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IN THE SUPREME COURT OF THE UNITED STATES

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EXECUTIVE BENEFITS INSURANCE :

AGENCY, :

Petitioner : No. 12-1200

v. :

PETER H. ARKISON, CHAPTER 7 :

TRUSTEE OF THE ESTATE OF :

BELLINGHAM INSURANCE AGENCY, INC. :

- - - - - x

Washington, D.C.

Tuesday, January 14, 2014

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:11 a.m.

APPEARANCES:

DOUGLAS HALLWARD-DRIEMEIER, ESQ., Washington, D.C.; on behalf of Petitioner.

JOHN POTTOW, ESQ., Ann Arbor, Michigan; on behalf of Respondent.

CURTIS E. GANNON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Respondent.

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P R O C E E D I N G S

(10:11 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 12-1200, Executive Benefits Insurance Agency v. Arkison, the Chapter 7 Trustee of the Estate of Bellingham Insurance Agency. Mr. Hallward-Driemeier.

ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER
ON BEHALF OF THE PETITIONER

MR. HALLWARD-DRIEMEIER: Mr. Chief Justice and may it please the Court:

The judgment enforced against EBIA in this case was entered by a non-Article 3 bankruptcy court pursuant to a statute that this Court has declared unconstitutional as violating the separation of powers.

The entry of a judgment of the United States is not nearly a matter of private interest to the litigants. Rather, it carries the force of law that is binding on other courts, binding on the executive branch which must enforce the judgment, and even binding on the legislature which cannot reopen the judgment.

The entry of final judgment of the United States is the ultimate exercise of the judicial power under Article 3, just as the enactment of legislation is the ultimate exercise of the legislative power under

1 Article I.

2 JUSTICE GINSBURG: Why should that matter
3 given that, after the bankruptcy judge ruled, the U.S.
4 District Court gave de novo review to this case and
5 entered a final judgment that met all the requirements
6 of Article 3?

7 MR. HALLWARD-DRIEMEIER: The judgment that
8 was entered by the district court was not an exercise of
9 original jurisdiction but rather appellate jurisdiction.
10 In fact, Section 1334 is clear that it confers the
11 district court original jurisdiction, but once a
12 judgment has been entered by the bankruptcy court, the
13 review by the district court is an exercise of appellate
14 jurisdiction under Section 158.

15 JUSTICE ALITO: Here's something -- I'm
16 sorry. Here's something that happens every day. A
17 district judge refers to a magistrate judge a motion for
18 summary judgment. The magistrate judge issues a report
19 and recommendation. The district judge reviews it de
20 novo and may agree or disagree. If it agrees, the
21 district court will enter summary judgment.

22 I don't see a difference other than a purely
23 semantic difference between that situation and what
24 happened here.

25 MR. HALLWARD-DRIEMEIER: Your Honor, the

1 entry of judgment is the act of the judicial branch that
2 carries the force of law. The issuance of a report and
3 recommendation by a magistrate does not. It's only
4 after the exercise of judgment and the entry of judgment
5 that it has binding effect. Binding on the other --

6 JUSTICE SOTOMAYOR: Are you talking about a
7 mere formality? Are you arguing that because it was the
8 bankruptcy judge and not the district court judge who
9 signed the final judgment, that that makes a difference?

10 MR. HALLWARD-DRIEMEIER: It -- yes, Your
11 Honor.

12 JUSTICE SOTOMAYOR: That's the essence of
13 your argument.

14 MR. HALLWARD-DRIEMEIER: Yes, Your Honor.
15 Because the active entry of judgment --

16 JUSTICE SOTOMAYOR: So if we vacated and
17 remanded, and the district court looked at this, because
18 it's already seen it, and basically just signed below
19 the line that the bankruptcy judge signed, you would be
20 okay?

21 MR. HALLWARD-DRIEMEIER: Yes, Your Honor.
22 But the act of entering judgment is, both as a legal
23 matter and as a practical matter, different from the
24 appellate -- exercise of appellate jurisdiction. The
25 act of entering judgment, the district court must -- if

1 it is the one entering the judgment, has to determine
2 that judgment is properly entered. It's a proper
3 exercise of the appellate -- of the Article 3 power.

4 The district court would have the
5 discretions under Ninth Circuit law consistent with
6 Anderson v. Liberty Lobby to carry a motion for summary
7 judgment to allow the record to develop further. That
8 option, available to the district court when it's
9 sitting as a matter of original jurisdiction, is not
10 available to the district court sitting on appeal.

11 JUSTICE SOTOMAYOR: It reviewed this case de
12 novo.

13 MR. HALLWARD-DRIEMEIER: That's true.

14 JUSTICE SOTOMAYOR: And it decided that
15 there were no issues, no factual issues in dispute and
16 that the law clearly applied the way it did. I don't
17 understand why that option was taken away from it on
18 appellate review.

19 MR. HALLWARD-DRIEMEIER: On appellate
20 review, it had two options: Affirm or reverse. As an
21 original matter, though, it would have had a third
22 option, which would have been to deny the motion at that
23 time to let the record develop more fully.

24 But more fundamentally --

25 JUSTICE GINSBURG: Why would the -- why

1 would the district judge do that when the district court
2 said that there are no disputed issues, no relevant
3 disputed issues of fact and it's a pure legal question?

4 MR. HALLWARD-DRIEMEIER: Well, Your Honor, I
5 truly believe that on this record, where there clearly
6 were disputes between the two affidavits, that an
7 Article 3 judge would not have entered summary judgment
8 as an original matter. Sitting as an appellate court
9 where its decision was going to be subject to appellate
10 review immediately, perhaps its analysis was different.

11 But I think more fundamentally, the absence
12 of a judgment entered by a court with authority to do so
13 means that the appellate court also lacks appellate
14 jurisdiction, and this Court has so recognized in
15 *Ayrshire Collieries*, in the *Glidden* case --

16 JUSTICE KENNEDY: Will it be conceded, so
17 far as you know, by your friends on the other side that
18 this was appellate?

19 MR. HALLWARD-DRIEMEIER: Well, I don't
20 know --

21 JUSTICE KENNEDY: What is it that makes it
22 appellate?

23 MR. HALLWARD-DRIEMEIER: Well,
24 Section 158(a) speaks in language of the district court
25 exercising appellate jurisdiction. It uses the word

1 "jurisdiction." So once the -- in 157(b), a core matter
2 such as this, the bankruptcy court is delegated
3 authority to hear and determine and enter final judgment
4 subject to review pursuant to Section 158.

5 Section 158(a) specifies that the district
6 court is exercising appellate jurisdiction in that
7 event. So the district court --

8 JUSTICE GINSBURG: It uses the word
9 "appellate" --

10 MR. HALLWARD-DRIEMEIER: It uses --

11 JUSTICE GINSBURG: -- in 158?

12 MR. HALLWARD-DRIEMEIER: Yes, 158(a) says --

13 JUSTICE SCALIA: Which is where? Where are
14 you reading?

15 MR. HALLWARD-DRIEMEIER: I'm using the
16 government's amicus brief, the statutory appendix that's
17 on page 4a.

18 JUSTICE SCALIA: I don't know why it wasn't
19 in your brief.

20 MR. HALLWARD-DRIEMEIER: It is in our brief.
21 The reason I cite to the government's brief is it also
22 has 1334. It's slightly more comprehensive.

23 So on page 4a of the government's statutory
24 appendix, Section 158(a), "The district courts of the
25 United States shall have jurisdiction to hear appeals."

1 This Court has, in numerous decisions,
2 attributed significance to Congress's use of the word
3 "jurisdiction," that Congress knows what the word means
4 and when it uses that word, it means it is
5 jurisdictional.

6 The -- Section 1334, on the other hand,
7 which is on page 14a of the government's statutory
8 appendix, 1334(b) says that "The district courts shall
9 have original but not exclusive jurisdiction of all
10 civil proceedings arising under Title 11."

11 So the district court does have original
12 jurisdiction at the outset, but when it has referred the
13 matter to the bankruptcy court and the bankruptcy court
14 has entered final judgment, then pursuant to 157(b) and
15 pursuant to 158(a), the district court is now exercising
16 appellate jurisdiction.

