No. 10-179

IN THE

Supreme Court of the United States

In re: VICKIE LYNN MARSHALL,
Debtor.

HOWARD K. STERN, EXECUTOR
OF THE ESTATE OF VICKIE LYNN MARSHALL,
Petitioner,

v.

ELAINE T. MARSHALL, EXECUTRIX
OF THE ESTATE OF E. PIERCE MARSHALL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Section 157(b)(1) of Title 28 confers jurisdiction on the bankruptcy courts to finally decide "core" proceedings that either "arise under" the Bankruptcy Code or "arise in" a case under the Code. 28 U.S.C. § 157(b)(1). For non-core matters that are "related to" a bankruptcy case, section 157(c) confers jurisdiction on a bankruptcy court to enter proposed findings of fact and conclusions of law, subject to *de novo* review in the district court (unless the litigants expressly agree otherwise as prescribed in Rule 7012(b) of the Federal Rules of Bankruptcy Procedure). 28 U.S.C. § 157(b)(1).

Applying the reasoning of this Court's landmark decision in *Katchen v. Landy*, and with due regard to this Court's decision in *Marathon*, the court below concluded that Petitioner's state law claim for "tortious interference with an expectancy of a gift" was not a "core" matter "arising in" a bankruptcy case "because [her tort claim was] not so closely related to [Respondent's] defamation claim that it must be resolved in order to determine the allowance or disallowance of his [defamation] claim against her bankruptcy estate." Pet. App. 51. In reaching this conclusion, the court below gave full meaning to the *complete* statutory text, not merely the portion Petitioner recites. Likewise, the decision below is fully consistent with settled bankruptcy

practice and does not conflict with the decisions of other courts of appeals to have addressed the issue, which decisions also follow *Katchen* and give due regard to *Marathon*.

In proper context, the questions presented are:

1. Whether the court below properly considered the complete statutory text in reaching its conclusion, not simply the incomplete portion Petitioner recites?

2. Whether, as the court below concluded, Congress has limited the jurisdiction of the bankruptcy courts to finally decide a state law counterclaim that is not inextricably intertwined with a claim?

3. Whether, consistent with the approach taken by every other court of appeals to have addressed the issue, the court below properly followed this Court's reasoning in *Katchen* and gave due regard to *Marathon* in applying the relevant statutory text?

4. Where, as here, the relevant rules of procedure require that consent to the final adjudication of a state law counterclaim in a bankruptcy court must be "express," has a creditor consented to have a bankruptcy court finally decide the counterclaim where the creditor vigor-

ously objected to the bankruptcy court's jurisdiction to adjudicate the counterclaim, moved the court to abstain, and sought to withdraw the litigation to another forum?

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PRELIMINARY STATEMENT

Petitioner, Howard K. Stern ("Stern"), is the executor of the estate of the late Vickie Lynn Marshall ("Vickie"), the former wife of the late J. Howard Marshall II ("J. Howard"). Respondent, Elaine T. Marshall ("Elaine"), is the executrix of the estate of the late E. Pierce Marshall ("Pierce"), J. Howard's son.

Vickie sued Pierce in Texas state court, alleging that he had "tortiously interfered" with her expectancy of receiving a gift from J. Howard. Following a five-and-a-half month jury trial, the Texas court rejected Vickie's claim, concluding in a final judgment that Vickie was entitled to take nothing from Pierce.

During the course of the state court action, Vickie filed for bankruptcy in California and pursued the same "tortious interference" claim against Pierce in the Bankruptcy Court. Pet. App. 13. The Bankruptcy Court determined that it had jurisdiction to finally resolve Vickie's "tortious interference" claim on the theory that the claim constituted a "core" bankruptcy matter asserted in response to a defamation claim that Pierce held against Vickie. Pet. App. 306-07. On appeal, the District Court reversed, concluding that Vickie's tort claim and Pierce's defamation claim were not sufficiently related to justify "core" adjudication in the Bankruptcy Court at the expense of Pierce's right to defend against

Vickie's claim in an Article III forum. Pet. App. 280-81, 283. On further appeal, the Ninth Circuit affirmed the District Court, holding similarly that Vickie's claim was not a "core" proceeding requiring administration in bankruptcy "because it [was] not so closely related to Pierce['s] defamation claim that it must be resolved in order to determine the allowance or disallowance of his claim against her bankruptcy estate." Pet. App. 51. In so holding, the court below upheld the District Court's vacatur of the Bankruptcy Court's non-Article III adjudication of Vickie's state law claim and permitted the Texas state court's comprehensive, five-and-a-half month jury trial adjudication to stand as the first final judgment resolving critical issues dispositive of her claim. (Stern does not seek further review of the court's preclusion determination.)

The decision of the Court of Appeals provides no occasion for certiorari review. First, there is no split of authority on the jurisdictional question. The decisions of the few courts of appeals to have addressed the issue are logically consistent with each other, and all follow the reasoning of this Court's decision in *Katchen v. Landy*. Second, in addition to following *Katchen*, the decision below does not conflict with this Court's other precedents and is also fully consistent with the governing statutory text and Congress' intent in crafting the current bankruptcy jurisdictional provisions. Third, the decision be-

low does not upset settled bankruptcy practice and has not generated confusion. On the contrary, it is consistent with settled practice.

Certiorari should also be denied because this case presents a poor vehicle to address the jurisdictional issue raised. To say the least, the facts of this controversy are atypical. Further, the Bankruptcy Court's assumption of jurisdiction encounters serious jurisdictional difficulties beyond those raised in the petition, as the concurrence below explained. These additional jurisdictional difficulties are by themselves fatal to the adjudication of Vickie's claim in the Bankruptcy Court.

The underlying litigation in this case is quickly approaching its third decade. All of the original litigants have passed away. The decision of the Court of Appeals fully and finally resolves the matter by permitting the results of a five-and-a-half month state court jury trial proceeding to control the outcome. In addition, the decision of the Court of Appeals likewise avoids litigation over a host of unresolved issues, including whether (1) Pierce was entitled to a jury trial in the federal proceeding, (2) Vickie's claim is barred by the Texas statute of frauds, (3) Pierce's due process rights were violated, (4) there is any evidence to support Vickie's claim that Pierce engaged in wrongdoing, and (5) the

other jurisdictional issues addressed by the concurrence. Certiorari should be denied.

STATEMENT

The relevant facts are hotly contested. The contest is heightened because the relevant state and federal courts reached diametrically opposed conclusions on the same factual issues. In addition, the record is all the more complicated because the decision of the Bankruptcy Court rests on "presumed" facts, whereas the decision of the state court rests on the results of a five-and-a-half month jury trial. Further, Stern mistakenly characterizes both the facts and the course of the state and federal proceedings. For the sake of brevity, Elaine corrects or qualifies only those mistakes that are particularly relevant.

