No. 12-1200

IN THE
Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY

Petitioners,

v.

PETER H. ARKISON, TRUSTEE, SOLELY IN HIS CAPACITY AS CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.,

Respondent.

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

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether Article III of the Constitution permits a bankruptcy court to hear and determine matters outside of the bankruptcy court's constitutional authority upon a litigant's express or implied consent.

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Bar Association ("ABA") submits this brief in support of Respondent, and respectfully urges the Court to conclude that permitting bankruptcy courts to hear, determine, and enter final orders and judgments with litigant consent does not violate Article III of the United States Constitution.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members come from all fifty states and other jurisdictions, and include attorneys in law firms, corporations, non-profit organizations, and state and federal governments. Members also include judges, law professors, law students, and non-lawyer associates in related fields.[2]

Since its founding in 1878, the ABA has worked to protect the rights guaranteed by the Constitution, including those protected by Article III. Because this

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council before filing.

Court's precedent teaches that there is no constitutional harm that arises when litigants consent to have their claims heard by non-Article III courts and there are real, practical benefits to the federal court system when litigants consent to proceed in such forums, the ABA urges this Court to continue to permit litigants to consent to adjudication of their claims by non-Article III bankruptcy courts.

The ABA's support of the bankruptcy courts is long-standing. In 1978, for example, the ABA formed the Task Force on Revision of the Bankruptcy Laws, and in 1983, following this Court's decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the ABA adopted a policy urging Congress to provide for party consent to bankruptcy court adjudications.[3]

In 2013, following this Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), the ABA adopted a policy that supports the authority of bankruptcy judges:

> upon the consent of all the parties to the proceeding, to hear, determine, and

[3] ABA Policy # 303 (adopted February 1983), available from the ABA archives. The ABA adopts policies by vote of the ABA's House of Delegates ("HOD"). Today, the HOD includes more than 560 delegates representing states and territories, state and local bar associations, affiliated organizations, and ABA sections and divisions. *See* ABA Leadership, House of Delegates, General Information, *available at* http://www.abanet.org/leadership/delegates.html.

> enter final orders and judgments in those proceedings that, while they may be among those designated as 'core' within the meaning of 28 U.S.C. § 157(b), may not otherwise be heard and determined by a non-Article III tribunal absent the parties' consent, as being consistent with and not violative of Article III of the United States Constitution.[4]

This brief sets forth the legal and practical analysis on which this ABA policy is based.

SUMMARY OF THE ARGUMENT

The ABA submits that the holding of *Stern v. Marshall*, 131 S. Ct. 2594 (2011) should not be extended to eliminate the ability of litigants to consent to adjudications by bankruptcy and other

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[4] ABA Policy # 109 (adopted February 2013), available at http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2013_hod_midyear_meeting_109.docx. In addition, concerned that *Stern* might be seen as calling into question the constitutionality of the consent provisions of the Federal Magistrates Act, 28 U.S.C. § 636(c)(1), the ABA adopted similar policy supporting that Act's grant to magistrate judges "upon the consent of the parties, the power to conduct any and all proceedings in a jury or non-jury civil matter in federal court and to order the entry of judgment in the case, as being consistent with and not violative of Article III of the United States Constitution." ABA Policy # 10B (adopted February 2012), available at http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2012_hod_midyear_meeting_10b.doc.

non-Article III courts. *Stern* held only that a creditor did not consent to be sued in bankruptcy court on a state law claim merely by filing a proof of claim in the bankruptcy case. *Id.* at 2614-15. In a situation where a litigant has *not* consented, *Stern* held, as a plurality of the Court did in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), that Article III precluded the bankruptcy court from entering a final judgment on a state law claim that did not "stem[] from the bankruptcy itself" and which would not "necessarily be resolved in the claims allowance process." 131 S. Ct. at 2618.

During the thirty-one years since *Northern Pipeline*, the Court has held in other analogous contexts that "Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-49 (1986). The argument that, following *Stern*, litigants can no longer consent to having non-Article III courts decide their claims runs contrary to this precedent and to the Court's statement that its holding in *Stern* was "narrow." 131 S. Ct. at 2620. It also contradicts the principle that "'courts should not lightly overrule past decisions.'" *See Miller v. Fenton*, 474 U.S. 104, 115 (1985) (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970)).

