No. 22-701

In The
Supreme Court of the United States

NORMAN BARTSCH HERTERICH, PETITIONER

v.

MARY E. WISS, *ET AL.*

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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ORIGINAL

QUESTION PRESENTED

Petitioner's federal complaint alleges Constitutional violations which arose from, but had not been decided in, prior state-court proceedings. The district court dismissed the federal action under the *Rooker-Feldman* doctrine, which provides that federal district courts lack jurisdiction to decide claims and issues already decided by state courts. However, Petitioner asserted that state courts had not decided any of his federal claims or ancillary issues, and nothing to the contrary appears in the record. Yet the Ninth Circuit nonetheless affirmed dismissal under *Rooker-Feldman*, holding that Petitioner's action was a forbidden *de facto* appeal of unspecified state-court decisions and raised claims that were "inextricably intertwined" with those decisions. The Ninth Circuit identified no state-court decisions and stated no fact about Petitioner's federal action other than that the action alleged Constitutional violations "arising from" state-court proceedings involving the estate of Petitioner's father.

In such circumstances application of *Rooker-Feldman* conflicts with jurisprudence of this Court and of other Circuit Courts.

The question presented is:

Whether the *Rooker-Feldman* doctrine bars federal district-court jurisdiction over an action merely because the action alleges federal Constitutional violations "arising from" state-court proceedings, where the claims and issues presented to the federal district court for adjudication have not been adjudicated by state courts.

PARTIES TO THE PROCEEDING

Petitioner Norman Bartsch Herterich was the plaintiff and appellant below.

Respondents, who were defendants and appellees below, are: Mary E. Wiss, individually and as a Judge of the Superior Court of California for the County of San Francisco; Robert L. Dondero, individually and as a Justice of the First District Court of Appeal of the State of California; Sandra L. Margulies, individually and as a Justice of the First District Court of Appeal of the State of California; Diana Becton, individually and as a Justice of the First District Court of Appeal of the State of California; Tani Gorre Cantil-Sakauye, individually and as a Justice of the Supreme Court of the State of California; Ming William Chin, individually and as a Justice of the Supreme Court of the State of California; Carol Ann Corrigan, individually and as a Justice of the Supreme Court of the State of California; Marvin Ray Baxter, individually and as a Justice of the Supreme Court of the State of California; Kathryn Mickle Werdegar, individually and as a Justice of the Supreme Court of the State of California; Goodwin Hon Liu, individually and as a Justice of the Supreme Court of the State of California; Mariano-Florentino Cuéllar, individually and as a Justice of the Supreme Court of the State of California; and Leondra Reid Kruger, individually and as a Justice of the Supreme Court of the State of California.

RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

Norman Bartsch Herterich v. Mary E. Wiss, et al., No. 3:21-cv-04078-LB (Judgment entered September 20, 2021)

United States Court of Appeals (9th Cir.):

Norman Bartsch Herterich v. Mary E. Wiss, et al., No. 21-16746 (Judgment entered July 21, 2022)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Norman Bartsch Herterich respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The panel opinion of the Court of Appeals in Ninth Circuit Case No. 21-16746 is not published in the Federal Reporter but is included below as Appendix A and can be found on WestLaw at 2022 WL 2869768.

The Court of Appeals' denials of Petitioner's petitions for panel rehearing and rehearing *en banc* are not published in the Federal Reporter but are included below as Appendix D.

The decision of the district court in Northern District of California Case No. 21-cv-04078-LB is not published but is included below as Appendix B and can be found on WestLaw at 2021 WL 4267483.

JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 2022. Appendix A-1. Timely petitions for rehearing were denied on October 24, 2022. Appendix D-1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent Constitutional and statutory provisions are reprinted below in Appendix E.

INTRODUCTION

The *Rooker-Feldman* doctrine is essentially a procedural rule for prescribing the proper federal forum for a claim or issue that has been adjudicated by a state court. Under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3), federal district courts normally exercise "original jurisdiction" over many federal claims, including those made below by Petitioner. But if a state court has already adjudicated a claim or issue in a decision made preclusive by 28 U.S.C. § 1738 ("§ 1738") then under 28 U.S.C. § 1257 ("§ 1257") federal jurisdiction over that claim or issue is vested solely in this Court as an appeal of the state-court determination of that matter, and federal district courts may not exercise jurisdiction over that matter.

See *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 (2005) ("*Exxon Mobil*"); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 622 (1989) ("*ASARCO*"). See also *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 414-416 (1923) ("*Rooker*"); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983) ("*Feldman*"); *Lance v. Dennis*, 546 U.S. 459, 463 (2006) ("*Lance*").

Here there is no indication in the record that state courts decided any of the federal claims or ancillary issues presented by Petitioner to the federal district court, yet a Ninth-Circuit panel

nonetheless held that *Rooker-Feldman* barred all the claims — and did so merely because the claims alleged Constitutional violations "arising from" state-court proceedings. Applying *Rooker-Feldman* in such circumstances and on such grounds conflicts with precedents of this Court and most Circuit Courts. It also implicates persistent and widespread problems that this Court can and should address by granting certiorari.

More specifically, as Justice Stevens once observed *Feldman* "generated a plethora of confusion and debate among scholars and judges" and *Rooker-Feldman* "produced nothing but mischief." *Lance*, 546 U.S. at 467-468 (dissent). To address these problems this Court has repeatedly emphasized that *Rooker-Feldman* is "confined", "limited", and "narrow." See *Exxon Mobil*, 544 U.S. at 284 and 291; *Lance*, 546 U.S. at 464 and 466; *Skinner v. Switzer*, 562 U.S. 521, 532 (2011) ("*Skinner*"). This Court also disapproved of constructions of *Rooker-Feldman* that "supersed[e] the ordinary application of preclusion law pursuant to 28 U.S.C. § 1738", emphasizing that aside from the cases to which *Rooker-Feldman* "is confined" "*Rooker-Feldman* does not otherwise override or supplant preclusion doctrine." *Exxon Mobil*, 544 U.S. at 283-284. This Court explained that "[a] more expansive *Rooker-Feldman* rule would tend to supplant Congress' mandate" regarding preclusion. *Lance*, 546 U.S. at 466.

However, to date this Court's efforts have not alleviated the problems described by Justice Stevens. To the contrary, district-court misapplication of *Rooker-Feldman* has skyrocketed

in the past two decades, and an Eleventh-Circuit panel recently noted that:

> ...in the lower courts...application of *Rooker-Feldman* has been unrestrained to say the least, sometimes leading to dismissal of any claim that even touches on a previous state court action. Though the Supreme Court has stepped in to restore the doctrine to its original boundaries, courts have continued to apply *Rooker-Feldman* as a one-size-fits-all preclusion doctrine for a vast array of claims relating to state court litigation.

Behr v. Campbell, 8 F.4th 1206, 1208 (11th Cir. 2021) ("*Behr*"). Similarly, a Sixth-Circuit panel recently noted that because of such misuse *Rooker-Feldman* has been described as "a quasi-magical means of docket-clearing" and "a panacea to be applied whenever state court decisions and federal court decisions potentially or actually overlap." *RLR Invs., LLC v. City of Pigeon Forge, Tennessee*, 4 F.4th 380, 385-386 (6th Cir. 2021) ("*RLR*"). The problem is especially severe in the Ninth Circuit, where misapplication of *Rooker-Feldman* is routinely condoned — as Petitioner's case illustrates.

This Court can provide much-needed guidance and reduce misapplication of *Rooker-Feldman* simply by clarifying its past jurisprudence or approving or adopting binding Circuit authority. For example, this Court could explain that *Rooker-Feldman* cannot bar federal district-court jurisdiction over a claim unless: (1) a

state court has already adjudicated that specific claim or an ancillary issue; (2) the state-court adjudication satisfies the stringent requirements of preclusion doctrine under § 1738; (3) the plaintiff explicitly requests relief from the preclusive effect of that adjudication; and (4) under § 1257 federal-court jurisdiction over that explicit request may be exercised only by this Court acting under its appellate jurisdiction. Here, the record cannot support any of these requirements, so upon granting certiorari this Court could straightforwardly provide much-needed guidance unencumbered by case-specific factual analysis.

