

Nos. 02-56002, 02-56067

**In the United States Court of Appeals
for the Ninth Circuit**

IN RE: VICKIE LYNN MARSHALL, Debtor.

ELAINE T. MARSHALL, as Independent Executor of the Estate of E. Pierce Marshall,

Appellant and Cross-Appellee,

v.

HOWARD K. STERN, as Executor under the Will of Vickie Lynn Marshall,

Appellee and Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA IN NO. CV-01-00097
(HONORABLE DAVID O. CARTER, JUDGE)

**MOTION OF PROFESSORS OF LAW S. TODD BROWN, G. MARCUS
COLE, RONALD D. ROTUNDA, AND TODD J. ZYWICKI FOR LEAVE
TO FILE A BRIEF AS AMICI CURIAE**

CRAIG GOLDBLATT
SHIRLEY CASSIN WOODWARD
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000

Counsel for Amici Curiae

Pursuant to Federal Rule of Appellate Procedure 29(b) and this Court's Order dated March 19, 2009 (02-56002, Dkt. 200 and 02-56067, Dkt. 157), law professors S. Todd Brown, G. Marcus Cole, Ronald D. Rotunda, and Todd J. Zywicki respectfully move for leave to file the attached brief *amici curiae*, supporting Appellant Elaine T. Marshall in the above-captioned matters on the question as to the proper distinction between "core" and "non-core" bankruptcy proceedings and the application of that distinction to counterclaims like Vickie Lynn Marshall's tortious interference counterclaim against E. Pierce Marshall in this case. In support of the present motion, the above law professors state the following:

1. *Amici* are law professors with particular expertise in bankruptcy law, constitutional law, and the federal courts. Professor S. Todd Brown is the Abraham L. Freedman Fellow and Lecturer at Temple University James E. Beasley School of Law. Professor G. Marcus Cole is the Wm. Benjamin Scott and Luna M. Scott Professor of Law at Stanford Law School. Professor Ronald D. Rotunda is the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence at Chapman University School of Law. Professor Todd J. Zywicki is the George Mason University Foundation Professor of Law at George Mason University School of Law and Senior Scholar of the Mercatus Center at George Mason University.

Amici teach and write on topics that include all aspects of bankruptcy law as well as separation of powers and the federal courts. They accordingly have a professional interest in the application and development of the law in these areas and seek to provide the Court with a discussion of the proper scope of jurisdiction of non-Article III bankruptcy courts. Specifically, in this brief *amici* address the proper distinction between “core” bankruptcy proceedings and “non-core” bankruptcy proceedings as applied to counterclaims like the one in this case—an issue that lies at the intersection of bankruptcy law and the constitutional limitations on the exercise of judicial authority over Article I judges.

2. This issue is important not only in terms of defining the constitutionally permissible boundaries of jurisdiction for non-Article III bankruptcy courts, but also because it is important to the disposition of this case. If Vickie Lynn Marshall’s tortious interference claim against E. Pierce Marshall was a “non-core” matter over which the bankruptcy court lacked authority to enter final judgment, then the bankruptcy court’s ruling in her favor was not a “judgment,” but instead the equivalent of a magistrate’s recommendation. In that event, the intervening state court judgment in favor of E. Pierce Marshall on the tortious interference claim, which was entered *before* the district court’s ruling on that same claim, should be entitled to preclusive effect. The district court’s failure to

give preclusive effect to the prior state court judgment would thus mandate reversal.

3. *Amici* therefore respectfully request leave to file their brief.

Respectfully submitted,

/s/ Craig Goldblatt

CRAIG GOLDBLATT

SHIRLEY CASSIN WOODWARD

WILMER CUTLER PICKERING

HALE AND DORR LLP

1875 Pennsylvania Avenue, N.W.

Washington, D.C. 20006

(202) 663-6000

Counsel for Amici Curiae

May 12, 2009

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2009, I electronically filed the foregoing Motion of Professors of Law S. Todd Brown, G. Marcus Cole, Ronald D. Rotunda, and Todd J. Zywicki For Leave To File A Brief As *Amici Curiae* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have dispatched the foregoing document to a third party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

Bruce S. Ross
Luce, Forward, Hamilton & Scripps LLP
Suite 3900
601 South Figueroa Street
Los Angeles, CA 90017

Eric Berg
HATCH & PARENT
21 East Carillo Street
Santa Barbara, CA 93101-2782

Philip W. Boesch, Jr.
THE BOESCH LAW GROUP
11th Floor
225 Santa Monica Boulevard

Santa Monica, CA 90401

Sheila S. Kato
GREINES MARTIN STEIN & RICHLAND, LLP
Suite 375
5900 Wilshire Boulevard
Los Angeles, CA 90036-3626

/s/ Craig Goldblatt
Craig Goldblatt

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**BRIEF FOR AMICI CURIAE PROFESSORS OF LAW S. TODD BROWN,
G. MARCUS COLE, RONALD D. ROTUNDA, AND TODD J. ZYWICKI IN
SUPPORT OF APPELLANT-CROSS APPELLEE ELAINE T. MARSHALL
AS INDEPENDENT EXECUTOR OF THE ESTATE OF E. PIERCE
MARSHALL**

CRAIG GOLDBLATT
SHIRLEY CASSIN WOODWARD
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000

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INTEREST OF AMICI

Amici are law professors with expertise in bankruptcy law and federal courts. This case addresses important issues regarding interpretation of federal bankruptcy law and the constitutionally permissible scope of jurisdiction of Article I bankruptcy courts. *Amici* have a professional interest in the proper application and development of the law in these areas. Pursuant to this Court's Order dated March 19, 2009 (02-56002, Dkt. 200 and 02-56067 Dkt. 157), *amici* have filed a separate motion seeking leave to file this brief.

