts clearly retained their primitive jurisdiction, unless the Constitution took that jurisdiction away in one of the enumerated modes. The Federalist No. 82 (Alexander Hamilton). State courts were not divested of any part of their primitive jurisdiction – at the time of the adoption of the Constitution – except to the extent that may relate to appeal from the state courts to the Supreme Court. *Id.*

Because the states are independent sovereigns in the federal system, this Court has long presumed that Congress did not cavalierly pre-empt traditional state regulation of a particular field of law unless Congress has made such an intention clear and manifest. *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788, 1801 (2005).

The Constitutional limitation upon Congressional action to declare substantive rules of law applicable in states was clear in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Congress has no such authority to declare substantive rules

of law applicable in a state whether they be local in their nature or general or whether they be commercial law or a part of the law of torts. *Id.* There is no federal common law. *Id.*

Judge Posner recognized the rational basis – the promotion of legal certainty – of a federalist allocation of probate jurisdiction away from the federal courts. *Dragan v. Miller*, 679 F.2d 712, 714 (7th Cir. 1982), *cert. den'd*, 459 U.S. 1017 (1982). As the Circuit Court noted:

> If an issue may end up being litigation in either a state or a federal court, its resolution is less certain, less predictable, than if it can be litigation in one or the other forum only, even if the same substantive law is applied. Certainty is desirable in every area of the law but has been thought especially so with regard to the transfer of property at death. *See, e.g.*, Restatement (Second) of Conflict of Laws, s 11, comment c (1971). There are obstacles enough to effectuating testamentary intentions; legal uncertainty ought not to be one of them.

679 F.2d at 714. While making this argument, Judge Posner concluded that it was not a very powerful argument. *Id.*

Judge Posner did recognize, however, that judicial economy is a more compelling reason for the probate exception, because it is hard to imagine how the initial jurisdiction over the decedent's estate could be elsewhere than in a state court. *Id.* If the probate proceeding must begin in state court, then the interest in judicial economy argues for keeping it there until it is concluded. *Id.* Furthermore, if for reasons of judicial economy, the state courts are going

to have a measure of exclusive jurisdiction in probate matters, federal courts will not have much experience in adjudicating those issues characteristic of probate proceedings and will have far less "relative expertness" in the substantive law of such matters. *Id.*

Judicial economy in a federalist court system and the recognition of the validity of state court probate proceedings clearly are critical bases for the probate exception to federal court jurisdiction. In *Markham*, this Court held that the reach of the probate exception was such that a federal court could not interfere with 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. Thus, for example, a determination of an issue that would necessitate an accounting is strictly a probate matter which would take the case beyond federal jurisdiction. *Starr v. Rupp*, 421 F.2d 999, 1006 (6th Cir. 1970). Similarly, a plaintiff's claim which implicates the validity of the probate proceedings is beyond federal jurisdiction. *Breaux v. Dilsaver*, 254 F.3d 533, 536 (5th Cir. 2001); *Blakeney v. Blakeney*, 664 F.2d 433, 434 (5th Cir. 1981).

Neither the Constitution nor Congressional enactments have shown a clear and manifest intent to infringe upon state regulation of probate matters. In fact, Congress' intent suggests that Congress did not intend to abrogate the probate exception. *See* discussion, under 2, *supra*.

Many, if not most, jurisdictions place the probate jurisdiction exclusively within specialized state courts. *See, e.g., Broderick's Will*, 88 U.S. at 515 (California); *Starr*, 421 F.2d at 1006 (Ohio); Tex. Prob. Code Ann. § 5 (Vernon 2005) (Texas).

Permitting federal courts to exercise probate jurisdiction would destroy the specialized state court regulation of such matters by encouraging the development of a federal common law of probate. Such a development would contravene the Constitutional basis of the federalist system of courts in which state courts have retained their primitive jurisdiction over probate matters.

4. The probate exception has an economic basis.

The Commission of the Bankruptcy Laws of the United States' observation that commercial creditors, who had a special interest in the reform of the bankruptcy statutes, did not show an interest in the reform of the probate system (*see* discussion at 2, *supra*), reveals that there is an economic benefit: (1) from the probate exception to federal court jurisdiction; and (2) from state regulation of probate matters.

