NO. 13-935

IN THE
Supreme Court of the United States

WELLNESS INTERNATIONAL NETWORK, LTD., RALPH OATES AND CATHY OATES,

Petitioners,

v.

RICHARD SHARIF,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BUSINESS LAW SECTION OF THE FLORIDA BAR IN SUPPORT OF NEITHER PARTY

THOMAS M. MESSANA
BRETT LIBERMAN
THOMAS ZEICHMAN
MESSANA, P.A.
401 East Las Olas Boulevard
Suite 1400
Fort Lauderdale, FL 33301
954-712-7400
tmessana@messana-law.com

PAUL STEVEN SINGERMAN
Counsel of Record
ARTHUR J. SPECTOR
ILYSE M. HOMER
ASHLEY DILLMAN BRUCE
ROBBIE T. BOONE, JR.
BERGER SINGERMAN LLP
1450 Brickell Avenue, Suite 1900
Miami, FL 33131-3453
(305) 755-9500
singerman@bergersingerman.com

Counsel for Amicus Curiae, Business Law Section of the Florida Bar

QUESTION PRESENTED*

Whether Article III permits the exercise of the judicial power of the United States by the bankruptcy courts on the basis of litigant consent, and if so, whether implied consent based on a litigant's conduct is sufficient to satisfy Article III.

*This amicus brief does not address the first issue presented in the Petition for Certiorari.

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I. *AMICUS CURIAE*

This brief is submitted by the Business Law Section of The Florida Bar (the "Section"), pursuant to the consent of the Petitioner and Respondent, in support of neither party.[1] The Section consists of more than 5,000 members and the Section's decision to file this brief arose out of the Section's Bankruptcy/UCC Committee. It is tendered solely by the Section and supported by the separate resources of this voluntary organization–not in the name of The Florida Bar, and without implicating the mandatory membership fees paid by any Florida Bar licensee.[2]

This brief deals solely with the third issue as presented by the Petition for Writ of Certiorari: whether a bankruptcy court may, with the consent of

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[1] Attorneys authoring the brief on behalf of the Section include Paul Steven Singerman and Thomas M. Messana. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus*, or its counsel, made a monetary contribution intended to fund its preparation or submission. Prior to filing this brief, counsel for the Section obtained the consent of the Petitioner and Respondent to file this brief, consistent with Rule 37.

[2] This brief was reviewed by the Executive Committee of the Board of Governors of The Florida Bar on September 15, 2014, consistent with applicable standing board policies.

all parties, issue final judgments on non-core matters, including those matters mischaracterized as "core" known as *Stern* claims.[3] The Section will address no factual issue or other legal issue raised by this appeal.

For almost 30 years under the Bankruptcy Code, Florida bankruptcy courts have finally adjudicated countless fraudulent transfer actions and other adversary proceedings now classified as *Stern* claims.[4] Trying such matters once in a bankruptcy court with the consent of the parties all the while remaining subject to a constitutional challenge to the court's authority at practically any point thereafter in the appellate process would render the decision of the bankruptcy court meaningless. It would have a significant deleterious impact on the administration of justice in states such as Florida, where federal and state courts are

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[3] Congress did not develop the nomenclature "core." The term comes from the Court's reference to matters that fall within the scope of a bankruptcy court's power to enter final judgments. *Executive Benefits Ins. Agency v. Arkinson*, 134 S. Ct. 2165, 2171 n.7 (2014). But despite using the label of core, "some claims labeled by Congress as 'core,'" could not be adjudicated as such. *Id*. at 2172. Thus, the Section uses the term core to denote when a court holds constitutional authority to enter a final judgment on the matter with or without consent.

[4] "*Stern* claims" are claims categorized as "core" under 28 U.S.C. § 157(b) that, after *Stern*, present a constitutional impediment to the bankruptcy court's ability to finally adjudicate the claim.

already struggling with overcrowded dockets. Eviscerating parties' ability to consent to such matters would also impact the quality of justice by injecting uncertainty into the administration of bankruptcy estates that already have limited resources, thus impairing creditors' recoveries. Because this appeal addresses the jurisdictional underpinnings of those judgments, the Section determined that an amicus brief is appropriate.

