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No. 12-1200

In the Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY, PETITIONER

v.

PETER H. ARKISON, TRUSTEE, 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

REPLY BRIEF FOR PETITIONER

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
NICHOLAS C. PERROS
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

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

KEITH H. WOFFORD
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, NY 10036

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ARGUMENT

I. INDIVIDUAL LITIGANT CONSENT CANNOT CURE THE STRUCTURAL ARTICLE III VIOLATION IDENTIFIED IN *STERN*

Article III, § 1 not only preserves litigants' rights to impartial adjudication, "but also serves as 'an inseparable element of the constitutional system of checks and balances.'" *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 850 (1986) (quoting *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion)). Article III "'both defines the power and protects the independence of the Judicial Branch.'" *Stern* v. *Marshall*, 131 S. Ct. 2594, 2608 (2011) (quoting *Northern Pipeline*, 458 U.S. at 58

(plurality opinion)). Entry of final judgment is the "most prototypical exercise of judicial power," and, in a suit "brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." *Id.* at 2609, 2615. By assigning that responsibility to non-Article III bankruptcy judges, Congress threatened the "integrity of the system of separated powers and the role of the Judiciary in that system." *Id.* at 2620. When this structural aspect of Article III is at stake, individual parties "cannot by consent cure the constitutional difficulty," because private litigants "cannot be expected to protect" Article III's structural limitations, which serve "institutional interests." *Schor*, 478 U.S. at 850-851.

Respondent does not even acknowledge *Stern*'s holding that Section 157(b) threatens the "integrity of the system of separated powers." 131 S. Ct. at 2620. Rather, respondent denies structural concerns are implicated because "Congress has not undertaken to 'emasculate' constitutional courts." Resp. Br. 37; see *id.* at 35-44 (omitting discussion of *Stern* in Argument I.E.). But this Court has never adopted "emasculation" as the threshold for threats to the Constitution's structural integrity. To the contrary, even "challenges that may seem innocuous at first blush" can constitute a "threat to the separation of powers" that must be resisted. *Stern*, 131 S. Ct. at 2620.

Respondent nonetheless argues that Section 157(b) does not implicate structural concerns to the extent that: (1) bankruptcy judges are subject to Article III judges' control; and (2) bankruptcy court adjudication is "consensual." Resp. Br. 35-44. But *Stern* rejected the former, and the latter would turn *Schor*'s admonition

that structural Article III violations cannot be waived into an empty tautology.

A. Vesting The Power To Enter Judgment Of The United States Outside Of Article III Courts Is A Structural Violation

As explained in Executive Benefits Insurance Agency's (EBIA) opening brief, Pet. Br. 17-19, even intra-branch violations can implicate the Constitution's structural separation of powers. See *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) (dual for-cause limitation on President's ability to remove Executive Branch officials); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) (allocation of jurisdiction between Supreme Court and lower courts). In *Marbury*, Congress's grant to the Supreme Court of *more* authority (to hear original cases) than Article III contemplated was not on its face an "encroachment" on the Judicial Branch, and certainly not an "aggrandizement" of another Branch at the Judiciary's expense. The Court nonetheless recognized that if Congress could confer original jurisdiction that should be appellate, it could equally confer "appellate jurisdiction, where the Constitution has declared their jurisdiction shall be original." *Marbury*, 5 U.S. (1 Cranch) at 174. Thus, Congress's disregard of the constitutional design carried an implicit threat to this Court's authority.

Likewise, *Stern* recognized that the putative help Congress offered to overburdened district courts—letting them cede their original jurisdiction to bankruptcy judges in favor of appellate jurisdiction—was an offer that had to be rejected. Because "the bankruptcy court itself exercises 'the essential attributes of judicial power,'" "it [did] not matter who appointed the bank-

ruptcy judge or authorized the judge to render final judgments in such proceedings. The constitutional bar remain[ed].” 131 S. Ct. at 2619 (citation omitted) (quoting *Schor*, 478 U.S. at 851); see *Northern Pipeline*, 458 U.S. at 59 n.10 (plurality opinion) (“The guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well[.]”). That the Judiciary might be complicit in this arrangement was of no moment. Cf. *Clinton* v. *City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (“That a congressional cession of power is voluntary does not make it innocuous.”).