Although Stern states at the outset that J. Howard "attempted to provide for Vickie through an inter vivos trust," and that Pierce "suppressed or destroyed the trust instrument," Pet. 2, these statements require qualification. It is true that the District and Bankruptcy Courts made "findings" adverse to Pierce on these points. As the Court of Appeals observed, however, "the district court made its factual findings without the benefit of the percipient witnesses that Pierce ... sought to have testify as part of his defense." Pet. App. 63 n.33. Likewise, the Bankruptcy Court made its findings on the basis of "deemed" facts and without allowing Pierce to put on his

case. *Marshall v. Marshall*, 392 F.3d 1118, 1126-27 (9th Cir. 2004). Moreover, when the Court of Appeals inquired directly (and insistently) of Stern's counsel whether there was any actual *evidence* in the record to back up the Bankruptcy and District Courts' adverse findings on these matters, Stern's counsel was unable to cite to any. Tr. 35-37 Oct. 9, 2003. Thus, although Stern's statements are based on the Bankruptcy and District Court's "findings," they remain highly disputed.

A. Background

J. Howard married Vickie, his third wife, in June of 1994, when J. Howard was eighty-nine and Vickie was twenty-six. ER-95, 2420.[1] Both prior to and during their marriage, J. Howard gave Vickie substantial gifts worth over $6 million. ER-2536-39, 2547-48. During his life, J. Howard stated repeatedly that he intended to provide for Vickie with the gifts that he gave her during his lifetime. ER-2417-18, 2498, 2509, 2959-61, 3404-05. In line with this intention, two weeks after he married Vickie, J. Howard executed his final amended and restated living trust instrument, irrevocably fixing the terms of his living trust in a manner that left the bulk of

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[1] The term "ER" refers to certain "excerpts of record" filed in the Ninth Circuit.

his estate to Pierce. ER-645-46, 1018, 3210, 3264-68.

B. The Probate Court Proceedings

Stern contends incorrectly that Vickie "first appeared in [the Texas probate court] proceeding in 1998, when she joined a pending will contest." Pet. 4. As the Court of Appeals explained, in April *1995* (several months prior to J. Howard's death), Vickie commenced proceedings in the Texas probate court (the "Probate Court"), seeking a declaration concerning the validity of the living trust and alleging that Pierce had tortiously interfered with her property rights concerning J. Howard's assets. Pet. App. 11; ER-5615-17, 5620. Three days after J. Howard died, Vickie filed a further application in the Texas Probate Court, stating that J. Howard had died intestate. Pet. App. 11; ER-816-18. Pierce opposed this application and sought to admit his father's will. ER-836-45. Vickie thereafter contested the will in the Probate Court, challenged the validity of the estate plan, and pursued her claim against Pierce in the probate case (the "Probate Case"). ER-1319-31, 2863-65, 5523-31.

Stern contends incorrectly that Vickie only "prophylactically" filed her tortious interference claim in the Probate Court, asserting that Vickie did not intend to litigate her claim there or participate robustly in the Probate Case. Pet. 4. As the Court of Appeals explained, Vickie partici-

pated fully in the Probate Case, litigated her tortious interference claim there, and likewise litigated all of her allegations involving J. Howard's intent and Pierce's conduct. Pet. App. 61; *Marshall*, 392 F.3d at 1128-29.

In particular, prior to trial in the Probate Case, Vickie identified the causes of action against Pierce that she proposed to try to the Texas jury, including her claim of tortious interference with a gift, ER-4073, 4076-78, 4089, 4102, and later stressed to the jury that "[t]his is a case about tortious interference with an intent to give an *inter vivos* gift ...." ER-4068, 4106, 4134. Vickie called seven witnesses in the Probate Case. ER-4069-70. She called three additional witnesses in rebuttal. ER-4070-71. Vickie's counsel questioned at least fourteen other witnesses. ER-4070-71. Vickie herself testified in the Probate Court for approximately six days, including extensively regarding her alleged expectancy of a gift. ER-4071.

All told, the Probate Court heard the testimony of over forty witnesses and received hundreds of items of evidence. ER-4066-71, 4706-27. Following the jury's verdict, the Probate Court entered its judgment on August 15, 2001, disposing of all claims and issues related to J. Howard's intended disposition of his property, including Vickie's claim. ER-4001-22. On December 7, 2001, the Probate Court entered its second

amended final judgment (the "Probate Judgment"). ER-4706, 4727. The Probate Court admitted J. Howard's will to probate, finding the will and living trust to be genuine and valid and not the product of improper conduct. ER-4714-15, 4717.

The Probate Court specifically ruled that "[J. Howard] did not intend to give and did not give to [Vickie] a gift or bequest from the Estate of [J. Howard] or from the [living trust – which contained all of his assets] either prior to or upon his death" and "that [Vickie] does not possess any interest in and is not entitled to possession of any property within the Estate of [J. Howard] or any property [of the living trust] because of any representations, promises, or agreements." ER-4721. The Probate Court also held that (1) all of Vickie's claims were resolved and dismissed; (2) Vickie was entitled to "take nothing" from Pierce; and (3) Pierce was entitled to his inheritance free and clear of any claim by Vickie. ER-4718-19, 4721.

It is true that, during the course of the proceedings in the Probate Court, Vickie attempted to withdraw from the case by "nonsuiting" her claims. As the Court of Appeals explained, however, the Probate Court refused to let her withdraw. Pet. App. 20-21; *Marshall*, 392 F.3d at 1128. Stern contends incorrectly that, "[a]fter nonsuiting her claims, Vickie remained

in the probate proceedings only as a counterdefendant on a sanctions claim by Pierce." Pet. 4. As the Court of Appeals noted, Vickie remained as a defendant to Pierce's declaratory judgment action seeking a determination of Vickie's rights and Pierce's liabilities. Pet. App. 21 & n.19; ER-4713.[2]

As the Court of Appeals concluded, all of the issues regarding J. Howard's intent to give Vickie a gift and Pierce's alleged misconduct "were fully and fairly litigated by Vickie ... and Pierce ... in the Texas probate court." Pet. App. 61. Further, "[d]uring the five-month trial in Texas, the jury and judge considered the evidence and arguments advanced by the parties, and the Texas probate court issued a reasoned opinion based upon the findings of fact as made by the unanimous jury." Pet. App. 61.

C. The Defamation Case

During the pendency of the Probate Case, Vickie's lawyers made various defamatory allegations against Pierce. ER-930. Subsequently, Pierce commenced a defamation action in Texas

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[2] Stern observes that the Bankruptcy Court enjoined Pierce from pursuing certain aspects of this litigation in the Probate Court. Pet. 5. The District Court, however, set aside the Bankruptcy Court's improper injunction. ER-3989.

state court against Vickie and two of her lawyers for these defamatory statements, alleging that Vickie was responsible for the conduct of her attorneys. SER-6001.[3] After Vickie commenced her bankruptcy case, Pierce dismissed her without prejudice from the defamation suit. Pet. App. 14 n.10.

