NO. _____

In the Supreme Court of the United States

IN RE: EVETTE NICOLE REED,
Debtor

ROSS HARRY BRIGGS,
Petitioner,
v.

THE HONORABLE CHARLES E. RENDLEN, III,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal claim pending before an Article I bankruptcy judge and intertwined with the bankruptcy but resolvable outside the claims allowance process and not related to the restructuring of creditor-debtor relations must be afforded the protections of Article III and resolved finally by an Article III judge.

PARTIES TO THE PROCEEDING

The parties to this proceeding are Ross H. Briggs, Petitioner and the Honorable Charles E. Rendlen, III, United States Bankruptcy Judge for the Eastern District of Missouri, Respondent.

The following were also parties below, but are not parties to this appeal: (1) Critique Services, LLC, a privately held limited liability company; (2) Beverly Holmes Diltz; (3) James Robinson; (4) the debtors in the eight underlying bankruptcy cases, Evette Nicole Reed; Pauline A. Brady; Lawanda Lanae Long; Marshall Beard; Darrell Moore; Nina Lynne Hogan; Jovon Neosha Stewart; and Angelique Shields; (5) the trustees representing the various debtors, Seth A. Albin; E. Rebecca Case; David A. Sosne, Robert Blackwell; Steven Neal Beck; Bryan Voss; Kristin J. Conwell; and Tom K. O'Loughlin; and (6) Daniel J. Casamatta as the Acting United States Trustee (Region 13), Office of the United States Trustee.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioner Ross Harry Briggs respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 888 F.3d 930. The opinion of United States District Court for the Eastern District of Missouri is available at 2017 WL 44645. The Memorandum Opinion and Judgment of the Bankruptcy Court are unreported.

JURISDICTION

The Judgment of the Eighth Circuit was entered on April 25, 2018. Petitioner filed a timely petition for rehearing that was denied on June 1, 2018. This Petition for Writ of Certiorari was timely filed, and this Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

ARTICLE III of the United States Constitution provides:

> **Section 1**
>
> 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. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a

Compensation, which shall not be diminished during their Continuance in Office.

Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Statutory Provisions

11 U.S.C. §157(a) provides:

> Each district court may provide that any or all cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11 shall be referred to the bankruptcy judges for the district.

11 U.S.C. §157(b)(1) provides:

> Bankruptcy judges may hear and determine cases under title 11 and all core proceedings arising under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

11 U.S.C. §329 provides:

> (a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not the attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.
>
> (b) If such compensation exceeds the reasonable value of such services, the court may cancel any such agreement, or

order the return of any such payment, to the extent excessive, to—

(1) the estate, if the property transferred –

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12 or 13 of this title; or

(2) the entity that made such payment.

11 U.S. Code §542 provides:

Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.

STATEMENT

The public rights doctrine rests upon the constitutional premise that, while Congress must retain the flexibility to create rights and claims through the passage of legislation, Congress cannot use this Article I power to unduly erode or abrogate the procedural protections afforded existing claims found in common or constitutional law. *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937).

The public rights doctrine has often been applied to proceedings in bankruptcy courts due to bankruptcy courts' status as Article I courts. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co*., 458 U.S. 50, 58 (1982); *Stern v. Marshall*, 564 U.S. 462 (2011). Article III, Section 1 of the Constitution assigns "[t]he judicial Power" to decide cases and controversies to an independent branch of government composed of judges who enjoy life time tenure and salary protection. Congress has authorized Article I bankruptcy judges to assist the Article III courts in their work. But the "public rights doctrine" limits the matters may be assigned to such Article I courts for final determination, *Stern v. Marshall*, 564 U.S. 462 (2011), "only to matters arising between individuals and the Government in connection with the performance of the constitutional functions of the executive or legislative departments . . . that historically could have been determined exclusively by those branches." *Stern*, 546 U.S. at 485 (internal quotations omitted).

