IN THE UNITED STATES BANKRUPTCY COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

In re:	)	Case No. 22-80765
	)	Chapter 7
ANTHONY J. WALLACE,	)	Judge Peter W. Henderson
	)	
Debtor.	)	
	)	
ANTHONY J. WALLACE,	)	Adv. Proc. No. 23-08005
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
INTERNAL REVENUE SERVICE,	)	
	)	
Defendant.	)	
	)	

UNITED STATES OF AMERICA'S
MOTION FOR LEAVE TO TAKE INTERLOCUTORY APPEAL

The United States of America, pursuant to Fed. R. Bankr. P. 8004(b) and 28 U.S.C. § 158(a)(3), moves for leave of the District Court to appeal the Bankruptcy Court's order of August 18, 2023, denying the government's motion requesting the Bankruptcy Court's abstention pursuant to 28 U.S.C. § 1334(c), including specifically the Bankruptcy Court's determination that jurisdiction over the adversary proceeding is secure.[1] Pursuant to Fed. R. Bankr. P. 8004(a), the government's Notice of Appeal under Fed. R. Bankr. P. 8003(a) is being filed concurrently with this motion.

[1] The motion to abstain argued that serious jurisdictional issues should be avoided by abstaining, but the Bankruptcy Court criticized the government for not raising jurisdiction directly under Fed. R. Civ. P. 12(b)(1). As noted below, it is not inappropriate for a court to moot a difficult jurisdictional question by abstaining. However, since the Bankruptcy Court ultimately decided the jurisdictional issues first, before denying abstention, and because the United States contends it decided the jurisdictional issues incorrectly, it is appealing on that jurisdictional basis as well.

INTRODUCTION

This matter arises in an adversary proceeding in the Bankruptcy Court in which debtor Anthony J. Wallace seeks a declaratory order determining that his federal income tax debts for the 2012 through 2018 tax years are dischargeable under 11 U.S.C. § 523(a).[2] At the time Mr. Wallace filed the adversary complaint, he had not received a Chapter 7 discharge, nor had the IRS made or even begun to make a determination that the tax debts would be excepted from the scope of any discharge.

The government responded by filing a motion requesting that the Bankruptcy Court abstain from hearing the dischargeability suit in view of jurisdictional questions, and in favor of a forum where jurisdiction would unquestionably be secure once the discharge entered – *i.e.*, the government proposed to file a plenary action under the Internal Revenue Code for a money judgment in this Court, quickly after the entry of the discharge, wherein discharge would be a defense. The jurisdictional questions stem on one hand from a substantial line of authority holding that similarly-timed (premature) dischargeability suits are not currently justiciable within the meaning of Article III of the United States Constitution, due to lack of ripeness and lack of standing, and on the other hand from the bar on declaratory relief "with respect to Federal taxes" imposed by the Declaratory Judgment Act, 28 U.S.C. § 2201, for bankruptcy proceedings other than those under § 505 or § 1146. In addition to avoiding the jurisdictional issues, the government argued that abstention was appropriate for a number of other reasons, including that (1) only the District Court can enter judgment that may be used to collect; (2) only a District Court action will eliminate the 10-year statute of limitations upon collection by the IRS; (3) only

[2] Unless otherwise indicated, all "§" references are to the Bankruptcy Code of 1978 (11 U.S.C.), as amended.

a suit in the District Court for a money judgment offers the United States a right to a jury trial; (4) the factual basis for dischargeability has nothing to do with bankruptcy law and is instead a creature of tax law; and (5) and any judgment in the Bankruptcy Court will be appealable to the District Court anyway.

On August 18, 2023, the Bankruptcy Court issued an opinion and an order denying the government's motion. The opinion reflects the Bankruptcy Court's view that the dischargeability issue was ripe, and that Mr. Wallace had standing to press it the moment he filed his bankruptcy petition, simply by dint of his allegation that the debt is dischargeable and because the existence of the potentially surviving debt threatens his fresh start in bankruptcy. It further reasoned that permissive abstention was unwarranted here because, in the Bankruptcy Court's eyes, the jurisdictional issues flagged by the government are not persuasive or merely prudential considerations, and because the non-jurisdictional grounds proffered by the government in favor of the District Court's resolution of the issue were unavailing.

The Bankruptcy Court's decision directly conflicts with a growing line of previously uncriticized decisions, including a December 2022 decision of the Bankruptcy Court for the Northern District of Illinois, and one by its District Court after granting interlocutory appeal and ultimately ruling in favor of the government, holding that dischargeability actions commenced by a debtor prematurely – as here – before the IRS resumes (or threatens to resume) collection activity after the discharge terminates the automatic stay do not give rise to a justiciable Article III case or controversy. By suggesting that debtors are instead free to commence such suits the moment they file their bankruptcy petition, the Bankruptcy Court's opinion injects substantial confusion into the otherwise uniform caselaw and mandates litigation by the government in this district that other several courts have held is jurisdictionally barred.

Moreover, the Bankruptcy Court's analysis of the non-jurisdictional considerations proffered in support of abstention was tainted by several legal errors.

The United States respectfully requests leave of the District Court to take an interlocutory appeal from the Bankruptcy Court's order. In support of that request, and as directed by Fed. R. Civ. P. 8004(b)(1), the government's motion next sets out (1) a statement of the facts necessary to understand the questions presented; (2) the questions presented; (3) the relief sought, should leave be granted; and (4) the reasons why leave to appeal should be granted.[3] In further keeping with that Rule, the government also includes copies of the Bankruptcy Court's opinion and its order as **Exhibit A** and **Exhibit B** to this motion, respectively.

STATEMENT OF FACTS

1. On December 19, 2022, Mr. Wallace filed a petition in the Bankruptcy Court to commence a voluntary Chapter 7 bankruptcy case. *In re Wallace*, No. 22-80765 (BK No. 1).[4] The deadline for objecting to the discharge was immediately set for March 19, 2023. BK No. 4

2. On March 8, 2023, eleven days before the deadline for objecting to the discharge, Mr. Wallace filed an adversary complaint against the Internal Revenue Service seeking a "declaratory order" and a determination that his 2012 through 2018 federal income tax debts are dischargeable. *Wallace v. IRS*, No. 23-08005 (AP No. 1).

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[3] As noted, this motion for leave to appeal follows the mandated organization in Fed. R. Bankr. P. 8004(b)(1), which does not specify a page or word limit. To the extent the District Court's local rules impose a 7000-word limit, the United States will file a motion for an enlargement of that word limit to accommodate the length of this motion as soon as this matter is docketed in the District Court. There are numerous issues involved in this matter and the Bankruptcy Court's opinion is uniquely at odds with the reasoning of many court decisions, including decisions from the neighboring Northern District of Illinois, and in some respects is at odds with Supreme Court decisions. The government accordingly respectfully submits that more than 7000 words are necessary to explicate the appropriateness of granting leave to file an interlocutory appeal.

[4] References to the docket of the Chapter 7 bankruptcy case are denoted as "BK No." Similarly, references to the docket of the adversary proceeding are denoted as "AP No."

3. The adversary complaint does not allege that, prior to the commencement of the adversary proceeding, the IRS had asserted that the foregoing tax debts would be excepted from the discharge if entered. *See generally* AP No. 1. Nor does the complaint allege that the IRS had begun, or threatened to begin, collection activity with respect to those tax debts.

4. On April 13, 2023, Mr. Wallace, responded to a 7-day warning from the Bankruptcy Court that his financial management certificate was late, and that if he did not timely file it, his case "will be closed without the discharge being granted." His response was not to file the certificate but rather a motion to extend the time to file it, explaining that he had timely completed the financial management course but wanted to delay entry of the discharge until an order on dischargeability "will become final and non-appealable after a fourteen (14) day period." BK Nos. 17, 18.

5. On May 24, 2023, after being granted an extension to respond, the United States appeared on behalf of the IRS and filed a motion asking the Bankruptcy Court "to abstain from hearing this adversary proceeding pursuant to 28 U.S.C. § 1334(c)(1), in favor of entering the discharge and thereby allowing the government to raise the issue in a District Court suit actually seeking a collectible (non-declaratory) judgment where the Department of Justice will claim that 11 U.S.C. § 523(a)(1)(C) applies." AP No. 15, at 1. The motion papers explained that the IRS had not even begun its normal post-discharge investigation to determine whether to invoke a discharge exception. AP No. 16, at 4, ¶ 6. It then explained that the "complaint, however, shifted jurisdiction over the issue to the Department of Justice, Tax Division, (*see* 26 U.S.C. § 7122) which determined that it is appropriate to assert § 523(a)(1)(C)'s exception for willful attempts in any manner to defeat tax and the IRS has, under 26 U.S.C. § 7401, authorized the DOJ Tax Division to file a District Court complaint under 26 U.S.C. § 7402[,]" adding "[s]till,

the IRS is not presently planning to resume administrative collection activity before the issue is adjudicated." *Id.* at 5, ¶ 7. The motion argued that serious jurisdictional issues of ripeness, standing, and the bar on tax disputes in the Declaratory Judgment Act (and thus sovereign immunity) could be avoided by abstaining, in addition to proffering other reasons why the District Court was the more appropriate forum.

6. The Bankruptcy Court thereafter held a preliminary hearing on the government's motion and directed further briefing. AP Nos. 19, 22. Mr. Wallace subsequently filed an opposition brief, AP No. 25, and the government filed a reply, AP No. 26.

7. On August 18, 2023, the Bankruptcy Court issued its opinion and an order denying the government's motion. AP Nos. 27-28. It criticized the government for not making the motion one for dismissal under Fed. R. Civ. P. 12(b)(1), but concluded the matter was ripe (and that Mr. Wallace had standing) when the complaint was filed, or at least ripened with the government thereafter determined to assert § 523(a)(1)(C); held that the Declaratory Judgment Act did not apply and that sovereign immunity was waived for free-standing determinations of dischargeability; and concluded that the other reasons proffered by the government for abstention were unpersuasive. The opinion further noted that Mr. Wallace filed first, and emphasized that the "shoe would be on the other foot" if the government had filed suit first like it did in another case it relied upon. It added: "Here, though, the IRS has not filed any action against Mr. Wallace, and the Court will not abstain in the hope that the IRS will bring the issue to the district court's attention."

8. On August 25, 2023, after Mr. Wallace filed his financial management course certificate on August 22, 2023, the Bankruptcy Court entered an order granting the discharge. BK Nos. 21, 22.

QUESTIONS TO BE PRESENTED UPON APPEAL IF LEAVE IS GRANTED

1. Whether the Bankruptcy Court erred in determining that a justiciable case or controversy within the meaning of Article III existed at the time Mr. Wallace filed the adversary complaint even though (a) the discharge had not yet been entered because the time to object had not expired; (b) the IRS had not yet determined whether tax debts would be excepted from the scope of any subsequent discharge; and (c) the IRS had not resumed or threatened to resume collection activity with regard to those tax debts?

2. Whether, if there was no Article III case or controversy at the time the adversary complaint was filed, post-complaint events (*i.e.,* the Department of Justice's subsequent determination regarding the merits of the dischargeability issue with which the IRS then agreed) cured the lack of jurisdiction?

3. Whether, if there was a justiciable Article III case or controversy, the Bankruptcy Court committed legal error by premising its refusal to abstain under 28 U.S.C. § 1334(c) on the stated grounds (a) that the United States's justiciability argument was about "prudential," rather than Article III, ripeness; (b) that the United States' failure to file a District Court suit before Mr. Wallace brought his adversary proceeding in the Bankruptcy Court entitled him to his choice of forum; (c) that there is no right to a jury trial in matters involving dischargeability in any event; and (d) that the inapplicability of the Declaratory Judgment Act, 28 U.S.C. 2201, is so clear that avoidance of the issue did not support abstention?

STATEMENT OF RELIEF SOUGHT

If leave of the District Court is granted, the government will seek in the appeal an order reversing the Bankruptcy Court's order entered on August 18, 2023, and remanding the case with instructions to dismiss the adversary complaint, without prejudice, for lack of jurisdiction. In the

alternative, the United States will request a reversal and a remand with instructions to the Bankruptcy Court to redetermine whether to abstain under 28 U.S.C. § 1334(c) without the taint of any legal errors determined by the District Court in the appeal.

