No. 23-3063

In the United States Court of Appeals
for the Tenth Circuit

GOD'S STOREHOUSE TOPEKA CHURCH,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

On Appeal from the United States District Court
for the District of Kansas – Topeka
5:22-CV-04014-DDC-TJJ
Daniel D. Crabtree, U.S. District Judge

REPLY BRIEF OF PETITIONER-APPELLANT

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PRIOR OR RELATED APPEALS

None. However, there is a related case in the United States District Court for the District of Colorado (Case No. 22-MC-00046) that contains similar issues and may be appealed.

From the earliest phases of this church tax inquiry and church tax examination, God's Storehouse Topeka Church ("GSH") has asserted that an appropriate high-level Treasury official failed to make the reasonable belief determination required under § 7611(a)(2) of the Church Audit Procedures Act ("CAPA"). The approval of an appropriate, high-level Treasury official ensures that churches' unique constitutional rights are appropriately balanced with the IRS's enforcement powers. But the official who approved this inquiry and examination—the Commissioner of the Tax Exempt and Government Entities Division ("TEGE Commissioner")—is not the official named in § 7611 or its implementing regulations.

Despite GSH's objections, the IRS continued with its investigation of GSH. It requested GSH bank records directly from the church in the first information document request of its church tax examination. GSH objected. Then, rather than summonsing GSH and seeking court enforcement, the IRS sought to exploit ambiguities in the statute. It requested the same GSH financial records from Kaw Valley Bank through a third-party summons. The Government argues that the IRS's use of a third-party summons prevents a church from challenging the

validity of the examination. But CAPA was enacted specifically to prevent the IRS from engaging in unwarranted incursions into churches. And the approval of an appropriate, high-level Treasury official is the linchpin of CAPA's protections. The Court should protect GSH's constitutional rights as CAPA intended by granting the petition to quash.

ARGUMENT

I. The requirements of § 7611 apply to this petition.

The Government, the district court, and GSH agree: the IRS initiated a church tax inquiry and examination of GSH and summonsed GSH's financial records from Kaw Valley Bank to examine GSH's status as a church and any potential tax liability. Br. at 31; Gov. Br. at 19-21.[1] But, although the Government states that "the protections in § 7611 apply when the IRS undertakes a church tax inquiry or church tax examination," it argues that compliance with the statutory procedures for beginning a church audit and examination are inapplicable to third-party summons issued during that inquiry or examination. Gov. Br. at

[1] "Appx. Vol. 1" refers to the Appendix filed with GSH's opening brief; "Br." refers to GSH's opening brief; "Gov. Br." refers to the Government's reply brief.

43-44. Instead, the Government argues that third-party summons governed by § 7609 exist entirely outside of the § 7611 scheme. *Id.* The express language of § 7611 and its implementing regulations may treat third-party summons differently from summons issued directly to a church taxpayer; however, the statute should not be interpreted to excuse the IRS from its duty to fulfill the procedural requirements for a valid investigation of a church at the outset.

Section 7602 grants the IRS the authority to compel production of documents and testimony when necessary to ascertain a tax liability or collect a tax. Under this section, the IRS may summons a taxpayer or other persons, such as third-party recordholders. 26 U.S.C. § 7602(a)(2). Section 7609 constrains the IRS's broad summons authority with additional procedures when it summons third parties for taxpayers' records. The IRS must give notice of the third-party summons to any person identified in the summons, and any person receiving notice is entitled to petition to quash the summons. 26 U.S.C. § 7609(a)-(b). Section 7611 also constrains the IRS's summons authority in the context of church tax inquiries or examinations. Both §§ 7609 and 7611 require the IRS to employ additional procedures to protect the rights of

taxpayers in special circumstances. And the Code is clear that "no taxpayer shall be subject to unnecessary examination or investigations" no matter the context. 26 U.S.C. § 7605(b).

