No. 24-108

IN THE

Supreme Court of the United States

JOHN PAUL SALVADOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari in the
United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS*

The American College of Tax Counsel (the "College") respectfully submits this brief as *amicus curiae* in support of petitioner John Paul Salvador.[1]

The College is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions, and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The purposes of the College are:

- To foster and recognize the excellence of its members and to elevate standards in the practice of the profession of tax law;
- To stimulate development of skills and knowledge through participation in continuing legal education programs and seminars;
- To provide additional mechanisms for input by tax professionals in development of tax laws and policy; and
- To facilitate scholarly discussion and examination of tax policy issues.

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, counsel for the College provided timely notice of the College's intent to file this brief.

The College is composed of approximately 700 Fellows recognized for their outstanding reputations and contributions to the field of tax law and is governed by a Board of Regents consisting of one Regent from each federal judicial circuit, two Regents at large, the Officers of the College, and the last retiring President of the College.

This *amicus* brief is submitted by the College's Board of Regents and does not necessarily reflect the views of all members of the College, including those who are government employees.

SUMMARY OF THE ARGUMENT

This case presents a long-contested question that affects millions of Americans who file for bankruptcy to discharge their personal debts. Bankruptcy Code (11 U.S.C.) section 523(a)(1)(B)(i) prevents a debtor from discharging a tax debt for which a return was not filed, but the provision does not clearly address whether and under what circumstances debt from a late-filed return can be discharged. That question has led to a decades-long debate among the courts of appeals and taxing authorities, with at least four distinct approaches being applied by different circuits and the IRS.

This patchwork application of the law flies in the face of the Constitutional mandate that bankruptcy and tax laws be uniform throughout the country. The Framers included a uniformity requirement in the bankruptcy and taxing clauses to prevent arbitrary geographic discrimination, which proved deeply harmful to the country in its early years under the Articles of Confederation. If Congress had enacted section 523(a)(1)(B)(i) in the way it is

currently being applied, the law would be blatantly unconstitutional under this Court's existing precedent. The fact that the disuniformity in this instance has come from the courts rather than Congress does not make it acceptable or lessen the harm.

The inconsistent application of section 523(a)(1)(B)(i) has serious consequences for debtors, taxing authorities, and bankruptcy and tax administration. Debtors are uncertain whether bankruptcy affords a fresh start or whether nondischargeable tax debts will stand in the way of becoming economically productive again. Taxing authorities face the same uncertainty and are forced to litigate this issue over and over, spending scarce resources that can overshadow the very debts they are trying to collect. The *status quo* reduces confidence in the fairness of the bankruptcy and tax systems and encourages forum shopping.

After decades of rulings on this issue, further legal development is unlikely to aid in this Court's consideration or bridge the divides between the circuits. The issue is ripe for decision by the Court, and the College therefore encourages the Court to grant the Petition for a Writ of Certiorari and bring uniformity and predictability to the question of whether debts from late-filed tax returns are dischargeable in bankruptcy.

ARGUMENT

I. THIS COURT'S INTERVENTION IS NECESSARY TO BRING UNIFORMITY TO THE APPLICATION OF SECTION 523(A)(1)(B)(I) OF THE BANKRUPTCY CODE, WHICH EXEMPTS CERTAIN TAX DEBTS FROM DISCHARGE

A. The Current State of the Law Is a Confusing Patchwork of Approaches

The underlying principle of the Bankruptcy Code is to provide the "honest but unfortunate" debtor with a "fresh start." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934); *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991). A fresh start provides debtors with a clean financial slate – "a new opportunity in life" – and is intended to free debtors from the "weight of oppressive indebtedness" and "the obligations and responsibilities consequent upon business misfortunes." *Local Loan*, 292 U.S. at 244 (citations omitted). This Court has long recognized that the fresh start policy serves both public and private interests. *See id.* at 244–45 (explaining that the fresh start policy "has been again and again emphasized by the courts as being of public as well as private interest" and that preserving an individual's ability to earn a living is "of the utmost importance . . . because it is a matter of great public concern"); *see also* Thomas Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1420 (1985) (citations omitted) (explaining that a fresh start as opposed to allowing excessive debt to linger posits a net social gain because it increases the debtor's

"productive contributions to society" as he or she attempts to re-engage in economic productivity).

