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

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INTEREST OF *AMICI CURIAE*

Amici curiae[1] are professors (listed in Appendix 1), with expertise in bankruptcy and tax law, who teach at accredited United States law schools. They urge this Court to grant certiorari and resolve a significant Circuit split, involving conflicting interpretations of bankruptcy law, which prevents certain taxpayers from discharging their tax debts in bankruptcy, depending on their geographic location, while allowing others (in different locations) to discharge similar debts under similar circumstances. *Amici* advocate that under applicable statutory law, as properly interpreted, all taxpayers may discharge these tax debts, consistent with the Eighth Circuit's holding in *In re Colsen*, 446 F.3d 836 (8th Cir. 2006).

In accordance with the independence of the *amici*'s positions and respective mandates, authorization for the positions and views expressed herein was neither sought from, nor given by, their respective law school employers.

SUMMARY OF ARGUMENT

Bankruptcy law and policy allow debtors to discharge certain debts including, generally, federal income tax debts. In 11 U.S.C. Section 523(a)(1), Congress provided for specific exceptions to the general

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[1] No counsel for any party authored this brief in whole or in part, and no person other than counsel for *amici* made a monetary contribution to fund its preparation or submission. Counsel for *amici* notified counsel for Petitioners and Respondents at least 10 days prior to the due date of this brief, in accordance with Supreme Court Rule 37.2.

rule that tax debts are dischargeable. At issue here is Section 523(a)(1)(B),[2] which prohibits discharge of a tax debt (i) if no return was filed, or (ii) for which a late return was filed less than two years before the Bankruptcy petition. Thus, under the plain meaning of the statute, debtors cannot discharge tax debts if they failed to file a return for that debt, but if they filed a late return, they can discharge the debt, as long as they wait two years before petitioning for bankruptcy.

Despite this clear statutory language, nine of the Circuit Courts have misinterpreted Section 523(a)(1) and held that a late-filed return may not be—or, in some Circuits, never is—a return for purposes of Section 523(a)(1)(B). These Circuits have done so based on either a misapplication of the relevant test in *Beard v. Commissioner,* 82 T.C. 766 (1984), *aff'd* 793 F.2d 139 (6th Cir. 1986) or a misinterpretation of an addition to the end of 11 U.S.C. Section 523(a), enacted by Congress in 2005 (referred to herein as Section 523(a)(*)). In doing so, these Circuits have overridden Congress's intent to provide relief to debtors who file untimely returns and then wait two years before seeking discharge in bankruptcy. Only one Circuit—*i.e.*, the Eighth Circuit—has properly interpreted Section 523(a)(1)(B) to provide relief for debtors who file late, but honest and reasonable, returns after the two-year waiting period.

This Circuit split, in the context of bankruptcy, results in geographic non-uniformity, because debtors in the Eighth Circuit can discharge these tax debts consistent with Congress's intent, while debtors in other

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[2] References to "Sections" refer to Sections of Title 11 of the United States Code, unless otherwise specified.

Circuits cannot. Moreover, these other Circuits' interpretations contravene the plain language of Section 523(a)(1)(B), applicable case law, and principles of statutory interpretation. And even if Section 523(a)(1)(B) were susceptible to multiple interpretations—and it is not—the Eighth Circuit's reading best reflects the "fresh start" policy embraced in the Bankruptcy Code (the "Code").

This Court should grant the petition for a writ of certiorari to correct the Circuit split below in favor of the Eighth Circuit's interpretation.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CIRCUIT SPLIT ON THE ISSUE OF DISCHARGABILITY BECAUSE ARTICLE I, SECTION 8 OF THE UNITED STATES CONSTITUTION MANDATES THAT BANKRUPTCY LAWS BE UNIFORM.

Bankruptcy law and policy generally give debtors an opportunity to discharge their debts, including their federal tax debts. See, *e.g.*, *Husky Int'l Elecs., Inc. v. Ritz*, 578 U.S. 355, 364 (2016). However, the Code, in 11 U.S.C. Section 523, provides that certain debts are not dischargeable. Pertinent here, Section 523(a)(1) bars discharge:

> from any debt– for a tax . . . (B) with respect to which a return . . . if required– (i) was not filed or given; or (ii) was filed or given after the date on which such return . . . was last due, under applicable law or under any extension, and after two

> years before the date of the filing of the [bankruptcy] petition; or (C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax . . . .

11 U.S.C. § 523(a)(1).

Currently, similarly situated debtors face disparate treatment under this statute based solely on geography. Specifically, the Circuits disagree about whether a "return" within the meaning of Section 523(a)(1)(B)(ii) includes an otherwise valid return which was filed after the operative deadline. This Court should grant certiorari to resolve this acknowledged, obvious, and irreconcilable Circuit split. Without a resolution, the split—which involves three starkly different statutory interpretations—violates this Court's longstanding edict that bankruptcy laws should be administered uniformly throughout the country. Without a resolution, similarly situated debtors will continue to be subject to arbitrary, disparate treatment based solely on geography. As set forth further *infra* Points II and III, this Court should resolve this Circuit split by adopting the Eighth Circuit's application of Section 523(a)(1).

Article I, Section 8, of the United States Constitution "empowers Congress to establish 'uniform Laws on the subject of Bankruptcies throughout the United States.'" *Siegel v. Fitzgerald*, 596 U.S. 464, 467 (2022) (quoting U.S. CONST. art. I, § 8, cl.4). To satisfy the constitutional requirement of uniformity, "'[a] law enacted under the Bankruptcy Clause must: (1) apply uniformly to a defined class of debtors; and (2) be geographically uniform.'" *In re Cir. City Stores, Inc.*, 996

F.3d 156, 165 (4th Cir. 2021), *rev'd and remanded sub nom. Siegel v. Fitzgerald*, 596 U.S. 464 (2022).

This Court has historically recognized the importance of geographical uniformity in bankruptcy. For example, in *Hanover National Bank v. Moyses*, 186 U.S. 181, 188 (1902), this Court emphasized that bankruptcy laws must be "uniform throughout the United States" in a "geographical, and not personal" sense. *Hanover* cited with approval an opinion from Chief Justice Waite sitting in the Eastern District of Virginia (prior to his appointment to this Court) holding that a rule which operates in the same way throughout the United States "is uniform within the meaning of that term, as used in the Constitution." *Id.* at 190 (*quoting Re Deckert*, 7 F. Cas. 334, 336 (C.C.E.D. Va. 1874)). Thereafter, this Court continued to review bankruptcy laws to ensure geographic uniformity. *See, e.g.*, *Ry. Lab. Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 469, 471-472 n.14 (1982) (invalidating a bankruptcy statute for lack of uniformity); *Siegel v. Fitzgerald*, 596 U.S. 464, 473, 478 (2022) (granting certiorari to resolve a Circuit split, and invalidating a bankruptcy statute because "the bankruptcy Clause offers Congress flexibility, but does not permit the arbitrary, disparate treatment of similarly situated debtors based on geography").

Even where a bankruptcy statute is geographically neutral on its face, this Court has granted certiorari to resolve Circuit splits when those splits result in disparate treatment of similarly-situated debtors based on geography. *See Harris v. Viegelahn*, 575 U.S. 510, 516 (2015) (certiorari granted to resolve 1-1 Circuit split in interpretation of bankruptcy statute); *Husky Int'l Elecs., Inc.*, 578 U.S. at 357 (certiorari granted to

resolve Circuit split in interpreting facially-neutral bankruptcy statute governing dischargability); *Bartenwerfer v. Buckley*, 598 U.S. 69, 74 n.1 (2023) (same). In other words, review by this Court is warranted even where the disparate geographic treatment is caused by different Circuit Court interpretations of bankruptcy law, rather than by the statutory language itself.

The Circuit split here constitutes such disparate treatment. Ten Circuits have confronted the situation contemplated by Section 523(a)(1)(B)(ii): a debtor seeks to discharge a tax debt for a tax year in which the debtor filed a late tax return, but filed it more than two years before the debtor filed for bankruptcy. These Circuits have adopted three distinct tests, leading to disparate results for taxpayers depending on geographic location.

