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 OF *AMICUS CURIAE* THE AMERICAN COLLEGE OF BANKRUPTCY IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*

Amicus, the American College of Bankruptcy (the "College"), has never before submitted a brief to this Court.[1] The College was formed in 1989 as an honorary association of bankruptcy and insolvency professionals. Membership is by invitation only. Its eight hundred fellows include individuals associated with all facets of bankruptcy practice: commercial and consumer bankruptcy attorneys, corporate turnaround advisors, United States trustees, bankruptcy trustees, investment bankers, insolvency accountants, law professors, judges, government officials, appraisers, and others involved in all aspects of the bankruptcy and insolvency community.

The College has typically avoided intervening in legal and political controversies, and it has never before filed an *amicus* brief in any court. The College's advocacy efforts are dedicated to the overall improvement of bankruptcy jurisprudence and the fair, efficient and effective functioning of the bankruptcy process.

The College is filing its first-ever amicus brief in this case because the referral of *Stern* claims to bankruptcy judges with litigant consent is essential to the effective and efficient administration of

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, the parties have consented to the filing of *amicus* briefs and their letters of consent are on file with the Court.

bankruptcy cases and consistent with longstanding historical practice in this country. If the Court finds that Article III bars litigants from voluntarily consenting to the adjudication of *Stern* claims by bankruptcy judges, it will throw the bankruptcy system into disarray, as well as cast doubt on the constitutionality of the magistrate system and other well-established schemes for consensual referrals to non-Article III adjudicators. As a non-partisan, diverse group of experienced bankruptcy professionals with expertise across all dimensions of bankruptcy and insolvency, the College has a substantial interest in the questions presented and a unique perspective on their proper resolution.

SUMMARY OF ARGUMENT

This Court gave assurances, in *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011), that the decision was not a watershed, but rather "does not change all that much." Petitioner's position, however, seriously tests that premise.

The College is convinced that Petitioner's proposed ruling, notwithstanding Petitioner's efforts to minimize its impact, would fundamentally threaten the orderly administration of our bankruptcy system. Proceedings will become mired waiting on action by district courts (already strained by increased dockets, decreased funding, and delays on judicial confirmations), while bankruptcy judges will be unable to effectively push cases forward.

Many business bankruptcy cases involve operating businesses with hundreds, if not thousands, of employees, vendors, landlords, service providers and other creditors and parties. Delay in

bankruptcy exacerbates losses and threatens the employment and livelihoods of substantial numbers of people and their families. Bankruptcy estates are necessarily limited, and the additional burden on such estates that would come to pass if Petitioner's position is upheld would be devastating.

It is no answer, as Petitioner suggests, to assign blame for this prospect to the Constitution. Article III simply does not command adoption of Petitioner's position, and indeed, a settled history of this Court's decisions refutes it.

For nearly two centuries, this Court has permitted litigants to forego their right to an Article III forum, even without any express statutory authorization to do so. In bankruptcy cases, this Court's Article III jurisprudence has honored the traditional distinction, imported from England, between summary proceedings to administer a bankruptcy estate, and plenary suits at law and in equity seeking to augment the estate. Litigants are entitled to adjudication of traditionally-plenary claims in an Article III court, but also have historically been permitted to consent to adjudication of such claims by non-Article III judges.

This case presents the perfect opportunity for the Court to clarify an area of the law that has grown increasingly tangled over the past half-century with a decisive holding that, with or without statutory authorization, litigants can consent to final adjudication of claims otherwise protected by Article III by a non-Article III bankruptcy judge.

Where Article III bars the bankruptcy judge from entering final judgment in a statutory core

proceeding (a "*Stern* claim") without litigant consent, the Court should nonetheless hold that the bankruptcy judge can submit proposed findings of fact and conclusions of law to the district court. Section 157(b)(1)'s grant of authority to bankruptcy judges, as limited by *Stern*, includes this lesser power, which is expressly acknowledged by the language and structure of the statute itself. A holding to that effect would also be consistent with this Court's tradition of minimizing the damage to a statutory scheme when only part of the scheme is unconstitutional.

ARGUMENT

I. This Court Has Consistently Permitted Litigants To Consent To Adjudication Of Disputes By Non-Article III Judges

It is impossible to understand the intertwined statutory and constitutional issues at stake in this case without examining the historical roots of today's bankruptcy system and this Court's role in the evolution of that system. This inquiry reveals a history of consistent acceptance of litigant consent to adjudication by non-Article III judges. It also reflects a healthy dose of pragmatism in accommodating the need for efficacious administration of bankruptcy estates.

A. The English Roots Of Our Bankruptcy System

Both the Framers' and this Court's understanding of bankruptcy-related adjudications grew out of the English bankruptcy system of

centuries ago, which set rigid, formalistic limits on the jurisdiction of so-called bankruptcy commissioners. Although the nomenclature of bankruptcy tribunals has changed over the years, the substantive limits on their jurisdiction have largely remained the same. From the very earliest days of bankruptcy practice in this country, the scope of non-Article III commissioners' (or referees' or bankruptcy judges') bankruptcy jurisdiction has been crafted to replicate the old British limits, with one key difference: consenting litigants have always been able to opt into a non-Article III adjudication.

Under the English system, the authority of the bankruptcy commissioners extended to whatever property the estate representative (now known as the trustee) possessed. All matters involving such property were considered "summary," including determinations of the validity of creditors' claims to a share of such property. On the other hand, any action concerning property possessed adversely by another party—for example, a suit by the trustee seeking to recover money or property for the estate—was considered "plenary," and could only be brought as a separate suit in a superior court of law or equity.

Bankruptcy commissioners decided summary matters in the first instance, but lacked authority to entertain plenary matters. The latter were reserved for a formal plenary suit in a court of law or equity. Accordingly, it is likely that the Framers viewed the Article III "judicial power" in bankruptcy cases as the power to adjudicate plenary suits against adverse claimants. *See* Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of*

Bankruptcy Judges' Core Jurisdiction After Stern v. Marshall, 86 AM. BANKR. L.J. 121, 166-67 (2012).

