No. 14-1072

In the Supreme Court of the United States

LIANA CAROL MALLO, ET AL., PETITIONERS

v.

INTERNAL REVENUE SERVICE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 11 U.S.C. 523(a)(1)(B)(i) renders non-dischargeable in bankruptcy petitioners' tax debts, where petitioners did not file their Forms 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. 1a–27a) is reported at 774 F.3d 1313. The opinions of the district court (Pet. App. 28a-52a, 53a-67a) are reported at 498 B.R. 268 (for the Mallo petitioners), and 500 B.R. 1 (for petitioner Martin). The opinion of the bankruptcy court regarding the Mallo petitioners (Pet. App. 68a-81a) is not reported. The opinion of the bankruptcy court regarding petitioner Martin (Pet. App. 82a-94a) is reported at 482 B.R. 635.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 2014. The petition for a writ of certiorari was filed on March 4, 2015. 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 non-dischargeable. 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 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.

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.

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[1] In this brief, the BAPCPA definition of "return" is denoted Section 523(a)(*) for ease of reference. Petitioners refer to this provision as the "hanging paragraph." See Pet. 5.

172, 180 (1934); *Florsheim Bros. Drygoods Co.* v. *United States*, 280 U.S. 453, 461-462 (1930). This is known as the *Beard* test. *E.g.*, Pet. App. 9a.

This case implicates a dispute over whether statutory deadlines for filing a Form 1040 are "applicable filing requirements" within the meaning of Section 523(a)(*). The deadlines themselves, however, are familiar and undisputed. Tax returns "shall be filed on or before the 15th day of April following the close of the calendar year." 26 U.S.C. 6072(a). Taxpayers may obtain a six-month extension of time to file, but no extension beyond that. 26 U.S.C. 6081(a); 26 C.F.R. 1.6081-4(a).

2. Petitioners filed their Forms 1040 for the tax debts at issue here several years late, after the Internal Revenue Service (IRS) had issued notices of deficiency, made assessments, and initiated collection efforts. After their belated filings, petitioners waited more than two years and then petitioned for bankruptcy. The court of appeals held that the petitioners' assessed tax debts were non-dischargeable under Section 523(a)(1)(B)(i). Pet. App. 1a-27a.

a. Petitioners Edson and Liana Mallo did not file timely Forms 1040 for years 2000 and 2001. Pet. App. 3a. The IRS issued notices of deficiency. *Ibid.* On July 11, 2005, the IRS assessed $34,464 in taxes against Mr. Mallo for the 2001 tax year, including penalties and interest. *Ibid.* On July 10, 2006, the IRS assessed $19,022 in taxes against Mrs. Mallo for the 2000 tax year. *Ibid.* The IRS began collection efforts in 2006. *Ibid.*

In 2007, the Mallos jointly filed Forms 1040 for the 2000 and 2001 tax years. Pet. App. 3a. Based on the Mallos' belated filings, the IRS increased Mrs. Mallo's

liability for the 2000 tax year by $4576, and partially abated Mr. Mallo's liability for the 2001 tax year by $3330. *Id.* at 3a, 29a-30a, 69a-72a.

On February 18, 2010, the Mallos filed a voluntary petition under Chapter 13 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Colorado. Pet. App. 3a-4a, 30a. On March 23, 2011, the case was converted to Chapter 7, and on July 5, 2011, the Mallos received a general discharge. *Ibid.*

On September 17, 2011, the Mallos initiated an adversary proceeding against the IRS, seeking a declaration that their tax liabilities for 2000 and 2001 had been discharged. Pet. App. 3a-4a, 30a, 69a. The IRS agreed that the additional $4576 in liability reported by the Mallos' belated filing for 2000 had been discharged, that penalties and interest had been discharged, and that the reduction of $3300 reported by the Mallos' belated filing for 2001 had reduced their total liability. *Ibid.* The IRS argued, however, that the assessed debts were otherwise non-dischargeable under Section 523(a)(1)(B)(i). *Ibid.*