The First, Fifth, and Tenth Circuits embrace an inflexible rule that a tax debt for which a return was filed even one day late is never dischargeable because a late-filed return is never a "return" within the meaning of Section 523(a)(1)(B). The Third, Fourth, Sixth, Seventh, Ninth and Eleventh Circuits hold that a late-filed return *may* be a "return," and the associated tax debt therefore *may* be dischargeable, depending in large part on whether the Internal Revenue Service (the "Service") assessed the debtor's taxes for the relevant year before the taxpayer filed the return. Only the Eighth Circuit recognizes the correct approach aligned with the statutory text and purpose of the Code: A return which was filed late is still a return, and the associated tax debt is thus dischargeable (af-

ter the two-year waiting period) so long as the substantive contents of the return demonstrate a sincere effort to comply with the tax laws.[3]

Thus, debtors that are identical in all respects, save for the geographic locations in which they file for bankruptcy, are subject to dramatically different consequences for a late-filed return. This Court should grant certiorari to resolve this geographically disparate treatment, which is antithetical to both the Bankruptcy Clause of the United States Constitution and to this Court's jurisprudence.

II. CERTIORARI SHOULD BE GRANTED BECAUSE MOST CIRCUITS HAVE MISINTERPRETED THE PLAIN LANGUAGE OF SECTION 523(a)(1), WHICH EXPRESSLY PERMITS TAXPAYERS WITH LATE-FILED RETURNS TO DISCHARGE THEIR INCOME TAX LIABILITIES THROUGH BANKRUPTCY.

Under the Code, pre-petition debts, including old federal income tax debts, are generally dischargeable in bankruptcy, unless those debts are exempted from

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[3] The Service takes a different approach, more lenient than all Circuits except the Eighth Circuit. It maintains that a late-filed return is a "return," and that debts connected to a late-filed return may be partially dischargeable—if the associated tax is unassessed when the return is filed—and partially not dischargeable if the associated tax has already been assessed when the return is filed. Thus, if a taxpayer makes a filing post-assessment, and this filing shows additional taxes owed, the Service would find these additional tax debts dischargeable after two years, but none of the Circuit Courts, except the Eighth Circuit, would likely do so. *See* I.R.S. Notice CC-2010-016 (Sept. 2, 2010), https://www.irs.gov/pub/irs-ccdm/cc_2010_016.pdf.

discharge. *See, e.g.*, *In re Tudisco*, 183 F.3d 133, 136 (2d Cir. 1999). Section 523(a) provides certain such exemptions. Section 523(a)(1)(A) bars discharge of new tax debts that are entitled to priority. These non-dischargeable debts include tax liabilities that (a) were due within three years of filing the petition, (b) were assessed within 240 days of filing the petition, or (c) that were not assessed, but could be assessed, after filing the petition. Section 523(a)(1)(B)(i) prohibits discharge of tax debts if no return was filed. Section 523(a)(1)(C) similarly forbids discharge if a fraudulent return was filed, or if there was a willful attempt to evade or defeat such tax. Section 523(a)(1)(B)(ii) strikes a balance by allowing discharge of old tax debts where a late, but good faith, return was filed, but only if the bankruptcy petition is filed two years (or more) after the late return.

Specifically, Section 523(a)(1)(B)(ii) states:

> A discharge . . . does not discharge an individual debtor from any debt . . . for a tax . . . with respect to which a return . . . was filed or given after the date on which such return . . . 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)(ii).

This plain language demonstrates Congress's intent to allow the discharge of old tax debts reported in returns "filed or given after the date on which such return . . . was last due"—*i.e.*, untimely filed returns—if they were filed more than two years before the bankruptcy petition. Congress thus balanced the competing

interests involved in late filings and determined that the proper result was to allow for discharge after a two-year waiting period.

Notwithstanding this plain language, the majority of Circuits have held that the late filing of returns can or does prevent discharge of tax debts in bankruptcy, regardless of how much time elapses between the filing of the return and the filing of the bankruptcy petition. Those holdings contravene a straightforward reading of Section 523(a)(1)(B).

Statutory "analysis begins with the plain language of the statute." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). "[W]hen the statutory language is plain, [a court] must enforce it according to its terms." *Id.* There is also a "'strong presumption' that the plain language of the statute expresses congressional intent," *Ardestani v. I.N.S.*, 502 U.S. 129, 135 (1991), and this presumption "is rebutted only in 'rare and exceptional circumstances.'" *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981))

Disregarding this express Congressional mandate authorizing discharge for taxpayers who file late, the majority of Circuits deem that taxpayers who file late returns (either one day late, or post-assessment, depending on the Circuit) can be treated as if they filed no returns at all. In so doing, these Circuits apply Section 523(a)(1)(B)(i)—precluding discharge where no return was filed—rather than Section 523(a)(1)(B)(ii), to late returns.

