No. S251574
(Court of Appeal No. F076395)
(Tuolumne County Super. Ct. No. PR11414)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOAN MAURI BAREFOOT,
Appellant,

v.

JANA SUSAN JENNINGS AND SHANA LEE WREN,
Respondents.

After a Decision By the Court of Appeal,
Fifth Appellate District

RESPONDENTS' ANSWER TO *AMICI CURIAE* BRIEFS

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INTRODUCTION

Three *amici curiae* briefs have been filed, two by bar associations and a third by an individual involved in a particular litigation. Contrary to *amici*'s arguments, this case is not about *whether* remedies should exist when a trust is obtained through improper means such as undue influence or fraud. It is undisputed that relief may be obtained through a civil action or the broad provisions of the Elder Abuse And Dependent Adult Civil Protection Act (WELF. & INST. CODE §§15600 *et seq.* (hereafter "Edler Abuse Act"); *see also* PROB. CODE §859). Relief is also available under Probate Code Section 850 (although Appellant and her *amici* have disclaimed availability of Section 850 in this case).

The question here is only whether Probate Code Section 17200, which allows petitions regarding the internal affairs of trusts, is an available vehicle to challenge a trust. Generally speaking, *amici* pay scant attention to the actual statutory text at issue in this case: that of Section 17200. While they share a policy desire to allow trust challenges under Section 17200, they offer disparate reasoning and workarounds that confirm their arguments have no basis in the statutory language. Indeed, *amici* effectively urge this Court to engage in a judicial rewriting of Section 17200 to include the defined term "interested person" (*see* PROB. CODE §48) as among those entitled to invoke Section 17200, a term used in statutes relating to will contests (*see* PROB. CODE §§1043, 8004, 8250, 8270) but absent from Section 17200. *Amici*'s desire to have Section 17200's standing language align with statutes relating to will contests is a matter they should present to the Legislature, not this Court.

Further, *amici* fail to grapple with or acknowledge that Section 17200 is a statute about the internal affairs of trusts. Internal affairs include matters such as appointment and removal of trustees, accountings and the like. *See* PROB.

CODE §17200(b). These are matters only those with an established interest in the trust may address. For example, access to Section 17200 includes the right to obtain a copy of the operative trust (*see* PROB. CODE §17200(b)(7)(A)), a document that is confidential and typically closely guarded to protect privacy. That is why Section 17200 limits standing to those with an actual interest in the trust (only a "beneficiary" or "trustee"), as opposed to the broader term "interested parties" that could include those who have no present interest but seek one through litigation. If, as *amici* urge, "interested parties" who challenge the trust and seek beneficiary status under an earlier trust must be treated as "beneficiaries" to invoke Section 17200, then those same interested parties can bring *any* petition regarding the trust's internal affairs, an absurd—and dangerous—result.

Indeed, while *amici* lampoon the notion that the ruling they seek will cause chaos, *amici* Local Bars[1] implicitly acknowledge the problem that adopting their position would cause. The Local Bars recognize that it would be inappropriate for trust challengers like Mauri to be permitted to bring an internal affairs petition. To address that problem, the Local Bars contend that "former beneficiary" challengers should be provided only limited access to Section 17200. In the Local Bars' view, such challengers should be permitted only to bring a trust challenge under Section 17200 and, unless and until such a challenge succeeds, be barred from filing any other kind of petition under Section 17200. Local Bars Br. 13–14. But that "solution" conflicts with Section 17200's language, and would effectively rewrite the statute,

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[1] The "Local Bars" that filed a joint brief include the estate planning sections of the Ventura County Bar Association, the San Fernando Valley Bar Association and the Orange County Bar Association. The Los Angeles County Bar Association has also sought to join in the Local Bars' brief.

because it allows *all* beneficiaries to bring an internal affairs petition. If former beneficiaries are "beneficiaries" under Section 17200, then they have the right to petition under the statute.

Amicus Trust and Estates Section of the California Lawyers Association ("TEXCOM"), actually agrees with certain critical arguments of Respondents, including that the term "interested person" cannot be read into Section 17200. But TEXCOM goes on to offer a tortured discussion of who can be considered a "beneficiary" that is nonsensical and would in effect open the door to internal affairs petitions to any "interested person" based on mere allegations that a trust is invalid.

In addition to all of these flaws in *amici*'s positions, adoption of their position would not even solve the (non-existent) problem they purport to address. As noted earlier, *amici* fret that if former beneficiaries do not have access to Section 17200 petitions, then abuse of elders and other vulnerable persons will go unremedied because so long as former beneficiaries are completely eliminated from a trust, they would lack standing to challenge a new trust. It is for that reason that *amici* urge the Court to shoehorn former beneficiaries into the statutorily defined term "beneficiary" (*see* PROB. CODE §24) used in Section 17200.

Amici's argument does not hold up. If adopted, *amici*'s position would leave unaddressed the situation in which a person who lacks either a trust or a will is induced wrongfully to create a trust. In that event, there would be no former beneficiaries under a prior trust to mount a challenge under Section 17200. Instead, the disinherited heirs would be the likely persons to bring a challenge. But under the Probate Code, the terms "heir" and "beneficiary" are distinct. *See* PROB. CODE §§24, 44. That means heirs who are disinherited by an ill-gotten trust would lack a remedy under Section

17200, even though they are similarly situated to former beneficiaries who lose a beneficial interest through improper inducement of the settlor to create a restated trust.

