No. 12-1200

In the Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY, PETITIONER

v.

PETER H. ARKISON, TRUSTEE, SOLELY IN HIS CAPACITY AS CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.

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

BRIEF FOR PETITIONER

D. ROSS MARTIN
ELIZABETH N. DEWAR
RYAN MCMANUS
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
ROPES & GRAY LLP
One Metro Center
700 12th Street, N.W., Suite 900
Washington, D.C. 20005
(202) 508-4600
Douglas.Hallward-Driemeier@ropesgray.com

QUESTIONS PRESENTED

In *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), this Court held that Article III of the United States Constitution precludes Congress from assigning certain "core" bankruptcy proceedings involving private rights to non-Article III bankruptcy judges for final adjudication. *Stern* left unresolved several related questions regarding the constitutional and statutory authority of bankruptcy judges, including:

1. Whether Article III permits the exercise of the judicial power of the United States over private rights by non-Article III bankruptcy judges on the sole basis of litigant consent, and, if so, whether "implied consent" based on a litigant's conduct, where the statutory scheme provides the litigant no notice that its consent is required, is sufficient to satisfy Article III.

2. Whether a bankruptcy judge may submit proposed findings of fact and conclusions of law for de novo review by a district court in a "core" proceeding under 28 U.S.C. 157(b).

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

The following list includes the names of all parties to the proceedings below:

Petitioner Executive Benefits Insurance Agency (EBIA) was the appellant in the court of appeals. EBIA has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Peter Arkison is the Chapter 7 Trustee of the bankruptcy estate of Bellingham Insurance Agency, Inc. (Bellingham), and was the appellee in the court of appeals.

Aegis Retirement Income Services, Inc., Nicholas Paleveda, Marjorie Ewing, Peter Pearce, and Jane Doe Pearce were EBIA's co-defendants in the adversary proceeding commenced in the bankruptcy court by Arkison as Trustee of Bellingham's estate, but were not subject to the bankruptcy court's judgment that was reviewed by the court of appeals, and were not parties to the proceedings before the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–40a) is reported at 702 F.3d 553. The opinion of the district court (Pet. App. 41a–52a) is unreported. The opinion of the bankruptcy court (Pet. App. 53a–54a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 2012. On March 1, 2013, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including April 3, 2013, and the petition was filed on that date. The petition for

a writ of certiorari was granted on June 24, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, section 1 of the Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

STATUTORY PROVISIONS INVOLVED

Sections 157 and 158 of Title 28 of the United States Code are reproduced in a statutory appendix hereto, App. 1a–9a, *infra*.

STATEMENT

I. STATUTORY FRAMEWORK

In 1984, Congress conferred on bankruptcy judges adjudicatory authority over "any or all cases under title 11," meaning petitions for relief, as well as "any or all proceedings [(1)] arising under title 11 or [(2)] arising in or [(3)] related to a case under title 11," provided that a district court makes an appropriate reference. Bankruptcy Amendments and Federal Judgeship Act of 1984 (1984 Act), Pub. L. No. 98-353, 98 Stat. 333 (1984) (codified as amended at 28 U.S.C. 157(a)). The Constitution requires that the judicial power of the United States be exercised by judges appointed by the President with

the advice and consent of the Senate, that those judges "hold their Offices during good Behaviour," and that their salaries be protected against diminution. U.S. Const. art. II, § 2, cl. 2; art. III, § 1. Bankruptcy judges have none of those characteristics. They are appointed by the courts of appeals for 14-year terms, 28 U.S.C. 152(a)(1); they are subject to removal by the judicial council of the circuit in which they sit for incompetence, misconduct, neglect of duty, or physical or mental disability, 28 U.S.C. 152(e); and their salaries are subject to diminution by Congress, see 28 U.S.C. 153(a).

The 1984 Act was promulgated in the wake of *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), in which this Court concluded that the Bankruptcy Act of 1978 violated Article III by vesting bankruptcy courts with authority to enter final judgment on a state-law contract claim asserted against a non-creditor, *id.* at 87 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in judgment). Justice Brennan's opinion for a plurality of the Court reviewed "three narrow situations" in which, on the basis of long-standing historical practice, adjudicatory authority could be vested in legislative courts not protected by Article III: territorial courts, military courts-martial, and legislative courts empowered to adjudicate cases involving "public rights." *Id.* at 64–67. The plurality concluded that the power conferred on the newly-formed bankruptcy courts was not authorized by any of these historical doctrines, including the public rights doctrine. *Id.* at 63–76. In so holding, the plurality drew a distinction between claims "at the core of the federal bankruptcy power," which "may well be a 'public right,' " and "state-created private rights" susceptible

to federal adjudication only by Article III judges. *Id.* at 71.

With the language of *Northern Pipeline* plainly in mind, Congress responded with the 1984 Act, dividing bankruptcy proceedings into two categories—core and non-core—and imbuing bankruptcy courts with different authority in each. See 28 U.S.C. 157(b), (c). Congress defined "core proceedings" as those that "aris[e] under title 11, or aris[e] in a case under title 11." 28 U.S.C. 157(b)(1). In a non-exhaustive list, Congress identified examples of core proceedings, including "matters concerning the administration of the estate," "counterclaims by the estate against persons filing claims against the estate," and "proceedings to determine, avoid, or recover fraudulent conveyances." 28 U.S.C. 157(b)(2)(A), (C), (H). Non-core proceedings are those that are not "core proceedings," *i.e.*, do not "aris[e] under title 11 or aris[e] in a case under title 11," but are nonetheless "related to a case under title 11." 28 U.S.C. 157(b)(1), (c)(2); see 28 U.S.C. 157(b)(3) (directing bankruptcy judge to classify proceedings into one or the other category).

Bankruptcy courts are empowered by statute to "hear and determine" and to enter "appropriate orders and judgments" in "all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. 157(b)(1). Bankruptcy court judgments can be registered in another judicial district, 28 U.S.C. 1963, and they are entitled to preclusive effect in subsequent proceedings, including in state court proceedings, see, *e.g.*, *Stern* v. *Marshall*, 131 S. Ct. 2594, 2602 (2011). Bankruptcy judges, like district court judges, are empowered to enforce their own

judgments by issuing writs of execution. Fed. R. Bankr. P. 7069; Fed. R. Civ. P. 69.

Bankruptcy court judgments entered in core proceedings are subject to review only if a party chooses to appeal. Appeals from bankruptcy judgments are heard by an Article III district court or—in those circuits in which such a panel has been established and where neither party has specifically requested review by a district court—by a bankruptcy appellate panel composed of non-Article III bankruptcy judges. 28 U.S.C. 158(a)–(b), (c)(1). Both the district courts and bankruptcy appellate panels review bankruptcy judgments under traditional appellate standards. *Stern*, 131 S. Ct. at 2604 (citing 28 U.S.C. 158(a); Fed. R. Bankr. P. 8013). Appellate decisions of both the district courts and the bankruptcy appellate panels are subject to further review by the courts of appeals. 28 U.S.C. 158(d)(1). Bankruptcy court judgments may also, in some circumstances, be appealed directly to the court of appeals. 28 U.S.C. 158(d)(2).

Non-core proceedings are governed by Section 157(c) of Title 28. Bankruptcy judges are empowered by statute to hear non-core proceedings and submit proposed findings of fact and conclusions of law to the district court. 28 U.S.C. 157(c)(1). The district court, in turn, is empowered to enter judgment in a non-core proceeding after reviewing de novo any portion of the bankruptcy judge's proposed findings and conclusions to which a party has objected. *Ibid.*

Section 157(c) also provides that, with the consent of all parties, a bankruptcy judge may "hear and determine" a non-core proceeding and enter "appropriate orders and judgments" subject to appellate review un-

der Section 158, like bankruptcy judgments entered in core proceedings. 28 U.S.C. 157(c)(2). The Federal Rules of Bankruptcy Procedure require that parties in a non-core proceeding indicate explicitly in their pleading their consent or refusal to adjudication by the bankruptcy court. Fed. R. Bankr. P. 7008, 7012.

II. PROCEEDINGS IN THIS CASE

A. The Bankruptcy Court's Entry Of Final Judgment Against EBIA

In 2006, Bellingham Insurance Agency, Inc. (Bellingham) declared bankruptcy, filing a voluntary Chapter 7 petition in the United States Bankruptcy Court for the Western District of Washington. Respondent Peter H. Arkison (Trustee) was appointed trustee of Bellingham's bankruptcy estate, and later commenced an adversary proceeding against non-creditor EBIA and five other defendants. Among other claims, the Trustee asserted that EBIA had received fraudulent transfers from Bellingham and that EBIA was liable for Bellingham's debts as a successor corporation. See J.A. 65, 70, 73. The Trustee's complaint alleged that the claims against EBIA were "core." J.A. 50.

At the time the Complaint was filed, Ninth Circuit precedent conclusively established that bankruptcy-court final adjudication of fraudulent conveyance actions was consistent with Article III. *Duck* v. *Munn (In re Mankin)*, 823 F.2d 1296 (1987), cert. denied, 485 U.S. 1006 (1988), overruled by Pet. App 15a. Under *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989), however, a defendant in such an action could insist on its right to a jury trial. But even where a defendant asserted its jury right under *Granfinanciera*, Ninth Circuit precedent established that "the bankruptcy

court may retain jurisdiction over the action for pretrial matters," including disposition of the case on summary judgment. *Sigma Micro* v. *Healthcentral.com (In re Healthcentral.com)*, 504 F.3d 775, 788 (2007).

In its Answer, EBIA demanded a jury trial, and indicated that it did not consent to a jury trial before a bankruptcy judge. J.A. 94. After the bankruptcy judge calendared the case for trial, EBIA renewed its demand for a jury trial before the district court by filing a motion to vacate the trial date. Pet. App. 77a–80a. In its motion, EBIA acknowledged that under Ninth Circuit precedent it had no right to an Article III court for proceedings prior to trial. See *id.* at 72a (citing *Healthcentral.com*, 504 F.3d at 786–788). The bankruptcy judge referred EBIA's request to the district court, which construed it as a motion to withdraw the reference and requested a status report to determine the matter's readiness for trial. J.A. 104.

Several parties submitted a status report indicating that the Trustee was about to file a motion for summary judgment against EBIA in the bankruptcy court and requesting time to conduct a settlement conference before a bankruptcy judge. Pet. App. 74a–75a. EBIA did not join in that status report. *Id.* at 76a. Noting that the case was still far from ready for trial, the district court stayed consideration of the motion to withdraw for three months and, consistent with Ninth Circuit precedent, allowed pretrial proceedings to continue in the bankruptcy court. *Id.* at 62a–63a.

