No. 12-1200

IN THE
Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,
Petitioner,

v.

PETER ARKISON, TRUSTEE,
Respondent.

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

BRIEF OF KERR-MCGEE CORPORATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does a defendant's failure to make a timely objection to a bankruptcy court's adjudication of a fraudulent-transfer claim against him extinguish a violation of Article III's vesting clause or otherwise prevent a federal court from remedying the violation?

2. If so, what form of assent is required for a defendant to waive Article III's requirement that a federal judge adjudicate a fraudulent-transfer claim?

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INTEREST OF THE AMICUS CURIAE[1]

Kerr-McGee Corporation is a defendant in one of largest adversary proceedings ever filed in bankruptcy court. A litigation trust whose beneficiaries are former alleged creditors of Tronox Incorporated, Tronox Worldwide LLC, and Tronox LLC seeks over $20 billion, on the view that Kerr-McGee's internal restructuring and spinoff of the Tronox entities years later amounted to a fraudulent transfer. The constitutional questions presented in Kerr-McGee's case are presented in this case. Kerr-McGee submits this brief to underscore the magnitude of the interests that hang on those questions and to present arguments different from the petitioner's.

SUMMARY OF ARGUMENT

Article III, Section 1 commands that "[t]he judicial Power of the United States shall be vested" in Article III courts. There are only two historical alternatives to that rule. Congress may establish legislative courts (territorial courts, military courts, and courts adjudicating "public" rights), and it may empower judicial adjuncts as long as they do not exercise the "essential attributes" of judicial power. See *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 63–64, 77 (1982) (plurality opinion).

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[1] Pursuant to Rule 37, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than the *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

In *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), the Court held that Article III's vesting clause prohibits bankruptcy courts to adjudicate state-law counterclaims "not resolved in the process of ruling on a creditor's proof of claim." *Id.* at 2620. Those state-law counterclaims are not "public" rights but are the archetypal "private" rights that cannot be removed from Article III courts. *Id.* at 2611–2615. And in deciding those counterclaims, bankruptcy courts are not judicial adjuncts because they exercise the "essential attributes" of judicial power; they enter fully enforceable final judgments subject only to appellate review by federal courts. *Id.* at 2618–2619.

Courts agree that *Stern* applies to bankruptcy courts adjudicating fraudulent-transfer claims. See, *e.g.*, *In re Bellingham Ins. Agency, Inc.*, 702 F.3d 553, 561–562 (CA9 2012); *Waldman* v. *Stone*, 698 F.3d 910, 921 (CA6 2012). *Stern* envisaged as much when it reaffirmed the holding of *Granfinanciera, S. A.* v. *Nordberg*, 492 U.S. 33 (1989), that fraudulent-transfer claims are "private" rights. See *Stern*, 131 S. Ct. at 2614. And the judicial power bankruptcy courts exercise over fraudulent-transfer claims is identical to that which *Stern* held they unconstitutionally exercised over state-law counterclaims. See 28 U.S.C. § 157(b)(1).

So it would appear straightforward that the bankruptcy court's entry of final judgment on the fraudulent-transfer claim in this case violated Article III. The rub is that the defendants (arguably) did not timely object on that ground. The question, then, is whether and how the defendants' assent matters—did they waive or forfeit the requirement of Article III's vesting clause, or is it unwaivable?

The question has not surfaced often. In *Stern*, Pierce preserved his Article III objection; he timely told the bankruptcy court that it had no constitutional authority to decide Vickie's state-law counterclaim. See 131 S. Ct. at 2601–2602. The same goes for *Northern Pipeline*; Marathon timely asserted its constitutional right in the bankruptcy court. See 458 U.S. at 56–57 (plurality op.).

The question appears to have arisen only in *Commodity Futures Trading Comm.* v. *Schor*, 478 U.S. 833 (1986). "Schor indisputably waived any right he may have possessed to the full trial of Conti's counterclaim before an Article III court." *Id.* at 849. So before reaching the merits of the question whether the CFTC's adjudication violated the requirement of Article III's vesting clause, the Court had to decide whether the requirement is either waivable or unwaivable. In an unprecedented move, *Schor* held that it is both. Supposedly, the vesting clause has distinct "personal" and "structural" components: the former (which *Schor* linked with precedents recognizing the historical alternatives to Article III adjudication) is waivable, and the latter (a totality-of-the-circumstances test *Schor* invented) is not. See *id.* at 848–857.

If *Schor*'s reasoning is correct, the petitioner here (arguably) waived or forfeited its personal right to challenge the bankruptcy court adjudication of the fraudulent-transfer claim as falling outside the historical alternatives, leaving only the question whether the adjudication violates the vesting clause's unwaivable structural right. But *Schor*'s reasoning is flawed and should not be followed.

Schor's personal-versus-structural dichotomy is unpersuasive. It is inconsistent with constitutional

text and mischaracterizes the precedents. More importantly, the dichotomy is irrelevant. Subject to only two exceptions, litigant consent extinguishes *all* legal errors—whether personal or structural. First, because litigants cannot confer power on Article III courts, they cannot waive or forfeit constitutional or statutory limits on federal courts' subject-matter jurisdiction. And second, in a range of exceptional cases, courts ignore litigants' assent to other defects in an adjudicator's authority. Both exceptions fit this case: a bankruptcy court's entry of judgment in violation of Article III's vesting clause expands federal appellate jurisdiction and raises exceptional questions of adjudicative authority. Applying either exception to negate litigants' consent to a violation of Article III's vesting clause would not overrule any holdings of this Court.

Even accepting *Schor*'s dichotomy, the Court should conclude that a bankruptcy court's consented-to adjudication of a fraudulent-transfer claim is unconstitutional. Bankruptcy courts are not expert agencies like the CFTC. They are courts, exercising the full range of judicial power—including entry of binding final judgments. Congress did not empower them to adjudicate fraudulent-transfer claims for a benign reason, like facilitating litigants' preferences for efficient or expert adjudication. Congress mandated that bankruptcy courts adjudicate those claims *whether or not litigants consent*.

