

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WELLNESS INTERNATIONAL :

4 NETWORK, LIMITED, ET AL., :

5 Petitioners : No. 13-935

6 v. :

7 RICHARD SHARIF. :

8 - - - - - x

9 Washington, D.C.

10 Wednesday, January 14, 2015

11

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

15 APPEARANCES:

16 CATHERINE STEEGE, ESQ., Chicago, Ill.; on behalf of
17 Petitioners.

18 CURTIS E. GANNON, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; on
20 behalf of United States, as amicus curiae, supporting
21 Petitioners.

22 JONATHAN D. HACKER, ESQ., Washington, D.C.; on behalf of
23 Respondent.

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

2 (11:11 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 13-935, Wellness International Network v.
5 Sharif.

6 Ms. Steege.

7 ORAL ARGUMENT OF CATHERINE STEEGE

8 ON BEHALF OF THE PETITIONERS

9 MS. STEEGE: Mr. Chief Justice, and may it
10 please the Court:

11 Stern v. Marshall held that a bankruptcy
12 judge may, consistent with Article III, enter judgment
13 in an action that stems from the bankruptcy itself.

14 The claim at issue in this case meets that
15 test. Wellness asked the bankruptcy court to decide the
16 first and most fundamental question that arises in every
17 bankruptcy case, what property became part of the debtor
18 Sharif's bankruptcy estate under Bankruptcy Code
19 Section 541 on the day Mr. Sharif filed for bankruptcy.

20 As this Court recognized over 100 years ago
21 in Mueller v. Nugent, it is essential that bankruptcy
22 judges have that authority. As long as there have been
23 bankruptcy laws, there have been debtors like Mr. Sharif
24 who devised creative ways to keep property in their own
25 possession and out of the hands of their trustees and

1 creditors. Here, Mr. Sharif's case is --

2 JUSTICE SOTOMAYOR: But we've already held
3 that a fraudulent conveyance against a noncreditor is an
4 Article III violation, is a Stern claim, essentially.

5 MS. STEEGE: Yes, Your Honor.

6 JUSTICE SOTOMAYOR: Or non-Stern claim. So
7 why isn't this the same thing?

8 MS. STEEGE: Because this action is a
9 case --

10 JUSTICE SOTOMAYOR: I mean, it's not the
11 same thing because he actually possessed this trust,
12 it's in his name as trustee --

13 MS. STEEGE: Yes.

14 JUSTICE SOTOMAYOR: -- and so it's a little
15 bit -- it's a lot different, but --

16 MS. STEEGE: Yes. But the allegations of
17 the complaint were that Mr. Sharif owned the property
18 and to the extent the trust existed, it should be
19 ignored by virtue of the way he handled his property.

20 JUSTICE SOTOMAYOR: Oh, but -- but that's
21 the same in a fraudulent conveyance. It was his
22 property and he was just trying to deny his other
23 creditors the benefit of that money. So it's not quite
24 that.

25 MS. STEEGE: Well, it's different, Your

1 Honor, because in a fraudulent transfer claim, the
2 debtor actually passes title over to someone, under the
3 definition of 548 or the --

4 JUSTICE SOTOMAYOR: But here, he's claiming
5 that the beneficiary has title.

6 MS. STEEGE: Yes, but that's the very
7 dispute that the Court was asked to decide under
8 Thompson v. Magnolia Petroleum, the issue is not what
9 the debtor claims his title is, but whether he has
10 actual possession. And so here -- the assets what we
11 have here are the condominium that he lives in and he's
12 lived in for 20 years, a pharmacy business, he's a
13 pharmacist, that he's been operating for many years and
14 that in the past, he had reported as his business on his
15 personal tax return; we have his own personal retirement
16 account that somehow inexplicably ended up in the
17 mother's grantor trust and then we have bank accounts
18 that he owned.

19 And so the allegations of the complaint were
20 that he really owned this and this charade that he put
21 up in front of the bankruptcy court of saying, this is
22 owned in a trust, that was the dispute the court had to
23 consider.

24 And a way, I think, to think of it as
25 differently from a fraudulent transfer action, where

1 you're going against a true third party to whom title
2 has passed, that chosen action, the intangible right to
3 sue on the fraudulent transfer claim, or as in Stern,
4 the right to bring the breach of contract or tort claim
5 in these other cases, that asset, the right to sue
6 exists in the estate at the time of its creation.

7 JUSTICE ALITO: The ben -- who is the
8 beneficiary of this trust? His sister, right?

9 MS. STEEGE: Well, that's --

10 JUSTICE ALITO: That's what's claimed.

11 MS. STEEGE: That's what's claimed, yes.

12 JUSTICE ALITO: And so what would be the
13 effect of a declaration by the bankruptcy court that --
14 that Respondent was the alter ego; that it was actually
15 his property? The sister -- would the sister be bound
16 by that judgment? Would the sister have to appear in
17 the bankruptcy court as if she were a creditor?

18 MS. STEEGE: Well, yes, she would be bound
19 because if we accept their characterization, the
20 trustee, through his litigation conduct, binds the
21 beneficiary under well-established Illinois law, the law
22 of -- of it's just basic trust law. But more importantly,
23 she did appear in this action. She appeared through
24 counsel. She, too, was subpoenaed. She, too, failed to
25 produce the trust documents in response to requests.

Official

1 She was given notice of the case as a creditor, um and could
2 have filed a claim. And there was a safety valve for
3 her and she's, in fact, exercised her ability to -- to
4 have that safety valve. She could have filed a proof of
5 claim in the case.

6 JUSTICE SOTOMAYOR: Would the -- would the court,
7 the bankruptcy court, have had the power to notify her or to
8 subpoena her to come in as a party?

9 MS. STEEGE: Yes, because if -- if she was a
10 necessary party to the action, the normal rules of
11 Federal Civil Procedure apply through the bankruptcy
12 rules and she would have been required to be brought in.
13 She's not a necessary party under the construct they
14 created.

15 JUSTICE SOTOMAYOR: Because she's the
16 representative. Right.

17 MS. STEEGE: They -- they created this construct
18 of this trust --

19 JUSTICE BREYER: So am I right about the
20 basic facts? Creditor wants some money from debtor,
21 who's in bankruptcy; creditor says, I look at your list
22 of assets, it seems to me something's missing. I have a
23 piece of paper here that you filed one year ago at the
24 bank which says you have \$5 million more.

25 MS. STEEGE: Right.

1 JUSTICE BREYER: Where is that on the list?
2 He thinks about it and he says, oh, yeah, there was
3 5 million more, but that wasn't mine. That belonged to
4 Saudi Arabia. Or that belonged to my cousin. Or -- and
5 so they say, let's prove it. And that's what we're at
6 issue. That's what's at issue.

7 MS. STEEGE: That's correct.

8 JUSTICE BREYER: Can the bankruptcy court,
9 it happens here, that the claim is not Saudi Arabia, the
10 claim is not my cousin, the claim is that the \$5 million
11 was a living trust of which there seems to be very
12 little record, which belonged to his mother. But in
13 principle, it's no different, is it, in your view?

14 MS. STEEGE: No. That's exactly what we
15 have here.

16 JUSTICE BREYER: It's a simple claim. But
17 we'll hear from the other side, which will say it's very
18 different.

19 MS. STEEGE: Right. And that is the basis
20 of bankruptcy. If we -- if we think about what
21 bankruptcy is and what it has historically always has
22 been, it's been about the in rem jurisdiction of the
23 court to take control of the debtor's property. And
24 this case really is easy because the debtor is in
25 possession of the property, the nature of this property

1 he's personally --

2 JUSTICE SCALIA: Is that the only basis for
3 distinguishing Stern?

4 MS. STEEGE: No, it's not, Your Honor.
5 There's a number of --

6 JUSTICE SCALIA: What else?

7 MS. STEEGE: Okay. This is decided as a
8 matter of Federal law. Section 541 determines what
9 comes into the estate and what doesn't. It's not --

10 JUSTICE SCALIA: Whether there's a trust or
11 not is not a question of Federal law, is it?

12 MS. STEEGE: But the question of whether
13 something belongs to the bankruptcy estate is a Federal
14 question, even if State law informs the answer. This
15 Court's precedent --

16 JUSTICE SCALIA: Well --

17 MS. STEEGE: -- in other -- under other
18 statutes. It's Law v. Siegel last year indicated --

19 JUSTICE SCALIA: It's a question of Federal
20 law even if State provides the answer. I - I don't know
21 what that means.

