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No. 12-1200

IN THE

Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,

Petitioner,

v.

PETER H. ARKISON, CHAPTER 7 TRUSTEE 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 OF THE *TOUSA* LIQUIDATION TRUSTEE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

LAWRENCE S. ROBBINS*
ROY T. ENGLERT, JR.
MICHAEL L. WALDMAN
SARAH W. CARROLL
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
(202) 775-4500
lrobbins@robbinsrussell.com

**Counsel of Record*

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BRIEF OF THE *TOUSA* LIQUIDATION TRUSTEE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae is the Trustee of the TOUSA Liquidation Trust, plaintiff in *3V Capital Master Fund Ltd.* v. *Official Committee of Unsecured Creditors of TOUSA, Inc. (In re TOUSA, Inc.)*, Case No. 10-62035-CIV-Moore (the "*TOUSA* litigation"), the remedial portion of which remains pending in the United States District Court for the Southern District of Florida. The litigation arose from the early 2008 bankruptcy filings of TOUSA, Inc. and its subsidiaries. Shortly before it filed for bankruptcy, TOUSA, Inc. caused certain of those subsidiaries ("the Conveying Subsidiaries") to borrow $500 million, and to grant liens to secure the new debt, in order to resolve claims that other lenders ("the Transeastern Lenders") were asserting against TOUSA, Inc., and for which the Conveying Subsidiaries were not liable. The new borrowing and liens greatly reduced the ability of the Conveying Subsidiaries to repay debts owed to their unsecured creditors. Several months after the bankruptcy filings, the Official Committee of Unsecured Creditors ("the Committee") initiated an adversary

[1] Petitioner and respondent have filed blanket letters of consent to the participation of *amici curiae*. No counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae* or his counsel, has made a monetary contribution to this brief's preparation or submission.

proceeding on behalf of the Conveying Subsidiaries in the United States Bankruptcy Court for the Southern District of Florida. The Committee alleged that the transfer of the liens by the Conveying Subsidiaries to the new lenders was a fraudulent transfer and that the Transeastern Lenders, which were paid with the proceeds of the new loans, should be required to disgorge the money paid to them because they were the entities "for whose benefit" the transfer was made, see 11 U.S.C. § 550(a).

In the bankruptcy court, the Transeastern Lenders failed to raise any objection to the bankruptcy court's authority to enter final judgment on the Committee's claims; indeed, the Transeastern Lenders asserted a counterclaim and third-party claims, which they alleged constituted core proceedings over which the bankruptcy court had jurisdiction. After a thirteen-day trial, the bankruptcy court ruled in favor of the Committee and ordered the Transeastern Lenders to disgorge the money that had been paid out to them.

The Transeastern Lenders appealed to the United States District Court for the Southern District of Florida. They challenged the bankruptcy court's findings on the merits but again said nothing about that court's authority to hear the case. The district court ruled that the Transeastern Lenders were not liable (and that challenges to the remedies ordered by the bankruptcy court were moot in light of that ruling), and the Committee appealed to the Eleventh Circuit. Once again, the Transeastern Lenders' brief said nothing about the bankruptcy court's authority to hear and resolve the Committee's claims. But on November 23, 2011—several months after this Court

decided *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), and several months after the completion of the Eleventh Circuit briefing—the Transeastern Lenders submitted a short letter notifying the court of *Stern*. The Eleventh Circuit reversed the district court's judgment on May 15, 2012. *In re TOUSA, Inc.*, 680 F.3d 1298 (11th Cir. 2012). The Eleventh Circuit later denied the Transeastern Lenders' petition for rehearing en banc. No party sought certiorari. The case was remanded to the district court, where it remains pending for review of the remedies the bankruptcy court ordered.

The Transeastern Lenders have now submitted an *amicus* brief in this case, asserting that the "clear" "implication of the *Stern* decision for fraudulent transfer defendants like the Transeastern Lenders" is that they have a "right to Article III adjudication of the claims against them and the bankruptcy court is without authority to enter a final judgment." Br. of Certain *TOUSA* Defendants 2-3. Although the Eleventh Circuit's decision became final long ago when neither the Transeastern Lenders nor anyone else sought certiorari—and therefore cannot be undone regardless of the outcome of the present case—the Transeastern Lenders assert that the Eleventh Circuit "should have" reviewed the district court's *appellate* ruling in the *TOUSA* case "with deference." *Id.* at 3. They are of course wrong about the proper remedy even if the Eleventh Circuit's decision could now somehow be

undone;[2] and it is too late to undo the Eleventh Circuit's decision in any event. But the Transeastern Lenders' effort to gain some advantage from the Court's decision in this case necessitates a response.

For the reasons expressed in this brief, this Court should hold that petitioner Executive Benefits Insurance Agency ("EBIA") effectively consented to adjudication by the bankruptcy court. But important differences between the present case and the *TOUSA* litigation suggest that the Transeastern Lenders had no valid argument against bankruptcy-court adjudication *even if* EBIA prevails in this case. Unlike EBIA, the Transeastern Lenders asserted a counterclaim and third-party claims in the bankruptcy court—which they alleged constituted a core proceeding over which the bankruptcy court had jurisdiction. Unlike EBIA, the Transeastern Lenders never objected to the proceedings in the bankruptcy court, demanded a jury trial, or denied that it was a core proceeding over which the bankruptcy court had jurisdiction. Also unlike EBIA, the Transeastern Lenders affirmatively *told* the district court on appeal to review the bankruptcy judge's factual findings for clear error and never filed a motion to vacate, even after this Court decided *Stern*. Finally, unlike EBIA, the Transeastern Lenders did not ask this Court to hear their case.

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[2] Because the district court never purported to act in a factfinding capacity, the remedy if the bankruptcy court's judgment were somehow wiped out would be a new district court proceeding in which the bankruptcy court's opinion was treated as a report and recommendation, or at most a new trial.

