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.

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether litigation conduct reflecting an implied consent to the entry of final judgment by a bankruptcy judge may waive the right to have certain fraudulent-conveyance claims adjudicated only by an Article III court.

2. Whether a bankruptcy judge has statutory authority to issue proposed findings of fact and conclusions of law, subject to a district court's *de novo* review, regarding a fraudulent-conveyance claim filed by the estate against a noncreditor.

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in this case because the Court's decision is likely to affect the allocation of authority between bankruptcy and district courts in the disposition of bankruptcy cases. That interest arises in part because United States Trustees—who are Department of Justice officials appointed by the Attorney General—are charged with supervising the administration of bankruptcy cases. See 28 U.S.C. 581-589a; see also 11 U.S.C. 307 ("The United States trustee may raise and may appear and be heard on any issue in any [bankruptcy] case or proceeding"). In addition, Congress has provided that, even in non-core proceedings, a bankruptcy judge may enter final judgment

"with the consent of all the parties to the proceeding." 28 U.S.C. 157(c)(2). The constitutionality of that provision depends on whether litigant consent can authorize a bankruptcy judge's exercise of powers that would otherwise be reserved for an Article III decisionmaker.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 1 of the United States Constitution provides:

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

Pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-14a.

STATEMENT

1. Since the enactment of the Bankruptcy Reform Act of 1978 (1978 Act), Pub. L. No. 95-598, 92 Stat. 2549, bankruptcy judges have been appointed to serve 14-year terms. See 28 U.S.C. 152(a)(1); 28 U.S.C. 152 (Supp. IV 1980). Bankruptcy judges therefore are not Article III judges, although they are "judicial officers of the United States district court," are appointed by the courts of appeals, and are removable for cause only by judicial councils. 28 U.S.C. 152(a)(1) and (e).

In *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), this Court invalidated aspects of the 1978 Act that vested in bankruptcy judges the power to enter final judgments in "a wide variety of

cases involving claims that may affect the property of the [bankruptcy] estate." *Id.* at 54 (plurality opinion). Because it did not produce a majority opinion, *Northern Pipeline* "establishe[d] only 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).

Congress responded to *Northern Pipeline* by enacting the Bankruptcy Amendments and Federal Judgeship Act of 1984 (1984 Act), Pub. L. No. 98-353, 98 Stat. 333. The 1984 Act vests original (and sometimes exclusive) jurisdiction over all bankruptcy cases and related civil proceedings in federal district courts. 28 U.S.C. 1334(a) and (b). It provides, however, that a district court may refer such a case or proceeding to a bankruptcy judge in its district and may, at any time, withdraw such a reference "in whole or in part," either "on its own motion or on timely motion of any party." 28 U.S.C. 157(a) and (d).

In prescribing procedures for bankruptcy judges, the 1984 Act distinguishes between "[c]ore" and "[n]on-core" proceedings. 28 U.S.C. 157(b)(2) and (4). The definition of core proceedings includes, as relevant here, "proceedings to determine, avoid, or recover fraudulent conveyances." 28 U.S.C. 157(b)(2)(H). When the reference has not been withdrawn in a core proceeding, the bankruptcy judge may "enter appropriate orders and judgments," which are subject to appellate review in the district court. 28 U.S.C. 157(b)(1), 158 (2006 & Supp. V 2011). In a non-core proceeding, by contrast, the bankruptcy judge may exercise a similar authority only "with

the consent of all the parties to the proceeding." 28 U.S.C. 157(c)(2). Absent such consent, the bankruptcy judge may "hear" a non-core proceeding and "submit proposed findings of fact and conclusions of law to the district court," which may then enter "any final order or judgment" after "de novo" review in light of the parties' "timely and specific[] object[ions]." 28 U.S.C. 157(c)(1).

In *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), the Court concluded that Section 157 grants too much authority to bankruptcy judges in at least some core proceedings. The 1984 Act identifies, as one category of "[c]ore proceedings," "counterclaims by the estate against persons filing claims against the estate." 28 U.S.C. 157(b)(2)(C). The Court in *Stern* held that, when a creditor has objected to bankruptcy-court adjudication of a debtor's counterclaim against it, the bankruptcy judge lacks authority under Article III to enter final judgment on the counterclaim if the counterclaim is founded on state law and its resolution would require factual and legal determinations that would not otherwise be made in the course of resolving objections to the creditor's proof of claim. *Id.* at 2608-2620. The Court relied in part on its prior decision in *Granfinanciera* v. *Nordberg*, 492 U.S. 33 (1989), which the *Stern* Court described as concluding that "Congress could not constitutionally assign resolution of the fraudulent conveyance action to a non-Article III court." 131 S. Ct. at 2614 n.7. The Court explained that its "removal of [such] counterclaims * * * from core bankruptcy jurisdiction" would not "meaningfully change[] the [statutory] division of labor" between district and bankruptcy judges. *Id.* at 2620.

2. This case is an adversary proceeding arising out of the chapter 7 bankruptcy of Bellingham Insurance

Agency, Inc. Pet. App. 1a, 5a-6a. Respondent is the chapter 7 trustee, who sought to recover for the estate (as relevant here) transfers that Bellingham had made to petitioner when Bellingham was already insolvent. *Ibid.* Respondent's May 31, 2008, complaint in the bankruptcy court alleged that the transfers were fraudulent conveyances under federal and state law (J.A. 65-66, 70-71) and, in the alternative, that petitioner was liable for Bellingham's debts because petitioner was the mere continuation of Bellingham under a different name (J.A. 73). The complaint also alleged that the matter was a "core proceeding" under 28 U.S.C. 157(b)(2). J.A. 50 (¶ 2.1).

On August 2, 2008, petitioner filed its answer to the complaint. J.A. 79-94; Pet. App. 78a n.1. Federal Rule of Bankruptcy Procedure 7012(b) states that "[a] responsive pleading shall admit or deny an allegation that the proceeding is core or non-core." Rule 7012(b) further provides that "[i]f the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge." With respect to paragraph 2.1 of respondent's complaint, which alleged that the proceeding was a core proceeding, petitioner's answer stated that "[t]o the extent that a response is required, [petitioner] denies." J.A. 80. Petitioner's answer also stated that petitioner "elect[ed]" for a jury trial "on all issues upon which it is entitled to a jury" and did not "consent to have said jury trial in [the Bankruptcy] Court." J.A. 94. Petitioner's answer did not otherwise specify, as Rule 7012(b) requires, whether petitioner did or did not "consent to entry of final orders or judgment by the bankruptcy judge."

