No. _____

In the Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY, PETITIONER

v.

PETER H. ARKISON, TRUSTEE, SOLELY IN HIS CAPACITY AS CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), this Court held that Article III of the United States Constitution precludes Congress from assigning certain "core" bankruptcy proceedings involving private state law rights to adjudication by non-Article III bankruptcy judges. Applying *Stern*, the court of appeals for the Ninth Circuit held that a fraudulent conveyance action is subject to Article III. The court further held, in conflict with the Sixth Circuit, that the Article III problem had been waived by petitioner's litigation conduct, which the court of appeals construed as implied consent to entry of final judgment by the bankruptcy court. The court of appeals also held, in conflict with the Seventh Circuit, that a bankruptcy court may issue proposed findings of fact and conclusions of law, subject to a district court's de novo review, in "core" bankruptcy proceedings where Article III precludes the bankruptcy court from entering final judgment. The court of appeals' decision presents the following questions, about which there is considerable confusion in the lower courts in the wake of *Stern*:

1. Whether Article III permits the exercise of the judicial power of the United States by bankruptcy courts on the basis of litigant consent, and, if so, whether "implied consent" based on a litigant's conduct, where the statutory scheme provides the litigant no notice that its consent is required, is sufficient to satisfy Article III.

2. Whether a bankruptcy judge may submit proposed findings of fact and conclusions of law for de novo review by a district court in a "core" proceeding under 28 U.S.C. 157(b).

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

The following list provides the names of all parties to the proceedings below:

Petitioner Executive Benefits Insurance Agency (EBIA) was the appellant in the court of appeals. EBIA has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent Peter Arkison is the Chapter 7 Trustee of the bankruptcy estate of Bellingham Insurance Agency, Inc. (Bellingham), and was the appellee in the court of appeals.

Aegis Retirement Income Services, Inc., Nicholas Paleveda, Marjorie Ewing, Peter Pearce, and Jane Doe Pearce, were co-defendants of EBIA in the adversary proceeding commenced in the bankruptcy court by Arkison as Trustee of Bellingham's estate, but were not subject to the bankruptcy court's judgment that was reviewed by the court of appeals, and were not parties to the proceedings before the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Cases—Continued:

Cases—Continued:

Constitution and statutes:

Miscellanous:

Miscellanous—Continued:

PETITION FOR A WRIT OF CERTIORARI

Petitioner Executive Benefits Insurance Agency (EBIA) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–40a) is reported at 702 F.3d 553. The opinion of the district court (App. 41a–52a) is unreported. The opinion of the bankruptcy court (App. 53a–54a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 2012. On March 1, 2013, Justice Kennedy granted an extension of time to and including April 3, 2013, in which to file a petition for certiorari. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

The notification required by Rule 29.4(b) has been made to the Solicitor General of the United States. Although no court has previously made a certification to the Attorney General pursuant to 28 U.S.C. 2403(a), the United States was informed by the court of appeals of the constitutional issues presented in this case following the decision in *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), and the United States thereafter participated as amicus curiae in the court of appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, section 1 of the 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.

U.S. Const. art III, § 1.

STATUTORY PROVISIONS INVOLVED

Sections 157 and 158 of Title 28 of the United States Code are reproduced in full in an appendix hereto (App. 64a–72a).

STATEMENT OF THE CASE

In *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), this Court held that Congress violated Article III when it vested in bankruptcy courts the authority to enter final judgments on certain state-law counterclaims designated as "core" bankruptcy proceedings under Section 157(b)(2) of Title 28. *Id.* at 2620. At the same time, the Court held that proceedings Congress had designated "core" could not simply be recharacterized as "related to" proceedings, in order to avoid the constitutional defect. *Id.* at 2604–2605. *Stern* left open two questions on which the courts of appeals are now divided. First, under what circumstances, if any, can litigant consent cure an otherwise unconstitutional exercise of the judi-

cial power of the United States by a bankruptcy judge? And second, does the grant to bankruptcy judges of authority to "hear and determine" certain proceedings (including proceedings labeled "core") subject to district court appellate review include the authority to issue proposed findings of fact and conclusions of law subject to de novo adjudication by the district court?

A. The Bankruptcy Court's Entry Of Final Judgment Against EBIA

In 2006, Bellingham Insurance Agency, Inc. (Bellingham) declared bankruptcy, filing a voluntary Chapter 7 petition in the United States Bankruptcy Court for the Western District of Washington. Respondent Peter H. Arkison (Trustee) was appointed trustee of Bellingham's bankruptcy estate, and later commenced an adversary proceeding against non-creditor EBIA and five other defendants. The bankruptcy court's jurisdiction was invoked under 28 U.S.C. 1334 and 28 U.S.C. 157. Among other claims, the Trustee asserted that EBIA had received fraudulent transfers from Bellingham and that EBIA was liable for Bellingham's debts as a successor corporation. See App. 6a.

At the time the Complaint was filed, binding Ninth Circuit precedent specifically held that final adjudication of fraudulent conveyance actions by bankruptcy courts was consistent with Article III. *Duck* v. *Munn (In re Mankin)*, 823 F.2d 1296 (1987), *overruled by* App 15a. Under *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989), however, a defendant in such an action could insist on its right to a jury trial. In its Answer, EBIA demanded a jury trial and expressly indicated that it did not consent to a jury trial before a bankruptcy judge. App. 82a. EBIA renewed its demand for a jury

trial in the district court after the bankruptcy judge set a trial date. App. 77a–80a. The bankruptcy judge referred EBIA's request to the district court, which construed it as motion to withdraw the reference.

In a status report filed with the district court, several parties indicated that the Trustee was about to file a summary judgment motion against EBIA before the bankruptcy court and further requested time to conduct a settlement conference before a bankruptcy judge. App. 74a–75a. EBIA did not join in that status report. App. 76a. Noting that the case was still far from ready for trial, the district court stayed consideration of the motion to withdraw for three months. App. 62a–63a.

While the motion was stayed, the Trustee moved in the bankruptcy court for summary judgment against EBIA on the fraudulent transfer and successor liability causes of action. App. 56a–57a. The bankruptcy judge granted the motion and entered a final, binding judgment against EBIA in the amount of $389,474.36. App. 53a–55a, 57a. The district court thereafter denied EBIA's motion to withdraw the reference and conduct a jury trial for the sole reason that the bankruptcy court had already entered summary judgment against EBIA and no other party sought withdrawal. App. 61a.

