No. 12-1200

IN THE

Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,

Petitioner,

v.

PETER H. ARKISON, 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

AMICUS BRIEF OF THE COMMERCIAL LAW LEAGUE OF AMERICA IN SUPPORT OF RESPONDENT, PETER H. ARKINSON, CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae the Commercial Law League of America (the "CLLA") is a professional organization of more than 3,000 collection, creditors' rights, and bankruptcy professionals. Established in 1895, the core mission of the CLLA is "to be the leader in providing legal, educational and professional services to the business and credit communities." Article I of the CLLA constitution states that its "objects shall be: to promote uniformity of legislation in matters affecting commercial law; to elevate the standards and improve the practice of commercial law…."

Consistent with those core beliefs and goals, the CLLA submits this brief in support of the position taken by the respondent.

SUMMARY OF ARGUMENT

The petition presents two questions for review: first, whether an Article I bankruptcy court can finally determine a proceeding that is constitutionally reserved for an Article III court *if the parties consent (expressly or*

1. On August 27, 2013, in accordance with Supreme Court Rule 37.3, the parties separately filed their consent to the filing of *amicus curiae* brief with the Clerk of Court. Attorneys authoring this brief on behalf of the CLLA include Jeffrey T. Kuntz and Michael D. Lessne. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, or its counsel, made a monetary contribution to the preparation or submission of this brief.

implicitly by waiver), and second, whether a bankruptcy court that does not have the constitutional authority to decide the proceeding can instead propose its findings and conclusions to the Article III court in the absence of express statutory authority to do so. These questions arise because Congress included as examples of "core" proceedings in 28 U.S.C. § 157(b)(2) certain proceedings—*Stern*[2] proceedings—that empower bankruptcy courts to exercise the judicial power of the United States where the Constitution does not permit the exercise by non-Article III judges.

The CLLA takes the following positions regarding the two questions before the Court:

(1) A defendant who fails to object to a final determination by a bankruptcy judge in a bankruptcy proceeding prior to the entry of judgment has waived the right to do so even if the judge decided an Article III matter. This is because the procedures of 28 U.S.C. § 157, as limited by *Stern*, afford such a defendant the right to an Article III judge unless the matter before the bankruptcy court is constitutionally core to the bankruptcy process.

(2) *Stern* proceedings are non-"core" proceedings in which bankruptcy judges may enter final judgments where the parties either expressly or impliedly consent. Since bankruptcy judges lack constitutional authority to enter final judgments in *Stern* proceedings, the subsections of 28 U.S.C. § 157(b)(2) that include *Stern* proceedings are void. As a result, *Stern* proceedings fall within the scope of 28 U.S.C. § 157(c)(1). It would be impractical if

2. *Stern v. Marshall,* 131 S. Ct. 2594 (2011).

bankruptcy judges could hear "related to" proceedings that are more attenuated than *Stern* proceedings simply because *Stern* proceedings were impermissibly classified as "core" within the Bankruptcy Code.

ARGUMENT

I. A Defendant May Consent (Expressly or Impliedly) to a Bankruptcy Judge Determining a *Stern* Proceeding.

Where a statute authorizes a non-Article III judge to enter a final judgment on an Article III matter, the right to adjudication by an Article III judge is a personal right subject to waiver so long as the law (the congressional scheme) does not violate the separation of powers. *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 850-851 (1986) (holding that disgruntled customers suing professional commodities broker for violations of the Commodity Exchange Act waived their rights to have state law counterclaims determined by Article III courts or state courts by not objecting until after final disposition).

To determine whether there is a structural problem with the law that cannot be cured by consent, the Court examines "the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch." *Id.* at 851. The Court has taken a functional approach to answer this esoteric inquiry, "declining to adopt formalistic and unbending rules" because such rules "might unduly constrict Congress' ability to take needed

and innovative action pursuant to its Article 1 powers." *Id.* (citations omitted). *Schor* explained:

> …in reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary. Among the factors upon which we have focused are the extent to which 'the essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the rights to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

Id. (citations omitted).