In December 2009, after the case was calendared for trial by the bankruptcy judge, petitioner filed a motion to vacate the trial date, in which it asserted that it was entitled to a jury trial in the district court under *Granfinanciera*. Pet. App. 79a. Petitioner added that the Ninth Circuit had "further clarified that" the bankruptcy court's jurisdiction could continue during "pretrial proceedings." *Ibid.* The district court construed the motion as one to withdraw the reference to the bankruptcy court, and it requested a joint status report from the parties about remaining pretrial proceedings. J.A. 104. On March 12, 2010, all parties except petitioner signed a joint status report, which noted that respondent would file a motion for summary judgment against petitioner. Pet. App. 74a, 76a. Petitioner did not object or file a separate report. The district court issued an order noting that the parties "wish to have additional time to complete discovery, to file dispositive motions in the bankruptcy court, and to attend a settlement conference before a bankruptcy judge." *Id.* at 62a-63a. The district court therefore postponed until June 2010 a determination of whether to withdraw the reference to the bankruptcy court. *Id.* at 63a.

On March 17, 2010, respondent filed its promised motion for summary judgment in the bankruptcy court. J.A. 106-107. Petitioner filed its opposition on April 9, 2010, contending that relevant "factual claims" were "highly controverted," J.A. 144, but raising no argument against disposition of the motion by the bankruptcy judge, J.A. 143-168.

After a hearing, J.A. 181-185, the bankruptcy judge granted respondent's motion for summary judgment, holding both that petitioner's transfers to the debtor had been "fraudulent in nature" and that petitioner "is a

mere successor of the debtor," Pet. App. 56a-57a. On May 27, 2010, the bankruptcy court entered final judgment in the amount of $389,474.36, plus post-judgment interest. *Id.* at 54a-55a.

3. Petitioner appealed the entry of summary judgment to the district court, J.A. 186, which affirmed, Pet. App. 41a-52a. Conducting *de novo* review, the district court held that petitioner had "failed to show any dispute of material fact in the record that could possibly support the reversal of the Bankruptcy Court's order." *Id.* at 45a, 51a; see *id.* at 46a (no "dispute of fact" with respect to claim under 11 U.S.C. 548(a)(2)); *id.* at 49a (no "genuine issue of material fact" with respect to state-law fraudulent-transfer claim); *id.* at 50a ("no error in the Bankruptcy Court's conclusion" that petitioner was a "'mere continuation' of" the debtor).

4. Petitioner appealed to the United States Court of Appeals for the Ninth Circuit. J.A. 39. Shortly before its reply brief was due, petitioner filed a motion to dismiss for lack of jurisdiction. J.A. 41. In that motion, petitioner invoked this Court's then-recent decision in *Stern*, *supra*, and contended for the first time that the bankruptcy judge had been constitutionally proscribed from entering final judgment on respondent's fraudulent-conveyance claim. Pet. App. 7a-8a. The court of appeals invited briefs from amici curiae addressing whether bankruptcy judges may enter final judgments in fraudulent-conveyance actions and, if not, whether they could "hear the proceeding and submit a report to and recommendation to a federal district court." *Id.* at 8a n.3. In response to that invitation, the United States filed a brief contending that, in the absence of consent, a bankruptcy judge may not enter final judgment in a fraudulent-conveyance action brought against noncredi-

tors; that petitioner's litigation conduct nevertheless showed that it had waived any Article III objections to bankruptcy-judge adjudication here; and that, even apart from the question of consent, any constitutional harm had been cured by the district court's *de novo* review. Gov't C.A. Amicus Br. 12-14, 15-20, 20-22.[1]

5. The court of appeals affirmed. Pet. App. 1a-40a.

a. The court of appeals recognized that bankruptcy judges have statutory authority to enter final judgments in fraudulent-conveyance proceedings. Pet. App. 8a-9a. It held, however, that, in light of this Court's decisions in *Granfinanciera* and *Stern*, that statutory authorization is inconsistent with Article III when a fraudulent-conveyance claim is asserted against "noncreditors to the bankruptcy estate." *Id.* at 23a.

b. The court of appeals then turned to "a subsidiary question: whether bankruptcy judges may constitutionally hear such claims, and prepare recommendations for de novo review by the federal district courts." Pet. App. 23a. The court recognized that 28 U.S.C. 157 does not "explicitly authorize bankruptcy judges to submit proposed findings of fact and conclusions of law in a core proceeding," though it grants them that power in non-core proceedings. Pet. App. 23a-24a. The court concluded, however, that bankruptcy courts are not "impotent to address fraudulent conveyance proceedings" because Congress intended to vest bankruptcy courts "with as much adjudicatory power as the Constitution

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[1] On the day the Department of Justice filed its brief in the court of appeals, the Attorney General informed Congress, in accordance with 28 U.S.C. 530D, of the Department's position that bankruptcy judges' authority under 28 U.S.C. 157(b)(2)(H) to issue final judgments in fraudulent-conveyance actions is unconstitutional in certain applications.

will bear." *Id.* at 24a. The court accordingly held that the statutory authority to "'hear and determine' a proceeding surely encompasses the power to hear the proceeding and submit proposed findings of fact and conclusions of law to the district court." *Ibid.* The court also noted that this Court in *Stern* had given tacit approval to the decision of the district court in that case to treat a bankruptcy court's judgment as "proposed[,] rather than final," and to review that decision *de novo*. *Id.* at 25a (quoting *Stern*, 131 S. Ct. at 2602) (alteration in original).

c. The court of appeals further concluded that, even when "defendants in fraudulent conveyance suits have a right to a hearing in an Article III court, that right is waivable." Pet. App. 26a. The court found that "[t]he waivable nature of the allocation of adjudicative authority between bankruptcy courts and Article III courts is well established." *Id.* at 26a-27a. It noted, *inter alia*, this Court's explanation that "Article III, § 1's guarantee of an independent and impartial adjudication * * * serves to protect primarily personal, rather than structural, interests." *Id.* at 27a (quoting *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 848 (1986)).

Turning to the facts of this case, the court of appeals held that petitioner's "conduct bore considerable indicia of consent." Pet. App. 29a. The court observed that, although petitioner had invoked its right to a jury trial in the district court, it had "elected not to pursue a hearing in an Article III court," and had instead "petitioned the district court to stay its consideration of the motion to withdraw the reference to give the bankruptcy court time to adjudicate [respondent's] motion for summary

judgment." *Ibid.*[2] The court further observed that, even after the bankruptcy judge entered judgment, petitioner had "abandoned its motion to withdraw the reference"; had never argued during its appeal to the district court that the bankruptcy court had lacked authority to enter final judgment; and had not raised that argument in the court of appeals until "the eve of oral argument." *Id.* at 29a-30a. "Because [petitioner] waited so long to object, and in light of its litigation tactics," the court of appeals had "little difficulty concluding that [petitioner] impliedly consented to the bankruptcy court's jurisdiction." *Id.* at 30a.

