No. 12-1200

In the
Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,
Petitioner,
v.
PETER H. ARKISON, TRUSTEE,
SOLEY IN HIS CAPACITY AS 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 THE STATES OF NEW HAMPSHIRE, WASHINGTON, HAWAII, SOUTH CAROLINA, OREGON, NEVADA AND TENNESSEE AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

The initial issue in this case is whether the bankruptcy courts may "hear and determine" statutory "core proceedings" involving fraudulent conveyance actions brought during bankruptcy cases consistent with Article III of the United States Constitution. The Ninth Circuit concluded that they may not. Also at issue is whether a bankruptcy court, hearing a proceeding that has been statutorily designated by Congress as "core," but in which the Constitution bars it from issuing a final judgment, may nonetheless provide proposed findings of fact and conclusions of law to the district court. The final questions addressed below are whether, in such a proceeding, a party can effectively consent to have final judgment entered by the bankruptcy court, rather than by an Article III court, through litigation conduct, and, if so, how such consent must be manifested. These are issues of importance to States which regularly find themselves parties in actions brought by bankruptcy debtors and trustees in both core and non-core proceedings in bankruptcy cases.

The special sovereignty interests of the States make them uniquely interested in the proper resolution of those issues. Article III, in addition to being an important structural element of the Constitutional balance of powers, also provides the States, as with other litigants, a personal right to have issues involving their "private rights" determined by an independent federal judiciary. States find themselves haled into bankruptcy courts outside of their own territory with frequency, particularly since this Court held that Article I's

Bankruptcy Clause was "intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena." *Central Va. Comm. College v. Katz*, 546 U.S. 363, 356 (2006). Article III protects both the structural concerns arising from the Constitutional separation of powers and the personal rights of litigants to be guaranteed the right to be heard before an independent judiciary.

As a result, Article III jurisdiction also serves to protect state sovereignty with respect to private rights that was not given up in the plan of the Convention. *See Katz*, 546 U.S. at 373; *see also* The Federalist No. 39, p. 285 (B. Wright ed. 1961) (J. Madison) (Constitution respects the States' "residuary and inviolable sovereignty over all other objects" the boundary of which Article III courts will impartially decide to "prevent an appeal to the sword and a dissolution of the compact..."). Thus, *Amici* have a pronounced sovereign interest in the protections afforded by Article III courts in the adjudication of private rights as a bulwark against encroachment into States' sovereignty by the political branches. *See* The Federalist No. 78, p. 494 (B. Wright ed. 1961) (A. Hamilton) ("the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments"). In bankruptcy cases, Article III jurisdiction plays an important role protecting state sovereignty.

The States also have an interest in ensuring that, when they are haled into sometimes far flung bankruptcy jurisdictions, they are not deemed to waive important rights guaranteed under the

Constitution in the absence of clear and predictable standards and rules. Important constitutional protections should not be subject to different standards in different states, particularly inasmuch as bankruptcy is required to be a "uniform" federal law. In light of the broad venue provisions available to debtors, a non-resident litigant should not be left without clear guidance from this Court as to how to assert its rights.

Finally, the States have an interest as important creditors of bankruptcy estates, in many instances holding priority and other claims owed to themselves and their citizens, such as for taxes, domestic support obligations, environmental clean-up costs, fines and penalties, and employee wages and benefits. In their capacity as creditors, it is important to the States that a ruling by this Court not be used to "roil[] the prevailing bankruptcy schema" Pet. App. p. 26a, by barring bankruptcy courts from taking any role in litigation of "non-final core" proceedings[1] that can serve a vital role in bringing additional revenues into the estate.

The economic effect of preventing the bankruptcy courts from even being able to enter proposed findings of fact and conclusions of law for

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[1] The term "non-final core proceedings" is used herein to refer to the category of proceedings that fall under the holding in *Stern* – those that are statutorily core but as to which the bankruptcy courts are precluded, absent special circumstances, from entering final judgments.

the district court to review *de novo* would be significant. It would hurt all creditors by inviting wasteful litigation over where to litigate and by imposing procedural burdens at odds with the efficiency that bankruptcy cases require to be successful. The economic costs of such litigation will impair the ability of States to recover amounts they are owed and their ability to advance the important public purposes to which such recoveries would be dedicated.