These holdings thus cannot be correct because they merge Section 523(a)(1)(B)(ii) into Section 523(a)(1)(B)(i), impermissibly rendering Section 523(a)(1)(B)(ii) superfluous, void, and insignificant. "It

is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

The Circuits that have determined that a late-filed return is not a "return" for Section 523(a)(1)(B)(ii) purposes have effectively eliminated any situation in which this provision would actually apply. Although Section 523(a)(1)(B)(ii) allows discharge for taxpayers who have filed their returns late, under those Circuits' logic, this Section cannot ever apply because the late returns are not considered returns. This circular logic ignores the plain language of the statute and contradicts Congress's intent in passing it. Why would Congress create a relief provision that was impossible to use? Indeed, as set forth in Point III below, all of the Circuits that decided this issue did so incorrectly, either based on a misreading of a Tax Court case (*Beard*, 82 T.C. 766), or based on a misapplication of Section 523(a)(*).

Those Circuits' rulings also contradict this Court's interpretation of the term "return" in *Badaracco v. Commissioner*, 464 U.S. 386, 396-97 (1984), where this Court rejected the argument that fraudulent returns were "nullities," and held that a fraudulent return was still a "return" for purposes of a statute of limitations analysis under Internal Revenue Code ("IRC") Section 6501. This Court concluded that "a document which on its face plausibly purports to be in compliance, and which is signed by the taxpayer, is a return despite its inaccuracies." *Id.*

If a fraudulent return is a return, then an untimely but good-faith return must be a return also. *Badaracco* rejects the argument—adopted by the majority of the Circuits—that deficiencies in a return from fraud or, as here, untimeliness, make a return a "nullity." Thus, the Eighth Circuit's position, adopted in *Colsen*, that the face of the return (rather than the date it was filed) determines if it is deemed a return is the only decision on this issue consistent with *Badaracco*. *See Colsen*, 446 F.3d at 840 (late-filed tax return is a "return" under Section 523(a)(1)(B)(ii), in accordance with both *Beard* and *Badaracco*).

This Court should grant certiorari to bring the interpretation of Section 523(a)(1)(B)(ii) in line with its plain meaning.

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE VARIOUS CIRCUITS HAVE MISINTERPRETED APPLICABLE CASE LAW AND THE CONGRESSIONAL ENACTMENT OF SECTION 523(a)(*).

Every Circuit—other than the Eighth Circuit—that has addressed the meaning of "return" under Section 523(a)(1)(B) has reached a conclusion that (i) contravenes prior caselaw (in particular, *Beard*, 82 T.C. 766) and (ii) endorses a statutory interpretation that creates disharmony within Section 523(a).

A. Other than the Eighth Circuit, the Circuits have misinterpreted *Beard*.

With the exception of the Eighth Circuit, every Circuit that has applied *Beard v. Commissioner*, 82 T.C. 766 to determine whether a tax debt contained in a late-filed tax return is dischargeable has applied

Beard incorrectly. The *Beard* Court held that deliberately incomplete or improperly executed tax returns (*i.e.*, returns with deliberate, substantive defects) were not "returns."

Beard did not involve a late-filed or delinquent return, and *Beard* was not a bankruptcy case. Instead, *Beard* involved a tax protestor who submitted a tampered Form 1040 claiming that wages earned for services were not income, but rather an exchange of values. *See Beard*, 82 T.C. at 778–79. The taxpayer replaced various portions of the Form with "language fabricated by petitioner," leading to a claim of zero tax liability. *Id.* at 776.

The Tax Court found that the document filed by the taxpayer was not a return because "it does not reflect an endeavor to satisfy the law. It in fact makes a mockery of the requirements for a tax return, both as to form and content." *Id.* at 778-779. *Beard* set forth a four-prong test for whether a document is considered a return: "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.* at 777.

