No. 13-935

IN THE

Supreme Court of the United States

WELLNESS INTERNATIONAL NETWORK, LIMITED, RALPH OATS, AND CATHY OATS,

Petitioners,

v.

RICHARD SHARIF,

Respondent.

On Writ of Certiorari to the United States Court Of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the presence of a subsidiary state property law issue in an 11 U.S.C. §541 action brought against a debtor to determine whether property in the debtor's possession is property of the bankruptcy estate means that such action does not "stem[] from the bankruptcy itself" and therefore, that a bankruptcy court does not have the constitutional authority to enter a final order deciding that action.

2. Whether Article III permits the exercise of the judicial power of the United States by the bankruptcy courts on the basis of litigant consent, and if so, whether implied consent based on a litigant's conduct is sufficient to satisfy Article III.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

The Petitioners are Wellness International Network, Limited, Ralph Oats, and Cathy Oats. Petitioners were the plaintiffs-appellees below. Wellness International Network, Limited, is a subsidiary of WIN Network, Inc. No publicly-held entity owns ten percent or more of the stock of Wellness International Network, Limited.

The respondent is Richard Sharif, the debtor-defendant and appellant below.

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The Seventh Circuit's opinion, Pet.App.1a-66a, is reported at 727 F.3d 751. Both the district court's opinion, Pet.App.69a-91a, and the bankruptcy court's opinion, Pet.App.92a-120a, are unpublished.

JURISDICTION

The Seventh Circuit entered judgment on August 21, 2013 and denied a timely petition for rehearing *en banc* on October 7, 2013. Pet.App.67a-68a. On December 20, 2013, Justice Kagan extended the time within which to file a petition for a writ of *certiorari* to February 5, 2014. The petition was filed on that date and granted on July 1, 2014. Jurisdiction rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, §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 behavior, 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

The primary statutory provisions involved in this case are 28 U.S.C. §157 and §1334 and 11 U.S.C. §541, which are reprinted in the attached addendum.

STATEMENT OF THE CASE

Sections 1334 and 157 of the United States Judicial Code establish the framework under which bankruptcy courts preside over more than one million cases and adversary proceedings each year.[1] Section 1334 supplies district courts with subject-matter jurisdiction over all bankruptcy cases and the adversary proceedings that "arise[] in" or are "related to" those bankruptcy cases or that "arise under" the Bankruptcy Code. 28 U.S.C. §1334(a),(b). Section 157(a) authorizes district courts to refer, in whole or in part, bankruptcy cases and adversary proceedings to the bankruptcy courts, which are "unit[s] of the district court." 28 U.S.C. §§151, 157(a).

Section 157 "divide[s] all matters that may be referred to the bankruptcy court into two categories: 'core' and 'non-core' proceedings." *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165, 2171 (2014). It also contains a non-exhaustive list of "core" proceedings identifying the types of matters that Congress understood to be "integral to the core bankruptcy function" and involving "all necessary

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[1] *See* http://uscourts.gov/Statistics/BankruptcyStatistics.aspx (Filings for 2008 through 2013).

aspects of a bankruptcy case." 28 U.S.C. §157(b)(2); 130 CONG. REC. E1108-09 (daily ed. March 20, 1984). For those matters deemed "integral to the core bankruptcy function," *id.* at 1109, "the statute empowers the bankruptcy judge to enter final judgment on the claim, subject to appellate review by the district court. If a matter is non-core, and the parties have not consented to final adjudication by the bankruptcy court, the bankruptcy judge must propose findings of fact and conclusions of law. Then, the district court must review the proceedings *de novo* and enter final judgment." *Executive Benefits*, 134 S. Ct. at 2172.

District courts have complete discretion to decide whether to refer a particular case or adversary proceeding to a bankruptcy court and may withdraw a reference previously made at any time for cause. 28 U.S.C. §157(a),(d). Cause is not defined in the statute and thus, district courts have wide discretion to withdraw matters previously referred.

In *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011), the Court held that "in one isolated respect" Congress exceeded the limitations of Article III of the Constitution by designating a bankruptcy estate's state-law counterclaim against a creditor who had filed a proof of claim as a core matter. In a situation where a non-debtor had not consented to be sued in bankruptcy court, *Stern* held that Article III precluded the bankruptcy court from entering judgment on a state-law counterclaim that did not "stem[] from the bankruptcy itself" or would not

"necessarily be resolved in the claims allowance process." 131 S. Ct. at 2618. *Stern* concluded that, because the debtor's tortious interference counterclaim was "in no way derived from or dependent upon bankruptcy law" and would "exist[] without regard to any bankruptcy proceeding," the bankruptcy court could not constitutionally enter a final order in that action. *Id.*

Stern did not catalogue every matter that "stems from the bankruptcy itself." *Id.* But the test the Court articulated, coupled with the Court's statement that its decision did "not change all that much," *id.* at 2620, strongly suggested that bankruptcy courts would continue to have the constitutional authority to hear and determine those matters that historically have been the "[c]ritical features of every bankruptcy"—"the exercise of exclusive jurisdiction over all of the debtor's property." *Central Va. Cmty. College v. Katz*, 546 U.S. 356, 363-64 (2006).

In this case, the Seventh Circuit ignored *Stern's* test for determining which matters are within a bankruptcy court's constitutional authority to decide and, as a result, expanded *Stern* far beyond its "narrow" holding. 131 S. Ct. at 2620. It held that bankruptcy courts lack the constitutional authority to decide whether property in the debtor's possession is property of the bankruptcy estate under 11 U.S.C. §541 when that determination also requires resolution of state-law issues. Pet.App.45a-51a.

Under a correct application of *Stern*, the §541 action at issue here was both statutorily and constitutionally within the bankruptcy court's authority to decide. An action to determine whether property in a debtor's possession belongs to that debtor's bankruptcy estate cannot "exist[] without regard to any bankruptcy proceeding." 131 S. Ct. at 2618. This conclusion flows ineluctably from the fact that a bankruptcy estate has no existence outside of the bankruptcy case because it is the "commencement of a case ... [that] creates an estate." 11 U.S.C. §541(a). Thus, an action to determine what is included within the bankruptcy estate is the quintessential action that "stems from the bankruptcy itself." 131 S. Ct. at 2618. Indeed, if an action against the debtor to decide whether property he holds belongs to his bankruptcy estate is *not* an action that "stems from the bankruptcy itself" it is hard to imagine what actions would ever satisfy this test.

The Seventh Circuit thus misread *Stern* when it concluded that the claim before it was a "*Stern* claim," *i.e.*, "a claim designated for final adjudication in the bankruptcy court as a statutory matter, but prohibited from proceeding in that way as a constitutional matter." *Executive Benefits*, 134 S. Ct. at 2170. The Seventh Circuit further erred by holding that "*Stern* claims" cannot be treated like non-core claims and tried in bankruptcy court with litigant consent under 28 U.S.C. §157(c)(2). Pet.App.31a-45a. In reaching this result, the Seventh Circuit broke with the Court's long line of

precedent holding that the right to insist on an Article III judge is "primarily [a] personal" right which may be waived. *See, e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986). It also employed reasoning that would invalidate major components of the bankruptcy and magistrate court systems.

A. Respondent's Bankruptcy Filing.

The dispute between Respondent Richard Sharif ("Sharif") and Petitioner Wellness International Network, Limited ("Wellness") began more than a decade ago, in 2003. Pet.App.4a. Sharif sued Wellness in the United States District Court for the Northern District of Texas. The district court entered judgment for Wellness after Sharif ignored Wellness's discovery requests. Pet.App.5a. The Fifth Circuit affirmed, calling Sharif's suit against Wellness "feckless" and remanding with directions to consider an award of attorney's fees. Pet.App.5a-6a (citing *Sharif v. Wellness Int'l Network, Ltd.*, 273 F. App'x 316, 317 (5th Cir.), *cert. denied*, 555 U.S. 1085 (2008)). On remand, the district court awarded Wellness $655,596.13 in attorney's fees. Pet.App.6a.

Thereafter, Wellness commenced a collection action in the Northern District of Texas. *Id.* Sharif ignored Wellness's post-judgment collection discovery. *Id.* As a result, the district court held Sharif in contempt and had him arrested. *Id.* Sharif obtained his release from jail by promising to answer Wellness's discovery, but instead of doing so, Sharif

filed a chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Northern District of Illinois. *Id.* Wellness was the only creditor to file a claim in Sharif's chapter 7 case. Pet.App.6a-7a.

In bankruptcy, Sharif again failed to answer questions about his assets, including questions about property worth $5,380,000 that Sharif listed on a pre-bankruptcy loan application but omitted from his bankruptcy schedules. Pet.App.7a. When the chapter 7 trustee questioned Sharif about the missing assets at the creditors' meeting held pursuant to 11 U.S.C. §341, Sharif testified that he lied on his loan application, that the missing assets actually belonged to the Soad Wattar Trust, and that he held the assets merely as trustee. *Id.* Wellness and the chapter 7 trustee asked for the trust documents; Sharif failed to produce them. Pet.App.7a-8a.

B. The Adversary Proceeding.

Wellness filed an adversary proceeding against Sharif in the bankruptcy court pursuant to 11 U.S.C. §727 objecting to Sharif's discharge. J.A.5-22. Wellness alleged that Sharif should not receive a discharge because, among other things, Sharif lied when he claimed the Soad Wattar Trust owned the disputed property. J.A.13-16,18-19. Wellness also sought a declaratory judgment that the assets Sharif purportedly held in trust—the same assets that Sharif listed on his personal financial statement—

actually were property of Sharif's bankruptcy estate. J.A.19-21; Pet.App.8a.

Wellness alleged that its complaint was a core proceeding, J.A.6, meaning that §157(b)(1) authorized the bankruptcy court to enter judgment. 28 U.S.C. §157(b)(1). Sharif admitted that the claims were core. J.A.24. Had Sharif denied that the claims were core, Bankruptcy Rule 7012 would have required him to state whether he consented to the bankruptcy court entering a judgment. Fed. R. Bankr. P. 7012(b).

Yet again, Sharif failed to respond properly to Wellness's discovery requests and to the bankruptcy court's related orders. Pet.App.8a-9a. As a result, Wellness moved for sanctions yet again, asking the bankruptcy court, among other things, to enter a default judgment against Sharif. Pet.App.9a. The bankruptcy court allowed Sharif time to comply with the discovery, warning Sharif in a written order that if he did not comply, the court would enter a default judgment against him. J.A.140-141. Sharif ignored that warning and the bankruptcy court conducted a hearing on the sanctions motion. Pet.App.10a. After that hearing, but before the bankruptcy court had ruled, Sharif moved for summary judgment, denying the merits of Wellness's allegations and asking the bankruptcy court to enter judgment in his favor on all counts of Wellness's complaint. *Id.*

On July 6, 2010, the bankruptcy court found that Sharif had failed to comply with its discovery order

in 16 different respects, including by failing to produce documents evidencing the formation or funding of the alleged Soad Wattar Trust. Pet.App.10a-14a,99a-120a. As a result, the bankruptcy court denied Sharif's summary judgment motion and entered a default judgment against Sharif, denying Sharif his discharge and declaring that the assets purportedly held by Sharif in the alleged trust were property of Sharif's bankruptcy estate. *Id.*

C. Appellate Proceedings In The District Court And The Court Of Appeals.

Sharif appealed to the United States District Court for the Northern District of Illinois. Pet.App.14a. Although Sharif filed his opening appeal brief six weeks *after* the Court had decided *Stern*, he did not challenge the bankruptcy court's constitutional authority to enter judgment. Pet.App.15a. Instead, after briefing closed, Sharif moved for leave to file a supplemental brief (again without citing *Stern*), arguing that the Seventh Circuit's decision, *Ortiz v. Aurora Health Care, Inc. (In re Ortiz)*, 665 F.3d 906 (7th Cir. 2011), "suggests that the bankruptcy court's order should only be treated as a report and recommendation and should not be treated as a final order." J.A.145. The district court denied Sharif's motion as untimely and affirmed. Pet.App.16a,90a-91a.

Sharif then appealed to the Seventh Circuit. Pet.App.17a. Once again, Sharif failed to contest the

bankruptcy court's constitutional authority to enter a judgment and did not cite *Stern*. No.12-1349, Dkt.13 (7th Cir.). As a result, Wellness had no reason to address *Stern* in its response brief. *Id.*, Dkt.22. Sharif first cited *Stern* in his reply, arguing that the bankruptcy court lacked jurisdiction to declare which assets were property of Sharif's bankruptcy estate. *Id.*, Dkt.29. Sharif did not, however, contest the bankruptcy court's constitutional authority to decide the discharge claim. *Id.*; Pet.App.17a.

On August 21, 2013, the Seventh Circuit affirmed the judgment denying Sharif a discharge. It held that Wellness's objections to Sharif's discharge "stem from federal law, not state law, as the provisions of 11 U.S.C. §727 provide the relevant rules of decision" and the decision "to grant or deny discharge is central to the restructuring of the debtor-creditor relationship." Pet.App.1a,45a-46a.

The Seventh Circuit reached the opposite result on the §541 property-of-the-estate claim, holding that the bankruptcy court lacked the constitutional authority to decide whether property in the debtor's possession was property of the debtor's bankruptcy estate. Pet.App.46a-51a. The Seventh Circuit reached this result even though it also acknowledged that the Court "has not come close to holding that an Article III judge must decide claims for which the Bankruptcy Code itself provides the rule of decision...." Pet.App.46a. Focusing on the fact that §541 property-of-the-estate determinations also involve questions of state law, the Seventh Circuit

concluded that Wellness's request for a declaration that the supposed trust assets were estate property is a "state-law claim between private parties that is wholly independent of federal bankruptcy law and is not resolved in the claims-allowance process" and therefore "is indistinguishable from the tortious-interference counterclaim in *Stern*." Pet.App.48a,51a.

Although it concluded that Sharif had waived his *Stern*-based arguments by failing to make them in a timely manner, the Seventh Circuit nonetheless considered them. Pet.App.31a-45a.[2] Because it read *Stern* as holding that §157(b) violated the structural protections of Article III, §1 of the Constitution, the Seventh Circuit concluded that Sharif could not waive his constitutional objections. Pet.App.45a. The Seventh Circuit insisted its holding applied only to "*Stern* claims" and so if a matter was non-core under §157(c), litigants could still consent to the bankruptcy court entering a judgment under §157(c)(2). Pet.App.42a-43a. The Seventh Circuit also ruled that §157 contained a statutory gap that prevented the district court from considering the bankruptcy court's order as a report and recommendation, Pet.App.51a-54a, a conclusion the

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[2] The Seventh Circuit characterized Sharif's failure to make his *Stern*-based arguments in a timely manner as a waiver, not a forfeiture. Pet.App.31a. As set forth in Section II.C., *infra*, Sharif did not simply forfeit his *Stern* arguments; he gave his consent both by filing his bankruptcy petition and by moving for summary judgment.

Court subsequently rejected in *Executive Benefits,* 134 S. Ct. at 2173.

