17-503

To Be Argued By:
ANDREW E. KRAUSE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 17-503

JOHN M. LARSON,

Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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Preliminary Statement

The Internal Revenue Service has assessed civil penalties against plaintiff-appellant John M. Larson for failing to register two tax shelters—shelters whose creation and implementation later led to Larson's criminal conviction. The outstanding balance of the IRS penalties is more than $61 million. Larson has paid only a fraction of the penalties, yet he now seeks a refund of the amount he has paid, as well as an abatement of the remaining penalties.

Larson cannot succeed, because a taxpayer must pay his challenged tax liabilities in full before filing a tax refund action in federal district court. That rule has been established by the Supreme Court since at

least 1875, reaffirmed in 1958 and 1960, and applied consistently by federal courts since then. Larson contends that he should be able to pursue his refund action in district court, alleging that he lacks the funds to pay the penalties in full, and that the United States Tax Court, an administrative tribunal that generally can review tax liabilities before full payment, lacks authority to consider the particular penalties at issue. But Larson's penalties were reviewed in a separate administrative forum, and in all the decades the full-payment rule has existed, no court has carved out any exception remotely like the one Larson now asks this Court to create. Nor has any court held that application of the full-payment rule in circumstances similar to Larson's violates the requirements of due process, or allowed what is essentially a tax refund action to evade the limitation Congress has placed on such suits by proceeding under the Administrative Procedure Act. The district court therefore correctly held that Larson may not obtain judicial review of his tax penalties until they are fully paid. That judgment should be affirmed.

Jurisdictional Statement

For the reasons set forth in the Argument section below, the district court lacked jurisdiction over Larson's claims. On December 28, 2016, the district court entered final judgment for the government (Joint Appendix ("JA") 58-59), and Larson filed a timely notice of appeal on February 21, 2017 (JA 60). Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

Issues Presented for Review

1. Whether the district court properly dismissed Larson's tax refund claim for lack of subject matter jurisdiction because Larson did not pay the assessed penalties in full prior to bringing suit.

2. Whether the district court properly rejected Larson's Fifth Amendment due process argument because the available mechanisms for review provide him a sufficient opportunity to be heard, despite the unavailability of prepayment review in the Tax Court and his alleged inability to pay his outstanding assessment.

3. Whether the district court properly dismissed Larson's APA claim because the availability of a tax refund claim constitutes an adequate remedy in a court and therefore precludes review under the APA.

4. Whether the district court properly dismissed Larson's Eighth Amendment claim because the United States has not waived its sovereign immunity for constitutional claims for money damages, and because the complaint fails to adequately allege a violation of the Excessive Fines Clause.

Statement of the Case

A. Procedural History

Larson commenced this action on January 13, 2016 (JA 2), and the operative version of his complaint was docketed on February 11, 2016 (JA 8-30). On April 29, 2016, the government moved to dismiss the complaint

in its entirety. (JA 31). By opinion and order dated December 28, 2016, the district court (Valerie E. Caproni, J.) granted the government's motion to dismiss (JA 37-57), and judgment was entered in accordance with the district court's order that day (JA 58-59). Larson filed a notice of appeal on February 21, 2017. (JA 60).

B. Factual Allegations

1. Larson's Criminal Conduct and the Tax Shelters at Issue

In 2009, Larson was convicted of crimes relating to his creation and implementation of fraudulent tax shelter vehicles. *United States v. Pfaff* ("*Pfaff I*"), 407 F. App'x 506, 508-11 (2d Cir. 2010); *Pfaff v. United States* ("*Pfaff II*"), 989 F. Supp. 2d 301, 303 (S.D.N.Y. 2013). The superseding indictment in Larson's criminal case identified specific fraudulent tax shelters, including those—the Foreign Leveraged Investment Program ("FLIP"); Offshore Portfolio Investment Strategy ("OPIS"); and Bond Linked Issue Premium Structure ("BLIPS")—that gave rise to the penalties at issue in this action. *See Pfaff II*, 989 F. Supp. 2d at 303; (JA 10). In general, these tax shelters were designed to look like legitimate transactions, "but were in fact unlawful devices designed to generate tax deductions." *Pfaff II*, 989 F. Supp. 2d at 303; (JA 33-34).

Although the FLIP and OPIS tax shelters were marketed at slightly different times and to different individuals, in all material respects, FLIP and OPIS were the same. Both were designed to generate substantial capital losses using an entity created in the Cayman Islands. (JA 34). The IRS issued Notice 2001-

45, stating that this type of "basis shifting" tax shelter is not permissible. (JA 34); *see* IRS Notice 2001-45, 2001-2 C.B. 129, 2001 WL 847824. The BLIPS tax shelter was designed to generate "paper" capital and ordinary losses through a series of pre-arranged transactions in which the client purportedly borrowed money from one of four banks. (JA 34). The IRS describes this type of shelter as an improper "tax avoidance using artificially high basis" shelter, and issued Notice 2000-44 stating it is impermissible. (JA 34); *see* IRS Notice 2000-44, 2000-2 C.B. 255, 2000 WL 1138430.

2. Statutory Framework for Penalties Assessed Against Larson

From 1997 to 2000, the Internal Revenue Code required tax shelter organizers to register their tax shelters with the IRS "not later than the day on which the first offering for sale" occurred. 26 U.S.C. § 6111(a) (1997-2000).[1] The IRS was authorized to assess a penalty when a person required to register a tax shelter failed to do so. 26 U.S.C. § 6707(a)(1)(A). The penalty for failure to register a tax shelter when required under § 6111(a) was fixed at "an amount equal to the

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[1] All citations to §§ 6111 and 6707 of the Internal Revenue Code are to the versions of those provisions in effect from 1997 through 2000. This is the statutory language that was in place when the conduct that gave rise to the penalties assessed against Larson—namely, his failure to register the FLIP/OPIS and BLIPS tax shelters—occurred.

greater of (A) 1 percent of the aggregate amount invested in such tax shelter, or (B) $500." 26 U.S.C. § 6707(a)(2).

3. Assessment of Tax Shelter Organizer/Promoter Penalties

According to the complaint, the IRS notified Larson by letter dated February 15, 2011, that it considered him to be a "tax shelter organizer with respect to Notice 2000-44 and 2001-45 transactions within the meaning of Internal Revenue Code Section 6111(e)." (JA 9-10). The February 15, 2011, letter further stated that Larson had "a duty to register the Notice 2000-44 and 2001-45 transactions pursuant to section 6111(a) and failed to do so," and that Larson therefore was subject to tax shelter promoter/organizer penalties under § 6707. (JA 9-10). The IRS calculated two separate penalties for Larson: one for his failure to register the FLIP/OPIS tax shelter, and one for his failure to register the BLIPS tax shelter. (JA 10, 33-34).

As alleged in the complaint, in a letter dated March 18, 2011, the IRS notified Larson that it proposed to assess penalties against him personally under § 6707. (JA 11). By letter dated May 13, 2011, Larson filed a request for reconsideration of the March 18, 2011, IRS letter, along with an appeal of the findings of the IRS examination. (JA 11).

On August 1, 2011, the IRS assessed penalties against Larson in the aggregate amount of $160,232,026 for his failure to register the FLIP/OPIS and BLIPS shelters. (JA 11, 33-34). The FLIP/OPIS penalty amounted to one percent of the aggregate

amount invested in the FLIP/OPIS shelter in calendar years 1997 through 1999, and the BLIPS penalty amounted to one percent of the aggregate amount invested in the BLIPS shelter in calendar years 1999 and 2000. (JA 33-34); *see* 26 U.S.C. § 6707(a)(2) (1997-2000).

Unlike many types of taxes, § 6707 penalties are immediately assessable; thus taxpayers do not receive a notice of deficiency for such penalties.[2] Congress has not provided for review of § 6707 penalties in the Tax Court. *Our Country Home*, 855 F.3d at 778-79; *Diversified Group Inc. v. United States*, 841 F.3d 975, 981 n.3 (Fed. Cir. 2016).

