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No. 12-1200

In The
Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,

Petitioner,

v.

PETER H. ARKISON, CHAPTER 7 TRUSTEE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF CHAPTER THIRTEEN TRUSTEES AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Chapter Thirteen Trustees ("NACTT") is a non-profit, educational organization composed of consumer bankruptcy professionals.[1] Its membership represents a broad spectrum of participants in the consumer bankruptcy process including debtors' attorneys, creditors' representatives, and chapter 13 standing trustees. The NACTT's voting membership is composed of private trustees appointed by the U.S. Department of Justice, Executive Office of the U.S. Trustee, *see* 28 U.S.C. § 586, and in the federal judicial districts of North Carolina and Alabama by the judiciary. Approximately 98% of the chapter 13 standing trustees in the United States are voting members of the NACTT. Margaret A. Burks, a Chapter 13 Standing Trustee for the Southern District of Ohio and current president of the NACTT, and the NACTT's Board of Directors, have directly authorized Henry E. Hildebrand, III, Chapter 13 Standing Trustee for the Middle District of Tennessee, to prepare and submit this *amicus curiae* brief on the NACTT's behalf.

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[1] Pursuant to Supreme Court Rule 37.2(a), the NACTT states that the parties have filed letters with the Court granting blanket consent to the filing of *amicus curiae* briefs. Pursuant to Supreme Court Rule 37.6, the NACTT states that no counsel for a party authored this brief in whole or in part and that neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of the brief. The NACTT is a non-profit association and has used its own resources in preparing this brief.

Historically, Congress and federal courts have observed that the more efficient and effective chapter 13 programs are those conducted by chapter 13 standing trustees who exercise a broad range of responsibilities in both the design and effectuation of chapter 13 plans. *See Matter of Maddox*, 15 F.3d 1347, 1355 (5th Cir. 1994). A chapter 13 trustee has a statutory responsibility to participate in the confirmation and administration of every chapter 13 plan. *See* 11 U.S.C. § 1302. A chapter 13 trustee, like bankruptcy trustees in general, is charged with a responsibility to the system and to maximize recoveries to creditors. The trustee is empowered to assert claims, avoid preferences and fraudulent transfers, collect property of the estate, and examine and object to creditors' claims in furtherance of the congressional goal of equitably distributing property of the estate to holders of allowed claims. *Maddox*, 15 F.3d at 1355; *In re Gustav Schaeter Co.*, 103 F.2d 237 (6th Cir. 1939). The trustee represents the interests of all creditors by exercising various powers to ensure that the collection of the debtor's disposable income and disbursement of that money to creditors pursuant to a confirmed plan occurs according to the dictates of Congress, as set forth in title 11 of the United States Code (the "Bankruptcy Code"). *Maddox*, 15 F.3d at 1355.

This case presents issues that have the potential to harm the consumer bankruptcy system broadly and the chapter 13 system in particular. The high-volume nature of consumer bankruptcy practice

makes the consumer bankruptcy system particularly susceptible to changes in the complexity of case administration. The NACTT and its members are also deeply aware of the importance of the specialized knowledge of bankruptcy and related law that bankruptcy courts provide.

SUMMARY OF THE ARGUMENT

The NACTT urges the Court to affirm the Ninth Circuit's conclusion that bankruptcy courts may adjudicate fraudulent conveyance actions with party consent. These determinations do not offend the constitutional limits on bankruptcy court authority. The Court has identified two sets of interests protected by Article III. The first is a personal interest that this Court has expressly concluded is subject to waiver. The second is a structural interest that is not implicated by bankruptcy court adjudications that occur only at the behest of Article III courts and, therefore, involve no encroachment upon the judicial power by other branches. The initial reference of cases and proceedings to bankruptcy courts occurs only at the election of the district courts, *see* 28 U.S.C. § 157(a), and the district courts retain the authority to withdraw the reference, *see* 28 U.S.C. § 157(d). Even if the Article III courts' control over the bankruptcy court adjudications did not eliminate structural concerns, the Court has recognized that party consent, though not dispositive, is nonetheless an important aspect in the analysis of the structural

interest. Consent, therefore, adds to the other aspects of the bankruptcy court system that alleviate structural concerns with allocating adjudicatory authority to bankruptcy courts. The allocation of authority to bankruptcy courts betrays no intent to emasculate Article III courts. It occurs at the complete discretion of Article III courts. It also builds on a strong historical foundation that plainly supports bankruptcy court adjudication of basic bankruptcy decisions. Bankruptcy court adjudication, with party consent, of proceedings associated with the basic bankruptcy proceedings does not diminish Article III courts because it serves the legitimate purpose of enhancing the effectiveness of the underlying bankruptcy process.

The nature of fraudulent conveyance actions also provides additional support for bankruptcy court authority over that particular set of proceedings with party consent. Because fraudulent conveyance determinations effectuate legislative decisions regarding the assets that should be distributed in accordance with the bankruptcy distribution scheme, they serve as predicates to the basic bankruptcy function of providing an equitable distribution of a debtor's estate. The close relationship – historically and functionally – between fraudulent conveyance actions and the basic bankruptcy proceedings reduces the structural implications of centralizing these proceedings in bankruptcy courts with party consent.

In determining whether a party has in fact consented to adjudication by a bankruptcy court, the NACTT submits that courts may infer consent from

litigant conduct, and that such an inference is appropriate regardless of whether the statutory scheme contains a specific consent requirement. The relevant issue, for purposes of the Article III analysis, is whether a party has in fact consented. A party's express consent assists greatly in that determination, but other evidence may also demonstrate consent. This Court's decisions strongly support the conclusion that courts need not ignore clear manifestations of consent from litigation conduct. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 849 (1986); *Roell v. Withrow*, 538 U.S. 580, 590 (2003). Similarly, although the existence of consent as a limiting factor in the statutory scheme provides evidence of a party's awareness of the possibility of withholding consent, nothing prevents a court from examining other evidence to establish the same fact.

