NO. 24-509

IN THE

Supreme Court of the United States

KATHLYN MOORE

Petitioner

V

UNITED STATES OF AMERICA

Respondent

On Petition For Writ of Certiorari
To the Supreme Court of the United States
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Kathlyn Moore
807 E. 13th Avenue
New Smyrna Beach, FL 32169
Phone: 386-957-3410

QUESTIONS PRESENTED FOR REVIEW
Introduction

This case is brought to the Supreme Court for review of the District Court's Report and Recommendation and Judgment and the Appellate Court's Opinion and Judgment. The purpose of this suit is to examine the IRS's unauthorized 2006 tax collection activity and their secret levy of 13 years. Calculations were wrongly based on self-employment. Petitioner's employer had not paid his employment taxes. The Petitioner appealed, but the IRS refused to communicate. The IRS dismissed administration of her claims by refusing a hearing on the matter and closing the appeal. Petitioner filed suit before the two year deadline.

Petitioner's Social Security ("SS") was levied without the statutory notice of deficiency or, 13 years later, the 30-day notice of levy. The IRS negligently changed Petitioner's 30-year residence address on her account without her knowledge or permission. As a result, the levy occurred without notice. Petitioner has been denied documents and instructions regarding her privileges and duties in the due process tax collection process.

The IRS acted without authority in a multitude of ways so that the cumulative effect denied Petitioner of her right to due process under the laws of the United States and the Taxpayer Bill of Rights **(H.R. 2337)** which is based on the Constitution. This unconstitutional situation caused great harm to Petitioner. After filing suit, the courts disrespected Petitioner because she was pro se. They denied her accommodations for a disability that kept her from attending her deposition and then used that to sanction dismissal.

The judges and IRS attorney used a multitude of deliberate bad acts, fabrications and misunderstandings to deny Petitioner's rights at every step. The discriminatory acts and abuses of the Courts have accumulated to violate Petitioner's right to a trial, to compensation and wholeness. With all due respect, please consider the following questions.

QUESTION 1: Does this Court agree that Petitioner's case was wrongly dismissed as a sanction for her inability to attend a deposition without accommodations under rules of Title II of the Americans With Disabilities Act (ADA) and 29 U.S.C. § 794 – Nondiscrimination under federal grants and programs?

(a) Does the ADA apply to the Middle District? Judge Irick contends that ADA rules and HIPPA don't apply to federal proceedings.

(b) Did the IRS wrongly demand medical information be produced to the public or there would be no accommodation in depositions or hearings?

(c) Did Judge Irick wrongly disregard Petitioner's physician's letter opinion asking for accommodation (dismiss or quash information) in violation of 28 U.S.C. § 636?

(d) Did the IRS wrongly demand disabled Petitioner pay $140 for her own accommodations?

(e) Did the Court wrongly dismiss this case for lack of prosecution?

(f) Did the Court wrongly award costs of $4,900 for depositions which the IRS made sure Petitioner could not attend due to no accommodations?

QUESTION 2: Does this Court agree that Petitioner did exhaust what administrative remedies there were AND the exhaustion of administrative remedies cannot apply where the IRS has no jurisdiction?

QUESTION 3: Does this Court agree that one requested amended complaint is not a fair limit, considering Petitioner is a pro se first-time litigator?

QUESTION 4: Does this court agree that this suit was wrongly dismissed for alleged violations of Anti-injunction Act and the Declaratory Judgment Act?

QUESTION 5: Did Judges Irick and Mendoza wrongly dismiss this case by alleging the government had not waived sovereign immunity?

QUESTION 6: Does 28 U.S.C. § 636 apply to Judge Irick who considered this case claiming it asked for injunctive relief, issued a judgment on the pleadings, dismissed or quashed information, dismissed for failure to state a claim upon which relief can be granted, and involuntarily dismissed this action?

QUESTION 7: Did Judge Irick's prejudice against pro se litigants, falsifying a hearing transcript and conferring alone with IRS attorney indicate mandatory recusal?

QUESTION 8: Does this court agree that this case has merit and should be remanded for trial with all these issues settled so the case can proceed?

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Supreme Court Rules, Kathlyn Moore certifies that, to the best of her knowledge, information, and belief, the following persons and entities have an interest in the outcome of this appeal:

Ellisen, Bruce R., United States Attorney

Glasser, David W., Attorney

Handberg, Roger B., United States Attorney,
Middle District of Florida

Hoppmann, Karin, former Acting United States Attorney,
Middle District of Florida

Hubbert, David A., Deputy Assistant Attorney General,
Tax Div, U.S. Department of Justice

Irick, Daniel C., Magistrate Judge, US District Court for the Middle District of Florida

Mendoza, Carlos E., Judge, United States District Court for the Middle District of Florida

Moore, Kathlyn, Petitioner

ON, GRANT, and LUCK, Circuit Judges

Parker, Richard L., Attorney for United States

Pett, Curtis Clarence, Attorney, Tax Division,
Appellate Section, Department of Justice
United States of America

Weisberg, Andrew Joseph, Attorney, Civil Trial Section – Southern Region, Tax Division,
Department of Justice

PROCEEDINGS IN FEDERAL AND APPELLATE COURTS

Case No. 6:21-cv-00395-CEM-DCI
Middle District of Florida
Moore v. United States of America
Filed 3/1/2021
Terminated: 01/31//2923
Jury Demand: Petitioner
Nature of Suit: 2870 Tax Suits
Jurisdiction: U.S. Government Defendant
Cause: 15:1692 Fair Debt Collection Act

Case No. 23-11053
Appealed to 11th Circuit Court
Atlanta, Georgia
Moore v. United States of America
Filed 4/1/2023
Nature of Suit: 2870 Tax Suits
Filed Notice of Appeal: 04/03/2023
Dismissed: 07/03/2024
Judgment/Mandate: 07/30//2024

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(d) Did the IRS wrongly demand disabled Petitioner pay $140 for her own accommodations?

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APPENDIX – Volume One

OPINIONS, ORDERS, FINDINGS OF FACT

STATUTES

*Too voluminous to print

REGULATIONS

APPENDIX - Volume Two

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CITATIONS OF REPORTS, OPINIONS, ORDERS

Appeals Brief Exhibits – Letters from IRS regarding hearing and appeal

Letter K6 dated 4-22-2019
Letter K-7-dated 3-2019
Letter K8 undated

Doc 118-Report and Recommendation dated 1/3/2023

Doc 131-Order adopting Report and Recommendations granting Motion to Dismiss; granting Motion to Dismiss for Lack of Jurisdiction; granting Motion to Dismiss for Failure to State a claim. Case Dismissed 01/31/2023

Doc 58 Dismissal by Appellate Court
Opinion issued by court as to Appellant G. Moore. Decision: Affirmed. Non-Published. Entered 04/24/2024

Doc 59 Judgment entered as to Appellant Kathlyn G. Moore dated 04/24/2024

Doc 64 Order of the Court rehearing denied dated 7-22-2024

Doc 65 Judgment issued as mandate regarding 7-22-2024
Order of the Court dated 7-30-2024

STATEMENT OF JURISDICTION

This case was dismissed from the Middle District of Florida, based on Report and Recommendation ("R&R") dated 1/3/2023 and Order adopting that R&R dated 1/31/2023. It was appealed to the Eleventh Circuit where it was dismissed by Opinion and Judgment filed 4/24/2024 and finalized with the Mandate of 7/30/2024. This is the judgment sought to be reviewed. It is appealed to the Supreme Court ("SC") under this Court's Rule 11.

The District Court has jurisdiction pursuant to **28 U.S.C. § 1346**. The case was timely filed within two years of the first instance of levy based upon IRS violations of **26 U.S.C. § 6331, 26 U.S.C. § 6212, 26 U.S.C. § 6303** and **26 USCA § 6330** (Doc. 59) The case contains federal questions. **28 U.S.C. 1331** "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Violations of the Taxpayer Bill of Rights codified at **IRC § 7803(a)(3)** which is based on the Constitution make this a federal question. **28 U.S.C. § 1254** confers jurisdiction on the Supreme Court to review decisions dismissed by lower federal courts.

Allegations regarding sovereign immunity, exhaustion of administrative remedies, violation of the Anti-Injunction Act **(26 U.S.C. § 7421)**, Declaratory Judgment Act **(Title 28 § 2201)**, failure to prosecute and bad faith were brought by Andrew Weisberg in a Motion for Sanctions (Doc 108) dated 12/13/2022, due directly to Petitioner's inability to attend her deposition due to the court's denial of accommodation for her illness and disability.

Sovereign immunity is waived by **26 U.S.C. § 7433** and **26 C.F.R. § 301.7433-1**.

Statute of limitations was up before filing active complaint. All taxes allegedly owed were paid before suit.

STATEMENT OF THE CASE

QUESTION 1: Does this Court agree that Petitioner's case was wrongly dismissed as a sanction for her inability to attend a deposition without accommodations under rules of Title II of the Americans With Act (ADA) and 29 U.S.C. § 794 – Nondiscrimination under federal grants and programs?

- **(a) Does the ADA apply to the Middle District? Judge Irick contends that ADA rules and HIPPA don't apply to federal proceedings.**
- **(b) Did the IRS wrongly demand medical information be produced to the public or there would be no accommodation in depositions or hearings?**
- **(c) Did Judge Irick wrongly disregard Petitioner's physician's letter opinion asking for accommodation (dismiss or quash information) in violation of 28 U.S.C. § 636?**
- **(d) Did the IRS wrongly demand disabled Petitioner pay $140 for her own accommodations?**
- **(e) Did the Court wrongly dismiss this case for lack of prosecution?**
- **(f) Did the Court wrongly award costs of $4,900 for depositions which the IRS made sure Petitioner could not attend due to no accommodations?**

1. Petitioner is disabled. During the August 16, 2024 hearing ("Withdrawal Hearing"), Judge Irick ("Irick") violated ADA rules when he demanded public disclosure of private medical information. Petitioner's attorney refused to disclose medical information in public. Judge Irick refused filing under seal and refused to accommodate Petitioner in hearings and depositions which led to the sanction of dismissal. (8-16-22 Withdrawal Hearing transcript Doc 115, pg 4, lns 8-9) When Petitioner's attorney refused to

disclose medical information in open court,[1] Irick asked her attorney/employer twice again to disclose her private information and he refused (Id. at pg 16, Lns. 8-12). Irick threatened that: "you're requesting some, accommodation in relation to your disability, and if you refuse to provide any information but also request accommodations based on an unknown disability, that's going to cause problems in your case because that's not going to result in good cause for things..." Also, "I could **easily** issue an order directing the doctor to give all of the information concerning your medical records and your disability." (Id. At pg 22, lns 11-13) Irick was so disrespectful during this hearing, it was clear that even if he had private information, he would not respect it, so he didn't get it. His disrespectful conduct was unprofessional. He also falsified the transcript of this hearing. He refused Petitioner a digital copy of the hearing so it could be verified something was missing. He refused to recuse himself. This case cannot be returned to him.

2. Irick contends that **Title II of the ADA** rules and HIPPA do not apply to him, the Middle District or an officer of the court, the IRS attorney Weisberg. Irick says, "Also, HIPPA doesn't apply to these proceedings and doesn't apply to court orders." (Doc 115, pg 22, Lns. 13-14.) On the contrary HIPPA does apply to federal proceedings and orders. **45 C.F.R. § 164.512(e)** There are protections written into the law to protect privacy. **FRCP Rule 45 Subpoena.** The **Rehabilitation Act of 1973, Section 504**,[2] is significant as it prohibits discrimination against individuals with disabilities in programs or activities receiving federal financial assistance. **29 U.S.C. § 794**. This includes federal courts, as they must ensure accessibility

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[1] Petitioner would produce only under Court Order and Under Seal per the rules of the court. If the accommodation is using a phone as opposed to driving 3 hours to appear in person, it wouldn't warrant that for this hearing. The Court's purpose was served over the phone.

[2] See **Exhibit B Fact Sheet – Your Rights Under Section 504 of the Rehabilitation Act)**

and reasonable accommodations. $140 is a reasonable accommodation. Weisberg wrongly held that the ADA did not apply to him and demanded the Petitioner pay the $140.

