ORAL ARGUMENT NOT YET SCHEDULED

Case No. 16-5242

In the United States Court of Appeals For the District of Columbia Circuit

REGINALD L. IVY,

Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,

Appellee.

On Appeal from the U.S. District Court
for the District of Columbia
Case No. 1:15-cv-01976-RC (Contreras, J.)

OPENING BRIEF FOR COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF APPELLANT REGINALD L. IVY

Travis Crum
Brian D. Netter
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000
tcrum@mayerbrown.com

Court-Appointed Amicus Curiae Attorneys for Appellant

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. ***Parties and Amici.*** The Plaintiff-Appellant in this case is Reginald L. Ivy. The Defendant-Appellee is the Commissioner of Internal Revenue Service.

This Court appointed undersigned counsel, Travis Crum of Mayer Brown LLP, as *amicus curiae* to present arguments in favor of Ivy. Appearing with Mr. Crum is Brian D. Netter, also of Mayer Brown LLP. No other *amici* have appeared in the district court or in this Court.

2. ***Rulings Under Review.*** The ruling under review is the Memorandum Opinion and Order of the U.S. District Court for the District of Columbia (Contreras, J.), which was docketed on July 18, 2016, and which granted the government's motion to dismiss for lack of jurisdiction. App.26; *Ivy v. Commissioner*, 197 F. Supp. 3d 139 (D.D.C. 2016).

3. ***Related Cases.*** Ivy previously appealed the decision of the U.S. Tax Court (Thornton, C.J.) granting the Defendant-Appellee's motion to dismiss for lack of jurisdiction. That appeal was docketed in this Court on November 19, 2014 as *Ivy v. Commissioner*, No. 14-1258. This Court summarily affirmed the Tax Court's decision. App.54.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES*

Page(s)

CASES

---

* *Authorities upon which we chiefly rely are marked with asterisks.*

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES, RULES, AND REGULATIONS

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

GLOSSARY

FMS	Financial Management Services
IRS	Internal Revenue Service
MDHE	Missouri Department of Higher Education

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 26 U.S.C. § 7433 and 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291. The district court's opinion granting the government's motion to dismiss for lack of jurisdiction was issued on July 18, 2016, and final judgment was entered that same day. App.32.[1] Plaintiff-Appellant Reginald L. Ivy's Notice of Appeal was timely filed on August 18, 2016. App.33.

STATEMENT OF THE ISSUES

1. Whether Ivy's claim under 26 U.S.C. § 7433 is moot even though the government has only compensated him for part of his requested relief and Ivy still seeks damages for the IRS's wrongful offset.

2. Whether the district court had jurisdiction under 26 U.S.C. § 7433 to entertain Ivy's suit for damages stemming from a wrongful offset of his overpayment of federal taxes.

---

[1] This brief cites the Joint Appendix as "App.__." And like the district court, *amicus* "will refer to the defendant as 'the IRS'" or the "government," even though Ivy named the Commissioner of the Internal Revenue Service as the defendant and even though the United States is the real party in interest. App.26.

3. Whether 26 U.S.C. § 6402(g) precludes jurisdiction over Ivy's claim under 26 U.S.C. § 7433.

PERTINENT STATUTES AND REGULATIONS

The pertinent statutes and regulations are contained in an addendum to this brief.

INTRODUCTION

This is a case about the jurisdiction of the federal courts and the rights and remedies afforded taxpayers who are injured by the misconduct of the Internal Revenue Service ("IRS").

Plaintiff-Appellant Reginald L. Ivy alleges that the IRS improperly offset his overpayment of taxes by transferring his putative refund to federal and state agencies to satisfy student loan debt that was no longer in default at the time he filed his 2011 tax return. Ivy brought suit in federal court seeking his overpayment as well as compensatory damages stemming from the wrongful offset.

The district court dismissed for lack of subject-matter jurisdiction. Relying on 26 U.S.C. § 6402(g), which strips jurisdiction over claims "brought to restrain or review a reduction authorized by" Section 6402(d), the district court held that it lacked authority to entertain a challenge to the IRS's allegedly wrongful invocation of

Section 6402(d) to "collect[] … debts owed to Federal agencies." The district court also rejected Ivy's claim for damages under 26 U.S.C. § 7433(a)—which waives the government's sovereign immunity for IRS misconduct taken "in connection with the collection of Federal tax"—on the grounds that a Section 6402(d) offset is not a collection-related activity.

While this case was pending on appeal and after this Court appointed undersigned counsel as *amicus curiae*, the IRS changed course. The IRS "administratively reversed" the offset and issued Ivy a check for his overpayment, plus interest. App.43. Ivy has since cashed the government's check, but he still seeks damages for the wrongful offset. Thus, even though the government's action has mooted any claim for the overpayment, Ivy's Section 7433 claim for compensatory damages is not moot.

Turning to the live issue in this case, the district court improperly dismissed Ivy's complaint for lack of jurisdiction. This Court has made clear that Section 7433's waiver of sovereign immunity applies to "collection-*related* activities." *Kim v. United States*, 632 F.3d 713, 716 (D.C. Cir. 2011) (emphasis added). The IRS's actions to "collect[]" a debt

owed to a federal agency qualifies as a collection-related activity. 26 U.S.C. § 6402(d). Indeed, that is apparent from Section 6402(d)'s heading, its contingency on assessment, and the protections for taxpayers embedded in the statutory and regulatory framework.

Finally, any attempt by the government to argue that Section 6402(g) strips the federal courts of jurisdiction over this entire case is misguided. While Ivy initially sought relief under both Section 6402(d) and Section 7433, only the latter claim is still pending. Section 6402(g) merely funnels requests for overpayments to the relevant federal agency. Section 7433, by contrast, provides the exclusive remedy for taxpayers seeking damages for the IRS's unlawful collection activities.

STATEMENT OF THE CASE

A. Statutory Background

At the outset, a brief overview of tax law may prove instructive.

1. *The Assessment/Collection Distinction*

This case hinges on the distinction between "assessment" and "collection" of federal taxes. These "terms refer to discrete phases of the taxation process." *Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1124, 1129 (2015). Indeed, "the timing of tax assessment and collection is critical to tax collection generally." *Seven-Sky v. Holder*, 661 F.3d 1, 32 (D.C. Cir.

2011) (Kavanaugh, J., dissenting), *abrogated on other grounds by National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

"'Assessment' … refers to the official recording of a taxpayer's liability." *Direct Marketing*, 135 S. Ct. at 1130; s*ee also* 26 U.S.C. § 6203 ("The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary."). "[A]ssessment is essentially a bookkeeping notation." *Hibbs v. Winn*, 542 U.S. 88, 100 (2004) (quotation marks and citation omitted).

"The Federal tax system is basically one of self-assessment, whereby each taxpayer computes the tax due and then files the appropriate form of return along with the requisite payment. In most cases, the Secretary accepts the self-assessment and simply records the liability of the taxpayer." *United States v. Galletti*, 541 U.S. 114, 122 (2004) (quotation marks and citation omitted).

"[T]ax 'assesssment' serves as the trigger for levy and collection efforts." *Hibbs*, 542 U.S. at 102; *see also Miller v. United States*, 763 F. Supp. 1534, 1543 (N.D. Cal. 1991) ("[A] mere assessment is not a

collection action."). "Collection" is thus "a separate step in the taxation process from assessment and the reporting on which assessment is based." *Direct Marketing*, 135 S. Ct. at 1131.

"'[C]ollection' is the act of obtaining payment of taxes due." *Id.* at 1130. Given the potential for abuse and heavy-handed treatment of taxpayers, collection procedures are strictly regulated. *See, e.g.*, 26 U.S.C. § 6304(b) ("The Secretary may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of any unpaid tax."). For instance, when seeking to collect unpaid taxes, "the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax … give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof." 26 U.S.C. § 6303(a). A lien is another quintessential example of a collection activity, *id.* § 6320, and the IRS must follow certain steps before it may impose a lien, *id.* § 6320(a)(1) (requiring written notice of a lien); *id.* § 6320(a)(1)(3) (written notice must include the "amount of unpaid tax" and information concerning appeal rights); *see also Kim*, 632 F.3d at 717 ("The process of executing liens, levies, or seizures on property

inherently involves collection activity; the purpose of a lien, levy, or seizure is to collect assets in exchange for a debt owed.").

Although assessment and collection are distinct concepts and the latter is contingent on the former, "a tax will generally be assessed and collected by the IRS with the submission of the taxpayer's tax return." *Seven-Sky*, 661 F.3d at 32 (Kavanaugh, J., dissenting).

