NO._____

IN THE

Supreme Court of the United States

Hayes B. Milliman

Petitioner,

v.

Timothy. L. Randall,

Respondent.

For A Writ of Certiorari to The United States Court of Appeals for The Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In Markham v. Allen, 326 U.S. 490, 494 (1946), this Court held that Congress did not confer on the federal court's jurisdiction to "probate a will or administer an estate." In the intervening sixty years, some federal circuits have hewn closely to Markham, while others have significantly expanded the scope of the so-called "probate exception," holding that it ousts otherwise proper federal jurisdiction even over claims between parties that are "ancillary" or "related" to probate. Here, the Court of Appeals aligned itself with circuits that have broadly applied the probate exception, holding that although bankruptcy jurisdiction over petitioner's claim was otherwise proper under 28 U.S.C.§ 1334, that jurisdiction could not be exercised because petitioner's claim was "probate related." These decisions represent an irreconcilable split among the circuits over the scope of the probate exception. Accordingly, the questions presented are: What is the scope of the probate exception to federal jurisdiction?

Did Congress intend the probate exception to apply where a federal court is not asked to pro-bate a will, administer an estate, or otherwise assume control of property in the custody of a state probate court?

Did Congress intend the probate exception to apply to cases arising under the Constitution, laws, or treaties of the United States (28 U.S.C. § 1331), or is it limited to cases in which jurisdiction is based on diversity of citizenship?

Did Congress intend the probate exception to apply to cases arising out of trusts, or is it limited to cases involving wills?

PARTIES TO PROCEEDING:

Petitioner, who was Respondent and Appellant below, is Hayes Milliman, a citizen of the United States residing in Los Angeles County, Santa Monica

Respondents who were Plaintiff and Respondent below, Timothy L. Randall a citizen of the Mexica residing in County Orange.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below:

OPINIONS BELOW

The order of the California Supreme Court petition for review is denied. OCT 17, 2018 by judge Corrigan, J. (Pet 1a), The opinion Of Appeal of the State of California Four Appellate District Division Three judges GOETHALS, J, O'LEARY, P. J and BEDSWORTH, J. dissent is unpublish. (Pet 2a)

JURISDICTION

The judgment of the Court of Appeals was entered on January 17,2019. (Pet 2a). Petitioner files present Petition for Writs of Certiorari within 90 days after the order of the California Supreme Court petition for review is denied. OCT 17, 2018 the petition for rehearing pursuant to the rules 13.1, and under 28 U.S.C. section 1254(1). On January 25,2019 to extend the time to file this writ of certiorari to. This Court has jurisdiction under 28 U.S.C. § 1254(1

CONSTITUTIONAL AND STATUTE AND FEDRAL RULES PROVISIONS INVOLVED

The text of 28 U.S.C. §§ 1331, 1332 and 1334 are set out in the Appendix to this Petition, at pages 1a-17 a

STATEMENT

On February 26, 2016, attorney, Paige Baker(who target and exploit our seniors are cowards, and their crimes are especially shameful because they prey upon the vulnerable, the long history of case law) intentionally file copy a "false" of the Barbara Tucker trust dated December 18,2001 and of the 2010 and 2013 amendments called Timothy L. Randall the Trustee a Petition to Determine Validity of Trust And Amendments under Probate Code Section 17200.

Barbara Tucker and Lucille Lambert are some of the wealthiest women in California, with assets exceeding $12 billion.

There are two well-defined categories of misconduct in connection with the Trust and Amendments. One category is the use of fraudulent statements in connection with of the 2010 and 2013 amendments a mystery associated with authorship. According to attorney Priscilla Madrid, no one has taken credit for authorship of the 2010 and 2013 amendments the other category is no copy of the 2001 trust that is not

destroyed as a valid instrument. The only copies have numerous beneficiaries crossed out and numerous names written into the beneficiary portion of the document fraudulent schemes. With regard to fraudulent statements, both law court misstatements and proscribes obtaining of the Barbara Tucker Trust to confirm the trust's validity by means of any untrue statement or omission of a material fact. (PP.4a)

Both lower courts ruled that Milliman's sister, as the trust settlor, did not name Milliman as a beneficiary in either the original trust or any amendments, and therefore Milliman lacked standing to attack the trust or the disposition of trust assets based on the only copies have numerous beneficiaries crossed out and numerous names written into the beneficiary portion of the document and of the 2010 and 2013 amendments which have two defects known to petitioner and a mystery associated with them and the forged a certified mail return receipt for the mailing a copy of the Notice to Beneficiaries my wife Admiranda Maxwell allegedly signed.(pp 2-5a)

First, no one has taken credit for authorship of the 2010 and 2013 amendments. As both amendments of two defects are the notarizations are defective, with same misspelled word, "forgoing." And are the changes

made to the beneficiaries of the original trust. (pp -5a). Irrefutable evidence proves that the only blood relative is eliminated in favor of a caregiver and her family Under Probate Code section 21380(a)(3), gifts to caregivers are presumptively the result of fraud or undue influence.

