No.

In The
SUPREME COURT OF THE UNITED STATES

William A. Salzwedel, on behalf of himself, and all others similarly situated,

Petitioner

v.

State of California, et al.

Respondents

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does an attorney in the practice of representing proposed adult conservatees/wards have direct standing, associational standing, or traditional third-party standing under Title II of the Americans With Disabilities Act, §504 of the Rehabilitation Act, or 42 U.S.C. §§1983, 1985 to challenge a state's adult conservatorship/ guardianship practices, laws, facially, or as applied, as being in violation of these statutes, or the due process or equal protection clauses of the 14th Amendment to the United States Constitution, when the attorney alleges an independent injury causally related to the alleged denial of federally required services to the attorney's client under these statutes?

2. Does the *Rooker-Feldman* doctrine prevent litigants from seeking a federal remedy for alleged violations of their constitutional rights where the violator is alleged to have so far succeeded in corrupting the state judicial process as to obtain a favorable state judgment against that federal litigant?

3. Does the *Rooker-Feldman* jurisdictional bar not apply to a claim, it would otherwise apply to, when the federal claimant had no reasonable opportunity to raise the claim in relevant state court proceedings?

LIST OF ALL PARTIES TO THE PROCEEDING

WILLIAM A. SALZWEDEL, on behalf of himself, and all others adversely affected by similar state action;
STATE OF CALIFORNIA, on behalf of itself and all other states;
JUDICIAL BRANCH OF CALIFORNIA, on behalf of itself and all other similarly situated court systems of other states;
HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA, on behalf of herself in her official capacity and all other similarly situated officials within other states;
JUDICIAL COUNCIL OF CALIFORNIA, on behalf of itself and all other similarly situated bodies within other states;
MARTIN HOSHINO, ADMINISTRATIVE DIRECTOR OF THE JUDICIAL COUNCIL OF CALIFORNIA, on behalf of himself in his official capacity and all other similarly situated officials within other states;
SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF VENTURA, on behalf of itself and all other Superior Courts of California and all other courts that adjudicate or supervise conservatorships or guardianships of adults in other states;
HONORABLE JUDGE GLEN M. REISER, on behalf of himself in his official capacities and all other judges in California that adjudicate or supervise conservatorships of adults and all other judges that adjudicate or supervise conservatorships or guardianships of adults in other states;
OFFICE OF THE PUBLIC DEFENDER FOR THE COUNTY OF VENTURA, STATE OF CALIFORNIA,

on behalf of itself and all other entities similarly situated;
COUNTY OF VENTURA, on behalf of itself and all other entities similarly situated;
MARY WEBSTER (AKA MARY C. SHEA), in both her individual capacity and official capacity and all others similarly situated;
ANGELIQUE FRIEND, CONSERVATOR OF THE PERSON AND ESTATE OF LESTER G. MOORE and all others similarly situated;
BENTON, ORR DUVAL & BUCKINGHAM and all others similarly situated;
THOMAS E. OLSON and all others similarly situated;
JOHN BARLOW and all others similarly situated;
POPPY HELGREN and all others similarly situated;
CALIFORNIA COURT OF APPEAL FOR THE 2ND APPELLATE DISTRICT, DIVISION SIX and all others similarly situated

There are no corporations involved in this case other than the governmental entities listed above.

There are no other proceedings "directly related" to this case as defined in U.S. Supreme Court Rule 14(b)(iii).

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Salzwedel v. State of California, Memorandum Filed March 19, 2019, United States Court of Appeals For the Ninth Circuit, No. 18-55574, Dkt. Entry: 48-1. 765 Fed.Appx. 165 (Mem); 2019 U.S. App. LEXIS 8118.

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STATEMENT OF JURISDICTION

Petitioner seeks review of the Memorandum Decision of the United States Court of Appeals For the Ninth Circuit Filed on March 19, 2019 affirming the U.S. District Court's Dismissal of Petitioner's Second Amended Complaint.

Petitioner's timely Petition For *En Banc* And Panel Rehearing was denied by the United States Court of Appeals For the Ninth Circuit on May 24, 2019.

Petitioner has filed this Petition for Certiorari by mailing it to the United States Supreme Court with the United States Postal Service on August 22, 2019, (postmarked August 22, 2019), 90 days after the above denial of the Petition For Rehearing.

On August 27, 2019, the Office of the Clerk for the Supreme Court of the United States returned the Petition to Petitioner for correction so that it complies in all respects with the Rules of the Supreme Court, in particular, the required font size for the appendix. The Office of the Clerk instructed Petitioner to return the corrected Petition to the Supreme Court and submit it to the Court within 60 days from August 27, 2019, which Petitioner is doing.

The U.S. Supreme Court has jurisdiction, pursuant to 28 U.S.C. §1254(1), to review on a writ of certiorari the above Memorandum Decision of the United States Court of Appeals For the Ninth Circuit filed on March 19, 2019.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

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General prohibitions against discrimination

AMERICANS WITH DISABILITIES ACT,
TITLE II
28 CFR §35.134 Retaliation or coercion

STATEMENT OF THE CASE

Petitioner's U.S. District Court Complaint in this case claims that California's Adult Conservatorship statute, like other states' adult guardianship laws, are in violation of civil rights laws for persons with mental disabilities, including Title II of the Americans With Disabilities Act, (42 U.S.C. §§12132, 12133) ("ADA"), The Rehabilitation Act of 1973 (29 U.S.C. §§794, 794a), 42 U.S.C. §1983, 1985, and the due process and equal protection clauses of the 14th Amendment to the United States Constitution. In a nutshell, these adult conservatorship and guardianship regimes fall short of the requirements of the ADA and U.S. Constitution because they never provide for any court ordered supervised help for adult conservatees without depriving the conservatees of their liberty to the same extent as powers are granted to their respective conservators. (See 9th Circuit Excerpts of Record, TAB/DOC#43, Pages 70-73). As such the laws are in violation of the integration mandate of Title II of the Americans With Disabilities Act (28 CFR §35.130(d)), which the U.S. Supreme Court addressed only one time, in *Olmstead v. L.C.*, 527 U.S. 581 (1999). There is a violation of the integration mandate when the state causes an unnecessary loss of that liberty putting the conservatee at high risk of unjustified isolation or institutionalization (also stigmatization, etc.). *M.R. v. Dreyfus*, 697 F.3d 706, 720, 732-735 (9th Cir. 2012) (relying on *Olmstead v. L.C.* to address violation of the integration mandate in a different context). The point is that, most often, adults with mental disabilities who need court supervised help in

meeting their physical needs or managing their finances, e.g., a guardian or conservator, do not also need their freedom curtailed by the court. This should come as no surprise, but amazingly, in the United States, whenever court supervised help (i.e., guardian or conservator) is appointed by a state court for an adult with mental disabilities, the adult is always stripped of rights to some degree in becoming a ward/conservatee.[1] In some other countries, such as Sweden, this is not so.[2]

This is a flagrant violation of the due process and equal protection of the United States Constitution that has been tolerated way too long. It is an inevitable wrongful cause of unjustified institutionalization that makes it a violation of the integration mandate of the ADA.

This was also not so in California between 1957 and 1979, with respect to appointments of conservators for managing the financial affairs of adults with mental disabilities. See *Board of Regents v. Davis*, 14 Cal.3d 33 (1975).

In 1957, the California legislature created conservatorships for persons who needed help managing their affairs. The establishment of conservatorship under these provisions did not necessitate any loss of capacity by the conservatee. Rather, the Court appointed and supervised agent helped the conservatee manage his or her financial resources without any concomitant loss of civil rights by the conservatee. This was in furtherance of the legislature's goal at the time to entice more persons,

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[1] (See 9th Circuit Excerpts of Record, TAB/DOC#43, Pages 70-73).
[2] See Joan L. O'Sullivan, *Role of the Attorney For the Alleged Incapacitated Person*, XXXI Stetson Law Review Spring 2002 Page 721-722.

in need, to avail themselves of the protections provided by conservatorship without the indignity of losing their civil rights. *Id.*[3]

The California legislature then abolished guardianship for adults in 1979, and revised the Probate Conservatorship regime whereby a proposed conservatee lost his or her civil rights to contract, upon the court establishing the conservatorship, absent special court order allowing the conservatee to retain a right to contract. The legislative intention of this statutory change was to simplify administration of conservatorships of the estate and make it so that practically all conservatorships of the estate involve a total loss of the conservatee's right to contract.[4]

The California legislature enacted Probate Code Section 1872 in 1979, which today, states: "Except as otherwise provided in this article, the appointment of a conservator of the estate is an adjudication that the conservatee lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate."[5]

Had California kept the above conservatorship law that it had between 1957 and 1979, the acrimony and financial cost of conservatorship litigation would be drastically reduced in almost all cases today, and, in many, virtually eliminated. The aspect of proposed adult conservatorship/guardianship that is fought over acrimoniously by proposed conservatees/wards, often to severe financial detriment and familial discord, is the adjudication of their incapacity and loss of their liberty and privacy, which usually results in

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[3] See Petitioner's First Amended Complaint Page 85.
[4] See Petitioner's First Amended Complaint Page 86.
[5] See Petitioner's First Amended Complaint Page 86.

unjustified isolation, stigmatization, and unnecessary institutionalization. A modification of the state program to remedy this, proposed by Plaintiff, is what California already demonstrated, from 1957 to 1979, it can do without a fundamental alteration to the program[6].

Understandably, proposed adult conservatees/wards often hire an attorney to help them contest the proposed conservatorship/ guardianship so as to preserve their civil rights. This is what happened in conservatorship litigation involving Petitioner described in *Conservatorship of Moore*, 240 Cal.App.4th 1101 (2015) that the U.S. District Court in the present case references on Page 1 of its attached Order Granting Motions to Dismiss. When the proposed conservatee (or ward) loses the litigation, the question inevitably arises whether the attorney's fees incurred in fighting the proposed conservatorship/guardianship was excessive, and also whether the mentally disabled client was competent to pay the attorney, etc.

This serves as a severe threat to Plaintiff, and other attorneys and trustees for proposed conservatee's/wards of being charged, surcharged, accused, or sued for financial or physical abuse for simply fulfilling their duty of loyalty to their clients/settlors in helping them oppose a proposed conservatorship/guardianship. Were there the prospect of conservatorship/guardianship without the concomitant loss of the conservatee's/ward's freedoms, this threat would be virtually eliminated, or at least substantially reduced. The surcharge described in *Conservatorship of Moore*, 240 Cal.App.4th 1101

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[6] See Appellant's Opening Brief, DktEntry 9-1, Page 39.

(2015) would never have happened, simply because litigation in opposition to a conservatorship without the loss of fundamental rights, would have been unnecessary in the circumstances of Lester Moore. However, for the prospective relief sought in the First Amended Complaint, the U.S. District Court does not have to decide the proximate causation of the surcharge in such California case.[7] Herein lies the Article III injury and threat of injury that gives Petitioner the constitutional standing to make the above claims. As described above, the injury is redressable by the U.S. District Court.

Plaintiff is a California attorney with many elderly clients practicing trusts, estates, and conservatorship law in Ventura County, California. Plaintiff is representing adult proposed conservatees in the defense of their fundamental rights before the Superior Court of California for the County Ventura. As such, he is threatened with injury as a result of the putatively unconstitutional California statutes, and continuing illegal policies, practices, and conduct of defendants described throughout the First Amended Complaint.[8] Furthermore, the surcharge described in *Conservatorship of Moore*, 240 Cal.App.4th 1101 was proximately caused by the above violation of the integration mandate, or at least enough of it to constitute Article III injury to Petitioner. But even were one to ascribe most, or even all of the surcharge to a proximate cause other than the violation of the

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[7] See Appellant's Opening Brief, DktEntry 9-1, Pages 39-40.

[8] First Amended Complaint Page 7, lines 17-23; Pages 11-12; Page 15, lines 8-20; Page 60, lines 1-10, Page 217, lines 22-28; Page 218, lines 1-7; Page 221, lines 12-18; Page 223, lines 13-27; Page 227, lines 12-18.

integration mandate, there is still enough Article III injury to Petitioner from the contentiousness proceedings described in *Conservatorship of Moore*, 240 Cal.App.4th 1101 to give him constitutional standing to make these claims now, besides the threat of future injury on account of California's violation of the integration mandate.

