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 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is the procedure in 28 U.S.C. § 157(c)(2), which allows parties to consent to the resolution of fraudulent transfer actions before non-Article III bankruptcy judges, constitutional, and if so, did the courts below properly infer petitioner's consent to such resolution in this case?

2. In circumstances where a bankruptcy proceeding's statutory designation as "core" is found to violate Article III of the United States Constitution, may the bankruptcy judge treat the matter as "non-core" and enter proposed findings of fact and conclusions of law for de novo district judge reconsideration under 28 U.S.C. § 157(c)(1)?

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RESPONDENT'S BRIEF IN OPPOSITION

Peter Arkison, trustee of the Estate of Bellingham Insurance Agency, Inc., respectfully opposes the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

This petition arises out of the bankruptcy of Bellingham Insurance Agency, Inc. ("Bellingham"). The trustee in that chapter 7 bankruptcy case, Peter Arkison, is the respondent to this petition. As part of his investigation into the affairs of Bellingham, Arkison concluded that Executive Benefits Insurance Agency ("EBIA"), petitioner here, received a massive transfer of the debtor's funds on the eve of bankruptcy and indeed was a mere successor entity/alter-ego of the debtor – all part of a scheme orchestrated by one of the debtor's principals and EBIA's former counsel. Arkison brought suit against petitioner and related defendants (including the principal) in bankruptcy court, alleging against EBIA claims for fraudulent transfer and alter-ego liability.

EBIA answered the complaint and (belatedly) demanded a jury trial, invoking its rights under *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). See Pet. App. 29a. The district court below treated this jury trial demand as a motion to withdraw the reference from the bankruptcy court and docketed it as such. *Ibid.* In a Joint Status

Report to the district court, however, EBIA subsequently asked to stay consideration of the motion to withdraw the reference to allow further proceedings to unfold in bankruptcy court, which the district court permitted. *Id.* at 29a, 62a–63a.

As the court below explained, EBIA knew it was consenting to possible bankruptcy court resolution of its claims on summary judgment when abandoning its attempt to have its case heard in the Article III district court in favor of bankruptcy court (perhaps encouraged by one defendant's success in defeating a summary judgment motion there, see *id.* at 74a): "In other words, [petitioner] did not simply fail to object to the bankruptcy judge's authority to enter final judgment in the fraudulent conveyance action; it affirmatively assented to suspend its demands for a jury trial in district court to give the bankruptcy judge an opportunity to adjudicate the claim." *Id.* at 29a.

Trustee Arkison was successful in his summary judgment motion in bankruptcy court, and final judgment was entered against EBIA. *Id.* at 53a–54a. EBIA appealed to the district court, which conducted a de novo review and affirmed on all grounds, finding that EBIA had "done nothing to show any defect in the Bankruptcy Court's grant of summary judgment" and, in fact, "everything to hinder the Court in assessing the merits of the appeal." *Id.* at 51a. EBIA further appealed to the Court of Appeals for the Ninth Circuit, which, in the opinion below, affirmed. *Id.* at 39a–40a.

In a motion to dismiss submitted to the Court of Appeals prior to oral argument, EBIA raised for the

first time an objection to bankruptcy court adjudication of the fraudulent transfer and alter-ego liability actions against it, raising its perceived rights to Article III adjudication under *Stern v. Marshall*, 131 S. Ct. 2594 (2011). Pet. App. at 7a–8a. The court below considered and rejected these last-minute claims. *Id.* at 26a–33a.

After oral argument in the case below, the Court of Appeals (Kozinski, C.J., presiding) sua sponte invited amicus curiae participation on two questions: first, "whether bankruptcy courts may enter a final, binding judgment on an action to avoid a fraudulent conveyance"; and second, "whether, if they cannot enter such final judgments, bankruptcy courts may hear the proceeding and submit a report and recommendation to a federal district court." *Id.* at 8a n.3.

In a lengthy and unanimous opinion affirming the district court and wholly rejecting EBIA's claims, the Court of Appeals answered the sua sponte questions. It held that non-Article III bankruptcy judges may not enter final judgments in fraudulent conveyance actions absent party consent, notwithstanding Congress's designation of such actions as "core proceedings" under section 157(b) of Title 28, see 28 U.S.C. § 157(b) (allowing bankruptcy courts to enter final judgments in "core proceedings" irrespective of party consent and including "proceedings to determine, avoid, or recover fraudulent conveyances" in non-exhaustive list of core proceedings), believing this outcome was required by this Court's holding in *Stern*. The court below also held, however, that this (potential) Article III problem was irrelevant, because EBIA

consented to bankruptcy court adjudication through its unambiguous conduct in the lower courts. Pet. App. 39a–40a (citing section 157(c)(2), which permits bankruptcy judges to enter final judgments in non-core proceedings upon district court referral and party consent).[1] (This finding of party consent technically rendered the court below's constitutional answer to the first sua sponte question dictum.)

On the second sua sponte question, the Court of Appeals held that on statutorily designated core claims where Article III prevents a bankruptcy judge from entering final judgment absent party consent ("*Stern* claims," for simplicity), when the parties do not consent, bankruptcy judges may treat the claims as non-core and submit reports and recommendations of proposed findings of fact and conclusions of law to the district court. Pet. App. 24a–25a (citing 28 U.S.C. § 157(c)(1) (permitting district courts to enter final judgments in non-core proceedings after reviewing de novo proposed findings of fact and conclusions of law of bankruptcy judges)). (This second sua sponte question resolution might also be dictum in light of the finding of consent.)

