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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FACEBOOK, INC. AND SUBSIDIARIES

Plaintiff,

v.

INTERNAL REVENUE SERVICE, and JOHN KOSKINEN, in his official capacity as Commissioner of Internal Revenue,

Defendants.

CASE NO. 3:17-cv-06490-LB

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE*

Date: April 12, 2018
Time: 9:30 a.m.
Dept.: Courtroom 15-C

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I. INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the Nation's business community.

This case presents two questions of significant importance to the Chamber and its members: (1) whether taxpayers have a right to an independent administrative appeal of their case before the Internal Revenue Service Office of Appeals ("IRS Appeals"), and (2) whether the limitations on agency action in the Administrative Procedure Act ("APA") apply with full force to the Internal Revenue Service.

As Facebook has explained, the Internal Revenue Code ("Code") guarantees taxpayers a right to present their cases in an independent forum within the Internal Revenue Service. The independent forum created by the IRS for this purpose is IRS Appeals. Revenue Procedure 2016-22, 2016-15 I.R.B. 577, violates the statute and fundamentally alters the administrative process. This Revenue Procedure delegates the authority to deny taxpayers this statutory right to the IRS examining agents' attorneys in IRS Counsel. Under the Revenue Procedure, the attorneys for IRS examining agents can deny a taxpayer access to IRS Appeals by claiming that the denial is in the interest of "sound tax administration." The Revenue Procedure provides no standards for application of this vague and toothless justification. Even if such standards existed, the IRS contends in this litigation that IRS Counsel's denial of access to IRS Appeals is unreviewable, either within the IRS or in court. The Revenue Procedure strips taxpayers of the right to independent administrative review and requires them to incur the costs of litigation to seek independent judicial review. This is not what Congress intended or enacted.

The government compounds its error by asserting that the Administrative Procedure Act does not apply with full force to the Internal Revenue Service. In *Mayo Foundation for Medical Education & Research v. United States*, 562 U.S. 44 (2011), the Supreme Court confirmed that Treasury Regulations should be reviewed under the deferential standard of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). With the privilege of deferential *Chevron* review comes the obligation to follow the requirements of the Administrative Procedure Act. There is not, and should not be, an IRS exception to the procedures that govern other administrative agencies. Nor should the IRS have the ability to engage in arbitrary and capricious decisionmaking without judicial review—a power the IRS claims to possess in the Motion to Dismiss.

II. A TAXPAYER RIGHT TO IRS APPEALS IS ESSENTIAL TO EFFICIENT TAX ADMINISTRATION

The IRS Appeals mission is "to resolve tax controversies, without litigation, on a basis which is fair and impartial to both the Government and the taxpayer and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Service." Internal Revenue Manual § 8.1.1.1. IRS Appeals accomplishes that mission efficiently. In fiscal year 2016, the approximately 925 officers in IRS Appeals closed over 111,000 cases. *See* Internal Revenue Service Data Book, 2016, table 21, https://www.irs.gov/pub/irs-soi/16databk.pdf (hereinafter, the "IRS Data Book"). Historically, IRS Appeals has been successful in closing approximately eighty-five percent of those cases on an agreed basis. *See* Mary A. McNulty & Lee Meyercord, *The IRS Appeals Process: A Primer in Resolving Federal Tax Disputes Without Litigation*, Texas Tax Lawyer (Winter 2012). IRS Appeals plays an integral role in preventing courts from being flooded with tens of thousands of additional tax cases annually, with the added benefit of obtaining taxpayer consent to the result.

An additional role of IRS Appeals is more difficult to quantify and yet perhaps more important. All stakeholders in the IRS compliance process—the taxpayers who file returns, pay tax, and endure the costs of examinations; the IRS executives who set enforcement priorities; the examining agents who conduct examinations; and the IRS Counsel attorneys who supply legal

1 advice—understand that after an examination is over, the taxpayer has the right (whether or not the
2 issue justifies the costs of litigation) to present its case to an IRS Appeals Officer charged with
3 making an independent judgment about the merits of the case. This knowledge affects the
4 incentives of everyone involved. Taxpayers have an incentive to be more cooperative during
5 examinations because they know their conduct during the examinations may be taken into account
6 by IRS Appeals. IRS examining agents and IRS Counsel attorneys know that their conduct and the
7 positions they take will likewise affect IRS Appeals consideration of their work. The belief that, if
8 necessary, an independent IRS Appeals Officer can serve as a safety valve against overzealous
9 enforcement serves to prevent overzealous and unreasonable enforcement in the first instance.

