No. 23-

IN THE

Supreme Court of the United States

ROCKY BRANCH TIMBERLANDS, LLC,

Petitioner,

v.

UNITED STATES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Date: December 5, 2023

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QUESTION PRESENTED

Whether the Anti-Injunction Act's bar on lawsuits for the purpose of restraining the assessment or collection of taxes also bars courts from enforcing laws which require the IRS to provide taxpayers with their due process rights.

PARTIES TO THE PROCEEDINGS AND RELATED PROCEEDINGS

The parties to the proceeding below are as follows:

Petitioner is Rocky Branch Timberlands, LLC. It was the plaintiff in the district court and appellant in the court of appeals.

Rocky Branch Timberlands Investments, LLC, individually and as the Tax Matters Partner for Southeastern Argive Investments, LLC, was the plaintiff in the district court.

Respondents are the United States of America, the Internal Revenue Service, and Lee Volkmann, Internal Revenue Service Manager. Respondents were defendants in the district court and appellees in the court of appeals.

The related proceedings below are:

1) Hancock County Land Acquisitions, LLC v. U.S., No. 1:20-cv-03096 (N.D. GA) – Judgment entered July 8, 2021;

2) Hancock County Land Acquisitions, LLC v. U.S., No. 21-12508 (11th Cir.) – Judgment entered August 17, 2022;

3) Rocky Branch Timberlands, LLC v. U.S., No. 1:21-cv-02605 (N.D. GA) – Judgment entered June 21, 2022; and

4) Rocky Branch Timberlands, LLC v. U.S., No. 22-12646 (11th Cir.) – Judgment entered September 6, 2023.

CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29, Petitioner Rocky Branch Timberlands, LLC states that it has no parent companies or publicly held companies with a 10% or greater ownership interest in it.

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Rocky Branch Timberlands, LLC ("Rocky Branch") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eleventh Circuit is available at 132 AFTR 2d 2023-5788 and is reproduced in the Appendix ("App.") at 1a-7a. The opinion of the U.S. District Court for the Northern District of Georgia is reported at 132 AFTR 2d 2023-5788 and is reproduced at App. 8a-22a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Eleventh Circuit was entered on September 6, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory provision involved in this case is 26 U.S.C. § 7803. This provision is reproduced at App. 48a.

INTRODUCTION

With the Taxpayer First Act, Congress codified a taxpayer's right to independent review of Internal Revenue Service ("IRS") actions. 26 U.S.C. § 7803(e). However, the IRS maintains that the denial of this right is not subject to any review regardless of the arbitrary

nature of its decision to deny such review. This Court has consistently found that the IRS is not exempt from the Administrative Procedures Act ("APA"). *Mayo Found. For Med. Educ. & Research v. United States*, 562 U.S. 44, 55 (2011); *CIC Services, LLC v. IRS*, 141 S. Ct. 1582 (2021). For far too long, the IRS has hidden behind the Anti-Injunction Act claiming that the APA does not serve as a check on its actions. It is clear that the Anti-Injunction Act bars suits to enforce taxpayer rights. It is equally clear that the Anti-Injunction Act does not allow the IRS to simply ignore and avoid specific procedural requirements mandated by Congress.

This case presents a very important question about the interplay between the APA and the Anti-Injunction Act: Does the Anti-Injunction Act override the APA and all future laws enacted by Congress, preventing taxpayers from seeking redress in any court when the IRS fails to follow legally mandated procedural safeguards? Here, Petitioner challenges the IRS denial of consideration by the Independent Office of Appeals prior to the commencement of litigation. Such consideration by the Independent Office of Appeals is a right Congress codified in 26 U.S.C. § 7803(e).

This Court has held pre-enforcement suits can proceed so long as the purpose of the suit does not seek to restrain the assessment or collection of taxes because IRS actions are subject to the APA. *CIC Services,* 141 S. Ct. 1582. But in this case the Eleventh Circuit concluded that, due to the jurisdictional limitations imposed by the Anti-Injunction Act, courts are unable to consider any suit seeking to remedy unlawful IRS conduct with respect to taxpayer's rights to independent review—where the

eventual result of the unlawful act may be the assessment or collection of a potential tax. App. at 5a.

First, the Eleventh Circuit's decision misapplies this Court's decision in *CIC Services* and is at odds with this Court's decision in *Direct Marketing. Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1 (2015). As in *CIC Services*, the purpose of Petitioner's suit, as shown by the relief sought in the complaint, targeted the IRS's violation of the law and not the underlying tax. Moreover, the challenged action—the denial of procedural rights—(1) inflicts additional costs separate and apart from the tax on the taxpayer, the Courts, and the IRS by requiring costly and expansive litigation; (2) is several steps removed from the downstream tax and (3) produces a situation where there is no other legal manner for Petitioner to challenge the IRS's actions. Like *CIC Services* and *Direct Marketing*, Petitioner's suit lacks a direct connection to the "assessment or collection" of taxes and the "downstream effect" of avoiding tax is tenuous at best.

Second, this case presents an important question about the role of the APA in reigning in agency overreach. Specifically, it asks whether the scope of the Anti-Injunction Act is so broad that it precludes the courts from ever having the authority to enforce any subsequent law. For example, the Taxpayer First Act was enacted in 2019 and seeks to protect taxpayers from specific IRS abuses by protecting taxpayer rights identified by Congress. Under the Eleventh Circuit's ruling, unlawful IRS actions can never be challenged under almost any circumstance, creating a regime where the IRS is insulated from both Congressional restraint and judicial oversight. Such a broadly erroneous holding confers upon the IRS full

license to arbitrarily ignore any law enacted by Congress to unilaterally deny the due process rights available to taxpayers, whenever respecting such rights presents an inconvenience to an enforcement action.

STATEMENT OF THE CASE

A. Background

In 2019, Congress created the Taxpayer First Act to address concerns about the IRS's abuse of taxpayer rights in enforcement actions. As explained by the Act's co-sponsor Rep. Kevin Brady of Texas:

> The Constitution guarantees Americans the right to due process and protection from unreasonable search and seizures. In the hearings led by Chairman Lewis and others, we have heard stories from across the country of the IRS abusing these rights. Under this bill, that stops…the Taxpayer First Act recasts the IRS as our tax administrator rather than simply an enforcement agency. We will better protect taxpayers from enforcement abuses by creating an impartial review of disputes they have with the IRS.

165 Cong. Rec. H4363 (daily ed. June 10, 2019) (statement of Rep. Brady).

One aim of the Taxpayer First Act was to "restrict and provide oversight of the procedures and standards that the IRS must follow in denying requests for an independent administrative review." (H.R. Rep. No.

116-39 at 29 (2019)). Another aim was "to codify the role of an independent administrative appeals function within the IRS" in an effort "to reassure taxpayers of the independence of the persons providing the administrative review." (*Id.* at 29.)

Recognizing the lack of a taxpayer right to an independent administrative appeal, Congress established the IRS Independent Office of Appeals and added 26 U.S.C. § 7803(e)(4), aptly titled "Right of Appeal," requiring the IRS to make the Independent Office of Appeals resolution process "generally available to all taxpayers."

Taxpayer rights are of the utmost importance given that no other government agency touches *every* aspect of American life. The IRS—and more importantly its adherence to procedural safeguards legally imposed by Congress—impacts individuals, partnerships, corporations, and non-profit organizations. All taxpayers may potentially be harmed by the IRS's refusal to follow the laws as enacted by Congress and the Eleventh Circuit's determination that the courts will never be able to enforce any law that may limit the IRS's unfettered authority to abuse taxpayer rights. The IRS must not be allowed to pick and choose when it wishes to comply with the law or to arbitrarily select which taxpayers will be afforded their due process rights. Allowing the IRS to do so runs afoul of the very purpose of the Taxpayer First Act and the very nature of due process.

