No. 25-108

IN THE
Supreme Court of the United States

DONALD WAYNE BUSH and
KIMBERLY ANN BUSH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Government cannot dispute the clear circuit split on whether 11 U.S.C. §505(a)(1) confers jurisdiction upon a bankruptcy court to determine the amount of a tax debt. Instead, the Government attempts to paper over the split by arguing that the eight other circuits which disagree with the Seventh Circuit were using the word "jurisdictional" as an imprecise label, but that is wrong: the "jurisdictional" characterization dictated the outcome of those cases and would necessarily have required the court to find jurisdiction here.

Likewise there is a clear split on whether 28 U.S.C. §1334(b) is an alternative jurisdictional basis for a bankruptcy court to decide the amount of a nondischargeable tax debt. Five circuits say yes without restriction; the Seventh Circuit said no except in the limited number of cases where the decision would impact payments to creditors. The Government glosses over that split too, devoting the bulk of its opposition to its argument that the Seventh Circuit was correct on the merits.

But whether the other circuits or the Seventh Circuit are right is not what the Court has to decide now. Rather, the question today is whether the Court should step in to ensure that debtors in every circuit are treated uniformly when their liabilities include disputed nondischargeable tax debts. This case is the correct vehicle to address that important issue because the rule the Seventh Circuit established—that neither the specific jurisdictional statute §505(a)(1) nor the

general jurisdictional statute §1334(b) confer jurisdiction to determine the amount of a debtor's tax liabilities when only the extent of a debtor's discharge is implicated—writes the relief provided by §505(a)(1) out of the Bankruptcy Code for the majority of debtors, a point the Government does not dispute.

The Court should grant certiorari to decide this important issue that divides the circuits.

I. THERE IS A CLEAR CIRCUIT SPLIT ON BOTH QUESTIONS.

A. The Seventh Circuit's Decision That §505(a)(1) Is Not An Independent Basis For Jurisdiction Conflicts With Eight Other Circuits.

The Government buries its discussion about the clear circuit split that this case presents at the very end of its opposition. BIO 17-19. There, the Government attempts to erase the circuit split by arguing that the conflicting decisions employ the term "jurisdiction" without precision, "loosely," "colloquially," or "profligate[ly]." BIO 17-18. According to the Government, if these circuits were to decide the issue today under the test established in *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288 (2023), they would come out differently. Therefore the Government reasons that the conflict these cases create can be ignored.

This argument is wrong on several fronts. *First*, the eight circuits that have found that §505(a)(1) is an

independent grant of jurisdiction precisely correlated their decisions to the understanding of jurisdiction that this Court set out in *MOAC Mall*. There, the Court reasoned that because noncompliance with jurisdictional rules "deprives courts of power to hear the case," a provision should only be treated as "jurisdictional if Congress 'clearly states' as much." 598 U.S. at 297-98 (citation omitted). Although "magic words" are not necessary to find a statute "jurisdictional" and '[t]raditional tools of statutory construction can reveal a clear statement," the guiding principle is whether the statute "pertain[s] to the power of the court rather than to the rights or obligations of the parties." *Id.* at 298 (internal citations and quotation marks omitted).

The eight circuits that hold §505(a)(1) is an independent grant of bankruptcy jurisdiction precisely follow this Court's instructions as to how to analyze this issue and thus, cannot be dismissed as decisions which used the term "jurisdictional" "loosely." In *IRS v. Luongo (In re Luongo)*, for example, the Fifth Circuit utilized traditional tools of statutory construction to reject the Government's argument there that §505(a)(1) "precludes a bankruptcy court from deciding the personal tax liability of the debtor." 259 F.3d 323, 328 (5th Cir. 2001). The Fifth Circuit looked first to the text of the statute, concluding that the words Congress used were a "broad" grant of authority to decide a particular class of cases. *Id.* It then turned to legislative history that supported its conclusion that Congress intended that bankruptcy courts "will have authority to determine which court will determine the merits of the tax

claim both as to claims against the estate and *claims against the debtor concerning his personal liability for nondischargeable taxes*.'" *Id.* (quoting 124 Cong. Rec. 32414 (1978) (Rep. Edwards)).