22 MS. STEEGE: Yes, Your Honor, and that's --
23 the Court has interpreted federal statutes dealing with
24 property rights, the Paulsen --

25 JUSTICE SCALIA: And that wasn't the case in

1 Stern?

2 MS. STEEGE: That was not the case in Stern.
3 The claim there was --

4 JUSTICE SCALIA: Well, likewise there, what
5 was in the estate is a question of Federal law, even if
6 State law provided the answer.

7 MS. STEEGE: The difference here would be if
8 there had been a dispute between the debtor and Stern
9 and her bankruptcy trustee over who got the right to go
10 sue Pierce, the -- the son-in-law, that would have been
11 this case. That would have been the 541 question.

12 The chosen action is what exists in the
13 estate at the time of its creation. And so that chose
14 of action, when you go out and you seek to go liquidate
15 that, bring the lawsuit, that's the augmenting-type
16 claim that the Court has talked about in its precedent
17 in Stern and in Northern Pipeline.

18 JUSTICE ALITO: Suppose that Illinois law,
19 and suppose that Illinois law governs the -- this -- the
20 issue of the trust, and suppose Illinois law says that
21 when a -- when it is held that the trustee is -- that --
22 that the trust is the trustee's alter ego, that the
23 property does not become the -- that the -- the property
24 at issue does not become the property of the trustee
25 until there is a judicial declaration that that -- that

1 occurs.

2 MS. STEEGE: Well, I don't think that
3 changes the analysis, because, ultimately, in a
4 bankruptcy case, if you're going to have to have a
5 dispute with the debtor --

6 JUSTICE ALITO: So that's -- that would be a
7 question of the status of this under Illinois law --

8 MS. STEEGE: Correct.

9 JUSTICE ALITO: -- not under Federal law,
10 right?

11 MS. STEEGE: It would inform the decision.
12 But, ultimately, whether the property comes into the
13 estate or not is determined under Section 541. And so
14 the -- the court of appeals, who have addressed this
15 issue, and we list a number of those cases in the third
16 footnote in our brief, all are very uniform. They are
17 looking to State law in a variety of different contexts
18 to figure out what the debtor's rights are in the
19 property because that's the Butner decision of this
20 Court.

21 But, ultimately, when you make that final
22 determination that it is property of the estate, you
23 look to 541. And Congress would have intended that
24 disputes over trusts be part of that 541 determination
25 by its inclusion of Section 541(d), which talks about

1 what title the debtor holds, whether it's legal title or
2 equitable title, which is directly, you know, driven
3 toward trusts because that's when you have a division of
4 title. And so it was intended that Federal law would
5 cover that.

6 And I also think that, you know, a -- a key
7 difference between this and Stern in the form of claim
8 that we have here is this is being brought against the
9 debtor. This isn't being brought against a third party
10 who's been hauled into bankruptcy court against their
11 will. The debtor has chosen to file a bankruptcy,
12 knowing by virtue of the statute that he or she will be
13 required to turn over their property to the bankruptcy
14 trustee; that there may be disputes over that. And
15 there can be legitimate disputes. It doesn't
16 necessarily just have to be a dishonest debtor, like we
17 would contend we have here. And that they're going to
18 be in front of the bankruptcy judge in the first
19 instance having those disputes determined.

20 It's part of the Federal scheme, exactly
21 what bankruptcy is supposed to accomplish, which is to
22 get all of the debtor's property put into the bankruptcy
23 estate for distribution to creditors. That's the
24 central key point of every bankruptcy case.

25 And if you don't do that, you lose your

1 discharge like Mr. Sharif. It really is -- this action
2 really is the flip side of the denial of his discharge,
3 which no one disputes the bankruptcy judge had the
4 authority to decide.

5 She couldn't decide if he should receive a
6 discharge if we didn't know what it was he was supposed
7 to be doing in the case in terms of the property that he
8 had.

9 And the two claims really overlap each
10 other; they're the flip side of each other. That's why
11 I think this is different than a cause of action against
12 a third party such as you had in Stern or Northern
13 Pipeline or Granfinanciera and the like.

14 JUSTICE SOTOMAYOR: But you've not explored
15 the consent question completely.

16 MS. STEEGE: Sure.

17 JUSTICE SOTOMAYOR: Basically the argument
18 that the SG and the -- of you and the SG is that you
19 need express consent -- or I guess the other side,
20 saying you need express consent and they didn't give
21 express consent. How do you get around that?

22 MS. STEEGE: Well, Your Honor, we think that
23 you don't need it. The Court has held and ruled that
24 implied consent is permissible. The argument is based
25 upon the bankruptcy rule, Bankruptcy Rule 7012. And if

1 you look at Section 157(c), it uses the term "express
2 consent" and then just the term "consent." In
3 connection with Section 157(c)(2), which deals with the
4 consent of a litigant to proceed to judgment on a
5 noncore Stern claim, it uses the word "consent." So if
6 we assume Congress meant to require express consent in
7 157(e) dealing with consenting to a jury trial right,
8 they must not have required express consent, and then we
9 have a rule that's going beyond what the statute
10 provides. That's exactly the situation in Roell.

11 JUSTICE SCALIA: We don't have to reach both
12 of these questions if we find one of them in -- in your
13 favor, do we?

14 MS. STEEGE: That's correct. If you don't
15 find it to be a Stern claim, then consent would not
16 matter.

17 JUSTICE SCALIA: Which one is the better
18 one? Which is the prettier question or -- or the one
19 that you think has more real world effect?

20 MS. STEEGE: Well, I think the first
21 question has real world effect in the sense that if the
22 Court were to take away from bankruptcy judges the power
23 to litigate disputes with the debtor over what they
24 possess comes in or out of the bankruptcy estate, you'd
25 see a sea change in how cases were handled. Because

1 that's the basic dispute you're going to have with the
2 debtor. You're going to have three disputes with the
3 debtor. It's going to be --

4 JUSTICE KENNEDY: Even -- even if consent
5 were sufficient to confer jurisdiction? And that's --
6 that's -- maybe just to continue Justice Scalia's
7 question, are the bankruptcy courts more confused by
8 Question 1 or Question 2?

9 MS. STEEGE: I think there's a lot of
10 confusion out there, Your Honor, and I think that
11 certainly people are also concerned about the consent
12 question, because the situation that you have today is
13 that both parties could consent, and the bankruptcy
14 judge could enter a judgment, and then the party who
15 loses can turn around and say, well, there's a question
16 about whether I really consented or not or whether it
17 was appropriate.

18 JUSTICE KAGAN: Can -- can --

19 MS. STEEGE: So both are -- are problems for
20 the courts right now.

21 JUSTICE KAGAN: Can I ask, you said implied
22 consent should be sufficient. How would you go about
23 implying consent? When would there be implied consent?
24 On the basis of what?

25 MS. STEEGE: Well, I think would you would

1 have implied consent where you have -- here you have a
2 debtor who moved for summary judgment. He asked the
3 bankruptcy judge to enter judgment in his behalf. He
4 never sought withdrawal of the reference. He never
5 sought to ask the district court to take this matter
6 away from him.

7 We have -- I think the act of filing a
8 bankruptcy puts you in front of the bankruptcy judge for
9 at least the basic administration of estate, property of
10 the estate determinations, but I would -- would submit
11 for all matters involving the debtor, because they all
12 really do relate to that. It's basically property of
13 the estate determinations, whether property can be
14 claimed as exempt and whether debtor gets the discharge.
15 That's what will involve 99 percent of litigation of the
16 debtor.

17 JUSTICE KAGAN: You've -- you've said, I
18 think, that the consent has to be knowing and
19 intelligent. Is there something that has to be told to
20 the debtor to make the consent knowing and intelligent?

21 MS. STEEGE: Congress didn't require that
22 here in Section 157, and, you know, it's a maxim of the
23 law that knowledge -- you know, lack of knowledge of the
24 law is no excuse. The statute puts you on notice that
25 there is a list of proceedings, the core proceedings,

1 that are like the old summary proceedings under the
2 Bankruptcy Act, that the bankruptcy judge can decide the
3 final judgment without the consent of the parties.

4 And the statute also puts you on notice that
5 if you don't agree with that, you can ask the bankruptcy
6 judge to make a determination, you can ask the district
7 court judge to make a determination for withdrawal of
8 the reference.

9 JUSTICE SOTOMAYOR: There -- there is a problem,
10 however, here, and that problem is that Stern wasn't
11 decided until the appeal. On rebuttal, I want to talk
12 about the American Colleges' appellate waiver argument.

