

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 VICKIE LYNN MARSHALL, :

4 Petitioner :

5 v. : No. 04-1544

6 E. PIERCE MARSHALL. :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, February 28, 2006

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States  
12 at 11:13 a.m.

13 APPEARANCES:

14 KENT L. RICHLAND, ESQ., Los Angeles, California; on  
15 behalf of the Petitioner.

16 DEANNE E. MAYNARD, ESQ., Assistant to the Solicitor  
17 General, Department of Justice, Washington, D.C.;  
18 on behalf of the United States, as amicus curiae,  
19 supporting the Petitioner.

20 G. ERIC BRUNSTAD, JR., ESQ., Hartford, Connecticut; on  
21 behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:13 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next in 04-1544, Vickie Lynn Marshall v. E. Pierce  
5 Marshall.

6 Mr. Richland.

7 ORAL ARGUMENT OF KENT L. RICHLAND

8 ON BEHALF OF THE PETITIONER

9 MR. RICHLAND: Mr. Chief Justice, and may it  
10 please the Court:

11 This is a bankruptcy case, but it is a  
12 bankruptcy case in which the Ninth Circuit has made --  
13 come to the extraordinary conclusion that the Federal  
14 bankruptcy court has no jurisdiction over the chief  
15 assets of the bankruptcy estate. That asset, a -- a  
16 tort cause of action, was to be the main source of the  
17 payment to the creditors. And the Ninth Circuit came  
18 to this conclusion because it gave a very broad  
19 interpretation of the so-called probate exception to  
20 Federal jurisdiction.

21 As I will explain, the Federal bankruptcy  
22 jurisdiction statutes are incompatible with the concept  
23 of having adopted a probate exception to Federal  
24 jurisdiction, particularly to Federal bankruptcy  
25 jurisdiction.

1 JUSTICE SCALIA: Any exception whatever.

2 MR. RICHLAND: That's correct, Your Honor.

3 There is no exception to that. The -- the statute  
4 itself is structured in such a way that its  
5 jurisdiction of the bankruptcy court depends on the  
6 relationship of the matter to the bankruptcy estate.

7 JUSTICE SCALIA: So if -- if the contention  
8 in the -- in the bankruptcy proceeding is that the will  
9 which has been probated by the State probate court is,  
10 in fact, not the true will and that under the true  
11 will, the bankruptcy estate would get money, you think  
12 the bankruptcy court would -- would have jurisdiction  
13 to probate the will.

14 MR. RICHLAND: Yes, Your Honor. Now, the  
15 question is, of course, that's an attack on a probated  
16 will, I believe, and I think that this Court's  
17 jurisprudence also supports the notion that --

18 JUSTICE SCALIA: All right. Well, I'm  
19 willing to -- to move it back. I mean, that's --  
20 that's even harder for you. But let's assume that the  
21 will is in probate but has not yet been probated. Do  
22 you think the bankruptcy court has jurisdiction to  
23 decide which will is the true will?

24 MR. RICHLAND: Well, the -- the bankruptcy  
25 jurisdiction statute states that --

1 JUSTICE SCALIA: Yes or no.

2 MR. RICHLAND: The answer is yes, it does--

3 JUSTICE SCALIA: All right.

4 MR. RICHLAND: -- and it must have that power  
5 to be able to do so because the bankruptcy jurisdiction  
6 statute states that the court has jurisdiction, in rem  
7 jurisdiction, exclusive in rem jurisdiction --

8 JUSTICE GINSBURG: What if the rem --

9 MR. RICHLAND: -- over all assets of the --

10 JUSTICE GINSBURG: -- what if the rem is in  
11 another court before the bankruptcy begins? What if  
12 the res is within -- is in another court?

13 MR. RICHLAND: Yes, yes, Justice Ginsburg.  
14 28 U.S.C., section 1334(e) states the bankruptcy court  
15 shall have exclusive jurisdiction, in rem jurisdiction,  
16 over the bankruptcy estate, and that has been  
17 interpreted by the courts as meaning that it has  
18 paramount jurisdiction in the sense that the normal in  
19 custodia legis doctrine does not apply where it is a  
20 bankruptcy court case.

21 JUSTICE GINSBURG: So even -- even if  
22 property is in the custody of another court in the  
23 probate proceeding and the bankruptcy proceeding comes  
24 later, the bankruptcy proceeding would sweep whatever  
25 assets are before the probate court into the

1 bankruptcy.

2 MR. RICHLAND: That -- that is correct, Your  
3 Honor, and there have been courts that have held that  
4 with respect --

5 JUSTICE SCALIA: Do you want to stand on this  
6 position, Mr. Richland, or do you have a lesser  
7 position --

8 MR. RICHLAND: Well, it's certainly not --

9 JUSTICE SCALIA: -- that -- that might cause  
10 you to win? Because --

11 (Laughter.)

12 MR. RICHLAND: Well, it certainly is not  
13 necessary, of course, to -- to -- for us to prevail in  
14 this case. However, I think it is an important  
15 principle to interpret the -- the bankruptcy  
16 jurisdiction statute, look at the language of that  
17 statute, and determine what Congress intended from  
18 that. And -- and I think it also is a dangerous thing  
19 to get into, implying exceptions into that statute.

20 But -- but let me state this. Obviously, in  
21 this case we have an action, the -- the in rem  
22 jurisdiction of the bankruptcy court over the chosen  
23 action, that is -- is miles away from the probate of --  
24 of a will. The particular cause of action involved  
25 here was an interference with an inter vivos gift. And

1 I think it's important to realize that that was  
2 intended to be a gift that would be complete during the  
3 lifetime of the decedent. That fact means that this  
4 case really has almost nothing to do with probate or  
5 probate jurisdiction.

6 CHIEF JUSTICE ROBERTS: But you did file a  
7 challenge to the probate of the will, didn't you, in  
8 Texas?

9 MR. RICHLAND: There was a challenge filed to  
10 the probate of the will originally by the -- the  
11 brother of the respondent in this case, and eventually  
12 yes, our client did join that some years later after it  
13 was first filed. So that would have been an  
14 alternative.

15 CHIEF JUSTICE ROBERTS: And wasn't the ground  
16 for that that it would be inconsistent with the inter  
17 vivos trust that you are asserting in the bankruptcy  
18 court proceeding?

19 MR. RICHLAND: No, that was not the case,  
20 Your Honor. The -- the grounds for that was the belief  
21 that there had been undue influence with respect to the  
22 will. But the inter vivos gift claim -- a tortious  
23 interference with inter vivos gift claim -- that was  
24 added only many years later in the year 2000. That was  
25 3 years, 3 and a half years after that same action was

1 pending in the bankruptcy court. And the only reason  
2 it was raised at that time was that respondent went to  
3 the Federal court and said -- and interposed the  
4 probate exception and argued at that time there is no  
5 jurisdiction here. Therefore, out of an excess of  
6 caution, our client went to the Texas probate court and  
7 said, well, I will -- I will make this -- this claim  
8 here.

9 In fact, once there was success in the  
10 bankruptcy court and the bankruptcy court said, now I  
11 have made a determination on that claim, our client did  
12 dismiss that claim and dismissed all affirmative claims  
13 with respect to the probate estate.

14 I think the important thing to realize here,  
15 with respect to both this particular claim and with  
16 respect to the bankruptcy jurisdiction statute in  
17 particular, is that the -- that the breadth of the --  
18 what that statute does is, it -- it announces that  
19 rather than having jurisdictional preclusions, there  
20 will be preclusions based on abstention. It has broad  
21 abstention provisions in section 1334(c), and indeed  
22 section 1334(c)(2), which is the mandatory abstention  
23 --

24 JUSTICE BREYER: You like this -- apparently  
25 you like this argument, although you say you're miles



1 away from probate. Well, if you want to get into that  
2 argument, I guess the strongest argument against  
3 keeping it -- for keeping it is bankruptcy  
4 jurisdictional statutes shouldn't be interpreted  
5 differently than diversity jurisdiction or any other  
6 statute, and Markham at least recognizes that there is  
7 such a thing as the probate exception and that Congress  
8 implicitly adopted it, just as they did the domestic  
9 relations exception. Therefore, if we are going to  
10 find for you on this ground, we'd have to go back and  
11 overrule that case and a lot of other water that's  
12 flowed over -- under the bridge or wherever the water  
13 flows.

14 (Laughter.)

