No. 19-552

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 REHEARING

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## PETITION FOR REHEARING

Pursuant to this Court's Rule 44.2, Petitioner, William A. Salzwedel, on behalf of himself, and all others similarly situated, petitions for rehearing of the Court's order denying certiorari in this case. Alternatively, petitioner requests that the Court grant the petition, vacate the judgment of the United States Court of Appeals for the 9th Circuit, and remand so that the court may take appropriate action.

## GROUNDS FOR REHEARING

### Overview

Developments since Petitioner filed his Cert Petition in August, 2019 compel this Court to grant rehearing. Three (3) intervening cases significantly change the context in which the Court should consider the Petition For Certiorari.

Also, the Court may not have had a sufficient fact statement in the Petition For Certiorari showing the conspiracy between the parties and the state court judge corrupting the conservatorship and surcharge proceedings whereby the exception to *Rooker-Feldman* applies as articulated initially by Judge Richard Posner in *Nesses v. Shepard*, 68 F.3d 1003, 1005 (7th Cir. 1995) and later by the 3rd, 5th, and 10th Circuits.

The Court should use this case to deal with this issue because 99% of the other court conspiracy cases and *Rooker-Feldman* involve criminal defendants and highly improbable allegations in bad taste.

## I. Regarding the Standing Issue

The 11th Circuit, as well as, a District Court in the 5th Circuit, published decisions in September, 2019 finding that the U.S. Attorney General has standing to sue under Title II of the Americans With Disabilities Act (42 U.S.C. §12132, 12133) ("ADA", hereafter) challenging state programs that discriminate against the mentally disabled. *U.S. v. Florida*, 938 F.3d 1221 (11th Cir. September 17, 2019); *U.S. v. Mississippi*, 400 F.Supp.3d 546 (S.D. Mississippi September 3, 2019). This was a matter of first impression for them and it is directly relevant to Petitioner's case here because guardianship/ conservatorship programs would be next under attack by the Attorney General. However, these rulings will not stand for federalism concerns, as well as, the fact that Title II only grants standing to "persons" aggrieved by the discrimination and the sovereign can never be a "person". This is pointed out in a dissenting opinion in the 11th Circuit case by Circuit Judge Elizabeth Branch and also in an amicus curiae brief by 10 other states in support of the State of Florida's Petition For Rehearing En Banc. *U.S. v. Florida*, 938 F.3d at 1250-1254; *Brief for the States of Texas, Alabama, Alaska, Georgia, Indiana, Kansas, Louisiana, Oklahoma, South Dakota, and Utah as Amici Curiae in Support of Appellee's Petition for Rehearing En Banc*, 2019 WL 5801919, No. 17-13595 (11th Cir. November 5, 2019).

Since the U.S. Government won't have standing to fight for the rights of the mentally disabled under Title II of the ADA, Petitioner's case is, therefore, even more important to show a way for attorney standing to do so, when the attorney can

show Article III injury herself caused by the discrimination against her mentally disabled client.

## II. Regarding the Rooker-Feldman Issue

### *A. Stephens v. Chad F. Kenney*, __ Fed. Appx.__, 2020 WL 833065, No. 19-2136 (3d Cir. February 20, 2020)

Only last week, the Third Circuit issued the above decision, *Stephens v. Kenney*, that is the closest on point to Petitioners than ever before. The federal plaintiff in *Stephens* alleged that state court proceedings to establish a guardianship over his father, as well as, later probate proceedings after his father's death were corrupted by a conspiracy to engineer the outcome against the federal plaintiff between the state court judge adjudicating the matters and the opposing parties and their counsel. *Id.* at 1-3. The 3d Circuit acknowledged that there may be independent injuries caused by the conspiracy and the state court judge's conduct that are not barred by *Rooker-Feldman*. *Id.* at 3. Some of the claims, however, were deemed to be barred by *Rooker-Feldman* because the federal plaintiff was pleading to have the U.S. District Court to have set aside all judgments by the state court. *Id.* at 2. That is what distinguishes *Stephens* from the Petitioner's present case because Petitioner never pleaded in federal court to have any state court judgment for which he was a party, to be set aside. But suffice it to say, that, were the facts in *Stephens* in a 9th Circuit case, the 9th Circuit would have found all of the claims therein

barred by *Rooker-Feldman.* What is important about *Stephens* is that it is the first such Circuit case to involve guardianship and probate proceedings in a *Rooker-Feldman* analysis. The 3d Circuit's conflict with the 9th Circuit on the issue, however, started with *Great Western Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 173 (3d Cir. 2010) as pointed out in the present Petition For Certiorari.