S. Todd Brown is the Abraham L. Freedman Fellow and Lecturer at Temple University Beasley School of Law. Professor G. Marcus Cole is the Wm. Benjamin Scott and Luna M. Scott Professor of Law at Stanford Law School. Professor Ronald D. Rotunda is the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law. Professor Todd J. Zywicki is the George Mason University Foundation Professor of Law at George Mason University School of Law and Senior Scholar of the Mercatus Center at George Mason University.

INTRODUCTION

While this case raises several important questions, this submission by the *amici* is limited to one issue that lies at the intersection of bankruptcy law and the constitutional limitations on the exercise of judicial authority by Article I judges.

Specifically, this *amici* brief is addressed to the proper distinction between “core” and “non-core” bankruptcy proceedings—and the application of that distinction to counterclaims like the one in this case.

As explained in the Supplemental Brief of Appellant Elaine T. Marshall (“Supplemental Brief”), Sections 157(b) & (c) of the Judicial Code—the provisions that distinguish between “core” and “non-core” proceedings in bankruptcy—should be interpreted to provide that Section 157(b)(1) confers jurisdiction on a bankruptcy court to finally determine a state-law counterclaim only if the counterclaim constitutes a “core” proceeding that either “arises under” the Bankruptcy Code or “arises in a case under” the Code. A counterclaim is a “core” proceeding that “arises under” the Code only if the counterclaim itself depends for its existence on a substantive provision of the Code. A counterclaim that depends for its existence on state law—as is the case here—is never a “core” proceeding that “arises under” the Code. In turn, a counterclaim is a “core” proceeding that “arises in” a case under the Code only if the counterclaim itself is uniquely a bankruptcy administrative matter that has no independent existence outside the bankruptcy context. If a counterclaim is not uniquely a bankruptcy administrative matter and could be brought in another court, it is not a “core” proceeding that “arises in” a case under the Code even if the counterclaim is asserted in response to the filing of a proof of claim. This narrow reading of 28

U.S.C. § 157(b)(2)(C) is necessary to avoid a conflict between Section 157(b) and the constitutional limitations imposed by Article III of the Constitution, as set out in the Supreme Court’s decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

Amici very much agree with Appellant Marshall’s argument, set forth in detail in the Supplemental Brief, as to the proper interpretation of the statute. This *amici* brief, however, sets forth an alternative interpretation of the statute—one that is also consistent with the overall statutory scheme and the dictates of *Marathon*. Specifically, *amici* contend that, even if the express requirements of Section 157(b)(1) are read more broadly so that a state-law counterclaim may be considered under some circumstances to “arise in a case” under the Bankruptcy Code, nevertheless Section 157(b) should be interpreted to provide that a state-law counterclaim to a proof of claim is a “core” proceeding “arising in a case under” the Code only if the counterclaim is so closely related to the proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself. Even on this broader reading of the statute, there can be little question but that the tortious interference claim in this case is not a “core” proceeding. Accordingly, this Court can and should find that the tortious interference counterclaim brought by Vickie Lynn Marshall (“Vickie”) is a “non-

core” matter, even if it does not adopt the construction of Section 157(b) that is forcefully and persuasively advanced in the Supplemental Brief.

The proper interpretation of “core” and “non-core” proceedings is important not only because it addresses the constitutionally permissible boundaries of Article I jurisdiction, but also because, as a practical matter, it is important to the resolution of this case. The Texas probate court entered its final judgment (rejecting Vickie’s claims against E. Pierce Marshall (“Pierce”), including her tortious interference claim) *before* the district court entered its final judgment (upholding her tortious interference claim, which had also been raised as a counterclaim in the bankruptcy court). Accordingly, if Vickie’s counterclaim was a non-core matter, the bankruptcy court’s ruling in her favor was not a “judgment,” but instead the equivalent of a magistrate’s recommendation. In that event, the intervening state court judgment in favor of Pierce—entered before the district court’s ruling—should be entitled to preclusive effect. The district court’s failure to give preclusive effect to the prior state court judgment would thus mandate reversal.

STATEMENT

This case has a lengthy and complicated procedural history, as set forth in the briefs of the parties. A brief summary of certain aspects of that procedural history, however, is useful here to describe the claims that form the basis of the

dispute regarding whether the tortious interference claim is a “core” bankruptcy proceeding.

Vickie Lynn Marshall (“Vickie”), also known as Anna Nicole Smith, married J. Howard Marshall II (“J. Howard”) in June 1994. In August 1995, J. Howard died. J. Howard gave significant sums of money and gifts to Vickie during their marriage, and his will and living trust left the balance of his assets to others. *Marshall v. Marshall*, 547 U.S. 293, 300 (2006). E. Pierce Marshall (“Pierce”), one of J. Howard’s sons, was the ultimate principal beneficiary of J. Howard’s estate plan. *Id.*

Competing claims regarding J. Howard’s assets were contested in both state and federal court. On December 7, 2001, the Texas probate court, after a lengthy jury trial on the issues, entered final judgment declaring, among other things, that (1) J. Howard’s living trust and will were valid and had not been forged or altered; (2) J. Howard did not intend to give Vickie a gift or bequest (other than the significant sums of money and gifts he actually gave to her during his lifetime); (3) J. Howard had not been the victim of fraud or undue influence; (4) Vickie’s claims against Pierce were all dismissed; and (5) Vickie was “entitled to take nothing” from Pierce. *See In re Marshall*, 392 F.3d 1118, 1129 (9th Cir. 2004).

While the probate proceedings were pending in state court, Vickie filed for bankruptcy in the federal bankruptcy court in California in January 1996.

Marshall, 392 F.3d at 1126; *In re Marshall*, 264 B.R. 609, 615 (C.D. Cal. 2001).

