No. 02-1849

In the Supreme Court of the United States

JUDICIAL WATCH, INC., PETITIONER

v.

CHARLES O. ROSSOTTI, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, on the facts of this case, petitioner possesses a cause of action for damages against individual officers and employees of the Internal Revenue Service under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), based on allegations of a retaliatory federal income tax examination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 317 F.3d 401. The opinion of the district court (Pet. App. 31-50) is reported at 217 F. Supp. 2d 618.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2003. A petition for rehearing was denied on March 24, 2003. Pet. App. 29-30. The petition for a writ of certiorari was filed on June 23, 2003 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner describes itself as a "non-partisan legal 'watchdog' organization" that seeks to "protect the American people from, and educate them about, corruption in government and abuses of power, and to enforce the principle that 'no one is above the law.'" Pet. App. 3. Since 1995, petitioner has operated as a tax-exempt organization under the provisions of 26 U.S.C. 501(c)(3). To qualify under that provision, "no substantial part" of its activities can be devoted to lobbying.[1] 26 U.S.C. 501(c)(3); see Pet. App. 3.

During the late 1990's, petitioner filed a number of lawsuits against President Clinton and Mrs. Clinton. Pet. App. 4. In September 1998, during impeachment proceedings against President Clinton, petitioner submitted a report to Congress entitled *Interim Report: Crimes and Other Offenses Committed by President Bill Clinton Warranting His Impeachment and Removal from Elected Office* (*Interim Report*). *Ibid.* Several days after submitting the *Interim Report*, petitioner received a letter from the Internal Revenue Service stating that it had been selected for audit. *Ibid.*

2. In September 2001, petitioner filed this action in federal district court against former Commissioner of

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[1] Section 501(c)(3) provides tax-exempt status for an otherwise qualified organization if:

> no substantial part of [its] activities * * * is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and [if the organization] does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

26 U.S.C. 501(c)(3).

Internal Revenue Charles Rossotti, four individual Internal Revenue Service (IRS) agents, and the United States. Pet. App. 5.[2] The complaint, as amended, alleged that the IRS audit was "retaliatory, politically-motivated, and unconstitutional," in violation of petitioner's "First Amendment free speech rights, Fifth Amendment due process rights, and Fifth Amendment right to be free from selective prosecution." *Ibid.* The complaint sought an injunction prohibiting the defendants from proceeding with the audit. It also sought the production of various documents pursuant to the Freedom of Information Act (FOIA) and compensatory and punitive damages against the Commissioner and the IRS employees. *Ibid.*

3. The district court granted the motion to dismiss filed by the individual defendants. Pet. App. 31-50.[3] The court first held that the plain text of the Anti-Injunction Act bars it from exercising jurisdiction over petitioner's request for injunctive relief. *Id.* at 39-43. The court then held that the claim for money damages

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[2] Petitioner filed an amended complaint in January 2002, withdrawing its claims against the United States, and adding the Department of the Treasury and the IRS as defendants. Pet. App. 5.

[3] The motion to dismiss filed by the individual defendants did not address the FOIA claims. Those claims had been brought against the IRS itself. Pet. App. 38 n.6. In a subsequent order, the district court granted judgment in favor of the IRS on those claims. An appeal of that decision is currently pending before the Fourth Circuit. No. 03-1160 (filed Mar. 26, 2003).

In January 2002, the IRS served petitioner with an administrative summons demanding the production of documents relating to the pending tax audit. Pet. App. 38. Petitioner filed a motion to stay or enjoin enforcement of that administrative summons. *Id.* at 32, 38. For the same reasons that the court dismissed petitioner's claims for injunctive relief, it also dismissed the motion to stay enforcement of the summons. *Id.* at 43.

must also be dismissed because, even assuming that a *Bivens* remedy is available for a retaliatory tax audit (*id.* at 44-45), the individual defendants are entitled to qualified immunity from such a claim. *Id.* at 46-49.

4. The court of appeals affirmed. The court agreed with the district court that the plain text of the Anti-Injunction Act bars the injunctive relief requested by petitioner. Pet. App. 7-17.[4] The court then further held that a *Bivens* action is not available for an allegedly retaliatory tax audit. *Id.* at 17-27. Because it concluded that no *Bivens* action exists in this context, the court found it unnecessary to address whether qualified immunity would apply in this case. *Id.* at 17 n.4.