3. At the Withdrawal Hearing, Petitioner presented her doctor's opinion on her abilities to participate in hearings or depositions. A change in methods, which the rules allow, was recommended. Irick disregarded Petitioner's doctor's letter **(Doc 77-1),** the opinion of a licensed medical physician who has been Petitioner's physician for 30+ yrs., in violation of **28 U.S.C. §636(b)(1)(A)**. Petitioner lives in 2 states but keeps the same physician. Irick was "shocked" that Petitioner's doctor was in Texas (Doc 115, pg 5, ln 19-25). Irick's medical knowledge is not current. He didn't know what telehealth was. Irick made the decision to quash the doctor's letter all by himself contrary to **28 U.S.C. § 636** and made it clear to the IRS attorney he did not have to consider Petitioner's illness or disabilities either. Neither Weisberg nor Irick are qualified to make complex medical decisions and this event did not require one. Disabilities are seen and unseen. They wanted to see one which is short-sighted at best.

4. HARASSMENT. Abusive men make women feel unsafe. Abuse occurred during any interaction with Weisberg. Weisberg harassed Petitioner for personal medical information at least 5 times prior to the Hearing so he could decide whether he had to make any consideration or accommodations. It is Petitioner's belief that you don't need to know all details of a medical condition to effect its accommodation as claimed by Irick (Doc 115, pg 5, Ln 19-25) when the accommodation is as simple as a phone call. It was the most expeditious form of hearing during Covid. (Weisberg himself asked to appear by phone and was denied as well. His travel costs from Washington and a stay overnight were not warranted for this hearing.) Weisberg also complains "she has refused on numerous occasions to give me a cell phone number that I am able to contact her at." (Appeal Brief Doc 108-2, pg 6, ln 2-5). The IRS is not

entitled to the Petitioner's private cell phone[3]. (Appeal Brief Exhibit L) The first time Weisberg called Petitioner's office, he harassed her, hinting he wanted to be called Ann which is entirely inappropriate. The harassment continued. Weisberg has no respect for Florida law. He should be banned from this case as a sanction for his disrespect.

5. DEPOSITIONS. When scheduling a deposition, "An attorney is expected to accommodate the schedules of opposing counsel. In doing so, the attorney should normally pre-arrange a deposition with opposing counsel before serving the notice." **Middle District's General Policy and Procedure, 1. Scheduling.**

6. Weisberg served 3 deposition notices without conferring. He offered accommodations, made Petitioner arrange accommodations and pay for them and then Weisberg cancelled them, knowing Petitioner could not attend without accommodation. His scheme was to incur costs and have the costs deducted from Petitioner's paycheck.[4] Petitioner motioned the court for a written deposition and the court refused because the Court demanded Petitioner produce medical information to the public. **FRCP Rule 30(b)(4)** Weisberg held 3 fake depositions to incur costs and then asked the court to levy her paycheck. He never

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[3] "Every natural person has the right to be left alone and free from governmental intrusion into his private life..." **Fla. Const. Art I, § 23.**

[4] "Depositions should be taken only when actually needed to ascertain relevant facts or information that is reasonably calculated to lead to the discovery of admissible evidence, or to perpetuate testimony evidence. Depositions never should be used as a means of harassment or to generate expense. For example, unless a rule of procedure or court limits the length of time for a deposition to be taken, the length of time for depositions should be limited to as much time as is reasonably needed by counsel to take the deposition, and counsel should refrain from taking long depositions for the sole purpose of harassing the deponent or to generate expense." - **Florida Bar, Code of Prof Conduct.**

intended to take a deposition, just rack up costs, with Judge Irick's blessing. **FRCP Rule 30(d)(2).**

7. The neutral location renting office space, Ripple Coworking ("Ripple"), charges $20 per hour. A deposition of 7 hours totaling $140. The government/Department of the Treasury, under **Section 504**, has the obligation to pay for accommodating the disabled as long as it is not burdensome. $140.00 is not burdensome. In bad faith, Weisberg offered and then quickly rescinded accommodation so he could build up his dismissal structure, each step building and building, until, he could say Petitioner "refused" to attend her deposition in bad faith. Petitioner agreed to pay for accommodation but still asked the court for an alternate method if it could be arranged before the deposition date. Irick used that (as if you could not do the two things at the same time) "bad faith" argument on behalf of the IRS. (Appeal Brief, Doc 102, pg 5 and Doc 105, pg 2) (Email C) The bad faith claim is a giant insult to a disabled person fighting for their rights **(42 U.S.C. § 1983).**

8. Fairness and justice require a neutral site for a deposition and usually arrangements are made kindly and with respect. Both sides should cooperate in coming to favorable agreements. Depositions in this case were taken for the purpose of harassment. The IRS was silent for 13 years and when challenged, demanded 7 hours of grilling in person on video to discomfort and distress. **FRCP Rule 30(d)(1)** states that a deposition should not be used to annoy, embarrass, or oppress a witness or party. That was the sole purpose of these fake depositions.

1st deposition-Weisberg set the 1st deposition without consult in Orlando. Petitioner worked in Daytona Beach, Florida which was 57 miles one way. Due to illness at the time, driving alone for hours was not possible. Weisberg held a deposition by himself in Orlando.

2nd deposition-Weisberg set the 2nd deposition without consult in Daytona Beach. He demanded a video deposition. Taking someone's picture here in Florida is illegal

if you don't agree.[5] Also, there is commerce involved where someone is making money off the deposition and they own the copyright of your image because they made the video. Petitioner declined video deposition but agreed to in person. Ripple rents offices hourly next to Petitioner's work. Weisberg said he would agree to that if Petitioner paid for it. (Appeal Brief, Email B, pg 5) Petitioner agreed to pay for it although that's wrong, in an attempt to expedite matters. Petitioner toured their facility. Ripple said they would provide security and watch for any distress caused by Defendant. They have glass walls and Petitioner's workplace and her boss, David Glasser would be right next door. Petitioner's co-worker, Joyce, takes care of Petitioner at the office to make sure she doesn't get injured and has a place to rest or sleep. Petitioner would feel safe only at a neutral place where people are watching for abuse through glass walls. Weisberg cancelled the next day. Weisberg reverted to the IRS office in Daytona, and held a fake deposition by himself. His strategy was to make it *appear* that Petitioner "refused." He lied to the Judge and the Court.

3rd deposition-Weisberg set the 3rd deposition at the IRS office in Daytona without conferring. It was a building under construction (Appeal Brief Email D, pg 7) Petitioner gets very sick around construction dust, mold or polluted air and that was the cause of her most recent illness and the very reason she missed the previous week of work before the Withdrawal Hearing. Weisberg said Petitioner would be escorted with security officers whom you assume carry guns. See Appeal Brief Affidavit A. Petitioner could not agree to attending a deposition with guns present (See Appeal Brief Exhibit B, page 5) Weisberg offered Ripple again only if Petitioner would pay. Petitioner agreed again to expedite the process. Then Weisberg cancelled again and

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[5] In Florida, it is illegal to record an in-person or telephone conversation without the consent of all parties. Violating this law constitutes either a misdemeanor or a third-degree felony depending on the offender's intent and conviction history, and can also subject the offender to civil damages. **FL Stat § 934.03** (definition & penalties).

said it was back at the IRS offices. The day before the deposition, Weisberg cheekily "gave Petitioner one more chance" and demanded the deposition be held at Petitioner's work. (Doc 108-2, lines 1-24) Nobody tells their boss they are going to take his offices the next day for private use. That was just to cover all his bases. In reality Weisberg was aggressive, abusive, and dishonest. **R. Regul. FL Bar 4-8.4(a)** Weisberg reverted to the IRS office in Daytona again, lying to the court that Petitioner "refused." Then he asked for sanctions.

9. ILLEGAL SURVEILLANCE. When Petitioner got to work the morning of the 3rd deposition, a man was standing in front of Glasser's office pointing a camera at the front door. Petitioner was being stalked! Weisberg called Glasser's office and said, "Is Kathlyn Moore working today?" (Appeal Brief Doc 108-pg 20) That's illegal government surveillance. He could legally say, "May I speak to Kathlyn Moore." This is an IRS attorney stalking and surveilling this Petitioner,[6] taking pictures! Everyone in the office was frightened and watching out for Petitioner. Then Weisberg claims Petitioner "refused" to take a deposition. Weisberg must be sanctioned and dismissed from this case for constructing a dismissal with lies. (Doc 108-2). Weisberg meant to cause harm and he did cause harm.

10. ALLEGED LACK OF PROSECUTION. Irick wrongly dismissed this suit claiming Petitioner failed to prosecute. Petitioner sent out discovery which went unanswered, objected to the method of the depositions and attempted to arrange her own accommodations. Petitioner prosecuted every second, pleading for Judge Irick to protect her at least three times (Docs 92, 95, 103), requesting an alternate method of deposition and to allow accommodations. Weisberg made it clear he intended to damage Petitioner physically and emotionally. He harassed and abused her in every way he could outside a deposition. Judge Irick only participated in the abuse and refused accommodations

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[6] **2023 Florida Statutes, Title XLVI Crimes, Chapter 784** Assault, Battery, Culpable Negligence, Section 048 Stalking.

of any kind and let Weisberg have his way. Petitioner continued to participate, write responses and appeal.

11. Sometimes it requires meeting the needs of the disabled by changing the way things are normally done so that people with disabilities have an equal opportunity to participate fully in all aspects of society without discrimination. Irick denied a disabled litigant (disability is defined the same as **ADA Title II**) the opportunity to participate in or benefit from federally funded programs, services or other benefits or opportunities to participate under **Section 504 of the Rehabilitation Act of 1973.**

QUESTION 2: Does this Court agree that Petitioner did exhaust what administrative remedies there were AND the exhaustion of administrative remedies cannot apply where the IRS has no jurisdiction?

1. The requirement to exhaust administrative remedies does not apply "when an agency is exercising authority beyond its statutorily conferred powers." Prompt judicial intervention is therefore permissible when the agency has no jurisdiction to begin with. *Westheimer Indep. Sch. Dist.*, 567 S.W.2d at 785. In Petitioner's case, the IRS is an agency that acted outside its statutory powers, or *ultra vires* by failing its duty to serve notices, thus had no authority. In such situations, exhaustion would not serve judicial and administrative efficiency, and agency policies and expertise are irrelevant. *Strayhorn v. Lexington Ins. Co.*, 128 S.W.3d. at 780.

2. **26 U.S.C. § 7429** says **a suit in district court is the only review of jeopardy levy or assessment procedures**. This opposes the "must exhaust administrative remedy" concept. The IRS does not have authority to impose sanctions, fines, remedies or negligence awards. "...the district courts of the United States shall have exclusive jurisdiction over any civil action for a determination under this subsection." **26 U.S.C. § 7429(2A).** Where the IRS refuses to communicate, there can be no remedies and the 2 year deadline to file in federal court

must be met. "Parties are not required to pursue the administrative process regardless of the price." *Houston Fed'n of Teachers, Local 2415 v. Houston Indep. Sch. Dist.*, 730 S.W.2d 644, 646 (Tex. 1987). Giving up the right to sue in federal court would be too costly a price.

3. Pursuant to *Jones v. Bock*, 127 S. Ct. 910 (2007), exhaustion is no longer a pleading requirement, but instead is an affirmative defense upon which Defendants have the burden of proof. Defendants have the burden of raising and proving the affirmative defense of failure to exhaust administrative remedies. There has been no definition of exhaustion of remedies in this case. The exhaustion requirement is nebulous at best and cannot be applied if not defined for each case. A blind application of the undefined applied with other statutes would render all other statutes without meaning.

4. After levy began, without any information about the levy, Petitioner made an administrative claim and asked for a refund in 5 letters.[7] Normally, people don't know much about tax, just to file once a year, and Petitioner was relying on the IRS to be fair and provide necessary due process collection procedural information and they provided nothing for 13 years. The IRS is at fault for Petitioner having no information on the levy, on appealing, on what forms to fill out, on what to do at all. The IRS is supposed to send a notice for each instance of an account being changed. The IRS has an obligation to inform taxpayers about significant changes that may affect their tax liability or rights. The IRS failed its duties so they cannot hold a taxpayer to do what they do not have information to perform. Petitioner asked for a CDP hearing (**26 U.S.C. § 6320**) upon hearing of the levy and was denied an appeal. That was the IRS administration of Petitioner's claim. They wrote a sign off letter (Appendix K-8). There were no further administrative actions to take.