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[2] A "deficiency," as used in the Internal Revenue Code, is "the amount of tax imposed [by the IRS] less any amount that may have been reported by the taxpayer on his return." *Laing v. United States*, 423 U.S. 161, 173 & n.18 (1976). "An assessment is the formal recording of a taxpayer's tax liability." *Our Country Home Enterprises, Inc. v. Comm'r*, 855 F.3d 773, 778 (7th Cir. 2017) (citing 26 U.S.C. § 6203). Generally, where a notice of deficiency is required, the IRS may not make an assessment until at least ninety days have elapsed, or until review in the Tax Court is complete. *Id.* (citing 26 U.S.C. § 6213); *see Keller Tank Servs. II, Inc. v. Comm'r*, 854 F.3d 1178, 1183-84 (10th Cir. 2017) (defining relevant terms).

4. Response from IRS Appeals Office and Adjustment of the Penalties Assessed Against Larson

According to the complaint, in a letter dated December 12, 2012, the IRS Appeals Office responded to Larson's challenge by reducing the amount owed on the August 1, 2011, penalty assessments, because other parties who were jointly and severally liable with Larson for some of the penalties made payments toward their joint obligations. (JA 12, 34-35). These adjustments, which are reflected on Larson's account transcripts, resulted in credits totaling $92,570,667, and left Larson with an outstanding penalty balance of more than $67 million at that time. (JA 12, 34-35).

The December 12, 2012, letter informed Larson that if he did not agree with the IRS Appeals Office determination that he owed the § 6707 penalties, his "next level of appeal would be to file a formal suit with either the United States District Court or the United States Court of Federal Claims." (JA 13-14). As set forth in the letter, in order to pursue these options, Larson was required to pay the balance due on the assessed penalties and file a Form 843 Claim for Refund and Request for Abatement. (JA 14). The IRS has explained that the Tax Court does not have jurisdiction to consider a challenge to a penalty assessed under § 6707, and there is no prepayment judicial forum to challenge such a penalty. (JA 14); *see* IRS Chief Counsel Advisory 200112003, 2001 WL 283666, at § 4 (Mar. 23, 2001).

On February 18, 2015, Larson made a payment of $1,432,735 to the United States Treasury; he designated this payment toward the portion of the BLIPS penalty related to investments in calendar year 1999. (JA 14, 21, 23, 34-35). At the same time, Larson submitted his Form 843 Claim for Refund and Request for Abatement. (JA 14, 21-27). The refund claim was denied by letter dated May 12, 2015, because Larson had not made full payment of his outstanding penalty liabilities. (JA 15, 29-30).

In total, Larson still owes more than $61 million for his § 6707 penalties. (JA 35-36).[3] Larson alleges that he does not have the ability to pay the full amount of the penalties. (JA 14).

C. The District Court Decision

Larson brought this action in the district court, seeking judicial review of the IRS's imposition of the § 6707 penalties. The district court dismissed the complaint in its entirety for lack of subject matter jurisdiction and failure to state a claim. (JA 37-57).

The district court first determined that it did not have subject matter jurisdiction over Larson's refund claim because Larson had not paid the assessed penalties in full prior to bringing suit. (JA 40-48). Specifically, the district court held that the Supreme Court

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[3] This figure reflects two additional credits applied after the IRS Appeals Office issued the December 12, 2012, letter, including Larson's February 2015 payment, as well as another payment received from jointly and severally liable parties. (JA 35).

has interpreted 28 U.S.C. § 1346(a)(1) to require full payment of a challenged tax assessment before a tax refund suit can be maintained, and that § 6707 penalties are not subject to the narrow exception to the full-payment rule for divisible taxes or penalties. (JA 41-45). In addition, the district court rejected Larson's contention that the full-payment rule does not apply in circumstances where Tax Court review is unavailable and the challenged penalty amount allegedly is unpayable by the taxpayer. (JA 46-48).

Larson also sought review under the APA, but the district court dismissed that claim, concluding that the APA provides for judicial review only of final agency actions for which there is no other adequate remedy in a court, and Larson did have another adequate remedy in a court, namely, a tax refund suit. (JA 48-52). The district court explained that because Congress created a statutory scheme through which Larson could seek refund and abatement of his § 6707 penalty, Larson's ability to seek relief in this manner precluded judicial review via the APA. (JA 50-51).

The district court questioned whether it had jurisdiction to consider Larson's Eighth Amendment claim for an allegedly excessive fine, indicating that sovereign immunity bars a constitutional claim against the United States for money damages. (JA 55). Ultimately, however, the district court dismissed the Eighth Amendment claim because Larson's allegations in support of the claim were conclusory, and

therefore failed to state a plausible basis for relief. (JA 56-57).[4]

Accordingly, the district court entered judgment for the government. This appeal followed.

Summary of Argument

This Court should affirm the district court's dismissal of Larson's complaint. First, Larson's tax refund claim should be dismissed for lack of subject matter jurisdiction because he did not make full payment of the penalty liabilities he seeks to contest prior to filing his lawsuit. Although Congress has provided a limited waiver of sovereign immunity to allow for judicial challenges to tax and penalty assessments, the Supreme Court has made clear that full payment of the assessment is necessary before such a dispute can be litigated in federal district court. That rule applies here, and the Court should decline Larson's invitation to create a new exception to it. No court has ever held that the full-payment rule should not apply when review in the Tax Court is unavailable, as it is here; nor has any court held that the full-payment rule should not apply when the taxpayer asserts an inability to pay the tax or penalty at issue. Indeed, the Supreme Court and federal courts of appeals have rejected such a "hardship" exception; and while Congress has enacted

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[4] In his complaint, Larson also sought to compel the IRS to provide him information about amounts it had collected from other jointly and severally liable parties. The district court rejected that claim (JA 52-55), and Larson has not raised it on appeal.

specific exceptions to the full-payment rule, including for certain immediately assessable penalties, it has never extended those exceptions to the § 6707 penalty at issue in this case. Larson's contrary contentions depend on misreadings of the case law, and should be rejected. *See infra* Point I.

Second, neither the lack of a remedy in the Tax Court nor Larson's alleged inability to pay the full amount of his outstanding penalties transforms the application of the full-payment rule here into a violation of the Due Process Clause of the Fifth Amendment. Taxpayers do not have a constitutional right of access to the Tax Court, an administrative tribunal of limited jurisdiction circumscribed by Congress, and multiple courts have recognized that although the full-payment rule may impose a burden on taxpayers, it does not violate the Constitution. Furthermore, Larson was able to dispute his § 6707 penalties through the independent IRS Appeals Office, an administrative forum designed to provide significant protections for taxpayers. Together with the availability of judicial review through a refund suit, that satisfies the requirements of due process. *See infra* Point II.

Third, Larson should not be permitted to circumvent the requirements of the full-payment rule by reframing his tax refund action as a claim under the APA. Because courts may consider APA claims only when there is no other adequate remedy in a court, the availability of a tax refund suit requires the dismissal of Larson's APA action. That remedy is adequate, as it permits full review of the IRS's actions, and can pro-

vide the same relief Larson seeks through his purported APA claim. Moreover, Larson's effort to achieve injunctive or declaratory relief through an APA suit is barred by the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act. *See infra* Point III.

Finally, Larson cannot pursue a free-standing affirmative claim for relief under the Excessive Fines Clause of the Eighth Amendment, because the government has not waived its sovereign immunity for constitutional claims for money damages. Moreover, the limited allegations in the complaint in support of this claim are conclusory, and do not provide a plausible basis to infer that the penalties were grossly disproportionate to the gravity of Larson's offense. *See infra* Point IV.