The court of appeals addressed and rejected two arguments against allowing consent to be inferred. First, although bankruptcy rules contemplate only express consent, the court found this situation parallel to that in *Roell* v. *Withrow*, 538 U.S. 580 (2003), in which this Court held that implied consent was sufficient to support a magistrate judge's civil jurisdiction under 28 U.S.C. 636(c)(1). Pet. App. 31a-32a. Second, while recognizing that this case was already pending in the Ninth Circuit when this Court decided *Stern*, the court of appeals found that petitioner "had ample reason to be alert to the possible jurisdictional problem." *Id.* at 32a. The court explained that the Ninth Circuit's own opinion in *Stern* had been issued on March 19, 2010, while petitioner's motion to withdraw the reference was still pending before the district court, and that petitioner was well aware of *Granfinanciera*, "which thoroughly foreshadowed the result in *Stern*." *Ibid.* Finally, the court noted

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[2] In support of this statement, the court of appeals cited the district court order (reprinted at Pet. App. 62a-63a) that was filed two weeks after the parties' joint status report contemplating further pretrial proceedings in the bankruptcy court.

that petitioner should not be permitted to sandbag the court by "fully litigat[ing] the fraudulent conveyance action before the bankruptcy court and the district court, without so much as a peep about Article III," and only later "assert[ing] a right it never thought to pursue when it still believed it might win" on the merits. *Id.* at 33a.

d. Having found that petitioner had consented to the bankruptcy judge's entry of judgment, the court of appeals turned to the merits of the summary-judgment decision. The court concluded that the bankruptcy court had correctly granted judgment for respondent on its federal- and state-law fraudulent-conveyance claims and on the question of petitioner's "successor liability." Pet. App. 33a-39a.

SUMMARY OF ARGUMENT

I. Although petitioner was constitutionally entitled to have the fraudulent-conveyance claim against it decided by an Article III judge, petitioner's right to that decisionmaker was a waivable personal right. The division of authority between a district court and its bankruptcy judge does not implicate subject-matter jurisdiction. Both in the bankruptcy context and in cases involving delegations of authority to magistrate judges, this Court and the courts of appeals have recognized that litigant consent can authorize the entry of final judgment by a non-Article III judge.

The 1984 Act provides that, even in non-core proceedings, the bankruptcy court may enter final judgment if all parties consent to that approach. In this case, petitioner's consent to entry of judgment by the bankruptcy judge can and should be inferred from petitioner's litigation conduct. Petitioner contends that, in light of adverse circuit precedent in effect at the time of

the bankruptcy-court proceedings, it had no choice but to acquiesce in the bankruptcy court's decision to resolve the summary-judgment motion. In its answer to respondent's complaint, however, petitioner *denied* that the matter was a core proceeding, indicating that it believed it had a right to insist on an Article III decisionmaker. In any event, if petitioner had preferred that the district court resolve the summary-judgment motion, it could have pursued a request to withdraw the reference.

Even if this Court holds that petitioner did not give constitutionally valid consent to entry of judgment by the bankruptcy court, it would be inappropriate to vacate the judgment below. A litigant's failure to assert a timely objection often precludes it from obtaining relief on appeal, even in circumstances where the litigant's acquiescence cannot legitimize the trial court's conduct. Vacatur of the judgment in this case would reward sandbagging, confer an unjustified windfall on petitioner, and unfairly diminish the assets available to pay Bellingham's creditors.

II. In circumstances like these, where the 1984 Act designates a particular matter as a "core" proceeding, but the Constitution entitles a litigant to have judgment entered by an Article III decisionmaker, the bankruptcy court may enter proposed findings of fact and conclusions of law. The 1984 Act states that "[b]ankruptcy judges may hear and determine * * * all core proceedings * * * and may enter appropriate orders and judgments." 28 U.S.C. 157(b)(1). That permissive authorization does not preclude the bankruptcy court in core proceedings from taking lesser steps such as the issuance of proposed findings and conclusions. In any event, the legal effect of this Court's decisions in *Granfinanci-*

era v. *Nordberg*, 492 U.S. 33 (1989), and *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), is to remove the fraudulent-conveyance claim at issue here from core bankruptcy jurisdiction. Under established principles of severability, the claim should therefore be treated, for purposes of the statutory allocation of responsibilities between the bankruptcy and district courts, as a non-core matter. That approach is consistent with the weight of recent lower-court authority, and with many local rules and orders that authorize bankruptcy judges to submit proposed findings of fact and conclusions of law when Article III precludes them from entering final judgment on a particular matter.

ARGUMENT

I. THE RIGHT TO HAVE CERTAIN FRAUDULENT-CONVEYANCE ACTIONS ADJUDICATED BY AN ARTICLE III JUDGE MAY BE WAIVED BY THE PARTIES' EXPRESS OR IMPLIED CONSENT TO ADJUDICATION BY A BANKRUPTCY JUDGE

The court of appeals correctly held that, in the absence of the parties' consent, a bankruptcy judge may not enter final judgment in a fraudulent-conveyance action that is brought against a party who has not filed a claim against the estate. Pet. App. 9a-23a. That conclusion follows from this Court's decisions in *Granfinanciera* v. *Nordberg*, 492 U.S. 33 (1989), and *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011). The square holding in *Granfinanciera* involved only the Seventh Amendment right to a jury trial. See 492 U.S. at 50, 64 n.19. The Court's opinion, however, drew a direct parallel with Congress's ability "to assign adjudication of that cause of action to a non-Article III tribunal." *Id.* at 53. The Court concluded that "a bankruptcy trustee's right to recover a fraudulent conveyance under 11 U.S.C.

§ 548(a)(2) seems * * * 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.

In *Stern*, the Court addressed Article III issues in the context of a counterclaim for tortious interference. 131 S. Ct. at 2604. The Court equated that counterclaim with the fraudulent-conveyance action in *Granfinanciera* and found that the defendant was entitled to insist on entry of final judgment by an Article III judge. *Id.* at 2614-2615. Thus, to the extent that 28 U.S.C. 157(b)(1) and (2)(H) authorize a bankruptcy judge to enter judgment without the parties' consent in a fraudulent-conveyance action against a party that has not filed a claim against the estate, those statutory provisions are inconsistent with Article III.