In May 1996, Pierce filed an adversary proceeding in that court, seeking a determination that Vickie's liability to him for defamation was a non-dischargeable debt. Pierce alleged that Vickie had defamed him when, shortly after J. Howard's death, Vickie's attorneys told members of the press that Pierce had engaged in forgery, fraud and overreaching to gain control of his father's assets. *Marshall*, 264 B.R. at 616. Pierce's theory was that Vickie was responsible for her lawyers' conduct. Pierce also filed a proof of claim, attaching his adversary proceeding to the form. *Id.*

Vickie responded with numerous counterclaims, among them the allegation that Pierce had tortiously interfered with her expectancy of a gift or bequest—the same allegations she had previously made in the Texas probate court. *Marshall*, 392 F.3d at 1125-1126 (noting that Vickie had filed a petition in Texas probate court in April 1995 alleging that Pierce had tortiously interfered with her rights regarding J. Howard's assets).

The bankruptcy court, addressing Pierce's proof of claim, granted summary judgment to Vickie. *Marshall*, 264 B.R. at 630-631. Pierce's claim involved two issues: whether Vickie was responsible for her attorney's allegedly defamatory statements, and whether those statements—that Pierce had used forgery, fraud, and overreaching to gain control of J. Howard's estate—were true. *Id.* The bankruptcy

court only addressed the question of Vickie's responsibility for the defamatory statements because the falsity of the statements had already been established in a prior state court proceeding in which Pierce obtained a judgment against Vickie's attorneys. *Id.* at 631. Finding that Vickie was not responsible for any defamatory statements her attorneys made about Pierce, the bankruptcy court entered summary judgment for Vickie. *Id.* at 616.

Addressing Vickie's tortious interference counterclaim, the bankruptcy court concluded that it was a "core" bankruptcy proceeding under 28 U.S.C. § 157 because it arose out of the same transaction or occurrence as the proof of claim. *In re Marshall*, 257 B.R. 35, 39 (Bankr. C.D. Cal. 2000). On that basis, the bankruptcy court concluded it had authority to enter final judgment disposing of the claim, and on December 29, 2000, the court entered judgment for Vickie on her tortious interference counterclaim, awarding compensatory and punitive damages of \$475 million. *Id.*; *Marshall*, 392 F.3d at 1128.

Pierce appealed the bankruptcy judgment to the district court. The district court first rejected Pierce's claim that it lacked subject matter jurisdiction under the "probate exception" to federal jurisdiction. *Marshall*, 392 F.3d at 1130. The district court vacated the bankruptcy court's final judgment, however, concluding that Vickie's counterclaim was not a "core" bankruptcy proceeding and the bankruptcy court's "judgment" therefore constituted only proposed findings of fact

and conclusions of law—similar to those that may be proposed by a federal magistrate judge. *Id.* The district court explained that the mere fact that Vickie’s counterclaim fell within the literal language of Section 157(b)(2)(C) was not dispositive because to read the statute such that all counterclaims are “core” proceedings would conflict with the Supreme Court’s decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). *Marshall*, 264 B.R. at 630. Instead, the district court explained that to be a “core” bankruptcy proceeding the state-law counterclaim must “arise in” a bankruptcy case, and therefore “core” treatment of such counterclaims is justified where the adjudication of the counterclaim is so closely related to the claim that the two effectively merge into allowance or disallowance of the claim itself. *Id.*

The district court concluded that Vickie’s counterclaim was not a “core” matter because it was a permissive counterclaim that was not sufficiently closely related to the proof of claim. *Marshall*, 264 B.R. at 630. In particular, the district court concluded that the only question that needed to be resolved in order to resolve the defamation claim was whether Vickie was responsible for the defamatory statements, and that question did not involve any of the disputed facts underlying the tortious interference claim. *Id.* at 631. Because the counterclaim was not a “core” matter, the bankruptcy court’s findings were merely proposed findings, subject to *de novo* review by the district court. *Id.* at 633.

After that review, the district court concluded that Pierce had tortiously interfered with Vickie's expectancy of a gift and awarded Vickie more than \$88 million in compensatory and punitive damages, entering final judgment on March 7, 2002. *Marshall*, 392 F.3d at 1130-1131. On appeal, this Court reversed on the threshold question of subject matter jurisdiction, finding that the "probate exception" applied and that the federal bankruptcy court lacked jurisdiction. *Id.* at 1137. The Supreme Court, in turn, reversed and remanded, concluding that this case did not fall within the narrow confines of the "probate exception" to federal jurisdiction. *Marshall*, 547 U.S. at 299-300, 314.

On remand to this Court, several important questions remain, including, as discussed here, whether Vickie's counterclaim for tortious interference is a "core" bankruptcy proceeding that "arises in" a case under the Bankruptcy Code such that the bankruptcy court can enter final judgment under 28 U.S.C. § 157(b)(1).

ARGUMENT

A STATE-LAW CLAIM, RAISED AS A COUNTERCLAIM TO A PROOF OF CLAIM, IS NOT A "CORE" BANKRUPTCY PROCEEDING WHERE ADJUDICATION OF THE COUNTERCLAIM IS NOT NECESSARY TO RESOLVE THE CLAIM AGAINST THE ESTATE

If Pierce had not filed a proof of claim in the bankruptcy court, there would be no dispute that Vickie's state-law tortious interference claim is a non-core proceeding—one that may, at most, be "related to" the bankruptcy case but that does not "arise in" the bankruptcy case or "arise under" the Bankruptcy Code. As

such, the counterclaim could not be finally adjudicated by an Article I bankruptcy court. Because the tortious interference claim was brought as a counterclaim after Pierce filed a proof of claim, however, the question is whether that counterclaim effectively becomes part of the process of determining the allowance of Pierce's claim, and therefore a "core" proceeding "arising in" a bankruptcy case.

