

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 EXECUTIVE BENEFITS INSURANCE :

4 AGENCY, :

5 Petitioner : No. 12-1200

6 v. :

7 PETER H. ARKISON, CHAPTER 7 :

8 TRUSTEE OF THE ESTATE OF :

9 BELLINGHAM INSURANCE AGENCY, INC. :

10 - - - - - x

11 Washington, D.C.

12 Tuesday, January 14, 2014

13

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

17 APPEARANCES:

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

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

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

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1 P R O C E E D I N G S

2 (10:11 a.m.)

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

7 Mr. Hallward-Driemeier.

8 ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

9 ON BEHALF OF THE PETITIONER

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

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

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

22 The entry of final judgment of the United
23 States is the ultimate exercise of the judicial power
24 under Article III, just as the enactment of legislation
25 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 III?

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 branches --

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 III power.

4 The district court would have the
5 discretion 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 III judge would not have entered summary
8 judgment as an original matter. Sitting as an appellate
9 court where its decision was going to be subject to
10 appellate review immediately, perhaps its analysis was
11 different.

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

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

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

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

24 MR. HALLWARD-DRIEMEIER: Well,
25 Section 158(a) speaks in language of the district court

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

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

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

11 MR. HALLWARD-DRIEMEIER: It uses --

12 JUSTICE GINSBURG: -- in 158?

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

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

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

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

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

24 So on page 4a of the government's statutory
25 appendix, Section 158(a), "The district courts of the

1 United States shall have jurisdiction to hear appeals."

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

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

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

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

1 what they thought was a core case that turned out to be
2 noncore.

3 So I want your response to that, and I would
4 couple that with my own research for an opinion when I
5 was one the First Circuit about the fraudulent
6 conveyances, and they are about bankruptcy.

7 I grant you that there is a Statute of
8 Elizabeth, it's a legal matter for several hundred
9 years, but the person who is defrauded, the people
10 defrauded are the creditors. And in most instances, the
11 fraud consists of transferring property to a friend,
12 rather than a creditor, where you know you are
13 insolvent.

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

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

25 JUSTICE BREYER: I know that, and I would

1 have said they were right. But, nonetheless, I am faced
2 with case law that says to the contrary. Okay. So my
3 question is, if they couldn't get -- if they couldn't
4 get what they wanted, which is to have the bankruptcy
5 judge decide it, why wouldn't they at least have wanted
6 the bankruptcy judge to write a report and
7 recommendations and send it on to the district judge so
8 he can review it de novo?

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

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

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

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

23 JUSTICE SCALIA: What is the ambiguity we
24 are talking about?

25 MR. HALLWARD-DRIEMEIER: Well, the

1 ambiguity -- I actually think there is no ambiguity
2 because --

3 JUSTICE SCALIA: What is the non-ambiguity
4 we are talking about?

5 (Laughter.)

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

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

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

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

1 which bankruptcy judges would enter judgment and there
2 would be only appellate review by the district courts.

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

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

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

24 JUSTICE GINSBURG: But the definition -- the
25 definition was linked to a purpose. You-- you laid out

1 very nicely the two categories; the one category where
2 the bankruptcy judge enters a judgment, the other
3 category where the bankruptcy judge makes
4 recommendations. So, if you -- the purpose of the
5 classification was to indicate the bankruptcy judge can
6 make the final judgment, can only make recommendations.

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

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

15 MR. HALLWARD-DRIEMEIER: I -- I don't think
16 that 157(b) envisions that the district court could do
17 that. The district court's review under -- of a
18 judgment entered under 157(b) is, on appeal, pursuant to
19 158, which is an exercise of appellate jurisdiction, not
20 original jurisdiction.

21 JUSTICE SCALIA: If -- if -- if we believe
22 that the word "determine" means make a final judgment,
23 which you assert it means, so that there's no ambiguity,
24 it seems to me you have a statute in which the
25 bankruptcy judge is only authorized to make

1 recommendations in some situations and to make final
2 judgments in others. And surely, there's a problem with
3 a district judge altering that disposition --

4 MR. HALLWARD-DRIEMEIER: That -- that's
5 right.

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

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

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

15 (Laughter.)