17 JUSTICE BREYER: But then there is a -- I
18 want you to get on a bit, because I'd say the question
19 that we're, at least for me, is one of congressional
20 intent, not in necessarily your case but in future
21 cases. And the argument that is that the statute can be
22 read, it silences, to say if Congress wanted to allow
23 people in noncore cases to submit reports and
24 recommendations, they surely would have wanted it in
25 what they thought was a core case that turned out to be

1 noncore.

2 So I want your response to that, and I would
3 couple that with my own research of an opinion when I
4 was one the First Circuit about the fraudulent
5 conveyances, and they are about bankruptcy. I grant you
6 that there is a Statute of Elizabeth, it's a legal
7 matter for several hundred years, but the person who is
8 defrauded, the people defrauded are the creditors. And
9 in most instances, the fraud consists of transferring
10 property to a friend, rather than a creditor, where you
11 know you are insolvent.

12 Now, that is a legal matter. But it is
13 about bankruptcy. And it's State law, but it is about
14 bankruptcy. And it is, according to you -- I may not
15 agree with that, but I think we have to take it as
16 noncore. But why wouldn't Congress have, of course,
17 wanted reports and recommendations if they couldn't get
18 what they really wanted, which is to have the bankruptcy
19 judge decide it?

20 MR. HALLWARD-DRIEMEIER: To be clear,
21 Congress designated fraudulent conveyance actions as
22 core.

23 JUSTICE BREYER: I know that, and I would
24 have said they were right. But, nonetheless, I am faced
25 with case law that says to the contrary. Okay. So my

1 question is, if they couldn't get -- if they couldn't
2 get what they wanted, which is to have the bankruptcy
3 judge decide it, why wouldn't they at least have wanted
4 the bankruptcy judge to write a report and
5 recommendations and send it on to the district judge so
6 he can review it de novo?

7 MR. HALLWARD-DRIEMEIER: Well, I think that
8 what's constraining the court is the language that
9 Congress enacted. Congress --

10 JUSTICE BREYER: If I find an ambiguity in
11 that language, then you would say I would be sensible to
12 read it contrary to what you want.

13 MR. HALLWARD-DRIEMEIER: I -- I don't
14 believe there is an ambiguity, Your Honor.

15 JUSTICE BREYER: Well, okay. That's -- I
16 got that point. One is you say, It's totally
17 unambiguous, you can't do anything about it. But if, in
18 my opinion, it is -- take it as a hypothetical -- it's
19 ambiguous enough to get what Congress wanted. Now, can
20 you give me any argument against what I just said?

21 JUSTICE SCALIA: What is the ambiguity we
22 are talking about?

23 MR. HALLWARD-DRIEMEIER: Well, the
24 ambiguity -- I actually think there is no ambiguity
25 because --

1 JUSTICE SCALIA: What is the non-ambiguity
2 we are talking about?

3 (Laughter.)

4 MR. HALLWARD-DRIEMEIER: Congress --
5 Congress very clearly distinguished a dichotomy between
6 those cases in which the bankruptcy courts were to issue
7 proposed findings and rec- -- conclusions and those that
8 it was to hear and determine.

9 The cases that bankruptcy courts were to
10 hear and determine were cases in which the bankruptcy
11 courts were to enter final judgment subject only to
12 appellate review --

13 JUSTICE BREYER: I've got it. I'd like an
14 answer to my question. My question is I want you to
15 assume that the language is at least somewhat ambiguous.
16 And on that assumption, is there any reason not to adopt
17 the government's position.

18 MR. HALLWARD-DRIEMEIER: There are -- there
19 are several, Your Honor. And part of the problem is
20 that the question of how to construe that language in
21 157(b) does not only affect how Stern claims are going
22 to be handled, but also, all other claims under 157(b).
23 Congress very clearly wanted an efficient system in
24 which bankruptcy judges would enter judgment and there
25 would only be appellate review by the district court.

1 If the Court reads 157(b)'s "hear and
2 determine" language to also encompass the authority to
3 issue non-final reports and recommendations, that would
4 not be limited to the class of cases covered by Stern
5 that are core, but not --

6 JUSTICE KAGAN: Well, why would we have to
7 do that, Mr. Hallward-Driemeier? Why couldn't we say
8 that this presents a distinct problem, these Stern-type
9 claims, and it's really a problem of severability, and
10 that we should understand this statute in light of Stern
11 as essentially creating this middle category which
12 Congress clearly meant to have the treatment that the
13 noncore claims get.

14 MR. HALLWARD-DRIEMEIER: It's --
15 unfortunately, the statutory language does not admit
16 of severance of the kind that Respondents suggest. And
17 that's because fraudulent conveyance actions are core,
18 not simply because they're listed in 157(b)(2)(H), but
19 because they are proceedings that arise under Title 11.
20 That's the definition of core proceedings. And so even
21 if the Court were to line out --

22 JUSTICE GINSBURG: But the definition -- the
23 definition was linked to a purpose. You-- you laid out
24 very nicely the two categories; the one category where
25 the bankruptcy judge enters a judgment, the other

1 category where the bankruptcy judge makes
2 recommendations. So, if you -- the purpose of the
3 classification was to indicate the bankruptcy judge can
4 make the final judgment, can only make recommendations.

5 Suppose the district judge had said, I'm
6 uncertain after Stern about whether the bankruptcy judge
7 had authority to enter a final judgment. So I am going
8 to treat that summary judgment as a recommendation.
9 I'll treat it as a recommendation and I will review it
10 de novo. I agree, I enter final judgment.

11 If the district judge had said that, then
12 you would have no case, right?

13 MR. HALLWARD-DRIEMEIER: I -- I don't think
14 that 157(b) envisions that the district court could do
15 that. The district court's review under -- of a
16 judgment entered under 157(b) is, on appeal, pursuant to
17 158, which is an exercise of appellate jurisdiction, not
18 original jurisdiction.

19 JUSTICE SCALIA: If -- if -- if we believe
20 that the word "determine" means make a final judgment,
21 which you assert it means, so that there's no ambiguity,
22 it seems to me you have a statute in which the
23 bankruptcy judge is only authorized to make
24 recommendations in some situations and to make final
25 judgments in others. And surely, there's a problem with

1 a district judge altering that disposition --

2 MR. HALLWARD-DRIEMEIER: That -- that's
3 right.

4 JUSTICE SCALIA: -- by just saying, oh, I
5 know you're supposed to make a final determination, but
6 just for fun, give me your recommendation. I mean,
7 that's just contrary to the statute.

8 MR. HALLWARD-DRIEMEIER: That's clearly not
9 what Congress provided. It had different --

10 JUSTICE SCALIA: Congress might have --
11 might have provided that if it had known about Stern,
12 right?

13 (Laughter.)

14 MR. HALLWARD-DRIEMEIER: That's -- that's
15 true. And --

16 JUSTICE SCALIA: But do we sit here to write
17 the statutes that Congress would have written --

18 MR. HALLWARD-DRIEMEIER: No, Your Honor.

19 JUSTICE SCALIA: -- if they knew about some
20 future events? I don't think so.

21 MR. HALLWARD-DRIEMEIER: And -- and, in
22 fact, there are a number of --

23 JUSTICE KAGAN: Well, we do try though,
24 again, to apply severability principles to write the
25 statute that Congress would have written if it had known

1 about a constitutional ruling. And that's essentially
2 what Justice Breyer is suggesting.

3 MR. HALLWARD-DRIEMEIER: I think, Your
4 Honor, there are two problems with that. First is that
5 by changing the definition of "core proceedings," there
6 are other collateral consequences for other provisions
7 of the code. Under Section 1 -- 1334(c), for example,
8 there is an abstention in certain noncore proceedings.
9 And so Congress has defined the scope of the abstention
10 according to the same language that it uses in 157(b)
11 whether a proceeding arises under Title 11 or does not
12 do so, but is merely in relation to a case under Title
13 11.

14 So if the Court goes and revises what
15 Congress has provided as the definition of core in
16 157(b), there will be collateral consequences for other
17 statutes that Congress had enacted.

18 But the second point is that there are, as I
19 think Justice Scalia was suggesting, policy decisions
20 that really only Congress can make in deciding how to
21 respond to Stern, because one can compare, for example,
22 the provisions of 157(c)(1), which is the bankruptcy
23 judge issuing a proposed findings and conclusions, and
24 the Magistrates Act, 636. The two are actually quite
25 different.