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[7] The district court should have addressed Mira's requests to amend her complaint, even though Mira submitted letters instead of motions. (*In re Sims*, 534 F.3d 117, 133 (2d Cir. 2008) Interpretation: Letters can meet the requirements.

5. Petitioner wrote letters (Appeal Brief Exhibit K) to get documents and instructions:

a. Appeals Brief, Exhibit K-1 dated 3/29/2019 is pro se administrative claim in letter form asking for a refund. It speaks to validation of the alleged debt, the right to be informed, no notices sent, demands assessment, wrong employment.
b. Appeals Brief, Exhibit K-2 dated 12-16-3019 speaks to wrong employment status, fraudulent change of address, failure to notice levy, refund.
c. Appeals Brief, Exhibit K-3 dated 4-29-2019 speaks to asking for copies of levy and documents.
d. Appeals Brief, Exhibit K-4 undated asking for help, documents proving levy and 1040 for 2006.
e. Appeals Brief, Exhibit 5, dated 12/15/2019, speaks to wrong employment status, illegal change of address, no notice of levy, demand for hearing.

6. Although it was way too late for a hearing, it should have been done before levy upon proper notice, Petitioner asked for a CDP hearing and was refused. (Appeals Brief Exhibit K-5) You had to qualify for an appeal. The IRS had not sent the proper documents. The reply letter said:

> "You're not entitled to a Collection Due Process hearing...**We hadn't issued Letter 3172; Notice of Federal Tax Lien Filing and your Rights to a Hearing...before you filed your hearing request**." (Appeals Brief Exhibit K-6

So at this time, there was a levy on SS but the IRS had not filed or served a Notice of Lien! **26 CFR 301.6320-1.**

7. Petitioner received *Appeals Received Your Request for a Collection Due Process Hearing* letter 7/3/2019, denying appeal because it was "frivolous or advance[s] a desire to delay tax administration or a moral, religious, political, constitutional, or similar objection." (Appeals Brief Exhibit K-7) It states that "if you have a valid issue to discuss, amend your hearing request in writing to state a valid

issue and withdraw the frivolous and/or desire-to-delay issue." Petitioner had given them all the information she had and had nothing further to submit to appeals.

8. IRS mischaracterizes again with "*Collection Due Process or Equivalent Hearing Disregarded* letter." (USA-019) Petitioner sent all issues already (Appeals Brief, Exhibits K) and could not agree to the three absurd reasons on their form letter. The hearing was denied. If there are any inadequacies to administrative claims, the responsibility falls on the IRS who failed their duty to inform, before and after the levy. They guaranteed litigation would occur.

QUESTION 3: Does this Court agree that one requested amended complaint is not a fair limit, considering Petitioner is a pro se first-time litigator?

1. The Original Complaint started the suit. The 1st Amended Complaint, which was court ordered, more clearly represented Petitioner's claims. (Doc. 27) The Second Amended Complaint (Doc 59 dated May 18, 2022), which Petitioner's attorney, David Glasser wrote, removed the majority of Petitioner's claims and had amounts wrong. As a result, Petitioner asked to write an amended complaint after Glasser withdrew and was denied her request.

2. Irick misrepresents the Original, 1st and 2nd Amended Complaints in his description of "already having two opportunities," and the Appellate court mimics him by saying "Petitioner was given three chances."

> "Petitioner, who is currently proceeding pro se, has already been given two opportunities to amend her Complaint." (Doc 131, FN 2)
> "Petitioner's Second Amended Complaint, which is the operative complaint, was filed by an attorney when Petitioner was represented. Therefore, Petitioner will not be given leave to amend." (Doc 131, pg 5)

3. Irick could not explain denying an amended complaint. He has a duty to explain (the explanation inher-

ent). He did not allow for hearing or discussion on this matter. This is bias. just like in the Withdrawal Hearing, "May I speak?" "Later" Later: "May I speak now?" "No."

4. The Original Petition had to be filed to start this suit. The Appeal denial includes it in its "3 chances," and denies an amended complaint (Doc 58 Appeals Court Opinion). The Original Complaint (Doc 1) was the first document Petitioner had ever written. It contains 20 claims, complaining of being denied Collections Due Process (no statutory delivery of documents were ever sent to Petitioner's home of 32 years) (1987-2017) and Negligence.

5. In 2008, the IRS changed the permanent mailing address on the Petitioner's online account to a commercial address in Dallas, TX, guaranteeing Petitioner would never knew of any deficiency for 13 years (2008-2017). The IRS racked up thousands of dollars in penalties and interest. They are supposed to notice changes to an account. Petitioner never received one shred of mail in 13 years at her Last Known Address. **26 CFR § 301.6212-2**

6. First Amended Complaint was court ordered, corrected and filed, but was not used in proceedings. Irick dismissed the case because Petitioner was pro se, using the excuse of the Case Management Report not being filed yet. No court does that to attorneys, only to a pro se. They just send a reminder to an attorney. It's a simple thing.

7. Second Amended Complaint. When the case was dismissed the first time, Petitioner's employer, Attorney David Glasser ("Glasser") wanted to "help." He made an appearance and wrote the Second Amended Complaint without getting Petitioner's approval.[8] The IRS attorney, Andrew J. Weisberg ("Weisberg") performed some shady

[8] The Second Amended Complaint (Doc 59) has money amounts wrong. It was written to "make things easier" for Glasser, he said. Petitioner never approved of it. He asked to withdraw and didn't say why. Petitioner's impression was he was threatened by the IRS. He acted like he was frightened. He appeared 5/3/2022, withdrew 7/29/22 and was terminated by the court 8/18/22. This separation was directly related to Weisberg's interference. Petitioner was left to defend a Complaint which was incorrect.

intrusions into the Attorney/Client relationship by not letting Petitioner be a part of any phone call (Petitioner had to listen through the door or on another phone). Weisberg made fun of Petitioner trying to prosecute this case as a pro se (big laugh). Then Petitioner heard Weisberg harassing Glasser to force him to intentionally not answer Petitioner's discovery and make it late so Weisberg could get a sanction for Weisberg to set up a deposition to particularly pick and choose which discovery Weisberg would choose to answer.[9] Weisberg called almost every day, abusing the process of discovery, continually harassing and strategizing every day. Petitioner's discovery was suppressed by tricks and abuse of the process by Weisberg. The result of these violations of professional conduct was Glasser asked to withdraw. Petitioner asked him if he was threatened. Petitioner did not want him to withdraw. Irick denied Petitioner's request to write an amended complaint after Glasser withdrew, "because the 2nd Amended Complaint was written by an attorney." (Doc. 130, pgs 5-6) It was written by an attorney who did not confer with his client as to facts, figures and preferences. It needed rewriting.

8. Petitioner still had to defend the Complaint. The real issues in the case still had not been addressed. To dismiss now would be to silence forever Petitioner's rights to due process, to a trial and to her rights under **Your Rights as a Taxpayer, Taxpayers Bill of Rights (Exhibit A to this Brief)**. Petitioner still does not have any discovery documents. The correct issues need to be heard to be fair.

> "If a Petitioner is proceeding pro se, leave to amend should be freely granted." *Frazier v.*

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[9] Weisberg argues this suit with statutory arguments. The IRS has no defense. He didn't want to answer discovery so he asked for a stay on discovery and was granted that on 11//07/22, due to the deposition problems, Petitioner was sanctioned, taking away any chance of the IRS having to answer for their illegal collections and levy. By separating Petitioner from her attorney, Weisberg made sure that the facts of this case would never come to light.

Coughlin, United States District Court, New York, June 12, 2020. "A pro se complaint should not be dismissed without the Court granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014) (internal quotation marks omitted). The district court should have addressed Mira's requests to amend her complaint, even though Mira submitted letters instead of motions. (*In re Sims*, 534 F.3d 117, 133 (2d Cir. 2008) (holding that pro se litigants should be allowed amendment more freely than counsel and that their rights should not be impaired by "harsh application of technical rules" (internal citation omitted)). *Mira v. Kingston*, United States Court of Appeals, Second Circuit, Oct 30, 2017,715 Fed.

9. The Appellate Court mimics Judge Irick's comments almost to the word saying "After allowing Moore to amend her complaint three times, the district court dismissed it." (Appeal Doc. 58-1) This is utterly false. It was amended two times. The Court also says, "For this review, we accept the allegations in the complaint as true and construe the facts in the light most favorable to the Petitioner." This again is utterly false. There is nothing construed favorable to Petitioner in the Appellate Opinion. The Appellate court's ruling conformed to IRS' response and did not consider Petitioner's questions. Also false is the claim Petitioner failed to state a claim and was dismissed for lack of subject matter jurisdiction. The statute of limitations was up, all taxes were paid when the suit was filed and Petitioner exhausted administrative remedies with letters because she was appealing the illegal levy.

10. REASONING: Allowing a pro se litigant to amend their complaint after their attorney withdraws en-

sures fairness in the legal process. When an attorney withdraws, a pro se litigant might need to adjust their claims or clarify issues or revise their claims based on new understanding. It helps ensure that pro se can still pursue their case effectively, even if they face challenges in articulating their claims which can lead to a more equitable resolution.

QUESTION 4: Does this court agree that this suit was wrongly dismissed for alleged violations of Anti-injunction Act and the Declaratory Judgment Act? (Doc 131, pg 7)?

1. The Anti-Injunction Act, **26 U.S.C. § 7421**, has 14 exemptions and at least seven of them apply to this case. (See Exhibit B to Appeal Brief – Analysis of Exemptions to the Anti-Injunction Act.)

2. Judge Irick and Weisberg deliberately misapply these acts. The stay on IRS activity was automatic upon filing this suit. The statute of limitations was up on **June 14, 2021,** which was before the filing of the active Complaint so there was nothing left for the IRS to be doing. THERE IS NO REQUEST FOR AN INJUNCTION NOR DECLARATORY ACTION IN THE ACTIVE COMPLAINT. (Doc 59)[10] This accusation is a tactic to draw attention away from the IRS who have no defense to what they did to Petitioner.

3. Weisberg tried to say Petitioner didn't pay the interest and penalties before suit. The levy paid the taxes. Penalties were written off in the 2nd Assessment. The Anti-Injunction Act specifies "Tax" is separate from "Penalty." Irick and Weisberg say Petitioner hasn't paid the "Tax" before suit. They offer no proof of what was owed or paid. **26 CFR § 301.6203-1** Congress specifically labeled consequences of the mandate (IRC § 5000A) as a "penalty" rather than a "tax" whereas other portions of the Act were labeled as a "tax." This is related to *Flora v. United States*,

[10] This refers to accusation that this case violates **The Tax Anti-Injunction Act, 28 U.S.C. § 1341** and the **Declaratory Judgment Act 28 U.S.C. §2201.**

357 U.S. 63 (1958), affirmed on rehearing, 362 U.S. 145 (1960), requiring that in most cases a person must pay the full amount of tax asserted by the IRS and then file for a refund. In this case, the amount owed was paid by levy before suit and that is all that is required.[11] If the levy is illegal and performed without authority, the IRS has no right to perform a levy and no penalties or interest can be sought. Also, the tax is the only portion allowed to be taken by levy, seven payments deducted from Petitioner's social security. (Affidavit F to Appeals Brief-Chart of Bank Withdrawals) Exhibit F to Appeals Brief, dated 3-27-2019, shows the total to be $1,518. "Before sending a debt to Fiscal Service, an agency must send notice to you at the *address in its records*." They did not. The three employers in 2006 listed on Exhibit E list her address as 2509 Oakdale, Irving, TX. The IRS had Petitioner's correct address for notices. They never performed service according to **IRM Part 5. Collecting – 5.1.1.2.2.4-5.1.1.2.2.5 Serving Levy**

QUESTION 5: Did judges Irick and Mendoza wrongly dismiss this case alleging the government had sovereign immunity?

1. Congress enacted a limited waiver of sovereign immunity encoded at **28 U.S.C. §1346(a)(1).** This suit is a civil action for the recovery of an illegal collections action – a tax refund, violation of due process and negligence.