STATEMENT OF THE REASONS WHY LEAVE TO APPEAL SHOULD BE GRANTED

I. Standard Applicable to the District Court's Discretion under 28 U.S.C. § 158(a)(3)

The District Court has authority under 28 U.S.C. § 158(a)(3) to "hear appeals …with leave of the court, from … interlocutory orders and decrees … of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title." The applicable provision does not provide factors relevant to the District Court's "broad discretion" whether to grant such leave, but many courts have looked to the standard set forth in 28 U.S.C. § 1292(b). *See, e.g.*, *In re Manzo*, 577 B.R. 759, 763 (N.D. Ill. 2017); *In re Barfield*, No. 15-03131, 2015 WL 4254028, at *4 (C.D. Ill. July 14, 2015).

Under the § 1292(b) standard, a proposed interlocutory appeal will be granted where: (1) it "involves a controlling question of law" as to which (2) "there is substantial ground for difference of opinion" and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation[.]" 28 U.S.C. § 1292(b). The United States submits that the § 1292(b) test simply does not control under § 158(a)(3). Rather, the District Court "has broad discretion in determining whether to exercise jurisdiction over interlocutory appeals from the bankruptcy court." *Tr. of Jartran, Inc. v. Strawn*, 208 B.R. 898, 900 (N.D. Ill. 1997). *See Fruehauf Corp. v. Jartran, Inc*. (*In re Jartran, Inc.*), 886 F.2d 859, 866 (7th Cir. 1989) (stating that "we decline to read anything into subsection (a) [of prior version of 28 U.S.C. § 158 containing substantially similar language] other than what it clearly says – that interlocutory appeals may proceed with leave of the district court"))

Perhaps it is appropriate for the District Court to look to 28 U.S.C. § 1292(b) for some guidance in evaluating whether to permit an interlocutory appeal under 28 U.S.C. § 158(a)(3), while recognizing that "the standard under § 158(a)(3) may be more flexible than under § 1292(b)." *Mitsubishi Int'l Corp. v. Prepetition Senior Lenders*, No. 00-01468, 2000 WL 1902188, at *1 (S.D. Ind. Dec. 19, 2000). *See also In re Williams*, 215 B.R. 289, 298 n.6 (D. R.I. 1997) ("the language of § 158(a)(3) obviously vests broader discretion in the district courts."); *Mishkin v. Ageloff*, 220 B.R. 784, 791 (S.D.N.Y. 1998) (crediting *Williams* and noting that "rigid adherence to the section 1292(b) standard is not appropriate in this case"); *In re Jackson Brook Institute, Inc.*, 227 B.R. 569, 581 (D. Mne. 1998) ("courts have also reasoned that discretion under section 158(a)(3) is greater than that afforded under section 1292(b)"); *Murphy v. IRS*, 554 B.R. 533, 534-35 (D. Me. 2014) (recognizing "that there is a greater measure of flexibility under § 158(a)(3)" than under § 1292(b), and employing latter test "as modified by" the District of Maine's "more pragmatic and liberal approach").

As explained in *First Grand Rapids Place Ltd. v. Bareham*, No. 98-00092, 1998 WL 34344109 (W.D. Mich. Mar. 31, 1998), "[t]he Third and Seventh Circuits have recognized [in dicta] that it is doubtful that Congress intended to grant district courts plenary authority over bankruptcy cases generally, implicit in the authority to withdraw a reference *sua sponte*, while at the same time restricting district courts' authority over interlocutory appeals." *Id.*at *1 n.1. This refers to 28 U.S.C. § 157(d), which permits a district court to assume plenary jurisdiction over any proceeding in a bankruptcy case, or even over the entire case. *See also In re Bush*, 1:15-cv-01318, at ECF No. 6 (S.D. Ind. Sep. 9, 2015) (order granting leave to file interlocutory appeal and noting that "the Court agrees with the United States that it has broad discretion to determine whether to accept an appeal under § 158(a)(3)").

The growing recognition that a district court's discretion under 28 U.S.C. § 158(a)(3) is not strictly bound by the principles of 28 U.S.C. § 1292(b) further comports with the maxim that statutes should be construed in accordance with the plain meaning of their terms. *See, e.g.*, *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) ("We must enforce plain and unambiguous statutory language according to its terms"); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 414 (2017) ("The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written") (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992)).

While the United States submits that its proposed appeal satisfies the standard of 28 U.S.C. § 1292(b), it likewise submits that the District Court is not constrained by that test in exercising its broad discretion here.

II. The Proposed Interlocutory Appeal Clears the Hurdles of 28 U.S.C. § 1292(b)

A. The Proposed Appeal Presents a Controlling Question of Law

First, the United States submits that an interlocutory appeal from the Bankruptcy Court's opinion and its order would present a controlling question of law. An issue of law includes "a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine." *Ahrenholz v. Bd. of Tr. of Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000). A question of law, in turn, is considered controlling "if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs.*, 86 F.3d 656, 659 (7th Cir. 1996).

Here, the proposed interlocutory appeal presents a question of law as to when the case-or-controversy requirement of Article III is met with respect to tax-dischargeability actions filed by debtors against the United States; in other words, when such an action becomes "justiciable." *See, e.g.*, *Winkler v. Gates*, 481 F.3d 977, 982 (7th Cir. 2007) ("Whether a party

has standing to bring a 'case or controversy' before the court is a question of law that this court reviews *de novo*"). That question is also controlling because the case-or-controversy requirement is jurisdictional, *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) ("Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'"), and is thereby not merely "quite likely to affect the further course of the litigation" but rather is likely to be dispositive of it. *See, e.g., Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 247 (7th Cir. 1981) (holding that "[b]eing jurisdictional questions, their resolution on appeal perforce promises to materially advance the ultimate resolution of this litigation and avoid unnecessary expense"), *overruled on other grounds*, 941 F.3d 315 (7th Cir. 2019). A related question of law is whether it is proper, for purposes of Article III, to rely on the government's post-complaint determination to assert the discharge exception. As discussed below, it is not.

Additionally, the Bankruptcy Court's threshold resolution of the Article III issue materially infected its related analysis of whether to abstain under 28 U.S.C. § 1334(c). In particular, the Bankruptcy Court proceeded to reject the government's Article III justiciability argument as merely raising a "prudential ripeness" theory rather than a true Article III theory. *See* AP No. 27, at 4 (explaining the Bankruptcy Court's view that the government's "ripeness" argument "focuses not on jurisdiction but rather on what you might call 'prudential ripeness.'"). The Bankruptcy Court then went on to import that analysis into its abstention calculus and rejected the grounds proffered by the government for abstention – including the avoidance of the Article III jurisdictional problem – because the matter of "prudential ripeness" is "not jurisdictional." *Id.* at 9.

The Bankruptcy Court's view of ripeness also tainted its perception of the fact that Mr. Wallace filed in the Bankruptcy Court first, while the government had not filed in the District Court. The problem is that the government *could not* file in the District Court until the discharge entered and terminated the automatic stay – an event that, in this case, post-dated the filing of the adversary complaint and even the issuance of the Bankruptcy Court's opinion. 11 U.S.C. § 362(c)(2)(C). When that point is coupled with the recognition that jurisdiction is evaluated based on the situation as of the time of the complaint, it is revealed that the adversary complaint *even now* remains an invalid pleading; under established law, Mr. Wallace would have to dismiss and refile it. Accordingly, the government's forthcoming District Court complaint will presumably be the first one for which there is jurisdiction.

B. There is Substantial Ground for Difference of Opinion on the Article III Issue

Second, in addition to being a controlling question of law, the Article III issue that the United States proposes to appeal is, in light of the Bankruptcy Court's opinion (which appears slated for official publication) now a question over which there is substantial ground for difference of opinion. To clear that bar, "[t]here must generally be a difficult question of law which is not settled by controlling authority[,]" and "[i]f the question is not settled by controlling authority, there should be a 'substantial likelihood' of being reversed on appeal." *Bunn-O-Matic Corp. v. Bunn Coffee Serv. Inc.*, No. 97-03259, 1998 WL 633638, at *2 (C.D. Ill. May 22, 1998) (citing *In re Brand Name Prescription Drugs Antitrust Litigation*, 878 F.Supp. 1078, 1081 (N.D. Ill. 1995)). As will be demonstrated, this test is also met.

1. Article III Principles Applicable to Dischargeability Actions

Prior to the Bankruptcy Court's decision here, federal courts – including those in the neighboring Northern District of Illinois – had held that dischargeability actions brought by

debtors against the United States before the IRS had staked out a position on the dischargeability of the subject federal tax debts and commenced (or threatened to commence) collection activity are not currently justiciable disputes. *See, e.g.*, *Hinton v. U.S. (In re Hinton)*, 2011 WL 1838724 (N.D. Ill. May 12, 2011); *Erikson v. U.S. (In re Erikson)*, No. 12-05546, 2013 WL 2035875 (Bankr. E.D. Mich. May 10, 2013); *Sheehan v. U.S. (In re Sheehan)*, No. 09-01351, 2010 WL 4499326 (Bankr. N.D. Ohio Oct. 29, 2010); *Mlincek v. U.S. (In re Mlincek)*, 350 B.R. 764 (Bankr. N.D. Ohio 2006); *see also* **Ex. C**, Transcript of December 12, 2022 Bench Opinion in *Cosmano v. U.S. (In re Cosmano)*, No. 21-00059 (Bankr. N.D. Ill.)).[5] *Hinton* was notably an interlocutory appeal in which the district court reversed the bankruptcy court.

As the United States had argued before the Bankruptcy Court, the gist of the foregoing cases is that without a present or imminent threat of collection action by the government, such actions present only a "hypothetical dispute," and "[p]rinciples of justiciability, whether it be called case or controversy, standing or ripeness, point to the conclusion" that bankruptcy courts lack jurisdiction to adjudicate those contingent disputes. *Hinton*, 2011 WL 1838724, at *3-4; *see also Mlincek*, 350 B.R. at 769-70 (declining to exercise jurisdiction over dischargeability proceeding and emphasizing that the debtors had "not alleged that the United States has commenced any collection activities, nor have they alleged that the United States is even considering collection activities").

Importantly, the justiciability issue has not been couched exclusively in terms of

[5] Still yet, on the next business day following the Bankruptcy Court's decision here, the United States Bankruptcy Court for the District of Maryland dismissed without prejudice a dischargeability action against the United States in view of its finding that "there is no case or controversy to adjudicate at this time" where the United States had not asserted a federal tax lien or exception to discharge, and had "written off" the subject tax debts. *Namai v. U.S. (In re Namai)*, 2023 WL 5422627 (Bankr. D. Md. Aug. 21, 2023).

Article III ripeness, but also involves Article III standing, and both sub-doctrines of justiciability have significant overlap. *See Hinton*, 2011 WL 1838724 at *2 ("Whether characterized as case or controversy, standing, or ripeness, the issue is one of justiciability"); **Ex. C**, at 20:20-24 (concluding that dischargeability suit did not give rise to justiciable case or controversy in view of the debtor's lack of standing and the absence of a ripe dispute); *see also Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975) ("The standing question thus bears close affinity to questions of ripeness – whether the harm asserted has matured sufficiently to warrant judicial intervention – and of mootness – whether the occasion for judicial intervention persists").

The Seventh Circuit has explained that to establish Article III standing, the plaintiff "must demonstrate" that they have "suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." *Lewert v. P.F. Chang's China Bistro, Inc*., 819 F.3d 963, 966 (7th Cir. 2016) (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013)) (internal quotation marks omitted). Further, these "are not mere pleading requirements" but instead comprise "an indispensable part of the plaintiff's case." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). In the instant case, there was absolutely no harm to Mr. Wallace at the time he filed his adversary complaint, before he even received his discharge, and he had certainly not suffered any "particularized injury that is fairly traceable to the challenged conduct" because there had been no IRS conduct at all. Rather, the adversary complaint was predicated solely upon Mr. Wallace's worry about a speculative possibility of collection by the IRS at some indeterminate future point.

2. Further Article III Timing Considerations

Additionally, the foregoing authorities must also be taken against the broader doctrinal point that "[a] foundational principle of Article III is that 'an actual controversy must exist not

only at the time the complaint is filed, but through all stages of the litigation.'" *Trump v. New York*, 141 S.Ct. 530, 534 (2020) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90-91 (2013)); *accord Kleinknecht v. Ritter*, No. 21-02041, 2023 WL 380536, at *3 n.2 (2d Cir. Jan. 25, 2023) ("[A] case must be ripe – and 'not dependent on contingent future events' – when 'the complaint is filed'") (quoting *Trump*).

