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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

The Respondent's Brief employs three strategies to sell its broad "probate exception" to federal bankruptcy jurisdiction. First, it relies heavily on dicta rather than holdings. Emblematic of this approach, the brief offers this law review article quotation in support of its claim of a broad, widely-accepted probate exception: "'[O]ne of the most widely stated generalizations in the area of federal jurisdiction is that federal courts can exercise no probate jurisdiction. Statements have been made to that effect in approximately 250 reported federal cases.'" Resp. Br. 26, quoting Allan D. Vestal & David L. Foster, *Implied Limitations of the Diversity Jurisdiction of Federal Courts*, 41 Minn.L.Rev. 1, 13 (1956-1957). But the brief omits the article's next sentence that directly undermines the brief's central thesis: "The *holdings* of the cases, however, do not support the generalization."

Second, the brief places great emphasis on an inaccurate version of the facts. For example, the brief contends Vickie went to the bankruptcy court because she was forum-shopping her claim of tortious interference with an inter vivos gift. Resp. Br. 3-5 & n.2 & n.5, 26. But the very first time she asserted that claim was in the bankruptcy court in 1996, as a compulsory counterclaim to Pierce's creditor's claim. JA 23-25; SER 6020, 6757; App. 179-80, 197. Four years later, in 2000, she filed it in the probate court, as a prophylactic measure after Pierce asserted the bankruptcy court lacked jurisdiction to decide it. ER 2838, 2863-65, 2875; SER 12660; App. 195. The brief distorts these facts by conflating two separate "tortious interference" claims: a claim for interference *with spousal support* that Vickie filed in Howard's 1995 *guardianship* proceeding, and the unrelated interference *with gift* claim she filed in 2000 in Howard's *probate* case. *Compare* JA 9, 11, *with* ER 2838, 2863-65, 2875; *see* Pet. Br. 2-4.

Third, the brief argues policy, much of it a paean to exclusive probate court jurisdiction of all matters related to a decedent's property. Whatever the merits of such a

scheme – and whether they outweigh the policies that inform the present system of concurrent federal jurisdiction over such matters – are questions for Congress.

To prevail here, Pierce must be right twice: Congress must have intended an implied "probate exception" to bankruptcy jurisdiction, *and* that exception must be broad enough to encompass Vickie's tort action against Pierce. But his argument for an implied exception in bankruptcy is wrong because (a) no "probate exception" applied in bankruptcy when Congress adopted the Bankruptcy Act in 1978; (b) the purpose of the 1978 bankruptcy overhaul was expressly to *expand* jurisdiction over bankruptcy-related claims and eliminate the balkanization that a "probate exception" would represent; and (c) Congress addressed federal-state comity concerns in bankruptcy through broad abstention provisions, not jurisdictional exclusions. And Pierce is also wrong about there being a broad probate exception – for the simple reason that this Court's cases completely refute it.

Finally, virtually every policy concern raised by Pierce and his amici are addressed by application of currently prevailing preclusion and bankruptcy abstention principles. To the extent (if any) they are not, the proper audience is Congress.

ARGUMENT

I. CONGRESS INTENDED NO "PROBATE EXCEPTION" TO THE BANKRUPTCY JURISDICTION CONFERRED BY 28 U.S.C. SECTION 1334.

Relying on the "implied acquiescence" holding in *Ankenbrandt v. Richards,* 504 U.S. 689 (1992), Pierce argues that a probate exception should be implied into 28 U.S.C. § 1334 because courts "have long understood the probate exception to apply in bankruptcy and other federal-question cases" and "Congress should not be presumed to have intended to change a longstanding practice

– particularly one established, not only in bankruptcy but elsewhere – without saying so." Resp. Br. 44-45. Pierce's theory fails.

A. There Was No "Longstanding And Well-Known" Probate Exception To Bankruptcy Jurisdiction When Congress Adopted The Bankruptcy Act In 1978.

Ankenbrandt's "implied acquiescence" holding rested on Congress' re-enactment of the diversity statute in 1948, when there was a "longstanding and well-known construction of the diversity statute" recognizing a domestic relations exception. *Ankenbrandt*, 504 U.S. at 700. By contrast, when Congress enacted the 1978 Bankruptcy Act, there was no such practice in bankruptcy cases.

Pre-1978 bankruptcy cases: Pierce and his amici rely primarily on *Harris v. Zion Sav. Bank & Trust Co.*, 317 U.S. 447 (1943), claiming *Harris* "applied the probate exception to reject the bankruptcy court's assertion of bankruptcy jurisdiction under an express statutory grant." Resp. Br. 43; *see also* amicus brief of professors Young and Elliot (ALP) 23. *Harris* did no such thing. Although it noted in dicta "that the federal courts have no probate jurisdiction" – the language Pierce emphasizes – it made no ruling regarding the applicability of any so-called probate exception. *Id.* at 450-52. The Court determined solely whether Congress intended section 75 of the Bankruptcy Act of 1898 to permit a personal representative to revive a decedent farmer's bankruptcy action without authorization from the probate court that appointed him – a question it would not have had occasion to reach had it determined there was no federal jurisdiction under a probate exception. Indeed, *Harris*' utter inapplicability here is made clear by the dissent's observation that had "this been an ordinary bankruptcy case," not one involving this particular statute, "there can be no doubt that the personal representative of this decedent would have been

entitled to" proceed with the bankruptcy. 317 U.S. at 454 (Douglas, J., dissenting.)