When constitutional limitations prevent bankruptcy courts from exercising the full adjudicative authority over core proceedings granted by statute, the bankruptcy courts still retain the authority to hear the proceedings and submit proposed findings of fact and conclusions of law to the district courts. The Court has clearly implied that Article III's restriction on bankruptcy court adjudicative authority is only a restriction on the power to "enter a final judgment." *See Stern v. Marshall*, 131 S. Ct. 2594, 2615 (2011). The statutory authority of bankruptcy courts, however, to "hear and determine" core proceedings and to "enter appropriate orders and judgments," 28 U.S.C. § 157(b)(2), encompasses more than just the power to

enter a final judgment. The power to "hear" a proceeding necessarily involves a power to submit proposed findings of fact and conclusions of law when the court is unable to enter a final order. Even if it did not, the residual authority a bankruptcy court retains when the Constitution requires the withdrawal of the power to enter a final order includes the authority to submit proposed findings of fact and conclusions of law.

This case presents particular concerns for consumer bankruptcy cases, such as those administered by the NACTT's member trustees. The consumer bankruptcy system is remarkably complex, yet it operates under significant resource constraints. Successful consumer bankruptcy practice involves high case volumes. In this environment, the efficiency demands are high. The cumulative effect of inefficiencies that might be minor irritants in a single case is potentially serious. It not only increases the cost of proceedings that – in most cases – already involve inadequate resources; it also affects the viability of effective representation in these proceedings. These considerations, of course, would not be sufficient to overcome a true structural constitutional deficiency in the bankruptcy system, but the considerations do underline the importance of the Court's practical approach to Article III.

ARGUMENT

I. Article III does not preclude the entry of a final order in a fraudulent conveyance action by a bankruptcy court when the parties consent

This Court has expressly held that the personal interests protected by Article III are subject to waiver, and the Court has made clear that consent is a significant factor in evaluating the structural concerns under Article III. Party consent, therefore, fundamentally affects the constitutionality of adjudication by non-Article III tribunals. The Court has clearly and properly rejected a rigid approach that would prevent any delegation of adjudicative authority to non-Article III tribunals. The bankruptcy court system under current law exemplifies the need for this practical approach. Basic bankruptcy proceedings properly reside in bankruptcy courts, and the centralization of associated proceedings in a single forum – including proceedings, such as fraudulent conveyance actions, that are closely tied to the basic bankruptcy proceedings – is important to the efficiency and effectiveness of the system.

A. Consent fundamentally affects the constitutionality of bankruptcy court adjudication

In *Commodity Futures Trading Commission v. Schor*, this Court unequivocally held that, "as a personal right, Article III's guarantee of an impartial

and independent federal adjudication is subject to waiver." 478 U.S. 833, 848 (1986). With respect to the personal interest protected by Article III, therefore, the Court has already decided that party consent removes the constitutional impediment to final decision by a non-Article III tribunal, such as a bankruptcy court. The *Schor* opinion also described the personal interests as the primary interests protected by Article III's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States. *Id*. (explaining that the guarantee "serves to protect *primarily personal*, rather than structural, interests" (emphasis added)).

The Court identified structural interests protected by Article III as well, but the bankruptcy court system does not implicate these interests. As the Respondent explains, the bankruptcy court system, like the magistrate system, exists only at the option of the judiciary. (Br. of Resp't at 36-40.) The complete control that Article III courts have over the bankruptcy court system contradicts the conclusion of the Fifth and Sixth Circuits that the system somehow diminishes the judicial branch. *See Waldman v. Stone*, 698 F.3d 910, 918 (6th Cir. 2012); *BP RE, L.P. v. RML Waxahachie Dodge, L.L.C. (In re BP RE, L.P.)*, No. 12-51270, 2013 WL 5975030 at *7 (5th Cir. Nov. 11, 2013). When parties have consented to bankruptcy court adjudication and eliminated concern regarding the personal rights protected by Article III, the analysis of bankruptcy court authority follows the Court's

analysis of magistrate authority in *Peretz v. United States*, 501 U.S. 923 (1991). In that case, the Court noted that "[m]agistrates are appointed and subject to removal by Article III judges." *Id*. at 937. The same is true of bankruptcy judges. *See* 28 U.S.C. § 152. The Court also noted that the "'ultimate decision' whether to invoke the magistrate's assistance is made by the district court." *Peretz*, 501 U.S. at 937 (quoting *United States v. Raddatz*, 447 U.S. 667, 683 (1980)). Again, the bankruptcy court system is virtually identical.[2] *See* 28 U.S.C. § 157(a) (providing district courts the discretion to refer proceedings to the bankruptcy courts); *see also* 28 U.S.C. § 157(d) (permitting district courts to withdraw, in whole or in part, any case or proceeding referred to the bankruptcy courts). The Respondent is also correct that the consensual referral of proceedings to bankruptcy courts does not violate the nondelegation doctrine. (Br. of Resp't at 40-42.) The historical practice of consensual referrals and the continuing ability of district courts to withdraw the reference of a proceeding distinguish this system from unconstitutional delegations of legislative power to executive agencies without any "intelligible principle" to control the delegation of power. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472

[2] In describing the magistrate system, the Court also noted that the district court's decision to invoke the magistrate's assistance is "subject to veto by the parties." *Peretz v. United States*, 501 U.S. 923, 937 (1991). Because the bankruptcy court authority the Petitioner advocates in this case involves party consent, it is functionally the same on this point as well.

(2001) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

Even if the framework for the bankruptcy court system did not wholly remove structural concerns, the *Schor* opinion made clear that, although "notions of consent and waiver cannot be dispositive" with respect to structural issues, *Schor*, 478 U.S. at 851, consent nevertheless affects the assessment of whether a non-Article III adjudication implicates structural interests. *See id*. at 855 ("[I]t seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences."). The structural aspect of Article III is closely related to the personal aspect; the judiciary's structural role is, in large part, to protect individual liberty by providing an impartial tribunal. *See Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011) ("As Hamilton put it, quoting Montesquieu, 'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" (quoting The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton)) (internal quotation marks omitted)).

