No. 12-1200

**IN THE**
# Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,

*Petitioner*,

*v.*

PETER H. ARKISON, TRUSTEE, SOLELY IN HIS CAPACITY AS CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.,

*Respondent*.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## BRIEF FOR RESPONDENT


G. Eric Brunstad, Jr.
Kate M. O'Keeffe
DECHERT LLP
90 State House Square
Hartford, Connecticut 06103
(860) 524-3999
eric.brunstad@dechert.com

John A. E. Pottow
*Counsel of Record*
c/o 625 South State Street
Ann Arbor, MI 48109
(834) 647-3736
pottow@umich.edu

*Counsel for Respondent*

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

Peter H. Arkison
103 East Holly Street, Suite 502
Bellingham, Washington 98225
(360) 671-0300
peter@arkinson.com

Denice E. Moewes
303 N. 67th Street
Settle, Washington 98101
dmoewes@aol.com

## QUESTIONS PRESENTED

1. May a defendant in a federal fraudulent conveyance action consent to have the matter adjudicated by a bankruptcy judge?

2. If a defendant in a fraudulent conveyance action does not so consent to final bankruptcy judge adjudication, may the bankruptcy judge nonetheless hear the matter and issue a report and recommendation of proposed findings of fact and conclusions of law to the district judge adjudicating the matter for de novo consideration?

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES

**Page(s)**

**CONSTITUTION AND FEDERAL STATUTES**

**RULES**



**OTHER AUTHORITIES**

## STATEMENT

This matter arises out of the bankruptcy proceedings of Bellingham Insurance Agency, Inc. ("Bellingham"). Bellingham's affairs were orchestrated largely by Nicholas Paleveda ("Paleveda"), an attorney. Pet. App. 5a. Bellingham had a corporate affiliate named Aegis Retirement Income Services, Inc. ("ARIS"), with which Bellingham kept joint accounting records. *Id.*

In 2003, Paleveda and his then-partners had a falling-out about the distribution of insurance commissions, and the partners instructed the remitting carrier to deposit future commissions into a separate account not accessible by Paleveda. Resp. to Trustee's Mot. Partial Summ. J. 2–3, ECF No. 24. Paleveda responded by initiating arbitration. *Id.* He lost, and the arbitrator ordered him and Bellingham to pay the ex-partners' attorneys' fees. First Am. Compl. ¶ 7, *Hess v. Exec. Benefits Ins. Agency*, No. 06-2-01256-5 (Wa. Sup. Ct. June 14, 2006).

After the arbitrator rendered this adverse determination as an interim award, but before it was finalized, Paleveda initiated a wholesale transfer of assets from Bellingham to a newly created company named Executive Benefits Insurance Agency ("EBIA"), petitioner in this appeal. Pet. App. 43a–44a. The transfer was affected in part by Bellingham assigning its

commissions to EBIA directly, and in part through transfers via third parties. *Id.* at 35a. The transfer of property was all done on paper—EBIA occupied Bellingham's corporate headquarters, employed Bellingham's staff, and engaged in Bellingham's business. *Id.* at 50a. Although Paleveda repeatedly insisted that these were distinct companies, the courts below dismissed this as the "narcissism of minor differences" and found full alter-ego liability. *See id.* at 38a–39a.

Upon discovering the looting of Bellingham's assets, the ex-partners commenced a state-court fraudulent conveyance action against Bellingham, Paleveda, and ARIS, among others. *Id.* at 44a. Paleveda halted that lawsuit by placing Bellingham in Chapter 7 bankruptcy, thus invoking the automatic stay. *Id.*; 11 U.S.C. § 362. He then removed the fraudulent conveyance action to the federal bankruptcy court presiding over Bellingham's Chapter 7 case, and filed his answer in the duly opened adversary proceeding. J.A. 1–2. (Bankruptcy procedure requires that a matter such as a fraudulent conveyance action be docketed as a separate "adversary proceeding" within a bankruptcy case, with independent service of process. Fed. R. Bankr. P. 7001(1), 7004.)

Paleveda's respite from the fraudulent conveyance litigation proved short-lived. His Chapter 7 petition created an independent

bankruptcy estate. Respondent, Peter Arkison, was appointed trustee, thus divesting Paleveda of further control over Bellingham. Arkison commenced his own fraudulent conveyance action (on behalf of all of Bellingham's unsecured creditors, not just the arbitration victors), under section 548 of the Bankruptcy Code, 11 U.S.C. § 548, against, among others, Paleveda; EBIA, the recipient of the transferred assets; and ARIS, which participated in the chain of transactions that put Bellingham's money in EBIA's hands. Pet. App. 6a. A new adversary proceeding docket was opened, giving rise to the instant action. J.A. 8.

The relevant defendant for present purposes is EBIA, the entity Paleveda created three days before the final arbitration award. Pet. App. 43a.[1] EBIA filed an answer in the adversary proceeding, denying many of the allegations. J.A. 79. Critically for purposes of this appeal, EBIA denied that the fraudulent conveyance action was a "core" proceeding, *id.* at 80, which means that EBIA took the position that the proceeding was "non-core" and thus EBIA was entitled to all the Article III and Seventh Amendment rights non-core proceedings entail.

[1] While EBIA and Paleveda are nominally distinct, the overlap between the fraudulent conveyance defendants is difficult to overstate. For example, Paleveda represented EBIA as counsel below in the proceedings before the Court of Appeals. Pet. App. 3a.

*See Stern v. Marshall*, 131 S. Ct. 2594, 2604–05 (2011) (explaining that core and non-core matters are exhaustive categories of bankruptcy proceedings). Consistent with its position that the fraudulent conveyance proceeding was non-core, EBIA also demanded (albeit belatedly and in the wrong case) a jury trial. J.A. 94; Pet. App. 79a.

Under Bankruptcy Rule 7012, when a defendant denies in its answer that a proceeding is core, as EBIA did, it is required to state in that same answer whether it consents to the bankruptcy court's entry of a final judgment, or whether it prefers instead to exercise its right to insist that the bankruptcy judge merely issue proposed findings of fact and conclusions of law subject to de novo review in the district court. Fed. R. Bankr. P. 7012(b). (This up-front declaration prevents sandbagging by making it impossible for a party who chooses to proceed before a bankruptcy judge to claim in regret after a loss that it never consented to bankruptcy court resolution.)[2] EBIA violated Rule 7012.

[2] "A responsive pleading shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties." Fed. R. Bankr. P. 7012(b).

Although it denied that the fraudulent conveyance proceeding was core, it refused to state whether it consented or not to a final adjudication in the bankruptcy court.

After discovery, Arkison moved for summary judgment against ARIS. J.A. 12. Citing disputed facts, the bankruptcy judge denied the motion. *Id.* at 17–18. After ARIS successfully survived summary judgment, EBIA brought a motion in the bankruptcy court to vacate the existing bankruptcy court trial date, citing its jury demand that would require trial in the district court. *Id.* at 95; Pet. App. 77a. Arkison objected, asserting, among other reasons, the untimeliness of the jury trial demand. J.A. 97. Instead of holding a hearing on the contested motion, however, the bankruptcy court vacated the trial date and transmitted the record to the district court, which docketed the matter as a motion to withdraw the reference of the adversary proceeding from the bankruptcy court. *Id.* at 101, 104. (A motion to withdraw the reference is the means by which a district court exercises its supervisory prerogative to take a bankruptcy case or proceeding away from a bankruptcy judge, either in whole or in part. 28 U.S.C. § 157(d).)

In preparing to address whether to withdraw the fraudulent conveyance proceeding from the bankruptcy court, the district judge (Jones, J.) ordered a status conference and instructed the

parties to participate in preparing a Joint Status Report (the "JSR") to help inform the court's decision. J.A. 104. Counsel for all the parties—with the exception of Paleveda, representing himself—joined a conference call to discuss the JSR. *See* Pet. App. 73a. After the call, Arkison's counsel circulated the agreed-upon report, but EBIA's counsel never signed it before transmission to Judge Jones. *Id.* EBIA made no objection when the report was circulated and voiced none after it was filed. The JSR advised Judge Jones that settlement discussions, further discovery, and motions for summary judgment were being contemplated in the bankruptcy court. *Id.* The JSR therefore requested that he defer adjudicating the withdrawal motion pending the resolution of those matters. *Id.* Thus, the JSR left no doubt that summary judgment motions were anticipated and would be litigated in the bankruptcy court when filed. *Id.* Faced with apparently unanimous consent and certainly no declared opposition, Judge Jones re-calendared the withdrawal motion for three months hence. J.A. 33.

As anticipated, Arkison filed a motion for summary judgment against EBIA in the bankruptcy court. *Id.* at 106. At the hearing on the motion, the court found that there were no genuine issues of material fact regarding whether EBIA was the alter-ego of Bellingham or whether assets had been transferred into EBIA (either directly or via various conduits),

and thus Arkison was entitled to judgment as a matter of law. *Id.* at 181–85. The bankruptcy judge therefore entered summary judgment against EBIA. *Id.* At no point in the summary judgment pleadings or at the hearing—including after circulation of the judgment—did EBIA ever suggest that the bankruptcy judge could not finally decide the matter but could only enter proposed findings of fact and conclusions of law in a matter that EBIA contended was non-core.

Instead, EBIA appealed the bankruptcy court's judgment. Conducting a full de novo review, the district court (Pechman, C.J.) affirmed the bankruptcy court's grant of summary judgment, setting forth her reasons and analysis in an extensive and detailed opinion. Pet. App. 41a.

While EBIA was prosecuting its appeal in the district court before Chief Judge Pechman, Judge Jones, who still had jurisdiction over the withdrawal motion, remained in the dark. He issued an order to show cause when nobody updated him on the status of the motion, asking why the parties had not followed up with an appropriate report. J.A. 33–34. Arkison's counsel responded, bringing Judge Jones up to speed and explaining her belief that EBIA had presumably lost interest in pursuing the motion. *Id.* at 34. Hearing nothing from EBIA, Judge Jones dismissed the motion to withdraw the reference as abandoned. *Id.*

EBIA appealed the district court's affirmance of the bankruptcy court's summary judgment determination to the Ninth Circuit, with Paleveda representing EBIA directly. *Id.* at 39. After EBIA's brief was filed, but before oral argument, EBIA for the first time raised an objection that Article III of the United States Constitution precluded the bankruptcy court's entry of judgment (including summary judgment) against it on the fraudulent conveyance claim. *Id.* at 41. After the panel invited amicus participation on the scope of this Court's holding in *Stern*, 131 S. Ct. 2594, to which over a dozen amici, including the United States, responded, Pet. App. 58a, the Ninth Circuit affirmed. *Id.* at 1a.

