No. 22-

IN THE

Supreme Court of the United States

HCLA,

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: November 15, 2022

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QUESTION PRESENTED

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

CORPORATE DISCLOSURE STATEMENT

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

PARTIES TO THE PROCEEDINGS AND RELATED PROCEEDINGS

The parties to the proceeding below are as follows:

Petitioner is Hancock Land Acquisitions, LLC. It was the plaintiff in the district court and appellant in the court of appeals.

Bryan Kelley, individually and as the Tax Matters Partner for Southeastern Argive Investments, LLC, were plaintiffs in the district court.

Respondents are the United States of America, the Internal Revenue Service, Catherine C. Brooks, Internal Revenue Service Manager, Pamela Stafford, Internal Revenue Service Agent. 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. US, No. 1:20-cv-03096 (N.D. GA) – Judgment entered July 8, 2021;

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

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

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES:

STATUTES AND OTHER AUTHORITIES:

Hancock County Land Acquisitions, LLC ("HCLA") 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The opinion of the U.S. Court of Appeals for the Eleventh Circuit is unpublished but is available at 2022-2 USTC P 50,206 and is reproduced in the Appendix ("App.") at 1a-8a. The opinion of the U.S. District Court for the Northern District of Georgia is reported at 553 F. Supp. 3d 1284 and is reproduced at App. 9a-32.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Eleventh Circuit was entered on August 17, 2022. This Court has jurisdiction pursuant to 28 U.S. § 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. *Mayo Found. For Med. Educ. & Research v. United States*, 562 U.S. 44, 55 (2011); *CIC Services, LLC v. IRS*, 141 S. Ct. 1582. For far too long, the IRS has hidden behind the Anti-Injunction Act claiming that the Administrative Procedures Act ("APA") does not serve as a check on their 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 court when the IRS fails to follow legally mandated procedural safeguards? Here, Petitioner challenges the IRS's 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 (2021). 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 tax. App. at 6a.

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*. 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, 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 *Direct Marketing* and *CIC Services*, 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, whether the scope of the Anti-Injunction Act is so broad that it precludes the courts from ever having the authority to enforce subsequent laws, such as the Taxpayer First Act which was enacted in 2019, and seeks to protect taxpayers from specific abuses identified by Congress. Under the Eleventh Circuit's ruling, unlawful IRS actions can never be challenged, which creates a regime where the IRS is insulated from Congressional restraint and judicial oversight. Such a broadly erroneous holding confers upon the IRS full license to arbitrarily ignore any law enacted by Congress and unilaterally determine and deny the due process rights available to taxpayers.

STATEMENT OF THE CASE

A. Background

In 2019, the Taxpayer First Act was created to address concerns about the IRS's abuse of taxpayer rights in enforcement. 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 stated that "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 Independant 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 are potentially affected 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 which laws it wishes to follow 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 concept of due process.

B. Proceedings Below

On its 2016 tax return, HCLA reported the donation of a conservation easement. In 2018, the IRS selected HCLA for audit. Throughout the course of the audit, HCLA took every necessary step to avail themselves of their right to review by the Independent Office of Appeals, as mandated by Congress. Shortly into the audit, the IRS requested that HCLA execute a Form 872-P (Consent to Extend the Time to Assess Tax). HCLA initially declined due to the concern that the extension would increase costs related to the audit if the IRS did not quickly resolve the audit. HCLA, however, did not completely close the door on the issue because an extension could still be signed at a later date.

In April 2021, when the IRS sent HCLA a Notice of Proposed Adjustment ("NOPA") proposing to disallow

the entire charitable deduction and adjusting other deductions, HCLA revisited the IRS's request to extend the statute of limitations. At that time, HCLA executed and submitted the original Form 872-P consenting to extend the time to assess tax. Furthermore, HCLA informed the IRS that they unequivocally disagreed with the proposed findings and had every intention of filing a written protest to begin the appeals process as outlined in Code § 7803(e)(4). HCLA also informed the IRS that it would execute another Form 872-P to allow for any additional time that may be required in order to submit the case to the Independent Office of Appeals.

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 informed HCLA that there was insufficient time remaining on the statute of limitations to allow the IRS to send the case to the Independent Office of Appeals. To further aggravate the appeals process, the IRS chose to hastily issue a Final Partnership Administrative Adjustment ("FPAA") in an attempt to prevent HCLA from review by the Independent Office of Appeals. HCLA decided to file a petition with the Tax Court to preserve their rights to contest the FPAA.

In July 2020, prior to receiving the hastily issued FPAA, HCLA filed suit in the Northern District of Georgia seeking the Court to require the IRS to provide HCLA with an administrative review of the IRS's proposed determinations. Specifically, HCLA asked the Court to order the IRS countersign the IRS-issued Form 872-P to extend the statutory period for assessment and collection and to *temporarily* rescind the FPAA.

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 32a.

The Eleventh Circuit affirmed the district court's decision. App at 8a. HCLA 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. HCLA 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, HCLA 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 HCLA's suit violated the Anti-Injunction Act by effectively restraining the assessment and collection of taxes. The Eleventh Circuit concluded that "[a]t its heart, this suit is a 'dispute over taxes.'" App. at 6a.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 Petitioner'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). Under the Eleventh Circuit's reasoning, taxpayers have no recourse or protection when the IRS deprives them of their statutory right to administrative appeal as mandated by Congress. The IRS must be held to the same standard as other agencies and cannot forever hide behind the Anti-Injunction Act whenever it decides that it does not need to follow the law. 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*.

HCLA is challenging 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). HCLA does not seek to restrain the assessment or collection of any tax. Any hypothetical or eventual tax

liability that may attach is separate and apart from the remedy sought by this suit. HCLA seeks judicial action to compel the IRS to comply with the law as enacted by Congress by granting HCLA a review of its case by the Office of Independent Appeals. Thus, the current suit targets the IRS's violations of the law, not the underlying tax.

This Court in *Direct Marketing* and *CIC Services* has found 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 and not the Anti-Injunction Act, 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 reasoning in both of these cases illustrates why HCLA's suit is not 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; only lawsuits that actually "stop" the assessment or collection of a tax are barred. *Direct Mrktg,* 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 Serv., LLC*, 141 S. Ct. at 1591 (quoting the Government's oral argument).

