No. 23-1361

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

In its Opposition, the IRS does not contest that this case straightforwardly presents the legal issue of whether § 6103 of the Internal Revenue Code and the APA or, contrastingly, FOIA controls judicial review of the IRS's non-disclosure of a taxpayer's own returns or return information; thus, the IRS has no qualms that Powell's Petition is an appropriate vehicle for determining the legal issue. Nor does the IRS dispute that "[t]he question of what law controls judicial review of Internal Revenue Service . . . decisions concerning disclosure of 'return information' is a difficult as well as an important one." *Grasso v. IRS*, 785 F.2d 70, 78 (3d Cir.1986) (Adams, J., concurring).

Instead, the IRS's principal focus is on the merits, notwithstanding that the merits typically is the chief concern once the Court grants plenary review, not determinative of whether the Court should grant review in the first place. And secondarily, the IRS questions the existence of a Circuit split, though numerous courts previously have identified the split referenced in the Petition *and* the IRS itself has previously recognized it.

In any event, on the merits, the IRS gets things very wrong, even trying – erroneously – to recast the Question Presented to focus on whether FOIA is an "adequate remedy," 5 U.S.C. § 704, rather than on whether a specific statute (*i.e.*, § 6103) overrides a general one (*i.e.*, FOIA). Moreover, the Circuit split is well-established and readily survives the IRS's criticisms and maneuvers to reshape the case law.

ARGUMENT

I. THE IRS'S ARGUMENTS ON THE MERITS ARE UNPERSUASIVE

A. The IRS's defense on the merits begins with recasting the Question Presented from whether § 6103 is a specific statute that displaces FOIA to whether FOIA "provides an adequate remedy in court for persons seeking the disclosure of tax records" so as to "preclude" resorting to § 6103 and the APA. U.S. Opp. (I) (Question Presented). The recasting lacks legitimacy because the IRS seeks not just to foist the FOIA cause of action in 5 U.S.C. § 552(a)(4)(B) on those seeking to obtain their own tax returns and return information, but the entirety of the FOIA regime. That is, the D.C. Circuit's and, on its side of the split, other Circuits' invocation of a FOIA cause of action to the exclusion of an APA suit to enforce § 6103 is a corollary of these courts' larger holding that "FOIA procedures" as a whole apply – including, as well as FOIA's enforcement scheme, its exemptions to disclosure, its limited requirements for record searches, and its stringent criteria both concerning descriptions for requests for information and to whom requests should be addressed. *Maxwell v. Snow*, 409 F.3d 354, 358 (D.C. Cir. 2005); *see id.* ("FOIA requirements should apply to the processing of Appellants' § 6103 requests"); *accord* Pet. App. 5a (D.C. Circuit, below, holding that "the substantive requirements of § 6103 operate *within* FOIA's scheme).

Because the IRS seeks to supplement § 6103 with the full slate of FOIA's requirements, not just the latter's enforcement scheme, the appropriate inquiry is whether "§ 6103 [is] 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." Pet. i (Question Presented). That is the way the Circuit decisions prior to Powell's case had viewed the relevant inquiry, as opposed to seizing on whether a FOIA cause of action constitutes an "adequate remedy" under the APA, 5 U.S.C. § 704, for § 6103 violations. *E.g.*, *DeSalvo v. IRS*, 861 F.2d 1217, 1218 (10th Cir. 1988) ("[t]his case presents an issue of first impression in this circuit – whether I.R.C. § 6103 exclusively governs the IRS' duty to disclose 'return information,' thereby precluding application of the FOIA"); *Grasso v. IRS*, 785 F.2d 70, 73 (3d Cir. 1986) (similar); *see also Maxwell*, 409 F.3d at 357-58 (nowhere mentioning APA § 704); *cf. Hobbs v. United States ex rel. Russell*, 209 F.3d 408, 412 (5th Cir. 2000) (in finding § 6103 displaces the Privacy Act, invoking the principle that "a precisely drawn, detailed statute preempts more general remedies") (internal quotation marks and citations omitted).[1]

B. Even assuming the central focus on the merits should be on whether FOIA constitutes an adequate remedy under APA § 704, the IRS comes up short on the answer. Referencing then-Judge Scalia's opinion for the D.C. Circuit in *Church of Scientology*,