The Second Circuit's decision in *United States v. Bond*, further refutes the Government's contention that the circuits holding that §505(a)(1) confers jurisdiction have done so haphazardly and without properly analyzing the jurisdictional question. 762 F.3d 255 (2d Cir. 2014). In *Bond*, the issue was whether one of the exceptions (not applicable here) to the court's exercise of jurisdiction under §505(a)(1) applied. In addressing this argument, the Second Circuit held that because §505(a)(1) is jurisdictional, the Government could not have waived its jurisdictional argument. *Id.* at 263-64. In applying that strict rule notwithstanding the Government's potential waiver, the Second Circuit made clear that it was not using the term jurisdictional lightly and meant what it said when it concluded that "[§]505(a) is a grant of jurisdiction…." *Id.* at 262.

Second, the Government also attempts to recast the question this case presents in an effort to eliminate the circuit split. It contends that the other eight circuits have not addressed "whether Section 505(a)(1) confers jurisdiction in a case not within the bankruptcy court's jurisdiction under 28 U.S.C. §1334(b)." BIO 17. Not so. None of the decisions treat §505(a)(1), as the Seventh Circuit does, as merely a procedural implementation of the bankruptcy jurisdiction set out in 28 U.S.C. §1334(b). To the contrary, the question of bankruptcy jurisdiction in nearly all of these decisions turned

exclusively on whether §505(a)(1) applied to confer jurisdiction over the dispute.

Bond illustrates the point. In that case, the Second Circuit held that "§505(a) is a grant of jurisdiction to the bankruptcy court over certain tax claims" but ordered dismissal of the suit because it concluded the type of tax claim at issue there did not fall under §505(a). 762 F.3d at 262-64. If the Second Circuit thought that §1334(b) was the statute that supplied jurisdiction, and its analysis of jurisdiction under §505(a) was superfluous, it would not have ordered dismissal.

Likewise, in *United States v. Kearns*, the Eighth Circuit concluded that it "need not reach [the] question" of whether the bankruptcy court had jurisdiction under the "additional bases" asserted by the debtor because it found "that Congress intended under §505 to grant jurisdiction to the bankruptcy court to determine [the debtor's] tax liability." 177 F.3d 706, 709 n.7 (8th Cir. 1999). By declining to address alternative bases for jurisdiction, the Eighth Circuit made clear its decision rested jurisdiction exclusively upon §505(a).

Indeed, with one exception, those circuits which have held that §505(a) confers jurisdiction do not consider jurisdiction under §1334(b) or even mention it.[1]

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[1] *See, e.g.*, *Bunyan v. United States (In re Bunyan)*, 354 F.3d 1149, 1151 (9th Cir. 2004) (addressing jurisdiction only under §505(a)(1) without mentioning §1334); *City of Perth Amboy v. Custom Distrib. Servs., Inc. (In re Custom Distrib. Servs. Inc.)*, 224 F.3d 235, 239-40 (3d Cir. 2000) (same); *Luongo*, 259 F.3d at 328 (same); *Kearns*, 177 F.3d at 709-10, 709 n.7 (same); *City Vending of*

And in that one case, the Sixth Circuit considered §1334(b) jurisdiction *only* after concluding that jurisdiction under §505(a)(1) did not apply to a tax dispute involving a nondebtor. *See Michigan Emp. Sec. Comm'n v. Wolverine Radio Co.* (*In re Wolverine Radio Co.*), 930 F.2d 1132, 1140 (6th Cir. 1991).

Finally, the Government argues that the Second and Eighth Circuits were "describ[ing] [§]505 as jurisdictional in the sense that Congress has abrogated sovereign immunity" and therefore their decisions do not create a conflict. BIO 18-19. Again not so. If those circuits were treating §505(a) as only a waiver of sovereign immunity then the bankruptcy courts would have needed another jurisdictional basis to hear the disputes. But neither *Bond* nor *Kearns* offer any other basis for the bankruptcy courts to exercise subject-matter jurisdiction. And in fact, in *Kearns* the Eighth Circuit rejected the argument that because a waiver of sovereign immunity does not confer subject-matter jurisdiction, there was no jurisdiction to hear the dispute. 177 F.3d at 709 n.7. It held instead that because "Congress intended under §505 to grant jurisdiction" it did not need to address any other basis for federal jurisdiction. *Id.*

Muskogee, Inc. v. Okla. Tax Comm'n, 898 F.2d 122, 124-25 (10th Cir. 1990) (same).

