No. 14-921

In the Supreme Court of the United States

JAMES CHARLES VAUGHN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
CAROLINE D. CIRAOLO
Acting Assistant Attorney General
BRUCE R. ELLISEN
RACHEL I. WOLLITZER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly upheld the bankruptcy court's determination that petitioner had acted "willfully," within the meaning of Section 523(a)(1)(C) of the Bankruptcy Code, 11 U.S.C. 523(a)(1)(C), in attempting to evade his 1999 and 2000 income tax liabilities.

TABLE OF CONTENTS

Page

Opinions below ... 1
Jurisdiction ... 1
Statement ... 2
Argument ... 10
Conclusion ... 19

TABLE OF AUTHORITIES

Cases:

Birkenstock, *In re,* 87 F.3d 947 (7th Cir. 1996) ... 14
Cheeks v. *United States,* 498 U.S. 192 (1991) ... 17
Dalton v. *IRS*, 77 F.3d 1297 (10th Cir. 1996) ... 8
Gardner v. *United States (In re Gardner),* 360 F.3d 551 (6th Cir. 2004) ... 14
Hawkins v. *Franchise Tax Bd.*, 769 F.3d 662 (9th Cir. 2014) ... 15, 16, 17, 18
Safeco Ins. Co. of Am. v. *Burr*, 551 U.S. 47 (2007) ... 17
United States v. *Coney*, 689 F.3d 365 (5th Cir. 2012 ... 14
United States v. *Fegeley (In re Fegeley)*, 118 F.3d 979 (3d Cir. 1997) ... 14
United States v. *Fretz (In re Fretz),* 244 F.3d 1323 (11th Cir. 2001) ... 14
United States v. *Johnston*, 268 U.S. 220 (1925) ... 12
United States v. *Pomponio*, 429 U.S. 10 (1976) ... 17

Statutes and rule:

Bankruptcy Code:
11 U.S.C. 523(a) ... 11
11 U.S.C. 523(a)(1)(C) ... *passim*
11 U.S.C. 1141 ... 2
11 U.S.C. 1141(d)(1) ... 2

Statute and rule—Continued: Page

Internal Revenue Code, 26 U.S.C. 7201 17

Sup. Ct. R. 10 12

Miscellaneous:

I.R.S. Notice 2000-44, 2000-2 C.B. 255 4

In the Supreme Court of the United States

No. 14-921

JAMES CHARLES VAUGHN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 765 F.3d 1174. The opinion of the district court (Pet. App. 24-38) is not published in the *Federal Supplement* but is available at 2013 WL 1324377. The opinion of the bankruptcy court (Pet. App. 39-75) is reported at 463 B.R. 531.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 2014. A petition for rehearing was denied on October 30, 2014 (Pet. App. 76-77). The petition for a writ of certiorari was filed on January 27, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under Section 1141 of the Bankruptcy Code, a Chapter 11 debtor is generally discharged from all debts that arose before confirmation of the plan. 11 U.S.C. 1141(d)(1). Under Section 523(a)(1)(C) of the Code, however, a debtor is not discharged "from any debt * * * for a tax * * * with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax." 11 U.S.C. 523(a)(1)(C). This case concerns the standard for determining whether a debtor acted "willfully" within the meaning of Section 523(a)(1)(C).

2. Petitioner is a former cable television executive and the founder of FrontierVision Partners, LP (FrontierVision), a cable television acquisition company. Pet. App. 2. In 1999, FrontierVision was sold to another company. *Ibid.* As a result of the sale, petitioner received approximately $20 million in cash and $11 million worth of the purchasing company's stock. *Id.* at 2-3.

In order to avoid paying tax on that income, petitioner participated in a tax shelter known as Bond Linked Issue Premium Structure (BLIPS). Pet. App. 3-5. BLIPS, which was marketed by the international accounting firm KPMG LLC, "used a combination of a small cash investment, a loan, and a loan premium" to artificially increase a taxpayer's basis in partnership assets in order "to facilitate a high tax loss without a corresponding economic loss" when those assets were sold. *Id.* at 26; see *id.* at 42-44 (describing the BLIPS scheme in greater detail).

