1 IN THE SUPREME COURT OF THE UNITED STATES

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3 HOWARD K. STERN, EXECUTOR OF THE :

4 ESTATE OF VICKIE LYNN MARSHALL, :

5 Petitioner :

6 v. : No. 10-179

7 ELAINE T. MARSHALL, EXECUTRIX OF :

8 THE ESTATE OF E. PIERCE MARSHALL :

9 - - - - - - - - - - - - - - - - - - x

10 Washington, D.C.

11 Tuesday, January 18, 2011

12

13 The above-entitled matter came on for oral

14 argument before the Supreme Court of the United States

15 at 1:00 p.m.

16 APPEARANCES:

17 KENT L. RICHLAND, ESQ., Los Angeles, California; on

18 behalf of Petitioner.

19 MALCOLM L. STEWART, ESQ., Deputy Solicitor General,

20 Department of Justice, Washington, D.C.; on

21 behalf of the United States, as amicus curiae,

22 supporting Petitioner.

23 ROY T. ENGLERT, JR., ESQ., Washington, D.C.; on behalf

24 of Respondent.

25

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

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We'll now hear

4 argument in Case 10-179, Stern v. Marshall.

5 Mr. Richland.

6 ORAL ARGUMENT OF KENT L. RICHLAND

7 ON BEHALF OF THE PETITIONER

8 MR. RICHLAND: Mr. Chief Justice, and may it

9 please the Court:

10 Pierce Marshall filed a claim in Vickie

11 Marshall's bankruptcy case. He alleged he was damaged

12 because she falsely accused him of cheating her out of

13 money that her late husband intended to give her. In

14 order to preserve its claim against him, the bankruptcy

15 estate had no choice but then to file its counterclaim

16 in the bankruptcy court, alleging that those statements

17 were in fact true and that far from Pierce being

18 entitled to money from the estate, he owed money to the

19 bankruptcy estate. This Court's cases established that

20 the bankruptcy court was constitutionally authorized to

21 decide that entire dispute.

22 Congress drafted the bankruptcy statutes --

23 JUSTICE SOTOMAYOR: Can you tell me why?

24 MR. RICHLAND: Excuse me, Your Honor? I'm

25 sorry.

1 JUSTICE SOTOMAYOR: What's the authority at
2 all for a bankruptcy court to adjudicate proof of
3 claims, without violating Article III? I don't think
4 we've ever had a case that's actually said that.
5 MR. RICHLAND: This Court has never
6 approached that issue directly. Of course --
7 JUSTICE SOTOMAYOR: So, what's --
8 MR. RICHLAND: Excuse me, Your Honor.
9 JUSTICE SOTOMAYOR: So, what's the
10 constitutional basis?
11 MR. RICHLAND: Well, of course, it need not
12 reach that issue in this case, because the court below
13 and the Respondents assume for the purposes of this case
14 that, in fact, there was authority for the bankruptcy
15 court.
16 JUSTICE SOTOMAYOR: I'm not sure how that
17 helps. If there's no jurisdiction for the bankruptcy
18 court to adjudicate proof of claims, then how can it
19 adjudicate counterclaims? Don't both fall if there's an
20 Article III violation?
21 MR. RICHLAND: Well, I don't think so, Your
22 Honor, because Article III, of course, is not
23 jurisdictional in the sense that we think of basic
24 fundamental jurisdiction, subject matter jurisdiction.
25 It can be waived, of course. But beyond that, I think

1 that Marathon, as I said, assumes that there is Article
2 III authority to adjudicate the proof of claim.
3 Katchen --
4 JUSTICE SOTOMAYOR: So, answer the --
5 MR. RICHLAND: Katchen --
6 JUSTICE SOTOMAYOR: Answer the question.
7 Don't assume.
8 MR. RICHLAND: Okay. And -- well, the
9 answer is that, under -- under the various theories that
10 this Court has put forth, there is a basis for the
11 bankruptcy court to adjudicate a proof of claim.
12 One theory, of course, is the public rights
13 theory, and in Granfinanciera, this Court established
14 that the -- the public rights theory was broader than
15 just the kind of situation where the government was a
16 party, and it said that -- that it -- public rights are
17 defined as whether Congress, acting under Article I, has
18 created a seemingly private right that is so closely
19 integrated into a public regulatory scheme as to be a
20 matter appropriate for agency resolution with limited
21 involvement by the Article III judiciary.
22 JUSTICE ALITO: The claim here was not one
23 that was created by Congress, though, was it?
24 MR. RICHLAND: That's -- that's correct, but
25 this Court has never held that in fact the claim had to

1 be created by -- literally created by Congress. What
2 this Court has always talked about is -- is, is the
3 claim one that Congress has established as being
4 applicable within the system but that may be based on a
5 State law claim?
6 For example, when, you know, this Court
7 analyzed the claims which were at issue in
8 Granfinanciera, it looked at the fact that they were
9 fundamentally common law claims. It didn't depend on
10 the fact that they were Federal claims.
11 The same thing was -- is true in the way
12 that the -- that this Court analyzed the -- the claim in
13 -- in Marathon itself. It made the determination that
14 because this was -- I think the way Justice Rehnquist
15 stated it was: This is the stuff that would have been
16 adjudicated at common law in Westminster in 1789. So it
17 was not the Federal or State nature of the claim, it was
18 the fact that these were common law claims that made it
19 important.
20 JUSTICE KAGAN: Are there any limits, Mr.
21 Richland? Suppose that Congress had authorized
22 bankruptcy courts to decide contract disputes between
23 two creditors in a bankruptcy proceeding. Would that be
24 all right?
25 MR. RICHLAND: I think that there are

1 limits, and they must be related to the purpose of
2 bankruptcy. I think that a -- that sort of thing would
3 be related to, perhaps, within the "related to"
4 jurisdiction of bankruptcy, and that would fall within
5 the problems identified in Granfinanciera, for example.
6 That would be beyond the scope of what could be
7 adjudicated in bankruptcy.
8 But what we are talking about here is claims
9 and counterclaims that are at the essence of what
10 bankruptcy courts do. The bankruptcy system, of course,
11 is set up in order to adjudicate claims to a limited
12 amount of money, and in order to do that in an efficient
13 manner, in a manner that will not utilize the entire
14 amount of the -- the estate in the adjudication process,
15 it set up the bankruptcy courts. And so they are set up
16 in order to be efficient, effective, and as soon as, of
17 course, as we get an Article III court involved, that
18 really does place some brakes on the efficiency. It
19 becomes much more costly.
20 JUSTICE SOTOMAYOR: Can the bankruptcy court
21 adjudicate permissive counterclaims?
22 MR. RICHLAND: Well --
23 JUSTICE SOTOMAYOR: And if you posit a no,
24 what's the limiting principle?
25 MR. RICHLAND: Well, certainly the

1 statute -- 157(b)(3), (2) -- does not distinguish
2 between compulsory and permissive counterclaims. And
3 it's also true that this Court's authority in
4 Granfinanciera, in Langenkamp and in Katchen -- the
5 rationale of those cases is broad enough to encompass
6 permissive counterclaims, but this Court need not reach
7 that issue in this case, because here we do have what
8 both the court of appeals below and what seems to have
9 been conceded by Respondents is, indeed, a compulsory
10 counterclaim.
11 JUSTICE GINSBURG: Mr. Richland, isn't there
12 this difference: Just to take ordinary civil procedure,
13 compulsory counterclaim doesn't have to satisfy any
14 jurisdictional requirements, because it comes in under
15 the wing of the main claim, but a permissive
16 counterclaim has to independently satisfy a
17 jurisdictional requirement.
18 So that could be a reason, even though the
19 Bankruptcy Code just says counterclaim, to distinguish
20 the two. If there's an authority to deal with the
21 claim, then there's authority to deal with the
22 counterclaim, but if it's a permissive counterclaim,
23 it's not based on the same transaction or premise, then
24 it would have to be a self-standing claim. But, as
25 you -- as you have said, this case does present what the

1 parties have agreed is a compulsory counterclaim.

