No. 12-1200

IN THE
Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,
Petitioner,
v.

PETER H. ARKISON, CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.,
Respondent.

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

BRIEF FOR PROFESSORS S. TODD BROWN, G. MARCUS COLE, AND RONALD D. ROTUNDA AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE

CRAIG GOLDBLATT
DANIELLE SPINELLI
Counsel of Record
SONYA L. LEBSACK
ISLEY MARKMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
danielle.spinelli@wilmerhale.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL AND STATUTORY PROVISIONS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

RULES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

Amici are law professors whose expertise ranges from bankruptcy law to federal jurisdiction to constitutional law. S. Todd Brown is an Associate Professor and the Director of the Center for the Study of Business Transactions at the State University of New York at Buffalo School of Law. G. Marcus Cole is the Wm. Benjamin Scott and Luna M. Scott Professor of Law at Stanford Law School. Ronald D. Rotunda is the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence, The Dale E. Fowler School of Law at Chapman University.

Amici share a scholarly interest regarding the nature and scope of bankruptcy courts' statutory and constitutional authority. Amici filed a brief in *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), and in this case when it was before the Ninth Circuit, *see* Brief For Amici S. Todd Brown et al., No. 11-35162, *Executive Benefits Insurance Agency* v. *Arkison (In re Bellingham Insurance Agency, Inc.)* (Jan. 13, 2012).

SUMMARY OF ARGUMENT

Amici submit that the judgment below should be affirmed, but reach that result by a different path than respondent.

---

[1] The parties have consented to the filing of this brief in letters on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than the amici curiae and their counsel made any monetary contribution to the preparation or submission of this brief.

Amici agree that this Court should reject petitioner's wooden approach to both the statutory and constitutional questions presented here—one that would eviscerate the functioning not only of the bankruptcy courts, but also of the federal magistrate system. Amici believe, however, that the statutory question presented is best understood against the backdrop of Congress's effort to respond to the constitutional concerns embodied in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). That is, Congress intended "core" and "non-core" proceedings to be, respectively, proceedings as to which the bankruptcy court may constitutionally enter final judgment and proceedings as to which (absent consent) it may not. Once that is understood, principles of severability readily provide the answer to the statutory question: Bankruptcy courts may enter proposed findings of fact and conclusions of law in fraudulent conveyance actions.

As for the constitutional question—whether parties may consent to entry of final judgment by the bankruptcy court in non-core proceedings—amici agree with respondent that parties may consent. But consent may not be implied: The Federal Rules of Bankruptcy Procedure specifically state that consent must be "express," and *Roell* v. *Withrow*, 538 U.S. 580 (2003), provides no justification for reading that requirement out of the rule. The judgment below should nonetheless be affirmed because petitioner actually received de novo review of its claim by the district court, and Article III entitles it to nothing further.

1. There is no dispute that 28 U.S.C. § 157(b)(2)(H), which purports to grant bankruptcy courts the authority to enter final judgment in fraudulent conveyance actions, is unconstitutional under

Granfinanciera S.A. v. *Nordberg*, 492 U.S. 33 (1989), and *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011). That subparagraph must, then, be stricken from the statute. The question whether bankruptcy courts may enter proposed findings of fact and conclusions of law in fraudulent conveyance actions requires construing the remainder of Section 157 in light of basic principles of severability—that is, asking how Congress would have intended the statute to operate had it known that bankruptcy courts could not constitutionally enter final judgment, absent consent, in such actions.

When the question is framed that way, it can have only one answer. Congress created the "core" and "non-core" categories in response to this Court's decision in *Marathon*. It intended "core" proceedings to be proceedings that may, consistent with Article III, be heard and determined by a bankruptcy court—put differently, matters of public right. And it intended "non-core" proceedings to be proceedings as to which a litigant is entitled to an Article III tribunal—or matters of private right.

So far, Congress's plan was consistent with Article III. As *Stern* held, however, Congress erred in some respects when it drew the line between core and non-core proceedings. Accordingly, some of the examples of core proceedings set out in Section 157(b)(2)—including certain counterclaims by the estate against non-creditors (subparagraph (C)) and fraudulent conveyance actions against non-creditors (subparagraph (H))—are not, in fact, proceedings as to which the bankruptcy court may constitutionally enter final judgment absent consent.

That flaw in the statute, however, can be remedied simply by striking those subparagraphs—or, more pre-

cisely, their unconstitutional applications. Contrary to petitioner, that does not open an irremediable statutory "gap" preventing bankruptcy courts from taking any action at all in such proceedings. Once Section 157(b)(2)(H) is stricken, fraudulent conveyance claims against non-creditors become "non-core" proceedings, and Section 157(c)(1) expressly grants bankruptcy courts the authority to enter proposed findings of fact and conclusions of law. That is the conclusion demanded by the language and structure of the statute, and it is also the only conclusion consistent with Congress's plain intention to give bankruptcy courts as much authority as they may constitutionally wield.

2. Because bankruptcy courts may enter findings and conclusions for de novo review by the district court in fraudulent conveyance actions, and because petitioner received the de novo review by the district court to which it was entitled, this Court need go no further: The court of appeals' judgment should be affirmed whether or not petitioner validly consented to entry of final judgment by the bankruptcy court.

