No. 04-1544

IN THE

Supreme Court of the United States

VICKIE LYNN MARSHALL,

Petitioner,

v.

E. PIERCE MARSHALL,

Respondent.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the "probate exception" bars the exercise of bankruptcy jurisdiction over a cause of action that, under applicable state probate law, Petitioner was required to assert, and actually did assert unsuccessfully, in the state probate case.

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PRELIMINARY STATEMENT

This case involves a dispute concerning the intended disposition of the assets of the late J. Howard Marshall II ("J. Howard"), as well as a conflict between a state probate court and a federal district court over which court should resolve that dispute. Petitioner is J. Howard's widow, Vickie Lynn Marshall, a/k/a Anna Nicole Smith ("Vickie"). Respondent is J. Howard's son, E. Pierce Marshall ("Pierce").

During his lifetime, J. Howard gave Vickie gifts of property and cash worth over $6 million. In his written estate plan ("Estate Plan"), J. Howard left all of his remaining assets to persons other than Vickie. Vickie commenced proceedings in the Texas probate court ("Probate Court") challenging the Estate Plan and contending that, contrary to that plan, J. Howard intended to give her an additional gift in the form of a separate trust to provide her with additional funds after his death. Among other allegations, Vickie asserted in the Probate Court that Pierce had "tortiously interfered" with her "expectancy of a gift." The Probate Court resolved all competing claims regarding J. Howard's intended disposition of his assets; held that J. Howard did not intend to give Vickie any additional gift; resolved all claims of improper conduct surrounding the Estate Plan and validated the plan; and dismissed Vickie's tortious interference claim.

The federal district court in California ("District Court") reached the opposite conclusion. Contrary to the Probate Court's judgment, the District Court ruled that the Estate Plan was invalid and did not reflect J. Howard's intent; that J. Howard instead intended to create a separate trust for Vickie; and that Pierce had "tortiously interfered" with her "expectancy of a gift" by manipulating the Estate Plan. The question presented is whether, under this Court's precedents addressing federal court jurisdiction over probate matters, the District Court had jurisdiction to adjudicate these issues and determine that Pierce should be liable for J. Howard's failure to create a trust for Vickie out of the assets in his Estate Plan.

For nearly two hundred years, this Court has adhered to the rule that federal courts lack jurisdiction over a claim that involves probate matters if the adjudication of the claim would "interfere" with probate proceedings or judgments. The Court's precedents

establish that interference exists, and a federal court lacks jurisdiction over a claim otherwise within its jurisdiction, if the adjudication of the claim in federal court would require (1) exercising the core probate functions of a probate court, such as administering an estate or determining the validity of an estate planning instrument; (2) disregarding or setting aside a probate court's probate judgment; or (3) resolving critical questions of law or fact that, in the performance of its core probate functions, a probate court must decide. The adjudication of Vickie's claim in federal court involves each type of interference. Accordingly, the court of appeals correctly held that the District Court lacked jurisdiction in this case.

STATEMENT

J. Howard met Vickie in 1991 at a club where she danced. PA[1] 67. They were married in 1994, when he was eighty-nine and she was twenty-six. PA 3. The marriage lasted fourteen months, ending with J. Howard's death on August 4, 1995. ER 95; PA 7.

In 1982, J. Howard established his Estate Plan, consisting of two principal instruments: a will (as amended, the "Will"), and a living trust (as amended, the "Trust"). ER 131, 264, 510, 819, 1018, 2623. Years before J. Howard met Vickie, he placed all of his assets in the Trust and designated Pierce and others to receive these assets upon his death. ER 392, 528, 644; PA 3. The Will is what is known as a "pourover" will because it provides that, upon J. Howard's death, all of his property not already in the Trust must be transferred to the Trust. ER 514-16. Because J. Howard intended the Trust to govern the distribution of his property upon his death, the Trust, rather than the Will, was his principal estate-planning device. For probate purposes, the Trust is what is known as a "will substitute" because it performs all the functions of a traditional will. *See* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109 (1984) ("*Langbein*").

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[1] "PA" refers to the Petition Appendix. "JA" refers to the Joint Appendix. "ER" refers to certain "excerpts of record" filed in the Ninth Circuit pursuant to that court's local rules.

During his lifetime, J. Howard – a lawyer and former Trusts and Estates professor at the Yale Law School – never designated Vickie as a beneficiary under his Will or Trust, even though he amended these instruments repeatedly both before and after their marriage. ER 510, 647-51, 819; PA 3-4. Instead, during his lifetime, J. Howard gave Vickie gifts of cash and other property worth over $6 million that he obtained largely with borrowed funds. ER 2547-48, 3302. These gifts are evidenced in part by an "Act of Donation," which conveyed substantial property to Vickie "in consideration of her marriage to me." PA 6. Disappointed by her exclusion from J. Howard's Will and Trust, Vickie brought claims in both state and federal court, leading to ten years of contentious litigation between herself and Pierce.

The Initial Probate Proceedings. Vickie's attempts to challenge the Estate Plan began four months before J. Howard's death, when she commenced proceedings in the Probate Court ("Probate Case") seeking a declaration concerning the Trust's validity, JA 9-12, and alleging that Pierce had tortiously interfered with her property rights with respect to J. Howard's assets, *id*. 11-12; *see* PA 11.[2]

Three days after J. Howard died, Vickie filed a further application in the Probate Court, seeking a declaration that J. Howard had died intestate. PA 11. Pierce opposed this application on the ground that his father *had* left a will, and sought to admit J. Howard's Will into probate. *Id*. Vickie thereafter contested the Will, *Id.*, and further challenged the validity of the entire Estate Plan, ER 2864, 2870-72. Vickie did not dispute that J. Howard had given her numerous gifts. Instead, she claimed that J. Howard

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[2] Vickie plainly errs in contending (Pet. Br. 3 & n.4) that she did not participate initially in the Probate Case. The record demonstrates that Vickie commenced the Probate Case and, from the beginning, alleged in the Probate Case that the Trust was invalid and that Pierce had tortiously interfered with her alleged entitlements. ER 5620. Although Pierce moved early in the Probate Case to dismiss her initial allegations, the Probate Court declined to do so, and Vickie's initial allegations, amended and supplemented in her subsequent filings in the Probate Court, remained pending until the Probate Court entered its final judgment dismissing all of her claims.

intended to give her much more of his property and that the only reason he did not was that Pierce had wrongfully thwarted his intent. JA 26-31. Vickie alleged that J. Howard had instructed his attorneys to create a "catch-all trust" for her benefit containing substantial property, ER 2845-46, but that Pierce had intervened to prevent this instruction from being carried out, ER 2851-53. She contended that Pierce had procured through forgery, "fraud, mistake, duress, and/or undue influence," a power of attorney from his father, as well as an amendment to the Trust that rendered it irrevocable. ER 2850. Vickie further alleged that Pierce used the power of attorney and other undue influence to make it impossible for his father to give assets to her. JA 28-31. Vickie requested that the Probate Court declare both the Will and Trust invalid so that the bulk of J. Howard's property could be distributed under state rules of intestacy more favorable to her. ER 2870-72.

Pierce filed a counterclaim asking the Probate Court to issue a declaratory judgment that the Will and Trust were valid. PA 11. The Probate Court proceeded to resolve the competing claims regarding J. Howard's intent; any improper conduct surrounding the Will and Trust; the validity of his Estate Plan; and the ultimate disposition of his assets. JA 119, 124.

The Initial Bankruptcy Proceedings. While the Probate Case was under way, Vickie's housekeeper obtained a sexual harassment judgment against her for more than $800,000. ER 3048. In response, on January 25, 1996, Vickie filed a chapter 11 case ("Bankruptcy Case") in the bankruptcy court in Los Angeles ("Bankruptcy Court"). PA 12.

On May 7, 1996, Pierce filed a "non-dischargeability" complaint in the Bankruptcy Court asking that the court deny Vickie a discharge of any debt that she might owe arising from a defamation suit that Pierce had filed previously in state court against Vickie and her lawyers. ER 922-26.[3] Shortly thereafter,

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[3] Because of the intervention of Vickie's Bankruptcy Case and the imposition of the automatic stay, *see* 11 U.S.C. § 362, Pierce dismissed Vickie without prejudice from the pending state court defamation action, and proceeded solely against her attorneys. Pierce settled with one of the attorneys, and obtained an $8.5 million jury verdict against the other, which he also subsequently settled.

Vickie filed in the Bankruptcy Court a "counterclaim" to Pierce's non-dischargeability complaint asking the Bankruptcy Court to adjudicate her claim that Pierce had tortiously interfered with her expectancy of a gift from J. Howard.[4] JA 23-25. This claim is indistinguishable from the tortious interference claim that Vickie filed in the Probate Court. *Compare* JA 23-24 *with* JA 28.[5] Vickie alleged in the Bankruptcy Court that J. Howard had promised to provide her with an "inheritance and/or gift" and that Pierce had prevented J. Howard from effecting this inheritance or gift through his Will or Trust by, among other things, "obstructing the express wishes of Mr. Marshall, by deceiving Mr. Marshall, . . . by preparing documents and by ostensibly making transfers of property of Mr. Marshall [in and out of the Trust] which were inconsistent with his expressed wishes and desires." JA 24.

On July 8, 1996, Pierce moved to dismiss Vickie's counterclaim, arguing that the Bankruptcy Court lacked jurisdiction to resolve her allegations because they were subject to resolution only in the pending Probate Case. ER 957-60; PA 13. The Bankruptcy Court denied Pierce's motion on August 14, 1996. ER 3366.[6] On March 8, 1999, the Bankruptcy Court confirmed

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[4] The Bankruptcy Court subsequently granted Vickie's motion for summary judgment on the non-dischargeability complaint. ER 2758. Instead of resolving the narrow bankruptcy question of whether the defamation claim was subject to discharge, the Bankruptcy Court summarily determined that Vickie had no liability for any defamatory conduct. ER 2757.

[5] Vickie plainly errs in claiming (Pet. Br. 3) that her filing in the Bankruptcy Court was the first time that she alleged her tortious interference claim in any court. As noted, Vickie first challenged the validity of the Trust in 1995 when she commenced the Probate Case and alleged at that time that Pierce had tortiously interfered with her rights. ER 5615-17.

[6] Vickie errs in claiming (Pet. Br. 4.) that Pierce waited until 1999 to move to dismiss her tortious interference claim for lack of jurisdiction. Pierce first moved to dismiss her claim much earlier. ER 957, 1049-69. Pierce also sought to have the bankruptcy litigation withdrawn to the District Court. ER 2019; *see* 28 U.S.C. § 157(d). On January 12, 1999, after the District Court had granted Pierce's withdrawal motion, the bankruptcy judge stated that he intended to submit a secret memorandum

Vickie's chapter 11 plan, thereby resolving Vickie's bankruptcy petition. ER 2200-01. Even though Vickie's Bankruptcy Case had ended, the Bankruptcy Court proceeded to adjudicate her state law probate claim against Pierce.

The Bankruptcy Court's Subsequently Vacated Judgment. In October, 1999, at the beginning of the Bankruptcy Court's hearings on Vickie's tortious interference claim, the presiding judge held a press conference in open court during which he invited members of the press to ask questions about the pending case. ER 2393-95.[7] During the hearings that followed in the Bankruptcy Court, Pierce was precluded from contesting the essential elements of Vickie's claim as a sanction for alleged discovery abuse, a sanction that Pierce vigorously disputed and that the District Court subsequently vacated. ER 2173-75.[8]

On September 27, 2000 – on the eve of jury selection in the Probate Case – the Bankruptcy Court issued a decision in favor of Vickie, based on "factual determinations" that the court entered

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(the "Secret Memo") to the district judge "to assist in his review of the matter," and that the Secret Memo would not be available to Pierce. ER 2158. The contents of the Secret Memo have never been disclosed. ER 2207-08. The District Court acknowledged receipt of the Secret Memo, ER 2207, and vacated its prior order withdrawing the litigation, ER 2209, 2211.

[7] A *Newsweek* reporter took the podium to ask questions. ER 2393-95. The presiding judge answered them and discussed the relationship between the Bankruptcy Case and the Probate Case. *Id*.

