18-14922

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MASSACHUSETTS DEPARTMENT OF REVENUE,
Appellant
v.

JOHN ROBERT SHEK,
Appellee

ON APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA
Case No. 5:18-cv-00341-JSM

BRIEF OF AMICUS CURIAE PROFESSOR JOHN A. E. POTTOW IN SUPPORT OF APPELLEE FOR AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rule 26.1-1, J o h n A. E. Pottow hereby certifies that, to the best of his knowledge, information, and belief, the following persons and entities have an interest in the outcome of this appeal:

- de la Foscade-Condon, Celine, Attorney for the Appellant
- Healey, Maura, Attorney General for the Commonwealth of Massachusetts
- Jenneman, Karen S., U.S. Bankruptcy Court Judge
- Massachusetts Department of Revenue, Appellant
- Meyer, Robert, Attorney for the Appellee
- Moody, James S., Jr., U.S. District Court Judge
- O'Donnell, John, Attorney for the Appellant
- Shek, John, Appellee

The undersigned certifies that there are no publicly traded companies or corporations that have an interest in the outcome of the case or appeal.

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae, Professor John A. E. Pottow (Amicus), is the John Philip Dawson Collegiate Professor of Law at the University of Michigan Law School. He co-authors one of the leading textbooks on bankruptcy law, *The Law of Debtors and Creditors* (7th ed. 2014). He submits this brief as part of his ongoing pro bono service to the federal courts in matters of his scholarly expertise. Amicus states that no party's counsel authored this brief in whole or in part, and that no party or other person contributed money to fund this brief's submission. Both parties have consented to the filing of this brief for purposes of Fed. R. App. P. 29(a)(2).

SUMMARY OF ARGUMENT

This appeal implicates the so-called "hanging paragraph" of 11 U.S.C. § 523(a). Amicus respectfully submits that proper interpretation of this provision is not nearly so difficult as several courts have fretted. It requires no distortion or even "fudging" of Congress' explicit text, as some seem to have feared. Indeed, some have gone so far to imply they must overcome the clear text of § 523(a) to avoid a "draconian" result. *See, e.g.*, *Biggers v. Internal Revenue Serv.*, 557 B.R. 589, 594 (M.D. Tenn. 2016) (avoiding "draconian result of a per se rule" that excludes all untimely tax forms from discharge).

This is wrong. Section 523(a)'s clear text does not sit in tension with but *supports* Appellee Shek's reading of the statute under traditional canons of statutory interpretation. Appellant Massachusetts Department of Revenue's (DOR)'s proposed interpretation either ignores or absurdly reads the qualifier "applicable," eviscerates the tripartite structure of the relevant statutory provision, and renders explicit textual references to other statutes wholly redundant. A proper reading of the text also has the virtue of comporting with the best indicia available of legislative intent and sound policy. This is true when § 523(a) is applied to federal law, and so too for Massachusetts law.

STATEMENT AND HISTORY OF RELEVANT STATUTES

The district court accurately boiled down the dispute to turning on a four-word parenthetical added by Congress to the Bankruptcy Code in 2005. Appellant's app. at 364 ("The culprit lies in the parenthetical phrase in the new definition: "including applicable filing requirements.") (referencing 11 U.S.C. § 523(a)(*)). Accordingly, Amicus will first give statement of the prior law and then the 2005 amendment.

I. 11 U.S.C. § 523(a): Nondischargeable Debts.

The Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, provides for discharge of general unsecured debt. This "fresh start" reflects Congress's policy balancing that weighs the debtor's legal and moral obligation to repay debts against the necessity of moving on when those debts have become hopeless. *See Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) ("The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'") (quoting *Grogan v. Garner*, 498 U.S. 279, 286, 287 (1991)). Some debts, however, Congress excepts from discharge. These *nondischargeable* debts shoulder some debtors with ongoing repayment obligations notwithstanding the general presumption of a fresh start. 11 U.S.C. § 523.

Congress's grounds for nondischargeability vary. They range from moral

culpability—e.g., willful and intentional tort damages under § 523(a)(6)—to proper functioning of the bankruptcy system—e.g., debts unlisted on a debtor's bankruptcy schedules under § 523(a)(10)—to perceived threats to the solvency of governmental programs—e.g., student loans under § 523(a)(8). Because nondischargeability is literally "exception[al]," 11 U.S.C. § 523, strict construction of the § 523(a) exceptions is a cornerstone of bankruptcy interpretation. *See Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998) ("[E]xceptions to discharge 'should be confined to those plainly expressed.'") (quoting *Gleason v. Thaw*, 236 U.S. 558, 562 (1915)).