Here, HCLA is challenging the IRS's denial of appeals consideration because that denial preceded the steps of assessment and collection. Indeed, HCLA, by submitting the original signed Form 872-P, actually undertook every administrative action within its control to preserve the IRS's ability to assess and collect any potential tax determined after providing HCLA with a procedural process consistent with the legal requirements of 26 U.S.C. § 7803(e). Thus, HCLA is not trying to stop the "assessment or collection" of any tax; it is merely asking the courts to enforce the procedural safeguards. HCLA does not challenge any tax liability here. As in *CIC Services*, "the suit contests, and seeks relief from, a separate legal mandate" and any tax "appears on the scene" at some later point. *CIC Services,* 141 S. Ct. at 1593.

The ultimate conclusion of *temporarily* rescinding the FPAA, forcing the IRS to countersign the Form 872-P they issued, and sending the case to the Independent Office of Appeals does not necessarily prohibit the "assessment or collection" of any tax. Similar to *CIC Services*, the totality of the remedy gives the taxpayer what it wants: relief from the IRS's arbitrary denial of its due process rights.

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 Anti-Injunction Act.

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 LLC v. IRS*, 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. Thus, the facts necessitated a pre-enforcement suit, rather than a refund suit.

CIC Services establishes that the inquiry must look not to "a taxpayer's subjective motive, but into the action's objective aim – essentially the relief the suit requests." *Id*. at 1589. The Court held that the suit was not barred by the Anti-Injunction Act after reviewing the aim of the action by reviewing the complaint.

The Eleventh Circuit's application is not in line with this Court's decision in *CIC Services*. First, the Eleventh Circuit did not properly apply the standards of *CIC Services*. The Eleventh Circuit reasoned that at its heart, this suit is a dispute over taxes and the legal rule at issue here is a tax provision, not a reporting requirement. App. at 6a. However, HCLA is not challenging a tax provision; the "legal rule at issue" here is a procedural safeguard against arbitrary agency action.

This Court's precedent makes clear that suits that do not directly attack a tax, but rather seek review of agency actions that precede the assessment or collection of a tax, are not barred by the Anti-Injunction Act. The Eleventh Circuit's decision conflicts with this Court's reasoning in *CIC Services* and *Direct Marketing*.

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 fundamental question here is: when the IRS ignores the laws prescribed by Congress and violates taxpayer rights, do the courts have the authority to enforce the law violated by the IRS? Alternatively, can the courts *ever* enforce laws enacted after the adoption of the Anti-Injunction Act or is the Anti-Injunction Act so broad as to prevent the effect of any subsequent law enacted by Congress? 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. The IRS has sought to insulate its agency actions from judicial review which undermines the purpose of the APA.

Questions surrounding the IRS's unilateral authority to ignore procedural safeguards are important to all taxpayers. If left to stand, the Eleventh Circuit's decision will forever preclude all taxpayers from challenging illegal IRS actions, if an eventual downstream effect of such actions is the potential assessment or collection of a tax. In such a world, administrative agencies, not elected legislatures nor appointed judges, will have the sole authority to decide which laws are to have any effect and who is to be affored procedural due process rights.

Legislative history explains that Congress implemented 26 U.S.C. 7803(e) because it identified specific instances where the IRS abused taxpayer due process rights, and the legislative history further demonstrates that the purpose of the law was to protect taxpayer due process rights and stop future such abuses by the IRS. Requiring the IRS to follow the laws that it is charged with enforcing—the specific relief that the Petitioner requested in its Complaint—is merely an effort to protect their statutory right to due process. Any other finding would undermine congressional intent by leaving all future decisions regarding the protection of taxpayer rights to sole discretion of the entity that Congress identified as the abuser from whom the taxpayers needed protection. Thereby rendering the congressionally mandated taxpayer protections meaningless and rendering this law, and any future taxpayer protection law, unenforceable by the courts.

The IRS has long maintained that the administration of taxes 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. In 2011, in *Mayo Foundation for Medical Education and Research v. United States*, the Court unanimously wrote that it was "not inclined to carve out an approach to administrative review good for tax law only." 562 U.S. 44, 55. The IRS must comply with general administrative law requirements, doctrines, and norms. Here, this Court has already rejected the notion of tax exceptionalism.

Under the Eleventh Circuit's decision, taxpayers are subject to the whims of arbitrary agency decisions without a pre-litigation forum for independent review. This was

the precise issue Congress sought to remedy by codifying appeals rights in 26 U.S.C. §7803(e). The courts should have the authority to enforce such rights which were enacted in 2019 without regard to the mere existence of a law enacted in its current form in 1954, a law about which Congress was presumably aware when drafting and enacting the Taxpayer First Act. The asserted authority does not fit the overall statutory scheme.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully Submitted,

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Date: November 15, 2022

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED AUGUST 17, 2022

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-12508

HANCOCK COUNTY LAND ACQUISITIONS, LLC,

Plaintiff-Appellant,

BRYAN KELLEY, INDIVIDUALLY AND AS THE TAX MATTERS PARTNER FOR SOUTHEASTERN ARGIVE INVESTMENTS, LLC, *et al.*,

Plaintiffs,

versus

UNITED STATES OF AMERICA, THE INTERNAL REVENUE SERVICE, CATHERINE C. BROOKS, INTERNAL REVENUE SERVICE MANAGER, PAMELA V. STAFFORD, INTERNAL REVENUE SERVICE REVENUE AGENT,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia.
D.C. Docket No. 1:20-cv-03096-AT.

August 17, 2022, Filed

Appendix A

Before WILLIAM PRYOR, Chief Judge, LUCK, and ED CARNES, Circuit Judges.

PER CURIAM:

Hancock County Land Acquisitions, LLC, claimed a tax deduction for a conservation easement that it donated on property it owned in Mississippi. The IRS undertook a review of the return and ultimately issued a Final Partnership Administrative Adjustment (FPAA).[1] Hancock then sued the IRS and related parties, seeking various forms of injunctive and declaratory relief. The district court dismissed the lawsuit on jurisdictional grounds. This is Hancock's appeal.

I.

