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

BRIEF OF AMICUS CURIAE CENTRAL DISTRICT CONSUMER BANKRUPTCY ATTORNEY ASSOCIATION (CDCBAA) IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

The CENTRAL DISTRICT CONSUMER BANKRUPTCY ATTORNEY ASSOCIATION (CDCBAA) is an association whose goal is to address issues and concerns which affect consumer bankruptcy attorneys and their clients in the Central District of California. It regularly schedules educational programs to assist its members in learning and maintaining a high level of knowledge and professionalism to best assist their consumer clients. It maintains a listserv where members can discuss legal issues that arise and may share their experience in addressing routine and unique issues. It publishes a newsletter which often focuses on practice tips or emerging trends, so that its members can be best prepared to serve their clients. The primary purpose of this organization is to address issues and concerns which affect consumer bankruptcy attorneys and their clients within the jurisdiction of the Central District, provide educational and networking opportunities for attorneys who primarily represent consumer bankruptcy debtors, and to carry on such other activities associated with these purposes as allowed by law.

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[1] Under Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Under Rule 37.2(a), *amicus curiae* states that all parties received notice of its intention to file this amicus brief at least 10 days before the due date.

INTRODUCTION

A critical task of any attorney, and in particular those representing consumers who are often not sophisticated about legal matters, is to advise their clients of the likely outcome of their case before undertaking active representation. In consumer bankruptcy representation most clients want to know the impact of the bankruptcy filing on the discharge of their debts, often the primary purpose for filing the case. Ideally, attorneys will be able to accurately assess the facts of their debtors' cases and advise them which debts are likely to be discharged and which might not be. Not the least of many debtors' concerns is what will happen to older tax debt: will it be discharged or will it survive the bankruptcy filing? A consumer bankruptcy attorney is best equipped to answer these questions if the law is well-settled or at least not ambiguous, uncertain, or subject to change.

When the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) amended 11 U.S.C. § 523(a) by adding the hanging paragraph which attempted to define "return," rather than clarifying the dischargeability of older taxes, it added a level of ambiguity not experienced before. This ambiguity has caused the three-way circuit split on the meaning of the word "return" in 11 U.S.C. § 523(a)(1)(B) and its impact on tax dischargeability when a return has been filed late, as highlighted in the Petition for Writ of Certiorari. The Ninth Circuit itself has an "almost but not quite" bright line test (that is described as "subjective") which is not entirely aligned with the other circuits who have addressed the "after assessment"

timing issue. The circuit split and the additional lack of uniformity within the three primary approaches make the job of the CDCBAA members-to advise their clients of potential outcomes-all that much more difficult.

The CDCBAA members would benefit in a very practical sense if the Supreme Court grants certiorari and settles the circuit split, which would provide certainty and predictability. Therefore, the CDCBAA files this amicus brief in support of the Petition, seeking the missing uniformity. As this brief concludes, it strongly supports a merits decision which would adopt the Eighth Circuit conclusion that a late-filed return, even if after assessment, is still a return, using an objective standard. This approach is best aligned with the general principle that exceptions to discharge should be narrowly construed and that an honest but unfortunate debtor – even one who files his tax returns late on occasion – is entitled to a fresh start.

ARGUMENT

A. The Circuit Split on Whether a Late-Filed Form 1040 is a "Return"

The Petition frames the issue presented as "[w]hether a late but otherwise correctly filed Form 1040 is a 'return' for purposes of § 523(a) of the Bankruptcy Code." The more specific inquiry is whether a late-filed return can qualify a tax debt for dischargeability under § 523(a)(1)(B)(ii). The troubling BAPCPA addition, referred to as the hanging paragraph for § 523(a), defines "return:"

> For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986 or a similar State or local law.

