No. _____

IN THE

Supreme Court of the United States

WILLIAM EDWARD POWELL,

Petitioner,

V.

JANET L. YELLEN, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF TREASURY, UNITED STATES DEPARTMENT OF TREASURY, INTERNAL REVENUE SERVICE, DANIEL I. WERFEL, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE INTERNAL REVENUE SERVICE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Section 6103 of the Internal Revenue Code, 26 U.S.C. § 6103, establishes a liberal and detailed regime for taxpayers to obtain from the Internal Revenue Service ("IRS") *their own* tax returns and return information (including the returns and return information of estates they administer and corporations to which they are closely tied). At the same time, the provision severely limits anyone from obtaining *another's* returns and return information. Previously, this Court upheld enforcement of § 6103's limits on disclosure of others' return information in a claim brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. *See Church of Scientology v. IRS*, 484 U.S. 9, 18 (1987).

But the Court has not addressed the proper judicial review scheme for taxpayers seeking to compel disclosure of their own returns and return information. The Sixth and Seventh Circuits have held that § 6103 is a specific statute displacing FOIA, making a suit to enforce § 6103 under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, the remedy to challenge an IRS disclosure refusal. The Third, Fifth, Tenth, Eleventh, and D.C. Circuits have held that FOIA – with its more limited requirement for searches for records, its exemptions to disclosure, and its unique enforcement scheme – exclusively controls. The First Circuit has sanctioned a hybrid approach.

The Question Presented is:

Is § 6103 a specific statute displacing FOIA, so that the remedy for taxpayers to compel disclosure of their returns and return information is a suit under the APA to enforce § 6103?

List of Parties to the Proceedings

The caption contains the names of all of the parties.

List of Proceedings

Powell v. Yellen, No. 22-5200, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered December 28, 2023.

Powell v. Yellen, No. 21-cv-2946, U.S. District Court for the District of Columbia. Judgment entered June 30, 2022.

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The December 28, 2023 opinion of the U.S. Court of Appeals for the District of Columbia Circuit is unreported but appears at 2023 U.S. App. LEXIS 34479 and is reproduced in the Petitioners' Appendix ("Pet. App.") at 1a-6a. The opinion of the U.S. District Court for the District of Columbia is unreported but appears at 2022 U.S. Dist. LEXIS 116038 (D.D.C. June 30, 2022) and is reproduced at Pet. App. 7a-12a.

STATEMENT OF JURISDICTION

The D.C. Circuit entered its judgment on December 28, 2023, and denied timely petitions for rehearing on February 29, 2024. *See* Pet. App. 14a-15a. On May 23, 2024, the Chief Justice extended Petitioner's time for filing a Petition for Certiorari (*see* No. 23A1032) to June 28, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THE CASE

Relevant provisions of the Internal Revenue Code, the Freedom of Information Act ("FOIA"), the Privacy Act, and the Administrative Procedure Act ("APA") are set forth at Pet. App. 16a-166a.

STATEMENT OF THE CASE

A. Internal Revenue Code § 6103

Section 6103 of the Internal Revenue Code "in its present form was added by the Tax Reform Act of 1976." *Cheek v. IRS*, 703 F.2d 271, 271 (7th Cir. 1983); *see generally Church of Scientology v. IRS*, 484 U.S. 9, 15 (1987). "[P]assed in the wake of Watergate and White House efforts to harass those on its enemies list, Congress amended § 6103 of the

Internal Revenue Code to protect the privacy of tax return information and to regulate in minute detail the disclosure of this material." *Lake v. Rubin*, 162 F.3d 113, 115 (D.C. Cir. 1998) (internal quotation marks and citation omitted); *accord Cheek*, 703 F.2d at 271 (§ 6103 "deals comprehensively with the subject of disclosure of tax return information"). The provision "covers approximately thirty-five pages of the United States Code." *Hobbs v. United States ex rel. Russell*, 209 F.3d 408, 412 (5th Cir. 2000).

Overall, § 6103 "requires" the IRS to disclose to taxpayers information *about themselves* (*Lake*, 162 F.3d at 115), but otherwise "tightens the restrictions on the use of return information by entities other than [the IRS]," including by "congressional committees, the President, state tax officials, and other federal agencies." *Church of Scientology*, 484 U.S. at 16, 15; *see* S. Rep. No. 94-938, at 318 (1976) ("[R]eturns and return information should generally be treated as confidential and not subject to disclosure except in those limited situations delineated in the newly amended section 6103").

Structurally, § 6103 begins with a general rule of confidentiality:

> Returns and return information shall be confidential, and except as authorized by this title[,] . . . no [federal] officer or employee[,] . . . no [State or local government] officer or employee[,] . . . and . . . no other person . . . who has or had access to returns or return information . . . shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.

26 U.S.C. § 6103(a). Under § 6103, "[r]eturns and return information" pertain to federal tax filings (as opposed to State filings). *Id.* § 6103(b)(1)-(2). A "return" is the "tax or information return, declaration of estimated tax, or claim for refund" of a taxpayer; and "return information" includes "a taxpayer's identity" and details about the income, tax payments, tax liabilities, and audit status of a taxpayer kept and furnished by the IRS. *Id.*

After setting forth its general confidentiality rule, § 6103 states various authorizations for disclosures (and permission for inspection). With respect to returns, as opposed to return information, the authorized disclosures relevant to this case are largely contained in subsection (e) entitled "Disclosure to persons having material interest." *Id.* § 6103(e) (title). Under that subsection, the IRS[1] "*shall*, upon written request," disclose (*id.* § 6103(e)(1) (emphasis added)):

- "[t]he return of a person" to "that individual," *id.* § 6103(e)(1)(A)(i);
- "the return of a partnership" to "any person who was a member of such partnership," *id.* § 6103(e)(1)(C);
- "the return of a corporation" to (among others) anyone designated by the corporation's board or governing body, any officer or employee

[1] Section 6103 is addressed to the Secretary of the Department of the Treasury, not specifically to the IRS. Since the IRS, of course, is the entity within the Treasury Department responsible for administering the tax system, Petitioner generally refers to the IRS's obligations under § 6103, or uses "Secretary" interchangeably with the IRS. The Treasury Department, IRS, and their heads are all named parties here.

designated by the corporation's principal officer, and any shareholder owning one percent or more of stock, *id.* §6103(e)(1)(D);

- "the return of an estate" to the estate's administrator and "any heir at law," "next of kin," and will beneficiary, as long as the Secretary finds that the individual "has a material interest which will be affected by information contained therein," *id.* § 6103(e)(1)(E);
- "the return of a trust" to a trustee or trust beneficiary who the Secretary determines has a material interest in the trust, *id.* § 6103(e)(1)(F); and
- "the return of a decedent" to the decedent's estate's administrator or "any heir at law," "next of kin," or will beneficiary, as long as the Secretary finds that the individual "has a material interest which will be affected by information contained therein," *id.* § 6103(e)(3).