If accepted, this argument also would strip bankruptcy courts of adjudicative powers they have held since Congress enacted the modern Bankruptcy Code and force that work upon the district courts' already very crowded dockets. As demonstrated by the 1,107,699 bankruptcy cases filed in the year ending September 30, 2013, "the volume of bankruptcy cases is staggering." *Stern*, 131 S. Ct. at 2630 (Breyer, J., dissenting).[5] The number of adversary proceedings is equally high. As of September 30, 2012, 65,599 adversary proceedings were also pending in the bankruptcy courts.[6]

To illustrate the impact on the district courts and litigants if bankruptcy courts may no longer hear and determine fraudulent transfer, preference, and state-law counterclaims with litigant consent, or recommend proposed rulings in those proceedings, the ABA gathered case filing data from the CM/ECF system for a sample district from each circuit for the four year period of July 1, 2009 through June 30, 2013. As demonstrated in the ABA's chart summarizing that analysis, *see infra* at 21-22, those eleven district courts would have been required to hear and decide at least 37,639 additional cases. Spread out over the entire federal court system, the shift in work load would be significant.

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[5] http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/0913_f2.pdf.

[6] http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/F08Sep12.pdf.

This Court predicted in *Stern* that its ruling would not "meaningfully change[] the division of labor" between the district courts and bankruptcy courts under 28 U.S.C. § 157. 131 S. Ct. at 2620. The ABA respectfully submits that, consistent with this Court's prediction in *Stern*, and its established precedent in bankruptcy and analogous contexts, the Court should conclude that bankruptcy and other non-Article III courts may continue to hear and determine matters with litigant consent.

ARGUMENT

I. Allowing Bankruptcy Courts To Hear, Determine, And Enter Final Orders And Judgments With Litigant Consent Does Not Violate Article III Of The Constitution.

A. The Court Has Historically Upheld The Ability Of Litigants To Waive The Right To An Article III Court.

This Court has consistently upheld the authority of non-Article III tribunals, with the consent of the litigants, to hear any and all proceedings in bankruptcy or other civil cases, and to order the entry of judgment. *See, e.g.*, *Gonzalez v. United States*, 553 U.S. 242, 252 (2008); *Roell v. Withrow*, 538 U.S. 580, 586-87 (2003); *Schor*, 478 U.S. at 848; *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263, 268 (1932). As the Court explained in *Schor*, "Article III does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court. Moreover, as a personal

right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." 478 U.S. at 848-49 (citations omitted). In *Schor*, the Court rejected the argument that allowing a litigant to file a state law counterclaim in a CFTC reparation proceeding created a "substantial threat to the separation of powers," *id.* at 854, recognizing that such concerns are diminished when "the decision to invoke [the non-Article III] forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected." *Id.* at 855.

The singular importance of consent to the constitutional analysis runs through the relevant authorities. The Bankruptcy Act of 1898 authorized bankruptcy referees to hear and decide summary matters incident to the administration of the bankrupt's estate and to adjudicate creditors' claims against the estate, but did not authorize those referees to hear and decide plenary suits to recover money for the estate. *See* Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After Stern v. Marshall*, 86 Am. Bankr. L.J. 121, 128-29 (2012).

In *MacDonald*, a case decided under the 1898 Act, the Court held that litigants could waive the right to have a plenary suit, like the fraudulent transfer action at issue here, heard by an Article III court.

286 U.S. at 268. In *Cline v. Kaplan*, 323 U.S. 97, 99 (1944), also decided under the 1898 Act, the Court held that "[c]onsent to proceed summarily may be formally expressed" or "may be waived by failure to make timely objection."

When the Court addressed the constitutionality of the jurisdictional provisions of the Bankruptcy Reform Act of 1978 in *Northern Pipeline*, 458 U.S. 50, consent continued to be a determinative factor in the Court's analysis. In commenting on the plurality decision, both the concurring and dissenting opinions emphasized that the defendant Marathon had not consented to having an Article I court decide the debtor's breach of contract action against it. *Id.* at 89-90, 92.