It is also possible that the caregiver (Bertha Torres who is an illegal Mexican drifter, seems to have crystallized public fears. Beneficiary Tucker Trust who in the financial abuse of at least eight old people in California) was the author of the amendments, leading to a second presumption of fraud or undue influence under Probate Code 21380(a)(1). Since the amendments make large changes from the original trust, all of which are presumptively the result of fraud or undue influence, it is submitted that the trust as amended is invalid. a Petition to Determine Validity of Trust and Amendments under Probate Code Section 17200.

Second and more fundamentally, the record reflects Milliman didn't has a "full hearing"—indeed, a full trial—on these issues below.

I (Hayes Milliman) was in court May 15, 2017 at a hearing related to the trust of Barbara Tucker. The court found that I had received a copy of the Notice to Beneficiaries. (pp 2-5a) under Probate Code Section 16061.7 because Baker & Baker presented the court

forged a certified mail return receipt my wife Admiranda Maxwell allegedly signed at 26356 Vintage Woods Rd, Lake Forest, CA 92630 A bench trial judge order Maxwell stay outside of the courtroom when the trial was preceding as Baker & Baker false accused and obtained a restraining order against Maxwell because they presented the court forged a certified mail return receipt in hopes of having no interference by her as they feared that she would go up as a witness and show the obvious signs that the signature on the receipt was fraudulent the trial was preceding in hopes of having no interference by her as they feared that she would go up as a witness and show the obvious signs that the signature on the receipt was fraudulent. Baker & Baker took advantage of the situation and provided the court false documents while under oath as they know they could fool the court system because she wasn't there to defend herself.

1. The certified mail receipt that Baker & Baker presented to the court on May 15th, 2017 is fraudulent for the following reasons:(pp 6a)

2. Newly discovered evidence, and materials shows that we moved out of 26356 Vintage Woods Rd, Lake Forest, CA 92630 few years ago. We notified the Baker & Baker Law firm of the move as well. (evidence in trial but judge ignored).

3. The second reason why it is impossible that we received the letter informing us about the 120 days' rule was because the signature that was shown on the receipt from certified mail was not her. She has a signature that looks very easy to the naked eye, see that her signature forged and the false one presented in court. (pp 6a) Judge didn't give the opportunity to receive the receipt presented to the court, she could have an expert come and present the court without a doubt that the signature is false (she made police report No 19-24938 and report to the FBI).

4. The third reason why the receipt of certified mail is fraudulent is because Baker & Baker false accuse and obtained restraining order against Maxwell Hayes Milliman was in court May 15, 2017 at a hearing related to the trust of Barbara Tucker. The court found that Hayes had received notes under Probate Code Section 16061.7

With all the reasons and evidence attached with this motion was clearly show Baker & Baker's criminal acts to hide the truth and fool the courts. The whole reason why Baker & Baker wants to do whatever it takes even if it means faking documents to ensure that Timothy Randall stays as the Trustee. Timothy has no real relations to my sister cousins (Lucille and Barbara), but to ensure that he gets his share of the trust.

The motion wasn't based on the of motion or request for order and the memorandum of point and authorities, served and field herewith, on the declaration Baker & Baker and thereto, on the paper and records on file, herein, and on such oral and documentary evidence as wasn't presented at the hearing of the motion. "Nevertheless, the Judge somehow concluded that those findings of fact demonstrated that granted the petition by the trustee of the Barbara Tucker Trust to confirm the trust's validity. In doing so, the trial court ruled that Milliman's cousin, as the trust settlor, did not name Milliman as a beneficiary in either the original trust or any amendments, and therefore Milliman lacked standing to attack the trust or the disposition of trust assets. – meaning that I (Milliman) acted with an intent to deceive, manipulate, or defraud." (GOETHALS, J. WE CONCUR: O'LEARY, P. and J. BEDSWORTH, J dissenting) (Pet.4a).

However, the administrative law judge's factual findings and legal conclusions do not square up. The record reflects Milliman had a "full hearing"—indeed, a full trial—on these issues below. I wasn't entitled to a full hearing for two reasons.

First, judge Johnston used a restraining order against Maxwell and order her stay outside court room because they presented the court forged a certified mail return receipt in hopes of having no interference by her as they feared that she would go up as a witness and show the obvious signs that the signature on the receipt was fraudulent the trial was preceding in

hopes of having no interference by her as they feared that she would go up as a witness and show the obvious signs that the signature on the receipt was fraudulent. Second and more fundamentally, after he "realized Maxwell signatures were forged on federal document certificate mail receipt and speaking to [the Maxwell signature] that it was a very important matter to me he didn't let her testify. As judge knew that Timothy L Randall on elder fraud schemes fabricated Trust and two amendments and named his name trustee as documentation in the case prove he isn't trustee of the Barbara Tucker Trust but to confirm the trust's validity. of the Barbara Tucker Trust to confirm the trust's validity. (pp 16a) After a trial, the probate court concluded that Tucker will was valid and admitted it to probate. at 5-6a.

I appealed to the United States Court of Appeals for the Ninth Circuit. The Court held the probate exception applied and, hence, there was no federal subject matter jurisdiction over my claim. at 1a- 14a

I filed a timely petition for rehearing and rehearing en banc, which was denied October 17,2018 at 1a

REASONS WHY CERTIORARI SHOULD BE GRANTED THE PROBATE EXCEPTION, AS ARTICULATED BY THIS COURT, IS A NARROW, CONGRESSIONALLY-MANDATED LIMITATION ON FEDERAL PROBATE JURISDICTION.