13 MS. STEEGE: Yes, Your Honor.

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Gannon.

17 ORAL ARGUMENT OF CURTIS E. GANNON,

18 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

19 SUPPORTING PETITIONERS

20 MR. GANNON: Mr. Chief Justice, and may it
21 please the Court:

22 We agree with Petitioners on both questions
23 presented. With respect to the first question, we don't
24 think this is like a Stern claim for the two reasons
25 that have already been discussed, that is that the

1 question of whether something is property of the estate
2 under Section 541 stems from bankruptcy itself.

3 JUSTICE SOTOMAYOR: But that's too broad an
4 answer, because that would be true of fraudulent
5 conveyances.

6 MR. GANNON: Well, and -- and it also does
7 not involve an attempt to augment the estate. We're
8 talking about a determination about --

9 JUSTICE SOTOMAYOR: How about a simpler
10 rule, if you have legal title to something?

11 MR. GANNON: Well --

12 JUSTICE SOTOMAYOR: If you -- if you possess
13 it physically or you have legal title to it, then the
14 bankruptcy court can determine.

15 MR. GANNON: Well, I think --

16 JUSTICE SOTOMAYOR: They -- he has -- the
17 trustee had legal title. He's just claiming --

18 MR. GANNON: The trustee had bare legal
19 title and you think that that's --

20 JUSTICE SOTOMAYOR: -- that there's an
21 equitable requirement to hold it for someone else.

22 MR. GANNON: And -- and under 541(d), if it
23 is true that the trustee only -- only holds bare legal
24 title, and then ultimately the trust is not looked
25 through because it's found not to exist or because it's

1 found to be the alter ego of the trustee, then the --
2 then the equitable interest would not have come into --
3 to the estate.

4 JUSTICE SOTOMAYOR: Yeah. I'm trying to get
5 away from the --

6 MR. GANNON: And so that's true.

7 JUSTICE SOTOMAYOR: I'm trying to get away
8 from the augmentation argument because it's really
9 difficult to apply in a case like this. Anything that's
10 in the estate augments it or anything that comes into
11 the estate.

12 MR. GANNON: Well, I -- I don't think that
13 that's true. I think that when the Court in Stern and
14 Granfinanciera and Northern Pipeline was talking about
15 the difference between questions that stem from the
16 bankruptcy itself and are integral to the restructuring
17 of the debtor/creditor relationship --

18 JUSTICE SOTOMAYOR: Well, then --

19 MR. GANNON: -- they were talking about the
20 baseline that you have there with the estate is the
21 property --

22 JUSTICE SOTOMAYOR: Well, tell me why my
23 rule is not simpler.

24 MR. GANNON: Well, I think --

25 JUSTICE SOTOMAYOR: If you -- if you

1 physically possess it at the time you declare bankruptcy
2 or you have legal title to it --

3 MR. GANNON: I think that --

4 JUSTICE SOTOMAYOR: -- then the bankruptcy
5 -- then it's not a Stern claim.

6 MR. GANNON: I suppose that -- that that --
7 what this is feinting towards is the system that the
8 parties have talked about that developed under the 1898
9 Act that ended up being a relatively reticulated system
10 as described in the Taubel-Scott-Kitzmiller case, in
11 which there are multiple categories in which the
12 bankruptcy court would have jurisdiction to make these
13 determinations. And we agree with Petitioners that on
14 facts like these where there was possession of the
15 property, which we think indisputably the trustee had
16 possession of the trust assets here, and that would be
17 enough to give the bankruptcy judge the jurisdiction --
18 or the referee under the 1898 Act cases -- jurisdiction
19 to determine who had title. And then if -- if --

20 JUSTICE SOTOMAYOR: In Stern we said we
21 would look to history.

22 MR. GANNON: Pardon?

23 JUSTICE SOTOMAYOR: In Stern we said we
24 would look to history.

25 MR. GANNON: Portions of the Stern opinion

1 looked to history but it did not indicate that the
2 historical precedents for this were going to be
3 dispositive and we don't think that -- that the
4 rationale of Stern, Granfinanciera, and Northern
5 Pipeline requires that as an Article III matter, nor
6 does the statute here, because the statutory definition
7 of -- of property of the estate refers to property
8 wherever located and by whomever held. It still
9 ultimately has to be property of the debtor.

10 And so, if you're going to say that if it's
11 -- if it's -- if the debtor holds title to the property,
12 that is the ultimate determination and if you say that
13 that's not --

14 JUSTICE SOTOMAYOR: So let's to go -- let's
15 go to the hypothetical. The sister holds title, but
16 you're saying that it belonged to him.

17 MR. GANNON: Well, I --

18 JUSTICE SOTOMAYOR: That she holds legal
19 title but, in fact, she -- it's really his money.

20 MR. GANNON: Well, I -- I think -- I think
21 it would -- if she held legal title and the property had
22 already been transferred to her and that's what the
23 bankruptcy judge determined, then it wouldn't be
24 property of the estate. And -- but we don't know the
25 answer to the question of who holds title until the

1 so-called Stern claim or non-Stern claim has already
2 been decided, and so I think that that's the trouble
3 with assuming that the answer to the title question or
4 the ownership question -- because that is the answer to
5 the property of the estate question, we can't -- we
6 can't wait to know the -- the merits determination
7 before we know whether it's a Stern claim I think is --
8 is the problem with approaching it that way.

9 But it is sensible to say that the question
10 of whether something was property of the estate on day
11 one such that it was the debtor's property -- because
12 that's the determination here -- that that is not like a
13 Stern claim. It's not like a fraudulent conveyance or
14 avoidable transfer where you're attempting to go out,
15 after the bankruptcy has already been initiated, and
16 trying to reduce a chosen action to judgment and
17 liquidate it and therefore increase the size of the
18 estate after the fact.

19 CHIEF JUSTICE ROBERTS: Counsel, on the
20 consent question, is -- under your theory, is there
21 anything wrong with Congress adding a proviso to every
22 Federal contract saying the contractor hereby agrees to
23 waive any Article III objections to having disputes with
24 the government resolved by something we'll call the
25 congressional courts where the -- the individuals serve

1 for 3 years and Congress has a lot more sway over their
2 decisions?

3 MR. GANNON: Well, I suspect yes, if for no
4 other reason than be -- I mean --

5 JUSTICE SCALIA: Yes, yes what? I forgot
6 the question.

7 MR. GANNON: Yes, if for no other reason
8 than because --

9 JUSTICE SCALIA: Yes, it's okay.

10 MR. GANNON: Yes, that that would be a
11 problem -- I'm sorry, that that would not be
12 permissible. I've forgotten the question.

13 But the reason why this would not be --

14 CHIEF JUSTICE ROBERTS: I thought it was an
15 unforgettable question.

16 (Laughter.)

17 MR. GANNON: I promise you I won't forget it
18 now.

19 JUSTICE SCALIA: Yes. Yes, we have no
20 bananas.

21 MR. GANNON: The reason -- the reason why
22 this would be a problem is -- is because of the
23 structural concerns that you raise there which we don't
24 think are present here. When you said that those were
25 -- were congressional courts that would be more subject

1 to supervision by Congress, we do not think that that
2 describes the bankruptcy system. We think the
3 bankruptcy system is akin to the magistrate judge system
4 where this Court has repeatedly recognized that the
5 structural concerns that were at issue in Schor were not
6 sufficient to create a problem --

7 JUSTICE BREYER: You --

8 MR. GANNON: There is two things here.
9 There is both the consent of the parties but also
10 adequate judicial control, both in the aggregate over
11 bankruptcy judges who are appointed by and removable by
12 Article III judges, and also in every individual case
13 because they don't get any bankruptcy case --

14 CHIEF JUSTICE ROBERTS: Well, there's
15 judicial control in the sense that you have deferential
16 appellate review and whatnot, but it still takes out of
17 the Federal courts our constitutional birthright to
18 decide cases and controversies under Article III.

19 MR. GANNON: And I think --

20 CHIEF JUSTICE ROBERTS: It's hard for me to
21 see how --

22 MR. GANNON: But I think --

23 CHIEF JUSTICE ROBERTS: -- sort of vague --
24 vague notions of, oh, well, the judges are involved
25 there somewhere.

1 MR. GANNON: But I don't think that this is
2 vague. We're talking about something different from
3 just having appellate review after the fact. We're
4 talking here about supervision of the bankruptcy judges
5 just like magistrate judges by Article III judges,
6 they're appointed and removed by them. They don't ever
7 get a case unless the Court agrees to give it to them
8 and that seems to me the principal difference between
9 your hypothetical congressional support scheme, which is
10 that the parties are all not even making a voluntary
11 choice because Congress -- Congress is deeming them to
12 have made the choice, and then also no court is able to
13 say, I don't want the transfer to happen.