The close relationship between the structural and personal interests protected by Article III calls into question the conclusion by the Seventh Circuit that the Court, in *Stern*, has already decided that the

statutory scheme under 28 U.S.C. § 157 implicates structural concerns. *See Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751, 771 (7th Cir. 2013). The constitutional issue in the *Stern* case did not involve consent, so the Court had no reason to discuss the personal/structural dichotomy, and the significant overlap between the structural and personal interests prevents the Court's discussion in *Stern* from standing for anything other than a discussion of the combined interests, in the absence of consent. Indeed, the effect of consent on the analysis of structural concerns reveals an even deeper flaw in the Seventh Circuit's conclusion. The *Stern* case presented a materially different *structural* analysis because it did not involve consent.

The Court has provided other indications of the importance of consent in the Article III analysis. In the *Stern* case, the Court noted the lack of true consent as a factor distinguishing the case from *Schor*. *Stern*, 131 S. Ct. at 2614. Similarly, the Court has taken care to specify that its holding in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), only concerned Congress's authority to vest power in non-Article III courts "without consent of the litigants." *See, e.g.*, *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584 (1985). In *Katchen v. Landy*, moreover, the Court noted that its holding left no need to "ascertain whether the creditor has 'consented' . . . within the meaning of s 23, sub. b" of the Bankruptcy Act, without any suggestion that a consent-based adjudication would present a

constitutional concern. 382 U.S. 323, 333 (1966). Similarly, in *MacDonald v. Plymouth County Trust Co.*, the Court raised no constitutional issues after concluding that a bankruptcy "referee may, if the parties consent, try the issues which must otherwise be tried in a plenary suit" before a district court under the Bankruptcy Act. 286 U.S. 263, 267 (1932). If that proceeding had presented a structural constitutional concern, the Court presumably would not have authorized it to go forward.

The Court has also addressed the constitutional significance of consent in other contexts. In addition to its conclusion in *Peretz* that "consent significantly changes the constitutional analysis" and that "there is no Article III problem when a district court judge permits a magistrate to conduct *voir dire* in accordance with the defendant's consent," 501 U.S. at 932, the Court also cited party consent as a factor in support of its conclusion that the arbitration scheme under the Federal Insecticide, Fungicide, and Rodenticide Act complied with Article III in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. at 591-92. The significance of consent in these cases highlights the practical importance of consent-based adjudication systems. A sweeping decision against bankruptcy court adjudication in this case would threaten federal efforts to encourage private arbitration, *see generally* Peter B. Rutledge, *Arbitration and Article III*, 61 Vand. L. Rev. 1189 (2008), and the magistrate system, a system that "in today's federal judicial system is nothing less than indispensable."

Gov't of the Virgin Islands v. Williams, 892 F.2d 305, 308 (3d Cir. 1989), *quoted in Peretz*, 501 U.S. at 928.

B. Bankruptcy court adjudication of fraudulent conveyance actions with party consent does not implicate the structural interests protected by Article III

The Court has recognized the need for a nuanced evaluation of the structural interests protected by Article III. Noting the risk that "formalistic and unbending rules" with respect to the structural interests would pose to "Congress' ability to take needed and innovative action pursuant to its Article I powers," *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986), the Court has highlighted the importance of flexibility and pragmatism in evaluating the limits imposed by Article III. *See id.* at 847 ("[T]he constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III."); *see also Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985) ("[P]ractical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.").

This approach is sound. Whereas the issue of personal rights is essentially zero-sum, with an improper delegation of judicial power coming at the direct expense of individuals' rights to an Article III tribunal, the structural boundaries are not so strictly

defined. "[T]he three branches are not hermetically sealed from one another." *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011). On some matters, the branches of government have "concurrent authority," *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring), and one branch's exercise of authority over these matters is not at the expense of another branch simply because the other branch might also constitutionally exercise the authority. The nature of the structural interest under Article III also distinguishes it from subject matter jurisdiction. The "harsh rule" of ignoring consent in considering subject matter jurisdiction "can be justified only because the issue concerns the fundamental constitutional question of the allocation of judicial power between the federal and state governments." Charles Alan Wright et al., 13 *Federal Practice & Procedure* § 3522 (3d ed. database updated Apr. 2013). A decision by a federal court lacking subject matter jurisdiction is, *ipso facto*, an infringement of rights reserved to the states or the people. Under the structural analysis of Article III, on the other hand, the fact that a matter implicates the powers of other branches does not necessarily mean that it implicates structural concerns.

In the *Schor* case, the Court set out a number of factors, "none of which has been deemed determinative," for evaluating whether an exercise of authority implicates structural concerns, "with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal

judiciary." *Schor*, 478 U.S. at 851. The dissenting opinion in the *Stern* case found these factors favored bankruptcy court authority to issue final orders even in the counterclaims at issue in that case. *Stern*, 131 S. Ct. at 2626-29 (Breyer, J., dissenting). The majority's disagreement with that assessment, however, is not conclusive as to the issue in this case. As described in greater detail below, fraudulent conveyance actions fit in a materially different category of proceedings than do the counterclaims at issue in *Stern*. Further, as noted, party consent affects the structural analysis. The majority did not consider Pierce Marshall's filing of a proof of claim as effective consent to bankruptcy court authority over his counterclaim, and so the majority opinion did not consider the effect of consent on the *Schor* factors. *See Stern*, 131 S. Ct. at 2614-15.

