No. 24-108

In the Supreme Court of the United States

JOHN PAUL SALVADOR, PETITIONER,

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE PETITIONER

JOHN N. TEDFORD, IV
DANNING, GILL, ISRAEL & KRASNOFF, LLP
1901 Avenue of the Stars, Suite 450
Los Angeles, CA 90067
(310) 277-0077

ANDREW T. TUTT
Counsel of Record
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

CATHERINE M. LANGHANS
CALEB THOMPSON
CLAIRE A. FAHLMAN
MAX GOULD
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th St.
New York, NY 10019
(212) 836-8000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

In the Supreme Court of the United States

JOHN PAUL SALVADOR, PETITIONER,

v.

UNITED STATES OF AMERICA.

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

REPLY BRIEF FOR THE PETITIONER

This case presents a significant conflict over a recurrent question of federal law with profound implications for millions of Americans. The government concedes the existence of a circuit split and does not dispute the exceptional importance of this issue. Further percolation will not aid the Court in resolving the question. The split has persisted for decades, and it will not resolve itself: as the Ninth Circuit made clear below, it will not revisit its position because doing so "would only further entrench the existing inter-circuit split." Pet. App. 4a. This case is a clean vehicle to resolve the question presented. The Court should grant the petition for certiorari and resolve the substantial, entrenched, decades-long circuit conflict in this case.

The government concedes the significant circuit split over the dischargeability of tax debts in bankruptcy cases and admits that the IRS takes its own "different approach." Opp. 6, 9, 15. Unable to deny the obvious circuit conflict, the government suggests waiting for the Eighth Circuit to "revisit" its precedent. Opp. 15. But nearly 20 years have passed since the Eighth Circuit's

decision in *In re Colsen*, 446 F.3d 836 (8th Cir. 2006), and Congress's enactment of the hanging paragraph at the end of 11 U.S.C. § 523(a). If the Eighth Circuit has not revisited it by now, it is unlikely to do so in the near future. Moreover, even if the Eighth Circuit were to revisit *Colsen* and adopt a new position, it would still leave intact the deep and enduring split between the "one-day-late" circuits and the "*Beard* test" circuits. Opp. 8-9. It would also leave the IRS using its own separate approach that, like *Colsen*, treats the timeliness of a Form 1040 as irrelevant to whether it constitutes a "return." Opp. 9-10.

The government does not contest the critical importance of this issue. The impressive array of *amicus* briefs from tax and bankruptcy scholars, practitioners, and professional associations underscores the immense importance of this issue to ordinary people as well as the tax and bankruptcy bars. *See* Brief of Profs. Nicholas L. Georgakopoulos, et al. as *Amici Curiae* 1-3 (Law Professors *Amicus* Br.); Brief of the American College of Tax Counsel as *Amicus Curiae* 1-3 (College *Amicus* Br.); Brief of the Center for Taxpayer Rights as *Amicus Curiae* 1-4 (Center *Amicus* Br.); Brief of A. Lavar Taylor as *Amicus Curiae* 1-4 (Taylor *Amicus* Br.); Brief for Central District Consumer Bankruptcy Attorney Association as *Amicus Curiae* 1-3 (CDCBAA *Amicus* Br.). That the government does not anywhere in its brief contest this issue's critical national importance speaks volumes.

Finally, the government does not dispute that there are no obstacles to this Court's review of the question presented or that this case is an ideal vehicle to resolve it. Nor does the government contest that petitioner would prevail under the Eighth Circuit's approach from *Colsen*. This case presents the ideal opportunity to address this important question that is critical to the dischargeability

of tax debts for millions of Americans. The Court should grant certiorari and reverse.

ARGUMENT

I. THE GOVERNMENT CONCEDES THE CIRCUIT SPLIT

This is the rare remarkable case where a party opposing the petition for certiorari readily admits that a circuit split exists. The government acknowledges that the Third, Ninth, and Eleventh Circuits "have concluded that the *Beard* test applies when determining whether a filing" is a "return" for purposes of discharge, Opp. 7, while "three other courts of appeals" apply the "one-day-late rule." Opp. 8.

The government also concedes that "the IRS does not treat filing deadlines as 'applicable filing requirements' that must be 'satisfie[d]' to count as a 'return' defined by Section 523(a)(*)." Opp. 10. The government admits that under the IRS's view of the law, whether a Form 1040 is filed late is *irrelevant* to whether it is a "return." Opp. 10 (explaining that, even if a Form 1040 is filed post-assessment, the IRS will treat "the portion of the tax that was not previously assessed" as "potentially dischargeable").[1]

---

[1] The government provides a lengthy explanation of the IRS's official position, but misses an important nuance. The IRS's view is that when the IRS assesses a tax with respect to which no return has been filed at the time of the assessment, the debt is based on the assessment, not a return. Pet. App. 36a. Thus, according to the IRS, even if a return confirming the accuracy of the assessment is filed and accepted by the IRS, the debt still is one "with respect to which a return was not filed" and, pursuant to section 523(a)(1)(B)(i), is not dischargeable. *Id.* The IRS therefore tries to frame the question as being whether a tax debt is based on an assessment instead of a later-filed return. Courts have consistently rejected the IRS's position because, among other things, federal tax debts are created by the Internal Revenue Code, not the assessment process that calculates and records the liability, and under the

The government's only dispute with petitioner is over whether *In re Colsen* is still the law in the Eighth Circuit. Opp. 13-15. As an initial matter, whether *Colsen* remains the law or not, the split between the Third, Ninth, and Eleventh Circuits, on the one hand, the First, Fifth, and Tenth, on the other hand, and the IRS on still another hand, would still warrant review. And the government does not dispute that the one-day-late rule has considerable bite for taxpayers compared to the more lenient rule that permits discharge until the IRS assesses the tax.

