No. 24-416

IN THE
Supreme Court of the United States

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

JENNIFER ZUCH,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
Third Circuit

BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION , NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., AND NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in direct litigation and *amicus curiae* briefs upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce.

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington,

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[1] Counsel for *Amici* represent that none of the parties or their counsel, nor any other person or entity other than *Amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

D.C., and all 50 state capitals, the interests of its members.

National Association of Wholesaler-Distributors (NAW) is an employer and a non-profit, non-stock, incorporated trade association that represents the wholesale distribution industry—the essential link in the supply chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. NAW is made up of direct-member companies and a federation of national, regional, and state associations across 19 commodity lines of trade which together include approximately 35,000 companies operating nearly 150,000 locations throughout the nation. The overwhelming majority of wholesaler-distributors are small-to-medium-size, closely held businesses. As an industry, wholesale distribution generates more than $8 trillion in annual sales volume providing stable and well-paying jobs to more than 6 million workers.

Accordingly, NTUF, NFIB Legal Center, and NAW have institutional interests in this case.

SUMMARY OF THE ARGUMENT

Abuse of administrative power is a quintessential evil Congress has consistently sought to avoid. The IRS administratively abused Zuch here by helping itself to money it believes it was owed under an intended levy while she was in the middle of a pre-levy challenge. Congress created a statutory right to a pre-levy challenge precisely to stop this. Allowing the IRS to engage in this type of self-help flies in the face of logic. It is not only an abuse of the IRS's tax collecting power, but also robs Zuch of her money and any

opportunity to engage in a pre-levy challenge. Taxpayers need to be sure they can rely on the statutory protections created by Congress and that the IRS will not try to steal their money from their pockets while they are challenging the levy.

Additionally, the IRS's use of self-help to satisfy a proposed levy does not render a taxpayer's pre-levy challenge moot. Just because the IRS voluntarily chose not to apply the intended levy, after collecting on the amount owed through other means, does not mean it will not apply a levy against the taxpayer later on. Also, this case is not moot because a remedy still exists where the lower court finds the IRS's pre-levy to be improper and orders the IRS to return the stolen money to Zuch.

The IRS's actions here cannot be upheld and this Court should affirm the decision of the Court below.

ARGUMENT

I. THE IRS RESORTING TO SELF-HELP IGNORES CONGRESS'S DEMAND FOR PRE-LEVY DETERMINATIONS.

This case concerns whether the IRS can bypass Congress's statutory demands by engaging in self-help to collect monies it believes it is owed. The IRS asserts because it applied Respondent's overpayments from subsequent tax years' refunds to its proposed levy, and then decided not to apply the levy, then Zuch's challenge is moot. Such an argument is circular and misses the fact that a pre-levy challenge is supposed to challenge the levy before it is collected.

Congress created a taxpayer's right to a pre-levy challenge under 26 U.S.C. § 6330 as part of 1998 legislation generally improving taxpayers' rights. *See* Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105–206, § 3401. Section 6330 gave taxpayers a fair chance to litigate prior to a levy being issued and collected. *See e.g., Keller Tank Servs. II, Inc. v. Comm'r of Internal Revenue*, 854 F.3d 1178, 1188 (10th Cir. 2017) ("Before 1998, the IRS could reach a taxpayer's assets by lien or levy without providing the taxpayer any process before the amount owed by the taxpayer was assessed and collected." (quotation omitted)); *Boyd v. Comm'r*, 451 F.3d 8, 11-12 (1st Cir. 2006) ("[B]efore the Tax Code revisions of 1998, the IRS generally had the authority, under 26 U.S.C. § 6402, to offset a taxpayer's outstanding tax liability with any subsequent overpayment owed to the taxpayer, and that the IRS was not expected to obtain a formal levy in order to do so." (internal footnote and footnote omitted)). Congress enacted the 1998 legislation to stop this from happening, out of a concern "about potential abuses of this administrative authority to seize a taxpayer's property[] . . . ." *Robinette v. Comm'r of I.R.S.*, 439 F.3d 455, 458 (8th Cir. 2006). Congress "created the CDP process to afford taxpayers a pre-deprivation opportunity to contest the lien or levy before the IRS proceeded with collection." *Keller Tank Servs. II, Inc.*, 854 F.3d at 1188 (citation omitted).