In October 1999, petitioner contributed $2.8 million to the BLIPS shelter, and two months later he withdrew from the transaction that had generated the

BLIPS losses. Pet. App. 45-47. Petitioner subsequently testified that the amount of his BLIPS contribution and the timing of his BLIPS withdrawal were designed to generate the tax loss necessary to offset his capital gains from the sale of FrontierVision. *Id.* at 4.

On his 1999 income tax return, petitioner reported more than $30 million in capital gains, including gains from the FrontierVision sale. Pet. App. 5. Petitioner also reported losses from the BLIPS shelter that were nearly sufficient to offset those gains. *Ibid.* Petitioner later admitted that "the returns were structured to show a small net capital gain rather than showing the entire amount of BLIPS losses." *Id.* at 65.[1] Petitioner testified that, when he signed that return, he understood that his BLIPS losses did not represent any actual economic loss. *Id.* at 5-6, 48.

Before petitioner signed his tax return, KPMG advised him that, "in order for a BLIPS transaction to withstand a challenge by [the Internal Revenue Service (IRS)], a participant needed to have a legitimate profit motive in the BLIPS investment." Pet. App. 4. Although the letter stated KPMG's view that the BLIPS tax shelter would "more likely than not" withstand scrutiny, *id.* at 5, petitioner signed a statement acknowledging that the BLIPS scheme was aggressive and might be successfully challenged by the IRS.

---

[1] Petitioner reported a short-term capital loss of approximately $32.3 million, but the paper losses generated by the BLIPS transaction totaled approximately $42 million. Pet. App. 5, 47. Petitioner admitted at his deposition (but denied at trial) that he had been instructed by a KPMG partner not to report the full amount of the BLIPS losses on his return to avoid arousing the IRS's suspicion over the validity of the claimed loss. *Id.* at 5-6.

Id. at 4-5. Petitioner "appreciated the risks associated with BLIPS, stating he understood the BLIPS program 'as a choice between paying $9 million of taxes currently or claiming the benefits of [the BLIPS] losses and paying $3 million currently with some risk of paying more taxes later.'" *Id.* at 4 (citation omitted).

In 2000, the IRS issued a notice informing taxpayers that the use of a loan premium to create an artificially high basis in partnership assets was invalid under the tax laws. See I.R.S. Notice 2000-44, 2000-2 C.B. 255. The notice explained that purported losses from such a transaction would be disallowed because they did not represent bona fide losses reflecting actual economic consequences. *Ibid.* "[T]he type of transactional scheme described in the notice perfectly described BLIPS." Pet. App. 6. By February 2001, KPMG had advised petitioner of the notice and provided him with a copy of it. *Ibid.*

In September 2001 petitioner divorced his wife and became engaged to Kathy St. Onge. Pet. App. 7. That same month, petitioner spent approximately $1.7 million in cash to purchase a house, which he titled in St. Onge's name only. *Ibid.* Petitioner and St. Onge married in October 2001. *Ibid.*

In February 2002, KPMG representatives informed petitioner that the IRS would likely identify him as a BLIPS participant and would audit his 1999 tax return. Pet. App. 8. KPMG encouraged petitioner to voluntarily disclose his BLIPS participation in order to avoid certain tax penalties under an IRS settlement initiative. *Ibid.*

On March 4, 2002, petitioner established a $1.5 million irrevocable trust for his stepdaughter, St. Onge's

daughter. Pet. App. 8. Petitioner named St. Onge as the trustee and secondary beneficiary. *Ibid.* Approximately three weeks later, petitioner disclosed his participation in the BLIPS shelter to the IRS under the settlement initiative. *Ibid.* In May 2002, the IRS notified petitioner that it would audit his 1999 tax return. *Ibid.*

During their marriage, petitioner and St. Onge spent large amounts of money on luxury items. Pet. App. 9. Between October 2001 and April 2003, they "spent thousands of dollars in monthly charges to various credit card accounts," spent "similarly substantial sums of money on such things as home decoration, jewelry, and cars," and withdrew $157,000 in cash from their bank accounts. *Ibid.* In March 2003, petitioner and St. Onge divorced. *Ibid.*

In June 2004, the IRS notified petitioner of a tax deficiency of approximately $8.6 million for the 1999 tax year, arising from the disallowance of his BLIPS losses. Pet. App. 10. The IRS subsequently notified petitioner of a tax deficiency of approximately $120,000 for the 2000 tax year, arising from the disallowance of a BLIPS-related expense. *Ibid.*

