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No. 12-1200

IN THE

Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,

Petitioner,

v.

PETER H. ARKISON, TRUSTEE,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF IRVING H. PICARD, AS TRUSTEE OF THE SUBSTANTIVELY CONSOLIDATED ESTATE OF BERNARD L. MADOFF INVESTMENT SECURITIES LLC AND BERNARD L. MADOFF, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

In his capacity as Trustee of the substantively consolidated estate of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff, Irving H. Picard is responsible for recovering as much as possible of the nearly $20 billion in investor principal lost in the world's largest-ever Ponzi scheme, for distribution to Madoff's customers on a *pro rata* basis. To that end, Mr. Picard has filed over one thousand actions to avoid fraudulent or preferential transfers, most against Madoff investors who, by luck or otherwise, came out ahead when his fraud unraveled, at the direct expense of their fellow investors. The *amicus curiae's* interest in the orderly and efficient operation of the bankruptcy system, particularly its avoidance provisions, is plain: the sooner he can avoid and recover Madoff's wrongful transfers, the sooner he can provide relief to Madoff's victims.

A decision that removes avoidance actions from the bankruptcy courts would impair that interest by fundamentally altering the division of labor between bankruptcy courts and the district courts. It would essentially bifurcate every complex bankruptcy proceeding (and many non-complex ones), placing initial

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[1] Pursuant to Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae*, or his counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the clerk.

responsibility for the recovery of assets in one tribunal and their distribution in another, even in cases where the two turn on overlapping sets of facts and evidence. History and experience have necessarily treated the recovery and distribution of assets in bankruptcy as two sides of the same coin. There is no reason now to upset that settled practice—particularly in a case where the Petitioner in fact received plenary Article III adjudication and has no current injury.

SUMMARY OF THE ARGUMENT

The Court presumably granted certiorari in this case because it was the first to raise several issues left open in the wake of its decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). But timing isn't everything. Those issues, due to the way that they are raised in this case, are not susceptible to judgment at this point under Article III's "case" or "controversy" requirement. The Petitioner here, Executive Benefits Insurance Agency ("EBIA"), already received any relief to which it might be entitled in mounting its defense under *Stern*, depriving it of standing to argue those issues here.

But if the Court does reach the merits of this abstract dispute, it should not follow EBIA's lead in simply assuming that Congress's assignment of avoidance actions to bankruptcy courts for adjudication in the first instance violates the Constitution. Greater respect than that is owed to a coordinate branch of the Government, and the issue is nowhere

near so clear-cut as EBIA would have it. Neither *Stern* nor any of the Court's other precedents, including *Granfinanciera, S.A., v. Nordberg*, 492 U.S. 33 (1989), resolved that issue, and EBIA flat-out ignores language in *Stern* and other cases indicating that avoidance actions are different in kind from other claims that might be brought in connection with a bankruptcy.

Whereas common law claims and the like merely seek to augment a bankruptcy estate and have traditionally been heard in courts of law, avoidance actions are integral to bankruptcy, the mirror image of the claims-allowance process that the Court has always recognized may be overseen by a non-Article III tribunal. Historical evidence demonstrates beyond any reasonable doubt that Congress's Bankruptcy Clause power also authorizes it to assign such actions to non-Article III bankruptcy courts, in the same way that English law assigned them to non-judicial "commissions" for centuries prior to the Framing—a practice adopted in the first United States bankruptcy law in 1800. To hold or just assume that this practice is unconstitutional would break sharply with historical understanding of the scope of the Bankruptcy Clause power, depriving Congress of a narrow but important authority that does not intrude at all on the exclusive domain of Article III courts.

Finally, while the Court may not have expected the chaos that resulted from its decision in *Stern*, it must be aware that a decision for EBIA in this case

threatens even worse. The parties in this case do not raise the central issue that has vexed courts following *Stern*: the constitutional limits on bankruptcy court jurisdiction. Rather than address that issue, EBIA asks the Court to amplify the consequences for when lower courts get it wrong. The predictable result will be to channel tens of thousands of cases into already overburdened district courts, imposing delays and litigation burdens that are incompatible with the purposes of any sound bankruptcy regime. That should be reason enough for the Court to hesitate in reaching the merits here. But if the Court does do so, and if it reverses the decision below, it should take care to affirm the vitality of its decisions in *Katchen v. Landy*, 382 U.S. 323 (1966), and *Langenkamp v. Kulp*, 498 U.S. 42 (1990) (per curiam), so as to avoid causing entirely predictable but unnecessary injury to parties already injured by insolvency and fraud.

ARGUMENT

I. The Writ of Certiorari Should Be Dismissed Because EBIA Lacks the Requisite Personal Stake in This Appeal

"In litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary?" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1996). So should the Court here. EBIA already received the sole relief that it seeks in this appeal: vindication of its asserted "Article III

right to adjudication by a district judge" of the Respondent Trustee's fraudulent transfer claims against it. Pet. at 9; *see also* Pet. at 18; Pet. Br. at 43. Accordingly, this appeal presents no "proper case or controversy," and the Court has "no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

A. Although the relevant procedural history of this case is neither lengthy nor complex, EBIA unaccountably gives short shrift to the proceedings before the district court. *See* Pet. Br. at 9. Significantly, that court measured the Trustee's motion for summary judgment, EBIA's response, and the parties' supporting papers against the standard set forth in Fed. R. Civ. P. 56, finding that EBIA failed to establish any genuine dispute of material fact and that the Trustee was entitled to judgment as a matter of law.

