No. 21-1498

In The
Supreme Court of the United States

NORMAN BARTSCH HERTERICH, PETITIONER

v.

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, *ET AL.*

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 Supreme Court Rule 44.2, Norman Bartsch Herterich ("Herterich") petitions for rehearing of the Court's October 3, 2022, order denying certiorari in this case.

INTRODUCTION

Herterich presented to the federal district court federal claims that had *not* been adjudicated by state courts. The district court dismissed the claims under *Rooker-Feldman*. *Rooker-Feldman* does not bar such claims in most Circuits, but the Ninth Circuit affirmed dismissal of the claims under *Rooker-Feldman*. The Ninth Circuit's ruling did not indicate that the claims had previously been adjudicated, and the Ninth Circuit cited only one fact about Herterich's actions—specifically, that the actions alleged Constitutional violations "arising from" state-court proceedings. Consequently, the Question Presented by Herterich's certiorari petition concerned whether *Rooker-Feldman* bars federal district-court jurisdiction over unadjudicated federal claims merely because the actions allege Constitutional violations "arising from" state-court proceedings.

The Question Presented can perhaps be misperceived as concerning an isolated incident and an infrequently-invoked doctrine, and therefore lacking "compelling reasons" for granting certiorari under Supreme Court Rule 10. However, intervening circumstances of a substantial effect, and other substantial grounds not previously presented, demonstrate that (1) the Ninth Circuit

continues, unabated, to affirm dismissal under *Rooker-Feldman* of unadjudicated claims; (2) other Circuits continue to hold that, to the contrary, unadjudicated claims may *not* be dismissed under *Rooker-Feldman*; and (3) in recent years federal district courts nationwide have, with rapidly increasing frequency, considered whether to apply *Rooker-Feldman*. Consequently, nationwide uniformity in the application of federal law is being continuously, increasingly, and conspicuously undermined, as are the rule of law and the integrity of the courts. Such circumstances provide compelling reasons for granting certiorari.

GROUNDS FOR REHEARING

I. The Ninth Circuit continues to affirm dismissal under *Rooker-Feldman* without indicating that the dismissed claims had previously been adjudicated by state courts.

The Ninth Circuit often affirms dismissal under *Rooker-Feldman* without indicating that the dismissed claims had been adjudicated by state courts, and the Ninth Circuit has continued doing so after Herterich prepared and filed his certiorari petition. Thus, the conflict identified in Herterich's certiorari petition—between the Ninth Circuit's application of *Rooker-Feldman* and other circuits' application of *Rooker-Feldman*, as well as this Court's *Rooker-Feldman* jurisprudence—is a persistent and recurring conflict. Recent examples of such Ninth-Circuit dispositions include:

- *Kleidman v. California Ct. of Appeal for Second App. Dist.*, No. 20-56256, 2022 WL

1153932 (9th Cir. Apr. 19, 2022) (affirming dismissal under *Rooker-Feldman* despite indicating little more about the action than that it "alleg[es] violations of federal and state law in connection with [plaintiff's] state court proceedings");

- *Lindow v. Wallace*, No. 21-15810, 2022 WL 1172129 (9th Cir. Apr. 20, 2022) (affirming dismissal under *Rooker-Feldman* despite indicating little more about the action than that it "alleg[es] federal and state law claims arising from conservatorship proceedings in state court");

- *Spencer v. Sinclair*, No. 21-15192, 2022 WL 1744059 (9th Cir. May 31, 2022) (affirming dismissal under *Rooker-Feldman* despite indicating little more about the action than that it is "for declaratory relief challenging two California state court judgments")[1]; and

- *Herterich v. Wiss*, No. 21-16746, 2022 WL 2869768 (9th Cir. July 21, 2022) (affirming dismissal under *Rooker-Feldman* despite indicating little more about the action than that it is a "42 U.S.C. § 1983 action alleging constitutional violations arising from California state court proceedings involving [plaintiff's] father's estate").

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[1] *Rooker-Feldman* does not bar claims challenging state-court judgments when the claims are "independent." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 293 (2005) (*Rooker-Feldman* inapplicable when "a federal plaintiff 'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached' ").

II. Other Circuits continue to hold that unadjudicated claims may not be dismissed under *Rooker-Feldman*.

A. The Eleventh Circuit continues to reverse dismissals under *Rooker-Feldman* that do not comply with the stringent safeguards, recently set forth in *Behr*, against improper dismissal of unadjudicated claims .