14 And both of those things are not true here
15 because the parties are able to make the choice and the
16 courts are able to withdraw the reference. The parties
17 are always able to ask for the courts to withdraw the
18 reference. This makes it just like the bankruptcy
19 system with respect to whether it's a consentable
20 constitutional violation.

21 And so we don't think that this is like
22 subject-matter jurisdiction, and the Court in Stern said
23 that, that the division of authority between bankruptcy
24 judges and district court judges and 157 is not a
25 question of subject matter jurisdiction. And we think

1 that is why it's one that's waivable.

2 JUSTICE BREYER: You can go back to your
3 experience in your office. I just want to know -- it
4 seems to me by memory, but I'm not positive -- it is not
5 totally unusual and we do have the power to give two
6 affirmative answers where either answer would be
7 sufficient. That is, we could answer both questions.

8 Now is your -- as a representative of the
9 solicitor general, is your reaction the same as mine,
10 that there are cases where a court had -- where we had
11 two questions.

12 MR. GANNON: I --

13 JUSTICE BREYER: And you say one would be
14 enough for the party to win, so would two, but we think
15 it's important to answer both and we will.

16 MR. GANNON: I do believe that the Court has
17 done that. I don't have any particular cases at the tip
18 of my --

19 JUSTICE SCALIA: Perhaps so. Perhaps we
20 made other mistakes as well, you know?

21 JUSTICE BREYER: That's what I wondered. Is
22 there any reason that --

23 MR. GANNON: I --

24 JUSTICE BREYER: -- strikes you that that
25 would be a mistake? I don't know anything in the

1 Constitution --

2 MR. GANNON: Well --

3 JUSTICE BREYER: -- or in any precedent of
4 this Court that prohibits it.

5 MR. GANNON: I --

6 JUSTICE BREYER: So I think saying it is a
7 mistake does not necessarily make it one.

8 MR. GANNON: I think that that's something
9 that would be in the discretion of the Court. I do
10 think that both of these questions are independently
11 important. It is the case that Petitioners can prevail
12 and you can reverse the judge of the court of appeals on
13 either ground and without having to reach the other.

14 I do think that until a case -- there
15 probably was not confusion in the bankruptcy courts
16 about whether questions involving the definition of the
17 property of the estate were Stern claims, and so -- but
18 I do think that there is confusion about that just by
19 virtue of the fact that this case is here.

20 JUSTICE ALITO: Could I ask you --

21 MR. GANNON: The second --

22 JUSTICE ALITO: Could I ask you this quick
23 question before your time runs out. If Federal
24 Bankruptcy Rule 7012(b) applies to Stern claims because
25 they're non-core, do you agree with Petitioner that the

1 rule is invalid because it requires express consent and
2 the statute does not refer to express consent?

3 MR. GANNON: I don't think you have to get
4 to the point of saying that the rule is invalid. That's
5 not the way the Court approached the case in Roell where
6 the situation was, as my friend just said, exactly
7 parallel. The statute did not require express consent,
8 or it did in some places but not in this one, and the
9 same thing is true if you contrast 157(c)(2) with
10 157(e), the relevant statutory provision period does not
11 require express consent.

12 The Federal Rule of Civil Procedure that was
13 applicable in Roell did, and the Court nevertheless said
14 that it was going to overlook the lack of an express
15 waiver there because it found that there was
16 sufficiently implied consent on the record.

17 JUSTICE KENNEDY: Do you agree that there's
18 --

19 MR. GANNON: There is --

20 JUSTICE KENNEDY: Excuse me. Do you agree
21 there's implied consent merely by filing a voluntary
22 bankruptcy petition?

23 MR. GANNON: Well, I - I think that the Court --

24 JUSTICE KENNEDY: I thought that I heard
25 that that's what the Petitioner said.

1 MR. GANNON: When you said, "a voluntarily
2 bankruptcy petition?"

3 JUSTICE KENNEDY: Yes.

4 MR. GANNON: The Court didn't grant cert on
5 that question but we do think that there's lots of other
6 conduct here but ultimately there's also the forfeiture
7 after Stern itself was decided that we think would be
8 adequate to decide that there was consent in this case.

9 JUSTICE SCALIA: Mr. Gannon, I hate to
10 protract your presentation here. I wasn't clear about
11 what your answer to Justice Breyer covered. Did you say
12 there are prior cases in which we have decided two
13 constitutional questions?

14 MR. GANNON: I said two different questions.

15 JUSTICE SCALIA: Ah.

16 MR. GANNON: I think that --

17 JUSTICE SCALIA: What about two
18 constitutional questions given that we're supposed to --

19 MR. GANNON: I think that --

20 JUSTICE SCALIA: -- avoid the determination
21 of constitutional questions?

22 MR. GANNON: I do realize that that is the
23 general prudential rule that the Court applies, but I
24 think that it normally does so in a context of --

25 JUSTICE SCALIA: I understand --

1 MR. GANNON: -- here it would be upholding
2 the statute in both regards and therefore I don't think
3 that the normal concerns about constitutionality rise to
4 the same level.

5 CHIEF JUSTICE ROBERTS: Counsel.
6 Justice Kagan.

7 JUSTICE KAGAN: You were saying that you
8 wanted to talk about the importance of both questions.
9 I think you got the first one out. What, in your view,
10 is the importance of the second?

11 MR. GANNON: Well, I do think that the Court
12 was not able to decide the consent question in executive
13 benefits last term, and that there is a circuit split on
14 it. It would be very useful to know that Stern claims
15 are the sorts of things to which parties consent or
16 those claims are waivable as they are in the magistrate
17 judge context which we think is parallel.

18 JUSTICE GINSBURG: The government agrees
19 with the Petitioner that the first question, what goes
20 into this estate, that if we had to choose between the
21 two, which would you say is the more important?

22 MR. GANNON: I -- I think that -- that it
23 would be good to settle that for the purposes of
24 bankruptcy courts, but you would still have the
25 unsettled consent question that has been kicking around

1 ever since Stern and on which there's already a circuit
2 split.

3 JUSTICE SCALIA: And vice versa.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Hacker.

6 ORAL ARGUMENT OF JONATHAN D. HACKER

7 ON BEHALF OF RESPONDENT

8 MR. HACKER: Mr. Chief Justice, and may it
9 please the Court:

10 We agree with what I understand the
11 solicitor general's position this morning to be, that
12 the Stern rule is relatively straightforward, which is
13 that a common law claim that seeks to augment the estate
14 with third-party property cannot be withdrawn by
15 Congress from Article III jurisdiction.

16 We also know that the alter ego claim
17 asserted by Wellness was a common law claim seeking to
18 augment --

19 JUSTICE SOTOMAYOR: That really begs the
20 question, your client possessed something and he says it
21 really belonged to someone else. Don't you have to
22 decide who it belongs to if there is no clear indication
23 of it?

24 MR. HACKER: Two -- two point --

25 JUSTICE SOTOMAYOR: I mean, there may be a

1 clear one, but it still begs the question.

2 MR. HACKER: Right. Two points on that,
3 Your Honor. Let me start with where this Court started
4 and where the law has been for decades, if not
5 centuries, which is that the trustee of the trust
6 possesses, if anything at all, no more than bare legal
7 title. And so this Court said in the Hardinsburg case,
8 it said in Whiting Pools, and more import -- maybe most
9 importantly there is no case anywhere to the contrary,
10 that when a trust -- a trustee of a trust declares
11 personal bankruptcy, the trust assets do not become part
12 of the estate at the commencement of the bankruptcy.

13 So what Wellness had to do was establish
14 through its common law alter ego claim that the -- was
15 to bring the assets of the trust into the --

16 JUSTICE BREYER: So you're just saying that
17 they didn't decide it correctly, but it's terribly easy
18 to imagine a different debtor who goes into bankruptcy
19 and he lists Item 1, 2, 3, and 4. And the creditors
20 come in and say, you know, it's awfully surprising, four
21 or five, six months ago I have a similar list you gave
22 to the National Bank, and it had 10 items on it. What
23 happened to 6 through 10? Ah, the debtor replies, oh,
24 they didn't really belong to me. Why not? Because
25 State law gives it to somebody else because State law is

1 the source of all property law. And they say, no. And
2 now we have a dispute.