In *Trump*, the plaintiffs sought to challenge the President's memorandum directing the exclusion of certain aliens from the census base. The district court granted relief and enjoined the proposed exclusion. In vacating, the Supreme Court highlighted that the actual apportionment had not occurred, so there was not yet any injury in fact for standing on the part of the plaintiffs, adding that the case also was not ripe because it was contingent on future events including how exactly the policy would be implemented. And "[a]ny prediction how the Executive Branch might eventually implement this general statement of policy is 'no more than conjecture' at this time." 141 S.Ct. at 535 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983)). The Court remanded with instructions to dismiss for lack of jurisdiction.

The defect flagged in *Trump* is analogous to the instant case where, at the time the complaint was filed, the IRS had not performed its usual dischargeability analysis, in part because the discharge had not even entered yet, just as the actual apportionment in *Trump* had not yet occurred. At least at the time the complaint was filed, there was no actual dispute between Mr. Wallace and the IRS over the issue of dischargeability, and there was not yet even a discharge – indeed, even after the filing of the adversary complaint, the Bankruptcy Court cautioned Mr. Wallace that if he did not timely certify his completion of the required financial management course, his bankruptcy case "will be closed without the discharge being granted." BK No. 17.

A related issue is whether the dischargeability issue *became* ripe because the adversary complaint triggered the involvement of the Department of Justice, which then determined that the facts supported the exception to discharge in § 523(a)(1)(C) and requested the IRS to authorize a suit in the District Court to reduce the taxes to judgment, and in which action discharge would be a defense (which suit the IRS then authorized). *See* AP No. 16, at 5. But if post-complaint events can confer jurisdiction, that would render meaningless the Supreme Court's instruction that an actual controversy must exist at the time the complaint is filed. *See Kleinknecht*, 2023 WL 380536 at *2 n.2 (holding that events occurring two months after complaint was filed could not confer jurisdiction over one of the claims in the complaint, citing *Trump*). "If jurisdiction is lacking at the outset, [a] district court ha[s] no power to do anything, other than to dismiss the action." *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir.1988) (internal quotations and citations omitted) (second alteration in original). *See also Mollan v. Torrance*, 22 U.S. (9 Wheat) 537, 539 (1824) (jurisdiction "depends upon the state of things at the time of the action brought").

In *Int'l Harvester Co. v. Deere & Co.*, 623 F.2d 1207 (7th Cir. 1980), the Seventh Circuit similarly observed, in the context of evaluating the actual controversy requirement reiterated in the Declaratory Judgment Act, that "the court must look to the state of affairs as of the filing of the complaint" and that "a justiciable controversy must have existed at that time." *Id.* at 1210 (citations omitted). In that case, the plaintiff anticipated that the defendant would claim patent infringement, but there was not yet sufficient indication to show this would actually occur. That scenario, too, is similar to a debtor's mere anticipation that the IRS will assert a discharge exception before it has begun its evaluation of the matter.

3. The Bankruptcy Court's Decision Conflicts with Prevailing Article III Jurisprudence

In contrast to the foregoing Article III backdrop, the Bankruptcy Court determined that Mr. Wallace's adversary complaint seeking a dischargeability determination – which he filed before he received a Chapter 7 discharge, before the IRS had determined whether the subject tax debts would be excepted from any discharge, and before the IRS had either begun or threatened collection activity – was not only "ripe for adjudication under Article III[,]" it was also "ripe as soon as [Mr. Wallace] filed a petition seeking a discharge of prior debts under §727 as a person eligible for relief under Chapter 7." AP No. 27, at pp. 3-4. In other words, the Bankruptcy Court ruled that the issue was ripe *the instant Mr. Wallace filed his bankruptcy petition*. That ruling is not only significantly at odds with the foregoing line of authority, it also expressly clashes with the decision of the United States Bankruptcy Court for the Northern District of Illinois in *Cosmano*, which concluded that a dischargeability suit brought by the debtor was not ripe and that the debtor lacked standing, where "the United States hasn't sought to collect the tax debt from Cosmano personally or even threatened to[.]" *Compare* **Ex. C**, at 17:13-15 with AP No. 27, at p. 5, n.2 ("This Court cannot reconcile that holding [in *Cosmano*] with one of the fundamental purposes of bankruptcy, which is to determine the extent of a debtor's discharge").

Indeed, if the Bankruptcy Court had merely denied abstention without going so far as publishing a decision disagreeing with all the cases that have held that dischargeability is not ripe, and that a debtor lacks standing to sue, before the IRS has at least determined its position on dischargeability, the United States might not have filed this motion for interlocutory appeal. We strongly urge that even if this Court denies appeal or grants appeal and affirms, it should at least

limit the Bankruptcy Court's ruling to the particular facts of this case where, in response to the complaint, the Department of Justice determined to defend on the merits.[6]

Even if the matter of dischargeability could "ripen" into a justiciable Article III case or controversy upon the Justice Department's conclusion that § 523(a)(1)(C) does in fact apply (or upon the IRS's subsequent agreement with that conclusion), the Bankruptcy Court's decision essentially invites future debtors to forum shop by allowing them to file while the government is statutorily handcuffed by the automatic stay from bringing a suit in the District Court. The Bankruptcy Court agreed that this case would be far different if the United States had first filed a district court suit for a money judgment, as it did in *U.S. v. Mikhov*, 645 B.R. 609 (S.D. Ind. 2022). It then added: "[w]hen a party tries to force its way into a court to be heard on an issue that was already pending in a different venue, one cannot help but think that forum shopping is involved. Here, though, the IRS has not filed any action against Mr. Wallace, and the Court will not abstain in the hope that the IRS will bring the issue to the district court's attention." AP No. 27, at 10. That admonition, of course, ignored the fact that the automatic stay barred the United States from bringing such a suit here until the discharge entry terminated the stay. 11 U.S.C. §§ 362(a)(1) (stay), 362(c)(2)(C) (termination at discharge). *Mikhov*, by contrast, involved a suit by the United States long after the discharge entered and the IRS had decided the taxes were nondischargeable and asked the Justice Department to file suit.

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[6] The Bankruptcy Court's opinion suggests in a footnote that it was not addressing the question of whether the doctrine of prudential ripeness might warrant abstention where the IRS has not yet made up its mind. AP No. 27, at 5 n.3. But that portrayal was contradicted by its earlier statement in the same footnote that "[t]here is a persuasive argument to be made that a debtor is always entitled to seek a determination of the dischargeability of his tax debts, even if the IRS has not made up its mind whether to contest their dischargeability," *id.*, and its prior announcement, in the text of the opinion, that every case is ripe and every debtor has standing under Article III as soon as the bankruptcy petition is filed. *Id.* at 4.

Under the Bankruptcy Court's approach, every debtor can instead bring a free-standing adversary complaint to determine dischargeability action, even before discharge enters and thus terminates the automatic stay, ensuring that in the event the government decides to defend the action, it has no opportunity to have the matter be determined by a jury, or by an Article III judge at least, and that it must also first win a declaratory judgment before it can get a judgment from a district court that can be enforced against a debtor's assets and income and that eliminates the statute of limitations on collection by the IRS as well.[7]

In sum, the Bankruptcy Court's decision here represents a significant departure from the prevailing view of Article III doctrine in the realm of dischargeability actions against the United States. The United States is not aware of any controlling authority for the District Court on this issue, as the Seventh Circuit has not addressed it. And, indeed, the "difference of opinion" on the Article III issue is express on the face of the Bankruptcy Court's opinion, not least because it directly rejects *Cosmano*, which itself is predicated upon the line of cases cited by the government in service of the Article III issue. *See* **Ex. C**, at 11 (applying *Erikson*). The United States submits that the issue is one likely to result in reversal upon appeal because the Bankruptcy Court's departure from *Hinton* and cases like it is not well-taken. The second prong of 28 U.S.C. § 1292(b) is thus met.

[7] A bankruptcy court has no authority over property that is not property of the bankruptcy estate and thus could not issue a writ of garnishment, for example, to collect post-petition income or to collect pre-petition assets that are excluded or exempt from the estate, or that were abandoned. *See Matter of Xonics, Inc.*, 813 F.2d 127, 131 (7th Cir. 1987) (bankruptcy court does not have jurisdiction to adjudicate claims to property that is not property of the estate). And the statute of limitations on collection by IRS is only eliminated by a judgment in a suit for the collection of the tax. 26 U.S.C. § 6502. A declaratory action by a taxpayer in a bankruptcy court does not fit the bill.

C. The Proposed Appeal May Materially Advance the Ultimate Termination of the Litigation in the Bankruptcy Court

Finally, the proposed appeal will "materially advance the ultimate termination" of the litigation before the Bankruptcy Court because if the District Court permits the government's interlocutory appeal and disagrees with the Bankruptcy Court that it had a justiciable case or controversy for purposes of Article III "at the time the complaint [was] filed," it will result in dismissal without prejudice of Mr. Wallace's action for lack of jurisdiction; it will then make the government's forthcoming complaint in this Court the first valid suit. And even the Bankruptcy Court stated that would put the shoe on the other foot. In other words, because resolution of the Article III jurisdictional issue "might end the case right away, thereby obviating the need for discovery, dispositive motions, and a possible trial[,]" the proposed appeal satisfies the third prong of 28 U.S.C. § 1292(b). *See Dahlstrom v. Sun-Times Media, LLC*, 39 F.Supp.3d 998, 1002 (N.D. Ill. 2014).[8]

Moreover, failure to resolve the jurisdiction issue now in an interlocutory appeal risks a tremendous waste of resources should this Court or the Seventh Circuit conclude, after a final judgment, that there was no jurisdiction in the Bankruptcy Court and that the dischargeability dispute must start over in the future . Section 523(a)(1)(C) disputes are extremely fact intensive, with discovery embracing all of a taxpayer's financial transactions for the implicated tax years (and, to the extent the issue includes collection evasion, subsequent years as well).

The problem is best revealed by *Bond v. United States*, 762 F.3d 255 (2d Cir. 2014) In that case, the trustee of a state-law trust established under a Chapter 11 plan of liquidation filed a

[8] Notably, litigation over the dischargeability point will still unfold in the separate action to be commenced by the government action for a tax judgment in the District Court, as it will be a defense to the judgment.

claim for refund with the IRS and then sued under § 505(a)(2). The government argued that only a real (pre-confirmation) bankruptcy trustee could do that under § 505(a)(2). The bankruptcy court disagreed. The district court denied interlocutory appeal. After years of discovery and a five-day trial, both parties appealed. The government renewed its jurisdictional objection but the district court disagreed. After affirmance for the most part, only the trustee appealed to the Second Circuit whereupon the government against raised the jurisdictional objection defensively (without cross-appealing). The Second Circuit held there was no jurisdiction and that the case should start over in the District Court.

III. The Bankruptcy Court's Legal Errors Infected Its Analysis of Whether to Abstain under 28 U.S.C. § 1334(c)

As noted above, the Bankruptcy Court criticized the government for not moving to dismiss given its arguments regarding jurisdiction. The United States respectfully differs with the Bankruptcy Court on that point, and maintains that abstention is an appropriate way to avoid a difficult jurisdictional issue. Of course, the general rule is that a court may not decide a cause of action before resolving whether the court has Article III jurisdiction. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). But as reflected in footnote 3 of that decision, that applies to the merits and does not preclude deciding a discretionary jurisdictional determination, such as permissive abstention, before reaching subject matter jurisdiction. *Id.* at n.3 (citing *Moor v. Cty of Alameda,* 411 U.S. 693, 715-16 (1973), and *Ellis v. Dyson*, 421 U.S. 426, 436 (1975)).