B. Proceedings Below

On its 2017 tax return, Rocky Branch reported the donation of a conservation easement. In 2019, the IRS

selected Rocky Branch for examination. Throughout the course of the examination, Rocky Branch took every necessary step to avail itself of its right to review by the Independent Office of Appeals, as mandated by Congress. Shortly into the examination, the IRS requested that Rocky Branch execute a Form 872-P (Consent to Extend the Time to Assess Tax). Pursuant to 26 U.S.C. § 6501, the statutory period for the assessment and collection of taxes resulting from Rocky Branch's 2017 Form 1065 expired on September 15, 2021. In January 2021, the IRS requested that Rocky Branch extend the statutory period for the assessment and collection of taxes until December 31, 2022. To effectuate that extension, Agent Veney sent Rocky Branch a Form 872-P. Rocky Branch signed Form 872-P, but—due to concerns about the duration and expense of an examination—Rocky Branch did not submit it to the IRS at that time. Legal counsel for Rocky Branch informed the IRS that *at that time* Rocky Branch would not consent to extend the statute of limitations.

In April 2021, the IRS sent Rocky Branch a Notice of Proposed Adjustment ("NOPA") proposing to disallow the entire charitable deduction and adjusting other deductions. After receiving the NOPA, Rocky Branch revisited the IRS's request to extend the statutory period to assess and collect, decided to extend the statute of limitations, and submitted the signed Form 872-P previously issued by the IRS. On May 7, 2021, Rocky Branch's legal counsel informed the IRS that Rocky Branch disagreed with the proposed findings in the NOPA and that it intended to file a written protest and avail itself of its right to appeal. To allow for sufficient time for review by the Independent Office of Appeals, Rocky Branch's legal counsel provided Agent Veney with the signed Form 872-P and requested

that the IRS provide a countersigned Form 872-P. In an email dated May 7, 2021, Rocky Branch's counsel acknowledged that since "additional time may be required in order to submit this case to the IRS Appeals Division, Rocky Branch [will] sign another Form 872-P providing any such additional time required by the Independent Appeals Office." By submitting the Form 872-P, Rocky Branch took every available action necessary to protect its rights provided by the Internal Revenue Code ("Code"). Rocky Branch also undertook the steps necessary to preserve the IRS's ability to assess and collect any potential tax deficiencies until after the conclusion of the administrative process.

Upon Rocky Branch's submission of the signed Form 872-P, the IRS could have extended the statute of limitations, as it originally wanted, by undertaking the merely ministerial act of countersigning the Form 872-P. However, the IRS deliberately and unilaterally chose not to do so.

In May 2021, the IRS informed Rocky Branch's legal counsel that it received the signed Form 872-P and the offer to further extend the statute of limitations for any additional amount of time necessary. However, the IRS refused to accept Rocky Branch's signed Form 872-P because in February 2021, Rocky Branch's legal counsel informed Agent Veney that Rocky Branch did not *at that time* intend to sign the Form 872-P sent by the IRS. The IRS informed Rocky Branch's legal counsel that the IRS was not going to provide Rocky Branch with the administrative review processes that it is required to provide to taxpayers pursuant to 26 U.S.C. § 7803. Instead, the IRS decided to process the case without

regard to its own legal requirements, hastily issuing the Final Partnership Administrative Adjustment ("FPAA") notice based solely on the NOPA's proposed adjustments.

In June 2021, in an effort to preserve and protect their due process rights, Rocky Branch filed a complaint in the Northern District of Georgia seeking to enjoin the IRS from issuing the FPAA until it complied with the legal requirements of 26 U.S.C. § 7803(e)(4) by providing Rocky Branch with a review of its case by the Independent Office of Appeals. (*Id.* at 23.) Additionally, to preserve the right and ability of the IRS to assess and collect any potential tax deficiencies confirmed by the Independent Office of Appeals, Rocky Branch requested that the court grant mandamus relief by requiring the IRS to countersign the Form 872-P to extend the statutory period for assessment and collection until December 31, 2022. (Doc. 1 at 26.)

In May 2021, the IRS knew that Rocky Branch intended to protest the NOPA and avail themselves of their 26 U.S.C. § 7803(e)(4) due process rights. The IRS also had a Form 872-P signed by Rocky Branch in their possession leaving the power to extend the statute of limitations solely within the IRS's control. However, fully aware of its own legal obligations imposed by the legislature and the authority of the judiciary to enforce the laws enacted by the legislature, instead of undertaking the merely ministerial act of countersigning the Form 872-P, the IRS rushed to complete its violations of Rocky Branch's statutory due process rights by issuing an illegal FPAA. After violating Rocky Branch's due process rights, the IRS moved to dismiss Rocky Branch's complaint by arguing that the issue was moot because the Anti-Injunction Act rendered the courts powerless to prevent

the IRS from effectuating a harm resulting from an intentional violation of the law committed after the issue had been raised with the court.

After the IRS consummated the violation of 26 U.S.C. § 7803 by issuing the FPAA without adhering to the process required by law, Rocky Branch filed an amended complaint with the district court seeking additional relief by requesting that the Court rescind the FPAA before granting the requested injunctive relief.

Despite the mandate in 26 U.S.C. § 7803(e)(4) requiring the IRS to provide review by the Independent Office of Appeals, the IRS chose not to complete the ministerial act of countersigning the Form 872-P, which would have extended the time to assess tax.

The IRS moved to dismiss the complaint. The district court granted the IRS's motion to dismiss on the ground that the Anti-Injunction Act bars suits for the purpose of restraining the assessment or collection of any tax and that the suit was barred by the tax exception to the Declaratory Judgment Act. App. at 22a.

The Eleventh Circuit affirmed the district court's decision. App. at 7a. Rocky Branch argued that the purpose of its suit targeted the IRS's violations of the law not an underlying tax and that the remedy sought was far removed from the downstream tax. Rocky Branch also argued that under the reasoning of *CIC Services*, the purpose of its suit targeted unlawful IRS actions and the tax ultimately at issue was too far removed from the targeted actions. Thus, Rocky Branch argued that its suit was not a suit for the purpose of restraining the assessment or collection of a tax.

Nevertheless, the Eleventh Circuit concluded that Rocky Branch's suit violated the Anti-Injunction Act by effectively restraining the assessment and collection of taxes. It decided that "[a]t its heart, this suit is a 'dispute over taxes.'" App. at 4a. The Eleventh Circuit distinguished this suit from *CIC Services* by finding that "the legal rule at issue" was a "tax provision," not a reporting requirement backed up with a tax provision. *Id.*

Furthermore, the Eleventh Circuit stated that the suit was also barred by the Declaratory Judgment Act because it had already found that the Anti-Injunction Act barred the suit, and because the Anti-Injunction Act and the Declaratory Judgment Act are coextensive and coterminous. App. at 8a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit decided "an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(c). By holding that the Anti-Injunction Act barred Rocky Branch's suit, the decision below conflicts with this Court's application of the Anti-Injunction Act in other pre-enforcement actions.

Alternatively, the decision below involves "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. Rule 10 (c). Based on the Eleventh Circuit's ruling, taxpayers would have no protection or even recourse if the IRS deprives them of their statutory right to administrative appeal. As part of the administrative state, the IRS cannot forever hide behind the Anti-Injunction Act whenever it decides that it does not want to follow the law. The IRS must

be held to the same standard as other agencies. For these reasons, the Court should grant review, reverse the decision below, and allow taxpayers to hold the IRS accountable when they exhibit agency overreach.

