No. 14-

IN THE

Supreme Court of the United States

NEILAND COHEN, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

It is undisputed that the IRS unlawfully exacted approximately $13 billion in long distance telephone excise taxes from individuals, corporations, and non-profit entities between February 28, 2003 and July 31, 2006; has failed to return approximately half of these funds; and adopted a refund rule that violated the procedural requirements of the APA. The issue presented by this petition is

Whether, having invalidated the only mechanism the IRS had developed for pursuing refunds of the unlawfully exacted excise taxes, the District Court was nevertheless precluded by this Court's decision in *Norton v. SUWA*, 542 U.S. 55 (2004), from directing the IRS to provide by properly adopted regulation for a workable refund protocol applicable to those taxes?

LIST OF PARTIES

The petitioners are Neiland Cohen, Catering by Design, Inc., Joan Denenberg, Stacy Markowitz, Virginia Sloan, Gary M. Sable, Robert McGranahan, Shari Perlowitz, Bernadette Carol Duffy, Oscar Gurrola, and Rosalva Gurrola.

CORPORATE DISCLOSURE STATEMENT

Petitioner Catering By Design, Inc. has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases:

Page

Page

Statutes & Other Authorities:

PETITION FOR A WRIT OF *CERTIORARI*

Petitioners, plaintiffs and appellants below, respectfully petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in Case No. 12-5380.

OPINIONS BELOW

The District of Columbia Circuit's decision that petitioners ask to have reviewed (*Cohen II*) is reported at 751 F.3d 629 (D.C. Cir. 2014). Petitioners' petition for *en banc* review of that decision was denied, and is reported at 12-5380, 2014 U.S. App. LEXIS 12636 (D.C. Cir. Jul. 2, 2014). The District Court decision affirmed by the D.C. Circuit in *Cohen II* is reported at 853 F. Supp. 2d 138 (D.D.C. 2012). The original district court decision dismissing petitioners' complaints is reported at 539 F. Supp. 2d 281 (D.D.C. 2008). The D.C. Circuit's *en banc vacatur* of the judgment entered pursuant that decision and remand of the case (*Cohen I*) is reported at 650 F.3d 717 (D.C. Cir. 2011). The panel decision affirmed by the *en banc* court is reported at 578 F.3d 1 (D.C. Cir. 2009).

JURISDICTION

The Order of the Court of Appeals denying petitioners' motion for rehearing *en banc* was entered on July 2, 2014. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

26 U.S.C. § 7422 provides in pertinent part:

> (a) No suit prior to filing claim for refund. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof. ***

STATEMENT OF THE CASE

Background

The IRC has for decades imposed an excise tax on charges for long-distance calls, defined as calls for which charges were assessed on the basis of the distance covered by the call and the time consumed by the call. The evolution of mobile phone technology in the 1990's made this provision obsolete, as long-distance carriers rapidly moved to charges based on time alone, without regard to distance.

Despite its recognition of this shift, "the IRS continued to collect taxes on all long-distance communications." *Cohen I*, 650 F.3d at 720. For the period from February

28, 2003 through August 1, 2006 alone,[1] illegal collections from American phone-users amounted to an estimated $13 billion. The IRS defended this expropriation by contending that statutory authorization to tax calls charged for by distance *and* time allowed taxation of calls charged for by distance *or* time.

After five Circuit Courts of Appeals had rejected this contention,[2] and under the pressure of putative class actions filed by petitioners (taxpayers who have paid unlawfully exacted taxes), the IRS abandoned its position. It simultaneously undertook to provide for partial refunds through an improvised administrative "notice" that the courts below found did not comply with the Administrative Procedure Act.

Legal Challenges to the IRS Position

Except for a single district judge and a dissent in the Sixth Circuit, every trial and appellate judge to whom the IRS presented its "and"-means-"or" argument rejected it. In *American Bankers Insurance Group v. United States*, 408 F.3d 1328 (11th Cir. 2005), *rev'g* 308 F. Supp. 2d 1360 (S.D. Fla. 2004), the Eleventh Circuit became the first of five Courts of Appeals to repudiate the argument. The IRS

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1. Petitioners contend that the appropriate refund period begins well before February 28, 2003.