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[1] Section 157(c) actually does not use the term "non-core," for reasons not relevant to this petition, but instead uses the infamous "related to" language. 28 U.S.C. § 157(c) ("A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11."). This Court held in *Stern v. Marshall* that "related to" means the same thing as non-core. 131 S. Ct. 2594, 2604–05 (2011).

As petitioner, EBIA now seeks this Court's review of two questions, contending that each raises a circuit split. The first is the court below's holding that EBIA can and did waive its Article III objections by consenting through its conduct to bankruptcy court resolution of its fraudulent conveyance action, which it contends creates a circuit split with *Waldman v. Stone*, 698 F.3d 910 (6th Cir. 2012) (forbidding such consent), *cert. denied*, 133 S. Ct. 1604 (2013). The second is that as a procedural matter bankruptcy courts can treat *Stern* claims as non-core and resolve them accordingly. EBIA contends this dictum pronouncement in the opinion below also creates a circuit split, with *Ortiz v. Aurora Healthcare, Inc. (In re Ortiz)*, 665 F.3d 906 (7th Cir. 2011).

In asking this Court to review the permissibility of litigant consent to non-Article III adjudication of private rights in bankruptcy, petitioner is inescapably challenging the constitutionality of section 157(c)(2), which explicitly permits such consent. Embedded in this request is an alternative entreaty: that if section 157(c)(2) remains constitutional, and hence party consent to bankruptcy court adjudication is permissible, this Court should hear the case-specific factual question whether the court below properly inferred EBIA's consent.

Petitioner's second ground for seeking this Court's review is to address the technical question of what to do with *Stern* claims as a procedural matter – specifically, whether bankruptcy courts should just treat them as non-core notwithstanding their statutory classification as core. Petitioner premises

the need for this Court's review of this more arcane point on a purported circuit conflict between the Courts of Appeals for the Seventh and Ninth Circuits – a conflict that respondent submits does not exist.

REASONS FOR DENYING THE PETITION

This case presents a poor vehicle for review of the circuit split regarding the permissibility of consent to non-Article III adjudication. The court below's judgment can be affirmed on the independent ground that any Article III defect was harmless and moot in light of the de novo consideration of EBIA's claim EBIA received by an Article III U.S. District Court.

Furthermore, any such split is unripe for review and results only from a prior aberrational decision of the Court of Appeals for the Sixth Circuit on which this Court just denied certiorari. Given the immaturity of the split – both opinions are from 2012 – and the complete lack of evidence that any court will follow the Sixth Circuit path, this Court should allow lower courts time to confront the issue before expending resources on what could well prove to be a one-off jurisprudential hiccough.

Indeed, the unusual nature of the Sixth Circuit opinion that conflicts with the case below heightens the likelihood it will not be well followed. In denying litigants the right to consensual resolution of private rights before non-Article III bankruptcy judges, it struck down – without mention or citation

– section 157(c)(2) of Title 28, a mainstay of bankruptcy court structure for decades. The Ninth Circuit opinion below, by contrast, after inviting the views of a dozen amici curiae, discusses section 157(c)(2) and engages in extended analysis of this Court's judgment in *Roell v. Withrow*, 538 U.S. 580 (2003), which is expressly devoted to the near-identical consent-based adjudicatory scheme of magistrate judges. Given that both circuit court opinions are from 2012, whatever conflict that may develop is unripe and may well dissipate.

Petitioner's alternative argument – that even if litigant consent is constitutionally permissible to allow non-Article III adjudication in bankruptcy court, the court below erred in finding that consent through EBIA's unambiguous conduct – seeks a case-specific error correction that would be a poor use of this Court's scarce resources. Indeed, the question of implied litigant consent in bankruptcy cases initiated before this Court's opinion in *Stern* is a time-limited one of minimal importance. Litigants today invoke *Stern* by name, and the pace of bankruptcy litigation is generally so fast that few if any pending cases involve parties who could not have known of *Stern* before their relevant filing deadlines.

Petitioner's second, more technical ground for seeking certiorari, on the ability of bankruptcy courts to treat *Stern* claims as non-core, risks another poor use of this Court's time. No circuit split exists (petitioner's contention to the contrary notwithstanding), and respondent is hard-pressed to find any court that thinks bankruptcy courts are

hamstrung in the way petitioner contends the Seventh Circuit suggests.

I. THE CONSTITUTIONALITY OF LITIGANT CONSENT TO NON-ARTICLE III ADJUDICATION IS IRRELEVANT IN THIS CASE GIVEN THE DE NOVO ENTRY OF JUDGMENT BY AN ARTICLE III DISTRICT COURT, MAKING THIS CASE A POOR VEHICLE TO REVIEW THE CONSTITUTIONAL QUESTION.

Nobody contends that United States District Judge Pechman was unable to enter judgment against EBIA. That is what she did when, on January 21, 2011, she concluded a de novo review of the bankruptcy court's resolution of the case on summary judgment. Petitioner's characterization of the district court review as a "substantial evidence" review is simply false, Pet. 4; the district court reviewed the bankruptcy court's order de novo. Pet. App. 45a ("The Court reviews the Bankruptcy Court's order de novo.").[2]

Assuming, arguendo only, that petitioner is right and the bankruptcy court had no constitutional authority to enter its summary judgment decision as a final judgment, then the outcome would have been for EBIA to present its claim to the District Court for resolution by an Article III judge – which is what happened here on Judge Pechman's de novo review.