The Section acknowledges that concern for efficient judicial administration and timely justice alone cannot trump constitutional requirements, but it does caution prudence and restraint in considering the constitutionality of important and longstanding practices built upon the Article I jurisprudence of this Court.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Much of the bankruptcy process is administrative and is conducted away from the courthouse by a bankruptcy trustee or debtor in possession. Under all chapters, a fundamental goal of the federal bankruptcy laws enacted by Congress is to give debtors a financial "fresh start" from burdensome debts. *See Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). To effectuate this goal, a trustee in a chapter 7 case must liquidate all non-exempt property, and in chapter 11 and 13 cases, a debtor in possession must propose a plan to reorganize an estate burdened with debt. Under these chapters, a debtor or trustee must maximize the recovery for creditors. Consistent with this process, the bankruptcy estate shrinks, *see* §§ 11 U.S.C. 502, 522, and grows, *see* §§ 544, 547, 548, according to the Bankruptcy Code. But in all cases, an estate is much akin to a broken water main requiring immediate repair because in order to recover property through adversary proceedings or contested matters, an estate professional hired by the trustee must expend the resources of the bankruptcy estate itself. These expenses are manifested in the form of administrative expenses.

Administrative expenses are amplified in corporate cases under chapter 11 and (sometimes in chapter 7 where there is a sale) where the goal of a trustee or debtor in possession is to maintain the viability of the business while simultaneously recovering property and resolving claims. This is

often difficult given that debtors in bankruptcy frequently do not have enough cash or other "liquid" property to sustain professional fees at the beginning stages of a case. The strategy among many estate professionals is normally to grow the estate before beginning the claims allowance process. Large, complex cases can continue for years, while smaller cases often take months.

When Congress enacted general revisions of the bankruptcy laws,[5] it gave "special attention" to making the bankruptcy laws inexpensive in their administration. *Katchen v. Landy*, 382 U.S. 323, 328 (1966) (citing H.R. Rep. No. 1228, 54th Cong., 1st Sess., p. 2; H.R. Rep. No. 1409, 75th Cong., 1st Sess., p. 2; S. Rep. No. 1916, 75th Cong., 3d Sess., p. 2). The bankruptcy laws are intended "'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period'" and include provisions for "summary disposition, 'without regard to usual modes of trial attended by some necessary delay.'" *Id.* at 328-39 (quoting *Ex parte Christy*, 44 U.S. 292, 312 (1845) and *Bailey v. Glover*, 88 U.S. 342, 346 (1874)). What is at issue now involves one of the means chosen by Congress to effectuate that purpose. It is important to keep in mind that in many bankruptcy cases, the length of time a main bankruptcy case remains open is often dependent on the status of the adversary proceedings, which often concern non-core matters.

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[5] Though the Bankruptcy Act was in effect at the time, the underlying purposes and policies were not abandoned with the adoption of the Bankruptcy Code.

The Seventh Circuit's conclusion that a bankruptcy court cannot enter a final judgment on *Stern* claims even when it has the implied consent of the parties would place a tremendous burden on the ability of bankruptcy courts to adjudicate bankruptcy cases timely and effectively. A plethora of *Stern* claims underlie many aspects of bankruptcy cases and dominate the adversary proceeding arena. If this Court were to adopt the Seventh Circuit's reading of *Stern,* the efficiency Congress legislated and achieved by the bankruptcy courts over the past four decades since the last major overhaul in 1978 would be lost. The many adversary proceedings that are timely adjudicated now in the bankruptcy courts would have to be heard by district judges. The main bankruptcy cases would be held hostage to the outcome of the bankruptcy litigation conducted in district courts that are already struggling to grant criminal defendants speedy trials and to dispose of the many other responsibilities that already burden district courts. One could reasonably expect delays in the processing of the bankruptcy lawsuits in district courts, which the bankruptcy judge in charge of the main bankruptcy case is competent to adjudicate. Moreover, an endorsement of the holding of the Seventh Circuit would likely put into serious doubt the ability of magistrate judges to fully and fairly consider matters which they are statutorily authorized to try with the parties' consent.

For the reasons that follow, this Court should conclude that parties may consent to a bankruptcy court's full adjudication of non-core matters and with

that consent, a bankruptcy court has the authority to do so. Finally, this consent may be expressed explicitly or implicitly.