Should the Court reach the constitutional question, however, it should hold that Article III poses no barrier to a bankruptcy court's entering final judgment in a fraudulent conveyance action with the parties' consent. This Court explained in *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833 (1986), that Article III, § 1, serves to protect "primarily personal, rather than structural, interests," and that such personal rights are waivable. *Id.* at 848. To be sure, Article III, § 1, also protects against encroachment by the political branches on the judicial branch—and arguably against improper delegation by the judicial branch of its own duties—and "the parties cannot by consent cure" such structural flaws. *Id.* at 851. But no such encroachment

or improper delegation is present here, given that bankruptcy courts are units of the district court and can adjudicate matters only by reference from the district court that may at any time be withdrawn. Accordingly, the parties may give their consent to entry of final judgment by the bankruptcy court—just as they may to entry of final judgment by a federal magistrate.

Such consent may not, however, be implied. Federal Rule of Bankruptcy Procedure 7012(b) plainly states that "[i]n non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the *express* consent of the parties." Fed. R. Bankr. P. 7012(b) (emphasis added). *Roell* v. *Withrow*, which interpreted a different statutory scheme and addressed very different facts, provides no basis to rewrite the clear requirement of the rule.

ARGUMENT

I. BANKRUPTCY COURTS MAY ENTER PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN FRAUDULENT CONVEYANCE ACTIONS

A. The Language, History, And Purpose Of Section 157 Reflect Congress's Intent To Extend Bankruptcy Courts' Authority To The Constitutional Limit

Consistent with historical practice, the Bankruptcy Act of 1898 divided bankruptcy proceedings into "summary" proceedings involving "the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge [of the debt]," *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363-364 (2006), over which bankruptcy referees exercised broad authority, and "plenary" proceedings involving other legal controversies related to the bank-

ruptcy, over which referees exercised more limited authority. *See* Pub. L. No. 55-171, 30 Stat. 544, 552 (1898) (repealed 1979); *MacDonald* v. *Plymouth County Trust Co.*, 286 U.S. 263, 266-268 (1932). "'[S]uits to recover preferences,'" for example, were deemed "'separate, plenary suits'" that bankruptcy referees could not decide unless the parties consented. *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 49-50 (1989) (quoting *Schoenthal* v. *Irving Trust Co.*, 287 U.S. 92, 95 (1932)); *see also Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 79 n.31 (1982) (referees had "no jurisdiction, except with consent, over controversies beyond those involving property in the actual or constructive possession of the court"). The parameters of summary jurisdiction, however, were never precisely defined, inviting strategic litigation over referees' ability to adjudicate certain claims. *See Katchen* v. *Landy*, 382 U.S. 323, 328 (1966).

In 1978, in part to alleviate this problem, Congress "substantially expanded" bankruptcy courts' authority. H.R. Rep. No. 95-595, at 13 (1977). The new Bankruptcy Code abolished the statutory distinction between summary and plenary proceedings and permitted newly constituted "bankruptcy courts" to hear and determine "*all* civil proceedings arising under [the Bankruptcy Code] or arising in or related to cases under [it]." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 241(a), 92 Stat. 2549, 2668 (enacting 28 U.S.C. § 1471(b)) (repealed 1984) (emphasis added); *see also* H.R. Rep. No. 95-595, at 13 ("[p]ossession or consent will no longer be necessary to the jurisdiction of the bankruptcy courts"); *Marathon*, 458 U.S. at 54. This "distinct departure from the jurisdiction conferred under previous Acts," *Celotex Corp.* v. *Edwards*, 514 U.S. 300, 308 (1995), "sought to simplify jurisdictional

inquiries with a statutory grant of an awesome magnitude," Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 Wm. & Mary L. Rev. 743, 791 (2000). But although the 1978 Code permitted bankruptcy courts to enter final judgment in any proceeding within federal bankruptcy jurisdiction, bankruptcy judges were not given the Article III protections of lifetime tenure and undiminished compensation.[2]

In *Marathon*, this Court held that broad grant of power to a non-Article III court unconstitutional. *See* 458 U.S. at 87 (plurality); *id.* at 91 (Rehnquist, J., concurring in the judgment). *Marathon* involved a state-law breach-of-contract action brought by a debtor against a third-party non-creditor. The Court concluded that such an action was a matter of "private right," as opposed to "public right," and thus could not constitutionally be decided by a non-Article III tribunal absent the parties' consent. The plurality explained that "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power," and thus arguably a matter of public right that Congress could remit to a non-Article III tribunal for decision, "must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages." *Id.* at 71. While the "divided Court" was unable to agree on the precise scope of the public-rights

---

[2] The 1978 Code provided that the President would appoint bankruptcy judges to fourteen-year terms, with the judges subject to removal for cause by the judicial council for the circuit in which the judge was serving. *See* Pub. L. No. 95-598, § 201(a), 92 Stat. at 2657-2658 (enacting 28 U.S.C. §§ 152-153) (repealed 1984). It set bankruptcy judges' salaries at a fixed sum subject to adjustment under the Federal Salary Act. *See id.* § 201(a), 92 Stat. at 2658 (enacting 28 U.S.C. § 154).

doctrine, a majority of the Court held that "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584 (1985) (citing *Marathon*, 458 U.S. at 84).