Even if “inter-branch encroachment” were essential to make an Article III violation unwaivable, see Resp. Br. 36, Section 157(b) would qualify. Congress reserved *for itself* power over bankruptcy judges that the Constitution denies Congress over Article III judges. Congress retains the power to cut bankruptcy judges’ pay, to remove them from office, and even to eliminate their positions. See *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 534 (1962) (plurality opinion) (statute guaranteeing tenure and undiminished salary “was ineffective to bind any subsequent Congress unless those judges were invested at appointment with the protections of Article III”). Moreover, Congress deprived the President and Senate of their constitutional roles in the appointment of federal judges. Congress, consistent with Article III, could have created a bankruptcy court system with precisely the same shape as at present—judges with specialized bankruptcy jurisdiction (and lower salaries) and district courts sitting as first-level appellate courts—as long as it gave those judges life tenure and salary protection, and allowed the President to appoint them with the Senate’s advice and consent.

In fact, in the aftermath of *Northern Pipeline*, Congress considered making bankruptcy judges Article III judges, but ultimately rejected this solution. See Susan Block-Lieb, *What Congress Had to Say: Legislative History as a Rehearsal of Congressional Response to* Stern v. Marshall, 86 Am. Bankr. L.J. 55, 59 (2012).

Respondent and his amici complain that EBIA seeks to destroy the bankruptcy courts and eviscerate their "efficiency." But the only "efficiency" served by the present system, in contrast to an Article III-compliant one, is evasion of the President's and Senate's constitutional roles, and the constitutional guarantees of tenure and salary. The Framers adopted these "inefficiencies" as essential to the system of checks and balances, and they may not be waived by the President, the Senate, or individual litigants. See *INS* v. *Chadha*, 462 U.S. 919, 958-959 (1983) ("[I]t is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency.").

B. "Consent" In An Individual Case Does Not Cure A *Stern* Structural Violation

Schor recognized that, "[t]o the extent [Article III's] structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty." 478 U.S. at 850-851. Respondent argues that *Schor*'s "structural principle" is not implicated here because of the "consensual nature" of bankruptcy court adjudication. Resp. Br. 43. But if the "structural" inquiry turns on ad-hoc litigant consent, *Schor*'s limitation on the role of consent becomes a futile tautology.

The only way to avoid the tautology while giving consent some role in the structural inquiry (if any is

appropriate) is to require that consent be an express limitation on the authority of the non-Article III adjudicator. See Pet. Br. 28-36. For example, under the Magistrates Act or Section 157(c)(2), litigants are "made aware of the need for consent and the right to refuse it," *Roell* v. *Withrow*, 538 U.S. 580, 590 (2003), and the absence of advance consent is a jurisdictional defect that can be policed on appeal, see *Gomez* v. *United States*, 490 U.S. 858, 870-871 (1989); *Roell*, 538 U.S. at 597-598 (Thomas, J., dissenting).

None of those protections exist in Section 157(b), which simply assigned respondent's fraudulent conveyance claim against EBIA to a bankruptcy judge for final adjudication.[1]

C. Even If Consent In An Individual Case Were Sufficient, It Would Have To Be Knowing And Voluntary Consent, Which Could Not Exist Here

Respondent's fanciful assertion that "there is no serious argument that EBIA did not consent to proceeding in bankruptcy court on summary judgment," Resp. Br. 43, demonstrates, like the court of appeals' decision below, that "consent" offers scant protection if

[1] Respondent asserts that the absence of consent was critical to *Stern*'s analysis of the Article III issue, and that the presence of supposed consent here therefore compels a different result. Resp. Br. 29-33. But the undisputed absence of consent in *Stern* simply means that the issue presented here was not decided in *Stern*. Moreover, to the extent *Stern* discussed the role of consent, it was to emphasize that creditors have "no choice" where to litigate their claims against the bankruptcy estate. See *Stern*, 131 S. Ct. at 2615 n.8. Likewise, Section 157(b) and controlling precedent gave EBIA "no choice" but to defend itself in the bankruptcy court.

courts can infer it post hoc from conduct that is, at best, ambiguous, while controlling precedent told the party it had no choice.

1. Respondent first purports to derive EBIA's consent from the fact that EBIA did not object to a joint status report that EBIA refused to sign, which reported that respondent would seek summary judgment against EBIA in bankruptcy court. Resp. Br. 60; Pet. App. 74a, 76a. But respondent ignores binding circuit authority that informed EBIA it had no right to Article III adjudication at summary judgment.

Even after this Court's decisions in *Northern Pipeline*, *Schor*, and *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), the Ninth Circuit held in *Duck* v. *Munn (In re Mankin)* that there was no Article III right to proceed before the district court on fraudulent conveyance claims. 823 F.2d 1296, 1301-1311 (1987), cert. denied, 485 U.S. 1006 (1988), overruled by Pet. App. 15a. Stressing the control Article III courts have through appointing bankruptcy judges, the Ninth Circuit concluded that Article III was satisfied. *Id.* at 1309-1310.