[8] The Bankruptcy Court initially issued its sanctions order on February 2, 1999, ER 2172-75, which the District Court later vacated for lack of evidentiary support, PA 14. On May 20, 1999, the Bankruptcy Court reissued its sanctions order with the addition of some footnotes and without conducting an evidentiary hearing. *Id.* at 14-15. On January 18, 2000, the Bankruptcy Court *sua sponte* vacated its reinstated sanctions order. *Id.* at 16. Nevertheless, the Bankruptcy Court relied on the then-vacated sanctions order in its September 28, 2000 judgment against Pierce. *Id.* at 16-17. Pierce again appealed the sanctions determination to the District Court, which again vacated the sanctions as part of its vacatur of the Bankruptcy Court's ultimate judgment against Pierce. *Id.* at 186-87. In fact, Pierce did not commit any discovery abuse, as demonstrated to the court of appeals. *See* JA 190-99.

solely as a discovery sanction. PA 16. Among other things, the court found (as a discovery sanction) that Pierce had fraudulently altered the Trust to make it irrevocable and concluded that Vickie "would have received half of the community property but for [Pierce's] actions in making the . . . Trust irrevocable." ER 3036-37. The court reasoned that this was so because, under its interpretation of Texas law, J. Howard's failure to include Vickie in his Will entitled her to a "widow's election," pursuant to which she was "entitled to receive half of the community property that passes through [J. Howard's] estate." *Id*. at 3037. The court determined that, if the Trust had remained revocable, its assets would have been part of the estate subject to Vickie's "widow's election." *Id.*

On October 6, 2000, the Bankruptcy Court issued a revised opinion offering a new theory of the case. PA 16. Whereas the prior decision had concluded that Pierce had tortiously interfered with Vickie's right to inherit J. Howard's wealth, ER 3033, the new decision held that J. Howard had, instead, intended to give Vickie a gift during his lifetime by transferring a substantial portion of his property from the Trust to a separate "catch-all trust" for Vickie. ER 3049. The court determined that Pierce had tortiously interfered with this expectancy (again as a discovery sanction, ER 3049 n.5), by firing the lawyer that J. Howard had instructed to create the "catch-all trust." ER 3049, 3054. Under these new findings, the court awarded Vickie $449,754,134, ER 3055, calculated, in part, based on the court's assumptions about increases in the price of oil, ER 3049 n.7. The court subsequently awarded Vickie an additional $25 million in punitive damages. JA 40-44.

Pierce appealed to the District Court. On June 19, 2001, the District Court agreed that the state law dispute between Vickie and Pierce did not fall within the Bankruptcy Court's "core" jurisdiction and therefore vacated the Bankruptcy Court's judgment. PA 22, 171-86. The District Court, however, rejected Pierce's argument that the District Court lacked jurisdiction over Vickie's claim under the "probate exception" to federal jurisdiction, PA 158-70, and declared that it would adjudicate Vickie's probate claim *de novo*, PA 186-87.

The Probate Jury Verdict and Final Judgment. On September 18, 2000, the Probate Court commenced a jury trial to

resolve the pending claims regarding J. Howard's intentions; whether the Will and Trust were tainted by misconduct; the validity of the Will and Trust; allegations of improper estate-planning transactions; and whether Pierce had tortiously interfered with Vickie's alleged expectancies. JA 106. Whereas the Bankruptcy Court's hearings lasted five days, the probate jury trial lasted over five months, ending on March 1, 2001. *Id.* While the Bankruptcy Court heard from only a handful of witnesses and refused to hear witnesses that would have testified on Pierce's behalf, the Probate Court heard the testimony of over forty witnesses for all the parties and received hundreds of items of evidence. ER 4066-71; JA 106-140.

Vickie participated fully in the Probate Case. According to the probate judge's record, Vickie's counsel spent 3590 minutes examining witnesses, including 1031 minutes questioning Pierce. ER 4070. Vickie's counsel also questioned fourteen other witnesses, including all five witnesses who later testified on the same issues before the District Court. ER 8, 4070-71, 4173-75. Vickie herself testified for approximately six days, ER 4071; called seven witnesses as part of her case in chief, ER 4069-70; and called three rebuttal witnesses, ER 4070.[9]

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[9] Vickie also fully litigated her tortious interference claim in the Probate Case. JA 26-32. Prior to trial, Vickie identified the causes of action against Pierce that she proposed to submit to the jury, *id.* 33, including her claim of tortious interference with a gift, and allegations of fraud, duress, and undue influence, *id*. 33-35. On October 2, 2000, Vickie's counsel declared in his opening statement that "[t]his is a case about tortious interference with an intent to give an *inter vivos* gift." *Id.* 36-37. In discussing the "evidence" that he intended to present, Vickie's counsel referred to exactly the same "evidence" that Vickie later relied on in federal court. ER 4124-27, 4138, 4147, 4164-66; PA 55-130. At the end of the probate trial, and after the Bankruptcy Court entered its later-vacated decision in her favor, Vickie moved to dismiss her claims in the Probate Court. PA 17-18. The Probate Court warned Vickie that withdrawing her claims in the Probate Case would not preclude the Probate Court from determining the validity of J. Howard's Will and Trust; all of the various challenges to the Estate Plan; and J. Howard's true intentions regarding the disposition of his property, including whether he ever intended to make any gift to her; and that she would be

On March 7, 2001, the Texas jury returned its verdict upholding the validity of J. Howard's Trust and Will and rejecting the various claims seeking recoveries at odds with the Estate Plan. JA 55, 62. The Texas jury rejected all of the various allegations that the Trust and Will did not reflect J. Howard's true intentions or were the subject of any misconduct. These included the allegation that the Trust had been forged or altered; that J. Howard had been the victim of fraud, duress, manipulation, or undue influence; that Pierce had interfered with J. Howard's intent; and that J. Howard lacked the requisite mental capacity when he executed his Will and Trust. JA 55-56, 62, 75-76, 84-85, 93. [10] The jury also rejected Vickie's claim that J. Howard promised her half of his assets. JA 93.

On December 7, 2001, the Probate Court entered its final probate judgment ("Probate Judgment"). JA 106.[11] In that judgment, the Probate Court admitted J. Howard's Will to probate, finding the Will to be genuine and valid and not the product of improper conduct. *Id.* 118-20. The court also found the Trust to be genuine and valid and not the product of improper conduct. *Id.* 124. The court further determined that any and all claims by Vickie regarding J. Howard and his property, "including but not

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bound by the court's determination. *Id.* at 18. Vickie insisted nonetheless on withdrawing her claims. *Id.* Vickie remained as a counter-defendant in the case, owing to Pierce's amended declaratory judgment action to determine her rights and claims (which the Probate Court refused to dismiss, ER 3446, 3472), and, as noted, she actively participated in the Probate Case through its conclusion. Notably, following the Bankruptcy Court's ruling in her favor, Vickie did not establish that this decision was binding in the Probate Case. Instead, she sought and obtained a series of injunctions from the Bankruptcy Court enjoining the Probate Case. ER 3807-16. The Probate Court then enjoined Vickie from enforcing her injunctions. ER 3922. The District Court later reversed the Bankruptcy Court's injunctions. ER 3989-90.

[10] Vickie thus plainly errs in claiming (Pet. Br. at 5) that the jury verdict addressed only one question pertaining to her.

[11] The court entered its initial judgment on August 15, 2001, an amended judgment on October 15, 2001, and its final judgment on December 7, 2001. The final judgment, quoted in the text, alters the prior judgments in ways not relevant here.

limited to claims that [J. Howard] intended but failed to give her or to leave her any portion of such property during his life or upon his death, were required by law to have been asserted as compulsory counterclaims in this proceeding." *Id.* 129. On the merits of Vickie's claim, the Probate Court 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] either prior to or upon his death." *Id.* 130. The court also ruled "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 Trust] because of any representations, promises, or agreements." *Id.* The Probate Court held that (1) all of Vickie's claims were resolved and dismissed, *id*. 127-28; (2) Vickie was entitled to "take nothing" from Pierce, *id*. 130-31; and (3) Pierce was entitled to his inheritance free and clear of any claim by Vickie, *id*. 125-26. Each and every one of the foregoing matters were fully litigated in the Probate Case, including the Probate Court's determination that it had exclusive jurisdiction under the Texas Probate Code over each of the foregoing, and its conclusion that Vickie's claim was required to be brought in the Probate Case. JA 116, 130; ER 2522-25, 2683-87.[12]

The Federal District Court Proceedings and Judgment. Soon after the Probate Court entered its Probate Judgment, and *prior* to the commencement of trial in the District Court, Pierce moved in the District Court to dismiss Vickie's pending state law probate claims. ER 4733-4742. The District Court denied the motion. *Id*. The court held that the Probate Court had misunderstood Texas law when it concluded that Vickie was required to bring her claim of tortious interference in the Probate Case. ER 5202. The court further concluded that it was not required to give preclusive effect to any state court judgment entered after a federal trial had commenced, even if the state judgment was issued prior to final judgment in the federal case. ER 5204-06.[13]

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[12] Vickie thus plainly errs in asserting (Pet. Br. at 6) that the Probate Court did not resolve her tortious interference claim.

[13] The District Court also held initially that it was not required to give preclusive effect to the Probate Judgment because it was not, at that time,

On March 7, 2002, three years after the end of Vickie's Bankruptcy Case, and three months after the Probate Court's final Probate Judgment, the District Court entered its decision on Vickie's state law tortious interference claim. PA 39, 147.[14] Acknowledging that Texas courts had not recognized a claim for "tortious interference" with an "expectancy of an *inter vivos* gift" under Texas law, *id.* 130, the court concluded nonetheless that there was such a tort in Texas, *id.* 132.[15] The elements of that tort, the court predicted, would be "(1) the existence of an expectancy; (2) a reasonable certainty that the expectancy would have been realized but for the interference; (3) intentional interference with the expectancy; (4) tortious conduct involved with the interference; and (5) damages." *Id.* 132-33. The court found that Vickie had established each element, based on findings that directly contradicted the core findings reached by the Probate Court in validating J. Howard's Will and Trust and disposing of his property.

For example, although the Texas jury had specifically found that J. Howard never agreed to give Vickie half of his estate, the District Court found that "J. Howard made numerous promises to Vickie that she would receive half of what he owned." *Id.* 133. The District Court accepted Vickie's claim (rejected by the Probate Court) that J. Howard intended to create a "catch-all" trust for Vickie "that would provide her with money after his death," *id.*

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final. ER 5203-04. By the time the District Court entered its judgment, however, it acknowledged that the Probate Judgment had long since attained finality. PA 41.

[14] Vickie contends that, as part of its review, "the district court examined all the evidence before the bankruptcy court, plus substantial documentary evidence that Pierce previously had refused to produce." Pet. Br. 6. The "documentary evidence that Pierce previously had refused to produce," however, consisted only of the privileged counsel files of Pierce's attorneys, containing such information as trial strategy memos and confidential attorney-client communications. All non-privileged information had already been produced, both in the Bankruptcy Court and in the Probate Court. Vickie obtained Pierce's confidential attorney-client communications as a result of the District Court's summary decision to give them to Vickie. *See* ER 4063-64.

[15] It is undisputed that Texas law governs Vickie's claim.

134, and that "he wanted Vickie to have the benefit of the gift after he had passed away," *id*. 82. Although the Probate Court had found that the Will and Trust, and all amendments thereto, were valid and untainted by misconduct, the District Court found that Pierce tortiously interfered with Vickie's expectancy by falsifying and backdating amendments to, and transactions with, the Trust, *id.* 134-36, and by engaging in illegitimate "estate planning transactions for J. Howard," *id.* 136. Disagreeing with the Probate Court's contrary holdings, the District Court also determined that the Trust had been tampered with and forged. *Id.* 125-26. Based on these findings, the District Court awarded Vickie $88,585,534.66 in compensatory and punitive damages. *Id.* 147.[16]

The Decision of the Court of Appeals. Pierce appealed to the Ninth Circuit, arguing that the federal courts lacked jurisdiction to resolve Vickie's claim in light of the long-standing probate exception to federal jurisdiction, and that, in the alternative, the District Court violated the Full Faith and Credit Act by failing to give preclusive effect to the Probate Judgment. Agreeing with the first contention, the Ninth Circuit declined to address any other grounds for reversal, and vacated the District Court's judgment. PA 2-3.[17]

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[16] In conducting its review, the District Court refused to hear many of Pierce's percipient witnesses, but heard all of Vickie's witnesses. ER 5274-87. Although the District Court based its judgment on voluminous "findings" adverse to Pierce, these findings are not based on actual evidence, for all of the evidence – including the testimony of the percipient witnesses who were permitted to testify – was that J. Howard never intended to give Vickie the gift that she claims, and that Pierce never interfered with any such gift. A full analysis of the clear error in the District Court's unsupported "findings" was presented to the court of appeals. *See* JA 143, 212-239. Moreover, when pressed at oral argument in the court below, Vickie's counsel could not identify any actual evidence in the record in support of her claim that J. Howard intended to create a trust for her or that Pierce had suppressed the trust or otherwise interfered with its creation or fulfillment, and no such evidence exists. JA 240-45.