16 MR. HALLWARD-DRIEMEIER: That's -- that's
17 true. And --

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

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

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

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

25 JUSTICE KAGAN: Well, we do try though,

1 again, to apply severability principles to write the
2 statute that Congress would have written if it had known
3 about a constitutional ruling. And that's essentially
4 what Justice Breyer is suggesting.

5 MR. HALLWARD-DRIEMEIER: I think, Your
6 Honor, there are two problems with that. First is that
7 by changing the definition of "core proceedings," there
8 are other collateral consequences for other provisions
9 of the code. Under Section 1 -- 1334(c), for example,
10 there is an abstention in certain noncore proceedings.
11 And so Congress has defined the scope of the abstention
12 according to the same language that it uses in 157(b)
13 whether a proceeding arises under Title 11 or does not
14 do so, but is merely in relation to a case under Title
15 11.

16 So if the Court goes and revises what
17 Congress has provided as the definition of core in
18 157(b), there will be collateral consequences for other
19 statutes that Congress had enacted.

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

1 the Magistrates Act, 636. The two are actually quite
2 different.

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

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

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

21 MR. HALLWARD-DRIEMEIER: But the formalities
22 matter.

23 JUSTICE ALITO: Well, why do they matter for
24 Article III? Maybe they matter for statutory reasons.
25 Why do they matter for Article III? What your client

1 got was exactly -- substantively exactly what your
2 client would have gotten had this been referred to a
3 magistrate judge for a report and recommendation.

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

10 JUSTICE SCALIA: Counsel, is Article III not
11 violated so long as the parties are happy?

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

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

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

21 JUSTICE BREYER: I thought there were two
22 aspects to the Article III problem. One affects the
23 individuals and it's an unfairness, and the other is
24 structural, as Justice Scalia has said. But both are at
25 issue. And so where you have only a structural issue

1 and it's a question of getting the bankruptcy courts to
2 work and nobody's hurt by it, doesn't that at least cut
3 in favor of interpreting a statute to prevent chaos --
4 not chaos, that's too strong -- but to prevent -- to
5 allow the function of the court to work better?

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

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

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

23 The President's power to appoint has been
24 encroached upon.

25 JUSTICE KAGAN: Well, couldn't you say the

1 same thing once again about magistrates, the exact same
2 arguments would apply to them?

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

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

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

24 So if consent were to cure the problem here,
25 then the jurisdiction of the Court would depend solely

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

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

18 MR. HALLWARD-DRIEMEIER: Only -- only the
19 former, Your Honor.

20 JUSTICE ALITO: The former is not implicated
21 in this case.

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

24 JUSTICE ALITO: I see.

25 MR. HALLWARD-DRIEMEIER: -- about the logic

1 of the argument and how far it went.

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

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

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

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

1 statute had advised the litigant that it had the right
2 to refuse consent.

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

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

11 JUSTICE SCALIA: Express or implied.

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

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

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

21 JUSTICE SOTOMAYOR: I'm a little confused.

22 MR. HALLWARD-DRIEMEIER: I'm sorry, Your
23 Honor.

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

1 MR. HALLWARD-DRIEMEIER: So there -- there
2 were two cases that the other side had cited, Roell and
3 McDonald, for that point. But in each case, the statute
4 itself featured consent as a limiting feature on the
5 non-Article III court's authority.

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

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Mr. Pottow.

10 ORAL ARGUMENT OF JOHN POTTOW
11 ON BEHALF OF THE RESPONDENT

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

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

20 But if I may begin, please, I'd like to
21 address Justice Scalia's point about where's the
22 ambiguity in the statute. And unfortunately, my friend
23 and I disagree, because I think the statute under
24 157(b)(1) is unambiguous in my favor.

25 So if I could take you back to the statute,

1 and I'll use the Solicitor General's brief for
2 convenience. 157(b)(1) is the provision by which
3 district courts, if they want to -- there's no
4 compulsion on these Article III officers -- if they want
5 to, they can refer matters to bankruptcy judges. And it
6 says, when there is a matter referred, that they may
7 hear and determine the matter and may enter an order or
8 judgment.