15 JUSTICE BREYER: And we ought to take what's  
16 given as given, whatever the true meaning of  
17 ecclesiastical courts having jurisdiction over certain  
18 probate matters or not in the 18th century.

19 MR. RICHLAND: Well, of course, if one looks  
20 at 1334(c)(2), one sees that Congress itself  
21 contemplated that there would bankruptcy jurisdiction  
22 under circumstances where there was no diversity  
23 jurisdiction and when there was no Federal question  
24 jurisdiction. So it -- it certainly is true that  
25 rolled into the whole notion of mandatory abstention is

1 the possibility that the bankruptcy court will have  
2 before it matters over which there would be no  
3 diversity jurisdiction.

4 JUSTICE SCALIA: But you could say the same  
5 thing about diversity jurisdiction, that Congress  
6 contemplated that there would be diversity jurisdiction  
7 where there was no bankruptcy jurisdiction and no  
8 Federal question jurisdiction. I mean, I don't see  
9 what that proves.

10 MR. RICHLAND: Well, excuse me, Justice  
11 Scalia, but what I think it does prove is that when  
12 Congress enacted in 1978 the rather comprehensive  
13 change that it made to the bankruptcy statutes, that it  
14 intended to exercise as broad a jurisdiction as  
15 possible so that the bankruptcy courts would be able to  
16 control the bankruptcy estate and make determinations  
17 as to how the creditors could best be protected.

18 Let me -- let -- yes. I'm sorry.

19 JUSTICE SCALIA: I'm just saying no more so  
20 than -- than when Congress enacted diversity  
21 jurisdiction. It intended it to apply, you know,  
22 uniformly.

23 MR. RICHLAND: To -- to apply very broadly  
24 according to its terms.

25 JUSTICE SCALIA: Yes.

1                   MR. RICHLAND:  And, of course, this Court in  
2                   -- first in Lear v. Armstrong said, yes, this applies  
3                   very broadly.  However, there is an exception and the  
4                   exception is purely the probate of a will -- the  
5                   probate of a will and that alone.  And this Court has  
6                   really hewn very closely to that very narrow limitation  
7                   since that point in time.

8                   JUSTICE SCALIA:  That's true.

9                   MR. RICHLAND:  I do think that it's  
10                  important, however, to realize that if one examines  
11                  this Court's probate exception jurisdiction over the  
12                  years, it has consistently determined that the -- the  
13                  narrowness of that exception must be confirmed, and as  
14                  late as the Markham case, this Court has held that --  
15                  that Federal courts have jurisdiction to decide all  
16                  kinds of issues with respect to wills, all kinds of  
17                  issues with respect to trusts.  Certainly this Court  
18                  has said that it can determine questions such as how to  
19                  interpret the provision of a will.  It has even held  
20                  that Federal courts can determine whether a will is  
21                  invalid.  It can make that determination if the --

22                  JUSTICE SOUTER:  But none -- none of this has  
23                  to be done for you to win this case, does it?

24                  MR. RICHLAND:  You are absolutely correct.

25                  JUSTICE SOUTER:  Then I -- I wish we'd stick

1 to this case.

2 MR. RICHLAND: Well, I'm happy to do that,  
3 Your Honor. This case is an outlier. I believe that  
4 is true. This case is so far from the potential of any  
5 probate exception that, although I felt that it was  
6 important to be able to explicate the -- the principles  
7 involved here, I --

8 JUSTICE SCALIA: You want to look moderate.

9 MR. RICHLAND: Oh --

10 JUSTICE SOUTER: Does this case involve  
11 anything more than the enforcement of an in personam  
12 tort judgment if you are to win?

13 MR. RICHLAND: It -- it would not. That is  
14 all that's involved.

15 JUSTICE KENNEDY: Well, it did involve, at  
16 least the bankruptcy court thought, the judgment  
17 invalidating the inter vivos trust. Was that necessary  
18 to the decision? Or am I -- correct me if I'm --

19 MR. RICHLAND: I -- I don't believe --

20 JUSTICE KENNEDY: -- correct me if I'm wrong  
21 about that.

22 MR. RICHLAND: That is -- that is incorrect,  
23 Justice Kennedy. It did not invalidate the inter vivos  
24 trust. What it held was that as part of the evidence  
25 that it was considering, in terms of the intent, the

1 donative intent, that one portion of that inter vivos  
2 trust, an amendment to it, had been forged, but it did  
3 not invalidate it. In fact, it -- it expressly held  
4 that the -- the inter vivos trust is valid, and that  
5 was a basis for its conclusion that, indeed, this  
6 particular claim was also valid. This claim was a  
7 cause of action for interference with an inter vivos  
8 gift.

9 JUSTICE BREYER: I guess what you're going to  
10 hear in 5-10 minutes --

11 MR. RICHLAND: Yes.

12 JUSTICE BREYER: -- you might as well deal  
13 with it now --

14 MR. RICHLAND: Yes. Why not?

15 JUSTICE BREYER: -- is that the inter vivos  
16 -- a -- a claim for a -- the Texas tort of interference  
17 with inter vivos gift, according to Texas law, must be  
18 brought at the time of the probate proceeding. And for  
19 that reason, it is bound up with probate, and for that  
20 reason, they didn't have jurisdiction.

21 MR. RICHLAND: Well, A -- A, we do not  
22 interpret Texas law as so providing.

23 JUSTICE BREYER: All right. Now, let's  
24 suppose you're --

25 MR. RICHLAND: But -- but assuming --

1 JUSTICE BREYER: -- suppose they're right  
2 about their interpretation.

3 MR. RICHLAND: Assuming that they're right  
4 for that -- by their interpretation, this Court has  
5 repeatedly said that it -- that a -- a State court  
6 cannot -- by simply assigning matters that otherwise  
7 would be heard by Federal courts to the probate court,  
8 that it can, in effect, shield those --

9 JUSTICE BREYER: And the strongest case for  
10 you on that is?

11 MR. RICHLAND: Oh, I think Hess --

12 JUSTICE BREYER: You said this Court has  
13 repeatedly said. So what --

14 MR. RICHLAND: Said it over and over, but  
15 Hess v. Reynolds from 1885, which says that merely the  
16 convenience of a -- a State court to, you know, assign  
17 matters to -- to its probate court. That was a case in  
18 which a debt --

19 CHIEF JUSTICE ROBERTS: But -- but this case  
20 involves a lot more than convenience. It involves a  
21 substantial amount of assets that is either going to  
22 pass to one person under probate or is not going to be  
23 available for passing to that person because of the  
24 inter vivos gift. That seems to be more closely  
25 related to the core probate matters.

1           MR. RICHLAND: Well in fact, Chief Justice  
2           Roberts, I don't believe that's the case. Nothing  
3           passed by way of probate in this case. The -- there  
4           were no assets in the probate. What happened here was  
5           that all of the assets -- and the record shows this,  
6           and I don't believe it's -- that there is any dispute  
7           here. All of the assets had passed to the respondent  
8           in this case before the will and the trust were  
9           actually submitted to the probate court.

10           Once again, this is a tort claim and it's a  
11           tort claim only for an interference. If those assets  
12           had never gone to respondent in this case, there would,  
13           nevertheless, still be a good tort claim. If, for  
14           example, those assets had been passed to respondent's  
15           child or to another brother, the interference itself --

16           JUSTICE GINSBURG: Mr. Richland --

17           MR. RICHLAND: Excuse me, Justice --

18           JUSTICE GINSBURG: -- what seems to me to be  
19           involved here is what is not uncommon in our Federal  
20           system, that is, two proceedings, both dealing with the  
21           same or closely related subject matter. It is not  
22           infrequent that you have parallel proceedings in  
23           Federal court and State court, and then the one that  
24           gets finished first -- that judgment is binding on the  
25           other. And as I understand it, the probate proceeding

1 concluded first before the district judge reviewed the  
2 bankruptcy judge's opinion.

3 MR. RICHLAND: Justice Ginsburg, you're quite  
4 correct that issues -- that -- that the principles of  
5 preclusion ordinarily would deal with the kinds of  
6 issues here, and -- and we think that that -- those --  
7 that should be what governs this case.

8 But I don't believe that it is correct to say  
9 that the probate court judgment preceded that of the  
10 bankruptcy court. The bankruptcy court judgment came  
11 first. A year later the probate court judgment then --

12 JUSTICE GINSBURG: Well, I'm -- I'm assuming  
13 -- and correct me if I'm wrong about this -- that the  
14 bankruptcy court makes a proposed opinion. It doesn't  
15 become a binding opinion until it's affirmed by the  
16 district court.