In addition, § 6103 authorizes disclosures of returns to "attorney[s] in fact," if authorized by a person mentioned above. *Id.* § 6103(e)(6).

With respect to return information (as opposed to returns), § 6103 authorizes the persons above to obtain return information, but on condition that "the Secretary determines that such disclosure would not seriously impair Federal tax administration." *Id.* § 6103 (e)(7). Section 6103 contain no similar condition with respect to disclosure of the return itself.[2]

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[2] Separately, § 6103 permits disclosure of returns and return information to any person "designate[d]" by "the taxpayer,"

In its subsection (p), § 6103 covers "Procedure and recordkeeping" associated with the disclosures the section authorizes. *Id.* § 6103(p) (title). In general, "[r]equests for the inspection or disclosure of a return or return information and such inspection or disclosure shall be made in such manner and at such time and place as shall be prescribed by the Secretary." *Id.* § 6103(p)(1). Section 6103 prescribes that copies of returns "shall, upon written request, be furnished to any person to whom disclosure or inspection of such return is authorized under this section," subject to collection of a "reasonable fee." *Id.* § 6103(p)(2)(A). With respect to return information, the statute does not state a specific procedure, but provides that the Secretary "may" make disclosure in various formats. *Id.* § 6103(p)(2)(B).

In its many other provisions unrelated to taxpayers' requests for their *own* returns and return information, § 6103 establishes detailed procedures that limit disclosures. Thus, the provision regulates disclosures to State agencies, federal and State law enforcement officials, Congressional Committees and their staffs, the President and Presidential appointees, and judges. *See id.* § 6103(d), (f), (g). In most instances, § 6103 limits the persons within the particular body who may request or have access to returns and return information, mandates a statement of need or a court order or warrant, specifies rigid procedures for seeking disclosure (such as the President himself signing a written request for materials if he wishes to review them, along with a statement of reasons), and outlines safeguards to protect the privacy of the disclosed information even

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unless the IRS "determines that such disclosure would seriously impair Federal tax administration." 26 U.S.C. § 6103(c).

after disclosure. *See id.*; *see also id.* § 6103(p)(4) (establishing "Safeguards" to be established by government officials who "receiv[e] returns or return information" pursuant to § 6103).

As far as Petitioner can discern, § 6103 makes no mention of disclosure of returns and return information to members of the general public. Nor does § 6103 appear to make any reference to FOIA, 5 U.S.C. § 552, though it does make slight reference to FOIA's close cousin (*see infra* p. 27) the Privacy Act, 5 U.S.C. § 552a. The most notable mention of the Privacy Act is in subsection (p), as part of the "Procedure and recordkeeping" measures. There, the statute provides that the Secretary shall keep a "permanent system of standardized records or accountings" of all requests for disclosure and disclosures actually provided of returns and return information, but shall not be required to keep such records for requests and disclosures under certain subsections, including "subsection (c) . . . [and] (e)"; and "[s]uch record[s]" may be available to the public "but only to the extent[] authorized . . . under [5 U.S.C.] section 552a(c)(3)." 26 U.S.C. § 6103(p)(3)(A).

B. FOIA

Describing FOIA generally, this Court has written:

> The statute known as the FOIA is actually a part of the Administrative Procedure Act (APA). Section 3 of the APA as enacted in 1946 gave agencies broad discretion concerning the publication of governmental records. In 1966 Congress amended that section to implement "'a general philosophy of full agency disclosure.'" [*Dep't of Air Force v.*

> *Rose*, 425 U.S. 352, 360 (1976) (quoting S. Rep. No. 89-813, at 3 (1965)).] The amendment required agencies to publish their rules of procedure in the Federal Register, 5 U. S. C. § 552(a)(1)(C), and to make available for public inspection and copying their opinions, statements of policy, interpretations, and staff manuals and instructions that are not published in the Federal Register, § 552(a)(2). In addition, § 552(a)(3) requires every agency "upon any request for records which . . . reasonably describes such records" to make such records "promptly available to any person." [*Id.* § 552(a)(3)(A).] If an agency improperly withholds any documents, the district court has jurisdiction to order their production. Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden "on the agency to sustain its action" and directs the district courts to "determine the matter de novo." [*Id.* § 552(a)(4)(B).]

U.S. DOJ v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 754-55 (1989).

FOIA exempts "nine categories of documents" from its disclosure requirements. *Id.* at 755. These exempted categories include materials "specifically exempted from disclosure by statute," "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," "files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," and records compiled in enforcement situations where disclosure

"could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(3), (5), (6), (7).

As alluded to already, in order for disclosure to occur under FOIA, the requester must "reasonably describe[]" the records sought and seek them "in accordance with published rules stating the time, place, fees (if any), and procedures to be followed." *Id.* § 552(a)(3)(A).[3] Additionally, the agency at issue need only make "reasonable efforts" to search for relevant records. *Id.* § 552(a)(3)(C); *see Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985) ("the standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials"). "[T]he [agency] is not required by [FOIA] to account for documents which the requester has in some way identified if it has made a diligent search for those documents in the places in which they might be expected to be found." *Id.* at 1385.

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[3] The FOIA requirement that the requester seek records pursuant to the agency's prescribed methods for making a request has, historically speaking, easily tripped up taxpayers seeking their returns and return information. "The IRS does not have a central file of records in which copies of all documents in its possession are retained." *Church of Scientology v. IRS*, 792 F.2d 146, 150 (D.C. Cir. 1986). Therefore, IRS regulations as a general matter instruct that the taxpayer make the request to the *right* office – *i.e.*, "to the office of the official who is responsible for control of the records requested" – at pain of potential nondisclosure if the wrong office is consulted. *Id.*; *e.g.*, *Maxwell v. Snow*, 409 F.3d 354, 356 (D.C. Cir. 2005) (noting, but not endorsing, IRS's failure to disclose documents on basis that requesters "had failed to send their requests to the proper local bureau under FOIA").

