Scott H. Frewing (SBN 191311)
Andrew P. Crousore (SBN 202195)
Robert C. Hammill (SBN 298689)
BAKER & McKENZIE LLP
660 Hansen Way
Palo Alto, CA 94304-1044
Telephone: +1.650.856.2400
Facsimile: +1.650 856.9299
scott.frewing@bakermckenzie.com
andrew.crousore@bakermckenzie.com
robert.hammill@bakermckenzie.com

Attorneys for Plaintiff
Facebook, Inc. and Subsidiaries

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

FACEBOOK'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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

TABLE OF CONTENTS

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

TABLE OF CONTENTS
(continued)

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

Federal Statutes

Regulations

IRS Revenue Procedures

Other Authorities

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

I. INTRODUCTION

In 2015, after years of advocacy by the National Taxpayer Advocate,[1] Congress enacted the Taxpayer Bill of Rights ("TBOR") because Congress determined that prior directions to the IRS had been ignored or abused. Congress concluded it needed to codify taxpayer rights.

Among the rights that Congress enacted in 2015 was the right to appeal to an independent forum within the IRS. Specifically, Congress expanded upon its earlier 1998 mandate that IRS Appeals exist within the IRS, by making clear that access to IRS Appeals is a *mandatory* right. As the National Taxpayer Advocate said in 2017 after passage of TBOR, "[a]n independent dispute resolution mechanism is central to effective tax administration . . . In my view, the IRS Office of Appeals was intended to provide exactly that mechanism." *IRS Reform: Perspectives from the National Taxpayer Advocate. Hearings Before the Subcomm. Oversight of the H. Comm. on Ways & Means*, 115th Cong. 26 (2017) (statement of Nina Olson, Taxpayer Advocate). ("Olson 2017 Stmt.")

Facebook has Article III standing because it has alleged two distinct injuries: (i) denial of its right to IRS Appeals under TBOR, a *per se* injury; and (ii) a material increase in the probability of Facebook incurring litigation costs. Facebook has statutory standing to challenge the IRS pursuant to: (i) TBOR and the Administrative Procedures Act ("APA") because 5 U.S.C. §§ 702 and 706(2)(A) provide a cause of action for violations of federal statutes, whether or not those statutes contain express causes of action; and (ii) the APA itself because the IRS acted arbitrarily and capriciously in issuing Rev. Proc. 2016-22 and denying Facebook access to IRS Appeals.

The government's position in this litigation is nothing less than an assertion that Congress's enactment of TBOR was meaningless, and that the IRS can deny Congressionally mandated rights without judicial review. This Court cannot conclude that acts of Congress mean nothing. Denial of access to IRS Appeals is a concrete injury violating a right given by Congress to all taxpayers. That said, even if the Court views TBOR as somehow not creating a mandatory right, Facebook has Article III standing because it alleged that the arbitrary IRS actions of issuing Rev. Proc. 2016-22 and denying Facebook access to IRS Appeals in March 2017 injured Facebook by materially

[1] Congress created the Taxpayer Advocate Service in 1979 to address large-scale, systematic issues that impact taxpayers. *See* Taxpayer Advocate Service, "Our History" available at https://taxpayeradvocate.irs.gov/about/our-history.

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

increasing the probability that it would incur litigation costs.

II. STATEMENT OF FACTS

A. The IRS Office of Appeals Was Created to Provide Taxpayers an Independent Venue to Seek Administrative Relief Short of Litigation

When the IRS finishes an audit and believes adjustments should be made, it issues one of two documents, either a "Form 5701" (commonly called a "30-day letter") or a "Statutory Notice of Deficiency" (commonly called a "90-day letter"). Whether the IRS issues a 30-day letter or a 90-day letter, IRS procedures provide an option for the taxpayer to resolve that dispute through the IRS Office of Appeals ("IRS Appeals"). *See* IRS Publication 4227 (stating "[i]f you disagree with the proposed adjustment or action in your tax case, *you can appeal your case to the Office of Appeals.*") (emphasis added). Taxpayers have this right whether or not they proceed first to U.S. Tax Court.[2] *See* 26 C.F.R. 601.106 ("After the filing of a petition in the Tax Court, the Appeals office will have exclusive settlement jurisdiction . . . for a period of 4 months").

Originally founded in 1927, IRS Appeals is "one of the oldest and largest dispute resolution organizations in the United States." General Accounting Office, Report No. GGD-97-71, Internal Revenue Service: IRS Initiatives to Resolve Disputes of Tax Liabilities 2 (1997) at 2. Taxpayers pursuing settlement at IRS Appeals receive an administrative review of the potential adjustment by an independent IRS Appeals officer. *Id*. Taxpayers have the opportunity to present information through both written submissions and one or more informal conferences. *Id*. Taxpayers submit a formal "protest" that outlines the relevant facts, the issues the taxpayer seeks to resolve, and the law upon which the taxpayer relies. *See* IRS Publication 5, Your Appeal Rights and How To Prepare a Protest If You Don't Agree; *see also* I.R.M. 8.6.1, Conference and Issue Resolution.[3]

Based on the taxpayer protest, IRS Appeals officers assess the merits of the taxpayer's arguments and determine a settlement position for the IRS. *Id*. IRS Appeals performs its own independent analysis of significant issues and is authorized to consider the hazards of litigation in determining a fair settlement. *Id*. For more complex cases, the IRS Appeals team will include

[2] The 30-day letter allows the taxpayer to submit a protest to IRS Appeals within 30 days. The 90-day letter requires the taxpayer to either petition the U.S. Tax Court in 90 days or pay the tax.
[3] *See* IRS video overview of IRS Appeals at https://www.youtube.com/watch?v=PYb7i_sXkHE.

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

specialists, such as economists or international tax professionals. IRS Appeals presently seeks to take a quasi-judicial approach to its function. *See* IRS Memo for Appeals Employees (July 18, 2013) (instituting "Appeals Judicial Attitude and Culture").[4]

In short, IRS Appeals provides taxpayers two critical elements for a potential administrative settlement: (i) independence - a forum free from the biases of agency personnel who initially asserted the adjustment and those who will ultimately defend it (i.e., IRS Counsel), and (ii) the authorization to consider all factors for settlement - namely, the hazards of impending litigation. *See* Treasury Inspector General for Tax Administration ("TIGTA") 2005 report.[5] TIGTA, Ref. No. 2005-10-141 (Sept. 9, 2005) ("2005 TIGTA Report") at 25 (noting that the *primary* goal of IRS Appeals is resolving disputes without litigation). As the IRS itself states, "The federal government and the private sector have long recognized that litigation is costly, time consuming, and destructive of cooperative relationships."). *Id*. at 2.

B. In the Restructuring and Reform Act of 1998 Congress Mandated the Existence of IRS Appeals as an Independent Administrative Forum

Congress first mandated the existence of IRS Appeals in the Internal Revenue Service Restructuring and Reform Act of 1998 (the "RRA"). The RRA directed the IRS Commissioner to implement a plan that would accomplish four goals, one of which was to "ensure an independent appeals function within the Internal Revenue Service." Pub. L. 105-206 § 1001(4), 112 Stat. 685, 689. Congress's focus on promoting access to IRS Appeals was underlined by Senator Roth's statement: "One of the major concerns we heard throughout our oversight initiative was that taxpayers who get caught in the IRS hall of mirrors have no place to turn that is truly independent and structured to represent their concerns." 144 Cong. Rec. 14689 (1998) (Statement of Sen. Roth).

