NO. 24-108

IN THE
Supreme Court of the United States

JOHN PAUL SALVADOR,

Petitioner,

v.

UNITED STATES et al.,

Respondent.

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

BRIEF OF A. LAVAR TAYLOR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*[1]

Amicus A. Lavar Taylor is a tax practitioner who has practiced law as a tax controversy attorney, with a sub-specialty in bankruptcy-related tax issues, for nearly 43 years. He previously worked for the IRS Office of Chief Counsel and as an Assistant U.S. Attorney, handling bankruptcy-related tax issues for his then-client, the Internal Revenue Service. He has litigated numerous tax-related bankruptcy cases in private practice as both counsel for parties and as *amicus* counsel. *See, e.g., Smith v. United States IRS (In re Smith),* 828 F.3d 1094 (9th Cir.2016 (as *amicus*), *Hawkins v. Franchise Tax Board,* 769 F.3d 662 (9th Cir. 2014 (as *amicus*), *Ilko v. Cal. State Bd. of Equalization (In re Ilko)*, 651 F.3d 1048 (9th Cir. 2011) (as debtor's counsel), *In re Taffi,* 68 F.3d 306 (9th Cir. 1995), *aff'd and modified,* 96 F.3d 1190 (9th Cir. 1996) (en banc), *cert. denied,* 521 U.S. 1103 (2007) (as debtor's counsel), *United States v. Klein (In re Klein),* 189 B.R. 505 (Bankr. C.D. Cal. 1995).

Amicus has counseled many hundreds of taxpayers on the extent to which they may be able to discharge their federal and state tax liabilities in bankruptcy. He continues to provide advice on this subject matter to his clients today.

Amicus also lectures on federal tax procedure, having been an adjunct Professor of Law at Chapter University Fowler School of Law for 20 years and

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[1] No person other than the named *Amicus* or their counsel authored this Brief or provided financial support for this Brief.

having also served as an adjunct Professor of Law at the University of California at Irvine Law School. He has litigated numerous tax-related issues outside of the bankruptcy area, including cases of first impression and cases involving unusual tax procedure issues. *See, e.g., United States v. Boyd,* 991 F.3d 1077 (9th Cir. 2021), *Keene-Stevens v. Commissioner,* 72 F.4th 1015 (9th Cir. 2023), *certiorari denied*, 114 S. Ct. 816, *Keller Tank Services II v. Commissioner*, 854 F.3d 1178 (10th Cir. 2017), *Gorospe v. Commissioner*, 451 F.3d 966 (9th Cir. 2006), *Couturier v. Commissioner,* 162 T.C. No. 4 (2024), *SECC v. Commissioner*, 142 T.C. 225 (2014).

Amicus is filing this brief in support of Petitioner to explain the urgent need for this Court to resolve the existing three-way split in authority on the issue of what constitutes a "return" for purposes of Bankruptcy Code §523(a). This split of authority is causing significant problems for both taxpayers who are contemplating the use of bankruptcy for the purpose of resolving their outstanding tax liabilities and practitioners such as *amicus* who advise them on the resolution of their outstanding tax liabilities.

SUMMARY OF ARGUMENT

Taxpayers with unpaid tax liabilities that they cannot pay in full have limited options for dealing with those liabilities. These limited opportunities include filing bankruptcy to discharge their tax liabilities when the rules established by Congress permit such a result. Tax practitioners who advise clients with unpaid tax liabilities pay careful

attention to the rules governing the dischargeability of tax liabilities in bankruptcy and advise their clients consistently with those rules.

Under section 523(a) of the Bankruptcy Code, taxpayers are not able to discharge taxes required to be shown on a return if the taxpayer has never filed the requisite "return." Thus, where a taxpayer has not filed a "return" as defined in the Bankruptcy Code, filing bankruptcy is not an option that is available for resolving an unpaid tax liability to which the "return" relates.

Section 523(a) of the Bankruptcy Code directs courts to look to "applicable non-bankruptcy law (including filing requirements)" to determine whether or not a "return" has been filed for purposes of section 523(a). There is now a three-way split among the Courts of Appeals on what constitutes a "return" for purposes of section 523(a). One of the three lines of cases is faithful to the directive that courts look to "applicable non-bankruptcy law" to determine whether a return has been filed. A second line of cases cites to applicable non-bankruptcy case law, but misinterprets this case law in a way that is detrimental to taxpayers. The third line of cases effectively ignores the Congressional directive to look to applicable non-bankruptcy law to resolve this issue.