Finally, even if litigants can waive the personal aspects of Article III's vesting clause, courts should not infer waiver from conduct. Waiver cannot be inadvertent, and "whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the de-

fendant's choice must be particularly informed or voluntary, all depend on the right at stake." *United States* v. *Olano*, 507 U.S. 725, 733 (1993).

The personal right to an Article III judge belongs to a class of trial rights that cannot be waived impliedly. That conclusion is especially true when Congress has not made consent an operative part of the statutory scheme. In other contexts, procedures are in place to assure that litigants can freely withhold consent. But Congress requires bankruptcy courts to adjudicate fraudulent-transfer claims without regard to litigants' preferences, so a court cannot reasonably infer a knowing, voluntarily, and intelligent relinquishment of a defendant's personal Article III right from the fact that he did not object.

For these reasons, the Court should reverse the decision of the Ninth Circuit.

ARGUMENT

I. LITIGANT CONSENT IS IRRELEVANT TO THE CONSTITUTIONALITY OF A NON-ARTICLE III ADJUDICATION.

A. *Schor* Misapplies Rules Of Error Preservation And Misconceives The Vesting Clause.

Because the litigants in *Schor* consented to a non-Article III adjudication of a state-law claim, *Schor* has been the focus of lower-court decisions considering how consent affects the constitutionality of bankruptcy court adjudication of similar claims after *Stern*. See *Bellingham*, 702 F.3d at 567–569 & n.9; *Waldman*, 698 F.3d at 917. *Schor* reimagined the vesting clause as having two components—"personal" and "structural." Then, claiming to be faithful to the rules of error preservation, *Schor* held

that the personal right is waivable while the structural right is not. See *Schor*, 478 U.S. at 848–857.

Schor's logic is triply flawed. First, it sets out on the wrong path. The rules of error preservation do not depend on whether a right is personal or structural; every right is waivable unless it relates to federal courts' subject-matter jurisdiction or implicates an exceptional question of adjudicative authority. Second, it is wrong as a matter of theory and logic; that a constitutional provision serves personal and structural *interests* does not mean that it creates separate personal and structural *rights*. Third, it misreads the precedents as having treated the requirement of Article III's vesting clause as personal and waivable; the precedents treated it as purely structural and suggested it is unwaivable.

1. Error preservation rules do not distinguish between personal and structural rights.

As a matter of judicial discretion, trial and appellate courts refuse to consider most errors that are not contemporaneously objected to. See *Yakus* v. *United States*, 321 U.S. 414, 444 (1944); *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941); see also *Freytag* v. *C.I.R.*, 501 U.S. 868, 894–895, 900 (1991) (Scalia, J., concurring in part, dissenting in part). A litigant that fails to make a timely objection either "waives" his right by affirmative consent or "forfeits" it by silence. *Olano*, 507 U.S. at 733. Waiver typically extinguishes an alleged violation of a right. (*E.g.*, a criminal defendant's right to trial is not violated when he knowingly and voluntarily pleads guilty.) Forfeiture does not, and courts review forfeited errors that are "plain" and that "affect substantial rights." *Id.* at 733–734.

Yet, waiver does not extinguish every error. "Whether a particular right is waivable * * * depend[s] on the particular right at stake." *Id.* at 733. Two types of rights are unwaivable, and trial and appellate courts exercise discretion to review them despite waiver or forfeiture.

First are statutory and constitutional limits on federal courts' subject-matter jurisdiction. Trial courts always must be assured of their original jurisdiction, and appellate courts always must be assured of their appellate jurisdiction. Appellate courts also always must be assured of the original jurisdiction of the trial courts they review because their appellate jurisdiction is derivative of it. See *Marbury* v. *Madison*, 1 Cranch 137, 175 (1803) ("It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause."). A statutory or constitutional defect in original jurisdiction "deprives not only the initial court *but also the appellate court* of its power over the case or controversy." *Freytag*, 501 U.S. at 896 (emphasis added) (Scalia, J., concurring in part, dissenting in part); see *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 535 (1962) (op. of Harlan, J.) (holding that an "alleged defect of [lower court] authority" is not waivable when it "operates also as a limitation on this Court's appellate jurisdiction"). Accordingly, a statutory or constitutional limit on an adjudicator's subject-matter jurisdiction can, and must, be raised any time before the close of direct review.

Second are errors that arise in "exceptional" circumstances. *Hormel*, 312 U.S. at 557. What counts as "exceptional" depends on the nature of the error and the litigants' interests. See, *e.g.*, *Glidden*,

370 U.S. at 535–537 (op. of Harlan, J.); *Freytag*, 501 U.S. at 878–879; *Nguyen* v. *United States*, 539 U.S. 69, 78–81 & n.12 (2003). Questions of adjudicative authority are prototypically exceptional because they implicate "a strong policy concerning the proper administration of judicial business." *Glidden*, 370 U.S. at 536 (op. of Harlan, J.); see *Freytag*, 501 U.S. at 879; *Nguyen*, 539 U.S. at 78–81.

These rules of error preservation apply to *all* rights. *Schor*, however, assumes that all personal rights are waivable and that all structural rights are unwaivable. But see *Freytag*, 501 U.S. at 893–894 (Scalia, J., concurring in part, dissenting in part). Accordingly, *Schor*'s effort to characterize the requirement of Article III's vesting clause as personal, structural, or both, simply confuses the relevant question. When a litigant raises an error he did not challenge at the proper time—whether because he consented or just remained silent—the court confronted with the belated challenge asks only whether the error affects its subject-matter jurisdiction or otherwise presents an exceptional question of adjudicative authority. If the answer is "yes," the court addresses the merits as if the error were preserved.

2. *Schor*'s theory and logic are flawed.