C. Powell's Current Lawsuit

Proceeding *pro se*, Petitioner William Edward Powell sued the IRS (along with its Commissioner, the Department of Treasury, and its Secretary) in the U.S. District Court for the District of Columbia, alleging that the IRS unlawfully "fail[ed] to provide" him with "tax return" and "tax return information" he had requested, thereby "violat[ing] [26 U.S.C.] Section 6103(e)." AA18, AA19.[4] The tax records "concern[] himself, his family, and his family's businesses." Pet. App. 7a. As the D.C. Circuit later put it, Powell "alleged a violation of 26 U.S.C. § 6103 and sought an order requiring the IRS to produce tax records regarding Powell, his deceased relatives, and related entities." *Id.* at 2a-3a. He seeks "to use the records to investigate possible breaches of fiduciary duty by the trustees who distributed his father's assets after his father's death." *Id.* at 2a. The D.C. Circuit also indicated Powell's operative pleading could be read to raise "a familiar claim under the APA" to "compel agency action that Powell claims is unlawfully withheld" under § 6103. *Id.* at 4a.

This is not Powell's first lawsuit to compel the IRS to produce tax records. *See id.* at 2a, 6a. Rather, his effort to obtain his, his next of kin's, and related corporations' tax returns and return information spans almost a decade. The other actions (all also filed *pro se*) were adjudicated under FOIA and the Privacy Act. *See id.* at 2a. The current case,

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[4] "AA" refers to the Appendix of the *Amicus Curiae* filed in the D.C. Circuit in this case (Doc. #1995169, filed Apr. 17, 2023). The D.C. Circuit appointed the undersigned counsel, Anthony F. Shelley, as *amicus curiae* to present arguments in favor of Powell. Undersigned counsel now represents Powell in this Court as counsel of record.

however, is not a mere duplicate of its predecessors. *See id.* (Powell "nevertheless sued the agency in the instant case to obtain *additional documents* under the Internal Revenue Code, 26 U.S.C. § 6103.") (emphasis added); *see also* Appellees' Suppl. App. in D.C. Cir. at SA9 (Doc. #2003785, filed June 16, 2023) (in motion to dismiss below, Government asserting just that "several" of the currently requested materials were "adjudicated in Powell's prior suits against the IRS").[5]

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[5] Many of the bases for upholding the IRS's non-disclosure in the prior cases derived from standards unique to FOIA: courts determined the searches to be reasonable (even if unfruitful) under FOIA's reasonableness test, *see Powell v. IRS*, No. 15-11033, 2016 WL 7473446, at *4 (E.D. Mich. Dec. 29, 2016); *Powell v. IRS*, 280 F. Supp. 3d 155, 162-63 (D.D.C. 2017); some of Powell's requests for information, though filed with various IRS offices, were still not the correct filing locales under FOIA regulations, *see Powell v. IRS*, No. 18-453, 2019 WL 1980973, at *3 (D.D.C. May 3, 2019); where disclosure did not occur, Powell supposedly failed to file internal administrative appeals pursuant to FOIA regulations, *see id*; *Powell v. IRS*, No. 18-2675, 2020 WL 3605774, at *7-8 (D.D.C. July 2, 2020); and Powell allegedly failed to satisfy FOIA's reasonable-description requirement. *See Powell*, 2016 WL 7473446, at *5. Other grounds for non-disclosure, upheld on judicial review under FOIA, included the IRS's conclusion that some of his requests "'may be obtained through routine procedures and are not processed through FOIA,'" *id.*, that the relevant IRS systems were too obsolete to make the requested records reasonably "'accessible,'" *Powell v. IRS*, 317 F. Supp. 3d 266, 279 (D.D.C. 2018) (quoting IRS declaration), and that he sought to enforce § 6103 when FOIA constituted the exclusive remedy. *See Powell*, 2020 WL 3605774, at *5; *Powell v. IRS*, No. 18-2675, 2020 WL 7024229, at *3 (D.D.C. Nov. 30, 2020); *Powell v. IRS*, No. 16-1682, 2017 WL 2799934, at *1 (D.D.C. Jan. 24, 2017).

As to the current lawsuit, Powell commenced this action under § 6103 after receiving the following response from the IRS for information requests he had filed (rehearsing what the IRS had maintained with respect to an earlier request, *see supra* p. 10 n.5): "'requests for records processed in accordance with routine agency procedures are specifically excluded from the processing requirements of the Freedom of Information Act (FOIA)[.] As a result, Disclosure Offices do not process requests for returns and/or transcripts under FOIA[.]'" Appellant's Pet. for Reh'g *En Banc* at 10 (Doc. #2038023, filed Jan. 30, 2024) (quoting IRS response to his request for documents, which appears at Appellee's Suppl. App. at SA24 (Doc. #2003785)) (emphasis added). Being told by the IRS that FOIA was irrelevant, and having unsuccessfully sought various documents previously through FOIA's enforcement scheme, Powell pursued this suit exclusively under § 6103 and the APA. *See* Pet. App. 2a, 3a.

D. Proceedings Below

The District Court dismissed Powell's case pursuant to Fed. R. Civ. P. 12(b)(1) on the grounds that "the Court lacks subject-matter jurisdiction." *Id.* at 12a. According to the District Court, "§ 6103 does not provide an independent cause of action" and, therefore, "the Court does not have the authority to adjudicate a claim brought exclusively under 26 U.S.C. § 6103." *Id.* . In so holding, the District Court relied on a holding from one of its earlier cases involving Powell:

> "Section 6103 . . . does not 'provide an independent basis for subject matter jurisdiction' over claims seeking the disclosure of return information. *See Maxwell v. O'Neill*, No. 00-

> 1953, 2002 WL 31367754, at *4 (D.D.C. Sept. 12, 2002), *aff'd*, *Maxwell v. Snow*, 409 F.3d 354, 357-58 (D.C. Cir. 2005). Instead, § 6103 'operates as part of the larger [Freedom of Information Act] framework.' *Id.* at *3."

Pet. App. 10a-11a (quoting *Powell*, 2017 WL 2799934, at *1) (alterations in original).[6]

On appeal, after appointing an *amicus curiae* to address, in part, whether subject-matter jurisdiction was at issue (*see supra* p. 9 n.4), the D.C. Circuit reversed the District Court's jurisdictional holding, but affirmed on the "alternative ground that [the operative pleading] failed to state a claim." Pet. App. 4a. Invoking *Church of Scientology of California v. IRS*, 792 F.2d 146 (D.C. Cir. 1986), and *Maxwell v. Snow*, 409 F.3d 354 (D.C. Cir. 2005), the panel concluded that "§ 6103 and the APA do not provide a cause of action that is independent of FOIA." Pet. App. at 4a; *id.* at 4a-5a ("In *Church of Scientology*, we rejected the argument that § 6103 'totally supersedes FOIA[,]'" and "[w]e reaffirmed that holding in *Maxwell.*") (quoting *Church of Scientology*, 792 F.2d at 148).[7]

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[6] The District Court also noted that, according to the IRS, Powell "would need to first submit a proper request for routine records to the IRS's Return and Income Verification Service program and then submit a FOIA request," but Powell supposedly "failed to follow that procedure before bringing his suit." Pet. App. 12a.