D. The Bankruptcy Proceedings

On January 25, 1996, while the probate proceedings were ongoing and in the midst of the defamation suit, Vickie filed for bankruptcy in the United States Bankruptcy Court for the Central District of California. ER-2642. As a result of her bankruptcy filing, the defamation action against her was stayed, *see* 11 U.S.C. § 362, and, as noted, Pierce dismissed her "without prejudice" from the defamation action. Pet. App. 14 n.10.

On May 7, 1996, Pierce filed a complaint in the Bankruptcy Court seeking a determination that, in the event Vickie were found to be liable for defamation in state court, her liability would not be dischargeable in her bankruptcy proceeding. ER-922-32. In filing his complaint, Pierce did not request the Bankruptcy Court to deter-

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[3] The term "SER" refers to certain 'Supplemental Excerpts of Record" filed in the Ninth Circuit.

mine whether Vickie was, in fact, liable for defamation; he requested only a determination that whatever her liability might be, it was nondischargeable. Pet. App. 67-68 (Kleinfeld, J., concurring); ER-922-26. Over a month later, on June 12, 1996, Pierce also filed a proof of claim, attaching the nondischargeability complaint. Pet. App. 67-68; SER-6020.

On June 14, 1996, Vickie filed a counterclaim against Pierce's nondischargeability complaint, alleging that J. Howard intended to give her a gift worth tens of millions of dollars and that Pierce had interfered. ER-936, 954. Vickie later objected to Pierce's proof of claim separately, but raised no counterclaim to Pierce's proof of claim. SER-6031-32.

Stern contends incorrectly that Pierce "brought his defamation claims into the bankruptcy court" and suggests that Pierce was content to litigate Vickie's claim in that forum. Pet. 2-3, 10 n.4. As the Court of Appeals explained, Pierce objected to the Bankruptcy Court's assertion of jurisdiction over Vickie's claim, requested that the Bankruptcy Court abstain, and also moved to have the litigation withdrawn to the District Court. *Marshall*, 392 F.3d at 1126; ER-957, 1049-69; SER-6754. As the District Court also concluded, Pierce did not consent to the Bankruptcy Court's jurisdiction. Pet. App. 266 & n.17; Fed. R. Bankr. P. 7012(b).

On March 5, 1999, while Vickie's counterclaim for tortious interference remained pending, Vickie confirmed her chapter 11 plan of reorganization. ER-2200-02. Pursuant to the Bankruptcy Court's confirmation order, Vickie was granted a discharge of her debts. ER-2201.

On November 5, 1999, the Bankruptcy Court granted Vickie's motion for summary judgment on Pierce's nondischargeability complaint. ER-2756-58. Instead of resolving the narrow bankruptcy question of nondischargeability, the court summarily determined that Vickie had no liability for any defamatory conduct. ER-2757. Following her bankruptcy discharge and the subsequent summary resolution of Pierce's underlying defamation claim, Vickie continued to litigate her tortious interference claim against Pierce in both the Bankruptcy Court and the Probate Court.

In the course of its five days of hearings on Vickie's counterclaim, the Bankruptcy Court severely circumscribed Pierce's presentation of evidence and made findings of fact adverse to him as a sanction for alleged discovery abuses that remain strenuously disputed. ER-2173-75, 2641-49. The Bankruptcy Court had previously entered its sanctions order against Pierce on February 2, 1999. As the Court of Appeals explained, "[t]he sanctions imposed by the court

deemed almost all facts alleged in the pleadings filed by the attorneys for Vickie ... to be admitted facts ...." *Marshall*, 392 F.3d at 1126. In addition, "[a]s a result of the sanctions order, [Pierce] was not allowed to present conflicting evidence ...." *Id.* at 1127; Pet. App. 19 n.17. Pierce appealed the sanctions order to the District Court. On March 9, 1999, the District Court vacated the sanctions order, finding that the order was not supported by the record. ER-2211-12, 5744-49. On remand, and without taking evidence, the Bankruptcy Court reimposed its sanctions order. ER-2240.

As the Court of Appeals explained, on January 18, 2000, "the bankruptcy court *sua sponte* withdrew its sanctions order, but did not change any of its other rulings which had been based on the allegations by Vickie ... deemed true." *Marshall*, 392 F.3d at 1127. As the Court further observed, the Bankruptcy Court "did not hold another evidentiary hearing." *Id.*

On September 27, 2000, nearly a year after it summarily resolved and dismissed Pierce's underlying defamation claim, the Bankruptcy Court issued a decision concluding that Vickie had an expectancy of an inheritance, based on a "widow's election" theory, and awarded Vickie $449,754,134. Pet. App. 18; ER-3031-38. On October 6, 2000, the Bankruptcy Court *sua sponte* issued a revised opinion, in which the court

abandoned its "widow's election" theory and deemed that Vickie had an expectancy of a substantial portion of J. Howard's wealth. Pet. App. 19; ER-3047-55. Concluding on the basis of presumed facts that Pierce interfered with this expectancy, the court again awarded Vickie $449,754,134. On November 21, 2000, the Bankruptcy Court assessed punitive damages against Pierce in the amount of $25 million, and on December 29, 2000, entered judgment in Vickie's favor for approximately $474 million (the "Bankruptcy Judgment"). ER-3360.

In its opinion of December 29, 2000, the Bankruptcy Court concluded that it had jurisdiction to enter the Bankruptcy Judgment, rejecting Pierce's argument that the "probate exception" to federal jurisdiction applied. Pet. App. 286-99. In addition, the court concluded that Vickie's claim for "tortious interference" constituted a counterclaim to Pierce's defamation claim and, thus, a "core" bankruptcy proceeding under 28 U.S.C. § 157(b)(2)(C). ER-306-07.

E. The District Court Proceedings

Pierce appealed the Bankruptcy Judgment to the United States District Court for the Central District of California. On June 20, 2001, the District Court affirmed the Bankruptcy Court's determination that the "probate exception" did not apply, but reversed the Bankruptcy Court's conclusion that Vickie's tortious interference

claim constituted a "core" proceeding that the Bankruptcy Court could finally resolve and vacated the Bankruptcy Judgment. Pet. App. 283. Stern contends that "the district court concluded that Vickie's claim was a *compulsory counterclaim* to Pierce's defamation claim." Pet. 6 (emphasis added). The District Court, however, did *not* determine that Vickie's claim was a "compulsory" counterclaim; the court consistently referred to it merely as a "counterclaim," stating that "it is not certain that Vickie's counterclaim arises from the same transaction as Pierce's proof of claim." Pet. App. 280. The District Court concluded that Vickie's claim was not "core" because it was only "somewhat related" to Pierce's defamation claim, and Pierce was entitled to an adjudication of Vickie's allegations in an Article III forum. Pet. App. 283.