The bankruptcy court granted the IRS's motion for summary judgment. Pet. App. 68a-81a. The court followed *Wogoman* v. *IRS (In re Wogoman)*, 475 B.R. 239 (B.A.P. 10th Cir. 2012), in which the bankruptcy appellate panel had addressed the "precise" issue that is presented here. Pet. App. 75a. In *Wogoman*, the panel reviewed three possible approaches to dischargeability. It concluded that, "regardless of which one is applied to the facts," tax debts are not dischargeable when, due to the debtor's own lack of diligence, the debtor fails to file a Form 1040 with respect to those debts until after the IRS has issued a notice

of deficiency and assessed the tax. 475 B.R. at 245, 248.

The *Wogoman* panel first addressed *Beard*'s definition of "return," on which courts had relied before Congress enacted Section 523(a)(*). See 475 B.R. at 245-248. The panel concluded that an untimely Form 1040 did not represent "an honest and reasonable attempt to satisfy the requirements of the tax law," and thus was not a "return" under *Beard* when, due to the debtor's own lack of diligence, the debtor did not file until after the IRS issued a notice of deficiency and assessed the taxes. *Id.* at 248. The panel explained that "to belatedly accept responsibility for one's tax liabilities, only when the IRS has left one with no other choice, is hardly how honest and reasonable taxpayers attempt to comply with the tax code." *Ibid.* (quoting *Moroney* v. *United States (In re Moroney)*, 352 F.3d 902, 906 (4th Cir. 2003)). The panel found unpersuasive *Colsen* v. *United States (In re Colsen)*, 446 F.3d 836 (8th Cir. 2006), which had applied *Beard* to conclude that a post-assessment Form 1040 could constitute a "return" if it "contained data that allowed the IRS to calculate [a] tax obligation more accurately." *Id.* at 840-841; see *Wogoman*, 475 B.R. at 247.

Second, the *Wogoman* panel addressed *McCoy* v. *Mississippi State Tax Commission (In re McCoy)*, 666 F.3d 924 (5th Cir.), cert. denied, 133 S. Ct. 192 (2012). The court in *McCoy* held that a late-filed tax form can never be a "return" as defined by Section 523(a)(*) because that statutory definition requires compliance with "applicable filing requirements," which in the Fifth Circuit's view include filing deadlines. *Wogoman*, 475 B.R. at 248-250; see *McCoy*, 666

F.3d at 932. Under that approach, a Form 1040 filed after the IRS has made an assessment is plainly not a "return." *Ibid.*

Third, the *Wogoman* panel addressed the IRS's position that, although a belated filing can sometimes constitute a "return" under Section 523(a)(*) and can therefore serve as a predicate for discharge of tax debts, a filing submitted after the IRS has assessed a tax cannot have that effect with respect to the previously assessed debt. 475 B.R. at 250-251; see IRS, Office of Chief Counsel, Notice No. CC-2010-016 (Sept. 2, 2010), *Litigating Position Regarding the Dischargeability in Bankruptcy of Tax Liabilities Reported on Late-Filed Returns and Returns Filed After Assessment* (*Chief Counsel Notice*), http://www.irs.gov/pub/irs-ccdm/cc_2010_016.pdf. The panel observed that, "[f]rom a tax policy perspective, the IRS's position is logical and simple to administer," but that "no court has adopted this interpretation." *Wogoman*, 475 B.R. at 250. The panel reiterated, however, that "it matters not whether we adopt" *McCoy*'s rule "or the assessment rule advocated by the IRS." *Id.* at 250-251. The panel explained that, "under either alternative," tax debts that have already been assessed are "excepted from discharge." *Id.* at 251.