Non-priority tax debt is generally dischargeable.[1] Nevertheless, Congress catches three types of non-priority tax debts in § 523's nondischargeability scoop. Two of them trigger a permanent bar from discharge, and one triggers a postponement of the discharge. *See* 11 U.S.C. § 523(a)(1)(B), (C).

The first pertains to *scofflaws*: debtors who refuse to file tax returns never get to discharge their debts associated with the years of the unfiled returns. *Id.*, § 523(a)(1)(B)(i).

The second pertains to *frauds*: debtors who file fraudulent returns also never get to discharge the taxes associated with those fraud years. *Id.*,

[1] Priority tax debt, not relevant to this petition, is generally nondischargeable. *See* 11 U.S.C. §§ 507(a)(3), (a)(8) (pertaining to "trust fund" taxes and incurred-just-before-bankruptcy taxes).

§ 523(a)(1)(C).

The third pertains to *procrastinators*. With them, Congress is even more fine-grained in its discharge policy balancing: latecomers can discharge their taxes just like any other taxpayer, but only upon waiting for two years after their belated filing dates before petitioning for bankruptcy. *Id.*, § 523(a)(1)(B)(ii). This postponement affords the IRS a reasonable time to audit the late returns by preventing the debtor from blindsiding the IRS with a quick bankruptcy filing and discharge before it even knows what is owed.

The statute lays out the scheme thus:

> (a) A discharge . . . does not discharge an individual debtor from any debt—
> (1) for a tax or customs duty--
> (A) [priority tax debts];
> (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; or
> (C) 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).

This tripartite approach to non-filers, late filers, and fraudulent filers carefully calibrated the exceptional bankruptcy penalty of nondischargeability: those who try to cheat the IRS may never discharge their tax debts in bankruptcy,

and those who file late have to give the IRS two years to catch up before they can discharge their debts in bankruptcy like any other taxpayer.

II. 26 U.S.C. §§ 6020(a) and (b): "Return-Like" Filings.

Up until 2005, the Bankruptcy Code never bothered to define "return" for purposes of the nondischargeability provisions of § 523(a). It was in good company, as neither did the Internal Revenue Code. The omission proved mostly trivial, however, as courts far and wide adopted a Tax-Court-developed test for the definition of "return" whenever litigation called a document's status into question. *Beard v. Commissioner*, 82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986). *Beard* itself built upon Supreme Court precedents. *See, e.g.*, *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 180 (1934) ("Perfect accuracy or completeness is not necessary [if a filing] purports to be a return, is sworn to as such, and evinces an honest and genuine endeavor to satisfy the law.") (citation omitted).

The very need for defining "return" may at first blush seem odd—a tax return in the federal system is a Form 1040, most people might think. But all sorts of taxpayers fail to file that specific document (or its analogue) and, when challenged, seek to show that their alternative documentation nonetheless legally suffices for various purposes. *See, e.g.*, *Lowrie v. United States (In re Lowrie)*,

162 B.R. 864, 866 (Bankr. D. Nev. 1994) (debtor arguing successfully signed 1902-B forms attached to unsigned and incomplete 1040 constituted a "return"). Thus, it might help to think of *Beard* as really focused on identifying what should count as a "constructive return" when a proper Form 1040 is not on file. *Beard's* significance, however, and even its content are not important for this appeal. (Moreover, the decisions below and the parties' briefings discuss *Beard* perfectly well.) All that matters is that the *Beard* test is ubiquitous as the applicable tax law definition of "return" (at least so far as the federal taxation system is concerned, as it is in many states' systems, too, *see, e.g.*, *Bert v. Comptroller of the Treasury*, 81 A.3d 460, 482–83 (Md. Ct. Spec. App. 2013) (applying *Beard* test to state tax return)). Indeed, Amicus unearthed no tax case refusing to adopt *Beard*.

To be sure, *Beard* does not resolve every conceivable question that crops up when something's status as a "return" is questioned. For example, in bankruptcy cases, historical confusion arose under the *Beard* test about how to treat IRS-prepared filings under 26 U.S.C. §§ 6020(a) and 6020(b) (the latter often called "SFRs" or "Substitutes for Returns"). *See, e.g.*, *Swanson v. Comm'r*, 121 T.C. 111, 111 (2003) (referring to return prepared by the IRS under § 6020(b) as an "SFR"). When the IRS discovers a missing tax return (necessarily after the filing deadline), and the taxpayer does not respond to letters cajoling compliance,

it has two options. First, the IRS can draft a return itself with the taxpayer's cooperation, preparing it for taxpayer signature, under 26 U.S.C. § 6020(a). The IRS advises this is a rarely invoked procedure that arises in a trivial number of cases. See *Fahey v. Mass. Dep't of Revenue (In re Fahey)*, 779 F.3d 1, 6 (1st Cir. 2015) ("The I.R.S.'s Chief Counsel has referred to the number of section 6020(a) returns as 'minute.'").