Regardless of which of these three lines of cases is correct, the existing three-way split in the Circuits creates significant uncertainties for taxpayers who have unpaid tax liabilities and their advisors and

result in similarly situated taxpayers being treated differently, depending on the Circuit Court of Appeals in which they reside.

It is now time for this Court to resolve the existing three-way split in the Courts of Appeals. Failure of this Court to resolve the Circuit split and existing uncertainties now may result in an extended period of uncertainty going forward. That is because the current uncertainties create significant disincentives for taxpayers who are affected by the split in authority to attempt to resolve their existing tax liabilities through bankruptcy.

Taxpayers generally do not choose to resolve their existing tax liabilities by signing up to litigate a test case for years, all the way to the Supreme Court. They will generally choose a more efficient (and less costly) method of resolving their existing tax liabilities, thereby limiting future opportunities for this Court to resolve the Circuit split and existing uncertainties.

ARGUMENT

A. Introduction

Taxpayers who have unpaid tax liabilities and who have no hope of ever paying those unpaid tax liabilities in full have limited options for resolving those unpaid tax liabilities in a manner that will allow those taxpayers to move on with their lives. For example, the IRS allows taxpayers to seek relief from these liabilities through a process called an offer in compromise ("OIC"), whereby the taxpayer asks the

IRS to forgive a portion of the unpaid tax liabilities in return for the payment of a specific amount which the IRS determines is sufficient to warrant forgiveness of a portion of the unpaid taxes, based on the taxpayer's specific circumstances. *See* Internal Revenue Code (26 U.S.C.) §7122.

Another method available to some (but not all) taxpayers to resolve their unpaid tax liabilities is bankruptcy. Congress enacted a detailed set of rules governing when unpaid tax liabilities can be discharged by an individual in bankruptcy. Those rules are generally set forth in Bankruptcy Code (11 U.S.C.) §523(a)(1).

Congress has barred certain categories of taxes from being discharged by individuals in bankruptcy. The provision of the Bankruptcy Code at issue here, §523(a)(1), prohibits taxpayers from ever discharging in bankruptcy a tax liability for which a "return" was required but never filed by the taxpayer. In broad terms, if a taxpayer was required to file a tax return for a specific time period but did not file a tax return for that time period prior to filing for bankruptcy, the taxpayer may not discharge the tax liability.[2] Thus, the issue of what constitutes a "return" for purposes of Bankruptcy Code §523(a)(1) is of critical importance to those taxpayers contemplating the filing of bankruptcy. Those taxpayers need to know whether they have filed a "return" for the period(s) for which they have unpaid tax liabilities so that they can determine whether filing a bankruptcy for the

[2] There is a separate rule for tax-related penalties that are not pecuniary loss penalties. Bankruptcy Code §523(a)(7).

purpose of discharging their tax liabilities is a feasible alternative for them.

Taxpayers with unpaid tax liabilities typically seek advice from professionals on whether their unpaid tax liabilities are potentially dischargeable in bankruptcy. Professionals who give advice in this area need to provide accurate advice to their clients. Thus, these professionals and their clients need to understand what the rules are and there is consistency across jurisdictions. If the relevant taxes cannot be discharged in bankruptcy, the taxpayer must attempt to resolve their unpaid tax liability through some other method, such as an OIC.

B. The Three-Way Split in the Case Law

As is discussed in detail in Petitioner's Petition for Writ of Certiorari at pp. 10-22, there is an existing three-way split among the Courts of Appeal on the issue of what constitutes a "return" for purposes of Bankruptcy Code §523(a)(1). The flush language at the end of that section states that, for purposes of subsection 523(a),

> *the term "return" means a return that satisfies the requirements of applicable non-bankruptcy 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 non-bankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law. (emphasis added)

Despite the seemingly straightforward task of looking to applicable non-bankruptcy law to determine whether a taxpayer has filed a "return" for purposes of this subsection, courts have badly fractured in construing this provision.

One Circuit has looked solely to the factors set forth in *Beard v. Commissioner*, 82 T.C. 766 (1984) for purposes of determining whether a Form 1040 submitted to the IRS qualifies as "return" for purposes of §523(a)(1) of the Bankruptcy Code, regardless of when that Form 1040 was filed. *In re Colsen*, 446 F.3d 836 (8th Cir. 2006). The *Beard* test, drawing on this Court's opinion in *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934), continues to be the test under applicable non-bankruptcy law (i.e., the Internal Revenue Code) for purposes of determining whether a particular document qualifies as a "return." *See, e.g., YA Global Investments v. Commissioner*, 161 T.C. No. 11 (2023).

