No. 16-15999

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH GARY BAXTER, PATRICIA MARY BAXTER,
Petitioners-Appellees
v.
UNITED STATES OF AMERICA,
Respondent-Appellant

On Appeal from the United States District Court for the Northern District of California, D.C. No. 15-cv-04764-YGR

MOTION OF ZERBE, MILLER, FINGERET, FRANK & JADAV, LLP FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* OUT OF TIME

Pursuant to Federal Rules of Appellate Procedure 29(b) and (e), Zerbe, Miller, Fingeret, Frank & Jadav, LLP respectfully requests leave to file the accompanying *amicus* brief out of time. The Respondent-Appellant in this case challenges the district court's ruling that the Petitioners-Appellees did not receive sufficient notice pursuant to section 7602(c) of the Internal Revenue Code before the Internal Revenue Service issued third party summons revealing the taxpayer's

return information. *Amicus*'s participation in this appeal is desirable and will aid the Court's disposition of this appeal because, *amicus* and its counsel have extensive experience representing taxpayers before the Internal Revenue Service, and because the Parties' briefs have not addressed many of the issues relevant to the sufficiency of notice prior to making third party contacts required by the Internal Revenue Code.

Because the district court's decision in this matter was not brought to amicus's attention by the parties or the legal press, *amicus* was not aware of this case until well after the time ordinarily allotted for the filing of amicus briefs had passed. Counsel for *amicus* has worked diligently to prepare and submit the accompanying brief for the Court's consideration as soon as possible.

INTEREST OF ZERBE, MILLER, FINGERET, FRANK & JADAV, LLP

Amicus is a law firm with a significant practice representing small- and medium-sized businesses across the country in tax controversy matters. *Amicus* has worked with a great number of clients, representing them before the Internal Revenue Service.

In the course of its work, *Amicus* has seen firsthand how the IRS's current practice with respect to third party contacts fails to give

taxpayers a chance to respond to the IRS, offer more information, and potentially avoid third party contacts altogether.[1] Indeed, in IRS audits and examinations, the Service is increasingly bypassing many of *Amicus's* clients altogether, preferring to make third party contacts in the first instance.[2] In a 2015 study of the issue, the IRS's Office of the Taxpayer Advocate found that "the IRS made [third party contacts] in

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1 Testifying before Congress, Kathy Petronchak—the former Commissioner for the IRS's Small Business/ Self-Employed Division, and current Director of IRS Practice & Procedure at alliantgroup, LP—stated that "we are seeing increasing use of the [third party] contacts that warrant concern," namely those contacts where the IRS has not made a reasonable attempt to obtain the information from the taxpayer, but "already has the information […] [or] haven't even requested the information [from the taxpayer] in the first place." Kathy Petronchak, *Testimony Before House Committee on Small Business*, Sept. 14, 2016, available at: http://smallbusiness.house.gov/uploadedfiles/9-14-16_petronchak_testimony.pdf.

2 "In representing small business clients, we are seeing extensive third party contacts. These third party contacts do not appear to be done as a last resort or because the taxpayer has refused to provide the information. Instead the IRS uses the rubric of 'verifying' what information the taxpayer has stated. This is done even in cases where there is no evidence to suggest that the taxpayer is incorrect and is done without giving the taxpayer a chance to address an IRS question." Dean Zerbe, *Testimony Before the Senate Committee on Small Business and Entrepreneurship*, July 22, 2015, available at: http://www.sbc.senate.gov/public/?a=Files.Serve&File_id=052772a2-cbc7-40b3-ab6b-e7eacfdd6694

68.1 of its field collection cases and 8.5 percent of its field examination cases." Taxpayer Advocate Service, 2015 Annual Report to Congress, Vol. 1 at 124 ("Taxpayer Advocate"). This practice threatens to expose *Amicus's* clients to unnecessary reputational and financial harm, as third party contacts have the potential to damage a taxpayer's client and business relationships.

Amicus therefore seeks to inform the Court of arguments and materials that Appellees may have missed, or that Appellants have neglected to address. *Amicus's* clients—many of which are located within the ninth circuit—will directly be affected by this Court's decision.

ARGUMENT

Amicus's counsel have deep familiarity with the issues relating IRS examinations, and, in particular third party contacts. *Amicus* has included in its proposed brief arguments relating to section 6103 of the Internal Revenue Code, which the parties have not addressed, and which Amicus believes is relevant to the consideration of the issues on appeal. Additionally, the proposed brief includes discussion of other relevant materials, such as the Report of the National Taxpayer

Advocate on the issue. Accordingly, *amicus* represents that the accompanying brief is submitted in good faith to ensure that the important legal issues before the Court—which affect all taxpayers, not just the parties in the instant case—are thoughtfully presented for the Court's consideration.

Amicus is aware that the time ordinarily allotted for filing *amicus* briefs in this case has passed. In this instance, however, *amicus* was not aware of the pendency of this matter until after the ordinary time for filing amicus briefs had passed. Upon learning of this matter, counsel for *amicus* worked diligently to prepare and submit the accompanying brief for the Court's consideration as expeditiously as possible.

Further, *amicus* submits that accepting the proposed *amicus* brief for filing will not unduly delay the ultimate disposition of this matter, especially when this appeal has not yet been scheduled for oral argument, and will not unfairly prejudice the parties, because Federal Rule of Appellate Procedure 29(e) provides for the opposing party (here, Respondent-Appellant) to be afforded an opportunity to respond if the Court accepts the proposed brief for filing.