The foregoing point was recognized in *Turedi v. Coca Cola Co.*, 460 F.Supp.2d 507, 514-15 (S.D.N.Y. 2006), which discussed *Steel Co.* and recognized that abstention may be determined to avoid a difficult question of subject matter jurisdiction. It was also reflected in *Fort Worth & Western R.R.Co. v. City of Fort Worth*, No. 03-00319, 2004 WL 743901, at *2 (N.D.Tex. March 8, 2004), where the district court determined to abstain in part to "pretermit" a

"thorny" issue of subject matter jurisdiction. While these are not bankruptcy abstention cases, the reasoning is analogous – abstention avoids the exercise of judicial power, and thus deciding abstention first to moot a difficult jurisdictional issue avoids the problem highlighted in *Steel Co.*[9]

While denial of abstention is reviewed for abuse of discretion, discretion is "by definition" abused when the analysis incorporates an error of law. *U.S. v. Merriweather*, 294 F.3d 930, 931 (7th Cir. 2002); *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 500 (7th Cir. 2012). Here, if leave to appeal is granted, the United States will argue there were at least four purely legal errors made by the Bankruptcy Court that skewed its abstention analysis, and the case should at least be remanded to reconsider abstention shorn of the legal errors. Before discussing the four legal errors below, it is useful to point out two preliminary points.

First, although discharge is a creature of the Bankruptcy Code, the *factual predicate* for the exception in § 523(a)(1)(C) has nothing to do with bankruptcy and everything to do with tax, and is familiar to the district courts because the language of the exception incorporates nearly verbatim the language of the criminal tax evasion statute, 26 U.S.C. § 7201 ("[a]ny person who willfully attempts in any manner to evade or defeat any tax"). In addition, the United States has routinely sought to have the district courts determine dischargeability when seeking a money judgment for taxes after a bankruptcy discharge, and there are numerous reported decisions reflecting this, not to mention unreported ones that may have settled.

Second, when Rule 8 of the Federal Rules of Civil Procedure was amended to remove "discharge in bankruptcy" as an affirmative defense to a suit for a money judgment in 2010, it

[9] The rule in *Steel Co*. also supports granting leave for interlocutory appeal because it would permit the District Court to assure itself that there is no jurisdictional defect before the merits of the dischargeability issue are adjudicated.

was done to clarify that failure to timely plead the defense of discharge should not result in a waiver of that defense, and the Advisory Committee explained that the change was not intended to alter the fact that "in most instances" dischargeability is determined together with the merits "in another court with jurisdiction over the creditor's claim." While that may not be true for the exceptions under § 523(a)(2), (4), or (6), for which creditors are required to preserve non-dischargeability by pleading it in the bankruptcy courts, it is certainly true of § 523(a)(1)(C), which is quite frequently litigated in the district courts in the first instance in suits brought by the United States. Indeed, as the Seventh Circuit held in *Bush v. United States*, 939 F.3d 839 (7th Cir. 2019), the merits of the tax here could not possibly be adjudicated in the Bankruptcy Court because there is no bankruptcy estate to impact – *i.e.*, because this case is a no-asset case. In other words, the Bankruptcy Court employed an overly broad approach to this issue that will sometimes prevent adjudicating the merits and dischargeability in a single action, even though they are at least sometimes intertwined (*i.e.*, where the facts regarding the non-reporting of income or claiming excessive deductions bear on willfulness under § 523(a)(1)(C), although that interrelationship may not affect Mr. Wallace's case).

With that preface in mind, the United States next sets out the four legal errors it ascribes to the Bankruptcy Court's the abstention analysis.

A. The Article III Basis for Abstention Proffered by the Government was Jurisdictional, Not Merely Prudential

First, Bankruptcy Court recharacterized the government's Article III ripeness and standing arguments as pressing a "prudential" theory rather than a true Article III theory. AP No. 27 at 4. Relying upon that characterization, the Bankruptcy Court then rejected the government's pitch in favor of abstention insofar as it was premised on justiciability because

"[p]rudential ripeness does not have much to do with permissive abstention here," *id.* at 7, and because the "prudential ripeness" argument is "not jurisdictional[,]" *id.* at 9.

The Bankruptcy Court erred in its conception of when a justiciable Article III case or controversy arises in the context of a debtor-initiated dischargeability action. But it also erred in its portrayal of the government's arguments as limited to non-jurisdictional "prudential" ripeness, and then imported that characterization into its determination not to abstain. That conception facially misapprehended the government's briefing before the Bankruptcy Court, which included caselaw (*i.e.*, the decisions in *Hinton*, *Erikson*, and *Cosmano*) making clear that the issue is one of constitutional justiciability under Article III.[10]

B. The Bankruptcy Court Erred in Assuming that the Government Was Permitted to File First

Second, the Bankruptcy Court's abstention analysis also improperly faulted the United States for not filing an action for a money judgment in the District Court (in which action discharge would be a defense) before Mr. Wallace filed his adversary complaint seeking an advance determination of dischargeability. *See* AP No. 27, at 10. As noted above, the Bankruptcy Court's abstention analysis on this front neglects a fundamental point of bankruptcy law – that when a debtor files a petition to commence a bankruptcy case, the automatic stay prohibits, among other things, "the commencement … of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under" Title 11 and terminates with the entry of the discharge. *See*

[10] It is certainly true enough that two of the earliest cases in this line of authority, *Mlincek* and *Sheehan*, turned (in the view of those courts) on "prudential" grounds rather than true Article III justiciability. But the more recent decisions are couched in terms of Article III doctrine and, indeed, the United States' briefing reflects that it was the Article III approach that it was asserting before the Bankruptcy Court.

§ 362(a)(1) (stay); § 362(c)(2)(C) (termination at discharge). In other words, Mr. Wallace brought his suit in the Bankruptcy Court while the United States was restrained from commencing an action for a tax judgment in the District Court. To the extent the Bankruptcy Court suggested the United States could have simply moved more swiftly, it was wrong as a matter of law. And given the incongruity between the freedom of the parties in view of the automatic stay, it is not appropriate to invoke the general proposition that, when faced with two cases involving the same dispute, courts should favor an action filed first, *particularly* when the first action was not justiciable when filed.

C. The Bankruptcy Court Erroneously Assumed that a Jury Trial is Unavailable in a District Court Action for a Tax Judgment

Third, Bankruptcy Court also erred in its broad-brush assumption about the unavailability of a jury trial on the issue of dischargeability, for which it cited *Matter of Hallahan*, 936 F.2d 1496, 1505 (7th Cir. 1991). The problem is that the Bankruptcy Court was correct in reference to the *adversary proceeding* before it – there is no right to a jury trial where a debtor files a free-standing dischargeability complaint in a bankruptcy court under Fed. R. Bankr. P. 4007, as Mr. Wallace has done – but wrong in assuming the same would apply to a suit for a money judgment for taxes under the Internal Revenue Code brought in the District Court.

Hallahan arose in yet a third and unique procedural context – a suit by a creditor under § 523(c) that must be brought quickly after a bankruptcy petition to *preserve* a debt from automatic discharge when the creditor claims that § 523(a)(2), (4), or (6) applies. That kind of suit did not exist when the Seventh Amendment was adopted and, unless Congress provided for a jury trial right, there is none. *Hallahan* almost surely extends to where the debtor brings a free-standing declaratory action in the bankruptcy court. Its statement about the action being "equitable" stems from the well-established proposition that "bankruptcy courts are courts of

equity" – not in the sense of the old English courts of chancery but in a more colloquial sense that the bankruptcy courts may use equitable remedies under § 105 and should attempt to achieve results that are fair or equitable when matters are committed to the judge's discretion. The "equity" analogy, however, cannot logically be imported to a cause of action seeking a money judgment on a monetary claim simply because that debt is subject to the statutory defense of discharge with a statutory exception. In this regard, the discharge itself is not a creature of equity but rather is conferred by statute pursuant to Congress's power under the Bankruptcy Clause of the Constitution.

The right to a jury trial in the District Court suit by the United States for a money judgment is also squarely within the reasoning of *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). In that case, a bankruptcy trustee brought a fraudulent transfer action provided by the Bankruptcy Code (§ 548) to recover money, and the defendants sought a jury trial. The Supreme Court distinguished between fraudulent transfers actions seeking return of real or tangible property still held by the transferee and those seeking a money judgment, holding that the latter cause of action is legal rather than equitable. And it did not matter that the cause of action was created by the Bankruptcy Code (§ 548). It thus held that while a fraudulent transfer suit is equitable where the remedy sought is recovery of the transferred property, it is legal when the remedy sought is a money judgment.

The right to a jury trial in a suit to reduce an IRS tax assessment to a money judgment is clear. Courts have consistently held that such a suit existed at common law at the time the Seventh Amendment was adopted, and the cause of action remains one pursuant to common law. In *Damsky v. Zavatt*, 289 F.2d 46 (2d Cir. 1961), the court of appeals granted a writ of mandamus where the district judge granted a motion to strike the taxpayer's jury demand even

where equitable claims were also simultaneously involved. So it is clear that Mr. Wallace could demand a jury in the District Court suit brought by the United States. But the right to a jury trial is always a two-way street because the Seventh Amendment is not worded in terms of who is the plaintiff or defendant: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, . . ."

Moreover, in *In re Varner*, No. 14-61103, No. 14-61103, 2021 WL 5312469 (Bankr. N.D. Ohio Nov. 15, 2021), the bankruptcy court agreed with the United States that it should not reopen the bankruptcy case to permit a declaratory dischargeability action where the United States, while the motion to reopen was pending, brought a district court suit and demanded a jury. The court relied in part on the government's right to a jury in the district court case and observed, by analogy, that where permissive abstention under 28 U.S.C. § 1334(c) is sought for tax merits determination under § 505, one of the factors to weigh is the right to a jury trial. *Id.* at *1-2.

In sum, the Bankruptcy Court's abstention analysis here was therefore improperly skewed by its incorrect assumption that *Hallahan* would apply to a district court suit by the United States seeking a money judgment in which discharge would be a defense.

D. The Bankruptcy Court Should Have Avoided the Declaratory Judgment Act Problem by Abstaining

And *fourth*, in the Bankruptcy Court, the United States also argued that jurisdiction was highly questionable in light of the Declaratory Judgment Act's prohibition of declaratory judgments involving federal taxes. 28 U.S.C. § 2201 ("DJA"). The United States also argued that although § 106(a)(1) abrogates sovereign immunity with regard to § 523, the latter statute does not include any express suit provision allowing a debtor to seek a declaratory judgment regarding dischargeability that might arguably override the DJA. As with the issues of ripeness

and standing, the United States did not actually seek dismissal on this basis but instead urged the Bankruptcy Court to avoid the jurisdictional issue by abstaining.

The Bankruptcy Court held that Seventh Circuit precedent establishes that bankruptcy dischargeability is not declaratory within the meaning of the DJA, citing *McKenzie v. United States*, 536 F.2d 726 (7th Cir. 1976). It observed that *McKenzie* also held that § 17c of the old Bankruptcy Act of 1898 waived sovereign immunity for declaratory actions concerning dischargeability. It further opined that the Seventh Circuit held the same was true of the 1978 Bankruptcy Code, despite the lack of an express statute tracking old § 17c, citing *Matter of Neavear*, 674 F.2d 1201, 1204 (7th Cir. 1982). It further cited *Bush v. United States*, 939 F.3d 839, 844 (7th Cir. 2019), for the proposition that "neither § 505 nor § 523 is a jurisdictional statute" and "sovereign immunity is not a jurisdictional concern." AP No. 27, at 9.

To be clear, the United States is not asking the District Court at this time to grant interlocutory appeal regarding the issue of sovereign immunity and the DJA directly (although, of course, jurisdiction cannot be waived and the United States is not waiving those arguments for any final appeal). But the government does continue to believe that abstention would be appropriate to avoid what are far more difficult jurisdictional issues than the Bankruptcy Court's analysis would lead one to believe. While explicating why the trifecta of these three cases do not in fact preclude a ruling that sovereign immunity or the DJA bar the instant suit, for the sake of completeness and because they bear on the abstention issue, here is a brief synopsis of the more difficult issue.

First, there is no question that old § 17c waived sovereign immunity for declaratory judgments in the bankruptcy courts, and there is also no question that the action in *McKenzie* was not declaratory within the meaning of the DJA. Preliminarily, the old pre-1978 bankruptcy

courts were not "courts of the United States" and thus were not even covered by the DJA as held in *Matter of Becker's Motor Transportation*, 632 F.2d 242, 246-47 (3rd Cir. 1980) – a problem overlooked in *McKenzie*. Under 28 U.S.C. § 151, as enacted in 1978 along with the Bankruptcy Code, bankruptcy courts became "adjuncts" of the district courts, and in 1984, an amendment made them "units" of the district courts. There is no doubt that they are now covered, or else Congress would not have had to add Bankruptcy Code exceptions.