ARGUMENT

Standard of Review

When considering a district court's dismissal of a complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, this Court reviews "factual findings for clear error and legal conclusions *de novo*." *Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 243 (2d Cir. 2014). In addition, this Court reviews *de novo* a district court's dismissal of a complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Lanier v. Bats Exchange, Inc.*, 838 F.3d 139, 150 (2d Cir. 2016).

POINT I

The District Court Properly Dismissed Larson's Tax Refund Claim for Lack of Subject Matter Jurisdiction

Larson has not fully paid the § 6707 penalties that he seeks to challenge. (JA 14, 35-36). Because Larson has not complied with this threshold requirement for filing a tax refund action pursuant to 26 U.S.C. § 7422(a) and 28 U.S.C. § 1346(a)(1), the district court correctly determined that it lacked subject matter jurisdiction to consider Larson's tax refund claim.

A. Sovereign Immunity and the District Court's Lack of Jurisdiction

A plaintiff must establish that a district court has subject matter jurisdiction to adjudicate his complaint. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000); *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994). Though a court must "accept as true all material factual allegations in the complaint," for purposes of assessing jurisdiction, it also must refrain from "drawing from the pleadings inferences favorable to the party asserting [jurisdiction]." *Shipping Financial Services Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998).

In a suit against the United States, sovereign immunity bars a federal court's jurisdiction unless the government has waived that immunity by congressional enactment. *Hercules Inc. v. United States*, 516 U.S. 417, 422 (1996); *Millares Guiraldes de Tineo v. United States*, 137 F.3d 715, 719 (2d Cir. 1998). Any

such waiver of sovereign immunity must be strictly construed in favor of the government. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983); *Millares Guiraldes*, 137 F.3d at 719. If the government has not waived its sovereign immunity, or if the conditions under which the government has agreed to waive that immunity have not been met, federal subject matter jurisdiction does not exist. *United States v. Sherwood*, 312 U.S. 584, 586-87 (1941); *United States v. Forma*, 42 F.3d 759, 763 (2d Cir. 1994).

In this case, Larson failed to satisfy the prerequisites for the government's waiver of sovereign immunity. Accordingly, the dismissal of his refund claim for lack of subject matter jurisdiction should be affirmed.

B. The Full-Payment Rule Applies to Larson's § 6707 Penalties

United States district courts may adjudicate suits "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority . . . ." 28 U.S.C. § 1346(a)(1). But taxpayers must satisfy certain conditions in order to bring such a suit. *Forma*, 42 F.3d at 763. In particular, jurisdiction in tax refund actions is limited to cases in which the plaintiff has fully paid the challenged tax liabilities or penalties. *Flora v. United States* ("*Flora I*"), 357 U.S. 63 (1958), *on reh'g* ("*Flora II*"), 362 U.S. 145 (1960).

That rule bars Larson's claims here, as the district court held. Indeed, Larson does not dispute that he has failed to fully pay the penalties assessed against him.

Unable to satisfy that jurisdictional prerequisite, Larson instead argues that the Court should create an exception to it. But his arguments run contrary to the Supreme Court's holdings in *Flora*, as well as the uninterrupted holdings of federal courts of appeals in the nearly sixty years since then.

1. The *Flora* Decisions Interpreted 28 U.S.C. § 1346(a)(1) to Require Full Payment of Assessed Taxes

The *Flora* decisions reaffirmed a longstanding rule that "'the payment of the tax claimed [is] a condition precedent to a resort to the courts by the party against whom the tax is assessed.'" *Flora II*, 362 U.S. at 154 (quoting *Cheatham v. United States*, 92 U.S. 85, 88-89 (1875)). In *Flora I*, the Court traced the history of 28 U.S.C. § 1346(a)(1) and concluded that there was "no room for contention" that the statute was "intended to alter in any way" the principle that those challenging a tax in district court must "pay first and litigate later." 357 U.S. at 75. The Court acknowledged that where Tax Court review is unavailable, "the requirement of full payment may in some instances work a hardship." *Id.* at 75-76. But the Court explained that "amelioration" of any such hardship was not within the purview of the judiciary—rather, it would be "a matter for Congress." *Id.*

On rehearing, the Supreme Court again upheld the full-payment rule: "Reargument has but fortified our view that § 1346(a)(1), correctly construed, requires full payment of the assessment before an income tax refund suit can be maintained in a Federal District

Court." *Flora II*, 362 U.S. at 177. The Court exhaustively reviewed the history of Congress's grant of jurisdiction to courts to consider refund suits and the language of the statutes. *Id.* at 148-56. It noted that the full-payment rule furthered the "smooth functioning" of the federal tax system, while a "part-payment rule would work at cross-purposes with it." *Id.* at 176; *accord id.* at 154 ("'It is essential to the honor and orderly conduct of the government that its taxes should be promptly paid, and drawbacks speedily adjusted; and the rule prescribed in this class of cases is neither arbitrary nor unreasonable.'" (quoting *Cheatham*, 92 U.S. at 88-89)). The Court further observed that § 1346(a) is "a keystone in a carefully articulated and quite complicated structure of tax laws," and that in enacting that structure, Congress had, on numerous occasions, "acted upon the assumption that § 1346(a)(1) requires full payment before suit"—indeed, the Court concluded it would "destroy[] the existing harmony of the tax statutes" to permit suit to recover partial tax payments. *Id.* at 157. Accordingly, the Court unambiguously reaffirmed its prior conclusion that "full payment of the assessment is a jurisdictional prerequisite to suit." *Id.* at 146.

2. There Is No Exception to the *Flora* Full-Payment Rule Where Tax Court Review Is Unavailable

In the nearly sixty years since *Flora*, federal courts have adhered to its unambiguous holding and required full payment of taxes before litigation in district court, regardless of the hardship that may cause or any pol-

icy arguments to the contrary. Indeed, the courts of appeals have been clear that "there exists only one exception to the *Flora* prepayment rule which has been recognized by the federal courts," where the tax is "divisible." *Ardalan v. United States*, 748 F.2d 1411, 1414 (10th Cir. 1984); *accord Rocovich v. United States*, 933 F.2d 991, 995 (Fed. Cir. 1991); *Boynton v. United States*, 566 F.2d 50, 53 (9th Cir. 1977). Although Larson unsuccessfully contended in the district court that the § 6707 penalties assessed against him are "divisible," he has abandoned that argument on appeal. *See Smith v. Fischer*, 803 F.3d 124, 126 n.1 (2d Cir. 2015) (argument abandoned if not raised in opening brief). Instead, he urges this Court to create a new, previously unrecognized exception for his particular circumstance: where review in the Tax Court is unavailable, and the taxpayer asserts he is unable to fully pay the assessed tax. But that proposed exception contradicts *Flora* and subsequent case law.

a. Courts Have Uniformly Declined to Create New Exceptions to *Flora*

Several courts of appeals have held that unavailability of review by the Tax Court does not mean that the full-payment rule is not applicable. Whether the Tax Court lacks jurisdiction in a particular case due to the taxpayer's own actions, or because Congress has declined to make Tax Court review available, courts have consistently enforced the full-payment rule.

In *Rocovich*, the Tax Court lacked jurisdiction by statute to consider the taxpayer's challenge to his as-

sessed liability. 933 F.2d at 995. But the Federal Circuit held that the argument that the full-payment rule should not apply was "without merit," as neither Congress nor the courts had created an exception where Tax Court review is unavailable. *Id.*[5] Similarly, in *Johnston v. Commissioner* the court of appeals rejected the argument that where review in the Tax Court is "barred by statute," and the taxpayer declines to make full payment due to the "combined costs" of the tax liability and litigation expenses, access to prepayment review is required. 429 F.2d 804, 805-06 (6th Cir. 1970).[6] And in *Ardalan*, the Tenth Circuit held that no exception to the full-payment rule existed for circumstances where Tax Court review was unavailable. 748 F.2d at 1414-15. While the taxpayers in that case had

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[5] Larson attempts to distinguish *Rocovich*, quoting its statement that "[i]f the tax was not assessed at the time the refund suit was initiated, then payment of the deferred amount would not be required to give the Claims Court jurisdiction." (Brief for Plaintiff-Appellant ("Br.") 25 (quoting 933 F.2d at 994)). That argument is difficult to fathom; the IRS has never maintained that a taxpayer must fully pay a tax that was never assessed before challenging it. In any event, in this case, the § 6707 penalty was in fact assessed at the time Larson initiated suit, so the *Rocovich* quotation does not help him.