3 So forget about the trust. Maybe I don't
4 see why that's special. This is simply a question of
5 whether a bankruptcy judge can litigate who owns Items 6
6 through 10, and one party says State law gives them to
7 my cousin Mary and the other party says State law gives
8 them right to you.

9 Now, if we say, no, and side with you on
10 that one, what happens to the constitutional grant to
11 Congress to make uniform laws of bankruptcy? I imagine
12 it would still exist, but I can't imagine in what form.

13 Now you see a pretty hostile argument, so I
14 would like to hear your reply.

15 (Laughter.)

16 MR. HACKER: I -- I -- and I think the
17 example is a good one because I do think the trust is
18 very important because we do have decades of law on
19 that, but the example is not problematic because if in
20 that situation the trustee says, I see some other
21 bankruptcy trustee, sees -- I see some other property,
22 and the debtor says, that's not mine, I do think it's
23 true that there wouldn't be a litigable claim there
24 unless the third party also asserted ownership to the
25 property.

1 But if that happened, if the third party
2 says, that's not the debtor's, that's all mine, I've had
3 it for years, that's my car, that's my boat, that's my
4 house, then I think it's absolutely clear that under
5 that circumstance the trustee could not extinguish the
6 third party's rights, the bankruptcy court could not
7 distinguish the third party's rights by itself. That's
8 an Article III claim, a classic private rights claim
9 where the bankruptcy trustee, the bankruptcy court is
10 reaching out to take the third party's property on the
11 trustee's --

12 JUSTICE BREYER: And what is the example of
13 6 through 10 that you could find that wouldn't involve
14 the issue you have described? Because if there is a
15 piece of property and the debtor is saying it isn't
16 mine, it must be somebody's, and by definition it's not
17 the creditor's, and so it must be somebody else's. And
18 so that other person, if there is a dispute, will say
19 it's mine.

20 And therefore, isn't your answer to say to
21 my property -- to my question, too bad, the bankruptcy
22 trustee cannot litigate who owns 6 through 10?

23 MR. HACKER: So long as the third-party
24 asserts --

25 JUSTICE BREYER: Yes.

1 MR. HACKER: Yes, that's right, but --
2 but --

3 JUSTICE BREYER: Yes, he can't do it. All
4 right. Then we're back to where are we with bankruptcy
5 courts, when you have taken from them the power to
6 litigate what I would think is the most fundamental
7 thing imaginable: How much money does the debtor have
8 in cases where that is in dispute?

9 MR. HACKER: I don't -- I don't think that's
10 fundamental because you have -- what you're talking
11 about, I mean, this Court already crossed that bridge I
12 think in Stern in saying when you're augmenting the
13 estate with third-party property, you don't assume at
14 the beginning of the Article III litigation that the
15 other side has a claim. That's the whole point. The
16 other side says don't take my property.

17 JUSTICE BREYER: You said for thousands of
18 years -- I got that point -- for thousands of years this
19 has been the law. So can you think of any case -- I
20 find it rather interesting, I'm reading about Henry II,
21 who, in fact, created many of the laws of England.

22 So from the time of Henry II onward, is
23 there a case that you have found somewhere which said
24 that the bankruptcy trustee or the bankruptcy judge
25 cannot litigate who owns property, the bankrupt or

1 someone else, in the state -- in the estate.

2 MR. HACKER: Well, a couple of --

3 JUSTICE BREYER: I'll read it. I'll read
4 it.

5 MR. HACKER: First of all, all of the
6 cases --

7 JUSTICE SCALIA: Besides -- besides Stern,
8 he means.

9 MR. HACKER: Well, Stern -- yes, Stern is --

10 JUSTICE BREYER: Stern is a case of a third
11 party and counterclaim, and there never would have been
12 the money in the estate had it not been for the fact
13 that the debtor in fact asserted a claim, a counterclaim
14 against a claim that was being made by an outsider to
15 the estate. It's not too hard to distinguish Stern.

16 But I am saying other than Stern -- I don't
17 even think Stern -- let's go back to Henry II. Maybe
18 you have so many you'd have to send them on a list, but
19 maybe not.

20 MR. HACKER: I -- if you look at all of the
21 cases cited on both sides' brief, I think the rule is
22 best stated in the Taubel-Scott-Kitzmiller -- which is
23 one word -- case that says when there is a bona fide
24 claim of adverse possession -- or excuse me, of
25 ownership by a third party, that can't be extinguished

1 except through plenary proceeding.

2 And that's the exact same situation you're
3 talking about, Your Honor. There's no difference, and
4 there's decades of that law, and that law and that rule
5 was never disputed.

6 And so going back now to the trust
7 proposition, I think it's important to make clear that
8 Wellness is asserting --

9 JUSTICE GINSBURG: Who is the third party?
10 You said it's just -- it's no different, no different
11 than a third party coming in and saying that's my vote.
12 Who is the third party here? And what --

13 MR. HACKER: The third -- go ahead.

14 JUSTICE GINSBURG: There is only the
15 trustee. This is supposed to be his mother's trust, and
16 his sister is supposed to be the beneficiary, so who is
17 the third party?

18 MR. HACKER: So two -- there's -- well,
19 three. There's the trust, but importantly, during her
20 lifetime, Soad Wattar was the owner, the only owner of
21 the beneficial interest in the trust assets. So she's
22 the third party.

23 So to the extent the bankruptcy court wants
24 to decide for itself --

25 JUSTICE GINSBURG: I thought she was dead.

1 MR. HACKER: When the bankruptcy was
2 commenced, she was still alive, and she had the -- it's
3 a revocable living trust right. She has the absolute
4 right to use all of those assets to revoke the trust.
5 That's -- they're her assets. If she had declared
6 bankruptcy, those assets would have been in her estate.
7 There's --

8 JUSTICE GINSBURG: Did she say, when she was
9 alive, did she say, bankruptcy court, wait a minute,
10 this belongs to me?

11 MR. HACKER: She was in Syria, I think, I'm
12 not sure at what point. But the point is the trust
13 itself was an existing document and -- and was an
14 existing entity.

15 And I want to be clear about something.
16 Wellness doesn't dispute that. I mean, Exhibit 13 to
17 Sharif's deposition was the trust amendment in 1996. It
18 was an existing trust.

19 And, in fact, their first primary argument,
20 which pervades their reply brief, depends on the
21 proposition that the trust was a real entity because
22 what they're saying is a version of what you were
23 saying, Justice Sotomayor, which is that he had
24 possession because he was the trustee of the trust. The
25 possession only exists because he's a trustee of the

1 trust. The trust assets aren't listed in his name. If
2 they're not in the trust, there's no tenable theory that
3 he is the -- on the face of the assets, that they start
4 in the estate, they're going to have to be gotten
5 somehow. So their theory is, well, he's the trustee of
6 a trust and therefore he has sufficient possession.

7 And our answer to that is simple. Not one
8 case ever in the history of western law that anybody has
9 found says that trust assets go into the personal
10 bankruptcy estate of a trustee, if and when the trustee
11 declares bankruptcy, this Court said the opposite in
12 Hardenburg, it said the opposite in Whiting Pools in
13 saying that when you have only bare legal title, which
14 is at most the only thing a trustee has, only bare legal
15 title goes in and no other beneficial interests go into
16 the estate.

17 So then there's a second question, a second
18 argument, which is that well, because in 2002, not one
19 year, Justice Breyer, but seven years before the
20 bankruptcy, we have discovered these documents that
21 suggest that he was treating the trust as trustee was
22 treating the trust assets as his own.

23 JUSTICE KENNEDY: But in the cases you just
24 cited, did the courts say who decides the question of
25 whether there's bare legal title?

1 MR. HACKER: Those cases were --

2 JUSTICE KENNEDY: You -- you said the case
3 very clear, only bare legal title goes. But who -- did
4 it -- did it go on to say that the bankruptcy court
5 cannot decide who has the bare -- whether you have only
6 bare legal title?

7 MR. HACKER: Right. Those cases were not
8 about that proposition. This -- this is about this --
9 this threshold proposition that because he's the trustee
10 of the trust and in possession of bare legal title,
11 that's all we need to know. That's their --

12 JUSTICE BREYER: No argue -- so -- so where
13 you have brought me so far is these cases say -- what
14 they say is you have to -- you can't just grab it; you
15 have to proceed under Section 23 and have a proceeding.
16 But the -- the -- a proceeding -- some kind of a
17 proceeding, I don't know exactly what that kind is, you
18 probably do, but that doesn't mean the trustee doesn't
19 get it. I mean, it's the trustee who litigates it out,
20 it's the trustee who decides, but I don't know what a
21 Section 23 proceeding is.