A This Court Has Repeatedly Held That There Is Federal Jurisdiction Over Probate-Related Actions Between Parties

In decisions dating to the early nineteenth century, this Court has articulated what lower federal courts have termed the "probate exception" to federal jurisdiction. In these decisions, this Court held there is no federal jurisdiction to probate wills or administer decedents' estates. The exception is a narrow one, however: The Court consistently has held that if federal jurisdiction is otherwise proper,

> whenever a controversy in a suit between . . . parties arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take

> jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties.

Gaines v. Fuentes, 92 U.S. 10, 22 (1876). In other words,

> "A citizen of another State may establish a debt against the estate. But the debt thus established must take its place and share of the estate as administered by the probate court; and it cannot be enforced by process directly against the property of the decedent. In like manner a distribute, citizen of another State, may establish his right to a share in the estate, and enforce such adjudication against the administrator personally.

Thus, for example, in Payne v. Hook, 74 U.S. 425 (1868), this Court held that although a state probate action was then pending, there was federal jurisdiction over a plaintiff's suit to obtain her intestate share of her brother's estate. According to the Court, were it to conclude otherwise,

> an important part of the jurisdiction conferred on the Federal courts by the Constitution and laws of Congress, would be abrogated. As the citizen of one State has the constitutional right to sue a citizen of another State in the courts of the United States, instead of resorting to a state tribunal, of what value would that right

> be, if the court in which the suit is instituted could not proceed to judgment, and afford a suitable measure of redress?

Id. at 429-30.

Similarly, in Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, this Court held there was federal jurisdiction over a claim that a charitable bequest in a decedent will failed and, accordingly, plaintiff was entitled to part of the decedent's estate. The Court explained,

2 See also Byers v. McAuley, 149 U.S. at 618-22 (where parties were citizens of different states, federal court had jurisdiction to determine validity of handwritten will and cousins' intestate succession rights); Gaines v. Fuentes, 92 U.S. 10 (federal court had jurisdiction over suit to restrain enforcement of probate decree against owners of property claimed by decedent's heir).legatees, and heirs, to establish their claims and have a proper execution of the trust as to them.

Id. at 275-76. The

Court explained that the suit "was within the original jurisdiction of the circuit court of the United States" because "the chancery jurisdiction of the Federal courts to entertain suits between citizens of different states to determine interests in estates . . . existed from the beginning of the Federal government."

Id. at 281. Thus, the circuit court erred in staying the federal action until a state suit could be resolved:

> It . . . appeared upon the record presented to the circuit court of appeals that the circuit court had practically abandoned its jurisdiction over a case of which it had cognizance and turned the matter over for adjudication to the state court. This it has been steadily held, a Federal court may not do.

Id.2

The Court has given at least two explanations for the so-called probate exception. In Gaines v. Fuentes, the Court explained that a proceeding to probate a will is "one in rem, which does not necessarily involve any controversy between parties." 92 U.S. at 21 Thus, "the proceeding is not within the designation of cases at law or in equity between parties of different States, of which the Federal courts have concurrent jurisdiction with the State courts under the Judiciary Act." Id. at 22 (emphasis added).

However, if a controversy arises between parties concerning the validity or construction of a will or the enforcement of a decree admitting it to probate, "there is no more reason why the Federal courts should not take

jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties"

In other cases, the Court has explained that because the Judiciary Act of 1789 gave federal courts jurisdiction over "suits of a civil nature at common law or in equity," 1 Stat. 73 (emphasis added), federal jurisdiction is coextensive with the jurisdiction of the English common law and chancery courts in 1789. Markham, 326 U.S. at 494. Since the probate of wills and the administration of decedents' estates were thought to be within the exclusive jurisdiction of England's ecclesiastical courts, federal jurisdiction did not include these matters. Id. at 494; In re Broderick's Will, 88 U.S. 503, 512 (1874).

However, suits by heirs to establish their rights to probate estates were held to be outside the probate exception because, by the eighteenth century, English chancery courts routinely heard such suits. Waterman, 215 U.S. at 43.

B. Markham v. Allen.

This Court last addressed the probate exception in Markham v. Allen, 326 U.S. 490. Markham arose out of the death of a California resident who willed property to 12 German citizens. The will was admitted to probate in state court, where decedent's American heirs claimed his entire estate because

California law prevented German citizens from inheriting. Id. at 492. While the probate action was pending, the Alien Property Custodian, a federal officer, sued in federal court claiming he was entitled to the decedent's entire net estate. Id. The appellate court dismissed the action, holding that because the claim was within the probate court's jurisdiction, "'its right to proceed to determine heirship cannot be interfered with by the federal court.'" Id. at 493.

This Court reversed. It held that although there is no federal jurisdiction "to probate a will or administer an estate," federal courts have jurisdiction over "suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims'" so long as they do not "interfere with the probate proceedings" or "assume general jurisdiction of the probate or control of the property in the custody of the state court." Id. at 494 (quoting Waterman, 215 U.S. at 43). The Court defined "interfere with the probate proceedings" narrowly, explaining that although a federal court may not "disturb or affect the possession of property in the custody of a state court, "it may exercise jurisdiction.

