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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 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 CENTER FOR THE RULE OF LAW AS *AMICUS CURIAE* SUPPORTING THE RESPONDENT

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BRIEF FOR THE CENTER FOR THE RULE OF LAW AS *AMICUS CURIAE* SUPPORTING THE RESPONDENT

INTEREST OF *AMICUS* [1]

The Center for the Rule of Law is a non-profit, educational institution of scholars and others interested in issues related to the rule of law. Issues of central concern to scholars at the Center include the preser-

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[1] The parties to this case have filed with the Clerk of this Court written letters giving blanket consent to the filing of amicus briefs. This brief was not authored in whole or in part by counsel for any party, and monetary support for the preparation and submission of this brief has been provided entirely by *amicus curiae*, its members, and its counsel.

vation of impartial judicial processes and constitutional rules protecting property and individual rights. Affiliated scholars at the Center include long-time teachers and authors in the fields of constitutional and administrative law who have strong interests in promoting adherence to constitutional requirements and to rules that preserve predictable determination of legal rights (including their commitment to the fora most likely to provide consistent interpretation and effectuation of those rights). These interests are substantially affected by questions before this Court respecting the constitutionality of assigning to federal officials lacking essential attributes of Article III judges the power to decide questions traditionally within the preserve of state court judges or Article III federal judges.

SUMMARY OF ARGUMENT

The questions before the Court in this case are whether non-Article III bankruptcy judges are authorized by law to render final, binding decisions on state law private right claims and, if so, whether that authorization violates Article III of the Constitution. *Amicus* does not take a position on the terms of the statute itself, but if the law is read to grant the authority sought by petitioner, it should be held to violate the requirements of Article III.

Article III plainly and clearly declares that the "judicial power of the United States" is vested in a judiciary that is protected by certain specific guarantees of independence, notably including life tenure and irreducible compensation. U.S. Const., Art. III, § 1. This commitment of national judicial power to judges enjoying Article III's protections is set out in terms that contain no exceptions.

It was understood at the time, however, that the national judicial power did not comprehend every exercise of adjudicatory authority by the government. Matters presented in connection with the governance of federally-controlled territories, questions of military discipline or application of the laws of war to enemy combatants, and decisions on public rights (primarily, disposition of public property or public funds) were recognized as lying outside the scope of the national judicial power. This understanding was consistent with conceptions of judicial power embraced by Blackstone and Locke and with accepted practice at the time of the Constitution's framing. It also is consistent with interpretations of Article III by this Court from the early nineteenth century forward.

While non-Article III federal officers handled many matters and made many decisions, they did not enjoy final decisional authority over matters within the scope of the judicial power assigned by Article III. As this Court explained in *Crowell v. Benson*, 285 U.S. 22, 51 (1932), for such matters other officers may act essentially as adjuncts to Article III judges, but the Constitution does not permit them to render decisions that are final (subject only to ordinary appellate review). *Id.* at 51-65. This understanding of Article III's limits helped shape the array of administrative arrangements that has been adopted over more than three-quarters of a century.

Although the scope of one category of matters that fall outside the judicial power – administration of public rights – has been the subject of debate, it long has been clear that the broad run of state law tort claims is squarely within the class of disputes that would be categorized as involving private, not public, rights. State tort actions between private parties do

not constitute claims by or against the government, do not present issues whose resolution necessarily is subject to revision by the political branches (as is the case with certain obligations respecting public lands or public finance), and do not derive from federal law. Thus, they do not fit any conception of public rights. Claims respecting these state-created private rights must be decided by Article III judges. *See*, *e.g.*, *Thomas v. Union Carbide Agricultural Prods. Co.,* 473 U.S. 568, 584 (1985); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982) (plurality op.); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450, 458 (1977).

Non-Article III officers have been found constitutionally authorized to render decisions on such private law claims only where, first, the decision is essential to (integrally intertwined with) disposition of another matter that falls outside the scope of the judicial power *and*, second, the decision of the non-Article III officer is appropriately confined to assure that it fits *Crowell*'s conception of the administrative determination as advisory to an Article III court rather than as a final decision. *See Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833, 852-53 (1986). Whether even this limited commitment of authority to non-Article III officers is constitutional may be questioned, but the risks of expanding this category – risks to the integrity of the constitutional structure protected by Article III – cannot.

Bankruptcy law traditionally has operated within the limitations imposed by Article III. From 1800 to 1978, non-Article III personnel functioned as adjuncts to Article III judges, with no final decisional authority independent of the district court. Although

minor aspects of these adjuncts' authority varied over time, it was only in 1978 that Congress changed that central feature of the bankruptcy regime. This effort to confer final decisional authority on non-Article III bankruptcy judges was held unconstitutional in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, *supra*. Subsequently, the law was reconstituted to again grant district court judges broad authority over bankruptcy judges' determinations. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.

The 1984 law, however, provides that the district courts can refer cases to the non-Article III bankruptcy judges. Bankruptcy judges then have authority to "hear and determine" certain "core" matters that become final decisions of the court, but they are only authorized to "submit proposed findings of fact and conclusions of law to the district court" for other, "non-core" matters. *See* 28 U.S.C. § 157(b), (c). Interpretation of this provision is disputed. However, reading the provision as granting bankruptcy judges final decisional authority over state law tort claims would conflict with the commands of Article III.