The test in *Beard* focuses on whether the tax form itself evinces an honest and genuine endeavor to satisfy the law. The *Beard* test does not focus at all whether the tax form in question was filed timely or was filed late. Nor, if the form was filed late, does the *Beard* test focus on the reasons why the tax form was

filed late. The Tax Court's focus in *Beard* was strictly on the characteristics of the tax form itself and whether the form evinces an honest and genuine endeavor to satisfy the law. *Beard v. Commissioner, supra.*

Other Courts of Appeal, such as the Ninth Circuit, have misconstrued the nature of the *Beard* test and have held that a tax form filed after a certain point in time normally cannot be a return for purposes of Bankruptcy Code §523(a), even if the information within the four corners of the tax form itself evinces a good faith effort to comply with the tax laws. Thus, in *In re Smith*, 828 F.3d 1094 (9th Cir. 2016), the Ninth Circuit held that a Form 1040 filed with the IRS after the IRS had sent the taxpayer a notice of deficiency to which the taxpayer did not respond, and after the IRS had assessed the taxes asserted in the notice of deficiency, was not a valid "return" for purposes of Bankruptcy Code §523(a). The Ninth Circuit left a very small window of opportunity open to avoid the application of this "bright line" test, without specifying what might convince the Ninth Circuit to avoid the application of that "bright line" rule. 828 F.3d at 1097.

The Ninth Circuit's rationale, *i.e.,* that the failure of a taxpayer to file a Form 1040 until after the IRS has assessed taxes set forth in a notice of deficiency sent to a taxpayer – to which the taxpayer did not respond – normally prevents the taxpayer from discharging the taxes shown on that Form 1040, is flawed. There is nothing in the *Beard* test that focuses on whether the tax form in question was filed

late or was filed after the IRS issued a notice of deficiency to the taxpayer and assessed the taxes asserted by the notice of deficiency.[3] Rather, the focus is on whether the tax form itself form evinces an honest and genuine endeavor to satisfy the law.

While the Ninth Circuit has misconstrued the requirements of the *Beard* test in the process of looking to "applicable non-bankruptcy law," other Courts of Appeal have completely disregarded the statutory mandate to look to applicable non-bankruptcy law for purposes of determining whether a "return" was filed for purposes of Bankruptcy Code §523(a)(1). *See, e.g., In re Fahey*,779 F.3d 1 (1st Cir. 2015), *In re McCoy*, 666 F.3d 924, 932 (5th Cir. 2012),*cert. denied sub nom. McCoy v. Miss. State Tax Comm'n*, 568 U.S. 822 (2012*); In re Mallo* , 774 F.3d 1313, 1321 (10th Cir. 2014), *cert. denied sub nom. Mallo v. IRS*, 576 U.S.1054 (2015).

These courts have relied on the parenthetical language "(including applicable filing requirements)" to hold that a Form 1040 (or its state law equivalent) that is filed "late" can never qualify as a "return" for Bankruptcy Code §523(a)(1). Per these courts, "applicable filing requirements" includes the

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[3] The taxpayer's reasons for failing to file a Form 1040 until after the IRS has assessed taxes shown in a notice of deficiency to which the taxpayer did not respond may be relevant for determining whether the taxes shown on the (very) late-filed Form 1040 may be relevant in determining whether the taxes shown on the Form 1040 are non-dischargeable because the taxpayer attempted to evade or defeat the taxes shown on the Form 1040. *See Hawkins v. Franchise Tax Board*, 769 F.3d 662 (9th Cir. 2014)

requirement that a "return" is required by law to be filed by a specific date. Thus, any "return" that is not filed on time, *i.e.*, that is filed one day late or even later, can never qualify as a "return" for purposes of Bankruptcy Code §523 (a).

The basic problem with the rationale relied on by these courts is that there is no known universe in which a Form 1040 (or its state law equivalent) that is filed "late," but otherwise meets the requirements of the *Beard* test, is *not* treated as a valid "return" under non-bankruptcy law. In other words, these courts have created an entirely new definition of a "return" for purposes of Bankruptcy Code §523(a)(1) that is completely detached from the reality of applicable non-bankruptcy law. Under applicable non-bankruptcy law, "returns" that are filed after the deadline for filing returns are nevertheless treated as "returns" under applicable non-bankruptcy law as long as the tax form itself meets the *Beard* requirements. *See, e.g., Soni v. Commissioner,* 76 F.4th 49 (3d Cir. 2023) (Form 1040 filed late treated as a valid return).