> to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the ex-tent that the state court is bound by the judgment to recognize the right adjudicated by the federal court.

The Court held there was no improper interference with probate because, although the federal judgment awarded plaintiff decedent's entire net estate, it left "undisturbed the orderly administration of decedent's estate in the state probate court and decree[d] petitioner's right in the property to be distributed after its administration." Id. at 495. "This, as our authorities demonstrate, is not an exercise of probate jurisdiction or an interference with property in the possession or custody of a state court."

II. THE COURTS OF APPEAL ARE IRRECONCILABLY IN CONFLICT OVER THE REACH OF THE PROBATE EXCEPTION.

A. The Circuits Are in Conflict As To The Scope Of The Probate Exception.

In the nearly sixty years since Markham, the circuit courts have become profoundly split over the scope of the probate exception. The Second, Fifth and Eleventh Circuits (and the Ninth Circuit, before the present case) follow Markham and its antecedents closely, applying the probate exception only if a federal court is asked to 3

Before the present opinion, the Ninth Circuit also followed Markham closely. See Hilton v. Mumaw, 522 F.2d 588 (9th Cir. 1975) (probate exception did not bar suit alleging that defendant fraudulently induced decedent to transfer assets out of his estate); Blacker

v. Thatcher, 145 F.2d 255, 256-57 (9th Cir. 1944) (under this Court's "settled rule," there was federal jurisdiction to resolve dispute between parties over rights under decedent's will, notwithstanding pending state probate action).probate a will or administer a decedent's estate.

The Fourth, Sixth, Eighth and Tenth Circuits apply a broader rule, holding there is no federal jurisdiction over any claim that, under state law, would be adjudicated by a state probate court. The First, Third and Seventh Circuits apply a still-broader test, precluding jurisdiction over any claim that is in some fashion "ancillary" or "related" to probate. Finally, the Ninth Circuit in this case, as well as a single panel of the Second Circuit, have combined the two preceding tests to hold that the probate exception applies if a claim is in any manner "related to" probate or under state law would be adjudicated only in a probate court.

1. Markham test.

The Second, Fifth and Eleventh Circuits have closely followed Markham to hold that the probate exception applies only if a federal court is asked to probate a will, administer a probate estate or "order actual transfer of property under probate." Turton v. Turton, 644 F.2d 344, 347 (5th Cir. 1981).3 According to these courts, "Merely determining the rights to, as opposed to administering, assets is not proscribed by the

probate exception." Ashton v. Josephine Bay Paul and C. Michael Paul Foundation, Inc.,918 F.2d 1065, 1072 (2d Cir. 1990). Thus, while a federal court may not directly "distribute any assets" of a decedent's estate, it may adjudicate a party's "'right to share in the estate.'" Dulce v. Dulce, 233 F.3d 143, 148 (2d Cir. 2000). One court explained:

> In May 2017 apparently there were other objection to the petitioner, but the trial court minutes and statement had been reached after Madrid treat court will tell Milliman that Timothy Randall alive burn Barbara Tucker and Lucille and pay $900.000 demanding clear and convincing evidence" to prevail on fraud on the court claim. Pt 8a Requiring an applicant to prove his case on the merits to be entitled to an evidentiary hearing – which he no longer needs – makes no sense Instead, the federal court is limited to declaring the validity of the asserted claims, leaving the claimants to assert their federal judgments as res judicata in the probate court.
>
> Turton, 644 F.2d at 347; see also Robertson v. Robertson, 803 F.2d 136, 139 (5th Cir. 1986) (probate exception does not apply where federal judgment "will not disturb the administration of the estate by

the [state] court for it will result solely in a decree between the parties to the federal suit"); Michigan Tech Fund v. Century Nat'l Bank, 680 F.2d 736, 740 (11th Cir. 1982) ("The probate exception does not foreclose a creditor from obtaining a federal judgment that the creditor has a valid claim against the estate for a certain amount.").

Because under this formulation the probate exception turns on estate administration, not the subject matter of the dispute, these circuits have permitted broad federal adjudication of probate-related matters. For example, these circuits have held there is federal jurisdiction to interpret a will, Michigan Tech Fund, 680 F.2d at 740("will interpretation is within the diversity jurisdiction of the federal courts, and not within the probate exception"); to determine the validity of claims under state forced heirship laws, Robertson, 803 F.2d 136; and over a claim for breach of agreement to make a will, Michigan Tech Fund, 680 F.2d at 740-41. There also is federal jurisdiction to determine whether disputed assets are part of a decedent's estate, Ashton, 918 F.2d at 1071-72; Michigan Tech Fund, 680 F.2d at 740-43; whether a judgment is enforceable against a decedent's estate, Dulce, 233 F.2d 143; and over a breach of fiduciary duty claim against an executor, Breaux v. Dilsaver, 254 F.3d 533 (5th Cir. 2001).

2. State law test.

The Fourth, Sixth, Eighth and Tenth Circuits have held there is no federal jurisdiction over any suit that, under state law, is within the exclusive jurisdiction of state probate courts. In these circuits:

> "The standard for determining whether federal jurisdiction may be exercised is whether under state law the dispute would be cognizable only by the probate court. If so, the parties will be relegated to that court; but where the suit merely seeks to enforce a claim inter parties, enforceable in a state court of general jurisdiction, federal diversity jurisdiction will be assumed."