More fundamentally, a brief perusal of *McKenzie* reveals that the action there was not remotely declaratory in nature, and that dischargeability was not even in dispute (even though the complaint sought a dischargeability determination). Instead, the case involved a fight over whether amounts that the IRS collected pre-petition and applied to undisputedly discharged taxes had to be reapplied to undisputedly nondischargeable withholding taxes because an IRS employee had promised they would be so applied in the first place. The willful evasion exception to discharge now found in § 523(a)(1)(C) existed in the old Bankruptcy Act but it was never at issue in *McKenzie* (and neither was any other discharge exception).[11] The relief sought by the debtor was to require the IRS to reapply or reallocate what it collected to the non-dischargeable tax instead of the dischargeable tax, in order to enhance the debtor's fresh start. Because dischargeability itself was not at issue and because more than mere declaratory relief was sought, any pronouncement about whether a debtor could seek a pure declaratory judgment regarding tax dischargeability was dictum, putting aside that under the then-applicable statutes, the dictum was correct.

[11] The taxes were small in amount and all more than three years old, and the only part that was not discharged was the withholding portion of employment taxes, which were not governed by the three-year lookback provision.

As the Bankruptcy Court's opinion here acknowledges, the same statute that enacted the modern Bankruptcy Code in 1978 also amended the DJA to add two Title 11 exceptions to the DJA's tax exclusion clause, but did not add § 523 as an additional exception. It also made the bankruptcy courts adjuncts (and later units) of the district courts and thus "courts of the United States."

As for *Neavear,* it was not even a tax case and did not even cite the DJA. It concerned the Social Security Administration's right to offset a pre-petition claim for an overpayment of disability benefits against the Administration's post-petition obligation to pay disability benefits. Since the complaint sought to undo the offset, it too was not declaratory (and again the DJA is not cited). It describes *McKenzie* as having "upheld the jurisdiction of the bankruptcy court to determine the dischargeability of a tax debt despite the government's failure to file a proof of claim." That is correct, and the United States does not dispute that when an action is not purely declaratory, a bankruptcy court may determine dischargeability of a tax even if no proof of claim was filed. (In "no-asset" cases such as this one, claims need not be filed.) This happens frequently when the IRS is collecting or threatening to collect and a complaint logically seeks to enforce the statutory discharge injunction in § 524 and thus is not merely declaratory. The government does not dispute the Bankruptcy Court's jurisdiction over dischargeability in such cases. *Neavear* correctly held that the authority of bankruptcy courts to determine dischargeability under old § 17c was carried forward despite not being explicit in the new Code. That may well be true for private creditors and even other federal agencies since the DJA excludes only taxes from its purview, but it is not the case "with respect to Federal taxes[.]".

Finally, the Bankruptcy Court's opinion appears to misunderstand *Bush*, in which the government had appealed only the bankruptcy court's insistence that it could determine the

merits of a tax penalty that was undisputedly excepted from discharge when there was no effect on the bankruptcy estate, since it lacked sufficient funds to reach penalties that are subordinated under § 726(a)(4). The penalty applied to a tax return filed less than three years before the bankruptcy case, and so the parties agreed that it fit § 523(a)(7)'s discharge exception. Except for making that point early in the opinion, *Bush* does not cite § 523 at all. And, contrary to the Bankruptcy Court's opinion here, *Bush* did *not* hold that "sovereign immunity is not jurisdictional concern" or face any argument about the Declaratory Judgment Act's limitation of any other statutory waiver of sovereign immunity. *Bush* held that "sovereign immunity does not affect subject-matter jurisdiction," which is correct because sovereign immunity is a different jurisdictional issue. It limits jurisdiction over the United States and thus is more analogous to *in personam* jurisdiction and, even when sovereign immunity is waived to sue the United States, it may limit the *remedies* available against the government. *E.g.*, *F.A.A. v. Cooper*, 566 U.S. 284, 290-91 (2012); *Lane v. Pena*, 518 U.S. 187, 192-94 (1996). The Declaratory Judgment Act is certainly jurisdictional in limiting the declaratory *remedy* to suits that do not involve federal tax (with certain stated exceptions).

One other point warrants brief mention, which is that many courts have characterized dischargeability actions by debtors before a creditor tries to collect as "declaratory." To suggest that such suits do not fall within the language of the DJA now that Congress has made bankruptcy courts units of the district courts flies in the face of the well accepted meaning of the word "declaratory." Mr. Wallace's complaint here is purely declaratory – he wants a determination of whether his taxes were discharged in a context in which there is no pending IRS levy or threat to levy (and indeed in which the discharge was not even entered when the complaint was filed so any levy or threat to levy was barred by the automatic stay).

In the end, the government's position is far narrower than the Bankruptcy Court painted it. The government conceded that sovereign immunity is waived for § 523 and merely argued there is no current declaratory suit provision like the "application" expressly authorized by § 17c of the former Bankruptcy Act. It nevertheless conceded that § 105(a) authorizes bankruptcy courts to enforce § 523 and the discharge injunction in § 524, and that they may and must determine dischargeability *in such suits* as a predicate issue to granting relief that is not merely declaratory (*e.g.*, enforcing the discharge injunction or awarding compensatory damages for its violation or ordering a refund of money collected in violation thereof).

The issue is sufficiently novel that the United States submits it tends to support abstention to avoid the risk that, after extensive discovery and trial of a fact-intensive issue, a higher court may say the litigation must start over in a non-declaratory framework – *i.e.,* either through a government suit for a money judgment overcoming discharge as a defense, or in complaint to enforce the statutory discharge injunction when it is allegedly being violated or to recover funds improperly collected (or for damages).

CONCLUSION

For the foregoing reasons, the United States submits that the District Court should grant leave to appeal and set a full briefing schedule.

WHEREFORE, the United States respectfully requests that the District Court grant this motion and grant it leave under 28 U.S.C. § 158(a)(3).

[SIGNATURE BLOCK FOLLOWS]

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of September 2023, I electronically filed the foregoing with the Clerk of the Court using CM/ECF system which will send notification of such filing to all persons requesting electronic notice through the Court's CM/ECF noticing system, specifically including:

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CERTIFICATION REGARDING TYPE VOLUME LIMITATION

I hereby certify that the foregoing motion contains 10,496 words including headings, quotations, and footnotes (but excluding the caption, signature block, and certificates). As stated above, to the extent the District Court's local rules embrace the instant motion for an interlocutory appeal under Fed. R. Bankr. P. 8004, the United States will file a motion requesting that the District Court accept the foregoing motion in excess of the type-volume limitation, as soon as the matter is docketed in the District Court.

/s/ Noah D. Glover-Ettrich
NOAH D. GLOVER-ETTRICH
Trial Attorney, Tax Division
U.S. Department of Justice

SIGNED THIS: August 18, 2023

Exhibit
A

s/Peter W. Henderson

Peter W. Henderson
United States Chief Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF ILLINOIS

IN RE:	
ANTHONY J. WALLACE,	**Case No. 22-80765**
Debtor.	
ANTHONY J. WALLACE,	
Plaintiff,	
vs.	**Adv. No. 23-8005**
INTERNAL REVENUE SERVICE,	
Defendant.	

OPINION

The Defendant, the United States of America, on behalf of the Internal Revenue Service, has moved the Court to abstain under 28 U.S.C. §1334(c)(1) from hearing this adversary complaint, in which the Debtor-Plaintiff seeks a determination that prior tax debts are dischargeable notwithstanding 11 U.S.C. §523(a)(1)(C). The IRS wishes instead to file a suit against the Debtor in the District Court to seek a collectible judgment. For the following reasons, the motion will be denied.

I

The Debtor, Anthony J. Wallace, filed a Chapter 7 petition in December 2022. Four months later the Chapter 7 Trustee filed a report concluding that the estate did not contain any property available for distribution to creditors. Around the same time, the Debtor filed this adversary proceeding. The complaint is straightforward: the Debtor alleges he is indebted to the IRS for pre-petition income taxes for tax years 2012–2018, and he alleges that those debts are dischargeable notwithstanding 11 U.S.C. §523(a)(1), which excepts income tax debts from discharge in certain circumstances. The Debtor seeks a finding that the taxes are dischargeable and an order that the IRS not take any action to collect on the pre-petition income tax debts.

Though the Chapter 7 estate has been fully administered, the Debtor has not yet received a discharge. Though he has completed the financial management course required for a discharge under 11 U.S.C. §727(a)(11), he has not yet filed a certificate of completion. He has delayed filing the certificate under the belief that the entry of a discharge order would prompt the IRS to move to dismiss this adversary proceeding as moot. Instead, the IRS claims the issue is not ripe, as no discharge has been entered. It also suggests that the Court lacks authority to award the requested relief in light of the Declaratory Judgment Act, 28 U.S.C. §2201. Finally, it argues that the district court, not the bankruptcy court, is the better forum in which to litigate the dischargeability of the Debtor's tax debts. Given those potential problems, the IRS argues, the Court should abstain from hearing this case in favor of the IRS bringing its own suit in the district court under 26 U.S.C. §7402.

II

Despite its perception of a "jurisdictional quagmire," the IRS does not move to dismiss for lack of jurisdiction. See Fed. R. Bankr. P. 7012(b), incorporating Fed. R. Civ. P. 12(b)(1). It instead raises the bogeyman of a jurisdictional reversal on appeal to try to persuade the Court to abstain. That approach is discouraged; if a party believes jurisdiction is lacking, it should move to dismiss. Still, the Court has the independent duty to assure itself of its subject-matter jurisdiction. *Mathis v. Metropolitan Life Ins. Co.*, 12 F.4th 658, 663 (7th Cir. 2021). The Court is confident that jurisdiction is present.

A

The Debtor brought this adversary proceeding to determine the dischargeability of a debt for income taxes. 11 U.S.C. §523(a)(1). The district court has original but not exclusive jurisdiction of all civil proceedings arising under title 11, like this one. 28 U.S.C. §1334(b). The district court has referred all such cases to the bankruptcy judges in this district. Bankr. C.D. Ill. R. 4.1; see 28 U.S.C. §157(a). Bankruptcy judges have authority to hear "all core proceedings arising under title 11" including "determinations as to the dischargeability of particular debts." 28 U.S.C. §157(b)(2)(I). Subject-matter jurisdiction is secure. *Sprout v. Internal Revenue Service* (*In re Sprout*), No. 19-2113, 2020 WL 2527376, at **3–5 (Bankr. S.D. Ohio 2020).

B

The IRS contends that the Court might lack authority to act under Article III because there is no live case or controversy (or at least there was not at the time the complaint was filed). It cites a number of non-bankruptcy decisions to explain, in general terms, that a matter must be "ripe" before a federal court may exercise jurisdiction. It then points to several bankruptcy decisions holding that a dischargeability action is not "ripe" without a "present or imminent threat of collection action by the government." E.g., *Hinton v. United States*, No. 09-621, 2011 WL 1838724 (N.D. Ill. May 12, 2011); *Mlincek v. United States*, 350 B.R. 764 (Bankr. N.D. Ohio 2006).

The case is ripe for adjudication under Article III. Mr. Wallace contends that certain debts owed to a creditor are dischargeable. That contention goes to the "core of the federal bankruptcy power" to restructure debtor-creditor relations. See *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982). It does not matter whether the creditor wishes to contest dischargeability, or indeed whether it participates at all. The debtor has standing under the Bankruptcy Code to seek discharge of his prior debts. See *Central Virginia Community College v. Katz*, 546 U.S. 356,

364 (2006). Outstanding debts, including for past taxes, pose a direct threat to a debtor's fresh start in bankruptcy. *In re Kilen*, 129 B.R. 538, 549 (Bankr. N.D. Ill. 1991); see *In re Landrie*, 303 B.R. 140, 142 (Bankr. N.D. Ohio 2003) ("[I]n a dischargeability proceeding such as this, the 'case or controversy' requirement will be met as long as there exists a 'debt' to discharge."). The existence of the debt and the imminent discharge[1] here is not speculative or hypothetical; the parties "are at odds about a legal issue with concrete consequences for them." *Union Pacific Railroad Co. v. Regional Transportation Authority*, No. 22-1445, 2023 WL 4755727, at *2 (7th Cir. Jul. 26, 2023).