Shortly after the status report was filed, the Trustee moved in the bankruptcy court for summary judgment against EBIA on the fraudulent transfer and suc-

cessor liability causes of action. J.A. 106–107. The Trustee argued that EBIA received fraudulent transfers from Bellingham's estate, as evidenced by deposits made by EBIA and Peter Pearce (a former Bellingham employee) into the bank account of a third corporation, A.R.I.S., Inc. (ARIS). J.A. 119. The motion contended that these deposits represented commissions earned by Bellingham and were thus assets of the estate. See J.A. 120. The Trustee further asserted that ARIS's bookkeeping software showed the deposits were subsequently credited back to EBIA as "intercompany transfers." J.A. 119.

EBIA disagreed. To meet its burden in opposing summary judgment, EBIA submitted a declaration from its President and CEO, Nicholas Paleveda, stating that any commissions Pearce deposited with ARIS were never transferred to EBIA, and that, notwithstanding what ARIS's internal bookkeeping software reflected, EBIA did not owe any debt to ARIS that could have been offset by the purported intercompany transfers alleged by the Trustee. See J.A. 178. Paleveda further stated that by May 2006—when the earliest purported transfers of commissions from EBIA to an ARIS account occurred, see J.A. 142—any money EBIA earned was its own revenue from new business cultivated in the four months since EBIA was formed. J.A. 174.

A hearing on the Trustee's motion was held on April 14, 2010. At that hearing the bankruptcy judge commented that he did not find Mr. Paleveda's declaration credible. J.A. 184–185. While disclaiming reliance on this credibility determination, the bankruptcy judge granted summary judgment for the Trustee, notwithstanding the Paleveda declaration, on the ground that

the judge did not "think the transfers ha[d] been adequately explained by the responding parties." J.A. 185.

The bankruptcy court thereafter entered a final judgment against EBIA in the amount of $389,474.36. Pet. App. 53a–55a, 57a. Upon learning that summary judgment had been granted against EBIA, the district court denied EBIA's motion to withdraw the reference as moot. See Pet. App. 61a.

B. Appellate Proceedings In The District Court And Court Of Appeals

EBIA appealed the bankruptcy court's final judgment to the district court. The district court indicated that the bankruptcy court's grant of summary judgment was subject to de novo review, but, at the same time, invoked a "substantial evidence" standard in reviewing the bankruptcy court's findings. Pet. App. 45a, 50a. The district court concluded that EBIA had failed to show any error on the part of the bankruptcy court and, on that basis, dismissed EBIA's appeal and affirmed the bankruptcy court's judgment. Pet. App. 51a; J.A. 188. Following the district court's decision on appeal, the Trustee executed the bankruptcy court's judgment by obtaining writs of garnishment from the bankruptcy court. J.A. 189–205.

EBIA appealed the district court's appellate ruling to the Ninth Circuit. After EBIA had filed its opening brief, this Court decided *Stern*, holding that bankruptcy courts lack constitutional authority to enter final judgment in certain core proceedings. EBIA thereafter filed a supplemental brief arguing that, under *Stern*, the bankruptcy judge was constitutionally proscribed from entering final judgment on the Trustee's claims. Pet. App. 7a–8a.

The court of appeals affirmed. Pet. App. 39a–40a. Regarding EBIA's objection to the bankruptcy court entering final judgment, the court of appeals observed that "until quite recently, the exercise of that statutory authority [to enter final judgment in fraudulent conveyance proceedings] was routine and uncontroversial." Pet. App. 9a. The court of appeals acknowledged, however, that "following the Supreme Court's decision in *Stern v. Marshall*, the view that such judgments are consistent with the Constitution is no longer tenable." *Ibid.* Relying on *Stern* and this Court's earlier decision *Granfinanciera*, the court of appeals overruled its decision in *Mankin*, and held that a fraudulent conveyance claim against a non-creditor cannot constitutionally be assigned by Congress to a bankruptcy court for final adjudication. *Id.* at 15a, 23a.

The court of appeals recognized that its holding, though required by *Stern*, "create[d] a gap in [the Bankruptcy Code's] statutory framework" because "[n]owhere does the statute explicitly authorize bankruptcy judges to submit proposed findings of fact and conclusions of law in a core proceeding." Pet. App. 23a–24a. The court observed that 28 U.S.C. 157(c)(1) grants bankruptcy judges such authority only in a proceeding that is " 'not a core proceeding,' " and further that a fraudulent conveyance proceeding does not fall within Section 157(c)(1) because it is a "core proceeding" under Section 157(b). *Id.* at 24a. Nevertheless, the court of appeals interpreted "the power to 'hear and determine' a proceeding" under Section 157(b)(1) to encompass the "more modest power to submit findings of fact and recommendations of law to the district courts." *Id.* at 24a. It reasoned such a construction was appropriate because Congress intended to vest bankruptcy judges

with "as much adjudicatory power as the Constitution will bear." *Ibid.* The court of appeals did not attempt to reconcile its holding with Section 157(b)'s statement that a bankruptcy court's "orders and judgments" in core proceedings are reviewable only on "appeal[]" to the district court. 28 U.S.C. 157(b)(1), 158(a).

The court of appeals further held that EBIA had "impliedly consented" to adjudication by the bankruptcy judge. Pet. App. 30a. It reasoned that a litigant's consent can cure an otherwise unconstitutional exercise of judicial power by a non-Article III bankruptcy judge. Pet. App. 26a–29a. The court acknowledged that litigant consent cannot overcome Article III's structural protection of the separation of powers. *Id.* at 27a n.9 (citing *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 850–851 (1986)). But it believed the structural component of Article III is only implicated where "the encroachment or aggrandizement of one branch at the expense of the other is at stake." *Ibid.* (internal quotation marks omitted). The court concluded that "the allocation of authority between bankruptcy courts and district courts does not implicate structural interests, because bankruptcy judges are officers of the district court and are appointed by the Courts of Appeals." *Ibid.* (brackets and internal quotation marks omitted).

Although EBIA had repeatedly demanded a jury trial before the district court, the court of appeals concluded that EBIA, through its litigation conduct, had "impliedly consented" to adjudication by a bankruptcy judge. Pet. App. 29a–30a. That conclusion was based, at least in part, on the court of appeals' understanding that EBIA had "*petitioned* the district court to stay its consideration of the motion to withdraw the reference

to give the bankruptcy court time to adjudicate the Trustee's motion for summary judgment." *Id.* at 29a (emphasis added). This statement appears to be based on the joint status report filed with the district court in connection with EBIA's request to withdraw the reference in order to vindicate its jury trial right. See *id.* at 73a–76a. But EBIA did not join that status report, in which other parties reported to the district court that the Trustee intended to move for summary judgment in the bankruptcy court. See *id.* at 76a (indicating that counsel for EBIA had not joined the report).

The Ninth Circuit also emphasized that EBIA had not framed its objection explicitly in terms of Article III until after this Court decided *Stern*, which was after EBIA had filed its opening brief in the court of appeals. Pet. App. 30a. "Because it waited so long to object, and in light of its litigation tactics," the court held that "EBIA impliedly consented to the bankruptcy court's jurisdiction." *Ibid.* The court of appeals faulted EBIA for failing to anticipate this Court's holding in *Stern* on the basis of *Granfinanciera*, despite the court of appeals' own prior conclusion that *Granfinanciera*'s holding was limited to the conduct of jury trials. Pet. App. 15a; cf. *Healthcentral.com*, 504 F.3d at 788.

SUMMARY OF ARGUMENT

The decision of the court of appeals must be vacated because the bankruptcy court lacked constitutional authority to enter a final judgment of the United States and because EBIA's purported consent (consisting of failure to assert an argument foreclosed by binding circuit precedent) could not cure that constitutional defect.

I. The Constitution ensures the separation of powers by assigning the core legislative, executive, and judicial functions to the three branches of government. Diminishing or reallocating a particular branch's core constitutional functions, including even within a branch, violates the separation of powers. Neither an agreement among the branches of government nor the agreement of private parties can authorize such a departure from the Constitution's structural design.

The core function of the Judicial Branch is the authority to enter final judgment on private claims. That authority is confined by Article III, § 1 to judges appointed by the President with the consent of the Senate, and who have life tenure and protection from salary diminution. Assigning the core judicial function to non-Article III judges violates the separation of powers, as this Court held in *Stern* v. *Marshall*.

The consent of private parties cannot cure an Article III defect that implicates the separation of powers. Because *Stern* established that a bankruptcy judge's entry of final judgment on a private right violates the separation-of-powers component of Article III, the court of appeals erred in holding that it was cured by the implied consent or waiver of EBIA.

To the extent consent can be relevant to the separation-of-powers analysis at all, it is only insofar as Congress has made consent a limiting feature of the statute permitting non-Article III adjudication. A statutory requirement of consent ensures that litigants are made aware of the need to consent and their right to refuse it, and ensures that Congress has carefully considered the constitutional issues at stake. Further, by making consent a jurisdictional limitation on the

non-Article II tribunal, Congress also provides the basis for Article III oversight, to ensure, on appellate review, that consent to a non-Article III judge was knowing and voluntary. The provisions of the Bankruptcy Code governing core proceedings include no requirement of consent, however, and implied consent in an individual case provides none of the ameliorating functions of a statutory consent requirement. Individual litigant consent cannot cure the separation of powers defect identified by this Court in *Stern*.

Because the bankruptcy court's judgment was entered without constitutional authority, it must be vacated on appeal. Like a defect in subject matter jurisdiction, a violation of Article III, § 1 implicating the separation of powers goes to the authority of the court to enter judgment. It therefore cannot be cured by consent of the parties, and is an error correctable at any time on direct appeal.

II. Even if litigant consent were relevant (in the absence of a statutory requirement), such consent would still have to be knowing and voluntary. Failure to make an objection that is foreclosed by binding precedent does not constitute knowing and voluntary consent. Prior to *Stern*, both the Bankruptcy Code and controlling Ninth Circuit authority denied that litigants had a right to an Article III judge to decide summary judgment in core proceedings. Failure to object to entry of summary judgment by a bankruptcy judge could not, therefore, constitute knowing and voluntary consent.

The court of appeals' finding of implied consent demonstrates just how little protection will be afforded to the commands of Article III in the absence of a strict

requirement of knowing and voluntary consent. Without any such constraint, post-hoc judicial findings of implied consent—made in an effort to salvage unconstitutional adjudications by the bankruptcy courts—will render hollow this Court's holding in *Stern*. Because EBIA could not, prior to *Stern*, have knowingly and voluntarily consented to the bankruptcy court's entry of judgment, the judgment of the court of appeals must be vacated.