In *Schor*, the Court reinforced that point, explaining that "the absence of consent" in *Northern Pipeline* was "a significant factor" in the Court's decision that "Article III forbade" the adjudication of Northern Pipeline's breach of contract action against Marathon in the bankruptcy court. 478 U.S. at 849. In *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 584 (1985), the Court described *Northern Pipeline* as "establish[ing] only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent of the litigants*, and subject only to ordinary appellate review." (emphasis added).

B. In Similar Contexts, The Court Has Affirmed The Singular Significance Of Consent.

In the analogous context of magistrate judges, the Court in *Roell* again emphasized the singular significance of consent, holding that a magistrate judge may enter a final judgment with the consent of the parties and that such consent may be express or implied. 538 U.S. at 589-91. The *Roell* Court held that, by allowing magistrate judges to hear and determine matters where consent is inferred, "[j]udicial efficiency is served; the Article III right is substantially honored." *Id.* at 590. *See also Peretz v. United States,* 501 U.S. 923, 936 (1991) (no constitutional infirmity in the delegation of felony trial jury selection to a magistrate judge with litigant consent).

Consistent with *Roell* and *Peretz*, the eleven circuit courts to address the issue have held that it is constitutionally permissible for magistrate judges to enter final judgments in civil proceedings based on the parties' consent.[7] As the Fifth Circuit recently explained, the Federal Magistrates Act was "'saved from any constitutional infirmity by its requirement that all parties consent. . . .'" *Technical Automation Services Corp. v. Liberty Surplus Insurance Corp.*, 673 F.3d 399, 405 (5th Cir. 2012) (quoting *Puryear,* 731 F.2d at 1154).[8]

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[7] *See, e.g.*, *Orsini v. Wallace*, 913 F.2d 474, 479 (8th Cir. 1990) (upholding constitutionality of magistrate judge's entering final orders with consent of the parties); *Bell & Beckwith v. Internal Revenue Service*, 766 F.2d 910, 912 (6th Cir. 1985) (same); *Gairola v. Va. Dep't of Gen. Services*, 753 F.2d 1281, 1284-85 (4th Cir. 1985) (same); *D.L. Auld Co. v. Chroma Graphics Corp.*, 753 F.2d 1029, 1031-32 (Fed. Cir.) (same); *Fields v. Washington Metro. Area Transit Auth.*, 743 F.2d 890, 894 (D.C. Cir. 1984) (same); *Lehman Bros. Kuhn Loeb Inc. v. Clark Oil & Refining Corp.*, 739 F.2d 1313, 1315 (8th Cir. 1984) (same); *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1041-42 (7th Cir. 1984) (same); *Puryear v. Ede's Ltd.*, 731 F.2d 1153, 1154 (5th Cir. 1984) (same); *Collins v. Foreman*, 729 F.2d 108, 119 (2d Cir.) (same); *Goldstein v. Kelleher*, 728 F.2d 32, 35-36 (1st Cir.) (same); *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 542-43 (9th Cir. 1984) (*en banc*) (same); *Wharton-Thomas v. United States*, 721 F.2d 922, 929-30 (3rd Cir. 1983) (same).

[8] *See also* ABA Policy 109 (adopted Feb. 11, 2013), Report at 6-7 (significant legislative purposes for delegating adjudicative authority to magistrate judges—including providing less formal, more efficient, and less expensive means of resolving civil controversies in a single forum—apply equally in the bankruptcy context), available at http://www.americanbar.org/

C. *Stern* Does Not Change The Constitutional Analysis.

Stern does not hold that parties may no longer consent to non-Article III adjudications. In *Stern,* the Court addressed the issue of waiver in two contexts and reached different conclusions based on the facts, thereby demonstrating that *Stern's* focus was not on whether consent is constitutionally permissible, but on what constitutes consent to a non-Article III adjudication. 131 S. Ct. at 2614-18.