The Judicial Code identifies "core" proceedings as including "counterclaims by the estate against persons filing claims against the estate." 28 U.S.C. § 157(b)(2)(C). But reading that language broadly to cover *all* counterclaims would raise very serious constitutional concerns, as the Supreme Court has made clear that state-law counterclaims that are only "related to" a bankruptcy case cannot constitutionally be adjudicated in an Article I bankruptcy court. *Marathon*, 458 U.S. at 76, 87 (plurality); *id.* at 91-92 (Rehnquist, J., concurring in the judgment). Accordingly, one reading of the statute, and the one persuasively set forth by Appellant Marshall, is that even if a counterclaim is asserted in response to a proof of claim, that counterclaim is not a "core" proceeding that "arises in" a case under the Code unless the counterclaim is uniquely a bankruptcy administrative matter that has no independent existence outside the bankruptcy context. While *amici* agree with that construction, this *amici* brief offers an alternative reading of the statute. Assuming that some state-law counterclaims can, under certain narrow circumstances, constitute "core" proceedings that "arise in a

case” under the Code, nonetheless a counterclaim under Section 157(b)(2)(C) is properly a “core” proceeding “arising in a case under” the Code only if the counterclaim is so closely related to the proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself. Because Vickie’s counterclaim cannot meet this standard, it is properly a “non-core” proceeding.

A. Under The Constitutional Principles Of *Marathon*, A State-Law Claim of Tortious Interference Is A Non-Core Proceeding Under 28 U.S.C. § 157

1. Article III and non-Article III tribunals

Article III of the Constitution provides that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish,” and that the judges of those courts must have life tenure (assuming “good Behavior”) and receive undiminished compensation during that tenure. U.S. Const. art. III, § 1. These protections ensure the independence of the judiciary, which is an “inseparable element of the constitutional system of checks and balances.” *Marathon*, 458 U.S. at 58.¹

¹ See Rotunda & Nowak, 1 *Treatise on Constitutional Law: Substance & Procedure* § 2.1 (4th ed. 2007) (“Article I Courts”; discussing the *Marathon* principle, *Thomas v. Union Carbide Agricultural Products, Inc.* and *Shor*); *id.* § 3.7 (“Sources of Federal Power—Bankruptcy”; discussing *Marathon*).

At the same time, the Supreme Court has “long recognized” that Congress may act pursuant to its powers under Article I to vest decision-making authority over certain disputes in tribunals that lack the attributes of Article III courts. *Thomas v. Union Carbide Agric. Prods., Inc.*, 473 U.S. 568, 583 (1986). The question whether a given congressional delegation of adjudicative functions to a non-Article III tribunal—like the bankruptcy courts—is constitutionally permissible “must be assessed by reference to the purposes underlying the requirements of Article III.” *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 847-848 (1986).

2. The Supreme Court’s decision in *Marathon*

In 1978, Congress fundamentally re-wrote the nation’s bankruptcy laws, replacing the Bankruptcy Act of 1898 with the modern Bankruptcy Code. Under the 1978 Bankruptcy Code, bankruptcy courts were given very broad jurisdiction over “all civil proceedings arising under title 11 [the Bankruptcy Code] or arising in or related to cases under title 11.” 28 U.S.C. § 1471(b) (repealed 1984). The 1978 Code did not include a distinction between “core” and “non-core” bankruptcy proceedings. Instead, bankruptcy courts—which are non-Article III courts whose judges are appointed for 14-year terms—had plenary jurisdiction over all proceedings “arising under” the Code or “arising in or related to” cases under the Code.

The Supreme Court considered a constitutional challenge to this statute in *Marathon*, addressing whether this jurisdictional scheme violated Article III. After Northern Pipeline filed for bankruptcy, it brought suit in the bankruptcy court against Marathon on a state-law breach-of-contract claim. *Marathon*, 458 U.S. at 56. The state-law claim did not arise under the Bankruptcy Code or arise in the bankruptcy case, but was “related to” the bankruptcy case because any recovery on the claim would increase the estate’s assets. *Id.* at 54, 71-72 (plurality). As noted, under the 1978 Act then in effect, the bankruptcy court was permitted to exercise plenary jurisdiction over proceedings “related to” the bankruptcy estate. *Id.* at 54. The Supreme Court held, however, that permitting non-Article III bankruptcy courts to exercise plenary jurisdiction over state-law contract claims merely because those claims were “related to” the bankruptcy petition contravened Article III because doing so removed “the essential attributes of the judicial power from the Article III district court and vested those attributes in a non-Article III adjunct.” *Id.* at 87 (plurality); *id.* at 91-92 (Rehnquist, J., concurring in the judgment).

A plurality of four Justices concluded that there was a constitutionally significant difference between “public rights” matters—those “arising between the Government and persons subject to its authority”—that historically could have been determined by Congress or the executive branch; and “private rights” matters, which include disputes between individuals arising under common law. *Id.* at 67-

70. “Public rights” matters could under certain circumstances be constitutionally adjudicated by non-Article III tribunals. *Id.* at 69. But “private rights matters—such as the state-law contract claim at issue—generally could not be finally determined by a non-Article III court. *Id.* at 70-71; *see also id.* at 83-87; *infra* at 23-27 (discussing post-*Marathon* Supreme Court case law under which the public right/private right distinction remains important).

3. Congressional response to *Marathon*

In response to the constitutional concern articulated in *Marathon*, in 1984 Congress amended the jurisdictional provisions for bankruptcy courts to limit the power of the bankruptcy court to enter final judgment to the type of “public rights” that are at the core of the bankruptcy process and that *Marathon* suggested may be constitutionally adjudicated in an Article I court. The statute achieves this goal by distinguishing between “core” bankruptcy proceedings that “aris[e] under” the Bankruptcy Code or “aris[e] in a case under” the Bankruptcy Code, and “non-core” bankruptcy proceedings that are simply “otherwise related to” a case under the bankruptcy law (such as the state-law contract claim in *Marathon*).