[6] *Johnston* addressed only a constitutional challenge to the statute barring review in the Tax Court, but rejected that claim by relying on the rule of *Cheatham* and *Flora*. 429 F.2d at 805-06.

waived the right to proceed in the Tax Court, the Tenth Circuit expressly stated that its determination that the district court lacked jurisdiction did not depend on the effectiveness of that waiver, which the taxpayers had challenged. *Id.* Thus, there is no merit to Larson's claim (Br. 22-23) that *Ardalan* "could be read to imply that a non-voluntary barrier to Tax Court review, such as lack of a deficiency, may allow suit for refund."[7]

Nor does a taxpayer's apparent inability to pay the tax in full entitle him to disregard the full-payment rule. As noted above, in *Johnston* the taxpayer apparently contended that the cost of full payment was prohibitive, but the Sixth Circuit still held he was not entitled to an additional forum. And the Seventh Circuit has held that even where taxpayers' "modest" income makes them apparently unable to pay a tax, and that tax was based on "doubtful" income figures, the courts still "cannot remedy" the "hardship" caused by the full-payment rule. *Curry v. United States*, 774 F.2d 852, 853-55 (7th Cir. 1985). In *Curry*, the taxpayers had no recourse to the Tax Court, due to their own errors and those of their accountant. *Id.* at 853-54. But the court of appeals held that the lack of Tax Court review did

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[7] In an unpublished opinion, the Fourth Circuit dismissed an argument that the full-payment rule applies only in cases where a Tax Court remedy is available, explaining that such an interpretation "is at odds with the holding of *Flora* itself." *Cooper v. United States*, No. 92-1962, 1993 WL 78893, at *1 (4th Cir. Mar. 22, 1993) (unpublished opinion).

not meaningfully distinguish the case from *Flora*. *Id.* at 854. Creating an exception to the full-payment rule based on the hardship to the taxpayers would "endanger the 'public purse' and disrupt the smooth functioning of the tax system, two tax policy considerations that led the *Flora* Court to adopt the prepayment rule in the first place." *Id*. at 855. And consistent with the *Flora I* Court's assessment, any hardship experienced by the taxpayers is "a matter for legislative, not judicial remedy." *Id.* at 854. Larson attempts to distinguish *Curry* on the ground that the Currys' tax liability was "self-assessed," that is, based on their own reported liability on their tax return. (Br. 23-25). But nothing in either *Curry* or *Flora* supports Larson's distinction; here, as in *Curry*, Larson seeks to challenge an assessment made by the IRS, and claims that there is no effective way for him to do so due to the full-payment rule and the limits on the Tax Court's jurisdiction. In both cases, however, the full-payment rule must prevail.

That result is fully consistent with *Flora* itself. The *Flora II* Court repeatedly emphasized the historical consistency of the full-payment rule, and the need for that requirement to "promote the smooth functioning of [the tax] system." 362 U.S. at 176. The Court's broad approach admits no leeway for limiting the application of the full-payment rule to situations where Congress provided for review in the Tax Court. And while Larson points out that penalties were not at issue in *Flora* (Br. 15-16), the Court's holding concerned the proper interpretation of § 1346(a)(1), which covers actions for, among other things, "any penalty claimed to have been

collected without authority." Any argument that penalty assessments should be treated differently than other tax assessments disregards the plain language of the statute, which treats penalties the same as other taxes. *See Flora II*, 362 U.S. at 148-50 (discussing three elements of § 1346(a)(1)—"any internal-revenue tax," "any penalty," or "any sum"—as each subject to full-payment requirement); *Flora I*, 357 U.S. at 65-66 (same); *Carroll v. United States*, 339 F.3d 61, 68 (2d Cir. 2003) (applying *Flora* rule to penalties); *Magnone v. United States*, 902 F.2d 192, 193 (2d Cir. 1990) (same); *Diversified Group*, 841 F.3d at 979, 981 (same applied to § 6707 penalties); *Thomas v. United States*, 755 F.2d 728, 729 (9th Cir. 1985).

b. *Flora* Is Not Limited to Cases Where Tax Court Review Is Available

Larson attempts to limit the *Flora* full-payment rule to cases where the IRS has issued a notice of deficiency, making prepayment review available in the Tax Court. (Br. 14-16). That contention depends on reading a single word from *Flora II* out of context, and is inconsistent with the remainder of *Flora* and subsequent cases.

After considering eighty-five years of its own decisions, statutory language, legislative history, and policy considerations, the *Flora II* Court concluded that "full payment of the assessment is a jurisdictional prerequisite to suit"—and in doing so, repeatedly stated the rule and the evidence supporting it in terms of full payment of the "assessment" or the "tax." 362 U.S. at 146-75. The Court then rejected the argument that the

full-payment rule will cause some taxpayers "great hardship," noting that that contention "seems to ignore entirely the right of the taxpayer to appeal the deficiency to the Tax Court without paying a cent." *Id.* at 175. Larson latches onto the word "deficiency," and contends that the *Flora* full-payment rule is limited to "tax deficiencies, rather than . . . appl[ying] equally across all taxes, all interest, and all penalties." (Br. 15-16).

That ignores the *Flora* Court's discussion of the three elements of § 1346(a)(1)—which include both taxes and penalties and which are all subject to full payment before suit—and the multiple circuit courts cited above that have applied the *Flora* rule to penalties. More fundamentally, Larson's argument disregards the context of the Court's language. In stating that a taxpayer may "appeal the deficiency to the Tax Court," the Supreme Court was simply describing the jurisdiction of the Tax Court, which is generally limited to reviewing notices of deficiency. *See Baral v. United States*, 528 U.S. 431, 439 n.2 (2000); *Laing v. United States*, 423 U.S. 161, 165 n.4 (1976). Nothing in that descriptive language suggests that the Court was limiting the longstanding full-payment rule to situations where the IRS issued notices of deficiency, as Larson would have it. Again, the Court repeatedly stated its holding in terms of "assessments"—indeed, in the Court's concluding paragraph, immediately after the language Larson relies on, the Court summarizes its opinion as holding that "§ 1346(a)(1), correctly construed, requires full payment of the assessment before an income tax refund suit can be maintained in a Federal District Court." 362 U.S. at 177. The Court

therefore made clear that the full-payment rule applies to all assessments, not only assessments of tax deficiencies.

Nor is Larson correct in arguing that *Flora*'s holding depended on the availability of Tax Court review, or on the determination that "since the avenue of Tax Court litigation is open to the taxpayer, he should not be permitted as a matter of policy to pay in part and sue for refund in district court." (Br. 14-15). That argument mischaracterizes the Supreme Court's decisions, which relied "on a detailed investigation of statutory interpretation and legislative intent that leaves no room for creation of a policy oriented exception." *Ardalan*, 748 F.2d at 1414. Although the Court extensively discussed the Tax Court and its predecessor, the Board of Tax Appeals, it did so not to rest its holding on the availability of that forum, but to demonstrate that "it is apparent that Congress has several times acted upon the assumption that § 1346(a)(1) requires full payment before suit." 362 U.S. at 157. As the Court explained, "throughout the congressional debates" regarding the creation of the Board of Tax Appeals "are to be found frequent expressions of the principle that payment of the full tax was a precondition to suit." *Id.* at 159. Similarly, the Court observed that Congress excluded federal tax matters from the Declaratory Judgment Act to prevent circumvention of the full-payment rule. *Id.* at 164-65; *see* 28 U.S.C. § 2201(a). None of that suggests that Larson is correct that the full-payment rule only applies when the doors of the Tax Court are open to consideration of a claim. To the contrary, the fact that Congress intended to alleviate the hardship of the full-payment rule by creating the Tax Court

shows that Congress was aware of, and implicitly approved, the full-payment rule, and that it intended to alleviate the hardship of that rule only to the limited extent permitted by the Tax Court's jurisdiction.

