No. 24-108

IN THE

Supreme Court of the United States

JOHN PAUL SALVADOR,

Petitioner,

v.

UNITED STATES,

Respondent.

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

AMICUS CURIAE BRIEF OF THE CENTER FOR TAXPAYER RIGHTS IN SUPPORT OF THE PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Center for Taxpayer Rights ("the Center") is a §501(c)(3)[2] nonpartisan, nonprofit organization that applies a multifaceted, rights-based approach to furthering equitable tax administration practices worldwide. One of the Center's programs is a federally funded Low Income Taxpayer Clinic (LITC) offering direct legal representation to qualifying taxpayers. The Center's staff, including its Executive Director, Nina E. Olson, the former National Taxpayer Advocate,[3] has several decades of experience representing low-income taxpayers and advocating on behalf of taxpayers.

The Tax Litigation Clinic at the Legal Services Center of Harvard Law School ("the Clinic") was formed in 2015 to represent low-income taxpayers before the Internal Revenue Service ("IRS") and in tax matters before the courts, with the goal of protecting the rights of taxpayers and pursuing legal reform to improve the tax system.

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1. The parties were timely notified on August 19, 2024 of the filing of this brief. Pursuant to Supreme Court Rule. 37.6, this is to affirm that no party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. The only person who contributed money that was intended to fund preparing or submitting this brief is the Center for Taxpayer Rights. The Tax Litigation Clinic is part of the Legal Services Center of Harvard Law School. The views expressed herein are those of the Clinic, not Harvard University.

2. Unless otherwise indicated, section references are to the Internal Revenue Code, Title 26.

3. From 2001 through 2019, Nina E. Olson served as the IRS National Taxpayer Advocate, appointed under § 7803(c)(1)(B).

The Center and the Clinic have taken an interest in this case as it involves issues directly affecting low- and moderate-income taxpayers, particularly those who qualify for Chapter 7 bankruptcy relief, including the mandated means testing and related eligibility under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA")[4].

SUMMARY OF ARGUMENT

This Court should grant the Petitioner certiorari because the United States Courts of Appeals widely disagree as to what counts as a debtor/taxpayer's[5] filed federal income tax return for purposes of discharge in a Bankruptcy Court case. This split causes harm because late tax return filers are treated differently across the country, with some receiving discharge of tax liability and others similarly situated being denied discharge. These various interpretations are also inconsistent with the IRS's treatment of late-filed returns as superseding returns in situations where the IRS has already assessed a tax liability.

There is a three-way split. Three circuits adopt a "one day late" rule based on their interpretation of the "hanging paragraph" in Bankruptcy Code Section 523.

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4. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.) [hereinafter "BAPCPA"].

5. In Bankruptcy cases, litigants are referred to as debtors. However, in the Tax Law context the term "taxpayer" is a frequent descriptor. Both terms are used in this brief depending on the context.

11 U.S.C. § 523(*). These circuits understand the phrase "applicable filing requirements" in that paragraph to include non-substantive requirements, such as tax filing deadlines, to determine whether a filing is a return. Thus, if a deadline is missed by one day, the filing cannot be a return.

Meanwhile, six other circuits do not find the "applicable filing requirements" in the hanging paragraph dispositive. Rather they use the Sixth Circuit's four-prong *Beard* test, which the United States Tax Court adopted, to determine whether a filing is a return. In all six of these circuits, they find that a late-filed return fails to meet the "honest and reasonable" requirement under the test's fourth prong.[6] The third split is in the Eighth Circuit, which does not consider timeliness relevant under the *Beard* test's fourth prong.

To resolve the circuit split and create a workable rule that aligns with the purpose of bankruptcy and the IRS' treatment of late-filed tax returns, *Amicus* proposes that this Court adopt the logic in the Eleventh Circuit to correctly interpret the "applicable requirements" language in the hanging paragraph to exclude filing deadlines as a substantive requirement for a filing to be a return. *See In re Shek*, 947 F.3d 770 (11th Cir. 2020). It further proposes that the Court find that subjective intent should not be determinative of whether a filing is "honest

6. This was originally the third prong of the *Beard* test as implemented by the Tax Court, until the Sixth Circuit in *In re Hindenlang*, 164 F.3d 1029 (6th Cir. 1999) altered the order of the factors. Since then, appeals courts have consistently adopted the Sixth Court's ordering. *See In re Justice*, 817 F.3d 738, 747 n.1 (11th Cir. 2016).

and reasonable" under the fourth prong of the *Beard* test, as articulated by the Eighth Circuit in *In re Colsen*, 446 F. 3d. 836, 840 (8th Cir. 2006).

