No. 16-786

In the Supreme Court of the United States

CHRISTOPHER MICHAEL JUSTICE, PETITIONER

v.

INTERNAL REVENUE SERVICE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 11 U.S.C. 523(a)(1)(B) renders non-dischargeable in bankruptcy petitioner's tax debts, where petitioner did not file a Form 1040 with respect to those debts until after the Internal Revenue Service had assessed the taxes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-18a) is reported at 817 F.3d 738. The opinion of the district court (Pet. App. 19a-38a) is not published in the *Federal Supplement* but is available at 2014 WL 11294741. The opinion of the bankruptcy court (Pet. App. 39a-63a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 2016. A petition for rehearing was denied on September 19, 2016 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on December 16, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. A debtor who receives a discharge under Chapter 7 of the Bankruptcy Code is generally discharged

from personal liability for all debts incurred before the filing of the petition. 11 U.S.C. 727(b). Under 11 U.S.C. 523, however, certain debts are exempt from discharge. As relevant here, a discharge does not cover "any debt"—

> (1) for a tax or a customs duty—
>
> * * * * *
>
> (B) with respect to which a return, or equivalent report or notice, if required—
>
> (i) was not filed or given; or
>
> (ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition.

11 U.S.C. 523(a)(1)(B). Under this provision, tax debts with respect to which no return was filed are nondischargeable. Tax debts with respect to which a return was filed late are potentially dischargeable, so long as the return was filed two years or more before the bankruptcy petition was filed.

In the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, § 714(2), 119 Stat. 128-129, Congress added a definition of "return" to an unnumbered hanging paragraph at the end of Section 523(a):

> 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 or-

> der 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.

11 U.S.C. 523(a)(*).[1] Section 6020(a) of the Internal Revenue Code authorizes the Secretary of the Treasury to prepare a return for a taxpayer if the taxpayer provides "all information necessary for the preparation thereof." 26 U.S.C. 6020(a). Section 6020(b) authorizes the Secretary to prepare a return for a taxpayer without the taxpayer's cooperation, based on the information available to the Secretary at the time. 26 U.S.C. 6020(b).

The "applicable nonbankruptcy law" here is federal tax law. The Internal Revenue Code does not define the term "return." It is well-accepted, however, that a filing qualifies as a "return" for purposes of federal tax law if it provides "sufficient data to calculate tax liability"; the filing "purport[s] to be a return"; the taxpayer has made "an honest and reasonable attempt to satisfy the requirements of the tax law"; and the taxpayer has "execute[d] the return under penalties of perjury." *Beard* v. *Commissioner*, 82 T.C. 766, 777 (1984), aff'd, 793 F.2d 139 (6th Cir. 1986) (per curiam); see *Badaracco* v. *Commissioner*, 464 U.S. 386, 397 (1984); *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172, 180 (1934); *Florsheim Bros. Drygoods Co.* v. *United States*, 280 U.S. 453, 461-462 (1930). This is known as the *Beard* test.

2. Petitioner did not file federal income tax returns for the years 2000, 2001, 2002, and 2003 within the time

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[1] This brief denotes the BAPCPA definition of "return" as Section 523(a)(*).

required by law. Pet. App. 6a; see 26 U.S.C. 6072(a), 6081(a); 26 C.F.R. 1.6081-4(a). As a result, the Internal Revenue Service (IRS) "attempted to determine [petitioner's] liability for those years using third-party information." Pet. App. 6a. Pursuant to this determination, on August 28, 2006, the IRS made assessments of petitioner's unpaid federal income tax, penalties, and interest for the tax years 2000, 2001, 2002, and 2003. *Ibid.*

"On October 22, 2007, after the IRS had issued notices of deficiency to him and assessed his liability, [petitioner] prepared Forms 1040 for all four tax years and delivered them to the IRS." Pet. App. 7a. "The forms were tendered between three (for the 2003 tax year) and six (for the 2000 tax year) years late." *Ibid.* "For each tax year, [petitioner] reported a lower tax liability than the IRS had assessed" based on its own determinations. *Ibid.* Based on the information reported in those late-filed Forms 1040, the IRS abated a portion of the assessments it had made against petitioner in 2006. *Ibid.*

a. On July 22, 2011, petitioner filed a voluntary Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Middle District of Florida. Pet. App. 7a. Petitioner received his discharge on November 4, 2011. *Ibid.* Nearly a year later, on October 30, 2012, petitioner brought an adversary proceeding against the IRS to determine the dischargeability of his assessed 2000, 2001, 2002, and 2003 federal income tax debts. *Id.* at 23a, 43a.