10 A. The Examination Process Can Be Costly and Lengthy.

11 In 2015, the IRS received nearly 200 million returns, and in fiscal year 2016, it conducted
12 examinations of more than one million returns. *See* IRS Data Book, table 9a. The IRS conducted
13 more than 20,000 examinations of corporation income tax returns, more than ninety percent of
14 which were field examinations, which "are generally performed in person." *Id.*

15 The Internal Revenue Code grants broad powers to the agents charged with examining
16 returns. Section 7601 grants authority to "inquire after and concerning all persons . . . who may be
17 liable to pay any internal revenue tax." The authority granted by section 7602 has been delegated
18 to IRS examining agents, who may "examine any books, papers, records, or other data which may
19 be relevant or material to such inquiry" and to summon individuals "to produce such books, papers,
20 records, or other data, and to give such testimony, under oath, as may be relevant or material to
21 such inquiry." 26 U.S.C. § 7602(a).

22 As a practical matter, the examinations conducted under this authority can last for years
23 (sometimes longer than a decade) and can require a taxpayer to respond to hundreds of IRS
24 document requests. IRS examinations of corporate returns can require taxpayers to review and
25 produce millions of electronic records, and to make available for interviews numerous employees,
26 suppliers, and customers. Responding to IRS requests for documents and interviews is often
27 costly, including the opportunity cost to the business of employees who are focused on defending
28 the examination instead of advancing the success of the business.

1 Moreover, in the largest examinations, the Internal Revenue Manual contemplates that
2 taxpayers will provide "space set aside for the agent's use," "parking arrangements," "equipment
3 needed by the team," and "[t]elephone and data lines." Internal Revenue Manual § 4.46.3.9.3.1(8).
4 Taxpayers sometimes provide IRS examiners with computers and specialized software to complete
5 their examinations. It is not uncommon for teams of several IRS agents to work full-time in
6 dedicated space provided by the taxpayer for years on end.
7 During IRS examinations, the examination teams are not permitted to take into account the
8 hazards of litigation in calculating their assessments of tax due. In other words, if an examining
9 agent proposes a change that would result in $100 of additional tax due, but the agent believes her
10 position has only a sixty percent chance of being sustained in litigation, she must nonetheless
11 assess the full $100 of tax, and she cannot settle with the taxpayer for $60. The fact that IRS
12 examining agents lack settlement authority based on the hazards of litigation necessarily means
13 that many issues cannot be resolved by IRS examining agents. If those issues are not resolved in
14 IRS Appeals, there will necessarily be much more litigation, at substantial cost to both the
15 government and to taxpayers.
16 The general rule under the Internal Revenue Code is that the IRS has three full years after a
17 return is filed to assess additional tax. 26 U.S.C. § 6501. But the Code provides that the IRS and
18 the taxpayer can agree to extend the statute of limitations on assessment. *Id.* § 6501(c)(4). As a
19 practical matter, the IRS has enormous leverage in extracting statute extensions from taxpayers. If
20 the taxpayer refuses to consent to an extension, the IRS is likely to take immediate action to assess
21 any additional tax the examining agents believe to be due. *See* IRS Pub. No. 1035, Extending the
22 Tax Assessment Period, at 3 ("If you choose not to sign the consent, we will take steps that will
23 allow us to assess any tax we determine to be due."). The first step is the issuance of a statutory
24 notice of deficiency, which requires the taxpayer either to pay the tax alleged to be due (followed
25 by a claim for refund) or to initiate litigation in United States Tax Court. *See id.* ("The notice gives
26 you 90 days (150 days if the notice was addressed to a person outside the United States) to either
27 agree to the deficiency . . . or file a petition with the United States Tax Court . . ."). Unlike IRS
28 examinations, which are generally protected from public disclosure by 26 U.S.C. § 6103, tax

litigations are public proceedings. The rules of the Tax Court require taxpayers to attach the statutory notice of deficiency (and any IRS explanations attached thereto) to the petition that commences their case, *see* Rule 34(b)(8), Tax Court Rules of Practice and Procedure, and the press regularly monitors and publicizes the contents of petitions they deem newsworthy. *See, e.g.*, Marie Sapirie, *Facebook to Comply with IRS Summons, Files Tax Court Petition*, 153 Tax Notes (TA) 358 (Oct. 17, 2016). If the litigation proceeds to trial, taxpayers are generally required to present evidence in open court, including sensitive business information such as competitive business strategy.