22 MR. HACKER: In the older cases --

23 JUSTICE BREYER: Yeah.

24 MR. HACKER: -- the rule that would apply,
25 Justice Kennedy, would be the *Talburg v. Scott*

1 Kitzmiller rule, you have to have a plenary proceeding
2 to go get it.

3 JUSTICE BREYER: A plenary proceeding. But
4 where does that take place?

5 MR. HACKER: That would have been -- it's
6 sort of the equivalent now the parties are treating, I
7 think, not incorrectly as equivalent now of an
8 Article III proceeding. This would have to be --

9 JUSTICE BREYER: It didn't take place before
10 the bankruptcy judge?

11 MR. HACKER: Well, at the -- most of these
12 cases at the time, remember, the district court was the
13 bankruptcy court and the question was whether it's the
14 exercise of summary jurisdiction versus a plenary
15 Article III proceeding.

16 JUSTICE BREYER: Oh, I see the problem.

17 MR. HACKER: A plenary proceeding. Now it
18 would be an adversary proceeding that would have to be
19 determined finally by the -- the Federal court.

20 So -- but I want to get to the second point,
21 because it's an important one. Wellness doesn't just
22 rest on the proposition that just because the trustee is
23 a trustee, the trust assets are part of the estate,
24 which I think is completely unsupportable. They go on
25 to say because seven years earlier, as trustee, he

1 treated them as -- the trust assets as his own;
2 therefore, we should disregard the trust.

3 That argument, I think, as I think
4 Justice Sotomayor pointed out, is functionally
5 indistinguishable from a fraudulent transfer claim
6 because they're saying, based on his alleged misuse of
7 trust assets at some point in the now distant past, we
8 should treat them as part of the estate, we should
9 disregard the trust, which is just like a fraudulent
10 transfer, which it says because of something the debtor
11 did before, transferring the assets, we should disregard
12 the transfer and treat them as part of the estate.

13 In that respect, it's -- it's
14 indistinguishable and it is in that respect in the same
15 way because you augment the estate.

16 JUSTICE SOTOMAYOR: Just to clarify the
17 record, I asked the question whether they were or
18 weren't.

19 MR. HACKER: Fair enough. And -- and I will
20 try to answer it, which is I think they are in that
21 respect indistinguishable. And then if you follow from
22 what the -- all of the lower courts have said, that a
23 fraudulent transfer action is a Stern claim --

24 JUSTICE SOTOMAYOR: Well, we've said that,
25 too, against --

1 MR. HACKER: Held that it's an Article --
2 basically an Article III claim in Grand Financier. So I
3 think for all of these reasons, it is quite clear that
4 the action to bring these claims into the estate is a
5 common law action seeking to augment the estate with
6 somebody else's property. Property that Soad Wattar
7 owned during her life and that Ragda Sharif owned upon
8 Soad's death.

9 JUSTICE SOTOMAYOR: Alright, so give me examples.
10 The suggested rule that I have for the Solicitor
11 General , which he would like the broader one, but if at
12 the time you have legal title to or in physical
13 possession of something, then it's not a Stern claim,
14 not an Article III claim because that is the
15 quintessential question that bankruptcy judges decide
16 are the things that you possess either by title or by
17 constructive holding -- or by holding.

18 MR. HACKER: Right. I think there's two
19 problems with that analysis. First is that all the
20 trustee has is bare legal title as a matter of law, does
21 not have any property interest, which is what the
22 current bankruptcy code focuses on, what are the
23 debtor's interests in property and it's the -- the
24 trustee of a trust does not have any interest,
25 beneficial or legal interest in the assets, it's only

1 bare legal title.

2 So to get more interest as part of the
3 estate, you have to have some common law way to do that,
4 some claim for doing that and a classic claim is an
5 alter ego claim, if that's what you think because of
6 something the trustee did, then --

7 JUSTICE SCALIA: But -- but you say that's
8 always going to be the case, that you need an
9 Article III proceeding whenever the bankruptcy trustee
10 determines that something belongs to the debtor and is
11 in the bankruptcy estate and some other private party
12 says, no, it belongs to me. That always has to be
13 litigated in an Article III court?

14 MR. HACKER: I don't think this Court needs
15 to decide that. That's not quite the question here
16 because the property interests from the start are
17 outside the estate. But I do think --

18 JUSTICE SCALIA: Is that what you're arguing
19 here?

20 MR. HACKER: I -- I -- I would not be
21 surprised if this Court were to hold one day that if a
22 third party has a claim to property, comes into court
23 and says, that's my -- that's my house, I know the
24 debtor says it is, that says it's his and the trustee
25 thinks it's his, that's my house, that that person is

1 entitled to an Article III adjudication --

2 JUSTICE BREYER: That's exactly --
3 because -- it's interesting. I mean, I've read the page
4 you have there now with the cases. And I see you can --
5 the distinction will drive you towards that, not 100
6 percent, because there will be some instances of
7 colorable -- colorable title and so forth, not 100
8 percent, but 99 percent, items 6 through 10 go to a
9 different court.

10 But what -- the constitutional question is
11 the deepest one to me, is we do have a constitutional
12 provision specifically giving to Congress the authority
13 to create a uniform system of bankruptcy courts which
14 have served our economy well, I think. That's what I
15 read. Makes us richer. And on the other hand, we do
16 have the question, as you point out, that this is
17 determining a title where there are two people under
18 State law contesting it. And so which prevails? And
19 until I think Stern, it would have been Congress's
20 delegation, maybe.

21 And what is the strongest argument for not
22 giving weight? These are sort of like administrative
23 agencies defining -- you know, deciding things that
24 never have been done before. What's the strongest
25 argument? No, don't do it, it might gut the bankruptcy

1 court, but don't do it. Or maybe you want to say it
2 won't gut the bankruptcy court.

3 MR. HACKER: --I don't - that- That was my
4 answer was I don't think it will gut the bankruptcy court.
5 We think this is just a straightforward application of
6 where we already are -- where we already are with Stern.

7 JUSTICE BREYER: Yes, yes. I agree with you
8 to this extent. It's either Stern marches forward or
9 it's -- I'd say steps in place.

10 MR. HACKER: Well, and I don't think -- I
11 don't think we're pushing Stern forward. I do think
12 we're just applying Stern.

13 But I also want to address your point about
14 uniform bankruptcy code. I think the fact that this
15 Court has long said and understood and the lower courts
16 have accepted that bankruptcy law takes State law and
17 property rights as defined by State law as they find
18 them. That's all we're talking about here. To the
19 extent there is a State law property dispute between a
20 third party and the debtor/bankruptcy trust trustee,
21 that -- that doesn't change the uniformity of the
22 bankruptcy code.

23 JUSTICE SCALIA: And I suppose the
24 constitutional provision authorizing Congress to
25 establish a uniform law of bankruptcy does not authorize

1 Congress to establish bankruptcy courts that can decide
2 questions which would normally be decided by Article III
3 courts.

4 MR. HACKER: That's clearly right. You
5 could establish bankruptcy law, but it's going to be an
6 Article III question, the extent to which the bankruptcy
7 courts can exercise judicial power.

8 As to one more point on Justice Sotomayor's
9 question, I had two responses. The second one was that
10 physical possession is not a great test. As this case
11 shows, Sharif as trustee didn't physically possess
12 anything. If anybody did, it was the banks where the
13 trust assets were, so you can't think about it in terms
14 of physical possession.

15 JUSTICE BREYER: That's -- let me proceed
16 with this question one more step. Every day of the week
17 administrative agencies change State law. Every day of
18 the week they change State law, even involving property.
19 And in such a case, the question is whether -- has this
20 administrative agency, under authority of Congress,
21 changed State law affecting people's property rights in
22 a way that deprives them of due process of law? Have
23 they gotten fair procedure?

24 And so is a possible answer to your problem:
25 If the procedures of the bankruptcy court are fair when

1 they litigate these questions of property right, the
2 fact that they do affect State law and take property
3 among persons switching it is not forbidden by the
4 Constitution where it indeed is authorized as part of a
5 uniform system of bankruptcy law?