2. *The Taxpayer Bill of Rights*

"Congress has … provided for a variety of safeguards and remedies" "with respect to alleged misconduct by individual IRS employees." *Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 410 (4th Cir. 2003) (quotation marks omitted). Most relevant here, "Congress enacted [26 U.S.C. § 7433] as part of a 'Taxpayer Bill of Rights.'" *Gonsalves v. IRS*, 975 F.2d 13, 15 (1st Cir. 1992). "Section 7433 was intended to give taxpayers a specific right to bring an action against the Government for damages sustained due to unreasonable actions taken by an IRS employee." *Id.* (quotation marks omitted); *see also Rossotti*, 317 F.3d at 411 ("Congress has … provided a civil damages action for misconduct by IRS employees in connection with the collection of taxes.").

Section 7433(a) provides that:

> If, in *connection with any collection* of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards *any provision of this title*, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action *shall be the exclusive remedy* for recovering damages resulting from such actions.

26 U.S.C. § 7433(a) (emphases added).

Section 7433 is thus a waiver of the government's sovereign immunity and is contingent on the assessment/collection distinction. *See, e.g.*, *Gessert v. United States*, 703 F.3d 1028, 1033 (7th Cir. 2013); *see also supra* at pp.4-9. Section 7433's second sentence contains an exclusivity provision for actions seeking damages for collection-related activities, *see infra* at pp.40-42.

In *Kim v. United States*, 632 F.3d 713 (D.C. Cir. 2011), this Court held that "Section 7433 applies only to collection-*related* activities." *Id.* at 716 (emphasis added). Indeed, "it is well-settled that assessments do not give rise to a cause of action under Section 7433." *Gandy Nursery, Inc. v. United States*, 318 F.3d 631, 636 (5th Cir. 2003); *see also Shaw v.*

United States, 20 F.3d 182, 184 (5th Cir. 1994) ("Although in its early form the statute granted taxpayers the right to sue for damages in connection with the *determination or collection* of any Federal tax, Congress later deleted that portion of the statute that referred to determination of taxes.") (internal citation omitted); *Miller v. United States*, 66 F.3d 220, 222-23 (9th Cir. 1995) (similar). Put simply, a plaintiff may bring suit under Section 7433—and a district court only has jurisdiction over such a suit—if the plaintiff is challenging misconduct "in connection with any collection of Federal tax." 26 U.S.C. § 7433(a).

3. *Collection Of Debts Owed To Federal Agencies*

The tax code provision that spawned this litigation is 26 U.S.C. § 6402(d). "[E]nacted as part of the Deficit Reduction Act of 1984," *In re Chateaugay Corp.*, 94 F.3d 772, 777 (2d Cir. 1996), Section 6402(d) authorizes the IRS to "collect[] … debts owed to Federal agencies." 26 U.S.C. § 6402(d). Section 6402(d)(1) provides, in relevant part, that:

> Upon receiving notice from any Federal agency that a named person owes a past-due legally enforceable debt … to such agency, the Secretary shall—

> (A) reduce the amount of any overpayment payable to such person by the amount of such debt;
>
> (B) pay the amount by which such overpayment is reduced under subparagraph (A) to such agency; and
>
> (C) notify the person making such overpayment that such overpayment has been reduced by an amount necessary to satisfy such debt.

Id. § 6402(d)(1).

In plain English, Section 6402(d) authorizes the IRS to reduce an overpayment of taxes owed to a taxpayer and transfer that overpayment to a federal agency. *See Sorenson v. Secretary of Treasury*, 475 U.S. 851, 855 n.4 (1986) ("Section 6402(d) requires the offset of debts owed to various federal agencies."). Hence, Section 6402(d) "offsets" or "intercepts" a taxpayer's refund. *See id.* at 852-53.

Like other collection-related provisions of the Internal Revenue Code, Section 6402(d) requires that the taxpayer receive notice of the IRS's actions. 26 U.S.C. § 6402(d)(1)(C). In addition, Section 6402(d) imposes notice requirements and provides protections to joint filers in situations involving overpayment of Social Security benefits. *Id.* § 6402(d)(3)(B). The Secretary of the Treasury has also promulgated regulations implementing Section 6402(d) that require the creditor

agency to certify that it has provided the taxpayer with notice and an opportunity to repay the debt. *See* 31 C.F.R. § 285.2; *see also* 31 U.S.C. § 3720A (statutory requirements that federal agencies must follow to coordinate with IRS in obtaining a Section 6402(d) offset).

Also of relevance here, Section 6402 contains a jurisdictional provision. Section 6402(g) provides, in relevant part, that:

> No court of the United States shall have jurisdiction to hear any action, whether legal or equitable, brought to restrain or review a reduction authorized by [Section 6402(d)]. No such reduction shall be subject to review by the Secretary in an administrative proceeding. No action brought against the United States to recover the amount of any such reduction shall be considered to be a suit for refund of tax. This subsection does not preclude any legal, equitable, or administrative action against the Federal agency or State to which the amount of such reduction was paid … .

Id. § 6402(g).

Section 6402(g) purports to limit judicial review of decisions made pursuant to Section 6402(d). As discussed below, *see infra* at pp.17-18, the district court dismissed Ivy's Section 6402(d) claim for lack of jurisdiction pursuant to Section 6402(g).

B. Factual Background

Unlike many cases involving Section 7433, this is not "one of [the] many … actions brought by tax protestors accusing the IRS of a miscellany of misconduct." *Kim*, 632 F.3d at 714. Rather, Ivy seeks damages for the IRS's collection activities related to the "wrongful offset" of an overpayment toward his defaulted student loans. App.2.

Ivy alleges that, unbeknownst to him, his "2011 tax return was fraudulently filed." App.1; *see also Jerome Stevens Pharmaceuticals, Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005) ("While the district court may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction, the court must still accept all of the factual allegations in the complaint as true.") (quotation marks, citation, and alteration omitted).

IRS records show that the fraudulent 2011 tax return included an overpayment of $1,822. App.27. At that time, Ivy's student loans were in default, and Ivy owed outstanding student loan debt to the United States Department of Education and the Missouri Department of Higher Education ("MDHE"). App.2; App.27. In a September 2012 letter, "the Department of Treasury, Financial Management Services

('FMS'), notified [Ivy] that it had 'applied this overpayment toward [his] outstanding student loan debt.'" App.27 (quoting letter). "The FMS advised [Ivy] that it '[could not] resolve issues regarding debts with other agencies.'" App.27 (quoting letter). The IRS thus invoked Section 6402(d) to transfer Ivy's overpayment to the U.S. Department of Education and the MDHE. App.28-29.

In August 2013, Ivy's "student loan debt was marked as satisfied in full by the [MDHE] and consolidated into a new loan." App.27; *see also* App.2 ("[Ivy's] student loan … was in default (until August 2013) during the fraudulent return."). After that consolidation, Ivy's student loans were no longer in default. App.27.

Shortly thereafter, in September 2013, Ivy "discovered [the] fraudulent filing of [his] 2011 tax return." App.1. Ivy promptly filed a 2011 tax return that same month. App.27. According to Ivy's actual 2011 tax return, his overpayment was only $634. App.27.

The filing of Ivy's actual 2011 tax return initiated a "recovery process" that was "finalized" in January 2014. App.1. In light of Ivy's actual 2011 tax return, the Department of the Treasury "partially reversed its … setoff against [Ivy's] original student loan so that only

$634 was credited toward that pre-consolidated debt." App.27. In other words, the IRS "decreased the $1,822.00 applied in September 2012 toward [the pre-consolidated] student loan by $1,188.00" and let the U.S. Department of Education and MDHE keep Ivy's $634 overpayment. App.27-28.

Ivy characterizes the IRS's January 2014 decision to allow the U.S. Department of Education and MDHE to retain his $634 overpayment as a "wrongful offset." App.27. Ivy alleges that, even though his student loans were no longer in default when his actual 2011 tax return was filed in September 2013, "the IRS made a decision to allow [the U.S. Department of Education and MDHE] to retain funds which would have been sent to [him] by means of [a] 2011 tax refund." App.2.

C. Procedural Background

Ivy has brought two suits seeking damages for the IRS's "wrongful offset," one in the tax court and one in the district court. App.2. Ivy incorporated his tax court petition by reference in his district court complaint. App.1 ("Please be advised that prior actions were filed in the US Tax cou[r]t in the month of May of 2014, but it was dismissed."); *see*

also Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007) (documents incorporated by reference into a complaint may be considered at the motion-to-dismiss stage). The government attached Ivy's tax court petition to its motion to dismiss in the district court. App.8; App.16.

1. *The Tax Court Proceedings*

In May 2014, Ivy brought suit in the United States Tax Court seeking "civil damage[s]." App.16. In that petition, Ivy outlined much of the same factual allegations that he subsequently alleged in his district court complaint. *Compare* App.16-17 (tax court petition) *with* App.1-3 (complaint). Ivy also alleged that he "sustained monetary damages because the funds that [were] due to him would have been used to pay a bill. The bill has a very high interest rate, which cost [him] twice the amount that was due, [thus] creating unnecessary payments and hardship." App.17. As relief, Ivy specifically requested $634—the amount of his overpayment based on his actual 2011 tax return—as well as damages for "every payment[] made to the high interest bill starting in September, and the remaining balance of the bill." App.17.