Moreover, if the taxpayer does not consent to extend the statute of limitations, the taxpayer will have to forgo the opportunity to attempt to resolve the dispute with IRS Appeals before either paying the contested tax or commencing litigation: IRS Appeals generally will not accept a case for consideration unless there are at least 365 days remaining on the statute of limitations. *See* Internal Revenue Manual § 8.21.2.3. As a result, many taxpayers that hope to resolve their cases in IRS Appeals consent to repeated extensions of the statute of limitations on assessment. The ensuing lengthy examinations can consume significant resources.

B. The IRS Appeals Process Is Comparatively Inexpensive and Expeditious.

If there is sufficient time remaining on the statute, after an examination team completes its work and proposes adjustments to the tax reported on the taxpayer's return, the taxpayer has thirty days to file a protest with the examination team so that the case can be transmitted to IRS Appeals. If there is not sufficient time remaining on the statute, the taxpayer that wishes to present its case to IRS Appeals has a more difficult choice. The examination team will issue a statutory notice of deficiency, and the taxpayer must decide what to do. If it is committed to pursuing IRS Appeals, it can commence litigation in Tax Court. Treasury Regulations provide that "[a]fter the filing of a petition in the Tax Court, the Appeals office will have exclusive settlement jurisdiction . . . for a period of 4 months." 26 C.F.R. § 601.106(a)(1)(i). But taxpayers that prefer to litigate their cases in a United States District Court or in the United States Court of Federal Claims must forgo automatic consideration by IRS Appeals.

Once a taxpayer's case is before IRS Appeals, either before or after the case is docketed in the Tax Court, IRS Appeals generally follows similar procedures to attempt to reach an agreed resolution of the case. IRS Appeals Officers are independent of the examination teams and are insulated from those teams by rules that prevent ex parte communications between examination teams and the IRS Appeals Officer assigned to the case. *See* Internal Revenue Manual § 4.2.7.1 ("This manual focuses on ensuring communication between IRS and Appeals employees doesn't compromise or appear to compromise Appeals independence.").

Appeals fiercely guards its reputation for independence:

> Independence is the most important of Appeals' core values. Independence from IRS compliance functions is critical for Appeals to accomplish its mission. To resolve disputes effectively, Appeals must show itself to be objective, impartial, and neutral in fact as well as appearance. If taxpayers perceive they will not get a fair hearing in Appeals, more tax controversies would be litigated in Tax Court, which would increase the cost and burden to both the taxpayer and the Federal Government.

Internal Revenue Service, Appeals – An Independent Organization, https://www.irs.gov/compliance/appeals/appeals-an-independent-organization (last updated Nov. 16, 2017).

In addition to independence from other IRS employees, IRS Appeals Officers are granted a key source of authority that examination teams do not have. IRS Appeals Officers are permitted, indeed required, to take into account the hazards of litigation when considering their cases. *See* Internal Revenue Manual § 8.1.3.4 ("[I]t is important [that] all aspects of the case be fully discussed so all parties understand the issue(s), particularly when agreement is based on hazards of litigation."). Thus, if an examining agent proposes an adjustment that would result in $100 of additional tax due, the taxpayer and the Appeals Officer will attempt to agree how likely that adjustment is to be sustained in court, and can then settle the case on that basis (e.g., for $60 of additional tax if they agree the government has a sixty percent chance of victory).

The proceedings before IRS Appeals are relatively informal. Before the case is transmitted to IRS Appeals, taxpayers generally present their positions in writing in a document called a protest. IRS examination teams have the opportunity to present their own views on the case, and on the taxpayer's protest, in an opening conference in the taxpayer's presence. In some cases,

taxpayers and IRS Appeals Officers reach agreement during the opening conference. If not, negotiations proceed over the following months between the IRS Appeals Officer and the taxpayer in an attempt to reach a resolution. The negotiations can be conducted over the phone, in person, or through additional written submissions by the taxpayer. In IRS Appeals (unlike in litigation), sensitive business information is not disclosed to the public because of 26 U.S.C. § 6103's requirement that IRS employees protect the confidentiality of tax return information. Therefore, compared to the costs of an IRS examination and those of litigation, it costs taxpayers relatively little to attempt to reach a resolution with IRS Appeals.