STATEMENT OF THE CASE

I. Petitioner's federal Complaint alleged Equal Protection violations, or alternatively other Constitutional violations, in state-court pretermission proceedings.

Petitioner Norman Bartsch Herterich ("Petitioner" or "Herterich") is the legal child and heir of Hans Herbert Bartsch ("Bartsch"), yet Bartsch's will ("the Will") did not mention Herterich and, to the contrary, contained an explicit declaration ("the Declaration") that Bartsch had had no children. Appendix F-14—F-16. Relying on the Declaration, Herterich filed a state-law pretermission claim in state court, alleging that when the Will was executed Bartsch was unaware that Herterich was Bartsch's child, so notwithstanding the Will Herterich was entitled under state law to a statutory share of Bartsch's assets. Appendix F-17—F-19. The state courts

denied Herterich's pretermission claim, concluding that when the Will was executed Bartsch was aware that Herterich was Bartsch's child. Appendix F-29—F-36.

In a subsequent federal complaint ("the Complaint") Herterich alleged that, when deciding his pretermission claim, state courts treated him differently from prior similarly situated persons. Appendix F-46—F-52. For example, state courts refused to draw from the Declaration the inference that Bartsch was unaware that Herterich was Bartsch's child, and instead concluded that the Declaration showed an intent to disinherit Herterich; but in prior pretermission cases wherein a will similarly stated incorrectly that the testator had no children state courts *did* draw from the statement the inference that the testator was unaware of his child, and state courts did *not* conclude that the statement showed an intent to disinherit the child. Appendix F-46—F-47. The Complaint additionally alleged other discriminatory treatment related to the admission of and the effect given to evidence extrinsic to the Will. Appendix F-47—F-52.

The Complaint states claims for denying Herterich the equal protection of the laws, or alternatively for violating some of Herterich's other federal Constitutional rights. Appendix F-53—F-60. The Complaint invokes federal district-court jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343. Appendix F-6. The defendants are state-court judges who presided over Herterich's pretermission claim. Appendix F-7—F-8.

II. **The district court dismissed the Complaint, doing so solely for lack of jurisdiction under the *Rooker-Feldman* doctrine, but without identifying any state-court decision which adjudicated the Complaint's claims or ancillary issues.**

The district court ruled that the *Rooker-Feldman* doctrine barred the Complaint because granting relief would necessarily require the district court to "revers[e]" prior state-court decisions or adjudicate "a de facto appeal of", or "a collateral attack on", such decisions. Appendix B-9—B-10. But the district court did not identify any state-court decision which adjudicated the Complaint's claims or ancillary issues. Appendix B. The district court "dismissed this case for lack of subject-matter jurisdiction and issued no other holdings on other grounds for dismissal." Appendix C-3. "The holding...rests entirely on lack of subject-matter jurisdiction." Appendix C-3.

III. **The Ninth Circuit affirmed dismissal under *Rooker-Feldman*, explaining that the Complaint alleged violations "arising from" state-court proceedings and therefore it was a *de facto* appeal of prior state-court decisions and its claims were "inextricably intertwined" with those decisions.**

A Ninth Circuit panel affirmed dismissal of the Complaint in a memorandum disposition ("the Memorandum"). Appendix A-2. Dismissal was affirmed solely on the ground that *Rooker-Feldman* barred the action. Appendix A-2—A-3.

The Memorandum's *Rooker-Feldman* analysis consisted of a single sentence (plus citation to authority) stating dismissal was affirmed under *Rooker-Feldman* because "Herterich's action...was a 'forbidden de facto appeal' of prior state court decisions and Herterich raised claims that were 'inextricably intertwined' with those state court decisions." Appendix A-2—A-3.

In support of this conclusion the Memorandum cited two cases — *Noel v. Hall*, 341 F.3d 1148, 1163-1165 (9th Cir. 2003) ("*Noel*") and *Cooper v. Ramos*, 704 F.3d 772, 782 (9th Cir. 2012) ("*Cooper*") — but cited no state-court decisions and stated no facts about Herterich's action or claims other than that his action alleged "constitutional violations arising from California state court proceedings involving his father's estate." Appendix A-2—A-3.

The Memorandum did not mention or provide grounds for applying § 1738 or § 1257; and the Memorandum also did not provide descriptions of state-court rulings, analysis of the relationship between such rulings and Herterich's federal claims, or facts indicating that state courts had adjudicated those claims or ancillary issues. Appendix A-2—A-3. The Memorandum thus effectively held that *Rooker-Feldman* bars district-court jurisdiction over claims merely because those claims allege constitutional violations "arising from" state-court proceedings, and that *Rooker-Feldman* does so even when the claims and ancillary issues are unadjudicated.

IV. Petitioner unsuccessfully sought rehearing, arguing that *Rooker-Feldman* cannot bar claims merely because they allege Constitutional violations "arising from" state-court proceedings.

Herterich timely petitioned for rehearing of the Memorandum's holding that *Rooker-Feldman* bars district-court jurisdiction over claims merely because those claims allege Constitutional violations "arising from" state-court proceedings. More specifically, Herterich petitioned for: (1) panel rehearing, because neither *Noel* nor *Cooper* support that holding; and (2) rehearing *en banc*, because that holding conflicts with binding and authoritative decisions of this Court and of other Courts of Appeals. Ninth Circuit Case No. 21-16746, Docket-Entry 32. But the Ninth Circuit summarily denied both requests for rehearing. Appendix D-1—D-2.

V. Dismissing the Complaint under *Rooker-Feldman* was clearly error.

A. State courts did not decide the Complaint's claims or ancillary issues.

The Complaint's claims all arise under federal law. Appendix F-53—F-60. As then-Circuit Judge Samuel Alito has explained, "plaintiffs did not actually litigate their federal claims in the state court proceeding...within the meaning of the *Rooker-Feldman* doctrine" when, as here, there is "nothing in the record that suggests that the plaintiffs made arguments or presented evidence to the state court concerning the validity of their

federal claims" and "the state court's opinion contains no discussion of any issues of federal law." *Desi's Pizza, Inc. v. City of Wilkes-Barre*, 321 F.3d 411, 420-421 (3d Cir. 2003) ("*Desi's Pizza*"); see also *Simes v. Huckabee*, 354 F.3d 823, 829 (8th Cir. 2004) (for purposes of applying *Rooker-Feldman*, "federal plaintiffs cannot be said to have had a reasonable opportunity to raise their federal claims in state court where the state court...rests its holding solely on state law").

Here nothing in the record indicates that state courts decided any issue of federal law arising from the Complaint's allegations, including the Complaint's claims. The Complaint does not allege that state courts decided any federal claim or ancillary issue. Appendix F. Respondents offered no evidence indicating that state courts decided any such claim or issue. Northern District of California Case No. 3:21-cv-04078-LB, Docket-Entry 14. The lower federal courts did not admit evidence or take judicial notice of adjudicative facts. Appendix A; Appendix B. Consequently, *Rooker-Feldman* cannot bar the Complaint's claims. "Without a direct challenge to a state court's factual or legal conclusion,... *Rooker-Feldman* is inapplicable." *Bell v. City of Boise*, 709 F.3d 890, 897 (9th Cir. 2013) (collecting cases).

Furthermore, claims against Respondents *could not* have been decided in the state-court pretermission proceedings, for two reasons. First, Respondents were not parties to those proceedings. Second, Respondents were judges in those proceedings, and Constitutional Due Process requirements prevented Respondents from deciding

claims against themselves. See *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *In re Murchison*, 349 U.S. 133, 136 (1955) ("[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.").

B. Petitioner's federal discrimination claims are "independent" of his state-law pretermission claim.

Rooker-Feldman does not bar "independent claim[s]." *Exxon Mobil*, 544 U.S. at 293. The Complaint's federal Constitutional discrimination claims are "independent" of Herterich's state-law pretermission claim.