In response to *Marathon*, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984). While rejecting proposals to establish an Article III bankruptcy court, Congress sought to satisfy this Court's instruction that "'the essential attributes' of judicial power" be retained in the Article III court. *Marathon*, 458 U.S. at 87. Accordingly, while the 1984 Act did not alter the scope of bankruptcy jurisdiction set out in the 1978 Code, *compare* 28 U.S.C. § 1471(b) (1976 ed., Supp. IV), *with id.* § 1334, it replaced the independent bankruptcy court established in the 1978 Code with an entity that would be a "unit" of the district courts and would hear bankruptcy proceedings only by referral from the district courts, *see id.* § 151.[3] Specifically, district courts "may provide that any or all cases under [the Bankruptcy Code] and any or all proceedings arising under [the Bankruptcy Code] or arising in or related to a case under [the Code] shall be referred to the bankruptcy judges for the district." *Id.* § 157(a). Moreover, "[t]he district court may withdraw, in whole or in part, any case or proceeding referred [to the bankrupt-

[3] Under the 1984 Act, bankruptcy judges are appointed by the courts of appeals for fourteen-year terms, 28 U.S.C. § 152(a)(1), and may be removed for cause by the judicial council for the circuit in which the bankruptcy court is located, *id.* § 152(e).

cy court], on its own motion or on timely motion of any party, for cause shown." *Id.* § 157(d).[4]

In addition, the 1984 Act drew a distinction—at the heart of the statute's scheme for constitutionally allocating authority between district and bankruptcy courts—between "core" and "non-core" bankruptcy proceedings. The "core" designation sprang from *Marathon*'s statement that "the restructuring of debtor-creditor relations … is at the core of the federal bankruptcy power," 458 U.S. at 71 (plurality), and the core/non-core distinction was intended to track *Marathon*'s dichotomy between public and private rights.[5]

As one of the 1984 Act's sponsors explained, core proceedings were intended to be those "integral to the core bankruptcy function of restructuring debtor-creditor rights," 130 Cong. Rec. E1109 (daily ed. Mar. 20, 1984) (statement of Rep. Kastenmeier)—that is, matters of public right as to which the bankruptcy courts could constitutionally enter final judgment. The Act accordingly authorizes bankruptcy courts to "hear and determine … all core proceedings arising under [the Bankruptcy Code] or arising in a case under [the Bank-

---

[4] Withdrawal of a proceeding from the bankruptcy court is mandatory "if the [district] court determines that resolution of the proceeding requires consideration of both [the Bankruptcy Code] and other laws of the United States regulating organizations or activities affecting interstate commerce." 28 U.S.C. § 157(d).

[5] *See* Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After* Stern *v.* Marshall, 86 Am. Bankr. L.J. 121, 136 (2012) ("The terminology of 'core' bankruptcy proceedings has no statutory ancestors and is apparently taken from Justice Brennan's plurality opinion, wherein he said that 'the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights.'").

ruptcy Code]" and to "enter appropriate orders and judgments" in such proceedings, subject only to ordinary appellate review. 28 U.S.C. § 157(b)(1). By contrast, "[n]on-core proceedings … concern aspects of the bankruptcy case that *Marathon* barred non-Article III judges from determining on their own." *In re Arnold Print Works, Inc.*, 815 F.2d 165, 167 (1st Cir. 1987) (Breyer, J.). Under the Act, non-core proceedings include any "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)—that is, any proceeding within the outer bounds of bankruptcy jurisdiction that is not core. Absent the parties' consent, *see id.* § 157(c)(2), in non-core proceedings bankruptcy courts may only enter proposed findings of fact and conclusions of law, subject to de novo review by the district court, *id.* § 157(c)(1).

Congress thus chose to define core proceedings "broadly, close to or congruent with constitutional limits." *Arnold Print Works*, 815 F.2d at 168; *see also In re CBI Holding Co.*, 529 F.3d 432, 460 (2d Cir. 2008) ("In crafting § 157, 'Congress realized that the bankruptcy court's jurisdictional reach was essential to the efficient administration of bankruptcy proceedings and intended that the "core" jurisdiction would be construed as broadly as possible subject to the constitutional limits established in *Marathon*.'"); *In re Mankin*, 823 F.2d 1296, 1301 (9th Cir. 1987) ("Nothing in the legislative history of § 157(b) suggests that Congress enumerated examples of core proceedings in § 157(b)(2) with anything but a view toward expanding the bankruptcy court's jurisdiction to its constitutional limit."). In doing so, Congress intended both that the category of core proceedings that the bankruptcy court may hear and determine be as broad as possible consistent with the Constitution, and that the bankruptcy court have

the power to issue findings and conclusions in all other proceedings within bankruptcy jurisdiction.

B. The 1984 Act Erroneously Included, As Examples Of "Core Matters," Certain Claims That Are Matters Of Private Right

In the 1984 Act, Congress enumerated certain examples of core proceedings—proceedings that it believed the bankruptcy courts could constitutionally hear and determine without the parties' consent. 28 U.S.C. § 157(b)(2). Core proceedings include, for instance, the "allowance or disallowance of claims against the estate," *id.* § 157(b)(2)(B), "determinations as to the dischargeability of particular debts," *id.* § 157(b)(2)(I), and "determinations of the validity, extent, or priority of liens," *id.* § 157(b)(2)(K).

This Court held in *Stern*, however, that Congress erred in at least one instance in enumerating those examples. Congress included in its list of core proceedings "counterclaims by the estate against persons filing claims against the estate." 28 U.S.C. § 157(b)(2)(C). As applied to the counterclaim at issue in *Stern*—a state-law tort claim by the debtor against a creditor that did not need to be decided to adjudicate the creditor's claim—this Court held that § 157(b)(2)(C) unconstitutionally granted the bankruptcy court the authority to enter final judgment in a matter of private right without the litigants' consent. *Stern* v. *Marshall*, 131 S. Ct. 2594, 2620 (2011).

