No. 10-179

In The
Supreme Court of the United States

HOWARD K. STERN, Executor of
the Estate of Vickie Lynn Marshall,

Petitioner,

v.

ELAINE T. MARSHALL, Executrix of
the Estate of E. Pierce Marshall,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF FOR THE NATIONAL BLACK CHAMBER OF COMMERCE AND THE AMERICAN BOARD OF TRIAL ADVOCATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit opinion contravenes Congress's intent in enacting 28 U.S.C. § 157(b)(2)(C).

2. Whether Congress may, under Articles I and III, constitutionally authorize core jurisdiction over debtors' compulsory counterclaims to proofs of claim.

3. Whether allowing non-Article III bankruptcy judges to enter final judgment on all compulsory counterclaims to proofs of claim would violate personal injury plaintiffs' Seventh Amendment right to trial by jury.

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INTEREST OF *AMICI CURIAE*

The National Black Chamber of Commerce is a nonprofit, nonpartisan, nonsectarian organization dedicated to the economic empowerment of African American communities through entrepreneurship. Incorporated in 1993, it represents nearly 100,000 African American-owned businesses, and advocates on behalf of the one million Black-owned businesses in the United States. The Chamber has 190 affiliated chapters located throughout the nation, as well as international affiliates in, among others, the Bahamas, Brazil, Colombia, Ghana, and Jamaica.[1]

The Chamber is committed to furthering the rule of law and due process under law, which are key to protecting its members' rights and ensuring their economic success. To that end, the Chamber has undertaken to educate its members on a variety of matters of law, from those impacting business directly, such as government contracting, to those implicating constitutional rights and civil rights. Chamber officials write and speak regularly on legal issues that bear on the Black business community's continued growth and achievement in the face of multiple barriers to accomplishment. Chamber officials have

[1] Pursuant to Supreme Court Rule 37.6, counsel for amici represents that it entirely authored this brief and no party, its counsel, or any other entity but amici and their counsel made a monetary contribution to fund the brief's preparation or submission. All parties have consented to the filing of this brief. Letters reflecting their consent are filed with the Clerk.

also testified on these issues before Congress numerous times.

Laws that impact economic rights pose challenges to businesses, and this is particularly so of bankruptcy law, which has the potential to upset rights and obligations between private parties. Minority-owned automobile dealers, for example, were among the hardest hit by the government-managed bankruptcies of General Motors and Chrysler.[2] On the basis of its experience and that of its members, the National Black Chamber of Commerce is gravely concerned that, if bankruptcy is allowed to supplant Article III adjudication, the quality of justice will suffer.

For more than fifty years, the American Board of Trial Advocates (ABOTA), a by-invitation organization of both plaintiffs' and defendants' attorneys who have demonstrated excellence in the profession, has fought to preserve inviolate the right to trial by jury in civil cases guaranteed by the Seventh Amendment. The result sought in this matter by Petitioner would, if granted, violate that constitutionally guaranteed right. It is that threat to this valuable right, which is

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[2] *Ramifications of Auto Industry Bankruptcies: Hearing Before the H. Comm. On the Judiciary*, 111th Cong. 14-17 (2009) (statement of Damon Lester, National Association of Minority Automobile Dealers).

guaranteed to all civil litigants, that has prompted ABOTA to appear as amicus curiae before this Court.

SUMMARY OF ARGUMENT

Article III of the United States Constitution "protect[s] the role of the independent judiciary within the constitutional scheme of tripartite government and assure impartial adjudication in federal courts." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583-84 (1985). When Congress attempts to intrude on the judicial role, the separation of powers is breached and impartial adjudication is threatened.

The vesting of power in the bankruptcy courts is, of course, a legitimate exercise of Congress's Article I power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. But the Bankruptcy Clause cannot be read so broadly so as to allow significant intrusions on the "judicial Power" expressly assigned to Article III courts. To do so would aggrandize the Legislative Branch at the expense of the Judicial. Accordingly, the Court has long recognized that Congress's power to confer jurisdiction[3] on non-Article

[3] "Jurisdiction," as used in this brief, refers to the bankruptcy court's power to issue final orders regarding a claim, absent the consent of the parties. *See* 28 U.S.C. § 157(b). A bankruptcy court may hear claims over which it lacks jurisdiction, in this sense,

(Continued on following page)

III bodies is limited. *See Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 850 (1986) (listing cases). Principles of federalism are also implicated when Congress assigns state-law claims to non-Article III courts.

To avoid these constitutional infirmities, 28 U.S.C. § 157(b), which defines bankruptcy judges' power to "hear and determine . . . all core proceedings" arising in a Chapter 11 bankruptcy, must be given its natural meaning as excluding the adjudication of ancillary claims inessential to resolution of the estate.

This result is no mere exercise in constitutional formalism, but a pragmatic recognition of the Framers' approach to preserving liberty and achieving justice. Bankruptcy judges lack the essential attributes of their Article III counterparts: life tenure during good behavior and compensation that may not be diminished during that tenure. Further, bankruptcy procedure – focused on the quick resolution of insolvent estates – entails a haste that may be at times incompatible with the procedural regularities that traditionally attend private lawsuits. These characteristics may further bankruptcy courts' core role of expeditiously resolving the bankruptcy estate, but they

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but acts as a special master, submitting proposed findings of fact and conclusions of law to the district court, which in turn considers them *de novo*. 28 U.S.C. § 157(c)(1).

nonetheless counsel against application to claims that are ancillary to the bankruptcy estate.