Following vacatur of the Bankruptcy Court's decision, Pierce moved in the District Court to dismiss Vickie's "tortious interference" counterclaim on the grounds that it was barred by the doctrines of claim and issue preclusion following the Probate Court's final judgment. Pet. App. 222-23. The District Court denied the motion. Pet. App. 234.

Asserting its own bankruptcy jurisdiction, the District Court conducted a "de novo" review of Vickie's "tortious interference" claim. Like the Bankruptcy Court, the District Court refused to

hear many of Pierce's percipient witnesses, Pet. App. 63 n.33, but heard all of Vickie's witnesses. ER-5280-87. On March 7, 2002, the District Court ultimately awarded Vickie $88,585,534.66 on her claim (the "District Court Judgment"), concluding that J. Howard's signature on the Trust was forged; that the estate plan did not reflect J. Howard's true intentions; and that Pierce had thwarted J. Howard's intent to give Vickie an alleged gift by engaging in illegitimate "estate planning transactions for J. Howard," Pet. App. 90-214, 215-16, conclusions diametrically opposed to the determinations of the Probate Court and, Pierce argued, unsupported by any evidence.

In its ruling, the District Court did not reach the issue whether Pierce committed discovery abuse and declined to consider the Bankruptcy Court's sanctions rulings. Pet. App. 98-99. Prior to conducting its own hearings, the District Court ordered a complete "redo" of discovery that included turning over to Vickie's counsel not only all of the relevant documents but also all of Pierce's privileged communications with his attorneys. ER-4063. Pierce appealed the District Court Judgment to the Court of Appeals.

F. The Resolution of the Probate Exception Issue and the Decision Below

In vacating the District Court Judgment, the Ninth Circuit first held that the "probate exception" applied in this matter. *Marshall*, 392 F.3d at 1137. This Court subsequently reversed that determination. *Marshall v. Marshall*, 547 U.S. 293 (2006). Following this Court's remand, the principal parties passed away, and Stern, Vickie's former attorney, assumed responsibility for pursuing the interests of Vickie's estate as her executor. In addition, Elaine, Pierce's widow, assumed responsibility for pursuing the interests of Pierce's estate.

In the decision below, the Ninth Circuit held that Vickie's counterclaim to Pierce's non-dischargeability complaint was not a "core" bankruptcy proceeding arising in a bankruptcy case because her counterclaim was "not so closely related to Pierce Marshall's defamation claim that it must be resolved in order to determine the allowance or disallowance of his claim against her bankruptcy estate." Pet. App. 51. Accordingly, because it resolved a "non-core" matter, the Bankruptcy Judgment properly constituted merely *proposed* findings of fact and conclusions of law subject to "de novo" review in the District Court, and not a final judgment. *See* Fed. R. Bankr. P. 9033. In contrast, the Probate Judgment was properly a final judgment. Because the Probate Judgment preceded the Dis-

trict Court Judgment and resolved issues dispositive of Vickie's "tortious interference" claim, the Ninth Circuit applied the doctrine of issue preclusion and held that the earlier final Probate Judgment prevented Vickie from succeeding on her claim for tortious interference in the District Court. (Stern does not seek review of the court's preclusion determination.) Pet. App. 55-57.

In addition to the majority opinion, Judge Kleinfeld issued a concurring opinion in which he explained that he had "no quarrel with the majority opinion, and offer[ed] no argument against it" but instead wrote "merely to offer additional grounds that compel the same result." Pet. App. 66 (Kleinfeld, J., concurring). On May 5, 2010, the court below denied Stern's petition for panel rehearing and rehearing en banc.

REASONS FOR DENYING THE PETITION

Stern's petition for certiorari should be denied. There is no conflict among the courts of appeals on the jurisdictional question presented. The courts of appeals have held consistently that, if a creditor's claim against the debtor and the debtor's counterclaim against the creditor are inextricably intertwined such that the bankruptcy court cannot administer the claim without adjudicating the counterclaim, the adjudication of the counterclaim may be a "core" proceeding that the bankruptcy court may finally de-

termine. On the other hand, where (as here) the claim and counterclaim are not inextricably intertwined, the bankruptcy court may not finally adjudicate a state law counterclaim without the creditor's consent. The court below properly determined that Pierce's state law "defamation" claim was not inextricably intertwined with Vickie's state law "tortious interference" claim. This is entirely consistent with the approach taken by every other court of appeals to have addressed the same jurisdictional issue.

Likewise, the decision below comports fully with this Court's precedents, as well as the governing statutory text and Congress' intent in enacting the current provisions governing the exercise of bankruptcy jurisdiction. The current jurisdictional provisions were enacted in response to this Court's ruling in *Marathon*, and the decision below properly applied the relevant statutory provisions with due regard to relevant constitutional principles and congressional intent to circumscribe bankruptcy jurisdiction in cases of this kind to preserve a litigant's right to an Article III forum and jury trial adjudications of state law claims.

Contrary to Stern's contention, the decision below will not hamper the administration of bankruptcy cases. Nor has it generated confusion. Rather, the decision below follows and reinforces settled practice.

Further, this case presents a poor vehicle to address the questions presented. The facts are atypical, and, as Stern concedes, the issue arises only sporadically. Moreover, the Bankruptcy Court's assumption of jurisdiction in this case encounters crippling difficulties beyond those addressed in the petition. The petition should be denied.

A. The Decision Below Does Not Conflict with the Decisions of Other Courts of Appeals.

The decision below does not conflict with the decisions of other courts of appeals. Stern contends that the decision below "is the only circuit decision in the three decades since the statute's enactment to ever find a compulsory counterclaim to a proof of claim to be non-core." Pet. 21. Stern's argument attends to labels and ignores the relevant substance of this Court's analysis in *Katchen v. Landy*, and the actual holdings and analyses of the decisions of the courts of appeals that he cites.