III. In addition to lacking constitutional authority to enter judgment, the bankruptcy court lacked statutory authority to issue proposed findings of fact and conclusions of law. The text and structure of Section 157(b) of Title 28, which governs core proceedings, plainly demonstrates that bankruptcy courts' authority to "hear and determine" core proceedings does not include authority to propose non-final findings and conclusions. The plain meaning of the word "determine" is to decide conclusively or authoritatively, not to propose a non-final recommendation. This plain meaning is confirmed by Section 158(b), which provides that bankruptcy appellate panels "hear and determine" appeals, a grant of authority not conceivably including the "lesser" action of issuing a "proposed ruling on appeal."

Moreover, construing Section 157(b) to permit issuance of proposed findings and conclusions also cannot be reconciled with Section 158. Section 158 grants district courts appellate jurisdiction over bankruptcy court judgments, but grants district courts no authority to enter judgment in the first instance in a case that has been referred to (and not withdrawn from) the bankruptcy court.

Nor can bankruptcy courts propose findings of fact and conclusions of law in core proceedings pursuant to other sections of the Bankruptcy Code. Section 157(c)(1) permits them to issue proposed findings and conclusions only in non-core, "related to" proceedings. Fraudulent conveyance proceedings are specifically denominated as core, and could only be adjudicated under Section 157(c)(1) through judicial rewriting of the statute. Nor can district courts exercise their power to refer cases under Section 157(a) by promulgating local rules or standing orders purporting to alter the specific procedures established by Congress for bankruptcy courts. Ultimately, it is the responsibility of Congress, not the courts, to choose among the multiple potential legislative remedies for the constitutional defect in the Bankruptcy Code that this Court identified in *Stern*.

ARGUMENT

I. THE ARTICLE III VIOLATION IDENTIFIED IN *STERN* V. *MARSHALL* CANNOT BE CURED BY LITIGANT CONSENT IN AN INDIVIDUAL CASE

A. The Constitutional Allocation Of Functions Among The Three Branches Of Government Cannot Be Altered By Agreement Between The Branches Or Wishes Of Private Parties

One of the defining features of the Constitution is its dispersion of federal power among "three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982) (plurality opinion). Although "the three branches are not hermetically sealed from one another," the Constitution "imposes

some basic limitations," *Stern* v. *Marshall*, 131 S. Ct. 2594, 2609 (2011), and assigns to each branch certain core sovereign functions that cannot be allocated or exercised in a manner other than set forth in the Constitution, see *Loving* v. *United States*, 517 U.S. 748, 757 (1996) ("[I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another."); *Pacemaker Diagnostic Clinic of Am.* v. *Instromedix, Inc.*, 725 F.2d 537, 544 (9th Cir. 1984) (en banc) (Kennedy, J.) (the "separation of powers * * * requir[es] that each branch retain its *essential powers* and independence" (emphasis added)), cert. denied, 469 U.S. 824 (1984).

The core legislative power is the power to make laws of the United States. The Constitution commands that "the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure": bicameralism and presentment. *INS* v. *Chadha*, 462 U.S. 919, 951, 956–958 (1983).

The core executive powers include oversight of those executing laws enacted by Congress. *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 (2010) (" '[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.' ") (quoting James Madison, 1 Annals of Cong. 463 (1789)). That power cannot be conferred on a person or entity not accountable to the President. *Ibid.* (dual for-cause limitation on President's removal authority violates separation of powers).

The core judicial power "is one to render dispositive judgments" on private claims, *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (internal quotation marks omitted), and particularly private claims heard by courts of law and equity at the time of the Constitution's adoption, see *Stern*, 131 S. Ct. at 2614–2615. That authority cannot be conferred on non-Article III judges. *Id.* at 2620 (entry of judgment on common-law counterclaim by bankruptcy court violates separation of powers); *Northern Pipeline*, 458 U.S. at 87 (plurality opinion).

The preservation of the separation of powers is secured by the structure of the Constitution, not the pleasure of any particular branch. A breach of the separation of powers violates the Constitution "whether or not the encroached-upon branch approves of the encroachment." *New York* v. *United States*, 505 U.S. 144, 182 (1992); see also *Free Enter. Fund*, 130 S. Ct. at 3155 ("[T]he separation of powers does not depend on the views of individual Presidents[.]"); *Clinton* v. *New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) ("That a congressional cession of power is voluntary does not make it innocuous."). Nor can agreement among the branches justify a deviation from the Constitution's requirements for how their respective authorities are to be exercised. See *Chadha*, 462 U.S. at 942 n.3 (statute violating requirements of bicameralism and presentment not "immunized" simply because it "was passed by Congress and approved by the President").

Contrary to the court of appeals' understanding, the separation of powers is not implicated only when there is a self-evident "encroachment or aggrandizement of one branch at the expense of the other." Pet.

App. 27a n.9 (internal quotation marks omitted). No less authority than *Marbury* v. *Madison* establishes that even attempts to reallocate authority *within* a branch of government are void when inconsistent with the Constitution's structural design. 5 U.S. (1 Cranch) 137, 175–176 (1803). There, the Court held invalid an attempt by Congress to confer original jurisdiction on this Court over matters in which the Constitution granted only appellate review. *Ibid.* There was no doubt in that case that original jurisdiction to issue a writ of mandamus against the Secretary of State could permissibly reside within the Judicial Branch. *Id.* at 173–174. Thus, there was no obvious risk of aggrandizing one branch's powers at the expense of another. Yet the Court recognized that if Congress could allocate to the Supreme Court original jurisdiction where it should only have appellate powers, Congress might equally allocate to the lower courts original jurisdiction where the Constitution reserved it to the Supreme Court. *Ibid.* Thus, "even with respect to challenges that may seem innocuous at first blush," the Court will not "compromise the integrity of the system of separated powers and the role of the Judiciary in that system." *Stern*, 131 S. Ct. at 2620; *id.* at 2619–2620 (rejecting contention that appointment and supervision of bankruptcy judges by Article III judges ameliorated the "threat to the separation of powers").

Just as the three branches cannot alter the Constitution's allocation of authority, neither can private parties do so by agreement. In *Marbury*, tellingly, once the Court declared that the statute granting it original jurisdiction was inconsistent with Article III, it did not even inquire whether Mr. Marbury's willing invocation of the Court's jurisdiction and Secretary of State Madi-

son's failure to object made exercise of the power acceptable. 5 U.S. (1 Cranch) at 180 ("a law repugnant to the constitution is void"). And what was implicit in *Marbury* has since been made explicit many times over. Litigants "may not by stipulation invoke the judicial power of the United States in litigation which does not present an actual 'case or controversy' " under Article III. *Sosna* v. *Iowa*, 419 U.S. 393, 398 (1975). Nor can they agree to confer jurisdiction beyond the courts' statutory authority, even though Congress could have constitutionally conferred more expansive jurisdiction. *Mansfield, C. & L.M. Ry. Co.* v. *Swan*, 111 U.S. 379, 382, 384 (1884) (noting, where there was an absence of complete diversity, that "the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted").

The assignment of core sovereign functions to each of the three branches is so central to the design of the Constitution that neither the consent of the affected branch, nor the consent of private parties—nor even the consent of both—can authorize the reallocation of those responsibilities.

B. Conferring On Non-Article III Bankruptcy Courts Authority To Render Judgments Of The United States Violates The Separation Of Powers

Rendering final judgments of the United States is the core power assigned to the Judicial Branch. The judicial power is " 'the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.' " *Muskrat* v. *United States*, 219 U.S. 346, 355–356

(1911) (quoting Justice Samuel Miller, *On the Constitution* 314 (1891)); accord *Plaut*, 514 U.S. at 218–219. As the Court declared in *Stern*, rendering a final judgment on a private right is the "most prototypical exercise of judicial power." 131 S. Ct. at 2615.

The Judiciary exerts its authority as a co-equal branch of government by rendering judgment in the cases before it. See The Federalist No. 78, at 465 (Alexander Hamilton) (C. Rossiter ed. 1961) ("[The Judiciary] may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."). A judgment, once final, "becomes the last word of the judicial department with regard to a particular case or controversy," *Plaut*, 514 U.S. at 227, and, as such, judgments of the United States carry great authority. They can declare invalid the acts of Congress. *Marbury*, 5 U.S. (1 Cranch) at 180. They "may not lawfully be * * * refused faith and credit by another Department of Government." *Chi. & S. Air Lines* v. *Waterman S. S. Corp.*, 333 U.S. 103, 113 (1948). They can direct the conduct of the States, even in areas of traditional local concern. See, *e.g.*, *Brown* v. *Bd. of Educ.*, 349 U.S. 294 (1955). And they can affect countless aspects of the affairs of private citizens and noncitizens alike. See *O'Donoghue* v. *United States*, 289 U.S. 516, 532 (1933) (" 'The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all.' " (quoting Chief Justice John Marshall, *Debates of the Virginia State Convention of 1829–1830* at 616)).

The Framers were acutely aware of the potential for conflict that exists when courts render final judgments disfavored by the political branches or other

powerful interests. A "crescendo of legislative interference with private judgments of the courts" prompted the Framers to make the "critical decision to establish a judicial department independent of the Legislative Branch." *Plaut*, 514 U.S. at 221. They recognized that, although the Judicial Branch was likely to be the "weakest of the three departments of power," the exercise of national judicial power would be dangerous unless "the judiciary remains truly distinct from both the legislature and the Executive." The Federalist No. 78, at 465–466. "The complete independence of the courts of justice" was thus deemed "peculiarly essential in a limited Constitution." *Id.* at 466.

The independence of the Judiciary is ensured by Article III's tenure and salary protections. Tenure during "good Behaviour" was deemed essential because "[p]eriodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [judges'] necessary independence." The Federalist No. 78, at 471. And because the "*power over a man's subsistence amounts to a power over his will*," the Framers believed that "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision of their support." The Federalist No. 79, at 472 (Alexander Hamilton).

Entry of final judgments by non-Article III bankruptcy courts implicates the same concerns that underlie the Constitution's separation of powers. Like the judgments of Article III courts, bankruptcy court judgments carry the full force of a judgment of the United States. They can be registered in another judicial district, 28 U.S.C. 1963, must be honored in state court proceedings, see *Stern*, 131 S. Ct. at 2602, and can be enforced through writs of execution issued by the

bankruptcy judge, Fed. R. Bankr. P. 7069. In some circumstances, bankruptcy judgments can be appealed directly to the courts of appeals. 28 U.S.C. 158(d)(2). And because bankruptcy courts' "substantive jurisdiction reach[es] any area of the *corpus juris*," *Stern*, 131 S. Ct. at 2615, their judgments carry the same risks of political conflict as those of district courts. Through their judgments, bankruptcy courts can direct the conduct of the political branches, see 11 U.S.C. 106, pass on the constitutionality of acts of Congress, see *In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011), and bind the States, see *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356 (2006).