[17] Pierce also challenged the District Court's judgment on four additional grounds: (1) Vickie's alleged cause of action of "tortious interference" with an "expectancy of a gift" does not exist as a matter of Texas law;

The court of appeals began by recognizing that this Court's cases have long established that "matters of strict probate are not within the jurisdiction of the courts of the United States." PA 24 (quoting *Sutton* v. *English*, 246 U.S. 199, 205 (1918)). While federal courts may resolve some disputes relating to a probate estate, they may not "interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Id.* (quoting *Markham v. Allen*, 326 U.S. 490, 494 (1946) (internal quotation marks omitted). The court rejected Vickie's contention that the probate exception applies only in diversity cases, PA 25-26, noting that the "evil to be avoided is federal interference with state probate proceedings," an evil that can arise as easily from a bankruptcy proceeding as from a diversity suit. *Id.* 26 (citation omitted). The court also relied on *Harris v. Zion Sav. Bank & Trust Co*., 317 U.S. 447 (1943), in which this Court applied the probate exception to bar the exercise of bankruptcy jurisdiction over a decedent's property. *Id.*

The Ninth Circuit then turned to the scope of the probate exception. Relying on this Court's description of the exception in *Markham*, the court held that, in addition to preventing a federal court from directly probating a will or administering an estate, PA 27, the probate exception prevents a federal court from "exercising jurisdiction over the matter [if] the federal court would: (1) interfere with probate proceedings; (2) assume general jurisdiction of the probate; or (3) assume control over property in the custody of the state court," *id.* 28 (citations omitted). The court added that the "reach of the probate exception encompasses not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument." *Id.* 29. "Such questions include fraud, undue influence upon a testator, and

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(2) the District Court violated Pierce's due process rights by failing to hear his evidence; (3) the District Court's "findings" of fact adverse to Pierce were clearly erroneous; and (4) the District and Bankruptcy Courts lacked jurisdiction to adjudicate her claim because Vickie's Bankruptcy Case had ended and any resolution of the claim would have no impact on her bankruptcy estate or creditors.

tortious interference with the testator's intent." *Id.* Vickie's claims, the court of appeals held, fell within the probate exception because they required the federal court to determine how J. Howard intended to dispose of his assets upon his death and to judge the validity of J. Howard's estate-planning instruments. *Id.* 30.

The court rejected Vickie's contention that her federal suit did not interfere with the Probate Case because it was a suit against Pierce *in personam*, rather than a claim against the estate. PA 31. "Regardless of the way in which Vickie Lynn Marshall seeks to characterize her suit, 'it is in substance nothing more than a thinly veiled will contest.'" *Id.* (citation omitted). In awarding damages against Pierce in a sum equal to the amount that the District Court thought Vickie should have received from the estate, "the power of the Texas probate court was negated." *Id.* 32. The court further rejected Vickie's claim that the probate exception did not apply because her claim arose from interference with an *inter vivos* gift rather than a testamentary bequest. *Id.* 33. "The probate exception applies not only to contested wills, but also to trusts that direct a post mortem disposition of the trustor's property." *Id.* Such a trust, the court noted, "is a recognized will substitute." *Id.*

Applying the probate exception to such claims, the court explained, was necessary in light of the practical function served by the exception. PA 34-35. Under Texas law (as in most states), "all claims against the decedent and his estate were required to be made in the probate proceedings," including Vickie's claim to an entitlement to a portion of J. Howard's assets, a claim that "went to the very essence of the testamentary instruments." *Id.* at 35. Similarly, any claim that Pierce improperly removed assets from the estate prior to his father's death, the court held, was "clearly within the exclusive jurisdiction of the probate courts of Texas." *Id.* 36. The Ninth Circuit therefore vacated the District Court's decision. PA 37-38.

SUMMARY OF ARGUMENT

As this Court has long recognized, the States have the power and the duty to establish probate systems to facilitate the final disposition of a decedent's assets. Like other States, Texas has discharged this responsibility by vesting its probate courts with exclusive jurisdiction over (1) the decedent's probate estate; (2) the

appointment and supervision of administrators of the estate; (3) the determination of the validity of the decedent's estate plan (or that the decedent died intestate); and (4) the resolution of all claims and controversies necessary to the performance of these core probate functions. Like other States, Texas has also proscribed rules that protect the exclusivity and finality of probate proceedings and judgments in its courts. Review of these protections demonstrates that they are critical to the sound functioning of the Texas probate system.

For nearly two centuries, this Court's probate exception doctrine has served to protect the administration of state probate proceedings by sheltering from federal interference the exclusive jurisdiction of state probate courts to perform their core probate responsibilities. As this case demonstrates, the exercise of federal jurisdiction over controversies and issues that probate courts ordinarily resolve in performing their core probate functions invites only confusion, diseconomy, and conflict among state and federal courts at the expense of the sound administration of probate proceedings and the harmonious relations among state and federal tribunals. This is perhaps most vividly illustrated in this case by the fact that, following the Bankruptcy Court's entry of its later-vacated judgment, the Bankruptcy Court enjoined ongoing probate proceedings in the middle of the Probate Court's jury trial.[18]

This Court's precedents make plain that the touchstone for application of the probate exception is interference with probate proceedings. The Court's precedents further establish that interference exists, and that a federal court lacks jurisdiction over a claim otherwise within its jurisdiction, if the adjudication of the claim in federal court would require the federal court to (1) exercise the core probate functions of a probate court, such as administering an estate or determining the validity of an estate planning instrument; (2) disregard or set aside a probate court's probate judgment; or (3) resolve critical questions of law or fact that, in the performance of its core probate functions, a probate court must decide. In this case, the adjudication in federal court of

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[18] *See* note 9 *supra* (discussing injunctions).

Vickie's claim for "tortious interference" with an "expectancy of a gift" involves all three types of interference.

First, the adjudication of Vickie's claim in federal court involves the exercise of core probate functions because it necessarily requires the determination that J. Howard intended to give Vickie a gift from his assets in the form of a separate "catch-all" trust in competition with his written Trust governing the disposition of all of his property. Unless J. Howard actually intended to establish this catch-all trust, Vickie can have no claim. Yet establishing that a decedent truly intended to create an instrument disposing of his assets in competition with his written estate plan lies within the core probate functions of a Texas probate court, and the exercise of federal court jurisdiction over such claims negates the exclusive jurisdiction of the probate court over the same matter.

Second, the adjudication of Vickie's claim in federal court requires the federal court to disregard the Probate Court's Probate Judgment. Under Texas law, the Probate Court's decision validating J. Howard's Estate Plan extinguished Vickie's claim as a matter of well-established state law. The District Court's adjudication of Vickie's tort claim is also completely inconsistent with the Probate Court's prior findings and conclusions, made in connection with its validation of the Estate Plan, that J. Howard never intended to give Vickie the gift that she claims, and that his Estate Plan is not tainted by misconduct. It is also wholly inconsistent with the Probate Court's *in rem* determination quieting title to J. Howard's assets in Pierce and determining that Pierce is entitled to his inheritance free and clear of any claim by Vickie. Moreover, Texas law provides that probate judgments are binding against the world, except as applicable state procedures permit them to be set aside, and the adjudication of Vickie's claim in federal court impermissibly circumvents this salutary rule.

Third, the adjudication of Vickie's claim in federal court requires the resolution of critical questions of law or fact that the Texas Probate Court typically decides in performing its core probate functions, and actually did decide in this case, including the determination of J. Howard's intent regarding the disposition of his assets, and any misconduct surrounding his Estate Plan, each of which are core elements of Vickie's claim. It also requires the determination that J. Howard's Estate Plan was invalid because

Vickie cannot establish a legitimate expectancy of a gift without demonstrating that the Estate Plan is invalid. Here, the Probate Court, in determining that J. Howard's Estate Plan is valid, resolved all of these issues against Vickie in its Probate Judgment, and no clearer case of interference can be shown than the District Court's assumption of jurisdiction over precisely the same issues.

Although Vickie attempts to exclude her tort claim from the scope of the probate exception by artful pleading, her claim is, in substance, a challenge to J. Howard's Estate Plan. Similarly, Vickie's contention that the probate exception does not apply in bankruptcy is also unsound. The probate exception is best conceived as a presumption that, when Congress establishes a font of federal jurisdiction, it does not intend that jurisdiction to be exercised in ways that would interfere with probate proceedings. The evils that the probate exception seeks to avoid arise no less in the exercise of bankruptcy jurisdiction than in other areas, and there is no reason to believe that Congress intended bankruptcy courts to exercise greater probate jurisdiction than federal district courts sitting in diversity.

Finally, there is no merit to Vickie's contention that the probate exception should be subsumed within available abstention doctrines. Apart from the fact that this Court flatly rejected the same invitation in construing the analogous domestic relations exception in its decision in *Ankenbrandt v. Richards*, 504 U.S. 689, 706 n.8 (1992), the policies underlying the probate exception clearly would be ill-served by re-characterizing a nearly two-hundred-year-old jurisdictional doctrine into a largely discretionary abstention concept. For all of these reasons, the decision of the court of appeals should be affirmed.

ARGUMENT

A. Probate Courts Perform Specialized Functions That Require Exclusive Jurisdiction.

This Court stated almost a century ago that "[i]t is the duty of the sovereign to provide a tribunal, under whose direction the just demands against the estate may be determined and paid, the succession decreed, and the estate devolved to those who are found to be entitled to it" and that "somewhere the power must exist to decide finally, as against the world, all questions which arise in the settlement of the succession." *Tilt v. Kelsey*, 207 U.S. 43, 55-56

(1907). In the United States, that duty and power belongs to the sovereign States, which have discharged their duty through the establishment of state probate systems. This Court has long recognized that this "is a sovereign right which may not be readily frustrated." *Riley v. New York Trust Co.*, 315 U.S. 343, 355 (1942); s*ee also Lalli v. Lalli*, 439 U.S. 259, 268 (1978) (recognizing a State's right to "provide for the just and orderly disposition of property at death" and stating that "[w]e long have recognized that this is an area with which the States have an interest of considerable magnitude"); *Case of Broderick's Will*, 88 U.S. 503, 509 (1874).

Although the details of state probate systems differ from one jurisdiction to the next, they typically employ state probate courts to perform a variety of vital probate functions. It is evident that probate courts could not effectively perform their core probate duties without exclusive jurisdiction to do so. Recognizing this, state probate systems (of which Texas is typical, *see* TEX. PROB. CODE ANN. ("TPCA") § 1 *et seq*.),[19] generally vest their probate courts with exclusive jurisdiction over several categories of core probate matters, and incorporate mechanisms to protect both the exclusivity and finality of probate jurisdictions and judgments.

Probate Estate. When an individual dies, state probate law typically provides for the marshalling of the decedent's assets into a "probate estate," and vests its probate courts with *in rem* jurisdiction over the estate and all property within it. As this Court has long acknowledged, *in rem* jurisdiction of this kind is necessarily exclusive to avoid competing struggles among courts over possession and control of the same property, and applies not only to formal probate estates but also to *in rem* and *quasi in rem* disputes over property held in trust. *Princess Lida v. Thompson*, 305 U.S. 456, 466 (1939) ("the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other . . . applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court

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[19] Although the Texas Probate Code has since been amended, the 1999 version applies here.

must control the property"); *Gelston v. Hoyt*, 16 U.S. 246, 315 (1818). Under the Texas Probate Code, the Texas probate courts are vested with exclusive *in rem* jurisdiction over all probate estates and over trust property related to an estate. TPCA §§ 5A(b), 5A(c)(2), 5(e); *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981) (noting the *in rem* nature of Texas probate proceedings).[20]

Administration. After an individual dies, a probate court ordinarily appoints and supervises a representative to administer the decedent's estate, with the responsibility for collecting and maintaining the decedent's property for distribution among creditors and beneficiaries. *See generally* TPCA Chs. 7-8; *Bailey v. Cherokee County Appraisal Dist.*, 862 S.W.2d 581, 584-85 (Tex. 1993) (observing that administrator, "as trustee of the estate property, assumes legal title" and is responsible for paying court-ordered debts). In Texas, this includes the administration of trust property related to a decedent's estate. TPCA §§ 5A(b), 5A(c)(2), 5(e). This procedure could not work effectively if multiple courts had concurrent jurisdiction to appoint and instruct multiple administrators of the same property. Accordingly, the probate court's jurisdiction to appoint and instruct the administrator is exclusive. *E.g.*, TPCA § 5A(b); *Perfect Union Lodge of San Antonio v. Interfirst Bank of San Antonio N.A.*, 748 S.W.2d 218, 221 (Tex. 1988) (probate court had jurisdiction to direct sale of trust property for benefit of decedent's intended beneficiaries); *Byers v. McAuley*, 149 U.S. 608, 614 (1893).[21]

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[20] In some counties in Texas, particularly those that do not have large metropolitan centers, Texas has assigned the exercise of probate jurisdiction under the Texas Probate Code to statutory courts that perform functions other than adjudicating probate matters. *See* TPCA § 5(b); *Sutton v. English*, 246 U.S. 199, 207-08 (1918) (discussing exclusive jurisdiction of Texas county court over probate claim of undue influence). In this case, however, the Probate Case was administered by a statutory probate court vested with probate jurisdiction under Texas law.

