No. 01-1160

In the Supreme Court of the United States

COMPRO-TAX, INC., ET AL., PETITIONERS

v.

INTERNAL REVENUE SERVICE, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' challenges to their suspensions from the Internal Revenue Service (IRS) electronic filing program were properly dismissed and are now moot.

2. Whether petitioners' claims under the Privacy Act, 5 U.S.C. 552a, were properly dismissed because petitioners failed to point to any inaccurate or untimely information contained in IRS records.

3. Whether petitioners' request for class certification is moot because their claims have been dismissed.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1), which affirmed the decision of the district court without opinion, is unpublished, but the decision is noted at 273 F.3d 1095 (Table). The opinion of the district court (Pet. App. 2-24) is unofficially reported at 2000-1 U.S. Tax Cas. (CCH) ¶ 50,406. The order of the district court denying petitioners' motion for class certification (Pet. App. 25-27) is unofficially reported at 84 A.F.T.R.2d (RIA) 99-6311. The order of the district court adopting the recommendation of the Magistrate Judge (Pet. App. 28), and the recommendation of the Magistrate Judge (Pet. App. 29-42), are unofficially reported at 83 A.F.T.R.2d (RIA) 99-2411, 99-2986.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2001. The petition for rehearing was denied on November 9, 2001. Pet. App. 61-62. The petition for a writ of certiorari was filed on February 6, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Compro-Tax, Inc. is a Texas corporation founded and owned by petitioners Jackie E. Mayfield and Yusef A. Muhammad. Although Compro-Tax does not itself prepare or file tax returns, it trains tax preparers who conduct businesses (described as "brokerages") under the Compro-Tax name.[1] The brokerages are equipped to provide electronic filing for tax returns. Compro-Tax, Inc., receives a twenty percent commission from each tax preparation fee earned by these brokerages. Pet. App. 3, 30.

Petitioners Mayfield, Muhammad and Rhodes submitted applications to the IRS to obtain permission to participate in the agency's electronic filing program. In those applications, petitioners agreed to comply with all of the requirements of that program and acknowledged that noncompliance would result in their suspension from participation in the program. Pet. App. 30-31.

The failure to file a timely individual tax return is a violation of the electronic filing rules for which immediate suspension is authorized. Petitioners Mayfield and Muhammad nonetheless did not make a timely filing of their individual income tax returns for 1995. Pet. App.

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[1] Petitioner Inga Rhodes is the daughter of petitioner Jackie Mayfield. She worked in her father's office and operated a brokerage under the Compro-Tax name. Pet. App. 3, 32.

3-4, 30-31. As a result, Mayfield and Muhammad received letters on July 24, 1997, that suspended them from participation in the electronic filing program. They were advised of their administrative appeal rights. They both thereafter filed administrative appeals, which were denied. *Id.* at 4, 31-32.

Petitioner Rhodes, who had not then been suspended, continued to charge and collect fees for filing income tax returns, including returns that were electronically filed. After petitioners Mayfield and Muhammad were suspended from that program, she continued to pay a portion of those fees to Compro-Tax. Pet. App. 32. As owners of Compro-Tax, petitioners Mayfield and Muhammad thus continued to receive a portion of the fees earned by petitioner Rhodes after they were suspended from the electronic filing program.

The rules of the electronic filing program prohibit employment by, or the sharing of fees with, a suspended filer. On April 23, 1998, Rhodes was therefore suspended from participating in the electronic filing program. She was notified of her appeal rights and filed an administrative appeal, which was denied. Pet. App. 32. The IRS also sent letters to other tax preparers who were associated with Mayfield and Muhammad, informed them of the suspensions of Mayfield and Muhammad, and advised them that continued association with Mayfield and Muhammad could result in their own suspension from the program. *Id.* at 4.

2. Petitioners thereupon commenced this suit against the United States, the Internal Revenue Service and Revenue Agent Thelma Dennis. Agent Dennis was the Electronic Filing Coordinator for Houston and had issued the suspension letters. Pet. App. 33. Petitioners alleged a variety of constitutional and statutory

violations with respect to their suspensions. They sought a variety of remedies including damages, costs, attorneys' fees, and declaratory and injunctive relief. *Id.* at 4. Petitioners also sought to have a class action certified for their claims.

The case was referred to a Magistrate Judge, who recommended that most of petitioners' claims be dismissed. Pet. App. 5, 29-42. In particular, the magistrate recommended that petitioners' claims under the Privacy Act be dismissed because they failed to identify any inaccurate or untimely information that was intentionally or willfully placed or maintained in their files, as required by 5 U.S.C. 552a(g)(4). Pet. App. 36-37. The magistrate rejected petitioners' argument that their records inaccurately reflected that they were not "suitable" to participate in the electronic filing program. The magistrate explained that the Privacy Act does not provide a method for making a collateral attack on a final agency decision simply because the agency made an official record of its decision. *Id.* at 37.

