No. 10-179

IN THE
Supreme Court of the United States

HOWARD K. STERN, Executor
of the Estate of Vickie Lynn Marshall,
Petitioner,
v.

ELAINE T. MARSHALL, Executrix
of the Estate of E. Pierce Marshall,
Respondent.

On Writ of Certiorari
to the U.S. Court of Appeals
for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

A Texas probate court upheld the validity of an estate plan and estate planning documents prepared by J. Howard Marshall, finding that he knowingly effected his estate plan free from coercion from his son Pierce Marshall. The U.S. Court of Appeals for the Ninth Circuit concluded that the findings of the Texas probate court should be afforded preclusive effect in on-going bankruptcy proceedings involving Vickie Lynn Marshall, who was married to J. Howard Marshall in the year prior to his death in 1995. Based on that conclusion, it directed that judgment be entered in favor of the Estate of Pierce Marshall on a claim against him for tortious interference with an intervivos gift. The Estate of Vickie Lynn Marshall sought review of the appeals court's decision. The Court granted review to consider the following question:

Whether, consistent with 28 U.S.C. § 157 and Article III, a bankruptcy judge may enter final judgment on a bankruptcy estate's counterclaim against an individual who has filed a claim against the estate, where: (1) the bankruptcy court lacked jurisdiction to try the individual's claim because it was a personal injury claim; (2) resolution of the counterclaim was not a necessary precursor to resolution of the individual's claim; and (3) neither the individual's claim nor the counterclaim involved "public rights" but rather raised issues of Texas law?

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 States.[1] WLF defends and promotes free enterprise, individual rights, and a limited and accountable government. WLF has appeared in this Court on numerous occasions to support its view that federal law, as well as principles of federalism, require federal courts to give full faith and credit to the judgments of state courts. *See, e.g. San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996).

For multiple reasons, WLF agrees with the appeals court's conclusion that the findings of the Texas probate court should be afforded preclusive effect in these on-going federal bankruptcy proceedings. The bankruptcy court's efforts to conduct a trial and enter a final judgment on Petitioner's tort claims far exceeded the bounds of both Article III of the Constitution and federal law. WLF is concerned that if those efforts are affirmed, the strict limitations that Congress sought to place on bankruptcy court jurisdiction will have been abandoned.

WLF agrees with the appeals court's preclusion determination for the additional reason that the Texas probate court judgment, as the last unappealed

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

judgment entered in this case, is entitled to preclusive effect. The issues that Petitioner continues to press in these proceedings were decided conclusively against it in the Texas probate court judgment. Petitioner chose not to appeal from that judgment, nor has it sought review from the Ninth Circuit's holding that the Texas judgment conclusively decided the issues that Petitioner still seeks to press. Under those circumstances, the last-in-time rule – a rule that Respondent has asserted throughout this litigation – requires affirmance of the Ninth Circuit's preclusion determination. WLF does not believe that Petitioner's forum shopping ought to be rewarded.

STATEMENT OF THE CASE

This feud over the assets of the estate of J. Howard Marshall II has spawned three court judgments.[2] A principal issue before the Ninth Circuit was whether any of those judgments should have preclusive effect in these proceedings.

The first judgment was issued by the U.S. Bankruptcy Court for the Central District of California on December 29, 2000. The bankruptcy court determined that Pierce tortiously interfered with Vickie's expectation of an *inter vivos* gift and awarded her $450 million in compensatory damages (less any

[2] Because four of the individuals involved in this dispute – J. Howard Marshall II, Vickie Lynn Marshall, E. Pierce Marshall, and Elaine T. Marshall – share the same last name, each will be referred to herein by his or her first name only. Of those four, Elaine T. (the widow of E. Peirce and the executrix of his estate) is the only one still living.

amount recovered by Vickie in the Texas Probate Court action) and $25 million in punitive damages. *See In re Vickie Lynn Marshall* ("*Marshall I*"), 253 B.R. 550 (Bankr. C.D. Cal 2000). The district court vacated that judgment on May 24, 2001; it determined that Vickie's tortious interference claim was not a "core" bankruptcy proceeding and thus that the bankruptcy court was not empowered to enter a final judgment with respect to that claim. *In re Vickie Lynn Marshall* ("*Marshall II*"), 274 B.R. 609, 633 (C.D. Cal. 2001) (as amended on June 20, 2001). Vickie's appeal from the district court's decision to vacate the judgment was rejected by the court below. *Marshall v. Stern* ("*Marshall V*"), 600 F.3d 1037 (9th Cir. 2010).