Wellness filed a petition for rehearing *en banc*, which was denied. Pet.App.67a-68a. It then filed a timely petition for *certiorari*, which the Court granted on July 1, 2014.

SUMMARY OF ARGUMENT

The Seventh Circuit held that post-*Stern*, bankruptcy courts may no longer decide actions against a debtor to determine whether property in the debtor's possession belongs to the debtor's bankruptcy estate even with litigant consent. Pet.App.31a-51a. It further held that because Wellness's claim was a so-called "*Stern* claim," the bankruptcy court lacked statutory authority to take any action with respect to that claim, including even presiding over discovery or recommending proposed findings of fact and conclusions of law to the district court. Pet.App.51a-54a. The Court already has corrected the last of these errors in *Executive Benefits* by holding that "*Stern* claims" are the same as non-core claims, thereby closing §157's supposed "statutory gap." 134 S. Ct. at 2172-74. Wellness now asks the Court to correct the first two errors.

Contrary to the Seventh Circuit's conclusion, Wellness's §541 action is not a "*Stern* claim." In *Stern*, the Court emphasized that it was not invalidating the authority of bankruptcy courts to enter judgments in all circumstances, which would

effect a massive disruption of the bankruptcy system. To the contrary, the Court held that bankruptcy courts could continue to enter judgments in actions that "stem[] from the bankruptcy itself." 131 S. Ct. at 2618. As the Court explained, because the state-law tort action against the creditor in *Stern* was "in no way derived from or dependent upon bankruptcy law" and would "exist[] without regard to any bankruptcy proceeding," it was outside of the constitutional bounds of the bankruptcy court's authority to enter judgment. *Id.*

The same is not true here. Wellness's §541 action against Sharif to determine if property in Sharif's possession belongs to his bankruptcy estate is a claim that "stems from the bankruptcy itself." *Stern*, 131 S. Ct. at 2618. Bankruptcy jurisdiction "is principally *in rem* jurisdiction." *Central Va. Cmty. College*, 546 U.S. at 369. Thus, a bankruptcy court's "exercise of exclusive jurisdiction over all of the debtor's property" is a "[c]ritical feature[] of every bankruptcy." *Id.* at 363-64. By automatically creating an estate when Sharif filed for bankruptcy, §541 constructs the means by which the basic bargain of every bankruptcy is satisfied: the debtor surrenders his property in exchange for a fresh start. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). Thus, a dispute *with a debtor* about which of his assets belong to his bankruptcy estate necessarily "stems from the bankruptcy." *Stern*, 131 S. Ct. at 2618.

Moreover, Wellness's action seeking a declaration that Sharif's bankruptcy estate, and not Sharif individually, holds title to the alleged trust assets in Sharif's possession is nothing like the state-law counterclaim seeking money damages against a third party that was at issue in *Stern*. By definition, Wellness's §541 action could arise only post-bankruptcy because it is the "commencement of a case ... [that] creates an estate." 11 U.S.C. §541(a). Unlike a state-law tort claim, a §541 action also "'depend[s] upon the will of congress,'" because Congress establishes the terms under which a debtor's property is included in the bankruptcy estate. 131 S. Ct. at 2614 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855)); *see also* U.S. CONST. art I, §8, cl. 4.

Furthermore, contrary to the Seventh Circuit's analysis, the underlying presence of state-law issues does not alter this conclusion. A §541 action is "derived from" and "dependent upon bankruptcy law," *Stern*, 131 S. Ct. at 2618, even if it requires the resolution of subsidiary state-law issues. *See, e.g.*, *Parks v. Dittmar (In re Dittmar)*, 618 F.3d 1199, 1204 (10th Cir. 2010). Indeed, in other contexts, the Court has recognized that the presence of state-law issues does not transform an action based on a Bankruptcy Code provision into a state-law claim. In *Law v. Siegel*, for example, the Court recognized that federal law—11 U.S.C. §522—creates the right to claim an exemption even if the specifics of that exemption are based upon state law. 134 S. Ct. 1188, 1196-97 (2014); *accord Barnhill v. Johnson*,

503 U.S. 393, 397-98 (1992) (what constitutes a "transfer" under 11 U.S.C. §101(54) is a federal law question even though state law informs the answer). Here, the debtor claimed to own the property at issue only as a trustee, thereby implicating questions of state trust law. But whether trust property is part of the estate is a question that §541(d) expressly makes a matter of federal bankruptcy law. *See* 5 Collier on Bankruptcy, ¶541.28, at 541-103-04 (Alan A. Resnick *et al*. eds., 16th ed. 2013) (explaining that §541(d) applies whenever a debtor claims he holds property in trust).

A "firmly established historical practice" also authorizes bankruptcy courts to decide whether a debtor's property belongs to his bankruptcy estate. *See Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring). From the framing of the Constitution, and before under English law, bankruptcy courts (and their historical precursors) have always decided such issues. Thomas E. Plank, *Why Bankruptcy Judges Need Not And Should Not Be Article III Judges*, 72 Am. Bankr. L.J. 567, 584-87, 600-10 (1998). The Court just this year recognized in *Executive Benefits* that bankruptcy judges historically had the authority to decide claims involving "'property in the actual or constructive possession of the [bankruptcy] court.'" 134 S. Ct. at 2170 (citing Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After Stern v. Marshall*, 86 Am. Bankr. L.J. 121, 124 (2012)) (original modification).

The Seventh Circuit's conclusion that property-of-the-estate determinations are not constitutionally core due to the presence of subsidiary state-law issues marks a significant departure from this historical precedent that would shift much of the traditional work of bankruptcy courts to the district courts as state-law issues permeate many, if not most, aspects of bankruptcy cases. *Stern*, 131 S. Ct. at 2616. Because *Stern* does not hold, or even suggest, that the Constitution requires such a radical reassignment of the judicial workload, the Court should reverse the Seventh Circuit's ruling that §541 actions are "*Stern* claims."

Because the action here is within the bankruptcy court's constitutional authority to decide, the Court need not reach the second question on which it granted *certiorari*. If the Court elects to decide the second question, it should conclude that bankruptcy courts may, consistent with Article III, decide "*Stern* claims" with a litigant's express or implied consent.

As a general matter, Article III "serves to protect primarily personal, rather than structural, interests" and "as a personal right ... is subject to waiver." *Schor*, 478 U.S. at 848. The Seventh Circuit misread *Stern* to hold that structural interests predominate when bankruptcy courts decide "*Stern* claims," making litigant consent irrelevant. Pet.App.31a-45a. *Stern*, however, addressed the Article III question in the absence of consent. The Court described *Stern* as "establish[ing] 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 [or tort] action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review." 131 S. Ct. at 2615 (emphasis added, internal quotations omitted).

Allowing the bankruptcy court to enter judgment on Wellness's §541 claim against Sharif with Sharif's consent does not raise Article III structural concerns. As the Court explained in *Schor*, unwaivable structural interests arise only when Congress "attempts to transfer jurisdiction [to non-Article III tribunals] for the purposes of emasculating constitutional courts...." 478 U.S. at 850 (internal citations and quotations omitted) (original modification). Congress has not done that in §157. Bankruptcy courts operate wholly within the Judicial Branch, exercising jurisdiction over "*Stern* claims" only upon referral from the district courts and entering judgment only with litigant consent.

Indeed, the Court has consistently upheld the judgments of non-Article III adjudicators when the referring court has had subject matter jurisdiction over the suit and possessed the necessary reference authority (either by tradition, statute, or rule) and the parties have consented. *See, e.g., Roell v. Withrow*, 538 U.S. 580, 586-87 (2003); *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263, 268 (1932); *Heckers v. Fowler*, 69 U.S. 123, 131 (1864). In the directly analogous context of magistrate judges, the Court in *Roell* emphasized the singular

significance of consent to the Article III analysis, holding that a magistrate judge may enter judgment in a civil suit with the express or implied consent of the parties. 538 U.S. at 589-91. Thus, because resort to a bankruptcy judge under §157 always requires the authorization of an Article III judge and the election of the parties, allowing bankruptcy courts to decide "*Stern* claims" with litigant consent does not violate Article III.

Finally, in this case, Sharif consented to have determinations about his property decided by the bankruptcy court. He voluntarily filed for bankruptcy, moving his dispute with Wellness that was already before an Article III judge in Texas to a bankruptcy court in Illinois. He did so on notice that §541 would make all of his non-exempt property part of his bankruptcy estate. Once in bankruptcy, Sharif asked the bankruptcy court to enter summary judgment in his favor. Pet.App.10a. *A fortiori* by asking the bankruptcy court to enter judgment, Sharif necessarily consented to the bankruptcy court's authority to do so. Only long after he lost (and long after the Court decided *Stern*), did Sharif raise Article III concerns. J.A.145-146. Finding consent from Sharif's conduct "checks the risk of gamesmanship" and "substantially honor[s]" Sharif's Article III right. *Roell*, 538 U.S. at 590.

ARGUMENT

I. Bankruptcy Courts Have Constitutional Authority To Enter Judgment On §541 Claims Because The Determination Whether A Debtor's Property Is Property Of The Bankruptcy Estate "Stems From The Bankruptcy Itself."

The "narrow" holding of *Stern* is that, absent party consent, bankruptcy courts "lack[] the constitutional authority to enter a final judgment on a [debtor's] state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." 131 S. Ct. at 2620. As the Seventh Circuit acknowledged, "the Supreme Court [did] not come close to holding [in *Stern*] that an Article III judge must decide claims for which the Bankruptcy Code itself provides the rule of decision...." Pet.App.46a. Instead, *Stern* framed the operative constitutional question as "whether the action at issue stems from the bankruptcy itself *or* would necessarily be resolved in the claims allowance process." 131 S. Ct. at 2618 (emphasis added). Because the "action at issue" in *Stern*, a debtor's state-law-based counterclaim against a creditor, was "in no way derived from or dependent upon bankruptcy law" and would "exist[] without regard to any bankruptcy proceeding," the Court held that it did not "stem[] from the bankruptcy itself" and the bankruptcy court lacked the constitutional authority to decide it. *Id.*

The Seventh Circuit misapplied *Stern*. It held that the bankruptcy court lacked the constitutional

authority to decide whether the debtor Sharif's property belonged to his bankruptcy estate or should be treated as trust property in which Sharif held only a legal interest as trustee and not equitable title. Although the action at issue "derived from" and was "dependent upon bankruptcy law," specifically Bankruptcy Code §541(a) and (d), and could only "exist[]" because Sharif had filed his bankruptcy case, the Seventh Circuit nonetheless concluded it was outside the bankruptcy court's authority to decide because state law played a role in the decision. Pet.App.45a-51a. If allowed to stand, the Seventh Circuit's expansive reading of *Stern's* "narrow" holding, 131 S. Ct. at 2620, would cripple the bankruptcy courts' authority, both because property-of-the-estate determinations are among the most basic of questions a bankruptcy court must adjudicate and because state-law issues permeate all aspects of bankruptcy cases.

A. Consistent With *Stern*, Bankruptcy Courts May Enter Judgments Deciding Whether A Debtor's Property Is Part Of His Bankruptcy Estate Under Bankruptcy Code §541.

1. Section 541 Determinations "Stem[] From The Bankruptcy Itself."

No determination more clearly "stems from the bankruptcy itself" than the §541 assessment of whether property in the debtor's possession is property of the bankruptcy estate. 131 S. Ct. at

2618. Section 541's creation of the bankruptcy estate, and the bankruptcy court's authority over the property within that estate, form the central mechanism by which the goals of bankruptcy are achieved.

As the Court explained in *Central Virginia Community College*, "[b]ankruptcy jurisdiction, as understood today and at the time of the framing, is principally *in rem* jurisdiction." 546 U.S. at 369. "In bankruptcy, 'the court's jurisdiction is premised on the debtor and his estate, and not on the creditors.'" *Id.* at 370 (quoting *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004)). Congress recognized the *in rem* nature of federal bankruptcy jurisdiction by providing in 28 U.S.C. §1334(e) that district courts (and bankruptcy courts if a matter is referred under §157(a)) have "exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate...." Thus, a bankruptcy court's "exercise of exclusive jurisdiction over all of the debtor's property" is a "[c]ritical feature[] of every bankruptcy." *Central Va. Cmty. College*, 546 U.S. at 364-65.

The *in rem* nature of bankruptcy jurisdiction serves "[o]ne of the primary purposes of [bankruptcy]" which is to "give[] to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure

and discouragement of pre-existing debt." *Local Loan*, 292 U.S. at 244. To achieve this purpose, the Code provides that "[a]s a general matter, upon the filing of a petition for bankruptcy, 'all legal or equitable interests of the debtor in property' become the property of the bankruptcy estate and will be distributed to the debtor's creditors." *Rousey v. Jacoway*, 544 U.S. 320, 325 (2005) (quoting 11 U.S.C. §541(a)(1)). By creating the estate at the outset of the bankruptcy case, bankruptcy law "secure[s] for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition." *Segal v. Rochelle*, 382 U.S. 375, 379 (1966). It further gives bankruptcy courts "exclusive jurisdiction" over the estate to ensure an "equitable distribution of that property among the debtor's creditors...." *Central Va. Cmty. College*, 546 U.S. at 363-64.

Plainly, the determination whether property in the debtor's possession is property of the bankruptcy estate is integral to the bankruptcy process. That determination forms the very basis of the bankruptcy court's *in rem* jurisdiction. It also is the necessary predicate to distributing the estate assets to creditors, the central purpose of bankruptcy. Bankruptcy courts' authority over bankruptcy estates would be utterly ineffectual were bankruptcy courts without the power to determine which of the debtor's assets actually fall within the estate. Creditors also would no longer be able to rely on bankruptcy courts to collect and distribute all of a debtor's property equitably and expeditiously. This

would thwart a "chief purpose of the bankruptcy laws" which is "'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period.'" *Katchen v. Landy*, 382 U.S. 323, 328 (1966) (quoting *Ex parte Christy*, 44 U.S. 292, 312 (1845)).

The Court recognized this foundational point over a hundred years ago in *Mueller v. Nugent*, 184 U.S. 1 (1902), a case brought under the 1898 Bankruptcy Act. In *Mueller*, the debtor transferred certain property to an agent, pre-bankruptcy, to hold in trust. When the bankruptcy trustee claimed that property on behalf of the bankruptcy estate, the agent protested, contending that the bankruptcy court lacked authority to adjudicate the claim. The Court thus faced the question whether "the bankruptcy court [has] the power to compel the bankrupt or his agent to deliver up money or other assets of the bankrupt [or whether] a mere refusal by the bankrupt or his agent so to deliver up oblige[s] the trustee to resort to a plenary suit in the circuit court or a state court...." *Id.* at 14.