While opining in dictum that a fraudulent conveyance action cannot be tried to final judgment in a bankruptcy court over the timely objection of a non-creditor defendant without violating Article III, *see Granfinanciera S.A. v. Nordberg*, 492 U.S. 33 (1989); *Stern*, 131 S. Ct. 2594, the Court of Appeals held that EBIA's consent obviated any Article III problem. Pet. App. 58a. Although EBIA's consent had not been given explicitly in writing, the court held that EBIA's acquiescence could be implied by its unambiguous conduct. *Id.* at 30a. In other words, the court held, EBIA knowingly took its summary judgment chances in the bankruptcy court and could not later plead lack of consent to get a second bite at the apple.

Although EBIA's consent rendered entry of judgment by the bankruptcy court appropriate, the Court of Appeals (to provide guidance to future cases) also decided that in non-creditor fraudulent conveyance cases where the defendant does *not* consent to bankruptcy court adjudication, bankruptcy judges may nonetheless enter proposed findings of fact and conclusions of law for district court de novo consideration (the procedural treatment accorded non-core proceedings). *Id.* at 24a–25a. This appeal followed.

## STATUTORY CONTEXT

### A. The Historical Practice

In 1800, Congress passed its first bankruptcy act. Bankruptcy Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803). The 1800 act entrusted administration of the debtor's estate to judicial officers called "commissioners," who were appointed by district courts. Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567, 608–09 (1998). Congress largely copied the English bankruptcy statute then in force. *See* Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 6–7 (1995) [hereinafter Tabb, *History of the Bankruptcy Laws*]. English bankruptcy commissioners had great power over the affairs of bankrupts; for instance, they could "[s]ell and

a[ss]ign all property which a bankrupt has conveyed in contemplation of an act of bankruptcy," i.e., a fraudulent conveyance. A SUCCINCT DIGEST OF THE LAWS RELATING TO BANKRUPTS 83 (Dublin, Brett Smith 1791).

American commissioners under the Act of 1800 had similarly broad authority. Plank, *supra*, 607–09; *see also Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 370–71 (2006). Commissioners, among other matters, adjudicated whether a debtor was bankrupt and processed debtor claims. *See* Plank, *supra*, at 608. Furthermore, the act entrusted these adjudicators with the power to decide nearly all bankruptcy disputes. *Id.* at 609. The authority of these commissioners included warrant and subpoena power, contempt authority to jail uncooperative witnesses, and even the power to imprison third parties withholding debtor assets. *Id.* at 608–09. Commissioners generally decided bankruptcy matters, which parties could then appeal to district courts. *Id.* at 609. For example, a district judge could grant a discharge if it found that discharge had been "unreasonably denied" by the commissioner. Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 346–47 (1991).

Throughout the nineteenth century, Congress experimented with variations in bankruptcy law, including the selection of bankruptcy

commissioners. In 1841, Congress allowed district judges to use their general supervisory powers to appoint commissioners adjudicating bankruptcy cases in their districts. *See* Ralph Brubaker, *A 'Summary' Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction after* Stern v. Marshall, 86 AM. BANKR. L.J. 121, 126–27 n.25. (2012). In 1867, the district courts, sitting as "courts of bankruptcy," were directed to appoint "registers in bankruptcy," rather than commissioners. Bankruptcy Act of March 2, 1867, ch. 176, 14 Stat. 517, §§ 1, 3 (*repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99 (1878)); Tabb, *History of the Bankruptcy Laws*, *supra*, at 19. Registers, as officers of the district court, were nominated by the Chief Justice of the United States and then appointed and removed by district judges. Act of 1867, §§ 3, 5.

Congress passed its first permanent bankruptcy act in 1898, changing the name of the relevant bankruptcy officer to "referee." Brubaker, *supra*, at 127. (The district courts were given the option to "refer" bankruptcy cases to these adjudicators to resolve. Bankruptcy Act of July 1, 1898, ch. 541, § 22, 30 Stat. 544 (repealed 1978).) Under the 1898 claims-resolution scheme, just as in pre-constitutional England with commissioners, most proceedings before referees were "summary" in nature, with abbreviated procedures befitting the need to adjust and finalize claims to a debtor's assets

expeditiously. *See* Brubaker, *supra*, at 127–28. Certain bankruptcy-related matters, however, required full legal process. *Id.* at 128–29. These were known as "plenary" matters, and trustees in bankruptcy (sometimes referred to historically as "assignees") would have to resort to state or federal courts to pursue them. *Id.* For example, a breach of contract claim vested in the estate as a chose in action would be pursued by the assignee as a plenary suit.

The principal rule for dividing summary from plenary matters was that the referees generally had summary jurisdiction over property within the actual or constructive possession of the debtor. *See Katchen v. Landy*, 382 U.S. 323, 327 (1966) (quoting *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 481 (1940)); John C. McCoid, II, *Right to Jury Trial in Bankruptcy:* Granfinanciera, S.A. v. Nordberg, 65 AM. BANKR. L.J. 15, 36 (1991). Other assets could only be reached by plenary proceedings. *Katchen,* 382 U.S. at 36. Parties could, however, jointly consent to proceed before a referee in a summary proceeding, even with respect to an otherwise plenary matter. *MacDonald v. Plymouth Cnty. Trust Co.*, 286 U.S. 263, 267 (1932) ("[W]e can perceive no reason why the privilege of claiming the benefits of the procedure in a plenary suit . . . may not be waived by consent, as any other procedural privilege of the suitor may be waived, and a more summary procedure substituted."); *see also In re Patterson*, 18 F. Cas.

1313, 1314 (S.D.N.Y. 1867) (holding, under the 1867 bankruptcy act, that parties can impliedly consent to adjudication by a register). In contrast, the *absence* of consent precluded the resolution through summary proceedings of a plenary matter. *Weidhorn v. Levy*, 253 U.S. 268, 274 (1920).

### B. The 1978 Experiment

In 1978, Congress radically overhauled the bankruptcy court system in two main ways. *See* Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978). First, the summary/plenary division was abolished; bankruptcy judges (as referees had come to be called) were given jurisdiction over *all* matters falling under the federal subject matter jurisdiction in bankruptcy, i.e., all matters arising in a bankruptcy case, under the Bankruptcy Code, or related to the bankruptcy case. *See id.* at § 1471. Second, bankruptcy courts were largely freed from the oversight of the district courts, who were stripped of the power to refer matters to bankruptcy judges. Instead, Congress provided for *mandatory* assignment of all bankruptcy cases to the new bankruptcy courts for full and final judgment on all questions of law and fact. *See id.* at § 1471(c). These new autonomous courts were styled "adjuncts" of the district court. *See id.* at § 151. These newly powerful bankruptcy judges, however, did not have life

tenure or salary protection. *See id.* at §§ 152–154.

### C. The 1984 Amendments and the Return to Historical Practice

After this Court struck down this unprecedented new bankruptcy court system in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), Congress reverted to the historical reference-based model, abandoning the idea of independent bankruptcy courts. Specifically, Article III district judges were again given the power to use or ignore bankruptcy judges as inclined, referring bankruptcy cases to them at the district judges' election and without compulsion by Congress. 28 U.S.C. § 157(a). Additionally, the district judges were once more granted the power to take cases back from bankruptcy judges "mid-stream," for cause. 28 U.S.C. § 157(d). Bankruptcy judges were classified statutorily as "units" of the district court. 28 U.S.C. § 151.

Further, tracking the language in Justice Brennan's plurality opinion and Justice Rehnquist's concurrence regarding the restructuring of debtor-creditor relations as lying at the "core" of the federal bankruptcy power, *see Northern Pipeline*, 458 U.S. at 71 (plurality opinion); *id* at 90 (Rehnquist, J., concurring), Congress curtailed bankruptcy judges' ability to enter final judgments. Under the 1984

amendments, bankruptcy judges could enter final judgments only with respect to such "core matters." 28 U.S.C. § 157(b). In all other matters, such as state common law actions—members of Congress called these "*Marathon* claims"—the authority of bankruptcy judges tracked the magistrate judge system: bankruptcy judges could only enter proposed findings of fact and conclusions of law, unless the parties jointly consented to allowing a final judgment. 28 U.S.C. § 157(c)(1)–(2). In this regard, Congress *explicitly* mirrored the magistrate system. 130 Cong. Rec. E 1109–10 (daily ed. Mar. 20, 1984) (statement by Rep. Kastenmeier) (explaining that "[t]he powers that bankruptcy judges exercise" will be "identical to those exercised by magistrates," including the power to "enter a binding judgment" as long as "the parties consent"). Congress's clear intent was to follow the Constitution's commands:

> Where the parties consent, the bankruptcy judge may enter a binding judgment. Identical consent provisions have been upheld by each of the four courts of appeals to address the issue . . . .
>
> . . . .
>
> Question: May the parties consent to have State law suits decided by a bankruptcy judge?

> Answer: Yes. If this were not true, then the U.S. magistrate judge system, which is partly based upon consent, would also be unconstitutional . . . .

*Id.*

Congress thus returned to the basic bifurcated approach that existed before 1978, albeit replacing the summary/plenary distinction with the Court-inspired terminology "core/non-core." The only real difference between the pre-1978 and post-1984 regimes in this regard is that the core/non-core dichotomy does not exactly track the summary/plenary distinction. For example, the statutory definition of core proceedings includes federal fraudulent conveyance actions. 28 U.S.C. 157(b)(2)(H). Thus, in some respects, Congress made core proceedings broader than the former category of summary proceedings. The general mechanism for consensual adjudication, however, did not change. Just as plenary matters could be treated as summary with party consent pre-1978, so too non-core matters could be treated as core with consent post-1984. Following the magistrate judge model, Congress authorized bankruptcy judges to issue final judgments in such consensual proceedings.

