Article III of the Constitution provides that the judicial power of the United States shall be vested in the Supreme Court and such inferior courts that Congress may establish. U.S. Const. art. III, §1. It further provides that the judges “both of the supreme and inferior courts, shall hold their Offices during good Behavior” and shall receive compensation, “which shall not be diminished during their continuance in office.” Id. As the Supreme Court explained in *Stern v. Marshall*, “Article III is an inseparable element of the constitutional system of checks and balances that both defines the power and protects the independence of the Judicial Branch.” 131 S. Ct. 2594, 2608 (2011) (internal quotations omitted).

In *Stern*, the Supreme Court addressed the interplay between Article III and section 157(b) of title 28, 28 U.S.C. §157(b), authorizing bankruptcy judges (who do not enjoy Article III’s protections) to enter final judgments in certain “core” bankruptcy proceedings. Specifically, the Court addressed whether a bankruptcy judge may constitutionally enter a final judgment resolving the debtor’s state law counterclaim against a creditor filing a proof of claim—a matter statutorily designated as “core” in section 157(b)(2)(C)—where the creditor objected to the judge’s exercise of jurisdiction. The counterclaim at issue was a garden-variety state law tort action essentially unrelated to the proof of claim. The Court held that Article III of the Constitution precludes Congress from assigning such matters involving “private rights” to non-Article III bankruptcy judges for final adjudication. In sum, because the underlying tort claim at
issue in *Stern* was a state law cause of action independent of the federal bankruptcy law, the bankruptcy court “lacked the constitutional authority to enter a final judgment.” *Id.* at 2621.

Following *Stern*, the Supreme Court recently granted *certiorari* in *Executive Benefits Ins. Agency v. Arkinson*, to address two questions left unresolved by its decision in *Stern*: (1) whether Article III of the Constitution permits bankruptcy judges to exercise the judicial power of the United States to finally decide a private-right controversy on the basis of litigant consent, and, if so, whether a litigant’s conduct can constitute “implied” consent; and (2) whether a bankruptcy judge may submit proposed findings of fact and conclusions of law for *de novo* review in the district court in a “core” proceeding under 28 U.S.C. §157(b).

**A. Stern and the Statutory Scheme**

Generally, district courts have “original and exclusive jurisdiction of all cases under title 11,” as well as all proceedings (1) arising under the Bankruptcy Code, (2) arising in a case under the Code, and (3) related to a case under the Code. 28 U.S.C. § 1334; *Stern*, 131 S. Ct. at 2603. Under section 157(a), district judges enjoy discretion to refer any or all bankruptcy cases and proceedings to the bankruptcy judges in their district. Bankruptcy judges are appointed to 14 year terms by the federal courts of appeals. *Id.*; 28 U.S.C. 152(a)(1). Every district court has provided for the automatic referral of cases and proceedings by standing order.

The scope of a bankruptcy judge’s power depends on the type of proceeding involved. *Stern*, 131 S. Ct. at 2603. “Bankruptcy judges may hear and enter final judgments in “all core proceedings arising under title 11, or arising in a case under title 11.”” *Id.* (quoting § 157(b)(1)). “‘Core proceedings include, but are not limited to’ 16 different types of matters, including ‘counterclaims by [a debtor’s] estate against persons filing claims against the estate.’” *Id.* (quoting § 157(b)(2)(c)).
When a bankruptcy judge determines that a referred proceeding is not a core proceeding, but is instead merely related to a case under title 11, the judge may, without the parties’ consent, only “submit proposed findings of fact and conclusions of law to the district court.” § 157(c)(1). After *de novo* review of any matter to which a party objects, the district court may then enter final judgment in those cases. *Id.* at 2604.

In *Stern*, the Supreme Court held that Article III of the Constitution precludes Congress from assigning certain “core” bankruptcy proceedings involving private-right controversies to non-Article III bankruptcy judges for final adjudication. Because the tort claim at issue in *Stern* was fundamentally a state law claim and did not implicate a public right, it was only amenable to final determination and entry of judgment by an Article III judge, at least absent the parties’ consent otherwise. In reaching that conclusion, the Court rejected the argument that bankruptcy judges are mere “adjuncts” of the district courts because they “exercise[] the essential attributes of the judicial power.” *Id.* at 2619. Accordingly, without the parties’ consent, only Article III judges can adjudicate certain core claims not involving public rights.