Schor's assertion that the vesting clause of Article III creates separate personal and structural rights (with separate waiver rules) is one-of-a-kind. Consider a more pedestrian analog. Consistent with Article III, Section 2, a Massachusetts citizen cannot sue another Massachusetts citizen in federal court on a state-law claim because the case lacks minimal diversity. Even if both consent, a federal court cannot constitutionally exercise jurisdiction and must

dismiss. Before announcing that rule, this Court did not first tease out personal and/or structural components of Article III's diversity requirement—say, a personal interest in a neutral forum and a structural interest in balancing state and federal power. The Court simply called a judgment in excess of subject-matter jurisdiction "an error *of the Court*," not an error of the litigants, so even the plaintiff who invited the error by invoking the court's jurisdiction "has a right to take advantage of" it on appeal. *Capron* v. *Van Noorden*, 6 U.S. 126, 127 (1804) (emphasis added). That conclusion flows directly from the plain and uncomplicated text of Article III, Section 2: "The judicial power shall extend * * * to controversies * * * between citizens of different states." The provision may serve personal and structural *interests*, yet it establishes just one *rule*.

The vesting clause of Article III is no different. It establishes just one rule: "The judicial power of the United States, shall be vested in" Article III courts, subject only to two historical alternatives. The rule has structural and personal purposes. It is structural because it empowers the judicial branch and circumscribes its domain vis-à-vis other branches. See *N. Pipeline*, 458 U.S. at 58 (plurality op.). And it is personal because "the judicial power" is power over, and invoked by, individual persons. See *Marbury*, 1 Cranch at 170 ("The province of the Court is, solely, to decide on the rights of individuals.").

Those structural and personal purposes are intertwined. They are substantively intertwined because structure is the means by which the Constitution preserves personal liberty. See *Bond* v. *United States*, 131 S. Ct. 2355, 2365 (2011); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635

(1952) (Jackson, J., concurring) ("[T]he Constitution diffuses power the better to secure liberty."). "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton* v. *City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

The purposes of Article III's vesting clause are textually intertwined because they spring from the single requirement of the vesting clause. Purposes may be inferred from text, but not the other way around. Whatever the purpose (or purposes) of a rule may be, the underlying text and its meaning remain the same. See *Dist. of Columbia* v. *Heller*, 554 U.S. 570, 577–578 (2008); *Eldred* v. *Ashcroft*, 537 U.S. 186, 211–212 (2003). Cf. *Clark* v. *Martinez*, 543 U.S. 371, 386 (2005) (cautioning against "the dangerous principle that judges can give the same statutory text different meanings in different cases").

Schor's analysis contradicts all those norms. *Schor* abjured constitutional text ("the resolution of claims such as Schor's cannot turn on conclusory references to the language of Article III"), as well as "formalistic and unbending rules," in favor of purpose ("constitutionality * * * must be assessed by reference to the purposes underlying the requirements of Article III"). See 478 U.S. at 847, 851. Then, *Schor* separated the vesting clause's inseparable purposes and constructed a personal right to "an impartial and independent federal adjudication" and a structural right against Congress's creation of adjudicatory schemes that "impermissibly threaten[] the institutional integrity of the Judicial Branch." *Id.* at 848, 851.

Further proof that *Schor*'s approach is an outlier is that no factor it identified as bearing on the vest-

ing clause's structural requirement—practical effects, congressional intent, and litigant consent—adds anything meaningful to the analysis. Whether an adjudicative scheme intrudes too much on Article III courts cannot be measured without a yardstick. See *Granfinanciera*, 492 U.S. at 70 (noting that one cannot "preserve a system of separation of powers on the basis of such intuitive judgment regarding 'practical effects'") (Scalia, J., concurring). The notion that congressional intent affects structural violations transforms Article III's vesting clause into a precatory suggestion that Congress show respect to the judiciary; it should not prove hard for Congress to fill legislative history with blandishments about the judges whose power it is removing. And *Schor*'s reliance upon litigant consent on the merits of the constitutional question departs from the traditional rule that litigant assent is relevant *only* to threshold questions of error preservation. Once a court determines that a requirement is unwaivable, it proceeds to the merits as if the error had been fully preserved.

3. *Schor* mischaracterizes precedents.

Despite admitting that precedents had not dwelt upon the newfound personal aspects of Article III's vesting clause, *Schor* implausibly asserted they "intimated" that the vesting clause is "primarily personal, rather than structural." 478 U.S. at 848. In fact, structural concerns predominate in precedents.

Take *Northern Pipeline*. After relating the Framers' concern about tyrannical government, the plurality described the vesting clause as structural—"an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial

Branch." 458 U.S. at 58 (plurality op.). The plurality linked the vesting clause with Article III's life-tenure and compensation clauses, which the plurality also described as structural. See *id.* at 59 & n.10.

Schor misread *Northern Pipeline* as recognizing that litigants can waive the requirement of Article III's vesting clause. See *Schor*, 478 U.S. at 849. *Northern Pipeline* had no occasion to consider waiver or forfeiture because Marathon timely objected. See 458 U.S. at 56–57 (plurality op.). Consent came up in a footnote; the Court noted that the challenged bankruptcy scheme did not require litigant consent whereas the prior scheme did. *Id.* at 79–80 n.31. *Northern Pipeline* called that a "significant change[]," but cautioned that the prior scheme had "never been explicitly endorsed by this Court." *Ibid.*

While it does not appear that the Court had to apply error-preservation rules to Article III's vesting clause before *Schor*, precedents *Schor* overlooked imply that the requirement of the clause cannot be waived. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. 272 (1855), addressed the constitutionality of a Treasury auditor's adjudication that a customs collector had underpaid the government. Pursuant to a warrant issued after the auditor's judgment, a marshal sold the collector's land to the defendant. The plaintiff, claiming he acquired the land at the same time by other means, argued that the auditor's judgment (and all that followed) violated Article III's vesting clause. In the suit between the plaintiff and defendant, the Court fully considered the constitutionality of the auditor's adjudication, upholding it as a legislative court adjudicating "public" rights, even though there was no indication that the collector lodged a timely objection

to the auditor's constitutional authority. See *Granfinanciera*, 492 U.S. at 67 (Scalia, J., concurring) (noting the apparent absence of any challenge by the collector). The collector's assent had no bearing whatsoever on the constitutional question. Indeed, the Court implied that the collector's assent was immaterial, noting that, "if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, *the proceeding was void*." *Murray's Lessee*, 59 U.S. at 275 (emphasis added).