The second final judgment was issued by the Texas Probate Court on December 7, 2001. That judgment upheld J. Howard's will and his 1982 living trust as genuine, valid, and not the product of improper conduct. Ninth Circuit Excerpts of Record ("ER") 4706. The probate court also determined that it had jurisdiction over Vickie's tortious interference claim; it rejected that claim on the merits, finding that J. Howard had not intended to make a gift to Vickie from either his estate or the living trust, and thus that Pierce was entitled to his inheritance free and clear of any claim by Vickie. ER 4721, 4718. Importantly, although Vickie actively participated in the Texas probate proceedings, she never formally asserted in those proceedings that the bankruptcy court judgment should be given preclusive effect. Under Texas law (as interpreted by the district court), a judgment becomes final for preclusion purposes when, after entry of the judgment, the 30-day period for filing a motion to amend the

judgment has expired (or the period for ruling on any such motion has expired). *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986). This Court stated that the Probate Court judgment became final for preclusion purposes on February 11, 2002. *Marshall v. Marshall*, 547 U.S. 293, 314 (2006). Vickie did not appeal from that judgment.

The third final judgment was issued by the U.S. District Court for the Central District of California on March 7, 2002. The district court concluded that Pierce tortiously interfered with Vickie's expectancy and awarded her compensatory and punitive damages totaling $89 million. *In re Vickie Lynn Marshall* ("*Marshall IV*"), 275 B.R. 5 (C.D. Cal. 2002). The district court had previously (on December 21, 2001) rejected Pierce's request that the December 7, 2001 probate court findings be given preclusive effect. *In re Vickie Lynn Marshall* ("*Marshall III*"), 271 B.R. 858 (C.D. Cal. 2001). As part of its *Marshall V* decision (Pet. App. 1-89), the Ninth Circuit concluded that the district court erred in failing to give preclusive effect to the probate court findings. In particular, the Ninth Circuit rejected Vickie's contention that the issues she was seeking to litigate in the bankruptcy proceedings were distinct from the issues decided in the probate court. *Marshall V*, 600 F.3d at 1062-64. It also determined that Vickie had "fully and fairly litigated" those issues in the probate court. *Id.* at 1063.

Before the Ninth Circuit, Respondent raised two principal arguments regarding why preclusive effect should be given to the probate court's December 7, 2001 judgment rather than to the December 20, 2000

bankruptcy court judgment. First, Respondent argued that the bankruptcy lacked jurisdiction to enter a final judgment on Vickie's state-law counterclaim under 28 U.S.C. §157(b), but rather was authorized (at most) to submit proposed findings of fact and conclusions of law to the district court under § 157(c). Second, Respondent argued that even if the bankruptcy court was acting within its jurisdiction, the last-in-time rule required that preclusive effect be given to the later judgment – in this case, the December 7, 2001 probate court judgment.

The Ninth Circuit ruled in Respondent's favor on the first argument and thus did not need to reach the second argument. The court's ruling focused on 28 U.S.C. § 157(b), the provision that grants bankruptcy courts jurisdiction to enter final judgments in certain cases. The court held that determining whether a proceeding falls within a bankruptcy court's § 157(b) jurisdiction is a "two-step" process. First, one determines whether a proceeding is a "core proceeding" within the meaning of § 157(b)(2). If so, a bankruptcy court may enter a final judgment if the "core proceeding" "aris[es] under title 11" or "aris[es] in a case under title 11." *Marshall V*, 600 F.3d at 1055.

Petitioner contended that Vickie's tortious interference counterclaim was a "core proceeding" under § 157(b)(2)(C) (which provides that core proceedings include, but are not limited to, "counterclaims by the estate against persons filing claims against the estate"). The Ninth Circuit held that regardless whether Vickie's claim was a "core proceeding," it was not a core proceeding "in a case arising under the Bankruptcy Code" because it was "not

so closely related to Pierce Marshall's defamation claim that it must be resolved in order to determine the allowance or disallowance of his claim against her bankruptcy estate." *Id.* at 1059. The court concluded that its "closely related" standard was the proper reading of § 157(b) based on: (1) its review of the evolution of the Bankruptcy Code; (2) this Court's opinions in cases construing Article III and Seventh Amendment limitations on bankruptcy court jurisdiction; and (3) Ninth Circuit jurisprudence "cautioning against creating constitutional problems through an overly broad construction" of bankruptcy court jurisdiction. *Id.* at 1058.

The Court granted review to Petitioner on the issue of whether the Ninth Circuit properly interpreted § 157(b). Petitioner did not seek review of the Ninth Circuit's holding that the issues Vickie sought to litigate in the bankruptcy proceedings were *not* distinct from the issues decided in the probate court; thus, that holding is now final.

SUMMARY OF ARGUMENT

WLF agrees with Respondent that the bankruptcy court exceeded its jurisdiction when in December 2000 it enter a judgment on Vickie's tortious interference counterclaim. But under well-established rules governing *res judicata* and collateral estoppel, the probate court judgment would be entitled to preclusive effect even if this Court reverses the district court on this issue and determines that the bankruptcy court judgment was properly entered. When (as would be true here if the bankruptcy court judgment were deemed

properly entered) conflicting judgments have been entered by two courts, the last-in-time rule requires that preclusive effect be given to the later judgment – in this case, the probate court judgment.