By contrast, the existing remedies through a civil action, and Section 850—not to mention the Elder Abuse Act—are subject to no such limitations and provide complete relief in any circumstance in which a trust is legitimately subject to challenge. Accordingly, there is no reason for the Court to interpret Section 17200 as *amici* urge, which will cause substantial problems with no corresponding public benefit.

Amicus Bonnie Sterngold does not discuss Section 17200's language at all, instead advocating adoption of a policy position untethered to the statutory language. She also asserts that the Court of Appeal Opinion created a "two-step" process for trust challenges, which is false. As already noted, the Opinion leaves open either a civil action, a Probate Code Section 855 petition or an Elder Abuse Act claim as a means to challenge a trust. Only one adjudication under either of those avenues is required or permitted, and Probate Code Section 859 allows the Probate Code to consider claims cognizable in civil court when appropriate.

Finally, *amici* offer a hodgepodge of other points that—like some of Appellant's points—delve into issues not addressed by the Court of Appeal and not discussed in the petition for review. These addition points are not properly before the Court for decision.

ARGUMENT

I.

TEXCOM'S ARGUMENTS REGARDING PROBATE CODE SECTION 17200 LACK MERIT.

A. TEXCOM Fails To Explain How A Challenge To An Entire Trust Could Be Deemed An "Internal Affair" Of The Supposedly Invalid Trust.

Like Appellant, TEXCOM never explains how a challenge to the entirety of a trust could be considered a matter of the trust's "internal affairs," which is Section 17200's purview. Nor does TEXCOM address the fact that Section 17200 provides for a challenge to a "provision" of a trust, which by negative implication indicates that Section 17200 is *not* a vehicle to challenge a trust in its entirety. *See* Answer Br. 25 (discussing PROB. CODE §17200(b)(3)).

Instead, like Appellant, TEXCOM seeks to elide this fatal flaw in Appellant's argument by incorrectly describing the operative trust as an "amendment" to a prior trust under which Mauri was a beneficiary. *See, e.g.*, TEXCOM Br. 18, 31–33; Opening Br. 10 (issue presented is whether "a former beneficiary of a trust lacks standing to challenge the validity of *amendments* to that trust") (emphasis added); Reply Br. 6 (similar); Opening Br. 17 (incorrectly describing the operative, restated trust as the "purported 24th amended version of the Trust"). But no amendment is at issue here. The operative trust states that all prior trust agreements are "delete[d] in [their] entirety and restated." CT 39.

The disconnect between a challenge to an entire trust and matters involving the internal affairs of the trust is the proverbial elephant in the room. Amidst the tens of thousands of words offered by Appellant and her *amici*, entirely absent is any coherent discussion of this issue.

David v. Hermann, 129 Cal. App. 4th 672 (2005), which TEXCOM discusses at length (TEXCOM Br. 31–33), does not support TEXCOM's attempt to bring an attack to an entire

trust within Section 17200(b)(3). That decision, as TEXCOM's own description confirms, involved a challenge to an *amendment* to a trust that the court viewed as a trust "provision" within Section 17200(b)(3)'s terms. Notably, *David*'s discussion of this issue is cursory and does not consider any of the issues the parties have briefed here. Moreover, *David* was decided prior to the enactment of Section 17200.1, which requires that "[a]ll proceedings concerning the transfer of property of the trust shall be conducted pursuant to the provisions of Part 19 (commencing with Section 850) of Division 2." As Respondents have explained, without rebuttal from *amici*, Section 17200.1 makes Section 850 the exclusive means for bringing a trust challenge in Probate Court except insofar as civil and Elder Abuse Act claims can be brought to Probate Court. *See* Answer Br. 17, 29–30; PROB. CODE §859; p.25, *infra*.

While one could argue that an amendment to a trust that leaves the remainder of the trust materially intact could be a "provision of the trust" subject to challenge under Section 17200(b)(3) viewing that subdivision in isolation, other provisions show that it is doubtful that is the intended purpose of Section 17200(b)(3) as to amendments that change the distribution of property. If such an amendment were invalidated, that would affect distribution of property of the trust and bring the petition within Section 850, barring the use of a Section 17200 internal affairs petition. As Respondents showed in their Answer Brief, requiring a challenger to proceed under Section 850 is important due to the added due process safeguards of Section 850 by comparison to Section 17200. *See* Answer Br. 18.

In any event, resolution of whether a challenge to a trust *amendment* that changed the property distribution plan must

wait for another day because the case at bench involves a completely *restated* trust, not an amendment to a trust.[2]

B. *Drake v. Pinkham* Has No Holding On Point.

TEXCOM offers an extended, convoluted discussion of *Drake v. Pinkham*, 217 Cal. App. 4th 400 (2013), that in pertinent part rehashes Appellant's contention about this decision. TEXCOM Br. 18–21; Opening Br. 36–39. Appellant and TEXCOM argue that because *Drake* held that a challenge to a trust amendment could have been brought under Section 17200 during the settlor's lifetime *if* she were incompetent (*see* Section 15800), then *Drake* stands for the proposition that Section 17200 may be used as a vehicle to attack an entire trust. TEXCOM Br. 18–21. TEXCOM is incorrect.

Respondents have already explained, as did the Court of Appeal, that *Drake* did not address the issue at bench. *See* Answer Br. 19 n.6; *Barefoot v. Jennings*, 27 Cal. App. 5th 1, 7–8 (2018). *Drake* held that, under Section 15800, a Section 17200 petition is not available to a beneficiary during the settlor's lifetime unless the settlor is incompetent. *See Drake*, 217 Cal. App. 4th at 409; *Barefoot*, 27 Cal. App. 5th at 8. The parties in *Drake* did not dispute, and the court there did not decide, whether the beneficiary of a superseded trust could invoke Section 17200 to challenge the entirety of a trust. "An opinion is not authority for a point not raised, considered, or resolved therein." *Styne v Stevens*, 26 Cal. 4th 42, 57 (2001).