III. ARGUMENT

A. Consent is Sufficient to Confer Authority in "*Stern*" Matters

Commentators noted that *Stern* shocked both bankruptcy practitioners and the judges presiding over bankruptcy matters. *See, e.g.,* Danielle Spinelli & Craig Goldblatt, *Constitutional and Statutory Limits After Executive Benefits*, 33 Am. Bankr. Inst. J., 14 (Aug. 2014); S. Todd Brown, *Constitutional Gaps in Bankruptcy*, 20 Am. Bankr. Inst. L. Rev. 179, 221 (Spring 2012) ("As one judge observed following *Marshall*, 'in exercising my delegated authority, I have entered countless orders as final without a second thought about the legitimacy of what I was doing.'"). In the years since *Stern*, the shock has faded, but questions remain. Many were hopeful that all of the issues raised by *Stern* would be answered when this Court granted certiorari in *Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014),[6] but alas, a key question remains: "Can bankruptcy courts enter final judgment in matters that would otherwise require an Article III tribunal if the parties give their consent?" *Spinelli*, *supra*, at 14.

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[6] The Court's admonition that the *Stern* opinion be construed narrowly, *Stern*, 131 S. Ct. at 2620, has, unfortunately, not served to limit litigation on this issue.

To prevent further uncertainty, the Section asks that the Court address the issue of consent in a holistic manner that will not only quell doubts as to the specific circumstance presented here—of a debtor filing a voluntary petition and waiting several years to raise a *Stern* issue—but also provide a sufficiently robust framework for bankruptcy courts to address the oft-raised question of consent in its varied iterations. The Section also asks the Court to confirm its guidance to bankruptcy courts in the recent *Executive Benefits* opinion, where the Court relied upon established principles of severability and instructed bankruptcy courts to give effect to the valid provisions of the statute by following the procedures in 28 U.S.C. § 157(c) when a *Stern* claim is present. Indeed, if consent is held to be impermissible, then the statutory "gap" this Court sought to address and effectively closed in *Executive Benefits* will be reopened.

There are many circumstances beyond the filing of a voluntary petition which implicate the issue of consent. Most often, it becomes a critical issue in the context of avoidance actions, particularly fraudulent transfers. Avoidance actions often involve non-parties to the case who are made defendants in an adversary proceeding, and inevitably concern jurisdictional questions that are not, by any means, new to this Court. *See*, *e.g.*, *Schoenthal v. Irving Trust Co.*, 287 U.S. 92 (1932); *Stern*, 131 S. Ct. at 2609 (recognizing that "[t]his is not the first time the Court has faced an Article III challenge to a bankruptcy court's resolution of a debtor's suit").

Apropos to the considerations at hand, in *Katchen* the Court explained that in the context of the Bankruptcy Act, the bankruptcy process was expressly built around expediency. *Katchen*, 382 U.S. at 329. The policy of expediency is, in part, why the Court held a plenary action was not appropriate or necessary for the trustee in *Katchen* to bring assets into the bankruptcy estate through a preference action. *Id.* at 329-30. Though we now travel under the Bankruptcy Code, the policies and purposes of bankruptcy law have not changed.

Because the costs of administering a bankruptcy are often paid out of the bankruptcy estate itself, delay creates an expense that ultimately creditors must bear. How can delay be avoided? The answer is for this Court to provide clarity as to when and how the bankruptcy court is vested with the authority to enter final judgments. Delineating when and how a party may consent to entry of such a judgment eliminates the unnecessary delay of either waiting for review of the bankruptcy court's findings of fact and conclusions of law or seeking adjudication in the district court in the first instance.

Avoidance actions are not the only instance that the question of consent presents itself: administration of a bankruptcy case often involves settlement agreements, counter-claims, judicial sales and actions stemming wholly from the common law. The lingering question regarding the validity of consent hovers over many of these proceedings causing uncertainty. The uncertainty delays the

administration of justice because parties to any truly complex dispute will seek the district court in the first instance so as to avoid a costly "dress rehearsal" in the bankruptcy court. S. Todd Brown, *supra* at 233 (noting the increased incentive, post-*Stern,* to request a withdrawal of the reference causing greater inefficiencies in bankruptcy adjudication). The standing order of reference to the bankruptcy courts in every district plainly demonstrates that the district courts wish for these matters to be resolved in the bankruptcy court in which the related case is pending. Permitting parties to consent to entry of final judgment on non-core matters, subject to appellate review, is aligned with the policy of expediency permeating the Bankruptcy Code.