B. Appellate Proceedings In The District Court And The Court of Appeals

EBIA appealed the bankruptcy court's final judgment to the district court. The district court indicated that the bankruptcy court's grant of summary judgment was subject to de novo review, but, at the same time, invoked a "substantial evidence" standard in reviewing the bankruptcy court's findings. App. 45a, 50a.

The district court concluded that EBIA had failed to show any error on the part of the bankruptcy court and, on that basis, dismissed EBIA's appeal and affirmed the bankruptcy court's entry of judgment. App. 51a.

EBIA appealed to the Ninth Circuit. After EBIA filed its opening brief, this Court issued its decision in *Stern*, which held that bankruptcy courts lack constitutional authority to enter final judgment in certain "core" proceedings. EBIA thereafter filed a supplemental brief in the court of appeals arguing that, under *Stern*, the bankruptcy judge was constitutionally proscribed from entering final judgment on the Trustee's claims. App. 7a–8a.

Following oral argument, the court of appeals sua sponte invited amicus briefs on two questions:

> 1) Does *Stern v. Marshall*, 131 S. Ct. 2594 (2011), prohibit bankruptcy courts from entering a final, binding judgment on an action to avoid a fraudulent conveyance?
>
> 2) If so, may the bankruptcy court hear the proceeding and submit a report and recommendation to a federal district court in lieu of entering a final judgment?

App. 58a–59a. More than a dozen amici, including the United States, filed briefs in response to the court's invitation. App. 3a–4a.

The court of appeals issued its decision on December 4, 2012. Relying on *Stern* and *Granfinanciera*, the court first overruled its decision in *Mankin*, and concluded that a fraudulent conveyance claim against a non-creditor is subject to Article III and cannot consti-

tutionally be assigned by Congress to a bankruptcy court for final adjudication. App. 15a, 23a.

The court of appeals acknowledged that this holding, though required by *Stern*, "create[d] a gap in [the Bankruptcy Code's] statutory framework" because "[n]owhere does the statute explicitly authorize bankruptcy judges to submit proposed findings of fact and conclusions of law in a core proceeding." See App. 23a–24a. The court recognized that 28 U.S.C. 157(c)(1) grants bankruptcy judges the authority to issue proposed findings of fact and conclusions of law only in a proceeding that is " 'not a core proceeding,' " and further that a fraudulent conveyance proceeding does not fall within Section 157(c)(1) because it is "core" under the statute. App. 24a. The court of appeals determined that the gap should be filled by reading "the power to 'hear and determine' a proceeding" under Section 157(b)(1) to encompass the "more modest power to submit findings of fact and recommendations of law to the district courts." *Ibid.* It reasoned that Congress intended to vest bankruptcy judges with "as much adjudicatory power as the Constitution will bear." *Ibid.*

The court of appeals acknowledged that the Seventh Circuit had expressed a contrary view in *Ortiz* v. *Aurora Health Care (In re Ortiz)*, 665 F.3d 906, 915 (2011), which indicated that proposed findings of fact and conclusions of law were authorized only in non-core proceedings. The court of appeals declared that it did "not find the *Ortiz* court's analysis of the issue thoroughly reasoned." App. 25a n.8. The court of appeals did not explain how, under its own solution, the district court's "de novo review" of a bankruptcy court in a core proceeding could be reconciled with Section 157(b)'s statement that a bankruptcy court's orders and judg-

ments in core proceedings are reviewable only on "appeal[]" to the district court. 28 U.S.C. 157(b), 158. Nor did the court of appeals address the absence of authority in Section 157(b) for a district court to enter final judgment in core proceedings. *Cf.* 28 U.S.C. 157(c)(1) (specifying that, in any non-core proceeding "any final order or judgment shall be entered by the district judge").

The court of appeals next held that EBIA had "impliedly consented" to adjudication by the bankruptcy judge. App. 30a. It reasoned that a litigant's consent can cure an otherwise unconstitutional exercise of judicial power by a non-Article III bankruptcy judge. App. 26a–29a. The court acknowledged that litigant consent cannot overcome Article III's structural protection of the separation of powers. App. 27a n.9 (citing *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833, 850–851 (1986)). But the court believed that the structural component of Article III is only implicated where "the encroachment or aggrandizement of one branch at the expense of the other is at stake." *Ibid.* (internal quotation marks omitted). The court concluded that "the allocation of authority between bankruptcy courts and district courts does not implicate structural interests, because bankruptcy judges are officers of the district court and are appointed by the Courts of Appeals." *Ibid.* (brackets and internal quotation marks omitted).

The court of appeals concluded that EBIA, through its litigation conduct, had "impliedly consented" to adjudication by a bankruptcy judge. App. 29a–30a. Although EBIA had repeatedly demanded a jury trial before the district court, the court of appeals found that EBIA's failure to object to the bankruptcy court adju-

dicating the Trustee's summary judgment motion amounted to an "elect[ion] not to pursue a hearing in an Article III court." App. 29a. The Ninth Circuit also emphasized that EBIA had not framed its objection in terms of Article III until after this Court's decision in *Stern*, which was after EBIA filed its opening brief in the court of appeals. App. 30a. "Because it waited so long to object, and in light of its litigation tactics," the court held that "EBIA impliedly consented to the bankruptcy court's jurisdiction." *Ibid.* Although the court of appeals faulted EBIA for failing to anticipate this Court's holding in *Stern*, the court of appeals itself was required to overrule binding circuit precedent upholding bankruptcy courts' entry of final judgment in fraudulent conveyance actions. App. 15a (overruling *Mankin*).

On the merits, the court of appeals affirmed the bankruptcy court's grant of summary judgment on the fraudulent conveyance and successor entity claims. App. 34a–39a.

REASONS FOR GRANTING THE PETITION

This petition presents two fundamental questions about the authority of non-Article III bankruptcy judges. The court of appeals' decision creates a clear split with the Sixth Circuit on whether litigants can consent to the exercise of the judicial power of the United States by a non-Article III judge, in the form of entry of a final, enforceable judgment. No decision of this Court has specifically addressed the question whether the structural, separation-of-powers function of Article III permits Congress to reassign the powers of the Judicial Branch as long as the parties consent. Although the court of appeals found support for that proposition

in this Court's decision in *Stern* v. *Marshall*, see App. 33a, that decision suggests the contrary conclusion, stressing that "it does not matter who * * * authorized the [bankruptcy] judge to render final judgments in such proceedings. The constitutional bar remains," 131 S. Ct. 2594, 2619 (2011). This Court's decision in *Roell* v. *Withrow*, 538 U.S. 580 (2003), upon which the court of appeals also relied, did not address the separation-of-powers aspect of Article III. And, in any event, *Roell* construed a statute under which litigants were "made aware of the need for consent and the right to refuse it." *Id.* at 590. Here, by contrast, the statutory scheme does not require consent, and binding circuit precedent denied that EBIA had an Article III right to adjudication by a district judge.