### *B.* Important Facts of Petitioner's Case Inadvertently Omitted from Petition For Certiorari

In Petitioners case, the operative verified first amended complaint describes numerous statements and actions by the state court judge and parties opposing petitioner and his client that show an agreement among them to predetermine the proceedings to impose a conservatorship over petitioner's client without hearing the evidence and thereafter surcharge petitioner as punishment for zealously defending the civil rights of his client, the proposed conservatee. Their agreement was implemented as intended (9th Cir. Tab/District Court Doc #43, Pages 112-166). For instance, the state court judge expressed his agreement with some counsel and parties to manipulate Petitioner's accounting to be "wrong" before Petitioner rendered it: "*And then the accounting. Just make it due by June 15th to be filed for a hearing on July 17th. How's that? It doesn't- Yeah. That gives them plenty of time- to get it wrong*." (9th Cir. Tab/District Court Doc#43, Page 148, lines 6-

8). This is not an injury caused by the upcoming Judgment. Rather, it was caused by the Court's discrimination in violation of Title II of the ADA in the proceedings before the judgment.

Petitioner's injury was also of the "class of one" category of discrimination, as even the state court judge acknowledged he was causing saying "*Because of the robust history of this case, I really want to make sure that the successor/conservator dots their i's and crosses their t's, so there's no claim of disparate treatment to the removed surcharged trustee."* (9th Cir. Tab/District Court Doc#43, Page 208, lines 20-25). In other words, the successor trustee/conservator who served after Petitioner's trusteeship was in a similar position to petitioner, or less deserving than petitioner, but was being treated more favorably by the court than how it treated petitioner. This is because of irrational animus that the state court had towards petitioner for his zealous defense of his client's civil rights. The disparate treatment is described in detail in the First Amended Complaint, both the favoritism shown to similarly situated parties and the wrongful discrimination shown by the court to petitioner. (9th Cir. Tab/District Court Doc#43, Pages 147-216)

Even if the government action surcharging Petitioner was otherwise warranted, Petitioner was injured, not by the underlying government action, but rather by the difference in treatment he received by the state court compared to how the court treated other similarly situated parties. See *Gerhart v. Lake County*, 637 F.3d 1013, 1023 (9th Cir. 2011). These

claims are outside the *Rooker-Feldman* jurisdictional bar.

### C. *Hulsey v. Cisa*, 947 F.3d 246 (January 17, 2020) Since January 17, 2020, the 4th Circuit has now joined the 3rd, 5th, 7th, and 10th Circuits in conflict with the 9th Circuit and Petitioner's instant case, but the 4th Circuit here adds confusion to the *Rooker-Feldman Doctrine. Hulsey v. Cisa*, 947 F.3d 246

Unlike the 9th Circuit, the 4th Circuit in Hulsey recognizes that the "inextricably intertwined" language of Feldman has no independent significance (Id. at 252) and that, for Rooker-Feldman to apply, it is not enough for the federal adjudication to "undermine" the state court's ruling (Id. at 251). Were the case in Hulsey to have been decided by the 9th Circuit, its result would have been entirely different than as decided by the 4th Circuit.

But Hulsey also adds confusion to the *Rooker-Feldman* doctrine that granting Certiorari in the present case would actually dispel. Hulsey tracks the U.S. Supreme Court's Exxon Mobil formula for resolving *Rooker-Feldman* issues but only comes to the right conclusion for 1 of the 3 elements. (See *Exxon Mobil Corp. v. Saudi Basic Industries*, 544 U.S. 280, 284 (2005)). Hulsey started with state lawsuits for defamation that the later federal plaintiff (defendant in the state lawsuits) failed to answer and was defaulted. 947 F.3d 248. In the resulting damages trials, the South Carolina court

denied the defendant discovery that turned out to be crucial for the defendant's defense. Judgments adverse to the defendants were reviewed both by the South Carolina Court of Appeals and then the Supreme Court, which reversed and remanded for new trials and an opportunity for defendant to answer the defamation complaints and have full discovery. The South Carolina Supreme Court determined that it was nonetheless appropriate under the circumstances formerly for the defendant to be denied discovery, but that now he should be entitled to discovery. Defendant thereupon, through discovery obtained crucial evidence that secured him a judgment in his favor in one case, and as the other was nearing trial, he settled both cases. Id. at 248-249. A year later, the defendant files suit in U.S. District Court alleging that the crucial evidence that was denied him for so long by the state court's order forbidding him discovery, was actually fraudulently concealed from him by the state court plaintiffs (defendants in the federal action). The District Court dismissed based on the Rooker-Feldman doctrine thinking that the federal action was a "veiled attack" on the state court orders denying him discovery. Id. at 249.

The part of Hulsey decided in the correct manner that, if similarly applied to the present case, would compel reversal of the lower court's orders has to do with whether the federal plaintiff seeks to undo the state court judgment. As in the present case, the federal plaintiff in Hulsey seeks monetary damages, which would not effectively reverse or handicap the state court order/judgment. The discovery order in Hulsey actually can never be undone. It is history.