Precedents of this Court dealing with settings in which bankruptcy trustees sought to recover avoidable preferences from claimants against the bankrupt's estate – raising matters that are at the very heart of the bankruptcy process and also are necessarily implicated in the nature of the claims filed – do not support conferring decisional authority over the state law tort claims at issue here. *Katchen v. Landy*, 382 U.S. 323 (1966), and *Langenkamp v. Culp*, 498 U.S. 42 (1990), addressed the right to jury trial (an issue related to the constitutional question presented here). Both *Katchen* and *Langenkamp* involved claims

by individuals who allegedly had received avoidable preferences (through self-dealing) and who then sought distributions from the bankrupt's estate. In these circumstances, the distribution of assets in the bankrupt's estate depended directly on disposition of the claims those parties filed against the estate and the preference assertions against the claimants. Although the preference assertions could have been brought by the respective bankruptcy trustees as separate suits, resolving them together with the claims they offset fit the traditional scope of bankruptcy proceedings.

The facts of this case are very different from *Katchen* and *Langenkamp*. This case presents two private state law tort claims: neither concerns preference claims; neither depends directly on the other; and neither was essential to disposition of the assets of the bankrupt's estate to other claimants in the bankruptcy proceeding. Unlike the limited waiver of jury trials approved in those cases, expanding the class of determinations subject to decision by non-Article III bankruptcy judges to cover this case would greatly increase the number of settings in which private law rights would be subject to disposition outside of normal judicial proceedings. Indeed, it is difficult to imagine administrative programs that could not sweep a broad array of private law claims into their net. Such an expansion would threaten to unravel Article III's protections.

Opposition to a straight-forward application of Article III's requirements rests in part on an assumption that this would undermine the efficiency of the bankruptcy process, leading to increased cost and delay. *See*, *e.g.*, Brief for *Amicus Curiae* United States, at 16. Concerns for any impact on the

administrative efficiency of the bankruptcy process, however, are easily exaggerated. After all, the bankruptcy process has functioned for almost two centuries without placing authority over state law tort claims outside the Article III courts. In all events, even well-grounded efficiency concerns do not justify departing from constitutional command.

ARGUMENT

I. ARTICLE III'S REQUIREMENTS APPLY TO ALL FINAL DECISIONS WITHIN "THE JUDICIAL POWER" OF THE UNITED STATES

A. Article III's Language and Contemporary Understanding Are Clear and Unexceptional

The framers of the Constitution self-consciously created a system in which judicial power was vested in a judiciary insulated from the political branches. Article III, § 1 declares that "The judicial Power of the United States shall be vested in one supreme Court and such inferior courts as Congress may from time to time ordain and establish." It then commands that "The Judges, of both the supreme and inferior Courts, shall hold their Offices during good Behaviour" and shall receive compensation which cannot be diminished.

The protections of life tenure and irreducible pay were important considerations to the framers. Alexander Hamilton put the case bluntly in Federalist No. 78:

> The standard of good behavior for the continuation in office of the federal magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a

> monarchy, it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

THE FEDERALIST NO. 78, at 503 (Edward Meade Earle ed., 1937). This was not merely a throw-away line, but the focus of much of Hamilton's argument in favor of the Constitution's arrangements respecting the judicial branch. Hamilton trumpeted the independence that such arrangements produced as especially vital when courts might have the necessity to decide that the legislative branch had overstepped its constitutional bounds, *id*. at 505-508, but also found them advisable in securing the independence of judicial decisions in other matters as well, *id*. at 509-11; THE FEDERALIST NO. 79, at 512-13 (Edward Meade Earle ed., 1937).

Nothing in the text of Article III suggests any exceptions to these requirements. Nothing in the text suggests the possibility that Congress might constitutionally choose to create courts whose judges exercise some of the federal judicial power without the specific attributes of independence mentioned in the Article's first section. There is no qualifying language saying that these arrangements will obtain unless Congress (or Congress and the President in concert) deems a different structure necessary. Such a qualification would be wholly at odds with the evident meaning and purpose of the provisions in Article III.

This Court's decisions repeatedly have emphasized the deep historical roots of the provisions for life tenure and irreducible pay and the importance of

these protections to judicial independence. *See*, *e.g.*, *United States v. Will*, 449 U.S. 200, 217-21 (1980); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955); *O'Donoghue v. United States*, 289 U.S. 516, 531-34 (1933). Articulating the starting point for another inquiry into the consistency of the legal regime governing bankruptcy determinations with the mandates of Article III, Justice Brennan, writing for the plurality in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), declared:

> [O]ur Constitution unambiguously enunciates a fundamental principle–that the "judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.

Id. at 60. That again should be common ground for the inquiry at bar.

B. Academic Suggestions of Exceptions to Article III's Requirements Mischaracterize the Scope of Federal Judicial Power

In spite of the clear command of Article III respecting the institutional protections that must be extended to federal officials exercising the judicial power of the United States, there has been confusion – especially within the academic community – over the occasions in which adjudicatory functions have been, and constitutionally may be, committed to other officials. Several legal scholars have concluded that Article III must be read to include qualifications because a literal application of the Constitution

would conflict with practices they believe should not be disturbed.