WLF also agrees with Respondent that the bankruptcy court, by entering a final judgment on Vickie's state-law counterclaim, exceeded the jurisdiction granted it by 28 U.S.C. § 157(b). If the Court nonetheless interprets the statute in the manner suggested by Petitioner, then it should not hesitate to rule that § 157(b) is unconstitutional as applied in this case. The Court's Article III precedent makes clear that Congress is not permitted to authorize the federal adjudication of claims of this nature by a body other than an Article III court. Nor do the facts support a finding that Respondent has waived his Article III rights by consenting to the bankruptcy court's jurisdiction.

In adopting § 157(b), Congress did not intend to authorize a bankruptcy court to a enter final judgment on a bankruptcy estate's counterclaim of the sort at issue in this case. At the very least, Respondent has demonstrated that its interpretation of § 157(b) is highly plausible and should be adopted in order to avoid the serious constitutional difficulties that would arise if Petitioner's interpretation of § 157(b) were adopted. Were the Court to adopt the interpretation of § 157(b) espoused by Petitioner and the United States, all effective limits on the jurisdiction of bankruptcy courts would be eliminated. In responding to *Northern Pipeline*, Congress made clear that it intended to impose strict limits on that jurisdiction.

ARGUMENT

I. REGARDLESS WHETHER THE BANKRUPTCY COURT WAS EMPOWERED TO ENTER A JUDGMENT, THE PROBATE COURT JUDGMENT MUST PREVAIL UNDER THE LAST-IN-TIME RULE

J. Howard Marshall II died more than 15 years ago. Litigation over the disposition of his assets has been going on for nearly as long, and it has outlived Vickie and Pierce, the two principal adversaries. It needs to end.

WLF agrees with Respondent that the bankruptcy court exceeded its jurisdiction when in December 2000 it enter a judgment on Vickie's tortious interference counterclaim. But under well-established rules governing *res judicata* and collateral estoppel, the probate court judgment would be entitled to preclusive effect even if this Court reverses the district court on this issue and determines that the bankruptcy court judgment was properly entered. When (as would be true here if the bankruptcy court judgment were deemed properly entered) conflicting judgments have been entered by two courts, the last-in-time rule requires that preclusive effect be given to the later judgment – in this case, the probate court judgment. *See, e.g.,* RESTATEMENT (SECOND) OF JUDGMENTS, § 15 (1982).

Respondent raised the last-in-time rule in both the district court and the Ninth Circuit. The appeals court did not need to reach the issue because it held that the bankruptcy court lacked jurisdiction to enter its

judgment. But "[w]ithout cross-petitioning for certiorari, a prevailing party may, of course, defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1474 (2009) (quoting *Grandfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989). In her brief filed in this Court, Respondent has explicitly preserved her assertion that the last-in-time rule bars Vickie's tortious interference claim. Resp. Br. 34.

The Court, in an exercise of its discretion, often declines to address an issue that has not yet been decided by the lower courts, and if necessary will remand a case to give the court of appeals the initial opportunity to consider the issue. WLF respectfully suggests that any such remand would be inappropriate under the facts of this case. This litigation is before the Court for a second occasion. The interests of justice will not be served by allowing the case to stretch into a third decade. The basic facts regarding the course of the litigation are largely undisputed. The applicability of the last-in-time rule is clear-cut. Should the Court decide that the bankruptcy court had jurisdiction to enter a judgment on Vickie's tortious interference claim, the Court should go on to determine whether the last-in-time rule operates to bar consideration of that claim.

The last-in-time rule, which provides that the most recent of two inconsistent judgments controls, faithfully applies the principles of the Full Faith and Credit Clause and its implementing Act. The Court applied the last-in-time rule to give conclusive effect to

a later-entered judgment in *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 74-78 (1939). State courts in Washington and Idaho had issued conflicting judgments regarding ownership of stock in Sunshine Mining Co. Sunshine later filed an interpleader action, seeking guidance from the federal courts regarding ownership. The Court determined that the Idaho judgment should prevail because: (1) it was issued later; and (2) the Idaho courts (before whom all parties appeared) determined that the Washington courts lacked jurisdiction over the stock and thus that the Washington judgment was not binding; (3) the party that had prevailed in the Washington lawsuit failed to appeal from the adverse Idaho decision; and (4) issue preclusion prevented the federal courts from relitigating the jurisdictional question. *Id.* *See generally* Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit*: *The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798 (1969).

The probate court can hardly be blamed for having failed to give preclusive effect to the bankruptcy judgment. By the time the probate court issued its final judgment in December 2001, the bankruptcy court judgment had long since been vacated by the district court – so there was no existing judgment to which the probate court could have deferred. But if Vickie believed that the probate court erred in failing to defer to the bankruptcy court judgment and findings, her appropriate response would have been to appeal the judgment – all the way to the U.S. Supreme Court if necessary. Instead of pursuing such an appeal, Vickie chose to pursue a collateral attack on the probate court judgment in the federal courts. The last-in-time rule

was adopted to prevent just such collateral attacks.

