

# No. 23-3063

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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GOD'S STOREHOUSE TOPEKA CHURCH,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

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ORAL ARGUMENT REQUESTED

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ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT OF KANSAS  
JUDGE DANIEL D. CRABTREE  
No. 22-4014-DDC-TJJ

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BRIEF FOR THE APPELLEE

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## GLOSSARY

<b>Term</b>	<b>Definition</b>
App. Vol. 1	Appendix
Br.	Appellant's Brief
I.R.C.	Internal Revenue Code
IRS	Internal Revenue Service
Taxpayer	God's Storehouse Topeka Church
TE/GE Commissioner	Commissioner of the IRS's Tax Exempt and Government Entities Division



## STATEMENT OF RELATED CASES

Pursuant to Tenth Circuit Rule 28.2(C)(3), counsel for the United States state that while there currently is no related appeal, there is a case before the United States District Court for the District of Colorado, *God's Storehouse Topeka Church v. United States*, No. 22-mc-00046-PAB (D. Colo. Feb. 28, 2022), stemming from the same IRS investigation of God's Storehouse Topeka Church at issue in this case. In that case, the IRS issued a third-party summons to a financial services company called FISERV. God's Storehouse Topeka Church filed a similar petition to quash in the District of Colorado, and the Government filed a motion for summary denial. Magistrate Judge Scott Varholak has issued a report and recommendation granting the Government's motion and denying the petition to quash. R. & R., *God's Storehouse Topeka Church v. United States*, No. 22-mc-00046-PAB, 2023 WL 2824525 (D. Colo. Feb. 22, 2023), ECF No. 32. The District Court for the District of Colorado has not yet acted on the report and recommendation.

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**BRIEF FOR THE APPELLEE**

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**JURISDICTIONAL STATEMENT**

This Court has jurisdiction over this case, as did the District Court. The IRS issued a third-party summons to Kaw Valley Bank in order to obtain information material to its investigation of God’s Storehouse Topeka Church (“taxpayer”). (App. Vol. 1 at A29.)<sup>1</sup>

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<sup>1</sup> “App. Vol. 1” refers to the appendix filed with taxpayer’s opening brief. “Br.” refers to taxpayer’s opening brief.

Taxpayer timely petitioned to quash the summons in the district court pursuant to 26 U.S.C. (I.R.C.) § 7609(b)(2). (App. Vol. 1 at A8-A26.) In response, the United States moved for summary denial of the petition to quash. (App. Vol. 1 at A42-A56.) The District Court had jurisdiction under I.R.C. § 7609(h)(1). After a magistrate judge recommended dismissing the petition to quash and granting the United States' motion for summary denial, the District Court adopted the magistrate judge's report and recommendation. (App. Vol. 1 at A154, A236-A237.) The District Court's judgment of March 24, 2023, dismissing the petition to quash and granting the United States' motion for summary denial, is a final judgment that disposed of the parties' claims. (App. Vol. 1 at A237-A238.)

Taxpayer timely appealed the District Court's judgment on April 21, 2023. (App. Vol. 1 at A239); 28 U.S.C. § 2107(b); Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

### **STATEMENT OF THE ISSUES**

1. Whether taxpayer is statutorily precluded from raising the IRS's alleged failure to comply with the "high-level Treasury official" requirement for commencing a church tax inquiry in this proceeding to

quash a third-party summons issued by the IRS in connection with that inquiry.

2. Whether the District Court correctly held that, for purposes of demonstrating the validity of a third-party summons issued in connection with a church tax examination, the IRS is not required to demonstrate its compliance with the “high-level Treasury official” requirement in order to satisfy the generally applicable “administrative steps” requirement articulated in *United States v. Powell*, 379 U.S. 48, 57-58 (1964).

3. Whether, in any event, the District Court correctly found that the IRS complied with the “high-level Treasury official” requirement by obtaining the approval of the Commissioner of its Tax Exempt and Government Entities Division before commencing the church tax inquiry that led to the issuance of the third-party summons at issue in this case.

## **STATEMENT OF THE CASE**

### **A. Procedural overview**

This case arises out of a third-party summons that the IRS issued to Kaw Valley Bank in order to obtain information material to its

investigation of taxpayer God’s Storehouse Topeka Church. (App. Vol. 1 at A29.) Taxpayer petitioned the District Court to quash the summons pursuant to I.R.C. § 7609(b)(2). (App. Vol. 1 at A8-A26.) The case was referred to a magistrate judge. (App. Vol. 1 at A5.) After the United States moved for summary denial of the petition to quash, the magistrate judge recommended dismissing the petition and granting the United States’ motion. (App. Vol. 1 at A42-A56; App. Vol. 1 at A154.) The District Court adopted the magistrate judge’s report and recommendation. (App. Vol. 1 at A236-A237.)

#### **B. Background on the IRS’s summons authority**

Congress has authorized the Secretary of the Treasury “to make the inquiries, determinations, and assessments of all taxes” imposed by the Internal Revenue Code, I.R.C. § 6201(a), and the Secretary has delegated that duty to the Commissioner of Internal Revenue. Treas. Reg. (26 C.F.R.) §§ 301.7602-1(b), 301.7701-9. To discharge this responsibility, the Commissioner is authorized in § 7602 to summons records and other documents that may be relevant to a tax inquiry. Courts consistently have held that § 7602 grants the IRS “expansive information-gathering authority.” *United States v. Arthur Young & Co.*,

465 U.S. 805, 816 (1984); *see also United States v. Balanced Fin. Mgmt., Inc.*, 769 F.2d 1440, 1446 (10th Cir. 1985) (Congress granted the IRS broad latitude to adopt tax enforcement techniques).

Summonses that are directed to third parties (i.e., individuals and entities other than the individual or entity being investigated) are subject to special procedures prescribed by I.R.C. § 7609.

Section 7609(a)(1) requires the IRS to give notice of any third-party summons to “any person ... who is identified in the summons.” Under I.R.C. § 7609(b)(2)(A) and (C), persons entitled to notice of the summons may bring an action in district court to quash the summons, and the summoned party may intervene.

Churches are not excepted from the IRS’s investigative authority. Instead, in accordance with the Church Audit Procedures Act, codified at I.R.C. § 7611, the IRS can investigate churches, but it must follow specific procedures before beginning an inquiry regarding the church’s exempt status or whether the church is engaged in activities subject to taxation. I.R.C. § 7611(a)(2). Those procedures include written approval of the inquiry by “an appropriate high-level Treasury official” and advance written notice to the church. I.R.C. § 7611(a)(2)-(3). To

“the extent necessary” to determine tax liability, the IRS can examine “church records”—defined as “all corporate and financial records regularly kept *by a church*”—after providing the church written notice of the proposed examination and an opportunity for a conference with the IRS. I.R.C. § 7611(b), (h)(4)(A) (emphasis added). The notice of the examination must include “a copy of all documents which were collected or prepared by the Internal Revenue Service for use in such examination and the disclosure of which is required by the Freedom of Information Act.” I.R.C. § 7611(b)(3).

Section 7611 represents an effort to balance the rights of “legitimate churches” with the IRS’s responsibility to investigate and eliminate “church tax avoidance schemes.” *United States v. Living Word Christian Ctr.*, Civ. No. 08-MC-37ADM/JJK, 2009 WL 250049, at \*2 (D. Minn. Jan. 30, 2009) (unpublished). Thus, while § 7611(b)(1)(A) limits the purpose for which the IRS may examine church records, § 7611(h)(4) specifically excludes from the definition of “church records” documents that the IRS acquires pursuant to a summons to which § 7609 applies, i.e., a summons issued to a third party. I.R.C. § 7611(h)(4).

A church's remedies for the IRS's failure to perform the administrative requirements outlined in § 7611 are limited. As relevant here, if the IRS fails to provide notice to the church of its tax inquiry or tax examination, fails to provide the church with an opportunity to conference before the examination, or fails to obtain the written approval of the "appropriate high-level Treasury official" before commencing the inquiry, the church is entitled to a stay of any proceeding to compel compliance with a summons related to the inquiry or examination "until the court finds that all practicable steps to correct the noncompliance have been taken." I.R.C. § 7611(a)(2), (e)(1) (flush language); *see id.* § 7611(e)(1)(A), (B); Treas. Reg. § 301.7611-1 at A-17. No other type of suit can be brought, and no defense may be raised in any other type of proceeding, as a result of the IRS's noncompliance with the requirements in § 7611; the remedy in § 7611(e)(1) is exclusive. I.R.C. § 7611(e)(2).