In a case that involves "private rights" in which Article III prevents a bankruptcy court from entering a final judgment, a bankruptcy court may enter only a report and recommendation which is subject to de novo

review by the Article III court. *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014).

The present case involves the intersection of private rights with a bankruptcy court's authority to regulate matters before it. Almost eighteen months after entering the bankruptcy discharge, Bankruptcy Judge Rendlen entered a final order – not a recommendation subject to Article III court review – imposing sanctions upon Petitioner after finding Petitioner had engaged in contempt and (a finding later vacated on appeal) had made misstatements to the Bankruptcy Court. Petitioner timely challenged the sanctions, asserting the sanction order implicated only private rights, such that the Bankruptcy Judge lacked authority to enter a final order. The District Court and Eighth Circuit subsequently rejected Petitioner's contentions regarding public and private rights, holding that the Bankruptcy Court had authority to enter a final judgment on such rights.

In reaching this conclusion, the Eighth Circuit has created a circuit split regarding the proper distinction between public and private rights with the Ninth Circuit. In *In re Bellingham Ins. Agency, Inc*., 702 F.3d 553 (9th Cir. 2012), the Ninth Circuit Court of Appeals held that the bankruptcy court could not enter a final judgment on a fraudulent conveyance claim created by federal statute, 11 U.S.C. Section 157(b)(2)(H). In reaching the conclusion that Article III applied, the Ninth Circuit indicated that the "dispositive" inquiry is whether a claim "necessarily had to be resolved in the course of the claims allowance process." 702 F.3d at 564. Under *Bellingham*, a claim such as Petitioner's that may be (and was) resolved outside the claims

process involves private rights, such that only an Article III judge may enter a final resolution.

The opinions of the Eighth Circuit in this case and the Ninth Circuit in *Bellingham* are in conflict, disagreeing on this pivotal issue: whether Article III is triggered in bankruptcy court when a claim arises from federal law and is one that does not need to be resolved in the claims allowance process. In ruling to the contrary, the Eighth Circuit decided an important federal question in a way that conflicts with the relevant decisions of this Court.

The test to be used to determine a "private right" in the bankruptcy court raises an important federal question that has resulted in confusion and disagreement in the courts below. "What most everyone wants to know is *which* aspects of the typical bankruptcy proceedings do and don't implicate public rights. Yet even *Stern*, perhaps the Court's most comprehensive tangle with the question, offered no comprehensive rule for application across all cases." *In re Renewable Energy Development Corp.*, 792 F.3d 1274, 1279 (10th Cir. 2015)(Gorsuch, J.) (emphasis in original).

In the absence of a comprehensive rule defining the "public rights" exception in the bankruptcy court context, both litigants and the bankruptcy courts are left without a clear, easily applied test to resolve an issue that routinely appears in bankruptcy cases. By granting this Petition and ruling upon Petitioner's case, this Court can provide guidance and address this important federal question regarding the proper separation of Article I and Article III powers.

Article III and the "public rights" doctrine

Article III is an "inseparable" element of the constitutional system of checks and balances that "'both defines the power and protects the independence of the Judicial Branch.'" *Stern,* 564 at 483 (*citing Northern Pipeline Constr. Co. v. Marathon Pipe Line Co*., 458 U.S. 50, 58 (plurality opinion) (internal quotations omitted)). "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decision making if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside of Article III." *Stern*, 565 U.S. at 484.

Article III provides important protections for individuals by assuring that the federal adjudicative power is exercised only by judges who serve without term limits and by restricting the ability of the other branches to diminish judges' salaries. *Id.* These restrictions are designed to protect citizens from potential abuse of the Federal Government's judicial powers by ensuring Article III judges with "the [c]lear heads . . . and honest hearts deemed essential to good judges" decide federal suits. *Id*. (internal quotations omitted). "With narrow exceptions, Congress may not confer power to decide federal cases and controversies upon judges who do not comply with the procedural safeguards of Article III." *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015). When a suit is made of "the stuff of the traditional actions at common law tried by courts at Westminster in 1789," and "is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article

III judges in Article III courts." *Stern* at 484 (internal quotations omitted).