In its 2016 tax return, Hancock claimed a charitable contribution deduction of approximately $180 million for a conservation easement it had donated on land it owned. Two years later, in 2018, the IRS opened an investigation into Hancock's 2016 tax return. Thereafter, the IRS asked if Hancock would agree to extend the statutory deadline for the IRS to complete its investigation. See I.R.C. § 6229(a) (repealed effective for tax returns filed after 2017). Hancock initially did not agree to the extension but changed its mind eleven months later. At that point,

1. "An FPAA is the functional equivalent of a Statutory Notice of Deficiency for individual taxpayers" and is issued when the IRS determines that an adjustment to a partnership tax return is required. *See United States v. Clarke*, 816 F.3d 1310, 1313 n.2 (11th Cir. 2016).

the IRS had almost completed its investigation, and the parties never agreed on an extension of the limitations period. The IRS issued Hancock's FPAA and mailed it to Hancock's tax matters partner on July 23, 2020.

Two days later, on July 25, 2020, apparently without realizing that the FPAA had already been issued, Hancock filed this lawsuit. Later it filed an amended complaint, which is the operative one, asserting one claim under the Administrative Procedure Act. The claim alleged that I.R.C. § 7803(e)(4) required the IRS to provide Hancock with "an opportunity to resolve [its] case with the Appeals Office." Hancock alleged that issuance of the FPAA without first sending the case to the Appeals Office would allow the IRS "to immediately assess a tax" and deprive Hancock of its right to pre-litigation administrative resolution of its tax dispute.

Hancock's amended complaint asked the district court to declare that: (1) Hancock has "the statutory right to the independent review of its case by the Appeals Office," and (2) the IRS is "required to comply with all of the legal requirements imposed by [I.R.C.] § 7803(e)." It also sought injunctive relief: (1) compelling the IRS to agree to extend the statute of limitations, (2) compelling the IRS to provide Hancock with "independent review" of its tax case by the Appeals Office, (3) enjoining the IRS from violating I.R.C. § 7803(e), and (4) temporarily enjoining the IRS "from issuing an FPAA" until after providing Hancock with "an independent review of its case by the Appeals Office."

The IRS moved to dismiss Hancock's complaint, and the district court did so. The court concluded that it did not have subject matter jurisdiction to decide the dispute because the relief Hancock sought was barred by the Anti-Injunction Act (AIA) and the tax exception to the Declaratory Judgment Act (DJA).

II.

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

Hancock contends that its suit is not barred by the AIA or the tax exception to the DJA.

A.

The AIA provides that, with exceptions that are not relevant in 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 [AIA] applies, it deprives federal courts of jurisdiction." *In re Walter Energy, Inc.*, 911 F.3d 1121, 1136 (11th Cir. 2018).

Hancock first argues that its suit is not barred by the AIA because it does not seek to restrain the assessment or collection of a tax. Relying on *CIC Services*, Hancock argues that its suit challenges only unlawful IRS conduct, not the assessment of a tax. In the *CIC Services* case, the Supreme Court considered whether a suit challenging an information-reporting requirement was barred by the AIA. 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 [AIA] 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 AIA. *Id.* at 1594.

Three considerations led to that conclusion in CIC Services. First, the reporting rule at issue "impose[d] affirmative reporting obligations, inflicting costs separate and apart from the statutory tax penalty," *id.* at 1591; second, 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," *id.*; and third, 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, Hancock will not be subject to any "costs separate and apart" from the tax penalty that may result from the FPAA. *Id.* at 1591. Second, Hancock 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 Hancock, see I.R.C. § 6232(b), and Hancock concedes that "if the FPAA is allowed [to] stand, the IRS will be able to immediately assess a tax." Third, Hancock will suffer no criminal punishment by following the AIA's "familiar pay-now-sue-later procedure." *Id.* 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, *id.*, is a tax provision, not a reporting requirement backed up with a tax provision. Hancock's single claim alleged that the IRS violated § 7803(e)(4) by failing to provide Hancock with administrative review of its tax case. To remedy that alleged violation, Hancock 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 finds that Hancock improperly claimed a $180 million deduction on its 2016 tax return, resulting in an underpayment of taxes. Because the relief Hancock's lawsuit seeks would restrain the IRS from assessing and collecting those taxes, it is barred by the AIA.

B.

Hancock argues that even if its lawsuit seeks to restrain the assessment of a tax, it falls within a narrow exception to the AIA. 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).

Hancock 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 "another remedy at law exists in connection with [Hancock's] challenge to the FPAA, specifically through the Tax Court." Hancock has already challenged the FPAA in tax court in a parallel proceeding. If issuing the FPAA without providing Hancock 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 Hancock's claim. *Williams Packing*, 370 U.S. at 7. Hancock's strict interpretation of § 7803(e)(4) is not the only plausible one. The district court pointed out that I.R.C. § 7803(e)(5) provides for referral to the Appeals Office for "any taxpayer which is in receipt of a notice of deficiency." It 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 Hancock 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).

C.

Finally, the tax exception to the Declaratory Judgment Act bars Hancock's requested declaratory relief. It 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. Ams. United Inc.*, 416 U.S. 752, 759 n.10, 94 S. Ct. 2053, 40 L. Ed. 2d 518 (1974); *accord Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1362 n.6 (11th Cir. 2003).

Hancock concedes that "courts have determined [the two Acts] to be coextensive and coterminous." Because we hold that the AIA bars Hancock's suit, it follows that the tax exception to the DJA bars the declaratory relief Hancock seeks. *See Mobile Republican Assembly*, 353 F.3d at 1362 n.6 (holding that the AIA prohibited the appellees from seeking injunctive relief, which "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 — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, DATED JULY 7, 2021

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

CIVIL ACTION NO.
1:20-cv-3096-AT

HANCOCK COUNTY LAND
ACQUISITIONS, LLC, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

July 7, 2021, Decided;
July 7, 2021, Filed

ORDER

Plaintiff Hancock County Land Acquisitions, LLC ("Hancock") and its Tax Matters Partner Southeastern Argive Investments, LLC ("Argive") and *its* Tax Matters Partner Representative Bryan Kelley ("Kelley") (collectively, "Plaintiffs") bring this suit against Defendants under the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq.*, and ask the Court to provide declaratory

and injunctive relief related to the Internal Revenue Service's ("IRS") examination and treatment of Hancock's 2016 partnership tax return. Defendants the United States of America, the IRS, IRS Manager Catherine C. Brooks, and IRS Agent Pamela Stafford (collectively, "the Government" or "Defendants") filed the instant Motion to Dismiss [Doc. 22], asserting that Plaintiffs' claim should be dismissed for lack of subject matter jurisdiction and alternatively for failure to state a claim. For the reasons that follow, Defendants' Motion [Doc. 22] is **GRANTED**.