Moreover, Vickie never filed any papers in the probate court asserting that the bankruptcy court judgment should be given preclusive effect. She argued in the lower federal courts that she had adequately preserved the point because one of her attorneys raised the point orally on one occasion in the probate court. But even so, any such oral assertion was inadequate to: (1) excuse her failure to take a direct appeal from the probate court judgment; or (2) explain how the probate court could be deemed to have erred given that the bankruptcy court judgment had been vacated months before the probate court issued its judgment.

This case raises a wrinkle on the last-in-time rule because the first judgment (the December 2000 bankruptcy court judgment) is still on direct appeal. Commentators are nonetheless unanimous in concluding that the last-in-time rule requires an appellate court hearing a direct appeal of the first judgment to defer to the last judgment. One leading treatise concludes:

> [O]ne of the two judgments must control, and there is no reason to depart from the general preference for the second judgment if the parties have failed to assert preclusion from the first judgment or if the second court has properly rejected the preclusion argument. The court reviewing the first judgment may be tempted to review the preclusion effects of the first judgment if there was no effective opportunity to raise the question in the second action or if rejection of the

> preclusion argument seems dubious. *That temptation should be resisted*. Unless appeals from both judgments can be consolidated before a single court, the second judgment should be reviewed only within its own system. Any claim that the court reviewing the first judgment has power to enter its own subsequent judgment that should prevail over the second judgment would simply lead to a parallel assertion that review of the second judgment can lead to yet another and most final judgment.

18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure: Jurisdiction*, § 4404 at 30-31 (1981) (emphasis added).

The judgment of the probate court is final, and has been for nearly a decade. Having failed to appeal that judgment, Petitioner is not entitled at this late date to ask the Court to re-examine it. The Ninth Circuit ruled that the probate court judgment conclusively determined the issues that Vickie was seeking to press in the bankruptcy proceedings, rejecting her contention that those issues were distinct from the issues decided in the probate court. *Marshall V*, 600 F.3d at 1062-64. Accordingly, the last-in-time rule provides an alternative basis for affirming the Ninth Circuit's judgment.

II. ARTICLE III BARS BANKRUPTCY JUDGES FROM ENTERING A FINAL JUDGMENT ON A BANKRUPTCY ESTATE'S COUNTERCLAIM UNDER THE FACTS OF THIS CASE

WLF agrees with Respondent that the bankruptcy court, by entering a final judgment on Vickie's state-law counterclaim, exceeded the jurisdiction granted it by 28 U.S.C. § 157(b). If the Court nonetheless interprets the statute in the manner suggested by Petitioner, then it should not hesitate to rule that § 157(b) is unconstitutional as applied in this case. The Court's Article III precedent makes clear that Congress is not permitted to authorize the federal adjudication of claims of this nature by a body other than an Article III court.

It is common ground that, in general, the judicial power of the United States must be exercised by courts having the attributes prescribed by Article III. The Constitution explicitly sets forth those attributes:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at Stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Art. III, § 1. Bankruptcy judges do not and never have possessed those attributes – they are appointed for a fixed term, they can be removed from office by means other than a congressional impeachment and trial, and their salaries are not protected from diminution by

Congress. Accordingly, all agree that bankruptcy courts do not qualify as Article III courts.

In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court imposed strict constitutional limits on the authority of non-Article III bankruptcy courts to exercise jurisdiction over state-law claims filed by a debtor-in-possession against a third party. Although the six-justice majority could not agree on the precise rationale for its holding, the Court largely invalidated the Bankruptcy Act of 1978 because Congress had impermissibly shifted essential attributes of judicial power from the Article III district courts to the non-Article III bankruptcy courts. 458 U.S. at 87 (plurality); *id.* at 91-92 (Rehnquist, J., concurring in the judgment).

Based on a review of case law, the four-judge plurality identified three "narrow" exceptions to the requirement that the judicial power of the United States must be vested in Article III courts: (1) "territorial courts," exercising jurisdiction over territories not within the States that constitute the United States; (2) courts-martial; and (3) legislative courts and administrative agencies created by Congress to adjudicate cases involving "public rights." *Id.* at 64-70.[3]

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[3] The plurality did not attempt to provide a comprehensive definition of what constituted a "public right." The plurality nonetheless was very explicit about one category of matters that was excluded:

> The liability of one individual to another under the law as defined is a matter of private rights. Our precedents clearly establish that *only* controversies in the former category

The plurality concluded that the bankruptcy courts as constituted by the Bankruptcy Act of 1978 fit into none of those three categories and thus violated the dictates of Article III.