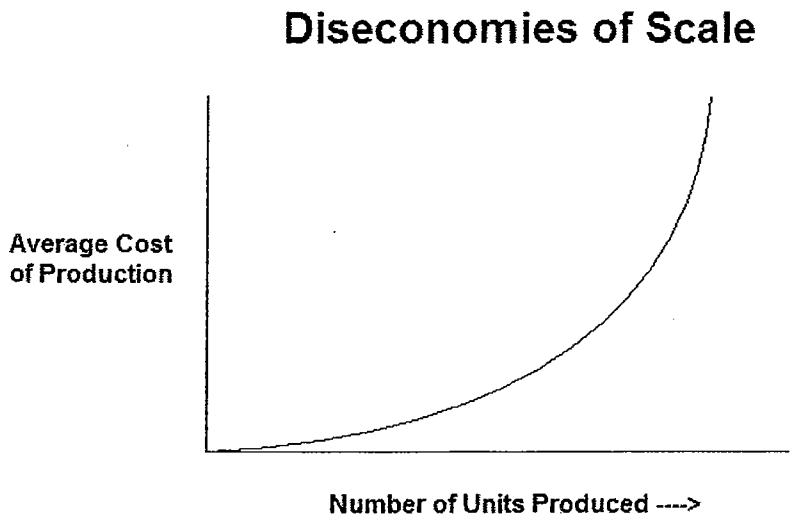
Judge Posner has noted the economics of federalism in his landmark treatise on the Economic Analysis of Law:

> *Diseconomies of scale and diversity of approaches.* If all government in the United States were federal, the bureaucracy of government would be immense and unwieldy, and the scope of experimentation with divergent approaches to problems of public policy would be curtailed. In principle, any organization can avoid problems of giantism and monolithicity by adopting a decentralized form of organization, as many business firms do by constituting different branches of the firm as separate profit centers...since we have state governments already, it may make more sense to assign them functions

> in which diversity or small scale is desirable than to decentralize the federal government.

Richard Posner, Economic Analysis of Law 696 (Aspen Law & Business, 5th ed.,1998).

This Court has recognized, for example, that our Nation's banking system has thrived while experiencing disparities in matters of corporate governance from the divergent state-law governance standards applicable to banks chartered in different states. *See Atherton v. Fed. Deposit Ins. Corp.*, 519 U.S. 213, 220 (1997). Similarly, this Court has accepted divergent state property laws, particularly with respect to homestead and marital property rights. *See, e.g., United States v. Yazell*, 382 U.S. 341, 355-56 (1966).



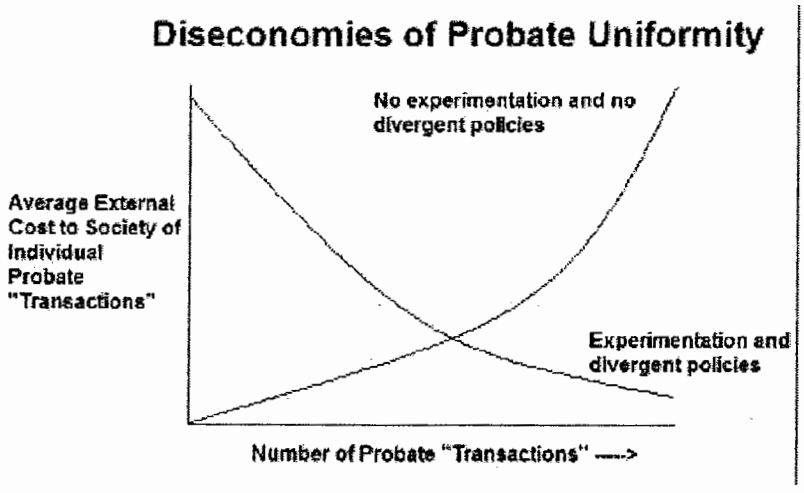
A classic diseconomy of scale involves the phenomenon that the average cost of production of some product *increases* with the number of units of output.

The Commission recorded no complaints with the federalist system of probate laws where divergent state rules controlled the distribution of decedent's estates. *See* discussion at part 2, *supra*.

Similarly, this Court in a number of opinions has noted that there are no problems – in banking, property laws, and exemption laws, to name a few – with divergent state rules of law in particular areas.

Judge Posner, however, has noted that there is a diseconomy of scale where laws become too uniform and the legal system suffers from giantism and monolithicity.