17 MR. RICHLAND: Unless it's a core matter.

18 JUSTICE GINSBURG: Yes.

19 MR. RICHLAND: And here we claim that it is a  
20 core matter.

21 JUSTICE GINSBURG: Well, if it isn't a core  
22 matter. I think you lost on that in the district  
23 court.

24 MR. RICHLAND: If it isn't a core matter,  
25 then in any event the district court here held that



1       there was no preclusion, and it held it for a number of  
2       reasons.

3               JUSTICE GINSBURG:  But that was not reviewed  
4       by the Ninth Circuit.

5               MR. RICHLAND:  That's correct.  That was not  
6       reviewed by the Ninth Circuit.  But that would be the  
7       -- the appropriate manner of review.

8               JUSTICE GINSBURG:  That would -- that would  
9       be the -- if you -- if you're correct about the limits  
10      of the probate exception, that issue would be open for  
11      review by the Ninth Circuit.

12              MR. RICHLAND:  It certainly would, Justice  
13      Ginsburg.  We agree with that.

14              And if I may reserve the rest of my time for  
15      rebuttal.

16              CHIEF JUSTICE ROBERTS:  Thank you, counsel.

17              MR. RICHLAND:  Thank you.

18              CHIEF JUSTICE ROBERTS:  Ms. Maynard.

19                      ORAL ARGUMENT OF DEANNE E. MAYNARD

20                              ON BEHALF OF THE UNITED STATES,

21                              AS AMICUS CURIAE, SUPPORTING THE PETITIONER

22                      MS. MAYNARD:  Mr. Chief Justice, and may it  
23      please the Court:

24                      Two independent principles require reversal  
25      of the Ninth Circuit's decision.

1           First, the probate exception to Federal  
2 jurisdiction is a will-specific rule and it does not  
3 apply beyond the context of wills to other types of  
4 will substitutes like inter vivos trusts.

5           Second, even with respect to wills, it is a  
6 very narrow exception that is no bar to deciding the  
7 rights to a decedent's estate, construing a will, or  
8 determining the testator's intent.

9           There are only three things under this  
10 Court's precedent that a Federal court cannot do. The  
11 first is to probate a will, that is, to determine the  
12 formal key requisites of the validity of a will;  
13 second, to annul an already probated will; and three,  
14 to take in rem jurisdiction over a res over which a  
15 State court has already taken in rem jurisdiction. But  
16 that is it, and none of those are applicable here.

17           The justifications for the probate exception  
18 do not apply to will substitutes. The -- the probate  
19 exception is based on the peculiar nature of a will,  
20 that is, that unlike inter vivos trusts, unlike the  
21 current modern will substitutes, a will is not valid --  
22 it has no legal effect. This Court's opinions have  
23 said that on several occasions -- unless it is  
24 probated. Therefore, a will must be probated even if  
25 there is no dispute about its validity before any title

1 can pass. Not so with trusts. In fact, that is the  
2 whole point that people engage in the modern world  
3 substitutes is to avoid the necessity to go to the  
4 probate court in order to have their assets passed to  
5 their heirs.

6 The second ground for this Court's probate  
7 exception is a historical one based on the Court's  
8 understanding of the limits of the equity courts in  
9 England. Whatever the merit of that historical  
10 analysis, it has no application to trusts, which have  
11 always been the problems of equity.

12 The Federal Government has a strong interest  
13 in the Court not expanding the Federal exception -- the  
14 -- the probate exception to Federal jurisdiction,  
15 particularly in the sweeping manner that the Ninth  
16 Circuit has done. It is not uncommon for the tax  
17 consequences of an estate planning instrument, such as  
18 a trust, to turn on whether or not the trust is valid  
19 or invalid. And the Congress has provided Federal  
20 jurisdiction to the United States to bring its -- most  
21 of its disputes in the Federal court system.

22 Secondly, more generally, Congress has  
23 determined what types of disputes should be in the  
24 Federal courts and has passed broad statutes providing  
25 the courts with Federal jurisdiction that the courts

1 have an obligation to exercise, if it exists.

2 CHIEF JUSTICE ROBERTS: Except if it's a will  
3 -- will-specific. In other words, you -- it seems to  
4 me you're in for a penny and in for a pound. You  
5 recognize the existence of this exception in certain  
6 cases, and then you argue against it by saying, well,  
7 Congress wrote the statutes broadly. The latter  
8 argument disproves your first point.

9 MS. MAYNARD: I don't believe it does, and  
10 perhaps I'm -- I'm -- I wasn't making clear what my  
11 argument is. The Court has adopted a very narrow  
12 probate exception with respect to the probating of the  
13 will and annulling a probated will, but that is it.  
14 And that analysis was based on a -- the historical --  
15 the Court's view of the historical limits of courts of  
16 equity and therefore was an interpretation of the  
17 Federal diversity statute. Under the logic of  
18 Ankenbrandt, one can assume -- one may -- the Court may  
19 assume that's carried forward.

20 But certainly that -- for the reasons I've  
21 said, that rationale, those justifications, for that  
22 narrow will rule do not apply to trusts, which have  
23 always been the province of equity, and especially  
24 given the questionable historical underpinnings of the  
25 exception, even the narrow exception that does appear

1 to exist, there's no justification for expanding that  
2 beyond its current confines.

3 As this Court recognized in *Ankenbrandt*, the  
4 lower courts had taken the -- the so-called domestic  
5 relations exception beyond this Court's very narrow  
6 limits, and this Court brought -- brought it back to  
7 its origins. And -- and the Federal Government  
8 believes that -- that the same would be appropriate  
9 here with respect to the probate exception.

10 JUSTICE STEVENS: Ms. Maynard, it's my  
11 understanding that a lot of this law developed out of  
12 the dicta in the *Markham* case. Do you think the dicta  
13 in the *Markham* case was an accurate description of the  
14 prior history?

15 MS. MAYNARD: It was probably not a very  
16 precise history, Justice Stevens. I do think one can  
17 read *Markham*, however, especially if one reads it in  
18 the context of the cases it cites for its principles,  
19 to hold what we are saying now, which is that Federal  
20 courts have no jurisdiction over pure probate matters,  
21 that is, no jurisdiction to probate a will. And its  
22 interference language, I believe, was its statement of  
23 the *in rem v. in rem* jurisdiction principle, which in  
24 fact isn't really a probate jurisdiction principle at  
25 all.

1 JUSTICE SCALIA: What do you mean by no  
2 jurisdiction to probate a will? Could -- could -- does  
3 that exclude the possibility of a bankruptcy court  
4 deciding for itself where there are contested wills  
5 that in its in view the -- the right -- the valid will  
6 is a certain one and that, therefore, the bankruptcy  
7 estate includes this fund or doesn't include this fund?  
8 Is that probating the will?

9 MS. MAYNARD: The -- the United States hasn't  
10 taken a position on the broader argument about whether  
11 or not the --

12 JUSTICE SCALIA: Well, if that isn't  
13 probating a will, the exception for probating a will  
14 doesn't -- doesn't amount to a hill of beans, does it?

15 MS. MAYNARD: If -- if the question you're  
16 asking me is what does it mean to probate a will --

17 JUSTICE SCALIA: Yes.

18 MS. MAYNARD: -- the -- the probate of a will  
19 requires determining that it has the appropriate formal  
20 prerequisites, which in most States is appropriate  
21 number of signatures that the testator was coherent,  
22 competent to make a will and that there was no undue  
23 influence.

24 JUSTICE SCALIA: Well, and that this is --  
25 that this is the -- the last will and testament and

1 that there is not some other one.

2 MS. MAYNARD: That's true, yes, that there's  
3 no competing will.

4 JUSTICE SCALIA: Okay. Now, can -- can the  
5 bankruptcy court determine that, that the -- that the  
6 proper will and testament of this decedent is this one?  
7 We're not probating it. No, no.

8 MS. MAYNARD: The --

9 JUSTICE SCALIA: We don't pretend to probate  
10 it. We're just saying that this happens to be the true  
11 will and testament.