3. In November 2006, petitioner filed a Chapter 11 bankruptcy petition. Pet. App. 11. The IRS filed a proof of claim of approximately $14 million for petitioner's 1999 and 2000 income tax liabilities. *Ibid.* Petitioner commenced this adversary proceeding, seeking a determination that those liabilities were dischargeable in the bankruptcy. *Ibid.*

a. After a trial, the bankruptcy court concluded that petitioner's 1999 and 2000 tax debts were excepted from discharge under 11 U.S.C. 523(a)(1)(C) for two independent reasons: (1) because petitioner had

"made a fraudulent return," and (2) because he had "willfully attempted in any manner to evade or defeat such tax." Pet. App. 39-75.

Based on its conclusion that petitioner had knowledge of the falsity of the return and intended to evade taxes, the bankruptcy court determined that petitioner had filed a fraudulent return. Pet. App. 59-66. The court found "not credible" petitioner's testimony that he had simply relied on KPMG's misrepresentations. *Id.* at 60. Rather, the court determined that petitioner had been aware that BLIPS was an abusive tax shelter and not a legitimate investment strategy. *Id.* at 60-61. The court explained that the case exhibited a "badge of fraud" in that petitioner's "actions involving the BLIPS investment were inconsistent * * * with his other investment behaviors, and were both implausible and inconsistent with his business acumen and purported investment goals." *Id.* at 66 (citation omitted). The bankruptcy court further found that petitioner's "motivation in making the BLIPS investment and filing tax returns using the losses from the BLIPS investment was designed to evade taxes on the income from the sale of his company." *Id.* at 65. Accordingly, the court held that it was proper to deny a discharge under Section 523(a)(1)(C) based on petitioner's fraudulent tax return. *Id.* at 66.

The bankruptcy court separately concluded that petitioner had willfully attempted to evade or defeat taxes within the meaning of Section 523(a)(1)(C). Pet. App. 67-74. The court recognized that the statute contains both a conduct requirement and a mental-state requirement. *Id.* at 67. The court determined that petitioner's actions satisfied the conduct requirement because petitioner had purchased a $1.7

million home titled solely in St. Onge's name and had funded a $1.5 million irrevocable trust for his stepdaughter at a time when he knew that the IRS considered BLIPS to be illegitimate and would likely audit his tax return. *Id.* at 68-69. The court also observed that petitioner had spent substantial sums on luxury items such as home furnishings and jewelry throughout his marriage to St. Onge, despite his awareness of his "large potential tax liability." *Id.* at 69. The court concluded that those various expenditures and transfers of property "ensured funds would not be available to satisfy [petitioner's] tax obligations." *Ibid.*

The bankruptcy court further determined that petitioner had acted "willfully," within the meaning of Section 523(a)(1)(C), in evading his tax obligation. The court stated that, in order to show that a debtor acted willfully, "[t]he government must prove that the debtor 1) had a duty to pay taxes, 2) knew she had a duty, and 3) voluntarily and intentionally violated that duty." Pet. App. 67. The court explained that the evidence in this case satisfied that standard because it demonstrated that petitioner's "motive in * * * transferring funds and assets to St. Onge" and his stepdaughter "was to reduce assets subject to potential IRS execution" and so "take those funds and assets out of the reach of the IRS." *Id.* at 72. The court concluded that petitioner's "unnecessary expenditures combined with nonpayment of a known tax constitutes a willful attempt under Section 523(a)(1)(C)." *Id.* at 73.

b. The district court upheld the bankruptcy court's determination that petitioner had willfully attempted to evade or defeat his tax liabilities within the mean-

ing of Section 523(a)(1)(C). Pet. App. 24-38.[2] The district court found that the bankruptcy court had properly denied a discharge based on petitioner's attempt "to conceal[] or transfer[] assets in order to prevent them from being used to pay his 1999 and 2000 tax liability." *Id.* at 30; see *id.* at 31 (observing that "willful[]" evasion occurs when a "debtor ma[kes] large discretionary expenditures or conceal[s] or transfer[s] assets so as to render them unreachable by the IRS").

Petitioner "argue[d] that a debtor must know of a fixed or actual tax liability at the time of transferring assets in order to willfully evade a tax." Pet. App. 32. The district court rejected that contention. *Id.* at 32-37. The court relied on Tenth Circuit precedent holding that a willful attempt to evade taxes can be established when a debtor attempts to conceal and transfer assets at a time when he knows of an IRS investigation and possible tax liability. *Id.* at 33-37 (citing *Dalton* v. *IRS*, 77 F.3d 1297 (1996)).