STATEMENT

Peter Arkison, a Chapter 7 bankruptcy trustee for the Chapter 7 debtor, Bellingham Insurance Agency, Inc. ("BIA"), brought a proceeding against two non-bankrupt defendants, Aegis Retirement Income Services, Inc. ("ARIS") and Executive Benefits Insurance Agency, Inc. ("EBIA") seeking to recover funds fraudulently transferred pre-bankruptcy to them by BIA. Pet. App. pp. 4a-8a. The bankruptcy court entered summary judgment in favor of the trustee for $373,291.28. Pet. App. pp. 6a-7a. On appeal, the district court affirmed the judgment. *Id.* at 7a. After briefing was completed at the Ninth Circuit, however, EBIA moved the appeals court to vacate the judgment for lack of subject-matter jurisdiction, citing *Stern v. Marshall*, 131 S. Ct. 2594 (2011). Pet. App. p. 8a. EBIA had never before challenged the bankruptcy court's subject matter jurisdiction to hear the case on the basis that it was entitled to an Article III court's adjudication of the claims that the trustee had brought against it. *Id.* at 30a. In light of that timing, and in light of its prior litigation tactics, the Ninth Circuit found that EBIA

had impliedly consented to the bankruptcy court's jurisdiction and affirmed the bankruptcy court's ruling. *Id.* at 30a & 39a-40a.

In reaching that conclusion, the Ninth Circuit noted that, while EBIA, the defendant in the trustee's fraudulent conveyance action, had not filed a proof of claim with the bankruptcy court, so as to affirmatively invoke its jurisdiction, it had taken other steps that appeared to signify consent. It had initially demanded a jury trial on the trustee's action, which the district court treated as a motion to withdraw the reference of the case. *Id.* at 29a. When the trustee sought summary judgment, though, EBIA affirmatively moved to hold the district court action in abeyance while the trustee's request was heard. *Id.* After the bankruptcy court granted summary judgment, EBIA abandoned its jury trial demand, and did not pursue the withdrawal request further and instead pursued an appeal of the bankruptcy court's order. *Id.* at 29a-30a.

In denying the Petitioner's motion to vacate and affirming the bankruptcy court's judgment, the Ninth Circuit first held that this Court's decisions in *Stern v. Marshall* and *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) would normally require an Article III court, not a bankruptcy judge, to adjudicate a proceeding brought against a non-creditor to recover a fraudulent conveyance for a bankruptcy estate. *Id.* at 22a-23a.

Next, the Ninth Circuit noted that its decision on the Article III question created a gap in the statutory framework for the division of labor between

the bankruptcy and district courts with respect to core and non-core proceedings. Pet. App. at p. 23a-24a. In that regard, under section 157(b)(2) of Title 28, fraudulent conveyance actions are unmistakably designated as "core" proceedings, and the statute provides that the bankruptcy courts may "hear and determine" such matters; *i.e.*, issue final judgments therein. Conversely, Congress provided, in section 157(c)(1), that bankruptcy courts could only issue proposed findings of fact and conclusions of law in "non-core" proceedings. The statute does not deal with the case of a proceeding that is statutorily core but where the bankruptcy court is precluded by the Constitution from issuing a final judgment. Thus, there is nothing in the statute that explicitly instructs how to deal with the anomaly created under *Stern* of a "core proceeding" in which the bankruptcy court may not, constitutionally, enter a final judgment.

The Ninth Circuit reasoned, though, that because "only the power to enter final judgment is abrogated" by its decision on the Article III issue, *id.* at 25a, Congress' general intention, as set out in the statute, to allow the bankruptcy courts the broader power to "hear and determine" issues necessarily included the "more modest power" to simply render findings and rulings for the district court to review *de novo* and determine whether to enter as final judgments. *Id.* at 24a.

Finally, the Ninth Circuit concluded that the Petitioner had waived its right to claim that the bankruptcy court's final judgment was invalid by failing to raise the issue in a timely fashion and had,

through its conduct, impliedly consented to bankruptcy court jurisdiction. *Id.* at 26a-33a. The court determined that "'as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver.'" *Id.* at 27a-28a (*quoting Stern v. Marshall*, 131 S. Ct. at 2607). The court also noted that section 157(c)(2) expressly provides for consent to full bankruptcy court jurisdiction in the case of conceded "non-core" proceedings, and there was no reason to grant any lesser authority to the bankruptcy court in hearing a non-final "core" proceeding. *Id.* at 28a.