While the IRS can summons documents from a third party without meeting the requirements of § 7611, it 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. H.R. Rep. No. 98-861, at 1106 (1984) (Conf. Rep.); Treas. Reg. § 301.7611-1 at A-5. In other words, the IRS cannot use information obtained from a third-party summons to avoid the safeguards provided to churches in § 7611. H.R. Rep. No. 98-861, at 1106 (“The conferees further intend that the IRS will be prohibited from using information obtained from third party bank records to avoid the purposes of the church audit procedures.”).

**C. The IRS’s third-party summons to Kaw Valley Bank**

The IRS issued a summons to third-party Kaw Valley Bank as part of its ongoing investigation into taxpayer God’s Storehouse Topeka Church, a Kansas not-for-profit corporation. (App. Vol. 1 at A204.) Taxpayer self-identifies as a church,<sup>2</sup> and it also operates a thrift store and coffee shop. (App. Vol. 1 at A204-A205.)

Richard Kloos is an officer of taxpayer, as well as a state senator in Kansas. (App. Vol. 1 at A58, A205.) When he ran for that office in 2020, his campaign signs read “Rick Kloos – Kansas Senate,” alongside the words “Founder of God’s Storehouse.” (App. Vol. 1 at A60, A205.)

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<sup>2</sup> An organization that self-identifies as a church need not formally apply to the IRS for tax-exempt status. I.R.C. § 508(c)(1)(A).

The campaign signs were highlighted in various media articles during the time of the campaign. (App. Vol. 1 at A60.)

In February 2021, the IRS assigned Revenue Agent Kesroy C. Henry to investigate whether taxpayer had improperly engaged in political campaign intervention,<sup>3</sup> and to assess whether the IRS should begin a formal church tax inquiry for the years 2019 and 2020. (App. Vol. 1 at A58, A205.) As defined in I.R.C. § 7611(h)(2), a “church tax inquiry” is an inquiry to a church to determine whether the church is tax-exempt, or whether it is carrying on a trade or business unrelated to its status as a church or is otherwise engaged in activities that may be subject to taxation.

Through his examination, Henry learned that taxpayer may be subject to additional tax. As Henry discovered, taxpayer’s website did not reveal any information about church services, but, instead, advertised taxpayer’s thrift store and coffee shop. (App. Vol. 1 at A59); *see also* God’s Storehouse, [www.gshtopeka.org](http://www.gshtopeka.org) (last visited Sept. 1,

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<sup>3</sup> A church that engages in political campaign intervention may lose its tax-exempt status. I.R.C. 501(c)(3) (defining tax-exempt organizations as ones that do not intervene in any political campaign on behalf of any candidate for public office).

2023). According to the website, taxpayer sells coffee to patrons at cost, as part of “the overall experience at God’s Storehouse.” (App. Vol. 1 at A59.) Henry also determined from taxpayer’s W-2s that taxpayer had failed to withhold (and pay to the IRS) employment taxes from the wages it paid to Richard Kloos and his wife Pennie Kloos, even though it had done so with respect to wages paid to other employees. (App. Vol. 1 at A59.)

Based on this information, Henry sought approval to open a church tax inquiry regarding taxpayer. (App. Vol. 1 at A205.) Sunita B. Lough, the Commissioner of the IRS’s Tax Exempt and Government Entities Division (“TE/GE Commissioner”) at the time, approved the inquiry in June 2021. (App. Vol. 1 at A205.) Henry subsequently issued to taxpayer a notice of church tax inquiry, which advised that the IRS had opened an inquiry based on the IRS’s concerns that taxpayer was operating as a thrift shop rather than as a church; may have impermissibly engaged in political campaign intervention in 2020; and may be liable for unrelated business income tax from the operation of the coffee shop. (App. Vol. 1 at A206.) *See generally* I.R.C. §§ 501, 511-513. The notice also advised that taxpayer may be liable for

employment taxes on wages that it had paid to Richard and Pennie Kloos. (App. Vol. 1 at A206.)

After reviewing taxpayer's responses to the notice and the documents taxpayer submitted therewith, Henry still had concerns about taxpayer's tax-exempt status, as well as its potential liability for additional tax. (App. Vol. 1 at A206.) As a result, Henry sought approval to begin a church tax examination. (App. Vol. 1 at A206.) As defined in the Internal Revenue Code, a church tax examination is an examination of church records or a church's religious activities for purposes of determining whether the church is tax-exempt because of its church status, or whether the church (even if otherwise tax-exempt) is engaged in activities subject to taxation. I.R.C. § 7611(h)(3). TE/GE Commissioner Lough approved the church tax examination in September 2021. (App. Vol. 1 at A206.) Henry issued a notice of the church tax examination to taxpayer, explaining the IRS's concerns and the records it was interested in examining. (App. Vol. 1 at A206.) The church tax examination notice also offered a pre-examination conference. (App. Vol. 1 at A206.) The parties attended a pre-examination conference in October 2021, but the conference did not

resolve any of the IRS's concerns. (App. Vol. 1 at A206.) The IRS thereafter notified taxpayer that the IRS would move forward with its examination. (App. Vol. 1 at A206.)

The IRS issued an information and document request to taxpayer, seeking, among other things, copies of taxpayer's bank statements from January 1, 2019 to December 31, 2020. (App. Vol. 1 at A206.) Henry explained to taxpayer that the IRS needed the bank statements to independently verify the coffee shop and thrift store transactions that taxpayer had listed on its general ledger and income statements. (App. Vol. 1 at A61-A62.) He further explained that the IRS also planned to use the bank statements to examine the compensation paid to Richard and Pennie Kloos, and to determine whether taxpayer had engaged in any political campaign intervention. (App. Vol. 1 at A61-A62.)

Taxpayer objected to the request for its bank statements and refused to provide them. (App. Vol. 1 at A206.) On December 7, 2021, Henry sent a letter to taxpayer advising that, as part of its examination of taxpayer, the IRS intended to contact third parties during the one-year period starting on January 22, 2022, and ending on January 22, 2023. (App. Vol. 1 at A62, A207.) *See* I.R.C. § 7602(c)(1).

In order to obtain the documents that taxpayer refused to supply, the IRS issued a third-party summons to Kaw Valley Bank on February 8, 2022. (App. Vol. 1 at A29, A207.) The IRS knew that taxpayer banked with Kaw Valley Bank because the bank had sent taxpayer a Form 1098, a document that was part of the IRS's records. (App. Vol. 1 at A62.) Taxpayer itself had not disclosed its account with Kaw Valley Bank in the information it had provided to the IRS. (App. Vol. 1 at A62.) The summons to the bank requested monthly statements, records of deposits, cancelled checks, and financial statements, among other items, for the period beginning on January 1, 2019, through December 31, 2020. (App. Vol. 1 at A35, A207.) The summoned records were set to be examined on March 7, 2022. (App. Vol. 1 at A29.) As Henry declared, the IRS did not already have this information. (App. Vol. 1 at A63.) Henry gave notice of the summons to taxpayer on February 8, 2022, and followed all of the other required administrative procedures in issuing the summons. (App. Vol. 1 at A63-A64, A79, A207.) As of the date of this brief, Kaw Valley Bank has not complied with the summons. (App. Vol. 1 at A207.)

**D. The District Court proceedings**

**1. Taxpayer's petition to quash and the IRS's motion for summary denial of the petition**

Taxpayer petitioned the District Court to quash the third-party summons issued to Kaw Valley Bank, arguing primarily that the IRS had failed to meet the heightened requirements of I.R.C. § 7611 for church tax inquiries and examinations. (App. Vol. 1 at A8-A26.)

According to taxpayer, the IRS had failed to obtain the appropriate high-level Treasury official authorization. (App. Vol. 1 at A24-A25.)