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[2] The court offhandedly stated at one point that "[t]here is substantial evidence supporting" one of the bankruptcy court's conclusions. Pet. App. 50a. It would be absurd to suggest that this comment contradicts the court's express declaration it was conducting a de novo review, see *id.* at 45a.

EBIA thus got all the Article III treatment it wanted and to which it was entitled. Petitioner alleges no harm from what was at worst a constitutionally irrelevant first stop in bankruptcy court. No judgment money was paid, no preclusive effect was given to the bankruptcy court's order by other courts, and the bankruptcy court resolution of the summary judgment motion received no deference on appeal. Indeed, if the bankruptcy court had treated EBIA's claim as non-core from the outset – as EBIA presumably would have preferred – and entered merely proposed findings of fact and conclusions of law, then EBIA still would have ended up in the exact same boat: losing in bankruptcy court, getting de novo review by an Article III district court upon timely objection, and then losing again there (and one more time in the Court of Appeals). That is precisely what happened here.

In a strikingly similar case involving another non-Article III judge, *Estate of Conners v. O'Conner*, the Court of Appeals held that a magistrate judge did not have authority to enter a postjudgment order of attorney's fees. 6 F.3d 656, 659 (9th Cir. 1993). 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, and then entering judgment after that review. 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." *Ibid.*[3]

In the instant case, the district court below did a searching de novo review and found EBIA's arguments utterly meritless, holding EBIA "failed to raise *any* dispute of fact that might preclude the entry of [summary] judgment." Pet. App. 46a (emphasis added). The court further held that in contrast to the trustee's considerable evidence – including the debtor's own accounting records showing transfers out to EBIA – the only evidence submitted by the defendant was a "self-serving" declaration sheepishly proclaiming either ignorance of the transfers or at best a "clerical error." *Id.* at 47a–49a. The district court summed up: "The Bankruptcy Court did not err . . . ." *Id.* at 47a.

Similarly, in the face of overwhelming evidence of actual fraud in the fraudulent transfer claims (including wholesale transfers of the debtor's assets within three days of an adverse arbitration ruling), the district court likewise noted:

> [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

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[3] 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 section 101(13) of Title 11. Affirmance of this claim renders moot any error with the fraudulent transfer claim.

> Defendant Paleveda's self-serving declaration, which, as explained above, fails to raise a genuine issue of material fact.

Id. at 49a. Affirming the district court, the court below accused petitioner of engaging in the Freudian "narcissism of minor differences." *Id.* at 38a & n.12.

The district court concluded its de novo review, finding no "plausible basis for reversal" on the alter-ego claim, *id.* at 51a, and pointing out instances where petitioner's arguments hurt rather than helped its cause. For example, it stated that

> [EBIA] has done nothing to show any defect in the Bankruptcy Court's grant of summary judgment. . . . . On the merits, Appellant has failed to show *any* dispute of material fact in the record that could *possibly* support the reversal of the Bankruptcy Court's order. The Court DISMISSES the appeal and AFFIRMS the Bankruptcy Court.

Ibid. (emphasis added).

In sum, EBIA got all the Article III consideration of its defenses to which it was entitled under the Constitution. Accordingly, even if this Court grants review of the constitutional question presented in the petition, the outcome of the case will not change. Either the court below was correct on the constitutional question, resulting in affirmance, or the court below was incorrect on the constitutional question, and petitioner was entitled to Article III adjudication of his fraudulent conveyance defense – but since he already received that Article III

consideration in district court, affirmance would once again result. This case thus presents a poor vehicle to review the constitutional question presented.

II. THE *WALDMAN* OPINION CREATING THE CIRCUIT SPLIT IS SO ABERRATIONAL THAT FEW COURTS (IF ANY) WILL FOLLOW IT; THIS COURT'S INVOLVEMENT IS NOT REQUIRED.

The court below held that EBIA can – and did – consent to adjudication of its claims by a non-Article III judge. EBIA seeks review of that holding, citing a circuit split with *Waldman*, in which the Court of Appeals for the Sixth Circuit held that such consent is constitutionally impermissible. But that holding would require invalidating section 157(c)(2) of Title 28 – a provision of the U.S. Code the *Waldman* court did not even consider, but one which this Court in *Stern* itself cited repeatedly. Respondent thus concedes the split's existence but respectfully submits that it is trivial. Few courts, if any, are likely to follow *Waldman*'s cursory constitutional analysis. More importantly, given that both *Waldman* and the case below were decided in 2012, this Court should wait to see whether this incipient circuit split ever ripens to maturity.