Under the facts before it the Ninth Circuit easily concluded that the Petitioner had actually consented to the final adjudication by the bankruptcy court through its litigation conduct. *Id.* at 29a. The court interpreted the Petitioner's petition to suspend the proceedings before the district court and subsequent withdrawal of its jury trial demand, in favor of allowing the bankruptcy court to decide the summary judgment motion, as clearly indicating an intention to allow the latter court to resolve the issues. *Id.* Moreover, the Court also relied on the fact that the Petitioner did not raise a constitutional objection to the bankruptcy court's jurisdiction until the issues were briefed before it in 2011, despite the Ninth Circuit's opinion in *Marshall v. Stern*, 600 F.3d 1037 (2010) which had clearly raised these constitutional issues. *See id.* at 29a, 32a. The court did not find it conclusive that the consent had not been expressly stated, despite provisions in the Bankruptcy Rules providing for such a statement, relying on *Roell v. Withrow,* 538 U.S. 580 (2003). Pet.

App. p. 31a-32a. Quoting from this Court's decision in *Stern*, the court said "'the consequences of a litigant sandbagging the court – remaining silent about its objection and belatedly raising the error only if the case does not conclude in its favor – can be ... severe.'" Pet. App. p. 33a (*quoting Stern v. Marshall*, 131 S. Ct. at 2609).

SUMMARY OF ARGUMENT

The *Amici States* urge the Court to affirm the judgment below. The Ninth Circuit was correct that a fraudulent conveyance proceeding is one which the Constitution requires be presided over by an Article III judge. The Court's decision in *Stern v. Marshall* and its reliance on *Granfinanciera v. Nordberg* made this conclusion inescapable. But this is not the difficult issue faced with this appeal. The more challenging issues are whether a bankruptcy court can bridge the gap that results when a statutorily core proceeding cannot be heard to finality by a bankruptcy court because of Article III, by issuing findings of fact and conclusions of law for the district court to review and issue judgment. The other unsettled issue is the determination of the appropriate standard for finding that a party has consented to the bankruptcy court's entry of final judgment and thereby waived the party's right to an Article III tribunal.

The *Amici States* agree with the vast majority of the courts around the nation that have found that the bankruptcy courts can bridge the gap and enter findings of fact and conclusions of law. These courts do so by taking a big picture look, noting that the

bankruptcy courts' subject matter jurisdiction for such matters is clear. The Court concluded *Stern* noting that the ruling there was not intended to change the division of labor between the bankruptcy and the district court. The Ninth Circuit's judgment is sustainable because it does not disturb the division of labor in the prevailing schema.

The *Amici States* diverge with the Ninth Circuit somewhat over the consent issue. The court below concluded that under existing ninth circuit law a simple failure to object is sufficient to consent and waive Article III protections. In the proceedings below there was a relatively clear consent and waiver and therefore the *Amici States* do not argue with the judgment. Courts across the nation, however, do not have a uniform approach to this issue. Some conclude that no consent is possible. For others, consent is easily implied by the failure to object. Other courts are at various degrees of clarity in between these two extremes. The standard the court below applied leaves much to be desired. *Amici States* urge the Court in affirming the judgment below to adopt for bankruptcy purposes the same approach that it employed in *Roell v. Withrow*. That standard, that consent may only be found where the party clearly knew of the need for consent and the right to refuse it, and still voluntarily appeared, provides greater certainty for parties litigating these matters and provides much needed uniformity across the hundreds of bankruptcy court jurisdictions in the nation. The U.S. Magistrate practice is a close cognate to the bankruptcy court jurisdiction and the standard is familiar to district and appeals courts

and thus has an established presence in the proceedings of those courts.

ARGUMENT

I. ABSENT CONSENT, BANKRUPTCY COURTS MAY NOT NORMALLY ENTER FINAL JUDGMENTS IN AVOIDANCE PROCEEDINGS.

For the reasons discussed persuasively in the opinion below, the *Amici States* agree with the Ninth Circuit that the fraudulent conveyance action (absent a filed claim to which the action may be raised as a defense under 11 U.S.C. § 502(d)) is one that a party may demand be heard before an Article III judge. Thus, to the extent that the bankruptcy court "heard and determined" the matter below and issued a purportedly final judgment, if properly and timely challenged by the aggrieved party, its actions cannot stand.