In holding that the bankruptcy court had the authority to adjudicate the matter and issue a final order, *Mueller* observed "the filing of the [bankruptcy] petition is a *caveat* to all the world," that upon the filing of the petition the entirety of the debtor's property—whether in "actual or constructive possession"—is "placed in the custody of the bankruptcy court." *Id.* If the bankruptcy court nonetheless were unable to determine whether

property held by the debtor in his constructive possession was properly within the bankruptcy estate, the authority of the bankruptcy court would be "seriously impaired, and in many respects rendered practically inefficient." *Id.* As the Court explained, "[t]he bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law." *Id.*

The rule of *Mueller*—that a bankruptcy court has the authority to determine whether property in the debtor's possession is property of the estate regardless of party consent—is a bedrock principle of bankruptcy law and follows naturally from the fundamental tenet that "a federal court always has jurisdiction to determine its own jurisdiction," here the scope of the bankruptcy court's *in rem* jurisdiction. *United States v. Ruiz*, 536 U.S. 622, 628 (2002).

The Court made this exact point explicitly in *Taubel-Scott-Kitzmiller Co. v. Fox*, concluding that "[a]s every court must have power to determine, in the first instance, whether it has jurisdiction to proceed, the bankruptcy court has, in every case, jurisdiction to determine whether it has possession actual or constructive [of a debtor's property]." 264 U.S. 426, 433 (1924). Although the Court concluded

in *Fox* that the bankruptcy court lacked the authority to enter a judgment, it reached that conclusion only because the property at issue was not in the debtor's actual or constructive possession. *Id.* at 438. Thus, *Fox* clearly states the principle the Court applied in *Mueller*—inherent within a bankruptcy court's authority to administer the bankruptcy estate is the authority to decide whether property in the debtor's actual or constructive possession constitutes part of that estate. Accordingly, an action to determine if property held by the debtor belongs to the bankruptcy estate is an action that "stems from the bankruptcy itself." *Stern*, 131 S. Ct. at 2618.

2. *Stern* Did Not Alter Bankruptcy Courts' Authority To Make §541 Determinations.

Stern did not overrule *Mueller* or otherwise suggest that bankruptcy courts may no longer decide whether a debtor's property is included in his bankruptcy estate under §541. The Seventh Circuit erroneously concluded otherwise because it failed to appreciate the significant substantive differences between Wellness's §541 action and the tortious interference claim at issue in *Stern*. Pet.App.48a. The Seventh Circuit found the two actions "indistinguishable," because it misunderstood a §541 action to be a state-law claim that, like the tortious interference claim in *Stern*, was intended to augment the estate by recovering property from entities other than the debtor. *Id.*

But the §541 action at issue here is nothing like the tortious interference counterclaim in *Stern.* The tort claim at issue in *Stern* was not based on the Bankruptcy Code at all. There the debtor sued a creditor for money damages on a common law tort claim for an injury that occurred *before* the bankruptcy case was even filed. *Stern*, 131 S. Ct. at 2601-02. The tort action was not central to the bankruptcy case; indeed, the only reason the action in *Stern* was not before a state court was because one of the parties to the dispute had filed for bankruptcy.

This is the polar opposite of a §541 action, which can arise only *after* a debtor files for bankruptcy and is central to a "restructuring of debtor-creditor relations" and thus at the "core of the federal bankruptcy power...." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982). Indeed, without a bankruptcy estate, there would be nothing to restructure. Moreover, a §541 action also does not seek monetary damages; it seeks a declaration of title consistent with a bankruptcy court's traditional *in rem* jurisdiction.

Further, a §541 action possesses none of the three attributes that caused the Court to conclude that the tortious interference claim in *Stern* did not "stem[] from the bankruptcy itself [n]or would [it] necessarily be resolved in the claims allowance process." 131 S. Ct. at 2618. *First*, the *Stern* debtor's tortious interference claim was a "state law action independent of the federal bankruptcy law

and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy." *Id.* at 2611. *Second*, the *Stern* debtor's "claimed right to relief [did] not flow from a federal statutory scheme," *id.* at 2614, and was instead a "state common law [claim] between two private parties," that did "'not 'depend[] on the will of congress,'" *id.* (quoting *Murray's Lessee*, 59 U.S. at 284). *Third*, the *Stern* debtor's tort action was brought "'to augment the bankruptcy estate'" rather than to adjust "'creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res.'" *Stern*, 131 S. Ct. at 2614 (quoting *Granfinanciera, S.A v. Nordberg*, 492 U.S. 33, 56 (1989)).

Wellness's §541 action differs on all three counts. *First*, an action to determine whether property in the debtor's possession belongs to his bankruptcy estate is *wholly* dependent upon federal bankruptcy law and is an issue that, pursuant to the text of the Bankruptcy Code itself, arises in every single bankruptcy case. *See* 11 U.S.C. §541(a). The Seventh Circuit's confusion over this point likely stems from a misunderstanding about the role state law plays in §541 property-of-the-estate determinations. As the Court recognized in *Butner v. United States*, 440 U.S. 48, 55 (1979), state law establishes most property rights. Thus, bankruptcy courts generally look first to state law to determine what a debtor's rights are in a particular piece of property. "Once that state law determination is made, however, [bankruptcy courts] must still look to federal bankruptcy law to resolve the extent to which

that interest is property of the estate under §541." *Dittmar*, 618 F.3d at 1204 (internal quotations omitted).[3]

In this case, that means that even though state law informs the decision about whether Sharif's trust was a sham, whether the purported trust assets ultimately would be considered property of the bankruptcy estate is a federal law question answered by Bankruptcy Code §541(a) and (d). Thus, because federal law ultimately determines whether a particular asset is in or out of the bankruptcy estate, a §541 action (unlike the common law tort at issue in *Stern*) cannot be described as a "state law action independent of the federal bankruptcy law...." *Stern*, 131 S. Ct. at 2611.[4]

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[3] *Accord Croft v. AMS SA Mgmt., L.L.C. (In re Croft)*, 737 F.3d 372, 374 (5th Cir. 2013) (*per curiam*) (explaining that federal law establishes extent to which debtor's property rights become bankruptcy estate property); *Tyler v. DH Capital Mgmt., Inc.*, 736 F.3d 455, 461 (6th Cir. 2013) (same); *Abboud v. The Ground Round, Inc. (In re The Ground Round, Inc.)*, 482 F.3d 15, 17 (1st Cir. 2007) (same); *American Bankers Ins. Co. of Florida v. Maness*, 101 F.3d 358, 363 (4th Cir. 1996) (same); *N.S. Garrott & Sons v. Union Planters Nat'l Bank of Memphis (In re N.S. Garrott & Sons)*, 772 F.2d 462, 466 (8th Cir. 1985) (same); *see also Law,* 134 S. Ct. at 1196-97 (recognizing right to a homestead exemption under §522 is a federal question, even if the type and value of the property to be exempted is determined by state law); *Barnhill,* 503 U.S. at 397-98 (recognizing same in context of §101(54)).

[4] In other contexts, the Court has recognized this same interplay between state property law and federal law. For

That the Court could not have intended in *Stern* that subsidiary state-law issues would transform matters arising under specific Bankruptcy Code provisions into "state law actions" outside of the bankruptcy court's decisional authority is further underscored by *Stern's* recognition that bankruptcy courts may, consistent with Article III, decide creditor claims against the bankruptcy estate. 131 S. Ct. at 2618. Like property interests, "[c]reditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation," which generally is state law. *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000); *accord Butner*, 440 U.S. at 55. As with property-of-the-estate determinations, the question whether a state law-based claim is allowed against the estate under 11 U.S.C. §502 is a matter of federal law. *See, e.g., Stancill v. Hartford Sands Inc. (In re Harford Sands Inc.)*, 372 F.3d 637, 640 (4th Cir. 2004). Thus, the Court's recognition that bankruptcy courts may, consistent with Article III, decide disputes involving the allowability of creditor claims demonstrates that post-*Stern*, bankruptcy courts may continue to decide state-law issues.

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example, in *United States ex rel. Tennessee Valley Authority v. Powelson*, the Court held that "[t]hough the meaning of 'property' as used in §25 of the [Tennessee Valley Authority Act of 1933] and in the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law." 319 U.S. 266, 279 (1943). In *Yiatchos v. Yiatchos*, 376 U.S. 306, 309 (1964), the Court recognized this same interplay in a case involving the survivorship provisions of federal bonds.

Second, also unlike *Stern's* common law tort claim, Wellness's "claimed right to relief" under §541 "flow[s] from a federal statutory scheme." 131 S. Ct. at 2614. The Constitution authorizes Congress "[t]o establish ... uniform Laws on the subject of Bankruptcies...." U.S. CONST. art I, §8, cl. 4. Section 541 is central to the uniform bankruptcy law that Congress has established because, as explained above, the creation of the bankruptcy estate pursuant to §541 is the means by which Congress "secure[s] for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition." *Segal*, 382 U.S. at 379. Thus, property-of-the-estate determinations "flow from a federal statutory scheme." *Stern*, 131 S. Ct. at 2614.

Third, the Seventh Circuit's characterization of a §541 claim as one "intended only to augment the bankruptcy estate"—with citations to *Stern*, *Granfinanciera*, and *Northern Pipeline*—misapprehends the Court's use of the word "augment" in those decisions. Pet.App.48a. As the Court explained in *Granfinanciera*, an action "augment[s]" the estate when it "'constitute[s] no part of the proceedings in bankruptcy but concern[s] controversies arising out of it....'" 492 U.S. at 56 (quoting *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94-95 (1932)). *Schoenthal*, like *Granfinanciera*, *Northern Pipeline*, and *Stern,* involved a trustee's action against a third-party to obtain a money judgment that would "augment" the estate by bringing in new funds from that third-party. In

contrast, a §541 action establishes the proper extent of the estate by determining whether a debtor is withholding property in his actual or constructive possession that rightfully belongs in his bankruptcy estate rather than "augmenting" the estate with additional funds from a third-party.

Thus, unlike the third-party actions in those cases, the action at issue here is part of the bankruptcy proceedings. *Granfinanciera*, 492 U.S. at 56 (internal quotations omitted). "[T]he restructuring of debtor-creditor relations," which is described as being at the "core of the federal bankruptcy power," *Northern Pipeline*, 458 U.S. at 71, starts with the *in rem* creation of a bankruptcy estate and that estate, at a minimum, consists of all property in a debtor's actual or constructive possession. *Rousey*, 544 U.S. at 325; *Mueller*, 184 U.S. at 13-14. A claim against a debtor seeking to ensure that all of his property is properly placed within the estate therefore necessarily is "part of the proceedings in bankruptcy...." *Granfinanciera*, 492 U.S. at 56. Thus, Wellness's §541 claim against debtor Sharif was not an action seeking to "augment" the estate; it sought to ensure that the estate was properly constituted in the first instance.

* * *

Because *Stern* expressly holds that bankruptcy courts may decide actions that, like the §541 action here, "stem[] from the bankruptcy itself," 131 S. Ct.

at 2618, the Court should reverse the Seventh Circuit's decision.

B. Firmly-Established Historical Practice Authorizes Bankruptcy Courts To Decide Those Actions That "Stem[] From The Bankruptcy Itself," Such As Whether A Debtor's Property Constitutes Property Of The Bankruptcy Estate.

A "firmly established historical practice" also authorizes bankruptcy courts to decide whether a debtor's property constitutes property of the bankruptcy estate. *Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring). The Framers of the Constitution would have understood non-Article III bankruptcy judges (or, using earlier nomenclature, commissioners or referees) to possess the authority to decide actions "stem[ming] from the bankruptcy itself." Plank, 72 Am. Bankr. L.J. at 572-75; Brubaker, 86 Am. Bankr. L.J. at 123.

At the time of the Founding, the Framers' understanding of bankruptcy derived from English bankruptcy acts. These acts were not part of the common law and they authorized commissioners to adjudicate the basic issues arising in bankruptcy, such as a debtor's eligibility for bankruptcy relief, what constitutes property of the estate, the allowance of claims against that estate, the distribution of the estate to creditors, and the debtor's entitlement to a discharge. Plank, 72 Am. Bankr. L.J. at 575-77. From the earliest days of

bankruptcy practice in this country, Congress has modeled our bankruptcy laws upon the English system in place at the time of the Founding and thus, placed the authority to decide these basic bankruptcy matters with non-Article III adjudicators. This "firmly established historical practice" authorizes bankruptcy courts to decide whether a debtor's property constitutes property of the bankruptcy estate. *Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring).

1. English Laws At The Time Of The Founding Authorized Bankruptcy Commissioners To Determine The Extent Of A Debtor's Property.

Under the English bankruptcy act in effect at the time of the Founding, the Lord Chancellor appointed five bankruptcy commissioners to preside over bankruptcy proceedings, and these five commissioners, or a quorum of three, determined almost all of the issues arising in the bankruptcy proceedings. Plank, 72 Am. Bankr. L.J. at 576-78 (citing 5 Geo. 2, ch. 30, §§1,2 (1732)). Central to the bankruptcy commissioners' authority was the power to seize property in the debtor's actual or constructive possession. Thus, bankruptcy commissioners could issue a warrant for the seizure of a debtor's "Goods, Wares, Merchandizes and Effects … and Books, Papers or Writings." 5 Geo. 2, ch. 30, §14 (1732) (Eng.). Under the Statute of 1 James, these commissioners also could break open the homes, warehouses, trunks, or chests of the

bankrupt to seize property belonging to the bankruptcy estate. 1 Jam. ch. 15, §8 (1604) (Eng.); *see generally* Plank, 72 Am. Bankr. L. J. at 585-87.

As Sir William Blackstone observed, "all personal estate and effects of the bankrupt are considered as vested by the act of bankruptcy ... and the commissioners by their warrant may cause any house or tenement of the bankrupt to be broken open, in order to enter upon and seize the same." 2 WILLIAM BLACKSTONE, COMMENTARIES *485. Thus, under the English model, bankruptcy commissioners had "*in rem* jurisdiction over property rightfully in the possession of the estate," and could administer that property—including through its distribution to creditors—in summary equitable proceedings. *See* Brubaker, 86 Am. Bankr. L. J. at 124.

2. Early American Bankruptcy Statutes Continued The Practice Of Vesting Commissioners With Authority Over Property In The Actual Or Constructive Possession Of The Debtor.

In our nation's earliest bankruptcy statutes, Congress adopted the English practice of conferring upon bankruptcy commissioners who were not Article III judges the authority to decide almost all matters. *See* Brubaker, 86 Am. Bank. L.J. at 124-25. The first federal bankruptcy statute, the Bankruptcy Act of 1800, authorized bankruptcy commissioners "to take into their possession, all the estate, real and

personal, of every nature and description to which the said bankrupt may be entitled, either in law or equity, in any manner whatsoever, and cause the same to be inventoried and appraised to the best value." Bankruptcy Act of 1800, ch. 19 §5, 2 Stat. 19 (repealed 1803). The 1800 Act gave bankruptcy commissioners power over a debtor's estate so complete that a commissioner could "imprison recalcitrant third parties in possession of the estate's assets." *Central Va. Cmty. College*, 546 U.S. at 370. Similarly, the Bankruptcy Acts of 1841 and 1867 gave federal courts jurisdiction over "all matters and proceedings in bankruptcy" and authorized federal courts to appoint bankruptcy commissioners to exercise that jurisdiction. *See* Bankruptcy Act of 1841, ch. 9 §6, 5 Stat. 440 (repealed 1843); Bankruptcy Act of 1867, ch. 176 §6, 14 Stat. 517 (repealed 1878).