[7] The D.C. Circuit's *Church of Scientology* decision relevant here and throughout this Petition is a different disposition than what led in this Court to *Church of Scientology v. IRS*, 484 U.S. 9 (1987). This Court's decision evolved from a D.C. Circuit *en banc* ruling (792 F.2d 153 (D.C. Cir. 1986)), discretely addressing the question of whether de-identified

The D.C. Circuit also found *Lake v. Rubin*, 162 F.3d 113 (D.C. Cir. 1998), inapposite. *Lake* determined "that § 6103 displaces the Privacy Act"; springboarding from that holding, Powell had asserted that his requests were for "*personal* records" usually the province of the Privacy Act, which *Lake* displaced in favor of § 6103. Pet App. at 5a-6a. Nonetheless, the D.C. Circuit concluded that *Maxwell* "specifically rejected an argument 'that FOIA requirements cannot be applicable to [the plaintiffs'] requests for personal information, but only to requests for public information." *Id.* at 6a (quoting *Maxwell*, 409 F.3d at 357).

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE SPLIT ON WHETHER § 6103 DISPLACES FOIA

The Court should grant the Petition because the Circuits are split on whether § 6103 displaces FOIA and thus on whether an APA claim to enforce § 6103 or a FOIA claim is the proper remedy to challenge the IRS's non-disclosure to taxpayers of their own tax returns and return information. The Sixth and Seventh Circuits have held that § 6103 displaces FOIA in such circumstances; in contrast, the Third, Fifth, Tenth, Eleventh, and D.C. Circuits have held

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"return information" under § 6103 is disclosable to the public, whereas the *Church of Scientology* decision on which the D.C. Circuit in Powell's case relied was a separate ruling about the interrelationship between § 6103 and FOIA and whether the IRS had properly responded to the plaintiffs' FOIA requests. This Court's *Church of Scientology* decision was not an affirmance of the D.C. Circuit *Church of Scientology* decision relied upon below. *See generally DeSalvo v. IRS*, 861 F.2d 1217, 1219 n.3 (10th Cir. 1988) (explaining "unusual procedural history" of *Church of Scientology* litigation).

that § 6103 does not supersede FOIA. The First Circuit is somewhere in between.

The first Court of Appeals to address the issue was the Seventh Circuit in *King v. IRS*, 688 F.2d 488 (7th Cir. 1982). In *King*, the Seventh Circuit actually considered the proper rubric for assessing a claim challenging the non-disclosure of tax return information of a taxpayer *other than* the requester. Even in that situation, the court determined that § 6103 and the APA displace FOIA, "conclu[ding] that return information is not subject to the provisions of the FOIA." *Id.* at 495-96.

The Seventh Circuit was "persuaded" (*id.* at 495) by what it termed the "well-reasoned opinion" (*id.*) in *Zale Corp. v. IRS*, 481 F. Supp. 486 (D.D.C. 1979), quoting its analysis at length:

> "[T]he structure of section 6103 is replete with elaborate detail, identifying discrete groups to whom disclosure of certain specified types of information is permissible. In this respect it differs markedly from the structure of FOIA, which calls for the release of information to the public at large with no showing of need required. Despite ample indication in the legislative history that Congress was aware of FOIA while it labored over the tax reform legislation, there is no evidence of an intention to allow that Act to negate, supersede, or otherwise frustrate the clear purpose and structure of § 6103. For a court to decide that the generalized strictures of FOIA take precedence over this subsequently enacted, particularized disclosure scheme would in effect render the tax reform provision an exercise in legislative futility. Absent an indication that

> Congress so intended, this Court will not imply such a prospective pre-emption by FOIA."

King, 688 F.2d at 495 (quoting *Zale*, 481 F. Supp. at 489). Then referencing the APA rather than FOIA, the Seventh Circuit said its "decision does not relieve the I.R.S. from the requirement of demonstrating that the decision to withhold documents is not arbitrary and capricious." *Id.* at 496.

After *King*, the Seventh Circuit reaffirmed § 6103's primacy where the taxpayer "sued the [IRS] under the Freedom of Information Act, and the Privacy Act, to obtain information in the Service's files about *his* tax returns which the Service had refused to turn over to him on the ground that they were shielded from disclosure by the confidentiality provisions of the Internal Revenue Code." *Cheek v. IRS*, 703 F.2d 271, 271 (7th Cir. 1983) (emphasis added) (citations omitted). The court said: "*King v. Internal Revenue Service*, holding that disclosure of tax return information is governed by section 6103 rather than the Freedom of Information Act, disposes of Cheek's Freedom of Information Act ground . . . ." *Id.* (citation omitted). The Seventh Circuit then also held that § 6103 "is exclusive" as to the Privacy Act as well, concluding "it would make no sense to hold that section 6103 was exclusive as regards the Freedom of Information Act but not as regards the Privacy Act." *Id.* at 272.

The Sixth Circuit thereafter followed the Seventh Circuit's lead. *White v. IRS*, 707 F.2d 897 (6th Cir. 1983). In *White*, the taxpayer "filed a complaint . . . seeking to require . . . that [the IRS] release to him wide-ranging information . . . under the Freedom of Information Act." *Id.* 898 (citation omitted). The district court upheld the IRS's refusal to

disclose the information, which concerned the taxpayer himself and which the IRS characterized as "return information," because "'revelation would very possibly "seriously impair" [an] impending [] investigation'" of the taxpayer; thus, the district court ruled that the IRS's 'determination not to disclose said documents is neither arbitrary nor capricious' under section 6103." *Id.* at 899-900 (quoting district court's decision, quoting 26 U.S.C. § 6103(e)(7)); *see supra* p. 4 (noting § 6103(e)(7) limitation of disclosure of tax return information even to relevant taxpayers where it would "seriously impair Federal tax administration").

The Sixth Circuit said that it was "disposed to affirm the district court on the basis of the *Zale* and *King* rationale" and because "[t]he actions of [the IRS] are neither arbitrary nor capricious." 707 F.2d at 900. It added: "Section 6103 we find to be a detailed and specific statutory scheme which essentially controls the disclosure of tax returns and investigations aimed at determining tax liabilities of an identified particular taxpayer." *Id.*[8]

Disagreeing with the Sixth and Seventh Circuits, several other Circuits have held that FOIA applies when taxpayers seek their own materials covered by § 6103. *See, e.g.*, *DeSalvo v. IRS*, 861 F.2d 1217, 1218-22 (10th Cir. 1988); *Church of Scientology of Cal. v. IRS*, 792 F.2d 146, 149-50 (D.C. Cir. 1986);

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[8] The Sixth Circuit also went on to determine that it would reach the same result applying FOIA, because it thought exemptions to disclosure under FOIA applied, including "Exemption 5 embody[ing] privileges against discovery such as attorney-client and work-product privileges" and covering "materials reflecting deliberative or policymaking processes." 707 F.2d at 902 (internal quotation marks and citation omitted).