II. BANKRUPTCY COURTS MAY ISSUE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN "NON-FINAL" CORE PROCEEDINGS.

As unsecured creditors in a multitude of bankruptcy cases around the nation, the *Amici* are keenly interested in preserving the bankruptcy court's efficient administration of the marshaling activities of trustees and debtors in possession. Bankruptcy estates have become increasingly 'bankrupt' since the 1978 reforms with fewer and fewer assets available for liquidation and distribution to any other than secured creditors. The costs of

administration in increasingly complex and prolonged cases also has multiplied and threatens the economic recoveries of unsecured creditors. In light of these factors, the ability of bankruptcy trustees and others in control of the process to recover assets disposed of fraudulently or preferentially prior to bankruptcy or to recover for breaches of contract or other non-bankruptcy claims takes on an outsized importance and is essential for unsecured creditors to realize anything on their claims.

The Ninth Circuit held that 28 U.S.C. § 157 was not an obstacle to the power of a bankruptcy court to enter proposed findings of fact and conclusions of law in "non-final core proceedings." Pet. App. pp. 23a-26a. The *Amici States* agree. The court at that point was not dealing with the issue (discussed later) of whether parties could consent to a *final* judgment; rather, it was dealing only with the relatively modest question of whether the bankruptcy court had *any* power to act under the express language of section 157. As noted, the section states that bankruptcy courts may "hear and determine" *i.e.*, issue final judgments, in *core* proceedings and may issue non-final "proposed findings and conclusions" in *non-core* proceedings. Section 157 does not explicitly authorize the court to enter such proposed findings and conclusions in the anomalous context of "non-final core proceedings."

While some courts, such as the Seventh Circuit in *Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751 (7th Cir. 2013), have concluded that this Court's analysis in *Stern* is so far-reaching that they must oust bankruptcy courts from *any* trial jurisdiction

with respect to such actions, the *Amici States* disagree. As the Ninth Circuit held, *Stern* did not intend to impose such a dramatic and far-reaching contraction of the bankruptcy court's authority. To the contrary, this Court emphasized that it did not view its actions as "meaningfully chang[ing] the division of labor in the current statute," and that the question it was resolving was a "narrow one." *Stern*, 131 S. Ct. at 2620. As a result, nearly every court to have considered this issue has held that the division of authority in section 157 was not intended to preclude the bankruptcy courts from handling such "non-final core proceedings' in a way akin to that of non-core matters. *See Heller Ehrman LLP v. Arnold & Porter, LLP (In re Heller Ehrman LLP)*, 464 B.R. 348, 355-56 (N.D. Cal. 2011) (detailing cases).[2]

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[2] The list of matters that are core is non-exclusive and the statute also clearly contemplates that the bankruptcy court must determine whether a matter before it is core or non-core. 28 U.S.C. § 157(b)(3). As an alternative to the discussion below, it could also be argued that, once the bankruptcy court has determined under section 157(b)(3) that a matter is one where it is *constitutionally* barred under *Stern* from issuing a final decision, such a conclusion should be treated as necessarily excluding the matter from the list of statutory core proceedings. Such matters are ones where Congress intended that final determinations can be allowed; if that is unconstitutional, then a solution is to excise the particular matter from the listing of core proceeding. Under that approach, then without doing any violence to the statute and consistent with its workings, the court could proceed with the matter under section 157(c), since it is clearly still at least "related to" the bankruptcy and within its subject matter jurisdiction.

With respect to the statutorily non-core claims that are outside the bankruptcy court's authority under Article I to issue final judgments, Congress authorized the bankruptcy courts to make findings and conclusions for submittal to the district court for entry of final judgment. 28 U.S.C. § 157(c)(1) and (2).

Although the Constitution may bar bankruptcy courts from entering final judgments on some matters that Congress had intended be allowed, nothing in *Stern* suggests that this Court's finding of a constitutional violation in that "one isolated respect," *Stern*, 131 S. Ct. at 2621, was meant to preclude bankruptcy courts from exercising the lesser power of issuing a proposed finding of facts and conclusions for *de novo* review in these "non-final core proceedings," just as it could with "non-core" matters that are "non final." The Court specifically noted in *Stern* that Marshall had not argued that the bankruptcy court was barred from hearing the counterclaim filed against him, but only that the district court should enter final judgment thereon. That is precisely the approach adopted here by the Ninth Circuit; the *Amici States* submit it is wholly in accordance with the approach taken by this Court in *Stern*.