A. *Waldman*'s Prohibition of Litigant Consent to Bankruptcy Court Final Judgment Is Cursory.

In *Waldman*, 698 F.3d at 917, the Court of Appeals for the Sixth Circuit quotes the language in

Commodity Futures Trading Commission v. Schor that there is a structural (and hence unwaiveable) component to the Article III right as well as a personal (and hence waiveable) component: "Article III, § 1, serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government." 478 U.S. 833, 848 (1986) (citations and internal quotation marks omitted).[4]

When the United States as Amicus Curiae noted the difference between the personal and the structural nature of the Article III right and that the

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[4] Justice Brennan's more formalistic rule that Article III is entirely structural and never waiveable was thus categorically rejected in *Schor*. See 478 U.S. at 867 (Brennan, J., dissenting) ("I do not believe that a litigant may ever waive his right to an Article III tribunal where one is constitutionally required."). The Commodity Futures Trading Commission as well as the magistrate and bankruptcy court systems have all functioned well for decades since then, and the Article III judiciary appears to have suffered no concomitant diminution of power and respect, perhaps showing with the benefit of hindsight that Justice Brennan's concerns were overstated and that this Court's constitutional comfort was apt. "From 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 Diagnostic Clinic of Am. v. Instromedix, Inc.*, 725 F.2d 537, 546 (9th Cir. 1984) (en banc) (Kennedy, J.); cf. *Roell v. Withrow*, 538 U.S. 580, 589 n.6 (2003) (discussing the 1990 amendments to 28 U.S.C. § 636(c) that evinced increasing comfort with the magistrate judge system and "diminishing concern that communication between the judge and the parties would lead to coercive referrals").

structural one is only implicated when other branches of the government encroach upon the judiciary, the Court of Appeals disagreed: "The argument takes too narrow a view of the interests preserved by Article III. The issue here is not so much aggrandizement of the Legislative or Executive Branches, as it is the diminution of the Judicial one." *Waldman*, 698 F.3d at 918.

The *Waldman* court did not expand on this distinction, leaving unexplained just where power taken from the judicial branch would be going if not to another branch. In fact, in contrast to the Ninth Circuit's sua sponte amicus call that spawned a voluminous opinion, the Sixth Circuit's entire discussion of this constitutional issue spans barely a page. See *id.* at 917–18. *Waldman* contains a cite to *Schor* and to *Stern* but to nothing else: there is no mention of section 157(c)(2), let alone *Roell,* which is this Court's most recent pronouncement on litigant consent to non-Article III adjudication (discussed *infra*). *Waldman* has just a cursory proclamation that Article III concerns are simply "unwaiveable" – apparently ever – by parties who seek to try cases before non-Article III jurists, such as magistrate or bankruptcy judges. *Ibid.*[5]

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[5] The Sixth Circuit elided *Schor*'s more detailed pronouncement that the structural aspect of Article III is the exceptional residuum and that the main right is personal and waiveable: "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. This makes sense if one believes that judicial independence is not an end unto itself but a means of

In light of the repeated reference by this Court to the ability of parties to try private rights consensually before magistrate and bankruptcy judges, it is difficult to imagine *Waldman* generating serious following, let alone confusion, in the federal courts. A case that strikes down a longstanding provision of the Judicial Code without even mentioning it, let alone the Supreme Court's recent citations to it, bespeaks inadvertence. Indeed, in its short lifespan, *Waldman* has already attracted the express disagreement of courts in three jurisdictions, see *Bank of Neb. v. Rose (In re Rose)*, 483 B.R. 540, 544–45 (B.A.P. 8th Cir. 2012); *Res. Funding, Inc. v. Pac. Cont'l Bank (In re Wash. Coast I, L.L.C.)*, 485 B.R. 393, 407–08 (B.A.P. 9th Cir. 2012); *Exec. Sounding Bd. Assocs. v. Advanced Mach. & Eng. Co. (In re Oldco M Corp.)*, 484 B.R. 598, 612–14 (Bankr. S.D.N.Y. 2012), and the Sixth Circuit itself is not averse to using its own en banc procedures to reverse decisions, see, e.g., *Gagne v. Booker*, 680 F.3d 493 (6th Cir. 2012) (en banc). By contrast, no court appears to have disagreed so far with the court below's holding that the right to an Article III judge is waiveable in bankruptcy.[6]

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ensuring impartial resolution of rights held by individuals in these United States. See *ibid.* (explaining Article III protects an individual's "right to have claims decided before judges who are free from potential domination by other branches of government" (quoting *United States v. Will*, 449 U.S. 200, 218 (1980))).

[6] At least one court has quibbled with the court below's holding that bankruptcy judges cannot finally decide fraudulent conveyance actions. See *Mukamel v. ABN AMRO Fund Servs. Bank (Cayman) Ltd. (In re Palm Beach Fin.*

Accordingly, EBIA's insistence that this Court must grant its petition to resolve the circuit-splitting question on the permissibility of private litigant consensual adjudication in non-Article III systems like the bankruptcy and magistrate courts is at best premature and at worst exaggerated.

B. *Waldman*'s Prohibition of Litigant Consent to Bankruptcy Court Final Judgment Is Wrong.

The court below held that litigant consent to non-Article III adjudication by bankruptcy courts raises no Article III concerns. *Waldman*'s contrary holding supported by petitioner, while creating a circuit split, is so clearly wrong that few courts, if any, will be led astray.[7]

Section 157(c)(2)'s allowance of party consent to non-Article III bankruptcy court adjudication is clearly constitutional, and no intervention is required to reaffirm that. This Court has recently cited this statutory provision specifically and more generally approved litigant consent to non-Article III magistrate judge adjudication.

Partners), No. 13-80102-CIV, 2013 WL 2036161, at *3–4 (S.D. Fla. May 14, 2013). That holding is not at issue here, and respondent is not cross-petitioning on it.