Stern, in combination with *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989), makes clear that Section 157(b)(2)(H)—which provides that "proceedings to determine, avoid or recover fraudulent conveyances" are core proceedings—is likewise unconstitutional when

applied to a suit against a non-creditor.[6] *Granfinanciera* held that the Seventh Amendment entitles a non-creditor in a fraudulent conveyance action to a jury trial. 492 U.S. at 58-59. Moreover, it explained that "the Seventh Amendment [question] … requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal." *Id.* at 53. Lower courts were slow to recognize that, under the reasoning of *Granfinanciera*, non-creditor defendants in fraudulent conveyance actions were accordingly entitled to an Article III court. But *Stern* made that conclusion inescapable, noting that the fraudulent conveyance claim in *Granfinanciera*, like the debtor's counterclaim in *Stern*, "does not fall within any of the varied formulations of the public rights exceptions in this Court's cases." 131 S. Ct. at 2614.

As the court of appeals correctly held, Pet. App. 15a—and as respondent does not here contest—*Stern* and *Granfinanciera* compel the conclusion that fraudulent conveyance actions against non-creditors are mat-

[6] The analysis is different when a fraudulent conveyance suit is brought against a creditor who has filed a proof of claim in the bankruptcy case. Section 502(d) of the Bankruptcy Code provides that the bankruptcy court "shall disallow" a claim by any creditor who is a transferee of a fraudulent transfer that has not been repaid. 11 U.S.C. § 502(d). Accordingly, a fraudulent conveyance suit against a creditor must be decided before the creditor's claim can be adjudicated. It is thus part of the process of allowance and disallowance of claims, as to which the bankruptcy court may constitutionally enter final judgment. *See Stern*, 131 S. Ct. at 2616-2617; *Katchen*, 382 U.S. at 336; *Langenkamp* v. *Culp*, 498 U.S. 42, 44-45 (1990) (per curiam).

ters of private right. Section 157(b)(2)(H) thus contravenes Article III.[7]

C. There Is No Irremediable "Statutory Gap"

Petitioner contends (at 46-57) that, given this constitutional flaw, bankruptcy courts are powerless to take any action whatever in a fraudulent conveyance proceeding, and that, until Congress amends the statute, all fraudulent conveyance suits must be heard from beginning to end in district court. But that result is as unnecessary as it is impractical. Properly understood, the statute clearly provides that the bankruptcy courts may enter proposed findings of fact and conclusions of law in such suits.

1. Where, as here, a particular provision of a statute is found to be unconstitutional, the question how to interpret the remainder of the statutory scheme is informed by basic principles of severability. A court must first decide whether Congress would have wanted

---

[7] Indeed, in the court of appeals the United States conceded that Section 157(b)(2)(H) exceeded Congress's constitutional authority. U.S. Amicus Br. 2-3, 13-14, No. 11-35162, *Executive Benefits Insurance Agency* v. *Arkison (In re Bellingham Insurance Agency, Inc.)* (9th Cir. Jan. 19, 2012). Some lower courts have nevertheless reached a contrary conclusion, holding that a bankruptcy court may enter final judgment on a fraudulent conveyance claim against a non-creditor, even without consent of the parties. *See, e.g.*, *Burtch* v. *Seaport Capital, LLC (In re Direct Response Media, Inc.)*, 466 B.R. 626, 646 (Bankr. D. Del. 2012); *Cifelli* v. *Blue Star Residential (In re Miles)*, 477 B.R. 266, 270-271 (Bankr. N.D. Ga. 2012); *Feuerbacher* v. *Moser*, 2012 WL 1070138, at *6-9 (E.D. Tex. Mar. 29, 2012); *Silverman* v. *A-Z RX LLC (In re Allou Distribs. Inc.)*, 2012 WL 6012149, at *8-9 (Bankr. E.D.N.Y. Dec. 3, 2012); *Kirschner* v. *Agoglia (In re Refco Inc.)*, 461 B.R. 181, 191-192 (Bankr. S.D.N.Y. 2011). This Court should thus say clearly that, absent consent, the authority to issue a final judgment in such a proceeding is reserved to Article III courts.

the rest of the Act to stand had it known that the offending provision was unconstitutional. *See, e.g.*, *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2607 (2012). "Unless it is 'evident' that the answer is no," the Court "must leave the rest of the Act intact." *Id.* (quoting *Champlin Refining Co.* v. *Corporation Comm'n of Okla.*, 286 U.S. 210, 234 (1932)); *see also Ayotte* v. *Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006) (the relevant question is whether "the legislature would have preferred what is left of its statute to no statute at all"); *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161-3162 (2010).

Here, that threshold question is answered by Congress's inclusion of a severability clause in the 1984 Act: "If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act, or the application of that provision to persons or circumstances other than those as to which it is held invalid, is not affected thereby." Pub. L. No. 98-353, 98 Stat. 333, 344 (1984), *codified at* note following 28 U.S.C. § 151. A severability clause is "Congress' explicit textual instruction to leave unaffected 'the remainder of [the Act]'" if any particular provision or application of it is unconstitutional. *Sebelius*, 132 S. Ct. at 2607 (examining a substantially identical severability clause); *see also id.* ("a severability clause confirm[s] that we need go no further").