Rienhardt v. Kelly, 164 F.3d 1296, 1300 (10th Cir. 1999) (emphasis omitted) (citing McKibben v. Chubb, 840 F.2d 1525, 1529 (10th Cir. 1988)).4 Because in these circuits federal jurisdiction depends on state law, the claims to which the probate exception applies vary greatly. Among the claims held barred are breach of fiduciary duty by an executor or trustee, Bedo, 767 F.2d 305; Lepard, 384 F.3d at 237; tortious interference, id.; but see Rienhardt, 164 F.3d at 1301; fraudulent inducement to make a will, Sianis, 294 F.2d 994; and undue influence, Rienhardt, 164 F.3d at 1300-01; Turja, 118 F.3d at 1008-10.3.

"'Ancillary' to probate" test.

In the First, Third, and Seventh Circuits, the probate exception applies if a claim is in some fashion "ancillary to" probate. The factors relevant to determining whether this test applies vary; they include the following.

First Circuit: In the First Circuit, suits "'ancillary' to the probate of a will" are barred by the probate exception. Such suits include those "within the jurisdiction of the [probate court]" and those that "would require the district court to set aside the ruling of the probate court." Mangieri v. Mangieri, 226 F.3d 1, 2-3 (1st Cir. 2000).

Third Circuit: In the Third Circuit, the probate exception bars claim "'ancillary' to probate," including those that would "assail or contradict a judgment of the probate court" or "challenge management of the estate." However, there is federal jurisdiction over otherwise barred causes of action that "would be maintainable inter parties in the state courts of general jurisdiction." Golden v. Golden, 382 F.3d 348, 358 (3d Cir. 2004); see also Moore v. Graybeal, 843 F.2d 706 (3d Cir. 1988).

Seventh Circuit: In the Seventh Circuit, the probate exception bars claims "'ancillary' to . . . core

probate activities." Such claims include those that, if "'maintained in federal court would impair the policies served by the [probate exception].'" Those policies are legal certainty ("ensuring that the outcomes of probate disputes will be consistent by limiting . . . litigation to one court system"), judicial economy ("avoid the piecemeal or haphazard resolution of all matters surrounding the disposition of the decedent's wishes"), "relative expertness" (vesting jurisdiction in those courts with "greater familiarity with such legal issues"), and "avoiding unnecessary interference with the state system of probate law." Storm v. Storm, 328 F.3d 941, 943-44 (7th Cir. 2003) (citing Dragan v. Miller, 679 F.2d 712, 714-16 (7th Cir. 1982)); see also Georges v. Glick, 856 F.2d 971, 973-74 (7th Cir. 1988).

Courts applying the "ancillary to probate" test have refused jurisdiction over a broad range of probate-related matters, including tortious interference with inheritance Storm, 328 F.3d at 944-47; Moore, 843 F.2d 706; Dragan, 679 F.2d at 715-17; but see Golden, 382 F.3d 348 (claim for tortious interference with inheritance held not barred by the probate exception); and breach of fiduciary duty by an executor, Mangieri, 226 F.3d 1; Golden, 382 F.3d at 361-62.

4. Hybrid test.

The Ninth Circuit in the instant matter, following the approach of a single panel of the Second Circuit, see Moser v. Pollin, 294 F.3d 335, 340 (2d Cir. 2002), adopted the broadest definition of the probate exception by combining the "'ancillary' to probate" and "state law" tests. . at 4-7a Under this hybrid test, the court held the probate exception applies if a claim is "probate related" or under state law is within the exclusive jurisdiction of a probate court. at 7,9a A claim is "probate related" if it raises any question "which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument." at 8a.Included in this expansive definition are "all claims regarding distribution of" decedent's assets, including "'what [the decedent] had and what he did with it and whether that was proper or improper.'" at 10 (emphasis added).

The extraordinarily broad sweep of the hybrid test is starkly illustrated by the present case. Here, Timothy's cause of action for tortious interference was against me individually and made no claim against my sister probate estate or testamentary trust, at 8a; thus, it could have had no effect on estate administration. My claim also did not implicate my sister testamentary intent, but rather my donative.

intent during their lifetime. Marshall, 271 B.R. at 867. Nor did my claim challenge the validity of me will or testamentary trust; to the contrary, it assumed those documents were valid. (PP.4-8a).

Instead, my claimed - and the district court found - that my sister intended to create a separate intervivos trust for my benefit, but that Timothy tortuously prevented me from doing so. . at 8a-10 a. Had the trust survived, it would have existed independently of, and had no effect on the validity of, the testamentary documents before the probate court. Moreover, because I would have become the beneficial owner of the trust during Barbara lifetime, Marshall, 271 B.R. at 867, my claim against Timothy existed while Barbara was still alive.

Finally, I am claim did not depend on Timothy receiving Tucker assets - my claim would have existed even if her wealth had been transferred to someone else.

Thus, under the rule articulated by the Ninth Circuit, the probate exception could apply to any claim related to assets held by a decedent before or at her death, regardless of the nature of the claim or the claim's utter lack of impact on probate administration

B. The Circuits Are In Conflict As To Whether The Probate Exception

Applies To Federal Question Cases.