[7] Respondent would not, of course, object to this Court granting the petition solely to enter a summary affirmance.

1. *Stern* Explicitly Mentions Section 157(c)(2) in an Opinion Expressly Devoted to the Article III Concerns of the Bankruptcy Court System.

While subject matter jurisdiction cannot be conferred by consent, *Capron v. Van Noorden*, 6 U.S. 126, 127 (1804), entitlement to an Article III jurist is a different matter. As the First Circuit explains:

> Unlike the issue of subject matter jurisdiction, which may neither be waived nor forfeited by the parties, and into which the courts are duty-bound to inquire, *sua sponte*, even absent objection by any party, the protections afforded by the *Northern Pipeline* core/non-core distinction may be waived or forfeited, either by (i) consenting to the bankruptcy court's treatment of an otherwise non-core proceeding as core, or (ii) failing to raise or pursue the issue adequately on appeal.

Sheridan v. Michels (In re Sheridan), 362 F.3d 96, 100 (1st Cir. 2004) (citations omitted).

As this Court itself added in *Stern*:

> 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).

Petitioner's suggestion that consent to non-Article III adjudication of private rights is now impermissible – by command of *Stern*, no less – is impossible to square with this passage from the opinion. See also *id.* at 2606 ("Vickie argues [that] a party may waive or forfeit any objections under § 157(b)(5), in the same way a party can waive or forfeit an objection to the bankruptcy court finally resolving a non-core claim.") (citations omitted, including explicit quotation of section 157(c)(2)). And as this Court further summarized:

> 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 (internal quotation marks, citations, and alterations omitted; emphasis added).

Stern provides no support for EBIA's contention that litigant consent is insufficient to permit non-Article III resolution of private rights in bankruptcy and thus section 157(c)(2) violates Article III. On the contrary, *Stern*'s repeated references to section 157(c)(2) without a whiff of constitutional disapprobation renders such an implication difficult

at best and unfounded at worst.[8] *See generally 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.").

2. *Roell v. Withrow* Unambiguously Countenances Litigant Consent to Final Judgments by Magistrate Judges in "Any and All [Civil] Proceedings" Under 28 U.S.C. § 636(c).

In 2003, this Court decided *Roell v. Withrow*, 538 U.S. 580 (2003), which considered implied consent to federal magistrate judge final judgments in civil proceedings. Under section 636(c) of Title 28, just like section 157(c), parties can consent to a non-Article III magistrate judge's final adjudication of private rights. The majority opinion affirmed that implied consent of the parties was sufficient to grant magistrate judge adjudicative authority notwithstanding the lack of express written consent as commanded by the relevant Federal Rules of Civil Procedure. *Id.* at 582, 586–87 (holding that the statute's textual reference to mere "consent" trumped Rule 73(b)'s reference to an express execution and filing of "a joint form of consent").

The dissent rejected implied consent, preferring for prudential reasons the bright-line rule of express consent to escape what it feared would be a

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[8] *Commodity Futures Trading Commission v. Schor* also involved the waiver of Article III protections regarding a claim grounded in a private right. 478 U.S. 833, 848–50 (1986).

litigation-inducing standard. *Id.* at 596 (Thomas, J., dissenting) ("If express consent is required, courts will not have to study the record of a proceeding on a case-by-case basis, searching for patterns in the parties' behavior that would provide sufficient indicia of voluntariness to satisfy this newly minted, but vague, test for consent."). But even the dissent recognized the Article III permissibility of party consent to magistrate court disposition by final judgment: "Reading § 636(c)(1) to require express consent not only is more consistent with the text of the statute, but also ensures that the parties knowingly and voluntarily waive their right to an Article III judge." *Id.* at 595. Again, it is difficult to suggest the Court deciding *Roell* somehow thought party consent to magistrate judge resolution of private rights would violate Article III.[9]

III. IMPLIED CONSENT WAS CORRECTLY FOUND ON THE FACTS OF THIS CASE.

EBIA argues strenuously in the alternative that even if consent is permissible to justify non-Article III adjudication of private rights in bankruptcy court, that consent should not have been implied in this case. This case-specific request for error correction is not compelling and, indeed, ill-taken given the unambiguous evidence of consent documented by the court below.

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[9] Petitioner does not suggest *Stern* overruled *Roell*, which is unsurprising – *Stern* does not even cite *Roell*.

A. Implied Consent Is Permissible.

Consensual resolution does not offend Article III, and *Roell* holds that that consent may be implied.[10] (For an interesting discussion of whether this should properly be called "implied consent" or "waiver," see *Sheridan v. Michels (In re Sheridan)*, 362 F.3d 96, 113 n.20 (1st Cir. 2004) (Lynch, J., dissenting) (discussing bankruptcy practice of considering Article III waiver as question of implied consent, collecting cases (including *Schor*), and concluding that "[t]he terms are used interchangeably . . . as the substantive standard is the same").) Petitioner tries to hide from this unequivocal holding of *Roell* approving implied consent by dropping a footnote to make the following contention: "In *Roell*, . . . the *only question* at issue was the statutory one: whether consent implied through conduct can count as conferring civil jurisdiction under 28 U.S.C. § 636(c)(1). [*Roell* does not] constitute[] controlling precedent on the Article III questions presented by this petition." Pet. 17 n.1 (citations, alterations, and quotation marks omitted). This argument is unpersuasive – and ironic. On the next page of its petition, EBIA quotes Justice Thomas's Article III concerns addressed in *Roell*. *Id.* at 18. To suggest this Court addressed seriously the statutory issue of whether and when to infer consent under section 636(c)(1) in *Roell* but at the same time overlooked