What is lost in the uniformity is the experimentation with divergent approaches to public policy. Thus, society as a whole will suffer a cost from uniformity but would otherwise enjoy substantial gains from experimentation between jurisdictions in divergent approaches to probate policy.



5. Elimination of the probate exception from bankruptcy court jurisdiction would encourage forum shopping and would endanger the federalist allocation of probate jurisdiction.

This Court has long sought to discourage forum shopping. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820 (1985).

Opening bankruptcy courts to probate controversies by the elimination of the probate exception to federal jurisdiction would encourage unhappy heirs or legatees to file bankruptcy in order to opt for a forum which they perceive is more favorable than a state probate court might be. This danger is particularly substantial in light of the implications of the general policy of the Bankruptcy Code to maximize the debtor's estate for the benefit of the debtor's creditors. *See* Brief of *Amici Curiae* Professors Richard Aaron, *et al.*, at 23-25, *Marshall v. Marshall*, 2005 WL 3156908 (2005).

If bankruptcy courts were to apply probate law in the context of this policy to maximize the debtor's estate, then an heir would have a powerful incentive to *see*k bankruptcy protection in order to maximize his or her probate recovery.

Two factual situations provide particularly striking examples of this sort of forum shopping.

The first such example is the case before this Court. It is undisputed that Petitioner initially sought in the Texas probate court the relief against Respondent which she eventually received in the bankruptcy court. During the probate proceedings, Petitioner filed for bankruptcy protection in California and there pursued her identical claim in that

court as well. Petitioner prevailed in the bankruptcy court, while the Texas probate court dismissed her claim against Respondent there.

The primary result of the procedural maneuvering was a multiplicity of litigation, so that Petitioner could pursue her claim in a forum which she believed was more favorable to her than the Texas probate court.

The scenario of the Herbert Clinton Sisco Estate, which the *Amicus* presents as a hypothetical situation only, provides a much more striking example of the forum shopping and direct threat to state probate proceedings which would result from the elimination of the probate exception to federal court jurisdiction in the bankruptcy context. The scenario[2] follows:

> Herbert Clinton Sisco ("Herbert") died in 1993 with an estate which his son, Jon Sisco ("Jon"), had sworn was worth approximately $1 million. Jon had served as the guardian for his sick father before his father died. While serving as guardian, Jon had taken more than $271,000 from his

2. The *Amicus* presents the scenario as a hypothetical. The scenario in reality is not hypothetical but constitutes a summary of three proceedings: (1) the bankruptcy proceeding, *In re Jon Allan Sisco*, Case No. 04-30608, and the adversary proceeding, *Eric Yollick, Dependent Administrator of the Estate of Herbert Clinton Sisco v. Jon Allan Sisco*, Case No. 04-03252, both pending in the United States Bankruptcy Court for the Southern District of Texas, Houston Division; (2) the probate proceeding, *In re Estate of Herbert Clinton Sisco*, cause number 01-19,047-P, pending in County Court at Law Number Three of Montgomery County, Texas; and (3) the guardianship proceeding, *In re Herbert Clinton Sisco*, cause number 12,286, pending in County Court at Law Number Three of Montgomery County, Texas.

father's estate by writing checks to himself and for Jon's personal benefit.

Jon is a very wealthy man as a result of a trust fund which his mother (who was divorced from Herbert 50 years ago) established and which pays him approximately $250,000 per year.

When Herbert died, he left five (5) heirs and arguably no valid will. Jon continued to operate the estate of Herbert as though Herbert were still alive. Jon collected hundreds of thousands of dollars of rental income, bought and sold property in his father's name, and never filed any estate or estate income tax returns. Jon paid the money to himself. For nine (9) years, Jon acted as pseudo-administrator, filed lawsuits on the estate's behalf, and even signed affidavits stating that he was the "executor" of his father's estate. In 2001, after a state district judge dismissed a lawsuit that Jon had filed allegedly as "executor" of his father's estate where Jon had never opened a probate proceeding, Jon commenced a probate proceeding and asked the probate court to name him as executor of his father's estate.

The probate court held a lengthy hearing and determined that Jon was not a suitable representative for the estate, because: (1) Jon is a felon convicted of embezzlement from a bank; (2) Jon had never filed an estate tax return for his father; and (3) Jon had operated his father's estate for many years without authority. Instead, the probate court appointed Eric Yollick, a stranger to the Sisco

family, to act as administrator in a capacity fully dependent upon the probate court's orders for his authority, i.e. a "dependent administrator."

