No. 17-228

IN THE
Supreme Court of the United States

THE RENCO GROUP, INC., A DELAWARE CORPORATION, AND IRA LEON RENNERT,
Petitioners,

v.

LEE E. BUCHWALD, AS TRUSTEE FOR MAGNESIUM CORPORATION OF AMERICA AND RELATED DEBTOR, RENCO METALS, INC., ET AL.,
Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENT LEE E. BUCHWALD

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QUESTION PRESENTED

Petitioners err in claiming that this case presents the question whether a bankruptcy debtor or trustee has a right to a jury trial. As petitioners themselves acknowledge (at 10), the court of appeals declined to decide that question, ruling instead on narrow, nonconstitutional grounds. If this Court were to grant certiorari, therefore, the only question properly presented would be:

Whether the court of appeals erred in concluding that "any jury trial error in this case was necessarily harmless," Pet. App. 4a, where respondents admit that they affirmatively consented in district court to a jury trial on all of petitioners' claims; where respondents never even attempted to withdraw their consent as to some of petitioners' claims; and where the claims as to which respondents never attempted to withdraw consent supported the jury's full damage award.

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INTRODUCTION

The jury in this case found that petitioners Ira Rennert ("Rennert") and his company The Renco Group, Inc. ("Renco") deliberately looted two of Renco's subsidiaries, Magnesium Corporation of America ("MagCorp") and Renco Metals, Inc. ("Metals"). During the late 1990s, Renco and Rennert loaded MagCorp and Metals with $150 million in debt and caused them to hand out more than $100 million in dividends. MagCorp and Metals became insolvent, later defaulted, and ultimately went bankrupt. Since 2003, respondent Lee E. Buchwald, as bankruptcy trustee for MagCorp and Metals (the "Trustee"), has pursued claims to make their estates whole for Renco's and Rennert's willful misconduct.

It is undisputed that Renco and Rennert consented to have all of the Trustee's claims tried before a jury. But they insisted that the jury trial take place in district (not bankruptcy) court. Accordingly, the district court withdrew its jurisdictional reference to the bankruptcy court and prepared the case for trial. Shortly before trial, Renco and Rennert reversed course and moved to strike the Trustee's jury demand as to some (but not all) of his claims. The district court denied the motion, finding that it was too late for Renco and Rennert to withdraw consent. The jury found for the Trustee on most of his claims.

On appeal, Renco and Rennert contended for the first time, in a footnote, that the Trustee had no right to a jury trial on *any* of his claims. The Second Circuit affirmed by unpublished summary order. It expressly declined to decide whether the Trustee had a right to a jury trial. It found instead that "any jury trial error in this case was necessarily harmless," Pet. App. 4a, because the damages award was support-

ed entirely by claims as to which Renco and Rennert never even attempted to withdraw their consent to a jury trial. The court of appeals also observed that, on the record of this case, Renco and Rennert would have a "difficult time" showing that the district court abused its discretion in refusing to allow them to withdraw consent. *Id.* at 3a.

Renco and Rennert now ask this Court to decide whether the Trustee had a constitutional right to trial by jury. That request ignores three fatal procedural defects in their petition. *First*, petitioners do not and cannot say that the stated basis for the decision below warrants this Court's review, or even that it was incorrect. Instead, they improperly urge the Court to bypass the court of appeals' unchallenged harmless-error ruling in order to go straight to the constitutional question. Such a course would violate not only well-established principles of review, but also the prohibition on advisory opinions.

Second, petitioners also ignore the district court's discretionary ruling that their withdrawal of consent was untimely. This Court's longstanding practice of constitutional avoidance would counsel strongly in favor of reviewing that ruling as well before reaching the constitutional jury-trial question.

Third, and in any event, petitioners forfeited the jury-trial question in the form presented here by failing to preserve it properly either in the district court or before the court of appeals.

The Second Circuit's prudent choice to rule on narrow nonconstitutional grounds makes this case a wholly inappropriate vehicle for the broad constitutional question Renco and Rennert failed to preserve below. Further, even if the case's three procedural defects were not fatal to the petition (which they

are), the constitutional question petitioners purport to present would not warrant review because the alleged conflict is illusory and predates this Court's pathmarking decision in *Stern v. Marshall*, 564 U.S. 462 (2011).

STATEMENT

1. During the 1990s, MagCorp owned a facility in Rowley, Utah, that produced magnesium from the brine of the Great Salt Lake. C.A. App. 2783, 2791. Making a profit from magnesium production was difficult because MagCorp used inefficient, outdated technology. *Id.* at 1766, 1946, 2569-70. That technology generated corrosive, toxic wastes, creating potential federal environmental liability. *Id.* at 1767-68, 1873-86, 3163, 3279-80, 3285, 3287-92. MagCorp's profits rose briefly in 1995 because of a "bubble" in magnesium prices from late 1994 to late 1996, *id.* at 1950, 2770, but its management knew the bubble was only a "transient phenomenon," *id.* at 1729, so that MagCorp could not expect similar results in the future.