Granting certiorari and resolving the circuit split with a rule favorable to bankruptcy debtors by allowing them to include federal income tax liability from late-filed returns is consistent with the policy underlying bankruptcy. This will especially help low- and moderate-income taxpayers seeking discharges. It will also further taxpayer rights by providing consistency for how late-filed returns are treated by the IRS and by the Bankruptcy courts.

ARGUMENT

This Court should grant the Petitioner's writ for certiorari to resolve an unworkable circuit split that sows confusion as to whether federal income tax liability can be discharged in bankruptcy courts. In doing so, it should adopt the logic of the Eleventh Circuit that "applicable filing requirements" under the hanging paragraph in Bankruptcy Code Section 523 do not include tax filing deadlines. It should also take the bright line rule developed by the Eighth Circuit that timeliness is irrelevant to the "honest and reasonable" prong of the *Beard* test. This will provide consistency in interpretation and will align with how the IRS itself processes late-filed returns. This will be more consistent with the aims of the Bankruptcy Code and with taxpayer rights, thereby benefiting more low- and moderate-income workers.

I. Defining a 'Return' under BAPCPA and *Beard*

The Bankruptcy Code favors discharge for most of an individual's debts in accordance with Congress' intent to provide to the "honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt"—a "fresh start." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). Debts arising from personal income tax liability are subject to certain discharge restrictions. 11 U.S.C. § 523(a)(1)(B) & (C). Under § 523(a)(1)(B), tax debts are not dischargeable if a personal income tax return was (i) never filed at all, or (ii) filed late and within two years of the taxpayer's petition for bankruptcy. 11 U.S.C. § 523(a)(1)(B). However, neither the Internal Revenue Code nor relevant Treasury regulations formally define a "return." *In re Mallo*, 774 F.3d 1313, 1318 (10th Cir. 2014).

A. "Applicable Filing Requirements" under the Hanging Paragraph

In 2005, Congress added a hanging paragraph to § 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 similar State or local law.

11 U.S.C. § 523(a).

The BAPCPA amendment provided a much-needed distinction between 26 U.S.C. §§ 6020(a) and (b) returns. *In re Shek*, 947 F.3d at 774. Under § 6020(a), the IRS can choose to prepare a return with input and cooperation from the taxpayer. Provided that the taxpayer cooperates with the government and does not file a false or fraudulent tax return, their tax debts remain dischargeable. *Id.* Under § 6020(b), where the IRS opts to prepare and file a substitute for return ("SFR") on a taxpayer's behalf without their cooperation, the taxpayer's debts are rendered non-dischargeable. *Id.* SFRs are typically based on third party wage and income reporting and do not allow for various credits and deductions.

The BAPCPA amendment does not clarify whether the phrase "applicable filing requirements" includes filing deadlines. It also leaves unresolved the treatment of a return filed by a taxpayer after the IRS has conducted an SFR under § 6020(b). The result is persistent confusion among the circuit courts. The *Shek* court agreed with arguments that it is common sense for "the term 'applicable' [to] relate to matters relevant to the determination of whether the document at issue can reasonably be deemed a return." *Id.* at 776. That analysis would look to things "like a return's form and contents . . . not to more tangential considerations, like whether it was properly stapled in the upper-left corner, or whether it was filed by the required date." *Id.*

This interpretation is supported by the surplusage canon of statutory interpretation, which cautions against adopting a meaning that would render a "clause, sentence, or word . . . superfluous, void, or insignificant." *Id.* at 777 (quoting *TRW Inc. v. Andrews*, 534 U.S. 19 (2001)); *see also Hibbs v. Winn*, 542 U.S. 88, 101 (2004). Congress's decision to use the term "applicable" rather than "all" suggests it was referring only to those considerations relevant to establishing the substance of a return.[7] To squeeze non-substantive considerations like timeliness and location into the definition of "applicable filing requirements" would render superfluous the term "applicable."[8] It would also render superfluous § 523(a)(1)(B)(ii), the portion of the statute which permits discharge for at least some late-filed returns that were filed at least two years before the debtor's bankruptcy petition. "Applicable filing requirements" should be construed narrowly in line with the purpose of the bankruptcy system to "relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." *In re Fahey*, 779 F.3d at 17 (Thompson, J., dissenting) (quoting *Local Loan*, 292 U.S. at 244).