Taxpayer also claimed that the IRS had failed to restrict its examination to only those records that were “necessary to determine” tax liability per § 7611(b)(1)(A), and had failed to provide to taxpayer documents related to its investigation per § 7611(b)(3)(A)(iv), including a copy of a letter the IRS had purportedly received from the Freedom from Religion Foundation alleging that Richard Kloos's campaign signs were unlawful. (App. Vol. 1 at A11-A12, A15-A16, A24.) Regarding its claim that the IRS had summoned unnecessary documents, taxpayer maintained that it “unquestionably” was a church and that it already had provided the IRS all of the necessary information to support that conclusion. (App. Vol. 1 at A16-A20.)

Taxpayer argued in the alternative that the IRS had not issued the summons in good faith, citing the Supreme Court's decision in *United States v. Powell*, 379 U.S. 48 (1964). (App. Vol. 1 at A13-14 (citing *Powell*, 379 U.S. at 57-58.)) In that case, the Supreme Court established four criteria for establishing the IRS's good faith in issuing an administrative summons. The test asks whether (1) the IRS is conducting the 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 the requisite administrative steps. *Powell*, 379 U.S. at 57-58. Taxpayer argued that the Government could not meet three of the four prongs of the *Powell* test, but it expounded only on its argument as to the first prong. (App. Vol. 1 at A14.) It contended that the IRS had no bona fide purpose in summoning the bank records, and that the investigation instead was "initiated at the behest of Pastor Kloos'[s] political opponents through the [Freedom from Religion Foundation]." (App. Vol. 1 at A23-A24.) Relatedly, taxpayer argued that it had not engaged in any improper political intervention when Richard Kloos ran for the Kansas legislature. (App. Vol. 1 at A19-A20.) The signs,



taxpayer admitted, stated that Richard Kloos was the “Founder of God’s Storehouse,” but taxpayer alleged that Kloos had paid for the signs “wholly independently of God’s Storehouse.” (App. Vol. 1 at A11.) And, as taxpayer asserted, the state’s ethics commission had approved the signs prior to their display. (App. Vol. 1 at A11.)

The Government moved for summary denial of taxpayer’s petition to quash, arguing that it had met its prima facie burden of demonstrating the summons’s validity. (App. Vol. 1 at A49.) It emphasized that § 7609 and the Supreme Court’s decision in *Powell*, 379 U.S. at 57-58, governed the court’s analysis of whether the third-party summons was validly issued, not § 7611. (App. Vol. 1 at A49-A52.) The Government cited the language in § 7611 that specifically excludes records acquired via third-party summons from its reach. (App. Vol. 1 at A52-A53 (citing I.R.C. § 7611(h)(4).) As the Government explained, each of the courts that had examined whether § 7611 applied to third-party summonses concluded that it did not, and the legislative history of § 7611 supported that conclusion. (App. Vol. 1 at A52-A53.)

The Government also highlighted that § 7611(e) limited a taxpayer’s remedy for the IRS’s non-compliance with the administrative

procedures in § 7611 to a temporary stay of any summons enforcement proceeding—a remedy distinct from quashal of the summons. (App. Vol. 1 at A53.) As the Government explained, taxpayer’s arguments based on the IRS’s alleged violations of § 7611 therefore were inapplicable in this proceeding. (App. Vol. 1 at A53.)

The Government further argued that the IRS’s summons to Kaw Valley Bank complied with the requirements in § 7609 and *Powell*. (App. Vol. 1 at A49.) In a declaration from Revenue Agent Henry that it submitted with its motion, the Government detailed its various purposes for summoning the bank records, which included evaluating whether taxpayer could maintain its tax-exempt status and whether it was liable for any additional tax, purposes authorized by the Internal Revenue Code itself. (App. Vol. 1 at A49-A50 (citing I.R.C. § 7602(a)), A61-A64.) As the Government explained, the documents it sought from the bank—monthly statements, records of deposits, cancelled checks, etc.—may be relevant to these purposes. Such information might shed light on whether taxpayer primarily operated as a church or, instead, as a thrift store or coffee shop; whether it had unrelated business taxable income; whether it had expenses related to Richard Kloos’s campaign;

and whether it may be liable for additional employment taxes on wages paid to Richard and Penny Kloos. (App. Vol. 1 at A50-A51, A64.) The Government also asserted that it did not already have the bank records, and that it had followed the requisite administrative steps before issuing the third-party summons to Kaw Valley Bank. (App. Vol. 1 at A51, A63-A64.)

The Government argued in the alternative that even if § 7611 applied to the third-party summons at issue, the IRS had met the heightened procedural requirements of that provision. (App. Vol. 1 at A54.) In particular, the Government maintained that the IRS had obtained the requisite approval from the appropriate high-level Treasury official before beginning its church tax inquiry, and that the IRS was not required to include a copy of the Freedom from Religion Foundation letter with the notice of examination it had issued to taxpayer. (App. Vol. 1 at A54-A55.) *See* I.R.C. § 7611(a)(2), (b)(3)(A)(iv).

In its response to the Government's motion, taxpayer argued that the court was required to infer from its petition and Richard Kloos's affidavit that it was a church and not a thrift store; that it did not

engage in any political activity or have any unrelated business taxable income; that it did not owe employment taxes on wages paid to Richard and Penny Kloos; and that the IRS's church tax inquiry was politically motivated. (App. Vol. 1 at A83, A86; *see id.* at A106-A107.) In response to the Government's argument that § 7609 was controlling, taxpayer argued that the IRS could not obtain third-party records regarding churches because such actions would "sidestep" the protections in § 7611. (App. Vol. 1 at A87-A88.)

## **2. The magistrate judge's report and recommendation**

The District Judge referred the petition and motion to Magistrate Judge Teresa James. Applying *Powell*, the magistrate judge concluded that the Government had sufficiently made its prima facie case under § 7609 and thus recommended that taxpayer's petition to quash be dismissed and the Government's motion for summary denial of taxpayer's petition be granted. (App. Vol. 1 at A154.)

The magistrate judge first determined that under the "plain statutory language" in § 7611(h)(4)(B) (excepting records obtained through third-party summonses from the definition of "church records"), the third-party summons that the IRS issued to Kaw Valley Bank was

not subject to the heightened requirements in § 7611, and that § 7609 governed the analysis instead. (App. Vol. 1 at A131-A132.) She also noted that Treas. Reg. § 301.7611-1 at A-5, expressly provides that records held by a third-party bank are not church records. (App. Vol. 1 at A131-A132.) As the magistrate judge concluded, “the IRS is permitted access to records summoned from a third party without meeting the requirements of the church audit procedures,” including the heightened relevance standard (i.e., that the IRS review church records only “to the extent necessary” to determine tax liability). (App. Vol. 1 at A134.)

The magistrate judge next ruled that, based on the four *Powell* factors, the IRS had issued the summons in good faith. (App. Vol. 1 at A137-A153.) As to the first *Powell* factor, she reasoned that the IRS’s multiple purposes for issuing the third-party summons—determining whether taxpayer operated as a thrift shop rather than as a church, whether taxpayer may have unrelated business income subject to tax, whether taxpayer engaged in prohibited political campaign intervention, and whether taxpayer may be liable for additional

employment taxes—were consistent with the IRS’s duty to assess taxes. (App. Vol. 1 at A138-A148.)

The magistrate judge rejected taxpayer’s contention that the Freedom from Religion Foundation letter supported an inference that the IRS’s issuance of the third-party summons was politically motivated, an allegation she characterized as “sheer supposition.” (App. Vol. 1 at A141.) Nor did she find any merit in taxpayer’s argument that the Kansas ethics commission’s approval of the campaign signs at issue precluded a finding of political campaign intervention for federal tax purposes. (App. Vol. 1 at A141.) Instead, the magistrate judge found that the IRS’s investigation into the campaign signs was a legitimate purpose underlying its issuance of the third-party summons, as those signs did not include any disclaimers that Richard Kloos’s affiliation with taxpayer was provided for identification purposes only. (App. Vol. 1 at A142.)

The magistrate judge also held that the Government had demonstrated that the requested bank documents were potentially relevant to the IRS’s investigation, which is a sufficient nexus under § 7609. (App. Vol. 1 at A139-A140, A144-A148.) She therefore held

that the Government had satisfied the relevancy prong of the *Powell* test. (App. Vol. 1 at A139-A140, A149.)