2. The process of IRS collections is called Collections Due Process. Irick makes the silly statement, "Even though Petitioner does not mention the Fifth Amendment..." and then claims "to the extent Count I is a due process constitutional claim, there is no consent to suit against the United States."[12] (Appeals Brief Doc. C-14th)

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[11] "All parties agree that before a taxpayer may file a refund claim in federal court, the taxpayer must have first made a timely administrative claim and paid the taxes for which a refund is sought." *Barse v. United States*, 374 F. Supp. 3d 823 (D.S.D. 2019)

[12] Judge Irick was wrong "there is no consent to suit against the United States". **42 US.C §1983** allows '*an individual who believes that his or*

These two things are absurd together. There is no extent if there is no mention!! The Fifth Amendment guarantees that individuals have the right to be informed and have an opportunity to contest government actions affecting their property. Also, if there was a constitutional claim, it would be for procedural due process based on the 14th Amendment (Appeals Brief Exh C-14th). A relationship with the 5th and 14th Amendments is implied in the suit because the **Taxpayer Bill of Rights** is based on constitutional due process principles and Petitioners interest in "life, liberty or property" was threatened. Any of the arguments in the R&R or the Appeals Opinion that infringe on the Petitioner's rights guaranteed by the Constitution, including due process, must fail. The Constitution is always with us.

3. Congress also waives sovereign immunity under **26 U.S.C.S § 7433**. An administrative claim was timely filed in letter form. The IRS had no authority.

4. The waiver of sovereign immunity is limited to actions seeking damages in connection with any collection of tax that involves the reckless, intentional or negligent disregard of any provision or regulation under **§ 7433.** In other words, for sovereign immunity to be waived, a Petitioner must allege a violation of another statutory or regulatory provision in combination with **§ 7433**, which Petitioner's suit does. *Myers v. United States*, Civil Action No. 12-4005-KHV (D. Kan. Oct. 11, 2013). Petitioner had no information because she was never served with anything and would qualify for the exemption in **26 U.S.C. § 7433-1(f).**

5. This suit for abuse of due process, negligence and abuse of authority is the *exclusive remedy* for recovering damages for tax collection without authority. **26 U.S.C. § 7429** The federal court has exclusive jurisdiction. No

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her constitutional rights have been violated to bring a civil action against the government to recover the damages sustained as a result of that violation.' Gomez v. Toledo, 446 US 635, 638 (1980). The **FTC Act** allows citizens to sue the federal government in certain wrongful act and negligence claims.

other authority including IRS administration, has jurisdiction over this matter.

QUESTION 6: Does 28 U.S.C. § 636 apply to Judge Irick who considered this case, claiming it (1)asked for injunctive relief, (2) issued a judgment on the pleadings, dismissed or quashed information, (3) dismissed for failure to state a claim upon which relief can be granted, and (4) involuntarily dismissed this action?

1. Mendoza is violating **28 U.S.C.** by letting Irick taking privileges that he is not entitled as a Magistrate Judge. Irick has "*heard and determined*" matters he does not have the right to hear or determine. This statutory code takes precedent over any local rule. **28 U.S.C. §636(b)(1)(A)** Its exceptions are valid. Petitioner objected and never consented to a magistrate judge. There is no valid consent in the docket. Petitioner protested:

> "a judge may designate a magistrate judge to '*hear and determine*' any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant,[13] to suppress evidence in a criminal case,...to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action," **28 U.S.C. §636(b)(1)(A).**

2. Irick has considered and judged on the pleadings, considered and discussed summary judgment, injunctive relief, dismissed information made by the "Defendant," [doctor's letter] dismissed for failure to state a claim[14] upon

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[13] Here Petitioner is" defending themselves. Irick disregarded Petitioner's doctor's professional opinions and recommendations without consulting with Mendoza.

[14] The argument that Petitioner failed to state a claim is false. *Haines v. Kerner*, et al. 404 U.S, 519 (1972) A Pro Se litigant complaint cannot

which relief can be granted,[15] and did consider, judge and write the involuntary dismissal of this action. Mendoza just signed off. Irick's disregard of Petitioner's letter in the Withdrawal Hearing without consulting Mendoza is clearly erroneous. It is contrary to law for him to consider or write on these matters because **Middle District Rule 1.02(a)** incorporates **28 U.S.C. § 636** with the word "and."

> "Rule 1.02(a) General Authority. A magistrate judge may exercise the authority and perform the duties permitted by the Constitution, the statutes, and the rules of the United States and specified in **28 U.S.C. § 636**."

The Supreme Court is perfect to make this decision.

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals. **28 U.S.C. § 2072(a)**

3. MISCONDUCT. Irick quashed Petitioner's doctor's letter (Doc 77-1) the opinion of a licensed medical physician in violation of **28 U.S.C. §636(b)(1)(A)**, who has been Petitioner's physician for 30+ years in Texas and Florida. He made that unilateral decision all by himself during the hearing, contrary to **28 U.S.C. § 636** and made it clear

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be dismissed for failure to state a claim upon which relief can be granted. Litigant is entitled to offer proof.

[15] *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014), 893 F. Supp. 2d 133, reversed and remanded. Ct. 99, 2 L. Ed. 2d 80 (1957), the Supreme Court interpreted these rules to mean that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Petitioner can prove no set of facts in support of his claim which would entitle him to relief." In *Conley v. Gibson*, 355 U.S. 41 (1957), the Supreme Court stated that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Petitioner can prove no set of facts in support of his claim which would entitle him to relief. **FRCP 8 (a) (2)**, requires only "a short and plain statement of the claim showing that the pleader is entitled to relief".

to the IRS attorney he did not have to consider Petitioner's disabilities either.

4. Petitioner objected to the procedures in the Withdrawal Hearing. Irick has no respect for Petitioner's right to privacy. The facts are, he would have to subpoena the records, contact the record owner and give them a chance to object. **FRCP Rule 45** Even if he did procure that information by subpeona, it would still be under seal. Irick threatened Petitioner, an elderly female, with something akin to arrest if she did not disclose private medical information in open court for publication, committing a criminal act of intentionally intimidating, scaring her and causing physical or psychological damage to an elderly person[16] and violating her right to privacy under **45 C.F.R § 164.512(e)** and violating his oath of office:

> *"I, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [a United States District Judge (Mendoza) or United States Magistrate Judge (Irick)] under the Constitution) and laws of the United States. So help me God."*

5. Irick didn't just state the law, he threatened Petitioner. He created anxiety and fear that he would put her and her doctor in jail. Once a Judge has violated a person like this, there is no faith left in his ability to render unbiased decisions. Recusal is mandatory for both Irick and Mendoza. **28 U.S.C. § 144** – Bias or prejudice of judge:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any ad-

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[16] **2012 Florida Statutes, Title XLVI, 825.102** Abuse, aggravated abuse, and neglect of an elderly person or disabled adult; penalties-(1)(a)(b)(c).

verse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

6. Due process, fair and equitable treatment have been denied. Petitioner is requesting relief from district court's final judgment for "mistake, inadvertence, surprise or excusable neglect, misconduct by an opposing party, newly discovered evidence or any other reason that justifies relief." **FRCP Rule 60(b).**

QUESTION 7: Prejudice and bias of Judge Irick in federal court. Did Judge Irick's prejudice against pro se litigants, falsifying a hearing transcript and conferring alone with IRS attorney mean mandatory recusal?

1. Judge Irick is biased against pro se. He denied Petitioner use of the e-filing system and denied her equal access to the court, she being the only person in Florida denied use of e-filing for 2 years. (Appeals Brief pg. 23) Judge Irick knew Petitioner worked as a paralegal and used state and federal court efiling on a daily basis. However, despite multiple requests to efile like the rest of the state, Petitioner was denied until shortly before the case was dismissed. Mailing was obviously burdensome in terms of less time to prepare and file, time wasted in travel to the post office and the mailing expense. It was mandatory Irick and Mendoza recuse themselves.

2. Judge Irick falsified the transcript (Doc 115) of the hearing. While on the phone with Petitioner during the hearing, Judge Irick said, "I only let you back in because you had an attorney." That is the clearest evidence that he is biased against pro se. The words he said to attorney Glasser meant the same thing in different words, "...it was only reinstated upon your appearance in this case...Your appearance has, frankly, reopened the case." (Doc 115, Pg 4, Ln 25) What Irick said to Petitioner on the phone wasn't in the transcript. Irick scrubbed what he said to Petitioner from the transcript but left in the words to the

attorney. Petitioner motioned for access to the digital recording (Doc 124) and Irick denied that Motion. Impartiality is in question. **28 U.S.C. § 455(a)(b)(1)**. Judge Irick has disqualified himself and must recuse. **28 U.S.C. § 455**

QUESTION 8: Does this court agree that this case has merit and should be remanded for trial with all these issues settled so the case can proceed?

1. This case is very similar to The Tax Court recently issued decisions in *Kearse v. Commissioner*, 92 F.2d 1023 (4th Cir. 1989) Sep 12, 1989 and *Commission v. Romano-Murphy*, 916 F.3d 1217 (10th Cir. 2019). [17]

> "HOLDINGS: -The IRS Office of Appeals' upholding of the filing of a notice of federal tax lien for a taxpayer's unpaid federal income tax liability was an abuse of discretion because it was clear from the record that the Appeals officer failed to properly perform the verification mandated by I.R.C. § 6330(c), that the assessment of the taxpayer's unpaid income tax liability was preceded by a duly mailed notice of deficiency, and because the IRS had stipulated that it could not produce a USPS Form 3877 to show proof of mailing of the notice of deficiency or otherwise establish that it was delivered to petitioner, the fact that it was able to produce the Form in time for the instant hearing was to no avail." Decision entered for the taxpayer.

2. In Petitioner's case, the IRS's collections actions were performed without authority, making them illegal. The levy was kept secret for 13 years to accrue interest and penalties. The IRS Commissioner failed to perform his mandatory duties required by **IRC § 7803(a)(3)**. Due process must be performed to meet the guarantees in the Constitution. This case must be remanded.

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[17] **Exhibit C**: Kearse v. Commissioner-Collection Actions Invalidated for Failure to Follow Required Procedures https://esapllc.com/kearse-rmii/

ARGUMENT

Petitioner suffered the same abuse from the IRS that millions of others are suffering. When levied without notice for 13 years, Petitioner started asking others if they experienced the same thing. Petitioner heard stories of suffering, going without necessities (electricity, heat and food) just to pay illegally levied taxes. Petitioner determined to object for herself and on behalf of other Americans.

The IRS fatalistically made no efforts to get the Last Known Address correct and failed to check back and see that the notices were received. Anyone can go on the internet and find someone's current address and telephone these days. The IRS made sure Petitioner would receive no notices by changing her permanent address without her knowledge. The IRS didn't send notices to any address and cannot locate any documents statutorily required. Weisberg says, "We're still looking." In a telephone call to the levy office, Agent Johnston said, "We don't do that, we don't have time, we have too many cases." Petitioner's rights in the collection due process have been violated and she has been deprived of having a trial to prove her case.

The Taxpayers Bill of Rights are based on Constitutional Amendments 5 and 14, therefore, Petitioner's rights under the Constitution have been violated.

The Courts have also violated Petitioner in dismissing her case at least 4 times demonstrating extreme bias.

Petitioner has been deprived of her rights under the ADA for accommodations in a deposition and the case was dismissed as a sanction for not attending her deposition.

The statute of limitations expired (6-14-2021) before the filing of the active complaint (5-18-2022). Petitioner had no need to ask for an injunction or declaratory judgment. Petitioner did not act in bad faith or fail to prosecute.

Petitioner exhausted administrative remedies. The IRS did not have jurisdiction. With these issues out of the way, the real issues can be addressed. The Petitioner deserves to have this case restored.

CONCLUSION

Americans believe in their government. They realize that government has to be paid for and paying taxes is a privilege of democracy. However, they depend on the IRS to treat them fairly. That is not what is happening. Across the board, there are no procedures being followed to ensure administration, fairness, justice and due process.

Petitioner is not unique. What happens to her is happening to others. The IRS kept a levy going for 13 years to accrue interest and penalties. When justice is ignored to the extent seen in this case, a person feels compelled to do something about it. You don't have a choice. It has to be done and Petitioner has done it to the best of her abilities.