Third party prudential standing has two elements besides the Article III minimum: that ". . .the party asserting the right has a 'close' relationship with the person who possesses the right [citation] . . .and that there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). Petitioner has met both of these requirements. Conservatees and proposed conservatees are obviously hindered in their ability to protect their own interests. And Petitioner as their attorney has a close relationship with them. See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 619-621, 623-624 fn. 3 (1989).

But Congress has abrogated these prudential restraints on third party standing for claims under Title II of the ADA, §504 of the Rehabilitation Act, and their respective regulations, providing standing to non-disabled persons, under these provisions, as broadly as permitted by Article III of the U.S. Constitution. *Barker v. Riverside Office of Educ.*, 584 F.3d 821, 825-828 (9th Cir. 2009). Therefore, to having standing, Petitioner need not show that conservatees or proposed conservatees are hindered in their ability to protect their own interests, nor that Petitioner has a "close" relationship with any of them.

Petitioner has "associational standing" under these statutory and regulatory provisions based on his association with Lester Moore in *Conservatorship of*

Moore, and association with other of Petitioner's clients who are threatened with injury due to California's violation of the above described integration mandate.

Petitioner also has standing based on the following statutory provision of the ADA[9] and:

> "It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual . . .on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

42 U.S.C. §12203(b). There is a constant threat of collision by government actors' exercise of *parens patriae* authority or hubris in conservatorship/ guardianship proceedings with proposed conservatees'/ wards' due process and equal protection rights, especially liberty. Inevitably, for attorneys such as Appellant, the zealous (and expensive) defense of the client's due process and equal protection rights comes into conflict with that *parens patriae* position of the government actor whereby the government actor violates the ADA's prohibition of "interference" with the protected activity. 42 U.S.C. §12203(a)(b), pursuant to 42 U.S.C. §12203(c), 42 U.S.C. §12133, 29 U.S.C. §794a(a)(2), and 42 U.S.C. §2000d et seq. *Barnes v. Gorman*, 536 U.S. 181, 184-185 (2002). This provides direct standing to attorneys for proposed conservatees who oppose conservatorship to challenge substantive and procedural aspects of

[9] The Rehabilitation Act has similar provisions through its implementing regulations, as described in *Barker v. Riverside Office of Educ.*, 584 F.3d 821, 825-828.

conservatorship law, facially, and as applied, that violate the conservatee's due process and equal protection rights under the ADA, Rehabilitation Act, and the 14th Amendment to the United States Constitution (42 U.S.C. §§1983, 1985).

When the state court and parties to a conservatorship/ guardianship proceeding injure the proposed conservatee/ ward and its advocate in the proceeding, whether that advocate is an attorney or trustee, there are arises the issue whether the *Rooker-Feldman* jurisdictional bar applies to deny any relief. The 9th Circuit in this case was presented with this issue. As to Petitioner, while he was and is in privity with his clients, as in the *Conservatorship of Moore*, the U.S. Supreme Court has established that *Rooker-Feldman* does not apply to Petitioner and others like him for being in privity with his client/ settlor, the state court loser. *Lance v. Dennis*, 546 U.S. 459, 466-467 (2006). The issue is more complicated when the state court has made a ruling specifically against the advocate, as in *Conservatorship of Moore*, 240 Cal.App.4th 1101, and the advocate (Petitioner) claims to be injured by related state court actions, and claims Article III standing, at least in part on such injury.[10] However, in the present case, Petitioner does not seek to have the federal court undo any judgment in *Conservatorship of Moore.* For instance, Petitioner does not claim any damages against a party in whose favor the judgment was rendered in *Conservatorship of Moore* (the Successor Trustee of the Moore Family

[10] See Petitioner's Excerpts of Record before the 9th Circuit, TAB/DOC #43, Pages 111-215.

Trust).[11] Rather, the damages are sought against the State of California and other defendants. Moreover, the injury is proximately caused by the State of California's violation of the integration mandate of the ADA and Rehabilitation Act.[12]

REASONS FOR GRANTING THE PETITION

I. THERE IS A CIRCUIT SPLIT AS TO THE SCOPE OF ASSOCIATIONAL STANDING UNDER THE ADA AND REHABILITATION ACT ("RA").

Last year, *Durand v. Fairview Health Services*, identified this split between the Second and Eleventh Circuits on the issue. 902 F.3d 836, 844 (8th Cir. 2018):

> "In *Loeffler*, the Second Circuit determined under the ADA and RA, 'non-disabled parties bringing associational discrimination claims need only prove an independent injury causally related to the denial of federally required services to the disabled persons with whom the non-disabled plaintiffs are associated.' 582 F.3d at 279. The majority in *Loeffler* concluded that, because a hospital did not provide federally-

[11] See Petitioner's Excerpts of Records before the 9th Circuit, TAB/DOC #43, Page 219, lines 15-28, Page 220, lines 1-4, Page 225, lines 15-28, Page 226, lines 1-4).

[12] See Petitioner's Excerpts of Record before the 9th Circuit, TAB/DOC #43, Pages 88-89, 97-98.

required services to a deaf patient, and because his two minor and hearing disabled children were required to act as on-call interpreters for their father, forcing the kids to miss school and be "involuntary[il]y expos[ed] to their father's suffering. *Id.* But see *id.* at 287 (Jacobs, C.J., dissenting) (noting that because Congress intended the standard under the ADA and RA to require non-disabled individuals to be excluded or denied services *because of their association,* and the non-disabled children had not been excluded from or denied services based on their association with their deaf father, the children did not have associational standing under either statute).

"In *McCullum*, the Eleventh Circuit held ' a non-disabled individual has standing to bring suit under the ADA [and RA] only if she was personally discriminated against or denied some benefit because of her association with a disabled person.' 768 F.3d at 1142. The Eleventh Circuit cited Chief Judge Jacobs' dissent in *Loeffler* and shared his concern at the possibility that 'non-disabled individuals may seek relief under the RA and ADA for injuries other than exclusion, denial of benefits, or discrimination that they themselves suffer.' *Id.* at 1143-44. The court noted, 'If that contention were correct, it would mean that Congress granted non-disabled persons more rights under the ADA and RA than it granted disabled persons, who can recover only if they are personally excluded, denied benefits, or

> discriminated against based on their disability.' *Id.* Although the ADA and RA may not intend to grant *more* rights to non-disabled individuals, the statutes do grant *different* rights to disabled and non-disabled individuals"

Durand, 902 F.3d at 844 (8th Cir. 2018). While Petitioner would never be intended as a beneficiary of California's conservatorship statutory regime, his injury is related to the denial of benefits to his clients. This is enough under the 2d Circuit's requirement for Associational standing under the ADA and Rehabilitation Act.

II. IT IS IMPORTANT FOR ATTORNEYS OF PROPOSED CONSERVATEES/WARDS TO HAVE STANDING TO CHALLENGE A STATE'S ADULT CONSERVATORSHOP/ GUARDIANSHIP REGIME IN FEDERAL COURT WHEN IT IS IN VIOLATION OF CIVIL RIGHTS LAWS.

It is exceptionally important for the federal courts to be able to measure the compliance of conservatorship and guardianship practices in the states with the ADA, 42 U.S.C. §§12132, 12133, 12203, Rehabilitation Act, 29 U.S.C. §§794, 794a, and the due process and equal protection clauses of the 14 Amendment to the United States Constitution. Conservatees/wards and proposed conservatees/wards are obviously hindered from litigating these issues themselves on account of their mental disabilities. So the standing of others to be able to raise these issues in federal court is very important, but this has been almost entirely overlooked by the federal courts. It is an impermissible conflict of interest to leave such

standing to conservators/ guardians as the 9th Circuit has done in this case.

In addition, the subject of "conspiracy" in this case between a state judicial actor and parties to the conservatorship proceeding to predetermine a conservatorship proceeding and curtail or punish a zealous (and very expensive) defense of the liberty of a proposed conservatee with declining mental abilities is hardly unusual. It is actually common, and it should be taken up by the federal court since it involves a federally protected activity, the defense of the freedom of the mentally disabled.

III. STANDING BY THIRD PARTIES LITIGATING FOR THE RIGHTS OF PERSONS WITH DISABILITIES UNDER 42 U.S.C. §12203(b) AND SIMILAR STATUTES IS A MATTER OF FIRST IMPRESSION FOR THE FEDERAL COURTS EXCEPT FOR A RETALIATION CLAIM.

The U.S. Supreme Court has not addressed the standing of non-disabled third parties under the ADA and Rehabilitiation Act to claim retaliation for advocating for the rights of the disabled as in *Barker v. Riverside Office of Educ.*, 584 F.3d 821, 825-828 (9th Cir. 2009) and the cases cited therein. Furthermore, it is a matter of first impression for all federal courts as to the standing of non-disabled third parties under the ADA[13] at 42 U.S.C. §12203(b) to claim "interference", short of retaliation, with their efforts to advocate for the rights of the disabled.

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[13] And similar regulations under the Rehabilitation Act as described in *Barker*, 584 F.3d at 825-828.

IV. THERE IS A CIRCUIT SPLIT AS TO WHETHER THE *ROOKER-FELDMAN* JURISDICTIONAL BAR PREVENTS LITIGANTS FROM SEEKING A FEDERAL REMEDY FOR ALLEGED VIOLATIONS OF THEIR CONSTITUTIONAL RIGHTS WHERE THE VIOLATOR IS ALLEGED TO HAVE SO FAR SUCCEEDED IN CORRUPTING THE STATE JUDICIAL PROCESS TO OBTAIN A FAVORABLE STATE JUDGMENT AGAINST THAT FEDERAL LITIGANT.

On this issue the 9th Circuit is at odds with the Seventh Circuit, Third Circuit, Fifth Circuit, and Tenth Circuit: *Nesses v. Shepard*, 68 F.3d 1003, 1004-1006 (7th Cir. 1995); *Loubser v. Thacker*, 440 F.3d 439, 441-443 (7th Cir. 2005); *Great Western Mining & Mineral Co. v. Fox Rothschild* LLP, 615 F.3d 159, 171-173 (3d Cir. 2010); *Land and Bay Gauging, LLC v. Shor*, 623 Fed.Appx. 674, 679-681 (5th Cir. 2015), and *Read v. Klein*, 1 Fed.Appx. 866, 870 (10th Cir. 2001). For instance, *Great Western Mining & Mineral Co.* states:

> "Regardless of the merits of the state-court decisions, if Great Western could prove the existence of a conspiracy to reach a predetermined outcome in state court, it could recover nominal damages for this due process violation. *Carey*, 435 U.S. at 262-64, 266, 98 S.Ct. 1042. Great Western's entitlement to such damages could be assessed without any analysis of the state-court judgments. To recover for more than the alleged due process

violation, however, Great Western would have to show that the adverse state-court decisions were entered erroneously. See *Nesses*, 68 F.3d at 1005. This is not the type of appellate review of state-court decisions contemplated by the *Rooker-Feldman* doctrine. In both *Rooker* and *Feldman*, the plaintiffs sought to have the state-court decisions undone or declared null and void by the federal courts. *See Rooker*, 263 U.S. at 414, 44 S.Ct. 149; *Feldman*, 460 U.S. at 468-69, 472-73, 103 S.Ct. 1303. The relief requested by the plaintiffs in the federal courts would have required effectively overruling the state-court judgments. This is not the case here. Great Western may, "as part of [its] claim for damages," show "that the [constitutional] violation caused the decision[s] to be adverse to [it] and thus did [it] harm." *Nesses*, 68 F.3d at 1005. A finding by the District Court that the state-court decisions were erroneous and thus injured Great Western would not result in overruling the judgments of the Pennsylvania courts. Pursuant to *Exxon Mobil*, a federal plaintiff may not seek "review and rejection of state-court judgments, 544 U.S. at 284, 125 S.Ct. 1517. Here, while Great Western's claim for damages may require review of state-court judgments and even a conclusion that they were erroneous, those judgments would not have to be rejected or overruled for Great Western to prevail. Accordingly, the review and rejection requirement of the *Rooker-Feldman* doctrine is not met, and the District Court properly exercised jurisdiction over Great Western's suit.