Although bankruptcy court judgments carry all the attendant risks of district court judgments, bankruptcy judges have none of the Constitution's structural protections. They are not nominated by the President or confirmed by the Senate, but rather are appointed by circuit court judges. 28 U.S.C. 152(a)(1). They are not insulated by life tenure, but rather are appointed for a term of years and subject to removal for cause, 28 U.S.C. 152(a), (e). Nor are they protected against salary diminution. See *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 534 (1962) (plurality opinion) (even a "statutory declaration" that judges should serve "with undiminished salary * * * [is] ineffective to bind any subsequent Congress unless those judges were invested at appointment with the protections of Article III").

Precisely because bankruptcy judges do not meet the qualifications of judges under Article III, this Court "emphatic[ally]" declared in *Stern* that the entry of final judgments on private rights by bankruptcy judges poses a "threat to the separation of powers" and violates Article III. 131 S. Ct. at 2620. As in *Marbury*, it

did not matter in *Stern* that this extra-constitutional allocation of responsibility arguably took place within Article III. That bankruptcy judges are appointed by the courts of appeals and decide only those cases that have been referred to them by the district courts did not alter the Court's conclusion. "[T]he 'essential attributes of judicial power' " must be "reserved to Article III courts." *Schor*, 478 U.S. at 851. Thus, "it does not matter who appointed the bankruptcy judge or authorized the judge to render final judgments in such proceedings [over private claims]. The constitutional bar remains." *Stern*, 131 S. Ct. at 2619 (citing The Federalist No. 78, at 471). Permitting bankruptcy courts to enter final judgment in such proceedings would "compromise the integrity of the system of separated powers and the role of the Judiciary in that system." *Id.* at 2620.

C. Private Litigants Cannot, By Consent Or Waiver, Confer On Non-Article III Bankruptcy Courts Authority To Enter Judgment In Violation Of The Separation Of Powers

Stern established that Congress violated Article III and the separation of powers by granting bankruptcy judges authority to enter final judgment in traditional private actions. Because the bankruptcy courts' authority to enter final judgment implicates the structural separation of powers, it cannot be overcome by consent or waiver, for the same reasons subject matter jurisdiction cannot be conferred in such fashion.

1. Consent cannot cure structural Article III violations affecting the separation of powers, such as that identified in *Stern*

In *Commodity Futures Trading Commission* v. *Schor*, the Court held that a violation of Article III implicating the separation of powers cannot be waived or cured by litigant consent. 478 U.S. at 850–851. Although the Court indicated that Article III, § 1 in part protects purely personal interests that can be waived, *id.* at 848, it also observed that "Article III, § 1 * * * serves as 'an inseparable element of the constitutional system of checks and balances' " that "safeguards the role of the Judicial Branch in our tripartite system," *id.* at 850 (quoting *Northern Pipeline*, 458 U.S. at 58 (plurality opinion)). The Court declared that "[t]o the extent that this structural principle [*i.e.*, Article III, § 1's protection of the separation of powers] is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that parties by consent cannot confer on federal courts subject matter jurisdiction beyond the limitations imposed by Article III, § 2." *Id.* at 850–851; accord *Freytag* v. *Comm'r Internal Revenue*, 501 U.S. 868, 897 (1991) (Scalia, J., concurring in part and concurring in the judgment); *Glidden*, 370 U.S. at 535–536 (plurality opinion) (declaring that "disruption to sound appellate process entailed by entertaining [Article III] objections not raised below * * * is plainly insufficient to overcome the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers"); *Pacemaker*, 725 F.2d at 544 ("Statutes or governmental actions which violate the separation of powers doctrine in its systemic aspect should be invalidated, as a general rule, despite waiver by affected private parties."). "When

these Article III limitations are at issue," *Schor* explained, "notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." 478 U.S. at 851.

The dissenting opinion of Justice Brennan in *Schor*, joined by Justice Marshall, would have gone further. In Justice Brennan's view, "the structural and individual interests served by Article III are inseparable," and therefore, in all cases, "consent is irrelevant to Article III analysis." *Schor*, 478 U.S. at 867. Notably, however, all nine Justices agreed that, wherever adjudication by non-Article III courts implicates the separation of powers, the consent or waiver of individual litigants cannot cure the constitutional difficulty. See *id.* at 850–851 (majority opinion); *id.* at 867 (Brennan, J., dissenting).

Stern conclusively established that the provisions of the Bankruptcy Code governing core proceedings, which purport to grant bankruptcy courts authority to enter final judgments of the United States on private rights, violate the structural, separation-of-powers component of Article III. Indeed, *Stern* "emphatic[ally]" declared that permitting bankruptcy courts to enter final judgment in core proceedings involving private rights would "compromise the integrity of the system of separated powers and the role of the Judiciary within that system." 131 S. Ct. at 2620; accord *Wellness Int'l Network, Ltd.* v. *Sharif*, ---F.3d---, No. 12-1349, 2013 WL 4441926, at *17 (7th Cir. Aug. 21, 2013) ("*Stern* unequivocally holds that 28 U.S.C. § 157(b) violates the structural protections of Article III, § 1 * * * .").

Under *Schor*, therefore, "the parties cannot by consent cure the constitutional difficulty" identified in *Stern*. 478 U.S. at 850–851. *Stern* recognized as much in declaring that, because "the bankruptcy court itself exercises the essential attributes of judicial power that are reserved to Article III courts, *it does not matter who * * * authorized the judge to render final judgments in such proceedings*." 131 S. Ct. at 2619 (emphasis added) (citation and internal quotation marks omitted). *Stern* and *Schor* together establish that the consent or waiver of litigants in an individual case is insufficient to confer on non-Article III bankruptcy courts authority to enter final judgment on private rights. See *Wellness Int'l*, 2013 WL 4441926, at *17 (relying on *Schor* and *Stern* to conclude Article III objection to bankruptcy-court adjudication could not be waived); *Waldman* v. *Stone*, 698 F.3d 910, 918 (6th Cir. 2012) (same), cert. denied, 133 S. Ct. 1604 (2013).

Because "Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article," Congress's purported assignment of "the essential attributes of judicial power" was void as violating "[t]he constitutional bar." *Stern*, 131 S. Ct. at 2618–2620. It makes no more sense to ask whether private litigants have consented to the unconstitutional reassignment of Article III authority under Bankruptcy Code Section 157(b) than it would to have asked whether Secretary Madison had consented (or waived by objections) to this Court's exercise of original jurisdiction in *Marbury*. See 5 U.S. (1 Cranch) at 180.

2. Even assuming consent can be relevant to the constitutional inquiry when Congress confers authority to enter final judgments on non-Article III courts, it is only to the extent that consent is a limiting feature of the statutory scheme

For the reasons above, it is doubtful that litigant consent can ever be the determining factor in the constitutionality of a non-Article III judge's exercise of the essential attributes of the judicial power of the United States. To the extent litigant consent is ever relevant to the structural analysis, it is only insofar as Congress included a *statutory* requirement of consent that diminishes separation-of-powers concerns.

a. *Whereas a statutory consent requirement might diminish a potential threat to the separation of powers, ad-hoc litigant consent cannot validate adjudication under an unconstitutional statute*

Schor recognized that "the parties cannot by consent cure" structural violations of the separation of powers. 478 U.S. at 850–851. The Court has, however, at times given some consideration to the role of consent within a statutory scheme in evaluating whether a statute's limited delegation of judicial authority violates the separation of powers in the first place. See, *e.g.*, *id.* at 855.

Thus, in *Schor* itself, the Court discussed consent in analyzing the structural component of Article III in connection with determining whether the adjudicatory authority of the Commodity Futures Trading Commission (CFTC) threatened the separation of powers. See

478 U.S. at 855. The Court observed that the CFTC's authority over counterclaims in CFTC reparation proceedings was "left entirely to the parties." *Ibid.*[1] The inclusion of consent as a feature of the statute was significant, the Court explained, because "separation of powers concerns are diminished" where "Congress * * * make[s] available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences." *Ibid.*; accord *Wellness Int'l*, 2013 WL 4441926, at *17 (distinguishing core bankruptcy proceedings from statutory schemes that explicitly require consent); *Pacemaker*, 725 F.2d at 546 (holding that the "statutory safeguard[]" of litigant consent "is essential to the constitutionality of the [Magistrates] Act").

Ultimately *Schor* held that entry of reparation orders by the CFTC did not violate the separation of powers. See 478 U.S. at 857 (finding "no genuine threat to [separation of powers] principles to be present"); *ibid.* (holding that CFTC counterclaim "adjudication does not contravene separation of powers principles or Article III"). In reaching that conclusion the Court relied on a number of factors, including the statutory requirement of consent. See *id.* at 855. The Court also emphasized that the CFTC's orders (unlike bankruptcy judgments) were "enforceable only by order of the dis-

[1] In *Schor*, the consent of both parties was ensured by the structure of the statute: a counterclaim-defendant manifested its consent by initiating a reparation action before the CFTC, and a counterclaim-plaintiff manifested its consent by voluntarily electing to bring its counterclaim in that forum. See 478 U.S. at 841–843 (observing that CFTC's authority to adjudicate counterclaims "is evident on the face of the statute").

trict court," see *id.* at 853, and further observed that the CFTC scheme dealt with a "particularized area of law," *id.* at 852; that the CFTC's orders were "reviewed under the same 'weight of the evidence' standard sustained in *Crowell* [v. *Benson*, 285 U.S. 22 (1932)], rather than the more deferential standard found lacking in *Northern Pipeline*," *id.* at 853; and that the CFTC's counterclaim jurisdiction was "limited to that which [was] necessary to make the reparations procedure workable," *id.* at 856. *Schor* thus concluded that the CFTC scheme "hew[ed] closely to the agency model approved by the Court in *Crowell*," *id.* at 852, in which the agency "functioned as a true 'adjunct' of the District Court," *Stern*, 131 S. Ct. at 2613 n.6.