The first *Schor* factor is "the extent to which the essential attributes of judicial power are reserved to Article III courts." *Schor*, 478 U.S. at 851. Bankruptcy court adjudication of fraudulent conveyance actions with party consent plainly reserves the essential attributes of judicial power to Article III courts. The entire process is at the district court's option. Initial adjudication by a bankruptcy court under 28 U.S.C. § 157 occurs only when the district court exercises the discretion granted in § 157(a) to refer a bankruptcy case or associated proceeding to the bankruptcy court. 28 U.S.C. § 157(a). Further, the district court retains the authority to "withdraw, in whole or in part, any case or proceeding" it has

referred to the bankruptcy court. 28 U.S.C. § 157(d). There is no slippery slope in this framework in terms of the structural aspect of Article III. To the extent the judiciary perceives any threat to the powers reserved to it under the Constitution, it has the power to eliminate the threat completely. Even when a district court does not withdraw a proceeding, moreover, any party may appeal a bankruptcy court decision and obtain review by an Article III court. 11 U.S.C. § 158. The review of the legal conclusions on such an appeal is *de novo*. Fed. R. Bankr. P. 8013. The review of factual determinations does involve deference to the bankruptcy court's findings, *id*., but this aspect does not create a structural concern. *See Crowell v. Benson*, 285 U.S. 22, 51 (1932) ("[T]here is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges."), *quoted in Stern*, 131 S. Ct. at 2627 (Breyer, J., dissenting).

The second *Schor* factor is "the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts." *Schor*, 478 U.S. at 851. The Court's prior decisions leave open the question of whether the adjudication of fraudulent conveyance actions is a matter normally vested only in Article III courts. Even if these proceedings do require Article III tribunals in

some circumstances,[3] however, they exist very close to the line. Bankruptcy court adjudications of fraudulent conveyance actions clearly do not encroach broadly upon Article III courts' powers. Unlike the counterclaims at issue in *Stern*, the scope of bankruptcy courts' authority under 28 U.S.C. § 157(b)(2)(H) does not extend to any "area of the *corpus juris.*" *Stern*, 131 S. Ct. at 2615. It concerns only an area closely linked to the basic bankruptcy proceedings.

Admittedly, bankruptcy court orders are enforceable without district court order, unlike the orders of the non-Article III tribunal in *Schor*. *See Schor*, 478 U.S. at 853. This component of the system, however, has minimal significance in the structural analysis. Nothing in the scheme described in *Schor* suggested that the district court would conduct any *de novo* review of the underlying reparations order of the non-Article III tribunal.[4] As a practical matter, the most important question is whether an order from a non-Article III tribunal is enforceable as a final order. Further, to the extent the enforcement component is problematic, it is readily severable in the context

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[3] The validity of bankruptcy court adjudications of fraudulent conveyance actions may depend on circumstances such as whether the fraudulent conveyance would be determined in the course of the claims-allowance process or whether the parties consent to the bankruptcy court adjudication.

[4] The statute permitted any person for whose benefit a reparations order was made to file a certified copy of the order with the district court "for enforcement of reparation award by appropriate orders." 7 U.S.C. § 18(f) (1976).

here. In fact, the Bankruptcy Code clearly separates the authority to avoid fraudulent transfers, 11 U.S.C. § 548, from the authority to order recovery of the avoided transfers in 11 U.S.C. § 550.

The third *Schor* factor requires consideration of "the origins and importance of the right to be adjudicated." *Schor*, 478 U.S. at 851. Again, fraudulent conveyance actions are not the wide-ranging rights involved in *Marathon* or *Stern*. Fraudulent conveyance actions are closely associated with – if not a part of – the basic bankruptcy matters that this Court has implied bankruptcy courts may decide. They are clearly within the specialized area of bankruptcy and insolvency law. In *Granfinanciera, S.A. v. Nordberg*, the Court did hold that fraudulent conveyance actions fall outside of the public rights exception to the Seventh Amendment right to a jury trial, in large part because the Court concluded that the actions are "quintessentially suits at common law" tried no more than occasionally in courts of equity. 492 U.S. 33, 56 (1989). But the *Schor* analysis involves a different evaluation than the "public rights" analysis. The conclusion that a proceeding involves a private right, therefore, "does not end our inquiry." *Schor*, 478 U.S. at 853.

The existence of common-law fraudulent conveyance actions does not indicate that fraudulent conveyance actions are so distinct from bankruptcy proceedings that their adjudication by a bankruptcy court, with party consent, presents a structural concern. Bankruptcy addresses a collective action

problem, in large part by providing a system designed to consider the interests of creditors collectively. Fraudulent conveyance recoveries in bankruptcy play a central role in this process. In contrast to recoveries by individual creditors outside of bankruptcy, for the benefit of the individual creditors alone, recoveries of fraudulent transfers in connection with bankruptcy cases benefit the creditors in the cases collectively. (*See* Br. *Amicus Curiae* of the Bus. L. Section of the Fla. Bar in Support of Neither Party at 4-5.) In this respect, a proceeding to avoid a fraudulent conveyance in connection with a bankruptcy case is similar to a proceeding to avoid a preferential transfer, a type of proceeding that has been "a core aspect of the administration of bankrupt estates since at least the 18th century."[5] *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S.

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[5] The *Katz* decision and others also suggest some qualification to *Granfinanciera*'s characterization of recovery actions as actions to "augment the bankruptcy estate." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56 (1989). As a purely definitional matter, the Court has indicated in other cases that the trustee's recovery rights represent "property of the estate" under the Code. *See, e.g.*, *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 (1983) (noting that "property of the estate" includes "any property made available to the estate by any other provision of the Bankruptcy Code"); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992) ("[T]he right to recover a postpetition transfer under § 550 . . . is 'property of the estate' (defined in § 541(a)(3))."). But the *Katz* decision also seems to go the substantive question of whether fraudulent conveyance actions stand apart from the main bankruptcy case. The *Katz* decision presents a different view of the bankruptcy case than *Granfinanciera*, implying that an action seeking the recovery of actual property transferred – even particular dollars conveyed –

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356, 372 (2006). Both types of proceedings effectuate legislative decisions about the restructuring of debtors' financial affairs and both serve as predicates to the "equitable distribution" that is one of the "[c]ritical features of every bankruptcy proceeding." *Id*. at 364-65. Both also are expressly incorporated into the claims-allowance process when a transferee has filed a proof of claim: the Code makes the recovery of any voidable preferential or fraudulent transfer a condition of the allowance of a transferee's claim. 11 U.S.C. § 502(d).