The amended statute gives federal district courts original jurisdiction over “all civil proceedings arising under” the Bankruptcy Code, “or arising in or related to cases under” the Code. 28 U.S.C. § 1334(b). District courts may therefore refer any of these proceedings to a bankruptcy court. *Id.* § 157(a). However, absent the

parties' consent, a bankruptcy court has the authority to enter final judgment only in "core" bankruptcy proceedings that "aris[e] under" the Bankruptcy Code, or "aris[e] in a case under" the Bankruptcy Code. *Id.* § 157(b)(1). In contrast, for "non-core" matters that are only "related to" a bankruptcy case, a bankruptcy court cannot enter final judgment without the express consent of the parties, but may act only as a magistrate, entering proposed findings of facts and conclusions of law subject to *de novo* review by the district court. *Id.* § 157(b)(1), (c).

Core proceedings that "arise under" the Bankruptcy Code are those proceedings involving rights created or determined by federal bankruptcy law. *See In re Eastport Assocs.*, 935 F.2d 1071, 1076 (9th Cir. 1991); *In re Wood*, 825 F.2d 90, 96-97 (5th Cir. 1987); *see also* 1 *Collier on Bankruptcy* ¶ 3.01[4][c][i] (15th ed. rev. 2009) (statutory language suggests that civil proceeding arises under title 11 "when the cause of action is one that is created by title 11"). Core proceedings that "arise in a case" under the Code are those matters that arise *only* in bankruptcy cases. *See Security Farms v. International Bhd. of Teamsters*, 124 F.3d 999, 1008 (9th Cir. 1997); *Eastport*, 935 F.2d at 1076-1077; *see also Collier* ¶ 3.01[4][c][iv]. For example, filing of a proof of claim or an objection to a discharge of a particular debt are matters that arise only in bankruptcy. *Wood*, 825 F.2d at 97. In short, those proceedings that invoke substantive rights created by federal bankruptcy law or those proceedings that could arise only in the context of a bankruptcy case are

the kinds of “core” proceedings that a bankruptcy court may finally resolve. *Eastport*, 935 F.2d at 1076 (“‘arising in’ proceedings are not based on any right expressly created by Title 11, but nevertheless would have no existence outside of bankruptcy”).

4. Tortious interference claim

Under this statutory scheme, it is clear that—in the absence of Pierce’s proof of claim—Vickie’s counterclaim for tortious interference with an expectation of a gift is a “non-core” bankruptcy proceeding. The claim clearly arises under Texas law and not under the Bankruptcy Code; the claim does not arise only in the context of a bankruptcy case; and the claim could exist outside of bankruptcy. At most, the claim of tortious interference could be “related to” the bankruptcy case to the extent that recovery on that claim could increase the estate’s assets. But it is clearly a non-core proceeding.

B. Reading Section 157(b)(2)(C) To Provide That All Counterclaims Are Core “Arising In” Or “Arising Under” Proceedings Would Contravene *Marathon* And Raise Serious Constitutional Issues

Here, however, Pierce *did* file a proof of claim, to which Vickie filed her tortious interference claim as a counterclaim. The question therefore becomes whether that distinction necessarily converts that counterclaim to a “core” bankruptcy proceeding “arising in a case under” the Code. It does not.

The statute provides an illustrative list of “core” proceedings, one of which is “counterclaims by the estate against persons filing claims against the estate.” 28 U.S.C. § 157(b)(2)(C). Vickie argues that, because her counterclaim for tortious interference falls within the literal language of Section 157(b)(2)(C), her counterclaim is a “core” proceeding that can be finally adjudicated by the bankruptcy court. *See* Combined Appellee’s Br./Cross Appellant’s Opening Br. 129-130.

Such a literal reading of the statute cannot be dispositive, however, because the statute must be interpreted consistent with the overall statutory scheme and in light of the constitutional principles delineated in *Marathon*. *See, e.g., In re Castlerock Props.*, 781 F.2d 159 (9th Cir. 1986); *see also Marshall*, 264 B.R. at 629 (“most courts agree that the plain language of § 157(b)(2)(C) cannot be the end of the analysis, because such a construction would conflict with *Marathon*”).

Interpreting Section 157(b)(2)(C) consistently with the principles of *Marathon* as reflected in the overall statutory scheme, therefore, it is clear that that provision cannot mean that *all* “counterclaims by the estate against persons filing claims against the estate” are core proceedings that arise under the bankruptcy law or arise in a case under that law. Such a literal interpretation of Section 157(b)(2)(C) would necessarily encompass not only counterclaims that involve rights under federal bankruptcy law (“arising under”) and counterclaims involving

matters that arise *only* in the context of a bankruptcy case (“arising in”), but also counterclaims that are only “related to” cases under the Bankruptcy Code. For example, a state-law breach-of-contract claim (or tortious interference claim), raised as a permissive counterclaim to a proof of claim in a bankruptcy case is only “related to” the bankruptcy case because that permissive counterclaim can, by definition, arise outside the context of bankruptcy and be resolved without resolving the core issue of allowance or disallowance of claims against the estate. To read the statute to mean that all counterclaims are “core” matters would therefore directly contravene *Marathon* and the Article III concerns the Supreme Court articulated, concerns that the amended statutory scheme was expressly intended to address.

Under established principles of statutory construction, courts should avoid an interpretation of a statute that raises constitutional questions. *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (When “a serious doubt of constitutionality is raised [about an act of Congress], it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”); *see, e.g., Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (reading an “implicit limitation” into immigration statute to avoid an interpretation that would permit indefinite detention and create serious doubt as to the statute’s constitutionality). Accordingly, the statute should be interpreted with an “implicit

limitation” on the kinds of counterclaims that can be considered “core” proceedings.