I. Factual Background

Hancock is a Mississippi LLC that in 2016 donated a conservation easement on its property in Mississippi. (Amended Complaint ("Compl."), Doc. 19 ¶ 32.) In reporting this donation on its 2016 partnership tax return,[1] Hancock claimed a total charitable contribution deduction of $180,177,000 for the conservation easement and $1,712,242 and $4,416,251 for other related deductions. (Tax Court Petition, Doc. 22-2 ¶¶ en, eo, eq, at 22.)[2] Plaintiff Argive is a Georgia LLC that owns 97% of the membership units

1. Because Hancock did not make the election to be taxed as a corporation, Hancock is taxed as a partnership under the IRS Code. (Compl. ¶ 15.)

2. Defendants have attached to their Motion Plaintiffs' Petition in Tax Court and the Final Partnership Administrative Adjustment ("FPAA"), referenced in the Amended Complaint. (Doc. 22-2.) Plaintiffs have not challenged the authenticity of these documents. The Court may consider these documents on Defendants' Motion to Dismiss without converting the motion to a motion for summary judgment. *Day v. Taylor*, 400 F.3d 1272, 1275-76 (11th Cir. 2005) (citing *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002)).

of Hancock and was designated as Hancock's Tax Matters Partner. (Compl. ¶ 16.) Plaintiff Kelley is an individual who is designated as the Tax Matters Partner Representative for Argive. (*Id.* ¶ 17.) A Tax Matters Partner is designated by the partnership or LLC to represent the partnership or LLC before the IRS in all tax matters for a specific year.[3] In July of 2018, the IRS opened an examination into Hancock's 2016 partnership tax return and specifically the charitable contribution deduction for the conservation easement. (*Id.* ¶ 33.) Under the IRS Code, the IRS had until September 15, 2020 to assess any tax related to Hancock's 2016 return. (*Id.* ¶ 34.)

In May 2019, the IRS, through Agent Stafford, requested that Hancock's Tax Matters Partner, Argive, consent to an extension of the statute of limitations on assessment through September 30, 2021 to allow the IRS more time to develop and review facts related to Hancock's donation of the conservation easement. (*Id.* ¶ 35.) Argive did not agree to the extension outright; rather, it offered to extend the statutory period for assessment *if* the extension were *solely* for the purpose of allowing the case to be reviewed by the IRS Appeals Office and *not* for further factfinding. (*Id.* ¶ 37.) The Appeals Office generally functions as a settlement arm of the IRS.[4]

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3. *See*, Tax Equity and Fiscal Responsibility Act ("TEFRA"), 96 Stat. 648, codified as amended at 26 U.S.C. §§ 6221-6232; *see also IRS Plain Language Summary Tax Matters Partner for Limited Liability Companies*, Oct. 30, 1995 https://www.irs.gov/pub/irs-regs/td3492pl.txt (last visited June 25, 2021).

4. The IRS has traditionally operated an Office of Appeals headed by a Chief of Appeals. This Office of Appeals attempts

The IRS did not agree to these terms and continued its factfinding. (Compl. ¶ 38.) In April 2020, Plaintiffs proposed the same offer again by sending a letter to Defendants with the signed IRS Form 872-P, a form that allows for an extension of the statute of limitations, because Plaintiffs were informed that access to the Appeals Office was only available if a taxpayer has at least 20 months left before the statute of limitations runs. (*Id.* ¶ 42.) The letter noted that Plaintiffs were taking "proactive steps" to agree to an extension of the assessment period until September 30, 2021 so that Hancock could "file a Protest Letter and address matters with the Appeals Office, before the IRS issues a notice of Final Partnership Administrative Adjustment ("FPAA") and forces Tax Court litigation." (*Id.*) An FPAA is similar to a statutory notice of deficiency except that it shows only the determined treatment of partnership items rather than a tax deficiency. *See* IRS Manual Transmittal, Apr. 19, 2016 https://www.irs.gov/irm/part8/irm_08-019-012.[5] Once an FPAA notice

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to resolve administrative determinations without the need for litigation and by using alternative dispute resolution methods such as arbitration or mediation. H.R. REP. 116-39, 29. In July of 2019, the Taxpayer First Act ("TPA") was signed into law. Pub. L. No. 116-25, 133 Stat. 981 (2019). The TPA established an Independent Office of Appeals. TFA § 1001, 133 Stat. at 983, codified at 26 U.S.C. § 7803(e). The legislative history of the TPA explains that the establishment of the new Independent Office of Appeals was intended to "codify the role of an independent administrative appeals function within the IRS and provide new guidelines for procedures that the IRS is to follow in the new office." H.R. REP. 116-39, 29. However, the Independent Office of Appeals is "intended to perform functions similar to those" of the current Office of Appeals. *Id.* at 30.

5. In 1982, Congress passed the Tax Equity and Fiscal Responsibility Act ("TEFRA"), Pub. L. No. 97-248, 96 Stat. 648

is issued, a partnership may challenge the adjustment through active litigation in Tax Court, district court, or the Court of Federal Claims. *See* 26 U.S.C. § 6234(a). After the notice of the FPAA is mailed, the IRS must wait 90 days to assess an imputed underpayment. *Id.* § 6232(b)(1). If the Tax Matters Partner challenges the FPAA in court, the IRS may not make an assessment of an imputed underpayment until after the decision of the Tax Court, district court, or Court of Federal Claims has become final. *Id.* § 6232(b)(2).

On April 29, 2020 Defendants informed Plaintiffs that they had issued a summary report of the IRS' examination of Hancock, proposing adjustments to Hancock's tax return, and further explained that the IRS planned to finish processing the case and then issue the FPAA notice based on the report's proposed adjustments. (Compl. ¶ 50.) In line with this direction, on July 23, 2020 the IRS issued the FPAA to Hancock's Tax Matters Partner, Argive. (FPAA, Doc. 22-2 at 36-52.) Two days later, Hancock filed suit in this Court asking the Court to enjoin the issuance of the FPAA, apparently unaware that the FPAA had already been issued. (Doc. 1.)