Because the counterclaim defendant in *Stern* had objected to the bankruptcy court's exercise of jurisdiction over the counterclaim, see 131 S. Ct. at 2607, the only potential ground for inferring consent was the defendant's pursuit of his own claim against the estate. The Court found that inference unwarranted, explaining that the counterclaim defendant "did not truly consent to resolution of [the counterclaim] in the bankruptcy court proceedings" because "[h]e had nowhere else to go if he wished to recover from [the bankrupt's] estate." *Id.* at 2614. The Court in *Stern* did not cast doubt, however, on the established proposition that parties who would otherwise have the right to an Article III decisionmaker may consent to an alternative adjudicator.[3]

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[3] The Court in *Stern* also distinguished a separate line of decisions represented by *Katchen* v. *Landy*, 382 U.S. 323 (1966), and *Langenkamp* v. *Culp*, 498 U.S. 42 (1990) (per curiam), in which the Court has upheld the authority of bankruptcy courts to adjudicate trustees' voidable-preference claims against persons who have filed

A. In The Context Of A Bankruptcy Proceeding, The Right To A Final Adjudication By An Article III Judge Is A Waivable Personal Interest

In *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833, 848 (1986), the Court held that "Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States * * * serves to protect primarily personal rather than structural interests." The Court further explained that, "as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Id.* at 848-849. The Court observed, however, that Article III "also serves as an inseparable element of the constitutional system of checks and balances" by "preventing the encroachment or aggrandizement of one branch at the expense of the other." *Id.* at 850 (internal quotation marks and citations omitted). It recognized that, "[t]o the extent that this structural principle is implicated in a given case, the parties cannot

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claims against the estate. See *Stern*, 131 S. Ct. at 2616-2617. As the Court observed in *Stern*, bankruptcy-court adjudication of such claims is appropriate because the bankruptcy court often must decide whether a voidable preference has occurred in order to determine whether the creditor's own claim should be allowed. See *ibid.* In *Stern* itself, by contrast, disposition of the counterclaim required the bankruptcy court to resolve various issues not implicated by the counterclaim defendant's own claim against the estate. See *id.* at 2617-2618. The rationale articulated in *Katchen* and *Langenkamp*, and subsequently reaffirmed in *Stern*, would also apply to fraudulent-conveyance actions against persons who have filed claims against the estate. That rationale is inapplicable here, however, because petitioner did not file such a claim.

by consent cure the constitutional difficulty." *Id.* at 850-851.

The right to insist on adjudication by an Article III judge in a bankruptcy proceeding is "primarily personal." *Schor*, 478 U.S. at 848. Thus, while petitioner was entitled to insist that the fraudulent-conveyance claim against it be decided by an Article III judge, petitioner could also consent to resolution of that claim by the bankruptcy court.

1. The division of tasks between a district court and its bankruptcy judge does not implicate subject-matter jurisdiction, which is vested in the district court

Petitioner seeks to analogize the Article III question here to questions of subject-matter jurisdiction. Br. 24, 36-37. An Article III court must police the constitutional and statutory boundaries of its subject-matter jurisdiction and cannot exceed them even with the litigants' consent. See, *e.g.*, *Henderson ex rel. Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011); *Capron* v. *Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804). That explains the result in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), and other cases that petitioner invokes (Br. 19-20).

That rationale does not apply here. Petitioner and respondent unquestionably have a "Case[]" or "Controvers[y]" in the sense required by Article III, Section 2, Clause 1. And, with respect to statutory jurisdiction, this Court recognized in *Stern* that Congress's allocation in 28 U.S.C. 157 of "the authority to enter final judgment between the bankruptcy court and the district court * * * does not implicate questions of subject matter jurisdiction." 131 S. Ct. at 2607.

Since the 1984 Act, Congress has vested subject-matter jurisdiction over bankruptcy cases and proceed-

ings in the district courts. See 28 U.S.C. 1334(a) and (b). Bankruptcy judges have been given no jurisdiction of their own; their authority depends entirely on a district court's reference of a case or proceeding within *its* jurisdiction. See 28 U.S.C. 157(a) and (b). And if the district court makes such a reference, the court may withdraw it, in whole or in part, either *sua sponte* or on a party's timely motion. See 28 U.S.C. 157(d). Even when the litigants affirmatively consent to entry of final judgment by a bankruptcy judge, the statute provides only that the district court "may refer" the matter to the bankruptcy court—not that it is obligated to do so. See 28 U.S.C. 157(c)(2). After a bankruptcy court enters judgment, the district court retains the authority to hear an appeal and to set the judgment aside if it is erroneous. See 28 U.S.C. 158(a)(1).[4]

Thus, while both the Constitution and the 1984 Act limit the district courts' authority to seek assistance from bankruptcy judges, those limits do not implicate the subject-matter jurisdiction of either tribunal. Cf. *Peretz* v. *United States*, 501 U.S. 923, 953-955 (1991) (Scalia, J., dissenting) (finding that, where the district court undoubtedly had subject-matter jurisdiction, "[t]he fact that the court may have improperly delegated to the Magistrate a function it should have performed personally goes to the lawfulness of the manner in which

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[4] An appeal to the district court of a bankruptcy judge's final judgment is taken in the same manner as appeals in civil proceedings are generally taken to the court of appeals from a district court judgment. See 28 U.S.C. 158(c)(2). Here, because the bankruptcy judge granted summary judgment, the district court reviewed the judgment *de novo*, considering afresh whether there was a genuine issue of material fact and whether respondent, as movant, was entitled to judgment as a matter of law. Pet. App. 45a.

it acted, but not to its jurisdiction to act"). In such a circumstance, the better analogy for the Article III right is not to subject-matter jurisdiction, but to "a defect in jurisdiction over the person," where waiver is eminently possible. *Pacemaker Diagnostic Clinic of Am., Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 543 (9th Cir.) (en banc) (Kennedy, J.) (drawing that analogy in the context of referrals, with consent, to magistrate judges), cert. denied, 469 U.S. 824 (1984).

2. In bankruptcy and similar contexts, the Court has repeatedly relied on a timely objection to trigger enforcement of a party's right to an Article III decisionmaker

a. As respondent notes (Br. 34), every case in which this Court has found a violation of a litigant's right to an Article III decisionmaker "has involved an objecting defendant forced to litigate its private rights involuntarily before a non-Article III judge." In discussing bankruptcy practice in particular, the Court has repeatedly recognized the importance of a party's objection to a non-Article III decisionmaker. Thus, in *Schor*, the Court explained that "the absence of consent to an initial adjudication before a non-Article III tribunal was relied on as a significant factor in determining [in *Northern Pipeline*] that Article III forbade such adjudication." 478 U.S. at 849; see *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 80 n.31 (1982) (plurality opinion); *id.* at 91 (Rehnquist, J. concurring in the judgment); *id.* at 95 (White, J., dissenting). Similarly in *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), the Court gave the following description of what *Northern Pipeline* had "establishe[d]": "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." *Id.* at 584 (emphasis added).[5]