This Court has had occasion to examine and define the limits that Article III places upon the exercise of judicial authority by an Article I bankruptcy court. In *Northern Pipeline*, 458 U.S. 50 (1982), this Court reviewed whether a bankruptcy judge, serving under the Bankruptcy Act of 1978, could enter a final judgment on a state law contract claim against an entity who was not otherwise a party to bankruptcy proceeding. The Court held that the assignment of resolution of such state law claims to a bankruptcy judge violates Article III. A plurality of the Court recognized the "public rights" exception, and a majority of the Court concluded that the "public rights" exception did not encompass the adjudication of the state law claim at issue in the case.

Subsequent to *Northern Pipeline*, Congress revised the statutes governing bankruptcy jurisdiction and bankruptcy judges. Under the 1984 Bankruptcy Act, Congress permitted bankruptcy courts to enter final judgments on certain enumerated "core matters," subject to review by the district courts under the appellate review standards. If a matter is "non-core," the Bankruptcy Act provides that the bankruptcy court may only issue a report and recommendation, subject to *de novo* review by the district court. 11 U.S.C. §157(c)(1).

In *Granfinanciera, S.A., v. Nordberg*, 492 U.S. 33 (1989), this Court again considered the "public rights" doctrine. In holding that a fraudulent conveyance claim filed against a non-creditor was not a "public right," the court explained, "If a statutory right is not

closely intertwined with a federal regulatory program Congress has the power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court." 492 U.S. at 54-55. In *Granfinanciera*, this Court equated litigants' Article III rights with their Seventh Amendment jury trial rights in bankruptcy-related case." 492 U.S. at 53. The Court reasoned that since fraudulent conveyance suits were "quintessentially suits at common law that more nearly resemble state law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res," they are "more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions." *Id*. at 55.

In *Stern*, this Court considered whether a bankruptcy court could enter final judgment on state-law claim for interference with a gift expectancy filed as a compulsory counterclaim to a proof of claim in a bankruptcy proceeding. This Court held that the matter was a "private right." Reviewing its "private rights" precedents, the Court found that the state-law "counterclaim – like the fraudulent conveyance claim at issue in *Granfinanciera* – does not fall within any of the varied formulations of the public rights exception in this Court's cases." *Stern,* 564 at 493. *Stern* equated bankruptcy litigants' Seventh Amendment rights to a jury in federal bankruptcy proceedings with their rights to proceed before an Article III judge. Because the claim at issue neither "stem[med] from the bankruptcy itself" nor would "necessarily be involved in

the claims allowance process," it fell outside of the recognized exceptions of Article III. *Id.* at 499.

Subsequent to *Stern*, this Court addressed the procedure to be used when a case involves a private right, and held that a bankruptcy court can only issue a report and recommendations subject to de novo review by an Article III judge. *Executive Benefits Ins. Agency v. Arkison*, 573 U.S. __, 134 S. Ct. 2165 (2014). The Court also held that a litigant may waive the protections of Article III. *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. at 1944-45.

This Court has not determined whether a federal claim before the bankruptcy court but resolvable outside the claims allowance process and not related to the restructuring of creditor-debtor relations must be afforded the protections of Article III and final resolution by an Article III judge. Petitioner's case presents this issue.

The Proceedings Below

This case arises out of an investigation that the Hon. Charles E. Rendlen, III, U.S. Bankruptcy Judge for the Eastern District of Missouri, undertook largely *sua sponte* into bankruptcy preparer Critique Services, LLC and its affiliated attorney James Robinson ("Attorney Robinson"). In June 2014, Judge Rendlen suspended Attorney Robinson from practice in the Bankruptcy Court. The Order suspending Attorney Robinson made no provision for the representation of Robinson's clients after his suspension. After Attorney Robinson's suspension, Petitioner had agreed to represent *pro bono* approximately ninety-five of Attorney Robinson's former Chapter 7 clients (as well

as approximately 100 of Attorney Robinson's former Chapter 13 clients).