## SUMMARY OF ARGUMENT

As this Court explained in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986), "as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver." In that case, Schor waived his right to an Article III adjudication, preferring instead the faster procedure before the Commodities Futures Trading Commission ("CFTC"). So too in this case, EBIA chose to take its summary judgment chances in the bankruptcy court on its fraudulent conveyance claim instead of exercising its right to proceed in district court. Only after EBIA lost did it raise an Article III challenge on appeal. As in *Schor*, EBIA's waiver of its personal right did not offend Article III. And while *Schor* adds that in some, but not all, cases, Article III presents "structural" concerns that the parties cannot waive, those concerns do not arise in this case. EBIA's waiver was thus fatal.

Article III is not offended by EBIA's waiver in this case any more than it was in *Schor*—in fact, less so. Unlike *Schor*'s administrative regime, the bankruptcy court consensual adjudication system exists entirely within Article III, following longstanding judicial practice. Centuries of tradition have allowed the consensual resolution of private rights by adjudicators, such as the bankruptcy

commissioners, who lack the protections of Article III but serve at the pleasure and under the control of the district courts. And since the nation's early days, this Court has repeatedly upheld the use of special masters in equity who functioned similarly to today's bankruptcy judges.

The modern analogues to special masters—magistrate judges—continue the longstanding tradition of consensual private-rights adjudication within Article III. Magistrate judges were the model upon which consensual bankruptcy court adjudication was explicitly based and their authority has been upheld against Article III challenge by every Circuit Court of Appeals. Indeed, in *Roell v. Withrow*, 538 U.S. 580 (2003), this Court found consensual magistrate adjudication so constitutionally unremarkable it divided only on whether that consent could be implied in the absence of a writing.

The only time this Court has struck down a regime as a violation of Article III has been when the parties have not consented to judgment of their private rights by a non-Article III adjudicator. Indeed, consent is so critical that it is the sole distinguishing feature between the regime found constitutional by this Court in *Peretz v. United States*, 501 U.S. 923 (1991) and unconstitutional in *Gomez v. United States*, 490 U.S. 858 (1989). And in *Stern* itself, the lack of

true consent to bankruptcy court adjudication by the petitioner was the lynchpin in the Court's holding of constitutional infirmity.

This Court's reference in *Schor* to the unwaivable, "structural" component of Article III that pertains to the separation of powers is inapplicable in this case and presents no problem to consensual adjudicatory regimes like bankruptcy courts. *Schor* explicitly holds that these unwaivable concerns are only implicated in some private-rights cases. Specifically, concern arises only in connection with inter-branch incursion: when the executive or legislative branches threaten or encroach upon the power of the judiciary. Because resort to bankruptcy judges is fully at the joint election of district judges and the parties in private-rights controversies, the political branches have no involvement whatsoever and hence there is no encroachment on the judiciary violating the separation of powers.

To the extent that wholly *intra-branch* regimes can even raise structural constitutional concerns, those concerns would sound in the non-delegation doctrine. Here, there is no serious argument that adjudication by a bankruptcy judge *at the request of the parties* reflects an impermissible abdication of the judicial function any more than confirmation of an arbitration award determined by private arbitrators on party consent or even a clerk of court's entry of a

default judgment under the Federal Rules of Civil Procedure.

EBIA's broad-sweeping arguments that suggest invalidating the entire bankruptcy and magistrate judge systems reflect a profound misreading of *Stern*. The Court should dispel this uncertainty and confirm that *Stern* is precisely the narrow decision it purports to be. To the extent that EBIA challenges the constitutionality of core bankruptcy court power to adjust debtor-creditor claims, the Court should decline to reach this unnecessary question or, in the alternative, uphold these historically exercised powers as constitutional.

Consent to bankruptcy judge adjudication may be implied by conduct of the kind at issue here, just as the Court held that consent could be implied in the analogous if not identical magistrate judge setting in *Roell*. Although EBIA's consent was properly implied in this case, the Court need not decide this factual question on which it did not grant certiorari. Because an Article III district court conducted a full de novo review of the summary judgment order and entered its own judgment, EBIA got all the Article III consideration to which it was entitled. Remand could produce no different outcome. This is as it should be, because EBIA's insistence that its claim was non-core—in the face of a statute that lists fraudulent conveyances as core—shows that EBIA knew it had a right to

insist on Article III adjudication, a stance that accurately anticipated this Court's decision in *Stern*. Knowing (or at least, correctly predicting) that it had the right to veto proceedings in bankruptcy court, but then flouting the rule requiring it to specify whether it consented to those proceedings, consigns EBIA to the consequences of its choice of forum. EBIA's failure to follow the basic pleading rules specifically designed to prevent this sort of maneuver cannot be used as a sandbag.

*Stern* creates no insoluble statutory gap. Bankruptcy judges may issue proposed findings of fact and conclusions of law on "*Stern* claims" if the parties do not consent to final judgment in bankruptcy court. EBIA's contrary argument misreads the permissive power to enter an order or judgment under 28 U.S.C. § 157(b)(1) as mandatory, reads the reference-withdrawal power of section 157(d) out of the statute, and is otherwise unsound.

## ARGUMENT

### I. Consensual Resolution of Private-Rights Controversies by Adjudicators Working Under and at the Pleasure of Article III Judges Is Constitutional.

As the Court has explained, "Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters

within the judicial power of the United States . . . serves to protect *primarily* personal, rather than structural, interests." *Schor*, 478 U.S. at 848 (emphasis added). This is so because private rights, as their name implies, are entitlements held by private individuals, whose dignity and autonomy in choosing how they wish to resolve their disputes should be respected. For this reason, the presence or absence of consent has been the touchstone of this Court's jurisprudence on the constraints of Article III. And while consent cannot be dispositive in regimes that evince encroachment by the political branches into the independence and integrity of the judiciary—a structural violation of separation of powers—it can be fully vindicated in adjudicatory regimes implemented entirely within the judicial branch.

### A. The Court Has Long Approved the Historical Practice of Consensual Private-Rights Dispute Resolution by Adjudicators Working Within Article III.

Under the earliest American bankruptcy statutes, judicial officers lacking the protections of Article III life tenure and guaranteed salary have played an important role in adjudicating claims that, without the parties' consent, would traditionally be decided in federal court by Article III judges. For example, following ancient chancery court practice, federal courts

sitting in equity routinely permitted special masters to resolve a variety of disputes over matters of private right. *E.g.*, *Kimberly v. Arms*, 129 U.S. 512, 524 (1889).

Sometimes the master would serve a only recommending role, with final judgment reserved to an Article III judge, but at other times, the master was given full adjudicatory authority. As the Court explained in *Kimberly*, the touchstone of this power derived from the autonomy of the parties:

> It is not within the general province of a master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire decision of a case to him, without the consent of the parties. It cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented and devolve that duty upon any of its officers. But when the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings, both of fact and of law, and such reference is entered as a rule of the court, the master is clothed with very different powers from those which he exercises upon ordinary references, without such consent; and his determinations are not subject to be set

> aside and disregarded at the mere discretion of the court. A reference, by consent of the parties, of an entire case for the determination of all its issues, though not strictly a submission . . . to arbitration . . . , is a submission of the controversy to a tribunal of the parties' own selection.

*Id*. at 524 (citing English authorities and finding the power to refer such cases upon party request "incident to all courts of superior jurisdiction").

Similarly, in *Heckers v. Fowler*, 69 U.S. (2 Wall.) 123 (1864), the Court upheld the parties' joint consent to a referee. EBIA cites *Heckers* for the proposition that referees could *not* exercise judicial power, because the final judgment was entered by the district court and not by the referee. Pet'r's Br. at 31. But this misunderstands *Heckers*. There, the parties "agreed that the report of the referee should have the same force and effect as a judgment of the court . . . ." *Heckers*, 69 U.S. at 133. The circuit court ordered, "by consent of parties, that on filing the [referee's] report with the clerk of the court, judgment should be entered in conformity therewith, the same as if the cause had been tried before the court." *Id.* The referee made and filed the report, and the clerk entered judgment. *Id.* This Court affirmed. *Id.* at 133–34. In fact, bankruptcy commissioners and referees historically issued their decrees directly in resolving their cases. *See, e.g.*, McCoid, *supra*,

at 30 n.80 (English bankruptcy commissioners) (citing *Clark v. Capron*, 30 Eng. Rep. 832 (1795)); *Mitchell v. Mitchell*, 59 F.2d 62, 66 (1st Cir. 1932), ("The decree of the District Court is reversed, and the order or decree of the referee is affirmed . . . ").

Critically, these practices did not "create" jurisdiction "by consent" where it did not otherwise exist. In all instances, the referring courts possessed subject matter jurisdiction over the relevant controversy and likewise possessed the necessary reference authority (either as a matter of tradition, statute, or rule). These practices demonstrate that, with the consent of the parties, courts *with* jurisdiction could legitimately exercise their reference authority to refer matters to be heard and finally determined by inferior adjudicators.

### B. Modern Precedents Continue the Court's Approval of Consensual Adjudication Regimes in the Context of Magistrate Judges.

Modern cases continue this tradition of approving consensual resolution of private-rights disputes within Article III-controlled regimes. In 2003, the Court decided *Roell*, which involved implied consent to final judgments by federal magistrate judges under 28 U.S.C. § 636(c)(1). 538 U.S. at 585–86. Section 636(c)(1)'s grant of authority to magistrate judges is even broader

than section 157(c)(2)'s grant of authority to bankruptcy judges to enter judgment in non-core proceedings "related to" bankruptcy upon party consent: section 636(c)(1) allows consensual magistrate final judgments in all civil proceedings and even misdemeanor criminal trials. *Compare* 28 U.S.C. § 636(c)(1) *with* 28 U.S.C. § 157(c)(1). Rejecting the argument that express consent was a precondition to such consensual adjudicative power, the Court affirmed that implied consent of the parties sufficed. *Roell*, 538 U.S. at 582, 586–87 (holding that the statute's textual reference to mere "consent" trumped Federal Rule of Civil Procedure 73(b)'s reference to an express execution and filing of "a joint form of consent").