Professor Pfander, for example, announced that, "despite the importance of these provisions to the framing of the Constitution and their centrality to founding-era notions of judicial independence and the separation of powers, Congress has often assigned disputes that appear to fall within the scope of the federal judicial power to . . . tribunals whose judges lack salary and tenure protections." James Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 Harv. L. Rev. 643, 646 (2004). He sums up the academic literature trying to make sense of the use of non-Article III tribunals by asserting that "[n]early everyone agrees that Article III defies literal interpretation." *Id*.

Professor Fallon (who is among the relatively small number of authorities cited by Pfander in support of that proposition)[2] also starts with acceptance of the clarity of Article III's commands before declaring that they cannot be taken at face value:

> By nearly universal consensus, the most plausible construction of [the Constitution's] language would hold that if Congress creates any adjudicative bodies at all, it must grant them the protections of judicial independence that are contemplated by article III. . . . Today, the familiar roles of legislative courts and especially of administrative agencies render a return to 'article III literalism' virtually unthinkable.

[2] Curiously, Professor Pfander cites more authorities who *disagree* with the conclusion he says "[n]early everyone agrees" with than who are in accord with it. *See* 118 Harv. L. Rev. at 646-47 nn. 2-10.

Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 916-17 (1988) (citations omitted).

What makes the notion of following the Constitution's commands as plainly written "unthinkable" is the array of settings in which non-Article III officers have been granted authority to decide matters that might in other circumstances have come before courts constituted in conformity to Article III. As Professors Fallon and Pfander point out, Congress, from early in the republic's history, has assigned executive officials, non-Article III tribunals, and administrative agencies tasks that look very similar to adjudication and that, if put in dispute in a "case or controversy," might indeed fall within the judicial power of the United States.

That particular decisions *might* be within the judicial power in other circumstances, however, does not mean that they *are* within that power when assigned to others nor does it mean that Congress is free to decide when to assign a matter to a non-Article III officer. The conjectures of scholars who write in support of diluting Article III's clear meaning depend critically on acceptance of one or both of those conclusions.

The historical record supports a very different conclusion: that non-Article III officers traditionally have been asked to render judgments either that are not on matters within the judicial power of the United States or that do not have finality until endorsed by judges protected by the special guarantees set forth in Article III. This Court's decisions are overwhelmingly in keeping with that conclusion.

C. The Federal Judicial Power Does Not Extend to Matters of Local, Territorial or Similar Non-National Law Enforcement, of Military Justice, or of Public Rights

The plurality opinion in *Marathon* accurately summarized this Court's prior decisions respecting appropriate delegation of adjudicatory authority to decision-makers who lack Article III's protections. Three headings make up this list.

First, there are determinations of matters that lie outside the national sphere – and, hence, outside the judicial power of the United States – because they are local disputes over which the Congress exercises authority in the nature of a lesser sovereign, on par with a state or local government, rather than in its capacity as legislature for the national government. That was the rationale of Chief Justice Marshall in *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828), with respect to territorial courts' non-Article III status. The same reasoning supported decision that local matters respecting the District of Columbia could be tried in courts set up in the nature of state or local courts, though under Congress' authority to regulate affairs of the District. *Palmore v. United States*, 411 U.S. 389, 406-10 (1973). Similarly, the disposition of tribal matters has been held to be outside the purview of the federal judicial power, as Native American tribes are independently sovereign. *See Wallace v. Adams*, 204 U.S. 415, 422 (1907).

In all of these instances, a claim involving federal law could be presented and disputed such that federal appellate jurisdiction could attach – for example, to review a question of jurisdiction. *See*, *e.g.*, *In re Moran*, 203 U.S. 96 (1906). However, an initial

determination of claims based on law applicable only in particular enclaves or under the law of another sovereign – not under national, federal law or under the grant of federal diversity jurisdiction over conflicts between residents of different states – would not be within the judicial power of the United States. This view is consistent with the way eighteenth and nineteenth century jurists and scholars thought about the scope of a jurisdiction's judicial power. *See*, *e.g.*, Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 575-77 (2007); Craig Stern, *What's a Constitution Among Friends? – Unbalancing Article III*, 146 U. Pa. L. Rev. 1043, 1068 (1998).

Second, military tribunals such as courts-martial or panels for trying foreign enemy combatants under the laws of war were not considered to be within the judicial power of the United States. *See Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1857). While there is debate today about whether these proceedings should be thought to be subject principally to the executive's authority over the military or the legislature's, the proceedings, though adjudicatory, were not thought to be within the realm of law committed to national courts and Article III judges. *See*, *e.g.*, *Johnson v. Eisentrager*, 339 U.S. 763, 786-87 (1950); *Ex parte Quirin*, 317 U.S. 1, 40-41 (1942); Curtis Bradley & Jack Goldsmith, *The Constitutional Validity of Military Commissions*, 5 Green Bag 2d 249 (2002).

Third, matters pertaining to the disposition of public property or public funds were thought to be outside the scope of judicial power. Two reasons supported placing these claims outside Article III's reach. One was that final resolution of these tended to be subject to discretionary authority in the politi-

cal branches regarding ultimate payment or disposition of property; that removed them from matters that the courts could finally resolve, making the judicial decision in some sense merely advisory, hence, not properly matters for strictly judicial disposition. *See*, *e.g.*, *Muskrat v. United States*, 219 U.S. 346, 352-62 (1911); *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1865); *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52 (1851). The other was that these claims did not involve matters of private right but instead presented claims by or against the public. Those matters then were viewed as not within the ambit of the judicial authority, either following the traditional definition of what matters are judicial or as matters withdrawn from that sphere by virtue of sovereign immunity. *See*, *e.g.*, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, *supra*, at 69 (plurality op.); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450, 457-58 (1977); *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 283 (1856); Nelson, *supra* at 577-89. This is the category of cases referred to in *Marathon*, as it has been since this Court's decision in *Murray's Lessee*, as involving "public rights."