The court of appeals' decision also creates a split with the Seventh Circuit on whether bankruptcy judges have statutory authority to propose findings of fact and conclusions of law in "core" proceedings. *Stern* held that bankruptcy judges lack constitutional authority to enter final judgment against non-creditors in core proceedings asserting private rights of action. But the Bankruptcy Code grants bankruptcy judges authority to issue proposed findings of fact and conclusions of law only in *non*-core proceedings. As a result, lower courts have struggled to determine what authority bankruptcy judges retain in those core proceedings where the constitution precludes the bankruptcy court from entering final judgment. The Ninth Circuit's remedy—allowing bankruptcy judges to issue proposed findings of fact and conclusions of law in core proceedings—is inconsistent with the text and structure of the statute, which assigns no such authority to bankruptcy judges, and which provides only for district court appellate re-

view of bankruptcy court orders and judgments in core proceedings. As this Court has previously held, recalibrating the allocation of authority between bankruptcy courts and district courts in light of a constitutional defect in the statute is the responsibility of Congress, not the federal courts.

These circuit splits reflect the extent to which the lower courts are struggling to deal with the statutory gaps exposed by this Court's decision in *Stern*. Only this Court can resolve those open questions.

I. This Court Should Resolve The Question Whether, And Under What Circumstances, Litigant Consent Can Confer On Non-Article III Judges Authority To Exercise The Judicial Power Of The United States

A. The Court of Appeals' Holding Conflicts With A Decision of the Sixth Circuit

In *Waldman* v. *Stone*, the Sixth Circuit considered and squarely rejected the argument that litigants can consent, by implication or otherwise, to a bankruptcy judge's entry of final judgment on a private right of action subject to Article III. 698 F.3d 910, 917–918 (2012), cert. denied, 2013 U.S. LEXIS 2333 (Mar. 18, 2013). "[T]he structural principle advanced by Article III," the Sixth Circuit reasoned, "is not [a litigant's] to waive." *Id.* at 918. The holding of the court of appeals below is directly to the contrary. According to the Ninth Circuit, "the allocation of authority between bankruptcy courts and district courts does not implicate structural interests" and can therefore be waived. App. 28a & n.9. That direct conflict among the circuits reflects the ambiguity in this Court's own statements

on the issue. Only this Court can resolve that fundamental constitutional question.

The relevant facts in *Waldman* are identical to this case. Like EBIA, the defendant in *Waldman* was subject to a money judgment entered by a bankruptcy judge and affirmed by the district court. 698 F.3d at 916. Like EBIA, he argued in the court of appeals, in a supplemental brief following *Stern*, that the "judgment was beyond the bankruptcy court's power as limited by Article III of the Constitution." *Ibid.* And like EBIA, he was opposed by the plaintiff and the United States as amicus curiae, both of whom argued that the Article III objection was waived because the defendant had not raised the argument prior to appeal. *Id.* at 917.

Unlike the Ninth Circuit, however, the Sixth Circuit concluded that the defendant's purported waiver could not cure the constitutional defect in the bankruptcy judge's adjudication. The Sixth Circuit observed that Article III not only protects litigants' personal interest in an impartial adjudicator, but also " 'serves as an inseparable element of the constitutional system of checks and balances' " and thus embodies a "non-waivable structural principle." *Waldman*, 698 F.3d at 917 (quoting *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 850 (1986)). The Sixth Circuit explicitly rejected the argument, advanced by the United States, that the structural component of Article III is implicated only where the encroachment or aggrandizement of one branch at the expense of another is at risk: "The issue here is not so much the aggrandizement of the Legislative or Executive Branches, as it is the diminution of the Judicial one. * * * To the extent that Congress can shift the judicial Power to judges without [Article III] protections, the Judicial Branch

is weaker and less independent than it is supposed to be." *Id.* at 918. Because the bankruptcy judge's entry of final judgment "implicate[ed] * * * the structural principle advanced by Article III," the Sixth Circuit held that the constitutional defect could not be cured by the litigants' waiver. *Ibid.*

Notwithstanding the Sixth Circuit's decision in *Waldman*, the Ninth Circuit held that EBIA's failure to raise its Article III objection before the bankruptcy judge or the district court was dispositive. App. 26a–33a. Contrary to the Sixth Circuit, the Ninth Circuit concluded that entry of final judgment by bankruptcy judges on the consent of the parties raises no separation-of-powers concern "because bankruptcy judges are 'officer[s]' of the district court and are appointed by the Courts of Appeals." App. 27a n.9.

The question on which the Ninth and Sixth Circuits are divided was outcome determinative in EBIA's case. Had EBIA been sued for fraudulent conveyance in a bankruptcy court in Ohio, the final judgment entered against it by the bankruptcy judge would have been vacated. Because it was sued in bankruptcy court in Washington, the judgment was affirmed. Until this conflict is resolved by this Court, every judgment entered by a bankruptcy court on the basis of litigant consent will be in doubt, subject to possible vacatur on appeal if this Court ultimately agrees with the views of the Sixth Circuit.

B. Entry Of Final Judgment On A Private Right Of Action By A Non-Article III Bankruptcy Judge Violates The Separation Of Powers Regardless Of Litigant Consent

The Ninth Circuit's decision is, moreover, contrary to this Court's clear statements that the core structural features of Article III cannot be dispensed with by litigant consent. EBIA's purported consent thus could not have cured the constitutional defect in the bankruptcy court's adjudication identified by the Court in *Stern*.

This Court has repeatedly recognized that "Article III is 'an inseparable element of the constitutional system of checks and balances.' " *Stern*, 131 S. Ct. at 2608 (quoting *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion)). Article III protects the separation of powers by reserving in "one supreme Court" and "such inferior Courts" as Congress may establish—and in those courts alone—the "judicial Power of the United States." U.S. Const. art. III, § 1, cl. 1; see *Stern*, 131 S. Ct. at 2608.