3. The Bankruptcy Act Of 1898 Continued The Practice Of Vesting Bankruptcy Referees With Authority Over Property In The Debtor's Actual Or Constructive Possession.

The Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (Code, tit. 11 U.S.C. §66) (repealed 1978), was the first comprehensive permanent federal bankruptcy legislation and it remained in force (with various amendments and modifications) until the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978). The 1898 Act designated district courts as "courts of bankruptcy" and, with

some exceptions, invested those courts with the power to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto." Bankruptcy Act of 1898, §2(a)(7) (Code, tit. 11, ch. 2, §11).

Like the earlier bankruptcy acts, the 1898 Act authorized the district courts to appoint bankruptcy referees and authorized these referees to exercise "summary *in rem* jurisdiction ... to adjudicate all disputes incident to administration of property in the actual or constructive possession of the court." Brubaker, 86 Am. Bank. L.J. at 128; Bankruptcy Act of 1898, §§34, 38 (Code, tit. 11, ch. 5, §§62, 66); *see also* 2A Collier on Bankruptcy, ¶38.09[2], at 1428-29 (James Wm. Moore *et al*. eds., 14th ed. 1978). As the Court explained in *Van Huffel v. Harkelrode*, "bankruptcy court[s] possess[] the power … to collect, reduce to money and distribute the estates of bankrupts, and to determine controversies with relation thereto." 284 U.S. 225, 227-28 (1931).

Since 1898, Article III courts—including this Court—have frequently affirmed the authority of bankruptcy referees to exercise summary jurisdiction over property in the actual or constructive possession of the debtor. In *Mueller*, as discussed above, the Court rejected the notion that a bankruptcy referee lacked authority to enter final orders about property in the debtor's actual or constructive possession, reasoning that the referee's "grant of jurisdiction to cause the estates of bankrupts to be collected ...

would be seriously impaired" if a referee lacked such authority. 184 U.S. at 14.

Following *Mueller*, the courts of appeals consistently acknowledged the authority of bankruptcy referees operating under the 1898 Act to issue judgment orders concerning property in a debtor's actual or constructive possession. *See, e.g.*, *White v. Murtha*, 343 F.2d 831, 832 (5th Cir. 1965). Significantly for purposes of this case, the courts of appeals also confirmed the authority of bankruptcy referees to enter final orders deciding that property held by entities that debtors had created to shield their assets from turnover belonged to the bankruptcy estate. For example, in *Wellston, Okla., Natural Gas Authority Bondholders v. Nesbitt (In re Eufaula Enterprises, Inc.)*, the Tenth Circuit held that the bankruptcy referee could disregard distinct legal entities in determining ownership of assets because the entities were alter egos of each other. 565 F.2d 1157, 1161 (10th Cir. 1977).

4. Before The Decision Below, The Courts Of Appeals Had Continued To Affirm The Authority Of Bankruptcy Courts Constituted Under The 1984 Act To Determine Whether Property Of The Debtor Is Property Of The Estate.

In 1978, Congress passed the Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549 (1978). "[T]he 1978 Act mandated that bankruptcy judges

'shall exercise' jurisdiction over 'all civil proceedings arising under title 11 or arising in or related to cases under title 11.'" *Executive Benefits*, 134 S. Ct. at 2170 (quoting 28 U.S.C. §1471(b)-(c) (repealed)). "Under the 1978 Act, bankruptcy judges were 'vested with all of the 'powers of a court of equity, law, and admiralty,' with only a few limited exceptions." 134 S. Ct. at 2171 (quoting *Northern Pipeline*, 458 U.S. at 55 and 28 U.S.C. §1481 (repealed)). In 1982, the Court struck this statute as unconstitutional in *Northern Pipeline*, holding 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 Agricultural Products Co.*, 473 U.S. 568, 584 (1985).

In response to *Northern Pipeline*, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"), Pub. L. No. 98-535, 98 Stat. 333 returning to district courts the complete discretion to determine whether and when to refer matters to the bankruptcy courts. 28 U.S.C. §§151, 157(a). BAFJA also limited the ability of bankruptcy courts to enter judgment orders, in the absence of party consent, to those matters deemed "core" to the bankruptcy case. *Id.* at §157(b)(1); *Executive Benefits*, 134 U.S. at 2171-72.

Following *Northern Pipeline* and the enactment of BAFJA, the courts of appeals consistently upheld

the authority of bankruptcy courts to decide disputes about property in the debtor's possession. In *Canal Corp. v. Finnman* (*In re Johnson)*, the Fourth Circuit addressed the authority of the bankruptcy court to enter a final order deciding whether property in the debtor's possession belonged to the bankruptcy estate in light of the Court's decision in *Northern Pipeline*. 960 F.2d 396, 400-02 (4th Cir. 1992). The Fourth Circuit concluded that the bankruptcy court had the constitutional authority to decide whether the property was estate property or should instead be distributed to a limited group of creditors because the determination of whether the property belonged to the bankruptcy estate was inextricably tied to the question of who was entitled to the funds. Both matters therefore were "intimately tied to the traditional bankruptcy functions and estate, and, therefore, are core matters within the clear jurisdiction of the bankruptcy court." *Id.* at 402.

The Fourth Circuit's conclusion that the bankruptcy court had the authority to enter a final order hinged on the fact that, just as in the instant case, the debtor was in possession of the property in dispute. *Id.* at 400-02. As the Eleventh Circuit explained in a subsequent case, *The Whiting-Turner Contracting Co. v. Electric Machinery Enterprises, Inc. (In re Electric Machinery Enterprises, Inc.)*, the debtor's possession of the disputed asset is what gave the bankruptcy judge the constitutional authority to enter judgment in *Johnson*. 479 F.3d 791, 797 (11th Cir. 2007).

* * *

History thus confirms that bankruptcy adjudicators, whether acting pursuant to authority granted by acts of the English Parliament in the early 17th century, or acts of Congress from 1800 to the modern day, have long exercised, as part and parcel of the authority granted to them, the power to determine whether property in the debtor's actual or constructive possession constitutes property of the bankruptcy estate. The Seventh Circuit's ruling to the contrary stands in stark contrast to hundreds of years of historical practice and is neither required nor even suggested, by *Stern*.

C. The Seventh Circuit's Reading Of *Stern* Threatens The Efficient Administration Of Bankruptcy Cases.

If allowed to stand, the Seventh Circuit's implicit prohibition against bankruptcy courts deciding state-law issues would severely limit what bankruptcy courts may do and would transfer most of their work to the district courts. State law by necessity pervades many bankruptcy law determinations because "[p]roperty interests are created and defined by state law." *Stern*, 131 S. Ct. at 2616 (internal quotations omitted); *Butner*, 440 U.S. at 55.

Indeed, Congress intended that bankruptcy courts would decide incidental state-law issues. When the bill that became §157 was introduced, its sponsor, Representative Robert Kastenmeier,

anticipated that bankruptcy courts would continue to decide state-law issues "that arise in the course of restructuring debtor-creditor rights," stating that these issues are "matters of Federal law." 130 CONG. REC. E1109 (daily ed. March 20, 1984).

Stern did not hold (or even suggest) otherwise. Post-*Stern*, the operative constitutional question is whether an action "stems from the bankruptcy itself" not whether the bankruptcy court must decide an incidental issue of state law. 131 S. Ct. 2618. When addressing the question *Stern* posed, the Court can and should consider the practical implications of its ruling. "The idea of separation of powers is justified by eminently practical considerations. It is faithful to the idea of separation of powers to examine the real consequences of the statute." *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.* 725 F.2d 537, 546-47 (9th Cir. 1984) (*en banc*) (citing The Federalist No. 51 (J. Madison) at 349 (J. Cooke ed. 1961)) (other citation omitted).

The "real consequences" here of eliminating bankruptcy courts' authority to decide state-law issues would be to divest bankruptcy courts of most of their decisional authority. Given the very large number of bankruptcy cases filed each year, the practical consequences would be enormous for the efficient administration of the federal courts. This radical reassignment also would be contrary to the Court's assurance in *Stern* that its decision would *not* "meaningfully change[] the division of labor [between bankruptcy and district courts under

§157]...." 131 S. Ct. at 2620; *see also Executive Benefits*, 134 S. Ct. at 2173 n.8. Accordingly, the Court should conclude that §541 actions are within the bankruptcy courts' constitutional authority to decide.

II. Even If A §541 Claim Is A "*Stern* Claim," Litigants May Consent To Adjudicate Those Claims To Judgment Before The Bankruptcy Courts Without Offending Article III.

Because the action at issue here is *not* a so-called "*Stern* claim," the Court need not reach the second question on which it granted *certiorari*. If the Court does address this question, however, it should reaffirm its precedents permitting the consensual resolution of private rights before non-Article III adjudicators.

A. The Seventh Circuit Erred By Concluding That *Stern* Bars Bankruptcy Courts From Deciding "*Stern* Claims" With Litigant Consent.

Article III, §1 of the Constitution protects two distinct interests: the rights of litigants "to have claims decided before judges who are free from potential domination by other branches of government," and "the role of the independent judiciary within the constitutional scheme of tripartite government." *Schor*, 478 U.S. at 848 (internal citations and quotations omitted). As a general matter, Article III'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." *Id.* (emphasis added). Because Article III, §1's purpose is "primarily" to protect the individual, the Court has held that the right to an Article III judge "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 848-49.

Thus, when the litigants have consented, the Court has consistently upheld the authority of adjudicators who are not Article III judges—within and sometimes even outside the Judicial Branch—to hear any and all proceedings in bankruptcy cases or in other civil cases, and to enter judgment. *See, e.g.*, *Gonzalez v. United States*, 553 U.S. 242, 252 (2008); *Roell*, 538 U.S. at 586-87; *Schor*, 478 U.S. at 848; *MacDonald*, 286 U.S. at 268. As the Court explained in *Peretz v. United States*, "*with the parties' consent*, a district judge may delegate to a magistrate supervision of entire civil and misdemeanor trials." 501 U.S. 923, 933 (1991) (emphasis added). Undoubtedly because Article III "primarily" protects personal rights, *Schor,* 478 U.S. at 848, the Court has found constitutional violations arising from non-Article III adjudications only when the litigants did not consent. *See, e.g.*, *Stern*, 131 S. Ct. at 2614-15; *Northern Pipeline*, 458 U.S. at 56-57.

In this case, the Seventh Circuit undervalued the critical importance of consent to the Article III

analysis. The Seventh Circuit read *Stern* as "unequivocally" holding that there was a structural separation of powers problem with bankruptcy courts entering judgments on "*Stern* claims" that would persist even with litigant consent. Pet.App.41a. But in reaching this conclusion, the Seventh Circuit failed to appreciate that *Stern* was not a case, like this one, where the litigant had consented to the bankruptcy court's authority to adjudicate the dispute. In *Stern*, the creditor objected to the bankruptcy court entering a judgment on the debtor's state-law counterclaim both before and after the bankruptcy court ruled against him. 131 S. Ct. at 2601-02. The debtor nonetheless argued that the creditor had consented to the bankruptcy court's authority to enter a judgment because the creditor had filed a proof of claim in the debtor's bankruptcy case. *Id.* at 2615-16. The Court rejected this argument, reasoning that unlike the litigant in *Schor* who had filed suit in a non-Article III forum and thus consented to proceed there, a creditor in a bankruptcy case has "nowhere else to go" to collect on its claim and thus, by filing that claim, does "not truly consent" to be sued on a counterclaim in bankruptcy court. *Id.* at 2614-15.

Stern therefore addressed the constitutional problems that arise in the *absence* of litigant consent. The Court itself acknowledged this fact, noting that *Stern* and *Northern Pipeline* both could be described as "'establish[ing] 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 [or tort] action arising under state law, *without consent of the litigants,* and subject only to ordinary appellate review.'" 131 S. Ct. at 2615 (quoting *Thomas*, 473 at 584) (emphasis added).

The Court's conclusion in *Stern* that the creditor-litigant was entitled to an Article III judge in the absence of consent therefore cannot mean, as the Seventh Circuit concluded, that consent and waiver no longer have a meaningful role to play in the Article III analysis. *Stern* holds nothing more than what it says: a litigant who does not consent to the entry of a judgment by the bankruptcy court in a suit "made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789'" is entitled to an Article III judge. *Stern*, 131 S. Ct. at 2609 (quoting *Northern Pipeline*, 458 U.S. at 90) (Rehnquist, J., concurring in judgment). If anything, by highlighting the *lack* of consent in its description of its own holding, 131 S. Ct. at 2615-16, the Court emphasized in *Stern* the critical role consent plays in the constitutional analysis, echoing *Schor's* characterization of Article III rights as "primarily personal." 478 U.S. at 848.

In reaching the opposite conclusion, the Seventh Circuit failed to appreciate the extent to which consent is legally intertwined with the analysis of whether a given adjudicatory regime violates Article III, §1. Its confusion on this point appears to stem from its erroneous conclusion that "*Stern* claims" are different from non-core claims. Pet.App.53a-54a.

The Court, however, held in *Executive Benefits* that §157 "permits '*Stern* claims' to proceed as non-core within the meaning of §157(c)." 134 S. Ct. at 2173.

Had the Seventh Circuit understood that a "*Stern* claim" and a non-core claim are the same, it likely would have reached the opposite result in this case. Although the Seventh Circuit believed that litigant consent could never change the constitutional equation for "*Stern* claims," it stated that when bankruptcy courts decide non-core claims with the litigants' consent pursuant to 28 U.S.C. §157(c)(2), "a strong argument can be made" that "Congress has left the essential attributes of judicial power to Article III courts" because in non-core proceedings the bankruptcy court may enter judgment "only if the parties consent and the district court decides to refer the matter to the bankruptcy court." Pet.App.43a. As explained in Section II.B., *infra*, this conclusion was correct; the Seventh Circuit's error was failing to recognize that when bankruptcy courts decide "*Stern* claims" with litigant consent they are necessarily doing so under §157(c)(2). *Executive Benefits*, 134 S. Ct. at 2173.

B. Allowing Bankruptcy Courts To Decide "*Stern* Claims" With Litigant Consent Upon A District Court's Referral Does Not Violate Article III.