B. The Early American Practice Of Non-Article III Adjudications With Litigant Consent

During the first century of the Republic, this Court repeatedly affirmed the practice of referring Article III cases and controversies to non-Article III adjudicators for entry of final judgment in accordance with the report of the referee, where litigants consented to such referrals. Litigant consent (and *not* congressional authorization thereof) was the crucial linchpin in the validity of these non-Article III adjudications.

The Court explicitly rejected challenges—conceptually very similar to Petitioner's—to the validity of such judgments in two separate cases while emphasizing the importance of litigant consent. In *Heckers v. Fowler*, involving a consensual referral of a civil suit to a referee, the plaintiff alleged that the Article III court "erred in allowing the reference" and permitting the adjudication to be "conducted by a judicial officer unknown to the courts of the United States." 69 U.S. 123, 125, 127 (1864) (objecting that "[e]ven if it is a judgment *in* the [federal] Circuit Court, it is not a judgment *of* the court"). The Court rebuffed that challenge, and upheld the propriety of the referee's report constituting a final judgment with consent of the litigants:

> [The] [p]ractice of referring pending actions under a rule of court, by consent of parties, was well known at common

> law, and the report of the referees appointed, when regularly made to the court, pursuant to the rule of reference, and duly accepted, is now universally regarded in the State courts as the proper foundation of judgment.

Id. at 131 (collecting cases). *See id.* at 130 (stating that "[u]pon principle we can see no objection to the introduction of the same practice in the courts of the United States" (quoting *York & Cumberland R.R. Co. v. Myers*, 59 U.S. 246, 252 (1855)); *id.* at 128 (noting that the practice "is coeval with the organization of our judicial system").

A quarter-century later, in *Kimberly v. Arms*, the Court not only affirmed the propriety of referring a case to a non-Article III "special master," 129 U.S. 512, 524-25 (1889), but took pains to emphasize that litigant consent was required and that its absence would render the reference illegitimate:

> [It is not] competent for the court to refer the entire decision of a case to [the master] without the consent of the parties. . . . 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, . . . the master is clothed with very different powers from those which he exercises upon ordinary references, without such consent.

Id. at 524 (emphasis added). Moreover, the Court noted that "reference of a whole case to a master … has always been within the power of a court of

chancery, with the consent of parties," and indeed, "[t]he power is incident to all courts of superior jurisdiction." *Id.* at 524-25.

Furthermore, the Court tacitly approved the practice of referring consenting litigants to non-Article III adjudicators by upholding judgments in such cases with the legitimacy of the reference resting on litigant consent. *See, e.g., York & Cumberland R.R.*, 59 U.S. at 252, 253 (affirming referee's judgment in a breach-of-contract case and explaining that the referee can only rule on matters submitted to him by the consent of all parties); *Alexandria Canal Co. v Swann*, 46 U.S. 83, 89 (1847).

Specifically in the bankruptcy context, the Court held that litigants could, by consent, opt to have non-Article III bankruptcy referees adjudicate a plenary suit. In *Newcomb v. Wood*, 97 U.S. 581 (1878), a bankruptcy assignee (the then-equivalent of a bankruptcy trustee) sued Stephen Newcomb in district court to recover for the benefit of the bankruptcy estate certain property held adversely by Mr. Newcomb. With both parties' consent, the district court referred the case to a panel of three referees "with power to hear and determine all questions of law and fact, and report thereon to the court." *See id.* at 581. In accordance with the referees' report and over Mr. Newcomb's objections, the district court entered judgment in favor of the assignee. This Court affirmed the judgment, rejecting Mr. Newcomb's argument that the district court "erred . . . [i]n appointing referees in said cause":

> The power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it, is incident to all judicial administration . . . . In such an agreement there is nothing contrary to law or public policy.

Id. at 583.

Petitioner attempts to distinguish *Kimberly* and *Heckers* on the ground that the non-Article III masters and referees did not enter final judgment; the referring Article III court entered the judgment. Pet. Br. 31. That is misleading, though, because the referees' reports *were* binding on the Article III court, with the same effect as a final judgment—only reversible under a standard akin to appellate review. *See Heckers*, 69 U.S. at 127 (the order of reference expressly provided "that on filing the report of the said referee with the clerk of the court, judgment be entered in conformity therewith, the same as if the cause had been heard before the court"); *Kimberly*, 129 U.S. at 524 (the master's "findings, like those of an independent tribunal, are to be taken as presumptively correct," subject to revision only "when there has been a manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise"). *See also Newcomb*, 97 U.S. at 583 (defendant not entitled to *de novo* retrial in the district court because the parties' "agreement to submit the controversy to referees" indicated "clearly that they intended the [referees'] award should be final and conclusive").

C. The Bankruptcy Act Of 1898

Enacted against the backdrop of the traditional summary/plenary distinction, the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898) ("1898 Act"), vested bankruptcy jurisdiction in the federal district courts and granted district judges broad authority to refer bankruptcy matters to non-Article III bankruptcy referees. The 1898 Act was less specific than predecessors in demarcating the boundaries of referee authority, so it often fell to the Court to step in to do so, guided by traditional norms of bankruptcy law and constitutional considerations.

Read literally, the 1898 Act allowed district judges to delegate practically the entirety of their bankruptcy jurisdiction to non-Article III bankruptcy referees. Section 38 of the 1898 Act granted bankruptcy referees jurisdiction to "perform such of the duties as are by this Act conferred on courts of bankruptcy." *See* COLLIER ON BANKRUPTCY appx. A, pt. 3(a), at 3-32 (16th ed. 2013) (reprinting the Bankruptcy Act of 1898, as amended through date of repeal). Moreover, section 1 defined the term "court" to include both the district court and the referee, and section 36 required referees "to take the same oath of office as that prescribed for judges of United States courts." Congress therefore authorized a referee to act as the court in a referred matter, with "all jurisdiction given the courts of bankruptcy." 2A COLLIER ON BANKRUPTCY ¶ 38.08[2], at 1415 (James Wm. Moore et al. eds., 14th ed. 1978).