12 MS. MAYNARD: It's conceivable that if that  
13 determination went to a -- an element of, for example,  
14 a tort claim and that the person were not -- were not  
15 seeking to take under the will, it is possible. This  
16 Court's precedent doesn't address that precise  
17 question. The United States hasn't taken a position on  
18 whether or not bankruptcy jurisdiction, ala the logic  
19 in Ankenbrandt, encompasses the narrow probate  
20 exception that we concede exists because it's not  
21 necessary to decide this case. The -- the petitioner's  
22 claim is far beyond anything that the probate exception  
23 has ever applied to.

24 The respondent suggests that States have an  
25 overriding interest in having one forum resolve all

1 probate-related disputes. This Court has repeatedly,  
2 for over 150 years, rejected that exact proposition --  
3 Justice Breyer, *Payne v. Hook*, *Hess v. Reynolds*,  
4 *McClellan v. Carland*, which this Court cited last term  
5 in *Exxon Mobil* -- and it was the basis of Markham's  
6 reversal of the Ninth Circuit decision that the Federal  
7 jurisdiction is not determined by the scope and extent  
8 of the State's decisions with respect to where to send  
9 its own citizens with respect to disputes that don't  
10 otherwise have a basis for Federal jurisdiction. The  
11 only place in this --

12 JUSTICE GINSBURG: Ms. Maynard, you said at  
13 one point it's not necessary for you to decide this,  
14 but there is vast confusion in the lower courts about  
15 the extent of the probate exception. And so I take it  
16 that your -- what you began -- what you began with is  
17 -- I wrote them down. That's it?

18 MS. MAYNARD: That's what the United States  
19 believes the limit of the exception is, and the -- let  
20 me be clear. The United States has a strong interest  
21 in having this Court clarify the exception. That is  
22 where the confusion lies in the court of appeals. That  
23 is where the United States feels like its interests are  
24 at risk. So although the petitioner's claim is well  
25 outside the exception, the United States' interests lie



1 in having the Court clear up the confusion and reject  
2 the sweeping and expansive view of the probate  
3 exception that the Ninth Circuit has announced.

4 JUSTICE GINSBURG: And in addition to  
5 Markham, what other case of this Court do you think  
6 spells out the proper bounds?

7 MS. MAYNARD: I -- I think the -- Waterman  
8 has a -- has a good summary of the -- of the limits. I  
9 think even the two cases on which the respondent  
10 principally rely, Sutton and O'Callaghan, lay out the  
11 proper scope of the rule. Those -- both of those cases  
12 involved a claim that depended on having a will that  
13 had been probated declared invalid, and that is within  
14 the narrow confines of the exception. But it is a  
15 will-specific rule.

16 The -- and, Justice Stevens, back to your  
17 question. The one thing about Markham is that there's  
18 no general interference principle, and that's where the  
19 --

20 JUSTICE STEVENS: You know there are a lot of  
21 scholars who think that Markham is the source of most  
22 of the confusion, and so that's why I was asking  
23 whether you think we should -- to clear up, which  
24 you're suggesting we should do, we should reexamine  
25 some of that dicta or we should just stick to the

1 holding.

2 MS. MAYNARD: I would -- I would -- you can  
3 -- it would be helpful to -- to clarify what the Court  
4 meant in Markham. I think the holding in Markham is  
5 correct.

6 CHIEF JUSTICE ROBERTS: With -- with new  
7 dicta of our own?

8 (Laughter.)

9 MS. MAYNARD: It will probably be necessary,  
10 to -- to rule on the case, to make some holding about  
11 what the scope of the exception is, Your Honor. And  
12 the -- the -- but, Justice Stevens, the --

13 JUSTICE SCALIA: We could just say whatever  
14 its scope is it ain't this. I mean, couldn't we do  
15 that?

16 MS. MAYNARD: The Court certainly could  
17 resolve it that way, Your Honor.

18 But, Justice Stevens, the -- the -- Markham,  
19 I do think, makes clear what interference is and is not  
20 by its holding. And on page 494 of Markham, it says,  
21 where the final judgment does not undertake to  
22 interfere with the State court's possession, save to  
23 the extent that the State court is bound by the  
24 judgment to recognize the right adjudicated by the  
25 Federal court. So that is not the type of interference

1 that runs afoul of the rule.

2 CHIEF JUSTICE ROBERTS: Thank you, Ms.  
3 Maynard.

4 Mr. Brunstad.

5 ORAL ARGUMENT OF G. ERIC BRUNSTAD, JR.

6 ON BEHALF OF THE RESPONDENT

7 MR. BRUNSTAD: Mr. Chief Justice, and may it  
8 please the Court:

9 The probate exception exists precisely to  
10 prevent what happened in this case, a Federal court  
11 enjoining ongoing probate proceedings in the middle of  
12 a probate trial, a Federal court determining that the  
13 decedent's estate plan was invalid, a Federal court's  
14 reallocation through a damage claim of the decedent's  
15 assets, contrary to the value of the estate plan, a  
16 Federal court's creation of a novel cause of action --

17 JUSTICE STEVENS: Well, is it -- is it  
18 correct -- I just want to be sure I follow you -- that  
19 they determined that the estate plan was invalid?

20 MR. BRUNSTAD: Correct, Justice Stevens. At  
21 petition appendix 123 to 126, the district court  
22 determined that the -- that J. Howard's living trust  
23 was a forgery, that there were pages that were  
24 substituted --

25 JUSTICE BREYER: But this is all -- this has

1 nothing -- I mean, I -- you have the total differently  
2 -- different understanding than I do of this case, and  
3 I did read Judge Carter's opinion. I thought that case  
4 simply held that because your clients had interfered  
5 with an effort by J. Howard to give quite a few  
6 millions of dollars to Vickie Marshall -- because of  
7 that interference, they had committed the tort of inter  
8 vivos interference with a gift, and they had to pay  
9 damages.

10 Now, they said a lot of things by way of what  
11 the evidence was. Indeed, they did say, as you point  
12 out, that your clients forged three pages of the will.

13 But that was simply evidence of their bad intent, and  
14 it did not invalidate anything in the probate  
15 proceeding, as I read it.

16 Now, what have I said that's not right?

17 MR. BRUNSTAD: Justice Breyer, the answer to  
18 your question, I think, depends upon the fact that  
19 opposing counsel has studiously avoided actually  
20 revealing what his claim is. I think we have to focus  
21 on the -- her exact claim. As a matter of fact and as  
22 a matter of law, she did not prevail --

23 JUSTICE BREYER: I'm not interested in what  
24 he said. I'm interested in what Judge Carter said --

25 MR. BRUNSTAD: Correct, Your Honor.

1 JUSTICE BREYER: -- because that, it seems to  
2 me, is -- and what is it that Judge Carter did that was  
3 wrong in this respect?

4 MR. BRUNSTAD: Judge -- Judge Carter  
5 understood quite clearly that in order for her claim to  
6 proceed as a matter of fact and as a matter of law, he  
7 had to invalidate her living trust. And let me explain  
8 why that was so.

9 That was so because her claim is that J.  
10 Howard intended to give her a catchall trust. The  
11 argument is that Pierce blocked the catchall trust from  
12 being funded by rendering the living trust irrevocable  
13 in July of 1994. Judge Carter found that the catchall  
14 trust was drafted in December of 1994.

15 She can only have a claim -- now, all of J.  
16 Howard's assets were in the living trust. She can only  
17 have a claim -- the catchall trust could only have been  
18 funded or prevented from being funded if the living  
19 trust was, in fact, validly rendered irrevocable. To  
20 prevent -- to -- to counter that, she says, no, the  
21 living trust was invalid. As a matter of fact, she can  
22 have no claim unless the living trust is rendered  
23 invalid. Judge Carter understood that and he expressly  
24 concluded that it was a forgery.

25 Now rendering--

1 JUSTICE SOUTER: Isn't -- isn't it the case  
2 that she can have her claim and she can prove her  
3 claim, but she may not be able to collect the judgment  
4 unless the living trust is invalid? But that's not  
5 what we're litigating here, is it?

6 MR. BRUNSTAD: Your Honor, as a matter of  
7 law, she cannot have her claim because the two cases we  
8 rely on, Neill v. Yett and Thompson v. Deloitte, the  
9 two Texas cases, establish as a predicate to any  
10 tortious interference claim, she must demonstrate that  
11 the estate plan, the living trust, was invalid as a  
12 matter of Texas law. And that is exclusively under  
13 Texas law for the Texas probate court to decide.

14 Now --

15 JUSTICE SOUTER: Why does she have to show  
16 that is invalid as distinct from showing that another  
17 trust, favorable to her, was not created and it was not  
18 created because of the tortious conduct of your client?