Properly understood, *Beard* applies where tampered, incomplete, or unsigned returns are submitted to the Service. *See, e.g.*, *Sochia v. Comm'r,* T.C. Memo. 1998-294, at *2 ("A Form 1040 which contains only 'Object–5th Amend.' entries is not a Federal income tax return."); *Williams v. Comm'r*, 114 T.C. 136, 142 (2000) ("While not physically deleting, altering, or

adding words to the jurat [*i.e.*, the certification of signing under the penalties of perjury], the disclaimer negated the meaning of the jurat.").

Many Circuits have misinterpreted *Beard* to hold that a return filed after the Service has assessed the tax liability for a given year cannot satisfy the "honest and reasonable attempt to satisfy the requirements of the tax law" prong of the *Beard* test.[4] However, this interpretation is incorrect. Neither *Beard* nor the Code require timeliness in order for a return to be deemed a return. Indeed, the language and circumstances of *Beard* demonstrate that this prong focuses on the information and content in the return, rather than its timeliness.

The Eighth Circuit properly interpreted *Beard* in *In re Colsen*, noting that the relevant "*Beard* criterion contains no mention of timeliness or the filer's intent. We have been offered no persuasive reason to create a more subjective definition of 'return' that is dependent on the facts and circumstances of a taxpayer's filing." 446 F.3d at 840. *Colsen* went on 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 reason for it." *Id*.

For this reason, the Eighth Circuit is the only Circuit whose interpretation of Section 523(a)(1)(B) is

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[4] *Beard*, 82 T.C. at 778. *See In re Moroney*, 352 F.3d 902, 905 (4th Cir. 2003); *In re Giacchi*, 856 F.3d 244, 247 (3d Cir. 2017); *In re Hindenlang*, 164 F.3d 1029, 1034 (6th Cir. 1999); *In re Payne*, 431 F.3d 1055, 1057 (7th Cir. 2005); *In re Smith*, 828 F.3d 1094, 1097 (9th Cir. 2016); *In re Just.*, 817 F.3d 738, 746 (11th Cir. 2016); *see also* Point II(a), *infra*.

consistent with *Badaracco*. By contrast, the inflexible positions of the First, Fifth, and Tenth Circuits that a tax debt is not dischargeable if the underlying return was filed even one date late cannot be justified under the plain meaning of the statute, nor under *Beard* or *Badaracco.*

The position of the Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits—that the debt is dischargeable only if the return was filed before the Service has assessed the debtor's tax—is also incorrect. The Sixth Circuit adopted this rule in *In re Hindenlang*, 164 F.3d 1029, on the basis that a form filed after the Service has assessed the tax has no purpose or effect under the IRC. *See id.* at 1034 ("[A] Form 1040 is not a return if it no longer serves any tax purpose or has any effect under the Internal Revenue Code . . . [and] cannot constitute 'an honest and reasonable attempt to satisfy the requirements of the tax law.'")

However, this holding is based on a fallacy, because post-assessment returns serve multiple tax purposes and have multiple effects. *See Colsen*, 446 F.3d at 840–41 ("Mr. Colsen's 1040 forms contained data that allowed the IRS to calculate his tax obligation more accurately.")

Where taxpayers fail to file returns, the Service can file Substitutes for Returns ("SFRs"), and assess taxes based on these SFRs, using information the Service receives from other sources. The Tax Court has nevertheless found that taxpayer returns filed *after* an SFR (and an assessment) are valuable. *See Venuto v. Comm'r*, T.C. Memo. 2017-123, at *2 (Despite an SFR having been filed and the Service not receiving taxpayer's Form 1040, "[t]he foundations for the parties'

arguments at trial were the items claimed on the [missing] Form 1040."); *Sherman v. Comm'r*, T.C. Memo. 2023-63, at *3 (Although the Service declined to process the Form 1040 after it prepared an SFR, the Tax Court considered the attachments to Schedule C.).

Similarly, the Service's own Internal Revenue Manual ("IRM"), though not legally binding,[5] illustrates that post-SFR returns have value. The IRM instructs Service personnel that "the amounts on the secured return [filed post-SFR] must be incorporated into an examination report and assessed as a TC 300." I.R.M. 4.4.9.6(1).[6] Moreover, returns filed post-SFR can be accepted as filed "[i]f there will be no further examination of the return." I.R.M. 4.4.9.6.3. The IRM therefore demonstrates that the Service can and does process delinquent returns and that returns filed after an SFR can be valuable to the Service.