Bankruptcy courts are statutorily authorized to hear non-core matters "related to" bankruptcy cases and issue proposed findings of fact and conclusions of law. 28 U.S.C. § 157(c)(1) and (c)(2). The jurisdictional grant is, as intended, extremely broad. *Cont'l Nat'l Bank of Miami v. Sanchez (In re Toledo)*, 170 F.3d 1340, 1345 (11th Cir. 1999). This Court recognized in *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995), that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *Id.* at 308 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). The real question presented now is whether bankruptcy courts have the authority to *fully* adjudicate those claims.

To some extent, 28 U.S.C. § 157 provides the answer to that question. Under § 157, bankruptcy courts are authorized to enter final judgments in core proceedings. With respect to non-core proceedings, bankruptcy courts are—absent consent of the parties—only permitted to enter proposed findings of fact and conclusions of law, which are then submitted to the district court for *de novo* review. § 157(c)(1) and (c)(2). The significance of the Court's decision in *Stern* is that bankruptcy courts no longer have authority to enter final judgments in proceedings simply because they are designated as "core" by statute. *Stern*, however, left untouched bankruptcy courts' authority to adjudicate non-core proceedings under § 157(c).

Almost thirty years ago, this Court observed that, "it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 855 (1986). The issue of consent before this Court has not, in the view of the Section, changed since *Schor*.

Without belaboring the facts in *Schor*, of which the Court is aware, a futures customer, William T. Schor, filed reparations complaints with the Commodity Futures Trading Commission ("CFTC"). *Id.* at 833. In response, the broker-defendants counterclaimed to recover the debit

balance of certain accounts. The dispute came down to whether the debit balances were, as Mr. Schor alleged, the result of the defendants' violations of the Commodities Exchange Act ("CEA"), or instead, simple debt that Mr. Schor owed due to trading activity. *Id.* at 837-38. The parties litigated the matter in a CFTC reparations hearing, which consisted of discovery, briefing and a hearing, before an administrative law judge. Much like the procedural history presently before the Court, Mr. Schor did not challenge the authority of the Article I administrative law judge until after he received an adverse ruling. *Id.* at 838.

When the appeal ultimately reached this Court, two questions were considered: (1) whether the CEA, as a matter of statutory interpretation, permitted the adjudication of state-law counterclaims and (2) whether such a grant of authority would violate Article III of the United States Constitution. *Id.* 835-36. This Court held that the lower court's reading of the CEA, which would preclude the CFTB from adjudicating non-core claims, undermined its meaning, and the provision allowing parties to consent to adjudication of counterclaims passed constitutional muster—even when consent was not explicit. *Schor*, 478 U.S. at 849.

This Court, in *Schor*, noted that where serious doubts as to constitutionality arise in interpreting a federal statute, "a court should determine whether a construction of the statute is 'fairly possible' by which the constitutional question can be avoided."

Id. at 841. Indeed, the Court went on to instruct that courts should "often strain to construe legislation so as to save it against constitutional attack" but must not "carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it." *Id.* at 841 (internal punctuation and citation omitted).

Citing one of Mr. Schor's own prior filings in federal court, the Court pinpointed that reading the CEA to bifurcate proceedings would have a "crippling effect" and destroy the purpose of the CEA. *Id.* at 843-44. The Section believes that, like in *Schor*, the Seventh Circuit's reading of § 157 would serve to destroy its purpose. Though the Court is not directly addressing the validity of § 157, its meaning and purpose must be considered in order to make an adequate determination as to the nature of rights it implicates.

Section 157 establishes procedures for bankruptcy courts to follow in cases that inevitably present various kinds of claims. These procedures provide that core matters may be subject to final orders of the bankruptcy court, whereas, absent the parties' consent, non-core matters must be submitted to the district court as findings of fact and conclusions of law. The intent behind the statute is clear: the bankruptcy court can enter final orders on matters over which it has constitutional authority, and as those matters over which it lacks constitutional authority, the bankruptcy court must have the consent of both parties to enter a final judgment. The fact that this Court in *Stern* found that certain matters were—as a matter of

constitutional authority—misclassified as core does not justify the logical leap that the procedures in § 157 should be discarded; such reasoning flies in the face of the Court's holding in *Schor* that a state-law counterclaim, which carried with it all indicia of being non-core, was permissibly subject to an administrative law judge's final adjudication on the basis of consent.