The *Mallo* bankruptcy court held that the Mallos' post-assessment filings "do not constitute returns under any of the three analyses used in *Wogoman*, and the subject taxes are therefore excepted from discharge under § 523(a)(1)(B)(i)." Pet. App. 80a. The court explained that the debtors' post-assessment Forms 1040 did not "represent an honest and reasonable attempt to comply with the tax law," but were

"belated attempts to create a record of compliance when none really exists." *Ibid.*

b. Petitioner Peter Martin failed to file timely Forms 1040 for tax years 2000 and 2001. Pet. App. 3a. The IRS sent notices of deficiency and, on November 8, 2004, assessed $15,677 in taxes for the 2000 tax year and $11,766 for the 2001 tax year. *Id.* at 3a, 54a. The IRS began collection efforts. *Ibid.*

On May 5, 2005, Martin filed Forms 1040 for 2000 and 2001. Pet. App. 3a, 54a. Based on those delinquent submissions, the IRS partially abated Martin's 2000 and 2001 tax liabilities by $5629 and $5340, respectively. *Ibid.*

On October 28, 2010, Martin filed a voluntary Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the District of Colorado. Pet. App. 4a, 54a. On February 18, 2011, he received a general discharge. *Ibid.*

Martin initiated an adversary proceeding against the United States, seeking a declaration that his remaining tax liabilities for years 2000 and 2001 had been discharged. Pet. App. 4a. The bankruptcy court granted summary judgment in favor of Martin. Applying the *Beard* test, the court held that, although Martin had filed his Forms 1040 after assessment and had only disclosed debt that had already been assessed, those filings were nonetheless 'returns.'" *Id.* at 82a-94a; see *id.* at 91a-92a (citing *Colsen*, 446 F.3d at 840). The court concluded that, because Martin had submitted those "returns" more than two years before he filed for bankruptcy, the debts were dischargeable under Section 523(a)(1)(B)(ii). *Id.* at 85a & n.3, 88a.

3. Both bankruptcy court decisions were appealed to the United States District Court for the District of

Colorado, which consolidated them for briefing purposes. Pet. App. 5a. The district court affirmed the bankruptcy court's order regarding the Mallo petitioners (*id.* at 28a-52a) and reversed the bankruptcy court's order regarding petitioner Martin (*id.* at 53a-67a), holding that the debts at issue in both cases were non-dischargeable.

The district court "decline[d] to apply" *McCoy*'s rule that a late filing can never be a "return," because the parties agreed that this test should not be applied. Pet. App. 39a, 43a-44a. The court also concluded that "the statutory language defining a return for purposes of assessing whether a 'return was filed'—under § 523(a)(1)(B)(i) and the hanging paragraph to § 523(a)—cannot be interpreted consistent with the IRS' official position." *Id.* at 42a-43a. The court instead concluded that "the Beard test is the applicable nonbankruptcy law." *Id.* at 50a. Applying that test, the court held that petitioners' debts were non-dischargeable because filing a return form after an assessment "negates 'an honest and reasonable attempt to comply with tax law'" when, "as here, there is no claim of circumstances beyond a taxpayer's control that prevented him or her from filing a timely return." *Id.* at 50a-51a; see *id.* at 66a-67a.

4. The court of appeals consolidated the cases and affirmed, albeit on a different rationale. Pet. App. 3a-27a. The court "agree[d] with the Fifth Circuit's decision in *McCoy* that the plain and unambiguous language of § 523(a) excludes from the definition of 'return' all late-filed tax forms, except those prepared with the assistance of the IRS under § 6020(a)." *Id.* at 26a. The court viewed the requirement that a return "shall be filed" by April 15 as an "applicable filing

requirement[]" within the meaning of Section 523(a)(*). *Id.* at 13a-14a (quoting 26 U.S.C. 6072(a) and 11 U.S.C. 523(a)(*)). The court concluded that, "because the applicable filing requirements include filing deadlines, § 523(a)(*) plainly excludes late-filed Form 1040s from the definition of a return." *Id.* at 14a.