Delineation of the class of cases properly referred to under this heading has been a matter of some debate. *See*, *e.g.*, *Granfinanciera, S.A. v. Norberg*, 492 U.S. 33, 66-70 (1989) (Scalia, J., concurring); *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851-56 (1986); *Thomas v. Union Carbide Agricultural Prods. Co.,* 473 U.S. 568, 587-89 (1985); *id*. at 596-99 (Brennan, J., concurring). The scope of this category is addressed further below.

What should be clear is that the public rights cases, like cases in the other categories set forth above, describe matters that are not within the federal judicial power. That does not mean that no case could be designed to present a conflict regarding the general subject in a manner that could be within the judicial power. *See*, *e.g.*, *Murray's Lessee*, *supra* at 284 ("matters [] involving public rights . . . may be presented in such form that the judicial power is capable of acting on them"). As Professor Nelson explains particularly clearly, however, under the framework of rights understood by jurists and theorists whose work influenced the framing of the Constitution, most of all Blackstone and Locke, public rights were within the peculiar province of the political branches of government and were not judicially cognizable in the same way as private rights. *See* Nelson, *supra* at 566-72. *See also* Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 Geo. L.J. 1015, 1020-22 (2006).

Recognition of occasions in which non-Article III officers have been given decisional authority over matters that lie outside the ambit of national judicial power (as understood at the time of the Constitution's framing and as repeatedly reaffirmed since then) does not, thus, establish a list of *exceptions* to Article III. Instead, it is consistent with the Constitution's vesting of the national judicial power – and *only* that power – in the Article III courts.[3] Consideration of the three categories referenced in *Marathon* helps define the limits of the power assigned in Article III,

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[3] To be sure, state courts were thought capable of exercising authority over questions that might be contested in the federal courts. The role of state courts is discussed *infra*.

just as this Court's exposition of the meaning of the terms "case or controversy" elsewhere does.

Academic criticism of this Court's treatment of these categories as failing to establish a coherent theory of judicial power, *see*, *e.g.*, Fallon, *supra* at 948, misses the point. Although there may be some question about the outer contours of any category, the categories describe matters that were understood not to be within the scope of national judicial power in the first place. That should be a sufficiently coherent basis for judicial decisions. Unlike academic writing, this Court's task is not to establish an over-arching theory of judicial power, but to implement constitutional command, a task that fits well with the Court's decisions respecting Article III's scope.

D. Administrative Agencies' Authority Traditionally Has Not Encompassed Final Decision on Matters within the Judicial Power

Although scholarly commentary has evinced concern that a straight-forward interpretation of Article III would invalidate large swaths of the now firmly established administrative state, virtually none of the decisions committed to administrative officials (who do not enjoy Article III's protections) is at risk. Vast stretches of the landscape associated with the administrative state fall into one of three categories that do not call the terms of Article III into question.

First, the overwhelming majority of administrative actions are not adjudicatory in nature. Officials collect fees, process requests, forward information, buy goods and services, keep accounts, contract for buildings and maintain them, analyze data, conduct

research, support personnel (military and civilian) at home and abroad, and do much more that defies description as adjudication.

Second, decisions that are adjudicatory in some sense primarily (indeed, almost entirely) consist of determinations on matters such as benefits, licenses, taxes, and other matters falling squarely within the category of public rights issues that lie outside the scope of the judicial power. *See, e.g.*, Ronald A. Cass, *Allocation of Authority within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 B.U. L. Rev. 1, 11 n. 50 (1986) (Social Security benefits adjudications comprise 95 percent of formal administrative adjudications in federal government).

Third, insofar as the issues decided by administrators appear to fall within the realm of the judicial power, those decisions are not final in the same sense as a judicial determination until confirmed by a judge appointed in conformity with Article III. The classic exposition is *Crowell v. Benson*, 285 U.S. 22 (1932), which found that lack of finality on matters within the judicial power (as well as on "jurisdictional facts" critical to determination whether a matter *is* within the judicial power) preserved the constitutional legitimacy of an administrative scheme. *Id*. at 51-65 (approving law respecting employment-related compensation of longshoremen). *Crowell* analogized the role of the agency there to that of a special master whose determinations, even where there is some weight given to them, "are essentially of an advisory nature," assisting the Article III court that finally decides matters. *Id*. at 51.