[21] Although not implicated here, an exception exists for property located outside the territorial jurisdiction of the probate court. *See Hanson v. Denkla*, 357 U.S. 235, 248-49 (1958).

Validation of Estate Plan and Resolution of Related Controversies and Issues. As part of the process of reaching a "firm and perpetual" determination governing who is entitled to receive a decedent's property, state probate law typically vests probate courts with jurisdiction to declare the validity of a decedent's estate plan (or to determine that the decedent died intestate, so that the decedent's property remaining after the payment of debts may be distributed in accordance with the State's intestacy rules). An estate plan is either valid "against the world" or it is not, and this determination is not feasibly divisible among courts exercising concurrent jurisdiction over disparate groups of interested parties. Probate proceedings are, by design, collective in nature, to address in one place and at one time the interests of all potential beneficiaries, and in Texas, only the probate court has jurisdiction to declare the validity of a decedent's estate plan. TPCA §§ 5(c) & 5A; *English v. Cobb*, 593 S.W.2d 674, 676 (Tex. 1979) (the "obvious purpose" for the broad grant of exclusive jurisdiction to the state probate courts was "so that such courts could more fully and quickly settle a decedent's estate in one proceeding").

Historically, probate proceedings focused on the formal probate of wills. Over the past century, however, a variety of "will substitutes" have overtaken formal wills as the primary means of transferring a decedent's wealth upon his death. Will substitutes may take several forms and include *inter vivos* trusts such as the Trust at issue in this case. *Langbein* at 1117. Such instruments are functionally indistinguishable from wills to the extent that they reserve to their owner until death complete control over property governed by the instrument in question, including the power to name and change beneficiaries. *Id.* 1109. Accordingly, disputes regarding the validity and administration of will substitutes, like the *inter vivos* Trust in this case, are also typically subject to exclusive probate court jurisdiction. In Texas, the probate courts have exclusive jurisdiction to determine disputes regarding the validity of a decedent's trust to the extent that the trust functions as a will substitute or is otherwise related to the estate. *Perfect Union*

Lodge, 748 S.W.2d at 221 (probate court had jurisdiction over decedent's trust governing the disposition of his assets).[22]

Probate courts are also typically responsible for resolving competing claims, entitlements, and issues concerning the disposition of the decedent's property that are intertwined with determining the validity of the decedent's estate plan. These include claims seeking to establish that the decedent intended to dispose of his or her assets other than as provided in an estate plan, or otherwise invalidate the plan on grounds of undue influence, fraud, duress, or other tortious conduct, as well as claims that depend for their existence on the validity of competing estate-planning instruments. A probate court's exclusive jurisdiction to determine the validity of an estate plan would hardly be exclusive if some other court had concurrent jurisdiction to resolve these kinds of controversies because they are precisely the kinds of matters that the probate court must consider and resolve in upholding or overturning a contested estate plan for the benefit of all interested parties. Accordingly, in Texas, a probate court has exclusive jurisdiction over all such claims and issues. TPCA §§ 5(c) & 5A; *Perfect Union Lodge*, 748 S.W.2d at 221; *Cobb*, 593

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[22] In general, Texas probate courts have concurrent jurisdiction with state district courts over "all actions involving an *inter vivos* trust." TPCA §§ 5(d), 5A(c)(2). However, "[i]n situations where the jurisdiction of a statutory probate court is concurrent with that of a [state] district court, any cause of action appertaining to estates or incident to an estate shall be brought in a statutory probate court rather than in the district court." TPCA § 5A(b). Under Texas law, a matter "appertains" or is "incident" to an estate if it involves a matter "relating to the settlement, partition, and distribution of estates of deceased persons," including all "claims" to the decedent's assets. TPCA § 5A(a); *Bailey*, 862 S.W.2d at 585. These concepts are construed broadly: "An action is 'incident or appertaining' to an estate when the outcome will have a direct bearing on the assimilation, collection, and distribution of the decedent's estate." *Falderbaum v. Lowe*, 964 S.W.2d 744, 747 (Tex. App. 1998). Thus, any matter involving an *inter vivos* trust that is also "incident" or that "appertains" to an estate lies within the probate court's exclusive jurisdiction. TPCA § 5(c) (all applications, petitions and motions regarding "probate" must be filed and heard in a probate court); *Perfect Union Lodge*, 748 S.W.2d at 221.

S.W.2d at 676; *Pullen v. Swanson*, 667 S.W.2d 359, 361-63 (Tex. App. 1984); *see also Bailey*, 862 S.W.2d at 585-86; *In re Graham*, 971 S.W.2d 56, 59 (Tex. 1998) (guardianship); *see also Sutton*, 246 U.S. at 208.

Protecting Exclusivity and Finality. State probate law typically prescribes rules and procedures to protect and enforce the exclusivity and finality of probate jurisdiction and judgments. Exclusive jurisdiction would ill serve the probate system if other courts were free to disregard the judgment of the probate court, or had jurisdiction to entertain a collateral attack on that judgment. Accordingly, like probate judgments in other states, Texas probate judgments are binding against the world unless set aside in the manner provided by Texas law. *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981); *Ladehoff v. Ladehoff*, 436 S.W.2d 334, 336-37 (Tex. 1968); *see also Broderick's Will*, 88 U.S. at 514-15 ("[I]n the United States, wherever the power to probate a will is given to a probate or surrogate's court the decree of such court is final and conclusive, and not subject, except on an appeal to a higher court, to be questioned in any other court, or be set aside or vacated by the court of chancery on any ground.").

Under Texas law, attempts to set aside the judgment of a probate court other than by ordinary appeal are strictly limited in time and procedure. TPCA § 31 (any bill of review must be filed with probate court within two years of judgment); TPCA § 93 (any will contest must be made within two years of probate). Moreover, such claims must be brought in the court that issued the original probate judgment, and are in the nature of a continuation of the original probate proceeding. *Estate of Devitt*, 758 S.W.2d 601, 604 (Tex. App. 1988); *Crawford v. Williams*, 797 S.W.2d 184, 186 (Tex. App. 1990) (will contest must be brought before original probating court); *Hardin v. Hardin*, 66 S.W.2d 362, 364 (Tex. App. 1933) (same). Correspondingly, Texas courts other than the probate court lack jurisdiction to entertain claims based, for example, upon the validity of some instrument other than a validated estate plan. *Messer v. Carnes*, 71 S.W.2d 580, 582 (Tex. App. 1934) (Texas district court had no jurisdiction over claim for property based on claim of invalid will where probate court had determined probated will to be valid). Moreover, in order to protect their jurisdiction, Texas probate courts have the power to transfer any Texas case falling within their exclusive jurisdiction to

their own dockets. TPCA § 5B; *In re Ramsey*, 28 S.W.3d 58, 63-64 (Tex. App. 2000).

Consistent with these limitations, once a probate court has validated an estate plan, Texas law recognizes that all tort claims based on expectancies of inheritance contrary to the plan are foreclosed. *Thompson v. Deloitte & Touche*, 902 S.W.2d 13, 16 (Tex. App. 1995) (probate judgment establishing validity of decedent's intended scheme of distribution precludes tortious interference claim based on expectancy of a different distribution); *Neill v. Yett*, 746 S.W.2d 32, 35 (Tex. App. 1988) (same). Likewise, except as Texas law expressly allows (e.g., in situations not relevant here involving incapacitated persons or those who did not receive adequate notice), Texas law does not permit disappointed beneficiaries to proceed directly against other beneficiaries to recover their alleged entitlements, but vests the probate court with exclusive jurisdiction to determine "all actions for trial of the right of property" related to the disposition of the decedent's assets. TPCA § 5A(b).

One of the key functions of any probate proceeding is to clear title to the decedent's assets otherwise clouded by disputes over its proper ownership. *Simmons v. Saul*, 138 U.S. 439, 455-56 (1891) ("[A] judgment, decree, sentence, or order passed by a competent jurisdiction, which creates or changes a title or any interest in an estate, is not only final as to the parties themselves and all claiming under them, but furnishes conclusive evidence to all mankind that the right or interest belongs to the party to whom the court adjudged it."); *Langbein* at 1117. In this case, the Probate Judgment effectuated this very purpose, holding that Pierce is entitled to his inheritance free of any competing claim, including any claim by Vickie. JA 125-26.

B. Federal Courts Lack Jurisdiction To Interfere With State Probate Proceedings.

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." *Bank of Tennessee v. Vaiden*, 59 U.S. 503, 507 (1855). In view of the importance of a final and unitary determination of the controversies arising in probate, this Court has firmly established that federal courts, including bankruptcy courts, lack subject matter jurisdiction to undertake core probate functions

or to interfere with the state court's exercise of its probate powers. *E.g.*, *Harris*, 317 U.S. at 450; *Sutton*, 246 U.S. at 205; *O'Brien*, 199 U.S. at 114-16; *Byers*, 149 U.S. at 619; *Broderick's Will*, 88 U.S. at 515-20; *Armstrong v. Lear*, 25 U.S. 169, 175-76 (1827). Like the related "domestic relations exception," the probate exception is best conceived as a presumption of statutory construction that, when Congress creates a font of federal jurisdiction, it does not thereby intend for federal courts exercising that jurisdiction to interfere with probate matters unless Congress' intent to interfere is clearly and specifically expressed. *Ankenbrandt v. Richards*, 504 U.S. 689, 700 (1992) (explaining that when Congress amends a jurisdictional provision "we presume Congress [made the amendment] with full cognizance of the Court's nearly century-long interpretation of the prior statutes, which had construed the statutory . . . jurisdiction to contain an exception for certain domestic relations matters"). The probate exception doctrine has existed and evolved for nearly two hundred years, and there is no basis for rejecting it now or for declining to apply it to Vickie's claim in this case.

1. There is no basis for abandoning the probate exception that Congress has not seen fit to displace.

Vickie urges as an initial matter that this Court should abandon the probate exception altogether as an anachronism. Pet. Br. 28-29. That argument is misplaced. While Congress' long acceptance of the exception is, in itself, reason enough to retain it, *see Ankenbrandt*, 504 U.S. at 700, the doctrine's continued vitality arises principally from the essential practical function it serves. As this Court explained more than 100 years ago, "[w]hatever may have been the original ground of this rule (perhaps something in the peculiar constitution of the English courts), the most satisfactory ground for its continued prevalence" is the probate court's need to conclusively settle the validity of an estate plan:

> The public interest requires that the estates of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership; and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with least chance

> of injustice and fraud; and that the result attained should be firm and perpetual.

Broderick's Will, 88 U.S. at 509-10. The probate exception has endured precisely because the jurisdictional exclusivity that it promotes is critical to the sound administration of proceedings in probate.

This case illustrates the vital need for the probate exception and the severe consequences that follow when it is not respected by a federal court. Vickie's attempts to litigate her probate-based state law claims in both state and federal court instigated an unseemly open conflict between the two court systems, leading each court to enjoin the parties from proceeding in the other.[23] The conflict arose because, despite her artful pleading, Vickie's federal claims sought a federal resolution of the same probate claims pending before the Texas Probate Court. Had she succeeded, the efforts of the Texas Probate Court to establish the validity of the Estate Plan and J. Howard's true intentions would have been rendered a nullity. In the absence of the probate exception, the authority to decide a claim like Vickie's would fall to the court that could decide the question fastest, rather than to the court with the specialized expertise in state probate law. In the process, the State's interest in administering probate proceedings, including the special need for reconciling the competing claims of numerous parties relating to the validity of the decedent's estate plan, would be frustrated.