Although the dissent disapproved of implied consent, preferring for prudential reasons the bright-line rule of express consent to escape what it feared would be a litigation-inducing standard, *id.* at 596 (Thomas, J., dissenting), the dissent still recognized the Article III permissibility of party consent to magistrate court disposition by final judgment: "Reading § 636(c)(1) to require express consent . . . *ensures that the parties knowingly and voluntarily waive their right to an Article III judge*." *Id.* at 595 (emphasis added).

EBIA attempts to distinguish *Roell* by arguing that it was decided on statutory grounds alone and thus has no relevance to Article III

issues. Pet'r's Br. 32 n.4. But EBIA's reading is too wooden. Article III concerns were keenly present in *Roell*, as the preceding quotation makes clear and the Court's repeated citations to *Schor* confirm. *Roell*, 538 U.S. at 588–90; *id.* at 595 (Thomas, J., dissenting). Indeed, *Roell*'s holding would make little sense if Article III structurally prohibited litigant consent to magistrate judge adjudications. EBIA's reading also would not accord with the Court's practice of allowing complaints of such errors to be forfeited. *Plaut v. Spendthrift Farm., Inc.*, 514 U.S. 211, 231 (1995) ("[T]he proposition that legal defenses based upon doctrines central to the courts' structural independence can never be waived simply does not accord with our cases."); *see also Nguyen v. United States*, 539 U.S. 69, 88–89 (2003) (Rehnquist, C.J., dissenting) (reaching constitutional argument unconsidered by majority and deciding that structural-error argument regarding non-Article III judge on appellate panel was forfeited and unsaved by plain-error review).

The more plausible characterization of *Roell* is that there was no need to address any Article III concerns because the Court had already settled the matter in a previous case. In upholding consensual magistrate judge authority to conduct felony *voir dire*, the Court in *Peretz* unambiguously held: "There is no Article III problem when a district court judge permits a magistrate to conduct *voir dire* in accordance

with the defendant's consent." *Peretz*, 501 U.S. at 932. The Court explained that "with the parties' consent, a district judge may delegate to a magistrate supervision of entire civil and misdemeanor trials. These duties are comparable in responsibility and importance to presiding over *voir dire* at a felony trial." *Id.* at 933.

Moreover, the Court's implicit recognition of the constitutional propriety of consensual magistrate judge adjudication is unsurprising given that every court of appeals has come to the same result when called upon to address the constitutional issue explicitly.[3] The fact that the consensual bankruptcy court regime mirrors this

---

[3] *See Sinclair v. Wainwright*, 814 F.2d 1516, 1519 (11th Cir. 1987); *Bell & Beckwith v. United States*, 766 F.2d 910, 912 (6th Cir. 1985); *Gairola v. Virginia Dep't of Gen. Servs.*, 753 F.2d 1281, 1285 (4th Cir. 1985); *D.L. Auld Co. v. Groma Graphics Co.*, 753 F.2d 1029, 1032 (Fed. Cir. 1985); *United States v. Dobey*, 751 F.2d 1140, 1143 (10th Cir. 1985); *Fields v. Washington Metro. Area Transit Auth.*, 743 F.2d 890, 893 (D.C. Cir. 1984); *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1045 (7th Cir. 1984); *Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil & Refining Corp.*, 739 F.2d 1313, 1316 (8th Cir. 1984); *Puryear v. Ede's Ltd.*, 731 F.2d 1153, 1154 (5th Cir. 1984); *Goldstein v. Kelleher*, 728 F.2d 32, 36 (1st Cir. 1984); *Collins v. Foreman*, 729 F.2d 108, 115–16 (2d Cir. 1984); *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 540 (9th Cir. 1984) (en banc) (Kennedy, J.); *Wharton-Thomas v. United States*, 721 F.2d 922, 929–30 (3rd Cir. 1983).

magistrate system led Chief Judge Easterbrook just recently to question the decision in *Wellness Int'l Network v. Sharif*, 727 F.3d 751 (7th Cir. 2013), relied upon by EBIA to prohibit bankruptcy court consensual judgments. In *Peterson v. Somers Dublin Ltd.*, 729 F. 3d 741 (7th Cir. 2013), Judge Easterbrook pointed out that *Wellness* neglected to address the Seventh Circuit's prior decision in *Geras* upholding the magistrates' similar authority against Article III challenge. *See id.* at 746–47 (noting certiorari grant in this case in questioning *Wellness*).

In sum, the magistrate judge cases confirm the Court's ongoing approval, recognized by the lower courts, of consensual magistrate judge adjudication of private rights.

### C. *Stern* Itself Cements this Court's Approval of the Historical Practice of Consensual Adjudicatory Regimes.

Most recently, and in alignment with the longstanding Court tradition of approving consensual adjudicatory regimes within Article III, the Court in *Stern* cited the bankruptcy judge consensual adjudication provision without objection:

> Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court.

> See §§ 157(b)(1), (c)(1). That allocation does not implicate questions of subject matter jurisdiction. See § 157(c)(2) (*parties may consent to entry of final judgment by bankruptcy judge in non-core case*).

131 S. Ct. at 2607 (emphasis added); *see also id.* at 2606 ("Vickie argues [that] a party may waive or forfeit any objections under § 157(b)(5), in the same way [that] a party can waive or forfeit an objection to the bankruptcy court finally resolving a non-core claim.") (citations omitted, including explicit quotation of § 157(c)(2)). As the Court further explained, the unobjectionable nature of consensual private-rights resolution by bankruptcy courts was equally accepted by *Stern*'s dissenters:

> The dissent reads our cases differently, and in particular contends that more recent cases view *Northern Pipeline* as establishing only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review. Just so: Substitute "tort" for "contract," and that statement directly covers this case.

*Id.* at 2615 (emphasis added) (citations, internal quotation marks, and alterations omitted).

EBIA's suggestion that *Stern* casts doubt on the historical practice is puzzling. *See MacDonald*, 286 U.S. at 267 (upholding consensual adjudication of plenary proceedings before referees). It seems to rest on an assumption that because some of the Court's references to the bankruptcy court consensual adjudication statute were in *Stern*'s statutory discussion, not the constitutional discussion, the Court was carelessly citing a law that violated Article III. Pet'r's Br. at 35 n.5. The suggestion that the Court was not attuned to Article III issues in *Stern* is implausible.

The historical precedents, modern magistrate cases, and even *Stern* itself confirm the Court's unwavering trajectory: consensual private-rights adjudicatory regimes that arise wholly within Article III and allow the judiciary and the parties the joint discretion to use or ignore them at their pleasure fully comport with the Constitution.

### D. The Fatal Flaw in Unconstitutional Private-Rights Adjudicatory Regimes Has Always Been the Absence of Party Consent.

In *Stern* and other precedents, the Court has consistently identified the lack of party consent

as a critical defect in non-Article III regimes. For example, in *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568 (1985), the Court stated that its decision in *Northern Pipeline* "establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review." *Id.* at 584 (emphasis added); *accord Stern*, 131 S. Ct. at 2614–15. And *Stern*'s consent ruling synthesized prior precedent that could have been read to create an overly broad understanding of *ipso facto* counterclaim consent merely by filing a claim in bankruptcy.

*Ipso facto* consent to summary adjudication of otherwise plenary claims simply by virtue of filing as a creditor was colloquially known as "jurisdiction by ambush" under the 1898 Act. *See, e.g.*, *In re Bokum Res. Corp.*, 49 B.R. 854, 863 (Bankr. D.N.M. 1985) ("This . . . result[s] in a return to the much-maligned jurisdiction by ambush which prevailed prior to 1978."). *Stern* ended this practice. In *Stern*, the respondent, Vickie, argued that the petitioner, Pierce, consented to counterclaim adjudication simply by filing his claim, citing *Langenkamp v. Culp*, 498 U.S. 42, 45 (1990) and *Katchen*, 382 U.S. at 475–76 for the proposition that mere filing of a claim constitutes meaningful consent. *Stern*, 131 S. Ct. at 2616.

*Stern*'s rejection of Vickie's position turned on the true meaning of consent. The Court found her implication of consent unwarranted, because all Pierce could truly be said to have consented to was adjudication of his claim and those counterclaims that would necessarily be resolved in processing his consented claim. *Id.* at 2614. The Court solved the *Langenkamp* tension by clarifying that a consensually filed claim only supports implied consent to necessarily intertwined counterclaims. *Id.* at 2617 (citing *Langenkamp*, 498 U.S. at 44–45). In sum, only true consent, which the Court found absent in *Stern*, will suffice.

Indeed, consent is so critical in the Article III analysis that the differing outcomes in *Gomez*, and *Peretz* turned on its presence and absence in otherwise identical circumstances. In *Gomez*, the Court invoked the canon of constitutional avoidance in interpreting the Magistrates Act to forbid magistrate judges from conducting *voir dire* in felony cases without the parties' consent. *Gomez*, 490 U.S. at 864. But consent "significantly change[d] the constitutional analysis" in *Peretz* and led the Court to conclude that "[t]here is no constitutional infirmity in the delegation of felony jury trial selection to a magistrate when the litigants consent." *Peretz* 501 U.S. at 932, 936; *see also Gomez*, 490 U.S. at 870 ("A critical limitation on this expanded jurisdiction [of magistrate final judgment power] is consent."); *Schor*, 478 U.S. at 849 ("[T]he

relevance of concepts of waiver to Article III challenges is demonstrated by our decision in *Northern Pipeline*, in which the absence of consent . . . was relied on as a significant factor in determining Article III forbade such adjudication."); *see also* Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 303 (1990) ("[C]onsent provides, if not complete, at least very considerable reason to doubt that the tribunal poses a serious threat to the ideal of federal adjudicatory independence."); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 991 (1988) ("As long as the waiver is not procured by any form of illegitimate pressure, waiver ought to be held permissible . . . .").

Unsurprisingly, every relevant case in which the Court has found constitutional transgression under Article III has involved an objecting defendant forced to litigate its private rights involuntarily before a non-Article III judge. *See Northern Pipeline*, 458 U.S. at 56 (plurality opinion); *id.* at 90 (Rehnquist, J., concurring in the judgment); *Stern*, 131 S. Ct. at 2614; *Granfinanciera*, 492 U.S. at 37. In contrast, consensual regimes have been upheld. *Schor*, 478 U.S. at 849; *Langenkamp*, 498 U.S. 42. And even some involuntary regimes have been upheld, either under the permissibility of the non-Article III adjudication of public rights, *Murray's Lessee v. Hoboken Land &*

*Improvement Co.*, 59 U.S. (18 How.) 272, 283–84 (1855), an administrative agency adjunct test, *Crowell v. Benson*, 285 U.S. 22, 56–61 (1932),[4] or a combination of both, *Union Carbide*, 473 U.S. 568, 593–94 (mandatory arbitration regime). The authority of a district court to refer private-rights controversies to be finally adjudicated by a bankruptcy judge with the parties' consent is thus fully consistent with this Court's precedents.