Although the fresh start principle is the guiding force of bankruptcy law, Congress limited that principle in certain circumstances, set out in the exceptions to bankruptcy discharge in 11 U.S.C. § 523. One of those exceptions prevents an individual debtor from discharging a debt "for a tax or a customs duty . . . with respect to which a return, or equivalent report or notice, if required . . . was not filed or given." 11 U.S.C. § 523(a)(1)(B)(i). This exception has engendered a decades-long debate among courts and taxing authorities as to whether a late-filed submission is a "return" for purposes of discharging the associated tax debt.

The first courts of appeals to address the exception to discharge under section 523(a)(1)(B)(i) applied the well-known test in *Beard v. Commissioner*, 82 T.C. 766 (1984) to determine whether a submission constitutes a return. *See In re Payne*, 431 F.3d 1055, 1057 (7th Cir. 2005); *In re Moroney*, 352 F.3d 902, 905 (4th Cir. 2003); *In re Hatton*, 220 F.3d 1057, 1061 (9th Cir. 2000); *In re Hindenlang*, 164 F.3d 1029, 1034 (6th Cir. 1999). The *Beard* test includes four factors, the most relevant of which for purposes of section 523(a)(1)(B)(i) is whether the submission constitutes an "honest and reasonable attempt to satisfy the requirements of the tax law." *In re Hatton*, 220 F.3d at 1061. Generally, courts applying the *Beard* test have found that a submission filed after the IRS

prepares a substitute-for-return ("SFR")[2] does not constitute an honest and reasonable attempt to comply with the law and therefore does not qualify as a return. *See, e.g., In re Moroney*, 352 F.3d at 907; *In re Hindenlang*, 164 F.3d at 1035.

While determining whether a particular submission is an honest and reasonable attempt to satisfy the law requires an analysis of the facts surrounding the submission, most courts applying the *Beard* test have found that post-SFR submissions are not returns. However, some lower courts applying the *Beard* test have concluded that debtors made an honest and reasonable attempt to satisfy the law, notwithstanding that they filed their return after an SFR had been issued, based on the particular facts explaining the cause of the delinquency. *See, e.g., In re Golden*, 641 B.R. 392, 407 (Bankr. E.D. Cal. 2022); *In re Briggs*, 511 B.R. 707, 718–19 (Bankr. N.D. Ga. 2014).

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[2] The IRS may prepare an SFR for a taxpayer who has failed to file a return, or has filed a false or fraudulent return, pursuant to its authority under 26 U.S.C. § 6020(b). The gross income shown on an SFR is generally based on information the IRS has received about the taxpayer from third parties, such as Forms W-2 (Wage and Tax Statement) and Forms 1099-INT (interest income). The IRS generally does not take marriage status or dependents into account on an SFR and only allows the taxpayer the minimum available standard deduction. After an SFR is produced, the IRS calculates tax, penalties, and interest and notifies the taxpayer of the impending assessment via a "30-day letter." Internal Revenue Manual ("IRM") 5.18.1.6.3 (03-11-2020), 5.18.1.6.5 (04-06-2016). If the taxpayer disagrees or does not respond, the IRS issues a 90-day Statutory Notice of Deficiency before making an assessment. IRM 5.18.1.6.6 (03-11-2020); *see generally* 26 U.S.C. § 6213.

The Eighth Circuit opted for a clearer rule in *In re Colsen*, 446 F.3d 836 (8th Cir. 2006), by adopting the *Beard* test but jettisoning any inquiry into the causes of the delinquency, reasoning that the "honesty and genuineness of the filer's attempt to satisfy the tax laws should be determined from the face of the form itself, not from the filer's delinquency or the reasons for it." *Id.* at 840. The Eighth Circuit accordingly concluded that a return filed after an SFR should be treated as a return for purposes of section 523(a)(1)(B)(i).[3] *Id.*