Indeed, this Court has essentially concluded the same with respect to the “catch-all” provisions of Section 157(b)(2). In *Castlerock*, this Court noted that the state-law contract counterclaim at issue arguably fell within the two catch-all provisions of Section 157(b)(2) that include as core proceedings “matters concerning the administration of the estate,” 28 U.S.C. § 157(b)(2)(A) and “other proceedings affecting the liquidation of the assets of the estate,” *id.* § 157(b)(2)(O). *In re Castlerock*, 781 F.2d 159, 162 (9th Cir. 1986). This Court held, however, that a court “should avoid characterizing a proceeding as ‘core’ if to do so would raise constitutional problems.” *Id.* (citing other cases holding that claims were non-core even though falling within the literal terms of the catch-all provisions); *see also Wood*, 825 F.2d at 95 (rejecting a literal reading of “proceedings affecting ... the estate” because to do so would give such a broad meaning to “core” proceedings as to be contrary to *Marathon* and the “ostensible purpose of the 1984 Act”).

C. State Law Counterclaims Are Only “Core” Proceedings Where The Resolution Of The Counterclaim Is Necessary To The Allowance Or Disallowance Of Claims Against The Estate

As noted, Appellant Elaine Marshall argues persuasively (Supplemental Br. at 6-9), that under *Marathon* core proceedings are limited to those that “arise

under” the Bankruptcy Code or “arise in” a bankruptcy case. State-law tort and breach of contract actions do not meet that standard. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995) (stating that matters “related to” a bankruptcy case include those that “involve a claim like the state-law breach of contract action at issue in [*Marathon*]”). Accordingly, as Marshall argues, one reading of Section 157(b)(2)(C) that would render it consistent with *Marathon*’s dictates would be that *only* counterclaims that independently arise under the Bankruptcy Code or in a bankruptcy case—such as a counterclaim for a preference action or for equitable subordination of a claim—are “core” matters that can be finally adjudicated by a bankruptcy court.

Even if Section 157(b) is given the somewhat broader interpretation that *amici* discuss here, however, Vickie’s tortious interference counterclaim is still not a “core” proceeding that the bankruptcy court may finally resolve. In order to avoid the constitutionally dubious conclusion that all counterclaims are “core” proceedings that a bankruptcy court may finally determine—including the very state-law actions held outside the bankruptcy court’s power to adjudicate under *Marathon*—a counterclaim can be a “core” proceeding that a bankruptcy court may finally resolve only if resolution of that counterclaim is necessary to determine the core matter of allowance or disallowance of claims against the estate.

As explained, only claims “arising under” the Code—which refers to substantive rights created by the federal bankruptcy law—or claims “arising in a case under” the Code—which refers to claims that would arise only in bankruptcy—are “core” proceedings subject to final adjudication by the bankruptcy court. *See Eastport*, 935 F.2d at 1076-1077. A state-law tortious interference counterclaim clearly does not “arise under” the Bankruptcy Code.

However, under *amici*’s broader interpretation of the requirement for “arising in a case” under the Code, a state-law tortious interference claim might, in some circumstances, “arise in” a bankruptcy case. For example, a proof of claim arises only in the context of bankruptcy. Therefore, a state-law counterclaim for tortious interference, if it were brought in response to a proof of claim, might be said to “arise in” a bankruptcy case and thus be a “core” matter if the resolution of that counterclaim were necessary for the bankruptcy court to fulfill its obligations under Section 502 of the Code to determine the allowance or disallowance of claims against the estate. In other words, if the proof of claim and counterclaim are so intertwined that the two will almost merge, the counterclaim might reasonably be thought to “arise in” bankruptcy. On the other hand, where resolution of the state-law counterclaim does not require resolution of any claims against the estate or require adjudication of the same essential facts, that

counterclaim cannot fairly be described as a “core” proceeding that “arises in” a case under the Code.

This construction of Section 157 accords with the teachings of the Supreme Court, in cases like *Butner v. United States*, 440 U.S. 48, 57 (1979), and *Travelers Casualty & Surety Co. of America v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 451 (2007), which make clear that the Bankruptcy Code must be construed to respect state law rights and entitlements except for the rare circumstances in which federal bankruptcy purposes *require* that they be overridden. *See Butner*, 440 U.S. at 55 (“Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving a windfall merely by reason of the happenstance of bankruptcy.” (citation omitted)). Consistent with *Butner*’s focus on discouraging forum shopping into bankruptcy court, Section 157 should be construed to limit a bankruptcy court’s authority to enter final judgment on a state-law counterclaim to those circumstances—utterly absent here—in which the resolution of that counterclaim is *necessary* to adjudicating the creditor’s claim against the estate.

Any interpretation of Section 157, including the alternative view discussed here, must also be consistent with *Marathon* and subsequent Supreme Court precedent. The Supreme Court’s post-*Marathon* cases delineating the permissible scope of matters that can be adjudicated in a non-Article III tribunal suggest that, if a state-law counterclaim can ever be a “core” proceeding that a bankruptcy court may finally resolve, a counterclaim to a proof of claim in bankruptcy can be such a “core” bankruptcy proceeding only where the resolution of that counterclaim is necessary to determine the allowance or disallowance of that claim against the estate—*i.e.*, it is so intertwined with a function that the bankruptcy court can and must perform that it may properly be assigned to a non-Article III judicial officer.

Although a majority of the *Marathon* Court did not adopt the plurality’s analysis that the “public rights”/“private rights” dichotomy was dispositive, the basic distinction drawn in *Marathon* between matters of public right that are at the core of the bankruptcy process and matters of private right that are outside the core of bankruptcy is still viable, as the Supreme Court’s later cases reflect. In *Thomas v. Union Carbide Agricultural Products, Inc.*, the Supreme Court considered the constitutionality of certain provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and whether disputes over related licensing fees could be decided by a non-Article III tribunal with only limited Article III review. 473 U.S. 568 (1986). To evaluate the constitutional propriety of this statutory scheme, the

Court adopted a balancing test, under which the “public right”/“private right” determination was one important factor. *Id.* at 587. The Court concluded that although the license-fee disputes were between private parties, the licensing provision had “many of the characteristics of a ‘public right’” because it was an integral part of a federal regulatory scheme. In those circumstances, the Court concluded that “Congress may create a seemingly private right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.” *Id.* at 593-594.