Second, which is more likely, the IRS can file an SFR under 26 U.S.C. § 6020(b) without the taxpayer's blessing. A § 6020(b) SFR does not trigger many of the statutory rights that follow a full tax return, notably, the start of the limitations period on assessment, but does start the IRS' collection procedures. *See Spurlock v. Comm'r*, 118 T.C. 155, 158 (2002) (discussing 26 U.S.C. § 6501(b)(3)).

Whether an SFR was a "return" for purposes of § 523(a)(1) had become a contested bankruptcy discharge question before 2005. *Compare, e.g.*, *Ridgway v. United States (In re Ridgway)*, 322 B.R. 19, 37 (Bankr. D. Conn. 2005) (holding SFR filed under 6020(b) was a return for purposes of § 523(a)(1)(B)), *with, e.g.*, *In re Lowrie*, 162 B.R. at 866) ("[W]hen a debtor fails to file a tax return and the IRS prepares one for her pursuant to § 6020(b), the debtor is not considered to have filed a return for purposes of § 523(a)(1)(B)(i)."). *Beard* thus answers many questions on what is a "return," but yields incomplete certainty on at least some

others, such as what to do with § 6020 filings.

III. The 2005 Amendment to 11 U.S.C. § 523(a): The "Hanging Paragraph."

When Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 overhaul of the Bankruptcy Code, it added an inartfully placed "hanging paragraph" at the end of § 523(a). *See In re Fahey*, 779 F.3d at 4 (using common reference to this amendment as the "hanging paragraph"). Styled a definition of "return," the hanging paragraph principally directed bankruptcy courts to do what many if not all were already doing: look to nonbankruptcy law (i.e., tax law—namely, *Beard*) for the definition of "return." But it also added a provision settling the technical but nonetheless recurrent § 6020 dispute explained above.

In its entirety, the hanging paragraph reads:

> 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)(*).

The only relevant legislative history is sparse but does indeed focus on the

§ 6020 debate:

> Section 714 of the Act amends section 523(a) of the Bankruptcy Code to provide that a return prepared pursuant to section 6020(a) of the Internal Revenue Code, or similar State or local law, constitutes filing a return (and the debt can be discharged), but that a return filed on behalf of a taxpayer pursuant to section 6020(b) of the Internal Revenue Code, or similar State or local law, does not constitute filing a return (and the debt cannot be discharged).

H.R. Rep. No. 109-31, at 103 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 167.

Thus, the hanging paragraph did two things. First, it codified the use of *Beard*, or more specifically, the use of "applicable nonbankruptcy law," to provide the definition of "return," thereby legislatively precluding the development of bankruptcy-specific common law. Second, it resolved the SFR debate by deciding § 6020(a) filings—but not § 6020(b) ones—would count as tax returns.

The instant dispute arises because some courts (endorsed by DOR) have interpreted the hanging paragraph to effect a third, much more dramatic change to longstanding bankruptcy practice. These courts say that the hanging paragraph amendment transfers almost every debtor who files a late return from falling under § 523(a)(1)(B)(ii) (late returns) to falling under § 523(a)(1)(B)(i) (no returns). Section 523(a)(1)(B)(ii) survives on the books, say these proponents, but only as a vestigial provision for the "minute" number of taxpayers who file §

6020(a) returns. This position transforming late returns into non-returns has come to be called the "one-day-late" approach. *See, e.g.*, *Justice v. United States (In re Justice)*, 817 F.3d 738, 743 (11th Cir. 2016) ("This approach has been termed the 'one-day-late rule' because it prohibits discharge of a tax debt with respect to which a return was filed even one day late.").

The one-day-late approach rests upon a simple syllogism flowing from the hanging paragraph's four-word parenthetical: (1) the hanging paragraph's definition of "return" includes compliance with "applicable filing requirements"; (2) timely filing is a requirement of all federal and state tax laws; and therefore (3) an untimely return, out of compliance with the timely filing requirement, is not a "return" under this definition. As Amicus will explain in his argument, this syllogism is flawed.

ARGUMENT

The syllogism underlying the one-day-late approach is flawed and cannot withstand textual scrutiny. Massachusetts law does not alter this result.