In 2005, Congress amended section 523 by adding a "hanging paragraph" that defines a return as one that "satisfies . . . the requirements of applicable nonbankruptcy law (including applicable filing requirements)." 11 U.S.C. § 523(a)(*). This amendment engendered another circuit split, as the First, Fifth, and Tenth Circuits interpreted the new language as precluding discharge if a debtor filed his tax return even one day after the deadline, creating the so-called "one-day rule." *See In re McCoy*, 666 F.3d 924, 932 (5th Cir. 2012) ("[A] state income tax return that is filed late . . . is not a 'return' for bankruptcy discharge purposes under § 523(a)."); *In re Mallo*, 774 F.3d 1313, 1321 (10th Cir. 2014) (concluding that applicable filing requirements include filing deadlines); *In re Fahey*, 779 F.3d 1, 10 (1st Cir. 2015) ("Congress's chosen test called for satisfying the filing requirements of applicable law, not merely making an 'honest attempt' to do so.").

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[3] We refer to the Eighth Circuit rule as the "face-of-the-return rule," and to the approach of the Fourth, Sixth, Seventh, and Ninth Circuits as the "*Beard*-test rule."

Adding further confusion to the already entrenched splits, the IRS maintains a policy that any submission filed after a tax has been assessed *per se* fails to qualify for discharge.[4] *See* I.R.S. Notice CC-2010-016 (Sept. 2, 2010). The *per se* rule usually produces the same outcome as the *Beard*-test rule because most courts have found that post-SFR submissions are not honest and reasonable attempts to satisfy the law. However, circuits applying the *Beard*-test rule have refused to adopt the *per se* approach. *See, e.g., In re Moroney*, 352 F.3d at 907 ("This simply goes too far. Circumstances not presented in this case might demonstrate that the debtor, despite his delinquency, had attempted in good faith to comply with the tax laws.").

Because the IRS's unique *per se* approach maintains that returns filed prior to assessment qualify for discharge, the IRS does not enforce the one-day rule in the circuits where it applies. This IRS policy mitigates the harsh impact of the one-day rule somewhat, but many debtors are still subject to the rule with respect to their state tax debts. Section 523(a)(1)(B)(i) refers to "a tax . . . with respect to which a return, or equivalent report or notice" was required without distinguishing between federal, state, and local tax debts.

Most states require residents and certain non-resident income earners to file annual income tax returns, so section 523(a)(1)(B)(i) applies to bar the discharge of those tax debts as well as federal tax debts. Several state tax authorities actively enforce the one-day rule. *See, e.g., In re Fahey*, 779 F.3d at 10

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[4] We refer to the IRS policy as the "*per se* rule."

(Massachusetts Department of Revenue); *In re McCoy*, 666 F.3d at 925 (Mississippi State Tax Commission). Thus, the impact of the one-day rule is still felt by debtors in the First, Fifth, and Tenth Circuits, who may have their federal tax debts discharged but not their state tax debts.

The current patchwork application of the law, which comprises three different analyses by the courts of appeals and a separate application by the IRS, serves no one and is not a faithful representation of Congressional intent. While it is Congress's prerogative to weigh the fresh start principle against other public interests, courts and governmental agencies have for decades been unable to agree on what Congress intended by section 523(a)(1)(B)(i). This case presents an opportunity for the Court to bring uniformity to the intersection of bankruptcy and tax law, areas in which uniformity holds special importance and is mandated by the Constitution.

B. Uniformity of Federal Law Is Always Desirable But Has Special Historical Importance in Bankruptcy and Tax Law

A basic tenet of our federalist system is that federal law applies consistently throughout the United States. Consistent application of federal law promotes fairness, certainty, and efficiency, and reduces opportunities for gamesmanship. While uniformity in federal law is always desirable, the Framers considered it so important to tax and bankruptcy law that they wrote it into the text of the Constitution itself. The bankruptcy clause and the taxing clause both contain a uniformity requirement. *See* U.S. Const., art. I, § 8, cl. 4 ("[The Congress shall

have Power . . .] To establish . . . *uniform* Laws on the subject of Bankruptcies throughout the United States[.]") (emphasis added); *see also id.* at cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, . . . but all Duties, Imposts and Excises *shall be uniform throughout the United States*[.]") (emphasis added).