Last year the Eleventh Circuit sharply curtailed its district courts' "unrestrained" application of *Rooker-Feldman*, noting that such application "sometimes lead[] to dismissal of any claim that even touche[d] on a previous state court action." *Behr v. Campbell*, 8 F.4th 1206, 1208 (11th Cir. 2021) ("*Behr*"). More recently—i.e., since Herterich petitioned for certiorari—the Eleventh Circuit reversed several dismissals under *Rooker-Feldman* for failing to comply with *Behr*'s stringent requirements. In doing so the Eleventh Circuit left no doubt that, unlike the Ninth Circuit, it would have reversed dismissal under *Rooker-Feldman* of claims like Herterich's that had not previously been adjudicated by state courts.

For example, in *Otero v. Newrez LLC*, No. 21-12990, 2022 WL 3155414, at *2 (11th Cir. Aug. 8, 2022) ("*Otero*") the Eleventh Circuit vacated dismissal under *Rooker-Feldman* and remanded "for the district court to conform its application of the *Rooker-Feldman* doctrine to *Behr*." The *Otero* court explained:

> District courts should take a claim-by-claim approach and consider the type of relief

> sought because (1) the doctrine bars only claims inviting a district court's review and rejection of a state court judgment, and (2) claims for damages resulting from constitutional violations of third parties are permitted. ... The district court erred by applying an abrogated test to dismiss Appellants' complaint under *Rooker-Feldman*. The district court also failed to (1) apply *Rooker-Feldman* on a claim-by-claim basis and (2) consider the requested relief, as required under *Behr*, and instead applied the expansive view of the doctrine that we have rejected.

Otero, at *2. The *Otero* court also explained that in *Behr* it had "admonished courts for using the doctrine as 'a broad means of dismissing all claims related in one way or another to state court litigation.'" *Id.* And the *Otero* court held that the plaintiff-appellants had *not* brought a *de facto* appeal because, like Herterich, they "sought money" for their alleged injuries and "a declaration that state judges violated their rights." *Id.*

Similarly, in *Hill v. Johnson*, No. 21-12271, 2022 WL 3155832, at *1 (11th Cir. Aug. 8, 2022), the Eleventh Circuit vacated dismissal under *Rooker-Feldman*—despite the fact that the suit "related to several prior Florida state court judgments" and was "filed against three Florida judges"—"[b]ecause the district court did not review each of [plaintiff's] individual claims to determine whether the *Rooker-Feldman* doctrine barred each claim as required."

Finally in *Davis v. Nahmias*, No. 21-14424, 2022 WL 5128153, at *4 (11th Cir. Oct. 5, 2022) ("*Davis*"), the Eleventh Circuit similarly "conclude[d] that the district court erred in dismissing some of [plaintiff's] claims under *Rooker-Feldman*." The *Davis* court noted that those claims (like Herterich's claims) "discussed and referenced the prior state court litigation", but the *Davis* court nevertheless concluded that the claims (again, like Herterich's claims) were not "a direct appeal of, or a *de facto* appeal of, the state court judgment, as success in any of these claims would not invalidate or undermine the state court judgment." *Id.* And for purposes of applying *Rooker-Feldman* "a federal law claim is not 'inextricably intertwined' with a state law one simply because it 'require[s] some reconsideration of a decision of a state court.' " *Id.*, *2.

B. Seven additional Circuits also recently held that claims that had not been adjudicated by state courts could not be dismissed under *Rooker-Feldman*.

In addition to the Eleventh Circuit, seven other Circuits have recently (i.e., since Herterich petitioned for certiorari) held that unadjudicated claims arising from state-court proceedings could not be dismissed under *Rooker-Feldman*. These holdings all conflict with the Ninth Circuit's continuing application of *Rooker-Feldman* to bar such claims. These holdings instead are all in accord with the Eleventh Circuit's holdings, as set forth in *Behr* and its progeny, that applying *Rooker-Feldman* requires a claim-by-claim

analysis and that *Rooker-Feldman* does not apply to claims that are "independent" of state-court judgments, where "independent" claims (1) can be claims for damages resulting from Constitutional violations by third parties such as state-court judges; and (2) can require some reconsideration of a state-court decision. More specifically:

- The Third Circuit recently reversed dismissal under *Rooker-Feldman* of (1) some claims because the plaintiff was (like Herterich in some of his claims) not a party to the state-court litigation; and (2) other claims because the plaintiff was (like Herterich) seeking "damages from harm caused by defendants during litigation." *Webb v. City of Wilmington*, No. 22-2109, 2022 WL 4533849, at *1 (3d Cir. Sept. 28, 2022).

