No. 98-1324

In the Supreme Court of the United States

MITCHELL SWARTZ, PETITIONER

v.

INTERNAL REVENUE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether an action may be brought against the Internal Revenue Service to contest the agency's remittance of petitioner's federal income tax overpayments to the State of California for past-due child support obligations, pursuant to Section 6402(c) of the Internal Revenue Code, 26 U.S.C. 6402(c).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is unofficially reported at 82 A.F.T.R.2d (RIA) 98-6797. The opinion of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1998. A petition for rehearing was denied on November 20, 1998 (Pet. App. B). The petition for a writ of certiorari was filed on February 18, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner overpaid his federal income taxes for 1989 and 1991 in the amounts of $11,245 and $1,954, respectively. Instead of refunding these overpayments

to petitioner or applying them as a credit against his taxes due for other years, the Internal Revenue Service paid them to the Orange County, California, District Attorney's Office, Child Support Enforcement Division. This was done at the request of the California authorities, pursuant to Section 6402(c) of the Internal Revenue Code, 26 U.S.C. 6402(c), to satisfy a portion of petitioner's past-due child support obligations (A. ¶¶ 20-21, 24, at 14; A. 39, at 17; A. 76-77).[1] That statute provides a mechanism for States to notify the Secretary of the Treasury of past-due support obligations and directs the Secretary to "remit the amount" of an overpayment "to the State * * * and notify the person making the overpayment that so much of the overpayment as was necessary to satisfy his obligation for past-due support has been paid to the State." 26 U.S.C. 6402(c). The statute further specifies that (26 U.S.C. 6402(e) (Supp. III 1997)):[2]

> 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) * * * . 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.

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[1] "A." references are to the record appendix filed in the court of appeals. "Add." references are to the addendum attached to taxpayer's opening brief filed in the court of appeals.

[2] At the time this case arose, this provision was located at 26 U.S.C. 6402(f) (Supp. II 1996). Subsection (f) was redesignated as subsection (e) by the Balanced Budget Act of 1997, Pub. L. No. 105-33, § 5514(a)(1), 111 Stat. 620, effective July 1, 1997.

2. Notwithstanding this express limitation on the jurisdiction of the federal courts to "restrain or review a reduction authorized by [Section 6402(c)]" (26 U.S.C. 6402(e) (Supp. III 1997)), petitioner filed this action against the Internal Revenue Service and its Commissioner and a District Director to challenge the transfer of his tax overpayment to the California authorities. He asserted in his complaint that he did not owe unpaid child support, that by intercepting his tax refunds the Internal Revenue Service had violated his civil rights, and that by not providing him with notice and a hearing before transferring his tax overpayments the Service had violated his right to due process. Petitioner asked for "a return of the money, with interest, including reasonable litigation costs, and legal fees," and monetary damages for "unreasonable actions taken by the IRS employees" and for "unethical pain and suffering" (A. 19). He also sought various forms of injunctive relief, including the "removal of all other improper fees, fines, penalties, and levies" and an order enjoining the IRS "from all present harassment, summons, and levies" (*ibid.*).

3. The government did not file a timely answer to the complaint and, on petitioner's motion, the district court issued a notice of default (A. 22). The United States moved to set aside the default (Add. xvi) and to dismiss the complaint (Add. xix). Petitioner then moved to enjoin enforcement of the various liens, levies and summonses that the Service had issued in an effort to obtain collection of the 1990 and 1992 taxes owed by petitioner (Add. xi, xii, xiv). Petitioner alleged that these collection actions were taken to harass him in retaliation for the filing of his suit.

The district court issued an order setting aside the default and granting the government's motion to dis-

miss this case for lack of subject matter jurisdiction. The court concluded that (what is now) 26 U.S.C. 6402(e) (Supp. III 1997) expressly precludes petitioner from proceeding in federal court to challenge the transfer of his tax overpayments to California under Section 6402(c).

4. The court of appeals affirmed (Pet. App. A). The court of appeals concluded that the district court had correctly set aside the entry of default against the government because petitioner did not "establish a claim or right to relief" as required by Rule 55(e) of the Federal Rules of Civil Procedure. The court also agreed with the district court that petitioner's effort to challenge the remittance of his tax overpayments for 1989 and 1991 to California under Section 6402(c) is barred by the plain text of (what is now) 26 U.S.C. 6402(e) (Supp. III 1997).

The court further held that petitioner's claim for damages for collection activities for the 1990 and 1992 tax years failed to show—as 26 U.S.C. 7433(a) requires—that the challenged collection activities were taken with a reckless or intentional disregard of the internal revenue laws. The court noted that petitioner's request for injunctive relief against these tax collection actions was, in any event, barred by the Anti-Injunction Act, 26 U.S.C. 7421(a) (Supp. III 1997). Finally, the court concluded that petitioner's claim for a refund of an overpayment of taxes was barred because he had not satisfied the jurisdictional prerequisite of a timely administrative claim for refund.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of

any other court of appeals. Further review is therefore not warranted.