The district court also rejected petitioner's contention that there was insufficient record evidence to support the bankruptcy court's finding that he "knew of a tax liability for 1999 and 2000 at the time he dissipated his assets." Pet. App. 37. "[D]efer[ring] to the credibility determinations made by the trial court" on that "purely factual issue," the district court concluded that, at the time petitioner "purchased a home that he titled in the name of his fiancé" and "transferred

[2] Because the district court agreed with the bankruptcy court's conclusion that petitioner had willfully attempted to evade or defeat taxes, it declined to address petitioner's challenge to the bankruptcy court's determination that he had filed a fraudulent return. Pet. App. 29-30.

$1.5 million to a trust for his step-daughter," he had sufficient "knowledge that he was likely to have some significant tax obligation * * * to form a purposeful intent to conceal or dissipate his assets to evade or defeat his 1999 and 2000 tax obligations." *Id.* at 37-38.

c. The court of appeals affirmed the bankruptcy court's determination that petitioner had willfully attempted to evade or defeat taxes, and that his debt was consequently non-dischargeable under Section 523(a)(1)(C). Pet. App. 1-21. The court explained that Section 523(a)(1)(C)'s conduct requirement was satisfied because petitioner had taken a number of evasive actions "in light of [his] knowledge of his impending tax liability," including purchasing the $1.7 million home that he had titled solely in St. Onge's name, diverting $1.5 million to a trust for his stepdaughter, and making "several purchases of jewelry and other luxury items." *Id.* at 16-17 & n.5. The court further held that the statute's mental-state requirement was satisfied because petitioner knew he had a duty to pay taxes under the law, "which he voluntarily and intentionally violated" when he transferred and depleted his assets to place them beyond the IRS's reach. *Id.* at 15 (citation and internal quotation marks omitted).

Petitioner argued that the bankruptcy court had erroneously based its non-dischargeability finding "on negligent conduct rather than the willful conduct required by the text of § 523(a)(1)(C)." Pet. App. 17. The court of appeals rejected that contention. The court rejected petitioner's argument that willful evasion can occur only after a tax deficiency is assessed, explaining that evasive conduct coupled with "knowledge of an anticipated tax obligation can be considered willful." *Id.* at 18. "To the extent [petitioner]

ultimately dispute[d] that he did not know of the anticipated tax obligation," the court rejected the claim because "the bankruptcy court found to the contrary and that conclusion was not clearly erroneous." *Ibid.* The court of appeals similarly found unpersuasive petitioner's claim that he had innocently relied on KPMG's advice and so was at most negligent. *Id.* at 19. Finally, the court observed that petitioner's arguments regarding negligence were based on a misreading of the bankruptcy court's opinion, which had actually concluded that petitioner acted willfully because he knew the BLIPS losses were invalid yet intentionally depleted his assets in anticipation of his impending tax liability. *Id.* at 20.

ARGUMENT

Petitioner contends (Pet. 14-38) that the court of appeals erred in upholding the bankruptcy court's finding that he acted "willfully" within the meaning of 11 U.S.C. 523(a)(1)(C). The court of appeals' decision is correct, and the bankruptcy court's fact-bound conclusion that petitioner's actions were willful rather than merely negligent does not warrant review. Petitioner further asserts (Pet. 18) that there is disagreement among the courts of appeals regarding Section 523(a)(1)(C)'s mental-state requirement. This case is an unsuitable vehicle for resolving any such disagreement, however, because petitioner agrees with the standard that the courts below adopted, and disputes only how that standard applies to the facts of his case. In any event, petitioner's actions satisfy Section 523(a)(1)(C)'s mental-state requirement under any plausible standard.