(codified as amended at 26 U.S.C. §§ 6221-6232), in part to address problems related to deficiency proceedings for partnership-related tax matters. *United States v. Woods*, 571 U.S. 31, 38, 134 S. Ct. 557, 187 L. Ed. 2d 472 (2013). Under TEFRA, partnership-related tax matters are addressed in two stages. First, the IRS initiates proceedings to adjust the partnership items by issuing an FPAA, notifying the partners of any adjustments. *Id.* at 39. The partners may seek judicial review in Tax Court, district court, or the Court of Federal Claims. *Id.* Then, once the adjustments become final, the IRS may undertake further proceedings to make "computational adjustments" in the tax liability of individuals partners. *Id.*

Appendix B

The only Plaintiff named in the initial complaint was Hancock. Asserting two claims, one under the APA and one for "Mandamus Act," Hancock argued that it has a statutory right to review by the Appeals Office and that Defendants' refusal to send Hancock's case to the Appeals Office and refusal to extend the statute of limitations period were abuses of discretion. (*Id.* ¶¶ 65, 67.) For relief, Hancock sought (1) a declaratory judgment that it has a statutory right to independent review by the Appeals Office, as well as injunctive relief (2) compelling Defendants to sign Form 872-P (extending the statute of limitations so that their case would still be in the window of time during which it could be sent to the Appeals Office), (3) ordering Defendants to provide Hancock access to the Appeals Office, and (4) temporarily enjoining Defendants from issuing the FPAA until after Hancock was provided review by the Appeals Office. (*Id.* at 29-30.) As noted, the FPAA had actually been issued two days prior, apparently unbeknownst to Hancock. (FPAA, Doc. 22-2 at 36-52.)

Shortly thereafter, Defendants filed a motion to dismiss (Doc. 15) and Hancock filed the Amended Complaint (Doc. 19). In the initial motion to dismiss, Defendants argued that Hancock lacked standing because the partnership whose return is under exam is not a party to the exam and has no right to participate; only the Tax Matters Partner has standing. (Doc. 15 at 6-9.) Argive and Kelly were added as Plaintiffs in the Amended Complaint.[6]

6. Defendants reiterate in the current motion to dismiss that Hancock does not have standing to challenge a lack of access to appeals or other procedures related to the examination of its 2016 tax return, but acknowledge that Argive does have standing to bring such a challenge. (Mot. at 10 n.4.)

The Amended Complaint also drops the second count for mandamus relief and includes only a single count under the APA. The requested relief, however, remains the same. Plaintiffs still request (1) declaratory judgment that it has a statutory right to independent review by the Appeals Office and (2) injunctive relief compelling Defendants to sign Form 872-P, (3) injunctive relief compelling Defendants to provide Hancock review by the Appeals Office, and (4) injunctive relief temporarily enjoining Defendants from issuing the FPAA until after review by the Appeals Office. (Compl. at 29-30.)

In addition to filing this suit, Plaintiffs filed a Petition for Readjustment of the FPAA in the United States Tax Court in October 2020. (Tax Court Petition, Doc. 22-2). This Petition asks the Tax Court (1) for a readjustment of the partnership items set out in the FPAA that was issued on July 23, 2020, and (2) to find that Hancock's 2016 return was accurate as filed or determine that Hancock *undervalued* the conservation easement. (*Id.* at 34.) Now before the Court is Defendants renewed Motion to Dismiss the Amended Complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). [Doc. 22.]

II. Legal Standard

"Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction can be asserted on either facial or factual grounds." *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1279 (11th Cir. 2009). When addressing facial challenges, the Court takes the complaint's allegations as true and assesses whether

such facts sufficiently allege a basis for subject matter jurisdiction. *Id.; Am. Ins. Co. v. Evercare Co.*, 699 F. Supp. 2d 1355, 1358 (N.D. Ga. 2010).

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). For the purposes of a motion to dismiss, the court must accept all factual allegations in the complaint as true; however, the court is not bound to accept as true a legal conclusion couched as a factual allegation. *Twombly*, 550 U.S. at 555. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, at 679. Although the plaintiff is not required to provide "detailed factual allegations" to survive dismissal, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555, 570.

III. Discussion

Defendants first propound a series of jurisdictional arguments for dismissal. Defendants argue that there is no subject matter jurisdiction because: (1) this action was mooted by the issuance of the FPAA and the ensuing Tax Court Petition; (2) the Anti-Injunction Act, 26 U.S.C. § 7421(a), which bars any "suit for the purpose of restraining the assessment or collection of any tax,"

forecloses Plaintiffs' suit; (3) the Declaratory Judgment Act, 28 U.S.C. § 2201, does not confer jurisdiction because it removes federal tax matters from its ambit; and (4) the APA's waiver of sovereign immunity does not apply because the challenged actions were discretionary and not final agency actions. In addition, Defendants argue that the Amended Complaint should be dismissed for failure to state a claim because Plaintiffs do not have a substantive right to review by the Appeals Office.

As the application of these jurisdictional defenses varies depending on the challenged agency action and the relief requested, the Court addresses these arguments, and Plaintiffs' responses, through the lens of the relief sought.

A. Plaintiffs' request that the Court temporarily enjoin the issuance of the FPAA until Plaintiffs have been afforded independent review by the Appeals Office

This request and aspect of the case is moot. "When events subsequent to the commencement of a lawsuit create a situation in which the court can no longer give the plaintiff meaningful relief, the case is moot and must be dismissed." *Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1216-17 (11th Cir. 2000) (citing *Jews for Jesus, Inc. v. Hillsborough Cty. Aviation Auth.*, 162 F.3d 627, 629 (11th Cir.1998) (citing *Pac. Ins. Co. v. General Dev. Corp.*, 28 F.3d 1093, 1096 (11th Cir.1994)). Once such an event occurs, the case "no longer presents a live case or

controversy" and must be dismissed. *Ethridge v. Hail*, 996 F.2d 1173, 1175 (11th Cir. 1993). Here, the Court cannot enjoin the IRS from issuing the FPAA that was already issued on July 23, 2020, and thus cannot provide Plaintiffs' requested relief.