Although the RRA mandated the *existence* of IRS Appeals, the IRS continued to assert that it had the discretion to deny some taxpayers access to that forum. *See e.g.* Rev. Proc. 2000–43, I.R.B. 2000-41 (outlining IRS changes pursuant to RRA, but not changing Rev. Proc. 87-24 § 2.08, which permitted IRS Counsel to deny access to IRS Appeals in consultation with IRS Appeals). In subsequent years, taxpayers and advocacy groups raised concerns over whether the IRS had fully

[4] Available at https://www.irs.gov/pub/foia/ig/spder/AP-08-0713-03.pdf.
[5] TIGTA provides oversight of the Department of Treasury, auditing IRS actions to promote fair administration of the Federal tax system. https://www.treasury.gov/tigta/about_what.shtml .

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

carried out the RRA mandate to provide access to an independent IRS Appeals. TIGTA specifically evaluated the state of IRS Appeals in 2005 and provided recommendations for ensuring independence. *See* 2005 TIGTA Report. In response to the resulting report, the IRS Chief of Appeals, David B. Robinson, affirmed that the RRA had created a "Congressional mandate" for an independent IRS Appeals forum. *Id.* at 25 (noting that "Before RRA '98 the right to an appeal was a taxpayer right found in administrative regulations - not in statute. Such a significant change makes it *clear that a fair and impartial case resolution process is of paramount importance to Congress.*") (emphasis added).

C. From 2007 to 2015, the IRS Taxpayer Advocate Sought Codification of the Taxpayer Bill of Rights to Guarantee Fundamental Taxpayer Rights, Including the Right to Access IRS Appeals

After enactment of the RRA in 1998, the IRS Taxpayer Advocate Service ("TAS") took up the fight to enforce taxpayer access to an independent IRS Appeals. Specifically, in its 2007 Annual Report to Congress ("TAS 2007 Report") the TAS Report recommended that Congress enact a TBOR with ten enumerated rights, including the "[r]ight to appeal (administrative **and** judicial)." 2007 TAS Report at 479 (emphasis added). The breadth of this proposed right was defined as providing taxpayers access to administrative appeal for *all compliance actions*, unless otherwise *barred* by *congressional statute*. TAS 2007 Report at 487 ("the right to be advised of and avail themselves of a prompt administrative appeal that provides an impartial review of all compliance actions (unless expressly barred by statute) and an explanation of the appeals decision."). On June 10, 2014, the IRS formally adopted TBOR as a result of TAS persistence. IR-2014-72.

Despite this adoption by the IRS, the TAS 2014 Annual Report to Congress 2014 ("TAS 2014 Report") advocated that Congress formally codify TBOR into law. TAS 2014 Report at 27. The TAS 2014 report noted multiple reasons why IRS adoption of TBOR, alone, was insufficient to secure and protect taxpayer rights, including that the IRS had historically failed to implement and protect those rights and "the lack of an enforceable remedy for the violations." *Id*. The TAS warned that if the IRS is not monitored regularly the rights may erode over time and said that Congress should "codify the Taxpayer Bill of Rights that sets forth the fundamental rights and obligations of U.S. taxpayers; enact past legislative recommendations as well as those from this year's Annual

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

Report that relate to each of the core taxpayer rights; . . . and address problem areas, with specific focus on how the IRS . . . is protecting taxpayer rights." TAS 2014 Report at 27.

Similarly, in June 2014, the American Bar Association ("ABA") urged Congress to codify TBOR and, specifically, to enact a general right to access IRS Appeals. Letter from Michael Hirschfeld Chair, Section of Taxation to Chairmen and Ranking Members of Senate Finance Committee and House Committee on Ways and Means (June 25, 2014) at 6.

D. In 2015, Congress Passed TBOR, Codifying the Right to an Independent Forum Within the IRS

In 2015, Congress heeded this advice and codified the ten rights in TBOR. The Taxpayer Bill of Rights Act of 2015, H.R. 1058, was introduced in the U.S. House of Representatives on February 25, 2015 and passed the House on April 15, 2015.[6] In the congressional floor debate, representatives specifically noted that H.R. 1058 was drafted with input and support from Nina Olson, the long-time leader of TAS. *See* Congressional Record - House, Floor Debate, at H2231, April 15, 2015. When addressing the purpose of the bill, Representative Roskam said:

> Mr. Speaker, here is what the Taxpayer Bill of Rights calls for. ***These would then be enumerated rights the taxpayers would have, and under this legislation***, it would be the responsibility of the Commissioner of the Internal Revenue Service to make sure . . . ***that the Internal Revenue Service would be acting in accordance with them***…
>
> We, in turn, and some of our predecessors, have delegated that authority to the Internal Revenue Service. I would argue- and, I think on a bipartisan basis that argument is echoed- that that authority has been abused . . . ***The remedy is Congress comes together, as reflecting the American public, and it says, We are going to reclaim this***…

Id. (emphasis added).

The language of H.R. 1058 was folded into the 2015 Protecting Americans from Tax Hikes Act (the "PATH" Act) and passed both chambers with significant bipartisan support. Pub. L. No. 114-113, Div. Q, Title IV, § 401(a), codified at 26 U.S.C. § 7803(a)(3). (passing in the House 316-113 and Senate 65-33).[7] The PATH Act codified TBOR at 26 U.S.C. § 7803(a)(3) and stated, in relevant part:

> 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— …
>
> (E) the right to appeal a decision of the Internal Revenue Service in an independent

[6] *See* H.B. 1058, (114th Congress).

[7] *See* H.R. 2029 Roll Call 705. Prior to amendment, the PATH Act passed in the House 255-163; H.R. 2029 Roll Call 193, April 30, 2015; Record Vote Number 339, December 18, 2015.

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

forum.

Even after enactment, the TAS warned of the need to monitor that the IRS was, indeed, upholding these rights. Olson 2017 Stmt. at 5 ("the challenge [after codification] is to ensure TBOR is not merely aspirational").

E. Before and After Enactment of TBOR, the IRS Stated that the Right to an Independent Forum Refers to IRS Appeals

Various IRS executives and publications have stated that the "right to an independent forum" enumerated in TBOR refers to or includes a right to IRS Appeals specifically. For example:

(1) In 2005, the IRS Chief of Appeals, David B. Robinson, affirmed that the RRA had created a "Congressional mandate" for an independent IRS Appeals forum. *See* 2005 TIGTA Report at 25, described *supra*.

(2) IRS Publication 1 "Your Rights as a Taxpayer" memorialized the right to both an administrative ***and*** judicial review ("If you disagree with us about the amount of your tax liability or certain collection actions, you have the right to ask the Appeals Office to review your case. You may also ask a court to review your case.") (2012).

(3) In a presentation at the 2016 IRS Nationwide Tax Forum, the TAS[8] stated that if a taxpayer disagrees with the proposed adjustment resulting from an audit, the taxpayer has the right to an ***administrative*** appeal. Advocating for your Client Using the Taxpayer Bill of Rights, 2016 (emphasis added).[9]

(4) In its own procedural rules at 26 C.F.R. § 601.106(b), the IRS states that "the taxpayer has the right (and will be so advised by the district director) of administrative appeal to the Appeals organization."