1. a. The court of appeals correctly affirmed the district court's judgment, which was based in turn on

the bankruptcy court's finding that petitioner had "willfully" attempted to evade or defeat taxes. Section 523(a)(1)(C) contains a conduct requirement (that a debtor "attempt[] in any manner to evade or defeat" his taxes), and a mental-state requirement (that he engage in that conduct "willfully"). See 11 U.S.C. 523(a). Petitioner does not challenge the bankruptcy court's finding that his actions—including his purchase of a $1.7 million home titled exclusively in St. Onge's name, his creation of a $1.5 million irrevocable trust for his stepdaughter, and his substantial expenditures on luxury items at a time when he knew of an impending IRS investigation—satisfied Section 523(a)(1)(C)'s conduct requirement. See Pet. i (question presented limited to Section 523(a)(1)(C)'s mental-state requirement). Thus, the only question is whether petitioner "willfully" engaged in that conduct.

As the court of appeals and the bankruptcy court explained, an attempt to evade or defeat taxes is willful under Section 523(a)(1)(C) when "the government shows the following three elements: 1) the debtor had a duty under the law; 2) the debtor knew he had the duty; and 3) the debtor voluntarily and intentionally violated the duty." Pet. App. 15 (citation and internal quotation marks omitted); *id.* at 67, 70. The bankruptcy court determined that petitioner had a duty to pay taxes under the law, and that he knew he had that duty before he transferred and depleted his assets, which "ensured funds would not be available to satisfy his tax obligations." *Id.* at 69. Specifically, the court found that, by June 2001, petitioner was aware that the IRS considered BLIPS invalid. *Id.* at 68. Petitioner nevertheless "purchased a $1.7 million home * * * , but put the title in the sole name of" St. Onge,

and he additionally funded a $1.5 million trust for his stepdaughter "shortly before disclosing his participation in BLIPS to the IRS," which he knew would likely trigger an audit. *Id.* at 69.

The timing of those transactions, in combination with petitioner's knowledge of his impending tax liability, demonstrated that his "motive * * * was to reduce assets subject to potential IRS execution." Pet. App. 72. Because petitioner voluntarily and intentionally transferred and dissipated assets in order to "take those funds and assets out of the reach of the IRS," *ibid.*, the bankruptcy court correctly found that petitioner had acted willfully in his attempt to evade taxes. The court of appeals therefore correctly upheld, as supported by the evidence, the bankruptcy court's conclusion that petitioner "knew he had a duty under the law which he voluntarily and intentionally violated, thus satisfying § 523(a)(1)(C)'s mental state requirement." *Id.* at 15 (citation and internal quotation marks omitted).

b. Petitioner argues (Pet. 17) that the court of appeals and the bankruptcy court erred by "treating mere negligence as willfulness." According to petitioner (*ibid.*), at the time he purchased the $1.7 million home titled solely in St. Onge's name and established the $1.5 million trust fund for his stepdaughter, "he reasonably believed" that he would not owe taxes due to a disallowance of the BLIPS losses. That factbound challenge does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * *

certiorari to review evidence and discuss specific facts.”).

In any event, petitioner’s argument lacks merit. The bankruptcy court made a factual finding that petitioner knew the BLIPS shelter was invalid, and that he was aware of his impending tax liability, before he transferred and dissipated his assets. Pet. App. 62, 68-69, 72. As the court of appeals explained, “[t]o the extent [petitioner] ultimately disputes that he did not know of the anticipated tax obligation, the bankruptcy court found to the contrary and that conclusion was not clearly erroneous.” *Id.* at 18.[3]

Petitioner further contends (Pet. 28-32) that a debtor cannot willfully evade a tax until a tax deficiency is formally assessed. In petitioner’s view (Pet. 29), “[a] debtor may know that there is a chance that he will owe a tax in the future, but as long as that probability is not a practical certainty, spending in the face of such a probability is at worst negligent or reckless.” As the district court explained, however, petitioner’s “knowledge that he was likely to have some significant tax obligation, even if the precise amount of that obligation was unknown [prior to the assessment], was sufficient for [him] to form a purposeful intent to conceal or dissipate his assets to evade or defeat his 1999 and 2000 tax obligations.” Pet. App. 38.

---

[3] Petitioner also maintains (Pet. 32-35) that his conduct was merely negligent rather than willful because, at the time he transferred and dissipated his assets, he “had more money on hand * * * that could have gone to pay a possible future tax assessment.” Petitioner did not raise that contention in the court of appeals or make any other argument regarding his ability to pay an assessed tax. That fact-bound argument, which would not warrant review in any event, therefore is not properly before this Court.

