No.

# In the Supreme Court of the United States

JOHN PAUL SALVADOR, PETITIONER,

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

The Bankruptcy Code provides that an individual debtor's unpaid tax debts are dischargeable so long as they meet certain requirements. For older tax debts, one of those requirements is that the debtor have filed a "return" for each of the tax years in which the debts were incurred. Because many tax returns are filed after the dates on which they are due, the question whether a late-filed Form 1040 income tax return is a "return" is an important one that affects numerous debtors seeking a fresh start under the Bankruptcy Code each year.

Due to a three-way circuit split, whether a debtor's late-filed Form 1040 is a "return" depends on where the debtor lives. Three circuits hold that, even if the IRS accepts it as a tax return, a Form 1040 is not a "return" if it has any filing defects—meaning it is not a "return" if it is filed even one day late. Six circuits generally hold that a late but otherwise correctly filed Form 1040 is not a "return" if the IRS has already assessed the filer's tax liability for the tax year for which it is filed, because in the courts' view a Form 1040 filed so late does not represent an honest and reasonable attempt to satisfy the tax laws. One circuit, by contrast, has held that a late but otherwise correctly filed Form 1040 can be a "return," even if filed after assessment, so long as the form, on its face, evinces an honest and reasonable attempt to satisfy the tax laws. The IRS, for its part, *agrees with petitioner* that late-filed returns are "returns" but takes the position that post-assessment tax debts are generally nondischargeable based on an entirely different theory that has been rejected by virtually every court to consider it.

The question presented is:

Whether a late but otherwise correctly filed Form 1040 is a "return" for purposes of § 523(a) of the Bankruptcy Code.

## RELATED PROCEEDINGS

U.S. Bankruptcy Court for the Central District of California:

- *In re John Paul Salvador*, Bankr. Case No. 6:19-bk-19296-SC (Feb. 3, 2020) (granting petitioner's general discharge under 11 U.S.C. § 727)
- *John Paul Salvador v. United States of America* (*In re Salvador*), Adversary Proceeding No. 6:20-ap-01010-SC (Nov. 3, 2021) (granting summary judgment to the United States, determining that certain of petitioner's tax debts are not dischargeable)

U.S. Court of Appeals for the Ninth Circuit, Bankruptcy Appellate Panel (B.A.P. 9th Cir.):

- *John Paul Salvador v. United States of America* (*In re Salvador*), BAP No. CC-21-1252 (Jan. 12, 2023) (affirming bankruptcy court)

U.S. Court of Appeals for the Ninth Circuit (9th Cir.):

- *John Paul Salvador v. United States of America* (*In re Salvador*), Case No. 22-80030 (May 25, 2022) (denying petition for permission to appeal pursuant to 28 U.S.C. § 158(d))
- *John Paul Salvador v. United States of America* (*In re Salvador*), Case No. 23-60008 (Mar. 1, 2024) (affirming BAP decision)

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## PETITION FOR A WRIT OF CERTIORARI

### OPINIONS BELOW

The opinion of the Ninth Circuit and denial of petitioner's request for an initial hearing en banc (App. 1a-4a) is unpublished but available at 2024 WL 885041. The decision of the bankruptcy appellate panel (App. 5a-6a) is unpublished but available at 2023 WL 166826. The decision of the bankruptcy court (App. 7a-12a) granting summary judgment to the United States is unpublished.

### JURISDICTION

The judgment of the court of appeals was entered on March 1, 2024. Justice Kagan extended the time to file the petition for certiorari to July 29, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the petition appendix at App. 15a-30a.

### STATEMENT OF THE CASE

This case presents an acknowledged, irreconcilable three-way circuit conflict on a question that affects myriad Americans who file for bankruptcy every year: Whether a late but otherwise correctly filed Form 1040 is a "return" for purposes of § 523(a) of the Bankruptcy Code.

This question has vexed the courts of appeals for decades and has led to deeply disparate outcomes for numerous bankruptcy filers. Three circuits never treat late-filed Form 1040s as tax returns, preventing the discharge of tax debts incurred in tax years for which the debtor filed her tax returns even one day late; six decline to treat late-filed Form 1040s as tax returns if the IRS has

estimated and assessed the filer's taxes for the relevant tax year; only one treats a Form 1040's timeliness as irrelevant to whether it is a tax return. The IRS rejects the view of the nine circuits that hold that a Form 1040's timeliness affects its status as a "return"; instead, the IRS maintains that already-assessed taxes are nondischargeable for a wholly different reason—one no court of appeals has adopted.

Below, the Ninth Circuit acknowledged the split, citing the leading cases from the circuits on all three sides, including its own. But the Ninth Circuit declined to grant a hearing *en banc* to reconsider its precedent because "adopting [petitioner's] approach would only further entrench the existing inter-circuit split." App. 4a. The Ninth Circuit therefore followed its existing precedent and held that petitioner did not file "returns" for several tax years for which he would otherwise be eligible for discharge because he filed his Form 1040s after the IRS had already assessed taxes for those tax years. *Id.*

This case satisfies all the criteria for granting review. The split is longstanding, deep, and intractable. It has already been recognized by countless courts and commentators.[1] The United States has acknowledged the

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[1] *See, e.g.*, Kristi R. Sutton & Inan Uluc, *If It Looks Like a Duck, Swims Like a Duck, and Quacks Like a Duck, It Is Probably a Duck!—Whether Late-Filed Tax Returns Constitute "Returns" for Purposes of Discharge Under § 523*, 93 Am. Bankr. L. J. 111, 138 (2019) ("[W]ithout Supreme Court clarification, the circuit split results in the absence of a workable test that can be applied fairly and uniformly …"); Justin C. Valencia, In Re Colsen *and the Circuit Court Split Defining A Tax "Return"*, Am. Bankr. Inst. J. (Jan. 2018), at 34, 34 ("There is currently a split among the courts of appeals interpreting the definition of a 'return' for purposes of dischargeability of taxes under § 523 (a)."); Nicholas J. Huffmon, *Putting the Hanging Paragraph Out to Pasture: Reconciling the Mandates of Bankruptcy and Tax Law*, 103 Iowa L. Rev. 1729, 1745 (2018) ("[T]he pre-BAPCPA split over how to apply *Beard* remains

split in several recent submissions to this Court.[2] Further percolation is futile: the arguments have been exhaustively developed on all sides, and there is no genuine likelihood that any side will reverse course. The remaining circuit (the Second Circuit) is simply left to pick sides. This case is an ideal vehicle to address this conflict; there are no conceivable obstacles to resolving it in this Court.