Grasso v. IRS, 785 F.2d 70, 73-76 (3d Cir. 1986); *Linsteadt v. IRS*, 729 F.2d 998, 1001-03 (5th Cir. 1984); *Currie v. IRS*, 704 F.2d 523, 527-31 (11th Cir. 1983); *see also Maxwell v. Snow*, 409 F.3d 354, 357-58 (D.C. Cir. 2005). This is the line of decisions to which the D.C. Circuit, below, analytically adhered. *See* Pet. App. 4a-5a.

In fact, the D.C. Circuit's decision in *Church of Scientology* well illustrates the various Circuits' reasoning for applying FOIA and its enforcement scheme, in the face of § 6103, to taxpayers' grievances regarding the disclosure of their own tax returns and return information. The court there (per then-Judge Scalia) saw FOIA as "a structural statute, designed to apply across-the-board to many substantive programs." 792 F.2d at 149. In particular, the D.C. Circuit relied on FOIA's Exemption 3, 5 U.S.C. § 552(b)(3), which "exclud[es] from [FOIA's] disclosure requirement documents 'specifically exempted from disclosure' by other statutes." 792 F.2d at 149. Because of Exemption 3, the court said:

> The two statutes seem to us entirely harmonious; indeed, they seem quite literally made for each other: Section 6103 prohibits the disclosure of certain information (with exceptions for many recipients); and FOIA, which requires all agencies, including the IRS, to provide nonexempt information to the public, establishes the procedures the IRS must follow in asserting the § 6103 (or any other) exemption.

Id.

The D.C. Circuit conceded that to some degree § 6103 might be "comprehensive," but its

"comprehensive detail relates to exceptions from the prohibition of disclosure." *Id.* (internal quotation marks omitted). Yet, the lack of a civil remedy in § 6103 – even with respect to application of § 6103's exceptions to confidentiality – contrasted § 6103 with other legal provisions that the court was willing to consider sufficiently comprehensive to displace FOIA. *See id.* (comparing § 6103 with 26 U.S.C. § 6110, which "prescribe[s] [that a] civil remedy in the Claims Court shall be the exclusive means of obtaining disclosure" of "IRS written determinations").[9]

Staking out a third, hybrid approach, the First Circuit has signaled that the FOIA framework generally applies, but § 6103 necessitates alteration of the standard of review, to the requester's detriment. In *Aronson v. IRS*, 973 F.2d 962 (1st Cir. 1992) (Breyer, J.), the First Circuit considered various "[l]egal [q]uestions" surrounding the FOIA requests of "a private tracer of lost taxpayers" seeking others' tax return information. *Id.* at 964, 963. First off, the court agreed with the Circuits holding that § 6103 constitutes a statute subsumed within "FOIA Exemption 3," such that a challenge to the IRS's

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[9] When discussing the pro-FOIA side of the split, two other Circuits' decisions are worth noting, though they are not directly on point. The Ninth Circuit has found FOIA to provide the framework for enforcing § 6103 (and thus that § 6103 does not displace FOIA), but in the context of prohibiting members of the public from seeking others' tax returns and tax information, which is different than the Question Presented here. *See Long v. U.S. IRS*, 742 F.2d 1173, 1177-78 (9th Cir. 1984). Additionally, the Eighth Circuit noted, in *dictum* in a footnote, that it was "inclined to agree with th[e] analysis" of the Circuits finding FOIA to be primary. *Barney v. IRS*, 618 F.2d 1268, 1274 n.15 (8th Cir. 1980).

non-disclosure takes the form of a FOIA suit. *Id.* at 964-65 (citing *DeSalvo*, 861 F.2d at 1221 n.4; *Grasso*, 785 F.2d at 77; *Linsteadt*, 729 F.2d at 1000)).

Aronson, however, thereafter, crafted a special standard of review to govern in the case. Finding elements of *King*, *White*, and *Zale* persuasive, and now rejecting *DeSalvo*, *Grasso*, *Linsteadt*, and the D.C. Circuit's *Church of Scientology* decision, the First Circuit adopted the APA's arbitrary-and-capricious standard of review to adjudge the IRS's non-disclosure. *See id.* at 965-66. Emphasizing that the "aim" of "the tax statute" – in its *non*-disclosure parts – was "confidentiality, not sunlight," the court eschewed FOIA's *de novo* standard in favor of more deferential review, in order "to carry out Congress's confidentiality-protecting purpose." *Id.* at 966.

Though *Aronson* was a suit seeking *others'* tax return information, and potentially could be limited to the context of where the court is promoting § 6103's *non*-disclosure provisions, the First Circuit later cited *Aronson* with favor and applied its general framework in a case involving a taxpayer seeking his own returns and return information. *See Gillin v. IRS*, 980 F.2d 819, 822 (1st Cir. 1992) (referencing *Aronson*'s discussion of the "relationship between § 552(b)(3) and § 6103"); *see also id.* at 823 (deeming it "sensible" for the taxpayer to "bear the burden" when challenging IRS refusal to disclose based on alleged "ambiguity" in his FOIA request). Insofar as the First Circuit sanctions FOIA's enforcement scheme as applicable where taxpayers challenge the IRS's withholding of their own returns and return information, but with the APA's standard of review, its approach arguably translates to the harshest for the requesting taxpayer – *i.e.*, FOIA's complex

procedures (*see infra* p. 31) apply, but its requester-friendly standard of review does not.

Accordingly, whereas the Sixth and Seventh Circuits find § 6103 to override FOIA when taxpayers seek their own returns and return information, five other Circuits deem FOIA to control. One Circuit – the First – has amalgamated the disparate approaches of the others. Moreover, this is a mature, acknowledged Circuit split. *See DeSalvo*, 861 F.2d at 1219 ("Other circuits are divided on the issue of whether the release of return information is governed by the FOIA or exclusively by section 6103."); *Church of Scientology*, 792 F.2d at 150 ("[w]e cannot agree" with *King* and *White* and "hold, in agreement with the Fifth and Eleventh Circuits, that Section 6103 does not supersede FOIA"); *cf. Branch Int'l Servs., Inc. v. United States*, 905 F. Supp. 434, 437 (E.D. Mich. 1995) (describing as "widely disputed" the "question whether the FOIA's *de novo* standard or a more deferential standard of review applies"). And the split currently continues to produce divergent decisions, depending on the jurisdiction in which suit is brought. *Compare* Pet. App. at 4a-5a (necessarily following D.C. Circuit's decisions in *Church of Scientology* and *Maxwell*) *with Baranski v. United States*, No. 11-CV-123, 2015 U.S. Dist. LEXIS 71584, at *26 & n.11 (E.D. Mo. June 3, 2015) (following *King* and *White*). This Court should intervene to resolve the conflict.[10]

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[10] To be sure, *King* and *White* to some extent have their genesis in *Zale*, which the D.C. Circuit (*Zale*'s overseeing court) in *Church of Scientology* disavowed. *See Church of Scientology*, 792 F.2d at 149. However, no court within the Sixth or Seventh Circuits has since questioned either *King* or *White*, and a subsequent panel in those Circuits would not be permitted to

II. THE DECISION BELOW WAS WRONGLY DECIDED

Adding to the case that certiorari is warranted, the D.C. Circuit's decision below is wrong on its merits.