The Tax Court granted the government's motion to dismiss for lack of jurisdiction, and Ivy appealed that decision to this Court. In July 2015, this Court summarily affirmed on the grounds that the Tax Court lacked jurisdiction over Ivy's case. App.54.

2. *The District Court Proceedings*

After this Court dismissed his tax court case, Ivy filed a complaint in the United States District Court for the District of Columbia in November 2015. Ivy alleges that the IRS improperly allowed the U.S. Department of Education and the MDHE "to retain funds [*i.e.*, the $634 overpayment] which would have been sent to [him] by means of [a] 2011 tax refund." App.2. Ivy claims that this "wrongful offset" violated 26 U.S.C. § 6402 and 31 C.F.R. § 285.2. App.2.

According to Ivy, Section 6402(d) and 31 C.F.R. § 285.2 apply to "*past-due* debts." App.2 (emphasis in original). Ivy alleges that the IRS violated those provisions because, "[w]hen the IRS made its decision [in January 2014] to allow [the U.S. Department of Education and MDHE] to retain [his] 2011 tax refund, [the decision] was made when the account was *paid-in-full* not *past-due*, [thus] contrary to the statutes." App.2 (emphasis in original).

Ivy also brings a claim under Section 7433. Ivy specifically references Section 7433 in his request for "damages and/or expenses" due to the offset. App.2. Ivy thus seeks damages for the IRS's misconduct in connection with the "wrongful offset." App.2.[2]

The district court granted the government's motion to dismiss for lack of jurisdiction. App.31. In so doing, the district court separately addressed each of Ivy's claims.

Regarding Ivy's claim under Section 6402, the district court reasoned that Section 6402(g)'s jurisdictional provision "'prohibits suits against [the IRS] merely for carrying out its statutory obligation to collect debts that agencies refer to it.'" App.29 (quoting *Dasisa v. Department of Treasury*, 951 F. Supp. 2d 45, 46 (D.D.C. 2013)). The district court further explained that, contrary to Ivy's allegation, "the IRS took action under § 6402(d) at a time when [he] owed a past-due legally enforceable debt" because the "IRS applied the overpayment to the plaintiff's debt in September 2012, at a time when his pre-consolidated debt was in default status." App.29. The district court also

[2] In addition, Ivy seeks punitive damages and alleges an Eighth Amendment claim based on the wrongful offset. App.2.

looked to the relevant regulations and concluded that the "duty" is "on a creditor agency, not the IRS, to correct errors in the information submitted to the FMS, or amounts credited to a debtor's account by the FMS." App.30 (discussing 31 C.F.R. § 285.2(d)(4)).

As to Ivy's Section 7433 claim, the district court reasoned that Section 7433 "pertains to tax collection, and there is no allegation in the complaint that the IRS was collecting unpaid taxes from the plaintiff." App.30. In reaching that conclusion, the district court credited the government's argument that "the processing of the overpayment here was not done in connection with the collection of federal taxes because the overpayment was set off against outstanding non-tax debt." App.30 (quotation marks and alterations omitted).[3]

The district court dismissed the case on jurisdictional grounds under Rule 12(b)(1) and did not reach the government's arguments made under Rule 12(b)(6). App.31 ("Where, as here, the Court determines that it lacks subject matter jurisdiction, the plaintiff's

[3] The district court also rejected Ivy's Eighth Amendment claim because "[t]he United States has not waived sovereign immunity with respect to constitutional tort claims." App.31.

claims must be dismissed."). Ivy then filed a timely notice of appeal. App.33.

3. *Developments On Appeal*

After an initial round of briefing, this Court denied the government's motion for summary affirmance and, on its own motion, appointed undersigned counsel as *amicus curiae* in support of Ivy. App.36.

Following *amicus*'s appointment, the parties entered negotiations to administratively resolve this case in lieu of further litigation. App.37.[4] The parties, however, were unable to resolve this dispute, and the government rejected Ivy's offer to settle the case for damages. App.47-48; App.58.

Notwithstanding the parties' inability to settle this matter, the Bureau of the Fiscal Service, at the IRS's direction, "administratively reversed the remaining $634 of the offset and disbursed to Mr. Ivy a refund of that amount, plus interest of $83.71." App.43. "Mr. Ivy subsequently informed [the government's attorney] that he received the

[4] Because undersigned counsel is a court-appointed *amicus curiae* rather than Ivy's attorney, he did not participate in the settlement negotiations between the parties.

refund check for $717.71 on June 12, 2017." App.43. According to the government, "Mr. Ivy's 2011 overpayment is no longer offset against any debt and has been refunded to him in full." App.43. The government cites no statutory or regulatory authority for this "administrative[] revers[al]" of the Section 6402(d) offset. App.43.

On June 20, 2017, Ivy informed court-appointed *amicus* via telephone that he had cashed the $717.71 check sent to him by the government. Ivy continues to seek damages stemming from the wrongful offset. App.56-57.

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

Amicus curiae in support of Plaintiff-Appellant Reginald L. Ivy is Travis Crum of Mayer Brown LLP, appearing with Brian D. Netter, of the same firm. On April 6, 2017, this Court appointed Mr. Crum to present argument in favor of Ivy's position.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

This brief was drafted exclusively by Travis Crum and Brian D. Netter, who received no financial contributions from any party in preparing this brief. *Amicus curiae* participated after being appointed by this Court on a *pro bono* basis.

STANDARD OF REVIEW

The district court dismissed Ivy's complaint for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). App.31. As such, this Court "review[s] de novo" and "'accept[s] as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Ord v. District of Columbia*, 587 F.3d 1136, 1140 (D.C. Cir. 2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)); *see also Kim*, 632 F.3d at 715 ("We review *de novo* the district court's grant of a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1).").

SUMMARY OF ARGUMENT

1. Notwithstanding that the government has sent Ivy a check for his overpayment plus interest, this case is not moot. To be clear, Ivy's claim under Section 6402(d) for his overpayment has been mooted by the government's actions. But Ivy still seeks compensatory damages under Section 7433. Ivy thus maintains a concrete interest in the outcome of this litigation and his Section 7433 claim is not moot.

2. In *Kim v. United States*, 632 F.3d 713 (D.C. Cir. 2011), this Court held that Section 7433 waives the government's sovereign immunity with regards to "collection-*related* activities." *Id.* at 716

(emphasis added). Under the factors articulated in *Kim*—namely, the placement and heading of the relevant provision as well as the activity's relation to tax assessment—a Section 6402(d) offset is a collection-related activity. In addition, Section 6402(d) and its implementing regulations contain numerous protections for taxpayers, protections that are quite similar to those required in collection activities. Section 7433's plain text and this Court's holding in *Kim* further counsel in favor of a broad construction of collection-related activities.

3. Section 6402(g)'s jurisdictional provision does not bar Ivy's claim under Section 7433 for several reasons. *First*, Ivy alleges two distinct claims: one for the overpayment, and one for compensatory damages. Only the former is affected by Section 6402(g) and, in any event, the government's actions have mooted that claim. *Second*, Section 7433 contains an exclusivity provision that requires that any suit seeking monetary relief for actions taken "in connection with the collection of Federal tax" be brought against the IRS. *And third*, to the extent that there is tension between Sections 6402(g) and 7433, this Court can harmonize the statutes by allowing damages claims to

proceed against the IRS while requiring that plaintiffs seeking their overpayment request redress from the relevant creditor agency.

ARGUMENT

I. IVY'S CLAIM UNDER SECTION 6402 IS MOOT BUT HIS CLAIM UNDER SECTION 7433 IS NOT MOOT

As an initial matter, the issue of mootness must be addressed given the government's tendering of a check for Ivy's overpayment—plus interest—and Ivy's acceptance of that check.

"Article III … limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013). "A corollary to th[e] case-or-controversy requirement is that 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Id.* (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)). "If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Id.* (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990)).

"A case becomes moot, however, 'only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'"

Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 669 (2016) (quoting *Knox v. Services Employees International Union*, 567 U.S. 298, 307 (2012)). "'As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.'" *Id.* (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)).

The mootness inquiry, moreover, must be determined on a claim-by-claim basis. *See True the Vote, Inc. v. Internal Revenue Service*, 831 F.3d 551, 554-56 (D.C. Cir. 2016) (analyzing mootness as to specific claims); *cf. Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 733 (1st Cir. 2016) (noting the "claim-by-claim analysis required by standing doctrine").