### E. *Schor's* Reference to Unwaivable "Structural" Article III Rights Is Inapposite to this Case.

EBIA repeatedly invokes the Court's discussion in *Schor* concerning the structural, unwaiveable aspects of Article III, *see* Pet'r's Br. 25–26, but EBIA misreads *Schor* and misunderstands the separation of powers doctrine. Unwaiveable, "structural" Article III concerns do not arise in this case.

---

[4] In *Stern*, the Court resisted a suggestion that the power of circuit court judges to appoint bankruptcy judges likened bankruptcy courts to administrative adjuncts. *Stern*, 131 S. Ct. at 2618–19. The Court did not address the more important issue, discussed below, of the complete control district court judges have over bankruptcy judges to use or ignore them at their pleasure.

### 1. *Schor's* "Structural Test" for Separation of Powers Concerns Applies Only to Inter-Branch Encroachment.

Because the adjudication of private rights within the federal system is typically and principally a matter between the parties whose rights are being adjudicated, the Court in *Schor* recognized that Article III's protections are "primarily" personal, and hence waivable: "[Our Article III jurisprudence indicates] that this guarantee serves to protect primarily personal, rather than structural interests. . . . Article III, § 1[] was designed as a protection for the parties from the risk of legislative or executive pressure on judicial decision." *Schor*, 478 U.S. at 848. Additionally, however, the Court qualified that in some—but not all—cases, Article III concerns can rise to structural levels beyond the parties' ability to waive:

> Article III, § 1 . . . [bars] congressional attempts to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts, and thereby preventing the encroachment or aggrandizement of one branch at the expense of the other. *To the extent this structural principle is implicated in a given case*, the parties cannot by consent cure the constitutional difficulty . . . .

*Id.* at 850 (emphasis added) (citations and internal quotation marks omitted).

This case is not one in which the structural concern is implicated. Congress has not undertaken to "emasculate" constitutional courts—far from it. Bankruptcy judges perform their functions entirely within the confines of the judicial branch; they hear bankruptcy cases at the pleasure of Article III judges, who closely supervise their work and review all questions of fact and law. By contrast, the subset of cases implicating structural separation of powers concerns comprises those involving the "encroachment or aggrandizement of one branch at the expense of the other[s]." *Id.* This interpretation tracks *Schor*'s analysis, in which every source cited references encroachment or aggrandizement between the branches. Indeed, even oft-quoted Federalist 78, from which EBIA quotes a snippet, Pet'r's Br. 21-22, explains in full context that its concern over periodical appointments stems from inter-branch encroachment:

> If the power of making [periodical appointments] was committed either to the Executive or the Legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the People, or to persons

> chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

The Federalist No. 78, at 546 (Alexander Hamilton) (H. Dawson ed. 1876); *see also United States ex rel Toth v. Quarles*, 350 U.S. 11, 16 (1955) ("The provisions of Article III were designed to give judges maximum freedom from the possible coercion or influence by the executive or legislative branches of the Government.").

Neither modern Court precedents nor historical sources indicate that any Article III separation-of-powers encroachment concern would arise when Article III judges may at their election refer matters to consensual adjudication before a bankruptcy judge. To the contrary, the concern is with inter-branch interference with the judicial power.[5] As the Court explained in *Peretz*:

> Even assuming that a litigant may not waive structural protections provided by

---

[5] EBIA seizes on *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), as an example of what it contends is an intra-branch separation-of-powers problem. Pet'r's Br. 19. It is mistaken. *Marbury* involves the original subject matter jurisdiction of this Court under the Constitution, a topic that has nothing to do with this appeal.

> Article III, see *Schor*, we are convinced that no such structural protections are implicated by the [consensual magistrate] procedure followed in this case. Magistrates are appointed and subject to removal by Article III judges. *The 'ultimate decision' whether to invoke the magistrates' assistance is made by the district court, subject to veto by the parties.* . . . [T]here is no danger that use of the magistrate involves a 'congressional attempt to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts.

*Peretz*, 501 U.S. at 937 (emphasis added) (citations omitted); *see also Gonzalez v. United States*, 553 U.S. 242, 254 (2008) (Scalia, J., concurring in the judgment) (agreeing that Constitution creates no obstacle to waiver of right to Article III judge).[6] Wholly intra-Article III regimes thus do not even implicate *Schor*'s encroachment concerns. Consequently, this case

---

[6] EBIA references the impermissibility of *political* branch waiver of structural constraints, Pet'r's Br. at 17 (citing *INS v. Chadha*, 462 U.S. 919 (1983)), an inapposite concept. The President cannot "waive" the Presentment Clause on behalf of every citizen in the country without each citizen's consent; nor could he "waive" that Clause in a way that could ever bind a future President. Private parties, by contrast, can bind themselves by waivers in the adjudication of their private rights.

does not turn on whether Congress gave too much power to bankruptcy courts (although it might raise questions whether the district courts delegate too much power to bankruptcy courts).

### 2. The Consensual Bankruptcy Court Adjudication Regime Within Article III Evinces No Impermissible Delegation of Judicial Authority.

The fact that consensual adjudicative schemes, like the bankruptcy and magistrate judge ones, do not exhibit inter-branch encroachment does not necessarily end all structural inquiry. *See Peretz*, 501 U.S. at 956 (Scalia, J., dissenting) ("[T]he Constitution guarantees . . . that none of the branches will *itself* alienate its assigned powers. Otherwise, the doctrine of unconstitutional delegation . . . is a dead letter."); *Gonzalez*, 553 U.S. at 265–66 (Thomas, J., dissenting) (same); *Pacemaker*, 725 F.2d at 544 (Kennedy, J.) (disaggregating from encroachment concern the additional problem of "the erosion of the central powers of the judiciary by permitting it to delegate its own authority").

In this regard, the nondelegation doctrine, if applied to the judiciary, may well prohibit the complete abdication or self-inflicted diminishment of the judiciary's core constitutional role. *Cf. A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935)

("The Congress is not permitted to abdicate or to transfer to others the essential legislative function[] . . . ."). But the nondelegation doctrine has never required the complete stagnation and insularity of all decision-making functions. For example, Congress may delegate decision-making authority to an administrative agency, so long as Congress provides an "intelligible principle" restraining the agency's discretion. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

Applying this doctrine to the judicial power would involve considering whether the judiciary retained sufficient control and accountability over the delegated actors. There can be no question that Article III judges maintain robust involvement in bankruptcy, with appellate review of all questions of law and fact, and the overarching power to cancel the reference at any time—a power commonly invoked in bankruptcy, *see, e.g.*, Order Regarding Referral of Title 11 Proceedings to the United States Bankruptcy Judges for This District (Jan. 23, 1997*, reprinted in* Bankruptcy Court Decisions News and Comment, Feb. 4, 1997), at A1, A8 (suspending all referrals to bankruptcy courts in the District of Delaware for four years following controversy involving case assignments).

More importantly, it is doubtful whether vindication of party consent to bankruptcy court adjudication even invokes the concerns of

transparency and accountability animating the nondelegation doctrine. Permitting final adjudication in bankruptcy court upon request of the parties is not judicial shirking of difficult questions; it is respecting the autonomy of the parties and is no more a constitutional abdication than confirming an arbitration award, dismissing a case upon a consensual settlement agreement, or even allowing a clerk of court to enter a default judgment. *See Schor*, 478 U.S. at 855; Fed R. Civ. P. 55(b)(1); *see also Heckers*, 69 U.S. at 132–33 (holding that the delegation of a case to a referee without party consent would be an impermissible abdication, but upholding the same delegation with consent).

Viewed in this light, consensual adjudication regimes within Article III do not impermissibly delegate the judicial power. As then-Judge Kennedy recognized, "[f]rom a realistic and practical perspective, reference of civil cases to magistrates with the consent of the parties, subject to careful supervision by Article III judges, may serve to strengthen an independent judiciary, not undermine it." *Pacemaker*, 725 F.2d at 546.

### 3. Consensual Adjudication Regimes Within Article III Otherwise Satisfy *Schor*.

Even if the Court were to apply *Schor*'s balancing test to structural concerns arising

wholly within the judicial branch, consensual bankruptcy adjudication would pass muster. To begin with, a key consideration weighing heavily in favor of its legitimacy is its consensual nature.[7] As the Court explained in *Schor*:

> [T]he decision to invoke [CFTC adjudication] is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected. In such circumstances, separation of powers concerns are diminished, for it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences.

*Schor*, 478 U.S. at 855.

In this case, there is no serious argument that EBIA did not consent to proceeding in bankruptcy court on summary judgment.

---

[7] Consent, while critically important when this analysis is triggered, cannot be the dispositive factor, or the structural analysis would become redundant; thus, "notions of consent and waiver cannot be dispositive." *Schor*, 478 U.S. at 851.

Instead, EBIA emphasizes that its consent was not required as a statutory precondition to bankruptcy court resolution of a core proceeding. Pet'r's Br. at 32. But EBIA's answer revealed its belief that the fraudulent conveyance action was non-core, making its position irrelevant. J.A. 80. The consent so crucial to *Schor*'s consideration of structural issues was unquestionably present here.

In addition to consent, *Schor* counsels examining the degree to which the non-Article III forum exercises Article III judicial power, the origin and importance of the right to be adjudicated, the concerns that drove Congress to depart from Article III, and the "degree of judicial control saved to the federal courts." *Schor*, 478 U.S. at 852–55. While conceding that bankruptcy and magistrate judges exercise more judicial power than the CFTC, Arkison submits that the centuries-old practice of bankruptcy adjudication driven by the need for an "inexpensive and expeditious alternative to existing fora," *id.* at 836, justifies the consensual adjudication of bankruptcy-related private rights under *Schor's* flexible and pragmatic test. Finally, on the critical factor of ongoing control and supervision by Article III judges, the bankruptcy judges remain clearly subordinate and subject to the control and supervision of Article III courts, which have the power to decline references ex ante and withdraw them ex post.