This is not to say that IRS Appeals always agrees with taxpayers, or that the IRS Appeals process is not a rigorous assessment of the litigating hazards. Far from it. IRS Appeals has the benefit of the entire examination record, in addition to the written and oral presentations of the examination team's and the taxpayers' positions, and has the ability to request additional information or, in some cases, to remand the case to the examination team for further development. Moreover, taxpayers frequently are disappointed to learn that the IRS Appeals Officer assigned to their case believes that the examination team had the better of the argument, and the settlement offer that the Appeals Officer is willing to consider reflects this position.

As a result, in approximately eighty-five percent of cases, the taxpayer and the IRS Appeals Officer agree on a resolution of the case, which brings to an end the IRS's consideration of that particular return filed by the taxpayer. *See* Mary A. McNulty & Lee Meyercord, *The IRS Appeals Process: A Primer in Resolving Federal Tax Disputes Without Litigation*, Texas Tax Lawyer (Winter 2012). In cases where the agreed resolution results in additional tax being due, the taxpayer is required to pay the tax shortly after reaching agreement with IRS Appeals. Both the taxpayer and the government are spared the delay, expense, and uncertainty of litigation.

If IRS Appeals and the taxpayer are not able to reach agreement, IRS Appeals issues a statutory notice of deficiency, and the taxpayer can either pay the additional tax due (often as a prerequisite to filing refund litigation in a United States District Court or in the Court of Federal Claims) or commence litigation in Tax Court.

III. TAXPAYERS HAVE A STATUTORY RIGHT TO ACCESS IRS APPEALS, AND REVENUE PROCEDURE 2016-22 CANNOT DENY THAT RIGHT

A. The Taxpayer Bill of Rights Ensures Taxpayer Access to IRS Appeals.

The Taxpayer Bill of Rights guarantees taxpayers the right to appeal a decision of the Internal Revenue Service in an independent forum within the IRS:

> In discharging his duties, the Commissioner shall ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title, including . . . the right to appeal a decision of the Internal Revenue Service in an independent forum.

26 U.S.C. § 7803(a)(3).

The IRS's claim that the "independent forum" contemplated by the statute is the United States Tax Court is incorrect because it would render this language a nullity. *See* Notice of Mot. and Def.'s Mot. to Dismiss 9–10, ECF No. 19. Congress granted jurisdiction to the United States Tax Court in the Internal Revenue Code, *see, e.g.*, 26 U.S.C. § 7442, and that jurisdiction exists whether or not the Commissioner "act[s] in accord" with it. ECF No. 19, at 9–10. For this language to have meaning, it must require the Commissioner to ensure access to this independent forum *within the IRS*. When Congress enacted this provision, it had already mandated in 1998 that the Commissioner "ensure an independent appeals function within the Internal Revenue Service." Internal Revenue Service Restructuring and Report Act of 1998, Pub. L. No. 105-206, § 1001(4), 112 Stat. 685, 689 (1998). The Commissioner can ensure the appeal in an independent forum mandated by 26 U.S.C. § 7803 only if the forum is within the organization the Commissioner controls, i.e., the IRS. The Code grants the Commissioner no authority to claim that he has satisfied his obligation to provide access to an independent forum merely by "ensuring" what already existed and what he never had authority to prevent—independent review in the judicial forum of the Tax Court. Nor can the Commissioner credibly suggest that the IRS examination function is an independent forum. Rather, as the IRS is currently structured, the independent forum that the Commissioner must ensure access to is IRS Appeals.

B. Revenue Procedure 2016-22 Cannot and Should Not Override the Statute.

In Revenue Procedure 2016-22, 2016-15 I.R.B. 577, the IRS claims the ability to deny taxpayers the right to IRS Appeals whenever IRS Counsel (i.e., the examining agents' lawyers) makes a unilateral and unreviewable "determin[ation] that referral is not in the interest of sound tax administration." This Revenue Procedure violates the Internal Revenue Code and represents a pernicious threat to the function of IRS Appeals, and the positive effects that it has on other IRS functions. As explained below, this procedure allows IRS Counsel, without either high-level executive involvement or input from the other IRS functions, to deny taxpayers access to IRS Appeals for any reason, or for no reason at all. Moreover, according to the IRS in this action, IRS Counsel's decision to deny a taxpayer its statutory right to IRS Appeals is unreviewable by any court. This threat highlights why Congress saw fit to guarantee a right to IRS Appeals in the Internal Revenue Code and why this Court should vindicate that right in this case.