More than five months after Attorney Robinson's suspension, Judge Rendlen proceeded *sua sponte* to investigate how Attorney Robinson had handled attorney fees paid by eight of his clients, all of whom had already received their bankruptcy discharges in their Chapter 7 cases.[1]

On November 26, 2014, and December 2, 2014, Judge Rendlen issued two show cause orders to Attorney Robinson, directing Attorney Robinson, as legal counsel for the debtors, to indicate why Judge Rendlen should not order disgorgement of Attorney Robinson's attorneys' fees under 11 U.S.C. §329. Judge Rendlen's November and December 2014 show cause orders also directed the bankruptcy trustees for the underlying cases to address how Attorney Robinson had held his fees and whether any of the fees had been disbursed to Attorney Robinson or to any attorney or other person affiliated with Critique Legal Services, L.L.C.

Despite disputing that debtors were due a refund, on December 8, 2014, Attorney Robinson refunded all attorneys' fees paid by each debtor in the eight cases. Shortly thereafter, each debtor filed amended schedules in bankruptcy court which identified the receipt of refunded attorney's fees and claimed such fees as exempt under law. No Trustee or interested party objected to the debtors' claims of exemption.

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[1] The eight cases were consolidated by the district court on appeal.

Subsequently, Judge Rendlen with assistance from the trustees began investigating how Attorney Robinson's fees had been handled prior to refund. Judge Rendlen's investigation included seeking such information from Petitioner as Attorney Robinson's successor counsel on the eight underlying bankruptcy cases.

Petitioner responded to the trustee's inquiry with a true and accurate written response that Petitioner did not possess "any document of [Critique Services]" or "any documents which are encompassed within [the trustees'] request to Mr. Robinson," and that all Petitioner's "services rendered on behalf of [six of the eight] debtors in question were afforded free of charge and no fee was paid to or shared with [Petitioner] in these cases. Accordingly, there are no checks, ledgers or account statements that relate to such non-existent fees."

On January 13, 2015, approximately one month after the relevant debtors had received a full refund of their previously-paid attorney fees, Judge Rendlen held a hearing on his November and December 2014 orders to show cause. Apparently dissatisfied with the information received, on January 23, 2015, Judge Rendlen then entered an additional order directing Attorney Robinson, Critique Services, and also Petitioner to turn over information relating to how, prior to the December 2014 refunds, Attorney Robinson had held his attorney's fees in the eight cases. In his January 2015 order, Judge Rendlen warned Petitioner that he might have to seek the documents and information from third parties or "mak[e] inquiries" on

Critique Services or Attorney Robinson in order to comply with the January 2015 Order.

On July 6, 2015, Bankruptcy Judge Rendlen issued an order finding that Petitioner, Critique Services, and Attorney Robinson had "failed to comply" with the Court's January 2015 Order. Judge Rendlen indicated that he was considering imposing monetary or other sanctions on Petitioner. Petitioner responded to this July 2015 Order by arguing (a) the Bankruptcy Court lacked authority to impose sanctions *inter alia* under *Stern v. Marshall* and (b) Petitioner's conduct did not warrant sanctions.

On April 20, 2016, Bankruptcy Judge Rendlen held Petitioner had engaged in contempt and – a finding later reversed on appeal, 888 F.3d at 939 – had made a misstatement to the Bankruptcy Court. Judge Rendlen sanctioned Petitioner, including prohibiting Petitioner from filing new cases in the Bankruptcy Court for a period of six months. In finding contempt, the Bankruptcy Court specifically acknowledged that neither Petitioner nor his clients had possession or control of the information sought. Rather, the order was entered because Petitioner had not made a sincere effort to obtain the documents from Attorney Robinson or Critique Services. Bankruptcy Court Memorandum and Opinion, Appendix, pp. 61-2.