But the statute was not read literally, because this Court interpreted the scope of the referees' powers to coincide with the traditional

summary/plenary distinction. For instance, in *Weidhorn v. Levy*, 253 U.S. 268, 269 (1920), after a case had already been referred generally (*i.e.*, without limitation) to the bankruptcy referee, the bankruptcy trustee filed a plenary suit before the referee against the bankrupt's brother to recover a fraudulent transfer. The referee overruled the brother's objection to the referee's jurisdiction and entered a final decree on the merits in favor of the trustee. *Id.* This Court held that a "general reference" could not authorize the referee to handle a plenary matter:

> [W]e conclude that . . . a referee, by virtue of a general reference . . . has not jurisdiction over a plenary suit in equity brought by the trustee in bankruptcy against a third party . . . and affecting property not in the custody or control of the court of bankruptcy.

Id. at 274.

The Court's holding relied on the traditional summary/plenary distinction rather than the literal language of the Act. Without specific guidance from the Act itself, the Court concluded that it would be inappropriate in light of the historical tradition for a bankruptcy referee to adjudicate a plenary suit. *See id.* at 273. In summary proceedings, however, the Court treated the referee as the equal of the judge, allowing him to enter final orders reviewable only by appeal and having the same preclusive effects as a district court decision. *See id.* at 271-72; *Katchen v. Landy*, 382 U.S. 323, 334 (1966); *Page v. Ark. Natural Gas Corp.*, 286 U.S. 269, 270-72 (1932). *See*

generally 2 COLLIER (14th ed.), *supra*, ¶ 22.05; 2A *id.* ¶¶ 38.02, 39.01[5], 39.16, 39.28-.29.

It was not just Congress, therefore, but also the Court that superintended limitations on referees' adjudicatory powers. An elaborate jurisprudence defining the scope of summary matters appropriate for final adjudication by a non-Article III referee unfolded. *See* 2A COLLIER (14th ed.), *supra*, ¶ 38.09[2]; 2 *id.* ¶¶ 23.02-23.11 (collecting extensive case law). Indeed, this Court openly acknowledged that, in administering the 1898 Act, Congress left the Court significant latitude in specifying the full scope of referees' jurisdiction. *See Katchen*, 382 U.S. at 328 ("Congress has often left the exact scope of summary proceedings in bankruptcy undefined, and this Court has elsewhere recognized that in the absence of congressional definition this is a matter to be determined by decisions of this Court..."); *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426, 431 & n.7 (1924) ("Congress has, also (subject to the constitutional guaranties), power to determine to what extent jurisdiction conferred [on the bankruptcy courts], . . . shall be exercised by summary proceedings and to what extent by plenary suit. It has not done so in terms. In the absence of congressional definition of the scope of summary proceedings, it has been determined by decisions of this Court."); 2 COLLIER (14th ed.), *supra*, ¶ 23.04[2], at 455-56 (stating that "[t]hese general principles regarding the summary jurisdiction of the bankruptcy court have been affirmed and reaffirmed in a chain of decisions beginning with *White v. Schloerb* [178 U.S. 542 (1900)] and extending down to the present date").

As part of its 1898 Act jurisprudence defining the scope of non-Article III referees' adjudicatory powers, this Court held in *MacDonald v. Plymouth Cnty. Trust Co.*, 286 U.S. 263, 267 (1932), that a plenary suit—otherwise triable only in an Article III district court—could be adjudicated by a non-Article III referee with the parties' consent. By expressly analogizing to the ability to waive one's constitutional right to a jury trial (and expressly distinguishing non-waivable structural limitations such as subject matter jurisdiction), this Court acknowledged the waivable nature of litigants' constitutional right to final judgment from an Article III judge in plenary matters, *see id.* at 267, citing *Patton v. United States*, 281 U.S. 276 (1930), a case decided on constitutional grounds. The Court's holding, therefore, relied on the premise that the right to adjudication of plenary proceedings in an Article III district court is an individual right, waivable by the parties.

The Court later cited *MacDonald* in cases acknowledging the referee's jurisdiction to decide plenary matters among consenting litigants. *See, e.g.*, *Page v. Arkansas Natural Gas Corp.*, 286 U.S. 269, 272 (1932) (citing *MacDonald* and holding that "the referee is a court [according to the 1898 Act] and that, respondent's predecessor having consented to litigate the issues . . . and answer before the referee, the latter had jurisdiction to decide the issues"); *Cline v. Kaplan*, 323 U.S. 97, 99 (1944) (citing *MacDonald* for the proposition that the bankruptcy court lacks jurisdiction over a plenary claim "unless the claimant consents to its adjudication in the bankruptcy court").

Petitioner attempts to minimize *MacDonald* as merely "decided on statutory grounds." Pet. Br. 31 n.3 (internal quotation marks omitted). However, as was true of the entirety of this Court's 1898 Act jurisprudence demarcating the limits of referee's adjudicatory powers, *nowhere* did the statute specify comprehensively what referees could (or could not) adjudicate with (or without) litigant consent.[2] The statute expressly authorized referees to exercise the same "jurisdiction to … perform such duties as are by this Act conferred on courts of bankruptcy," 1898 Act § 38, *without* any further distinction (provided solely by this Court) between summary and plenary proceedings. As the lower courts recognized, *MacDonald* was not merely a statutory construction decision interpreting the consent provision of 1898 Act § 23b. *See, e.g.*, *Morrison v. Rocco Ferrera & Co.*, 554 F.2d 290, 296-97 (6th Cir. 1977) (concluding that *MacDonald* permitted a referee to finally adjudicate a plenary suit with litigant consent in Chapter X bankruptcy cases in which Section 23b was entirely inapplicable). Rather, *MacDonald* was simply another in the long line of this Court's decisions crafting prudential limitations on the adjudicatory powers of non-Article III referees.