Though Plaintiffs argue in their response that the Court has the authority to, in essence, compel the IRS to rescind the FPAA (Pl. Resp., Doc. 24 at 16), the Amended Complaint does not ask for such relief.[7] Moreover, even if it did, the Court could not compel the IRS to rescind the FPAA because such an order would certainly run afoul of the Anti-Injunction Act, 26 U.S.C. § 7421(a), which "bars any 'suit for the purpose of restraining the assessment or collection of any tax.'" *CIC Servs., LLC v. Internal Revenue Service*, 141 S. Ct. 1582, 1593, 209 L. Ed. 2d 615 (2021) (noting that the Act bars pre-enforcement review and prohibits a taxpayer from bringing preemptive suit to foreclose tax liability); *see also, Kemlon Prods. & Dev. Co. v. United States*, 638 F.2d 1315, 1320 (5th Cir. 1981), *modified on other grounds*, 646 F.2d 223 (5th Cir. 1981) (explaining that the Anti-Injunction Act also bars claims

7. Plaintiffs argue that the Court has jurisdiction to rescind the FPAA or render its issuance invalid under *Romano-Murphy v. Commissioner*, 816 F.3d 708 (11th Cir. 2016). (Pl. Resp. at 13, 16.) *Romano-Murphy* involved a completely different issue (an assessment related to a trust fund) arising under a different statutory provision, 26 U.S.C. § 6672(b), which *specifically allows* a taxpayer to file a timely protest of a proposed assessment and requires that the IRS make a final administrative determination on the protest before any assessment. *Id.* at 721. Plaintiffs have not cited any comparable language in the operative provision here. *Romano-Murphy* is inapposite.

that seek to restrain IRS "activities which are intended to or may culminate in the assessment or collection of taxes"). 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. 26 U.S.C. § 6232(b). To interfere with the issuance of the FPAA would therefore be to restrain the IRS' activities intended to culminate in the assessment of a tax.[8] Accordingly, the Declaratory Judgment Act, 28 U.S.C. § 2201, which excludes federal tax matters from its remedial scheme, does not confer jurisdiction over this requested relief. "[T]he prohibition on entering declaratory judgment regarding federal taxes 'is at least as broad as the prohibition of the Anti-Injunction Act . . . .'" *Bufkin v. U.S.*, 522 F. App'x 530, 533 (11th Cir. 2013) (citing *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1362 n.6 (11th Cir. 2003)).

8. Plaintiffs also argue that this action 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). (Pl. Resp. at 21-22.) This exception does not apply here because it is by no means clear that the Government cannot prevail under any circumstances and also because another remedy at law exists in connection with Plaintiffs' challenge to the FPAA, specifically through the Tax Court.

B. Plaintiffs' request that the Court compel Defendants to sign the IRS Form 872-P, extending the statute of limitations for assessment

The deadline for the IRS to assess a tax on Hancock related to its 2016 return was September 15, 2020. (Compl. ¶ 34.) While Plaintiffs originally declined the IRS' request to extend this limitations period to September 30, 2021, they later sought to *force* the IRS to agree to an extension so that Hancock's return could go before the Appeals Office. As alleged, the IRS informed Plaintiffs that, to be sent to the Appeals Office, a case must have 20 months remaining on the statute of limitations when it is closed by the Examination Division of the IRS. (*Id.* ¶ 38.) When Plaintiffs completed the form for the extension and stated in a letter that they were doing so to address matters with the Appeals Office before the issuance of the FPAA, Defendants refused to countersign the form. (*Id.* ¶¶ 42, 47.) When Defendants issued the FPAA, the statute of limitations was suspended pursuant to 26 U.S.C. § 6229(d), until the decision of the Tax Court becomes final and for one year thereafter.

Defendants argue *inter alia* that this challenged action — the failure to countersign the Form 872-P — is not subject to judicial review under the APA and therefore the Court lacks jurisdiction. (Mot. 11-14.) The Court agrees.

"The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood*,

312 U.S. 584, 586, 61 S. Ct. 767, 85 L. Ed. 1058 (1941). Absent 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). Here, Plaintiffs' sole claim is brought under the APA.

The APA's sovereign immunity waiver, 5 U.S.C. § 702, provides in relevant part:

> 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. However, district courts lack jurisdiction over administrative action where agency action is committed to agency discretion by law. 5. U.S.C. § 701(a). In addition, "federal jurisdiction is similarly lacking where the administrative action in question is not 'final' within the meaning of 5 U.S.C. § 704." *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1236 (11th Cir. 2003). Section 704 provides that "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. To be considered "final," the agency action must (1) mark the consummation of the agency's decisionmaking process, and must not be "of a merely tentative or interlocutory nature;" and (2) be one by which rights or obligations have been determined or from which legal consequences will flow. *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997).

Here, the IRS' decision not to sign the Form 872-P, and thereby decline to extend the statute of limitations, is not a final agency action within the meaning § 704, as it was a "preliminary, procedural, or intermediate" step leading up to the issuance of the FPAA and did not in any manner alter Plaintiffs' rights or obligations. 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. In addition, the Court finds that the decision not to extend the limitations period was discretionary. Plaintiffs have pointed to no requirement that the IRS must agree to an extension and in fact do not respond to Defendants' arguments that this action was not a final agency action or that it was discretionary. (Pl. Resp. at 18-19.)

Additionally, this request to force the IRS to extend the statute of limitations — and thus prolong assessment of a tax — also constitutes an attempt to interfere with activities that are intended to culminate in the assessment

of a tax and thus federal jurisdiction is precluded under the Anti-Injunction Act, 26 U.S.C. § 7421(a); *see also, CIC Services*, 141 S. Ct. at 1593. Consequently, there is also no jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201, as detailed above. *See Mobile Republican Assembly*, 353 F.3d at n.6.

C. Plaintiffs' request that the Court compel Defendants to provide Plaintiffs with review by the Appeals Office before the issuance of the FPAA under 26 U.S.C. § 7803(e)

Plaintiffs argue that, prior to the issuance of the FPAA (the deficiency), they had a statutory right to the independent review of Hancock's case by the Appeals Office under the 2019 Taxpayer First Act, Pub. L. No. 116-25, 133 Stat. 981 (2019), the relevant portion of which is codified at 26 U.S.C. § 7803(e). (Pl. Resp. at 10-11.) As noted *supra* at n.4, the Taxpayer First Act established an Independent Office of Appeals, "intended to perform functions similar to those of the current" Appeals Office. H.R. REP. 116-39, 30. Section 7803(e) states the purpose and duties of the Office, as follows:

> (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.