Finally, the Petitioner presents arguments that would, if accepted by this Court, significantly undermine the broad personal injury exception stated in the Bankruptcy Code and impermissibly restrict the right to trial by jury in civil cases. Specifically, Petitioner asserts that bankruptcy courts have jurisdiction to resolve *any* compulsory counterclaim by the debtor, even one asserted against a personal injury claim over which the bankruptcy court wholly lacks jurisdiction, and that the "personal injury" exception to bankruptcy jurisdiction should be read narrowly to include only claims involving bodily injury. These arguments threaten to deprive injured persons of their constitutional right to trial by jury.

ARGUMENT

I. Bankruptcy Court Adjudication Of Counterclaims That Are Not Necessary To Resolve The Bankruptcy Estate Is Unconstitutional

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. This command necessarily tempers Congress's authority to empower adjudicatory bodies in the exercise of its Article I powers, as those bodies may not impermissibly encroach on the Article III courts' judicial power.

For that reason, and under the Court's precedents, Congress may not assign bankruptcy courts the power to decide claims that are not necessary to resolve creditors' claims against a bankruptcy estate.

A. Congress's Power To Confer Jurisdiction On Non-Article III Courts Is Limited

The "judicial Power" that Article III vests in the courts established according to its dictates, though put in absolute terms, is broad but not plenary. "[T]he literal command of Art. III . . . must be interpreted in light of the historical context in which the Constitution was written, and of the structural imperatives of the Constitution as a whole." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982). There is strong basis in history and practice for adjudication of specific types of matters in venues other than the Article III courts. Courts-martial and military commissions, for example, predate the Revolution and continued in use uninterrupted through the ratification of the Constitution, with little indication that their proceedings were to be subsumed into the "judicial Power." *See generally* Detlev Vagts, *Military Commissions: A Concise History*, 101 Am. J. Int'l L. 35 (2007). Bankruptcy proceedings are likewise rooted in the Nation's history, and were employed as early as 1800. *See* "An Act to establish a Uniform System of Bankruptcy throughout the United States," 2 Stat. 19 (1800) (establishing system of bankruptcy "commissioners"). *See generally* David

Skeel, *Debt's Dominion: A History of Bankruptcy Law in America* 21-70 (2001).

The plurality opinion in *Marathon* synthesized this historical practice by identifying "three narrow situations not subject to [the Judicial Vesting Clause's] command." *Marathon*, 458 U.S. at 64. These are territorial courts, which operate where no State is a sovereign; courts-martial and related proceedings, premised on historical practice and specific assignments of power to the Executive and Congress; and legislative courts and administrative agencies created by Congress to adjudicate cases involving "public rights." *Id*. at 65-67.

It is the final category that is at issue in the present case. "Public rights" encompasses matters "that Congress would be free to commit . . . completely to nonjudicial executive determination," such that "there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency." *Id*. at 68. Thus, this category does not threaten the separation of powers or "the Framers' vision of an independent Federal Judiciary." *Id*. at 70 n.25. It includes administrative disputes between the government and its agents, *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 (18 How.) U.S. 272 (1856), decisions that might otherwise be assigned to the discretionary authority of agency personnel, *Thomas*, 473 U.S. at 568, and narrow

categories of claims intertwined with a public regulatory scheme, *Schor*, 478 U.S. at 833.[4]

By contrast, rights and obligations between private parties involve, in nearly all instances, "private rights." Though public rights may be assigned to adjudication before non-Article III bodies, lacking "the essential attributes of the judicial power," "'[w]holly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated'" in that allowance. *Granfinanciera v. Nordberg*, 492 U.S. 33, 53, 51 (1989) (quoting *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 458 (1977)). In a suit between private parties, the appropriate test is whether "'a seemingly "private" right [] is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.'" *Id*. at 54 (quoting *Thomas*, 473 U.S. at 593-94). If not, the matter "must be adjudicated by an Article III court." *Id*. at 55.

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[4] *See also Crowell v. Benson*, 285 U.S. 22, 46 (1932) (allowing administrative adjudication of public law claims to proceed where "[t]o hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task").

The Court has identified four factors relevant to the inquiry of whether a grant of power to an Article I tribunal implicates private rights:

> the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

Schor, 473 U.S. at 851.

Thus, in *Schor*, the Court upheld agency adjudication of a counterclaim by a commodities broker against its customers who had filed reparations complaints with the Commodity Futures Trading Commission ("CFTC"). *Id*. at 837-38, 856. First, the agency "deals only with a particularized area of law," claims related to violations of commodities trading law, and, second, "does not exercise all ordinary powers of district courts." *Id*. at 852-53 (internal quotation marks omitted). Third, "the decision to invoke this [Article I] forum is left entirely to the parties," and therefore did not limit the federal judiciary's power to take jurisdiction. *Id*. at 855. Fourth, the grant of jurisdiction to the CFTC was necessary to "mak[e] effective a specific and limited federal regulatory scheme," carried out by an expert agency in a highly technical area of the law. *Id*. at 855-56. In particular, counterclaim jurisdiction was

"necessary to make the reparations procedure workable," "incidental to, and completely dependent upon, adjudication of reparations claims created by federal law," and "limited to claims arising out of the same transaction or occurrence." *Id*. at 856. Taken together, and despite the Court's usual "searching" examination when Congress provides an alternative forum for claims traditionally held in the courts, *id*. at 854, these factors demonstrated that any encroachment on the judicial power was "de minimis." *Id*. at 856.

By contrast, a majority of the Court (across a plurality opinion and concurring opinion) in *Marathon* found that "adjudication of state-created private rights, such as the right to recover contract damages," in a bankruptcy proceeding implicated wholly private rights unsusceptible to adjudication by bankruptcy judges imbued with only Article I powers. 458 U.S. at 71. At issue in that case was the 1978 Bankruptcy Act, which assigned bankruptcy courts jurisdiction over all "civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. § 1471(b) (1976 ed., Supp.IV). Relying on this jurisdiction, a Chapter 11 debtor filed suit in bankruptcy court against a third party for breach of contract and related claims that arose prior to its filing. 458 U.S. at 56.