Great Western Mining & Mineral Co., 615 F.3d at 173. The Circuit split began when the Honorable Richard Posner authored *Nesses v. Shepard* in 1995 from which the language of Petitioner's Question Presented is derived at 68 F.3d at 1005. In *Nesses*, the doctrine of *Rooker-Feldman* did not apply because although the Plaintiff "was in a sense attacking the ruling by the state court," by asserting that he lost in state-court because "the lawyers and the judges [engineered the plaintiff's] defeat," the plaintiff was not seeking to undo a remedial order of some sort." *Id.* at 1005. For about six years, no other U.S. Circuit Judges endorsed his reasoning on this issue. One District Court Judge stated in 2008, "the *Nesses* exception to Rooker-Feldman has been unmentioned by judges in other Circuits, and I believe the Eighth Circuit would apply Rooker-Feldman rather than *Nesses* here." *Long v. Cross-Reporting Service*, 2008 WL 822124 at 2, No. 01-1111-cv-W-HFS (W.D. Missouri 2008).[14] Actually in 2001 a federal circuit finally endorsed Judge Posner on this issue in dicta, although not in a published opinion: *Read v. Klein*, 1 Fed.Appx. 866, 870 (10th Cir. 2001) (See also *Simon v. Taylor*, 981 F.Supp.2d 1020, 1051 (D. New Mexico 2013) (citing to *Read v. Klein* in stating that the 10th

[14] "; The dissenter in *Loubser*, as a judge of the Seventh Circuit, was bound by *Nesses*, but was troubled that it "could come to consume the Rooker-Feldman rule'. 440 F.3d at 444. Judge Fairchild, who was on the *Nesses* panel, also disagreed with the Posner handling of the issue, and concluded that 'the Rooker-Feldman doctrine requires dismissal for lack of jurisdiction.' 68 F.3d at 1005. *Long v. Cross Reporting Service, Inc.*, 2008 WL 822124 at 2.

Circuit would follow Judge Posner's reasoning in *Nesses v. Shepard*).

Then, in 2006, the Honorable Richard Posner authored another decision coming to the same conclusion on the issue in *Loubser v. Thacker*, 440 F.3d 439 where the District Court's decision to dismiss on the basis of *Rooker-Feldman* was deemed erroneous for the same reason as in *Nesses*:

> "Otherwise there would be no federal remedy other than an appeal to the U.S. Supreme Court, and that remedy would be ineffectual because the plaintiff could not present evidence showing that the judicial proceeding has been a farce, [citation]; one cannot present evidence to an appellate court . . .

Loubser, 440 F.3d at 441-442. In 2010, the 3d Circuit sided with Judge Posner and the 7th Circuit in the above described *Great Western Mining & Mineral Co.*, 615 F.3d 159 (3d Cir. 2010). The other Circuits have refrained from published decisions endorsing this view or otherwise coming to the same conclusion as the 3rd and 7th Circuits as to this exception to *Rooker-Feldman*. In an unpublished decision, the Fifth Circuit reversed a District Court's application of *Rooker-Feldman* to a federal plaintiff's §1983 constitutional claims that a state-court judge conspired with parties in a state court proceeding to engineer the federal plaintiff's defeat in those state court proceedings. *Land and Bay Gauging, LLC*, 623 Fed.Appx. 674, 679-680 (5th Cir. 2015). However, other federal claims in the same case were deemed barred by *Rooker-Feldman* due to the "timing" of the

injuries. Some of the injuries were deemed to be caused by the state court judgment, itself, and others were deemed to be caused by the conspiracy between the state court judge and other state court litigants in the proceedings leading up to the state court judgment. *Id.* When the adverse state court litigants were acting pursuant to authority by the state court judgment, and as such "harming" the federal plaintiff, *Rooker-Feldman* bars relief. *Id.* at 679. But harm to the federal plaintiff resulting from a state court's misconduct and adverse parties' misconduct in the proceedings that resulted in such state court judgment, is redressable, and *Rooker-Feldman* does not apply to bar relief for those injuries. *Id.* at 679-680. This 5th Circuit case shows, at pages 680-681, how the 5th Circuit's application of the *Rooker-Feldman* doctrine changed significantly after its watershed opinion in *Truong v. Bank of America*, 717 F.3d 377 (5th Cir. 2013), at which point it recognized that the troublesome phrase "inextricably intertwined" from *Feldman* "does not enlarge the core holding of *Rooker* or *Feldman*". *Id.* at 385 (quoted in *Land and Bay Gauging, L.L.C.*, 623 Fed.Appx. at 680-681 (referring to *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)).

The fact that circuits outside of the 3rd and 7th Circuits have used unpublished opinions to deal with this issue, signals a persistent conflict on the matter. There is a lingering confusion among the lower courts on when, if ever, *Rooker Feldman* does not apply when the federal plaintiff alleges damages or declaratory relief against a state, or a judge for conspiring with the federal plaintiff's opposing party in state court proceedings to predetermine the

outcome of that proceeding against the federal plaintiff. The importance of this issue for the country is obvious.

On the issue of judicial conspiracy, the 9th Circuit has attempted to hide its conflict with *Nesses, Loubser, Great Western Mining & Mineral Co.*, and *Land and Bay Gauging, LLC.* This is because, unlike when the 5th Circuit had its epiphany in 2013 in *Truong*, the 9th Circuit still erroneously believes that the "inextricably intertwined" language from *Feldman* properly expands the scope of the *Rooker-Feldman* jurisdictional bar. Before discussing how this is so in 9th Circuit's published case law, I refer the Court to two recent unpublished 9th Circuit decisions directly in conflict with the 3rd, 7th, and 5th Circuits on the question presented here regarding state judicial conspiracy. One is *Finnegan v. Munoz*, 698 Fed.Appx. 526 (9th Cir. 2017). But, as in Petitioner's case, one must read the underlying District Court opinion reviewed by the 9th Circuit to clearly see the conflict. *Finnegan v. Munoz*,[15] 2015 WL 3937590 at 1, 3-5; 2015 U.S. Dist. LEXIS 83530 at 1-2, 5-12 (SACV 15-0420-DSF (RNB) (C.D. California June 26, 2015).

Finnegan v. Munoz involved a federal plaintiff bringing a 42 U.S.C. §1983 suit against a California Judge, court clerk, and four attorneys representing a City that obtained a receivership over the Plaintiff's property. The federal plaintiff claimed that all these defendants conspired together to deny Plaintiff a fair trial over whether the receiver should be appointed.

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[15] One of the Circuit Judges on the 9th Circuit panel in the present case, N.R. Smith, was also on the appellate panel in *Finnegan v. Munoz*.

Critically, Plaintiff did not seek an injunction forcing the City to return his property. Nor did he seek declaratory relief. The suit was only for compensatory and punitive damages for the violation of the federal plaintiff's constitutional right to a fair trial. 2015 WL 3937590 at 1, 3-5; 2015 U.S. Dist. LEXIS 83530 at 1-2, 5-12. The defendants were all entitled to absolute immunity. *Id.* at WL 5-8 and LEXIS at 12-18. But the 9th Circuit chose not to affirm on the basis of the immunity of the defendants, but rather decided the case on the basis of *Rooker-Feldman*, as did the U.S. District Judge. *Id.* WL at 4-5; LEXIS at 8-12; *Finnegan v. Munoz*, 698 Fed.Appx. 526 (2017). This was wrong because *Rooker-Feldman* did not apply to any part of such case.

Another 9th Circuit case showing the conflict is *Thomas v. Zelon*,[16] 715 Fed.Appx. 780 (9th Cir. 2018), but here again one must carefully review the underlying U.S. District Court opinion to see it: 2017 WL 6017343, at 1, 3, 7. In *Thomas v. Zelon,* the federal plaintiff claimed a conspiracy between several California Court of Appeal Judges and adverse parties in state court appellate proceedings to predetermine the outcome of the proceedings and deny Plaintiff a fair and impartial forum. *Id.* The suit sought

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[16] Another of the Circuit Judges on the 9th Circuit panel in the present case, Edward Leavy, was also on the appellate panel in *Thomas v. Zelon.* Edward Leavy is one of the most distinguished U.S. Circuit Judges in the nation, having received the federal judiciary's highest honor in 2015, the Edward J. Devitt Distinguished Service to Justice Award. See News Release dated October 5, 2015 from the Public Information Office of the United States Courts for the Ninth Circuit. Justice Rehnquist appointed Edward Leavy as Presiding Judge of the United States Foreign Intelligence Surveillance Court of Review between 2005 and 2008. (See Wikipedia entry for Judge Edward Leavy).

damages, *Id.* 3, a permanent injunction prohibiting enforcement of a California Court of Appeal's sanction order, and declaratory relief that the sanctions order violated the federal plaintiff's constitutional rights, *Id.* at 6. The federal plaintiff also claimed "extrinsic fraud" upon the state court by an adverse party in the state court proceedings. *Id.* at 8-9.[17] While, as in the 5th Circuit's *Land and Bay Gauging, LLC* , some of the claims and relief sought in *Thomas v. Zelon* were rightfully barred by *Rooker-Feldman*, (like an injunction prohibiting enforcement of the state court judgment), the constitutional due process claims should not have been. The 9th Circuit Memorandum in *Thomas v. Zelon* implied that the *Rooker-Feldman* was being applied differently in two categories of the claims in the case before it: those that constituted a "'de facto appeal' of prior state court judgments", and, secondly, (and differently) those that "are inextricably intertwined' with those judgments". 715 Fed.Appx. 780.

The 9th Circuit has acknowledged that the *Rooker-Feldman* doctrine "is often misapplied".

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[17] The District Court applied the *Rooker-Feldman* bar because it found that there was no "extrinsic fraud" by an adverse party in "procur[ing]" "state court jurisdiction" in the state court proceedings being reviewed. *Id.* at 8-9. Otherwise, the 9th Circuit does recognize an extrinsic fraud exception to *Rooker-Feldman*, even allowing the federal court to set aside or void a state court judgment, as long as the extrinsic fraud was caused by a party in the state court litigation who was adverse at the time to the federal court plaintiff. *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140-1143 (9th Cir. 2004).[17] But this fraud exception to *Rooker-Feldman* in the 9th Circuit does not extend to a case in which the federal plaintiff also alleges legal error, or bias on the part of the state court tribunal, or conspiracy on the part of the state court or state judge to deprive the federal litigant of a fair hearing.

Carmona v. Carmona, 603 F.3d 1041, 1051 (9th Cir. 2010). The reason why the doctrine was misapplied in Petitioner's instant case, as well as, *Finnegan v. Munoz*, *Thomas v. Zelon*, and others, is because of erroneous fundamental 9th Circuit doctrine on the subject that has persisted long after the U.S. Supreme Court's 2005 limiting instruction in *Exxon Mobil Corp.*, 544 U.S. 280. Unlike other Circuits, the 9th Circuit has two separate tests in applying the *Rooker-Feldman* jurisdictional bar to a case, the "de facto appeal" test, and the "inextricably intertwined" test. These two tests are misleading and confusing courts in the 9th Circuit to apply *Rooker-Feldman* in violation of U.S. Supreme Court precedent.

First, the federal court is to determine whether the federal plaintiff is explicitly styling its complaint as an appeal to a U.S. District Court of a state court judgment adverse to the federal plaintiff, or bringing a "defacto equivalent" of such an appeal. *Cooper v. Ramos*, 704 F.3d 772, 777-778 (9th Cir. 2012) (citing *Noel v. Hall*, 341 F.3d 1148, 1155, 1158 (9th Cir. 2003). If so, then the *Rooker-Feldman* doctrine applies to the case, at least in part. *Id.*

Second, once the federal court determines that such a "defacto" appeal of a state court judgment is present in the federal case, the court then determines whether there are any issues in the federal case, the resolution of which in plaintiff's favor would be dependent on a finding by the federal court that the state court's decision was in error. Any such issues are also barred by *Rooker-Feldman* according to the 9th Circuit because they are considered "inextricably interwined" with the state court decision that the plaintiff is "defacto" appealing. *Id.* at 782. So the 9th Circuit allows the *Rooker-Feldman* jurisdictional bar

to apply more broadly than permitted by the U.S. Supreme Court in *Exxon Mobil.* One of the cases cited by the 9th Circuit Memorandum in this present matter explicitly describes the 9th Circuit's broader use of this jurisdictional bar: "The inextricably intertwined test thus allows courts to dismiss claims closely related to claims that are themselves barred under *Rooker-Feldman.*" *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1142 (9th Cir. 2004). This is no longer allowed after *Exxon Mobil*, but the 9th Circuit continues to do so.