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

1 JUSTICE KENNEDY: Does that bear on the
2 question whether this is appellate? Do you agree that
3 this is appellate, once the district judge -- district
4 court has the matter in front of it?

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

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

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

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

15 JUSTICE KENNEDY: Yes.

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

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

1 MR. POTTOW: No. No.

2 JUSTICE SCALIA: I'm on Easter vacation and
3 I may hear and determine it, and I may enter appropriate
4 orders, but I don't feel like it.

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

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

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

15 JUSTICE SCALIA: How do you bring the "may"
16 over to the district court?

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

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

1 JUSTICE SCALIA: Then then the "may" that you're
2 concerned with is the "may" in (a), not the "may" in
3 (b).

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

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

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

25 For core proceedings, what the statute says

1 is you'll -- is you'll determine it. And you're saying,
2 well, it says that, but since it's been held
3 unconstitutional, we're going to shift this over to
4 the -- to the category in which they -- they can issue
5 an order and recommendation. Where does that come from?

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

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

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

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

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

1 JUSTICE SCALIA: Oh, really? I mean, can a
2 district judge sort of -- you know, it's not terribly
3 important because it's just a recommendation. So I'm
4 going to refer it to my former partner, you know, my
5 former law partner.

6 MR. POTTOW: But with the consent of the
7 parties?

8 JUSTICE SCALIA: Yes, even with the consent
9 of the parties.

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

15 JUSTICE SCALIA: To a special master.

16 MR. POTTOW: Yes.

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

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

1 JUSTICE BREYER: You're saying basically, I
2 think, the words are, for core proceedings, it
3 gives the power to the bankruptcy judge to hear and
4 determine.

5 MR. POTTOW: Yes.

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

11 MR. POTTOW: Yes.

12 JUSTICE BREYER: That's why I thought
13 perhaps it's ambiguous.

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

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

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

22 JUSTICE SCALIA: It can just refer them and
23 say just give me the eggs.

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

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

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

2 JUSTICE SCALIA: You don't have to determine
3 it; just give me your recommendation.

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

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

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

14 JUSTICE SCALIA: The whole dichotomy of the
15 statute disappears.

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

25 JUSTICE SOTOMAYOR: All right. Can I go to

1 that for a second?

2 MR. POTTOW: Yes.

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

6 That for statutorily core proceedings that
7 constitutionally are not core --

8 MR. POTTOW: Yes.

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

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

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

17 MR. POTTOW: Yes.

18 JUSTICE SOTOMAYOR: -- what do I do with
19 Federal Rules of Bankruptcy Procedure 7012 --

20 MR. POTTOW: Yes.

21 JUSTICE SOTOMAYOR: -- which explicitly
22 states, quote: "In noncore proceedings, final orders
23 and judgments shall not be entered on the bankruptcy
24 judge's order except with the 'express consent of the
25 parties.'" So, now you're telling me we're going to

1 have a third category. Makes very little sense to me,
2 okay? Which is you need express consent for a
3 magistrate judge to issue a final judgment in a noncore
4 proceeding, but you can have express or implied consent
5 to enter the final judgment in core proceedings.

6 MR. POTTOW: I think --

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

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

22 And what this Court held was when there's a
23 violation of that rule, right? When there's not express
24 consent, if there is, in fact, true consent based on the
25 conduct, then consent is what matters and it can trump

1 the rule. And that's the square holding of Roell. So
2 we would argue that --

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

10 MR. POTTOW: No, but --

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

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

17 JUSTICE SOTOMAYOR: No, here you have to
18 express consent.

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

22 JUSTICE SOTOMAYOR: Got it.

23 MR. POTTOW: Okay.

24 JUSTICE SOTOMAYOR: Okay. Now I understand.

25 MR. POTTOW: May I -- if I may, I'd like to

1 go back to the question that Justice Kennedy raised and
2 also back to Justice Alito's and Justice Ginsburg
3 before.