Regarding the third *Powell* element, the magistrate judge determined that the IRS did not already have the information sought. Not only had Revenue Agent Henry declared that the IRS did not already possess the information, but taxpayer admitted that it had refused to produce its financial records. (App. Vol. 1 at A149.) The magistrate judge held that even if some of the relevant information may have been available from public campaign finance records, such a finding would not rebut the IRS's showing that it did not already possess the information. (App. Vol. 1 at A143.)

The magistrate judge next concluded that through Revenue Agent Henry's declaration, the Government had made a prima facie showing that the IRS had followed all of the requisite administrative steps, thereby satisfying the fourth *Powell* prong. (App. Vol. 1 at A150.) Even though she already had ruled that § 7611 did not apply to the summons issued to Kaw Valley Bank (App. Vol. 1 at A135), the magistrate judge rejected taxpayer's contention that the IRS had not complied with that

Section's heightened administrative requirements.<sup>4</sup> (App. Vol. 1 at A150-A153.)

First, the magistrate judge rejected taxpayer's assertion that the IRS was required to provide it a copy of the Freedom from Religion Foundation letter pursuant to I.R.C. § 7611(b)(3)(A)(iv), which requires the IRS to include with a notice of church tax examination a copy of all documents it had collected for use in the examination. (App. Vol. 1 at A150.) Citing Treas. Reg. § 301.7611-1 at A-10, she concluded that the IRS was not required to disclose information that may reveal the identity of its informants. (App. Vol. 1 at A151-A152.)

The magistrate judge also determined that the IRS had obtained the requisite approval for its church tax inquiry from the appropriate high-level Treasury official per I.R.C. § 7611(a)(2) and (h)(7). (App. Vol. 1 at A152-A153.) She explained that while the Treasury Regulations provided that the appropriate high-level official was the Regional Commissioner or a higher Treasury official, the position of Regional

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<sup>4</sup> The magistrate judge (and the District Court) failed to address the Government's reliance on I.R.C. § 7611(e), the provision that limits an examinee's ability to challenge the IRS's compliance with the procedures under § 7611. *See supra* at 7, 16-17.



Commissioner no longer existed after the organizational restructuring of the IRS beginning in 1998 (which removed any regional configuration). (App. Vol. 1 at A152.) Noting that another district court had examined this same issue and had concluded that the TE/GE Commissioner was the logical counterpart to the Regional Commissioner after the restructuring, the magistrate judge found that taxpayer had failed to rebut the Government's showing that the IRS had obtained the requisite approval to open its inquiry into taxpayer's activities. (App. Vol. 1 at A152-A153.)

### **3. The District Court's opinion**

The District Court adopted the report and recommendation over taxpayer's objection. (App. Vol. 1 at A209, A236.) The court began by rejecting taxpayer's objection to the magistrate judge's conclusion that the IRS had issued its summons in the course of a valid church tax inquiry, ruling that an appropriate high-level official had signed off on the inquiry.<sup>5</sup> (App. Vol. 1 at A211-A215.) It agreed with other district

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<sup>5</sup> Although the District Court addressed the "high-level Treasury official" requirement in evaluating the validity of the church tax inquiry that led to the issuance of the third-party summons, it later rejected the notion that this requirement plays any part in the *Powell* analysis applicable to the summons itself. (App. Vol. 1 at A231 & n.4.)

courts that had found that the TE/GE Commissioner was comparable to the former Regional Commissioner—the official who had approved church tax inquiries prior to the IRS’s reorganization—because the TE/GE Commissioner had a similar rank to that of Regional Commissioners and had sufficiently broad responsibilities. (App. Vol. 1 at A214-A215.)

The District Court also rejected taxpayer’s argument that the magistrate judge had somehow misapplied I.R.C. § 7611(h)(4)(B), the provision that excepts documents acquired through a third-party summons from the definition of “church records” (which, per I.R.C. § 7611(b)(1)(A), the IRS may examine only “to the extent necessary” to determine tax liability). The court determined that taxpayer had failed to present “any cogent argument” why bank records should not qualify for the exception. (App. Vol. 1 at A218.) “In sum,” the court concluded, “Judge James correctly concluded that the IRS summons served on the bank doesn’t seek ‘church records,’ and thus the ‘extent necessary’ restriction in § 7611(b)(1)(A) doesn’t apply to it.” (App. Vol. 1 at A219.)

Turning to the *Powell* factors, the District Court agreed with the magistrate judge’s analysis in every respect except one. In holding that

the Government had met the fourth *Powell* factor by demonstrating that the IRS had followed the proper administrative steps required for third-party summonses in §§ 7602 and 7609, the court explicitly rejected taxpayer's claim that those administrative steps include the procedural requirements in § 7611. In particular, the court rejected the applicability of § 7611(b)(3)(A)(iv)'s document disclosure requirement, which taxpayer had cited in support of its argument that the IRS was required to provide it a copy of the Freedom from Religion Foundation letter. (App. Vol. 1 at A231.) But the court went on to hold that even if § 7611 applied, the magistrate judge had correctly held that the Government was not required to provide that letter to taxpayer. (App. Vol. 1 at A231-A234.)

Finally, the District Court adopted the magistrate judge's rejection of taxpayer's argument that an IRS third-party summons serves as a means of circumventing the requirements in § 7611. (App. Vol. 1 at A234-A235.) The court reasoned that, because the IRS cannot determine tax liability based solely on information acquired from third

parties without first complying with the procedures in § 7611, taxpayer's concerns were unfounded. (App. Vol. 1 at A234-A235.)<sup>6</sup>

### SUMMARY OF ARGUMENT

The IRS is investigating taxpayer to determine whether it operates as a church, or, instead, as a thrift store and coffee shop. In conducting this investigation, the IRS summoned financial records from third-party Kaw Valley Bank—information which may shed light on taxpayer's status as a church and any potential tax liability. In an attempt to quash the summons, taxpayer argues that the IRS failed to obtain the requisite approval for its church tax inquiry from a high-level Treasury official pursuant to I.R.C. § 7611(a)(2). But that requirement does not apply to the third-party summons at issue here.

As a threshold matter, § 7611(e) prohibits taxpayer from raising this challenge in this proceeding. Although the regulations under § 7611 include compliance with the “high-level Treasury official” requirement among the available procedural challenges, the remedy is

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<sup>6</sup> The court also denied taxpayer's request for limited discovery into its allegation of the IRS's improper motive. It noted that taxpayer had waived that request by failing to raise it before the magistrate judge and, in any event, had not demonstrated any extraordinary circumstances warranting discovery. (App. Vol. 1 at A235-A236.)

limited to a stay of any proceeding to compel compliance with a summons. I.R.C. § 7611(e)(1). Given that a proceeding to quash a summons—such as the instant case—is distinct from a proceeding to compel compliance with a summons, taxpayer has no recourse under § 7611 in this proceeding. And § 7611(e)(2) makes clear that the remedy in § 7611(e)(1) is exclusive. Accordingly, any analysis of the requirements in § 7611 by the magistrate judge and the District Court was wholly gratuitous.

In any event, the requirements in § 7611—including the “high-level Treasury official” requirement—apply when the IRS commences a church tax inquiry or examines church records or a church’s religious activities; they do not apply to the issuance of a third party-summons in connection with such an inquiry or examination. Instead, third-party summonses are subject to the requirements in § 7609 and those articulated by the Supreme Court in *Powell*. In that regard (and contrary to taxpayer’s suggestion), the Government is not required to demonstrate compliance with the “high-level Treasury official” requirement in § 7611(a)(2) in order to satisfy the “administrative steps” factor of the *Powell* analysis.

The courts that have analyzed this issue, including the Ninth Circuit, agree that § 7611 has no application to third-party summonses, even those issued in the course of a church tax inquiry or examination. And the legislative history of § 7611 further bolsters this point. Because § 7609 controls here, the magistrate judge and District Court correctly evaluated whether the IRS complied with the requirements in § 7609, as well as the applicable standard from *Powell* for demonstrating good faith. As the magistrate judge found in her recommendation, which the District Court adopted, the United States made its prima facie *Powell* showing, and taxpayer failed to refute it. Taxpayer did not challenge that ruling in its opening brief, and it therefore has waived any such challenge.