More specifically, the Complaint alleges that Respondents intentionally treated Herterich differently from others similarly situated and that there was no rational basis for the difference in treatment. Appendix F-46—F-55. The Complaint thus states a federal "equal protection claim[] brought by a 'class of one' " within the meaning of *Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000) ("*Olech*"). Such a claim asserts a federal Constitutional right to an outcome similar to that given to similarly situated persons "even though this is a departure from the requirement of statute." *Sioux City Bridge Co. v. Dakota Cty., Neb.*, 260 U.S. 441, 446 (1923); *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster Cty., W. Va.*, 488 U.S. at 346 (1989). Whether statutes were correctly applied under state law is irrelevant to vindicating the Constitutional right asserted and upholding the supremacy of federal law. *Id. Rooker-Feldman* does not bar federal suits

that, like such a claim, "could have started from the premise that the [state tribunals] reached the correct result under state law." *In re Philadelphia Entm't & Dev. Partners*, 879 F.3d 492, 500-501 (3d Cir. 2018).

Consequently when, as here, "[t]he state court did not consider whether [the federal defendant] had violated equal protection", an equal-protection claim "is not barred by *Rooker-Feldman*." *Dorce v. City of New York*, 2 F.4th 82, 106 (2d Cir. 2021) ("*Dorce*"); *Jicarilla Apache Nation v. Rio Arriba Cty.*, 440 F.3d 1202, 1207 (10th Cir. 2006) (*Rooker-Feldman* did not bar *Olech* claim "ask[ing] a lower federal court to reverse the result of a state court decision"); *Desi's Pizza*, 321 F.3d at 426; *Parkview Assocs. P'ship v. City of Lebanon*, 225 F.3d 321, 325-326 (3d Cir. 2000).

VI. The Ninth Circuit often affirms dismissal under *Rooker-Feldman*, concluding that claims are *de facto* appeals of prior state-court decisions and "inextricably intertwined" with such decisions merely because the claims allege violations arising from or related to prior state-court cases.

The disposition of Herterich's Complaint is part of a pattern wherein the Ninth Circuit routinely and summarily affirms dismissal of claims under *Rooker-Feldman*, concluding that the claims are *de facto* appeals of prior state-court decisions and "inextricably intertwined" with such decisions merely because the claims allege violations arising from or related to prior state-

court proceedings, without describing the specific claims or state-court adjudications of those claims or ancillary issues. In just the 20 months since Herterich's Complaint was filed several Ninth-Circuit dispositions have fallen into this pattern, including:

- *Carrera v. Forsberg*, No. 21-16582, 2022 WL 17716325, at *1 (9th Cir. Dec. 15, 2022);
- *Conerly v. Yang*, No. 22-15281, 2022 WL 17223043, at *1 (9th Cir. Nov. 25, 2022);
- *Conerly v. Davenport*, No. 21-17081, 2022 WL 17223039, at *1 (9th Cir. Nov. 25, 2022);
- *Lindow v. Wallace*, No. 21-15810, 2022 WL 1172129 (9th Cir. Apr. 20, 2022);
- *Garau v. Los Angeles Cty. Sheriff's Dep't*, No. 20-56086, 2022 WL 229095, at *1 (9th Cir. Jan. 25, 2022);
- *Samaniego v. L. Offs. of Les Zieve*, No. 20-56354, 2021 WL 3783349 (9th Cir. Aug. 26, 2021);
- *Uziel v. Superior Ct. of California*, No. 20-55554, 2021 WL 3721777 (9th Cir. Aug. 23, 2021);
- *Kagel v. Raftery*, No. 20-17351, 2021 WL 3081659 (9th Cir. July 21, 2021);
- *Conerly v. Winn*, 851 F.App'x 815, 816 (9th Cir. July 2, 2021);

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's application of *Rooker-Feldman* violates this Court's requirement for preclusive state-court adjudications of claims or issues presented to district courts.

This Court's rulings establish that, for *Rooker-Feldman* to bar claims, there must be preclusive state-court adjudications of those claims or ancillary issues. And as explained in Section V(A) of the Statement of the Case, *supra*, state courts have not adjudicated any of the claims or issues presented by the Complaint. Yet the Ninth Circuit nonetheless held that *Rooker-Feldman* barred all of Herterich's claims — simply because they alleged violations "arising from" state-court proceedings. That holding conflicts with this Court's rulings and should be reversed.

First, the Ninth Circuit's holding conflicts with this Court's holdings that *Rooker-Feldman* "is confined to cases...inviting district court review and rejection of [already-rendered state-court] judgments", *Exxon Mobil*, 544 U.S. at 284, and "applies only...where a party in effect seeks to take an appeal of an unfavorable state-court decision to a lower federal court", *Lance*, 546 U.S. at 466. Here there are no state-court judgments or decisions concerning Herterich's federal claims, so *Rooker-Feldman* cannot apply. And obviously Herterich does *not* invite district-court review and rejection of, or seek to take an appeal from, adjudications which are nonexistent.

Second, the Ninth Circuit's holding conflicts with this Court's holding that *Rooker-Feldman* "is

confined to cases of the kind from which the doctrine acquired its name" and "does not otherwise override or supplant preclusion doctrine." *Exxon Mobil*, 544 U.S. at 284. Herterich's Complaint is distinguishable from both *Rooker* and *Feldman* in that Herterich presents *unadjudicated* claims, to which preclusion cannot apply, and Herterich does *not* call upon the district court to overturn state-court judgments. "Plaintiffs in both [*Rooker* and *Feldman*]...called upon the District Court to overturn an injurious state-court judgment." *Id.*, 291-292.

Third, the Ninth Circuit's holding conflicts with this Court's holding that notwithstanding *Rooker-Feldman* "[i]f a federal plaintiff presents some independent claim,...then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion." *Exxon Mobil*, 544 U.S. at 293 (punctuation omitted). Herterich's federal claims are all "independent" within the meaning of *Exxon Mobil*, so the district court had jurisdiction, and any disputes over the effects of prior state-court litigation should have been decided under principles of preclusion.

Fourth, the Ninth Circuit's holding conflicts with this Court's decisions holding that *Rooker-Feldman* did not bar claims fairly describable as alleging violations "arising from" state-court proceedings — including *Exxon Mobil*, *Lance*, *Skinner*, *Feldman*, *Johnson v. De Grandy*, 512 U.S. 997 (1994), and *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) ("*Pennzoil*"). "In *Pennzoil*...five [Supreme-Court] Justices expressly refused to apply *Rooker-Feldman* to a federal cause *arising*

from state proceedings." *In re Gruntz*, 202 F.3d 1074, 1079 n. 3 (9th Cir. 2000) (*en banc*) (emphasis added).

Finally, the Ninth Circuit's holding conflicts with this Court's disapproval of *Moccio v. New York State Off. of Ct. Admin.*, 95 F.3d 195, 199-200 (2d Cir. 1996) ("*Moccio*"). See *Exxon Mobil*, 544 U.S. at 283 (disapproving *Moccio*). The *Moccio* plaintiff, like Herterich here, contended that state courts had not adjudicated the Constitutional claims presented to a federal district court, but despite the absence of evidence indicating state-court adjudication of those claims the Second Circuit nonetheless held the claims barred by *Rooker-Feldman*. *Moccio*, 95 F.3d at 199-200. This Court cited *Moccio* as a case wherein *Rooker-Feldman* had "been construed to extend far beyond the contours of the *Rooker* and *Feldman* cases, overriding Congress' conferral of federal-court jurisdiction...and superseding the ordinary application of preclusion law." *Exxon Mobil*, 544 U.S. at 283.

II. The Ninth Circuit's application of *Rooker-Feldman* conflicts with binding precedents of other Circuits, which held that applying *Rooker-Feldman* requires a preclusive state-court adjudication reviewable under § 1257 and an explicit attack on that adjudication.