§ 7803(e)(3). Following this subsection, the Act provides for the "right of appeal" upon which Plaintiffs rely:

> (4) Right of appeal.—The resolution process described in paragraph (3) shall be *generally* available to all taxpayers.
>
> (5) *Limitations 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.

§ 7803(e)(4)-(5) (emphases added). The legislative history further clarifies that

> Independent Appeals is to resolve tax controversies and review administrative decisions of the IRS in a fair and impartial manner, for the purposes of enhancing public confidence, promoting voluntary compliance, and ensuring consistent application and interpretation of Federal tax laws. Resolution of tax controversies in this manner is *generally* available to all taxpayers, *subject to reasonable exceptions that the Secretary may provide.*

H.R. REP. 116-39, 30-31 (emphasis added).

Upon review, the Court finds that Plaintiffs' request — for access to the Appeals Office before the issuance of the FPAA — is also moot. In the Amended Complaint, Plaintiffs specifically challenge the IRS' denial of their request that Hancock's case be referred to the Appeals Office *before* the issuance of the FPAA. (Compl. ¶¶ 2,

37, 38, 41, 42, 43, 58.) The Amended Complaint does not allege that Plaintiffs sought and were denied review by the Appeals Office *after* the FPAA was issued. Therefore, the only action Plaintiffs actually challenge is the denial of pre-FPAA access to the Appeals Office. The FPAA was issued on July 23, 2020. (FPAA, Doc. 22-2 at 36-52.) The Court cannot compel the IRS to rescind the FPAA, as to do so would violate the Anti-Injunction Act, as described above. 26 U.S.C. § 7421(a). As the Court cannot provide Plaintiffs the relief sought, this request is moot. *Fla. Ass'n of Rehab. Facilities*, 225 F.3d at 1216-17.[9]

In addition, Plaintiffs have not established a waiver of sovereign immunity in connection with this request for Appeals Office review. As noted above, "[t]he United States, as sovereign, is immune from suit save as it consents to be sued." *Sherwood*, 312 U.S. at 586. Absent a waiver of sovereign immunity, the Court lacks subject matter jurisdiction to adjudicate claims against the United States and its agencies. *Mitchell*, 463 U.S. at 212. The party bringing the action against the United States or one of its agencies has the burden of showing a waiver of

9. The Court briefly notes that Plaintiffs' position that they had an absolute right to review by the Appeals Office *before* the FPAA was issued is not supported by the statutory text, which clearly contemplates that a taxpayer will make a request to have their case sent to appeals *after* receiving a notice of deficiency. 26 U.S.C. § 7803(e)(5) ("If any taxpayer *which is in receipt of a notice of deficiency* . . . requests referral to the . . . Office of Appeals and such request is denied, the Commissioner . . . shall provide such taxpayer a written notice . . . .") (emphasis added). Here, as noted numerous times above, Plaintiffs do not allege that they sought to go before the Appeals Office after the FPAA was issued.

sovereign immunity. *Lundeen v. Mineta*, 291 F.3d 300, 304 (5th Cir. 2002); *Holloman v. Wyatt*, 708 F.2d 1399, 1401 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2168 (1984).

Plaintiffs' asserted claim is brought under the APA and Plaintiffs argue that the APA's waiver of sovereign immunity applies. (Pl. Resp. at 18.) As noted *supra*, under the APA, district courts lack jurisdiction over administrative action when agency action is committed to agency discretion by law, 5 U.S.C. § 701(a), or when the administrative action in question is not "final" within the meaning of 5. U.S.C. § 704. *Norton*, 324 F.3d at 1236. To be considered "final," the agency action must both (1) mark the consummation of the agency's decisionmaking process, and not be "of a merely tentative or interlocutory nature;" and (2) be one by which rights or obligations have been determined, or from which legal consequences will flow. *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997); s*ee also Franklin v. Massachusetts*, 505 U.S. 788, 797, 112 S. Ct. 2767, 120 L. Ed. 2d 636 ("The core question [in the finality determination] is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties."). By contrast, a nonfinal agency action is "one that 'does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action.'" *Norton*, 324 F.3d at 1237 (quoting *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130, 59 S. Ct. 754, 83 L. Ed. 1147 (1939)).

Here, Defendants argue that the IRS' decision not to refer Hancock's case to the Appeals Office is within

the discretion of the IRS. (Mot., Doc. 22-1 at 16-18.) Specifically, Defendants contend that the text of 26 U.S.C. § 7803(e) delineates agency discretion in stating that review by the Appeals Office shall be "generally available" and also in acknowledging that the Commissioner will, under certain circumstances, decline to refer cases to the Appeals Office. (Def. Mot. at 18) (citing 26 U.S.C. § 7803(e)(4)). Practically speaking, as the Appeals Office operates as the settlement arm of the IRS, Defendants also cite authority for the principle that an agency's decision to settle (or not) is discretionary. *See 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.") (collecting cases). Plaintiffs have not responded to this argument and fail to refute that the IRS' decision not to refer the case to the Appeals Office was within the IRS' discretion. (Pl. Resp. at 18-19.)

Defendants separately contend that Plaintiffs fail to establish a waiver of sovereign immunity under the APA because the decision not to refer Hancock's case to the Appeals Office before the issuance of the FPAA was not a final agency action. Defendants take the position that the "consummation of the [IRS'] decisionmaking process" was the issuance of the FPAA and the steps that led to that point were procedural in nature. (Def. Mot. at 19.) Further, according to Defendants, the rights and consequences of Hancock's tax examination were not determined until the issuance of the FPAA. (*Id.*)

Again, Plaintiffs do not respond to this argument and thus fail to meet their burden to establish that the challenged action was a final agency action. Moreover, the Court agrees with Defendants that the refusal to refer Hancock's case to Appeals before the issuance of the FPAA was interlocutory in nature, not final. The decision "d[id] not itself adversely affect" Plaintiffs and any legal consequences are "contingent on future events." *Norton*, 324 F.3d at 1237.

