IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

GBX ASSOCIATES LLC,	)	
	)	Case No. 1:22-cv-00401-PAB
Plaintiff,	)	
	)	Judge Pamela A. Barker
v.	)	
	)	
UNITED STATES OF AMERICA, *et al.*,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

In response and opposition to the plaintiff GBX Associates LLC's ("GBX") motion for summary judgment, the defendants United States of America, Department of the Treasury, and IRS cross-move for summary judgment that IRS Notice 2017-10 is held unlawful and set aside as to GBX only. A supporting brief is attached.

Respectfully Submitted,

DAVID A. HUBBERT
Deputy Assistant Attorney General
U.S. Department of Justice,
Tax Division

/s/ Edward J. Murphy
EDWARD J. MURPHY
RYAN D. GALISEWSKI
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 55
Washington, D.C. 20044
Tel: (202) 307-6064 / (202) 305-3719
Fax: (202) 514-5238
Edward.J.Murphy@usdoj.gov
Ryan.D.Galisewski@usdoj.gov

Certificate of Service

I certify that on June 24, 2022, I electronically filed the foregoing **Defendants' Cross-Motion for Judgment** and thereby served all counsel of record.

/s/ Edward J. Murphy
EDWARD J. MURPHY
Trial Attorney, Tax Division

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

GBX ASSOCIATES LLC,	)	
	)	Case No. 1:22-cv-00401-PAB
Plaintiff,	)	
	)	Judge Pamela A. Barker
v.	)	
	)	
UNITED STATES OF AMERICA, *et al.*,	)	
	)	
Defendants.	)	
	)	

BRIEF IN SUPPORT OF
DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND
IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Respectfully Submitted,

DAVID A. HUBBERT
Deputy Assistant Attorney General
U.S. Department of Justice,
Tax Division

/s/ Edward J. Murphy
EDWARD J. MURPHY
RYAN D. GALISEWSKI
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 55
Washington, D.C. 20044
Tel: (202) 307-6064 / (202) 305-3719
Fax: (202) 514-5238
Edward.J.Murphy@usdoj.gov
Ryan.D.Galisewski@usdoj.gov

I certify that this memorandum adheres to the 20-page limit for memoranda in support of dispositive motions in cases with unassigned classification, as set forth in Local Civil Rule 7.1(f). /s/ Edward J. Murphy 6/24/22.

TABLE OF CONTENTS

I. Introduction……………………………………………………………………………..1

II. Background……………………………………………………………………………..2

III. Argument…………………………………………………………………………………4

A. The APA Does Not Mandate Nationwide Relief for All Taxpayers……………...5

B. GBX Lacks Standing to Seek Relief as to Non-Parties………………………...…8

C. Setting Aside the Notice as to GBX Only Is Consistent with the Traditional Limits on the Scope of Equitable Remedies………………………...12

D. Section 706's Instruction to "Set Aside" Is Part of a Waiver of Sovereign Immunity That Must Be Strictly Construed in the Government's Favor………..16

E. The United States Should Be Permitted to Dispute the Analysis in *Mann* and Defend the Validity of the Notice in Other Jurisdictions……………………18

IV. Conclusion………………………………………………………………………… 20

TABLE OF AUTHORITIES

Cases

Allied-Signal v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146 (D.C. Cir. 1993)……….7-8 n.3

Alvarez v. Smith, 558 U.S. 87 (2009)……………………………………………………….14

Ammex, Inc. v. United States, 367 F.3d 530 (6th Cir. 2004)………………………………...…9

Arizona v. Biden, 31 F.4th 469 (6th Cir. Apr. 12, 2022) (Sutton, C.J., concurring)……..1, 6, 8, 14

Arizona v. City & County of San Francisco, California,
--- S. Ct. ----, 2022 WL 2135493 (June 15, 2022)…………………………………….....6 n.2

Arizona v. Evans, 514 U.S. 1 (1995) (Ginsburg, J., dissenting)………………………………....18

Ass'n of Am. Physicians & Surgeons v. FDA, 13 F.4th 531 (6th Cir. 2021)……………..…..11 n.6

Biggs v. Quicken Loans, Inc., 990 F. Supp. 2d 780 (E.D. Mich. 2014)…………………………...8

Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs,
781 F.3d 1271 (11th Cir. 2015)……………………………………………………………….15

California v. Texas, 141 S. Ct. 2104 (2021)…………………………………………………11, 13

CASA de Md., Inc. v. Trump, 971 F.3d 220, (4th Cir.), *reh'g en banc granted*,
981 F.3d 311 (4th Cir. 2020), *voluntarily dismissed prior to hearing*………….………………..18

CIC Services, LLC v. IRS, 141 S. Ct. 1582 (2021)……………………………………....16 n.11

City of Chicago v. Barr, 961 F.3d 882 (7th Cir. 2020)…………………………………..17 n.12

Clapper v. Amnesty Intern. USA, 568 U.S. 398 (2013)………………………………………...9

Comcast Corp. v. Behrend, 569 U.S. 27 (2013)………………..……………………………..14

DamilerChrysler Corp. v. Cuno, 547 U.S. 332 (2006)……………………………………………8

Dep't of Army v. Blue Fox, Inc., 525 U.S. 255 (1999)…………………………………………..…17

Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (2020) (Gorsuch, J., concurring)...1-2, 12, 19

Estate of Smith ex rel. Richardson v. United States, 509 F. App'x 436 (6th Cir. 2012)……...…17

FAA v. Cooper, 566 U.S. 284 (2012)………………………………………………………….…17

Friends of the Earth v. Haaland,
--- F.Supp.3d ----2022 WL 254526 (D.D.C. Jan. 27, 2022)……………………………..16 n.10

Gill v. Whitford, 138 S. Ct. 1916 (2018)……………………………………………………8, 11

Gun Owners of America, Inc. v. Garland, 992 F.3d 446 (6th Cir. 2021),
vacated on other grounds, 19 F.4th 890 (6th Cir. 2021) (en banc)…………………………..…19

Hill v. Snyder, 821 F.3d 763 (6th Cir. 2016)…………………………………………..…..15 n.9

In re Caudill, No. 20-3834, 2020 WL 6748203 (6th Cir. Oct. 30, 2020)………………………..12

Johnson v. Governor of New Jersey, No. 21-1795, 2022 WL 767035 (3d Cir. Mar. 14, 2022)…13

Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003)……14 n.8

Lee v. City of Columbus, No. 2:07-cv-1230,
2008 WL 2557255 (S.D. Ohio June 24, 2008)…………………………………………15 n.9

Los Angeles Haven Hospice, Inc. v. Sebelius, 638 F.3d 644 (9th Cir. 2011)…………………....14

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)…………………………………………10

Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994)……………………………………13

Mann Construction, Inc. v. United States, 27 F.4th 1138 (6th Cir. Mar. 3, 2022)…………passim

Mass. Delivery Ass'n v. Coakley, 671 F.3d 33 (1st Cir. 2012)…………………………………..13

Monsanto Co. v. Geerston Seed Farms, 561 U.S. 139 (2010)…………………...…14, 15, 16 n.10

Morris v. U.S. Army Corps of Eng'rs, 60 F. Supp. 3d 1120 (D. Idaho 2014)……………….14 n.8

National Mining Association v. U.S. Army Corps of Engineers,
145 F.3d 1399, 1409 (D.C. Cir. 1998)……………………………………………………7-8, 19

Nken v. Holder, 556 U.S. 418 (2009)……………………………………………………………..6

Portsmouth Ambulance, Inc. v. United States, 756 F.3d 494 (6th Cir. 2014)…………………...17

Powers v. Ohio, 499 U.S. 400 (1991)…………………………………………………..11 n.6

Salazar v. Buono, 559 U.S. 700 (2010)…………………………………………………..…8, 12

Sharpe v. Cureton, 319 F.3d 259 (6th Cir. 2003)…………………………………………15 n.9

Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976)………………………………………...9

Skyworks, Ltd. v. Centers for Disease Control, 542 F. Supp. 3d 719 (N.D. Ohio 2021)…...passim

Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs,
985 F.3d 1032 (D.C. Cir. 2021)…………………………………………………...15-16 & n.10

Summers v. Earth Island Institute, 555 U.S. 488 (2009)……………………………………..11-12

Tennessee Hospital Association v. Azar, 908 F.3d 1029 (6th Cir. 2018)…………………………5

Tesmer v. Granholm, 333 F.3d 683 (6th Cir. 2003),
overruled on other grounds sub nom Kowalski v. Tesmer, 543 U.S. 125 (2004)……………15 n.9

Town of Chester, N.Y. v. Laroe Estates, Inc., 137 S. Ct. 1645 (2017)……………………………8

TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021)……………………………………...…11

Trump v. Hawaii, 138 S. Ct. 2392 (2018) (Thomas, J., concurring)…………………….…1, 18

United States v. Mendoza, 464 U.S. 154 (1984)………………………………………..18, 19

Virginia Society for Human Life, Inc. v. FEC, 263 F.3d 379 (4th Cir. 2001)…………………...13

Warth v. Seldin, 422 U.S. 490 (1975)……………………………………………………....11

Washington v. Reno, 35 F.3d 1093 (6th Cir. 1994)……………………………………….15 n.9

Webster v. Doe, 486 U.S. 592 (1988)……………………………………………………....12

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982)……………………………………...….6

Statutes

5 U.S.C. § 702……………………………………………………………………..………..16

5 U.S.C. § 703……………………………………………………………………..…12, 16

5 U.S.C. § 706………………………………………………………………………….passim

26 U.S.C. § 6111…………………………………………………………………………...……2

26 U.S.C. § 6111(b)(1)………………………………………………………………………… 2

26 U.S.C. § 6112……………………………………………………………………………..2

26 U.S.C. § 6707A(c)(1)…………………………………………………………………...…2

26 U.S.C. § 6707A(c)(2)……………………………………………………………………..2

26 U.S.C. § 7421(a)………………………………………………………...……16 n.11

28 U.S.C. § 2201……………………………………………………………………..…..13

Other Authorities

26 C.F.R. § 1.6011-4………………………………………………………………………....2

26 C.F.R. § 1.6011-4(d)……………………………………………………………………11

26 C.F.R. § 301.6111-3(d)(1)……………………………………………………..10 n.5

26 C.F.R. § 301.6111-3(d)(2)………………………………………………………….....10

IRS increases enforcement action on Syndicated Conservation Easements, https://www.irs.gov/newsroom/irs-increases-enforcement-action-on-syndicated-conservation-easements [https://perma.cc/M9N7-6CJL]…………………………………………….….3

IRS Notice 2007-83, 2007-45 I.R.B. 960…………………………………………………4

IRS Notice 2017-10, 2017-4 I.R.B. 544…………………………………………….passim

IRS wraps up its 2021 "Dirty Dozen" scams list with warning about promoted abusive arrangements https://www.irs.gov/newsroom/irs-wraps-up-its-2021-dirty-dozen-scams-list-with-warning-about-promoted-abusive-arrangements [https://perma.cc/7J2H-YGSV]……………………….....3

IRS wraps up 2022 "Dirty Dozen" scams list; agency urges taxpayers to watch out for tax avoidance strategies https://www.irs.gov/newsroom/irs-wraps-up-2022-dirty-dozen-scams-list-agency-urges-taxpayers-to-watch-out-for-tax-avoidance-strategies [https://perma.cc/6BW3-737D]…………...3

John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 Yale J. Reg. Bull. 37, 41–47 (2020)……….....6, 17

Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121, 1191–92 (2020)…..6

Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 438 n.121 (2017)……………………………………………………....6

I. Introduction

Plaintiff GBX Associates LLC ("GBX") has sued the United States of America, Department of the Treasury, and IRS (collectively, the "United States") under the Administrative Procedure Act ("APA") seeking to invalidate IRS Notice 2017-10, 2017-4 I.R.B. 544 ("the Notice"), which identifies certain syndicated conservation easement transactions as "listed transactions" subject to reporting and recordkeeping requirements. The United States concedes that the Notice is unlawful under the APA based on controlling Sixth Circuit authority in *Mann Construction, Inc. v. United States*, 27 F.4th 1138 (6th Cir. Mar. 3, 2022). *Mann* held that another IRS listed transaction notice was a legislative rule and that, because the IRS issued it without following notice-and-comment procedures, it was promulgated in violation of the APA. The United States agrees that the analysis in *Mann* applies to the Notice and that the Court should, under 5 U.S.C. § 706, "hold unlawful and set aside" the Notice as to GBX.

However, the United States disagrees emphatically with GBX's proposed remedy that would extend relief beyond the plaintiff in this case and invalidate the Notice beyond the Sixth Circuit. The United States maintains that it should still be able to argue in cases outside the Sixth Circuit that *Mann* was wrongly decided and that the Notice (as well as other listed transaction notices issued without notice and comment) remain valid and enforceable.

In seeking nationwide relief disconnected from the plaintiff's own injury, GBX takes a position that another judge of this Court declined to adopt last year, *see Skyworks, Ltd. v. Centers for Disease Control*, 542 F. Supp. 3d 719 (N.D. Ohio 2021); that was sharply criticized just two months ago by the Chief Judge of the Sixth Circuit who wrote the *Mann* opinion, *see Arizona v. Biden*, 31 F.4th 469, 484 (6th Cir. Apr. 12, 2022) (Sutton, C.J., concurring); and that has been assailed by two justices of the Supreme Court, *see Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring), and *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600

(2020) (Gorsuch, J., concurring). This brief will demonstrate that the sweeping judgment sought by GBX is not mandated by the APA and would violate basic principles of Article III, equity jurisdiction, and sovereign immunity, while inhibiting development of the law. The Court should therefore deny GBX's motion for summary judgment and grant the United States' cross-motion.

II. Background

As part of the IRS's program to combat abusive tax shelters, the Internal Revenue Code allows any transaction that is "of a type which the Secretary determines as having a potential for tax avoidance or evasion" to be designated as a "reportable transaction." 26 U.S.C. § 6707A(c)(1). A "material advisor" with respect to a reportable transaction (as defined in 26 U.S.C. § 6111(b)(1)) has transaction-related disclosure and recordkeeping obligations under the Code. *See* 26 U.S.C. §§ 6111, 6112. A "participant" in a reportable transaction has a disclosure requirement as well. *See* 26 C.F.R. § 1.6011-4. One type of reportable transaction is a "listed transaction," defined as being "the same as, or substantially similar to, a transaction specifically identified by the Secretary as a tax avoidance transaction." 26 U.S.C. § 6707A(c)(2).

