No. 07-300

In the Supreme Court of the United States

JAMES GREVE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly found that the Internal Revenue Service (IRS) did not violate petitioner's Fourth and Fifth Amendment rights in the course of a routine civil tax audit.

2. Whether the district court abused its discretion in denying petitioner's motions for discovery and for an evidentiary hearing on his claim that the IRS violated his Fourth and Fifth Amendment rights in the course of a routine civil tax audit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 490 F.3d 566. The opinion of the district court (Pet. App. 12a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2007. The petition for a writ of certiorari was filed on September 4, 2007 (Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Illinois, petitioner was convicted of one count of filing a false federal income tax return, in violation of 26 U.S.C. 7206(1). The

district court sentenced petitioner to 21 months of imprisonment, to be followed by one year of supervised release. The court of appeals affirmed. Pet. App. 1a-11a.

1. During the time period at issue in this case,[1] the Internal Revenue Service (IRS) "split[] the responsibility for enforcing the nation's tax laws between its two investigative divisions": the Examination Division and the Criminal Investigative Division (CID). *United States* v. *Peters*, 153 F.3d 445, 447 (7th Cir. 1998), cert. denied, 525 U.S. 1070 (1999). The CID was "charged with investigating criminal violations of the tax code and related federal statutes." *Ibid.* Its investigators, called "special agents," generally operated like other criminal law enforcement agents, carrying firearms and badges. *Ibid.* A special agent was required to "recite an administrative warning prior to soliciting information from taxpayers." *Ibid.*

In contrast, the Examination Division was responsible for conducting civil tax audits, and its investigators were known as "revenue agents." *Peters*, 153 F.3d at 447. They did not carry weapons and were not required to "provide taxpayers with an administrative warning" before soliciting information from them. *Ibid.*

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[1] After the events giving rise to this case, the IRS reorganized, renaming the old Criminal Investigation Division the Criminal Investigation component and relocating the functions of the old Examination Division to several new components. See generally *Joint Review of the Strategic Plans and Budget of the Internal Revenue Service: Hearing Before the House Comm. on Ways and Means, House Comm. on Appropriations, House Comm. on Gov't Reform, Senate Comm. on Fin., Senate Comm. on Appropriations, and Senate Comm. on Governmental Affairs*, 107th Cong., 1st Sess. 93-94 (2001) (statement of David C. Williams, Inspector General for Tax Administration, Department of Treasury).

Although an Examination Division audit often "conclude[d] with some sort of civil settlement between the IRS and the taxpayer," an audit sometimes "uncover[ed] evidence that cause[d] the revenue agent to refer the case to the CID for criminal investigation." *Peters*, 153 F.3d at 447. According to the IRS's internal manual, when a revenue agent "discover[ed] a firm indication of fraud on the part of the taxpayer," she was to cease her investigation and refer the case to the CID. *Internal Revenue Manual* § 4.23.9.6.2 (2003). The manual cautions, however, that "[a] *firm* indication of fraud must be distinguished from a *first* indication of fraud," which is a mere suspicion of fraud. *Ibid.* (emphasis added). In order to determine whether a firm indication of fraud has been found, a revenue agent was to "consult with" her supervisor and the District Fraud Coordinator, the person responsible for advising revenue agents about how to investigate cases that may involve civil fraud or result in a referral to the CID. *Ibid.*; Gov't C.A. Br. 5-6.

2. Petitioner owned and operated a snow-plowing business. Pet. App. 2a. From 1990 until 2000, petitioner prepared his own federal income tax returns, using a hybrid cash and accrual method of reporting income. *Ibid.* Over a six-year period in the 1990s, petitioner omitted approximately $1.3 million in business receipts from his business tax returns and falsely claimed refunds on his individual tax returns. Gov't C.A. Br. 4.

In 1999, the IRS began a routine civil audit of petitioner's 1997 federal income tax return. During his initial interview with an IRS revenue agent, petitioner admitted that he had not reported approximately $108,000 in income on his 1997 individual income tax return. The revenue agent advised petitioner that he had kept inadequate documentation of his income, and petitioner re-

plied that he had recently hired an accountant for future income tax returns. Pet. App. 2a.

After that interview, the revenue agent issued petitioner a request for bank records that would reflect unreported gross receipts, and petitioner produced some bank records. The revenue agent reviewed those records, and she determined that she had not been given all of the records she had requested and that some of the records might have been altered. She observed in her audit notes that the case "potentially involved fraud as opposed to merely an understatement of income." Pet. App. 3a.