A. The Eleventh Circuit's decision conflicts with this Court's decision in *Direct Marketing and CIC Services*.

In its complaint, Rocky Branch challenged the IRS's unlawful and arbitrary denial of its appeal rights as provided by 26 U.S.C. § 7803(e). 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." 26 U.S.C. § 7421(a). But here, Rocky Branch does not seek to restrain the assessment or collection of any tax, but only asks that the IRS comply with its obligation to provide administrative review prior to attempting to assess or collet any potential tax. Any hypothetical or eventual tax liability that may attach is separate and apart from the remedy sought by this suit. Here, Rocky Branch seeks judicial action to compel the IRS to comply with the law enacted by Congress. The IRS's violations of the law can only be rectified by granting Rocky Branch a review of its case by the Independent Office of Appeals, not by adjudicating the underlying tax. Thus, the current suit targets the IRS's violations of the law, not the underlying tax.

This Court in *Direct Marketing* and *CIC Services* held that the Anti-Injunction Act does not bar pre-enforcement suits challenging certain reporting requirements. *Direct Mktg. Ass'n v. Brohl,* 575 U.S. 1 (2015); *CIC Services*, 141 S. Ct. 1582 (2021). *In Direct Marketing*, this Court

interpreted the Tax Injunction Act (which relates to taxation by the states) and not the Anti-Injunction Act (which relates to taxation by the Federal government), but this Court "has assumed that words used in both Acts such as assessment and collection are generally used in the same way." *CIC Services*, 141 S. Ct. at 1589 n.1. The Court's sound reasoning in both cases illustrates why Rocky Branch's suit cannot be barred by the Anti-Injunction Act.

In *Direct Marketing*, the Court reasoned that a suit that "merely inhibits" the collection of tax revenue will not trigger the Tax Injunction Act; rather only suits that "stop" the assessment or collection of a tax are barred. *Direct Mktg.*, 575 at 12-13. Since the reporting requirements in *Direct Marketing* "precede[d] the steps of 'assessment' and 'collection,'" a challenge to their enforcement did not stop assessment or collection. *Id.* at 8. Stated another way, "when there is 'too attenuated a chain of connection' between an upstream duty and a 'downstream tax,' a court should not view a suit challenging the duty as aiming to 'restrain the assessment or collection of a tax.'" *CIC Services*, 141 S. Ct. at 1591 (quoting the Government's oral argument). Thus, even if the suit could ultimately impact the assessment or collection of a tax, the Anti-Injunction Act would not bar a suit so long as it does not seek to stop dead the "downstream tax."

In *CIC Services*, this Court considered whether a suit to enjoin an information reporting requirement that was backed by civil and criminal penalties was barred by the Anti-Injunction Act. The taxpayer challenged the lawfulness of the IRS's issuance of Notice 2016-66, not a specific tax liability. The Court held that challenges to

unlawful IRS actions, rather than challenges of a specific tax liability, may fall outside the ambit of the AIA.

Here, Rocky Branch is challenging the IRS's denial of consideration by the Independent Office of Appeals. Review by the Independent Office of Appeals precedes the assessment and collection of any potential tax by a substantial number of procedural steps. If the review by the Independent Office of Appeals did in fact stop dead the assessment or collection of tax, every case sent for consideration would result in no additional tax or assessment. The absurdity of that conclusion shows that the suit here was not aimed at stopping or even impairing the assessment or collection of tax.

Indeed, by submitting the original signed statue extension, Rocky Branch undertook every administrative action within its control to preserve the IRS's ability to assess and collect any potential tax after the IRS complied with the law by providing Rocky Branch with an administrative review of its case by the Independent Office of Appeals. The same cannot be said of the IRS's action because the IRS is the only party that failed to countersign the valid statute extension. The Rocky Branch suit was not an attempt to stop dead the "assessment or collection" of any tax; it was merely an effort to protect and preserve the procedural safeguards that Congress enacted to protect taxpayers from the abuses identified by the legislature. Rocky Branch's suit does not challenge any tax liability here. As in *CIC Services*, "the suit contests, and seeks relief from, a separate legal mandate" and any potential tax "appears on the scene" at some later point. *CIC Services,* 141 S. Ct. at 1593.

Rocky Branch contests and seeks relief from the IRS's violations of its right to review by the Independent Office of Appeals a right that is guaranteed by 26 U.S.C. § 7430. The effect of *temporarily* rescinding the FPAA, forcing the IRS to countersign the Form 872-P, and sending the case to the Independent Office of Appeals does not prohibit the "assessment or collection" of any potential tax. Similar to *CIC Services*, the totality of the remedy gives the taxpayer what it wants and that which Congress attempted to provide by enacting the Taxpayer First Act: relief from IRS abuse and the denial of taxpayer due process rights. The remedy merely inhibits the IRS from unlawfully assessing and collecting tax until after it has complied with the congressional mandate and afforded Rocky Branch its review by the Independent Office of Appeals.

Furthermore, in *CIC Services*, the taxpayer challenged the IRS's unlawful action—the issuance of Notice 2016-66 without the necessary notice-and-comment period. The Court found that "[t]hree aspects of the regulatory scheme…taken in combination, refute the idea that [the case was] a tax action in disguise." *CIC Services*, 141 S.Ct. at 1590-1591. First, the Notice imposed substantial costs that are unconnected to any potential tax. *Id.* Second, the causal chain between the Notice's reporting requirements and any potential tax is attenuated. *Id.* Third, the result of the Notice's reporting requirements necessitated a pre-enforcement suit because a violation of the Notice not only resulted in a tax but also separate criminal penalties. *Id.* Under the "the Anti-Injunction Act's familiar pay-now-sue-later procedure," irreparable harm (criminal penalties) would attach prior to the ability to challenge the IRS's unlawful action. *Id.* Thus, the facts necessitated a pre-enforcement suit, rather than a refund suit.

Under the *CIC Services* framework, the first inquiry asks what is the suit's purpose. To do so, court's must look not to "a taxpayer's subjective motive, but into the action's objective aim—essentially the relief the suit requests." *CIC Services*, 141 S. Ct. 1582, 1589 (2021). In *CIC Services*, the Court determined that purpose of the suit was to declare the Notice unlawful and enjoin the enforcement of the Notice, based on an objective reading of the complaint. Next the Court reviewed whether that purpose —declaring unlawful and enjoining the Notice— violated the Anti-Injunction Act. The Court rejected the Government's argument that the Court need review whether the ultimate potential outcome of the requested relief many steps removed could impact a tax.

In *CIC Services*, the taxpayer challenged the IRS's unlawful action of issuing Notice 2016-66 without the required notice-and-comment period and asked that the Notice be enjoined. The Court ultimately held that the Anti-Injunction Act did not bar the suit. The Court determined the purpose of the suit by examining the relief sought by the complaint without regard to whether the relief sought by the suit could possibly inhibit the future assessment or collection of a potential tax. Crucially, the Court focused on the relief sought.

Here, the Eleventh Circuit's ruling contradicts the Court's decision in *CIC Services* because it did not properly apply the first step of the analysis outlined by the Court. First, the Eleventh Circuit erroneously concluded that, at its heart, this suit is a dispute over taxes and the legal rule at issue here is a tax provision. App. at 4a. The Eleventh Circuit based that conclusion on the faulty reasoning that Rocky Branch was challenging a tax provision; despite

the fact that the "legal rule at issue" here, as explained in the legislative history, is a procedural safeguard against abusive agency action. Second, the Eleventh Circuit did not properly identify the action targeted by the complaint to determine the suit's purpose. The complaint requested several forms of relief, none of which restrained the assessment or collection of tax. Most importantly the complaint requested administrative review by the Independent Office of Appeals prior to the issuance of the FPAA. Rocky Branch just wanted a chance to be heard by the Independent Office of Appeals, a right guaranteed by 26 U.S.C. § 7430. Thus, the issue to be examined was not whether a tax provision was at issue after the administrative review—it was whether the IRS violated the law in denying that review and whether the IRS should be required to provide such a review.