The CLLA submits that the procedures of 11 U.S.C. § 157, as limited by *Stern*, reserve the essential attributes of judicial power to the Article III courts while assuring the effective and efficient administration of our bankruptcy laws by knowledgeable and experienced bankruptcy judges. Since there is no question about the constitutional authority of bankruptcy judges to hear and decide constitutionally "core" bankruptcy proceedings and to hear all other proceedings that are "related to" bankruptcy, there is no structural infirmity with our bankruptcy system. Therefore, a defendant in a *Stern* proceeding or any other "related to" matter waives the

right to district court adjudication by not objecting to the authority of the bankruptcy court prior to the entry of judgment. *See United States v. Olano*, 507 U.S. 725, 731 (1993) (stating that "'[n]o procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited . . . by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944))).

A. The Current Bankruptcy System Reserves the Essential Attributes of Judicial Power in Article III Courts.

In *Northern Pipeline,* the Court held "that a 'traditional' state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, *absent consent of the litigants*, be heard by an 'Art. III court' if it is to be heard by any court or agency of the United States." *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 92 (1982) (Burger, C.J., succinctly reciting the position of the majority in the dissent) (emphasis supplied). It was a given that the parties could consent to adjudication by the bankruptcy court. *See also Stern,* 131 S.Ct. at 2602. The fix instituted by Congress following *Northern Pipeline*—the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the 1984 Act)—adopted a procedure that meaningfully changed the division of labor and stripped the bankruptcy courts of their ability to adjudicate to finality those matters that were merely "related to … a case under title 11," absent

the consent of the parties.[3] The new procedure[4] bifurcated matters that jurisdictionally "arise under title 11 [of the Bankruptcy Code]" and "arise in … a case under title 11"[5]—"core" proceedings—from the "related to" matters that are the stuff of Article III courts.

In defining the proceedings that are "core" proceedings, *Stern* determined that Congress exceeded its constitutional authority in at least one respect—by allowing bankruptcy courts to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim. The effect of *Stern* and any other invalidation of those subsections of section 157(b)(2) that are *Stern* proceedings are that such matters are rendered "related to" proceedings. The 1984 Act's procedures combined with *Stern* constitutionally limit the bankruptcy judges to (a) making final adjudications of only quintessential bankruptcy matters (non-*Stern* "core" proceedings)[6] (28 U.S.C. § 157(b)(1)) and (b) submitting reports and recommendations to the district courts for final adjudication of Article III matters unless the parties expressly or impliedly consent (28 U.S.C. § 157(c)(1)). This ensures that bankruptcy matters are administered through a uniform bankruptcy system that does not encroach on the judicial branch.

In *Schor,* the Court distinguished the authority of the CFTC from the authority of the bankruptcy courts

3. 28 U.S.C. § 157(c)(1).

4. 28 U.S.C. § 157.

5. 28 U.S.C. § 1334(b).

6. See the discussion in subsection 2 below regarding summary v. plenary matters.

as to the scope of the exercise of judicial power by Article I courts. 478 U.S. at 853. The distinction is no longer appropriate in light of the 1984 Act and *Stern*; bankruptcy courts, like the CFTC, deal only with a particularized area of the law for a specific and limited purpose: to administer the federal bankruptcy laws. Our federal bankruptcy system is a specific and limited regulatory scheme for the administration of our bankruptcy laws.

The right of a litigant to have an Article III determination in any other bankruptcy proceeding is preserved. The litigant has the right to object to the bankruptcy court's authority to make final determinations—by requesting the bankruptcy court determine that the matter is not a "core" proceeding pursuant to 28 U.S.C. § 157(b)(3), by seeking to have the district court withdraw the reference pursuant to 28 U.S.C. § 157(d), and by seeking abstention pursuant to 28 U.S.C. § 1334(c). Review by the district court of a non-"core," "related to" matter is *de novo* pursuant to 28 U.S.C. § 157(c)(1).