CONCLUSION

The Court should grant leave to file the accompanying amicus brief and should direct the Clerk to accept the proposed brief for filing.

Respectfully Submitted,

s/ Felipe Bohnet-Gomez

Dean A. Zerbe
Steven T. Miller
Felipe S. Bohnet-Gomez*

ZERBE, MILLER, FINGERET, FRANK & JADAV, LLP
1455 Pennsylvania Ave. NW, Suite 300
Washington, D.C. 20004
Tel. (713) 350-3529

*Admitted in New York only. Supervised by Steven T. Miller, a member of the D.C. Bar.

Counsel for Amicus Curiae

Date: February 24, 2017

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 24, 2017. I certify that participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Felipe Bohnet-Gomez
Felipe Bohnet-Gomez

Attorney for Amicus Curiae

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AMICUS CURIAE BRIEF OF ZERBE, MILLER, FINGERET, FRANK & JADAV, LLP IN SUPPORT OF PETITIONERS-APPELLEES

Dean A. Zerbe
dzerbe@zffjlaw.com
Steven T. Miller
smiller@zffjlaw.com
Felipe S. Bohnet-Gomez
fbgomez@zffjlaw.com
ZERBE, MILLER, FINGERET, FRANK & JADAV, LLP
1455 Pennsylvania Ave. NW, Suite 300
Washington, D.C. 20004
Tel. (713) 350-3529
Attorneys for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Amicus Curiae certifies that Zerbe, Miller, Fingeret, Frank & Jadav, LLP has no parent corporation, and no publicly held corporation holds more than 10 percent of its ownership.

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INTEREST OF AMICUS[1]

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[1] No person except amicus or its counsel authored or funded any portion of this brief.

[2] Testifying before Congress, Kathy Petronchak—the former Commissioner for the IRS's Small Business/ Self-Employed Division, and current Director of IRS Practice & Procedure at alliantgroup, LP—stated that "we are seeing increasing use of the [third party] contacts that warrant concern," namely those contacts where the IRS has not made a reasonable attempt to obtain the information from the taxpayer, but "already has the information […] [or] haven't even requested the information [from the taxpayer] in the first place." Kathy Petronchak, *Testimony Before House Committee on Small Business*, Sept. 14, 2016, available at: http://smallbusiness.house.gov/uploadedfiles/9-14-16_petronchak_testimony.pdf.

the first instance.[3] In a 2015 study of the issue, the IRS's Office of the Taxpayer Advocate found that "the IRS made [third party contacts] in 68.1 of its field collection cases and 8.5 percent of its field examination cases." Taxpayer Advocate Service, 2015 Annual Report to Congress, Vol. 1 at 124 ("Taxpayer Advocate"). This practice threatens to expose Amicus's clients to unnecessary reputational and financial harm, as third party contacts have the potential to damage a taxpayer's client and business relationships.

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within the ninth circuit—will directly be affected by this Court's decision.

SUMMARY OF ARGUMENT

Amicus urges this Court to affirm the District Court's decision, which quashes a summons issued by the IRS to a third party on the grounds that the IRS did not provide reasonable advance notice of the third party contact, as required by 26 U.S.C. § 7602(c)(1).

Although the IRS has broad authority to investigate and gather information in order to enforce the tax Code and collect tax, this authority is not without limits. The District Court's decision enforces reasonable restrictions on the IRS's summons power, and is consistent with the Internal Revenue Code, Congress's intent, and with the views of the National Taxpayer Advocate. Moreover, it comports with the IRS's own past administrative practice, until the Service unilaterally determined to provide less notice of third party contacts than before.

The Internal Revenue Code contains a number of provisions designed to protect taxpayer information and to restrain the Service's investigatory authority, as well as protect taxpayers who are under examination or other investigation by the IRS. In particular, as

exceptions to the overriding protection afforded under section 6103, sections 7602(c) and 6103(k)(6) together form a statutory scheme that further protects taxpayers by requiring that the IRS generally attempt to obtain information from the taxpayers themselves before sharing sensitive tax return information with third parties. Section 7602(c) requires reasonable advance notice that a third party contact may be made, and section 6103(k)(6) prohibits the disclosure of taxpayers' confidential information—including their name—to third parties except where necessary to obtain information that is not otherwise reasonably obtainable. Thus, before a third party contact is made, taxpayers must be given reasonable advance notice such that they have an opportunity to respond to the IRS's information request.

As the legislative history makes clear, section 7602(c)(1)'s advance notice requirement was borne directly out of Congressional intent to protect taxpayers from the potential harm of unnecessary third party contacts, and from the harms that result in needlessly disclosing taxpayer's sensitive tax return information.

The District Court's ruling gives effect to Congress's intent that taxpayer information be kept confidential if at all possible, by requiring

that the IRS provide meaningful advance notice to taxpayers that gives them a chance to avoid harm from third party disclosures. By contrast, embracing Appellant's position would reduce the reasonable advance notice requirement to insignificance, and would enable the IRS to cut out the taxpayer from the exam process and expose taxpayers to embarrassment, financial, and reputational harm from the unnecessary disclosure of their information to third parties.

ARGUMENT

As Appellant correctly points out, the IRS has the responsibility and authority to determine and collect tax liability, and has broad investigative authority to carry out these functions. But this authority is subject to important limitations, designed to protect taxpayers' confidentiality, and to provide a safeguard against the harms that can be caused by the government's unlimited exercise of investigative authority.