19 MR. BRUNSTAD: Because, Justice Souter, under  
20 Texas law when the -- the probate court determines the  
21 validity of an estate plan, it forecloses, as a matter  
22 of law, all expectancies contrary to those that are  
23 part of the estate plan.

24 JUSTICE SOUTER: Well, let me -- let me stop  
25 you there because this is something I didn't understand

1 in the brief. You speak of the Texas probate court  
2 determining the validity of an estate plan.

3 MR. BRUNSTAD: Correct.

4 JUSTICE SOUTER: I take it the Texas probate  
5 court determined the validity of a will here.

6 MR. BRUNSTAD: Correct.

7 JUSTICE SOUTER: It determined the validity  
8 of -- of a pourover trust. Is that correct?

9 MR. BRUNSTAD: Yes, Your Honor, it did.

10 JUSTICE SOUTER: All right.

11 MR. BRUNSTAD: The living trust.

12 JUSTICE SOUTER: All right.

13 Isn't it the case that the two Texas  
14 determinations can be respected and still, in the  
15 Federal court, enter a judgment for tort liability  
16 against your client?

17 MR. BRUNSTAD: No, Justice Souter, and the  
18 reason why is because her cause of action is a State  
19 law cause of action, and under Texas law, putting aside  
20 the fact that no Texas court has ever recognized a  
21 cause of action for tortious interference --

22 JUSTICE SOUTER: That's in -- you may be  
23 right on that, but that's not what -- what we're here  
24 for.

25 MR. BRUNSTAD: Correct. Putting that aside,

1 under Texas law -- and the Deloitte case and the Neill  
2 v. Yett case conclusively established this, and there's  
3 no contrary decisions in Texas -- that once the probate  
4 court determines an estate plan is valid, it  
5 conclusively determines the universe of persons with  
6 legitimate expectancies.

7 JUSTICE SOUTER: But when you speak of estate  
8 plan, you are -- you seem to be talking in global  
9 terms; i.e., that there could have been no other  
10 disposition of assets by the decedent or on behalf of  
11 the decedent except those which the Texas court is  
12 recognizing, the trust, the will. Is that what the  
13 Texas court does, or does the Texas court say, the will  
14 is good, the trust is good?

15 MR. BRUNSTAD: The Texas courts have  
16 conveniently described for us Justice -- Justice Souter  
17 --

18 JUSTICE SOUTER: In other words, is it  
19 preclusive of everything else? That's what I'm getting  
20 at.

21 MR. BRUNSTAD: Yes, exactly so, Justice  
22 Souter. And in the Thompson case itself, the -- the  
23 Texas court says, when the probate court admitted the  
24 1989 will to probate, it necessarily found that Mr.  
25 Thompson signed the will with testamentary capacity and



1 that it reflected his intent, was not the result of  
2 coercion or under influence, and was valid. And the  
3 court continued, as a matter of law, the final probate  
4 court judgment bars any claim that appellees tortiously  
5 interfered with any inheritance--

6 JUSTICE BREYER: That -- that sounds to  
7 me like a matter of preemption, but -- but -- or not  
8 preemption but, you know, res judicata.

9 But just out of curiosity or -- because I  
10 think it is relevant, did the Texas probate court have  
11 in front of it the documents among the lawyers that the  
12 district judge, Judge Carter, relied upon in showing  
13 that there was an intent to create the catchall trust?

14 MR. BRUNSTAD: Yes, Justice Breyer. Everything  
15 --

16 JUSTICE BREYER: It had all those documents.

17 MR. BRUNSTAD: Yes, Justice Breyer.  
18 Everything the district court had and more was examined,  
19 adjudicated in the 5-and-a-half-month jury trial in the  
20 Texas probate court exhaustively.

21 CHIEF JUSTICE ROBERTS: So why isn't that, as  
22 Justice Breyer prefaced his question, an issue of  
23 preclusion rather than, as you frame it, an issue of  
24 jurisdiction?

25 MR. BRUNSTAD: Chief Justice Roberts, the

1 probate exception has always been jurisdictional, and  
2 the reason why it can't be subsumed by res judicata or  
3 collateral estoppel -- we believe we win on those  
4 grounds, but the reason why the probate exception can't  
5 be subsumed within those doctrines is because it  
6 applies even before you have a State court judgment.  
7 It prevents a Federal court from determining an estate  
8 plan from being invalidated --

9 JUSTICE GINSBURG: Why should it? The  
10 probate exception is court-created. Congress passed no  
11 law that said it. Congress gave the Federal courts  
12 jurisdiction in certain categories of cases and  
13 expected them to exercise that jurisdiction. Since our  
14 jurisdiction is statutory and the probate exception was  
15 made up by the courts, shouldn't we interpret it as  
16 narrowly as possible, perhaps even do away with it  
17 because it lacks any statutory basis?

18 MR. BRUNSTAD: Justice Ginsburg, the probate  
19 exception, like the domestic relations exception, is  
20 best conceived as a presumption that when Congress  
21 establishes a font of Federal jurisdiction, it does not  
22 intend that jurisdiction to be extended to interfere  
23 with probate proceedings. That is properly a  
24 jurisdictional doctrine in this case because it is  
25 never appropriate for a bankruptcy court to invalidate

1 or validate a will and -- or an estate plan. And that  
2 is a necessary element of Vickie's claim.

3 JUSTICE KENNEDY: Well, you say -- you say an  
4 -- an estate plan. Most people would think insurance  
5 policies are part of their estate plan, and if it's  
6 alleged that there was a fraudulent alteration of the  
7 beneficiary designation in the insurance policies, is  
8 that within the Texas probate court jurisdiction?

9 MR. BRUNSTAD: Justice Kennedy, no. Here we  
10 have -- when I say estate plan, I mean the living trust  
11 and the will operating together.

12 JUSTICE KENNEDY: Well, there's -- there's a  
13 further irony here in that revocable trusts are always  
14 promoted on the grounds that it keeps us out of  
15 probate. And now you're -- you're insisting that it  
16 has to be in probate.

17 MR. BRUNSTAD: Well, Justice Kennedy, the  
18 living trust here did two things that a will does. It  
19 provided for the succession of J. Howard's property  
20 upon his death, and it provided for the payment of his  
21 last -- last illness expenses and his -- his debts. It  
22 is quintessentially a will substitute in the sense that  
23 it also provides for the succession of his property.  
24 In this case --

25 JUSTICE SCALIA: But it isn't probated.

1 That's -- it is, indeed, a will substitute. The whole  
2 purpose of doing it is to avoid probate.

3 MR. BRUNSTAD: But in this case, Justice  
4 Scalia, the will and the -- the living trust acted  
5 together. The probate court had exclusive jurisdiction  
6 over both of them and the challenges to them. Vickie  
7 challenged the living trust, even before J. Howard  
8 died. Those proceedings continued on in the probate  
9 court, and --

10 JUSTICE KENNEDY: Well, but as Justice Breyer  
11 indicated, can't you just, for purposes of  
12 understanding the cause of action as asserted by Vickie  
13 Marshall here, just say, we will assume the trust is  
14 valid, we will assume the will is valid? All we're  
15 saying was that there's a tort and he's going to be  
16 liable to us in tort.

17 MR. BRUNSTAD: Because, Justice Kennedy,  
18 again, a critical element of her cause of action is  
19 the invalidity of the trust as a matter of fact and  
20 law.

21 JUSTICE BREYER: Why? Why? Why? That is to  
22 say, what the finding is, is that there was a different  
23 matter, a catchall trust, and he told the lawyers, go  
24 draw it up so I can give gifts to her, the increase in  
25 the value of my property during the 13 months we're

1 married, do it, and they never did it. Now, that seems  
2 to have nothing whatsoever to do with the GRAT trust or  
3 with the will. It just happens that those are  
4 evidentiary, what went on there, of what likely  
5 happened with the catchall trust.

6 So I don't see why those are necessary. I  
7 don't see why they're more than evidentiary, and I  
8 don't see whether or not those are barred, those  
9 particular facts have anything to do with this, as far  
10 as jurisdiction is concerned.

11 Now, explain to me why I'm wrong.

12 MR. BRUNSTAD: Certainly, Justice Breyer.  
13 First of all, Texas has the right to prescribe the  
14 elements of its own causes of action, and under Texas  
15 law, her cause of action depends upon two critical  
16 things, a legitimate expectancy J. Howard intended to  
17 do this for her, and the second, tortious conduct of  
18 some kind. Her claim -- she tries to meet those two  
19 critical elements by showing two things. One, that J.  
20 Howard intended to give me this -- this gift in the  
21 form of this -- this trust, and that it was tortiously  
22 interfered with because the living trust was rendered  
23 irrevocable.