Moreover, without Section 157(b)(2)(H), Section 157 remains "consistent with Congress' basic objectives in enacting the statute," *United States* v. *Booker*, 543 U.S. 220, 259 (2005), and would continue to further "Congress' basic statutory goal," *id.* at 250. Indeed, it is "sure that the policies Congress sought to advance by enacting [Section 157] can be effectuated even though

[part of it] is unenforceable." *Regan* v. *Time, Inc.*, 468 U.S. 641, 653 (1984). That much is obvious, given that Section 157(b)(2)(H) is merely one example of a core proceeding, and that Congress's basic allocation of power between the district and bankruptcy courts will remain unchanged. Subparagraph (H) is not "essential to the statutory program as a whole," *Tilton* v. *Richardson*, 403 U.S. 672, 684 (1971), nor is "the balance of the legislation … incapable of functioning independently," *Alaska Airlines* v. *Brock*, 480 U.S. 678, 684 (1987).[8]

2. The question then arises how to interpret the remainder of the statute, once the unconstitutional provision has been severed. That question is readily answered by recourse to the plain text and undisputed purpose of the statute. Once Section 157(b)(2)(H)—or its unconstitutional application to suits against non-creditors—is stricken, nothing in the statute requires the conclusion that fraudulent conveyance suits against non-creditors are core proceedings. To the contrary, because Congress plainly intended the category of core proceedings to track the category of matters of public right identified in *Marathon*, once Section 157(b)(2)(H) is severed, the only reasonable conclusion is that fraudulent conveyance actions against non-creditors—which are matters of private right—are non-core matters. And Section 157(c)(1) provides that "[a] bankruptcy judge may hear a proceeding that is not a core proceed-

[8] The presence of a severability clause in the 1984 Act—together with the discrete nature of the unconstitutional subparagraph—makes this case entirely different from *Marathon*, where the Court concluded that the unconstitutional grant of authority to bankruptcy courts to adjudicate matters of private right was "not readily severable from the remaining grant of authority to bankruptcy courts under § 1471." 458 U.S. at 91-92 (Rehnquist, J., concurring); *see id.* at 88 n.40 (plurality).

ing but is otherwise related to a case under title 11," directing the bankruptcy judge in such proceedings to "submit proposed findings of fact and conclusions of law to the district court" subject to de novo review. 28 U.S.C. § 157(c)(1). Because fraudulent conveyance suits are unquestionably "related to" the bankruptcy case—that is, if successful, they will augment the bankruptcy estate, *see Celotex*, 514 U.S. at 308 n.6; *Pacor, Inc.* v. *Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)—Section 157(c)(1) grants bankruptcy courts the power to hear them and to enter findings and conclusions for district court review.[9]

That fraudulent conveyance actions can be said to "arise under" the Bankruptcy Code makes no difference to this analysis. It is undoubtedly true that Congress viewed "core" proceedings as generally synonymous with "arising in" and "arising under" proceedings. As *Stern* noted, "[u]nder our reading of the statute, core proceedings are those that arise in a bankruptcy case or under Title 11." 131 S. Ct. at 2605. The obverse will also usually be true: Proceedings that arise in a bankruptcy case or under Title 11 will generally be core, even if not enumerated in the non-exclusive list of examples of core matters. But nothing in the statute mandates that *all* proceedings that arise in a bankruptcy case or under Title 11 must be core, and fraudulent conveyance actions are an exception. They "arise under" the Bankruptcy Code because the federal cause of action is set forth in Sections 544 and 548 of the Code.

---

[9] A proceeding that arises under the Code may still be "related to" a bankruptcy case, because the "related to" concept merely sets the outer limits of bankruptcy jurisdiction, which extends to any dispute that "could conceivably have any effect on the estate being administered in bankruptcy," *Pacor*, 743 F.2d at 994 (emphasis omitted).

As *Granfinanciera* explains, however, the Bankruptcy Code merely codified a preexisting common-law cause of action that was, and remains, a matter of private right. 492 U.S. at 60-61. Accordingly, fraudulent conveyances cannot be "core" as a constitutional matter. And because—after severance of the unconstitutional subparagraph—the remainder of Section 157 should be construed in accordance with Congress's intention to mirror the constitutional categories set out in *Marathon*, fraudulent conveyances should not be deemed "core" as a statutory matter either.

That conclusion gives effect to Congress's purpose—to confer on the bankruptcy court all the authority it could constitutionally exercise. As noted above, *see supra* pp. 8-11, Congress intended that bankruptcy courts have the power to enter final judgment in bankruptcy proceedings to the full extent consistent with the Constitution, and that they have the power to "hear" and issue findings and conclusions in all other bankruptcy proceedings. Where, as here, Congress erroneously characterizes a non-core proceeding as core, the statute is best read to permit bankruptcy courts to exercise the same authority they would exercise over any other non-core proceeding.

Stern is not to the contrary. Indeed, permitting bankruptcy courts to enter findings and conclusions in fraudulent conveyance suits (and on counterclaims like the one in *Stern*) is the only result that makes sense of *Stern*'s statement that its holding "is a 'narrow' one." 131 S. Ct. at 2620. This Court noted that no one in *Stern* argued that bankruptcy courts "'are barred from "hearing" all counterclaims' or proposing findings of fact and conclusions of law on those matters," *id.*, and while it did not address that question directly, it certainly nowhere intimated that its reasoning supported

such a conclusion. To the contrary, the Court commented that "[w]e do not think the removal of counterclaims such as [petitioner's] from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute." *Id.* If *Stern* meant that district courts would have to hear, as well as determine, all such claims, the division of labor would be changed materially and the district court would assume substantial additional burdens. Nothing in *Stern* warrants that result.

3. Petitioner reaches the wrong answer because it asks the wrong question. Petitioner frames the issue as whether the statute authorizes bankruptcy courts to issue findings and conclusions in a *core* matter. Pet. Br. 46. The answer to that question is probably yes. The statute does not *require* the bankruptcy court to enter final judgment in core matters. Indeed, it expressly permits the district courts to withdraw the reference of core matters at any time. *See* 28 U.S.C. § 157(d). As the court of appeals held (Pet. App. 24a-26a) and respondent explains (Resp. Br. 63-69), it is thus more than plausible to read Section 157(b)(1)'s provision that bankruptcy courts "may hear and determine" core proceedings to carry with it the lesser-included power to issue findings of fact and conclusions of law in such proceedings.