A. The holding in the decision below and the D.C. Circuit's *Church of Scientology* decision from which it derives – *i.e.*, that § 6103 is not exclusive and, instead, taxpayers seeking their own returns and return information must use FOIA to obtain them – contravenes a bedrock principle of this Court's jurisprudence: a general statute shall not override a specific one. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Marcari*, 417 U.S. 535, 550-51 (1974). In the past, this Court has found FOIA inapplicable where more specific rules or doctrine apply to the disclosure or withholding of government-held information. *See United States v. Zubaydah*, 595 U.S. 195, 210-11 (2022) (finding FOIA inapplicable in discovery situation seeking material covered by state-secrets privilege); *accord id.* at 220 n.1 (Thomas, J., concurring).

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depart from *King* or *White* unless this Court or an *en banc* court in the relevant Circuit said otherwise. Additionally, *King* itself noted that the district courts within the D.C. Circuit already at the time were divided about § 6103's exclusivity, and the Seventh Circuit expressly stated it found the position contrary to *Zale* "unpersuasive" – hardly an indication that the Seventh Circuit (even if it could) would switch courses after the D.C. Circuit's ruling in *Church of Scientology*. *King*, 688 F.2d at 495-96; *cf. Aronson*, 973 F.2d at 965 (following *King*, *White*, and *Zale* and rejecting D.C. Circuit's position in *Church of Scientology* on standard of review).

The *Morton* principle is an easy fit for ousting FOIA in favor of § 6103 and the APA. Indeed, the courts universally have relied on the specific-defeats-the-general rule to hold that § 6103 supersedes the Privacy Act (*see infra* p. 26), and the reasoning of those decisions is readily extended to FOIA: "'[A] precisely drawn, detailed statute preempts more general remedies.' *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 734 [(1989)]. . . . Section 6103 [is] dedicated entirely to confidentiality and disclosure issues related to tax returns and tax return information." *Hobbs v. United States ex rel. Russell*, 209 F.3d 408, 412 (5th Cir. 2000). In contrast, FOIA is a generic, "broadly conceived" statute applicable to nearly all agencies and their collected information. *EPA v. Mink*, 410 U.S. 73, 80 (1973). Ironically, the D.C. Circuit has analogized to specific disclosure statutes overriding FOIA when finding that § 6103 supersedes the Privacy Act; but separately has then deemed FOIA to trump § 6103. *See Lake v. Rubin*, 162 F.3d 113, 115-16 (D.C. Cir. 1998).

Furthermore, applying FOIA's disclosure regime to a taxpayer's request for his or her own returns and return information necessarily "control[s]" and frustrates § 6103. *Morton*, 417 U.S. at 550. Section 6103, in simple, unadorned language, provides that taxpayers need only make "written request" for their returns and that the IRS "shall" disclose them. 26 U.S.C. § 6103(e)(1). There are *no* exceptions. Return information is disclosable to the taxpayer with just one exception – when disclosure would "seriously impair Federal tax administration." *Id.* § 6103(e)(7). FOIA, oppositely, is – especially for *pro se* taxpayers – a labyrinth of processes and standards, instructing specific requests and only

reasonable searches of government-determined likely sources (*see supra* p. 10 n.5) and, importantly, containing many exemptions that can limit disclosure and that have "no counterpart" in § 6103. *Lake*, 162 F.3d at 116.[11] The IRS has, in fact, successfully utilized exemptions in FOIA to deny to taxpayers their own tax information, despite § 6103 containing no similar exemption to disclosure. *E.g.*, *Faiella v. IRS*, No. 05-cv-238, 2006 U.S. Dist. LEXIS 49710, at *14-20 (D.N.H. July 20, 2006) (relying on Exemption 5 and deliberative-process privilege); *see also supra* p. 16 n.8 (noting alternative basis in Sixth Circuit's *White* decision for denying disclosure under FOIA's Exemption 5).

Nor is the D.C. Circuit's reasoning sound in *Church of Scientology* as to why FOIA supposedly accommodates § 6103. The court there rested entirely on Exemption 3 of FOIA, which excludes from disclosure those materials that are "specifically exempted from disclosure" by other statutes. 5 U.S.C. § 552(b)(3). That provision may offer opportunity for the *non*-disclosure aspects of § 6103 to gain life by,

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[11] Many of the key decisions in this area have involved taxpayers who, like Powell, proceeded *pro se* and who had attempted to navigate FOIA. *E.g.*, *Maxwell v. Snow*, 409 F.3d 354 (D.C. Cir. 2005); *DeSalvo v. IRS*, 861 F.2d 1217 (10th Cir. 1988); *Grasso v. IRS*, 785 F.2d 70 (3d Cir. 1986). That the steady stream of taxpayers requesting their own information from the IRS likely may involve taxpayers acting on their own behalf only makes more appropriate the adoption of the less complex disclosure regime invited by § 6103(e). *See generally Maxwell*, 409 F.3d at 357 (noting *pro se* taxpayer's characterization of "government's desire to follow FOIA as a 'deceptive shell game' in which the IRS throws up successive barriers on shifting and 'revisionist' legal theories to avoid answering Appellants' requests").

for instance, adding § 6103's general confidentiality requirement to FOIA. But Exemption 3 does nothing to further the *disclosure* aspects of § 6103 and, in reality, makes no reference to expanding disclosure consistent with what a specific statute might intend. The D.C. Circuit's *Church of Scientology* decision makes the mistake of using a provision in FOIA that might mesh with one part of § 6103 as a springboard for wholesale subordination of all of § 6103 to FOIA, including the generous disclosure rules in § 6103 for taxpayers with respect to their own returns and return information.[12]