Pierce and his amici rely on only one other pre-1978 bankruptcy case, *Bank of Hamburg v. Tri-State Sav. & Loan Ass'n*, 69 F.2d 436, 437-38 (8th Cir. 1934). Resp. Br. 45. But *Hamburg* does not discuss or apply a probate exception; it merely applied a rule, abrogated in 1978, that conditioned bankruptcy jurisdiction on the parties' consent or on the debtor's or trustee's possession of the res. 69 F.2d at 437-38 (no bankruptcy jurisdiction because parties had not consented and executor of probate estate had possession of land); *see Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995).[1]

Pre-1978 non-bankruptcy cases: Pierce and his amici also cite *Markham v. Allen*, 326 U.S. 490 (1946). Resp. Br. 43; ALP 12. Although *Markham* concerned issues of federal law, it did not discuss whether the probate exception applied to non-diversity cases, let alone to bankruptcy cases, because it found that a probate exception would not in any event apply to the claim before it. The rest of Pierce and his amici's pre-1978 cases are diversity cases, which do not consider whether a probate exception applies in bankruptcy. *See* Pet. Br. 15-24, 34 n.25.[2]

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[1] The only post-1978 decisions citing *Hamburg* recognize that federal bankruptcy jurisdiction *now exists* in the circumstances *Hamburg* addressed; each cites *Hamburg* to show that federal courts have *discretion*, under section 1334(c)(1), to *abstain* in favor of probate courts. *See In re Robino*, 243 B.R. 472, 495 (Bankr. N.D. Ala. 1999); *In re Tarkio College,* 137 B.R. 34, 36 (W.D. Mo. 1992); *Matter of Bob Lee Beauty Supply Co.*, 56 B.R. 17, 20 (Bankr. N.D. Ala. 1985).

[2] Amicus Washington Law Foundation (WLF) unsuccessfully attempts to distinguish the three cases cited in footnote 25 of Petitioner's Brief. It argues two of them involve divorce proceedings. WLF Br. 13. But the point is that these cases, after analyzing section 1334's language and legislative history, properly recognize that Congress intended that bankruptcy courts have exclusive *in rem* jurisdiction over all property of the bankruptcy estate even where other courts previously had *in rem* jurisdiction. Cases in *non-divorce* contexts agree. *E.g*, *In re Noletto*, 244 B.R. 845, 853 (Bankr. S.D. Ala. 2000); *In re Fagel*, 234

(Continued on following page)

Conclusion: Pierce's handful of authorities provide "no confidence" that his purported probate exception to bankruptcy jurisdiction "is 'the type of "rule" that . . . Congress was aware of when enacting [section 1334].'" *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 10 (2000) (similar authorities did not "establish a bankruptcy practice sufficiently widespread and well recognized to justify the conclusion of implicit adoption by the Code"); *accord Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle Street P'ship*, 526 U.S. 434, 462 (1999) (Thomas, J., concurring) (pre-Code practice could not "inform the interpretation" of a statute given "the sparse history" of the purported implied exception, including references "in dictum").[3]

B. Congress Enacted Section 1334 To Depart From Pre-1978 Jurisdictional Doctrines.

The keystone of *Ankenbrandt*'s "implied acquiescence" holding is that Congress explained when re-enacting the diversity statute in 1948 that "'no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly

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B.R. 784, 786 (Bankr. C.D. Cal. 1999); *In re Sundance Corp.*, 149 B.R. 641, 650 (Bankr. E.D. Wa. 1993). WLF claims the third case is inapposite because it was a federal admiralty proceeding and section 1334(b) "refers to 'any *Act of Congress* that confers exclusive jurisdiction' but makes no mention of 'state law' that confers exclusive jurisdiction." WLF Br. 10, 14, emphasis in original. There was no need for Congress to specifically mention "state law," because section 1334(b)'s grant of concurrent bankruptcy jurisdiction necessarily preempted, under the Supremacy Clause, any state laws conferring exclusive jurisdiction on state courts.

[3] The 1978 Act's legislative history repeatedly references case precedent or existing doctrines where relevant to interpreting the statutes. *See*, *e.g.*, H.R. Rep. No. 95-595, at 315-16, 319, 330, 339, 353, 355-59, 361, 367-69 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6272-73, 6276, 6286, 6295-96, 6309, 6311-15, 6317, 6323-25. It contains no references to *Harris*, *Markham* or the other cases and concepts on which Pierce relies.

expressed.'" *Ankenbrandt*, 504 U.S. at 700. Here, in contrast, it is undisputed that Congress enacted section 1334 to *expand* bankruptcy jurisdiction beyond that conferred by the diversity and federal-question statutes and all prior bankruptcy acts.