The Court has likewise considered litigant consent in upholding the assignment of some judicial responsibility to Article III adjuncts.[2] But it has done so only where, as in *Schor*, the "essential attributes of judicial power" remained with an Article III court. 478 U.S. at 852; see, *e.g.*, *Gonzalez* v. *United States*, 553 U.S. 242, 252 (2008); *Peretz* v. *United States*, 501 U.S. 923, 937 (1991) (magistrates may preside over *voir dire* with consent because " 'the entire process takes place under

[2] The Court has also discussed litigant consent in upholding non-Article III adjudication of so-called "public rights" that are "integrally related to particular federal government action." *Stern*, 131 S. Ct. at 2613; see, *e.g.*, *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985) (holding that it was permissible for Congress to assign the valuation task within a federal compensation scheme outside Article III courts). As the court of appeals correctly concluded, the fraudulent conveyance claims asserted against EBIA do not qualify as public rights. Pet. App. 15a; see *Granfinanciera*, 492 U.S. at 54.

the district court's total control and jurisdiction' " and both the ultimate decision whether to empanel the jury and the further conduct of the trial and entry of judgment remain with the district court (quoting *United States* v. *Raddatz*, 447 U.S. 667, 681 (1980))); *Thomas* v. *Arn*, 474 U.S. 140, 142, 154 (1985) (waiver of objections to proposed findings of fact and conclusions of law does not "remove[] the essential attributes of the judicial power" from Article III courts because the district judge "retains full authority * * * to enter judgment") (internal quotation marks omitted); *Kimberly* v. *Arms*, 129 U.S. 512, 524–525 (1889) (master's report was entitled to deference, but final authority to enter judgment remained with court); *Heckers* v. *Fowler*, 69 U.S. (2 Wall.) 123, 128 (1864) (affirming judgment entered by court upon unobjected-to referee's report, where parties consented to referee acting in place of the jury).[3] The foregoing decisions cannot control the outcome here, however, because "a bankruptcy court can no more be deemed a mere 'adjunct' of the district court than a district court can be deemed such an 'adjunct' of the court of appeals." *Stern*, 131 S. Ct. at 2619.

To the extent the Court has implied that consent might be relevant to the constitutionality of a statute that assigns non-Article III judges the power to enter final judgments of the United States, the consent in

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[3] The court of appeals cited *MacDonald* v. *Plymouth County Trust Co.*, 286 U.S. 263 (1932), as holding that "the right to an Article III judge in plenary proceedings [under the Bankruptcy Act of 1898] could be waived by the litigants." Pet. App. 27a. But "*MacDonald* was decided on statutory grounds" and "did not mention the Constitution, let alone Article III, § 1." *Wellness Int'l*, 2013 WL 4441926, at *17 n.2.

question was an inherent, limiting feature of the non-Article III judge's statutory jurisdiction. This Court has never squarely addressed the constitutionality the Federal Magistrates Act, which authorizes magistrate judges, acting with the parties' consent, to enter final judgments of the United States, directly appealable to the court of appeals "in the same manner as an appeal from any other judgment of a district court." 28 U.S.C. 636(c)(3).[4] But, to the extent the Court has suggested that the Magistrates Act's authorization of consensual reference to magistrates for entry of final judgment is constitutional, that statute is distinctive in that it makes consent an explicit, statutory limitation on the non-Article III judge's jurisdiction. 28 U.S.C. 636(c)(1). Unlike the Magistrates Act, the Bankruptcy Code does not require consent as a condition to bankruptcy judges' authority to enter final judgment in core proceedings. See 28 U.S.C. 157(b).

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[4] In *Roell* v. *Withrow*, the Court repeatedly emphasized that "the *only* question" before it was the *statutory* question "whether [implied consent] can count as conferring 'civil jurisdiction' under § 636(c)(1), or whether adherence to the letter of § 636(c)(2) is an absolute demand." 538 U.S. 580, 586–587 (2003) (emphasis added); see also, *e.g.*, *id.* at 587 n.5. In holding, as a matter of statutory construction, that implied consent can satisfy Section 636(c)(1), the Court did not address the "serious constitutional concerns" raised by the dissent concerning entry of judgment by a magistrate. *Id.* at 592 (Thomas, J., dissenting). In *Peretz*, which concerned the magistrate's conduct of jury *voir dire*, the Court noted magistrate judges' statutory authority to preside over trials with litigant consent. 501 U.S. at 933, 935 n.12. But *Peretz*'s holding did not address the constitutionality of that provision. See *id.* at 953 (Scalia, J., dissenting) (observing that no question of jurisdiction was presented because judgment was entered by the district court).

Thus, whereas the limiting character of the statutory consent requirement might in a future case play a role in deciding whether the Magistrates Act is constitutional, the absence of consent as a statutory feature was already part of the Court's analysis in *Stern* concluding that Section 157(b) was *not* constitutional. See 131 S. Ct. at 2614–2615 & n.8. Where this Court has already held that the statute conferring authority to enter judgment unconstitutionally violates the separation of powers, the mere preferences of private litigants cannot "cure the constitutional difficulty" in an individual case. *Schor*, 478 U.S. at 851; see *Marbury*, 5 U.S. (1 Cranch) at 180.

b. ***Insisting that consent be expressly included in the statute ensures that it will serve as a limiting feature on the bankruptcy court's authority to enter judgment***

Where Congress enacts a statute that specifically conditions non-Article III courts' authority to enter judgment on consent of the litigants, the threat to the separation of powers is potentially diminished.

First, a statutory requirement of consent ensures that litigants are "made aware of the need for consent and the right to refuse it." *Roell*, 538 U.S. at 590. Statutory notice assures that any supposed consent is knowing and voluntary, and thereby guarantees that unsuspecting litigants are not deprived of the protections afforded by Article III. See, *e.g.*, 28 U.S.C. 636(c)(2) ("Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.").

Second, Congress's inclusion of consent as a statutory requirement demonstrates that Congress "has in fact faced, and intended to bring into issue," the serious constitutional questions raised by non-Article III adjudication. See *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991) (internal quotation marks omitted). "In traditionally sensitive areas, such as legislation affecting the federal balance," and legislation implicating the separation of powers, the Court has for this reason required a "clear statement" from Congress. *Ibid.* (internal quotation marks omitted); see *Kucana* v. *Holder*, 558 U.S. 233, 237 (2010) (applying clear statement rule in light of "[s]eparation-of-powers concerns"). By including a consent limitation in a statute assigning judicial powers to non-Article III courts, Congress demonstrates an awareness of the sensitive constitutional ground on which it treads, and its attempt to navigate it with care. See, *e.g.*, 28 U.S.C. 157(c)(2); 28 U.S.C. 636(c)(1); see also *Pacemaker*, 725 F.2d at 542 (giving "considerable weight to the judgment of Congress that consent of the parties eliminates constitutional objections").

Third and finally, by including consent as a jurisdictional limit in the statute it enacts, Congress ensures that a non-Article III court *cannot* proceed without the parties' knowing consent, and if it does its error will be correctable on appeal. This is true, for example, with the Magistrates Act. See 28 U.S.C. 636(c)(1). In *Roell*, because the dissenting Justices believed litigant consent to magistrate adjudication was lacking, they went on to consider whether that defect in the magistrate's authority was jurisdictional and could be raised *sua sponte* by the court on appeal. 538 U.S. at 597–598 (Thomas, J. dissenting). The dissent concluded that "[a]bsence of consent means absence of a 'judgment,' "

and therefore "absence of consent is a jurisdictional defect" that the court of appeals must raise *sua sponte*. *Id.* at 598, 599; *Gomez* v. *United States*, 490 U.S. 858, 870 (1989) (observing that a "critical limitation on [magistrates'] expanded jurisdiction is consent" and that "the magistrate's criminal trial jurisdiction depends on the defendant's specific, written consent"). Subsequent to *Roell*, the courts of appeals, including the Ninth Circuit, have concluded that consent is a jurisdictional prerequisite to entry of judgment by a magistrate judge, and its absence is correctable whenever noted on appeal. See, *e.g.*, *Yeldon* v. *Fisher*, 710 F.3d 452, 453 (2d Cir. 2013) ("lack of consent is a jurisdictional defect that cannot be waived"); *Stevo* v. *Frasor*, 662 F.3d 880, 884 (7th Cir. 2011) ("If the parties have not given valid consent to entry of judgment by a magistrate judge, we treat the purported judgment as not final so that we lack appellate jurisdiction."); *Anderson* v. *Woodcreek Venture Ltd.*, 351 F.3d 911, 914 (9th Cir. 2003) ("Our appellate jurisdiction * * * depends on the magistrate judge's lawful exercise of jurisdiction." (citing *Roell*, 538 U.S. at 598 (Thomas, J., dissenting)).[5]

[5] A passing reference in *Stern* suggests that consent is not a jurisdictional prerequisite to a bankruptcy court's authority to enter final judgment under Section 157(c)(2). 131 S. Ct. at 2607. That dictum is in tension with the Court's acknowledgement elsewhere that Section 157 defines the subject matter jurisdiction of bankruptcy courts. See *Kontrick* v. *Ryan*, 540 U.S. 443, 452–453 (2004). The Court need not resolve here whether consent is a jurisdictional requirement of Section 157(c)(2) or whether a non-jurisdictional statutory consent requirement could sufficiently ameliorate separation of powers concerns to affect the Article III analysis. The bankruptcy court entered judgment in this core pro-

In these respects a statutory consent requirement arguably ameliorates the threat to Article III values of a statute that assigns a non-Article III judge authority to enter judgments of the United States. Even assuming a statutory consent requirement could properly influence the constitutional analysis for these reasons, mere post-hoc determinations of implied consent by litigation conduct can serve none of those limiting functions.

3. Where the bankruptcy court's judgment was entered without constitutional authority in violation of the separation of powers, it must be vacated on appeal

Stern held the provisions of the Bankruptcy Code governing core proceedings violate the separation of powers insofar as they permit bankruptcy courts to enter judgment on private rights. Litigant consent in an individual case therefore cannot cure the constitutional violation. A private party's consent or waiver may no more confer on a non-Article III judge authority to exercise the judicial power of the United States than it can confer on Article III courts the authority to adjudicate claims beyond their constitutionally or legislatively established subject matter jurisdiction.

A defect in subject matter jurisdiction is correctable at any time on direct appeal because it implicates "the courts' statutory or constitutional *power* to adjudicate the case." *United States* v. *Cotton*, 535 U.S. 625, 630 (2002). And because subject matter jurisdiction

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ceeding pursuant to Section 157(b), which contains no consent limitation whatsoever.

"involves a court's power to hear a case, it can never be forfeited or waived." *Ibid.* ("defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court").