It is more likely that Congress intended to address bad faith when drafting the hanging paragraph, not delinquency, since discharge is expressly permitted for returns prepared under § 6020(a) but not for SFRs

7. National Taxpayer Advocate, 2020 Annual Report to Congress at 173, *available at* https://www.taxpayeradvocate.irs.gov/reports/2020-annual-report-to-congress/full-report/ (accessed on Aug. 28, 2024).

8. *Id.*

prepared under § 6020(b)—even though both types of returns are prepared for late filers. *Id.* at 18. Afterall, "[i]f all late-filed returns except § 6020(a) returns are not returns[,] there is no need to state that § 6020(b) returns are not returns." *Id.* at 14-15. The statute should be interpreted accordingly to minimize redundancies and align with public policy, as debtors might otherwise be arbitrarily precluded from discharge depending on whether § 6020(a) returns or § 6020(b) SFRs were prepared on their behalf. *Id.*

The Court can issue clear guidance by limiting the definition of "applicable filing requirements" under the hanging paragraph to those considerations that pertain to the substance of a tax return, and not to the timeliness of its filer.

B. "Honest and Reasonable" under the *Beard* Test

When determining whether a filing is a return, courts generally apply the *Beard* test. As cases arose requiring a determination as to whether filings constituted tax returns for statute of limitations purposes, non-bankruptcy courts devised a four-part test in accordance with precedent from two Supreme Court cases: *Germantown Trust Co. v. Commissioner*, 309 U.S. 304 (1940), and *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934). *In re Hindenlang*, 164 F.3d 1029, 1033 (6th Cir. 1999).

The United States Tax Court later applied this test. The Sixth Circuit elaborated on it in *Beard v. Commissioner*, 793 F.2d 139 (6th Cir.1986) (per curiam), aff'g 82 T.C. 766 (1984). The *Beard* test, requires that a tax return: "(1) must purport to be a return; (2) must

be executed under penalty of perjury; (3) must contain sufficient data to allow calculation of tax; and (4) must represent an honest and reasonable attempt to satisfy the requirements of the tax law." *In re Hindenlang*, 164 F.3d at 1033 (quoting *In re Hindenlang*, 214 B.R. 847, 848 (S.D. Ohio 1997), rev'd, 164 F.3d 1029 (6th Cir. 1999)).

In 1999, the Sixth Circuit confronted the question of defining a return in the bankruptcy context. The *Hindenlang* court was charged with determining whether a post-assessment filing could constitute an honest and reasonable attempt to satisfy tax law requirements. Because the debtor filed his return after the IRS had already assessed tax and prepared an SFR, the Court found that his filing did not serve any tax purpose. The court ruled that because, in its view, there was no tax purpose served by the late filing, "the government thereby[had] met its burden of showing that the debtor's actions were not an honest and reasonable effort to satisfy the tax law." *Id.* at 1035. Citing the tax system's inability to "function properly if the great majority of taxpayers did not report the correct amount of tax without the government's prior determination of tax liability," the Court equated filing late to failing to make a reasonable effort to comply with the tax law. *Id.* at 1033 (quoting Bernard Wolfman, James P. Holden & Kenneth L. Harris, Standards of Tax Practice § 201 (1995)). The *Hindenlang* approach creates an arbitrary line between late filers who were able to file their return before the IRS prepared an SFR and those for whom the IRS already, and without their prior knowledge, filed returns. This division adds to the confusion already present in the circuit split.