Though acknowledging that the "restructuring of debtor-creditor relations" may be a "public right" subject to non-Article III adjudication, the Court held that the grant of ancillary jurisdiction to hear claims such as those at issue "carries the possibility of . . .

unwarranted encroachment" on the judicial power. *Id*. at 71, 84. It premised that conclusion on two findings. First, the bankruptcy courts had been granted authority to adjudicate rights not created by Congress, but traditional to common law and Article III adjudication. *Id*. at 81-82. Second, it assigned a broad – rather than "specialized" and "narrowly confined" – degree of subject matter jurisdiction to the bankruptcy courts, while empowering them to enter final orders not subject to *de novo* review. *Id*. at 85. In short, the statutory scheme brooked "no limiting principle" to bar efforts "to supplant completely our system of adjudication in independent Art. III tribunals and replace it with a system of 'specialized' legislative courts." *Id*. at 73.

A final limitation on Congress's power to assign adjudicatory powers to Article I tribunals is that those tribunals' determination of their jurisdiction must be subject to de novo review by an Article III court. *Crowell*, 285 U.S. at 54-55. *Crowell* concerned a workman's compensation scheme for those in maritime employment injured on the navigable waters of the United States. While upholding the assignment of adjudicatory authority to a "Compensation Commission," the Court held that the Commission could not be the final arbiter of the facts underlying whether a claim fell within its purview – that is, whether the injury occurred on the water and whether there existed a master-servant relationship. *Id*. Because "Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and

maritime jurisdiction," a specialized area in which it could create such an adjudicatory scheme, the determination of jurisdiction must be subject to de novo review by an Article III court. *Id*. at 62.

B. Bankruptcy Court Adjudication Of Ancillary Disputes Over "Private Rights" Violates Fundamental Separation Of Powers Principles

There can be no question but that the controversy underlying this case implicates a "private right." The Respondent's claim – assuming *arguendo* that he had actually presented one to the bankruptcy court, *In re Marshall*, 600 F.3d 1037, 1065-66 (2010) (Kleinfeld, J., concurring) – and the Petitioner's counterclaim are private, common law torts that do not, themselves, implicate any "rights of the public." *Granfinanciera*, 492 U.S. at 68 (Scalia, J., concurring). The question, then, is whether an interpretation of 28 U.S.C. § 157(b) that provides a bankruptcy court jurisdiction to hear such a claim supplants the Article III courts' judicial power.

The adjudicatory authority Petitioner claims on behalf of the bankruptcy courts is far broader than that at issue in *Schor* in four specific ways. First, bankruptcy, by its nature, is limited to no "particularized area of the law," but reaches any possible claim by or against the debtor's estate. Though bankruptcy practice is technical and specialized, the adjudication of damages claims is the role of every trial judge. This

breadth is not, in itself, fatal – were it so, the Bankruptcy Power would be a nullity, or nearly so – but it does require a more "searching" examination of the limits on the jurisdiction and the manner in which the rights at stake are adjudicated. *Schor*, 478 U.S. at 854.

Second, in "core" proceedings, the bankruptcy court exercises all the ordinary powers of the district court, such as conducting hearings, finding facts, and entering final orders. This is so by operation of statute, and is independent from Petitioner's interpretation of the law. *See* 28 U.S.C. § 157(b)(1). Its factual determinations are not subject to plenary review by an Article III court, and there is no exception for its jurisdictional fact-finding. *See* Fed. R. Bankr. P. 8013.

Third, the decision whether to submit to the jurisdiction of the bankruptcy court is not entirely consensual, as the facts of the present case demonstrate. To preserve his claim, Respondent's predecessor was required to seek a declaration of nondischargeability from the bankruptcy court, which, in turn, subjected him to Petitioners' counterclaim; his only alternative was to abandon his claim against Petitioner in its entirety, notwithstanding its legal merits and the fact that it was pending in state court. This attribute of bankruptcy practice pulls into the estate many claims that would otherwise fall outside of the bankruptcy court's jurisdiction and that ordinarily would proceed in state or federal courts. Litigants may therefore face the same situation as the defendant in *Marathon*: being subject, without

consent, to bankruptcy jurisdiction over claims unrelated to the resolution of the bankruptcy estate.

Fourth and finally, this extended jurisdiction is not necessary to "make effective a specific and limited" regulatory scheme. To the contrary, Congress put any number of claims that may be conducive to the settlement of the state outside of the bankruptcy court's jurisdiction. 28 U.S.C. § 157(c) (non-core claims). Within its jurisdiction, however, are every possible proceeding relating to the administration of the estate, claims filed upon the estate, and the disposition of the estate's property. § 157(b)(2). Perhaps most importantly, the estate's claims are not unrecoverable if they are outside of "core" jurisdiction. The trustee or debtor-in-possession may bring suit in state or federal court to collect on them, bringing assets into the estate, for the benefit of creditors, while preserving the defendant's rights and the Article III courts' plenary power.

In these ways, Petitioner conjures a doctrine of bankruptcy jurisdiction very similar to that struck down in *Marathon*. The bankruptcy court may hear and decide any possible counterclaim against a claimant, no matter how remote from the bankruptcy. The claimant, like Respondent, has little more choice than the defendant in *Marathon* whether to submit himself to the possibility of facing unlimited jurisdiction in an Article I court. Should he decline to do so, his legitimate claim is extinguished. And once the bankruptcy court has determined the facts render a

counterclaim "core," its decision is not reviewable in full by any Article III court.