Larson contends that the Supreme Court and this Court have refused to apply the *Flora* full-payment rule in cases where there was no tribunal available for prepayment litigation. (Br. 17-18). That is incorrect. In *Laing*, the Supreme Court interpreted the Internal Revenue Code to require the IRS to issue a deficiency notice when the government terminates a taxpayer's tax year before its normal expiration date. 423 U.S. at 173-75. After considering the statutory text, the Court observed that "[b]esides conflicting with the plain language of the Code provisions," a refusal to issue deficiency notices would preclude Tax Court review, a result "out of keeping with the thrust of the Code." *Id.* at 176. In short, the Court stated that the general preference for allowing Tax Court review militated in favor of concluding that a notice of deficiency was required by the statutes, whose plain text otherwise led to the same conclusion. That is a far cry from Larson's conclusion that the "*Laing* Court suggested that the full-payment rule would not apply against a taxpayer who is deprived of the opportunity to litigate in Tax Court" (Br. 18)—a characterization at odds with the *Laing* Court's recognition that Congress had on occasion expressly denied Tax Court review, *id.* at 176, and indeed the absence of any mention of *Flora* or the full-payment rule by the Court majority.

And while the *Laing* dissenters characterized *Flora* as tied to the Tax Court's jurisdiction, 423 U.S. at 208-

09 (Blackmun, J., dissenting), that position failed to persuade the Court, and has not been adopted by any later judicial decision. This Court's decision in *Irving v. Gray*, 479 F.2d 20 (2d Cir. 1973), considered the same question later addressed in *Laing*, and reached the opposite conclusion—meaning that after *Laing*, *Irving* is effectively a dead letter. *See Laing*, 423 U.S. at 166-67 (noting that the Second Circuit decision the Court reversed adhered to the earlier *Irving* precedent). In the four decades since the *Laing* dissent was rejected and *Irving* was overruled by the Supreme Court, this Court has applied the *Flora* full-payment rule in multiple cases without ever suggesting that it was limited to situations where Tax Court review is available. *See, e.g.*, *Forma*, 42 F.3d at 763 (recognizing that the full-payment rule must be applied even though "taxpayers with patently meritorious refund claims can be tripped up procedurally and be left without a remedy"); *Magnone*, 902 F.2d at 193.

Finally, to the extent Larson argues that the *Flora* rule depends on the availability of some form of prepayment review, whether in the Tax Court or otherwise, again there is no support in *Flora* for that position—but Larson also ignores the fact that such review exists. As more fully explained below, the IRS Appeals Office is an independent and impartial forum that courts have repeatedly recognized as providing significant protection for taxpayers. Larson himself utilized the review provided by the Appeals Office. Thus, even if the case law can be read to require some sort of prepayment review, that requirement was satisfied.

c. The Exceptions to the Full-Payment Rule Undercut Larson's Attempt to Narrow the Scope of the *Flora* Precedents

Lastly, Larson's argument that full payment is not required for challenges to assessable penalties fails, because if that were true, there would be no need for existing exceptions to the full-payment rule created by Congress for particular assessable penalties. That these exceptions exist demonstrates that Larson's argument is wrong.

Congress has provided mechanisms that allow for certain assessable penalties to be challenged upon partial payment of the assessment. *See Rocovich*, 933 F.2d at 995 (discussing partial-payment statutes). For example, for penalties assessed against tax return preparers for understating a taxpayer's liability, a preparer may file a claim for refund and pursue the refund in district court after paying only fifteen percent of the penalty amount. 26 U.S.C. §§ 6694(c), 6701, 6703(c). Similarly, assessable tax shelter promoter penalties under 26 U.S.C. § 6700 also can be challenged upon payment of fifteen percent of the penalty. 26 U.S.C. § 6703(c). Again, there would have been no reason for Congress to expressly authorize tax refund suits based on partial payment of certain assessable penalties if the full-payment rule did not apply to assessable penalties at all.

As *Flora I* and others have recognized, any alteration of the full-payment rule is a matter for Congress, not the courts. 357 U.S. at 75-76; *Curry*, 774 F.2d at

854. Whether through its authority to expand or contract the jurisdiction of the Tax Court, or its demonstrated ability to create alternatives to the full-payment rule for particular assessable penalties, Congress is capable of addressing these types of issues at any time. But it has not created any exception to the full-payment rule for § 6707 penalties. Larson's effort to have this Court do so, by interpreting *Flora* to allow prepayment review in district courts for dozens of assessable penalties, would circumvent Congress's decision and undercut long-established precedents regarding the necessary procedures for filing a tax refund suit. The district court's judgment rejecting that attempt should be affirmed.[8]

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[8] Much of the amicus brief supporting Larson depends on the assertion that Congress has increased the number of assessable penalties since *Flora* was decided, broadening the range of penalties that are not reviewable in Tax Court. (Amicus Br. 3-5). But as *Flora* stated, Congress is plainly aware of the full-payment rule; its decision to create assessable penalties without exempting them from the rule was therefore presumably intentional. Congress may "prefer questions of liability concerning nondeficiency-related taxes to be decided" in a "postpayment refund suit," and that choice is "reasonable." *Our Country Home*, 855 F.3d at 790. Amicus also asserts policy reasons for an exception to the full-payment rule, but those variants on the hardship argument must be directed to Congress. *Ardalan*, 748 F.2d at 1414 (rejecting "policy oriented exception").

POINT II

Application of the Full-Payment Rule to Larson Does Not Violate Due Process

The full-payment rule articulated in *Flora* still applies to Larson even though he could not seek relief in the Tax Court and allegedly cannot pay the full amount of the penalties assessed against him. That does not violate the requirements of due process. Larson was afforded meaningful prepayment administrative review by the Appeals Office, and may obtain judicial review in a postpayment refund suit. Those mechanisms satisfy the requirements of the Due Process Clause.

The Fifth Amendment guarantees a taxpayer facing a penalty assessment "the opportunity to be heard at a meaningful time and in a meaningful manner"—"but the concept is flexible, calling for procedural protection as dictated by the particular circumstance." *Kahn v. United States*, 753 F.2d 1208, 1218 (3d Cir. 1985). "[I]n resolving a claimed violation of procedural due process, a careful weighing of the respective interests is required, and . . . the Government's interest in collecting the revenues is an important one." *Commissioner v. Shapiro*, 424 U.S. 614, 630 n.12 (1976) (citation omitted). Thus, "summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained" so long as "adequate opportunity is afforded for a later judicial determination of the legal rights." *Phillips v. Commissioner*, 283 U.S. 589, 595 (1931); *accord Kahn*, 753 F.2d at 1218 ("In the tax context, the constitutionality of a

scheme providing for only post-assessment judicial review is well-settled.").

Here, Congress has provided for such a "later judicial determination" in a tax refund suit, which may address Larson's challenge to his § 6707 penalty. Although such a suit requires full prepayment of the assessment, that does not pose a due-process problem: even when a taxpayer is placed in a "precarious financial position, the problems presented do not rise to the level of constitutional infirmities, in light of the powerful governmental interests in protecting the administration of the tax system from premature judicial interference, and of the opportunities for review that are available." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 747–48 (1974) (citations omitted; citing, *inter alia*, *Cheatham*, 92 U.S. at 88-89); *see Bull v. United States*, 295 U.S. 247, 260 (1935) ("The ordinary defendant stands in judgment only after a hearing. The taxpayer often is afforded his hearing after judgment and after payment, and his only redress for unjust administrative action is the right to claim restitution."); *Kahn*, 753 F.2d at 1218 ("in considering prior due process objections to tax collection, the Supreme Court has shown special deference to the manner in which the IRS has collected the revenues of the government").