Two years after *Mankin*, this Court held in *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989), that there is a right to a jury trial in fraudulent conveyance actions against non-creditors. But the Court limited its decision to Seventh Amendment jury rights without reaching broader Article III issues. *Id.* at 50. And in *Sigma Micro Corp.* v. *Healthcentral.com (In re Healthcentral.com)*, the Ninth Circuit expressly held that *Granfinanciera* did not entitle a defendant to Article III adjudication of pre-trial summary judgment motions, 504 F.3d 775, 786-787 (2007).

Respondent faults EBIA for failing to anticipate *Stern*'s holding on the basis of *Granfinanciera* and *Northern Pipeline*, Br. 60-63, but respondent does not even acknowledge *Healthcentral.com*, which rejected the reading of *Granfinanciera* respondent contends was foreordained.[2] In this very case, the court of appeals acknowledged that bankruptcy-court entry of final judgment in fraudulent conveyance actions "was routine and uncontroversial" prior to *Stern*, Pet. App. 9a (citing *Mankin, supra*), but that "following [*Stern*] the view that such judgments are consistent with the Constitution is no longer tenable." *Ibid.*; *id.* at 15a, 23a (overruling *Mankin, supra*).[3]

Neither respondent nor any of his learned amici claim to have foreseen that *Granfinanciera* rendered unconstitutional bankruptcy court adjudication of

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[2] EBIA acknowledged *Healthcentral.com* in the bankruptcy court, conceding that court "retain[ed] jurisdiction over pretrial proceedings," Pet. App. 79a. Only one of respondent's amici mentions *Healthcentral.com*, Richard Aaron et al. Amicus Br. 15-16, erroneously asserting that the *Healthcentral.com* appellant raised no Article III objection. To the contrary, "the central issue" was that "bankruptcy courts did not have jurisdiction" because "pretrial proceedings in suits which properly belong before an Article III court may not be conducted by non-Article III courts." Appellant's Br. 2, 9, *Healthcentral.com*, *supra* (No. 04-17565).

[3] Nor would the Ninth Circuit's decision in *Marshall* v. *Stern (In re Marshall)*, 600 F.3d 1037 (2010), aff'd on other grounds, 131 S. Ct. 2594 (2011), have alerted EBIA to a new Article III argument. That decision held, as a matter of statutory interpretation, that Section 157(b)(2)(C) did not include a state-law counterclaim because it was not "core," *id.* at 1055-1061. But the decision did not disturb *Mankin*'s or *Healthcentral.com*'s constitutional holdings. See Pet. Br. 45-46.

fraudulent conveyance or other "core" claims. To the contrary, bankruptcy scholars were collectively "shock[ed]" by *Stern*. Block-Lieb, 86 Am. Bankr. L.J. at 57-58. As one of respondent's own amici explained, *Stern* was regarded as "the result of yet another shift in the Court's Article III jurisprudence." *Ibid.* Rather than predicting *Stern*'s outcome, "[c]ommentators predicted that the Court would overrule *Northern Pipeline*." *Ibid.*

2. In a final effort to manufacture EBIA's "consent," respondent argues for the first time that EBIA's alleged "pugnacious strategy of insisting that Arkison's fraudulent conveyance claim was non-core" demonstrates that EBIA made a "tactical decision to take its summary judgment chances in bankruptcy court." Resp. Br. 61-63. That is demonstrably not so.

To begin, respondent's characterization of EBIA's Answer is inaccurate. EBIA never "insist[ed] that Arkison's fraudulent conveyance claim was non-core." The Trustee's Complaint alleged that the proceeding was "an action to recover estate property" pursuant to nine causes of action against EBIA, including preferential transfers, fraudulent transfers, conversion, and breach of fiduciary duty, and that "thus" the action "is a 'core proceeding' pursuant to" specified subparagraphs of Section 157(b)(2). J.A. 50, ¶ 2.1. EBIA's Answer responded: "*Paragraph 2.1 of the Complaint states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies.*" J.A. 80 (emphasis added). The Complaint's (implicit) assertion that fraudulent conveyance actions are "core" proceedings was a "legal conclusion" to which EBIA did not respond. EBIA did, however, dispute non-legal

assertions, such as that the property at issue was "estate property."[4]

Respondent's attempt to infer consent from EBIA's failure to specify whether a given claim was "core" or "non-core" is, moreover, directly contrary to the Bankruptcy Rules, which forbid inferring consent from a mere failure to respond. "A final order of judgment may not be entered in a non-core proceeding heard by a bankruptcy judge unless all parties expressly consent." Fed. R. Bankr. P. 7012 (1987 advisory committee note); Fed. R. Bankr. P. 7008 (1987 advisory committee note) ("[F]ailure to include the statement of consent does not constitute consent.").