Accordingly, in its essential aspects, the Petitioner's conception of bankruptcy jurisdiction is akin to the expansive jurisdiction the Court disapproved in *Marathon*. It constitutes a usurpation of the Article III courts' powers by the legislative branch – a clear violation of the separation of powers.[5]

C. Section 157(b)(2) Readily Bears A Narrower Reading That Avoids The Need For Constitutional Adjudication

The Court need not make the "delicate undertaking" of "[d]rawing the line between permissible extensions of legislative power and impermissible incursions into judicial power." *Marathon*, 458 U.S. at 84 n.35. Instead, it should avoid this constitutional question by construing 28 U.S.C. § 157(b)(2) to allow bankruptcy courts plenary jurisdiction to decide only

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[5] Petitioners' broad interpretation of bankruptcy jurisdiction also intrudes upon the powers and prerogatives of the States by extending bankruptcy jurisdiction to non-diverse state-law claims that would not otherwise typically be brought in federal court. Such actions must, at the very least, be accompanied by a "clear statement" that Congress intended to use its bankruptcy power to supersede traditional state law rules. *Cf. BFB v. Resolution Trust Co.*, 511 U.S. 531, 544 (1994) (holding that that the Bankruptcy Code was not sufficiently "clear and manifest" to "displace traditional state regulation" of foreclosure sales) (internal quotation marks omitted).

core claims "arising under" the Bankruptcy Code or "arising in" a bankruptcy case.

"[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979). Where one possible construction "presents a significant risk" of constitutional infirmity but a second construction does not, the courts should choose the latter. *See id.* at 510-12. This doctrine is "followed out of respect for Congress, which we assume legislates in the light of constitutional limitations," *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998), and "reflects the prudential concern that constitutional issues not be needlessly confronted." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

Petitioner effectively concedes that its reading of Section 157(b)(2)(C) requires the Court to confront these weighty constitutional issues head-on. *See* Pet. Br. 37-65 (arguing that its interpretation does not violate Article III). The Petitioner interprets the phrase "[c]ore proceedings include . . . (C) counterclaims by the estate against persons filing claims against the estate" in that subsection to mean that all compulsory counterclaims filed in response to a

creditor's proof of claim[6] are "core" and among the claims that "[b]ankruptcy judges may hear and determine," § 157(b)(1). Pet. Br. 15, 26-28.

"Statutory construction, however, is a holistic endeavor." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). And unlike in *Schor*, where the Court found that the CFTC's "authority to adjudicate counterclaims is evident on the face of the statute," 478 U.S. at 841-42, Section 157 has a natural reading that avoids constitutional infirmity.

Specifically, Section 157(b)(2) must be read together with Section 157(b)(1), which references it. Section 1571(b)(1) limits jurisdiction to "all cases under title 11 and all core proceedings *arising under* title 11, or *arising in* a case under title 11." § 157(b)(1) (emphasis added). Section 157(b)(2), in turn, provides a non-exclusive list of core proceedings. Taken together, the plain language of these interlocking provisions requires that a claim must satisfy two criteria to be subject to decision by a bankruptcy court: (1) it must "aris[e] under" the Bankruptcy Code

[6] In this instance, there is significant doubt that the Respondent actually sought to enforce his claim in the bankruptcy proceeding, rather than preserve it against discharge. *See In re Marshall*, 600 F.3d at 1065-66 (Kleinfeld, J., concurring). If this view of the record is correct, the bankruptcy court assumed the very jurisdiction that this Court struck down in *Marathon* – determining the private rights of *non-claimants* to the estate.

or "aris[e] in" a bankruptcy case, and (2) it must be "core" under Section 157(b)(2).[7]

The terms "arising under" and "arising in" have well established meanings. "Arising under" is used in other jurisdictional contexts, including 28 U.S.C. § 1331's grant of federal question jurisdiction and 28 U.S.C. § 1334(b)'s grant of district court bankruptcy subject matter jurisdiction. This latter provision was copied from Section 1471(b) of the 1978 Bankruptcy Act, and Congress provided this guidance on it at the time:

> The phrase "arising under" has a well defined and broad meaning in the jurisdictional context. By a grant of jurisdiction over all proceedings arising under title 11, the bankruptcy courts will be able to hear any matter under which a claim is made under a provision of title 11.

H.R. Rep. No. 95-595, at 445-46 (1978). *See* 1 *Collier on Bankruptcy* § 3.01[3][c][i] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (discussing § 1334(b) in light of § 1331).

Similarly, "arising in" has an established usage premised on Congress' drafting of Section 157 in the aftermath of *Marathon*. The leading case on this point is *In re Wood*, 825 F.2d 90 (5th Cir. 1987). *Wood*

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[7] Additionally, of course, the parties may consent to the hearing and determination by the bankruptcy court of certain non-core but "related" matters. 28 U.S.C. § 157(c).

concerned a claim filed on a debtor for misappropriation of corporate assets prior to the debtor's bankruptcy filing. *Id*. at 91. The district court dismissed the case for want of bankruptcy jurisdiction, and the Fifth Circuit reversed, finding that the claim was "related to" the bankruptcy, and so within the district court's bankruptcy jurisdiction, but not a "core" proceeding. *Id*. at 92, 97. The court relied on *Marathon* for the principle that "bankruptcy judges may exercise full judicial power over only those controversies that implicate the peculiar rights and powers of bankruptcy or, in Justice Brennan's words, controversies 'at the core of the federal bankruptcy power.'" *Id*. at 96 (quoting *Marathon*, 458 U.S. at 71). *Cf. Granfinanciera*, 492 U.S. at 56 (discussing "fraudulent conveyance actions by bankruptcy trustees-suits"). As the court observed, the enumeration of "core" proceedings in Section 157(b)(2) reflects this understanding of *Marathon* by referencing "those 'administrative' matters that arise only in bankruptcy cases." *Id*. at 97.