On December 23, 2016, the IRS issued the Notice, titled "Listing Notice--Syndicated Conservation Easement Transactions." ECF No. 1-1. The Notice announced that the syndicated conservation easement transaction described in Section 2 of the Notice, as well as substantially similar transactions, were listed transactions subject to disclosure and recordkeeping requirements. The Notice explained that some promoters are syndicating conservation easement transactions that purport to give investors the opportunity to obtain charitable contribution deductions in amounts that significantly exceed the amount invested. Under these schemes, an investor receives promotional materials that offer prospective investors in a pass-through entity the possibility of a charitable contribution deduction that equals or exceeds an amount that is two and one-half times the amount of the investor's investment. The promoters "syndicate" the

investors' ownership interests through a partnership or other pass-through entity created to hold title to the property on which the conservation easement is to be donated. The promoters obtain an appraisal that inflates the property's value based on unreasonable factual assumptions and conclusions about the property's development potential. The entity then donates a conservation easement on the property. The resulting charitable deduction, representing the difference between the inflated appraisal and the reduced value of the encumbered property, passes through the entity to be allocated among the entity's investors. This results in exaggerated tax benefits to the investors that are worth significantly more than the investors' initial investments.

Since 2019, syndicated conservation easements have been on the IRS's "dirty dozen" list of tax schemes. As Commissioner Charles P. Rettig commented in 2019: "Abusive syndicated conservation easement transactions undermine the public's trust in private land conservation and defraud the government of revenue." https://www.irs.gov/newsroom/irs-increases-enforcement-action-on-syndicated-conservation-easements [https://perma.cc/M9N7-6CJL]. A 2021 IRS release added that "promoters take a provision of tax law for conservation easements and twist it . . . to game the system and generate inflated and unwarranted tax deductions." https://www.irs.gov/newsroom/irs-wraps-up-its-2021-dirty-dozen-scams-list-with-warning-about-promoted-abusive-arrangements [https://perma.cc/7J2H-YGSV]. And again, just this month, the IRS warned that abusive syndicated conservation easements "do nothing more than game the tax system with grossly inflated tax deductions and generate high fees for promoters." https://www.irs.gov/newsroom/irs-wraps-up-2022-dirty-dozen-scams-list-agency-urges-taxpayers-to-watch-out-for-tax-avoidance-strategies [https://perma.cc/6BW3-737D]. "In the last five years, the IRS has examined many hundreds of syndicated conservation easement deals where tens of billions of dollars of deductions were improperly claimed. It is an agency-wide effort using a significant number of resources and thousands of staff hours." *Id.*

GBX is a material advisor with respect to syndicated conservation easement transactions identified as listed transactions in Section 2 of the Notice. GBX alleges that it is injured by the Notice due to costs incurred by both itself and others in complying with the listed transaction requirements. Complaint ¶¶ 41-44. It filed this action on March 11, 2022, asserting that the IRS violated the APA by promulgating the Notice without following notice-and-comment procedures. *Id*. ¶ 63. The filing came only eight days after the Sixth Circuit's decision in *Mann*, which reversed the district court and found that another IRS listed transaction notice (IRS Notice 2007-83, 2007-45 I.R.B. 960) violated the APA. 27 F.4th at 1148. Relying on *Mann* (Complaint ¶ 6), GBX asks that the Court both "[d]eclare Notice 2017-10 unlawful and set it aside" and "[p]ermanently enjoin enforcement of Notice 2017-10." *Id*. (Prayer for Relief).

The United States has conceded that the analysis in *Mann* applies to the Notice because *Mann* is controlling precedent within the Sixth Circuit. ECF No. 15 (Answer, response to ¶ 6). However, the United States reserves the right to dispute the correctness of *Mann*, and to assert the validity of the Notice and other listed transaction notices, in cases outside the Sixth Circuit. *See id*. For instance, on June 13, 2022, the United States filed a motion for summary judgment in *Green Rock LLC v. IRS*, Case No. 2:21-cv-1320 (N.D. Ala.), contending that *Mann* was wrongly decided and that the Notice is valid. Exhibit 1 attached to this brief (*Green Rock* motion).

GBX has moved for summary judgment that the Notice "should be vacated in whole and not set aside as to Plaintiff only." ECF No. 17. In other words, GBX asks that the Notice be set aside as to all taxpayers nationwide. The United States cross-moves to limit relief to GBX only.

III. Argument

The Court should grant relief only as to GBX for the five reasons discussed below. First, no broader relief is mandated by the text of the APA or any controlling Sixth Circuit authority. Second, the expansive judgment sought by GBX would exceed the Court's Article III power

because GBX lacks standing to sue based on alleged harm to non-parties. Third, GBX's proposal would go beyond the traditional scope of the equitable remedies it requests. Fourth, the "set aside" language in 5 U.S.C. § 706 is part of a sovereign-immunity waiver and so must be strictly construed in the government's favor. Fifth, restricting relief to the party before the Court fosters the development of the law and the healthy functioning of the judicial system.

A. The APA Does Not Mandate Nationwide Relief for All Taxpayers

Because this Court must find the Notice invalid based on controlling Sixth Circuit authority in *Mann*, the APA, in 5 U.S.C. § 706, instructs that the Court "shall . . . hold unlawful and set aside" the Notice. But on the question of the scope of the "setting aside"—whether framed *as to whom* the Notice shall be set aside or *where* it shall be set aside—§ 706 is silent.

GBX is wrong to assert that *Mann* "controls the result here" in this respect. ECF No. 17-1 at 9. Although *Mann* does not expressly address the scope of relief, it does, for its explanation of "set aside," cite the 2018 Sixth Circuit APA case of *Tennessee Hospital Association v. Azar*, 908 F.3d 1029. *See Mann*, 27 F.4th at 1143. In *Tennessee Hospital*, the court affirmed a decision that a Medicare rule was improperly promulgated without notice and comment, but it expressly limited the scope of the remedy to the plaintiffs only. 908 F.3d at 1046-47. This limitation refutes GBX's apparent belief that *Tennessee Hospital* supports its claim for broader relief (*see* ECF No. 17-1 at 9) and suggests *Mann* similarly intended only plaintiff-specific relief.[1]

The uncertainty over the effect of *Mann* belies GBX's blithe assertions that "the law is clear" and the United States' position is "highly unusual and bizarre." ECF No. 17-1 at 4. In

[1] The *Mann* plaintiffs recently filed a motion in district court on remand claiming the decision on appeal means "[t]he entire Notice is set aside everywhere as to everyone." Case No. 1:20-cv-11307, ECF No. 53 (E.D. Mich. June 8, 2022). The United States intends to oppose that motion. Another suit filed in New Jersey on May 11, 2022, alleges *Mann* "is universal and applicable nationwide." *Oom, Inc. v. United States*, Case No. 2:22-cv-2762 (D.N.J.), ECF No. 1 ¶ 19. The Answer in that case is currently due July 19.

reality, the law is unsettled, and the meaning of "set aside" in § 706 is hotly contested among judges and scholars.[2] Most importantly for this Court's consideration, while there is no controlling Sixth Circuit precedent on the issue, two recent opinions, one from the Sixth Circuit and one from this District, address the issue and offer sound analyses supporting the government.

The most recent Sixth Circuit pronouncement is Chief Judge Sutton's April 12, 2022 concurring opinion in *Arizona v. Biden*, a case that granted a stay pending appeal of a nationwide injunction of the Department of Homeland Security's immigration enforcement priorities memorandum. His opinion comments directly on the issue now before the Court and expressly disagrees with GBX's view that "set aside" requires nullifying agency action nationwide:

> The [APA], it is true, says that a reviewing court may "hold unlawful and set aside" agency actions that violate the law. 5 U.S.C. § 706(2). But that raises a question; it does not answer it. The question is whether Congress meant to upset the bedrock practice of case-by-case judgments with respect to the parties in each case or create a new and far-reaching power through this unremarkable language. We presume that statutes conform to longstanding remedial principles. *Nken v. Holder*, 556 U.S. 418, 433 (2009); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982). And it is far from clear that Congress intended to make such a sweeping change. *Compare* [Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 438 n.121 (2017)]; *and* John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 Yale J. Reg. Bull. 37, 41–47 (2020); *with* Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121, 1191–92 (2020). Use of the "setting aside" language does not seem to tell us one way or another whether to nullify illegal administrative action or not to enforce it in the case with the named litigants. For that reason, I would be inclined to stand by the long-understood view of equity—that courts issue judgments that bind the parties in each case over whom they have personal jurisdiction.

Arizona v. Biden, 31 F.4th 469, 484 (6th Cir. Apr. 12, 2022) (Sutton, C.J., concurring). Notably, Chief Judge Sutton also wrote the *Mann* opinion, and his *Arizona* concurrence further indicates

[2] As recently as June 15, four Supreme Court justices signaled that it remains an open question "whether, contrary to what '[t]he government has long argued,' the APA 'authorize[s] district courts to vacate regulations or other agency actions on a nationwide basis[.]'" *Arizona v. City & County of San Francisco, California*, --- S. Ct. ----, 2022 WL 2135493 at *1 (June 15, 2022) (concurring opinion in dismissal of writ of certiorari) (quoting brief for federal respondents).

that his use of "set aside" in *Mann* was not intended to provide relief to non-parties.

Judge Calabrese's decision in *Skyworks, Ltd. v. Centers for Disease Control and Prevention*, 542 F. Supp. 3d 719 (N.D. Ohio June 3, 2021), also supports the United States' position. That case concerned the moratorium on evictions due to the COVID-19 pandemic, which Judge Calabrese found to have exceeded the CDC's authority. Plaintiffs then sought "a ruling on whether the Court's judgment binds only the parties to this action or applies more broadly and, if so, how far." *Id*. at 722. Noting that "[t]his dispute implicates complex legal issues and doctrines" that are "the subject of debate," *id*., Judge Calabrese canvassed relevant authorities, finding "that the scope of relief under the [APA] in a case like this remains unsettled." *Id*. at 728. For one, "the statutory text directing a reviewing court to 'hold unlawful and set aside agency action' does not directly resolve the parties' disagreement over the scope of the remedy" because it leaves open "the question as to whom the agency action shall be set aside—only the parties, all affected by the agency action, or some group in between, perhaps one limited by the geographic limits of the Court's jurisdiction." *Id*. at 729. Ultimately, Judge Calabrese declined to order universal relief, concluding that "the lack of a firm foundation for nationwide vacatur in the language, structure, and history of the [APA] is striking." *Id*. at 735.

GBX completely ignores these recent opinions, instead selectively citing out-of-circuit law, primarily from the D.C. Circuit, that it finds more advantageous. Most prominently, GBX relies on *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998), citing that case five times, as well as several other cases that parrot *National Mining* for the proposition that "the ordinary result" for an APA violation is universal vacatur.[3]

---

[3] Even in the D.C. Circuit, vacatur is not always the appropriate remedy for an APA violation. Weighing the "seriousness" of a violation and "disruptive consequences" of vacatur, some courts have remanded to the agency without vacatur. *See*, *e.g.*, *Allied-Signal v. U.S. Nuclear Regulatory*

(continued...)

But, "[u]nlike the Ninth and D.C. Circuits, the Sixth Circuit is not among those that have adopted a rule like *National Mining* or otherwise provided a precedential interpretation of Section 706." *Skyworks*, 542 F. Supp. 3d at 734. In fact, "the Sixth Circuit has previously acted under the rule that agency regulations like the one in *National Mining Ass'n* may be stricken on a circuit-by-circuit basis, and independently by each circuit." *Biggs v. Quicken Loans, Inc.*, 990 F. Supp. 2d 780, 786 (E.D. Mich. 2014).

Consistent with the well-reasoned analyses in Judge Sutton's concurrence in *Arizona* and Judge Calabrese's decision in *Skyworks*, the ambiguity in the "set aside" language of § 706 should be resolved in the United States' favor for the four additional reasons discussed below.

B. GBX Lacks Standing to Seek Relief as to Non-Parties

"[S]tanding is not dispensed in gross." *DamilerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006) (quotation omitted). "To the contrary, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quotation omitted). For instance, a plaintiff "cannot sidestep Article III's requirements by combining a request for injunctive relief for which he *has* standing with a request for injunctive relief for which he *lacks* standing." *Salazar v. Buono*, 559 U.S. 700, 731 (2010) (Scalia, J., concurring in the judgment). By the same token, "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). Applied here, this means that the proper remedy is to set aside the Notice as to GBX, thus redressing GBX's own asserted injury based on its listed transaction obligations, but not as to any non-parties. *See* ECF No. 17-1 at 12 (admitting that "an order setting aside Notice 2017-10 as to GBX would technically relieve GBX of its own filing obligation").

Comm'n, 988 F.2d 146, 150-51 (D.C. Cir. 1993). Thus, the D.C. Circuit acknowledges the existence of the courts' equitable discretion not to vacate agency rules when the APA is violated. The United States is not requesting a remand without vacatur in the present case, though.

In resisting this outcome, GBX has taken two slightly different positions with regard to standing over the course of this litigation, but neither withstands scrutiny.

At the outset, plaintiff's Complaint and motion for speedy hearing (ECF No. 7) advanced the theory that GBX was injured by reporting and recordkeeping requirements imposed against other taxpayers. This was because of GBX's own business decision to take on the contractual obligation to prepare tax forms for those other taxpayers with respect to GBX-promoted transactions. *See* Complaint ¶ 42 (complaining about compliance costs of "other material advisors" as well as "investors who participate" in the transactions GBX sets up); *see also* ECF No. 10 at 3 (alleging injuries to "Plaintiff and many other advisors and taxpayers").