Section 1334's jurisdictional grant "was a distinct departure from the jurisdiction conferred under previous acts, which had been limited to either possession of property by the debtor or consent as a basis for jurisdiction." *Celotex*, 514 U.S. at 308. The "related to" jurisdiction "extends federal bankruptcy jurisdiction further than any of the prior bankruptcy statutes," going "beyond even Justice Story's image of a general federal bankruptcy jurisdiction over all claims by and against the bankruptcy estate" and including "third-party disputes to which the bankruptcy estate is not a party, but that are nonetheless 'related to' a bankruptcy case in some manner." Ralph Brubaker, *One Hundred Years Of Federal Bankruptcy Law And Still Clinging To An In Rem Model Of Bankruptcy Jurisdiction*, 15 Bankr. Dev. J. 261, 272-73 (1999).

Thus, *Ankenbrandt*'s basic rationale cannot apply here. "[I]t makes little sense to graft onto the Code concepts that were developed during a quite different era of bankruptcy," particularly where Congress intended to depart from them. *Bank of Am. Nat'l Trust & Sav. Ass'n*, 526 U.S. at 461-62 (Thomas, J., concurring) (reliance on pre-Code practices dubious because "[t]he Code's overall scheme often reflects substantial departures from various pre-Code practices").

Pierce and his amici therefore err in relying on *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986) and *Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998). Resp. Br. 45; ALP Br. 24. There, the Court "used prior practice to fill in the details of a pre-Code concept that the Code had adopted without elaboration." *Hartford Underwriters*, 530 U.S. at 11. In section 1334, Congress did not adopt pre-1978 jurisdictional concepts without elaboration; it enacted the statute to depart from them.

C. Congress Did Not Intend A Probate Exception To Bankruptcy Jurisdiction.

Pierce and his amici claim that the Court must assume Congress intends to exclude probate or domestic-relations matters from all jurisdictional grants unless it expressly says otherwise. Resp. Br. 17, 45; ALP Br. 13, 22. This "Congress means what it doesn't say" presumption is a perversion of statutory construction. A court must "begin with the understanding that Congress 'says in a statute what it means and means in a statute what it says there.'" *Hartford Underwriters*, 530 U.S. at 6. The legislative history confirms Congress did so here.

Pierce claims there is "no plausible reason why Congress would have intended to apply the probate exception to the federal adjudication of state law claims by a federal court sitting in diversity, but not to one adjudicating precisely the same claims in a bankruptcy adversary proceeding. . . ." Resp. Br. 47. Not so. "'Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with *all matters* connected with the bankruptcy estate.'" *Celotex*, 514 U.S. at 308 (emphasis added).

Although Pierce labels the legislative history "sparse," Resp. Br. 46, it demonstrates that Congress irrefutably intended to confer "broad and complete jurisdiction over all matters and proceedings that arise in connection with bankruptcy cases," including "all litigation having a significant connection with bankruptcy." H.R. Rep. No. 95-595, at 47-49, *as reprinted in* 1978 U.S.C.C.A.N. at 6009; see Ralph Brubaker, *On The Nature Of Federal Bankruptcy Jurisdiction: A General Statutory And Constitutional Theory*, 41 Wm. & Mary L. Rev. 743, 847 (2000) [hereinafter, "*Nature Of Federal Bankruptcy Jurisdiction*"] ("The bankruptcy jurisdiction statute unquestionably contains a general federal bankruptcy jurisdiction over all claims by and against the bankruptcy estate"). Indeed, Congress described the scope of "related to" jurisdiction alone as "'pervasive,' 'complete,' 'comprehensive,' 'as broad

[a] jurisdiction as possible', and 'as broad as can be conceived.'" *Id*., 41 Wm. & Mary L. Rev. at 796-97. It sought "a federal bankruptcy jurisdiction as expansive as is constitutionally permissible." *Id*. at 805 n.224.

Discussion regarding potential grounds for lifting the automatic stay further demonstrates that Congress did not intend probate or domestic-relations exceptions to bankruptcy jurisdiction:

> [A] desire to permit an action to proceed to completion in another tribunal may provide another cause [to lift the stay]. Other causes might include the lack of any connection with or interference with the pending bankruptcy case. For example, a divorce or child custody proceeding involving the debtor may bear no relation to the bankruptcy case. In that case, it should not be stayed. A probate proceeding in which the debtor is the executor or administrator of another's estate usually will not be related to the bankruptcy case, and should not be stayed. . . . The facts of each request will determine whether relief is appropriate under the circumstances.

H.R. Rep. 95-595, at 343-44, *as reprinted in* 1978 U.S.C.C.A.N. at 6300. This advice would have been unnecessary had Congress believed the domestic relations and probate exceptions applied in bankruptcy.