The Ninth Circuit, when affirming dismissal under *Rooker-Feldman* of Herterich's federal claims on *de novo* review, did not base its ruling on any state-court adjudications — let alone

adjudications that had preclusive effect as to those claims or were reviewable by this Court under § 1257. Appendix A-2—A-3. That ruling should be reversed because it conflicts with binding precedents of other Circuits, which have held that application of *Rooker-Feldman* must be based on a preclusive adjudication, reviewable by this Court under § 1257, of the specific federal claims or issues presented, and on the claimant's explicit request to alter the adjudication itself. More specifically:

- The First and Fifth Circuits have held that "[o]nly a state court adjudication that itself has preclusive effect can bring the Rooker-Feldman doctrine into play." *Cruz v. Melecio*, 204 F.3d 14, 21 n. 5 (1st Cir. 2000) ("*Cruz*") (citing *Davis v. Bayless*, 70 F.3d 367, 376 (5th Cir. 1995), as "stating that Rooker-Feldman does not 'bar an action in federal court when that same action would be allowed in the state court of the rendering state'"). "A judgment that is not entitled to full faith and credit does not acquire extra force via the Rooker-Feldman doctrine." *Cruz*, 204 F.3d at 21 n. 5.

- Similarly, the Second Circuit has held that *Rooker-Feldman* does not bar federal claims that are not precluded from being filed in state court. *Edwards v. McMillen Cap., LLC*, 952 F.3d 32, 36 (2d Cir. 2020).

- The First and Third Circuits have held that there is a state-court "judgment" which bars district-court jurisdiction over federal questions under *Rooker-Feldman* only "when a state proceeding has 'finally resolved all the federal questions in the litigation.'" *Malhan v. Sec'y United*

States Dep't of State, 938 F.3d 453, 459-460 (3d Cir. 2019) ("*Malhan*") (quoting *Federacion de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico*, 410 F.3d 17, 25 (1st Cir. 2005)). Here there were no federal questions resolved in state-court litigation.

- The Fourth Circuit has held that *Rooker-Feldman* "assesses only whether the process for appealing a state court judgment to the Supreme Court under 28 U.S.C. § 1257(a) has been sidetracked." *Thana v. Bd. of License Commissioners for Charles Cnty., Maryland*, 827 F.3d 314, 320 (4th Cir. 2016) ("*Thana*").
- Similarly, the First Circuit has held that "denying jurisdiction based on a state court judgment that is not eligible for review by the United States Supreme Court simply would not follow from the jurisdictional statute that invigorated the Rooker-Feldman doctrine in the first place." *Cruz*, 204 F.3d at 21 n. 5.
- The Second, Third, and Eighth Circuits have held that *Rooker-Feldman* does not bar district-court jurisdiction over federal claims when, as here, there is no indication that state courts reached those claims. See *Vargas v. City of New York*, 377 F.3d 200, 208 (2d Cir. 2004) (holding "that the *Rooker-Feldman* doctrine would prevent the District Court from exercising subject matter jurisdiction over [plaintiff's] equal protection claim only if [plaintiff] had raised it in the state court proceedings."); *Desi's Pizza,* 321 F.3d at 420-421 (*Rooker-Feldman* inapplicable when "the state court's opinion contains no discussion of any issues of federal law"); *Gulla v. N. Strabane Twp.*, 146

F.3d 168, 172-173 (3d Cir. 1998) (*Rooker-Feldman* inapplicable where state court did not adjudicate plaintiffs' Constitutional claims); *Webb as next friend of K. S. v. Smith*, 936 F.3d 808, 817 (8th Cir. 2019) ("[I]f there is no state-court judgment, ...Rooker-Feldman does not apply."); *Simes v. Huckabee*, 354 F.3d at 829 (*Rooker-Feldman* inapplicable "where the state court...rests its holding solely on state law").

- The Eighth Circuit has held that "to determine whether *Rooker-Feldman* bars [plaintiff's] federal suit requires determining exactly what the state court held." *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 (8th Cir. 1995) (emphasis added). Here the Ninth Circuit concluded that *Rooker-Feldman* bars Herterich's federal suit without determining exactly what the state court held.

- The Tenth Circuit has held that "*Rooker-Feldman* does not deprive a federal court of jurisdiction to hear a claim just because it could result in a judgment inconsistent with a state-court judgment." *Mayotte v. U.S. Bank Nat'l Ass'n*, 880 F.3d 1169, 1174 (10th Cir. 2018). "There is no *jurisdictional* bar to litigating the same dispute on the same facts that led to the state judgment." *Id.* (italics in original). "Seeking relief that is *inconsistent* with [a] state-court judgment...is the province of preclusion doctrine" and "the federal court has *jurisdiction* to determine whether there is [a preclusion] bar." *Id.*, 1174-1175 (italics in original). "What *is* prohibited under *Rooker-Feldman* is a federal action that tries to *modify or set aside* a state-court judgment because the state

proceedings should not have led to that judgment." *Id.*, 1174 (italics in original). Under these holdings *Rooker-Feldman* would not bar Herterich's claims.

- The Second Circuit has held that, notwithstanding *Rooker-Feldman*, plaintiffs, like Herterich here, "are permitted to seek damages for injuries caused by a defendant's misconduct in procuring a state court judgment." *Dorce*, 2 F.4th at 104; *Id.*, 94 (*Rooker-Feldman* did not bar specific claims arising from state-court proceedings, including claims for damages and Constitutional claims); *Id.*, 107 (*Rooker-Feldman* did not prevent plaintiffs from seeking compensatory damages or "at minimum, nominal damages" in claims arising from state-court proceedings).

- The Eleventh Circuit has held that a claim "falls outside *Rooker-Feldman*'s boundaries" when, as here, "it seeks relief for violations that happened during the state processes" or plaintiffs ask the court "to consider whether their constitutional rights were violated during the proceedings and whether they are entitled to damages for those violations." *Behr*, 8 F.4th at 1213.

- Similarly, the Third and Seventh Circuits have held that *Rooker-Feldman* does not bar "claims that 'people involved in the decision violated some independent right'" — even if (like here) those claims allege Constitutional violations by "members of the [state] judiciary" involved in that decision. *Great Western Mining & Min. Co. v. Fox Rothschild LLP*, 615 F.3d 159, 172-173 (3d Cir. 2010) ("*Great Western*") (citing *Nesses v. Shepard*, 68 F.3d 1003, 1005 (7th Cir. 1995) ("*Nesses*") and

Brokaw v. Weaver, 305 F.3d 660, 667 (7th Cir. 2002) ("*Brokaw*")); *Allen v. DeBello*, 861 F.3d 433, 438 (3d Cir. 2017) ("*Rooker-Feldman* does not bar suits that challenge actions or injuries underlying state court decisions."); *Marran v. Marran*, 376 F.3d 143, 154 (3d Cir. 2004); *Loubser v. Thacker*, 440 F.3d 439, 441 (7th Cir. 2006). "'It was this separate constitutional violation which caused the adverse state court decision' and the injury to [plaintiff]", and "not the state-court decisions themselves." *Great Western*, 615 F.3d at 172-173; *Brokaw,* 305 F.3d at 667; *Ernst v. Child & Youth Servs. of Chester Cty.*, 108 F.3d 486, 491-492 (3d Cir. 1997). In such circumstances "show[ing] that the adverse state-court decisions were entered erroneously...is not the type of appellate review of state-court decisions contemplated by the *Rooker-Feldman* doctrine", and a plaintiff properly "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.'" *Great Western*, 615 F.3d at 173; *Nesses,* 68 F.3d at 1005. "A finding by the District Court that state-court decisions were erroneous and thus injured [plaintiff] would not result in overruling the judgments of the [state] courts." *Great Western*, 615 F.3d at 173. *Rooker-Feldman* is inapplicable because "while [plaintiff'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 [plaintiff] to prevail." *Id.* "Otherwise there would be no federal remedy for a violation of federal rights whenever the violator so far

succeeded in corrupting the state judicial process as to obtain a favorable judgment." *Nesses*, 68 F.3d at 1005.