**B. Background of Arkison**

*Arkison* arises out of the bankruptcy proceedings of the Bellingham Insurance Agency, Inc. (“Bellingham”). Nicholas Paleveda, an attorney, was largely responsible for managing Bellingham’s affairs. Bellingham was affiliated with Aegis Retirement Income Services, Inc. (“ARIS”), with which it kept joint accounting records.

In 2003—following a dispute between Paleveda and his partners concerning the distribution of certain insurance commissions—the partners instructed the relevant insurance carrier to deposit future commissions into an account not accessible by Paleveda. As a result of
this falling out, Paleveda initiated arbitration against his former partners. He lost and was ordered to pay his former partner’s attorney’s fees.

Before the arbitration award became final, Paleveda initiated a transfer of all of Bellingham’s assets to a newly-created company named Executive Benefits Insurance Agency (“EBIA”). EBIA occupied Bellingham’s headquarters, employed its staff, and engaged in its business. After discovering the transfer, the ex-partners commenced a state-court fraudulent conveyance action against Paleveda, Bellingham, ARIS, and others. Paleveda then placed Bellingham in Chapter 7 bankruptcy, halting the lawsuit by way of the automatic stay. Paleveda then removed the action to federal bankruptcy court and filed an answer in the newly initiated adversary proceeding.

The commencement of the Chapter 7 proceeding triggered the appointment of Peter Arkinson, Respondent, as trustee, and deprived Paleveda of further control over Bellingham. Arkinson subsequently commenced his own fraudulent conveyance action on behalf of Bellingham’s estate, pursuant to 11 U.S.C. § 548, against Paleveda, EBIA, ARIS, and others. As a result, an adversary proceeding was opened and EBIA answered, denying many of the allegations. Notably, EBIA denied that the fraudulent conveyance action was a “core” proceeding, meaning that he contended that the proceeding was “non-core,” and he asserted that EBIA was entitled to all the Article III and Seventh Amendment rights non-core proceedings entail. Consistent with that view, EBIA belatedly demanded a jury trial.

Pursuant to Bankruptcy Rule 7012, when a defendant denies in its answer that a proceeding is core, as EBIA did here, it is required to state in that same answer whether it consents to the bankruptcy court’s entry of a final judgment, or if it prefers to exercise its right to insist that the bankruptcy court only issue proposed findings of fact and conclusions of law to be
reviewed *de novo* by the district court. EBIA failed to state in its answer whether it consented to a final adjudication by the bankruptcy court, thus violating Rule 7012.

After Arkinson unsuccessfully sought summary judgment against ARIS, EBIA brought a motion in the bankruptcy court to vacate that court’s trial date, citing its jury demand, which would require trial in the district court. Arkinson objected to the motion, highlighting EBIA’s tardiness in bringing its demand. Rather than holding a hearing on the matter, the bankruptcy court vacated the trial date and transmitted the record to the district court, which docketed the matter as a motion to withdraw the reference from the bankruptcy court. The district court then ordered a status conference and instructed the parties to prepare a Joint Status Report to inform the court’s decision with respect to the motion to withdraw the reference. All of the parties but Paleveda participated in a conference call. After the call, Arkinson’s counsel circulated the agreed-upon report, indicating that summary judgment proceedings would be litigated in the bankruptcy court. EBIA’s counsel never signed the report before it was produced to the district court; on the other hand, EBIA made no objection at the time the report was circulated or after it was filed. The district court subsequently re-calendared the withdrawal motion for three months hence.

Arkinson thereafter moved for summary judgment against EBIA in the bankruptcy court. The court found there were no genuine issues of material fact concerning whether EBIA was the alter-ego of Bellingham or whether the assets had been transferred to EBIA fraudulently. Consequently, it concluded that Arkinson was entitled to judgment as a matter of law and entered summary judgment against EBIA.