Bankruptcy courts are unlikely to become probate or family law courts, because divorce, child-custody and will-probate decrees generally are not "related to" bankruptcy cases.[4] But disputes regarding asset allocation or damages that could impact the administration or distribution of the bankruptcy estate *are* "related to" a bankruptcy case,

[4] Although bankruptcy courts do not issue divorce decrees, for example, they can refuse to lift stays of divorce proceedings where they suspect "collusion between the spouse to stage a divorce to avoid payment of the just claims of creditors." *In re White*, 851 F.2d 170, 174 (6th Cir. 1988).

regardless of whether they might also relate to probate or divorce proceedings; in those contexts, the only germane question is whether the federal court should abstain under section 1334(c).

Pierce argues that section 1334(c)'s abstention provisions apply in non-probate contexts and that *Ankenbrandt* (decided fourteen years after the 1978 Act) said the domestic relations exception was jurisdictional.[5] Resp. Br. 48. But Congress adopted the abstention provisions in lieu of jurisdictional limitations. *See* H.R. Rep. No. 95-595, at 51, *as reprinted in* 1978 U.S.C.C.A.N. at 6012; Brubaker, *Nature Of Federal Bankruptcy Jurisdiction*, *supra*, 41 Wm. & Mary L. Rev. at 797-98 & n.198, 802-03; Block-Lieb, *Permissive Bankruptcy Abstention*, *supra*, 76 Wash. U. L.Q. at 805-06, 810-14. More specifically, there is broad understanding that "bankruptcy courts have the jurisdiction to adjudicate probate matters involving a decedent debtor or a decedent non-debtor in which a debtor has an interest" and that "[a]bstention under these varying circumstances is discretionary." Bernard Schenkler, *Death And Bankruptcy: How The Probate And Bankruptcy Processes Interact*, 3 J. Bankr. L. & Prac. 453, 466-467 (1994) (see cases cited therein); *see also* Gregory McCoskey, *Death And Debtors: What Every Probate Lawyer Should Know About Bankruptcy*, 34 Real Prop. Prob. & Tr. J. 669, 674-76

[5] There is ample authority that even after *Ankenbrandt* domestic relations issues are not jurisdictional in bankruptcy, but rather are matters of abstention. *E.g.*, *Cummings v. Cummings*, 244 F.3d 1263, 1267 (11th Cir. 2001); Susan Block-Lieb, *Permissive Bankruptcy Abstention*, 76 Wash. U. L.Q. 781, 817 & n.175 (1998) (appellate courts "agree that bankruptcy courts are frequently justified in abstaining from domestic relations issues, such as divorce, alimony, child support and the like"); L. Spindler, *Making Sausage Make Sense: Domestic Relations In Bankruptcy*, 4 Norton Bankr. L. Adviser 6, 6 (1997) (bankruptcy is "major exception" to *Ankenbrandt* rule; "bankruptcy courts regularly must review the divorce proceeding's orders and agreements under the fresh start rubric").

(2000); *In re Brown*, 1996 WL 757100, *3 (Bankr. E.D. Va. 1996); *and see* cases cited at footnote 1, *supra*.

Pierce and his amici cite to only one snippet from the legislative history as purportedly supporting their "implied acquiescence" theory – Congress' acceptance of the Bankruptcy Commission's recommendation against allowing an insolvent decedent's estate to file for bankruptcy. Resp. Br. 47; ALP Br. 24. The Commission's sole focus was whether to deviate from previous practice disallowing such filing, and it found that "numerous practical problems and questions would arise if the traditional exclusion [were] eliminated"; the Commission did not mention any "probate exception" to jurisdiction, nor did it indicate that only a state probate court could adjudicate a bankrupt-debtor's tort claims against an heir of a decedent's estate. *See* Report Of The Commission On The Bankruptcy Laws Of The United States, H.R. Doc. 93-137, pt. 1, at 183-85 (1973). To the contrary, it advocated bankruptcy jurisdiction over "all controversies between a trustee in bankruptcy on behalf of the estate and any third party." *Id.* at 6.[6]

[6] The exclusive *in rem* jurisdiction section 1334(e) confers over bankruptcy estate property (*Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004)) confirms that Congress did not intend to deny bankruptcy jurisdiction over Vickie's claim – the estate's primary asset and means by which creditors will be paid (SER 6074-75, DC 98, Tab 31, p. Bk 465). Pierce claims section 1334(e) applies only to "ordinary property of the bankruptcy estate, which does not include a debtor's causes of action." Resp. Br. 42 n.34. But because "property of the estate" is statutorily defined to include intangibles, a debtor's causes of action are subject to the exclusive *in rem* bankruptcy jurisdiction. *See* 11 U.S.C. § 541(a)(1); H.R. Rep. 95-595 at 175, 367, as reprinted in 1978 U.S.C.C.A.N. at 6137, 6323; *San Francisco v. PG&E Corp.*, 433 F.3d 1115, 1126 (9th Cir. 2006); *In re Polis*, 217 F.3d 899, 901 (7th Cir. 2000); *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 476 (1974) (Stewart, J., concurring). The bankruptcy court, thus, has exclusive power to dispose of the debtor's third-party claims, *e.g.*, it can approve/deny proposed settlements or assignments or permit abandonment. The two amici law professors suggest that Vickie's section 1334(e) interpretation would preclude bankruptcy courts from abstaining in

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II. THIS COURT'S PRECEDENTS DEFEAT PIERCE'S BROAD "PROBATE EXCEPTION" TO FEDERAL JURISDICTION.