The result is that our bankruptcy system constitutionally reserves the judicial power of the United States to the district courts while providing for the uniform and efficient administration of the Bankruptcy Code. Our bankruptcy system has highly experienced and specialized judges intimately familiar with the legal issues routinely facing insolvent debtors. They are uniquely equipped to handle the scope of bankruptcy matters[7]

7. The range of matters before the bankruptcy courts extends from high volume consumer cases (e.g., a single chapter 13 calendar call might have 50-100 hearings) to large complex business cases.

quickly and efficiently, possessing a keen understanding of how a particular dispute fits in the larger context of the entire bankruptcy estate. These attributes translate into immeasurable benefits to litigants in the form of ease of administration, diminished decision-making time, and reduced legal expense

B. The Origins and Importance of the Rights to be Adjudicated.

In *Schor,* this Court was "persuaded that the congressional authorization of limited CFTC jurisdiction over a narrow class of common law claims as an incident to the CFTC's primary, and unchallenged, adjudicative function does not create a substantial threat to the separation of powers." 478 U.S. at 854. Likewise, the congressional authorization of a bankruptcy judge's authority to decide *Stern* proceedings just like other "related to" matters is incident to the bankruptcy court's primary and unchallenged authority to adjudicate "core" proceedings that are within constitutional bounds.

Congress did not have stable bankruptcy laws until the Bankruptcy Act of 1898. The 1898 Act allowed debtors to petition for bankruptcy, and the district courts took on all cases and controversies in bankruptcy arising between the bankrupt and the creditor. The act defined "the courts of bankruptcy" to be the respective district courts and vested all jurisdiction in those courts. A. Paskay, *Creditor's Rights*, pgs. 5-6 (Vandeplas Publishing 2006). The district courts were authorized to, and generally did, appoint "referees" to adjudicate matters in bankruptcy. *Id*.

The 1898 Act limited the adjudicative authority of Article I bankruptcy referees to "summary" proceedings, as opposed to "plenary" proceedings. Bankruptcy referees were vested with authority to decide summary matters, but only an Article III judge could decide plenary suits absent consent of the parties. *In re Bellingham Ins. Agency, Inc.*, 702 F.3d 553, 567 (9th Cir. 2012) (citing *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263, 267 (1932) (addressing consent)).

Summary proceedings included "controversies relating to property over which [the bankruptcy courts] have actual or constructive possession" and "matters of an administrative character, including questions between the bankrupt and his creditors, which are presented in the ordinary course of the administration of the bankrupt's estate." *Katchen v. Landy,* 382 U.S. 323, 327 (1966) (internal citations omitted).

In *Katchen,* the Court noted that Congress "left the exact scope of summary proceedings in bankruptcy undefined." *Id.* at 328. The Court considered the structure and purpose of the Bankruptcy Act, recognizing that "a chief purpose of the bankruptcy laws is to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period, and that provision for summary disposition, without regard to usual modes of trial attended by some necessary delay, is one of the means chosen by Congress to effectuate that purpose. *Id.* (internal citations omitted).

In 1978, Congress enacted the Bankruptcy Reform Act of 1978, which eliminated the referee system and established the bankruptcy system as we know it today.

The 1978 Act, however, did not limit the authority of bankruptcy judges to decide "related-to" matters.

After *Northern Pipeline*, Congress attempted to rectify the constitutional infirmities of the 1978 Act by passing the 1984 Act, attempting to heed Justice Burger's call in the dissent to "provid[e] that ancillary common-law actions, such as the one involved in these cases, be routed to the United States district court of which the bankruptcy court is an adjunct." 485 U.S. at 92. The reforms addressed, *inter alia*, mandatory and permissive abstention under 28 U.S.C. § 1334, and provided for the procedures of 28 U.S.C. § 157 to distinguish "core" proceedings over which a bankruptcy court can exercise summary jurisdiction from "related to" matters over which the bankruptcy court cannot unless the parties consent.

While Congress drew the line between "core" and "related to" in the wrong place, *Stern* and its progeny have moved it back to what is constitutionally permitted so that the bankruptcy scheme does not intrude into the province of the judiciary.

C. The concerns that drove Congress to depart from the requirements of Article III.

The importance of establishing specialized bankruptcy tribunals to effectively and efficiently administer the uniform bankruptcy laws was recognized early in this nation's history. The Framers believed that "[t]he power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, *that*

the expediency of it seems not likely to be drawn into question." The Federalist No. 42, p. 271 (C. Rossiter ed. 1961) (emphasis added).