Furthermore, other sections of the IRC support the proposition that untimely filed returns are deemed to be "returns" under applicable non-bankruptcy law.

For example, IRC Section 6103, defining return for purposes of privacy protection, instructs:

> The term "return" means any tax . . . return . . . required by . . . provided for or permitted under . . . this title which is

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[5] *See Estate of Duncan v. Comm'r*, 890 F.3d 192, 200 (5th Cir. 2018).

[6] TC 300 is a transaction code that appears as part of the Service's Record of Accounts Transcript, indicating an additional tax or other deficiency that was assessed by the Service's Examination Division or the Service's Collection Division.

> filed with the Secretary by . . . any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

26 U.S.C. § 6103(b)(1)

IRC Section 6103 does not mention timeliness. If the Circuits that interpreted *Beard* to limit "returns" to documents that are timely filed were correct (and they are not), then any information contained in a late-filed return would presumably not qualify for privacy protection under IRC Section 6103. The absurdity of this implication shows that any interpretation of *Beard* requiring that a return be timely in order to be deemed a "return" must be mistaken.

Likewise, while there are several provisions in the IRC specifically relating to late-filed returns, none of them contemplate (let alone authorize) rejecting such returns or treating them as non-returns. For example, IRC Section 6651(a)(1) authorizes penalties for late-filed returns, which may not apply if there is reasonable cause. Thus, IRC Section 6651 acknowledges that "returns" can be filed late. It is illogical to believe that Congress intended to permit taxpayers to escape a monetary penalty for late-filed returns if reasonable cause exists but intended to deny those same taxpayers any ability to have these tax debts discharged in bankruptcy, despite this same reasonable cause.

Similarly, IRC Section 6501 acknowledges that the three-year statute of limitations for assessment applies "whether or not such return was filed on or after the date prescribed." This clearly indicates that a late-filed return constitutes a "return."

Accordingly, *Beard* has been misapplied by the majority of Circuits. *Beard* was intended to clarify that a document that deliberately makes a mockery of the requirements for a tax return is not a return. But in so holding, *Beard* recognized that defective or incomplete returns can sometimes be returns. 82 T.C. at 778. *Beard* does not write out of the IRC the ability to file late returns. Thus, cases in the bankruptcy context which rely on *Beard* to hold that untimely returns are not "returns" are misguided.[7]

Indeed, this application of *Beard* not only runs afoul of its original intent, but it also creates concerns regarding the processing of untimely returns moving forward. It would be perilous if the Service and courts use *Beard* to rule, as some Circuits have already done, that any untimely filed return, regardless of reasonable cause, is invalid despite being complete and reporting all necessary information. Taxpayers and the tax system rely on late returns in certain situations (*e.g.*, during collections, where certain collection alternatives are not authorized unless the taxpayer is, or comes into, compliance).[8] The Service's Collections Division is authorized to request that delinquent returns be filed before entering into a collection alternative. If these delinquent returns are not considered "returns," can a taxpayer in collections ever actually come into compliance? If not, this would cause grievous injury to taxpayers facing collection actions, and the Service

[7] *See supra* note 3.

[8] *See* I.R.M. 8.22.7.10.5.3(1).

would face difficulties in collecting these debts, because it cannot use those mechanisms to reach collection agreements with delinquent taxpayers.

In sum, those Circuits which have misinterpreted the *Beard* test to hold that an otherwise valid return is not a "return" under Section 523(a)(1)(B) if it was filed after the Service has assessed taxes have both misapplied *Beard* and violated Congress's intent to allow taxpayers to discharge tax debts, even for late-filed returns, in bankruptcy. Certiorari should be granted to correct this error.

B. The First, Fifth and Tenth Circuits' interpretation of "applicable filing requirements" in Section 523(a)(*) creates disharmony within the statute.

In 2005, Congress added further language at the end of Section 523(a), which defines the word "return" for purposes of determining dischargeability of tax debts under the Code.

That additional language—Section 523(a)(*)—provides that "[f]or purposes of this subsection, the term 'return' means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such return includes a return prepared pursuant to section 6020(a)[.]"