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[2] And, notably, TEXCOM (like Mauri) does not challenge Respondents' showing that Section 17200's allowance for determination of the "existence of a trust" does not encompass attacks on a trust's validity. *See* Answer Br. 25-26.

C. TEXCOM Advocates A Tortured Interpretation Of The Statutory Term "Beneficiary" That Would Lead To Absurd Results.

TEXCOM forthrightly recognizes that Mauri's contention that the Probate Code affords "flexible standing" is incorrect; instead, as TEXCOM states, that Code is "studded with specific standing requirements and limitations" that must be abided. TEXCOM Br. 14

TEXCOM also acknowledges that the Legislature has expressly adopted different standing requirements for will contests in Probate Court by contrast to trust challenges. Will contests may be brought by any "interested person" (TEXCOM Br. 15 (citing PROB. CODE §§1043, 8004, 8250, 8270)), whereas internal affairs petitions under Section 17200—the statute at issue here—may be brought only by a "trustee" or "beneficiary." This refutes Mauri's contention that trust contests should be governed by statutory provisions relating to will contests. *See* Opening Br. 35.

However, despite the difference in statutory language governing standing to contest a will versus an internal affairs petition under Section 17200, TEXCOM contends that a former beneficiary nonetheless has standing under Section 17200. TEXCOM reaches that conclusion by contending that the statutory term "beneficiary" can include those who would be a beneficiary of a prior trust, were the operative trust to be invalidated. TEXCOM Br. 18. That argument ignores the Probate Code's express language, not to mention common sense.

As Respondents have shown—with no response from Mauri or *amici*—Section 24(c) of the Probate Code includes those with a "present or future" interest within the category of "beneficiary." Answer Br. 20. That does not include those with a "past" interest. *Id.* It makes sense that those with a present or future interest in trust assets would have standing to seek orders regarding the internal affairs of a trust. For

instance, a person with a contingent interest in a trust—such as a remainder interest or an interest that comes into existence only when the beneficiary reaches a certain age—would have a legitimate interest in management or accounting of trust assets under certain circumstances. Indeed, the Local Bars make this point eloquently: Mauri was someone who "*could become* a 'beneficiary'" through litigation (Local Bars Br. 13 (emphasis in original)); she was *not* a beneficiary.

Those who would have an interest in trust assets only by obtaining invalidation of the operative trust are not similarly situated to those with a present or future interest. Such challengers have no interest in trust assets unless and until the operative trust is invalidated by a court after a trial. To characterize those who might benefit from a trust being invalidated as a "beneficiary" of a "future interest" would not only stretch the term "beneficiary" beyond its ordinary meaning but would create an absurd outcome the Legislature could not have intended.

If, as TEXCOM argues, the Probate Court must treat as a beneficiary anyone who merely alleges that the current trust is invalid, and that she was a beneficiary under a prior trust, then such persons would be free to bring *any* petition under Section 17200, not just a petition to invalidate the trust. Such internal affairs petitions could include those seeking a copy of the trust (which is otherwise confidential), to appoint or remove a trustee, or to transfer property of the trust. And, under TEXCOM's way of thinking, the Probate Court would have to accept as true—without proof—an allegation that the trust is invalid. It makes no sense that the Legislature would have intended strangers to a trust to bring such matters before the Probate Court.

The Local Bars would go a step further, urging the Court to be even less faithful to the statutory text than would TEXCOM. The Local Bars breezily state that "any heir"

should be considered a "beneficiary" under Section 17200, ignoring that both terms are defined distinctly in the Probate Code. *See* PROB. CODE §§24, 44. To interpret Section 17200—rather than rewrite it as *amici* advocate—the absence of the term "heir" in Section 17200 must be afforded significance. *See, e.g., Gikas v. Zolin*, 6 Cal. 4th 841, 852 (1993) ("The expression of some things in a statute necessarily means the exclusion of other things not expressed.").

It is understandable that, in their effort to rewrite Section 17200, the Local Bars would propose including heirs because that would resolve one of the absurd results of adopting TEXCOM's position. Under TEXCOM's view, an heir would presumably lack standing to bring an internal affairs petition under Section 17200 by alleging that a trust is invalid just as an "interested party" lacks standing. *See* TEXCOM Br. 15. In TEXCOM's view, only a beneficiary under a prior trust could do that. But there is no logical reason why the Legislature would grant standing to beneficiaries under a superseded trust to bring internal affairs petitions regarding the management of a trust, on the theory that the court must assume that a challenge to the present trust would succeed, while denying that standing to similarly situated heirs.

For instance, if the settlor established a single trust, and an heir challenged the validity of the trust, that heir would not be able to establish he or she was a "beneficiary" under a prior trust because no such trust ever existed. Yet in TEXCOM's view such an heir would be unable to bring an internal affairs petition, whereas a prior beneficiary could. This makes no sense because both an heir and a prior beneficiary who challenge the validity of a trust would be identically situated regarding their interest in bringing an internal affairs petition.