F. After the 2015 Mandate in TBOR, the IRS Ignored Congress's Instruction that Access to IRS Appeals Is Mandatory

As the government acknowledges in its Motion to Dismiss, the Commissioner historically exercised discretion to afford "***almost all taxpayers***" an opportunity to seek resolution through IRS Appeals either before, or after, the IRS issues a notice of deficiency. ECF No. 19 at 2-3 (also stating

[8] A number of TAS publications state that the TAS is independent and does not speak for the IRS. Nonetheless, none of the quotes attributed to the TAS in this Opposition have ever been repudiated by the IRS.

[9] Available at https://www.irs.gov/pub/irs-utl/2016ntf-advocating-bill-of-rights.pdf.

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

"Chief Counsel ***generally, but not always***, will refer the case to IRS Appeals.") (emphases added).

The two procedural mechanisms under which the Commissioner denied access to IRS Appeals prior to 2015 were (1) a denial pursuant to IRS Rev. Proc. 87-24 § 2.08 and (2) designating a case for litigation pursuant to Internal Revenue Manual section 33.3.6.[10] Both of these processes purported to have some level of procedural safeguard for taxpayers. Denial pursuant to Rev. Proc. 87-24 required consultation with IRS Appeals. Rev. Proc. 87-24, § 2.08. A designation for litigation required specific findings by senior IRS executives, notification of IRS Appeals, the creation and review of a detailed memorandum, and an opportunity for the taxpayer to be heard by IRS Chief Counsel. I.R.M. 33.3.6, Designating a Case for Litigation.

After TBOR, the Commissioner and the IRS did not take steps to revise or withdraw the IRS procedures that permitted the Commissioner or his or her delegates to deny taxpayers access to IRS Appeals. Specifically, the IRS did not revise Rev. Proc. 87-24 to clarify that access to IRS Appeals could no longer be withheld pursuant to Rev. Proc. 87-24, § 2.08. Similarly, the IRS did not revise the "designation for litigation" procedures to make clear that such a finding should either not occur before a case was heard by IRS Appeals, or that such a designation would not prevent a taxpayer from accessing IRS Appeals (i.e., to permit a case to go to IRS Appeals before a taxpayer would be forced to litigate).

G. In 2016, the IRS Issued Rev. Proc. 2016-22, Permitting IRS Counsel To Independently Deny Taxpayers their Right to IRS Appeals

Instead of acting to guarantee the rights mandated by Congress in TBOR, on October 15, 2015, the Department of Treasury published Notice 2015-72, 2015-44 I.R.B. 613, which proposed expanding IRS discretion to deny access to IRS Appeals. In direct conflict with the PATH Act, Notice 2015-72 proposed permitting IRS Counsel to unilaterally deny (i.e., even without input from IRS Appeals) a taxpayer access to IRS Appeals in a docketed tax case if in the interest of "sound tax administration," providing no definition and just two "examples." Four parties provided comments

[10] Facebook is not challenging the IRS procedures for designating a case for litigation because the IRS has not designated Facebook's case for litigation. For the avoidance of doubt, the enactment of TBOR in 2015 removed any discretion the Commissioner may have had prior to 2015 to deny taxpayers access to IRS Appeals, and thus to the extent the IRS "designation for litigation" procedures are used to deny taxpayers access to IRS Appeals, those procedures also violate TBOR.

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

to Notice 2015-72, including the ABA. Rev. Proc. 2016-22, ¶1.04. The ABA urged the IRS to "elaborate and clarify" the "sound tax administration" standard. ABA, Comments on Notice 2015-72 Concerning the Administrative Appeals Process (Nov. 16, 2015) at 2.

On March 23, 2016, without altering the proposed ability of IRS Counsel to deny access to IRS Appeals pursuant to the "sound tax administration" standard, the IRS released Rev. Proc. 2016-22, 2016-15 I.R.B. 1 ("Rev. Proc. 2016-22") purporting "to clarify and describe the practices for cases docketed in the United States Tax Court (Tax Court)." Rev. Proc. 2016-22, § 3.03 permits IRS Counsel to deny taxpayers access to IRS Appeals solely through a determination that "referral is not in the interest of sound tax administration," but does not define "sound tax administration" or instruct how IRS Counsel should make its determination. ECF No. 1, ¶ 31.

H. In March 2017, the IRS Denied Facebook's Access to IRS Appeals

The IRS began its current audit of Facebook in November 2011. During the course of that audit, Facebook consistently informed the IRS that it wished to go to IRS Appeals, and the IRS indicated that access to IRS Appeals would be available. *See* Decl. of Nancy Bronson, Case No. 3:16-cv-0377-LB, ECF No. 23-1, ¶¶ 6, 7, 10, 11. As the audit continued to linger into 2016, Facebook informed the IRS that it would not grant a *sixth* extension to the statute of limitations for assessment without the IRS agreeing to certain conditions, including a timetable for going to IRS Appeals before commencement of any judicial proceeding. ECF No. 1, ¶ 36. The IRS rejected Facebook's offer and issued a notice of deficiency. *Id*.

After initiating the U.S. Tax Court case, Facebook requested that its case be sent to IRS Appeals. On March 16, 2017, IRS Counsel provided a letter confirming its decision to deny Facebook access to IRS Appeals pursuant to Rev Proc. 2016-22. ECF No. 1, ¶ 42. The IRS declined Facebook's request to reconsider and has not otherwise provided any explanation or justification for this position even under its own standard of "sound tax administration." ECF No. 1, ¶¶ 43, 44.

III. ARGUMENT

The enactment of TBOR in 2015 removed any discretion the Commissioner had to deny taxpayers access to IRS Appeals. TBOR made access to IRS Appeals a *mandatory* right.[11]

[11] Facebook filed its action in this Court, as opposed to Tax Court, because Facebook understands

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

A. Congress Enacted TBOR to Enforce Taxpayers Rights, Including a Right to an Independent Administrative Appeal

1. Congress Meant What It Said - Its Words Were Not Mere Surplusage

In interpreting Congress's intent, the language of the statute controls. *Miranda v. Anchondo*, 684 F.3d 844, 849 (9th Cir. 2012) (holding the preeminent canon of statutory interpretation assumes that the "'legislature says in a statute what it means and means in a statute what it says there.'") (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004)). If the language of the statute is unambiguous and the statutory scheme is "coherent and consistent," then the judicial inquiry must cease. *In re Ferrell*, 539 F.3d 1186, 1190 n.10 (9th Cir. 2008) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)).

Here, Congress directed the IRS Commissioner to guarantee access to an independent forum controlled by the IRS Commissioner. The language Congress used, a "right to appeal a decision of the Internal Revenue Service in an independent forum" is not ambiguous - it mandates that every taxpayer has a right to an independent forum. *See* 26 U.S.C. § 7803(a)(3)(E).

Congress also mandated that the Commissioner "shall ensure that ***employees of the Internal Revenue Service*** … act in accord with taxpayer rights as afforded by other provisions of this title." *Id.* (emphasis added). This language can only have one meaning: the independent forum referenced by Congress must be one that can be controlled by the Commissioner or employees of the IRS, consistent with Congress's prior direction to the IRS. Congress had already, in 1998, mandated "an independent appeals function within the Internal Revenue Service." Pub. L. 105-206 § 1001(4), 112 Stat. 685, 689. Also in 1998, Congress had directed that IRS Appeals adopt certain alternative dispute procedures intended to make IRS Appeals more efficient, and had made sure that tax exempt organizations could request an administrative appeal. 26 U.S.C. § 7123. Hence, Congress's TBOR mandate in 2015 encompassed those prior explicit Congressional statutory directives.[12] The IRS

---

the IRS takes the position that the Tax Court has limited equitable powers and is unable to enjoin the IRS unless specifically authorized to do so by statute. *See Commissioner v. McCoy*, 484 U.S. 3, 7 (1987).