3. The district court adopted the recommendation of the magistrate. Pet. App. 5. The court thereafter withdrew the reference to the magistrate and, on September 14, 1999, issued an order denying petitioners' motion to certify this case as a class action. *Id.* at 25-27. The court held that petitioners (i) failed to show with specificity how their situation resembled that of a single tax return preparer not associated with Compro-Tax and (ii) failed to identify a single preparer not associated with Compro-Tax who belonged to the putative class. *Id.* at 26. The court concluded that petitioners had thus failed to show the existence of a class whose members were similarly treated by the defendants.

Noting that petitioners had alleged that the organizational structure of the Compor-Tax companies is

unique, the court also concluded that petitioners failed to allege a basis for believing that any member of the putative class outside the Compro-Tax family had been treated in the same manner as petitioners. The court concluded that the individual facts and issues relating to petitioners predominated over common questions of law and fact. Pet. App. 26-27.

4. The district court granted leave for petitioners to file an amended complaint. Pet. App. 5. The amended complaint, however, was essentially a verbatim restatement of their original complaint. *Id.* at 6 n.1. On March 27, 2000, the district court therefore issued an order dismissing petitioners' claims against all parties.[2] *Id.* at 2-24.

a. Noting that petitioners had failed to specify the theories underlying their constitutional claims, had failed to specify which defendants those claims were asserted against, and had failed to indicate any basis for concluding that there has been a waiver of sovereign immunity with respect to their claims, the court dismissed the constitutional claims against the United States and the IRS. Pet. App. 9-10. The court also dismissed petitioners' constitutional claims against Agent Dennis under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). The court found no basis for any assertion that Agent Dennis had violated their constitutional rights. Pet. App. 11-17.

b. The district court also rejected petitioners' claim that the decision to suspend them from the electronic filing program, and the investigation that led to those suspensions, violated the Administrative Procedure

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[2] Petitioners' claim that the agency made unauthorized disclosures of tax return information in violation of 26 U.S.C. 6103 and 7431 (see Pet. App. 24) was dismissed by agreement of the parties.

Act, 5 U.S.C. 701-706. The court determined that there was an adequate evidentiary basis for the finding of the IRS that Mayfield and Muhammad violated the filing rules by failing to timely file 1995 returns and that Rhodes had violated the rules by her sharing of payments with Mayfield, a suspended filer. Pet. App. 19-21. The court noted that the purpose of these rules is (i) to insure that third-party filers are conscientious and honest and (ii) to prevent suspended filers from circumventing the rules by continuing to operate in the name of another. Because the IRS articulated a rational relationship between the facts found (failure to timely file personal returns and association with a suspended filer) and the action taken (suspension), the court held that the suspensions were not arbitrary or capricious and did not violate the APA. Pet. App. 20, 22.

c. The district court also rejected petitioners' claim that the investigation that led to their suspensions violated the APA. The court noted that, although petitioners had been given three opportunities to do so, they had failed to plead how the investigation was deficient or indicate what aspects of the investigation they challenged. Pet. App. 22. In the absence of sufficient pleadings and of any evidence of an improper investigation, the court determined that the agency was entitled to summary judgment on this claim. *Id.* at 23.

5. The court of appeals affirmed the decision of the district court without an opinion. Pet. App. 1.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioners err in asserting that the decision of the court of appeals conflicts with decisions of this Court holding that Section 702 of the APA (5 U.S.C. 702) serves as a waiver of sovereign immunity for claims seeking relief *other than* money damages. Pet. 12 (citing *Lane* v. *Pena*, 518 U.S. 187 (1996)).[3] The claims asserted by petitioners for non-monetary relief are for declaratory and injunctive relief to set aside their suspensions. The suspensions of Mayfield and Mohammad occurred on July 24, 1997, and expired on December 31, 1999. The suspension of Rhodes occurred on March 30, 1998, and expired on December 31, 2000. Pet. App. 3, 71, 79 (the period of suspension includes the remainder of the calendar year, plus the next two calendar years). Petitioners' claims for declaratory and injunctive relief to set aside their suspensions are therefore now moot. See *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975) ("an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed"). Indeed, those claims became moot even before petitioners filed their notice of appeal to the Fifth Circuit in this case.