From 1995 to 1998, Renco and Rennert caused MagCorp and Metals to take on $150 million in debt while paying more than $100 million in dividends. *Id.* at 2797-99. They obtained no valuation of MagCorp at that time. *Id.* at 1500-01, 1588. Expert valuation evidence later showed that MagCorp and Metals were insolvent by roughly $50 million or more when they paid the dividends, leaving aside environmental problems. *Id.* at 1938-39, 1948-49. Other expert evidence established MagCorp's contingent environmental liabilities: compliance and remediation costs likely ranging from $36 to $66 million, plus added potential fines and penalties. *Id.* at 3461-63.

MagCorp's position continued to worsen. Attempts to find a new technology failed, *id.* at 1918-19, and the price of magnesium began to drop as foreign competitors brought more production capacity online, *id.* at 1508-10, 2684. In January 2001, MagCorp and Metals defaulted on their debt. *Id.* at 1604. That same month, the Environmental Protection Agency ("EPA") conducted a surprise inspection of the Rowley facility that revealed previous misrepresentations about environmental contamination. *Id.* at 2579-80. EPA then filed an enforcement action seeking injunctive relief and up to $900 million in civil penalties.

On August 2, 2001, MagCorp and Metals filed a voluntary Chapter 11 bankruptcy petition, *id.* at 2780, later converted to Chapter 7, *id.* at 1025.

2. On July 31, 2003, the Trustee filed an adversary proceeding against Renco and Rennert, seeking to recover for fraudulent transfer under federal law, fraudulent conveyance under New York law, breach of fiduciary duty, aiding and abetting such breach, and unjust enrichment. C.A. App. 1060 (initial complaint); *id.* at 1220 (amended complaint).[1] The Trustee demanded a jury trial. *Id.* at 1218, 1380. The bankruptcy court (Gerber, J.) presided over motions to dismiss, discovery, summary judgment, and *Daubert* motions. *Id.* at 70-102 (docket).

On November 5, 2013, the Trustee moved to withdraw the reference to the bankruptcy court so that a jury trial could be held in the district court. *Id.* at 227-40. Withdrawal was necessary because under 28 U.S.C. § 157(e) a bankruptcy judge may preside over

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[1] Other defendants were named in the adversary complaint, but Renco and Rennert are the only petitioners now.

a jury trial only if all parties consent. Here, Renco and Rennert consented to a jury trial but not to the bankruptcy judge presiding. C.A. App. 233; *id.* at 241-42 (stating that "Defendants agree that the Trustee is entitled to a jury trial" and that "all of the Trustee's claims constitute 'private' claims as defined by *Stern v. Marshall*, [564 U.S. 462] (2011)"). Renco and Rennert also affirmed their consent to a jury trial on the record at a hearing.[2] The district court withdrew the reference. Trial preparation went forward. By moving the case to the district court, Renco and Rennert obtained immediate *de novo* review of certain *Daubert* rulings. *Id.* at 262, 309-40.

On November 12, 2014, Renco and Rennert contended for the first time that some (but not all) of the Trustee's claims were not jury-eligible. *Id.* at 443. A supporting memorandum listed 12 counts in the Trustee's Amended Complaint as to which Renco and Rennert sought to strike the Trustee's jury demand. *Id.* at 451 n.1. Those 12 did not include counts 32 or 45, *see id.*, which were the Trustee's claims for aiding and abetting breaches of fiduciary duty. *Id.* at 1361, 1374. Renco and Rennert did not then or later argue to the district court that the Trustee's claims were categorically ineligible for a jury trial. The district court (Nathan, J.) denied the motion, finding that (1) the Trustee had a right to a jury trial; (2) Renco's and Rennert's previous representations to the court

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[2] C.A. App. 267 (counsel for Renco and Rennert) ("[M]y intention is to file a short response to the motion indicating that we consent to the withdrawal, because there's no issue about the [T]rustee['s] entitlement to a jury trial."); *id.* at 293 (court's statement) ("Counsel have . . . represented that both sides consent to a jury trial but not before the bankruptcy court.").

"suffice[d] as consent" to such a trial; and (3) because the Trustee had moved to withdraw the reference to obtain a jury trial in reliance on Renco's and Rennert's position, he "would be prejudiced by any attempt to withdraw that consent." Pet. App. 12a-14a.

3. The case went to trial. Jury selection began on February 2, 2015. On February 27, the jury found for the Trustee on his claims for fraudulent conveyance under New York law, aiding and abetting fraudulent conveyance, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and unjust enrichment. C.A. App. 764-74. The jury awarded $101 million in compensatory damages against Renco and $16.2 million against Rennert, *id.*, as well as $1 million in punitive damages against Renco, *id.* at 771-72, 776, 2242-47, indicating that Renco had engaged in "willful or wanton conduct and acted maliciously," *id.* at 3810, when it breached its fiduciary duty. The jury found for Renco and Rennert on the Trustee's federal fraudulent-transfer claims and other state-law claims. *Id.* at 760-64, 771-74.