Indeed, various courts have recognized that while the full-payment requirement imposes a burden on taxpayers, it does not constitute a deprivation of fundamental fairness under the Fifth Amendment. *See, e.g.*, *Johnston*, 429 F.2d at 806 (rejecting due process challenge where Tax Court review was unavailable and petitioner alleged that expense of tax refund suit

deprived him of meaningful opportunity for review); *Ardalan*, 748 F.2d at 1414; (JA 47 ("Although full payment of Larson's challenged assessment may be prohibitively costly, courts have consistently rejected the argument that application of the full-payment rule deprives a taxpayer of fundamental due process in circumstances where the taxpayer is unable to pay the full amount." (quotation marks omitted))).

Moreover, Larson was afforded the opportunity, which he took, for meaningful prepayment administrative review through the IRS Appeals Office. As the Federal Circuit has explained, "[i]n general, a person can challenge a penalty assessed by the IRS in two ways: First, they can appeal to the IRS Appeals Office without paying the penalty. Second, they can pay the penalty, request a refund from the IRS, and, if unsuccessful, sue to recover a refund." *Diversified Group*, 841 F.3d at 980-81 (citations and footnote omitted). The IRS Appeals Office is "an independent bureau of the IRS charged with impartially resolving disputes between the government and taxpayers," and "Congress has determined that hearings before this office constitute significant protections for taxpayers." *Our Country Home*, 855 F.3d at 789; *accord Iames v. Comm'r*, 850 F.3d 160, 165 (4th Cir. 2017) ("the Office of Appeals is an independent decisionmaker"); *Keller Tank*, 854 F.3d at 1184 ("Appeals Office must be an independent bureau of the IRS and be impartial to the government and taxpayer."); *Porter v. Comm'r*, 130 T.C. 115, 138 (2008) ("Congress saw the informal Appeals process as serving an important function in resolving tax disputes while giving taxpayers a meaningful opportunity to voice their concerns."). Review in the

Appeals Office thus provides a "meaningful opportunity to challenge the imposition and amount" of a tax penalty. *Iames*, 850 F.3d at 166; *accord Keller Tank*, 854 F.3d at 1199-200 ("conference with the Appeals Office provides a taxpayer a meaningful opportunity to dispute an underlying tax liability" (quotation marks omitted)).

Administrative proceedings before the IRS Appeals Office can permissibly be a taxpayer's only opportunity to challenge the IRS's liability findings, even if there is no prepayment judicial forum. *See Our Country Home*, 855 F.3d at 784; 787 ("it is more likely that Congress considers administrative proceedings to be appropriate forums for most prepayment tax challenges"). In this case, Larson pursued a challenge to his § 6707 penalties through the IRS Appeals Office. (JA 11-12). Having been granted that "meaningful" review, and having the further opportunity for postpayment judicial review, Larson has been accorded due process, and his contention that he has not had any opportunity to be heard rings hollow.

Larson attempts to create an entitlement to more process by misreading *Phillips*, contending that the Supreme Court held that due process mandates the existence of a Tax Court remedy in addition to the availability of a tax refund suit. (Br. 27-28). The *Phillips* Court held that a collection mechanism in the Code "satisfies the requirements of due process because two alternative methods of eventual judicial review are available to the transferee," namely, postpayment judicial review and prepayment review in the Board of Tax Appeals. 283 U.S. at 597-98. Larson argues that

the word "because" implies that both methods are required. But *Phillips* did not say that; the quoted sentence describes the review available in the case before the Court and holds that they satisfy due process, but nowhere does it say both are required. Indeed, as discussed above, the Tax Court does not have the authority to adjudicate each and every type of tax dispute, *see Laing*, 423 U.S. at 207-08 (Blackmun, J., dissenting) ("There is, of course, no constitutional requirement that every tax dispute be adjudicable in the Tax Court."), but no court has held that to be a due process violation. And in any event, while the Board of Tax Appeals may have provided a layer of prepayment administrative review in *Phillips*, and the Tax Court (which is not an Article III court) may provide such review in other cases, Larson too received prepayment administrative review through the Appeals Office. *See Samuels, Kramer & Co. v. Comm'r*, 930 F.2d 975, 992 (2d Cir. 1991) (resolution of disputes between government and taxpayer "can be relegated to a non-Article III forum" such as Tax Court). He therefore has no valid due process claim.

POINT III

The District Court Properly Dismissed Larson's APA Claim

Larson's alleged inability to pay his outstanding penalty liabilities also should not determine whether his complaint overcomes the "threshold limitations on the scope of APA review." *Sharkey v. Quarantillo*, 541 F.3d 75, 87 (2d Cir. 2008). As the district court recognized, Congress has designated a specific mechanism

for review of IRS impositions of penalty assessments: the tax refund suit procedures of 26 U.S.C. § 7422(a) and 28 U.S.C. § 1346(a)(1). This statutory scheme provided Larson with an avenue to seek refund and abatement of his § 6707 penalties in federal district court. *See United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 4 (2008). Because final agency actions are reviewable under the APA only when "there is no other adequate remedy in a court," 5 U.S.C. § 704, the availability of the tax refund suit precludes judicial review under the APA for the same relief, and the district court correctly dismissed Larson's APA claim.[9]

A. Statutory Framework for Review of Agency Action Under the APA

The APA authorizes judicial review for any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," but only for "relief other than money damages." 5 U.S.C. § 702. As this Court has recognized, however, there are "many

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[9] This Court has observed in dicta that it is "uncertain in light of recent Supreme Court precedent whether [certain] threshold limitations [of the APA] are truly jurisdictional or are rather essential elements of the APA claims for relief." *Sharkey*, 541 F.3d at 87. But whether analyzed under Fed. R. Civ. P. 12(b)(1) or 12(b)(6), Larson's APA claims should be dismissed. *See Conyers v. Rossides*, 558 F.3d 137, 143 n.8 (2d Cir. 2009); *County of Westchester v. HUD*, 778 F.3d 412, 416 n.5 (2d Cir. 2015).

threshold limitations to judicial review under the APA." *Sharkey*, 541 F.3d at 84. As relevant here, APA review is permitted only for a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016).

B. Congress Has Provided an Adequate Judicial Remedy for the Relief Larson Seeks Under the APA

The APA "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (quotation marks omitted); *see Marlow v. U.S. Dep't of Educ.*, 820 F.2d 581, 583 n.3 (2d Cir. 1987). "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." *Bowen*, 487 U.S. at 903.

Congress has established a specific judicial procedure for review of the IRS's handling of penalty assessments—a tax refund suit pursuant to 26 U.S.C. § 7422(a) and 28 U.S.C. § 1346(a)(1). *See Clintwood Elkhorn*, 553 U.S. at 4; *Bob Jones Univ.*, 416 U.S. at 746-47. Larson acknowledges as much, and pleads the first claim in his complaint under this statutory scheme. (JA 15-16). The very availability of this claim forecloses APA review. Indeed, Larson's purported APA claim is essentially a tax-refund claim by another name: it would provide him the same relief based on the same legal theory. The only difference is that it would allow him to evade the constraints on review

created by Congress, which require full payment before a refund suit can be brought.[10]

Just because Larson has not complied with the requirements for filing a tax refund lawsuit does not mean that the remedy itself was not an "adequate" one. A remedy "will be deemed adequate where a statute affords an opportunity for *de novo* district-court review of the agency action. In such cases . . . Congress did not intend to permit a litigant challenging an administrative denial to utilize simultaneously both the review provision and the APA." *Garcia v. Vilsack*, 563 F.3d 519, 522-23 (D.C. Cir. 2009) (quotation marks, citations, and alterations omitted). Litigants who comply with the requirements of the tax refund suit statutes have access to *de novo* judicial review of the challenged IRS determination, and Larson does not cite a single case in which a taxpayer has been permitted to pursue an APA claim as an "alternative" to a tax refund suit.