Moreover, "a mere act of Congress cannot amend the Constitution." *Brown v. Walker*, 161 U.S. 591, 619 (1896). Petitioner's attempt to distinguish *MacDonald*, therefore, also implausibly suggests that this Court turned a blind eye to the structural

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[2] The Court's discussion of Section 23b's consent provision, *MacDonald*, 286 U.S. at 265-68, spoke solely to federal subject-matter jurisdiction, which in *MacDonald* was *not* dependent upon "consent of the defendant" at all because *MacDonald* involved a suit under Section 60b. *Id.* at 265-66.

constraints of Article III when it explicitly stated that it could "perceive *no reason* why the privilege of claiming the benefits of the procedure in a plenary suit, secured to suitors under § 60b and § 23b, may not be waived by consent, as any other procedural privilege of the suitor may be waived." 286 U.S. at 267 (emphasis added).

In making that statement, the *MacDonald* Court cited the case of *Chicago, Burlington & Quincy Ry. Co. v. Willard*, and its extensive discussion of the principle that restrictions on federal courts' subject matter jurisdiction "cannot be waived, and the want of it will be error at any stage of the cause," including on appeal, "and cannot be overlooked by the court, even if the parties … consent that it may be waived." 220 U.S. 413, 419-21 (1911) (quoting *Ayers v. Watson*, 113 U.S. 594, 598 (1885), and *Thomas v. Ohio State Univ.*, 195 U.S. 207, 211 (1904)). That principle, of course, is founded in the structural constitutional guarantees of Article III. *See CFTC v. Schor*, 478 U.S. 833, 850-51 (1986). By expressly dismissing the applicability of such concerns in *MacDonald*, therefore, the Court did not ignore its obligation to police litigant dilution of structural constitutional constraints, as Petitioner suggests. Rather, the Court acknowledged that such structural constitutional concerns simply were not implicated by litigant consent to a non-Article III referee's adjudication of a plenary suit.

II. In *Marathon* And Later Cases, This Court Has Continued To Permit Non-Article III Adjudication With Litigant Consent

A. The Constitutional Right To Final Judgment From An Article III Court In The Absence Of Litigant Consent

Contrary to Petitioner's attempt to brush aside this Court's extensive 1898 Act jurisprudence as mere statutory interpretation, this Court has repeatedly treated those cases as Article III precedent.

In *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 74 (1982), the non-Article III bankruptcy court had entered final judgment in a suit to recover damages brought by the representative of a bankruptcy estate. The Court found this to be unconstitutional because there must be some "limiting principle" for determining the extent to which "Congress may create courts free of Article III's requirements." *Id.* at 73 (Brennan, J., plurality opinion).

The *Marathon* holding maintains the traditional historical understanding of the kinds of plenary suits requiring adjudication by an Article III court.

> [T]he Court has recognized certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus. Only in the face of such an exceptional grant of power has the Court declined to hold the authority

> of Congress subject to the general prescriptions of Art. III.

Id. at 70.

The *Marathon* Court, though, could "discern no such exceptional grant of power applicable in the case[] before" the Court, *id.* at 71, which was precisely of the kind consistently recognized as requiring a plenary suit against an adverse claimant since well before the Founding. See *id.* at 90 (Rehnquist, J., concurring) (reasoning that "the lawsuit in which Marathon was named defendant seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional [plenary] actions at common law tried by the courts at Westminster in 1789"). *See generally* Brubaker, *supra*, 86 AM. BANKR. L.J. at 122-32, 152. And such a plenary suit, absent consent of the litigants, had *never* been entrusted to final adjudication by a non-Article III judicial officer prior to the 1978 statute that *Marathon* struck down.

In *Granfinanciera, SA v. Nordberg*, 492 U.S. 33 (1989), the Court relied directly on the 1898 Act cases and the summary/plenary distinction to determine that a defendant in a fraudulent conveyance action was constitutionally entitled to an Article III court and a jury trial. The Court reasoned that "if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal in nature." *Id.* at 54. Citing *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94-95 (1932), the Court explained that fraudulent conveyance "actions brought by a trustee in

bankruptcy were deemed separate, plenary suits to which the Seventh Amendment applied." *Granfinanciera*, 492 U.S. at 50. The Court also relied on *Katchen v. Landy*, which held that litigants had no Seventh Amendment rights in summary proceedings. 382 U.S. at 336-40. Acknowledging that Congress has now statutorily abolished the "distinction between plenary and summary proceedings, on which the Court relied in *Schoenthal* and *Katchen*," the Court in *Granfinanciera* invoked the constitutional implications of that long-standing historical distinction by holding that Congress could not even "purport[ ] to abolish jury trial rights in what were formerly plenary actions" "merely by relabeling the cause of action to which it attaches" and assigning jurisdiction to finally adjudicate that action to non-Article III bankruptcy judges. 492 U.S. at 60-61. *See id.* at 58 (stating that *Schoenthal* and *Katchen* did not "rest[] on an accident of statutory history").

Most recently, in *Stern*, this Court re-affirmed the constitutional significance of the summary/plenary distinction when it concluded that the nature of the damages action brought by the estate representative in that case was "the very type of claim that [the Court] held in *Northern Pipeline* and *Granfinanciera* must be decided by an Article III court"—i.e., a traditionally-plenary suit "that simply attempts to augment the bankruptcy estate." 131 S. Ct. at 2616.

B. In Cases Where Litigants Consent, Structural Concerns Are Assessed By A Pragmatic Functional Analysis

Petitioner would have this Court believe that the constitutional right to final judgment from an Article III judge, recognized in *Marathon*, *Granfinanciera*, and *Stern*, is solely in service of structural protections that cannot be waived by litigants. As this Court has emphasized, however, "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," and "as a personal right, Article III's guarantee of an impartial and independent federal adjudication *is* subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Schor*, 478 U.S. at 848-49 (emphasis added).