1. The Decision Below Follows *Katchen*.

In *Katchen v. Landy*, the Court considered whether a bankruptcy court had "summary jurisdiction to order the surrender of voidable preferences [*i.e.*, certain payments a bankrupt debtor

makes to one creditor that prefer that creditor over others] asserted and proved by the trustee in response to a claim filed by the creditor who received the preferences." 382 U.S. 323, 325 (1966). The creditor in that case had filed proofs of claim asserting a particular debt, and the trustee responded with a counterclaim asserting that prior payments made to the creditor were voidable "preferences" that must be returned to the debtor. *Id.*

As a critical part of its analysis, the Court explained that section 57 of the Bankruptcy Act of 1898 – the relevant claims-allowance provision – contained an "important congressional directive around which much of this case turns. Subsection [57]g forbids the allowance of a claim when the creditor has 'received of acquired preferences ... void or voidable under this title' absent a surrender of any preference." *Id.* at 330 (quoting Bankruptcy Act of 1898 § 57(g)). In light of Section 57(g), the Court explained that "[u]navoidably *and by the very terms of the Act,* when a bankruptcy trustee presents a s 57, sub. g objection to a claim, *the claim can neither be allowed nor disallowed until the preference matter is adjudicated.*" *Id.* (emphasis added). Therefore, "in passing on a s 57, sub. g objection a bankruptcy court must necessarily determine the amount of the preference, if any, so as to ascertain whether the claimant, should he return the preference, has satisfied the condition im-

posed by s 57, sub. g on allowance of the claim." *Id.* at 334; *see also* 11 U.S.C. § 502(d). In other words, the Court concluded that it was essentially impossible to allow the claim without determining the preference counterclaim. The Court held that "examination of the structure and purpose of the Bankruptcy Act and the provisions dealing with allowance of claims therefore leads us to conclude, and we so hold, that the Act does confer summary jurisdiction to compel a claimant to surrender preferences that under s 57, sub. g. would require disallowance of the claim." *Id.* at 335.

The decision below adopted the same criteria for determining whether the Bankruptcy Court had "core" jurisdiction over Vickie's counterclaim. As the Ninth Circuit explained, "[c]ritical to the Court's decision [in *Katchen*] was the fact that the bankruptcy court was *unable to perform its statutory duty of allowing or disallowing the creditor's claim unless it ruled upon the trustee's counterclaim.*" Pet. App. 49 (emphasis added). In contrast, "the resolution of Vickie Lynn Marshall's counterclaim was not a necessary predicate to the bankruptcy court's decision to allow or disallow Pierce Marshall's defamation claim." Pet. App. 51. As the court explained, the "differences between the nature and scope of the factual allegations" in Pierce's underlying claim and Vickie's counterclaim demonstrated that Vickie's counterclaim "was not an

integral part of the claims allowance and disallowance process." Pet. App. 52. Noting that there was "little overlap of the legal elements of the claims at issue," the Ninth Circuit explained that "Pierce Marshall's defamation claim could be fully adjudicated without fully adjudicating Vickie Lynn Marshall's tortious interference claim." Pet. App. 54-55.

The factual record confirms that finding, as the Bankruptcy Court granted summary judgment for Vickie on Pierce's adversary complaint on November 5, 1999, but did not rule on Vickie's counterclaim *until nearly a year later* on September 27, 2000. Pet. App. 18. Further, although Vickie's claim for "tortious interference" involved her allegations concerning Pierce's conduct *prior* to J. Howard's death, Pierce's defamation claim against Vickie involved her conduct and statements *after* J. Howard died. Moreover, unlike the preference claim in *Katchen*, Vickie's "counterclaim" was not a federally created preference suit. The decision below is fully faithful to this Court's analysis in *Katchen*.

2. The Decision Below Is Consistent with the Decisions of the Other Courts of Appeals, Which Also Align with *Katchen*.

Stern contends erroneously that the decision below conflicts with the decisions of the Second Circuit in *Bankruptcy Servs., Inc. v. Ernst &*

Young, LLP (In re CBI Holding Co.), 529 F.3d 432 (2d Cir. 2008), the First Circuit in *Riley v. Decoulos (In re Am. Bridge Prods. Inc.)*, 599 F.3d 1 (1st Cir. 2010), the Fifth Circuit in *Bank of Lafayette v. Baudoin (In re Baudoin)*, 981 F.2d 736 (5th Cir. 1993), the Sixth Circuit in *United States v. McLeod Co. (In re McLeod Co.)*, No 90-3019, 1991 WL 96718 (6th Cir. 1991) (unpublished), and the Third Circuit in *Southeastern Sprinkler Co. v. Meyertech Corp. (In re Meyertech Corp.)*, 831 F.2d 410, 418 n.9 (3d Cir. 1987). None of these asserted "conflicts" are genuine, and Stern misapprehends the relevant rationale that unites these decisions: consistent with *Katchen*, whether it is necessary for the bankruptcy court to adjudicate a "counterclaim" in order to fulfill its administrative bankruptcy functions. Where it is, the courts have held the matter to be a "core" controversy that the bankruptcy court may finally resolve. Where it is not, as in this case, they have reached the opposite conclusion, consistent with the statutory text, relevant constitutional principles, and Congress' purpose in enacting the current jurisdictional scheme.

In *CBI*, a creditor filed a proof of claim seeking money for unpaid auditing and counseling services. 529 F.3d at 437. Following the creditor's filing of its claim, the disbursing agent under the debtor's plan of reorganization filed counterclaims against the auditor concerning

those very same professional services, alleging, *inter alia*, fraud, recklessness, and breach of fiduciary duty. *Id.* at 438, 441-42. Logically and legally, the creditor could not recover its fees if these allegations were meritorious. In this factual context, the Second Circuit considered whether the claims against the creditor were properly "core" proceedings under section 157(b) that the bankruptcy court could finally resolve. *Id.* at 459.

In finding the claim and counterclaim to be inextricably linked, the Second Circuit ultimately held that the counterclaims were core "because they are covered by the language of 28 U.S.C. § 157(b) *and are integrally related to the Proof of Claim.*" *Id.* at 438 (emphasis added). The Second Circuit reiterated a key point repeatedly throughout its decision that the claim and proof of claim were "factually and legally interconnected," and a determination on one "would likely be dispositive on the other." *Id.* at 438, 460, 462, 464.

Moreover, the Second Circuit in *CBI* expressly considered and *distinguished* the District Court decision in this case. *Id.* at 464. The Second Circuit explained that, whereas in *Marshall* there was merely an "attenuated" nexus between the transactions out of which Pierce and Vickie's claims arose, the claims in *CBI* were far more closely related, and, thus, "*Marshall's* context-

specific holding is inapposite here." *Id.* *CBI* simply does not establish a circuit split.

This reading of *CBI* is supported by an earlier Second Circuit decision in *Germain v. Connecticut Nat'l Bank.* 988 F.2d 1323 (2d Cir. 1993). In *Germain*, one of the litigants sought to interpret *Katchen* broadly and argued that, as soon as a proof of claim is filed, the claims allowance process is necessarily triggered for all counterclaims sufficient to permit the bankruptcy court to resolve them without a jury. *Id.* at 1327. In rejecting this argument, the Second Circuit explained that while it "agree[d] that the filing of a proof of claim is a *necessary* condition – the claims-allowance process can hardly begin before a claim is made – ... it is not a *sufficient* condition." *Id.* Distinguishing the facts in *Germain* from *Katchen*, the Second Circuit explained that "before a claim may be allowed, a court *must* resolve any preference issues that the trustee might raise." *Id.* In contrast, the state law counterclaims at issue in *Germain* did not have to be.