These protections are fundamental to the American tax system, which is built on voluntary reporting. Section 6103 establishes the bedrock principle of this system: in order to encourage truthful, accurate, and voluntary self-reporting, a taxpayer's information is

private, and will not be disclosed to third parties. This is a fundamental underpinning of our American tax system. The third party contact scheme established by section 7602 is an exception to the foundation of taxpayer confidence that their information is protected. Section 7602 must therefore be read together with section 6103, and, as an exception to section 6103, should be read narrowly and in keeping with the purpose of taxpayer privacy.

Together with section 6103's confidentiality protections, section 7602(c)(1)'s requirement of reasonable advance notice of third party contacts requires the IRS to first give the taxpayer a reasonable opportunity to provide the information the IRS is seeking, by alerting the taxpayer that the IRS may contact a third party. The District Court correctly held that providing Publication 1 over two years before the summons were issued could not, without more, constitute the reasonable advance notice contemplated by section 7602(c)(1). The District Court's holding is supported by the legislative history—which shows the notice requirement was enacted in order to give taxpayers an opportunity to respond to the IRS and stave off potential third party contacts—by the IRS's prior practice—which provided taxpayers with

more timely and substantial notice of third party contacts—and by the report of the IRS's own National Taxpayer Advocate—which identifies the IRS's current practice as a serious problem area where the IRS is not following the law consistent with Congress's intent. This Court should therefore affirm the District Court.

A. Investigatory exceptions to taxpayers' fundamental privacy rights require the IRS to give taxpayers a chance to respond before third party contacts are made.

In the usual examination or investigation of a taxpayer, the IRS primarily obtains its information directly from the taxpayer, as well as from third parties that the taxpayer has consented in advance to allow the IRS to contact. When the Service deals directly with the taxpayer it is examining, the confidentiality of a taxpayer's information is not implicated, and the Service has broad latitude to request information relating to the taxpayer's tax liability. When the IRS decides to contact a third party about the taxpayer, however, a suspect disclosure has occurred even if the disclosure occurs as part of the IRS's investigatory function. This is only permitted under very specific exceptions. The IRS's authority is also counterbalanced, by related protections contained in these exceptions. These restrictions are intended

specifically to minimize the harm to taxpayers when there is a disclosure of their information to third parties. It is these principles that are embodied in the section 7602(c)(1)'s requirement that the IRS provide reasonable advance notice before it engages in a third party contact.

Together, the statutory scheme set up by section 6103(k)(6), which limit's the IRS's disclosure of taxpayer information in investigations, and section 7602(c)(1), which limits the IRS's ability to engage in third party contacts without providing advance notice, work to provide taxpayers an opportunity to respond directly to the IRS's need for information as it arises during the course of an investigation, and thereby possibly obviate both the need to seek the information from third parties, as well as the potential harms to the taxpayer from doing so.

In the case at bar, the IRS provided the taxpayers with Publication 1 on July 25, 2013. (Doc. 10–1 at 18.) Publication 1, titled "Your Rights as a Taxpayer," is a generic pamphlet sent to all taxpayers shortly after the IRS selects them for examination, and includes a variety of general information about the IRS audit process. Although

the IRS issued third party summons over two years later, on September 25, 2015, (App. Br. 9 (citing ER 6)), Appellant contends that Publication 1 served as "reasonable notice in advance" that the IRS might contact a third party with respect to the taxpayer's examination. (App. Br. 23–35.) But Publication 1 does not meaningfully notify taxpayers about third party contacts. Nor does it not give them a timely opportunity to dialogue with, or provide information to, the IRS in order to avoid third party contacts. In short, it does not provide the protections contemplated by the Internal Revenue Code, and the District Court thus correctly held that section 7602(c)(1)'s requirement of reasonable advance notice "cannot be satisfied by the transmission of a publication about the audit process generally." (Doc. 22 at 4.)

1. Section 6103(k)(6) limits third party contacts to those necessary to obtain information not otherwise reasonably available.

In addition to purportedly providing taxpayers advance notice of the IRS's third party contacts in an audit, Publication 1 also informs taxpayers of their rights to privacy and confidentiality. To a significant extent, these rights stem from Section 6103 of the Internal Revenue Code, which provides strong safeguards against the disclosure of taxpayer information. In particular, it prohibits the IRS from disclosing

any "return information" except as expressly authorized by statute. 26 U.S.C. § 6103(a). The Code broadly defines return information to include even "a taxpayer's identity," as well as a host of other information, such as "whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing." 26 U.S.C. § 6103(b)(2)(A).

Generally, when the IRS makes a third party contact, it must necessarily disclose the identity of the taxpayer to whom the contact relates.[4] Additionally, when a third party is contacted by the IRS about a particular taxpayer—or receives a summons about the taxpayer—the third party necessarily becomes aware that the taxpayer is being examined or otherwise investigated by the IRS.[5] Any third party contact by the IRS, therefore, is a suspect disclosure, implicating section 6103 and triggering its protections. *See, e.g.*, *Payne v. United States*, 91

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4 In certain cases, the IRS may choose to issue a so-called "John Doe summons." A "John Doe summons" is a summons to a third party seeking information related to one or more taxpayers whose identities are unknown to the IRS, or which the IRS has chosen not to reveal. See 26 U.S.C. § 7609(f).

5 The Internal Revenue Manual makes clear that a third party summons is a third party contact for the purposes of the notice required by section 7602(c)(1). I.R.M. 4.11.57.5 (Dec. 20, 2011).