While EBIA contends that the district court applied "a 'substantial evidence' standard in reviewing the bankruptcy court's findings," Pet. Br. at 9, the court's order itself demonstrates otherwise. To begin with, this is how the court described its task:

> Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is one that, "under the

> governing substantive law . . . could affect the outcome of the case." When reviewing the record, all "'inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, (1986)). However, self-serving declarations that lack detailed facts or supporting evidence are insufficient to raise a genuine issue of material fact.

Pet. App. 45a (some citations omitted). This should look familiar: it is the same standard enunciated in this Court's 1986 summary judgment trilogy and properly applied by any district court considering a motion for summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

No less compelling is the district court's application of that standard. At issue were the Trustee's claims under the Bankruptcy Code to avoid fraudulent transfers allegedly made by the debtor, "BIA," to its affiliate, "ARIS," and EBIA. Following a recitation of the case's background rich with citations of the parties' evidence, Pet. App. 41a-44a, the court methodically ticked off the statutory elements and supporting facts for each claim. Here, for example, is the court's analysis of the Trustee's avoidance claim under 11 U.S.C. § 548:

> First, the transfers of items of value from BIA to EBIA were made within one year of the bankruptcy action. The transfers oc-

> curred in February 2006 and the bankruptcy was filed in June 2006. Second, BIA was insolvent on the date of the transfers. Third, the evidence shows that commissions owed to BIA were routed through Peter Pearce, into ARIS's joint account that was shared with EBIA. The accounting spreadsheet for ARIS showed that after BIA ceased to operate, Pearce deposited the BIA commissions into the ARIS account, which was shared with EBIA. ARIS is entirely owned by Marjorie Ewing, who is not only the wife of [former BIA CEO] Paleveda, but also became the CEO of BIA after EBIA was created. Indeed, there was little distinction between ARIS and BIA, with employees splitting time between the two companies and yet receiving one pay check for work done for both companies. Appellant attempts to controvert these facts with a self-serving statement from Defendant Paleveda that he did "not know whether Peter Pearce deposited any of his commissions into the ARIS accounts" and that "[i]f this is true, it is a clerical error." This conjecture does not controvert the accounting records that show the transactions moved BIA's accounts receivable to EBIA at the expense of BIA's creditors.

Pet. App. 46a-47a (citations omitted).

The district court's order is precisely what it appears to be and the very thing that EBIA claims it

was denied: adjudication by an Article III district court applying the Rule 56 standard. Three days later, that court entered judgment, from which EBIA appealed.

B. Having actually received the consideration that it now asserts it was denied, EBIA lacks any injury and therefore lacks standing to raise its Article III defense.

Standing, of course, "is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Instead, a plaintiff "must demonstrate standing for each claim he seeks to press" and therefore "must demonstrate standing separately for each form of relief sought." *DaimlerChrysler*, 547 U.S. at 352 (citing *Friends of Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 185 (2000)). So while EBIA surely has standing to contest the merit of the Trustee's avoidance claims—as it did before moving the Ninth Circuit in light of *Stern* to vacate the judgment below and remand *for trial*—it must also support its defense that it was wrongfully denied access to an Article III court, such that this Court could act to remedy its resulting injury.[2] *Cf. Parr v. United States*,

[2] A party must have standing to raise a defense. *See, e.g., Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 n.26 (1985) (holding that religious foundation had standing to raise free exercise defense to Fair Labor Standards Act claims); *Focus Inv. Assocs., Inc. v. Am. Title Ins. Co.*, 992 F.2d 1231, 1241 (1st Cir. 1993) ("[T]he defense of usury is personal to the borrower or one in privity with the borrower, and unavailable to strangers to the usurious transaction.").

351 U.S. 513, 516 (1956) ("Only one injured by the judgment sought to be reviewed can appeal . . . ."); *see generally Camreta v. Greene*, 131 S. Ct. 2020, 2029 (2011) (prevailing officials may challenge a ruling that their conduct violated the Constitution only because "the judgment may have prospective effect on [them]").

And yet EBIA fails to identify any injury that it suffered as a result of what it contends was an illegitimate interlude in bankruptcy court. EBIA's claim is that the bankruptcy court lacked authority to enter judgment. Even assuming that EBIA is correct on that score, what difference does it make? EBIA does not claim that initial entry of judgment by the bankruptcy court, as opposed to the district court, caused any collateral consequence at all. For example, unlike in *Stern*, nothing here turns upon the date on which final judgment was entered. *See Stern*, 131 S. Ct. at 2602-03. EBIA also does not claim that the district court was unable to exercise the full discretion of a court of first instance. Instead, it only insinuates that the district may not have acted in that fashion because it may have deferred to the judgment of the bankruptcy court in some unspecified fashion, Pet. Br. at 9—an unsupported and unsupportable claim that is demonstrably at odds with the district court's consideration of the evidence and application of the law.[3] Far from "concrete," this im-

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[3] And if the gravamen of EBIA's complaint is merely that the district court misapplied the Rule 56 standard and should not

aginary harm does not even rise to the level of "speculative." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

A hypothetical example illustrates the point. Imagine that a district court judge's law clerk comes to the realization, while the judge is away from chambers for a long weekend, that he can decide the cases just as well as his boss and proceeds to issue an "order" under his own signature dismissing an action. The judge, immediately upon her return, decides the case for herself, entering an order of dismissal. The plaintiff, of course, has suffered no injury because the law clerk's "order" imposed no consequences on him. On that basis, no federal court could entertain the plaintiff's claim challenging the authority of law clerks to decide cases; if the plaintiff were to raise such a claim in a motion for reconsideration, the district court judge would be right to deny it for lack of standing.