Unfortunately, here the IRS has done an end run around precisely what Congress forbade. By effectively collecting on the pending levy by offsetting Respondent's overpayments during active litigation over the levy, the IRS has engaged in self-help and

sidestepped the pre-deprivation procedural safeguards that Congress gave taxpayers. The IRS may believe it was entitled to seize the subsequent years' refunds, but this can only be if the amount due in the pre-levy proceeding was proper.

As both this Court and the Tenth Circuit Court of Appeals have said, in a case like this, a pre-levy challenge is a "proceeding . . . [which] generally provides taxpayers with administrative review *before the IRS takes their property*." *Boechler, P.C. v. Comm'r of Internal Revenue*, 596 U.S. 199, 202 (2022) (emphasis added) (citing 26 U.S.C. § 6330(a)(1)); *Keller Tank Servs. II, Inc.*, 854 F.3d at 1188 ("At the CDP hearing, the taxpayer may challenge the propriety of a pending lien or levy. . . .").

The IRS's logic is akin to a cashier stealing money from a company's cash register just because the company owes him backpay. Such flawed logic has routinely been struck down by state Supreme Courts:

- In *State Counsel for Discipline of Nebraska Supreme Court v. Sundvold*, 844 N.W.2d 771, 782 (Neb. 2014), the Supreme Court of Nebraska noted an attorney wrongfully engaged in self-help when he kept client fees instead of providing it to his firm because he believed his firm owed him money.
- In *Greelish v. Wood*, 914 A.2d 1211, 1215 (N.H. 2006), the New Hampshire Supreme Court held landlords could not revert to self-help when a statutory scheme is available.
- In *Edwards v. State*, 181 N.W.2d 383, 388 (Wis. 1970), the Wisconsin Supreme Court held a creditor committed robbery when he engaged in

> self-help through taking money by force from a debtor for the repayment of the debtor's debts: "A debtor can owe another $150 but the $150 in the debtor's pocket is not the specific property of the creditor. One has the intention to steal when he takes money from another's possession against the possessor's consent . . . to apply the stolen money to a debt." *Id.*

As these cases show, someone cannot take money they have access to just because they believe they are owed the money. Zuch's tax refund overpayments were rightfully hers, despite what the IRS claimed she owed under the intended levy. The IRS robbed Zuch of her money when it helped itself to her overpayments from subsequent tax years' refunds.

If the IRS is allowed to continue to engage in this type of self-help, these types of cases will continue to occur. Over and over again, the IRS will collect on proposed levies through other sources during pre-levy litigation. Taxpayers, in turn, will effectively have no outlet to litigate a pre-levy challenge in the Tax Court. Instead, taxpayers will be forced to litigate refund actions in Article 3 courts.[2] Article 3 courts will, as a result, be further overwhelmed as they will be forced to decide the pre-levy challenges Congress intended for the Tax Court to decide.

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[2] *See also Boechler,* 596 U.S. at 207–08 (explaining that under § 6330(e)(1), Congress did not intend to initiate a dual-track jurisdiction if the IRS suspends the levy during an appeal such that the taxpayer would have to initiate a new action in the district court to stop the IRS from collecting).

II. THE IRS'S VOLUNTARY CESSATION AFTER SELF-HELP CANNOT MANUFACTURE MOOTNESS.

The IRS choosing not to impose a levy on Respondent after it robbed her of her tax refund overpayments does not moot her case.