IRC Section 6020(a) provides:

> If any person shall fail to make a return required by this title . . . but shall consent to disclose all information necessary for the preparation thereof, then, and in that case, the Secretary may prepare such return, which, being signed by such person,

> may be received by the Secretary as the return of such person.

26 U.S.C. § 6020(a)

The First, Fifth and Tenth Circuits have misinterpreted Section 523(a)(*) to mean that a return filed even one day late does not comply with "applicable filing requirements," and thus is not a "return" under the Code, unless prepared pursuant to IRC Section 6020(a). However, this narrow reading cannot be correct given the practical application of IRC Section 6020(a).

IRC Section 6020(a), in turn, does not require the Service to create a return but rather provides that "the Secretary *may* prepare such return" (emphasis added). Thus, relief may be available only if the Secretary decides to assist the taxpayer. Next, even if the Secretary prepares the return, there is no guarantee that the return will be accepted, because IRC Section 6020(a) states that the return "*may* be received by the Secretary as the return of such person" (emphasis added). Thus, many taxpayers may ultimately be unable to seek discharge through this process.

Finally, IRC Section 6020(a) has no temporal limitation, and it is unclear how long the Service would take to prepare the return. Taxpayers are further left without certainty as to when the return will be deemed filed for purposes of the two-year clock under Section 523(a)(1)(B)(ii).[9] Furthermore, the interpretation of Section 523(a)(*) adopted by the First, Fifth and

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[9] The Service has acknowledged that the number of returns prepared under IRC Section 6020(a) is minute. I.R.S. Notice CC-2010-016, at 2 (Sept. 2, 2010), https://www.irs.gov/pub/irs-ccdm/cc_2010_016.pdf.

Tenth Circuits illogically places a taxpayer who filed no return at all (but for whom a return was filed by the Service under IRC Section 6020(a)) in a better position than a taxpayer who files a tax return late.

In sum, despite the plain language of Section 523(a)(1)(B)(ii), the First, Fifth and Tenth Circuits have rendered this provision a nullity by finding that a late-filed return is not a return, and that only late-filed returns that are submitted under IRC Section 6020(a), can be discharged.[10] "The Bankruptcy Act should be liberally construed in favor of the right of discharge." *Bockus v. Yuen*, 29 F.2d 205, 206 (9th Cir. 1928). Rather than favoring discharge, the First, Fifth and Tenth Circuits' interpretation renders discharging a tax liability generated from an untimely return practically impossible.

The canons of construction require that Section 523(a)(*) be interpreted in a manner that is harmonious with the balance of the statute. "Good sense and legal tradition alike enjoin that an enactment of Congress dealing with bankruptcy should be read in harmony with the existing system of equity jurisprudence of which it is a part." *S.E.C. v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 457 (1940); *see also Young v. U.S.*, 535 U.S. 43, 50 (2002) ("bankruptcy courts . . . are courts of equity and apply the principles and rules of equity jurisprudence") (quoting *Pepper v. Litton*, 308 U.S. 295, 304).

Despite this edict, three Circuits have interpreted the phrase "applicable filing requirements" in Section

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[10] *In re McCoy*, 666 F.3d 924, 932 (5th Cir. 2012); *In re Mallo*, 724 F.3d 1313, 1323 (10th Cir. 2014); *In re Fahey*, 779 F.3d 1, 6 (1st Cir. 2015).

523(a)(*) to mean that a return filed a day late is not a return. But this construction creates obvious disharmony, and internal inconsistency, within Section 523(a), because Section 523(a)(1)(B)(ii) clearly contemplates that late-filed returns are "returns," which can sometimes be discharged in bankruptcy.

Furthermore, Congress left Section 523(a)(1)(B)(ii) in place when it enacted Section 523(a)(*). If Congress intended that debts reflected in late-filed returns would no longer be dischargeable, it would have been much simpler to remove Section 523(a)(1)(B)(ii), which provides for discharge of tax debts reflected in late-filed returns. Thus, Circuits which interpret Section 523(a)(*) in a manner that essentially reads Section 523(a)(1)(B)(ii) out of the Code, or limits it to the essentially non-existent circumstances of a IRC Section 6020(a) return in the context of a bankruptcy, cannot be correct.