The Court has made clear that Article III's protection of the separation of powers cannot be overcome by waiver or litigant consent. As the Court explained in *Schor*: "To the extent that this structural principle [of separation of powers] is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III." 478 U.S. at 850–851; see also *id.* at 867 (Brennan, J., dissenting) ("[C]onsent is irrelevant to Article III analysis."); *Peretz* v. *United States*, 501 U.S. 923, 950 (1991) (Marshall, J., dissenting) (citing *Schor* for the proposi-

tion that "parties may *not* waive Article III's structural guarantee"). Consistent with that principle, the Court has held that a litigant cannot consent to presence of a non-Article III judge on a panel of the court of appeals. *Nguyen* v. *United States*, 539 U.S. 69, 80 (2003) (explaining that "[e]ven if the parties had *expressly* stipulated to the participation of a non-Article III judge in the consideration of their appeals * * * such a stipulation would not have cured the plain defect in the composition of the panel"). The Court has likewise held that other structural constitutional objections cannot be overcome by litigant consent. See *Freytag* v. *Comm'n of Internal Revenue*, 501 U.S. 868, 879–880 (1991) (Appointments Clause objection). Thus, at least to the extent that the exercise of judicial power by a non-Article III bankruptcy judge threatens the separation of powers, notions of waiver and consent are irrelevant to the constitutional analysis.

Of course, "[p]rivate parties may, without offense to the Constitution, agree to settle their disputes *outside the federal adjudicatory system*." *Schor* v. *Commodity Futures Trading Comm'n*, 740 F.2d 1262, 1274 (D.C. Cir. 1984) (Ginsburg, R.B., J.) (emphasis added) (explaining that arbitration "does not implicate the separation of powers" for this reason), rev'd on other grounds, 478 U.S. 833 (1986); see *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1052 (7th Cir. 1984) (Posner, J., dissenting) (explaining that, unlike magistrates, "[a]rbitrators are not public officials" and "[t]heir decisions carry no official imprimatur"). Likewise, state court adjudication of claims that could have been asserted in federal court does not offend the Constitution, notwithstanding that state court judges are not appointed in accordance with Article III. Only

where the adjudicator is an organ of the federal government is the judicial power "of the United States" implicated, and the separation of powers potentially endangered.

The broad statutory authority of bankruptcy judges to enter final judgments poses a serious risk to the separation of powers. As this Court recognized in *Stern*, bankruptcy judges exercise "the essential attributes of judicial power" by entering " 'appropriate orders and judgments'—including final judgments—subject to review only if a party chooses to appeal." 131 S. Ct. at 2618–2619. A judgment of a bankruptcy court carries the full weight of a judgment of the United States. It may be registered and enforced in another judicial district, 28 U.S.C. 1963, and it is entitled to preclusive effect in subsequent litigation, including in state courts, see *Stern*, 131 S. Ct. at 2600.

That bankruptcy judges are appointed by Article III judges rather than the political branches does render bankruptcy judges mere "adjuncts" of the district courts, nor alleviate the danger to the separation of powers that results from their entering final judgments. *Stern*, 131 S. Ct. at 2619 ("[I]t does not matter who appointed the bankruptcy judge or authorized the judge to render final judgments in such proceedings."). Congress cannot circumvent Article III simply by commanding life-tenured judges to appoint lesser officers to exercise the judicial power of the United States. To the contrary, as this Court "emphatic[ally]" declared in *Stern*, the exercise of judicial power by bankruptcy judges poses a real "threat to the separation of powers" because "[a] statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely." *Id.* at 2620.

The court of appeals' decision dismissed as insignificant the separation-of-powers concerns presented by the bankruptcy courts' exercising "the most prototypical * * * judicial power: the entry of a final, binding judgment." See *Stern*, 131 S. Ct. at 2615. Citing *Schor*'s statement that Article III serves "primarily personal, rather than structural, interests," the court of appeals held that "the allocation of authority between bankruptcy courts and district courts does not implicate structural interests, because bankruptcy judges are 'officer[s] of' the district court and are appointed by the Courts of Appeals." App. 27a & n.9. But that holding disregards *Stern*, which unequivocally established that bankruptcy judges are *not* mere adjuncts of the district courts, and that Congress' allocation of judicial power to bankruptcy courts *does* infringe separation-of-powers principles. See 131 S. Ct. at 2619–2620. The court of appeals' reliance on *Schor* was also misplaced because, there, the Court based its conclusion that adjudication of counterclaims by the Commodity Futures Trading Commission (CFTC) posed "no genuine threat to [separation of powers] principles" in part on the fact that orders of the CFTC were enforceable only by a district court, and the district court's review was more searching than normal appellate standards. 478 U.S. at 853, 857. By contrast, this Court made clear in *Stern* that bankruptcy courts' entry of enforceable, final judgments on private rights of action, subject only to appellate review, *does* pose "a threat to the separation of powers." *Stern*, 131 S. Ct at 2610–2611, 2620. Because allocation of the judicial power of the United States to bankruptcy courts implicates separation-of-power principles, private litigants can no more "authorize[] the [bankruptcy] judge to render final judgments in such proceedings" than can Congress. *Id.* at 2619.

Contrary to the understanding of the court of appeals, no decision of this Court has ever held that litigant consent is sufficient to validate what would otherwise be a separation-of-powers violation of Article III. The court of appeals cited *MacDonald* v. *Plymouth County Trust Co.*, 286 U.S. 263 (1932), and *Roell* v. *Withrow*, 538 U.S. 580 (2003), as holding that litigant consent can authorize the entry of final judgment by (respectively) a bankruptcy judge or magistrate judge that would otherwise violate the Constitution. See App. 27a–28a & n.10. But neither *MacDonald* nor *Roell* holds that Article III separation-of-power principles could be overcome by litigant consent.[1] The court of appeals also cited this Court's discussion in *Stern* of Pierce Marshall's waiver of any objection to the bankruptcy court's adjudication of his own defamation claim against the bankruptcy estate. App. 33a (citing *Stern*, 131 S. Ct. at 2606, 2608). But that discussion in *Stern* concerned only Pierce's purported *statutory* right to adjudication of the defamation claim by the district court. See 28 U.S.C. 157(b)(5). Because Pierce's claim

[1] *MacDonald* does not even mention Article III and, as the plurality opinion in *Marathon* recognized, the practice of bankruptcy referees exercising plenary authority had "never been explicitly endorsed by this Court." 458 U.S. at 79 n.31. In *Roell*, the Court made clear that "[t]he *only question*" at issue was the statutory one: whether consent implied through conduct "can count as conferring 'civil jurisdiction' under [28 U.S.C.] § 636(c)(1)." *Roell*, 538 U.S. at 586–587 (emphasis added). Neither decision constitutes controlling precedent on the Article III questions presented by this petition. See *Webster* v. *Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

was asserted against the bankruptcy estate, there was no Article III right to adjudication by a district court. See *Marathon*, 458 U.S. at 71 (plurality opinion) ("restructuring of debtor-creditor relations * * * is at the core of the federal bankruptcy power"). Thus, the court of appeals was mistaken to think that this Court had endorsed litigant consent as sufficient to overcome Article III structural concerns.