These Constitutional uniformity requirements are generally understood to require parity in the application of the law to similarly situated subjects. *See Ry. Lab. Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 473 (1982) ("To survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors."); *Head Money Cases*, 112 U.S. 580, 594 (1884) ("[A] tax is uniform when it operates with the same force and effect in every place where the subject of it is found."). This basic rule of geographic nondiscrimination is no mere historical artifact – it is a real limitation on Congress's legislative power.

Facing a funding crisis in the United States Trustee System Fund in 2017, Congress enacted a large, temporary increase in fees applicable to certain bankruptcy cases. *See Siegel v. Fitzgerald*, 596 U.S. 464, 470 (2022). The fee increases were delayed for debtors in Alabama and North Carolina and applied only to newly filed cases in those states rather than pending cases as occurred in the rest of the country. *Id.* at 471. This Court struck down the law, finding that "the uniformity requirement of the Bankruptcy Clause prohibits Congress from arbitrarily burdening only one set of debtors with a more onerous funding mechanism than that which applies to debtors in other States." *Id.* at 480.

Compared with *Siegel*, the different applications of section 523(a)(1)(B)(i) have persisted for decades and affect debtors and creditors just as much, if not more. Tax debts are treated differently depending solely on where a debtor lived prior to filing for bankruptcy. To illustrate, a debtor who late-files his Massachusetts return and files for bankruptcy in the First Circuit can never have his tax debt discharged, while a debtor who late-files the same return but files for bankruptcy in the Eleventh Circuit may be able to discharge the tax debt. *Compare In re Fahey*, 779 F.3d at 10 (adopting the one-day rule in a case involving Massachusetts state taxes), *with In re Shek*, 947 F.3d 770, 781 (11th Cir. 2020) (rejecting application of the one-day rule to Massachusetts state taxes and finding that section 523 "does not incorporate a mandatory precondition that a tax return must be timely filed to be dischargeable"). If Congress had enacted section 523(a)(1)(B)(i) to apply differently to residents of the First Circuit and the Eleventh Circuit, the law would be blatantly unconstitutional. Although the disuniformity in this instance has come about from the courts, the current state of the law is contrary to Congress's and the Framers' intent.

The Framers understood that arbitrary geographic discrimination in federal law undermines faith in the federal government. In *Sturges v. Crowninshield*, 17 U.S. 122 (1819), this Court described the erosion of confidence that had been caused by the multitude of clashing state bankruptcy laws: "It was notorious, that the states had . . . allowed debts to be paid by instalments, and prohibited a recovery of the interest. All these evils, so destructive of public and private faith, and so embarrassing to commerce, the convention intended, doubtless, to prevent in future."

Id. at 133; *see also Cary v. Curtis*, 44 U.S. 236, 242 (1845) ("Regularity and certainty in the payment of [tax] revenue must be admitted by every one as of primary importance: they may be said almost to constitute the basis of good faith in the transactions of the government; to be essential to its practical existence.").

Particularly when it comes to tax administration, lack of public faith in the just and fair administration of the laws has serious practical consequences that continue today. Our tax system is one that relies on individual "self-assessment" and "voluntary compliance" to raise revenue. *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 350 (1977). Lack of confidence in the government is a severe threat to voluntary compliance. A 2024 study found that faith in government is a crucial factor in voluntary compliance, noting that "voluntary tax compliance behavior is positively and significantly influenced by trust in the government. Taxpayers who trust their government are more likely to comply than those who do not, according to the overall quota ratio value." Agumas Alamirew Mebratu, *Theoretical Foundations of Voluntary Tax Compliance: Evidence from a Developing Country*, 11 HUMANS. & SOC. SCIS. COMMC'NS 1, 6 (2024). The IRS has also stressed the importance of efforts to increase taxpayer confidence in response to findings that the Nation's tax gap bordered on $500 billion from 2014 to 2016.[5] *See* I.R.S.

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[5] The tax gap calculation reflects "the difference between estimated 'true' tax liability for a given period and the amount of tax that is paid on time." I.R.S. Press Release IR-2022-192 (Oct.

Press Release IR-2022-192 (Oct. 28, 2022) ("A one-percentage-point increase in voluntary compliance would bring in about $40 billion in additional tax receipts.").