Most recently, the Court in *Stern* quoted and endorsed that description of *Northern Pipeline*'s holding, saying: "Substitute 'tort' for 'contract,' and that statement directly covers this case." 131 S. Ct. at 2615. The Court offered that endorsement, moreover, in an opinion that was acutely attentive to questions of consent. In upholding the respondent's challenge to the bankruptcy-

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[5] In this regard, the Court's recent decisions are consistent with pre-1978 bankruptcy practice, under which bankruptcy judges' forebears exercised broad powers to adjudicate claims that, in the absence of the parties' consent, would have lain within the district courts' exclusive authority. For instance, under the 1898 Bankruptcy Act, the power to decide bankruptcy matters was divided between district courts and bankruptcy "referees" who were appointed and removable by the district court. See Act of July 1, 1898, ch. 541, §§ 34-39, 30 Stat. 555-556. In *MacDonald* v. *Plymouth County Trust Co.*, 286 U.S. 263 (1932), the Court held that although the statute authorized district courts to decide, in a "plenary" proceeding, a trustee's claim to set aside a voidable preference, a bankruptcy referee could hear and determine such a matter if the parties had consented to a summary disposition. *Id.* at 268; accord *Northern Pipeline*, 458 U.S. at 53 (plurality opinion) ("with consent, the bankruptcy court also had jurisdiction over some 'plenary' matters"). Because *MacDonald* involved a litigant's waiver of a *statutory* right to plenary proceedings before the district court, the Court did not directly address whether consent is sufficient to permit a non-Article III decisionmaker to resolve a claim in instances where the right to district-court determination is founded on the Constitution. *MacDonald* nonetheless demonstrates that, as a matter of historical practice, the right to adjudication of bankruptcy claims by an Article III judge, rather than by a non-Article III adjudicator subject to the district court's appointment and removal, was long regarded as a personal right subject to waiver.

court judgment entered against it on the debtor's counterclaim, the Court in *Stern* explained that the respondent had "not truly consent[ed] to resolution of [the counterclaim] in the bankruptcy court." *Id.* at 2614. By contrast, the Court rejected the respondent's contention that the bankruptcy court lacked authority to adjudicate his own defamation claim against the debtor, explaining that respondent *had* "consented to the Bankruptcy Court's resolution of [that] claim." 131 S. Ct. at 2606. Thus, *Stern* itself refutes the contention (Pet. Br. 26) that "*Stern* conclusively established" the irrelevance of consent to an Article III challenge to a bankruptcy court's entry of final judgment.

b. Petitioner's approach is also at odds with decisions holding that federal magistrate judges may, with the litigants' consent, enter final judgment in cases otherwise committed for resolution to an Article III court. The Federal Magistrates Act, 28 U.S.C. 631 *et seq.*, provides that, "[u]pon the consent of the parties, a full-time United States 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 courts he serves." 28 U.S.C. 636(c)(1). Like bankruptcy judges, magistrate judges are appointed for a limited term and thus lack Article III's tenure protections. See 28 U.S.C. 631(e).

In *Roell* v. *Withrow*, 538 U.S. 580 (2003), the Court held that the litigants' consent, which was inferred from their litigation conduct, was sufficient to permit a magistrate judge to enter final judgment in a damages action under 42 U.S.C. 1983. 538 U.S. at 591. Petitioner attempts (Br. 32 n.4) to distinguish *Roell* on the ground that it decided only a statutory question. But the Court

in *Roell* recognized that the statute was "meant to preserve a litigant's [constitutional] right to insist on trial before an Article III judge." 538 U.S. at 588 (citing *Schor*'s discussion of Article III). And the Court concluded that, under its reading of the statute, "the Article III right is substantially honored," *id.* at 590—which would be a particularly odd thing to say if the Court were turning a blind eye to constitutional concerns.[6]

The courts of appeals have uniformly held, as a constitutional matter, that a magistrate judge may, with the litigants' consent, enter final judgment in a case otherwise reserved to an Article III judge. In *Pacemaker Diagnostic Clinic*, for example, the en banc Ninth Circuit recognized that the right to an adjudication by an Article III judge is "personal to the parties" and "may be waived." 725 F.2d at 542. With respect to separation-of-powers considerations, it further determined that Congress had not attempted to confer expanded subject-matter jurisdiction upon an Article III court, that no other branch was attempting to arrogate power from the judiciary to itself, and that the judiciary maintained constitutionally sufficient supervisory and managerial authority over the magistrate system, including the power to control which matters could be decided by magistrates and to conduct appellate review of magistrates' decisions. *Id.* at 543-546; see 12 Charles Alan Wright et al., *Federal Practice and Procedure* § 3071.1,

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[6] Although petitioner invokes (Br. 32 n.4) the "serious constitutional concerns" referenced in the *Roell* dissent, that opinion recognized that parties may "knowingly and voluntarily waive their right to an Article III judge." 538 U.S. at 595 (Thomas, J.). So did the party who argued that waiver had not occurred on the facts of that case. See Resp. Br. at 28, *Roell*, *supra* (No. 02-69) ("Individuals * * * can choose to forgo their personal right to an Article III judge.").

at 398 n.18 (2d ed. 1997) (citing cases from eleven other circuits upholding the constitutionality of referrals to magistrate judges).

Because the same things are true with respect to bankruptcy judges, petitioner's argument against waiver impugns the constitutionality of the federal system's well-established use of magistrate judges.

3. Bankruptcy-judge adjudications do not raise sufficient separation-of-powers concerns to render the Article III right nonwaivable

In light of *Schor*'s reference to the nonwaivable "structural" component of Article III (478 U.S. at 850-851), petitioner contends (Br. 26) that *Stern* "conclusively established" the nonwaivability of an Article III objection to entry of final judgment by a bankruptcy judge on a matter of private rights, because *Stern* observed that such an act "really [is] a threat to the separation of powers," 131 S. Ct. at 2620. Neither *Stern* nor *Schor* supports that conclusion. As discussed above (pp. 19-20, *supra*), the Court in *Stern* referred to the absence of litigant consent in its restatement of the governing Article III principle, and the Court explained that the respondent there "did not truly consent to resolution" by the bankruptcy judge of the counterclaim against him. *Id.* at 2614-2615. Thus, "[t]he constitutional bar" announced in *Stern* (*id.* at 2619) precluded adjudication of the state-law counterclaim by a non-Article III decisionmaker in the *absence* of the parties' consent.

The impingement on the judiciary in this case is manifestly less threatening than the regime at issue in *Schor*, which was held not to violate Article III even though it permitted an Executive Branch agency to adjudicate common-law counterclaims. 478 U.S. at 850-857. Bankruptcy judges are "judicial officers of the

United States district court," appointed by courts of appeals, and removable for cause by judicial councils. 28 U.S.C. 152(a)(1) and (e). Their authority in any case depends entirely on a reference from a district court, which can be withdrawn, and their decisions are subject to appellate review by the courts. 28 U.S.C. 157(a) and (d); 28 U.S.C. 158 (2006 & Supp. V 2011). Accordingly, their authority to enter final judgment does not risk "the encroachment or aggrandizement of one branch at the expense of the other." *Schor*, 478 U.S. at 850 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976)).