Mr. Briggs appealed the Bankruptcy Court's imposition of sanctions to the United States District Court for the Eastern District of Missouri and then the United States Court of Appeals for the Eighth Circuit, *inter alia* challenging that a bankruptcy judge lacked final authority under *Stern* and related precedent to impose a final order of sanction. Both appellate courts

affirmed the imposition of sanctions. Specifically, on April 25, 2018, the Eight Circuit rejected Petitioner's argument that the Bankruptcy Court had adjudicated private rights in violation of *Stern*, holding *Stern* "affects only … one small part of the bankruptcy judges' authority." *In re Reed*, 888 F.3d 930, 936 (8th Cir. 2018)((internal quotations omitted). The Eighth Circuit instead held that the Bankruptcy Court had authority to enter a final order because (a) the claim "stem[med]" from the bankruptcy itself and did not "implicate a common-law claim," and (b), unlike the claim at issue in *Granfinanciera*, the claim was not a fraudulent conveyance claim. *Id.* at 935-36.

Petitioner filed a timely Petition for Rehearing and/or for Rehearing en Banc which was denied on June 1, 2018.

REASONS FOR GRANTING THE WRIT

In entering its ruling sanctioning Petitioner, the Bankruptcy Court was not ruling on a claim of a creditor. Indeed, all of the debtors had received a full discharge and there were no proceedings pending in the claims-allowance process. Given this posture, the claim before the Bankruptcy Court was a "private right." Under Article III, Petitioner had the right to the protections afforded litigants under Article III and a *de novo* determination by an Article III district judge.

This Court should grant the Petition for Certiorari and hold that Article III requires that persons be afforded Article III protections, including *de novo* review by an Article III court, on matters that are resolved outside of, and do not affect, the bankruptcy claims-resolution process. In so doing, this Court will

clarify the test for determining whether a claim is a "public right" subject to adjudication in an Article I court or a "private right" where the litigant must be afforded protections of an Article III court.

I. Article III prevents a bankruptcy court from entering a final judgment because the claim did not require resolution in the claims allowance process and the resolution had no effect on the restructuring of debtor- creditor relations

The Court below erred in holding that *Stern* is confined to a narrow class of cases and in holding that the Bankruptcy Court had authority to enter a final order here. Under *Stern* and *Granfinanciera*, an Article I bankruptcy judge only has authority to enter a final judgment on a claim against a creditor that necessarily involves a "public right" and has to be resolved in the course of the claims allowance process or has a bearing on the restructuring of debtor-creditor relations. The Bankruptcy Court was investigating whether Attorney Robinson had properly handled attorney fees prior to refunding those fees to the debtors, and whether Petitioner had adequately cooperated with that investigation. Although these matters might be of interest to the trustees and the Bankruptcy Court, the Bankruptcy Court did not need to rule on this claim in resolving any proof of claim, and its resolution would have had no effect on the restructuring of debtor-creditor relations. Consequently, the Article I Bankruptcy Court lacked the authority to enter a final order.

This Court's precedents demonstrate that an Article I bankruptcy court's jurisdiction to enter a final

judgment is confined to claims that are "necessarily resolvable" in ruling on a creditor proof of claim. In *Granfinanciera*, this Court held that a bankruptcy trustee's action under 11 U.S.C. §548(a)(2) to recover a fraudulent transfer against a non-creditor was a claim involving a "private right." In the bankruptcy context, a cause of action is a purely private right if it does not implicate, in any way, the claims allowance process or the restructuring of debtor creditor relations. *Granfinanciera*, 492 U.S. at 60. Similarly, in *Stern*, the son-in-law of the debtor filed a claim against a debtor in bankruptcy. The debtor thereafter filed a counterclaim for tortious interference. The debtor's counterclaim was held to involve a private right because the bankruptcy court was not required to resolve the debtor's counterclaim in order to determine the son-in-law's claim to the estate. 564 U.S. at 503.

