No. _____

In the Supreme Court of the United States

JOHN PAUL SALVADOR,

Applicant,

v.

UNITED STATES OF AMERICA

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

1. Pursuant to Supreme Court Rule 13.5, Applicant John Paul Salvador respectfully requests a 60-day extension of time, to and including July 29, 2024, within which to file a petition for a writ of certiorari. The U.S. Court of Appeals for the Ninth Circuit issued an opinion on March 1, 2024. A copy of that opinion is attached. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

2. Absent an extension, a petition for a writ of certiorari would be due on May 30, 2024. This application is being filed more than 10 days in advance of that date, and no prior application has been made in this case.

3. This cases raises a nationally important question at the intersection of the Bankruptcy Code and the tax law over which there is now a three-way circuit split. The

question is whether tax debts for certain tax years involving late-filed tax returns are (a) never dischargeable in bankruptcy (1st, 5th, 10th circuits),[1] (b) almost never dischargeable in bankruptcy (4th, 6th, 7th, 9th, 11th circuits),[2] or (c) virtually always dischargeable in bankruptcy (8th circuit).[3] The resolution of this question affects many of the hundreds of thousands of individuals who file for Chapter 7 bankruptcy each year.

4. In 2015, Applicant submitted late federal income tax returns to the IRS for multiple tax years, including 2003, 2004, 2006, and 2009. In February 2017, an IRS representative confirmed that Applicant had filed all then-required federal income tax returns. In October 2019—more than four years after filing his returns—Applicant filed for bankruptcy.

5. Generally, in a Chapter 7 bankruptcy case, an individual debtor is granted a "discharge" that discharges all of the debtor's debts that arose before the debtor filed his or her bankruptcy petition. *See* 11 U.S.C. § 727(b). However, certain types of debts are not discharged. These "nondischargeable" debts are listed in section 523(a) of the Bankruptcy Code.

6. Section 523(a)(1) makes certain tax debts nondischargeable:

- First, if a debt is entitled to priority in payment under the Bankruptcy Code, it is nondischargeable.

[1] *In re Fahey*, 779 F.3d 1 (1st Cir. 2015); *In re Mallo*, 774 F.3d 1313 (10th Cir. 2014); *In re McCoy*, 666 F.3d 924 (5th Cir. 2012).
[2] *In re Shek*, 947 F.3d 770 (11th Cir. 2020); *In re Smith*, 828 F.3d 1094 (9th Cir. 2016); *In re Hatton,* 220 F.3d 1057 (9th Cir. 2000); *In re Payne,* 431 F.3d 1055 (7th Cir. 2005); *In re Moroney,* 352 F.3d 902 (4th Cir. 2003); *In re Hindenlang,* 164 F.3d 1029 (6th Cir. 1999).
[3] *In re Colsen*, 446 F.3d 836 (8th Cir. 2006).

- Second, if the debt relates to a tax for which a return was required, but no return was *ever* filed, it is nondischargeable.
- Third, if a required return was filed *late* and within two years before the bankruptcy filing, the debt is nondischargeable. On the other hand, if a required return was filed late but two or more years before the bankruptcy filing, the debt may be dischargeable.
- Fourth, even if a required return was filed on time, the debt is nondischargeable if "the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax."

7. Applying section 523(a)(1) to Applicant's tax debt for the subject tax periods should be easy. First, the Government's claim is not entitled to priority in payment. Second, although they were filed late, Applicant filed the required returns. Third, the returns were filed more than two years before Applicant filed for bankruptcy. Fourth, the returns were not fraudulent and Applicant did not willfully attempt to evade or defeat the taxes (and the government has never alleged otherwise). Accordingly, Applicant's tax debts for the subject tax periods are dischargeable.

8. Notwithstanding the statute's text, most Circuits do not apply it. In the decision below, the Ninth Circuit followed its controlling precedent to hold that when a taxpayer files a tax return after the government has assessed the tax and started collection activities, the return is not a "return" and therefore the tax is not dischargeable in bankruptcy. In reaching that result, the panel followed the Ninth Circuit's controlling precedent set forth in *In re Smith*, 828 F.3d 1094 (9th Cir. 2016), which itself followed its

earlier decision in *In re Hatton*, 220 F.3d 1057 (9th Cir. 2000). In those earlier decisions the Ninth Circuit held that when a taxpayer files a tax return after the government has assessed the tax and started collection activities, the return is not a "return" and therefore the tax is not dischargeable in bankruptcy. Applying that precedent, the panel in this case ruled that (1) the returns filed by Applicant in 2015 were not "returns" under applicable nonbankruptcy law, and (2) because Applicant did not file "returns" for the subject tax periods Applicant's debts for those years are *not* dischargeable. The panel also denied Applicant's request for an initial *en banc* hearing, which would have allowed the full Ninth Circuit to reevaluate its precedent. The panel declined, in part, because "adopting [Applicant's] approach would only further entrench the existing inter-circuit split." Slip. op. at 4.