- The Fourth Circuit recently held that West Virginia's legal theory for the application of *Rooker-Feldman* to unadjudicated claims was "entirely foreclose[d]" by the "axiom" that "where the federal complaint presents an 'independent claim,' even 'one that denies a legal conclusion that a state court has reached in a case to which [plaintiff] was a party...there is jurisdiction.' " *Jonathan R. by Dixon v. Justice*, 41 F.4th 316, 340 (4th Cir. 2022). "[E]ven the most generous analysis of [West Virginia's] contentions cannot be squared with [Fourth Circuit] or the Supreme Court's precedent." *Id.*, 339.

- The Fifth Circuit recently refused to apply *Rooker-Feldman* to claims made in federal court, concluding that the claims were "independent" of claims previously adjudicated in state courts and "did not directly attack the state court judgments nor invited district court rejection of those judgments." *Uptown Grill, L.L.C. v. Camellia Grill Holdings, Inc.*, 46 F.4th 374, 385 (5th Cir. 2022).

- The Sixth Circuit recently refused to apply *Rooker-Feldman* to claims made in federal court, concluding that the claims "fail[ed] to fall within that doctrine's narrow strictures" because "[plaintiffs'] complaint reveals their injury was caused by the allegedly unlawful seizure and retention of their firearms—not the Michigan state court's judgment", where the state-court judgment declined to order return of the firearms. *Novak v. Federspiel*, No. 21-1722, 2022 WL 3046973, at *3 (6th Cir. Aug. 2, 2022).

- The Seventh Circuit recently refused to apply *Rooker-Feldman* to claims, concluding the claims "do not seek to alter" a state-court ruling and plaintiff instead "seeks damages for what she regards as the defendants' independently unlawful conduct—their interference with her Fourteenth Amendment rights." *Royal v. Payne*, No. 22-1184, 2022 WL 4008718, at *1 (7th Cir. Sept. 2, 2022).

- The Eighth Circuit recently refused to apply *Rooker-Feldman* to claims that defendants had failed to pay the required minimum wage to a participant in a court-ordered drug-and-alcohol recovery program ("DARP"), concluding that "[plaintiff] does not challenge the drug court's decision to order him to participate in DARP; he argues that [defendants] were required to pay certain wages to him after he entered the program" and "[t]he state drug court judgments did not address or resolve issues under the Arkansas Minimum Wage Act." *Fochtman v. Hendren Plastics, Inc.*, 47 F.4th 638, 643-644 (8th Cir. 2022).

- The Tenth Circuit recently reversed dismissal under *Rooker-Feldman* of federal claims against county employees performing state-court-authorized child placement, explaining that "Rooker-Feldman does not bar a federal-court claim merely because it seeks relief inconsistent with a state court judgment" and finding that "Plaintiffs seek relief independent from any judgment rendered by the state court." *Estate of Angel Place v. Anderson*, No. 19-1269, 2022 WL 1467645, at *4 (10th Cir. May 10, 2022).[2]

[2] Dismissal was nonetheless affirmed on other grounds.

III. Federal district courts, with rapidly increasing frequency, consider whether to apply *Rooker-Feldman*.

It is no accident that, in the short time interval since Herterich petitioned for certiorari, the Ninth Circuit has made several rulings that conflict with other Circuits' *Rooker-Feldman* jurisprudence, and that other Circuits have made an even larger number of rulings that conflict with Ninth-Circuit *Rooker-Feldman* jurisprudence. In recent years an average of over 500 federal district-court orders annually have mentioned *Rooker-Feldman*, usually for purposes of considering whether to apply the doctrine. And the frequency with which such orders mention the doctrine has increased exponentially for several decades, almost doubling in the last decade alone. Given this trend, federal courts are likely to continue making conflicting *Rooker-Feldman* rulings with increasing frequency in the foreseeable future.