The classification of fraudulent conveyance actions as legal rather than equitable – which the Court has conceded "admits of some debate," *Granfinanciera*, 492 U.S. at 55 – is also not conclusive in the structural analysis. The law/equity divide, though central to the Seventh Amendment analysis, provides an incomplete picture, especially in the Article III structural analysis. *See* Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 Am. Bankr. L.J. 567, 617 (1998) ("[T]he legal-equitable distinction fails . . . because it does not recognize bankruptcy as a *sui generis* creation of the legislature."). Historically, moreover, fraudulent conveyance determinations did *not* always require court action: "Under the eighteenth-century practice, the commissioners initially adjudicated whether there had been a preferential or fraudulent

falls within the court's *in rem* jurisdiction over the estate. *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 372 n.10 (2006).

transfer of the bankrupt's property. Such a transfer often was an act of bankruptcy that the commissioners initially determined." *Id*. (footnote omitted). Regardless of whether the historical practice is sufficient to bring fraudulent conveyance determinations into the constitutionally core matters that bankruptcy courts have the authority to adjudicate regardless of consent,[6] it surely eliminates any significant *structural* concerns with adjudication when parties do consent.

The fourth and final *Schor* factor requires consideration of "the concerns that drove Congress to

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[6] An *amicus* in this proceeding, in fact, argues that bankruptcy courts have constitutional authority to adjudicate fraudulent conveyances regardless of consent. (Br. *Amicus Curiae* of the Bus. L. Section of the Fla. Bar in Support of Neither Party.) The fact that fraudulent conveyances rest in a gray area, even in the historical record, suggests that the constitutional grant empowering Congress to "establish . . . uniform Laws on the subject of Bankruptcies," U.S. Const. art. I, § 8, provides Congress the authority to delegate the determination of fraudulent conveyances to the bankruptcy courts. *Cf.* Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 Am. Bankr. L.J. 567, 574 (1998) ("From the nature of preconstitutional bankruptcy adjudication emerges a general principle: The details of bankruptcy adjudication are a matter of legislative discretion requiring only a right of appeal to a court of law or equity."). The Court, however, need not conclude that historical practice alone permits bankruptcy courts to enter final orders in fraudulent conveyance actions in order to find that the close connection between them and other bankruptcy-related matters affects the third *Schor* factor in assessing structural concerns with bankruptcy court adjudication with party consent.

depart from the requirements of Article III." *Schor*, 478 U.S. at 851. This factor weighs strongly against any finding of structural concerns with bankruptcy court adjudication of fraudulent conveyance actions. Compelling practical considerations have motivated Congress's efforts to centralize bankruptcy-related proceedings in bankruptcy courts and conclusively demonstrate that the efforts have a "valid legislative purpose." *Thomas*, 473 U.S. at 593. The inclusion of fraudulent conveyance actions within bankruptcy courts' authority reflects "Congress' conclusion that the proper functioning of the bankruptcy system requires that expert judges handle these claims, and that the claims be given higher priority than they would receive on a crowded district court's civil jury docket." *Granfinanciera*, 492 U.S. at 93-94 (Blackmun, J., dissenting). Even more than bankruptcy court adjudication of the counterclaims at issue in *Stern*, the adjudication of fraudulent conveyance actions by bankruptcy courts "plays a critical role in Congress' constitutionally based effort to create an efficient, effective federal bankruptcy system." *Stern*, 131 S. Ct. at 2629 (Breyer, J., dissenting); *see also Granfinanciera*, 492 U.S. at 93-94 (Blackmun, J., dissenting) ("Although causes of action to recover fraudulent conveyances exist outside the federal bankruptcy laws, the problems created by fraudulent conveyances are of particular significance to the bankruptcy process."). Unlike the denial of bankruptcy court authority over counterclaims, moreover, the denial of authority over fraudulent conveyance actions would "meaningfully change[ ] the

division of labor in the current statute." *Stern*, 131 S. Ct. at 2620.

Also significant is the fact that bankruptcy court authority over fraudulent conveyance proceedings ultimately derives from the authority over basic bankruptcy proceedings that the Court has implied that bankruptcy courts may constitutionally exercise. *See, e.g.*, *Stern*, 131 S. Ct. at 2618 ("[T]he question is whether the action at issue stems from the bankruptcy itself. . . ."). The authority over secondary proceedings, therefore, bears some resemblance to concepts of supplemental jurisdiction. *Cf. Katchen v. Landy*, 382 U.S. 323, 335 (1966) (noting the "rule generally followed by courts of equity that, having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief" (quoting *Alexander v. Hillman*, 296 U.S. 222, 242 (1935)) (internal quotation marks omitted)). In both circumstances, the authority over the primary proceeding provides the foundation for the authority over the secondary proceeding. This analogy may not, by itself, validate bankruptcy court authority over all associated proceedings, but it weighs against any structural concern with that authority when parties consent.