9. The Ninth Circuit's position is joined by the Fourth, Sixth, Seventh and Eleventh Circuits. Those circuits hold that a late-filed return can be a "return" but at some point in time cease to be a "return" even if the government accepts it as such. These courts generally find that a return filed after the government has assessed the tax is not a "return." The First, Fifth and Tenth Circuits have an even harsher rule: they hold that a tax return filed even a single day late is not a "return" even though the government accepts it as a return. The Eighth Circuit alone holds that a tax return is always a "return" no matter when it is filed.

10. This case raises an exceptionally important question warranting this Court's review on which the circuits are split three ways. Under the Bankruptcy Code, an individual debtor cannot discharge an old tax debt if he or she *never* filed a required return for the

year in which the tax was incurred. If the required return was filed late, the debt may be dischargeable if the return was filed at least two years before the bankruptcy filing. When courts hold that late-filed returns are not "returns" even when they have been filed more than two years before a bankruptcy filing, debtors are denied the fresh start to which they are entitled under the Bankruptcy Code.

11. The holdings of the Fourth, Sixth, Seventh and Eleventh Circuits—and the Eighth Circuit—all grow out of a 1984 U.S. Tax Court decision, *Beard v. Comm'r*, 82 T.C. 766 (1984). In that decision, drawing on then-existing Supreme Court authority, the Tax Court formulated a four-part test to be used when determining whether a document constitutes a "return" under federal tax law. Under the *Beard* test:

- there must be sufficient data to calculate tax liability;
- the document must purport to be a return;
- there must be an honest and reasonable attempt to satisfy the requirements of the tax law; and
- the taxpayer must execute the return under penalty of perjury.

The Tax Court noted that "[t]he most recent Supreme Court reaffirmation of the test" was found in *Badaracco v. Commissioner*, 464 U.S. 386 (1984), in which this Court confirmed that even fraudulent returns are "returns" under applicable law because the returns "appeared on their faces to constitute endeavors to satisfy the law." *Badaracco*, 464 U.S. at 397.

12. The Fourth, Sixth, Seventh Eighth, and Eleventh Circuits all apply the *Beard* test in determining whether a late-filed tax return is a "return" and thus is dischargeable

in bankruptcy. These Circuits differ from one another, however, in how they construe the critical third prong of that test which requires the document to evidence an "honest and reasonable attempt to satisfy the requirements of the tax law."

13. The Sixth Circuit held in *In re Hindenlang*, 164 F.3d 1029 (6th Cir. 1999), that a return filed too late to serve any tax purpose or have any effect under the Internal Revenue Code cannot constitute "an honest and reasonable attempt to satisfy the requirements of the tax law," and therefore is not a "return" under the *Beard* test.

14. The Fourth Circuit reached a similar result in *In re Moroney*, 352 F.3d 902 (4th Cir. 2003), holding that, generally a post-assessment return is not a "return" because "to belatedly accept responsibility for one's tax liabilities, only when the IRS has left one with no other choice, is hardly how honest and reasonable taxpayers attempt to comply with the tax code."

15. The Seventh Circuit reached a similar result in *In re Payne*, 431 F.3d 1055 (7th Cir. 2005), over a dissent by Judge Easterbrook, holding that a return filed after tax authorities have completed the process of constructing a taxpayer's income and tax liability using information from third parties, and without the taxpayer's assistance, is not a "return" because the filing does not serve the primary purpose of the filing requirement. In dissent, Judge Easterbrook pointed out that even the IRS believes that post-assessment returns serve a purpose. He correctly pointed out that "[m]otive may affect the *consequences* of a return, but not the definition."

16. The Ninth Circuit has also reached this conclusion, holding in *In re Hatton*, 220 F.3d 1057 (9th Cir. 2000) and reaffirming in *In re Smith*, 828 F.3d 1094 (9th Cir. 2016),

that generally a return filed post-assessment is not "an honest and reasonable attempt to satisfy the requirements of the tax law" and thus is not a return.

17. Like the Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits, the Eighth Circuit also relies on the *Beard* test to determine whether a document is a "return" for purposes of the Bankruptcy Code, but unlike those circuits, it holds that the relevant question is whether the document on its face evidences an effort to comply with the tax law. Thus, in *In re Colson*, 446 F.3d 836 (8th Cir. 2006), the Eight Circuit carefully examined the *Beard* test and the Supreme Court cases upon which the *Beard* test was based to hold that "the honesty and genuineness of the filer's attempt to satisfy the tax laws should be determined from the face of the form itself, not from the filer's delinquency or the reasons for it." As a consequence, in the Eighth Circuit, whether a return is filed late is generally irrelevant to whether a document filed with the IRS that purports to be a tax return is in fact a return.