Several weeks later, the revenue agent discussed the audit with her supervisor, who agreed that the case "may have fraud potential" and arranged a meeting with the District Fraud Coordinator. Pet. App. 3a. After a discussion of petitioner's case, the District Fraud Coordinator recommended that the revenue agent expand her audit to include tax year 1998 and confirm whether petitioner had provided altered documents to the IRS. The revenue agent then contacted petitioner to request additional documents and another interview. In the course of that conversation, the revenue agent asked petitioner about his unreported 1997 income, and petitioner replied that he had only reported income from customers who did not issue him IRS Forms 1099, on the theory that the IRS was already aware of the income reported on Forms 1099. *Id.* at 3a-4a; Gov't C.A. Br. 6-7.

In the meantime, the District Fraud Coordinator reviewed the audit file and noted that petitioner had a previously undisclosed bank account, had placed his residence in a trust upon learning that the IRS was auditing him, and had engaged in numerous large cash transactions. The revenue agent reviewed the file and pre-

pared examination requests for 1998 (providing as reasons "recurring issue" and "develop[] for fraud") and for 1996 (with a note that it was for "info only"). Pet. App. 4a. The revenue agent then retrieved IRS information relevant to petitioner's 1996 and 1998 tax returns and requested additional documents from petitioner related to the 1997 and 1998 tax years. Petitioner requested additional time in which to provide those documents, which the revenue agent allowed. But after several months passed, the revenue agent determined that she was unable to proceed with the audit until she received the documents she had requested, so she gave petitioner a deadline of July 20, 2000. *Id.* at 4a-5a.

On July 20, the revenue agent met with petitioner and his newly retained counsel. Counsel asked the agent whether she would be able to wrap up the audit for the years in question upon receipt of the documents that petitioner had assembled. Pet. App. 5a. He also asked "where things were going" and "what [petitioner] was looking at." Pet. C.A. Br. 14. The agent replied that upon review and final determination, there likely would be additional tax due, plus interest and penalties, but that the matter should be "wrapped up" quickly following the meeting. Petitioner provided the agent with the requested documents and admitted that he had understated his 1997 and 1998 income by approximately $245,000. Pet. App. 5a.

In October 2000, the revenue agent advised her supervisor that she had completed most of the audit, but that she had learned of a new bank account in the name of petitioner's wife. The next day, petitioner called the revenue agent and asked her for a status report on the audit. The agent replied that she needed the bank records relating to his wife's account and that she might

request an extension of the civil statute of limitations from him. Pet. App. 5a-6a.

In January 2001, after another discussion with the District Fraud Coordinator, the revenue agent obtained a copy of the IRS Fraud Handbook and wrote herself a note that she should either "write up [a] referral" to criminal fraud investigators or "close" the case by having petitioner agree to a tax deficiency. Pet. App. 6a. She then completed her analysis of petitioner's bank accounts and scheduled a meeting with the District Fraud Coordinator. *Ibid.* In that meeting, the District Fraud Coordinator concluded that, because there was insufficient evidence of petitioner's intent to evade tax, the case was not ready for referral to CID. *Ibid.*; Gov't C.A. Br. 11. The revenue agent contacted several of petitioner's customers and verified that they had not filed Forms 1099 with the IRS, apparently because petitioner misrepresented to them that he had incorporated when he had not. Pet. App. 6a-7a; Gov't C.A. Br. 12. The revenue agent then provided that new information to the Fraud Coordinator, and the matter was referred to CID. Pet. App. 7a. CID accepted the fraud referral and conducted a criminal investigation that, several years later, culminated in petitioner's indictment on charges extending well beyond the subject matter of the civil audit. *Ibid.*; Gov't C.A. Br. 12.