In *Stern*, the creditor, E. Pierce Marshall ("Pierce"), never expressly consented to being sued in the bankruptcy court and objected to the bankruptcy court entering a final judgment on the debtor Vickie Lynn Marshall's ("Vickie") state law counterclaim against him both before and after the bankruptcy court ruled against him. *Id.* at 2601-02. The Court rejected the argument that Pierce had consented to being sued in bankruptcy court merely by filing a proof of claim against Vickie, and held that the subpart of the statute which authorized the bankruptcy court to enter a final judgment on Vickie's state law counterclaim, 28 U.S.C. §157(b)(2)(C), without Pierce's consent, was unconstitutional "in one isolated respect." 131 S. Ct. at 2620.

The Court reached the opposite conclusion when Pierce gave his consent. Pierce told the bankruptcy

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court that he was "happy to litigate his claim" against Vickie in the bankruptcy court. 131 S. Ct. at 2597. The Court held that Pierce's consent waived the right to trial in an Article III court on his claim against Vickie even though the subsection at issue with respect to Pierce's claim, Section 157(b)(5), provides that the district court "shall order" claims like Pierce's tried in the district court. 131 S. Ct. at 2606-08; *see Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (holding the use of the word "shall" connotes a mandatory action).

The juxtaposition of the Court's determination that Pierce's consent allowed the bankruptcy court to enter judgment on Pierce's claim against Vickie with its determination that Pierce's lack of consent prevented Vickie from having the bankruptcy court enter judgment on her state law counterclaim against Pierce demonstrates that *Stern* did not eliminate the ability of litigants to consent to determinations by non-Article III courts. Instead, *Stern* held only that when a creditor files a proof of claim he does not consent to being sued on a state law counterclaim in the bankruptcy court unless resolution of the proof of claim will resolve the counterclaim. 131 S. Ct. at 2620.

The ABA submits that those circuit courts that have read *Stern* to hold that parties can no longer consent to non-Article III adjudications have incorrectly interpreted *Stern's* discussion of the structural importance Article III plays in our "system of separated powers." *See, e.g.*, *Frazin v.*

Haynes & Boone, L.L.P., 732 F.3d 313, 320 n.3 (5th Cir. 2013) (quoting *Stern*, 131 S. Ct. at 2620). But *Stern's* discussion should be considered in the context of its facts: Pierce had not consented to being sued in bankruptcy court and had affirmatively objected. Pierce's refusal to consent to a bankruptcy court adjudication of the claims against him distinguishes *Stern* from *Schor*, and resulted in the Court's conclusion in *Stern* that Article III was violated. 131 S. Ct. at 2614.

The Court's conclusion in *Stern* that structural concerns predominated in the absence of consent, however, does not mean that those structural concerns preclude hearing, determination, and final judgment in an Article I tribunal when the parties give their consent. The Court recognized in *Stern* that "the structural principles secured by the separation of powers protect the individual as well." 131 S. Ct. at 2609. Thus, Article III's dual protection of both the individual and structural separation of powers concerns, recognized in *Schor,* remains the law post-*Stern*. Moreover, as the Court concluded in *Schor*, "separation of powers concerns are diminished" and litigants may waive the right to an Article III court, when "the decision to invoke [a non-Article III] forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction" is unaffected. *Schor*, 478 U.S. at 855.

Under the statutes relevant to the bankruptcy courts, "the power of the federal judiciary to take jurisdiction," even in matters where the parties

consent to proceed in the bankruptcy court, is unaffected. *Id.* The jurisdictional statute, 28 U.S.C. § 1334, vests jurisdiction in the district courts over all bankruptcy cases and civil proceedings arising under title 11, or arising in or related to a bankruptcy case. The district courts also have complete discretion when deciding under 28 U.S.C. § 157(a) whether to refer a case or adversary proceeding to the bankruptcy court and under 28 U.S.C. § 157(d) whether to withdraw the reference of a matter previously referred to the bankruptcy court. Thus, the "power of the federal judiciary to take jurisdiction" in bankruptcy cases and adversary proceedings is preserved, making consent the determinative factor in the constitutional analysis. *Schor*, 478 U.S. at 855.