So too here. Even if the bankruptcy court's "judgment" was without legal weight or authority, EBIA has no basis to complain that it was denied any part of the attention of an Article III judge that it claims was due, because the district court did not defer in

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have granted summary judgment, that contention may be—and has been—addressed by the court of appeals, Pet. App. 34a-37a, without implicating the weighty issues that EBIA asks this Court to resolve.

any respect to the bankruptcy court's "judgment."[4] Had EBIA bothered to raise its Article III defense before the district court, the district court would have had to deny it for lack of injury and therefore lack of standing.

Because EBIA was never injured, no remedy is possible, either. In any standing inquiry, "[t]he remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis*, 518 U.S. at 357. The Court applied that rule in *DaimlerChrysler*, finding that taxpayers' status as *municipal* taxpayers did not confer on them standing to challenge a *state* franchise tax credit. 547 U.S. at 353. Even if the taxpayers could establish injury with respect to their municipal taxes, the Court concluded, "that injury does not entitle them to seek a remedy as to the state taxes." *Id.*

EBIA attempts a similar sleight-of-hand. Quite understandably, it would like to put behind it its failure to adduce any evidence in opposition to summary judgment beyond a "self-serving" affidavit and to have its case set for trial.[5] *See* Pet. App. 49a, 44a,

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[4] Again, even if the district court erred in applying the Rule 56 standard, that error should be resolved, as in any other case, in a routine appeal contesting that point. *See supra* n.3.

[5] To be clear, that was in fact the relief that EBIA sought from the Ninth Circuit, that "the court [] vacate the judgment and remand for trial." Motion to vacate the Judgment of the Bankruptcy Court for Lack of Jurisdiction over the subject matter under F.R.C.P. 12(b)(1), at 2, *The 412(i) Co. a/k/a Bellingham*

47a. But its standing to dispute the merits of the avoidance claims against it does not entitle it to seek another shot at Article III adjudication, as if the first one never happened, and certainly does not entitle it to avoid ordinary summary judgment practice and go straight to trial. Instead, any remedy must be limited to redressing an "inadequacy" that EBIA actually suffered—at most, correction of some error in the merits of the district court's judgment, which the Ninth Circuit has already upheld and which EBIA does not challenge here. Pet. App. 34a-37a. At this point, no relief is possible.

In sum, with respect to its Article III defense, EBIA lacks "such a personal stake in the outcome of the controversy as to warrant [its] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [its] behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (quotation marks omitted). While the issue of a bankruptcy court's authority might be resolved in a suitable case, this is not it.

C. Even had EBIA suffered some injury by the bankruptcy court's entry of judgment, the district court's subsequent *de novo* review of the judgment completely remedied that injury, rendering EBIA's Article III defense moot.

Ins. Agency, Inc. v. Executive Benefits Ins. Agency, Inc., No. 11-35162 (9th Cir. filed July 22, 2011).

"To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English*, 520 U.S. at 67 (quotation marks omitted). Thus, "[t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, (1980) (quoting Henry Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1384 (1973)).

That interest is lacking here, for the reasons described above. EBIA received complete relief for any possible claim that it was denied its due Article III adjudication when the district court ruled on the Trustee's summary-judgment motion and entered judgment. EBIA's defense is therefore moot.

There is nothing unusual in that result. This Court, for example, concluded in *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991), that arrestees' claims that they had been denied prompt judicial determinations of probable cause "have since been rendered moot" because "they either received probable cause determinations or were released." Only the fact that the case was brought as a class action allowed it nonetheless to continue. *Id*. That basis to avoid mootness is unavailable here. *See also Allen v. Am. Fed'n of Gov't Employees AFL-CIO*, 276 F. App'x 197, 198 n.1 (3d Cir. 2008) (district court denied as moot plaintiff's "motion for only Article III judges to

be assigned to his case"); *Estate of Connors v. O'Connor*, 6 F.3d 656, 659 (9th Cir. 1993) (magistrate's unauthorized award of attorney's fees "was cured by the district court's later de novo review of the magistrate's findings and conclusions").

Nor may EBIA take advantage of the exception to mootness for disputes capable of repetition, but evading review. That exception applies only where "there is a reasonable expectation that *the same complaining party* will be subject to the same action again." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735 (2008) (emphasis added and quotation marks omitted). EBIA surely does not concede that it intends to undertake the same or a similar course of action as the one that made it the target of a successful fraudulent transfer action.

Having already received precisely and entirely what it seeks in mounting its Article III defense, EBIA lacks a "still vital claim for prospective relief." *Arizonans for Official English*, 520 U.S. at 67. That requisite interest lacking, the writ of certiorari should be dismissed.