Even on its own terms, respondent's hypothesis strains credulity. It assumes that when EBIA filed its Answer, more than 18 months before the Ninth Circuit decided *Marshall*, EBIA: (1) anticipated *Stern*'s constitutional holding; (2) concluded that the solution to the as-yet unrecognized constitutional violation would be to recharacterize fraudulent conveyances as "non-core" (despite the statutory text); (3) recognized that EBIA would then have a right to an Article III court, but

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[4] To the extent that, contrary to what EBIA said, EBIA can be deemed to have "denied" the legal conclusion that the action was a "core proceeding," it would be more logical to infer that it was disputing the Trustee's incorrect (implied) assertion that all nine of the claims against EBIA were core. The breach of fiduciary duty claim, for example, was not core. See J.A. 75-76; *Diamond Mortg. Corp.* v. *Sugar*, 913 F.2d 1233 (7th Cir. 1990), cert. denied, 498 U.S. 1089 (1991). (That the fiduciary duty claim was not "core" is otherwise irrelevant here, because the claim was not the subject of the Trustee's summary judgment motion. See J.A. 125.)

could consent to bankruptcy adjudication; and (4) chose not to request Article III adjudication of dispositive pre-trial motions while simultaneously insisting on jury trial in district court. Pet. App. 77a-80a. If so implausible a string of conjecture were sufficient to demonstrate a party's "consent" to non-Article III adjudication, then a "consent" requirement is no practical limit at all.

II. APPELLATE REVIEW CANNOT CURE THE ABSENCE OF A VALID ARTICLE III JUDGMENT

Because the bankruptcy court "lacked the constitutional authority" to enter judgment, *Stern* v. *Marshall*, 131 S. Ct. 2594, 2601 (2011), no valid judgment has been entered. Absence of authority to enter judgment "means absence of a 'judgment,'" which in turn "destroys jurisdiction of a court * * * reviewing" that judgment. *Roell* v. *Withrow*, 538 U.S. 580, 597-598 (2003) (Thomas, J., dissenting); see also, *e.g.*, *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132, 144 (1947) (two judges instead of statutorily-required three rendered judgment "void and without statutory authority," leaving "no alternative but to vacate the judgment and dismiss the appeal"); Pet. Br. 37. Proceedings of a court without jurisdiction are *coram non judice*, "'before a person not a judge'"; "the proceeding in question was not a *judicial* proceeding because lawful judicial authority was not present and could therefore not yield a *judgment*." *Burnham* v. *Sup. Ct. of Cal.*, 495 U.S. 604, 608-609 (1990) (plurality opinion); see also *Freytag* v. *Comm'r Internal Revenue*, 501 U.S. 868, 896 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("a jurisdictional defect deprives not only the initial court but also the appellate court of its power

over the case"); *id.* at 897-898 (equating the structural defect in *Schor* with subject matter jurisdiction).

Here, the district court exercised appellate jurisdiction over the bankruptcy court's invalid "final judgment." Pet. App. 51a; J.A. 188; 28 U.S.C. 158. But, lacking a valid original "final judgment" of an Article III court, the district court and court of appeals lacked appellate jurisdiction, and their decisions below must be vacated "for want of jurisdiction." See *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379-380 (1981) (appellate decision vacated because "finality requirement embodied in § 1291 is jurisdictional"); *Ortiz* v. *Aurora Health Care, Inc.* (*In re Ortiz)*, 665 F.3d 906, 915 (7th Cir. 2011) ("Unless and until an Article III judge enters a final judgment, we have no jurisdiction to review these matters.").[5]

Appellate review by the district court (and court of appeals) is no substitute for an Article III tribunal's exercise of original jurisdiction. This Court has long recognized that "the essential criterion of appellate jurisdiction [is] that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." *Marbury* v. *Madison*, 5 U.S. (1 Cranch)

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[5] The United States suggests that, under *Stern*, the defect in the bankruptcy court's judgment was not jurisdictional. U.S. Br. 16-17 (citing 131 S. Ct. at 2607). But *Stern*'s statements on jurisdiction concern Subsection 157(b)(5), which governs only where a tort claim "shall be tried." *Stern* did not address either Section 158(a) (providing district courts with "jurisdiction to hear appeals" of "final judgments" by bankruptcy courts on core matters), or Section 158(d)(1) (giving courts of appeals "jurisdiction" over appeals from district courts' appellate rulings). Without a "final judgment" of a court with constitutional authority, the lower courts here lacked appellate jurisdiction.