Because the Transeastern Lenders nevertheless seek to align themselves with petitioner, the issues presented by this case are of great importance to *amicus curiae*, who represents a group of lenders that litigated a highly complex proceeding before the bankruptcy court and the district court, and briefed all of the issues before the court of appeals—all before the Transeastern Lenders expressed the slightest objection to the bankruptcy court's authority. *Amicus curiae* has a strong interest in ensuring that the Transeastern Lenders and other parties do not use *Stern* as a vehicle to try to undo their own litigation decisions after the fact.

INTRODUCTION AND SUMMARY OF ARGUMENT

Stern involved state-law tort claims. Both this case and *TOUSA* involved fraudulent transfer claims governed by the Bankruptcy Code. The parties have not asked the Court to decide whether *Stern* extends to fraudulent transfer claims, and *amicus* therefore assumes *arguendo* that, without litigant consent, a bankruptcy court would lack constitutional authority to enter final judgment on a fraudulent transfer claim. Many lower courts have held, however, that bankruptcy courts retain such authority after *Stern*. See, *e.g.*, *KHI Liquidation Trust* v. *Wisenbaker Builder Servs., Inc. (In re Kimball Hill, Inc.)*, 480 B.R. 894, 906-08 (Bankr. N.D. Ill. 2012) (citing additional decisions to the same effect); 1 Collier on Bankruptcy ¶ 3.02[3][b] (16th ed. rev. 2013) ("In *Marathon* and in *Stern* v. *Marshall*, there is considerable language that could lead one to conclude that avoidance actions, which are created by the Bankruptcy Code, can be heard and

determined by a nontenured judge."). It is therefore important at the outset to note that a bankruptcy court's inability to adjudicate fraudulent transfer claims without litigant consent is merely an assumption, not an issue the Court will resolve in this case.[3]

Even on that assumption, the court of appeals correctly held that Article III permits bankruptcy judges to enter final judgment on fraudulent transfer

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[3] Whether *Stern* would have barred the bankruptcy court in the *TOUSA* litigation from entering final judgment is particularly questionable. The Transeastern Lenders' co-defendants in the adversary proceeding—as well as some of the Transeastern Lenders themselves—filed claims against the bankruptcy estate. See *Langenkamp* v. *Culp*, 498 U.S. 42, 45 (1990) (per curiam) (holding that parties that "filed claims against the bankruptcy estate[] thereby [brought] themselves within the equitable jurisdiction of the Bankruptcy Court"); *Katchen* v. *Landy*, 382 U.S. 323, 332 n.9 (1966) ("[H]e who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure.") (internal citation omitted); see also 11 U.S.C. § 502(d) (requiring courts to "disallow any claim of any entity from which property is recoverable" because of an avoidable transfer). Moreover, as the fraudulent transfer at issue was made for the Transeastern Lenders' benefit, even the nonclaimant lenders were a necessary party to the adversary proceeding. See, *e.g.*, *Official Comm. of Unsecured Creditors of M. Fabrikant & Sons, Inc.* v. *JP Morgan Chase Bank, N.A. (In re M. Fabrikant & Sons, Inc.)*, 394 B.R. 721, 744-75 (Bankr. S.D.N.Y. 2008); 5 Collier on Bankruptcy ¶ 548.11[1][a][i] (16th ed. rev. 2013); cf. *Katchen*, 382 U.S. at 333-34 ("[O]nce it is established that the issue of preference may be summarily adjudicated absent an affirmative demand for surrender of the preference, it can hardly be doubted that there is also summary jurisdiction to order the return of the preference.").

claims with litigant consent and, further, that petitioner gave such consent in this case.

A long line of this Court's cases, dating back at least to the mid-1800s, has bound litigants to their consensual decisions to refer disputes to non-Article III judges for adjudication. Where litigants have been dissatisfied with a referee or special master's findings and conclusions, this Court has refused to upset the consensual referral retroactively. And more recent cases have held explicitly that the right to an Article III adjudication is a personal, forfeitable one. The Court has thus repeatedly upheld entry of final judgment, with express or implied litigant consent, by bankruptcy judges, magistrate judges, and other officials who lack tenure and salary protection under Article III.

Like these other cases, consensual referral of fraudulent transfer claims to bankruptcy judges is entirely consistent with Article III. This Court held in *CFTC* v. *Schor* that litigants may not consent to adjudication by a non-Article III judge if the adjudication will cause "the encroachment or aggrandizement of one branch at the expense of the other." 478 U.S. 833, 850 (1986) (internal citation omitted). The relevant provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984 cause no such encroachment or aggrandizement. To the contrary, the statute merely reallocates authority within the Judicial Branch; it leaves Article III judges with plenary control over the bankruptcy courts' execution of their duties. The Article III courts are responsible for appointing, removing, and paying the expenses of bankruptcy judges. They review bankruptcy judges' legal conclusions de novo.

And 28 U.S.C. § 157 leaves the district courts full control over which cases bankruptcy judges will hear and, indeed, whether bankruptcy judges will hear cases at all. This oversight scheme, which closely mirrors others that this Court has held are consistent with Article III of the Constitution, does not implicate the structural aspects of Article III.

Litigants' consent to entry of judgment by a bankruptcy judge can be either express or implied. In the absence of a clear statutory provision requiring express consent, this Court has consistently held that litigation conduct suffices as consent to non-Article III adjudication. Recognizing implied consent is also consistent with Congress's intent and lessens fairness concerns about "sandbagging."