2 MR. RICHLAND: Well, I -- I think that --

3 that is an excellent justification for why one might

4 want to make this a very narrow determination in this

5 case. In fact, Justice Rehnquist, in his concurring

6 opinion in Marathon, said that this is an area which is

7 very touchy and difficult and complex, and it is one

8 where we particularly should not, as a court, go beyond

9 the facts of the individual case and what must be

10 decided for this case.

11 Of course, the other thing about compulsory

12 counterclaims and what makes it more applicable in this

13 kind of situation in an Article III setting is that,

14 according to the Schor analysis, what we are talking

15 about is how much of an intrusion on the Article III

16 process are we talking about. And if we assume, as

17 appears to have been assumed here, that the claim itself

18 may be determined by the bankruptcy court, then the net

19 intrusion by determining a counterclaim, a compulsory

20 counterclaim, is much, much smaller, because there

21 almost inevitably will be overlap between what must be

22 decided by the bankruptcy court and what -- on the claim

23 and what must be decided on the counterclaim.

24 JUSTICE KENNEDY: Is there any authority --

25 this began as a motion for -- for nondischargeability.

1 MR. RICHLAND: Yes.
2 JUSTICE KENNEDY: Is there -- is there --
3 are there any cases in the -- in the Federal courts
4 which tell us that a motion for nondischargeability does
5 or does not require the pleading of a counterclaim?
6 MR. RICHLAND: I don't believe so, Justice
7 Kennedy. But in fact, what happened here was something
8 much, much more than just a motion, a request for
9 determination of nondischargeability, because 1 month
10 after that was filed, the actual proof of claim itself
11 was filed. And all the courts below have uniformly
12 concluded that when that additional step is taken, it
13 could have no purpose other than to present the claim --
14 beyond just the question of dischargeability, present
15 the question of liquidation of the claim to the
16 bankruptcy court.
17 JUSTICE GINSBURG: And the counterclaim came
18 at what point? After the proof of claim was filed?
19 MR. RICHLAND: That is correct. Some weeks
20 after the proof of claim was filed, the -- the
21 counterclaim was filed. The objections and counterclaim
22 was filed.
23 The -- the statutory structure here is
24 something that -- it has been suggested that this is a
25 question of statutory interpretation and that, in fact,

1 the statute does not provide for this kind of treatment,
2 that, in fact, there is a two-step process by which one
3 determines whether a bankruptcy court can finally decide
4 a counterclaim. But I think that really is belied by
5 the plain language of the statute as well as the
6 statutory structure.
7 Of course, the starting point is
8 157(b)(2)(C), which very clearly and straightforwardly
9 states that core claims include counterclaims by the
10 estate against persons filing claims against the estate.
11 JUSTICE ALITO: What do you make of the fact
12 that -- that (b)(2) says core proceedings include, but
13 are not limited to, the matters that are listed after
14 that?
15 How would a court go about deciding whether
16 something that is not specifically mentioned constitutes
17 a core proceeding except by looking back to (b)(1),
18 which is what the court of appeals did?
19 MR. RICHLAND: Well, I think that when -- a
20 court would indeed, if one were looking at something
21 that was outside the scope of the explicitly mentioned
22 categories from (B) to (N) in 157(b)(2), one would in
23 fact look beyond the words of (A) and (O) -- those are
24 the two catch-all provisions -- and one would look to
25 the usual, normal principles of statutory construction

1 to determine what fit within them.

2 But 152 -- 157(b)(2)(C) is very

3 straightforward. It does not require any additional

4 interpretation. There is -- a counterclaim against a

5 person filing a proof of claim is just, on its face,

6 something that is unambiguous. And the fact that there

7 are more ambiguous categories there would probably

8 require a court to go beyond, you know, the four corners

9 of the statute and look to the normal kinds of

10 principles we use in determining what statutes mean.

11 We'd look at the categories that were

12 actually included. We would see, is this something that

13 is similar, does it fall within that category, and so

14 on.

15 JUSTICE ALITO: What do you think is the

16 principle that defines a core proceeding? Some of these

17 specifically enumerated items are very -- potentially

18 very broad: (A) "matters concerning the administration

19 of the estate."

20 MR. RICHLAND: That's right. The -- (A) and

21 (O) are very broad. And so, what -- that category --

22 what those two categories would have to be informed by

23 and are informed by are the principles of statutory

24 construction that are normally used. And included among

25 those, we would contend, would be looking at the words

1 of the statute that talk about, does this arise under
2 the Bankruptcy Code or arise in a bankruptcy case?
3 So for those particular categories, the
4 lower courts have been comfortable with the idea that we
5 look at the language of the statute, apply those words
6 and use those as limitations, but with respect to the
7 specific categories from (B) to (N), the courts have
8 uniformly indicated that those categories do not require
9 further interpretation, that they are straightforward,
10 and they constitute core proceedings on their face.
11 I think the -- with respect to the question
12 that you asked, Justice Sotomayor, and the whole issue
13 of whether a matter is under -- may pass muster under
14 Article III is a very easy one in this case. And the
15 reason for that is that if we look to Schor and Schor's
16 Article III analysis, we can see that it really divides
17 into two parts.
18 Part 1 is: Was there some -- is the Article
19 III -- to the extent the Article III right is a personal
20 one, that is to the extent that it guarantees someone
21 a -- a decision maker who is not going to be affected by
22 the political branches of the government or by the winds
23 of politics, that's something that's waivable. And, in
24 fact --
25 JUSTICE SCALIA: But you don't say you waive

1 it when -- when, in order to protect yourself for a debt
2 that is owed to you, you make a claim in a bankruptcy
3 proceeding. We do have a doctrine that you cannot --
4 you cannot condition a Federal right upon the waiver of
5 constitutional protections. And that seems to me what
6 you're saying here. If you want to get paid by the
7 bankrupt estate, you have to waive your -- your right to
8 a -- to a jury trial.
9 MR. RICHLAND: Well, Justice Scalia, that is
10 precisely what this Court addressed in footnote 14 in
11 Granfinanciera. It explained that, yes, waiver under
12 many circumstances and -- under the Schor case, for
13 example, waiver involves a choice between two equal or
14 optional options.
15 However, I should point out that in this
16 case, there was another option. There was a
17 dischargeability complaint filed, and, in fact, the
18 choice was made not to pursue that but, instead, to
19 pursue the proof of claim. There was already a State
20 court suit on file and, instead of requesting a stay, a
21 relief from the bankruptcy stay, the proof of claim was
22 filed.
23 In general, however, the Alexander v.
24 Hillman principle, which is also discussed in footnote
25 14, is what applies in this -- in this circumstance.