[12] In contrast, the judicial forums used for tax disputes, such as the Tax Court, the District Court, or the Court of Federal Claims are not controlled by the Commissioner or by the employees of the IRS. Further, taxpayers already have rights to those forums that the Commissioner and IRS employees could not limit even if they wanted to do so. *See, e.g.* 26 U.S.C. § 7441 (Tax Court); 28 U.S.C. § 133 (District Courts); 28 U.S.C. §1491 (Court of Federal Claims).

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

Chief of Appeals himself had affirmed the RRA Congressional mandate for an independent IRS Appeals. *See* 2005 TIGTA Report at 25 ("Before RRA '98 the right to an appeal was a taxpayer right found in administrative regulations - not in statute. Such a significant change makes it clear that a fair and impartial case resolution process is of paramount importance to Congress").

When Congress unambiguously directs agency action, as it has here, the IRS is not permitted to dismiss it as meaningless. *See Feder v. Frank (In re HP Inkjet Printer Litig.)*, 716 F.3d 1173, 1184 (9th Cir. 2013) (holding "under accepted canons of statutory interpretation, courts must make every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.") (citing *Boise Cascade Corp. v. United States EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991)). This is particularly true when, as here, the IRS had not adequately followed prior Congressional direction. Congress was reacting to prior IRS failures to ensure an independent appeals function, such as allowing IRS employees to deny taxpayers access to IRS Appeals. *See* Rev. Proc. 87-24, § 2.08 (allowing IRS Counsel and IRS Appeals to consult and deny access to IRS Appeals); Internal Revenue Manual § 33.3.6 (allowing IRS Counsel to designate certain cases for litigation and thus deny access to IRS Appeals). This was underlined by Congressman Roskam's statement that the reason for TBOR was that too much authority had been delegated to the IRS, that authority had been abused, and a remedy was required. Congressional Record - House, Floor Debate, at H2231, April 15, 2015, *supra*.

In short, when the 2015 TBOR mandate of a "right to appeal a decision of the Internal Revenue Service in an independent forum," is read with the 1998 RRA mandate to have "an independent appeals function within the Internal Revenue Service," there is no ambiguity that Congress eliminated any IRS discretion to deny access to IRS Appeals. A determination that Congress's codification of TBOR created substantive taxpayer rights is thus fully consistent with the Supreme Court's refusal to read statutes in a manner that renders the language as mere surplusage. *See Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 697-698 (1995); *see also Am. Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002) (holding that "[i]t is a well-established principle of statutory construction that legislative enactments should not be construed to render their provisions mere surplusage." (internal quotation marks

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

omitted)); *United States v. Butler*, 297 U.S. 1, 65 (1936) ("words cannot be meaningless, else they would not have been used").

a. **The IRS Interpretation Reads TBOR Out of Existence**

The government's position essentially reads TBOR out of existence: it is inconsistent with the plain language, and it would allow the Commissioner to arbitrarily deny access to IRS Appeals in direct violation of Congressional intent. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Babbitt*, 515 U.S. at 701 (citing *Stone v. INS*, 514 U.S. 386, 397 (1995)). Congress acted with purpose when it amended 26 U.S.C. § 7803 to codify the right to appeal an IRS decision in an independent forum. The effect of such amendment is to ensure a right beyond those existing prior to codification.

Under the government's interpretation of TBOR, the IRS has complete discretion to override taxpayer rights. According to the government, not only can the government limit taxpayer access to IRS Appeals in contradiction to the express language of TBOR, but the IRS may do so *arbitrarily*, using criteria such as income, size of tax adjustment, or other characteristics - anything that it deems to be "sound tax administration." Such a result is inconsistent with Congress's grant of rights in TBOR and strains credulity. *See Barry v. Bowen*, 825 F.2d 1324 (9th Cir. 1987) (rejecting the merits of a government litigating position defending an agency action that impaired the independence of administrative law judges as not "substantially justified" under standards for fee awards).

Further, the government's attempt to argue that section 1001 of the RRA (a statute restructuring the IRS) is not in Title 26, and thus a right to access IRS Appeals is not "afforded by other provisions of this title," (ECF No. 19. at 9) fails entirely. Congress's mandate to "ensure an independent appeals function within the Internal Revenue Service" is a statutory note to 26 U.S.C. § 7801, and statutory notes are codified law. *See Conyers v. MSPB*, 388 F.3d 1380, 1382 n.2 (D.C. Cir. 2004).

b. **TBOR Invalidated IRS Rules Preventing Access to IRS Appeals**

Congress's mandate in TBOR for a right to an independent forum invalidated IRS rules permitting IRS employees to deny access to IRS Appeals, specifically Rev. Proc. 87-24, § 2.08 and I.R.M. 33.3.6. It is axiomatic that when Congress speaks to an issue in a statute, agency rules that

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

predate and contradict the statute are no longer valid. *See Farrell v. United States*, 313 F.3d 1214, 1219 (9th Cir. 2002) ("It is well settled that when a regulation conflicts with a subsequently enacted statute, the statute controls and voids the regulation.") (citing *Microsoft Corp. v. Comm'r*, 311 F.3d 1178 (9th Cir. 2002)). For example, when Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") it invalidated two regulations that predated and contradicted that statute. *See Toor v. Lynch*, 789 F.3d 1055 (9th Cir. 2015). Similar to the PATH Act, the IIRIRA included a procedural guarantee that all non-citizens could file a single motion to reconsider an immigration decision or reopen proceedings. *Id*. In *Toor*, the Ninth Circuit considered whether the IIRIRA invalidated the two regulations that limited such motions. *Id*. at 1057. The Court in *Toor* invalidated the regulations and held that Congress is not required to explicitly identify the regulations it seeks to overturn. *Id.* at 1064.

2. In Mandating a Right to an Independent Forum, Congress Did Not Intend Merely to Refer to Taxpayers' Existing Rights to Tax Court

The government's assertion that the reference to an "independent forum" refers to the Tax Court (ECF No. 19 at 9-10) is belied by the legislative history and the plain language of the statute.

First, and most crucially, the assertion that Congress intended to refer to the U.S. Tax Court instead of IRS Appeals would illogically impose an obligation upon the Commissioner that was impossible to fulfill. As discussed above, TBOR codified a set of taxpayer rights and commanded the IRS Commissioner to ensure those rights were respected. 26 U.S.C. § 7803. Long ago, Congress expressly placed the U.S. Tax Court outside of the executive branch. 26 U.S.C. § 7443(a) ("the Tax Court is not an agency of, and shall be independent of, the executive branch of the Government.") In 1969, Congress established the modern U.S. Tax Court as a distinct court under Article 1 of the U.S. Constitution. Tax Reform Act of 1969 § 951, 83 Stat. 730, 26 U.S.C. § 7441. Further, the Supreme Court has expressly held that the U.S. Tax Court exercises judicial, rather than executive power. *Freytag v. Commissioner*, 501 U.S. 868, 890–91 (1991). Thus, the government's position means Congress either ordered the Commissioner to do something beyond his or her statutory authority (i.e., direct Tax Court action) or to stop IRS employees from denying access to the Tax Court, which is already guaranteed by statute.