24 JUSTICE BREYER: Well, that's just one of the  
25 things.

1 MR. BRUNSTAD: But it's --

2 JUSTICE BREYER: Among other things that went  
3 on were they hired private detectives to go after  
4 her, to keep her from the bed. I mean, you've read that  
5 opinion and there are like about 30 things in there. And  
6 I grant you that one of those things is the fact that  
7 three pages of the living trust, according to the judge,  
8 were created after the event of that trust and slipped  
9 in without his knowledge. I mean, it's quite a story.

10 MR. BRUNSTAD: Of course, Your Honor --

11 JUSTICE BREYER: And -- and so I -- but as I  
12 read it, there were many, many, many things involved  
13 here, and this is just one of them. So how can Texas  
14 say that you have to prove this particular one as -- as  
15 opposed to proving a lot of others?

16 MR. BRUNSTAD: Justice Breyer, of course, as  
17 an aside, we went to great pains in the Ninth Circuit  
18 to demonstrate why all those findings were clearly  
19 erroneous and not based on the evidence.

20 But assuming them to be so, which we dispute,  
21 again, looking at her claim, that is the critical  
22 element of her claim. If, in fact, there -- if, in  
23 fact, the living trust was made revocable, then at any  
24 point in time, he could have funded, if -- if he had it  
25 as revocable until his death, he could have funded her

1 gift that she alleges and she would have no damage  
2 claim. It is because of the trust becoming irrevocable  
3 that he was prevented from doing it. That is her  
4 claim.

5 JUSTICE SOUTER: Yes, but her claim is assume  
6 it's been made irrevocable. I just want some money  
7 from this guy.

8 MR. BRUNSTAD: Correct.

9 JUSTICE SOUTER: That's all she's saying, as  
10 I understand it. She -- she can -- as I understand her  
11 cause of action, it can proceed on the assumption the  
12 will is valid, the -- the trust is valid. Just give me  
13 the money that I would have had.

14 MR. BRUNSTAD: Justice Souter, as a matter of  
15 Texas law, she cannot establish a legitimate  
16 expectancy. Again, once the probate court -- and the  
17 probate court alone has the right to determine the  
18 validity of an estate plan. Once the probate court has  
19 determined that as a matter of Texas law, all claims  
20 about expectancies contrary to those provided in the --  
21 in the plan are foreclosed. That's the Thompson case  
22 and the Neill case.

23 JUSTICE GINSBURG: You're arguing a  
24 preclusion question, and if the Ninth Circuit thought  
25 it had jurisdiction, it could have tested what you say

1 about Texas law. There's no finding in this record of  
2 what Texas law is other than what you have just told  
3 us, and perhaps you're right and perhaps you're not.  
4 But the Ninth Circuit said the Federal door is closed  
5 to this probate exception, and that's what we're here  
6 to decide.

7 MR. BRUNSTAD: Justice Ginsburg, preclusion  
8 will also not work. Res judicata and collateral  
9 estoppel will also not work because the parties in the  
10 Federal proceeding are merely a subset of the parties  
11 in the probate court. The probate court's judgment is  
12 unique because it has a binding-against-the-world  
13 effect. Federal courts cannot pull chunks of the  
14 critical issues into the Federal court because doing  
15 so creates an inconsistency of judgments potentially.  
16 Where the Federal court only has part of the parties  
17 before it, the Federal court has all -- the probate  
18 court has all the parties before it. The probate  
19 court's judgment is binding against the world --

20 JUSTICE GINSBURG: I think it -- it may be  
21 that there's another side to that story. For example,  
22 I think the bankruptcy court was heard from first.  
23 Arguably, that's binding on the Texas court. Whether  
24 the bankruptcy court was right or wrong, it would get  
25 full faith and credit. That's one argument.



1           Another is perhaps you can explain to me how  
2 this all started because I thought that it was a claim  
3 made against her in the bankruptcy court for  
4 defamation. Then the claim that she asserts is a  
5 compulsory counterclaim. She has to make it there or  
6 she'll lose it.

7           MR. BRUNSTAD: No, Justice Ginsburg, the  
8 claim was not a compulsory counterclaim. The action  
9 which was -- that Pierce commenced in the -- in the  
10 bankruptcy court was merely to ask the bankruptcy court  
11 to decide that if he had a debt against -- if he had a  
12 claim against her she owed him money, it would be  
13 nondischargeable in bankruptcy. She then used that  
14 opportunity to pursue this tortious interference claim  
15 against Pierce that she was already pursuing in the  
16 probate court. So because there was a prior pending  
17 proceeding where she had made the claim --

18           JUSTICE GINSBURG: I -- I didn't understand  
19 the pleading to say if I have a claim, it would be  
20 nondischargeable. I thought he made a claim. He made  
21 -- filed a claim for defamation in the bankruptcy  
22 proceeding.

23           MR. BRUNSTAD: Justice Ginsburg, Pierce did  
24 not ask the bankruptcy court to decide the claim. He  
25 only -- he only asked for the bankruptcy court to

1       decide whether it was nondischargeable or not.

2                   But even so -- even so, I think it's  
3       important to recognize --

4                   JUSTICE GINSBURG:   He would have to say I  
5       have a claim because the bankruptcy court is not going  
6       to decide a hypothetical if he has a claim.  He has to  
7       at least assert I have a claim.

8                   MR. BRUNSTAD:   But bankruptcy judges do that,  
9       Justice Ginsburg.  They decide only the  
10      nondischargeability aspect of claims rather than the  
11      claims themselves.

12                   JUSTICE GINSBURG:   It has to be a real claim.  
13      It can't be if I have a claim.

14                   MR. BRUNSTAD:   No, Justice Ginsburg, because  
15      the nondischargeability jurisdiction in bankruptcy is  
16      unique.  You allow the claim to be determined in a  
17      proper court of competent jurisdiction, and then the  
18      bankruptcy court decides whether it's nondischargeable  
19      or not.  That's how it should proceed particularly  
20      where, as here, her claim requires, as -- in order for  
21      it to -- to be valid, to determine the validity or  
22      nonvalidity of J. Howard's estate plan.

23                   Now, the United States --

24                   CHIEF JUSTICE ROBERTS:   Counsel, I don't -- I  
25      don't see how the interference with the probate court

1 that you're articulating is any greater than the  
2 interference in Markham. In Markham, it was a decision  
3 by a Federal court that these claimants were not  
4 going to claim under the will. Why is -- isn't that  
5 even greater than the interference you're complaining  
6 of?

7 MR. BRUNSTAD: No, Chief Justice Roberts.  
8 You can readily divide the Court's precedents into two  
9 categories, those where there was impermissible  
10 interference and therefore no jurisdiction, and those  
11 where there isn't. On the impermissible interference  
12 side, you have a case like Federal court cannot  
13 determine the validity of an estate plan, Armstrong,  
14 Gaines v. Chew. A Federal -- a Federal court cannot  
15 determine --

16 JUSTICE SCALIA: Was it an estate plan or a  
17 will?

18 MR. BRUNSTAD: In Sutton --

19 JUSTICE SCALIA: I mean, you -- you -- you're  
20 stretching the probate concept from determining whether  
21 the will is valid or invalid and who inherits under the  
22 will to also determining what goes into the probate  
23 estate, that is, the insurance policies, the trust, and  
24 so forth. That to me is -- is something quite  
25 different from probating a will.

1           MR. BRUNSTAD: Justice Scalia, the probate  
2 exception protects the integrity of the succession  
3 process. If the documents you're looking at deal with  
4 the succession of the property, as the living trust and  
5 will do in this case, it is encompassed within the  
6 probate exception in the Sutton case --

7           JUSTICE SOUTER: No, I don't -- I don't see  
8 your -- your logic there. Of course, it protects the  
9 succession process, but it does not follow that  
10 everything that implicates a succession process falls  
11 within the probate exception.

12           MR. BRUNSTAD: Correct. Correct, Justice  
13 Souter. But here the succession was determined under  
14 the living trust, and in Sutton v. English, that's  
15 exactly the same scenario. Moses Hubbard left a --

16           JUSTICE SOUTER: If -- if there had been a  
17 joint bank account, the succession would have been  
18 determined based on the validity of the joint bank  
19 account, and that certainly wouldn't have fallen within  
20 the probate exception.