United States v. Powell sets forth prerequisites to the enforcement of *any* summons, including summons to third parties and during church examinations. 379 U.S. 48 (1964). *Powell* requires the IRS to establish that a summons is valid and properly authorized by showing that (1) the IRS is conducting its investigation pursuant to a legitimate purpose; (2) the information sought may be relevant to that purpose; (3) the information sought is not already within the IRS's possession; and (4) the IRS followed all required administrative steps. 379 U.S. 48, 57-58 (1964). When a summons is issued to a third party or in the context of a church examination, it adds to the IRS's burden under *Powell*—it does not subtract from it. *See, e.g.*, *Standing Akimbo, LLC v. United States*, 955 F.3d 1146 (10th Cir. 2020) (applying *Powell* factors to a third-party summons); *United States v. Church of Scientology of Boston, Inc.*, 739 F. Supp. 46, 48 (D. Mass. 1990), *aff'd*, 933 F.2d 1074 (1st Cir. 1991) (determining that the requirements of § 7611 have been incorporated into *Powell*). And, as the Supreme Court stated in *Powell*,

it is the role of the judiciary to ensure that summons issued for an improper purpose are not enforced. 379 U.S. at 58 (holding that a court may look into an examination's underlying reasons because "[i]t is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused.").

A valid, properly authorized inquiry or examination of a taxpayer is a condition precedent to the enforcement of any summons, including third-party summons. This is why *Powell* requires the Service to establish a legitimate purpose and that the "administrative steps required by the Code have been followed" before a summons may be enforced. *See, e.g., Standing Akimbo, LLC v. United States*, 955 F.3d 1146 (10th Cir. 2020); (evaluating the enforceability of a third-party summons using the *Powell* factors); *also United States v. Arthur Young & Co.*, 465 U.S. 805, 815 (1984) (noting that *Powell* permits the IRS to summons information relevant to a *legitimate* IRS inquiry). And the procedural requirements of § 7611 have been incorporated into *Powell*'s "administrative steps" prong. *Scientology Boston*, 739 F. Supp. at 48. So, to fulfill the requirements of *Powell* in this context, the IRS must

establish compliance with the administrative steps described in § 7611(a).

Though the Supreme Court in *Powell* directed the IRS to follow the "administrative steps required by the Code," the Government now argues that these administrative steps do not include the procedures of § 7611(a)-(b) so long as the IRS summons a church's records from a third party and not from the church itself. But the IRS should not be permitted to do indirectly what it cannot do directly. It is the proper role of the judiciary to ensure that the IRS complies with the procedures for beginning a church examination when evaluating the validity of a summons. This includes summons directed at churches and their financial institutions when such summons are issued as a part of the investigation of a church for the purposes of a church tax examination. The exception of third-party summons from the definition of "church records" found in § 7611(h)(4)(B)(i) is not intended to prevent a court from evaluating whether the IRS's underlying investigation of the church is proper and compliant with § 7611(a) under *Powell*.

Under § 7611(a), the underlying inquiry or examination is not legitimate unless the IRS has obtained approval of an appropriate,

high-level Treasury official. This is a required administrative step and protects churches from unnecessary scrutiny. Crucially, the statute accords this protection to churches *before* the IRS launches its inquiry or examination. *See* Church Audit Procedures Act: Hearing Before the Subcomm. on Oversight of the I.R.S. of the S. Comm. on Finance, 98th Cong. 2 (1983) (statement of Sen. Charles Grassley) ("Hearing"). Once the IRS has begun its review of church financials and other documents, the IRS may not unring the bell.

Here, once the IRS has obtained GSH's financials from Kaw Valley Bank, it will have rung the bell and summonsed the church's financial records pursuant to an improper, invalid inquiry and examination. As the Government notes, the IRS may not decide on a church's tax-exempt status or assess unrelated business income tax on the basis of documents obtained through a third-party summons. Treas. Reg. § 301.7611-1, Q&A 5; Gov. Br. at 48. However, § 7611 was designed to protect churches from undue scrutiny because of their status under the Constitution—not just from unfounded tax assessments post-hoc. *See* Hearing at 13 (statement of Rep. Mickey

Edwards). GSH will have effectively lost the protections of § 7611 if it must defend itself throughout an unauthorized, invalid investigation.