3. A federal grand jury in the Northern District of Illinois charged petitioner with four counts of filing false federal income tax returns for the tax years 1998-2000, in violation of 26 U.S.C. 7206(1). Pet. App. 7a. Petitioner moved to dismiss the indictment and to suppress evidence, arguing that the IRS had obtained documents from him by conducting a civil audit as a guise for a criminal investigation, in violation of the Fourth and

Fifth Amendments. *Ibid.* He also sought additional discovery and an evidentiary hearing. *Ibid.*

The district court noted that "[a] consensual search is unreasonable under the Fourth Amendment and/or violative of due process under the Fifth Amendment if the consent was induced by fraud, deceit, trickery, or misrepresentation." Pet. App. 13a. Relying on *United States* v. *Peters*, 153 F.3d 445 (7th Cir. 1998), which applied that general rule in the context of an IRS investigation, and "[v]iewing all of the [petitioner's] factual assertions * * * as true," the district court found no Fourth or Fifth Amendment violation. Pet. App. 13a-18a.[2] It characterized the IRS investigation here as "a typical IRS civil investigation that ultimately led to a criminal referral." *Id.* at 15a. The revenue agent "began her civil investigation as part of a tax audit"; "obtained additional evidence," some of which "caused her to suspect that criminal fraud may have been committed"; "had discussions with her supervisor and the fraud coordinator," which were necessary "to do her job properly"; and was never told "to conduct a criminal investigation under the guise of a civil one." *Id.* at 15a-16a. As "evidence of criminal liability began to emerge," the revenue agent requested additional documents from and meetings with petitioner to confirm or deny her suspicion of fraud, rather than immediately—and prematurely—referring the case to CID. *Id.* at 16a.

The district court rejected petitioner's argument that the revenue agent's noncommital response regarding when the audit might be "wrapped up" was an affirmative misrepresentation because "the questions [peti-

[2] Because petitioner established no basis for relief even accepting all of his factual assertions as true, the district court declined to conduct an evidentiary hearing. Pet. App. 13a.

tioner] posed were equally vague and did not command any more specific of a response." Pet. App. 17a. And the court noted that there was "no evidence of any active involvement by any criminal investigator" in the audit and no "continuation of civil audit activities after the revenue agent began her preparation of the criminal fraud referral." *Id.* at 17a-18a. Finally, the court found that there were no "firm indications of fraud during any of the time the [revenue agent] was actively engaged in conduct related to her fraud investigation." *Id.* at 18a; see *Internal Revenue Service Manual* § 4.23.9.6.2 (directing a revenue agent to suspend her audit when there is a "firm indication of fraud").

The district court thus found that "no colorable basis has been shown to justify further discovery" and denied petitioner's motion for discovery and motion to dismiss the indictment and suppress evidence. Pet. App. 18a.

Petitioner entered a conditional guilty plea to one count of the indictment, reserving his right to appeal the district court's denial of his motion to dismiss and to suppress evidence and his related discovery motion. Gov't C.A. Br. 14. The district court sentenced petitioner to 21 months of imprisonment, to be followed by one year of supervised release. Gov't C.A. App. C1-C5.

4. The court of appeals affirmed. Pet. App. 1a-11a. It first held that the district court correctly refused to dismiss the indictment, explaining that "[a]n indictment returned by a legally constituted and unbiased grand jury * * *, if valid on its face, is enough to call for a trial on the merits." *Id.* at 8a (quoting *Costello* v. *United States*, 350 U.S. 359, 363 (1956)).[3]

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[3] Petitioner does not renew in the petition his request for dismissal of the indictment and accordingly that aspect of the court of appeals' decision is no longer at issue in this case.

The court then rejected petitioner's argument that the IRS obtained evidence from him in violation of the Fourth and Fifth Amendments. The court noted that, although the IRS manual directs "a civil investigator to cease her investigation when she has developed firm indications of fraud," a "'failure to terminate a civil investigation'" at that point "'does not, without more, establish the inadmissibility of evidence obtained'" as the agent continues to pursue the investigation, because "[p]roof of deceit must be linked up to the constitutional standard of threat or promise." Pet. App. 9a (quoting *United States* v. *Kontny*, 238 F.3d 815, 819-820 (7th Cir.), cert. denied, 532 U.S. 1022 (2001)). As an illustration, the court observed that "an inappropriate promise might occur if an agent 'pretend[s] to be an Assistant U.S. Attorney and assure[s] [the taxpayer that he] w[ill] not be prosecuted if [he] cooperate[s].'" *Id.* at 10a (quoting *Kontny*, 238 F.3d at 819).

Reviewing the district court's factual determinations for clear error, the court of appeals concluded that IRS officials had not made any false promises to petitioner. Pet. App. 9a-10a. The court reviewed a July 10, 2000, phone conversation in which petitioner told the revenue agent that he was having difficulty obtaining all of the requested documents, and the revenue agent "told him not to worry because the records were due on July 20, 2000." *Ibid.* Although petitioner claimed that the revenue agent was "promising [him] that the case would be concluded if he provided his deposit records and further cooperated on July 20, 2000," the court found that "no such affirmative promise occurred during this conversation." *Id.* at 10a.