I. A LATE-FILED TAX RETURN IS TEXTUALLY JUST THAT—A "RETURN" THAT IS "LATE."

To begin, and at the risk of stating the semantically and perhaps ontologically obvious, a tax return can have various attributes having nothing to do with its status as a return. It can be "helpful" to the taxing authorities, just as it can be "unhelpful." It can be "aggressive," "early," or "late." But it is still a return. The one-day-late rule requires concluding that a Form 1040, which is clearly captioned "U.S. Individual Income Tax Return," ceases to be a "return" when it is filed too late (specifically, after its filing deadline). *See Form 1040*, Internal Revenue Service 1, 1 (2018); *see also Form 1*, Mass. Dept. of Revenue 1, 1 (2018) ("Massachusetts Resident Income Tax Return"). This result is not in any way demanded by the statutory text, and indeed violates almost any common understanding of what constitutes a return. No English dictionary so far as Amicus can discover ever refers to timeliness in its definition of "return" or "tax return." *See, e.g.*, Tax Return, Black's Law Dictionary (10th ed. 2014) ("[The] form on which an individual, corporation or other entity reports income, deductions, and exemptions and calculates their tax liability."). Given the

ordinary meaning of "return," reading the hanging paragraph to exclude a one-day-late return from its definition of that term violates the logical interpretive principle endorsed by the Supreme Court that "[i]n settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, *particularly when there is dissonance between that ordinary meaning and the reach of the definition*." *Bond v. United States*, 134 S. Ct. 2077, 2091 (2014) (emphasis added).

Perhaps most telling are DOR's own laws, which refer to overdue returns as "late," but nonetheless still "returns." *See, e.g.*, Mass. Gen. Laws ch. 62, § 33(a) ("LATE RETURNS") ("If any return is not filed with the commissioner on or before its due date or within any extension of time granted by him, there shall be added to and become a part of the tax, as an additional tax, a penalty . . . during which such failure continues, not exceeding, in the aggregate, twenty-five per cent of said amount."). Even its plain-English web page instructions use the terminology of being "overdue":

> **Original return has not been timely:** A request for a refund or credit of an overpayment of any tax where an original return has not been timely filed, shall be made by filing the overdue return within 3 years from the due date of the return, taking into account any extension of time for filing the return, or within 2 years of the date that the tax was paid, whichever is later.

Refunds and Credits of Overpayments, Mass.gov, https://www.mass.gov/info-details/refunds-and-credit-of-overpayments#overview.

DOR's insistence that late filing transforms a return into a "non-return" is therefore inconsistent with its own vocabulary. It is also textually indefensible, for at least three reasons.

1. DOR Ignores (or Reads Absurdly) the Qualifier "Applicable."

None of the one-day-late cases has adequately addressed, let alone given meaningful content to, the modifier "applicable" preceding "filing requirements" in the hanging paragraph's parenthetical. 11 U.S.C. § 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).") (emphasis added). As the Supreme Court has made clear, "applicable" does not mean "all" but rather requires analysis of context and has a standard dictionary definition of "appropriate, relevant, suitable or fit." *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 70 (2011).

Here, the "appropriate," "relevant" or "suitable" filing requirements to consider in the definition of "return" are obviously those definitional to what constitutes a return. Indeed, DOR's very own sources provide a ready example of just what such an "applicable" filing requirement would be. Massachusetts has regulations pertaining to overpayment interest rates. Those specify, explicitly, the "requirements" for a "properly filed return" entitled to earn such interest. See 830

C.M.R. 62C.26.1(17)(g) ("Requirement of properly filed return"):

> For purposes of any return required to be filed to obtain a refund under 830 CMR 62C.26.1(17), the Commissioner will not treat a return as filed until the return is filed on a form prescribed by the Commissioner, containing the following information:
>
> 1. The taxpayer's name, address, tax identification number, and any required signatures; and
>
> 2. Sufficient information to permit the mathematical verification of the tax liability shown on the return.

830 C.M.R. 62C.26.1(17)(g). (This regulatory provision is helpfully reproduced at ADD. 023 of Appellant's Brief's Appendix.)

This example shows an *applicable* filing requirement that would be "included" as part of "applicable nonbankruptcy law" that serves to define a tax return. This regulation has to do with the information necessary for a filing to constitute a return, namely: name, address, signatures, and so forth. A W-2 (an unsigned document) would not make the cut under this Massachusetts regulation. By contrast, the filing requirement that the filer use only black ink to fill out a Massachusetts resident income tax form, *see Form 1*, Mass. Dept. of Revenue 1, 1 (2018), while certainly a "filing requirement," would not be an *applicable* filing requirement (or "relevant" in the Supreme Court's wording) to helping inform a

court whether a W-2 counts as a tax return.[2] *See also Form 1040*, Internal Revenue Service 1, 1 (2018), https://www.irs.gov/pub/irs-pdf/f1040.pdf. (prohibiting stapling or writing in upper-right-hand corner of form). Similarly, the due date specified by law and regulation tells a court nothing about whether a W-2 counts as a tax return. It is simply not "applicable" to the question at hand.