Contrary to *Schor*'s suggestion, precedents are steeped in constitutional structure and strongly suggest that the requirement of Article III's vesting clause is unwaivable.

B. The Requirement Of Article III's Vesting Clause Is Unwaivable.

Because *Schor*'s distinction between personal and structural rights is irrelevant and because *Schor* departs from text, logic, and precedent, its approach should not govern. The Court should apply the traditional framework and hold that the requirement of Article III's vesting clause is unwaivable because of its connection with federal appellate subject-matter jurisdiction and because it raises exceptional questions of adjudicative authority.

In isolation, questions about the constitutionality of adjudication by non-Article III entities might seem unrelated to the subject-matter jurisdiction of Article III courts and, thus, outside the rule that limits on federal jurisdiction are unwaivable. Lower courts have held as much in several contexts. See, *e.g.*, *Wellness Int'l Network, Ltd.* v. *Sharif*, 2013 WL 4441926, at *14 (CA7 Aug. 21, 2013); *Pacemaker Di-*

agnostic Clinic of Am., Inc. v. *Instromedix, Inc.*, 725 F.2d 537, 543–544 (CA9 1984). But in the bankruptcy context, the right to an Article III judge is unwaivable because a bankruptcy court's unconstitutional adjudication of a fraudulent-transfer claim ultimately expands federal courts' jurisdiction—specifically, their appellate jurisdiction over the bankruptcy court's judgment.

The vesting clause of Article III establishes a constitutional limit on subject-matter jurisdiction. See *N. Pipeline*, 458 U.S. at 87 n.40 (plurality op.) ("[T]he new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state law contract claim * * *."). When a bankruptcy court enters final judgment in violation of that constitutional limit, it expands the appellate jurisdiction of federal courts. After a bankruptcy court enters final judgment on a fraudulent-transfer claim pursuant to 28 U.S.C. § 157(b), a federal district court may exercise appellate jurisdiction under 28 U.S.C. § 158(a). After that, a federal court of appeals and this Court may exercise appellate jurisdiction under generally applicable appellate-jurisdiction statutes, including 28 U.S.C. § 1291 and § 1254. To exercise that appellate jurisdiction, a federal court must assess not only its own statutory and constitutional jurisdiction, but the statutory and constitutional jurisdiction of the bankruptcy court as well. If the bankruptcy court's authority to enter final judgment is constitutionally improper (because the vesting clause requires an Article III court to decide the case instead), federal appellate jurisdiction is constitutionally improper as well. See, *supra*, p.7. Even *Schor* recognized the force of this logic (as to the structural aspects of Article III's vesting clause): "the parties cannot by con-

sent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction." *Schor*, 478 U.S. at 851 (citing *United States* v. *Griffin*, 303 U.S. 226, 229 (1938)); see also *Freytag*, 501 U.S. at 897 (Scalia, J., concurring in part, dissenting in part) ("It is clear from our opinion in *Schor* that we had the analogy to Article III subject-matter jurisdiction in mind."). Accordingly, a federal court exercising appellate jurisdiction over a bankruptcy court's judgment must decide whether, consistent with Article III's vesting clause, the bankruptcy court had constitutional jurisdiction to enter the judgment—even if the bankruptcy court had statutory jurisdiction and even if the litigants timely objected.

Exceptional circumstances also warrant voiding litigants' assent to let a bankruptcy court enter final judgment on a fraudulent-transfer claim. The question whether Congress may reassign the power to enter final judgment on a fraudulent-transfer claim from an Article III judge to a bankruptcy judge implicates a "strong policy concerning the proper administration of judicial business"—perhaps the strongest such policy. *Glidden*, 370 U.S. at 536 (op. of Harlan, J.). It thus comes within the heartland of questions exceptional enough to answer despite litigants' failure to preserve them. Indeed, issues of adjudicative authority and appointments are inextricably intertwined, see *Palmore* v. *United States*, 411 U.S. 389, 405–407 (1973) (discussing *O' Donoghue* v. *United States*, 289 U.S. 516 (1933)), so the fact that the Court has found the latter exceptional is evidence the former is exceptional too.

The constitutionality of an adjudication by a federal officer therefore stands or falls on its consisten-

cy with Article III's vesting clause. Unless the officer acts as a legislative court (a territorial court, a military court, or a court adjudicating "public" rights) or as a judicial adjunct, he must be an Article III judge. Anything else is unconstitutional, so "[e]ven if both litigants not only agree to, but themselves propose, such a course, the judge must tell them no." *Freytag*, 501 U.S. at 896 (Scalia, J., concurring in part, dissenting in part).