Here, the government's proffering of a check and Ivy's cashing of that check has granted Ivy all of the relief that he seeks under Section 6402(d)—that is, for the $634 overpayment. His claim under Section 6402(d) is thus moot. *See Campbell-Ewald*, 136 S. Ct. at 669-70 (explaining that accepted offers of settlement moots a claim whereas an unaccepted offer of settlement does not). And because Ivy's Section 6402(d) claim is moot, this Court need not consider the propriety of the district court's decision on that claim.

Ivy's claim under Section 7433, however, is not moot. Pursuant to Section 7433, a taxpayer may bring a "civil action for damages against the United States." 26 U.S.C. § 7433. In his complaint, Ivy specifically references Section 7433 in his request for "damages and/or expenses" caused by the offset. App.2. And given the government's rejection of his settlement offer, App.58, Ivy continues to seek damages based on the wrongful offset. App.56-57. One example of damages sought by Ivy is his request for compensation for "every payment[] made to the high interest bill starting in September, and the remaining balance of the bill." App.17. Put simply, it is "'[]possible for a court to grant … relief … to [Ivy].'" *Campbell-Ewald Co.*, 136 S. Ct. at 669 (quoting *Knox*, 567 U.S. at 307). Ivy therefore maintains a concrete interest in this case and his Section 7433 claim is not moot. *See Gonyer v. Vane Line Bunkering, Inc.*, 32 F. Supp. 3d 514, 517 (S.D.N.Y. 2014) ("[E]ven an accepted offer of judgment does not terminate a case unless it satisfies *all damages* for all plaintiffs.") (quotation marks omitted; emphasis altered).

II. THE DISTRICT COURT HAD JURISDICTION UNDER SECTION 7433 BECAUSE THE WRONGFUL OFFSET WAS MADE IN CONNECTION WITH THE COLLECTION OF FEDERAL TAX

"As sovereign, the Government may not be sued without its consent. Waivers are not implied and are construed narrowly against the plaintiff. Section 7433 of the Internal Revenue Code is such a waiver." *Gessert*, 703 F.3d at 1033 (internal citations omitted); *see also FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature. Indeed, the 'terms of [the United States'] consent to be sued in any court define the court's jurisdiction to entertain the suit.'") (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)).

Section 7433 waives sovereign immunity for actions taken "in connection with the collection of Federal tax." 26 U.S.C. § 7433(a). The transfer of an overpayment pursuant to Section 6402(d) falls within Section 7433's waiver of sovereign immunity.[5]

---

[5] In light of circuit precedent, *amicus* does not press Ivy's constitutional claim under the Eighth Amendment. *See Kim*, 632 F.3d at 715 ("It is well established that *Bivens* remedies do not exist against officials sued in their official capacities."); *id.* at 717 ("[N]o *Bivens* remedy [against officials in their individual capacities is] available in light of the

A. Under *Kim*, A Section 6402(d) Offset Is A Collection-Related Activity

In *Kim*, this Court held that "Section 7433 applies only to collection-*related* activities." *Kim*, 632 F.3d at 716 (emphasis added). That point is undisputed by *amicus*, and there is agreement amongst the courts of appeals on this issue. *See Gonsalves*, 975 F.2d at 16 (1st Cir); *Shaw*, 20 F.3d at 184 (5th Cir.); *Miller*, 66 F.3d at 222-23 (9th Cir.). The question, then, is whether Section 6402 is a "collection-related activit[y]." *Kim*, 632 F.3d at 716. On this front, *Kim* provides instructive guidance.

---

comprehensive remedial scheme set forth by the Internal Revenue Code."); *see also True the Vote*, 831 F.3d at 556 (reaffirming *Kim*); *but cf. Bowman v. Iddon*, 848 F.3d 1034, 1041 (D.C. Cir. 2017) (Tatel, J., concurring) (recognizing *Bivens* remedy for individuals who have been barred from preparing taxes by the IRS). Furthermore, given the unavailability of a *Bivens* remedy and given that Section 7433(b) waives the government's sovereign immunity only for compensatory damages, *amicus* does not contend that Ivy is entitled to punitive damages. 26 U.S.C. § 7433(b) ("[T]he defendant shall be liable to the plaintiff in an amount equal to the lesser of $1,000,000 ($100,000, in the case of negligence) or the sum of actual, direct economic damages … and the costs of the action."); *see also Keohane v. United States*, 669 F.3d 325, 328 (D.C. Cir. 2012) (discussing damages that may be awarded under Section 7433(b)).

1. *The* Kim *Factors*

After ascertaining the scope of Section 7433's waiver of sovereign immunity, this Court in *Kim* proceeded to address whether two claims brought by the plaintiffs fell within that waiver. As to both claims, this Court found that the relevant conduct fell within Section 7433's waiver.

First, this Court addressed the plaintiffs' Section 7433 claim concerning Section 6303, which "requires the Secretary to provide a taxpayer notice of assessment within sixty days of making that assessment. That notice must 'stat[e] the amount [of an unpaid tax] and demand[] payment.'" *Id.* (quoting 26 U.S.C. § 6303(a)). This Court noted that "Section 6303 appears in Chapter 64 of the Internal Revenue Code, which is aptly entitled 'Collection.'" *Id.* This Court explained that "[p]lacement of the provision requiring notice of assessment in the chapter pertaining to 'collection' is not happenstance. It strongly suggests the notice of assessment referred to in § 6303 pertains to collections, while those actions authorized under § 6203 do not." *Id.* at 716-17; *see also id.* at 716 ("This placement is persuasive."). In addition, the sequencing of the IRS's actions matters: "[Section] 6303 requires notice of assessment '*after* the making of an assessment of a tax

pursuant to section 6203.'" *Id.* (quoting 26 U.S.C. § 6303) (emphasis added). In other words, a "notice of assessment signifies the beginning of the [IRS's] enforcement efforts," *id.*, and therefore "involves conduct in connection with collection." *Id.* at 717.

Second, this Court found that the plaintiffs' claim alleging a "violation of 26 U.S.C. § 6301 and the IRS Restructuring and Reform Act of 1998" fell within Section 7433's waiver of sovereign immunity. *Id.* Those provisions "together require the Commissioner to develop and implement review and disciplinary procedures for an IRS employee's decision to file a notice of lien, levy, or seizure." *Id.* Like Section 6303, Section 6301 "is also located in the [Internal Revenue Code] Chapter on 'Collection.'" *Id.* And because "the 1998 amendment to § 6301 added provisions detailing procedures for executing liens, levies, and seizures on a taxpayer's property" and such procedures "inherently involve[] collection activity," this Court held that "the procedures described in § 6301 … entail some collection activities." *Id.*

In determining whether particular conduct qualified as a collection-related activity, this Court looked to the placement and title of the relevant statutory provision as well as the sequencing of the IRS's

actions. Each of these factors counsel in favor of finding that a Section 6402(d) offset is a collection-related activity.

2. *The* Kim *Factors Demonstrate That A Section 6402(d) Offset Is A Collection-Related Activity*

Section 6402(d)'s heading is "[c]ollection of debts owed to Federal agencies." Using the term "collection" in the heading is "persuasive" evidence that "strongly suggests" a Section 6402(d) offset is collection-related. *Kim*, 632 F.3d at 716.

To be sure, unlike the statutory provisions at issue in *Kim*, Section 6402(d) is found in a chapter entitled "Abatements, Credits, and Refunds," 26 U.S.C. § 6401, rather than in a chapter entitled "Collection." *See Kim*, 632 F.3d at 716-17. But "the heading of a section [is a] tool[] available for the resolution of a doubt about the meaning of a statute." *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (citation and quotation marks omitted); *see also United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1243 (D.C. Cir. 2008) (examining statue's title). Neighboring statutory provisions use the term "collection" in their headings as well. 26 U.S.C. § 6402(e) ("Collection of past-due, legally enforceable State income tax obligations."); *id.* § 6402(f) ("Collection of unemployment compensation debts."). This

Court should look to Section 6402(d)'s heading—rather than the chapter title—in determining whether an offset to collect federal debts is a collection-related activity.

And like collection efforts, a Section 6402(d) offset occurs *after* the assessment of a tax. Recall that "assessment is the official recording of liability that triggers levy and collection efforts." *Hibbs*, 542 U.S. at 101. It is "essentially a bookkeeping notation." *Id.* at 100; *see also Galletti*, 541 U.S. at 122 ("In its numerous uses throughout the Code, it is clear that the term 'assessment' refers to little more than the calculation or recording of a tax liability."); *supra* at pp.4-7.

An overpayment, by definition, occurs after assessment. 26 U.S.C. § 6401 ("'[O]verpayment' includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto."). That is because one cannot know whether a taxpayer has *over*-paid prior to assessing that taxpayer's liability. *Cf. Black's Law Dictionary* 133 (9th ed. 2009) (defining "assessment" as the "[d]etermination of the rate or amount of something, such as a tax or damages."). Accordingly,

Section 6402(d) is triggered only "[a]fter the amount of liability has been established and recorded." *Galletti*, 541 U.S. at 122.