18. Three other Circuits—the First, Fifth, and Tenth—have taken an entirely different approach to determining what constitutes a return, based on a 2005 amendment to the Bankruptcy Code. In October 2005, Congress added "flush language" to the end of section 523(a) (sometimes referred to as the "hanging paragraph" or "section 523(a)(*)") attempting to clarify (rather inartfully) that a "return" for purposes of section 523(a) should be determined by reference to "nonbankruptcy law." Section 523(a)(*) reads as follows:

> For purposes of [§ 523(a)], the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by

> a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

19. The First, Fifth, and Tenth Circuits have all seized on the language in parentheses—i.e. the part of the paragraph that says that a return means a return that satisfies the requirements of applicable nonbankruptcy law "(including applicable filing requirements)" to mean that any return that does not conform to "applicable filing requirements" is not a return. As a consequence, because a return that is filed even a single day late does not conform to "applicable filing requirements" in these circuits *all* late returns—even returns filed a single day late—are not "returns" for purposes of the Bankruptcy Code. *See In re McCoy*, 666 F.3d 924 (5th Cir. 2012); *In re Mallo*, 774 F.3d 1313 (10th Cir. 2014); *In re Fahey*, 779 F.3d 1 (1st Cir. 2015). The First Circuit panel divided over whether this was the appropriate interpretation of the statute, and the Tenth Circuit adopted this "One-Day-Late" approach even though both the debtor *and* the IRS argued against it.

20. Notwithstanding the 2005 amendment to the Code, the circuits that adopted the *Beard* test have continued to adhere to it. The Ninth Circuit reaffirmed its commitment to the *Beard* test in *In re Smith*, 828 F.3d 1094 (9th Cir. 2016). And in *In re Shek*, 947 F.3d 770 (11th Cir. 2020), the Eleventh Circuit expressly rejected the One-Day-Late approach and embraced the variant of the *Beard* test applied in the Fourth, Sixth, Seventh and Ninth Circuits.

21. The United States favors the bottom-line rule that post-assessment returns should not be considered returns for purposes of section 523(a)(1), but it does not actually

agree with the legal reasoning of *any* of the circuits. The Government's official position is that a debt recorded by an assessment is based on the assessment, not on any subsequently filed return. I.R.S. Chief Counsel Notice 2010-016 (Sept. 2, 2010). According to the Government, the assessed tax is not a debt "with respect to which a return was … filed," and therefore the tax is nondischargeable. The Government's position is contrary to the Bankruptcy Code, has never been embraced by any circuit, and has been rejected by virtually every court to consider it.

22. This case raises the question of how courts should interpret the word "return" in nondischargeability proceedings. This is an exceptionally important question to individual debtors. Courts universally recognize that exceptions to discharge must be construed narrowly, with any doubt resolved in the debtor's favor, to honor the Bankruptcy Code's goal to afford debtors a fresh start. *See, e.g.*, *In re Fin. Oversight and Mgmt. Bd. for Puerto Rico*, 73 F.4th 53, 57 (1st Cir. 2023); *In re Luebbert*, 987 F.3d 771, 781 (8th Cir. 2021); *In re Crocker*, 941 F.3d 206, 218 (5th Cir. 2019); *In re Snyder*, 939 F.3d 92, 101 (2d Cir. 2019); *In re Rivera*, 832 F.3d 1103, 1109 (9th Cir. 2016); *In re Sandoval*, 541 F.3d 997, 1001 (10th Cir. 2008). A substantial number of individual taxpayers fail to file required income tax returns each year, and many of those will eventually need to file for bankruptcy.

23. In this case, Applicant filed returns for the subject tax periods in 2015. When he filed for bankruptcy in 2019, his tax debts for those years should have been discharged because the returns were filed more than two years prior to his bankruptcy filing. Instead, because of how the Ninth Circuit interpreted the *Beard* test in *Hatton* (2000) and applied it in *Smith* (2016), the Bankruptcy Court found that Applicant's returns are not "returns"

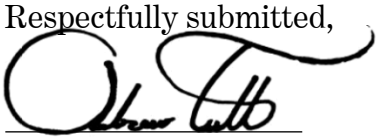
and, therefore, the tax debts are nondischargeable. The Ninth Circuit (1) affirmed based on its precedent, and (2) denied Applicant's request for a hearing *en banc* because overruling *Hatton* and *Smith*, and adopting the Eighth Circuit's correct interpretation of the *Beard* test, would further entrench the existing circuit split. It is important that this Court resolve the existing circuit split to ensure that debtors such as Applicant do not continue to be denied the Bankruptcy Code's promise of a fresh start.

24. Applicant respectfully requests an extension of time to file a petition for a writ of certiorari. Undersigned counsel, who will serve as lead counsel in this case, was retained in this matter recently, and a 60-day extension would allow counsel sufficient time to fully examine the decision's consequences, research and analyze the issues presented, and prepare the petition for filing. Additionally, the undersigned counsel has a number of other pending matters that will interfere with counsel's ability to file the petition on or before May 30, 2024.

Wherefore, Applicant respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari to and including July 29, 2024.

Dated: May 17, 2024

Respectfully submitted,



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