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14
15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**
17 **SAN FRANCISCO DIVISION**

18 FACEBOOK, INC. AND SUBSIDIARIES
19 Plaintiff,
20 v.
21 INTERNAL REVENUE SERVICE, and
JOHN KOSKINEN, in his official capacity as
22 Commissioner of Internal Revenue,
23 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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2 **I. INTEREST OF *AMICUS CURIAE***

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

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

15 As Facebook has explained, the Internal Revenue Code (“Code”) guarantees taxpayers a
16 right to present their cases in an independent forum within the Internal Revenue Service. The
17 independent forum created by the IRS for this purpose is IRS Appeals. Revenue Procedure 2016-
18 22, 2016-15 I.R.B. 577, violates the statute and fundamentally alters the administrative process.
19 This Revenue Procedure delegates the authority to deny taxpayers this statutory right to the IRS
20 examining agents’ attorneys in IRS Counsel. Under the Revenue Procedure, the attorneys for IRS
21 examining agents can deny a taxpayer access to IRS Appeals by claiming that the denial is in the
22 interest of “sound tax administration.” The Revenue Procedure provides no standards for
23 application of this vague and toothless justification. Even if such standards existed, the IRS
24 contends in this litigation that IRS Counsel’s denial of access to IRS Appeals is unreviewable,
25 either within the IRS or in court. The Revenue Procedure strips taxpayers of the right to
26 independent administrative review and requires them to incur the costs of litigation to seek
27 independent judicial review. This is not what Congress intended or enacted.

28

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

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

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

25 An additional role of IRS Appeals is more difficult to quantify and yet perhaps more
26 important. All stakeholders in the IRS compliance process—the taxpayers who file returns, pay
27 tax, and endure the costs of examinations; the IRS executives who set enforcement priorities; the
28 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

1 litigations are public proceedings. The rules of the Tax Court require taxpayers to attach the
2 statutory notice of deficiency (and any IRS explanations attached thereto) to the petition that
3 commences their case, *see* Rule 34(b)(8), Tax Court Rules of Practice and Procedure, and the press
4 regularly monitors and publicizes the contents of petitions they deem newsworthy. *See, e.g.,* Marie
5 Sapirie, *Facebook to Comply with IRS Summons, Files Tax Court Petition*, 153 Tax Notes (TA)
6 358 (Oct. 17, 2016). If the litigation proceeds to trial, taxpayers are generally required to present
7 evidence in open court, including sensitive business information such as competitive business
8 strategy.

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

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

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

28

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

8 Appeals fiercely guards its reputation for independence:

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

13 Internal Revenue Service, Appeals – An Independent Organization,

14 <https://www.irs.gov/compliance/appeals/>

15 [appeals-an-independent-organization](https://www.irs.gov/compliance/appeals/appeals-an-independent-organization) (last updated Nov. 16, 2017).

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

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

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

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

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

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

28

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

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

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

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

10 26 U.S.C. § 7803(a)(3).

11 The IRS's claim that the "independent forum" contemplated by the statute is the United
12 States Tax Court is incorrect because it would render this language a nullity. *See* Notice of Mot.
13 and Def.'s Mot. to Dismiss 9–10, ECF No. 19. Congress granted jurisdiction to the United States
14 Tax Court in the Internal Revenue Code, *see, e.g.*, 26 U.S.C. § 7442, and that jurisdiction exists
15 whether or not the Commissioner "act[s] in accord" with it. ECF No. 19, at 9–10. For this
16 language to have meaning, it must require the Commissioner to ensure access to this independent
17 forum *within the IRS*. When Congress enacted this provision, it had already mandated in 1998 that
18 the Commissioner "ensure an independent appeals function within the Internal Revenue Service."
19 Internal Revenue Service Restructuring and Report Act of 1998, Pub. L. No. 105-206, § 1001(4),
20 112 Stat. 685, 689 (1998). The Commissioner can ensure the appeal in an independent forum
21 mandated by 26 U.S.C. § 7803 only if the forum is within the organization the Commissioner
22 controls, i.e., the IRS. The Code grants the Commissioner no authority to claim that he has
23 satisfied his obligation to provide access to an independent forum merely by "ensuring" what
24 already existed and what he never had authority to prevent—independent review in the judicial
25 forum of the Tax Court. Nor can the Commissioner credibly suggest that the IRS examination
26 function is an independent forum. Rather, as the IRS is currently structured, the independent forum
27 that the Commissioner must ensure access to is IRS Appeals.
28

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

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

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

23 As Facebook explained, prior to 2015, there were only two situations in which the IRS
24 denied taxpayers a right to present their case to IRS Appeals. First, under Revenue Procedure 87-
25 24 § 2.08, 1987-1 C.B. 720, 721, *superseded*, Revenue Procedure 2016-22, the Director of the Tax
26 Litigation Division, following consultation with the Director of IRS Appeals and the appropriate
27 Regional Counsel, could determine that a case, or issues within a case, should not be considered by
28 Appeals. This authority was rarely invoked (perhaps because of the consultation requirements),

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

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

9 [C]ases are designated for litigation in the interest of sound tax administration to
10 establish judicial precedent, conserve resources, or reduce litigation costs for the
11 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.

12 *Id.*

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

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

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

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

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

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

25 **IV. IRS PROCEDURES MUST COMPLY WITH THE APA**

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

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

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

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

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

9 **V. CONCLUSION**

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

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Dated: March 14, 2018

Respectfully submitted,

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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_____