2. *See Fortis, Inc. v. United States*, 447 F.3d 190 (2d Cir. 2006) (per curiam); *Reese Bros., Inc. v. United States*, 447 F.3d 229 (3d Cir. 2006); *American Bankers Ins. Grp. v. United States*, 408 F.3d 1328 (11th Cir. 2005); *Nat'l R.R. Passenger Corp. v. United States*, 431 F.3d 374 (D.C. Cir. 2005); and *Office Max, Inc. v. United States*, 428 F.3d 583 (6th Cir. 2005).

reacted to *American Bankers* by directing long-distance phone carriers—specifically including those within the Eleventh Circuit—to continue billing users for the tax. *See* Notice 2005-79, 2005-46 I.R.B. 952

In late 2005 and early 2006, petitioners filed separate putative class actions challenging the IRS's continued collection of the tax, particularly from users who, unlike the large corporate parties involved in cases such as *American Bankers*, suffered individual exactions amounting to a few hundred dollars or less.[3] In May, 2006, the IRS issued Notice 2006-50, formally abandoning its position and revoking Notice 2005-79. *See* Notice 2006-50, 2006-25 I.R.B. 1141. That Notice directed long-distance carriers to stop collecting the challenged excise tax. It also set up an *ad hoc* refund scheme premised on a defined refund period starting on February 28, 2003 and running through the date collections were supposed to stop. The Notice contemplated a one-time refund request using annual income tax returns, or a special return for users who would not normally file an income tax return.

Notice 2006-50 was a formal rule promulgated without notice or opportunity for comment under the Administrative Procedure Act and thus, as the courts below found, in violation of that statute. As a result, neither petitioners nor taxpayers in general had any chance for input during the rule-making process. They were thus unable to address such topics as the correct length of the refund period, the appropriate level of "safe-harbor"

3. These suits were later consolidated for pretrial purposes in the United States District Court for the District of Columbia by the Judicial Panel on Multi-District Litigation.

amounts for refund claims, reasonable documentation requirements, a constructive role for carriers in the refund process, and the use of refund mechanisms reasonably calculated to reach the large number of victims who would not have genuine access to refunds under Notice 2006-50's *ad hoc* procedures. Petitioners promptly amended their complaints to add APA challenges to the notice.

Refunds Under Notice 2006-50 and Supplemental Notices

The IRS has acknowledged that it expected to refund $10 billion in illegally collected taxes to individuals and $5 billion to entities. As of April 26, 2012, not quite six years after promulgation of Notice 2006-50, only $4.5 billion had been requested by individuals, and only $1.5 billion dollars by businesses. No more than 4% of the money the IRS expected to return to non-filers—primarily low-income phone users—has actually been refunded. Only 1.7% of the small businesses entitled to refunds requested one.

Litigation Over the IRS's Notice Approach

On March 25, 2008, the district court dismissed the consolidated challenges to Notice 2006-50 on the grounds that (1) petitioners had not exhausted the administrative remedy established by the Notice procedure, and (2) the Notice itself was an internal IRS guideline not subject to APA requirements or to challenge under that statute. *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 539 F. Supp. 2d 281 (D.D.C. 2008). A divided D.C. Circuit panel reversed this conclusion, determining that the Notice refund procedure was in fact agency action subject to APA review. *Cohen I*, 578 F.2d 1, 3-4. The panel majority characterized the IRS's approach in the following terms:

> Comic-strip writer Bob Thaves famously quipped, "A fool and his money are soon parted. It takes creative tax laws for the rest." In this case it took the Internal Revenue Service's . . . aggressive interpretation of the tax code to part millions of Americans with billions of dollars inexcise tax collections. Even this remarkable feat did not end the IRS's creativity. When it finally conceded defeat on the legal front, the IRS got really inventive and developed a refund scheme under which almost half the funds remained unclaimed.

Id. at 2.

The IRS successfully petitioned for *en banc* rehearing. *See Cohen v. United States*, 599 F.3d 652 (D.C. Cir. 2010). The *en banc* court, however, affirmed the panel decision and remanded the case to the District Court to consider the merits of petitioners' APA claims. *Cohen II*, 650 F.3d 717. The *en banc* majority echoed the panel majority:

> The litigation position of the IRS throughout the history of the excise tax has been startling. But the taxpayers' response to Notice 2006-50 is not so shocking. After conceding the excise tax was collected illegally, the Service set up a virtual obstacle course for taxpayers to get their money back.

Id. at 736.