In *Am. Bridge*, a receiver appointed to administer the assets of American Bridge sought compensation for services he had rendered to the company. 599 F.3d at 3. Once the company was forced into bankruptcy, the receiver was obligated to account to the federal court as to the property he held as receiver. *Id.* The receiver

sought his compensation without filing an accounting. *Id.* Subsequently, the trustee of American Bridge's bankruptcy estate filed an adversary proceeding against the receiver for the receiver's actions in the capacity for which he sought compensation. *Id.* Accordingly, the claim and counterclaim, which both involved the work performed by the receiver, were inextricably related, also distinguishing *Am. Bridge* from this controversy.

In *Baudoin*, a creditor filed a proof of claim based on loans it had made to the debtor corporation. 981 F.2d at 741. Following the conclusion of its bankruptcy case, the debtor subsequently filed a lender liability suit based on an alleged "violation of these very same loan agreements." *Id.* While the *Baudoin* court stated in very general terms that a counterclaim to a proof of claim is a "core" proceeding under 157(b)(2)(C), the factual circumstances demonstrate that the "claim" and the "counterclaim" were inextricably linked. *Id.* at 741-42. Indeed, the Fifth Circuit explained that "[t]he contracts at issue are the *very loan agreements* which were the basis of the Bank's proof of claim in the prior bankruptcy. *It is difficult to imagine a more common nucleus of operative facts.*" *Id.* at 743 (emphasis added).

In *McLeod* (an unpublished opinion), a governmental agency sought the release of certain trucks the debtor was obligated to deliver

under contract. The debtor counterclaimed, seeking payment for the unpaid balance of the same contract. 1991 WL 96718, at *1. Obviously, the claim and counterclaim were inextricably linked, *id.* at *3, and the court concluded that the bankruptcy court had jurisdiction over the matter. Critically, the court did not hold that all compulsory counterclaims are necessarily "core." It simply held that the counterclaim in question was both compulsory and core. *Id.* at *4.

In *Meyertech*, a creditor filed a claim against the debtor for breach of contract. 831 F.2d at 412. The debtor counterclaimed, seeking the amount the creditor still owed under the same contract. *Id.* at 412-13. Once again, the claim and counterclaim were inextricably intertwined, and the court concluded that the counterclaim was a "core" matter that the bankruptcy court could finally resolve. *Id.* at 418.

Review of the circuit cases Stern cites reveals that each involves a contractual relationship between the relevant creditor and debtor and claims and counterclaims that are inextricably intertwined within that contractual relationship. None involve circumstances even remotely like those at issue here. Stern's contention that the decisions of the courts of appeals are in conflict rings hollow.

In addition to alleging a purported circuit split, Stern contends that the decision below "fundamentally changes bankruptcy law as applied for decades by bankruptcy and district courts." Pet. 24. Not so. Review of the cases Stern cites demonstrates that they also adhere to the dichotomy identified above: if the claim and counterclaim are inextricably intertwined such that one cannot be determined without the other, then the counterclaim may be a core matter that the bankruptcy court may finally resolve; if not, then not (absent the creditor's consent). Stern's characterization of the impact of the Court of Appeals' decision is simply inaccurate.

B. The Decision Below Properly Addresses *Marathon*.

Stern claims that the Ninth Circuit's analysis misapplies this Court's decision in *Marathon*. Pet. 32. It is Stern's analysis, however, that is in error. In *Marathon*, the Court invalidated the bankruptcy jurisdictional provisions that preceded the current scheme. In construing the current statutory text, it was entirely appropriate for the court below to consider the import of *Marathon* – just like every other Court of Appeals to have addressed the same issue.

A key point of *Marathon* was that a party should not be forced to litigate a state law claim in bankruptcy against his or her will without the benefit of an adjudication by an Article III judge

with the constitutional protections of life tenure and irreducible salary. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 59-60 (1982); *id.* at 90-91 (Rehnquist, J., concurring in judgment). The decision below held correctly that Pierce should not be subjected to a non-Article III Bankruptcy Court determination at the expense of his right to a jury trial adjudication and the resolution of the matter in an Article III forum. Further, the decision below correctly recognized that *Marathon* places limits on what matters can be heard by non-Article III judges, and the decision below adheres to that teaching. Pet. App. 36-38, 46.

In *Marathon*, this Court considered whether Congress' grant of broad jurisdiction to bankruptcy judges in section 241(a) of the Bankruptcy Act of 1978 violated Article III of the United States Constitution. *Marathon*, 458 U.S. at 52. After the debtor in the case, Northern Pipeline, filed for bankruptcy, it sued one of its creditors, Marathon, for "alleged breaches of contract and warranty, as well as for alleged misrepresentation, coercion, and duress" – all state law claims. *Id.* at 56. Marathon sought to dismiss the suit "on the ground that the Act unconstitutionally conferred Art. III judicial power upon judges who lacked life tenure and protection against salary diminution." *Id.* at 56-57.

Agreeing with Marathon, the Court held that Congress could not grant non-Article III bankruptcy courts jurisdiction over Northern Pipeline's state law claims merely because they were "related to" the bankruptcy petition, because doing so "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court." *Id.* at 87; *see also id.* at 91-92 (Rehnquist, J., concurring in judgment). The plurality of four Justices relied on the distinction between "public rights" matters, *i.e.*, arising "between the Government and persons subject to its authority," and "private rights" matters, *i.e.*, "the liability of one individual to another." *Id.* at 67-70. Justice Rehnquist's concurrence focused primarily on the narrower ground of the state law nature of the claim. *Id.* at 90-92. Because the concurrence constitutes a narrower, common ground with the plurality, its reasoning may be viewed as the holding of the Court. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

Contrary to Stern's assertion, the fact that *Marathon* did not involve a compulsory counterclaim does not affect its application here. A key point of *Marathon* was that a person should not be forced to litigate a state law claim in bankruptcy against his or her will without the benefit of an Article III judge that has the constitutional protections of life tenure and irreducible salary. *Marathon*, 458 U.S. at 59-60; *id.* at 90-91

(Rehnquist, J., concurring in judgment). As in *Marathon*, Vickie sought to subject Pierce, despite his objection, to her purported state law cause of action without the benefit of the Article III adjudication to which he was entitled. *Id.* at 91. When Vickie asserted her tortious interference counterclaim in response to Pierce's complaint to determine the dischargeability of his claim for defamation, Pierce promptly objected to the adjudication of her claim in the non-Article III Bankruptcy Court. ER-957.