1 The magistrates, for example, are assigned a
2 specific motion to consider and issue a report and
3 recommendation on. By contrast, the bankruptcy court in
4 (c)(1) exercises jurisdiction over the entire
5 proceeding, including up to conducting a trial in
6 something that isn't subject to jury trial, and then
7 issuing a report and recommendation to the district
8 court.

9 JUSTICE ALITO: But none of that is involved
10 in this case. We have this case in front of us. We
11 don't have every other possible case that could
12 implicate this issue. We have one case and it involves
13 summary judgment.

14 And so there isn't -- there are no findings
15 of fact, and there is no substantive difference between
16 a district court's reviewing a report and recommendation
17 on summary judgment and what happened here. I -- I have
18 heard nothing other than formalities.

19 MR. HALLWARD-DRIEMEIER: But the formalities
20 matter.

21 JUSTICE ALITO: Well, why do they matter for
22 Article 3? Maybe they matter for statutory reasons.
23 Why do they matter for Article 3? What your client got
24 was exactly -- substantively exactly what your client
25 would have gotten had this been referred to a magistrate

1 judge for a report and recommendation.

2 MR. HALLWARD-DRIEMEIER: Well, I -- to
3 begin, I think the formalities do matter and not only do
4 I think so. This Court has repeatedly said that the
5 absence of a judgment entered with authority means the
6 absence of appellate jurisdiction as well. And all the
7 appellate court can do is to vacate and remand.

8 JUSTICE SCALIA: Counsel, is Article 3 not
9 violated so long as the parties are happy?

10 MR. HALLWARD-DRIEMEIER: No, Your Honor.

11 JUSTICE SCALIA: Can the parties agree to
12 have a -- an Article 3 court decide a case it has no
13 jurisdiction to decide, and so long as no harm is done
14 to the parties, it's okay?

15 MR. HALLWARD-DRIEMEIER: Quite -- quite the
16 contrary, Your Honor. The Court has repeatedly stressed
17 that the parties may not, by their agreement, confer
18 jurisdiction that would not otherwise exist.

19 JUSTICE BREYER: I thought there were two
20 aspects to the Article 3 problem. One affects the
21 individuals and it's an unfairness, and the other is
22 structural, as Justice Scalia has said. But both are at
23 issue. And so where you have only a structural issue
24 and it's a question of getting the bankruptcy courts to
25 work and nobody's hurt by it, doesn't that at least cut

1 in favor of interpreting a statute to prevent chaos --
2 not chaos, that's too strong -- but to prevent -- to
3 allow the function of the court to work better?

4 MR. HALLWARD-DRIEMEIER: To the contrary,
5 Your Honor, in Schor, the Court made clear that where
6 the structural features of the Constitution are at
7 issue, that is precisely where parties cannot be
8 depended upon to assert the interest, and it cannot be
9 joined by consent. And here we have an example.

10 The constitutional violation identified by
11 the Court in Stern existed for 25 years before the issue
12 finally made it to this Court. In part because parties
13 were reluctant to assert that issue before a bankruptcy
14 court in which its fate held.

15 The -- the issues here, the other side says
16 there is no structural problem because there's no
17 aggrandizement or encroachment. But to the contrary,
18 Congress has reserved to itself power over bankruptcy
19 judges that the Constitution denies it over Article 3
20 judges.

21 The president's power to appoint has been
22 encroached upon.

23 JUSTICE KAGAN: Well, couldn't you say the
24 same thing once again about magistrates, the exact same
25 arguments would apply to them?

1 MR. HALLWARD-DRIEMEIER: I think in large
2 part they do. Although there is a distinction, perhaps
3 an important distinction, that in the Magistrates Act,
4 the consent requirement is built into the statute.

5 JUSTICE KAGAN: Well, I don't see why that
6 would make a difference if you say the problem is
7 congressional aggrandizement or congressional
8 encroachment of a certain kind. It doesn't seem to me
9 to make any difference in that case, if Congress says,
10 by the way, you can consent to it.

11 MR. HALLWARD-DRIEMEIER: You're absolutely
12 right, Your Honor. And I think that the problem that
13 this Court identified in Stern and that we identify here
14 applies equally to the magistrates. But we have
15 explained that that argument, even if not accepted in
16 full, would distinguish our case from the Magistrates
17 Act, because here, the Act enacted by Congress was
18 unconstitutional. It assigned, irregardless of consent,
19 this action to determination and final judgment by a
20 bankruptcy judge. The Court considered this statute and
21 held it unconstitutional in Stern.

22 So if consent were to cure the problem here,
23 then the jurisdiction of the Court would depend solely
24 on the consent of the parties. If, on the other hand,
25 the Court was considering in the first instance whether

1 consent as a limiting feature on the jurisdiction of the
2 non-Article 3 body meant that there was not the types of
3 structural problems that the Court identified in Stern,
4 then it would be as part of the determination whether
5 there was or was not an Article 3 violation in the first
6 instance.

7 JUSTICE ALITO: Can I ask you to clarify
8 what you're saying about the constitutionality of the
9 Magistrates Act? Are you saying that it is
10 unconstitutional insofar as it allows magistrate judges
11 to try matters by consent, or are you saying further
12 that it is unconstitutional insofar as it allows a
13 district judge to refer a dispositive matter to a
14 magistrate judge for a report and recommendation subject
15 to de novo review, or both?

16 MR. HALLWARD-DRIEMEIER: Only -- only the
17 former, Your Honor.

18 JUSTICE ALITO: The former is not implicated
19 in this case.

20 MR. HALLWARD-DRIEMEIER: That -- that's
21 right. I was answer -- just answering the question --

22 JUSTICE ALITO: I see.

23 MR. HALLWARD-DRIEMEIER: -- about the logic
24 of the argument and how far it went.

25 And -- and, I guess, again, what we suggest

1 is that there might be a distinction when the Court is
2 considering a statute. And as Schor lays out the many
3 factors that the Court might consider, the fact that
4 consent is a limiting feature on the non-Article 3
5 body's jurisdiction might lead the Court to conclude
6 there was no Article 3 violation.

7 But here, where there was no consent in this
8 statute, the Court has already held in Stern that there
9 was an Article 3 violation. The statute does not
10 constitutionally confer jurisdiction on the bankruptcy
11 courts. So if there is jurisdiction here, it would be
12 purely a matter of private party consent. And that's
13 precisely what the Court has held is not permissible as
14 a matter of jurisdiction.

15 JUSTICE SOTOMAYOR: So are you saying,
16 contrary to our case law, that you can never have
17 implied consent? We have held differently in other
18 cases.

19 MR. HALLWARD-DRIEMEIER: I'm not arguing
20 that there cannot be implied consent, but in Roell,
21 as -- as a construction of the Magistrates Act, the
22 Court held that consent must be knowing and voluntary.
23 There, of course, the litigant had notice because the
24 statute had advised the litigant that it had the right
25 to refuse consent.

1 JUSTICE SCALIA: You're confusing me. I
2 thought you -- you did say that there can't be implied
3 consent or even express consent to what happened here.
4 Isn't that your position?

5 MR. HALLWARD-DRIEMEIER: I'm -- I'm sorry.
6 I was -- I was -- I thought I was answering a different
7 question. In our view, consent cannot be the basis for
8 the exercise of jurisdiction by a non-Article 3 court.

9 JUSTICE SCALIA: Express or implied.

10 MR. HALLWARD-DRIEMEIER: Express or implied.
11 That's right, Your Honor.

12 JUSTICE SCALIA: I thought that's what --

13 MR. HALLWARD-DRIEMEIER: So this is the
14 subsidiary argument, our, really, fallback argument,
15 which is to say, even if consent could play a role, it
16 would only be where that was part of the statute, and
17 thus, part of the Court's analysis of whether this
18 statute was constitutional.

19 JUSTICE SOTOMAYOR: I'm a little confused.

20 MR. HALLWARD-DRIEMEIER: I'm sorry, Your
21 Honor.

22 JUSTICE SOTOMAYOR: Let's just save your
23 time. I'll ask on rebuttal.

24 MR. HALLWARD-DRIEMEIER: So there -- there
25 were two cases that the other side had cited, Roell and

1 McDonald, for that point. But in each case, the statute
2 itself featured consent as a limiting feature on the
3 non-Article 3 court's authority.