Even while stretching Section 17200's language to the breaking point, the Local Bars implicitly acknowledge the

serious problems adoption of their position would cause in opening up internal affairs petitions to those who claim a disputed interest in trust assets through a trust challenge. Accordingly, the Local Bars argue that such a person should be treated as a beneficiary under Section 17200 *only* for purposes of challenging the trust but *not* for any other type of internal affairs petition under Section 17200. They argue that only those who are beneficiaries or trustees of a trust instrument finally adjudicated to be controlling (or as to which the time to challenge has lapsed) should be allowed to bring a petition under Section 17200 regarding any matter other than challenging the entire trust. Local Bars Br. 13–14.

The Local Bars pluck this supposed rule out of thin air, ignoring the fact that the definition of "beneficiary" under Section 17200 cannot shift or morph. If someone is a beneficiary under Section 17200 for purposes of challenging a trust, then that person is a beneficiary under Section 17200 for all purposes. That the Local Bars see the need for this further judicial revision of Section 17200 to mitigate the problems that adoption of their interpretation would cause is further evidence that *amici* seek to rewrite Section 17200 rather than to interpret it.

Accordingly, the Legislature's restriction of standing for internal affairs petitions to trustees and beneficiaries is not only sensible but unmistakable due to the Legislature's omission of the defined term "interested person" from Section 17200, by contrast to its use of that term in connection with will contests. Section 17200's language controls this Court's interpretation, not the free-floating policy arguments *amici* advance. Those arguments are for the Legislature to consider, not the Court.

II.

TEXCOM'S ARGUMENTS REGARDING PROBATE CODE SECTION 850 ARE IRRELEVANT, MISLEADING AND IMPROPERLY INJECT A NEW ISSUE.

TEXCOM presents a confusing and potentially misleading discussion of Section 850 that contradicts Mauri's position in this litigation, excepting her Reply Brief on the Merits before this Court in which Mauri also contradicted her own prior arguments. Before laying this out, the limited relevance of Section 850 to this Court's review must be put in perspective.

A. Section 850 Is Relevant Only To The Mistaken Assumption Of Mauri And Her Amici That The Probate Code Must Provide For Trust Contests.

The scope of Section 850 is an ancillary point not within the grant of review. The Court of Appeal's Opinion interpreted only Section 17200, not Section 850, and the petition for review was likewise limited to Section 17200. The Court need not even reach the proper scope of Section 850 to address the proper interpretation of Section 17200. That is because Section 850 is relevant at most to rebut Mauri's contention (joined by *amici*) that the Court of Appeal's opinion ousts trust challenges from Probate Court, requiring them to pursue challenges to trusts in civil court. *See, e.g.*, Opening Br. 11. If, as Respondents demonstrated in their Answer Brief, Section 850 is a proper vehicle for a former beneficiary to bring a trust challenge, then a central pillar of *amici*'s arguments falls.

But even if *amici* were right that Section 850 is not a vehicle for a trust challenge, that would not mean that Section 17200 is. The unstated assumption of *amici*'s argument regarding Section 850 is that there *must* be a vehicle under the Probate Code to challenge trusts in addition to the undisputed availability of a civil action to obtain that relief. Put another way, *amici* assume that it is inconceivable that the Legislature did not provide by statute for a means to

challenge a trust in Probate Court *in addition* to the undisputed remedies available through a civil action. Thus, they argue, if no other portion of the Probate Code allows a former beneficiary to bring a trust challenge, then Section 17200 must.

That argument is flawed. Even if challenges to entire trusts were outside the scope of Section 850 (either completely or partially) as well as Section 17200, that does not inexorably mean that the Court must find a statutory basis to bring a trust challenge under the Probate Code. If the Legislature has not provided such a vehicle in the Probate Code, then remedies are—as both sides agree—available in a civil action, including a claim for intentional interference with expected inheritance, as well as under the Elder Abuse Act. *See, e.g.,* Local Bars Br. 11 n.5 (citing *Beckwith v. Dahl*, 205 Cal. App. 4th 1039 (2012)). Put another way, the Court's role in interpreting statutes "is simply to ascertain and declare what is in the relevant statutes, not to insert what has been omitted, or to omit what has been inserted." *Stop Youth Addiction v. Lucky Stores*, 17 Cal. 4th 553, 573 (1998) (internal quotation marks omitted); *see also id.* ("We . . . may not rewrite the statute to conform to an assumed intention which does not appear from its language.").

In short, because Section 850 could be deemed relevant to this case only under the flawed assumption of Mauri and her amici that the Probate Code must be interpreted to provide for trust challenges, the Court need not comment on Section 850's application to trust contests.

B. As TEXCOM Admits, Section 850 May Be Used To Challenge Trusts.

If the Court does consider Section 850, then it should determine that *amici*'s arguments are not well taken.

Section 850(a)(3) provides that a trustee or interested person may seek relief where "the trustee is in possession of, or

holds title to, real or personal property, and the property, or some interest, is claimed to belong to another." This statute would apply if a trust is invalid because in that event the trustee under the invalid trust would hold title to property that belongs to another, namely either the decedent's estate or the trustee under a prior, valid trust. And, contrary to Mauri's contention in her opening brief, Section 850 applies to *any* property, not just real property.

Indeed, TEXCOM acknowledges that *Estate of Young*, 160 Cal. App. 4th 62 (2008), reflects the use of Section 850 as a vehicle to obtain a ruling that a trust is invalid. In TEXCOM's own words, in that case "[o]n the basis of undue influence and fraud, the trial court found no valid trust was created and issued an order nullifying the trust and directing that the property be reconveyed to the estate." TEXCOM Br. 25 (quoting *Young*, 160 Cal. App. 4th at 80). TEXCOM does not argue that *Young* was wrongly decided. TEXCOM argues only that Mauri's petition *as framed* was not within Section 850 because her petition did not expressly seek transfer of property. TEXCOM Br. 25. That is a very different proposition than that Section 850 can *never* be a means of challenging a trust, which is the position that TEXCOM (and Mauri in her reply brief) seemingly urge this Court to adopt.