Even if taxpayer were not statutorily precluded from challenging the IRS's compliance with § 7611(a)(2) in this proceeding, and even if the "high-level Treasury official" requirement were somehow incorporated into the "administrative steps" factor of the *Powell* analysis, the IRS properly obtained sign-off of the church tax inquiry from an appropriate high-level Treasury official. Although the minimum-level position described in the statute and identified in the

corresponding regulation no longer exists following the IRS's restructuring in the late 1990s, the IRS has designated the TE/GE Commissioner as the current high-level Treasury official authorized to approve church tax inquiries. At only two levels removed from the Commissioner of Internal Revenue, the TE/GE Commissioner is clearly a high-level Treasury official. The courts and commentators that have analyzed this issue agree that the rank of TE/GE Commissioner is equivalent to that of the now-abolished Regional Commissioner referenced in the regulations, and that an authorization by the TE/GE Commissioner suffices for purposes of § 7611(a)(2).

## ARGUMENT

**The District Court correctly dismissed taxpayer's petition to quash the third-party summons at issue in this case**

### Standard of review

“[B]ecause the district court's decision on the petition [to quash] turned on issues of law, [this Court] review[s] de novo.” *Standing Akimbo, LLC v. United States*, 955 F.3d 1146, 1155 (10th Cir. 2020); *see also id.* at 1155 n.4.

**A. Taxpayer is statutorily foreclosed from raising a challenge to the IRS’s compliance with § 7611 in this proceeding to quash a third-party summons**

This Court “ha[s] discretion to affirm on any ground adequately supported by the record, so long as the parties have had a fair opportunity to address that ground.” *United States v. Bacon*, 900 F.3d 1234, 1238 (10th Cir. 2018) (citation omitted). Taxpayer had the opportunity to respond to the Government’s § 7611(e) argument below (see App. Vol. 1 at A53), and it will have another opportunity to do so in its reply brief in this appeal, see *Bacon*, 900 F.3d at 1238. Although neither the magistrate judge nor the District Court addressed the § 7611(e) issue, see *supra* at 23 n.4, consideration of an alternative ground in the first instance on appeal is more appropriate where (as here) it “hinges on a question of statutory interpretation” and “is in the interests of judicial economy.” *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1264 (10th Cir. 2001). We invite the Court to consider the § 7611(e) issue at the outset because we believe it provides the most straightforward means of disposing of this case.

A taxpayer challenging the IRS’s compliance with § 7611 has a limited remedy—one that is not available in this proceeding. That



remedy is a stay of any action to *enforce* a summons issued in connection with a church tax inquiry or examination. I.R.C. § 7611(e)(1) (flush language). Although the regulations under § 7611 provide that the remedy is available where the IRS fails to obtain the written approval of the appropriate high-level Treasury official before commencing a church tax inquiry, Treas. Reg. § 301.7611-1 at A-17, a proceeding to quash a summons is distinct from a proceeding to enforce a summons. *See Bible Study Time, Inc. v. United States*, 240 F. Supp. 3d 409, 421 (D.S.C. 2017) (rejecting argument that § 7611(e) should be read to allow procedural challenges under § 7611 to be raised in the context of a petition to quash). And the exclusivity of § 7611(e)(1) is plain. *See* I.R.C. § 7611(e)(2) (“No suit may be maintained, and no defense may be raised in any proceeding (other than as provided in paragraph (1)), by reason of any noncompliance by the Secretary with the requirements of this section.”); *see also Music Square Church v. United States*, 218 F.3d 1367, 1370 (Fed. Cir. 2000) (confirming that “there is to be no judicial remedy for the IRS’[s] failure to comply with any of the requirements in section 7611, aside from the exclusive remedy described in subsection 7611(e)(1)”).

Taxpayer is thus statutorily foreclosed from challenging the IRS's compliance with § 7611 in this proceeding. As the District Court for the District of Columbia held in a similar case involving a challenge to the IRS's compliance with the "high-level Treasury official" requirement, any remedy available to the church arises "[i]f and when it is served with an IRS summons" and exists only in a summons *enforcement* proceeding. *S. Faith Ministries, Inc. v. Geithner*, 660 F. Supp. 2d 54, 56 (D.D.C. 2009). Accordingly, this Court may end its inquiry here.

**B. In any event, the District Court correctly held that the IRS need not demonstrate compliance with the "high-level Treasury official" requirement in § 7611(a)(2) to satisfy the fourth *Powell* factor**

Should the Court decide to press on, it may affirm on the basis that, as the District Court correctly held, the Government is not required to demonstrate compliance with § 7611(a)(2) in order to satisfy the "administrative steps" factor of the *Powell* analysis.

Acknowledging that the records the IRS summoned from Kaw Valley Bank are third-party records to which § 7611(b)'s requirements

do not apply,<sup>7</sup> taxpayer limits its appeal to its claim that the IRS nevertheless was required to meet the high-level authorization requirement in § 7611(a)(2). (Br. at 22-24.) Section 7611(a)(2) applies when the IRS seeks to commence a church tax inquiry, not when it issues a third-party summons (like the one issued to Kaw Valley Bank), even when it does so in the course of a church tax inquiry or examination. The express language of § 7611 is fatal to taxpayer's appeal.

As § 7611 explicitly provides, the protections in § 7611 apply when the IRS undertakes a church tax inquiry or a church tax examination. Section 7611(h)(2) defines a "church tax inquiry" as "any inquiry to a church (other than an examination)" to determine whether the church is tax-exempt or, even if generally tax-exempt, is subject to taxation with regard to certain of its activities. And § 7611(h)(3) defines "church

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<sup>7</sup> On appeal, taxpayer has not raised the arguments it raised below regarding the IRS's compliance with § 7611(b). Taxpayer has therefore waived its arguments that the documents the IRS summoned were not "necessary" as provided in § 7611(b)(1)(A), and that the IRS should have provided it with a copy of the Freedom from Religion Foundation letter pursuant to § 7611(b)(3)(A)(iv). *SCO Grp., Inc. v. Novell, Inc.*, 578 F.3d 1201, 1226 (10th Cir. 2009) (providing that an "issue or argument insufficiently raised in a party's opening brief is deemed waived").

tax examination” as an examination of “church records”—which in turn are defined in § 7611(h)(4) as “records regularly kept by a church.”<sup>8</sup> This definition of “church records” explicitly excludes records that the IRS acquires pursuant to a summons to which § 7609 applies. I.R.C. § 7611(h)(4)(B)(i). Thus, the statutory language is clear that § 7611’s requirements do not apply to third-party summonses, and instead apply only when the IRS initiates inquiries *to churches* and examinations of *church records*.

Even if the Court considered the legislative history of § 7611—which it need not do because the statutory text is unambiguous, *Navajo Nation v. Dalley*, 896 F.3d 1196, 1211 (10th Cir. 2018)—the legislative history is consistent with the statutory text. The relevant conference report provides that “the IRS is permitted access to [third-party] records *without regard to the requirements of the church audit*

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<sup>8</sup> Section 7611(h)(3)(B) also defines “church tax examination” as including an examination of the religious activities of a church. Taxpayer does not argue on appeal that the IRS seeks to examine the church’s religious activities through its summons to Kaw Valley Bank, and it has therefore waived any such argument. *SCO Grp.*, 578 F.3d at 1226. Even if it had made such an argument, an examination of bank records is not an examination of religious activities. *R. & R., God’s Storehouse Topeka Church v. United States*, No. 22-mc-00046-PAB, 2023 WL 2824525, at \*4-5 (D. Colo. Feb. 22, 2023), ECF No. 32.

*procedures ....*” H.R. Rep. No. 98-861, at 1106 (1984) (Conf. Rep.) (emphasis added). Similarly, the legislative history that taxpayer cites on page 21 of its brief indicates that Congress sought to protect churches from “fishing expeditions” by preventing the IRS from demanding information “*from a church*” where there was no supported basis to do so. (Br. at 21 (emphasis added).)