4 If there are no further questions, I'll
5 reserve the balance of my time.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Mr. Pottow.

8 ORAL ARGUMENT OF JOHN POTTOW

9 ON BEHALF OF THE RESPONDENT

10 MR. POTTOW: Thank you, Mr. Chief Justice,
11 and may it please the Court:

12 Justice Alito is entirely correct, for the
13 reason we can win the most straightforward way is
14 because he got everything he wanted in the courts below.
15 And I would like to also address Justice Ginsburg's
16 question about what could have happened in the
17 hypothetical situation.

18 But if I may begin, please, I'd like to
19 address Justice Scalia's point about where's the
20 ambiguity in the statute. And unfortunately, my friend
21 and I disagree, because I think the statute under
22 157(b)(1) is unambiguous in my favor.

23 So if I could take you back to the statute,
24 and I'll use the Solicitor General's brief for
25 convenience. 157(b)(1) is the provision by which

1 district courts, if they want to -- there's no
2 compulsion on these Article 3 officers -- if they want
3 to, they can refer matters to bankruptcy judges. And it
4 says, when there is a matter referred, that they may
5 hear and determine the matter and may enter an order or
6 judgment.

7 My interpretation, I believe, is the more
8 natural one of "may enter an order of judgment," it's a
9 permissive grant of authority. There's no compulsion to
10 enter an order and judgment. They can simply hear and
11 determine the matter and not enter an order and
12 judgment. And I can contrast this textual language --
13 you don't have to go very far -- down in (c)(1) and
14 (c)(2), where (c)(2), there was only one "may," they
15 don't have the double "may permissive grant of
16 authority." And there's -- and in the noncore matters,
17 there's a -- a "it shall," when "it shall determine."
18 They use the verb "shall" in (c)(2). So I think that
19 (b)(1) with two uses of "may" is very clear that when a
20 matter is referred under (b)(1), they may enter an order
21 of judgment, but don't have to enter an order of
22 judgment. And I think this gets us around his
23 difficulty --

24 JUSTICE KENNEDY: Does this bear on the
25 question whether this is appellate? Do you agree that

1 this is appellate, once the district judge -- district
2 court has the matter in front of it?

3 MR. POTTOW: So if there is a judgment, I
4 would concede that we then have an appeal that occurs,
5 Justice Kennedy.

6 But what is critically important why I think
7 that doesn't create a problem --

8 JUSTICE KENNEDY: If there is a judgment in
9 the bankruptcy court, you would concede there is an
10 appeal to the district court?

11 MR. POTTOW: If there is a district -- for
12 example, in a noncore proceedings --

13 JUSTICE KENNEDY: Yes.

14 MR. POTTOW: I'm sorry. In a core
15 proceeding where there would be a judgment in the
16 bankruptcy court, I would concede that that would be an
17 appellate matter before the district court, if there was
18 a full judgment.

19 JUSTICE SCALIA: So you -- you read me --
20 want me to read that -- that when a district judge
21 refers the matter to a bankruptcy judge to hear and
22 determine and to enter an appropriate order, the
23 bankruptcy judge can say, you know, I'm just too busy.

24 MR. POTTOW: No. No.

25 JUSTICE SCALIA: I'm on Easter vacation and

1 I may hear and determine it, and I may enter appropriate
2 orders, but I don't feel like it.

3 MR. POTTOW: No. The "may -- the "may"
4 prerogative, Justice Scalia, is with the district court.
5 The district court may refer to it and it may refer to a
6 final judgment or may not.

7 JUSTICE SCALIA: It doesn't say that it may
8 refer. It says, "bankruptcy judges may hear and
9 determine."

10 MR. POTTOW: At the instruction of the
11 district judge. I don't believe the bankruptcy judge
12 has the authority to feel lazy or disinclined.

13 JUSTICE SCALIA: How do you bring the "may"
14 over to the district court?

15 MR. POTTOW: In the order of reference, so
16 we have to go back to 157(a), which is what -- what
17 starts with the whole reference of cases from district
18 courts. Recall that a bankruptcy court is a unit of the
19 district court. So as an institutional matter, it's the
20 district court that exercises jurisdiction.

21 Under 1334, the Federal subject matter
22 jurisdiction of bankruptcy is vested in the district
23 court. Now, as a matter of which officer --

24 JUSTICE SCALIA: Then the "may" that you're
25 concerned with is the "may" in (a), not the "may" in

1 (b).

2 MR. POTTOW: I -- I use both of those "mays"
3 if I may, Justice Scalia. And -- and I think that
4 the -- that the revision post Stern of many district
5 courts that government puts forward in appendix of how
6 these courts have changed their orders of references
7 have explicitly used this power. And they say for
8 matters in which we refer a statutorily core proceeding,
9 we would -- but there is a Stern claim that arises. So
10 when we refer a claim and you think that Article 3
11 presents a problem, we do not want you to enter a final
12 judgment. On those referred proceedings, we only want
13 you to enter a report and recommendation.

14 So the district courts below are working
15 this out by changing their orders of references and not
16 having them enter judgment.

17 JUSTICE SCALIA: And what the other side
18 says is that's very nice, but that's not what the
19 statute says. The statute does not give the bankruptcy
20 court the authority to enter a -- a simply
21 recommendation for what has been defined as a core
22 proceeding.

23 For core proceedings, what the statute says
24 is you'll -- is you'll determine it. And you're saying,
25 well, it says that, but since it's been held

1 unconstitutional, we're going to shift this over to
2 the -- to the category in which they -- they can issue
3 an order and recommendation. Where does that come from?

4 MR. POTTOW: I think it has to come from a
5 textual disagreement with my friend. He says the phrase
6 "may hear and determine" should be read to mean must
7 determine and enter a final judgment. And I think the
8 textual phrase "may hear and determine" and "may enter
9 an order or judgment," suggests that they, if referred
10 to by the district court, may enter a judgment.

11 JUSTICE SCALIA: No, that's not my problem.
12 My problem is -- is not why they don't have to enter an
13 order and judgment. My problem is why they are
14 authorized to issue a recommendation.

15 MR. POTTOW: Oh, because I don't think --

16 JUSTICE SCALIA: Where does that come from?
17 They're not issued -- they're not authorized to issue
18 recommendations for core proceedings.

19 MR. POTTOW: I see. I don't believe,
20 Justice Scalia, that the issuance of a report is a
21 matter of such significance that there would need to be
22 an explicit reference to what issue in a report. A
23 judgment, if you contrast Section 157 --

24 JUSTICE SCALIA: Oh, really? I mean, can a
25 district judge sort of -- you know, it's not terribly

1 important because it's just a recommendation. So I'm
2 going to refer it to my former partner, you know, my
3 former law partner.

4 MR. POTTOW: But with consent of the
5 parties?

6 JUSTICE SCALIA: Yes, even with the consent
7 of the parties.

8 MR. POTTOW: That would be a special master
9 situation, I think, Justice Scalia. If they -- if they
10 referred, and the district -- yes, the district court
11 would have inherent authority to refer an issue to a
12 special master.

13 JUSTICE SCALIA: To a special master.

14 MR. POTTOW: Yes.

15 JUSTICE SCALIA: But it has statutory
16 authority to do that. There is no statutory authority
17 here to refer a matter to a bankruptcy judge for nothing
18 other than a recommendation, except for noncore matters.

19 MR. POTTOW: And -- and our position would
20 be that the issuance of a report does not require a
21 statutory authorization the way the entry of a judgment
22 requires a statutory authorization. So the contrasting
23 treatment under 157(c) of noncore matters is very --

24 JUSTICE BREYER: You're saying basically, I
25 think, that the words are, for core proceedings, it

1 gives the power to the bankruptcy judge to hear and
2 determine.

3 MR. POTTOW: Yes.

4 JUSTICE BREYER: And if I tell the assistant
5 chef, you deal with orders for bacon and eggs, that
6 might mean that the assistant chef can deal with eggs
7 orders alone, or it might mean only those that order
8 both.