Additionally, the Eleventh Circuit failed to review the three considerations laid out in *CIC Services* with that understanding; instead it focused on the later outcome of the assessment of tax after the FPAA. That fatal error in the first step of the analysis rendered the entire decision incompatible with the Court's three factor analysis from *CIC Services.* Thus, the Eleventh Circuit's decision conflicts with this Court's precedence in determining the purpose of a suit under the Anti-Injunction Act. The Court made clear in *CIC Services* that when "determin[ing] whether the suit seeks to restrain the assessment or collection of taxes, 'we inquire not into a taxpayer's subjective motive, but into the action's objective aim—essentially, the relief the suit requests.'" App. at 3a. (quoting *CIC Services*, 141 S. Ct. at 1589). However, the Eleventh Circuit failed to properly apply that standard.

This Court's precedent in *CIC Services* and *Direct Marketing* requires a decision that suits that do not directly attack a tax provision, but rather seek review of unlawful agency actions that precede the assessment or collection of a tax, are not barred by the Anti-Injunction Act. Accordingly, the Eleventh Circuit's decision conflicts with this Court's reasoning in *CIC Services* and *Direct Marketing*. Since the Eleventh Circuit decided "an important federal question in a way that conflicts with relevant decisions of this Court," the Court should grant review to bring clarity to this critical area of administrative law.

B. The Eleventh Circuit's decision involves an important question of federal law that has not been but should be settled by this Court.

The essential issue raised by Rocky Branch's suit is: when the IRS (or any agency) willfully and unlawfully ignores statutory safeguards provided by Congress and violates taxpayer rights, do the courts have the authority to force the IRS to comply with the law? Alternatively, can the courts *ever* enforce laws aimed at protecting taxpayer rights or is the Anti-Injunction Act so broad as to allow the IRS to ignore, violate, and avoid any subsequent law enacted by Congress? This case is a textbook review of the checks and balances our founding fathers hoped to create when crafting the Constitution. For decades and as the administrative state grew, the IRS has sought to insulate its agency actions from judicial review. The notion the IRS need not comply with safeguards against agency overreach undermines the very purpose of the APA. For far too long, the IRS has hidden behind the Anti-Injunction Act, claiming that the APA does not serve as a check on

their actions as agency. Without judicial checks on the IRS's overreach and unlawful actions the administrative state will continue to be an ever-present threat to the rights of all taxpayers.

Challenges to the IRS's unilateral authority to ignore codified procedural safeguards present questions that are important to all taxpayers. If left to stand, the Eleventh Circuit's decision will forever preclude taxpayers from challenging unlawful abuses by the IRS, so long as such abusive acts have some attenuated eventual downstream effect of on the assessment or collection of a potential tax. In such a world, administrative agencies, not elected legislatures nor appointed judges, will have the sole authority to decide which laws have any effect and whether any person should be afforded their procedural due process rights.

As shown by the legislative history, Congress implemented 26 U.S.C. § 7803(e) because it identified specific instances where the IRS abused taxpayers' due process rights. The legislative history further demonstrates that Congress's purpose in codifying a taxpayer right to administrative appeal was to stop future abuses by the IRS and protect taxpayer due process rights. Requiring the IRS to follow the laws and comply with procedural safeguards—the specific relief that Rocky Branch requested in its Complaint—is merely an effort to protect taxpayer due process rights. Any other finding would undermine Congressional intent by leaving all future decisions regarding the protection of taxpayer rights to sole discretion of the abuser from which Congress was attempting to provide protection. Such a conclusion would render the Congressionally

mandated taxpayer protections meaningless and frustrate any future taxpayer protection laws by rendering them unenforceable by the courts.

For decades the IRS has maintained that the administration of taxation was so "exceptional" that most of its actions were not subject to judicial review under the APA or were subject to a different standard than other agencies. This led to rampant violations of the APA by the IRS. Now, the IRS seeks—with the Eleventh Circuit's blessing—to go one step further than merely avoiding the requirements of the APA when issuing regulations by going so far as to actually deny taxpayers their statutorily codified rights by violating laws enacted by Congress. However, in 2011, in *Mayo Foundation for Medical Education and Research v. United States*, the Court unanimously agreed that it was "not inclined to carve out an approach to administrative review good for tax law only." 131 S.Ct. 704, 713 (2011). The IRS must comply with general administrative law requirements, doctrines, and norms. This Court has already rejected the notion of tax exceptionalism. The IRS must be held accountable to laws enacted by Congress. If not, what effect—if any—will legislative action ever have?

Under the Eleventh Circuit's decision, the rights of taxpayers, which Congress intended to guarantee and protect, are subject to the arbitrary whims of the IRS with no judicial or other oversight available to protect taxpayers and enforce the law. This was the precise issue Congress sought to remedy by codifying appeals rights in 26 U.S.C. § 7803(e). The Court has already ruled that taxpayers can challenge IRS actions under the APA. Now it is necessary to clarify once again for the IRS's benefit

what should be a simple conclusion: the IRS cannot use the Anti-Injunction Act to evade and avoid judicial review when it violates the law and denies taxpayers' of their codified due process rights. The IRS's exceptionalism did not preclude taxpayer challenges of unlawfully issued Notices in *CIC Services*; now it cannot preclude taxpayer challenges to unlawful violations of taxpayers' statutory rights. The courts must have the authority to review agency actions and to enforce the law granting such rights without running afoul of the Anti-Injunction Act, which was enacted in its current form in 1954 and about which Congress was presumably aware when enacting the Taxpayer First Act in 2019. As the Eleventh Circuit's decision could potentially deprive any taxpayer of the right to challenge any unlawful IRS action, the Court should grant the petition. To do otherwise would essentially grant the IRS complete authority to evade and avoid the enforcement of any law it does not wish to comply with, in the Eleventh Circuit. The Court's review is necessary to clarify the law and thwart federal agencies from avoiding judicial review of unlawful actions.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DATE FILED SEPTEMBER 6, 2023

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-12646

Non-Argument Calendar

ROCKY BRANCH TIMBERLANDS LLC, ROCKY BRANCH INVESTMENTS LLC, INDIVIDUALLY AND AS TAX MATTERS PARTNER FOR ROCKY BRANCH TIMBERLANDS LLC,

Plaintiffs-Appellants,

BRIAN KELLEY, INDIVIDUALLY AND AS THE TAX MATTERS PARTNER REPRESENTATIVE FOR ROCKY BRANCH INVESTMENTS LLC AS TAX MATTERS PARTNER FOR ROCKY BRANCH TIMBERLANDS LLC,

Plaintiff,

versus

UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, IRS MANAGER LEE VOLKMANN,

Defendants-Appellees.

Appendix A

September 6, 2023, Filed

Appeal from the United States District Court
for the Northern District of Georgia.
D.C. Docket No. 1:21-cv-02605-MLB.

Before NEWSOM, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

Rocky Branch Timberlands, LLC, claimed a $26.5 million tax deduction on its 2017 tax return for a conservation easement. The IRS undertook a review of the return and ultimately issued a Final Partnership Administrative Adjustment (FPAA) that disallowed the deduction. Rocky Branch Timberlands then sued the IRS and related parties, seeking various forms of injunctive and declaratory relief. The district court dismissed the lawsuit on jurisdictional grounds because the relief that Rocky Branch Timberlands sought was barred by the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act. We agree.

I

We review de novo a district court's decision to grant a motion to dismiss for lack of subject-matter jurisdiction. *McElmurray v. Consolidated Gov't of Augusta-Richmond Cnty.*, 501 F.3d 1244, 1250 (11th Cir. 2007).