A real and substantial controversy exists about the dischargeability of Mr. Wallace's tax debts. A final judgment will determine the rights of the Debtor under §§523(a)(1) and 727(b), statutes intended to provide the honest debtor with a fresh start. See *Matter of James Wilson Associates*, 965 F.2d 160, 168 (7th Cir. 1992) (defining "standing"). The Debtor's complaint was ripe as soon as he filed a petition seeking a discharge of prior debts under §727 as a person eligible for relief under Chapter 7. Article III is not offended. Cf. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

C

The IRS does not seem to contend otherwise. Its "ripeness" argument focuses not on jurisdiction but rather on what you might call "prudential ripeness." See *E.F. Transit, Inc. v. Cook*, 878 F.3d 606, 609 (7th Cir. 2018) ("Ripeness doctrine has both constitutional and prudential aspects."). A bankruptcy court that has authority to act under the Constitution should not always exercise that authority. *Local Loan Co. v. Hunt*, 292 U.S. 234, 241 (1934); *Mlincek*, 350 B.R. at 768 ("[P]ossessing authority and exercising it are separate considerations."). Whether a case is ripe as a prudential matter turns on (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). In other words: can the dispute fairly be resolved now, and is there reason to believe the dispute now affects the parties? See *E.F. Transit*, 878 F.3d at 610; Wright & Miller, 13B Fed. Prac. & Proc. Juris. §3532.1 (3d ed.) ("[C]ourts should not render decisions absent a genuine need to resolve a real dispute.").

There is no question the issue in this adversary proceeding is ripe. The IRS, notwithstanding its arguments, actually seems to agree. It intends to file a complaint under 26 U.S.C. §7402 to reduce the tax debts to a collectible judgment, having

[1] Mr. Wallace's fear that a discharge order will moot this adversary proceeding is unfounded. A live case or controversy will still exist between the parties as to whether the discharge order encompasses his pre-petition tax debts.

determined that they are nondischargeable. Even it disclaims extending the principle from the main cases it cites—that a §523(a)(1)(C) determination is not ripe until the IRS has "made up its mind regarding non-dischargeability"—to cases (like this one) in which the IRS *has* in fact made up its mind.[2] So while there may be instances in which the Court might determine that a debtor-initiated §523(a)(1) adversary complaint is not yet ripe as a prudential matter, that is not this case.[3] The parties have a dispute affecting their rights, capable of adjudication, that needs to be resolved now. The case is ripe.[4]

III

Even when a Chapter 7 bankruptcy proceeding involves a justiciable controversy, nothing in Title 11 prevents a district court (or bankruptcy court, by reference) from abstaining from hearing that proceeding "in the interest of justice." 11 U.S.C. §1334(c)(1). The IRS argues that the interest of justice favors abstention because (1) the case might not be ripe, (2) the Court might not have authority to enter judgment due to the Declaratory Judgment Act, and (3) it would be a waste of resources to litigate

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[2] The IRS is "skeptical" of the result in *Cosmano v. United States*, No. 21-59 (Bankr. N.D. Ill. Dec. 12, 2022). The Court agrees that skepticism is warranted. There, the bankruptcy court held that a debtor lacks standing to seek a determination of the dischargeability of his pre-petition tax debts "without some action from the United States to collect the debt or some threat to do so imminently." This Court cannot reconcile that holding with one of the fundamental purposes of bankruptcy, which is to determine the extent of a debtor's discharge. See *In re Dambowsky*, 526 B.R. 590, 603 (Bankr. M.D.N.C. 2015). Debtors *always* have standing to seek a discharge.

[3] There is a persuasive argument to be made that a debtor is always entitled to seek a determination of the dischargeability of his tax debts, even if the IRS has not made up its mind whether to contest their dischargeability. See *Wiswall v. Campbell*, 93 U.S. 347, 350 (1876) ("Prompt action is everywhere required by law."). A Chapter 7 bankruptcy allows the debtor to get a "fresh start" by discharging his debts. *Bartenwerfer v. Buckley*, 143 S. Ct. 665, 670 (2023). The Court wonders how refreshing it is to have potential tax liability lingering over one's shoulder for an indefinite period of time. But that is not this case, so the Court need not decide whether the doctrine of prudential ripeness might favor abstention in a case where the IRS has not yet decided whether §523(a)(1) applies.

[4] The IRS mentions that a case must be "ripe" from its inception. That statement conflates jurisdictional concerns (standing, mootness, Article III ripeness) with prudential concerns. See *Norfolk Southern Ry. Co. v. Guthrie*, 233 F.3d 532, 534–35 (7th Cir. 2000) (discussing in context of Article III ripeness). The Court is unaware of any case holding that a court may not adjudicate an actually ripe dispute, over which it has always had jurisdiction, because it may not have been prudent to hear it at the time the complaint was filed. Such a rule would contradict the normal federal practice of staying a case to permit an important future event to occur. E.g., *Rhines v. Weber*, 544 U.S. 269, 278 (2005); see *Hartford Cas. Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419, 427 (7th Cir. 1990).

the §523(a)(1) issue in this Court, rather than the district court. Those arguments, both in isolation and as a whole, are unpersuasive.

Abstention under §1334(c)(1) is "informed by principles developed under the judicial abstention doctrines, and courts have usually looked to these well-developed notions of judicial abstention when applying section 1334(c)(1)." *Matter of Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 6 F.3d 1184, 1189 (7th Cir. 1993). The Seventh Circuit has suggested that bankruptcy courts apply twelve factors flexibly according to their relevance and importance under the particular circumstances of each case. *Id*. The factors include:

(1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention,
(2) the extent to which state law issues predominate over bankruptcy issues,
(3) the difficulty or unsettled nature of the applicable law,
(4) the presence of a related proceeding commenced in state court or other nonbankruptcy court,
(5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334,
(6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case,
(7) the substance rather than form of an asserted "core" proceeding,
(8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court,
(9) the burden of [the bankruptcy court's] docket,
(10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties,
(11) the existence of a right to a jury trial, and
(12) the presence in the proceeding of nondebtor parties.

Id. On the other hand, the Seventh Circuit has also suggested that a twelve-factor list does not actually constrain a judge's discretion in any meaningful way. See generally *Exacto Spring Corp. v. C.I.R.*, 196 F.3d 833, 834–35 (7th Cir. 1999) (criticizing multi-factor tests). This Court doubts the factors' efficacy as a legal test for what the "interest of justice" requires, because they can justify nearly any outcome a bankruptcy judge desires. See *Matter of Plunkett*, 82 F.3d 738, 741 (7th Cir. 1996) (criticizing laundry list attempting to define "when justice so requires"). The Court has considered each of the

twelve factors in deciding whether abstention would be in the interest of justice[5], but a more appropriate inquiry focuses on the particular reasons the parties in this case believe abstention would or would not be in the interest of justice. See *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

A

The first concern raised by the IRS is that the case might not be ripe. It is, for the reasons given above. And the IRS seems to agree. But it stirs up uncertainty about the matter to try to convince the Court to abstain, suggesting in part that a later court might disagree. This case though presents a quintessentially ripe issue. The parties disagree on a legal issue with concrete consequences for them. The Court is confident in its jurisdiction. Given the "virtually unflagging" obligation of a federal court to hear and decide matters within its jurisdiction, the Court does not believe it would be prudent to abstain based on ripeness concerns. See *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014).

Prudential ripeness does not have much to do with permissive abstention here, anyway. The former doctrine asks, "Should this court act at this particular time?" while the latter asks, "Should this particular court act at this time?" The essence of the IRS's motion is not that the timing is off—it intends to immediately raise the same dispute under 26 U.S.C. §7402—but that the matter should be heard in a different court. So the IRS's arguments on prudential ripeness are unavailing.

B

The IRS then sows doubt about the availability of relief in this Court in light of the Declaratory Judgment Act, 28 U.S.C. §2201. Again, the IRS has not moved to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Bankr. P. 7012(b), incorporating Fed. R. Civ. P. 12(b)(6). Regardless, the IRS's position on the merits is foreclosed by appellate precedent, which this Court must follow, so there is no uncertainty that would justify abstention.

McKenzie v. United States, 536 F.2d 726 (7th Cir. 1976), has two relevant holdings. First, a provision of the Bankruptcy Act that permitted the debtor to file an application for the determination of the dischargeability of any debt waived the sovereign immunity of the United States in any bankruptcy action in which the United States was

[5] Factors 1, 2, 4, 5, and 8 are irrelevant or neutral. Factors 3 and 12 support abstention. Factors 6, 7, 9, 10, and 11 do not support abstention.

alleged to be a creditor of the bankrupt, including instances in which federal taxes had become due and owing. Second, a debtor seeking a determination of the dischargeability of his tax indebtedness under the Act was *not* requesting a declaratory judgment with respect to Federal taxes in the sense that §2201 did not authorize. 536 F.2d at 729.

True, that was the Bankruptcy Act, not the modern Bankruptcy Code. But the Seventh Circuit has held that the Code waives sovereign immunity as well. *Matter of Neavear*, 674 F.2d 1201, 1204 (7th Cir. 1982). The applicable section when the Code was first enacted "preserve[d] the rule, … approved by this court in *McKenzie*, that a debtor may seek a declaration from the bankruptcy court that a debt owed to an agency of the United States is dischargeable." *Id*. The current edition of the Code puts it in black and white: "[S]overeign immunity is abrogated as to a governmental unit … with respect to … sections … 505 … [and] 523 … ." 11 U.S.C. §106(a)(1); see *Bush v. United States*, 939 F.3d 839, 844 (7th Cir. 2019). The IRS suggests some reasons why §106(a)(1) does not mean what it says, but this Court is constrained by the Seventh Circuit's explicit holding that sovereign immunity is waived when a debtor seeks a determination of dischargeability. There is no reason to think that the abrogation of sovereign immunity in §106(a)(1) with respect to §§505 and 523 is meant to apply piecemeal to only some *types* of determinations under those sections rather than categorically to *any* determination. Cf. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 143 S. Ct. 1689, 1697 (2023).

What about the Declaratory Judgment Act? *McKenzie* holds that a determination of dischargeability is not a declaratory judgment for the purposes of §2201. That resolves the matter; nothing in the enactment of the Bankruptcy Code or amendments to §2201 calls that characterization of dischargeability determinations into question. Indeed, the legislative history behind the enactment of §505 of the Bankruptcy Code leaves no doubt that Congress meant to preserve the ability of a debtor to seek a determination as to the dischargeability of his tax debts:

> Under the House amendment, as under present law, an individual debtor can also file a complaint to determine dischargeability. Consequently, where the tax authority does not file a claim or a request that the bankruptcy court determine dischargeability of a specific tax liability, the debtor could file such a request on his own behalf, so that the bankruptcy court would then determine both the validity of the claim against assets in the estate and also the personal liability of the debtor for any nondischargeable tax.

124 Cong. Rec. 32,413 (Sept. 28, 1978) (House); 124 Cong. Rec. 34,013 (Oct. 5, 1978) (Senate).

The Seventh Circuit was right in *McKenzie*, by the way. A determination of the scope of a debtor's discharge is one of the two primary purposes of bankruptcy law. *Wiswall*, 93 U.S. at 350. A debtor who seeks a dischargeability determination is not seeking a declaration about his rights "whether or not further relief is or could be sought." 28 U.S.C. §2201. He is seeking substantive relief, provided by the Bankruptcy Code, to adjust the relationship he has with his creditors. So a determination of dischargeability is not a declaratory judgment under §2201, even if it might be analogized to such an action. The Seventh Circuit could not "believe that Congress gave the bankruptcy court [authority] to determine the dischargeability of tax debts … and then intended that the determination should be prohibited by the Declaratory Judgment Act." *McKenzie*, 536 F.2d at 729. This Court does not believe it either.

McKenzie's sound holding establishes that the Court has authority to determine the dischargeability of Mr. Wallace's tax debts, because they are not subject to §2201's limitations. The parties' extended discussion of the relationship between §505 and §2201 is therefore irrelevant. The Court is confident it has authority to perform one of its two essential functions in determining the scope of Mr. Wallace's discharge. The Declaratory Judgment Act provides no reason to abstain.