The *Wood* court's construction of the term "arising in" is necessary to render Section 157(b)(2)(O) – a sweeping provision that provides for jurisdiction over, *inter alia*, "other proceedings affecting the liquidation of assets of the estate" – something less than a grant of plenary civil power to the bankruptcy courts. For example, without this limitation, "an action to collect a prepetition account receivable is a core proceeding," as would be any proceedings "that arise out of causes of action owed by the debtor at the time the

[bankruptcy] case is filed." 1 *Collier* § 3.02[3][d][ii]. Bankruptcy court jurisdiction over such claims would contravene *Marathon*'s holding that such a claim could not, as a constitutional matter, be within bankruptcy jurisdiction. 458 U.S. at 71 (plurality); *id*. at 90 (Rehnquist, J., concurring).

Petitioner's interpretative approach, which construes Section 157(b)(2)(C)'s allowance of counterclaims in a vacuum, runs headfirst into this problem. It would abandon the "arising under" or "arising in" limitation on the language of Section 157(b)(2)(O), transforming that provision and others into plenary grants of jurisdiction to the bankruptcy courts.

Further, Petitioner's interpretation of Section 157 renders the terms "arising under" and "arising in," mere surplusage. This contradicts the Court's dictate that "we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991).[8]

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[8] Indeed, under Petitioner's approach and the facts of this case, the "arising in" category would blend into, or even exceed, the class of cases "related to" a bankruptcy that the statute logically considers to be broader. *See In re Marshall*, 600 F.3d at 1065 ("Vickie's counterclaim was not related to the bankruptcy, because she had already been discharged and her creditors would get none of the money she sought from Pierce in her counterclaim[.]"). This would, in effect, render whole swaths of § 157 surplusage, e.g., §§ 157(a), (c)(1), (c)(2).

Finally, Petitioner asks the Court to abrogate two overriding presumptions of statutory construction. First is the presumption of constitutionality that applies to legislative acts. *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983). "The elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality." *Hooper v. People of State of Cal.*, 155 U.S. 648, 657 (1895). *Cf. The Federalist No. 78* (Alexander Hamilton) (federal court should strike down a statute as contrary to the constitution only "[i]f there should happen to be an irreconcilable variance between the two"). In this instance, the most reasonable construction of Section 157 – and not Petitioner's – passes muster. Second is the presumption that Congress legislates in light of the opinions of the judicial branch, particularly where Congress "was aware of them" or "they were called to its attention." *Yates v. U.S.*, 354 U.S. 298, 310 (1957). The record is clear, of course, that *Marathon* was brought to Congress's attention. *See Marathon*, 458 U.S. at 88 (affording "Congress an opportunity to reconstitute the bankruptcy courts"); 130 Cong. Rec. 7489 (1984) (statement of Rep. Peter W. Rodino Jr., Chairman of the House Committee on the Judiciary).

Where "a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). *Cf. Catholic Bishop*, 440 U.S. at 500-02. The Court can decide this case without

accepting Petitioner's invitation to wade into delicate constitutional questions that need not be answered here.

II. Bankruptcy Court Adjudication Of Claims Properly Heard By Article III Courts Threatens The Quality Of Justice

Article III's specific protections of judicial independence were "not created for the benefit of the judges, but for the benefit of the judged."[9] Our Constitution therefore "commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence." *Marathon,* 458 U.S. at 60. Allowing expansive bankruptcy court adjudication of private rights claims that are ancillary to the bankruptcy estate would frustrate judicial independence. It would also move bankruptcy courts away from their core competence of efficiently resolving creditor and debtor rights, to deciding unrelated common law claims.

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[9] Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. Chi. L. Rev. 665, 698 (1969), quoted in The Honorable Irving Kaufman, *Chilling Judicial Independence*, 88 Yale L. J. 681, 690 (1979).

A. The Framers Devised A System To Ensure Judicial Independence "For The Benefit Of The Judged"

The Framers carefully separated the judicial from the legislative and executive branches, "to secure a steady, upright, and impartial administration of the laws." *The Federalist No. 78* (Alexander Hamilton). "There is no liberty, if the power of judging be not separated from the legislative and executive powers." *Id.* (quoting Montesquieu, *The Spirit of the Law*). *See also The Federalist No. 47* (James Madison) (same), Samuel Bryan, *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents*, Dec. 18, 1787. For these and other reasons, the first section of Article III "serves to protect primarily personal, rather than structural, interests." *Schor*, 478 U.S. at 848. Where "private, common law rights are at stake," the Court's "examination of the congressional attempt to control the manner in which those rights are adjudicated has been searching." *Id*. at 854. *See also Mistretta v. United States*, 488 U.S. 361, 380-83 (1989).

There is no question but that bankruptcy judges lack the essential – and constitutionally mandated – attributes of judges exercising plenary judicial power: lifetime tenure during "good behavior" and compensation that may not be diminished during that tenure. Bankruptcy judges are instead "appointed by the court of appeals of the United States for the circuit in which [a judicial district] is located." 28 U.S.C.

§ 152(a)(1). Bankruptcy judges need not be reappointed, and may be removed by the circuit's judicial council for a variety of reasons. *See* 28 U.S.C. § 152(e).

"Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the courts'] necessary independence." *The Federalist No. 78* (Alexander Hamilton). Allowing bankruptcy judges plenary power to adjudicate state common law claims would, therefore, abrogate the many benefits inuring from judicial independence. Independence from political forces promotes public confidence in the judiciary. *See id*. It helps to attract well-qualified persons to the federal bench. *Marathon*, 458 U.S. at 60 n.10. It also insulates judges from pressure by their colleagues, promoting judicial individualism. *Id*. at 60 n.10. This last benefit is particularly important with regard to bankruptcy judges, who are appointed (and who often wish to be re-appointed) by Article III judges.