The existing situation is intolerable. The question presented is exceptionally important, both legally and practically. As it stands, the nation's poorest and most vulnerable debtors have vastly different discharge rights in bankruptcy based only on the fortuity of where they happen to litigate their cases. Especially in the area of

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very much alive."); Kimberly J. Winbush, *Construction and Application of Provision of Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") of 2005 Defining "Return" for Purposes of 11 U.S.C.A § 523 Providing Discharge Exception for Tax Liability (Referred to as the "Hanging Paragraph" and cited as 11 U.S.C.A. § 523(a)(*))*, 20 A.L.R. Fed. 3d Art. 6 (2017) ("Courts have been divided on the interpretation of [§ 523(a)], with some ruling that no late-filed document can comprise a 'return,' and some disagreeing; with some finding that the *Beard* test still applies; and some disagreeing."); Mark S. Zuckerberg & Amanda K. Quick, *Dischargeability of Taxes in Bankruptcy*, 61 Res Gestae 29, 31 (2017) ("Unless the Supreme Court grants certiorari, the split among circuit courts will deepen …"); Timothy M. Todd, *Discharge of Late Tax Return Debt in Bankruptcy: Fixing BAPCPA's Draconian Hanging Paragraph*, 24 Am. Bankr. Inst. L. Rev. 433, 442 (2016) (explaining that the circuit split arose in part because "courts are split on the efficacy of the taxpayer-prepared late filing").

[2] *See* Br. in Opp. at 6, *Smith v. IRS*, 580 U.S. 1114 (2017) (No. 16-497) ("[T]he circuits have differed somewhat in their approaches to dischargeability under [§ 523(a)] …."); Br. in Opp. at 14, *Justice v. IRS*, 580 U.S. 1217 (2017) (No. 16-786) ("[T]he circuit courts have adopted somewhat different approaches when interpreting Section 523(a)(*) ….").

bankruptcy, where the Constitution mandates uniformity, this significant disparity is insupportable. Because this case presents an optimal vehicle for resolving this important question of federal law, the petition should be granted.

**1.a.** An individual debtor who receives a discharge under the Bankruptcy Code is generally discharged from personal liability for all debts incurred before the filing of the petition. 11 U.S.C. §§ 727(b), 1141(d)(1), 1328(a)-(b). However, certain debts are nondischargeable. For example, recently-incurred income taxes are entitled to priority of payment and cannot be discharged. 11 U.S.C. §§ 507(a)(8)(A), 523(a)(1)(A). As relevant here, a discharge also does not reach older tax debts

> with respect to which a return, or equivalent report or notice, if required—
>
> (i) was not filed or given; or
>
> (ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition.

11 U.S.C. § 523(a)(1)(B). Under this provision, an old tax debt with respect to which a return was never filed is nondischargeable. However, an old tax debt with respect to which a return was filed late is potentially dischargeable, so long as the return was filed at least two years before the bankruptcy petition was filed.

**b.** In the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 714(2), 119 Stat. 128-129, ("BAPCPA"), Congress added a definition of "return" in a new, unnumbered hanging paragraph at the end of § 523(a):

> For purposes of this subsection, 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.

11 U.S.C. § 523(a)(*).[3] Section 6020(a) of the Internal Revenue Code authorizes the Secretary of the Treasury to prepare a return for a taxpayer if the taxpayer provides "all information necessary for the preparation thereof." 26 U.S.C. § 6020(a). According to the IRS itself, the number of returns it prepares under § 6020(a) is "minute." *See In re Fahey*, 779 F.3d 1, 6 (1st Cir. 2015). Section 6020(b) authorizes the Secretary to prepare a return for a taxpayer without the taxpayer's cooperation, based on the information available to the Secretary at the time. 26 U.S.C. § 6020(b). This type of return often is referred to as a "substitute for return" or a "substitute return."

In this case, the "applicable nonbankruptcy law" is federal tax law. The Internal Revenue Code does not define the term "return." It is widely-accepted among the federal courts of appeals, however, that a filing qualifies as a "return" for purposes of federal tax law if it meets the elements of the so-called *Beard* test—the filing contains "sufficient data to calculate tax liability"; the filing "purport[s] to be a return"; the filing evidences "an honest and reasonable attempt to satisfy the requirements of the tax law"; and the taxpayer has "execute[d] the return under penalties of perjury." *Beard v. Comm'r*, 82 T.C. 766, 777 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986) (per curiam); *see also Badaracco v. Comm'r*, 464 U.S. 386, 397

[3] This petition denotes the hanging paragraph as § 523(a)(*).

(1984); *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 180 (1934); *Florsheim Bros. Drygoods Co. v. United States*, 280 U.S. 453, 461-462 (1930).

**2.a.** This case begins, as thousands do, with a failure to timely file a Form 1040.

Petitioner John Paul Salvador did not timely file his Form 1040 income tax returns for tax years 2003, 2004, 2006, and 2009. App. 8a. That prompted the IRS to prepare substitute returns pursuant to 26 U.S.C. § 6020(b). *Id.* In 2009, the IRS prepared substitute returns for the 2003, 2004, and 2006 tax years. *Id.* And in 2012, the IRS prepared a substitute return for the 2009 tax year. *Id.*

The IRS issued deficiency notices to petitioner pursuant to 26 U.S.C. § 6212. *Id.* Petitioner did not petition for redetermination of the proposed deficiencies pursuant to 26 U.S.C. § 6213. App. 8a-9a. Accordingly, the IRS assessed petitioner's proposed deficiencies related to the 2003, 2004, and 2006 taxes in 2010, and his proposed deficiency related to the 2009 taxes in 2013. App. 9a. And in 2014, the IRS began collection efforts. *Id.*

In an effort to get right with the IRS, in 2014 petitioner retained a tax lawyer to help him resolve his outstanding tax liabilities for the years 2000 through 2013. Decl. John D. Ellis at 4, *In re John Paul Salvador*, Ch. 7 Case No. 6:19-bk-19296-SC, Adv. No. 6:20-ap-1010-SC (C.D. Cal. Sept. 21, 2021), ECF 81-1. Petitioner's lawyer began discussions with an IRS Revenue Officer to arrange an installment agreement for his unpaid tax balance. *Id.* As part of those discussions, the Revenue Officer requested the production of petitioner's Form 1040s for the relevant tax years. *Id.* Petitioner then prepared, signed, and conveyed to the Revenue Officer, through his tax counsel, his Form 1040s for 2003, 2004, 2006, and 2009. *Id.* at 4-5. The Form 1040s were executed under penalty of perjury on February 25, 2015 (for the

2003, 2004 and 2006 returns), and March 3, 2015 (for the 2009 return). *Id.* at 17-40. The Form 1040s were conveyed by petitioner's tax counsel to the Revenue Officer on May 27, 2015. *Id.* at 5. In early 2017, the Revenue Officer confirmed that petitioner had filed all required federal income tax returns to date and that he was in compliance. *Id.* at 6-7.

**b.** Petitioner filed for Chapter 7 bankruptcy in October 2019—more than four years after filing his returns. In connection with that bankruptcy, petitioner initiated an adversary proceeding against the United States seeking a declaratory judgment that his tax liabilities from 2003-2014 were dischargeable.

As to the tax liabilities for 2003, 2004, 2006 and 2009, the United States moved for summary judgment. Applying controlling Ninth Circuit precedent, the Bankruptcy Court found that petitioner's tax debts for those years are not dischargeable because his Form 1040s were filed too late to constitute "return[s]" for nondischargeability purposes. App. 11a-12a.