If the intent of Congress in adding this paragraph was to clarify what qualifies as a "return," it has done anything but achieve that goal. As the Petition explains, the Circuit Courts have developed three distinct general approaches to answering the question at hand. Three Circuits (the First, Fifth, and Tenth) hold that a return filed even one day late has not been filed in accordance with "applicable filing requirement" and therefore can never be a return for nondischargeability purposes. Six Circuits have generally held that a Form 1040 filed after the IRS has assessed the tax is not a return for nondischargeability purposes. A single Circuit, the Eighth, has held that a late-filed Form 1040 is still a tax return if the document, on its face, evidences a sincere effort to comply with the tax laws. Because of these irreconcilable approaches, the Petition urges the Supreme Court to step in to resolve the conflict. The CDCBAA firmly supports the necessity for that intervention. Without a uniform national standard, debtors who for any reason filed their tax returns after the deadline will receive widely disparate discharge outcomes when they file bankruptcy

cases in different Circuits. This outcome is intolerable when one considers that the bankruptcy law is a federal law with uniformity as its goal.

B. The One-Day Late Standard Is Not Even supported by the IRS

Three circuits, the First, Fifth and Tenth, rely on the fact that timeliness is an "applicable filing requirement" to conclude that any late-filed return cannot qualify for a bankruptcy discharge because of § 523(a)(1)(B). Referred to often as the "one-day late rule," this harsh standard is eschewed even by the IRS itself. The Petition highlights that this rule is contrary to published guidelines. Moreover, the IRS does not even urge this standard in active cases. *See*, for example, *United States v. Martin (In re Martin)*, 542 B.R. 479 (BAP 9th Cir. 2015), where the BAP notes that the IRS makes two alternate arguments for why the Martins' tax debt should be nondischargeable, neither of which turned on whether a tax payer filed the return before or after an assessment. But, as the BAP notes,

> [n]otably, neither side here advocates in favor of the literal construction of the "return" definition that Congress added to the nondischargeability statute . . . Indeed, in this case and in other cases, the IRS expressly has rejected the literal construction and has stated that the literal construction leads to 'overly harsh' results. [citations omitted].

Id. at 483.

Bankruptcy offers the honest but unfortunate debtor a chance at a fresh start. Where in the application of the one-day-late rule is there any recognition of that goal? There are many reasons why a well-

meaning debtor might miss a filing deadline, not the least of which is he misunderstood the actual due date when extensions have been granted for the pandemic or natural disasters. Or maybe he rushed to the post office and missed the midnight closing by minutes. Perhaps the return was delayed in the mail when a tax preparer sent it back to the debtor for filing. Or using more current filing techniques, maybe the debtor was not tech savvy and messed up electronic filing for a day. Or a serious health condition or circumstances rendered the tax payer unable to "timely" file the return leaving no room for a sincere effort to comply. If debtors reside in one of the three draconian Circuits, they can *never* discharge any unpaid taxes for the year in which an inadvertent mistake or circumstances beyond their control occurred. The Supreme Court can obviate these calamities by granting certiorari and disavowing this unfair and punitive application of the hanging paragraph.

C. Though Treated as Uniform Among Them, the Six Circuits Have Approached the After-Assessment Filing Using Different Reasoning and Have not Adopted a Bright Line Rule

Because their fact patterns all involved post-assessment returns where the IRS had already prepared a substitute return and assessed the taxes, most commentators and many courts lump the six circuits together (Fourth, Sixth, Seventh, Eleventh Ninth, and usually the Third). However, a close reading of these decisions belies that they reached their conclusions for the same reasoning. The Sixth Circuit in *In re Hindenlang*, 164 F. 3d 1029, 1034-35 (6th Cir. 1999), said that a post-assessment return is generally not a

return under the *Beard* test[2] because, as a matter of law, a return filed too late to have any effect under the Internal Revenue Code is not a return: it does not constitute an "honest and reasonable attempt" to comply with the tax law. Despite its "matter of law" ruling, the Sixth Circuit did not adopt a bright line test that every post-assessment return is not a return, but many have read it to effectively do so.