The court came to the same conclusion regarding the July 20, 2000, meeting, where petitioner's counsel asked

if the audit would soon be "wrap[ped] up" and the revenue agent responded that "upon review and final determination, there would be additional tax due, plus interest and penalties, but that it should be wrapped up." Pet. App. 10a. The court found that the revenue agent "made no promise" that she would not refer the case to CID, and that her failure to advise petitioner of that possibility did not amount to affirmative deceit. *Ibid.*

Finally, the court of appeals held that the district court did not abuse its discretion in declining to hold an evidentiary hearing, because the "district court accepted [petitioner's] factual assertions as true" and "the district court had no need to make a credibility determination." Pet. App. 11a.

ARGUMENT

1. Petitioner contends (Pet. 9-14) that the court of appeals erred in finding that IRS agents did not violate his Fourth or Fifth Amendment rights. According to petitioner, the agents "conducted a 'covert criminal investigation'" in the guise of a civil audit. Pet. 10. The court of appeals correctly rejected that claim, and its decision does not conflict with any decision of this Court or any other court of appeals.

a. "[A] consensual search is unreasonable under the Fourth Amendment or violative of due process under the Fifth Amendment if the consent was induced by fraud, deceit, trickery or misrepresentation by the revenue agent." *United States* v. *Peters*, 153 F.3d 445, 451 (7th Cir. 1998), cert. denied, 525 U.S. 1070 (1999); see, *e.g.*, *United States* v. *Tweel*, 550 F.2d 297, 299 (5th Cir. 1977). As the court of appeals correctly noted, although the IRS manual directs a revenue agent to terminate her investigation once she has found "firm indications of fraud," a failure to terminate the investigation at that

point does not require suppression of any evidence obtained through further investigation. Pet. App. 9a.[4] Rather, "[p]roof of deceit must be linked up to a constitutional standard of threat or promise." *Ibid.* (quoting *United States* v. *Kontny*, 238 F.3d 815, 819 (7th Cir.), cert. denied, 532 U.S. 1022 (2001)). Petitioner does not dispute that legal rule (Pet. 10-11); rather, he contends that the court of appeals erred in failing to find an impermissible promise on the facts of this case.

The court of appeals' conclusion that the IRS revenue agent did not make any false promises was correct. Petitioner identified two instances in which he alleges that the revenue agent made such a promise. The first was an instance in which petitioner called the revenue agent because he was having difficulty obtaining the documents the IRS had requested, and the revenue agent told him not to worry because the records were not due for ten days. Pet. App. 9a-10a. The court of appeals correctly found that the revenue agent made no promise; her comments simply addressed "the timing of [petitioner's] compliance" with the request for documents. *Id.* at 10a.

The second instance cited by petitioner is similarly unremarkable. Petitioner's counsel asked the revenue agent whether she would be able to wrap up the audit once she received the documents she had requested, and she replied that "upon review and final determination, there would be additional tax due, plus interest and penalties, but that it should be wrapped up following the meeting." Pet. App. 10a. Again, the court of appeals

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[4] The *Internal Revenue Service Manual* is an internal guidance document; it does not have the force of law and is not binding on the IRS. See *Fargo* v. *Commissioner*, 447 F.3d 706, 713 (9th Cir. 2006) (citing cases).

correctly found that the revenue agent's statement fell well short of a promise that no criminal consequences would ensue. *Ibid.* (noting that the revenue agent "qualified her statement by saying that any decisions were dependent upon review and final determination"). Indeed, as the district court explained, the agent's "vague response[]" was unsurprising in light of the fact that "the questions posed were equally vague." *Id.* at 17a. Further, although petitioner claims that the revenue agent should have "advise[d] [him] of the obvious criminal nature of the investigation," Pet. 11, a revenue agent generally has no affirmative obligation to advise a taxpayer of the nature of her investigation, *Peters*, 153 F.3d at 447. See *United States* v. *Serlin*, 707 F.2d 953, 956 (7th Cir. 1983) ("Simple failure to inform defendant that he was the subject of the investigation, or that the investigation was criminal in nature, does not amount to affirmative deceit unless defendant inquired about the nature of the investigation and the agents' failure to respond was intended to mislead.").