In any event, the district court carefully considered the claims made by petitioners under the APA and granted summary judgment to the United States because "the IRS's action was neither arbitrary nor capricious under the APA." Pet. App. 22; see also *id.* at 23. The court thus did plainly not hold that petitioners

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[3] Petitioners also contend (Pet. 13) that 28 U.S.C. 2201 and 2202 provide a waiver of sovereign immunity that is available in this case. Those provisions, however, merely define the scope of available declaratory relief in federal actions otherwise authorized by federal law. *Progressive Consumers Federal Credit Union* v. *United States*, 79 F.3d 1228, 1230 (1st Cir. 1996).

could not state a claim for declaratory or injunctive relief under the APA. Nothing in the disposition of this case by the district court, or in the one-word affirmance of the court of appeals, conflicts with decisions of this Court or of other circuits.

2. Petitioners contend (Pet. 13-15) that the district court incorrectly dismissed their Privacy Act claims and their claims under 5 U.S.C. 552a(g)(1)(A), (B), (C), and (D). Petitioners fail, however, to point to any conflict among the circuits or with the decisions of this Court on these issues. Petitioners also make no attempt to explain how their claims under these provisions present issues of substantial, recurring importance. Further review of the decision of the district court is therefore not warranted.

Petitioners failed, in any event, to establish any error in the decisions below. The district court dismissed their claims under the Privacy Act because they failed to allege any intentional or willful action that resulted in inaccurate information being placed or maintained in their files.[4] Pet. App. 36. Petitioners conceded that the agency's records accurately reflect that they had not timely filed their income tax returns in certain years. It was also undisputed that the agency's records correctly reflected that petitioners had been suspended from the electronic filing program. *Id.* at 36-37. Because

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[4] The district court was correct in holding that suit may be brought for monetary relief under the Privacy Act only for intentional or willful violations of the statute. Pet. App. 36. See 5 U.S.C. 552a(g)(4) ("In any suit * * * in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable" for actual damages, costs, and attorneys' fees.). Petitioners never alleged that the IRS acted intentionally and willfully in maintaining inaccurate records, and they pointed to no evidence establishing such behavior.

the recorded information was neither inaccurate nor untimely, the district court properly dismissed petitioners' claims. See *Reinbold* v. *Evers*, 187 F.3d 348, 360 (4th Cir. 1999) (the Privacy Act does not permit courts to revise records that accurately reflect an agency's decision); *Douglas* v. *Agricultural Stabilization and Conservation Serv.*, 33 F.3d 784, 785 (7th Cir. 1994) (same).[5]

3. Petitioners argue (Pet. 15-26) that the district court erred in failing to consider a variety of claims that they assert were raised under the APA and by committing numerous errors in upholding their suspensions. The district court carefully addressed the claims raised by petitioners and correctly concluded that the suspensions were warranted by the agency's rules and procedures.[6]

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[5] Petitioners claim (Pet. 8) that after receiving notice of their suspensions, Mayfield and Muhammad contacted Agent Dennis and requested that IRS records be corrected to reflect that they were in fact suitable to participate in the electronic filing program. Petitioners, however, have pointed to no evidence that they made a proper written request to have their records corrected (as 5 U.S.C. 552a(d)(2) requires) or that they exhausted their administrative remedies with respect to such a request pursuant to 5 U.S.C. 552a(d)(3). Petitioners have thus failed to state a cause of action under 5 U.S.C. 552a(g)(B). Their attempt to obtain monetary relief through a collateral attack on their suspensions under the Privacy Act was therefore properly rejected. See Pet. App. 37.

[6] In the district court, petitioners claimed that (Pet. App. 7):

> [I]n performing a slipshod, reckless, malicious, and sham investigation of Plaintiffs' qualifications to continue to participate in the IRS's electronic filing program, Defendants' actions were unconstitutional, arbitrary, capricious, and an illegal abuse of

a. The revenue procedures under the electronic filing program have long provided that electronic filers may be immediately suspended for "failure to file timely and accurate" tax returns. Pet. App. 69, 77. Petitioners Mayfield and Muhammad admitted that they did not file timely 1995 returns. Pet. 7. As the district court recognized, "[t]his is a clear violation of the * * * rules," for which immediate suspension was authorized. Pet. App. 19.

Petitioners note that the rules were amended in 1996 to authorize suspension for "failure to file timely and accurate [business or personal] tax returns, *including returns indicating that no tax is due*." Pet. 20; see Pet. App. 69. They contend that, prior to the addition of the underlined language, the rules did not authorize suspension for failure to file a timely return indicating that no tax was due. Pet. 21-22. As the district court recognized, however, "the plain language of the prior revenue rul[ing] encompassed both tax returns where tax was due and those where no tax was due." Pet. App. 20 n.12. Prior to amendment, the regulations indicated that suspension was appropriate for "failure to file timely and accurate * * * returns," without any

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discretion in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 * * *[.]