But any such injury is caused by GBX's own choice to enter into these alleged contractual relationships and is not fairly traceable to the government. It is well established that a plaintiff's standing cannot be the result of "the independent action of some third party not before the court," such as some unnamed taxpayer who demanded that GBX agree to prepare its tax forms. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976). Nor is harm that is "self-inflicted" actionable, *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 418 (2013), and that restriction would apply if GBX had gratuitously offered to accept the burden of preparing these tax forms for others. Either way, GBX does not have standing based on the disclosure or recordkeeping obligations of other taxpayers. *See Ammex, Inc. v. United States*, 367 F.3d 530, 533 (6th Cir. 2004) (no standing to challenge excise tax assessed against third party, since "alleged injury . . . in the form of increased fuel costs was not occasioned by the Government").[4]

Even if the Court were open to this theory of standing, the record does not support it. GBX initially sought relief for a "constellation" of GBX and other unnamed taxpayers with

[4] Similarly, the allegation that "several states have laws that impose reporting obligations that are triggered by IRS's 'listed transaction' designation," Complaint ¶ 38, does not confer standing.

whom GBX does business, but GBX abandoned this argument when the United States asked it to identify these other taxpayers and to substantiate their obligations and contracts. As a result, there is no evidence to support GBX's bare assertion—and we do not concede—that GBX itself is harmed by disclosure and recordkeeping requirements applicable to non-parties. Thus, the Court must reject standing to assert those supposed injuries and decline to expand a remedy to reach them. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (standing is "an indispensable part of the plaintiff's case" on which "plaintiff bears the burden of proof.").

Now, on summary judgment GBX now makes a slightly different version of the "constellation" argument but runs into the same problem. According to GBX, the government's proposed judgment is "unworkable" because "a material advisor such as GBX must file Form 8918 with" the IRS Office of Tax Shelter Analysis to obtain a reportable transaction number and then "is required to provide" that number "to all taxpayers and other material advisors" involved in the transaction. ECF No. 17-1 at 11-12; *see* 26 C.F.R. § 301.6111-3(d)(2). Consequently, if GBX stops requesting reportable transaction numbers, then it claims that "each of these parties in GBX's transactions would be without the necessary information to comply with Notice 2017-10 and would be subject to civil penalties and criminal prosecution." ECF No. 17-1 at 12.

For one thing, the claim is false. To the extent GBX already filed Form 8918 with respect to certain transactions, it has received reportable transaction numbers for those transactions and can provide them to participants and other material advisors (if not done already).[5] Regardless, the requirement for GBX to provide the number arises in 26 C.F.R. § 301.6111-3(d)(2), which says the IRS will issue to the material advisor a number, and the material advisor must provide the number to all taxpayers and other material advisors for whom the material advisor (here,

[5] GBX was only required to file one Form 8918 for all substantially similar transactions and is not required to file an additional form for each additional taxpayer that enters into the same or substantially similar transactions. *See* 26 C.F.R. § 301.6111-3(d)(1).

GBX) acts as a material advisor. However, the IRS will not issue GBX a number if GBX does not file a Form 8918, and there would thus be no reportable transaction number to provide. With respect to participants, § 1.6011-4(d) states, "[i]f a taxpayer receives one or more reportable transaction numbers for a reportable transaction, the taxpayer must include the reportable transaction number(s) on the Form 8886 (or a successor form)." By its terms, then, the requirement only applies "if" a number is received. A taxpayer who does not receive a reportable transaction number—as GBX claims would be the case for participants in its transactions when GBX no longer files Form 8918—is under no obligation to report one.

Even if the allegation were true, GBX would still have no standing to pursue a remedy for alleged injury to other "parties in GBX's transactions" (ECF No. 17-1 at 12) who GBX (incorrectly) believes would be vulnerable to penalties. That is because GBX "must assert [its] own legal rights and interests, and cannot rest [its] claim to relief on the legal rights or interests of third parties."[6] *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Again, a "plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill*, 138 S. Ct. 1916, 1934 (2018). As the Supreme Court has explained, "Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) (quotation omitted); *see also California v. Texas*, 141 S. Ct. 2104, 2115 (2021) ("Remedies ordinarily operate with respect to specific parties" and not "on legal rules in the abstract" (quotation omitted)).

This standing principle remains relevant in the APA context. In *Summers v. Earth Island*

[6] A plaintiff may bring suit on behalf of a third party if it has "a close relation to the third party" and there is "some hindrance to the third party's ability to protect his or her own interests," but there is nothing in the record suggesting GBX meets either of these criteria here. *Powers v. Ohio*, 499 U.S. 400, 411-12 (1991) (citations omitted); *see also Ass'n of Am. Physicians & Surgeons v. FDA*, 13 F.4th 531, 540 (6th Cir. 2021) ("[I]t is hard to see how the Supreme Court's more recent caselaw on standing has not undercut its associational-standing test.").

Institute, 555 U.S. 488 (2009), the Supreme Court held that the plaintiffs lacked standing to challenge Forest Service regulations under the APA after the parties had resolved the controversy regarding the application of the regulations to the project that had caused the plaintiffs' alleged injury. Noting that the plaintiffs' "injury in fact with regard to that project ha[d] been remedied," *id*. at 494, the Court held that to allow the plaintiffs to challenge the regulations "apart from any concrete application that threatens imminent harm to [their] interests" would "fly in the face of Article III's injury-in-fact requirement." *Id*.

In sum, GBX's injury is based on its own obligations, and that injury is fully remedied by a judgment setting the Notice aside as to GBX only. Because GBX lacks standing to pursue any further relief as to non-parties, the Court should not extend its jurisdiction to grant such relief.

C. Setting Aside the Notice as to GBX Only Is Consistent with the Traditional Limits on the Scope of Equitable Remedies

Complementing Article III's constitutional limit on judicial power, the traditional understanding of the courts' equity jurisdiction imposes similar constraints. That understanding is that "[e]quitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit." *New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring). By contrast, universal remedies, such as GBX seeks, "share the same basic flaw—they direct how the defendant must act toward persons who are not parties to the case." *Id*.

The injunctive and declaratory relief sought by GBX are equitable remedies. *See Salazar*, 559 U.S. at 714; *In re Caudill*, No. 20-3834, 2020 WL 6748203 at *1 (6th Cir. Oct. 30, 2020); *Skyworks*, 542 F. Supp. 3d at 723. Moreover, 5 U.S.C. § 703, titled "Form and venue of proceeding," provides that GBX can pursue APA relief via "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction," as GBX has done in its Complaint. "[T]raditional equitable principles" thus "control the grant of declaratory or injunctive relief." *Webster v. Doe*, 486 U.S. 592, 604-05 (1988).

With respect to GBX's request for a declaratory judgment, the long-understood view of equity dictates that the scope of relief must be limited to GBX only. The Third Circuit recently explained that "declaratory judgments, like equitable remedies, operate on a 'specific party,' and 'do not simply operate on legal rules in the abstract.'" *Johnson v. Governor of New Jersey*, No. 21-1795, 2022 WL 767035 at *2 (3d Cir. Mar. 14, 2022) (quoting *California v. Texas*, 141 S. Ct. at 2115). The Declaratory Judgment Act, 28 U.S.C. § 2201 (cited in Complaint ¶ 11), expressly limits any judgment to declaring "the rights and other legal relations of any interested party seeking such declaration." It "does not contain any provisions indicating that declaratory judgments are authoritative vis-à-vis nonparties to the litigation." *Mass. Delivery Ass'n v. Coakley*, 671 F.3d 33, 48 n.12 (1st Cir. 2012). In *Skyworks*, Judge Calabrese reviewed the relevant authority and concluded that "a declaratory judgment binds the parties, and only the parties, wherever they may be." 542 F. Supp. 3d at 728. With GBX the only "interested party" seeking declaratory relief here, it follows that a declaratory judgment must be as to GBX only.

Established limits on injunctive relief also weigh against GBX's request.[7] The general rule is that injunctions must "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quotation omitted). Courts often avoid extending injunctions to cover non-parties for this reason. In *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001), the court vacated an injunction that precluded an agency from enforcing, against anyone, a regulation that violated the First Amendment. It explained that an injunction covering the plaintiff "alone adequately protects it from the feared prosecution," and that "[p]reventing the [agency] from

[7] Declaratory and injunctive relief are distinct remedies but their "practical effect is similar." *Skyworks*, 542 F. Supp. 3d at 725. "With an injunction, a federal court may enforce compliance. In contrast, a declaratory judgment functions through persuasion, but is a step toward coercive means if necessary." *Id*.

enforcing [the regulation] against other parties in other circuits does not provide any additional relief to [the plaintiff]." *Id*. at 393. Likewise, in *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644 (9th Cir. 2011), even though the Ninth Circuit held that an agency's regulation was facially invalid, it nevertheless vacated the district court's injunction insofar as it barred the agency from enforcing the regulation against entities other than the plaintiff. *Id*. at 664.[8]

A more expansive approach that would extend an injunction to cover non-parties overlooks that "[t]he law already has a mechanism for applying a judgment to third parties," namely a class action under Fed. R. Civ. P. 23, which GBX has not invoked. *Arizona*, 31 F.4th at 484 (Sutton, C.J., concurring); *see also Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (class action is an "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only" (quotation omitted)). Here, declaring the Notice unlawful and setting it aside as to GBX fully remedies the harm to GBX, making an injunction applicable to non-parties who are not represented through a class action both unnecessary and improper. *See Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 163 (2010) ("Respondents in this case do not represent a class, so they could not seek to enjoin such an order on the ground that it might cause harm to other parties."); *see also Alvarez v. Smith*, 558 U.S. 87, 92-93 (2009) (declining to address "an abstract dispute about the law" because, in absence of a class action, the "only disputes relevant here are those between these six plaintiffs and the State's Attorney . . . and those disputes are now over").[9]

---

[8] *See also*, *e.g.*, *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 436 (4th Cir. 2003) (vacating injunction with "substantial national impact" as "far broader than necessary to provide [plaintiff] complete relief"); *Morris v. U.S. Army Corps of Eng'rs*, 60 F. Supp. 3d 1120, 1125 (D. Idaho 2014) (limiting injunction to Idaho "because its scope is dictated by the allegations of the two named plaintiffs").

[9] The Sixth Circuit has acknowledged "confusion regarding this circuit's precedent on whether or not class certification is required to extend declaratory and injunctive relief to non-plaintiffs."

(continued...)

GBX's summary judgment brief wrongly suggests that this body of law regarding injunctions should not apply because "injunctions and vacaturs are distinct remedies" and GBX only seeks vacatur of the Notice. ECF No. 17-1 at 10. There are several problems with its argument. First, GBX has plainly sought injunctive relief here: the title of GBX's Complaint seeks "injunctive" relief, and the prayer for relief asks the Court to "[p]ermanently enjoin enforcement" of the Notice. Second, APA vacatur is itself an equitable remedy and must conform to the traditional principles of equity jurisdiction described above. *See Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1290 (11th Cir. 2015) ("The decision whether to vacate agency action falls within our broad equitable discretion.").

Third and most importantly, it is untenable for plaintiff to claim that vacatur is a wholly distinct remedy not subject to traditional limits on injunctive relief while simultaneously using it to achieve the same effect as an injunction. "If a district court could, in every case, effectively enjoin agency action simply by recharacterizing its injunction as a necessary consequence of vacatur, that would circumvent the Supreme Court's instruction in *Monsanto* that 'a court must determine that an injunction should issue under the traditional four-factor test.'" *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1054 (D.C. Cir. 2021) (quoting 561

Hill v. Snyder, 821 F.3d 763, 771 (6th Cir. 2016). Compare *Tesmer v. Granholm*, 333 F.3d 683, 701 (6th Cir. 2003), *overruled on other grounds sub nom Kowalski v. Tesmer*, 543 U.S. 125 (2004) ("When a class has not been certified, the only interests of concern are those of the named plaintiffs.") with *Washington v. Reno*, 35 F.3d 1093, 1104 (6th Cir. 1994) (extending injunction to non-parties where "the appropriate relief to be granted to the plaintiffs . . . necessarily implicates nationwide relief"). The Court need not resolve this confusion because, even under the more lenient standard, GBX's injury is fully remedied by the United States' proposal. *See Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003) ("While district courts are not categorically prohibited from granting injunctive relief benefitting an entire class in an *individual suit*, such broad relief is rarely justified."); *Lee v. City of Columbus*, No. 2:07-cv-1230, 2008 WL 2557255 at *4-5 (S.D. Ohio June 24, 2008) (limiting injunction to plaintiffs because "[i]t is possible to grant effective relief [to] the individual plaintiffs . . . without inevitably covering those within the possible class" and thus "not necessary to demand a change in how non-parties are treated").

U.S. at 158).[10] Despite the semantic wordplay about vacatur, then, GBX still seeks equitable relief comparable to an injunction and the scope of relief must be limited.

D. Section 706's Instruction to "Set Aside" Is Part of a Waiver of Sovereign Immunity That Must Be Strictly Construed in the Government's Favor

The scope of potential relief in this case is further constrained by the text of the APA and the canon of statutory construction that sovereign-immunity waivers are read narrowly.

The APA's immunity waiver in 5 U.S.C. § 702 ("Right of Review"), under which GBX brings this suit (*see* Complaint ¶ 48), says "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof." This does not "affect[] other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." § 702. Coupled with § 703's guidance that the "form of legal action" is one for declaratory and injunctive relief, the APA thus incorporates the limits on Article III standing and equity jurisdiction described above. These limits logically restrict the "Scope of review" under § 706.[11]

Like any other waiver of sovereign immunity, § 706 must "be strictly construed, in terms

[10] The instant case differs from *Monsanto* and *Standing Rock* because in those cases "the injunction extended to some agency action beyond that which was vacated itself." *Friends of the Earth v. Haaland*, --- F.Supp.3d ----2022 WL 254526 at *29 (D.D.C. Jan. 27, 2022). By contrast here, GBX's proposed vacatur of the Notice would have an effect indistinguishable from enjoining the Notice, making the remedies of vacatur and injunction essentially the same.