Under the Revenue Procedure, taxpayers are stripped of their statutory right to independent administrative review. Consequently, taxpayers must endure the constant threat of litigation throughout their examinations because IRS Counsel may unilaterally deny (or threaten to deny) access to IRS Appeals, leaving taxpayers with one option for independent review: litigation in court. Even if IRS Counsel chooses in most cases not to exercise the right the IRS claims in the Revenue Procedure, taxpayers and examining agents will be aware of the threat that IRS Counsel can be convinced to deny taxpayers access to IRS Appeals. Demoting the statutory right to IRS Appeals into a discretionary decision by IRS Counsel cannot help but alter the dynamics of an examination. This Court should restore to taxpayers the right granted to them by the Internal Revenue Code.

As Facebook explained, prior to 2015, there were only two situations in which the IRS denied taxpayers a right to present their case to IRS Appeals. First, under Revenue Procedure 87-24 § 2.08, 1987-1 C.B. 720, 721, *superseded*, Revenue Procedure 2016-22, the Director of the Tax Litigation Division, following consultation with the Director of IRS Appeals and the appropriate Regional Counsel, could determine that a case, or issues within a case, should not be considered by Appeals. This authority was rarely invoked (perhaps because of the consultation requirements),

and at least ensured that IRS Appeals would have input before IRS Appeals access could be denied.

Similarly, Internal Revenue Manual § 33.3.6 provides a mechanism through which the IRS can designate a case for litigation. These procedures are supposed to be reserved for "cases [that] present recurring, significant legal issues affecting large numbers of taxpayers." *Id.* § 33.3.6.1. Once a case is designated by the IRS for litigation, the designated issue in the case will not be resolved without a full concession by the taxpayer. The theory underlying the designation procedure is that:

> [C]ases are designated for litigation in the interest of sound tax administration to establish judicial precedent, conserve resources, or reduce litigation costs for the Service and taxpayers. For example, judicial precedent may provide guidance for the resolution of industry-wide, tax shelter or other issues, thereby serving early issue resolution and conserving Service and taxpayer resources.

Id.

No case can be designated for litigation without the approval of the Chief Counsel for the Internal Revenue Service. *Id.* § 33.3.6. Because the Chief Counsel is an employee of the Treasury Department, not the IRS, this procedure ensures input from the Treasury Department before a case can be designated. Although this procedure is not consistent with the statutory right to access IRS Appeals, the standards for designation set forth in the Internal Revenue Manual at least provide some relatively rigorous standards for consideration: If a case does not present recurring, significant legal issues affecting large numbers of taxpayers, it should proceed to IRS Appeals for consideration.

By contrast, the standard in Revenue Procedure 2016-22—the "sound tax administration" standard—is so vague and undefined that it is no standard at all. The Revenue Procedure does not require consultation with any other IRS functions, and it provides no concrete guidance about what qualifies as "sound tax administration" and what does not. Moreover, the procedure does not even require IRS Counsel to provide a taxpayer with any explanation of why IRS Counsel concluded that denying access to IRS Appeals is in the interest of "sound tax administration." This case is a perfect example. Facebook has alleged that "[t]he IRS has never provided Facebook an explanation of why IRS Counsel concluded providing Facebook access to IRS Appeals is not in the

interest of sound tax administration." Complaint ¶ 44, ECF No. 1. Armed with such a vague standard, and freed from the obligation to explain the decision, IRS Counsel could deny a taxpayer access to IRS Appeals for almost any reason.

Worse still, this vague standard permits IRS Counsel to invoke it to mask illegitimate reasons for denying access to IRS Appeals. As explained above, the IRS has significant leverage to coerce a taxpayer to forgo its statutory right to invoke the statute of limitations. Permitting the IRS to retaliate against a taxpayer that refuses to extend the statute of limitations by denying that taxpayer access to Appeals would be both arbitrary and capricious. Yet in this case, that is precisely what Facebook's Complaint alleges has happened: "one of the reasons the IRS denied Facebook access to IRS Appeals was to retaliate against Facebook for not providing an additional extension of the statute of limitations." *Id.* ¶ 47.