Petitioners were given three opportunities further to refine or restate their vague and conclusory claims, but they failed to do so. Pet. App. 6 n.1. In thereafter opposing the government's motion for summary judgment, petitioners argued only that the agency's action was arbitrary and capricious and an abuse of discretion. Plaintiff's Response to Defendant's Motion for Summary Judgment at 15. The district court was thus fully justified in addressing and resolving the claims that petitioners in fact made, rather than the additional claims that they now assert that they wished to make.

suggestion that returns indicating that no tax was due were excepted from this general rule or that they could be untimely or inaccurate. *Id.* at 77. The IRS simply chose to clarify this matter by adding the language at issue. *Id.* at 68 (changes to electronic filing program include "clarifications").

b. The "association rules" forbid "knowingly and directly or indirectly accepting employment as an associate, correspondent, or as a sub-agent from, or sharing fees with any * * * [person who has been] * * * suspended from the Electronic Filing Program." Pet. App. 78, 86. Electronic filers may be suspended for violating the association rules. *Id.* at 79, 87. Petitioner Rhodes admitted that, pursuant to the brokerage contract she made with Compro-Tax, she charged fees for preparation of returns, including electronically filed returns, and paid twenty percent of those fees to Compro-Tax. R.1241-1245. Mayfield admitted that after his suspension he continued to benefit as an owner of Compro-Tax from the fees collected under the broker agreements. R.1281. As the district court correctly held, these facts established a direct violation of the "association rules." Pet. App. 21-22.[7]

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[7] Contrary to petitioners' assertion (Pet. 17), the decision of the district court does not conflict with the holding of this Court in *Motor Vehicle Manufactures Ass'n* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 50 (1983), that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." The IRS suspended Rhodes for "[her] association with Jackie Mayfield, a suspended electronic filer." Pet. App. 59. The district court stated, however, that Rhodes was properly suspended for her "association through employment with Mayfield." *Id.* at 22. This statement may have been an imprecise description of the financial relationship between Rhodes and Mayfield or it may reflect the fact that the agency's rules prohibit "directly or indirectly accepting employment as an associate, correspondent, or

c. Contrary to petitioners' assertion (Pet. 25), the determination of the courts below that the agency's procedures do not violate due process does not conflict with *Chernin* v. *Lyng*, 874 F.2d 501 (8th Cir. 1989), or *FDIC* v. *Mallen*, 486 U.S. 230 (1988).

Unlike *Chernin*, petitioners were not foreclosed from following their chosen occupations. Petitioners acknowledge that they were not prohibited from practicing before the IRS or from filing income tax returns; instead, they were suspended temporarily from participating in the electronic filing program. Pet. 10 n.4. And, at the time that they were suspended, they were afforded the right to appeal that administrative determination. As this Court emphasized in *Mallen*, 486 U.S. at 240, post-suspension proceedings satisfy the requirements of due process when "prompt action" is appropriate and there is an "opportunity to be heard * * * after the" suspension takes effect. Courts have therefore consistently held that procedural due process is not denied by a suspension of participation in the electronic filing program when, as here, the plaintiff is afforded a prompt administrative appeal of that determination. See *Sabat* v. *IRS*, 2000-1 US. Tax. Cas. (CCH) ¶ 50,328, at 83,975 (W.D. Pa. 2000); *Ekanem* v. *IRS*, 98-1 U.S. Tax Cas. (CCH) ¶ 50,257, at 83,528 (D. Md. 1998).[8]

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as a subagent" with a suspended filer. Pet. App. 78, 86. Due to the unusual relationship between Compro-Tax and its "brokerages," the court may have viewed Rhodes as "indirectly" employed by Compro-Tax as a subagent. In any event, the factual intricacies of the record below, and the factual contentions now raised by petitioners, do not warrant further review in this case.

[8] The district court also correctly found that the issuance of the suspension notices by Revenue Agent Dennis did not violate the Constitution. The court found no support for the "novel legal

4. Finally, petitioners contend (Pet. 26-29) that the district court abused its discretion in denying their request for class certification. Because petitioners' claims have been dismissed, the question of class certification "is now moot" (*Bazemore* v. *Friday*, 478 U.S. 385, 387 n.2 (1986); see *id.* at 407-409 (White, J., concurring)).

In any event, the district court did not abuse its discretion in determining that a class should not be certified in this case. Petitioners failed to show the existence of a class whose members were similarly treated by the defendants. Pet. App. 26. Because petitioners asserted that their method of doing business was "unique," they did not show that the interest of the putative class would be adequately represented by them, or that any putative class member received the same treatment of which petitioners complain. *Ibid.*

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theory" that a *Bivens* claim arises from a government employee's enforcement of a valid agency rule in the course of administering the agency's lawful programs. Pet. App. 12-13.

The district court similarly rejected petitioners' claim that the government's actions violated their First Amendment rights to freedom of association and speech. Pet. App. 15. Petitioners did not challenge that holding on appeal and therefore waived the issue. That claim is therefore not appropriate for review by this Court. *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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