The court of appeals rejected petitioners' argument that treating statutory filing deadlines as "applicable filing requirements" would render Section 523(a)(1)(B)(ii) superfluous. Pet. App. 18a-19a. The court reasoned that returns prepared by the Secretary under Section 6020(a) "could be filed late," yet "still qualify as returns under § 523(a)(*)." *Id.* at 19a. The court also concluded that Section 523(a)(*) "is not ambiguous simply because it provides that tax forms prepared by the Secretary under § 6020(a) are 'returns,'" but that "forms prepared under § 6020(b) are not." *Ibid.* In the court of appeals' view, "[t]he reference to both sections simply indicates Congress's efforts to make clear that the 'returns' prepared under § 6020(a) constitute a narrow category of otherwise noncompliant tax forms that are expressly dischargeable." *Ibid.*

The court of appeals also rejected the IRS's position that the dischargeability of tax debts for which a Form 1040 was filed late should depend on whether the Form 1040 was filed before or after the IRS assessed the tax. Pet. App. 22a-26a. The court stated that "[a] 'debt' for purposes of § 523(a) is created when 'a right to payment' accrues, regardless of when the extent of that liability is calculated." *Id.* at 24a (quoting 11 U.S.C. 101(5)(A) and (12)). It also reasoned that, "if Congress wished to make the assessment process relevant to discharge of tax debts, it could easily have done so," but that "nothing in the

language of the hanging paragraph reflects such an intent." *Ibid.*

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, if a Form 1040 is filed late, the tax debt is non-dischargeable under Section 523(a)(1)(B)(i). The court reasoned that a late-filed Form 1040 is not a "return," as defined by Section 523(a)(*), because it does not satisfy "applicable filing requirements." Every other court of appeals to consider the issue has reached the same conclusion.

The IRS has interpreted Section 523(a)(*) in a somewhat more forgiving manner, so that the late filing of a Form 1040 will preclude discharge only if the IRS has already assessed the tax debt by the time the form is submitted. That disagreement has no impact on the disposition of this case, however, because the court of appeals' judgment is correct under either approach. Petitioners did not merely file their Forms 1040 late. They filed their forms "long after the IRS had determined liability, provided notices of deficiency and assessed the taxes." Pet. App. 80a. The courts of appeals and the IRS agree that a tax debt cannot be discharged in that circumstance. Further review is not warranted.

1. The judgment below is correct under both the courts of appeals' interpretation of Section 523(a) and the IRS's interpretation.

a. The court of appeals affirmed the district court's judgments that petitioners' tax debts were excepted from discharge under Section 523(a)(1)(B)(i). The court of appeals explained that Section 523(a)(*) "de-

fines return as a document that 'satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements).'" Pet. App. 12a (quoting 11 U.S.C. 523(a)(*)). The court further held that deadlines for filing a return are "applicable filing requirements" for purposes of that provision, and that a late-filed Form 1040 therefore is not a "return" within the meaning of Section 523(a). See *id.* at 12a-16a (citing *McCoy* v. *Mississippi State Tax Comm'n (In re McCoy)*, 666 F.3d 924, 928-929 (5th Cir.), cert. denied, 133 S. Ct. 192 (2012)). Because Section 523(a)(1)(B)(i) precludes discharge of any tax debt "with respect to which a return * * * was not filed," the court's reading of the term "applicable filing requirements" meant that petitioners' tax debts were non-dischargeable.

b. Where it is not bound by contrary circuit precedent, the IRS interprets Section 523(a) in a way that allows discharge of tax debts in a somewhat broader range of circumstances. In cases like this one, however, where taxpayers have submitted Forms 1040 only *after* the IRS has assessed the tax that is the subject of the debt, the IRS agrees with the courts of appeals that the debt is non-dischargeable under Section 523(a)(1)(B)(i). See Gov't C.A. Br. 22-27.