That is precisely what happened here. As is "typical[]," Ivy's taxes were "collected by the IRS when [he] submit[ted] his … tax return." *Seven-Sky*, 661 F.3d at 32 (Kavanaugh, J., dissenting). Accordingly, the Section 6402(d) offset occurred *after* the assessment of Ivy's taxes and is a collection-related activity.

B. Section 6402(d)'s Notice Requirements Further Indicate That It Is A Collection-Related Activity

In addition to the factors discussed in *Kim*, a Section 6402(d) offset resembles a collection activity in another important respect: the statutory protections for taxpayers that must be followed prior to the IRS depriving that individual of his or her property.

Recall that Section 6402(d) imposes procedural protections for taxpayers whose overpayments are intercepted by the IRS and transferred to other federal agencies. *See supra* at pp.10-11. For instance, Section 6402(d)(1)(C) requires that the IRS "notify the person making such overpayment that such overpayment has been reduced by an amount necessary to satisfy such debt." 26 U.S.C. § 6402(d)(1)(C). Section 6402(d) also imposes special protections for joint filers in

situations involving overpayment of Social Security benefits. Specifically, the IRS must "notify *each* taxpayer filing such joint return that the reduction is being made from a refund" and "include in such notification a description of the procedures to be followed … to protect the share of the refund which may be payable to another person." *Id.* §§ 6402(d)(3)(B)(i)(I) & 6402(d)(3)(B)(i)(II) (emphasis added). The IRS must also permit the "other person filing a joint return" to "take[] appropriate action to secure his or her proper share of the refund." *Id.* § 6402(d)(3)(B)(ii).

Furthermore, IRS regulations place requirements on the federal agencies seeking to intercept the taxpayer's refund and collect the taxpayer's debt. The creditor agency must "certify to [FMS]" that "[t]he debt is past-due and legally enforceable in the amount submitted to [FMS]." 31 C.F.R. § 285.2(d)(1)(i). The IRS further requires the agency to certify that it "has made reasonable efforts to obtain payment of the debt." *Id.* § 285.2(d)(1)(ii). This certification requires the agency to have (1) "[n]otified, or has made a reasonable attempt to notify, the debtor that the date is past-due, and unless repaid within 60 days after the date of the notice, will be referred to [FMS] for tax refund offset"; (2)

"[g]iven the debtor at least 60 days to present evidence that all or part of the debt is not past-due or legally enforceable, considered any evidence presented by the debtor, and determined that the debt is past-due and legally enforceable"; and (3) "[p]rovided the debtor with an opportunity to make a written agreement to repay the amount of the debt." *Id.* §§ 285.2(d)(1)(ii)(B) & 285.2(d)(1)(ii)(C) & 285.2(d)(1)(ii)(D); *see also* 31 U.S.C. § 3720A(b) (containing similar requirements for federal agencies seeking to collect debts via Section 6402).

The procedural protections associated with a Section 6402(d) offset are quite similar to those employed in Section 6303 collection activities. When the IRS seeks to collect unpaid taxes, it must first issue a notice of assessment "to each person liable for the unpaid tax, stating the amount and demanding payment thereof." 26 U.S.C. § 6303(a). And the IRS must follow particular procedures designed to protect taxpayers prior to imposing a lien. *See id.* § 6320(a)(1) (requiring written notice of a lien); *id.* § 6320(a)(3) (written notice must include the "amount of unpaid tax" and information concerning appeal rights); *id.* § 6320(b) (providing for a taxpayer's right to a fair hearing); *see also Kim*, 632 F.3d at 717 (noting that the IRS Restructuring and Reform Act of 1998

created procedures for imposing liens, levies, and seizures and describing these activities as "inherently involv[ing] collection activity").

Because Section 6402(d) and Section 6303 activities require the IRS to follow certain procedures for the protection of taxpayers, a Section 6402(d) offset is a collection-related activity.

C. Section 7433 Should Be Interpreted Broadly To Encompass Any Collection-Related Activity

Both Section 7433's plain text—which waives sovereign immunity for actions taken "in *connection* with the collection of Federal tax," 26 U.S.C. § 7433(a) (emphasis added)—and *Kim*'s holding—that Section 7433 waives sovereign immunity for "collection-*related* activities," *Kim*, 632 F.3d at 716—establish that Section 7433 covers a somewhat broader swath of activities than collection efforts *simpliciter*. So even if a Section 6402(d) offset is not collection activity, it is certainly related to such an activity. In a similar vein, even though the IRS transferred Ivy's overpayment to the U.S. Department of Education and the MDHE

to satisfy a student-loan debt, the IRS still undertook that action as part of its collection of federal taxes.[6]

Moreover, Section 7433 waives sovereign immunity when the IRS intentionally, recklessly, or negligently "disregards *any* provision of this *title*." 26 U.S.C. § 7433(a) (emphases added). Congress's selection of the word "any" demonstrates a broad waiver of sovereign immunity. *See Miklautsch v. Gibbs*, 1990 WL 236045, at *6 (D. Alaska Nov. 6, 1990) ("[Section 7433] refers to any act in disregard of *any* provision in the tax code, which is connected with the eventual 'collection' of a tax."); *United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any'

[6] In a variety of contexts, courts take a broad view of what qualify as collection activities. The Fifth Circuit has described Section 6402(d) as an "IRS offset *collection* procedure." *Grider v. Cavazos*, 911 F.2d 1158, 1161 (5th Cir. 1990) (emphasis added); *cf. Ludtke v. United States*, 84 F. Supp. 2d 294, 301 (D. Conn. 1999) ("[T]he IRS's application of the plaintiff's overpayment … to the plaintiff's trust fund recovery penalty … may properly be viewed as a collection activity against the plaintiff."). A defective notice of assessment and the imposition of a lien are archetypal examples of collection activities. *See Kim*, 632 F.3d at 716-17; *see also McIver v. United States*, 650 F. Supp. 2d 587, 591 (N.D. Tex. 2009) (imposing a lien is collection activity); *Johnson v. United States*, 188 F.R.D. 692, 701 (N.D. Ga. 1999) (defective notice of assessment is a collection activity). And as Judge Kavanaugh has explained, certain "tax penalties" are encompassed within "the right [of a taxpayer under Section 7433(a)] to being a civil action for damages against an IRS employee who violates any Tax Code provision in collecting a tax." *Seven-Sky*, 661 F.3d at 32 (Kavanaugh, J., dissenting).

has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting Webster's Third New International Dictionary 97 (1976)). And Congress's use of the word "title" as opposed to specifically identifying Chapter 64—the chapter of the Internal Revenue Code entitled "Collection"—indicates that certain actionable misconduct taken "in connection with the collection of Federal tax" encompasses statutory provisions found in other chapters of the Internal Revenue Code. Section 6402(d) is part of the Internal Revenue Code and thus a violation of that provision is actionable under Section 7433 if performed as part of a collection-related activity.

Although waivers of sovereign immunity must be strictly construed, *see, e.g.*, *FAA v. Cooper*, 566 U.S. 284, 289-90 (2012), an unduly narrow construction of Section 7433 would read the words "in connection with," "any provision," and "title" out of the statute. Such a result would ignore the cardinal principle of statutory interpretation "that courts must give effect to each word of a statute." *New York v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006); *see also United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty to 'to give effect,

if possible, to every clause and word of a statute.'") (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)).

This Court should follow Section 7433's plain language and its holding in *Kim* and interpret the government's waiver of sovereign immunity to encompass actions taken pursuant to Section 6402(d).

III. SECTION 6402(G) DOES NOT STRIP THE DISTRICT COURTS OF JURISDICTION OVER A SECTION 7433 SUIT FOR COMPENSATORY DAMAGES

Any attempt by the government to argue that Section 6402(g)'s jurisdictional provision strips the federal courts of jurisdiction over this case is unavailing.

Recall that Ivy initially brought claims under *both* Section 6402(d) and Section 7433. The former claim concerns Ivy's attempt to reverse the IRS's wrongful offset and obtain a refund of his $634 overpayment. Given the government's unexplained capitulation and administrative reversal of the offset, that claim is now moot. *See supra* at Section I. But Ivy seeks more than just his $634 refund. He also seeks damages stemming from that wrongful offset. That claim is cognizable under Section 7433 and is unaffected by Section 6402(g)'s jurisdictional provision.