B. Consent To Bankruptcy-judge Adjudication May Be Inferred From Litigation Conduct

In the alternative, petitioner contends that, even if a party may consent to bankruptcy-judge adjudication, such consent must be expressly provided for by statute, Pet. Br. 28-36, or should not otherwise have been found on the facts of this case, *id.* at 38-46.

1. There is no merit to petitioner's contention that consent to a non-Article III decisionmaker is invalid whenever the governing statute does not expressly provide for it. "[I]n the context of a broad array of constitutional and statutory provisions," the Court has not deemed waiver to be "presumptively unavailable absent some sort of express enabling clause," but has "instead * * * adhered to the opposite presumption." *United States* v. *Mezzanatto*, 513 U.S. 196, 200-201 (1995). In *Roell*, the Court was willing to infer consent to magistrate-judge adjudication from the parties' litigation conduct, even though that statute did not prescribe what form consent must take, and even though the relevant rule of civil procedure required express consent in writing. 538 U.S. at 586-587. Because the parties had been made aware of the need for consent and the right

to refuse it, the Court refused to allow them to "sit back without a word about their failure to file the form, with a right to vacate any judgment that turned out not to their liking." *Id.* at 590.

In any event, the 1984 Act *does* reflect Congress's express determination that the consent of the parties provides a sufficient justification for bankruptcy-court resolution of matters that would otherwise be reserved to the district court. Although the bankruptcy court's authority in non-core proceedings is ordinarily limited to submitting "proposed findings of fact and conclusions of law to the district court," 28 U.S.C. 157(c)(1), Congress authorized the bankruptcy court to enter final judgment in such matters "with the consent of all the parties to the proceeding," 28 U.S.C. 157(c)(2). To be sure, Section 157(c)(2) does not literally encompass the fraudulent-conveyance claim at issue here because that claim is defined by the 1984 Act as a core rather than a non-core proceeding. See 28 U.S.C. 157(b)(2)(H). But once it is determined that the claim cannot constitutionally be treated as a core proceeding for purposes of the 1984 Act provisions that allocate power between the bankruptcy and district courts, Section 157(c)(2) provides an appropriate statutory ground for treating the parties' consent as a sufficient basis for the bankruptcy court to act. Cf. pp. 30-32, *infra*.

2. Petitioner contends that its acquiescence in the bankruptcy judge's resolution of the parties' summary-judgment motions did not amount to constitutionally valid consent. That is so, petitioner argues, because the 1984 Act authorizes bankruptcy judges to decide core proceedings (defined to include the fraudulent-conveyance claim at issue here) without the parties' consent, and because any Article III objection to that

mode of proceeding would have been futile in light of then-extant Ninth Circuit precedent. Pet. Br. 38-46.

That explanation for petitioner's acquiescence is inconsistent with petitioner's own prior litigation conduct. In its answer to respondent's adversary complaint, petitioner *denied* respondent's allegation that the matter was a "core proceeding." See J.A. 50, 80; p. 5, *supra*. Under the framework established by the 1984 Act, that statement logically implied that petitioner believed it had the right to grant or withhold its consent to the entry of final orders or judgment by the bankruptcy judge.

In any event, the fact that the bankruptcy judge *could* continue to hear pretrial proceedings under circuit precedent did not mean that it was *required* to do so. If petitioner had preferred that the district court resolve the summary-judgment motions, it could have pursued a motion to withdraw the reference. Pet. App. 29a. Petitioner identifies no reason to assume that such a request would have been futile, see 1 Alan N. Resnick et al., *Collier Bankruptcy Manual* ¶ 3.04[1][b], at 3-38 & n. 4 (4th ed. June 2013) (noting that courts consider a variety of factors in deciding whether to withdraw a reference, including the inability of the bankruptcy court to hold a jury trial without the parties' consent), and its failure to pursue that course reinforces the inference that petitioner was content to have the bankruptcy court resolve the motion. Petitioner's argument suggests that, even if petitioner had expressed an affirmative *preference* for bankruptcy-court resolution of the summary-judgment motion (*e.g.*, if respondent had moved to withdraw the reference and petitioner had opposed that request), its consent to that mode of proceeding would be invalid because then-extant circuit precedent indicated that

petitioner had no valid *constitutional* objection. This Court's precedents do not support that extreme view of the prerequisites to valid consent. Cf. *Brady* v. *United States*, 397 U.S. 742, 757 (1970) (holding that "a voluntary plea of guilty intelligently made in light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty [legal] premise" about the potential penalty).

C. Even If This Court Holds That Petitioner's Litigation Conduct Did Not Amount To Constitutionally Valid Consent To Bankruptcy-judge Resolution Of Respondent's Fraudulent-conveyance Claim, Petitioner Is Not Entitled To Vacatur Of The Judgment Below

For the foregoing reasons, petitioner's litigation conduct provided a constitutionally valid justification for the bankruptcy court's disposition of respondent's summary-judgment motion. But even if this Court concludes otherwise (either on the ground that the parties' consent cannot justify a bankruptcy court's entry of judgment on a matter of private right, or on the ground that petitioner's own conduct did not amount to valid consent), petitioner would not be entitled to relief from the judgment below.

"'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited * * * by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). In some circumstances, the effect of a litigant's agreement is that no error occurs at all. See *id.* at 733 (explaining that, "[b]ecause the right to trial is waivable, and because the defendant who enters a valid guilty plea waives that

right, his conviction without a trial is not 'error'"). In other instances, a trial judge may be legally forbidden to take particular action, even if the parties affirmatively request that he do so. See *Freytag* v. *Commissioner*, 501 U.S. 868, 896 (1991) (Scalia, J., concurring in part and concurring in the judgment) (explaining that, even if both parties urge a judge "to disregard a structural limitation upon his power," "the judge must tell them no"). But even in that category of cases, a litigant's failure to assert a contemporaneous objection will often prevent him from obtaining relief on appeal. See *ibid.* (distinguishing the question whether a litigant's consent has a "*legitimating* effect" from the question whether "a judgment already rendered [must] be set aside because of an alleged structural error to which the losing party did not properly object"); *Stern*, 131 S. Ct. at 2608 (noting the "particularly severe" consequences that arise when a litigant is permitted to "remain[] silent about his objection and belatedly rais[e] the error only if the case does not conclude in his favor") (internal quotation and citation omitted); *Olano*, 507 U.S. at 733-737.