### F. EBIA's Broad Arguments Undermine the Court's Careful Insistence That *Stern*'s Holding Was Narrow.

Perhaps the most remarkable argument EBIA appears to advance is its claim that *Stern*'s scope was so broad-sweeping that it now precludes bankruptcy judges from entering judgment on virtually anything, Pet'r's Br. 20–24, including even the traditional adjustment of creditor claims that the Court has repeatedly invoked hypothetically as the quintessential permissible use of specialized bankruptcy courts. *E.g.*, *Northern Pipeline*, 458 U.S. at 71 (plurality opinion) ("[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power . . . may well be a 'public right,' . . . ."); *see also Union Carbide*, 473 U.S. at 599 (Brennan, J., concurring in the judgment) ("Properly understood, the [public rights analysis of the *Northern Pipeline* plurality] does not place the Federal Government in an Art. III straitjacket whenever a dispute technically is one between private parties. We recognized that a bankruptcy adjudication, though technically a dispute among private parties, may well be properly characterized as a matter of public rights."). In addition to upending centuries of bankruptcy practice and invalidating the entire magistrate judge system, EBIA's position rests upon a flawed assumption that *Stern* was

intended to destabilize the very foundation of the bankruptcy system.

EBIA is not unique in its misreading. A few lower courts have now over-read *Stern* as an unraveling of the entire magistrate and bankruptcy judge systems, refusing to take the Court at its word that the opinion was modest. *See, e.g.*, *Frazin v. Haynes & Boone* (*In re Frazin)*, 732 F.3d 313, 2013 WL 5495920, at *3 (5th Cir. 2013) ("Although the Court [in *Stern*] stated that its decision was 'narrow,' its reasoning was sweeping.") (citation omitted); *cf. In re Ambac Fin. Grp.*, 457 B.R. 299, 308 (S.D.N.Y. 2011) ("Unfortunately, *Stern* . . . has become the mantra of every litigant who, for strategic or tactical reasons, would rather litigate somewhere other than the bankruptcy court.").

EBIA and these stray lower courts distort *Stern*. Since the nineteenth century, the bankruptcy system has divided matters into proceedings that bankruptcy judges may finally adjudicate and those that they may not (absent the consent of the parties). While the relevant line between these types of proceedings has been labeled in different ways, one constant persists: certain matters are central—"core"—to the bankruptcy power, such as the expeditious resolution of claims against the bankruptcy res. Adjudication of those matters by bankruptcy judges or their precursors, with or without party

consent, has never been held to violate Article III.

Although the Article III permissibility of bankruptcy court authority over claims administration is not at issue in this appeal, EBIA's arguments might be read to call it into question, and Arkison therefore responds in an abundance of caution. *Cf. Stern*, 131 S. Ct. at 2614 n.7 (noting neither party asked the Court to decide whether bankruptcy claims administration and discharge is a public right).

When Congress's 1978 abandonment of the summary/plenary distinction was struck down in *Northern Pipeline*, Congress returned to a bifurcated system that essentially preserves the historical dichotomy of bankruptcy proceedings in a scheme of specialized bankruptcy adjudicators. *Stern* holds no more than that Congress got the line slightly wrong. *Stern* never called into question Congress's power to maintain the historical practice of bankruptcy administration before non-Article III judges. *Stern*'s holding should thus be read for nothing more than the "narrow" opinion it purports to be, *Stern*, 131 S. Ct. at 2620; EBIA's suggestion that it calls into doubt the entire system of bankruptcy judges is unwarranted.

It is true that the Court has never officially sanctioned the bifurcated system and concomitant vesting of full adjudicative

authority in bankruptcy courts over truly "core" claims. *See, e.g.*, *Stern*, 131 S. Ct. at 2610–11, 2614 n.7. But it is worth commenting that the Court's hesitation to recognize and endorse the historical practice seems to rest upon a mistaken foundation from a footnote in *Granfinanciera*, where the Court appeared to back away from its earlier suggestions that *in rem* resolution of bankruptcy claims and discharge entitlement is likely a public right adjudicable by a non-Article III judge. 492 U.S. at 56 n.11. Concerned that this position had met with "substantial scholarly criticism," the Court clarified that it had never squarely so held, either before or after 1978. *Id.*

The Court's concerns over scholarly criticism were actually unwarranted. This purported "criticism" consisted of only three articles. The first was a law-and-economics piece arguing that bankruptcy laws should be about the procedural negotiation of state-law property and contract rights and thus not have any federal, public-rights component whatsoever. *See* Douglas G. Baird, *Bankruptcy Procedure and State-Created Rights: The Lessons of Gibbons and Marathon*, 1982 SUP. CT. REV. 25 (1982). The second (devoid of historical analysis) was a commentary on the already-discredited 1978 bankruptcy court system and was written before the 1984 amendments re-bifurcated bankruptcy proceedings. *See* David P. Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441 (1983). And the final

article expressly states, in a single footnote in an otherwise lengthy study of jury trials, that it does not address the constitutional issue left open by *Northern Pipeline*. *See* S. Elizabeth Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 MINN. L. REV. 967, 1040 n.345 (citing *Arnold Print Works v. Apkin*, 815 F.2d 165, 169 (1st Cir. 1987) (Breyer, J.) as illustrative of courts' assumptions that the public rights doctrine renders the core bankruptcy functions permissible). While the Court's caution was understandable, it was probably overstatement to consider these works "substantial criticism," especially in light of the overwhelming evidence of longstanding (and legitimate) acceptance of bankruptcy procedures and practices.

On the contrary, *every* lower court to decide the issue has held that the truly core functions of bankruptcy law (not the type of private-rights dispute at issue in *Stern*) are permissible matters for non-Article III adjudication under the public rights doctrine propounded by *Martin's Lessee* and its successors up through *Stern*. *See, e.g.*, *Carpenters Pension Trust Fund for N. Cal. v. Moxley*, 2013 WL 4417594, *4 (9th Cir. Aug. 20, 2013); *CoreStates Bank, N.A. v. Huls Am., Inc.*, 176 F.3d 187, 196 n.11 (3d Cir. 1999); *Kirschner v. Agoglia*, 476 B.R. 75, 79 (S.D.N.Y. 2012). Those decisions are in accord with scholars whose historical research has

consistently noted the routine final adjudication of bankruptcy cases by judicial officers since the English bankruptcy commissioners. *See, e.g.*, Plank, *supra*, at 573, 575–80, 590–96, 600–10 (1996); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 719–22 (2004) (suggesting commissioners, like sui generis ecclesiastical courts, arose neither in law, equity, nor admiralty and thus may not have even exercised "judicial power" as the framers understood it); 2 WILLIAM BLACKSTONE, COMMENTARIES *471–88; Tabb, *History of the Bankruptcy Laws*, *supra*, at 7–12; McCoid, *supra*, at 28–33, 37. Should the Court be inclined to take up EBIA's provocative arguments, it should not only reject them but confirm that the practices in place since the ratification of the Constitution comport with Article III, whether under its ongoing interpretation of the pragmatic and flexible public rights doctrine or in recognition of the historical tradition.[8]

---

[8] As Justice Scalia fairly observes, if historical practice is the basis for Article III exceptionalism in permitting private-rights adjudications outside Article III by courts-martial and territorial courts, then there is no reason why the list of exceptions in *Northern Pipeline* is or should be exhaustive. *Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring)). For example, no justification readily presents itself why the military regulation power should provide any surer a bypass of Article III for private-rights

## II. Constitutionally Permissible Consent May Be Implied.

As discussed above, this Court held in *Roell* that consent simpliciter suffices to permit magistrate judge adjudication and may be implied. *Roell*, 538 U.S. at 590. *Compare also* § 157(c)(2) (requiring only consent) *with* § 157(e) (requiring express consent). EBIA offers no argument to overrule *Roell*, and members of the Court who found themselves in dissent in *Roell* have followed the decision as stare decisis. *See Gonzalez*, 553 U.S. at 251–52 (2008) (citing *Roell*'s rule of implied consent in rejecting Article III challenge to magistrate judge authority).

EBIA tries to distinguish section 636's magistrate provisions from section 157 by noting that Congress requires more specific protections of consent under the former. Pet'r's Br. 33–36. But the bankruptcy consent scheme provides the same protections by rule as section 636(c)(2) provides by statute. Like section 636(c), Rule 7012 ensures that consent is knowing and voluntary. Rule 7012 requires responsive pleadings to "include a statement that the party does or does not consent to entry of final orders or judgments by a bankruptcy judge." Fed. R. Bankr. P. 7012. Thus, there is no meaningful

---

adjudication than the bankruptcy power, which the Court has held to have its own exceptional constitutional provenance. *Cent. Va. Cmty. Coll.*, 546 U.S. at 370.

difference between magistrate and bankruptcy judge consent. And, as *Roell* confirms, violation of a rule designed to protect consent cannot be used to lay a foundation to evade an adjudicatory outcome the defendant does not like.[9]

To the extent the statute and only the statute were to be relevant for some reason, the presence of any arguably more specific protections in the Magistrate Act than in the bankruptcy statutes would be a product of the statutes' respective historical contexts. The magistrate provisions were enacted against an explicit congressional backdrop of fear of "coerced" consent into magistrate courtrooms. *Roell*, 538 U.S. at 589 ("It was thus concern about the possibility of coercive referrals that prompted Congress to make it clear that the voluntary consent of the parties is required before a civil action may be referred to a magistrate for a final decision.") (internal quotation marks omitted). But coercion was never cited by anyone as a concern in bankruptcy. *See* 130 Cong. Rec. 6045 (1984)

---

[9] Some might call this "implied consent;" some might say "waiver" or "forfeiture." *See Sheridan v. Michels (In re Sheridan)*, 362 F.3d 96, 113–14 n.20 (1st Cir. 2004) (Lynch, J., dissenting) (noting difference in terminology and lack of relevant distinction in the bankruptcy context); *cf. Peterson v. Somers Dublin*, 729 F.3d at 746–47, (Easterbrook, C.J.) (suggesting distinction between waiver and forfeiture could plausibly have relevance in this specific context).