EBIA appealed the bankruptcy court’s judgment to the district court. After reviewing the bankruptcy court’s determinations *de novo*, the district court affirmed the bankruptcy court’s
grant of summary judgment. EBIA then appealed the district court’s affirmance to the Ninth Circuit. After filing its brief, but before oral argument, EBIA for the first time objected to the proceedings in the bankruptcy court on the ground that Article III of the Constitution precluded the bankruptcy court’s entry of final judgment against it on the fraudulent conveyance claim. The Ninth Circuit invited amici curiae briefing, and the United States (among others) participated. Ultimately, the Court of Appeals affirmed.

In rendering its decision, the Court of Appeals recognized that, although bankruptcy judges have statutory authority to enter final judgments in fraudulent conveyance proceedings, they lack the constitutional authority to do so because fraudulent conveyance actions, like state law tort actions, are properly matters of private right. Nonetheless, the court held that, in this case, EBIA’s litigation conduct evidenced its acquiescence and obviated any Article III infirmity. The court additionally held that, in fraudulent conveyance cases where the defendant does not consent, bankruptcy judges may nonetheless enter proposed findings of fact and conclusions of law subject to de novo review in the district court.

C. Legal Analysis

1. EBIA’s Argument

After the Ninth Circuit affirmed the district court’s decision, EBIA petitioned the Supreme Court for a writ of certiorari, which was granted on June 24, 2013, and the case has been fully briefed and argued. In its merits brief, EBIA argues that, as non-Article III judges, bankruptcy judges are constitutionally proscribed from entering final judgment on private-right claims in non-core proceedings, because entering final judgment is the “core function of the Judicial Branch.” Pet. Br. at 13. EBIA argues that, while “bankruptcy judgments carry all the attendant risks of district court judgments, bankruptcy judges have none of the Constitution’s
structural protections.” *Id.* at 23. To allow bankruptcy judges to enter final judgments on private rights, EBIA asserts, “would ‘compromise the integrity of the system of separated powers and the role of the Judiciary in that system.’” *Id.* at 24 (quoting *Stern*, 131 S. Ct. at 2620).

Nor, EBIA asserts, can the consent of the parties cure the purported constitutional defect. *Id.* at 13. Where structural separation of powers issues are at stake, EBIA maintains, “notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.” *Id.* at 26 (quoting *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 851 (1986)). Accordingly, EBIA argues, the “consent or waiver of litigants in an individual case is insufficient to confer on non-Article III bankruptcy courts authority to enter final judgments on private rights.” *Id.* at 27.

EBIA argues in that alternative that consent could only cure the constitutional defect to the extent that Congress has made consent “a limiting feature of the statute permitting non-Article III adjudication.” *Id.* at 13. EBIA concedes that the Court has “at times given some consideration to the role of consent within a statutory scheme in evaluating whether a statute’s limited delegation of judicial authority violates the separation of powers in the first place.” *Id.* at 28. EBIA attempts to distinguish delegations to bankruptcy judges from other delegations to quasi-judicial authorities by emphasizing the presence or absence of consent, the scope of review of the adjudicative body, and the review that body’s findings or determinations are subject to by Article III courts. *See id.* at 30-31. For example, the Magistrate Judge’s Act, EBIA suggests, “is distinctive in that it makes consent an explicit, statutory limitation on the non-Article III judge’s jurisdiction.” *Id.* at 31 (citing 28 U.S.C. 636(c)(1)). A statutory consent requirement, EBIA argues, “ensures that litigants are made aware of the need to consent and their right to refuse it, and ensures that Congress has carefully considered the constitutional issues at stake.” *Id.* at 13.
EBIA further asserts that “[e]ven if consent in an individual case were relevant to the question whether a non-Article II judge may enter final judgment of the United States, such consent would need to be knowing and voluntary.” Id. at 38. EBIA contends that its “failure to assert an argument foreclosed by binding precedent” (that the bankruptcy court lacked authority to enter final judgment because an earlier Ninth Circuit decision had rejected such an argument) “could not confer on the bankruptcy judge constitutional authority that Article III otherwise forbids.” Id.

