No. 12-644

In The
Supreme Court of the United States

ELLEN MARIANI,

Petitioner,

v.

JOHN C. RANSMEIER and UAL CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. REVIEW IS IN THE NATIONAL INTEREST

Respondent argues that the Supreme Court's rules are so restrictive that the Court cannot review the dismissal of an appeal involving the biggest terrorist incident in United States history. Petitioner replies that the rules of the highest court in the nation should never be that restrictive, and that the rules are in fact not that restrictive, whether read broadly or narrowly.

As a threshold matter, Petitioner will never assume that the United States Supreme Court is disinterested in the twin pillars of any credible judicial system: truth and justice. They may be unfashionable to invoke, or deemed too abstract to discuss, but they underlie all else. Respondent is almost mocking in his allegation (conceded, Pet. p. 33) that Petitioner Ellen Mariani "always wanted a trial to get to the truth," to see "what the evidence [ ] showed in regard to the events leading to the death of her husband" (the latter of which clauses has been conveniently omitted by Respondent in his own derisory comments). Resp. Br. 4-5. But Rule 10 imposes no idealism filters on the Court. Confirming a litigant's opportunity to obtain a conflict-free award and disclosures about terrorist events leading to loss of life and national security is "compelling reason" enough to grant the petition.

Petitioner of course acknowledges that disclosure of "the truth" is not the objective of tort litigation. But that does not mean that the judicial system is indifferent to truth or the risk of corruption to the truth, e.g. through conflicts of

interest. Granting a petition for certiorari is completely within the discretion of the Court. By its own terms, the illustrations set forth in Rule 10 of the types of reasons usually required for the grant of petitions are not controlling--although Petitioner falls within the literal embrace of the Rule as well.

Respondent wants the Court to infer from Petitioner's interest in "the truth" that Petitioner is interested only in vindicating a particular Middle Eastern "conspiracy" theory (Resp. Br. 5)--apparently distinguishing official accounts which also identify the events of 9/11 as the result of a Middle East-based conspiracy--but there is no basis in the record for that inference. Petitioner has always known that her claims and those of her deceased husband pled in New York federal court were tort claims brought against aviation-related defendants who either caused her husband's death or whose negligence allowed it to occur, filed pursuant to a specific Congressional Act, the Air Transportation Safety and System Stabilization Act ("ATSSSA"), 49 U.S.C. § 49101.

Unlike Respondent (as noted in more detail at pp. 10ff), Petitioner has stuck to the facts in her presentation to this Court, and she has engaged in no speculation about the source of 9/11 terror. To the extent her intervention in litigation could further illuminate the shadowy path to one or more portals of terror, of course, independent of official conclusions reached without the benefit of litigation, she justifiably believed that not just Ellen Mariani but others--including the nation--would benefit.

Accordingly, the first--but not only--compelling reason for granting her Petition is to allow a victim of national terror the opportunity for truth leading to justice, both having been prematurely taken from her. Reversal of the hasty dismissal by the Court of Appeals would allow intervention, which would in turn yield the possibility of renegotiation of the terms and scope of disclosure by 9/11 defendants of facts including carefully-managed pretrial discovery concerning events of 9/11, and a proper valuation of Petitioner's loss, whether as part of a settlement or in the context of a trial still to be held. The justice system could only benefit from such participation by a fearless family member and not a compromised fiduciary with loyalties to 9/11 aviation clients and insurers on the other side of the aisle.

II. THERE ARE COMPELLING REASONS TO REVIEW THE DECISION OF THE 2ND CIRCUIT BASED ON CONFLICTS WITH DECISIONS OF THIS COURT

Petitioner also qualifies on multiple grounds for a writ of certiorari under Rule 10(c) on the basis that a court of appeals has "decided an important question of federal law...in a way that conflicts with relevant decisions of this Court."