Unfortunately, despite the just-described moment of candor in TEXCOM's brief, most of TEXCOM's discussion of Section 850 is carefully written to lend the incorrect impression that Section 850 can *never* be used to challenge a trust. TEXCOM Br. 22–25. While portions of TEXCOM's discussion include qualifiers that make any particular statement literally true, they could be easily overlooked by more prominent, broad and inaccurate characterizations of Section 850. For instance, TEXCOM's point heading states that "Section 850 was intended to address title and transfer issues, not create a *general* procedure for trust contests." TEXCOM Br. 22

(capitalization altered; emphasis added). And the opening passage of that section states as follows:

> Respondents contend that the Legislature created section 850 to serve as a vehicle for trust contests. (AB, p. 17.) However, the plain language of the statute and its legislative history belie this assertion. (TEXCOM Br. 22)

The truth is later admitted by TEXCOM, as discussed above in connection with *Young*: Section 850 *can* be used as a vehicle for trust contests but, in TEXCOM's view, Mauri's petition *in particular* did not invoke Section 850. TEXCOM Br. 25.

Accordingly, even if the assumption of TEXCOM that the Probate Code must somewhere provide a vehicle for trust challenges were to be indulged, regardless of the actual language of that Code, Section 850 serves that purpose (or, put another way, fills the supposed statutory gap on which TEXCOM's argument depends). As Mauri stated in her opening brief, Section 850 applies to a "trust contest that affects real property (as undoubtedly most trust contests that end up in court will)." Opening Br. 59. She was right on that point: a trust contest inherently seeks transfer of property held in trust, whether to the trustee of a prior trust for distribution to beneficiaries under that prior trust or through intestate succession. And, of course, Section 850 expressly applies not only to real property but personal property as well—in other words, any kind of property.

Therefore, Section 850 would apply to most if not all trust challenges—were a party to invoke that statute and comply with its terms—which means that TEXCOM errs in contending that the Probate Code lacks a means of challenging an entire trust unless Section 17200 is interpreted to provide that relief. Further, by adopting Probate Code Section 17200.1 in 2001, the Legislature directed that all proceedings concerning the transfer of property of the trust shall be conducted pursuant to Probate Code Sections 850 *et seq.*, which

provides additional procedural protections not included for internal affairs petitions under Section 17200. *See* Answer Br. 17–19.

C. TEXCOM Improperly Seeks To Inject A New Issue And—Ironically—Supports The Court of Appeal's Reasoning.

TEXCOM's contention that Mauri's petition as framed could not have been brought under Section 850 contradicts positions Mauri has asserted in this Court, the Court of Appeal and the trial court. In all three venues, Mauri has asserted the same contention verbatim: she claims "standing to bring all of her claims under Probate Code section 850(a)(3)(A), because she is an interested person asserting a claim to property held by the acting trustee." Opening Br. 45–46; Appellant's Opening Brief in Court of Appeal 17; CT 180–81 (Mauri's motion to reconsider). That Mauri, too, has chosen to contradict her prior positions in her Reply Brief (pages 20 to 22) does not exempt *amici* from the usual rule that they may not introduce new issues into a case. Nor can *amici* briefs be used to evade the basic principle that a new issue cannot be raised for the first time in a reply brief. *See Cal. Bldg. Indus. Ass'n v. State Water Res. Control Bd.*, 4 Cal. 5th 1032, 1048 n.12 (2018) ("California courts will not consider issues raised for the first time by an amicus curiae") (internal quotation marks omitted); *Julian v. Hartford Underwriters Ins. Co.*, 35 Cal. 4th 747, 760 n.4 (2005) ("points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before") (internal quotation marks omitted).

Further, TEXCOM's position that Mauri's petition did not invoke Section 850 only confirms the Court of Appeal's analysis of the petition solely under Section 17200. As Respondents have already pointed out, Mauri cannot seek reversal based on the notion that her petition was proper under

Section 850 because the Court of Appeal did not rule on that contention, she did not seek rehearing and she did not assert that issue in her petition for review. Answer Br. 31–32.

And, of course, Mauri's new contention in her reply brief that Section 850 "cannot generally be used for trust contests" (Reply Br. 20 (capitalization altered)), implying that her petition could not have been brought under Section 850, also forecloses a ruling that her petition could have been brought under Section 850.

III.

AMICI'S PROCEDURAL CONTENTIONS ARE NOT PROPERLY BEFORE THE COURT AND IN ANY EVENT ARE MERITLESS.

Amici offer three procedural proposals, two of which have not been argued by the parties and are therefore improper new issues raised by *amici*. The third—application of a "demurrer standard" regarding Section 17200—was raised by Mauri but is not properly before this Court for multiple reasons previously demonstrated by Respondents. In any event, each of these arguments must fail even if considered on the merits.

A. TEXCOM's Proposed "Evidentiary Hearing" On Standing Would Require Resolution Of The Merits, Negating Section 17200's Limitation On Standing.