Section 6402(g) states that "[n]o court of the United States shall have jurisdiction to hear any action … brought to restrain or review a reduction authorized by [Section 6402(d)]." 26 U.S.C. § 6402(g). Section 6402(g) further suggests that the correct defendant is the creditor agency. *Id.* ("This subsection does not preclude any legal, equitable, or administrative action against the Federal agency or State to which the amount of such reduction was paid."). Because Ivy's Section 6402(d) claim has been mooted by the IRS—but, tellingly, not by the creditor agencies—he is no longer seeking to "restrain or review a reduction." *Id.* Nor is Ivy still seeking his $634 overpayment; he has already acquired that relief.[7]

And even assuming that Section 6402(g) would have precluded Ivy from suing the IRS to obtain his $634 overpayment,[8] that provision says

---

[7] The IRS's actions in this case indicate that it retains substantial discretion over offsets and belies any suggestion that creditor agencies are the sole decision-makers in the Section 6402(d) process.

[8] In its motion to dismiss, the government emphasized that "Ivy is not without a remedy" and suggested that Ivy bring suit against "the agency claiming the debt." App.10; *see also Jones v. United States*, 2012 WL 1424170, at *4 (D.D.C. Feb. 13, 2012) (finding an improper Section 6402(d) offset to be a collection activity under Section 7433 but dismissing claim under Section 6402(g) because plaintiff did not name the creditor agency as a defendant); *Thomas v. Bennett*, 856 F.2d 1165,

nothing about whether Ivy may seek compensatory damages against the IRS for injuries caused by the IRS's wrongful conduct in performing the offset.

In fact, Section 7433's plain language indicates otherwise. After waiving the government's sovereign immunity "in connection with the collection of Federal tax," Section 7433 contains an exclusivity provision: "Except as provided in section 7432, such civil action *shall be the exclusive remedy* for recovering damages resulting from such

---

1167 (8th Cir. 1988) ("The jurisdictional limitation in [Section 6402(g)] was intended to relieve the [IRS] from the burden of handling challenges to the substantive merits of debts underlying requested refund setoffs. … [Section 6402(g)] only prohibits actions directed at the [IRS] during *the time the refund setoff is being processed*. It does not prohibit lawsuits … against the originating agency over the validity of the request to execute an offset.") (emphasis added). Even if this were correct, the proper course would be to allow Ivy—who was proceeding *pro se* in the district court—an opportunity to amend his complaint, not to dismiss it for lack of jurisdiction. *See, e.g.*, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is 'to be liberally construed' and 'a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'") (citations omitted); *Moore v. Agency for International Development*, 994 F.2d 874, 876 (D.C. Cir. 1993) ("Pro se litigants are allowed more latitude than litigants represented by counsel to correct defects in … pleadings."); *Donald v. Cook County Sherriff's Department*, 95 F.3d 548, 556-57 (7th Cir. 1996) ("[R]efusal to allow a *pro se* civil rights plaintiff to amend a complaint so as to name the appropriate defendants has been widely recognized as an abuse of the district court's discretion.").

actions." 26 U.S.C. § 7433(a) (emphasis added); *see also id.* § 7432 (creating damages remedy for failure to release a lien). In other words, Section 7433 directs—indeed, compels—plaintiffs who seek monetary damages for a collection-related action to sue the IRS, not the creditor agency.

To be sure, there is some tension between these two statutes. In such a situation, this Court has a "duty to harmonize the provisions and render each effective." *Adirondack Medical Center v. Sebelius*, 740 F.3d 692, 698-99 (D.C. Cir. 2014); *see also Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

The statutes can be reconciled as follows: Section 6402(g) requires that plaintiffs seek the return of the overpayment *itself* from the creditor agency whereas Section 7433 provides the exclusive remedy for damages actions against the IRS for collection-related activities. Such an approach ensures that plaintiffs can obtain their intercepted tax refund as well as receive compensation for any damages that the IRS's

wrongful conduct caused in connection with that collection-related activity.

Accordingly, this Court should hold that the district court erred in dismissing Ivy's complaint for lack of subject-matter jurisdiction.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

/s/ *Travis Crum*
Travis Crum
Brian D. Netter
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000
tcrum@mayerbrown.com

Court-Appointed Amicus Curiae Attorneys for Appellant

July 6, 2017

STATUTORY AND REGULATORY ADDENDUM

TABLE OF CONTENTS FOR STATUTORY AND REGULATORY ADDENDUM

26 U.S.C. § 7433 provides that:

> (a) In general
>
> If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.
>
> (b) Damages
>
> In any action brought under subsection (a) or petition filed under subsection (e), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the lesser of $1,000,000 ($100,000, in the case of negligence) or the sum of—
>
> (1) actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional or negligent actions of the officer or employee, and
>
> (2) the costs of the action.
>
> (c) Payment authority.--Claims pursuant to this section shall be payable out of funds appropriated under section 1304 of Title 31, United States Code.
>
> (d) Limitations.--

(1) Requirement that administrative remedies be exhausted.--A judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.

(2) Mitigation of damages.--The amount of damages awarded under subsection (b)(1) shall be reduced by the amount of such damages which could have reasonably been mitigated by the plaintiff.

(3) Period for bringing action.--Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in controversy and may be brought only within 2 years after the date the right of action accrues.

(e) Actions for violations of certain bankruptcy procedures.--

(1) In general.--If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service willfully violates any provision of section 362 (relating to automatic stay) or 524 (relating to effect of discharge) of Title 11, United States Code (or any successor provision), or any regulation promulgated under such provision, such taxpayer may petition the bankruptcy court to recover damages against the United States.

(2) Remedy to be exclusive.--

(A) In general.--Except as provided in subparagraph (B), notwithstanding section 105 of such Title 11, such petition shall be the exclusive

remedy for recovering damages resulting from such actions.

(B) Certain other actions permitted.--Subparagraph (A) shall not apply to an action under section 362(h) of such Title 11 for a violation of a stay provided by section 362 of such title; except that--

(i) administrative and litigation costs in connection with such an action may only be awarded under section 7430; and

(ii) administrative costs may be awarded only if incurred on or after the date that the bankruptcy petition is filed.

26 U.S.C. § 6402(d) provides that:

> (d) Collection of debts owed to Federal agencies
>
> (1) In general
>
> Upon receiving notice from any Federal agency that a named person owes a past-due legally enforceable debt (other than past-due support subject to the provisions of subsection (c)) to such agency, the Secretary shall—
>
> (A) reduce the amount of any overpayment payable to such person by the amount of such debt;
>
> (B) pay the amount by which such overpayment is reduced under subparagraph (A) to such agency; and
>
> (C) notify the person making such overpayment that such overpayment has been reduced by an amount necessary to satisfy such debt.
>
> (2) Priorities for offset.--Any overpayment by a person shall be reduced pursuant to this subsection after such overpayment is reduced pursuant to subsection (c) with respect to past-due support collected pursuant to an assignment under section 402(a)(26) of the Social Security Act and before such overpayment is reduced pursuant to subsections (e) and (f) and before such overpayment is credited to the future liability for tax of such person pursuant to subsection (b). If the Secretary receives notice from a Federal agency or agencies of more than one debt subject to paragraph (1) that is owed by a person to such agency or agencies, any overpayment by such person shall be applied against such debts in the order in which such debts accrued.

(3) Treatment of OASDI overpayments.--

(A) Requirements.--Paragraph (1) shall apply with respect to an OASDI overpayment only if the requirements of paragraphs (1) and (2) of section 3720A(f) of title 31, United States Code, are met with respect to such overpayment.

(B) Notice; protection of other persons filing joint return.--

(i) Notice.--In the case of a debt consisting of an OASDI overpayment, if the Secretary determines upon receipt of the notice referred to in paragraph (1) that the refund from which the reduction described in paragraph (1)(A) would be made is based upon a joint return, the Secretary shall--

(I) notify each taxpayer filing such joint return that the reduction is being made from a refund based upon such return, and

(II) include in such notification a description of the procedures to be followed, in the case of a joint return, to protect the share of the refund which may be payable to another person.

(ii) Adjustments based on protections given to other taxpayers on joint return.--If the other person filing a joint return with the person owing the OASDI overpayment takes appropriate action to secure his or her proper share of the refund subject to reduction under this subsection, the Secretary shall pay such share to such other person. The Secretary shall deduct the amount of such payment from amounts which are derived from subsequent reductions in refunds under this subsection and are payable to a trust fund referred to in subparagraph (C).

(C) Deposit of amount of reduction into appropriate trust fund.--In lieu of payment, pursuant to paragraph (1)(B), of the amount of any reduction under this subsection to the Commissioner of Social Security, the Secretary shall deposit such amount in the Federal Old-Age and Survivors Insurance Trust Fund or the Federal Disability Insurance Trust Fund, whichever is certified to the Secretary as appropriate by the Commissioner of Social Security.

(D) OASDI overpayment.--For purposes of this paragraph, the term "OASDI overpayment" means any overpayment of benefits made to an individual under title II of the Social Security Act.