F. Supp. 2d 1014, 1022 (S.D. Tex. 1999) ("The third-party contacts […] constitute disclosures of Payne's confidential return information.") (remanded on other grounds).

In the case at bar, the IRS's summons not only included the taxpayer's name and Social Security Number, but referred to a specific income amount, and requested billing statements, invoices, and contracts with the taxpayer. (Doc. 7 at 23.) The IRS's issuance of the third party summons clearly disclosed "return information" and therefore implicated the confidentiality protections of section 6103.

Section 6103(k) permits the disclosure of return information in connection with "any audit, collection activity, or civil or criminal tax investigation." But it only allows return information to be disclosed "to the extent that such disclosure is *necessary* in obtaining information, which is *not otherwise reasonably available*." 26 U.S.C. § 6103(k)(6) (emphasis added). There are certain cases, such as criminal investigations and other sensitive matters, where the information is not reasonably obtainable from the taxpayer. But in the usual case, the IRS can request and obtain all the information it needs directly from the taxpayer, and obtaining the information from a third party becomes

necessary only where the taxpayer is not forthcoming, or where the IRS, after giving the taxpayer a chance to discuss the matter, reasonably determines that the taxpayer's information must be verified by a third party. *See Payne v. United States*, 289 F.3d 377, 383 (5th Cir. 2002) ("even corroborating evidence might be available from bank or other records to which a taxpayer voluntarily grants access, thus negating the necessity of contacting third-parties."). Thus, breaching section 6103's fundamental guarantee of privacy in order to make a third party contact is not usually authorized until the IRS has made a reasonable attempt obtain the information from the taxpayer, or where there are other exceptional circumstances that make the taxpayer an unreliable source of information. *See Payne v. United States*, 289 F.3d 377, 383–384 (5th Cir. 2002) (holding that a determination that the information sought by the IRS cannot reasonably be obtained from the taxpayer is "a determination [that] must be made in light of the 'facts and circumstances' of the case, and that the taxpayer's cooperation legitimately forms part of the inquiry").

2. The plain language and structure of section 7602(c) require notice that gives taxpayers a real opportunity to respond.

In addition to section 6103's limitations on the disclosure of return information, section 7602 of the Internal Revenue Code places more explicit limits on the IRS's third party contacts. In particular, section 7602(c)(1) requires that the IRS "provid[e] *reasonable notice in advance* to the taxpayer that contacts with persons other than the taxpayer may be made." 26 U.S.C. § 7602(c)(1) (emphasis added). By the statute's own plain terms, the notice must be both "reasonable" and "in advance" of any third party contact.

Appellant makes much of the fact that the notice required by section 7602(c)(1) is that "contacts with persons other than the taxpayer *may* be made." (App. Br. 26–27.) But Congress's use of the term "may" in section 7602 fits with the broader statutory context of section 6103 confidentiality protections as well as other Internal Revenue Code provisions. That is, notice that the IRS *may* make a third party contact is required precisely because the Code's section 6103 confidentiality protections require that the taxpayer be given an opportunity to respond *before* a third party contact is made, and before the

confidentiality of a taxpayer's return information is breached. Otherwise no third party contact is permitted under that exception.

By requiring advance notice when the IRS *may* make a third party contact, section 7602 requires *more* notice, not less—it requires that the IRS involve the taxpayer earlier in the process, before a decision to make a third party contact has definitively been made, in order to accomplish Congress's objective of giving the taxpayer an opportunity to avoid the third party contact and maintain his confidentiality. As described above, when provided an opportunity to respond in advance of a third party contact, the taxpayer can often provide the information, or clarify whether the information is necessary, and thereby obviate the need to make a third party contact at all. Moreover, the contact and resultant discussion will allow IRS officials to weigh the need for the contact against the potential harm to the taxpayer, as well as the availability of any alternatives. Thus, the third party contact *might* be made, depending on the taxpayer's response—or lack thereof.

Appellant argues that the term "will" would be necessary for the statute to require more particularized notice. But if Congress had used the term "will," then notice would only be given when the IRS has

already determined a third party contact is necessary, and no response by the taxpayer would change the IRS's planned course of action. Under such a statutory scheme, the objective of giving taxpayers a meaningful opportunity to respond before sharing their return information with third parties would not be furthered. Moreover, the notice required under section 7602(c)(1) would be duplicative of the notice required under section 7602(c)(2), which requires that the IRS keep "a record of persons contacted" and provide it to the taxpayer both periodically and at the taxpayer's request.[6] And, significantly, in the case of a third party summons, the notice would be duplicative of the notice separately required by section 7609.[7] Thus, by requiring reasonable advance notice to the taxpayer that the IRS may make a third party contact, Congress

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6 As Appellant notes, the House Conference Committee bifurcated the notice requirement of the Senate Bill into section 7602(c)(1)'s requirement of reasonable advance notice and section 7602(c)(2)'s requirement that a record of third party contacts be kept and provided to taxpayers. (App. Br. 31–32.)

7 Section 7609 requires, among other things, that "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." 26 U.S.C. § 7609(a). Unlike section 7602(c), section 7609 requires that the notice "be accompanied by a copy of the summons." *Id.*

made clear that it sought to provide taxpayers with an opportunity to respond to the IRS as it was considering making a third party contact, allowing for the possibility that the taxpayer's response would avoid the contact in the first place.[8]

Perversely, the IRS has interpreted section 7602's use of "may" as permitting the IRS to rely on an extremely general pamphlet—given to taxpayers months or even years before any actual third party contact is contemplated—to satisfy the Code's requirement that reasonable advance notice of third party contacts be given to taxpayers. By focusing on "may," the IRS's interpretation serves the IRS's convenience and ignores Congress's intent that taxpayers should be given enough advance notice of third party contacts so that they can do something about them.