After the verdict, Renco and Rennert sought a new trial or judgment in their favor, largely without success.[3] Among the arguments they raised (and repeat in their petition, though they do not seek review of the issue) was that the jury's verdict was inconsistent or an improper compromise because no rational jury could have found for them on the

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[3] The district court did set aside the unjust-enrichment finding as unsupported by the evidence, C.A. Spec. App. 35-39, as well as the punitive-damages award because Delaware law does not permit such awards for breach of fiduciary duty, *id.* at 41-43. The court did not evaluate the evidence supporting the jury's findings of willful, malicious conduct. *Id.* at 43.

federal fraudulent-transfer claims while finding for the Trustee on the New York fraudulent-conveyance claims. The district court rejected those arguments as procedurally barred and substantively meritless. C.A. Spec. App. 48-57; C.A. App. 666-76.[4]

On September 25, 2014, after calculating pre-judgment interest, the district court entered judgment for the Trustee of $183.7 million against Renco and $29.5 million against Rennert. They appealed.

4. Before the Second Circuit, Renco and Rennert argued that the district court had erred in denying their motion to strike the Trustee's jury demand. They purported to "reserve" in a footnote of their opening brief the right to "challenge [the] validity" of *Germain v. Connecticut National Bank*, 988 F.2d 1323 (2d Cir. 1993), one of the subjects of the present petition. Renco/Rennert C.A. Br. 63 n.9. The Trustee responded that (1) the district court had acted within its discretion in holding Renco and Rennert to their previously given consent, Trustee C.A. Br. 60-61; (2) in any event, the Trustee had a right to a jury trial as to all claims at issue, *id.* at 62-65; and (3) in the alternative, any error was harmless because the

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[4] The procedural bars to Renco's and Rennert's claims of alleged inconsistency or compromise were that (1) defense counsel argued for separate instructions on the solvency standard for federal and New York claims, C.A. Spec. App. 55; (2) defense counsel argued for a jury verdict form that would direct the jury to reach the New York claims even if it found for Renco and Rennert on the federal claims, *id.*; and (3) defense counsel's statements showed awareness of the "alleged inconsistency or compromise" before the jury was discharged, but counsel "made a tactical decision to forego [sic] raising it until after the jury was no longer able to address the asserted error," *id.* at 53.

Trustee had such a right at least for his claims based on breach of fiduciary duty, *id.* at 66-67.

On February 9, 2017, a three-judge panel (Raggi, Lohier, and Droney, JJ.) heard oral argument. During the argument, Judge Lohier asked Rennert's and Renco's counsel to identify the point in the record at which his "client withdrew consent to a jury trial in connection with the aiding and abetting a breach of fiduciary duty" claim. Oral Arg. Rec. 7:13-7:25.[5] Counsel responded erroneously that his clients "withdrew consent with respect to the entire case." *Id.* at 7:25-7:31. Even after Judge Lohier referred counsel to "451 of the appendix," where Renco and Rennert withdrew consent as to "certain claims or counts, not as to all of them," *id.* at 7:34-7:46, counsel later repeated the inaccurate statement that his client "withdrew consent as to a jury trial, plain and simple. On all claims." *Id.* at 8:57-9:04. When asked by Judge Raggi for record support, he offered to "get the page number," *id.* at 9:13-9:17, but never provided one (nor does one exist).

On March 8, 2017, the court of appeals affirmed by unpublished summary order. Pet. App. 1a-10a. It did not decide whether "the Trustee was . . . entitled to a jury trial as a matter of law." *Id.* at 3a. It did not even decide whether the district court erred in refusing to allow Renco and Rennert to withdraw their consent – though it indicated that they would

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[5] "Oral Arg. Rec." refers to the audio recording for the February 9, 2017 oral argument available on the Second Circuit's website. *See* http://www.ca2.uscourts.gov/decisions/isysquery/1bca9560-378d-4d1d-9fcb-4cc871b2d39a/428/doc/15-2691%2C%2015-2971%2C%2015-2962.mp3. Citations indicate the minute and second of the audio file where particular statements occur.

have a "difficult time demonstrating abuse" of discretion. *Id.* Instead, it based its decision on harmless error, concluding that, "even if we were to identify any error in the rejection of defendants' withdrawal [of consent], that error would be harmless because defendants' withdrawal was not complete." *Id.* at 4a. The Second Circuit explained that

> the defendants did not move to strike the [Trustee's jury demand as to the] claims against Rennert and the Renco Group for aiding and abetting a breach of fiduciary duty. *See* [C.A. App.] 451 n.l. Thus, regardless of whether the Trustee had the right to a jury trial on these claims, the district court was authorized to try them before a jury on the prior consent that defendants never withdrew. *See* Fed. R. Civ. P. 39(c)(2). Moreover, the jury awarded the same damages for these aiding-and-abetting claims as it did for the other claims specified in defendants' withdrawal. [C.A. App.] 768-71. The challenged judgment did not double count these identical damages and the defendants bring no other challenges to the aiding-and-abetting claims. Thus, defendants were not harmed by the fact that all of these claims were tried to a jury.

Id. The court of appeals also rejected all of Renco's and Rennert's other arguments and a cross-appeal by the Trustee on prejudgment interest. *Id.* at 5a-10a.