C. Rejecting *Schor*'s Approach Does Not Require Overturning Holdings Of This Court.

Rejecting *Schor*'s personal-versus-structural dichotomy would not disturb the Court's holdings on other non-Article III adjudicative schemes. Not even *Schor* would have to be overruled. As *Stern* read *Schor*, the CFTC proceeding was constitutional principally because the CFTC's resolution of a federal reparations claim (a "public" right, according to *Schor*) necessarily resolved state-law counterclaims presenting the same issues. See *Stern*, 131 S. Ct at 2613–2614 (citing *Schor*, 478 U.S. at 856). Because the CFTC's judgment on a reparations claim has collateral estoppel effect and can preclude relitigation of overlapping state-law claims outright, there is no violation of Article III's vesting clause if the CFTC decides all the claims at once.[2]

Arbitration under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, also would be unaffected because Article III's vesting clause applies only to *federal* officers. A private arbitrator's decision on a

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[2] *Stern* read *Katchen* v. *Landy*, 382 U.S. 323 (1966), and *Langenkamp* v. *Culp*, 498 U.S. 42 (1990) (per curiam), the same way. See *Stern*, 131 S. Ct. at 2616–2617.

claim is no more a violation of Article III than a state-court judge's decision on the same claim. See *N. Pipeline*, 458 U.S. at 64 n.15 (plurality op.) ("[T]he principle of separation of powers is not threatened by leaving the adjudication of federal disputes to [state-court] judges"); see also *Freytag*, 501 U.S. at 911 (Scalia, J., concurring in part, dissenting in part) ("[G]iven the performance of adjudicatory functions by a federal officer, it is the identity of the officer * * * that tells us whether the judicial power is being exercised."). Arbitrators also do not enter final judgments, but like judicial adjuncts, their judgments must be enforced by courts. See *N. Pipeline*, 458 U.S. at 78–79 (plurality op.); see also *Stern*, 131 S. Ct. at 2619 (noting that bankruptcy judges are not judicial adjuncts because they enter final judgments). Litigant consent is not the reason why the FAA comports with Article III's vesting clause.

Adjudication by a magistrate judge under 28 U.S.C. § 636 is more complicated. The Court has treated magistrate judges as judicial adjuncts insofar as they render decisions that are not final. See *United States* v. *Raddatz*, 447 U.S. 667 (1980). In *Peretz* v. *United States*, 501 U.S. 923 (1991), the Court extended that logic to criminal *voir dire*. Although *Peretz* discussed litigant consent and cited *Schor* favorably, *id.* at 936, *Schor* did not factor into *Peretz*'s holding, which relied on the fact that district courts retain authority to decline to empanel a jury and to review rulings rendered during delegated *voir dire*—that is, courts retain the essential attributes of judicial power. See *id.* at 937–939; see also *id.* at 951 (Marshall, J., dissenting) (accusing the majority of being unfaithful to *Schor*).

The Court has never addressed whether magistrate judges remain judicial adjuncts when entering final judgments or contempt sanctions, which the statute expressly allows if litigants agree to let a magistrate judge preside. See 28 U.S.C. § 636(c), (e). The closest the Court has come to that constitutional question is not all that close. See *Roell* v. *Withrow*, 538 U.S. 580 (2003) (holding that implied consent suffices *under the statute* but not addressing the constitutionality of the impliedly consented-to judgment). Adjudication by a magistrate judge appears substantially similar to adjudication by a bankruptcy judge: both are federal officers exercising the full extent of federal judicial power, including entering final judgments subject only to appellate review by federal courts. Magistrate judges entering final judgment on civil claims likely are not judicial adjuncts, just as bankruptcy judges certainly are not.

That is not to say that all final judgments entered by magistrate judges are unconstitutional. In some cases, magistrate judges might be the equivalent of legislative courts adjudicating "public" rights. The important takeaway is that consent cannot extinguish a violation of Article III's vesting clause, so a federal court exercising appellate jurisdiction over a consented-to judgment of a magistrate judge cannot point to the litigants' consent as a reason either to avoid answering the constitutional question or to affirm the judgment's constitutionality.

II. A BANKRUPTCY COURT'S ADJUDICATION OF FRAUDULENT-TRANSFER CLAIMS VIOLATES ARTICLE III EVEN UNDER *SCHOR*'S APPROACH.

While *Schor*'s analysis is unsound, a bankruptcy judge's entry of judgment after a consented-to adju-

dication of a fraudulent-transfer claim is unconstitutional even under *Schor*'s approach. According to *Schor*, because error preservation is irrelevant to Article III's structural aspects, courts always must consider the extent to which an adjudicative scheme "impermissibly threatens the institutional integrity of the Judicial Branch." 478 U.S. at 851. *Schor*'s approach to structural violations requires a court to "weigh a number of factors":

> [T]he 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 right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III. *Ibid*.

In the context of the CFTC's adjudication of state-law counterclaims, *Schor* weighed those factors and concluded that the scheme was constitutional. *Id*. at 857. In this case, those factors weigh in favor of holding that the statute authorizing bankruptcy judges to adjudicate fraudulent-transfer claims, 28 U.S.C. § 157(b)(2)(H), is unconstitutional. Specifically, a bankruptcy court adjudicating a fraudulent-transfer claim (i) enters a final, binding judgment exercising broad substantive jurisdiction, (ii) outside of a regulatory scheme, (iii) where Congress has intentionally encroached on the judiciary.

Schor itself recognizes that those factors weigh in favor of holding that bankruptcy adjudications violate Article III's structural requirements. For in concluding that Congress's allocation of judicial pow-

er to the CFTC did not "impermissibly intrude on the province of the judiciary," *Schor* distinguished the CFTC's limited powers from the broad powers wielded by bankruptcy courts in the scheme that *Northern Pipeline* held unconstitutional. *Schor*, 478 U.S. at 851–853. And as *Stern* held, the problems of *Northern Pipeline* persist in a subset of "core" cases today. See *Stern*, 131 S. Ct. at 2610.

A. Bankruptcy Courts Enter Final, Binding Judgments In Fraudulent-Transfer Cases.

The reparations procedure administered by the CFTC left "far more of the 'essential attributes of judicial power' to Article III courts" than did the provisions of the bankruptcy regime held unconstitutional in *Northern Pipeline*. *Schor*, 478 U.S. at 852. A litigant could enforce a CFTC determination only in a district court, while bankruptcy judges in *Northern Pipeline* had power to issue final judgments. *Id.* at 853. The CFTC focused only on a "particularized area of law," while bankruptcy judges in *Northern Pipeline* had jurisdiction of "all civil proceedings arising under title 11 or arising in or *related to* cases under title 11." *Id.* at 852–853 (quotations omitted).