There are checks and balances in a federalist government but there are no checks on the IRS. They follow no rules of any kind. They abused Petitioner when she called after the levy, they laughed at her and hung up. When Petitioner could not get any information over the phone, she started writing letters and got no information that way either. This is not a fair and just tax system.

Filing this document represents Petitioner's attempt to right many wrongs and hopefully put her case in case law so that others might find it helpful to find justice in their own cases when they are abused by the IRS.

Petitioner prays that the Supreme Court will take this case and set all matters straight regarding Petitioner's years long battle to find justice.

The Appeals Court erred in dismissing Petitioner's case for the reasons stated in their Opinion. They did not address any of the matters asked by Petitioner for them to review. They responded to the IRS's contentions verbatim only, not to the actual questions. For the foregoing reasons, Petitioner prays the Court will remand this case for further proceedings and recuse Irick and Mendoza.

Respectfully submitted this ____ day of October, 2024.

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[DO NOT PUBLISH]

In the

United States Court of Appeals
For the Eleventh Circuit

No. 23-11053

Non-Argument Calendar

KATHLYN MOORE,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:21-cv-00395-CEM-DCI

ON, GRANT, and LUCK, Circuit Judges.

PER CURIAM:

Kathlyn Moore brought claims against the United States for illegal tax collection. After allowing Moore to amend her complaint three times, the district court dismissed it. Because we agree that Moore's claims are all barred, we affirm.

I.

Kathlyn Moore, proceeding pro se, filed claims against the United States alleging that the Internal Revenue Service conducted illegal tax collection when it took money out of her Social Security payments without notice. The government moved to dismiss, arguing that Moore's requested relief was barred. The district court agreed, but it allowed Moore to amend her complaint. After Moore amended her complaint, the district court dismissed the case sua sponte because the parties failed to file a case management report pursuant to local rules. The court later reopened the case once Moore obtained counsel. Moore then filed a second amended complaint alleging that the government's tax collection violated her due process rights and was otherwise negligent. Again, the government moved to dismiss, after which Moore's counsel withdrew from the case.

The magistrate judge issued a report recommending that Moore's claims be dismissed, to which Moore objected. The district court adopted the magistrate judge's report and recommendation and dismissed Moore's complaint. Moore appeals that dismissal.[1]

[1] Moore also brings various allegations of bias and prejudice she claims occurred throughout the litigation process. She specifically contests the denial of her motion to recuse against the district court judge and magistrate judge, and claims that the government violated the rules of professional conduct. These claims are frivolous as they are based primarily on conjecture and her dissatisfaction with judicial determinations in her case rather than any real evidence of bias or prejudice.

II.

We review de novo a district court's dismissal for failure to state a claim and for lack of subject matter jurisdiction. *Georgia Ass'n of Latino Elected Offs., Inc. v. Gwinnett Cnty. Bd. of Registration & Elections*, 36 F.4th 1100, 1112 (11th Cir. 2022). For this review, "we accept the allegations in the complaint as true and construe the facts in the light most favorable to the plaintiff." *Id.* at 1112–13. Pro se complaints should be construed liberally but still must comply with the procedural rules. *McNeil v. United States*, 508 U.S.
106, 113 (1993).

III.

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *King v. United States*, 878 F.3d 1265, 1267 (11th Cir. 2018) (quotation omitted). And for claims of illegal tax collection, Congress has specifically limited the remedy that courts can provide. The Anti-Injunction Act "prohibits courts from entertaining pre-enforcement suits challenging the IRS's assessment or collection of federal taxes." *Christian Coal. of Florida, Inc. v. United States*, 662 F.3d 1182, 1190 (11th Cir. 2011); *see* 26 U.S.C. § 7421(a). And the Declaratory Judgment Act, "which generally authorizes courts to issue declaratory judgments as a remedy, excludes federal tax matters from its remedial scheme." *Christian Coal.*, 662 F.3d at 1188–89; *see* 28 U.S.C. § 2201(a). For certain claims requesting damages based on illegal tax collection, Congress has waived sovereign immunity and allowed such relief to be granted by courts—but only if a plaintiff has exhausted the available administrative remedies. 26 U.S.C. § 7433(a), (d)(1). Exhaustion requires that a plaintiff send an administrative claim to the appropriate IRS office. Treas. Reg. § 301.7433-1(e)(1).

Moore's due process and negligence claims requesting injunctive relief, declaratory judgment, and damages are all barred. To the extent that her claims request injunctive relief and declaratory judgment, they are barred

by sovereign immunity. And even if they were not, the Declaratory Judgment Act and the Anti-Injunction Act would prohibit the district court from issuing these forms of relief. Sovereign immunity also bars Moore's claims requesting damages because she failed to exhaust the administrative remedies. While Moore sent various letters to the IRS, none were sent to the appropriate IRS office and thus did not satisfy the exhaustion requirement. *See id.*

In one last attempt, Moore requests that she be allowed to amend her complaint for a third time. Though courts should generally allow for amendment, that principle does not apply when amendment would be futile. *Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1262–63 (11th Cir. 2004). Here, Moore has already been given three chances to amend her complaint, and she fails to explain in her briefing before this Court how she would amend her complaint to resolve its deficiencies. Because any further amendment would be futile, we reject Moore's request.

* * *

Because Moore's claims are barred and amending her complaint would not resolve that defect, the district court did not err in its dismissal. We **AFFIRM.**

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
ELBERT PARR TUTTLE COURT OF APPEALS BLDG
56 Forsyth Street, N.W.
Atlanta, Georgia 30303
David J. Smith
For rules and forms visitwww.ca11.uscourts.gov
Clerk of Court

In the

United States Court of Appeals
For the Eleventh Circuit

No. 23-11053

KATHLYN MOORE,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:21-cv-00395-CEM-DCI

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Order of the Court

Before WILSON, GRANT, and LUCK, Circuit Judges

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

KATHLYN MOORE,	)
Plaintiff	)Case No. 6:21-cv-395
	)
v.	)Hon. Carlos E. Mendoza
	)
UNITED STATES OF AMERICA	)
Defendant.	)
	)

REPORT AND RECOMMENDATION

This cause comes before the Court for consideration without oral argument on the following motion:

MOTION: Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. 63)

FILED: June 24, 2022

THEREON it is **RECOMMENDED** that the motion be **GRANTED**.

I. Background

Kathlyn Moore (Plaintiff), proceeding *pro se*, initiated this case against the United States of America (Defendant) seeking injunctive relief and monetary damages for the alleged use of a "surprise levy" to take money out of her Social Security check without due process in violation of debt collection laws and the United States Constitution. Doc. 1. The Court granted in part Defendant's motion to dismiss the Complaint to

the extent that claims four, seven, and ten [1] were dismissed without prejudice as were each of the other claims to the extent each included requests for injunctive relief or for an order directing production of documents. Doc. 19 at 11. The Court denied the remainder of the motion and directed Plaintiff to file an amended complaint consistent with the Order. *Id.* Plaintiff filed the amended pleading, but subsequently moved to amend. Doc. 54. The Court granted the motion and Plaintiff filed the Second Amended Complaint, which is the operative pleading. Doc. 59. Pending before the Court is Defendant's Motion to Dismiss the Second Amended Complaint pursuant to Federal Rule 12(b)(1) and 12(b)(6). Doc. 63. (the Motion).[2] Plaintiff has filed a Response to the Motion to Dismiss (the Response) and Defendant has filed a Reply to the Response (the Reply).[3] Docs. 88, 94. The matter is ripe for review, and the Motion has been referred to the undersigned.

For the reasons stated herein, the undersigned recommends that the Motion is due to be granted.

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[1] In claim four, Plaintiff alleged that the IRS failed in its duty to collect any unpaid taxes from Plaintiff's employer. In claims seven and ten, Plaintiff claimed that the IRS failed to produce certain documents.

[2] Defendant has also filed a second motion for sanctions to include the dismissal of this action based on a discovery matter. Doc. 108. That motion was also referred to the undersigned but is not addressed in this report and recommendation.

[3] Plaintiff's Response to the Motion to Dismiss was due September 6, 2022 per the Court's Order, but it was not filed until September 9, 2022. Docs. 74,88. Defendant argues in the Reply that the Court should not consider the Response because it is untimely. Doc. 94. When Defendant served Plaintiff with the Motion, she was represented by counsel and received service through CM/ECF. As such, she did not benefit from the additional time permitted under Federal Rule Civil Procedure 6(d) and, therefore, the Response was to be filed no later than the Court's deadline. Even so, the undersigned has exercised discretion based on the circumstances of this case and considered the Response in making this Report and Recommendation. However, in reviewing this Report, the Court may still find that the Response was untimely and that the Motion to Dismiss is unopposed. *See* Local Rule 3.01(a).

II. Plaintiff's Allegations

The Second Amended Complaint includes two claims—Count I (Violation of Due Process) and Count II (Negligence). Doc. 59. With respect to Count I, Plaintiff alleges that the IRS calculated past due taxes and made deductions from Plaintiff's Social Security disability check without her consent or notice. *Id.* at 1. Plaintiff asserts that on or about February 27, 2019, the IRS began deductions from "Plaintiff's Social Security benefits a monthly amount." *Id.* at 2. Plaintiff states that "[m]onies were deducted from the Plaintiff's Social Security benefits for a period of an estimated one year for a total of $2,726.04." *Id.* at 3. Plaintiff claims that after several inquiries, Defendant provided Plaintiff with a summary of back taxes owed for the year 2006. *Id.* at 3, citing Doc. 59-1 at 1-3.

Plaintiff alleges that Defendant then forwarded Plaintiff a "Notice of Deficiency dated January 10, 2011, for taxes allegedly owed for the year 2006." *Id.*, citing Doc. 59-1 at 4.[4] Plaintiff contends that "Defendant apparently provided an accounting that the Plaintiff owed taxes for the year 2006 as an independent contractor in the amount of the $2,995." *Id.* at 4, citing Doc. 59-1 at 1-3. Plaintiff disputes the independent contractor status and contends that employee tax calculations are different. *Id.* at 4. Plaintiff alleges that she "additionally learned that the defendant contended that the Plaintiff failed to pay those amounts, the defendant assisted [sic] penalties and interest totaling $7,146.43." *Id.* at Doc. 59-1 at 1-3. As such, Plaintiff states that Defendant calculated the amount owed at $10,141.43. *Id.* Plaintiff then claims that Defendant forwarded documentation to an address at which she never resided or had any business connection to and has resided at the same address in Irving Texas from 1987 to 2017. *Id.* at 4. Plaintiff states from 1987 to 2008—

[4] The attached notice is entitled "Notice of Deficiency – Waiver" and is dated January 10, 2011. Doc. 59-1 at 4.

during her employment—she resided at the Irving address and used that address on her tax returns. *Id.* at 5. As such, Plaintiff contends that Defendant had notice of her address during the relevant time period and alleges that:

> At no time did the Plaintiff formally receive by way of certified mail as required by 26 U.S. Code § 6212, or otherwise, from the Defendant regarding calculations of past taxes due and owing nor a levy on the Plaintiff's Social Security check nor information had an opportunity to challenge and/or appeal those actions by the defendant. Doc. 59 at 5.

Plaintiff claims that she had a right to due process to include notice and an opportunity to be heard regarding any amount due and to appeal any determination. *Id.*, citing 26 U.S.C. § 6212. With respect to Count I, Plaintiff claims that:

> Defendant's failure to serve the Plaintiff with any notice of tax deficiencies (26 U.S.C. § 6212) and awarding notice of levies was a violation of the Plaintiff's right to notice and opportunity to be heard. See 26 U.S. § 6331 which states: (2)30-day requirement. The notice required under paragraph (1) shall be—(A) given in person, (B) left at the dwelling or usual place of business of such person, or (C) sent by certified or registered mail to such person's last known address, no less than 30 days before the day of the levy.

Id. at 6. Plaintiff asserts that she "lost an estimated $2700, lost interest on those monies 2019, and substantial penalties and interest have been assessed and will continue to be assessed by the Defendant." *Id.* at 7.