137, 175-176 (1803). An appellate court "may not create jurisdiction by entering judgments on behalf of the district courts and then reviewing those judgments." *Middleby Corp.* v. *Hussmann Corp.*, 962 F.2d 614, 616 (7th Cir. 1992).

Respondent suggests that the district court's *appellate* review "renders constitutionally irrelevant" any injury suffered by EBIA, Resp. Br. 54, but respondent fails to account for the absence of a constitutionally valid judgment. Judgments of the United States are an expression of the co-equal power of the Judicial Branch. See The Federalist No. 64, at 394 (John Jay) (Clinton Rossiter ed. 1961) ("[T]he judgments of our courts * * * are as valid and as binding on all persons whom they concern, as the laws passed by our legislature."). Here, it was the judgment *of the non-Article III bankruptcy court* that imposed an obligation upon EBIA to pay the money judgment, triggered accrual of post-judgment interest, and was the basis for garnishment to enforce that judgment. J.A. 189-205.[6]

The district court's subsequent appellate review—even if de novo—could not cure the absence of a valid judgment having been entered. *Marbury*'s recognition that appellate review "revises and corrects" the original decision, "and does not create the cause," 5 U.S. (1 Cranch) at 175-176, is not merely a statement of legal

[6] Indeed, in respondent's only example of a district court's de novo review purportedly remedying the absence of a valid judgment, *Estate of Conners* v. *O'Connor*, 6 F.3d 656 (9th Cir. 1993), cert. denied, 510 U.S. 1045 (1994), see Resp. Br. 55, the district court conducted its own review of a magistrate's attorneys' fees award, reduced it, and *entered its own judgment*, from which the circuit appeal was taken, 6 F.3d at 658-660.

principle, but a recognition of practical reality. See *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 86 n.39 (1982) (plurality opinion) (noting that an appellate court is restricted to "the case as it has been shaped at the trial level"); *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1051 (7th Cir. 1984) (Posner, J., dissenting) (observing that, although a magistrate judge ruling would not "have the last word," "his decision, and the record he had shaped on which [his] decision rested, might influence the decision of the reviewing court"). Indeed, the record contains strong indications that the bankruptcy court's actions affected the district court's review as an appellate tribunal. See, *e.g.*, Pet. App. 50a-51a (invoking deferential "substantial evidence" standard, citing the "weight of the evidence," and stating that EBIA, the nonmovant, "had done nothing to show any defect" in the bankruptcy court's ruling).

This Court need not—and should not—pass on the underlying summary judgment merits. But respondent mischaracterizes the record in suggesting that "overwhelming evidence" renders the issues before this Court academic. Resp. Br. 57. Had EBIA received an initial determination by an Article III court, summary judgment likely would not have been granted.[7] The

[7] Respondent also falsely asserts in passing that the Trustee's successor liability claim "renders moot any error on the fraudulent conveyance claim." Resp. Br. 56 n.10. It suffices to note that respondent's successor liability claim was for less than a third of the total judgment, and thus the award on successor liability is insufficient to sustain the bankruptcy court's full judgment. See J.A. 137 (summary judgment memorandum seeking $117,286.84 in outstanding debts under successor liability, or $373,291.28 for assets fraudulently transferred); Pet. App. 54a (principal judgment

Trustee's evidence of fraudulent transfers consisted principally of a single page printed from QuickBooks accounting software as interpreted by the bankruptcy estate's accountant. J.A. 139-142. This evidence was pitted against Nicholas Paleveda's declaration explaining that the inter-company transactions were not fraudulent because they reflected commissions from new business developed after EBIA's formation. See J.A. 174, 177-178.[8] The bankruptcy court did not "trust Mr. Paleveda's testimony," J.A. 185, and the district court dismissed it as "self-serving," Pet. App. 49a. Yet the conflicting factual assertions should have been sufficient to defeat summary judgment. See, *e.g.*, *SEC* v. *Phan*, 500 F.3d 895, 909 (9th Cir. 2007) (ordinarily, "[t]hat an affidavit is self-serving bears on its credibility, not on its cognizability for purposes of establishing a genuine issue of material fact").