But whether or not Facebook is ultimately permitted to prove this allegation, the damage to the tax system has already been done. Taxpayers no longer can feel confident that they will have access to an independent forum to serve as a safety valve on an overzealous examination team. Taxpayers and examination teams alike may focus more energy on convincing IRS Counsel whether it is in the interests of "sound tax administration" to permit access to IRS Appeals at the expense of devoting effort to developing the merits of the issues in the case. The effects of Revenue Procedure 2016-22 will be felt far beyond those cases in which access to IRS Appeals is actually denied.

As Facebook has explained, Congress enacted in the Internal Revenue Code a taxpayer right to present its case to IRS Appeals. Revenue Procedure 2016-22 demonstrates the risks posed by the failure to honor that right. The Chamber respectfully submits that the Court should hold that Congress meant what it said: taxpayers have "the right to appeal a decision of the Internal Revenue Service in an independent forum." 26 U.S.C. § 7803(a)(3).

IV. IRS PROCEDURES MUST COMPLY WITH THE APA

For decades, tax practitioners inside and outside the government subscribed to the theory of "tax exceptionalism"—the idea that the administrative law applicable to tax should differ from the administrative law applicable to other administrative agencies. The Supreme Court unanimously

and emphatically rejected this view in *Mayo Foundation for Medical Education & Research v. United States*, 562 U.S. 44 (2011). In holding that tax regulations can be eligible for deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the unanimous *Mayo Foundation* Court refused "to carve out an approach to administrative review good for tax law only," noting that it has "expressly '[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.'" *Mayo Foundation*, 562 U.S. at 55 (quoting *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999)). Thus, the Court found "no reason why [judicial] review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as [judicial] review of other regulations." *Id.* at 56.

But the end of tax exceptionalism cuts both ways: Treasury and the IRS cannot earn *Chevron*'s deference unless they comply with the procedures required by the Administrative Procedure Act. In *Cohen v. United States*, 650 F.3d 717, 736 (D.C. Cir. 2011) (en banc), the D.C. Circuit held that the APA's judicial review provisions apply to IRS Notices. In reaching this conclusion, the IRS remarked that "[t]he IRS is not special in this regard; no exception exists shielding it—unlike the rest of the Federal Government—from suit under the APA." *Id.* at 723. The court acknowledged the argument that "[t]here may be good policy reasons to exempt IRS action from judicial review" under the APA. *Id.* at 736. The D.C. Circuit emphasized, however, that "Congress has not made that call. And we are in no position to usurp that choice." *Id.* (citations omitted).

The IRS continues to resist application of the APA, arguing in this case that "Congress has provided specific rules for judicial review of tax determinations; those specific rules control over the more general rules for judicial review embodied in the APA." ECF No. 19, at 18. This position does not confront the essence of Facebook's claim. Facebook is not challenging in this action the IRS's tax determination; instead, it is challenging the IRS's procedural action, pursuant to Revenue Procedure 2016-22, to deny it access to IRS Appeals. As explained above, Facebook has alleged that this action is arbitrary and capricious, and indeed that it was taken for the improper motive of retaliating for Facebook's exercise of its statutory right not to extend the statute of limitations on assessment.

Whatever the underlying merits of the IRS Appeals process, and Facebook's claims in this case, it is nonetheless astonishing for the IRS to argue in its Motion to Dismiss that it has the authority to deny taxpayers access to an independent administrative forum in an arbitrary and capricious manner, and that taxpayers that are adversely impacted by those actions have absolutely no judicial recourse. Whatever one can say about the goals of "sound tax administration," a system in which the IRS is above the law—the very same law that applies to all administrative agencies of the federal government—is not one that the Supreme Court has approved and is not one that this Court should approve.

V. CONCLUSION

For the foregoing reasons, the Court should deny the IRS's Motion to Dismiss.

* * * * *

Dated: March 14, 2018

Respectfully submitted,

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

/s/ David W. Foster
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/s/ Christopher P. Murphy
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FILER'S ATTESTATION

I, Christopher P. Murphy, am the ECF user whose identification and password are being used to file the Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae*. In compliance with Local Rule 5-1(i)(3), I hereby attest that all signatories hereto concur in this filing.

/s/ Christopher P. Murphy