Congress has long recognized the breadth of bankruptcy, covering all matters "arising under title 11, or arising in or related to cases under title 11;" the interrelatedness of the proceedings as evidenced by the fine line between "core" and "related-to;" and the importance of having the matters decided expediently in a single forum by specialized judges.

Consider, for example, the inefficiency of a system that provides bankruptcy judges with authority to deny a debtor's discharge after determining that the bankrupt made an intentionally fraudulent transfer within a year before the petition date[8], but does not permit them to avoid the transfer itself.[9] Another example is the resolution of the claim and counterclaim in *Stern*. Having interrelated proceedings in the bankruptcy forum (even if the judge may only enter proposed findings of facts and conclusions of law in one of the proceedings) ensures the efficient and effective operation of our bankruptcy system.

D. The Ninth Circuit Correctly Applied This Court's Holdings And Concluded That The Right To Adjudication By An Article III Court Can Be Waived

The decision below adheres to the goals of Congress in maintaining an efficient bankruptcy system and the

8. 28 U.S.C. § 727(a)(2).

9. 11 U.S.C. § 548(A)(1)(A).

decisions from this Court that require a watchful eye be kept on even the slightest encroachments upon the judicial powers provided by Article III. Through its decision, "[j] udicial efficiency is served; [and] the Article III right is substantially honored." *Roell v. Withrow*, 538 U.S. 580, 587 (2003).

Relying upon *Granfinanciera*[10] and *Stern*, the Ninth Circuit concluded that bankruptcy courts do not have the general authority to enter final judgments in fraudulent conveyance actions. *In re Bellingham Ins. Agency, Inc.*, 702 F.3d 553, 565 (9th Cir. 2012). Notwithstanding that conclusion, a bankruptcy court is permitted to prepare a proposed judgment for the district court. *Id.* (noting that in *Stern* the Court did not express any objection to the district court in that case treating the bankruptcy court's judgment as proposed). Furthermore, the Ninth Circuit concluded that "even if defendants in fraudulent conveyance suits have a right to a hearing in an Article III court, that right is waivable." *Id*. at 566.

Admittedly, other courts of appeal have reached a contrary result. *See*, *Waldman v. Stone*, 698 F.3d 910, 914 (6th Cir. 2012), *cert. denied,* 133 S. Ct. 1604 (2013); *Wellness Intern. Network, Ltd. v. Sharif*, 727 F.3d 751, 771 (7th Cir. 2013); *In re Frazin*, - F.3d -, fn. 3, No. 11-10403, 2013 WL 5495920 (5th Cir. Oct. 1, 2013).

However, support for these decisions is not founded upon prior holdings of this Court. For example:

> ...in support of the discussion about the structural component of Article III, *Waldman*

10. *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33 (1989).

> emphasizes only the importance of the structural component of Article III (*see Waldman,* 698 F.3d at 917–18), but it fails to address the critical issue, derived from *Murray's Lessee*[11], *Schor* and *Stern,* that the structural component of Article III prevents *Congress* from removing cases from Article III judicial cognizance, something that has not occurred here.

In re Oldco M Corp., 484 B.R. 598, 613 (Bankr. S.D.N.Y. 2012).

In fact, with regard to *Sharif*, the Seventh Circuit itself has acknowledged its opinion has limitations. Chief Judge Easterbrook noted that the issue in *Sharif* "was forfeiture rather than waiver" and that the *Sharif* court had not discussed the impact of other decisions from the Seventh Circuit "which hold that consent on the record authorizes decision by an untenured magistrate judge, even though the parties' failure to object does not." *Peterson v. Somers Dublin Ltd.*, 729 F.3d 741, 747 (7th Cir. 2013).

This Court's precedent supports the Ninth Circuit's conclusion that the right to a hearing in an Article III court is a waivable right. See, e.g., *MacDonald*, 286 U.S. at 267 (holding that the benefit of trial of a "plenary suit" in an Article III court oculd be waived by the consent of the parties); *Schor*, 478 U.S. at 848-849. Recently, the Court held that consent to the entry of judgment by a magistrate judge could be given by conduct. *Roell*, 538 U.S. at 586-587.