6 MR. HACKER: I think due process viewed that
7 way is not sufficient. I think, again, this Court
8 answered that question in Stern. There wasn't a claim
9 that there wasn't going to be due process for the
10 disposition of the -- of the property rights there. The
11 problem was that the bankruptcy court was exercising the
12 judicial power of the United States in entering a final
13 judgment. And if I can turn to that argument, I will.

14 Stern itself is based on a structural
15 separation of powers concerns, that private rights of
16 this kind are exclusively committed to -- by the
17 Constitution, to Article III. It's about the exercise
18 of judicial power, which entails the implementation and
19 enforcement of judgments of the United States that are
20 entitled to full faith and credit by courts both in the
21 United States and elsewhere, pursuant to treaties. They
22 are precedential. They can be law -- they are law of
23 the case in what can be very complicated cases that
24 stretch around different courts and go on for years.
25 That's --

1 JUSTICE SOTOMAYOR: By the way, is -- are
2 the arguments you're raising now any different as
3 applied to magistrate judges? If we rule in your favor
4 in this case, are we calling into question our -- our
5 acceptance of magistrate judge positions?

6 MR. HACKER: Well, a couple of points.
7 First of all, with respect to magistrate judges, it's
8 only with respect to final adjudications. Magistrate
9 judges can still perform the functions --

10 JUSTICE SOTOMAYOR: So your answer is yes,
11 because you can do -- on express consent, you can do
12 reports and recommendations.

13 MR. HACKER: As -- as to final adjudications
14 of private rights matters, magistrate judges can still
15 do something, can still litigate and resolve public
16 rights, whatever those kinds of rights and matters are.
17 But I do think it would be difficult after this case to
18 say that a magistrate can exercise judicial power of the
19 United States to enter a final judgment based solely on
20 consent. I think this Court answered that question in
21 Schor, effectively.

22 Schor would have been an easy case, an
23 incredibly easy case, if consent alone were enough,
24 because that was an issue in Schor, and the parties
25 there did consent. But the Court didn't stop with that

1 one sentence: The parties consented; that's all we need
2 to know. The Court went on to do an elaborate analysis
3 of the structural concerns involved and why there were
4 no structural concerns, such that the consent was
5 sufficient. And when you boil it all down, basically
6 what Schor said, which is what I think the Court
7 recognized in Stern, was that the structural concerns
8 exist when you're talking about the adjudication of a
9 private --

10 JUSTICE SOTOMAYOR: I agree, but we didn't
11 say that you couldn't consent in Schor.

12 MR. HACKER: I understand that. I'm just
13 saying, it would have been a very easy case if consent
14 were enough. And the Court nevertheless went on to say
15 consent is enough here, because we're talking about what
16 is --

17 JUSTICE SOTOMAYOR: No, consent is enough
18 for arbitration, and there you give up --

19 MR. HACKER: I understand that. And
20 arbitration is fundamentally different. Arbitration is
21 not the exercise of the judicial power of the
22 United States. An arbitrator doesn't issue a judgment.
23 It's not entitled to full faith and credit. It's a
24 fundamentally different kind of exercise of authority,
25 of which --

1 JUSTICE KAGAN: Well, but it's something
2 which has to be enforced by a court except in very
3 extraordinary circumstances. You know, there's much
4 less supervision over the arbitration system than there
5 is over a typical bankruptcy court.

6 MR. HACKER: Right. But the decision by the
7 parties to go to an arbitrator -- which, by the way, is
8 their own decision. What arbitrator they choose is
9 their own choice. The arbitrator is not controlled --
10 the salary of the arbitrator is not controlled by
11 Congress. The tenure of the arbitrator is not
12 controlled by Congress. And when the FFA -- excuse me
13 -- the FAA --

14 JUSTICE SCALIA: There's very little
15 difference --

16 JUSTICE KAGAN: All those things make it
17 worse. You know, this is a proceeding that's totally
18 divorced from any kind of control by anybody, and yet
19 Federal courts, under the Arbitration Act, simply have
20 to rubber-stamp it and say it's valid except in
21 extremely unusual circumstances.

22 MR. HACKER: But that's pursuant to
23 Congress's Article I power to say, here is a type of
24 contract that we're going to say is enforceable under a
25 particular situation. That's all arbitration is, is a

1 private contract.

2 JUSTICE SCALIA: That's just contract law,
3 isn't it? I mean, they're just enforcing the parties'
4 contracts.

5 MR. HACKER: Right. And that --

6 JUSTICE SCALIA: But --

7 JUSTICE KAGAN: This is the parties'
8 contract. It's -- I mean, the entire question is that
9 the parties are consenting to go to bankruptcy court,
10 and the question is: Will that consent be sufficient in
11 the same way that it is in the arbitration system?

12 MR. HACKER: I understand. But it adds the
13 element that what you're consenting to, by hypothesis,
14 is the exercise of judicial power by the entry of a
15 judgment that will be given full faith and credit, the
16 entry of a judgment by an entity in a --

17 JUSTICE SOTOMAYOR: No, because that's what
18 happens in arbitration. You're agreeing to the entry of
19 a judgment, of an award. Perhaps not even, because you
20 don't even put that into the contract. Congress is
21 saying, we're going to do it anyway.

22 MR. HACKER: What I'm saying is, you're not
23 -- you're not consenting to the exercise of the judicial
24 -- judicial power, to the dilution of the Article III
25 court's authority --

1 JUSTICE KAGAN: Well, I understand that --

2 MR. HACKER: -- to issue judgments that are
3 precedential.

4 JUSTICE KAGAN: Please. I'm sorry.

5 MR. HACKER: Well, that's all I was going to
6 say.

7 JUSTICE KAGAN: I -- you know, I understand
8 that formalism matters in many contexts, but the fact
9 that the arbitrator himself doesn't issue the judgment,
10 and instead you have to take it across the street and
11 the Federal court has to issue the judgment, basically
12 on the arbitrator's say-so, again, seems to me -- I
13 mean, the arbitrator case seems to me much more
14 threatening to the integrity of the Federal judicial
15 system than a system of bankruptcy courts which are,
16 from the very beginning all the way through, supervised
17 by -- by district courts.

18 MR. HACKER: Well, I mean, the -- the key
19 difference, though, I think, is that, as I said,
20 bankruptcy courts are exercising judicial power.
21 Arbitrators aren't. And then when the district court --
22 in an arbitration proceeding, all the district court is
23 doing is enforcing a judgment -- excuse me -- enforcing
24 an arbitration award, a contractual choice, pursuant to
25 a Congressional judgment that says, here are the rules,

1 the decision rule for enforcing this particular type of
2 contract. That's an Article I issue. It's within
3 Congress's Article I power to constrain -- to establish
4 the decision rule that the -- the part of the -- the
5 entity exercising judicial power will apply.

6 In this situation, the party exercising, the
7 entity exercising the judicial power is a
8 non-Article III court. It's as if you said -- you
9 changed the FAA and added another paragraph to say, an
10 arbitrator's awards are exercises -- they're final
11 judgments of the United States, entitled to full faith
12 and credit, subject to appellate review by the -- by
13 appellate courts. And I think --

14 JUSTICE SOTOMAYOR: Could you spend a moment
15 just talking about the forfeited argument on appeal?

16 MR. HACKER: On the -- the --

17 JUSTICE SOTOMAYOR: The -- the argument that
18 consent can be presumed from your forfeiture of the
19 argument on appeal.

20 MR. HACKER: And I'm glad you put it this
21 way, Your Honor, because I think they're -- they're
22 different points. The -- the law clearly requires
23 consent, and I think everybody agrees it requires
24 knowing and voluntary consent. You have to have at
25 least that. The rule which we think is applicable, and

1 agree with the American College of Bankruptcy, that the
2 rules writers and this Court in implementing the rule
3 required express consent. I don't think there's a
4 credible argument here that there was express consent.

5 And I think this Court ought to adopt
6 express consent as the requirement and hold that there
7 was not express consent here, precisely for the
8 constitutional avoidance reasons that Justice Scalia
9 mentioned earlier, to avoid getting into the whole
10 discussion we just had, because if there's insufficient
11 consent here, then we don't need to decide the
12 circumstances under which consent is sufficient.

13 JUSTICE ALITO: But isn't forfeiture quite
14 different from consent? It's not a species of consent.
15 It's different from consent.