On remand, the District Court held that the IRS had violated the APA's rulemaking requirements when it

issued Notice 2006-50, finding that the "failure to comply with the APA's notice-and-comment requirements is unquestionably a 'serious' deficiency." *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 853 F. Supp. 2d 138, 144 (D.D.C. 2012) (quoting *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 91 (D.D.C. 2007)). The IRS urged the District Court, however, to send the matter back to the agency without specific direction or requirement that it remedy any of the substantive APA challenges to the offending notice because "concerns underlying plaintiffs' substantive APA claims may be addressed by the IRS upon remand." United States' Motion for Determination of Mandate's Scope, at page 9, No. 1:07-mc-00014-RCL (D.D.C.), D.E. # 74. The District Court accepted the IRS's representation and agreed with this approach.

The IRS in fact did not have the slightest intention of addressing petitioners' substantive claims; nor of engaging in APA-compliant rule-making that would correct the procedural deficiencies infecting Notice 2006-50; nor of making any further effort whatever to refund payments to the phone-users from whom it had unlawfully taken money under a tissue-thin pretext that evoked withering scorn from almost every judge who looked at it. The IRS has taken no action since the District Court's decision more than two years ago, and in oral argument in *Cohen II* sheepishly admitted to the D.C. Circuit that it does not intend to take any action. Transcript of Oral Argument at 22-24, *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litigation,* No. 12-5380, 751 F.3d 629 (D.C. Cir. Feb. 21, 2014)

The District Court based its naked remand order on its understanding of this Court's decision in *Norton*

v. SUWA, 542 U.S. 55 (2004). In *Norton*, this Court rejected a demand that the Bureau of Land management be ordered to adopt a regulatory regime to control use of off-road vehicles in certain wilderness study areas. In doing so, this Court held that an APA remedy for agency failure to act will lie only for "a *discrete* action" that is "legally required." *Norton*, 542 U.S. at 63 (emphasis in original). The District Court found that the "legally required" criterion was not satisfied here, noting that "no statute or regulation . . . requires the IRS to execute" the detailed refund program that petitioners have called for.[4] The appellate court agreed that petitioners' contention foundered on the "legally required" prong of that test, because (once again) no statute or regulation called for the specific remedial measures petitioners sought.

REASONS FOR GRANTING THE PETITION

Can the IRS lawlessly take money from taxpayers in unvarnished defiance of statutory limitations without incurring a legal obligation to give the victims a procedurally compliant process for getting their money back? The breathtaking answer to that question below is

4. *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 853 F. Supp. 2d at 145. The district court also suggested that the "discrete action" criterion could not be satisfied, expressing doubt about its authority to mandate "wholesale improvement of [a] program by court decree." *Id.* at 146 (quoting *Long Term Care Pharm. Alliance v. Leavitt*, 530 F. Supp. 2d 173, 185-87 (D.D.C. 2008)). The Court of Appeals did not address the discrete-action issue. Petitioners discuss it, below, however, both in anticipation of the Government citing that criterion as an alternative basis for denying review and because there is some interrelationship between the criteria.

"Yes." Instead of asking whether provision of a workable protocol for pursuing refunds was required by law, as the *Norton* analysis calls for, the appellate court asked whether any statute mandated the specific remedies advocated by petitioners. That is a basic and critical misunderstanding of *Norton*. This Court should grant review in order to correct this misunderstanding for at least three reasons:

(1) The decision deforms *Norton* by focusing on whether a particular remedy is required by law instead of on the question *Norton* asks—Is discrete and pertinent agency action of any kind required by law?

(2) The decision thus converts *Norton* from a limitation on the authority of courts to compel future agency policy-making *ab initio* into an obstacle to judicial correction of unlawful affirmative agency action that has already taken place, thereby impairing agency accountability to the law over a broad range of cases.

(3) "Yes" is an unthinkable answer. As Judge Brown noted in her dissent below, Justice Story found it "unimaginable" that Congress had "'a right to take from the citizens all right of action in any court to recover back money claimed illegally, and extorted by compulsion, by its officers under color of law, but without any legal authority, and thus to deny them all remedy for an admitted wrong'"—and Congress clearly agreed. *Cohen II*, 751 F.3d at 638 (Brown, J., dissenting) (citing *Cary v. Curtis*, 44 U.S. (3 How.) 236, 253 (1845) (Story, J., dissenting); and Brown, *A Dissenting Opinion of Mr. Justice Story Enacted as Law Within Thirty-Six Days*, 26 Va. L. Rev. 759, 760 (1940)).