In interpreting *Stern* and *Granfinanciera* to determine whether the matters before them involve "public" or "private" rights, the Courts of Appeals have found the determining factor is whether the claim at issue must necessarily be resolved in administering a claim or has an effect on the restructuring of debtor-creditor relations. In *Bellingham*, the Ninth Circuit reviewed *Stern* (which involved a state law claim) in conjunction with *Granfinanciera* (involving a federal claim) and *Katchen v. Landy*, 382 U.S. 323 (1966) (involving a state-law claim), and concluded the "dispositive distinction" was whether the subject matter "would necessarily be resolved in the claims allowance process." *Bellingham*, 702 F.3d at 564 (citing *Stern*); *see also Renewable Energy* at 1279 (Gorsuch, J.) (confirming this analysis of *Stern* and *Bellingham*); *Waldman v. Stone*, 698 F.3d 910, 921 (6th Cir. 2012)

("[F]or a bankruptcy court to enter final judgment as to claims that seek an award of money damages to the estate, there must have been, at the outset of the claims-disallowance process, 'reason to believe that the process of adjudicating [the] proof of claim would necessarily resolve' the damages claim."). *See also In re Fisher Island Invs., Inc*., 778 F.3d 1172, 1192 (11th Cir. 2015)(holding that a bankruptcy court had authority to decide a state law dispute that was necessarily resolved in the claims allowance process); *In re Frazin*, 732 F.3d 313, 320-24 (5th Cir. 2013)(invoking the claims allowance process to explain why a bankruptcy court could decide certain state law claims, but not others).

It is difficult to imagine a controversy more attenuated from the bankruptcy process or more remote from the bankruptcy claims allowance process than the dispute which brings Petitioner before this Court, whether Petitioner had adequately cooperated with an investigation into another lawyer's handling of his attorney fees after the relevant debtors had all received bankruptcy discharges and after the claims-allowance process had effectively ended. The resolution of this matter cannot and will not adjust the relationship between the debtors and their creditors. Under *Granfinancieria* and *Stern*, the final authority to adjudicate the claims at issue in this appeal could therefore only rest with an Article III court.

Moreover, in reaching its decision, instead of employing a proper "public rights doctrine" analysis consistent with *Stern*, *Bellingham*, and other precedent cited above, the Eighth Circuit adopted a "but for" or "intertwined" analysis, finding an Article I court could

engage in final adjudication because, "unlike the *Stern* counterclaim," the relevant orders "stem[] from the bankruptcy itself and do not implicate a common-law claim" *Reed*, 888 F.3d at 935.

The Eighth Circuit's "but for" analysis is not supported by controlling precedent. Rather, *Stern* expressly ***rejects*** the argument that when claims are merely "intertwined" with a bankruptcy suffices to authorize bankruptcy court jurisdiction. *Renewable Energy*, 792 F.3d at 1279-80. Further, had the Eighth Circuit's "but for" analysis been employed in *Stern* and *Granfinanciera*, the Supreme Court should have reached the opposite outcome in both those cases, because both *Stern* and *Granfinanciera* involved matters – a common-law tortious interference counterclaim and a statutory fraudulent transfer claim, respectively – that would not have arisen but for the filing of a bankruptcy, a proceeding which the Article I bankruptcy court admittedly possessed jurisdictional authority to hear.