The dischargeability of tax debts in this circumstance turns on whether the debt is one "with respect to which a return * * * was * * * filed." 11 U.S.C. 523(a)(1)(B)(i); see Gov't C.A. Br. 31-43; *Chief Counsel Notice* 1-3. 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 with respect to the entire tax debt for that year. Un-

der that view, the entire debt is dischargeable so long as the debtor waits more than two years to file a bankruptcy petition. See *Chief Counsel Notice* 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 larger statutory context supports the IRS's view that the phrase "applicable filing requirements" in Section 523(a)(*) does not include deadlines for filing a tax form. See *Chief Counsel Notice* 2. Section 523(a)(1)(B)(ii) refers specifically to a "return" that "was filed * * * after the date on which such return * * * was last due," and states that in such cases the tax debt will be non-dischargeable if the return was filed less than two years before the bankruptcy petition. 11 U.S.C. 523(a)(1)(B)(ii). If Section 523(a)(*) is read to mean that a late-filed Form 1040 is not a "return" at all, Section 523(a)(*)'s definition of "return" would function at cross-purposes with Section 523(a)(1)(B)(ii), which refers to late-filed "return[s]" and expressly contemplates that debts with respect to which such returns were filed may be dischargeable. Congress does not usually "give with one hand what it takes away with the other." *Greenlaw* v. *United States*,

554 U.S. 237, 251 (2008). Indeed, if deadlines are "applicable filing requirements," Section 523(a)(1)(B)(ii) would only apply when a late return has been prepared by the appropriate taxing authority under 26 U.S.C. 6020(a) or a state-law equivalent, or if the debtor has stipulated to the liability in a nonbankruptcy tribunal. See 11 U.S.C. 523(a)(*). Those events occur in a "minute number of cases." *Chief Counsel Notice* 2.

Interpreting the definition of "return" to exclude late-filed tax forms would also render superfluous Congress's statement that the term does not "include a return made pursuant to section 6020(b)." 11 U.S.C. 523(a)(*). Section 6020(b) returns "are, by definition, late." Pet. App. 17a; see 26 U.S.C. 6020(b)(1). The court of appeals found that this phrase serves to make clear that "tax forms prepared by the Secretary under § 6020(a) are 'returns,'" but that "forms prepared under § 6020(b) are not." Pet. App. 19a. But the definition of "return" directly addresses the former point by explicitly including Section 6020(a) returns within its coverage. 11 U.S.C. 523(a)(*). If the court of appeals' interpretation were correct, the express exclusion of returns under Subsection (b) would be unnecessary.

Read in context, the phrase "applicable filing requirements" is better understood to refer to requirements other than deadlines, including the requirement that a filing serve the fundamental purpose of a return—which, under federal law, is "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 liabili-

ties." *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). Tax forms filed after assessment, by contrast, serve no such purpose with respect to any liability that has already been assessed. *Moroney*, 352 F.3d at 906.[2]

c. The interpretations proffered by the court of appeals and the IRS could lead to divergent outcomes in some cases, namely those in which a Form 1040 is filed after the statutory deadline but before the IRS has assessed the tax. The judgment in this case, however, is correct under either approach. Under the court of appeals' interpretation, petitioners' post-assessment Forms 1040 were not "returns" because they were filed after the statutory deadline. See pp. 11-12, *supra*. Under the IRS's interpretation, petitioners' tax debts were non-dischargeable because the IRS had already assessed those debts before petitioners filed their Forms 1040. See pp. 12-15, *supra*.[3]

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[2] The IRS's interpretation also avoids harsh results. Congress has addressed delinquencies in filing by enacting a detailed scheme that assesses interest and progressive penalties tailored to different circumstances, see 26 U.S.C. 6651(a)(1) and (b)(1), and that imposes no fine or penalty when the taxpayer is owed a refund or credit and files within three years after the deadline, see *ibid.* It would be incongruous to interpret Section 523(a) to impose the significant sanction of non-dischargeability on every taxpayer who files even one day late.