In any event, bankruptcy court jurisdiction over claims that are largely unrelated to the debtor's estate far exceeds this Court's limited allowance of derogations from Article III and cannot be justified by any act of Respondent or similarly-situated litigants.

In *Schor*, the Supreme Court affirmed the CFTC's adjudication of a counterclaim that was integral to the CFTC's resolution of disputes between brokers and investors where the decision to invoke the CFTC's jurisdiction was "left entirely to the

parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected." *Schor*, 478 U.S. at 855-56. In contrast, the counterclaim in the instant case was necessitated by a Hobson's choice: Respondent was limited to forfeiting a claim that was already pending in state court or subjecting the claim (and any compulsory counterclaims) to parallel non-Article III adjudication. Neither Petitioner's claim nor Respondent's counterclaim had any relationship to the bankruptcy proceedings. This is simply not the case of "Congress . . . mak[ing] available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences." *Id*. at 855. Rather, this case involves a mandatory non-Article III adjudication through which unwilling parties may be pulled into bankruptcy court to preserve their existing state law rights.

This Court has been, and ought to be, wary of extending plenary bankruptcy court adjudication over state law private rights claims. This is particularly true in light of the constitutional difficulties discussed above. Expedited liquidation of a bankruptcy estate is a worthy goal, but it gives no license to upend the separation of powers and the federalist structure, or to intrude upon the procedural rights of persons litigating pending private law claims.

B. Appellate Review Of Bankruptcy Court Decisions Cannot Cure Its Defects

Article III appellate review of bankruptcy court decisions does not ameliorate the constitutional difficulties stemming from the bankruptcy court's adjudication of the state law claim at issue here.

As a practical matter, appellate review of bankruptcy decisions is rare and affords little opportunity for error correction or development of the law. *See* Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 Stan. L. Rev. 747, 777 (2010).

> [A]lmost no bankruptcy litigation goes farther than the bankruptcy court, and only the rare case will make it all the way to decision in a court of appeals. Between 2000 and 2007, 11,224,562 bankruptcy petitions were filed in the federal courts. During the same period, the courts of appeals received only 7106 bankruptcy appeals – or approximately one appeal for every 1580 bankruptcy cases filed below. By comparison, 1,637,700 non-prisoner civil suits were filed in the federal district courts and 132,439 appeals in civil cases in the courts of appeals – or approximately one appeal for every twelve cases filed.

Id. at 783-84 (footnotes omitted). Furthermore, in the rare instances in which appellate review *does* occur, it is highly circumscribed. Article III courts review bankruptcy courts' factual determinations only for

clear error. *See* Fed. R. Bankr. P. 8013. Consequently, appellate review is a "poor guarantor" of "'Article III' values" in bankruptcy cases. McKenzie, at 777.

In contrast, this Court has held that more Article III judicial involvement is necessary where a statute "displace[s] a traditional cause of action and affect[s] a pre-existing relationship based on" common law. The inability of the Article III courts to review factual determinations *de novo* is particularly prejudicial because bankruptcy law and procedure are often ill-suited to the adjudication of routine claims. Orderly resolution of an estate necessarily entails expedition that may be incompatible with the procedural regularities that traditionally attend private lawsuits. Extended discovery, motions practice to tease out the nuances of a claim, and trial by jury may be unavailable.

The inadequacy of bankruptcy courts for adjudicating private rights claims that are ancillary to the bankruptcy estate itself is a matter of significant interest to civil rights plaintiffs. *Amici*'s members have been party to, and will continue to be involved in, significant civil rights litigation in both state and federal courts. The occurrence of a bankruptcy event should not force civil rights plaintiffs to defend against counterclaims outside the Article III or state courts. The Ninth Circuit's decision, by separating the wheat (claims that are "part and parcel" of the claims allowance process) from the chaff (claims that are not "part and parcel" of the claims allowance process), strikes a common-sense and functional

distinction that will allow for a fast and efficient resolution of the bankruptcy process, while at the same time protecting the third parties' rights.

III. Granting The Relief Petitioner Seeks Would Violate Personal Injury Plaintiffs' Seventh Amendment Right To Trial By Jury

The Seventh Amendment provides, in pertinent part, that "where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States. . . ." U.S. Const. amend. VII.

Due to Seventh Amendment concerns, the 1984 Amendment to the U.S. Bankruptcy Code specifically exempted personal injury and wrongful death claims from core proceedings that bankruptcy courts could finally adjudicate. 28 U.S.C. § 157(b)(2)(B), (O). As a result, the law provides such claims must be tried in federal district court, if they are raised in a bankruptcy proceeding. 28 U.S.C. § 157(b)(5).

Petitioner, however, asserts that bankruptcy courts have jurisdiction to resolve *any* compulsory counterclaim by the debtor, even one asserted against a personal injury claim over which the bankruptcy court would otherwise lack jurisdiction. Further, Petitioner also urges that "personal injury" in Section 157(b)(2)(B) of the Code should be read narrowly to include only claims involving bodily injury. These

arguments are contrary to the plain meaning of the statutory text, this Court's decision in *Marathon*, and the principles embodied in the Seventh Amendment.[10]

A. Petitioners' Proposed Exception To The Personal Injury Claim Exclusion Is Not Supported By The Bankruptcy Code's Plain Language.

As noted above, 28 U.S.C. § 157(b)(2) specifically exempts personal injury claims from the definition of core proceedings that may be finally adjudicated by bankruptcy courts:

> (2) Core proceedings include, but are not limited to – . . .
>
> > (B) allowance or disallowance of claims against the estate . . . *but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate* for purposes of distribution in a case under title 11.
> >
> > . . .
> >
> > (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, *except*

[10] Consistent with its mission of preserving the right to trial by jury in civil cases, ABOTA's primary focus is on Part III of this Brief.

> *personal injury tort or wrongful death claims*.