This Court repeatedly has invoked *Crowell*'s reasoning in deciding whether other statutory arrangements provide constitutionally sufficient

review by an Article III judge of critical determinations respecting private rights. *See*, *e.g.*, *United States v. Raddatz*, 447 U.S. 667, 682-83 (1980) (upholding use of federal magistrates for non-final dispositions of criminal cases); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, *supra*¸ 458 U.S. at 77-86 (striking down commitment of final authority over bankruptcy determinations to non-Article III judges). Although *Crowell*'s distinction between "jurisdictional facts" and other facts has proved elusive, this Court has continued to invoke Chief Justice Hughes' basic insight that non-Article III tribunals can provide a first level determination but not a final decision on matters within the judicial power of the United States. *See*, *e.g.*, *Commodities Futures Trading Comm'n v. Schor*, *supra*, 478 U.S. at 852-53; *Thomas v. Union Carbide Agricultural Prods. Co.*, *supra*, 473 U.S. at 586-87; *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, *supra*, 430 U.S. at 450.

II. FINAL DECISION OF STATE LAW TORT CLAIMS CANNOT BE COMMITTED TO NON-ARTICLE III FEDERAL OFFICERS

A. State Law Tort Claims Are Private Rights Subject to Article III's Mandates

The dispute in this case involves state law tort claims that are quintessential private rights. Although they have been swept into the ambit of a bankruptcy proceeding, the claims at issue are state law tort claims. Indeed, in this case, the matter in dispute is a state law tort claim (tortious interference with an expectancy of a gift) purportedly asserted as a counterclaim to another state law tort claim (defa-

mation).[4] In other words, this case presents the question of whether Article III can be displaced in adjudicating rights among private parties where one private state law right is asserted in opposition to another private state law right.

State law tort claims, of course, can be heard by state officials who do not share Article III's protections. Nothing in the Constitution purports to impose those same requirements on state judges as it does on judges exercising the judicial power of the United States.

The national judicial power, however, expressly extends to such claims when they arise between citizens of different states. U.S. Const., Art. III, § 2. In that circumstance, at the very least, there can be no thought that controversies rooted in state private law claims are assignable for final decision by non-Article III officers, "subject only to ordinary appellate review." *See Thomas v. Union Carbide Agricultural Prods.*, *supra*, 473 U.S. at 584 (describing holding in *Marathon*, *supra*). As this Court said in *Atlas Roofing*, *supra*:

> Our prior cases support administrative fact-finding in only those situations involving "public rights," *e.g.,* where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well

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[4] The degree to which the state law tort claims were actually before the bankruptcy court is a matter of dispute. *See Marshall v. Stern (In re Marshall)*, 600 F.3d 1037, 1044 (9th Cir. 2010); *id*. at 1065 (Kleinfeld, J., concurring). Under the reading most favorable to petitioner, the case presents two competing state law private rights claims.

> as a vast range of other cases, are not at all implicated.

430 U.S. at 458. The Court also stated that "[i]n cases which do involve only 'private rights,' this Court has accepted factfinding by an administrative agency, without intervention by a jury, only as an adjunct to an Art. III court." *Id*. at 450 n. 7.

This does not mean that there can be *no* involvement of non-Article III decision-makers in adjudication of private rights. Notably, *Schor* rejected the contention that federalism concerns respecting the division of state and national powers (as opposed to considerations relevant to the separation of powers within the national government) "absolutely preclude any adjudication of state law claims" by non-Article III federal officers. *Commodities Futures Trading Comm'n v. Schor*, *supra*, 478 U.S. at 858. That rejection was based in part on the perceived misfit between the theory and the assertion and in part on the Court's view that there was *some* scope for determinations of private rights by non-Article III officers.

Although *Schor* departed from prior decisions in its description of the category of public rights, *see Granfinanciera, S.A. v. Norberg*, *supra*, 492 U.S. at 66-70 (Scalia, J., concurring), the Court's opinion emphasized that non-Article III adjudication of private, state law claims was constitutional only because it had certain characteristics that brought it within *Crowell*'s ambit of adjunct, not final, determination:

> The [statutory] scheme . . . hews closely to the agency model approved by the Court in *Crowell v. Benson*. The CFTC, like the agency in *Crowell,* deals only with a "particularized area of law,"

> whereas the jurisdiction of the bankruptcy courts found unconstitutional in *Northern Pipeline* extended to broadly "all civil proceedings arising under title 11 or arising in or *related to* cases under title 11." . . . CFTC orders, like those of the agency in *Crowell,* but unlike those of the bankruptcy courts under the 1978 Act, are enforceable only by order of the district court. CFTC orders are also reviewed under the same "weight of the evidence" standard sustained in *Crowell,* rather than the more deferential standard found lacking in *Northern Pipeline.* The legal rulings of the CFTC, like the legal determinations of the agency in *Crowell,* are subject to *de novo* review. Finally, the CFTC, unlike the bankruptcy courts under the 1978 Act, does not exercise "all ordinary powers of district courts" . . .

478 U.S. at 852-53 (citations omitted).

Schor did expand the scope of authority for non-Article III officers, perhaps beyond what best fits constitutional text and historical understanding, *see*, *e.g.*, Fallon, *supra*, at 917, but the Court nonetheless took pains to circumscribe the decision. The Court's opinion makes clear that it would not approve even initial decision of private right state law claims except in limited circumstances and would not approve any final decision of a private state law claim by non-Article III officers.