(remarks of Rep. Kastenmeier) (discussing consent without reference to risk of coercion). This is not surprising: bankruptcy proceedings are largely populated by repeat-player trustees (the debtors themselves are rarely involved in litigation of non-core matters). In addition, creditors, too, are often repeat-player financial institutions, in contrast to the pro se parties who might find themselves before a magistrate (as in *Roell*, 538 U.S. at 597 (Thomas, J., dissenting)).

More importantly, the wide swath of adjudicatory authority conferred on magistrate judges dwarfs the more narrow sphere in which bankruptcy judges operate. Bankruptcy judges may only finally decide private-rights controversies "related to" a debtor's bankruptcy proceeding, 28 U.S.C. § 1334(b), and even then only upon the parties' consent, *id.* at § 157(c). Magistrate judges, by contrast, can with consent decide "any or all proceedings in a jury or nonjury civil matter . . . ." *Id.* at § 636(c)(1). They may additionally decide criminal misdemeanor matters. 18 U.S.C. § 3401(a). Magistrates' presence in the more constitutionally protected criminal sphere renders understandable any heightened consent protections Congress may have required.

## III. Implied Consent on the Facts of this Case Was Properly Found by the Courts Below, But The Court Need Not And Should Not Decide that Question.

Despite EBIA's protestations that it was railroaded into consenting by binding precedent, Pet'r's Br. II.B, it could, and did, fully consent to the resolution of its summary judgment motion by the bankruptcy judge. But more importantly, because EBIA received the full Article III review it desired, the Court need not wade into that fact-specific quagmire.

### A. The Court Need Not and Should Not Decide Whether and When, on the Facts of this Case, EBIA Consented.

The unique procedural posture of this case renders factual analysis of EBIA's consent unnecessary. This bypass opportunity is important, because there are compelling prudential reasons why the Court should not resolve the question.

The posture of this case—a de novo district court entry of judgment on a summary judgment motion—renders constitutionally irrelevant what happened in the bankruptcy court prior to that point. Nobody contends that an Article III district judge was unable to enter a fraudulent

conveyance judgment against EBIA. Chief Judge Pechman could have withdrawn the reference and heard the summary judgment motion herself. And that is effectively what she did when, on January 21, 2011, she conducted a de novo review that accorded the bankruptcy court no deference. As such, EBIA got full Article III consideration. Indeed, if this Court for any reason were to vacate and remand for further proceedings, presumably Chief Judge Pechman would be within her rights to re-enter the same order.

Examples of this procedural quirk are hard to find, but once again the magistrate judge system provides an analogous field. In *Estate of Conners v. O'Conner*, 6 F.3d 656, 659 (9th Cir. 1993), the magistrate judge did not have authority to enter a postjudgment order of attorney's fees. The district court, however, caught the error and subjected the flawed order to de novo review, recasting it as proposed findings of fact and conclusions of law. Approving this outcome and the functional mootness of the appellant's complaint, the Court of Appeals summarized: "[The] error . . . was cured by the district court's later de novo review of the magistrate's findings and conclusions, and the court's entry of its own

order awarding attorney's fees and costs." *Id.*[10] The same analysis applies here.

The only way EBIA could have suffered cognizable injury would be if the bankruptcy court's judgment was accorded preclusive effect, as was the case in *Stern*, or if the district court had given the bankruptcy court decision deference on appeal. Neither occurred. EBIA tries to recast Chief Judge Pechman's review as one based on an evaluation of "substantial evidence" rather than de novo. Pet'r's Br. 9. This is false. Indeed, the district court was explicit about its standard of review. Pet. App. 45a ("The Court reviews the Bankruptcy Court's order de novo.").[11]

Moreover, not only did the district court state expressly its standard of review, its detailed opinion reveals a thorough and searching

---

[10] Similar mootness arguments can be made regarding the alter-ego claim, which is not even a matter of private right but of federal bankruptcy law arising directly under the Bankruptcy Code's definition of "debtor" under 11 U.S.C. § 101(13) of Title 11. Affirmance of this claim renders moot any error on the fraudulent conveyance claim.

[11] The court offhandedly stated at one point that "[t]here is substantial evidence supporting" one of the bankruptcy court's conclusions, Pet. App. 50a, but this observation does not contradict the court's express declaration that it was conducting a de novo review, see *id.* at 45a.

inquiry. *Id.* at 41a–52a. It found EBIA's arguments utterly meritless, holding that EBIA "failed to raise *any* dispute of fact that might preclude the entry of [summary] judgment." *Id.* at 46a (emphasis added). The court further held that, in contrast to Arkison's considerable evidence (including the debtor's own accounting records showing transfers out to EBIA), the only evidence EBIA submitted was a "self-serving" declaration sheepishly proclaiming either ignorance of the transfers or at best a "clerical error." *Id.* at 47a–49a. Similarly, in the face of overwhelming evidence of actual fraud (including wholesale transfers of the debtor's assets within three days of an adverse arbitration ruling), the district court ultimately concluded there was no "plausible basis for reversal." *Id.* at 51a. As Chief Judge Pechman explained:

> [EBIA] has done nothing to point out where in the record contradictory facts exist. It attempts to argue that EBIA received nothing from [the debtor] and that it was an entirely different business. This is supported only by Defendant Paleveda's self-serving declaration, which, as explained above, fails to raise a genuine issue of material fact.

*Id.* at 49a.

In sum, EBIA got all the Article III consideration it could have hoped for if the

matter had been litigated wholly and exclusively in the Article III district court. Further proceedings on the unique procedural posture of this case would be undeserved, fruitless, and wasteful.[12] Moreover, there are additional prudential reasons the Court should exercise its power not to decide the consent issue.

First, and most fundamentally, the Court did not grant certiorari on the question. *Exec. Benefits Ins. Agency v. Arkison*, 133 S. Ct. 2880 (June 24, 2013). To be sure, the Court doubtless has latitude in what it decides in any given case, but Arkison respectfully submits that the Court should hew closely to the questions presented.

Second, the issue of how to properly detect implied consent in a bankruptcy case when parties violate Rules 7008 and 7012 (as EBIA did here) is not yet ripe for the Court's consideration. This is an active issue percolating through the lower courts. Some have held that participation before a bankruptcy judge by a represented party is enough to draw an implication of consent; others have required "something else" beyond mere non-objection. *See Sheridan*, 362 F.3d at 103 n.5 (collecting cases); *Hasse v. Rainsden (In re Pringle)*, 495 B.R. 447, 457–62 (B.A.P. 9th Cir. 2013) (proposing rebuttable

[12] This functional mootness point entitles Arkison to prevail even if he loses on every other argument in this appeal.

presumption of consent when represented parties proceed in bankruptcy court and describing the instant case as "sandbagging" that would warrant implication of consent under even the most stringent test); 1 Collier on Bankruptcy, ¶ 3.03[4] (16th ed. 2011) (collecting cases and recommending that "failure to interpose an objection at the pleading stage" be deemed "consent to the final order being entered by the bankruptcy judge"). Unless and until it comes to the Court on a properly filed petition, the Court should stay its hand.

Finally, the question of how best to imply consent to adjudicate a private-rights controversy designated as "core" under section 157(b) (a "Stern claim") in a case filed before *Stern* came down is a limited one not worth the Court's going beyond the certiorari grant. By now, all litigants in newly commenced bankruptcy cases know of *Stern* and invoke *Stern* by name when making their objections. For these reasons, the Court can simply affirm the findings of the courts below without parsing the point at which EBIA consented and designing the best test to be applied in determining that question.

### B. EBIA Unequivocally Consented to Bankruptcy Court Adjudication of the Summary Judgment Motion.

The court below held that EBIA consented to bankruptcy judge resolution of the summary judgment motion by virtue of the JSR in which it participated that asked Judge Jones to defer the motion to withdraw the reference pending further pretrial proceedings, a report which specifically included the possibility of a motion for summary judgment. Pet. App. 29a-30a. EBIA trumpets repeatedly that it did not sign the JSR, Pet'r's Br. 7, 12, 44, which is factually correct but legally irrelevant. Judge Jones told counsel to confer and file a report. Counsel for every party but Paleveda participated in the conference, and thereafter a report was circulated and filed. *See* Pet. App. 73a. The fact that EBIA's counsel never bothered to sign the report—in the absence of any objection whatsoever to its contents, both when it was circulated and again when it was filed—cannot now be used as a sandbag. *See id.* at 28a–30a.

Moreover, ever since the Court's decision in *Northern Pipeline*, litigants have been on notice that, if they are embroiled in a controversy in a bankruptcy court that they believe involves a private right, and they do not want the bankruptcy judge to finally decide the matter, they have a legal right to object and must take action to vindicate their right. And ever since

the Court's decision in *Granfinanciera*, litigants have been on notice that a fraudulent conveyance action involves a private-rights controversy. Given that *Stern* acknowledges and reaffirms the holdings in both cases, EBIA's argument that it did not know that it could withhold consent to bankruptcy court adjudication rings hollow.

EBIA's tactical decision to take its summary judgment chances in bankruptcy court was made in 2010 at the time the Court of Appeals handed down its own opinion in *Stern*, which this Court functionally affirmed on different grounds.[13] The Court of Appeals' *Stern* decision made clear that section 157's inclusion of private rights as core proceedings raised serious constitutional problems under Article III. Indeed, Pierce Marshall himself, the respondent in *Stern*,

---

[13] While the Court of Appeals' *Stern* decision actually came down a few days after (March 19) the parties requested that pretrial proceedings continue in the bankruptcy court (March 15), the JSR lay pending with the district court for ample time after *Stern* to enable amendment before the district court entered its order (March 26). And, of course, *Stern* was under reserve for quite some time before that, and was on remand from this Court from a *Jarndyce-v.-Jarndyce*-aged, high-profile proceeding well known to the entire Ninth Circuit bankruptcy community. Even after the bankruptcy court's summary judgment order, EBIA never revived the reference withdrawal motion, causing it ultimately to be dismissed as abandoned. Pet. App. 60a–61a.

strenuously and repeatedly raised the Article III problems before the Court of Appeals and each of the other lower courts, mindful of the Ninth Circuit's then-precedents and well before this Court decided his case. *Stern*, 131 S. Ct. at 2607–08 (noting that although Pierce was late in objecting to bankruptcy court adjudication *of his defamation claim*, he had repeatedly asserted from the beginning his Article III objections with respect to *Vickie's counterclaim*).