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

12 By contrast, district courts in bankruptcy
13 can enter judgments; they have both appellate and
14 original jurisdiction. They can withdraw the reference
15 from a bankruptcy court under 157(d) and they can enter
16 judgment. So the Petitioner in this case got everything
17 it wanted. It had an Article III consideration of its
18 fraudulent conveyance defense before Chief Judge Pechman
19 of the Western District of Washington, and they lost.
20 And on -- on page 45A of the Pet. App, you can see that
21 Chief Judge Pechman meticulously spells out her standard
22 of review. She says -- she spends a whole page on it
23 saying this is going to be de novo review, and she
24 writes a 12-page opinion with complete de novo review,
25 saying this is why you lose on the State claim; this is

1 why you lose on the Federal claim; this is why you lose
2 on the alter ego claim. And she says there is no
3 genuine issue of material fact that has been submitted
4 on this record.

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

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

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

1 matter for --

2 JUSTICE SCALIA: I want to go back to your
3 statement that the district court here has both original
4 and appellate jurisdiction because it can recall the
5 reference to the bankruptcy judge. Can it recall the
6 reference after the bankruptcy judge has issued his
7 decision in the case?

8 MR. POTTOW: I don't --

9 JUSTICE SCALIA: Has entered a judgment in
10 the case?

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

1 review.

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

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

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

22 But if I may, I'd like to comment on my
23 friend's backup argument. If -- if the Court agrees
24 with me that Article III is not imperiled by consensual
25 adjudicative regimes like the magistrate's civil

1 judgments and the bankruptcy court noncore proceedings
2 which, by the way, I would like to remind the Court that
3 in Stern itself, you did quote Section 157(c)(2), which
4 is the noncore consensual proceedings in an opinion
5 exclusively devoted to Article III.

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

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

16 CHIEF JUSTICE ROBERTS: I'm sorry. Go
17 ahead.

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

24 CHIEF JUSTICE ROBERTS: You're right. We've
25 been talking about backup arguments to backup arguments.

1 Your central argument is that the consent of the parties
2 can overcome what Stern identified as a structural
3 separation of powers problem.

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

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

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

24 CHIEF JUSTICE ROBERTS: We've already told
25 the district court, haven't we, that its Article III

1 status is infringed when he refers or when there's a
2 reference to a non-Article III tribunal?

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

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

12 MR. POTTOW: That's what Heckers said.
13 Heckers -- and that -- that's basically --

14 CHIEF JUSTICE ROBERTS: Is that what you're
15 saying?

16 MR. POTTOW: Yes, that's a Special Master.
17 That's what a Special Master is.

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

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

1 thinking --

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

8 MR. POTTOW: That -- that is the current
9 system of the magistrate judges under 636.

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

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

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

25 So when this Court has had opportunity to

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

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

21 So our submission, Mr. Chief Justice, is
22 yes, we do think that the consent matters. And the final
23 thing I'd like to say is, my friend cast this narrative.
24 He said, well, how do you know I consented through my
25 implied conduct to the noncore claim? Remember, he did

1 plead it was noncore in his answer, and -- my red light.

2 CHIEF JUSTICE ROBERTS: Finish your
3 sentence.

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

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Mr. Gannon.

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

13 MR. GANNON: Mr. Chief Justice, and may it
14 please the Court:

15 We believe that a party may consent to have
16 a fraudulent conveyance claim determined by a bankruptcy
17 judge. And even in the absence of consent, principles
18 of severability justify treating such an action as a
19 noncore proceeding in which a bankruptcy judge may enter
20 proposed findings of fact and conclusions of law.

21 There's also one other aspect of our argument that has
22 not yet been mentioned this morning, which is that we
23 think that even if consent is not adequate to cure the
24 constitutional violation or if you find that there is
25 not adequate consent on this record, we think that it

1 would still be open to you to find that petitioner has
2 forfeited this constitutional argument.

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

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

15 MR. GANNON: You might have thought the same
16 thing.

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

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

1 could overlook that type of forfeiture. I don't think
2 that it was futile here. I think it is demonstrated by
3 the fact that Stern itself came out of the Ninth
4 Circuit. The litigants there were making those
5 arguments, and indeed the Healthcentral.Com case the
6 petitioner relies upon just had a discussion of the
7 Seventh Amendment.