1 JUSTICE SCALIA: Would it have been normal
2 for the bankruptcy judge to lift the stay with respect
3 to a claim that could be presented in the bankruptcy
4 proceeding?
5 MR. RICHLAND: Well, the -- certainly the --
6 the principles of -- of permissive abstention, for
7 example, encourage, if, in fact, comity is to be
8 respected and if there is another suit pending
9 elsewhere, that bankruptcy courts will permit the suit
10 to proceed in that jurisdiction, so that that does in
11 fact occur. But it was never even tried here, and
12 that's -- that's really the point.
13 And I'd like to reserve the rest of my time,
14 but I would like to make one final point before I sit
15 down initially, and that is, if this Court should decide
16 to reverse, that as we requested in our -- in our reply
17 brief and as we requested in our relief on our
18 cross-appeal, we would request that -- that this case be
19 sent back to the district court, because it was the
20 district court that in the first instance applied the
21 improper standard, and we think that would be an
22 appropriate way of -- of taking care of this case in
23 this instance.
24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 Mr. Stewart.

1 ORAL ARGUMENT OF MALCOLM L. STEWART
2 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE PETITIONER
4 MR. STEWART: Mr. Chief Justice, and may it
5 please the Court:
6 I -- I'd like to begin by addressing Justice
7 Scalia's question about the -- what's sometimes referred
8 to as the unconstitutional conditions doctrine, whether
9 it's appropriate to place a person in a position where
10 he has to make a choice whether to assert one of two
11 constitutional rights. And although there is in many
12 contexts reluctance to put an individual to that choice,
13 there's not an inflexible rule against it.
14 And to take one example, a criminal
15 defendant has an absolute constitutional right to
16 testify in his own defense. He also has an absolute
17 constitutional right to resist compelled testimony in
18 which the prosecution will ask him hostile questions,
19 but he doesn't have a constitutional right to do both.
20 If he chooses -- chooses to take the stand and testify,
21 he may be cross-examined at trial by the prosecution,
22 and he has no residual Fifth Amendment right to resist
23 the hostile questioning.
24 CHIEF JUSTICE ROBERTS: This is a little --
25 it's a little different when you're talking about the

1 right to have a -- a decision before an Article III
2 tribunal. It seems a bit more fundamental than the
3 examples you're giving.
4 MR. STEWART: Well, I don't know that it's
5 more fundamental than the right not to be questioned
6 against one's will in a criminal proceeding in which
7 you're --
8 CHIEF JUSTICE ROBERTS: Well, not -- not
9 fundamental in the sense of is it important or not. I
10 guess "fundamental" is not the right word. Maybe
11 "structural" or -- or something like that. It's sort of
12 the whole basis for the decision that's going to be
13 made.
14 MR. STEWART: I guess there are two
15 potential objections to the use of a non-Article III
16 judge, and one of them would be, as you say, structural;
17 that is, one of the objections that is sometimes made to
18 the use of non-Article III adjudicators is that if
19 Congress can parcel out part of the work of the
20 judiciary to other units, the stature of the judicial
21 branch will be diminished.
22 I think this particular statute doesn't
23 create that risk, because the use of bankruptcy judges
24 is entirely under the control of the district judges;
25 that is, the district court decides whether to refer a

1 bankruptcy case to the bankruptcy judge; the district
2 court can withdraw the referral with respect to
3 particular proceedings.
4 CHIEF JUSTICE ROBERTS: Well, that just
5 means that the district court is acting in concert with
6 Congress -- take action that undermines the long-term
7 institutional and constitutional basis of the judiciary.
8 And the district courts have their different reasons and
9 incentives to do that. That doesn't mean that all bets
10 are off, and just because they're involved in the
11 process it's not a concern.
12 MR. STEWART: Well, to the extent that the
13 concern is with fairness to individual litigants, that
14 is, the idea that the Respondent in this case has a
15 right to an Article III tribunal and should not likely
16 be held to have waived it, I think that a person who
17 seeks affirmative relief from a court doesn't waive all
18 his constitutional rights, to be sure, but should
19 ordinarily be taken to accept the consequences that
20 ordinarily follow from a request for judicial relief.
21 And as a matter of history and tradition, one of the
22 consequences that follows from the assertion of an
23 affirmative claim is subjection to counterclaims, and
24 especially compulsory counterclaims.
25 JUSTICE SCALIA: That can't be right.

1 You -- you can take all sorts of matters that belong in
2 Article III courts, and so long as you place them in
3 some other tribunal where somebody is coerced into
4 coming in, supposedly voluntarily, it's all okay. I
5 mean, that's -- that's not an adequate protection.
6 MR. STEWART: Well, the Court has applied
7 this basic principle in a number of contexts. That is,
8 in McElrath v. United States, which is cited in the
9 Petitioner's brief, the plaintiff filed suit against the
10 United States in the Court of Claims, and the United
11 States then asserted counterclaims against him, and the
12 original plaintiff said that he had a -- a right to jury
13 trial under the Seventh Amendment.
14 JUSTICE KENNEDY: Well, that's because
15 there's a basic sovereign immunity. The government
16 doesn't have to be sued at all.
17 MR. STEWART: The government doesn't have --
18 JUSTICE KENNEDY: -- so it can -- so it can
19 make conditions, but that's not this case.
20 MR. STEWART: Well, the government can make
21 conditions, but -- but the point was the plaintiff in
22 that situation had no alternative forum to which he
23 could attempt to obtain a recovery from the government.
24 JUSTICE KENNEDY: But that's because of the
25 limitation of sovereign immunity, and you don't -- and

1 you don't have that analogue here.

2 MR. STEWART: Another example would be Adam

3 v. Saenger, which is also cited in the Petitioner's

4 brief, in which I believe it was a Texas plaintiff filed

5 suit in the California State courts, and the California

6 defendant asserted a -- a cross-complaint, basically a

7 counterclaim, against him, and the Texas plaintiff

8 objected to the California court's assertion of personal

9 jurisdiction.

10 And this Court said: By seeking affirmative

11 relief from the California court, you have subjected

12 yourself to the jurisdiction of that court for all

13 purposes for which justice requires. And it said the

14 State can make that the price it pays for seeking

15 affirmative judicial relief in its courts. Now, it may

16 have --

17 JUSTICE SCALIA: A State can do that, but

18 can the Federal Government make it the price that you

19 pay for -- for going into a non-Article III tribunal?

20 MR. STEWART: Well --

21 JUSTICE SCALIA: It's a different situation,

22 it seems.