TEXCOM argues that the trial court should have conducted an "evidentiary hearing upon the standing question before proceeding with the trial of the contest." TEXCOM Br. 16 (quoting *Estate of Lind*, 209 Cal. App. 3d 1424, 1434 (1989)). This a new argument not raised by Appellant at any stage of these proceedings[3] and is therefore out of bounds for an

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[3] Appellant's counsel, presumably referring to this argument, has noted that "[o]ne of the amici briefs . . . (. . . continued)

amicus curiae. *See Cal. Bldg. Indus. Ass'n,* 4 Cal. 5th at 1048 n.12.

And TEXCOM's point is in any event circular. The supposedly preliminary hearing TEXCOM proposes would require resolution of the merits of Mauri's challenge to the operative trust. In other words, TEXCOM's interpretation, if adopted, would negate the concept of standing and has been expressly disclaimed by Mauri. Indeed, Appellant herself states that a "preliminary evidentiary hearing" on standing "would be impracticable in this case because standing and merits turn on exactly the same facts and evidence." Opening Br. 42 n.1; *see also Mercury Cas. Co. v. Hertz Corp.*, 59 Cal. App. 4th 414, 425 (1997) (the "general rule [that] issues not raised by the appealing parties may not be considered if raised for the first time by amici curiae . . . is particularly appropriate where the party who stands to benefit from the argument has expressly disavowed any interest in it").

But if the Court were nonetheless to entertain TEXCOM's argument, playing out TEXCOM's theory shows that it falls of its own weight. TEXCOM's position implicitly concedes that a party in Mauri's position could obtain standing under Section 17200 only by being a current beneficiary. That is because, until an evidentiary hearing at which Mauri could successfully prove that the operative trust is invalid, she would not be a beneficiary of any trust. And in no event could Mauri ever be a beneficiary of the trust that was operative upon her mother's death (the "Operative Trust"). At most, by obtaining a ruling that the Operative Trust is invalid, Mauri could be a beneficiary under an *earlier* trust (the "Prior Trust").

(. . . continued)
recommends instituting a new procedure *not discussed in Appellant's briefing*." Appellant's Request For Extension, July 9, 2019, at 3 (emphasis added).

At *that* point, Mauri would have standing to bring a Section 17200 petition regarding the internal affairs of the Prior Trust, *not* the Operative Trust. But that does not mean that Section 17200 was an appropriate vehicle to attack the Operative Trust in the first place because—as TEXCOM implicitly concedes—Mauri is not and never could be a beneficiary under the Operative Trust. Because the Operative Trust is the subject of Mauri's present Section 17200 petition, not the superseded trust under which Mauri was a beneficiary, TEXCOM's theory simply does not fly.

Further, an evidentiary hearing on standing would be pointless in this case because there are no disputed facts regarding standing to be resolved. There is no dispute that Mauri is not a beneficiary under the Operative Trust. Nor is there any dispute that she was a beneficiary under a prior trust that the current trust superseded. The question presented is one of law, namely whether Mauri's status as a beneficiary under a superseded trust allows her standing to bring an internal affairs petition under Section 17200, the purpose of which is to have the operative trust declared invalid.

B. Ms. Sterngold Incorrectly Asserts That The Court Of Appeal's Decision Creates A "Two-Step" Process.

Sterngold contends that the Opinion "sends the disinherited beneficiary on a needlessly expensive and wasteful trip, first to the unlimited civil court to adjudicate the fraud, then on to the probate court to accomplish the very same purpose of adjudicating the validity *vel non* of the 'internal affairs' of the wrongfully amended trust." Sterngold Br. 11–12; *see also id.* 15. This assertion is a new argument and therefore off-limits for an amicus. It is also false.

Nothing in the Opinion creates a two-step process. It simply held that Section 17200 cannot be used as vehicle to challenge an entire trust, based on that statute's specific language as well as the statutory definition of "beneficiary."

Nothing in the Opinion prevents a trust challenge from being brought in a civil action. Whether successful or not, that would resolve the dispute. No second procedure is necessary or permissible to retread the same territory. Likewise, if a trust challenge were brought via Section 850, that resolution would be final and not require or permit a second step (other than appeal). As already demonstrated, the Probate Code recognizes that civil actions and Probate Court actions can overlap and provides the trial court with the tools to manage such cases accordingly. *See* Answer Br. 29–30. Among other things, a Probate Code Section 850 petition "may include claims, causes of action, or matters that are normally raised in a civil action to the extent that the matters are related factually to the subject matter of a petition . . . ." Answer Br. 29 (quoting PROB. CODE §855).

In fact, it is only Mauri's *amici* who posit a two-step process. As discussed above, TEXCOM proposes an evidentiary hearing on standing that would precede the merits trial but in fact would eliminate the standing inquiry altogether. *See* Part III(A), *supra.* And the Local Bars advocate a curious interpretation of Section 17200 that would allow those who seek beneficiary status through judicial invalidation of a trust to seek that determination via Section 17200 while being barred from all of Section 17200's other forms of relief until that decision is made. *See* p.16, *supra.* These convoluted proposals would complicate, not simplify, procedures relating to a trust challenge (and in any event are creatures of *amici*'s imagination not based on Section 17200's language).

It is true that a correct interpretation of Section 17200 bars those who are not currently beneficiaries, but seek to attain that status through litigation, from bringing an internal affairs petition unless and until beneficiary status is declared by the court. But as just explained, such an internal affairs petition would not be a repeat of the trust challenge

and indeed would not relate to the trust that had been successfully challenged at all. Instead, one who becomes a beneficiary under a prior, superseded trust by challenging a more recent trust could, like any beneficiary, bring an internal affairs petition regarding the then-current trust to address matters enumerated in Section 17200 such as appointment or removal of the trustee, accountings, etc. But a litigant may seek that relief only when *actually* a beneficiary and not merely seeking that status through pending litigation.