Petitioner cites no decision holding that acts taken prior to the assessment of a tax are categorically irrelevant when determining whether a debtor willfully attempted to evade taxes under Section 523(a)(1)(C). To the contrary, numerous "authorities establish that actions taken with knowledge of an anticipated tax obligation can be considered willful, rather than negligent, thus rendering tax debts non-dischargeable in bankruptcy." Pet. App. 18. Petitioner's suggestion that a willful attempt to evade or defeat taxes must always involve post-assessment evasive conduct finds no support in case law or in common sense.[4]

2. Petitioner identifies an apparent disagreement among the courts of appeals regarding Section 523(a)(1)(C)'s mental-state requirement. Six circuits, including the court of appeals in this case (Pet. App. 15), have held that a debtor acts "willfully" within the meaning of Section 523(a)(1)(C) when "the debtor (1) had a duty to pay taxes under the law, (2) knew he had that duty, and (3) voluntarily and intentionally violated that duty." *United States* v. *Coney*, 689 F.3d 365, 374 (5th Cir. 2012); see *Gardner* v. *United States* (*In re Gardner*), 360 F.3d 551, 558 (6th Cir. 2004); *United States* v. *Fretz* (*In re Fretz*), 244 F.3d 1323, 1330 (11th Cir. 2001); *United States* v. *Fegeley* (*In re Fegeley*), 118 F.3d 979, 984 (3d Cir. 1997); *In re Birkenstock*, 87 F.3d 947, 952 (7th Cir. 1996). The Ninth Circuit, in contrast, recently disagreed with

[4] Petitioner also argues (Pet. 23-26) that the failure to file a tax return in combination with the failure to pay taxes cannot constitute willful evasion. This case provides no opportunity to consider that issue, both because petitioner filed tax returns for the years in question and because petitioner engaged in additional evasive conduct involving transfers and dissipation of assets.

those decisions "[t]o the extent" that they did not require that the debtor have a "specific intent to evade the tax." *Hawkins* v. *Franchise Tax Bd.*, 769 F.3d 662, 669-670 (2014). The Ninth Circuit suggested that such a specific intent is akin to a "bad purpose." *Id.* at 667. For two basic reasons, any disagreement between the court below and the Ninth Circuit regarding Section 523(a)(1)(C)'s mental-state requirement does not warrant this Court's review.

a. Petitioner does not endorse the Ninth Circuit's suggestion that Section 523(a)(1)(C)'s willfulness element requires a bad purpose beyond an intent not to pay taxes that the debtor realizes he owes. To the contrary, petitioner states that "[s]pecific intent to evade may not be required" (Pet. 35), and that "[t]he Ninth Circuit's decision to require specific intent * * * may raise problems of its own" (Pet. 15-16). In the court of appeals, moreover, petitioner advocated the same willfulness standard that the court ultimately applied: "[F]or willful evasion, the government must prove that the debtor (1) had a duty to pay taxes, (2) *knew* she had a duty, and (3) voluntarily and intentionally violated that duty." Pet. C.A. Br. 26 (citation and internal quotation marks omitted); see *id.* at 25 ("[T]o be willful, the taxpayer must spend money or dispose of assets while knowing that he owes a tax."). Petitioner's objection to the court's analysis centers not on the proper legal standard for willfulness, but on the factual finding that petitioner knew of his tax liability at the time he intentionally dissipated his assets. Because petitioner has not preserved and does not press an argument that Section 523(a)(1)(C)'s willfulness element requires any more culpable intent

than that, this case is not an appropriate vehicle to review that issue.

The bankruptcy court's findings easily satisfy the legal standard that petitioner concedes to be appropriate. The court found that petitioner's "motivation in making the BLIPS investment and filing tax returns using the losses from the BLIPS investment was designed to evade taxes on the income from the sale of his company." Pet. App. 65.[5] The court further found that petitioner's motive in transferring assets to St. Onge and his stepdaughter, and in depleting funds through purchases of luxury items, "was to reduce assets subject to potential IRS execution." *Id.* at 72; see *ibid.* (concluding that petitioner engaged in that conduct for the purpose of "tak[ing] those funds and assets out of the reach of the IRS"). As the district court recognized in affirming the bankruptcy court's decision, petitioner acted willfully when he "form[ed] a purposeful intent to conceal or dissipate his assets to evade or defeat his 1999 and 2000 tax obligations." *Id.* at 38.