II. Historical precedents do not permit the Bankruptcy Court to enter a final judgment because the claim at issue sought to reach assets lawfully in the hands of a third-party non-creditor

The Bankruptcy Court invoked 11 U.S.C. §329(b) to determine whether Attorney Robinson had retained excessive fees that should be disgorged, an issue disputed by Attorney Robinson. In order to investigate this concern, the Bankruptcy Court invoked 11 U.S. §542, the "turnover statute." When the Bankruptcy Court acted to determine whether the attorneys' fees should be disgorged, it acted to deprive Attorney

Robinson of property that was in his lawful custody and control. This type of action "quintessentially" required a suit at common law. *Sharif*, 135 S. Ct. at 1268 (citing *Granfinanciera*, 492 U.S. at 56). *Stern* fully equated a bankruptcy litigants' Seventh Amendment right to a jury trial with their rights to proceed before an Article III judge. 492 U.S. at 53, 109 S. Ct. 2782. The claim at issue – a claim to recover funds from a third-party non-creditor with a substantial adverse claim to the funds – is "the stuff of traditional actions at common law tried by the courts at Westminster in 1789." *Stern*, 564 at 484 (internal quotations omitted). Petitioner was entitled to de novo review before an Article III judge.

The principle that an Article III judge's participation was required in Petitioner's case has long-standing judicial precedent. "At its most basic level, bankruptcy is an adjudication of interests claimed in a *res*." *Katchen v. Landy*, 382 U.S. 323, 329 (1966) (internal quotations omitted). As discussed in John A.E. Pottow & Jason S. Levin, *Rethinking Criminal Contempt in the Bankruptcy Courts,* 91 Am. Bankr. L. J. 311 (2017), and in the Dissenting Opinion of Chief Justice John Roberts in *Sharif*, since the time of Blackstone, English statutes have empowered non-judicial bankruptcy "commissioners" to collect a debtor's property, resolve claims against creditors, order the distribution of assets in the estate, and ultimately discharge debts. *See* 2 W. Blackstone, Commentaries, 471-488; *see also Sharif*, 135 S. Ct. at 1952 (Roberts, C.J., dissenting) (stating that identifying the property of the estate "has long been a central feature of bankruptcy adjudication"). Although the commissioners had authority to collect property in

the debtor's possession and to "cause any house or tenement of the bankrupt to be broken open" in order to uncover and seize property that the debtor had concealed, 2 W. Blackstone, Commentaries 485, English bankruptcy commissioners' authority was not unfettered. Rather, bankruptcy participants maintained the ability to challenge the actions of the commissioners through actions brought in courts of law and equity, and the Lord Chancellor retained the ability to appoint new commissioners. Pottow & Levin, 91 Am. Banr. L.J. at 323-23 & n.68 (discussing, *inter alia*, 1 & 2 Edward Christian, *The Origin, Progress, and Present Practice of the Bankrupt Law, Both in England and Ireland* 11-16 (2d ed. 1818). In particular, an action at law or equity seeking to deprive third parties of property received from the debtor but within the lawful custody and control of the third party – such as a fraudulent transfer action – was a matter relegated to the final disposition of the Chancery or law courts. *Granfinanciera*, 492 U.S. at 56.

Buttressed by the Colonists' experience with abuse of power by the English monarch and the resulting protections installed through creation of independent Article III courts, the United States' first Bankruptcy Act of 1800 continued the practice that the courts, rather than the commissioners, retained final authority over claims against third parties. "The estate's claims against third parties were settled by resort to litigation before a judge, not before commissioners." Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 Hastings L.J. 238 (2008); Act of Apr. 4, 1800, Section 13, 2 Stat. at 25.