The question before this Court concerning *Stern* claims is strikingly similar to its consideration of the CEA in *Schor*: *Stern* claims, like the state-law counterclaim at issue in *Schor*, can be heard in fora other than the bankruptcy court. These non-core matters, though outside the bankruptcy court's core jurisdiction, are expressly contemplated as part of the statutory scheme promoting the efficient and expedient administration of the bankruptcy estate. The items mischaracterized as core in § 157 that are now classified as *Stern* claims are all matters that traditionally are part of the administration of a bankruptcy case. By definition, these are matters that represent that limited sub-set of claims that have an impact upon a bankruptcy case. The Court favored adjudication in an Article I court in *Schor*, in part, because it concerned adjudication of matters necessary to advance the legislative purpose of creating "an inexpensive and expeditious alternative forum." *Schor*, 478 U.S. at 855. Moreover, the Court highlighted the importance of the litigant's ability to choose between final adjudication of a matter before an Article I body and pursuing the claim before an Article III court. *Id.* Concerns that Congress attempted to "withdraw from judicial cognizance"

certain claims are greatly alleviated when final adjudication of a claim in an Article I forum is the product of consent. *Schor*, 478 U.S. at 854-55. The Section perceives no difference in the present case. Non-core matters do not represent the kind of legislative fiat implicating structural, separation-of-powers concerns, but rather, are matters pursued regularly outside of bankruptcy in federal and state courts alike. The fact that Congress did not reallocate these matters from the Article III judiciary to the exclusive province of the bankruptcy courts, and established consent as the *sine qua non* for final adjudication serves to negate structural concerns. Because a litigant can designate the forum in which the matter will be subject to final judgment by the granting or withholding of consent, non-core matters plainly implicate a personal right, not a structural one.[7]

Despite the admonition to read *Stern* narrowly, particularly in respect of the aberrational fact pattern in that case, *Stern* and its progeny have had a significant impact on bankruptcy courts, litigants, and creditors alike. The Section encourages the Court to provide certainty and clarity regarding its longstanding precedent regarding consent to the adjudication of Article III-type claims. The Section

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[7] The Court's recent decisions suggest that the parties' consent to a bankruptcy court's adjudication of a *Stern* claim implicates personal rights rather than structural ones. *Stern*, 131 S. Ct. at 2625; *Executive Benefits*, 134 S. Ct. at 2171 (addressing *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)).

believes that this Court's decision in *Schor* should apply here and that the Court should clearly so hold; *Stern* perhaps raised new questions, but the analysis remains the same.[8] In answering the question presented, the Section encourages the Court to reaffirm the well-reasoned rationale and policies set forth in *Schor*, and hold that structural concerns are not implicated when parties agree—either explicitly or implicitly, to final adjudication of a non-core matter.

Ultimately, the Court's answer to this question will have a substantial impact on the day-to-day decisions of trustees, debtors-in-possession, creditors and other interested parties. If the Court holds that *Stern* claims implicate structural, separation-of-powers concerns, making the parties' consent to a full adjudication by the bankruptcy court a nullity, then certainty concerning the exercise of a bankruptcy court adjudicating a *Stern*

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[8] According to the Seventh Circuit, 28 U.S.C. § 157(c)(2) extends only to the enumerated "non-core" proceedings. *Wellness Intern. Network, Ltd. v. Sharif*, 727 F.3d 751, 772 (7th Cir. 2013). Those matters otherwise classified as "core" that this Court has called "*Stern*" claims fall into a gap that does not leave the essential attributes of judicial power to Article III courts. This analysis is flawed. It is premised on the idea that the statutory "gap" in § 157 precludes a bankruptcy court from adjudicating those "core" proceedings that fall under the rubric of *Stern* claims even if there is consent of the parties. In the view of the Section, such an interpretation would be incongruent with this Court's holding in *Executive Benefits*.

claim will be imperiled. Indeed, if a challenge may be brought at any time in the appellate process that would result in a district court having to start the litigation anew, it will cause the needless expenditure of assets of bankruptcy estates that would otherwise be used to satisfy the claims of creditors. Retrying a *Stern* claim in this manner could undoubtedly deplete a bankruptcy estate to the point that professional fees effectively swallow any benefit that creditors, and possibly equity holders, would have otherwise enjoyed.