5. Renco and Rennert sought panel rehearing and rehearing en banc. In doing so, they conceded that "[t]he panel never decided whether Plaintiff had any right to a jury trial on its claims," Reh'g Pet. 8, and they did not contend that the en banc court could or should immediately reach the question whether the Trustee had a Seventh Amendment right to a

jury trial. Instead, Renco and Rennert contended that the panel's harmless-error ruling was erroneous and urged the panel to "grant rehearing and review of Defendants' jury-right arguments on the merits." *Id.* at 13. In a footnote, they stated that, if the panel were to reach the merits on their claims and to disagree with them, they would then file a second petition for rehearing en banc in which they would argue "that a bankruptcy trustee never has a jury trial right because his claims are inherently equitable." *Id.* at 13 n.*.

The Second Circuit denied rehearing and rehearing en banc. Pet. App. 17a-18a. The present petition for certiorari followed.

REASONS FOR DENYING THE PETITION

I. THIS CASE DOES NOT PRESENT THE QUESTION WHETHER THE TRUSTEE HAD A RIGHT TO A JURY TRIAL

The court of appeals determined that "any jury trial error in this case was necessarily harmless" because "defendants' withdrawal [of consent] was not complete." Pet. App. 4a. That determination does not warrant review. Renco and Rennert do not argue otherwise. They do not argue that the Second Circuit's ruling on consent and harmless error creates or implicates any conflict with other circuits. They do not even say that ruling was incorrect. Renco and Rennert instead invite this Court to ignore the actual decision below (which sets forth a simple, factbound basis for affirmance) and address the constitutional question whether the Trustee had a jury-trial right under the Seventh Amendment (which the court of appeals declined to reach). Familiar principles of review weigh decisively against that approach.

A. When this Court reviews a lower court's decision on the merits, it generally decides only those questions of law necessary to assess the lower court's judgment. *See Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956) ("This Court . . . reviews judgments, not statements in opinions."). Here, Renco and Rennert do not challenge the actual grounds for the judgment below. They instead ask this Court to review statements about bankruptcy trustees' jury-trial rights that were not even in the Second Circuit's opinion under review, but in its earlier decisions in *Germain v. Connecticut National Bank*, 988 F.2d 1323 (2d Cir. 1993), and *In re CBI Holding Co.*, 529 F.3d 432 (2d Cir. 2008), *cert. denied*, 556 U.S. 1183 (2009). Granting that request would be a remarkable departure from this Court's practice. Indeed, if the Court opined on the Seventh Amendment question without deciding whether the Second Circuit's decision was correct for the reasons that court gave, it would be giving an advisory opinion, which Article III prohibits. *See Flast v. Cohen*, 392 U.S. 83, 96 (1968).

Renco's and Rennert's proposal that this Court disregard consent and harmless error to reach the Seventh Amendment issue also runs counter to the prudential rules that this Court will "'not . . . decide questions of a constitutional nature unless absolutely necessary to a decision of the case,'" *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting *Burton v. United States*, 196 U.S. 283, 295 (1905)); and that, "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter," *id.* The Second Circuit acted in accordance with those precepts. If it granted review, this Court would have no reason to do

otherwise – especially because Renco and Rennert do not even challenge the panel's harmless-error ruling. The purported basis for granting certiorari would be irrelevant.

Constitutional avoidance would also weigh in favor of considering a second ground for affirmance before reaching the Seventh Amendment issue: whether the district court abused its discretion in refusing to allow Renco and Rennert to withdraw their consent even in part. The court's basis for that finding – that the Trustee "would be prejudiced by any attempt to withdraw . . . consent because he moved to withdraw the reference expressly for the purpose of seeking a jury trial and with defendants' full assurance that they were in agreement," Pet. App. 14a – is specific to this case and wholly unsuitable for review. The Second Circuit's observations that Renco and Rennert had "conceded" that this issue was subject to the district court's discretion[6] and would have a "difficult time demonstrating abuse" of that discretion on the present record, *id.* at 3a, provide an added reason to think that a grant of certiorari would not likely resolve any question of interest to anyone but the parties to this case.

Finally, Renco and Rennert failed to preserve properly in the courts below the question they now seek to present. There is no dispute that Renco and Rennert never argued to the district court that the Trustee lacked any right to a jury trial on any of his claims. As for the court of appeals, it is the Second

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[6] Oral Arg. Rec. 3:46-3:55 (Judge Raggi asking whether a party could "start trial in front of the jury and then stand up and say . . . we're [going to] withdraw this consent"; counsel answering that he was "pretty sure not").

Circuit's longstanding rule that "an argument mentioned only in a footnote" is not "adequately raised or preserved for appellate review." *United States v. Restrepo,* 986 F.2d 1462, 1463 (2d Cir. 1993). A footnote was all the space that Renco's and Rennert's present argument got in their merits brief. *See* Renco/Rennert C.A. Br. 63 n.9. Accordingly, this Court's "usual practice" of "declin[ing] to review" a claim "not raised or addressed in federal proceedings[] below," *Gray v. Netherland*, 518 U.S. 152, 165 (1996), is an additional, independent reason to deny certiorari.