II. The Avoidance Action Here Is Integral to the Bankruptcy and Therefore Was Properly Before the Bankruptcy Court

EBIA asks the Court to simply assume the answer to the weighty question pointedly left open by *Granfinanciera, S.A., v. Nordberg*, 492 U.S. 33, 50, 64 (1989): whether Congress may authorize bankruptcy courts to preside over fraudulent transfer actions

subject to review in, or withdrawal by, the district courts. Simply assuming that a portion of the Bankruptcy Code's jurisdictional reach is unconstitutional, without actually reasoning through the matter, would not only be deeply disrespectful to a coordinate branch, but also would be deeply mistaken. Indeed, *Stern* itself supports what history and experience also recognize: actions to avoid fraudulent and preferential transfers are no less central to the Bankruptcy Clause power than the claims-allowance process, which the Court has long held amenable to adjudication in bankruptcy. *See* 131 S. Ct. at 2618. There is no meaningful constitutional distinction between the fraudulent transfer claims at issue here and the adjudication of creditors' claims on the bankruptcy estate.[6]

A. EBIA's two arguments, regarding consent and bankruptcy courts' statutory authority to submit proposed findings of facts and conclusion of law, rest on the assumption that Article III of the Constitution precludes Congress from assigning proceedings

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[6] This Court absolutely may address a question "predicate to the resolution of the question presented in the petition," *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994), and (if it reaches the merits at all) should do so here out of "[p]roper respect for a coordinate branch of the government." *United States v. Harris*, 106 U.S. 629, 635 (1883). *See also Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2296 n.9 (2012) (addressing antecedent question of whether an opt-out regime is permitted for payment of union agency fees where petitioner challenged the circumstances under which a state may deduct such fees from employees' wages under an opt-out regime).

over the fraudulent transfer claims against it to non-Article III bankruptcy courts. *See* Pet. Br. at (I) ("Questions Presented"). Without at all arguing the point, EBIA simply asserts that this case implicates "the constitutional defect in the Bankruptcy Code that this Court identified in *Stern*." Pet. Br. at 16. It does not.

Stern held that Article III prevented Congress from assigning to a bankruptcy court "authority 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." 131 S. Ct. at 2620. At issue was a state common law tort claim, for tortious interference with a gift. *Id*. at 2601. That claim could not be resolved by a bankruptcy court, the Court explained, because it was "a state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy." *Id*. at 2611.

The Court identified several factors relevant to that characterization. First, the claim was "one under state common law between two private parties" that "does not depend on the will of congress." *Id*. at 2614 (quotation marks omitted). Second, the claimant's "claimed right to relief does not flow from a federal statutory scheme." *Id*. And third, "the asserted authority to decide [the] claim is not limited to a particularized area of the law." *Id*. at 2614 (quotation marks omitted). Resolution of such a claim, the Court concluded, therefore "involves the most proto-

typical exercise of judicial power" and so could not be assigned to a non-Article III tribunal. *Id*. at 2615.

To reach that conclusion, the Court specifically rejected the claimant's reliance on two prior cases that approved bankruptcy jurisdiction over avoidance actions. *Katchen v. Landy*, 382 U.S. 323 (1966), had "permitted a bankruptcy referee acting under the Bankruptcy Acts of 1898 and 1938 (akin to a bankruptcy court today) to exercise what was known as 'summary jurisdiction' over a voidable preference claim" against a creditor. *Stern*, 131 S. Ct. at 2616. Similarly, *Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990) (per curiam), approved a bankruptcy court's resolution of a preferential transfer claim against a creditor. These cases, the Court explained, were distinguishable on two bases, the first being that, in each case, the bankruptcy court's adjudication of the creditor's claim on the estate would necessarily resolve the avoidance action. 131 S. Ct. at 2617.

The second, however, concerned the nature of the actions, distinguishing avoidance claims in bankruptcy from other claims among private parties:

> In both *Katchen* and *Langenkam* . . . the trustee bringing the preference action was asserting a right of recovery created by federal bankruptcy law. In *Langenkamp*, we noted that "the trustee instituted adversary proceedings under 11 U.S.C. § 547(b) to recover, as avoidable preferences," payments respondents received from the debtor before the bankruptcy filings. 498 U.S., at 43, 111

> S. Ct. 330; *see, e.g.*, § 547(b)(1) ("the trustee may avoid any transfer of an interest of the debtor in property—(1) to or for the benefit of a creditor"). In *Katchen*, "the Trustee asserted that the payments made to the creditor were preferences inhibited by Section 60a of the Bankruptcy Act." [This] claim, in contrast, is in no way derived from or dependent upon bankruptcy law; it is a state tort action that exists without regard to any bankruptcy proceeding.

Id. at 2618 (alterations and some citations omitted). As the Court concluded, the proper inquiry "is *whether the action at issue stems from the bankruptcy itself* or would necessarily be resolved in the claims allowance process." *Id*. (emphasis added).