[11] Another limit is the Anti-Injunction Act, 26 U.S.C. § 7421(a) ("AIA"), which prohibits suits "for the purpose of restraining the assessment or collection of any tax." If a suit brought under the APA violates the AIA, it must be dismissed. *See CIC Services, LLC v. IRS*, 141 S. Ct. 1582, 1588 (2021). In *CIC*, the Supreme Court held that an APA suit brought by a material advisor to set aside an IRS reportable transaction notice (Notice 2016-66) could proceed despite the AIA because the disclosure requirements were distinct from the potential penalty for non-compliance. *Id*. at 1590-92. Nonetheless, Justice Sotomayor wrote a concurrence "to highlight that the answer might be different if CIC Services were a taxpayer instead of a tax advisor." *Id*. at 1594. GBX, like CIC, is a material advisor and not a taxpayer-participant in its transactions. Therefore, to the extent GBX argues for setting aside the Notice as to all taxpayers nationwide, including not only material advisors but also participants, that overbroad request may yet run afoul of the AIA.

of its scope, in favor of the sovereign." *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *see also Portsmouth Ambulance, Inc. v. United States*, 756 F.3d 494, 498 (6th Cir. 2014) ("All waivers of federal sovereign immunity must be unequivocally expressed in the statutory text, must be strictly construed in favor of the United States, and may not be enlarged beyond what the language of the statute requires."). Applying this rule, the Supreme Court in *FAA v. Cooper*, 566 U.S. 284, 299 (2012), interpreted the Privacy Act to preclude suits for emotional damages based on a narrow reading of the term "actual damages," because Congress did not "unequivocally" allow such suits and the Court could not "expand the scope of Congress' sovereign immunity waiver[.]" *Id.*; *see also Estate of Smith ex rel Richardson v. United States*, 509 F. App'x 436, 440 (6th Cir. 2012). Likewise here, the "hold unlawful and set aside" language in § 706 does not "unequivocally" extend to non-parties, and that means the government's more restrictive reading must prevail.

GBX cannot overcome the narrow-construction canon of sovereign immunity with its dictionary-based argument concerning the phrase "set aside." *See* ECF No. 17-1 at 5-6. That phrase may be used, and has been used since before the APA's enactment, to signify either the annulment of a legal object or —as the Court should do here—ignoring it for the purpose of deciding the rights of the parties in a particular case. *See* Harrison, *supra*, 37 Yale J. Reg. Bulletin 37, 42-45 (2020).[12]

In the end, when considering whether § 706 authorizes nationwide relief here, the Court should follow Judge Calabrese's reasoning: "Based on the lack of clear answer in the language, structure, and history of the Administrative Procedure Act and the absence of clear precedent, the

[12] In recent years there has been a "veritable cottage industry of scholarly articles" exploring this historical premise, but even those who view the evidence as leaving the door open to universal APA remedies agree that they "will be appropriate only in rare circumstances." *See City of Chicago v. Barr*, 961 F.3d 882, 912, 916 (7th Cir. 2020). This case does not present such a circumstance.

Court is not prepared to extend the remedy as far as Plaintiffs request." *Skyworks*, 542 F. Supp. 3d 719, 735–36; *see also CASA de Md., Inc. v. Trump*, 971 F.3d 220, 262 n.8 (4th Cir.), *reh'g en banc granted*, 981 F.3d 311 (4th Cir. 2020), *voluntarily dismissed prior to hearing* ("[T]he position that § 706 even authorizes, much less compels, nationwide injunctions is baseless.").

E. The United States Should Be Permitted to Dispute the Analysis in *Mann* and Defend the Validity of the Notice in Other Jurisdictions

Finally, the healthy functioning of the judicial system would be supported by the United States' form of judgment as opposed to the nationwide relief preferred by plaintiff.

Allowing litigation of an issue in different forums is necessary to provide reviewing courts with diverse perspectives and well-reasoned analyses. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984). The Supreme Court has observed that allowing parties to assert nonmutual collateral estoppel against the government—the functional equivalent of a nationwide vacatur of an agency rule—"would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular issue." *Id.*; *see also Hawaii*, 138 S. Ct. at 2425 (Thomas, J., concurring) ("[Nationwide injunctions] are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch."); *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("[W]hen frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.").

Allowing the United States, in cases outside the Sixth Circuit, to continue litigating APA challenges to the Notice, as well as other similar IRS listed transaction notices, will foster further development of the law and aid the eventual decision-making of the appellate courts. In recognition of these interests, a recent Sixth Circuit panel decision directed a district court in an

APA case that "the scope of the injunction . . . may not exceed the bounds of the four states within the Sixth Circuit's jurisdiction." *Gun Owners of America, Inc. v. Garland*, 992 F.3d 446, 474 (6th Cir. 2021), *vacated on other grounds*, 19 F.4th 890 (6th Cir. 2021) (en banc).

Entering a nationwide remedy would cut off this process by preventing the government from having a second chance to litigate an issue it lost in a single court, an outcome at odds with *Mendoza*. This would incentivize forum shopping by plaintiffs, who need only find a single district judge to effectively nullify decisions of all other lower courts by barring application of a policy in any district nationwide. *New York*, 140 S. Ct. at 601 (Gorsuch, J., concurring). It would also require the United States to prevail in every suit while a plaintiff could derail agency action throughout the country with a single victory. *See id.*

The *National Mining* opinion, on which GBX most heavily relies, actually conforms to this reasoning. In that case, the D.C. Circuit, citing *Mendoza*, expressed concern that a "broad injunction" would harm the government's interest to "relitigate issues in multiple circuits." 145 F.3d at 1409. The court relied on a permissive venue provision allowing review in the District of Columbia, regardless of the location of parties and injury, to anticipate "a flood of duplicative litigation." *See id.* The court explained that the breadth of its injunction was a "consequence of the venue rules *in combination with* the APA's command" to set aside. *See id.* at 1410 (emphasis added). It recognized that other circuits (such as the Sixth) "need not fear a flood of relitigation since venue restrictions would exclude many would-be plaintiffs from access to the invalidating court." *Id.* at 1409-1410. Indeed, this concern underlies many D.C. Circuit APA remedy rulings, which often arise under venue provisions allowing (if not requiring) actions to be brought in the District of Columbia regardless of where the case arises. In light of this background to the case law on which GBX most heavily relies, GBX's worries about "thousands of cases" and "waste of judicial resources" is greatly overstated. ECF No. 17-1 at 11, 13. Further, the possibility that

issues might be relitigated in multiple circuits is a salutary feature of our judicial system.

The possibility that the government might wish to relitigate the validity of the Notice is not an abstract consideration. As noted above, there is another APA lawsuit currently pending in the Northern District of Alabama challenging the Notice. That case is *Green Rock, LLC v. IRS*, Case No. 2:21-cv-1320 (N.D. Ala.), and the United States filed a motion for summary judgment on June 13, 2022, contending that *Mann* was wrongly decided and should not be controlling outside the Sixth Circuit. *See* Ex. 1. The judgment that GBX is asking for would effectively deprive the Alabama court of the opportunity to weigh in on these issues and to decide for itself. Several other APA challenges to IRS listed transaction notices have been filed in the wake of *Mann* as well, both within and without the Sixth Circuit. The government should be allowed to make its arguments in these other cases, and the other judges should be allowed to have their say.

IV. Conclusion

For the above reasons, the Court should deny GBX's summary judgment motion, grant the United States' cross-motion, and enter judgment setting aside the Notice as to GBX only.

Respectfully Submitted,

DAVID A. HUBBERT
Deputy Assistant Attorney General
U.S. Department of Justice, Tax Division

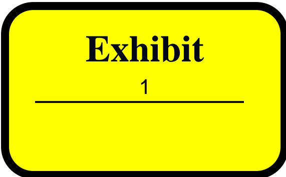
/s/ Edward J. Murphy
EDWARD J. MURPHY
RYAN D. GALISEWSKI
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 55
Washington, D.C. 20044
Tel: (202) 307-6064 / (202) 305-3719
Fax: (202) 514-5238
Edward.J.Murphy@usdoj.gov
Ryan.D.Galisewski@usdoj.gov

Certificate of Service

I certify that on June 24, 2022, I electronically filed the foregoing **Brief in Support of Defendants' Cross-Motion for Judgment and in Opposition to Plaintiff's Motion for Judgment** and thereby served all counsel of record.

/s/ Edward J. Murphy
EDWARD J. MURPHY
Trial Attorney, Tax Division

FILED
2022 Jun-13 PM 05:31
U.S. DISTRICT COURT
N.D. OF ALABAMA



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

GREEN ROCK, LLC,

Plaintiff,

Case No 2:21-cv-01320-ACA

v.

INTERNAL REVENUE SERVICE;
U.S. DEPARTMENT OF TREASURY;
and UNITED STATES OF AMERICA,

Defendants.

DEFENDANTS' RESPONSE/ CROSS MOTION
FOR SUMMARY JUDGMENT

Notice 2017-10 is a procedurally and substantively valid agency action that allows the IRS to detect and address abusive syndicated conservation easement schemes that lead to bogus tax deductions. Defendants move for judgment as a matter of law and on the Administrative Record that is before the Court.

Here, Defendants are entitled to judgment because: (1) the Treasury Department issued Notice 2017-10 under procedures allowed by Congress; and (2) the Administrative Record adequately supports the substance of that Notice. Defendants submit a separate memorandum in support of this cross motion and in opposition to Green Rock's motion for summary judgment.

Dated: June 13, 2022

Respectfully submitted,

DAVID A. HUBBERT
Deputy Assistant Attorney General

/s/ Daniel B. Causey, IV
DANIEL B. CAUSEY, IV
LAURA M. CONNER
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 14198
Washington, D.C. 20044
202-307-1427 (v)
202-514-4963 (f)
Daniel.B.Causey@usdoj.gov
Laura.M.Conner@usdoj.gov

OF COUNSEL:

PRIM F. ESCALONA
United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2022, I served this document on plaintiff's counsel by electronically filing it with the Clerk of Court using the CM/ECF system.

/s/ Daniel B. Causey, IV
DANIEL B. CAUSEY, IV
Trial Attorney
DOJ Tax Division

FILED
2022 Jun-13 PM 05:35
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

GREEN ROCK, LLC,

Plaintiff,

Case No 2:21-cv-01320-ACA

v.

INTERNAL REVENUE SERVICE;
U.S. DEPARTMENT OF TREASURY;
and UNITED STATES OF AMERICA,

Defendants.
_______________________________________/

DEFENDANTS' RESPONSE / CROSS MOTION
FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION 1

DISCUSSION 4

I. Background 4

- A. Response to statement of facts and clarification of review standard 4
- B. Legislative and regulatory background 5
- C. Issuance of Notice 2017-10 10

II. Congress authorized the IRS to identify listed transactions without notice-and-comment rulemaking...11

- A. Congress can authorize agencies to promulgate rules using procedures other than those outlined in the APA. 12
- B. The plain text of § 6707A expressly adopted the existing Treasury Regulation authorizing the IRS to identify listed transactions by notice......14
- C. The statutory text of other AJCA provisions makes clear that Congress viewed the existing listed transaction notices and regulation as valid.........17
- D. The context and legislative history of the AJCA and later statutes reinforces Congress's intent to allow identification by notice. 19
  1. Congress passed § 6707A to give teeth to the IRS's efforts to detect and prevent tax avoidance transactions, not to undermine the IRS's existing efforts. 20
  2. Subsequent statutory enactments relating to listed transactions left the IRS's identification process unchanged...22
  3. Congress's reference to and reliance on Notice 2017-10 further confirms its intent to except the identification of listed transactions from notice-and-comment rulemaking. 25
- E. *Mann Construction* was wrongly decided...27

III. Notice 2017-10 is a valid, reasonable response to years of abusive syndicated conservation easement transactions.......30

A. The arbitrary and capricious standard of review is exceedingly deferential towards agency action. 30

B. Notice 2017-10 is a reasoned response to combat the pervasive abuse of syndicated conservation easement transactions. 32

C. Green Rock's challenges do not show Notice 2017-10 is arbitrary and capricious.......35

CONCLUSION.......42

Table of Authorities

Page(s)

Federal Cases

Air Transp. Ass'n of America, Inc. v. Nat'l Mediation Bd.,
719 F. Supp. 2d 26 (D.D.C. 2010) 31, 34

Alaska Dep't of Envtl. Conservation v. EPA,
540 U.S. 461 (2004) 31, 35, 42

Am. Bioscience, Inc. v. Thompson,
269 F.3d 1077 (D.C. Cir. 2001) 4

Asiana Airlines v. FAA,
134 F.3d 393 (D.C. Cir. 1998) 13, 26

United States v. Bailey,
34 U.S. (9 Pet.) 238 (1835) 5

Balt. Gas & Elec. Co. v. Nat. Res. Def. Council,
462 U.S. 87 (1983) 3, 31

Blak Invs. v. Commissioner,
133 T.C. 431 (2009) 18, 21

Boeing Co. v. United States,
537 U.S. 437 (2003) 23

Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc.,
419 U.S. 281 (1974) 31

Cassell v. FCC,
154 F.3d 478 (D.C. Cir. 1998) 40

Citizens to Pres. Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971) 31

Corley v. United States,
556 U.S. 303 (2009) 28

Cottage Sav. Ass'n v. Commissioner,
499 U.S. 554 (1991) 24

Dep't of Com. v. New York,
588 U.S. ___, 139 S. Ct. 2551 (2019).....30

Dorsey v. United States,
567 U.S. 260 (2012).....13, 14, 20, 28, 29

Env. Defense v. Duke Energy Corp.,
549 U.S. 561 (2007).....16

New Jersey v. EPA,
989 F.3d 1038 (D.C. Cir. 2021).....31

Ethyl Corp. v. EPA,
541 F.2d 1 (D.C. Cir. 1976).....32, 40

Fund for Animals, Inc. v. Rice,
85 F.3d 535 (11th Cir. 1996).....30

Georgia-Pac. Corp. v. OSHRC,
25 F.3d 999 (11th Cir. 1994).....41

Hibbs v. Winn,
542 U.S. 88 (2004).....17

Interior Glass Sys., Inc. v. United States,
927 F.3d 1081 (9th Cir. 2019).....41

James Madison Ltd. by Hecht v. Ludwig,
82 F.3d 1085 (D.C. Cir. 1996).....4

Jett v. Blue Cross & Blue Shield of Ala., Inc.,
890 F.2d 1137 (11th Cir. 1989).....31, 37

Lorillard v. Pons,
434 U.S. 575 (1978).....23, 24

Mann Constr., Inc., v. United States,
27 F.4th 1138 (6th Cir. 2022).....3, 27, 28, 29, 30