Because the exercise of judicial power by non-Article III bankruptcy judges threatens the Constitution's separation of powers, EBIA's purported implied consent could not confer on the bankruptcy court the authority to enter final judgment.

C. Consent Is Only Relevant To An Article III Structural Analysis To The Extent Congress Made Consent A Feature Of The Statutory Scheme, Not Where It Is Inferred Post-Hoc From A Litigant's Failure To Object

To the extent consent is relevant to the Article III structural analysis, it is as part of the Court's review of the statutory scheme Congress adopted, not as part of a post-hoc analysis in an individual case. The Ninth Circuit's post-hoc approach to consent was plainly insufficient to eliminate separation-of-powers concerns. Nothing in the Bankruptcy Code ensures voluntary litigant consent to a bankruptcy court's adjudication of core claims. For this reason, and in light of binding circuit precedent upholding the statute, nothing would have advised EBIA of its right to insist on an Article III court. In *Roell*, Justice Thomas's dissenting opinion warned of the "serious constitutional concerns" raised by relying on implied consent to authorize adjudication by a magistrate judge. 538 U.S. at 592. Those constitu-

tional concerns are fully realized in the present case, where the court of appeals extended *Roell* to the point that "consent" no longer offers any protection for Article III values. Unlike the Federal Magistrate Act of 1979 considered in *Roell*, the Bankruptcy Code does not ensure that litigants in core proceedings are advised of their Article III rights. In the present context, the court of appeals' invocation of "implied consent" was merely a post-hoc justification for an unconstitutional statutory scheme. The result is that a litigant who made every available objection to litigating in bankruptcy court under then-existing precedent was held to have waived an Article III right that no bankruptcy or district court could have recognized until the court of appeals overturned its own precedent.

1. To the extent consent can form a part of the separation-of-powers analysis, it must be central to the statutory scheme

Even where consent can be considered as part of the Article III separation-of-powers analysis, it is not alone dispositive, but must be weighed as one of several factors in assessing the constitutionality of the statutory scheme under review. See *Schor*, 478 U.S. at 855; *Stern*, 131 S. Ct. at 2625 (Breyer, J., dissenting) (noting five factors considered in *Schor*). For litigant consent to lessen Article III separation-of-powers concerns about a statutory grant of judicial power to non-Article III courts, the requirement of genuine and voluntary consent must be a central, limiting feature of the statute. If litigants are unaware of their right to insist on adjudication by an Article III judge, then the notion of "consent" does not constrain a statute's potential to erode Article III courts' constitutional role. In *Schor*, the Court considered consent as a factor in its separa-

tion-of-powers analysis because consent was an essential feature of every matter adjudicated by the CFTC: "the decision to invoke [that] forum [was] left entirely to the parties." 478 U.S. at 855.

In other instances where Congress has assigned adjudicatory power over private rights to non-Article III judges, it has specifically incorporated litigant consent into the statutory scheme. The Bankruptcy Code, for example, authorizes bankruptcy judges to finally adjudicate *non*-core proceedings only if "the district court, with the consent of all of the parties to the proceeding," refers the matter to the bankruptcy judge. 28 U.S.C. 157(c)(2); see Fed. R. Bankr. P. 7008, 7012 (requiring parties' pleadings to state whether "the party does or does not consent to entry of final orders or judgment by the bankruptcy judge"). Likewise, the Federal Magistrates Act permits civil cases to be assigned to magistrate judges for final adjudication only "[u]pon the consent of the parties," and under procedures that "advise the parties that they are free to withhold consent" and are otherwise designed "to protect the voluntariness of the parties' consent." 28 U.S.C. 636(c)(1), (2); see also *Pacemaker Diagnostic Clinic of Am., Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 546 (9th Cir.) (en banc) (Kennedy, J.) (noting the Federal Magistrate Act's "statutory safeguard[]" through "the requirement of litigant consent"), cert. denied, 469 U.S 824 (1984).

The adjudication of core claims by bankruptcy judges under the Bankruptcy Code does not depend on litigant consent at all. As the Court recognized in *Stern*, Congress has in such actions assigned bankruptcy judges "the power to adjudicate, render final judgment, and issue binding orders * * * without consent of

the litigants." 131 S. Ct. at 2615 (internal quotation marks omitted). Because Congress did not incorporate consent into the statutory scheme for core claims, there was nothing in the statute to ensure that EBIA genuinely and voluntarily consented to adjudication of the claims against it by a non-Article III judge, and nothing to limit the encroachment on the authority of Article III courts.

The court of appeals' finding of consent in the case at bar did not implement a limiting statutory feature that cabins Congress's reallocation of Article III authority, but was rather a post-hoc rationalization of an unconstitutional statute. The courts should not save Congress from its own violations of Article III. Where the statutory scheme adopted by Congress breaches the separation of powers, the fortuity of litigant consent not contemplated by the statute is irrelevant. See *Schor*, 478 U.S. at 850–851; *Pacemaker*, 725 F.2d at 544 ("Statutes * * * which violate the separation of powers doctrine in its systemic aspect should be invalidated, as a general rule, despite waiver by affected private parties."). If this Court is to consider litigant consent at all in assessing the separation-of-powers implications of a statute, it should insist that Congress include consent in the statute it enacts.

2. The court of appeals' decision illustrates the danger of allowing post-hoc findings of implied consent to form part of the separation-of-powers analysis

In *Stern*, this Court held unequivocally, even "emphatically," that Congress's assignment of private rights to final adjudication by bankruptcy judges violated the "separation of powers." 131 S. Ct. at 2620.