The first test described above is misleading because there is no such thing as an attempted *direct* appeal from a state court to a U.S. District Court, and there are no cases anywhere showing such. Applications of the *Rooker-Feldman* jurisdictional bar only concerns a federal plaintiff attempting to make a "defacto" appeal. *Noel v. Hall* created confusion when it drew a distinction between a *direct* appeal and *defacto* appeal, when it stated: "*Rooker-Feldman* becomes difficult- and, in practical reality, only comes into play when a disappointed party seeks to take not a formal direct appeal, but rather its de facto equivalent, to a federal district court". 341 F.3d 1148, 1155 (9th Cir. 2003). The confusion persisted because *Noel v. Hall*'s standing in 9th Circuit case law was greatly enhanced when the U.S. Supreme Court approved of another part of *Noel v. Hall,* 341 F.3d at 1163-1164, in its watershed decision *Exxon Mobil Corp.*, 544 U.S. at 292.

This false distinction between a *direct* appeal of a state court decision to a U.S. District Court versus a *defacto* appeal resulted in a post-*Exxon Mobil Corp.* 9th Circuit case, *Henrichs v. Valley View Development*, 474 F.3d 609, 613 (9th Cir. 2007)

inferring that there is more than one category of cases to which *Rooker-Feldman* applies: "The clearest case for dismissal based on the *Rooker-Feldman* doctrine occurs when 'a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision . . .' *Noel v. Hall*, 341 F.3d 1148, 1164 (9th Cir. 2003)", 474 F.3d at 613. The District Court in the present case quotes this statement on pages 3-4 of its Order Dismissing Petitioner's case. The U.S. District Court in the present case then, on Page 4 of its order, misquotes *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1139 as stating "*Rooker-Feldman* may also apply where the parties do not directly contest the merits of a state court decision, as the doctrine . . .", and then the order correctly quotes *Kougasian* as stating that *Rooker-Feldman* "prohibits a federal district court from exercising subject matter jurisdiction over a suit that is a de facto appeal from a state court judgment." *Id.* After the U.S. Supreme Court's decision in *Exxon Mobil Corp.* the only claims to which the *Rooker Feldman* jurisdictional bar applies are supposed to be those that the meet the definition set forth at 544 U.S. 280, 284,[18] no matter how the case may be labeled, as a *direct* or *defacto* appeal of a state court decision. There is no such additional distinction. Such erroneous distinction in 9th Circuit jurisprudence

[18] "The *Rooker-Feldman* doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. *Rooker-Feldman* does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions". *Id* at 284.

between *direct* versus *defacto* appeal caused Petitioner's present case to be dismissed.

The above described second test used in the 9th Circuit for application of the *Rooker-Feldman* doctrine wrongfully ascribes independent content to the "inextricably intertwined" language of *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483-84, n. 16 (1983). Soon after *Exxon Mobil Corp.*, the Second Circuit recognized this pitfall in *Hoblock v. Albany County Board of Elections*, 422 F.3d 77 (2d Cir. 2005), its watershed case for the doctrine ever since:

> The "inextricably intertwined language from *Feldman* led lower federal courts, including this court in *Moccio*, 95 F.3d at 199-200, to apply *Rooker-Feldman* too broadly. In light of *Exxon Mobil-* which quotes *Feldman*'s use of the phrase but does not otherwise explicate or employ it, [citation]- it appears that describing a federal claim as "inextricably intertwined" with a state-court judgment only states a conclusion. *Rooker-Feldman* bars a federal claim, whether or not raised in state court, that asserts injury based on a state judgment and seeks review and reversal of that judgment; such a claim is "inextricably intertwined" with the state judgment. But the phrase "inextricably intertwined" has no independent content. It is simply a descriptive label attached to claims that meet the requirements outlined in *Exxon Mobil.*

Hoblock, 422 F.3d 77, 86-87 (2d Cir. 2005). The 9th Circuit continues to misuse this "inextricably intertwined" language following *Exxon Mobil Corp.*

The 9th Circuit Memorandum in the present case cites to *Cooper v. Ramos* where the Court barred one of the federal claims that did not seek to undo a state court judgment simply because it was related to a claim that did seek to undo a state court judgment and also because the claim was "contingent upon a finding that the state court decision was in error. 704 F.3d 772, 782 (9th Cir. 2012).

In *Cooper v. Ramos*, the federal plaintiff claimed that his constitutional due process rights were violated in state court criminal proceedings when his motion in the state court to be allowed DNA testing of evidence was denied. 704 F.3d 772, 776 (9th Cir. 2012). He sought a declaratory judgment stating that he is entitled to the DNA testing, *Id.* at 779, and the federal plaintiff also sought monetary damages against adverse parties in the state court criminal litigation for their violation of his constitutional rights, *Id.* at 781-783.[19] The claim for declaratory relief was considered by the 9th Circuit to be a "de facto appeal" of the state court judgment and barred by *Rooker-Feldman* on that basis. *Id.* at 779-781 ("pure horizontal appeal of the state court decision", *Id.* at 779). The claim for monetary damages for the due process violations was considered barred by *Rooker-Feldman*, not because it was a "de facto appeal", but rather simply because it was considered "inextricably intertwined" with the other claim for declaratory relief. *Id.* at 781-783. In this respect, *Cooper v. Ramos* is in conflict with *Exxon Mobil* because the claim for monetary damages does not

[19] The monetary damages were claimed against the San Bernardino County District Attorneys criminologists, and various law enforcement officials. Neither the state court, nor any judge is named as a defendant. *Id.* at 772, 776.

seek to undo (or "reject") the state court judgment. *Cooper v. Ramos* was decided seven years after *Exxon Mobil*, but the 9th Circuit was, and continues to apply *Rooker-Feldman* broader than as allowed by the U.S. Supreme Court (and broader than how the 3rd, 5th, and 7th Circuits apply the doctrine). The 9th Circuit Memorandum in the present quotes *Cooper v. Ramos* to apply the jurisdictional bar when the federal adjudication would simply "undercut the state ruling". *Id.* at 782. As follows, *Cooper* adopts Justice Marshall's approach to expand *Rooker-Feldman* in his concurring opinion in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25 (1987). *Cooper* quotes Marshall:

> While the question whether a federal constitutional challenge is inextricably intertwined with the merits of a state-court judgment may sometimes be difficult to answer, it is apparent, as a first step, that the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of a state-court judgment.

Id. (quoted by *Cooper v. Ramos*, 704 F.3d 772, 778-779, 782 (9th Cir. 2012)). One of the 9th Circuit cases quoted by the U.S. District Court on page 4 of its order in the present matter tracks Justice Marshall's approach: "Where the district court must hold that

the state court was wrong in order to find in favor of the plaintiff, the issues presented to both courts are inextricably intertwined". *Doe & Associates Law Offices v. Napolitano*, 252 F.3d 1026, 1030 (9th Cir. 2001). The conclusion is, therefore, that such a finding is sufficient for the federal court to lack jurisdiction. But this conclusion is now at odds with the limiting construction of *Exxon Mobil Corp.*

Following *Exxon Mobil Corp.*, there is a conflict between Circuits as to whether the "inextricably intertwined" language in *Feldman* has "independent significance" and whether the *Rooker-Feldman* doctrine can apply simply where a federal "plaintiff's claim can succeed only to the extent that the federal court concludes that a state court wrongly decided a factual or legal issue." *Dodson v. University of Ark. For Med. Sciences*, 601 F.3d 750, 758 (8th Cir. 2010) (Melloy, J., concurring).

V. THERE IS A CIRCUIT SPLIT ON WHETHER A "REASONABLE OPPORTUNITY" EXCEPTION APPLIES TO THE *ROOKER-FELDMAN* JURISDICTIONAL BAR.

The 11th Circuit recognizes such an exception. *Target Media Partners v. Specialty Marketing Corporation*, 881 F.3d 1279, 1286 (11th Cir. 2018) ("a federal claim is not "inextricably intertwined" with a state court judgment when there was no 'reasonable opportunity to raise' that particular claim during the relevant state court proceeding. [citation]."). The 9th Circuit does not recognize this exception as shown in its case law described in this petition. The exception should apply to Petitioner's case here.

Dated: August 22, 2019

s/ WILLIAM A. SALZWEDEL

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William A. Salzwedel

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765 Fed.Appx. 165 (Mem)

United States Court of Appeals, Ninth Circuit.

William A. **SALZWEDEL**, on behalf of himself, and all others adversely affected by similar state action, Plaintiff-Appellant,

v.

State of CALIFORNIA; et al., Defendants-Appellees.

No.
18-55574
|
Submitted March 12, 2019*
|
Filed March 19, 2019

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Appeal from the United States District Court for the Central District of California, Andre Birotte, Jr., District Judge, Presiding, D.C. No. 2:17-cv-03156-AB-RAO

Before: LEAVY, BEA, and N.R. SMITH, Circuit Judges.

***166** MEMORANDUM**

William A. Salzwedel appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging various claims stemming from his dual role as attorney and trustee in a California probate court. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1139 (9th Cir. 2004) (dismissal under *Rooker–Feldman* doctrine); *Canatella v. California*, 304 F.3d 843, 852 (9th Cir. 2002) (dismissal for lack of

standing). We affirm.

The district court properly dismissed for lack of standing Salzwedel's claims asserted on behalf of third parties. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (constitutional standing requires an "injury in fact," causation, and redressability); *Coalition of Clergy, Lawyers, & Professors v. Bush*, 310 F.3d 1153, 1163 (9th Cir. 2002) (setting forth third-party standing requirements).

The district court properly dismissed as barred by the *Rooker–Feldman* doctrine Salzwedel's first and second claims because they are a de facto appeal of decisions of the California probate and appellate courts and are inextricably intertwined with those state court decisions. *See Kougasian*, 359 F.3d at 1139 ("*Rooker–Feldman* prohibits a federal district court from exercising subject matter jurisdiction over a suit that is a de facto appeal from a state court judgment."); *see also Cooper v. Ramos*, 704 F.3d 772, 782 (9th Cir. 2012) (explaining that *Rooker–Feldman* doctrine bars "inextricably intertwined" claim where federal adjudication "would impermissibly undercut the state ruling on the same issues" (citation and internal quotation marks omitted)).

Salzwedel's requests for judicial notice, set forth in his opening brief, and his motion for judicial notice (Docket Entry No. 18) are granted.

AFFIRMED.

All Citations
765 Fed.Appx. 165 (Mem)

Footnotes

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Salzwedel v. California

United States Court of Appeals for the Ninth Circuit
May 24, 2019, Filed
No. 18-55574

Reporter
2019 U.S. App. LEXIS 15637 *

WILLIAM A. SALZWEDEL, on behalf of himself, and all others adversely affected by similar state action, Plaintiff-Appellant, v. STATE OF CALIFORNIA; et al., Defendants-Appellees.

Prior History: [*1] D.C. No. 2:17-cv-03156-AB-RAO. Central District of California, Los Angeles.

Salzwedel v. California, 2019 U.S. App. LEXIS 8118 (9th Cir. Cal., Mar. 19, 2019)

Core Terms
en banc, petition for rehearing

Counsel: WILLIAM A. SALZWEDEL, on behalf of himself, and all others adversely affected by similar state action, Plaintiff - Appellant, Pro se, Thousand Oaks, CA.

For State of California, Judicial Branch of California, TANI G. CANTIL-SAKAUYE, on behalf of herself in her official capacity and all other similarly situated officials within other states, JUDICIAL COUNCIL OF CALIFORNIA, on behalf of itself and all other similarly situated bodies within other states, MARTIN HOSHINO,

Administrative Director of the Judicial Council of California, on behalf of himself in his official capacity and all other similarly situated officials within other states, SUPERIOR COURT OF CALIFORNIA COUNTY OF VENTURA, on behalf of itself and all other Superior Courts of California and all other courts that adjudicate or supervise conservatorships or guardianships of adults in other states, GLEN M. REISER, Honorable; on behalf of himself in his official capacities and all other judges in California that adjudicate of supervise conservatorships of adults and all other judges that adjudicate or supervise conservatorships or guardianships of adults **[*2]** in other states, Defendants- Appellees: Jeffrey A. Rich, Esquire, Deputy, Associate General Counsel, AGCA-Office of the California Attorney General, Sacramento, CA.