1. The Court Has Long Held That Litigants May Waive Or Forfeit Constitutional Rights That Implicate Structural Concerns.

The Seventh Circuit's conclusion that the structural problems it perceived in §157(b) could never be waived cannot be squared with the Court's jurisprudence rejecting the proposition that structural constitutional challenges enjoy an inviolate right to review. As the Court explained in *Plaut v. Spendthrift Farm, Inc.*: "the proposition that legal defenses based upon doctrines central to the courts' structural independence can never be waived simply does not accord with our cases." 514 U.S. 211, 231 (1995).[5]

The conclusion that structural constitutional challenges (apart from subject-matter jurisdiction) may be forfeited or waived flows naturally from the

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[5] *Accord Ryder v. United States*, 515 U.S. 177, 182 (1995) (only a litigant "who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question"); *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 397-98 (1990) (refusing to entertain a structural challenge under the dormant commerce clause where the petitioner failed to timely raise the issue).

rule that "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444 (1944). In *Freytag v. Commissioner*, four Justices of the Court in a concurring opinion agreed that creating a special entitlement to review for structural constitutional arguments "that do not call into question the jurisdiction of the forum" "would erode [the] cardinal principle of sound judicial administration" and "has no support in principle or in precedent or in policy." 501 U.S. 868, 895, 898 (1991) (Scalia, J., concurring).

2. Allowing Bankruptcy Courts To Decide "*Stern* Claims" With Litigant Consent Upon A District Court's Referral Does Not Implicate Any Unwaivable Structural Article III Rights.

In this case, no unwaivable structural Article III concerns prevented the parties from choosing to proceed before the bankruptcy court to a final adjudication. As the Court held in *Schor*, Article III "primarily" protects the individual and thus the right to an Article III court is eminently waivable. 478 U.S. at 848.

Article III also protects the structural interest of an independent and autonomous judiciary, but these concerns do not arise in this case. Article III protects

these structural interests by "barring congressional attempts to *transfer jurisdiction* [to non-Article III tribunals] for the purposes of emasculating constitutional courts…." 478 U.S. at 850 (internal citations and quotations omitted) (emphasis added) (original modification). As *Schor* explained, "[t]o the extent that this structural principle 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, § 2." *Id.* at 850-51.

This case does not implicate structural concerns because Congress has not "transfer[red] jurisdiction" to a non-Article III forum: bankruptcy judges operate entirely within the confines of the Judicial Branch and under the direct control of the district courts. In the words of *Schor*, "the power of the federal judiciary to take jurisdiction" is not merely "unaffected." *Id.* at 855. Rather, Congress has expressly preserved it.

The jurisdictional statute at issue—§1334—vests jurisdiction in the district courts over all bankruptcy cases and civil proceedings arising under title 11, or arising in or related to a bankruptcy case. 28 U.S.C. §1334(a), (b). Unlike repealed 28 U.S.C. §1471, the statute the Court held unconstitutional in *Northern Pipeline*, §1334 gives the bankruptcy courts *no* independent authority to exercise the district court's jurisdiction. Under repealed §1471, bankruptcy courts had independent power conferred by Congress

to exercise the district court's jurisdiction. *Executive Benefits*, 134 S. Ct. at 2170-71. Today, under §1334 and §157, the authority of bankruptcy courts to do anything depends entirely on the discretion of district court judges who may refer bankruptcy cases and adversary proceedings to the bankruptcy courts as they see fit. 28 U.S.C. §157(a). Even when a district court makes a reference, it can withdraw that reference *at any time* either "on [the district court's] own motion, or on timely motion of any party." 28 U.S.C. §157(d). A bankruptcy court therefore serves entirely at the pleasure of the district court, just as magistrate judges do under the Federal Magistrates Act (28 U.S.C. §631 *et. seq.*). When referred bankruptcy cases and proceedings, the bankruptcy court exercises the district court's jurisdiction. 28 U.S.C. §1334.

Moreover, the manner in which Congress established the bankruptcy courts demonstrates that when bankruptcy courts exercise federal bankruptcy jurisdiction they are doing so within the confines of the Judicial Branch. BAFJA constitutes bankruptcy courts as "unit[s] of the district court" and designates bankruptcy judges as "judicial officer[s] of the district court" where the bankruptcy court is located. 28 U.S.C. §151. So "while functionally there may appear to be a separate bankruptcy court, for jurisdictional purposes there is only one court, *i.e.*, the district court." *Grewe v. United States (In re Grewe)*, 4 F.3d 299, 304 (4th Cir. 1993) (internal quotations omitted); *accord In re Dorner*, 343 F.3d 910, 914 (7th Cir. 2003) (noting that "[b]ankruptcy

judges and district judges serve on a unified court"); *Browning v. Levy*, 283 F.3d 761, 779 (6th Cir. 2002) ("the bankruptcy court is not a free standing court, but rather a unit of the district court") (internal quotations omitted). The fact that bankruptcy courts are part of the district courts establishes that Congress has not removed jurisdiction from Article III courts.

In the nearly identical circumstance of federal magistrate judges, the Court has held this same level of Article III judicial control sufficient to defeat any structural concerns, when coupled with the parties' consent. *Peretz,* 501 U.S. at 937-38. In *Peretz*, the Court explained that allowing magistrate judges to preside over *voir dire* in felony proceedings with the defendant's consent did not raise structural Article III concerns because "the entire process takes place under the district court's total control and jurisdiction" and thus "there is no danger that use of the magistrate involves a congressional attemp[t] to transfer jurisdiction [to non Article III tribunals] for the purpose of emasculating constitutional courts." *Id.* at 937 (internal quotations omitted) (original modifications).

The same is true of bankruptcy courts. Because bankruptcy courts act entirely under the control and supervision of Article III courts and may only exercise, with the parties' consent, such jurisdiction as Article III courts confer upon them, Congress has not impermissibly transferred the district court's "jurisdiction [to the bankruptcy courts] for the

purpose of emasculating constitutional courts." *Id.* Accordingly, allowing bankruptcy courts to decide "*Stern* claims" with the parties' consent, does not raise "structural" concerns that litigants may not waive or forfeit.

3. The Court Has Consistently Authorized Non-Article III Adjudicators Operating Under The Control Of Article III Courts To Enter Judgments With Litigant Consent.

The touchstone of the Court's Article III jurisprudence has been consent. The Court has consistently upheld the judgments of non-Article III adjudicators when, as is the case under §1334 and §157, the referring court has had subject matter jurisdiction over the suit and possessed the necessary reference authority (either by tradition, statute, or rule) and the parties have consented.

In *Heckers v. Fowler*, for example, "the parties agreed in writing" that the federal district court could refer the cause to a referee and that "the report of the referee [would] have the same force and effect as a judgment of the [district] court." 69 U.S. at 127. The losing party challenged the judgment because an Article III judge did not enter it. *Id.* at 126. Relying on what was already a well-established practice in 1864, the Court upheld the referee's judgment, stating that the "[p]ractice of referring pending actions under a rule of court, by consent of parties, was well known at common law" and further that

"the report of the referees appointed, when regularly made to the court, pursuant to the rule of reference, and duly accepted, is now universally regarded in the State courts as the proper foundation of judgment." *Id.* at 131. The Court held that it "[could] see no objection to the introduction of the same practice into the courts of the United States" and ruled the practice to be "coeval with the organization of our judicial system." *Id.* at 128, 130.

In *Kimberly v. Arms*, the Court reinforced the point that the constitutionality of referred non-Article III adjudications turns on litigant consent. 129 U.S. 512, 516 (1889). There parties asked the district court to appoint a special master and agreed that he would "decide all the issues between the parties...." *Id.* After the special master issued his decision, the district court refused to give it any deference. *Id* at 522. The Court reversed, holding that when the parties consent, the findings of a special master "are to be taken as presumptively correct." *Id.* at 524. To do otherwise, the Court held, would "defeat … the purpose of the reference, and disregard the express stipulation of the parties." *Id.* at 525.

In the bankruptcy context, the Court has reached the same conclusion. In *Newcomb v. Wood*, the Court rejected a challenge to the referees' decision, stating "[t]he power of a court of justice, *with the consent of the parties*, to appoint arbitrators and refer to a case pending before it, is incident to all judicial administration, where the right exists to

ascertain the facts as well as to pronounce the law. *Conventio facit legem*. In such an agreement there is nothing contrary to law or public policy." 97 U.S. 581, 583 (1878) (emphasis added).

The Court also held that a bankruptcy litigant could waive the right to a trial in the district court in *MacDonald v. Plymouth County Trust Co.*, explaining that "the restriction" that prevented bankruptcy referees from deciding certain plenary matters "may be removed ... by the consent of the parties to a summary trial of the issue presented." 286 U.S. at 268. Again, the Court stressed the importance of consent, emphasizing the "distinction" between "the power of the referee to decide the issues in such a suit brought before him without objection" and his lack of power to compel suit "over the objection of the proposed defendant." *Id.* at 266.

Contrasting two more recent cases, *Gomez v. United States*, 490 U.S. 858 (1989) and *Peretz*, 501 U.S. at 923, makes this same point, underscoring just how crucial consent is to the Article III analysis. Both cases presented the same issue: whether a magistrate judges could preside over felony jury trial selection. In *Gomez*, where the defendant had not consented, the Court held that the Federal Magistrates Act did not authorize this practice, thereby avoiding the constitutional question. 490 U.S. at 875-76. But two years later, in *Peretz*, the "defendant's consent significantly change[d] the constitutional analysis" and the Court had "no trouble concluding that there is no Article III

problem when a district court judge permits a magistrate to conduct *voir dire* in accordance with the defendant's consent." 501 U.S. at 932. Most importantly—and fatally for Sharif's argument—the Court explained in rejecting the structural Article III challenge that *voir dire* oversight is comparable to the power magistrate judges have to enter judgment in civil and misdemeanor trials with litigant consent. *Id.* at 933.

Similarly, the Court ruled in *Roell* that a magistrate judge may preside over a jury trial and enter judgment in a civil action with the express or implied consent of the parties. 538 U.S. at 589-91. Sections 636(c)(1) and (3) of the Federal Magistrates Act authorizes magistrate judges with the parties' consent to conduct "any or all proceedings in a jury or nonjury civil matter" and enter a judgment that is appealable directly to the court of appeals. 28 U.S.C. §636(c)(1), (3). Even though the parties failed to follow the procedural rules for consenting in *Roell*, the Court concluded that implied consent sufficed. The Court reasoned that inferring consent "checks the risk of gamesmanship" and "substantially honor[s]" the Article III right. 538 U.S. at 590. Although the dissent disapproved of implied consent, even the dissent recognized that consensual non-Article III adjudications are permissible: "[r]eading §636(c)(1) to require express consent ... ensures that the parties knowingly and voluntarily waive their right to an Article III judge." *Id.* at 595 (Thomas, J., dissenting).

Consistent with the Court's long-standing precedent authorizing district courts to refer matters to non-Article III adjudicators, the circuit courts have all held that the Constitution permits magistrate judges to enter judgments in civil proceedings with litigant consent.[6] The same result should hold under §157 because Congress modeled §157 on the Federal Magistrates Act. *See* 1 Collier on Bankruptcy ¶3.03.[4] (Alan A. Resnick *et al.* eds., 16th ed. 2013); 130 CONG. REC. E1109 (daily ed. Mar. 20, 1984) (statement by Rep. Kastenmeier) (stating that "[t]he powers that bankruptcy judges exercise" will be "identical to those exercised by magistrates" and will include the power to "enter a binding judgment" so long as "the parties consent").

Therefore, as set forth in Section II.C., *infra*, because Sharif consented to the bankruptcy court

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[6] *See, e.g.*, *Sinclair v. Wainwright*, 814 F.2d 1516, 1519 (11th Cir. 1987); *Bell & Beckwith v. U.S., I.R.S.*, 766 F.2d 910, 912 (6th Cir. 1985); *Gairola v. Va. Dep't of Gen. Services*, 753 F.2d 1281, 1284-85 (4th Cir. 1985); *D.L. Auld Co. v. Chroma Graphics Corp.*, 753 F.2d 1029, 1031-32 (Fed. Cir. 1985); *United States v. Dobey*, 751 F.2d 1140, 1143 (10th Cir. 1985); *Fields v. Washington Metro. Area Transit Auth.*, 743 F.2d 890, 894 (D.C. Cir. 1984); *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1041-42 (7th Cir. 1984); *Lehman Bros. Kuhn Loeb Inc. v. Clark Oil & Refining Corp.*, 739 F.2d 1313, 1315 (8th Cir. 1984); *Puryear v. Ede's Ltd.*, 731 F.2d 1153, 1154 (5th Cir. 1984); *Collins v. Foreman*, 729 F.2d 108, 119 (2d Cir. 1984); *Goldstein v. Kelleher*, 728 F.2d 32, 35-36 (1st Cir. 1984); *Pacemaker Diagnostic Clinic of Am., Inc.*, 725 F.2d at 542-43 (*en banc*); *Wharton-Thomas v. United States*, 721 F.2d 922, 929-30 (3d Cir. 1983).

exercising authority over his property, and §157 does not "transfer [the district court's] jurisdiction" over bankruptcy cases and proceedings to another branch of government, the bankruptcy court in this case could, consistent with Article III, enter a judgment on Wellness's §541 claim. *Schor*, 478 U.S. at 850.

4. Even If §157 Raised Structural Article III Concerns, Allowing Bankruptcy Courts To Decide "*Stern* Claims" With Litigant Consent Is Constitutionally Permissible Under The *Schor* Balancing Test.

When litigants consent to bankruptcy courts deciding "*Stern* claims," §157 does not raise unwaivable structural concerns because it does not impinge upon the jurisdiction of Article III courts. Even if it did, though, that would not end the analysis. As the Court explained in *Schor*, Article III eschews "formalistic and unbending rules" "[i]n determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch." 478 U.S. at 851. Instead, the Court views the question "with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary." *Id.*

The federal statute at issue in *Schor*, unlike §157, transferred the federal judiciary's jurisdiction

over certain common law claims to the Executive Branch, specifically to a CFTC administrative law judge, and thus did indeed implicate structural concerns. *Id.* at 836-37. Nonetheless, the Court still found that adjudicatory regime constitutional applying a balancing test. *Id.* at 858. The same "practical" considerations that led the Court to uphold the CFTC's authority to decide certain state-law claims apply with equal force in this case.

As with consensual adjudications that occur wholly within the Judicial Branch, the key consideration in *Schor's* analysis of a non-Judicial Branch regime was litigant consent. The Court explained, "it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences." *Id.* at 855.

After recognizing the litigants' consent to the Executive Branch tribunal as highly significant (though not dispositive), the Court proceeded to weigh:

> the extent to which the essential attributes of judicial power are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the

> range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

Id. at 851 (internal quotations omitted).

Applying the factors identified in *Schor* to this case demonstrates absolutely no reason to find an Article III violation here. *First*, like the litigant in *Schor* who filed his claims with the CFTC, the debtor Sharif consented to the bankruptcy forum by filing his bankruptcy petition seeking a discharge. *Id.* at 849. Just as the litigant in *Schor* expressly eschewed an Article III forum by moving to stay a parallel district court case, *id.* at 838, 849, Sharif did the same—filing bankruptcy to move his litigation with Wellness from an Article III district court in Texas to the bankruptcy court in Illinois. Pet.App.6a.