Indeed, all indications suggest that the revenue agent engaged in a "typical IRS civil investigation," and that she was not using a civil audit as a subterfuge for criminal investigation. Pet. App. 15a. As the district court noted, the investigation began as a routine civil audit—it was not initiated "at the behest of a criminal law enforcement agency"—and there was no active involvement by criminal investigators in the audit. *Peters*, 153 F.3d at 453; see Pet. App. 17a.

Petitioner asserts (Pet. 10-11), without any explanation or record citation, that the IRS "actively involv[ed] a criminal investigator in the civil audit process." That assertion is baseless. To the extent petitioner is intending to suggest that the District Fraud Coordinator is a

"criminal investigator," petitioner is mistaken. As the court of appeals explained, the "Fraud Coordinator helps develop potential fraud cases and instructs revenue agents and tax auditors how to investigate cases that may involve *civil* fraud or result in criminal *referrals* to the IRS Criminal Investigation Division." Pet. App. 3a (emphases added). Thus, far from acting as a "criminal investigator," the District Fraud Coordinator instead assists in the development of *civil* fraud cases and in the determination whether a civil investigation has developed sufficient evidence of criminal activity to call for a criminal referral. Those are quintessentially *civil* investigatory activities.

Moreover, the revenue agent followed IRS procedures in developing her initial suspicions of fraud and providing petitioner with a chance to explain any discrepancies before immediately referring his case for criminal prosecution. See *Peters*, 153 F.3d at 456 ("Revenue agents must take adequate steps to perfect indications of fraud and must ensure that the fraud is substantial prior to making a referral to the CID."); Pet. App. 17a. The statements that petitioner identifies as misrepresentations—the agent's reassurance that petitioner still had time within which to comply with her document request, and her estimation to petitioner's counsel that she would complete her audit soon after her examination of petitioner's financial records—were made long before the District Fraud Coordinator considered the evidence sufficient to warrant a criminal referral. *Id.* at 16a-18a. Finally, and again consistent with IRS procedures, the revenue agent ceased her investigatory activities after she prepared a criminal fraud referral. See *Peters*, 153 F.3d at 454-455; Pet. App. 17a-18a. Petitioner's fact-bound claim of "actual deception" by

the IRS was correctly rejected by both the district court and the court of appeals, and in any event it does not warrant further review.

b. Petitioner contends (Pet. 11-12) that the decision below conflicts with the decision of the Fifth Circuit in *United States* v. *Tweel*, 550 F.2d 297 (1977). According to petitioner (Pet. 11-12), the court below held that "the IRS could not violate [a taxpayer's] constitutional rights, notwithstanding the fact that it was conducting a covert criminal investigation under the guise of a civil audit, unless its agents 'pretend[ed]' to be Assistant United States Attorneys assuring [the taxpayer] that he will not be prosecuted if he cooperates." The court of appeals did not so hold. Rather, the court stated a general legal standard—that whether statements have been obtained in violation of the Constitution depends on whether IRS agents made an affirmatively misleading threat or promise—and then stated, by way of example, that "an inappropriate promise might occur if an agent pretend[s] to be an Assistant U.S. Attorney and assure[s] [the taxpayer that he] w[ill] not be prosecuted if [he] cooperates." Pet. App. 9a-10a (internal quotation marks omitted).

The decision below presents no conflict with *Tweel*, because both the Fifth and Seventh Circuits apply the same rule of law. Compare *Tweel*, 550 F.2d at 299 ("[A] consent search is unreasonable under the Fourth Amendment if the consent was induced by the deceit, trickery or misrepresentation of the Internal Revenue agent."), with Pet. App. 9a ("[a taxpayer] must prove that [a revenue agent] induced his compliance through false promises"), and *Peters*, 153 F.3d at 451 ("A consensual search is unreasonable under the Fourth Amendment or violative of due process under the Fifth Amend-

ment if the consent was induced by fraud, deceit, trickery or misrepresentation by the revenue agent.").