The value of the bankruptcy court forum is more than just the value of a single forum for bankruptcy matters. The bankruptcy court system also provides a forum that is sensitive to the demands of bankruptcy cases. Bankruptcy courts are capable of the expeditious review that is often critically important in bankruptcy matters. Further, although bankruptcy

courts may not be specialized courts with respect to the type of counterclaim at issue in *Stern*, bankruptcy courts do have specialized knowledge with respect to debtor-creditor law, an area of law that extends beyond the Bankruptcy Code. For example, bankruptcy courts routinely decide issues under Article 9 of the Uniform Commercial Code in the exercise of their constitutionally core responsibilities. *See* James J. White et al., 4 *Uniform Commercial Code* § 32-1 (6th ed. database updated Oct. 2013) ("Of all judges, bankruptcy judges are the most likely to have experience with Article 9 and be conversant with its operation."). Fraudulent conveyance actions are, similarly, within bankruptcy courts' specialized area. Though the actions do exist under state law, they are principally heard in bankruptcy courts today. *See* Troy A. McKenzie, *Getting to the Core of Stern v. Marshall: History, Expertise, and the Separation of Powers*, 86 Am. Bankr. L.J. 23, 52 (2012) ("Judging from an assessment of expertise, . . . fraudulent conveyance actions plainly belong in bankruptcy court. As a substantive matter, much of the caselaw development in fraudulent conveyance doctrine occurs in bankruptcy court."). Again, these considerations may not, by themselves, remove constitutional limitations on bankruptcy court authority over fraudulent conveyance actions, but they do reduce any structural concern by demonstrating a legitimate purpose to the authority.

The difficulty in determining the constitutional bounds of bankruptcy court adjudication of fraudulent conveyance actions (and other "core" matters under

§ 157(b)) in the absence of consent also weighs against structural concerns with permitting bankruptcy court adjudication when parties do consent. The Court itself has conceded that its cases in this area "do not admit of easy synthesis."[7] *Schor*, 478 U.S. at 847. Permitting consent to tip the scales in this situation does not present a structural concern. The "practical effect . . . on the constitutionally assigned role of the federal judiciary," *Schor*, 478 U.S. at 851, is extremely limited. The very uncertainty in the constitutional determination helps ensure that any shift of authority to bankruptcy courts is not structurally significant. It also prevents the bankruptcy court authority from representing any derogation of Article III courts. Recognizing the effect of consent in these proceedings serves the legitimate purpose of providing parties a means of settling a difficult and uncertain legal question without the need for expensive litigation. *Cf.* Hon. Joan N. Feeney, *Statement to the House of Representatives Judiciary Committee on the Impact of Stern v. Marshall*, 86 Am. Bankr. L.J. 357, 358-59 (2012) ("Wasteful litigation over whether the bankruptcy court or the district

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[7] The Court has suggested that bankruptcy courts may properly decide matters central to a bankruptcy proceeding, but it has also emphasized that it has not actually reached that decision. *See Stern v. Marshall*, 131 S. Ct. 2594, 2614 n.7 (2011). Bankruptcy courts and practitioners, as a result, lack definitive guidelines regarding bankruptcy court authority over even the most basic bankruptcy proceedings.

court is the proper forum for adjudicating bankruptcy matters has exploded. . . . Litigating these disputes drains bankruptcy estate resources, delays the administration of bankruptcy cases, and reduces payment to creditors.”).

The concerns are especially compelling in consumer bankruptcy matters. Resource constraints make consumer bankruptcy a high-volume practice area, amplifying the significance of efficiency in case management. The existing system already strains the viability of effective representation in these proceedings.[8] Parties to these proceedings rarely have the resources to litigate complex constitutional issues. These issues, therefore, present a significant threat to the system if parties have no clear path to avoid them other than accepting expensive and time-consuming multi-forum litigation. *See* Kent L. Richland, *Stern v. Marshall: A Dead-End Marathon?*, 28 Emory Bankr. Dev. J. 393, 413 (2012) (“Particularly where the bankruptcy estate is relatively small, keeping the entire matter in the bankruptcy court may be the

[8] The pressures affect the representation of both debtors, *see, e.g.*, Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17, 122 (2012) (“Efficiency coupled with a high level of skill, while important in every area of law practice, is crucial to the success of a consumer bankruptcy practice.”); Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 Nw. U. L. Rev. 1463, 1531 (2005) (describing the emergence of bankruptcy “mills”), and creditors, *see, e.g.*, *In re Taylor*, 655 F.3d 274, 277 (3d Cir. 2011) (describing an example of “overreliance [by a creditor’s attorneys] on computerized processes in a high-volume practice”).

only way to preserve the estate against excessive costs.”).

II. Neither the statutory scheme nor constitutional strictures prevent a court from inferring consent from litigant conduct

When party consent is necessary to confer authority on a bankruptcy court to adjudicate a “core” matter under 28 U.S.C. § 157(a), the court may infer consent from party conduct. This Court’s holdings clearly establish that Article III does not require express consent. In the absence of any statutory requirement for express consent, the relevant inquiry is simply whether the parties have in fact consented to the bankruptcy court adjudication. Express consent provides a significant indicium on this question, but nothing prevents a court from looking at other indicia.

No statutory provision mandates express consent for bankruptcy court adjudication of a fraudulent conveyance action. Because Congress classified fraudulent conveyance actions as “core” matters, subject to final adjudication by bankruptcy courts regardless of consent, the statute does not impose any consent requirement for these matters at all. The only cause for considering consent is its effect on constitutional issues. The statute, moreover, contains a clear indication that Congress does not believe that the constitutional issues require express consent, as the statute requires only consent *simpliciter* for the

analogous exercise of adjudicative authority over non-core matters. *See* 28 U.S.C. § 157(c)(2); *cf. Roell v. Withrow*, 538 U.S. 580, 587 (2003) ("These unadorned references to 'consent of the parties' [in 28 U.S.C. § 636(c)(1) and (c)(3) concerning referral to full-time magistrate judges] contrast with the language in § 636(c)(1) covering referral to certain part-time magistrate judges, which requires not only that the parties consent, but that they do so by 'specific written request.'"). The statute only requires *express* consent in the context of an authorization for a bankruptcy court to conduct a jury trial. *See* 28 U.S.C. § 157(e).[9]

In the absence of a statutory mandate of express consent, the remaining legal question is one this Court has already answered: whether courts may infer consent to adjudication by a non-Article III