For all the reasons discussed above, Congress did not intend a "probate exception" to federal bankruptcy jurisdiction. But even if Congress had so intended, there still would be federal jurisdiction to adjudicate Vickie's tort claim.

From this Court's diversity cases holding that there is no jurisdiction to probate or, in some circumstances, annul wills, Pet. Br. 19-23, Pierce attempts to craft a broad "probate exception" that would prevent federal courts from "interfer[ing]" with probate proceedings by exercising "core probate functions," "disregarding or setting aside a probate court's probate judgment," or "resolv[ing] critical questions . . . a probate court must decide." Resp. Br. 1-2, 26-27. But this Court's cases do not come close to supporting the expansive jurisdictional principles Pierce advocates.[7]

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favor of state courts. ALP Br. 20-21. But section 1334(c) specifically provides that "[n]othing in this section prevents a district court . . . from abstaining," and settled precedent establishes a bankruptcy court's power to abstain even if its jurisdiction is "exclusive" (*e.g.*, *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 483 (1940), cited at H.R. Rep. 95-595, at 446, as reprinted in 1978 U.S.C.C.A.N. at 6401).

[7] Vickie has never urged, as Pierce contends, that this Court should abandon the narrow probate limitations on federal diversity jurisdiction its past cases recognize. Resp. Br. 24. To the contrary, Vickie acknowledges that statutory jurisdictional requirements and the *custodia legis* doctrine limit federal diversity jurisdiction to probate and (in some circumstances) annul wills and to administer probate estates. Pet. Br. 15-27. But the narrow limits intended by Congress do not warrant this Court engrafting the broad probate exception urged by Pierce and his amici.

A. Pierce's Broad "Interference" Test Directly Conflicts With This Court's Jurisprudence.

1. This Court's Will-Probate Cases Do Not Support Pierce's "Core Probate Functions" Analysis.

Several decisions of this Court hold there is no federal diversity jurisdiction to probate a will. *E.g.*, *Gaines v. Chew*, 43 U.S. (2 How.) 619, 644-47 (1844); *Armstrong v. Lear*, 25 U.S. (12 Wheat.) 169, 175-76 (1827). From these cases, Pierce concludes that federal courts may not trench on "core probate functions," a phrase he defines broadly enough to oust Vickie's tortious interference claim. Resp. Br. 27-28, 32-36.[8] He is wrong. These cases hold only that where a party premises a right to a decedent's property *on a will*, that party must "probate" the will – *i.e.*, "establish" or "prove" its validity – in state court as a predicate to seeking federal court relief.[9] *None* suggests that state

[8] Although Pierce does not purport to adopt the "state law" test articulated by the Ninth Circuit and other federal courts, Pet. Cert. 14-15, 17, Pet. Br. 42-49, his brief is peppered with suggestions that state law should define what constitutes "core probate functions." Resp. Br. 14-15, 17-23, 32-35, 36. As we have demonstrated, this Court repeatedly has rejected a state law test. Pet. Br. 42-49; *see also Evans v. Pearson Enters., Inc.*, 434 F.3d 839, 849 (6th Cir. 2006) ("If . . . exclusive probate jurisdiction under state law were to determine federal jurisdiction, nothing would prevent a state from purposefully moving whole bodies of law into its probate courts to constrict federal diversity jurisdiction.").

[9] *Gaines v. Chew*, 43 U.S. at 645-46 (because probate court "has exclusive jurisdiction in the *proof of wills*," "the will of 1813 [must] be proved, before any title can be set up under it"); *Armstrong*, 25 U.S. at 175-76 (probate court must "pronounce upon [a purported will] as a testamentary paper, and to grant a probate" before will can be admitted as evidence of title); *see also Sutton v. English*, 246 U.S. 199, 205 (1918) ("as . . . the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of the courts of the United States"); *O'Callaghan v. O'Brien*, 199 U.S. 89, 110 (1905) (same); *Ellis v. Davis*, 109 U.S. 485, 497 (1883) ("no instrument can be effective as a will until proved, no rights in relation to it . . . can arise until preliminary probate has been first made").

courts have exclusive jurisdiction to decide questions of intent, trust issues, or – as in the present case – a *damages claim* for interference with an intended inter vivos gift.