This case provides the Court with a chance not just to correct a vexatious error in a particular case but to prevent the corrosive metastasis of that error through the body of federal administrative law. *Norton* defined neutral principles for balancing the demand for cabined administrative autonomy and discretion against the need for judicial supervision of agencies acting outside the realm of statutory authorization (and without direct electoral accountability). There is a vast and critical difference between striking that balance in a given case and providing Get-Out-of-Court-Free cards to agencies that, with stunning arrogance, shrug off express statutory limitations and requirements as inconvenient technicalities.

I. THE APPELLATE COURT CRITICALLY MISCONSTRUED THE "LEGALLY REQUIRED" ELEMENT OF *NORTON'S* ANALYSIS, WHICH IS IN FACT AMPLY SATISFIED HERE.

A. The "Legally Required" Facet of the *Norton* Analysis Refers to a Requirement for Pertinent Agency Action, not to the Specific Remedies Sought in a Particular Case.

Under the appellate court's misunderstanding of *Norton's* "legally required" element, the more lawlessly and cynically an agency behaves, the less subject to effective judicial review its actions become. The courts can correct an agency that has overlooked a particular statutory requirement; where the IRS has nakedly flouted an express and unambiguous limitation in the IRC, however, and then in violation of the APA has set up a jury-rigged remedy confronting the victims of its

wrongdoing with "a virtual house of mirrors" if they want a refund, the very scale and complexity of the mess it has made put it beyond the reach of any court's correction.

That seriously misreads *Norton*. The plaintiffs in *Norton* sought to compel BLM compliance with a statutory mandate that the agency manage wilderness study areas in such a way as not to impair the suitability of such areas for use as wilderness—entailing, in the plaintiffs' view, exclusion of off-road vehicles from such areas. *See Norton*, 542 U.S. at 60. This Court rejected plaintiffs' demand for a court order directing compliance with that mandate because the mandate's breadth meant that compliance was not "a *discrete* agency action, as we have discussed above." *Id.* at 66 (emphasis in original). Enjoining compliance with such a generalized prescription, this Court said, would inevitably entangle the courts in "abstract policy disagreements which courts lack both expertise and information to resolve." *Id.*

This Court sharply contrasted such broad, programmatic, policy-oriented mandates with "a specific statutory command requiring an agency to promulgate regulations by a certain date . . . . " *Id.* at 71. Agency noncompliance with a mandate of the latter kind, this Court said, *would* "support[ ] a judicial decree under the APA requiring the prompt issuance of regulations," albeit "not a judicial decree setting forth the content of those regulations." *Id.*

As discussed below, a specific statutory command requiring the IRS to promulgate regulations is precisely what is at issue here. In this case, the statute does not set a date-specific time-limit, but a *de facto* time limit is

necessarily implied: the IRS cannot coherently insist that telephone excise tax refund requests are time-barred—as it did in Notice 2006-50 and as it has repeatedly done in this litigation—until it has in place a statutorily compliant and practicably workable mechanism for seeking such refunds. This is illustrated by one of the cases *Norton* cited as an example of statutory requirements on agencies that *are* judicially enforceable, *Safeway Stores, Inc. v. Brown*, 138 F.2d 278, 280 (Emer. Ct. App. 1943) (" . . . the statute is silent as to a further time limit upon final action . . . . But we think that by clear implication the act requires such action within a reasonable time."). In other words, the IRS missed the relevant "deadline" when it collected the first dollar in unauthorized taxes without having *any* refund mechanism in place to recover that unlawful exaction. *Norton* thus shows rather clearly that the absence of a statutory requirement for a specific remedy sought in a case does *not* bar a court from directing compliance with a statutory mandate that *does* exist if that mandate is for a discrete agency action rather than a broad-ranging foray into policy-making. As (once again) discussed below, that is the case here.