[10] Petitioner does not ask to overrule *Roell*.

the fact that section 636(c)(1) is entirely unconstitutional boggles the mind.[11]

Petitioner tries to distinguish section 636 from section 157 by noting Congress requires more explicit protection of consent under the former. "Unlike the Federal Magistrate Act of 1979 considered in *Roell*, the Bankruptcy Code does not ensure that litigants in core proceedings are advised of their Article III rights." Pet. 19. Its implication is that the Judicial Code is right on the constitutional margin, with magistrate judges making the Article III cut but bankruptcy judges not – wholly on account of this heightened consent protection.

This argument is inapposite. First, the magistrate provisions were enacted against an explicit congressional backdrop of fear of "coerced" consent into magistrate courts, encouraged by overwhelmed federal judges seeking to push litigants away, perhaps especially the disadvantaged. *Roell*, 538 U.S. at 589 ("It was . . . 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

[11] By contrast, an example of this Court's express exclusion of a constitutional argument would be its admonition in *Nguyen v. United States* that because it invalidated the appellate panel containing a non-Article III judge on statutory grounds alone it need not address the additional constitutional grounds under Article III that might also have required invalidation. 539 U.S. 69, 76 n.9 (2003) ("We find it unnecessary to discuss the constitutional questions because the statutory violation is clear."). If a law is invalidated statutorily, it need not be "double-invalidated" constitutionally.

final decision.") (internal quotation marks omitted); see also *Pacemaker Diagnostic Clinic of Am. v. Instromedix, Inc.*, 725 F.2d 537, 553–55 (9th Cir. 1984) (en banc) (Kennedy, J.) (discussing legislative history and context of Magistrate Act). But coercion was not a principal concern motivating the enactment of the bankruptcy referral scheme. See 130 Cong. Rec. 6045 (1984) (remarks of Rep. Kastenmeier) (discussing consent without reference to risk of coercion).

Secondly, and 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 "related to" a debtor's bankruptcy proceeding, 28 U.S.C. § 1334(b), and even then only upon parties' consent, *id.* § 157(c). Magistrate judges, by contrast, can decide "any or all proceedings in a jury or nonjury civil matter." *Id.* § 636(c)(1). To the extent that a distinction between the magistrate judges and bankruptcy judges is appropriate, presumably Congress would have wanted *additional* safeguards on the exercise of judicial power by the wider-ambit magistrate judges. Accordingly, even assuming the heightened consent protection of litigants invoking magistrate judge resolutions is relevant, it is perfectly understandable given a magistrate judge's broader judicial reach into the private right domain – with literally *any* civil action eligible for consideration.[12]

[12] Most of the bankruptcy court docket involves the routine processing of claims and objections – straight-up core

B. The Court Below Was Right on the Fact-Specific Question of Implied Consent

The court below held that EBIA consented to bankruptcy judge resolution by affirmatively requesting to stay the withdrawal of the reference motion pending in district court so that matters could proceed in bankruptcy court (in retrospect a decision petitioner doubtless regrets given its loss there). Pet. App. 28a–30a. This tactical decision was made in 2010 when the Court of Appeals handed down its own opinion in *Stern*, which this Court functionally affirmed on different grounds.[13]

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proceedings. Fraudulent conveyance actions against non-creditor defendants are infrequent. Indeed, it is no surprise that the major precedents of this Court (*Granfinanciera*, *Northern Pipeline*, even *Stern*) all involve corporate or at least well heeled litigants unlikely to be ignorant of their legal rights – the worry that animated the Congress drafting the magistrate judge consent provisions. See *Stern v. Marshall*, 131 S. Ct. 2594, 2600 (U.S. 2011) (involving claims against the estate of "a man believed to have been one of the richest people in Texas"); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 36–37 (1989) (involving a corporation controlled by the government of Colombia); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 56–57 (1982) (plurality opinion) (involving litigation between two oil-pipeline companies).

[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 status report lay pending with the district court for ample time after *Stern* to enable amendment before the court entered its order (March 26). And of course, the *Stern* opinion itself was under reserve for quite some time before that. 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.

The Court of Appeals' *Stern* decision already 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 petitioner in *Stern*, strenuously objected to the Article III problems before the Court of Appeals and other courts, mindful of the court below's then-precedents and well before this Court decided his case. *Stern v. Marshall*, 131 S. Ct. 2594, 2607–08 (2011) (noting that although Pierce was late in objecting to bankruptcy court adjudication of *his defamation claim*, he had been making the same Article III objection with respect to *Vickie's counterclaim* all along).