The need to retain control of probate issues in probate court is further illustrated by the District Court's recognition that it was unclear whether state courts would even recognize Vickie's novel state law claim of "tortious interference" with an "expectancy of a gift." PA 130; *see also Ankenbrandt*, 504 U.S. at 703-04 (concluding that the related "domestic relations" exception is justified on ground that "state courts are more eminently suited to work of this type than are federal courts," in part, because of the state courts' "judicial expertise" in a specialized area of state law). The fact that no Texas court has ever recognized Vickie's alleged cause of action illustrates vividly how the federal adjudication of

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[23] *See* note 9 *supra* (discussing injunctions).

probate matters can stray dangerously beyond the borders of established probate administration. Federal courts should not be engaged in adjudicating novel probate causes of action that disrupt or supplant the administration of probate proceedings because doing so quintessentially robs the States of their prerogative over the design of state probate systems. Yet, inevitably, that is what federal courts will be asked to do in cases of this kind unless the probate exception applies.

The probate exception has also long served to prevent the kind of forum shopping exhibited in this case. Indeed, as this case demonstrates, disregard for the probate exception encourages those disappointed by a state probate decision to seek a remedy in federal court, rather than through appellate review in the state with the possibility of eventual review by this Court. Vickie's insistence in this case that her claims are not barred by the preclusive effects of the Probate Judgment, *see* Pet. Br. 42 n.30, demonstrate that the possible defenses of *res judicata* and collateral estoppel will be insufficient to stem the tide of disappointed beneficiaries into federal court, particularly when the financial and emotional stakes are high. Even if ultimately unsuccessful, such collateral litigation on probate issues imposes enormous costs on the parties and the federal courts; can delay final resolution of the decedent's last wishes for years; and introduces harmful uncertainty into estate planning.

Because the probate exception serves such manifestly important purposes, the lower federal courts have repeatedly invoked or cited the doctrine in literally hundreds of decisions. *See* Allan D. Vestal & David L. Foster, *Implied Limitations of the Diversity Jurisdiction of Federal Courts*, 41 MINN. L. REV. 1, 13 (1956-1957) ("[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."). Because of its critical importance, the Court should reject Vickie's invitation to abandon the probate exception in this case, but, rather, should apply it to bar federal adjudication of her claim.

2. The scope of the probate exception.

Although the precise boundaries of impermissible interference with probate matters have never been defined conclusively, the Court's precedents establish that interference

exists, and that a federal court lacks jurisdiction over a claim otherwise within its jurisdiction, if the adjudication of the claim would require the federal court to do any one of the following: (1) exercise the core probate functions of a probate court, such as administering an estate or determining the validity of an estate planning instrument; (2) disregard or set aside a probate court's probate judgment; or (3) resolve critical questions of law or fact that, in the performance of its core probate functions, a probate court must decide.

Exercise of Probate Powers. This Court's earliest cases establish that a federal court may not undertake to exercise the core functions of a probate court. Thus, in *Armstrong v. Lear*, 25 U.S. 169 (1827), this Court held that a plaintiff may not directly or indirectly establish in federal court the validity of a will. There, the plaintiff brought suit in federal court to establish, on the basis of an instrument purporting to grant him a bequest, the "right of the plaintiff to receive payment out of the assets of the testator." 25 U.S. at 175. The Court held that the claim of payment depended on the validity of the purported will and that no will can be effective until "admitted to probate." *Id*. Accordingly, the Court held, "it is indispensable to the plaintiff's title, to procure, in the first instance, a regular probate of this testamentary paper" in the relevant state probate court and, therefore, the claim could not proceed in federal court. *Id.* at 176.

This Court has since repeatedly reaffirmed that a federal court lacks the power to probate a will or to proceed on a claim that requires the federal court to determine the validity of a will not yet subject to probate. *E.g.*, *O'Callaghan v. O'Brien*, 199 U.S. 89, 110 (1905) ("[A]s the authority to make wills is derived from the state, and the requirement of probate is but a regulation to make a will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of courts of the United States."); *Gaines v. Chew*, 43 U.S. 619 (1844) (federal court lacked jurisdiction to hear claim against defendants alleged to have "fraudulently concealed, suppressed, or destroyed" a will because claim depended on the validity of the allegedly suppressed will which had never been probated).

Nor may a federal court undertake to directly exercise any of the other core powers of a probate court, including, for example, administration of the estate, *Markham*, 326 U.S. at 494, or

direction of the distribution of the assets of the estate among competing creditors, *e.g.*, *Waterman v. Canal-Louisiana Bank & Tr. Co.*, 215 U.S. 33, 44-46 (1909), or otherwise exercise control over the property in the probate estate, *see Byers*, 149 U.S. at 614.

Not every activity undertaken by a probate court is, of course, necessarily a core probate function beyond the competence of any other court or sheltered under the probate exception doctrine. This Court has long recognized, for example, that establishing a debt owed by the decedent is not generally a core function of the probate court protected by the doctrine and, consequently, may be undertaken by other state courts of general jurisdiction and by the federal courts with appropriate jurisdiction. *See Markham*, 326 U.S. at 494; *Byers*, 149 U.S. at 615; *Hess* v. *Reynolds*, 113 U.S. 73, 75-79 (1885); *Green's Administratrix v. Creighton*, 64 U.S. 90, 107-08 (1859); *see also Ingersoll v. Coram*, 211 U.S. 335, 360 (1908) (federal court may establish lien against beneficiary's share of estate); *Hagan v. Walker*, 55 U.S. 29, 33-34 (1852) (creditor may maintain a bill for the discovery of the assets of his deceased debtor). Likewise, once the validity of an estate plan has been established by a probate court, a federal court may interpret the will to establish the right of "'legatees and heirs' and other claimants against a decedent's estate to 'establish their claims' *so long as the federal court does not interfere with the probate proceedings*." *Markham*, 326 U.S. at 494 (emphasis added).

But each of these examples define narrowly tailored instances in which interference with core probate functions would not, in fact, occur. Moreover, as the Court has explained, the "occasional departures from the rule are always carefully placed on such special grounds that they tend rather to establish than to weaken its force." *Broderick's Will*, 88 U.S. at 510. As shown below, the adjudication of Vickie's claim in federal court clearly interferes with the essential functions of the Probate Court, the probate exception applies, and federal jurisdiction is lacking.

Disregard of Probate Judgments. Just as a federal court may not undertake to perform a probate court's core functions itself, it also may not disregard or revisit determinations made by a probate court in the exercise of its protected jurisdiction. Thus, for example, when a state probate court has probated a will, a federal court may not entertain a claim to set the probate aside, even on the

ground that the probated document was a fraud, or that the probate judgment itself was obtained by fraud. *See Tarver v. Tarver*, 34 U.S. 174, 180 (1835) ("And the bill cannot be sustained on the allegation that the probate is void. An original bill will not lie for this purpose. If any error was committed in admitting the will to probate, it should have been corrected by appeal.");[24] *Fouvergne v. New Orleans*, 59 U.S. 470, 473 (1855) (same for probate judgment allegedly obtained by fraud); *see also O'Callaghan*, 199 U.S. at 116 (same).

A federal court must also decline, not only to directly set aside a probate judgment, but also to hear a claim that is inconsistent with the judgment of a probate court. In *Fouvergne*, for example, the federal-court plaintiff claimed to be entitled to a share of the estate of a decedent under the intestacy laws of Louisiana because the will that had been probated by the Louisiana probate court was, in fact, invalid and the probate fraudulently obtained. Because accepting that claim would require the federal court to reject the validity of the probated will, it was barred: "The courts of the United States have no probate jurisdiction, and must receive the sentences of the courts to which the jurisdiction over testamentary matters is committed, as conclusive of the validity and contests of a will; an original bill [in federal court] cannot be sustained upon an allegation that the probate of a will is contrary to law." 59 U.S. at 473. The Court reaffirmed once again that any objection to the probate court's judgment must be the subject of a state court appeal, not a collateral attack in federal court. *Id*.[25]

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[24] Subsequent cases established a limited exception, discussed below, which has no application to this case.

[25] The United States concedes that "[o]nce the state court has established a will through probate . . . if state law requires all contests to that will to be brought in the probate court itself or on appeal from that court, then allowing a subsequent federal suit to annul an already-probated will would directly interfere with the in rem state proceedings." U.S. Br. 15-16. As the government concludes, "unless state law provides for such a collateral challenge by way of an independent suit . . ., a contest to an established will must be brought in the state probate proceedings or on direct appeal therefrom." *Id.*

So too must a federal court decline to entertain or order remedies that, in effect, negate the probate court's judgment. In *Broderick's Will*, the Court found no jurisdiction to entertain an equitable action for fraud because the action could succeed only if the probate judgment were ignored. 88 U.S. at 517. The plaintiffs in that case alleged that the defendants had obtained certain property under a forged will. The plaintiffs prayed for a constructive trust under which the defendants would be required to hold the property they obtained under the will in trust for the plaintiffs (the rightful owners if the will were invalid). *Id*. at 507-08. In rejecting this indirect collateral attack on the probate judgment, the Court explained that the claim of fraud could only prevail if the will was wrongly probated: "On the establishment or non-establishment of the will depended the entire right of the parties; and that was a question entirely and exclusively within the jurisdiction of the Probate court." 88 U.S. at 517. The Court held that, in such circumstances the federal court "will not interfere, for it has no jurisdiction to do so." *Id.*; *see also Ellis v. Davis*, 109 U.S. 485, 494 (1883) (federal court lacked jurisdiction to entertain action to recover property from defendant premised on invalidity of will owing to claim of undue influence because plaintiff had adequate remedy under state probate law).

This rule is subject to an important exception (although not one applicable to this case): Because a central purpose of the probate exception is to permit a State to assign the task of deciding particular probate questions to a single court for uniform and final disposition, the exception does not apply when a State has chosen *not* to make the question the exclusive province of a court exercising probate jurisdiction. Thus, if a plaintiff would be permitted to raise a particular probate-related claim in a state court of general jurisdiction, the plaintiff can raise that claim in federal court, too. *E.g.*, *Sutton*, 246 U.S. at 205; *O'Callaghan*, 199 U.S. at 111-112.

This exception permits federal courts to hear claims challenging probated wills and other probate decisions in some cases. *E.g.*, *Ellis*, 109 U.S. at 496 (holding that, in a State "where, by its law, its own courts of general civil jurisdiction are authorized thus incidentally and collaterally to try and determine the question of the validity of a will and its probate in a suit involving the title to real property, there can be no question that the circuit courts of

the United States might have jurisdiction of such a suit by reason of the citizenship of the parties"); *Gaines v. Fuentes*, 92 U.S. 10, 20-21 (1876) (because Louisiana permitted invalidity of a probated will to be raised as a defense against a claim that the will was a muniment of title); *Gaines v. Relf*, 43 U.S. 619 (1844) (same). In States that, like Texas, require such challenges to be made in the court that probated the will initially, however, federal courts lack jurisdiction to hear the contest. *See Sutton*, 246 U.S. at 207; *O'Callaghan*, 199 U.S. at 115-16. As discussed below, because Vickie's claim falls within the latter category of cases, it is barred.

Deciding Questions Falling Within the Probate Court's Core Jurisdiction. A federal court impermissibly interferes with a probate court's exercise of jurisdiction over its core functions, not only by directly setting aside or ignoring the probate court's judgment, but also by deciding questions that effectively usurp the probate court's functions or may bar the probate court from making an independent determination on the factual and legal questions that are at the core of its probate responsibilities.

For example, if a federal court were to decide that a bequest is valid based upon a particular instrument, and issue its judgment before the completion of the probate of a second superseding instrument not presented in the federal case (perhaps because the party holding the superseding instrument was unaware of the federal case), the federal court could thwart the effectiveness of the superseding instrument by ordering payment of the bequest under the first instrument.[26] To prevent the piecemeal adjudication of what are essentially probate issues, this Court's cases, such as *Armstrong*, *Tarver*, *O'Callaghan*, *Broderick's Will*, and *Sutton*, proscribe federal jurisdiction over matters presented in actions superficially labeled as unrelated to probate, but that require as part of their adjudication the resolution of essential probate issues.

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[26] The federal decision might also lead to the odd and untenable consequence that the probate court would be required to accept the validity of the first instrument, insofar as it applied to the parties before the federal court, but nonetheless could hold that the superceding instrument was valid with respect to all others (since those not parties or privies to the federal judgment would not be bound by any preclusive effect of the federal judgment).