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8 Because the section 7609 notice occurs after the summons has already been issued, the taxpayer can, as Appellant notes "challenge the summons before the IRS can examine the summoned information." But that notice comes too late to prevent return information from being shared with a third party against the taxpayer's wishes. Therefore, the notice of issued third party summons provided by section 7609(a) and the advance notice of a potential third party contact required under section 7602(c)(1) serve different purposes, and section 7609(a) notice is insufficient to address the potential harms Congress was concerned with when it enacted section 7602(c)(1).

3. The statutory structure of section 7602(c) supports the District Court's holding.

In addition to the language of section 7602(c)(1), the structure of section 7602(c) as a whole confirms that more particular advance notice of third party contacts is required, and that a general notice the IRS provides contemporaneously with its initial contact letter is insufficient.

In particular, section 7602(c)(3) provides exceptions to the notice requirements of both subsections (1) and (2). Three categories of exceptions are provided: cases where "the Secretary determines for good cause shown that such notice would jeopardize collection of any tax or such notice may involve reprisal against any person," criminal investigations, and, most relevantly, "any contact which the taxpayer has authorized." 26 U.S.C. § 7602(c)(3)(A)–(C). That is, if a taxpayer has authorized a particular contact, the IRS is not required to provide *either* advance notice *or* record that the contact was made. Both the IRS's own regulations and practice confirm this interpretation. Yet the exceptions under section 7602(c)(3) can only be understood if the notice required by section 7602(c)(1) goes beyond simply providing taxpayers a one-size-fits-all pamphlet about the audit process.

After section 7602 was enacted, the IRS created a "Third Party Contact Authorization Form" whereby it could obtain such authorization from taxpayers. The Form's explanatory language made clear that, "the IRS is not required to provide advance notice *or* a record of persons contacted with respect to any contacts which the taxpayer has authorized," and that "[i]f no third party contacts are made other than those authorized by you, the IRS will not be required to provide you with advance notice that contacts with third parties may be made *or* provide you with a record of persons contacted." Internal Revenue Service, Form 12180 (Rev. 1–99) (emphasis added). Thus, it is clear from both the statutory language, as well as the IRS's own interpretation thereof, that the section 7602(c)(3) exceptions apply both to the advance notice and recordation requirements of section 7602.

Yet the ability of the IRS to avoid providing advance notice of possible third party contacts if specific authorization is obtained as to all third party contacts that are made does not square with the IRS's current interpretation of section 7602(c)(1) as merely requiring the taxpayer be provided with Publication 1's explanation that the IRS is *able* to make third party contacts, and might do so in any particular

exam or investigation. If this lesser notice is all that is required, then obtaining authorization as to particular third parties would not alter the calculus. Conversely, even if the IRS obtained prior authorization as to all third parties it ultimately contacts, it would—under its current interpretation—still be required to give taxpayers the "advance notice" it claims Publication 1 provides.

The IRS's regulations implementing section 7602(c) provide that "Pre-contact notice under this section need not be provided to a taxpayer for third-party contacts of which advance notice has otherwise been provided to the taxpayer pursuant to another statute, regulation or administrative procedure." 26 C.F.R. § 301.7602–2(d)(2). Either 7602(c)(1) requires, as the District Court held, notice sufficient to reasonably inform a taxpayer that a third party contact may be made—thereby giving the taxpayer a chance to address that particular potential contact—or, as Appellant contends, it merely requires the IRS to notify taxpayers that it is able to make third party contacts in the course of its exams or investigations. If it requires only the latter, however, then the distinction as to *which* third-party contacts a taxpayer has received notice for is impossible: a taxpayer has either

received generalized notice that the Service can—and might—make third party contacts, or it has not. Similarly, as the District Court opinion below recognized, such a distinction is impossible to make with respect to the exceptions to the notice requirements for taxpayer-approved contacts, and therefore the implementing regulations did not contemplate only "a generic publication's reference that the IRS may talk to third parties throughout the course of an investigation." (Doc. 22 at 4.)

4. The legislative history makes clear that taxpayers should have a chance to respond before a third party contact is made.

The statutory language now codified at section 7602(c) originated in the Senate, as a result of an amendment it proposed to the Internal Revenue Service Restructuring Act of 1998 ("1998 Act" or "Act"). Pub. L. No. 105–206, 112 Stat. 685. As Appellant notes, the House Bill did not address the subject at all. (App. Br. 30.) The Senate Finance Committee Report noted that the Senate was motivated to amend the Act to require prior notice of a third party contact because "[s]uch contacts may have a chilling effect on the taxpayer's business and could damage the taxpayer's reputation in the community." S. Rep. No. 105–174 at 77.

The IRS itself acknowledges this legislative intent in its current Internal Revenue Manual, which states:

> […] the intent behind this statute is to prevent the Service from disclosing to third parties that the taxpayer is the subject of a Service action without first providing reasonable notice to the taxpayer *and allowing the taxpayer an opportunity to provide the information and resolve the matter*.