• The Fourth, Fifth, Sixth and Seventh Circuits have held that *Rooker-Feldman* does not bar claims when plaintiffs like Herterich do not explicitly *seek* or *ask* the district court to review, invalidate, reverse, set aside, overturn, expunge, correct, or alter state-court judgments. *Hulsey v. Cisa*, 947 F.3d 246, 251 (4th Cir. 2020) (*Rooker-Feldman* did not apply because "the federal action must be filed '*specifically* to review th[e] state court judgment.'" (emphasis in original)); *Weaver v. Texas Cap. Bank N.A.*, 660 F.3d 900, 904 (5th Cir. 2011) ("[T]he *Rooker-Feldman* doctrine generally applies only where a plaintiff seeks relief that directly attacks the validity of an existing state court judgment."); *Truong v. Bank of Am., N.A.*, 717 F.3d 377, 384 (5th Cir. 2013) (*Rooker-Feldman* inapplicable because plaintiff "did not seek to reverse or void the adverse foreclosure judgment."); *Hood v. Keller*, 341 F.3d 593, 598 (6th Cir. 2003) (*Rooker-Feldman* inapplicable because "the complaint contains 'no demand to set aside the verdict or the state court ruling'" and plaintiff "does not seek to have the district court overturn his...conviction); *Buckley v. Illinois Jud. Inquiry Bd.*, 997 F.2d 224, 227 (7th Cir. 1993) (*Rooker-Feldman* inapplicable because plaintiff "is not asking [the court] to expunge the disciplinary finding or do anything else to correct or revise the Commission's judgment" and "is not, in short, asking for any relief of the kind an appellant seeks—relief directed against a judgment."); *GASH*

Assocs. v. Vill. of Rosemont, Ill., 995 F.2d 726, 728 (7th Cir. 1993) ("The *Rooker-Feldman* doctrine asks: is the federal plaintiff seeking to set aside a state judgment...?); *Milchtein v. Chisholm*, 880 F.3d 895, 898 (7th Cir. 2018) ("*Milchtein*") ("The vital question...is whether the federal plaintiff seeks the alteration of a state court's judgment.").

- The Eleventh Circuit held it improper to dismiss an entire complaint under *Rooker-Feldman* merely because, like here, "the claims were related to [plaintiffs'] earlier state court litigation." *Behr*, 8 F.4th at 1208. "That kind of sweeping dismissal is...at odds with the Supreme Court's clearly articulated description of *Rooker-Feldman*." *Id.* "*Rooker-Feldman*...requires a more targeted approach." *Id.*, 1213. A "claim-by-claim approach is the right one" because the question is "whether resolution of each individual claim requires review and rejection of a state court judgment." *Id.*
- The Sixth and Tenth Circuits have held that, notwithstanding *Rooker-Feldman*, a state-court adjudication does not preclude a claimant like Herterich from subsequently seeking prospective relief from an alleged violation of federal law arising from or related to that adjudication. *Berry v. Schmitt*, 688 F.3d 290, 300 (6th Cir. 2012) (collecting cases); *Mo's Express, LLC v. Sopkin*, 441 F.3d 1229, 1238 (10th Cir. 2006); see also *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 727 (2010) (plurality opinion) (It "does not necessarily follow" "that applying the Takings Clause to judicial decisions would force lower federal courts to review final state-court

judgments, in violation of the so-called *Rooker-Feldman* doctrine.").

- The Eighth Circuit has held that *Rooker-Feldman* does not bar claims merely because they, like Herterich's claims, "arise from...state court proceedings." *Hageman v. Barton*, 817 F.3d 611, 614 (8th Cir. 2016). Here the Ninth Circuit has held precisely the opposite.

III. Circuits are split on applying the "inextricably intertwined" test.

The Ninth Circuit affirmed dismissal of Herterich's claims in part because "Herterich raised claims that were 'inextricably intertwined' with...state court decisions." Appendix A-2—A-3. The Ninth Circuit did not explain its reasoning or identify the state-court decisions at issue. But assuming *arguendo* that there were state-court decisions to which the "inextricably intertwined" test could potentially apply, certiorari should be granted because the Ninth Circuit's ruling implicates an issue on which Circuits are split.

Circuits "are torn on whether the inextricably intertwined test, formerly the touchstone of the *Rooker-Feldman* analysis, remains intact after *Exxon Mobil Corp.*, and if so, to what extent." Bradford Higdon, *The Rooker-Feldman Doctrine: The Case for Putting It to Work, Not to Rest*, 90 U. Cin. L. Rev. 352, 363 (2021) ("*Higdon*"). "This confusion arose because the Supreme Court almost ignored the phrase entirely in its *Exxon Mobil Corp.* opinion." *Id.* "The consequence of the Court's ignoring the phrase

means that, after *Exxon,* lower courts do not know if they still must apply 'inextricably applied' [sic] or how to do so." *Sophocleus v. Alabama Dep't of Transp.*, 605 F.Supp.2d 1209, 1216 (M.D. Ala. 2009), *aff'd,* 371 F.App'x 996 (11th Cir. 2010). Today, the lower federal courts "apply a variety of inconsistent iterations of the 'inextricably intertwined' test, almost all of which were developed before the Exxon Mobil and Lance decisions." Dustin E. Buehler, *Jurisdiction, Abstention, and Finality: Articulating A Unique Role for the Rooker-Feldman Doctrine*, 42 Seton Hall L. Rev. 553, 567 (2012) ("*Buehler*"); Brian L. Shaw & Mark L. Radtke, *Rooker-Feldman: Still A Litigator's Merry Mischief-Maker?*, Am. Bankr. Inst. J., July/August 2008, at 24, 77 ("*Shaw*") (notwithstanding *Exxon Mobil* and *Lance* "rules of decision among the courts still vary", including those applying the "inextricably intertwined" test).

More specifically, the Second, Fourth, Sixth, and Seventh Circuits have abandoned the "inextricably intertwined" test and now use the phrase at most to state a conclusion. *Hoblock v. Albany Cty. Bd. of Elections*, 422 F.3d 77, 86-87 (2d Cir. 2005) ("*Hoblock*") (explaining that "describing a federal claim as 'inextricably intertwined' with a state-court judgment only states a conclusion", "the phrase 'inextricably intertwined' has no independent content", and the phrase "is simply a descriptive label attached to claims that meet the requirements outlined in *Exxon Mobil.*"); *Davani v. Virginia Dep't of Transp.*, 434 F.3d 712, 719 (4th Cir. 2006) ("*Davani*") ("*Feldman's* 'inextricably intertwined' language does not create an additional

legal test for determining when claims challenging a state-court decision are barred, but merely states a conclusion."); *McCormick v. Braverman*, 451 F.3d 382, 394-395 (6th Cir. 2006) ("*McCormick*") ("[T]he phrase 'inextricably intertwined' only describes the conclusion that a claim asserts an injury whose source is the state court judgment."); *Milchtein*, 880 F.3d at 898 ("Because the phrase 'inextricably intertwined' has the potential to blur this boundary [between preclusion and *Rooker-Feldman*], it should not be used as a ground of decision.").

Similarly, the Tenth Circuit deemed it "unclear whether a claim could be inextricably intertwined with a judgment other than by being a challenge to the judgment", concluded this Court was "unsure of what was meant by 'inextricably intertwined' ", and thought it best "not trying to untangle the meaning of *inextricably intertwined*." *Campbell v. City of Spencer*, 682 F.3d 1278, 1282-1283 (10th Cir. 2012).

In contrast, the Ninth Circuit uses the "inextricably intertwined" test as an independent ground for dismissing complaints, as is demonstrated by Herterich's case and the cases collected in Section VI of the Statement of the Case, *supra*. The Third Circuit also uses the test for that purpose. *Shawe v. Pincus*, 265 F.Supp.3d 480, 486 (D. Del. 2017) (collecting Third Circuit cases which "demonstrate that the legal underpinnings of the inextricably intertwined test are still valid" after *Exxon Mobil*).

IV. The Ninth Circuit's application of *Rooker-Feldman* improperly deprives many federal claimants of their right to a federal forum for their unadjudicated federal claims.

As explained in Sections III, IV and VI of the Statement of the Case, *supra*, the Ninth Circuit routinely applies *Rooker-Feldman* to bar district-court jurisdiction over claims merely because those claims allege violations arising from or related to state-court proceedings. But claims alleging such violations have not necessarily been adjudicated by a state court, and in those many instances (including Herterich's federal claims) wherein the claims have not been adjudicated by a state court the application of *Rooker-Feldman* improperly and without statutory basis deprives claimants of their right to a federal forum for their unadjudicated federal claims. This Court should grant certiorari to end such deprivation.