But the court of appeals treated the issue of consent as though all that was at stake were "personal, rather than structural, interests." App. 27a (quoting *Schor*, 478 U.S. at 848); see also App. 27a n.9 ("[T]he allocation of authority between bankruptcy courts and district courts does not implicate structural interests."). In the court of appeals' view, as long as EBIA could be said, after the fact, to have "waived its right to an Article III hearing" through its litigation conduct, Article III was satisfied. App. 26a. The tenuous facts from which the court of appeals inferred EBIA's consent demonstrate how little protection that approach affords Article III values. The court of appeals' holding goes far beyond what this Court has previously recognized as sufficient to evidence voluntary consent to adjudication by a non-Article III judge.

This Court has held that consent to adjudication by a non-Article III tribunal must at the very least be given by a litigant who "was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case" before a non-Article III judge. *Roell*, 538 U.S. at 590; *id.* at 587 n.5 (holding that "notification of the right to refuse the magistrate judge is a prerequisite to any inference of consent"). Other courts of appeals have likewise recognized that unambiguous voluntary consent is essential to preserving Article III from encroachment. See, *e.g.*, *Phillips* v. *Beierwaltes*, 466 F.3d 1217, 1221 (10th Cir. 2006) ("Because there was no notification to the Beierwaltes or their counsel of the need to consent or the right to refuse consent, *Roell* does not permit us to infer consent * * * ."); *Donaldson* v. *Ducote*, 373 F.3d 622, 624 n.1 (5th Cir. 2004) (holding that *Roell* "did not alter our rule that the party's consent must be clear and unam-

biguous"); *Sheridan* v. *Michels (In re Sheridan)*, 362 F.3d 96, 101 (1st Cir. 2004) (no consent where litigant's "conduct did not unambiguously connote consent, either to the bankruptcy court's characterization of the proceeding as core or to its final adjudication of the proceeding as non-core"); *Pacemaker*, 725 F.2d at 546 (voluntary consent "essential to the constitutionality" of the Federal Magistrates Act).

Here, the court of appeals found that EBIA had "impliedly consented" to final adjudication by a bankruptcy judge even though the statute in question assigned adjudication to the bankruptcy court, without regard to litigant consent, and binding circuit precedent had upheld that statutory scheme against constitutional challenge. In those circumstances, a finding of "consent" cannot serve the function this Court has attributed to consent as a factor that reduces Article III concerns. EBIA was never made aware of the "need to consent" to proceedings before the bankruptcy court or of its "right to refuse it." As noted, under Section 157(b)(2)(H), fraudulent conveyance actions were deemed "core" proceedings, and bankruptcy courts were authorized to "hear and determine" such proceedings, including issuing final judgments, without regard to the consent of the parties. 28 U.S.C. 157(b); cf. 28 U.S.C. 157(c)(2) (requiring litigant consent for final adjudication of non-core proceedings by a bankruptcy judge). Moreover, controlling case law in the Ninth Circuit at that time upheld as valid under Article III Section 157(b)'s assignment of fraudulent conveyance claims against non-creditors to final adjudication by a bankruptcy judge *even where the defendant objected.* See *Duck* v. *Munn (In re Mankin)*, 823 F.2d 1296 (1987), overruled by, App 15a. An objection by EBIA

that it did not consent to adjudication before a bankruptcy judge would have been futile. See *Robinson* v. *Heilman*, 563 F.2d 1304, 1307 (9th Cir. 1977) (holding that "[n]o exception is required when it would not have produced any results in the trial court because a solid wall of Circuit authority then foreclosed the point").

Contrary to the understanding of the court of appeals, the fact that intervening judicial decisions might have provided a basis to challenge the statute and precedent does not provide the same safeguard of Article III values as a requirement that parties be notified before the fact of their right to insist on an Article III tribunal. The court of appeals suggested that *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1988), should have foreshadowed to EBIA and its counsel the eventual demise of *Mankin* and unconstitutionality of Section 157(b)(2)(H). App 32a. *Granfinanciera* did confirm that a fraudulent conveyance defendant could insist on its right to trial by jury, and EBIA did assert that right, repeatedly. 492 U.S. at 36; App. 77a–80a, 82a. *Granfinanciera* did not, however, establish that a litigant had a right to insist on an Article III judge to adjudicate dispositive pre-trial motions. And, indeed, the Ninth Circuit's own decision in *Stern* did not even reference *Mankin*, much less overrule it. See generally *Marshall* v. *Stern (In re Marshall)*, 600 F.3d 1037 (2010), aff'd on other grounds, 131 S. Ct. 2594 (2011). Thus, there was no notice to EBIA that it had a right to insist that the Trustee's pre-trial motion for summary judgment be decided by the district court.[2]

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[2] Notably, the district court also appears to have distinguished between the Seventh Amendment right to a jury trial be-

Because EBIA was never made aware of the need for consent or its right to refuse it, the implied consent found by the Ninth Circuit could not have been voluntary. The Ninth Circuit's holding in this case goes far beyond the holding of this Court in *Roell* and the holdings of other courts of appeals.

II. This Court Should Resolve The Conflict Among Lower Courts On Whether Bankruptcy Judges Are Statutorily Authorized To Submit Proposed Findings Of Fact And Conclusions Of Law In "Core" Proceedings

After *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), bankruptcy judges can no longer finally adjudicate some proceedings statutorily designated as "core" under Section 157(b). Section 157(c), which allows bankruptcy judges to "submit proposed findings of fact and conclusions of law to the district court," only applies in proceedings that are "not * * * core." 28 U.S.C. 157(c)(1). The court of appeals recognized that *Stern*'s holding left a "gap" in the statute. App. 23a. Rather than wait for Congress to address this statutory gap, the Ninth Circuit rewrote Section 157(b) to authorize bankruptcy judges to propose findings of fact and conclusions of law in core proceedings.[3] The text and

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fore the district court and adjudication of dispositive pre-trial motions, which the court left to the bankruptcy judge. App. 62a–63a.

[3] In light of the court of appeals' finding that EBIA consented to final adjudication by the bankruptcy court, its discussion of the bankruptcy court's authority to propose findings of fact and conclusions of law was technically dictum. But it is nonetheless binding in the Ninth Circuit. See *Miranda B.* v. *Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003) ("[W]here a panel confronts an issue

structure of Section 157 make clear that Congress did not provide bankruptcy courts that authority in core proceedings, and it is up to Congress, not the courts, to remedy the statutory gap.