For the same reasons that subject matter jurisdiction is correctable at any time on direct appeal, so too are violations of Article III, § 1 that implicate the separation of powers, including the violation that occurred here. Just like a defect in subject matter jurisdiction, such violations go to the bankruptcy court's "constitutional authority" to enter judgment. *Stern*, 131 S. Ct. at 2601 (concluding that bankruptcy court "lacked constitutional authority" "to enter judgment on Vickie's counterclaim"). Absence of authority to enter judgment "means absence of a 'judgment,' " which, in turn, "destroys jurisdiction of a court * * * reviewing" that judgment. *Roell*, 538 U.S. at 597–598 (Thomas, J., dissenting); see *Ortiz* v. *Aurora Health Care, Inc. (In re Ortiz)*, 665 F.3d 906, 915 (7th Cir. 2011) (appellate jurisdiction absent where bankruptcy judge lacked authority under Article III to enter final judgment after *Stern*). Under the Bankruptcy Act, "[t]he district courts * * * have jurisdiction to hear appeals * * * from final judgments * * * of bankruptcy judges entered * * * under section 157." 28 U.S.C. 158(a). The district court exercised such appellate jurisdiction in this case. See J.A. 28 (notice of appeal to district court); Pet. App. 41a (noting appellate jurisdiction); J.A. 188 (affirming judgment of bankruptcy court and dismissing appeal). And if the district court lacked appellate jurisdiction for want of a final judgment, so did the court of appeals. See, *e.g.*, *Mort Ranta* v. *Gorman*, 721 F.3d 241, 245 (4th Cir. 2013) ("Both the district court order and the bankruptcy court order must be final for our jurisdiction to

be proper under § 158(d)(1)."); *ASARCO, Inc.* v. *Elliott Mgmt. (In re ASARCO, LLC)*, 650 F.3d 593, 599 (5th Cir. 2011) ("[The district court's] jurisdiction—as well as our own—depends on the finality of the bankruptcy order appealed from.").

II. Even If Consent Could Cure The Constitutional Violation Identified In *Stern*, Such Consent Must Be Knowing And Voluntary, Unlike The Purported Consent Here

Even if consent in an individual case were relevant to the question whether a non-Article III judge may enter final judgment of the United States, such consent would need to be knowing and voluntary. Mere failure to assert an argument foreclosed by binding precedent, as in this case, could not confer on the bankruptcy judge constitutional authority that Article III otherwise forbids.

No such knowing and voluntary consent could be found in this case. EBIA consistently and repeatedly invoked the only right it had under binding precedent to get before a district court, the right to jury trial. Yet the court of appeals found that EBIA had impliedly consented to final adjudication of the claims against it by the bankruptcy court (or alternatively waived objection thereto) by failing to anticipate that this Court would overrule circuit precedent in *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), and therefore failing to object when other parties reported that pretrial proceedings (including ruling on a forthcoming summary judgment motion) remained to be conducted in the bankruptcy court before any trial might be necessary. The court of appeals' holding demonstrates well the risk to Article III values if post-hoc findings of "implied consent"

based on "litigation conduct" can trump this Court's constitutional holding in *Stern*.

A. Only Consent That Is Knowing And Voluntary Is Capable Of Conferring Judicial Authority On A Non-Article III Judge

Even if entry of a judgment by a non-Article III bankruptcy court were constitutionally permissible in the absence of a statutory consent requirement based solely on the litigants' consent to such adjudication in the individual case, only knowing and voluntary consent could supply the otherwise missing constitutional authority. Where consent is a statutory prerequisite to authority to enter judgment, this Court has made clear that only knowing and voluntary consent can satisfy the requirement. And no less would be acceptable to confer constitutional authority.

In *Roell* v. *Withrow*, where consent was an explicit feature of the Federal Magistrates Act, the Court repeatedly emphasized that litigants must voluntarily consent to proceed before a magistrate with awareness of the "need to consent and the right to refuse it." 538 U.S. 580, 590 (2003); *id.* at 587 & n.5 ("Certainly, notification of the right to refuse the magistrate judge is a prerequisite to any inference of consent * * * ."); see also *id.* at 595 (Thomas, J., dissenting) (arguing that express consent is required to ensure "that the parties knowingly and voluntarily waive their right to an Article III judge"); *Pacemaker Diagnostic Clinic of Am.* v. *Instromedix, Inc.*, 725 F.2d 537, 543 (9th Cir. 1984) (en banc) (Kennedy, J.) (holding that consent to adjudication by a magistrate judge must be "freely and voluntarily" given and that the Magistrates Act "recognizes the importance of this requirement and provides that

'rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties consent' " (quoting 28 U.S.C. 636(c)(2)). Likewise, in *Commodity Futures Trading Commission* v. *Schor*, the Court concluded that "Schor effectively agreed to an adjudication by the CFTC" only after observing that he had asserted a claim in that forum with "full knowledge" that the CFTC would exercise jurisdiction over a counterclaim against him. 478 U.S. 833, 850 (1986). Indeed, as discussed *supra*, a statutory requirement of consent has even been construed as a jurisdictional prerequisite that cannot be waived. See, *e.g.*, *Roell*, 538 U.S. at 597–598 (Thomas, J., dissenting).[6]

Where the prerequisite of litigant consent derives not from a statute but instead directly from the requirements of Article III, it would be perverse to conclude that something *less* than knowing and voluntary consent is sufficient to confer on a non-Article III court constitutional authority to enter the judgment of the United States. Cf. *Glidden Co.* v. *Zdanok*, 370 U.S.

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[6] The Court has extended similar treatment to other statutes that incorporate the requirements of Article III, § 1 even without determining if they are specifically jurisdictional. See *Nguyen* v. *United States*, 539 U.S. 69, 81 (2003) (refusing to treat as waived defendants' objections to participation of non-Article III judge on Ninth Circuit panel). In *Nguyen*, this Court observed that "Congress' decision to preserve the Article III character of the courts of appeals is more than a trivial concern," *id.* at 80 (citing *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 57–60 (1982)), and therefore "[e]ven if the parties had *expressly* stipulated to the participation of a non-Article III judge in consideration of their appeals * * * such a stipulation would not have cured the plain defect in the composition of the panel," *ibid.*

530, 536 (1962) (plurality opinion) (where violation of a statute "embod[ying] a strong policy concerning the proper administration of judicial business" is treated as jurisdictional, then "[a] fortiori is this so when the challenge is based on nonfrivolous constitutional grounds"). Thus, if consent in an individual case (where the statute did not require it) could ever be sufficient to confer constitutional authority on a non-Article III court, this Court should require that such consent be provided knowingly and voluntarily.

B. Failure To Assert An Argument Foreclosed By Binding Precedent, As Here, Does Not Constitute Knowing And Voluntary Consent

This Court has found knowing and voluntary consent to proceed before a non-Article III tribunal where the statute itself makes litigants aware of the "need for consent and the right to refuse it." See *Roell*, 538 U.S. at 590; *Schor*, 478 U.S. at 849–850; accord *Pacemaker*, 725 F.2d at 543. EBIA had no such notice. The provisions of the Bankruptcy Code governing core proceedings unconstitutionally purport to confer on the bankruptcy court complete authority to enter judgment even in the absence of consent. 28 U.S.C. 157(b). And, prior to *Stern*, the law in the Ninth Circuit squarely foreclosed any argument that bankruptcy courts lacked authority to enter summary judgment against the defendant in core proceedings, including on fraudulent conveyance claims. In *Duck* v. *Munn (In re Mankin)*, the Ninth Circuit held that Section 157(b)'s assignment of fraudulent conveyance claims against non-creditors to final adjudication by a bankruptcy judge did not violate Article III, even where the defendant objected. 823 F.2d 1296, 1309 (1987). Even after this Court held in *Granfinanciera S.A.* v. *Nordberg*, 492 U.S. 33, 43–49

(1989), that the Seventh Amendment entitles a defendant in a fraudulent conveyance action to a jury trial before a district judge, the Ninth Circuit held unambiguously, in *Sigma Micro Corp.* v. *Healthcentral.com (In re Healthcentral.com)* that "the bankruptcy court may retain jurisdiction over the action for pre-trial matters," including disposition on summary judgment. 504 F.3d 775, 788 (2007). In light of this authority, it is unsurprising that the court of appeals itself acknowledged below that, before *Stern*, the bankruptcy court's adjudication of this case would have been "routine and uncontroversial." Pet. App. 9a.

Where an argument that was foreclosed by controlling precedent becomes tenable only following an intervening change in law, failure to assert it sooner cannot be deemed a knowing and voluntary choice. See *Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 143–144 (1967) (opinion of Harlan, J.) (entertaining constitutional defense raised on appeal where, prior to intervening decision of *New York Times* v. *Sullivan*, "there was strong precedent indicating that civil libel actions were immune from general constitutional scrutiny"); *id.* at 173 n.1 (separate opinion of Brennan, J.); *Big Horn County Elec. Co-op., Inc.* v. *Adams*, 219 F.3d 944, 953 (9th Cir. 2000) ("[A]n exception to the waiver rule exists for intervening changes in the law." (citing *Curtis Publ'g*, 388 U.S. at 142–143)); accord *Hawknet, Ltd.* v. *Overseas Shipping Agencies*, 590 F.3d 87, 92 (2d Cir. 2009) (entertaining personal-jurisdiction argument raised on appeal where, prior to intervening decision, "an argument that the court lacked jurisdiction over defendant would have been directly contrary to controlling precedent in this Circuit").

The failure, prior to *Stern*, of litigants in the Ninth Circuit to object to the pretrial adjudication of core proceedings by a bankruptcy judge cannot, therefore, constitute knowing and voluntary consent. Nothing made litigants aware of the need to consent or their right to refuse it. *Roell*, 538 U.S. at 590; *id.* at 587 n.5 ("notification of the right to refuse the magistrate judge is a prerequisite to any inference of consent"). To the contrary, both the statute and controlling precedent provided that consent was irrelevant to the bankruptcy courts' authority to enter judgment in core proceedings.

C. The Court Of Appeals' Finding Of Implied Consent Demonstrates That A Standard Of Knowing And Voluntary Consent Is Essential To Safeguard This Court's Constitutional Holding In *Stern*

Despite controlling law denying EBIA any right to object, the court of appeals found that EBIA's failure to object to the bankruptcy court entering judgment amounted to "implied consent." Pet. App. 30a. The court thus upheld a judgment that it acknowledged would otherwise violate Article III and this Court's decision in *Stern*. *Id.* at 8a–23a. The court of appeals' reasoning demonstrates just how far the concept of implied consent can and will be stretched if knowing and voluntary consent were not required—and how *Stern*'s constitutional holding would be rendered hollow.