The Anti-Injunction Act provides that, with exceptions not relevant to this case, "no suit for the purpose of

restraining the assessment or collection of any tax shall be maintained in any court by any person." I.R.C. § 7421(a). To determine whether the suit seeks to restrain the assessment or collection of taxes, "we inquire not into a taxpayer's subjective motive, but into the action's objective aim—essentially, the relief the suit requests." *CIC Servs., LLC v. Internal Revenue Serv.*, 141 S. Ct. 1582, 1589, 209 L. Ed. 2d 615 (2021). "When the Anti-Injunction Act applies, it deprives federal courts of jurisdiction." *In re Walter Energy, Inc.*, 911 F.3d 1121, 1136 (11th Cir. 2018).

A

Rocky Branch Timberlands first argues that its suit is not barred by the Anti-Injunction Act because it does not seek to restrain the assessment or collection of a tax.

In *CIC Services*, the Supreme Court considered whether a suit challenging an information-reporting requirement was barred by the Anti-Injunction Act. 141 S. Ct. at 1588. Failure to comply with the reporting requirement would lead to both tax and criminal penalties. *Id.* at 1587-88. The Court held that the suit fell "outside the Anti-Injunction Act because the injunction" that it requested did not "run against a tax at all." *Id.* at 1593. Instead, the tax penalty functioned "only as a sanction for noncompliance with the reporting obligation," so the plaintiff's suit seeking to enjoin the reporting requirement was not barred by the Anti-Injunction Act. *Id.* at 1594.

Three considerations led to that conclusion in *CIC Services*: (1) The reporting rule at issue "impose[d]

affirmative reporting obligations, inflicting costs separate and apart from the statutory tax penalty"; (2) the taxpayer was "nowhere near the cusp of tax liability" because the "reporting rule and the statutory tax penalty [were] several steps removed from each other"; and (3) the requirement was enforced through criminal penalties in addition to tax penalties. *Id.* at 1591-92.

Those same three considerations lead to the opposite conclusion here. First, Rocky Branch Timberlands will not be subject to any "costs separate and apart" from the tax penalty that may result from the FPAA. *Id.* at 1591. The cost of litigating the tax assessment doesn't count—that's why the Anti-Injunction Act provides a pay-now-sue-later procedure. Second, Rocky Branch Timberlands was on "the cusp of tax liability" when it filed its suit, *id.*, because the FPAA is the statutory prerequisite to assessing a tax on Rocky Branch Timberlands, *see* I.R.C. § 6232(b), and Rocky Branch Timberlands concedes that if the FPAA is allowed to stand, the IRS will be able to immediately assess a tax. Third, Rocky Branch Timberlands will suffer no criminal punishment by following the Anti-Injunction Act's "familiar pay-now-sue-later procedure." *CIC Servs.*, 141 S. Ct. at 1592.

At its heart, this suit is "a dispute over taxes." *Id.* at 1593 (quotation marks omitted). Unlike in *CIC Services*, the "legal rule at issue" here is a tax provision, not a reporting requirement backed up with a tax provision. *See id.* Rocky Branch Timberlands's single claim alleged that the IRS violated § 7803(e)(4) by failing to provide Rocky Branch Timberlands with administrative review

of its tax case. To remedy that alleged violation, Rocky Branch Timberlands sought to compel the IRS to provide it with administrative review and, until it did, to prevent the IRS from issuing an FPAA (which the IRS had already issued). The FPAA that the IRS had issued found that Rocky Branch Timberlands improperly claimed a deduction on its tax return, resulting in an underpayment of taxes. Because the relief Rocky Branch Timberlands's lawsuit seeks would restrain the IRS from assessing and collecting those taxes, it is barred by the Anti-Injunction Act.

B

Rocky Branch Timberlands argues that even if its lawsuit seeks to restrain the assessment of a tax, it falls within a narrow exception to the Anti-Injunction Act. That exception permits injunctive relief for plaintiffs who show that they will "suffer irreparable injury if collection [of the tax] were effected" and show that "it is clear that under no circumstances could the [IRS] ultimately prevail." *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7, 82 S. Ct. 1125, 8 L. Ed. 2d 292 (1962).

Rocky Branch Timberlands cannot make either showing. A plaintiff suffers irreparable injury for injunctive purposes when there is no adequate remedy at law. *Rosen v. Cascade Int'l, Inc.*, 21 F.3d 1520, 1527 (11th Cir. 1994). The district court correctly pointed out that Rocky Branch Timberlands had "another adequate remedy [at law] for challenging the FPAA, specifically . . . Tax Court." Rocky Branch Timberlands has already

challenged the FPAA in tax court in a parallel proceeding. If issuing the FPAA without providing Rocky Branch Timberlands administrative review was a violation of I.R.C. § 7803(e)(4), that parallel proceeding can provide a remedy.

It is also far from "clear that under no circumstances could" the IRS prevail on the merits of Rocky Branch Timberlands's claim. *Williams Packing*, 370 U.S. at 7. Rocky Branch Timberlands's strict interpretation of § 7803(e)(4) is not the only plausible one. Section § 7803(e)(5)(A) contemplates requests for referral to the Appeals Office by "taxpayer[s] . . . in receipt of a notice of deficiency." The district court interpreted that provision as contemplating appeals for taxpayers already "in receipt of a notice of deficiency"—or, in the case of partnerships, an FPAA. It is at least debatable whether Rocky Branch Timberlands would succeed on the merits of its claim, which is enough to foreclose application of the *Williams Packing* exception. *See Bob Jones Univ. v. Simon*, 416 U.S. 725, 749, 94 S. Ct. 2038, 40 L. Ed. 2d 496 (1974) (holding that the petitioner's arguments were "sufficiently debatable to foreclose any notion that" the *Williams Packing* exception applied).

II

Rocky Branch Timberlands also argues that its requested declaratory relief is not barred by the tax exception to the Declaratory Judgment Act.

The tax exception to the Declaratory Judgment Act forbids courts from issuing declaratory judgments "with respect to Federal taxes." 28 U.S.C. § 2201(a). And it is "clear that the federal tax exception to the Declaratory Judgment Act is at least as broad as the prohibition of the Anti-Injunction Act." *Alexander v. ""americans United" Inc.*, 416 U.S. 752, 759, 94 S. Ct. 2053, 40 L. Ed. 2d 518 n.10 (1974); *accord Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1362 n.6 (11th Cir. 2003).

Rocky Branch Timberlands concedes that "courts have determined [the two Acts] to be coextensive and coterminous." Because we hold that the Anti-Injunction Act bars Rocky Branch Timberlands's suit, it follows that the tax exception to the Declaratory Judgment Act bars the declaratory relief Rocky Branch Timberlands seeks. *See Mobile Republican Assembly*, 353 F.3d at 1362 n.6 (holding that the conclusion that the Anti-Injunction Act prohibited the appellees from seeking injunctive relief "also foreclose[d] the appellees from seeking declaratory relief"); *see also Alexander*, 416 U.S. at 759 n.10 ("Because we hold that the [Anti-Injunction] Act bars the instant suit, there is no occasion to deal separately with the [tax exception to the Declaratory Judgment Act].").

AFFIRMED.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED JUNE 21, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

Case No. 1:21-cv-2605-MLB

ROCKY BRANCH TIMBERLANDS LLC, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

OPINION & ORDER

Plaintiffs Rocky Branch Timberlands LLC ("RBT"), Rocky Branch Investments LLC, and Bryan Kelley sued Defendants United States of America, Internal Revenue Service ("IRS"), and IRS Manager Lee Volkmann, seeking declaratory and injunctive relief to compel the government to refer the examination of RBT's 2017 partnership return to the IRS's Independent Office of Appeals for review before issuance of a Notice of Final Partnership Administrative Adjustment. (Dkt. 17.) Defendants move to dismiss for lack of jurisdiction and failure to state a

claim under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Dkt. 19.) The Court grants that motion because it lacks subject matter jurisdiction.