9 MR. POTTOW: Yes.

10 JUSTICE BREYER: That's why I thought
11 perhaps it's ambiguous.

12 MR. POTTOW: Yes. And -- and if there's --
13 further, Justice Breyer, there's a successive "may"
14 afterwards, after the bacon and eggs, "and may prepare a
15 dessert as well," that's even more permissive in --

16 JUSTICE SCALIA: So it can do that for core
17 -- for those core proceedings that were not held
18 unconstitutional under Stern, right?

19 MR. POTTOW: Yes. And that was --

20 JUSTICE SCALIA: It can just refer them and
21 say just give me the eggs.

22 MR. POTTOW: Yes, that's right.

23 JUSTICE SCALIA: I don't need the bacon.

24 MR. POTTOW: And that was the practice --

25 JUSTICE SCALIA: You don't have to determine

1 it; just give me your recommendation.

2 MR. POTTOW: Yes. And that was a practice
3 even before Stern. Some courts did that; they had them
4 just refer on straight-up core claims to give the
5 reports and recommendations. There's a case out of the
6 Tenth Circuit called --

7 JUSTICE SCALIA: It seems to me the
8 dichotomy set forth in the statute disappears once you
9 say "hear and determine" means either "hear and
10 determine" or "hear or determine."

11 MR. POTTOW: But I don't think --

12 JUSTICE SCALIA: The whole dichotomy of the
13 statute disappears.

14 MR. POTTOW: Justice Scalia, I don't think
15 -- I don't think it's a dichotomy. I think that -- what
16 they're worried -- I believe what the Congress is
17 worried about is by putting express constraints on the
18 entry of a judgment, for precisely the reasons Mr.
19 Hallward-Driemeier says that judgments are a matter of
20 some, at least formalistic significance, that they put a
21 constraint on what you can do regarding entry of a
22 judgment.

23 JUSTICE SOTOMAYOR: All right. Can I go to
24 that for a second?

25 MR. POTTOW: Yes.

1 JUSTICE SOTOMAYOR: Because let's deal with
2 statutory language, okay? I get the core of your
3 argument to be as follows; pardon the puns.

4 That for statutorily core proceedings that
5 constitutionally are not core --

6 MR. POTTOW: Yes.

7 JUSTICE SOTOMAYOR: -- we should treat them
8 as noncore proceedings. Am I at your point?

9 MR. POTTOW: Yes. But I -- I want to be
10 clear. I'm not shoehorning them into the category of
11 noncore. I'm saying we should accord them the same
12 treatment that is accorded to noncore proceedings.

13 JUSTICE SOTOMAYOR: So if we're going to
14 accord them the same treatment --

15 MR. POTTOW: Yes.

16 JUSTICE SOTOMAYOR: -- what do I do with
17 Federal Rules of Bankruptcy Procedure 7012 --

18 MR. POTTOW: Yes.

19 JUSTICE SOTOMAYOR: -- which explicitly
20 states, quote: "In noncore proceedings, final orders
21 and judgments shall not be entered on the bankruptcy
22 judge's order except with the 'express consent of the
23 parties.'" So, now you're telling me we're going to
24 have a third category. Makes very little sense to me,
25 okay? Which is you need express consent for a

1 magistrate judge to issue a final judgment in a noncore
2 proceeding, but you can have express or implied consent
3 to enter the final judgment in core proceedings.

4 MR. POTTOW: I think --

5 JUSTICE SOTOMAYOR: That -- that makes
6 very -- I understand treating it like noncore
7 proceeding, but if we're going to treat it that way,
8 then I think you have to treat it that way for all
9 purposes, not pick and choose the ones you want.

10 MR. POTTOW: I -- first of all, I'd like to
11 give you some hope, Justice Sotomayor, which is there is
12 amendments to Rule 7012 that's percolating up to this
13 Court for -- for consideration to address the issue. In
14 the interim, this is what happened in Roell. In Roell,
15 we had a rule of procedure that said there must be
16 express consent before there is the -- the trial before
17 a magistrate judge, a civil trial before a magistrate
18 judge, which we do believe is the exact same system as
19 the bankruptcy court judge.

20 And what this Court held was when there's a
21 violation of that rule, right? When there's not express
22 consent, if there is, in fact, true consent based on the
23 conduct, then consent is what matters and it can trump
24 the rule. And that's the square holding of Roell. So
25 we would argue that --

1 JUSTICE SOTOMAYOR: The language of Roell,
2 the magistrate judge's language didn't use the word --
3 the language in Roell, the magistrate judge's language
4 didn't use the word "express consent." It just -- the
5 part -- "the clerk shall give written notice to the
6 parties of their opportunity to consent to the
7 exercise."

8 MR. POTTOW: No, but --

9 JUSTICE SOTOMAYOR: So the word "express"
10 was not in the magistrate judge's act.

11 MR. POTTOW: No, no, no, no. So in the act,
12 in the statute, there was just a reference to consent,
13 just like we have here in noncore proceedings reference
14 to consent. In the rules --

15 JUSTICE SOTOMAYOR: No, here you have to
16 express consent.

17 MR. POTTOW: Yes. In -- in the rules, there
18 is a requirement under bankruptcy for express consent,
19 and under Roell, there was a rule for a --

20 JUSTICE SOTOMAYOR: Got it.

21 MR. POTTOW: Okay.

22 JUSTICE SOTOMAYOR: Okay. Now I understand.

23 MR. POTTOW: May I -- if I may, I'd like to
24 go back to the question that Justice Kennedy raised and
25 also back to Justice Alito's and Justice Ginsburg

1 before.

2 What makes this unusual if -- even if I do
3 concede that it's an exercise of appellate jurisdiction,
4 it's unlike all the cases cited when talked about the
5 limited appellate jurisdiction of something like a
6 circuit court of appeals. There's a statutory
7 constraint. A circuit court of appeals can't enter
8 judgment if it wants to to fix a trial court that forgot
9 to enter judgment.

10 By contrast, district courts in bankruptcy
11 can enter judgments; they have both appellate and
12 original jurisdiction. They can withdraw the reference
13 from a bankruptcy court under 157(d) and they can enter
14 judgment. So the Petitioner in this case got everything
15 it wanted. It had an Article 3 consideration of its
16 fraudulent conveyance defense before Chief Judge Pechman
17 of the Western District of Washington, and they lost.
18 And on -- on page 45A of the Pet. App, you can see that
19 Chief Judge Pechman meticulously spells out her standard
20 of review. She says -- she spends a whole page on it
21 saying this is going to be de novo review, and she
22 writes a 12-page opinion with complete de novo review,
23 saying this is why you lose on the State claim; this is
24 why you lose on the Federal claim; this is why you lose
25 on the alter ego claim. And she says there is no

1 genuine issue of material fact that has been submitted
2 on this record.

3 CHIEF JUSTICE ROBERTS: You would concede
4 that your case would be -- you would not have a case if
5 we were dealing with factual findings?

6 MR. POTTOW: Yes, that is -- I believe,
7 Mr. Chief Justice, this is a unique factual posture,
8 because other -- you can't have de novo review of a fact
9 that there'd be a clearly erroneous standard. But
10 that's not what we have here today.

11 And regarding his -- my friend's secondary
12 argument that even if consent is permissible under the
13 Constitution, and with respect, I do believe this Court
14 has held that consent is permissible as a grand
15 constitutional matter, the trilogy of magistrate cases
16 of Peretz and Roell and Gonzales make it clear that
17 consensual voir dire is okay; and in discussing
18 consensual voir dire, this Court explicitly says because
19 voir dire is comparable in importance to entry of civil
20 judgment with the consent, which is what magistrate
21 judges can do. So I believe this Court has already
22 blessed the entry of civil judgment by magistrate judges
23 upon the consent of the parties as a constitutional
24 matter for --

25 JUSTICE SCALIA: I want to go back to your

1 statement that the district court here has both original
2 and appellate jurisdiction because it can recall the
3 reference to the bankruptcy judge. Can it recall the
4 reference after the bankruptcy judge has issued his
5 decision in the case?