1. Petitioner errs in contending (Pet. 24-25) that the entry of default against the government should not have been set aside. As the court of appeals explained (Pet. App. A), Rule 55(e) of the Federal Rules of Civil Procedure precludes a default judgment against the United States and its agencies and officers "unless the claimant establishes a claim or right to relief by evidence satisfactory to the court." Fed. R. Civ. P. 55(e). Petitioner did not establish a claim or right to relief. To the contrary, petitioner's contention that the courts should review and set aside the Commissioner's determination that petitioner's overpayments were to be remitted to California to pay overdue child support was barred by the plain text of 26 U.S.C. 6402(e)(Supp. III 1997).

2. Petitioner's tax overpayments were remitted to California under what is known as the tax refund intercept program (TRIP). The mechanics of that program have been described in detail in *Anderson* v. *White*, 888 F.2d 985, 988-989 (3d Cir. 1989):

> TRIP procedures begin when the local agency identifies a parent who is past-due in his or her child support in welfare cases by $150 or more, and in non-welfare cases by $500 or more. 45 C.F.R. § 303.72. The local agency submits the name and social security number of the delinquent parent to the state bureau. It then relays the data to the United States Department of Health and Human Services, Office of Child Support Enforcement (federal office). *Id.* The federal office then forwards this information to the IRS, and it checks to see whether the parent is entitled to a tax refund. If a

tax refund is due, the IRS intercepts the refund and begins the process of having this money refunded to the state. 26 C.F.R. § 301.6402-5. Normally the interception process is not completed until after the parent said to owe support has been given an opportunity to contest that fact in local administrative proceedings. Indeed, the TRIP statute and regulations require that he or she be sent a pre-offset notice before a parent's tax refund is actually intercepted and applied to his or her child support obligation. *See* 42 U.S.C.A. §664(a)(3)(A); 42 C.F.R. § 303.72(e). If the parent makes no objection or if the objections are finally dismissed, the tax refund is sent to the local agency for application against the taxpayer's delinquent support obligation.

Under the federal statute and regulations, the pre-offset notice must inform the parent that his or her tax refund may be withheld to pay delinquent court-ordered child support. It must also inform the parent of the right to obtain administrative review through the local agency. * * *

* * * * *

If the local agency determines that a modification or deletion is warranted after administrative review, it submits the appropriate information to the state bureau, which in turn forwards it to the federal office. 45 C.F.R. §§ 303.72(d)(2), (f)(3), (g)(4). The federal office then contacts the IRS, and the intercept order is changed. If the individual's tax return has not yet been processed, an intercept will be avoided. If, on the other hand, an inappropriate intercept has already occurred, the refund due to the individual is restored. *Id.* § 303.72(h)(4).

It is in this context that Congress specified that federal courts are not to exercise jurisdiction over "any action, whether legal or equitable, brought to restrain or review a reduction authorized by [Section 6402(c)]" that remits tax overpayments to state authorities for delinquent child support. 26 U.S.C. 6402(e) (Supp. III 1997). Under Section 6402(c), the IRS was required, upon certification by the State of California that taxpayer had past-due child support obligations, to reduce any refund or credit due taxpayer as needed to offset those obligations, and to remit that amount to California. Federal courts are barred from reviewing that action by Section 6402(e). Petitioner's remedy is to obtain review of the asserted delinquency through the applicable state administrative or judicial process. *Anderson* v. *White*, 888 F.2d at 988-989. Petitioner's contention (Pet. 19-20) that he did not owe the child support demanded by California is thus a matter for him to resolve with the California authorities.

There is no conflict among the circuits concerning the proper interpretation of the plain language of Section 6402(e). The courts have consistently held that the statute bars federal court review of overpayment transfers made pursuant to Section 6402(c). See Pet. App. A; *Larsen* v. *Larsen*, 671 F. Supp. 718, 719-720 (D. Utah 1987), aff'd, 871 F.2d 1095 (10th Cir.), cert. denied, 493 U.S. 844 (1989). Cf. *Oatman* v. *Department of Treasury-IRS*, 34 F.3d 787, 788 (9th Cir. 1994) (acknowledging that Section 6402(e) bars federal court jurisdiction to review an overpayment reduction made under Section 6402(c) with respect to a taxpayer obligated to pay child support, but holding that the

taxpayer's spouse could seek to recover her share of an intercepted overpayment reported on a joint return).[3]

3. Petitioner's effort to enjoin the IRS from using liens, levies and summonses to collect his 1990 and 1992 taxes is similarly barred by the express terms of the Anti-Injunction Act, 26 U.S.C. 7421(a) (Supp. III 1997). That statute specifies that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." *Ibid.*; see *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 736 (1974). The judicial exception to the Anti-Injunction Act articulated by this Court in *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), does not apply to this case, for petitioner has not established that "under no circumstances could the Government ultimately prevail" on the merits of his assessed liability for unpaid taxes for 1990 and 1992 (*id.* at 7).