C. The Three-Way Circuit Split Creates Difficulties for Both Taxpayers and Their Advisors

Regardless of this Court's views on this issue, the three-way split of authority on the question of what constitutes a "return" for purposes of Bankruptcy Code §523(a) creates significant difficulties for taxpayers who are contemplating the possibility of filing bankruptcy to deal with their

federal and/or state tax liabilities. Simply put, taxpayers who are contemplating how to resolve their existing tax liabilities through bankruptcy face risky choices that could backfire at a later date if they choose to file for bankruptcy. Advisors who are being asked by taxpayers to advise them on whether it is possible to discharge the taxpayer's tax liability in bankruptcy are required to give complicated, messy, and sometimes difficult to comprehend responses to their clients' questions.

Consider the (simplified) advice that a competent tax practitioner must give their client based on the following (simplified) fact pattern. For year "X", Taxpayer A files a Form 1040 late, after the IRS issues a notice of deficiency for year X and after the IRS assesses the taxes asserted in the notice of deficiency against Taxpayer A. Similarly, Taxpayer A files the equivalent of a Form 1040 for year X with State Q after the State Q issued the equivalent of a notice of deficiency to Taxpayer A for year X and after State Q assesses the tax for year X against Taxpayer A. Both the Form 1040 and the state equivalent of the Form 1040 for year X late-filed by Taxpayer A accurately reflect Taxpayer A's income, deductions, taxable income, and tax liability. The amounts of taxes reflected on the late-filed tax forms exceed the amounts of taxes assessed by the IRS and State Q.

Taxpayer A now wants advice from Attorney Z as to whether A's federal and state income tax liabilities for year X can be discharged in a chapter 7 bankruptcy. This advice will vary dramatically depending on where the taxpayer resides. But there

will be an important commonality to the advice given to taxpayers in all locations, namely, the high degree of uncertainty as to if and when the law as it now exists will change. This high degree of uncertainty results from the three-way split in the Courts' of Appeal on the question of what constitutes a "return" for purposes of Bankruptcy Code §523(a).

If Taxpayer A lives in a jurisdiction within the Eighth Circuit, Taxpayer A will receive the following advice. They will be told that, under the law as it presently stands in the Eighth Circuit, they will be able to potentially discharge both IRS and State tax liabilities if they wait more than two years from the dates of the filing of the federal and state (late-filed) "returns" for year X, as required by Bankruptcy Code §523(a)(1)(B)(ii), subject to the following caveats.

The initial caveat is that, if between now and the two year anniversary of the filing of the "returns" for Year X, this Court grants a petition for certiorari to review the question of how to define a "return" for purposes of section 523(a), the rules as they currently exist in the Eighth Circuit may change. The taxpayer may lose their ability to discharge these tax liabilities for Year X, depending on how this Court rules.

The second caveat is that, if they move to a jurisdiction that is outside of the Eighth Circuit (for example, if they move from St. Louis, Missouri to an Illinois suburb of St. Louis), the rules will change at the time of the move, even if the Supreme Court does not grant review to resolve the existing split in authority. They will be told, if they move outside of

the Eighth Circuit, there are two possible sets of different rules that could apply and that, under either set of these different rules, they will likely not be able to discharge their tax liabilities for Year X, even after waiting the requisite two year period from the dates of the late-filing of the "returns." Of course, these two sets of different rules could themselves change if the Supreme Court grants review in a case to resolve the Circuit conflict and then the Court follows the rationale of the Eighth Circuit in its opinion. They will also be told that there is no way to predict if or when the Supreme Court will grant review.

If Taxpayer A lives in a jurisdiction that follows the rule set by the Ninth Circuit in *In re Smith, supra*, the taxpayer will receive the following advice. They will be told that they cannot discharge the taxes for Year X in a chapter 7 bankruptcy unless one of the following happens: 1) They move to a jurisdiction within the Eighth Circuit and they wait out the requisite two year period following the dates of the late-filing of the "returns," and the law in the Eighth Circuit does not change as the result of the Eighth Circuit's existing case law on this issue being overruled by the Supreme Court, 2) they wait the requisite two year period after the late-filing of the "returns" before filing bankruptcy, the Supreme Court grants review to resolve the Circuit conflict, and the Supreme Court rules consistently with the prior ruling of the Eighth Circuit, or 3) they wait the requisite two year period after the late-filing of the returns, the Supreme Court does not grant review in a case to resolve the Circuit conflict, and they happen to have a "good enough" explanation for not filing the

tax "returns" until the date they did file the returns (after assessments of taxes were made against the taxpayer) that they are allowed to take advantage of the small window of opportunity left open by the Ninth Circuit in *In re Smith* to avoid the application of a "per se" rule that treats all Forms 1040 filed after the issuance of a notice of deficiency and assessment of the taxes asserted in that notice of deficiency as legal nullities, even if the Forms 1040 satisfy the *Beard* test. *See In re Smith, supra*, 828 F.3d at 1097.