On September 27, 2013, the bankruptcy court granted summary judgment in favor of the government, holding that petitioner's assessed tax debts were nondischargeable. Pet. App. 39a-63a. The court first

held that the requirement that the statutory deadline for filing tax returns was not an "applicable filing requirement[]" within the meaning of Section 523(a)(*). *Id.* at 51a. The court then addressed *Beard*'s definition of "return." The court concluded that where, as here, the debtor filed tax forms "for no discernible reason from three to six years after their due date and after the IRS had already assessed the taxes," those forms "did not serve a purpose under the Internal Revenue Code" and, under *Beard*, "were not honest and reasonable attempts to comply with the requirements of the tax law." *Id.* at 62a. Accordingly, the court concluded, petitioner's untimely Forms 1040 did not constitute "returns" for purposes of Section 523(a)(1)(B)(i). *Ibid.*

b. Petitioner appealed to the United States District Court for the Middle District of Florida, which affirmed. Pet. App. 19a-38a. The court held that petitioner's assessed tax debts were nondischargeable. The court held that the definition of a "return" in Section 523(a)(*) "explicitly incorporates the factors delineated by the court in *Beard*, which decision constitutes 'applicable nonbankruptcy law.'" *Id.* at 29a. Applying *Beard*, the court concluded that petitioner's untimely Forms 1040 were not "returns" because petitioner had failed "to demonstrate that his belated Forms 1040 reflected an honest and *reasonable* attempt to comply with the tax laws." *Id.* at 32a. The court explained that "[t]he fact that the IRS abated a portion of [petitioner's] tax liability does not mean that [petitioner's] Forms 1040 were an honest and reasonable attempt to comply [with] the tax laws." *Id.* at 33a. "Under [petitioner's] approach, the availability of a discharge would turn on the IRS' accuracy in assessing

taxes, rather than on [petitioner's] diligence in comply[ing] with the tax code." *Ibid.* "That is not the test." *Id.* at 34a.

c. The court of appeals affirmed. Pet. App. 3a-18a. Applying the *Beard* test, the court held that the post-assessment filings here did not qualify as "return[s]" within the meaning of Section 523(a)(*). *Id.* at 11a-12a, 18a. A "taxpayer's behavior does not evince an honest and reasonable effort to satisfy the requirements of the tax law," the court concluded, where the taxpayer "files many years late, without any justification at all, and only after the IRS has issued notices of deficiency and assessed his tax liability[.]" *Id.* at 17a.

The court did not decide whether an untimely filing could *ever* qualify as a "return" for purposes of Section 523(a)(*). Pet. App. 17a n.8. The court noted that several circuits have viewed statutory deadlines for filing a return as "applicable filing requirements" within the meaning of Section 523(a)(*), and have held that non-compliance with those deadlines renders nondischargeable a tax debt from any late-filed return. *Id.* at 9a. The court did not decide whether that interpretation was correct, however, because the *Beard* test led to the same result (nondischargeability) on the facts of this case involving a post-assessment filing. *Id.* at 10a-11a.

ARGUMENT

The court of appeals' judgment is correct, does not implicate any conflict among the courts of appeals, and does not warrant further review. The court below held that petitioner's tax debts for 2000, 2001, 2002, and 2003 are non-dischargeable under 11 U.S.C. 523(a)(1)(B)(i). The court concluded that petitioner's Forms 1040, filed "many years late, without any justification at all, and

only after the IRS has issued notices of deficiency and has assessed his tax liability," were not "returns" within the meaning of 11 U.S.C. 523(a)(1)(B)(i) and 523(a)(*). Pet. App. 17a.

Although the circuits have differed somewhat in their approaches to dischargeability under those provisions, every court of appeals that has addressed the specific question in this case has reached the same result: when the IRS has already assessed a tax debt for a given year, a debtor cannot make that debt dischargeable by filing a Form 1040 years later that reports debt the IRS has previously identified. This Court recently denied other petitions for writs of certiorari presenting the same question. See *Smith* v. *Internal Revenue Serv. (In re Smith)*, No. 16-497, 2017 WL 670222 (Feb. 21, 2017); *Mallo* v. *Internal Revenue Serv. (In re Mallo)*, 135 S. Ct. 2889 (2015) (No. 14-1072); see also *McCoy* v. *Mississippi State Tax Comm'n (In re McCoy)*, 133 S. Ct. 192 (2012) (No. 11-1469) (denying certiorari in a case involving a post-assessment state-tax filing). There is no reason for a different result here.