[9] Though Rules 7008(a) and 7012(b) of Federal Rules of Bankruptcy Procedure contain requirements that litigants state whether they consent to entry of final orders, these requirements are not jurisdictional. *See Kontrick v. Ryan*, 540 U.S. 443, 453 (2004) ("[I]t is axiomatic that [the Rules of Bankruptcy Procedure] do not create or withdraw federal jurisdiction." (internal quotation marks omitted)). They merely reflect the practical reality that obtaining express statements of consent is procedurally preferable, to reduce the likelihood of later disputes about the effectiveness of consent. *See also Bellingham Ins. Agency, Inc. v. Arkison (In re Bellingham Ins. Agency)*, 702 F.3d 553, 569 (9th Cir. 2012) (reasoning that the *Roell* decision precludes any objection based on rule requirements because the Court in that case recognized implied consent at a time the Federal Rules of Civil Procedure required written consent).

tribunal from party conduct. In *Schor*, the Court stated directly that the party's consent would have been effective "[e]ven were there no evidence of an express waiver." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 849 (1986). And in *Roell v. Withrow*, the Court was comfortable that the recognition of inferred consent in that case "substantially honored" the Article III right. *Roell*, 538 U.S. at 590.

The Court's approach to the question of implied consent recognizes that the ultimate constitutional question concerns actual consent. The difference between express consent and implied consent is only a difference in the method of determining actual consent. The Ninth Circuit below approached the issue in exactly this way, stating the relevant question as "whether EBIA did in fact consent to the bankruptcy court's jurisdiction" and, in considering that question, reviewing whether EBIA's litigation conduct implied its actual consent. *See Bellingham Ins. Agency, Inc. v. Arkison (In re Bellingham Ins. Agency)*, 702 F.3d 553, 567 (9th Cir. 2012).

The Petitioner asks the Court to create a rule prohibiting a finding of effective consent unless consent is an element of the statutory scheme. (Br. of Pet'r at 28-33.) This rule is unwarranted for the same reason that a requirement of express consent is unwarranted. A court's determination of implied consent is a determination of *actual* consent. It is not an imposition of deemed or constructive consent. Inferring actual consent necessarily involves a determination that a party understood its ability to

deny consent. The existence of a statutory scheme that specifically requires consent assists in the determination, but nothing makes it a necessity. In fact, the regulatory scheme at issue in *Schor* did not contain a specific consent requirement. *See Schor*, 478 U.S. at 836-37. Instead, the structure of the regulatory scheme meant that the "counterclaim-defendant manifested its consent by initiating a reparation action." (Br. of Pet'r at 29 n.1). The regulatory scheme, in other words, did not make consent a limiting factor; its structure merely facilitated the *inference* of consent *from litigant conduct*. (The *Roell* case, which presented questions regarding the effectiveness of consent notwithstanding a statutory consent requirement, *see* 538 U.S. at 587-88, also belies any argument that the existence of consent as a feature of the statutory scheme would eliminate questions regarding the effectiveness of consent.)

Courts should not infer actual consent lightly, but the Court has rejected the argument that courts may not do so when a litigant's conduct *does* indicate actual consent. In *Roell*, the Court directly considered the issue and refused to impose an express consent requirement, concluding the "bright line is not worth the downside." *Roell*, 538 U.S. at 590. As the Court noted, permitting parties to disavow their manifestations of consent after the fact wastes judicial resources and presents opportunities for abuse. *Id*. The Court highlighted similar considerations in *Stern*, noting the potential for severe consequences of a litigant "sandbagging" the court. These concerns are

particularly compelling in bankruptcy matters, which involve the allocation of interests in an estate that – in most cases – is insufficient to satisfy all obligations in full.

III. Bankruptcy courts have statutory authority to submit proposed findings of fact and conclusions of law in core proceedings

To the extent the court affirms the constitutional authority of the Bankruptcy Court to enter the order below, the case presents no apparent statutory question. The fraudulent conveyance action is plainly a "core" proceeding under 28 U.S.C. § 157(b)(2)(H), and the statute authorizes bankruptcy courts to exercise full adjudicative authority over core matters. *See* 28 U.S.C. § 157(b). But if the Court were to reverse the Bankruptcy Court's order on constitutional grounds, the case would present questions regarding the bankruptcy courts' subsidiary statutory authority over core matters, such as the authority to submit proposed findings of fact and conclusions of law. On this question, a strong consensus exists in the lower courts that bankruptcy courts do retain residual authority over core matters in this circumstance.[10] *See, e.g.*, *Rothrock v. PNC Bank, N.A. (In re Parco*

[10] Numerous district courts have also revised their standing orders of reference to accommodate constitutional limitations on bankruptcy court authority over statutory "core" proceedings. *See, e.g.*, *Rothrock v. PNC Bank, N.A. (In re Parco Merged Media Corp.)*, 489 B.R. 323, 326 (D. Me. 2013).

Merged Media Corp.), 489 B.R. 323, 326 (D. Me. 2013) (collecting cases). The statute provides ample support for that conclusion.

The statute's lack of any specific authorization to submit proposed findings of fact and conclusions of law does not offer any indication that this authority is outside the scope of bankruptcy courts' powers. Congress had no cause to specify the authority in the statute it enacted because the statutory framework clearly builds on the premise that bankruptcy courts have the constitutional authority to enter final orders in the proceedings the statute designates as "core." The "core" appellation echoes the distinction Justice Brennan made in the *Marathon* plurality opinion between matters "at the core of the federal bankruptcy power" that "may well" involve public rights, and matters involving only "state-created private rights." *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982). Congress clearly intended the statute's "core" proceedings to correspond to the "core" proceedings that the *Marathon* opinion implied bankruptcy courts have the constitutional authority to decide under the "public rights" exception. For core proceedings, the statute provides full adjudicative authority. For the residual category of non-core proceedings, the statute provides lesser authority, including the power to submit proposed findings of fact and conclusions of law. *See* 28 U.S.C. § 157(c)(1).