With respect to "core" matters, including fraudulent-transfer claims, bankruptcy courts still have all the "essential attributes" of judicial power they had at the time of *Northern Pipeline*. "As in *Northern Pipeline*, for example, the newly constituted bankruptcy courts are charged * * * with resolving all matters of fact and law in whatever domains of the law to which a counterclaim may lead." *Stern*, 131 S. Ct. at 2610 (citations and quotations omitted). "We deal here not with an agency but with a court, with substantive jurisdiction reaching any area of

the *corpus juris*." *Id*. at 2615 (citations and quotations omitted). As the statute authorizes, the bankruptcy judge enters final judgment, "which [is] binding and enforceable even in the absence of an appeal." See *id*. at 2610–2611.

B. This Case Does Not Involve An Agency Or Regulatory Scheme.

Schor found it significant that the CFTC scheme was a "specific and limited federal regulatory scheme" through which "Congress intended to create an inexpensive and expeditious alternative forum" for resolving alleged violations of the CEA. *Schor*, 478 U.S. at 855. In allocating authority to the CFTC, Congress intended "only to ensure the effectiveness" of the regulatory scheme. *Id*. at 856. If the CFTC could not adjudicate state-law counterclaims, the scheme would crumble. *Ibid*. The bankruptcy scheme is different. Federal courts are available to exercise the judicial power of the United States to hear cases and controversies in which a plaintiff seeks money from a third party.

Stern involved a state-law claim for money, brought by a bankruptcy trustee. Holding that the grant of judicial power to bankruptcy courts was unconstitutional, the Court distinguished *Schor* as "a situation in which Congress devised an expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task." *Stern*, 131 S. Ct. at 2615 (quotations and citations omitted). Here, as in *Stern*, Article III courts are the experts at resolving common-law claims like fraudulent-transfer claims, and preserving federal courts' au-

thority over those claims will not eviscerate the crux of the bankruptcy scheme.

C. Congress Encroached On The Judicial Branch By Authorizing Bankruptcy Courts To Enter Final Judgment On Fraudulent-Transfer Claims.

Whether a particular adjudicative scheme offends Article III's structural component depends, in part, on the "concerns that drove Congress to depart from the requirements of Article III." *Schor*, 478 U.S. at 851. Significant to *Schor*'s determination that there had been no encroachment was the fact that Congress gave litigants the option to pursue claims either through the administrative procedure or in the district court. *Id*. at 855. Here, there is no option. Congress authorized bankruptcy courts to proceed despite a litigant's objection. And in many cases, the defendant is also a creditor and has no choice but to visit the bankruptcy forum to share in the estate. See *Stern*, 131 S. Ct. at 2614–2615 (noting that "consent" in the bankruptcy context is not "true consent").

"[T]he nature of the claim" also played a significant role in *Schor*'s analysis. *Schor*, 478 U.S. at 853. *Schor* explained that a "quasi-judicial method" of resolving "public" rights involves reduced "danger of encroaching on the judicial powers" than is presented when adjudication of private rights is assigned to a non-Article III forum. *Id.* at 854. The Court recognized that "[t]he risk that Congress may improperly have encroached on the federal judiciary is obviously magnified" when Congress delegates authority over "private" rights to non-Article III tribunals. *Id*. at 854. A fraudulent-transfer claim is a "private"

right whose reassignment to non-Article III tribunals magnifies congressional encroachment. Characterizing *Schor* as a case where the right to relief was "completely dependent upon adjudication of a claim created by federal law," *Stern*, 131 S. Ct. at 2614 (quotations omitted), *Stern* reaffirmed that a fraudulent-transfer claim is the prototypical example of "a suit at the common law" that must remain within Article III courts, *id.* at 2609, 2614 & n.7.

Not only did Congress reassign "private" rights to bankruptcy courts, but Congress also reassigned essential judicial power as well. Congress gave bankruptcy courts "the most prototypical exercise of judicial power: the entry of a final, binding judgment * * *." *Id.* at 2615. Because Congress had no justification for its failure to comply with Article III, a bankruptcy court's adjudication of a fraudulent-transfer claim pursuant to 28 U.S.C. § 157(b)(2)(H) is unconstitutional under *Schor*.

III. LITIGANT CONSENT IS RELEVANT ONLY TO THE EXTENT CONGRESS HAS MADE CONSENT A FEATURE OF THE STATUTORY SCHEME.

Schor's holding that the personal aspects of Article III's vesting clause may be waived was tied to the statutory scheme at issue in *Schor*—one where Congress had made consent a feature and requirement of the statutory scheme. So, assuming the Court reaffirms *Schor*'s conception of Article III's vesting clause, the Court should apply established presumptions against waiver of constitutional rights. Litigants' personal rights under the vesting clause, if they are waivable, should be waived by implication only when Congress addresses the form that consent must take and delineates the circumstances in which

consent effects a waiver. Because Congress has not done so here, implied consent is insufficient.

A. Waiver Of Article III Rights Should Not Be Inferred From Litigant Conduct Without A Statutory Consent Requirement.

"[I]n the civil no less than the criminal area, 'courts indulge every reasonable presumption against waiver.'" *Fuentes* v. *Shevin*, 407 U.S. 67, 94 n.31 (1972) (quoting *Aetna Ins. Co.* v. *Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)); see also *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966); *Ohio Bell Tel. Co.* v. *Public Util. Comm'n*, 301 U.S. 292, 307 (1937). "This Court has always set high standards of proof for the waiver of constitutional rights." *Miranda* v. *Arizona*, 384 U.S. 436, 475 (1966).