EBIA's assumption that *Stern's* holding applies to the avoidance actions against it ignores this inquiry and ignores *Stern's* indication that at least some avoidance actions, when central to the resolution of an estate in bankruptcy, are creatures of federal bankruptcy law and therefore not subject to *Stern's* holding. *Stern's* factors indicate that the claims at issue here are such claims. First, they are not state common law claims, but instead "depend on the will of Congress," which addressed avoidance actions pursuant to its Bankruptcy Clause power. *See* 11 U.S.C. § 548 (directly authorizing a bankruptcy trustee to avoid fraudulent transfers, purely as a matter

of federal law); § 544 (incorporating state avoidance actions to apply in bankruptcy proceedings).[7] As described below, avoidance actions are different from all other claims that seek merely to augment the estate because they address conduct that is itself an "act of bankruptcy" and directly concern the structure of debtor-creditor relations. *See infra* § II.B. Second, unlike in *Stern*, the claimed right to relief flows directly from a federal statutory scheme, authority for which is expressly committed to Congress. U.S. Const. art. I, § 8, cl. 4. And third, the necessary jurisdiction to decide such claims is narrow and particularized, having been handled by non-Article III bankruptcy-specific tribunals for over a century without intruding on the core authority of Article III courts.

In sum, under *Stern's* factors, the claims at issue here are ones that are integral to "a specific and limited federal regulatory scheme," and bankruptcy jurisdiction over them "is limited to that which is necessary to make the reparations procedure workable." *Schor v. CFTC*, 478 U.S. 833, 856 (1986). Accordingly, the bankruptcy court's exercise of jurisdiction in this case did not encroach on Article III.

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[7] That Congress chose to incorporate state avoidance actions into federal bankruptcy law is of no moment, given that, under its Bankruptcy Clause power, Congress could clearly preempt the application of those state laws to transfers by debtors in bankruptcy.

B. That conclusion is consistent with the historical practice of bankruptcy. This history and original public understanding of the Bankruptcy Clause power provide no meaningful constitutional basis to distinguish core fraudulent transfer claims from the bankruptcy court-supervised process of allowing and disallowing claims on the bankruptcy estate. This makes sense: as a logical matter, avoidance actions and the claims process are two sides of the same coin, each concerning the claims of third parties on the *res* of the estate. The only difference is timing. Between two creditors with identical claims, the one that manages to collect on the day before the bankruptcy filing may be subject to an avoidance action, while the one who presents his claim the day after seeks allowance and payment from the estate. There is no good reason to treat those proceedings differently when both identically involve the restructuring of debtor-creditor relations and nothing more. This distinguishes the bulk of avoidance actions from other claims involving private rights, such as that in *Stern*.

Avoidance is as central to bankruptcy as the claims-allowance process, and it always has been. From the 1570 enactment of the Statute of Elizabeth—the model for all subsequent bankruptcy legislation—bankruptcy and avoidance have been inextricably intertwined. *See* Charles Tabb, The History of Bankruptcy Laws in the United States, 3 Am. Bankr. Inst. L. Rev. 5, 7-8 (1995). That statute recognized as an "act of bankruptcy"—*i.e.*, the predicate

to being declared a bankrupt—the transfer of assets not "due for money delivered, wares sold, or any other just or lawful course, or good consideration or purposes . . . to the intent or purpose to defraud or hinder any of his or her creditors." 13 Eliz. 1, c. 7, § 1 (1570). Creditors so defrauded could petition the Lord Chancellor to convene a bankruptcy proceeding, presided over by "commissioners." *Id.* § 2.

Those commissioners—who were not judges but "wise and honest" persons, *id.* § 2—exercised almost absolute authority over the case:

> The commissioners had substantial powers, originally somewhat akin to a combination of today's trustee and bankruptcy judge. In addition to the normal trustee-like activities of collecting, liquidating, and distributing the debtor's property to creditors, commissioners could seize property, summon persons to appear before them, and commit people to prison.

Tabb, *supra*, at 8. Thus, commissioners decided all bankruptcy-related claims in the first instance, with their actions subject to review by appeal or collateral attack. Thomas Plank, Why Bankruptcy Judges Need Not and Should Not Be Article III Judges, 72 Am. Bankr. L.J. 567, 576-77 (1998) (appeal was by petition to the Lord Chancellor, who "would either resolve the issue or refer the matter to one of the common law courts") (footnotes omitted).

In particular, commissioners' authority extended to the investigation, seizure, and assignment of assets wrongfully transferred by the bankrupt to third parties. Commissioners were empowered to summon such transferees (under penalty of imprisonment) and examine them under oath. 13 Eliz. 1, c. 7, § 5. If, in the commissioners' view, a party failed to "declare the plain and whole truth" concerning any assets that he had received from the bankrupt, they could levy a penalty of "double the value of all such goods, chattels, wares, merchandizes, and debts, by them or any of them so concealed." *Id.* § 5. And if a third party declined to hand over any fraudulently transferred assets, the commissioners could levy those assets in the same manner. *Id.* at § 6.