E.g., *Sutton*, 246 U.S. at 208 (recognizing that the suit "in an essential feature" involved the invalidity of the decedent's will, the Court observed that, under Texas law, disputes of this kind were assigned for resolution in Texas courts exercising probate jurisdiction as "merely supplemental to the proceedings for probate of the will and cognizable only by the probate court"). As discussed below, because Vickie's alleged cause of action for "tortious interference" with an "expectancy of a gift" falls within this category, it is also barred.

C. The Probate Exception Extends To Vickie's Tortious Interference Claim.

1. The adjudication of Vickie's claim in federal court caused a foreseeable and irreconcilable conflict of jurisdictions and judgments.

The federal adjudication of Vickie's claim for "tortious interference" with an "expectancy of a gift" strikes at the very heart of the Probate Court's core responsibilities and exclusive jurisdiction – determining how J. Howard intended to dispose of his assets and whether his Estate Plan was tainted by misconduct. Because of this necessary overlap, it was entirely foreseeable that the assertion of federal jurisdiction over Vickie's tort claim could lead to directly conflicting findings of fact and law between the state and federal courts concerning fundamental and essential probate issues that the Probate Court was required to decide in exercising its exclusive probate jurisdiction to fulfill its core probate responsibilities.

In this case, the Probate Court properly determined that it had exclusive jurisdiction under Texas law to determine the validity of the Trust. JA 116. Here, the Trust operated in tandem with the Will, and the Trust, rather than the Will, was J. Howard's principal vehicle for disposing of his assets upon his death. In addition, the whole point of Vickie's challenge to the Trust was to defeat the Trust on the ground that it was contrary to J. Howard's intent and tainted by misconduct so that all of the property in the Trust would then be part of J. Howard's estate free of the terms of the Trust. Vickie's theory was that, once the Trust was defeated, she could then claim a share of the assets under the Texas succession laws. ER 2870-72. Vickie's challenge to the Trust was thus "incident" or "appertaining" to J. Howard's estate within the meaning of the Texas Probate Code, not only because the Trust

operated in tandem with the Will, but also because Vickie's challenge *necessarily* related to "the settlement, partition, and distribution of estates of deceased persons." TPCA § 5A(a).

The Probate Court also properly determined that it had exclusive jurisdiction under Texas law over Vickie's claims, including any claim regarding "the making of any *inter vivos* or testamentary gift or transfer by [J. Howard] of any of his property," and "all affirmative claims and all filed and possible compulsory counterclaims raised by [Vickie]" (which "filed" claims include the tortious interference claim that she filed against Pierce in the Probate Case). JA 116. The Probate Court *necessarily* had exclusive jurisdiction under Texas law over Vickie's claim that J. Howard intended to give her a gift worth tens of millions of dollars from assets contained in his Estate Plan; her various other challenges to the Estate Plan based on any alleged misconduct; and her specific claim for "tortious interference" with an "expectancy of a gift" based on the same allegations. This is so because all of these claims involved key issues that the Probate Court had to decide in order to determine J. Howard's true intentions; validate his Estate Plan as untainted by misconduct; and resolve competing claims to the same property. *E.g.*, *Perfect Union Lodge*, 748 S.W.2d at 220 (stating that the purpose of the construction of a will or trust is to determine the decedent's intent and that "[t]he court shall effectuate that intent as far as legally possible"); *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963) ("Undue influence in the procurement of a testament is a ground for its avoidance.").

Moreover, as this Court has made plain, a state court's construction of its own jurisdiction is binding, and may not be disturbed collaterally, in federal court. *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident Health Ins. Guar. Ass'n*, 455 U.S. 691, 706-07 (1982); *Durfee v. Duke*, 375 U.S. 106, 116 (1963). Thus, although the Probate Court's construction of its jurisdiction under Texas law may not preclude a federal court from determining its own jurisdiction under federal law, it does conclusively establish the scope of the Probate Court's jurisdiction in this case.

The District Court's adjudication of Vickie's tortious interference claim necessarily tread upon this traditional, exclusive area of state probate jurisdiction and expertise. To begin with, Vickie contends that J. Howard intended to give her a gift in the

form of a "catch-all trust." It is undisputed, however, that, during the course of his entire relationship with Vickie, J. Howard kept *all* of his assets in his actual Trust. Thus, the assets in the Trust constitute the *only* source of the gift that Vickie claims. It is also undisputed that J. Howard never created a separate "catch-all trust" as a gift for Vickie, and that the Trust that J. Howard actually established provides that *all* of J. Howard's property is to be distributed to persons other than Vickie. Thus, the Trust and the alleged catch-all trust involve the same property, and only one of them can accurately reflect J. Howard's true intent.

As a matter of Texas law, either J. Howard intended his assets to be distributed as provided under the Trust (which the Probate Court determined), or he intended some other disposition, including a distribution to Vickie (which the Probate Court expressly rejected, but the District Court accepted). One *necessarily* precludes the other where, as here, Texas has prescribed a comprehensive procedure for resolving finally, and in a single forum, *all* competing theories regarding the decedent's intended disposition of the same assets. *Thompson*, 902 S.W.2d at 16 (probate judgment establishing validity of decedent's intended scheme of distribution precludes tortious interference claim based on expectancy of a different distribution); *Neill*, 746 S.W.2d at 35 (same). Likewise, except as Texas law expressly allows (e.g., in situations not relevant here involving incapacitated persons or those who did not receive adequate notice), it is inescapable that the District Court's acceptance of Vickie's theory regarding J. Howard's intent negated the Probate Court's contrary finding and, thus, interfered with its essential probate function of finally resolving the issue in the course of validating J. Howard's Estate Plan.

In addition to basing her claim on J. Howard's alleged intent to create a gift for her, Vickie contends that Pierce thwarted J. Howard's intent (i.e., tortiously interfered with it) by manipulating the Estate Plan. Specifically, she alleges that Pierce, by forgery, duress, fraud, and undue influence, prevented any of the assets in the Trust from being used to fund her alleged catch-all trust. Plainly, if the Trust is perfectly valid and untainted by any misconduct, then Vickie's claim must fail because, not only does the validity of the Trust establish conclusively that J. Howard intended to distribute all of his assets to persons other than Vickie

(rebutting the contrary theory underlying her claim), it likewise demonstrates conclusively that the manipulation she alleges did not occur.

Under Texas law, the Trust cannot be perfectly valid and untainted by misconduct (as the Probate Court expressly found), and at the same time be invalid and the object of rampant forgery, manipulation, duress, and fraud (which the Probate Court rejected, but the District Court accepted). Again, one determination necessarily precludes the other where, as here, Texas has prescribed a comprehensive procedure for resolving finally, and in a single forum, all claims of misconduct surrounding a decedent's Estate Plan. It is again inescapable that the District Court's acceptance of Vickie's allegations of wrongdoing negated the Probate Court's contrary findings and, thus, interfered with its essential probate function of finally resolving the issue in the course of validating J. Howard's Will and Trust.

As the Ninth Circuit correctly recognized, the District Court awarded Vickie damages based on what it believed she would have received if J. Howard had actually effectuated the gift that she claims. PA 32. This award plainly negated through the imposition of damages, not only the Probate Court's rejection of Vickie's gift theory and various challenges to the Estate Plan, but also the Probate Court's express determination that Pierce is entitled to his inheritance free and clear of any claim by Vickie.

2. Vickie's claims are barred by the probate exception.

The federal adjudication of Vickie's claim for "tortious interference" with an "expectancy of a gift" causes all three types of impermissible interference under this Court's probate exception doctrine.

Exercise of Probate Powers. In order to rule in Vickie's favor on her claim, the District Court was required to determine that Vickie had a legitimate expectancy of a gift on the theory that J. Howard intended to establish the catch-all trust that she claims.[27]

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[27] Indeed, as Vickie argued below, the existence of this catch-all trust is "central" to her claim. JA 243.

In other words, the District Court necessarily had to determine that J. Howard intended to create an instrument disposing of a portion of his assets in competition with (and in contravention of) the terms of the Trust. But the power to declare the validity of such a competing instrument, together with any entitlement arising from it, belonged exclusively to the Probate Court. Accordingly, the District Court inescapably interfered with the Probate Court's prerogative and the federal adjudication of Vickie's claim runs afoul of this Court's probate exception doctrine as applied in such cases as *Armstrong* and *O'Callaghan*.

Disregard of Probate Judgments. In order to rule in Vickie's favor, the District Court also was required to exercise the Probate Court's exclusive power to set aside its prior Probate Judgment, and otherwise disregard the prior judgment. Under Texas law, no court other than the probate court that determined the validity of an estate plan may entertain an action that conflicts with a prior probate judgment. *See Estate of Devitt*, 758 S.W.2d at 604; *Crawford*, 797 S.W.2d at 186 (will contest must be brought before original probating court); *Messer*, 71 S.W.2d at 582 (Texas state district court had no jurisdiction over claim for property based on claim of invalid will where probate court had determined probated will to be valid); *Hardin*, 66 S.W.2d at 364. Moreover, although no Texas court has ever recognized a cause of action for tortious interference with the expectancy of a gift, Texas courts have determined that, in the context of alleged claims for tortious interference with inheritance rights, such claims are barred by the successful probate of a will that contradicts the plaintiff's expectancy. *See Thompson*, 902 S.W.2d at 16; *Neill*, 746 S.W.2d at 35.

The preclusion of tortious interference claims that conflict with the result of a completed probate proceeding is a prudent and important measure designed to ensure that the tort does not become an instrument for undermining probate jurisdiction. In particular, requiring a tortious interference plaintiff to return to the probate court in order to first set aside a previously validated Estate Plan instrument protects against the radically inconsistent judgments obtained in the competing forums in this case. *See generally Jackson v. Kelly*, 44 S.W.3d 328, 332-33 (Ark. 2001).

Because a federal court could not provide Vickie any relief on her tort claim without first setting aside the Probate Judgment,

Vickie's claim is barred as long as the Probate Judgment validating the Trust stands.[28] This Court has repeatedly held that such claims fall within the probate exception. *E.g.*, *Ellis*, 109 U.S. at 494; *Broderick's Will*, 88 U.S. at 517; *Fouvergne*, 59 U.S. at 471-73. As these cases teach, if the Probate Court erred in concluding that the Will and Trust were valid, then Vickie's sole "remedy is in the state courts, according to their appropriate modes of proceeding." *Fouvergne*, 59 U.S. at 473.[29]

Vickie's adjudication of her claim in federal court is barred for the additional reason that the Probate Judgment expressly quiets title to J. Howard's assets in Pierce free and clear of any claim by Vickie. JA 125-26. This Court long ago concluded that

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[28] For this reason, it makes no difference that Vickie does not specifically ask the federal court to set aside the Trust or declare it invalid. *See* Pet. Br. 14 & n.12. It is enough that her claim can only succeed as a matter of law on the theory that the Trust is, in fact, invalid.

[29] Vickie suggests that the Bankruptcy Court's judgment was the first final order in this case and that, therefore, it was binding on the Probate Court. Pet. Br. 42 n. 30. By the time the Probate Court entered its judgment, however, the purported bankruptcy judgment in Vickie's favor had been vacated and, therefore, was not entitled to any preclusive effect. PA 22; *see* RESTATEMENT 2D JUDGMENTS § 16 (vacated judgments not entitled to preclusive effect); *cf.* FED. R. CIV. P. 60(b)(5) (judgment based on preclusive effect of prior decision that has since been vacated may be set aside). Contrary to Vickie's suggestion, the Probate Court was not required to immediately enter judgment in Vickie's favor in light of the questionable Bankruptcy Court judgment. *See* RESTATEMENT, *supra*, § 16 cmt. b (When "the actions are being maintained in different jurisdictions, or there is not an identity of claims but rather an identity of issues, it may still be advisable for the court that is being asked to apply the judgment as *res judicata* to stay its own proceedings to await the ultimate disposition of the judgment in the trial court or on appeal. This course commends itself if the disposition will not be long delayed and especially if there is substantial doubt whether the judgment will be upheld."). In any case, Vickie never established in the Probate Court that it was required to give preclusive effect to the vacated Bankruptcy Court judgment. *See Arizona* v. *California*, 530 U.S. 392, 410 (2000) (preclusion is an affirmative defense "ordinarily lost if not timely raised"); *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 349 n.9 (Tex. 1992) (same); *cf.* FED. R. CIV. P. 8(c) (same); TEX. R. CIV. P. 94 (same).

determinations of this kind are also not subject to collateral attack in federal court, and must be respected as binding against the world. *See Simmons*, 138 U.S. at 455-56. Accordingly, Vickie's claim fails for this reason too, unless and until the Probate Judgment is set aside.