In any event, the Eighth Circuit will almost certainly treat *Colsen* as binding if that Circuit ever revisits it. In the years since the hanging paragraph was added to 11 U.S.C. § 523(a) by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, § 712(2), 119 Stat. 128-29, three Circuits have continued to use the *Beard* test to determine whether a late-filed Form 1040 is a return, *See In re Smith*, 828 F.3d 1094, 1097 (9th Cir. 2016); *In re Justice*, 817 F.3d 738, 746-47 (11th Cir. 2016); *In re Giacchi*, 856 F.3d 244, 248-49 (3d Cir. 2017). And at least one court has said that, with an exception not relevant to this case, the definition of "return" added by BAPCPA "effectively codified the *Beard* test." *In re Martin*, 542 B.R. at 489-90. No Circuit has jettisoned its pre-BAPCPA reliance on the *Beard* test

---

Bankruptcy Code the debt exists regardless of whether the tax has been assessed. *See In re Mallo*, 774 F.3d 1313, 1326 (10th Cir. 2014); *In re Martin*, 542 B.R. 479, 491-92 (B.A.P. 9th Cir. 2015).

The government's opposition may give the impression that the IRS's position has a relationship to the *Beard* test (Opp. 10-11) but it does not. The *Beard* test is used exclusively to determine whether a document filed with the IRS is a "return." Opp. 3. At base, the government does not treat timeliness as a relevant factor in determining whether a Form 1040 is a return. *See* Opp. 9-11; *see also* Pet. App. 31a-37a.

in favor of the one-day-late approach, and there is no reason to think that the Eighth Circuit would do so.

The Eighth Circuit's rule in *Colsen* is just a different *approach* to applying the *Beard* test, a test that three Circuits hold still applies even after BAPCPA.[2] *See In re Giacchi*, 856 F.3d at 248 (recognizing that *Colsen* applies a version of the *Beard* test). The government's position that the Eighth Circuit could reverse course and reject the *Beard* test in its entirety is bewildering given that the

---

[2] And *Colsen*'s approach is a persuasive one, as numerous commentators have recognized. *See* Kristi R. Sutton & Inan Uluc, *If It Looks Like a Duck, Swims Like a Duck, and Quacks Like a Duck, It Is Probably a Duck!—Whether Late-Filed Tax Returns Constitute "Returns" for Purposes of Discharge Under § 523*, 93 Am. Bankr. L. J. 111, 138 (2019) (endorsing for the Eighth Circuit's approach); Nicholas J. Huffmon, *Putting the Hanging Paragraph Out to Pasture: Reconciling the Mandates of Bankruptcy and Tax Law*, 103 Iowa L. Rev. 1729, 1751 (2018) (proposing a legislative amendment that "expressly adopts the view of Judge Easterbrook and the Eighth Circuit, which most closely aligns with the rationale in *Beard*."); Timothy M. Todd, *Discharge of Late Tax Return Debt in Bankruptcy: Fixing BAPCPA's Draconian Hanging Paragraph*, 24 Am. Bankr. Inst. L. Rev. 433, 462 (2016) (the "no-time-limit approach from *Colsen*" is the better interpretation of *Beard* because it "comports with the various construction canons, provides a sensible balance between tax enforcement and discharge, and honors the goal of giving the debtor a fresh start."); John N. Tedford, IV, *Dischargeability of Non-Priority Taxes for Which a Tax Return Was Not Timely Filed*, 2020 Norton Ann. Surv. of Bankr. L. 183 (2020 ed.) ("If the Supreme Court accepts review, it should hold that the No-Time-Limit Approach adopted by the Eight Circuit in *Colsen* is correct."); John N. Tedford, IV, *Dischargeability of Nonpriority Taxes for Late-Filed Tax Return*, 38-SEP Am. Bankr. Inst. J. 14, 15 (Sept. 2019) ("The no-time-limit approach adopted by the Eighth Circuit in *Colsen* … gives full effect to § 523(a)(1) and (*), and maintains the balance struck more than 50 years ago between the debtor's need for a fresh start and the government's need for sufficient time to conduct its auditing, assessment and collection functions.").