Thus, the vast majority of courts have held since *Stern*, in agreement with the Ninth Circuit here, that the authority to hear these matters falls within the bankruptcy court's subject matter jurisdiction over core and non-core matters and that the ability to enter proposed findings and conclusions on these "non-final core proceedings" is a lesser included power of the bankruptcy court to enter final

judgments on such matters as stated in section 157. *See, e.g., Securities Investor Protect. Corp. v. Bernard L. Madoff Inv. Sec., LLC,* 490 B.R. 46, 55-58 (S.D.N.Y. 2013); *Rothroch v. PNC Bank, N.A. (In re Parco Merged Media Corp.),* 489 B.R. 323, 325-26 (D. Me. 2013); *Rosenberg v. Harvey A. Bookstein Corp.,* 479 B.R. 584, 589-91 (D. Nev. 2012); *Kirschner v. Agoglia,* 476 B.R. 75, 82 (S.D.N.Y. 2012); *Official Comm. of Unsecured Creditors of Appalachian Fuels, LLC v. Energy Coal Res., Inc. (In re Appalachian Fuels, LLC),* 472 B.R. 731, 742-43 (E.D. Ky. 2012); *Blixseth v. Brown,* 470 B.R. 562, 571-72 (D. Mont. 2012); *see also Zazzali v. 1031 Exchange Grp. (In re DBSI, Inc.),* 467 B.R. 767, 774-75 (Bankr. D. Del. 2012); *Miller v. Grosso (In re Miller),* 467 B.R. 677, 683-84 (Bankr. D. Mass. 2012).

It is critical that the bankruptcy courts retain this power. Far from protecting either litigants or the system, precluding bankruptcy courts from hearing these "non-final core proceedings" would conflict with the basic principle that bankruptcy is designed for the "honest but unfortunate debtor" by rewarding and encouraging those that simply seek to delay and confound resolution of important portions of the case. This is particularly true with respect to allegations of fraud regarding prebankruptcy transfers in that such a ruling would take even the basic litigation issues in this area away from the bankruptcy courts and load them onto district courts that will be hard-pressed to find time to hear such matters.

In many cases, the primary, if not the only, unencumbered asset of the estate is the right to seek

recovery of preferences and fraudulent conveyances. Similarly, the ability to marshal the debtor's assets, including the right to collect on amounts owed to it, in order to fund payments to creditors has always been a fundamental, *i.e.*, "core," part of the duties of the debtor or its trustee in a bankruptcy proceeding. While, to be sure, as this Court held in *Marathon* and *Stern*, there are constitutional limits on the bankruptcy court's powers in those regards, it would, however, unnecessarily "roil[] the prevailing bankruptcy schema" to hold that the bankruptcy court could play *no* role in such matters. Pet. App. p. 26a.

Nothing in this Court's analysis in *Stern* and its careful noting of the limited scope of the opinion can be read to suggest such a dramatic expansion of its effect. If Congress intended to allow bankruptcy courts to take such action with regard to the relatively less important matters that comprise the statutorily "non-core" issues in the case, it cannot reasonably be assumed that it intended to deny that power to the bankruptcy courts with respect to matters as to which it had tried to accord them full, unencumbered powers of decision, but which, under the Court's precedents can only be finally determined by an Article III judge.

III. CONSENT TO A BANKRUPTCY COURT'S ENTRY OF A FINAL JUDGMENT IN A FRAUDULENT CONVEYANCE PROCEEDING GIVES THE COURT THE POWER TO ISSUE A FINAL JUDGMENT; HOWEVER, SUCH CONSENT MUST BE CLEAR AND UNEQUIVOCAL.

A. The Ninth Circuit Correctly Ruled That Consent Of The Parties Could Authorize The Bankruptcy Court To Issue A Final Judgment.

The *Amici States* agree with the Ninth Circuit, and the vast majority of other courts that have considered the issue, that bankruptcy courts may exercise full decisional authority with respect to these "non-final core proceedings" if the parties consent. As suggested above, the exercise of that authority is conceptually no different than the authority that has been given to bankruptcy judges to issue final decisions in non-core "related to" matters with the consent of the parties. 28 U.S.C. § 157(c)(2). This has never been questioned by the Court, and nothing in the nature of this new category of "non-final core proceedings" suggests that any different treatment is required.