**c.** The Bankruptcy Appellate Panel (BAP) affirmed.[4] The body of the opinion states, in its entirety: "Debtor John Paul Salvador appeals the bankruptcy court's judgment declaring that income taxes he owed to the Internal Revenue Service for the 2003, 2004, 2006, and 2009 tax years were nondischargeable in his chapter 7 bankruptcy case. As Debtor admits, however, the bankruptcy court's ruling is consistent with binding Ninth Circuit authority. Therefore, the bankruptcy court did not err, and we AFFIRM." App. 6a.

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[4] Petitioner petitioned for direct review under 28 U.S.C. § 158(d); the Ninth Circuit denied the petition. *See John Paul Salvador v. United States* (*In re Salvador*), No. 22-80030 (9th Cir. May 25, 2022).

**d.** A Ninth Circuit panel affirmed in an unpublished decision. App. 1a-4a.

The panel first canvassed the background of this issue. The panel explained that "Section 523(a)(1)(B)(i) of the Bankruptcy Code provides that tax debts are only dischargeable if, among other things, the debtor has filed a return," and that "[t]he statute did not originally define what qualified as a 'return.'" App. 2a. The panel noted that, in the absence of a statutory definition, the Ninth Circuit had "adopted the Tax Court's *Beard* test to determine whether a document filed by a bankruptcy debtor qualifies as a return." *Id.* (citing *In re Hatton*, 220 F.3d 1057, 1060-61 (9th Cir. 2000) (quoting *Beard*, 82 T.C. at 766).

The panel then explained that the *Beard* test has four elements: "First, there must be sufficient data to calculate tax liability; second, the document must purport to be a return; third, there must be an honest and reasonable attempt to satisfy the requirements of the tax law; and fourth, the taxpayer must execute the return under penalties of perjury." *Id.* (quoting *Beard*, 82 T.C. at 777).

The panel explained that, applying *Beard*, the Ninth Circuit had "held in *In re Hatton* that a document filed by a debtor after the IRS has already assessed his taxes does not generally qualify as a return because such a late filing is not an 'honest and reasonable attempt' to comply with the tax law." *Id.* (citing *Hatton*, 220 F.3d at 1061). In a footnote the panel recognized that the Fourth, Sixth, and Seventh Circuits have reached the same holding. *Id.* (citing *In re Moroney*, 352 F.3d 902, 906 (4th Cir. 2003); *In re Hindenlang*, 164 F.3d 1029, 1034 (6th Cir. 1999), *cert. denied sub nom. Hindenlang v. United States*, 528 U.S. 810 (1999); *In re Payne*, 431 F.3d 1055, 1057 (7th Cir. 2005)). In that same footnote, the panel also recognized that the Eighth Circuit has reached the opposite conclusion, holding "that post-assessment filings

generally qualif[y] as returns." *Id.* (citing *In re Colsen*, 446 F.3d 836, 840 (8th Cir. 2006)). The panel acknowledged that Judge Easterbrook had first set forth the Eighth Circuit's position in his dissent in *Payne*. *Id.* (citing *Payne*, 431 F.3d at 1060).

The panel explained that, in *In re Smith*, the Ninth Circuit had held that the *Beard* test still applies in nondischargeability proceedings even though, in 2005, BAPCPA added a definition of the word "return" to the end of § 523(a). App. 3a (citing *In re Smith*, 828 F.3d 1094, 1097 (9th Cir. 2016), *cert. denied sub nom. Smith v. IRS*, 580 U.S. 1114 (2017)). In a footnote the panel recognized that the Third Circuit has similarly held that the *Beard* test determines the dischargeability of late-filed tax returns post-BAPCPA. *Id.* (citing *In re Giacchi*, 856 F.3d 244, 247 (3rd Cir. 2017)). In that same footnote, the panel recognized that the First, Fifth, and Tenth Circuits have held that, based on § 523(a)(*), late-filed tax returns almost never qualify as "returns" under § 523(a), even if they are filed only one day late. *Id.* (citing *Fahey*, 779 F.3d at 7; *In re McCoy*, 666 F.3d 924, 932 (5th Cir. 2012), *cert. denied sub nom. McCoy v. Miss. State Tax Comm'n*, 568 U.S. 822 (2012); *In re Mallo*, 774 F.3d 1313, 1321 (10th Cir. 2014), *cert. denied sub nom. Mallo v. IRS*, 576 U.S. 1054 (2015)). Finally, the panel noted that the Eleventh Circuit has rejected the one-day-late approach, but has not resolved whether the *Beard* test always applies. *Id.* (citing *In re Shek*, 947 F.3d 770, 781 (11th Cir. 2020)).

The panel then explained that it was bound by *In re Smith* to hold that petitioner could not discharge his tax debts in this case because he filed his Form 1040s after the IRS had already assessed his taxes for the relevant tax years. *Id.* The panel recognized that petitioner "[brought] this appeal to try to change the Ninth Circuit's case law" and "filed a petition for initial hearing en banc, urging [the Ninth Circuit] to adopt the Eighth Circuit's

approach from *In re Colsen*, 446 F.3d 836 (8th Cir. 2006)." *Id.* Acting "[o]n behalf of the court," the panel denied the petition, stating: "[t]here is no intra-circuit split and adopting [petitioner's] approach would only further entrench the existing inter-circuit split." App. 3a-4a.

## REASONS FOR GRANTING THE PETITION

### I. THERE IS A THREE-WAY CONFLICT OVER AN IMPORTANT QUESTION OF FEDERAL LAW

The Ninth Circuit's decision cements "the existing inter-circuit split" over whether a late-filed Form 1040 is a "return" for bankruptcy nondischargeability purposes. App. 4a. The circuit split is recognized by courts and commentators, and conceded by the United States in this Court. *See supra* notes 1-2.

- Six circuits (the Third, Fourth, Sixth, Seventh, Ninth, and Eleventh) generally hold that a Form 1040 filed after the IRS has already prepared a substitute return and assessed the tax is not a tax return, at least for bankruptcy nondischargeability purposes.
- Three circuits (the First, Fifth, and Tenth) hold that because a late-filed return is not filed in accordance with "applicable filing requirements" it is never a tax return for bankruptcy nondischargeability purposes.
- One circuit (the Eighth) holds that a late-filed Form 1040 is still a tax return as long as the document, on its face, evidences a sincere effort to comply with the tax laws.

The IRS has explicitly rejected the First, Fifth, and Tenth Circuits' position in published guidance. *See* App. 31a-37a (IRS, Office of the Chief Counsel, Notice No. CC-2010-016 (Sept. 2, 2010), *Litigating Position Regarding the Dischargeability in Bankruptcy of Tax Liabilities Reported on Late-Filed Returns and Returns*

*Filed After Assessment* ("Chief Counsel Notice").[5] The IRS has also, at least implicitly, rejected the Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits' position that post-assessment Form 1040s are not returns; indeed, if a post-assessment Form 1040 increases the filer's tax liability, the IRS concedes that the additional liability may be dischargeable. *See id.* Thus, in the key question in this case, petitioner, the Eighth Circuit, and the IRS take the position that a late-filed Form 1040, even one filed *after* the IRS assesses the filer's taxes, is still a tax return. Given the scope, extent, and importance of this conflict, this Court should grant review.