The Constitution guarantees EBIA an initial adjudication by an Article III court—not appellate review retroactively deemed original. In any event, the absence of a valid initial judgment destroyed the basis for appellate jurisdiction, foreclosing review until an Article III court exercises original jurisdiction.

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amount of $373,291.28). In any event, the successor liability claim is likely also governed by *Stern*. See *TTOD Liquidation, Inc.* v. *Lim (In re DOTT Acquisition, LLC)*, No. 12-12133, 2012 WL 3257882, at *3 (E.D. Mich. July 25, 2012).

[8] In particular, the QuickBooks print-out showed $250,157 in disputed deposits after May 1, 2006. J.A. 142; Pet. App. 7a n.2. Paleveda's declaration explained that EBIA began earning commissions on new business by then. J.A. 162-164.

III. VINDICATING ARTICLE III IN THIS CASE DOES NOT REQUIRE THE COURT TO OVERTURN PRECEDENT OR OTHER STATUTORY SCHEMES

Contrary to respondent's suggestion, vindicating Article III here would not require overturning established precedent or other statutory schemes.

A. Respondent's Historical Authorities Are Inapposite

Respondent's focus on certain 19th-century decisions, see Br. 23-24, ignores the constitutional significance of entry of final judgment of the United States, see *Stern* v. *Marshall*, 131 S. Ct. 2594, 2615 (2011). In both *Kimberly* v. *Arms*, 129 U.S. 512 (1889), and *Heckers* v. *Fowler*, 69 U.S. (2 Wall.) 123 (1864), a court entered the enforceable final judgment. Thus, neither holds that a private party (or official who is not an Article III judge) may, on consent of the parties, enter final judgment of the United States.

In *Kimberly*, the special master (to whom the dispute was referred by express written agreement) submitted his report to the court, recommending an award for plaintiff. The court, upon review, disagreed and entered judgment for defendant. Drawing an analogy to arbitration agreements, this Court held that the trial court's failure to defer to the master's findings "disregard[ed] the express stipulation of the parties." 129 U.S. at 524-525.[9] The Court remanded "with direction

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[9] Today, post-*Erie*, the case would likely be decided under the Federal Arbitration Act. Private arbitrations do not offend Article III because "arbitration is not a judicial proceeding," *McDonald* v. *City of West Branch*, 466 U.S. 284, 288 (1984), and the court,

to confirm the report of the special master," *id.* at 530, *i.e.*, to enter a new final judgment. There was no question of the special master entering final judgment.

In *Heckers*, the case was referred by the parties' written consent, and "judgment was rendered" in the trial court "upon the report of the referee," to which "the losing party made no objections." 69 U.S. (2 Wall.) at 126, 127, 133. Before this Court, the appellant did *argue* the judgment had been improperly entered by the clerk, rather than the court, cf. Resp. Br. 24, but this Court rejected that characterization as without record support. 69 U.S. (2 Wall.) at 132. The Court observed that "[j]udgments are always entered by the clerk" but "under the authority of the court," and that, even without a minute order so directing, "no one ever doubted that a judgment entered under such circumstances was the act of the court and not of the clerk." *Ibid.* Here, in any event, there is no question that a non-Article III bankruptcy judge entered "judgment." Pet. App. 54a.

Respondent's early bankruptcy cases are likewise inapposite. His historical account omits that fraudulent conveyance actions were "plenary," and referees lacked authority to decide them. *Weidhorn* v. *Levy*, 253 U.S. 268, 274 (1920). Contrary to the suggestion of some amici, American College of Bankruptcy Amicus Br. 13, *MacDonald* v. *Plymouth County Trust Co.*, 286 U.S. 263 (1932), did not implicitly hold that Article III structural violations could be waived by consent. It decided only whether, as a statutory matter, a plenary prefer-

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which enters judgment, merely effectuates the parties' contractual agreement, see 9 U.S.C. 9-11.

ence action to be conducted in district court could be submitted to a referee, and even then only on express agreement as opposed to after-the-fact inferred consent or waiver. *Id.* at 265, 267 (noting this was the "only question presented"); U.S. Br. 19 n.5 (acknowledging only "litigant's waiver of a *statutory* right" was presented).