28 U.S.C. § 157(b)(2) (emphasis added). In addition, Congress has specifically provided that personal injury claims may be tried *only* in district court:

> *The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court* in which the bankruptcy case is pending, or in the district court in the district in which the claim arose. . . .

28 U.S.C. § 157(b)(5) (emphasis added).

The purpose of these provisions is to protect plaintiffs' rights by preventing bankruptcy courts from trying personal injury tort actions. *In re Poole Funeral Chapel, Inc.,* 63 B.R. 527, 532 (Bankr. N.D. Ala. 1986). And, as the Seventh Circuit has explained, if a bankruptcy court lacks jurisdiction over a claim under Section 157(b)(5), then "[t]he whole case, including defenses of all kinds, goes off to the district judge or the state court." *Pettibone Corp. v. Easley*, 935 F.2d 120, 123 (7th Cir. 1991).

Congress not only excepted personal injury claims from core bankruptcy court jurisdiction and dictated that such claims be tried in district court, but also specifically preserved to such claimants their right to trial by jury. Section 1411 preserves "any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." 28 U.S.C.

§ 1411(a) (1998 & Supp. V 1993). Read together, these provisions not only ensure that personal injury claims are tried by an Article III judge, but that the claimant's right to trial by jury is protected as well. A personal injury claimant does not lose this right simply because he files a Proof of Claim. *See Germain v. Connecticut Nat'l Bank,* 988 F.2d 1323, 1327 (2nd Cir. 1993) (the presence of Section 157(b)(5)'s requirement that a personal injury claim be tried in district court "strongly suggests that these litigants are entitled to a jury trial in such an action even after a proof of claim has been filed in bankruptcy court").

Because of these clear provisions of the Code, bankruptcy courts lack jurisdiction over personal injury claims. *In re Arnold,* 407 B.R. 849, 851 (Bankr. M.D. N.C. 2009). Additionally, a personal injury claimant cannot consent to bankruptcy court jurisdiction by filing a proof of claim. *In re Gary Brew Enters. Ltd. v. Adams,* 198 B.R. 616, 620 (Bankr. S.D. Cal. 1996).

Notwithstanding these clear statutory restrictions, Petitioner argues that a debtor's compulsory counterclaim, resolution of which disposes of a claimant's personal injury claim, may be resolved by the bankruptcy court. That approach would deny personal injury claimants the very constitutional protections from bankruptcy court jurisdiction that Congress preserved in the Code and would deprive personal injury claimants of the right to trial by jury guaranteed by the Seventh Amendment.

The procedural history and facts are recited at length in the parties' briefs, but a brief overview is illustrative of the flaws in Petitioner's argument. In 1995, Vickie Lynn Marshall commenced probate proceedings in a Texas probate court concerning the estate of her deceased husband J. Howard Marshall, II ("J. Howard"), the father of E. Pierce Marshall ("Pierce"). She sought a declaration concerning the validity of J. Howard's estate plan, and alleged that Pierce had tortiously interfered with her property rights concerning J. Howard's assets. During those proceedings, Vickie's lawyers defamed Pierce, who filed suit in another Texas court against Vickie and her attorneys. Vickie subsequently filed for bankruptcy in California, and Pierce was compelled to dismiss her from his defamation suit. He filed a non-dischargeability complaint and proof of claim in the bankruptcy court concerning his defamation claim against Vickie.

Defamation is a personal injury claim under both federal and Texas law. *See In re Arnold*, 407 B.R. at 853; *In re Smith*, 389 B.R. 902, 908 (Bankr. D. Nev. 2008); *Newsom v. Brod,* 89 S.W.3d 732, 735 (Tex. App.-Houston [1st Dist.] 2002, no writ). Vickie filed a counterclaim asserting that Pierce interfered with an *inter vivos* gift that J. Howard intended to give her by facilitating illegitimate estate planning transactions for J. Howard. She argued that her counterclaim negated an element – falsity – of Pierce's defamation claim.

Petitioner argues that her counterclaim to Pierce's personal injury claim was a "core proceeding" under the Code because Section 157(b)(2)(C) mentions "counterclaims by the estate against persons filing claims against the estate." Thus, she suggests that this includes *any* counterclaim, including one asserted in response to a personal injury claim over which the bankruptcy court has no jurisdiction. If this position is accepted by this Court, the personal injury claim exception to bankruptcy court jurisdiction will be rendered meaningless, and the right to trial by jury guaranteed in the Seventh Amendment will have been ignored. Indeed, Petitioner's interpretation of Section 157(b)(2)(C) would vitiate a personal injury claimant's right to trial by jury in federal district court under Sections 157(2)(B), (O), and (5).

For example, because the personal injury claim *must* be tried in federal district court, Petitioner's interpretation would mean that the prosecution of the claim and defenses to it and prosecution of the counterclaim would be split between two courts, because – unlike the "counterclaim" provision – there is no provision that speaks to "defenses." Trying the counterclaim in a court different from the one in which the claim is prosecuted may lead to inconsistent results on the same facts. It is simply illogical to construe the Code to mean that Congress intended to allow a debtor to prosecute in bankruptcy court a counterclaim to a claim against the debtor that must also be brought in a district court. The interpretation urged by Petitioner violates the common mandate of

statutory construction: avoid an absurd result. *See, e.g., U.S. v. Katz,* 271 U.S. 354, 357 (1926) ("All laws are to be given a sensible construction.").

Further, if resolution of the counterclaim would defeat plaintiff's personal injury claim, its prosecution in bankruptcy court would permit, indirectly, that which Congress has clearly and directly disallowed. In the Code, Congress expressly exempted personal injury claims from bankruptcy court jurisdiction and mandated that the merits of such claims be decided in a federal district court. If the bankruptcy court is permitted, as urged by Petitioner, to decide a counterclaim that defeats an element of plaintiff's (here, Respondent's) personal injury claim, the plaintiff is denied its right to a jury trial on that claim in a district court. There is no justification for the position Petitioner would have this Court adopt, and the Seventh Amendment militates against it.