Finally, petitioner EBIA consented to the bankruptcy court's adjudication of the fraudulent transfer claims at issue in this proceeding. Petitioner concedes that it "registered no objection to the bankruptcy court hearing and deciding the summary judgment motion." Pet. Br. 44. Petitioner seeks relief from that consent on the ground that Ninth Circuit case law foreclosed it from objecting, but this Court found effective consent to action by a non-Article III tribunal in *Peretz* v. *United States*, 501 U.S. 923 (1991), even though Second Circuit case law had foreclosed any objection. To the extent the state of the case law is relevant, petitioner should have been alerted by *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989), and cases in lower courts that the issue was debatable. The Transeastern Lenders were even more clearly on notice that the issue was an open one in the Eleventh

Circuit. See *Gower* v. *Farmers Home Admin. (In re Davis)*, 899 F.2d 1136, 1140 & n.9 (11th Cir. 1990), *cert. denied*, 498 U.S. 981 (1990). In the end, *Stern* itself states the relevant standard: if a litigant "believe[s] that the Bankruptcy Court lack[s] authority to decide his claim," he must "sa[y] so—and sa[y] so promptly." 131 S. Ct. at 2608. Both petitioner and the Transeastern Lenders failed to do so.

ARGUMENT

I. BANKRUPTCY COURTS HAVE CONSTITUTIONAL AUTHORITY TO ENTER FINAL JUDGMENT ON FRAUDULENT TRANSFER CLAIMS WITH THE CONSENT OF THE PARTIES

A. A Long Line Of This Court's Decisions Permit Litigants To Consent To The Entry Of Final Judgment By A Non-Article III Decisionmaker

Petitioner argues at length (Pet. Br. 16-38) that *Stern* limited the authority of bankruptcy courts so stringently that litigant consent (no matter how unequivocal) can *never* be effective to allow bankruptcy-court adjudication of a claim otherwise within *Stern*'s rule. That proposition would represent a radical departure from historical practice that is wholly unwarranted; as this Court observed in *Stern* itself, "our decision today does not change all that much." 131 S. Ct. at 2620.

This Court has long respected litigants' consensual decisions to have non-Article III decisionmakers adjudicate their claims in the first

instance. In *Heckers* v. *Fowler*, 69 U.S. (2 Wall.) 123, 133 (1865), for example, litigants agreed to empower a referee to hear their dispute and further agreed that the referee's determination would "have the same force and effect as a judgment of the court." This Court found it uncontroversial that the referee's final judgment, indeed, bound the parties: "[j]udgment having been entered without objection, and pursuant to the order of the court and the agreement of the parties, it [was] not possible to hold that there [was] any error in the record." *Ibid.* The Court also noted that consensual referral of cases to nonjudicial decisionmakers was an ancient practice—"coeval with the organization of our judicial system" and "well known at common law." *Id.* at 128, 131; see also *Newcomb* v. *Wood*, 97 U.S. 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 . . . . In such an agreement there is nothing contrary to law or public policy.").

Likewise, in *Kimberly* v. *Arms*, 129 U.S. 512 (1889), the parties to a contractual dispute agreed to refer their case to a special master. After receiving the special master's decision, the defendants took issue with his factual and legal conclusions and appealed to a federal court. *Id.* at 522-23. The court "refused" to defer to the special master's findings and instead reevaluated the issues itself, "as presented on the pleadings and proofs, without reference to the [master's] report" as anything more than "the careful and well-considered" advice of a lawyer. *Id.* at 523.

This Court reversed, holding that the lower court should not have reviewed the report de novo.

"[W]hen the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, . . . [the master's] determinations are not subject to be set aside and disregarded at the mere discretion of the court." *Id.* at 524. Parties that have agreed to be bound by a non-Article III adjudicator's conclusions must abide by that decision—and for a district court to review the issues anew, without deference to the adjudicator's findings, would be "to defeat . . . the purpose of the reference, and disregard the express stipulation of the parties." *Id.* at 525; see also *MacDonald* v. *Plymouth Cnty. Trust Co.*, 286 U.S. 263, 267 (1932) (noting, in a bankruptcy case, that "we can perceive no reason why the privilege of claiming the benefits of the procedure in a plenary suit [i.e., proceedings before an Article III judge] . . . may not be waived by consent, as any other procedural privilege of the suitor may be waived, and a more summary procedure substituted").

That understanding—that consensual reference of disputes to non-Article III actors is commonplace, and that litigants are thereafter bound by their decisions to refer such disputes—has continued to pervade the Court's case law. Indeed, virtually all of the cases on which petitioner bases its conception of an absolute right to Article III adjudication in fact carve out litigant consent as an express exception to their holdings.

Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), one of the primary forebears of *Stern*, certainly did so. This Court has more than once described *Northern Pipeline* as standing for the proposition 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) (emphasis added), *quoted in Stern* v. *Marshall*, 131 S. Ct. 2594, 2615 (2011); *id.* at 2624 (Breyer, J., dissenting). Likewise, this Court noted in *CFTC* v. *Schor* that *Northern Pipeline* relied on "the absence of consent to an initial adjudication before a non-Article III tribunal . . . as a significant factor in determining that Article III forbade such an adjudication." 478 U.S. 833, 849 (1986) (also citing *Thomas*, 473 U.S. at 584, 591; *Kimberly*, 129 U.S. 512; and *Heckers*, 69 U.S. (2 Wall.) 123).

Northern Pipeline was a landmark decision regarding the assignment of adjudicatory functions to non-Article III judges, but it left this Court's long history of deference to litigant choice in that area undisturbed. Construing *Northern Pipeline* not long after it was decided, then-Judge Kennedy straightforwardly explained that "all the Justices . . . indicated that consent is important to the constitutional analysis." *Pacemaker Diagnostic Clinic of Am., Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 542 (9th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 824 (1984). Considerations of policy as well as precedent point to that conclusion: "There are compelling reasons for the creation of an infrastructure for determining certain civil cases with the consent of the parties and subject to judicial control." *Id.* at 547.