Nor does this case implicate bankruptcy-court resolution of issues "integral to the claims determination process." *Stern*, 131 S. Ct. at 2617 (quoting *Langenkamp* v. *Culp*, 498 U.S. 42, 44 (1990) (per curiam)). This Court has only addressed that possible exception to Article III in the narrow context of preference actions, where the claims allowance process may necessarily "decide whether there had been a voidable preference." *Id.* at 2616 (discussing *Katchen* v. *Landy*, 382 U.S. 323 (1966)). Petitioner does not challenge that bankruptcy courts can resolve "the restructuring of debtor-creditor relations" that the Court has assumed may be "public rights." See *id.* at 2614 n.7 (quoting *Granfinanciera*, 492 U.S. at 56 n.11).

B. Finding A Structural Violation Here Does Not Require Invalidating Other Statutes

Contrary to respondent's hyperbole, ruling for EBIA does not require "invalidating the entire magistrate judge system." Resp. Br. 45. Magistrates' authority under 28 U.S.C. 636(b) to rule on non-dispositive pre-trial matters or make proposed findings is simply not implicated here. Cf. *Stern*, 131 S. Ct. at 2618-2619 (discussing characteristics of "adjuncts"). The current authority of bankruptcy judges is significantly greater than magistrate judges. Compare 28 U.S.C. 157(b) (entry of judgment) and 157(c)(1) (report

and recommendation even for final evidentiary hearings) with *United States* v. *Raddatz*, 447 U.S. 667, 679-684 (1980) (Section 636(b) did not confer authority for either final decision of major pretrial matters or report and recommendation on final merits hearing).

Nor need the Court decide whether the magistrates or bankruptcy statutes incorporating consent as a jurisdictional limit on entry of final judgment violate Article III. See 28 U.S.C. 636(c)(1); 28 U.S.C. 157(c)(2); Pet. Br. 28-36.[10] Unlike those statutes, under Section 157(b), EBIA "had nowhere else to go" to defend the Trustee's fraudulent conveyance action. *Stern*, 131 S. Ct. at 2614.

In any event, the Court has never held that Article III permits private parties to consent to entry of a final judgment of the United States by someone not an Article III judge. *Roell*, 538 U.S. 580, was decided on statutory, not constitutional, grounds. See Pet. Br. 32 n.4; contra Resp. Br. 26-27. The sole question was the standard for consent under Section 636(c), because respondent asserted no structural Article III violation. See Resp. Br. at 28, *Roell*, *supra* (No. 02-69) (arguing that individuals "can choose to forego their personal right to an Article III judge," but that no valid consent occurred); *Webster* v. *Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither

[10] One factor in such an inquiry would be whether the process for consensual referral preserves "the confidentiality of a party's choice," as the Magistrates Act does by requiring the clerk of court to handle consent questions, "protecting an objecting party against any possible prejudice at the * * * judge's hands later on." *Roell* v. *Withrow*, 538 U.S. 580, 586 (2003); see also 28 U.S.C. 636(c)(2); Fed. R. Civ. P. 73(b). No analogous protection exists in bankruptcy.

brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”).

IV. BANKRUPTCY JUDGES LACK STATUTORY AUTHORITY TO ISSUE PROPOSED FINDINGS AND CONCLUSIONS IN CORE PROCEEDINGS

Stern created a statutory gap in the bankruptcy court’s authority under Section 157. Respondent and his amici propose various “solutions” that amount to asking this Court to cure one separation-of-powers violation with another, by rewriting Congress’s statute. The constitutional defect in Section 157(b) is not susceptible to simple severance.

First, the statute does *not* grant bankruptcy judges authority to issue proposed findings of fact and conclusions of law in core proceedings like fraudulent conveyances. The “manner in which a bankruptcy judge may act on a referred matter depends on the type of proceeding involved.” *Stern* v. *Marshall*, 131 S. Ct. 2594, 2603 (2011). In core proceedings, bankruptcy judges enter final judgment, subject to appellate review; in non-core proceedings, the bankruptcy judge submits proposed findings and conclusions, and the district court enters final judgment. *Id.* at 2604-2605. Section 157(b)(1) provides only one mechanism for district courts to act upon core proceedings that have been referred: appellate review under Section 158.

Respondent suggests the word “may” in Section 157(b)(1) makes entry of judgment by bankruptcy courts permissive. Resp. Br. 66. However, “the mere use of ‘may’ is not necessarily conclusive of congressional intent to provide for a permissive or discretionary authority.” *Cortez Byrd Chips, Inc.* v. *Bill Harbert*

Const. Co., 529 U.S. 193, 198 (2000). Section 157(b) provides a quintessential example; the disjunctive treatment of core and non-core proceedings (with the bankruptcy court and district court, respectively, authorized to enter judgment and no reference to proposed findings in core proceedings) demonstrate that the word "may" is a grant of *authority* to enter judgment, not *discretion* to enter judgment.