The conclusion that *Stern* did not eliminate the right of litigants to consent to non-Article III adjudications also is consistent with the Court's reliance in *Stern* on its precedent addressing Seventh Amendment jury trial rights in bankruptcy cases. *See Stern*, 131 S. Ct. at 2618 (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52-56 (1989), *Langenkamp v. Culp*, 498 U.S. 42, 43 (1990) (*per curiam*), and *Katchen v. Landy*, 382 U.S. 323 (1966)). In *Granfinanciera*, the Court equated the right to trial by jury with the right to trial by an Article III court, stating that "if a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the

question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal." 492 U.S. at 53. *Stern* adopts the *Granfinanciera* analysis and the two decisions together stand for the proposition that if a litigant has a right to trial by jury, he also has the right to be heard in an Article III court. *See* R. Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After Stern v. Marshall*, 86 Am. Bankr. L.J. 121, 150-51 (2012) (explaining that *Stern* and *Granfinanciera* equate the right to a trial by jury to the right to an Article III court). Because the Court has recognized in this Seventh Amendment precedent that a party may waive its right to trial by jury in the bankruptcy context, *see Stern*, 131 S. Ct. at 2618, it should follow that a party similarly should be entitled to waive its right to have a judgment entered by an Article III court when the constitutional analysis that *Stern* requires leads to the conclusion that the bankruptcy court may not otherwise be entitled to enter a final judgment order.

Moreover, like the Federal Magistrates Act, Section 157(c) also provides an effective means for litigants entitled to an Article III court to consent to the bankruptcy court's entry of a final judgment. 28 U.S.C. § 157(c); *see also* Fed. R. Bankr. P. 8001(a). "The inspiration for 28 U.S.C. § 157(c)(2) is 28 U.S.C. § 636(c)(1), which deals with the powers of United States magistrate judges in like situations." 1 Collier on Bankruptcy ¶ 3.03[4] (16th ed. 2011). In *Stern*, the Court explained that the remedy for the

constitutional violation was the "the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction. . . ." 131 S. Ct. at 2620.[9] Because Section 157 divides the universe of claims into only two categories, those that are core and those that are not, by "remov[ing]" Vickie's counterclaim from the bankruptcy court's core authority, the Court necessarily classified that counterclaim into the only other class of matters recognized under Section 157, those that are non-core. 131 S. Ct. at 2620. Thus, Section 157(c) applies and provides litigants with an effective means to consent to final adjudication by the bankruptcy court or absent such consent, allows for the bankruptcy court to enter proposed findings of fact and conclusions of law subject to *de novo* review in the district court.

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[9] The Court stated that the "removal" of Vickie's counterclaim from the bankruptcy court's authority to enter a final judgment would not "meaningfully change[] the division of labor in the current statute; we agree with the United States that the question presented here is a 'narrow' one." 131 S. Ct. at 2620 (Citing United States as *Amicus Curiae* at 23). The United States' position, with which the Court agreed, was that "[t]he narrow constitutional question presented is whether Congress, consistent with Article III, could authorize the bankruptcy judge to enter final judgment on petitioner's counterclaim (subject to appellate review as provided in 28 U.S.C. § 158) *rather than simply submitting proposed findings and conclusions to the district court*." *See* Brief of United States as *Amicus Curiae* at 23, *Stern v. Marshall*, 131 S. Ct. 2594 (2011) (No. 10-179), 2010 WL 4717271 (emphasis added).

II. The Ability Of Litigants To Consent To Final Adjudications By Non-Article III Tribunals Serves An Important Role In The Federal Court System.

Contrary to the Court's prediction in *Stern* that its ruling would "not change all that much," 131 S. Ct. at 2620, the ABA asserts that there would be a sea change in the division of labor between the bankruptcy courts and the district courts if parties are no longer able to consent to bankruptcy courts hearing and deciding fraudulent transfer claims or any other matters which are held to be core but outside of the bankruptcy court's constitutional power to adjudicate. The ABA submits that where such a change is not constitutionally required, judicial economy and practicality should be considered. "The idea of separation of powers is justified by eminently practical considerations. It is [therefore] faithful to the idea of separation of powers to examine the real consequences of the statute." *Pacemaker Diagnostic Clinic*, 725 F.2d at 546-47 (citing The Federalist No. 51 (J. Madison) at 349 (J. Cooke ed. 1962)).