Petitioner relies heavily on—and quotes selectively from—*Stern*, *Schor*, and *Pacemaker* for the argument that litigants cannot constitutionally consent to the entry of final judgment by a bankruptcy court. But all of those cases relied on findings of litigant consent to *reject* attacks on judgments entered by non-Article III judges. See *Stern*, 131 S. Ct. at 2606-07; *Schor*, 478 U.S. at 857; *Pacemaker*, 725 F.2d at 547.

In particular, *Stern*, although it ultimately accepted an argument that Pierce Marshall had preserved and on that basis held bankruptcy-court adjudication of Vickie Marshall's counterclaim impermissible, first rejected a different argument against bankruptcy-court adjudication of Pierce Marshall's own defamation claim, precisely because "he consented to that court's resolution of his defamation claim (and forfeited any argument to the contrary)." 131 S. Ct. at 2608.[4] In reaching that conclusion, the Court repeatedly stated that parties could consent under § 157—the very section of the statute at issue here—to a bankruptcy judge's resolution of their claims. 131 S. Ct. at 2606-07 (holding that 28 U.S.C. § 157(b)(5), which calls for personal injury torts to be "tried in the district court," is not jurisdictional and is therefore waivable); *id.* at 2607 (describing § 157(c)(2) as permitting parties to consent to entry of final

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[4] Pierce argued that, because his defamation claim could not be adjudicated by the bankruptcy court, that court could not adjudicate Vickie's counterclaim either. *Stern*, 131 S. Ct. at 2606. Had the Court agreed, it would not have reached the Article III issue.

judgment by a bankruptcy judge in a non-core proceeding). The Court placed weight on "'the value of waiver and forfeiture rules' in 'complex' cases," where the risk of litigant "'sandbagging'" "can be particularly severe." *Id*. at 2608.

An especially important context in which this Court's respect for litigant consent has been apparent is adjudication by United States magistrate judges. Magistrate judges, like bankruptcy judges, are not subject to Article III's protections. As explained in more detail below, Article III courts' oversight of magistrates is structured very similarly to their oversight of bankruptcy judges.[5] Nonetheless, with litigant consent, magistrate judges can preside over criminal misdemeanor trials, *Gonzalez* v. *United States*, 553 U.S. 242, 252 (2008); enter final judgment on the merits of entire civil proceedings, *Roell* v. *Withrow*, 538 U.S. 580 (2003); and oversee felony jury selection, *Peretz* v. *United States*, 501 U.S. 923, 937 (1991). The lower courts have authorized magistrate judges to accept guilty pleas and adjudicate defendants guilty. See *United States* v. *Woodard*, 387 F.3d 1329, 1331 (11th Cir. 2004) (noting that "every circuit to have examined these issues" agreed that the practice was consistent with Article III), *cert. denied*, 543 U.S. 1176 (2005). To hold that litigants could not consent to adjudication of their claims by a bankruptcy judge

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[5] Congress apparently emulated the Federal Magistrates Act when it redesigned the bankruptcy system after *Northern Pipeline*. See *Daniels-Head & Assocs.* v. *William M. Mercer, Inc. (In re Daniels-Head & Assocs.)*, 819 F.2d 914, 918 (9th Cir. 1987).

would conflict with a chain of precedents in a context that is nearly indistinguishable from this one.

Seeking nevertheless to distinguish magistrate-judge adjudication from bankruptcy-court adjudication, petitioner contends that the Constitution might permit litigants to consent to non-Article III adjudication, but "only insofar as Congress included a *statutory* requirement of consent." Pet. Br. 28. That argument is flawed for at least two reasons.

First, this Court has upheld consensual non-Article III adjudications even where the applicable statutes said nothing whatsoever about consent. In *Stern*, 131 S. Ct. at 2606-08, as discussed earlier, this Court held that Pierce Marshall consented to bankruptcy-court adjudication of his defamation claim, but the relevant statutory provision, 28 U.S.C. § 157(b)(5), did not mention consent. In *Peretz*, 501 U.S. at 927-28, 942, this Court held that it did not violate Article III for a magistrate judge to preside over criminal jury selection with the defendant's consent, where the statute stated merely that a magistrate could "be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."

Second, there is no reason to think that including a statutory consent provision is what ensures that a non-Article III court's "error will be correctable on appeal" if it proceeds without consent. Pet. Br. 34-35. To the contrary, if this Court said litigant consent was required, non-Article III adjudication without consent would be correctable on appeal, statute or not.

In light of all of these precedents, petitioner swims upstream in trying to deny the relevance of litigant consent in deciding whether an adjudication violates Article III. Petitioner nevertheless assigns talismanic significance to *CFTC* v. *Schor*, which according to petitioner must be read together with *Stern* to hold that any restriction on bankruptcy courts' adjudicative authority implicates the separation of powers and is for that reason non-waivable. Pet. Br. 25-27. We therefore next examine the framework established by that decision.

B. Giving Effect To Litigant Consent In The Present Context Is Consistent With The Framework This Court Developed In *Schor*

In *Schor*, this Court held that it did not violate Article III for the Commodity Futures Trading Commission to assume jurisdiction over common law counterclaims against a party that had waived any objection to adjudication of those claims by the Commission. 478 U.S. at 847-58. First, the Court held that in general "Article III's guarantee of an impartial and independent federal adjudication" is "a personal right" and "is subject to waiver." *Id.* at 848. Second, the Court rejected the argument that the case fell within a category of cases involving structural principles not subject to "cure" by litigant consent. *Id*. at 850-57. The Court identified the kind of case that implicates Article III's non-consentable structural underpinnings as one in which the vesting of adjudicatory power in a non-Article III actor causes "'the encroachment or aggrandizement of one branch at the expense of the other.'" *Id*. at 850 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976) (per

curiam)); see also *Pacemaker*, 725 F.2d at 544 ("The standard for determining whether there is an improper interference with or delegation of the independent power of a branch is whether the alteration prevents or substantially impairs performance by the branch of its essential role in the constitutional system.") (citing *Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977)).[6]

The statutory provision at issue in bankruptcy cases involving alleged fraudulent transfers is not within the category *Schor* identified as problematic. It poses no risk of encroachment of the functions of the Judicial Branch or aggrandizement of the role of another Branch.