As discussed above, however, there is a clearer path to the conclusion that bankruptcy courts may issue findings and conclusions in fraudulent conveyance suits. Once Section 157(b)(2)(H) has been stricken from the statute, fraudulent conveyance actions are *non-core* matters. And Section 157(c)(1) expressly grants bankruptcy courts the power to enter findings and conclusions in non-core matters.

Petitioner objects (at 53) that "[f]raudulent 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)." But, as petitioner would surely agree, Section 157(b)(2)(H) is unconstitutional. Accordingly, it must be stricken. It is irrelevant to the task of interpreting the constitutional remainder of the statute. Petitioner likewise misses the point when it asserts (at 53) that a proceeding cannot be "'simultaneously core and yet only related to the bankruptcy case.'" That is so. But a fraudulent conveyance suit against a non-creditor is *not* core on a proper understanding of Article III and after severance of the unconstitutional subparagraph of Section 157(b)(2).

Ultimately, petitioner's analysis is flawed by the failure to recognize that the 1984 Act was intended to correct the *Marathon* problem, while granting bankruptcy courts all the power to decide bankruptcy matters that they may constitutionally exercise. Because petitioner disregards the Act's context and purpose, it approaches the question as if the statutory categories of "core" and "non-core" are wholly unrelated to the constitutional principles they were intended to implement.[10] If the statute, cleansed of its unconstitutional provisions, is read to comport with the constitutional principles it embodies, there is no justification for the impractical and burdensome outcome petitioner advocates, and no need to permit one mislaid stone to cause the entire edifice to crumble.

---

[10] The analysis of the one court of appeals that has adopted petitioner's position, *see Wellness Int'l Network, Ltd.* v. *Sharif*, 727 F.3d 751 (7th Cir. 2013), suffers from the same defect. Because it analyzed the statute in a manner divorced from the constitutional principles that underlie it, the court believed that it was forced to reject what it conceded was "perhaps the most practical and equitable remedy"—to treat the bankruptcy court's unconstitutionally entered final judgment as findings and conclusions. *See id.* at 776.

II. BANKRUPTCY COURTS MAY "HEAR AND DETERMINE" FRAUDULENT CONVEYANCE SUITS WITH THE CONSENT OF THE PARTIES, BUT SUCH CONSENT MUST BE EXPRESS

Because bankruptcy courts may enter findings and conclusions in fraudulent conveyance suits for de novo review by the district court—and because the district court did in fact review the bankruptcy court's grant of summary judgment to respondent de novo, *see* Pet. App. 45a—this Court need go no further to affirm the judgment below. Petitioner received de novo consideration of the claim against it by an Article III court. Article III entitles petitioner to nothing more. It therefore makes no difference to the outcome of this case whether or not petitioner could, or did, consent to bankruptcy court adjudication.

Were the Court to reach the question, however, it should hold that a bankruptcy court may constitutionally hear and determine non-core matters—including fraudulent conveyance suits—with the consent of the parties pursuant to Section 157(c)(2). That conclusion is most consistent with this Court's Article III jurisprudence, which holds that in the absence of meaningful encroachment on or diminution of the prerogatives of the judicial branch, the consent of the parties to a non-Article III resolution of a private-right dispute does not offend the separation of powers. Respondent is incorrect, however, in asserting that in the bankruptcy context such consent may be implied. Bankruptcy Rule 7012(b) makes clear that such consent must be "express," and there is no reason for this Court to hold that the rule means anything other than what it says.

A. Litigants May Consent To A Bankruptcy Court's Entry Of Final Judgment In A Non-Core Matter

As respondent capably explains (at 21-44), bankruptcy courts' adjudication of private-right controversies with the litigants' consent, as Congress authorized in Section 157(c)(2), does not offend Article III.

In *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833 (1986), this Court explained that Article III, § 1, serves to protect "primarily personal, rather than structural, interests." *Id.* at 848. "[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights." *Id.*

To be sure, Article III, § 1, also plays a structural role, "safeguard[ing] the role of the Judicial Branch in our tripartite system by barring congressional attempts [to] 'emasculat[e]' constitutional courts, and thereby preventing 'the encroachment or aggrandizement of one branch at the expense of the other.'" *Schor*, 478 U.S. at 850 (citation omitted). It may also restrain the judicial branch from abdicating its own core constitutional duties. *See, e.g.*, *Peretz* v. *United States*, 501 U.S. 923, 956 (1991) (Scalia, J., dissenting). "To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty." *Schor*, 478 U.S. at 850-851. The question, therefore, is whether a particular grant of authority to a non-Article III tribunal poses such a great risk of encroachment on the judicial branch, or abdication of that branch's authority, that it cannot constitutionally be tolerated even if the litigants consent.

This Court has never previously identified such a case. When it has struck down a grant of power to a non-Article III tribunal, it has always been in cases in which litigants had no option to proceed before a constitutional court. In *Marathon*, for example, this Court's holding was that "Congress may not vest in a non-Article III court the power to adjudicate, render a final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review." *Thomas*, 473 U.S. at 584 (emphasis added). *Stern*, too, struck down Section 157(b)(2)(C) as applied in that case, and distinguished *Schor*, in part because the objecting creditor "did not truly consent to resolution of [the debtor's] claim in the bankruptcy court proceedings." 131 S. Ct. at 2614.