Second, as explained in Section II.B.2., *supra*, under §157, the district court retained complete control over the decision to refer Sharif's case to the bankruptcy court and to withdraw it from the bankruptcy court. 28 U.S.C. §157(a), (d). "[S]eparation of powers concerns are diminished" when, as is the case under §157, "the decision to invoke [a non-Article III] forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction" remains. *Schor*, 478 U.S. at 855.

Third, any encroachment on Article III is limited to "a narrow class of common law claims as an incident to the [bankruptcy courts'] primary, and unchallenged, adjudicative function" and therefore "does not create a substantial threat to the separation of powers." *Id.* at 854. Here, of course, the §541 action at issue is not even a common law claim; rather it is a congressionally-created right that "stems from the bankruptcy itself." *Stern*, 131 S. Ct. at 2618. Moreover, the adjudication of this action is not just "incident" to the bankruptcy court's adjudicative authority, it is at the core of federal bankruptcy *in rem* jurisdiction.

Finally, there is no evidence that when Congress gave bankruptcy courts the ability to decide "*Stern* claims," its focus was on impermissibly allocating jurisdiction "among federal tribunals." *Schor,* 478 U.S. at 855. Just as Congress intended in the Commodity Exchange Act to create an inexpensive and expeditious alternative forum within the Executive Branch through which customers and brokers could assert their claims, *id.*, Congress created the current bankruptcy system to assist the district courts in administering a "sometimes unruly [] area of law" efficiently, while continuing to provide the district courts with ultimate control over the bankruptcy courts. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2073 (2012); *see also* S. REP. NO. 98-55, at 16 (1983) (stating that BAFJA was designed "to give[] the district courts far greater control over the handling of all bankruptcy

cases and proceedings" than the Act that *Northern Pipeline* invalidated).

"In [these] circumstances, the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*." *Schor*, 478 U.S. at 856. Therefore, even if bankruptcy courts are subject to *Schor's* balancing test, allowing bankruptcy courts to decide "*Stern* claims" with litigant consent would still pass constitutional muster.

C. Sharif Consented To The Bankruptcy Court's Entry Of A Judgment.

1. Sharif Expressly Consented To The Bankruptcy Court's Exercise Of *In Rem* Jurisdiction Over His Property.

The bankruptcy court in this case entered judgment on the §541 claim pursuant to a referral from the district court and with the debtor Sharif's express and implied consent. Sharif provided his express consent by voluntarily filing for bankruptcy necessarily understanding that if he did so his property would be subject to the authority of the bankruptcy court. *Central Va. Cmty. College*, 546 U.S. at 363-64; 11 U.S.C. §541(a).

Because a "statute is itself sufficient notice" of the law, Sharif's consent was both knowing and voluntary. *See City of West Covina v. Perkins*, 525 U.S. 234, 241 (1999) (quoting *Reetz v. Michigan*, 188 U.S. 505, 509 (1903)). Bankruptcy Code §541 and §521 placed Sharif on notice that if he filed

bankruptcy, an estate would be automatically created of all of his property, including potentially the purported trust property, and that he would be required to deliver that property to his trustee. 11 U.S.C. §§521(a)(4); 541(a),(d). Section 157(a) likewise placed Sharif on notice that his bankruptcy case likely would proceed in bankruptcy court unless he sought to have the district court withdraw the reference. 28 U.S.C. §157(a).

Sharif also decided to file his petition voluntarily. As the Court explained in *United States v. Kras*, where it held that a debtor did not have a constitutional right to file a bankruptcy case without paying a filing fee, "bankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors." 409 U.S. 434, 445 (1973). Sharif chose to file bankruptcy to stay the Texas collection action (where an Article III judge had jailed him for failing to answer discovery). That tactical choice came with the obligation to submit his person and property to the authority of the bankruptcy court. *Central Va. Cmty. College*, 546 U.S. at 363-64.

The fact that Sharif voluntarily chose to file a petition in bankruptcy court and stay the Texas suit distinguishes him from the creditor in *Stern*, whom the Court concluded had "nowhere else to go" to file his claim against the debtor once she filed bankruptcy and thus had not truly consented to proceed in bankruptcy court. 131 S. Ct. at 2614-15. Sharif's voluntary decision to file a bankruptcy

petition (and to enjoy the automatic stay) places him in the same position as the litigants in *Schor*, who had a choice of proceeding on their claims in either federal district court or before a CFTC administrative law judge and complained about their Article III rights only after choosing the CFTC and losing before it. 478 U.S. at 849. Just as the litigants' decision to proceed before the CFTC in *Schor* constituted sufficient consent to overcome their constitutional challenge, *id.* at 847-50, Sharif's decision to file for bankruptcy rather than proceed in the Article III court in Texas constituted consent here.

Holding otherwise would render bankruptcy courts "helpless indeed" to ensure that debtors comply with their obligations under the Code. *Mueller*, 184 U.S. at 14. Section 521(a)(4) commands that debtors must "surrender to the trustee all property of the estate." 11 U.S.C. §521(a)(4). If debtors are allowed to delay and evade that duty by contesting the bankruptcy court's authority over their property while simultaneously enjoying the benefits of the automatic stay and the other advantages of bankruptcy, the bankruptcy system will fail in its essential purpose of "secur[ing] a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period." *See Katchen,* 382 U.S. at 328 (internal quotations omitted).

2. Sharif's Implied Consent Sufficed.

Sharif also implicitly consented to adjudication before the bankruptcy court through his conduct. As discussed above, the Court held in *Roell* that implied consent in the magistrate context suffices. Similarly, in *Thomas v. Arn*, the Court held a party may waive the right to challenge a magistrate judge's ruling on appeal by failing to lodge an objection with the district court. 474 U.S. 140, 147-48 (1985). The Court reasoned that applying a waiver rule prevents litigants "from 'sandbagging' the district judge" and thus promotes "judicial economy." *Id.* In the bankruptcy context, the Court held in *Cline v. Kaplan*, that "[c]onsent to proceed summarily may be formally expressed, or ... may be waived by failure to make timely objection." 323 U.S. 97, 99 (1944).

Sharif's conduct was equivalent to the conduct of the litigants in *Roell*, *Thomas*, and *Cline*. Most significantly, Sharif responded to Wellness's motion for sanctions by filing his own summary judgment motion demanding that the bankruptcy court enter judgment in his favor. Pet.App.10a. "There can be no clearer sign of consent" then asking a court to enter judgment. *In re G.S.F. Corp.*, 938 F.2d 1467, 1477 (1st Cir. 1991). Indeed, by asking the bankruptcy court to rule on his summary judgment motion, Sharif *a fortiori* consented to the bankruptcy court's entry of judgment. Thus, the act of moving for summary judgment is tantamount to express consent.

Sharif also consented by admitting that Wellness's action was a core proceeding in which the bankruptcy court could enter a judgment. 28 U.S.C. §157(b)(1); *see* J.A.24. "Furthermore, by failing to object to the bankruptcy court's assumption of core jurisdiction" Sharif "impliedly consented to the court's entry of final judgment." *M.A. Baheth & Co. v. Schott (In re M.A. Baheth Constr. Co.)*, 118 F.3d 1082, 1084 (5th Cir. 1997).

After he lost, Sharif also failed to raise his constitutional objections properly in either his district court or Seventh Circuit appeals even though the Court decided *Stern* well before Sharif's district court brief was due. Pet.App.15a; No.12-1349, Dkt.13 (7th Cir.). Finding consent from Sharif's conduct therefore "checks the risk of gamesmanship" and is consistent with the Court's decisions in *Roell, Thomas,* and *Cline*. *Roell*, 538 U.S. at 590.

* * *

The basic bargain of bankruptcy is that debtors cede control of their property to their bankruptcy estates in exchange for a fresh start. Each year, over one million individuals and companies take advantage of that bargain, automatically triggering in each of those cases the creation of a bankruptcy estate under §541. This basic bankruptcy bargain would be broken if bankruptcy courts lacked the authority to enter judgments against debtors like Sharif who withhold property in their possession from their bankruptcy estates. *Stern* acknowledged

the authority of bankruptcy courts to decide matters that "stem[] from the bankruptcy." 131 S. Ct. at 2618. That authority should extend to actions against a debtor because allowing voluntary debtors to block the authority of bankruptcy courts to enter orders on such basic bankruptcy determinations would render those courts "helpless indeed." *Mueller*, 184 U.S. at 14.

CONCLUSION

The judgment of the Seventh Circuit should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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ADDENDUM

28 U.S.C.A. § 157

§ 157. 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 proceeding 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.

* * *

28 U.S.C.A. § 1334

§ 1334. 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.

(c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section

362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction--

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

* * *

11 U.S.C.A. § 541

§ 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date--

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include--

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that--

(A)(i) the debtor has transferred or has agreed to transfer such interest pursuant to a

farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 542 of this title;

(5) funds placed in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but--

(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

(B) only to the extent that such funds--

(i) are not pledged or promised to any entity in connection with any extension of credit; and

(ii) are not excess contributions (as described in section 4973(e) of the Internal Revenue Code of 1986); and

(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $6,225[1];

(6) funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 under a qualified State tuition program (as defined in section 529(b)(1) of such Code) not later than 365 days before the date of the filing of the petition in a case under this title, but--

(A) only if the designated beneficiary of the amounts paid or contributed to such tuition program was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were paid or contributed;

(B) with respect to the aggregate amount paid or contributed to such program having

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[1] Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

the same designated beneficiary, only so much of such amount as does not exceed the total contributions permitted under section 529(b)(6) of such Code with respect to such beneficiary, as adjusted beginning on the date of the filing of the petition in a case under this title by the annual increase or decrease (rounded to the nearest tenth of 1 percent) in the education expenditure category of the Consumer Price Index prepared by the Department of Labor; and

(C) in the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $6,225[1];

(7) any amount--

(A) withheld by an employer from the wages of employees for payment as contributions--

(i) to--

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title; or

(B) received by an employer from employees for payment as contributions--

(i) to--

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title;

(8) subject to subchapter III of chapter 5, any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where--

(A) the tangible personal property is in the possession of the pledgee or transferee;

(B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and

(C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b); or

(9) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made--

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor),

unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law--

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a cus-

todian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(e) In determining whether any of the relationships specified in paragraph (5)(A) or (6)(A) of subsection (b) exists, a legally adopted child of an individual (and a child who is a member of an individual's household, if placed with such individual by an authorized placement agency for legal adoption by such individual), or a foster child of an individual (if such child has as the child's principal place of abode the home of the debtor and is a member of the debtor's household) shall be treated as a child of such individual by blood.

(f) Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

No. 13-935

IN THE

Supreme Court of the United States

WELLNESS INTERNATIONAL NETWORK, LIMITED, RALPH OATS, AND CATHY OATS,

Petitioners,

v.

RICHARD SHARIF,

Respondent.

On Writ of Certiorari to the United States Court Of Appeals for the Seventh Circuit

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I. Bankruptcy Courts Have Constitutional Authority To Enter Judgment On §541 Claims.

The bankruptcy court possessed constitutional authority to decide whether the disputed assets belonged to the debtor Sharif's bankruptcy estate because those assets were in Sharif's possession and under his control when he filed for bankruptcy. *See* Pet.Br.19-42. Sharif contends otherwise, maintaining that all a debtor need do to eliminate a bankruptcy court's authority to decide the extent of the bankruptcy estate is to claim that assets he possesses and controls actually belong to another. Resp.Br.22-25. Once a debtor makes that claim, Sharif asserts, the court loses all authority to decide whether the debtor in fact holds title to the assets. *Id.* As the Court recognized over a century ago in *Mueller v. Nugent*, Sharif's proposed rule would create significant opportunities for mischief. 184 U.S. 1, 14 (1902). More importantly, it disregards this Court's long-established precedent that the "test" of a bankruptcy court's authority "is *not title in* but *possession by* the bankrupt at the time of the filing of the petition...." *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 481 (1940) (emphasis added).

Sharif indisputably had possession and control over the assets. He admitted, and the bankruptcy court ruled, that before Sharif filed for bankruptcy, he claimed the assets as his own on a loan application. Pet.App.7a. But even accepting Sharif's post-bankruptcy assertion that his pre-bankruptcy statements about his ownership of the assets were

dishonest and that he really held the assets in trust, *id.*, as the purported trustee, Sharif had possession of and control over those assets under Illinois law. *See* 760 ILCS §§5/4-5/4.26 (describing trustee's rights over trust property).[1] That possession of and control over the assets are precisely what gave the bankruptcy court the constitutional authority to determine the extent of Sharif's title in those assets. *See Thompson*, 309 U.S. at 481; Pet.Br.22-25. Because Sharif's contrary arguments depend on the Court concluding that bankruptcy courts cannot decide title disputes with a debtor, all fail.

A. Sharif's Reliance On §541(d) Is Misplaced.

Sharif's reliance on 11 U.S.C. §541(d) to support his argument that bankruptcy courts cannot decide title disputes with debtors is misplaced. Resp.Br.22-25. Section 541, including subsection (d), addresses only how the Bankruptcy Code treats an asset (*i.e.*, placing it in or out of the estate) once the debtor's title to that asset is settled. It says nothing about who decides a dispute over the application of §541. Sharif proposes a rule that conflates the authority to decide the dispute with the dispute's outcome. He contends that, if the ultimate answer to the §541(d) dispute is that his trust was valid, then the

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[1] Sharif assumes Illinois law applies. Resp.Br.22. In any event, Illinois law is unremarkable on this point. "The duties of the trustee almost universally require him to take into his possession tangible realty or personalty, and to reduce choses in action to possession." Bogert Trusts & Trustees, §583 (2d rev. ed. 2013).

bankruptcy court would not have had the authority to decide whether the trust was valid in the first place. Resp.Br.15, 22-25.

Sharif's analytical framework is unworkable because it yields different answers to the question whether a §541 claim is a "*Stern* claim" depending on whether the property is ultimately found to be in or out of the estate. It also contradicts the long-standing rule that bankruptcy courts have the power to determine in the first instance if the debtor has actual or constructive possession of property. If the debtor has such possession, and here Sharif's possession was actual, then the bankruptcy court has the authority to decide the debtor's title in the property. *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426, 433 (1924).

Moreover, Sharif misunderstands both trust and bankruptcy law. Sharif acknowledges that as purported trustee he held legal title to the alleged trust assets, but claims that legal title is not a property interest because it is valueless. Resp.Br.23. The case Sharif cites for this proposition, however, *In re Pfister*, expressly recognized that this "valueless" asset of "bare legal title" still "'becomes property of the [bankruptcy] estate.'" 749 F.3d 294, 297 (4th Cir. 2014) (quoting 11 U.S.C. §541(d)). Further, by allowing a trustee to abandon property of "inconsequential value," §554 confirms that §541 does not erect a value barrier to including property in the estate. 11 U.S.C. §554(a). Thus, Sharif's position that his "'bare' legal title" left him with no

property interest the Bankruptcy Code recognizes is incorrect. Resp.Br.23.