The text, structure, and legislative history of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("the 1984 Act") make readily apparent that

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[6] The *Schor* paradigm does not necessarily prevent litigants from waiving or forfeiting even structural rights. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995) ("[T]he proposition that legal defenses based upon doctrines central to the courts' structural independence can never be waived simply does not accord with our cases. Certainly one such doctrine consists of the 'judicial Power' to disregard an unconstitutional statute, see *Marbury* [v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)]; yet none would suggest that a litigant may never waive the defense that a statute is unconstitutional."); see also *Nguyen* v. *United States*, 539 U.S. 69, 88-89 (2003) (Rehnquist, C.J., dissenting) (concluding that criminal defendants had "forfeited" their argument that the participation of a non-Article III judge on a Ninth Circuit panel violated "the structural guarantees embodied in Article III"). The majority in *Nguyen* decided the case on statutory grounds and thus did not address this issue. See *Nguyen*, 539 U.S. at 74-76.

Congress did not enact that law "'for the purpose of emasculating'" Article III courts. *Schor*, 478 U.S. at 850 (quoting *Nat'l Mut. Ins. Co. of D.C.* v. *Tidewater Transfer Co., Inc.*, 337 U.S. 582, 644 (1949)). To the contrary, one of Congress's primary objectives was to give the Article III judiciary as much control as possible over the bankruptcy courts, while still allowing it the benefits of sharing its caseload with specialized judicial officers. See, *e.g.*, S. Rep. No. 98-55, at 16 (1983) (explaining that the bill that became the 1984 Act was designed to "give[] the district court far greater control over the handling of all bankruptcy cases and proceedings" than did the law that this Court invalidated in *Northern Pipeline*). And, true to Congress's intention, the 1984 Act, like the Federal Magistrates Act, leaves the Article III courts with "continuing, plenary responsibility for the administration of the judicial business of the United States." *Pacemaker*, 725 F.2d at 546.

The 1984 Act makes bankruptcy judges "unit[s]" and "officer[s]" of the district court. 28 U.S.C. § 151. Bankruptcy judges are appointed and subject to removal by the Article III judges of their circuits.[7]

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[7] *Stern* rejected this as a basis for finding that bankruptcy courts were a "mere 'adjunct'" to district courts. See 131 S. Ct. at 2619. However, the Court in *Stern* was addressing whether bankruptcy courts were exercising judicial power, a wholly different question from that currently before the Court: whether, for consentability purposes, one branch of government is "encroaching" on another. In conducting the latter analysis, this Court has considered the source of an official's appointment. See, *e.g.*, *Peretz*, 501 U.S. at 937 (finding relevant, for purposes of *Schor*'s "encroachment" inquiry, the fact that

Id. § 152(a)(1), (e). Their salaries track those of Article III judges, and the federal judiciary pays their work expenses. *Id.* § 156. District courts review bankruptcy judges' legal conclusions de novo. See, *e.g.*, *Galam* v. *Carmel (In re Larry's Apartment, LLC)*, 249 F.3d 832, 836 (9th Cir. 2001); cf. *Crowell* v. *Benson*, 285 U.S. 22, 51-54 (1932) (emphasizing, in upholding administrative adjudication of a workers' compensation award, that Article III courts reviewed the agency's legal conclusions de novo).

Importantly, the approval of an Article III judge is a necessary precondition to a bankruptcy court's taking any action whatsoever; the 1984 Act gives district courts absolute control over whether, and to what extent, bankruptcy judges participate in bankruptcy proceedings. Under 28 U.S.C. § 157(a), "[e]ach district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." Applying that statutory language, the judges of a district court could opt to refer all bankruptcy proceedings automatically to bankruptcy judges for initial adjudication, or they could choose never to refer any such proceedings; Congress has left either alternative, or anything in between, open to the courts. See also *id.* § 157(b)(1) (conditioning bankruptcy judges' power to "hear and determine . . . cases" on district court referral under § 157(a)).

"[m]agistrates are appointed and subject to removal by Article III judges").

Likewise, a district court can, on the motion of a party or sua sponte, reassert direct control at any time over a case it has previously referred to a bankruptcy judge. See *id.* § 157(d). If the district courts became dissatisfied with bankruptcy judges' execution of their duties, they could simply stop allowing them to hear cases. There is no threat of the encroachment or aggrandizement of one branch at the expense of another—the characteristic *Schor* identified, 478 U.S. at 850, as taking a case out of the usual rule that Article III rights are personal rights subject to waiver or forfeiture.

As mentioned above, this scheme closely resembles the balance of power that Congress designed—and this Court has repeatedly approved—to govern magistrate judges' participation in judicial proceedings with litigant consent. Indeed, the same factors on which the Court has relied in its magistrate cases are equally present here.