II. This Court should not erode § 7611's constitutional protections for churches.

As the Government observes, few courts have examined whether the IRS must comply with § 7611's procedural requirements in order to satisfy the "administrative steps" factor in *Powell*. Fewer still have examined whether the IRS must meet this burden in the context of third-party summons. Given these precedents, this Court should not further diminish § 7611's intended protections for churches by granting the Government's argument.

In *United States v. Church of Scientology of Boston*, the First Circuit stated that the "IRS cannot even begin its investigation until it 'reasonably believes' the church has the relevant liability" because § 7611 requires a showing beyond what is required under *Powell*. 933 F.2d 1074, 1077 (1st Cir. 1991) (holding that the IRS must prove that the church's summonsed documents are necessary, not merely relevant).

In *United States v. C.E. Hobbs Found. for Religious Training & Educ., Inc.*, 7 F.3d 169, 171 (9th Cir. 1993), the Ninth Circuit affirmed that the IRS must meet the procedural requirements of § 7611(a) before initiating a church tax inquiry. These procedural requirements "are the heart of the statute, in that they afford religious institutions extensive safeguards from having to defend an audit at all." *Id.* The *Hobbs* court then examined whether the IRS must prove that documents summonsed from third parties are necessary under § 7611(b), or merely relevant. *Id.* at 173. It did not directly address the threshold requirements of § 7611(a) when evaluating the IRS's burden in enforcing third-party summons issued during church tax examinations.

Only two district courts have squarely considered whether the IRS must meet the requirements of § 7611(a) by obtaining the approval of an appropriate, high-level Treasury official before issuing summons to third parties during a church tax examination. This Court is not bound by either decision.

First, when the *Bible Study Time* court evaluated the proper role of § 7611 in third-party summons, it created a loophole that permits the IRS to circumvent CAPA's protections. *Bible Study Time, Inc. v. United*

States, 240 F. Supp. 3d 409 (D.S.C. 2017). The *Bible Study Time* plaintiffs predicted that if the IRS is not required to meet the requirements of § 7611(a) prior to issuing third-party summons in an investigation of a church, the IRS may perform an end-run around CAPA's requirements.[2] But the court did not fully address this argument. So, under the court's reasoning in *Bible Study Time*, just like in this case, the IRS may summons financial records from third parties as soon as churches raise constitutional or procedural concerns. This makes a mockery of the statute and its intended protections for churches' constitutional rights. The only other case to address this precise issue is the companion to this case before the Colorado district court, involving another third-party summons issued during the IRS's

[2] In a brief before the South Carolina district court, Bible Study Time argued that "[i]t is exceedingly unlikely a commercial bank would of its own volition defy an IRS summons. Accordingly, the government's interpretation of the statutes would effectively vitiate the protections of § 7611 and would allow the government to defy that statute's safeguards with near impunity by beginning a church tax inquiry, and then when met with resistance pursuant to the church's assertion of § 7611's protections, doing an end run by issuing summonses to the churches' banks with no regard to § 7611's requirements." *See* Resp. to Gov. Motion to Dismiss at 7, *Bible Study Time, Inc. v. United States*, 240 F. Supp. 3d 409 (D.S.C. 2017). The South Carolina district court did not directly address this argument and now, six years later, the IRS has done just that.

church tax examination of GSH. *God's Storehouse Topeka Church v. United States*, No. 22-mc-00046-PAB, 2023 WL 2824525 (D. Colo. Feb. 22, 2023). There, a district court judge has yet to rule on the magistrate judge's report and recommendation.

Taken together, these cases document a slow erosion of churches' rights under CAPA. While the earlier circuit court decisions noted that the IRS must establish the reasonable belief of a high-level Treasury official before beginning *any* investigation, *Bible Study Time* removed that protection for churches. As Professor Benjamin Akins observes, under this regime, CAPA is "an unworkable statute." Benjamin W. Akins, *A Broken Vesper: Questioning the Relevancy and Workability of the Church Audit Procedures Act*, 44 Seton Hall Legis. J. 1, 26 (2020). This Court should uphold congressional intent by requiring the IRS to obtain the approval of an appropriate, high-level Treasury official.