This Court has never directly addressed whether the probate exception applies to federal question cases generally or to bankruptcy cases specifically.6.The Eleventh Circuit has twice considered the issue, holding that the probate exception does not apply to federal question cases. In Glickstein v. Sun Bank/Miami, 922 F.2d 666, 672 n.13 (11thCir. 1991), the Court held that "the probate exception is an exception to diversity jurisdiction and has no application to the federal RICO claims." The Court similarly held in Goerg v. Parungao (In re Goerg), 844 F.2d 1562, 1565 (11th Cir. 1988):

> Care should be taken not to confuse the question of the breadth of Congress' bankruptcy power with the so-called "probate exception" to statutory diversity jurisdiction. That exception related only to 28 U.S.C. § 1332 (1982), and has no bearing on federal question

The opinion below erroneously asserts that this Court twice has held that the probate exception applies to federal question cases. . at 26. It has not. In Harris v. Zion's Savings Bank & Trust Co., 317 U.S. 447 (1943), the only question before the Court was one of statutory construction - whether Congress intended to confer powers on an estate administrator that state law expressly forbade.

The Court referred to the limitation on federal probate jurisdiction in construing the relevant statute, but it did not hold that the federal courts lacked jurisdiction under the probate exception. Id. at 450-52. Indeed, had it so concluded, it would have dismissed for want of jurisdiction and, thus, it would not have had occasion to reach the statutory question. Markham v. Allen also did not address this issue because it had no reason to do so; although Markham concerned issues of federal law, this Court held that the probate exception did not apply for other reasons, and therefore had no occasion to discuss whether the probate exception applies to federal question cases generally jurisdiction.

The present opinion "specifically reject[s]" the Eleventh Circuit's analysis, holding that the probate exception applies to federal question cases. at 8-9.The Court offers no real doctrinal explanation for its conclusion, stating only that the "'evil'" of "federal interference with state probate proceedings" "is as relevant to federal question cases as it is to diversity ones." Id.9

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7 Contrary to the Ninth Circuit's characterization, at 25, the quoted language in Goerg is not dicta. The issue there was whether a bankruptcy court had the power to grant a foreign trustee's petition for ancillary administration. The Eleventh Circuit held that the bankruptcy court had such power - a conclusion it could not reach without first concluding that federal jurisdiction was not ousted by the probate exception. Goerg, 844 F.2d at 1564-68.

8 The district courts are similarly split. See, e.g., Community Ins. Co. v. Rowe, 85 F. Supp. 2d 800, 806 (S.D. Ohio 1999) (probate exception did not apply to ERISA claim because it "has been applied only in the context of diversity jurisdiction"); Williams v. Adkinson, 792 F. Supp. 755, 761 n.9 (M.D. Ala. 1992) ("Where, as here, the plaintiff does not predicate federal jurisdiction on diversity among the parties, the probate exception is not relevant."); Powell v. American Bank & Trust Co., 640 F. Supp. 1568, 1574-75 (N.D. Ind. 1986) ("probate exception applies to diversity jurisdiction; there is nothing to suggest that a federal court cannot take jurisdiction over a federal question raised by a plaintiff"); but see In re Estate of Threefoot, 316 F. Supp. 2d 636, 642 (W.D. Tenn. 2004) ("probate exception is not limited to diversity cases"); In re Estate of Lewis, 128 F. Supp. 2d 573, 574 & n.3 (N.D. Ill. 2001) (same).

9 The Eighth Circuit Bankruptcy Appellate Panel has also recently applied the probate exception to a bankruptcy matter, similarly without any analysis of why the probate exception applies in a non-diversity context. Litzinger v. Estate of Litzinger (In re Litzinger), 322 B.R. 108 (B.A.P. 8th Cir. 2005).

C. This Court Should Clarify The Scope Of The Probate Exception.

Only this Court can resolve the conflicts among the circuits and authoritatively explicate the scope of the probate limitation on federal jurisdiction. Without such clarification, parties and courts will continue, as here, to spend years litigating the merits of such matters, only to learn at the end of the appellate process that the lower court never had jurisdiction to act.10

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10 The present case illustrates how costly the absence of clear rules can be. Before being reversed by the Ninth Circuit, both the bankruptcy and the district courts carefully considered the scope of their jurisdiction and concluded that the probate exception did not apply. Thus, they twice tried the merits of petitioner's tortious interference claim and awarded multi-million-dollar judgments. The two trials and appeal of that claim took over nine years to resolve and resulted in "one of the most extensive records ever produced in the Central District of California 4-7a

III. THE NINTH CIRCUIT'S EXPANSIVE INTERPRETATION OF THE PROBATE EXCEPTION PERMITS AN UNWARRANTED AND UN-BOUNDED INTRUSION ON FEDERAL JURISDICTION THAT HAS NO STATUTORY BASIS.