For example, *Peretz* v. *United States*, 501 U.S. 923 (1991), held that Article III permitted a magistrate judge to preside, with the defendant's consent, over jury selection in a felony trial. Citing *Schor*, 478 U.S. at 848, the Court first noted: "We have previously held that litigants may waive their *personal right* to have an Article III judge preside over a civil trial." *Id.* at 936 (emphasis added). Applying the rest of *Schor*'s framework, the Court concluded that such participation by a magistrate judge—who lacks Article III salary and tenure protections—did not implicate "structural protections provided by Article III." *Id.* at 937. The Court noted first that "[m]agistrates are appointed and subject to removal by Article III judges." *Ibid.* The same is

true in the bankruptcy context. See 28 U.S.C. § 152(a)(1), (e). Moreover (and again paralleling the bankruptcy system, see 28 U.S.C. § 157(a)), "[t]he 'ultimate decision' whether to invoke the magistrate's assistance is made by the district court, subject to veto by the parties." *Peretz*, 501 U.S. at 937 (quoting *United States* v. *Raddatz*, 447 U.S. 667, 683 (1980)). Because the district court had plenary control of the process, the Court perceived "no danger that use of the magistrate involves a congressional attempt to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts." *Ibid.* (internal quotations and alterations omitted). Parallel considerations apply here, where Article III courts' control over the bankruptcy courts take this case out of any category that could possibly involve the kind of threats to the Judicial Branch that make consent ineffective.

The conclusion that litigants can validly consent to a bankruptcy judge's entry of final judgment on a fraudulent transfer claim is wholly consistent with this Court's decision in *Schor*. The "allocat[ion]" in 28 U.S.C. § 157 of "authority to enter final judgment between the bankruptcy court and the district court . . . does not implicate questions of subject matter jurisdiction." *Stern*, 131 S. Ct. at 2607. Nor does it implicate the structural concerns that partially underlie Article III, § 1 of the Constitution. To the contrary, it implicates "primarily personal" interests, *Schor*, 478 U.S. at 848, and litigants may by consent forgo any right to initial adjudication of their bankruptcy claims by an Article III judge, see *Stern*, 131 S. Ct. at 2607 (noting that § 157(c)(2) permits parties to "consent to entry of final judgment

by bankruptcy judge in [a] non-core case," and questioning why a neighboring provision "may not be similarly waived").

For all of these reasons, bankruptcy courts' consensual adjudication of fraudulent transfer claims does not implicate the structural values underlying Article III. It fits easily into the framework this Court developed in *Schor*.

II. A PARTY'S CONSENT TO ENTRY OF FINAL JUDGMENT BY A BANKRUPTCY COURT MAY BE EITHER EXPRESS OR IMPLIED

In litigation, consent to a tribunal's exercise of authority can come in many forms. This Court's precedents and other relevant considerations demonstrate that implied consent can be just as effective as express consent.[8]

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[8] Failure to raise an issue in a timely fashion can constitute implied consent, but also can preclude later assertion of the issue under the separate doctrine of forfeiture. See *Stern*, 131 S. Ct. at 2608 ("Given Pierce's course of conduct before the Bankruptcy Court, we concluded that he consented to that court's resolution of his defamation claim (*and forfeited any argument to the contrary*).") (emphasis added). This Court has, of course, repeatedly held that even constitutional defenses bearing on important rights are subject to forfeiture. See, *e.g.*, *United States* v. *Olano*, 507 U.S. 725, 732 (1993). In the Eleventh Circuit, the doctrine of forfeiture is applied strictly. A litigant forfeits any argument he fails to raise in his opening brief, even if the claim was "squarely foreclosed by [Eleventh Circuit] precedent at the time his opening brief was filed," *United States* v. *Smith*, 402 F.3d 1303, 1309-10 (11th Cir. 2005), and even if a relevant Supreme Court decision was issued after he submitted the brief, see *United States* v. *Levy*, 416 F.3d 1273, 1275-79 (11th Cir. 2005). In the *TOUSA*

First, in the absence of a clear statutory command that consent be express, this Court has accepted litigant conduct as a manifestation of consent to non-Article III adjudication. In *Schor*, for example, the Court noted that implied consent—in the form of a decision to seek relief through an administrative proceeding, rather than through a lawsuit in state or federal court—"constituted an effective waiver." 478 U.S. at 849. Likewise, *Stern* relied on Pierce Marshall's "course of conduct before the Bankruptcy Court" to conclude that he had waived his right under 28 U.S.C. § 157(b)(5) to adjudication of his defamation claim (and any counterclaim) before a district judge. 131 S. Ct. at 2607-08. In *Thomas* v. *Arn*, 474 U.S. 140 (1985), the Court approved a Sixth Circuit rule that a litigant would forfeit his right to any Article III review whatsoever of a magistrate judge's findings and conclusions if he did not timely object to them. And the substantial majority of courts agree that implied consent, in the form of "failure to make a timely objection" to proceedings before the bankruptcy judge, authorizes a bankruptcy court to enter final judgment in non-core proceedings. *Canal Corp.* v. *Finnman (In re Johnson)*, 960 F.2d 396, 403 (4th Cir. 1992) (surveying authorities); see also, *e.g.*, *Stern*, 131 S. Ct. at 2606 (referring to a party's ability to "waive *or forfeit* an objection to the bankruptcy court

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litigation, the Transeastern Lenders forfeited their ability to raise a challenge to the bankruptcy's court's authority to adjudicate the fraudulent transfer issue, even if their failure to raise the issue in the lower courts is not construed to be "consent."

finally resolving a non-core claim") (emphasis added); *In re Daniels-Head*, 819 F.2d at 918-19 ("The fact that Congress failed to include any provision for explicit consent in the 1984 Act indicates that consent implied from the parties' actions is sufficient.").

Giving effect to implied consent is also consistent with the legislative intent underlying the 1984 Act. In *Roell*, this Court found in the legislative history of the Federal Magistrates Act "a good pragmatic reason to think that Congress intended to permit implied consent" when it authorized magistrates to enter judgment in civil matters with litigants' sanction: Congress's expressed desire to reduce the backlog of pending civil cases and "thereby 'improve access to the courts for all groups.'" 538 U.S. at 588 (quoting S. Rep. No. 96-74, at 4 (1979)). Just so here. In its deliberations on the 1984 Act, Congress focused on "the crucial need for speed in bankruptcy cases and the district court's historical lack of interest in and neglect of bankruptcy cases," along with "the volume of bankruptcy cases and the need for expedition in [those] cases." H.R. Rep. No. 98-9, at 7-8 (1983). The Senate Report explained that the bill that became the 1984 Act gives "the parties themselves" "greater control . . . to determine the forum" in which their claims will be litigated; a party "may . . . consent to a bankruptcy judge" handling non-core proceedings "*and does so by not moving to have that proceeding recalled*." S. Rep. No. 98-55, at

17 (1983) (emphasis added).[9] Demanding a formal expression of consent where the statute includes no such requirement would contravene Congress's will.