I.R.M. 4.11.57.2(3) (Jan. 17, 2014) (emphasis added).[9]

In that vein, the preamble to the Treasury Regulations implementing section 7602(c) states that their purpose is to "balance a taxpayer's business and reputational interests with […] the IRS' responsibility to administer the internal revenue laws effectively" and to "enable a taxpayer to come forward with information required by the IRS before third parties are contacted." T.D. 9028, 67 Fed. Reg. 77,419, 77420 (Dec. 18, 2002). While providing taxpayers with Publication 1

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9 The legislative intent behind the advance notice requirement has been recognized by the District Courts as well. *See United States v. Jillson*, 84 A.F.T.R. 2d 99-7115 at 99-7717, No. 99-cv-14223 (S.D. Fla. Oct. 28, 1999) ("One of Congress' purposes in enacting Section 7602(c) was to provide the taxpayer the opportunity to volunteer whatever information is sought before the IRS contacts a third-party." (citing S. Rep. No. 105–174, at 77)); *see also Clearwater Consulting Concepts, LLLP v. United States*, 102 A.F.T.R. 2d 2008-5307, 2008-5313, No. 2007-33 (D.V.I. July 22, 2008).

theoretically puts taxpayers on notice that the IRS is able to contact third parties, it does not provide any notice that the IRS is contemplating making any third party contacts *in the taxpayer's own audit*, and does not provide taxpayers any meaningful opportunity to come forward with specific information or other discussion, and falls woefully short of the sort of the notice that Congress envisioned.

Indeed, shortly after the 1998 Act was passed into law, Senator Christopher S. "Kit" Bond, Chairman of the Senate Committee on Small Business & Entrepreneurship, wrote to the IRS Commissioner with concerns about the enforcement of section 7602(c) stating:

> Our intent […] was that the taxpayer should have the opportunity to provide information requested during an examination before the IRS turns to any third party. In addition, once the IRS determines that such information can only be obtained from third parties, the taxpayer has a right to reasonable notice concerning the third parties that the IRS needs to contact and to receive such notice before the inquiries are made.

(S. Rep No. 107–19 at 58).

The legislative history is clear: Congress intended notice under section 7602(c)(1) that was sufficient to give taxpayers a chance to head off the IRS's contemplated third party contacts by offering additional information to the IRS, alternatives to the IRS current course of

conduct or by engaging in a discussion with the IRS about the necessity of the third party contact relative to the potential harm to the taxpayer. This stands in stark contrast to the IRS's current interpretation of its obligations under section 7602(c)(1)—namely that the IRS must only include Publication 1 "or a similarly general notice with its initial contact letter." Taxpayer Advocate 123. The IRS's practice of providing only Publication 1 therefore cannot and does not constitute "reasonable" notice contemplated by section 7602(c)(1).

B. The notice provided by Publication 1 does not give taxpayers a meaningful opportunity to respond, and therefore cannot meet the requirements of section 7602(c) and 6103(k)(6).

In the case at bar, as in many others, the IRS provided only its Publication 1 to the taxpayer, which states that "we sometimes talk with other persons if we need information that you have been unable to provide." Publication 1 further states that "[i]f we do contact other persons […] we will generally need to tell them limited information, such as your name."

Relying on Publication 1 to fulfill the requirement of reasonable advance notice is problematic because of its vagueness, and because it is given to a taxpayers along with their "initial contact letter." *See, e.g.*,

I.R.M. 4.46.3.1.6(4) (March 14, 2016) (requiring Publication 1 to be included in initial contact of individual taxpayers). This contact occurs right after they have been selected for examination, at a point in time when generally even the IRS, let alone the taxpayer, does not know what ultimate issues may become relevant in the examination. Moreover, Publication 1 covers many other topics, some of which conflict with the Service's practice of making third party contacts without providing clearer, more specific notice. For example, Publication 1 informs the taxpayer of their "Right to Privacy" and their "Right to Confidentiality," stating that "[t]axpayers have a right to expect that an IRS inquiry […] [will be] no more intrusive than necessary," and that "any information they provide to the IRS will not be disclosed unless authorized by the taxpayer or by law." Under these circumstances, a taxpayer reasonably could believe that they would have some more specific advance notice of potential third party contacts, and would be given an opportunity to respond before such contacts are made.

Even the IRS's own National Taxpayer Advocate has noted in its annual report to Congress, that Publication 1 is ineffective in allowing

taxpayers an opportunity to respond to the IRS and volunteer information because it "do[es] not identify the information the IRS needs […] or provide the taxpayer with enough advanced notice to deliver the information before the contact." Taxpayer Advocate 123.

> [The Publication 1] language is vague. It does not even reveal whether the IRS plans to make a [third party contact] in the taxpayer's particular case. Moreover, the IRS generally delivers the [third party contact] notice with the initial contact letter—*potentially before the IRS has requested any information from the taxpayer*."

Id. at 127 (emphasis added).

The notices provided by Publication 1 "are ineffective because they do not identify the information the IRS needs, inform the taxpayer the IRS *will* make a [third party contact] in the taxpayer's particular case, or provide the taxpayer with enough advanced notice to deliver the information before the contact." *Id.* at 123.

In short, Publication 1 does not supply the reasonable advance notice required by section 7602(c)(1) because it does not give taxpayers a meaningful opportunity to provide the requested or other relevant information to the IRS that would avoid third party contacts. The distribution of Publication 1 is entirely disconnected in time and substance from the IRS's information-gathering, and from the IRS's

decision to make a third party contact. If Congress's intent is to allow the taxpayer an opportunity for voluntary compliance, then the taxpayer needs to know who the third party contact is being made to, and what it is about. Publication 1 is not intended to achieve and fails to achieve this purpose.