And the D.C. Circuit's reference in *Church of Scientology* to 26 U.S.C. § 6110 is misplaced. That section, as the D.C. Circuit noted, expressly provides a remedy in the Court of Federal Claims to challenge the IRS's refusal to disclose "IRS written determinations." 792 F.2d at 149; *see* 26 U.S.C. § 6110(j)(2). The § 6110 remedy does not suggest that Congress, by saying nothing about a cause of action in § 6103, intended to grant FOIA dominion over § 6103. This Court has emphasized that, without mention at all, an APA remedy is typically available for an agency's violation of a statute. *See Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, 586 U.S. 9, 22-23 (2018). Congress needed to set forth a remedy in § 6110 because it wanted to deviate from the

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[12] What is worse is that Powell was relegated to FOIA when the IRS told him in responding to his requests that FOIA did not apply. *See supra* p. 11. So, not only does FOIA frustrate § 6103's object of free and simple disclosure of a taxpayer's own information to the taxpayer, the IRS can compound the problem by telling taxpayers at the outset that FOIA does not apply. In effect, the statute that the D.C. Circuit said is exclusive is, according to the IRS, also irrelevant.

customary APA route for enforcement by channeling claims to the Court of Federal Claims (rather than to a district-court forum under the APA). The creation of a special remedy somewhere else does not negate the normal enforcement of § 6103 via the APA.

B. There is a ready approach to reconcile § 6103 and FOIA supplied by the D.C. Circuit's own precedents, but the D.C. Circuit – erroneously – rejected the approach here. In *Ricchio v. Kline*, 773 F.2d 1389 (D.C. Cir. 1985), the court found that the Materials Act covering the disclosure and secrecy of Presidential documents "provided a comprehensive, carefully tailored and detailed procedure designed to protect both the interest of the public in obtaining disclosure of . . . papers and of [a President] in protecting the confidentiality of Presidential conversations and deliberations"; as a result, the "proper method" for "seek[ing] disclosure" of documents addressed by the Materials Act "is by proceeding under the Materials Act," not "under the [Freedom of] Information Act." *Id.* at 1395.

Addressing *Ricchio* in a concurrence in a subsequent decision, Judge Henderson viewed *Ricchio* as standing for the following proposition: "to the extent that [a statute] is a *disclosure* statute, its 'comprehensive, carefully tailored and detailed procedure,' like that of the Materials Act, precludes obtaining access to . . . materials under the FOIA"; but insofar as that same statute is "a *nondisclosure* statute, it is covered by [FOIA's] Exemption 3," as a law whose nondisclosure rules are made part of FOIA Exemption 3's incorporation of other enactments. *Essential Info., Inc. v. U.S. Info. Agency*, 134 F.3d 1165, 1170 & n.3 (D.C. Cir. 1998) (Henderson, J., concurring)

(first emphasis added) (quoting *Church of Scientology v. IRS*, 792 F.2d 146, 149 (D.C. Cir. 1986)).

Under this approach, if a taxpayer is seeking *disclosure* of his or her *own* tax returns and return information, § 6103 alone would control. To the extent that the *nondisclosure* aspects of § 6103 were at issue, such as when a member of the public seeks *another's* tax returns and return information that § 6103 keeps confidential, § 6103's confidentiality rules would be incorporated into FOIA and applied through FOIA Exemption 3. *See Lake*, 162 F.3d at 115-16 (citing *Ricchio* and Judge Henderson's concurrence in *Essential Information* for notion that § 6103 "represents the exclusive statutory route for taxpayers to gain access to their return information," so as to oust the Privacy Act). Contrary to the ruling below in Powell's case, the approach espoused in *Ricchio* and by Judge Henderson would, in a reasoned, sensible way, harmonize to the greatest extent possible the instructions in § 6103 and FOIA.

C. Reversal of the D.C. Circuit's decision below would curtail a glaring anomaly created by the decision, as well as by all of the others finding FOIA to apply in § 6103 situations involving disclosure of a taxpayer's own returns and return information. As noted earlier, the case law is nearly uniform in holding that § 6103 is exclusive as to the Privacy Act. *See Hobbs*, 209 F.3d at 412; *Lake*, 162 F.3d at 116; *Cheek v. IRS*, 703 F.2d 271, 271-72 (7th Cir. 1983); *but cf. Sinicki v. U.S. Dep't of Treasury*, No. 97 Civ. 0901, 1998 U.S. Dist. LEXIS 2015, at *13 (S.D.N.Y. Feb. 24, 1998) ("Section 6103 should only implicitly repeal the Privacy Act to the extent it presents irreconcilable conflict.").

At the same time, the Department of Justice has emphasized the close relationship between the Privacy Act and FOIA. The two statutes are "often read in tandem; [t]he Privacy Act allows individuals to access records about themselves, while FOIA allows the public to access government information." Office or Privacy and Civil Liberties, Dep't of Justice, *Overview of the Privacy Act of 1974 (2020 Edition): Individual's Right of Access*, https://www.justice.gov/opcl/overview-privacy-act-1974-2020-edition/access (last updated Oct. 22, 2022) (italics removed). "FOIA is entirely an access statute and 'is often explained as a means for citizens to know "what their Government is up to."'" *Id.* (quoting *NARA v. Favish*, 541 U.S. 157, 171-72 (2004), quoting *DOJ v. Reps. Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). "By comparison, the Privacy Act permits only an 'individual' to seek access to only his own 'record,' and only if that record is maintained by the agency within a 'system of records'. . . ." *Id.* (citing *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1121 (D.C. Cir. 2007)); *see* 5 U.S.C. § 552a(d)(1).

Yet, despite the symbiotic relationship between the Privacy Act and FOIA, courts on the D.C. Circuit side of the Circuit split have found that § 6103 is exclusive as to the Privacy Act, but not FOIA. Stranger still, where the taxpayer's own returns and return information are at issue, § 6103 becomes subordinated to the general statute – FOIA – that does not even focus on *the individual's own records*, since it is the Privacy Act that (as the DOJ has emphasized) concerns an individual's own records. The Seventh Circuit's statement bears repeating: "it would make no sense to hold that section 6103 was exclusive as regards the Freedom of Information Act

but not as regards the Privacy Act." *Cheek*, 703 F.2d at 272. Rather, § 6103 should be "exclusive as to both" when taxpayers request their own returns and return information. *Id.*[13]

D. This Court's decision in *Church of Scientology v. IRS*, 484 U.S. 9 (1987), does not address the Question Presented, but still – on balance – favors Powell's position. This Court decided *Church of Scientology* in the posture in which that case arrived here: as a suit brought under FOIA requiring determination as to whether § 6103 authorized disclosure of tax materials that otherwise would not be disclosable to the requester, if the IRS could de-identify the materials. *Id.* at 11 ("In the District Court the parties agreed – as they continue to agree here – that § 6103 of the Internal Revenue Code is the sort of statute referred to by the FOIA in 5 U.S.C. § 552(b)(3) relating to matters that are 'specifically exempted from disclosure by statute . . .'"). This Court determined whether deidentification would allow for disclosure (finding it would not), but did not comment on the rubric for suing to obtain