B. Allowing A Bankruptcy Court To Finally Adjudicate A Counterclaim To A Personal Injury Claim Runs Afoul Of *Marathon*

In *Marathon,* this Court held that a non-Article III bankruptcy court could not constitutionally exercise jurisdiction over a state law claim brought by the debtor against a non-consenting third party. Petitioner argues that *Marathon* is not implicated by a bankruptcy court's resolution of a state law counterclaim because the counterclaim defendant (i.e., plaintiff)

voluntarily submitted to bankruptcy court jurisdiction by filing a Proof of Claim.

A personal injury plaintiff does no such thing. By the express terms of the Code, a personal injury plaintiff who files a Proof of Claim *does not and cannot* submit to bankruptcy court jurisdiction and filing of the Proof of Claim does not make it a core proceeding. *See, e.g., In re Castlerock,* 781 F.2d 159, 163 (9th Cir. 1986) (creditor did not consent to bankruptcy court jurisdiction when, in response to counterclaim filed by debtor against creditor's Non-dischargeability Complaint, creditor filed defensive Proof of Claim); *Mohawk Indus., Inc. v. Robinson Indus., Inc.,* 46 B.R. 464, 465 (D.C. Mass. 1985) (defendant did not consent to bankruptcy court jurisdiction over debtor's claim by asserting affirmative defense). Unlike Petitioner's interpretation, limiting "counterclaims" to those in response to claims that are, themselves, within bankruptcy court subject matter jurisdiction properly avoids construing the statute in an unconstitutional manner. *Johnson v. Robison,* 415 U.S. 361, 366-67 (1974). The preferred interpretation of the Code – to the extent it requires interpretation – is one that does not deprive civil litigants of their right to trial by jury.

C. The Bankruptcy Code Language Does Not Support Interpreting "Personal Injury Claim" To Mean Only A Claim Arising From Bodily Injury

Petitioner also argues that a claim is not a personal injury claim unless it involves bodily injury. Congress, however, knew how to use the phrase "bodily injury" when that was intended. In Section 522(d)(11) of the Code, for example, Congress specifically used the phrase "personal *bodily* injury." (emphasis added). In addition, the majority of courts to address the issue have rejected this narrow reading of the term. *Compare Massey Energy Co. v. West Virginia Consumers for Justice,* 351 B.R. 348, 351 (E.D. Va. 2006) (adopting narrow, "bodily injury" only view); *Perino v. Cohen (In re Cohen),* 107 B.R. 453, 455 (S.D.N.Y. 1989) (same); *In re Atron Inc. of Michigan,* 172 B.R. 541, 545 (Bankr. W.D. Mich. 1994) (same); *Bertholet v. Harman,* 126 B.R. 413, 416 (Bankr. D.N.H. 1991) (same), *with Hansen v. Borough of Seaside Park (In re Hansen),* 164 B.R. 482, 485-86 (D.N.J. 1994) (adopting expansive view that personal injury includes broad category of private or civil wrongs or injuries); *In re Erickson,* 330 B.R. 346, 349 (Bankr. D. Conn. 2005) (same); *Rizzo v. Passialis (In re Passialis),* 292 B.R. 346, 352 (Bankr. N.D. Ill. 2003) (same); *Boyer v. Balanoff (In re Boyer),* 93 B.R. 313, 317 (Bankr. N.D.N.Y. 1988) (same); *Leathem v. Von Volkmar (In re Von Volkmar),* 218 B.R. 890, 894 (Bankr. N.D. Ill. 1998) (same); *In re Ice Cream Liquidation, Inc.,* 281 B.R. 154, 161 (Bankr. D. Conn. 2002)

(rejecting "bodily injury" view, but adopting middle ground that inquires whether claim has earmarks of financial, business or property tort claim); *Adelson v. Smith (In re Smith),* 389 B.R. 902, 908 (Bankr. D. Nev. 2008) (same).

Moreover, commercial practice recognizes that "personal injury" is much broader than "bodily injury." For example, the "personal injury" endorsement to a Commercial General Liability (CGL) insurance policy does not cover "bodily injury" at all. Rather, it covers such things as defamation, false arrest, malicious prosecution, trademark infringement, business piracy and other things much more akin to claims for civil rights violations and defamation than to a broken leg. *See, e.g., Delta Pride Catfish, Inc. v. Home Ins. Co.*, 697 So. 2d 400, 403 (Miss. 1997) (quoting personal injury endorsement policy language).

Petitioner's urged interpretation also ignores the fact that the "personal injury" exception embodies Congress's recognition that personal injury claimants stand in a different relationship with the bankruptcy debtor, because they did not voluntarily enter into dealings with the debtor, unlike a business creditor. *Adams v. Cumberland Farms, Inc.,* No. 95-1736, 1996 WL 228567, *3 (1st Cir. May 7, 1996). This principle is equally true whether the debtor has negligently injured the creditor or intentionally defamed him. If this Court were to accept Petitioner's argument, the personal injury exception will be significantly and unreasonably narrowed to only those plaintiffs who have suffered bodily harm. Other traditional "personal

injury" plaintiffs, including those whose civil rights have been violated, will lose their constitutional right to trial by jury. As a result, a substantial number of traditional personal injury plaintiffs will likely be required to prosecute their claims in bankruptcy courts that are ill-equipped to manage such trials and operate under equitable rules that differ markedly from the standardized rules of procedure and evidence followed by federal district courts and state courts.

Preservation of the Seventh Amendment right to trial by jury in civil cases demands rejection of the unwarranted construction sought by Petitioner.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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