In *Commodity Futures Trading Comm’n v. Schor*, the Supreme Court considered the constitutionality of a scheme under which non-Article III tribunals adjudicated state-law counterclaims between private parties. 478 U.S. 833 (1986). Under the Commodity Exchange Act, the Commodity Futures Trading Commission (CFTC) administered a reparations procedure under which customers of commodity brokers could seek monetary redress for violations of the Act. As part of adjudicating such reparations claims, the CFTC was also permitted (but not required) to adjudicate *state-law* counterclaims by brokers against the customers that arose out of the same transaction or occurrence. *Id.* at 837. Applying the balancing test articulated in *Thomas*, the Supreme Court found that this scheme did not violate Article III, even though the state-law counterclaim at issue was a matter of “private right” “at the ‘core’ of matters normally reserved to Article III courts.”

Id. at 853. The Court concluded that the scheme was permissible because the CFTC’s jurisdiction was limited to “a narrow class” of state-law counterclaims that arose out of the same transaction or occurrence and whose resolution was “a necessary incident to the adjudication of federal claims.” *Id.* at 865, 856-857.²

In *Granfinanciera, S.A. v. Nordberg*, the Supreme Court addressed the question whether a person who had not submitted a claim against a bankruptcy estate had a right to a jury trial when sued by the bankruptcy trustee to recover an alleged fraudulent transfer from the debtor. 492 U.S. 33, 36 (1989). The Supreme Court held that the defendant in the fraudulent transfer action was entitled to a jury trial, relying heavily on the public right/private right distinction. Notably, Congress had expressly designated fraudulent transfer actions as “core proceedings” in Section 157(b)(2)(H), suggesting that Congress viewed such actions as falling within the “public rights” category under *Marathon*. The Supreme Court nevertheless concluded that a fraudulent transfer action was a matter of “private right” because it was a common-law action that more closely resembled a contract suit brought by a debtor to augment the estate than creditors’ claims to distributions from the estate. *See id.* at 55-56.

² The Court also noted that others factors in the balancing test supported its conclusion, explaining that the decision to proceed before the CFTC was completely up to the complainant and the CFTC’s decisions were subject to *de novo* review in federal court. *Id.* at 852-856.

Accordingly, the Court held that, where the defendant had not filed a claim against the estate, it was entitled to a jury trial on a fraudulent transfer action against it. *See* 492 U.S. at 64. By contrast, where a creditor has filed a proof of claim, and the trustee in turn brings a preference action against the creditor such that resolution of those claims are intertwined and “integral” to the public right involved in restructuring of the debtor-creditor relationship, a jury trial is not required. *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990); *see also Katchen v. Landy*, 382 U.S. 323, 330-331 (1966) (claim against the estate could be neither allowed nor disallowed until the preference issue was decided; therefore, the question whether the creditor has received a voidable preference is “part and parcel of the allowance process” and is subject to summary adjudication by the bankruptcy court).

The approach adopted by the Supreme Court since *Marathon*, therefore, retains the important distinction between matters of “public right” and “private right” and recognizes that a non-Article III tribunal can adjudicate state-law “private rights,” but only where the state-law claim is so intertwined with a public right that resolution of the state-law claim is necessary to determine federal rights. Interpreting Section 157(b)(2)(C) in light of *Marathon*, subsequent Supreme Court case law, Section 157 as a whole, and in such a way as to avoid serious questions about the constitutionality of the statute, to the extent a state-law counterclaim can

be a “core” proceeding that a bankruptcy judge may finally determine, such a counterclaim under Section 157(b)(2)(C) should be considered a “core” proceeding “arising in a case under” the Code only if the counterclaim is so closely related to the proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself.

D. The Tortious Interference Counterclaim Here Was Not Integral To The Resolution Of The Allowance Of Claims Against The Estate And Thus Is Not A “Core” Bankruptcy Proceeding

Under this view, Vickie’s tortious interference claim can only be a “core” proceeding “arising in” a case under the Code if it were necessary to resolve her counterclaim in order to resolve the allowance or disallowance of claims against the estate. Vickie argued to this Court that her counterclaim was a “core” proceeding because it was a compulsory counterclaim and therefore it “could not ... have existed outside of her bankruptcy case once Pierce filed his proof of claim.” Cross-Appellant’s Reply Br. 18; *see also* Combined Appellee’s Br./Cross Appellant’s Opening Br. 134-136. For at least two reasons, however, on the facts as described by the courts below, Vickie’s counterclaim does not “arise in a case under” the Code because it was not necessary to resolve that counterclaim in order to resolve the allowance or disallowance of claims against the estate.

First, as the district court found, the counterclaim was not compulsory because it did not involve adjudication of the same essential facts as the proof of

claim. *Marshall*, 264 B.R. at 630-631. The district court explained that Pierce’s defamation claim involved two issues: whether Vickie was responsible for her attorney’s allegedly defamatory statements, and whether those statements—that Pierce had used forgery, fraud, and overreaching to gain control of J. Howard’s estate—were true. *Id.*

The district court concluded, however, that the only question that needed to be resolved in order to resolve the defamation claim was whether Vickie was responsible for the statements; the falsity of the statements had already been established in a prior state court proceeding in which Pierce obtained a judgment against Vickie’s attorneys. 264 B.R. at 631. As to the sole remaining question of Vickie’s responsibility for the statements, that question did not involve any of the disputed facts underlying the tortious interference claim. *Id.*

As such, resolution of the counterclaim was not integral to the resolution of the allowance or disallowance of any claims against the estate. The district court concluded, therefore, that the counterclaim was not a “core” proceeding. 264 B.R. at 631.

Second, the counterclaim was not compulsory because it fell within one of the exceptions to the rule for compulsory counterclaims. Because Vickie was not required to bring the counterclaim (but could bring it if she so chose), it cannot fairly be said to be the kind of claim that would “arise only in bankruptcy” so as to

“arise in a case under” the bankruptcy law, nor was it “integral” or a necessary incident to resolution of claims against the estate.