Deciding Questions Falling Within Probate Court's Core Jurisdiction. It is equally clear that Vickie's claim required the federal court to adjudicate facts and legal questions that must be, and in fact were, established by the Probate Court in the exercise of its core probate functions.[30] These include the findings that J. Howard did not intend to give Vickie a gift and that his Estate Plan is untainted by misconduct. Given the interconnected nature of these findings and the Probate Court's duties, it is not surprising that the Probate Court held that Vickie's tortious interference claim is a compulsory claim under state law that she was required to assert in the Probate Case, to which she was a party. JA 129.[31] Federal jurisdiction over Vickie's claim is, accordingly, barred.

3. Vickie's attempts to remove her claims from the scope of the probate exception fail.

Vickie attempts to extricate her suit from the probate exception by pointing to various features of her tort claim that, she says, distinguish it from claims falling within this Court's established doctrine. Those attempts fail.

Vickie argues first that the probate exception does not apply to her suit because it "is against Pierce individually, not against Howard's estate." Pet. Br. 14. She contends that such a suit is "*inter partes*," and, therefore, outside the scope of the probate exception, *id.* at 16-18, and that federal courts have long exercised

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[30] Thus, even if the Probate Court had not won the race to judgment, the federal court nonetheless would have been precluded from resolving Vickie's claim because doing so would interfere with the Probate Court's core duties.

[31] Vickie argues (Pet. Br. 42 n.30) that the Texas Probate Court misinterpreted the Texas Rules of Civil Procedure on this question. That would be surprising indeed. In any event, for the same reasons that the federal courts had no authority to revisit the Probate Court's determination of its jurisdiction, they had no authority to second-guess the Probate Court's interpretation of its own procedural rules.

jurisdiction to annul previously probated wills and otherwise disregard probate judgments so long as the suit arose between two or more particular parties, *id.* at 13, 17, 21. Vickie is mistaken.

As noted, this Court has held that federal courts may not exercise *in rem* jurisdiction over the probate estate itself, *e.g.*, *Byers*, 149 U.S. at 614, and that *some* suits between individuals fall outside the probate exception (particularly when state law permits such a suit to be brought outside of probate court), *see supra* 27 (collecting cases). The Court has also made clear, however, that the probate exception *does* apply to some suits between individuals and that Vickie's suit is one of them. For example, in *Broderick's Will*, this Court held the probate exception to apply to an indistinguishable circumstance in which plaintiff pursued an *inter partes* suit, seeking a constructive trust to be imposed on individuals who obtained property as a result of the allegedly fraudulent will. 88 U.S. at 517. Because that suit, like this one, could succeed only by disregarding a prior probate judgment validating an estate plan, the federal court had no jurisdiction to hear it. *Id.*[32]

Vickie also suggests that this Court's decision in *Markham v. Allen* authorizes her suit. Pet. Br. 24-25. Critically, *Markham* did

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[32] As the Court explained in *O'Callaghan*, although a suit "*inter partes*" may be entertained in federal court, "we must . . . accurately fix the meaning of the words 'action or suit *inter partes.*'" 199 U.S. at 110. As the Court explained further, an action between two individuals is not an action "*inter partes*" if it involves, for example, "mere controversies which may arise on an application to probate a will because the state law provides for notice, or to disputes concerning the setting aside of a probate, when the remedy to set aside afforded by the state law is a mere continuation of the probate proceeding." *Id.* Moreover, in order to determine whether a state law cause of action is one "*inter partes*," it is necessary to determine whether "by custom or the statute law of the state" the action is one that may be heard only in the state probate court, or is otherwise a probate remedy. *Id*. 111-12; *see id.* 114-16 (where a proceeding to contest a will under state law can only be heard before the court that admitted the will to probate, and where the relief in that proceeding operates as against the entire world and not just the parties before the court, it is not an action *inter partes*); *Sutton*, 246 U.S. at 207-08.

not involve federal-court adjudication of either the validity of the decedent's estate plan or questions concerning the decedent's intent. 326 U.S. at 495-96. Instead, the role of the federal court was strictly limited in that case to merely substituting the United States for certain foreign beneficiaries, pursuant to a federal statute, *after* the probate issues had been resolved. Thus, the federal court had no occasion to address any substantive probate matters or otherwise interfere with the probate proceedings in any meaningful way. Moreover, any interference occasioned by the suit would have arisen only because Congress had taken the unusual step of enacting a statute that directly governed the distribution of probate assets and provided a cause of action under that statute for the United States as a party. While Congress obviously contemplated federal jurisdiction over the limited probate-related matters addressed in *Markham*, there is no indication that Congress intended to depart from the settled probate exception in a case such as this one, involving private parties to a state law dispute that unquestionably interferes with core probate functions.

Vickie further argues (Pet. Br. 26-27) that the scope of the probate exception should be "frozen" -- i.e., limited to a hodge-podge of particular holdings in this Court's prior cases, rather than governed by the animating principles that have led courts and Congress to retain the exception. As demonstrated above, even so "frozen," the exception precludes Vickie's suit in this case. But, even if this Court concluded that Vickie's suit did not fall neatly within its prior cases, that would not constitute grounds to refuse to adapt the doctrine in response to the changes in estate planning and probate administration that have been made over the past 150 years. The probate exception cannot serve its vital function if disappointed beneficiaries can, through clever pleading and novel tort theories, evade its essential boundaries.

Finally, contrary to the position taken by the Solicitor General, it is important to note that a proper interpretation of the probate exception has no real significance for the interests of the United States. As the government eventually acknowledges, well-established case law "would preclude application of any such exception to cases in which the United States is a party." U.S. Br. 14. Although the government gives scant attention to this latter point, the case law indeed makes clear that, even when Congress has expressly "divested the federal courts of jurisdiction . . . in a

specified class of cases," and even when, in so doing, Congress "ma[d]e no express exception of the United States" from that general jurisdictional restriction, the jurisdictional restriction will *not* be deemed to apply to the United States. *United States v. United Mine Workers of Am.*, 330 U.S. 258, 270-272 (1947). This Court has clearly held, on several occasions, that if any general restriction on the existing jurisdiction of the federal courts "is intended to reach the Government in the use of known rights and remedies, the language must be clear and specific to that effect." *United States v. Stevenson*, 215 U.S. 190, 197 (1909). *See Dollar Sav. Bank v. United States*, 19 U.S. (19 Wall.) 227, 239 (1873). There are, in short, no implied restrictions on the jurisdiction of the federal courts over claims of the United States: As this Court has held, if such a restriction were intended, Congress would not "omit to use 'clear and specific [language] to that effect' if it actually intended to reach the Government." *United Mine Workers*, 330 U.S. at 273 (quoting *Stevenson*, 215 U.S. at 197). *Accord NLRB v. Nash-Finch Co*., 404 U.S. 138, 146 (1971); *Leiter Minerals v. United States*, 352 U.S. 220, 225-226 (1957).[33]

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[33] Indeed, in the only case cited by the United States in which it appears that the government has *raised* the point that a general probate exception should *not* apply to the government because there is no "clear and specific" statement of legislative intent to that effect, the court expressly agreed with the government in holding that the probate exception does *not* apply to the government's right to litigate its tax and other claims in federal court. *In re Palmer's Will*, 11 F. Supp. 301, 304 (E.D. Okla. 1935). In the only other cases that the government cites as purportedly having any relevance to this issue (U.S. Br. at 1), the issue either was not addressed by the court at all (*Ashton v. Josephine Bay Paul & C. Michael Paul Found., Inc.*, 918 F.2d 1065, 1067-1068 (2d Cir. 1990)), or the government failed (or for some tactical reason declined) to raise this important jurisdictional point (*Estate of Threefoot*, 316 F. Supp. 2d 636, 642-645 (W.D. Tenn. 2004)). This question whether the United States is subject to the probate exception is, in any event, obviously not presented in this case. The government's tax claims against the Marshall estate were, in fact, addressed and resolved in the federal Tax Court, not in the Probate Court, and those tax claims have no bearing on the dispute involved in this case. The government's hypothetical objections to the possible application of the probate exception to the interests of the United States are thus, not only unsupported by the record, they are squarely

D. The Probate Exception Applies To A Bankruptcy Court's Adjudication Of A State Law Claim "Related To" A Bankruptcy Case.

Vickie also argues that the probate exception does not apply because the federal court's authority to adjudicate her state law claims derives, not from the diversity statute, but from 28 U.S.C. § 1334(b), which gives district courts non-exclusive bankruptcy jurisdiction over "civil proceedings . . . related to cases under title 11."[34] Pet. Br. 29-37. This argument also fails.[35]

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refuted by the actual conduct in the Probate Case. Moreover, the absence of any significant body of authority directly addressing the question whether the United States is subject to the implied probate exception to federal court jurisdiction is not merely accidental. To the contrary, it reflects the established consensus of almost 100 years of practice under the federal estate and income tax laws that the United States may indeed (as Congress has expressly provided) litigate its estate and income tax claims in the federal courts. Accordingly, there is plainly no need for the Court to address the unwarranted, hypothetical and premature concerns raised in the government's brief.

[34] Vickie's suggestion (Pet. Br. 30, 33-34 & n.25) that the federal district court has exclusive jurisdiction over Vickie's claims pursuant to section 1334(e)(1) is patently meritless, for that statute provides only *in rem* jurisdiction over the ordinary property of the bankruptcy estate, which does not include a debtor's causes of action. A contrary conclusion would conflict with numerous other provisions of the Bankruptcy Code, including section 1334(b), which provides that "[e]xcept as provided in subsection (e)(2), . . . the district courts shall have original *but not exclusive* jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." (Emphasis supplied).

[35] Although 28 U.S.C. § 1334 governs the district court's jurisdiction over bankruptcy cases, the jurisdiction of the bankruptcy court is governed by 28 U.S.C. § 157. Here, the Bankruptcy Court plainly lacked jurisdiction to enter a final order regarding Vickie's tort claim and, thus, the District Court properly vacated the Bankruptcy Court's purportedly final judgment. Like all federal courts, bankruptcy courts may exercise only the jurisdiction prescribed by Congress. *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995). Significantly, bankruptcy judges are not Article III judges, and Congress has authorized them to finally resolve only a limited category of matters that are relevant to the performance of their duties in administering bankruptcy estates. 28 U.S.C. § 157(b)(1). Although

This Court has never limited the probate exception to diversity jurisdiction. The Court has considered application of the probate exception in non-diversity settings – in *Markham* (United States a party) and in *Harris v. Zion Sav. Bank & Trust Co.*, 317 U.S. 447 (1943) (bankruptcy) – without even suggesting that the doctrine applies only in diversity cases.

To the contrary, in *Harris* – which Vickie fails even to mention – the Court applied the probate exception to reject the bankruptcy court's assertion of bankruptcy jurisdiction under an express statutory grant. There, the decedent farmer commenced a bankruptcy case before her death. After she died, the bankruptcy court abated her case and the administrator of the decedent's probate estate petitioned to revive her bankruptcy case. The then-applicable Bankruptcy Act plainly gave the bankruptcy court jurisdiction and authorized the personal representative to pursue

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bankruptcy judges may also resolve certain other matters peripheral to their administrative duties that "relate to" a bankruptcy case, they may not enter final orders concerning these matters without the express written consent of all parties (absent in this case), *see* FED. R. BANKR. P. 7012(b), and may issue only recommended findings of fact and conclusions of law subject to *de novo* review by an Article III judge, *see* 28 U.S.C. § 157(c). At best, Vickie claim falls within this latter category. Section 157(b)(1) vests bankruptcy courts with jurisdiction to enter final judgments *only* with respect to (1) "core proceedings" that (2) "arise under title 11" or "arise in a case under title 11." It is not enough that a matter is a "core proceeding." In turn, section 157(c) vests bankruptcy courts with only limited jurisdiction over matters "related to" a bankruptcy case. *Celotex*, 514 U.S. at 307. Vickie's tort claim clearly does not "arise in" or "arise under" the Bankruptcy Code because it exists, if at all, only under state law. *See Eastport Assocs. v. City of Los Angeles (In re Eastport Assocs.)*, 935 F.2d 1071, 1076 (9th Cir. 1991) ("Congress used the phrase 'arising under [the Bankruptcy Code]' to describe those proceedings that involve a cause of action created or determined by a statutory provision of title 11."); *id.* at 1076 (proceedings that "arise in a case under title 11" are "'administrative matters' that arise only in bankruptcy cases," "are not based on any right expressly created by [the Bankruptcy Code]," and "have no existence outside of the bankruptcy.") (quoting *In re Wood*, 825 F.2d 90, 96-97 (5th Cir. 1987)).

the bankruptcy.[36] Applying the principles underlying the probate exception doctrine, this Court nevertheless affirmed dismissal of the petition, explaining that "inconsistencies and difficulties" would arise if bankruptcy were pursued in conflict with the probate court's direction, and that Utah probate law did not authorize resort to bankruptcy court. 317 U.S. at 451-52. The Court reasoned:

> When we reflect that the settlement and distribution of decedents' estates and the right to succeed to the ownership of realty and personalty are peculiarly matters of state law; that the federal courts have no probate jurisdiction and have sedulously refrained, even in diversity cases, from interfering with the operations of state tribunals invested with that jurisdiction, we naturally incline to a construction of . . . [section] 75 consistent with these principles.