I. Background

RBT is treated as a partnership for federal tax purposes and is subject to the unified partnership audit and litigation procedures under the Tax Equity and Fiscal Responsibility Act of 1982. (Dkt. 17 ¶ 28.) Rocky Branch Investments LLC is RBT's Tax Matters Partner ("TMP"), and Bryan Kelley is the TMP representative. (*Id.* at 1.)

On September 14, 2018, RBT filed a Form 1065 (U.S. Return of Partnership Income) for the 2017 partnership year. (*Id.* ¶ 45.) On that form, RBT reported a charitable contribution deduction related to a donation of a conservation easement. (*Id.*) In December 2019, Defendants informed Plaintiffs that the Form 1065 had been selected for examination. (*Id.* ¶ 46.)

Defendants concluded that, pursuant to the three-year statutory period for assessment and collection of taxes under 26 U.S.C. § 6501(a), they had to complete their assessment of RBT's charitable contribution and levy any tax assessment by September 15, 2021. (*Id.* ¶ 48.) The IRS asked RBT to extend the statutory period through December 31, 2022. (*Id.* ¶ 49.) As part of this request, Defendants sent Plaintiffs a Form 872-P (Consent to Extend the Time to Assess Tax Attributable to Items of a Partnership), which Plaintiffs signed on January 27, 2021 but did not return to the IRS. (*Id.* ¶¶ 49-50.) On

February 22, 2021, RBT told Defendants it had decided not to extend the statutory period. (*Id.* ¶ 52.) So Defendants proceeded with their examination to meet the September 2021 deadline. (*Id.* ¶ 53.)

On April 8, 2021, Defendants sent Plaintiffs a Notice of Proposed Adjustment ("NOPA"), proposing to disallow the charitable deduction. (*Id.*) Plaintiffs disagreed with that conclusion and wanted to seek review from the IRS's Independent Office of Appeals ("IAO") before the IRS issued its so-called Final Partnership Administrative Adjustment ("FPAA") regarding RBT's 2017 charitable deduction. (*Id.* ¶ 57.) On May 7, 2021, Plaintiff sent Defendants an email setting forth its position. (*Id.*) Plaintiffs also attached a signed Form 872-P and asked the IRS execute the form and extend the statutory period so that Plaintiffs could obtain review by the IOA before issuance of the FPAA. (*Id.* ¶ 58.)

Defendants responded saying that, since Plaintiffs had previously refused to extend the statutory period, it would not agree to Plaintiff's request for an extension. (*Id.* ¶¶ 63-64.) Defendants then explained that, because there was not enough time remaining in the statutory assessment period, they were not going to allow review by the IAO before filing the FPAA. (*Id.*)

Plaintiffs sued Defendants in June 2021 but did not seek emergency injunctive relief to stop the IRS's process. (Dkt. 1.) On July 23, 2021, Defendants issued the FPAA. (Dkt. 17 ¶ 79.) Plaintiffs then filed an amended complaint. (Dkt 17.) They claim Defendant's refusal to sign the

Form 872-P denied them their right to have Defendants' proposed determination reviewed by the IOA before issuance of the FPAA as provided in 26 U.S.C. § 7803(e)(4). (*Id.* ¶ 64.) So, Plaintiffs seek to have everything undone so they can go back and have that review. They seek injunctive relief temporarily enjoining Defendants from issuing the FPAA until after review by the IOA; rescinding the FPAA issued on July 23, 2021; requiring Defendants to sign the Form 872-P (so that IOA can review Defendant's assessment of the charitable contribution before issuing the FPAA); and compelling Defendants to provide the requested review by the IOA.

II. Discussion

Defendants argue this Court lacks jurisdiction because (1) this action was mooted by the issuance of the FPAA and the ensuing Tax Court Petition and (2) Plaintiffs have not established a waiver of sovereign immunity for any relief sought. (Dkt. 19-1 at 2.) The Court addresses each argument. The Court also recognizes that nearly the exact same issues are before the Eleventh Circuit on appeal from a decision by another Court in this district addressing nearly identical facts (and involving many of the same attorneys). *See Hancock Cnty. Land Acquisitions, LLC v. United States*, 553 F. Supp. 3d 1284 (N.D. Ga. 2021), *appeal docketed*, No. 21-12508 (11th Cir. July 22, 2021). The Court provides its own assessment and determination of the legal claims at issue but is mindful that the Court of Appeals could provide additional guidance at any time.

Appendix B

A. Plaintiffs' request for temporary injunctive relief pending administrative independent review by the IOA (Dkt. 17 at 28)

Federal courts are courts of limited jurisdiction. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340-42, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006). "[F]ederal courts cannot exercise jurisdiction . . . where the issue in controversy has become moot." *Fla. Wildlife Fed'n, Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F.3d 1296, 1302 (11th Cir. 2011). A case is moot when "an event occurring after the filing of a suit deprives the court of the ability to give the parties meaningful relief." *Mailplanet.com, Inc. v. Lo Monaco Hogar, S.L.*, 291 F. App'x 229, 232 (11th Cir. 2008). Once such an event occurs, the case "no longer presents a live case or controversy" and must be dismissed. *Ethredge v. Hail*, 996 F.2d 1173, 1175 (11th Cir. 1993).

Here, the Court cannot enjoin the IRS from issuing the FPAA because the IRS issued it nearly a year ago—specifically on July 23, 2021. (Dkts. 17 ¶ 79; 19-2 at 14-21.) The Court thus cannot provide Plaintiffs' requested relief. *See Hancock*, 553 F. Supp. 3d at 1291.

B. Plaintiffs' request that the Court rescind the FPAA (Dkt. 17 at 27)

As an alternative avenue for relief, Plaintiff's ask that the Court order Defendants to rescind the FPAA. This request fails for two reasons: (1) the Court has no authority to do so and (2) rescinding the FPAA would violate the Anti-Injunction Act, 26 U.S.C. § 7421(a).

Plaintiffs argue the IRS can simply rescind the FPAA and issue a new one under 26 U.S.C. § 6223(f) based on Defendants' alleged malfeasance. (Dkt. 22 at 10-11.) Defendants say that is incorrect because § 6223(f) only permits the IRS to issue a subsequent FPAA if the first FPAA was tainted by *taxpayer* malfeasance. (Dkt. 25 at 5.) The Court agrees with Defendants. *See PAA Mgmt., Ltd. v. United States*, 962 F.2d 212, 216 (2d Cir. 1992) ("[S]ection 6223(f) . . . allows the IRS to 'mail' only one FPAA per partner per tax year absent a 'showing' of fraud or malfeasance . . . ."); *NPR Invs., LLC v. United States*, 740 F.3d 998, 1006 (5th Cir. 2014) ("The IRS may only mail one FPAA for a taxable year with respect to a partner unless there has been 'a showing of fraud, malfeasance, or misrepresentation of a material fact.'"). There is no evidence the FPAA is tainted by Plaintiffs' fraud, malfeasance, or misrepresentation.