Justices Rehnquist (joined by Justice O'Connor) concurred in the judgment but did so on narrower grounds, limiting his finding of unconstitutionality to cases similar in nature to the case before the Court. *Id.* at 89-92. While acknowledging that Congress's power to create non-Article III courts was limited, he declined to decide whether exercise of that power should be limited to "the three tidy exceptions" enumerated by the plurality. *Id.* at 91. He nonetheless concluded that Congress had gone too far in sanctioning "the type of adjudication to which Marathon will be subjected against its will under the 1978 Act." *Id.* He concluded, "To whatever extent different powers granted under that Act might be sustained under the 'public rights' doctrine . . ., I am satisfied that the adjudication of Northern's lawsuit cannot be so sustained." *Id.*

Critically, Rehnquist's description of the salient features of the suit against Marathon makes no mention of the feature on which Petitioner and the United States rely so heavily: the fact that Marathon had not filed a

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> may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power.

Id. at 69-70 (plurality).

claim against the bankruptcy estate.[4] Petitioner is free, of course, to argue that *Northern Pipeline* should not be applied to cases in which the party objecting to the jurisdiction of the bankruptcy court has not filed a claim, but nothing in the language of either the plurality opinion or the concurring opinion supports such a limitation. To the contrary, Justice Rehnquist stated unequivocally that the "public rights" doctrine could not justify bankruptcy-court adjudication of claims of the sort that Northern Pipeline had filed against Marathon, without any indication that the result would have been different if Marathon had filed a claim against the bankruptcy estate.

Moreover, later decisions of the Court that have discussed *Northern Pipeline* have never suggested that the decision applies only to claims filed against parties that have not themselves filed claims against the bankrupt estate. For example, in *Thomas* the Court described the holding in *Northern Pipeline* as follows:

> The Court's holding in that case establishes only

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[4] Rehnquist's description was as follows:

> [T]he lawsuit in which Marathon was named seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789. There is apparently no federal rule of decision provided for any of the issues in the lawsuit; the claims of Northern arise totally under state law. No m method of adjudication is hinted, other than the traditional common-law mode of judge and jury.

Id. at 90.

> that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without the consent of the litigants, and subject only to ordinary appellate review.

Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 584 (1985).

Thomas, as had *Northern Pipeline*, made reference to the fact that litigants are permitted to "consent" to having their lawsuits decided by a non-Article III court.[5] But neither decision suggests that the filing of bankruptcy claim is the equivalent to granting consent or that a lawsuit filed by a debtor against a private party is suddenly transformed into a matter involving a "public right" if the party files a claim against the bankruptcy estate.

Northern Pipeline is controlling on the facts of this case and requires a finding that Article III prohibited the non-Article III bankruptcy court from rendering a final judgment on Vickie's tortious interference claim. That claim arose under Texas law and is largely indistinguishable from the tort and contract claims that Northern Pipeline asserted against

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[5] Pierce did not, of course, explicitly "consent" to the bankruptcy court conducting a trial and issuing a judgment on Vickie's counterclaim. Indeed, he repeatedly objected to a trial in the bankruptcy court. WLF discusses the issue of consent more fully *infra*, including Petitioner's claim that a party that files a claim against the bankruptcy estate should be "deemed" to have consented to a non-Article III trial of all counterclaims.

Marathon. Justice Rehnquist observed that "[n]one of [the Court's Article III] cases has gone so far as to sanction the type of adjudication to which Marathon will be subjected against its will under the provisions of the 1978 Act." *Northern Pipeline*, 458 U.S. at 91 (Rehnquist, concurring in the judgment). So too, none of those cases has gone so far as to sanction the highly similar adjudication to which Vickie sought to subject Pierce against his will under the 1984 Act.

A. Case Law Involving Preference Claims Does Not Support Petitioner

Petitioner and the United States rely primarily on two decisions of this Court involving the adjudication of "preference" claims in bankruptcy proceedings. Bankruptcy law historically has included provisions authorizing bankruptcy trustees to seek the repayment of such "preferences" – funds paid by the debtor in the days immediately preceding a bankruptcy filing, if the recipient did not contemporaneously provide fair equivalent value in return for the payment. None of those decisions support Petitioner's position in this case.

Katchen v. Landy, 382 U.S. 323 (1966), held that a bankruptcy court has summary jurisdiction to order the surrender of a voidable preference proved by the trustee, if the party that received the preference previously filed a claim against the bankruptcy estate. The Court held that allowing the bankruptcy court to issue such a judgment did not violate the Seventh Amendment jury trial rights of the creditor. *Id*. at 337. The United States contends that although *Katchen* arose in the narrow voidable-preference context, it

established a rule that should apply broadly to *any* bankruptcy claimant. U.S. Br. 26.[6]