1. The judgment below is correct under the analysis applied by every court of appeals to consider the issue under the current version of Section 523(a), as well as under the IRS's somewhat different approach.

a. Section 523(a)(1)(B)(i) precludes discharge of any tax debt "with respect to which a return * * * was not filed." 11 U.S.C. 523(a)(1)(B)(i). Section 523(a)(*) defines a "return" as a "return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)." 11 U.S.C. 523(a)(*). The court of appeals below held that the *Beard* test applies when determining whether a filing satisfies the requirements of "applicable nonbankruptcy law." Pet.

App. 11a (quoting 11 U.S.C. 523(a)(*)). The court further held that petitioner's belated Forms 1040 were not "returns," under *Beard*, because they were filed "many years late, without any justification at all, and only after the IRS ha[d] issued notices of deficiency and ha[d] assessed his tax liability." *Id.* at 17a. Those forms did not satisfy the *Beard* test because they did "not evince an honest and reasonable effort to satisfy the requirements of the tax law." *Ibid.*

The court of appeals did not address a possible alternate basis for reaching the same conclusion. The court did not discuss whether the federal requirements for filing a timely return constitute "applicable filing requirements" within the meaning of 11 U.S.C. 523(a)(*). The court therefore did not address whether, separate and apart from the fact that the IRS had already assessed tax debts when petitioner filed his Forms 1040, petitioner's failure to comply with the applicable filing deadline took his Forms 1040 outside Section 523(a)(*)'s definition of "return." The court "assume[d] *arguendo* that the applicable filing requirements Congress envisioned in the hanging paragraph do not include filing deadlines," but expressly declined to so hold. Pet. App. 11a.

The Ninth Circuit recently followed a similar approach. That court applied *Beard* to hold that a Form 1040 filed after assessment of a tax was not a "return" as defined in Section 523(a)(*), without deciding whether filing deadlines are "applicable filing requirements." See *Smith* v. *Internal Revenue Serv. (In re Smith)*, 828 F.3d 1094, 1097 (2016), cert. denied, No. 16-497, 2017 WL 670222 (Feb. 21, 2017).[2]

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[2] In *Maryland* v. *Ciotti (In re Ciotti)*, 638 F.3d 276, 280 (2011), the Fourth Circuit applied *Beard* as the "applicable nonbankrupt-

b. Three courts of appeals have reached substantially the same result through a different textual analysis. Those courts have concluded that a post-assessment filing was not a "return" as defined in Section 523(a)(*), not by applying *Beard*, but instead on the grounds that filing deadlines are "applicable filing requirements." *Fahey* v. *Massachusetts Dep't of Revenue (In re Fahey)*, 779 F.3d 1, 4 (1st Cir. 2015) ("timely filing" is "plainly" a "filing requirement" for a state tax return); *Mallo* v. *Internal Revenue Serv. (In re Mallo)*, 774 F.3d 1313, 1321 (10th Cir. 2014) ("§ 523(a)(*) plainly excludes late-filed Form 1040s from the definition of a [federal] return."), cert. denied, 135 S. Ct. 2889 (2015); *McCoy* v. *Mississippi State Tax Comm'n (In re McCoy)*, 666 F.3d 924, 931-932 (5th Cir.) (similar for state taxes), cert. denied, 133 S. Ct. 192 (2012). The practical consequence of that interpretation is that an untimely filing can never qualify as a "return." Under that approach, any tax debt for which a Form 1040 was filed late is nondischargeable, since Section 523(a)(1)(B)(i) bars discharge of any debt "for a tax * * * with respect to which a return * * * was not filed or given."

c. Where it is not bound by contrary circuit precedent, the IRS relies on a somewhat different interpretation of Section 523(a), albeit one that produces the same result (*i.e.*, that petitioner's tax debts are nondischargeable) under the circumstances presented here. See IRS, Office of Chief Counsel, Notice No. CC-2010-

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cy law" under Section 523(a)(*), without addressing lateness or "applicable filing requirements." Rather, the Fourth Circuit held that a "report" of a change of income that Maryland law required to be filed (but that Ciotti had never filed) was a "return, *or equivalent report or notice*" within the meaning of Section 523(a)(1)(B). See *id.* at 279 (quoting 11 U.S.C. 523(a)(1)(B)).