21           MR. BRUNSTAD: Because the joint -- where you  
22 have the equivalent of tenancies in the entirety, I'd  
23 say that's a separate issue.

24           Here, however, the living trust performed all  
25 the functions of a traditional will, unlike a joint

1 bank account. In the Sutton case, you had both a will  
2 and a trust, just like in this case. There, Moses  
3 Hubbard left a will and a trust. Mary Jane Hubbard  
4 enjoyed the benefits of the trust for her life.

5 JUSTICE SOUTER: Does -- does Texas law  
6 provide that a -- a living trust must be executed and  
7 administered with the formalities of a will?

8 MR. BRUNSTAD: Not quite the same, Justice  
9 Souter. Not quite the same.

10 JUSTICE SOUTER: Then -- then you have to get  
11 beyond our probate exception cases to cover the living  
12 trust.

13 MR. BRUNSTAD: But in Sutton v. English,  
14 there was both a will and a trust, exactly the same as  
15 here. The plaintiffs were just going after the  
16 property. We just want the assets. We're saying we're  
17 not touching the trust and the will. This Court held  
18 -- this Court held, wait a minute. Only the Texas  
19 probate courts may determine whether these instruments  
20 are valid or not.

21 CHIEF JUSTICE ROBERTS: Yes, but she's not --  
22 she's not even going after the assets in this case.  
23 She's asserting an in personam claim against the  
24 individual. Correct?

25 MR. BRUNSTAD: She is, but that's exactly the

1 same as Broderick's Will, Chief Justice Roberts, an in  
2 personam claim against the beneficiaries of the  
3 allegedly invalid estate plan to impose a constructive  
4 trust on them to get the money. No matter how you dice  
5 it or slice it in this case, she is doing an end run  
6 around the probate proceeding.

7 JUSTICE BREYER: I don't think they're going  
8 to impose a constructive trust, are they? All -- all  
9 they're going to say is pay her the money.

10 MR. BRUNSTAD: But why are they going to say  
11 pay her the money?

12 JUSTICE BREYER: They're going to say it  
13 because they make a finding that through a whole  
14 variety of various devices, all of which were listed,  
15 that J. Howard, who wanted to give her money through  
16 something called the catchall trust was prevented in  
17 about 15 ways. And even if you're right that there's a  
18 Texas finding that those three pages weren't slipped  
19 in, well, how do we know? Maybe it was a valid GRAT  
20 trust, but if only they hadn't tried to isolate J.  
21 Howard from contact with her, J. Howard would have  
22 figured out what had happened before he died and he  
23 would have told his lawyers, hey, cut this out. Do  
24 what I want. Revoke it. But all that is just  
25 hypothetical. I'm just using that to show you why I

1 think this is evidentiary not a matter of what the  
2 elements of the crime are -- or the elements of the  
3 tort are.

4 MR. BRUNSTAD: What's not evidentiary,  
5 Justice Breyer, is the fact that in order to prove a  
6 legitimate expectancy, she must establish that the  
7 validated estate plan is in fact invalid. And under  
8 Texas law, that can only be done in the probate court.

9 JUSTICE BREYER: What's the cite on that that  
10 I -- that I need for --

11 MR. BRUNSTAD: Well, in our brief we cite to  
12 many, many cases, Your Honor. I would -- I would  
13 specifically refer you to --

14 JUSTICE BREYER: You're saying you can't  
15 bring an inter vivos trust -- an inter vivos --  
16 interference with an inter vivos gift action in Texas  
17 unless you show that a will, for example, is invalid.

18 MR. BRUNSTAD: That's correct, Your Honor,  
19 and those are the Neill v. Yett and the Thompson --  
20 Thompson v. Deloitte cases, which I was reading to  
21 before. And the Court said as a matter of law, the  
22 final probate court judgment bars any claim that  
23 appellees tortiously interfered with any inheritance  
24 expectancy because, in light of the final invalid  
25 probate court judgment, appellant has --

1 JUSTICE SCALIA: But that -- but that's res  
2 judicata. I mean, that -- that isn't necessarily a --  
3 an application of -- of any probate exception.

4 MR. BRUNSTAD: Justice Scalia, it is not res  
5 judicata for the following reason. Not only may a  
6 Federal court not determine the validity or invalidity  
7 after the probate court, it may not do so before the  
8 probate court has had a chance --

9 JUSTICE SCALIA: You say that, but that case  
10 doesn't say that.

11 MR. BRUNSTAD: That case doesn't say that.

12 JUSTICE SCALIA: What -- what case do you  
13 have that says that?

14 MR. BRUNSTAD: The cases -- there is no  
15 specific case where someone has tried to litigate a  
16 tortious interference claim in Federal court before the  
17 probate court has had -- has had its say.

18 Under Texas law, however, because of the  
19 preclusive effect of that determination, Vickie would  
20 be able to come to the probate court and say, look, J.  
21 Howard intended to give me this. It's a finding of  
22 intent. That's preclusive on the probate court. The  
23 probate court would be perhaps prohibited from saying,  
24 oh, I can't determine under -- that the valid estate  
25 plan gives the intent to somebody else.



1 JUSTICE SCALIA: But the mere fact that you  
2 have jurisdiction to say something does not mean that  
3 if -- if some other court says the same thing first,  
4 you won't be bound by that.

5 MR. BRUNSTAD: The problem, though, Justice  
6 Scalia, is that the probate court is supposed to make  
7 that finding in a judgment good against the world. But  
8 all of a sudden, part of the world who has done an end  
9 run around the probate proceeding has now gone to some  
10 other court for a critical determination of fact that  
11 the probate court must decide and always must decide in  
12 determining the validity of an estate plan --

13 JUSTICE GINSBURG: You -- you are suggesting  
14 an extraordinary setup with a State court being able to  
15 preclude other courts from dealing with related, not  
16 identical matters, and that's just not the way our  
17 system works. You can bring duplicative proceedings in  
18 different courts. One will finish first and that will  
19 bind the others. But I -- I never heard of a State  
20 court being able to say, because we are a probate  
21 court, that you -- you couldn't bring a tort case  
22 someplace else.

23 MR. BRUNSTAD: Justice Ginsburg --

24 CHIEF JUSTICE ROBERTS: The -- the only court  
25 I've heard of that can do that is the Federal

1 bankruptcy court.

2 MR. BRUNSTAD: Just as a Federal bankruptcy  
3 court is in rem and executes and enters some judgments  
4 good against the world with respect to some issues, a  
5 probate court does the same thing. You have exactly  
6 the same reason why the probate court does it as in the  
7 bankruptcy court.

8 Now, this Court has recognized in *Tilt v.*  
9 *Kelsey*, for example, that the State has a sovereign  
10 interest in deciding the scope of its probate procedure  
11 that the State may, this Court said in *Broderick's*  
12 *Will*, provide for the probate court to enter a judgment  
13 good against the world, whether the person was a party  
14 to the proceeding or not. If a -- if a Federal court  
15 can predetermine --

16 JUSTICE GINSBURG: That's the definition of  
17 an in rem judgment, but she's suing for an in personam  
18 judgment an individual, not an estate, just for a plain  
19 old money judgment.

20 MR. BRUNSTAD: But in a race to judgment,  
21 Your Honor, if the Federal court gets to decide this  
22 critical issue of intent before the probate court, it  
23 preempts the probate court from doing its core probate  
24 function of validating or invalidating an estate plan.

25 That would render our probate system unworkable. That

1 is why --

2 JUSTICE STEVENS: Mr. Brunstad --

3 MR. BRUNSTAD: -- this is a jurisdictional  
4 doctrine.

5 Yes, Justice Stevens.

6 JUSTICE STEVENS: May I ask you two  
7 questions? First, if there were no such animal as the  
8 probate exception, would there have been bankruptcy  
9 court jurisdiction over your claim?

10 MR. BRUNSTAD: We argue no, Justice Stevens,  
11 because as we argued in the Ninth Circuit, there was  
12 not even bankruptcy jurisdiction because the other side  
13 never responded to our argument that the outcome of  
14 this case would not result in any money going to  
15 creditors of her estate.