Petitioner has identified as one compelling reason for grant of certiorari the failure of the Court of Appeals ("CA") to act consistently with the repeated holdings of this Court regarding the "law of the case" doctrine (Pet. i, 14ff), namely, that a court

must consider whether "manifest injustice" would result from application of the doctrine.

Petitioner is not precluded from obtaining such relief by the final sentence of Rule 10, which states: "A petition for certiorari is rarely granted when the asserted error consists of...misapplication of a properly stated rule of law" (emphasis added). The "law of the case" doctrine is a rule of law. That rule is necessarily misapplied where incompletely stated or where exceptions to its application are not properly identified. Petitioner even pointed out "misstatements" under the heading using the term "misapplied" which Respondent has focused on. Pet. v. Respondent's attempt to fault Petitioner for asserting a "misapplication" of law is an exercise in semantics, ignoring Petitioner's main point that the 2nd Circuit didn't properly acknowledge or state the need for a "manifest injustice" inquiry.

Petitioner is not barred from briefing this appellate error just because Petitioner has raised it for the first time in her Petition, where the error did not ripen until the order appealed from. Notwithstanding Respondent's protestations (Resp. Br. 24), there was never any explicit invocation of "law of the case" until the Summary Order of the 2nd Circuit ("SO2") that is the subject of this Petition. App. 1a. Petitioner thus made the argument at her first opportunity. Moreover, contrary to the implication of Respondent, Petitioner was nowhere obliged to seek rehearing from a court which had already impermissibly chilled her good faith advocacy with an unresolved OSC.

Respondent also incorrectly urges that the "law of the case" argument is the "main thrust" of Petitioner's petition. This allows Respondent to sidestep what is arguably an even more important question presented by Petitioner: whether Petitioner deserved to be allowed to intervene as a non-party objecting to a (newly-filed) settlement that greatly affected her rights and interests, pursuant to Marino v. Ortiz, 484 U.S. 30 (1988), particularly where she had presented uncontroverted facts of a conflict of interest on the part of the settlement advocate.

Respondent nowhere addresses Marino v. Ortiz. Instead, Respondent--without explicitly coming out and saying so--tries to make it appear that the right of intervention by a non-party affected by a settlement was not an issue new to the second of Mariani's intervention motions. He does this by posturing that the settlement presented to the District Court ("DC") was "settled more than five years ago," thus implying that it predated Mariani's first motion to intervene (Resp. Br. 3). However, this is specious, since neither a signing of a settlement agreement or its terms were ever disclosed or presented to the DC until October 2010, and had never been formally presented to Mariani until Mariani was poised to file her second intervention motion. JA 28.5-28.10. Mariani could not know how her interests were affected until settlement terms were actually detailed. JA 33.2.

If Judge Hellerstein had no right to characterize an intervention argument based on her settlement challenge as a "rehash," App. 18a--and he clearly did not--then the CA had no right to refuse on

"law of the case" grounds to address her capacity to challenge the settlement.

Respondent also argues that Petitioner has misstated Ransmeier's conflicts. However, for the purpose of evaluating the DC's ruling, where Petitioner was effectively nonsuited without any adverse facts being found, the CA was obliged to accept the validity of Petitioner's assertions regarding her fiduciary's conflict of interest. See Hui v. Castaneda, 130 S. Ct. 1845 n.1 (2010). The Supreme Court is not in a position to engage in fact-finding.

It follows that, whatever quibbles might ultimately exist about the exact relationship of Ransmeier to his aviation and insurer clients, Petitioner has not misstated any fact material to her Petition. But if this Court disagrees, Respondent still has it wrong. Respondent claims that the salient misstatement is, "Ransmeier had undisclosed loyalties to defendants United Airlines and UAL Corporation." That is a straw man. Petitioner's argument about a conflict of interest does not rise or fall on whether United was a client of John Ransmeier or his law firm in 2004.[1] Even if

[1] Moreover, as to United Air Lines, what is important is not whether Ransmeier's firm had any active files with United in 2004, but whether United was a client of the firm. Having accepted multiple cases from United over a span of a decade during the 1990's, Ransmeier would be hard pressed to argue that disclosure and waiver were not required, but is even less credible in arguing that his neutrality as a fiduciary suing United could not be questioned--which is perhaps why he does not make that argument.