EBIA also maintains—contrary to the Ninth Circuit’s holding—that in core proceedings bankruptcy courts “lack[] statutory authority to issue proposed findings of fact and conclusions of law.” Id. at 15. The power granted by Section 157(b) to the bankruptcy courts to “hear and determine” core proceedings “does not include authority to propose non-final findings and conclusions” because the plain meaning of “determine” is to decide conclusively. Id. Nor, EBIA asserts, can construing Section 157(b) to permit issuance of proposed findings and conclusions be reconciled with Section 158. Id. Section 158 grants district courts appellate jurisdiction over bankruptcy court judgments, but provides them with “no authority to enter judgments in the first instance in a case that has been referred to (and not withdrawn from) the bankruptcy court.” Id. Thus, EBIA maintains, the task of “crafting a constitutional alternative to the existing partially unconstitutional framework”—wherein bankruptcy judges are not explicitly authorized to make non-final recommendations—“belongs to Congress, not the courts.” Id. at 46.

2. Arkinson’s Argument

In its brief, Arkinson traces the history of district court reliance on third-party bankruptcy adjudicators (referred to as commissioners or referees) from the first bankruptcy act, passed in
1800, through its numerous iterations to the present. Resp’t’s Br. at 9-12. Traditionally, Arkinson explains, commissioners or referees oversaw “summary” matters, with abbreviated procedures. Id. at 11. Where a party demanded full legal process (for example, in so-called “plenary matters”), resort had to be made to state or Article III federal courts. Id. at 12. Generally, referees “had summary jurisdiction over property within the actual or constructive possession of the debtor.” Id. Assets outside the debtor’s possession generally could only be reached by plenary proceedings. Id. Nonetheless, Respondent observes, parties could “jointly consent to proceed before a referee in a summary proceeding, even with respect to an otherwise plenary matter.” Id.

In 1978, Congress overhauled the bankruptcy system, abolishing the summary/plenary division and granting bankruptcy judges jurisdiction over all matters arising in a bankruptcy case, arising under the Bankruptcy Code, or related to a case. Id. at 13. Additionally, Congress provided for mandatory assignment of all bankruptcy cases to the new bankruptcy courts for full and final determination, largely freeing those courts from the district courts’ oversight. Id.

After the Supreme Court struck down this nascent independent bankruptcy regime in Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), “Congress reverted to the historical reference-based model.” Id. at 14. Article III judges were again empowered to use or ignore bankruptcy judges as they desired and to take cases back from those judges “mid-stream” for cause. Id. And consistent with the language in Justice Brennan’s plurality opinion and Justice Rehnquist’s concurrence characterizing the restructuring of debtor-creditor relations as lying at the “core” of the federal bankruptcy power, Congress curtailed bankruptcy judges’ ability to enter final judgments with respect to matters that are non-core. Id.
Arkinson also contends that EBIA waived its right to take its case to the district court, instead “tak[ing] its summary judgment chances in the bankruptcy court” and only after losing raising an Article III challenge on appeal. *Id.* Nor are structural Article III concerns present in this case, Arkinson maintains, because “the bankruptcy court consensual adjudication system exists entirely within Article III, following longstanding judicial practice.” *Id.* Indeed, “[b]ecause resort to bankruptcy judges is fully at the joint election of district judges and the parties in private-rights controversies, the political branches have no involvement whatsoever and hence there is no encroachment on the judiciary violating the separation of powers.” *Id.* at 19. EBIA’s argument concerning structural concerns is inapposite, Arkinson argues, because “the subset of cases implicating structural separation of powers concerns comprises those involving the encroachment or aggrandizement of one branch at the expense of the others,” which is not the case here. *Id.* at 37 (internal quotation marks and brackets omitted).

Furthermore, Arkinson argues, consent to bankruptcy court adjudication “may be implied by conduct of the kind at issue here” just as consent can be implied in the analogous magistrate judge setting. *Id.* at 20. Indeed, the Court affirmed the permissibility of implied consent to final judgments by federal magistrate judges in *Roell v. Winthrow*, 538 U.S. 580, 585-86 (2003). And as Arkinson notes, the “grant of authority to magistrate judges is even broader” than is the analogous grant of authority to bankruptcy judges. Resp’t’s Br. at 26. Additionally, Bankruptcy Rule 7012 provides the same protection as statutorily required consent because it requires responsive pleadings to “include a statement that the party does or does not consent to entry of final orders or judgments by a bankruptcy judge.” *Id.* at 51 (quoting Rule 7012).