The court of appeals noted that, in recognizing in *Bivens* an implied private cause of action for damages against federal agents who allegedly conduct an illegal search and seizure, this Court emphasized that this constitutional cause of action would be recognized because there was "'no explicit congressional declaration' prohibited it, and 'no special factors [counselling] hesitation [by the Court] in the absence of affirmative action by Congress.'" Pet. App. 17 (quoting *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396-397 (1971)). The court of

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[4] The court also made clear that it found petitioner's allegations of a retaliatory audit to be less than persuasive (Pet. App. 10):

> The initial difficulty with this argument is that, although the amended complaint contains general allegations of retaliatory conduct by IRS agents based on the factual chronology outlined above, the complaint does not allege that the individual IRS agents even knew that Judicial Watch had filed various lawsuits, much less its *Interim Report*, explicitly targeting the Clinton administration. Nor does Judicial Watch dispute that the Inspector General conducted two investigations and twice exonerated the individual IRS employees involved in the audit decision.

appeals emphasized that this Court has been reluctant to create other causes of action for money damages based on *Bivens*, especially in circumstances involving complex statutory schemes in which Congress has provided meaningful avenues for redress. *Id.* at 18-19 (citing *Bush* v. *Lucas*, 462 U.S. 367 (1983), and *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988)). In concluding that a *Bivens* action does not lie for the allegations of retaliatory tax audits asserted in this case, the court of appeals noted that "[i]t would be difficult to conceive of a more comprehensive statutory scheme, or one that has received more intense scrutiny from Congress, than the Internal Revenue Code." *Id.* at 20.

The court of appeals explained that the Internal Revenue Code provides numerous methods for petitioner to challenge the conduct of the agency. Pet. App. 21. In particular, with respect to actions of individual IRS employees, Congress enacted 26 U.S.C. 7433 in 1988 to establish a civil damages action against the United States for individual misconduct in the collection (but not the investigation or determination) of taxes.[5] Pet. App. 22. See note 5, *supra*. The court noted that the legislative history of this statute makes

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[5] 26 U.S.C. 7433(a) provides in pertinent part:

> 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 [civil damages for failure to release lien], such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

clear that "Congress did not act inadvertently in failing to create an action for damages allegedly arising from the investigation or determination of tax liability." *Id.* at 23. The court explained that "Congress's considerable attention to the rights and remedies available to taxpayers and [this Court's] hesitancy in creating *Bivens* remedies in such circumstances provide strong support for the conclusion that no *Bivens* remedy lies in this case." *Id.* at 24.

The court of appeals emphasized that no other appellate court has dealt with the precise question whether a *Bivens* action is available for an allegedly retaliatory tax audit. Pet. App. 25. The court noted that Judge Reinhardt, in his concurrence in *Western Center for Journalism* v. *Cederquist*, 235 F.3d 1153 (9th Cir. 2000) (per curiam), expressed the view that such a remedy should be available. It also noted that, in *National Commodity & Barter Ass'n* v. *Archer*, 31 F.3d 1521 (1994) (NCBA), the Tenth Circuit concluded that a *Bivens* remedy would lie in situations involving unwarranted searches and seizures for which the Internal Revenue Code provided no mechanism for compensation. See Pet. App. 25-26. The court of appeals observed, however, that neither the *Western Center* nor *NCBA* opinions considered the enactment of Section 7433 in 1988 or the legislative history of that statute. *Id.* at 26. The court of appeals stated in conclusion that "[w]e * * * decline 'to create a new substantive legal liability * * * because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it.'" *Id.* at 27 (quoting *Schweiker* v. *Chilicky*, 487 U.S. at 426-427, and *Bush* v. *Lucas*, 462 U.S. at 390).

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. The court of appeals correctly recognized that this Court's precedents reflect a strong reluctance to recognize new *Bivens* actions. As the court of appeals noted, since the decision in *Bivens*, this Court had recognized only two additional categories of *Bivens* actions: in *Davis* v. *Passman*, 442 U.S. 228 (1979), the Court found such an action under the due process clause of the Fifth Amendment; and, in *Carlson* v. *Green*, 446 U.S. 14 (1980), the Court found such an action under the cruel and unusual punishment clause of the Eighth Amendment. Pet. App. 17-18. Moreover, as this Court emphasized in *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), cases arising from complex statutory schemes are particularly inappropriate candidates for a *Bivens* action (id. at 423):

> the concept of "special factors counselling hesitation in the absence of affirmative action by Congress" has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.