Similarly, consent has long been the lynchpin of the magistrate system, whose constitutionality has not been impugned by this Court. *Compare Gomez* v. *United States*, 490 U.S. 858, 872 (1989) (holding, on constitutional avoidance grounds, that Congress "did not contemplate inclusion of jury selection in felony trials among a magistrate's additional duties" where the defendant did not consent), *with Peretz*, 501 U.S. at 932 (holding that a magistrate may constitutionally exercise that duty where the defendant did consent). "[T]he litigant's consent makes the crucial difference." *Peretz*, 501 U.S. at 932. As a personal right, the defendant's right to have an Article III judge preside over voir dire is waivable. *Id.* at 937. Moreover, a magistrate's presiding over jury selection with the defendant's consent does not offend the "structural protections provided by Article III" because "[m]agistrates are appointed and subject to removal by Article III judges"; "[t]he 'ultimate decision' whether to invoke the magistrate's as-

sistance is made by the district court, subject to veto by the parties"; and "'the entire process takes place under the district court's total control and jurisdiction.'" *Id.*[11]

The same is true here. The 1984 Act did not "'transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts." *Schor*, 478 U.S. at 850. To the contrary, the Act carefully and deliberately ensured that Article III district courts would exercise a full measure of control over bankruptcy proceedings. *Cf. id.* at 855 (examining the "congressional plan at issue and its practical consequences" before upholding the grant of authority). Bankruptcy courts are "unit[s]" of the district courts, 28 U.S.C. § 151, and bankruptcy judges are appointed—and may be removed—by Article III judges, *id.* § 152(a), (e). The district courts enjoy extensive supervisory authority over the administration of bankruptcy

---

[11] Indeed, this Court has long approved similar practices in an array of contexts. *See Kimberly* v. *Arms*, 129 U.S. 512, 524 (1889) (approving practice in chancery courts where "the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings, both of fact and of law" and concluding that decision of master had same effect as final judgment from federal court); *Newcomb* v. *Wood*, 97 U.S. (7 Otto) 581, 583 (1878) ("The power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it, is incident to all judicial administration, where the right exists to ascertain the facts as well as to pronounce the law. *Conventio facit legem.* In such an agreement there is nothing contrary to law or public policy."); *Heckers* v. *Fowler*, 69 U.S. (2 Wall.) 123, 127, 131 (1864) (upholding referrals of civil matters for adjudication by non-Article III entities where "the parties agreed in writing to refer the cause to a referee 'to hear and determine the same and all the issues therein, with the same powers as the court'" and noting that the "[p]ractice of referring pending actions under a rule of court, by consent of the parties, was well known at common law").

proceedings: Bankruptcy courts hear no matter unless the district court has made an appropriate reference, *id.* § 157(a); the district court may withdraw that reference for cause at any time, *id.* § 157(d); and the district court *must* withdraw the reference of any proceeding that requires meaningful interpretation of a federal statute (other than the Bankruptcy Code) affecting interstate commerce, *id.* And, of course, all bankruptcy court judgments are reviewable by Article III courts. *Id.* § 158. While these provisions are inadequate to render constitutional bankruptcy courts' *nonconsensual* entry of final judgment in non-core proceedings, *see Stern*, 131 S. Ct. at 2619, they demonstrate that the 1984 Act does not strip the judicial power of the United States from constitutional courts in a way that raises concerns consent cannot address.

Like bankruptcy courts, magistrates enter final judgments with the consent of the litigants in proceedings that would otherwise be the exclusive province of Article III courts, and have long done so without constitutional controversy. *See* 28 U.S.C. § 636(c)(1); *Pacemaker Diagnostic Clinic of Am., Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 547 (9th Cir. 1984) (en banc) ("We hold that consensual reference of a civil case to a magistrate is constitutional[.]"). The constitutionality of a magistrate judge's authority under 28 U.S.C. § 636(c)(1) to enter final judgment with the parties' consent has been upheld by every court of appeals to address the issue. *See* American Bar Association Resolution 109, at 5 (Feb. 11, 2013) (collecting cases); *see also id.* at 10 (resolving that "bankruptcy judges may constitutionally enter final orders and judgments in *Stern*-type proceedings upon the consent of the parties").

Indeed, petitioner concedes (at 29, 33) that, as *Schor* held, "separation of powers concerns are dimin-

ished" when a congressional grant of power to a non-Article III court includes a requirement of litigant consent. 478 U.S. at 855. Petitioner attempts (at 32) to distinguish the magistrate system on that basis. But there is no such distinction: The 1984 Act clearly provides that a bankruptcy judge may hear and determine non-core proceedings (such as fraudulent transfer suits against non-creditors) only "with the consent of all parties." 28 U.S.C. § 157(c)(2). In fact, as discussed further below, *see infra* Part II.B, the Federal Rules of Bankruptcy Procedure require parties to provide *express* consent to entry of judgment by the bankruptcy court in non-core matters, *see* Fed. R. Bankr. P. 7012.

There can thus be no argument that the magistrate system has a more robust consent requirement or differs in any way meaningful to the constitutional analysis. If adopted, petitioner's approach would logically require the invalidation of the magistrate system, as well as Section 157(c)(2). Petitioner's argument thus belies this Court's caution that its holding in *Stern* "does not change all that much," 131 S. Ct. at 2620, and would work nothing short of a revolution in the federal courts. It should be rejected.

B. A Litigant's Consent Must Be Express

While respondent is correct that a litigant may consent to having a bankruptcy court adjudicate a fraudulent conveyance suit against a non-creditor, implied consent is insufficient. The Federal Rules of Bankruptcy Procedure require such consent to be express.

Consent to having a non-Article III judge enter final judgment in a private-right dispute is no small thing. It is a relinquishment of the right to have an Article III judge preside over a critical—indeed, determi-

native—stage of the proceedings. As with respect to federal magistrates, consent is "[a] critical limitation" on the bankruptcy court's "expanded" authority. *Gomez*, 490 U.S. at 870.