The Court underscored that point in *Granfinanciera v. Norberg*, *supra*, in deciding the closely related question of the consistency of an adjudicative process with Seventh Amendment jury-trial rights. *Id.*, 492 U.S. at 53. The Court cautioned that decisions approving fact-finding by an administrative agency

as an adjunct to an Article III court "should not be taken to mean that Congress may assign at least the initial factfinding in all cases involving controversies entirely between private parties to administrative agencies or other tribunals not involving juries, so long as they are established as adjuncts to Article III courts." *Id*., 492 U.S. at 55 n. 10. Quoting from the plurality in *Marathon*, the Court reiterated that private law claims subject to suits at law, equity, or admiralty "lie at the 'protected core' of Article III judicial power." 492 U.S. at 56.

This Court's decisions clearly require judges who enjoy Article III's protections, not other federal officers, to render final judgment on state private law claims. Because state law tort claims of the sort at issue here lie squarely within that set of matters, their disposition must be confided to Article III judges.

B. Bankruptcy Law Historically Has Committed Final Decision of Private Law Claims to Article III Judges

Nothing in the nature of bankruptcy law, in the historical structure of bankruptcy adjudications, or in this Court's precedents regarding bankruptcy law alters the analysis above.

Bankruptcy adjudications historically have proceeded as matters within the full authority of Article III judges, with other officers serving only as adjuncts to the judges. *See*, *e.g.*, Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 Hastings L.J. 233, 236-40 (2008). The officers – at various times labeled commissioners, registers, referees, or judges – performed a variety of tasks, both ministerial and judgmental, but they

were never given final authority to decide matters of private right. *Id*. The bankruptcy officers expressly served as adjuncts to district court judges who are appointed in conformity to Article III, and the officers' decisions were always subject to review by the district court. *See* Act of July 1, 1898, ch. 541, § 38, 30 Stat. 544, 555. This pattern obtained over repeated iterations of bankruptcy law spanning more than 175 years. It was broken only by the 1978 revision of the bankruptcy law that was declared unconstitutional in *Marathon*, *supra*.

The assignment to non-Article III bankruptcy officers of final adjudicatory authority over private rights embedded in state tort law would be at odds not only with the text of the Constitution and the history of bankruptcy law – it also would be at odds with the decisions of this Court respecting the ambit of Article III authority, both in cases directly concerning that question and in disposition of Seventh Amendment issues on analogous grounds. *See Granfinanciera v. Norberg*, *supra*, at 55-56; *Commodities Futures Trading Comm'n v. Schor*, *supra*, 478 U.S. at 852-53; *Thomas v. Union Carbide Agricultural Prods. Co.*, *supra*, 473 U.S. at 586-87; *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, *supra*, 430 U.S. at 450.

The Solicitor General's *amicus* brief states that interim rules adopted by the various circuits of the court of appeals, all based on the rule suggested by the Director of the Administrative Office of the Courts following *Marathon*, were "uniformly upheld against constitutional challenge by the court of appeals." Brief for *Amicus Curiae* United States, at 7. Although accurate if read narrowly, that statement cannot support inference that the court of appeals

uniformly has resolved (and rejected) the constitutional challenge presented in this case.

Virtually all of the cases cited by the Solicitor General focus on matters such as the permissibility of judicial adoption of a bankruptcy rule or the existence of jurisdiction in the district court following enactment of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, and preceding enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. *See*, *e.g.*, *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 700 F.2d 214, 215 (5th Cir.) (*per curiam*), *cert. denied*, 463 U.S. 1208 (1983) (relying on 27 B.R. 231 (N.D. Tex. 1983)); *White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254, 263 (6th Cir. 1983); *Stewart v. Stewart*, 741 F.2d 127, 131-32 (7th Cir. 1984). They generally do not address the constitutionality of a bankruptcy judge rendering final decision on private rights, the issues that are presented in the instant case.

Indeed, to the extent the cases cited by the Solicitor General do look to the matters at hand, the circuit courts mainly suggested that the rule was constitutional only insofar as it reverted to making the bankruptcy judge an adjunct to the Article III district court judge and did not grant final authority to the bankruptcy judge. *See*, *e.g.*, *Salomon v. Kaiser*, 722 F.2d 1574, 1580 (2d Cir. 1983) ("'even in traditional bankruptcy cases, the district courts may hold a hearing and receive evidence in cases first adjudicated by the bankruptcy court. The district court need give no deference to the bankruptcy judge's factual findings or interpretations of the law,'" quoting *White Motor Corp. v. Citibank*, *supra*); *White Motor Corp. v. Citibank*, *supra*, at 263 ("The interim

rule does not violate the Constitution because the district courts retain primary jurisdiction over all bankruptcy proceedings. . . . The district courts retain control and primary responsibility for the conduct of bankruptcy proceedings."); *Stewart v. Stewart*, *supra*, at 132 ("The Interim Rule adopted by the district courts establishes a system of bankruptcy adjudication whereby the bankruptcy judges act as adjuncts of the Article III district courts. . . . The bankruptcy judges act as subsidiaries to and only in aid of the district courts by carrying on preliminary procedures and proposing decisions for adoption by the district court. The ultimate adjudicatory determination is reserved to the district judge. The Interim Rule sufficiently ensures that Article III powers are exercised by Article III judges . . ." (citations omitted)).