Voluntary cessation alone has never been enough to moot a case. This Court recently noted in *Lackey v. Stinnie*, 604 U.S. 662 (2025), that a defendant's voluntary cessation "does not moot an action 'unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* at 669 (internal quotation marks omitted) (quoting *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 609 (2001)). In *Federal Bureau of Investigation v. Fikre*, 601 U.S. 234 (2024), this Court held plaintiff's challenge to the Federal Bureau of Investigation's (FBI) act of placing him on a no-fly list was not moot even though the FBI had removed him from the no-fly list during the litigation because the FBI could not "'automatically moot a case' by the simple expedient of suspending its challenged conduct after it is sued." *Id.* at 241 (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)). In *West Virginia v. Environmental Protection Agency*, 597 U.S. 697 (2022), this Court concluded, in part, that the Environmental Protection Agency's promise not to enforce a challenged plan did not moot the case because "the Government 'nowhere suggests that if this litigation is resolved in its favor it will not' reimpose emissions limits predicated on generation shifting." *Id. at* 720 (quoting *Parents Involved in Community Schools v. Seattle School Dist.*

No. 1, 551 U.S. 701, 719 (2007)). Likewise, in *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000), this Court held a subcontractor's constitutional challenge to a federal contracting policy was not moot despite the state's voluntary easement of the federal policy during litigation. *Id.* at 217-23; *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (explaining if voluntary cessation was sufficient to moot a case, "the courts would be compelled to leave the defendant . . . free to return to his old ways…." (internal quotation marks and brackets omitted)); *Already, LLC,* 568 U.S. at 91 (holding that if voluntary cessation was sufficient to moot a case, "a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends….").

The IRS's voluntary cessation of applying a levy to Zuch's property does not moot this case. Every year Respondent will have to file tax returns and state that she made payments to the IRS. The IRS, in turn, will continue to issue deficiencies, and this cycle will occur year after year until the ultimate question of whether the IRS rightfully collected on the pre-levy is resolved. Respondent may, in the future, owe additional amounts for which the IRS intends to place a levy upon her property, and will then resume the same harm here of collecting on the levy through overpayments before she has a chance to litigate a pre-levy challenge.[3]

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[3] Regardless of the speculative nature of the possible future harms, this is not enough to moot a case. *See Adarand Constructors, Inc.*, 528 U.S. at 224 ("The plain lesson of our

If this Court allows the IRS to moot pre-levy challenges by offsetting a taxpayer's overpayments during pre-levy litigation, then the IRS will generate a refund action loop over and over again for every taxpayer who attempts to bring a pre-levy challenge. Stated plainly, there is a "reasonable expectation that the wrong will be repeated." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) (footnote omitted) (quotation omitted). Just because the IRS promised not to apply a levy on Respondent's property (after it unlawfully collected the money in the first place) does not meet the "heavy" burden required to establish mootness after an administrative agency voluntary ceases the challenged conduct. *Id.*

On a micro level, Respondent will likely continue to challenge the IRS's withholding of her refund overpayments with each tax year filing. On a macro level, if the IRS is allowed to help itself to other sources of funds during a pre-levy challenge, it will continue to sidestep the pre-levy litigation process for other taxpayers. The IRS cannot be permitted to "automatically moot a [pre-levy] case by the simple expedient of suspending its challenged conduct after it is sued." *Fed. Bureau of Investigation*, 601 U.S. at 238-39 (internal quotation marks omitted) (quotation omitted). As such, this Court should hold Respondent's challenge is not moot.

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precedents is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." (internal brackets omitted) (quotation omitted)).

Also, Respondent's pre-levy challenge is not moot since a remedy still exists. The existence of a remedy, "even the availability of a partial remedy is sufficient to prevent a case from being moot." *Chafin v. Chafin*, 568 U.S. 165, 177 (2013) (internal quotation marks and brackets omitted) (quoting *Calderon v. Moore,* 518 U.S. 149, 150 (1996) (*per curiam*)); *see also Church of Scientology of California v. United States*, 506 U.S. 9, 15 (1992) (finding the case was not moot despite the IRS's unlawful acquisition of evidence because "if the summons were improperly issued or enforced a court could order that the IRS' copies of the tapes be either returned or destroyed[]"). The remedy here is clear: the court below could order the IRS to refund the amounts improperly offset by the IRS against Respondent's refunds that would be otherwise due.

CONCLUSION

For the foregoing reasons, *Amici* requests that this Court affirm the decision below.

Respectfully submitted,

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