The will-probate cases do not suggest that federal courts lack jurisdiction over determinations of testamentary intent, much less donative intent during life. Enlisting this Court's will-probate cases, Pierce argues that determining a testator's intent is a "core probate function" that belongs exclusively to state courts. Resp. Br. 16, 32-34. But nothing in those cases suggests that state courts have exclusive jurisdiction to determine how a decedent intended to dispose of his assets, either upon death or during life. Indeed, this Court repeatedly has held the opposite. *E.g.*, *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33 (1909); *Byers v. McAuley*, 149 U.S. 608, 620-21 (1893); *Hayes v. Pratt*, 147 U.S. 557 (1893); *Wellford v. Snyder*, 137 U.S. 521 (1890); *Colton v. Colton*, 127 U.S. 300 (1888); *Smith v. Bell*, 31 U.S. (6 Pet.) 68 (1832).

Here, of course, the district court did not determine Howard's testamentary intent; it determined only that Howard intended to give Vickie an irrevocable gift during his life. The evidence established, and the district court expressly found, that while Howard's goal was to provide for Vickie after his death, he intended her trust to be a fully-funded and completed gift, vested and "legally enforceable" *during his life*. App. 80-83, 87-90, 158 n.10; SER 9567, 10611, 11100, 11788. Since federal courts have jurisdiction to decide the former, they certainly can decide the latter.

The will-probate cases do not suggest that federal courts lack jurisdiction over trusts. Pierce claims that because trusts largely have supplanted wills, this Court's will-probate cases preclude establishment of trusts that are "functionally indistinguishable from wills." Resp. Br. 16, 20. None of his cases so suggest, however. To the contrary, this Court has often held there is federal

jurisdiction to determine the existence of even testamentary trusts. *E.g.*, *Mandeville v. Canterbury*, 318 U.S. 47 (1943) (federal jurisdiction to determine rights in trust claimed to have been created under a will); *Byers*, 149 U.S. at 620-21 (1893) (provision of decedent's will constituted "a valid declaration of a trust"); *Colton*, 127 U.S. 300 (1888) (federal jurisdiction to determine rights in trust claimed to have been created under a will); *Fontain v. Ravenel*, 58 U.S. (17 How.) 369 (1854) (considering merits of whether decedent's will gave rise to charitable trust). Of course, this makes perfect sense: Trusts were the exclusive province of courts of equity, and since the probate limitation on federal diversity jurisdiction derives from the exclusive English ecclesiastical jurisdiction to probate wills, Congress cannot be presumed to have intended its extension to trusts. Pet. Br. 19-23.[10]

In any event, even if trusts that effect *testamentary* transfers were somehow outside federal diversity jurisdiction, there would still be federal jurisdiction over the irrevocable *inter vivos* trust Howard intended to create for Vickie. None of Pierce's cases suggests that federal courts lack jurisdiction over claims arising out of a trust intended to be a completed gift *during a decedent's life.*[11]

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[10] Wills and trusts continue to serve very different purposes. Inter vivos trusts are employed specifically to *avoid* probate, which "has earned a lamentable reputation for expense, delay, clumsiness, makework, and worse." John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1116 (1984). It would be truly perverse to conclude Congress intended to place trusts under the exclusive jurisdiction of the very courts their settlors seek to avoid.

[11] Indeed, Pierce's own definition of "will substitute" – which must *"reserve to the owner until death complete control over property governed by the instrument in question*, including the power to name and change beneficiaries" – plainly excludes Vickie's *irrevocable* trust. Resp. Br. 20, quoting Langbein, *Nonprobate Revolution, supra,* 97 Harv. L. Rev. at 1109 (emphasis added). It also excludes Howard's primary trust, which Pierce asserts was made irrevocable after Howard married Vickie. ER 645, 2656; App. 125.

The will-probate cases do not suggest federal courts lack jurisdiction over tort claims for interference with intended lifetime gifts or testamentary transfers. Pierce cites no case where this Court has held a damages claim to be exclusively within probate court jurisdiction, even if the claim concerns a decedent's intended testamentary disposition. Nor does he acknowledge this Court's cases approving federal jurisdiction over damages claims involving wills, such as for breach of a promise to leave property by will. *E.g.*, *In re Simons*, 247 U.S. 231 (1918); *Townsend v. Vanderwerker*, 160 U.S. 171 (1895); *Brown v. Sutton*, 129 U.S. 238 (1889).

2. This Court's Will-Annulment Cases Do Not Support Pierce's Attempt To Conflate Jurisdiction And Preclusion.

Several of this Court's decisions hold that because there is no federal diversity jurisdiction to *validate* a will, there also is no federal diversity jurisdiction to *invalidate* a probated will where the invalidation proceedings are a continuation of the probate. Pet. Br. 19; *Sutton*, 246 U.S. at 205 (federal equity courts lack jurisdiction "to set aside a will"); *O'Callaghan*, 199 U.S. at 110 (same); *Ellis*, 109 U.S. at 494 (federal court cannot "decree[ ] the invalidity of the will"); *In re Broderick's Will*, 88 U.S. 503, 509 (1874) ("a court of equity will not entertain jurisdiction of a bill to set aside a will"); *Fouvergne v. New Orleans*, 59 U.S. (18 How.) 470, 473 (1855) (probate judgments are conclusive of "the validity and contents of a will").[12] Like the limitation