6 MR. POTTOW: I don't --

7 JUSTICE SCALIA: Has entered a judgment in
8 the case?

9 MR. POTTOW: I think that would be -- I
10 don't have any case authority for whether they can do
11 that or not. And I share Your Honor's skepticism that
12 that would be -- that would create a statutory problem.
13 But the question we have here is whether there's an
14 article -- even if we concede a statutory violation,
15 which I don't, by the way; I think that this is -- it's
16 very clear that there was consent of the parties, that
17 they went before the bankruptcy judge, and he went in
18 with wide -- eyes wide open. So I'm spending all this
19 time talking about a backup argument, as to if we
20 assume, arguendo, that the bankruptcy judgment was
21 illegitimate, we still win. And that's why I said it's
22 the most straightforward way to resolve this case. If
23 it was illegitimate, we still win because of the de novo
24 review.

25 My friend tries to disparage Chief Judge

1 Pechman's and say well, it really wasn't de novo because
2 even though she spent a page saying I'm doing a de novo
3 review, I found the word "substantial" and "evidence"
4 juxtaposed on page 50A of the Pet. App. And I don't
5 think that's a fair reading of her opinion. I think if
6 you read her analysis, it's quite de novo; she goes
7 through all the evidence that's submitted and says no
8 genuine issue of material fact; judgment as a matter of
9 law.

10 JUSTICE GINSBURG: But she did say that EBIA
11 had the burden to demonstrate error in bankruptcy
12 courts.

13 MR. POTTOW: That -- she does say that at
14 one point in her opinion. But I believe if we read the
15 analysis in its context, it is clear that she's
16 according a full de novo review of the claims. And I
17 think that -- I don't think she misunderstood the -- the
18 standard of review that should be done and the true de
19 novo nature of it.

20 But if I may, I'd like to comment on my
21 friend's backup argument. If -- if the Court agrees
22 with me that Article 3 is not imperiled by consensual
23 adjudicative regimes like the magistrate's civil
24 judgments and the bankruptcy court noncore proceedings
25 which, by the way, I would like to remind the Court that

1 in Stern itself, you did quote Section 157(c)(2), which
2 is the noncore consensual proceedings in an opinion
3 exclusively devoted to Article 3.

4 My friend says, well, as a backup, even if
5 that's constitutionally okay, I have to have notice that
6 I can withhold my consent. And under the statute, it's
7 clear that on a noncore claim under 157(c)(2), the
8 parties have to consent. And he says, but I had a Stern
9 claim so I didn't really know that I was a noncore claim
10 and could withhold my consent.

11 So it's a one-off, quirky argument he's
12 making because he had a Stern claim before Stern.
13 That's belied -- sorry.

14 CHIEF JUSTICE ROBERTS: I'm sorry. Go
15 ahead.

16 MR. POTTOW: I was going to say, that's
17 belied by the pleadings in his -- in his answer to the
18 complaint, which is at page 80 of the Joint Appendix on
19 the jurisdictional allegations of the Trustee, this is a
20 core proceeding. He says denied. So he thought he had
21 a noncore proceeding.

22 CHIEF JUSTICE ROBERTS: You're right. We've
23 been talking about backup arguments to backup arguments.
24 Your central argument is that the consent of the parties
25 can overcome what Stern identified as a structural

1 separation of powers problem.

2 MR. POTTOW: I would -- I would -- I would
3 slightly rephrase that, Mr. Chief Justice, and say what
4 Stern defined as the problem was the adjudication of the
5 private right without the consent of the parties. So I
6 think it's already intrinsic in how Stern --

7 CHIEF JUSTICE ROBERTS: Well, I guess that's
8 my question. Is there any other case where we've said
9 the consent of the parties can overcome a constitutional
10 structural separation of powers?

11 MR. POTTOW: Well, in the Heckers case,
12 which we cite in our material, the old -- the old
13 Special Master's case, that's what happened. There was
14 a reference to a referee. And when there's -- and it's
15 a -- it's a two-part thing, Mr. Chief Justice. It's not
16 just the consent of the parties, remember; it's the
17 referral by the district court. So if the district
18 court feels that its Article 3 authority is being
19 impinged upon, it has no obligation to refer matters out
20 to a bankruptcy judge. The parties can say, we consent.
21 We want to go to the bankruptcy judge.

22 CHIEF JUSTICE ROBERTS: We've already told
23 the district court, haven't we, that its Article 3
24 status is infringed when he refers or when there's a
25 reference to a non-Article 3 tribunal?

1 MR. POTTOW: No, in -- I -- that's why I
2 said I think it's two necessary conditions. I think
3 there has to be both district court permission to grant
4 the reference out and the consent of the parties. Okay.

5 CHIEF JUSTICE ROBERTS: So if the district
6 court refers the case to his law partners, and that's
7 fine with the parties, that law partner can enter a
8 final judgment in the case subject only to appellate
9 review?

10 MR. POTTOW: That's what Heckers said.
11 Heckers -- and that -- that's basically --

12 CHIEF JUSTICE ROBERTS: Is that what you're
13 saying?

14 MR. POTTOW: Yes, that's a Special Master.
15 That's what a Special Master is.

16 CHIEF JUSTICE ROBERTS: The Special Masters
17 do not enter final judgment subject only to appellate
18 review.

19 MR. POTTOW: Well, technically if we want to
20 go through the procedure of what these equity officers
21 did, was they would prepare their report, and because
22 they're acting as officers of the court, and then the
23 clerk of court enters judgment. And so the adjudicative
24 thinking --

25 CHIEF JUSTICE ROBERTS: But the appellate

1 review is the important thing. The Article 3 court,
2 under your submission, is giving up its authority to
3 enter factual findings. It's giving that authority to a
4 non-Article 3 tribunal, and it can only review those
5 findings under clearly erroneous standard.

6 MR. POTTOW: That -- that is the current
7 system under the magistrate judges under 636.

8 CHIEF JUSTICE ROBERTS: Well, I know it's
9 the current system under the magistrate judges. We held
10 that unconstitutional in the bankruptcy context.

11 MR. POTTOW: No, you held it
12 unconstitutional regarding an objecting defendant.
13 There's been hundreds of years of consensual
14 adjudication with these inferior judicial officers, as
15 that they were called in the earlier cases, such as
16 Go-Bart.

17 They are officers. They're inferior
18 judicial officers, and they are controlled by the
19 Article 3 judiciary. The Article 3 judiciary retains
20 the control to use them or not use them as they want,
21 and parties can't be forced to do them over their --
22 without their consent.

23 So when this Court has had opportunity to
24 address Article 3 concerns of this, they have always
25 relied upon the lack of consent as a problem. And

1 that's why this Court's formulation in Stern, I think,
2 is critical, just following Union Carbide, and indeed
3 every opinion in Northern Pipeline, going back to the
4 MacDonald case under the old act. What matters missing
5 is the lack of consent. Plenary matters can't be tried
6 without consent under the old Bankruptcy Act. When
7 there is consent, this Court ruled under MacDonald,
8 that's fine. Indeed, when there's implied consent, this
9 court held in Klein against Baker in the American
10 College's amicus brief, that's fine.

11 And as the American College also lays out
12 well, these old statutory cases under the old Bankruptcy
13 Act were interpreted with constitutional values in mind.
14 The old act was very cryptically drafted and tersely
15 drafted, so this court used constitutional principles in
16 interpreting the scope of the old Bankruptcy Act and
17 upholding the consensual adjudication of plenary matters
18 when there is consent.

19 So our submission, Mr. Chief Justice, is
20 yes, we do think that consent matters. And the final
21 thing I'd like to say is, my friend has this narrative.
22 He said, well, how do you know I consented through my
23 implied conduct to the noncore claim? Remember, he did
24 plead it was noncore in his answer, and -- my red light.

25 CHIEF JUSTICE ROBERTS: Finish your

1 sentence.

2 MR. POTTOW: I was going to say is that his
3 codefendant won before the very same bankruptcy judge.
4 So he made a tactical decision he is trying to
5 second-guess ex post now that he's lost.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Mr. Gannon.

8 ORAL ARGUMENT OF CURTIS E. GANNON,
9 FOR UNITED STATES, AS AMICUS CURIAE,
10 SUPPORTING THE RESPONDENT

11 MR. GANNON: Mr. Chief Justice, and may it
12 please the Court:

13 We believe that a party may consent to have
14 a fraudulent conveyance claim determined by a bankruptcy
15 judge. And even in the absence of consent, principles
16 of severability justify treating such an action as a
17 noncore proceeding in which a bankruptcy judge may enter
18 proposed findings of fact and conclusions of law.
19 There's also one other aspect of our argument that has
20 not yet been mentioned this morning, which is that we
21 think that even if consent is not adequate to cure the
22 constitutional violation or if you find that there is
23 not adequate consent on this record, we think that it
24 would still be open to you to find that petitioner has
25 forfeited this constitutional argument.