More specifically, federal courts have a "virtually unflagging obligation...to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). District courts have been given jurisdiction, and "shall have original jurisdiction", under 28 U.S.C. § 1331 and 28 U.S.C. § 1343. District courts thus have a virtually unflagging *obligation* to exercise the jurisdiction granted by those statutes, and claimants invoking that jurisdiction have a corresponding *right* to have that jurisdiction exercised. See *Knick v. Twp. of Scott, Pennsylvania*, 139 S.Ct. 2162, 2167 (2019) ("The Civil Rights Act of 1871, after all, *guarantees* 'a federal forum for claims of unconstitutional

treatment at the hands of state officials.'" (emphasis added)). Herterich invoked the district court's jurisdiction under both of those statutes. Appendix F-6.

A rare exception to that obligation and the corresponding right applies under *Rooker-Feldman* when, unlike here, the claims presented to the district court have already been adjudicated by a state court. In that specific circumstance § 1257 effectively deprives the claimant of his *right* to federal-court consideration of the claims, and any consideration of the claims in the federal courts can only be had by way of *discretionary* appellate review in this Court.

More specifically, this Court "may" grant a writ of certiorari under § 1257 for purposes of "review[ing]" a state-court judgment or decree. § 1257(a) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, *may* be *reviewed* by the Supreme Court by writ of certiorari..." (emphasis added)). And whenever such discretionary Supreme-Court review of a state-court adjudication is authorized by § 1257 district courts automatically lose their otherwise-proper jurisdiction to consider the adjudicated claims because this Court's appellate jurisdiction "precludes" district-court jurisdiction. *Exxon Mobil*, 544 U.S. at 291 ("[The Supreme Court's] appellate jurisdiction over state-court judgments, 28 U.S.C. § 1257, precludes a United States district court from exercising subject-matter jurisdiction in an action it would otherwise be empowered to adjudicate."); *ASARCO*, 490 U.S. at 622 ("The *Rooker-Feldman* doctrine interprets 28

U.S.C. § 1257 as ordinarily barring direct review in the lower federal courts of a decision reached by the highest state court, for such authority is vested solely in [the Supreme Court].").

But this exception to district-court jurisdiction cannot apply in circumstances like those here, where there has been no state-court adjudication of the federal claims presented, because there is nothing to "preclude" district-court jurisdiction. Without a state-court adjudication of the claims there can be no appellate jurisdiction over such an adjudication, and under this Court's formulation of *Rooker-Feldman* in *Exxon Mobil* and *ASARCO* such appellate jurisdiction is required for district-court jurisdiction to be barred. See *Cruz*, 204 F.3d at 21 n. 5; *Thana*, 827 F.3d at 320; *Malhan*, 938 F.3d at 461 (limiting the interlocutory orders that count as "judgments" for purposes of applying *Rooker-Feldman* "to those over which the [Supreme] Court has § 1257 jurisdiction.").

Yet the Ninth Circuit's formulation of *Rooker-Feldman* as applied in this case and others nonetheless precludes district-court jurisdiction in circumstances where there cannot be appellate jurisdiction by this Court under § 1257. The Ninth-Circuit formulation extends *Rooker-Feldman* beyond its statutory basis, unjustifiably depriving claimants like Herterich of their right to a federal forum for their unadjudicated federal claims. For example, the Ninth Circuit recently allowed Arizona to execute a prisoner after dismissing under *Rooker-Feldman* the prisoner's

unadjudicated[1] Fourteenth Amendment due process claim asserting a federal right to the release of physical evidence for fingerprint and DNA analysis. *Hooper v. Brnovich*, No. 22-16764, 2022 WL 16947727, at *5 (9th Cir. Nov. 15, 2022).

V. Judges find *Rooker-Feldman* ambiguous, confuse it with preclusion, find its "inextricably intertwined" language difficult to apply, and desire further guidance.

In 2005 this Court noted that *Rooker-Feldman* "has sometimes been construed to extend far beyond the contours of the *Rooker* and *Feldman* cases, overriding Congress' conferral of federal-court jurisdiction...and superseding the ordinary application of preclusion law." *Exxon Mobil*, 544 U.S. at 283. Today these and related problems persist unabated, and lower courts need and desire further guidance — which this Court can provide after granting certiorari.

As one commentator recently noted *Rooker-Feldman* sometimes "creates mayhem among the federal circuits' jurisdictional analyses" and "[t]hroughout the years, scholars and judges alike have criticized the doctrine for its ambiguity." *Higdon*, 90 U. Cin. L. Rev. at 352 (footnotes omitted). For example, the Third Circuit recently acknowledged that notwithstanding *Exxon Mobil*

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[1] In the state-court proceeding from which *Hooper* arose, the prisoner had "moved under state law", and *not* under federal law, "for an order permitting him to conduct DNA testing and fingerprint analysis on evidence found at the crime scene." *Hooper v. Brnovich*, at *1.

their own non-precedential opinions "took *Rooker-Feldman* too far" and "contradict *Exxon*'s language and *Rooker-Feldman*'s rationale." *Malhan*, 938 F.3d at 460. The Seventh Circuit noted that "[c]ourts often confuse *Rooker-Feldman* cases with cases involving ordinary claim or issue preclusion." *Arnold v. KJD Real Est., LLC*, 752 F.3d 700, 706 (7th Cir. 2014). One bankruptcy court noted that "'general confusion' surrounds *Rooker-Feldman*, and as difficult as it is to decipher, it is even more difficult to apply." *In re Gray*, 573 B.R. 868, 875 (Bankr. D. Kan. 2017). See also *Behr*, 8 F.4th at 1208 ("application of *Rooker-Feldman* has been unrestrained"); *RLR*, 4 F.4th at 385-386 (*Rooker-Feldman* described as "a quasi-magical means of docket-clearing" and "a panacea"); *Hoblock*, 422 F.3d at 86 ("*Exxon Mobil* declares these requirements but scarcely elaborates on what they might mean.").

Lower federal courts have often described *Feldman*'s "inextricably intertwined" language as particularly ambiguous and difficult to apply without further guidance. See, e.g., *Taylor v. Fed. Nat. Mortg. Ass'n*, 374 F.3d 529, 533 (7th Cir. 2004), *as amended on denial of reh'g and reh'g en banc* (Aug. 3, 2004) ("'inextricably intertwined' is a somewhat metaphysical concept"); *Moccio*, 95 F.3d at 198 ("Since *Feldman*, the Supreme Court has provided us with little guidance in determining which claims are 'inextricably intertwined' with a prior state court judgment and which are not."); *Ritter v. Ross*, 992 F.2d 750, 754 (7th Cir. 1993) ("There is, unfortunately, no bright line that separates a federal claim that is 'inextricably

intertwined' with a state court judgment from a claim that is not so intertwined."); *Razatos v. Colorado Supreme Ct.*, 746 F.2d 1429, 1433 (10th Cir. 1984) (*Feldman*'s "inextricably intertwined" language "by itself does not provide district courts with a bright line rule").

Recently, Sixth Circuit Chief Judge Sutton "urg[ed]" this Court "to give one last requiem to *Rooker-Feldman*." *VanderKodde v. Mary Jane M. Elliott, P.C.*, 951 F.3d 397, 405 (6th Cir. 2020) ("*VanderKodde*") (concurring). Judge Sutton explained that, after *Exxon Mobil*, he and others believed that "the Court finally and mercifully had driven a stake through *Rooker-Feldman*" and thereafter *Rooker-Feldman* would apply only to "the occasional innocent who thought he could obtain appellate review of a final state supreme court decision in federal district court, as opposed to the U.S. Supreme Court." *Id.* But instead "*Rooker-Feldman* is back to its old tricks of interfering with efforts to vindicate federal rights and misleading federal courts into thinking they have no jurisdiction over cases Congress empowered them to decide." *Id.* Judge Sutton noted that "*Rooker-Feldman* continues to wreak havoc across the country." *Id.* (collecting cases). "*Rooker-Feldman* harasses litigants and courts to this day", as "[l]itigants continue to make expansive *Rooker-Feldman* arguments" and "lower courts keep buying them." *Id.*, 407.