Each of the other three courts that has examined this issue, including the Ninth Circuit, has held that § 7609 alone applies to a third-party summons, even when the IRS issues the summons in the course of a church tax inquiry or examination. *United States v. C.E. Hobbs Found. for Religious Training & Educ., Inc.*, 7 F.3d 169, 173 (9th Cir. 1993) (summons issued to third-party bank is not governed by § 7611); *Bible Study Time*, 240 F. Supp. 3d at 420 (“Third-party summonses are governed by Section 7609, not Section 7611, even when the summons is issued in connection with a church tax inquiry.”); *R. & R., God’s Storehouse Topeka Church*, 2023 WL 2824525, at \*4 (holding that “the requirements of Section 7611 do not apply to this

third-party summons”).<sup>9</sup> Taxpayer relegates the *Hobbs* decision from the Ninth Circuit to a footnote, averring that the court in *Hobbs* did not address whether § 7611 as a whole is inapplicable to third-party summonses, only that the requirements of § 7611(b)(1)(A) did not apply. Br. at 22-23 n.3. But the Ninth Circuit explicitly held that third-party records are not subject to the requirements in § 7611, without qualifying its holding. *Hobbs*, 7 F.3d at 173 (“The Bank summons is not governed by section 7611.”).

The statute, legislative history, and case law are harmonious: the requirements in § 7611 for initiating a church tax inquiry and examination do not apply to a third-party summons issued in connection with such an inquiry or examination. Rather, the IRS must meet the separate requirements in § 7609 when it summonses information from a third party in this context—there is no hybrid set of § 7609 and § 7611 requirements that applies here. *Bible Study Time*, 240 F. Supp. 3d at 420-21 (agreeing with the Government that “Section 7611 has no application to third-party summonses because third-party

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<sup>9</sup> At the time of the Government’s briefing below, the magistrate judge in the cited case from the District of Colorado had not yet issued the report and recommendation.

summonses are governed solely by Section 7609”). In particular, and contrary to taxpayer’s suggestion, the “high-level Treasury official” requirement in § 7611(a)(2) has *not* been “incorporated into the *Powell* test” (Br. at 15), i.e., as part of the “administrative steps” factor.<sup>10</sup>

R. & R., *God’s Storehouse Topeka Church*, 2023 WL 2824525, at \*12 (“[T]he administrative steps that the IRS took in initiating its church tax inquiry or examination are irrelevant to determining whether the IRS followed the proper administrative steps in issuing this third-party summons.”).

Taxpayer erroneously suggests that the District Court addressed the “high-level Treasury official” requirement of § 7611(a)(2) as part of its *Powell* analysis (i.e., in connection with the “administrative steps”

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<sup>10</sup> Although the district court in the case cited by taxpayer broadly couched its “incorporation” theory in terms of “the procedural requirements of § 7611,” its reliance on that provision was limited to § 7611(b)(1)(A), which (per § 7611(h)(4)(B)(i)) does not apply to documents obtained through a third-party summons. *United States v. Church of Scientology of Bos., Inc.*, 739 F. Supp. 46, 48, 50 (D. Mass. 1990), *aff’d*, 933 F.2d 1074 (1st Cir. 1991). And *Scientology of Boston* involved a proceeding to compel compliance with (not a proceeding to quash, *cf.* I.R.C. § 7611(e)) a summons issued directly to the church (not a third-party summons). See *Music Square*, 218 F.3d at 1372 (finding *Scientology of Boston* inapposite because it involved a summons enforcement proceeding); see also *Hobbs*, 7 F.3d at 173 (summons issued to third-party bank is not governed by § 7611).

factor). (Br. at 24.) Rather, it did so in response to taxpayer's objection to the magistrate judge's "conclusion that the IRS issued its summons in the course of a valid proceeding under [I.R.C.] § 7611." (App. Vol. 1 at A211.) When the court later turned its attention to the *Powell* analysis, it made clear that taxpayer's "high-level official argument" was irrelevant to the determination whether the Government had satisfied the "administrative steps" factor of that analysis. (App. Vol. 1 at A231 n.4.)

Taxpayer's arguments regarding the IRS's circumvention of the protections in § 7611 through the third-party summons process are unavailing. (Br. at 25.) As both the magistrate judge and the District Court concluded, the IRS cannot circumvent § 7611 because it cannot make any (1) determination that a church is not entitled to tax-exempt status, or (2) assessment of unrelated business income tax against a church based solely on documents collected via a third-party summons, without first complying with the § 7611 requirements of providing notice of the church tax inquiry and examination and offering a



conference.<sup>11</sup> (App. Vol. 1 at A136 (citing Treas. Reg. § 301.7611-1 at A-5), A234-A235.)

Taxpayer thus both mischaracterizes and exaggerates the consequences of an affirmance by this Court; if the Court affirms, it will not be “the first court of appeals to hold that the IRS may summons third-party records ... for the purposes of determining whether the church is a church or [is] liable for tax without the application of any of the requirements of § 7611(a).” (Br. at 25 (emphasis removed).) Other courts, including the Ninth Circuit, already have held that the protections in § 7611 do not apply to a third-party summons, even if it is issued in the course of a church tax inquiry or examination. *See supra* at 36-37. But the IRS’s latitude with regard to third-party summonses does not equate to “free reign” (Br. at 25), because, as just discussed, the IRS cannot determine that a church is no longer exempt or is liable for unrelated business income tax solely on the basis of third-party records without first complying with the notice and conference protections in § 7611. *See* Treas. Reg. § 301.7611-1 at A-5.

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<sup>11</sup> The IRS has not yet made any such determination or assessment in this case.

**C. Even if the IRS were required to demonstrate compliance with § 7611(a)(2), the District Court correctly found that the IRS properly received authorization to commence this church tax inquiry from the TE/GE Commissioner**

Even if the issue of the IRS's compliance with § 7611(a)(2) were properly before the Court (it is not, *see supra* Part A), and even if the IRS were required to demonstrate such compliance in order to satisfy the “administrative steps” factor of the *Powell* analysis (it is not, *see supra* Part B), the District Court correctly found that the IRS obtained authorization from the proper Treasury official—the TE/GE Commissioner—before initiating the church tax inquiry.

The “appropriate high-level Treasury official” that can authorize a church tax inquiry is defined in § 7611 as the Secretary of the Treasury or any delegate of the Secretary with a rank no lower than that of a principal Internal Revenue officer for an internal revenue region. I.R.C. § 7611(h)(7). The relevant treasury regulation provides that “the [IRS] may begin a church tax inquiry only when the appropriate Regional Commissioner (or higher Treasury official)” makes the reasonable-belief determination referenced in § 7611(a)(2). Treas. Reg. § 301.7611-1 at A-1.

The reorganization of the IRS between 1998 and 2000 eliminated the prior geographically-based structure, and thus abolished any “internal revenue region,” as referenced in § 7611, as well as “Regional Commissioner,” as referenced in Treas. Reg. § 301.7611-1. Instead, the IRS structure is now based on types of taxpayers. IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1001(a), 112 Stat. 685 (1998); *United States v. Bible Study Time, Inc.*, 295 F. Supp. 3d 606, 614 (D.S.C. 2018).

Section 7611 has not been updated since the reorganization of the IRS, but the IRS has issued post-reorganization delegation orders identifying the appropriate Treasury official that can authorize a church tax inquiry. An initial, broadly worded delegation order, I.R.S. Delegation Order 193 (Rev. 6) (republished as Delegation Order 1-23), IRM 1.2.2.2.20 (Nov. 8, 2000), was interpreted by the IRS as delegating that authority to the Director of Exempt Organizations, Examinations. *Bible Study Time*, 295 F. Supp. 3d at 614-15. The District Court for the District of Minnesota, however, held that the Director of Exempt Organizations, Examinations was not an appropriate high-level Treasury official because the Director’s role was not equivalent to that

of a Regional Commissioner. *United States v. Living Word Christian Ctr.*, Civ. No. 08-MC-37ADM/JJK, 2009 WL 250049, at \*3 (D. Minn. Jan. 30, 2009) (unpublished). That court also determined that the TE/GE Commissioner was the nearest equivalent of the Regional Commissioner. *Id.* at \*2. Similarly, when the District Court for the District of South Carolina examined the current IRS structure in *United States v. Bible Study Time* to determine which IRS official was the most equivalent to the now non-existent Regional Commissioner, it held that the TE/GE Commissioner satisfied § 7611(h)(7)'s definition of an appropriate high-level Treasury official. 295 F. Supp. 3d at 623. The IRS has heeded these courts' directions: the latest IRS delegation order identifies the TE/GE Commissioner as the appropriate high-level Treasury official for purposes of § 7611. I.R.S. Deleg. Order 7-3 (Rev. 2), IRM 1.2.2.8.3 (Jun. 23, 2020).