In this case, the court below held, and Arkinson maintains, that EBIA consented to bankruptcy judge determination by failing to object to the Joint Status Report both at the time it
was drafted and when it was filed. *Id.* at 60. In any event, Arkinson maintains, “[b]ecause an Article III district court conducted a full de novo review of the summary judgment order and entered its own judgment, EBIA got all the Article III consideration to which it was entitled.” *Id.* at 20.

Finally, Arkinson contends, “*Stern* creates no insoluble statutory gap” because bankruptcy judges may issue proposed findings of fact and conclusions of law if the parties do not consent to final judgment in the bankruptcy court. *Id.* at 21. “The apparent gap arises because [section 157] focuses on proposed findings of fact and conclusions of law for non-core claims, but *Stern* claims are statutorily core, and core claims do not have an analogously explicit provision for such reports and recommendations.” *Id.* at 63-4 (internal citation omitted). Understandably, Arkinson posits, “almost all courts have done the only logical thing: treat *Stern* claims as though they were non-core, restricting bankruptcy judges in the absence of party consent to proposed findings of fact and conclusions of law.” *Id.* at 64.

3. United States as Amicus Curiae Supporting Arkinson

The United States filed an *amicus curiae* brief in support of Respondent-Arkinson, arguing that, through its litigation strategy, EBIA had waived its right to have the claim against it decided by an Article III judge. Gov’t Amicus Br. at 11. The United States agreed with Arkinson that the Supreme “Court and the courts of appeals have recognized that litigant consent can authorize the entry of final judgment by a non-Article III judge.” *Id.*

Consistent with the Ninth Circuit’s holding and Arkinson’s argument in its merits brief, the United States submitted that EBIA could “consent to resolution of [its] claim by the bankruptcy court.” *Id.* at 16. Indeed, the United States quotes approvingly Arkinson’s characterization of the paramount importance of consent in determining the permissibility of a
non-Article III adjudication: “As respondent notes (Br. 34), every case in which this Court has found a violation of a litigant’s right to an Article III decisionmaker has involved an objecting defendant forced to litigant its private rights involuntarily before a non-Article III judge.” Id. at 18 (internal quotation marks omitted).

The United States, like Arkinson, notes that EBIA’s “approach is at odds with decisions holding that federal magistrate judges may, with the litigant’s consent, enter final judgment in cases otherwise committed for resolution to an Article III court.” Id. at 20. Indeed, the United States notes that EBIA’s “argument against waiver impugns the constitutionality of the federal system’s well-established use of magistrate judges.” Id. at 22. Nor, the United States maintains, does the ability of bankruptcy judges to enter final judgments implicate structural separation of powers concerns. Id. at 23.

Even if EBIA had not consented to final determination by its conduct, the United States argues, it still “would not be entitled to relief from the judgment below” because EBIA’s disregard for the Rule requiring that it either consent or object in it answer to final determination by a bankruptcy judge and because it failed to comply with the district court’s order concerning the joint status report. Id. at 26, 28. And because the district court “reviewed and sustained the bankruptcy court’s summary-judgment ruling under a de novo standard, there is no reason to suppose that the district court would have reached a different conclusion if the bankruptcy court had submitted” proposed findings and conclusions instead of a final judgment. Id. at 28.

With respect to the second question presented—the ability of a bankruptcy judge to enter recommendations and conclusions in core proceedings—the United States again agrees with Arkinson that the Bankruptcy Code may be permissibly read as allowing a bankruptcy judge to make proposed findings of fact and conclusions of law. Id. at 29. This result is necessary, the
United States argues, because EBIA’s approach “would create an anomalous statutory gap, preventing bankruptcy courts in matters like this one from exercising the statutory powers that apply to either core or non-core proceedings.” *Id.* at 31. Such a “crabbed” reading, the United States suggests, is contrary both to principles of severability and “the great weight of lower-court decisions.” *Id.* Moreover, such a reading is “in conflict with many local rules and orders that authorize bankruptcy judges” to do just that. *Id.*