For MARY C. WEBSTER, individual capacity and all others similarly situated, Defendant - Appellee: Martha Jennifer Wolter, Esquire, Office of the County Counsel, Ventura, CA.

For ANGELIQUE FRIEND, Conservator of the Person and Estate of Lester G. Moore and all others similarly situated, Benton Orr Duval And Buckingham, Thomas E. Olson, Defendants - Appellees: Kevin Michael McCormick, Attorney, Benton, Orr, Duval & Buckingham, Ventura, CA.

For John C. Barlow, Poppy Helgren, Defendants - Appellees: John C. Barlow, Esquire, Attorney, Law Offices of John C Barlow, Simi Valley, CA; Jeffrey T. Belton, Esquire, Attorney, Law Offices of Jeffrey T. Belton, Simi Valley, CA.

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For OFFICE OF THE PUBLIC DEFENDER FOR THE COUNTY OF VENTURA, STATE OF CALIFORNIA, on behalf of itself and all other entities similarly situated, [*3] Defendant - Appellee: Martha Jennifer Wolter, Esquire, Office of the County Counsel, Ventura, CA.

Judges: Before: LEAVY, BEA, and N.R. SMITH, Circuit Judges.

Opinion

ORDER

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See Fed. R. App. P. 35*.

Salzwedel's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 49) are denied.

No further filings will be entertained in this closed case.

2018 WL 5264159

Only the Westlaw citation is currently available.
United States District Court, C.D. California.

William A. SALZWEDEL et al.
v.
State of CALIFORNIA et al.

Case No.: CV 17-03156 AB (RAOx)
|
Filed 04/04/2018

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Proceedings: [In Chambers] ORDER GRANTING MOTIONS TO DISMISS [Dkt. Nos. 45, 48, 50]

ANDRÉ BIROTTE JR., United States District Judge

***1** Before the Court are three Motions to Dismiss ("Motions," Dkt. Nos. 45, 48, 50) First Amended Complaint filed by three groups of defendants.

Plaintiff William Salzwedel ("Plaintiff") filed oppositions and the defendants filed replies. For the following reasons, the Motions are **GRANTED**.

I. BACKGROUND

Plaintiff's First Amended Complaint ("FAC," Dkt. No. 43), which consists 240 pages and about 600 paragraphs[1], arises out of a conservatorship and trust suit ("Probate Proceedings") before the Ventura County Superior Court and the California Court of Appeal. FAC ¶¶ 231, 448, 449; *see also Conservatorship of Moore*, 240 Cal. App. 4th 1101 (2015).

In brief summary, Lester G. Moore had a Trust of which his child Poppy Helgren was a contingent beneficiary. *Id.* ¶ 232. In 2009, Moore, who was 80 years old, was diagnosed with dementia and appointed Helgren as his attorney-in-fact. *Id.* ¶ 234. In 2010, Helgren obtained physicians' statements saying Moore was no longer capable of managing his affairs and sought to be named trustee of the Trust, and apparently sought a conservatorship. *Id.* ¶235. Moore was displeased with Helgren's actions and hired Plaintiff, an attorney, to oppose Helgren, including by pursuing an elder abuse claim against her. *Id.* ¶ 240. Moore revoked Helgren's power of attorney and appointed Plaintiff as trustee. *Id.* ¶¶ 239, 243.

The FAC recounts in minute detail numerous events in the Probate Proceedings. Some of the Probate Proceedings are also described in *Conservatorship of Moore*, 240 Cal. App. 4th 1101 (2015), of which this Court takes judicial notice. As relevant, the probate

court removed Plaintiff as trustee and appointed a new trustee (Angelique Friend), but before Plaintiff was removed as trustee, he paid himself $148,015.11 in "trustee's fees," which was 31.22% of the trust estate, plus some $32,000 in other fees. *Conservatorship of Moore*, 240 Cal. App. 4th at 1105. Plaintiff filed a petition to settle his accounting, and Friend and Helgren objected. The probate court disapproved of $96,077.14 of Plaintiff's trustee fees, and entered a judgment surcharging him that amount. The Court of Appeal affirmed and ordered its opinion transmitted to the California State Bar so it could consider pursuing disciplinary action, characterizing the situation as follows: "Retained counsel for an elderly person suffering from dementia must safeguard the well-being of the person and his or her financial resources. As we shall explain, here the attorney did neither. The probate court expressly indicated that counsel put his own financial interests ahead of the interests of his client. It surcharged counsel. We agree with the probate court's ruling and its rationale. We commend it. We affirm the judgment." *Conservatorship of Moore*, 240 Cal. App. 4th at 1103.

The FAC lists the following claims on its face page: "1. discrimination, retaliation, coercion, intimidation, threat, harassment on the basis of disability"; "2. disparate treatment"; "3. conservatorship regime in violation of equal protection"; "4. conservatorship regime in violation of civil rights laws"; "5. violation of due process right in adjudication of incapacity and conservatorship"; and "6. declaratory relief." Plaintiff, who is appearing pro se, purports to assert some of these claims on his own behalf, and on behalf of

classes of attorneys and conservatees whose civil rights he claims are violated by California's conservatorship regime. FAC ¶ 22. Plaintiff further asserts that each of the named defendants conspired with one another to engage in the alleged violations.

***2** Plaintiff asserts these claims against numerous defendants who can be grouped as follows: the State of California, Judicial Branch of California, Hon. Tani G. Cantil-Sakauye, Judicial Council of California, Martin Hoshino (administrative director of the Judicial Counsel), Superior Court of California County of Ventura, Hon. Glen M Reiser (who presided over the trial court Probate Proceedings), and California Court of Appeal for the Second District, Division Six (which decided appeals from the Probate Proceedings) (together, the "Judicial Defendants"); Angelique Friend (the conservator Judge Reiser appointed for Moore), and Thomas E Olson and Benton, Orr, Duval & Buckingham, PLC (counsel for conservator Friend in the Probate Proceedings) (together, the "Conservator Defendants"); Mary Webster and the County of Ventura sued as the Office of the Public Defender of the County of Ventura (together, the "County Defendants"); Poppy Helgren (Moore's daughter and the petitioner in the Probate Proceedings); and John Barlow (counsel for Ms. Helgren in the Probate Proceedings).

Now before the Court are three motions to dismiss ("Motion") filed by the Judicial Defendants (Dkt. No. 48), the Conservator Defendants (Dkt. No. 45), and the County Defendants (Dkt. No. 50); Helgren and Barlow filed joinders (Dkt. Nos. 49, 53) which the Court grants. The Motions raise numerous

meritorious grounds for dismissal, but the Court will address only the *Rooker-Feldman* doctrine and Plaintiff's lack of standing. In light of the FAC's jurisdictional defects, the Court may not adjudicate the other grounds for dismissal.

II. DISCUSSION

A. The Court Lacks Subject Matter Jurisdiction Over Plaintiff's First and Second Causes of Action.

The only federal court authorized "to exercise appellate authority 'to reverse or modify' a state-court judgment" is the United States Supreme Court. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). ("The *Rooker-Feldman* doctrine [ ] recognizes that 28 U.S.C. § 1331 is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments, which Congress has reserved to this Court, *see* § 1257(a)." *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 644, n. 3 (2002)). Thus, under the *Rooker–Feldman* doctrine, a federal district court does not have subject matter jurisdiction to hear a direct appeal from the final judgment of a state court. *Noel v. Hall*, 341 F.3d 1148, 1154–55 (9th Cir. 2003) (explaining history and statutory origin of the doctrine). *Rooker–Feldman* bars "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil*, 544 U.S. at 284.

"The clearest case for dismissal based on the

Rooker–Feldman doctrine occurs when a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision." *Henrichs v. Valley View Dev.*, 474 F.3d 609, 613 (9th Cir.2007) (internal quotation marks omitted). But "*Rooker–Feldman* may also apply where the parties do not directly contest the merits of a state court decision, as the doctrine 'prohibits a federal district court from exercising subject matter jurisdiction over a suit that is a de facto appeal from a state court judgment.' " *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1139 (9th Cir. 2004) (citing *Bianchi v. Rylaarsdam*, 334 F.3d 895, 898 (9th Cir. 2003)).

Rooker–Feldman applies even where the challenge to the state court decision involves federal constitutional issues. *Worldwide Church of God v. McNair*, 805 F.2d 888, 891 (9th Cir.1986). To determine whether a plaintiff making a permissible general constitutional challenge that does not require review of a state court decision in a particular case and an impermissible appeal of a state court determination, the court should ask whether it is " 'in essence being called upon to review the state court decision.' " *Doe & Assocs. Law Offices v. Napolitano*, 252 F.3d 1026, 1029 (9th Cir. 2001) (citing *D.C. Ct. of App. v. Feldman*, 460 U.S. 462, 482 n. 16 (1983)).

***3** Here, Plaintiff's first and second claims are barred by *Rooker–Feldman*. To be sure, the FAC anticipates and attempts to preempt this argument by claiming that Plaintiff's harm derives not from the judgment against him, but rather from the conservatorship regime itself. But the FAC itself belies this

characterization, as it contains numerous allegations that Plaintiff's wrongs were caused by the probate and appellate court orders. *See, e.g.*, FAC ¶¶ 23(ii)-(iii), 245, 259, 2260, 262,291, 294, 296-297,306, 336, 339, 343-345, 352.367, 417-418, 429-433, 449-451. To adjudicate these claims, this court would have to sit in review of those state court orders.

The allegations specific to the first and second claims further show that they seek review of state court orders. Plaintiff's first claim, for retaliation, would require this court to decide that the state court actions adverse to him (removing him as trustee, surcharging his fees) were wrongful and motivated by discrimination. *See* FAC ¶ 457 and p. 219 ¶ 145 ("As a proximate result of the above misconduct, Plaintiff has been harmed in that a Judgment of Surcharge of $96,077.14 was entered against Plaintiff ..."). Plaintiff's second claim, for violation of the Equal Protection Clause, is that Judge Reiser treated him "less favorably" than he treated Friend, Barlow, Olson, and the Benton law firm, FAC p. 222 ¶ 143, and that Plaintiff was damaged by the surcharge order. *Id.* p. 225, ¶ 145. For Plaintiff to prevail on these claims, the Court would have to determine that the state court orders removing him as trustee and surcharging fees were wrong—something this Court lacks jurisdiction to do. *See Doe & Assocs.*, 252 F.3d at 1030 ("Where the district court must hold that the state court was wrong in order to find in favor of the plaintiff, the issues presented to both courts are inextricably intertwined" and the district court lacks jurisdiction).

Plaintiff mounts two main counterarguments, but

they are unavailing. First, he questions whether the *Rooker-Feldman* doctrine remains viable following the 2005 *Exxon* case, *supra*, but this argument fails in light of the numerous later cases cited throughout the defendants' memoranda. Second, Plaintiff argues that he is not really complaining of being injured by the state court judgment, but instead is complaining that the state courts "went far beyond their proper judicial functions and in fact, attacked the very objective of the representation itself, the defense of Lester Moore's fundamental rights." *See* Opp'n (Dkt. No. 61) 8:2-22. But Plaintiff's FAC repeatedly charges that the state court rulings were in error; implausibly suggesting that the defendants all engaged in misconduct and a conspiracy does not vest this court with jurisdiction to review the state court orders. *See Cooper v. Ramos*, 704 F.3d 772, 782 (9th Cir. 2012) ("The alleged conspiracy is a fig leaf for taking aim at the state court's own alleged errors. It is precisely this sort of horizontal review of state court decisions that the *Rooker–Feldman* doctrine bars."). Relatedly, Plaintiff argues that he is not challenging the imposition of the surcharge, but rather that the surcharge was a pretext for discrimination. *Id.* 9:12-18. This is a distinction without a difference because a challenge to the surcharge as pretextual is in fact an attack on the surcharge judgment.

For these reasons, the Court lacks jurisdiction over Plaintiff's first two causes of action and dismisses them on that basis.