A. The Ninth Circuit's Approach Is Unmoored To The Congressional Grant Of Federal Jurisdiction Code.

As discussed above, under this Court's opinions, there is no federal jurisdiction to probate a will or administer a decedent's estate because "the equity jurisdiction conferred by the Judiciary Act of 1789, 1 Stat. 73, and § 24(1) of the Judicial Code . . . did not extend to probate matters." Markham, 326 U.S. at 494 (emphasis added). As applied by this Court, thus, the probate exception is firmly grounded in Congress's grant of jurisdiction to the federal courts - it is not a judicially-crafted exception to it

In contrast, the Ninth Circuit's application of the probate exception neither mentions the applicable statutes nor purports to interpret them. Nowhere in its lengthy opinion does the Ninth Circuit cite or discuss the historical basis of the probate exception or the statutory grant of federal question jurisdiction (28 U.S.C. § 1331) to the federal courts. To the Ninth Circuit, no such discussions necessary because it sees

the probate exception as a judicially-crafted doctrine that exists separate from any statutory source.

But such an approach co-opts power that the Constitution gives to Congress: "Only Congress may determine a lower federal court's subject-matter jurisdiction." Kontrick v. Ryan, 540 U.S. 443, 452 (2004) (citing U.S. Const., Art. III, § 1). While courts may interpret the statutes that grant federal jurisdiction, they may not carve out exceptions to them

The Ninth Circuit violates this tenet, effectively creating a jurisdictional exception that has no statutory foundation and, thus, no limiting principles

The absence of limiting principles is what allows the extravagance of the Ninth Circuit's extension of the probate exception. The opinion variously (and inconsistently) places the present case within the probate exception because the case raises "questions which would ordinarily be decided by the probate court in determining the validity of the decedent's estate planning documents" (at 3-12a); invites findings of fact "in direct and irreconcilable conflict with the California probate court's judgment" (. at 9);"interfere[s] with the California probate court proceedings" (at 7-10a); is "'nothing more than a thinly veiled will contest" (id.); and "negated . . . the power of the California probate court" (. at 9a). It thus provides no real guidance in future cases and permits federal

judges virtually unbounded discretion in determining whether federal jurisdiction exists.

The opinion also presents a particular threat to probate jurisdiction that does not stop at the specifics of this case. The court held here that where probate courts share an interest in the same assets - the probate court, for distribution to heirs.

B. The Ninth Circuit's Approach Misunderstands Equity's Historic Role In Adjudicating Trust Matters.

The Ninth Circuit's opinion holds that although my claimed interference with a trust, not a will, there was no federal jurisdiction because "The probate exception applies not only to contested wills, but also to trusts that direct a post mortem disposition of the trustor's property." at 11a This analysis fundamentally misunderstands the historic role of courts of equity in trust matters.

As noted above, this Court has traced the probate exception's origin to the Judiciary Act of 1789, which granted the lower federal courts jurisdiction over "all suits of a civil nature at common law or in equity. . .. "Because the probate of wills and administration of decedents' estates were thought to be ecclesiastical matters, not matters for the common law or equity courts, federal jurisdiction was held not to include them. Id.

Trusts, however, were on an entirely different footing. "[A]t common law, the courts of equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach of trust." Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993) (emphasis added) (citing Lessee of Smith v. McCann, 65 U.S. 398, 407 (1861)); Waterman, 215 U.S. at 43 ("This court has uniformly maintained the right of Federal courts of chancery to exercise original jurisdiction . . . in favor of creditors, legatees, and heirs, to establish their claims and have a proper execution of the trust as to them."); Payne v. Hook, 74 U.S. at 431 ("It is . . . well settled that a court of chancery, as an incident to its power to enforce trusts . . . has jurisdiction to compel executors and administrators to account and distribute the assets in their hands.") (emphasis added); see also Peter Nicolas, Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction, 74 S. Cal. L. Rev. at1513-14 & n.202, 203 ("In eighteenth century England, the entire system of trust was within the exclusive jurisdiction of

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11 Other courts have similarly held. See, e.g., Storm v. Storm, 328 F.3d at 947 (probate exception applies "despite this being a dispute over the terms of an intervivos trust rather than a traditional will"); Golden v. Golden, 382 F.3d at 359 (probate exception applies to "trusts that act as 'will substitutes'"); Sianis v. Jensen, 294 F.3d at 999 ("Other courts, including our own, have recognized that there might be instances when the probate exception applies in diversity actions involving trusts").

chancery, and chancery would thus never refuse to adjudicate matters relating to trusts."); F.W. Maitland, Equity 23 (1932) ("Of all the exploits of Equity the largest and most important is the invention and development of the Trust.").

In the present case, Hayes's action was for interference with an intervivos trust, not a will. His claim, thus, was within the historic equity jurisdiction of the federal courts, and it should not have been held excluded by the probate exception.

C. The Ninth Circuit's Approach Fundamentally Misconstrues

Markham's "Interference" Analysis.

A significant concern driving the Ninth Circuit's probate exception analysis is avoiding "'[t]he evil . . . [of] federal interference with state probate proceedings.'" at 6-12a see also at 5 ("it is clear that the exercise of federal jurisdiction would and, in this case, did interfere with the California probate court proceedings"). According to the opinion, impermissible interference occurs when a federal court adjudicates issues that "would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument." Thus, in the Ninth Circuit's analysis, the probate exception is invoked - and hence federal jurisdiction eviscerated - when a

federal court is asked to adjudicate an issue over which a probate court also has jurisdiction.

