No. 16-497

In the Supreme Court of the United States

MARTIN SMITH, PETITIONER

v.

INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH 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 several years 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-8a) is reported at 828 F.3d 1094. The opinion of the district court (Pet. App. 9a-29a) is not published in the *Federal Supplement* but is available at 527 B.R. 14. The opinion of the bankruptcy court (Pet. App. 30a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 2016. The petition for a writ of certiorari was filed on October 11, 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). 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 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 if a 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 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. *E.g.*, Pet. 7-8.

2. Petitioner did not file a 2001 federal tax return within the time required by law. Pet. App. 10a; see 26 U.S.C. 6072(a), 6081(a); 26 C.F.R. 1.6081-4(a). The Internal Revenue Service (IRS) sent petitioner "a letter requesting that he file an income tax return for 2001,

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

but [he] failed to do so." Pet. App. 10a. "The IRS then began an examination regarding [petitioner's] liability for the 2001 tax year and determined his tax liability for 2001 based on information gathered from third parties." *Ibid.* The IRS prepared a return itself pursuant to Section 6020(b). *Ibid.* On March 27, 2006, the IRS notified petitioner that it had determined that he owed $70,662 in unpaid tax from 2001. *Ibid.*; see 26 U.S.C. 6212. Petitioner took no action in response, and "[o]n July 31, 2006, the IRS assessed the $70,662 tax liability and began collection activities." Pet. App. 11a.

"On May 22, 2009—over seven years after [petitioner's] 2001 tax return was due, over three years after the IRS had determined [his] tax liability for 2001, and after the IRS had already initiated collection activity on the debt—[petitioner] submitted a Form 1040 for the 2001 tax year, reporting a higher tax liability than the IRS previously had determined." Pet. App. 11a. Based on that late-filed Form 1040, the IRS assessed an additional tax liability of $40,095.[2] *Ibid.* & n.1.

a. On December 22, 2011, petitioner filed a voluntary Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Northern District of California. Pet. App. 37a. Petitioner then brought an adversary proceeding against the IRS to determine the dischargeability of his assessed $70,662 debt for his 2001 federal income taxes. *Ibid.*

On January 31, 2013, the bankruptcy court granted summary judgment in favor of petitioner, holding that the assessed tax debt was dischargeable. Pet. App. 30a. The court first determined that the requirement that tax returns be filed in a timely manner was not an

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[2] The government "does not contend that this $40,095 liability, or the associated penalties, is non-dischargeable." Pet. App. 11a n.1.

"applicable filing requirement[]" within the meaning of Section 523(a)(*). *Id.* at 42a. The court then addressed *Beard*'s definition of "return." The court concluded that, even though petitioner had not filed a Form 1040 until years after the IRS had assessed the $70,662 debt, his filing "evince[d] an honest and genuine endeavor to satisfy the law" and was therefore a "return." *Id.* at 43a-46a (citing *Beard*, 82 T.C. at 774-779); see *Colsen* v. *United States (In re Colsen)*, 446 F.3d 836 (8th Cir. 2006).

b. The government appealed to the United States District Court for the Northern District of California, which reversed. Pet. App. 9a-29a. The court held that the $70,662 tax debt was nondischargeable. Applying *Beard*, the court held that petitioner's belated Form 1040 was not a "return" because it did "not constitute an honest and reasonable attempt to comply with the requirements of the tax law." *Id.* at 22a (quoting *United States* v. *Hatton (In re Hatton)*, 220 F.3d 1057, 1061 (9th Cir. 2000)). The court 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." *Id.* at 25a (quoting *Moroney* v. *United States (In re Moroney)*, 352 F.3d 902, 906 (4th Cir. 2003)).

c. The court of appeals affirmed. Pet. App. 1a-8a. The court concluded that *Beard* governs the determination whether a filing satisfies the requirements of "applicable nonbankruptcy law (including applicable filing requirements)" for a return. *Id.* at 5a (quoting 11 U.S.C. 523(a)(*)). Applying *Beard*, the court held that petitioner's "tax filing, made seven years late and three years after the IRS assessed a deficiency against

him, was not an 'honest and reasonable' attempt to comply with the tax code." *Id.* at 7a.

The court of appeals also stated that it need not decide "whether any post-assessment filing could be 'honest and reasonable' because these are not close facts." Pet. App. 7a. The court explained that "the IRS communicated with [petitioner] for years before assessing a deficiency, and [petitioner] waited several more years before responding to the IRS or reporting his 2001 financial information." *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 petitioner's tax debt for 2001 is nondischargeable under 11 U.S.C. 523(a)(1)(B)(i) because his Form 1040, "made seven years late and three years after the IRS assessed a deficiency against him," was not a "return" within the meaning of 11 U.S.C. 523(a)(1)(B)(i) and 523(a)(*). Pet. App. 7a. 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 a petition for a writ of certiorari presenting the same question. See *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 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 (including applicable filing requirements)." Pet. App. 5a (quoting 11 U.S.C. 523(a)(*)). The court further held that petitioner's belated Form 1040 was not a "return" under *Beard* because petitioner's "tax filing, made seven years late and three years after the IRS assessed a deficiency against him, was not an 'honest and reasonable' attempt to comply with the tax code." *Id.* at 7a.

The court of appeals did not address a possible alternate basis for reaching the same conclusion. The court did not discuss whether the federal deadlines 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 a tax debt when petitioner filed his Form 1040, petitioner's failure to comply with the applicable filing deadline took his Form 1040 outside Section 523(a)(*)'s definition of "return."

The Eleventh Circuit recently followed a similar approach. That court applied *Beard* to hold that a Form 1040 filed after assessment of a tax did not qualify as a "return" as defined in Section 523(a)(*), but without deciding whether filing deadlines are "applicable filing requirements." See *Justice* v. *United States* (*In re Justice*), 817 F.3d 738, 742, 746 (2016), petition for cert. pending, No. 16-786 (filed Dec. 16, 2016).[3]

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 by reasoning that filing deadlines are "applicable filing requirements." *Fahey* v. *Massachusetts Dep't of Revenue* (*In re Fahey*), 779 F.3d 1, 5 (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

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[3] In *Maryland* v. *Ciotti (In re Ciotti)*, 638 F.3d 276, 280 (2011), the Fourth Circuit applied *Beard* as the "applicable nonbankruptcy law" under Section 523(a)(*), but 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)).

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 debt is nondischargeable) under the circumstances presented here. 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* 1-3 (*Chief Counsel Notice*).[4] 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),

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

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 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." Pet. App. 17a; 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 a tax form filed *after assessment* serves no such purpose with respect to any liability that has 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, 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." *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. 14-24), 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. 7a; *Justice*, 817 F.3d at 746. 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 $70,662 tax debt to be dischargeable.

Petitioner contends (Pet. 8, 18) 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 return "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 *Fahey*, 779 F.3d at 10 (distinguishing *Colsen* on this basis); *Mallo*, 774 F.3d at 1320 (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)(*).[5]

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 petitioner's interpretation of the current version of Section 523(a), further review is not warranted. This Court recently denied another petition presenting the same question, *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.

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[5] *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.

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.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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