23 MR. STEWART: Well, let me step back a

24 second and address the questions that were posed by

25 Justices Sotomayor and Alito at the -- at the beginning

1 about the initial authority of the bankruptcy judge to
2 adjudicate the claim brought against the estate, because
3 I agree with my colleague's answer that this is a
4 question -- and with Justice Sotomayor, that this is a
5 question that this Court hasn't squarely resolved.
6 Now, it's true that the initial -- that the
7 State law claim, the defamation claim that was made the
8 basis for the claim against the estate, was a State law
9 cause of action. But as this Court said in Katchen v.
10 Landy, the effect of the commencement of the bankruptcy
11 case is to convert the claimant's potential legal claim
12 against the defendant into an equitable claim against
13 the estate.
14 And Respondent's equitable claim against the
15 estate seeking a share of the assets was a claim created
16 by Federal law. That is, it's true that in the course
17 of deciding whether Respondent was ultimately entitled
18 to a share of the estate, the bankruptcy court would
19 have been required to adjudicate State law questions and
20 conduct something like the same proceedings that could
21 have arisen in a State case, but actually obtaining a
22 share of the bankruptcy estate requires more than that
23 there be a valid debt.
24 The whole point of bankruptcy is to deal
25 with situations in which the debtor doesn't have enough

1 assets to go around, and so the bankruptcy court will
2 have to not only determine whether a valid debt exists,
3 but what are the relative priorities of various
4 creditors, what is the appropriate pro rata share for a
5 particular claimant, and all of that is to be resolved
6 under Federal law.
7 So, when Respondent filed a proof of claim
8 in the bankruptcy case, it was asserting a Federal right
9 cognizable under the Bankruptcy Code. And, again, none
10 of the -- none of the analogues that I've identified are
11 precisely analogous to this one, but I think it's
12 noteworthy that Respondent cites no contrary authority
13 from this Court. That is, Respondent cites no case in
14 which a claimant has invoked the authority of a
15 particular court and has asked for affirmative relief,
16 and this Court has held that it nevertheless had a
17 constitutional entitlement to be free of counterclaims.
18 And that seems particularly true of
19 compulsory counterclaims, both because they are
20 counterclaims that our legal system affirmatively
21 encourages to be brought within the same proceeding and
22 for the reason that Justice Ginsburg said, that in an
23 analogous area of the law, when we ask whether there is
24 Federal court jurisdiction over a counterclaim to begin
25 with, if the counterclaim is compulsory, there need be

1 no independent basis for jurisdiction.

2 I'd like to address quickly the statutory

3 question, and the relevant provisions begin at page 1a

4 of the Government's brief.

5 JUSTICE GINSBURG: Will you include in that

6 this 157(b)(5), because this whole thing would be a

7 futile exercise if that tort claim comes -- comes out of

8 the bankruptcy judge's --

9 MR. STEWART: I think the 157(b)(5) is, in

10 our view, not jurisdictional. It deals with the -- the

11 respective authorities of the bankruptcy judge and the

12 district court within the bankruptcy case, but it

13 doesn't go to the question of what the -- the Federal

14 courts can adjudicate and the limitations on bankruptcy

15 court authority are waivable and subject to consent.

16 The court of appeals did not address the

17 personal injury aspect of the case. There is a -- a

18 lively dispute between the parties as to whether that

19 objection to bankruptcy court adjudication was properly

20 preserved, and that would be open to the court of

21 appeals on remand if this Court were to reverse.

22 On page 1a --

23 JUSTICE KAGAN: But, Mr. Stewart, do -- do

24 you think that we should resolve the constitutional

25 question if there's some significant possibility that it

1 wouldn't be necessary because the claims would be found
2 to fit into (b)(5)?
3 MR. STEWART: I think -- yes, I mean, this
4 could have been a prudential factor that might have
5 persuaded the Court not to grant certiorari in the first
6 instance, but the Court has obviously identified this as
7 an issue that warrants the expenditure of its resources.
8 And we think that the -- there is no jurisdictional
9 impediment to a decision in this case.
10 JUSTICE GINSBURG: Does the Government have
11 a position on what the answer would be? We've remanded
12 it, but that's an open question. But does the
13 Government have a position on whether these kinds of
14 claims would have to be heard by an Article III judge?
15 MR. STEWART: Again, we don't have a
16 position with respect to the defamation claim. That is,
17 defamation claims may be personal injury claims in many
18 contexts, but in this statute, it's linked with wrongful
19 death, which seems to -- to cut the other way. The
20 actual counterclaim was not a defamation claim; it was a
21 tortious interference claim. And we don't think that
22 would be a personal injury claim.
23 With respect to (b)(1), it says
24 bankruptcy -- I see my time is up. Thank you.
25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Englert.

2 ORAL ARGUMENT OF ROY T. ENGLERT, JR.,

3 ON BEHALF OF THE RESPONDENT

4 MR. ENGLERT: Mr. Chief Justice, and may it

5 please the Court:

6 There are three possible grounds for

7 affirmance of the Ninth Circuit in this case, one

8 constitutional and two statutory; and the 157(b)(5)

9 ground which was preserved below received some

10 discussion at the very end of Mr. Stewart's argument.

11 But I'd like to start the meat of my argument just the

12 way Mr. Stewart started his argument, which is by

13 addressing Justice Scalia's question, and like Mr.

14 Richland, I'd like to talk about footnote 14 of the

15 Granfinanciera opinion.

16 Now, Granfinanciera had to distinguish

17 Schor, which is the only case in which this Court has

18 ever said a State law claim could be a public right so

19 that it could be adjudicated by a non-Article III forum

20 and not subject to the Seventh Amendment. And Schor

21 rested on a consent and waiver rationale and on a

22 structural rationale that an alternative Article III

23 forum was made available by Congress for everyone in Mr.

24 Schor's position.

25 In distinguishing Schor, this Court said in

1 footnote 14: "Parallel reasoning is unavailable in the
2 context of bankruptcy proceedings because creditors lack
3 an alternative forum to the bankruptcy court in which to
4 pursue their claims." So with respect, this Court has
5 already answered the question Justice Scalia posed by
6 saying a creditor may not be put to that choice. Now,
7 the --
8 JUSTICE SOTOMAYOR: Counselor, that sort of
9 begs the question, because I think what I haven't
10 unpackaged -- and I want you to unpackage it with me --
11 you're obviously not deprived of a State or Federal
12 trial forum to decide your claim.
13 What you're -- what you're deprived of --
14 you can get your judgment. No one's telling you, you
15 can't go to those courts and get a declaration of your
16 rights. What you're being told is you can't get paid on
17 it. But that happens all of the time, either by the
18 vagrancies of the fact that a debtor goes bankrupt and
19 doesn't file in the bankruptcy court or does file and
20 there's been a discharge.
21 What you haven't said to me is what entitles
22 you, outside of equity, and what stops either a State
23 court or a Federal -- a State legislature or
24 congressional legislature from saying, when someone is
25 in bankruptcy, this is the res and these are the people

1 who are entitled to it? It's a separate claim. It's
2 not the State law claim. It may be measured by State
3 law entitlement, but it's a separate claim. Why isn't
4 it just a separate claim?
5 MR. ENGLERT: Okay, Justice Sotomayor, in
6 attempting to answer your question I'd like to
7 distinguish sharply between a claim of the creditor
8 against the res, which is --
9 JUSTICE SOTOMAYOR: But that's what you have
10 to become to make that claim, meaning you would need to
11 adjudicate your State law entitlement. You get a
12 judgment saying she defamed you. Then what do you do
13 with that judgment?
14 MR. ENGLERT: That judgment then is covered
15 by the priority scheme of Federal bankruptcy laws, which
16 are passed pursuant to congressional authority --
17 constitutional authority in Article I, section 8, clause
18 4, which is why, in answer to the question Your Honor
19 asked first of Mr. Richland, although the Court has
20 never squarely addressed it, it's broadly accepted that
21 there is no problem with adjudicating what would
22 otherwise be State law claims by the creditor against
23 the debtor in bankruptcy.
24 It's an entirely different subject when the
25 debtor tries to bring a claim against a creditor.