In that regard, the authority of bankruptcy judges is a close cognate to that of magistrate judges. Section 636(c)(1) of the Federal Magistrate Act provides that "Upon consent of the parties, a . . . magistrate judge . . . may conduct *any or all proceedings* in a jury or nonjury civil matter and *order the entry of judgment* in the case, when

specially designated to exercise such jurisdiction by the district court or court he serves." Magistrate judges, like bankruptcy judges, are not appointed under Article III. They are modestly less insulated from political pressures than bankruptcy judges: they are appointed by the district court, not the Court of Appeals; they serve for only eight years, rather than fourteen; their office can be abolished if the district court decides they are no longer needed; they serve after age 70 only with the annual approval of the district court; and they can be removed by a simple majority vote of the district court judges (all in contrast to bankruptcy judges who serve a fixed term, once appointed). A final decision made by the magistrate judge is then subject to appeal directly to the Court of Appeals, under section 636(c)(3), without even the intermediate level of district court review provided with respect to bankruptcy court decisions.

Yet this Court has reviewed issues relating to the authority of magistrate judges on numerous occasions without finding that there was anything suspect in the authority granted to them under the Act. In *Thomas v. Arn*, 474 U.S. 140, 141-42, 149-50 (1985), for instance, this Court had held that *de novo* review by the district court was needed for a decision by the magistrate judge only if objections were filed. Similarly, in *Peretz* the Court stated, "The statutory provision we upheld in *Raddatz* provided for *de novo* review only when a party objected to the magistrate's findings or recommendations. *See* 28 U.S.C. § 636(b)(1). To the extent *de novo* review is required to satisfy Article III concerns, it need not be exercised

unless requested by the parties." *Peretz v. United States*, 501 U.S. 923, 939 (1991).

In short, there is no meaningful difference for separation of powers purposes between the authority given magistrate judges, and that given to bankruptcy judges. Accordingly, there is no basis for limiting the degree to which consent of the parties can allow for entry of final judgment on these "non-final core" proceedings. In that regard, the *Amici States* disagree with the position recently taken by the Seventh Circuit. *See Sharif,* 727 F.3d at 773. In *Sharif*, after first concluding that the appellant could not waive the issue and, so, could belatedly raise the issue upon appeal, the Seventh Circuit then held that those same concerns also precluded any use of *consent* by the parties to allow the bankruptcy court to adjudicate the matter. The court held that the only remedy – if it were found on remand that the claim was statutorily core – would be for the district court to withdraw the order of reference on the matter and take it over for *de novo* handling. *Id.* at 777.

Such an ossified reading of the scope of the language in section 157 appears to go far beyond what this Court contemplated in *Stern*, could not possibly be what Congress intended, and simply is not dictated by the plain meaning of the statute. The judicial power suffers no erosion by the mere entry of proposed findings and conclusions by a bankruptcy judge. And the use of consent to allow the bankruptcy court to exercise the greater authority of entering a final judgment falls well within the

established case law dealing with "related to" jurisdiction and the authority of magistrate judges.

The *Amici States* urge that this Court expressly hold that bankruptcy courts may enter final judgments in "non-final core proceedings," if the parties consent.

B. The Showing Of Consent Must Be Clear And Unequivocal.

While the *Amici States* agree that consent *can* authorize the bankruptcy court's exercise of power and waive the party's right to insist upon an Article III adjudication, it leaves unanswered the question of how such consent and waiver must be demonstrated. The question of consent to jurisdiction and waiver of Article III protection in a given proceeding is one of great significance to *Amici*. Because Article III provides both personal and structural safeguards, and those safeguards are especially crucial as the benefit of the bargain that the States made in the Plan of the Convention, waiver and consent must be strictly controlled and transparently provided for through legislation or court rule making. *Ad hoc* determinations of consent and waiver through litigation conduct, without clear standards, cannot be the basis for surrender of such an important personal right and such an important part of our nation's constitutional federalism.

While this Court has required clear and unmistakable consent with respect to Article III proceedings in the context of practice before U.S. Magistrates, the court below apparently embraced a lower standard. This Court held in *Roell v. Withrow*

that consent to a trial by a U.S. Magistrate may be implied where "the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge." *Roell*, 538 U.S. at 590.