Petitioner makes much of the fact that an old Ninth Circuit case predating *Granfinanciera* purportedly negated any Article III claim he might have, see Pet. 3–4, 23–25 (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 that case's ongoing vitality was in serious doubt after *Granfinanciera* if not already overruled by it. The court below called petitioner out: "Although EBIA may not be as sophisticated or creative as Pierce, it fully litigated the fraudulent conveyance action before the bankruptcy court and district court, without so much as a peep about Article III – even going so far as to abandon its motion to withdraw the reference. . . . Having lost before the bankruptcy court, EBIA cannot assert a right it never thought to pursue when it believed it

might win." Pet. App. 33a. Nor can it be said EBIA was shy or unaware of its constitutional rights; it demanded and stuck to its Seventh Amendment jury trial rights at first before later abandoning the reference withdrawal request. *Id.* at 28a–30a. Accordingly, this Court's intervention is not required to revisit the factual question whether the Court of Appeals correctly concluded that petitioner's unambiguous conduct constituted consent to bankruptcy court adjudication and waiver of whatever Article III rights it may have had.[14]

C. Issues of Implied Consent to *Stern* Objections Are Time-Limited Ones of Minimal Importance.

An independent reason rendering this case a poor use of the Court's limited resources is the necessarily time-limited nature of the problem of inferring consent to bankruptcy court adjudication in the face of a possible *Stern* objection. Petitioner makes great hay of the fact it did not and could not know of its *Stern* rights until *Stern* itself was decided. Whatever petitioner's alleged state of knowledge was, everyone in the bankruptcy world now has had two years of living with *Stern*. That is an eternity in the bankruptcy context; most

[14] Were this Court inclined to intervene and review that factual determination, it would surely affirm the court below on whatever standard of review it might choose to employ for an issue of implied consent. Cf. *Sheridan v. Michels (In re Sheridan)*, 362 F.3d 96, 103 n.5 (1st Cir. 2004) (presenting different approaches bankruptcy courts have deployed to determine when consent to bankruptcy court adjudication can fairly be implied by litigant conduct).

bankruptcy petitions are resolved in under a year.[15] The problem of what facts suffice to find an implied consent to bankruptcy court adjudication in the absence of an express invocation of *Stern* was a small one to start with and gets smaller each day. Once again, this Court need not get involved on a question of such limited importance.

IV. AS ALL COURTS AGREE, BANKRUPTCY JUDGES CAN TREAT *STERN* CLAIMS AS NON-CORE.

Seizing upon a purported circuit conflict, petitioner's second ground for seeking certiorari is that this Court is required to clean up confusion over just how bankruptcy courts can resolve *Stern* claims. Petitioner is mistaken. There is no circuit conflict on this unremarkable issue.

A. Petitioner Misunderstands *Ortiz*.

Petitioner builds its second ground for certiorari on *Ortiz v. Aurora Healthcare, Inc. (In re Ortiz)*, 665 F.3d 906 (7th Cir. 2011), in which the Court of Appeals for the Seventh Circuit dismissed a case for lack of appellate jurisdiction in which the bankruptcy court issued a final judgment on a *Stern* claim.[16] Because circuit courts can for the most part

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[15] One study shows that the median length of chapter 11 bankruptcies is eleven months. Elizabeth Warren & Jay Lawrence Westbrook, *The Success of Chapter 11*, 107 Mich. L. Rev. 603, 626 (2009). The median duration of chapter 7 bankruptcies, which are simpler proceedings that constitute the lion's share of the bankruptcy docket, is far shorter.

[16] The *Ortiz* case is odd. It involves a debtor's purported state law cause of action for revealing confidential medical information arising from a medical creditor's (required)

only review final judgments, see 28 U.S.C. § 158(a), and because its case was directly certified by the bankruptcy court for immediate appeal under section 158(d)(2), the Court of Appeals held that the lack of a valid underlying final judgment on the *Stern* claim by the bankruptcy court rendered it without appellate jurisdiction. *Ortiz*, 665 F.3d at 915. It remanded the case to the bankruptcy court for further proceedings, see *ibid.* – the very disposition that petitioner suggests *Ortiz* forbids.

That is exactly what the Court of Appeals for the Ninth Circuit said to do with *Stern* claims in the case below. There is thus no circuit split but a circuit alignment. Neither circuit would prevent a district court, which can either hear de novo reconsiderations of proposals under section 157(c)(1) or appeals of final judgments under section 158(a)(1), from recharacterizing a disposition misclassified as the latter as arising under the former. Indeed, that is what happened in the district court in *Stern* itself – which this Court recounted without any disapproval – when the lower court treated the bankruptcy court's final judgment on Pierce's counterclaim as a proposed finding of fact and conclusion of law. 131 S. Ct. 2594, 2602 (U.S. 2011). Thus, to be perfectly clear, *Ortiz* was a case about appellate jurisdiction, which has nothing to do with the issues in this case. Finding no valid

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bankruptcy proof of claim filing, but the opinion contains no pre-emption analysis of that state law by federal bankruptcy law.

final judgment below, the *Ortiz* panel dismissed the appeal. Petitioner errs in alleging a circuit split.[17]

B. No Confusion Reigns in the Lower Courts.

Aside from some stray comments of dictum, respondent is unable to unearth any case holding that bankruptcy courts cannot simply treat *Stern* claims as non-core and enter proposed findings of

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[17] The *Ortiz* court made a stray comment wholly unnecessary to its decision that petitioner seizes upon:

> For the bankruptcy judge's orders to function as proposed findings of fact or conclusions of law under [section] 157(c)(1), we would have to hold that the debtors' complaints were not a core proceeding but are otherwise related to a case under title 11. As we have just concluded, the debtor's claims qualify as core proceedings and therefore do not fit under § 157(c)(1).

