

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 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 April 3, 2023, order denying certiorari in this case.

INTRODUCTION

The Ninth Circuit held that Herterich’s federal claims are all barred by *Rooker-Feldman*, but in reaching that conclusion the Ninth Circuit relied on nothing more than the fact that Herterich’s action alleges Constitutional violations “arising from” state-court proceedings. Nothing in either the Ninth Circuit’s ruling or the record indicates that the federal claims and issues which Herterich presented to the federal district court for adjudication had been adjudicated by state courts. Accordingly, the question presented in Herterich’s certiorari petition was whether the mere fact that Herterich’s action alleges Constitutional violations “arising from” state-court proceedings is by itself sufficient to require the application of *Rooker-Feldman* to Herterich’s claims, absent state-court adjudication of those claims or ancillary issues.

After this Court denied Herterich’s certiorari petition two binding opinions held *Rooker-Feldman* inapplicable to actions which alleged Constitutional violations arising from state-court proceedings. The holdings in those opinions directly conflict with the Ninth Circuit’s holding that alleging such violations is by itself sufficient to require application of *Rooker-Feldman*. Those opinions therefore create “intervening circumstances of a

substantial or controlling effect", within the meaning of Supreme Court Rule 44.2, which warrant rehearing. More specifically:

- In *Reed v. Goertz*, No. 21-442, 2023 WL 2992697, at *2 (U.S. Apr. 19, 2023) ("*Reed*"), a convicted prisoner filed a federal action that, like Herterich's action, alleged Constitutional violations arising from state-court proceedings. But—unlike the Ninth Circuit in Herterich's case—this Court explicitly ruled in *Reed* that the prisoner's action was not barred by *Rooker-Feldman*. *Id.*, at *3. This Court's ruling in *Reed* thus directly conflicts with the Ninth Circuit's ruling that the mere fact that an action alleges such violations is, by itself, sufficient to require application of *Rooker-Feldman*.
- In *Graff v. Aberdeen Enterprizes, II, Inc.*, No. 21-5031, 2023 WL 2860386, at *9 (10th Cir. Apr. 10, 2023) ("*Graff*"), the district court concluded the plaintiffs' Constitutional claims, like Herterich's Constitutional claims here, "arose from injuries imposed by [state-court] judgments." Like the Ninth Circuit here, the district court in *Graff* "concluded the entirety of the [complaint] 'falls within the confines of the *Rooker-Feldman* doctrine'", reaching that conclusion "[w]ithout referencing the specific causes of action set out therein." *Id.* In a unanimous published opinion, a Tenth Circuit panel reversed. *Id.*, at *16. But the *Graff* court did not overrule the district court's conclusion

that the plaintiffs' action alleged Constitutional violations arising from state-court proceedings. The *Graff* court instead reversed because, like the Ninth Circuit here, "the district court failed to grapple with the causes of action set out in the [complaint]." *Id.*, at *10. Upon grappling with those causes the *Graff* court determined the causes were "independent claims outside the scope of the *Rooker-Feldman* doctrine" because they "in no way challenge [plaintiffs'] underlying state-court judgments." *Id.*, at *10. *Graff* thus directly conflicts with the Ninth Circuit's holding that the application of *Rooker-Feldman* is required whenever (and merely because) an action alleges Constitutional violations arising from state-court proceedings.

As explained more fully below, *Reed* and *Graff* both illustrate some of the festering problems that burden *Rooker-Feldman* jurisprudence in the lower federal courts. Because the instant petition presents a clean vehicle to address these problems, the Court should grant this petition. At a minimum, in the wake of *Reed* this Court should vacate the Ninth Circuit's ruling and remand for a new determination that accords with the conclusion in *Reed* that the application of *Rooker-Feldman* is not automatically required whenever and merely because an action alleges Constitutional violations arising from state-court proceedings.

GROUNDS FOR REHEARING

- I. The Court should address arguments for applying *Rooker-Feldman* that are frequently relied upon by the lower federal courts but that were necessarily (though not explicitly) rejected in *Reed*, and this case provides a clean vehicle for doing so.

In *Reed* the Court necessarily rejected several substantive arguments for application of *Rooker-Feldman*, made first by Texas (in its respondent's brief at pp. 41-44) and then by Justice Thomas (in his dissent in *Reed* at *8-*10). These arguments are amongst those frequently made by litigants and deemed persuasive by judges in the lower federal courts when federal claims arise from state-court proceedings. Yet the Court did not address (or even mention) any of these arguments and instead held *Rooker-Feldman* inapplicable solely in reliance upon *Skinner v. Switzer*, 562 U.S. 521 (2011) ("*Skinner*"), which the Court deemed controlling in the narrowly-defined circumstances presented by *Reed*. *Reed*, at *3. The Court did not even address arguments made by Texas and Justice Thomas for distinguishing *Skinner*.