Unlike with subject-matter jurisdiction, parties can and should be able to consent to a bankruptcy court's authority to enter a final judgment. Those cases that hold that parties cannot waive a bankruptcy court's lack of constitutional authority to enter final judgments in certain proceedings overlook the framework delineating the powers to adjudicate matters under Article I that have been long established by this Court. For example, in *Roell v. Withrow*, 538 U.S. 580 (2003), the Court held that consent to proceedings before a magistrate judge (including entry of a final judgment by the magistrate judge) can be inferred from a party's conduct during litigation—and that such consent was effective to bind the party to the magistrate judge's decision, subject to appeal.

Although the Court did not directly address the constitutionality of the Federal Magistrate Act, it could not have decided the case the way it did if it believed that such consent was unconstitutional as violative of the institutional concerns underlying

Article III, § 1. Because institutional issues under § 1, like pure subject-matter jurisdiction questions under § 2 may be raised *sua sponte*, *United States v. Cotton*, 535 U.S. 625, 630 (2002); *Stern*, 131 S. Ct. at 2601, the Court would have had to raise and decide the issue. *See Roell*, 538 U.S. at 599 (Thomas, J., dissenting). Yet, no mention of constitutionality concerns was even whispered by the majority.

The import of *Roell* should not be ignored: an interpretation of consent as the Seventh Circuit proposed would be, at best, a carve-out that contradicts the policies applied to other Article I bodies, including magistrate judges. Not surprisingly, (other than in certain habeas corpus matters) in the magistrate judge context, circuit courts have ruled consistently with their own rules, that one must timely object to a report and recommendation to preserve an issue. The Court specifically approved of the practice in *Thomas v. Arn*, 474 U.S. 140 (1985), stating that Article III was not violated.[9]

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[9] A consideration of the impact on the Bankruptcy Appellate Panels ("BAP") throughout the United States would also be necessary because if implicit consent is not effective, then the current BAP rules are likely unconstitutional. *See, e.g.*, Order Referring Bankruptcy Cases and Proceedings to Bankruptcy Judges and Authorizing Bankruptcy Appeals to be Decided by the Ninth Circuit Bankruptcy Appellate Panel, Order 312-E (S.D. Cal.) (consent is effectively presumed unless the parties affirmatively indicate otherwise).

There is no good reason why a litigant's consent to entry of a final judgment by a magistrate judge is effective to bind the party but a litigant's consent to entry of a final judgment by a bankruptcy judge is not. Both are born from Article I and so the concern about safeguarding constitutional principles applies in either case. The fact that the power of a magistrate judge to fully adjudicate claims with the consent of the parties is conferred by statute does not provide a basis for distinguishing the two situations. The Court in *Roell* left no doubt that consent can be implied by the acts of a party. *See also Peretz v. United States*, 501 U.S. 923, 937 (1991) (finding no Article III issue with parties consenting to a magistrate judge conducting *voir dire* in a felony trial because "the entire process takes place under the district court's total control and jurisdiction") (internal quotation marks omitted). No distinction can be made to preclude the application of these decisions in the context of bankruptcy. Holding that § 157 does not permit consent because it implicates separation-of-powers-issues would be inconsistent with this Court's decision in *Roell*—that the parties can effectively consent, explicitly or implicitly, to an Article I court's authority to fully adjudicate non-core matters before it.

The guarantee of an independent and impartial judiciary serves primarily to protect personal interests, and so it "is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Schor*, 478 U.S. at 848-49 (citations omitted). To hold that *Stern* claims—

which, by definition, are claims that although not "core" are nevertheless related to the bankruptcy case—do not fall under the personal right rubric, would introduce significant uncertainty as to this Court's holding in *Schor*.