Judge Sutton urged "recall[ing] the roots of *Rooker-Feldman* and its status as a jurisdictional defense, both of which offer a way to cabin it." *VanderKodde*, 951 F.3d at 407. "As a jurisdictional

doctrine focused on state court judgments, it's about one thing and one thing alone: efforts to evade Congress's decision to funnel all appeals from final state court decisions to the United States Supreme Court." *Id.*, 406-407. "[U]sing the rule to call into question federal court efforts to undermine or sidestep or second guess state court rulings...pulls into its vortex the many things the rule does not do." *Id.*, 408.

And Seventh Circuit Chief Judge Sykes recently noted that *Rooker-Feldman* "continues to be applied outside its carefully circumscribed boundaries" and "continues to be confused with nonjurisdictional preclusion rules." *Andrade v. City of Hammond, Indiana*, 9 F.4th 947, 951 (7th Cir. 2021) (concurring). He argued that courts "should...avoid the 'inextricably intertwined' framing" because "[t]hat small change could go a long way toward correcting the lingering misconceptions about *Rooker-Feldman*'s reach." *Id.*, 954.

VI. Commentators have called for further clarification of *Feldman*'s "inextricably intertwined" language and the relationship between *Rooker-Feldman* and preclusion.

Scholarly analyses of the *Rooker-Feldman* doctrine routinely state that the doctrine is ambiguous, inconsistently applied, and in need of clarification by this Court as to both *Rooker-Feldman*'s relationship with preclusion and the application of *Feldman*'s "inextricably intertwined"

language. This Court should grant certiorari so that it can address these concerns.

For example, one commentator recently stated that "[t]he doctrine's current status demands that the Supreme Court provide further guidance on its limits and overall function" because "[i]f the doctrine is left to 'wreak havoc' on the lower courts, as Judge Sutton suggested that it has, then it can be more harmful than helpful." *Higdon*, 90 U. Cin. L. Rev. at 367 (footnote omitted). "As it stands, the doctrine remains vague enough for lower courts to continually misconstrue its boundaries, thereby creating inconsistent and conflicting case law", and "[i]n practice, the *Rooker-Feldman* doctrine does little more than unnecessarily constrain the jurisdiction of federal district courts and create confusing standards for litigants." *Id.*, 353. "In short, the lower courts' tango with the doctrine often involves too many missteps." *Id.* "Lower courts' missteps when applying the doctrine are largely attributable to a lack of Supreme Court guidance", and the doctrine "needs clarification and elaboration to be useful." *Id.*

That same commentator made "a call for clarification on the *Rooker-Feldman* doctrine" because the doctrine "can majorly impact principles of fairness and judicial efficiency depending on how it is applied" and "[i]f wrongly applied, it has the all-important effect of depriving a litigating party from due process or forcing them to litigate independent issues in a state court." *Higdon*, 90 U. Cin. L. Rev. at 370. "It would take a single Supreme Court opinion on *Rooker-Feldman*...to qualm the abuses currently observed in litigation

involving the doctrine." *Id.* "Should the Supreme Court refuse to act on the matter, however, it is likely that havoc and chaos will continue to be the norm for the *Rooker-Feldman* doctrine." *Id.*, 371.

More specifically, "the Court needs to provide a bright line rule to establish when *Rooker-Feldman* applies and when preclusion principles apply to guide the lower courts regarding the doctrine's lingering uncertainties." *Higdon*, 90 U. Cin. L. Rev. at 368. Furthermore, "[i]f the language and case law surrounding 'inextricably intertwined' is no longer relevant to the *Rooker-Feldman* discussion, then this should be stated." *Id.*, 369. "The Court's best option is to abandon this language and to do so expressly." *Id.* "[P]erhaps most importantly,...the Court should create clear boundaries for the doctrine's limits." *Id.*

In 2015 another commentator observed that *Rooker-Feldman* "serves as a convenient way for courts to discharge suits on preclusion-*like* grounds without engaging in actual preclusion analysis (often a messy, fact-intensive enterprise)", "strongly suggest[ed] that *Rooker-Feldman* is...widely supplanting traditional preclusion analysis in district courts", and concluded that "[a]bsent new guidance, it seems unlikely that district courts will substantially alter the manner in which they apply *Rooker-Feldman*." Raphael Graybill, *The Rook That Would Be King: Rooker-Feldman Abstention Analysis After Saudi Basic*, 32 Yale J. on Reg. 591, 592 (2015). Furthermore, *Rooker-Feldman* may "'encourage[] jurisdictional helplessness' by giving district courts an easy way out of tricky preclusion

analysis." *Id.*, 601. "*Rooker-Feldman's* appeal in such situations may be too hard to resist." *Id.*

Yet another commentator observed in 2012 that "lower federal courts continue to conflate Rooker-Feldman with preclusion", "the Supreme Court has provided little guidance on how these doctrines interact", and "[t]his confusion has far-reaching consequences for hundreds of litigants." *Buehler*, 42 Seton Hall L. Rev. at 557. *Exxon Mobil* and *Lance* "leave a key question unanswered: Exactly how does Rooker-Feldman interact with...preclusion law?" *Id.*, 553. Furthermore, "it is unclear what role the 'inextricably intertwined' inquiry plays in the Rooker-Feldman analysis." *Id.*, 566-567. "For example, it is unclear whether Rooker-Feldman...bars claims that are 'inextricably intertwined' with a state court judgment." *Id.*, 558.

And yet another commentator observed that *Rooker-Feldman*'s "mischief", as previously described by Justice Stevens, had persisted after *Exxon Mobil*. *Shaw*, Am. Bankr. Inst. J., July/August 2008, at 24 ("lower courts and litigators continue their mischievous ways"). "[C]ourts have struggled with the appropriate application of *Rooker* and *Feldman* in part because of the vague and subjective 'inextricably intertwined' language in *Feldman*." *Id.*, 25. "Notwithstanding the Supreme Court's...attempt to distance itself from the 'inextricably intertwined' language in *Feldman*, the doctrine continues to involve fact intensive inquiries and inherently subjective analyses without a clear rule of decision" and "likely to Justice Stevens' dismay, the mischief is likely to continue." *Id.*, 77.

Finally, shortly after *Exxon Mobil* one commentator noted that "one issue the Court did not explicate in Exxon Mobil was what it means to be inextricably intertwined for purposes of the Rooker-Feldman doctrine." Allison B. Jones, *The Rooker-Feldman Doctrine: What Does It Mean to Be Inextricably Intertwined?*, 56 Duke L.J. 643, 659 (2006) ("*Jones*"). "Without much guidance from the Supreme Court concerning the meaning and application of the abstruse 'inextricably intertwined' concept, federal courts have formulated their own criteria and rules, resulting in a rather large body of diverse standards." *Id.*, 660 (footnotes omitted). "Supreme Court opacity concerning what it means to be inextricably intertwined has resulted in significant incongruity in the lower federal courts, which is all the more troubling in light of the frequency with which these courts employ the concept, often to deny federal jurisdiction." *Id.*, 643-644 (footnotes omitted). "A primary source of the doctrine's expansion and the consequent confusion has been the 'inextricably intertwined' inquiry." *Id.*, 643.