In a fairly similar case, *Facebook, Inc. v. I.R.S.*, 2018 U.S. Dist. LEXIS 81986, 2018 WL 2215743, *10 (N.D. Cal. May 14, 2018), Facebook was issued a notice of deficiency (similar to an FPAA), which it challenged in Tax Court. After the issuance of the deficiency, Facebook requested that the IRS transfer its case to the Appeals Office, and the IRS denied this request without detailed explanation. *Id.* Facebook sued in district court, arguing that it had a right to take its case to the Appeals Office. The *Facebook* Court determined that the IRS' decision not to refer Facebook's case to the Appeals Office was not a final action under the APA because it was not an action by which rights or obligations had been determined or from which legal consequences flowed, and also because Facebook had challenged the deficiency finding in Tax Court. *Id.* at 18.[10] Although *Facebook* addressed a challenge under the 2015 Protecting Americans from Tax Hikes Act of 2015

10. Indeed, here, the IRS' denial of Plaintiffs' request is even less "final," as Plaintiffs sought access to the Appeals Office *before* the issuance of a deficiency. Plaintiffs' request raises the question of what decision Plaintiffs sought to have "appealed" to the Appeals Office because at that time there was no decision.

("PATH Act"), Pub. L. No. 114-113, 129 Stat. 2242 (2015), and not the 2019 Taxpayer First Act, 26 U.S.C. § 7803(e), *Facebook*'s reasoning applies squarely to Plaintiffs' challenge here.[11]

Consequently, because Plaintiffs have not refuted the IRS' arguments the that decision not to refer Hancock's case to the Appeals Office was (1) within the agency's discretion and (2) not a final agency action, they have not established that the APA's waiver of sovereign immunity applies.

Plaintiffs also fail to establish a waiver of sovereign immunity through the Declaratory Judgment Act, 28 U.S.C. § 2201, which excludes federal tax matters from its ambit. The Parties agree that the Declaratory Judgment Act is interpreted consistently with the Anti-Injunction

11. The *Facebook* decision was issued before the passage of the Taxpayer First Act. In that case, Facebook based its assertion that it had a right to appeal on the "Taxpayer Bill of Rights" included in the Protecting Americans from Tax Hikes Act of 2015 ("PATH Act"), Pub. L .No. 114-113, 129 Stat. 2242 (2015), relevant portion codified at 26 U.S.C. § 7803(a)(3). The provision at issue identified a "**right to appeal a decision** of the Internal Revenue Service and be heard." *Id.* § 7803(a)(E). In a thorough analysis, the *Facebook* Court determined the PATH Act did not grant new enforceable rights but instead imposed an obligation on the Commissioner to ensure that IRS employees act in accordance with preexisting taxpayer rights. 2018 U.S. Dist. LEXIS 81986, 2018 WL 2215743, at *13. Plaintiffs here rely heavily on the 2019 TFA's language identifying a "right to appeal." (Pl. Resp. at 10-11.) But as articulated in the *Facebook* decision, the inclusion of the word "right" cannot be read out of context to confer new enforceable and absolute rights. Plaintiffs do not mention or address this *Facebook* decision.

Act. *Mobile Republican Assembly*, 353 F.3d at n.6 (11th Cir. 2003) ("Because the federal tax exception to the Declaratory Judgment Act is at least as broad as the prohibition of the Anti-Injunction Act, our holding also forecloses the appellees from seeking declaratory relief."). As noted throughout, the Anti-Injunction Act bars any "suit for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a). The Act bars preenforcement review, *CIC Services*, 141 S. Ct. at 1593, and bars claims that seek to restrain IRS activities intended to culminate in the assessment of a tax, *Kemlon Prods.*, 638 F.2d at 1320.

Here, the crux of Plaintiffs' Complaint and their arguments in briefing acknowledge that the goal of requesting that the IRS to refer Hancock's case to the Appeals Office was to prevent or mitigate the effects of the issuance of the FPAA (the deficiency). *See e.g.*, Compl. ¶ 5 ("By depriving Plaintiffs of their statutorily mandated right to a hearing with the Appeals Office now, the Defendants will be able to immediately assess a tax . . . ."); *see also* (Pl. Resp. at 23) (arguing that any tax resulting from the FPAA is invalid and unsustainable). Accordingly, Plaintiffs' request for review by the Appeals Office, either to prevent the issuance of the FPAA or to challenge its issuance after the fact, is an attempt to restrain "activities which are intended to or may culminate in the assessment or collection of taxes," and therefore implicates the Anti-Injunction Act. *Kemlon Prods.*, 638 F.2d at 1320 (5th Cir. 1981). Because the Anti-Injunction Act and the Declaratory Judgment Act are coterminous, this action is outside the jurisdiction conferred by the Declaratory Judgment Act.

Mobile Republican Assembly, 363 F.3d at n.6. Plaintiffs have failed to establish the Court's jurisdiction over this requested relief, as well as this action as a whole.

CONCLUSION

Plaintiffs' Amended Complaint is due to be dismissed for lack of federal subject matter jurisdiction. The action primarily requests pre-FPAA relief, which is moot and the Court cannot now grant because the FPAA has already been issued. Further, Plaintiffs' requests for injunctive relief implicate the Anti-Injunction Act, 26 U.S.C. § 7421(a), because they ask the Court to restrain activities intended to culminate in the issuance of an assessment, which can only occur after the IRS issues the FPAA and any challenge to the FPAA is addressed by the Tax Court. As the Declaratory Judgment Act's prohibition on entering declaratory judgment regarding federal taxes is at least as broad as the Anti-Injunction Act, it also does not confer jurisdiction. In addition, the APA does not provide jurisdiction over the challenged actions because those actions are discretionary and not final. Plaintiffs, of course, have an alternate remedy here, one they are already pursuing—relief in Tax Court. As the Court lacks subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), Defendants Motion to Dismiss [Doc. 22] is **GRANTED**. The Clerk is **DIRECTED** to close the case.

IT IS SO ORDERED this 7th day of July 2021.

/s/ Amy Totenberg
Honorable Amy Totenberg
United States District Judge

APPENDIX C — OPINION & 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.

June 21, 2022, Decided;
June 21, 2022, Filed

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 C

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 D — STATUTES AND REGULATIONS

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.

(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.

(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*

Appendix D

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)).*