Indeed, petitioner acknowledges that both *Schweiker* and *Bush* v. *Lucas*, 462 U.S. 367 (1983), "hold that, when Congress affords a remedy for a particular harm, a court may not judicially create an additional remedy,

even if the congressionally-created remedy does not afford complete relief." Pet. 18. See *Schweiker* v. *Chilicky*, 487 U.S. at 425 (Congress need not provide "complete" relief but only "meaningful safeguards or remedies"). The Court expressed that same view in *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61, 69 (2001) ("So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability.").[6]

With these guiding principles in mind, the court of appeals properly determined that the "vast and exceedingly complex statutory apparatus" of the Internal Revenue Code provides taxpayers with a variety of safeguards and remedies against the misconduct of the IRS and its individual agents. Pet. App. 20-22. As the court emphasized, the text and history of Section 7433 of the Code reflect that Congress carefully considered, and rejected, a damages remedy that would have encompassed wrongful tax audit proceedings. *Id.* at 23-24. The detailed history of this statute amply establishes that the legislative determination that money damages are not an appropriate remedy in this context was not inadvertent. *Id.* at 27. See *Shreiber* v. *Mastrogiovanni*, 214 F.3d 148, 152-153 (3d Cir. 2000) (declining to extend *Bivens* remedy in connection with assessment of tax liability in light of Section 7433). The court of appeals correctly followed and applied this Court's precedents in *Bush* and *Schweiker* in determining, in this detailed statutory context, that it was for Con-

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[6] Petitioner thus errs in claiming (Pet. 15-27) that the decision in this case conflicts with the decisions of this Court in *Bush* v. *Lucas*, 462 U.S. 367 (1983), and *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988).

gress, rather than for the court, to determine the scope and availability of a damages remedy for allegedly retaliatory tax audits.

2. Petitioner errs in claiming (Pet. 27-28) that the decision in this case conflicts with the *Western Center* and *NCBA* cases. In *Western Center*, the Ninth Circuit held that any *Bivens* suit that might exist would be barred by the statute of limitations. 235 F.3d at 1158. The court had no occasion to, and therefore properly did not, address whether the plaintiff's asserted *Bivens* claim stated a valid cause of action. Instead, the court "dismiss[ed] the action on the ground that, whether or not a *Bivens* remedy is available, [the putative] action is time-barred." *Id.* at 1157. And, as the court of appeals noted in this case (Pet. App. 26), the concurring opinion of Judge Reinhardt in *Western Center*—which concluded that a *Bivens* action would exist for "a retaliatory audit on account of the expression of one's political views" (235 F.3d at 1159)—fails to give any consideration to the text or clear history of Section 7433. In any event, the *dictum* contained in the concurring opinion of a single judge does not establish the views of the Ninth Circuit and does not establish a conflict between the circuits on the question presented in this case.

There is also no conflict between the decision in this case and the decision of the Tenth Circuit in the *NCBA* case. As the court of appeals noted below (Pet. App. 26), the court in *NCBA* had no occasion to consider or discuss Section 7433 or its clear history because the events at issue in *NCBA* occurred between January 1984 and October 1985 and thus preceded the enactment of Section 7433 by several years. See *NCBA*, 31 F.3d at 1525-1526. And, in *NCBA*, the court allowed a *Bivens* claim to stand only for allegedly unconstitutional searches and seizures that assertedly sought in-

formation in a manner that interfered with associational rights. *Id.* at 1530-1532. The narrow holding of that case plainly does not stand for the broad proposition advanced by petitioner in this case that a *Bivens* remedy is available for a "retaliatory" tax audit.

Especially in light of the fact that the Tenth Circuit in *NCBA* had no occasion to consider the role of Section 7433 in its analysis, there is no reason to assume that, if the Tenth Circuit were presented with a case involving an allegedly retaliatory audit occurring after the enactment of Section 7433, it would reach a decision contrary to the decision reached by the court in this case. There is thus no present conflict among the circuits that would warrant review by this Court at this time.

3. There is also no merit to petitioner's assertion that the question whether a *Bivens* remedy is available for an allegedly retaliatory tax audit is of sufficient importance to merit certiorari in the absence of a conflict. Pet. 27. Only a handful of cases have raised or addressed this issue even indirectly. Review by this Court would thus be premature, for it would preclude initial consideration and development of the relevant issues in the various courts of appeals.

Review in this case is also unnecessary because, as the district court correctly concluded, petitioner could not prevail even if a *Bivens* remedy existed. Because respondents' conduct did not violate any clearly established constitutional right, they would be entitled to qualified immunity even if a *Bivens* cause of action might otherwise exist. Pet. App. 46-49.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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