Marcello v. Bonds,
349 U.S. 302 (1955).....13, 29

Mayo Found. v. United States,
562 U.S. 44 (2011).....37

McCoy v. United States,
802 F.2d 762 (4th Cir. 1986).....25

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983).....30, 35, 40

Norton v. S. Utah Wilderness Alliance,
542 U.S. 55 (2004).....35

Oakbrook Land Holdings, LLC v. Commissioner,
28 F. 4th 700 (6th Cir. 2022).....25

United States v. Pringle,
350 F.3d 1172 (11th Cir. 2003).....20

Qwest Corp. v. FCC,
258 F.3d 1191 (10th Cir. 2001).....40

Sewards v. Commissioner,
785 F.3d 1331 (9th Cir. 2015).....24

United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.,
484 U.S. 365 (1988).....14

Federal Statutes

5 U.S.C. § 553.....12

5 U.S.C. § 706.....30, 31

26 U.S.C. § 170.....10, 33, 37

26 U.S.C. § 4965.....23, 24

26 U.S.C. § 6011.....*passim*

26 U.S.C. § 6111.....16

26 U.S.C. § 6404.....19, 22, 27

26 U.S.C. § 6501.....18, 19, 21, 27, 39

26 U.S.C. § 6707A .... *passim*

American Jobs Creation Act of 2004, Pub. L. No. 108-357 (2004) .... *passim*

Gulf Opportunity Zone Act of 2005, Pub. L. 109-135 (2005) 22

Small Business Jobs Act of 2010, Pub. L. No. 111-240, (2010) 23

Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-222, (2006)...23

Regulations

65 Fed. Reg. 11205-02 (March 2, 2000)..1, 6

65 Fed. Reg. 11269-01 (March 2, 2000)..1, 6

68 Fed. Reg. 10161-01 (March 4, 2003)...6

Treasury Regulation § 301.6111-3 38

Treasury Regulation § 301.6112-1 ....38, 41

Treasury Regulation § 1.6011-4 ....*passim*

IRS Notices

IRS Notice 2004-67, 2004-2 C.B. 600..9

IRS Notice 2009-59, 2009-2 C.B. 170..24

IRS Notice 2017-10, 2017-4 I.R.B. 544 ....*passim*

IRS Notice 2017-29, 2017-20 I.R.B. 1243 38

IRS Notice 2017-58, 2017-42 I.R.B. 326 438

Congressional Sources

H.R. Rep. No. 108-548, pt. 1 (2004) 1, 21, 33

H.R. Rep. No. 108-755 (2004)...33

H.R. Rep. No. 109-455 (2006)...23

S. Rep. No. 108-192 (2004) 8, 9, 21

Staff of S. Comm. on Fin., 116th Cong., *Rep. on Syndicated Conservation-Easement Transactions* (Comm. Print 2020) 26

Corporate Tax Shelters: Looking Under the Roof: Hearing Before the S. Comm. on Fin., 107th Cong., (2002)..6, 7, 8, 21

Tax Shelters: Who's Buying, Who's Selling, and What's the Government Doing About It?: Hearing Before the S. Comm. on Fin., 108th Cong., (2003) 7, 8

Press Release, S. Fin. Comm., *Grassley, Wyden Launch Probe of Conservation Tax Benefit Abuse* (March 27, 2019) 25

Press Release, S. Fin. Comm., *Finance Committee Releases Report on Syndicated Conservation-Easement Transactions*, (August 25, 2020) 26

Other Authorities

Black's Law Dictionary (6th ed. 1997) 15

Miriam-Webster.com 15

Stephanie Hunter McMahon, *Classifying Tax Guidance According to End Users*, 73 Tax Law 245, 257-58 (2020) 6

U.S. Dep't of the Treas., *The Problem of Corporate Tax Shelters* 59-60 (July 1999)...5

INTRODUCTION

Although most taxpayers report and pay their taxes in full, some engage in abusive transactions designed to help them avoid paying the taxes they owe. As a House Committee observed, "the best way to combat tax shelters is to be aware of them." H.R. Rep. No. 108-548, pt. 1, at 261 (2004). Congress thus created Internal Revenue Code Section 6707A(c) to ensure Treasury had a flexible, speedy, and effective way of compelling taxpayers to disclose tax shelters.

Congress wasn't writing on a blank slate when it created § 6707A(c). Four years earlier, Treasury issued a regulation requiring taxpayers to disclose their participation in "reportable transactions," i.e., transactions that the IRS has identified as potentially abusive, as well as a subset of those known as "listed transactions," which the IRS has determined to be abusive tax avoidance transactions. 65 Fed. Reg. 11205-02 (March 2, 2000); 65 Fed. Reg. 11269-01 (March 2, 2000). From the outset, the IRS has identified each new listed transaction, describing the transaction in detail and almost always by publishing a notice, as provided for in the regulation.

In Notice 2017-10, the IRS identified certain syndicated conservation easement transactions as listed transactions. In these transactions, promoters orchestrate the illegal sale of inflated tax deductions to investors under the guise of charitable donations, often by using appraisals giving unrealistic valuations of

undeveloped land. Because participants and material advisors to listed transactions must disclose their participation under Treasury Regulation § 1.6011-4, the IRS can better gather information on the transactions and unravel those that are abusive. The IRS's identification of these transactions by notice is valid because (1) Congress excepted the IRS from using the Administrative Procedure Act's notice-and-comment rulemaking procedures when identifying listed transactions, and (2) the Notice is not arbitrary and capricious.

First, Treasury's identification of listed transactions by notice, as provided in Treasury Regulation § 1.6011-4, is authorized by statute and ratified by nearly two decades of congressional action and supervision. Congress closely followed the IRS's use of notices to identify listed transactions from the start. When taxpayers disregarded the reporting requirement, Congress enacted penalties and codified disclosure requirements in the American Jobs Creation Act of 2004 ("AJCA") to enforce compliance with Treasury's ongoing practice. As a result, a taxpayer who fails to disclose a listed transaction faces a variety of adverse consequences, including substantial monetary penalties and an extended statute of limitations.

Specifically, § 6707A, enacted through the AJCA, expressly references then-existing regulations prescribed under § 6011, showing Congress's incorporation of and intent to build on Treasury's existing notice-based disclosure framework. Plaintiff now asks the Court to conclude that when Congress enacted

this statute, it actually intended to do the *opposite*. When Congress referred to a pre-existing regulation to define what transactions taxpayers must report, Plaintiff claims it silently overruled that regulation. And so, Plaintiff's argument says, at the moment Congress created a stiff penalty for failing to report listed transactions, Congress eliminated the requirement to report any listed transactions the IRS had already defined by issuing a notice. That is not what Congress wanted – and it is not what Congress did. Although the Sixth Circuit recently concluded otherwise, *see Mann Constr., Inc., v. United States*, 27 F.4th 1138 (6th Cir. 2022), the United States respectfully submits that the evidence, including statutory text not considered by the *Mann Construction* court, compels the conclusion that Congress intended the IRS to continue to identify listed transactions by notice.

Second, Notice 2017-10 is not arbitrary and capricious. The IRS's concern with abusive conservation easement transactions is well-founded, as documented in the Administrative Record. Its decision to identify those transactions as listed transactions – which are subject to reporting requirements to facilitate detection of potential abuse – is rationally related to addressing that concern. Notice 2017-10 itself contains ample explanation to show that the IRS's decision is "within the bounds of reasoned decisionmaking." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 105 (1983).

For the reasons below, the Court should enter judgment for the United States for both Counts I and II and uphold Notice 2017-10.[1]

DISCUSSION

I. Background

A. Response to statement of facts and clarification of review standard

Defendants move for judgment as a matter of law and on the Administrative Record that is before the Court. But the usual summary judgment standard does not apply in cases, like this one, involving review of final agency action under the APA because "the district judge sits as an appellate tribunal" and "[t]he 'entire case' on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001); *see also James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996) ("Generally speaking, district courts reviewing agency action under the APA's arbitrary and capricious standard do not resolve factual issues, but operate instead as appellate courts resolving legal questions.").

Because the Court is not tasked with resolving disputed factual issues, traditional statements of facts are typically irrelevant in this type of case. But as Green Rock has included a statement of facts, the United States responds here as appropriate to serve the purposes of this type of action. The United States objects

[1] If the Court does not rule for the United States on both Counts I and II, the United States requests the opportunity to submit additional briefing on the scope of any remedy Green Rock may have.

to Paragraphs 6 through 14 because they consist of Green Rock's descriptions and characterizations of the law, as well as some of their legal arguments. Those are not appropriate factual assertions, and they are addressed in the legal analysis below. Paragraphs 15 through 23 are descriptions and legal arguments based on the Administrative Record. The contents of the Administrative Record are not in dispute, but the United States challenges Green Rock's interpretation of the contents of the record, as discussed below. The United States does not contest the factual allegations of the remaining paragraphs.

Green Rock's brief also omits background information critical to the core legal dispute in this case. That context is set out in the next two sections.

B. Legislative and regulatory background

Congress is presumed to act with knowledge of existing regulations. *See, e.g.*, *United States v. Bailey*, 34 U.S. (9 Pet.) 238, 256 (1835). Here, Congress didn't just know about Treasury Regulation § 1.6011-4. The statutory context leaves no doubt that Congress specifically relied on and incorporated those regulations when it passed the statute at the heart of this case.

By 2000, Treasury had unsuccessfully fought the swift-moving tax shelter industry for years, *see, e.g.*, U.S. Dep't of the Treas., *The Problem of Corporate Tax Shelters*, 59-60 (July 1999), and piecemeal legislation had proven unworkable, *id.* at 99. Using its authority under 26 U.S.C. § 6011(a), which allows it to

prescribe the information contained on returns and statements, Treasury issued the temporary and proposed regulations that launched the reportable transaction disclosure regime. 65 Fed. Reg. 11205-02 (March 2, 2000); 65 Fed. Reg. 11269-01 (March 2, 2000). Those regulations required taxpayers who participate in reportable transactions, including a sub-category of reportable transactions called "listed transactions," to disclose that participation to the IRS. Treasury finalized the regulation in March 2003, after issuing revised temporary and proposed regulations and providing a notice-and-comment period. 68 Fed. Reg. 10161-01 (March 4, 2003); Treas. Reg. § 1.6011-4 (2004).

The final regulation defines a listed transaction as one "that is the same as or substantially similar to one of the types of transactions that the [IRS] has determined to be a tax avoidance transaction and *identified by notice, regulation, or other form of published guidance*." *Id*. § 1.6011-4(b)(2) (emphasis added). Contemporaneously with the temporary and proposed regulation, the IRS issued Notice 2000-15, identifying the first ten listed transactions.[2] 2000-12 I.R.B. 826.

But "compliance with the regulations [was], to put it bluntly, a joke." *See* *Corporate Tax Shelters: Looking Under the Roof: Hearing Before the S. Comm. on*

---

[2] IRS Notices are a form of official guidance "[i]ssued without public notice and comment," typically issued "when the Service determines that a public concern requires a speedy response." Stephanie Hunter McMahon, *Classifying Tax Guidance According to End Users*, 73 Tax Law 245, 257-58 (2020).

Fin., 107th Cong., 2 (2002) ("2002 SFC Hearing") (Statement of Sen. Baucus, Chair). Treasury had no way to compel taxpayers to comply. It thus asked Congress to pass legislation imposing a penalty for failure to disclose a reportable transaction or a listed transaction, along with various other provisions intended to give teeth to the notice-based designation regime. *See* U.S. Dep't of the Treas., Treasury Department's Enforcement Proposals for Abusive Tax Avoidance Transactions, 15 (2002).

The Senate Finance Committee ("Committee" or "SFC") held hearings on tax shelter abuse in March 2002 and October 2003 to evaluate the problem. *See* 2002 SFC Hearing; *Tax Shelters: Who's Buying, Who's Selling, and What's the Government Doing About It?: Hearing Before the S. Comm. on Fin.*, 108th Cong., (2003) ("2003 SFC Hearing"). The transcripts of these hearings and the materials produced for them demonstrate that the Committee members, as they developed Congress's response to the IRS's efforts, understood and approved of the fact that the IRS was identifying listed transactions by notice. The Joint Committee on Taxation and various Treasury officials explained to the Committee the IRS's process of identifying listed transactions by notice, and cited specific examples of transactions. *See* Staff of J. Comm. on Tax'n, 107th Cong., *Background and Present Law Relating to Tax Shelters*, 2002 WL 34255160, at *24 (Comm. Print 2002) ("When the Treasury Department and the IRS determine a transaction has a

tax avoidance purpose, a notice is issued informing taxpayers of the details of such transaction."); 2002 SFC Hearing at 7-10 (statement of B. John Williams, Chief Counsel, IRS) (describing three listing notices); 2003 SFC Hearing at 36-37 (statement of Mark W. Everson, Comm'r, IRS) (describing three different listing notices). Indeed, members of the Committee asked about and noted the number of transactions that had been identified by notice. 2002 SFC Hearing at 15 (question to Larry Langdon, Comm'r of LMBD, IRS); 2003 SFC Hearing at 32-33 (statement of Mike Brostek, Director, Strategic Issues, GAO).

IRS witnesses also highlighted the importance of early detection, and the role identification by notice played in that. 2002 SFC Hearing at 12 (statement of Larry Langdon, Comm'r of LMBD, IRS) ("[D]isclosure is the key to shutting down tax shelters. Timely notices have been our most cost-effective tool in stopping these transactions."); 2003 SFC Hearing at 196 (letter from Pamela Olson, Assistant Sec'y for Tax Policy, to Sen. Charles Grassley) ("The Treasury Department believes that the ability to 'list' a transaction has been one of the most important tools in the fight against abusive tax avoidance transactions.").

The Committee ultimately noted that "the Treasury Department, using the tools available, [had] issued regulations requiring disclosure of certain transactions and requiring organizers and promoters of tax-engineered transactions to maintain customer lists and make these lists available to the IRS." S. Rep. No. 108-192, at

90 (2004). Those regulations included Treasury Regulation § 1.6011-4. And as the Committee knew, the specific transactions the regulation required to be disclosed were identified in Internal Revenue Bulletin guidance (notices and revenue rulings) under that regulation. *See* IRS Notice 2004-67, 2004-2 C.B. 600 (identifying the more than 30 listed transactions as of September 24, 2004).