Section 6402(g) provides that:

> (g) Review of reductions
>
> No court of the United States shall have jurisdiction to hear any action, whether legal or equitable, brought to restrain or review a reduction authorized by subsection (c), (d), (e), or (f). No such reduction shall be subject to review by the Secretary in an administrative proceeding. No action brought against the United States to recover the amount of any such reduction shall be considered to be a suit for refund of tax. This subsection does not preclude any legal, equitable, or administrative action against the Federal agency or State to which the amount of such reduction was paid or any such action against the Commissioner of Social Security which is otherwise available with respect to recoveries of overpayments of benefits under section 204 of the Social Security Act.

31 C.F.R. § 285.2 provides that:

> (a) Definitions. For purposes of this section:
>
> Creditor agency means a Federal agency owed a claim that seeks to collect that claim through tax refund offset.
>
> Debt or claim refers to an amount of money, funds, or property which has been determined by an agency official to be due the United States from any person, organization, or entity, except another Federal agency. For the purposes of this section, the terms "claim" and "debt" are synonymous and interchangeable and includes debt administered by a third party acting as an agent for the Federal Government.
>
> Debtor means a person who owes a debt or claim. The term "person" includes any individual, organization or entity, except another Federal agency.
>
> Fiscal Service means the Bureau of the Fiscal Service, a bureau of the Department of the Treasury.
>
> IRS means the Internal Revenue Service, a bureau of the Department of the Treasury.
>
> Tax refund offset means withholding or reducing a tax refund payment by an amount necessary to satisfy a debt owed by the payee(s) of a tax refund payment.
>
> Tax refund payment means any overpayment of Federal taxes to be refunded to the person making the overpayment after the IRS makes the appropriate credits as provided in 26 U.S.C. 6402(a) and 26 CFR 6402–3(a)(6)(i) for any

liabilities for any tax on the part of the person who made the overpayment.

(b) General rule.

(1) A Federal agency (as defined in 26 U.S.C. 6402(g)) that is owed by a person a past-due, legally enforceable nontax debt shall notify Fiscal Service of the amount of such debt for collection by tax refund offset. However, any agency subject to section 9 of the Act of May 18, 1933 (16 U.S.C. 831h) owed such a debt may, but is not required to, notify Fiscal Service of the amount of such debt for collection by tax refund offset.

(2) Fiscal Service will compare tax refund payment records, as certified by the IRS, with records of debts submitted to Fiscal Service. A match will occur when the taxpayer identifying number (as that term is used in 26 U.S.C. 6109) and name (or derivation of the name, known as a "name control") of a payment certification record are the same as the taxpayer identifying number and name control of a debtor record. When a match occurs and all other requirements for tax refund offset have been met, Fiscal Service will reduce the amount of any tax refund payment payable to a debtor by the amount of any past-due, legally enforceable debt owed by the debtor. Any amounts not offset will be paid to the payee(s) listed in the payment certification record.

(3) This section does not apply to any debt or claim arising under the Internal Revenue Code.

(4)(i) This section applies to Federal Old Age, Survivors and Disability Insurance (OASDI) overpayments provided the requirements of 31

U.S.C. 3720A(f)(1) and (2) are met with respect to such overpayments.

(ii) For purposes of this section, OASDI overpayment means any overpayment of benefits made to an individual under title II of the Social Security Act (42 U.S.C. 401 et seq.).

(5) A creditor agency is not precluded from using debt collection procedures, such as wage garnishment, to collect debts that have been submitted to Fiscal Service for purposes of offset under this part. Such debt collection procedures may be used separately or in conjunction with offset collection procedures.

(c) Regulations. Prior to submitting debts to Fiscal Service for collection by tax refund offset, Federal agencies shall promulgate temporary or final regulations under 31 U.S.C. 3716 and 31 U.S.C. 3720A, governing the agencies' authority to collect debts by administrative offset, in general, and offset of tax refund payments, in particular.

(d) Agency certification and referral of debt—

(1) Past-due, legally enforceable debt eligible for tax refund offset. For purposes of this section, when a Federal agency refers a past-due, legally enforceable debt to Fiscal Service for tax refund offset, the agency will certify to Fiscal Service that:

(i) The debt is past-due and legally enforceable in the amount submitted to Fiscal Service and that the agency will ensure that collections are properly credited to the debt;

(ii) The creditor agency has made reasonable efforts to obtain payment of the debt in that the agency has:

(A) Submitted the debt to Fiscal Service for collection by administrative offset and complied with the provisions of 31 U.S.C. 3716(a) and related regulations, to the extent that collection of the debt by administrative offset is not prohibited by statute;

(B) Notified, or has made a reasonable attempt to notify, the debtor that the debt is past-due, and unless repaid within 60 days after the date of the notice, will be referred to Fiscal Service for tax refund offset;

(C) Given the debtor at least 60 days to present evidence that all or part of the debt is not past-due or legally enforceable, considered any evidence presented by the debtor, and determined that the debt is past-due and legally enforceable; and

(D) Provided the debtor with an opportunity to make a written agreement to repay the amount of the debt;

(iii) The debt is at least $25; and

(iv) In the case of an OASDI overpayment—

(A) The individual is not currently entitled to monthly insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.);

(B) The notice describes conditions under which the Commissioner of Social Security is required to waive recovery of the overpayment, as provided under 42 U.S.C. 404(b); and

(C) If the debtor files a request for a waiver under 42 U.S.C. 404(b) within the 60–day notice period, the agency has considered the debtor's request.

(2) Pre-offset notice and consideration of evidence for past-due, legally enforceable debt.

(i) For purposes of paragraph (d)(1)(iii)(B) of this section, a creditor agency has made a reasonable attempt to notify the debtor if the agency uses the current address information contained in the agency's records related to the debt. Agencies may, but are not required to, obtain address information from the IRS pursuant to 26 U.S.C. 6103(m)(2), (4), or (5).

(ii) For purposes of paragraph (d)(1)(iii)(C) of this section, if the evidence presented by the debtor is considered by an agent of the creditor agency, or other entities or persons acting on the agency's behalf, the debtor must be accorded at least 30 days from the date the agent or other entity or person determines that all or part of the debt is past-due and legally enforceable to request review by an officer or employee of the agency of any unresolved dispute. The agency must then notify the debtor of its decision.

(3) Referral of past-due, legally enforceable debt. A Federal agency will submit past-due, legally enforceable debt information for tax refund offset to Fiscal Service in the time and manner prescribed by Fiscal Service. For each debt, the creditor agency will include the following information:

(i) The name and taxpayer identifying number (as defined in 26 U.S.C. 6109) of the debtor who is responsible for the debt;

(ii) The amount of such past-due and legally enforceable debt;

(iii) The date on which the debt became past-due;

(iv) The designation of the Federal agency or subagency referring the debt; and

(v) In the case of an OASDI overpayment, a certification by the Commissioner of Social Security designating whether the amount payable to the agency is to be deposited in either the Federal Old–Age and Survivors Insurance Trust Fund or the Federal Disability Insurance Trust Fund, but not both.

(4) Correcting and updating referral. If, after referring a past-due, legally enforceable debt to Fiscal Service as provided in paragraph (d)(3) of this section, a creditor agency determines that an error has been made with respect to the information transmitted to Fiscal Service, or if an agency receives a payment or credits a payment to the account of a debtor referred to Fiscal Service for offset, or if the debt amount is otherwise incorrect, the agency shall promptly notify Fiscal Service and make the appropriate correction of the agency's records. Creditor agencies will provide certification as required under paragraph (d)(1) of this section for any increases to amounts owed.

(5) Fiscal Service may reject a certification which does not comply with the requirements of paragraph (d)(1) of this section. Upon notification of the rejection and the reason for the rejection, a

creditor agency may resubmit the debt with a corrected certification.

(6)(i) Creditor agencies may submit debts to Fiscal Service for collection by tax refund offset irrespective of the amount of time the debt has been outstanding. Accordingly, all nontax debts, including debts that were delinquent for ten years or longer prior to December 28, 2009 may be collected by tax refund offset.

(ii) For debts outstanding more than ten years on or before December 28, 2009, creditor agencies must certify to Fiscal Service that the notice of intent to offset described in paragraph (d)(1)(ii)(B) of this section was sent to the debtor after the debt became ten years delinquent. This requirement will apply even in a case where notice was also sent prior to the debt becoming ten years delinquent, but does not apply to any debt that could be collected by offset without regard to any time limitation prior to December 28, 2009.

(e) Post-offset notice to the debtor, the creditor agency, and the IRS.

(1)(i) Fiscal Service will notify the payee(s) to whom the tax refund payment is due, in writing of:

(A) The amount and date of the offset to satisfy a past-due, legally enforceable nontax debt;

(B) The creditor agency to which this amount has been paid or credited; and

(C) A contact point within the creditor agency that will handle concerns or questions regarding the offset.