The consequences of eliminating consent would be stark. Statistics compiled by the Administrative Office of the United States Courts demonstrate that the district courts are stressed and without adequate resources.[10] In 2012, 66 of the 677 authorized district court judgeships remain unfilled (approximately 10%).[11] Seventeen of those positions had been open for more than 18 months.[12] As a result of these vacancies, the district courts experienced 28 judicial emergencies in 2012.[13] To help ease the burden on authorized judges, 354 senior United States district court judges with staff also served the Judiciary.[14] District court judges handled a total of 382,068 pending civil and criminal cases, resulting in civil filings per authorized judgeship of 411 cases (up 10%

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[10] *See also*, October 29, 2013, Letter from Thomas M. Susman, Director, ABA Governmental Affairs Office, to Hon. Robert W. Goodlatte, Chair, Committee on Judiciary, U.S. House of Representatives (urging that Congress has an obligation to provide the federal judiciary with resources, in both judges and funds, needed to carry out its constitutional and statutory duties), available at http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013oct29_judgeshiph_l.authcheckdam.pdf.

[11] http://www.uscourts.gov/Statistics/JudicialBusiness/2012/status-article-iii-judgeships.aspx.

[12] *Id.*

[13] A judicial emergency is either "a vacancy of any duration where weighted filings per judgeship are in excess of 600; or any vacancy longer than 18 months in a district court with weighted filings between 430 and 600 per judgeship; or any vacancy in a district court with more than one authorized judgeship and only one active judge." *Id.*

[14] *Id.*

from 2008) and weighted filings per authorized judgeship of 520 cases (also up 10% from 2008).[15]

The district courts' already heavy workload currently is lessened by the Judiciary's reference of title 11 matters to bankruptcy courts. As of 2012, 334 bankruptcy judges and 38 retired bankruptcy judges heard the 1,107,699 bankruptcy petitions filed in the twelve months preceding September 30, 2013 and the 65,599 adversary proceedings that were pending as of September 30, 2012.[16] If this Court concludes that bankruptcy courts lack the ability to hear adversary proceedings involving matters that are denominated as core but where those courts may not constitutionally enter judgment, or issue proposed findings of fact and conclusions of law in those cases, the resulting shift to the district courts will substantially increase their work load.

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[15] "Weighted filings statistics take into account the different amounts of time it takes a judge to resolve various types of civil and criminal actions.... The average civil case or criminal defendant each receives a weight of approximately 1.0. For more time-consuming cases, higher weights are assessed." http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx.

[16] http://www.uscourts.gov/Statistics/JudicialBusiness/2012/status-bankruptcy-judgeships.aspx; http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/0913_f2.pdf; http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/F08Sep12.pdf.

To demonstrate the impact on the district courts, the ABA gathered case filing data from the CM/ECF system for a sample district from each circuit. By searching under the "Nature of Suit," the ABA was able to determine the number of adversary proceedings filed during the four-year period from July 1, 2009 through June 30, 2013 that included fraudulent transfer, preference and state-law based claims.[17] The ABA then compared that number to the total number of civil proceedings filed in the applicable district during the same four-year period and calculated the percentage increase in the district courts' civil case load that would result if all fraudulent transfer, preference, and state-law based adversary proceedings were withdrawn to the district courts.

[17] The ABA searched using the following queries: "Recovery of money/property – 548 fraudulent conveyance", "Recovery of money/property – 547 preference", and "Other (e.g. actions that would have been brought in state court if unrelated to bankruptcy)."

The following chart summarizes that analysis:

Court	§548 & §544	§547	St. Law	*Total*	Dist. Ct./ % Inc.[18]
1st Cir. (D. Mass.)	147	370	126	643	11,996 *5.36%*
2d Cir. S.D. N.Y.)	1,029	5,951	221	7,201	40,078 *17.97%*
3d Cir. (D. Del.)	973	12,189	112	13,274	6,232 *213.00%*
4th Cir. (E.D. Va.)	185	1,221	70	1,476	13,418 *11.00%*
5th Cir. (N.D. Tex.)	188	731	82	1,001	23,018 *4.35%*
6th Cir. (E.D. Mich.)	360	1,656	92	2,108	23,368 *9.02%*

[18] http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2013/district-fcms-profiles-june-2013.pdf&page=1/district-fcms-profiles-june-2013.pdf&page=1; http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/FederalCourtManagementStatistics_Archive.aspx.