16 MR. HACKER: And I'm sorry I delayed getting
17 to Justice Sotomayor's question. The reason there's no
18 forfeiture here, among the reasons, is that this was a
19 problem of appellate jurisdiction. There was no
20 appellate jurisdiction here because there was no final
21 judgment in the bankruptcy court. If our first argument
22 is right, then the bankruptcy court lacked authority to
23 issue a final judgment. So when we went up to "appeal,"
24 quote/unquote, in the district court, there was no -- it
25 wasn't permissible for that court to exercise appellate

1 jurisdiction --

2 JUSTICE ALITO: You think a final judgment
3 has to be a valid final judgment in order for there to
4 be an appeal?

5 MR. HACKER: I think it has to be --

6 JUSTICE ALITO: It can be final and it can
7 be invalid.

8 MR. HACKER: Well, it's not a question of
9 being a defect. I think the problem here is there's an
10 absolute lack of any authority to enter a final
11 judgment. There wasn't something from which the
12 district court had any authority to exercise appellate
13 jurisdiction. That was the problem. It wasn't a
14 question of the date it was entered.

15 JUSTICE ALITO: I mean, if a court enters a
16 judgment against you and you say that court never had
17 jurisdiction to enter that judgment, you can't take an
18 appeal because there wasn't a final judgment because the
19 court below lacked jurisdiction. That's the argument?

20 MR. HACKER: Well, no, the argument would
21 be: If -- at any point on appeal, I can raise the
22 problem that the court to which I'm appealing lacks
23 appellate jurisdiction, lacks jurisdiction to resolve
24 the case, that's the kind of non-waivable problem. And
25 it's -- something that cannot be waived also can't be

1 forfeited. And -- and so that's the reason that there's
2 no forfeiture problem here.

3 Beyond that, it's quite clear that
4 Mr. Sharif made every effort to preserve the issue to
5 the extent he became aware of it. It was only 6 weeks
6 after Stern was decided that he filed his opening brief.
7 Did not cite Stern, that's true. But only a month or two
8 later his sister, Ragda Sharif, files a motion to
9 withdraw the reference. And then he immediately --
10 essentially; his lawyer realized what's happened. As
11 soon as he's aware of the Stern argument, as soon as the
12 Seventh Circuit issues its decision in Ortiz actually
13 applying Stern, then he promptly raises this issue.

14 He's not sandbagging. There's no
15 gamesmanship here. As soon as it's clear that he
16 understands that his consent was required before what
17 happened to him could permissibly happen, he
18 demonstrated that he did not consent to the exercise of
19 that -- of that -- of that jurisdiction.

20 Now, of course, our primary submission is
21 the bankruptcy court never had that jurisdiction. And
22 to -- and we think that's a correct argument, but to
23 avoid that argument, we think the simpler approach for
24 this Court is to say that express consent was required;
25 it wasn't satisfied; or that if implied consent was

1 sufficient, to apply what this Court applied in the
2 Roell case in finding implied consent, which clearly was
3 not applicable here.

4 In Roell, the Court found implied consent
5 only because, quote, "the litigant or counsel was
6 made" -- "was made aware of the need for consent" --
7 didn't happen here -- "and the right to refuse it" --
8 also didn't happen here -- "and still voluntarily
9 appeared to try the case."

10 Further, the Court emphasized in Roell, the
11 party later actually did consent in writing. That also
12 didn't happen here.

13 So none of the factors that created implied
14 consent in Roell were sufficient, and for that reason we
15 think the Court should affirm the judgment below.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Ms. Steege, you have five minutes left.

18 REBUTTAL ARGUMENT OF CATHERINE STEEGE

19 ON BEHALF OF THE PETITIONERS

20 MS. STEEGE: In response to the test that
21 Justice Sotomayor proposed about possession, that, in
22 fact, under the historic cases -- the
23 Taubel-Scott-Kitzmiller case, that's the easy situation,
24 the situation we have here where the debtor has actual
25 possession of the property.

1 And we don't contend that Mr. Sharif had --
2 had just a legal fiction as a trustee possession. This
3 was the house he lived in, the business he ran, his own
4 retirement accounts, and his own bank accounts. These
5 were assets he was enjoying while trying to take
6 advantage of the bankruptcy system, having, not
7 incoincidentally, left an Article III court where he was
8 litigating and where the Article III judge had held him
9 in contempt and thrown him in jail several times. So he
10 made a choice to go to bankruptcy court. He had actual
11 possession of these assets. And that, under the
12 historic precedent, has always been the easy case for
13 the bankruptcy judge to decide.

14 That case goes the other way. But that's
15 because the litigant was trying to bring a preference
16 action. What was happening in that case is the sheriff
17 had seized some property, and the argument was he had
18 done it within what was then a four-month preference
19 period, and they were really trying to bring a
20 preference case under the constructive actual
21 possession.

22 That's different than the situation with a
23 debtor that has actual possession of the property. And
24 so when you look at these cases, whenever it's the
25 debtor who has possession, going back to the historic

1 English law, the courts have always allowed the
2 bankruptcy referee or judge to make that determination.

3 With respect to the cases that were
4 discussed, the Whiting Pools and the State Bank of
5 Hardinsburg cases, neither of those cases actually
6 involved trustees. Whiting Pools was decided shortly
7 after this Court decided Northern Pipeline. Northern
8 Pipeline was cited in that case, and that's a case where
9 the bankruptcy judge's judgment ordering the Internal
10 Revenue Service to return property back to the
11 Chapter 11 debtor's estate because it belonged there,
12 subject to their rights as a secured creditor. The
13 Court upheld that. So I don't think that stands for the
14 proposition that bankruptcy judges don't have the
15 authority to decide disputes about where property should
16 come into the estate.

17 With respect to the issue of consent, yes,
18 this does have an impact. You know, our -- our argument
19 is very much based upon the fact that the Magistrate Act
20 has been held -- upheld in Roell and Peretz and
21 Gonzalez. There is authority in the Fifth Circuit --
22 six of the judges in the -- in the Fifth Circuit have
23 issued a dissent in a bankruptcy case saying that they
24 see no basis to allow the magistrate system to exist,
25 given that the Fifth Circuit has held that 157(c)(2)

1 consent is unconstitutional.

2 So you do have a circumstance where the
3 courts are -- the lower courts, anyway -- are seeing the
4 two systems as the same. And they are the same, because
5 the Article III judiciary has control over the
6 bankruptcy process at every step. It refers the cases
7 to the bankruptcy judges; it can take them away. Anyone
8 who ever has a problem with the bankruptcy judge can
9 always seek a motion to withdraw the reference. And
10 it's the district court judge who decides that.

11 There's also macro-control over the system,
12 in the sense that bankruptcy judges are pointed by the
13 Article III courts, they can be removed for cause by the
14 Article III courts, and for all of the reasons that the
15 Courts of Appeals that address this issue unanimously,
16 across the board and upheld the magistrate system, all
17 of that rationale in those cases applies to the
18 bankruptcy system.

19 JUSTICE BREYER: Taubel-Scott.

20 MS. STEEGE: Yes.

21 JUSTICE BREYER: Burrell, he says that --
22 they say that where possession was assertively held, not
23 for the bankrupt, but for others prior to bankruptcy,
24 the party in possession who is not subject to summary
25 judgment can be divested only if a plenary sued under

1 Section 23.

2 By that, I take it he means it's this case.
3 It's true that he said he was trustee. His mother says,
4 no, no, it is my property, or whatever, and -- and
5 therefore that fits within that case; therefore this is
6 one of the ones that went to a full court and didn't go
7 to the -- a bankruptcy case. So that's his case.
8 What's your response to that?

9 MS. STEEGE: But that's not this case,
10 because the debtor has possession. And Taubel-Scott
11 sets out five circumstances in which we have plenary or
12 summary jurisdiction under that statute. And on the
13 easy side of the line, on the constitutional side,
14 post-Stern, is debtors' possession of that property.
15 You can't make a claim like we have here.

16 And Wellness never conceded that the trust
17 was valid. That was the dispute before the court. You
18 can't let a debtor -- well, you can, but you -- it would
19 be very difficult for the system if a debtor were
20 allowed to say, I don't really own it. I'm using it; I
21 have it; I have possessed it --

22 JUSTICE BREYER: Well, the money here is in
23 his bank account. That's the point.

24 MS. STEEGE: Yeah. I mean, you -- you would
25 have a circumstance where the bankruptcy judge would

1 have no authority. And *Mueller v. Nugent*, decided back
2 in 1902, recognized that and said you would have courts
3 that would have no ability to supervise the system that
4 they're charged with supervising.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 The case is submitted.

8 (Whereupon, at 12:14 p.m., the case in the
9 above-entitled matter was submitted.)

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