Id. at 450. The Court concluded: "The probate court, not the bankruptcy court, is the appropriate forum for weighing the respective benefits or detriments to those who share in the equity of the decedent's estate." *Id.* at 452. Although the United States contends that *Harris* involves simply an exercise in construing the statutory provisions of the former Bankruptcy Act prescribing the jurisdiction of the bankruptcy courts, U.S. Br. 29 n.14, that describes precisely the operation of the probate exception, which presumes that, in vesting federal courts with jurisdiction, Congress does not intend that jurisdiction to interfere with probate matters.

The courts of appeals also have long understood the probate exception to apply in bankruptcy and other federal-question cases. *E.g.*, *Tonti v. Petropoulous*, 656 F.2d 212, 215 (6th Cir. 1981) (no federal-question jurisdiction to hear claim seeking "the same relief

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[36] Section 75c of the Act expressly authorized the deceased farmer's representative to pursue bankruptcy on the decedent's behalf. *Harris*, 317 U.S. at 449. Section 75r defined "farmer" to include "the personal representative of a deceased farmer." *Id.* Section 75n granted the bankruptcy court the same "jurisdiction and powers" as if the farmer had filed bankruptcy. 317 U.S. at 453-54 (Douglas, J., dissenting) (quoting Act). Further, section 8 provided that the death of a bankrupt "shall not abate the proceedings," but that they shall be conducted "as though he had not died." *Id.* at 454.

[that plaintiff] was denied in the Probate Court," that plaintiff's father had intended to give plaintiff an *inter vivos* gift); *Hamburg v. Tri-State Sav. & Loan Ass'n*, 69 F.2d 436, 437-38 (8th Cir. 1934) ("Under that law the probate court is given exclusive, original jurisdiction of matters relative to the administration and of the estates of deceased persons."); *Litzinger v. Litzinger,* 322 B.R. 108 (8th Cir. BAP 2005) (applying probate exception to bankruptcy claim).

Vickie nonetheless insists that, when Congress enacted the predecessor of the bankruptcy jurisdiction provision, 28 U.S.C. § 1334, in 1978, it intended to eliminate the long-standing probate exception from the bankruptcy context. But 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. *See Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998) ("We . . . 'will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.'") (citation omitted); *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986). Vickie's insistence that Congress nevertheless overrode the probate exception in bankruptcy without saying so fails.

Vickie points out that section 1334 speaks in broad general language that does not expressly incorporate the terms of the probate exception. Pet. Br. 30-31. The same, however, is true of the diversity statute, which speaks in terms no less broad and which, Vickie acknowledges, nonetheless includes the probate and domestic relations exceptions. *Compare* 28 U.S.C. § 1334(b) ("all civil proceedings") *with* 28 U.S.C. § 1332(a) ("all civil actions"). *See* Judiciary Act of 1789, 1 Stat. 78, c. 20 (former diversity statute, giving federal courts jurisdiction of "all suits of a civil nature at common law or in equity" with diverse parties and exceeding jurisdictional amount); *see also Ankenbrandt,* 504 U.S. at 698.[37] The probate exception arises, not from the language of

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[37] In her petition for writ of certiorari and Ninth Circuit brief, Vickie focused on the probate exception's application to federal-question cases. *See* Vickie's Question Presented No.3; Pet. 19-21 & n.8; Appellee's Brief/Cross-Appellant's Opening Brief 68-71. The federal-question

the statutes "but rather on Congress' apparent acceptance of this construction" of federal jurisdictional provisions "in the years prior to" their most recent amendments. *Id.* at 700.

The broad and general language Vickie cites from the sparse legislative history does not support a contrary conclusion. As Vickie acknowledges, section 1334 descends from the former 28 U.S.C. § 1471, enacted as part of the Bankruptcy Reform Act of 1978. Pet. Br. 31 & n.22. In adopting it, Congress relied heavily on the report of the Commission on the Bankruptcy Laws of the United States, created by Congress in 1970 to study and recommend changes to the bankruptcy laws. *See* S. Rep. No. 95-989 at 1-2, *reprinted in* 1978 U.S.C.C.A.N. 5787-88; H.R. Rep. No. 95-595 at 43-48, 49-50, 445-46, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6004-09, 6010-11 (reprinting portion of Commission Report describing problems of current bankruptcy jurisdiction and reasons for expanding jurisdiction, and heavily citing Commission Report to describe effect of what became section 1471).

The Commission informed Congress that "the present [Bankruptcy] Act has been consistently construed as not extending to the initiation of proceedings by representatives of decedents." It pointed out the "tradition of federal deference" to state probate proceedings, and recommended the bankruptcy laws *not* be changed to oust state probate courts of jurisdiction over decedents' estates even if insolvent, stating: "numerous practical problems and questions would arise if the traditional exclusion should be eliminated"; "[i]n light of the tradition of federal deference to state control of administration of decedents' estates and the complications and potential for increased litigation and increased costs arising from any change, substantial need should exist before any extension of federal legislation to cover insolvent decedents' estates is proposed"; and "the Commission recommends that the Bankruptcy Act not be extended to administration of decedents' estates other than to the extent necessary to wind up the

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statute's relevant text mirrors that of the diversity statute. *See* 28 U.S.C. § 1331 ("all civil actions"); Act of March 3, 1875, ch. 137, 18 Stat. 470, § 1 (former federal-question statute, providing jurisdiction over "all suits of a civil nature at common law or in equity").

administration of the estates of debtors who die after the date of the petition." Report of Commission on Bankruptcy Laws of the United States, H.R. Doc. 93-137, pt. 1, at 184-85 (1973) ("Bankruptcy Commission Report").

Taking this recommendation, Congress did not extend bankruptcy jurisdiction to include insolvent decedents' estates. In other words, Congress did not want to interfere with state probate proceedings even when the *probate estate itself* was insolvent and the insolvency would permeate the entire probate. *A fortiori*, Congress did not intend the exercise of bankruptcy jurisdiction to interfere with probate where a single beneficiary was insolvent.[38]

Moreover, Vickie identifies 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 under section 1334(b). The suggestion is implausible on its face. The interference and conflict that the probate exception operates to prevent can arise just as easily under either font of jurisdiction. *See Harris*, 317 U.S. at 450-52 (discussing potential for "inconsistencies and difficulties" and tension with state law if bankruptcy and probate compete). It is thus impossible to imagine that Congress would determine to maintain the probate exception in diversity cases, yet permit a bankruptcy court to engage in the even most egregious interference with probate proceedings (as, for example, directly probating a will).

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[38] Vickie states that Congress intended bankruptcy proceedings to continue if a debtor dies after filing for bankruptcy. Pet. Br. 35-36. But, unlike a bankruptcy court's intrusion on otherwise plenary state probate proceedings involving a solvent decedent, bankruptcy proceedings involving an already-bankrupt decedent cannot interfere with probate. As Congress noted, the assets affected by bankruptcy could not be probated anyway because the belong to the bankruptcy estate. H.R. Rep. No. 95-595 at 368, *reprinted in* 1978 U.S.C.C.AN. at 6324 ("Once the [bankruptcy] estate is created, no interest in property of the estate remain in the debtor" and only property not included in the estate "will be available to the representative of the debtor's probate estate").

Nor can Vickie point to any special bankruptcy-related purpose that requires that a bankruptcy court, rather than a probate court, adjudicate her claims. Indeed, the lack of such a need is precisely why Congress declined to give bankruptcy court exclusive jurisdiction over such state law claims and why, in this case, the Bankruptcy Court was able to finish the adjudication of Vickie's Bankruptcy Case and grant a general discharge years before it ruled on her tortious interference claim.

Contrary to Vickie's contentions, *see* Pet. Br. 37-39, that Congress allows, and in some cases required, a bankruptcy court to abstain from adjudicating certain state law claims, *see* 28 U.S.C. § 1334(c), undermines, rather than supports, Vickie's position. Congress was legislating against a backdrop of nearly two centuries of cases, starting with *Armstrong*, construing jurisdictional statutes to exclude probate matters. Moreover, this Court had never construed abstention as embracing the probate exception. *Cf. Ankenbrandt*, 504 U.S. at 715 n.8. Accordingly, Congress would have had no reason to think that merely codifying abstention would change this settled law and there is no indication that it intended to do so.

If anything, the abstention provisions demonstrate that Congress did not deem it essential to the operation of the bankruptcy system for a federal court to adjudicate claims like Vickie's tort claim. Further, Vickie cannot reasonably claim that the existence of these abstention provisions demonstrates that Congress intended for conflict with probate courts to be dealt with through abstention, rather than by application of the probate exception to federal jurisdiction. Section 1334(c) extends far beyond the probate context and, accordingly, serves an important purpose, even though it is inapplicable to cases within the probate exception. Furthermore, it would be surprising indeed if Congress intended to preclude federal courts in diversity cases from *ever* exercising jurisdiction over probate matters, but intended to provide bankruptcy courts with unreviewable discretion to decide for themselves whether or not to interfere with the state probate

system. *See* 28 U.S.C. § 1334(d) (decision not to abstain under section 1334(c)(1) is not appealable).[39]

Moreover, abstention cannot fully protect the interests served by the probate exception. Vickie notes (Pet. Br. 37) that, under section 1334(c)(2), the federal court is *required* to abstain if the state law claim is "related to a case under title 11," there is no other source of federal jurisdiction, and the claim "can be timely adjudicated . . . in a State forum of appropriate jurisdiction" and that decision is subject to review, *see* 28 U.S.C. § 1334(d). Vickie is careful, however, not to assert that this provision applies to all cases that would otherwise be subject to the probate exception, as she opposed Pierce's motion for abstention under this provision in the District Court. Moreover, by its terms, section 1334(c)(2) would not authorize abstention if no probate proceedings had been initiated, and would not apply to a case in which the debtor sought to disregard or set aside an already-completed probate judgment. Thus, unlike the probate exception, even mandatory abstention would not stop disappointed heirs from bringing probate proceedings and will contests in bankruptcy court in the first instance, or questioning the decedent's intent or testamentary instruments in bankruptcy court after the probate court had already upheld them.

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[39] Vickie misstates the holdings of cases relied upon in her abstention argument. For example, in *Salisbury v. Ameritrust Tex., N.A. (In re Bishop College)*, 151 B.R. 394 (Bankr. N.D. Tex. 1993), the bankruptcy court did *not* exercise its "discretion" to abstain under section 1334(c) when it declined to review a probate matter, but rather determined that the charitable trust at issue was not included within the bankruptcy estate. Although, in *Carter v. Lummis (In re Tom Carter Enters.)*, 44 B.R. 605 (C.D. Cal. 1984), the district court denied an abstention motion, it did *not* do so not "based on" the Nevada probate proceedings. Instead, the ruling was based on the bankruptcy interest involved in determining whether the debtor's agreement to purchase property from a Nevada estate created rights to Nevada property properly included within the bankruptcy estate. The remaining cases cited by Vickie concern bankruptcy adjudication of domestic relations matters. As noted, *Ankenbrandt* rejected the argument that domestic relations should be addressed as matter of abstention, holding instead that these issues are outside the jurisdiction of the federal courts. 504 U.S. 689, 706 n.8.

Finally, section 1334(c)(2) applies only if a party requests abstention, and only then if the federal court considers the application "timely." The probate exception, however, is designed to protect, not only private litigants, but also the authority and dignity of a state court system. There is no reason to conclude that Congress would have intended to permit a federal court to directly interfere with a state probate proceeding whenever a particular litigant is found to have waited too long to request abstention.[40]

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the court below.

Respectfully submitted,

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[40] If, however, this Court determined that the question presented by this case ought not to arise in ordinary circumstances because section 1334(c)(2) should uniformly require abstention from claims that would otherwise be barred by the probate exception, the petition for certiorari should be dismissed as improvidently granted.

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