Far from consenting to bankruptcy-court adjudication, EBIA repeatedly asserted the only right to an Article III tribunal then available to it: the right to a jury trial before an Article III court under *Granfinanciera*. See J.A. 94 (jury demand); Pet. App. 77a–79a. And

EBIA specifically acknowledged Ninth Circuit precedent holding that, despite EBIA's valid jury demand, " 'the bankruptcy court may retain jurisdiction over the action for pretrial matters.' " Pet. App. 79a (citing *Healthcentral.com*, 504 F.3d at 788). Following the bankruptcy court's referral to the district court of EBIA's motion to withdraw the reference in order to hear the trial, several parties (not including EBIA) reported the Trustee's intent to file a summary judgment motion before the bankruptcy court. See Pet. App. 73a–76a. EBIA registered no objection to the bankruptcy court hearing and deciding the summary judgment motion because it could not object; Ninth Circuit precedent unambiguously empowered the bankruptcy court to decide the motion and dispose of the case before trial. *Healthcentral.com*, 504 F.3d at 788.

From these facts, the court of appeals concluded that EBIA had "petitioned the district court to stay its consideration of the motion to withdraw the reference," Pet. App. 29a, apparently not realizing that EBIA did not join in the status report noting others' intent to move for summary judgment before the bankruptcy court, *id.* at 76a. The court of appeals also inferred consent from EBIA's "litigation tactics" in failing to raise a constitutional objection that was foreclosed by binding circuit precedent until after this Court decided *Stern*. Pet. App. 30a. According to the court of appeals, EBIA should have foreseen *Stern*'s outcome based on *Granfinanciera* and the Ninth Circuit's panel decision in *Marshall* v. *Stern (In re Marshall)*, 600 F.3d 1037 (2010), aff'd on other grounds, 131 S. Ct. 2594 (2011).

Such an inference is unwarranted and unfair. Even following *Granfinanciera*, the Ninth Circuit itself held that the right to a jury trial before an Article III

judge did *not* deprive bankruptcy courts of authority to dispose of a case on summary judgment. *Healthcentral.com*, 504 F.3d at 788. Moreover, although *Mankin* was decided before *Granfinanciera*, the Ninth Circuit never overruled *Mankin* in the decades between *Granfinanciera* and *Stern*. And in overruling *Mankin* in this very case, the court of appeals relied heavily on the reasoning of *Stern*. See Pet. App. 9a ("[U]ntil quite recently, the exercise of that statutory authority [to enter final judgment in fraudulent conveyance proceedings] was routine and uncontroversial. But following the Supreme Court's decision in *Stern v. Marshall*, the view that such judgments are consistent with the Constitution is no longer tenable.") (citations omitted). Any suggestion that *Granfinanciera* alerted Ninth Circuit litigants to the Article III defect identified in *Stern* is revisionist history.

Nor did EBIA impliedly consent by failing to raise an Article III objection during the 26 days between the Ninth Circuit's panel decision in *Marshall* and the bankruptcy court's grant of summary judgment against EBIA, see J.A. 23. In *Marshall*, attempting to heed this Court's decision in *Northern Pipeline*, the court of appeals held that the counterclaim at issue was not a "core" proceeding. 600 F.3d at 1057, 1058–1059. Fraudulent conveyance claims, however, the Ninth Circuit had already held following *Northern Pipeline*, *are* "core" proceedings and could be finally decided by a bankruptcy court. *Mankin*, 823 F.2d at 1299–1310. *Marshall* did not purport to overrule *Mankin* (or *Healthcentral.com*). See generally 600 F.3d 1037. Indeed, the Ninth Circuit continued to adhere to *Healthcentral.com* after *Marshall*. See, *e.g.*, *PDG Los Arcos, LLC* v. *Adams*, 436 F. App'x 739, 743 (2011)

(unpublished). In short, nothing in *Granfinanciera* or *Marshall* would have made EBIA "aware of the need for consent and the right to refuse it." See *Roell*, 538 U.S. at 590.

The court of appeals' finding of "implied consent" here demonstrates the disregard of Article III's commands that can result from the absence of a robust requirement of knowing and voluntary consent. This Court recognized in *Stern* that even the mildest of intrusions on Article III cannot be overlooked. 131 S. Ct. at 2620. But the court appeals' attempt to salvage an unconstitutional adjudication here manifests evident disregard for the Article III values at stake. To sustain *Stern*'s constitutional holding, this Court should insist that, at a minimum, non-Article III adjudication be based on litigants' knowing and voluntary consent—consent that did not exist here.

III. BANKRUPTCY JUDGES LACK STATUTORY AUTHORITY TO ISSUE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CORE PROCEEDINGS

The lower courts, including the court of appeals in this case, have improperly sought to fill a statutory "gap," Pet. App. 23a, left by this Court's holding in *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011). The "gap" in question is the fact that "[n]owhere does the statute explicitly authorize bankruptcy judges to submit proposed findings of fact and conclusions of law in a core proceeding." Pet. App. 23a–24a. The task of filling that "gap"—or crafting a constitutional alternative to the existing partially unconstitutional framework—belongs to Congress, not the courts. The sheer multiplicity of ways in which the lower courts have attempted to "fill

the gap" is testament to the fact that deciding how, if at all, to correct the problem is a choice that must be left to Congress.

Neither Section 157(b), nor Section 157(c), nor Section 157(a) provides a basis upon which bankruptcy courts may render non-final recommendations in connection with core bankruptcy proceedings referred to them by the district court. Section 157(b) authorizes the bankruptcy court only to enter final orders and judgments, not proposed findings, in core proceedings referred to them by the district court. And district court review is available only on appeal from those orders and judgments. 28 U.S.C. 157(b)(1); 28 U.S.C. 158(a). Section 157(c), on the other hand, does allow bankruptcy judges to "submit proposed findings of fact and conclusions of law to the district court," but by its terms that section only applies in proceedings that are "not * * * core." 28 U.S.C. 157(c)(1). And while Section 157(a) grants district courts discretion whether to refer bankruptcy cases or proceedings to the bankruptcy courts, it does not authorize the district court to alter the statutory framework that establishes the authority bankruptcy courts have over the cases referred to them. Thus, there is, following *Stern*, a statutory "gap" for core proceedings in which bankruptcy courts may not enter final judgment. In those cases, the bankruptcy courts likewise may not issue proposed findings of fact and conclusions of law. Because the "gap" is a *statutory* one, and only Congress can enact statutes, see *INS* v. *Chadha*, 462 U.S. 919, 956–958 (1983), only Congress can determine whether, and under what circumstances, to grant bankruptcy courts a lesser authority over core proceedings that they cannot finally adjudicate—or, alternatively, to resolve the constitu-

tional problem by other means, such as by elevating bankruptcy judges to status as Article III judges.

A. Section 157(b) Does Not Authorize Bankruptcy Judges To Propose Findings Of Fact And Conclusions Of Law In Core Proceedings

The court of appeals' conclusion that bankruptcy courts' authority to "hear and determine" a proceeding under Section 157(b)(1) "includes the more modest power to submit findings of fact and recommendations of law to the district courts," Pet. App. 24a, is inconsistent with the plain language of Section 157(b) and the statutory structure, and cannot be sustained.

1. The text and structure of Section 157(b) do not permit bankruptcy courts to propose findings of fact and conclusions of law in core proceedings

Statutory construction "begin[s] with the understanding that Congress says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted). The court of appeals' construction of the phrase "hear and determine" as encompassing proposed findings of fact and conclusions of law cannot be squared with the text of the statute. To "determine" means to "decide or settle * * * conclusively and authoritatively." American Heritage Dictionary 494 (5th ed. 2011); accord Black's Law Dictionary 514 (9th ed. 2009) (a "determination" is a "final decision"); Black's Law Dictionary 405 (5th ed. 1979) (determination "implies ending or finality of a controversy or suit"). The word "determine" thus con-

notes finality—not the issuance of non-final recommendations.

Nor does proposing findings and conclusions fall within the bankruptcy court's authority in core proceedings to enter "appropriate orders and judgments, subject to review under section 158." 28 U.S.C. 157(b)(1). Section 158 provides for *appellate* review of "orders"—"final" orders and certain interlocutory orders. 28 U.S.C. 158(a). By definition, such appellate jurisdiction does not include consideration of proposed findings of fact and conclusions of law and entry of judgment by the district court in the first instance. See *Marbury*, 5 U.S. (1 Cranch) at 175 ("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.").

The statutory structure confirms that Section 157(b) does not authorize bankruptcy courts to propose findings of fact and conclusions of law in core proceedings. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[W]ords of a statute must be read in their context and with a view to their place in the overall statutory scheme."). Proceedings that the bankruptcy courts are authorized to "hear and determine" are subject only to *appellate* review by an Article III court under Section 158. 28 U.S.C. 157(b)(1). Section 158, titled "appeals," provides district courts with "jurisdiction to hear appeals" from bankruptcy court final judgments, orders, and decrees, and from certain classes of interlocutory orders. See 28 U.S.C. 158(a). Neither Section 157(b) nor Section 158 authorizes the district court to enter judgment as an initial matter in a core proceeding that has been referred to the bankruptcy court.

Section 157(c)(2) confirms the Bankruptcy Code's strict dichotomy between those proceedings in which the district court retains original jurisdiction and those in which it has appellate jurisdiction only.[7] Section 157(c)(2) authorizes bankruptcy courts to "hear and determine" certain non-core proceedings with consent of the parties. Like Section 157(b), Section 157(c)(2) specifies that the bankruptcy court may "enter appropriate orders and judgments, subject to [appellate] review under section 158 of this title." 28 U.S.C. 157(c)(2).

The bankruptcy court's authority under Sections 157(b) and 157(c)(2) stands in stark contrast to its authority under Section 157(c)(1). That latter section, which is limited to non-core proceedings, see *Stern*, 131 S. Ct. 2604–2605, authorizes bankruptcy courts to "hear" the proceeding, but then it must "submit proposed findings of fact and conclusions of law to the district court," 28 U.S.C. 157(c)(1). Section 157(c)(1) further specifies that "*any final order or judgment shall be entered by the district judge*" after reviewing "de novo" those parts of the bankruptcy court's proposal to

[7] In *Stern*, the Court held that Section 157(b)(5)'s allocation between the bankruptcy court and district court of authority to oversee trial in a personal injury suit against the estate did not implicate questions of "jurisdiction." 131 S. Ct. at 2607–2608. To the extent the Court's language might be read to suggest more broadly that Sections 157 and 158 conferring authority to enter and review final judgments respectively on the bankruptcy and district courts, are categorically not "jurisdictional," that reading would be inconsistent with the text of Section 158(a), which is framed explicitly in the language of "jurisdiction." 28 U.S.C. 158(a) ("The district courts of the United States shall have jurisdiction to hear appeals * * * from final judgments * * * of bankruptcy judges.").

which the parties have objected. *Ibid.* (emphasis added). Section 157(b) grants no similar authority to district courts to conduct de novo review or enter final judgment in the first instance in core proceedings that have been referred to the bankruptcy court.