As relief, Plaintiff requests the following:

> 1. A determination by the Court as to whether the Defendant has waived the right to collect any back taxes based upon Defendant's failure to properly serve the Plaintiff with notice;

2. A determination by the court as to whether the plaintiff owes the defendant past and future monies for accrued penalties and interest;

3. A determination by the Court as to whether the Defendant waived the right to levy on the Plaintiff's Social Security disability check for failure to properly serve the Plaintiff with notice;

4. Damages for Defendant's wrongful levy;

5. Such other and further relief as the court deems just and proper in the circumstances;

6. Attorney fees and costs pursuant to IRC § 7430 and 26 U.S.C. § 7433.

Id. at 9.

Plaintiff brings Count II—Negligence—pursuant to § 7433 based on the allegation that an officer or employee of the IRS was negligent in collecting her federal taxes for "taxes allegedly owed for the year 2006." *Id.* at 10, 11, 12. The allegations in Count II are basically a reiteration of Count I but Plaintiff adds that Defendant breached a duty and failed to forward any documentation regarding a notice of deficiency and order a levy to the Plaintiff and, but for that breach, Plaintiff would have had an opportunity to challenge and appeal all determinations. *Id.* at 14. Plaintiff also claims that but for Defendant's failure to serve Plaintiff with notice, she would have had a right to a determination as to whether she was an independent contractor or an employee and a possible resolution before substantial penalties accrued. *Id.* at 15. With respect to relief on Count II, Plaintiff demands a judgment for damages and attorney fees pursuant to 26 U.S.C. § 7433. *Id.* at 18.

III. Standard

Defendant claims that the Second Amended Complaint is subject to dismissal in the entirety due to certain jurisdictional impediments and because Plaintiff failed to state a claim for injunctive relief and negligence. In reviewing a complaint on a Rule 12(b)(6) motion to dismiss, "courts must be mindful that the Federal Rules require only that the complaint contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *United States v. Baxter Int'l, Inc.*, 345 F.3d 866, 880 (11th Cir. 2003) (citing Fed. R. Civ. P. 8(a)). This is a liberal pleading requirement, one that does not require a plaintiff to plead with particularity every element of a cause of action. *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir. 2001). However, a plaintiff's obligation to provide the grounds for his or her entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007).Further, "conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003). The complaint's factual allegations "must be enough to raise a right to relief above the speculative level," *id.* at 555, and cross "the line from conceivable to plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009).

A motion under Rule 12(b)(1) challenges the Court's subject matter jurisdiction. "[B]ecause a federal court is powerless to act beyond its statutory grant of subject matter jurisdiction, a court must zealously insure that jurisdiction exists over a case." *Smith v. GTE Corp.*, 236 F.3d 1292, 1299 (11th Cir. 2001). It is presumed that a federal court lacks jurisdiction in a case until the plaintiff shows the court has jurisdiction over

the subject matter. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

A defendant may attack subject matter jurisdiction under Rule 12(b)(1) in two ways – a facial attack or a factual attack. *See McElmurray v. Consol. Gov't of Augusta-Richmond Cnty.*, 501 F.3d 1244, 1251 (11th Cir. 2007). "A 'facial attack' on the complaint 'require(s) the court merely to look and see if (the) plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion.'" *Id.* (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)). A factual attack, however, challenges the underlying facts supporting the Court's jurisdiction. *Odyssey Marine Expl. Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1169 (11th Cir. 2011).

IV. Discussion

I. Count I—Violation of Due Process

A. Injunctive or Declaratory Relief

In Count I, Defendant claims that Plaintiff has failed to state a claim because all relief— except for damages for a wrongful levy—is a request for an injunction that would bar the United
States from the assessment or collection of Plaintiff's taxes in contravention of the Anti-Injunction Act. Doc. 63 at 3-4. In a footnote, Defendant adds that under the Declaratory Judgment Act, district courts are prohibited from issuing a declaratory judgment restricting federal tax collection.
Id. at 6 n.3.

The Anti-Injunction Act, 26 U.S.C. § 7421, provides that "no suit for the purpose of restraining the assessment and collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." The Act "permits the United States to collect and assess taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be

determined in a suit for refund." *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962). If the Anti-Injunction Act applies, then this Court lacks subject matter jurisdiction over the claim. *See Gulden v. U.S.*, 287 Fed. App'x 813, 818 (11th Cir. 2008); *Hancock Cnty. Land Acquisitions, LLC v. Untied States, IRS*, 2022 WL 3449525, at *2 (11th Cir. Aug. 17, 2022) ("When the [AIA] applies, it deprives federal courts of jurisdiction" (quoting *In re Walter Energy, Inc.*, 911 F.ed 1121, 1136 (11th Cir. 2018)).

Further, "[t]he Declaratory Judgment Act, codified at 28 U.S.C. § 2201, generally authorizes district courts to issue declaratory judgments as a remedy, but removes federal tax matters from its ambit." *Bufkin v. United States*, 522 Fed. App'x 530, 532 (11th Cir. 2013) (citing *Raulerson v. United States*, 786 F.2d 1090, 1093 n.7 (11th Cir. 1986)). "The case law is clear that the Declaratory Judgment Act 'proscribes judicial declaration of the rights and legal relations of any interested parties in disputes involving federal taxes.'" *Carey v. United States*, 2013 U.S. Dist. LEXIS 208417, at *14 (M.D. Fla. Mar. 21, 2013) (citing *Christian Coalition of Fla., Inc. v. United States*, 662 F.3d 1182, 1189 (11th Cir. 2011)); *see also Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1362 n.6 (11th Cir. 2003) (explaining that "the federal tax exception to the Declaratory Judgment Act is at least as broad as the prohibition of the Anti-Injunction Act.).

As to Count I, the three requests at issue are as follows:

1. A determination by the Court as to whether the Defendant has waived the right to collect any back taxes based upon Defendant's failure to properly serve the Plaintiff with notice;
2. A determination by the court as to whether the plaintiff owes the defendant past and future monies for accrued penalties and interest;

3. A determination by the Court as to whether the Defendant waived the right to levy on the Plaintiff's Social Security disability check for failure to properly serve the Plaintiff with notice. Doc. 59 at 9.

Defendant argues that the relief is barred because it restrains the United States from assessment or collection of Plaintiff's taxes. Doc. 63 at 6. The undersigned agrees. This same bar applied to Plaintiff's original complaint (*See* Doc. 19), and Plaintiff's attempt to recharacterize the request under a "due process" claim does not save it from the jurisdictional impediment. *See Tinnerman v. United States*, 2021 WL 4427082 at *2 (M.D. Fla. Sept. 27, 2021) (finding that the Anti-Injunction Act barred the plaintiff's claim for judicial review of the Tax Court's decision related to the assessment and collection of a tax liability "regardless of [the plaintiff's] effort to frame it as a due process issue") (citing *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 9-10 (2008) (explaining that taxpayer constitutional claims are subject to the prohibition against tax injunctions); (*Alexander v. Americans United Inc.*, 416 U.S. 752, 760 (1974) ("[D]ecisions of [the] Supreme Court] make it unmistakably clear that the constitutional nature of a taxpayer's claim. . . is of no consequence under the Anti-Injunction Act.")).

Plaintiff states in the Response that "[a]s [Plaintiff] has repeatedly explained, this suit does not seek to restrain taxes." Doc. 88 at 7. While Plaintiff's intention may not be to restrain taxes, the nature of the relief as pled in the Second Amended Complaint would do just that and federal courts are expressly proscribed from granting such requests except under specific circumstances not applicable here.[5]

[5] Specifically, the Supreme Court has recognized an exception to the Anti-Injunction Act, holding that injunctive relief is appropriate if a plaintiff can show that (i) under the most liberal view of the law and facts, the United States

Accordingly, Plaintiff's requests for declaratory or injunctive relief on Count I are barred. *See Pace v. Platt*, 228 F.Supp.2d 1332, 1337-38 (N.D. Fla. 2002) ("Congress clearly established that . . . [district courts do] not have subject matter jurisdiction to grant declaratory relief in cases involving federal taxes"); *see also Bufkin*, 522 Fed. App'x at 533 ("[t]hus, because the AntiInjunction Act precluded his complaint, so, too, does the Declaratory Judgment Act."); *Slayman v. U.S. I.R.S.*, 2021 WL 1187081, at *2 (S.D. Ga. Mar. 29, 2021) (dismissing claims where both Anti-Injunction Act and Declaratory Judgment Act deprived court of subject matter jurisdiction, explaining that "taxes ordinarily may be challenged only after they are paid, by suing for a refund") (quoting *In re Walter Energy, Inc.*, 911 F.3d 1121, 1136 (11th Cir. 2018)).

B. Sovereign Immunity

Assuming *arguendo* that Plaintiff's request for declaratory or injunctive relief was not barred, Defendant raises another subject matter jurisdiction challenge as Plaintiff has not identified a waiver of sovereign immunity allowing Plaintiff to sue the United States. *Id.* at 4. The United States may only be sued to the extent it has waived its sovereign immunity. *United States v. Orleans*, 425 U.S. 807, 814, 96 S. Ct. 1971, 48 L. Ed. 2d 390 (1976). A waiver of sovereign immunity must be unequivocally expressed in statutory text and will be strictly construed. *GomezPerez v. Potter*, 553 U.S.

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cannot establish its claim, and (ii) there is no independent basis for equity jurisdiction. *Enochs*, 370 U.S. 1, 7. As Defendant argues, Plaintiff's pleading does not satisfy the *Enochs* test because Plaintiff has an adequate remedy at law, which will be discussed *infra*. *See Jennings v. United States*, 2007 WL 3232477, at *2 (M.D. Fla. Nov. 1, 2007) (granting the United States' motion to dismiss finding that the exception to the Anti-Injunction Act did not apply because the plaintiff had adequate remedies to challenge the erroneous filing of a notice of lien by pursing an administrative remedy or paying the tax and sue for a refund); *Tinnerman*, 2021 WL 4427082, at *2 (finding that the plaintiff had an adequate remedy at law "in that he can pay his disputed tax liabilities and sue for a refund under 28 U.S.C. § 1346.").

474, 491, 128 S. Ct. 1931, 170 L. Ed. 2d 887 (2008). If the United States has not waived its immunity, the Court lacks jurisdiction to proceed on a claim against the United States. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994); *see also United States v. Mitchell*, 463 U.S. 206, 212, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.").

As stated *supra*, in Count I Plaintiff mostly seeks declaratory relief for the alleged due process violations except for Plaintiff's request for "Damages for Defendant's wrongful levy." Doc. 59 at 9. Regardless of the relief, Plaintiff must establish that sovereign immunity was waived. *Kight v. United States Dist. Court*, 681 Fed. App'x 882, 883-84 (11th Cir. Mar. 9, 2017) (rejecting the plaintiff's contention that his claims were not barred because he sought declaratory and injunctive relief as he still must establish a valid waiver of sovereign immunity before his claims could against the federal government could go forward) (citing *Lynch v. United States*, 292 U.S. 571, 582 (1934) ("the sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced.")).

Here, Defendant argues that Plaintiff cites to no statute or case law that allows for a due process claim to be brought against the United States. Doc. 63 at 7. Even though Plaintiff does not mention the Fifth Amendment, Count I is entitled "Violation of Due Process" and Plaintiff alleges that she had a right to due process, which included notice and an opportunity to be heard, and she requested due process in the form of letters. *Id.* at Doc. 59 at 1, 5, 7. Due process claims, however, based directly on Fifth Amendment violations are barred by the doctrine of sovereign immunity. *Sharma v. Drug Enforcement Agency*, 511 Fed. App'x 898, 901 (11th Cir. 2013). "[T]here has been no waiver of sovereign

immunity to sue the United States or its agencies for constitutional claims." *Council v. United States*, 2012 WL 3112001, at *4 (M.D. Fla. July 30, 2012). "The district court lacks jurisdiction over constitutional claims brought directly against the United States for damages because those claims are barred by sovereign immunity." *Pollinger v.IRS Oversight Bd.*, 2010 U.S. App. LEXIS 966 (11th Cir. Jan. 15, 2010) (citing, *Boda v. United States*, 698 F.2d 1174, 1176 (11th Cir. 1983)).