As the district court observed (and as Larson admits), the cases cited by Larson in support of his argument that a tax refund suit is not an adequate remedy

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[10] As the district court noted, two other district courts to have considered whether a plaintiff could pursue an APA claim to challenge an IRS tax assessment found that APA review was foreclosed by the availability of a tax refund suit. (JA 51); *Clark County Bancorp. v. United States*, No. 13-632, 2014 WL 5140004, at *9 (D.D.C. Sept. 19, 2014); *Chatman v. United States*, No. CV 14-1244, 2014 WL 6367110, at *3 (C.D. Cal. Oct. 22, 2014).

"are not factually analogous." (JA 51-52 n.15; Br. 43). In *National Restaurant Association v. Simon*, the district court refused to require plaintiffs to manufacture an episode of non-compliance with tax obligations—to become "in essence, a lawbreaker"—only so the resulting controversy could be litigated as a refund suit. 411 F. Supp. 993, 996 (D.D.C. 1976). But Larson already is a "lawbreaker," having already committed actions that gave rise to both this penalty assessment and his federal criminal conviction; there is thus no need to artificially create a vehicle to pursue a tax refund claim. In *Estate of Michael v. Lullo*, the court of appeals permitted a mandamus action where the IRS admitted the statute of limitations on assessing a tax had run but sought to compensate for its own calculation error by reducing a separate previously allowed credit. 173 F.3d 503, 510-12 (4th Cir. 1999). Describing the case as involving "an unprecedented and extraordinary set of circumstances not likely to recur," the court took the "extraordinary" step of allowing a mandamus suit against the IRS, as a refund action would be "pointless" because the taxes were "unquestionably time-barred," and the taxpayer had therefore shown a "certainty of success on the merits." *Id.* at 506, 512, 513 & n.10. *Lullo* bears no relationship to the facts of this case, where Larson's malfeasance gave rise to the assessed penalty, he has already filed a tax refund suit to challenge the penalty assessment, and any prospect of success on the merits has yet to be demonstrated.[11]

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[11] Neither *Simon*, 411 F. Supp. at 995-96, nor *Lullo*, 173 F.3d at 510, involved an attempt to bring suit under the APA, and neither case even mentions

Finally, *Cohen v. United States* is also inapplicable, as the court of appeals made clear that plaintiffs' challenge to certain IRS procedures was "not a refund suit" —the plaintiffs were not seeking "recovery of any internal revenue tax," and allowing the APA claim to proceed did not "duplicate existing procedures for review of agency action." 650 F.3d 717, 728, 734 (D.C. Cir. 2011) (en banc). Further, the court noted that allowing the action to proceed "will not open the courthouse door to those wishing to avoid administrative exhaustion procedures in other cases. In the tax context, the only APA suits subject to review would be those cases pertaining to final agency action *unrelated to tax assessment and collection*." *Id.* at 733 (emphasis added). In contrast, Larson's case is a tax refund suit, one that directly challenges a final agency action related to tax assessment and collection; his APA theory is merely an attempt to circumvent the requirements for pursuing that claim.

Larson suggests that hypothetical scenarios involving egregious or intentional IRS misdeeds show the "danger" of not permitting judicial review prior to full payment. (Br. 46-48). But those hypotheticals either disregard the availability of administrative review by the independent and impartial Appeals Office, or simply assume that an Appeals Officer who is "not sympathetic" to the taxpayer will willfully disregard the merits of the taxpayer's claim—flatly contradicting

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the "no other adequate remedy in a court" provision of 5 U.S.C. § 704.

the Supreme Court's "presumption of honesty and integrity in those serving as [agency] adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *accord United States v. Morgan*, 313 U.S. 409, 421 (1941) ("Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures . . . [but instead] capable of judging a particular controversy fairly on the basis of its own circumstances."); *Estate of Landers v. Leavitt*, 545 F.3d 98, 113 (2d Cir. 2008) (court "unwilling to ascribe . . . nefarious motives to agency action"). Larson presents no reason to presume that the Appeals Office is not sufficiently effective to catch and correct obvious mistakes or misconduct. Larson's hypotheticals amount to nothing more than criticism of the requirement—in effect since *Cheatham* and *Flora*—of full prepayment before judicial review is available. Yet courts continue to enforce that requirement, and the "danger" posited by Larson has never apparently been realized.

In sum, Congress has determined the appropriate procedures for bringing the type of challenge that Larson seeks to pursue here, and the restrictions Congress imposed do not change based on whether a particular plaintiff does or does not have sufficient funds to satisfy his or her outstanding tax liabilities. A determination that a tax refund action is not an "adequate remedy" for purposes of 5 U.S.C. § 704 because of Larson's alleged inability to pay would create an impractical system, under which APA review might or might not be available depending on each individual taxpayer's financial circumstances. Larson should not be permitted to distort the congressionally established framework for tax refund suits in this manner.

C. Neither § 6707 nor Its History Suggests a Tax Refund Action Is Not an Adequate Remedy

Larson mounts an extensive discussion of the meaning of § 6707 and other penalty statutes to try to demonstrate that Congress did not intend to preclude judicial review. (Br. 33-41). That very inquiry is misguided, because judicial review actually is available here—through a tax refund suit. The limitations on that judicial review come not from § 6707, but from § 1346(a)(1), which the Supreme Court long ago determined requires full payment as a prerequisite to such judicial review.

What is clear from the plain language of § 6707 is that Congress did not create an exception to the full-payment rule to allow access to federal district court on a tax refund claim based on partial payment of a § 6707 penalty, even though such a partial-payment exception had been in place for tax shelter promoter penalties pursuant to 26 U.S.C. § 6700 since 1982. *See* 26 U.S.C. §§ 6703, 6707. There is no basis to infer that Congress intended that individuals subject to § 6707 penalties may file tax refund suits without making full payment of their outstanding liabilities, or to pursue "a refund suit in everything but name" (JA 51) by repackaging it as an APA claim. Section 704 precludes precisely the type of duplicative action Larson wishes to bring.

Larson's argument centers on the meaning of the phrase "aggregate amount invested" in § 6707. But any contention that the IRS misinterpreted or misapplied that statute in imposing penalties on Larson is a

merits argument, which cannot be advanced until Larson satisfies the jurisdictional prerequisites to suit. The district court was thus correct in holding that "the legislative history of section 6707 is irrelevant to the question of whether the APA is an instrument to obtain judicial review." (JA 52).

D. Larson Is Not Entitled to Relief Under the APA

Finally, Larson cannot pursue a claim for equitable relief under the APA, as both declaratory and injunctive relief are unavailable to address a matter pertaining to tax collection. The Declaratory Judgment Act "allows a federal court to declare the rights and obligations of the parties properly before it in any 'case of actual controversy within its jurisdiction, *except with respect to federal taxes.*'" *SEC v. Credit Bancorp, Ltd.*, 297 F.3d 127, 137 (2d Cir. 2002) (quoting 28 U.S.C. § 2201(a)) (emphasis added by court). Similarly, the Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a); *see Gulf Coast Maritime Supply, Inc. v. United States*, __ F.3d __, No. 16-5350, 2017 WL 3443041, at *4-5 (D.C. Cir. Aug. 11, 2017) (barring APA suit because "[w]hen the remedy sought directly affects tax collection, the suit is barred by the AIA"). Although the Anti-Injunction Act does not apply to actions where aggrieved parties lack "an alternative legal avenue by which to contest the legality of a particular tax," *South Carolina v. Regan*, 465 U.S. 367, 373 (1984), Larson does not contest the legality of the

§ 6707 tax—merely its imposition on him.[12] *See Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 408 (4th Cir. 2003) ("the basis of the *Regan* exception is *not* whether a plaintiff has access to a legal remedy for the precise harm that it has allegedly suffered, but whether the plaintiff has any access at all to judicial review"). And in any event, Congress has provided an avenue for taxpayers seeking to challenge a § 6707 penalty: a tax refund suit. Accordingly, the district court's dismissal of Larson's APA claim should be affirmed.