B. Renco and Rennert cannot cure the fatal vehicle problems here by incorrectly comparing this case to ones where the judgment of a court of appeals rested on a point of law that warranted review but had been settled by previous circuit precedent. *See* Pet. 23-24 (citing, *e.g.*, *California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042 (2017) ("*CalPERS*")). *CalPERS* turned on the question whether a certain statutory period of repose could be tolled by the filing of a class action. *See* 137 S. Ct. at 2048-49. The opinion of the Second Circuit in *CalPERS* treated the tolling question as largely settled under Second Circuit law.[7] But *CalPERS* was still an appropriate vehicle to decide that question because, if this Court had concluded that class-action tolling were available, its conclusion would have led it to reverse the judgment of the Second Circuit.

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[7] *See In re Lehman Bros. Sec. & Erisa Litig.*, 655 F. App'x 13, 15 (2d Cir. 2016) (following *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), *cert. dismissed*, 135 S. Ct. 42 (2014)), *aff'd sub nom. CalPERS*, 137 S. Ct. 2042.

No similar circumstances exist here. The Second Circuit did not hold that *Germain* had settled the jury-trial issue under circuit law. Instead, the court of appeals avoided addressing any jury-trial issue at all because the alleged error was harmless. That independent, factbound, and unchallenged basis for the judgment would prevent the Court from reaching the questions petitioners seek to present. Nor do Renco and Rennert contend that any of those cases involved an independent alternative ground for affirmance comparable to the district court's discretionary ruling that it was too late for Renco and Rennert to withdraw their consent to a jury trial. Accordingly, this case is wholly unlike *CalPERS* or similar cases.[8]

Renco and Rennert also err in comparing this case to a situation in which a party fails to contest a point already settled by circuit precedent, but later seeks to take advantage of a subsequent change in law. *See* Pet. 22 & n.11 (citing *Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87 (2d Cir. 2009)). That

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[8] *See* Pet. 24 (citing *Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014), and *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007)). In *Executive Benefits*, the petitioner contended that Article III required the lower courts to vacate a bankruptcy court's judgment of certain fraudulent-conveyance claims despite the petitioner's consent to the bankruptcy court's decision of those claims. *See* Br. for Pet'r 24-38, *Executive Benefits*, No. 12-1200 (filed Sept. 9, 2013), 2013 WL 4829341. Had this Court agreed, the judgment under review would have been vacated. In *MedImmune*, the petitioner contended that Article III permitted it to seek a declaratory judgment that a patent it had licensed was invalid. *See* 549 U.S. at 122-23. This Court agreed and therefore reversed. *Id.* at 137. In neither case was the question presented to this Court irrelevant to the basis given by the court of appeals for the judgment under review.

analogy fails for three reasons. *First*, this is not a case about a change in law. The Second Circuit's decision in *Germain* long predates both the trial and the appeal below. Cases such as *Hawknet* therefore do not help Renco and Rennert.

Second, the courts below properly concluded – and Renco and Rennert admitted on appeal, Oral Arg. Rec. 11:35-11:45 – that Renco's and Rennert's conduct and statements before the district court constituted "affirmative consent to a jury trial." Pet. App. 3a. Consent is more than failure to raise an argument: Federal Rule of Civil Procedure 39(c)(2) makes the parties' consent to a jury trial an independent legal basis for such a trial, regardless of whether either party could demand one as of right. The petition cites no authority for disregarding a party's undisputed consent to a jury trial because that party claims that, had circuit precedent been otherwise, it might have withheld consent.

Third, Renco and Rennert are wrong to say (at 22) that their consent to a jury trial (or their incomplete withdrawal of that consent) reflected deference to *Germain* as "binding Second Circuit precedent." As the petition admits in a footnote (at 7 n.2), Renco and Rennert argued vehemently (though erroneously) in the court of appeals that, regardless of *Germain*, a "jury trial right d[id] *not* attach to [the Trustee's] fiduciary breach claims." Renco/Rennert C.A. Reply Br. 17-20. Further, their counsel told the appellate panel repeatedly (though wrongly) that Renco and Rennert had withdrawn their consent as "to the entire case" and as to "all claims." *Supra* p. 8. Obviously, counsel did not, in the court of appeals, believe that Renco and Rennert lacked any arguable basis to withdraw consent under binding circuit

precedent. Only after the Second Circuit caught their misstatements of the record did Renco and Rennert invent their current position that *Germain* somehow compelled them – or, as they put it when seeking to stay the mandate below, affected their "strategic decision"[9] – to consent in the district court to the same jury trial as to which they categorically objected on appeal.

The record suggests a more likely reason that Renco and Rennert consented to a jury trial but insisted that trial take place in the district court. By moving the case to district court, Renco and Rennert obtained immediate *de novo* review of unfavorable *Daubert* and other rulings.[10] It may well have made sense for them to press for such immediate review at the cost of giving up the chance that this Court might someday take up their Seventh Amendment issue. But, sensible or foolish, that was the choice Renco and Rennert made and to which the courts below reasonably held them. *Cf. Stern v. Marshall*, 564 U.S. 462, 482 (2011) ("Pierce repeatedly stated to the Bankruptcy Court that he was happy to litigate there. We will not consider his claim to the contrary, now that he is sad.").

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[9] Mot. To Stay Issuance of the Mandate 4; *see also id.* at 3 ("*Germain*[] . . . had a direct and continuing effect on Defendant's strategy").