A. The Ninth Circuit's Decision Conflicts With A Decision Of The Seventh Circuit

In *In re Ortiz*, 665 F.3d 906 (2011), the Seventh Circuit concluded that bankruptcy judges lack statutory authority to issue a report and recommendation in a core proceeding. *Id.* at 915. The question arose in the context of a direct appeal from a bankruptcy judge's grant of summary judgment on a state law claim in a core proceeding. *Id.* at 908–909. To determine its own jurisdiction, the Seventh Circuit was required to decide how the bankruptcy judge's purportedly final judgment could be characterized after *Stern*. See 28 U.S.C. 158(a), (d)(2)(A). Based on a textual reading of the statute, the Seventh Circuit rejected the possibility that the bankruptcy judge's decision could be deemed proposed findings of fact and conclusions of law. *Ortiz*, 665 F.3d at 915. It observed that bankruptcy judges are authorized to issue proposed findings and conclusions under 28 U.S.C. 157(c)(1), but that section only applies to proceedings that are "not a core proceeding"

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germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." (internal quotation marks omitted)). If this Court were to agree with petitioner's first argument that the bankruptcy court's judgment violated Article III and must be vacated, then the Court should address the court of appeals' erroneous holding concerning the scope of the bankruptcy court's authority, which would otherwise be binding on remand.

but are "otherwise related to a case under title 11." *Ibid.* Because the proceeding in *Ortiz* was "core," *id.* at 911–912, the Seventh Circuit concluded that the bankruptcy court lacked statutory authority to issue proposed findings of fact and conclusions of law, *id.* at 915.

The Ninth Circuit's decision below is directly contrary to that of the Seventh Circuit in *Ortiz*. Instead of adhering to the text of the statute, as the Seventh Circuit did, the Ninth Circuit reasoned that "the power to 'hear and determine' a proceeding" could be read to encompass the "more modest"—but distinct—"power to submit findings of fact and recommendations of law to the district courts." App. 24a.

B. The Ninth Circuit's Holding Is Contrary To The Text And Structure Of The Statute

Congress clearly distinguished between the authority it granted bankruptcy courts in core proceedings and in non-core proceedings. Contrary to the ruling of the Ninth Circuit, the latter is not simply a subset of the former. Rather, the text and structure of Section 157 make clear that core and non-core proceedings are subject to two entirely distinct adjudicatory procedures. The "gap in the [statutory] framework," App. 23a, revealed when this Court held in *Stern* that bankruptcy courts cannot finally adjudicate certain statutory core cases, is a gap that only Congress can fill.

1. Statutory construction "begin[s] with the understanding that Congress says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted). The court of appeals' construction of the phrase "hear

and determine" as encompassing proposed findings of fact and conclusions of law cannot be squared with text of the statute. A "determination" is a "final decision." Black's Law Dictionary 514 (9th ed. 2009). The word "determine" thus connotes finality—not the issuance non-final recommendations.

That reading is confirmed by the fact that Congress only provided for *appellate* review of matters that the bankruptcy court is to "hear and determine." In Section 157(b)(1) Congress specified that in core proceedings that a bankruptcy court may "hear and determine," the bankruptcy court "may enter appropriate orders and judgments, subject to review under section 158 of this title." 28 U.S.C. 157(b)(1). Section 158(a), in turn, is entitled "appeals" and provides district courts with "jurisdiction to hear appeals" from bankruptcy court final judgments, orders, and decrees and from certain classes of interlocutory orders. See 28 U.S.C. 158(a). Neither Section 157(b) nor Section 158 authorizes the district court to enter judgment in a core proceeding that has been referred to the bankruptcy court. Section 157(c)(2), which authorizes bankruptcy courts to "hear and determine" certain non-core proceedings on the consent of the parties, likewise specifies that the bankruptcy court may "enter appropriate orders and judgments, subject to [appellate] review under section 158 of this title." 28 U.S.C. 157(c)(2).

By contrast, Section 157(c)(1), which is limited to non-core proceedings, see *Stern*, 131 S. Ct. 2605, authorizes bankruptcy courts to "submit proposed findings of fact and conclusions of law to the district court," 28 U.S.C. 157(c)(1). Section 157(c)(1) further specifies that "*any final order or judgment shall be entered by the district courts*" after reviewing "de novo" those

parts of the bankruptcy court's proposal to which the parties have objected. *Ibid.* (emphasis added). Section 157(b) grants no similar authority to district courts to review de novo or enter final judgment in core proceedings that have been referred to the bankruptcy court.

This structural dichotomy between core and non-core proceedings, including in particular the provision for district court de novo review and entry of judgment only in non-core proceedings, confirms that Congress only granted bankruptcy courts authority to conclusively adjudicate core proceedings, not to issue non-final proposed findings of fact and conclusions of law.

2. Other indications confirm that Congress intended the phrase "hear and determine" to require a final decision, rather than mere submission of proposed findings of fact and conclusions of law. The sponsors of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "1984 Act") explained that the bill empowered bankruptcy judges to "enter final judgments in the 95 percent of cases that do not require involvement by an article III judge." 130 Cong. Rec. 6045 (1984) (remarks of Rep. Kastenmeier). Indeed, the bill's sponsors listed as a benefit of the Act that it would "provide[] a *single*, *prompt forum* for almost all bankruptcy litigation," and that "the bankruptcy judges would make recommendations to the district court, rather than enter final judgments, in [only] about 5 percent of bankruptcy matters." *Ibid.* (emphasis added). The efficiency of *avoiding* proposed findings and conclusions in core proceedings was thus an important consideration in Congress' choice of language to describe the powers of bankruptcy courts in the respective proceedings.

Moreover, Congress has employed the "hear and determine" language in other contexts as well to require a final decision and preclude the possibility of a non-final proposal of findings and conclusions. The use of the phrase "hear and determine" in the Federal Magistrates Act, upon which Section 157 was based, 130 Cong. Rec. at 6046–6047, was intended to avoid unnecessary and duplicative reports and recommendations and to "make[] it clear that Congress intends that the magistrate shall have the power to make a determination of any pretrial matter * * * and that this determination * * * shall be 'final,' " H.R. Rep. No. 94-1609, at 10 (1976). Congress believed it "duplicative to require a 'report and recommendation' from the magistrate to the judge as a prelude to a separate order by the judge." *Ibid.* Similarly, this Court has elsewhere held that Congress uses "hear and determine" when it wants to "get * * * dispute[s] settled" and convey "the idea of deciding a controversy." *N.L.R.B.* v. *Radio & Television Broad. Eng'g Union*, 364 U.S. 573, 579 (1961) ("hear and determine" means NLRB must issue decision and settle dispute).