Significantly, in *none* of the Court's bankruptcy cases holding that the traditionally-plenary action at issue must be adjudicated by an Article III court—*Marathon*, *Granfinanciera*, *Stern*—did the litigants *consent* to final adjudication by a non-Article III bankruptcy court. In the absence of consent, this Court's formal, categorical approach to the constitutional right makes sense in order to preserve inviolate the individual litigants' personal right to final adjudication of a traditionally-plenary suit by an independent Article III court.

The Court's holdings in those cases, particularly *Marathon*, went to great lengths to emphasize the

absence of litigant consent. The plurality opinion in *Marathon*, in describing the limits on the summary jurisdiction of 1898 Act referees that the 1978 statute had unconstitutionally exceeded, *twice* noted that *with consent* referees could finally adjudicate suits that otherwise (absent litigant consent) had to be tried in an Article III trial court, citing the *MacDonald* case. 458 U.S. at 53, 79-80 n.31. Justice Rehnquist's concurrence highlighted Marathon's objection to the bankruptcy court deciding the action at issue as a determinative feature in the unconstitutionality of the bankruptcy court's judgment. *Id.* at 89, 91 (Rehnquist, J., concurring). And the dissents of both Chief Justice Burger (describing the holding of the Court), *id.* at 92, and Justice White, *id.* at 95, also indicated their understanding that consent of the litigants to final adjudication in a non-Article III bankruptcy court would cure any unconstitutionality under the Court's holding, "just as" was the case "before the 1978 Act was adopted." *Id.* Likewise, the *Stern* Court emphasized that "Pierce did not truly consent to the resolution of Vickie's claim in the bankruptcy court proceedings." 131 S. Ct. at 2614.

By contrast, where the parties *have* effectively consented to a non-Article III adjudication, "consent significantly changes the constitutional analysis." *Peretz v. United States*, 501 U.S. 923, 932 (1991). *See Schor*, 478 U.S. at 849 (emphasizing that "Schor indisputably waived any right he may have possessed to full trial" of the claim at issue "before an Article III court"); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589-92 (1985) (noting

the importance of consent in the agency adjudication process at issue).

Consent removes any concern for the litigants' personal right to an Article III adjudication, and thus, only Article III's structural guarantees are at stake. To the extent the consensual adjudication at issue implicates such structural concerns (e.g., through potential inter-branch incursions), this Court has conducted a pragmatic, functional assessment that is responsive to the structural values furthered by Article III. In doing so, this Court has focused upon substance rather than form, examining whether the non-Article III adjudication at issue truly poses a threat to separation of powers and the integrity of the judicial branch.

In *Thomas*, the Court held that Article III did not bar the adjudication of claims related to a voluntary pesticide-registration program through binding non-Article III arbitration. 473 U.S. at 587. "In assessing the degree of involvement required by Article III," the Court explained that "practical attention to substance" should "inform application of Article III." *Id.* In particular, the Court listed potential considerations such as "the origin of the right at issue" and Congress's reasons for the forum selection. *Id.* It explained that applying Article III simplistically would "throw[] into doubt" many "quasi-adjudicative activities carried on by administrative agencies." *Id.* And in *Schor*, 478 U.S. at 851, in upholding a consensual agency adjudication, this Court "weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the [non-Article III adjudication] will have on

the constitutionally assigned role of the federal judiciary."

Most significantly, though, in *Peretz*, 501 U.S. at 937-39, after reviewing the relevant features of the Federal Magistrates Act, this Court was "convinced that no such structural protections are implicated by the [consensual] procedure" at issue.

C. Structural And Functional Considerations Point To Permitting Bankruptcy Judges To Adjudicate *Stern* Claims With Litigant Consent

Where litigants consent to the bankruptcy court's jurisdiction over their *Stern* claim, this Court's precedent permits adjudication by the bankruptcy judge because structural concerns are not implicated and the functional consequences of forcing litigants into district court are significant. A comparison with magistrate adjudications and their compatibility with Article III underscores these points.

In the magistrate context, the Court wanted to ensure the preservation of "a litigant's right to insist on trial before an Article III . . . judge insulated from interference with his obligation to ignore everything but the merits of a case." *Roell v. Withrow*, 538 U.S. 580, 588 (2003). Where litigants had consented, though, the Court concluded that structural constitutional considerations were obviated by the fact that magistrates were fully within the control of Article III judges, who were "waiting in the wings, fully able to correct errors." *Peretz*, 501 U.S. at 938 (quoting *United States v. Raddatz*, 447 U.S. 667, 685-86 (1980)).

Similarly, the Court's structural concerns are allayed when litigants consent to final adjudication of *Stern* claims by a bankruptcy court. In fact, precisely the same relevant structural protections attendant to consensual magistrate adjudications are also present in the bankruptcy context: Article III judges have full discretionary powers of referral and withdrawal, handle all appointments and removals of bankruptcy judges, and can review any decision consistent with the appellate procedures that are available. "[T]o the extent that 'de novo review is required to satisfy Article III concerns'" for *Stern* claims, "'it need not be exercised unless requested by the parties.'" *Peretz*, 501 U.S. at 939 (quoting *United States v. Peacock*, 761 F.2d 1313, 1318 (9th Cir. 1985) (Kennedy, J.)).

"Because 'the entire process takes place under the district court's total control and jurisdiction,' there is no danger . . . 'of emasculating' constitutional courts." *Peretz*, 501 U.S. at 937 (quoting *Raddatz*, 447 U.S. at 681, and *Schor*, 478 U.S. at 850). Consequently, "no such structural protections are implicated" by bankruptcy courts' adjudication of *Stern* claims with litigant consent. *Peretz*, 501 U.S. at 937.