B. Claims 3, 4, and 5 Are Dismissed for Lack of Standing.

Plaintiff's claims 3-5 represent a wholesale challenge to the legality of California's "conservatorship regime," asserting that it violates the Equal Protection Clause, the Procedural and Substantive Due Process guarantees of the 14th Amendment, the California Constitution, the Americans with Disabilities Act ("ADA"), the Rehabilitation Act, and 42 U.S.C. §§ 1983 and 1985, among other laws and regulations. Plaintiff purports to bring these claims on behalf of his former client Lester Moore and other similarly situated conservatees and subclasses of conservatees nationwide, arguing that conservatorship regimes throughout the nation violate their constitutional and statutory rights. *See* FAC ¶ 63; *see also* ¶¶ 71-86 (purporting to define numerous classes and subclasses, including nationwide classes challenging the conservatorship laws in every state), *and* ¶¶ 87-110 (alleging that each named defendant also represents one or more class of defendants).

***4** But Lester Moore is not a plaintiff, so this action cannot be a vehicle to pursue claims for him. The claims on behalf of the other conservatee classes fail for the same reason: no member of any of those classes is a named plaintiff. Furthermore, Moore is a conservatee, and only his conservator can represent him. *See* Cal.Civ.Proc. § 372(a) (a party for whom a conservator has been appointed shall be represented by that conservator). Because Plaintiff is not Moore's conservator, he cannot represent Moore in this action even if Moore were a party to it.

To the extent that Plaintiff himself seeks to represent

any class, this tactic fails for at least two reasons. First, Plaintiff is not a conservatee, so he lacks standing to represent any class of conservatees. Second, Plaintiff is appearing pro se, and a pro se litigant cannot represent a class even if he is also an attorney. *See* Local Rule 83-2.2.

C. Claim 6 Is Dismissed.

Claim 6 seeks declaratory relief wholly derivative of Plaintiff's other claims. It therefore falls along with them, and is dismissed.

III. CONCLUSION

For the foregoing reasons, the Motions to Dismiss are **GRANTED**. Plaintiff already amended his complaint once, almost quadrupling its volume yet failing to state any claim that this Court may adjudicate. Furthermore, the defects noted above are jurisdictional and cannot be cured by any plausibly-available amendment. The action is therefore dismissed without leave to amend. The Clerk's Office is ordered to close the case.

IT IS SO ORDERED.

All Citations

Slip Copy, 2018 WL 5264159

Footnotes

[1] The count is an estimate because the FAC's paragraphs are misnumbered.

240 Cal.App.4th 1101

Court of Appeal, Second District, Division 6, California.

CONSERVATORSHIP OF the Person and Estate of Lester MOORE.
Angelique Friend, as Conservator and Trustee, etc., Petitioner and Respondent,
v.
William Salzwedel, Objector and Appellant.

2d Civil No. B253538
|
Filed September 30, 2015
|
Rehearing Denied October 21, 2015
|
Review Denied December 16, 2015

Synopsis

Background: Daughter beneficiary filed petition for conservatorship over settlor, and filed petition to determine his capacity to execute estate planning documents. After petitions were consolidated, and receiver and temporary conservator were appointed, court removed attorney trustee as trustee, and ordered him to render a trust accounting. Attorney trustee filed petition to settle his accounting. The Superior Court, Ventura County, Nos. 56–2010–00387487–PR–CP–OXN and 56–2011–00391417–PR–TR–OXN, Glen M. Reiser, J., issued surcharge order, and attorney trustee appealed.

Holdings: The Court of Appeal, Yegan, J., held that:

[1] substantial evidence supported finding that fees which attorney trustee charged trust were unreasonable;

[2] conservatee substantial evidence supported finding that $27,515.13 which attorney trustee charged to trust for expert witness fees was excessive;

[3] settlor's receipt of bills from attorney trustee and failure to object did not indicate approval of fees or that the fees charged were reasonable;

[4] testimony of conservatee settlor's girlfriend, who allegedly was present when settlor received bills from attorney trustee, was irrelevant to issue of whether fees were reasonable;

[5] court was not required to make findings concerning conservatee settlor's wishes and objectives in hiring attorney trustee;

[6] attorney trustee had notice required by due process that his block billings would be at issue;

[7] pre-hearing order placed attorney trustee on notice he had the burden of proving conservatee's mental capacity to consent to charged fees; and

[8] beneficiary was an interested party with standing to object to attorney trustee's accounting.

Affirmed.

West Headnotes (17)

[1] **Appeal and Error**
Costs and Fees
Appeal and Error
Attorney Fees

Court would review surcharge order for excessive trustee and attorney's fees using the abuse of discretion standard.

4 Cases that cite this headnote

[2] **Trusts**
Costs

Principles of trust law impose a double-barreled reasonableness requirement on fees awarded to a trustee: a fee award must be reasonable in amount and reasonably necessary to the conduct of the litigation, but it also must be reasonable and appropriate for the benefit of the trust.

1 Cases that cite this headnote

[3] **Trusts**
Counsel fees and costs

A spare-no-expense strategy by a trustee calls for close scrutiny on questions of reasonableness, proportionality and trust benefit; consequently, where the trust is not benefited by litigation, or did not stand to be benefited if the trustee had succeeded, there is no basis for the recovery of expenses out of the trust assets. Cal. Prob. Code § 17200(b)(9),(21).

2 Cases that cite this headnote

[4] **Trusts**
Counsel fees and costs
Trusts
Evidence

Attorney trustee had burden in accounting action to show that he subjectively believed fees and expenses charged to trust were necessary or appropriate to carry out the trust's purposes, and that his belief was objectively reasonable.

Cases that cite this headnote

[5] **Trusts**
Counsel fees and costs

Substantial evidence supported finding that fees which attorney trustee charged trust were unreasonable; attorney trustee drafted an elder abuse petition that was never filed, prepared trust amendments and estate planning documents that were not signed or filed, billed the trust to educate himself on conservatorship law, and failed to keep adequate time records. Cal. Prob. Code § 17200(b)(9),(21).

1 Cases that cite this headnote

[6] **Trusts**
Counsel fees and costs

Substantial evidence supported finding that $27,515.13 which attorney trustee charged to trust for expert witness fees was excessive; attorney trustee secured expert doctor who charged $6,000 for travel time and billed $11,508.75 for "report writing" and a psychological assessment, attorney trustee could have hired nearby doctor to make the psychological evaluation for

$2,500, attorney trustee also paid a "celebrity psychiatrist" $7,500 to evaluate conservatee, but she never wrote a report or testified, and attorney trustee paid another attorney-doctor $3,000 to review some medical records. Cal. Prob. Code § 17200(b)(21).

Cases that cite this headnote

[7] **Trusts**
Expenditures

A trustee's power to incur expenses is limited to those expenses which are reasonably necessary or appropriate to carry out the purposes of the trust.

Cases that cite this headnote

[8] **Trusts**
Counsel fees and costs

Attorney trustee did not have any duty to follow the instructions of conservatee settlor no matter what the cost or expense; rather, attorney trustee had a duty not to charge trust excessive fees and expenses. Cal. R. Prof. Conduct

4–200(a), 5-310(b)(3).

Cases that cite this headnote

[9] **Trusts**
Counsel fees and costs

Conservatee settlor's receipt of bills from attorney trustee and failure of settlor, who suffered from dementia, to object to the bills did not indicate approval of attorney trustee's fees or that the fees charged were reasonable. Cal. Prob. Code § 17200(b)(9).

Cases that cite this headnote

[10] **Trusts**
Evidence

Testimony of conservatee settlor's girlfriend, who allegedly was present when settlor, who suffered from dementia, received bills from attorney trustee, was irrelevant to issue of whether fees were reasonable, and thus was inadmissible in accounting action, even if testimony would show settlor's state of mind and implied approval of the fees; parties agreed that attorney trustee had a good faith belief that an attorney-client

relationship existed and asked the trial court to determine the reasonableness of the fees and medical expert expenses. Cal. Evid. Code §§ 1250, 1261; Cal. Prob. Code § 17200(b)(9).

Cases that cite this headnote

[11] **Evidence**
Nature and Admissibility

Conservatee settlor's statements to girlfriend, who allegedly was present when settlor, who suffered from dementia, received bills from attorney trustee, were not admissible in accounting action under hearsay exception for statements "offered in an action upon a claim or demand against the estate of the declarant if the statement was made upon the personal knowledge of the declarant at the time when the matter had been recently perceived by him and while his recollection was clear," absent any offer of proof that settlor verbally approved the fees or that his statement was trustworthy, i.e., made when the matter had been recently perceived by settlor and while his recollection was clear. Cal. Evid. Code § 1261(a); Cal.

Prob. Code § 17200(b)(9).

Cases that cite this headnote

[12] **Trusts**
Hearing or reference

Probate court was not required in accounting action to make findings concerning conservatee settlor's wishes and objectives in hiring attorney trustee, as focus of the hearing was whether fees and expenses charged by attorney trustee were reasonable and benefited the trust, and wishes or objectives of settlor, who suffered from dementia, did not trump attorney trustee's duty to prudently spend trust money and avoid conflicts of interest with the trust. Cal. Prob. Code § 17200(b)(9).

Cases that cite this headnote

[13] **Appeal and Error**
Constitutional questions

Attorney trustee did not object at accounting hearing that he was denied due process because he did not know until the last day of trial

that block billing would be a basis for surcharge order, and thus was precluded from raising that issue on appeal. U.S. Const. Amend. 14; Cal. Prob. Code § 17200(b)(9).

Cases that cite this headnote

[14] **Constitutional Law**
Wills, Trusts, Probate, Inheritance, and Dower
Trusts
Hearing or reference

Attorney trustee had notice required by due process that his block billings would be in issue in accounting proceeding; receiver had stated that he would not approve "billings with just hours appearing" and that he did not know how attorney trustee would segregate work representing trust from work representing conservatee settlor, receiver told attorney trustee to break out what was spent actually lawyering for the trust, what was spent being trustee, and what was spent on personal services for conservatee, and probate court found in pre-hearing order that accounting was disorganized and did not comply with accepted statutory format and asked to see time

sheets. U.S. Const. Amend. 14; Cal. Prob. Code § 17200(b)(9).

Cases that cite this headnote

[15] **Constitutional Law**
Wills, Trusts, Probate, Inheritance, and Dower
Trusts
Hearing or reference

Pre-hearing order placed attorney trustee on notice he had the burden at accounting hearing of proving conservatee's mental capacity to consent to charged fees, and thus hearing did not violate attorney's due process rights; pretrial order stated that accounting would be set for evidentiary hearing to surcharge attorney for any sums unnecessarily charged, improperly charged or overcharged, attorney was provided a three day hearing, and, like any trustee, the burden was on attorney to itemize his fees and expenses and show they were reasonable. U.S. Const. Amend. 14; Cal. Prob. Code § 17200(b)(9).

Cases that cite this headnote

[16] **Trusts**
Objections and exceptions to account

Remainder beneficiary was an interested party with standing to object to trust accounting. Cal. Prob. Code § 17200(a).

Cases that cite this headnote

[17] **Trusts**
Proceedings for Final Settlement

When presented with a petition to settle an account, the probate court has a duty imposed by law to inquire into the prudence of the trustee's administration. Cal. Prob. Code § 17200(b)(9).

See 13 Witkin, Summary of Cal. Law (10th ed. 2005) Trusts, § 229.

Cases that cite this headnote

**182 Glen M. Reiser, Judge, Superior Court County of Ventura, (Super. Ct. No. 56–2010–00387487–PR–CP–OXN Consolidated with No. 56–2011–00391417–PR–TR–OXN)

Attorneys and Law Firms

William A. Salzwedel, in pro per, for Appellant.

Benion, Orr, Duval & Buckingham and Thomas E. Olson, Ventura, for Angelique Friend, Respondent.

No appearance for Poppy Helgren, Respondent.

Opinion

YEGAN, J.

*1103 Retained counsel for an elderly person suffering from dementia must safeguard the well-being of the person and his or her financial resources. As we shall explain, here the attorney did neither. The probate court expressly indicated that counsel put his own financial interests ahead of the interests of his client. It surcharged counsel. We agree with the probate court's ruling and its rationale. We commend it. We affirm the judgment.

Attorney William Salzwedel appeals a $96,077.14 judgment surcharging him for excessive attorney's/trustee's fees ($70,044.99), medical expert fees ($25,015.13), and costs ($1,017.02) incurred while acting as the temporary trustee of the Moore Family Trust. Appellant paid himself fees and costs after his 82-year-old client, Lester Moore, was diagnosed with dementia and the subject of a conservatorship petition. Appellant hired medical experts to oppose the conservatorship petition and drafted trust and estate documents to disinherit Moore's family. Sitting as the trier of fact, and exercising its broad discretion, the probate court found that the fees and expenses

were unreasonable and did not benefit the trust or Moore.