The Framers knew from their experience under the Articles of Confederation that arbitrary geographic discrimination and disuniformity erodes faith in the federal government and poses a grave threat to our society. The current patchwork application of section 523(a)(1)(B)(i) hearkens back to an earlier time that the Framers sought to banish, when citizens were treated differently in their taxes and debts depending solely on where they lived. Such discriminatory treatment is inimical to public faith and voluntary compliance and should be ended as quickly as possible.

II. UNIFORM APPLICATION OF SECTION 523(A)(1)(B)(I) IS IMPORTANT FOR DEBTORS, BANKRUPTCY ADMINISTRATION, AND TAXING AUTHORITIES

Under the current patchwork application of section 523(a)(1)(B)(i), bankruptcy may not provide the relief from tax debts that Congress intended. Such a result is unjustifiable when the stakes for individual debtors are so high.

Tax debts significantly impinge on debtors' financial and personal well-being. At the federal level, a taxpayer's failure to pay an assessment after notice

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28, 2022), https://www.irs.gov/newsroom/irs-updates-tax-gap-estimates-new-data-points-the-way-toward-enhancing-taxpayer-service-compliance-efforts.

and demand automatically gives rise to a sweeping federal tax lien that attaches to "all property and rights to property" owned or subsequently acquired by the taxpayer. 26 U.S.C. § 6321; *see United States v. Nat'l Bank of Com.*, 472 U.S. 713, 719–720 (1985) ("[Section 6321] is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have."). The lien may be enforced by administrative levy, administrative seizure, and judicial remedies resulting in collections. 26 U.S.C. §§ 6331, 7401, 7402(a), 7403. The primacy of the federal tax lien makes it "the backbone of the federal tax collection process." Steve Mather & Paul Weisman, 637-3rd T.M., *Federal Tax Collection Procedure – Liens, Levies, Suits, and Third-Party Liability*, at I.

Because the federal tax lien arises automatically without any public filing, it is commonly referred to as a "secret lien." *United States v. Pioneer Am. Ins. Co.*, 374 U.S. 84, 89 (1963). The mere creation of the federal tax lien does not, however, afford the government priority over another creditor, nor is it enforceable against a bona fide purchaser. 26 U.S.C. § 6323(a). The IRS must file a public notice of federal tax lien ("NFTL") to have these effects. 26 U.S.C. § 6323(a), (f). The IRS generally files an NFTL when a debtor's aggregate unpaid balance is $10,000 or more, or a debtor resides outside the United States and has known assets. IRM 5.12.2.6 (10-14-2013).

Filing an NFTL can have devastating effects, impairing a debtor's ability to (1) finance a home or car, (2) obtain or hold down a job, (3) secure affordable housing or insurance, and ironically (4) repay the tax debt. Nat'l Taxpayer Advoc., *Annual Report to*

Congress, vol. 1, at 225 (2014), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2014-ARC_VOLUME-1-508.pdf; *see* Nat'l Taxpayer Advoc., *Annual Report to Congress*, vol. 2, at 111–12 (2012), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/Volume-2.pdf (concluding on the basis of research on the impacts of NFTLs that "lien filing was associated with negative outcomes for payment compliance behavior on the taxpayer's initial liabilities, negative filing compliance behavior, and negative impact on the amount of income earned by taxpayers in the years after the NFTL"). In 2023, the IRS filed a total of 179,019 NFTLs. IRS, *Internal Revenue Service Data Book*, at 61 (2023), https://www.irs.gov/pub/irs-pdf/p55b.pdf.

Unpaid tax debts can also prevent a debtor from being able to leave the United States. When a taxpayer has "seriously delinquent tax debt," defined as assessments greater than $62,000 enforced by an NFTL or levy, the IRS is authorized to relay that information to the State Department to deny, revoke, or limit the taxpayer's passport. 26 U.S.C. § 7345(a), (b), (f); Rev. Proc. 2023-34 § 3.60, I.R.B. 2023-48. Debtors who cannot discharge their tax debts in bankruptcy are thus confined both financially and physically, a harsh result that should only attach if clearly warranted by the law.