A review of the Court's reasoning makes clear that the Court did not intend such a broadly applicable result. Section 57g of the bankruptcy law then in effect, 11 U.S.C. § 93(g) (1964), prohibited the allowance of a claim when the creditor had "received or acquired preferences . . . void or voidable under federal bankruptcy law," absent a surrender of any preference. Thus, the Court noted, by the terms of § 57g, when a bankruptcy trustee objects to a claim on the grounds that the creditor has received a preference, "the claim can neither be allowed nor disallowed until the preference matter is adjudicated." *Id*. at 330. Since the allowance and disallowance of claims submitted by creditors is the traditional work of bankruptcy judges, the Court saw no difficulty in permitting them to decide preference matters when necessary to complete their normal work. *Id*.. at 330-32. Moreover, once the preference matter was decided, the Court saw no difficulty in permitting the bankruptcy judge to order the return of the preference. The Court reasoned that such orders did not violate the Seventh Amendment because the creditor under no circumstances would have been permitted a jury trial in a separate suit seeking

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[6] The United States relies on the Court's statement that "[b]y presenting their claims respondents subjected themselves to all the consequences that attach to an appearance." *Id* at 335. But that quotation, by itself, says nothing about what those consequences might be. As noted in the text, the narrow rationale adopted by the Court in *Katchen* makes plain that the "consequences" spelled out in that case are inapplicable outside the context of preference claims.

return of the preference item – since the bankruptcy court's earlier claims adjudication would preclude relitigation of the preference issue under normal principles of *res judicata*. *Id.* at 336-38.

The Court's reasoning thus makes clear that *Katchen* has no bearing on the Article III claims at issue here. It is true that Pierce submitted a defamation claim to the bankruptcy court. But in order to adjudicate that claim, the court had no need to decide Vickie's tortious interference counterclaim.[7] *Katchen*'s rationale for permitting the bankruptcy court to decide the preference claim (that the creditor's claim could not be resolved without deciding the preference claim) has no relevance to a case (as here) where the claim can be decided without reference to the counterclaim.

Indeed, Footnote 9 in *Katchen* appears to be designed to emphasize that the decision was not to be applied broadly in other bankruptcy situations. Rejecting arguments that its ruling violated § 23b of the former bankruptcy law, 11 U.S.C. § 46(b) (1964) (which significantly limited the trustee's choice of courts within which to prosecute an action), the Court said:

> We . . . hold that determination of claims, whether or not affirmative relief is decreed, does

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[7] Indeed, as Petitioner concedes (Pet. Br. 5), the bankruptcy court granted summary judgment to Vickie on the defamation claims on the grounds that she neither ratified nor published the alleged defamatory statements (which were allegedly uttered by her Texas attorneys). By resolving the defamation claim on those grounds, the bankruptcy court entirely eliminated the overlap between the two cases.

> not constitute adjudication of a suit by the trustee, and thus it is not necessary to ascertain whether the creditor has "consented" to such determination within the meaning of § 23b. Rather, our decision is governed by the traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure.

Id. at 332 n.9. In other words, the Court was explaining that: (1) it was *not* holding that the filing of a bankruptcy claim constituted "consent" to the filing of counterclaims by the bankruptcy trustee; and (2) the potential negative "consequences" of filing a claim are limited to consequences that can arise from the filing of the claim itself, not those arising from a counterclaim.

The other voidable preference case relied on by Petitioner is equally unhelpful to his position. *Langenkamp v. Culp*, 498 U.S. 42 (1990), was a brief *per curiam* decision that did no more than reaffirm *Katchen*. In 1989, the Court had held in *Grandfinanciera* that when a bankruptcy trustee files a preference action against a person who has not filed a claim against the estate, the Seventh Amendment affords that person a right to a jury trial. *Grandfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). Relying on that decision, the Tenth Circuit held that a jury right attached even when the defendant in the preference action *had* filed a claim against the estate. The Court summarily reversed, ruling that *Grandfinanciera* did not extend that far. *Langenkamp*, 498 U.S. at 44-45. Rather, *Langenkamp* reiterated the rule it had established in *Katchen*:

permitting a bankruptcy judge to rule on preference actions filed against those who have filed bankruptcy claims (thereby precluding a jury trial) does not violate Seventh Amendment rights. The fact that the Court chose to reverse the Tenth Circuit summarily without full briefing from the parties is a strong indication that the Court did not intend to establish new law but rather was simply reaffirming its decision in *Katchen*.

B. Filing a Bankruptcy Claim Cannot Be Deemed to Constitute "Consent" to the Filing of All Counterclaims

Petitioner argues alternatively that, even if *Northern Pipeline* does not interpret the "public rights" doctrine as encompassing bankruptcy counterclaims, Pierce should be deemed to have voluntarily consented to bankruptcy court adjudication of Vickie's counterclaim by virtue of having filed a claim with the bankruptcy estate.

In support of that claim, Petitioner relies primarily on the Court's decision in *CFTC v. Schor*, 478 U.S. 833 (1986). That reliance is misplaced; nothing in *Schor* supports an argument that Pierce consented to bankruptcy court jurisdiction.