8 I don't think it clearly foreclosed this
9 claim for purposes of the constitutional argument --

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

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

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

25 But if I can turn to the severability

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

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

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

23 And the consequence of that is that, because
24 the Congress had divided the world into core and noncore
25 proceedings in the wake of Northern Pipeline, thinking

1 that the distinction between them was core proceedings
2 were ones in which bankruptcy judges would have
3 authority, constitutional authority to enter final
4 judgments; noncore proceedings were ones in which they
5 could not do that without consent, or they would only be
6 able to provide proposed findings of fact and
7 conclusions of law.

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

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

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

1 law.

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

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

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

23 And so that was -- that was one where the
24 district court didn't come into it at that point.

25 CHIEF JUSTICE ROBERTS: Your -- your

1 position is -- I mean, the authority to decide cases,
2 which is our Constitutional birthright, we said in Stern
3 that Congress can't take that away from us. And your
4 position is that two parties who come in off the street,
5 if they agree, they can take that away from us.

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

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

19 CHIEF JUSTICE ROBERTS: No, it's the
20 parties, the parties who are --

21 MR. GANNON: It's not the parties that are
22 choosing.

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

1 MR. GANNON: You determined that it was
2 unconstitutional in the absence of consent, and it's not
3 just the consent of the parties. I think it is
4 important here, as it was in -- in the magistrate judge
5 context in Roell, in Peretz, in Gomez. This Court has
6 previously recognized that in the magistrate judge
7 context, consent makes or breaks the difference between
8 whether it's okay for a magistrate judge to oversee
9 felony voir dire, and it has subsequently compared that
10 to entry of civil judgments. In Roell, it sustained the
11 ability of a magistrate judge to enter a civil judgment.

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

17 CHIEF JUSTICE ROBERTS: The point of
18 everything that you said is, they do not comply with
19 Article III.

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

1 that imprimatur from the district court, and I --

2 JUSTICE KAGAN: Mr. Gannon --

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

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

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

1 be constitutionally problematic.

2 MR. GANNON: I -- obviously, we don't think
3 that -- that these schemes here in the bankruptcy judge
4 context and the magistrate judge context, which are --
5 which are hedged around with lots of procedural
6 protections and statutory protections, rise to that
7 level. But I do think that a principal difference, if
8 the Court were looking to distinguish arbitration from
9 these types of concerns, is that the arbitration is more
10 purely private.

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

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

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

24 CHIEF JUSTICE ROBERTS: Arbitration is a
25 matter of contract between two parties. Nothing happens

1 in an arbitration until you get a district court to
2 enter a judgment enforcing the contract. It seems to me
3 totally different from the situation we're talking about
4 here.

5 MR. GANNON: Well, I do --

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

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

11 (Laughter.)

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

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

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Hallward-Driemeier, you have five
25 minutes.

1 REBUTTAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

2 ON BEHALF OF THE PETITIONER

3 MR. HALLWARD-DRIEMEIER: Thank you,
4 Mr. Chief Justice.

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

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

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

22 Now, if we are going to go back into Crowell and
23 Benson and the power of agencies and whether we want to reverse
24 the things that were held in 1938 and so forth, I guess we
25 should have briefing on that. Am I supposed to assume

1 that this is a case -- I thought I assumed what we have
2 held before in respect to constitutionality. Not
3 whether Northern Pipeline extends to where it is with
4 consent of the parties.

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

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

15 (Laughter.)

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

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

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

1 JUSTICE SCALIA: They didn't say that it's
2 okay without consent.

3 MR. HALLWARD-DRIEMEIER: Right.

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

6 MR. HALLWARD-DRIEMEIER: That's right, Your
7 Honor.

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

10 MR. HALLWARD-DRIEMEIER: And Kimberly,
11 again, referred to the confirmation of the award, again
12 the judgment being entered by the court.

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

24 And although my friend --

25 JUSTICE SOTOMAYOR: But you had an

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

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

23 So the motion to withdraw was limited to the
24 motion for a trial if the court got that far. So the
25 suggestion that in the answer we disputed that

1 fraudulent conveyance actions are core is not consistent
2 with the record.

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

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 The case is submitted.

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

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