1 Constitutional arguments can be forfeited.
2 He has not -- he did not advance this argument at any
3 point -- any reasonable point before the bankruptcy
4 judge, before the district judge, until he was before
5 the Court of Appeals. Indeed, I think it's telling that
6 this Court had already granted certiorari in Stern and
7 had already heard oral argument in Stern before the
8 district court even ruled on the motion for summary
9 judgment.

10 JUSTICE BREYER: It's true, but if you were
11 in the Ninth Circuit, and I would have -- you would have
12 thought this was a core proceeding.

13 MR. GANNON: You might have thought the same
14 thing.

15 JUSTICE BREYER: So he says, you know, of
16 course I didn't object. I am faced with all kinds of
17 precedent that say it's impossible; and therefore, there
18 is no reason to object. That wasn't consent.

19 MR. GANNON: If there was true futility --
20 and I'm not talking about the consent argument now,
21 Justice Breyer. I'm talking about a forfeiture argument
22 for purposes of preserving an argument on appeal. And
23 if it were truly futile, I think that a Court of Appeals
24 could overlook that type of forfeiture. I don't think
25 that it was futile here. I think it is demonstrated by

1 the fact that Stern itself came out of the Ninth
2 Circuit. The litigants there were making those
3 arguments, and indeed the Healthcentral.Com case the
4 petitioner relies upon just had a discussion of the
5 Seventh Amendment.

6 I don't think it clearly foreclosed this
7 claim for purposes of the constitutional --

8 JUSTICE SOTOMAYOR: And the answer suggested
9 it because we he was claiming the fraudulent conveyance
10 claim in his answer was noncore. So he had the basis of
11 the argument.

12 MR. GANNON: Yes, I think it's -- he
13 certainly did, as my colleague already pointed out on
14 page 80 of the Joint Appendix and paragraph 2.1 of the
15 answer denied the allegation that this was a core
16 proceeding.

17 And if you look, then, to 157(c)(1) and (2),
18 the statute made consent relevant at that point, and
19 Rule 7012, which, Justice Sotomayor, you were earlier
20 quoting, made it clear that he was obliged, then, to --
21 or petitioner was obliged, then, to -- to give consent
22 or not.

23 But if I can turn to the severability
24 question, which was also the focus of a lot of the
25 argument before, Justice Scalia, you pointed out that

1 Congress can rewrite the statute the way it wants to.
2 And that's, of course, true. But it is always the case
3 when this Court gets to a severability analysis that
4 Congress didn't get its first option. Here, Congress
5 did include a severability clause in the 1984 Act. It's
6 in Section 119, and it says, if any provision of this
7 statute or any application thereof is held to be
8 unconstitutional we want the rest to stand.

9 CHIEF JUSTICE ROBERTS: That's what I
10 thought severability was. If you carve -- if you find
11 part of it unconstitutional, you ask whether what is
12 left can stand. You don't say that we're going to
13 rewrite what is left.

14 MR. GANNON: I don't think any rewriting is
15 required here, Mr. Chief Justice. And I think this is
16 actually essentially what the Court has already said in
17 Stern. In Stern, on page 2620, this Court characterized
18 the effect of its decision as being, "The removal of
19 Vicky's counterclaim there from core bankruptcy
20 jurisdiction."

21 And the consequence of that is that, because
22 the Congress had divided the world into core and noncore
23 proceedings in the wake of Northern Pipeline, thinking
24 that the distinction between them was core proceedings
25 were ones in which bankruptcy judges would have

1 authority, constitutional authority to enter final
2 judgments; noncore proceedings were ones in which they
3 could not do that without consent, or they would only be
4 able to provide proposed findings of fact and
5 conclusions of law.

6 And in the same paragraph where this Court
7 that the effect of its decision was effectively to
8 remove this, that type of counterclaim from core
9 jurisdiction, it said it did not expect that this
10 decision would meaningfully change the division of labor
11 between the bankruptcy and district court judges,
12 precisely because Pearce Marshall was not contesting the
13 idea that bankruptcy judges would still be able to enter
14 proposed findings of facts and conclusions of law.

15 CHIEF JUSTICE ROBERTS: Or it may be because
16 the particular claim at issue in Stern was one that
17 wasn't expected to arise in the normal course in
18 bankruptcy proceedings.

19 MR. GANNON: Well, that -- that may be
20 something the Court was thinking. In that particular
21 paragraph, the Court mentioned the fact that Pearce
22 Marshall was not contesting the district court's ability
23 to take proposed findings of fact and conclusions of
24 law.

25 And as Mr. Pottow already observed, many

1 district courts have already taken this action in
2 response to Stern. In the appendix to our brief at
3 pages 15A to 17A, we list 25 of those districts. Since
4 our brief was filed, two more districts have adopted
5 similar provisions in Rhode Island and in New Hampshire.
6 And we think that that is telling.

7 I also think, with respect to the underlying
8 constitutional claim, if I could elaborate a little bit
9 on what my colleague was saying in response to the
10 questions from the Chief Justice about instances in
11 which Article 3 judges may indeed delegate the ability
12 to enter certain decisions with which the district
13 court's subsequent ability to over -- to look over that
14 decision will be cabined by the action that has happened
15 with the consent of the parties.

16 My friend was talking about the Heckers
17 case. That was one in which the order of reference
18 specifically provided that judgment would be entered in
19 conformity with a referee's report, "as if the cause had
20 been heard before the court."

21 So that was -- that was one where the
22 district court didn't come into it at that point.

23 CHIEF JUSTICE ROBERTS: Your -- your
24 position is -- I mean, the authority to decide cases,
25 which is our Constitutional birthright, we said in Stern

1 that Congress can't take that away from us. And your
2 position is that two parties who come in off the street,
3 if they agree, they can take that away from us.

4 MR. GANNON: Depending. I think that under
5 the circumstances here -- and this Court has repeatedly,
6 in the context of considering Article 3 objections in
7 bankruptcy, has repeatedly recognized that the absence
8 of consent is relevant. Under Schor, and the Court is
9 obliged, I think, to look into all the circumstances
10 surrounding this, and there are lots of things that make
11 this far from the hypothetical that you pose, because
12 this is more like the magistrate judge scheme. And,
13 indeed, in some ways it's slightly more limited.

14 This is an instance where bankruptcy judges
15 are not just somebody off the street that a district
16 court is choosing to decide --

17 CHIEF JUSTICE ROBERTS: No, it's the
18 parties, the parties who are --

19 MR. GANNON: It's not the parties that are
20 choosing.

21 CHIEF JUSTICE ROBERTS: You said, "It's the
22 consent of the parties that allows a proceeding we have
23 determined to be unconstitutional to go forward."

24 MR. GANNON: You determined that it was
25 unconstitutional in the absence of consent, and it's not

1 just the consent of the parties. I think it is
2 important here, as it was in -- in the magistrate judge
3 context in Roell, in Peretz, in Gomez. This Court has
4 previously recognized that in the magistrate judge
5 context, consent makes or breaks the difference between
6 whether it's okay for a magistrate judge to oversee
7 felony voir dire, and it has subsequently compared that
8 to entry of civil judgments. In Roell, it sustained the
9 ability of a magistrate judge to enter a civil judgment.