**A.** It is settled law in six circuits that a Form 1040 filed after the IRS has already prepared a substitute return and assessed a filer's taxes pursuant to 26 U.S.C. § 6020(b) generally is not a return. *See In re Giacchi*, 856 F.3d 244, 247-49 (3rd Cir. 2017); *In re Moroney*, 352 F.3d 902, 907 (4th Cir. 2003); *In re Hindenlang*, 164 F.3d 1029, 1034-35 (6th Cir. 1999), *cert. denied sub nom. Hindenlang v. United States*, 528 U.S. 810 (1999); *In re Payne*, 431 F.3d 1055, 1057 (7th Cir. 2005); *In re Hatton*, 220 F.3d 1057, 1060-61 (9th Cir. 2000); *In re Smith*, 828 F.3d 1094, 1096-97 (9th Cir. 2016), *cert. denied sub nom. Smith v. IRS*, 580 U.S. 1114 (2017); *In re Justice*, 817 F.3d 738, 743-44 (11th Cir. 2016), *cert. denied sub nom. Justice v. IRS*, 580 U.S. 1217 (2017).

The circuits on this side of the split reach their result by applying the Tax Court's *Beard* test: a document is a return if (1) there is "sufficient data to calculate tax liability"; (2) the document "purport[s] to be a return"; (3) the document represents "an honest and reasonable attempt to satisfy the requirements of the tax law"; and (4) the taxpayer "execute[s] the return under penalties of

[5] http://www.irs.gov/pub/irs-ccdm/cc_2010_016.pdf.

perjury." *Beard*, 82 T.C. at 777. These circuits hold that a Form 1040 filed after the IRS has assessed the filer's tax liability can rarely, if ever, satisfy the third prong of the *Beard* test because they virtually never "qualify as an honest and reasonable attempt to satisfy the requirements of the tax law."[6] *Hindenlang*, 164 F.3d at 1035. These circuits reason that tax returns filed after assessment "do [] not serve the basic purpose of tax returns: to self-report to the IRS sufficient information that the returns may be readily processed and verified." *Moroney*, 352 F.3d at 906.

These circuits have not shied away from acknowledging that their approach to this divisive question is at odds with their sister circuits. *See In re Shek*, 947 F.3d 770, 775-76, 778 n.14 (11th Cir. 2020) (explicitly departing from the reasoning in *Fahey*, *Mallo*, and *McCoy*, which the panel found unpersuasive); *Giacchi*, 856 F.3d at 247 n.9, 247-48 (declining to follow both the one-day-late approach adopted in *Fahey*, *Mallo*, and *McCoy*, and the no-time-limit approach adopted by the Eighth Circuit in *Colsen*); *Justice*, 817 F.3d at 743-44 (noting the division between the First, Fifth, and Tenth Circuits, and the Fourth, Sixth, Seventh, and Ninth Circuits, and the disagreement between "the majority position and that of the Eighth Circuit").

Some of the circuits on this side of the split adopted their positions before Congress added § 523(a)(*), with its parenthetical reference to "applicable filing requirements," to the Bankruptcy Code in 2005. *See Hindenlang*, 164 F.3d at 1029; *Moroney*, 352 F.3d at 902; *Hatton*, 220 F.3d at 1057; *Payne*, 431 F.3d at 1055. None

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[6] Circuits on this side of the split have purported to leave open the theoretical possibility that extenuating circumstances could justify finding a post-assessment Form 1040 to be a return. *See Moroney*, 352 F.3d at 907; *see also Hindenlang*, 164 F.3d at 1034 n.5. But no circuit has ever found extenuating circumstances. Not once.

of these circuits have reversed course since 2005, with at least one affirmatively reaffirming that the new language did not displace the *Beard* test as the relevant test for whether a late-filed Form 1040 is a "return" for purposes of § 523(a). *See Smith*, 828 F.3d at 1096; *see also In re Ciotti*, 638 F.3d 276, 280 (4th Cir. 2011); *Shek*, 947 F.3d at 775 (rejecting "one-day-late" rule).

**B.** In direct conflict with the settled law in these circuits, in three circuits (the First, Fifth and Tenth) it is equally settled that a late-filed Form 1040 *never* qualifies as a return under § 523(a). *See Fahey*, 779 F.3d at 2; *In re McCoy*, 666 F.3d 924, 932 (5th Cir. 2012), *cert. denied sub nom. McCoy v. Miss. State Tax Comm'n*, 568 U.S. 822 (2012); *In re Mallo*, 774 F.3d 1313, 1327 (10th Cir. 2014), *cert. denied sub nom. Mallo v. IRS*, 576 U.S. 1054 (2015). Thus, if a filer misses the deadline to file her tax return for a given tax year by even a single day, that filer can never discharge her tax debt for that tax year in a later bankruptcy.

The circuits on this side of the split hold that § 523(a)(*)'s parenthetical referring to "applicable filing requirements" requires this harsh result. They hold that "because the applicable filing requirements include filing deadlines, § 523(a)(*) plainly excludes late-filed Form 1040s from the definition of a return." *Mallo*, 774 F.3d at 1321. And because late-filed Form 1040s are not returns, tax debts reflected in the Form 1040s are not dischargeable. *Id.* at 1328.

These circuits have not reached this result without controversy. The Tenth Circuit arrived at its decision in *Mallo* even though both parties argued against it. *Id.* at 1322-27. And in a powerful dissent to the First Circuit's decision in *Fahey*, Judge Thompson contended that the majority's one-day-late approach leads to absurd results. *Fahey*, 779 F.3d at 14-15 (Thompson, J., dissenting).

These circuits recognize that the question of what constitutes a return for nondischargeability purposes has stoked much disagreement amongst the courts. *See Fahey*, 779 F.3d at 16-17 (Thompson, J., dissenting) ("Since 2005, disagreement has continued to persist among the courts about how to apply the law, at least as it pertains to late-filed returns."); *Mallo*, 774 F.3d at 1319 (noting that the "federal circuits that have considered this issue have not been in complete agreement"). And at least one court has observed that these circuits "more or less admit that their unforgiving view of congressional intent cannot be squared within the context of § 523(a), or even within the narrower context of the hanging paragraph itself, without running into some significant conundrums." *In re Martin*, 542 B.R. 479, 480 (B.A.P. 9th Cir. 2015).

**C.** As the Ninth Circuit recognized below, App. 3a-4a, the Eighth Circuit has adopted an approach flatly at odds with the approaches adopted by all nine other circuits to have addressed this issue. *See Colsen*, 446 F.3d at 840; *see also Payne*, 431 F.3d at 1061 (Easterbrook, J., dissenting) (advocating for the approach that the Eighth Circuit later adopted in *Colsen*).

The Eighth Circuit, like most of the others, applies the *Beard* test when determining whether a late-filed Form 1040 is a tax return. *See Colsen*, 446, F.3d at 839-40. But unlike the other circuits that apply the *Beard* test, the Eighth Circuit holds that, in applying the *Beard* test's third prong, "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." *Id.* at 840. In adopting this "objective approach" to the *Beard* test's third prong, the Eighth Circuit grounded its analysis in this Court's precedent, explaining that this Court "has observed that even admittedly fraudulent returns can be returns under the tax laws, if they 'appeared on their faces to constitute

endeavors to satisfy the law.'" *Id.* (quoting *Badaracco v. Comm'r*, 464 U.S. 386, 397 (1984)). In adopting its rule, the Eighth Circuit expressly considered and rejected the subjective approach to the *Beard* test used by the Fourth, Sixth, Seventh, and Ninth Circuits. *See id.* at 839-40 ("With due regard to the opinions of the other circuits, we find Judge Easterbrook's arguments persuasive.").