Accepting the IRS's interpretation—namely that the language of Publication 1 is reasonable advance notice of third party contacts in every case—would create a rule that allows the IRS to bypass the taxpayer and go straight to third parties, without first giving taxpayers a chance to respond. Such a result would undermine the clear intent of Congress—i.e., that taxpayers be given a chance to respond before potentially harmful third party contacts are made—and would conflict with the fundamental taxpayer privacy rights guaranteed by section 6103's protection of return information.

The notice required by section 7602(c)(1) may vary with the facts and circumstances of a particular case. As the Taxpayer Advocate noted,

> "[w]hen the [third party contact] is to verify information already provided, a reasonable notice can be less specific because the taxpayer is unlikely to avoid it by providing the verification. When the [third party contact] is to obtain information, however,

> reasonable advanced notice may require the IRS to identify the specific information it needs so the taxpayer can avoid the contact either by providing the information or resolving the matter."

Taxpayer Advocate 126. But, in the case at bar, giving the taxpayers Publication 1 over two years earlier did not give them the notice required to engage the IRS in a discussion about the information it was seeking, whether it was truly necessary for the examination, and whether it could be provided by the taxpayers, as well as to raise with the IRS the potential harms to the taxpayer of the third party contact. Such a discussion would not only give the taxpayers a chance to avoid the third party contact, but would also provide the IRS with the information needed to determine whether, given the facts and circumstances of the case, verification of any of the taxpayer's information was reasonably necessary, especially when balanced with the potential harm to the taxpayer. The reasonable advance notice required by section 7602(c)(1) therefore cannot be satisfied as a matter of law in all cases by Pub. 1, and the District Court's holding that "the advance notice procedure cannot be satisfied by the transmission of a publication about the audit process generally" should therefore be affirmed (Doc. 22 at 4.)

And because section 6103(k)(6) allows third party contacts only where reasonable and necessary given the facts and circumstances of a particular case, holding that the Publication 1 notice is sufficient administrative process for third party contacts in every IRS examination, across the board, disturbing the District Court's holding also runs afoul of the fundamental taxpayer privacy rights guaranteed by section 6103. The exception to section 6103 granted to certain third party contacts must be read narrowly and the protections afforded by Congress in that exception must be read to mean more than the Appellant claims.

C. The IRS's past practice gave taxpayers more notice of third party contacts than Publication 1.

Although Appellants assert that the District Court's "ruling has potentially far-reaching impact" and "would require the IRS to change significantly how it conducts audits," the resulting change would actually be a return to the IRS's past practice. (Reply Br. 3.) This is because, until recently, it was the practice of the IRS to provide a taxpayer a series of notices and letters when a third party contact was contemplated. Shortly after the 1998 Act, the IRS took the position that "[p]roviding the taxpayer with [a general notice letter] alone does not

constitute adequate notification of third party contact," but that the more general notice "must be attached to another letter that contains the […] tax form, type of tax and tax period(s) [at issue]" for the information sought by the third party contact. I.R.M 4.10.1.6.12.2.1 (May 14, 1999).

This approach continued until approximately 2005 to 2008. As the Taxpayer Advocate notes,

> "under IRS procedure in effect between 2000 and 2005, the IRS issued a general [third party contact] notice followed by a more detailed one. The second notice was more likely to alert the taxpayer that the IRS was actually planning to make [third party contacts] unless it received additional information from the taxpayer."

Taxpayer Advocate 127. The notices—which took the form of letters sent to the taxpayer—"included a specific IRS employee's contact information and sometimes even identified the specific information that the IRS needed or needed to verify and why." *Id.*

There is some debate among the authorities as to when exactly the IRS's practice changed. The Taxpayer Advocate dates the change to 2005, when Publication 1 was amended to include the language about

third party contacts, on which the IRS now relies.[10] Other authorities date the change to 2008,[11] when the IRS issued Chief Counsel Advice Memorandum 200814008, which concluded, without analysis, that "[m]ailing publication 1 to a taxpayer satisfies section 7602(c)'s requirements that the taxpayer be given notice before the Service makes third-party contacts." CCA 200814008 at 3.

Regardless of when the change in the IRS's practice took place, it was undeniably a decision that gave taxpayers less notice than before. Whereas the Service "previously supplied separate letters that were *more specific* in nature than Publication 1, which has a *more general* purpose," after the change the IRS supplied only Publication 1 distant

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10 *See also Thompson v. United States*, 102 A.F.T.R. 2d 2008-6130, 6131, No. H08-1277 (S.D. Tex, Sept. 11, 2008) ("Before March 2006, the IRS used Letter 3164 to give taxpayers advance notice of the potential for third-party contact […]". But "An IRS memorandum dated March 10, 2006 directed examination agents to discontinue using Letter 3164 […] and instructed agents to use Publication 1 instead. Publication 1 was revised in May 2005 to include language advising of the potential for third-party contacts.").

11 *See, e.g.*, Michael I. Salzman & Leslie Book, *IRS Practice & Procedure* ¶ 8.07[4] n. 254 ("Prior to 2008, Service policy was to provide separate notices rather than the more general Publication 1 relating to third-party contacts.").

in time from the potential contact. Michael I. Salzman & Leslie Book, *IRS Practice & Procedure* ¶ 8.07[4] (emphasis added).