10 Here, bankruptcy judges are not just people
11 off the street chosen by the parties. They are people
12 who are appointed by Article 3 judges. They are
13 removable only by Article 3 judges. They never get a
14 case --

15 CHIEF JUSTICE ROBERTS: The point of
16 everything that you said is, they do not comply with
17 Article 3.

18 MR. GANNON: They themselves are not Article
19 3 judges, that is certainly true. But they never get a
20 case unless it is referred to them by an Article 3
21 judge, and then the Article 3 judge reserves the ability
22 to withdraw the reference and, therefore, they
23 don't have -- they are now unable to do anything without
24 that imprimatur from the district court, and I --

25 JUSTICE KAGAN: Mr. Gannon --

1 CHIEF JUSTICE ROBERTS: Does the district
2 court have that authority after the entry of judgment?

3 MR. GANNON: I -- I don't think as a
4 statutory matter that 157(d), which is the provision
5 that allows the district court to withdraw the
6 reference, it's possible that that can't be done at that
7 point, but I think that it is sensible as a matter of
8 constitutional remedy. If the -- if the entry of final
9 judgment by the bankruptcy court was a constitutional
10 violation, I think it is a sensible remedy, as I
11 discussed before, to deem that final judgment to be
12 proposed findings of fact and conclusions of law. As
13 this Court concluded in Stern, that subject matter
14 jurisdiction is vested in the district court and that
15 the allocation of authority between bankruptcy judges
16 and district judges contained in Section 157 is not of
17 subject matter jurisdictional consequences.

18 JUSTICE KAGAN: Mr. Gannon, could you say a
19 word about the relevance of arbitration here? Because
20 I've been trying to figure out, if there's an Article 3
21 problem irrespective of consent when Congress adopts
22 some kind of scheme for alternative adjudication, why
23 schemes of mediation and arbitration wouldn't similarly
24 be constitutionally problematic.

25 MR. GANNON: I -- obviously, we don't think

1 that -- that these schemes here in the bankruptcy judge
2 context and the magistrate judge context, which are --
3 which are hedged around with lots of procedural
4 protections and statutory protections, rise to that
5 level. But I do think that a principal difference, if
6 the Court were looking to distinguish arbitration from
7 these types of concerns, is that the arbitration is more
8 purely private.

9 Although there's statutory authorization,
10 the arbitrators are generally not Federal employees.
11 Bankruptcy judges, by contrast, are actually units of
12 the district courts. They are within Article 3. They
13 are --

14 JUSTICE KAGAN: Yes, but that would suggest
15 that arbitration is more constitutionally problematic
16 because it -- it extends -- you know, it goes -- it's
17 further away from the supervisory authority of the
18 district court.

19 MR. GANNON: I'm -- I'm loathe to say that
20 it's further away because I think that there may be a
21 separation of powers distinction between --

22 CHIEF JUSTICE ROBERTS: Arbitration is a
23 matter of contract between two parties. Nothing happens
24 in an arbitration until you get a district court to
25 enter a judgment enforcing the contract. It seems to me

1 totally different from the situation we're talking about
2 here.

3 MR. GANNON: Well, I do --

4 JUSTICE KAGAN: A matter of contract versus
5 a matter of consent? Like I said, you understand the
6 difference.

7 CHIEF JUSTICE ROBERTS: But you -- I'm
8 posing a question to you, I guess.

9 (Laughter.)

10 CHIEF JUSTICE ROBERTS: Courts enforce
11 contracts all the time. They don't enter judgments
12 beyond their Article 3 authority simply because the two
13 parties before them agree that they should.

14 MR. GANNON: That's true, Mr. Chief Justice.
15 In cases like Heckers and Kimberly, courts, in light of
16 a previous reference from the Court and the consent of
17 the parties agreed to have their power of de novo review
18 limited. Obviously that's not what happened here, but
19 we think that the judgment of the decision below should
20 be affirmed.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Hallward-Driemeier, you have five
23 minutes.

24 REBUTTAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

25 ON BEHALF OF THE PETITIONER

1 MR. HALLWARD-DRIEMEIER: Thank you,
2 Mr. Chief Justice.

3 I have four points in response. First with
4 respect to the history. Hecker's and Kimberly were not
5 instances in which the non-Article 3 actor entered the
6 judgment of the United States.

7 In Hecker's, the Court compared the
8 referee's actions akin to a jury. And a jury, of
9 course, only finds facts. Only the Court can decide
10 whether to enter judgment on the basis of the jury's
11 verdict. Likewise an arbitrator can decide facts
12 pursuant to the parties' contract, but until they bring
13 it to the Court and judgment is entered confirming --

14 JUSTICE BREYER: What are we supposed to
15 assume here on this point? In Thomas, this Court held
16 that what Northern Pipeline establishes is that Congress
17 cannot vest in a non-Article 3 court the power to
18 adjudicate without consent of the litigants. So that's
19 the holding.

20 Now, if we are going to go back into -- and
21 the power of agencies and whether we want to reverse the
22 things that were held in 1938 and so forth, I guess we
23 should have briefing on that. Am I supposed to assume
24 that this is a case -- I thought I assumed what we have
25 held before in respect to constitutionality. Not

1 whether Northern Pipeline extends to where it is with
2 consent of the parties.

3 MR. HALLWARD-DRIEMEIER: Although Northern
4 Pipeline, because the party had objected, did not
5 address the question whether consent --

6 JUSTICE BREYER: Now, you heard what I read
7 from Thomas. I was just reading it, and it talks about
8 without consent. So what I want to know is are we going
9 to open up these issues again? Because I have my own
10 views on that, but they don't necessarily -- they won't
11 necessarily command a majority, but I think we should
12 have briefing.

13 (Laughter.)

14 MR. HALLWARD-DRIEMEIER: No, Your Honor.
15 Because the earlier cases do not establish an authority
16 to enter judgment of the United States by a --

17 JUSTICE BREYER: My question is are we
18 supposed to go into that or do we just take as assumed
19 what Thomas said and Stern said, and I think -- you know
20 what I said. I don't want to repeat myself.

21 MR. HALLWARD-DRIEMEIER: Well, Thomas
22 certainly does not foreclose the argument that I'm
23 making because --

24 JUSTICE SCALIA: They didn't say that it's
25 okay without consent.

1 MR. HALLWARD-DRIEMEIER: Right.

2 JUSTICE SCALIA: They just say it is okay
3 with consent. They didn't address the point.

4 MR. HALLWARD-DRIEMEIER: That's right, Your
5 Honor.

6 JUSTICE BREYER: I think we should have
7 briefing on the point if we are going into it.

8 MR. HALLWARD-DRIEMEIER: And Kimberly,
9 again, referred to the confirmation of the award, again
10 the judgment being entered by the Court.

11 The -- in Roell, which really marks the
12 furthest extent of the recognition of consent and the
13 role that it can play with respect to judgments and, of
14 course, the Article 3 argument was not advanced by the
15 parties there. Both parties agreed that consent would
16 be sufficient. But significantly, even in Roell, the
17 Court said that the consent would have to be knowing and
18 voluntary consent. And we have the opposite of that
19 here. Because both the legislature and the judiciary
20 had told EBIA that it had no right to an Article 3 judge
21 for pretrial motions.

22 And although my friend --

23 JUSTICE SOTOMAYOR: But you had an
24 outstanding motion to withdraw the reference. And the
25 District Court gave you the option of proceeding with

1 that motion and having it determine the rest of the case
2 or to go and listen -- or go back to the bankruptcy
3 court and let the bankruptcy court manage this and you
4 chose the latter. I think obviously for the reasons
5 your -- your adversary speaks about, because your
6 co-defendant had won in bankruptcy court. I think you
7 were riding your chances.

8 MR. HALLWARD-DRIEMEIER: No, Your Honor, to
9 the contrary, and you don't need to hypothesize because
10 the record is clear, the motion was to withdraw for
11 purpose of conducting a jury trial because our client
12 recognized that Ninth Circuit precedent
13 Healthcentral.Com explicitly held after Granfinanciera,
14 that although you might have a Seventh Amendment jury
15 trial right to an Article 3 judge, that did not entitle
16 you to Article 3 determination of pretrial motions
17 including summary judgment motion on a fraudulent
18 conveyance claim. It was directly on point. Our client
19 cited that, recognized it, it had no right to Article 3
20 court prior to trial.

21 So the motion to withdraw was limited to the
22 motion for a trial if the Court got that far. So the
23 suggestion that in the answer we disputed that
24 fraudulent conveyance actions are core is not consistent
25 with the record.

1 The complaint had listed eight causes of
2 action, several of which were core, several noncore, and
3 then a single concluding allegation that the proceeding
4 was core. Under Ninth Circuit law we rightly denied
5 that allegation.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 The case is submitted.

8 (Whereupon, at 11:13 a.m., the case in the
9 above-entitled matter was submitted.)

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