These provisions were continued and clarified by later enactments. The 1603 bankruptcy statute made it an "act of bankruptcy" for any person to "make or cause to be made any fraudulent grant or conveyance of his, her, or their lands, tenement, goods, or chattels, to the intent or whereby his, her, or their creditors . . . shall or may be defeated or delayed for the recovery of their just and true debt." 1 Jac. 1, c. 15 § 1 (1603). Under King George II, preferential transfers were also made an act of bankruptcy, recoverable in the same manner as fraudulent transfers. *See* Francis Regis Noel, A History of the Bankruptcy Law 29-30 (1919) (discussing Bankrupts Act, 5 Geo. 2, c. 30 (1731)). Throughout, the fundamental practice point was that third parties levying fraudulent or preferential transfers were

made to “forfeit double the value of the goods . . . to be levied by the commissioners on his or their lands and goods, &c., for the benefit of the creditors, in the same manner as they may order the lands or goods of the bankrupt himself.” 2 John Comyns, A Digest of the Laws of England 120 (5th ed. 1822). Creditors, too, could bring fraudulent transfer actions, and their claims were heard in either courts of law or equity. *See Hobbs v. Hull*, 1 Cox 445, 445-446, 29 Eng. Rep. 1242, 1242 (1788) (“Courts of Equity have most certainly been in the habit of exercising a concurrent jurisdiction with the Courts of Law on the statutes of Elizabeth respecting fraudulent conveyances.”).

These same practices were adopted—often using identical language—by the American colonies. For example, Pennsylvania’s 1785 “Act for the Regulation of Bankruptcy” defined fraudulent transfer as an act of bankruptcy and provided that, “if a transfer at any time previously had been made with the intent to defraud the creditors, it was in the power of the commissioners ‘to sell or dispose thereof in as ample manner as if the bankrupt had been actually seized thereof.’” Noel, *supra*, at 63 (quoting statute).

Well familiar with English practice, “[t]he framers of the United States Constitution had the English bankruptcy system in mind when they included the power to enact ‘uniform laws on the subject of bankruptcies’ in the Article I powers of the legislative branch.” Tabb, *supra*, at 6. They recognized that the English system, which defined the practice of bankruptcy, could not operate on a state-by-state basis.

The Framers' purpose was to provide federal authority to enact such a system and thereby "prevent so many frauds where the parties or their property lie or be removed into different States." *The Federalist No. 42* (James Madison).

Unsurprisingly, the "first United States bankruptcy law, passed in 1800, virtually copied the existing English law," as filtered through the Pennsylvania statute. Tabb, *supra*, at 6-7, 14. Like English law, that Act recognized as an act of bankruptcy any action, "with intent unlawfully to delay or defraud his or her creditors, . . . [to] secretly convey his or her goods out of his or her house, or conceal them to prevent their being taken in execution, or make, or cause to be made, any fraudulent conveyance of his or her lands, or chattels." An Act to establish an uniform System of Bankruptcy throughout the United States, 2 Stat. 19, 21, § 1 (1800).

Also like the English system, the 1800 Act was administered by non-judge commissioners appointed by the district court, *Id*. at 21-22, § 2, exercising "powers very similar to the English commissioners." Tabb, *supra*, at 14. And identical to the English system, commissioners had the authority to summon recipients of improper transfers, examine them, and commit them to prison upon the commissioners' view that they had failed to "declare the whole truth." 2 Stat. at 25, § 14. Moreover, the commissioners could require such parties to "forfeit double the value of all the property, goods, chattels, and debts, by them concealed." *Id*. Finally, with respect to fraudulent

conveyances, the Act also provided that "the commissioners shall have power to assign the same, in as effectual a manner as if the bankrupt had been actually seised or possessed thereof." 2 Stat. at 26, § 17.

What this historical practice tells us is that "the details of the initial bankruptcy adjudication are essentially a matter for legislative discretion, so long as the subject matter of the adjudication is within the 'subject of Bankruptcies' under the Constitution." Plank, *supra*, at 611. The imperative of Article III is fully satisfied by judicial supervision of bankruptcy proceedings through appeal or collateral attack, just as the law provides today.

Yet EBIA asks the Court to assume that the English practices that practically *defined* "laws on the subject of bankruptcies" for the Framing generation are actually barred by the Constitution. And it asks the Court to assume that the early Congress that carried over same those practices into federal law was profoundly mistaken as to the extent of its power. But there is no basis for either assumption in history or the constitutional text. To the contrary, "[t]he practice of bankruptcy adjudication in England, Pennsylvania, and the United States before and shortly after the adoption of the Constitution establishes that non-Article III judges may as a general matter initially adjudicate bankruptcy issues under Article III of the Constitution" as an exercise of Congress's Bankruptcy Clause power. Plank, *supra*, at 610. If the Court reaches the merits in this case, it

should address Congress's authority under the Bankruptcy Clause to place core avoidance actions in specialized tribunals, rather than simply assume that Congress exceeded its authority by legislating consistent with all historical practice.

C. The Court's decision in *Granfinanciera, S.A., v. Nordberg*, 492 U.S. 33 (1989), does not undermine this point, for two reasons.

First, the claim at issue in that case was not in any manner integral to the bankruptcy proceeding. As the Court then recounted, the "fraudulent conveyance action was not filed until well *after* the Bankruptcy Court had approved the plan of reorganization and [the debtor's] tangible assets and business had been liquidated." *Id.* at 60 n.15. Although brought by a trustee, the avoidance action otherwise had nothing to do with the bankruptcy proceeding, being more in the nature of a suit by a creditors' representative, undertaken long after the requisite nexus to insolvency had dissipated. *See* Thomas Plank, The Constitutional Limits of Bankruptcy, 63 Tenn. L. Rev. 487, 491-92 (1996) ("Under the Bankruptcy Clause, Congress may only enact legislation that regulates the relationship between an insolvent debtor and her creditors."). On that basis, the Court was right to conclude that the action was not "integral to the restructuring of debtor-creditor relations." 492 U.S. at 58.