For some rights, the Court has imposed exacting requirements for an effective waiver. See *Olano*, 507 U.S. at 733. One requirement is that waivers be knowing, voluntary, and "intelligent." See, *e.g.*, *Brady* v. *United States*, 397 U.S. 742, 748 ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."). Constitutional rights to trial are the classic type of right that cannot be waived without informed consent. See *Illinois* v. *Rodriguez*, 497 U.S. 177, 183 (1990). Litigants' personal rights under Article III's vesting clause are that type of right and should be treated no differently.

Implied waiver of constitutional trial rights fits uneasily with the requirement that waivers be both knowing and voluntary. See *Coll. Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (noting "how anomalous it

is to speak of the 'constructive waiver' of a constitutionally protected privilege"); *Edelman* v. *Jordan*, 415 U.S. 651, 673 (1974) ("Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights."). Conduct alone often leaves substantial room for doubt as to whether a litigant was truly aware of her constitutional protections and genuinely meant to relinquish them. And because courts always presume that litigants have not waived rights, *Fuentes*, 407 U.S. at 94 n.31, the ambiguity that surrounds conduct-based implications makes it difficult for an implied waiver to meet constitutional minimums.

The Court's prior decisions have homed in on this difficulty. In the criminal context, the Court has held that a guilty plea, standing alone, is not sufficient to waive the constitutional rights that a plea necessarily surrenders: the rights to jury trial, to confront one's accusers, and against self-incrimination. See *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969). Accordingly, the Court requires "the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Id.* at 243–44; see *Miranda*, 384 U.S. at 471-72 ("[W]arning [of the right to counsel] is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead.").

In civil cases as well, the Court declines to infer waiver from conduct that does not unequivocally evince a knowing and voluntary abandonment of constitutional rights. It has declined to infer waiver of a civil litigant's right to jury trial under the Sev-

enth Amendment, which is closely related to Article III's vesting clause. See *Granfinanciera*, 492 U.S. at 53. As early as 1882, the Court declined to find a waiver of jury rights in the absence of an express stipulation, noting that "trial by jury is a fundamental guaranty of the rights and liberties of the people," and that "every reasonable presumption should be indulged against its waiver." *Hodges* v. *Easton*, 106 U.S. 408, 412 (1882). Similarly, in *Aetna Ins. Co.*, the Court held that litigants had not waived their jury rights by moving for a directed verdict, again emphasizing that "every reasonable presumption" must be overcome before inferring that this "fundamental" right has been abandoned. 301 U.S. at 393; cf. *Ohio Bell*, 301 U.S. at 306–307 (litigant did not waive right to evidentiary hearing by failing to oppose consolidation with a different proceeding).

Assuming the requirement of Article III's vesting clause is waivable, a statutory scheme that expressly conditions non-Article III adjudication on litigant consent might ameliorate the problems that beset waivers inferred from conduct. A statute at least can provide a litigant notice of her constitutional rights. See *Roell*, 538 U.S. at 587 n.5 (notification of the right to refuse final adjudication by a magistrate judge is a "prerequisite to any inference of consent"). And it can provide additional procedural protections to ensure that consent is truly voluntary, free from even subtle forms of coercion or duress. See *Pacemaker*, 725 F.2d at 543 ("The waiver of personal rights [to Article III adjudication] must, of course, be freely and voluntarily undertaken."). The risk that undue pressure will be exerted to induce involuntary waivers varies greatly according to context and circumstance. In some areas, it will be of little concern;

in others, it will cast a long shadow over a waiver's purportedly voluntary nature, and stringent measures will be needed to counteract it. See, *e.g.*, *Miranda*, 384 U.S. at 469 ("The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators.").

Unlike the bankruptcy laws, the Federal Magistrate Act is a statutory consent scheme that incorporates these protections. The Act authorizes magistrate judges to enter final judgment in a civil matter if litigants consent. See 28 U.S.C. § 636(c)(1), (3); Fed. R. Civ. P. 73(c). There are numerous protections designed to ensure that consent is given knowingly and voluntarily. Not only does the Act require litigant consent and thus put litigants on notice, 28 U.S.C. § 636(c)(1), (3), "the clerk must give the parties written notice of their opportunity to consent," Fed. R. Civ. P. 73(b)(1). Litigants' decisions to consent (or not) are reported only to the clerk. 28 U.S.C. § 636(c)(2). And while the Act permits judges to remind litigants of the referral option, it requires them also to "advise the parties that they are free to withhold consent without adverse substantive consequences." *Ibid.* In *Roell*, the Court relied upon these safeguards as ensuring that implied consent to adjudication by a magistrate judge is knowing and voluntary. See 538 U.S. at 582. And while the question before the Court in *Roell* was purely one of statutory interpretation, the Court observed in dictum that a litigant's personal "Article III right is substantially honored" by those safeguards as well. *Id.* at 590 (citing *Schor*, 478 U.S. at 849–850).

B. The Existing Laws Do Not Contain Safeguards Sufficient To Infer Consent From A Defendant's Conduct.

The court of appeals held that EBIA, through its litigation conduct, had "impliedly consented" to final adjudication by a bankruptcy judge of the fraudulent-conveyance action brought by the trustee. The bankruptcy laws, however, do not contain any safeguards that ensure that an implied waiver of Article III rights is knowing and voluntary. Without a statutory consent requirement, EBIA's litigation conduct did not clearly and unequivocally signal consent. Applying every reasonable presumption against waiver, the Court should hold that EBIA was entitled to an Article III tribunal.

The statute governing bankruptcy court proceedings does not place litigants on notice that their consent is required for a bankruptcy judge to enter final judgment in a fraudulent-transfer action. On the contrary, the statute expressly designates actions to "recover fraudulent conveyances" as "[c]ore proceedings," 28 U.S.C. § 157(b)(2)(H), and this "'core' status alone authorizes a bankruptcy judge, as a statutory matter, to enter final judgment," *Stern*, 131 S. Ct. at 2604. Only in *non-core* proceedings does the statute require "the consent of all the parties" for a final adjudication. 28 U.S.C. § 157(c)(2). Some contend that, after *Stern*, fraudulent-transfer claims should be treated as non-core claims subject to adjudication by a bankruptcy court only upon litigants' consent. But that is manifestly not what Congress intended when it wrote the statute.