There is no historical precedent for the Bankruptcy Court's entry of contempt to prohibit Petitioner, a duly-licensed attorney, from filing future cases in the federal court. This Court has recognized the "inherent authority" of an Article III court to sanction attorneys appearing before the court, *Anderson v. Dunn*, 19 U.S. 204, 227 (1821); *Ex Parte Robinson*, 86 U.S. 505, 510 (1873); *Chambers v. NASCO, Inc*., 501 U.S. 32, 44 (1991), but such recognition has been confined to courts created pursuant to Article III. This Court has never extended the final authority for contempt to an Article I tribunal, particularly where the Article I court would then be able to impose sanctions that impair a private right. Indeed, there exists considerable agreement among the lower courts that such an exercise of contempt power by an Article I court, absent *de novo* review by an Article III court, would be inconsistent with Article III. *See, e.g., Bingman v. Ward*, 100 F.3d 653, 658 (9th Cir. 1996); *In the Matter of Hipp*, 895 F.2d 1503 (5th Cir. 1990). Finally, a bankruptcy court, sitting as a "unit" of the district court under 11 U.S.C. §151, has never historically exercised any right of licensure or regulation of attorneys in the federal court; instead, the District Court, through its local rules, retains the authority regarding the "regulation of admissions to its own bar." *Frazier v. Heebe*, 482 U.S. 641, 645 (1987). Petitioner's right to practice law in the federal courts is unquestionably a private right that is not contingent upon, or created by, the enactment of the Bankruptcy Code.

When the Bankruptcy Court acted to disgorge Attorney Robinson's fees, in the face of Attorney Robinson's lawful claim to the funds, the action was the type of common law action that was reserved for the

courts under English precedents. Consequently, the Bankruptcy Court had no jurisdiction to enter a final judgment. When the Bankruptcy Court then adjudicated the adequacy of Mr. Briggs' cooperation with the disgorgement proceedings and related investigation, *a fortiori* this was adjudication of a private right that, harkening back to Westminster and Blackstone, could only be adjudicated by an Article III court.

III. The opinion of the Eighth Circuit conflicts with the opinion of the Ninth Circuit in *In re Bellingham*, 702 F.3d 553 (9th Cir. 2012)

Finally, the Eighth Circuit's opinion below conflicts with the opinion of the Ninth Circuit Court of Appeals in *In re Bellingham*, 702 F.3d 553 (9th Cir. 2012). In *Bellingham*, the Ninth Circuit considered whether a federal claim (a claim for fraudulent conveyance) not "necessarily resolvable" by ruling on a creditor proof of claim was a "private right." In reaching the conclusion that the federal claim before it was a "private right," the Ninth Circuit reviewed this Court's historical precedents and concluded that the only way to resolve them was to conclude that a "private right" is a claim that a bankruptcy court did not necessarily have to rule on in ruling on a proof of claim. The Ninth Circuit stated:

> *Granfinanciera* involved a federal-law claim, and *Stern* involved a state-law claim. But *Stern* held that both claims required an Article III court. Thus, the only principled basis on which to distinguish *Katchen* from both *Stern* and *Granfinanciera* is that *Katchen* involved a claim against a creditor that necessarily had to be

> resolved in the course of the claims-allowance process, and *Stern* and *Granfinanciera* did not.

702 F.3d at 564.

In Petitioner's case, the bankruptcy case was proceeding under two federal bankruptcy statutes: (a) 11 U.S.C. §329 (a claim for disgorgement of attorneys' fees directed to Attorney Robinson) and (b) 11 U.S.C. §542 (a claim for turnover of information and documents directed to Petitioner). The Bankruptcy Court had not needed to rule on either of these claims in the course of ruling on any creditor proof of claim; in fact, the claims process was fully resolved before the order sanctioning Petitioner was entered.

The Eighth Circuit never addressed the issue of whether the Bankruptcy Court had to rule on these claims in order to rule on a proof of claim. Instead, the Eighth Circuit held that a federal claim was a "public right" so long as it "stemmed from the bankruptcy itself and was not a fraudulent transfer claim" Under the Ninth Circuit *Bellingham* decision, a federal claim arising in a bankruptcy triggers Article III protection unless the bankruptcy court would be required to rule on the claim in ruling on a proof of claim. Under the Eighth Circuit ruling, Petitioner was denied Article III de novo review on a federal claim arising in a bankruptcy case on a claim that the bankruptcy never had to address in the claims allowance process. This split in the circuits requires the review of this Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

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