As such, to the extent Count I is a due process constitutional claim, there is no consent to suit against the United States and the claim is due to be dismissed. The undersigned notes that Plaintiff attempts to clarify in the Response that "this case is a refund suit." Doc. 88 at 12. It appears that she characterizes the suit in this manner because there is a waiver of sovereign immunity for refund actions, which the undersigned will discuss *infra*. Plaintiff, however, entitled the claim as "Violation of Due Process" and does not cite to the Internal Revenue Code's authority—26 § U.S.C. 7422—for a refund suit. In fact, Plaintiff does not use the word "refund" at all in her request for relief. *See* Doc. 59. Plaintiff mentions in the Second Amended Complaint the word "refund" with respect to the letters and forms she allegedly sent in an attempt to exhaust her administrative remedies, but Plaintiff's "due process" claim does not otherwise state that this is a "refund suit" as Plaintiff now contends.

Accordingly, to the extent Count I is pled as a constitutional due process claim, it cannot go forward because of sovereign immunity and Plaintiff cannot attempt to amend the pleading in the Response. *See Blohm v. United States*, 1993 U.S. Dist. LEXIS 972, at *19 (S.D. Ala. Jan. 19, 1993) ("[a]s the Court is aware of no waiver of sovereign immunity that would permit suits directly against the United States based on alleged constitutional violations, the motion to dismiss is due to be granted as to these claims.").

However, while the pleading does not refer to 26 U.S.C. § 7422, the Second Amended Complaint does cite to 28 U.S.C. § 1346 and 26 U.S.C. § 7433 and mentions that a claim for a refund was filed. Although there is no reason to give liberal construction to the pleading because Plaintiff's counsel filed it, the undersigned will discuss these statutes because this is a report and recommendation.

For Count I, Plaintiff claims that the Court has jurisdiction pursuant to 28 U.S.C. § 1346 since this is a "civil action against the United States for the recovery of any Internal Revenue tax alleged to have been erroneously or illegally assessed or collected, and collected without authority or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the Internal Revenue laws and 26 U.S.C. § 7433." *Id.* at 2, 10. Assuming Plaintiff's "due process" claim can be brought pursuant to § 1346, Defendant argues, and the undersigned agrees, that Plaintiff does not satisfy the statutory prerequisite for such a claim.

Section 1346 provides for a conditional waiver of sovereign immunity for federal suits seeking the recovery of taxes "alleged to have been erroneously or illegally assessed or collected." *Lawrence v. United States*, 597 Fed. App'x 599, 602 (11th Cir. 2015) (quoting 28 U.S.C. § 1346(a)(1)). There are, however, two jurisdictional prerequisites that must be met before Plaintiff can proceed under § 1346. First, "the taxpayer must make 'full payment of an assessed tax' before filing a refund suit with respect to the tax." *Id.* (internal quotation marks and citation omitted). The taxpayer must satisfy this "full-payment' rule." Second, "'a claim for refund or credit [must have] been duly filed with the Secretary [of Treasury], according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.'" *Id.* (quoting 26 U.S.C. § 7422(a)).

According to the Second Amended Complaint, the tax year at issue is 2006. But Defendant explains that even if Plaintiff is attempting to bring a claim for a tax refund, she did not fully pay her tax liability for 2006 and, therefore, has not met the statutory prerequisites. Doc. 94 at 3-4; *see also* Doc. 63 at 5-6. Indeed, Plaintiff does not plead that she has made full payment.[6] Instead, Plaintiff alleges that Defendant calculated that Plaintiff owed $10,141.43, and "[m]onies were deducted from the Plaintiff's Social Security benefits for a period of an estimated one year for a total of $2,726.04." Doc. 59 at 3, 4. Plaintiff has attached exhibits to the Second Amended Complaint reflecting these amounts. *See e.g.*, Doc. 59-1 at 2. As such, Plaintiff has failed to plead the necessary jurisdictional prerequisite of full payment for a claim brought pursuant to § 1346(a)(1) and the Court lacks subject matter jurisdiction to render a judgment on the merits.[7] *See Flora v. Untied States*, 362 U.S. 145, 150-51 (1960) ("Reargument has but fortified our view that § 1346(a)(1), correctly construed, requires full payment of the assessment before an income tax refund suit can be maintained in a Federal District Court"); *see also*, *Rotte v. Untied States*, 2022 WL 4280804, at *4 (S.D. Fla. Sept. 8, 2022) (finding that the plaintiff failed to demonstrate subject matter jurisdiction under § 1346 and granted a motion to dismiss, in part, because the complaint included

[6] In the Reply to the original Complaint, Defendant points out that Plaintiff did not dispute that she failed to meet the statutory prerequisites for claiming a tax refund. Doc. 18 at 2-3, citing Doc.

[7] Plaintiff alleges that "Defendant apparently provided an accounting that the Plaintiff owed taxes for the year 2006 as an independent contractor in the amount of the $2,995[]" and "Plaintiff additionally learned that the defendant contended that the Plaintiff failed to pay those amounts, the defendant assisted [sic] penalties and interest totaling $7146.43." Doc. 59 at 4, citing Ex. A. Since Plaintiff alleges that $2,726.04 was deducted, Plaintiff does not allege full payment of the tax liability even without penalties and interest.

"no allegations regarding Plaintiff's satisfaction of the full payment rule" or claim for a refund or credit.").

Based on the foregoing, the undersigned recommends that Count I is due to be dismissed because Plaintiff's request for injunctive or declaratory relief is barred; the United States has not waived sovereign immunity with respect to a Constitutional due process claim; and if Count I is construed as a claim brought pursuant to § 1346(a)(1), Plaintiff has not met the statutory prerequisite of paying the tax liability.

II. Count II—Negligence

Count II—Negligence—is brought pursuant to § 7433.[8] Section 7433 provides for a limited waiver for damage claims arising from certain unlawful tax collection practices. 26 U.S.C. § 7433(a). "It is a condition of that waiver that the taxpayer must strictly comply with the procedure for filing an administrative claim." *Babington v. Everson*, 2005 WL 2176118 at *2 (M.D. Fla. July 28, 2005) (citing *Amwest Sur. Ins. Co. v. United States*, 28 F.3d 690, 694 (7th Cir. 1994)).

Defendant argues that Plaintiff fails to state a claim for relief because she did not exhaust her administrative remedies before bringing a cause of action under § 7433. Doc. 63 at 4. The Eleventh Circuit has held that failure to exhaust administrative remedies under § 7433 is not a jurisdictional bar to suit, but it does make a complaint subject to dismissal under Rule 12(b)(6) for failure to state a claim. *See Galvez v. IRS*, 448 Fed. App'x 880, 887 (11th Cir. 2011); *Baldwin v. United States*, 2016 WL 6986667 at *4 n.3 (M.D. Fla. Nov. 29, 2016) ("A plaintiff's failure to exhaust his administrative remedies under § 77433

[8] In Count I, Plaintiff also alleges the following:

> Pursuant to 26 U.S.C. § 7433, the Plaintiff is entitled to bring an action against the United States Government in regard to collection of a federal tax as a result of the negligence of an officer or employee of the Internal Revenue Service. Doc. 59 at 2. To the extent Plaintiff brings her due process claim in Count I under § 7433, the exhaustion analysis applies to both counts.

renders such a claim subject to dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6).").

Specifically, to meet the exhaustion requirement, the taxpayer must send an administrative claim to the Area Director, Attn: Compliance Technical Support Manager in which the taxpayer currently resides, to include: (i) the name, address, phone numbers, any convenient time to be contacted, and taxpayer ID number for the claimant; (ii) the grounds for the claim, (iii) a description of the injuries sustained; (iv) the dollar amount of past and reasonably foreseeable damages not yet incurred and available substantiating documentation or evidence; and (v) the taxpayer's signature. *See* Treas. Reg. § 301.7433-1(e).

In Counts I and II, Plaintiff claims that she exhausted her administrative remedies. Doc. 59 at 8, 17. Defendant argues, however, that Plaintiff's exhibits do not support the allegation. Plaintiff attaches to the Second Amended Complaint letters and forms and refers the Court to these exhibits with respect to both counts. *Id.* at 7-8, 16-17. If a complaint is filed with exhibits, a court must also consider the facts derived from the exhibits.[9] It is the law of this Circuit that "'when the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern.'" *Lawrence*, 597 Fed. App'x at 602 (quoting *Griffin Industries, Inc. v. Irvin*, 496 F.3d 1189, 1206 (11th Cir. 2007)). Defendant contends, and the undersigned agrees, that none of the letters satisfy the exhaustion requirement as they were not sent to the appropriate IRS official as the statute requires nor do they include the requisite information. *See* Doc. 59-1 at 8-28 (Ex. E-M).

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[9] Exhibits attached to the complaint are treated as part of the complaint for Rule 12(b)(6) purposes. *Crowder v. Delta Air Lines, Inc.*, 963 F.3d 1197, 1202 (11th Cir. 2020).

Accordingly, despite Plaintiff's general allegation, the exhibits attached to the Second Amended Complaint show that exhaustion did not occur under § 7433 and, therefore, Plaintiff has failed to state a claim.

While Plaintiff claims that she exhausted her remedies in the pleading, it appears that it is also Plaintiff's position that she is excused from the exhaustion requirement because the administrative remedies were unavailable or exhaustion was otherwise futile. Plaintiff alleges in each count that "[i]n the alternative, based upon Defendant's failure to provide Plaintiff with notice and opportunity to be heard, there were no administrative remedies for plaintiff to exhaust prior to Plaintiff filing this action." *Id.* at 8, 17. Plaintiff claims in Counts I and II that:

> Upon discovering these amounts being deducted, as Plaintiff had no notice nor information as to how or why the benefits were deducted, Plaintiff made inquiries by and through the Internal Revenue Service and requested documentation. Plaintiff was not privy to certain information that she apparently needed to include in the administrative claim. The administrative claim was not entirely available.
>
> *Id.* at 3, 11.

Plaintiff asserts that after she wrote letters and requested copies of tax returns, she "concluded that it was futile and no more information was available." *Id.* However, according to the Eleventh Circuit, it is improper to "read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Karam v. Untied States Citizenship & Immigration*, 373 Fed. App'x 956, 957 (11th Cir. Apr. 16, 2010) (quoting *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001)). As another court explains, "[t]he exhaustion requirement contemplated by 26 U.S.C. § 7433(d)(1) and 26 C.F.R. § 301.7433-1 is a statutory creation. Therefore,

since the Court is 'not free to rewrite statutory text,' the Court equally is not free to excuse the exhaustion requirements mandated by statute." *Larue v. United States*, 2006 WL 4491442, at *11 (D.D.C. Dec. 4, 2006) (quoting *Turner v. United States*, 429 F. Supp. 2d 153 (D.D.C. 2006) (citing *McNeil v. United States*, 508 U.S. 106, 111, 113 S. Ct. 1980, 124 L. Ed. 2d 21 (1993) ("The command than an "action shall not be instituted . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and set by certified or registered mail' is unambiguous. We are not free to rewrite statutory text.")).

Accordingly, to the extent Plaintiff attempts in the Second Amended Complaint to bypass § 7433's requirements based on the premise that remedies were unavailable, the undersigned recommends that Plaintiff is not excused from exhaustion and her claim is due to be dismissed

III. Conclusion

For the reasons stated in this report, the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss (Doc. 63) be **GRANTED**.

NOTICE TO PARTIES

The party has fourteen days from the date the party is served a copy of this report to file written objections to this report's proposed findings and recommendations or to seek an extension of the fourteen-day deadline to file written objections. 28 U.S.C. § 636(b)(1)(C). A party's failure to serve and file written objections waives that party's right to challenge on appeal any unobjected-to factual finding or legal conclusion the district judge adopts from the Report and Recommendation. *See* 11th Cir. R. 3-1; 28 U.S.C. § 636(b)(1).

RECOMMENDED in Orlando, Florida on January 3, 2023.

DANIEL C. IRICK
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

KATHLYN MOORE,	)
Plaintiff	)Case No. 6:21-cv-395
	)
v.	)Hon. Carlos E. Mendoza
	)
UNITED STATES OF AMERICA	)
Defendant.	)
	)

ORDER

THIS CAUSE is before the Court on Defendant's Motion to Dismiss (Doc. 63) and Plaintiff's Request for Enlargement of Time (Doc. 129). For the reasons stated herein, the Motion to Dismiss will be granted, and the Motion for Enlargement of Time will be denied as moot.