"Nevertheless," the Committee concluded, "additional legislation is needed to provide the Treasury Department with additional tools to assist its efforts to curtail abusive transactions," and a penalty for non-disclosure would "provide an additional incentive for taxpayers to satisfy their reporting obligations under the new disclosure provisions." S. Rep. No. 108-192, at 90. Congress thus enacted 26 U.S.C. § 6707A, penalizing failure to disclose a reportable transaction, including an enhanced penalty for non-disclosure of a listed transaction. *See* American Jobs Creation Act of 2004, § 811(a), Pub. L. No. 108-357, 118 Stat. 1418, 1575. That law is at the heart of this case.

Section 6707A(c)(1) defines a "reportable transaction" as a transaction "with respect to which information is required to be included with a return or statement because, *as determined under regulations prescribed under section 6011*, such transaction is of a type which the Secretary determines as having a potential for tax avoidance or evasion." (Emphasis added.) Section 6707A(c)(2) defines "listed transaction" as "a reportable transaction" that is the same as or similar to "a

transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of section 6011." Along with § 6707A, other provisions in the AJCA support and enhance the IRS's efforts under its existing disclosure framework.

As explained in Part II below, the text and context of the statute establish beyond peradventure that Congress adopted and incorporated Treasury's practice of designating listed transactions by notice. And in late 2016, Treasury added syndicated conservation easement transactions to the list of listed transactions. Notice 2017-10, *Listing Notice – Syndicated Conservation Easement Transactions*, 2017-4 I.R.B. 544 (the "Notice").

C. Issuance of Notice 2017-10

Taxpayers who protect land in perpetuity by donating a qualifying conservation easement can claim a federal income tax deduction. 26 U.S.C. § 170(b)(1)(E), (h). Although the tax deduction for conservation easement donations exists for a noble purpose, syndicated conservation easement schemes exploit and abuse it. *See* ECF No. 17, Administrative Record ("AR") 593-97; 602-61. Under these schemes, a promoter typically markets and sells ownership interests in a tract of land to wealthy investors with the claim that the investors will receive tax deductions far greater than the amount of their contributions. AR510. The promoters "syndicate" the investors' ownership interests through a partnership or other pass-through entity created to hold title to the land on which the

conservation easement is to be donated. The promoters often obtain an appraisal that inflates the property's value based on unreasonable factual assumptions and conclusions about the development potential of the property. The entity then donates a conservation easement on the land. The resulting charitable deduction, representing the difference between the inflated appraisal and the reduced value of the encumbered land, passes through the entity to be allocated among the entity's investors. This results in "exaggerated tax benefits to the investors that are worth significantly more than the investors' initial investments." AR511.

The IRS determined that it needed to gather information about these transactions to identify them more quickly and to better direct its enforcement efforts. Thus, it issued the Notice, designating certain syndicated easement transactions as listed transactions. Accordingly, there are disclosure obligations for participants, *see* § 6011; Treas. Reg § 1.6011-4, as well as disclosure and recordkeeping obligations for material advisors, § 6111, to these transactions.

II. Congress authorized the IRS to identify listed transactions without notice-and-comment rulemaking.

In enacting the AJCA, Congress built on the existing transaction-reporting framework already used by the IRS. The plain text of the statute shows Congress incorporated the existing disclosure framework set forth in Treasury Regulation § 1.6011-4: the statute expressly references "regulations prescribed under section 6011" and adopts the "reportable transaction" and "listed transaction" terminology

used in the regulations. 26 U.S.C. § 6707A(c). In doing so, Congress excepted the identification of listed transactions from the APA. Congress's intent is confirmed in other sections of the AJCA, which complement and depend on the disclosure framework and are written specifically to encompass transactions identified by notice before the AJCA was enacted. Notice 2017-10 did not require notice-and-comment procedures under the APA. It was validly issued.

Green Rock disagrees and supposes that § 6707A(c)(1) means that the IRS may define listed transactions only through new regulations. This interpretation is wrong because it fails to give effect to all the words used in the statute. Moreover, it would lead to the absurd conclusion that Congress, in seeking to bolster an existing regulatory regime by penalizing taxpayers who failed to comply with it, simultaneously invalidated that entire regime. The United States' interpretation of the statute is the only reasonable one. And if there is any ambiguity in the statute, the legislative history conclusively resolves it in the United States' favor.

A. Congress can authorize agencies to promulgate rules using procedures other than those outlined in the APA.

Congress has the power to determine the procedures by which agencies promulgate rules. The APA generally requires notice-and-comment rulemaking. *See* 5 U.S.C. § 553. In that process, the public is given an opportunity to comment on a proposed version of a rule and the agency considers comments before it releases the final version. *Id*. This can be lengthy, and is not a one-size-fits-all

approach suited for every type of agency rule. Congress can modify the APA's requirements in later statutes and provide for alternative procedures better suited for the specific agency action, as long as it "does so expressly." *Id.* § 559.

Notwithstanding the APA's statement that exceptions to its procedures must be made "expressly," the Supreme Court has "long recognized" that such a law "creates what is in effect a less demanding interpretive requirement" – a "background principle of interpretation." *Dorsey v. United States*, 567 U.S. 260, 274 (2012). A later Congress "remains free to repeal the earlier statute," to modify its reach, or to exempt a new statute from the earlier one's reach, and "to express any such intention either expressly or by implication as it chooses." *Id.*

For this reason, Congress is not required "to employ magical passwords in order to effectuate an exemption" from notice-and-comment rulemaking. *See Marcello v. Bonds*, 349 U.S. 302, 310 (1955). Although Congress must make its intent to alter the prior legislation clear, "the Court has described the necessary indicia of congressional intent by the terms 'necessary implication,' 'clear implication,' and 'fair implication,' phrases it has used interchangeably." *Dorsey*, 567 U.S. at 274 (citations omitted); *see also Asiana Airlines v. FAA*, 134 F.3d 393, 397 (D.C. Cir. 1998) (notice-and-comment rulemaking not required where "Congress has established procedures so clearly different from those required by the APA that it must have intended to displace the norm").

Thus, an agency need not follow APA procedures if Congress has shown its intention that the agency use some other procedure, whether expressly or by "fair implication." *Dorsey*, 567 U.S. at 274.

B. The plain text of § 6707A expressly adopted the existing Treasury Regulation authorizing the IRS to identify listed transactions by notice.

Construing a statute is a "holistic endeavor," and the entirety of a statutory scheme can lend context to clarify the meaning of a provision. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). Here, the text of § 6707A and the overall statutory scheme leave no doubt. Congress relied on and ratified the IRS's practice of identifying listed transactions by notice, and intended for that practice to continue.

In § 6707A, Congress expressly defined reportable transactions by reference to the existing Treasury regulations under § 6011:

> The term "reportable transaction" means any transaction with respect to which information is required to be included with a return or statement because, ***as determined under regulations prescribed under section 6011***, such transaction is of a type which the Secretary determines as having a potential for tax avoidance or evasion.

§ 6707A(c)(1) (emphasis added). In the next provision, Congress defined "listed transactions" as a subset of "reportable transactions" – those "specifically identified by the Secretary as a tax avoidance transaction." § 6707A(c)(2).

The core of both definitions – indeed, the concepts of reportable and listed transactions – were drawn from existing regulations issued under 26 U.S.C. § 6011: Treasury Regulation § 1.6011-4(b)(1) and (b)(2) (2003), respectively. And those regulations themselves referred to designations of listed transactions by notice. Treasury Regulation § 1.6011-4(b)(2) defined a listed transaction as one that is the same or substantially similar to one the IRS "has determined to be a tax avoidance transaction and ***identified by notice***, regulation, or other form of published guidance as a listed transaction." (Emphasis added.) It makes sense for Congress to refer to Treasury Regulation § 1.6011-4 because that regulation sets forth the reporting requirements for which the § 6707A penalty applies.

This language is not just a reference in passing without purpose. The text of § 6707A(c)(1) shows Congress's intent to incorporate the existing process by which the IRS identified reportable transactions, including listed transactions. The prefatory phrase "as determined" refers to the manner or method of determination. In the context here, the most relevant meaning of the adverb "as" is "in the manner in which." *See* Black's Law Dictionary 113 (6th ed. 1997); *see also As*, Merriam-Webster.com. In the next part of the phrase, *i.e.*, "under regulations prescribed under section 6011," Congress revealed where to find the manner of determination. Congress's direction to look to the regulations under § 6011 incorporated the regulations that existed at the time.

The phrase "as determined under regulations prescribed under section 6011" is a highly specific one. It stands in contrast to other places, even in the AJCA and dealing with the same subject matter, where Congress used more general language to authorize the Secretary to issue new regulations. *See* AJCA § 815(a), 118 Stat. at 1582 (codified at 26 U.S.C. § 6111(c)) ("The Secretary may prescribe regulations which provide . . . ."). In § 6707A(c)(1), Congress referred to regulations "prescribed under section 6011," not merely to regulations "prescribed by the Secretary." Congress was so specific in referring to § 6011 because it was pointing to the regulations ***already*** "prescribed under section 6011": Treasury Regulation § 1.6011-4, which created the disclosure framework. Green Rock's reading of the statute does not account for that specificity. Indeed, it reads it out of the law altogether. The text and legislative context, working together, irrefutably show that Congress relied on Treasury Regulation § 1.6011-4 in framing § 6707A(c)(1), and viewed the Regulation's provisions as valid. Thus, Congress's reference gave the IRS the green light to keep identifying transactions as described in that regulation.

Congress used the word "determine" a second time in § 6707A(c)(1): a reportable transaction is one "of a type which the Secretary *determines* as having a potential for tax avoidance or evasion." The same word, used twice in close proximity, should have the same meaning. *See, e.g.*, *Env. Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007). And it does. In this second use, Congress

highlighted the Secretary's discretion in deciding what transactions should be reportable. Both uses of "determine" concern elements of Treasury's discretion: the first use covers the process, and the second covers the substance. Coming just after the specific reference to "regulations under section 6011," this aspect of § 6707A(c)(1) recognizes and approves the categories of reportable transaction the Secretary set out in Treasury Regulation § 1.6011-4(b).

Similarly, the definition of "listed transaction" in § 6707A(c)(2) incorporates the definition of "reportable transaction," but those "specifically identified by the Secretary as a tax avoidance transaction." Congress knew that the Secretary had already made specific identifications. And the mechanism for doing so was by notice. *See* Treas. Reg. § 1.6011-4(b)(2). Thus, Congress did not just incorporate the regulation; it recognized and incorporated the Secretary's ability to issue notices to identify listed transactions, including those that had already been issued.

C. The statutory text of other AJCA provisions makes clear that Congress viewed the existing listed transaction notices and regulation as valid.

Other provisions of the AJCA confirm that Congress adopted and ratified the IRS's notice-based process for designating listed transactions because they implicitly rely on the fact that the IRS had already done so. If those notices were invalid, Congress passed dead letters. The Court should avoid a reading of the AJCA that renders its provisions nullities. *See, e.g.*, *Hibbs v. Winn*, 542 U.S. 88,

101 (2004) (citing rule against superfluities). And if the pre-AJCA notices were validly issued, it means Congress approved listing transactions by notice.

To encourage taxpayers who were participating in listed transactions to disclose them, Congress held open the statute of limitations for assessing a tax deficiency until one year after the taxpayer's participation was disclosed. *See* AJCA § 814(a), 118 Stat. at 1581 (codified at 26 U.S.C. § 6501(c)(10)). Congress made this new provision effective for tax years with an open statute of limitations on October 22, 2004, the date the AJCA was enacted. *See id*. § 814(b), 118 Stat. at 1581. In other words, Congress gave the IRS more time to assess tax against taxpayers who had failed to comply with the IRS's listed transaction disclosure requirements before October 22, 2004. If Congress believed the existing notices identifying listed transactions were invalid, then there would have been no listed transactions to which § 6501(c)(10) could apply when AJCA was enacted. Indeed, the Tax Court applied § 6501(c)(10) to uphold the timeliness of a § 6707A penalty for failure to disclose a pre-AJCA transaction. *Blak Invs. v. Commissioner*, 133 T.C. 431 (2009). In doing so, it found that § 6707A "does not alter the definition of reportable transaction or listed transaction," holding that the term "listed transaction" as used in § 6707A is the pre-existing regulatory definition. *Id*. at 441.

Congress also decided to increase the cost for taxpayers who underpay tax due to a listed transaction – regardless of whether they comply with the IRS's

disclosure rules. Ordinarily, 26 U.S.C. § 6404(g) suspends the accrual of interest on a taxpayer's liability if the IRS fails to notify the taxpayer of the taxpayer's liability within a certain time. But exceptions apply, such as for fraud, gross misstatements, or criminal penalties. In the AJCA, Congress created a new exception to the suspension rule for listed transactions. AJCA § 903(c), 118 Stat. at 1652 (codified at 26 U.S.C. § 6404(g)(2)(E)). As a result, interest continues to accrue on a tax liability relating to a listed transaction no matter how long it takes for the IRS to notify the taxpayer of that liability. Again, the effective date Congress crafted for this provision shows that Congress's target included taxpayers who had *already* participated in listed transactions identified by notice – the new exception applies with respect to interest accruing after October 3, 2004. *Id.* § 903(d)(2), 118 Stat. at 1652. Congress specifically made that effective date different from – and generally earlier than – the effective date for its other changes to the interest suspension rules. *See id.* § 903(d)(1), (2), 118 Stat. at 1652. If the existing listing notices were invalid, no taxpayers could have any liability with respect to a listed transaction as of October 3, 2004. Again, the Court should not construe the statute to create a nullity.

D. The context and legislative history of the AJCA and later statutes reinforces Congress's intent to allow identification by notice.

The text of § 6707A(c), taken together with § 6501 and § 6404, is clear: Congress blessed and adopted the IRS's designation of listed transactions by

notice. But if the Court thinks that Green Rock's interpretation is reasonable, that means only that the statute is ambiguous – and the legislative history conclusively resolves any ambiguity in the United States' favor. *See United States v. Pringle*, 350 F.3d 1172, 1180 n.11 (11th Cir. 2003) ("When a statute is vague or ambiguous, other interpretative tools may be used, including an examination of the act's purpose and of its legislative history."). The hearing transcripts and committee reports for the AJCA show Congress was aware of, endorsed, and built upon the existing reportable transaction disclosure framework, and subsequent statutory enactments show continued ratification of it.