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[1] This litigation appears to be the first time the IRS has made the argument of FOIA's "adequacy" under APA § 704 to defend FOIA overtaking § 6103. In fact, the IRS previously has not just said the inquiry is whether the specific § 6103 governs over the general FOIA, but until lately has always pressed *the position that Powell here takes* – namely, that § 6103 and the APA apply to the exclusion of FOIA. *See, e.g.*, *DeSalvo*, 861 F.2d at 1219; *Grasso*, 785 F.2d at 73; *Church of Scientology v. IRS*, 792 F.2d 146, 148-49 (D.C. Cir. 1986); *King v. IRS*, 688 F.2d 488, 489 (7th Cir. 1982).

the IRS says the adequacy of FOIA as a remedy flows from FOIA's language, which, in its Exemption 3, supposedly "'explicitly accommodat[es] other laws by excluding from [FOIA's] disclosure requirement documents "specifically *exempted from disclosure*" by other statutes.'" U.S. Opp. 7-8 (quoting *Church of Scientology*, 792 F.2d at 149, quoting 5 U.S.C. § 552(b)(3)) (emphasis added). The problem with that line of reasoning, as explained in the Petition (at 23-24), is that the quoted statutory language speaks solely to FOIA's incorporation of *non*-disclosure elements of another statute – *i.e.*, other statutory provisions that exempt material from disclosure and thus make the material confidential despite FOIA. The question in this case is whether § 6103's generous allowance *for disclosure* to taxpayers of their own returns and return information should be subordinated to the FOIA regime. FOIA's Exemption 3 can be harmonized with the parts of § 6103 that keep certain tax materials confidential, such as tax returns and return information that are sought by persons other than the relevant taxpayer, but offers no guidance for the other aspect of § 6103 that liberally requires disclosure to taxpayers of *their own* tax returns and return information. *See* Pet. 24.[2]

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[2] The IRS assails the distinction between the disclosure and non-disclosure aspects of a statute such as § 6103, saying no court has discerned a difference for purposes of ousting FOIA. *See* U.S. Opp. 16. That is not true; the D.C. Circuit has. *See* Pet. 25-26. Additionally, the difference derives from the text of FOIA's Exemption 3, which addresses statutes that affix confidentiality, but not those that mandate disclosure. The statutory text matters.

Aside from focusing on Exemption 3, the IRS in its Opposition makes a run – unsuccessfully – at showing that application of FOIA in situations where taxpayers seek their own returns and return information would not frustrate § 6103's objectives, thus allegedly qualifying FOIA as an adequate remedy for vindicating the taxpayers' rights under § 6103. Here, the IRS states that FOIA merely "provid[es] additional detail as to how disclosures should be requested and provided," as if FOIA adds just a little nuance to § 6103. U.S. Opp. 8.

But the IRS ignores entirely the many standards and restrictions concerning disclosure in FOIA that are antithetical to § 6103. As noted in the Petition (at 22-23), and even in Powell's Question Presented, FOIA contains a web of processes, standards, and limitations, instructing specific requests and only reasonable searches of sources the government deigns likely to contain relevant information and, importantly, detailing many exemptions that can limit disclosures. In contrast, § 6103 provides the IRS with little or no authority or opportunity to deny taxpayers disclosure of their own tax returns and return information: the IRS's disclosure obligation is mandatory (*i.e.*, the IRS "shall" disclose, 26 U.S.C. § 6103(e)(1)), and there are zero exceptions to a taxpayer's disclosure right for returns and a single, narrow exception for return information (when disclosure would "seriously impair Federal tax administration," *id.* § 6103(e)(7)). *See Lake v. Rubin*, 162 F.3d 113, 116 (D.C. Cir. 1998) (FOIA's exemptions to disclosure have "no counterpart" in § 6103). The resulting curtailment, or even defeat, of taxpayers' rights to their own information by applying FOIA hardly constitutes "FOIA and

Section 6103 readily work[ing] together." U.S. Opp. 9.