Rather than help Sharif, §541(d) actually supports Wellness's position that property-of-the-estate determinations "stem[] from the bankruptcy itself" and may be decided by a bankruptcy court. *Stern v. Marshall*, 131 S. Ct. 2594, 2618 (2011). By establishing through §541(a) and (d) that assets in which a debtor holds only legal title are nonetheless estate property, Congress reinforced the *in rem* nature of bankruptcy court authority over *all* property in the debtor's possession. *See Central Va. Cmty. College v. Katz*, 546 U.S. 356, 363-64 (2006); 28 U.S.C. §1334(e). That *in rem* authority is required to accomplish the very purpose of every bankruptcy: ceding control over one's property in exchange for a fresh start. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). Therefore, such authority is central to "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982).

B. Wellness's §541 Claim Differs Fundamentally From A "*Stern* Claim."

Sharif argues that Wellness's §541 claim is the same as the claim in *Stern* and therefore outside the bankruptcy court's authority to decide. Resp.Br.25-28. In *Stern*, the debtor brought a state-law tort claim against a creditor seeking money damages for an injury that occurred *before* the bankruptcy began;

she brought that claim in bankruptcy court only because she had filed her bankruptcy case there. 131 S. Ct. at 2601-02. Wellness's §541 action does not ask for money damages and is not based on common law; instead, it seeks a declaration based on federal law that property in the debtor's possession belongs to his bankruptcy estate. A §541 claim would have no existence outside of a bankruptcy case because it is the "commencement of a case ... [that] creates an estate." 11 U.S.C. §541(a). Sharif's efforts to mask these fundamental differences fail.

First, Sharif describes Wellness's claim as a state-law alter-ego action, stressing that Wellness's complaint "does not cite §541...." Resp.Br.26-27. But below, even Sharif recognized that Wellness brought its claim under §541. No.12-1349,ECF29at30-31(7th Cir.May30,2012). He was correct: Wellness's complaint alleged that "[t]here is a justiciable controversy between Debtor and [Wellness] as to the Debtor's ownership interest in property purportedly held in the name of the Soad Watter Living Trust" and asked that the disputed property be "*treated as part of Debtor's estate*." J.A.19(¶35),21(¶38) (emphasis added). Wellness alleged that this relief was required because either the trust did not exist or "[t]o the extent that it exists," it was a sham. J.A.19-20(¶35). Plainly, the substance of Wellness's claim was that Sharif possessed property that belonged to his bankruptcy estate under §541, a dispute based upon the Bankruptcy Code that by definition can arise only in a bankruptcy case. *See, e.g.*, *Parks v.*

Dittmar (In re Dittmar), 618 F.3d 1199, 1204 (10th Cir. 2010); Pet.Br.14-15,27-28.

Second, Sharif argues that Wellness's §541 claim did not "arise uniquely from 'the bankruptcy itself'" because outside of bankruptcy, creditors may seek to collect their debts through the equitable remedy of piercing the corporate veil. Resp.Br.26-27. Sharif argues that if state law can be applied in some analogous way outside a bankruptcy case, then the bankruptcy court cannot decide any matter that involves that state law even if the state-law issue arises in the context of a Bankruptcy Code-based dispute, such as the property-of-the-estate determination at issue here. Although Sharif asserts he is not urging a rule that would "categorically prohibit[]" bankruptcy courts from "deciding all state-law issues," he is actually arguing more broadly, that bankruptcy courts cannot decide *federal* issues with state-law analogs. Resp.Br.37-38.

Stern does not support Sharif's argument. As Sharif acknowledges, *Stern* recognizes the authority of bankruptcy courts to allow claims against the estate. Resp.Br.26. Allowing a claim under 11 U.S.C. §502 is directly analogous to a creditor's breach of contract or tort suit against a debtor in state court—both will determine the debtor's liability to the creditor. Under Sharif's flawed argument, that comparison would doom the authority of bankruptcy court to decide whether to allow the claim. *Stern* holds otherwise. 131 S. Ct. at 2618.

The question addressed in *Stern* is not whether there is a state-law analog to the matter; instead, "the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id.* No action more clearly "stems from the bankruptcy itself" than an action seeking to determine whether property the debtor possesses or controls falls within the estate. The fact that state law plays an incidental role in that determination cannot transform the action into a state-law claim.

Third, Sharif contends that Wellness's §541 claim sought "to augment the bankruptcy estate by adding the property of third parties"—Wattar and Ragda—effectively arguing that they, not Sharif, were the real parties-in-interest below. Resp.Br.26.[2] But under Illinois law, if the trust existed, only Sharif, as its trustee, and not the trust beneficiaries, had the authority to sue and be sued on trust-related matters. 760 ILCS §5/4.11; *Godfrey v. Kamin*, 2000 WL 1847768, at *3-4 (N.D. Ill. Dec. 14, 2000); *cf. Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 567 (1990)

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[2] Sharif relies upon allegations Ragda made in a complaint she filed *after* the bankruptcy court ruled for Wellness to support her claim to the trust assets. Resp.Br.8-9. The bankruptcy court dismissed that complaint. 10-02239,ECF58(Bankr.N.D.Ill.Aug.24,2011). Her lawyer, however, moved to withdraw from a subsequent appeal, suggesting that Sharif backdated a document to make it appear that Ragda was a beneficiary. 11-cv-07374,ECF104(¶6)(N.D.Ill.Aug.24,2014).

("The trustee…has the sole responsibility for determining whether to settle, arbitrate, or otherwise dispose of the claim[s] [concerning a trust]"). Thus, the real party-in-interest was Sharif and, unlike in *Stern*, Wellness's claim was not an action against a third-party.

Moreover, Sharif's argument assumes the trust actually existed—the very dispute before the bankruptcy court that Sharif lost. What matters here is not whether Sharif claimed there was a trust, but whether he had possession of the property. Because he had possession, the bankruptcy court had the authority to decide the extent of Sharif's title. *See Thompson*, 309 U.S. at 481.

Finally, even if a trust were analogized to an independent legal entity, that "[m]ere legal paraphernalia" would not have prevented the bankruptcy court from deciding Wellness's §541 claim. *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 218 (1941). As the Government explains, U.S.Br.18-21, *Sampsell* recognized that creating a sham corporation would not defeat the bankruptcy court's authority to decide a property-of-the-estate dispute. 313 U.S. at 218; Pet.Br.37. That result is even more applicable to a sham trust—a real trust, if it existed, would have vested legal title and possession *in Sharif*.

Sharif challenges the Government's argument that piercing the corporate veil is an equitable remedy that exists under both state and federal law.

Resp.Br.33-35. The Government is correct. *International Financial Services Corp. v. Chromas Technologies Canada, Inc.*, one of the decisions Sharif cites, holds that under Illinois law veil-piercing is "an exercise of equitable power" and as such, is not a common law action triable to a jury. 356 F.3d 731, 737 (7th Cir. 2004); Resp.Br.27. The Government's point is simply that in applying federal law—here §541—the bankruptcy court had the authority to invoke an equitable remedy such as veil-piercing, and that doing so did not transform the action into a common law claim, as Sharif incorrectly contends.

C. Historical Practice Does Not Support Sharif's Position.

Sharif argues at length that the historical record, from the English common law forward, draws a distinction between property possessed by the debtor—which could be seized by bankruptcy commissioners for inclusion in the bankruptcy estate—and property legitimately possessed by third-parties—for which a trustee had to file suit in the appropriate court of law or equity. Resp.Br.28-32. That distinction does exist in the historical record, but does not help Sharif. He is the debtor, not a third-party. Even accepting his position that the trust actually existed, as its trustee, Sharif indisputably had possession and control of the alleged trust assets. *See* 760 ILCS §§5/4-5/4.26. Sharif also held legal title to the alleged trust assets. Bogert Trusts & Trustees, §§1,17 (3d ed. 2007).

Indeed, as trustee, Sharif was the only person who could sue and be sued with respect to these assets. 760 ILCS §5/4.11; *Godfrey*, 2000 WL 1847768, at *3-4. Thus, historically, bankruptcy commissioners (like bankruptcy judges today) would have had the authority to determine whether the alleged trust assets were property of the bankruptcy estate because those assets were in Sharif's possession.

Nor would Sharif's claim that he held the assets only nominally have helped him under English law. Statute 13 Elizabeth gave commissioners authority to examine third-parties if they held the debtor's property and Statute 1 James expanded that power to allow commissioners to issue warrants to apprehend and jail third-parties who failed to appear for examination. Thomas E. Plank, *Why Bankruptcy Judges Need Not And Should Not Be Article III Judges*, 72 Am. Bankr. L.J. 567, 585-86 (1998) (citing 13 Eliz., ch. 7, §5 (1570); 1 Jam., ch.15, §10 (1604).) "Commissioners could also dispose of goods and chattels of others when the bankrupt was the 'reputed owner' to the same extent as if they belonged to the bankrupt." *Id.* (citing 21 Jam., ch. 19, §11 (1623). Given that commissioners had power over debtor-owned property in the hands of third-parties, they surely had power over property the debtor himself possessed.

Sharif incorrectly suggests that commissioners lacked the power to determine whether property belonged to the bankruptcy estate, relying upon one sentence taken out of context from Professor

Brubaker's article, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After Stern v. Marshall*, 86 Am. Bankr. L.J. 121, 123 (2012). Resp.Br.29. Read in context, Professor Brubaker is stating only that *if* an assignee (the English equivalent of a trustee) required a suit to recover property from a third-party, then that suit had to be filed in a court of law or equity. 86 Am. Bankr. L.J. at 123-24. But commissioners had *in rem* jurisdiction over property in the debtor's hands, *id.*, and "'full Power and Authority to take by their Discretions such Order and Direction' with the body and property of the bankrupt." Plank, 72 Am. Bankr. L. J. at 584 (quoting 13 Eliz., ch. 7, §2, cls. (2)-(9) (1570)).

Bankruptcy referees under the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (Code, tit. 11 U.S.C. §66) (repealed 1978), enjoyed the same *in rem* authority over property in the debtor's actual or constructive possession as old English commissioners. *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2170 (2014). Sharif does not dispute this point; instead, he sidesteps the crucial fact that—trust or not—because the disputed assets were in Sharif's possession, the bankruptcy court had the authority to decide title under the 1898 Act. Resp.Br.29-32.

Thompson, which Sharif cites, Resp.Br.30, succinctly demonstrates Sharif's error. In *Thompson*, a trustee for a bankrupt railroad sought to claim title (through adverse possession) to certain

land. 309 U.S. at 479. An oil company contested the trustee's title, and this Court confronted the question whether a bankruptcy court exercising summary jurisdiction could adjudicate this dispute. Noting that "the test of this jurisdiction *is not title in but possession by* the bankrupt at the time of the filing of the petition," *id.* at 481 (emphasis added), the Court found the trustee's possessory interests sufficed to authorize the bankruptcy court to adjudicate the title dispute, *id.* at 482.[3]

Under the 1898 Act, bankruptcy courts even had authority over property possessed by true, non-debtor, third-parties where the third-parties' claims to the property were merely colorable. *Taubel-Scott-Kitzmiller*, 264 U.S. at 432-33. Thus, even were *Thompson* not explicit on this point, given that bankruptcy courts had the authority under the 1898 Act to determine whether third-parties had colorable title to property in their possession, *a fortiori* bankruptcy courts would have had the lesser power

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[3] Respondent's reliance on other cases he claims delineate bankruptcy courts' summary jurisdiction is likewise misplaced. For example, in *Katchen v. Landy*, 382 U.S. 323, 334-35 (1966), Resp.Br.30, this Court held that bankruptcy courts possessed summary authority to compel creditors to surrender preferences that under §57 of the Bankruptcy Act (11 U.S.C. § 93(g) (repealed 1978)) would have led to a disallowance of their claims. Thus *Katchen*, like *Taubel-Scott-Kitzmiller* and *Thompson*, demonstrates that bankruptcy courts had authority to decide disputes about debtor property not yet in the debtor's possession.

to determine the ownership interest of the debtor himself regarding property in his own possession.

By arguing that bankruptcy courts lack authority to decide whether property in a debtor's possession is properly included in his bankruptcy estate under §541, Sharif seeks to deny bankruptcy courts one of the primary means through which they can "secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period." *Ex parte Christy*, 44 U.S. 292, 312 (1845). No legal or constitutional principle requires this unprecedented curtailment of bankruptcy courts' authority.

D. The Complete Factual Overlap Between Wellness's Discharge Claims And §541 Claim Also Gave The Bankruptcy Court The Authority To Decide The §541 Claim.

The bankruptcy court also had the authority to decide the §541 claim because, as the Government demonstrates, the bankruptcy court necessarily had to find that Sharif owned the alleged trust property to deny him a discharge. U.S.Br.16-17. The gravamen of Counts I-IV of Wellness's complaint was that Sharif concealed and lied about his ownership interest in the purported trust assets. J.A.13-19. But if Sharif did not own the purported trust assets, his statements would not have been untruthful and there would have been no basis to deny his discharge. 11 U.S.C. §727(a)(2),(3),(4)(A),(5). Thus,

there was complete factual overlap between the claims: deciding one decided the other.

Sharif acknowledges that the discharge claims were within the bankruptcy court's authority to decide because they are the "quintessential exercise of the core bankruptcy power to restructure debtor-creditor relations." Resp.Br.36. Because "normal rules of res judicata and collateral estoppel apply to the decisions of bankruptcy courts," nothing would have remained to be adjudicated in the district court on a stand-alone §541 claim once the bankruptcy court ruled on Counts I-IV. *Katchen*, 382 U.S. at 334. Thus, under *Katchen* and *Stern*, the complete factual overlap between the §541 and §727 claims made the §541 claim "'integral to the restructuring of the debtor-creditor relationship.'" *Stern*, 131 S. Ct. at 2617 (quoting *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990) (*per curiam*)).

Sharif responds that his sister Ragda's "distinct property interests" in the alleged trust assets renders *Katchen* and *Langenkamp* inapplicable. Resp.Br.36-37. But this argument assumes the trust existed, the very issue the bankruptcy court resolved against Sharif. Moreover, as explained in Section I.B., *supra*, even if one accepts Sharif's claim that the trust existed, only Sharif had standing to sue and be sued with respect to it. 760 ILCS §5/4.11. Under basic rules of res judicata and collateral estoppel, Ragda was in privity with Sharif and bound by the bankruptcy court's ruling. *See, e.g.*, *Manson v.*

Duncanson, 166 U.S. 533, 542-43 (1897) (beneficiary bound by trustee's defense of suit).

II. Bankruptcy Courts May Decide "*Stern* Claims" With Litigant Consent.

A. Consent Is Constitutionally Permissible.

The Court has consistently upheld the judgments of non-Article III adjudicators when, as is the case under 28 U.S.C. §1334 and §157, the referring court has had subject matter jurisdiction over the suit and possessed the necessary reference authority (either by tradition, statute, or rule) and the parties have consented. Pet.Br.52-57. Sharif advances three reasons why such consensual adjudications are no longer permissible.