[10] *See* C.A. App. 262 (letter request for *de novo* review); *id.* at 269-74, 279-85, 290-91 (hearing where defense counsel urged a different district judge to address the rulings on interlocutory appeal); *id.* at 309-40 (resulting rulings).

II. THE QUESTION WHETHER THE TRUSTEE HAD A RIGHT TO A JURY TRIAL DOES NOT WARRANT REVIEW

Even if this case did present the question whether the Trustee had a right to a jury trial (which it does not), that question would not warrant review. The cases on which Renco and Rennert rely to establish a circuit split are old and distinguishable. Almost all predate this Court's 2011 ruling in *Stern*. In the district court, Renco and Rennert cited *Stern* as directly supporting their previous view that the Trustee had a right to a jury trial. C.A. App. 241-42. Here, their petition mentions the case only in passing (at 19). Because of *Stern*'s significant impact on this area of the law, there is no need for this Court's intervention unless and until a post-*Stern* split emerges.

A. No Live Circuit Split Warrants Review

1. Whether there is a Seventh Amendment right to a jury trial for a claim generally turns on whether a similar claim would historically have been triable at law (in which case a jury right attaches) or in equity (in which case not). *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 40-42 (1989). In the context of bankruptcy, some claims historically triable at law nevertheless fall outside the jury-trial right if they "arise[] as part of the process of allowance and disallowance of claims." *Katchen v. Landy*, 382 U.S. 323, 336 (1966); *see Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990) (per curiam) (no right to a jury trial on a claim that has "become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's equity jurisdiction") (emphasis omitted). Such claims may be decided by a bankruptcy judge without a jury.

This Court's most recent major decision on the authority of bankruptcy courts was *Stern*, which addressed Article III but is also relevant to jury-trial issues for its discussion of *Katchen* and *Langenkamp*. *Stern* held that a bankruptcy court lacked jurisdiction to enter final judgment on a claim for tortious interference with a gift, even though that claim had been filed as a counterclaim in the bankruptcy proceeding. 564 U.S. at 470-71, 503. It rejected the argument that *Katchen* or *Langenkamp* placed the counterclaim within the bankruptcy court's Article I authority "simply because an interested party [was] involved in a bankruptcy proceeding." *Id.* at 495. Instead, a claim "at common law that simply attempts to augment the bankruptcy estate . . . must be decided by an Article III court," *id.*, and (by implication) a jury if demanded.

Under *Stern*, a common-law claim becomes subject to the bankruptcy court's authority only where the claim must be "resol[ved] . . . as part of the process of allowing or disallowing claims." *Id.* at 496 (discussing *Katchen* and *Langenkamp*). A dispute is not part of the claims-allowance process where a claim requires "factual and legal determinations that were not 'disposed of in passing on objections' to [a creditor's] proof of claim," *id.* at 497, so that there is no "reason to believe that the process of ruling on [a] proof of claim would necessarily result in the resolution" of the other disputed claim," *id.* at 498.[11]

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[11] *Stern* also observed that "both *Katchen* and *Langenkamp*" involved "right[s] of recovery created by federal bankruptcy law," suggesting that the holdings of those cases might not extend to "a state tort action that exists without regard to any bankruptcy proceeding." 564 U.S. at 498-99.

2. Renco and Rennert incorrectly assert (at 11-16) that several circuit decisions applying *Katchen*, *Granfinanciera*, and *Langenkamp* in the early 1990s present a live circuit split that warrants review here.

a. Second and Third Circuits. It is true that in the Second Circuit a debtor retains a jury-trial right over historically legal claims except when "the dispute [is] part of the claims-allowance process or affect[s] the hierarchical reordering of creditors' claims." *Germain*, 988 F.2d at 1330; *see CBI Holding*, 529 F.3d at 467-68. It is also true that the Third Circuit cited with approval the reasoning of *Germain* in *Billing v. Ravin, Greenberg & Zackin, P.A.*, 22 F.3d 1242 (3d Cir. 1994), concluding that the particular claims in *Billing* were not subject to a jury trial because they "f[ell] within the process of the allowance and disallowance of claims." *Id.* at 1253.

b. Sixth and Seventh Circuits. Renco and Rennert overstate their case when it comes to the Sixth and Seventh Circuit decisions on the other side of the purported split: *In re Hallahan*, 936 F.2d 1496 (7th Cir. 1991), and *In re McLaren*, 3 F.3d 958 (6th Cir. 1993). Both of those cases involved a creditor's claim that certain debts were nondischargeable under 11 U.S.C. § 523(a). *See Hallahan*, 936 F.2d at 1499; *McLaren*, 3 F.3d at 959-60. Both cases held that a dischargeability proceeding was "a type of equitable claim for which a party cannot obtain a jury trial." *Hallahan*, 936 F.2d at 1505; *McLaren*, 3 F.3d at 960. And both cases then stated, broadly and unnecessarily, that the debtors also could not assert a right to jury trial because they had "voluntarily submitted [their] case[s] to bankruptcy court." *Hallahan*, 936 F.2d at 1505; *McLaren*, 3 F.3d at 960.