C

The IRS urges the Court to abstain because of what it calls "several reasons to doubt the Court's ability to exercise jurisdiction over Mr. Wallace's adversary complaint." But subject-matter jurisdiction is secure. 28 U.S.C. §§1334, 157. To illustrate what it means, the IRS cites *United States v. Bond*, 762 F.3d 255 (2d Cir. 2014), in which the court of appeals vacated the work of the lower courts due to its view that the bankruptcy court did not have jurisdiction under §505. That is not the law in the Seventh Circuit, though. Neither §505 nor §523 is a jurisdictional statute. *Bush*, 939 F.3d at 842–43. Nor is §2201, to the extent it is relevant. *NewPage Wisconsin System Inc. v. United Steel Workers Int'l Union*, 651 F.3d 775, 776 (7th Cir. 2011). And sovereign immunity is not a jurisdictional concern. *Bush*, 939 F.3d at 844. The two primary arguments raised by the IRS in favor of abstention—prudential ripeness and the Declaratory Judgment Act—are not jurisdictional. There is no doubt this Court has subject-matter jurisdiction under title 28; whether it has (and should exercise) the authority to enter a judgment resolving the §523(a)(1) dispute is a matter that should be litigated in the ordinary course. The Court rejects the premise that it should abstain

from deciding a core bankruptcy matter because a judgment that it has jurisdiction to enter might be reversed on appeal.

The IRS also argues that the Court is not uniquely situated to adjudicate whether the Debtor filed a fraudulent return or willfully attempted to evade taxes. It proffers that district courts hear tax evasion matters more frequently. The Court does not doubt that the district court would do a fine job handling the dispute in this case. But determining whether a debtor's tax debts are nondischargeable is a familiar inquiry to this Court as well. And while district judges are generalists, *Capps v. Drake*, 894 F.3d 802, 805 (7th Cir. 2018), bankruptcy judges specialize in issues such as dischargeability. It does not promote the interest of justice to transfer core bankruptcy matters, like the action here, from a specialized bankruptcy forum to a general district court docket. (The IRS's related contention that the district court is better equipped to conduct a jury trial is also a nonstarter. There is no right to a jury trial in a dischargeability proceeding. *Matter of Hallahan*, 936 F.2d 1496, 1505 (7th Cir. 1991).)

D

The final point the IRS makes is that consolidating its collection action with a determination of dischargeability in one forum—the district court—is sensible. The Court agrees in part. Had the IRS initiated a lawsuit in the district court under 26 U.S.C. §7402 before Mr. Wallace filed his dischargeability complaint, the shoe would be on the other foot. See *United States v. Mikhov*, 645 B.R. 609, 618 (S.D. Ind. 2022). When a party tries to force its way into a court to be heard on an issue that was already pending in a different venue, one cannot help but think that forum shopping is involved. Here, though, the IRS has not filed any action against Mr. Wallace, and the Court will not abstain in the hope that the IRS will bring the issue to the district court's attention. The dispute is ready for decision as pleaded by Mr. Wallace.

Besides, the judicial efficiency argument is a bit overblown. If the Court decides that the tax debts are dischargeable, the IRS is not likely to seek to collect them. See 11 U.S.C. §524(a). On the other hand, if the Court decides that they are nondischargeable, any collection action promises to be perfunctory in light of Mr. Wallace's concession that he owes the debts. There may be extra costs in the form of an additional layer of appellate review, but that is the bankruptcy system established by Congress and adopted by the Central District of Illinois. 28 U.S.C. §157(a); Bankr. C.D. Ill. R. 4.1.

IV

Abstention from the exercise of jurisdiction is the exception rather than the rule. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 6 F.3d at 1189. None of the reasons supplied by the IRS, individually or cumulatively, persuades the Court that this case is exceptional. It is not in the interest of justice to refuse to hear this core bankruptcy matter. The motion to abstain will therefore be denied.

# # #

IT IS SO ORDERED.

SIGNED THIS: August 18, 2023

Exhibit B

s/Peter W. Henderson

Peter W. Henderson
United States Chief Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF ILLINOIS

IN RE:	
ANTHONY J. WALLACE,	**Case No. 22-80765**
Debtor.	
ANTHONY J. WALLACE,	
Plaintiff,	
vs.	**Adv. No. 23-8005**
INTERNAL REVENUE SERVICE,	
Defendant.	

ORDER

For the reasons stated in an opinion entered this day, on the Motion to Abstain filed by the Defendant, IT IS HEREBY ORDERED:

1. The Motion to Abstain [#15] is DENIED.

2. The Defendant shall file a responsive pleading to the complaint within 14 days.

# # #

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF DIVISION
EASTERN DIVISION

JAMES COSMANO, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	No. 21 A 00059
	)	Chicago, Illinois December 12, 2022 10:00 a.m.
JAMES COSMANO, Debtor.	)	No. 19 B 13287

TRANSCRIPT OF PROCEEDINGS VIA ZOOM BEFORE THE HONORABLE A. BENJAMIN GOLDGAR

APPEARANCES:

For the Debtor: Mr. Paul Bach;

For the United States: Mr. Jeffrey Nunez;
Mr. Noah Glover-Ettrich;

Exhibit
C

THE CLERK: Calling line numbers 33, 34, 35 and 36, James Cosmano; Cosmano v. United States of America.

MR. BACH: Good morning, Your Honor. Paul Bach on behalf of James Cosmano.

MR. GLOVER-ETTRICH: Good morning, Your Honor. Noel Glover-Ettrich on behalf of the United States. And I'm joined by colleague Jeffrey Nunez.

MR. NUNEZ: Good morning, Your Honor.

THE COURT: Good morning.

Since no one is in the courtroom but Michelle and me, I'm going to remove my mask. I have a ruling to read into the record.

This adversary proceeding is before me because last month I expressed concerns that the matter wasn't justiciable. I asked the parties for simultaneous briefs on subject matter jurisdiction, and they've provided them. Although both sides contend jurisdiction is secure, I'm unconvinced. For reasons I'll describe, this adversary proceeding will be dismissed for lack of jurisdiction.

The background facts come from several sources: the parties' memoranda and exhibits, the docket in the bankruptcy case and adversary

proceeding, papers filed in the case and proceeding, the district court's docket in two related actions, and papers filed in those actions. No facts are in dispute.

James Cosmano is a Chicago lawyer with tax problems. The Internal Revenue Service audited Cosmano's income tax returns for the years 2007–10, determined that he'd underpaid his taxes for the years 2007, 2009, and 2010, and assessed total taxes due of $2,951,173. With interest, Cosmano's tax liability came to roughly $6.5 million as of May 2019.

In 2011, the IRS began efforts to collect the unpaid taxes. In 2015, the IRS recorded tax liens in Cook County. In 2017, the United States brought an action in the district court to reduce to judgment the IRS assessments against Cosmano. Cosmano didn't contest the action, and in January 2018, the district court entered judgment for the United States. In September 2018 the United States recorded its judgment in Cook County.

Recording the tax liens and judgment made sense because Cosmano owns a condominium on East Waterside Drive in Chicago. The tax liens and the judgment lien attached to the Waterside property.

A little over a year after the district court's judgment, Cosmano filed a chapter 7 bankruptcy case. Cosmano listed the IRS as a creditor, and the IRS filed a proof of claim and later an amended proof of claim. A month post-petition, Cosmano moved to avoid the United States's judgment lien. The United States countered with a motion to lift the automatic stay to enforce its tax liens against the Waterside property. Cosmano later withdrew his lien avoidance motion, but I granted the motion to lift the stay.

Because no party in interest had objected, in August 2019 Cosmano received a discharge in his bankruptcy case. In September 2020, the chapter 7 trustee filed a report of no distribution, and the case was closed.

Two months after that, Wilmington Savings Fund Society sued in the district court to foreclose its mortgage on the Waterside property, naming the United States as a defendant. The United States answered and counterclaimed. The counterclaim sought a determination that the federal tax liens were valid and entry of an order enforcing the liens against the property. Wilmington and the United States each moved for summary judgment, and in

January 2022 the district court granted both motions, entered judgment, and appointed a receiver to sell the property.

Meanwhile, in March 2021 Cosmano's counsel had withdrawn, and Cosmano had moved pro se to reopen his bankruptcy case, reinstate the stay, and avoid the judicial and tax liens. He also sought a declaration that his federal tax debt had been discharged. I reopened the case but denied the motion to reinstate the stay (since the entry of discharge meant there was no stay to reinstate), denied the motion to declare the tax debt dischargeable (since that relief has to be sought in an adversary proceeding), and denied the motions to avoid the liens.

The next month, equipped with new counsel, Cosmano filed an adversary proceeding against the United States seeking a determination that his federal tax debt was discharged. In his complaint, Cosmano alleged that the United States had "made accusations in this Court and other forums" that the debt was excepted from discharge under section 523(a)(1)(C) of the Code, but those accusations were "without support or a factual basis." In fact, Cosmano continued, the United

States "has not [proved] and cannot prove that Cosmano's federal tax debts were excepted from discharge," because his tax liabilities weren't debts as to which Cosmano had "made a fraudulent return or willfully attempted in any matter to evade or defeat such tax liability."

Rather than move to dismiss under Rule 12(b)(1), as it might have done, the United States answered the complaint. As to each allegation I just quoted, the United States said that it "lack[ed] knowledge or information sufficient to admit or deny" the allegation. Although that is, of course, a permissible way to answer a complaint and technically operates as a denial, see Fed. R. Civ. P. 8(b)(5) (made applicable by Fed. R. Bankr. P. 7008), the United States responded to Cosmano essentially by shrugging its shoulders.

The parties have since cross-moved for summary judgment. Those motions are pending and not quite fully briefed.

I first noticed the answer this past fall while preparing to rule on a motion from the United States to compel discovery responses. After ruling on the motion, I noted the agnostic response to the complaint and expressed "serious doubts" about

whether I had a case or controversy under Article III. I added that even if the United States had in fact made "accusations" about Cosmano's tax liability, accusations alone wouldn't be enough to produce a justiciable controversy. If the United States is "not trying to collect the debt and not threatening to collect the debt," I said, "then I don't have jurisdiction over this. I will have jurisdiction when the government tries to do something." As an example of a case presenting a similar problem, I cited Erikson v. U.S. Dep't of Treasury (In re Erikson), Nos. 12-59165, 12-5546, 2013 WL 2035875 (Bankr. E.D. Mich. May 10, 2013).

Because I have to raise and consider subject matter jurisdiction even when the parties don't, Gonzalez v. Thaler, 565 U.S. 134, 141 (2012), I stayed proceedings on the summary judgment motions and asked for briefing on the jurisdictional question. The parties have obliged.

In his memorandum, Cosmano maintains that the adversary proceeding presents a justiciable controversy and cites nineteen examples of actions the United States has taken showing as much. For its part, the United States concedes the action "was not ripe when Mr. Cosmano initially filed it" but says it

has since become ripe because the United States has now "staked out a firm position" that Cosmano's tax liability is nondischargeable. That said, the United States asserts there is an important jurisdictional question here under the Declaratory Judgment Act's tax exclusion clause. The United States would have me abstain rather than address the question.

Rather than abstain, I conclude that I must dismiss the adversary proceeding for lack of subject matter jurisdiction. Cosmano and the United States disagree about a legal question – whether Cosmano's tax debt is nondischargeable – but that's all. Without some action from the United States to collect the debt or some threat to do so imminently, the question is purely hypothetical. Whether viewed as a problem of standing or of ripeness, jurisdiction is lacking.

Federal jurisdiction is limited. Under Article III of the Constitution, federal courts have the power to decide only "actual cases or controversies." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013) (internal quotation omitted). As the Seventh Circuit explained recently, Article III "prevents federal courts from answering legal questions, however important, before those questions

have ripened into actual controversies between someone who has experienced (or imminently faces) an injury and another whose action or inaction caused (or risks causing) that injury." Sweeney v. Raoul, 990 F.3d 555, 559 (7th Cir. 2021).

Several different justiciability doctrines give effect to this limitation. 13 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Richard D. Freer, Federal Practice & Procedure § 3529 at 612 (3d ed. 2008). One such doctrine is the requirement that a plaintiff have standing. Id. Another is the requirement that the controversy be ripe. Id. These two doctrines are "closely related." Rock Energy Coop. v. Village of Rockton, 614 F.3d 745, 748 (7th Cir. 2010).

First, standing. To have standing, "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021); see also Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016). The question here involves the first element – that the plaintiff show an actual or imminent injury. If

the plaintiff has suffered no actual injury, the injury must at least be imminent. That means the injury must be "certainly impending." Clapper, 568 U.S. at 409. "Allegations of possible future injury are not sufficient." Id. (internal quotation omitted).