First, making an argument that would vitiate both the bankruptcy and magistrate courts, Sharif contends that *Stern* silently overruled the Court's long-standing precedent upholding the constitutional authority of non-Article III adjudicators to decide matters with litigant consent. Resp.Br.45-46. Sharif points to *Stern's* citation of *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 851 (1986), and *Schor's* reference to structural constitutional concerns as evidence that consent is no longer permissible in separation-of-powers cases. Resp.Br.45-46. *Schor*, however, stands for the proposition that only "congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts"

are immune from notions of consent and waiver. 478 U.S. at 850 (internal quotations omitted). In all other cases, consent carries the day as evidenced by the fact that *Schor* approved the CFTC's adjudication of a common-law claim *with litigant consent*, holding "separation of powers concerns are diminished" when, as is the case under §157, "the decision to invoke [a non-Article III] forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction" remains. 478 U.S. at 855. The Court relied upon *Schor* when it held, in both *Peretz v. United States*, 501 U.S. 923, 936 (1991) and *Roell v. Withrow*, 538 U.S. 580, 588 (2003), that magistrates, which are identical in all relevant respects to bankruptcy judges, may decide civil cases and other matters with litigant consent. Unlike these cases, the litigant in *Stern* did not consent. Therefore, by citing *Schor*, *Stern* did not silently overrule the Court's prior Article III precedent.

Second, Sharif tries to distinguish the Court's precedent upholding consensual non-Article III adjudications on three grounds. Resp.Br.47-48. He dismisses *Roell* and *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263, 268 (1932), on the basis that both "were decided on statutory grounds." Resp.Br.48(emphasis removed). Sharif, however, ignores *Roell's* conclusion that Roell's "Article III right [was] substantially honored" when he gave his implied consent to proceed in a civil trial before a magistrate. 538 U.S. at 590. As for *MacDonald*, the fact that the Court did not expressly address Article III in holding that a bankruptcy court may, with the

parties' consent, enter judgment in a matter that normally would require an Article III court, is more likely because consent alleviated any constitutional concerns than because, as Sharif contends, the Court allowed a constitutional violation to pass without comment. Brubaker, 86 Am. Bankr. L.J. at 129-30.

Sharif dismisses *Peretz* on the basis that it did not involve supervision of a trial or entry of judgment, only oversight of jury selection. Resp.Br.47-48. *Peretz*, however, rejected that very distinction, equating the "responsibility and importance [of] presiding over *voir dire* at a felony trial" to the "supervision of entire civil and misdemeanor trials," noting that supervision of such trials could be "delegat[ed] to a magistrate" with "the parties' consent." 501 U.S. at 933.

Sharif also asserts that *Peretz* and earlier cases involving special masters and referees did not remove the "essential attributes of judicial power" from Article III courts because an Article III court still entered judgment. Resp.Br.47-48. But as *Peretz* noted with approval, under 28 U.S.C. §636(c)(1), magistrates can preside over jury or nonjury civil trials, 501 U.S. at 933, and "*order the entry of judgment*" with parties' consent. 28 U.S.C. §636(c)(1) (emphasis added). Upon entry of judgment, parties appeal directly to the appropriate court of appeals. *Id.*§636(c)(3).

Further, Sharif's focus on the ministerial task of entering judgment incorrectly elevates form over

substance. In all three of the early cases—*Heckers v. Fowler*, 69 U.S. 123, 127-28 (1864), *Newcomb v. Wood*, 97 U.S. 581, 583 (1878), and *Kimberly v. Arms*, 129 U.S. 512, 524 (1889)—the referee's ruling was final and the Article III court lacked the authority to change it. Thus, as *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 586 (1985) holds, "'[i]n deciding whether the Congress, in enacting the statute under review, has exceeded the limits of its authority to prescribe procedure..., *regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form but to the substance of what is required*.'" (quoting *Crowell v. Benson*, 285 U.S. 22, 53 (1932) (Court's emphasis)).

Third, Sharif incorrectly contends that under *Schor's* balancing test, his consent would not overcome the structural interests that Article III protects. Resp.Br.42-45. *Schor's* balancing test does not apply because a bankruptcy court is not an executive agency and thus, the jurisdictional structural concerns present in *Schor* are absent here. But assuming *Schor's* test applies, the distinctions that Sharif seeks to draw between this case and *Schor* are invalid. Contrary to Sharif's argument, Wellness's §541 claim depends on federal law and flows from a federal regulatory scheme. Pet.Br.27-30. Resolution of Wellness's §541 claim also is necessary to the resolution of Wellness's discharge action (which Sharif admits the bankruptcy court can decide). Section I.D., *supra*. The bankruptcy court, like the CFTC in *Schor*, also has expertise in

deciding the type of claim at issue here. Additionally, *Stern* deemed "[m]ost significant[]" that in *Schor* "it was 'necessary' to allow the agency to exercise jurisdiction over the broker's claim, or else 'the reparations procedure would have been confounded.'" 131 S. Ct. at 2613-14 (quoting 478 U.S. at 856.) Not permitting bankruptcy courts to make property-of-the-estate determinations would confound their ability to function as well.

B. Sharif Consented To The Bankruptcy Court's Entry Of Judgment.

Sharif does not argue that implied consent is constitutionally impermissible; instead, he contends that if a party can consent, Bankruptcy Rule 7012(b) mandates "express [consent] in the bankruptcy context" and that he did not expressly consent. Resp.Br.50(emphasis removed). Sharif's statutory argument fails for multiple reasons. Sharif also expressly and impliedly gave his consent.

1. Rule 7012(b) Does Not Require Express Consent.

On its face, Rule 7012(b) does not even apply:

> A responsive pleading shall admit or deny an allegation that the proceeding is core or non-core. *If 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.

Fed. R. Bankr. P. 7012(b) (emphasis added). Sharif "[a]dmitted" Wellness's allegation that the complaint was core, J.A.24, thereby making Rule 7012(b)'s requirement that Sharif include a statement of consent inapplicable.

Rule 7012(b) also does *not* reflect "Congress's judgment that only express consent" suffices in the bankruptcy context. Resp.Br.51. As Sharif acknowledges, *id.*, the applicable statute here is 28 U.S.C. §157(c). It requires only "the consent of all the parties...." *Id.* That differs from §157(e), which requires "the *express* consent of all the parties" before a bankruptcy court may conduct a jury trial (emphasis added). "[W]here Congress includes particular language in one section of a statute but omits it in another..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotations omitted).

Roell, which held implied consent sufficed under the Federal Magistrate Act (28 U.S.C. §631 *et. seq.*), supports this conclusion. Like §157, §636(c)(1) allows "a full-time [] magistrate judge" to "conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case" "[u]pon the consent of the parties." In contrast, elsewhere §636(c)(1) requires parties to consent by

"specific written request" to a referral to a part-time magistrate. *Roell* held that §636(c)(1)'s "unadorned references" to consent, when contrasted with provisions that required express consent, meant implied consent was permissible. 538 U.S. at 587.

Finally, Sharif's attempt to force Rule 7012(b)'s requirements upon §157(c)(1) fails because while the Court has "the power to prescribe by general rules,... the practice and procedure in cases under title 11…[s]uch rules shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. §2075. Thus, holding that Rule 7012(b) requires express consent when §157(c)(2) does not "would give the [Bankruptcy] Rules an impermissible effect." *See Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 454 (2004).

Hood allowed a bankruptcy court to declare a state student loan non-dischargeable, notwithstanding Rule 7001(6)'s summons requirement because the applicable statute, 11 U.S.C. §523(a)(8), did not require the state to be served by summons. 541 U.S. at 453-54. Similarly, Rule 73(b) required a statement of consent, yet *Roell* deemed implied consent sufficient because the statute did not require express consent. 538 U.S. 587 & n.5. Accordingly, Sharif's argument that Rule 7012(b) makes only express consent effective in bankruptcy cases fails.

2. Sharif Expressly Consented.

In any event, Sharif expressly consented *twice*: by filing his bankruptcy petition and by moving for summary judgment. Pet.Br.61-63. Sharif dismisses as "frivolous" the Trustee's argument that he expressly consented by filing for bankruptcy. Resp.Br.53-54. Yet Sharif acknowledges that by filing for bankruptcy he "consented to the bankruptcy court's administration of his estate"—which includes determining whether his estate includes the property he possesses and previously claimed to own directly. *Id.*; Section I, *supra*.

Sharif's filing also did not take place in a vacuum. Sharif strategically opted to move his dispute with Wellness from an Article III district court—which had just jailed him for discovery abuses—to the bankruptcy court, forcing Wellness to follow him from Texas to Chicago to collect its claim. Pet.App.6a. Sharif had other options: "bankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors." *United States v. Kras*, 409 U.S. 434, 445 (1973). When a litigant affirmatively selects a non-Article III option, as Sharif did, that selection constitutes express consent to that forum. *Granfinanciera, S.A. v. Nordberg* explained:

> The [*Schor*] investors could have pursued their claims, albeit less expeditiously, in federal court. By electing to use the speedier, alternative procedures Congress

> had created, the Court said, the investors waived their right to have the state-law counterclaims against them adjudicated by an Article III court.

492 U.S. 33, 59n.14 (1989).

Sharif argues that the fact he "consented to the bankruptcy court's administration of his estate" does not "suggest his consent to the bankruptcy court's *adjudication of Wellness's alter ego claim*." Resp.Br.53 (original emphasis). But this is exactly the argument this Court rejected in *Schor*, when it held that Schor "effectively agreed to an adjudication by the CFTC *of the entire controversy* by seeking relief" in the non-Article III forum. 478 U.S. at 850 (emphasis supplied). Having consented to the bankruptcy court's adjudication of his bankruptcy case, Sharif cannot now selectively limit his consent.

The concept that a debtor consents to a non-Article III adjudication by filing for bankruptcy also finds support in the analogous Seventh Amendment case law. *See Granfinanciera*, 492 U.S. at 53 (equating Article III and the Seventh Amendment); *see also* Brubaker, 86 Am. Bankr. L.J. at 150-51. The Sixth and Seventh Circuits have held that a debtor waives his Seventh Amendment jury rights by filing for bankruptcy, explaining: "[the debtor] cannot claim a right to jury trial because, as a Chapter 7 debtor, he voluntarily submitted his case to bankruptcy court." *N.I.S. Corp. v. Hallahan (In re Hallahan)*, 936 F.2d 1496, 1505 (7th Cir. 1991);

accord Longo v. McLaren (In re McLaren), 3 F.3d 958, 960-61 (6th Cir. 1993).[4]

Sharif expressly consented again by moving the bankruptcy court for summary judgment. Pet.App.10a. Although Sharif responds that a non-consenting litigant might only be asking for a recommendation of summary judgment to the district court, Resp.Br.55, that is not what happened here. Sharif asked "for the entry of summary judgment" on Wellness's §541 claim. No.09-A-00770, ECF65-1at2(Bankr.N.D.Ill.June22,2010).

Sharif further claims that he never received notice that he could withhold his consent because *Stern* had not yet been decided when he moved for summary judgment and thus, he did not know he had a basis to object. Resp.Br.55. *Stern*, however, involved the authority of the bankruptcy court under §157(b)(2)(C) to enter final judgment on a counterclaim against a creditor who had filed a proof of claim. 131 S. Ct. at 2619-20. Section 157(b)(2)(C) never applied in this case because Sharif is not a creditor who filed a claim against the estate. Thus, the fact that *Stern* had not yet held §157(b)(2)(C)

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[4] The Bankruptcy Rules, upon which Sharif places importance, similarly recognize a debtor's consent. All proceedings to recover money or property, except those brought against a debtor, require the filing of an adversary complaint and the issuance of a summons. *See* Fed. R. Bankr. P. 7001(1). A party can proceed against a debtor by motion, because the debtor and his property are already under the bankruptcy court's *in rem* authority. *Cf. Hood*, 541 U.S. at 453-54.

unconstitutional in some circumstances should not excuse Sharif's failure to raise his constitutional argument. That Sharif did not even cite *Stern* until late in his appeals, long after *Stern* was decided, underscores that Sharif understood *Stern* did not preclude the bankruptcy court from entering judgment in this case.

Thus, by invoking the bankruptcy court's *in rem* jurisdiction to escape an Article III court and then asking the bankruptcy court "for the entry of summary judgment" against Wellness, Sharif expressly consented.

3. Sharif Impliedly Consented.

Sharif cannot dispute that *Roell* upholds implied consent, but urges that implied consent can only be found if the court explicitly warns the litigant of the need for consent first. Resp.51-52. Sharif's proposed rule contradicts long-standing precedent that a "'statute is itself sufficient notice'" of the law. *City of West Covina v. Perkins*, 525 U.S. 234, 241 (1999) (quoting *Reetz v. Michigan*, 188 U.S. 505, 509 (1903)). Moreover, to the extent Sharif's argument relies upon §636(c)(2)'s notice provisions, which were honored in the breach in *Roell*, Congress did not include the same provisions in §157(c)(2). That it did not include the same provisions in §157(c)(2) indicates Congress determined that there was no need in the bankruptcy context to deviate from the general rule that litigants are presumed to know the

law. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581 (2010).

Thus, §157 gave Sharif notice. He consented by admitting the entire matter was core and never objecting to the bankruptcy court's authority to enter judgment. Sharif now seeks to avoid his consent by arguing that Wellness's "core" allegation only applied to the discharge counts. But Wellness's complaint states: "[t]his adversary proceeding is a core proceeding…." J.A.6(¶1). Sharif also argues without record support that his admission was a "mistake," Resp.Br.54, but he repeated that "mistake" in his summary judgment motion, asserting that Wellness's case was core. No.09-A-00770,ECF65-2at1(Bankr.N.D.Ill.June22,2010).

Finally, Sharif also forfeited his arguments by failing to raise his constitutional objections properly in his two appeals below, even though *Stern* preceded his first opening appeal brief. Pet.App.15a. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) does not help Sharif because, unlike Curtis Publishing, Sharif had notice of *Stern* before he appealed. While a party is not required to foresee changes in the law, "it is equally clear that even constitutional objections may be waived by a failure to raise them at a proper time...." 388 U.S. at 143. By failing to raise *Stern* when it was first "available" to him, Sharif "forfeited his [*Stern*] argument." *United States v. Feinberg*, 89 F.3d 333, 340-41 (7th Cir. 1996).

Sharif seeks to excuse his admitted forfeiture by arguing that, if Wellness's §541 claim is a "*Stern* claim," the bankruptcy court lacked authority to enter judgment thereby rendering the district court without appellate jurisdiction to decide whether the bankruptcy court had proper authority. Resp.Br.56. An appellate court, however, always possesses jurisdiction to pass on the authority of the court below. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 7 n.6 (1983); *see Brown v. Plata*, 131 S. Ct. 1910, 1930 (2011); *United States v. Ruiz*, 536 U.S. 622, 628 (2002). Thus, Sharif has no excuse for his forfeiture.

CONCLUSION

The judgment below should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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December 19, 2014

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