If the Court holds that a party may not waive through consent an Article III, § 1-type objection, the immediate effect will be to cause dissatisfied parties to seek another bite at the apple.[10] The long-term

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[10] *See Roell*, 538 U.S. at 590 (holding that "[i]nferring consent in these circumstances thus checks the risk of gamesmanship by depriving parties of the luxury of waiting for the outcome before denying the magistrate judge's authority[;] [j]udicial efficiency is served; [and] the Article III right is substantially honored"); *Wellness*, 727 F.3d at 755 (noting that the defendant did not raise a *Stern* objection in his district court appeal, but instead waited for his sister to file a motion to withdraw the reference months later); *Exec. Benefits Ins. Agency, Inc. v. Arkison (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d 553, 568 (9th Cir. 2012) (stating that the defendant "waited so long to object, and in light of its litigation tactics, we have little difficulty concluding that [defendant] impliedly consented to the bankruptcy court's jurisdiction"); *Finley v. Carrington Mortg. Servs., LLC*, No. 12-S-00051-NE, 2012 WL 6610194, at *3 (N.D. Ala. Dec. 17, 2012) (recognizing that "[u]nfortunately, *Stern* has become the refuge for strategic-minded defendants who have sought to use [it] to prolong and/or obfuscate litigation" and "has developed into the mantra of every litigant who, for strategic or tactical reasons, would rather litigate somewhere other than the bankruptcy court") (internal quotation marks and citations omitted); *Haley v. Barclays Bank of Del. (In re Carter)*, 506 B.R. 83,

effect will be to cause all parties involved in a non-core matter to seek the district court in the first instance—because an agreement of the parties as to consent would be meaningless.

There are many reasons why these effects should not occur. To name a few, adding to the district courts' dockets the many matters that would otherwise be before bankruptcy courts would create a tremendous administrative burden. *See* Grant Hermes, *A Uniform Federal Judiciary Enables Bankruptcy Courts to Bring Relief to Debtors and Creditors*, 34 Whittier L. Rev. 261, 771-73 (Winter 2013). Bankruptcy courts have administrative and

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88 (Bankr. D. Ariz. 2014) (noting the gamesmanship of a party who simultaneously moved for summary judgment and objected to entry of a final judgment against it on *Stern* grounds, "it is difficult to understand how both the objection to final judgment and the request for entry of final judgment could have been filed in compliance with Rule 9011(b)"); *Adams Nat'l Bank v. GB Herndon & Assocs., Inc. (In re GB Herndon & Assocs., Inc.)*, 459 B.R. 148, 158 (Bankr. D.D.C. 2011) (holding that the defendants waiting until after the bankruptcy court entered a final judgment against them to raise a *Stern* objection amounted to "sandbagging" which resulted in waiver of their right to an Article III adjudication); *Res. Funding, Inc. v. Pacific Cont'l Bank* (*In re Washington Coast I, LLC)*, 485 B.R. 393, 409 (B.A.P. 9th Cir. 2012) (concluding that the defendant "litigated in the adversary proceeding for over two years and only raised the issue regarding the bankruptcy court's authority to enter the final judgment after an adverse ruling and for the first time on appeal").

functional expertise in handling, at times, hundreds of filings in a short span of time. *See, e.g., In re TOUSA, Inc.,* et al. No. 08-10928-JKO (Bankr. S.D. Fla.) (1,614 adversary proceedings filed); *In re Rothstein, Rosenfeldt, Adler*, *P.A.*, No. 09-34791-RBR (Bankr. S.D. Fla.) (152 adversary proceedings filed); *In re Winn-Dixie Stores, Inc.*, et al., No. 05-038170-JAF (Bankr. M.D. Fla.) (117 adversary proceedings filed); *In re Taylor, Bean & Whitaker Mortgage Corp*., et al. No. 09-07047-JAF (Bankr. M.D. Fla.) (417 adversary proceedings filed). In 2012 and 2013, more than 90,000 adversary proceedings were filed in the bankruptcy courts.[11]

Bankruptcy courts also serve an integral role in providing particularized adjudication of creditor and debtor rights, and are familiar with the background of the debtor and can visualize how all of the moving pieces fit together. Indeed, the value of the bankruptcy forum is that it provides a system capable of expeditious review in a specialized arena. *Granfinanciera*, 492 U.S. at 75 n.4 (White, J., dissenting). Bankruptcy courts often hold motion calendar on a daily basis, with any number of federal and state law issues presented for determination.[12]

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[11] Admin. Office of the U.S. Courts, U.S. Bankr. Courts – Adv. Proc. Commenced, Terminated, & Pending Under the Bankruptcy Code During the 12-Month Periods Ending Sept. 30, 2011 and 2012, available at www.uscourts.gov/uscourts, Statistics, Judicial Business, U.S. Bankr. Courts-Adversary Proceedings (Table F-8).