Had the Court explained the flaws that it perceived in the arguments made by Texas and Justice Thomas for applying *Rooker-Feldman*, then that explanation would likely have helped abate the inconsistent application of *Rooker-Feldman* in the lower federal courts. As documented in Herterich's certiorari petition at pp. 30-38, the inconsistency of *Rooker-Feldman*'s application has spawned a steady drumbeat over the last two

decades of urgent requests by judges and scholars for further guidance by this Court regarding the proper application of *Rooker-Feldman*. Yet despite such urgency, prior to *Reed* this Court has not discussed *Rooker-Feldman* at all since deciding *Skinner* in 2011, and the discussion of *Rooker-Feldman* in *Reed* consisted of only four sentences (plus citations) arranged into a short paragraph which did little more than deem *Skinner* controlling. *Reed*, at *3. The unfortunate result is that *Skinner* and *Reed* now stand as somewhat inexplicable exceptions to the reasoning commonly used by many lower federal courts when justifying dismissal under *Rooker-Feldman*.

The Court can address the most important of the arguments made by Texas and Justice Thomas by granting certiorari in this case. As in *Reed*, Herterich's action alleges Constitutional claims that arose from state-court proceedings but were not decided in those proceedings. And as in *Reed*, Herterich's action seeks relief that would effectively counteract the adverse consequences of a state-court judgment. Texas and Justice Thomas effectively argued that *Rooker-Feldman* bars all such cases in federal district court, so this Court can address their arguments (and thereby provide much-needed guidance to litigants and lower federal courts) by analyzing how those arguments apply in this case.

More specifically:

- Texas and Justice Thomas did not dispute that state courts had not adjudicated the *Reed* plaintiff's Constitutional claims, yet

both Texas and Justice Thomas nonetheless argued that the *Reed* plaintiff was effectively appealing a state-court judgment. Respondent's Brief, at p. 42 ("Reed, unlike the plaintiff in *Skinner*, 'challenge[s] the adverse [state-court] decision' in his case."); *Id.*, at pp. 43-44 (plaintiff's federal claim "effectively asked a federal district court to sit as an appellate court over the [state court]"); *Reed*, at *8 (Thomas, J., dissenting) ("The complaint transparently seeks nothing more than the District Court's 'review and rejection' of the [state court's] judgment."); *Id.* (plaintiff's complaint "seeks appellate review"); *Id.*, at *9-*10 (plaintiff's suit "requires an exercise of appellate jurisdiction").

- Justice Thomas argued that *Rooker-Feldman* bars all claims seeking relief that would effectively counteract the adverse consequences of a state-court judgment. *Reed*, at *8 (Thomas, J., dissenting) (*Rooker-Feldman* bars claims seeking "to redress an alleged injury inflicted by the [state court's] adverse decision"); see also *Id.* (granting relief redressing injuries "traceable to the [state court]...would require an exercise of appellate jurisdiction").
- Justice Thomas argued that *Rooker-Feldman* bars claims whenever (and merely because) they arose from state-court proceedings. *Reed*, at *8 (Thomas, J., dissenting) (*Rooker-Feldman* bars the

plaintiff's claims seeking redress for injuries because "[a]ll of those alleged injuries are traceable to the [state court], not the district attorney").

These arguments, though necessarily (but not explicitly) rejected in *Reed*, are frequently made by litigants and deemed persuasive by judges in the lower federal courts, often resulting in the improper dismissal under *Rooker-Feldman* of claims which had not been adjudicated by state courts. In such cases dismissal is typically ruled necessary because: (1) the claims somehow take *de facto* "appeals" from, or require "review and rejection" of, related state-court rulings; (2) the claimant seeks relief that would effectively counteract adverse consequences of a state-court judgment; or (3) the claims arise from state-court proceedings. All three of these arguments are present in the record of this case, though only the third argument was adopted by the Ninth Circuit. And, as Herterich explained on pp. 9-11 of his certiorari petition, state courts did not decide *any* of the claims he made in federal court. Consequently, this case provides a clean vehicle for this Court to analyze the validity of the arguments made by Texas and Justice Thomas.

Upon granting certiorari the Court can address arguments made by Texas and Justice Thomas by reiterating (or perhaps clarifying) its prior jurisprudence. This Court long ago held that *Rooker-Feldman* "is confined to cases...inviting district court review and rejection of [state-court] judgments." *Exxon Mobil Corp. v. Saudi Basic*

Indus. Corp., 544 U.S. 280, 284 (2005) (“*Exxon Mobil*”). The Court explained that *Rooker-Feldman* does not bar an “independent claim”, even if it is “one that denies a legal conclusion that a state court has reached in a case to which [the federal plaintiff] was a party.” *Id.*, 293. Upon granting certiorari the Court should explain that, when state courts did not adjudicate a claim or ancillary issues, that claim is “independent” and does not “invit[e] district court review and rejection of [state-court] judgments”, even if the claim seeks relief that would effectively counteract adverse consequences of a state-court judgment.

II. The circuit split over the requirements for applying *Rooker-Feldman* caused Herterich and the *Graff* plaintiffs to receive different outcomes notwithstanding that the two cases arose from materially similar facts.

Graff makes it clear that Herterich’s appeal would have had a different outcome if that appeal had been decided by the Tenth Circuit instead of the Ninth. Such a circumstance is repugnant to our legal system and should compel this Court to intervene.