Second, the legislative history of the RRA, the advocacy by the TAS, and the legislative

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

history of the PATH Act each compels the conclusion that 26 U.S.C. § 7803 refers to an independent *administrative* forum. The RRA specifically mandated that an independent appeals function exist *within the IRS*. Pub. L. 105-206 § 1001(4), 112 Stat. 685, 689. The TAS 2007 Report, in which Olson first recommended that Congress enact a statutory TBOR, included ten enumerated rights, including the "[r]ight to appeal (administrative ***and*** judicial)." IRS Appeals is the only independent administrative forum in the IRS, which is a reason the IRS has repeatedly recognized that the right set out in TBOR was to IRS Appeals, and not the Tax Court. Taxpayers were already guaranteed access to Tax Court by statute, and Tax Court was intentionally not under the control of the IRS Commissioner. The words "Tax Court" do not even appear in the Senate or House reports for the PATH Act. H.R. Rep. No. 114-92 (2015); S. Rep. No. 114-57 (2015).

3. The Cases Cited by the IRS Support Facebook's Position That TBOR Created a Statutory Right to IRS Appeals

The government cites two cases to support its assertion that the Tax Court previously determined that taxpayers do not have a right to access IRS Appeals (ECF No. 19 at 7), but the reasoning of those two cases, each decided prior to TBOR, support the opposite conclusion - i.e., taxpayers had a right to access IRS Appeals once Congress enacted TBOR. In *Estate of Weiss v. Comm'r*, T.C. Memo. 2005-284 (2005), the Tax Court denied a taxpayer request to transfer its case to IRS Appeals, finding that neither Rev. Proc. 87-24 nor 26 C.F.R. § 601.106 granted a mandatory right. Yet, in doing so, the court distinguished that request from one in *Drake v. Comm'r*, 125 T.C. 201, 125 (2005), which remanded a case back to IRS Appeals after improper IRS *ex parte* communications occurred. The *Weiss* court explained that there was a "statutory basis" for the *ex parte* procedures at issue in *Drake* and that the Revenue Procedure in that case, limiting *ex parte* communications, "was promulgated in direct response to a congressional mandate in the [RRA], that directed the Commissioner to develop a plan to prohibit *ex parte* communications between Appeals officers and other employees of the Internal Revenue Service." *Id*. at n.3. Hence, the reasoning in *Weiss* is *consistent* with finding that a right to IRS Appeals exists after enactment of TBOR in 2015.

In *Swanson v. Comm'r*, 106 T.C. 76 (1996), the Tax Court reviewed pre-TBOR procedures to reject an IRS argument that a taxpayer should not be awarded attorneys fees because the taxpayer failed to take advantage of IRS Appeals. The Tax Court ruled that the IRS could not avoid paying

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

the taxpayer's fees by pointing to a right to IRS Appeals, because neither Congress nor the IRS had, *as of 1996*, made IRS Appeals a mandatory right in docketed cases. Both *Swanson* and *Weiss* demonstrate that statutory rights, such as TBOR, will be enforced.[13]

In addition, the government cites to multiple cases holding that IRS procedural rules are not mandatory. ECF No. 19 at 3, 10. Facebook is not claiming that those rules give it a right. Rather, Facebook is relying on a Congressionally granted right to IRS Appeals. It is the IRS which must show that its procedural rules somehow permit it to disregard the TBOR statute as written.

4. Congress Can and Did Diminish IRS Chief Counsel's Authority to Deny Access to IRS Appeals

The government wrongly cites to 26 U.S.C. § 7803(b)(2) to argue that "any diminishment of the Chief Counsel's authority may only be accomplished after the Secretary of the Treasury has notified certain Congressional Committees, and even that, to date, has not occurred." ECF No. 19 at 2. The government has it backwards. Congress has the power to diminish the Chief Counsel's authority, and it did so by enacting TBOR. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 515 (2010) (holding the Necessary and Proper Clause affords Congress broad authority to structure [governmental] offices "as it chooses.") (quoting *Buckley v. Valeo*, 424 U.S. 1, 138 (1976)). Section 7803(b)(2) places limits on the IRS Commissioner, not Congress, and it was the Commissioner's prior failure to ensure taxpayer rights that caused Congress to act.

5. The IRS Positions are Contradicted by Binding IRS Admissions

A number of the IRS arguments in its Motion to Dismiss are contradicted by IRS admissions. For example, the IRS argues that the TBOR reference to an "independent forum" means the Tax Court,[14] but before and after TBOR, the IRS has referred to the right to an independent forum in a

[13] This Court previously addressed a challenge under TBOR (i.e., after the PATH Act), but in that case it does not appear that the taxpayer explained the statutory grounding of TBOR, and, in any event, the taxpayer sought to assert a right not identified in TBOR. *Appenrodt v. United States*, 2016 U.S. Dist. LEXIS 98201 (2016). As a result, Facebook's position in this case, that TBOR grants substantive rights, would not have changed the outcome of this Court's ruling in *Appenrodt*.

[14] Other than its admissions in taxpayer publications and presentations, the IRS has never formally interpreted TBOR as it has prior statutes mandating IRS action or behavior. *See, e.g.*, Rev. Proc. 2000-43 (outlining procedures to address "Prohibition described in Section 1001(a)(4) of the… Restructuring and Reform Act"). Its position does not, therefore, qualify for any deference. *See United States v. Mead*, 533 U.S. 218 (2001) (not all agency interpretations of a statute qualify for deference pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)). An agency action that fails to provide meaningful precedential analysis is not entitled to deference. *Garcia v. Holder*, 659 F.3d 1261, 1267 (9th Cir. 2011) (unpublished agency decision was

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

context that clearly refers to IRS Appeals, and not the Tax Court. For example, a recent IRS Appeals statement about a web-based virtual conference procedure "reminds taxpayers that their right to appeal an IRS decision in an independent forum is one of 10 key rights guaranteed to taxpayers under the Taxpayer Bill of Rights." IR-2017-122 (July 24, 2017).[15] The IRS news release would not make sense if TBOR referred to the Tax Court. *See also* 26 C.F.R. § 601.106(b) ("the taxpayer has the right (and will be so advised by the district director) of administrative appeal to the Appeals organization."). Similarly, the government's assertion that specific statutory IRS Appeals procedures for collection and levy determinations means a general right to IRS Appeals does not exist (ECF No. 19 at 8), is also belied by IRS statements. *See* IRS Tax Tip 2003-74 ("One of the guaranteed rights ***for all taxpayers*** . . . The IRS Appeals system is for people ***who do not agree with the results of an examination*** of their tax returns or other adjustments to their tax liability. ***In addition to examinations***, you can appeal many other things, including: - Collection actions") (emphasis added);[16] *see also* Section II.E., *supra* (additional IRS statements).

The government is bound by these statements and cannot be permitted to assert that access to Tax Court is a sufficient remedy to the right to appeal to an "independent forum." *See United States v. Santos*, 372 F.2d 177, 180 (2d Cir. 1967) (holding that inconsistent out-of-court statements of a government agent made in the course of the exercise of his authority and within the scope of that authority, are admissions binding upon an agent's principal in civil, but not criminal, cases); *see also Walsonavich v. United States*, 335 F.2d 96, 101 (3rd Cir. 1964) (actions by the IRS agents bind the United States if within the scope of their authority).