Ransmeier in 2004 was representing any defendant sued in the 9/11 litigation--and his firm clearly was, by his own admission (Resp. Br. 12 n. 6)--and even if he was representing any insurer involved in the litigation (Pet. Br. 6)--which he has never denied and has not denied in his Opposition Brief (Resp. Br. 10-12)--he had a conflict that was never waived by Mariani, and that posed a question about his neutrality sufficient to justify Mariani's second intervention motion as to whether she as beneficiary deserved her own role in the action he wanted to settle.

Finally, to uphold a federal court which declines to exercise jurisdiction over an otherwise viable Rule 24 intervention motion because of the supposed exclusivity of jurisdiction in the probate court is another example of a ruling on an important federal question which conflicts with a relevant decision of this court, namely Marshall v. Marshall, 547 U.S. 293 (2006). Respondent again argues that Petitioner ought to be precluded from making this argument because it was not raised below--but it was not until the SO2 that this issue ripened, because it was not until then that any court had gone beyond the opaque holding that Mariani's complaints "belong in Probate Court" to say that Mariani would have first had to dissolve a probate court agreement in order to have standing to intervene, App. 7a.

Not unrelated to that point is that Petitioner has also asserted, within the literal terms of Rule 10(c), that there are important federal questions involving the judicial administration of mass tort

actions that have not been settled and should be settled by this Court. The most important of these questions is whether federal courts may usurp the authority of state probate courts over assets that are otherwise part of a probate estate which are claimed to be owed as attorney's fees in federal litigation. Respondent Ransmeier is not, as he disingenuously asserts at Resp. Br. 5, proposing to return all "settlement proceeds to New Hampshire for disbursement...."

It is not necessary for certiorari, as Respondent seems to believe (Resp. Br. 2), that any of the CA's erroneous rulings have precedential effect. Indeed, it can be just as important for this Court to rule on an important national interest question that lower courts have sought to avoid (by issuing jurisdiction-based or non-precedential orders) as it is to review rulings that have more obvious effect on prospective litigants.

Accordingly, not only is this case important for its unique national security profile, Petitioner has satisfied the literal terms of Rule 10(c) that usually guide the granting of a petition in multiple respects.

III. REVIEW IS ALSO WARRANTED BASED ON MARKED DEPARTURES FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS

Petitioner also asserts that the SO2 so markedly departs from the accepted and usual course of judicial proceedings--and glosses over such departures by Judge Hellerstein--that it calls for

exercise of this Court's supervisory power, pursuant to Supreme Court Rule 10(a).

These departures include the assertion by a two-judge panel of the right to impose sanctions, and the failure of that panel to have ruled on its own Order to Show Cause. Perhaps the most serious departure was to dismiss an appeal for "law of the case" reasons when a prior panel of the same court has already rejected a motion to dismiss filed by Respondent for the same reason. App. 30a.

There is no space to treat the departures by the lower court; suffice it to say, however, that the Court should disregard the loaded language used by Respondent to try to impugn Petitioner's arguments ("assault on two federal courts") (Resp. Br. 1). Is reasoned argument now to be branded assault?

Respondent obviously wants to use the Opposition Brief as a bully pulpit to elevate his claim that Petitioner was "found" to have engaged in "vexatious litigation;" however, that finding has been made by the same court that has engaged in multiple departures from the accepted course of judicial proceedings; it is a finding contained only in the very order that is the subject of Petitioner's Petition; no such finding was made by the lower court that was in the best position to know whether Petitioner was in fact engaging in vexatious litigation; and moreover it has now effectively been mooted by the successful showing by Petitioner of "cause" why she and her counsel should not be sanctioned (at least no sanctions were ever imposed,

and it has now been well over six months since responses to the OSC were filed).