1 That's what Marathon addressed; that's what
2 Granfinanciera addressed; that's what Katchen v. Landy
3 addressed.
4 Now, in Katchen v. Landy, the Court said the
5 case turned on or largely turned on the proposition that
6 Congress had prescribed that the counterclaim, the
7 preference avoidance counterclaim created by Act of
8 Congress, must be adjudicated before the main claim
9 against the res and against the debtor could or couldn't
10 be disallowed. And the Court returned to that theme in
11 footnote 14 of Granfinanciera saying: "As Katchen makes
12 clear, however, by submitting a claim against the
13 bankruptcy estate, creditors subject themselves to the
14 court's equitable power to disallow those claims." So
15 to the --
16 JUSTICE SOTOMAYOR: That's -- that's my
17 problem, which is if Congress could do that, why can't
18 it do what it did here, which is to say if you -- not to
19 make an equitable claim against the estate. It's not
20 going to be in the amount of your judgment because
21 they're in bankruptcy because they can't pay your
22 judgment. If you want a piece of this, you have to
23 consent to all claims, all compulsory claims -- let's
24 not try to get into the compulsory/permissive
25 category -- to be adjudicated.

1 Otherwise, like with preferences, there's an
2 unfairness that makes this unequitable. You're asking
3 the estate to give you something, but you're not willing
4 to submit in equity to deciding whether there's
5 something you should give the estate back.
6 MR. ENGLERT: And -- and --
7 JUSTICE SOTOMAYOR: Compulsorily. I mean,
8 you know, not -- I'm trying to take the permissive issue
9 out.
10 MR. ENGLERT: Sure. And the answer, I
11 really do submit, is footnote 14 of Granfinanciera,
12 pointing out that there's nowhere else to go for a
13 creditor in bankruptcy, which distinguishes bankruptcy
14 from Schor, in particular, but from all the other
15 settings in which the Court has said that by submitting
16 a claim, you subject yourself to the jurisdiction for
17 all purposes.
18 JUSTICE SOTOMAYOR: Every -- every
19 bankruptcy priority rule extinguishes someone's
20 entitlement to money. The security rules mean the
21 people who have secured interests get paid before
22 unsecured people get paid, and there are insider rules.
23 Equity, as in terms of how the bankruptcy sets up the
24 res, is at the vagrancies of the legislature.
25 MR. ENGLERT: Exactly.

1 JUSTICE SOTOMAYOR: They choose what they're
2 going to permit you to take under what circumstances.
3 So why is it inequitable to -- to force you -- not to --
4 to force you, we'll use that word -- to say if you want
5 money from the res, what you trade off is letting the
6 debtor sue you for what you owe.
7 MR. ENGLERT: Well, I don't know if it's
8 inequitable, but it's certainly unconstitutional; and
9 the reason it's unconstitutional is because --
10 JUSTICE SOTOMAYOR: You don't have a
11 constitutional right to collect your debt. You have a
12 constitutional right to have your claim adjudicated by a
13 court.
14 MR. ENGLERT: With respect --
15 JUSTICE SOTOMAYOR: You can go to a -- well,
16 once you get the stay lifted at the end of the
17 discharge, you could sue the estate. You may not get a
18 judgment that you can collect after that.
19 MR. ENGLERT: With respect to the claim of
20 the creditor against the debtor and against the res, I
21 have no problem with that analysis. When the debtor,
22 instead of saying the res is limited and it can only be
23 distributed so far, instead says I get to bring my
24 counterclaim against the creditor in a non-Article III
25 forum and the non-Article III forum gets to hear it and

1 determine it, not just hear as 157(c)(1) says for
2 certain types of claims, then I suggest there is a
3 constitutional problem, at least with respect to claims
4 that neither, as in Katchen v. Landy, require rejection
5 of the main claim, nor, as in Katchen v. Landy, are
6 governed by Federal statute.
7 This is a State common law action for a
8 tort, which has importance for 157(b)(5), which has
9 importance for 157(b)(2), and which has extremely high
10 importance for the constitutional question.
11 In Marathon, as everyone here knows, there
12 was no majority opinion, but one point very much in
13 common between the plurality and the concurrence of
14 Justice -- then-Justice Rehnquist, was that it mattered
15 a great deal that it was a common law claim under State
16 law.
17 Here we have a common law claim --
18 JUSTICE SOTOMAYOR: Without a proof of
19 claim?
20 MR. ENGLERT: Yes. There was no proof of
21 claim in Marathon, so this case presents a different
22 issue than Marathon does. But it does present
23 categorically the same kinds of issues presented in
24 Katchen, Langenkamp, and Schor.
25 The only one of those cases that allowed a

1 State common law claim to go forward -- a State common
2 law counterclaim to go forward was Schor. And the
3 Court, as Mr. Richland correctly said, divided its
4 opinion into a part dealing with the personal rights
5 conferred by Article III, section 1, and the structural
6 rights protected by Article III, section 1.
7 In the part about personal rights, the Court
8 held Mr. Schor had waived his personal right to an
9 Article III forum. In the part about structural rights
10 at page 855 of that opinion, the Court said that it
11 mattered to the constitutional analysis that Congress
12 had made an Article III forum available for pursuit of
13 that claim.
14 So it is terribly, terribly important
15 whether an Article III forum is available. When one is
16 forced into a non-Article III forum, as Pierce Marshall
17 was, if he wanted to have any opportunity to collect
18 from the res, saying that he thereby in some meaningful
19 way consents and saying that the structural purposes of
20 Article III are not implicated is not in line with this
21 Court's cases.
22 JUSTICE GINSBURG: Mr. Englert, something
23 you just said about if he had any opportunity -- I
24 thought his position was this is a nondischargeable
25 debt. Even if it's discharged in bankruptcy, this debt

1 would survive.

2 MR. ENGLERT: That's correct.

3 JUSTICE GINSBURG: So it wouldn't be wiped

4 out? I mean, it would --

5 MR. ENGLERT: Oh -- Justice Ginsburg, I'm

6 sorry.

7 JUSTICE GINSBURG: He would have another

8 forum.

9 MR. ENGLERT: He would have another forum

10 against her post-bankruptcy assets after she had her --

11 her pre-bankruptcy assets distributed. So it's a --

12 it's a different kind of opportunity to recover from a

13 different set of assets. If he wanted to have any shot

14 at any of her pre-bankruptcy assets, he did have to file

15 a proof of claim and not just a nondischargeability

16 complaint.

17 And let me clear up one very minor aspect of

18 the record while I'm talking about the proof of claim

19 and the nondischargeability complaint. I doubt this

20 ends up mattering to the Court's decision, but Mr.

21 Richland misspoke slightly when he said the counterclaim

22 came weeks after the proof of claim. The proof of claim

23 was June 12th. The counterclaim was June 14th, and in

24 its very first paragraph, it says it is a counterclaim

25 to the nondischargeability complaint. It doesn't

1 purport to be a counterclaim to the proof of claim. I
2 doubt this ends up mattering, but it might be important
3 for this single purpose: It is inconceivable that this
4 was a compulsory counterclaim to the nondischargeability
5 complaint. It might have been a compulsory counterclaim
6 to the proof of claim, but not to the
7 nondischargeability complaint.
8 Now, I've explained why I believe --
9 JUSTICE GINSBURG: Just one more point about
10 the nondischargeability. He didn't have to bring that
11 claim, did he? I mean, if it's -- if it's a
12 nondischargeable debt, he doesn't have to have the
13 bankruptcy judge confirm that it's a nondischargeability
14 debt.
15 MR. ENGLERT: Given -- I haven't studied
16 closely the interaction between the automatic stay of
17 section 362 and the nondischargeability complaint of
18 section 523, so I'm not 100 percent sure my answer to
19 Your Honor is correct. But I believe that's not
20 correct. I believe that in order to preserve the
21 argument that something is nondischargeable, one does
22 have to go to the bankruptcy court under section 523 and
23 seek a determination of nondischargeability.
24 Now, the two statutory arguments are before
25 the Court, and I'd like to say something briefly about

1 each of those two statutory arguments.