Finally, to hold that parties can impliedly consent to bankruptcy court adjudication is superior as a matter of fairness. "Inferring consent in these circumstances . . . checks the risk of gamesmanship by depriving parties of the luxury of waiting for the outcome before denying the [bankruptcy] judge's authority." *Roell*, 538 U.S. at 590. This case exemplifies the concerns this Court has frequently expressed regarding litigant "sandbagging." It would be acutely unfair to let a party litigate an entire proceeding without objection, through multiple levels of judicial review, and then, after he loses on the merits, finally take from his back pocket a challenge to the bankruptcy judge's authority. The unfairness would be particularly serious in *TOUSA*, where longstanding circuit case law had highlighted the question of bankruptcy court authority since well before the *TOUSA* case was even filed. See *Gower* v. *Farmers Home Admin. (In re Davis)*, 899 F.2d 1136, 1140 & n.9 (11th Cir. 1990), *cert. denied*, 498 U.S. 981 (1990). Litigants like EBIA and the Transeastern Lenders should not be permitted to take a second shot at cases they lose on the merits by challenging bankruptcy judges' authority only after

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[9] See also *S.G. Phillips Constructors, Inc.* v. *City of Burlington (In re S.G. Phillips Constructors, Inc.)*, 45 F.3d 702, 705 (2d Cir. 1995) (explaining that when it passed the 1984 Act "Congress realized that the bankruptcy court's jurisdictional reach was essential to the efficient administration of bankruptcy proceedings").

they lose. Cf. *Stern*, 131 S. Ct. at 2608 ("Pierce repeatedly stated to the Bankruptcy Court that he was happy to litigate there. We will not consider his claim to the contrary, now that he is sad.").

III. PETITIONER CONSENTED TO ENTRY OF FINAL JUDGMENT BY THE BANKRUPTCY JUDGE

This case (unlike the *TOUSA* litigation, which went to trial) was decided on summary judgment. Petitioner acknowledges that it "registered no objection to the bankruptcy court hearing and deciding the summary judgment motion." Pet. Br. 44. The existence of consent is therefore quite clear. Petitioner seeks reversal not on the ground that consent did not exist, but on the ground that petitioner should be relieved from the consequences of that consent because of the state of the case law existing in the circuit when petitioner gave its consent. *Ibid.*[10]

This Court has not been hospitable to such arguments. In *Peretz*, at the time the case was tried, the Second Circuit had held that a magistrate judge was authorized to conduct felony *voir dire* even if the

[10] The Transeastern Lenders go further than petitioner. In their *amicus* brief, they assert that the failure to object to adjudication by a non-Article III court cannot be deemed consent to such adjudication unless "the outcome" of a case not yet decided (such as *Stern* at the time of trial in the *TOUSA* litigation) "was so inevitable that any prudent litigant should have anticipated it." Br. of Certain *TOUSA* Defendants 13. Such a standard is tantamount to saying that litigants are excused from raising any argument unless they are guaranteed to win. That cannot be the correct standard.

defendant objected. *United States* v. *Garcia*, 848 F.2d 1324 (2d Cir. 1988), *rev'd sub nom. Gomez* v. *United States*, 490 U.S. 858 (1989), *cited in Peretz*, 501 U.S. at 954 (Scalia, J., dissenting). When *Peretz* (which came from the Second Circuit) was reviewed, however, this Court readily concluded that "[t]his case differs from *Gomez* because petitioner's counsel, rather than objecting to the Magistrate's role, affirmatively welcomed it." 501 U.S. at 932. The Court did not pause to consider whether the petitioner in that case would have had any basis in the case law for objecting. So too here, it is petitioner EBIA's consent, not the reasons for such consent, that matters.[11]

To the extent that the state of the case law at the time of a litigant's consent is relevant, there is significant reason to believe that petitioner EBIA should have been on notice that the argument it did

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[11] Both petitioner EBIA (Pet. Br. 42) and *amicus* Transeastern Lenders (Br. of Certain *TOUSA* Defendants 5, 13) cite as contrary authority *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), but that case is very different. It did not involve consent or objection to proceeding before a particular tribunal. Instead, it involved First Amendment defenses raised in libel litigation. At the time of trial, at least four of *this Court's* cases "indicat[ed] that civil libel actions were immune from general constitutional scrutiny." 388 U.S. at 143-144 & n.8 (opinion of Harlan, J.). This Court's willingness to allow a litigant to make "prompt" presentation of a constitutional argument (*id*. at 145)—after a decision of this Court opens up an entire line of argumentation that this Court had previously foreclosed—is a far cry from allowing a litigant to consent to adjudication before a tribunal and later challenge its consent on the ground that circuit precedent would have made such a challenge difficult to win.

not raise had a chance of success—and *ample* reason for the Transeastern Lenders to have been on such notice in the *TOUSA* litigation. *Amicus* will discuss the precedents confronting the litigants in both cases.

Even today, it is not clear (and this Court is not being asked to decide) whether *Stern* extends to cases of alleged fraudulent transfers. See pp. 5-6 & note 3, *supra*. The argument for extending *Stern* from the state-law counterclaims at issue there to fraudulent transfer claims under the Bankruptcy Code, however, is based entirely on this Court's 24-year-old decision in *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989). In that case, the Court held that the petitioners, defendants in the fraudulent transfer action, had a Seventh Amendment right to a jury trial. The Court focused on the same distinction between "private rights" and "public rights" that had featured in its *Northern Pipeline* decision concerning the limits of adjudicatory authority for non-Article III courts. 492 U.S. at 51-55. The Court held that the right to recover a fraudulent conveyance in bankruptcy is "more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions." *Id*. at 55.