Even more importantly, § 523(a)'s parenthetical does not appear in isolation. It is a subset of "applicable nonbankruptcy law." See 11 U.S.C. 523(a)(*) ("The term 'return' means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)."). And that "applicable" law, of course, is the nonbankruptcy law applicable to whether a filing constitutes a "return"—i.e., *Beard*.

It is hard to make complete sense of DOR's proposed interpretation of "applicable" (both regarding "applicable nonbankruptcy law" and "applicable filing requirements"). It seems to mean "all," as in "all law applicable to tax

[2] Somewhat unclear is the hanging paragraph's distinction between "law" and "requirements." Most would agree that a compulsory legal obligation (a "requirement") spelled out by statute sounds like a "law," suggesting some redundancy between the two terms. This could be simply overly cautious Congressional drafting, but it could also reflect more meaning—say, a belief by Congress that lesser forms of relevant command (perhaps duly promulgated interpretative guidance documents) should be included in analyzing whether a document is a return. Alternately, it could merely be that applicable law refers to the choice of relevant law question (nonbankruptcy vs. bankruptcy), whereas "applicable filing requirements" refers to the specific relevant content of that chosen law. Happily, Amicus does not believe anything turns on definitively resolving this distinction.

returns (including all filing requirements applicable to tax returns)." But this reading would be utterly absurd. For example, on that view, if a taxpayer filed a timely return but claimed a deduction to which she was not entitled under tax law, she would be deemed to have never filed a return, as she would not have complied with *all* law pertaining to tax returns.

Thus, the "applicable" filing requirements, which are described as a subset of "applicable nonbankruptcy law," cannot be *all* filing requirements applicable to a given tax return; they are simply the *definitional requirements*, if any, specified in governing law applicable to the necessary content of a return. *See, e.g.*, 830 C.M.R. 62C.26.1(17)(g). They cannot include other, non-definitional filing requirements, such as rules on when the return is due, or rules on whether a check is allowed to be stapled to a return or must be enclosed loose. The one-day-late cases espoused by DOR either ignore the textual qualifier of "applicable" or read it, nonsensically, to mean "all."

2. DOR Does Violence to the Tripartite Structure of § 523(a)(1), Reading § 523(a)(1)(A)(ii) into Insignificance.

DOR's proposed reading also eviscerates the tripartite structure of § 523(a)(1). In reclassifying all late returns as non-returns, it reads the late-returns provision of § 523(a)(1)(B)(ii) into surplusage oblivion. As the Supreme Court has recognized, "the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory

scheme." *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013).

To be sure, DOR protests, just as did the First Circuit in *Fahey*, that it does not relegate § 523(a)(1)(B)(ii) to 100% surplusage—only roughly 99% surplusage—because § 523(a)(1)(B)(ii) can still apply non-redundantly to the trivial number of late returns filed under 26 U.S.C. § 6020(a) or similar state-law provisions, which the hanging paragraph defines as "returns." *See Fahey*, 779 F.3d at 6 (acknowledging that the IRS' Chief Counsel has described the number of returns filed under § 6020(a) as "minute," but nevertheless holding that "[w]hile section 6020(a) may only apply in a small minority of cases, the fact that a late filed section 6020(a) return can still qualify as a 'return' for section 523(a) purposes means that the two-year provision [of § 523(a)(1)(A)(ii)] still has a role to play . . . .").

With respect to the First Circuit, "small minority" is too charitable a recast of what the IRS actually says. The IRS represents that 6020(a) returns constitute not just a "minority" or even "small minority," but only a "*minute*" number of returns. *Id.* (emphasis added). As such, a fairer characterization might be to say that 6020(a) returns constitute an "insignificant" number of returns. But this is exactly what the Supreme Court has said cannot suffice to overcome the surplusage canon. It is a "cardinal principle of statutory construction that . . . no clause, sentence, or word shall be superfluous, void, *or insignificant*." *TRW Inc.*

v. Andrews, 534 U.S. 19, 31 (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)) (emphasis added).