16 JUSTICE STEVENS: So your -- you would  
17 prevail even if there were no probate exception in your  
18 view.

19 MR. BRUNSTAD: That's our argument. The  
20 Ninth Circuit did not address that ground, Your Honor.

21 JUSTICE STEVENS: And my -- my second  
22 question is I noticed you quoted from a Minnesota Law  
23 Review about 250 cases, and the -- your opponent  
24 pointed out that the -- the next sentence of the  
25 article said the holdings don't support the

1 generalization. And I would just like to ask you,  
2 apart from the Markham case, what is the case -- what  
3 holding of a case lends the greatest support to your  
4 probate exception argument.

5 MR. BRUNSTAD: Justice Stevens, I think that  
6 the Sutton case is the closest. The next closest is  
7 Broderick's Will. Sutton again involved both a trust  
8 and a will and was a construction of Texas law, which  
9 we say the Court has already decided in Sutton, and  
10 Texas law, which is undisputed, has the effects which  
11 we say it has in the brief. They did not contest,  
12 Justice Ginsburg, our construction or interpretation of  
13 Texas law.

14 I think also that the Court's decisions in  
15 Tarver and Fouvergne and also Ellis and O'Callaghan --

16 JUSTICE STEVENS: I'm not asking you to rank  
17 them. I don't want a list of cases that have a lot of  
18 dicta because some of these cases went off on laches,  
19 some went off a lot of different grounds than purely --  
20 than -- some of them don't even mention probate.

21 MR. BRUNSTAD: Justice Stevens, I think that  
22 it's -- it would be helpful if I could give you a  
23 thumbnail sketch breaking down, what I was trying to do  
24 earlier, between those where there's impermissible  
25 interference and those where there's not impermissible

1 interference. The United States' characterization I  
2 think is incorrect.

3 For example, again, this Court has determined  
4 there's no jurisdiction for a Federal court to  
5 determine the validity of an instrument. That's the  
6 first case in *Armstrong v. Lear* and also *Gaines v.*  
7 *Chew*.

8 Also, this Court has determined there's no  
9 Federal jurisdiction to determine the invalidity of an  
10 estate plan. That's *Tarver, Fouvergne*, and  
11 *O'Callaghan, Broderick's Will, Sutton*, and *Ellis*.

12 This Court has determined that Federal courts  
13 do not have jurisdiction to administer the probate  
14 estate. That's *Byers v. McAuley*.

15 This Court has determined that there is no  
16 Federal jurisdiction to take possession of the assets  
17 in the probate court. That is also *Broderick's Will*.  
18 I'm sorry. That is *Byers v. McAuley*.

19 This Court has determined one may not impose  
20 a constructive trust on the beneficiaries as, in  
21 essence, a way to get property to them. That's  
22 *Broderick's Will* and *Sutton*.

23 This Court has determined there's no  
24 jurisdiction to recover property from the beneficiary  
25 because of an alleged invalidity of a will. That's --

1 that's the Ellis case.

2 This Court has determined there's no  
3 jurisdiction for the Federal court to direct an  
4 accounting from the administrator. That's the Waterman  
5 case.

6 This Court has determined there's no  
7 jurisdiction to interfere with the State court's  
8 possession of the assets, again Waterman, Williams,  
9 Yonley, and Borer.

10 Now, no jurisdiction. It's always been a  
11 jurisdictional doctrine.

12 And for the same reasons this Court refused  
13 to recharacterize the -- the domestic relations  
14 exception as a abstention doctrine, the Court should  
15 also decline to do so here under the probate exception.

16 Now, the other side of the schema is, when is  
17 it permissible for a Federal court to undertake a  
18 probate-related matter? Well, if the State allows the  
19 claim, particular claim, to be brought outside its  
20 exclusive probate system, then Federal courts may  
21 entertain jurisdiction as well.

22 JUSTICE BREYER: By the way, in Texas if you  
23 have to go through all this probate stuff and  
24 everything, and they want to claim 15 years ago my  
25 mother gave a ring to my cousin who stole it, is that

1 precluded to bring that tort action when the person  
2 who, you know, was supposed to get it finds out about  
3 it?

4 MR. BRUNSTAD: Justice Breyer, all claims of  
5 incomplete gift, which Vickie's claim is here, compete  
6 with an estate plan.

7 JUSTICE BREYER: So -- so, in other words, if  
8 it -- when the guy is 2 years -- 15 years old, he gives  
9 a ring to somebody, and now he dies at age 93, and when  
10 they find out about that incomplete gift at age 15,  
11 nobody can bring a lawsuit anymore. You have to go to  
12 the probate court.

13 MR. BRUNSTAD: If in fact the ring passed  
14 under his valid estate plan, yes. Because the ring  
15 passed under the valid estate plan, you have to  
16 overturn the estate plan before you say the property  
17 goes somewhere else.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 MR. BRUNSTAD: Thank you, Your Honor.

20 CHIEF JUSTICE ROBERTS: Mr. Richland, you  
21 have 4 minutes remaining.

22 REBUTTAL ARGUMENT OF KENT L. RICHLAND

23 ON BEHALF OF THE PETITIONER

24 MR. RICHLAND: Thank you, Your Honor.

25 Justice Breyer, to answer your question about

1 whether the Texas court had all of the material before  
2 it that was before the bankruptcy court, the answer to  
3 that can be seen at page 45 of the appendix where the  
4 district court judge says that there were 400 boxes of  
5 documents.

6 JUSTICE BREYER: Yes, but did those documents  
7 -- did those boxes contain the key documents --

8 MR. RICHLAND: They did.

9 JUSTICE BREYER: -- about the catchall trust?

10 MR. RICHLAND: They did. They contained the  
11 -- perhaps the most key documents, which were the  
12 billing records that showed that that trust was  
13 actually drafted. The trust, of course, never saw the  
14 light of day, but those billing records reflected that.  
15 And none of that was in front of the Texas probate  
16 court.

17 In addition, Justice Breyer, you mentioned  
18 that there were a number of other instances of tortious  
19 misconduct that were found by Justice Carter, in  
20 addition to the forging of the -- of the irrevocability  
21 point. Indeed, Justice Carter found that there were  
22 massive transfers of J. Howard's assets to Pierce  
23 Marshall in his last days, and those asset transfers  
24 were made in exchange for notes that were payable years  
25 in the future. This was after J. Howard had been



1 diagnosed with terminal cancer, after he had had a  
2 heart attack. Annuities were used to pay for those as  
3 well. So that he was essentially stripped of all of  
4 his assets by the time he was dead. There was -- there  
5 were no assets in the probate estate at that time.

6 Justice Ginsburg, I would refer you to  
7 appendix page 42 where the -- the district court  
8 indicates that both a proof of claim and an adversary  
9 complaint were first filed by Pierce Marshall in the  
10 bankruptcy court, and that is, indeed, what caused,  
11 several months later, the compulsory counterclaim to be  
12 filed in a response.

13 Mr. Brunstad indicated that what happened  
14 here was that while the claim was pending in Texas, it  
15 was then brought to the bankruptcy court presumably  
16 because there was some dissatisfaction on Ms.  
17 Marshall's part as to how the Texas probate court was  
18 going. In fact, page 1 of our reply brief details very  
19 specifically the fact that the first time that the  
20 tortious interference with gift claim was made was in  
21 the bankruptcy court as the compulsory counterclaim.

22 And I would just conclude by stating that the  
23 cause of action that was at issue here was really a  
24 very common one. It's the -- not in and of itself, but  
25 it's common to make a claim against the estate in debt

1 or that a gift was given, and that may, indeed,  
2 diminish the estate that is eventually passed. But  
3 that doesn't invalidate any of the estate planning  
4 documents. It simply means that something that might  
5 otherwise have been within the estate was not included  
6 in the estate.

7 That's really all that happened here. The  
8 claim was for tortious interference with gift. That,  
9 indeed, may have diminished the amount or may not have  
10 since J. Howard was actually quite an active man at the  
11 time that he made this -- this gift or intended to make  
12 the gift, and was still doing business deals. He may  
13 have increased his -- his assets enormously at that  
14 point in time.

15 But in any event, what it certainly does not  
16 do is, it does not invalidate an estate plan. It does  
17 not invalidate a will, and it certainly didn't  
18 invalidate the trust or the will in this case.

19 If there are any further questions, I'd be  
20 happy to answer them.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 MR. RICHLAND: Thank you.

23 CHIEF JUSTICE ROBERTS: The case is  
24 submitted.

25 (Whereupon, at 12:14 p.m., the case in the

1 above-entitled matter was submitted.)

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