2 With regard to 157(b)(2), you have heard

3 Mr. Richland say this afternoon that the lower courts

4 limit subparagraphs (A) and (O) with the language

5 "arising in" and "arising under." You heard Mr.

6 Richland say 157(b)(2)(C), subparagraph (C), doesn't

7 need to be so limited because it's so straightforward.

8 But the point is not how straightforward it

9 is; the point is how broad and constitutionally dubious

10 it is. And if the canon of constitutional avoidance

11 means anything in limiting the scope of 157(b)(2), it

12 should have just as much application to (C) as it does

13 to (A) and (O), and the -- it is not as analytically

14 neat as some other cases of statutory interpretation,

15 but the most obvious way, if one is going to limit the

16 reach of (C) as well as (A) and (O), to do so is to take

17 the words "arising in" and "arising under" just as Mr.

18 Richland concedes they are used in limiting (A) and (O).

19 The alternative is to treat those words as

20 surplusage, and the alternative is to run headlong into

21 the constitutional issues.

22 JUSTICE BREYER: Can you go back to that for

23 one second? I understand the due process issue, which

24 is Brandeis's issue in Crowell. I think I can -- you're

25 not going to say anything that I can't read in the brief

1 on that. But the other one is worrying me, the
2 structural issue.
3 So imagine there's no due process concern
4 whatsoever. Now, when I looked at Crowell, your case
5 would seem to fall right in it. It is an adjudication
6 under the law as such, you know, between two people --
7 whatever that famous line is. You're captured by that
8 one. So the question is: Can you get out of it with
9 later cases? And you point to Schor to get out of it.
10 And Schor, as I read it, is an all-factors
11 case, that when she talks in the structural part of --
12 about -- when Justice O'Connor is talking about the
13 non-due process part, the structural part, just what you
14 said, that there isn't a hard-and-fast rule, that there
15 are a bunch of factors that we should look at. At least
16 that's how I read it. And you were reading it as a
17 hard-and-fast rule which means you win.
18 Now -- now, who's -- should I just read this
19 case further and make up my mind about that, or is there
20 something you want to say about it?
21 MR. ENGLERT: Well, no, Justice Breyer, I
22 think I can agree with most or all of your premises and
23 still argue that we should win under the proper
24 constitutional analysis.
25 The point is not that the opinion of the

1 Court in Schor said in so many words that the
2 availability of an alternative Article III forum is
3 dispositive. The point is it has to be dispositive,
4 given the larger sweep of this Court's cases, because
5 otherwise it is simply an all-factors test governing a
6 structural provision of the Constitution.
7 JUSTICE BREYER: Well, you know, that's what
8 she says. And the -- and what you're interested in
9 there, the key thing is not fairness; the key thing is
10 maintaining the integrity of the judicial system. In
11 Crowell, Justice Hughes says you've made that integrity
12 as long as there were review of matters of fact, the
13 independent decision by a court of questions of law, and
14 reservation to the court of constitutional facts which
15 have never been heard of since. Okay?
16 So we have this case. And your issue is,
17 after all, something that for many, many decades or
18 longer has been the subject of a bankruptcy proceeding.
19 The bankruptcy judge is an adjunct to the court. It is
20 well-established, this kind of review. Every part of
21 Crowell is met. So what is -- what is essential to the
22 integrity of the judicial process that requires you to
23 have a de novo hearing before a district court rather
24 than the kind of review that's given here?
25 MR. ENGLERT: Well, those, with respect,

1 Your Honor, I believe are the arguments that were
2 rejected in Marathon.
3 JUSTICE BREYER: In which case?
4 MR. ENGLERT: In Marathon, in Northern
5 Pipeline v. Marathon.
6 JUSTICE BREYER: Well, Marathon, you know,
7 you had four, four and -- and who knows what it stands
8 for. And then we have a sentence of what it stands for,
9 and if you read that one sentence, I don't think you can
10 say it's a slam-dunk for you.
11 MR. ENGLERT: Well, I'm not saying Marathon
12 makes this case a slam-dunk for me, Justice Breyer. I
13 am saying Marathon rejects many, if not all, of the
14 premises of your question, starting with --
15 JUSTICE BREYER: Of the -- of Marathon and
16 saying, where four and four judges really reject a
17 decision like Crowell, which is a kind of foundation
18 stone?
19 MR. ENGLERT: No, I'm suggesting that they
20 reject one particular interpretation of Crowell, a very
21 broad interpretation of Crowell, because --
22 JUSTICE SCALIA: Of course, Crowell involved
23 public rights in the -- in the narrow sense, didn't it?
24 It was -- it was a public suit.
25 MR. ENGLERT: Correct.

1 JUSTICE BREYER: True, but it's also a --

2 JUSTICE SCALIA: And perhaps there should be

3 different standards. Even if you do not agree with my

4 separate opinion in Granfinanciera that that should be

5 the only category, there may well be different standards

6 for public suits in the narrow sense that were involved

7 in Crowell and public suits which are -- are governed by

8 some totality of the circumstances test, which --

9 MR. ENGLERT: I -- I agree with that --

10 excuse me, Justice Scalia. I do agree with that, and I

11 think one doesn't have to adopt the reasoning of the

12 concurrence in the judgment in Granfinanciera to come to

13 that conclusion. I think part IV of Granfinanciera

14 itself supports that proposition.

15 But I also think -- returning to Justice

16 Breyer's question, I do think Marathon does stand for

17 certain propositions that this Court has accepted in

18 later cases and that -- and that do suggest that Crowell

19 is not to be read broadly and that some of the

20 limitations on Crowell are the ones suggested in Justice

21 Scalia's questions.

22 The -- the thing that the concurrence, the

23 two-justice concurrence in Marathon, agreed with the

24 plurality on was that what was fundamental to the

25 disposition of that case was that the claim by the

1 debtor against the creditor was the stuff of common law
2 at Westminster in 1789. It was a State law claim, not
3 by the creditor against the debtor, but by the debtor
4 against the creditor. And --
5 JUSTICE GINSBURG: Because there was no
6 bankruptcy court handle to start with. There was no
7 claim. If you're going to go back to equity, equity
8 lays hold of a claim that fits within the equity court,
9 and then, as you know, there were clean-up and clear-up
10 doctrines so they could decide the whole case.
11 So I think that the one thing one can say
12 about Marathon is that when the debtor has a claim
13 against the creditor and the creditor hasn't made any
14 claim in the bankruptcy, he can't drag that into
15 bankruptcy court. But once the bankruptcy court has
16 authority over the claim, the creditor's claim against
17 the debtor, then the court can clear up the whole
18 matter.
19 MR. ENGLERT: If all we were talking about,
20 Justice Ginsburg, were doctrines of equity, then perhaps
21 Alexander v. Hillman would be the governing precedent, a
22 non-constitutional case later cited in a Seventh
23 Amendment case and now attempts to be imported into an
24 Article III case.
25 But I do respectfully suggest that the