(ii) The notice in paragraph (e)(1)(i) of this section will also advise any non-debtor spouse who may have filed a joint tax return with the debtor of the steps which a non-debtor spouse may take in order to secure his or her proper share of the tax refund. See paragraph (f) of this section.

(2) Fiscal Service will advise each creditor agency of the names, mailing addresses, and identifying numbers of the debtors from whom amounts of past-due, legally enforceable debt were collected and of the amounts collected from each debtor for that agency. Fiscal Service will not advise the creditor agency of the source of payment from which such amounts were collected. If a payment from which an amount of past-due, legally enforceable debt is to be withheld is payable to two individual payees, Fiscal Service will notify the creditor agency and furnish the name and address of each payee to whom the payment was payable.

(3) At least weekly, Fiscal Service will notify the IRS of the names and taxpayer identifying numbers of the debtors from whom amounts of past-due, legally enforceable debt were collected and the amounts collected from each debtor.

(f) Offset made with regard to a tax refund payment based upon joint return. If the person filing a joint return with a debtor owing the past-due, legally enforceable debt takes appropriate action to secure his or her proper share of a tax refund from which an offset was made, the IRS will pay the person his or her share of the refund and request that Fiscal Service deduct that amount from amounts payable to the creditor agency. Fiscal Service and the creditor agency will adjust their debtor records accordingly.

(g) Disposition of amounts collected. Fiscal Service will transmit amounts collected for past-due, legally enforceable debts, less fees charged under paragraph (h) of this section, to the creditor agency's account. If an erroneous payment is made to any agency, Fiscal Service will notify the creditor agency that an erroneous payment has been made. The agency shall pay promptly to Fiscal Service an amount equal to the amount of the erroneous payment (without regard to whether any other amounts payable to such agency have been paid).

(h) Fees. The creditor agency will reimburse Fiscal Service and the IRS for the full cost of administering the tax refund offset program. Fiscal Service will deduct the fees from amounts collected prior to disposition and transmit a portion of the fees deducted to reimburse the IRS for its share of the cost of administering the tax refund offset program. To the extent allowed by law, creditor agencies may add the offset fees to the debt.

(i) Review of tax refund offsets. Any reduction of a taxpayer's refund made pursuant to 26 U.S.C. 6402(d) shall not be subject to review by any court of the United States or by the Secretary of the Treasury, Fiscal Service or IRS in an administrative proceeding. No action brought against the United States to recover the amount of this reduction shall be considered to be a suit for refund of tax. Any legal, equitable, or administrative action by any person seeking to recover the amount of the reduction of the overpayment must be taken against the Federal creditor agency to which the amount of the reduction was paid. Any action which is otherwise available with respect to recoveries of

overpayments of benefits under 42 U.S.C. 404 must be taken against the Commissioner of Social Security.

(j) Access to and use of confidential tax information. Access to and use of confidential tax information in connection with the tax refund offset program are restricted by 26 U.S.C. 6103. Generally, agencies will not receive confidential tax information from Fiscal Service. To the extent such information is received, agencies are subject to the safeguard, recordkeeping, and reporting requirements of 26 U.S.C. 6103(p)(4) and the regulations thereunder. The agency shall inform its officers and employees who access or use confidential tax information of the restrictions and penalties under the Internal Revenue Code for misuse of confidential tax information.

(k) Effective date. This section applies to tax refund payments payable under 26 U.S.C. 6402 after January 1, 1998.

(l) [Redesignated as subsection (k) by 74 FR 27433]

31 U.S.C. § 3720A provides that:

> (a) Any Federal agency that is owed by a person a past-due, legally enforceable debt (including debt administered by a third party acting as an agent for the Federal Government) shall, and any agency subject to section 9 of the Act of May 18, 1933 (16 U.S.C. 831h), owed such a debt may, in accordance with regulations issued pursuant to subsections (b) and (d), notify the Secretary of the Treasury at least once each year of the amount of such debt.
>
> (b) No Federal agency may take action pursuant to subsection (a) with respect to any debt until such agency—
>
> (1) notifies the person incurring such debt that such agency proposes to take action pursuant to such paragraph with respect to such debt;
>
> (2) gives such person at least 60 days to present evidence that all or part of such debt is not past-due or not legally enforceable;
>
> (3) considers any evidence presented by such person and determines that an amount of such debt is past due and legally enforceable;
>
> (4) satisfies such other conditions as the Secretary may prescribe to ensure that the determination made under paragraph (3) with respect to such debt is valid and that the agency has made reasonable efforts (determined on a government-wide basis) to obtain payment of such debt; and

(5) certifies that reasonable efforts have been made by the agency (pursuant to regulations) to obtain payment of such debt.

(c) Upon receiving notice from any Federal agency that a named person owes to such agency a past-due legally enforceable debt, the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such person. If the Secretary of the Treasury finds that any such amount is payable, he shall reduce such refunds by an amount equal to the amount of such debt, pay the amount of such reduction to such agency, and notify such agency of the individual's home address.

(d) The Secretary of the Treasury shall issue regulations prescribing the time or times at which agencies must submit notices of past-due legally enforceable debts, the manner in which such notices must be submitted, and the necessary information that must be contained in or accompany the notices. The regulations shall specify the minimum amount of debt to which the reduction procedure established by subsection (c) may be applied and the fee that an agency must pay to reimburse the Secretary of the Treasury for the full cost of applying such procedure. Any fee paid to the Secretary pursuant to the preceding sentence may be used to reimburse appropriations which bore all or part of the cost of applying such procedure.

(e) Any Federal agency receiving notice from the Secretary of the Treasury that an erroneous payment has been made to such agency under subsection (c) shall pay promptly to the Secretary, in accordance with such regulations as the Secretary may prescribe, an amount equal to

the amount of such erroneous payment (without regard to whether any other amounts payable to such agency under such subsection have been paid to such agency).

(f)

(1) Subsection (a) shall apply with respect to an OASDI overpayment made to any individual only if such individual is not currently entitled to monthly insurance benefits under title II of the Social Security Act.

(2)

(A) The requirements of subsection (b) shall not be treated as met in the case of the recovery of an OASDI overpayment from any individual under this section unless the notification under subsection (b)(1) describes the conditions under which the Commissioner of Social Security is required to waive recovery of an overpayment, as provided under section 204(b) of the Social Security Act.

(B) In any case in which an individual files for a waiver under section 204(b) of the Social Security Act within the 60-day period referred to in subsection (b)(2), the Commissioner of Social Security shall not certify to the Secretary of the Treasury that the debt is valid under subsection (b)(4) before rendering a decision on the waiver request under such section 204(b). In lieu of payment, pursuant to subsection (c), to the Commissioner of Social Security of the amount of any reduction under this subsection based on an OASDI overpayment, the Secretary of the Treasury shall deposit such amount in the Federal Old-Age and Survivors Insurance Trust

Fund or the Federal Disability Insurance Trust Fund, whichever is certified to the Secretary of the Treasury as appropriate by the Commissioner of Social Security.

(g) In the case of refunds of business associations, this section shall apply only to refunds payable on or after January 1, 1995. In the case of refunds of individuals who owe debts to Federal agencies that have not participated in the Federal tax refund offset program prior to the date of enactment of this subsection, this section shall apply only to refunds payable on or after January 1, 1994.

(h)

(1) [1] The disbursing official of the Department of the Treasury—

(1) 1 shall notify a taxpayer in writing of—

(A) the occurrence of an offset to satisfy a past-due legally enforceable nontax debt;

(B) the identity of the creditor agency requesting the offset; and

(C) a contact point within the creditor agency that will handle concerns regarding the offset;

(2) 1 shall notify the Internal Revenue Service on a weekly basis of—

(A) the occurrence of an offset to satisfy a past-due legally enforceable non-tax [2] debt;

(B) the amount of such offset; and

(C) any other information required by regulations; and

(3) shall match payment records with requests for offset by using a name control, taxpayer identifying number (as that term is used in section 6109 of the Internal Revenue Code of 1986), and any other necessary identifiers.

(h)

(2) 1 The term "disbursing official" of the Department of the Treasury means the Secretary or his designee.

(i) An agency subject to section 9 of the Act of May 18, 1933 (16 U.S.C. 831h), may implement this section at its discretion.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 8,223 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirement of Rule 32(a)(6) because it was been prepared in a proportionately spaced typeface using Microsoft Word 2007 in Century Schoolbook 14-point type for text and footnotes.

/s/ *Travis Crum*
Travis Crum

Court-Appointed Amicus Curiae
Attorney for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 6, 2017, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system and will cause an original and eight copies to be delivered to the Clerk's office. I further certify that two copies will be sent via overnight delivery to the following:

Reginald L. Ivy
9846 Edgefield Drive
Moline Acres, MO 63136

/s/ *Travis Crum*
Travis Crum

Court-Appointed Amicus Curiae
Attorney for Appellant