Schor addressed a federal statutory scheme under which those complaining of a violation of their rights under Commodity Exchange Act (CEA) by a registered commodity futures broker were provided a choice of two forums. They could either: (1) file an action in federal district court; or (2) apply to the Commodity Futures Trading Commission (CFTC) for an order directing the

broker to pay reparations. CFTC regulations provided that if the complainant applied to the CFTC for a reparations order, the CFTC was authorized to adjudicate a counterclaim filed broker, if the counterclaim arose out of the same transaction. At issue in *Schor* was whether the CFTC's assertion of jurisdiction over such counterclaims violated Article III.

The Court determined that Article III did not prohibit adjudication of CEA counterclaims by a non-Article III administrative agency because those who file administrative complaints are deemed to have waived their constitutional right to "an impartial and independent federal adjudication" by consenting to CFTC jurisdiction. 478 U.S. at 848-50. Petitioner cites *Schor* for the proposition that Pierce should be deemed to have waived his constitutional rights when he consented to bankruptcy court jurisdiction.

Schor does not support Petitioner's waiver/consent argument. The petitioner in *Schor* had a choice of forums within which to assert his CEA claim. Given the very close relationship between the typical CEA claim by an aggrieved consumer and the typical counterclaim by a commodities broker for payment of trading losses, the Court deemed it highly appropriate and efficient that those two claims be heard in conjunction with one another. *Id.* The consumer could have filed his CEA claim in federal court; if he had done so in *Schor*, neither the claim nor the broker's counterclaim would have been heard by the CFTC. But with full awareness of CFTC regulations providing for jurisdiction over counterclaims, the consumer filed his CEA claim with the CFTC. *Id.* Indeed, the consumer

did not object to the CFTC's exercise of jurisdiction over the counterclaim until *after* the CFTC had ruled against him. Under those circumstances, the Court held that it was appropriate to deem the consumer's voluntary choice of a CFTC forum (which all agreed provided for quicker and more efficient adjudication of CEA claims) as a waiver of his Article III rights and as consent to the CFTC's assertion of jurisdiction over the counterclaim. *Id.*

The facts in *Schor* bear little resemblance to the situation facing Pierce when he filed his defamation claim with the bankruptcy court. Unlike the consumer in *Schor*, Pierce had no alternative forums available to him; if he wanted to assert his common law defamation claim, he had no alternative to filing a proof of claim with the bankruptcy court. While Pierce had a choice in the sense that he had the option of abandoning his property right in the defamation claim, nothing in *Schor* suggests that a "choice" of that sort is sufficient to support a finding that an individual has waived his constitutional rights.[8] At most, Pierce's "choice" might

[8] As Senator DeConcini explained in proposing in 1984 an amendment to federal bankruptcy law to exclude personal injury tort claims from the bankruptcy court's claim allowance authority (an amendment that became 28 U.S.C. § 157(b)(5)), "Unlike a trade creditor who elects to do business with a particular company, the personal injury tort claimant does not choose to be injured by a particular debtor," and therefore should "have the right to have a final order entered by an Article III district judge." 130 CONG. REC. S13076 (daily ed. May 21, 1984) (statement of Sen. DeConcini). Pierce did not choose to be defamed by Vickie and her Texas attorneys and thus should not be deemed to have waived his rights to final adjudication of his defamation claim (and of her counterclaim) by an Article III court simply because he chose to file

be deemed a decision to permit his defamation claim and the tortious interference counterclaim to be adjudicated in federal courts rather than in Texas state courts. But consent to a federal forum is a far cry from consent to adjudication of counterclaims (seeking hundreds of millions of dollars) by a non-Article III court. After filing his defamation claim, Pierce repeatedly stated his objection to bankruptcy court adjudication of that claim and Vickie's tortious interference counterclaim. Nothing in *Schor* suggests that such conduct should be deemed a waiver of constitutional rights.

Assertions that a litigant has waived his rights to adjudication of his claims before an Article III court arise with regularity in the context of arbitration clauses. The Court has readily accepted the proposition that a litigant has waived his right to a judicial forum by signing an arbitration clause. But the Court has made clear that such waivers are not binding unless the agreement "clearly and unmistakably requires" arbitration, *14 Penn Plaza*, 129 S. Ct. at 1466, and (in the context of labor contracts) are "explicitly stated" in the collective-bargaining agreement. *Id.* at 1465. Similarly, because Pierce never explicitly stated that he was waiving his Article III rights nor took actions that could realistically be interpreted as constituting a waiver, he cannot be deemed to have consented to bankruptcy court jurisdiction over Vickie's tortious interference counterclaim.

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the claim in the only forum made available to him.

C. The Court Has Not Backed Away From *Northern Pipeline* in its Later Decisions

In two later decisions, the Court had occasion to revisit *Northern Pipeline*'s Article III holding, both times in non-bankruptcy contexts. Neither of the decisions – *Thomas* and *Schor* – represents a retreat from *Northern Pipeline*.