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[13] The logical outgrowth of the decision below is that, in situations like Powell's, FOIA now overtakes even the Privacy Act, notwithstanding that the Privacy Act more so than FOIA concerns an individual's own records. That is, whereas an individual typically would turn to the Privacy Act to obtain his or her own records, the current case law holds that § 6103 displaces the Privacy Act when tax records are at issue; however, FOIA then overtakes § 6103 under the D.C. Circuit's view, meaning that a situation otherwise arguably calling for Privacy-Act treatment is now exclusively controlled by FOIA. *See* Pet. App. 6a; *Maxwell*, 409 F.3d at 357 ("Appellants also claim, without citing any support, that FOIA requirements cannot be applicable to their requests for personal information, but only to requests for public information."). Powell knows of no other instance in which FOIA, in effect, "preempts" the Privacy Act.

information for which § 6103 prohibits disclosure, let alone the proper remedy for taxpayers to obtain *their own* tax returns and return information for which § 6103 does authorize disclosure.

Nonetheless, the unmistakable bent of this Court's decision in *Church of Scientology* is that § 6103 is a formidable, specific enactment capable of controlling the disclosure (or not) of materials covered by § 6103, as opposed to FOIA's various processes, procedures, and exemptions doing so. *E.g.*, *id.* at 15 (§ 6103 "contains an elaborate description of the sorts of information related to returns that respondent is compelled to keep confidential"). In the entirety of the decision, the Court applies no particular tenet of FOIA, but expounds on the text and meaning of § 6103 and how best to implement *its* strictures and allowances.[14]

III. THE QUESTION PRESENTED IS IMPORTANT

As Judge Adams commented: "The question of what law controls judicial review of Internal

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[14] Given the strength of the case on the merits that § 6103 is exclusive with respect to FOIA, it is not surprising that for many years the IRS "urge[d]" the position – in agreement with Powell's stance here – "that Section 6103 totally supersedes FOIA and provides the exclusive criteria for release of records affected by that section, so that courts must uphold any IRS refusal to disclose under Section 6103 that is not arbitrary or capricious and does not violate the other provisions of the Administrative Procedure Act." *Church of Scientology*, 792 F.2d at 148-49. The IRS appears to have changed its position largely in the D.C. Circuit in response to the D.C. Circuit's decisions in *Church of Scientology* and *Maxwell*. *See Maxwell v. O'Neill*, No. Civ.A.00-01953, 2002 WL 31367754, at *3 (D.D.C. Sept. 12, 2002), *aff'd sub nom. Maxwell v. Snow*, 409 F.3d 354 (D.C. Cir. 2005).

Revenue Service (IRS) decisions concerning disclosure of 'return information' is a difficult as well as important one." *Grasso v. IRS*, 785 F.2d 70, 78 (3d Cir. 1986) (Adams, J., concurring). Most notably, in the present context, it is important because the question's resolution determines the extent to which the IRS can avoid opening its files about particular taxpayers to those taxpayers themselves.

As noted already, § 6103 is a generous statute *to the extent* it provides for taxpayers to obtain certain returns and return information – *i.e.*, their own and the returns and return information of those closely related to them. Though the provisions for disclosure cover a "narrow[]" group of persons, once someone within that group seeks the disclosable records, "the IRS may, *or must*, reveal . . . this information." *Aronson v. IRS*, 973 F.2d 962, 964 (1st Cir. 1992) (emphasis added). Except for the one exception concerning return information (not even applicable to returns themselves), *see supra* p. 4, the IRS has no discretion to deny disclosure to taxpayers of their own returns and return information. In contrast, resort to FOIA (as the circumstances in Powell's disputes with the IRS evince) opens a legion of potential loopholes for the IRS to escape disclosure – from maintaining that descriptions in requests were not detailed enough, to conducting searches that are merely reasonable rather than ones that inexorably "shall" lead to disclosure (26 U.S.C. § 6103(e)(1)), to insisting that the requester petition the government office likely to contain the records. *See supra* p. 10 n.5; *see also Hull v. IRS*, 656 F.3d 1174, 1196 (10th Cir. 2011) (Kelly, J., dissenting) (criticizing majority for "allow[ing] the IRS to reject a FOIA request without first conducting a search of the requested

records"). Accordingly, which statute controls can be determinative of just how robust the IRS's disclosure will be.

Concededly, FOIA typically contains a *de novo* standard for judicial review that, at first blush, may appear favorable to a taxpayer stymied by the IRS, so that it is seemingly counterintuitive for Powell to prefer § 6103's exclusivity and the APA's standard of review to FOIA's operation. But the First Circuit in *Aronson* held that the APA's standard of review displaces FOIA's, even when FOIA otherwise controls the release of taxpayer information covered by § 6103. *See Aronson*, 973 F.2d at 966-67. Again, that puts the taxpayer in the worst of all worlds: navigating FOIA's intricate system for disclosure of one's own tax returns and return information, but then prevented from enjoying FOIA's *de novo* standard of review upon judicial review. *See supra* pp. 19-20. And anyway, the "searching and careful" review that the APA requires, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), based on a statute (*i.e.*, § 6103) under which the IRS "must" disclose records, *Aronson*, 973 F.2d at 964, is more favorable to the taxpayer than even *de novo* review under a statute (*i.e.*, FOIA) that provides the IRS with disclosure discretion.

We live in an era where, whether rightly or wrongly, government often is mistrusted and the IRS sometimes is accused of vindictiveness with respect to disfavored taxpayers. Section 6103's enactment was, in fact, designed to combat that suspicion. *See Lake v. Rubin*, 162 F.3d 113, 115 (D.C. Cir. 1998). While the confidentiality provisions of § 6103, no doubt, help protect taxpayers from "harass[ment]" either from government officials or

resulting from "revealing a taxpayer's return information to the public," *id.*, § 6103's uncomplicated, liberal allowance for disclosure to taxpayers of materials to which § 6103 entitles them correlatively builds taxpayer confidence in their government. Put differently, easy access to the IRS's information about oneself under § 6103, rather than pursuit of the FOIA maze, has "'consequences for the continued vitality of our voluntary tax assessment system.'" *King v. IRS*, 688 F.2d 488, 495 (7th Cir. 1982) (quoting *Zale Corp. v. IRS*, 481 F. Supp. 486, 489 (D.D.C. 1979)). The Court should grant certiorari to determine which paradigm pertains.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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