While this Court acknowledged in *Marathon* that Congress has substantial discretion to assign the adjudication of rights it creates (*e.g.*, preference actions) to whatever type of forum it desires, there is no comparable justification when the cause of action is not one of congressional creation. 458 U.S. at 83-84. Vickie's counterclaim is purely a creature of Texas law. ER-936. Accordingly, a non-Article III court could not constitutionally exercise jurisdiction over Vickie's claim in order to resolve it by final judgment.

C. The Decision Below Follows Congress' Intent.

Stern contends that the decision below runs afoul of Congress' intent in enacting section 157 and would effectively nullify part of the legislation. Once again, Stern is mistaken, and it is

his interpretation that would render part of the statute superfluous.

Following *Marathon*, Congress' primary concern in 1984 in enacting the current jurisdictional provisions was to pass a constitutional statute. *See, e.g.*, 130 Cong. Rec. H7493-7494 (daily ed. June 29, 1984) (Rep. Glickman) ("The conference report ... is intended to bring [the bankruptcy courts] into constitutional conformity ...."). Although it is true that some influential legislators stated that 95% of the cases would be core proceedings that a bankruptcy court may finally resolve, the legislation itself by its terms recognizes that significant matters are excluded. For example, sections 157(b)(2)(B), (O), and (b)(5) all provide for the explicit exclusion of personal injury torts from the scope of "core" proceedings that a bankruptcy court may finally resolve.

Stern argues that references to the legislative history support his theory, but his citations actually cut against him. For example, he quotes the comment of one legislator who stated his understanding that *Marathon* "was concerned only with State law issues that did not arise in the core bankruptcy function of adjusting debtor-creditor rights." Pet. 17 (citing 130 Cong. Rec. 6242 (daily ed. March 21, 1984) (Rep. Kindness)). Vickie's claim, however, is precisely such a state law issue: one that does not arise in the context of a "core bankruptcy function of adjusting

debtor-creditor rights" because it was not necessary to adjudicate her claim in order to administer her bankruptcy estate (any more than it was necessary to adjudicate the debtor's state law breach of contract claim in *Marathon*).

Stern states that, "[i]n accordance with its view of *Marathon*, Congress broadly defined core proceedings as those 'arising under' the bankruptcy code and 'arising in' bankruptcy cases." Pet. 17. But even a cursory glance at the statute reveals this characterization to be a glaring error as the statute says and does no such thing. As the Court of Appeals observed, the definitional provision of section 157(b)(2) defines the term "core proceeding" to include a non-exhaustive list of matters. Pet. App. 38 & n.24. The statute, however, does not define the phrases "arising under" or "arising in" set forth in section 157(b)(1), let alone define them to be synonymous with "core proceedings." Pet. App. 40-41. As the Court of Appeals correctly noted, the phrases "core" and "arising in" and "arising under" are distinct, and under section 157(b)(1), it is not enough for a matter to be a "core" proceeding in order to be finally resolved by a bankruptcy court. By its express terms, section 157(b)(1) requires that the matter must be a core proceeding (defined in section 157(b)(2)) and must also either "arise under" the Bankruptcy Code or "arise in" a case under the Code (not de-

fined). Pet. App. 37, 43. Stern's contrary characterization ignores half the statutory text.

Stern argues similarly that the decision of the court below "nullifies" section 157(b)(2)(C). Pet. 20. Stern's theory appears to be that section 157(b)(2)(C) defines "core" matters to include counterclaims against creditors who file proofs of claim, and this by itself is sufficient for jurisdiction purposes. As noted, however, the fatal problem with this theory is that Stern's interpretation eviscerates the additional requirement of section 157(b)(1) that the matter must also be "arising under" or "arising in" in order for a bankruptcy court to finally resolve it. Contrary to Stern's unfounded criticism, the decision below gives meaning to the entire statutory provision.

As the court below properly recognized (and like every other court of appeals to have addressed the issue), it is imperative in construing Section 157(b) to keep in view the constitutional concerns and restrictions articulated in *Marathon* that Congress hoped to avoid with the current statutory scheme. These include preserving the rights of creditors such as Pierce to Article III court adjudications and jury trials. The decision below is fully consistent with these important values.

D. The Decision Below Does Not Conflict with Other Precedents of this Court.

Stern contends that the Ninth Circuit's decision in this case is inconsistent with certain of the Court's post-*Marathon* decisions. Pet. 33-38. Stern is again mistaken.

In *Commodity Futures Trading Comm'n v. Schor*, this Court considered whether the Commodity Futures Trading Commission ("CFTC") could entertain state law counterclaims without violating Article III. 478 U.S. 833, 835-36 (1986). The dispute in that case arose after Schor initiated a CFTC reparations proceeding and filed complaints with the CFTC against ContiCommodity Services, Inc. ("Conti"). *Id.* at 837.

Schor's complaints to the CFTC alleged that Conti had caused Schor to have a debit balance in his trading account in violation of the Commodity Exchange Act ("CEA"). *Id.* Before it received notice of the reparations proceeding, Conti filed a diversity action in federal district court to recover the same debit balance owed by Schor. *Id.* Schor subsequently counterclaimed in the district court action, "reiterating his charges that the debit balance was due to Conti's violations of the CEA." *Id.* at 837-38. Additionally, Schor moved "on two separate occasions to dismiss or stay the District Court action" and argued that the CFTC reparations action would fully resolve and adjudicate all of the rights of

the parties in the district court action. *Id.* at 838. Acquiescing, Conti voluntarily dismissed the federal court action and "presented its debit balance claim by way of a counterclaim in the CFTC reparations proceeding." *Id.* After the Administrative Law Judge presiding over the reparations proceeding ruled in Conti's favor on both Schor's claims and Conti's counterclaims, "Schor for the first time challenged the CFTC's statutory authority to adjudicate Conti's counterclaim." *Id.*

This Court ultimately held that the jurisdictional grant was constitutional because "[t]he CFTC adjudication of common law counterclaims is incidental to, *and completely dependent upon*, adjudication of reparations claims created by federal law." *Id.* at 856 (emphasis added). The Court stressed that the constitutionality of the adjudicatory scheme at play in *Commodity Futures* was predicated on the fact that the jurisdiction at issue extended only to a "particularized area of law" and a "narrow class of common law claims," unlike the broader jurisdictional grant invalidated in *Marathon*. *Id.* at 852, 854-56. The Court further noted that the absence of consent in *Marathon* was a significant factor in determining that Article III forbade adjudication. *Id.* at 849; *see also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 59 n.14 (1989) (explaining that the notion of waiver in *Commodity Futures* is "unavailable in the context of bankruptcy pro-

ceedings, because creditors lack an alternative forum to the bankruptcy court in which to pursue their claims."). The Court explained that "Schor expressly demanded that Conti proceed on its counterclaim in the reparations proceeding rather than before the District Court ... and was content to have the entire dispute settled in the forum he had selected until the ALJ ruled against him on all counts." *Commodity Futures*, 478 U.S. at 849.