The Fourth Circuit in *In re Moroney*, 352 F. 3d 902, 907 (4th Cir. 2003), said that whether a post-assessment return is effective under the Internal Revenue Code does not matter. It adopted the more general view that "to belatedly accept responsibilities for one's tax liabilities, only when the IRS has left one with no other choice, is [not] how honest and reasonable taxpayers attempt to 'comply' with the tax law." *Id.* The Fourth Circuit also did not adopt a bright line rule. It is noteworthy that these two most-cited cases regarding post-assessment returns were both decided *before* the hanging paragraph was added by BAPCPA in 2005.

Three cases in the Ninth Circuit, often read together, deal with post-assessment returns and cause this circuit to be lumped into the six-circuit majority, *In re Hatton*, 220 F. 3d 1057, 1060-61 (9th Cir. 2000); *In re Smith*, 838 F. 3d 1094 (9th Cir. 2016); and sand-

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[2] The *Beard* test, which is widely-accepted among the federal courts of appeals for determining whether a filing qualifies as a return, is derived from a Tax Court case from 1984, *Beard v. Comm'r*, 82 T.C. 766, 777 (1984), *aff'd*, 793 F. 2d 139 (6th Cir. 1986) (per curiam). The four prongs are the filing (1) must purport to be a return; (2) be executed under penalty of perjury; (3) contain sufficient data to allow calculation of the tax; and (4) represent an honest and reasonable attempt by the taxpayer to satisfy the requirements of tax law.

wiched in between them *In re Martin*, 542 B.R. 479 (BAP 9th Cir. 2015), which primarily added that the *Beard* test still applied post-BAPCPA. In *Hatton* when the debtor failed to timely file a return and did not respond to notices, the IRS prepared a substitute return, assessed the tax, and eventually began collection efforts. Only after those efforts did the debtor enter into an installment repayment plan, which he followed until he filed bankruptcy and attempted to discharge the tax debt. The Ninth Circuit determined the installment agreement failed the *Beard* test because it was not signed under penalty of perjury. As an additional reason for the debtor failing the *Beard* test, the Ninth Circuit considered the "honest and reasonable" prong in light of the debtor's continual attempts to avoid paying the taxes, concluding that prong was also not met. It is significant that the Ninth Circuit did not follow the reasoning of *Hindenlang*. But, like the Sixth Circuit, the Ninth Circuit did not adopt a bright line rule.

In *Smith*, the debtor filed tax forms three years after the IRS assessed the tax. In his forms he reported a higher tax due than the IRS found. The IRS conceded that the additional liability reported on the late-filed returns was discharged but again relied on the "honest and reasonable attempt" prong to conclude the debtor failed the *Beard* test. In reaching that conclusion, however, it held that "[u]nder these circumstances" the attempt to comply was not reasonable. *Smith*, 828 F. 3d at 1096-07. No bright line test; in fact, *Smith* used a subjective test based on the specific facts before the Circuit, noting that the question of whether any post-assessment return could

be "honest and reasonable" is a close question. *Id.* at 1097.

This brief describes these three circuit cases in particular to highlight that, although often lumped together for reaching generally similar conclusions, there are distinctions among them, exacerbating the circuit split even more.

D. The Ninth Circuit's *Hatton* and *Smith* Leave Consumer Practitioner's Uncertain How to Advise Their Clients

The facts in both *Hatton* and *Smith* are egregious attempts by tax payers either to ignore their duties to file tax returns and pay the taxes which would be due under them or to affirmatively evade their tax debt and then attempt to use the Bankruptcy Code to discharge them. It is no surprise the Ninth Circuit concluded in both cases that the returns failed the fourth prong of the *Beard* test; *i.e.*, that the that the late-filed returns did not represent "honest and reasonable" efforts to comply with tax laws. The debtors never attempted in the first instance to file returns for the relevant years. They ignored repeated notifications to come forward and talk to the IRS after substitute returns had been filed. Only when collection efforts made their lives uncomfortable did they try to enter into installment agreements to pay the tax. Weighing these facts and circumstances, the Ninth Circuit concluded that under a subjective *Beard* test the debtors' taxes could not be discharged because of the provisions of § 523(a)(1)(B). Yet neither court adopted a bright line standard that a post-assessment return would never qualify for a discharge. In addition, neither court faced what would happen if a return was late-

filed but before any assessment had actually been imposed.