III. The IRS did not receive proper authorization from an appropriate high-level Treasury official.

The IRS did not receive proper authorization to commence this church tax inquiry under § 7611(a)(2) or its implementing regulation because the TEGE Commissioner is not an "appropriate Regional Commissioner (or higher Treasury official)" *or* a high-level Treasury

official whose rank is "no lower" than a Regional Commissioner. Treas. Reg. § 301.7611-1, Q&A-1; 26 U.S.C. § 7611(h)(7).

The Government presents this issue as settled, implying that courts, practitioners, scholars, and the IRS have coalesced around the TEGE Commissioner as the appropriate position to make the reasonable belief determination following the elimination of the Regional Commissioner. Gov. Br. at 52-53 ("Indeed, the authorities that have analyzed this issue, including many of those that taxpayer directly relies on, agree."). This is simply not true.

First, this issue will only be definitively settled when Treasury amends or changes the Regulations in accordance with the Administrative Procedures Act or Congress amends the statute itself. However, Treasury has not updated the § 7611 regulations though this task has remained on its annual Priority Guidance Plan for fourteen consecutive years. Br. at 27 n.2. Section 7611 was enacted to ensure, in part, that the constitutional rights of churches do not depend on vague internal IRS procedures. *See* Amendments to the Regulations Regarding Questions and Answers Relating to Church Tax Inquiries and Examinations, 74 Fed. Reg. 39003, 39004 (proposed Aug. 5, 2009)

(before § 7611 was enacted, limitations on church examinations were "somewhat vague and relied on internal IRS procedures to protect the rights of a church in the examination process."). Without updated and finalized regulations, churches like GSH lack due process and clarity—the existing regulations state that an appropriate Regional Commissioner (or higher official) will approve church tax examinations. The IRS is accountable to the regulations it developed and should be required to ensure that a Regional Commissioner *or higher* official fulfills this role.

Notably, the Secretary of the Treasury, the Commissioner of the IRS, and the Deputy Commissioner for Services and Enforcement are all positions that comply with the "no lower than that of a principal Internal Revenue officer for an internal revenue region" standard under § 7611(h)(7). Thus, without finalizing updated regulations, the IRS may comply with the statute and regulations by securing the approval of any one of these sufficiently high Treasury officials to begin a church tax inquiry.

A range of scholars, practitioners, and exempt organizations have provided feedback on the IRS's 2009 proposed regulations—many

critical of both the IRS's proposed selection of the Director of Exempt Organizations and of the TEGE Commissioner. As J. Michael Martin describes in great detail in *Why Congress Adopted the Church Audit Procedures Act and What Must Be Done to Restore the Law for Churches and the IRS*, commenters on the proposed regulations ranged from the conservative Alliance Defending Freedom to the Americans United for the Separation of Church and State. 29 Akron Tax Journal 1, 16-17 (2014). Collectively, they did not view either the Director of Exempt Organizations or the TEGE Commissioner as the optimal choice. Martin concludes that "[w]hile [selecting the TEGE Commissioner] is certainly a more plausible alternative than the Treasury's previous proposals of DEOE [Director of Exempt Organizations, Examinations] and DEO [Director of Exempt Organizations], this was not viewed as the ideal solution by any of those providing feedback to the Treasury on its proposed regulations in 2009." *Id.* at 24.

These scholars, practitioners, and exempt organizations are correct. The TEGE Commissioner cannot fulfill the impartial role played by the Regional Commissioner because the position directly oversees enforcement activities for exempt organizations, including

churches. CAPA reflects Congress's finely tuned balancing of churches' First Amendment rights and IRS enforcement responsibilities. *See* Hearing at 2 (statement of Sen. Charles Grassley). This balance purposefully separates EO enforcement from the reasonable belief determination. Attorney and former IRS Director of Exempt Organizations Marcus Owens observes:

> "It is easy to see why Congress did not put the office responsible for EO enforcement in charge of this review process. As in 1969, the express purpose of such review was to prevent unnecessary IRS scrutiny of churches. The principal sponsors of section 7611 believed this check was necessary to prevent churches' constitutional protections from being 'pushed aside' by overzealous IRS enforcers. Thus, officials responsible for reviewing and approving church tax inquiries and examinations needed to be sufficiently detached from charitable sector enforcement efforts to weigh the needs of such enforcement against First Amendment concerns dispassionately."