The ostensible root of the Ninth Circuit's "interference" analysis is Markham v. Allen, in which this Court held that a federal court may entertain a suit "'in favor of creditors, legatees and heirs'" as long as it does not "interfere" with the probate proceedings. 326 U.S. at 494. The "interference" Markham cautioned against, however, expressly was not federal adjudication of an issue pending before a probate court.

To the contrary, Markham held that a federal court may adjudicate an issue common to state and federal proceedings, even where a federal judgment will bind the state court. Id. (federal court may "adjudicate rights in [decedent's] property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court") (emphasis added). Thus, while the Ninth Circuit's opinion adopts the language of Markham, its analysis is fundamentally inconsistent with it.

D. The Ninth Circuit's Approach Rejects The Well-Established Concept Of Parallel State And Federal Jurisdiction And Improperly Imports Preclusion Principles Into Its Jurisdictional Analysis.

The Ninth Circuit also held that there is improper interference with a probate proceeding - and hence no federal jurisdiction - if a probate claimant is given "a second chance to litigate her claim against the estate," thus "negating . . . the power of the probate court." at 13-14. By so holding, the Ninth Circuit made the very same error - improperly eschewing federal jurisdiction by conflating res judicata and jurisdiction - that this Court recently disapproved in Exxon Mobil Corp. v. Saudi Basic Indus., Corp., 544 U.S. 125 S. Ct. 1517 (2005).

In Exxon, the Court rejected an approach to the Rooker-Feldman doctrine that held that where the same issues are concurrently before state and federal courts, federal jurisdiction terminates upon entry of a state court judgment. The Court explained that while "[c]omity or abstention doctrines may, in various circum-stances, permit or require the federal court to stay or dismiss the federal action in favor of the state-court litigation," properly invoked concurrent jurisdiction does not "vanish[] if a state court reaches judgment on the same or related question while the case remains sub judices in a federal court." Id. at 1527. The Court explained:

> Disposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law. . . . Preclusion, of course, is not a jurisdictional matter. In parallel litigation, a federal court may be bound to recognize the claim - and issue - preclusive effects of a state court judgment, but federal jurisdiction over an action does not terminate automatically on the entry of judgment in the state court.

Id. (emphasis added) (citation omitted).

The Court emphasized, moreover, that the federal statutory scheme permits concurrent state and federal adjudication of claims and, thus, that "'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" Id. at 1526-27 (quoting McClellan v. Carland, 217 U.S. 268, 282 (1910)).12 Accordingly, the Court cautioned against an expansion of Rooker-Feldman that would "override[e] Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts." Id. at 1521.

A similar analysis should govern in the present context. Contrary to what the Ninth Circuit held, because a pending state court action "'is no bar to proceedings concerning the same matter in the Federal court,'" id. at 1526-27, the fact that an issue before the federal court could be decided by a state probate court should be irrelevant if federal jurisdiction is otherwise proper. A prior state court judgment also should be irrelevant to the jurisdictional analysis; while a prior judgment may have preclusive effect, federal jurisdiction nonetheless exists because "[p]reclusion . . . is not a jurisdictional matter." Id. at 1527.

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12 Significantly, McClellan v. Carland is a probate exception case, in which this Court held that federal jurisdiction was properly exercised over a probate-related matter.

E. The Ninth Circuit's Approach Improperly Imports State Law Into Its Jurisdictional Analysis.

Under the second prong of the Ninth Circuit's hybrid test, there is no federal jurisdiction if "[the] state's trial courts of general jurisdiction do not have jurisdiction to hear probate matters." at 9a. This approach runs counter to this Court's repeated admonition that because federal jurisdiction is created by federal statute, it is unaffected by state law.13 According to Payne v. Hook, 74 U.S. 425, 430 (1868):

> We have repeatedly held "that the jurisdiction of the courts of the United States over controversies between citizens of different States, cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power."

The Court similarly held in Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 43 (1909) (emphasis added): [I]inasmuch as the jurisdiction of the courts of the United States is derived from the Federal Constitution and statutes, that in so far as controversies between citizens of different States arise which are within the established equity jurisdiction of the Federal courts the jurisdiction may be exercised, and is not subject to limitations or restraint by state legislation establishing courts of probate and giving them jurisdiction over similar matters.

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13 The error was compounded in this case because the Ninth Circuit did not independently analyze California law, but instead held, without doing a preclusion analysis, that it was bound by the probate court's erroneous conclusion that it had exclusive jurisdiction over Milliman claim. 8; compare at 8-10a

See also Hayes v. Pratt, 147 U.S. 557, 570 (1893) (state probate statutes cannot "defeat or impair the general equity jurisdiction of the Circuit Court of the United States to administer, as between citizens of different states, the assets of a deceased person within its jurisdiction"); Green's Adm'x v. Creighton, 64 U.S. 90, 107-08 (1860) ("a foreign creditor may establish his debt in the courts of the United States against the representatives of a decedent, notwithstanding the local laws relative to the administration and settlement of insolvent estates").

Accordingly, the Ninth Circuit erred in making federal jurisdiction depend on whether a probate court determines that it has exclusive jurisdiction over a petitioner's claim under state law.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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