When the Petitioner in this case agreed to the entry of summary judgment by the bankruptcy court, took no steps to protect its request to withdraw the reference, and did not raise the Article III objection until the eve of its appellate argument before the Ninth Circuit, the court there took the totality of those actions as indicating an implied assent to the entry of final judgment by the bankruptcy court. However, in stating in broad terms that a failure to timely object, standing alone, might be sufficient to find the requisite consent, Pet. App. p. 28a ("a bankruptcy litigant impliedly consents to the bankruptcy court's jurisdiction when he fails to timely object."), the Ninth Circuit's analysis sets a standard that the *Amici States* believe is too low for such an important issue. While, on the facts here, we do not believe the court's ultimate conclusion was necessarily incorrect, the *Amici States* believe it is important that this Court confirm that the standard must be at least as strong as that stated in *Roell*. *Roell* did not rely merely on a generalized failure to object in the face of a statutory provision that allowed for such an objection. Rather, the defendant there was specifically apprised of the need for consent and his right to object and yet still did nothing. The issue in that case was simply whether the failure to follow the very specific provisions of a supplementary rule describing how to register consent or objection would

preclude a finding of consent if the party's actions otherwise appeared to be sufficient to satisfy the statutory requirements that consent be found. *Roell*, 538 U.S. at 588-90 & n.5.

In that regard, the First Circuit permits implied consent by conduct but only where the evidence of consent drawn from such conduct is "affirmative and unambiguous" and is not merely a failure to object. *Sheridan v. Michels (In re Sheridan),* 362 F.3d 96, 101-102 (1st Cir. 2004). Other courts hold that under the Federal Rules of Bankruptcy Procedure a bright-line is required and no implied consent is permitted. *See, e.g., Messer v. Bentley Manhatten, Inc. (In re Madison Bentley Assocs., LLC),* 474 B.R. 430, 436-37 (S.D.N.Y. 2012) ("The test for consent is strict .... Mere implied consent 'appears to be insufficient.'"); *Weisfelner v. Blavatnik (In re Lyondell Chem. Co.),* 467 B.R. 712, 722 (S.D.N.Y. 2012); *In re Nell*, 71 B.R. 305, 311 (D. Utah 1987). By contrast, the Fourth, Sixth, and Eighth Circuits have suggested that implied consent is enough and may be shown simply by a failure to object (at least with respect to non-core proceedings). *See Canal Corp. v. Finnman (In re Johnson),* 960 F.2d 396, 403-404 (4th Cir. 1992); *DuVoisin v. Foster (In re Southern Indus. Banking Corp.),* 809 F.2d 329, 331 (6th Cir. 1987); and *Abramowitz v. Palmer*, 999 F.2d 1274, 1280 (8th Cir. 1993).

The Ninth Circuit's "consent by failure to object" approach seems to lack a predictable standard and instead suggests that a bankruptcy court can find consent whenever the party's conduct bears "considerable indicia of consent." Pet. App. p. 29a.

Such an approach leaves to each bankruptcy court to devise in each instance a formula of its own making. By contrast, in *Roell*, this Court bounded the lower court's latitude with a requirement that any finding of consent be based upon a knowing decision of the party as to whether to exert or waive those personal rights.

While the First Circuit's "affirmative and unambiguous" requirement is better than the Ninth Circuit's more amorphous approach, this Court's clearer standard would provide the most certainty to litigants, while still protecting against the efforts of parties to try to "sand-bag" the proceedings by waiting to raise the issue until they saw whether or not they would win the underlying litigation.

The question of the quantum necessary for a fair and predictable implied consent, consistent with the level of gravity that Article III's personal and structural elements merit, is now squarely before the Court. For the *Amici States*, the Court's approach in *Roell* best addresses it and should be applied to the nearly identical circumstances faced regularly in non-core bankruptcy proceedings. The Bankruptcy Rules[3] do require parties to affirmatively state their position on this issue and that will, in the main, prove sufficient to resolve the matter in the future. There will no doubt be cases where that does not suffice, however, and the *Amici States* believe that a clear

[3] Fed. R. Bankr. P. 7008(a) and 7012(b).

statement as to the minimum indicia of consent will be of tremendous benefit to all parties.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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