Thus, assuming the vitality of *Schor*'s reasoning, a bankruptcy court's authority to finally adjudicate

fraudulent-transfer claims should not be inferred from mere conduct alone. Litigant conduct, such as appearing before a bankruptcy judge without objection or engaging in dispositive motion practice, does not unequivocally evince a knowing and voluntary waiver of Article III rights.

Because Section 157(b) misinforms litigants that their consent is not needed for final adjudication of a fraudulent-transfer claim, merely proceeding with the litigation or asserting arguments in support of a favorable decision does not indicate that Article III rights were knowingly waived. All it shows is that a litigant participated in a proceeding in accordance with the statute—a statute that, by its plain terms, violates Article III.

Nor does litigant behavior alone provide an adequate basis to conclude that a waiver is truly voluntary. Adjudication of a fraudulent-transfer claim by a bankruptcy judge is very much like adjudication of a civil trial by a magistrate judge under Section 636(c). Both involve non-Article III officers engaging in "the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court*." *Stern*, 131 S. Ct. at 2615. And both present similar concerns that withholding consent will discomfit judges on whom the litigant depends for dispassionate decisionmaking or will result in other burdens that render the litigant's choice less than voluntary. See *Pacemaker*, 725 F.2d at 543 ("If it were shown that the choice is between trial to a magistrate or the endurance of delay or other measurable hardships not clearly justified by the needs of judicial administration, we would be required to consider whether the right to an Article III forum had been voluntarily relinquished."). The Federal Magistrate Act is sensi-

tive to these concerns. The bankruptcy laws are not. They contain none of the Federal Magistrate Act's safeguards, nor any similar measures, to ensure that waiver is voluntary. Without these protections, a litigant's consent to final adjudication by a bankruptcy court should not be inferred from conduct.

If the decision below were correct, the Federal Magistrate Act could be stripped of the consent requirement in Section 636(c)(1) and all the procedural protections in Section 636(c)(2). Any civil action could presumptively be assigned to a magistrate judge for final adjudication, without informing litigants that their consent is needed, and the Article III problem would disappear if the litigants failed to object and went along with the proceedings. In *Roell*, this Court envisioned that "implied consent will be the exception, not the rule." 538 U.S. at 591 n.7. But, if the lower court's decision stands, implied consent could become the default option in fraudulent-transfer cases, with nothing in the statute to apprise litigants of their prerogative not to waive constitutional rights.

This is a far worse affront to Article III than implying waiver after a litigant is afforded the notice and other protections in the Federal Magistrate Act. If consent can cure the constitutional defect that arises when Article I judges enter final judgments in plenary civil actions, it is only because of those safeguards. See *Pacemaker*, 725 F.2d at 540 (holding that magistrates may constitutionally conduct civil trials "in light of the statutory precondition of voluntary litigant consent"). This is true *a fortiori* of *implied* consent, which is an exception to the rule that consent ordinarily must be communicated expressly. The court of appeals erred in presuming the implied-

consent exception could stand alone, without express notice of the right to withhold consent or other statutory safeguards. But where, as here, a statute directs litigants to participate in a proceeding that violates Article III, compliance with the statute does not overcome the constitutional defect.

If the Court were to hold otherwise, the result would be not only dubious waivers but also a multiplicity of ancillary and avoidable litigations over implied consent. The absence of a developed record to establish knowledge and voluntariness will leave courts with a paucity of reliable sources to resolve these litigations. And nothing will be gained by bringing on this additional uncertainty, burdens, and expenses. When a statute falsely notifies litigants that they have no Article III rights, the remedy is to fix the statute, not to force the litigants and the courts into further litigation over conjectures drawn from litigants' silence.

The waiver found by the court of appeals was a *post hoc* rationalization of an unconstitutional proceeding. It illustrates a tendency to find implied waiver in order to cure a judgment that the governing statute authorizes even though the Constitution does not. But the burden of harmonizing the statute with the requirements of Article III's vesting clause should be met by amending the statute. It should not come out of the hide of litigants whose rights are jeopardized.

The court of appeals placed the onus on EBIA to object to bankruptcy court adjudication because EBIA supposedly had ample reason to be alert to the possible Article III problem. But this turns the question from an inquiry into whether there was a knowing and voluntary relinquishment of a right, to

an inquiry into whether a litigant gamed the odds cleverly enough, and that is not the test. Even if it were, EBIA had much *better* reason to believe its consent was irrelevant to the bankruptcy court's authority, as both the statute and circuit precedent then provided. But even if EBIA knew of a possible Article III issue, there still would have been no effective waiver. EBIA was entitled to unambiguous notice of a *right* (not a mere possibility) to select an Article III tribunal. See *Roell*, 538 U.S. at 587 n.5. And the notice, if not provided by the clerk or other officer of the court, should at least have been set forth in the statute. Inferring consent based on inferred notice is a bridge too far.

The court of appeals did not address whether EBIA's purported waiver was voluntary. But, even if knowledge could be established, the voluntary nature of inferred consent ought to have been a serious concern. Exercising an unequivocal statutory right to select Article III adjudication is one thing. Moving to oust a presiding bankruptcy judge when the statute and circuit precedent say it cannot be done is quite another. The latter course of conduct presents a significant practical risk of reprisals, which necessarily overshadows the calculus whether to press for Article III adjudication. Under the circumstances, it was error for the court of appeals to assume that any implied consent was truly voluntary.

CONCLUSION

The decision of Court of Appeals should be reversed.

Respectfully submitted,

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September 16, 2013