Instead, the phrase "applicable filing requirements" should be interpreted so that it can still apply to late-filed returns and thereby remain harmonious with Section 523(a)(1)(B). "[A]pplicable filing requirements" should therefore refer to the substantive contents required to be included in a return so that it is a whole and complete return, *i.e.*, the information, forms, and execution required for the Service to process the return.

Judge Thompson, dissenting in *In re Fahey*, correctly reached the same conclusion by noting the disharmony caused by including a timeliness requirement within the phrase "applicable filing requirements." *See In re Fahey,* 779 F.3d 1, 11 (1st Cir. 2015)

(Thompson, J., dissenting) (First Circuit ruling disallowing discharge for late-filed returns based on the "applicable filing requirements" language in Section 523(a)(*) "takes too academic and literal of an approach to its reading of one of the code's definitional provisions, leading to a result that defies common sense, while also conveniently ignoring the plain meaning of other words in the very same paragraph").

Judge Thompson concluded that the "most sensible" way to harmonize Sections 523(a)(1)(B)(ii) and 523(a)(*) was that a purported return which did not comply with applicable substantive filing requirements (and thus would not be accepted as a return by the taxing authority) does not count as a "return," and therefore those tax debts could not be discharged under Section 523(a)(1)(B). *Id.* at 18. Thus, if the Service (or state taxing authorities) rejects a return because it does not comply with substantive requirements, then the associated tax is not dischargeable in bankruptcy. This allows the Service to play its role in determining what returns are acceptable but does not apply strict liability to a taxpayer's failure to timely file, and thereby cause clear conflict and disharmony between provisions of the Code.

Certiorari should be granted so that this Court can harmonize the statute in a manner that permits tax debts reflected in late-filed returns to be discharged in bankruptcy, in line with Congressional intent.

IV. CERTIORARI SHOULD BE GRANTED BECAUSE THE LAW IN MOST CIRCUITS RUNS COUNTER TO THE "FRESH START" POLICY OF THE BANKRUPTCY CODE.

"Bankruptcy offers individuals and businesses in financial distress a fresh start to reorganize, discharge their debts, and maximize the property available to creditors." *Truck Ins. Exch. v. Kaiser Gypsum Co., Inc.*, 144 S. Ct. 1414, 1420–21 (2024). Part of receiving a "fresh start" is the discharge of debts. *See Bartenwerfer v. Buckley*, 598 U.S. 69, 73 (2023); *Cent. Va. Cmty. College v. Katz*, 546 U.S. 356, 363–64 (2006).

By holding that a late-filed return is not a return for purposes of discharge, the Circuits have effectively denied numerous debtors their ability to discharge their debts and move forward. This result does not comport with the "fresh start" policy of the Code.

The Circuits' analysis of Section 523(a)(1)(B) is also contrary to the liberal construction regularly applied to other discharge provisions of the Code. *See, e.g.*, *In re Reines*, 142 F.3d 970, 972–73 (7th Cir. 1998) ("exceptions to discharge of a debt are construed strictly against the creditor and liberally in the debtor's favor."); *In re Bernard*, 96 F.3d 1279, 1281 (9th Cir. 1996) ("In keeping with the 'fresh start' purposes behind the Bankruptcy Code, courts should construe § 727 liberally in favor of debtors and strictly against parties objecting to discharge."); *In re Miller*, 39 F.3d 301, 304 (11th Cir. 1994) ("Moreover, courts generally construe the statutory exceptions to discharge in bankruptcy 'liberally in favor of the debtor[.]'").

The holdings of the majority of Circuits that late-filed returns do not, or may not, constitute valid returns for purposes of discharge clearly contradict the policy that discharge provisions are to be liberally construed.

Not only has Section 523(a) not been liberally construed in favor of debtors, it has been construed so narrowly that it has created an absurd result. Specifically, by holding, under either *Beard* or Section 523(a)(*), that untimely-filed returns are not returns (unless they were filed under IRC Section 6020(a)), nine Circuits have interpreted Section 523(a)(1)(B)(ii) in a way that frustrates the intent of the statute.

Certiorari should be granted to correct this error and harmonize this aspect of the law with the "fresh start" policy of the Code.

CONCLUSION

The majority of Circuits' interpretation of Section 523(a)(1) is contrary to the plain language of the statute and results in non-uniform administration of the Code depending on a debtor's geographical location. This Court should grant certiorari to correct these errors.

Respectfully submitted,

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