II. The Three-Way Circuit Split as to *Beard*, BAPCPA, or Both

The *Beard* test's ambiguity has allowed for significant discrepancies in how late filers are treated. The need for consistency among the circuit courts is decades overdue. *Amicus* advocates adopting the approach of the Eighth Circuit to interpret the fourth prong of the *Beard* test to provide courts with a bright line rule that timeliness is not a factor in determining whether a filed return is a return. *In re Colsen*, 446 F.3d at 840. Limiting the *Beard* inquiry to whether a filer's forms were completed in good faith and with accuracy will reduce confusion, increase administrative efficiency, and provide a more uniform application of the bankruptcy code across the circuits.

A. Delinquency is Dispositive in the First, Fifth, and Tenth Circuits' Definition of a 'Return'

The First, Fifth, and Tenth Circuits penalize taxpayers who miss filing deadlines—even if just by one day, in accordance with their interpretation of the hanging paragraph. *See*, *e.g.*, *In re Fahey*, 779 F.3d at 1-19; *In re McCoy*, 666 F.3d 924 (5th Cir. 2012); *In re Mallo*, 774 F.3d at 1313-28. In response to the admittedly "cogent arguments concerning the tax purposes of a post-assessment Form 1040," these courts nonetheless consider post-assessment filings as failing to comply with applicable filing requirements from the outset; as a result, whether a post-assessment filing can constitute an honest and reasonable attempt to satisfy tax law requirements under the *Beard* test need not be resolved. *In re Mallo*, 774 F.3d at 1320. This effectively shuts down any inquiry into a late filer's personal circumstances solely based on their delinquency.

The First, Fifth, and Tenth Circuits contend that, per the hanging paragraph, a return filed after the due date, even if just by one day, fails to satisfy "applicable filing requirements" and thereby does not qualify as a return for purposes of discharge. *In re Fahey*, 779 F.3d at 5. In these circuits, this applies even when the IRS itself has abstained from imposing a late filing penalty on a taxpayer due to reasonable cause for filing late.[9]

Pointing to Chapter 61 of the Internal Revenue Code which states that returns "shall be filed" on or before April 15th of a relevant calendar year, these circuits conclude that "applicable filing requirements" include filing deadlines, meaning § 523(a) would exclude late-filed Forms 1040 from ever qualifying as returns. *See*, *e.g.*, *In re Fahey*, 779 F.3d at 3; *In re McCoy*, 666 F.3d at 928-29; *In re Mallo*, 774 F.3d at 1321. This interpretation renders superfluous the portion of § 523(a) that allows discharge for at least some late-filed returns. Even the IRS Office of Chief Counsel acknowledges that "Section 523(a) in its totality does not create the rule that every late-filed return is not a return for dischargeability purposes." I.R.S. Chief Counsel Notice 2010–016 at 3. These courts have thus created their own rule that any late filed return is not a return.

9. National Taxpayer Advocate, 2014 Annual Report to Congress at 419, *available at* https://www.taxpayeradvocate.irs.gov/reports/2014-annual-report-to-congress/full-report/ (accessed on Aug. 28, 2024).

B. Delinquency is Factored into the Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits' Definition of a 'Return'

The Third, Fourth, Sixth, Seventh, and Ninth circuits do not discuss the issue of "applicable filing requirements," some stating that they need not reach this question. *See e.g.*, *In re Giacchi*, 856 F.3d 244, 247 (3rd Cir. 2017). The Eleventh Circuit, as discussed in Section I.A above, did confront this issue, framing the two "plausible" constructions of "applicable filing requirements" as either: (1) those applying to a given taxpayer when filing or (2) those relevant to establishing that the substance of a filing is a return, with the court ultimately siding with the latter interpretations. *In re Shek*, 947 F.3d at 776.

All six circuits nonetheless agree that the late filings would likely fail to satisfy the *Beard* test. *In re Justice*, 817 F.3d at 744. These circuits broaden their inquiry of the fourth *Beard* factor to "the entire time frame relevant to the taxpayer's actions," viewing delinquency, absent a "legitimate excuse or explanation," as an indication of an insufficiently reasonable effort to comply with tax law requirements. *Id.*

This outcome is rooted in the premise that the basic purpose of filing tax returns is to "self-report to the IRS sufficient information that the returns may be readily processed and verified." *In re Moroney*, 352 F.3d 902, 906 (4th Cir. 2003) (quoting *United States v. Boyle*, 469 U.S. 241 (1985)). When Forms 1040 are filed after the IRS has already taken on the burden of reconstructing a taxpayer's income tax liability without their assistance, these circuits have found that the filings do not serve any tax purpose and thus fail to qualify as a return under the *Beard* test.