[12] These cases recognize, however, that if under state law a will can be invalidated in an independent *inter partes* action, that cause of action can be pursued in federal court. *Sutton*, 246 U.S. at 205; *O'Callaghan*, 199 U.S. at 110-12; *Ellis*, 109 U.S. at 494-504. Although they thus hold that state law can *expand*, not *contract*, federal jurisdiction, the state amici cite them for the proposition that states can shield claims from federal jurisdiction by giving them exclusively to state probate courts. States' Br. 3-14. Not only is this assertion based on a

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on will-probate, this rule originates in the "peculiar constitution of the English courts" in 1789, when Congress enacted the first Judiciary Act. *Broderick's Will*, 88 U.S. at 509; *see also O'Callaghan*, 199 U.S. at 103 (citing historical analysis of *Broderick's Will*).

From these cases, Pierce attempts to derive the sweeping principle that federal courts lack jurisdiction to "disregard" probate judgments. Resp. Br. 28-31, 36-38.[13] But none of these cases holds that federal courts are *jurisdictionally* barred from deciding issues other than will validity, even if those issues were previously decided by probate courts. And, indeed, other decisions of this Court establish that a prior probate judgment on an issue other than will validity is *not* a jurisdictional bar. *E.g.*, *Colton*, 127 U.S. 300 (notwithstanding probate court judgment distributing property to decedent's wife under will, federal court had jurisdiction to impress property with trust in favor of decedent's mother and sister); *Johnson v. Waters*, 111 U.S. 640-75, 642 (1884) (federal court had jurisdiction over claim to set aside sales of testator's lands made by testamentary executor "under an order of the probate court"); *Arrowsmith v. Gleason*, 129 U.S. 86 (1889) (same result where sale of land was made under probate court authority by court-appointed guardian).

Of course, the Full Faith and Credit Act, 28 U.S.C. § 1738, requires that federal courts give preclusive effect to probate court judgments that resolve issues other than

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fundamental misreading of the cases, it violates this Court's holdings that federal jurisdiction cannot be impaired by state legislation creating probate courts. Pet. Br. 42-46.

[13] Pierce's argument presupposes that the probate court judgment preceded the federal judgment. In fact, the probate court judgment *followed* the bankruptcy court judgment by a year. JA 45, 106. Its preclusive effect thus turns on a number of issues the Ninth Circuit never reached, including whether Vickie's claim was a "core" bankruptcy matter. App. 1-38; SER 11932; Vickie's Combined Appellee's Brief/Cross-Appellant's Opening Brief at 87-93, 129-54.

will validity where preclusion is properly raised and proved. But preclusion is not jurisdiction: "If a federal plaintiff 'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . . , *then there is jurisdiction* and state law determines whether the defendant prevails under principles of preclusion.'" *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517, 1527 (2005) (emphasis added).[14]

The present case is not governed by the will-annulment cases because Vickie's claim did not challenge Howard's will, or even his primary trust. App. 28, 163, 167; *see also* Resp. Br. 37 n.28 ("Vickie does not specifically ask the federal court to set aside the Trust or declare it invalid"). The district court found only that Howard intended a gift for Vickie in the form of an irrevocable trust, and that Pierce interfered. App. 78-136, 202-07, 215-19. Accordingly, there is jurisdiction to decide Vickie's claim, and the effect of the probate court judgment is determined by preclusion law.[15]

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[14] Pierce claims preclusion law provides insufficient protection because duplicative probate-related litigation, even if ultimately unsuccessful, "imposes enormous costs on the parties and the federal courts." Resp. Br. 26. But these costs are inherent in "Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts." *Exxon Mobil*, 125 S. Ct. at 1519; *see also Mandeville*, 318 U.S. at 49 (federal suit for construction of a will; "where the judgment sought is strictly in personam for the recovery of money . . . both a state court and a federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one court, which may be set up as res judicata in the other.")

[15] The district court held that the probate court judgment did not preclude the federal claim, and the Ninth Circuit never reached the issue. SER 10600-11, 11788; App. 37. The district court was correct. Vickie did not fully litigate her tortious interference claim in the probate court; she dismissed it mid-way through trial, no jury instructions were given on it, and the jury made no findings relating to it. SER 8426-27, 8585, 10306, 10605, 12260-61 & n.2, 12453 & n.9; *compare* JA 33-35, *with* JA 54-103; App. 163, 166-67. Nor did the probate court rule

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Pierce attempts to bring Vickie's claim within the will-invalidity cases by suggesting that although the district court did not *actually* invalidate Howard's will or trust, it *effectively* did so because the intended trust for Vickie was somehow incompatible with the primary trust because the two trusts were competing for the same assets. Resp. Br. 33-35, 36-38. Not so: A finding that Howard intended to give Vickie a gift during his life out of assets that were held in his primary trust (which at the time was revocable and placed no restrictions on his ability to use its assets, ER 531, SER 11240-41) did not "invalidate" the primary trust, any more than spending or giving away money after drafting a will "invalidates" the will. Creating a will or trust with residuary beneficiaries (like Howard's here, ER 537, 794) does not define *what* assets will be distributed upon death, but only to whom assets should pass. Thus, a decedent's use of his assets during his life for any purpose – whether by moving them into another trust or using them any other way – cannot invalidate a testamentary document.