IV. THE OPPOSITION BRIEF IS FLAWED IN MANY OTHER RESPECTS

Although Respondent Ransmeier also claims that Petitioner Mariani has engaged in multiple misstatements of fact and overlooked "material" facts, it is instead Respondent who has misstated facts and confused the function of a Petition with the function of a post-certiorari brief on the merits, which Petitioner still awaits opportunity to file with all of the hope and anxiety that might be expected of a widow forever bereft by the loss of her husband arising from the national outrage of 9/11.

Respondent has set forth facts (Resp. Br. 3-10) that it maintains are "material to consideration of the petition" without explaining how they relate to the questions presented by the Petitioner. It is, for example, irrelevant to Petitioner's claims that another beneficiary to the estate, Petitioner's stepdaughter, has "rejected allegations" of a conflict of interest on the part of Ransmeier. Ransmeier's assertion that he obtained a "strong" settlement for the Mariani estate (Resp. Br. 5) is not documented and is specifically contested. All of Respondent's assertions about New Hampshire law pertaining to loss of consortium damages (Resp. Br. 17, 22) are irrelevant to the administrator's duty to maximize value of a claim where there is indeterminacy in applicable law and its potential limitations, and, alternatively, these assertions remain contested, but

in any case are not proper subject matter at the Petition stage of this case.

Even more to the point, however, Ransmeier is simply wrong when he alleges misstatements by Mariani. He claims that the New Hampshire Supreme Court did not confirm any individual claim on the part of Mariani, but the salient point is that this state supreme court did not adopt Ransmeier's argument that the claim was entirely subsumed within an Estate claim, App. 78a, and it vacated the Probate Court finding that Ransmeier could settle Mariani's claim without a ruling on choice of law--which then never occurred. That meant that the federal court complaint controlled, JA 31.3, 2.10, and that prior Probate Court rulings controlled, JA 31.3, 9.62ff, and the complaint and those rulings recognized the distinction between a wrongful death claim owned by the Estate and the claim for the widow's personal loss.

Ransmeier also tells this Court (Resp. Br. 18) that the 12/1/04 Agreement nowhere gives him the responsibility to safeguard the individual claim of Petitioner that was pled in the complaint that he inherited; however, he has neglected to point out that the Probate Court confirmed that responsibility when Petitioner tried and failed to confirm her right to prosecute her individual claims in a <u>different</u> federal action. JA 9.62.

He also ridicules the notion that Petitioner's stepdaughter would have pled Petitioner's individual claim in the complaint he inherited from the stepdaughter--filed some two years after Petitioner's

own action had commenced--without acknowledging that, at the time, the inherited complaint was filed by the stepdaughter as a "putative representative" because she was trying to replace Mariani as probate administrator, and she was trying to track the language of the existing complaint in order to stave off any challenge that Mariani would lose rights. JA 2.1, 9.24, 9.62.

Finally, anyone reading the Release that was approved by Judge Hellerstein can see that it can be read to effect a full release by Ellen Mariani and Lauren Peters, and not only "to the extent of their interests in the Estate" as now urged by Ransmeier (Resp. Br. 14). That is for two reasons: first because it is not clear that the quoted clause modifies "Ellen Mariani" or whether it instead modifies only "all persons, heirs and next of kin of Louis Neil Mariani [other than Mrs. Mariani] having an interest in the Estate." Second, however, Ransmeier has clearly been arguing that the individual claim of Mariani is subsumed in the Estate's claim, and so the force of his argument on the scope of the release cuts directly counter to his arguments elsewhere that Mariani no longer had any individual claim to be concerned about.

The CA showed a similar misunderstanding about Mariani's individual claim and the prerogative of the DC to both ignore it on the one hand and bestow on Ransmeier the right to release it on the other, thus adding yet another reason for review.

WHEREFORE, the petition of Ellen Mariani for a writ of certiorari should be granted.

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