The structure of the statute thus confirms that Congress granted bankruptcy courts authority only to adjudicate core proceedings conclusively, not to issue non-final proposed findings of fact and conclusions of law in core proceedings.

2. Congress's use of "hear and determine" elsewhere confirms the plain meaning of Section 157(b)

Congress's use of the phrase "hear and determine" in other parts of the Bankruptcy Code and elsewhere confirms that Congress employs those words to require a final decision and preclude the possibility of a non-final proposal of findings and conclusions. See *Gustafson* v. *Alloyd Co., Inc.*, 513 U.S. 561, 568 (1995) (a "term should be construed, if possible, to give it a consistent meaning throughout the Act"); *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991) ("[W]e assume that when a statute uses [a term of art], Congress intended it to have its established meaning.").

This Court has recognized that Congress uses "hear and determine" when it wants to "get * * * dispute[s] settled" and convey "the idea of deciding a controversy." *N.L.R.B.* v. *Radio & Television Broad. Eng'g Union*, 364 U.S. 573, 579 (1961). That is equally true of the Bankruptcy Code. Most notably, Section 158 (enacted contemporaneously with Section 157) creates bankruptcy appellate panels to "hear and determine" appeals from bankruptcy courts. 28 U.S.C.

158(b)(1). It would be anomalous to say the least if a bankruptcy appellate panel authorized to "hear and determine" an appeal merely issued non-final, proposed findings and conclusions rather than a final judgment. The statute does not even contemplate non-final BAP recommendations because it provides no means for such hypothetical proposed findings and conclusions to be reviewed. 28 U.S.C. 158(d) (confining appellate jurisdiction of the courts of appeals to "final decisions, judgments, orders, and decrees" of the bankruptcy appellate panels). This makes clear that Congress intended "hear and determine" to allow only final adjudication and not some hypothetical, lesser-included power of non-final recommendations.

These sources confirm what the text and structure of the statute make plain: Section 157(b) cannot be read to authorize bankruptcy courts to propose findings and conclusions for de novo review by a district court in core proceedings.

B. Nor Does Section 157(c) Authorize Bankruptcy Judges To Propose Findings Of Fact And Conclusions Of Law In Core Proceedings

Although the court of appeals in the case below concluded that bankruptcy judges may propose findings of fact and conclusions of law in core proceedings pursuant to Section 157(b)(1), it is equally unavailing to try to locate such authority in Section 157(c)(1), as some lower courts have done and Respondent has urged. See, *e.g.*, *Field* v. *Lindell (In re Mortg. Store, Inc.)*, 464 B.R. 421, 427–428 (D. Haw. 2011); Br. in Opp. 28. By its express terms, Section 157(c)(1) applies to "a proceeding that *is not a core proceeding* but that is otherwise

related to a case under title 11." 28 U.S.C. 157(c)(1) (emphasis added). Fraudulent conveyance claims are expressly denominated "core" by Section 157(b)(2)(H), and therefore do not fit within the framework established by Section 157(c)(1). See *Ortiz* v. *Aurora Health Care, Inc. (In re Ortiz)*, 665 F.3d 906, 915 (7th Cir. 2011).

Courts cannot treat a proceeding arising under title 11 or arising in a case under title 11 as though it were not a "core proceeding" merely because *Stern* held that Article III applies to the particular class of core proceedings. *Stern* recognized that the categories of core proceedings and "related to" proceedings in Section 157(b) and 157(c) are mutually exclusive. 131 S. Ct. at 2605. Indeed, the Court rejected the argument that a proceeding could be "simultaneously core and yet only related to the bankruptcy case" even though that construction of the statute would have avoided the serious constitutional question the Court ultimately decided. *Ibid.* ("We would have to rewrite the statute, not interpret it, to bypass the constitutional issue.") (brackets and internal quotation marks omitted). Thus, as the court of appeals below recognized, although the bankruptcy court lacked constitutional authority to decide the fraudulent conveyance claims against EBIA, those claims "remain in the core," Pet. App. 25a, and cannot be reassigned by the courts to Section 157(c)(1).

C. Nor May District Courts Utilize Section 157(a) To Confer On Bankruptcy Courts Authority To Propose Findings Of Fact And Conclusions Of Law In Core Proceedings

Section 157(a) grants district courts authority to refer "any or all cases under title 11 and any or all pro-

ceedings arising under title 11 or arising in or related to a case under title 11" to bankruptcy courts to be heard in accordance with Sections 157(b) and (c). See 28 U.S.C. 157(a). Every judicial district has exercised that authority by promulgating a standing order providing for the automatic reference of bankruptcy cases and proceedings. 1 Collier on Bankruptcy ¶ 3.02[1] (16th ed. 2009). Following *Stern*, a number of judicial districts have amended their orders of reference to provide that

> [i]f a bankruptcy judge or district judge determines that entry of a final order or judgment by a bankruptcy judge would not be consistent with Article III * * * the bankruptcy judge shall * * * hear the proceeding and submit proposed findings of fact and conclusions of law to the district court.

In re Standing Order of Reference Re: Title 11, No. 12-misc-00032 (S.D.N.Y. Jan. 31, 2012); see also *In re Standing Order of Reference Re: Title 11*, (D. Del. Feb. 29, 2012); *In re Bankruptcy Proceedings*, Admin. Order 2012-25 (S.D. Fla. Mar. 25, 2012). But as with other judicial efforts to remedy the gap created by the constitutional violation identified in *Stern*, these orders cannot be squared with the statute Congress enacted.

All local rules and standing orders must conform to federal statutes. See Fed. R. Civ. P. 83. Although Congress has granted district courts authority to determine *whether* to refer bankruptcy proceedings, once a case has been referred, the adjudicatory power of the bankruptcy court is defined with utmost precision by the statute. See 28 U.S.C. 157(b), (c). That authority does not include the power to issue proposed findings of

fact and conclusions of law in core proceedings. Cf. 28 U.S.C. 157(c)(1). Standing orders that purport to grant bankruptcy judges such power conflict with the detailed scheme Congress has enacted, and are thus invalid. See, *e.g.*, *Sigma Micro* v. *Healthcentral.com (In re Healthcentral.com)*, 504 F.3d 775, 784 (9th Cir. 2007) (holding local bankruptcy rule governing withdrawal of reference invalid because it conflicted with Section 157).

D. The Responsibility For Addressing The Constitutional Defects In Bankruptcy Administration Lies With Congress, Not The Judiciary

Filling the statutory gap created by *Stern*'s constitutional holding is the responsibility of Congress, not this Court. See *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 76 (1996). For precisely that reason, after holding unconstitutional the Bankruptcy Act of 1978 in *Northern Pipeline*, this Court declined to speculate about how Congress would have revised the statute had it been aware of the constitutional defect. See 458 U.S. at 88 n.40. Instead it left it to "Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art. III." *Ibid.*

Congress determined in 1984 that bankruptcy courts should be authorized to enter final judgments in core proceedings. Had Congress been aware that bankruptcy courts lack constitutional authority to enter judgment in many core proceedings, it is far from clear that it would have preferred that in all such proceedings bankruptcy courts propose findings and conclusions to the district court for de novo review. The sponsors of the Bankruptcy Act of 1984 believed it

would "provide[] a single, prompt forum for almost all bankruptcy litigation" and repeatedly stressed that "bankruptcy judges would be able to enter final judgments in the 95 percent of cases that do not require involvement by an article III judge," leaving bankruptcy courts to propose findings of fact and conclusions of law in only "5 percent of bankruptcy cases." 130 Cong. Rec. 6045 (1984) (remarks of Rep. Kastenmeier). That no longer holds true after *Stern*. The sponsors of the 1984 Act also believed it would "eliminate most jurisdictional disputes" by "expressly identifying virtually all core proceedings." *Id.* at 6046. That too no longer holds true, as bankruptcy courts now have to determine both whether a proceeding is core *and* whether they are constitutionally authorized to enter final judgment. See *Stern*, 131 S. Ct. at 2630 (Breyer, J., dissenting) (lamenting that *Stern* will lead to a "constitutionally required game of jurisdictional ping-pong"). In fact, in some of the most recent major amendments to the bankruptcy administration scheme, Congress showed express concern for reducing the amount of multiple-layer review. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1233(a), 119 Stat. 23, 202–203 (2005) (introducing direct appellate review from bankruptcy courts to courts of appeals) (codified as amended at 28 U.S.C. 158(d)(2)); see H.R. Rep. 109-31, pt. 1, at 148–149 (2005) (noting time and cost factors attendant to the two-tier bankruptcy appellate system).

It is impossible to predict how Congress might eventually respond to *Stern*. Congress might decide to grant bankruptcy courts authority to propose findings of fact and conclusions of law in proceedings in which *Stern* requires that judgment be entered by the district

court. But, with a view toward avoiding "jurisdictional ping-pong," it might instead choose to recalibrate entirely the division of labor between bankruptcy judges and Article III courts. Congress might, even without changing the pay of bankruptcy judges or removing the first layer of district court review, choose to revisit Section 157(c) in light of *Stern* and preempt a number of potential constitutional challenges that loom in *Stern*'s wake. Congress could avoid all of the constitutional questions raised by *Northern Pipeline* and *Stern* by conferring Article III status on bankruptcy judges. See 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, 401 (2012) ("Article III status for bankruptcy judges is the only truly effective solution to the problems created by *Northern Pipeline*, the allocation of authority under the [1984 Act], and *Stern*."). In all events, the responsibility for deciding what structure of adjudication best advances the policy objectives of the federal system of bankruptcy administration lies with Congress, within constitutional constraints.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated.

Respectfully submitted,

DOUGLAS HALLWARD-DRIEMEIER
D. ROSS MARTIN
ELIZABETH N. DEWAR
RYAN MCMANUS
ROPES & GRAY LLP

Counsel for Petitioner

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APPENDIX A

28 U.S.C. 157

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires

consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

APPENDIX B

28 U.S.C. 158

(a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees; and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that—

(A) there are insufficient judicial resources available in the circuit; or

(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11. Not later than 90 days after making the finding, the judicial council shall submit

to the Judicial Conference of the United States a report containing the factual basis of such finding.

(2)(A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts

within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

(c)(1) Subject to subsections (b) and (d)(2), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless—

(A) the appellant elects at the time of filing the appeal; or

(B) any other party elects, not later than 30 days after service of notice of the appeal; to have such appeal heard by the district court.

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and

decrees entered under subsections (a) and (b) of this section.

(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken; and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A); then the bankruptcy court, the district court,

or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.