Respondent also suggests partial referral and then withdrawal of *Stern*-governed core claims, leaving the district court to review a report and recommendation. Resp. Br. 66-67. No such procedure occurred here, and recharacterizing the district court's appellate ruling cannot cure the absence of a valid final judgment. See pp. 11-16, *supra*. Furthermore, Section 157(b) does not set forth a process or standard of review for non-final reports, as Section 157(c)(1) does. Thus, this proposed "solution" raises more questions than it answers. Which interlocutory orders would be deemed "rulings" and which only recommendations (and reviewed under what standard)? Respondent's a-textual "solution" (and the litigation over scope and standards of review it would entail) would reduce, rather than improve, efficiency.

Second, no judicial pen stroke can turn fraudulent conveyance claims into non-core proceedings. Like the counterclaims in *Stern*, fraudulent conveyance claims are expressly core under the definition in Section 157(b)(1). They "aris[e] under title 11"—specifically, under Sections 544 and 548. They would remain core if Section 157(b)(2)(H) (or all of (b)(2)) were severed. Amici are thus forced to propose that fraudulent conveyances are an "exception" to the rule that all proceedings that "arise under title 11" are core. Brown et

al. Amicus Br. 15-16. *Stern* forecloses such judicial redrafting. 131 S. Ct. at 2605; see also *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3162 (2010) (cautioning against "blue-pencil[ing]" statute because "such editorial freedom * * * belongs to the Legislature, not the Judiciary"); *Randall* v. *Sorrell*, 548 U.S. 230, 262 (2006) (declining to sever where Court would "write words into the statute" or choose "which of the many different possible ways" the legislature might respond).

Moreover, "severing" as proposed would have collateral consequences for other provisions. If fraudulent conveyance claims (or other *Stern* claims defined as "core") are recharacterized as non-core, then, to the extent they arise under state law, they would be subject to mandatory abstention. See 28 U.S.C. 1334(c)(2); 28 U.S.C. 157(b)(2)(C) (state-law counterclaims); 28 U.S.C. 157(b)(2)(H) (Section 544(b) avoidances based on state law). Respondent's "severance" would thus rewrite critical features of the jurisdictional framework unrelated to the constitutional defect identified in *Stern*, including those reflecting federalism concerns.

Respondent and amici nonetheless plea for the Court to do "the only logical thing," Resp. Br. 64, and allow bankruptcy courts to enter final judgment to the extent of their constitutional authority and otherwise make proposed findings and conclusions. Though they assert this was Congress's intent, to the contrary, Section 157 did not uniformly seek to maximize bankruptcy court authority. See *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."). Section 157(d) requires district

court determination of any matter involving "consideration of both title 11 and laws of the United States regulating organizations or activities affecting interstate commerce." Congress similarly provided for district court trial of certain tort claims. 28 U.S.C. 157(b)(5). And Congress recognizes the *in*efficiencies of multilayer review, as evidenced by 2005 amendments allowing some direct court of appeals review of bankruptcy court decisions. 28 U.S.C. 158(d)(2); Laura B. Bartell, *The Appeal of Direct Appeal—Use of the New 28 U.S.C. § 158(d)(2)*, 84 Am. Bankr. L.J. 145, 147 (2010). These are hallmarks of a Congressional scheme allocating authority in highly nuanced ways, reflecting competing policy concerns the Court cannot resolve.

With the Bankruptcy Act of 1984, Congress expected that 95% of cases would not "require involvement by an article III judge." 130 Cong. Rec. 6045 (1984) (remarks of Rep. Kastenmeier). Following *Stern*, this is no longer true. There are many options for a constitutionally-compliant bankruptcy system: redrawing the line between core and non-core claims; placing *Stern*-governed matters entirely in district courts, with magistrate assistance; making bankruptcy judges magistrates for such matters; or establishing a new tier of Article III judges. Congress's overreach in Section 157(b) cannot, however, be corrected by an overreach in the opposite direction. Given the array of available options, it is for Congress to revise the statute.

CONCLUSION

For the foregoing reasons and those stated in petitioner's opening brief, the judgment of the court of appeals should be vacated.

Respectfully submitted,

DOUGLAS HALLWARD-DRIEMEIER
D. ROSS MARTIN
KEITH H. WOFFORD
ELIZABETH N. DEWAR
DAVID J. DERUSHA
NICHOLAS C. PERROS
ROPES & GRAY LLP

Counsel for Petitioner

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