B. The Seventh Circuit's Decision That Bankruptcy Courts Also Lack Jurisdiction Under 28 U.S.C. §1334(b) To Decide Nondischargeable Tax Claims Conflicts With Five Other Circuits.

The Seventh Circuit held that bankruptcy courts only have §1334(b) "related to" jurisdiction to decide the amount of a nondischargeable debt if that decision will impact payments creditors receive from a bankruptcy estate. The other five circuits that have addressed this issue do not place this condition, which appears nowhere in §1334(b), upon the exercise of jurisdiction. As it does with the §505(a) question, the Government fixates on factual differences between the cases without grappling with the fact that the legal rules of the circuits are irreconcilable. BIO 15-16.

The Government contends that this case is factually distinguishable from the decisions of the other five circuits because the bankruptcy court did not enter a money judgment against the debtor. BIO 15-16. But the only reason the bankruptcy court did not enter a money judgment against Petitioners is because the Government petitioned for, and was granted, leave to prosecute an interlocutory appeal before a judgment could be entered. Pet.App.43a. Absent that appeal, the bankruptcy court would have entered judgment—in the amount of either a negligent penalty or a fraudulent penalty. If the Government had appealed such a judgment, the posture of this case would have been identical to that of the conflicting circuit decisions.

The Government also incorrectly distinguishes the other circuits, arguing that they found jurisdiction only because those disputes were a necessary part of determining whether the debt was nondischargeable. BIO 16. But the conflicting decisions are not grounded in supplemental jurisdiction. Indeed, the Fifth Circuit expressly rejected supplemental jurisdiction as a basis for its holding that a bankruptcy court has "jurisdiction to enter complete relief between two parties on a claim." *Morrison v. W. Builders of Amarillo, Inc. (In re Morrison)*, 555 F.3d 473, 479-80 & n.4 (5th Cir. 2009).

Finally, the Government contends that the decision below only creates an intra-circuit conflict because the Seventh Circuit earlier found bankruptcy jurisdiction to determine the amount of a nondischargeable debt, citing *N.I.S. Corp. v. Hallahan (In re Hallahan)*, 936 F.2d 1496 (7th Cir. 1991). BIO 16-17. *Hallahan*, however, does not address whether a bankruptcy court has jurisdiction to enter a money judgment on a dischargeability claim; the issue there was jury trial rights. *Id.* at 1502-08. A later decision, *In re Collazo*, 817 F.3d 1047 (7th Cir. 2016), did address the issue, but the Seventh Circuit in this case found that *Collazo* was an "unreasoned" "drive-by ruling" that should not "be given effect." Pet.App. 22a. In short, *Hallahan's* oblique, unlitigated suggestion that §1334(b) confers jurisdiction is not good law in the Seventh Circuit.

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The Seventh Circuit's decision conflicts with multiple other circuits on the two questions presented and

the Court should grant certiorari to resolve this conflict.

II. THE COURT SHOULD RESOLVE THE CIRCUIT SPLITS.

The Government barely addresses the reasons why resolving this conflict among the circuits is important. BIO 13-14. As explained in the petition, the Seventh Circuit's decision means that the majority of debtors filing in the Seventh Circuit will be denied relief in the bankruptcy courts if they are facing nondischargeable tax debts. Pet. 3-4, 20-21. Unlike debtors in eight other circuits, they will leave their bankruptcy cases with "a sword of Damocles hanging over [their] heads" unsure about the amount of nondischargeable tax debts they will still owe to the Government. This result is contrary to the very reason Congress gave bankruptcy courts jurisdiction under §505(a)(1) and its predecessor statute. *Bostwick v. United States*, 521 F.2d 741, 746 (8th Cir. 1975) (holding that "Congress intended that the bankrupt have the opportunity for a full *and final* determination of the dischargeability of his tax debts") (emphasis added).