Far from asserting the constitutional propriety of conferring final decisional authority on bankruptcy judges with respect to private rights created by state law, the cases cited by the Solicitor General propose just the opposite: that the interim rule, and by extension the 1984 law, would be constitutional only insofar as they resist precisely the assignment of authority advocated by petitioner in this case. Subsequent court of appeals decisions likewise have concluded that conferring final decisional authority on bankruptcy judges, even on core bankruptcy issues, would violate Article III for any matter that would have been subject to a suit at law. *See*, *e.g.*, *Germain v. Connecticut National Bank*, 988 F.2d 1323, 1328-32 (2d Cir. 1993); *In re Clay*, 35 F.2d 190, 192-95 (5th Cir. 1994); *Piombo Corp.v. Castlerock Properties (In re Castelrock Properties)*, 781 F.2d 159, 160 (9th Cir. 1986); *In re Parklane/Atlanta Joint Venture*, 927 F.2d 532 (11th Cir. 1991). The Fifth Circuit's opinion in *Clay* typifies these decisions in adding that devolu-

tion of authority to a non-Article III bankruptcy judge cannot be saved by asserting that bankruptcy proceedings are at their core matters of "public right." *In re Clay*, *supra*, at 194 ("[B]ankruptcy law . . . provides process, procedures, and a forum, but does not (as would a public regulatory scheme) implement policy choices beyond the confines of the cases brought to it.").

In short, to the extent decisions of the court of appeals are thought to provide helpful guidance on this matter, they support the conclusion that non-Article III bankruptcy judges cannot constitutionally be given final decisional authority respecting state private law claims.

C. Filing Non-dischargeability Petition and Proof of Claim Did Not Constitute Consent to Decision of State Law Tort Claims by Bankruptcy Judge

The actions at issue in this case do not amount to either consent to the exercise of constitutionally suspect authority over disposition of a private state law tort claim or waiver of objections to such an exercise of authority. The facts in this case differ substantially from cases in which either consent or waiver may have played a role in the Court's disposition of contentions respecting a process' conformity to related constitutional requirements. For example, in *Commodities Futures Trading Comm'n v. Schor*, *supra*, the complaint about the administrative agency's exercise of authority over a state law claim was advanced by William Schor, the party who had invoked the agency's authority in the first instance, who had resisted trial of the state law claim in district court (asserting that the administrative agency could handle the matter full well), and whose

insistence on the administrative forum had led to the voluntary dismissal of the suit in favor of a counterclaim in the administrative process. *See id.*, at 837-38.

Katchen v. Landy, 382 U.S. 323 (1966), began when Louis Katchen filed a claim in a bankruptcy proceeding (having already distributed to himself assets of the soon-to-be-bankrupt business), and the trustee in bankruptcy responded by asserting that Katchen had received an avoidable preference from the bankrupt enterprise. In that context, the Court found that Katchen did not have a right to a jury trial, even though he would have if he had merely resisted an independent effort by the trustee to collect the preference. *Id*. at 335-40. As the Court said, the essence of the equity jurisdiction of the bankruptcy court was the allowance and disallowance of claims, and the avoidable preference question was central to that process: the bankruptcy court could not decide if Katchen had a right to share in the estate until it decided the preference issue. *Katchen*, however, does not address (much less dispose of) the Article III issue presented in this case, nor does it establish that every claim filed in a bankruptcy action constitutes consent to the use of non-Article III proceedings for disposition of all related issues.

This Court followed *Katchen* in *Langenkamp v. Culp*, 498 U.S. 42 (1990), another case in which a bankruptcy claimant assertedly had received an avoidable preference which the trustee sought to recover. Again, the Court decided that filing the claim caused Culp and associated claimants to forfeit the right to a jury trial, though, as in *Katchen*, they would have retained the right had they simply resisted a legal action by trustee Langenkamp to

collect amounts received. As in *Katchen*, the claims and counterclaims in *Langenkamp* went to the heart of the bankruptcy processes of determining and distributing assets of the bankrupt's estate and the party contesting application of bankruptcy procedures had plainly sought to invoke just those procedures to adjudicate a specific monetary claim against the estate. In neither case were the claims and counterclaims presentable as private state law rights independent of the bankruptcy.

This case cannot be resolved on the basis of decisions such as *Katchen* and *Langenkamp* concerning adjudication of avoidable preference issues. Whether Pierce Marshall's filings of a non-dischargeability complaint and subsequently a proof of claim with the bankruptcy court constituted in some respect the filing of a claim in the bankruptcy action – an issue on which the judges of the court of appeals disagreed, *see Marshall v. Stern (In re Marshall)*, *supra*, 600 F.3d at 1044; *id*. at 1065-67 (Kleinfeld, J., concurring) – those filings were significantly different from the claims filings in *Katchen* and *Langenkamp*. Marshall's filings did not specify an amount sought, claimed no preference (and he had received no preference), and did not affect other claimants' rights. *See id*. at 1045 (bankruptcy court, pursuant to settlement between Vickie Lynn Marshall and creditors, had discharged Vickie Lynn Marshall's other pre-existing debts prior to trial and decision on adversary issues between her and Pierce Marshall); *id*. at 1068 (Kleinfeld, J., concurring). The majority of the panel below concluded that the non-dischargeability petition and proof of claim constituted the assertion of a claim in the bankruptcy proceeding. *Id*. at 1044-45. In contrast, Judge Kleinfeld, concurring, saw the complaint merely as an effort to obtain a

ruling that any future defamation claim would be unaffected by the bankruptcy process, with the proof of claim filed as a measure that was legally necessary in support of the complaint (to preserve the contemplated state law claim). *Id*. at 1068 (Kleinfeld, J., concurring).