They will also be told that they will likely have to litigate to the applicable Circuit Court of Appeals to be able to take advantage of this small window, because the IRS continues to believe that there should be a "per se" loss of the ability to discharge taxes if "returns" are filed after the IRS has issued a notice of deficiency and assessed the taxes asserted in that notice of deficiency.

But they will also be told that, to the extent the amount of taxes shown on the late-filed "return" is greater than the amount of taxes asserted by the notice of deficiency, the IRS's current position is that they can discharge the "excess amount" of the taxes owed if they have waited the requisite two year period to file for bankruptcy and the taxes are otherwise dischargeable under the additional rules governing the discharge of tax liabilities in bankruptcy. *See* Petitioner' Petition for Certiorari at p. 18.

Finally, they will also be told that Courts of Appeal such as the Ninth Circuit that have ruled in litigation involving the IRS have never formally

rejected the "one day late" rule, discussed herein, because the IRS does not agree with or advocate for the application of the "one day late" rule. This means that it is theoretically possible for State Q to separately challenge the dischargeability of the state tax liability based on the "one day late" rule, even if the IRS ultimately agrees, or a court holds, that taxes owed to the IRS were dischargeable.

If Taxpayer A lives in a jurisdiction in which the courts have adopted the "one day late" rule, they will be given the following advice. They will not be able to discharge all of their taxes in bankruptcy except in the following circumstances. First, if they wait the requisite two year period after the late filing of the return, and if they move to a jurisdiction in the Seventh Circuit, and if the Supreme Court does not grant review to resolve the current split in authority, they will be able to discharge the tax liabilities in bankruptcy.

Second, if they wait the requisite two year period after late-filing their returns, and if the Supreme Court grants review of the issue of what constitutes a "return" for purposes of Bankruptcy Code §523(a) and if the Supreme Court adopts the position taken by the Eighth Circuit, they will be able to discharge the tax liabilities in bankruptcy.

They will also be told that, because the IRS does not administratively follow the "one day late" rule even in those jurisdictions where this rule is the law, it is possible that they could end up discharging the IRS taxes but not discharging the state taxes.

They would also be told that the IRS's refusal to administratively abide by the "one day late" rule in jurisdictions in which that rule is the law is a matter of the administrative grace of the IRS, administrative grace which could change at a moment's notice, without any advance warning.

In sum, the current situation is intolerable for both taxpayers who want to know whether they are able to discharge their tax liabilities in bankruptcy and professionals who advise those taxpayers. Taxpayers should not be required to face these uncertainties any longer, given that the uncertainties can be resolved by this Court if it grants review in the present case.

D. Future Opportunities to Resolve the Circuit Split May be Limited Because Taxpayers Generally Do Not Prefer to Spend Years of their Lives Litigating Cases All the Way to the Supreme Court to Find Out If Their Tax Liabilities Can be Discharged In Bankruptcy

Granting review in the present case is of particular importance because the case law in this area is well-developed. Taxpayers facing the choice of how to resolve unpaid taxes that they are unable to pay in full prefer to resolve their unpaid tax liabilities in a manner that is efficient as possible. They will generally choose certainty over uncertainty, to the extent that they are able to do so. They will also generally avoid spending years of their life litigating all the way to this Court the question of what

constitutes a "return" for purposes of Bankruptcy Code §523(a) in an effort to discharge their tax liabilities in bankruptcy, especially given that there is no guarantee that such an effort will be successful.

The uncertainties resulting from the existing three-way split in the Circuits acts as a strong disincentive for taxpayers to seek a resolution of their tax liabilities through bankruptcy. Taxpayers who enter the fray on the issue of "what is a 'return' for purposes of Bankruptcy Code §523(a)" now necessarily must do so with the understanding that, in order for them to prevail in Court, it is likely that they will be required to litigate all the way to this Court to be able to prevail. Taxpayers who are able to resolve their unpaid tax liabilities by more efficient (and less costly) means are very likely to do so.

As a practical matter, this means that future opportunities for this Court to resolve the existing three-way split in the Circuits are likely to be quite limited, but certainly not because the underlying issue has been resolved for taxpayers and their advisors. The existing uncertainties for taxpayers and their advisors could very well persist for years if this Court does not grant review in the present case.

The time for this Court to resolve these uncertainties is now, so that taxpayers and their professional advisors can make intelligent choices that have predictable consequences.

CONCLUSION

For the reasons set forth above, *Amicus* urges this Court to grant petitioner's petition for a grant of certiorari.

Respectfully submitted,

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