By contrast, the claims at issue here are absolutely integral to an ongoing bankruptcy proceeding and the concomitant restructuring of debtor-creditor re-

lations. The Trustee alleges, and has demonstrated to the satisfaction of three separate tribunals, that EBIA looted the debtor's assets in a scheme specifically undertaken to defraud its creditors. *See* Pet. App. 6a. This was, in the historical sense, an "act of bankruptcy," and its resolution is central to the ongoing liquidation of the estate. For those reasons, the Trustee's avoidance actions are integral to the bankruptcy. Assigning those actions to a non-Article III tribunal is a proper exercise of Congress's Bankruptcy Clause power, as historically understood and exercised.

Second, *Granfinanciera* only considered the application of the "public rights" framework to bankruptcy, rather than the scope of Congress's Bankruptcy Clause power. It is certainly less than obvious that even core bankruptcy functions, such as the determination of creditors' claims, concern *public* rights, when the parties involved are, as here, *private* entities. Indeed, the Court itself has cast doubt on the application of the "public rights" framework to bankruptcy proceedings, without suggesting that, contrary to historical practice, all such proceedings must be assigned to an Article III tribunal. *See, e.g., Stern*, 131 S. Ct. at 2614 n.7; *Granfinanciera*, 492 U.S. at 56 n.11 ("We do not suggest that the restructuring of debtor-creditor relations is in fact a public right.").

The "public rights" framework most comfortably fits disputes where the federal government is involved in its sovereign capacity, *see Granfinanciera*, 492 U.S. at 65-66 (Scalia, J., concurring) (citing cas-

es). The historical practice of placing initial adjudication of bankruptcy disputes in non-judicial tribunals may be *sui generis*, depending not on the application of Article III (*i.e.*, on whether "public rights" are involved) but instead on the scope of Congress's Bankruptcy Clause power. *See supra* § II.B; c*f. Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring) ("Perhaps historical practice permits non-Article III judges to process claims against the bankruptcy estate . . . . "). Before the Court rejects the longstanding constitutional practice of assigning certain bankruptcy-related claims to bankruptcy-specific tribunals and strikes down an act of Congress (whether directly or by implication), it should at least consider that possibility.

III. The Court Should Avoid or Minimize the Consequences of Reversing the Decision Below

This Court should be aware of the dislocation and harm that a decision for EBIA would cause. If the widespread confusion that followed *Stern* is any indication, the consequences of a decision that strips bankruptcy courts of any authority to preside over fraudulent transfer actions such as the ones here would be severe. As fairly possible, the Court should strive to avoid that result. But if it is unavoidable, the Court should, at the least, be clear about the limits of its ruling and the vitality of its other precedents in this area, particularly *Katchen* and *Langenkamp*.

A. The Court's expectation that its decision in *Stern* was a "'narrow' one" that did not "meaningfully change[] the division of labor in the current statute" was undermined by the failure to make clear its limits. 131 S. Ct. at 2620. In fact, *Stern* "sent shockwaves through the entire bankruptcy community." Jolene Tanner, Stern v. Marshall: The Earthquake that Hit the Bankruptcy Courts and the Aftershocks that Followed, 45 Loy. L.A. L. Rev. 587, 588 (2012). And it has led precisely to what its dissenters warned would occur: a "game of jurisdictional ping-pong between courts [that] lead[s] to inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy." *Id.* at 2630 (Breyer, J., dissenting).

This has, unfortunately, been the *amicus curiae's* direct experience. Over two years after the Court's decision in *Stern*, the issue of bankruptcy court authority continues to be litigated in the adversary actions that he has brought against parties that facilitated and/or profited from Bernard Madoff's fraud. *See, e.g., In re Madoff Securities*, 490 B.R. 46, 51-55 (S.D.N.Y. Jan. 4, 2013) (Rakoff, J.) (holding that *Stern* generally deprives the bankruptcy court of jurisdiction over certain avoidance actions); *In re Madoff Securities*, 1:12-mc-00115-JSR (S.D.N.Y. Feb. 12, 2013) (Rakoff, J.) ("bottom-line" order holding that, due to operation of 11 U.S.C. § 502(d), *Stern* does not deprive the bankruptcy court of authority to rule on other avoidance actions). That delay has consequences for Madoff's victims, who are the benefi-

ciaries of all funds that the *amicus curiae* is able to recover.

B. This case threatens even worse consequences, in several respects. To begin with, a decision for EBIA will only exacerbate the uncertainty that followed *Stern*. Since that decision, "courts across the country have been struggling to understand when a bankruptcy court may enter a final judgment, and when it may not do so." David Leta, Stern v. Marshall Changes the Landscape of Bankruptcy Court Adjudication, 26 Utah B.J. 34, 34 (March/April 2013)*; see id*. at 37 (discussing cases). But the parties here inexplicably do not ask the Court to provide further guidance on that point. *See* Pet. at (I); BIO at i. Instead, EBIA requests that the court amplify the consequences for when lower courts get it wrong, while the Trustee requests only that the Court not do so. In EBIA's view, if a bankruptcy court improperly adjudicates a claim, neither party consent nor *de novo* review by a district court can cure the error. If that view is accepted, the result will be to channel the initial adjudication of claims into the district courts, so as to avoid the risk of having to start over from scratch even after one or more rounds of litigation.