1. *Congress passed § 6707A to give teeth to the IRS's efforts to detect and prevent tax avoidance transactions, not to undermine the IRS's existing efforts.*

If there is any ambiguity as to whether Congress intended to ratify or repeal Treasury's then-existing efforts to force disclosure of tax shelters, the legislative history conclusively resolves it in favor of ratification. In passing the AJCA, Congress responded to the IRS's request to enhance the efficacy of its existing disclosure process, as detailed above. *See supra* Part I.B. There can be no question that Congress understood that the IRS had identified dozens of listed transactions by notice, and that the notice-based procedure helped the IRS to act quickly in identifying tax avoidance transactions because of the fast-moving nature of the tax shelter industry. The IRS emphasized to Congress on multiple occasions that

identifying transactions by notice was key to detecting abusive transactions early and timely informing the public of which transactions to avoid. *See supra* Part I.B.

Congress's awareness reveals more than mere passive acquiescence. Rather, Congress actively monitored the IRS's efforts and noted that more action was needed to strengthen their efficacy. *See* 2002 SFC Hearing at 15; S. Rep. No. 108-192, at 90. Congress's assessment of the purpose and performance of the IRS's disclosure framework shaped its action in the AJCA. Indeed, the committee reports state Congress's intent to provide the IRS with a firmer foundation for the disclosure framework, not to pull the rug out from under its efforts by invalidating what it had done. *See* S. Rep. No. 108-192, at 90; H.R. Rep. No. 108-548, at 261.

The legislative history also confirms that the amendment to § 6501(c)(10) stemmed from a concern that taxpayers had not been disclosing their participation in listed transactions in the hope that the IRS would not find them until after the statute of limitations had run. *See* H.R Rep. No. 108-548, pt. 1, at 267 (2004). Section 6501(c)(10) was designed to close the loophole, as the House Report notes. "The Committee . . . believes that it is appropriate to extend the statute of limitations for unreported listed transactions." *Id*. Congress designed the amendment with a specific eye towards addressing participants of transactions already identified by notice. *See Blak Invs.*, 133 T.C. at 442 (*citing* Press Release, Senator Charles Grassley, *Details of Plans to Ensure Continued "Son of Boss"*

Enforcement (July 23, 2004)). Yet Green Rock would have this Court hold, against all evidence and reason, that what Congress actually did was give those taxpayers a get-out-of-jail-free card by *eliminating* the disclosure requirements for participants of all transactions already identified in the IRS's listing notices. If Congress had thought the IRS's method of identifying transactions before the AJCA was invalid, it would not have enacted, without reservation, provisions that applied to transactions identified through that process.

2. *Subsequent statutory enactments relating to listed transactions left the IRS's identification process unchanged.*

Congress's post-AJCA actions underscore its approval of the IRS's identification procedure. A year after the AJCA, Congress expanded the suspension-of-interest exception in § 6404(g), *see supra* Part II.C, to interest accruing ***before*** the date of the AJCA's enactment. *See* Gulf Opportunity Zone Act of 2005 ("GOZA") § 303(a)(1), Pub. L. 109-135 (amending § 903(d)(2) of the AJCA retroactively as if included in the AJCA). Congress also provided that the interest rule would not apply to taxpayers that participated in an IRS settlement initiative for listed transactions. The GOZA specifically referred to IRS Announcement 2005-80, which described the settlement initiative and identified 16 listed transactions as covered. These backward-looking provisions would have served no purpose if the IRS's regulation and listing notices were invalid.

Then, in 2006, Congress enacted 26 U.S.C. § 4965, which imposes an additional tax on nonprofit organizations that participate in listed transactions. *See* Tax Increase Prevention and Reconciliation Act of 2005, § 516, Pub. L. No. 109-222, 120 Stat. 345, 368 (2006). Again, Congress passed this law knowing that the IRS was, under Treasury Regulation § 1.6011-4, identifying listed transactions by "notice, regulation, or other form of published guidance." H.R. Rep. No. 109-455, at 125 (2006) (Conf. Rep.). That Congress again legislated against the backdrop of Treasury Regulation § 1.6011-4, and that the legislation would have an effect only if the regulatory scheme for identifying listed transactions was valid, "serves as persuasive evidence that Congress regarded that regulation as a correct implementation of its intent." *See Boeing Co. v. United States*, 537 U.S. 437, 457 (2003) (citing *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)).

In 2010, Congress amended § 6707A to revise the penalties against taxpayers that fail to report their participation in a listed transaction. *See* Small Business Jobs Act of 2010, § 2041(a), Pub. L. No. 111-240, 124 Stat. 2504, 2560 (2010). In doing so, Congress left unchanged § 6707A's definition of reportable and listed transactions, as well as Treasury Regulation § 1.6011-4's procedure of identifying listed transactions by notice. As was the case six years earlier when Congress first enacted § 6707A, almost all listed transactions identified at the time of the amendment were in notices and none were identified following notice and

comment. *See* Notice 2009-59, 2009-2 C.B. 170, (July 15, 2009). Congress amended § 6707A without modifying its reliance on Treasury Regulation § 1.6011-4, showing Congress adopted the Treasury Department's continuing interpretation of § 6707A(c) that permitted it to designate listed transactions by notice. *See Lorillard*, 434 U.S. at 580-81 ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

These later statutes, like the AJCA's creation of § 6707A itself, show Congress's approval of the IRS's method of identifying reportable transactions. Congress meant the penalty for nonprofits participating in listed transactions in § 4965 and the heightened penalties under § 6707A to apply to transactions that had already been identified as "listed transactions," which happened by notice. If Congress had wished listed transactions to be identified solely by notice-and-comment, it could have made that correction in any of these laws rather than continuing to bolster Treasury's existing framework. This conclusion is reinforced by the well-settled rule that "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Cottage Sav. Ass'n v. Commissioner*, 499 U.S. 554, 561 (1991)); *see also Sewards v. Commissioner*, 785 F.3d 1331, 1335 (9th Cir. 2015) (applying

Cottage Savings); *Oakbrook Land Holdings, LLC v. Commissioner*, 28 F. 4th 700, 719 (6th Cir. 2022) (same); *McCoy v. United States*, 802 F.2d 762, 766 (4th Cir. 1986) (holding that administrative interpretations of statutory provisions that have been reenacted by Congress without substantial change are given the force and effect of law).

3. *Congress's reference to and reliance on Notice 2017-10 further confirms its intent to except the identification of listed transactions from notice-and-comment rulemaking.*

For the last 15 years, Congress has not only left undisturbed Treasury Regulation § 1.6011-4's procedure of allowing the IRS to identify listed transactions by notice. It has closely monitored and relied on the IRS's use of that procedure, particularly in the context of syndicated conservation easements. In March 2019, the Senate Finance Committee launched an investigation of syndicated conservation easement transactions. Press Release, S. Fin. Comm., *Grassley, Wyden Launch Probe of Conservation Tax Benefit Abuse*, (March 27, 2019). Congress asked the IRS Commissioner detailed questions about disclosures the IRS had received under the Notice and requested analysis of that information. Letter from Charles P. Rettig, Commissioner of the IRS, to Charles Grassley, Chairman, Sen. Fin. Comm., 2-7 (Feb. 12, 2020) (responding to SFC's questions). Based on the information gathered in this investigation, Committee Chairman Grassley and Ranking Member Wyden concluded, "the IRS has strong reason for

taking enforcement action against syndicated conservation-easement transactions, *as it has to date*" and that "Congress, the IRS and the Treasury Department … should take further action to preserve the integrity of the conservation-easement tax deduction." Press Release, S. Fin. Comm., *Finance Committee Releases Report on Syndicated Conservation-Easement Transactions*, (August 25, 2020) (emphasis added); *see also* Staff of S. Comm. on Fin., 116th Cong., *Rep. on Syndicated Conservation-Easement Transactions*, 44 (Comm. Print 2020).

This shows that the designation process is functioning as Congress intended. It allows the IRS to detect and gather information about abusive transactions quickly and share with Congress the information obtained; it also allows Congress to use the information to consider further action. Congress repeatedly requested updates about taxpayers' self-reporting of their participation in listed transactions generally, and conservation easements in particular, without criticizing or modifying the way the IRS gathered those reports. That's because Congress intended the IRS to gather them that way.

The only fair implication to draw from Congress's repeated actions over nearly twenty years is that Congress intended the IRS to identify listed transactions by notice. That procedure differs from the APA's notice-and-comment requirements. Thus, Congress intended to except the designation of listed transactions from those procedures. *Cf. Asiana Airlines*, 134 F.3d at 397.

E. *Mann Construction* was wrongly decided.

We recognize the Sixth Circuit decided otherwise in *Mann Construction*, but respectfully submit that the case is non-binding and was wrongly decided. Its analysis is flawed because it uses too narrow a lens to search for Congress's intent. It also did not consider the significance of statutory text from *other* parts of the AJCA (besides § 6707A) and other legislation showing Congress viewed listed-transaction notices, and the authorizing regulation, as valid. And while the Sixth Circuit considered § 6707A, it failed to give meaning to all aspects of that section, as well as the regulatory background against which Congress was legislating.

To start, the Sixth Circuit did not consider the effective date provisions for AJCA's amendments to §§ 6501 and 6404, which are predicated on the validity of the IRS's regulation and listing notices.[3] It also did not consider the significance of the many listing notices that the IRS had issued before the AJCA's enactment, or the absurdity of concluding that when Congress passed the AJCA, it invalidated all those notices. Congress would not have taken numerous steps to bolster the IRS's regulation and listing notices unless it viewed them as valid. *See supra* Part II.C.

[3] Indeed, the Sixth Circuit did not consider the effect of Congress's changes in §§ 6501(c)(10) and 6404(g) at all. To be fair, the United States focused its argument in that case on § 6707A and did not bring the significance of those other statutes to the Sixth Circuit's attention. But we make clear now: invalidating the IRS's notice procedure would also invalidate other provisions of the AJCA. Congress did not intend that result, and the Court should avoid it.

Short of "magical passwords," which the Sixth Circuit acknowledged are not required, it is hard to imagine stronger evidence of Congress's intent.

The Sixth Circuit also failed to give meaning to all portions of § 6707A itself. While it recognized that Congress's cross-reference in § 6707A(c)(1) to Treasury Regulation § 1.6011-4 is "probative of whether Congress was aware" of the IRS's notice-based designation, it failed to recognize what that "aware[ness]" meant. *Mann Constr.,* 27 F.4th at 1146. It makes no sense for Congress to incorporate that regulation by reference into the statute, without modification, if it did not intend to incorporate and endorse one of its most fundamental provisions.

The Sixth Circuit wrongly discounts the significance of the reference to the existing regulations because it says the "statute's key feature is to describe the types of transactions." *Id*. (internal quotations omitted). But a court's role is not to determine which features of a statute are "key" versus ancillary; it is to give effect to all text included by Congress in a statute. Indeed, a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (internal quotation marks omitted). Furthermore, the Sixth Circuit missed that § 6707A(c) defines the "types of transactions" by referring to the *process* of determination – the two are intrinsically tied together.

In ignoring the only "fair implication" of the statutory text, *Mann Construction* goes beyond requiring a "clear" exemption from the APA's procedures. Its reasoning would, under the circumstances of this case, require Congress to repeat what it already said in referring to the regulation. In other words, in addition to incorporating the regulation, the Sixth Circuit would require Congress to say, "and we specifically mean also by notice." The decision defies the Supreme Court's admonition in *Dorsey*, 567 U.S. at 274, that a later Congress is always free to modify a statute implicitly, and is akin to requiring the "magical passwords" the *Marcello* Court deemed unnecessary. 349 U.S. at 310.

The Sixth Circuit's narrow lens caused it to fundamentally misapprehend the case. At one point, the Sixth Circuit suggested that "Congress's 'mere acquiescence' to the IRS's non-conforming practices over the years" did not suffice to show an exemption from the APA. *Mann Constr.*, 27 F.4th at 1147. But the AJCA and subsequent legislation are not "mere acquiescence." Congress used the IRS's regulation and listing notices, in multiple contexts, as the very foundation of the legislation it enacted to combat tax shelters. Congress understood the regulatory background it was legislating within, and it crafted a statute that incorporated both the process and the substance of the IRS's practices.

In enacting the AJCA, Congress legislated to put teeth into the regulatory tax shelter disclosure regime already created by Treasury. In doing so, it adopted and

ratified that regime's procedures, excepting it from the APA. This Court should not follow *Mann Construction's* contrary conclusion.

III. Notice 2017-10 is a valid, reasonable response to years of abusive syndicated conservation easement transactions.

A. The arbitrary and capricious standard of review is exceedingly deferential towards agency action.

Although the APA allows a court to set aside agency action that is "arbitrary and capricious," 5 U.S.C. § 706(2)(A), that standard "is exceedingly deferential" towards agency action, *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996). Under that standard, the Court should only set aside agency action in the limited circumstances when it finds the agency: (1) relied on factors Congress did not intend for it to consider; (2) entirely failed to consider an important aspect of the problem; (3) offered an explanation for its action that runs counter to the evidence before the agency; or (4) offered an explanation "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This inquiry focuses on whether the agency examined "the relevant data" and articulated "a satisfactory explanation" for its decision, "including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (internal quotations omitted); *see also Dep't of Com. v. New York*, 588 U.S. ___, 139 S. Ct. 2551, 2578 (2019).

In the APA, Congress directed courts to evaluate agency action upon "the whole record or those parts of it cited by a party." 5 U.S.C. § 706; *see also Citizens to Pres. Overton Park, Inc. v. Volpe,* 401 U.S. 402, 420 (1971) (holding judicial review is based on the "full administrative record that was before [the agency] at the time [it] made [its] decision"), *abrogated on other grounds by Califano v. Saunders*, 430 U.S. 99 (1977). The record need only show the agency "engaged substantively with the question" at hand and adequately explained the reasoning supporting its conclusion. *Air Transp. Ass'n of America, Inc. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26, 32 (D.D.C. 2010).