Unlike the state-law claims at issue in *Germain*, 988 F.2d at 1326, and here, the dischargeability claims in *Hallahan* and *McLaren* were "integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's equity jurisdiction," *Langenkamp*, 498 U.S. at 44 (emphasis omitted), and involved the assertion of rights "created by federal bankruptcy law," *Stern*, 564 U.S. at 498. To apply *Hallahan* or *McLaren* to a case like this one would run counter to *Stern*'s statement that jury-trial rights are not lost "simply because an interested party [was] involved in a bankruptcy proceeding," *id.* at 495, and its clarification of *Katchen* and *Langenkamp*.

Renco and Rennert do not cite, and we have not found, any decision of either the Sixth or the Seventh Circuit resolving the effect of *Stern* on *Hallahan* or on *McLaren* as to a debtor's or trustee's right to a jury trial of state-law claims brought to augment the bankruptcy estate. Post-*Stern* cases from those circuits demonstrate that the Sixth and Seventh Circuits are well aware of *Stern*'s holding.[12]

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[12] *In re Hart*, 564 F. App'x 773 (6th Cir. 2014), applied *McLaren* to a dischargeability dispute, but only after confirming that "'the action at issue stems from the bankruptcy itself [and] would necessarily be resolved in the claims allowance process.'" *Id.* at 776 (quoting *Stern*, 564 U.S. at 499) (alteration in original). *Lee v. Christenson*, 558 F. App'x 674 (7th Cir. 2014), upheld a bankruptcy court's post-*Stern* refusal to reopen a judgment in favor of a creditor rendered in a dischargeability proceeding. *Id.* at 676. *Lee*'s reasoning was based primarily on the stringent requirements for reopening a judgment under Rule 60(b). *See id.* It sheds little light on how the Seventh Circuit would resolve a post-*Stern* direct appeal unrelated to dischargeability.

c. Fifth Circuit. Renco and Rennert also incorrectly attribute (at 14-15) to the Fifth Circuit a categorical rule that no jury-trial right attaches whenever "the litigation involves a creditor that has filed a proof of claim." They claim to find that rule in *In re Jensen*, 946 F.2d 369 (5th Cir. 1991), *abrogated on other grounds by In re El Paso Elec. Co.*, 77 F.3d 793 (5th Cir. 1996) (per curiam). *Jensen* held only that a debtor had a jury-trial right as to state law claims that did not "'arise as part of the process of allowance and disallowance of claims'" and were not "'integral to the restructuring of debtor-creditor relations.'" *Id.* at 374 (quoting *Granfinanciera*, 492 U.S. at 58). After that holding, the Fifth Circuit referred to the act of filing a proof of claim as "den[ying] both [creditor] and [debtor] any right to jury trial that they otherwise might have had on *that claim*." *Id.* (emphasis added). Certainly, if a claim is submitted to the bankruptcy court to be allowed or denied, then "that claim" becomes part of the claims-allowance process. But *Jensen* does not support Renco's and Rennert's suggestion that, in the Fifth Circuit, filing any claim eliminates jury-trial rights as to all claims.

Renco and Rennert further state (at 15) that the Fifth Circuit "reaffirmed" *Jensen* in *U.S. Bank National Ass'n v. Verizon Communications, Inc.*, 761 F.3d 409, 420 (5th Cir. 2014), *cert denied*, 135 S. Ct. 1430 (2015). Nothing in *U.S. Bank* adopts or attributes to *Jensen* the rule that Renco and Rennert attribute to the Fifth Circuit. Further, in discussing *Stern*, the Fifth Circuit made clear that the crucial question was whether "resolution of [a creditor's] proof of claim will require ruling" on the issues raised by the claim as to which a jury trial is sought.

Id. at 424. As Renco and Rennert admit (at 15), that is all consistent with *Germain*.

In sum, any disagreement among the circuits is limited and stale. The petition points to no case in which the Sixth or the Seventh Circuit has denied a jury trial to a debtor in a case that – like this one – involves a claim "at common law that simply attempts to augment the bankruptcy estate." *Stern*, 564 U.S. at 495. Whether either court would do so after *Stern* is questionable. And, if someday that happens, the resulting decision will make a better vehicle for development of the law.

B. The Trustee Had a Right to a Jury Trial

Review is also unwarranted because, even if this Court were to reach the constitutional question (which, for the reasons given in Part I, it almost certainly would not do), it likely would conclude that the Trustee had a right to a jury trial in this case. As explained in Part II.A, this Court's decisions make clear that, in the bankruptcy context, the ultimate test for a jury-trial right on an otherwise jury-triable claim[13] is whether that claim "arise[s] as part of the process of allowance and disallowance of claims" or was "integral to the restructuring of debtor-creditor relations." *Granfinanciera*, 492 U.S. at 58. That test

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[13] Renco and Rennert erroneously contended below that the Trustee's claims for breach of fiduciary duty were not jury-triable because they sought equitable relief. *See* Pet. 7 n.2. That issue is not fairly presented in the petition and is now abandoned under this Court's Rule 14.1(a). In any event, the Trustee's fiduciary-breach claims were jury-triable because he sought compensatory damages, not equitable restitution. *See* Trustee C.A. Br. 66-67 & n.39 (citing *Pereira v. Farace*, 413 F.3d 330 (2d Cir. 2005), which in turn discusses *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002)).

asks whether the claim requires "factual and legal determinations" independent of those required to resolve a proof of claim and whether the "process of adjudicating [the] proof of claim would necessarily resolve" the other claim. *Stern*, 564 U.S. at 497.