Unlike the litigant in *Commodity Futures*, Pierce did not demand that Vickie's "tortious interference" claim be adjudicated in the Bankruptcy Court and never consented to its adjudication there. Further, it was not necessary to resolve Vickie's claim in order to allow or disallow Pierce's proof of claim, or to vindicate Congressional regulation of a "particularized area of law." (Congress has not purported to regulate "tortious interference" claims involving alleged gifts.) The facts of the two cases are thus entirely dissimilar, and the decision below comports with *Commodity Futures*.

Stern's reference to language from *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985), also does not advance his cause. Pet. 33. As *Thomas* stated, "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III." 473 U.S. at 587. In this case, the court be-

low adhered fully to "practical attention to substance"; it is Stern who champions formalistic labels.

Stern's reference to *Granfinanciera* and *Langencamp v. Culp*, 498 U.S. 42 (1990), are equally unavailing. Pet. 37. Both cases involved the effect of the filing of a proof of claim on a creditor's right to a jury trial with respect to *federal* bankruptcy causes of action asserted against the creditor, not state law counterclaims. *See Langencamp*, 498 U.S. at 43; *Granfinanciera*, 492 U.S. at 36-37. Under the governing statutory scheme, it is not possible to allow a proof of claim without resolving *federal* bankruptcy causes of action. 11 U.S.C. § 502(d). Not so with respect to a state law counterclaim of the kind at issue here. The decision below does not conflict with these precedents.

E. The Decision Below Addresses an Arcane Issue and Has Not Generated Confusion.

Stern contends that certiorari should be granted because "[t]he issues presented by this petition rarely reach the circuit level." Pet. 38. Contrary to Stern's explanation, however, that is because, over the past several decades, courts have settled on a consistent methodology in resolving the dispute – one of evaluating whether the claim and counterclaim are so intertwined that it is necessary for the bankruptcy court to

adjudicate the counterclaim in order to fulfill its administrative bankruptcy functions. Further, the fact that the issue arises so rarely counsels *against* granting certiorari – particularly where, as here, there is no need to correct any disagreement among the courts of appeals.

Moreover, Stern's argument that certiorari is warranted because "the nature of bankruptcy cases tends to discourage appellate review" is overstated because the same could be said of virtually any petition involving a bankruptcy matter. In addition, contrary to Stern's assertion, the reason why bankruptcy cases generate relatively few appeals as compared to general civil matters is that the vast majority of bankruptcy cases do not generate litigation, but are handled routinely in an administrative fashion.

Further, Stern's assertion that the decision below is "an outlier decision in an extraordinary case that alters long-standing practices" is both untrue and self-defeating. Pet. 39. The only thing true about this statement is that the case is indeed "extraordinary," but its arcane nature counsels *against* certiorari review, not for it.

Stern contends erroneously that the decision below "is already causing confusion." Pet. 39. For this, he cites only one decision that postdates the opinion below. *In re Gorilla Cos.*, 429 B.R. 308 (Bankr. D. Ariz. 2010). In *Gorilla*, how-

ever, a creditor filed a proof of claim asserting an unpaid balance owing on a promissory note, and the debtor counterclaimed, alleging that no amount was owed due to the creditor's fraud. The claim and counterclaim were thus inextricably intertwined and, therefore, "so unlike that in *Marshall*." *Id.* at 314. There is no reason for certiorari review.

F. This Case Presents a Poor Vehicle for Review of the Jurisdictional Issue.

Apart from the questions presented, there are numerous additional grounds why the Bankruptcy Court's assumption of jurisdiction was defective. These are examined by Judge Kleinfeld in his concurrence and would be properly reviewable in this Court because each was raised below. *See Granfinanciera*, 492 U.S. at 38-39 ("[W]ithout cross-petitioning for certiorari, a prevailing party may, of course, 'defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals.'").

For example, as the concurrence explained, "[t]here is yet another independent reason, elementary and compelling even without the others, that the bankruptcy court was without jurisdiction over Vickie's counterclaim." Pet. App. 74 (Kleinfeld, J., concurring). Even if Pierce had asked the Bankruptcy Court to adjudicate his

defamation claim (which he did not), the Bankruptcy Court lacked jurisdiction to do so as his claim constituted a state law claim for personal injury, which cannot be a "core" matter that the Bankruptcy Court may finally resolve. Section 157(b)(5) of the Bankruptcy Code directs that "the district court shall order that personal injury tort and wrongful death claims shall be tried in the district court." 28 U.S.C. § 157(b)(5).

A defamation claim is properly a personal injury tort claim within the meaning of the statute. *See, e.g., Rizzo v Passialis (In re Passialis)*, 292 B.R. 346, 352-53 (Bankr. N.D. Ill. 2003) (bankruptcy court lacked jurisdiction under section 157(b)(5) to determine slander claim underlying dischargeability complaint); *see also Control Ctr., LLC v. Lauer*, 288 B.R. 269, 279 (M.D. Fla. 2002)). This is confirmed by reference to Texas law, which also characterizes a defamation suit as a personal injury action. *See In re Dillard Dep't Stores, Inc.*, 186 S.W.3d 514, 516 (Tex. 2006) (employee's defamation claim fell within the scope of an arbitration agreement that applied to "personal injuries"); *Brewster v. Baker*, 139 S.W.2d 643, 645 (Tex. Civ. App. 1940). Additionally, when Pierce filed his proof of claim attaching the non-dischargeability complaint, he checked the personal injury tort box on the form. Pet. App. 78; SER-6020.

Further, Vickie's "tortious interference" claim, is also a personal injury claim and, accordingly, was also required to be heard in the District Court. Moreover, even if Vickie's claim were not a personal injury tort, it would still be required to be adjudicated in the District Court because Pierce's defamation claim clearly is. As the Seventh Circuit explained in *Pettibone Corp. v. Easley*, bankruptcy judges "cannot try selected defenses in these tort cases .... The whole case, including defenses of all kinds, goes off to the district judge or the state court." 935 F.2d 120, 123 (7th Cir. 1991). Accordingly, as Elaine argued below and Judge Kleinfeld agreed, "[b]ecause Vickie's counterclaim was a personal injury claim, be it in defense of Pierce's defamation claim or an independent cause of action, the bankruptcy court would have lacked jurisdiction to enter final judgment on it." Pet. App. 75-76 (Kleinfeld, J., concurring). Section 157(b)(5) therefore presents yet another independent basis for the decision below and another compelling reason for this Court to deny the petition for certiorari.

There are numerous other grounds (summarized above) by which the Ninth Circuit could have reached the same result it reached below. *See* Pet. App. 65. Rather than address these issues, the Court of Appeals properly determined that the results of a comprehensive five-and-a-

half month jury trial should control the outcome of this controversy. Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny Stern's petition for a writ of certiorari.

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