**D.** Countless bankruptcy appellate panels, district courts, and bankruptcy courts have expressly recognized the depth and intractability of this circuit conflict. *See, e.g.*, *Biggers v. IRS*, 557 B.R. 589, 594 (M.D. Tenn. 2016) ("[C]ourts are divided on whether, under applicable nonbankruptcy law, every income tax return that is filed late is a 'return' for discharge purposes."); *In re Johnson*, No. 13-20774-EPK, 2016 WL 1599609, at *1 (Bankr. S.D. Fla. Apr. 18, 2016) (discussing "the split of authority on the issue" of whether "a debtor may obtain a discharge from a tax debt owed to the IRS if he files a late return"); *Green v. Comm'r*, 95 T.C.M. (CCH) 1512, 2008 WL 2065187, at *6 (T.C. 2008) ("The controversy has been hottest in bankruptcy cases, where the discharge of a tax debt under … 523(a)(1)(B)(i) turns on whether a debtor filed a valid tax return" and "[w]e are leery of finding ourselves in this titanomachy. And we can scurry away from the dispute till another day."), *aff'd*, 322 F. App'x 412 (5th Cir. 2009); *United States v. Klein*, 312 B.R. 443, 451 (S.D. Fla. 2004) ("Several courts confronted with the same question have identified a 'circuit split' and have been compelled to choose between two lines of cases … in the absence of a decision by their intermediate appellate courts."); *United States v. Woods*, No. 1:02-CV-1742-SEB-VSS, 2004 WL 882057, at *2-*3 (S.D. Ind. Mar. 12, 2004); *In re Klein*, No. 98-13391-BKC-RAM, 2003 WL 696856, at *3 (Bankr. S.D. Fla. Jan. 13, 2003).

Many of these courts have noted that, rather than clarifying the definition of "return," § 523(a)(*) has

created even more confusion. *See In re Starling*, 617 B.R. 208, 219 (Bankr. S.D.N.Y. 2020) ("Instead of resolving the Circuit split, the definition of 'return' … has created more uncertainty."), *rev'd and remanded*, No. 20-CV-7478 (CS), 2021 WL 5547307 (S.D.N.Y. Sept. 16, 2021); *In re Davis*, No. 14-26507 (CMG), 2015 WL 5734332, at *2, *4 (Bankr. D.N.J. Sept. 29, 2015) ("Somewhat frustratingly, despite Congress' attempts to clarify the definition of 'return,' this case law loosely mirrors that which existed [pre-BAPCPA]."); *Johnson v. United States*, No. 13-20774-EPK, 2015 WL 10963702, at *5, *9 (S.D. Fla. Feb. 9, 2015) ("While Congress may have intended to simplify the dischargeability of tax debts, the addition of the hanging paragraph has caused a divide among courts attempting to resolve its meaning."); *In re McBride*, 534 B.R. 326, 333 (Bankr. S.D. Ohio 2015) ("Instead of ending the ambiguity, this hanging paragraph added by BAPCPA has created new disagreements among the courts.").

That the lower federal courts have for so long recognized the lack of uniformity on this essential question, both before and after the passage of BAPCPA, underscores the need for this Court to provide clarity.

**E.** In published guidance and in litigation in the lower courts, the government appears to agree with the Eighth Circuit.

**1.** In published guidance the IRS explicitly rejects the one-day-late approach adopted by the First, Fifth, and Tenth Circuits and implicitly rejects the approaches adopted by the Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits (even though it agrees with the outcomes of those cases). App. 32a-37a. Specifically, the IRS's Office of Chief Counsel issued a Notice to "provide[] guidance on the application of the discharge exception under § 523(a)(1)(B)(i) of the Bankruptcy Code for a debt with respect to which a return was not filed in cases in

which the taxpayer filed a Form 1040 after the due date." App. 31a. In that Notice, the IRS states:

> **For bankruptcy cases filed on or after October 17, 2005, can a tax debt related to a late-filed Form 1040 be discharged?**
>
> Yes. Read as a whole, section 523(a) does not provide that every tax for which a return was filed late is nondischargeable …. We, therefore, conclude that section 523(a) in its totality does not create the rule that every late-filed return is not a return for dischargeability purposes.

App. 34a-35a. In reaching that result, the IRS carefully analyzed § 523(a)(*) and explained why at least some taxes reported on late-filed Form 1040s must be dischargeable. *See* App. 34a-37a. The IRS's position represents an explicit rejection of the one-day-late approach adopted by the First, Fifth, and Tenth Circuits.

The Notice also implicitly rejects the position of the Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits that post-assessment Form 1040s are not "returns." The IRS's position is that if no return has been filed when a tax is assessed, the debt recorded by the assessment is based on the assessment, not on any subsequently filed Form 1040. App. 37a. Thus, according to the IRS, (1) even if a Form 1040 is filed later, the assessed tax is not a debt "with respect to which a return … was filed," and therefore (2) the tax debt is nondischargeable. App. 31a, 37a. Although this position achieves the IRS's objectives, it is contrary to the Bankruptcy Code and therefore has been rejected by virtually every court to consider it, including the bankruptcy court in this case. App. 2a-4a; *see also In re Rhodes*, 498 B.R. 357, 362 (Bankr. N.D. Ga. 2013); *In re Briggs*, 511 B.R. 707, 711-712 (Bankr. N.D. Ga. 2014); *Mallo*, 774 F.3d at 1325-27; *Martin*, 542 B.R. at 491-92.

While the IRS takes the position that a tax debt is based on an assessment and not on a later-filed Form 1040, it does *not* take the position that the Form 1040 is not a return. The IRS concedes that if a taxpayer files a post-assessment Form 1040 that reports an additional amount of tax, "the portion of the tax that was not previously assessed would be a dischargeable debt[.]" App. 36a. This is because the IRS recognizes, at least implicitly, that a late but otherwise correctly filed Form 1040 is still a "return." The IRS's position that "the portion of [a] tax that was not previously assessed would be a dischargeable debt" is irreconcilable with the holdings of those circuits that have concluded that post-assessment Form 1040s are not tax "returns" at all.

**2.** Further, in the lower courts, the government has similarly taken the position that tax returns filed after the IRS has assessed the taxpayer's liability for a year in which the taxpayer failed to file a Form 1040 are still "returns" and the taxes are dischargeable in bankruptcy.