Cosmano hasn't shown either an actual injury or an imminent one. He offers no evidence either that the United States is trying to collect the unpaid taxes from him personally despite his discharge, or that there is "certainly impending" collection activity. It's been four years since the United States had its tax assessments reduced to judgment in the district court. During that time, as far as the record shows, the United States has done nothing to collect the unpaid taxes from Cosmano personally, nor has it threatened to do so, imminently or at all. The parties disagree about what the United States could do, true enough. But that's not enough. To date, the United States hasn't done what it says it could do or even said that it would. Until then, the disagreement is merely academic, a disagreement about rights the United States hasn't exercised. The parties' disagreement about the government's unexercised rights does

Cosmano no injury. See Erikson, 2013 WL 2035875, at *3.

Both Cosmano and the United States distinguish Erikson, Cosmano in particular pointing out that in Erikson the United States said it had "no present intent" to sue the debtors, id. at *1, and the United States has said nothing like that here. The parties are right that Erikson's facts differ slightly. But although the United States hasn't affirmatively disclaimed an intent to collect from Cosmano, it also hasn't said it does intend to. It has said nothing. The principle in Erikson – that chapter 7 debtors lack standing to bring, and a bankruptcy court lacks jurisdiction to hear, "potential nondischargeability actions under § 523(a)(1)(C) that could one day be brought," id. at *3 – applies here even though Erikson is not identical.

Cosmano, though, insists this case isn't remotely like Erikson. He cites nineteen examples of actions he says the United States has already taken to collect from him personally.

The examples are unconvincing. Two of them (Nos. 3 and 17) fail to describe actions by anyone, let alone the United States. Three (Nos. 1,

11, and 16) describe actions by entities other than the United States, including Cosmano himself. Four (Nos. 2, 5, 6, and 8) describe actions the United States took not only pre-discharge but prepetition. Many of Cosmano's examples (Nos. 5, 10, and 14-16) arise out of the United States's efforts to file and foreclose on its liens. By definition, those aren't efforts to collect from Cosmano personally despite his discharge.

Some of Cosmano's examples require more discussion.

In example No. 4, Cosmano notes that the IRS's internal account transcripts show interest accruing despite the discharge. To Cosmano, that proves the United States is asserting that his tax debt is nondischargeable. Perhaps so. But simply asserting nondischargeability is one thing; collecting or threatening to collect a debt because it's nondischargeable is another.

In example No. 7, Cosmano claims that the account transcripts have entries for 2019 and 2020 showing continuing efforts to collect from him personally. These entries say: "Removed appointed representative," "Bankruptcy or other legal action filed," "Passport certified seriously delinquent tax

debt reversal," "Appointed representative," "Lien placed on assets due to balance owed," and "Fees and other expenses for collection." Except for the references to "appointed representative," a representative empowered to act on Cosmano's behalf in dealing with the IRS, the meaning of these entries is opaque. Cosmano offers no explanation.

Example No. 9 cites the IRS proofs of claim filed in Cosmano's chapter 7 case. Filing a proof of claim is a creditor's attempt to be paid from the bankruptcy estate. A proof of claim is neither a creditor's attempt to collect from a debtor personally nor a statement that its claim is nondischargeable.

Examples Nos. 12 and 13 assert that the response of the United States to Cosmano's pro se motions to avoid liens, reinstate the stay, and declare the tax debt discharged "overtly challenged [him]" to file this adversary proceeding. True, the response (entitled "notice of objection") did state that Cosmano's tax debts were excepted from discharge, and perhaps Cosmano took that statement as a challenge. But the response nowhere said that the United States was trying to collect from Cosmano personally or intended to do so imminently.

Example No. 15 says that in the foreclosure action the counterclaim sought to enforce not only the United States's secured claim but also its unsecured claim for more than $6 million. It didn't. The counterclaim's request for relief simply sought an order enforcing the tax liens "securing the liabilities described above . . . against the property." The counterclaim asserted no claim against Cosmano personally for any deficiency.

Example No. 18 asserts that the United States is continuing to attempt to collect the tax debt in violation of the discharge. But Cosmano cites as support only the discharge itself. Cosmano's discharge says nothing about the actions or intentions of the United States or anyone else.

Example No. 19 notes that the United States has moved for summary judgment in the adversary proceeding and asserted that the tax debt is nondischargeable. Again, the parties unquestionably disagree over whether the debt was discharged. But that disagreement alone doesn't injure Cosmano or threaten to injure him.

Cosmano next claims two other injuries. He says that unless the court decides the dischargeability question, he won't know whether he

is subject to the debt, and "there is hardship in not knowing." He also says that given the size of the tax debt, he may not be eligible for a future chapter 13 case.

Cosmano cites no authority for these points, and both mistake the nature of a chapter 7 discharge. With limited exceptions not relevant here, a potentially nondischargeable debt is discharged until a court determines otherwise. In re Prate, 634 B.R. 72, 78 (Bankr. N.D. Ill. 2021). So Cosmano's tax debt is currently discharged. Because it is, the debt doesn't count against the unsecured debt limit in section 109(e) and wouldn't prevent him from filing a chapter 13 case. See In re Washington, 602 B.R. 710, 715 (B.A.P. 9th Cir. 2019). As for the hardship of "not knowing," that's common to all chapter 7 debtors. Rule 4007 makes plain that a nondischargeability complaint (other than one under section 523(c)) "may be filed at any time." Fed. R. Bankr. P. 4007(b). Without a showing that an injury is at the very least "certainly impending," there is no injury sufficient to confer standing. Clapper, 568 U.S. at 409; see, e.g., Prosser v. Becerra, 2 F.4th 708, 714 (7th Cir. 2021) (brain cancer patient's mere concern that she might one day have to

pay for treatment failed to create standing).

The party invoking federal jurisdiction bears the burden of showing its existence. Appert v. Morgan Stanley Dean Witter, Inc., 673 F.3d 609, 617 (7th Cir. 2012). That means the plaintiff in a civil action has the burden of showing standing to sue. TransUnion, 141 S. Ct. at 2207. As the plaintiff here, Cosmano had and still has that burden, and he hasn't met it. At most, he has shown a dispute with the United States about nondischargeability. He hasn't shown any practical effects from that dispute because he hasn't shown either that the United States has acted on its position by trying to collect Cosmano's tax debt or that the United States will do so imminently. Without some actual or imminent injury, Cosmano lacks standing to ask this court to determine the tax debt's dischargeability.

For much the same reasons, Cosmano's action isn't ripe. Ripeness is a justiciability doctrine "invoked to determine whether a dispute has yet matured to a point that warrants decision." 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, supra, § 3532 at 365 (3d ed. 2008). Ripeness concerns arise "when a case involves uncertain or

contingent events that may not occur as anticipated, or not occur at all." Wisconsin Right to Life Political Action Comm. v. Barland, 664 F.3d 139, 148 (7th Cir. 2011). Whether a claim is ripe for adjudication "depends on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Id. (internal quotation omitted). Either criterion may suggest that a matter isn't ripe. See, e.g., Milwaukee Police Ass'n v. Board of Police & Fire Comm'rs, 708 F.3d 921, 933 (7th Cir. 2013) (finding dispute unripe when dismissal posed no hardship).

Because the United States hasn't sought to collect the tax debt from Cosmano personally or even threatened to, the issue of nondischargeability isn't fit for decision because it has yet to arise and may not arise at all. True, the United States has asserted in this adversary proceeding that the debt is nondischargeable. But the United States appears to have done so only because Cosmano forced its hand by filing a complaint that demanded to have the court decide the issue. The United States hadn't yet concluded that the debt was nondischargeable – hence the equivocal answer to Cosmano's complaint. But even after deciding during

discovery that the debt was nondischargeable, the United States didn't try to collect the debt or say it would. It still hasn't. Cosmano's dispute with the United States isn't fit for decision and won't be until the United States puts the nondischargeability issue in play. Cf. Mlincek v. United States (In re Mlincek), 350 B.R. 764, 769 (Bankr. N.D. Ohio 2006) (dismissing section 523(a)(1) adversary proceeding as unripe partly because there was no pending or threatened collection activity).

Withholding consideration of the issue until the United States moves against Cosmano, or threatens to, poses no hardship to him. Right now, the tax debt is discharged, Prate, 634 B.R. at 78, and Cosmano can treat it as such. Should circumstances change one day, should the United States try to collect or threaten to imminently, Cosmano can argue that the debt is discharged and can claim a violation of the discharge injunction. At that point, Cosmano will have standing, and the dispute will be ripe. See, e.g., Prosser, 2 F.4th at 714; Milwaukee Police Ass'n, 708 F.3d at 933.

Not only will Cosmano suffer no hardship from the dismissal of this adversary proceeding, a dismissal might leave him better off,

given the adversary proceeding's unusual procedural posture with Cosmano as the plaintiff. Although the United States is the defendant, it would have the burden of proof at trial on the question of nondischargeability under section 523(a)(1)(C). See In re Birkenstock, 87 F.3d 947, 951 (7th Cir. 1996). Because Cosmano is the plaintiff, though, he would still have the burden of going forward at trial. See Lewis v. United States, 151 B.R. 140, 142 (Bankr. W.D. Tenn. 1992). That means Cosmano would have to "make a prima facie showing of dischargeability" before the burden of proof would fall to the United States. Id.

And therein lies the problem for Cosmano. After the United States announced in the Wilmington Savings foreclosure action that it had made a criminal referral to the U.S. Attorney, Cosmano refused to respond to discovery in this adversary proceeding and asserted his Fifth Amendment privilege. But because he would have the burden of going forward at trial, he would have to testify about his tax liabilities. In doing so, he might well waive the privilege. As the adversary proceeding is postured, in other words, Cosmano would be forced at trial to choose between refusing to

testify and losing on the merits or testifying and waiving his Fifth Amendment rights. Better for Cosmano to have the adversary proceeding dismissed for lack of jurisdiction and preserve his ability to litigate dischargeability (should it ever come to that) in a more favorable procedure framework.

When federal jurisdiction is questioned, the proponent of jurisdiction bears the burden of showing it. Ware v. Best Buy Stores, L.P., 6 F.4th 726, 731 (7th Cir. 2021). Jurisdiction's absence is presumed, Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994), and in doubtful cases, doubts are resolved against jurisdiction, see Avante Int'l Tech., Inc. v. Hart Intercivic, Inc., No. 08-832-GPM, 2009 WL 2431993, at *4 (S.D. Ill. July 31, 2009); United States ex rel. Coleman v. Indiana, No. IP96-0714-C-T/G, 2000 WL 1357791, at *16 (S.D. Ind. Sept. 19, 2000). Cosmano has not met his burden to show I have jurisdiction to hear and decide this adversary proceeding. Because Cosmano lacks standing and because the dispute isn't ripe, the adversary proceeding fails to present a justiciable controversy and will be dismissed for lack of subject matter jurisdiction.

One last point. Even if I weren't

dismissing the adversary proceeding, I wouldn't be inclined to abstain. The United States argues that the tax exclusion clause in the Declaratory Judgment Act, 28 U.S.C. § 2201, deprives me of jurisdiction to decide nondischargeability under section 523(a)(1). The United States believes I should abstain so the district court can address what it terms "a significant jurisdictional issue of first impression."

But the issue isn't one of first impression. The Seventh Circuit addressed it nearly half a century ago in McKenzie v. United States, 536 F.2d 726, 729 (7th Cir. 1976), and rejected the position the United States advances here. Other courts have done the same. See, e.g., Bostwick v. United States, 521 F.2d 741, 747 (8th Cir. 1975); see also Harker v. GYPC, Inc. (In re GYPC, Inc.), 639 B.R. 739, 745 (Bankr. S.D. Ohio 2022)(collecting cases). The McKenzie decision is binding on this court and, of course, would be binding on the district court, as well.

For these reasons, this adversary proceeding is dismissed without prejudice for lack of subject matter jurisdiction. All pending motions are denied as moot.

THE COURT: Thank you, gentlemen.

MR. GLOVER-ETTRICH: Thank you, Your Honor.

MR. BACH: Thank you, Your Honor.

MR. NUNEZ: Thank you.

(Which were all the proceedings had in the above-entitled cause, December 12, 2022, 10:00 a.m.)

I, AMY B. DOOLIN, CSR, RPR, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT OF PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE. /S/