1 Constitution places tighter limits on the authority of
2 non-Article III tribunals to adjudicate counterclaims
3 than just the general and very permissive rules that
4 allowed equity courts to adjudicate counterclaims
5 without -- Alexander v. Hillman was a case about whole
6 Equity Rule 30 and whether it superseded section 51 of
7 the Judicial Code and its venue provisions and personal
8 jurisdiction provisions. If all we were talking about
9 were equity, that would be a fine analysis.
10 But I do read the collection of this Court's
11 cases, including the crucial decisions in Katchen and
12 Langenkamp which involved Federal counterclaims that by
13 statute defeated the main claim, and Schor, which I do
14 believe relied heavily on the consent theory and on the
15 availability of an Article III forum -- I do read that
16 collection of cases to suggest that there are tighter
17 limits on assigning State law claims and State law
18 counterclaims to non-Article III tribunals --
19 JUSTICE SOTOMAYOR: Counsel, by your theory,
20 you're basically saying that Congress cannot delegate
21 any State law-based claim to which a jury is entitled to
22 the bankruptcy counterclaim at all. So if you have a
23 claim by lawyers for their fees in a defense of
24 malpractice, maybe they can adjudicate that, but they
25 can't adjudicate the malpractice claim. It would be a

1 counterclaim. Correct?

2 MR. ENGLERT: I am saying that, Your Honor,

3 but let me say for a moment why that's not inefficient,

4 why that's not such a surprising proposition. Remember,

5 the bankruptcy court can hear all of these claims unless

6 they're covered by 157(b)(5). It just can't determine

7 them.

8 So, the only thing we're talking about is

9 the standard of review. And with respect to -- it's not

10 a surprising proposition that the requirement of an

11 Article III forum does require that the district court,

12 the Article III court, decide those claims. So -- so

13 the -- my position is as broad as Your Honor's question

14 suggests, but the implications are not quite as broad as

15 Mr. Richland suggested when he said that an Article III

16 forum always brings in inefficiency.

17 JUSTICE KAGAN: Mr. Englert, one real

18 difference between Marathon and this case is that

19 Congress passed legislation in between which brought the

20 bankruptcy judges under the control of the district

21 courts and made them entirely Article III entities. So

22 you can look at a case like Marathon -- I mean, not --

23 supervised by Article III entities, not by the

24 President, not by Congress.

25 So one can look at a case like Marathon and

1 say the problem there was that the President appointed
2 the bankruptcy judges in a way that the President no
3 longer does and that the district courts did not have
4 the supervisory control over the bankruptcy judges in
5 the way that they do now, and that that makes a
6 constitutional difference.
7 MR. ENGLERT: I -- I would respectfully
8 subject -- suggest not, Justice Kagan, because there
9 remains a difference between a non-Article III court and
10 an Article III court, and the degree of supervision does
11 not convert the non-Article III court into an Article
12 III court. It simply means that we've gotten to this
13 non-Article III forum in a way that gives slightly
14 tighter control to the judiciary.
15 But as a whole line of cases, including
16 Crowell v. Benson, suggests, the degree of substantive
17 review of individual decisions by non-Article III
18 tribunals matters. It's not just the front end at which
19 the judges or commissioners or whatever they are of the
20 non-Article III tribunal are selected. It's also the
21 back end at which the Article III forum is either really
22 making the Article III decisions or giving deferential
23 review to the decisions of a non-Article I court. So I
24 do think the problem is not solved simply by a different
25 method of appointment of -- of bankruptcy courts.

1 Now, if I may, I'd like to spend a few
2 minutes on section 157(b)(5). It was interesting to me
3 that Mr. Stewart said the Government had no --
4 JUSTICE GINSBURG: Just clarify one point,
5 Mr. Englert. As I understand it, before the code was
6 amended, when the Federal courts were operating under
7 the interim rule, it was standard that the bankruptcy
8 judges, given a claim against the estate, routinely
9 dealt with counterclaims. Isn't that what the practice
10 was when the interim rule was in effect?
11 MR. ENGLERT: I -- I believe the answer is
12 yes, Justice Ginsburg. I can concede that point. But
13 there was, I believe, de novo review in district court.
14 And in any event, the interim rules were in effect for a
15 very short time as the arc of constitutional decision
16 making goes.
17 Marathon was decided in 1982. Congress
18 passed new legislation in 1984, and it took quite
19 sometime for the interim rules to be put into effect.
20 JUSTICE SCALIA: But did all of those court
21 of appeals cases involve Article III claims? Did they
22 pass upon the Article III contention?
23 If not, it's -- it's our clear law that
24 questions -- jurisdictional questions that aren't raised
25 and discussed are not decided for precedential purposes.

1 How -- how many of those cases grappled with the Article
2 III question?
3 MR. ENGLERT: I -- I don't have a case count
4 for you, Justice Scalia. Some did, I must concede that
5 some did, but certainly not all did.
6 JUSTICE SCALIA: But -- but not most, I
7 don't think.
8 MR. ENGLERT: Not most, and they were only
9 decisions of -- of lower courts, not of this Court.
10 Now, on the personal injury tort provision
11 in section 157(b)(5), which, by the way, is also
12 repeated in 157(b)(2)(B) and in 157(b)(2)(O) to give
13 emphasis to the fact that Congress really did not want
14 bankruptcy judges trying personal injury tort claims.
15 The -- the greatest dispute before this Court is not
16 whether we are right about 157(b)(5). Mr. Richland in
17 his -- in his reply brief says we're not right, but I
18 leave the Court to assess those arguments, but -- and
19 Mr. Stewart takes no position. The greatest dispute is
20 whether that issue was preserved for review.
21 And I want to suggest to this Court that it
22 was clearly preserved for review. In the proof of claim
23 filed on June 12th, 1996, Mr. Marshall, Pierce Marshall,
24 checked the box indicating that he was filing a personal
25 injury tort claim. So from literally the first document

1 that potentially brought this issue before the
2 bankruptcy court, it was noted that it was a personal
3 injury tort claim. Twenty-seven months passed before he
4 moved to withdraw the reference, that's true.
5 What's not true is that anything had
6 happened on the defamation claim during those 27 months,
7 and what's not true is that any court below held that
8 delay against Pierce Marshall. If you look at pages 109
9 to 112 of the Joint Appendix filed in this Court, you
10 will see that the timeliness of the motion to withdraw
11 the reference was actually discussed in the motion
12 itself. That's a matter easily accessible to this
13 Court.
14 Judge Keller granted the motion to withdraw
15 the reference. He said, Pierce Marshall, you're right.
16 Then he reversed himself. And you can find his ruling
17 reversing himself at pages 138 to 139 of the Joint
18 Appendix filed in this Court, but he did not reverse
19 himself on timeliness grounds.
20 Our respectful submission is that by
21 granting the motion and then reversing on other grounds,
22 he clearly accepted its timeliness. In any event, the
23 issue was clearly raised in the bankruptcy court and in
24 the district court --
25 JUSTICE KENNEDY: Excuse me, I just couldn't

1 hear. On what grounds did he reverse himself, do you
2 think?
3 MR. ENGLERT: He concluded that the
4 bankruptcy court actually did have authority to hear the
5 claim and the counterclaim on the merits.
6 JUSTICE BREYER: If -- if we were to decide
7 this case, and suppose we decide every other question
8 and suppose you lost, then wouldn't we send it back for
9 you -- if you're right on that, for the Ninth Circuit to
10 decide about that as an independent basis for no
11 jurisdiction?
12 MR. ENGLERT: Given the premise that I've
13 lost every other issue, the Court could either --
14 (Laughter.)
15 JUSTICE BREYER: I had to make that premise
16 in order to --
17 MR. ENGLERT: No, no, I understand. I
18 understand, but given the premise, the Court could then
19 either then reach an alternative ground for affirmance,
20 which is well within the ordinary operation of this
21 Court's rules or send it back. But let me suggest that
22 there is a reason, and I believe a -- a question from
23 one member of the bench earlier suggested that there
24 might be a reason to reach the 157(b)(5) issue, and to
25 put it colloquially and directly, the 157(b)(5) issue is

1 easy. The constitutional question is hard.