In addition to the considerations that generally support contemporaneous-objection requirements, two aspects of this case would make vacatur of the judgment below particularly inappropriate, even if the Court were to hold that the bankruptcy court was not authorized to enter final judgment under the circumstances presented here. *First*, petitioner's litigation conduct cannot fairly be viewed as a reasonable response to then-prevailing Ninth Circuit precedent. Having denied that respondent's adversary complaint was a "core proceeding," petitioner breached the requirement of Federal Rule of Bankruptcy Procedure 7012(b) that petitioner state whether or not it consented to bankruptcy-judge adjudi-

cation. And when the district court requested a "joint status report" addressing appropriate pre-trial proceedings, J.A. 104, petitioner neither signed the report (to which the other parties agreed) nor offered its own competing views. At the very least, petitioner's disregard for the Rule and the court order contributed to the impression that the bankruptcy court's authority to act was uncontroverted. Vacatur would thus reward precisely the type of sandbagging that contemporaneous-objection rules are intended to discourage.

Second, even without the parties' consent, the bankruptcy court would have been authorized to submit proposed findings of fact and conclusions of law concerning respondent's fraudulent-conveyance claim. See pp. 29-32, *infra*. Since the district court reviewed and sustained the bankruptcy court's summary-judgment ruling under a *de novo* standard, there is no reason to suppose that the district court would have reached a different conclusion if the bankruptcy court had submitted such proposed findings and conclusions rather than entering an appealable final judgment. Because petitioner is very unlikely to have been prejudiced by the bankruptcy court's entry of final judgment, vacatur would confer an unjustified windfall and unfairly diminish the assets available to pay Bellingham's creditors. Cf. *Olano*, 507 U.S. at 734-735 (explaining that, when criminal defendant seeks plain-error review on grounds not preserved at trial, reversal is ordinarily inappropriate unless defendant was prejudiced by the error).

II. A BANKRUPTCY JUDGE WHO CANNOT CONSTITUTIONALLY ENTER FINAL JUDGMENT MAY MAKE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT WILL BE SUBJECT TO THE DISTRICT COURT'S *DE NOVO* REVIEW

Petitioner's second question presented (Pet. i, 46-57) attacks the court of appeals' conclusion that, when "the Constitution prohibits bankruptcy judges from entering a final judgment," those judges have "statutory authority to hear and enter proposed findings of fact and conclusions of law in a fraudulent conveyance proceeding asserted by a bankruptcy trustee against a noncreditor, subject to de novo review by a federal district court," Pet. App. 24a, 26a. Petitioner's objections to that analysis lack merit. Indeed, the Court in *Stern* expressed the expectation that its holding would not "meaningfully change[] the division of labor in the current statute," and it observed with apparent approval that the respondent there "ha[d] not argued that bankruptcy courts are barred from hearing all counterclaims or proposing findings of fact and conclusions of law on those matters." 131 S. Ct. at 2620 (internal quotation marks and citation omitted).

A. The Statutory Text Does Not Preclude The Use Of Proposed Findings Of Fact And Conclusions Of Law In These Circumstances

Congress has generally prescribed two sets of procedures for bankruptcy judges, one of which applies to core proceedings and the other to non-core proceedings. Petitioner contrasts (Br. 50) the authorization to "hear and determine" core proceedings, 28 U.S.C. 157(b)(1), with the power to "submit proposed findings of fact and conclusions of law to the district court" in non-core proceedings, 28 U.S.C. 157(c)(1). Petitioner argues (Br.

48-49, 51-53) that, because the word "determine" in Section 157(b)(1) is uniformly understood to confer the power to enter final judgment, bankruptcy courts in core proceedings lack statutory authority to take the lesser step of submitting proposed findings and conclusions to district courts.

As respondent points out (Br. 66), however, the language of Section 157(b)(1) is permissive, providing that "[b]ankruptcy judges *may hear* and determine all cases under title 11 and all core proceedings * * * *and may enter* appropriate orders and judgments." 28 U.S.C. 157(b)(1) (emphases added). The grant of *permission* both to hear and to determine does not literally foreclose intermediate options, such as the issuance of proposed findings of fact and conclusions of law. In that regard, Section 157(b)(1) differs from a nearby provision, which states that a bankruptcy judge "shall determine" whether or not "a proceeding is a core proceeding." 28 U.S.C. 157(b)(3).

B. Where The Constitution Forbids Bankruptcy Courts From Using The Procedures Applicable To Core Proceedings, Principles Of Severability Warrant The Use Of The Procedures That Apply To Non-core Proceedings

This case does not present the question whether a bankruptcy court may issue proposed findings of fact and conclusions of law in a proceeding that, for *both* statutory *and* constitutional purposes, is appropriately treated as a "core" proceeding. Rather, the question is whether the bankruptcy court may issue such proposed findings and conclusions with respect to a matter that the 1984 Act designates as "core," but that the Constitution requires be decided by an Article III judge. The Court in *Stern* characterized its decision as effecting "the removal of counterclaims such as [the *Stern* debt-

or's] from core bankruptcy jurisdiction." 131 S. Ct. at 2620. If the fraudulent-conveyance claim at issue in this case is similarly "remov[ed] * * * from core bankruptcy jurisdiction" pursuant to Article III, the logical consequence is that it should be treated, for purposes of the 1984 Act's allocation of authority between bankruptcy and district courts, as "a proceeding that is not a core proceeding." 28 U.S.C. 157(c)(1). Under that approach, the bankruptcy court in a case like this one has the same authority to "submit proposed findings of fact and conclusions of law" (*ibid.*) that it has in proceedings that Congress itself has designated as non-core.[7]

That result is consistent with the Court's obligation, when declaring a federal statute unconstitutional, to "sever[] any problematic portions while leaving the remainder intact," unless it is "evident that Congress, faced with the limitations imposed by the Constitution, would have preferred" a different result. *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161, 3162 (2010) (internal quotation marks and citations omitted). Far from effectuating any evident congressional intent, petitioner's contrary approach would create an anomalous statutory gap, preventing bankruptcy courts in matters like this one from exercising the statutory powers that apply to *either* core *or* non-core proceedings. Petitioner's crabbed reading of the statute is contrary not only to established severabil-

[7] The alternative proposed by one amicus brief—that district judges be prohibited from using bankruptcy judges to make proposed findings of fact and conclusions of law in core proceedings, but be allowed to solicit precisely such recommendations from magistrate judges (Robert R. McCormick Found. Amicus Br. 11-12)—seems particularly fanciful, as it disregards bankruptcy judges' specialized knowledge and expertise.