Petitioner nonetheless contends that he has not received proper credit for tax payments that he has made (Pet. 13-15, 17, 22-24).[4] The declaration of petitioner's

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[3] None of the other provisions cited by petitioner (Pet. 4-5) authorizes this action to proceed against the United States in the face of the express statutory prohibition against federal court jurisdiction over the review of overpayment reductions made under Section 6402. Moreover, none of these provisions waives the government's immunity from suit. See, *e.g.*, *Clinton County Comm'rs* v. *United States Envtl. Protection Agency*, 116 F.3d 1018, 1021 (3d Cir. 1997) (general jurisdictional provisions such as 28 U.S.C. 1331 do not waive the government's sovereign immunity), cert. denied, 522 U.S. 1045 (1998); *Hughes* v. *United States*, 953 F.2d 531, 539 n. 5 (9th Cir. 1992) (same); *Lonsdale* v. *United States*, 919 F.2d 1440, 1444 (10th Cir. 1990) (same).

[4] Petitioner ascribes particular significance to two checks that he sent to the IRS (Pet. App. C), but these checks demonstrate only that on April 15, 1990, taxpayer made payments of $8,000 and $6,000 to the IRS. The record does not identify the tax period for

accountant (Pet. App. E) states that overpayments of taxes for 1989 and 1991 in the amounts of $11,245 and $1,954, respectively, were not credited against petitioner's 1990 and 1992 tax liabilities. Those, of course, are the very overpayment credits that were withheld and transferred to California pursuant to Section 6402(c).[5] See pp. 1-2, *supra*. In denying jurisdiction to federal courts to review such "a reduction authorized by [Section 6402(c)]," the statute further specifies that "[n]o 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." 26 U.S.C. 6402(e) (Supp. III 1997). Petitioner's effort to recast his claim for review of a child-support reduction under Section 6402(c) as a "suit for refund of tax" was thus anticipated, and precluded, by Congress in enacting this statute.

Moreover, as the court of appeals correctly stated (Pet. App. A), even if a tax refund suit were permissible in this context, petitioner could not bring such a suit because he has not established that he has satisfied the jurisdictional prerequisites of paying the assessed taxes in full and filing a timely administrative claim for refund. See *Flora* v. *United States*, 362 U.S. 145 (1960).

4. The court of appeals also correctly concluded (Pet. App. A) that petitioner has failed to satisfy the requirements for a claim for damages under 26 U.S.C. 7433(a) in contending that the agency engaged in improper

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which the payments were made or whether credit was given for those payments.

[5] The agency records that petitioner cites to corroborate his claim that he did not receive proper credit for payments of taxes (Pet. App. D) are simply notices of his overpayments for 1989 and 1991, which were intercepted and transmitted to the California authorities.

activities in collecting his outstanding tax obligations for 1990 and 1992. That statute provides a damages remedy against the United States for any action to collect a federal tax that "recklessly or intentionally disregards" the internal revenue laws or regulations. 26 U.S.C. 7433(a); *Gonsalves* v. *Internal Revenue Service*, 975 F.2d 13, 15 (1st Cir. 1992); *Vennes* v. *An Unknown Number of Unidentified Agents*, 26 F.3d 1448, 1454 (8th Cir. 1994), cert. denied, 513 U.S. 1076 (1995).[6] Petitioner failed, however, to allege that, in taking the actions complained of, the agency or its employees "recklessly or intentionally" disregarded the internal revenue laws (26 U.S.C. 7433(a) (1988)). Because this statutory requirement was not met, the court of appeals correctly concluded (Pet App. A) that petitioner failed to state a claim for relief.[7] See *Gonsalves* v. *Internal Revenue Service*, 975 F.2d at 15-16. Moreover, the agency's compliance with the requirements of Section 6402(c)—by remitting petitioner's overpayments to California upon the State's

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[6] Petitioner based his claim for damages on his allegation that the IRS had violated his civil rights by intercepting his tax refunds and had denied him due process by transferring the overpayments to California without affording him notice and a hearing. The assertion that the TRIP program deprives federal taxpayers of due process of law was fully addressed, and correctly rejected, in *Anderson* v. *White*, 888 F.2d at 991-995.

[7] Section 7433(a) was amended by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3102(a)(1)(A), 112 Stat. 730. As amended, Section 7433(a) allows a wrongful collection action against the United States if IRS employees disregard any provision of the internal revenue laws "recklessly or intentionally, *or by reason of negligence*." *Ibid.* (emphasis added). The amendment applies to actions of IRS employees occurring after July 22, 1998, and is not applicable to the instant lawsuit.

certification that taxpayer had past-due child support obligations—was manifestly not in "reckless" or "intentional" disregard of the internal revenue laws.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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