See In re Payne, 431 F.3d 1055, 1057 (7th Cir., 2005); *see also In re Hindenlang*, 164 F.3d at 1034. Yet again, these cases leave out taxpayers who voluntarily file their own return after an SFR-based assessment by the IRS.

Though perhaps less overt than the First, Fifth, and Tenth Circuits, these six circuits adopt a punitive approach, opining that taxpayers who file returns after they have already been assessed "belated[ly] accept responsibility," only when the IRS has left them "with no other choice," and so do not act as honest and reasonable taxpayers. *In re Hatton*, 220 F.3d at 1061. In contrast, Judge Easterbrook in his dissent in *Payne* cautioned against imputing a "bad" motive to a taxpayer to preclude discharge instead of determining at trial whether that taxpayer indeed willfully attempted to evade or defeat taxes. *In re Payne*, 431 F.3d at 1062 (Easterbrook, J., dissenting). He stressed that a taxpayer's motive should only affect the consequences of a return—not the functional definition of one. *Id.* at 1061-62.

C. Delinquency is Irrelevant to the Eighth Circuit's Definition of a 'Return'

The Eighth Circuit provides an instructive approach to the issues presented. The Court declined to accept the government's position that a late-filed return cannot meet the *Beard* test because it cannot be an "honest and genuine endeavor" to satisfy the tax law. *In re Colsen*, 446 F.3d at 839. In doing so, it declined to apply the Sixth's Circuit holding in *Hindenlang*, the Fourth's Circuit *Moroney* decision, and the Seventh Circuit holding in *Payne*. The Court was instead persuaded by Judge Easterbrook's dissent in *Payne*, where he noted the court inappropriately

inferred motive from a late filed return. *Id.* at 840. The Court found the *Beard* test does not invoke timeliness or intent. The Court was also prescient in its concern that unnecessarily creating a more subjective definition of "return" would substantially add administrative burdens and "introduce an inconsistency into the terminology of the tax laws." *Id.* Nearly two decades later, this is in fact the status quo, inconsistent and unequal application of different tax law terminology depending on the circuit where a taxpayer resides.

The *Colsen* decision also notes the relevance of post-assessment tax filings required as part of the Service's administration of the § 7122 Offer in Compromise (OIC) program. It is inconsistent for the government to not only accept but require post-assessment tax returns under their OIC program, yet to decline to accept a post-assessment tax return included in a bankruptcy discharge. Both tax filings reflect taxpayers' efforts to comply with their filing requirement and to obtain an accurate tax assessment, even if they are unable to fully pay the assessed amount.

III. The Inconsistency Between the Circuits Hurts Taxpayer Rights

This Court should grant the petition for certiorari to provide clarity and guidance to the circuit courts as to whether a filing deadline is considered an "applicable filing requirement" under the hanging paragraph of § 523(a), as well as whether a filer's delinquency is relevant to the "honest and reasonable" inquiry under the *Beard* test.

This would resolve decades of judicial confusion that results in three significantly different approaches

among the circuit courts. It is critical that bankruptcy law requirements be applied as uniformly as possible, as uncertainties in this area can have adverse impacts on taxpayers in different states.[10] In encouraging uniformity, it is most consistent to match how the IRS itself treats late-filed returns in the SFR context. Granting certiorari and developing a bright line rule would also discourage forum shopping, "the central dilemma with which bankruptcy law has struggled throughout its history," and level the playing field for moderate and low-income taxpayers who do not have the resources to forum shop. *See* G. Marcus Cole & Todd J. Zywicki, *Anna Nicole Smith Goes Shopping: The New Forum-Shopping Problem in Bankruptcy*, 2010 UTAH L. REV. 510, 511 (2010).