Ortiz, 665 F.3d at 915. This comment of dictum is clarified in the next sentence: "The direct appeal provision in [section] 158(d)(2)(A) also does not authorize us to review on direct appeal a bankruptcy judge's proposed findings of fact and conclusions of law." *Id.* As the Court further clarified, "[w]ithout a final judgment we lack a statutory basis for appellate jurisdiction," *id.*, confirming that its sole holding was limited to whether there was a final judgment below, which, under its holding on the dictates of Article III, there was not. The gratuitous comment that a statutorily core proceeding is not a statutorily non-core proceeding is banal and does not speak to what treatment befalls a *Stern* claim. Indeed, the *Ortiz* court was without appellate jurisdiction to issue any holding at all on the treatment of non-final bankruptcy court judgments. Gratuitous comments unnecessary to a court's holding cannot ground a circuit split.

fact and conclusions of law. See Pet. 32–34. The only close case that respondent did find, *Samson v. Blixseth (In re Blixseth)*, No. 09-60452-7, 2011 WL 3274042, at *12 (Bankr. D. Mont. Aug. 1, 2011), subsequently reversed itself upon further reflection, *Samson v. Western Capital Partners LLC (In re Blixseth)*, No. 09-60452-7, 2011 WL 6217416, at *1–3 (Bankr. D. Mont. Dec. 14, 2011). While one court has understood – in dicta – the *Ortiz* court the way petitioner does, see *Schafer v. Nextiraone Fed., LLC*, No. 1:12CV289, 2012 WL 2281828, at *4 (M.D.N.C. June 18, 2012), the District Court for the Northern District of Illinois, itself within the Seventh Circuit, has generally not understood *Ortiz* to be binding on the question, see, e.g., *Gecker v. Flynn (In re Emerald Casino, Inc.)*, 467 B.R. 128, 133–34 (N.D. Ill. 2012); *FTI Consulting, Inc. v. Merit Mgmt. Grp., LP*, 476 B.R. 535, 539 (N.D. Ill. 2012); see also *KHI Liquidation Trust v. Wisenbaker Builder Servs. (In re Kimball Hill, Inc.)*, 480 B.R. 894, 908 n.9 (Bankr. N.D. Ill. 2012) (stating in dicta that it would follow *Emerald Casino*'s understanding of the proposed findings issue); *Pulaski v. Dakota Fin., Inc. (In re Pulaski)*, 475 B.R. 681, 689 n.10 (Bankr. W.D. Wis. 2012) (stating in dicta, after discussing *Ortiz* at length, that bankruptcy courts may enter proposed findings on *Stern* claims).

This near-unanimity of approach 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 more

centrally bankruptcy-connected claims, such as fraudulent conveyances. See generally *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (discussing absurdity doctrine). EBIA's suggestion that the Seventh Circuit adopted this absurd position is inaccurate. As the court below summarized in rejecting petitioner's radical position: "Stripping the bankruptcy courts of the power to entertain state-law counterclaims in *any* capacity would have roiled the bankruptcy schema" and be inconsistent with *Stern*'s insistence it was a "narrow" opinion that did not "meaningfully change[] the division of labor in the current statute." Pet. App. 26a (internal quotation marks and citation to *Stern* omitted).

Finally, in trying to generate "confusion" among the lower courts over what the court below called the *Stern*-induced statutory "gap," *id.* at 23a–24a, petitioner discusses in its argument what some courts have done and what other courts have done in response, implying that there is a divergence of opinion. Pet. 33–34. In reality, *all* these cases agree that bankruptcy judges have authority to treat *Stern* claims as non-core. While some do it with standing orders of reference and others suggest such an order is unnecessary, all concur that bankruptcy courts can resolve *Stern* claims with reports and recommendations. EBIA marshals no case in which a bankruptcy court held it was without power to do anything on a *Stern* claim and was thus frozen, unable to proceed. Accordingly, there is neither conflict nor confusion in the lower courts requiring intervention.

C. Petitioner's Other Claims Are Meritless.

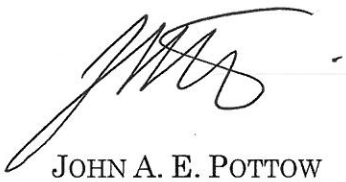
Respondent has not addressed each argument petitioner advances. Briefly, EBIA's position that the "hear and determine" textual authorization of bankruptcy court power under section 157(b)(2) would not suffice to empower a bankruptcy judge to enter proposed findings of fact and conclusions of law on *Stern* claims (because "proposing" is not "determining") finds scant support beyond an ambiguous reference to *Black's Law Dictionary*. Pet. 28. Nor is the general position that *Stern* created a "procedural morass" and thus requires revisitation at this early juncture well taken. On the contrary, far from offering revisitation, this Court should allow lower courts time to digest *Stern* and let legal arguments percolate to ripeness before (re-)weighing in.

CONCLUSION

The decision below was well reasoned and assisted by a dozen amici. There is no reason for this Court's intervention in this area so soon after *Stern*. One of petitioner's purported circuit conflicts does not exist. The other involves a brief passage in an isolated opinion (so far followed by no court) that invalidates a major component of the bankruptcy and magistrate judge system without so much as a reference to either's enabling statute, let alone this Court's recent pronouncements on implied consent under *Roell*.

For these and other foregoing reasons, Trustee Arkison opposes the petition for a writ of certiorari.

Respectfully submitted,



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