The Government dismisses this concern stating that corporate debtors with assets to distribute in a chapter 11 reorganization might still be able to obtain relief under §505(a)(1). BIO 13. But if Congress had intended to restrict §505(a)(1) to only chapter 11 debtors, it would have placed §505 in chapter 11 and not made it a general provision applicable to all debtors. The Government also posits that there is a difference between tax

claims and penalties in terms of priority and that in some cases with assets to distribute the amount of a tax claim might make a difference to the amount available to distribute to other creditors. BIO 13-14. While true, neither type of tax debt is paid in a "no asset" case and thus, this argument does nothing to rebut the fact that the Seventh Circuit's decision severely restricts the ability of bankruptcy courts to decide tax claims. This result is at odds with both the wording of §505(a)(1) and the primary purpose of any bankruptcy case: to provide the honest but unfortunate debtor with a fresh start. *See Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

The Government further argues that because some debts are nondischargeable the fresh start policy cannot outweigh the interests of creditors and therefore the inconsistency of treatment between debtors in the Seventh Circuit and elsewhere should not be a concern. BIO 14. But determining the amount a debtor will owe post-bankruptcy on debts that cannot be discharged is not at odds with a creditor's interest, since the creditor itself is benefitted by having the debt liquidated. And knowing with certainty the amount of nondischarged debts allows debtors to plan their financial futures, a result equally as important to a debtor's fresh start as discharging those debts that qualify for a discharge. *See Bostwick*, 521 F.2d at 744, 746.

Finally, the Government contends that this case is "an unsuitable vehicle for resolving the question presented" because of the lengthy delay in this case—a delay the Government caused by bringing an

interlocutory appeal. BIO 19-20. Having caused the delay, the Government should not now be allowed to capitalize on it by arguing that delay is a basis to deny review.

The Government further suggests that if the Court grants review, the appropriate disposition of this case would be abstention. But that is a theoretical impossibility because 28 U.S.C. §1334(d) bars this Court and the Seventh Circuit from reviewing the bankruptcy court's abstention decision, as the Seventh Circuit recognized when it corrected its initial decision for this error. Pet.App. 26a-27a. It also is unlikely that the district court would order abstention because it twice had the opportunity to avoid deciding the jurisdictional question by ordering abstention, including just a year ago, and both times did not order abstention. Pet.App. 4a-14a, 41a-50a.

Moreover, the Government ignores the fact that a third review of the bankruptcy court's abstention decision on remand to the district court would be based on the facts as they existed when that decision was made under an abuse of discretion standard and not with the benefit of the Government-caused delay. *Howe v. Vaughan (In re Howe)*, 913 F.2d 1138, 1143 (5th Cir. 1990). Because the principle issue in dispute in connection with what type of penalty to assess is whether Petitioners committed fraud and bankruptcy courts are well-experienced in trying financial fraud cases, it is unlikely that the district court would conclude that the bankruptcy court abused its discretion.

III. THE SEVENTH CIRCUIT'S DECISION IS WRONG.

The Government devotes most of its opposition to the merits of the Seventh Circuit's decision. BIO 6-14. But at bottom, its argument is circular. It urges the Court to adopt the Seventh Circuit's interpretation of §505(a)(1) and find that this statute merely prescribes a task the Court may perform, while at the same time arguing that there is no jurisdiction to perform this very task under §1334(b)'s general grant of jurisdiction.

In making this argument, the Government ignores the pre-Code source for the bankruptcy courts' jurisdictional power to both adjudicate tax disputes and to determine the amount of nondischargeable debts. Under the prior Bankruptcy Act, both the ability to determine tax claims and to decide the amount of a nondischargeable debt were explicitly included in the Act's jurisdictional grant of authority to the bankruptcy courts. *See* 11 U.S.C. §11 2a(2A), 17(c). *See* Pet.App.73a. When Congress enacted §1334 it intended to expand the bankruptcy court's jurisdiction, not constrict it, by making the jurisdictional statute more general. *Morrison*, 555 F.3d at 479. Yet, the Government would have this Court hold that bankruptcy courts may no longer decide those matters that Congress has historically allowed them to decide.

The basis for the Government's argument—*Celotex Corp. v. Edwards*, 514 U.S. 300 (1995)—cannot bear the weight the Government places upon it. *Celotex*

decided whether "related to" jurisdiction existed over a dispute between two sets of creditors over property that did not belong to the debtor. *Id.* at 303-05. Because the dispute could have impacted the debtor, the Court found "related to" jurisdiction. In so holding, the Court quoted with approval, that "[a]n action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action…." 514 U.S. at 308 n.6. (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). Because determining the amount of nondischargeable tax debts "could alter the debtor's…liabilities" and has historically been within the bankruptcy court's jurisdiction to decide, this Court should grant certiorari to reverse the Seventh Circuit's incorrect limitation on bankruptcy jurisdiction.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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