In *Peretz* and *Roell*, the Court also identified numerous functional advantages flowing from magistrate adjudications: the need to "relieve the district courts' 'mounting queue of civil cases' and thereby 'improve access to the courts for all groups,'" *Roell*, 538 U.S. at 588, "[to] check[] the risk of gamesmanship," *id.* at 590, to pursue "judicial efficiency," *id.*; *Peretz*, 501 U.S. at 929, 934, to maximize the compatibility of the process employed

with "the mix of congressional objectives," *Roell*, 538 U.S. at 589, to minimize the risk of secondary litigation, *id.* at 591 n.7, and to facilitate exploration of "constructive experiments that are acceptable to all participants," *Peretz*, 501 U.S. at 933, 934. Although this Court confirmed in *Marathon*, *Granfinanciera* and *Stern* that such concerns cannot justify forcing litigants to resolve traditionally-plenary suits in bankruptcy court, it has understood that such concerns are compelling in cases involving consenting litigants. As described in Part V, *infra*, the functional consequences of barring consenting litigants from the bankruptcy court would be significant. Accordingly, this Court's precedent points decidedly toward permitting bankruptcy court adjudications of *Stern* claims with litigant consent.

D. The Consequences Of A Categorical Article III Bar To Bankruptcy Court Adjudication By Consenting Litigants

If the Court finds that Article III bars consenting litigants from submitting traditionally-plenary suits to the jurisdiction of the bankruptcy court, severe repercussions will extend well beyond bankruptcy litigation. Bankruptcy Appellate Panels and Section 157(c)(2), which authorizes bankruptcy judges to finally adjudicate a non-core proceeding "with consent of all the parties," will be rendered unconstitutional. And, if Section 157(c)(2) is unconstitutional, then so too is Section 636, the consent provision of the Federal Magistrates Act. *See* 1 COLLIER ON BANKRUPTCY ¶ 3.03[4], at 3-54 (16th ed. 2013) ("The inspiration for 28 U.S.C. § 157(c)(2) is 28 U.S.C. § 636(c)(1), which deals with

the powers of United States magistrate judges in like situations.").

Finding Section 157(c)(2) unconstitutional on Article III grounds—inevitable under Petitioner's position—would be inconsistent with *Stern*, in which this Court explicitly *rejected* the notion that the constitutional right to final judgment from an Article III judge in a traditionally-plenary suit is a non-waivable structural right. Citing the litigant consent provision in Section 157(c)(2), *Stern* recognized that *nothing* in Section 157's allocation of adjudicatory authority as between the district court and the bankruptcy court is "jurisdictional" in the sense of codifying nonwaivable limitations such as subject-matter jurisdiction. 131 S. Ct. at 2607.

Through Section 157 (enacted in response to *Marathon*), Congress sought to codify Article III's constitutional limitations on bankruptcy judges' adjudicatory powers. If those limitations are nonwaivable (as Petitioner argues), that would have to be attributable to the kinds of nonwaivable structural constraints that surround subject matter jurisdiction. *See Schor*, 478 U.S. at 850-51 (stating that "[t]o the extent that this [Article III] structural principle *is* implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject matter jurisdiction" (emphasis added)). This Court in *Stern*, however, explained that Section 157, by its nature, codifies *waivable* rights. *See* 131 S. Ct. at 2607. Like the *MacDonald* Court, then, the *Stern* Court expressly acknowledged that structural constitutional concerns simply are *not* implicated by

litigant consent to adjudication of a traditionally-plenary suit by a non-Article III bankruptcy court.

A determination that bankruptcy judges cannot issue final judgments in certain matters even upon the consent of the parties would also jeopardize the constitutionality of the Bankruptcy Appellate Panels ("BAPs"), three-judge panels of bankruptcy judges that, with consent of all parties, hear bankruptcy appeals in the First, Sixth, Eighth, Ninth, and Tenth Circuits. The purpose of BAPs is to reduce delay and cost to the parties, and they exist as an alternative to appeals to the district courts. See 28 U.S.C. § 158(b)(1). Removing the jurisdiction of the BAPs would necessarily push hundreds of the BAP cases onto district court dockets in the five circuits where BAPs have been established.

Likewise, if litigant consent does not permit opting out of Article III adjudication, Section 636(c)(1)'s broad grant of authority to magistrate judges, pursuant to litigant consent, would logically be unconstitutional. *See* 28 U.S.C § 636(c)(1) (permitting magistrates to "conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case"). After all, the relevant structural protections surrounding Section 636 are equally present in bankruptcy: extensive oversight by an Article III judge, both in terms of appellate review and the ability to reacquire the case if necessary. Petitioner's position would even call into doubt the constitutionality of the Federal Arbitration Act. *See, e.g.*, Peter B. Rutledge, *Arbitration and Article III*, 61 VAND. L. REV. 1189 (2008).

Petitioner would, no doubt, attempt to distinguish Sections 157(c)(2) and 636(c)(1) on the ground that they contain explicit consent provisions authorized by Congress. However, for the reasons explained in Part III below, this is an untenable distinction. Congress cannot authorize by statute that which Article III forbids. Try as it might, there is no way for Petitioner to escape the consequence that its proposed ruling would yield broader doctrinal repercussions that would significantly impair the day-to-day functioning of the federal courts.

III. Litigant Consent Need Not Be Explicitly Authorized By Congress

Petitioner's alternate argument is that Article III may permit *Stern* claims to be resolved by the bankruptcy court with litigant consent, but only with explicit statutory authorization. However, this view is inconsistent with this Court's prior decisions permitting litigant consent to a non-Article III forum without statutory authorization by Congress.

This Court has approved a number of non-Article III adjudications-by-consent with no statutory authorization whatsoever. *See Heckers*, 69 U.S. at 128 (upheld over the specific objection that "there is no act of Congress which confers any such authority" because "Federal Courts[] have authority to make and establish all necessary rules for the orderly conducting [of] business in the said courts"); *Kimberly*, 129 U.S. at 524-25 ("it has always been within the power of a court of chancery with the consent of parties, to order such a reference," which "power is incident to all courts of superior

jurisdiction"); *Newcomb*, 97 U.S. at 583 ("[t]he power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it, is incident to all judicial administration"). Most significantly, this Court's *MacDonald* decision, discussed above, addressed precisely the issue that Petitioner's alternative argument raises and directly contradicts Petitioner's position.