016 (Sept. 2, 2010), *Litigating Position Regarding the Dischargeability in Bankruptcy of Tax Liabilities Reported on Late-Filed Returns and Returns Filed After Assessment* 1-3 (*Chief Counsel Notice*).[3] In the IRS's view, if a taxpayer files a Form 1040 late but before the IRS has made an assessment—*e.g.*, if a taxpayer misses the April 15 deadline by a few days—the IRS regards the taxpayer as having filed a "return" within the meaning of Section 523(a)(1)(B)(i) with respect to the entire tax debt for that year. Under that view, the entire debt is dischargeable so long as the debtor waits more than two years to file a bankruptcy petition. See *id.* at 2-3; 11 U.S.C. 523(a)(1)(B)(ii). By contrast, if the IRS has already made an assessment and a subsequent filing reports additional tax liability, "only the portion of the tax that was not previously assessed" would be potentially dischargeable under Section 523(a)(1)(B)(ii). *Chief Counsel Notice* 3. "The portion of a tax that was assessed before a Form 1040 was filed would be a debt for which no return was 'filed' within the meaning of section 523(a)(1)(B)(i), because at the time of assessment the debtor had not met the filing requirements for that portion of the tax and the assessed portion was not calculated based upon the tax reported on the Form 1040." *Ibid.*

The IRS thus does not treat filing deadlines as "applicable filing requirements" within the meaning of Section 523(a)(*). See *Chief Counsel Notice* 2. In the IRS's view, construing Section 523(a)(*)'s definition to mean that a late-filed Form 1040 can *never* be a "return" would cause that definition to function at cross-purposes with 11 U.S.C. 523(a)(1)(B)(ii), which refers

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[3] http://www.irs.gov/pub/irs-ccdm/cc_2010_016.pdf

to late-filed "return[s]" and expressly contemplates that debts with respect to which such returns were filed may be dischargeable. The IRS's approach also avoids rendering superfluous Congress's statement that a "return" does not "include a return made pursuant to section 6020(b)." 11 U.S.C. 523(a)(*). Because Section 6020(b) returns are, by definition, late, that statement would be unnecessary if late-filed documents were categorically excluded from Section 523(a)(*)'s definition of "return." See 26 U.S.C. 6020(b)(1).

Under the IRS's approach, however, an untimely filing will qualify as a Section 523(a)(*) "return" only if it serves the fundamental purpose of a federal tax return: "self-report[ing] to the IRS sufficient information that the returns may be readily processed and verified." *Moroney* v. *United States (In re Moroney)*, 352 F.3d 902, 906 (4th Cir. 2003). "The very essence of our system of taxation lies in the self-reporting and self-assessment of one's tax liabilities." *Ibid.*; see, *e.g.*, *United States* v. *Galletti*, 541 U.S. 114, 122 (2004); *United States* v. *Boyle*, 469 U.S. 241, 249 (1985); *Commissioner* v. *Lane-Wells Co.*, 321 U.S. 219, 223 (1944). A Form 1040 can sometimes serve that self-reporting purpose even though it is filed after the deadline. But tax forms filed *after assessment* serve no such purpose with respect to any liabilities that have already been assessed. *Moroney*, 352 F.3d at 906.

d. Petitioner urges this Court to adopt a rule of dischargeability that neither the IRS nor any court of appeals has accepted under the current version of Section 523(a). In petitioner's view, a taxpayer could "seek the safe haven of bankruptcy by failing to file tax returns, waiting to see if the IRS assesses taxes on its own, and then submitting statements long after the

IRS has been put to its costly proof." *Moroney*, 352 F.3d at 907. The taxpayer would need only to wait two years before seeking bankruptcy protection, and then could obtain a discharge of the entire tax debt, including the assessed amount. It is unlikely that Congress intended such a result. As to any previously assessed debts, a taxpayer's post-assessment filing does not further the self-reporting function that a tax return is intended to serve. An assessed tax debt of this nature therefore is naturally viewed as one "with respect to which a return * * * was not filed." 11 U.S.C. 523(a)(1)(B)(i).