Of course, Congress had good reason to seek to channel the large volume of bankruptcy claims *away* from the district courts:

> A major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the bankruptcy court in order to

> eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction . . . . [T]he jurisdictional limitations presently imposed on the bankruptcy courts have embroiled the court and the parties in voluminous litigation . . . ."

Granfinanciera, 492 U.S. at 75 n.4 (White, J., dissenting) (quoting S. Rep. No. 95-989, at 17 (1978)).

Assigning such core matters as actions to avoid preferential and fraudulent transfers to the district courts for initial determination "is problematic for two reasons: (1) the district courts already have overcrowded dockets; and (2) many times district courts lack the necessary familiarity with the Bankruptcy Code." Tanner, *supra*, at 608 (footnote omitted). As to the former, "the volume of bankruptcy cases is staggering, involving almost 1.6 million filings last year, compared to a federal district court docket of around 280,000 civil cases and 78,000 criminal cases." *Stern*, 121 S. Ct. at 2630 (Breyer, J., dissenting) (citing 2010 statistics). In 2011, more than 75,000 adversary proceedings were filed in the bankruptcy courts.[8] Assigning all of those matters to dis-

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[8] Administrative Office of the U.S. Courts, U.S. Bankruptcy Courts – Adversary Proceedings Commenced, Terminated, and Pending Under the Bankruptcy Code During the 12-Month Periods Ending September 30, 2011 and 2012 (2012), http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/F08Sep12.pdf

trict courts would increase their caseloads by more than 25 percent, at a time when civil actions already linger on district court dockets for years—for example, the median time from filing to trial in the Western District of Washington (where the instant case was brought) is 17.2 months.[9] And that compares favorably to many other districts, where the wait-times exceed two years. Such delays are fundamentally incompatible with the orderly resolution of a bankrupt estate *for the benefit of its creditors*.

As to familiarity, bankruptcy practice is highly specialized, with emphasis on practicality, compromise, and speed, as necessary to carry out the purposes of bankruptcy. Bankruptcy judges, selected on the basis of merit, tend to combine a deep, intuitive understanding of the Code and bankruptcy procedure that allows them to act quickly and decisively, consistent with the needs of debtors, creditors, and others affected by insolvency. While their mode of adjudication may be the same, district court judges are less likely to possess the intuition, born of years' experience in bankruptcy practice, that facilitates successful reorganization and liquidation.

For these reasons, "[p]lacing fraudulent transfer claims into the same bucket as purely state law

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[9] Administrative Office of the U.S. Courts, United States District Courts – National Judicial Caseload Profile (2013), http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2013/district-fcms-profiles-june-2013.pdf&page=76

claims, like those at issue in *Northern Pipeline* and *Stern*, is a realignment more significant than *Stern* implied." Tyson Crist, Stern v. Marshall: Application of the Supreme Court's Landmark Decision in the Lower Courts, 86 Am. Bankr. L.J. 627, 683 (2012). Doing so will have tangible, negative consequences for the efficiency and effectiveness of the bankruptcy system. In many cases, such as those brought by the *amicus curiae*, it will compound the injury to individuals who have already been victimized by financial fraud, without providing any commensurate benefit—in terms of due process rights or other aspects of fairness—to defendants of avoidance actions.

C. These consequences should be avoided, and the easiest way to do so would be to dismiss this case and wait for an appropriate vehicle to clarify *Stern's* holding. In the alternative, for the reasons stated above and in the Respondent Trustee's brief, the Court should affirm the decision of the Ninth Circuit. But if the Court does reach the merits, and if it does reverse the decision below, it has a responsibility to minimize unnecessary displacement by providing appropriate guidance to the lower courts and bar.

At the least, this requires affirming the vitality of the Court's precedents in *Katchen v. Landy*, 382 U.S. 323 (1966), and *Langenkamp v. Kulp*, 498 U.S. 42 (1990) (per curiam). The Court has never cast doubt on bankruptcy courts' authority to oversee the claims-allowance process. And when a "creditor is met, in turn, with a preference action from the trus-

tee, that action becomes part of the claims-allowance process which is triable only in equity." *Langenkamp*, 489 U.S. at 44. That is because the action is "integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's *equity jurisdiction*." *Id*.

Nothing in *Stern* calls that holding into doubt—to the contrary, *Stern* carefully distinguished both cases, 131 S. Ct. at 2616-18—and nothing in this case calls for that holding to be narrowed or overruled. But if the Court is inclined to accept the Ninth Circuit's view that *Stern's* holding applies to fraudulent transfer actions generally, *see* Pet. App. 23a, it should confirm that the longstanding exception for counterclaims resolved in the process of the claims-allowance process is still good law. Clarity on this point would reduce, somewhat, the uncertainty and confusion that would surely follow a decision in EBIA's favor.

CONCLUSION

The Court should dismiss the writ of certiorari as improvidently granted. But if the Court reaches the merits, it should affirm the decision of the Ninth Circuit.

Respectfully submitted,

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