The Anti-Injunction Act, 26 U.S.C. § 7421(a), "bars any 'suit for the purpose of restraining the assessment or collection of any tax.'" *CIC Servs., LLC v. IRS*, 141 S. Ct. 1582, 1586, 209 L. Ed. 2d 615 (2021). This prohibition precludes lawsuits that seek to restrain IRS "activities which are intended to or may culminate in the assessment or collection of taxes." *See also Kemlon Prods. & Dev. Co. v. United States*, 638 F.2d 1315, 1320 (5th Cir. 1981) (explaining that the Anti-Injunction Act also bars claims that), *modified on other grounds*, 646 F.2d 223 (5th Cir. 1981). If any adjustments to a partnership return are required, the IRS must issue an FPAA notifying the partners of the adjustments. *United States v. Clarke*, 816 F.3d 1310, 1313 n.2 (11th Cir. 2016). So to interfere with

the issuance of the FPAA would be to restrain the IRS's activities intended to culminate in the assessment of a tax. *Hancock*, 553 F. Supp. 3d at 1291 ("The issuance of an FPAA is a necessary step that occurs before the IRS may make an assessment of taxes on partnership items; the IRS cannot make such an assessment until after an FPAA has been issued, and after any challenge has been addressed by the Tax Court, district court, or Court of Federal Claims." (citing 26 U.S.C. § 6223(b))).[1]

Plaintiffs disagree, saying their claim falls "within the very narrow judicial exception to the Anti-Injunction Act set out in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7, 82 S. Ct. 1125, 8 L. Ed. 2d 292 (1962)." (Dkt. 22 at 16-20.) In *Enochs*, the Supreme Court held the Anti-Injunction Act does not bar suits where (1) it is clear that the government could not prevail under any circumstances and (2) no adequate remedy at law exists. 370 U.S. at 7.

That exception does not apply here. As a threshold matter, it is by no means clear that the government cannot prevail under any circumstances, particularly given the Court's analysis of Defendant's motion to dismiss. (This assessment could change depending on the outcome of the appeal in *Hancock.)* In addition, Plaintiff's certainly have another adequate remedy for challenging the FPAA, specifically petitioning for readjustment of the

1. "The Anti-Injunction Act bars this claim regardless of [Plaintiffs'] effort to frame it as a due process issue." *Tinnerman v. United States*, 2021 U.S. Dist. LEXIS 184110, 2021 WL 4427082, at *2 (M.D. Fla. Sept. 27, 2021).

FPAA in the United States Tax Court. The TMP has, in fact, already started that process on RBT's behalf. On October 20, 2021, it filed a petition for readjustment in the United States Tax Court, asking for "readjustment of the partnership items set forth in the [FPAA] dated July 23, 2021"—the very FPAA they seek to have rescinded here. (Dkt. 19-2.) That filing provides powerful evidence Plaintiffs have an alternative remedy and may not avail themselves of the judicial exception to the AIA set forth in *Enochs. Hancock*, 553 F. Supp. 3d at 1297 ("Plaintiffs, of course, have an alternate remedy here, one they are already pursuing—relief in Tax Court.").

Defendants add that the Declaratory Judgment Act also does not confer jurisdiction for the requested relief. (Dkts. 19-1 at 15; 25 at 11.) The Court agrees. The Declaratory Judgment Act, 28 U.S.C § 2201, "generally authorizes district courts to issue declaratory judgments as a remedy." *Bufkin v. United States*, 522 F. App'x 530, 532 (11th Cir. 2013) (per curiam). But it "removes federal tax matters from its ambit." *Id.* According to the Eleventh Circuit, this prohibition on entering declaratory judgment on federal taxes is "at least as broad as the prohibition of the Anti-Injunction Act." *Id.* (citing *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1362 n.6 (11th Cir. 2003)). Plaintiffs acknowledge these principle. (Dkt. 22 at 20 ("As the relief sought by Plaintiffs is not prohibited by the [Anti-Injunction Act], it cannot be prohibited by the tax exception to the Declaratory Judgment Act, which courts have determined to be coextensive and coterminous with the [Anti-Injunction Act]. Thus, an action allowed by one statute will not be barred by the other statute.").)

Since the Court determines it does not have jurisdiction under the Anti-Injunction Act, it likewise concludes the Declaratory Judgment Act does not confer jurisdiction over this requested relief.

C. Plaintiffs' request that the Court require Defendants to sign the Form 872-P (Dkt. 17 at 23)

As explained, the IRS initially faced a September 15, 2021 deadline for assessing and collecting taxes related to RBT's 2017 partnership return. (Dkt. 17 ¶ 48.) Plaintiffs refused the IRS's request to extend that deadline through December 2022. (*Id.* ¶¶ 49-52.) The IRS thus completed its review within the time provided and issued the NOPA, proposing to disallow Plaintiffs' charitable deduction. Unhappy with that decision, Plaintiffs sought an extension so they could appeal that decision to the IOA. (*Id.* ¶¶ 58-59.) Defendants denied the request because Plaintiffs had previously done so. (*Id.* ¶¶ 63-64.) Plaintiffs now request that the Court require Defendants to sign the Form 872-P. (*Id.* ¶ 78.) According to Plaintiffs, "Defendants' failure to countersign the Form 872-P was arbitrary, capricious, an abuse of discretion, was not in accordance with the law, and exceeded statutory jurisdiction, authority, or limitations or were short of statutory right." (*Id.* ¶ 86.) Plaintiffs bring this request under the APA. (*Id.* at 24.)

Defendants argue the Court lacks authority (and jurisdiction) under the APA to review its decision not to sign the Form 872-P. (Dkt. 19-1 at 16.) The Court agrees. The United States cannot be sued without its express

consent. *United States v. Testan*, 424 U.S. 392, 399, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976); *United States v. Sherwood*, 312 U.S. 584, 586, 61 S. Ct. 767, 85 L. Ed. 1058 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued."). Without a waiver of sovereign immunity, the Court lacks subject matter jurisdiction to adjudicate claims against the United States and its agencies. *United States v. Mitchell*, 463 U.S. 206, 212, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983). The plaintiff bears the burden of establishing a waiver of sovereign immunity. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). The APA contains a limited waiver of sovereign immunity. It states that:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States[.]

5 U.S.C. § 702. District courts, however, lack jurisdiction where the challenged agency action is committed to agency discretion by law, 5 U.S.C. § 701(a), or is not "final"

within the meaning of 5 U.S.C. § 704,[2] *National Parks Conservation Association v. Norton*, 324 F.3d 1229, 1236 (11th Cir. 2003). "The core question [in the finality determination] is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992).

The IRS's decision not to sign the Form 872-P, and thereby decline to extend the statutory period, was not a final agency action within the meaning of § 704. Rather, it was an intermediary and procedural step leading up to the issuance of the FPAA and did not alter Plaintiffs' rights or obligations. The IRS's decision not to sign the Form 872-P did not alter the limitations period. *Hancock*, 553 F. Supp. 3d at 1293 ("The limitations period for the IRS to assess a tax after a return is filed is three years, 26 U.S.C. § 6229(a), and the IRS' decision did not alter that requirement."). The FPAA was the final agency action and Plaintiffs are challenging that. The agency's decisions as to the speed with which it decided to act or when it wanted to act was simply an intermediate step.

The IRS's decision not to extend the statutory period was also discretionary. Plaintiffs identify no requirement

2. Section 704 states, "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704.

that the IRS agree to an extension, and the Court is aware of none. To the contrary, the law provides the statutory period may be extended only upon agreement by the taxpayer *and* the IRS. *See* 26 U.S.C. § 6501(c)(4); *Feldman v. Commissioner*, 20 F.3d 1128, 1132 (11th Cir. 1994). This provision clearly provides the IRS discretion—co-equal to a taxpayer's discretion—as to whether it will extend the statutory period. It is strange that Plaintiffs would deny the IRS the same discretion is previously exercised in the very same review.

D. Plaintiffs' request that the Court compel Defendants to provide Plaintiffs with review by the IOA under 26 U.S.C. § 7803(e) (Dkt. 17 at 27)

This request is moot. Plaintiffs challenge the IRS's denial of their request to resolve their case with the IOA. (*See, e.g.*, Dkt. 17 ¶¶ 4-5, 11.) The only action Plaintiffs challenge is the denial of ***pre-FPAA*** access to the IOA. The FPAA was issued on July 23, 2021. As already explained, the Court cannot compel the IRS to rescind the FPAA because doing so would violate the Anti-Injunction Act, as explained above. Because the Court cannot provide Plaintiffs with the relief sought, this request is moot.