Court	§548 & §544	§547	St. Law	*Total*	Dist. Ct./ % Inc.
7th Cir. (N.D. Ill.)	402	1,842	71	2,315	38,912 *5.95%*
8th Cir. (D. Minn.)	363	1,257	32	1,652	15,885 *10.40%*
9th Cir. (C.D. Cal.)	1,138	3,112	227	4,477	59,273 *7.55%*
10th Cir. (D. Col.)	191	845	101	1,137	13,346 *8.52%*
11th Cir. (M.D. Fla.)	970	1,174	211	2,355	31,512 *7.47%*

The ABA's analysis necessarily underestimates the potential impact on the district courts for three reasons. *First*, a broad reading of *Stern* is likely to lead to matters in addition to fraudulent transfer, preference, and state law counterclaims being deemed outside of the bankruptcy court's constitutional authority to enter a final judgment. The Seventh Circuit, for example, recently held that a bankruptcy court could not constitutionally decide an action seeking a declaration against the debtor

that certain property was property of the bankruptcy estate under 11 U.S.C. § 541. *Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751, 774-76 (7th Cir. 2013). The foregoing analysis does not capture a matter of this type that typically would be brought by a motion filed in the bankruptcy case itself, outside of the adversary proceeding context, *see* Fed. R. Bankr. P. 7001(1), and for which no readily-obtainable data from the CM/ECF system is available.[19]

Second, the chart reflects only a snapshot in time. A large liquidating chapter 11 case can generate a significant number of adversary proceedings that may pend for many years. In 2010, for example, a

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[19] If allowed to stand, the holding in *Wellness* will impact the district courts' workloads in two significant ways. First, it would expand *Stern's* "narrow" holding in an unprecedented manner to include actions against a debtor to determine what is property of the estate, a determination which historically has always been viewed as "stem[ing] from the bankruptcy itself," and under a "narrow" reading of *Stern* would be within the bankruptcy court's constitutional authority to decide. 131 S. Ct. at 2618, 2620; *see* Thomas E. Plank, *Why Bankruptcy Judges Need Not And Should Not Be Article III Judges*, 72 Am. Bankr. L.J. 567, 584-87, 607-09 (1998) (explaining the historical authority of bankruptcy commissioners to determine what is property of the bankrupt). Second, under *Wellness*, if a matter is denominated as core but outside of the bankruptcy court's constitutional authority, the matter must be heard entirely in the district court. 727 F.3d at 776-77. The combined impact of these two rulings, which is not captured in the chart, would exponentially increase the number of motions and adversary proceedings that will have to be heard entirely in the district court.

trustee in a case pending in the District of Minnesota filed 203 such adversary proceedings, and as of the filing of this brief, 123, or 59.7% of those adversary proceedings, remain pending.[20]

Third, a holding that litigants may not consent to proceed before non-Article III courts may include in its sweep matters now heard by magistrate judges, who "account for a staggering volume of judicial work" and are "indispensable." *Peretz,* 501 U.S. at 928 & n.5 (1991) (*citing Gov't of the Virgin Islands v. Williams*, 892 F.2d 305, 308 (3rd Cir. 1989)). In 2012, for example, magistrate judges disposed of 1,068,153 matters, including 15,049 civil cases concluded with finality by motion, jury trial, or bench trial *with litigant consent*.[21] As of 2012, the United States had 573 magistrate judges and 67 recalled retired magistrate judges, who provide substantial assistance to the 1020 active and senior status district court judges.[22]

The impact of eliminating consensual non-Article III adjudications is further demonstrated by these specific examples: a trustee in the case *In DBSI, Inc., et al.* (Case No. 08-12687), pending in the United States Bankruptcy Court for the District of Delaware, filed 885 fraudulent transfer and

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[20] https://ecf.mnb.uscourts.gov/cgi-bin/qryAscCases.pl?298823.