In *In re McGrew*, a debtor in Iowa failed to file Form 1040s for tax years 2000, 2001, 2004, 2005, 2006, 2007, or 2008. 559 B.R. 711, 712 (Bankr. N.D. Iowa 2016). The IRS prepared substitute returns for each of those years, and eventually began to garnish her wages in September of 2010. *Id.* at 713. Shortly thereafter, the debtor contacted the IRS and was told that to stop the garnishments she needed to file the missing tax returns. *Id.* She did so in October of 2010. *Id.* Over two years later, in February 2013, she filed for Chapter 7 bankruptcy protection and sought a determination that her tax debts were dischargeable. *Id.* The IRS *agreed* that the tax debts were dischargeable because the debtor's returns had been filed at least two years before the debtor sought bankruptcy protection. *Id.* ("In its answer, the IRS admitted that Debtor's tax debts for the years other than 2006 and 2007 were dischargeable because returns had

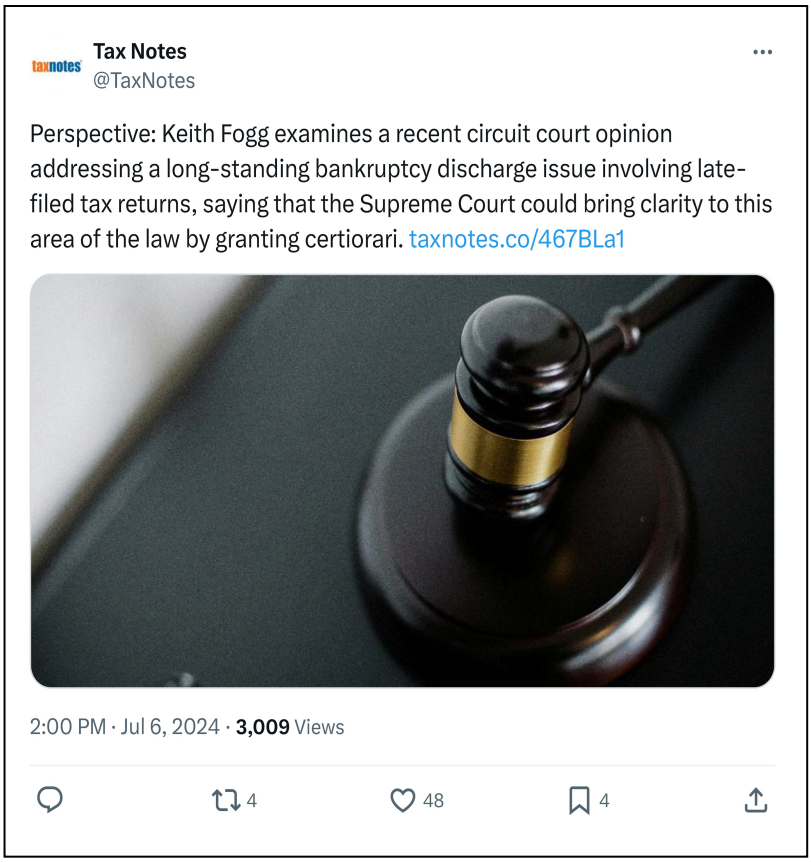
been filed two years before filing."). The IRS's position, at least in *McGrew*, is consistent with the Eighth Circuit's holding in *Colsen* that post-assessment Form 1040s are, in fact, returns and tax debts with respect to which the Form 1040s were filed are dischargeable in bankruptcy.

The government's position in *McGrew* is especially important in light of its representations to this Court in opposition to earlier petitions for certiorari on the question presented. The United States has represented to this Court in response to earlier petitions that "it remains an open question" whether the Eighth Circuit would treat late-filed returns as "returns" for purposes of discharge post-BAPCPA. *See* Br. in Opp. at 6, *Smith v. IRS*, 580 U.S. 1114 (2017) (No. 16-497) (stating "it remains an open question"); Br. in Opp. at 13-14, *Justice v. IRS*, 580 U.S. 1217 (2017) (No. 16-786) (same); Br. in Opp. at 18, *Mallo v. IRS*, 576 U.S. 1054 (2015) (No. 14-1072) (similar). But the United States's admission in *McGrew* (which post-dates BAPCPA by over ten years) belies that claim: its admission in *McGrew* shows that either (a) the United States does not regard this as an open question in the Eighth Circuit; (b) that the United States agrees with the Eighth Circuit's position; or (c) both. In any event, that the United States does not contest the Eighth Circuit's position when it litigates in the Eighth Circuit shows that this circuit conflict will not resolve itself.

**F.** An enormous volume of commentators have recognized the sharp circuit conflict over the question presented. *See supra* note 1; *see also, e.g.*, Keith Fogg, *Late-Filed Return Issue May Be Headed to Supreme Court*, Tax Notes (June 25, 2024), https://bit.ly/3YjfrYW; T. Keith Fogg, *What Is a Return—The Long Slow Fight in the Bankruptcy Courts*, 15 J. Tax Prac. & Proc. 53, 54 &n.7 (Oct. 2013); John N. Tedford, IV, *Dischargeability of Non-Priority Taxes for Which a Tax Return Was Not Timely Filed*, 2020 Norton Ann. Surv. of Bankr. L. 183

(2020 ed.); John N. Tedford, IV, *Dischargeability of Nonpriority Taxes for Late-Filed Tax Return*, 38-SEP Am. Bankr. Inst. J. 14, 14 (Sept. 2019); Keith Fogg, *Is the One Day Late Interpretation of Bankruptcy Code 523 Finally Headed to the Supreme Court?*, Tax Notes (Jan. 28, 2020), https://bit.ly/4bGGvV5; Jeffrey M. Sklarz & Joanna M. Kornafel, *Dischargeability of Income Tax Liability in Bankruptcy: The Late-Filed Tax Returns Conundrum Continues*, ABA Section of Taxation NewsQuarterly 20 (Summer 2014); William J. Rochelle III, *Circuit Split Widens over Discharging Taxes on Late-Filed Returns*, Am. Bankr. Inst.: Rochelle's Daily Wire (Jan. 28, 2020), https://bit.ly/3LlDOxl; John F. Robertson, *Definition of "Return" for Bankruptcy Purposes Remains Unclear*, 51 N. Atl. Reg'l Bus. Ass'n Bus. L. Rev. 57, 70 (2018); David Cox, *A Late-Filed Return Does Not Lose Its Status Because It Was Filed Late*, 39-MAY Am. Bankr. Inst. J. 29, 29 (May 2020); Nicholas A. Huckaby, Note, *Bankruptcy Court Allows Discharge of Penalties on Untimely Return*, 35-OCT Am. Bankr. Inst. J. 38, 38 (Oct. 2016); Roy Whitehead, Jr., *What is an "Honest and Reasonable" Tax Return*, 77 CPA J. 46 (Jan. 2007); Bryan Koenig, *"Circuit Split" On Tax Returns In Bankruptcy Hits High Court*, Law360 (Jan. 5, 2017) https://bit.ly/3yciG9Q.

The split has even reached X, formerly known as Twitter:




A more openly acknowledged and widespread division in circuit authority is difficult to imagine.

* * * * *

This entrenched split will not subside without this Court's intervention. The conflict is widespread and beyond self-correction. Virtually every regional circuit has weighed in (only the Second has yet to do so). The IRS has also taken the pro-taxpayer, pro-debtor position that petitioner presses here, a position in direct conflict with all but one of the circuits. This Court should review this issue to bring uniformity to federal law; bring the interpretation of § 523(a) into alignment with the views of

the IRS, the words Congress wrote, and this Court's decisions upon which the *Beard* test was based; and ensure that all Americans may discharge old tax debts as long as they file returns at least two years prior to filing for bankruptcy.