*1104 Appellant has no appreciation for the traditional rules on appeal. (See. e.g., **183 *Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448–1450, 77 Cal.Rptr.2d 463, *In re Marriage of Greenberg* (2011) 194 Cal.App.4th 1095, 1099, 125 Cal.Rptr.3d 238.) He contends, among other things, that the probate court used the wrong standard in determining the reasonableness of his fees and expenses.

Facts and Procedural History

In 1993, Lester Moore (Moore) and his wife, Lou Dell Moore, created the Moore Family Trust naming their daughter, Poppy Helgren, remainder beneficiary. After Lou Dell Moore died in 2001, Moore signed a durable power of attorney appointing Helgren as his attorney in fact.

After Moore's treating physicians notified Helgren that Moore suffered from dementia and lacked the capacity to handle his affairs, Helgren discovered that Moore was giving large sums of money to his girlfriend, Lieselotte Kruger. When Helgren brought this to Moore's attention, he accused Helgren of stealing trust money. Moore hired appellant to file an elder abuse petition and amend his estate plan.

In October of 2010, appellant had Moore sign the following documents: (1) a partial revocation and modification of the trust, naming appellant as temporary successor trustee of the trust; (2) Moore's

resignation as trustee; and (3) a durable power of attorney appointing appellant as Moore's attorney in fact. The next day, appellant sent Helgren a letter accusing her of violating trustee duties. Helgren provided an accounting which showed that no funds were misappropriated.

In December of 2010, Helgren filed a petition for conservatorship. (Ventura County Super Ct., Case No, 56-2010-00387487-PR-CP-OXN). A few months later, she filed a second petition to determine Moore's capacity to execute the estate planning documents (Super. Ct., Ventura County, 2011, No. 59-2011-00391417-PR-TR-OXN).

The probate court consolidated the petitions and appointed Attorney Lindsay Nielson as receiver to inventory Moore's property and trust assets. Appellant submitted billings for fees and expert witness expenses to the receiver who paid the bills but voiced concerns about the amount charged. In February of 2012, the court appointed Senior Deputy Public Defender Mary Shea as cocounsel for Moore and, appointed respondent Angelique Friend, a professional fiduciary, as temporary conservator of Moore's person and estate. Immediately upon her appointment, Friend terminated appellant as Moore's attorney.

***1105** In May of 2012, the probate court removed appellant as trustee, appointed Friend as the new temporary successor trustee of the trust, and ordered appellant to render a trust accounting. (Prob.Code, § 15642.) Before he was removed as trustee, appellant paid himself $148,015.11 in "trustee's fees."

Appellant filed a petition to settle his accounting to which Friend and Helgren objected. (Prob.Code, § 17200, subd. (b)(5))[1] Before the evidentiary hearing, the trial court ruled that the trustee's fees ($148,015.11) were disapproved absent a showing that the services benefited Moore in the sums charged and a showing that Moore had the capacity to contract for and approve the fees when the services were rendered. With respect to the medical expert expenses ($28,452.63), the probate court ruled that "[t]hese professional fees are expressly disapproved absent an affirmative showing by [appellant] that the charged 'medical' services benefited Mr. Moore in the sums charged." The probate **184 court noted that the accounting listed $474,348.01 in opening inventory and cash receipts and that appellant paid himself $148,015.11 in fees, "or 31.22% of the conservatee's reported trust estate, ... plus another $32,288.21, or another 6.81% of the conservatee's reported trust estate, in related 'professional' and litigation fees."

Reasonable Fees and Expenses

[1] [2]We review the surcharge order utilizing the abuse of discretion standard. (*Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 268–269, 105 Cal.Rptr.3d 723 (*Donahue*); see Estate of *Gilkison, supra,* 65 Cal.App.4th at pp. 1448–1449.) As trustee, appellant was charged with the responsibility of incurring fees and expenses that were reasonable in amount and appropriate to the purposes of the trust. (*Donahue v. Donahue, supra,* at p. 268, 105 Cal.Rptr.3d 723.) "Long-established principles of trust law impose a

double-barreled reasonableness requirement: the fee award must be reasonable in amount and reasonably necessary to the conduct of the litigation, but it also must be reasonable and appropriate *for the benefit of the trust.*" (*Id.,* at p. 363, 105 Cal.Rptr.3d 723.)

Appellant contends that the trial court applied the wrong standard in reviewing his fees because he was retained before Moore's mental capacity was adjudicated in the conservatorship proceeding. Appellant claims that Moore had the autonomous and unfettered right to decide what services would be provided and that appellant was duty bound to zealously act on Moore's personal wishes. By this theory, there could be no probate court review of his fees.

[3] [4]We reject these arguments because appellant, acting in a trustee capacity, paid the fees and expenses with trust funds. Appellant could not put ***1106** on "horse blinders" and follow the orders of a client whom he knew, even before formal adjudication, suffered from mental impairment.[2] In order to approve the trustee accounting, the trial court had to determine the reasonableness of the fees and expenses. (§ 17200, subd. (b)(9) & (b)(21); *Donahue, supra,* 182 Cal.App.4th at p. 269, 105 Cal.Rptr.3d 723.) "[A] spare-no-expense strategy calls for close scrutiny on questions of reasonableness, proportionality and trust benefit. 'Consequently, where the trust is not benefited by litigation, or did not stand to be benefited if the trustee had succeeded, there is no basis for the recovery of expenses out of the trust assets' [Citation.]" (*Id.,* at p. 273, 105 Cal.Rptr.3d 723.) As trustee, the burden was on

appellant to show that he subjectively believed the fees and expenses were necessary or appropriate to carry out the trust's purposes, and that his belief was objectively reasonable. (*Id.,* at p. 268, 105 Cal.Rptr.3d 723; *Conservatorship of Lefkowitz* (1996) 50 Cal.App.4th 1310, 1314, 58 Cal.Rptr.2d 299.)

[5]Substantial evidence supports the finding that the fees were unreasonable. Appellant drafted an elder abuse petition that was never filed, prepared trust amendments and estate planning documents that were not signed or filed, billed the trust to educate himself on conservatorship law, and failed to keep adequate time records. Appellant had little, if any, experience in conservatorship matters or in acting as a trustee.

[6]The expert witness expenses ($27,515.13) were also excessive. Appellant retained ****185** Edward Hyman, Ph.D., a psychologist, from Northern California who billed at the rate of $495 an hour. Doctor Hyman charged $6,000 for travel time and billed 23.25 hours ($11,508.75) on January 6, 2012 for "report writing" and a psychological assessment. The trial court found that appellant could have hired a medical expert from UCLA to make the psychological evaluation for $2,500.[3] Appellant also paid a "celebrity psychiatrist," Dr. Carole Lieberman, $7,500 to evaluate Moore but the doctor never wrote a report or testified. In an e-mail, appellant admitted that Doctor Lieberman's fees were shocking and that Doctor Hyman's travel fees were an embarrassment. Appellant paid another attorney-doctor, Alan Abrams, $3,000 to review some medical records. The trial court found that $2,500 was a reasonable fee for Moore's psychological evaluation

and that "everything else was wasted money and wasted time...." No abuse of discretion occurred. "Probate courts have a special responsibility to ensure that fee awards are *1107 reasonable, given their supervisory responsibilities over trusts." (*Donahue, supra,* 182 Cal.App.4th at p. 269, 105 Cal.Rptr.3d 723.)

The probate court factually found that appellant "was predominately fighting for his own economic interest, and was not fighting for Mr. Moore's rights.... [Appellant] prevailed upon Mr. Moore, who was a senior with conceded memory issues and prior dementia diagnoses[,] to engage counsel. In that context, [appellant] infused himself as the trustee of the Moore Family Trust, infused himself as the agent under a Power of Attorney signed by Mr. Moore, and infused himself as the attorney for Mr. Moore with a perceived license to utilize as much of the estate as necessary to satisfy [appellant's] vision of what fighting is all about, as opposed to the propriety of serving the needs of a prospective and possible conservatee. [¶] Ultimately, even during the conservatorship proceedings, [appellant] was drafting testamentary documents for signature by Lester G. Moore which would have had the effect of disinheriting his own family in favor of one of [appellant's] allies."

[7]Appellant contends that Moore "approved" the fees and that it operated as a partial revocation of the trust each time a bill was paid by appellant or the receiver. We reject the argument because there is no evidence that Moore, whether of sound mind or not, approved any of the fees or expenses. The

attorney-client relationship with Moore did not give appellant carte blanche authority to pay himself excessive fees. "A trustee's power to incur expenses is limited to those expenses which are reasonably necessary or appropriate to carry out the purposes of the trust. [Citation.]" (*Conservatorship of Lefkowitz, supra,* 50 Cal.App.4th at p. 1314, 58 Cal.Rptr.2d 299.)

[8]Appellant claims that he had a duty to follow the instructions of the conservatee no matter what the cost or expense. By this theory, he could have spent the entire trust corpus "fighting" the conservatorship petition. Appellant had Moore modify the trust and name appellant temporary successor trustee of the trust. As Moore's trustee and attorney, appellant had a duty not to charge excessive fees **186 and expenses. (State Bar Rules Prof. Conduct, rules 4-200(A) [attorney may not charge unconscionable fee]; Rule 5-310(B)(3) [attorney may not pay unreasonable fee for professional services of an expert witness].) Appellant's trust accounting shows that the fees and expenses were excessive. In the words of the probate court, "you're talking about an attorney broaching elder abuse and that disturbs me a lot."

Exclusion of Girlfriend's Testimony

[9]Appellant claims that Moore consented to the fees because billing copies were mailed to Moore's house and Moore never objected to the amounts *1108 charged. Receipt of the bills, however, does not mean that Moore approved the fees or that the fees were reasonable. Moore suffered from dementia and was an unavailable witness. At trial, Moore did not even

know who appellant was!

Appellant argues that the trial court abused its discretion in excluding the testimony of Moore's girlfriend, Kruger, who was allegedly present when Moore received the bills. The trial court ruled that Kruger's testimony was not relevant "[b]ecause the Court is determining the reasonableness [of the fees]. It is not Mr. Moore who is determining the reasonableness." When asked for an offer of proof as to the relevance of Kruger's testimony, he could not make one.

[10]Appellant now asserts that Kruger's testimony would show Moore's state of mind or emotion (Evid. Code, § 1250) and show implied approval of the fees (Evid.Code, § 1261). The argument conflates Moore's intent, plan, motive and feelings with Moore's mental capacity to enter into the attorney-client contract. It is not an issue. Before trial, the parties agreed that appellant had a good faith belief that an attorney-client relationship existed and asked the trial court to determine the reasonableness of the fees and medical expert expenses.

[11]Appellant also now argues that Moore's statements to Kruger are admissible under Evidence Code section 1261, subdivision (a) which provides in pertinent part: "Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was made upon the personal knowledge of the declarant at the time when the matter had been recently perceived by him and while his recollection was clear." Appellant made no offer of proof that

Moore verbally approved the fees or that his statement was trustworthy, i.e., made when the matter has been recently perceived by Moore "and while his recollection was clear." (See *Estate of Luke* (1987) 194 Cal.App.3d 1006, 1017, 240 Cal.Rptr. 84.)

Findings Concerning Moore's Intent

[12]Appellant argues that the probate court should have made findings concerning Moore's wishes and objectives in hiring appellant. But such an inquiry is irrelevant. The focus of the hearing was whether the fees and expenses were reasonable and benefited the trust. (*Donahue, supra,* 182 Cal.App.4th at p. 275, 105 Cal.Rptr.3d 723.) The wishes or objectives of Moore, who suffered from dementia, did not trump appellant's duty to prudently spend trust money and avoid conflicts of interest with the trust.

***1109** *Multiple Billing*

Where the trustee is an attorney, the general rule is that the trustee can receive compensation either for work as a trustee, or for work performing legal services for the trustee, but not both. (Hartog & Kovar, ****187** Matthew Bender Practice Guide: Cal. Trust Litigation (LexisNexis 2015) § 14.25[1][a], p. 14-32.) Section 15687, subdivision (a) prohibits a trustee who is an attorney from receiving compensation for both trustee services and legal services unless the trustee obtains advance approval from the court. (See Ross & Cohen, Cal. Practice Guide; Probate (The Rutter Group 2014) ¶ 1:26.2, p.