[12] *See, e.g.,* U.S. Bankr. Ct., S. Dist. of Fla., Court Calendars *available at* http://www.flsb.uscourts.gov/.

Indeed, Justice Breyer recognized that "the volume of bankruptcy cases is staggering, involving almost 1.6 million filings last year, compared to a federal district court docket of around 280,000 civil cases and 78,000 criminal cases." *Stern*, 121 S. Ct. at 2630 (Breyer, J., dissenting (citing 2010 statistics)).

To deal effectively with the large caseload, courts in various districts have implemented local rules and forms addressing a party's consent to bankruptcy court adjudication in adversary proceedings. All of the judges in the United States Bankruptcy Court for the Southern District of Florida utilize a standard pre-trial order which provides that a party's failure to object within ten days of the first pretrial conference constitutes consent to a bankruptcy court's adjudication:

> OBJECTION TO ENTRY OF FINAL ORDERS AND JUDGMENTS BY THE BANKRUPTCY COURT; CONSENT. Not later than ten (10) days before the date first set for the pretrial conference in the summons each party objecting to the entry of final orders or judgments by this court on any issue in this proceeding, whether or not designated as "core" under 28 U.S.C. §157(b), shall file with this court a motion requesting that this court determine whether this proceeding is a core proceeding or otherwise subject to the entry of final orders or judgments by this court. Any such motion shall be treated as an objection to the entry of final orders or judgments by this court. FAILURE OF ANY PARTY TO FILE A MOTION ON OR BEFORE THE DEADLINE PROVIDED IN THIS PARAGRAPH SHALL CONSTITUTE

> CONSENT BY SUCH PARTY TO THIS COURT ENTERING ALL APPROPRIATE FINAL ORDERS AND JUDGMENTS IN THIS PROCEEDING. Nothing in this paragraph limits this court's ability to determine *sua sponte* whether this proceeding is a core proceeding under 28 U.S.C. §157(b)(3) or otherwise subject to entry of final orders or judgments by this court.

Order Setting Filing and Disclosure Requirements for Pretrial and Trial, Form CGFI19 (Bankr. S.D. Fla.). Surely, if a debtor submits to the bankruptcy court by filing a voluntary petition, asserting claims or counter-claims, or otherwise subjects itself to the adjudication of a matter with an evident aim to receive a final order, it has effectively consented to the entry of a final judgment by the bankruptcy court. This is particularly true in courts such as the Bankruptcy Court for the Southern District of Florida, which, as explained above, have expressly outlined what actions, or inaction by failing to object, constitutes consent.

Severing bankruptcy from the long-standing consent jurisprudence in related magistrate judge cases recognizing implied consent would carry with it increased costs due to the delay in bifurcating a bankruptcy case between the bankruptcy court and the district court. Consent should not be transformed into an opportunity for gamesmanship to be exploited by disgruntled parties. Nor should the Court, through an overbroad reading of Article III, § 1, impose added burdens on the judiciary, bankruptcy estates and their creditors, who would

become the ultimate victims of unwinding a non-core matter after bankruptcy court adjudication.

IV. CONCLUSION

In the end, if the Court holds that parties cannot consent to a bankruptcy court entering a final judgment and thereby waiving a *Stern* objection, then the prompt and orderly administration of bankruptcy cases will be in jeopardy. The Section urges the Court to reverse the decision of the Seventh Circuit, and to preserve the efficacy of parties' consent to bankruptcy court adjudication of *Stern* claims.

Respectfully submitted this 16th day of September, 2014.

THOMAS M. MESSANA
BRETT LIBERMAN
THOMAS ZEICHMAN
MESSANA, P.A.
401 East Las Olas Boulevard
Suite 1400
Fort Lauderdale, FL 33301
954-712-7400
tmessana@messana-law.com

PAUL STEVEN SINGERMAN
Counsel of Record
ARTHUR J. SPECTOR
ILYSE M. HOMER
ASHLEY DILLMAN BRUCE
ROBBIE T. BOONE, JR.
BERGER SINGERMAN LLP
1450 Brickell Avenue
Suite 1900
Miami, FL 33131-3453
(305) 755-9500
singerman@
bergersingerman.com

Counsel for Amicus Curiae,
Business Law Section of the Florida Bar