Jumping through a hoop and doing a somersault to show a non-redundant reading of § 523(a)(1)(A)(ii) applying exclusively to 6020(a) returns and state analogues is not good enough. What the Supreme Court requires is a sensible reading of the statute that gives meaningful existence to *all* its provisions, not one that relegates a major provision to irrelevance except for a minute number of cases. See *TRW Inc.*, 534 U.S. at 29 (declining to render statute insignificant or "superfluous in all but the most unusual circumstances"); *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 103 (2012) (citing *TRW Inc.* in refusing to construe statute "in a manner that renders it entirely superfluous in all but the most unusual circumstances.") In fact, DOR does not even have analogous provisions to § 6020(a), *see, e.g.*, *Perkins v. Massachusetts Dep't of Revenue*, 507 B.R. 45, 53 n.6 (D. Mass. 2014), *aff'd sub nom. Fahey v. Massachusetts Dep't of Revenue (In re Fahey)*, 779 F.3d 1 (1st Cir. 2015) (acknowledging Massachusetts' lack of § 6020(a)-like provisions), which means it and similar states only worsen the fraction of taxpayers to which § 523(a)(1)(A)(ii) could plausibly apply on its reading—dropping the number from minute to miniscule).

Moreover, the attempt to rescue § 523(a)(1)(B)(ii) from surplusage oblivion by saying it applies (only) to § 6020(a) returns and state analogues runs into two

insurmountable roadblocks.

First, Congress does not effect radical changes to prior bankruptcy practice (as declaring debts associated with 99% of all late tax returns to be permanently nondischargeable, rather than only temporarily nondischargeable, would do) without a whiff of intention. *See Hamilton v. Lanning*, 560 U.S. 505, 517 (2010) ("Pre-BAPCPA bankruptcy practice is telling because we 'will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.'") (quoting *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 454 (2007)). Here, the legislative history (unsurprisingly) makes no suggestion of such an idiosyncratic intent. *See* H.R. Rep. No. 109-31, at 103 (2005). And the structure of the text suggests, if anything, a contrary intent. After all, the simplest way to amend the text to provide for § 6020(a) returns to be the only late-filed returns permissible for two-year discharge would be to amend the text of *§ 523(a)(1)(B)(ii) itself* to restrict its reach to § 6020(a) returns. It would be unnatural, to say the least, to implement such a change by leaving § 523(a)(1)(B)(ii)'s text unaltered, with a scope facially applicable to all late tax returns, but then, in a post-script paragraph, indirectly exclude 99% of those returns through a definitional clawback that bars all late-filed returns save those filed under § 6020(a). The suggestion that this is the "clear" reading of the text verges on the preposterous.

Second, consigning § 523(a)(1)(B)(ii)'s applicability to § 6020(a) returns runs smack into the absurdity doctrine. *See, e.g.*, *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). No court, nor even any commentator, of which Amicus is aware has yet to propose a non-absurd reason why Congress might want to favor § 6020(a) returns (forms where the IRS's staff has to complete the taxpayer's return at its own expense from information that taxpayer provides) from late-filed Form 1040s (forms where the taxpayer bears that cost herself). Both of these are returns filed after the IRS catches up with an initially delinquent taxpayer, but the § 6020(a) one alone imposes costs on the IRS, whereas the taxpayer internalizes his own preparation costs with a regular Form 1040. A full-employment policy for IRS personnel seems unlikely to have been motivating a deficit-fighting Congress.

Some courts have misfired in responding to this absurdity challenge by mistakenly construing the attack as on Congress' decision to accord more favorable treatment to § 6020(a) returns than § 6020(b) returns. *See, e.g.*, *McCoy v. Miss. State Tax Comm'n (In re McCoy)*, 666 F.3d 924, 931 (5th Cir. 2012). Congress does indeed appear to have so favored § 6020(a) filings over § 6020(b) filings, and there are eminently rational reasons for it having done so. But that

provides no rebuttal to the absurdity of contending, as DOR does, that Congress wanted to accord more favorable treatment to § 6020(a) returns over properly completed, self-financed Form 1040s. As such, try gamely as it might, DOR cannot escape the charge that it reads § 523(a)(1)(B)(ii) either out of the statute or into absurdity.

3. DOR Cannot Make Sense of the Textual References to §§ 6020(a) and (b) in the Hanging Paragraph.

Finally, even leaving aside the strong bankruptcy law presumption that all statutory ambiguities in discharge exceptions should be strictly construed in favor of the debtor, *see Kawaauhau*, 523 U.S. at 58, further textual embarrassment plagues DOR's proposed reading. Consider the hanging paragraph's explicit inclusion of § 6020(a) returns. Those are returns where the IRS catches an initial non-filer, and the non-filer cooperates to the extent of turning over all her paperwork to the IRS for the preparation of the errant return. On the one-day-late interpretation, these § 6020(a) returns are not "returns" (they were filed after the deadline), in which case their inclusion in the hanging paragraph has to be an exception from their otherwise being excluded. If this "6020(a) exception" reading were correct, however, the hanging paragraph's § 6020(a) clause would likely have been drafted with appropriate introductory language such as: "*Notwithstanding the foregoing*, a return prepared pursuant to section 6020(a) . . . *is nonetheless deemed* a return." But Congress's actual words were "Such term

[return] *includes* a return prepared pursuant to section 6020(a) . . .” 11 U.S.C § 523(a)(*) (emphasis added), which implies the opposite intent. Congress thus did not envision § 6020(a) returns as presumptive non-returns requiring statutory rescue from the fire; rather, it clarified that a § 6020(a) return forfeits no status as a return just because the IRS had to do the work of preparing it for signature outside the regular Form 1040 model.