That same commentator also noted that:

> The majority of commentators on the Rooker-Feldman doctrine sharply criticize it, and many have suggested that it be abandoned entirely. The critics assert that to the extent that the current conception of the Rooker-Feldman doctrine overlaps with existing doctrines of preclusion and abstention, it is redundant and unnecessary, and to the extent that it reaches beyond the

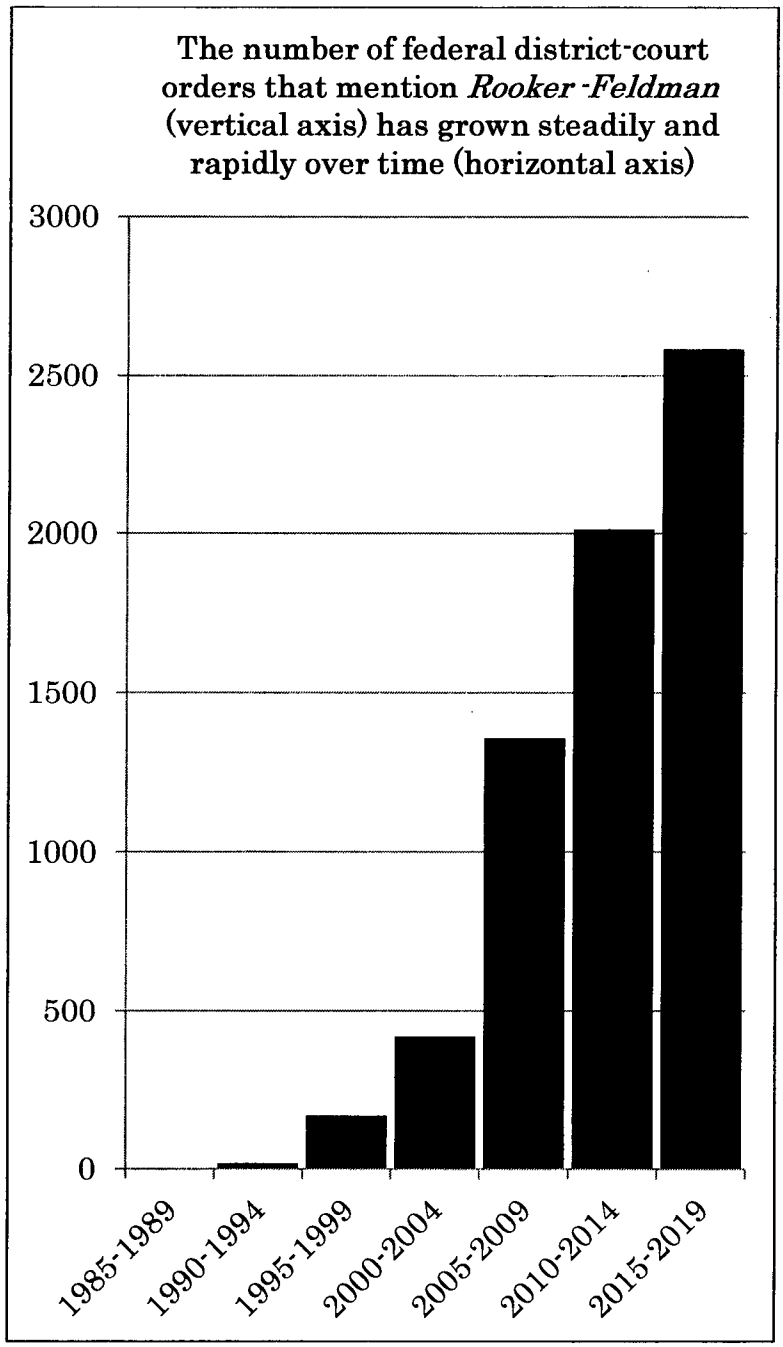
> preclusion and abstention doctrines, it is harmful and even illegitimate.

Jones, 56 Duke L.J. at 654-655 (footnotes omitted). She observed that from *Rooker-Feldman* "a seemingly impermeable cover of jurisprudential kudzu has grown." *Id.*, 643.

VII. District-court analysis of cases under *Rooker-Feldman* is skyrocketing.

In recent years an average of about 500 federal district-court orders annually have mentioned *Rooker-Feldman*, usually for purposes of analyzing whether to apply the doctrine, making guidance by this Court urgent.

More specifically, a recent WestLaw search for "*Rooker-Feldman*", limited to the dates from 01-01-2017 to 12-31-2021, yielded an astonishing 2,489 federal district-court orders ("cases") within that 5-year period. And similar searches, limited to earlier 5-year periods, reveal that for decades the frequency with which district courts mention *Rooker-Feldman* has grown steadily and rapidly, as is illustrated by the chart on the next page.


The number of federal district-court orders that mention *Rooker-Feldman* (vertical axis) has grown steadily and rapidly over time (horizontal axis)
3000
2500
2000
1500
1000
500
0
1985-1989
1990-1994
1995-1999
2000-2004
2005-2009
2010-2014
2015-2019

VIII. This case presents a clean vehicle for this Court to provide guidance regarding *Feldman*'s "inextricably intertwined" language and the relationship between *Rooker-Feldman* and preclusion.

Unlike most certiorari petitions addressing *Rooker-Feldman*, this petition is unburdened by any indication in the record that a state court adjudicated the claims or issues presented in the petitioner's federal complaint. Consequently, upon granting certiorari this Court can provide much-needed guidance, regarding the proper application of *Rooker-Feldman*, without analyzing whether Herterich's federal claims or issues have previously been adjudicated by state courts. This Court need only address a pure question of law: whether § 1257 (or perhaps some other statute or case) requires that federal district courts lack jurisdiction over Herterich's claims merely because Herterich alleges violations "arising from" state-court proceedings. In making that straightforward determination this Court can clarify *Feldman*'s "inextricably intertwined" language, and the relationship between *Rooker-Feldman* and preclusion, by doing one or more of the following, in whole or in part:

- Emphasize that *Rooker-Feldman* applies only to cases in which the existence of a prior state-court adjudication of the plaintiff's federal claims or ancillary issues is undisputed and the plaintiff, like the plaintiffs in *Rooker* and *Feldman*, explicitly "invit[es] district court review and rejection of [state-court] judgments" or "call[s] upon the District Court to overturn an injurious state-court judgment." See *Exxon Mobil*, 544 U.S. at 284 and

291-292. Disputes regarding the matters determined by prior state-court judgments and the effects of such judgments should be decided under principles of preclusion, and district courts properly should assert jurisdiction over such disputes. *Id.*, 293; *In re Athens/Alpha Gas Corp.*, 715 F.3d 230, 235 (8th Cir. 2013) (holding "it permissible to bypass *Rooker-Feldman* to reach a preclusion question" when facing "a murky problem under *Rooker-Feldman*" (collecting cases)); *VanderKodde*, 951 F.3d at 408 (concurring) ("It is hard to see a situation where *Rooker-Feldman* could add anything meaningful to [preclusion] rules.").

- Approve or adopt Circuit-Court rulings — set forth in Section II, *supra* — which have held that applying *Rooker-Feldman* requires a preclusive state-court adjudication, reviewable only by this Court under § 1257, of every federal claim asserted. Thus, *Rooker-Feldman* could effectively become little more than a procedural rule for determining the proper federal forum for a claim, and misreading of the malleable language of prior cases could be prevented. See *VanderKodde*, 951 F.3d at 409 (concurring) (noting that *Rooker-Feldman* has taken on "a life of its own" because the language of *Rooker* and *Feldman* has been "read creatively", and suggesting *Rooker-Feldman* be renamed "the 1257 Rule" or "the Supreme Court review rule").

- Approve or adopt Circuit-Court rulings — set forth in Section II, *supra* — which have held that applying *Rooker-Feldman* requires an explicit request that the district court review, invalidate, reverse, set aside, overturn, expunge, correct, or

alter preclusive state-court judgments. In other words, *Rooker-Feldman* could not apply merely because the relief a claimant seeks is *tantamount* to vacating a state-court judgment. See *United States v. Alkaramla*, 872 F.3d 532, 534 (7th Cir. 2017) (Under the Seventh Circuit's interpretation of *Rooker-Feldman*, "[t]he doctrine's complexity comes in determining whether the relief a litigant seeks 'is tantamount to vacating the state judgment.' But there's no complexity when the litigant directly asks a federal district court to do exactly that." (citation omitted)).

- Approve or adopt the Circuit-Court rulings — in *Hoblock*, *Davani*, *McCormick*, and *Milchtein* — that "inextricably intertwined" is properly used at most to state a conclusion.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

DATED: January 2023

Respectfully submitted,

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