For debtors laboring under the consequences of tax debt, bankruptcy holds the promise of a fresh start and "restor[es] to the public at large the benefits of these debtors' entrepreneurial skills and energies." Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an*

Interpretive Theory, 21 U. RICH. L. REV. 49, 57 (1986). When tax debt persists after bankruptcy because a late-filed submission was not afforded the status of a return, it remains a stain on a debtor's credit and prevents the debtor and the public from realizing the benefits of a fresh start.

Apart from these substantive harms, the inconsistent application of section 523(a)(1)(B)(i) also leaves debtors in a precarious legal position. Inconsistency leaves debtors uncertain about whether bankruptcy, in fact, discharges their tax debt. This may cause some debtors to put off petitioning for bankruptcy and prolong their economic marginalization and lack of productivity. Once debtors take the step of filing a petition, uncertainty on the part of both debtors and taxing authorities regarding the application of section 523(a)(1)(B)(i) has caused unnecessary and wasteful litigation. A debtor or taxing authority may commence an adversary proceeding in bankruptcy to determine the dischargeability of a tax debt. Fed. R. Bankr. P. 4007(a), (b), 7001(6). But that is not required, as "a complaint to obtain a determination of any debt," with exceptions not relevant here, "may be filed at any time" including in a post-bankruptcy adversary proceeding or in collection action brought by the tax authority in federal or state court. Fed. R. Bankr. P. 4007(a), (b); *see, e.g.*, *Washington v. Commissioner*, 120 T.C. 114, 120–21 (2003). Thus, bankruptcy does not necessarily resolve whether a tax debt is dischargeable, and debtors may not even be aware that the issue persists until faced with a post-bankruptcy collection action.

In re Starling, 617 B.R. 208 (Bankr. S.D.N.Y. 2020), *rev'd*, No. 12-36564, 2021 WL 5547307 (S.D.N.Y. Sept. 16, 2021), is an example of how uncertainty regarding the application of section 523(a)(1)(B)(i) wreaks havoc. The debtor in that case filed a motion for contempt in response to efforts to collect tax debt after the debtor petitioned for bankruptcy, had a proof of claim filed against him by the IRS, satisfied the chapter 13 plan, and received a discharge order. *Id.* at 212. The bankruptcy court found that the tax debt was discharged, contrary to the IRS's argument that section 523(a)(1)(B)(i) applied, and considered:

> Instead of coming to this Court, filing an adversary proceeding, and asking this Court to declare that the taxes were nondischargeable, the IRS made its own determination that the debt was nondischargeable and proceeded with collection activity. It now must face the consequences of its erroneous assumption.

Id. at 223.

The bankruptcy court did not award damages against the IRS because the debtor did not exhaust administrative remedies, but it did award damages against the private collection agency that carried out the collection activities.[6] *Id.* The district court concluded that tax debt was not discharged and

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[6] The IRS is authorized to contract with private debt collectors and, in fact, is required to do so for the collection of "inactive tax receivables," because the taxpayer's location is unknown, the receivable has not been assigned within the IRS for collection, or there has been no interaction with the taxpayer. 26 U.S.C. § 6303(a), (c).

reversed. *In re Starling*, 2021 WL 5547307, at 3–7. The parties and the courts all viewed the dischargeability question differently, and this is far from the only case exhibiting disagreement regarding the effect of a discharge order on tax debt. *See, e.g., In re Wildeman*, No. 13-B-04868, 2021 WL 816068 (Bankr. N.D. Ill. Mar. 3, 2021); *Uplinger v. Virginia*, 561 B.R. 56 (E.D. Va. 2016); *In re Shek*, 578 B.R. 918 (Bankr. M.D. Fla. 2017); *In re Murphy*, No. 05-22363, 2013 WL 6799251 (D. Me. Dec. 20, 2013); *Woods v. Commissioner*, T.C.M. 2006-38; *In re Carroll*, 310 B.R. 621 (Bankr. D. Minn. 2004); *Ramsdell v. Commissioner*, T.C.M. 2003-317; *In re Waugh*, 260 B.R. 806 (N.D. Tex. 2001).