More specifically, in *Graff* (as in Herterich’s case) the action alleged Constitutional violations arising from state-court proceedings and the district court dismissed the action under *Rooker-Feldman* “[w]ithout referencing the specific causes of action set out therein.” *Graff*, at *9. The *Graff* court held *Rooker-Feldman* could not be applied in such a summary and sweeping manner because

“*Rooker-Feldman*’s jurisdictional bar is claim specific” and the Tenth Circuit “independently consider[s] each claim against the backdrop of the *Rooker-Feldman* doctrine.” *Id.*, at *8. Quoting Sixth and Eleventh Circuit authority, the *Graff* court explained that *Rooker-Feldman* “is properly applied on a claim-by-claim basis, even though it is jurisdictional in nature” and that in applying *Rooker-Feldman* the question is “whether resolution of each individual claim requires review and rejection of a state court judgment.” *Id.*, *8 at fn. 15.

Under *Graff* a Tenth Circuit panel would have conducted a claim-by-claim analysis of the applicability of *Rooker-Feldman* to Herterich’s claims, and that panel likely would have concluded that none of Herterich’s claims are barred by *Rooker-Feldman*. The panel would have reached that conclusion because, as Herterich explained on pp. 9-11 of his certiorari petition, state courts did not decide any of the claims he made in federal court, so there are no state-court judgments that the federal district court would review or reject when adjudicating the claims. “The *Rooker-Feldman* doctrine...is confined to cases...inviting district court review and rejection of [state-court] judgments.” *Exxon Mobil*, 284. Herterich’s case clearly is not such a case.

Furthermore, under *Graff* the fact that a federal claim arises from state-court proceedings or seeks relief inconsistent with a state-court judgment is insufficient for applying *Rooker-Feldman* in the Tenth Circuit, where *Rooker-Feldman* applies only if a claim specifically seeks

to modify or set aside a state-court judgment. *Graff*, at *8 (for *Rooker-Feldman* to apply “a litigant’s claim must specifically seek to modify or set aside a state court judgment” (citing *Exxon Mobil*)); *Id.* (“*Rooker-Feldman* does not bar a federal court claim merely because it seeks relief inconsistent with a state court judgment.” (citing *Skinner*)). Here, Herterich’s claim does not specifically seek to modify or set aside a state-court judgment.

In stark contrast, in Herterich’s case the Ninth Circuit did precisely what *Graff* teaches district courts they may not do: dismiss an action under *Rooker-Feldman* “[w]ithout referencing the specific causes of action set out therein.” And the Ninth Circuit did not do what *Graff* holds circuit courts must do when reviewing dismissal under *Rooker-Feldman*: “independently consider[] each claim against the backdrop of the *Rooker-Feldman* doctrine.” The Ninth Circuit instead affirmed dismissal under *Rooker-Feldman* merely because Herterich’s action alleges Constitutional violations arising from state-court proceedings. That standard would have required that the action in *Graff* be dismissed under *Rooker-Feldman* for the same reason. But the *Graff* court held *Rooker-Feldman* inapplicable to that action.

The problems caused by the circuit split in applying *Rooker-Feldman* are unambiguously illustrated by comparing the Ninth Circuit’s disposition of Herterich’s action with the Tenth Circuit’s disposition of *Graff*. Herterich and the *Graff* plaintiffs both filed federal actions alleging Constitutional violations arising from state-court proceedings, and in both cases the district court

dismissed the action under *Rooker-Feldman* without referencing the specific causes of action set out therein, but on review the circuit courts then applied different and incompatible requirements for application of *Rooker-Feldman*, thereby giving the otherwise materially similar cases starkly different outcomes. In Herterich's case application of *Rooker-Feldman* was required merely because the action alleged Constitutional violations arising from state-court proceedings, but in *Graff* that fact did not require application of *Rooker-Feldman*. In *Graff* the reviewing court conducted a claim-by-claim analysis and then reversed, but in Herterich's case the reviewing court instead affirmed without conducting any such analysis. The Ninth and Tenth Circuits both applied the law, as they saw it, to materially similar facts. But their interpretations of *Rooker-Feldman*'s requirements differed so dramatically that, for claimants like Herterich and the *Graff* plaintiffs, federal district-court jurisdiction now depends on whether a claim is filed in the Ninth Circuit or the Tenth.

Nothing in this Court's *Rooker-Feldman* jurisprudence, or in the statutes on which the doctrine is grounded, can justify such a discrepancy. To the contrary, such a discrepancy is incompatible with principles of equal protection and national uniformity in the application of federal law. It undermines the integrity of the courts and the rule of law. This Court should not allow such a discrepancy to continue.

CONCLUSION

The Court should grant the petition for rehearing. If upon granting certiorari the Court does not order briefing and oral argument, then the Court should vacate the Ninth Circuit's ruling and remand for a new determination that accords with the conclusion in *Reed* that the application of *Rooker-Feldman* is not automatically required whenever and merely because an action alleges Constitutional violations arising from state-court proceedings.

DATED: April 2023

Respectfully submitted,

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Pro Se Petitioner

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MARY E. WISS, *ET AL.*

RULE 44.2 CERTIFICATION

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

I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 24, 2023



Norman Bartsch Herterich