A counterclaim is compulsory if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim. Fed. R. Civ. P. 13(a); *see also Pochiro v. Prudential Ins. Co. of Am.*, 827 F.2d 1246 (9th Cir. 1987) (applying “logical relationship” test to determine whether counterclaim is compulsory, under which the court asks whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all of the issues be resolved in one lawsuit).

There are, however, exceptions to this rule, one of which is that an otherwise compulsory counterclaim is not compulsory if “at the time the action was commenced the claim was the subject of another pending action.” Fed. R. Civ. P. 13(a); *see Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467 n.1 (1974) (under Rule 13(a), a counterclaim that arises out of the same transaction or occurrence that is the subject matter of the opposing party’s claim “is not compulsory if it was the subject of another pending action at the time the action was commenced”).

This exception to the compulsory counterclaim rule allows the claimant the option of continuing the prior action rather than advancing it as a counterclaim in the second action, without fear of it being barred if the second action results in a judgment before the claim has been adjudicated. *See Wright et al.*, 6 *Federal*

Practice and Procedure § 1411 (2d ed. 1990); see also *Union Paving Co. v. Downer Corp.*, 276 F.2d 468, 470 (9th Cir. 1960) (exception allows a party to escape the waiver rule for failing to bring an otherwise compulsory counterclaim if he has already begun his action in another forum).

Here, in April 1995, several months prior to J. Howard's death, Vickie commenced proceedings in the Texas probate court against Pierce and others challenging the validity of the Living Trust and seeking a declaration establishing her interest in the assets of J. Howard's Living Trust. *Marshall*, 392 F.3d at 1125. Vickie alleged in this proceeding that Pierce had tortiously interfered with her rights regarding J. Howard's assets and had procured the trust's execution by fraud and undue influence on J. Howard. *Id.* Three days after J. Howard's death on August 4, 1995, Vickie filed a petition in Texas probate court to establish the J. Howard died intestate (apparently because Vickie believed the will was invalid as allegedly having been forged or altered by Pierce). *See id.* at 1125, 1129. Pierce opposed Vickie's petition and sought to admit his father's will into probate. *Id.* at 1125. Vickie thereafter contested the will in the probate court and subsequently amended her probate petition to add a claim asserting that Pierce had tortiously interfered with J. Howard's alleged intent to give her a gift from his assets. *Id.* at 1126. During the pendency of these probate proceedings, Vickie filed for

bankruptcy on January 25, 1996. *Id.* at 1126. Pierce filed his proof of claim on June 11, 1996. *Marshall*, 264 B.R. at 616.

Based on this chronology, Vickie's allegations that Pierce had tortiously interfered with her rights to J. Howard's assets were pending in the Texas probate court before Vickie filed for bankruptcy. Vickie's tortious interference counterclaim was therefore not compulsory and it did not have to be brought in the bankruptcy proceeding.

Instead, the counterclaim could have been pursued only in the state court. It is therefore by definition not the kind of claim that would "arise only in bankruptcy" and therefore cannot fairly be said to "arise in a case under" the bankruptcy law. In other words, because the tortious interference counterclaim was not required to be brought in the bankruptcy proceeding, it clearly is not the kind of claim the resolution of which is "integral" or a necessary incident to resolution of core matters of the allowance or disallowance of claims against the estate. Accordingly, the tortious interference counterclaim is not a "core" bankruptcy proceeding and the bankruptcy court had no authority to enter a final judgment with respect to it.

CONCLUSION

Amici agree with the argument presented in Appellant Marshall's Supplemental Brief that Section 157 should be interpreted such that only those

counterclaims that independently arise under the Bankruptcy Code or in a bankruptcy case may be “core” matters that can be finally adjudicated by a non-Article III bankruptcy court. But even if this Court does not adopt that construction of the statute, and concludes that a state-law counterclaim can, in some circumstances, constitute a “core” proceeding, the tortious interference counterclaim here is not a “core” matter subject to final resolution in the bankruptcy court. The principles set forth in *Marathon* require, at the very least, that a state-law claim that is raised as a counterclaim to a proof of claim in bankruptcy can be such a “core” proceeding—if ever—*only* where the resolution of the counterclaim is intertwined with the resolution of the allowance or disallowance of the claim itself. On either interpretation of the statute, Vickie’s state-law tortious interference claim is a “non-core” proceeding over which the bankruptcy court lacked authority to issue a final judgment.

Respectfully submitted,

/s/ Craig Goldblatt

CRAIG GOLDBLATT
SHIRLEY CASSIN WOODWARD
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000

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Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7). The brief has been prepared in proportionately spaced typeface using Microsoft Word Version 2000 in Times New Roman 14 point type. Based upon the word-count function in Microsoft Word Version 2000, the brief contains 7,452 words.

/s/ Craig Goldblatt

Craig Goldblatt

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2009, I electronically filed the foregoing Brief for *Amici Curiae* Professors of Law S. Todd Brown, G. Marcus Cole, Ronald D. Rotunda, and Todd J. Zywicki with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have dispatched the foregoing document to a third party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

Bruce S. Ross
Luce, Forward, Hamilton & Scripps LLP
Suite 3900
601 South Figueroa Street
Los Angeles, CA 90017

Eric Berg
HATCH & PARENT
21 East Carillo Street
Santa Barbara, CA 93101-2782

Philip W. Boesch, Jr.
THE BOESCH LAW GROUP
11th Floor
225 Santa Monica Boulevard
Santa Monica, CA 90401

Sheila S. Kato
GREINES MARTIN STEIN & RICHLAND, LLP
Suite 375
5900 Wilshire Boulevard
Los Angeles, CA 90036-3626

/s/ Craig Goldblatt

Craig Goldblatt