ity principles, but also to the great weight of the lower-court decisions concluding that, "although the Bankruptcy Court may not ordinarily enter final judgment on avoidance claims, it may nonetheless hear the case in the first instance and recommend proposed findings of fact and conclusions of law." *Securities Investor Prot. Corp.* v. *Bernard L. Madoff Inv. Sec. LLC*, 490 B.R. 46, 49 (S.D.N.Y. 2013); see also, *e.g.*, *In re Parco Merged Media Corp.*, 489 B.R. 323, 325-327 (D. Me. 2013) (collecting cases and joining the "emerging consensus"). As petitioner acknowledges, its reading additionally conflicts with many local rules and orders that authorize bankruptcy judges to "hear the proceeding and submit proposed findings of fact and conclusions of law to the district court" when a determination is made that "entry of a final order or judgment by a bankruptcy judge would not be consistent with Article III." Pet. Br. 54 (quoting *In re Standing Order of Reference Re: Title 11*, No. 12-MISC-32 (S.D.N.Y. Jan. 31, 2012)).[8]

To be sure, Congress may ultimately choose to respond to *Stern* in a different or more comprehensive way. See Pet. Br. 56-57. But Congress's "editorial freedom" "to pursue [various] options going forward" (*Free Enter. Fund*, 130 S. Ct. at 3162) does not prevent the courts in the meantime from adopting a minimalist approach that, as here, suffices to cure the constitutional problem without "circumvent[ing] the intent of the legislature." *Ayotte* v. *Planned Parenthood*, 546 U.S. 320, 330 (2006)) (internal quotation marks and citation omitted). The decision below appropriately does that.

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[8] Similar provisions have been incorporated into local bankruptcy rules or standing orders in at least 25 districts. See App., *infra*, 15a-17a.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

1. 28 U.S.C. 157 provides:

Procedures

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

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

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

(A) matters concerning the administration of the estate;

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

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

(D) orders in respect to obtaining credit;

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

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

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

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

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

(J) objections to discharges;

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

(L) confirmations of plans;

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

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

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

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

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

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

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

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

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a pro-

ceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

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

2. 28 U.S.C. 158 (2006 & Supp. V 2011) provides:

Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals[1]

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

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[1] So in original. Probably should be followed by a dash.

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

(3) with leave of the court, from other interlocutory orders and decrees;

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

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

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

(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11.

Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

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

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

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

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

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

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

to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

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

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

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

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

(B) any other party elects, not later than 30 days after service of notice of the appeal;

to have such appeal heard by the district court.

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

(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

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

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

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

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

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

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

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

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

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

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

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

3. 28 U.S.C. 636(b)-(c) (2006 & Supp. V 2011) provides:

Jurisdiction, powers, and temporary assignment

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief[1] made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

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[1] So in original. Probably should be "post-trial".

Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

(2) A judge may designate a magistrate judge to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate judge to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer 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 courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate judge may exercise such jurisdiction, if such magistrate judge meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate judge may again advise the parties of the availability of the magistrate judge, but in so doing, shall also advise the parties that they are free to withhold consent with-

out adverse substantive consequences. Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate judge designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judge under this subsection.

(5) The magistrate judge shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

4. 28 U.S.C. 1334(a)-(b) provides:

Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

APPENDIX B

The following local rules and standing orders have provided that bankruptcy judges may make findings of fact and conclusions of law in a core proceeding under 28 U.S.C. 157(b) when entry of final judgment would be inconsistent with Article III, or that district courts may treat bankruptcy court orders as proposed findings of fact and conclusions of law:

District of Alaska: Local Bankr. R. 9033-2 (Sept. 19, 2012)

Central District of California: General Order No. 13-05, *In re: Reference of Cases and Proceedings to the Bankruptcy Judges of the Central District of California, and Reference of Appeals to the Bankruptcy Appellate Panel* (July 1, 2013)

Northern District of California: General Order No. 24, *Order Referring Bankruptcy Cases and Proceedings to Bankruptcy Judges and Authorizing Bankruptcy Appeals To Be Decided by the Ninth Circuit Bankruptcy Appellate Panel*, Part I, 1.01 (May 15, 2012)

District of Delaware: *In re: Standing Order of Reference Re: Title 11* (Feb. 29, 2012)

Middle District of Florida: *In re: Standing Order of Reference Cases arising Under Title 11, United States Code*, No. 12-MISC-26 (Feb. 22, 2012)

Northern District of Florida: *In re: Standing Order of Reference Regarding Title 11*, No. 95-MC-40111 (June 5, 2012)

Southern District of Florida: Admin. Order 2012-25, *In re Bankruptcy Proceedings* (Mar. 21, 2012)

Middle District of Georgia: *In re: Standing Order of Reference Re: Title 11* (Feb. 17, 2012)

Southern District of Indiana: Local Bankr. R. 9033-1 (Dec. 3, 2012)

District of Kansas: Standing Order 13-1, Re: Title 11 Cases (June 24, 2013)

Western District of Louisiana: SO 1.32, *General Order of Reference* (June 1, 2012)

District of Maryland: Standing Order 2012-05, *In re: Title 11 Proceedings* (July 24, 2012)

District of Massachusetts: Local R. 206 (June 5, 2012)

District of Nevada: Local Bankr. R. 1001(b)(1), 9033.1 (Jan. 1, 2013)

District of New Jersey: *In re: Standing Order of Reference to the Bankruptcy Court under Title 11*, No. 12-1 (Sept. 18, 2012)

Eastern District of New York: Order, *In re: The Referral of Matters to the Bankruptcy Judges* (Dec. 5, 2012) (given nunc pro tunc effect as of June 23, 2011)

Southern District of New York: Local Bankr. R. 9033-1 (Apr. 16, 2012); *In re: Standing Order of Reference Re: Title 11*, 12-MISC-32 (Jan. 31, 2012)

Western District of New York: *In re: Standing Order of Reference Re: Title 11* (Feb. 29, 2012)

Middle District of North Carolina: Local Bankr. R. 9033-1 (Apr. 20, 2012)

Northern District of Ohio: General Order No. 2012-7, *Referral of Title 11 Matters in the U.S. Bankruptcy Court for the Northern District of Ohio* (Apr. 4, 2012)

Southern District of Texas: Local Bankr. R. 9033-1 (Oct. 7, 2013); General Order 2012-6, *In re: Order of Reference to Bankruptcy Judges* (May 24, 2012)

Western District of Texas: *In re: Order of Reference to Bankruptcy Judges* (Oct. 4, 2013)

District of Vermont: Local Bankr. R. 9033-1 (Oct. 15, 2012); *In re: Standing Order of Reference Re: Title 11* (June 22, 2012)

Western District of Washington: Local R. 87(a) (Dec. 1, 2012)

Northern District of West Virginia: *In re: Administration of the United States Bankruptcy Court*, Misc. No. 5:13-MC-12 (Apr. 2, 2013)