Here, the Trustee's claims were tried (with Renco's and Rennert's consent) in the district court, not in the bankruptcy court. They were separate from the resolution of any proof of claim. Although Renco and Rennert did file proofs of claims in the bankruptcy court, those claims were not and still have not been adjudicated by that court. Nor will the judgments against Renco and Rennert prevent them from collecting on their proofs of claim, in the event that those claims otherwise have merit. Indeed, Renco and Rennert admit (at 7) that the Trustee's "fiduciary duty claims" would not "affect[] the claims allowance process." That resolves this case in the Trustee's favor not only under *Germain*, but also under *Katchen*, *Granfinanciera, Langenkamp*, and *Stern*.

Renco's and Rennert's position rests on the mistaken contention that a debtor in bankruptcy (or a trustee asserting a debtor's claims) gives up any right to a jury trial in any adversary proceeding by filing a petition in bankruptcy. That proposition finds no support in any decision of this Court. Renco and Rennert argue that a debtor's claims become subject to the bankruptcy court's jurisdiction when (as property of the debtor) they become part of the bankruptcy estate. *See* Pet. 27 (citing 11 U.S.C. §§ 301 and 541 and 28 U.S.C. § 1334(e)). But that proves too much: if the bankruptcy court's mere statutory jurisdiction over the estate transformed all of the debtor's claims into equitable ones, then the debtors'

fraudulent-conveyance claim in *Granfinanciera* or tortious-interference claim in *Stern* also would have become equitable, and the creditors in those cases could have asserted no jury-trial rights in response.

That did not happen in *Granfinanciera* or *Stern* because statutory bankruptcy jurisdiction is not always equitable. As the Fifth Circuit explained in *Jensen*, a "bankruptcy court has both legal and equitable powers," and there is no reason to assume that a "petition for bankruptcy subjects the petitioner's extant claims only to the equitable wing." 946 F.2d at 374 (quoting *Granfinanciera*'s statement that bankruptcy courts were "statutorily invested with jurisdiction at law as well" as in equity, 492 U.S. at 57); *see Germain*, 988 F.3d at 1329-30 (reasoning that the jury-trial right is lost only for a "legal issue [that] has been converted to an issue of equity" and that this does not occur for "disputes that are only incidentally related to the bankruptcy process"). Further, at the time of the motion to strike, the Trustee's claims were no longer subject to *any* bankruptcy jurisdiction because the district court's jurisdictional reference to the bankruptcy court had been withdrawn.[14]

Finally, Renco's and Rennert's closing appeal (at 29) to "[p]ractical considerations" is merely an argument that bankruptcy cases would be easier to manage if debtors did not have jury-trial rights.

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[14] *See Picard v. Katz*, 825 F. Supp. 2d 484, 486-87 (S.D.N.Y. 2011) (withdrawing the reference "substantially sever[s] adjudication of the Trustee's fraudulent transfer actions from both 'the claims-allowance process' and 'the hierarchical reordering of creditors' claims,'" enabling a jury trial even for claims that the bankruptcy court could have decided from the bench).

This Court rejected similar appeals to supposed practicality in *Granfinanciera*, 492 U.S. at 63-64 (concerns of speed and expense are "insufficient to overcome the clear command of the Seventh Amendment"), and in *Stern*, 564 U.S. at 501 ("'efficien[cy], convenien[ce], and u[tility]'" are insufficient to save a "'procedure . . . [that] is contrary to the Constitution'") (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)). A better, fully constitutional path to efficiency is the one the courts below took here: holding parties to admittedly "strategic decision[s]," *supra* p. 16, to consent to reasonable procedures and rejecting claims of error that affect no substantial rights.

C. No Other Considerations Warrant Review

Renco and Rennert unpersuasively contend (at 17) that review is appropriate because the question "[w]hether a debtor may demand a jury trial is an important question that recurs frequently," citing statistics about the total number of adversary proceedings in the United States and examples of bankruptcy courts that have confronted the issue. But frequency (or asserted frequency) of recurrence cuts both ways. When a case is a good vehicle, frequency is a reason to grant review. When, as here, a case is a bad vehicle, frequency is a reason to think a better one will come along. If not, perhaps the issue was not really that important or frequent.

Renco and Rennert also argue (at 19-20) that the jury-trial question is important because it may affect the allocation of work between bankruptcy and district courts, because uniformity is important in bankruptcy, and because bench trials may be more efficient than jury trials. Those generalities shed little light on whether this case warrants review. Further, as this case illustrates, parties can and do

consent (with court approval) to either jury or bench trials as they think best. At stake here is at most the rule where the parties disagree. Accordingly, even if the fatal vehicle problems with this petition could be overcome (which they cannot), the case for immediate review would still fall short – especially in light of the real possibility that, after *Stern*, further percolation will eliminate any conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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