Although the ultimate merits of the argument remain debatable to this day, *Granfinanciera* clearly flagged the Article III issues surrounding bankruptcy courts' adjudication of fraudulent transfer claims. The Court in *Granfinanciera* also remarked that its "decisions point to the conclusion that, if a statutory cause of action is legal in nature, the question whether the Seventh Amendment

permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders 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. Given that the Court's answer to the first question seemed to be no, litigants who were truly unhappy to be in bankruptcy court had reason to raise the issue there.

Sure enough, both petitioner EBIA and the Transeastern Lenders leaned heavily on *Granfinanciera* when they eventually, belatedly, challenged their respective bankruptcy courts' authority. Long before *Stern*, EBIA relied on *Granfinanciera* in its motion to vacate the bankruptcy court trial date. In the *TOUSA* litigation, the Transeastern Lenders expressed how clearly they thought *Granfinanciera* had flagged the issue. See Petition for Rehearing En Banc of Appellees Transeastern Lenders at 4, *Senior Transeastern Lenders* v. *Official Comm. of Unsecured Creditors (In re TOUSA, Inc.)*, 680 F.3d 1298 (11th Cir. 2012) (No. 11-11071) (contending that *Granfinanciera* "held that a fraudulent transfer action against a non-creditor does not fall within the doctrine allowing 'legislative' courts to resolve cases involving public rights"); *id.* at 5 ("The [*Stern*] Court . . . concluded that the common law tort claim, *like the fraudulent transfer claim at issue in Granfinanciera*, was 'the very type of claim that . . . must be decided by an Article III court.'") (quoting *Stern*, 131 S. Ct. at 2616) (emphasis added). As EBIA's and the Transeastern Lenders' own arguments show, *Granfinanciera* provided ample

notice that Article III might limit bankruptcy judges' authority.

If EBIA or the Transeastern Lenders needed further assurance, however, they could have looked to courts around the country, some of which had squarely held that bankruptcy courts lacked authority to enter final judgment on fraudulent transfer claims. See, *e.g.*, *McFarland* v. *Leyh (In re Tex. Gen. Petroleum Corp.)*, 52 F.3d 1330, 1336-37 (5th Cir. 1995) (holding that a fraudulent transfer litigant has a waivable Article III right to a district court trial); *Zahn* v. *Yucaipa Capital Fund (In re Almac's, Inc.)*, 202 B.R. 648, 659 (D.R.I. 1996) (concluding, based on *Granfinanciera* and other cases, "that the power to enter a final decision over [avoidance claims in bankruptcy] must rest with an Article III tribunal"). Many other courts had flagged the issue as a close one. In fact, Eleventh Circuit precedent, which governed the *TOUSA* litigation, explicitly questioned whether bankruptcy courts could enter final judgment on fraudulent transfer claims in the absence of litigant consent. See *In re Davis*, 899 F.2d at 1140 & n.9. Nonetheless, the Transeastern Lenders made no objection.

Early in the *EBIA* and *TOUSA* litigation, the Ninth Circuit's opinion in *Marshall* v. *Stern*, 600 F.3d 1037 (9th Cir. 2010), further increased the issue's salience. Although the Ninth Circuit's reasoning did not match this Court's, the Ninth Circuit's focus on the demands of Article III and the end result it reached—that the bankruptcy court lacked authority to enter final judgment on a claim despite the claim's statutory designation as "core"—signaled that the issue was subject to challenge. But

even then, neither EBIA nor the Transeastern Lenders raised the issue.

As for conduct constituting consent to litigate in the bankruptcy court notwithstanding that notice, all that is required (in the absence of a statutory provision requiring otherwise) is appearance before the bankruptcy judge "without expressing any reservation" regarding litigation there. *Roell*, 538 U.S. at 586; see also *Schor*, 478 U.S. at 849 ("Schor's election to forgo his right to proceed in state or federal court on his claim and his decision to seek relief instead in a CFTC reparations proceeding constituted an effective waiver.").

Both petitioner and the Transeastern Lenders easily meet this standard. The *TOUSA* litigation provides a particularly dramatic example: Despite all of the signals that bankruptcy courts' authority was open to challenge, and despite Eleventh Circuit case law explicitly advising the Transeastern Lenders that they might not have to litigate in bankruptcy court, see *In re Davis*, 899 F.2d 1136, they readily argued their case—and even asserted a counterclaim and third-party claims—there. They did not deny the Committee's allegations that it was a core proceeding over which the bankruptcy court had jurisdiction, and, in connection with the counterclaim and third-party claims, they affirmatively alleged that it *was* such a proceeding. They argued for application of the clear-error standard on appeal to the district court, and they notified the Eleventh Circuit of *Stern* only in a letter submitted five months after this Court issued its decision. In fact, they have scarcely mentioned *Stern* even in their now-pending briefs to the district court on remand. *Stern* itself states the

consequences of a failure to object to the adjudicatory authority of a bankruptcy court: if a litigant "believe[s] that the Bankruptcy Court lack[s] authority to decide his claim," he must "sa[y] so—and sa[y] so promptly." 131 S. Ct. at 2608. Litigating one's case without objection, as both the Transeastern Lenders and EBIA did, falls far short of that requirement.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

LAWRENCE S. ROBBINS*
ROY T. ENGLERT, JR.
MICHAEL L. WALDMAN
SARAH W. CARROLL
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
(202) 775-4500
lrobbins@robbinsrussell.com

**Counsel of Record*

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