C. When the IRS does address Powell's merits arguments on their own terms – noting "Petitioner's invocation of the canon that a specific enactment will control over a general enactment," *id.* – the IRS chiefly recites 5 U.S.C. § 559, suggesting it identifies a Congressional intention to subjugate § 6103 to FOIA. But the IRS overlooks the very first sentence of § 559, which states that FOIA and the APA "do not limit or repeal additional requirements imposed by statute or otherwise recognized by law." 5 U.S.C. § 559. As a consequence, FOIA cannot "limit" § 6103, which can only be avoided by § 6103 standing separately (with the APA as its enforcement tool) from FOIA and particularly FOIA's freighted procedural and enforcement scheme.

D. The IRS's theory of the case on the merits ultimately runs headlong into the universal holding of the Circuits to have reached the issue (including the D.C. Circuit) that § 6103 displaces FOIA's companion statute, the Privacy Act. As noted in the Petition (at 26-28), there is no analytically credible way to harmonize the Circuits' view that § 6103 is exclusive as to the Privacy Act with the proposition that FOIA controls § 6103.

The IRS detects a distinguishing feature in 26 U.S.C. § 7852(e), purportedly allowing for § 6103 to control over the Privacy Act but not FOIA. *See* U.S. Opp. 10. However, § 7852(e) provides only that "subsections (d)(2), (3), and (4), and (g) of section 552a of title 5, United States Code [*i.e.*, the Privacy Act], shall not be applied" with respect to tax "liability" determinations. 26 U.S.C. § 7852(e).

These subsections of the Privacy Act deal with *amending* existing government records and the jurisdiction of the courts to hear grievances about the government's failure to amend records. In contrast, the subsection of the Privacy Act relevant to the government's simple *disclosure* of documents (not amendments to them) – which is the situation pertinent to Powell – is subsection (d)(1) (5 U.S.C. § 552a(d)(1)). Section 7852(e) says nothing about subsection (d)(1)'s application (or not). *See Lake*, 162 F.3d at 115 (finding that § 7852(e) actually favors application of the Privacy Act over § 6103, due to its failure to "mention the Privacy Act's disclosure provision (subsection (d)(1))," but still concluding that "the specific provisions of § 6103 rather than the general provisions of the Privacy Act govern the disclosure of the sort of tax information requested here").

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

Since soon after § 6103's enactment in the 1970s, the Circuits have acknowledged that they are "divided on the issue of whether the release of return information is governed by the FOIA or exclusively by section 6103." *DeSalvo v. IRS*, 861 F.2d 1217, 1219 (10th Cir. 1988); *see Grasso v. IRS*, 785 F.2d 70, 73 (3d Cir. 1986) ("We consider first the government's contention that section 6103 of the Internal Revenue Code supersedes the Freedom of Information Act. This issue has divided the circuits."); *see also Church of Scientology v. IRS*, 792 F.2d 146, 149 (D.C. Cir. 1986) ("The IRS relies principally on *Zale Corp. v. IRS*, 481 F. Supp. 486 (D.D.C. 1979), which has been followed by the Sixth and Seventh Circuits, *see White v. IRS*, 707 F.2d 897,

900 (6th Cir. 1983); *King v. IRS*, 688 F.2d 488, 495-96 (7th Cir. 1982). We cannot agree with those decisions."). Consistent with the Circuits' viewpoint, the IRS, in this very litigation, previously admitted the Circuit split. *See* Answering Br. for Appellees 16-17 (June 16, 2023, D.C. Cir. Doc. #2003781) (noting D.C. Circuit aligns with "majority view," but "Sixth and Seventh Circuits have followed *Zale*").

Yet, the IRS *now* says there really is no Circuit conflict. *See* U.S Opp. 11-16. Its tactic is to try to pick apart, in order, the decisions from the Seventh, Sixth, and First Circuits that disagree fully or in part with the other Circuits' holdings favoring the IRS's current (but not historical, *see supra* p. 3 n.1) merits position. It takes the IRS six pages to create its fine distinctions, which itself is some indication of the tenuousness of the IRS's effort. In any case, its attempt at harmonization is ineffective.