The juxtaposed treatment of § 6020(b) SFRs buttresses this interpretation. DOR cannot explain the redundancy of the express reference to § 6020(b) in the hanging paragraph, because under the one-day-late rule, filings under this section are not “returns” in the first place (being filed late). Even courts adopting DOR’s reading have candidly had to admit this gratuitous reference to § 6020(b) is surplusage. *See Fahey*, 779 F.3d at 7 (conceding its reading creates “redundancy” in the statute). By contrast, if the provisions are read in the context of the relevant legislative history, *see* H.R. Rep. No. 109-31, at 103, which indicates the specific references to § 6020 returns were intended to do nothing more than to settle some historical confusion in bankruptcy courts about whether § 6020(b) returns sufficed to count as tax returns, then the surplusage problems go away. The references to § 6020(a) and § 6020(b) returns (which are both untimely filings) are simply statutory resolutions of technical uncertainties that had divided some courts before the Bankruptcy Abuse Prevention and Consumer Protection Act, not

surplusage-laden evidence of radical reclassifications within § 523(a)(1)'s tripartite structure.

II. MASSACHUSETTS LAW'S USE OF THE ADVERB "DULY" MAKES NO DIFFERENCE; THE SUGGESTION THAT IT INTRINSICALLY INCORPORATES A TEMPORAL ELEMENT IS BOTH FALSE AND BELIED BY MASSACHUSETTS' OWN TAX LAWS AND REGULATIONS.

1. Massachusetts' Statutory Reference to "Duly" Adds Nothing (or at Most, an Ambiguity).

DOR makes great hay of the fact that, unlike the Internal Revenue Code, the Massachusetts tax law has an explicit definition of return. See 830 C.M.R. 62C.26.1(2) (defining at arguably relevant time "return" as "a taxpayer's signed declaration of the tax due, if any, properly completed by the taxpayer or the taxpayer's representative on a form prescribed by the Commissioner and duly filed with the Commissioner"). As the district court correctly held, this is of no moment. Appellant's app. at 367. ("Appellant's argument that this case concerns a state income tax rather than a federal income tax is a distinction without a difference.").

DOR hangs its hat on the adverb "duly," offering a 1961 dictionary definition. Webster's Third New International Dictionary of the English Language Unabridged 700 (3d ed. 1961) (defining "duly" as "in a due manner,

time, or degree") (emphasis added).[3] Amicus counters with the current Black's Law Dictionary, which has no such timing element and focuses on form. *See Duly*, Black's Law Dictionary (10th ed. 2014) (defining "duly" as "[i]n a proper manner; in accordance with legal requirements. Regularly; upon a proper foundation, as distinguished from mere form."). A return given to a clerk in the office parking lot is (at least arguably) "filed" with him, but not "in a proper manner," and so is not *duly* filed. A return uploaded to the appropriate website is. "Duly" thus contains no intrinsic timeliness component.[4] By contrast, the traditional legal adverb for time-sensitivity is "timely," which is defined as "occurring at a suitable time; seasonable; opportune; well-timed." *Timely*, Dictionary.com, https://www.dictionary.com/browse/timely.

At most—and this is only a concession arguendo—DOR could say it has demonstrated ambiguity over the word "duly" by finding a less common but still

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[3] The Supreme Court disapproves of this specific Webster's edition. *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 227–28, n.3 (1994).

[4] DOR cites a trio of cases, *McAdams*, *MobilCorp*, and *Lawrence*, purporting to prove that the adverb "duly" necessarily includes a timeliness component. Appellant's Brief at 24–25. Those cases mention 26 U.S.C. § 7422, which generally requires claims for refunds to be "duly filed . . . according to the provisions of law in that regard." But the cases actually interpret a more specific "provision of law in that regard," namely, the applicable statute of limitations, 26 U.S.C. § 6511. The taxpayers lost in those cases not because they failed to "duly" file their returns in accordance with law, generally, but because they failed to file ("duly" or otherwise) *any return at all within the jurisdictional limitations period*, specifically. In other words, they lost under § 6511, not § 7422.

plausible interpretation that incorporates a timeliness element. But such a victory in finding ambiguity would be a pyrrhic one for DOR, because even if the term were ambiguous and intended, on one reading of that ambiguity, to include a timeliness component, its hypothesized ambiguity would still need to be resolved *in favor of discharge* under Supreme Court precedent. *See Kawaauhau*, 523 U.S. at 58.