However the filings are characterized, two things should be clear. First, the filings by Pierce Marshall were a far cry from the claims asserted by Louis Katchen or the Culps in relation to the central functions of bankruptcy. *Cf. Katchen v. Landy*, *supra*. Unlike Mr. Katchen, resolution of Pierce Marshall's filings did not affect the returns available to anyone in the bankruptcy proceeding apart from the one person who was the potential defendant in the contemplated defamation action, Vickie Lynn Marshall. *Id.* at 1045 ("[T]he bankruptcy court discharged Vickie Lynn Marshall's pre-existing debts and caused the property remaining in the bankruptcy estate to be revested in her" before deciding on the state law claims.).

Second, those filings should not be treated as implicitly consenting to the authority of the bankruptcy judge to enter a final decision on state law private rights claims or waiving objections to the constitutionality of such a decision. In sharp contrast to Mr. Schor, for instance, Pierce clearly objected to the consideration and decision of substantive matters regarding the state law claims – including both the defamation claim and the tortious interference claim – by the bankruptcy judge. *See Marshall v. Stern (In re Marshall)*, *supra*, 600 F.3d at 1045; *id*. at 1065-67 (Kleinfeld, J., concurring).

If filing a proof of claim is necessary to preserve rights in the event of an eventual recovery on state

law claims in another court, construing that filing as consent to whatever procedure – even one that violates constitutional strictures – is used in the bankruptcy proceeding substitutes bootstrapping for analysis. *See*, *e.g.*, *Germain v. Connecticut National Bank*, *supra*, 988 F.2d at 1330 ("[N]either precedent nor logic supports the proposition that either the creditor or the debtor automatically waives all right to a jury trial whenever a proof of claim is filed."). If the counterclaim filed in response to the proof of claim is necessary to preserve correlative rights (though in this case, that is not clearly so), it takes a compound form of bootstrapping to construe the initial filing as agreement to having whatever state law private rights claims are presented in opposition finally determined by the bankruptcy court. The metaphysical contortions needed to achieve "consent" in this context are more redolent of theology than of law.

Ultimately, the threat of expanding the concept of consent or waiver to cover this case is an unraveling of Article III's protections. It is difficult to construct scenarios in which there could not be a similar contention of waiver once a party is drawn into an administrative process, despite the Hobson's choice presented to those who must either participate in the process or forfeit valuable claims.

D. Constitutional Command Cannot Be Subordinated to Interests in Efficient Process

As a rule, this Court construes statutes whenever possible to avoid constitutional invalidity. *See*, *e.g.*, *United States ex rel. Attorney General v. Delaware & Hudson Co.,* 213 U.S. 366, 408 (1909) ("where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions

arise and by the other of which such questions are avoided, our duty is to adopt the latter."). While that is not always possible, consistent with a fair reading of the text, it certainly is the better choice when the text leaves that option open.

An opposed set of arguments supports interpreting statutory provisions in ways that might conflict with constitutional command but that enhances or preserves other values, such as efficient administration of the law. *See*, *e.g.*, Brief for *Amicus Curiae* United States, at 16. In this case, the Court has been urged to allow a non-Article III bankruptcy judge to render final decision on a state law tort claim (a quintessential claim of private right) in order to "avoid significant delay and inefficiency." *Id*.

It is far from evident that a decision hewing to the established understanding and clear textual command of Article III would engender the costs that the Solicitor General fears. (Rejecting a similar argument, the court of appeals noted that those opposed to strengthening district court authority in bankruptcy "trumpet efficiency, but we hear a kazoo, at best." *In re Clay*, *supra*, 35 F.3d at 195.) A variety of mechanisms is available to permit bankruptcy judges to function as adjuncts to the district courts without creating administrative quagmires. It is, however, up to the political branches, not this Court, to select the best mechanism.

In all events, the cost of finding alternatives that fit more readily within the strictures of the Constitution is not a consideration that should guide this Court. As the Court has said in another context:

> [T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating

> functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives – or the hallmarks – of democratic government . . .

INS v. Chadha, 462 U.S. 919, 944 (1983).

Many of the Constitution's provisions – two separate houses of Congress selected from different constituencies for different terms, the Electoral College, protections of individuals' rights against self-incrimination and to trial by jury, for examples – are designed not to promote efficiency, narrowly conceived, but to serve broader goals the Framers deemed worthy of the added cost and inconvenience. *See*, *e.g.*, THE FEDERALIST NO. 51, at 337 (Edward Meade Earle ed., 1937) (Madison) ("A dependence on the people is, no doubt, the primary control on government; but experience has taught mankind the necessity of auxiliary precautions."); *id.*, NO. 78, at 505 (Hamilton). If the political branches are free to elide constitutional commands whenever that seems more efficient, there will be no limitation to the revisions that might be made to our most basic governing charter.

In Justice Brennan's words, the values protected by "Article III are too central to our constitutional scheme to risk their incremental erosion." *Commodities Futures Trading Comm'n v. Schor*, *supra*, 478 U.S. at 861 (Brennan, J., dissenting). Permitting non-Article III bankruptcy judges to exercise final decisional authority over state law tort claims on matters of private right – matters within the core of the judicial power vested in our Article III judges – would put the Court on just that risky path.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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