1-19. (rev. # 1 2014).) Appellant did not obtain such approval.

Block Billing

Appellant billed at the same hourly rate regardless of whether it was for attorney services, a trustee activity, or tending to Moore's personal matters (i.e., scheduling medical appointments, caretaker services, driving lessons, etc.). The probate court imposed a five percent surcharge because the block billing failed to identify what services were provided and the time for each task.

[13]Appellant argues that he was denied due process because he did not know until the last day of trial that the block billing would be a basis for the surcharge order. Appellant, however, did not object on due process grounds and is precluded from raising the issue on appeal. (See e.g., *People v. Benson* (1990) 52 Cal.3d 754, 788, 276 Cal.Rptr. 827, 802 P.2d 330 [defendant waived due process challenge by failing to make constitutional objection at trial].) Any other rule would permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846, 54 Cal.Rptr.2d 27.)

[14]On the merits, appellant was on notice that his billings were a problem. Before trial, objections were raised by the receiver, the court auditor, and respondent. In a 2011 e-mail, the receiver stated that he would not approve "billings with just hours

appearing.... [¶] Frankly, I don't know how you are able to segregate the work you are doing to represent Mr. Moore individually and the Moore Trust." In a second e-mail, the receiver told appellant to be "very judicious in billing your time" and "to break out what is spent actually lawyering for the trust (actual legal work); what is spent being trustee (investments, bill paying, etc.) and what is spent on personal services for Mr. Moore (i.e., driving him to the doctor, bank, and other non-legal services)."

***1110** The probate court, in a pre-hearing order, found that the accounting was disorganized and "does not come close to complying with accepted statutory format...." It asked to see the time sheets. Appellant argued that "my services, my billing statements, when I did everything, that's private...." Appellant was afforded a three- day evidentiary hearing but failed to clarify what services were provided and the time spent on each task. (See Hartog & Kovar, Matthew Bender Practice Guide: Cal. Trust Litigation, *supra,* § 14.04[4], p. 14-10 [trustee's billing should include a detailed description of the tasks performed, an explanation of how the tasks benefited the trust, and time sheets and logs].)

Request for Reconsideration

[15]Denying appellant's motion for "new trial," the probate court found that appellant had notice of the substance of the proceeding well in advance of the hearing. "Given the nature of the testimony and evidence before the court, it was impossible, because of the lack of presentation of detailed billing records,

to precisely excise inappropriate time. The best that could be done was to construe a framework. This was done by counsel in closing argument, and the court found this to be an acceptable methodology. The statute **188 requires that the objection [be] made at trial, which it was not."

Appellant argues that the surcharge is tantamount to a constructive fraud judgment and violates his due process rights because he did not know he had the burden of proving Moore's mental capacity to consent to the fees. But all of that was spelled out in the pre-hearing order. The court ruled that appellant's fees ($148,015.11) were disapproved absent a showing that the services benefited Moore and a showing that Moore had the capacity to contract for and approve the fees when the services were rendered. The pretrial order states: "The accounting will be set for evidentiary hearing on the aforementioned issues and to surcharge [appellant] for any sums which Mr. Moore's estate has been unnecessarily charged, improperly charged or overcharged." Appellant was provided a three-day hearing. Like any trustee, the burden was on appellant to itemize his fees and expenses and show they were reasonable.

Standing

[16]Appellant claims that Helgren lacked standing to object to the accounting and it was a "procedural error" to allow Helgren to participate in the trial. As a remainder beneficiary, appellant was an interested party and had the right to object to the accounting. (See §§ 24, subd. (c); 17200, subd. (a); *Estate of*

Giraldin (2012) 55 Cal.4th 1058, 1076, 150 Cal.Rptr.3d 205, 290 P.3d 199.)

***1111** *Conclusion*

Appellant was repeatedly warned that he had a conflict of interest acting as trustee and as the attorney for a mentally impaired client in a conservatorship proceeding. Appellant had never served as a trustee or been involved in a conservatorship before but perceived it as a license to zealously fight for Moore no matter what the cost. The probate court remarked that conservatorship proceedings are "not about fighting. It's about doing the right thing. And [appellant] lost sight of doing the right thing...."

[17]At the evidentiary hearing, appellant complained that "the Court, and the parties seem[ ] to be focused on just the reasonableness of the fees, but you don't even get to.... [Y]ou can't second guess my fees now, he [i.e., Moore] approved of them, and he didn't complain...." Appellant makes the same argument on appeal. Trustee accountings are not a game of hide and seek. Section 17200, subdivision (b)(9) requires that probate courts review the reasonableness of a trustee's compensation. When "presented with a section 17200 petition to settle an account, 'the probate court has a duty *imposed by law* to inquire into the prudence of the trustee's administration.' [Citations.]" (*Schwartz v. Labow* (2008) 164 Cal.App.4th 417, 427, 78 Cal.Rptr.3d 838.)

Appellant's remaining arguments have been

considered and merit no further discussion.

The judgment (surcharge order) is affirmed. Respondent is awarded costs on appeal. The clerk of the court is ordered to transmit a copy of this opinion to the California State Bar. Whether appellant should be disciplined is addressed to the State Bar and we express no opinion thereon.

We concur:

GILBERT, P.J.

**189 LUI, J.*

All Citations

240 Cal.App.4th 1101, 193 Cal.Rptr.3d 179, 15 Cal. Daily Op. Serv. 10,859, 2015 Daily Journal D.A.R. 11,051

Footnotes

1 All statutory references are to the Probate Code unless otherwise stated.

2 At oral argument, appellant stated that as an attorney, he was better suited than the treating physicians to opine on Moore's mental capacity.

3 Appellant, in his reply brief, contends that the trial court erred in denying the creditor's claim of Edward Hyman, Ph.D. for $24,704.16

in additional fees. The issue was not raised in appellant's opening brief and is deemed forfeited. (*Peninsula Guardians, Inc. v. Peninsula Health Care Dist.* (2008) 168 Cal. App.4th 75, 86, fn. 6, 85 Cal.Rptr.3d 253; *SCI California Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 573, 137 Cal.Rptr.3d 693.)

* Associate Justice, Court of Appeal. Second District, Division One, assigned by the Chief Justice.

1st AMENDMENT TO THE UNITED STATES CONSTITUTION, FREE SPEECH CLAUSE

(Ratified 1791)

14th AMENDMENT TO THE UNITED STATES CONSTITUTION, SECTIONS 1 & 5

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(Ratified 1868)

42 U.S.C. §1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act

or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(Enacted 1871, Amended in 1979 and 1996).

42 U.S.C. §1985
CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS

Part (2) Obstructing justice; intimidating party, witness or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment or any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of

any person, or class of persons, to the equal protection of the laws.

(Enacted 1871).

42 U.S.C. §1985
CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS

Part (3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived

may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

(Enacted 1871).

§504 OF THE REHABILITATION ACT OF 1973
29 U.S.C. §794(a)(b)(1)(4)
Nondiscrimination Under Federal Grants And Programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason or her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of-

(1)(A) a department, agency, special purpose district, or other instrumentality of a

State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.

(Enacted 1973, Amended in 1992)

§504 OF THE REHABILITATION ACT OF 1973 AMENDED 1978
29 U.S.C. §794a (a)(2)
Remedies

(a)(2) The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(Enacted 1978; Amended 2009)

AMERICANS WITH DISABILITIES ACT
TITLE II
42 U.S.C. §12132
Discrimination

Subject to the provisions of this subchapter,

no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

(Dated July 26, 1990, but enactment not effective until 18 months thereafter, in 1991).

AMERICANS WITH DISABILITIES ACT
TITLE II
42 U.S.C. §12133
Enforcement

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

(Dated July 26, 1990, but enactment not effective until 18 months thereafter, in 1991)

AMERICANS WITH DISABILITIES ACT
42 U.S.C. §12203
Prohibition of Retaliation And Acts That Coerce, Intimidate, Threaten, Or Interfere With

(a) RETALIATION

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) INTERFERENCE, COERCION, OR

INTIMIDATION

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) REMEDIES AND PROCEDURES

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b), with respect to subchapter I, subchapter II and subchapter III, respectively.

(Pub. L. 101-336, title V, §503, July 26, 1990, 104 Stat. 370.)

§504 OF THE REHABILITIATION ACT OF 1973 AMENDED 1978
28 CFR §42.107(e)
(also 34 CFR §100.7(e))
Intimidatory or retaliatory acts prohibited (Originally In Implementation of Title VI of the Civil Rights Act of 1964; Subsequently Applied to §504 of the Rehabilitation Act)

No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of this Act or this subpart, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subpart. The identity of complainants shall be kept confidential except to

the extent necessary to carry out the purpose of this subpart, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

(28 CFR §42.107(e) was promulgated on July 29, 1966 by the U.S. Justice Department and amended on July 5, 1973. 34 CFR §100.7(e) was promulgated by the U.S. Department of Education in 1980. Both of these regulations were adopted by Congressional action in 1978 for purposes of §504 of the Rehabilitation Act, 29 U.S.C. §§794, 794a. See also 28 CFR §42.530 for).

§504 OF THE REHABILITATION ACT OF 1973
28 CFR §42.503 (b)(1)(2)(3)(5)(6)(d)(g)
Discrimination Prohibited

(b) Discriminatory actions prohibited

(1) A recipient may not discriminate on the basis of handicap in the following ways directly or through contractual, licensing, or other arrangements under any program or activity receiving Federal financial assistance:

(i) Deny a qualified handicapped person the opportunity accorded others to participate in the program or activity receiving Federal financial assistance;

(ii) Deny a qualified handicapped person an equal opportunity to achieve the same benefits that others achieve in the program or activity receiving Federal financial assistance;

(iii) Provide different or separate assistance to handicapped persons or

classes of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons or classes of handicapped persons with assistance as effective as that provided to others;

(iv) Deny a qualified handicapped person an equal opportunity to participate in the program or activity by providing services to the program;

(v) Deny a qualified handicapped person an opportunity to participate as a member of a planning or advisory body;

(vi) Permit the participation in the program or activity of agencies, organizations or persons which discriminate against the handicapped beneficiaries in the recipient's program;

(vii) Intimidate or retaliate against any individual, whether handicapped or not, for purpose of interfering with any right secured by section 504 or this subpart.

(2) A recipient may not deny a qualified handicapped person the opportunity to participate in any program or activity receiving Federal financial assistance on the ground that other specialized aid, benefits, or services for handicapped persons are available.

(3) A recipient may not, directly or through contractual, licensing, or other arrangements, utilize criteria or methods of administration that either purposely or in effect discriminate on the basis of handicap, defeat or substantially impair

accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons, or perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) A recipient is prohibited from discriminating on the basis of handicap in aid, benefits, or services operating without Federal financial assistance where such action would discriminate against the handicapped beneficiaries or participants in any program or activity of the recipient receiving Federal financial assistance.

(6) Any entity not otherwise receiving Federal financial assistance but using a facility provided with the aid of Federal financial assistance after the effective date of this subpart is prohibited from discriminating on the basis of handicap.

(d) Recipients shall administer programs or activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

(g) The enumeration of specific forms of prohibited discrimination in this subpart is not exhaustive but only illustrative.

(Promulgated by the U.S. Justice Department on June 3, 1980)

AMERICANS WITH DISABILITIES ACT
TITLE II
28 CFR §35.130

General prohibitions against discrimination

(a) No qualified individual with a disability

shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b)

(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability –

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded to others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration-

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals

with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7)

(i) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(ii) A public entity is not required to provide a reasonable modification to an individual who meets the definition of "disability" solely under the "regarded as" prong of the definition of disability at §35.108(a)(1)(iii).

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to

screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(h) A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

(Promulgated by the U.S. Justice Department on July 26, 1991, and amended on September 15, 2010 and August 11, 2016)

AMERICANS WITH DISABILITIES ACT
TITLE II
28 CFR §35.134
Retaliation or coercion

(a) No private or public entity shall discriminate against any individual because that individual has opposed any act or practice made unlawful by this

part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

(b) No private or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the Act or this part.

(Promulgated by the U.S. Justice Department on July 26, 1991).