Thomas held that Article III did not prohibit Congress from selecting binding arbitration as the mechanism for resolving disputes among participants in the registration program established by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). *Thomas*, 473 U.S. at 571. But it did so in a manner that did not call into question *Northern Pipeline*'s holding. The Court concluded that Congress's establishment of a non-Article III forum for adjudicating the claims at issue – claims by pesticide manufacturers that they were entitled to data licensing fees from other manufacturers – was constitutionally permissible because the disputes at issue involved "public rights." *Id.* at 589-90. While the Court did not adopt the precise definition of a "public right" that had been proposed by the *Northern Pipeline* plurality,[9] the Court nonetheless adhered to the view that Congress generally cannot require adjudication of "private rights" before non-Article III tribunals. *Id.* at 585-86. The Court upheld the arbitration scheme created by FIFRA only because it

[9] The plurality had stated that a "public right" must, at a minimum, "arise between the government and others." *Northern Pipeline*, 458 U.S. at 69.

deemed the data licensing fees at issue to be "public rights" – because the right to such fees was created by FIFRA. *Id.* at 589-91.

Nor can *Schor* be viewed as a retreat from *Northern Pipeline*'s holding. *Schor* stated that the distinction between public rights and private rights should not always be dispositive in Article III cases. Rather, the Court stated, "The constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III." *Schor*, 478 U.S. at 847. But the Court made clear that the fact that "private rights" are at issue cuts strongly in favor of a determination that the rights must be adjudicated by an Article III court. *Id.* at 854 ("[W]here private, common law rights are at stake, our examination of the congressional attempt to control the manner in which those rights are adjudicated has been searching."). The Court held that a non-Article III court may sometimes be permissible in a "particularized area of law" – such as the commodity trading disputes at issue in *Schor*. *Id.* at 852-53. Tellingly, the Court distinguished the "specialized" jurisdiction created by the CFTC with the far broader bankruptcy jurisdiction at issue in *Northern Pipeline*. *Id.* (the CFTC deals with a "particularized area of the law . . . whereas the jurisdiction of the bankruptcy courts found unconstitutional in *Northern Pipeline* extended to broadly 'all civil proceedings arising under title 11 or arising in or related to cases under title 11."). By contrasting *Northern Pipeline* in that manner, *Schor* made clear that nothing stated by the Court should be viewed as undermining the holding of *Northern*

Pipeline: Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants.

III. SECTION 157(b) PROHIBITS A BANKRUPTCY COURT FROM ENTERING A FINAL JUDGMENT ON A BANKRUPTCY ESTATE'S COUNTERCLAIM UNDER THE FACTS OF THIS CASE

Respondent has ably demonstrated that in adopting § 157(b), Congress did not intend to authorize a bankruptcy court to a enter final judgment on a bankruptcy estate's counterclaim of the sort at issue in this case. At the very least, Respondent has demonstrated that its interpretation of § 157(b) is highly plausible and should be adopted in order to avoid the serious constitutional difficulties that would arise if Petitioner's interpretation of § 157(b) were adopted.

WLF will not repeat the arguments contained in Respondent's brief. Rather, we write separately to make several additional points. First, we note that § 157(b)(2)'s list of "core" proceedings does not purport to be exhaustive. Rather, that subsection states that core proceedings include "but are not limited to" the 16 listed categories of proceedings. Thus, if the interpretation of the United States is adopted and the language of § 157(b)(1) – all core proceedings "arising under title 11, or arising in a case under title 11" – is not viewed as a limitation on the jurisdiction of bankruptcy courts, then there are *no* explicit limits on that jurisdiction. It is inconceivable that a Congress intent

on fixing the constitutional infirmities in the bankruptcy system identified by *Northern Pipeline* would have intended to create such open-ended jurisdiction in non-Article III bankruptcy courts.

Second, the legislative history leading up to adoption of the 1984 bankruptcy statute indicates a congressional decision to grant bankruptcy courts jurisdiction to adjudicate issues which they traditionally have been designed to handle, and to deny them jurisdiction over matters more traditionally handled by Article III courts and state courts. Had Congress wanted efficiency to trump all other concerns, it most likely would have granted bankruptcy judges Article III status and granted them jurisdiction to adjudicate all claims relating in any way to the debtor. But it rejected calls to grant Article III status, and spelled out a number of areas over which bankruptcy courts were to have no jurisdiction. *See, e.g.*, § 157(b)(5) (providing that all "personal injury tort and wrongful death claims shall be tried in the district court"). *Amicus* respectfully suggests that complex state-law claims of the sort asserted by Vickie in her counterclaim are precisely the sort of claims that Congress intended to be decided by Article III courts or state courts. The trial of the issues raised by the counterclaim consumed scores of trial days in both the Texas and federal courts. That type of trial is not an area of bankruptcy court experience or expertise. It is the type of trial that Congress almost certainly had in mind when it made a conscious effort to limit the bankruptcy courts' jurisdiction over "core" proceedings.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court affirm the decision of the court of appeals.

Respectfully submitted,

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