See Tax Notes, *Attorney Makes Recommendation Regarding IRS Inquiries of Churches* (Oct. 13, 2009), https://www.taxnotes.com /research/federal/other-documents/public-comments-on-regulations/attorney-makes-recommendation-regarding-irs-inquiries-of-churches/wjmp.

Regional Commissioners were appropriately detached and independent from church tax inquiries and examinations in order to

create a degree of impartiality. *Id.* Unlike Regional Commissioners, the TEGE Commissioner directly oversees church tax compliance enforcement. The TEGE Commissioner works alongside other EO officials to identify and implement tax compliance priorities among exempt organizations. Thus, the TEGE Commissioner does not provide the check on IRS power that Congress intended and does not constitute a sufficiently high-level Treasury official for the purposes of § 7611. These levels of separation also benefit the IRS; CAPA's procedural protections "allow the IRS to shield itself against possible criticisms for haphazardly intruding into the sensitive area of reviewing church records and activities." Martin, *supra*, at 3.

The Government accuses GSH of presuming bias on the part of the TEGE Commissioner. Gov. Br. at 55 ("taxpayer ascribes partiality to the upper echelons of the IRS"). Under the Government's reasoning, GSH should simply trust the TEGE Commissioner to evaluate church tax inquiries dispassionately. But GSH has no way of knowing whether any individual TEGE Commissioner—or other exempt organizations official—has partiality. Nor should it need to. CAPA's sufficiently high Treasury official requirement—like our entire system of government—

has an embedded system of checks and balances. After all, as James Madison wrote, "a dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. This policy [supplies] by opposite and rival interests, the defect of better motives[.]" *The Federalist No. 51* (James Madison). GSH merely asks that the IRS abide by the carefully weighted system of checks and balances already enshrined in CAPA.

The Government fails to consider the breadth and independence of the former Regional Commissioner role by focusing almost exclusively on hierarchy and step counting. But it "is too narrow of an exercise to simply point to a box on the current organizational chart and see if it is at the same level as one on the pre-1998 organizational chart." *See* Akins, *supra,* at 29. The express language of § 7611 mandates that the official making the reasonable belief determination be "appropriate[ly] high-level." 26 U.S.C. § 7611(a)(2). This phrase encompasses more than a position on an organizational chart; the official making the reasonable belief determination must also be *appropriate* for this responsibility. In other words, the official must—by virtue of their position—effectuate Congress's desire to provide a check on EO enforcement power. The

TEGE Commissioner is not an appropriate high-level Treasury official and so this church tax inquiry and examination have not been properly authorized.

IV. 26 U.S.C. § 7611(e) does not foreclose this petition.

Lastly, the Government asks the Court to dismiss the petition to quash because § 7611(e)(1) limits remedies for noncompliance with CAPA to a stay of action in a proceeding to *enforce* a summons. Because this proceeding involves a petition to quash a summons, the Government reasons that § 7611's safeguards do not apply. This argument was not fully briefed before the district court and the district court correctly disregarded it. This Court should do the same. The Government's narrow interpretation of § 7611(e) ignores the larger context of CAPA and this case, and, as discussed above, also permits the IRS to create an end-run around CAPA's requirements.

First, this petition to quash involves the type of issue contemplated by the § 7611(e) and the regulations. § 7611(e) limits the reasons why a church may challenge IRS compliance with CAPA as well as the remedies available to the church. Gov. Br. at 31-32. For one, CAPA provides that a church is entitled to a remedy under the statute

when the IRS fails to obtain written approval of an appropriate high-level Treasury official. Treas. Reg. § 301.7611-1, Q&A 17. Here, GSH asserts that the summons to Kaw Valley Bank is unenforceable because an appropriate, high-level Treasury official did not authorize the underlying church tax inquiry or examination.