Regardless of the level of deference that applies here (*cf.* Br. at 29, 32, 34, 36), the IRS's most-recent delegation to the TE/GE Commissioner is valid because the TE/GE Commissioner has a rank equivalent to that of the now non-existent Regional Commissioner. Indeed, the authorities that have analyzed this issue, including many of

those that taxpayer directly relies on, agree. *See Bible Study Time*, 295 F. Supp. 3d at 627; *Living Word*, 2009 WL 250049, at \*2; Benjamin W. Akins, *A Broken Vesper: Questioning the Relevancy and Workability of the Church Audit Procedures Act*, 44 Seton Hall Legis. J. 1, 33 (2020) (“the TE/GE Commissioner is an acceptable choice”); Letter from Marcus S. Owens to IRS Regarding Proposed Amendments to the Regulations Relating to Church Tax Inquiries and Examinations (Oct. 13, 2009) (“We recognize that the TE/GE Commissioner is also of rank no lower than the former Regional Commissioners.”).<sup>12</sup>

Given the role’s placement in the current IRS hierarchy—second from the top—the TE/GE Commissioner is clearly a high-level Treasury official. *See R. & R., United States v. Living Word Christian Ctr.*, Civ. No. 08-MC-37ADM/JJK, 2008 WL 5456381, at \*12 (D. Minn. Nov. 18, 2008) (describing the TE/GE Commissioner as a “high-level official

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<sup>12</sup> Available at TaxNotes, *Attorney Makes Recommendation Regarding IRS Inquiries of Churches* (October 13, 2009), <https://www.taxnotes.com/research/federal/other-documents/public-comments-on-regulations/attorney-makes-recommendation-regarding-irs-inquiries-of-churches/wjmp>. Mr. Owens served as the Director of the IRS’s Exempt Organizations Division from 1990 to 2000. *See* PLI, *Biography of Marcus S. Owens*, <https://www.pli.edu/faculty/marcus-s.-owens-i239044> (last visited Sept. 8, 2023).

position—head of a taxpayer division”), *report and recommendation adopted*, 2009 WL 250049. The TE/GE Commissioner reports to the Commissioner of Internal Revenue through the Deputy Commissioner for Services and Enforcement. *Bible Study Time*, 295 F. Supp. 3d at 624. And the TE/GE Commissioner is responsible for overseeing the administration of tax laws for all churches and other tax-exempt organizations. *Id.* at 626.

Taxpayer’s argument that the TE/GE Commissioner is not an appropriate high-level Treasury official as contemplated in § 7611(h)(7) is unavailing. Taxpayer argues that the TE/GE Commissioner is not the equivalent of the now-abolished position of Regional Commissioner, because, according to taxpayer, Regional Commissioners reported directly to the Commissioner of Internal Revenue. (Br. at 27, 36-37.) As the court in *Bible Study Time* determined, however, this suggestion of a singular degree of separation between Regional Commissioners and the Commissioner of Internal Revenue is unsupported. 295 F. Supp. 3d at 625 (noting that a pre-reorganization IRS organizational chart “places Regional Commissioners (like the TE/GE Commissioner today) on the first step outside the box containing the IRS Commissioner and

Deputy Commissioner(s),” suggesting “a ‘rank’ [for both positions] immediately below that of a Deputy Commissioner”).

Nor does the fact that the TE/GE Commissioner focuses on tax-exempt organizations make the incumbent any less of an appropriate high-level Treasury official as contemplated in § 7611(h)(7). Even after considering the different types of responsibilities held by the TE/GE Commissioner and Regional Commissioner, the *Bible Study Time* court determined that “both clearly have broad responsibilities,” sufficient “to balance the interests of proper enforcement of tax laws against the special First Amendment concerns applicable to churches.” 295 F. Supp. 3d at 623, 626-27. Taxpayer claims the TE/GE Commissioner’s oversight of exempt organizations means that the TE/GE Commissioner cannot maintain objectivity and independence. (Br. at 37-38.) But in making this baseless assertion, taxpayer ascribes partiality to the upper echelons of the IRS without providing any evidence—anecdotal or otherwise—suggesting that the TE/GE Commissioner is unable to be unbiased. (Br. at 38.)

According to taxpayer, the lowest-level official with authority to make a § 7611 determination is the Deputy Commissioner for Services

and Enforcement. (Br. at 39.) The Deputy Commissioner “serves as the Commissioner’s key assistant acting on behalf of the Commissioner in establishing and enforcing tax administration policy and upholding [the] IRS’s mission to provide America’s taxpayers top quality service by helping them understand and meet their tax responsibilities.” IRM 1.1.5.3.1 (Aug. 14, 2019). But as the court in *Bible Study Time* noted, even before the IRS was restructured, Deputy Commissioners were ranked above Regional Commissioners. 295 F. Supp. 3d at 627. Had Congress intended to place the responsibility of authorizing church tax inquiries with Deputy Commissioners, it could have done so at that time. *Id.* at 625, 627. Given the impracticability of shouldering “the Commissioner’s key assistant” with such additional responsibility, it is unsurprising that Congress did not do so. IRM 1.1.5.3.1 (Aug. 14, 2019).

Congress’s intent, clearest in the language of § 7611 itself, was to give the responsibility for authorizing church tax inquiries to an official with high-level authority. *Bible Study Time*, 295 F. Supp. 3d at 627 (rank is “the most significant consideration”). The TE/GE



Commissioner, at only two levels removed from the Commissioner of Internal Revenue, qualifies as such an official.

## CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

## STATEMENT REGARDING ORAL ARGUMENT

Counsel for the Government respectfully inform the Court that oral argument may be helpful to this Court in resolving this appeal.

Respectfully submitted,

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SEPTEMBER 13, 2023

**ADDENDUM**

**Internal Revenue Code (26 U.S.C.) § 7602 (excerpts) .....51**  
**Internal Revenue Code (26 U.S.C.) § 7609 (excerpts) .....52**  
**Internal Revenue Code (26 U.S.C.) § 7611 (excerpts) .....55**

## **26 U.S.C. § 7602. Examination of books and witnesses**

**(a) Authority to summon, etc.--**For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized--

**(1)** To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

**(2)** To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

**(3)** To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

**(b) Purpose may include inquiry into offense.--**The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

**(c) Notice of contact of third parties.--**

**(1) General notice.--**An officer or employee of the Internal Revenue Service may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer unless such contact occurs during a

period (not greater than 1 year) which is specified in a notice which—

(A) informs the taxpayer that contacts with persons other than the taxpayer are intended to be made during such period, and

(B) except as otherwise provided by the Secretary, is provided to the taxpayer not later than 45 days before the beginning of such period.

Nothing in the preceding sentence shall prevent the issuance of notices to the same taxpayer with respect to the same tax liability with periods specified therein that, in the aggregate, exceed 1 year. A notice shall not be issued under this paragraph unless there is an intent at the time such notice is issued to contact persons other than the taxpayer during the period specified in such notice. The preceding sentence shall not prevent the issuance of a notice if the requirement of such sentence is met on the basis of the assumption that the information sought to be obtained by such contact will not be obtained by other means before such contact.

\* \* \* \* \*

## **26 U.S.C. § 7609. Special procedures for third-party summonses**

### **(a) Notice.—**

**(1) In general.**--If any summons to which this section applies requires the giving of testimony on or relating to, the production of any portion of records made or kept on or relating to, or the production of any computer software source code (as defined in 7612(d)(2)) with respect to, any person (other than the person summoned) who is identified in the summons, then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the

23rd day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection (b)(2) to bring a proceeding to quash the summons.