2. Massachusetts' Own Tax Laws and Regulations Undermine DOR's Position.

DOR has not cited a single Massachusetts tax case holding that a belated return is not a return under its laws. Amicus challenges DOR to produce a precedent of tax proceedings in which it succeeded in fining (or even attempting to fine) a taxpayer who filed a *late* tax return under the Massachusetts provisions that deal with the penalties for *complete failure* to file a tax return—on the theory that the taxpayer had filed no return at all. Amicus submits DOR more likely proceeds in such cases under Mass. Gen. Laws ch. 62, § 33, which deals with late-filed return penalties, rather than under Mass. Gen. Laws ch. 62, § 34, which deals with penalties for complete failure to file a return.

Indeed, Massachusetts tax laws and regulations that speak to how to deal with untimely returns embarrass DOR doubly. First, they demonstrate how Massachusetts treats late returns as "returns" and not "non-returns." For example,

under Mass. Gen. Laws ch. 62, § 33(a) (emphasis added), "[i]f any return is not filed with the commissioner on or before its due date a penalty is added of one percent of the amount to be shown as the tax owing, not exceeding twenty-five percent *until the return is filed*." This necessarily suggests the laws contemplate belated returns still being "returns." By contrast, if a taxpayer fails to file a return altogether, the penalty may be a doubling of any tax deficiency, in addition to any other penalties, under Mass. Gen. Laws ch. 62, § 28. *See* 830 CMR 62C.26.1(13)(b). Second, such differential punitive regimes would not make sense if a late return were the equivalent, as is DOR's theory, of not filing a return at all.

Additionally, DOR's theory would render textually incomprehensible the Commissioner's requirement for non-filers. Once the Commissioner has realized a taxpayer has failed to file a return by the necessary deadline: "The Commissioner will send the taxpayer a written notification requesting that the taxpayer file *a proper return* . . . ." 830 CMR 62C.26.1(13)(c)(1) (emphasis added). Such a belated filing could not be a "return," let alone a "proper" one, under DOR's theory, yet that is what DOR's own regulations refer to it as. By definition, one cannot have "failed" to file a return until after its due date. And so on.

Finally, these same laws and regulations illustrate how Massachusetts uses

the word "timely" when speaking to tardiness issues, not "duly." *See, e.g.*, Mass. Gen. Laws ch. 62, § 33(f) ("If it is shown that any failure to file a return . . . in a *timely* manner is due to reasonable cause . . . .") (emphasis added). Under DOR's theory, *see* Appellant's Brief at 28, this law should read: "If it is shown that any failure to *duly* file a return . . . ." Lest there be any doubt about whether Massachusetts considers a late-filed return "late" or simply not a return at all (due to its lack of being "duly" filed), this Court need go no further than DOR's web-available Refunds and Credits of Overpayments, Mass.gov, https://www.mass.gov/info-details/refunds-and-credit-of-overpayments#overview.

. *See* New Limitations on Payment of Refunds Claimed on Late Filed Returns, Mass.gov, https://www.mass.gov/technical-information-release/tir-04-3-new-limitations-on-payment-of-refunds-claimed-on-late-filed. In sum, DOR's reading of "duly" to mean "timely" is not just strained but belied by the very terminology of its own regulations.

CONCLUSION

DOR (and, in fairness, some courts) has simply lost the statutory forest for the trees, which is why Amicus has intervened. A 1040 is a tax return. An untimely 1040 is a *late* tax return. Interpreting § 523(a) sensibly is a simple matter of reading four words of a statute's text not in isolation but within the full

structure of the statute, mindful of how its amendment came to be. Congress intentionally used the word "applicable" in the hanging paragraph. Such a qualifier should not be breezed over to mean (absurdly) "all" in modifying "filing requirements" that are to be included in the content of applicable nonbankruptcy law. "Applicable" should mean "relevant to the question at hand"—here, whether a filing constitutes a return under apposite nonbankruptcy law.

The decision below should be affirmed.

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/s/ John A. E. Pottow
John A. E. Pottow

Dated: March 18, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March 2019, this brief was filed with the Clerk of the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system and that seven copies were sent by U.S. Mail.

/s/ John A. E. Pottow
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