C. It Is For Congress, Not The Courts, To Determine How To Address The Statutory "Gap" Revealed By *Stern*

As this Court has explained on several occasions, filling statutory gaps created by this Court's constitutional rulings is the responsibility of Congress, not the federal courts. Courts are "not free to rewrite the statutory scheme in order to approximate what [they] think Congress might have wanted had it known that [a particular provision] was beyond its authority." *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 76 (1996).

This Court has previously taken exactly this approach with respect to Article III defects arising from the allocation of authority to bankruptcy courts. In *Northern Pipeline Construction Company* v. *Marathon Pipe Line Company*, after holding that bankruptcy judges cannot decide state law contract claims consistent with Article III, the Court did not attempt to reform the statute based on what it believed Congress might have wanted. 458 U.S. 50, 87 n.40 (1982) (plurality opinion). Instead, the Court left it to "Congress to determine the proper manner of restructuring the Bankruptcy Act." *Ibid.*

Other lower courts have also attempted to remedy the statutory gap created by *Stern*, but these efforts, like that of the court of appeals, underscore that the responsibility for amending the statute rests with Congress alone. Several lower courts, for example, have reclassified fraudulent conveyance actions as non-core and on that basis have purported to permit bankruptcy judges to propose findings and conclusions under Section 157(c)(1). See, *e.g.*, *Field* v. *Lindell (In re Mortg. Store, Inc.)*, 464 B.R. 421, 427–428 (D. Haw. 2011); *Paloian* v. *Am. Express Co. (In re Canopy Financial, Inc.)*, 464 B.R. 770, 774–775 (N.D. Ill. 2011). Of course, this directly contradicts the text of the statute, as well as this Court's directive in *Stern* that the courts must honor Congress's designation of proceedings as core or non-core. *Stern*, 131 S. Ct. at 2604–2605.

Several judicial districts have gone even farther, effectively attempting to amend the statute through the adoption of standing orders that purport to grant bankruptcy courts the authority to propose findings of fact and conclusions of law in core proceedings where the bankruptcy courts cannot, consistent with Article

III, issue final judgments. See, *e.g.*, *In re Standing Order of Reference Re: Title 11*, No. 12-misc-00032 (S.D.N.Y. Jan. 31, 2012); *In re Standing Order of Reference Re: Title 11* (D. Del. Feb. 29, 2012); *In re Bankruptcy Proceedings*, Admin. Order 2012-25 (S.D. Fla. Mar. 25, 2012). That numerous courts have found the need to adopt such quasi-legislation in the wake of *Stern* demonstrates the broad significance of this issue, which cries out for this Court's review.

As discussed above, it was a goal of the 1984 Act that all statutory core matters be determined in *one* forum, without the need for duplicative report and recommendation proceedings. Now that the core/non-core distinction currently delineated by statute has been unsettled by *Stern*, Congress may choose any number of reasonable policy alternatives. It may ultimately choose to grant bankruptcy judges authority to issue reports and recommendations in core proceedings, and grant district courts authority to enter judgment upon de novo review of such reports and recommendations. But Congress may also choose an entirely different approach, with a changed allocation of power and responsibilities between the district courts and bankruptcy judges. It is impossible to predict with any certainty how Congress might choose to respond to *Stern*. Without doubt, however, that responsibility lies with Congress and not the courts. *Marathon*, 458 U.S. at 87 n.40.

III. This Court's Review Is Necessary To Resolve Tremendous Uncertainty In The Lower Courts Following *Stern*

As demonstrated by the decision below, and by the circuit splits of which it is part, this Court's decision in *Stern*, has given rise to tremendous uncertainty among

the lower courts. As one bankruptcy judge observed, the "huge uncertainty" that *Stern* raises concerning whether litigant consent is sufficient to permit bankruptcy courts to enter final judgment "presages litigation over that issue with the potential to tie up this case, and countless others, in knots." *In re BearingPoint, Inc.*, 453 B.R. 486, 497 (Bankr. S.D.N.Y. 2011); cf. *Tech. Automation Servs. Corp.* v. *Liberty Surplus Ins. Corp.*, 673 F.3d 399, 404–407 (5th Cir. 2012) (raising sua sponte whether magistrates may enter final judgment with litigant consent after *Stern*). Writing about this very case, one scholar has observed that the Ninth Circuit's decision created "a split among the circuits and the need for the Supreme Court to decide an issue that affects litigants across the country every day." Erwin Chemerinsky, *Circuit Split Over Parties Expanding A Bankruptcy Court's Power*, Daily J. (Feb. 12, 2013); see also Ralph Brubaker, *The Constitutionality of Litigant Consent*, 32 No. 12 Bankr. L. Letter (Dec. 2012) 1 ("Given the importance of § 157(c)(2), in particular, to the routine functioning of the bankruptcy court system, the Supreme Court may soon need to clarify the constitutional validity of litigant consent to non-Article III bankruptcy adjudications."); Erwin Chemerinsky, *Enormous Confusion*, Nat'l L.J. (Aug. 29, 2011).

Stern has also resulted in substantial confusion regarding the authority of bankruptcy judges to propose findings of fact and conclusions of law in core proceedings. District courts have complained of being placed in "something of a procedural morass" following *Stern*, *In re Coudert Bros. LLP*, No. 11-2785, 2011 WL 5593147, at *13 (S.D.N.Y. Sept. 23, 2011), and have noted the "large number of motions to withdraw the reference

that have been brought * * * in the wake of *Stern*, many of which advance statutory 'gap' arguments," *Weisfelner* v. *Blavatnik (In re Lyondell Chem. Co.)*, 467 B.R. 712, 724 (S.D.N.Y. 2012). Attempts by the lower courts to remedy the "gap" by rewriting the statute only heighten the need for this Court's review. And the number of amici who participated in the court of appeals plainly demonstrates the importance of this issue to the bankruptcy bar. See App. 3a–4a.

The questions presented by this petition implicate the integrity of the Constitution's system of separated powers and directly affect countless federal proceedings that occur before non-Article III judges every day. These issues have perplexed the bankruptcy and district courts, and now have divided the courts of appeals. Prompt resolution of these questions by this Court is therefore critical.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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