6. Courts Have Previously Upheld Congress's Enactment of General Principles Similar to Those Provided by TBOR

The government argues the taxpayer rights granted under TBOR are "general principles" and not justiciable rights. ECF No. 19 at 9. This argument fails for two reasons.

First, as stated repeatedly above, TBOR is a bill of ***rights,*** not a bill of general principles. The government's argument does not square with the plain language of TBOR.

---

not entitled to *Chevron* deference). Indeed, the IRS has quite appropriately not asked this Court to apply any such deference here.

[15] Available at https://www.irs.gov/newsroom/irs-office-of-appeals-pilots-virtual-service.

[16] Available at https://www.irs.gov/pub/irs-news/at-03-74.pdf.

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

Second, even if TBOR constituted "mere" general principles, courts have previously upheld actions against administrative agencies that contradict Congressionally mandated general guidelines. For example, Congress outlined general guidelines for the U.S. Department of Housing and Urban Development ("HUD") under the National Housing Act ("NHA") 42 U.S.C. § 1441. The NHA provides that HUD shall exercise its powers and perform its duties "consistently with the national housing policy declared by this Act." These objectives include five general guidelines including (1) "housing of sound standards of design;" (2) "the reduction of the costs of housing;" (3) "the use of new designs, materials, techniques, and methods;" (4) "the development of well-planned, integrated, residential neighborhoods;" and (5) "the stabilization of the housing industry." *Id.*

In *United States v. Winthrop Towers*, a plaintiff sought judicial review, under the APA, of a HUD foreclosure because it contradicted the national housing policies in 42 U.S.C. § 1441. 628 F.2d 1028, 1030-35 (7th Cir. 1980). Because Congress had required that HUD exercise its powers and perform its duties consistently with the policy objectives, the court found that HUD's action was reviewable to determine if it was inconsistent with the objectives outlined by Congress, despite their general nature. *Id*. The Ninth Circuit has similarly upheld APA actions seeking to vindicate rights under the NHA guidelines. *Russell v. Landrieu*, 621 F.2d 1037, 1041-42 (9th Cir. 1980). This is so, even though those guidelines were, as here, general and broad. Courts regularly address broad statutory language; this does not allow the judiciary to abdicate its "responsibility to decide cases properly before it." *Zivotofsky v. Clinton*, 556 U.S. 189, 194-95 (2012) (quoting *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)).

B. Facebook Has Article III Standing Because It Alleged Particularized and Concrete Harm

The government argues that Facebook does not have Article III standing. ECF No. 19 at 6.

This Court has Article III jurisdiction to hear Facebook's claim because Facebook has: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Specifically, Facebook has pleaded that (i) it was denied access to a statutorily mandated

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

appeals process; (ii) Facebook will continue to suffer economic injury because of increased litigation costs; and (iii) an order directing the IRS to provide Facebook access to IRS Appeals will redress the injury by vindicating its statutory right and materially reducing the probability that Facebook will continue to incur litigation costs.

1. **IRS Denial of Facebook's Statutorily Mandated Appeals Rights**

Article III standing requires a plaintiff to plead an "injury in fact" that is both (a) "concrete and particularized," and (b) "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1545 (quoting *Lujan*, 504 U.S.at 560).

A "concrete injury " is one that is "de facto" that is "real" rather than "abstract," "conjectural," or "hypothetical." *Id*. at 1548. Both tangible injuries, such as the loss of money or property, or intangible injuries may qualify as injuries in fact. *Id.* at 1548-49. An injury is "particularized," when it "affect[s] the plaintiff in a personal and individual way." *Id.*; *see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982) (standing requires that the plaintiff "personally has suffered some actual or threatened injury.").

When a plaintiff is the object of a contested government action, there is ordinarily "little question that the action or inaction has caused [the plaintiff] injury and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561-562. This is plainly not a case where Facebook has alleged "a bare procedural violation, divorced from any concrete harm." *Spokeo*, 136 S. Ct. at 1549. IRS's statutory violation resulted in a real-world impact: Facebook was denied an appeal in which it could challenge the IRS's determination before an *independent* administrative forum.

When the government denies a procedural right that harms a real interest of the plaintiff, it constitutes a concrete injury. *Spokeo*, 136 S. Ct. at 1545; *see also Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 816-17 (9th Cir. 2017) (agency's "failure to satisfy the procedural requirement . . . satisfies the first element of Article III standing"); *California v. HHS*, 2017 U.S. Dist. LEXIS 210477, at *25 (N.D. Ca. Dec. 21, 2017) ("Plaintiffs have stated a procedural injury that is sufficient for Article III standing."). Congress specifically identified and legislated against this potential harm

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

when it codified TBOR.

The government argues that "Facebook has not suffered a concrete harm because nothing but unverifiable speculation indicates that it would be better off attempting to negotiate a settlement with IRS Appeals." ECF No. 19 at 9. That argument is frivolous. Facebook does not need to demonstrate that it would necessarily obtain a favorable outcome (or settlement) if it is permitted an appeal. For purposes of Article III, it is sufficient that Facebook has been denied even the *chance* to challenge a harmful IRS determination.

2. Denying Facebook a Right to IRS Appeals Materially Increased Facebook's Probability of Incurring Increased Litigation Costs

Facebook has also alleged a "risk of real harm" that it will suffer increased litigation costs.[17] *Spokeo*, 136 S. Ct. at 1549. The probability that Facebook will incur incurring significant litigation costs materially increased because it was denied a chance to settle at IRS Appeals. Tax Court litigation has begun, and a multi-week, public trial is scheduled for August 21, 2019 (ECF No. 19 at 6).

The risk of such litigation costs was one of the driving forces behind TBOR. *See* Stmt. of Nina Olson before House Ways and Means Subcommittee. May 19, 2017 ("The U.S. Tax Court does an admirable job of providing a dispute resolution forum for taxpayers … However, there is considerable time and expense involved when litigating cases in court, and it is critical that there be an effective administrative dispute resolution process to minimize the cases that require judicial involvement."). The IRS itself boasts that the benefit of accessing IRS Appeals is to avoid the expense of trial. *See* Publication 1. ("If you do not agree with the examiner's findings, you can appeal them to our Appeals Office. Most differences can be settled without expensive and time-consuming court trials."). These litigation costs constitute a tangible, pecuniary harm that Facebook is virtually certain to suffer.

The government's assertion that any economic harm can be avoided by seeking settlement with IRS Counsel (ECF No. 19 at 12, 19) ignores fundamental differences between IRS Counsel and IRS Appeals: IRS Appeals is independent of IRS Counsel and the prospect of a settlement with

[17] Another harm to Facebook is that it is compelled to defend itself in a public forum rather than the confidential IRS Appeals venue. *See* 26 U.S.C. § 6103 (providing confidentiality for taxpayer information).