But the District Court in that case thought that the federal case could not go forward because the result the federal plaintiff was seeking would somehow impugn the virtue of that state court discovery order and lower the esteem of the respective state courts who issued the order and reviewed it. Id. at 251. That is all that is also going on in the present case, as well. In Petitioner's case, the monetary damages that petitioner seeks are not against the judgment creditor of the surcharge judgment (the conservatorship estate/trust of Lester Moore), but rather against the State of California, the public defender, and Lester Moore's daughter individually (who is not the conservator), and her attorney. The result might be impugning the decision- making prowess of the state court, but it is not "rejection" "reversal", or the "undoing" of the state court judgment within the meaning of the Rooker-Feldman Doctrine. In fact, when monetary damages are sought in the federal action, Rooker-Feldman should only apply when the damages are sought against the state court judgment creditor by the federal plaintiff who is the state court judgment debtor. In such a situation, the federal action is contemplated as seeking to create an offset of some existing state court monetary judgment or swallowing the state court monetary judgment with a greater federal court monetary judgment in favor of the state court judgment debtor. That would truly be "rejection" of the state court judgment as understood by Exxon Mobil Corp., 544 U.S. at 284. And that is not going on in the federal action pertaining to the present petition for certiorari.

But the parts of Hulsey decided incorrectly, add more confusion to Rooker-Feldman jurisprudence that the Supreme Court can clear up by granting

rehearing of petitioner's present petition for certiorari. In Hulsey, the 4th Circuit contends that the federal plaintiff's injury was not "caused" by the state court's discovery order. Id. at 250-251. The 4th Circuit is wrong in this regard. Taking the allegations of the federal complaint as true, the injury would have to be caused both by the fraudulent conduct of the other parties and the court's order denying discovery. Or one could say the injury was also caused by the federal plaintiff himself in failing to answer the state court complaints, thereby being defaulted and denied discovery as a result. But, crucially, were it not for the discovery order barring the federal court plaintiff from having state court discovery, there would be no injury. That is enough causation for the concerns of the Rooker-Feldman doctrine. The issue in all such cases is what does it mean to "seek[ ] redress for an injury caused by the state-court decision itself". Id. at 250. The state court discovery order was not procured by any fraud on the part of the state court plaintiffs. It was rendered because of the federal plaintiff's default in the state court proceedings. Hulsey is correct in stating that the alleged fraud was not "produced" by the discovery order. Id. But Hulsey is incorrect in suggesting that the alleged fraud was "ratified, acquiesced in, or left unpunished by" the discovery order. Id. Hulsey is also incorrect in declaring that the fraud was "enabled" by the state court's discovery order. Id. at 251. Rather, they operated independently of one another. The federal plaintiff alleged that the federal defendants (state court plaintiffs) used the discovery order "as a tool to defraud". Id. Hulsey is correct that such does not make the state court's ruling a cause of the federal plaintiff's injury, but that does not obviate the fact

that the state court's ruling was an independent cause of the federal plaintiff's injury. Hulsey doesn't see that.

Hulsey is also incorrect in concluding that the federal plaintiff was not a state court loser for purposes of Rooker-Feldman. Id. at 251. Just because Hulsey ultimately settled the case does not mean he is not a state court loser. See the very recent case decided on September 18, 2019, Malhan v. Secretary United States Department of State, 938 F.3d 453, 459 (2019) (the state court issues an "interlocutory order (e.g., a discovery order . .) and the parties then voluntarily terminate the litigation." The interlocutory order is then a final order for RookerFeldman purposes) (citing Federacion de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico, 410 F.3d 17, 24, n.10 (1st Cir. 2005). The state court discovery order against the federal litigant affirmed by the South Carolina Supreme Court involved in Hulsey was an interlocutory order that was "effectively final" for Rooker-Feldman purposes pursuant to Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479-483 (1975), ASARCO Inc. v. Kadish, 490 U.S. 605, 612, 622-23 (1989). *Exxon Mobil Corp.*, 544 U.S. at 287, n.2 (2005)

The mistakes in Hulsey is a result of the 4th Circuit trying too hard to remedy what is all too common among the District Courts throughout the country: a desire to resort to the Rooker-Feldman to throw out federal lawsuits that criticize state court rulings (or that seem to be critical of state court rulings). Hulsey should have just stopped with showing that the federal case was not seeking to undo the state court order, which was impossible. That

would have been enough to show that *Rooker-Feldman* does not apply.

The Court here can rectify this problem by granting rehearing of the present petition for certiorari whereby when a state court judgment is procured through corruption of the state judicial process, there is a federal court remedy for such corruption. That would provide the drastic paradigm shift desperately needed by so many of the federal courts. They will then stop misusing Rooker-Feldman as a crutch to clear overburdened dockets without conducting the proper analyses of claim and issue preclusion, as well as preclusion principles.

## CONCLUSION

For the reasons presented above and in the petition for certiorari, this Court should grant the Petition for Rehearing and grant Certiorari setting the matter for hearing. In the alternative, the Court should grant the Petition immediately, vacate the lower court's judgment, and remand for an appropriate decision.

Respectfully submitted.

Dated: February 27, 2020

s/ WILLIAM A. SALZWEDEL

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William A. Salzwedel

## CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

s/ WILLIAM A. SALZWEDEL

William A. Salzwedel