United States has consistently and repeatedly argued that the *Beard* test remains the correct test for determining whether a Form 1040 is a "return" even after BAPCPA. *See id.* at 247 (explaining the United States's argument that the *Beard* test governs after BAPCPA); *In re Smith*, 828 F.3d at 1096 (same); *see* U.S. Br. at 20, *In re Justice*, No. 15-10273 (11th Cir.), Dkt. 20, https://bit.ly/3YheXCj (arguing the post-BAPCPA test "remains the *Beard* test").

Thus, if the Eighth Circuit takes the position the United States has consistently advocated for, and holds, as the Third, Ninth, and Eleventh Circuits have, that BAPCPA did not abrogate the *Beard* test in nondischargeability proceedings, *Colsen* will remain the law in the Eighth Circuit notwithstanding BAPCPA's addition of § 523(a)(*). The government's suggestion that the Court should wait for the Eighth Circuit to "revisit its pre-BAPCPA precedent in light of the intervening amendments," Opp. 15, contradicts the government's own longstanding position that BAPCPA did not displace the *Beard* test.

At bottom, the circuit split at issue in this case, whether it is two-ways, three-ways, or four-ways, is longstanding, deeply entrenched, and ripe for the Court's review. This split has persisted for decades and will not resolve without this Court's intervention. Only this Court can bring uniformity to federal law on this important issue.

II. THE GOVERNMENT DOES NOT DISPUTE THAT THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

The government does not dispute the exceptional importance of the question presented. Nor does it dispute that this issue recurs frequently for individuals facing bankruptcy across the nation. This question impacts millions of Americans who file for bankruptcy each year,

dictating whether they can discharge old tax debts and secure the "fresh start" central to bankruptcy law. The divergent rulings among the courts of appeals create a situation where a debtor's ability to discharge tax debts hinges solely on where the debtor files—an arbitrary distinction that flies in the face of the Constitution's requirement for uniform bankruptcy laws. This inconsistency also hampers the IRS's ability to administer tax laws and collect revenue effectively. The government's silence on these critical points is deafening.

And as the *amici* explain, a decision from this Court endorsing *Colsen* and holding that late filed tax returns are always potentially dischargeable in bankruptcy would have a massive positive impact on debtors nationwide. *See* College *Amicus* Br. 18-20; Center *Amicus* Br. 18-19; Law Professors *Amicus* Br. 24; CDCBAA *Amicus* Br. 12.

As the American College of Tax Counsel writes, this case warrants the Court's review because "debtors whose tax debts are not dischargeable are made demonstrably worse off by going through bankruptcy." College *Amicus* Br. 18. "[C]ourts are misapplying the exception" and "harming debtors in ways that are significant and unjustified." *Id.* "Tax debts significantly impinge on debtors' financial and personal well-being." *Id.* at 13. And ending uncertainty over the question presented "would benefit taxing authorities by ensuring they only expend resources collecting debts that are warranted by the law." *Id.* at 20.

As observed by the Center for Taxpayer Rights, reversal in this case would "put an end to the excessively harsh consequences [for low- and moderate-income taxpayers who are also bankruptcy debtors] doled out by most circuits." Center *Amicus* Br. 18-19 (noting that this issue "most gravely affects those least equipped to endure the financial implications of being denied a clean slate").

As the Professors of Tax and Bankruptcy Law aptly highlight, "[t]he 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." Law Professors *Amicus* Br. 24.

And finally, as the CDCBAA emphasizes: "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." CDCBAA *Amicus* Br. 12.

The importance of the question presented to millions of Americans is undeniable and undisputed in this case. Given the conceded split in authority, it is hard to imagine case more suitable for the Court's review than this one.

III. THE COURT SHOULD REVIEW THIS QUESTION NOW

The Court should review this question now. The arguments on all sides have been fully aired over decades of litigation, and additional percolation will not benefit the Court's consideration of this issue. As the American College of Tax Counsel notes, "[a]fter 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." College *Amicus* Br. 3. As A. Lavar Taylor, a distinguished tax practitioner and lecturer on federal tax procedure explains: "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." Taylor *Amicus* Br. 4. Thus, "the existing uncertainties could very well persist for years if

this Court does not grant review in the present case." *Id.* at 17. And the CDCBAA stresses that "[o]nly" this Court can intervene to bring uniformity to federal law on this important issue. CDCBAA *Amicus* Br. 12.

The government points to no vehicle problems that would impede the Court's review of the question presented, nor are there any. The outcome of this case turns entirely on the purely legal question presented, a question that was outcome-determinative in the Ninth Circuit below. This split is deeply entrenched and will not resolve itself. As the Ninth Circuit made clear in declining to revisit its precedent, doing so "would only further entrench the existing inter-circuit split." Pet. App. 4a. Only this Court can resolve this circuit conflict and bring uniformity to this important area of federal law. It should do so in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JOHN N. TEDFORD, IV
DANNING, GILL, ISRAEL & KRASNOFF, LLP
1901 Avenue of the Stars, Suite 450
Los Angeles, CA 90067
(310) 277-0077

ANDREW T. TUTT
Counsel of Record
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

CATHERINE M. LANGHANS
CALEB THOMPSON
CLAIRE A. FAHLMAN
MAX GOULD
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th St.
New York, NY 10019
(212) 836-8000

OCTOBER 2024