The probate court ordered Yollick to sue Jon for misappropriating funds from Jon's father's guardianship estate. Yollick sued Jon in the probate court. Yollick filed a motion for summary judgment against Jon for breach of fiduciary duty as guardian and received a hearing date of January 7, 2004.

Jon was very unhappy with several of the rulings of the Texas probate judge. Therefore, Jon filed bankruptcy on January 6, 2004, in order to avoid the summary judgment hearing and in an attempt to move the entire probate proceeding before the bankruptcy judge. The bankruptcy judge recognized Jon's attempted "forum shopping" and lifted the automatic stay of 11 U.S.C. § 362 to permit the probate administration to continue.

The probate administration continued. A second probate judge approved all of Yollick's accountings and all of Yollick's actions as dependent administrator. The probate judge found that Yollick "managed the probate estate in the manner in which a prudent man would manage his own affairs." The probate judge's orders approving the accountings and for other matters are all final orders for preclusion purposes under Texas law.

Frustrated with the probate proceeding in the Texas probate court, Jon decided to sue Yollick for breach of fiduciary duty, civil conspiracy

(allegedly with the probate judge and with Yollick's probate lawyer), and fraud in the bankruptcy court. Despite Yollick's protests that the bankruptcy court lacked jurisdiction under the probate exception to federal jurisdiction, the bankruptcy court permitted Jon to proceed. The bankruptcy court has issued numerous orders that directly contradict the Texas probate court. For example, the bankruptcy court ordered Yollick to turn certain property over to Jon, while the probate court had previously ordered Jon to turn that same property over to Yollick. The probate court entered an order permitting Yollick to pay his attorney fee defense costs for Jon's bankruptcy claims. The bankruptcy court ordered Yollick personally to post a bond in favor of the bankruptcy court for any probate estate funds which the probate estate paid for Yollick's attorney fees, thereby preventing Yollick from paying his attorneys any fees. The bankruptcy court has ignored the probate court's orders approving Yollick's accountings and has ignored the probate court's orders approving all of Yollick's conduct as dependent administrator. The bankruptcy court has ignored hornbook Texas probate law that an heir cannot sue an estate's administrator while the probate estate remains open and pending. In short, the bankruptcy court has subjected Yollick to multiple conflicting orders during an extraordinarily expensive litigation matter where Jon's entire purpose is to question the validity of the Texas probate proceeding.

Jon repeatedly lost in the Texas probate proceeding in front of four (4) different state probate judges who heard various matters. He lost an appeal of two matters which he filed in a Texas Court of Appeals. Jon filed fifteen (15) State Bar grievances against Yollick, five (5) against Yollick's probate lawyer, and three others against other attorneys, all to no avail. Jon filed a criminal complaint against one of the probate judges, Yollick, and Yollick's probate lawyer, which such criminal complaint was dismissed after an investigation by a special prosecutor.

Jon filed an estate tax return under Yollick's name and without Yollick's knowledge claiming that no estate taxes were owed. Jon presented a copy of a will for probate that was questionable under the best of circumstances. Jon misrepresented the value of the probate estate to the other heirs, so that they would not ask for much money when he attempted to purchase their interests.

The bankruptcy court, however, has allowed a trial, which has lasted off and on for three months, to proceed where Jon's entire purpose is to question the validity of the probate court's orders and other proceedings. In order to stop the probate court from taking any action which might harm Jon's causes of action against Yollick, such as making rulings which approve Yollick's conduct as dependent administrator, the bankruptcy court is considering whether to enjoin the probate court from any further proceedings. By the end of the

litigation, it is likely that all of the probate estate's funds will go to attorneys for litigation expenses.

In the foregoing scenario, Jon's claims constitute little more than forum shopping. Jon's claims are a direct threat to the validity of state probate proceedings. By filing bankruptcy before a judge who has no probate experience and who has not recognized the validity of the probate exception to federal jurisdiction, Jon has proceeded to trial on a very expensive claim with little merit, because its very basis contradicts the findings and orders of the state probate proceeding, which Jon chose not to appeal.

Jon's actions and, to a lesser degree, the actions of Petitioner constitute a direct threat to the federalist system of allocated jurisdiction between the National government and the states.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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