C. Amici's Advocacy Of A "Demurrer Standard" Is Beyond The Scope Of Review And Foreclosed By Mauri's Position.

Respondents' Answer Brief rebutted Mauri's contention that the trial court should have granted her leave to amend *sua sponte*. Answer Br. 35–36. As Respondents pointed out, Mauri did not seek leave to amend in the trial court and did not raise that issue in the Court of Appeal. Unsurprisingly, then, the Court of Appeal did not address that issue. As a result, the "demurrer" question is not properly before this Court because it was not addressed by the Court of Appeal, was not the subject of a petition for rehearing in that court and was not addressed in the petition for review. *See* Answer Br. 30–33; *see also Mercury Cas. Co.*, 59 Cal. App. 4th at 425.

TEXCOM entirely ignores these show-stopping barriers. *See* TEXCOM Br. 21–22. And Sterngold responds with generalities, disregarding the multiple reasons why our State's highest court should not decide an issue neither argued nor decided below. *See* Sterngold Br. 24–26.

And, on the merits, the "demurrer" argument is a dead end for Mauri. If the Court rules, as it should, that she lacked standing under Section 17200, her Reply Brief disclaims Section 850 as a vehicle for her trust challenge. *See Mercury Cas. Co.,* 59 Cal. App. 4th at 425 (amici may not raise a point when "the party who stands to benefit from the argument has

expressly disavowed any intrest in it"). That would leave only a civil action, which Mauri did not file in the Superior Court, was not before the Court of Appeal and is not before this Court on review.[4]

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[4] Further, taking up the "demurrer issue" in the first instance, with no decision from the lower courts to review, would be no small matter, as a summary of the response to *amici*'s contention demonstrates.

Section 17200 proceedings are addressed in their own Chapter of the Probate Code. Instead of demurrer, the Code specifies a statutory provision for a motion to dismiss. *See* PROB. CODE §17202. While Probate Code Section 1000 adopts the "rules of practice applicable to civil actions" in Probate Court proceedings, it provides an "[e]xcept[ion] to the extent that this code provides applicable rules." Because Section 17202 specifies a motion to dismiss rather than a demurer as a means of responding to a Section 17200 petition, neither a demurrer nor the special rules regarding demurrers apply to Section 17200.

That is further confirmed by the Legislature's specification that demurrers may be brought in will contests, further establishing demurrers cannot be filed in Section 17200 proceedings. *See* PROB. CODE §8251 (specifying, similar to a civil action, that an answer or demurrer may be filed in response to an objection to probate of a will). Indeed, proceedings regarding wills, on the one hand, and trusts on the other, are so distinct that they are set forth in entirely different Divisions of the Probate Code.

As a corollary to the Probate Code's specification of a motion to dismiss rather than a demurrer as an available response to a Section 17200 petition, *amici* err in relying on the unusually (and uniquely) liberal rules that apply to demurrers. For example, they disregard the well-established rules of appellate procedure that should bar Mauri from seeking leave to amend for the first time on appeal. While it is true that an appellant from a judgment dismissing a case after demurrer may seek leave to amend for the first time on appeal, that unusual exception to general appellate procedure emanates from a statute limited to demurrers. *See* CIV. PROC. CODE §472c(a) ("[w]hen any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making

(. . . continued)

IV.

THE LOCAL BARS' ARGUMENTS ARE MERITLESS.

The Local Bars offer what they cast as five points, none of which is elucidating.

1. Section 16061.7. The Local Bars repeat Mauri's argument that Section 16061.7, which requires a trustee to give notices to heirs, among others, in certain circumstances proves that heirs are included within Section 17200's reference to "beneficiary." *See* Local Bars Br. 7–8. As already explained, the one has nothing to do with the other and Section 16061.7, like other portions of the Probate Code, shows the Legislature's careful and deliberate use of defined terms like "heir" and "beneficiary." *See* Answer Br. 23–24.

Further, in referring to trust challenges, Section 16061.7 says nothing about the correct vehicle for such challenges, be it Section 850, Section 17200 or a civil action. Indeed, Section 16061.7(h) and 16061.8, in discussing the means to challenge

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(. . . continued)
such an order is open on appeal even though no request to amend such pleading was made.").

Prior to Section 472c(a), "a pleader was deemed to have waived his right to assert that the court abused its discretion by failing or refusing to grant leave to amend the pleading to which a demurrer was sustained unless he requested permission to amend the pleading." *Yasunaga v. Stockburger*, 43 Cal. App. 2d 396, 400 (1941). Here, because Mauri did not seek leave to amend and she was responding to a Section 17202 motion to dismiss—not a demurrer—her failure to seek to amend was a waiver under the usual rules of appellate procedure. And allowing new arguments on appeal could vastly prolong Section 17200 proceedings, contrary to the policy in favor of expedition that Mauri has pointed out. *See* Opening Br. 47-48.

Further, unlike demurrers, Section 17200 rulings are generally subject to abuse of discretion review, unless (as here) the issue presents as a pure question of law. *See Gregge v. Hugill*, 1 Cal. App. 5th 561, 567–68 (2016).

a trust, refers to "an action," not a "petition" addressed by Section 17200. If anything, that points to a civil action, not the "petitions" characteristic of Probate Court practice.