b. Various passages in the Ninth Circuit's opinion in *Hawkins* frame the court's decision as a gloss on the statutory term "willfully." See, *e.g.*, 769 F.3d at 666 ("The key question in this case is the meaning of the word 'willful' in the statute."); *id.* at 666-667 ("[T]he 'fresh start' philosophy of the Bankruptcy

---

[5] Indeed, the bankruptcy court found that petitioner had acted not only with the specific purpose to evade taxes, but with an intent to defraud the IRS; accordingly, the court denied a discharge under Section 523(a)(1)(C) on the separate ground that petitioner had filed a fraudulent tax return. Pet. App. 59-66. That alternative basis for denying petitioner a discharge of his tax liabilities makes this case a particularly poor vehicle for this Court's review.

Code argues for a stricter interpretation of 'willfully' than an expansive definition."). To the extent that the Ninth Circuit adopted an understanding of the statutory term "willfully" that is more demanding than the three-part test that other circuits have used, its decision is erroneous. This Court has made clear that the willfulness element of criminal tax evasion under 26 U.S.C. 7201 does not "require[] proof of any motive other than an intentional violation of a known legal duty." *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976) (per curiam); accord *Cheek* v. *United States*, 498 U.S. 192, 201 (1991). There is no sound reason to require a greater willfulness showing under Section 523(a)(1)(C). To the contrary, when the word "willfully" is used in civil statutes, it typically imposes a *less* demanding mental-state requirement than when the same term is used in the criminal law. See, *e.g.*, *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 56-58 & n.9 (2007).

Other portions of the Ninth Circuit's opinion in *Hawkins* suggest, however, that the court's main practical concern was with Section 523(a)(1)(C)'s distinct conduct requirement, not with the word "willfully" standing alone. Thus, the court stated that "[a] narrow interpretation of 'willfully' is also in accord with case precedent that generally except tax debts from discharge under § 523(a)(1)(C) only when the conduct amounting to attempted tax evasion is of a type likely to be accompanied by an evasive motivation." 769 F.3d at 667. The *Hawkins* court also distinguished various decisions of other circuits, including the Tenth Circuit's decision in this case, on the ground that "most of the cases involve intentional acts or omissions designed to evade taxes, such as criminal

structuring of financial transactions to avoid currency reporting requirements; concealing assets through nominee accounts; concealing ownership in assets; and failing to file tax returns and pay taxes." *Id.* at 669 (citations omitted). That analysis suggests that what the *Hawkins* court found lacking was sufficient proof of evasive conduct.[6]

There is no reason to suppose that the Ninth Circuit would find the government's proof of evasive conduct to be similarly inadequate in *this* case. To the contrary, the Ninth Circuit in *Hawkins* cited petitioner's case as an example of conduct that likely *would* qualify as willful tax evasion. See 769 F.3d at 667-668, 669. The *Hawkins* court explained that petitioner's action of "purchas[ing] and transfer[ring] * * * a house" to St. Onge and the "establishment and transfer of funds to a trust for [his] stepdaughter" is conduct "of a type likely to be accompanied by an evasive motivation." *Id.* at 667-668; see *id.* at 669 (citing petitioner's case as an example of conduct that "involve[s] intentional acts or omissions designed to evade taxes, such as * * * concealing assets through nominee

---

[6] Although the government continues to believe that the record in *Hawkins* was sufficient to support the non-dischargeability determinations made by the bankruptcy court and district court in that case, the Solicitor General has decided that the government will not file a petition for a writ of certiorari in *Hawkins*. The Ninth Circuit's decision is interlocutory, and the case has been remanded for further proceedings through which the government may yet be able to establish to the court of appeals' satisfaction that Hawkins's tax debt is non-dischargeable. See 769 F.3d at 669-670. And, to the extent that the Ninth Circuit's holding is understood to rest on the perceived inadequacy of the government's proof of evasive conduct, the decision in *Hawkins* does not squarely conflict with any ruling of another circuit.

accounts * * * [and] concealing ownership in assets"). Because petitioner would not be entitled to a discharge of his tax liabilities under the Ninth Circuit's approach, this case does not implicate any disagreement among the courts of appeals regarding Section 523(a)(1)(C).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
CAROLINE D. CIRAOLO
Acting Assistant Attorney General
BRUCE R. ELLISEN
RACHEL I. WOLLITZER
Attorneys

MAY 2015