I. BACKGROUND

Plaintiff, proceeding *pro se*, initiated this case against the United States Government, alleging that Defendant imposed a "Surprise Levy" against her in the form of garnishing unpaid back taxes from her social security check. (Compl., Doc. 1, at 1). Plaintiff sought injunctive relief, requesting that the Court enjoin Defendant from "all collection actions," and declaratory relief, requesting that the Court "declare collection actions unenforceable and refund amounts stolen without notice." (*Id.* at 10). The Court subsequently granted in part Defendant's Motion to Dismiss (Doc. 10), and permitted Plaintiff leave to file an amended complaint. (Sept. 21, 2021 Order, Doc. 19, at 11).

Plaintiff filed an Amended Complaint (Doc. 27). Plaintiff then obtained counsel, who sought leave of the Court to file a second amended complaint. (*See generally*

Pl.'s Mot. to File Second Am. Compl., Doc. 54). The Court granted that motion, (May 9, 2022 Endorsed Order, Doc. 56), and Plaintiff filed her Second Amended Complaint (Doc. 59), which is now the operative complaint.

Plaintiff's counsel then moved to withdraw from the case, which the Court permitted only after an in-person hearing. (Aug. 9, 2022 Endorsed Order, Doc. 76 (noting that "[w]henever the withdrawal of a lawyer will leave a party *pro se*, the Court requires an in-person hearing to discuss the motion, to discuss case management, and to bring all involved persons together in-person to facilitate both case management and the resolution of this matter"); Aug. 18, 2022 Order, Doc. 83, at 2–3 (granting withdrawal of Plaintiff's counsel and advising Plaintiff of her rights and responsibilities as a *pro se* litigant)).

Defendant filed the instant Motion to Dismiss, requesting dismissal of all counts. (*See generally* Doc. 63). Plaintiff, once again proceeding *pro se*, filed a Response (Doc. 88). The United States Magistrate Judge issued a Report and Recommendation (Doc. 118) on the Motion to Dismiss, recommending that the Motion to Dismiss be granted. (*Id.* at 1, 17). Plaintiff filed a Response to the Report and Recommendation (Doc. 130), asserting objections, which the Court now considers.

II. LEGAL STANDARD

Pursuant to 28 U.S.C. § 636(b)(1), when a party makes a timely objection, the Court shall review *de novo* any portions of a magistrate judge's R&R concerning specific proposed findings or recommendations to which an objection is made. *See also* Fed. R. Civ. P. 72(b)(3). *De novo* review "require[s] independent consideration of factual issues based on the record." *Jeffrey S. v. State Bd. of Educ. of Ga.*, 896 F.2d 507, 513 (11th Cir. 1990) (per curiam). The district court "may accept, reject, or modify,

in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

III. REQUEST FOR ENLARGEMENT OF TIME

Plaintiff previously requested and was granted an enlargement of time to file objections to the Report and Recommendation. (Jan. 20, 2023 Endorsed Order, Doc. 128). In the Court's Order granting the previous extension, the Court advised Plaintiff that "[a]bsent extraordinary circumstances, this deadline will not be further extended." (*Id.*). Plaintiff now requests another extension of time to file objections. However, upon review of Plaintiff's Request for Enlargement of Time, Plaintiff has not set forth any basis as to why the deadline should be further extended, much less extraordinary circumstances. Additionally, Plaintiff filed objections. Therefore, this request will be denied as moot.

IV. OBJECTIONS

Plaintiff's objections largely consists of a " rambling diatribe against the . . . government . . . that contains random thoughts and tangents loosely strung together." *Johnson v. United States*, No. 6:17-cv-64-Orl-40TBS, 2017 U.S. Dist. LEXIS 219536, at *6 (M.D. Fla. Apr. 18, 2017). To the extent that the Court is able to make sense of Plaintiff's objections, they will be addressed below.

The Court must first address two threshold issues. First, Plaintiff spends much of her objections slandering the Magistrate Judge. (*See, e.g.*, Doc. 130 at 2 (accusing the Magistrate Judge of "unprofessional conduct"), 3 (accusing the Magistrate Judge of "abusive and unprofessional discovery tactics"), 3 (accusing the Magistrate Judge of lying), 4 (accusing the Magistrate Judge of "blatant prejudice" and "undignified unprofessional uncontrolled emotionally abusive verbal speech"), 4 (accusing the Magistrate Judge of being "a little mentally confused by the most ordinary things"), 5 (accusing the Magistrate Judge of taking a "paycheck"

from Defendant and ruling in favor of Defendant because of that payment)). The Court will remind Plaintiff that slanderous language directed toward a Magistrate Judge or the Court—without any basis whatsoever in fact—is not acceptable. *Ramchanndani v. Gahdhi*, No. 6:18-cv1647-Orl-41DCI, Doc. 53, at 2 (M.D. Fla. Aug. 18, 2020) ("Such slanderous language towards a federal Judge is a sanctionable offense." (citing *Bethel v. Escambia Cnty.*, No. 3:06cv70/RV/EMT, 2006 U.S. Dist. LEXIS 92094, at *6 (N.D. Fla. Dec. 20, 2006))). Plaintiff is warned that any future disrespect towards this Court or any Judge in particular will not be tolerated, and the Court may sanction Plaintiff without further warning for such conduct.

Second, Plaintiff insinuates that the Court has a special "committee" to which *pro se* cases are assigned and systematically dismissed, an allegation that Plaintiff has also made in other filings. (Doc. 130 at 15). The Court assures Plaintiff that *pro se* civil cases are handled by the same judges as all represented cases. The only way that *pro se* cases are treated differently is that *pro se* filings are given a liberal construction. *Jones v. United States*, 304 F.3d 1035, 1043 n.17 (11th Cir. 2002) (discussing the Eleventh Circuit's "liberal-construction jurisprudence" for *pro se* parties).

Moving on to Plaintiff's substantive objections, Plaintiff first complains of the Court's delay in dismissing her case, arguing that if the Court reviewed the Complaint, and subsequent Amended Complaint and Second Amended Complaint, and did not determine that they were invalid at the time of filing, then the claims must now be "valid, legal, and correct." (Doc. 130 at 1). The explanation for the Court's purported delay is two-fold. First, as explained above, the Court liberally construes *pro se* filings. Plaintiff was given three chances to file and amend her allegations through each complaint.

The Court construed the allegations in those complaints as liberally as possible at every stage, attempting to discern if there was any possible way that Plaintiff could state a claim for relief. Second, the Court is extraordinarily busy, with thousands of civil cases filed in the Orlando Division alone each year and only a small handful of judges to adjudicate those cases. The Court takes very seriously this obligation and ensures that it spends the time and resources necessary to carefully review each and every allegation in all of these thousands of cases. The Court did the same with Plaintiff's case, working diligently to ensure that Plaintiff's case was carefully considered. This simply takes time. Therefore, to the extent that Plaintiff asserts an objection based on the timing of issuance of the Report and Recommendation, this objection will be overruled.

Next, Plaintiff objects to the Magistrate Judge's characterization of her Response to the Motion to Dismiss as untimely. However, the Magistrate Judge also noted that he accepted and considered Plaintiff's Response in formulating his recommendation to dismiss the case. So too will the Undersigned consider the Response. Therefore, this objection will be overruled as moot.

Next, Plaintiff contends that her Second Amended Complaint "contains no request for injunctive relief or declaratory judgment" and asserts several objections based on this conclusion. (Doc. 130 at 7). Plaintiff is incorrect. Plaintiff expressly seeks declaratory relief in her Second Amended Complaint. (Doc. 59 at 9).

Additionally, since the inception of this case, Plaintiff has sought to restrain Defendant, the United States Government, from collecting taxes from her. This is a request for injunctive relief. Indeed, Plaintiff seems to concede this point in her objections, noting that "[j]ust filing the suit accomplished the stay Plaintiff needed in her original complaint." (Doc. 130 at 6–7). Thus, it

appears that Plaintiff's argument is that she was already granted injunctive relief, so her Second Amended Complaint no longer requests such relief. But, as explained in the Report and Recommendation, "[t]he Anti-Injunction Act, 26 U.S.C. § 7421, provides that 'no suit for the purpose of restraining the assessment and collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.'" (Doc. 118 at 7). This objection, and all other objections based on the erroneous conclusion that Plaintiff did not seek such relief, will be overruled.

Finally, Plaintiff seems to object to the conclusion in the Report and Recommendation that Plaintiff failed to exhaust her administrative remedies prior to filing suit. Plaintiff's purported objections consist of slanderous language towards the Magistrate Judge—which the Court has already explained is improper—and simply disagreeing with the conclusions in the Report and Recommendation. To the extent that Plaintiff disagrees with the analysis and conclusions in the Report and Recommendation, this Court has reviewed the record and agrees with the Report and Recommendation. Plaintiff did not exhaust her administrative remedies prior to filing suit.[1] Therefore, this objection will be overruled.

V. CONCLUSION

After review in accordance with 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72, and considering Plaintiff's objections, the Magistrate Judge's recommended disposition is accepted. Accordingly, it is **ORDERED** and **ADJUDGED** as follows:

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[1] Nor is Plaintiff excused from the exhaustion requirement, for the reasons stated in the Report and Recommendation. (Doc. 118 at 16–17).

1. Plaintiff's Request for Enlargement of Time (Doc. 129) is **DENIED as moot.**
2. The Report and Recommendation (Doc. 118) is **ADOPTED** and made a part of this Order.
3. Defendant's Motion to Dismiss (Doc. 63) is **GRANTED**.
4. This case is **DISMISSED.**[1]
5. The Clerk is directed to close this case.

DONE and **ORDERED** in Orlando, Florida on January 31, 2023.

Copies furnished to:
Counsel of Record
Unrepresented Party

[1] "Generally, a district court must *sua sponte* provide a *pro se* plaintiff at least one opportunity to amend [her] complaint, even where the plaintiff did not request leave to amend." *Ross v. Apple, Inc.*, 741 F. App'x 733, 736 (11th Cir. 2018) (citing *Silva v. Bieluch*, 351 F.3d 1045, 1048–49 (11th Cir. 2003)). Plaintiff, who is currently proceeding *pro se*, has already been given two opportunities to amend her Complaint. (*See generally* Am. Compl., Doc. 27; Second Am. Compl., Doc. 59). Additionally, Plaintiff's Second Amended Complaint, which is the operative complaint, was filed by an attorney when Plaintiff was represented. (Doc. 59 at 18). Therefore, Plaintiff will not be given leave to amend.

On Petition for Writ of Certiorari
Supreme Court of the United States
Eleventh Circuit
Case No. 23-11053
Kathlyn Moore v. United States

CERTIFICATE OF COMPLIANCE

This is to certify that the Petition for Writ of Certiorari was prepared according to Rule 33 in a 6 1/8 by 9 ¼ inch booklet format using computer typesetting, in Century Schoolbook 12 point type with 2-point leading between lines, footnotes 10 point type with 2 point leading between lines, with text appearing on both sides of the page, with margins of .75 inches on all sides, on 60 pound paper, 80 pound paper covers, bound by perfect binding with cover of white.

As required by Supreme Court Rule 33.1(h), the word count is 7,669 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of October, 2024.

Kathlyn Moore

Kathlyn Moore
807 E. 13th Avenue
New Smyrna Beach, FL 32169
Phone: 386-957-3410

On Petition for Writ of Certiorari
Supreme Court of the United States
Eleventh Circuit
Case No. 23-11053
Kathlyn Moore v. United States

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Petition for Writ of Certiorari was forwarded by mail to the persons listed on the attached page on the 30th day of October, 2024. The chart shows the tracking number of all the packages sent. This certificate is being resigned because the Supreme Court tells me that they have lost my cover letter, my certificate of service and my certificate of compliance. This is a replacement.

Kathlyn Moore

Kathlyn Moore
807 E. 13th Avenue
New Smyrna Beach, FL 32169
Phone: 386-957-3410

State of Florida §
County of Volusia §

Sworn to and subscribed before me this 8 day of November, 2024 by Kathlyn Moore.

Kathlyn Moore, Pro Se

Signature of Notary Sandra K Phelps
Printed Name of Notary Sandra K Phelps

Notary Public, State of Florida
My Commission Expires: 08-11-2026
Commission No.: HH289417
(Seal)

SANDRA K PHELPS
Commission # HH 289417
Expires August 11, 2026

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