MacDonald was decided against the backdrop of (1) an overly broad statutory grant to non-Article III referees of "jurisdiction to . . . perform such of the duties as are by this Act conferred on courts of bankruptcy," 1898 Act § 38, (2) this Court's decision in *Weidhorn v. Levy* that, despite that broad all-inclusive jurisdictional grant, referees could *not* adjudicate a plenary suit, and (3) no explicit grant of statutory authority for referees to adjudicate plenary suits with litigant consent. Regarding plenary suits, therefore, referees' jurisdictional grant under the 1898 Act was overly broad in precisely the same manner that this Court held Section 157(b)(2)(C) to be unconstitutionally overbroad in *Stern* and that the Ninth Circuit below held Section 157(b)(2)(H) to be unconstitutionally overbroad. While Petitioner suggests that the absence of any explicit statutory authorization for bankruptcy judges to finally adjudicate such *Stern* claims with litigant consent is a bar thereto, the *MacDonald* Court held that referees *could* finally adjudicate plenary suits with litigant consent in the face of precisely the same supposed "statutory gap" that Petitioner decries. *See MacDonald*, 286 U.S. at 264-68.

Additionally, in cases involving non-consenting parties defending against plenary actions by the bankruptcy trustee, this Court acknowledged that

litigants could consent to the bankruptcy court's jurisdiction, despite the absence of any explicit statutory authorization. *See Tabuel-Scott-Kitzmiller Co., Inc. v. Fox*, 264 U.S. 426, 433-34, 438 (1924) ("[I]n no case where it lacked possession, could the bankruptcy court, under the law as originally enacted, nor can it now (*without consent*) adjudicate in a summary proceeding the validity of a substantial adverse claim[]") (emphasis added); *Harrison v. Chamberlin*, 271 U.S. 191, 193 (1926) ("[A] court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy in reference to property held adversely to the bankrupt estate, without the consent of the adverse claimant.").

In enacting Section 157 in response to *Marathon*, Congress sought to give bankruptcy judges as much adjudicatory authority as is constitutionally permissible. While Congress misjudged the location of the constitutional line regarding *Stern* claims, that does not mean that Congress would want to deny bankruptcy judges the authority to finally adjudicate *Stern* claims with litigant consent where Article III permits it. Indeed, Congress's unrestricted grant to bankruptcy judges of final-judgment jurisdiction over *Stern* claims suggests that the opposite presumption is appropriate, as the holding of *MacDonald* also confirms.

Section 157(c)(2) reflects Congress's intent that in any proceeding in which the parties have a constitutional right to final judgment from an Article III judge, bankruptcy judges should have the authority to finally adjudicate that proceeding with the parties' consent. The entire purpose and function of the non-core category to which Section

157(c)(2) applies is to capture those proceedings in which the parties have a constitutional right to final judgment from an Article III judge. To deny this authority to bankruptcy judges for *Stern* claims simply because Congress may have misread this Court's guidance in *Marathon* would affirmatively frustrate Congress's intent. *Cf. Roell*, 538 U.S. at 586-91 (implied consent sufficed for a magistrate adjudication, despite lack of explicit statutory authorization, because of "textual clues . . . complemented by a good pragmatic reason to think that Congress intended to permit implied consent"). And the same is true of the other supposed "statutory gap" into which (Petitioner asserts) *Stern* claims purportedly fall.

IV. The Current Bankruptcy Structure Allows Bankruptcy Judges To Enter Appropriate Findings On *Stern* Claims

The text of Section 157 demonstrates that bankruptcy courts may issue proposed findings of fact and conclusions of law in *Stern* proceedings. Although *Stern* removed bankruptcy judges' power to enter final judgment in those core proceedings which "simply attempt[] to augment the bankruptcy estate," *see* 131 S. Ct. at 2616, the general statutory authorization to "hear and determine" core claims, 28 U.S.C. § 157(b)(1), includes the lesser power to issue proposed findings of fact and conclusions of law.

By removing bankruptcy judges' power to enter final judgment in certain core proceedings, *Stern* effectively invalidated a portion of the authorization in Section 157(b)(1) to finally "determine" a so-called

Stern claim, but the balance of that statutory provision remains fully applicable:

> Bankruptcy judges may *hear and determine* . . . all core proceedings arising under title 11 . . . and may enter appropriate orders and judgments . . . .

28 U.S.C. § 157(b)(1) (emphasis added). "Generally speaking, when confronting a constitutional flaw in a statute, [the Court] tr[ies] to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010) (internal quotation marks and citation omitted).

Section 157(b)(1)'s general—and uncontested—authorization for a bankruptcy judge to "hear" a core proceeding must be read in light of Section 157(c)(1), which likewise contains a general authorization for bankruptcy judges to "hear" non-core proceedings. Section 157(c)(1) also specifies (in its second sentence) that included within the general authorization to "hear" the proceeding is the more specific direction to "submit proposed findings of fact and conclusions of law to the district court." If submission of proposed findings and conclusions is a component part of "hearing" a proceeding under Section 157(c)(1), then it is also a component part of "hearing" a *Stern* proceeding under Section 157(b)(1).

Alternatively, even if Section 157(c)(2)'s specific authorization of proposed findings and conclusions is necessary because that step is *not* subsumed within the "hearing" of a proceeding, then the second sentence is simply allocating the greater power to "determine" the proceeding as between the

bankruptcy court and the district court in a manner that reserves the ultimate "determination" by entry of a final order to the district court. In that case, when Sections 157(b)(1) and (c)(1) are read in conjunction, it becomes apparent that the lesser power to "submit proposed findings of fact and conclusions of law" is subsumed within the greater power to "determine" a proceeding, which is expressly granted to bankruptcy judges in *Stern* proceedings by Section 157(b)(1). *Stern* did *not* invalidate any lesser powers contained within the power to "hear and determine" a core proceeding and "enter appropriate orders" therein.