[21] http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-magistrate-judges.aspx.

[22] http://www.uscourts.gov/Statistics/JudicialBusiness/2012/appointments-magistrate-judges.aspx#table13.

preference actions in 2010.[23] Among the four district court judges in that district, during 2010, there were 1,595 civil cases pending; thus, if all of the fraudulent transfer and other avoidance actions had been transferred to one or more of the district court judges, their civil workload would have been increased by approximately 55.49%.[24] Similarly, a trustee in a case in the District of New Mexico, *In re Vaughan Company, Realtors*, (Case No. 10-10759), filed 168 fraudulent transfer and preference complaints in 2012.[25] That District had 1,085 civil matters pending at the end of 2012; thus a transfer to the district court of these 168 adversary proceedings would increase that district court's civil case load by 15.48%.[26] Additionally, in a pending case in the Eastern District of Washington, *In re LLS America LLC* (Case No. 09-06194), the liquidating trust filed 226 fraudulent transfer and preference actions in 2012.[27] Again, in the absence of

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[23] To compile this number and the other individual case numbers, the ABA reviewed the adversary complaints filed in these bankruptcy cases. The *DBSI* adversary complaints are available at: https://ecf.deb.uscourts.gov/cgi-bin/qryAscCases.pl?114658.

[24] http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2010/dec10/C01Dec10.pdf.

[25] http://ecf.nmb.uscourts.gov/cgi-bin/qryAscCases.pl?125654.

[26] http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/C00Mar12.pdf.

[27] https://ecf.waeb.uscourts.gov/cgi-bin/qryAscCases.pl?158228.

consensual non-Article III adjudications, the district court judges in that district would be required to add these cases to their 2012 pending case load of 834 civil cases, leading to 27% increase in their civil dockets.[28]

Eliminating consent also will have an impact on all civil litigants. More cases on the district courts' dockets necessarily mean more delay between the filing of a complaint and trial as more cases compete for the district courts' time and attention.

Further, the elimination of consent creates "the risk of gamesmanship" by losing parties, *Roell*, 538 U.S. at 590, as the following hypothetical demonstrates: a trustee brings an action against a creditor seeking turnover of estate property. That matter is denominated as core under 28 U.S.C. § 157(b)(2)(E) and in accordance with Federal Bankruptcy Rule 7008(a), the trustee alleges that the court may enter a final judgment order; the creditor does not respond to this allegation. The bankruptcy court hears the matter without objection and enters judgment. On appeal, the creditor asserts it did not consent to be sued in the bankruptcy court and that the turnover action is outside of the bankruptcy court's constitutional core authority. If *Stern* is extended to eliminate both express and implied consent and also to eliminate the ability of bankruptcy courts to recommend proposed

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[28] http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/C00Mar12.pdf.

judgments, litigants in this circumstance may safely "sit back without a word" knowing that they may "vacate any judgment that turned out not to be to their liking" and re-start their cases in the district court. *Roell*, 538 U.S. at 590.

Litigation in which the parties dispute which court will hear a matter can be inefficient and costly. Recognizing that bankruptcy cases are especially cost-sensitive, when Congress enacted the modern Bankruptcy Code, it sought to eliminate wasteful litigation about the forum in which matters would be decided. *See* Report Of The Commission On The Bankruptcy Laws Of The United States, July, 1973, H.R. Doc. No. 93-137, 93rd Cong., 1st Sess., Part I, ch.4B. (1973). Extending *Stern* to eliminate express and implied consent would defeat this Congressional purpose and would lead to more, not less, litigation and to further delay and expense for the parties and the federal court system.

Accordingly, the ABA submits that, where, as here, considerations of judicial economy and practicality are not in conflict with constitutional principles, this Court can and should consider the impact that decision will have on the courts and both bankruptcy and non-bankruptcy litigants. *See Schor*, 478 U.S. at 850-51. The ABA therefore urges this Court to decline Petitioner's invitation to read *Stern* as eliminating the ability of litigants to consent to non-Article III adjudications.

CONCLUSION

For the foregoing reasons, *amicus curiae* American Bar Association requests that the judgment of the court of appeals be affirmed.

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Respectfully submitted,

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