A. The IRS' Treatment of Returns Filed After an SFR

Under the Automated Substitute for Return (ASFR) program, the IRS uses information reported by third parties to identify delinquent taxpayers and construct tax returns, or substitute for returns (SFRs), on their behalf based on third-party information. The IRS then assesses tax, interest, and penalties based on the SFR. Unless and until the delinquent taxpayer completes and files their own return, the tax assessment based on an SFR remains in effect. *See* Internal Revenue Manual 5.1.15.3 (Aug. 11, 2015). Thus, it is well established that the IRS routinely accepts late-filed tax returns filed from

10. National Taxpayer Advocate, 2014 Annual Report to Congress at 422, *available at* https://www.taxpayeradvocate.irs.gov/reports/2014-annual-report-to-congress/full-report/ (accessed on Aug. 28, 2024).

taxpayers to reduce the tax, penalty, and interest assessed by the IRS through an SFR.

Per its own regulations, the IRS requires that all taxpayers must file any outstanding tax returns due before pursuing an OIC, even if the IRS has already assessed the tax on its own. *In re Payne*, 431 F.3d at 1060 (Easterbrook, J., dissenting). The IRS thus finds late-filed returns useful to accurately calculating a taxpayer's liability, which should constitute a valid tax purpose for *Beard* purposes. *In re Colsen*, 446 F.3d at 841.

The IRS approach to accepting late filed returns after an SFR makes good sense because the agency understands that SFRs are usually inaccurate. Between the fiscal years of 2011 and 2014, SFRs greatly overstated taxpayer liabilities, leading to a record-high abatement rate of 29% for the ASFR program.[11] It was only in 2019 that the IRS began to consider additional forms of third-party documentation and taxpayers' prior filing histories when preparing SFRs to minimize the need for taxpayer abatements later. Still, the IRS has declined over the years to refine the program's reason abatement codes, making troubleshooting largely impossible.[12] The administration of this program was identified as one of the most serious problems for taxpayers dealing with the IRS in 2015 and again as one of the most litigated issues in 2020, since its algorithm was designed to make assumptions that

11. National Taxpayer Advocate, 2019 Annual Report to Congress at 105, *available at* https://www.taxpayeradvocate.irs.gov/reports/2019-annual-report-to-congress/full-report/ (accessed on Aug. 28, 2024).

12. *Id.*at 106.

would maximize a taxpayer's liability—even if the IRS was aware of third-party evidence to the contrary.[13] As a result, this program continues to impose a burden on taxpayers while necessitating the expenditure of already-limited government resources to then make corrections and abate tax as needed.[14]

Nothing in BAPCPA changes a taxpayer's ability to obtain a correct tax assessment following an SFR. In fact, the Taxpayer Bill of Rights, located at §7803(a)(3) mandates that the Commissioner of the IRS must execute his duties in accordance with taxpayer rights including ensuring his employees respect, among other rights, the right of a taxpayer to pay no more than the correct amount of tax. §7803(a)(3)(C). Taxpayers routinely request abatement and reconsideration following an SFR by filing a tax return that is accepted by the IRS as a valid return.

Further, a return filed by the taxpayer after an SFR qualifies as a return under the *Beard* test because these late returns are intended as returns and are still signed under penalty of perjury, reflecting an honest attempt by the taxpayer to comply with their filing obligation, while containing the necessary information to correctly assess a tax. The IRS, in turn, routinely abates SFR assessments once a taxpayer files a return. In many instances because the taxpayer is correctly claiming family-based tax credits and other benefits that could not be included in an SFR due to the limited information available to the IRS when relying solely on information reporting by third parties.

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13. *Id.* at 103-06; *see also* National Taxpayer Advocate, 2020 Annual Report to Congress at 173.

14. *Id.*

B. Moderate and Low-Income Taxpayers Are Especially Affected by the Current Circuit Split

The current circuit split has a disproportionate impact on low- and moderate-income taxpayers who are also bankruptcy debtors. Notably, forum shopping is much less common among low-income workers who do not have the financial means to relocate to secure a more favorable circuit for a bankruptcy filing.[15] This deepens the importance of uniformity in the application of the BAPCPA hanging paragraph. Low-income workers in need of Chapter 7 bankruptcy relief are individuals who may also lack the resources to timely file their tax return each year, or who file only after an SFR has been prepared to correct the accuracy of an IRS-prepared return. This is especially important because family-based tax credits and other benefits administered through the tax code are not routinely included in SFRs since the IRS is typically not privy to whether eligible dependents lived with the taxpayer during any given tax year. These workers should not be further penalized if they happen to reside in and file for bankruptcy in a circuit that deems a late filed return ineligible for discharge. Overall, the current instability of the post-BAPCPA definition of a "return" most gravely affects those least equipped to endure the financial implications of being denied a clean slate.