A considerable chasm exists between the facts of *Hatton* and *Smith* and the facts usually presented by consumer debtors to their counsel. Many have failed to file their tax returns by the deadlines for widely-varied reasons that crop up in the mundane lives of families trying to get by, often experiencing debt levels which in the end they cannot maintain. These people are the clients of CDCBAA members. They present these attorneys with a dilemma about how to advise the debtors about discharging taxes, particularly if the IRS assessed the tax before the debtors filed returns. Will an inquiry into what might be good faith reasons the tax returns were not timely file make any difference? Should they advise potential debtors to wait the required two years after they filed their returns and then file because their reasons for late-filed returns represented "honest and reasonable" efforts? Or should they just file now, accepting that, irrespective of the reasons for the honest and genuine attempt at a return filing following assessment, the tax won't be discharged?

The Ninth Circuit cases do not presently answer those questions. By granting certiorari, the Supreme Court can provide those answers.

E. The Eighth Circuit Objective *Beard* Test Approach is Preferable

The facts presented to the Eighth Circuit in *Colsen v United States (In re Colsen)*, 446 F. 3d 836 (8th Cir. 2006) are similar to those before the other Circuits regarding post-assessment late-filed returns. Mr. Colsen failed to timely file tax returns from 1992-

96. The IRS prepared substitute returns, issued notices of deficiencies, and assessed taxes in 1999. In late 1999 Mr. Colsen filed 1040 forms and four years later filed for bankruptcy, seeking to discharge the tax debt despite the provisions of § 523(a)(1)(B)(i). The IRS objected, arguing that the after-assessment 1040's were not returns. The bankruptcy court and bankruptcy appellate panel ruled for the debtor and the Eighth Circuit affirmed. It rejected the holdings and reasoning of *Hindenlang, Moroney*, and *In re Payne*, 431 F. 3d 1055 (7th Cir. 2005), favoring instead a dissent in *Payne* by Judge Easterbrook, who asserted that the court had "conflated the objectives of obtaining accurate financial data and maximizing tax revenues, and had insinuated a motive requirement into the definition of 'return' that the cases used to formulate that definition do not support." *Colsen*, 446 F. 3d at 840.

> The Eighth Circuit looked at Supreme Court authority in *Badaracco v. Commissioner*, 464 U.S. 386, 397 (1984), where the Court had observed that even admittedly fraudulent returns can be returns under the tax laws if they "appeared on their faces to constitute endeavors to satisfy the law." They applied the *Badaracco* objective assessment as compatible with the fourth prong of the *Beard* criterion: 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. We think that to do so would increase the difficulty of administration and introduce an inconsistency into the terminology of the tax laws. We therefore 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 reasons for it. The filer's subjective intent is irrelevant.

Colsen, 446 F. 3d at 840.

The CDCBAA submits that the Eighth Circuit got it right. The Ninth Circuit analysis-avoiding an examination of the form itself, but rather focusing solely on delinquency-is forlorn and fails to properly address the equitable considerations a bankruptcy affords the honest but unfortunate debtor. The nonuniform decisions and flexible standards set forth in the other Circuit rulings have "increase[d] the difficulty of administration and introduce[d] an inconsistency into the terminology of the tax laws." It is that inconsistency that this Court can prevent by granting certiorari in this case. A definitive ruling, one that follows the objective simplicity of *Colsen*, would allow the CDCBAA members to properly advise their debtor clients who have filed their tax returns late whether those taxes may be discharged in bankruptcy. It would also achieve the uniformity that the Bankruptcy Code is intended to bring to bankruptcy courts around the country. When a Circuit split exists, as is evident on this issue, only the Supreme Court can assure that uniformity.

CONCLUSION

For the reasons stated above, the CDCBAA urges this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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