2 JUSTICE KENNEDY: Is -- is?

3 MR. ENGLERT: Is easy. The constitutional

4 question is hard.

5 JUSTICE BREYER: If it's that hard, why

6 don't we just DIG the case? I guess that --

7 (Laughter.)

8 MR. ENGLERT: No, but really, the 157(b)(5)

9 question is -- is easy, but the strongest argument

10 Mr. Richland makes on the merits of the 157(b)(5) claim

11 is that Congress meant only bodily injury when it

12 referred to personal injury. But section 522(d)(11) of

13 the code uses the term "bodily injury," so we know that

14 when Congress means bodily injury, it says bodily

15 injury. It's also been suggested that the phrase

16 "personal injury or wrongful death" is a phrase to which

17 the canons of interpretation, noscitur a sociis and

18 ejusdem generis, somehow apply. That's not why Congress

19 used "personal injury or wrongful death."

20 Until 1846, with Lord Campbell's Act, the

21 common law of England was that a wrongful death claim

22 didn't survive, couldn't be brought by the -- by the

23 heirs, because the victim of the tort was dead.

24 It is quite common all around the country to

25 use the phrase "personal injury or wrongful death" to

1 make clear that the tort being covered is a tort that
2 resulted in injury to someone who survived or is a tort
3 that resulted in death. So there's nothing surprising
4 about the use of that phrase. It doesn't mean bodily
5 injury. And for those who look at legislative history,
6 there is legislative history indicating quite
7 emphatically that the members of Congress who were
8 responsible for adding 157(b)(5), amending 157(b)(2)(B),
9 amending 157(b)(O), and putting the abstention
10 provisions in section 1334(c) really meant for
11 bankruptcy judges to keep their hands off personal
12 injury claims.
13 The main claim in this case that conceivably
14 could have given the bankruptcy court jurisdiction, if I
15 lose on the other issues, was Pierce's defamation claim,
16 not Vickie's intentional interference claim. We would
17 respectfully suggest they're both personal injury tort
18 claims, but it's particularly clear that Pierce's
19 defamation claim is an injury to his personal interest
20 in reputation.
21 So either by resolving the constitutional
22 issue or through the canon of constitutional avoidance,
23 or simply because it is the best reading of 157(b)(2),
24 this Court should affirm the Ninth Circuit. Thank you.
25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Richland, you have 3 minutes remaining.

2 REBUTTAL ARGUMENT OF KENT L. RICHLAND

3 ON BEHALF OF THE PETITIONER

4 MR. RICHLAND: Thank you, Mr. Chief Justice.

5 Let me address immediately this question of

6 whether Judge Keller effectively denied this -- this

7 withdrawal motion on timeliness grounds or not, because

8 that truly is the easy way of resolving this personal

9 injury question. The substantive question of whether

10 these particular torts fall within the personal injury

11 exception is a most difficult one, and it is one that

12 this Court really shouldn't take on unless there's a

13 substantial amount more of briefing and input from --

14 from others.

15 But the waiver issue is an easy one, and the

16 reason it's an easy one is the record is undisputed that

17 it was 27 months between the time that this claim --

18 counterclaim was -- claim was filed and between the time

19 that this personal injury issue was raised in a

20 withdrawal motion. During that period of time there

21 were numerous sanctions motions and numerous sanctions,

22 discovery sanctions imposed upon Pierce Marshall. And,

23 in fact, what happened was Judge Keller, before

24 considering the initial withdrawal motion on the

25 merits -- before having a hearing on it, he initially

1 granted the withdrawal. He then had a hearing, and at
2 the hearing what he said was -- he may not have used the
3 word "timeliness," but what he said was you've chosen
4 this forum, the bankruptcy court is immersed in this
5 case, and he used the colorful phrase what you are
6 experiencing here is the spawn of what you have begot.
7 And I think that that clearly imports the
8 nature that you are too late, you have not brought this
9 in a timely fashion; everything that has happened in the
10 bankruptcy court has made it too late for you to come to
11 this court at this time.
12 JUSTICE SCALIA: Well, I would take that to
13 mean you -- you brought it in here, and, you know, the
14 same kind of argument that you were making.
15 MR. RICHLAND: And that --
16 JUSTICE SCALIA: Volenti non fit injuria.
17 You chose to come into the court, and this is the spawn
18 of your coming in.
19 MR. RICHLAND: And the bankruptcy court is
20 so immersed in this because of what has gone on during
21 the bankruptcy proceedings that it is not appropriate
22 for me to withdraw it. That seems to connote clearly
23 the notion that it is not timely.
24 JUSTICE SCALIA: I would -- well, I would
25 rather say 27 months is too long. That's --

1 MR. RICHLAND: And that --

2 JUSTICE SCALIA: That's timely.

3 MR. RICHLAND: Well, 27 months is a long

4 time in bankruptcy.

5 Let me clear up this issue of whether the

6 counterclaim was to the proof of claim or to the

7 dischargeability. On the appendix to the petition, page

8 379, it is quite clearly stated that it was in response

9 to 170 -- 157(b)(2)(C). That is a counterclaim to a

10 person who has filed a claim.

11 On -- with respect to this issue of State

12 law having some great significance here as opposed to

13 Federal law, that issue has been rejected by this Court.

14 In the Schor case, the majority opinion states very

15 clearly that, in fact, there is no significance to the

16 fact that -- that something is a State law claim as

17 opposed to a Federal claim.

18 JUSTICE BREYER: Well, but his basic

19 argument I think is that in Marathon --

20 MR. RICHLAND: There is --

21 JUSTICE BREYER: Make it totally fair.

22 Nobody is being treated unfairly. Structurally, it does

23 injure the -- the prestige or something or the structure

24 or the integrity of the Federal Government -- judiciary,

25 Federal judiciary -- to allow the bankruptcy judge to

1 adjudicate a direct claim; why is a counterclaim
2 different?
3 MR. RICHLAND: Well, I understand that
4 argument, but the majority opinion in Schor states that
5 the State law character of a claim, quote, "has no
6 talismanic power in Article III inquiries." That's 478
7 at 853.
8 Thank you.
9 CHIEF JUSTICE ROBERTS: Thank you, counsel,
10 counsel.
11 The case is submitted.
12 (Whereupon, at 2:01 p.m., the case in the
13 above-entitled matter was submitted.)
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