[3] The Mallos' post-assessment Form 1040 for the 2000 tax year increased liability for that year by $4576. See Pet. App. 73a, 74a. The IRS agreed that this amount was dischargeable, and the bankruptcy court judgment states that it "exclud[es] the $4,576.00 assessed after the Mallos submitted a 2000 Form 1040." *Id.* at 81a. The other belated Forms 1040 that petitioners filed here reduced their overall

The court of appeals' judgment would also be affirmed under the district court's view that a post-assessment form is not a "return" unless the debtor was prevented from filing on time by circumstances beyond her control. Pet. App. 50a-51a. Because there were no such circumstances here, the district court found the debts to be non-dischargeable. *Ibid.* The *Mallo* bankruptcy court also concluded that "the Mallos' 2007 filings do not constitute returns under any of the three analyses used in *Wogoman*," which correspond to the approaches of the district court, the court of appeals, and the IRS. *Id.* at 80a. Petitioner Martin's case is materially identical.

d. Petitioners urge 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 petitioners' view, any 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." Pet. App. 47a (quoting *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. And because a taxpayer's post-assessment filing does not further the self-reporting function that a tax return is intended to serve as to any previously assessed debts, an assessed tax debt of this nature is naturally viewed as one "with respect to

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tax liability. *Id.* at 3a. The only debts at issue in this Court thus are debts that the IRS assessed before petitioners filed their Forms 1040.

which a return * * * was not filed." 11 U.S.C. 523(a)(1)(B)(i); see pp. 12-15, *supra*.

2. Petitioners recognize that there is no conflict among the circuits as to whether Section 523(a)(*)'s definition of "return" can ever encompass a late-filed form. Pet. 12. The courts of appeals unanimously agree that filing deadlines are "applicable filing requirements" within the meaning of that provision, and that a late-filed form therefore can never qualify as a "return" for purposes of Section 523(a). The court of appeals below reached that result as to federal income tax forms. Pet. App. 13a-16a. The First and Fifth Circuits have reached the same result as to state income tax forms. See *Fahey* v. *Massachusetts Dep't of Revenue (In re Fahey)*, 779 F.3d 1, 5 (1st Cir. 2015) (Massachusetts taxes); *McCoy*, 666 F.3d at 931-932 (Mississippi taxes).

No other court of appeals has addressed this question. In *Maryland* v. *Ciotti (In re Ciotti)*, 638 F.3d 276, 280 (2011), consistent with circuit precedent, the Fourth Circuit applied *Beard* as the "applicable nonbankruptcy law" under Section 523(a)(*). But the court in *Ciotti* did not address 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)).

When interpreting the pre-BAPCPA version of Section 523(a), four circuits applied *Beard* to hold that a tax form filed after assessment did not reflect an honest and reasonable attempt to satisfy the tax laws, at least when the debtor's own lack of diligence caused

the delay. 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). By contrast, 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 return "contained data that allowed the IRS to calculate [a] tax obligation more accurately." *Colsen* v. *United States (In re Colsen)*, 446 F.3d 836, 840-841 (2006). 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 position.

The difference in outcomes between this case and *Colsen* does not create a circuit conflict because *Colsen* was decided under pre-BAPCPA law. The court 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. Every court of appeals to address the issue has since concluded that Congress's definition of "return" in Section 523(a)(*) supersedes the prior disagreement about the meaning of that statutory term. Indeed, every court of appeals to address the question in light of Section 523(a)(*) has distinguished *Colsen* on the ground that it involved the pre-BAPCPA version of the statute. See Pet. App. 12a-13a; *Fahey*, 779 F.3d at 10; *McCoy*, 666 F.3d at 930.

3. Finally, the fact that the IRS has interpreted Section 523(a)(*) differently than have the courts of

appeals provides no basis for further review in this case. As explained above, the judgment below is correct under either 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.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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