Additionally, debtors whose tax debts are not dischargeable are made demonstrably worse off by going through bankruptcy. Following bankruptcy, when a debtor's assets have been applied to pay other creditors, a debtor is particularly ill equipped to overcome the effects of an NFTL and repay the tax debt. Furthermore, the statute of limitations on collections is suspended for the duration of the automatic stay on collections under bankruptcy law plus an additional six months. 26 U.S.C. § 6503(h)(2). In this manner, bankruptcy prolongs rather than resolves the existence of tax debt and its consequences.

This is not to suggest that all tax debts are dischargeable. Section 523(a)(1)(B)(i) expresses Congress's judgment that certain tax debts are excepted from discharge. But to the extent some courts are misapplying the exception, they are harming debtors in ways that are significant and unjustified. There were 434,064 nonbusiness

bankruptcy cases filed in 2023. United States Courts, *U.S. Bankruptcy Courts – Business and Nonbusiness Cases Filed, by Chapter of the Bankruptcy Code, District, and County*, Report F-5A (2023), https://www.uscourts.gov/sites/default/files/data_tables/bf_f5a_0331.2024.pdf. Combined with the millions of taxpayers who file delinquent federal and state returns each year for various reasons,[7] including the common misconception that a taxpayer should not file a return unless he or she can also simultaneously pay the tax, the scope of the issue comes into focus. After two decades of inconsistent application, it is past time for this Court to determine the proper construction of section 523(a)(1)(B)(i).

By granting the petition, this Court would also benefit bankruptcy administration and tax authorities. The inconsistent application of section 523(a)(1)(B)(i) exacerbates the forum shopping in bankruptcy cases that has long been a concern. *See,*

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[7] Reasons catalogued by the IRS include: (1) death, serious illness or unavoidable absence; (2) fire, casualty, natural disaster or other disturbance; (3) unable to obtain records, (4) mistake; (5) erroneous advice or reliance; (6) ignorance of the law; (7) forgetfulness; and (8) inaccessible notices. IRM 20.1.1.3.2.2.1–8 (03-29-2023). The IRS does not publish the number of late-filed returns each year, presumably because what constitutes a late filing is difficult to say when considering that not all taxpayers are required to file or are penalized for failing to file timely. *See* 26 U.S.C. § 6651(a); IRS Pub. 501 at 2–5 (2023). IRS taxpayer delinquency investigations give some indication, of which there were over 2 million open investigations at the end of fiscal year 2023. *Internal Revenue Service Data Book*, *supra*, at 61. In fiscal year 2023, the IRS also processed 252,098 cases in the Automated Substitute for Return Program. *Id.* at 34. These data account for only a portion of the late-filed federal returns each year.

e.g., 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) (describing forum shopping as "the central dilemma with which bankruptcy law has struggled throughout its history"). Venue in consumer bankruptcy cases is determined by where the debtor most resided in the 180 days preceding the filing of the petition. 28 U.S.C. § 1408. A debtor's address could determine whether tax debt is discharged or not and is capable of manipulation by debtors in the leadup to filing a bankruptcy petition.

Granting the petition would benefit taxing authorities by ensuring they only expend resources collecting debts that are warranted by the law. The IRS has a duty to "collect the taxes imposed by the internal revenue laws." 26 U.S.C. § 6301. Prior to bankruptcy, the IRS may have already spent significant resources trying unsuccessfully to collect or compromise a tax debt. Post-bankruptcy, the job is that much harder, if not impossible, after the debtor's assets have been liquidated. Yet even in the face of dim collection prospects, the IRS cannot simply abandon its statutory duty. One option the IRS has is to place debtors in currently not collectable, or CNC, status, where the IRS delays collection until a debtor's financial status improves or the statute of limitations on collections expires. *See* IRM 5.16.1.1.1 (09-18-2018) ("The IRS balances the potential for collection against the costs and its ability to collect."). But CNC status requires careful evaluation and monitoring by the IRS. *See* IRM 5.16.1.2.9(1), (14) (11-14-2023) (explaining the process for monitoring whether a debtor's CNC status is justified). Accordingly, the IRS is also harmed by the inconsistent application of

section 523(a)(1)(B)(i), which may be keeping alive tax debts that should be dischargeable in bankruptcy and draining limited collection resources.

CONCLUSION

The College respectfully requests that the Court grant the Petition.

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