Petitioner's all-or-nothing argument would not merely limit the jurisdiction of the bankruptcy judge, but would also encroach upon the authority granted by Section 157 to the Article III district court. To comply with *Marathon*, Congress sought to make bankruptcy courts more adjunct-like, in part, by giving district courts full discretion to refer (or not refer) any bankruptcy proceeding to the bankruptcy court and also to withdraw reference of that proceeding, "in whole or in part," at any time, even *sua sponte*. *See* 28 U.S.C. § 157(a), (d). The district court's greater power to withdraw the reference "in whole" expressly includes the lesser power to withdraw a proceeding only "in part" by, for example, requesting provisional findings and conclusions from the bankruptcy court for *de novo* review before entry of a final judgment.

Such actions happen every day – both with bankruptcy judges and magistrate judges. Any Article III concerns are satisfied by the fact that the proposed findings (like those of a special master) are just that – *proposed*. An Article III judge acting

independently must decide what judgment should be entered.

V. Petitioner's Rule Would Significantly Impair The Bankruptcy System

The practical consequences of Petitioner's position is that litigants cannot consent to final adjudication of fraudulent transfer claims, or other *Stern* claims, in bankruptcy court, and that bankruptcy judges cannot even submit proposed findings of fact and conclusions of law on such claims. The fallout would be—in the words of one bankruptcy judge—"pretty horrific." Jolene Tanner, *Stern v. Marshall: The Earthquake That Hit The Bankruptcy Courts And The Aftershocks That Followed*, 45 LOY. L.A. L. REV. 587, 608 (2012) (citing interview with Judge Sheri Bluebond). Fraudulent conveyance and other avoidance claims are an integral part of almost every bankruptcy case. Placing them beyond the jurisdiction of bankruptcy courts would result in having one portion of the bankruptcy litigated in the bankruptcy court and another (often significant) portion in the district court. Some findings in both contexts, such as insolvency, overlap. A guiding purpose of modern procedure, reflected in at least nine federal rules (*see* Fed. R. Civ. Proc. 13-14 & 18-24), is to encourage (if not mandate) parties to resolve all of their disputes at one time. Petitioner's rule would yield a fragmented approach, with similar claims tried by different courts on different timetables, with no hope of consistency in adjudication.

As a result of the backlog of cases in the district courts (and particularly the priority that criminal matters constitutionally command), matters

withdrawn by district courts invariably take longer to resolve. According to the Federal Judicial Center ("FJC"), district courts averaged 12.7 months to decide civil cases before trial and 23.4 months to decide cases that go to trial. 2012 Annual Report, Administrative Office of the United States Courts, at www.uscourts.gov/Statistics/JudicialBusiness/2012.aspx ("Judicial Business"). Given that companies in Chapter 11 bankruptcy are often a "melting ice cube," the pace of a civil case in the district courts is far too slow.

At the end of 2012, there were over 70,000 adversary proceedings pending in bankruptcy courts across the country—many of which are likely to be fraudulent transfer or other potential *Stern* claims that would have to be shifted to the district courts under Petitioner's rule. Judicial Business, Table F-8. There are approximately 334 bankruptcy judges and 611 district court judges. If those 334 bankruptcy judges each lost a significant portion of their workload, it would quickly overwhelm the district judges. Indeed, for every civil case filed in 2012, there were almost *five* new bankruptcy cases. Judicial Business, Caseload Highlights. The impact of these new cases on the district courts will be particularly hard as they are now feeling the effects of sequestration and other budgetary constraints, with their concomitant cuts of court budgets and staff.

Unfortunately, the district courts that are already in a judicial emergency will be the hardest hit by such a decision. For example, the Eastern District of California is already swamped, with 1,132 cases per judgeship, nearly twice the 600 cases that the FJC considers to create a judicial

emergency. The bankruptcy court in that district is also one of the Nation's busiest, with over a thousand businesses filing for bankruptcy in 2012. Judicial Business, Report F-5A. Commercial filings are complex and likely to result in fraudulent conveyance and other *Stern* claims—which would have to be decided by the district court under Petitioner's broad reading of *Stern*. For example, the bankruptcy of the Lyondell Chemical Company (No. 09-01037, Bankr. S.D.N.Y) spawned more than 600 adversary actions, many of which would have to be resolved in the district court under Petitioner's reading of *Stern*. The District of Delaware has even more cases per judgeship (1,165), and faces about a thousand commercial bankruptcy cases each year. Judicial Business, Report F-5A. The Central District of California is likewise in a judicial emergency, and had more than 3,500 commercial bankruptcies filed in 2012. *Id.* Those district court judges would have to shoulder many of those additional cases. Other districts, such as the Southern District of New York and the Northern District of Georgia, would be pushed into judicial emergencies by the new caseload attendant to an expansion of *Stern*.

In addition to the complex commercial cases, tens of thousands of (the million-plus) cases filed by individuals each year involve significant assets. Many of those cases also involve fraudulent transfer actions that would necessarily require the attention of district courts.

The elimination of the BAPs as unconstitutional, which would be required under Petitioner's

argument, would further exacerbate the strain on the district courts.

In the end, where the parties are willing to have their disputes heard by bankruptcy judges, an "unnecessary extension" of *Stern* "would be an inefficient use of judicial resources by overburdening the district court and foregoing the services of a bankruptcy court ready, willing and able to do its job." *Heller v. Arnold & Porter (In re Heller)*, No. 08-32514, Adv. No. 10-3203, 2011 WL 4542512, *1 (Bankr. N.D. Cal., Sept. 28, 2011). Petitioner's proposal would prevent parties from consenting to have their *Stern* disputes settled by bankruptcy judges, creating unnecessary delay and cost for the entire system.

CONCLUSION

For these reasons, the Court should affirm the Ninth Circuit's decision.

Respectfully submitted,

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