POINT IV

The District Court Properly Dismissed Larson's Eighth Amendment Claim

Larson's claim that the § 6707 penalties assessed against him violate the Excessive Fines Clause of the Eighth Amendment is yet another attempt to circumvent his failure to satisfy the jurisdictional prerequisites for a tax refund suit. This Court should not permit this claim to proceed.

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[12] Although the *Regan* Court at times phrased its conclusion simply in terms of an "alternative remedy," context makes it clear that the "'alternative remedy' to which the court referred, and which was not provided, was 'an alternative legal avenue by which to contest the legality of a particular tax.'" *Matter of LaSalle Rolling Mills, Inc.*, 832 F.2d 390, 393 & n.8 (7th Cir. 1987) (quoting *Regan*, 465 U.S. at 373); *accord In re American Bicycle Ass'n*, 895 F.2d 1277, 1280-81 & n.4 (9th Cir. 1990).

A. The District Court Lacked Jurisdiction to Consider Larson's Eighth Amendment Claims

To the extent Larson relies on the Eighth Amendment to assert a claim for damages, that claim fails because Congress has not waived the government's sovereign immunity from lawsuits based on constitutional claims for money damages. *Blakely v. United States*, 276 F.3d 853, 870 (6th Cir. 2002) (dismissing plaintiff's claim for violation of the Excessive Fines Clause because "[t]he United States as a sovereign is immune from suit for money damages unless it unequivocally has waived such immunity"); *see Robinson*, 21 F.3d at 510. Larson, however, appears to expressly disavow any such claim. (Br. 50 ("the Complaint does not demand money damages")).

To the extent Larson invokes the Eighth Amendment as a defense against the imposition of the § 6707 penalty or as a ground for refunding that penalty, that is a merits argument, which again Larson may not assert until he meets the prerequisites for bringing a refund action. Indeed, Larson appears to accept that his Eighth Amendment theory may only be considered as part of a procedurally proper suit against the United States, brought under an appropriate waiver of sovereign immunity that allows the district court to exercise subject matter jurisdiction. (Br. 51 ("The district court has jurisdiction to review the Eighth Amendment claim as part of the APA action.")). Because, as explained above, the district court had no jurisdiction

over Larson's action, the Eighth Amendment contentions may not now be considered.[13]

B. The District Court Correctly Dismissed the Eighth Amendment Claims as Conclusory

If the Court were to address them, however, the district court properly held that Larson's complaint contains nothing more than conclusory assertions that fail to state a plausible claim for relief under the Eighth Amendment.

In deciding a motion to dismiss, courts apply a "plausibility standard," which is guided by "[t]wo working principles." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *accord Harris v. Mills*, 572 F.3d 66, 71-72 (2d Cir. 2009). First, although courts must accept non-

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[13] Larson relies on two unpublished district court opinions to assert the court below had jurisdiction "under the APA." (Br. 51-52). But the APA itself does not confer jurisdiction on district courts. *Califano v. Sanders*, 430 U.S. 99, 107 (1977). In *Callister Nebeker & McCullough v. United States*, the court determined it had jurisdiction because the case presented a proper refund claim. No. 2:14-CV-919, 2015 WL 5918494, at *5 n.7 (D. Utah Oct. 9, 2015). And in *Moore v. United States*, No. C13-2063RAJ, 2015 WL 1510007 (W.D. Wash. Apr. 1, 2015), the court did not address jurisdiction at all. "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Arizona Christian School Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011).

conclusory factual allegations in the complaint as true, this "tenet" is "inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678; *accord Harris*, 572 F.3d at 72. As a result, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678; *accord Brown v. Daikin America Inc.*, 756 F.3d 219, 225 (2d Cir. 2014) ("we are not bound to accept as true a legal conclusion couched as a factual allegation" (quotation marks omitted)). Second, only complaints that state a "plausible claim for relief" can survive a Rule 12(b)(6) motion to dismiss. *Iqbal*, 556 U.S. at 679. Thus, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint should be dismissed for failure to state a claim. *Id.*

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. For a monetary penalty to violate the Excessive Fines Clause, the penalty must be a punitive "fine" that constitutes punishment, and must be "grossly disproportionate to the gravity of [the] offense." *United States v. Bajakajian*, 524 U.S. 321, 327-28, 334 (1998); *see United States v. Milbrand*, 58 F.3d 841, 845 (2d Cir. 1995).

Whether a penalty is "grossly disproportionate" within the meaning of the Excessive Fines Clause is an "inherently imprecise" inquiry that is not susceptible to "a simple mathematical formula." *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S.

424, 434-35 (2001) (quotation marks omitted). In assessing the constitutionality of a penalty under the Eighth Amendment, courts consider "the degree of the defendant's reprehensibility or culpability; the relationship between the penalty and the harm to the victim caused by the defendant's actions; and the sanctions imposed in other cases for comparable misconduct." *Id.* at 435 (citations omitted).

As the district court observed, Larson's conclusory allegations in support of his Eighth Amendment claim are limited to the amount of the penalty and the assertion that the penalty is "grossly disproportionate to the gravity of the alleged misconduct: Mr. Larson's failure to file two tax shelter registration forms." (JA 17, 56-57). These allegations are nothing more than a "recitation of the elements of a cause of action," and therefore fail to meet the plausibility standard. *Iqbal*, 556 U.S. at 678 (quotation marks omitted).

Moreover, characterizing the underlying misconduct as nothing more that the failure to file two forms is conclusory, and misleading in light of the basic structure of the § 6707 penalty and the harm that statute addresses. While certain IRS penalties for failing to file particular forms are for fixed sums—*e.g.*, $10,000 per occurrence for a foreign entity's failure to file a tax return, 26 U.S.C. § 6679(a)(1); $1,000 per occurrence for failure to file an actuarial report, 26 U.S.C. § 6692—the § 6707 penalty was for "an amount equal to the greater of (A) 1 percent of the aggregate amount invested in such tax shelter, or (B) $500." 26 U.S.C. § 6707(a)(2). In contrast to the simple "failure to file" penalties, Congress saw fit to peg the § 6707

penalty to the scope of what was being concealed by the failure to file. Here, the magnitude of the penalty is directly proportional to the magnitude of the scheme Larson was convicted of orchestrating, which resulted in billions of dollars in evaded taxes. *See Stein v. KPMG, LLP*, 486 F.3d 753, 756 (2d Cir. 2007) ("The defendants are alleged to have, *inter alia*, devised, marketed, and implemented fraudulent tax shelters that caused a tax loss to the United States Treasury of more than $2 billion.").

The complaint also does not include any allegations that would allow for evaluation of how Larson's § 6707 penalty compared to "the sanctions imposed in other cases for comparable misconduct." *See Cooper Indus.*, 532 U.S. at 435. Indeed, the size of Larson's penalties are similar to the $42 million § 6707 penalty at issue in *Diversified Group*. *See Diversified Group, Inc. v. United States*, 123 Fed. Cl. 442, 445 (2015).

In short, Larson's extremely limited allegations in support of his Eighth Amendment consist of nothing more than a statement of the legal standard for determining whether a penalty violates the Excessive Fines Clause, and a conclusory assertion that the § 6707 penalties assessed against him amount to a constitutional violation. This Court need not accept such allegations. *See Iqbal*, 556 U.S. at 678. And even construing the allegations in the complaint in the light most favorable to Larson, his failure to allege any non-conclusory facts that would allow a court to infer "more than the mere possibility of misconduct" warrants the dismissal of his Eighth Amendment claim. *Id.* at 679.

CONCLUSION

The judgment of the district court should be affirmed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 11,686 words in this brief.

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