## II. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS REVIEW IN THIS CASE

**A.** The question presented is of exceptional legal and practical importance. This case presents a significant question of federal law with profound real-world stakes. This issue arises repeatedly in bankruptcy cases nationwide, and countless debtors are losing access to the "fresh start" that is the Bankruptcy Code's "central purpose" to provide. *See Grogan v. Garner*, 498 U.S. 279, 286 (1991).

**1.** The question presented is exceptionally important as a matter of constitutional policy. The courts disagree over the correct interpretation of the bankruptcy laws, federal laws for which the Constitution requires uniformity. *Off. Of the U.S. Tr. v. John Q. Hammons Fall 2006, LLC*, 144 S. Ct. 1588, 1593 (2024) (citing U.S. Const. art. I, § 8, cl. 4); *Siegel v. Fitzgerald*, 596 U.S. 464, 476 (2022) (same). This Court's review of divisions over the interpretation of the Bankruptcy Code are critical because federal courts cannot do that which Congress itself cannot do: "permit arbitrary geographically disparate treatment of debtors." *Siegel*, 596 U.S. at 476.

This Court thus routinely grants review to resolve shallow conflicts over bankruptcy issues. *E.g.*, *Siegel*, 596 U.S. 464 (2-1 split); *Husky Int'l Elecs., Inc. v. Ritz*, 578 U.S. 355 (2016) (2-1 split); *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121 (2015) (1-1 split); *Harris v. Viegelahn*, 575 U.S. 510 (2015) (1-1 split). The widely recognized 6-3-1 split here is deeply entrenched, substantial, and ripe for review.

The persistence of this entrenched three-way split is untenable. The Constitution does not demand "uniform" laws "throughout the United States" so that some debtors can be discharged from tax debts, while others cannot be, based only on the happenstance of where they file for bankruptcy.

**2.** That nine circuit courts of appeals incorrectly interpret § 523(a) and/or the *Beard* test magnifies the legal importance of the question presented. A Form 1040 does not cease to be a tax return merely because it is filed late; and nothing about the fact that the IRS has assessed estimated taxes for the year for which it is filed changes that fact.

Contrary holdings not only contradict the IRS's legal position, but also contradict the IRS's well-established policies and procedures. The IRS *obviously* accepts late tax returns, even after the agency has created substitute returns, and uses the late-filed returns to amend its initial estimates. According to the IRS, for fiscal year 2023, it had over 2 million pending "delinquency investigations," which are opened when a taxpayer does not respond to a notice of delinquency. IRS, Internal Revenue Service Data Book, 2023 Pub. 55-B, 61 tbl. 27 (2023) https://bit.ly/3A98RKk [hereinafter "IRS Data Book"]. The IRS has consistently advised taxpayers that "[i]f a substitute return has already been filed for you by the IRS, you should still file your own return to claim any additional items. The IRS will generally adjust your account to reflect the corrected figures." IRS, Help Yourself by Filing Past-Due Tax Returns, FS-2008-12 (Jan. 2008), https://bit.ly/3YeogmX; *see also* IRS, Filing Past Due Tax Returns (Apr. 29, 2024), https://bit.ly/3SiknJO. Under federal tax law, late filers may seek abatement of penalties and even negotiate reduced payment of overdue tax debts directly with the IRS. 26 C.F.R. § 301.7122-1 (2002). Even so, each year

the IRS collects over $2 billion from taxpayers who file delinquent tax returns. *See* IRS Data book 61 tbl.27. Despite all this, multiple courts of appeals take the position that the IRS is somehow doing the impossible each day: accepting and processing late-filed "returns" that, according to these courts, are not "returns" at all.

The IRS recognizes that the one-day-late approach adopted by the First, Fifth, and Tenth Circuits has two major negative effects on its functions. First, it eliminates one of the incentives for debtors to file returns after they are due. As noted above, the IRS *wants* taxpayers to voluntarily file returns, even if they are late. Second, it burdens the IRS by increasing the number of taxpayers who may ask the IRS to prepare their returns under § 6020(a) of the Internal Revenue Code instead of preparing returns on their own. Thus, the issue presented is of practical importance to the IRS.

**3.** For debtors and potential debtors, the practical importance of the issue presented is also difficult to overstate. During the 12-month period ending March 31, 2024: 74,590 cases with predominantly non-business debt were filed under Chapters 7, 11 and 13 in the First, Fifth, and Tenth Circuits; 322,243 such cases were filed in the Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits; 29,003 such cases were filed in the Eighth Circuit; and 21,311 such cases were filed in the Second Circuit.[7] U.S. Bankr. Courts, Rep. F-5A, Business and Nonbusiness Bankruptcy Cases Commenced (Mar. 31, 2024) [hereinafter "Rep. F-5A"], https://bit.ly/3zTyYoE. Therefore, only about 6.5% of debtors who filed for bankruptcy during that time frame are assured that their

[7] Cases with predominantly non-business debt are those filed by individuals with debts incurred primarily for personal, family, or household purposes, and by debtors who indicate that they have neither business nor consumer debt.

old tax debts may be discharged as long as they filed their returns at least two years before filing for bankruptcy.

Overall, the number of individuals who file for Chapter 7 bankruptcy protection in the United States is staggering—exceeding 11 million individuals from 2009-2018 alone. Pamela Foohey, et al., *Portraits of Bankruptcy Filers*, 56 Ga. L. Rev. 573, 575 (2022). These individuals—roughly "[o]ne in ten adult Americans"—"turn[] to the consumer bankruptcy system for help … after struggling for years to pay their debts." *Id.* Sapping a household's ability to secure a complete discharge of debts, including tax debts, affects the trajectory of those individuals' lives as well as the lives of their children, whose median ages are seven and eleven years old (for the youngest and eldest children in a household, respectively). *Id.* at 625.

Among the individuals who file for bankruptcy—not to mention the indeterminate number of individuals who choose *not* to file for bankruptcy because they will not be able to discharge tax debts—a significant number are adversely affected by the circuit conflict here. Millions of individuals file their tax returns late each year, rendering those tax debts nondischargeable in the First, Fifth, and Tenth Circuits. *See* IRS Data Book, 61 tbl.27. The IRS prepares substitute returns for and makes assessments against tens of thousands more, rendering old tax debts nondischargeable in the Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits. *See Rep. F-5A.*

**4.** This issue is also important to lower courts in which debtors and taxing authorities continue to litigate. Petitioner has identified dozens of lower court cases that have addressed this issue to some extent just since 2005. *See, e.g.*, *In re Golden*, 641 B.R. 392 (Bankr. E.D. Cal. 2022); *Starling*, 617 B.R. at 208; *In re Kline*, 581 B.R. 597 (Bankr. W.D. Ark. 2018); *In re Bell*, 565 B.R. 702 (Bankr. M.D. Fla. 2017); *McGrew*, 559 B.R. at 711; *In re Selbst*,