Second, the Government argues that the limitations contained in § 7611(e)(1) are consistent with Congress's purpose to exclude third-party summons from the requirements of § 7611. But this argument undercuts CAPA's broader aims. CAPA was intended to ensure that "churches are protected from unfounded examinations." Hearing at 10 (testimony of Senator Charles Grassley). So, it would be illogical to assume that Congress intended to permit the IRS to freely summons records pursuant to an unauthorized inquiry or examination. Congress "intend[ed] that the IRS will be prohibited from using information obtained from third party bank records to avoid the purposes of the church audit procedures." H.R. Rep. No. 98-861, at 1106.

If the Court accepts the Government's reasoning, the IRS may avoid the requirements of CAPA while investigating a church by seeking identical records from third parties when churches assert their

constitutional rights or any objections to the IRS's compliance with CAPA. Here, the IRS first sought GSH's bank records through an information document request issued pursuant to its ongoing church tax examination. Appx. Vol. 1 at A61. GSH objected. Appx. Vol. 1 at A159-160. Then, the IRS sought the same GSH bank records through a third-party summons, thereby avoiding GSH's assertion of its constitutional rights under the statute. Appx. Vol. 1 at A62-64. This end-run around CAPA's requirements makes the statute largely superfluous. As discussed above, the rule created by the *Bible Study Time* court permits precisely this result. Further, the Government's position may leave churches without recourse entirely. The Government's reading of § 7611(e) would leave a church unable to litigate the validity of the underlying audit in any context except for a summons enforcement proceeding. Under the Government's interpretation of §7611(e)(2), the church would have no available remedy even after receiving an unfavorable determination or revocation of exempt status provided the IRS investigates the church without attempting to enforce a summons directly on the church.

Yet, the Government argues a church is still protected from the IRS's noncompliance in a church investigation because, while it does not have to comply with § 7611 for third-party summons, the IRS "cannot make a determination that a church is not entitled to an exemption or assess tax for unrelated business income against a church solely on the basis of third-party records without first complying with § 7611." But the Government does not mention that its interpretation of § 7611(e)(2) eliminates any remedy for the church for the IRS's noncompliance when such determination is made.

The two other cases the Government relies on are inapposite here. And, to follow these precedents would unduly limit churches' rights to seek a remedy under § 7611(e). In *Southern Faith Ministries v. Geithner*, the plaintiffs challenged the approval of the appropriate, high-level Treasury official before the IRS had issued any summons to the church or other parties. 660 F. Supp. 2d 54 (D.D.C. 2009). The plaintiffs requested an entirely different form of relief not contemplated in the statute: a writ of mandamus requiring the approval of an appropriate official. *Id.* at 56. The court observed that "the present case does not involve a summons or a summons enforcement proceeding" and

did not grant a remedy. *Id.* In *Music Square Church v. United States*, the church filed a petition for declaratory relief to challenge the IRS's compliance with § 7611(c)(1)(A), which places a two-year time limit on church tax examinations. 218 F.3d 1367, 1368 (Fed. Cir. 2000). Again, § 7611(e) does not permit churches to seek a remedy for this form of noncompliance and the court ruled against the church. *Id.* at 1371. Neither case squarely addressed a church's right to seek a remedy under § 7611(e) in a petition to quash a summons when the IRS fails to properly authorize an inquiry or examination under § 7611(a). These precedents do not bind the Court in this instance and should not be interpreted to foreclose relief here. Again, this Court should not erode CAPA by expanding the holdings of these cases to the detriment of churches' constitutional rights.

CONCLUSION

This Court should reverse the district court's order denying the Petition to Quash and granting the Motion to Dismiss and should grant the Petition to Quash.

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November 15, 2023

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Tenth Circuit Rule 32, the attached Brief is proportionately spaced, has a typeface of Century Schoolbook, 14 points or more and contains 4,276 words.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made;

(2) the hard copies submitted to the clerk are exact copies of the ECF submission;

(3) the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, SentinelOne 22.3.4.612, and according to the program is free of viruses.

November 15, 2023

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