More specifically, a recent WestLaw search for "*Rooker-Feldman*", limited to the dates from 01-01-2017 to 12-31-2021, yielded an astonishing 2,575 federal district-court orders ("cases") within that 5-year period. And similar searches, limited to earlier 5-year periods, reveal that the frequency with which district courts mention *Rooker-Feldman* has grown extremely rapidly since 1983[3], as is illustrated by the chart on the next page.

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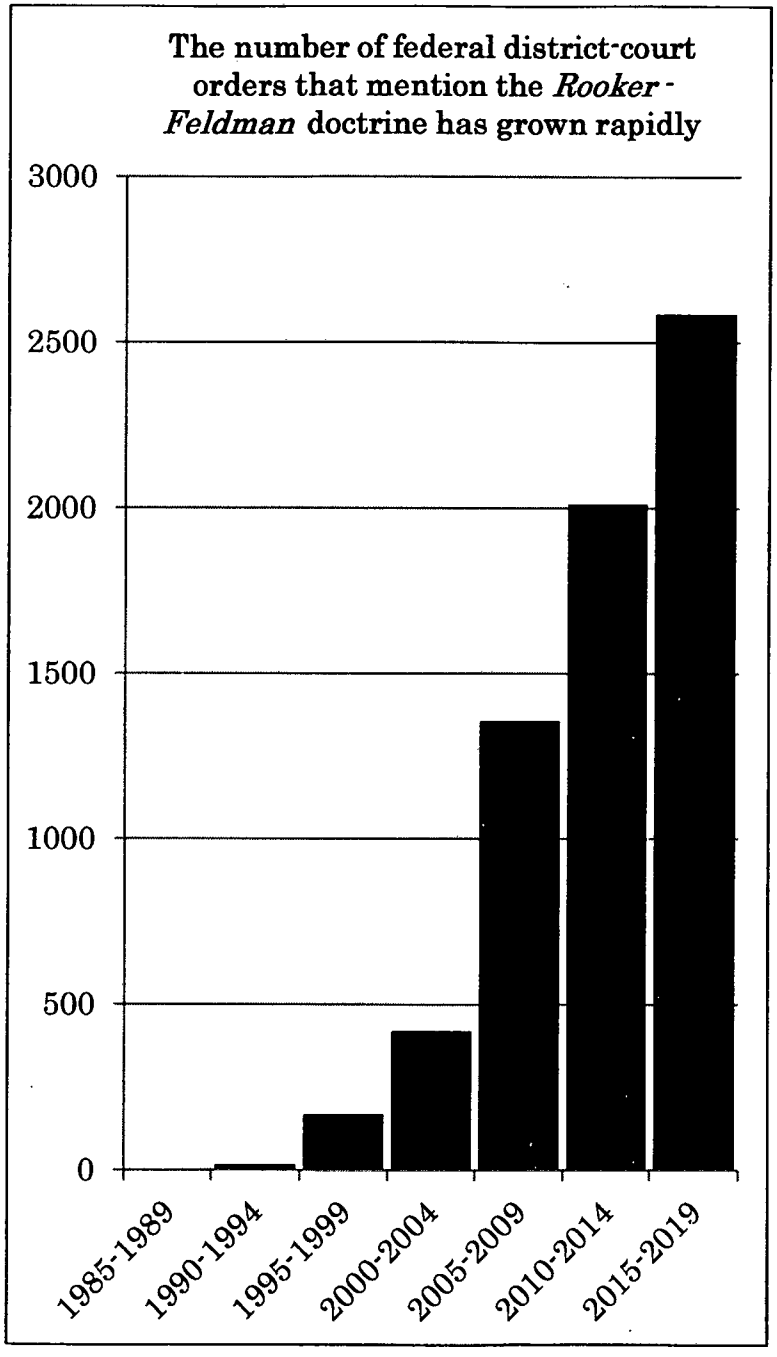
[3] The "Feldman" case, from which the *Rooker-Feldman* doctrine in part derives its name, was decided in 1983. See *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983).


The number of federal district-court orders that mention the *Rooker-Feldman* doctrine has grown rapidly
3000
2500
2000
1500
1000
500
0
1985-1989
1990-1994
1995-1999
2000-2004
2005-2009
2010-2014
2015-2019

CONCLUSION

The Court should grant the petition for rehearing.

DATED: October 2022

Respectfully submitted,

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