Although the outcome in *Tweel* was different from the outcome here, that difference is the result of stark factual differences between the two cases. In *Tweel*, unlike this case, an IRS agent commenced an audit at the specific request of the Organized Crime and Racketeering Section of the Criminal Division of the United States Department of Justice. 550 F.2d at 299. The taxpayer's accountant explicitly asked the revenue agent whether a special agent (*i.e.*, a criminal investigator) was involved in the audit, and the revenue agent replied that one was not. *Ibid.* Although that statement was technically correct, the agent "was acting at the request" of criminal investigators, and the Fifth Circuit determined that the agent's "failure to apprise the appellant of the obvious criminal nature of th[e] investigation" was a "silent misrepresentation [that] was both intentionally misleading and material." *Ibid.* In this case, by contrast, petitioner's audit was not instigated by a federal prosecutorial office; there were no criminal investigators involved in petitioner's audit; and the revenue agent did not mislead petitioner or his counsel about the pendency of a criminal investigation. Pet. App. 16a-18a. There is thus no conflict in the circuits suggesting a need to "articulate a clear standard concerning when the IRS during the course of a civil tax audit violates taxpayers' Fourth and Fifth Amendment rights." Pet. 9 (emphasis omitted).

c. Petitioner claims (Pet. 13) that the court of appeals erred by holding that "nothing that IRS agents do before beginning the actual preparation of the actual criminal referral document could demonstrate the unconstitutional acquisition of evidence." Petitioner pro-

vides no citation to the court of appeals' opinion for that alleged holding, and the court of appeals plainly did not so hold. To the contrary, the court correctly premised its legal rule on the well-established "constitutional standard of threat or promise." Pet. App. 9a.

2. Petitioner contends (Pet. 14-16) that the district court abused its discretion in denying him discovery and an evidentiary hearing on his claims. There is no conflict in the circuits on that issue, and petitioner's fact-bound challenge to the district court's discretionary determination does not warrant further review.

a. The court of appeals correctly determined that the district court did not abuse its discretion in declining to hold an evidentiary hearing or to order discovery. To obtain an evidentiary hearing, petitioner was required to establish a "substantial [constitutional] claim" and "disputed issues of material fact." Pet. App. 11a (quoting *United States* v. *Juarez*, 454 F.3d 717, 719-720 (7th Cir. 2006)). As petitioner himself notes (Pet. 7, 11, 12-13), the district court took all of his factual allegations as true, and there was thus "no need to make a credibility determination." Pet. App. 11a; see *id.* at 13a. Moreover, petitioner failed to adduce evidence of any threat or promise that would entitle him to relief under the Fourth or Fifth Amendment. See pp. 10-14, *supra*. Likewise, the court of appeals did not err in affirming the district court's denial of further discovery, because petitioner established "no colorable basis * * * to justify further discovery." Pet. App. 18a; see *id.* at 11a n.1. See also pp. 10-14, *supra*.

b. Petitioner asserts (Pet. 15-16) that the court below created a circuit conflict by establishing an "unrebuttable presumption of good-faith conduct of government investigatory agents notwithstanding the fact that

all of the admitted and deemed true facts * * * suggest strongly the exact opposite." Pet. 15. By contrast, according to petitioner, "several circuit courts of appeals * * * have held specifically that the IRS agent's motivation and intent * * * is highly relevant to determine whether * * * [the IRS's] investigatory practices were * * * unconstitutional." Pet. 15-16.

There is no conflict, for two reasons. First, nowhere in the decision below did the court of appeals adopt the rule petitioner suggests. Second, none of the cases cited by petitioner (Pet. 15-16) states that a court of appeals must consider a revenue agent's motivation in assessing an allegation of an unconstitutional threat or promise in the course of a civil tax audit. Indeed, several of those cases state precisely the opposite proposition, albeit in the different context of alleged bad-faith use of civil summons authority in a criminal case. For example, in *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298 (1978), this Court explained that "the question whether an investigation has solely criminal purposes must be answered only by an examination of the institutional posture of the IRS," because the IRS's "multilayered and thorough" "review process" makes the motivation of one special agent "hardly dispositive." *Id.* at 315-316. See *United States* v. *Millman*, 822 F.2d 305, 308 (2d Cir. 1987) (same); *United States* v. *Genser*, 595 F.2d 146, 151-152 (3d Cir.), cert. denied, 444 U.S. 928 (1979) (same).[5] There is thus no conflict in legal authority and no basis for further review.

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[5] The other case cited by petitioner, *United States* v. *Voight*, 89 F.3d 1050, 1067-1068 (3d Cir.), cert. denied, 519 U.S. 1047 (1996), is wholly inapposite, because it involved "alleged governmental intrusion into the attorney-client relationship," not alleged use of a civil tax audit as a guise for a criminal investigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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