First, as to the Seventh Circuit precedents, the IRS concedes *King* held that § 6103 applies over FOIA, but then emphasizes that the Seventh Circuit briefly said it could reach the same result on the merits if it instead utilized FOIA. *See* U.S. Opp. 11-12. That is not a signal to the lower courts in the Seventh Circuit to apply FOIA; rather, it is a belt-and-suspenders approach by the Seventh Circuit to justify its ruling that § 6103 controls. That *King* finds § 6103 to be exclusive is confirmed by *Cheek v. IRS*, 703 F.2d 271 (7th Cir. 1983), which – as explained in the Petition (at 15) – is actually the Seventh Circuit decision most on point, since *King* involved efforts to obtain *others'* tax information, not one's *own* tax information. *Cheek* takes *King*'s holding on § 6103's exclusivity (and *only* that holding) and applies it where taxpayers seek their

own returns and return information. The IRS belittles *Cheek* for containing a "single line" of analysis (in the IRS's view); however, the Seventh Circuit was extending the lengthy prior analysis in *King*, with no need to reinvent the wheel. U.S. Opp. 12. And although the IRS then sifts fastidiously through the district court cases in the Seventh Circuit, finding some that apply § 6103 over FOIA, and others that do the opposite, what it fails to recognize is that the decisions applying solely § 6103 (*see id.* at 12 n.2) *all* involved taxpayers seeking their *own* information, while those mentioning FOIA's Exemption 3 involved situations where members of the public sought "'return information of taxpayers other than the plaintiff (third-party taxpayers).'" *Kozacky & Weitzel, P.C. v. United States*, No. 07 C 2246, 2008 U.S. Dist. LEXIS 29779, at *9 (N.D. Ill. Apr. 10, 2008) (quoting IRS affidavit) (cited at U.S. Opp. 12). That difference in results tracks exactly Powell's view. *See* Pet. 25-26.

Second, the IRS disparages the Sixth Circuit's holding in *White* favoring § 6103. It implies that the Sixth Circuit there really accepted FOIA's primacy, because the backend of the decision – as with *King* – seeks to solidify a holding of § 6103's exclusivity by showing the same outcome would be reached by applying some of the exemptions in FOIA that have no counterpart (to use *Lake*'s terminology, *see supra* p. 5) in § 6103. *See* U.S. Opp. 13-14. Even considering the second part of *White* to constitute a holding, it would be an alternative holding to the first one the Sixth Circuit overtly said it was foremost "disposed" to follow. *White*, 707 F.2d at 900; *see id.* at 902 (Merritt, J., concurring) (joining only portion of majority opinion finding § 6103 to be

exclusive). In the Sixth Circuit, as elsewhere, district courts must, at a minimum, follow the "primary holding" in a case having two complementary ones. *Freed v. Thomas*, 976 F.3d 729, 738 (6th Cir. 2020). While the IRS cites a subsequent Sixth Circuit case that it says applied FOIA, the district court there actually followed *White*'s § 6103 holding and relied heavily on *Zale*; the Sixth Circuit vacated the district court's ruling not because FOIA instead should apply, but because the district court found "that the IRS's refusal [to disclose] was not arbitrary or capricious" without the IRS having properly explained "the basis for the withholding." *Osborn v. IRS*, 754 F.2d 195, 197 (6th Cir. 1985).

Third, regarding the First Circuit, the IRS spills much ink trying to prove that Powell's case "does not present the issue of the proper standard of review to be applied in a FOIA Exemption 3 case." U.S. Opp. 15 (discussing *Aronson v. IRS*, 973 F.2d 962 (1st Cir. 1992)). The IRS misses the point. Powell does not ask this Court to determine the appropriate standard of review for a FOIA claim involving records covered by § 6103, for Powell believes that FOIA does not apply. Instead, Powell described the First Circuit case law to note where the First Circuit stands in the divide between, on the one hand, the Sixth and Seventh Circuits and, on the other, the D.C. Circuit and the Circuits in its camp. In that contest, the First Circuit is somewhere in the middle, highlighting further the doctrinal inconsistency in this area. The First Circuit rejected *King/Cheek* and *White* when determining if § 6103 is exclusive (it is not, in the First Circuit), but then accepted *King/Cheek*, *White*, and *Zale* in

determining that some components of § 6103 and the APA shall nevertheless oust FOIA (*e.g.*, on the standard of review).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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