**(2) Sufficiency of notice.**--Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 (relating to service of summons) upon the person entitled to notice, or is mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left with the person summoned. If such notice is mailed, it shall be sufficient if mailed to the last known address of the person entitled to notice or, in the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to the last known address of the fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence.

**(3) Nature of summons.**--Any summons to which this subsection applies (and any summons in aid of collection described in subsection (c)(2)(D)) shall identify the taxpayer to whom the summons relates or the other person to whom the records pertain and shall provide such other information as will enable the person summoned to locate the records required under the summons.

**(b) Right to intervene; right to proceeding to quash.--**

**(1) Intervention.**--Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

**(2) Proceeding to quash.--**

**(A) In general.**--Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under

subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given in the manner provided in subsection (a)(2). In any such proceeding, the Secretary may seek to compel compliance with the summons.

**(B) Requirement of notice to person summoned and to Secretary.**--If any person begins a proceeding under subparagraph (A) with respect to any summons, not later than the close of the 20-day period referred to in subparagraph (A) such person shall mail by registered or certified mail a copy of the petition to the person summoned and to such office as the Secretary may direct in the notice referred to in subsection (a)(1).

**(C) Intervention; etc.**--Notwithstanding any other law or rule of law, the person summoned shall have the right to intervene in any proceeding under subparagraph (A). Such person shall be bound by the decision in such proceeding (whether or not the person intervenes in such proceeding).

**(c) Summons to which section applies.--**

**(1) In general.**--Except as provided in paragraph (2), this section shall apply to any summons issued under paragraph (2) of section 7602(a) or under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7612.

\* \* \* \* \*

**(h) Jurisdiction of district court; etc.--**

**(1) Jurisdiction.**--The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceeding brought under subsection (b)(2), (f), or (g). An order denying the petition shall be deemed a final order which may be appealed.

\* \* \* \* \*

**26 U.S.C. § 7611. Restrictions on church tax inquiries and examinations**

**(a) Restrictions on inquiries.—**

**(1) In general.**--The Secretary may begin a church tax inquiry only if—

**(A)** the reasonable belief requirements of paragraph (2), and

**(B)** the notice requirements of paragraph (3), have been met.

**(2) Reasonable belief requirements.**--The requirements of this paragraph are met with respect to any church tax inquiry if an appropriate high-level Treasury official reasonably believes (on the basis of facts and circumstances recorded in writing) that the church--

**(A)** may not be exempt, by reason of its status as a church, from tax under section 501(a), or

**(B)** may be carrying on an unrelated trade or business (within the meaning of section 513) or otherwise engaged in activities subject to taxation under this title.

**(3) Inquiry notice requirements.--**

**(A) In general.**--The requirements of this paragraph are met with respect to any church tax inquiry if, before beginning such inquiry, the Secretary provides written notice to the church of the beginning of such inquiry.

**(B) Contents of inquiry notice.**--The notice required by this paragraph shall include--

**(i)** an explanation of--



(I) the concerns which gave rise to such inquiry, and

(II) the general subject matter of such inquiry, and

(ii) a general explanation of the applicable--

(I) administrative and constitutional provisions with respect to such inquiry (including the right to a conference with the Secretary before any examination of church records), and

(II) provisions of this title which authorize such inquiry or which may be otherwise involved in such inquiry.

**(b) Restrictions on examinations.--**

**(1) In general.--**The Secretary may begin a church tax examination only if the requirements of paragraph (2) have been met and such examination may be made only--

(A) in the case of church records, to the extent necessary to determine the liability for, and the amount of, any tax imposed by this title, and

(B) in the case of religious activities, to the extent necessary to determine whether an organization claiming to be a church is a church for any period.

**(2) Notice of examination; opportunity for conference.--**The requirements of this paragraph are met with respect to any church tax examination if--

(A) at least 15 days before the beginning of such examination, the Secretary provides the notice described in

paragraph (3) to both the church and the appropriate regional counsel of the Internal Revenue Service, and

**(B)** the church has a reasonable time to participate in a conference described in paragraph (3)(A)(iii), but only if the church requests such a conference before the beginning of the examination.

**(3) Contents of examination notice, et cetera.--**

**(A) In general.--**The notice described in this paragraph is a written notice which includes--

**(i)** a copy of the church tax inquiry notice provided to the church under subsection (a),

**(ii)** a description of the church records and activities which the Secretary seeks to examine,

**(iii)** an offer to have a conference between the church and the Secretary in order to discuss, and attempt to resolve, concerns relating to such examination, and

**(iv)** a copy of all documents which were collected or prepared by the Internal Revenue Service for use in such examination and the disclosure of which is required by the Freedom of Information Act (5 U.S.C. 552).

**(B) Earliest day examination notice may be provided.-**

The examination notice described in subparagraph (A) shall not be provided to the church before the 15th day after the date on which the church tax inquiry notice was provided to the church under subsection (a).

**(C) Opinion of regional counsel with respect to**

**examination.--**Any regional counsel of the Internal Revenue Service who receives an examination notice under

paragraph (1) may, within 15 days after such notice is provided, submit to the regional commissioner for the region an advisory objection to the examination.

\* \* \* \* \*

**(d) Limitations on revocation of tax-exempt status, etc.--**

**(1) In general.--**The Secretary may--

**(A)** determine that an organization is not a church which--

**(i)** is exempt from taxation by reason of section 501(a),  
or

**(ii)** is described in section 170(c), or

**(B)(i)** send a notice of deficiency of any tax involved in a church tax examination, or

**(ii)** in the case of any tax with respect to which subchapter B of chapter 63 (relating to deficiency procedures) does not apply, assess any underpayment of such tax involved in a church tax examination,

only if the appropriate regional counsel of the Internal Revenue Service determines in writing that there has been substantial compliance with the requirements of this section and approves in writing of such revocation, notice of deficiency, or assessment.

\* \* \* \* \*

**(e) Information not collected in substantial compliance with procedures to stay summons proceeding.--**

**(1) In general.--**If there has not been substantial compliance with-

**(A)** the notice requirements of subsection (a) or (b),

**(B)** the conference requirement described in subsection (b)(3)(A)(iii), or

**(C)** the approval requirement of subsection (d)(1) (if applicable),

with respect to any church tax inquiry or examination, any proceeding to compel compliance with any summons with respect to such inquiry or examination shall be stayed until the court finds that all practicable steps to correct the noncompliance have been taken. The period applicable under paragraph (1) or subsection (c) shall not be suspended during the period of any stay under the preceding sentence.

**(2) Remedy to be exclusive.**--No suit may be maintained, and no defense may be raised in any proceeding (other than as provided in paragraph (1)), by reason of any noncompliance by the Secretary with the requirements of this section.

\* \* \* \* \*

**(h) Definitions.**--For purposes of this section--

**(1) Church.**--The term “church” includes--

**(A)** any organization claiming to be a church, and

**(B)** any convention or association of churches.

**(2) Church tax inquiry.**--The term “church tax inquiry” means any inquiry to a church (other than an examination) to serve as a basis for determining whether a church--

**(A)** is exempt from tax under section 501(a) by reason of its status as a church, or

(B) is carrying on an unrelated trade or business (within the meaning of section 513) or otherwise engaged in activities which may be subject to taxation under this title.

**(3) Church tax examination.**--The term “church tax examination” means any examination for purposes of making a determination described in paragraph (2) of--

(A) church records at the request of the Internal Revenue Service, or

(B) the religious activities of any church.

**(4) Church records.**--

(A) **In general.**--The term “church records” means all corporate and financial records regularly kept by a church, including corporate minute books and lists of members and contributors.

(B) **Exception.**--Such term shall not include records acquired--

(i) pursuant to a summons to which section 7609 applies, or

(ii) from any governmental agency.

**(5) Inquiry notice date.**--The term “inquiry notice date” means the date the notice with respect to a church tax inquiry is provided under subsection (a).

**(6) Examination notice date.**--The term “examination notice date” means the date the notice with respect to a church tax examination is provided under subsection (b) to the church.

**(7) Appropriate high-level Treasury official.**--The term “appropriate high-level Treasury official” means the Secretary of

the Treasury or any delegate of the Secretary whose rank is no lower than that of a principal Internal Revenue officer for an internal revenue region.

\* \* \* \* \*

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