Congress accordingly required that "the consent of all parties to the proceeding" be obtained before a bankruptcy court may enter final judgment in a non-core proceeding. 28 U.S.C. § 157(c)(2). And the Federal Rules of Bankruptcy Procedure provide, in clear and unambiguous terms, that "in non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order *except with the express consent of the parties.*" Fed. R. Bankr. P. 7012(b) (emphasis added); *see also* Fed. R. Bankr. P. 7012 (1987 adv. comm. note) ("A final order of judgment may not be entered in a non-core proceeding heard by a bankruptcy judge unless all parties *expressly* consent." (emphasis added)).

The rules further require parties to state in the complaint and responsive pleading whether the action is core or non-core and, if non-core, whether the party consents to entry of final orders or judgment by the bankruptcy judge.[12] And the rules make clear that "[f]ailure to include the statement of consent does not constitute consent. Only *express consent* in the pleadings or otherwise is effective to authorize entry of a fi-

[12] *See* Fed. R. Bankr. P. 7008(a) (providing that complaints filed in adversary proceedings "shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge"); Fed. R. Bankr. P. 7012(b) (providing that responsive pleadings filed in adversary proceedings "shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge").

nal order or judgment by the bankruptcy judge in a non-core proceeding." Fed. R. Bankr. P. 7008 (1987 adv. comm. note) (emphasis added).

As this Court has observed, these rules are not mere suggestions—they are commands. *See Kontrick* v. *Ryan*, 540 U.S. 443 (2004) (Federal Rules of Bankruptcy Procedure are mandatory); *see also Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988) ("[I]n every pertinent respect, … [a Federal Rule of Criminal Procedure is] as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions."). Accordingly, only express consent is sufficient to authorize entry of final judgment by the bankruptcy court in non-core matters. *See In re Lyondell Chem. Co.*, 467 B.R. 712, 722 (S.D.N.Y. 2012) (stating that in light of Federal Rule of Bankruptcy Procedure 7012(b) "mere implied consent appears to be insufficient"); *In re Madison Bentley Assocs., LLC*, 474 B.R. 430, 436 (S.D.N.Y. 2012) (same).

The court of appeals was mistaken in concluding that *Roell* v. *Withrow*, 538 U.S. 580 (2003), warrants a different result. Pet. App. 31a. *Roell* held—as a matter of statutory construction—that implied consent may satisfy 28 U.S.C. § 636(c)(1), a conclusion it reached only after determining that implied consent was consistent with "the text and structure of [§ 636] as a whole," and that an express consent rule would "'frustrate the plain objective of Congress to alleviate the increasing congestion of litigation in the district courts.'" 538 U.S. at 587, 590-591. The Court cautioned, however, that consent should be implied only in limited, exceptional circumstances. *Id.* at 591 n.7 ("district courts remain bound by the procedural requirements of § 636(c)(2) and Rule

73(b)"). *Roell* did not address or interpret the bankruptcy rules, and it simply is not possible to read those rules to permit implied consent.

The circumstances of *Roell* were also quite different from those here. The party raising the constitutional challenge (Withrow) *expressly* consented to adjudication by the magistrate and then waited until after he had lost at trial to argue that the magistrate lacked the authority to enter a final judgment because opposing counsel had not done the same. *See Roell*, 538 U.S. at 582-583. The Court thus found that Article III's protections could not be wielded by a *consenting* party as a tactical maneuver. *See id.* at 590 ("Withrow … received the protection intended by the statute."). The Court had no opportunity to address a situation in which the complaining party has not expressly consented to adjudication by a non-Article III court.

Nor will adhering to the plain language of the bankruptcy rules create a risk of "sandbagging." Respondent is correct (at 4) that petitioner failed to comply with Rule 7012(b)'s requirement that it indicate in its responsive pleading whether it consented to have the bankruptcy court "hear and determine" the matter. But respondent could have sought to enforce the rule in the bankruptcy court and demand that petitioner provide an express statement one way or the other at the outset of the litigation. The rules thus operate to permit the diligent litigant to avoid being "sandbagged."

Of course, there are also other protections against a party's lying in wait on the issue of consent until after appeals have been taken and the merits decided, such as the ordinary principle of appellate waiver. As this Court has explained, "'[n]o procedural principle is more familiar … than that a constitutional right,' or a right of

any other sort, 'may be forfeited … by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Stern*, 131 S. Ct. at 2608 (quoting *United States* v. *Olano*, 507 U.S. 725, 731 (1993)). Thus, even though a party's failure to object to entry of judgment does not constitute consent, on review of that judgment a party must raise—or forfeit according to the ordinary doctrine of appellate waiver—the argument that consent was not properly obtained.[13]

Whether the doctrine of appellate waiver could—or should—apply here is a question on which amici take no position. This Court should, however, reject the invitation to disregard the clear language of the federal bankruptcy rules requiring "express" consent to a non-Article III adjudication of a private-rights dispute.

CONCLUSION

The judgment of the court of appeals should be affirmed.

---

[13] As this Court noted in *Stern*, the question whether the bankruptcy court has the power to enter final judgment is not one of subject-matter jurisdiction. *See* 131 S. Ct. at 2607 ("Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. That allocation does not implicate questions of subject-matter jurisdiction.") (citation omitted). Accordingly, there is no reason to treat *Stern*-type objections as inherently non-waivable on appeal.

Respectfully submitted.

CRAIG GOLDBLATT
DANIELLE SPINELLI
Counsel of Record
SONYA L. LEBSACK
ISLEY MARKMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
danielle.spinelli@wilmerhale.com

NOVEMBER 2013