The Court should uphold a "decision [of] less than ideal clarity… if the agency's path may reasonably be discerned." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004); s*ee also Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). The question is whether the agency's decision is "within the bounds of reasoned decision making." *Balt. Gas & Elec. Co.*, 462 U.S. at 105. An agency need not act with "pinpoint precision" as long as the solution relates to the underlying concern. *New Jersey v. EPA*, 989 F.3d 1038, 1051 (D.C. Cir. 2021). "As long as a reasonable basis appears for [the] decision, it must be upheld as not being arbitrary and capricious, even if there is evidence that would support a contrary decision." *Jett v. Blue Cross & Blue Shield of Ala., Inc.*, 890 F.2d 1137, 1140 (11th Cir. 1989). The Court should not "become

a superagency that can supplant the agency's expert decision maker." *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976).

B. Notice 2017-10 is a reasoned response to combat the pervasive abuse of syndicated conservation easement transactions.

Deductions related to the donation of conservation easements have amounted to billions of dollars of tax savings to those claiming them. AR591, 594, 657. The IRS has long wrestled with abusive tactics that attempt to take unfair advantage of that type of deduction. AR431-581. Notice 2017-10 aimed to thwart the spread of this abuse. Syndicated conservation easements rely on "hyperinflated conservation donations as a tool for selling bogus federal tax deductions to wealthy investors." AR656. Before issuing the Notice, the IRS – and the conservation community – knew that the IRS's existing enforcement efforts were woefully inadequate. AR586. Commentators characterized the IRS as "outnumbered, outgunned, and [lacking] the audit capacity to stop those transactions." AR584. Members of the conservation community called on the IRS to take action to prevent continued abuse that would "substantially undermine" legitimate land conservation efforts. AR656.

The IRS issued the Notice to address these concerns. Exercising the broad scope of discretion authorized by Congress in § 6707A,[4] the IRS drew on years of case studies of abusive syndicated conservation easement transactions; experience litigating artificially inflated conservation easement deductions in court; and dialogue with stakeholders in the conservation community. The cases cited in the Administrative Record highlight the IRS's difficulty obtaining information related to syndicated conservation easement transactions before the Notice and the need for more streamlined reporting. AR11-32. The case studies and promotional materials show the nature of abuse and the inflated deductions within these transactions to be addressed by the Notice. AR677-765. The correspondence and articles in the record from members of the conservation community – on top of showing the public call for agency action to address the problem – show the IRS considered the perspectives of stakeholders in shaping the scope of the Notice. AR427-676; 766-805. In October 2016, the IRS previewed forthcoming guidance on § 170(h), and that the most likely outcome was a notice designating certain conservation easements donations as "listed transactions." AR777. Following that announcement, the IRS considered additional views from the impacted community,

[4] As Congress observed, § 6707A "does not define the terms 'listed transaction' or 'reportable transaction,'" but instead "authorizes the Treasury Department to define [those terms] under section 6011." H.R. Rep. No. 108-755, at 582-84 (Conf. Rep.) (2004); *see also* H.R. Rep. No. 108-548, pt. 1, at 261-62 (Conf. Rep.).

including support for and critiques of the listed transaction designation.[5] AR675, 777. Thus, the Administrative Record shows that the IRS took a holistic look at all aspects of the issue and "engaged substantively with the question" before releasing the Notice in its final form. *Air Transp.*, 719 F. Supp. 2d at 32.

The Notice was a solution tailored to address the issue before the IRS. The Notice states that the Treasury and IRS are "aware that some promoters are syndicating conservation easement transactions that purport to give investors the opportunity to obtain charitable contribution deductions in amounts that significantly exceed the amount invested." As discussed above, the Administrative Record demonstrates how the IRS learned of these schemes. The Notice provides a background description supported by the Administrative Record explaining why syndicated conservation easement transactions carry a high risk of abuse when bogus appraisals greatly inflate the value of the donated land. AR2-3. It also connects that description to the IRS's rationale for subjecting these transactions to more reporting requirements by designating them as listed transactions by explaining that the IRS "intends to challenge the purported tax benefits" flowing from "the overvaluation of the conservation easement." AR2.

[5] While the IRS was not required to engage in formal notice-and-comment procedures, the fact the IRS considered views of outside stakeholders supports the reasonable basis for its actions.

By requiring participants and material advisors to disclose their involvement in syndicated conservation easements, the IRS can more easily detect and challenge abusive transactions. Indeed, a central purpose of the listed transaction disclosure regime is to allow the IRS to gather information. Issuing the Notice was a reasonable way to address the problem the IRS considered, even if it were not the only option available. *State Farm*, 463 U.S. at 43. The purpose of "arbitrary and capricious" review is not to "inject[] the judge into day-to-day agency management" to make policy choices of the best solution to a problem, but to determine whether the agency had a reasonable basis for its decision. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66–67 (2004). The Notice provides sufficient description so that the path from the information considered to the IRS's decision can "reasonably be discerned," and is therefore not arbitrary and capricious. *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 497.

C. Green Rock's challenges do not show Notice 2017-10 is arbitrary and capricious.

Green Rock's challenges to the Notice are meritless. They amount to a request to this Court to usurp the discretion of the Commissioner of the IRS and engage in drafting exercises and policy decisions. The Court should deny that request. The United States responds to Green Rock's six specific challenges as follows:

1. Green Rock repeats its erroneous assertion that the Notice was not issued in accordance with the law for lack of notice and comment. ECF No. 22 at 16. As discussed above in Part II, the IRS issued the Notice under an alternative procedure authorized by Congress, which did not require notice and comment.

2. Green Rock erroneously contends the Notice does not identify any facts or data supporting the IRS's determination. ECF No. 22 at 16. The Notice explains how syndicated conservation easement transactions are used to avoid tax. It describes how promoters lure investors with advertisements that they can receive tax deductions two and one-half times the amount of the investment. AR2. To do so, the Notice explains, the promoters obtain a bogus appraisal that inflates the value of the conservation easement based on unreasonable conclusions about the development potential of the real property, resulting in inflated tax deductions. AR2. This language is not conclusory, but descriptive of the problem shown in the Record and addressed through the Notice. The Notice also explains that the IRS intends to challenge the purported tax benefits of these transactions based on the overvaluation. AR3. This shows a sufficient description of the problem, tied to the final choice made by the IRS under arbitrary and capricious review.

3. Green Rock erroneously contends that the Notice "restricts conservation easements that Congress wanted to incentivize, without grappling with that fact or considering obvious alternatives." ECF No. 22 at 17. In 26 U.S.C.

§170(h), Congress intended to promote land conservation, not scam investment schemes and improperly inflated tax deductions. Moreover, nothing in the Notice prevents a taxpayer from donating a conservation easement on land for a charitable purpose, including in a syndicated transaction; they just must inform the IRS. Participants merely must adhere to the disclosure requirements of Treasury Regulation § 1.6011-4, and the Notice announces the IRS's intent to challenge the deductions on other bases, such as overly inflated property valuation. And the IRS could reasonably decide that even if the Notice occasionally required taxpayers to report wholly valid transactions, it would be worth it to ensure that most or all abusive transactions were also captured. "Regulation, like legislation, often requires drawing lines." *Mayo Found. v. United States*, 562 U.S. 44, 59 (2011).

In reaching this solution, the IRS considered the consequences of designating syndicated conservation easement transactions as listed transactions and other alternatives. *See* AR675, 777, 786, 782. That the IRS chose this action while other options may have been available is irrelevant in the arbitrary and capricious analysis. *Jett*, 890 F.2d at 1140.

4. Green Rock erroneously argues that "Notice 2017-10 made the reporting and recordkeeping requirements retroactive … without any explanation or justification." ECF No. 22 at 18. The Notice did not create retroactive requirements. Material advisors did not have disclosure obligations under Treas.

Reg. § 301.6111-3 and § 301.6112 until after December 23, 2016, when the Notice was released.[6] Then material advisors had a future obligation to disclose advice given with regard to transactions that occurred before the effective date of the Notice. This requirement stems from Treas. Reg. § 1.6011-4(e), however, not the Notice. And imposing a future obligation to disclose transactions that occurred in the past is not creating a retroactive recordkeeping requirement – the requirement is entirely prospective.

In any event, the Notice adequately explains the justification for including transactions that occurred before the Notice was issued. As the Notice explains, at least some syndicated conservation easement transactions are tax avoidance transactions, and the IRS intends to challenge the resulting tax benefits when appropriate. The nature of these transactions is abusive no matter when they occurred. By including syndicated conservation easement transactions in which taxpayers participated and material advisors advised in the past, the Notice ensured that participants in these transactions would be treated similarly regardless of the date of their participation.

Material advisors must file their disclosure statement so that the IRS is aware they provided advice and can follow up with a request for a client list.

---

[6] In fact, the IRS repeatedly extended the time for material advisors to disclose involvement in any applicable past transactions. *See* IRS Notice 2017-29, 2017-20 I.R.B. 1243; IRS Notice 2017-58, 2017-42 I.R.B. 326.

Material advisors must maintain lists of their clients going back 6 years to allow the IRS to detect and respond to past participation in transactions, which it can do so long as the assessment period of limitations has not expired. The January 1, 2010, date identified in the Notice is directly in line with this goal because it captures years for which the assessment window is most likely to still be open, as the period for assessment of taxes can, in some instances, be extended up to six years. 26 U.S.C. § 6501. Thus, the Notice is not arbitrary and capricious for including years before its effective date because the path from the IRS's selection of these years to its stated goal is easily discernable.

5. Green Rock also challenges the IRS's determination that transactions promoting a share of a charitable contribution deduction of 2.5 times the amount of the investor's investment are most likely to be abusive tax-avoidance schemes subject to challenge. ECF No. 22 at 18. This amount reflects the IRS's intent to capture the most inflated land valuations, grounded in the IRS's experience challenging those valuations and supported by the materials in the Administrative Record. The 2.5 number was not plucked out of thin air but was based on the analysis of the Land Trust Alliance – representing its 950-member land trusts and their 6.4 million supporters nationwide – suggesting that this was the approximate break-even point for the promoter in attracting investors to tax avoidance schemes. AR785. The APA does not require the IRS to act with such

precision as to divine the exact percentage of inflated valuation that makes a transaction abusive, as long as its ultimate choice is grounded in the record, as it is here. *See, e.g.*, *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (noting that the Court is "generally unwilling to review line-drawing" by agencies unless the lines drawn are "patently unreasonable."). Nor can the Court "supplant the agency's expert decision maker" in its review under the arbitrary-and-capricious standard. *Ethyl Corp.*, 541 F.2d at 36. The IRS's goal was not to find the definitive threshold of when a transaction becomes a definite violation, but to identify transactions that warrant further scrutiny. Thus, because there is a "rational connection between the facts found and the choice made," the IRS's decision to set a 2.5-times-investment threshold is not arbitrary and capricious. *State Farm*, 463 U.S. at 43.

6. Green Rock erroneously contends the Notice is arbitrary and capricious for failing to define some terms, including "substantially similar" transactions and "promotional materials." ECF No. 22 at 21. But this case is unlike *Qwest Corp. v. FCC*, 258 F.3d 1191, 1201-02 (10th Cir. 2001), the case on which Green Rock relies. In *Qwest*, the terms were "inadequate to enable appellate review . . . and, if accepted, would provide only a circular argument in support of the FCC's position." *Id.* at 1201 (discussing failure to define "sufficient"). The terms Green Rock picks out suffer from no such infirmity. They are reasonably self-defining. In the absence of any specific pleading that would crystallize the

dispute beyond Green Rock's conclusory complaints, the Court should uphold the Notice if the terms "provide a fair and reasonable warning of what" they require. *Georgia-Pac. Corp. v. OSHRC*, 25 F.3d 999, 1004 (11th Cir. 1994) (applying constitutional standard). And both terms do.

First, the "substantially similar" language is used by Congress in § 6707A(c)(2); it is defined in Treasury Regulation § 1.6011-4(c)(4) as a transaction "that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or similar tax strategy." The elements identified in Notice 2017-10 as bringing a transaction within the direct ambit of that Notice provide the guidelines for any transaction that is "substantially similar." That phrase's meaning is sufficiently discernible: an ordinary person could determine which transactions are substantially similar to those listed in the Notice. *See Interior Glass Sys., Inc. v. United States*, 927 F.3d 1081, 1085 (9th Cir. 2019) (finding that the definition of "substantially similar" in Treasury Regulation § 1.6011-4(c)(4) is not unconstitutionally vague).

As for "promotional materials," the Notice partially incorporates the definition in Treasury Regulation § 301.6112-1(b)(3)(iii)(B). Beyond that, however, an ordinary person would easily understand "promotional materials" to carry its ordinary meaning: materials that are offered to potential participants to explain the transaction or to induce them to participate. Read in the overall context

of the Notice's description of syndicated conservation easement transactions, the meaning of "promotional materials" can be reasonably discerned.

Thus, both phrases that Green Rock challenges are rooted in the existing statutory and regulatory framework, their meanings are apparent to an ordinary reader, and they provide fair warning of what they require. As a result, neither phrase can render the Notice invalid under the Court's arbitrary and capricious review. *See Alaska Dep't of Envtl. Conservation*, 540 U.S. at 497 (the Court must uphold agency actions even where they fail to provide perfect detail or clarity).

CONCLUSION

Notice 2017-10 is valid. Because Congress expressed its intent for the IRS to identify listed transactions by notice, the IRS was not required to follow the APA's notice-and-comment procedures in creating Notice 2017-10. Further, the substance of Notice 2017-10 is not arbitrary and capricious. The IRS's decision to combat abusive syndicated conservation easement transactions by making them a listed transaction is rooted in the Administrative Record and sufficiently articulated through the notice. Thus, the Court should deny the Plaintiff's summary judgment motion and grant the United States' summary judgment motion on Counts I and II.

Dated: June 13, 2022

Respectfully submitted,

DAVID A. HUBBERT
Deputy Assistant Attorney General

/s/ Daniel B. Causey, IV

DANIEL B. CAUSEY, IV
LAURA M. CONNER
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 14198
Washington, D.C. 20044
202-307-1427 (v)
202-514-4963 (f)
Daniel.B.Causey@usdoj.gov
Laura.M.Conner@usdoj.gov

OF COUNSEL:

PRIM F. ESCALONA
United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2022, I served this document on plaintiff's counsel by electronically filing it with the Clerk of Court using the CM/ECF system.

/s/ Daniel B. Causey, IV
DANIEL B. CAUSEY, IV
Trial Attorney
DOJ Tax Division