2. Contrary to petitioner's assertions (Pet. 6-14), there is no conflict among the circuits as to whether a tax filing made years after assessment of a tax qualifies as a "return" as defined in Section 523(a)(*). As explained above, three circuits have held that a late filing *never* qualifies as a return because filing deadlines are "applicable filing requirements." See *Fahey*, 779 F.3d at 5; *Mallo*, 774 F.3d at 1321; *McCoy*, 666 F.3d at 931-932. Two circuits have held more narrowly that a post-assessment filing does not qualify as a Section 523(a)(*) "return" if it fails to satisfy the *Beard* test, without determining the proper treatment of a filing that is submitted after the statutory deadline but before any tax has been assessed. See Pet. App. 11a; *Smith*, 828 F.3d at 1097. But every circuit to have addressed the question has agreed that a Form 1040 filed years after the IRS assessed the tax debt is not a "return" within the meaning of Section 523(a)(1)(B)(i) and 523(a)(*). There is consequently no reason to believe that any other circuit would have held petitioner's assessed tax debts to be dischargeable.

Petitioner contends (Pet. 11-12, 23) that the decisions described above conflict with *Colsen* v. *United States (In re Colsen)*, 446 F.3d 836 (8th Cir. 2006). In *Colsen*, the Eighth Circuit read *Beard* to mean that a Form 1040 could qualify as a "return," even if the taxpayer filed it after assessment, so long as the form "contained data that allowed the IRS to calculate [a] tax obligation more accurately." *Id.* at 840-841. The post-assessment filing in *Colsen* resulted in a partial abatement of liability, but the court allowed the taxpayer to discharge the entire debt. *Ibid.* No other circuit has agreed with that reading of the statute.

The different outcome in *Colsen* does not establish a circuit conflict on the question presented here, however, because *Colsen* was decided under pre-BAPCPA law. The Eighth Circuit in *Colsen* declined to apply the recently-enacted definition of "return" in Section 523(a)(*) because the bankruptcy petition in that case "was filed before the Act's effective date." 446 F.3d at 839; see *Mallo*, 774 F.3d 1320 (distinguishing *Colsen* on this basis); *Fahey*, 779 F.3d at 10 (same); *McCoy*, 666 F.3d at 930 (same). Under the current statutory language, *Colsen*'s interpretation of the *Beard* test is no longer sufficient to conclude that a post-assessment filing is a "return": "In addition to meeting the requirements of applicable nonbankruptcy law, to qualify as returns under § 523(a), tax forms [now] must comply with applicable filing requirements." *Mallo*, 774 F.3d at 1320. The Eighth Circuit has not addressed whether a post-assessment filing satisfies "applicable filing requirements" within the meaning of Section 523(a). Accordingly, it remains an open question in that circuit whether a Form 1040 filed

after assessment qualifies as a "return" under Section 523(a)(1)(B)(i) and 523(a)(*).[4]

3. The fact that the circuit courts have adopted somewhat different approaches when interpreting Section 523(a)(*) provides no basis for further review in this case. As explained above, the judgment below is correct under either approach adopted by the courts of appeals, as well as under the IRS's approach. Because neither the agency nor any court of appeals has adopted petitioners' interpretation of the current version of Section 523(a), further review is not warranted. This Court recently denied other petitions presenting the same question, *Smith* v. *Internal Revenue Serv. (In re Smith)*, No. 16-497, 2017 WL 670222 (Feb. 21, 2017); *Mallo* v. *Internal Revenue Serv. (In re Mallo)*, 135 S. Ct. 2889 (2015) (No. 14-1072), as well as a petition presenting the same question in the context of a post-assessment state-income-tax filing, *McCoy* v. *Mississippi State Tax Comm'n (In re McCoy)*, 133 S. Ct. 192 (2012) (No. 11-1469). There is no reason for a different result here.

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[4] *Colsen* created a circuit conflict under the pre-BAPCPA version of the statute, with the other circuits applying *Beard* to hold that a post-assessment filing does not qualify as a "return." See *In re Payne*, 431 F.3d 1055, 1057-1059 (7th Cir. 2005); *Moroney*, 352 F.3d at 905-907; *United States* v. *Hatton (In re Hatton)*, 220 F.3d 1057, 1060-1061 (9th Cir. 2000); *United States* v. *Hindenlang* (*In re Hindenlang*), 164 F.3d 1029, 1034-1035 (6th Cir.), cert. denied, 528 U.S. 810 (1999). That conflict has no prospective importance and is not presented here, however, because the statute has been amended.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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