2. CEB Treatise. The Local Bars cite a CEB treatise that states "[t]hose would gain a pecuniary benefit from invalidating the trust should have standing to bring a trust contest" and that usually "the contestants are the beneficiaries of an earlier estate plan or the heirs at law." Local Bars Br. 8–9 (quoting J. BARRINGER & N. LAWRENCE, CALIFORNIA TRUST & PROBATE LITIGATION §20.6 (2019)). Here again, the treatise does not discuss any particular vehicle for bringing a trust contest (whether under the Probate Code or a civil action) and therefore sheds no light on the question presented.[5]

3. Public policy. The Local Bars here repeat the incorrect assertion that the Court of Appeal's opinion leaves former beneficiaries with "no remedy." Local Bars Br. 10. Not only is that wrong but, as already described, the Local Bars' approach would (a) not solve the problem they hypothesize and (b) create problems by allowing strangers to bring internal affairs petitions, an outcome the Local Bars acknowledge would be unacceptable. *See* pp.7–8, 16, *supra.*

The Local Bars go on to claim that "the argument has been advanced by those supporting the appellate court's opinion that the defrauded beneficiaries can simply 'provide the

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[5] Oddly, under a point heading accusing the Court of Appeal of ignoring "legal commenters" (i.e., secondary sources) the Local Bars cite *Olson v. Toy*, 46 Cal. App. 4th 818 (1996), a primary source. *See* Local Bars Br. 8–9. And *Olson* is in any event irrelevant.

That decision addressed standing under a statute not at issue here (PROB. CODE §9654) that allowed standing for "heirs" or "devisees." Each plaintiff fell into one of those categories. 46 Cal. App. 4th at 821–22. The court also held the plaintiff had standing under common law to bring a civil action (*id.* at 823–25), another holding that has nothing to do with the question presented.

information about undue influence or other wrongful acts' to the very trustee who perpetrated the fraud." Local Bars Br. 10. The Local Bars do not identify who they claim made this assertion but it is not one Respondents endorse and is therefore nothing more than an straw man—and an anonymous one at that—that Respondents have propped up, only to knock down.

4. Probate Code Section 21360. In another effort to inject an argument not made by the parties, the Local Bars claim that the Court of Appeal's Opinion would "leave no one with standing to set aside gifts and transfers that the Legislature has declared to be invalid and presumptively the product of undue influence" pursuant to Probate Code Sections 21360 *et seq.* Local Bars Br. 11. This contention is not only meritless but baffling.

The Opinion has nothing to do with Probate Code Sections 21360 *et seq.*, a part of the Probate Code that defines situations in which a donative transfer is presumed to have been made as the result of fraud or undue influence. Nothing in the Opinion relates to this Part of the Probate Code. Indeed, that Part hardly uses the term "beneficiary" and, when it does, it refers to the *target* of an action, not the persons to be protected. *See* PROB. CODE §§21370, 21380(d), 21386. And of course only a gift to an actual beneficiary (not a former beneficiary) would be subject to attack for fraud or undue influence. There would be no need to mount an attack on a document that formerly made someone a beneficiary but is no longer in effect.

Here again, *amici* revisit their alarmist and inaccurate theme that the Opinion cuts off all avenues of redress for wrongdoing. Probate Code Sections 21360 *et seq.*, merely provide definitions and substantive rules; it does not prescribe any particular enforcement procedure. In fact, the Legislature specifically confirmed that this part of the

Probate Code is "declarative of existing [common] law," confirming that a civil action is available to enforce its provisions. *See* PROB. CODE §21392(b).[6]

5. Definition of Beneficiary/Need For Adjudication. The points the Local Bars make in this section are addressed above. *See* p.16, *supra.*[7]

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

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[6] That subdivision provides as follows:

> It is the intent of the Legislature that this part supplement the common law on fraud and undue influence, without superseding or interfering in the operation of that law. Nothing in this part precludes an action to contest a donative transfer under the common law or under any other applicable law. This subdivision is declarative of existing law. (PROB. CODE §21392(b))

[7] As an *ad hominem* aside, the Local Bars assert the "unfortunate[]" supposed fact that this case "was argued at both the trial and appellate court levels by civil litigators generally unfamiliar with the nature of probate proceedings or the intricacies of the Probate Code." Local Bars Br. 12 n.6. Not so. Speaking only to counsel for Respondents below, both are well experienced in the estate planning and litigation field. And the Local Bars' comment that the Court of Appeal was "confus[ed]" (*id.* 12) is likewise regrettable.

DATED: July 19, 2019.

Respectfully,

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CERTIFICATE OF COMPLIANCE PURSUANT TO CAL. R. CT. 8.204(c)

Pursuant to California Rule of Court 8.204(c)(1), and in reliance upon the word count feature of the software used to prepare this document, I certify that the foregoing **RESPONDENTS' ANSWER TO AMICI CURIAE BRIEFS** contains 7,978 words, exclusive of those materials not required to be counted under Rule 8.204(c)(3).

DATED: July 19, 2019.

/s/ Sean M. SeLegue
SEAN M. SELEGUE

PROOF OF SERVICE

Supreme Court No. S251574
(Court of Appeal No. F076395)
(Tuolumne County Super. Ct. No. PR11414)

I am a resident of the State of California and over the age of eighteen years and not a party to the within-entitled action; my business address is Three Embarcadero Center, Tenth Floor, San Francisco, California 94111-4024.

On July 19, 2019, I served the document described as **RESPONDENTS' ANSWER TO AMICI CURIAE BRIEFS** on the interested parties in this action by sending a true copy addressed to each via electronic mail to the email addresses noted below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California on July 19, 2019.

Jane Rustice