Doubtless, however, the most important tactical consideration on EBIA's mind in making its decision to proceed before the bankruptcy court was the fact that its co-defendant, ARIS, had been recently successful there in resisting summary judgment. But the Court need not speculate on EBIA's motivations now that the motion has been decided and EBIA has lost. A contrary approach would enable sandbagging of the most invidious sort. *See In re Johnson*, 960 F.2d 396, 400 (4th Cir. 1992).

EBIA makes much of the fact that an old Ninth Circuit case predating *Granfinanciera* purportedly negated any Article III claim it might have had as a fraudulent conveyance defendant, Pet'r's Br. 41 (citing *Duck v. Munn (In re Mankin)*, 823 F.2d 1296 (9th Cir. 1987), *overruled by Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency)*, 702 F.3d 553 (9th Cir. 2012)), but the ongoing vitality of that case was at best in doubt after *Granfinanciera* and at

worst already overruled by it. Pet. App. 14a-18a. More importantly, it did not shake EBIA from its pugnacious strategy of insisting that Arkison's fraudulent conveyance claim was non-core. The only basis for such a position (based on the clear statutory definition of a fraudulent conveyance as core, 28 U.S.C. § 157(b)(2)(H)) is that EBIA thought the treatment of a fraudulent conveyance against a non-filing defendant as core would violate Article III. In other words, EBIA was taking a "*Stern* claim" stance by demanding the claim's treatment as non-core. In addition, EBIA was never shy or unaware of its constitutional rights; it stuck to its Seventh Amendment guns, citing *Granfinanciera* in bringing its motion to vacate the trial date before abandoning the reference withdrawal. Pet. App. 79a. Accordingly, the suggestion that shrinking-violet EBIA had no idea it could take the bold constitutional stand on the treatment of fraudulent conveyance actions in bankruptcy court that was later vindicated by *Stern* is impossible to square with the record.

## IV. *Stern* Creates No Insoluble "Gap" in Section 157.

This Court's holding in *Stern* creates what at first appears to be a "gap" in section 157 that in fact closes upon closer scrutiny. The apparent gap arises because the statute focuses on proposed findings of fact and conclusions of law only for *non-core* claims, 28 U.S.C. § 157(c)(1),

but *Stern* claims are statutorily *core*, and core claims do not have an analogously explicit statutory provision for such reports and recommendations. Only one court of appeals has suggested a problem, concluding that bankruptcy courts are powerless to proceed with *Stern* claims in any way at all. *Ortiz v. Aurora Health Care, Inc. (In re Ortiz)*, 665 F.3d 906, 915 (7th Cir. 2011). This approach, however, has been roundly rejected and subjected to withering academic treatment. Brubaker, *supra*, at 143 n.104 (criticizing *Ortiz*'s conclusion as "[i]ll-considered, ill-advised dicta" that should be "simply ignored").

All other lower courts seem to remain unfazed. Because a *Stern* claim by definition is one that is statutorily designated as core but cannot constitutionally be treated as such, it must be treated differently from a constitutionally core matter. And as "core" and "non-core" are exhaustive categories of proceedings in bankruptcy cases, *Stern*, 131 S. Ct. at 2604, almost all courts have done the only logical thing: treat *Stern* claims as though they were non-core, restricting bankruptcy judges in the absence of party consent to proposed findings of fact and conclusions of law. *E.g.*, *Dang v. Bank of Am. N.A.*, 2013 U.S. Dist. LEXIS 54833, at *39–41 (D. Md. Apr. 17, 2013) ("A majority of courts considering this issue in *Stern*'s wake have concluded that a bankruptcy court has the power to submit proposed findings of fact and

conclusions of law on claims for which they cannot issue final judgments."); *Rothroch v. PNC Bank, N.A. (In re Parco Merged Media Corp.)*, 489 B.R. 323, 325–27 (D. Me. 2013) (noting "emerging consensus").

Indeed, this is what the district court did in *Stern*, when it held Vickie's tort counterclaim could not be treated as core and thus recast the bankruptcy court's purported judgment as a report and recommendation. *Stern*, 131 S. Ct. at 2602. This Court recounted that procedural treatment with approval. *Id.* at 2620.

These lower courts have this issue right. But there is an even simpler way to deal with the statutory gap: recognize that it is not really a gap at all.

The starting point is section 157(a), which allows a district court, if inclined, to "provide that any or all cases under title 11 and any or all proceedings . . . arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." 28 U.S.C. § 157(a). This broad power does not specify whether a reference will be for final judgment or for recommendation only. The only restrictions are found later on, under section 157(c). That subsection constrains referred *non-core* proceedings to proposed findings of fact and conclusions of law only, unless the parties consent to entry of judgment. *Id.* at 157(c)(1), (2).

Referred *core* proceedings, by contrast, have no restrictions: "Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings . . . referred under subsection (a) of this section, *and may* enter appropriate orders and judgments, subject to review under section 158 . . . ." *Id.* at § 157(b)(1) (emphasis added).

The text of section 157(b)(1) reveals three things. First, bankruptcy judges may, but not must, enter orders and judgments in core proceedings. *Cf. id.* at § 157(c)(1) (bankruptcy judge "shall" enter proposed findings of fact and conclusions of law in non-core proceedings). Second, when they do enter an order or judgment, that decision is subject to review under section 158, which spells out the appellate procedure for final bankruptcy court orders and judgments. *Id.* at § 158. Third, "hearing and determining" is something other than (and presumably something lesser than) entering an "appropriate order or judgment."

Accordingly, section 157(b)(1) permits a bankruptcy judge to hear and determine *but not* make an order or judgment (unlike section 157(c)(2)), if the referring district court so directs under section 157(a). The logical output of such a proceeding would be a proposed finding of fact and conclusion of law, which, unlike a judgment or order, needs no statutory authorization.

EBIA fights the clear statutory text by saying "may hear and determine" should be read to mean "must determine," and in turn argues that "determine" means issue a final judgment resolving the cause. Pet'r's Br. 48–50. It goes so far with this logic as to contend that there is thus no authority for a *district* court judge to enter a final judgment on a referred core claim. *Id.* at 49. ("Neither Section 157(b) nor Section 158 authorizes the district court to enter judgment as an initial matter in a core proceeding that has been referred to the bankruptcy court."). In addition to lacking textual support for its startling claim, EBIA's interpretation fails by reading section 157(d) right out of the statute. Surely when an Article III judge exercises its superintendent power to withdraw the reference in a core proceeding, it has eminent authority to "enter judgment as an initial matter." To conclude that *Stern* precludes a district judge from entering judgment in such a core proceeding is nonsensical.

The near unanimity of lower courts in surmounting the purported gap makes sense, as a contrary holding would be absurd. It is impossible to concoct a plausible reason why Congress would choose to accord greater adjudicative authority to bankruptcy court judges over *non-core* claims—which are by definition only tangential to the bankruptcy process—than to the more centrally bankruptcy-connected *Stern* claims, such as fraudulent

conveyance actions, which are statutorily *core*. EBIA suggests three concentric classes of bankruptcy matters: (1) those that are statutorily and constitutionally core (at the heart of bankruptcy); (2) *Stern* claims (statutorily core but not constitutionally so); and (3) those that are non-core (the most tangentially related to the bankruptcy case). It then contends the statute should be read as according the following adjudicatory treatment. Class 1: bankruptcy judge may issue final judgments; Class 2: no bankruptcy judge authority for anything at all; Class 3: bankruptcy judge may issue reports and recommendations. This "doughnut reading" with a gap for Class 2 is facially absurd, and EBIA has proposed no non-absurd reason to read the statute in this way.[14]

Finally, EBIA's argument insisting on a wholesale congressional rewrite ignores the severance doctrine. When "confronting a constitutional flaw in a statute, [the Court tries] to limit the solution to the problem, severing any

---

[14] The only court Arkison can find that has taken this route is *Ortiz*, 665 F.3d at 915, followed up by the *Ortiz* author in *Wellness*, 727 F.3d at 776–77. *Wellness* offers no defense of its reading of the statute against the absurdity doctrine and finds itself boxed into the corner of suggesting that Congress may have permitted final adjudication over non-core claims, per section 157(c)(2), but left no authority whatsoever for bankruptcy courts for *Stern* claims. 727 F.3d at 772, 775–77.

problematic portions while leaving the remainder intact." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010) (citation and internal quotation marks omitted). A full statute should be struck down only if Congress expressed legislative intent that the act should fall in its entirety. "Unless it is 'evident' that the answer is no, we must leave the rest of the Act intact." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607, (2012) (citation omitted).

With the 1984 amendments, Congress sought to confer on bankruptcy judges as much authority as possible while respecting the constitutional limits announced by the Court in *Northern Pipeline*. *See, e.g.*, 130 Cong. Rec. H 7492 (daily ed. June 29, 1984) (statement of Rep. Kastenmeier) ("Mr. Speaker, [two] years ago yesterday the Supreme Court of the United States decided the Marathon Case[,] finding a part of the 1978 Bankruptcy Act unconstitutional. . . . I am pleased that we were able to fashion a constitutional, workable bankruptcy court system."). When *Stern* held that Congress got the line slightly wrong, the remedial outcome was not a mystery: keep the statute, with the line at the constitutionally appropriate place. Only such an outcome confirms that *Stern* was the narrow holding it promised it was.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

G. Eric Brunstad, Jr.
Kate M. O'Keeffe
DECHERT LLP
90 State House Square
Hartford, CT 06103
(860) 524-3999
eric.brunstad@dechert.com

John A. E. Pottow
*Counsel of Record*
c/o 625 South State St.
Ann Arbor, MI 48109
(834) 647-3736
pottow@umich.edu

Peter H. Arkison
103 East Holly Street, Suite 502
Bellingham, Washington 98225
(360) 671-0300
peter@arkison.com

Denice E. Moewes
303 North 67th Street
Seattle, Washington 98101
(206) 623-4382
dmoewes@aol.com

*Counsel for Respondent*

NOVEMBER 8, 2013