B. Pierce's Suggested Expansion Of Statutory Limits On Federal Probate-Related Jurisdiction Is A Matter For Congress, Not The Courts.

Pierce urges that even if the present case does not "fall neatly" within this Court's precedents, it should

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on her dismissed claim or preclude her from pursuing it in federal court; it stated: "We didn't try any issue of interference with inter vivos gift at all." SER 8660; *see also* SER 8674 (Vickie's federal suit is "only a claim for damages against Pierce, personally, individually, based on his personal, individual conduct, and [that] had nothing to do with this Court's jurisdiction over this Estate"), 8658, 8663-64. It also did not find that Vickie's claim was a compulsory counterclaim, JA 129; SER 8670-71; *see* Pet. Br. 42 n.30, or a claim over which it had exclusive jurisdiction, JA 116; SER 8664 (only "deciding all the issues concerning the Estate," but "not any complaints that [Vickie] has against [Pierce]"), 8669, 8674.

"adapt" – that is to say, *expand* – the probate exception consistent with the doctrine's "animating principles." Resp. Br. 40. But these so-called "animating principles" – the most important of which, Pierce contends, is protecting state probate jurisdiction from federal interference in order "to avoid competing struggles among courts," *id*. at 18 – simply do not exist. As we have shown, the limit on federal diversity jurisdiction to probate and annul wills derives from the distribution of power among the English courts, not a Congressional comity-based policy judgment. Pet. Br. 19-23. Moreover, this Court has never held that all probate-related matters must be centralized in a single court to avoid irreconcilable jurisdictional conflicts.[16] To the contrary, this Court expressly has held that even if it "may be convenient" for all probate-related claims to be heard in a single court, that fact does not "deprive [the federal courts] of jurisdiction to hear and determine a controversy between citizens of different states." *Hess v. Reynolds,* 113 U.S. 73, 77 (1885).[17] And, as Pierce himself concedes, Resp. Br. 28, this Court repeatedly has affirmed federal jurisdiction to decide all manner of probate-related disputes, notwithstanding the exclusive jurisdiction of state courts to distribute probate assets *after* those disputes are resolved. *See* cases cited at Pet. Br. 11-25.[18]

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[16] Pierce's authorities say nothing of the sort – including *Union Bank of Tennessee v. Vaiden*, 59 U.S. 503, 507 (1855), which Pierce quotes for the proposition that "This Court has recognized that, if federal courts could exercise unlimited concurrent jurisdiction over probate matters, 'the conflict of jurisdictions would be irreconcilable and disastrous.' " Resp. Br. 23. The quoted language, however, is not the Court's; it is *counsel's argument*, which the Court *rejected*. *Union Bank of Tennessee*, 59 U.S. at 507.

[17] Indeed, this Court's cases illustrate that multiple-court involvement in succession determinations is commonplace. *E.g.*, *Hanson v. Denckla*, 357 U.S. 235 (1958); *Riley v. New York Trust Co.*, 315 U.S. 343 (1942).

[18] Adjudication of related (or even identical) issues in multiple courts is a distinguishing feature of our system of concurrent federal/

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The policy arguments of Pierce and his amici are simply irrelevant here, because the jurisdiction of the lower federal courts is the exclusive province of Congress. *E.g.*, *Ankenbrandt*, 504 U.S. at 698. "Achieving a better policy outcome – if what [respondent] urges is that – is a task for Congress, not the courts." *Hartford Underwriters*, 530 U.S. at 13-14.

CONCLUSION

For the foregoing reasons, Petitioner urges that the decision of the Ninth Circuit Court of Appeals be reversed.

Respectfully submitted,

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state jurisdiction. *Exxon Mobil*, 125 S. Ct. at 1526-27. This Court therefore has been careful, in the interests of "harmonious cooperation of federal and state tribunals," not to permit state and federal courts concurrently to *administer* the same *res*. *Princess Lida v. Thompson*, 305 U.S. 456, 466 (1939). However, that principle has "*no application* to a case in a federal court . . . wherein the plaintiff seeks merely an adjudication of his right of his interest as a basis of a claim against a fund in the possession of a state court." *Id.*; *see* Pet. Br. 23-24. Here, because, as Pierce admits, at Howard's death there were no assets in his probate estate or trust, there was no *res* for the probate court to possess or administer. SER 5770, 6878-79, 7578, 7784, 11304. Moreover, Vickie's bankruptcy counterclaim sought only adjudication of her damages claim against Pierce; it did not seek to seize or control any property in the custody of the probate court. JA 23-25; App. 28, 162, 166-67.