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11. *Murray's Lessee v. Hoboken Land Improvement Co.,* 59 U.S. 272 (1855).

The same principles that led the Court to conclude consent is permissible to allow adjudication by a non-Article III court apply in this instance. Allowing the entry of judgment by a bankruptcy court when a party has consented expressly or by waiver protects the powers provided by Article III without even a "slight encroachment."

II. Bankruptcy courts may hear *Stern* proceedings and propose reports and recommendations.

Stern matters are not "core" proceedings. Any subsections of section 157(b)(2) that are unconstitutional because they require the exercise of the judicial power of the United States are void and do not affect the remainder of the statute. *See, e.g., Champlin Refining Co. v. Corporation Com'n of State of Okl.*, 286 U.S. 234-35 (1932) (explaining that "[t]he unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.").

The result is that *Stern* proceedings included within subsection 157(b)(2) are void so they fall neatly within the confines of section 157(c)(1). Each *Stern* proceeding is therefore "a proceeding that is not a core proceeding but that is otherwise related to a case under title 11" for which a bankruptcy judge may hear and submit to the district court proposed findings of fact and conclusions of law.

This Court in *Stern* implicitly accepted this principal when it recounted the district court's treatment of the bankruptcy court's judgment as proposed. *Stern,* 131 S.Ct. at 2602. Judicial districts across the country have accepted the principal by amending their orders of reference to the bankruptcy courts to provide that bankruptcy courts can hear *Stern* proceedings and submit proposed findings of fact and conclusions of law to the district court. *See, e.g., In re Bankruptcy Proceedings,* Admin. Order 2012-25 (S.D. Fla. Mar. 25, 2012). Likewise, courts across the country have determined that bankruptcy courts may propose reports and recommendations on *Stern* matters. *See*, *e.g.*, *In re British Am. Ins. Co. Ltd.*, 488 B.R. 205, 220-221 (Bankr. S.D. Fla. 2013); *In re Parco Merged Media Corp.*, 489 B.R. 323, 325 (D. Me. 2013); *Kirschner v. Agoglia*, 476 B.R. 75, 82 (S.D.N.Y. 2012).

While it is not the Court's role to write the law, it is certainly the Court's role to interpret it, and be guided by Congressional intent in doing so. In interpreting the 1984 Act, the Court is guided by Congress' intent, which was plainly for bankruptcy judges to enter final judgments in *Stern* proceedings. As a result of that authority being unconstitutional, the petitioner has pointed to an apparent statutory "gap" in section 157. The CLLA submits that even if such a gap does exist, it is not the result of a lack of intent on Congress' part, but rather a failure to draw the "core"/non-"core" line in the right place. When viewed in the context of the whole statute and Congress' clear intent to allow bankruptcy judges to decide what it deemed core bankruptcy matters, Congress clearly intended that at a minimum that the bankruptcy courts would be vested with the ability to propose findings of fact and conclusions of law.

To the extent that there is any doubt about the statutory basis for bankruptcy judges to submit reports and recommendations in *Stern* proceedings, it is enough for the CLLA to point to Chief Justice Marshall on the absurdity doctrine:

> [I]f, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.

Sturges v. Crowninshield, 17 U.S. 122 (1819). Through the 1984 Act, Congress gave authority to determine *Stern* proceedings. That the authority was unconstitutional does not in any way nullify congressional intent that bankruptcy judges hear such proceedings. Let there be no doubt about the view of the members of the CLLA: it is incredulous that a bankruptcy judge would be able to hear a "related to" matter (which might only *conceivably* have an effect on the bankruptcy estate,[12]) but that the judge would not be able to hear a *Stern* proceeding (a matter that Congress believed should be classified as "core" which absolutely has a greater effect on the estate).

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12. *See Celotex Corp. v. Edwards,* 514 U.S. 300, 308 & n. 6 (1995); *Pacor, Inc. v. Higgins (In re Pacor),* 743 F.2d 984 (3d Cir. 1984) (the test for determining "related-to" jurisdiction is whether the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy).

CONCLUSION

For these reasons, the CLLA believes the opinion of the Ninth Circuit should be affirmed in all respects.

Respectfully submitted,

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