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

substantially lower litigation costs is much greater with IRS Appeals. Indeed, in this case, the IRS is seeking to re-litigate a theory the Tax Court has rejected twice, and which IRS Appeals would perceive as having substantial hazards of litigation, and thus susceptible to settlement. *See Veritas Software Corp. v. Comm'r*, 133 T.C. 297 (2009) (IRS loss in first ever cost-sharing trial); *Amazon.com, Inc. v. Comm'r*, 148 T.C. 8 (2017) (IRS loss in second ever cost-sharing trial after IRS designation for litigation pre-TBOR). Relying on a TIGTA report, Facebook has pleaded that IRS Appeals regularly settles large transfer pricing disputes. ECF No. 1 at 50. This is not surprising because IRS Appeals offers taxpayers an independent review that IRS Counsel, charged with advancing the IRS position, by definition, cannot.

C. Facebook Has Statutory Standing Because the APA's Omnibus Judicial Review Provision Provides a Cause of Action Under TBOR or the APA Itself

1. Congress Enacted the APA to Provide Broad Judicial Review of Agency Actions

The government argues that Facebook does not have statutory standing (ECF No. 19 at 9), but Facebook satisfies statutory standing requirements because Congress granted standing in Section 702 of the APA. 5 U.S.C. § 702.

The breadth of Congress's intent to confer standing pursuant to Section 702 was confirmed by the Supreme Court in *Assoc. of Data Processing Serv. Org. Inc. V. Camp*, 397 U.S. 150 (1970). In *Data Processing*, the Court held that plaintiffs had standing under the APA if (1) they satisfied the Article III standing requirements and (2) the interest sought to be protected by the plaintiff "is *arguably* within the zone of interests to be protected or regulated by the statute." *Id*. at 153 (emphasis added). In this regard, the Court noted that the zone of interests test should be construed broadly. *Data Processing*, 397 U.S. 150, 154 (1970) (holding that "where statutes are concerned, the trend is towards enlargement of the class of people who may protest an administrative action" and "we have construed [the APA] not grudgingly but as serving a broadly remedial purpose."). *See also* H.R. Rep. No. 1980, 79th Cong., 2nd Sess., 41 ("The Statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it.").

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

Facebook meets both requirements. First, Facebook satisfies the Article III standing requirements as described above. Second, Facebook is squarely within the "zone of interests" test that has led the Supreme Court to refer to Section 702 as the "omnibus judicial-review provision" and hold that it permits suit for violations of "numerous statutes of varying character" whether or not those statutes contain express causes of action. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014). The Supreme Court has said that in the APA context:

> [W]e have often "conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff," and have said that the test "forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that'" Congress authorized that plaintiff to sue. *Id*., at ___ (slip op., at 15–16). That lenient approach is an appropriate means of preserving the flexibility of the APA's omnibus judicial-review provision, which permits suit for violations of numerous statutes of varying character that do not themselves include causes of action for judicial review. "We have made clear, however, that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the '"generous review provisions"' of the APA may not do so for other purposes.

Lexmark, 134 S. Ct. 1389 (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997)) (in turn quoting *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 400, n. 16 (1987).

Further, the IRS is not exempt from judicial scrutiny because the APA applies with full force to IRS actions and regulations. *See Mayo Found. v. United States*, 562 U.S. 44, 55-57 (2011) ("we are not inclined to carve out an approach to administrative review good for tax law only."); s*ee also Altera Corp. v. Commissioner*, 145 T.C. 91 (July 27, 2015). The government's claim that the APA applies differently to tax matters (ECF No. 19, at 18) is thus misleading and wrong.

Here, Congress issued a clear and specific direction to the IRS Commissioner under the PATH Act: ensure the right for taxpayers to appeal an IRS decision in an independent forum. The language of the PATH Act is mandatory and unambiguous. It does not offer any discretion for the Commissioner to deny access to the independent forum. While the Commissioner certainly retains discretion to set rules to govern the independent forum's processes, including, for example, to establish different independent forums for different types of tax issues or taxpayers,[18] what the

[18] *See, e.g.*, Rev. Proc. 2003-41 (Fast Track Settlement permitting certain taxpayers to engage in a rapid mediation process with IRS Appeals for certain issues); Rev. Proc. 2017-25 (separate Fast Track Settlement Program for small business and self employed taxpayers).

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

PATH Act makes unambiguous is that the Commissioner *may not deny access* to IRS Appeals.

Even if TBOR had not granted a substantive right to IRS Appeals, Section 706(2)(A) of the APA grants Facebook standing to challenge the IRS action of denying access to IRS Appeals as arbitrary and lacking meaningful explanation. *Humane Soc'y of the United States v. Locke*, 626 F.3d 1040, 1048 (9th Cir. 2010) (an individual may challenge agency action under the APA when an agency acts without "articulat[ing] a satisfactory explanation for its action") (quoting *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Even a broad grant of discretionary authority to an agency will not support the arbitrary treatment of a single individual without sufficient explanation for differential treatment. *Western States Petroleum Ass'n v. EPA*, 87 F.3d 280, 285 (9th Cir. 1996). In summary, sections 702 and 706(2)(A) of the APA confer standing upon Facebook to seek judicial review of the IRS actions. 5 U.S.C. §§ 702, 706(2)(a).

2. **Congress Waived Sovereign Immunity**

The government argues that Facebook has failed to establish waiver of sovereign immunity (ECF No. 19 at 13), but section 702 of the APA waives sovereign immunity where an individual seeks review of an "agency action." *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989) ("Congress was quite explicit about its goals of eliminating sovereign immunity as an obstacle in securing judicial review of the federal official conduct."). The APA waiver of sovereign immunity is not limited to the technical definition of "agency action," and it extends to all official misconduct by the agency. *Nation v. DOI*, 876 F.3d 1144, 1171 (9th Cir. 2017).

The government's argument also incorrectly relies upon *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). ECF No. 19 at 13. *Chaney* outlines two exceptions to judicial review under the APA, neither of which applies to Facebook. First, *Chaney* says judicial review is inappropriate if the statute precludes judicial review. *Id.*; 5 U.S.C. § 701(a)(1). TBOR does not have any language precluding judicial review. [19]

Second, Congress preserves sovereign immunity under the APA only if there is no meaningful standard against which to judge the agency's exercise of discretion. *Chaney*, 470 U.S. at

[19] Indeed, the government does not explicitly assert that the PATH Act, or any other statute, limits judicial review of the IRS denial of a taxpayer access to IRS Appeals. *See* ECF No. 19.

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

830; 5 U.S.C. § 701(a)(2) (excluding from the APA "agency action" [that] is committed to agency discretion by law."). This exception should be construed narrowly. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (the exception for agency action that is committed to agency discretion is "very narrow") (citing S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)). The Court in *Chaney* specifically distinguished the challenge in that case - a general challenge to an agency not promulgating regulations - from "an affirmative act," to which the Court had already decided the exception did not apply in *Overton*. *Chaney*, 470 U.S. at 831-32 ("when an agency refuses to act it generally does not exercise its coercive power . . . and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency does act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power . . . [and] can be reviewed to determine whether the agency exceeded its statutory powers.").