In sum, the past practice of the IRS, immediately after passage of section 7602, provided significantly more notice to taxpayers prior to third party contacts—notice that gave then a meaningful opportunity to engage with the IRS, whether to provide more information or to discuss the Service's need for the contact, and its potential harms to the taxpayer. This past practice underscores that there was broad understanding by both the executive and legislative branch of the intent of the statute. Further, this past practice shows that it is administratively feasible for the IRS to balance its ability to conduct its examination and audit functions with the rights of taxpayers to be informed of third party contacts in advance. The law has not changed protecting taxpayer rights as to third party contacts, but it is clear that, over time, the IRS has quietly drifted away from the statute and Congressional policy to the point where the IRS now claims that a general notice to the taxpayer, provided at the beginning of an audit, with a passing minor abstract reference made about possible third party contacts but with no substantive details is adequate. The Court

must anchor the IRS's behavior to the taxpayer rights encompassed by the sections 7602(c) and 6103(k)(6) and ensure that Congressional intent and statutory protections are honored.

D. The District Court's decision does not conflict with prior case law.

The District Court's ruling is not the "outlier" that Appellant paints it to be. (*See* App. Br. part B.4.) Rather than hold that "Publication 1 satisfies the pre-contact notice requirement of I.R.C. § 7602(c)(1)," many of the cases Appellant cites either did not squarely decide the issue, or were decided on other grounds.

In *Gangi*, for example, the "Petitioners did not deny that Mr. Gangi received advance notice of third-party contact." *Gangi v. United States*, 107 A.F.T.R. 2d 2011-1538, No. 10-cv-24 (D.N.J Jan. 7, 2011); *see also Gangi, et al. v. United States*, 113 A.F.T.R. 2d 2014-1175 n.5, No. 14-cv-10114 (D. Mass. Mar. 4, 2014) ("The petitioners do not appear to contend that the form of the notice—an examination letter with IRS Publication 1 attached—was insufficient.")

In *Clearwater Consulting Concepts, LLLP*, the taxpayers had received other forms of notice *in addition to Publication 1*, and the Court found that "the timing of *March 2006 letters* and the sufficiency

of Publication 1's notice to third-party contacts were not violative of the intent of section 7602 as articulated in the legislative history," namely that the statute "gives the taxpayer the *opportunity to volunteer information and to resolve issues before third- parties are contacted*." *Clearwater Consulting Concepts, LLLP v. United States*, 102 A.F.T.R. 2d 2008-5307 at 2008-5313, No. 2007-33 (D.V.I. July 22, 2008) (emphasis added).

While the District Court in *Highland* accorded *Skidmore* deference to the IRS's own interpretation that Publication 1 satisfied the notice requirements of section 7602(c)(1), it also found that the IRS "*prima facie* demonstrated that Highland was given *actual notice* of its intent" to make the particular third party contacts at issue. *Highland Capital Management*, 51 F. Supp.3d 544 (S.D.N.Y. 2014). The Second Circuit "conclude[d], as the District Court did, that *regardless* of whether Publication 1 satisfies § 7602(c)(1), the *oral notice* provided to Highland Capital during the January 2014 meeting was sufficient to satisfy that statutory requirement." *Highland Capital Mgmt., LP v. United States*, 626 F. App'x 324 (2d Cir. 2015) (emphasis added). No such notice was given in the instant case.

Likewise, in *Thompson*, before making any third party contacts, the IRS first sent the taxpayer several requests for information, and each request was accompanied by Publication 1. 102 A.F.T.R. 2d at 2008-6131. *Thompson v. United States*, 102 A.F.T.R. 2d 2008-6130, 6131, No. H08-1277 (S.D. Tex. Sept. 11, 2008). And, ultimately, "Thompson d[id] not dispute that Publication fulfills the notice requirements of Section 7602(c)(1)." 102 A.F.T.R. 2d at 2008-6134.

Significantly, Appellants ignore case law that supports Appellee's position. For example, like *Clearwater Consulting*, which recognized that the fundamental purpose of the notice requirement is to give taxpayers an opportunity to volunteer information before third party contacts are made, the District Court in *Jillson* held that "[b]y failing to provide a *notice of contact letter* prior to serving the summonses, [the taxpayer] was denied the opportunity to resolve issues and volunteer information prior to contact, and as such was not only harmed, but was *harmed in the very way Section 7602(c) was enacted to remedy*." *United States v. Jillson*, 84 A.F.T.R. 2d 99-7115 at 99-7717, No. 99-cv-14223 (S.D. Fla. Oct. 28, 1999) (emphasis added). The *Jillson* Court's analysis applies with equal force to the case at bar—because the IRS's practice of

giving taxpayers Publication 1 at the very outset of an exam or investigation denies taxpayers the opportunity to respond before a third party contact, it does not satisfy the IRS's obligation to provide reasonable advance notice under section 7602(c)(1).

CONCLUSION

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

Respectfully Submitted,

s/ Felipe Bohnet-Gomez

Dean A. Zerbe
Steven T. Miller
Felipe S. Bohnet-Gomez*

ZERBE, MILLER, FINGERET, FRANK & JADAV, LLP
1455 Pennsylvania Ave. NW, Suite 300
Washington, D.C. 20004
Tel. (713) 350-3529

*Admitted in New York only. Supervised by Steven T. Miller, a member of the D.C. Bar.

Counsel for Amicus Curiae

Date: February 24, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case No. 16–15999.

I certify that:

1. This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The Brief is 7,000 words , excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

2. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). This brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 14-point Century.

s/ Felipe Bohnet-Gomez

Attorney for Amicus Curiae

Dated: February 24, 2017

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 24, 2017. I certify that participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Felipe Bohnet-Gomez
Felipe Bohnet-Gomez

Attorney for Amicus Curiae