The *Stern* holding does not strip bankruptcy courts of all authority with respect to the affected

core matters. The Court's opinion consistently addresses only the authority to enter a "final judgment." *See, e.g.*, *Stern v. Marshall*, 131 S. Ct. 2594, 2615 (2011) ("[T]his case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment. . . ."). In fact, one of the factors the Court cited in describing its holding as "narrow" was that "Pierce has not argued that the bankruptcy courts 'are barred from "hearing" all counterclaims' or proposing findings of fact and conclusions of law on those matters, but rather that it must be the district court that 'finally decide[s]' them." *Id.* at 2620. The statute provides bankruptcy courts the authority to "hear and determine" core proceedings and to "enter appropriate orders and judgments," 28 U.S.C. § 157(b). At a bare minimum, therefore, the *Stern* decision leaves unaffected the bankruptcy court authority to "hear" these proceedings. *See Sheridan v. Michels (In re Sheridan)*, 362 F.3d 96, 102 (1st Cir. 2004) ("[W]hether the . . . proceeding was core or non-core, the bankruptcy court was empowered to hear the case and receive evidence."). In this context, at least, the power to submit proposed findings of fact and conclusions of law is a corollary of this authority.[11] The relevant authorization is the authorization to

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[11] The Court need not conclude that the authority to "hear and determine" *always* includes the power to submit proposed findings of fact and conclusions of law in order to conclude that it would in this case. Context matters, and the context here overwhelmingly supports the conclusion that the powers Congress granted to bankruptcy courts over core matters are

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"hear" a proceeding. That authorization is what actually empowers a bankruptcy court, providing it authority, for example, to compel attendance at hearings and to receive and admit evidence. Whether the bankruptcy court also submits proposed findings of fact and conclusions law (which carry no legal weight) is more a matter of convenience for the district court than a question of the bankruptcy court's powers. Indeed, § 157(c)(1) presents the issue in exactly that way. The statutory language does not provide a grant of authority to submit proposed findings of fact and conclusions of law; it imposes a duty to do so in the proceedings the statute does grant the bankruptcy courts the authority to "hear." *See* 28 U.S.C. § 157(c)(1).

Bankruptcy courts also retain any residual authority, short of the authority to enter final orders, encompassed within the authority to "hear and determine" core proceedings and to "enter appropriate orders and judgments." 28 U.S.C. § 157(b)(1); *see also Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) ("[A] court should refrain from invalidating more of the statute than is necessary."). The full adjudicatory

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sufficiently broad to include the power to submit proposed findings of fact and conclusions of law. The fact that 28 U.S.C. § 158 uses the same phrase does not undermine this conclusion in any way. In fact, it confirms the importance of context, as it is beyond dispute that a court's powers to "hear and determine" an appeal, 28 U.S.C. § 158(b)(6), are materially different than a court's powers to "hear and determine" a case in the first instance.

power authorized by 28 U.S.C. § 157(b) encompasses the lesser powers in subsection (c). Section 157 functions to allocate authority that is originally held by the Article III courts. *See Stern*, 131 S. Ct. at 2607 ("Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. That allocation does not implicate questions of subject matter jurisdiction." (citation omitted)). When a district court refers a core proceeding to a bankruptcy court under § 157(b), it refers full authority over that proceeding to the bankruptcy court, subject only to appellate review. The district court does not retain any power to submit proposed findings of fact and conclusions of law. That "power" is part of the internal decision-making power that is referred to the bankruptcy court. If constitutional limits prevent the bankruptcy court from entering a final order, then the only power the Constitution requires to revert to the district court is the power to enter a binding decision. The bankruptcy court retains the (previously latent) authority to submit proposed findings of fact and conclusions of law.

This Court's decisions regarding the severability of unconstitutional statutory provisions focus on legislative intent. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) ("The inquiry into whether a statute is severable is essentially an inquiry into legislative intent."). The history and statutory structure of 28 U.S.C. § 157 reveal "Congress' clear intent that, whenever a bankruptcy

court lacks the power to render a final judgment, it should render a report and recommendation." *Kirschner v. Agoglia*, 476 B.R. 75, 82 (S.D.N.Y. 2012). The initial creation of the bankruptcy court system stemmed from "the congressional perception of a lack of judicial interest in bankruptcy matters . . . : Congress feared that this lack of interest would lead to a failure by federal district courts to deal with bankruptcy matters in an expeditious manner." *Marathon*, 458 U.S. at 116 (White, J., dissenting) (citing H.R. Rep. No. 950595, p. 14 (1977)). After the *Marathon* decision invalidated a portion of the grant of authority to bankruptcy courts, Congress employed the "core" language of the *Marathon* plurality opinion in an obvious effort to provide bankruptcy courts with as much authority as the Constitution would permit. The framework the statute provides for handling these other proceedings offers a plain indication of the powers Congress intended bankruptcy courts to exercise when unable to enter final orders. The situation, therefore, differs markedly from the situation following the *Marathon* decision, when the Court had no indication of how Congress might choose to address the constitutional problem with its effort to "ensure adjudication of all claims in a single forum." *Marathon*, 458 U.S. at 87 n.40.

CONCLUSION

The adjudication of fraudulent conveyance actions by bankruptcy courts with the consent of the parties does not threaten any Article III interest. The personal interests protected by Article III are subject to waiver, and the structural interests are not implicated by these adjudications. In determining party consent, the relevant question is whether parties have actually consented. When a party's conduct clearly manifests consent, no constitutional limits prevent courts from inferring consent. Finally, even if bankruptcy courts did lack the constitutional authority to enter final orders in fraudulent conveyance actions with party consent, they would retain residual statutory authority sufficient to permit them to hear the proceedings and submit proposed findings of fact and conclusions of law to the district courts. For the foregoing reasons, the NACTT requests that the Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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