Here, the agency acted. The IRS issued Rev. Proc. 2016-22, *and* on the basis of that purported "authority" denied Facebook access to IRS Appeals. These affirmative actions purporting to abrogate a Congressionally mandated right are reviewable under the APA.[20]

3. IRS Promulgation of Rev. Proc. 2016-22 and Denial of Facebook's Access to IRS Appeals are Final Agency Actions

To be a "final agency action," justiciable under the APA, the agency action must be (1) final - "not be of a merely tentative or interlocutory nature" and (2) one by which "rights or obligations have been determined," or from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quoting *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). Here, the IRS's promulgation of Rev. Proc. 2016-22 is a final agency action. *See Or. Natural Desert Ass'n v. United States Forest Serv.*, 465 F.3d 977, 984-85 (9th Cir. 2006) (holding an agency action is final when an agency decisionmaker "arrived at a definitive position" and "puts that position into effect"). Second, promulgating Rev. Proc. 2016-22 determined

[20] The absurdity of the government's *Chaney* position is apparent in its own motion. *Compare* ECF No. 19 at 15 (stating that the ability of the Chief Counsel ***to withhold*** certain cases docketed in Tax Court from IRS Appeals is discretionary agency ***non-action*** ill-suited for judicial review" (emphasis added) *with* ECF No. 19 at 17 ("Chief Counsel's ***non-referral*** of Facebook's Tax Court Dispute to IRS Appeals is ***an action*** committed to agency discretion."). In any event, Congress did not tell the Commissioner that taxpayers only received their rights if the agency saw fit to bestow them. Congress took it upon itself to ensure those rights were upheld.

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

rights or obligations. *Bennett*, 520 U.S. at 178 (agency action which alters the procedural regime satisfies the second prong).

Likewise, the IRS's determination that granting Facebook access to IRS Appeals was "not in the sound interest of tax administration" constituted a final agency action. *See Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586, 589-90 (9th Cir. 2008) (agency made a justiciable final agency action when it required the landowner to obtain a permit); *see also* ECF No. 1, ¶ 43 (IRS Counsel would not reconsider decision to deny access to IRS Appeals). Denying Facebook access to IRS appeals also definitively determined Facebook's right. *See Or. Natural Desert Ass'n*, 465 F.3d 977 at 987 (agency action final once it denied a right or "fix[ed] some legal relationship as a consummation of the administrative process.").

D. Facebook Has Prudential Standing

The government also argues that Facebook does not have prudential standing (ECF No. 19 at 12), but Facebook squarely meets the two requirements for prudential standing. *See United States v. Lazarenko*, 476 F.3d 642, 649–50 (9th Cir. 2006) (stating three requirements for prudential standing and quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315 (1984)). *But see Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (establishing that the third test, the "zone-of-interests" test, is not a prudential standing requirement).

First, Facebook is asserting its own right to access to IRS Appeals, not the right of some other taxpayer. Second, Facebook is not asserting a generalized right that is best suited to the representative branches of government. Indeed, Congress passed TBOR to provide rights to taxpayers, and it is the executive branch, the IRS, that is denying Facebook that right.

Finally, to the extent prudential standing requires analysis of the "zone-of-interest" test, Facebook is within the class of plaintiffs (i.e., taxpayers whose rights are subject to IRS abuse) that Congress sought to protect by passing TBOR. As to this last element, in *Lexmark*, the Supreme Court said that the zone-of-interests test (i) is not a prudential standing requirement, (ii) is a tool for determining who may invoke a statute, and (iii) is not "especially demanding" in the APA context. *Lexmark*, 134 S. Ct. at 1389; *see also Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (explaining that the zone of interest test does not "require any

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

'indication of congressional purpose to benefit the would-be plaintiff.'") (quoting *Clarke v. Sec. Indus. Ass'n.*, 479 U.S. 388, 399 (1987)).

Hence, the government's half-hearted prudential standing argument (ECF No. 19 at 12-13) cites inapposite law, describes the test inaccurately, and is wrong. The government cites the pre-*Lexmark* case, *Nat'l Credit Union Admin. v. First Nat. Bank & Tr. Co.*, 522 U.S. 479, 488 (1998), for the proposition that prudential standing includes the "zone-of-interest" test. Further, the government omits the Supreme Court's guidance in *Lexmark* that, in the context of an APA claim, a lenient approach is required to preserve the flexibility of the APA's omnibus judicial-review provision. Finally, the government's citation to *Lujan* for prudential standing is misplaced because although *Lujan* mentions prudential standing *once*, it is a case about injury and redressability for Article III standing. *Lujan*, 504 U.S. at 560-61.

E. Congress Also Otherwise Waived Sovereign Immunity

1. Facebook is Entitled to Seek Mandamus Relief Under the DJA

In addition to the grant of jurisdiction under the APA, district courts also hold original jurisdiction over any action in the nature of mandamus to compel an officer or employee of the United States to perform a duty owed to the plaintiff. 28 U.S.C. § 1361. Mandamus is appropriate when: (1) the plaintiff''s claim is clear; (2) the duty is "ministerial and so plainly prescribed as to be free from doubt"; and (3) no other adequate remedy is available. *Or. Natural Resources Council v. Harrell*, 52 F.3d 1499, 1508 (9th Cir. 1995) (quoting *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986)). To determine if a plainly described duty exists, Courts analyze the language of the statute at issue. *Fallini*, 783 F.2d at 1345.

Assuming, *arguendo*, that this Court lacks subject matter jurisdiction under the APA or DJA (which it does not), Facebook may still satisfy standing through a request for mandamus relief. First, Facebook's claim is clear and certain as it seeks an order to compel the IRS to grant access to Appeals under 26 U.S.C. § 7803(a)(3). *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 603 (D.C. Cir. 1974) ("duty imposed on the executive is a proper subject for mandamus relief in the face of non-performance of such duty."). Second, as outlined in III.A.1, *supra*, TBOR imposes an unambiguous duty upon the IRS Commissioner to ensure access to an independent IRS forum.

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

Finally, assuming Facebook does not have a cause of action under the APA or DJA it would have no other mechanism for obtaining its requested remedy, that is access to IRS Appeals.

2. **Facebook is Entitled to Seek Non-Statutory Review of the IRS's Actions**

Also outside of the context of the APA, the Supreme Court has made it clear that courts will "ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986). Nothing in the enactment of the APA changed this pre-existing and fundamental right to review because "[w]hen an executive acts ultra vires, courts are normally available to reestablish the limits on his authority" unless Congress has expressly limited such judicial review. *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988). In such a case, the aggrieved party is entitled to "nonstatutory review" under the general federal question jurisdiction of the federal district courts. *See, e.g., Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996); *Five Flags Pipe Line Co. v. Department of Transp.*, 854 F.2d 1438, 1439 (D.C. Cir. 1988). The Supreme Court has likewise emphasized that federal courts stand ready to provide such review (notwithstanding claims of sovereign immunity) where federal officers or agencies are alleged to have been "acting in excess of . . . authority or under an authority not validly conferred." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691-692 (1948). Given the express statutory right granted to Facebook by Congress, and the lack of any authority given to the IRS to abrogate that right, that is the case here.

IV. CONCLUSION

In 2015, Congress enacted TBOR and imposed a mandate on the IRS Commissioner – access to an independent administrative settlement forum is a basic taxpayer right that may not be denied. The Commissioner violated Facebook's right by issuing Rev. Proc. 2016-22 and denying it access to IRS Appeals on March 16, 2017.

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400

Dated: March 9, 2018.

Respectfully Submitted,

BAKER & McKENZIE LLP

/s/ Scott Frewing
Scott H. Frewing

/s/ Drew Crousore
Andrew P. Crousore

Attorneys for Plaintiff
Facebook, Inc. and Subsidiaries

Baker & McKenzie LLP
660 Hansen Way
Palo Alto, CA 94304
+1 650 856-2400