544 B.R. 289 (Bankr. E.D.N.Y. 2016); *In re Nilsen*, 542 B.R. 640 (Bankr. D. Mass. 2015); *Martin*, 542 B.R. at 479; *In re Maitland*, 531 B.R. 516 (Bankr. D.N.J. 2015); *In re Biggers*, 528 B.R. 870 (Bankr. M.D. Tenn. 2015), *rev'd*, 557 B.R. 589 (M.D. Tenn. 2016); *In re Coyle*, 524 B.R. 863 (Bankr. S.D. Fla. 2015); *Briggs*, 511 B.R. at 707; *Perkins v. Mass. Dept. of Revenue*, 507 B.R. 45 (D. Mass. 2014); *In re Gonzalez*, 506 B.R. 317 (B.A.P. 1st Cir. 2014); *In re Wendt*, 512 B.R. 716 (Bankr. S.D. Fla. 2013); *Perry v. United States*, 500 B.R. 796 (M.D. Ala. 2013); *Rhodes*, 498 B.R. at 357; *In re Pitts*, 497 B.R. 73 (Bankr. C.D. Cal. 2013); *In re Pendergast*, 494 B.R. 8 (Bankr. D. Mass. 2013); *In re Brown*, 489 B.R. 1 (Bankr. D. Mass. 2013); *In re Martin*, 482 B.R. 635 (Bankr. D. Colo. 2012), *rev'd on other grounds*, 500 B.R. 1 (D. Colo. 2013); *In re Wogoman*, 475 B.R. 239 (B.A.P. 10th Cir. 2012); *In re Casano*, 473 B.R. 504 (Bankr. E.D.N.Y. 2012); *In re Cannon*, 451 B.R. 204 (Bankr. N.D. Ga. 2011); *In re Creekmore*, 401 B.R. 748 (Bankr. N.D. Miss. 2008); *In re Henne*, 359 B.R. 776 (Bankr. D. Ariz. 2007); *In re Izzo*, 340 B.R. 586 (E.D. Mich. 2006). The sheer number of cases litigated before the lower courts and resulting in published decisions reflects the importance of the question presented and how often courts are called upon to address this issue.

**5.** Circuits that have adopted the one-day-late rule have done so based on the parenthetical language in § 523(a)(*); as a result, their holdings adversely affect only individuals who file for bankruptcy. However, circuits that have held that post-assessment Form 1040s are not "returns" have done so based on the Tax Court's *Beard* test. Among other things, the *Beard* test is used to determine whether the IRS may assess failure-to-file penalties and the length of time in which the IRS must make an assessment after a return is filed. *See Beard*, 82 T.C. at 774-80 (failure-to-file penalties where the taxpayer tampered with the official form); *Badaracco*, 464 U.S. at

396-97 (IRS can assess tax "at any time" for year in which taxpayer files a fraudulent return). With one possible exception, each of these circuits' interpretations of the *Beard* test applies in tax cases as well as in bankruptcy nondischargeability cases. *See Coffey v. Comm'r*, 987 F.3d 808 (8th Cir. 2021) (applying Eighth Circuit's holding in *Colsen* in a non-bankruptcy case).[8] Accordingly, the question raised in this case is also of exceptional legal and practical importance in non-bankruptcy, tax-related proceedings.

**B.1.** This case is the ideal vehicle to resolve the conflict among the circuits. The operative facts are straightforward and typical of debtors facing this issue: Petitioner did not file Form 1040s for 2003, 2004, 2006, or 2009 before the original deadlines; the IRS prepared substitute returns; petitioner did not respond to the IRS's notices of deficiency; the IRS assessed the taxes; petitioner then filed returns, which he was required to do to work out his tax deficiency with the IRS; and over two years later, petitioner filed for bankruptcy. As reflected by the scores of published and unpublished decisions addressing this issue, these facts are common.

**2.** This case is also a perfect vehicle to resolve the question presented because it is a pure question of law that is ripe for determination by this Court. Throughout his appeals, petitioner has challenged the Ninth Circuit's

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[8] The Seventh Circuit stated that "there is no reason why the word 'return,' undefined in either the Bankruptcy Code or the Internal Revenue Code, should carry the same meaning regardless of context." *Payne*, 431 F.3d at 1058. According to the Seventh Circuit, despite the applicability of the *Beard* test in both contexts, a specific document could constitute a "return" under the Internal Revenue Code but not the Bankruptcy Code. Section 523(a)(*)'s mandate that "the term 'return' means a return that satisfies the requirements of applicable nonbankruptcy law" appears to legislatively overrule that view.

holdings in *Hatton* and *Smith*, not the bankruptcy court's application of *Hatton* and *Smith* to the facts of this case. This allows petitioner to bring the issue before this Court unencumbered by difficult facts or side issues that could derail the Court's analysis. Further, ten circuits have weighed in on this issue, and their positions are entrenched. The issues have been well-ventilated, and the various opinions and dissents at the circuit court level lay out the countervailing considerations in detail. Further percolation is unlikely to produce additional assistance to the Court; in fact, as the panel below recognized, it will "only further entrench the existing inter-circuit split." The question is ripe for review.

**3.** It is also important for the Court to accept review in this case because the issue presented is otherwise likely to evade review, leaving the circuit split in place for the foreseeable future. As noted above, in at least some cases filed within the Eighth Circuit, the United States adopts the Eighth Circuit's position. *See supra* pp. 18, (discussing *McGrew*, 559 B.R. at 711). In the First, Fifth, and Tenth Circuits, this issue may evade appellate review because under the IRS's published guidance, it need not pursue claims for a tax with respect to which a return was filed late but prior to assessment. Until this case, the most recent court of appeals decision on this issue was by the Eleventh Circuit in 2020. *See Shek*, 947 F.3d at 770. That would have been a good vehicle for this Court's review, but the non-prevailing party (the Massachusetts Department of Revenue) opted to not seek further review—likely to avoid the risk that this Court would overrule the First Circuit's adoption of the one-day-late approach. A recent New York case may have been a suitable case for this Court's review because the bankruptcy court adopted the Eighth Circuit's approach, *Starling*, 617 B.R. at 224, but after the district court reversed the debtor opted not to incur the time and

expense of an appeal to the Second Circuit. The last petition for certiorari to this Court was filed seven years ago. If the Court declines to accept review of this case, the existing 6-3-1 circuit split may persist for quite some time.

This Court has been asked to resolve this split four times. *See* Petition for Certiorari, *Smith v. IRS*, 580 U.S. 1114 (2017) (No. 16-497); Petition for Certiorari, *Justice v. IRS*, 580 U.S. 1217 (2017) (No. 16-786); Petition for Certiorari, *Mallo v. IRS*, 576 U.S. 1054 (2015) (No. 14-1072); Petition for Certiorari, *McCoy v. Miss. State Tax Comm'n*, 568 U.S. 822 (2012) (No. 11-1469). It should resolve it now. Since the Court last denied certiorari, the split has only deepened and ossified, as shown by the Eleventh Circuit's 2020 rejection of the one-day-late approach in *Shek* and the Ninth Circuit's refusal to reconsider its controlling precedent *in this case*. This is an extraordinarily important issue that affects a substantial number of debtors and potential debtors for whom bankruptcy offers an opportunity for a fresh start. The IRS agrees with petitioner's position and disagrees with the settled law in nine circuit courts of appeals. This case warrants this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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