Nor have Plaintiffs established a waiver of sovereign immunity in connection with the request for IOA review. Defendants contend the decision to refer a matter to the IOA before the issuance of the FPAA is discretionary and not a final agency action. (Dkt. 19-1 at 18-19.)

As to the former, Defendants argue the IRS's decision not to refer this case to the IOA is a decision committed to its discretion by law and is thus not judicially reviewable. (Dkts. 19-1 at 18; 25 at 12.) Defendants contend 26 U.S.C. § 7803(e)(4) provides that review by the IOA "shall be generally available to all taxpayers." (Dkt. 19-1 at 18.) Defendants say the use of the term "generally" makes clear that certain matters will not be referred to the IOA, and it is within the IRS's discretion to decide which matters will and will not be referred to the IOA.[3] (*Id.*) Defendants analogize the decision to refer a matter to IOA to the decision to settle a matter, and an agency's decision to settle is considered by courts to be a discretionary act not subject to judicial review. (*Id.* (citing *Garcia v. McCarthy*, 649 F. App'x 589, 591 (9th Cir. 2016) ("[C]ourts that have had occasion to address the issue have uniformly held that an agency's decision to settle falls under the penumbra of agency inaction that has traditionally been subject to a rebuttable presumption against judicial review.")).) Plaintiffs say Defendants' argument that the IRS has total discretion to determine which taxpayers, if any, are granted review by the IOA was previously rejected by the Eleventh Circuit in *Romano-Murphy v. Comm'r of the IRS*, 816 F.3d 707 (11th Cir. 2016). (Dkt. 22 at 7.) That is not true. *Romano-Murphy* dealt with an entirely different issue, the assessment of trust fund taxes, and an entirely different statute, 26 U.S.C. § 6672, which the Court held

3. Plaintiffs contend that, "[w]hile Defendants focus heavily on the modifier 'generally' . . ., the legislative history [of the statute] illustrates that Congress intended to protect taxpayers from arbitrary actions by the IRS." (Dkt. 22 at 23.) Plaintiffs cite no legislative history to support that assertion. (*Id.*)

expressly permits a taxpayer to file a timely protest of a proposed assessment. Plaintiffs make no attempt to analogize the language of § 6672 to the language of § 7803(e)(4). (Dkt. 22 at 7-8.) And the holding in *Romano-Murphy* is very narrow. *See* 816 F.3d at 721 ("We hold that a taxpayer is entitled to a pre-assessment administrative determination by the IRS of her proposed liability for trust fund taxes if she files a timely protest."). The Court agrees that the IRS has discretion as to whether to refer a matter to the IOA before issuing a FPAA.

Defendants' second argument is that the decision not to refer this matter to the IOA was not a final agency action. (Dkts. 19-1 at 18-19; 25 at 12.) They say that decision did not mark the consummation of the IRS's decision-making process and did not determine the rights and obligations of RBT's partnership return. (Dkt. 25 at 12.) Defendants take the position that the consummation of the IRS's decision-making process was the issuance of the FPAA because the consequences of RBT's tax examination were not determined until the issuance of the FPAA. (Dkts. 19-1 at 19; 25 at 12.) Plaintiffs say the decision to deny them review by the IOA was final because it consummated the IRS's decision to cut off any pre-litigation administrative review. (Dkt. 22 at 24.) But when Plaintiffs requested review by the IOA and Defendants denied that request, all that had been issued was the NOPA, which is merely a proposal, as the title suggests and even Plaintiffs admit. (*See* Dkt. 17 ¶¶ 53 ("Defendants sent Plaintiffs a Notice of Proposed Adjustment 'NOPA' *proposing* to disallow the entire charitable deduction and adjusting other deductions." (emphasis added)), 57

("[RBT] disagreed with the *proposed findings* in the NOPA . . . ." (emphasis added))); *see, e.g., Tribune Media Co. v. Comm'r*, T.C. Memo 2020-2, 2020 WL 58314, at *7 (T.C. Jan. 6, 2020) ("[A] NOPA standing alone is not a determination."); *see also Hancock*, 553 F. Supp. 3d at 1296 n.10 ("Plaintiffs sought access to the [IOA] *before* the issuance of a deficiency. Plaintiffs' request raises the question of what decision Plaintiffs sought to have 'appealed' to the [IOA] because at that time there was no decision."). The Court agrees with Defendants that the FPAA consummates the IRS's decision-making process and the NOPA is just an intermediate step. *See, e.g., NPR*, 740 F.3d at 1006 ("An FPAA signifies the end of partnership-level proceedings."). So the decision not to refer this matter to the IOA is not a final agency action.

III. Conclusion

As the Court lacks subject matter jurisdiction, Defendants' Motion to Dismiss the Complaint (Dkt. 19) is **GRANTED**. The Clerk is **DIRECTED** to **CLOSE** this case.

SO ORDERED this 21st day of June, 2022.

/s/ Michael L. Brown
MICHAEL L. BROWN
UNITED STATES
DISTRICT JUDGE

APPENDIX C — RELEVANT STATUTORY PROVISIONS

26 U.S.C. 7803(e)

(e) Independent Office of Appeals

(1)Establishment There is established in the Internal Revenue Service an office to be known as the "Internal Revenue Service Independent Office of Appeals".

(2)Chief of Appeals

(A) In general - The Internal Revenue Service Independent Office of Appeals shall be under the supervision and direction of an official to be known as the "Chief of Appeals". The Chief of Appeals shall report directly to the Commissioner of Internal Revenue and shall be entitled to compensation at the same rate as the highest rate of basic pay established for the Senior Executive Service under section 5382 of title 5, United States Code.

(B) Appointment - The Chief of Appeals shall be appointed by the Commissioner of Internal Revenue without regard to the provisions of title 5, United States Code, relating to appointments in the competitive service or the Senior Executive Service.

Appendix C

(C) Qualifications - An individual appointed under subparagraph (B) shall have experience and expertise in—

(i) administration of, and compliance with, Federal tax laws,

(ii) a broad range of compliance cases, and

(iii) management of large service organizations.

(3)Purposes and duties of office - It shall be the function of the Internal Revenue Service Independent Office of Appeals to resolve Federal tax controversies without litigation on a basis which—

(A) is fair and impartial to both the Government and the taxpayer,

(B) promotes a consistent application and interpretation of, and voluntary compliance with, the Federal tax laws, and

(C) enhances public confidence in the integrity and efficiency of the Internal Revenue Service.

(4)Right of appeal

The resolution process described in paragraph (3) shall be generally available to all taxpayers.

Appendix C

(5)Limitation on designation of cases as not eligible for referral to Independent Office of Appeals

(A) In general If any taxpayer which is in receipt of a notice of deficiency authorized under section 6212 requests referral to the Internal Revenue Service Independent Office of Appeals and such request is denied, the Commissioner of Internal Revenue shall provide such taxpayer a written notice which—

(i) provides a detailed description of the facts involved, the basis for the decision to deny the request, and a detailed explanation of how the basis of such decision applies to such facts, and

(ii) describes the procedures prescribed under subparagraph (C) for protesting the decision to deny the request.

(B) Report to Congress - The Commissioner of Internal Revenue shall submit a written report to Congress on an annual basis which includes the number of requests described in subparagraph (A) which were denied and the reasons (described by category) that such requests were denied.

(C) Procedures for protesting denial of request - The Commissioner of Internal Revenue shall prescribe procedures for protesting to the Commissioner of Internal Revenue a denial of a request described in subparagraph (A).

(D) Not applicable to frivolous positions - This paragraph shall not apply to a request for referral to the Internal Revenue Service Independent Office of Appeals which is denied on the basis that the issue involved is a frivolous position (within the meaning of section 6702(c)).