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15. "Forum shopping has long been a feature of large case chapter 11 bankruptcy practice, with debtors picking the judicial district for their case. In recent years, however, debtors have also begun to engage in intra-district judge shopping—picking the individual judge who will hear the case." Levitan, Adam J., *Judge Shopping in Chapter 11 Bankruptcy*, Illinois Law Review, (Mar. 2023).

Granting the petition would also put an end to the excessively harsh consequences doled out by most circuits, particularly those imposing the One-Day-Late Rule, in alignment with the primary purpose of the bankruptcy system: to offer otherwise compliant taxpayers who file late returns a "fresh start."[16] In jurisdictions where tax debts cannot be discharged due to delinquency, the consequences for taxpayers can be much more dire under bankruptcy law than tax law, since penalties under tax law at least lend the possibility of abatement.[17]

By granting certiorari, this Court can also shield late filers from unfair preclusion from discharge on the arbitrary basis of whether their returns were prepared under § 6020(a) or § 6020(b). This will also serve to protect those who filed late due to reasonable cause, including natural disasters or personal circumstances.

BAPCPA was intended to curb abuse and instituted a means test for individuals to qualify for bankruptcy.[18]

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16. National Taxpayer Advocate, 2014 Annual Report to Congress at 421, *available at* https://www.taxpayeradvocate.irs.gov/reports/2014-annual-report-to-congress/full-report/ (accessed on Aug. 28, 2024).

17. *Id.*

18. Bankruptcy Forms 122A-1 and 122C-1 statements of monthly income under Chapters 7 and 13, respectively, filed on or after May 15, 2024 follow Census published guidelines for state by state median family income. The median income for a single taxpayer with no dependents in Washington DC is $85,933, and $81,170 in Massachusetts. Most other states have lower median costs of living (for example, Missouri $59,605, Montana $65,242 and North Dakota $66,813). Census Bureau Median Income By Family

Due to a variety of factors, moderate and low-income taxpayers encounter economic difficulties that sometimes require a combination of debt resolution plans to obtain a clean slate and achieve some financial stability. For instance, it is not unusual for individuals in this situation to be single, one-income parents struggling to extricate their family from tax and consumer debt. In these cases, a combination of innocent spouse relief[19] and bankruptcy protection is often the quickest way to discharge tax debt incurred by the estranged spouse and achieve financial solvency. Many clients in this economic range also struggle disproportionately with medical debt.[20] Such cases illustrate some of the life circumstances present when a taxpayer may fail to file a tax return, or file late, or not file until after an SFR under section 6020(b) has been completed by the IRS. As the Taxpayer Bill of Rights provides, taxpayers have a right to a fair and just tax system as well as to challenge the IRS and be heard. §7803 (a)(3) (D), (J). Bankruptcy courts short circuit those rights when they ignore a person's late filed tax return that otherwise meets eligible criteria for discharge simply

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Size, *located at* https://www.justice.gov/ust/eo/bapcpa/20240515/bci_data/median_income_table.htm (last accessed August 28, 2024). See also, Eugene R. Wedoff, Means Testing in the New § 707(B), 79 AM. BANKR. L.J. 231, 233-34 (2005) (discussing pre-BAPCPA bankruptcy amendments and legislative history)

19. IRC § 6015 provides taxpayers with partial or full relief from an IRS debt resulting from a return filed jointly with a spouse or ex-spouse.

20. David U. Himmelstein, Elizabeth Warren, Deborah Thorne & Steffie Woolhandler, *MarketWatch: Illness And Injury As Contributors To Bankruptcy*, HEALTH AFFAIRS (Feb. 2, 2005), *available at* https://doi.org/10.1377/hlthaff.W5.63

because they read more meaning than does the IRS into the requirements for a return to actually count as a return.

CONCLUSION

The Center for Taxpayer Rights respectfully requests that the Court grant the Petitioner a Writ of Certiorari.

Respectfully submitted,

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August 29, 2024