In constraining its analysis as it did, in short, the appellate court asked the wrong question. *Norton*'s "legally required" elements asks whether some discrete and pertinent agency action is required by law. This is a simple and straightforward inquiry. The answer is either yes or no. If the answer is yes, then—and only then—does the analysis proceed to the substantive merits of the particular challenges raised in a given case, and the availability and advisability of the remedies sought (or of some other remedy). While the remedy in many such cases may be a simple remand with directions to develop

the required regulation and a deadline for compliance, other cases—and petitioners believe that this is one of them—may call for more detailed judicial direction, at least on issues of law. *See, e.g., Am. Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165, 182-89 (D.D.C. 2008) (where EPA's re-definition of "navigable waters" under the Clean Water Act was found both procedurally deficient and substantively dubious, court not only vacated re-definition on procedural grounds but discussed substantive issue in detail and remanded "for further proceedings consistent with this Opinion . . ."). The issue at this stage is not what the ultimate scope of the district court's direction should be, but whether, as the appellate court concluded, *Norton* simply stops the entire process in its tracks.

Norton plainly did not assume the existence of statutes so eerily prescient as to anticipate the issues arising and remedies appropriate in particular future cases and in particular circumstances (such as the eight years of agency stonewalling shown by the record here). The approach below artificially narrowed the *Norton* analysis to the point of turning it into a *de facto* excuse for judicial acquiescence in shockingly abusive agency behavior.

Having arrogated to itself the right to take money that Congress has not authorized it to take, and to keep much of that money simply because it thinks it can, the IRS was permitted below to brush off courts that were asked to redress its wrongdoing with an empty promise of substantive action that never occurred and was never intended to occur. The IRS interpreted the District Court's naked remand order not as meaning "adopt a regulation within the limits of your discretion" but as "do

anything you want—including nothing." Reviewing the decision below will enable this Court to rescue *Norton* from a misinterpretation whose practical effect is to create a *de facto* administrative exemption from the rule of law.

B. The IRS is Legally Required to Provide a Procedurally Compliant and Substantively Workable Method for Seeking Refunds of Taxes it has Unlawfully Exacted.

If you take something that doesn't belong to you, you should give it back—especially if you get caught. The truth of that proposition would be obvious to virtually all Americans except sociopaths, from first-graders on up. *See, e.g.*, *Bull v. United States*, 295 U.S. 247, 260 (1935) ("In a proceeding for the collection of estate tax, the United States through a palpable mistake took more than it was entitled to. Retention of the money was against morality and conscience."). Its rejection by the IRS is the single most stunning aspect of what the courts below have aptly characterized as the IRS's "startling" litigation strategy in this dispute.

There is, in fact, no difficulty in identifying a statutory embodiment of that obligation under the facts here. IRC § 7422 provides it. Even if there were not a line, sentence, or comma in statutory law requiring *in haec verba* that the IRS return money it has taken in frank defiance of congressionally prescribed limitations, moreover, the limitations themselves—indeed, the very existence of a comprehensive tax code—would entail such a requirement, as would the Constitution. *See Cohen II,* 751 F.3d at 639 (Brown, J., dissenting) ("If the structure of the Constitution . . . compels an agency to provide a

workable refund scheme, that should suffice for the APA. After all, the Constitution is law, and a supreme one at that."); *see also Carriso v. United States*, 106 F.2d 707, 712 (9th Cir. 1939) (claim to recover fees exacted under a statute that had been repealed held to be "founded upon a law of Congress").

1. The IRS has an express and unambiguous statutory duty to provide by regulation for pursuit of refunds of taxes wrongfully exacted.

Section 7422 of the IRC requires that the IRS provide for consideration of refund requests "under regulations promulgated by the Secretary." 26 U.S.C. § 7422(a). This is not a suggestion or an aspiration or a wistful hint about something it would be nice for the IRS to do if the agency gets around to it. It is an unambiguous statutory command. In *Pittway Corporation v. United States*, 102 F.3d 932 (7th Cir. 1996), for example, the court dealt with a provision in IRC § 4662(b)(1) for taxing butane "under regulations prescribed by the Secretary". The court held, unsurprisingly, that this made promulgation of interpretive regulations on the topic something that "the text of the statute requires." *Pittway*, 102 F.3d at 935. The substantively indistinguishable provision in IRC § 7422(a) must likewise make provision of the contemplated regulations something that "the text of the statute requires."

Indeed, IRC § 7422(a) presents an even stronger case for this conclusion than *Pittway* did. Section 7422, as the IRS has strenuously insisted throughout this litigation, is a jurisdictional statute. It *limits* the right to refunds by

requiring taxpayers to jump through certain hoops and respect specified restrictions when seeking them. Those hoops and those restrictions—the roadmap that taxpayers must follow and the square corners they must turn in order to obtain a refund—are what the "regulations promulgated by the Secretary" are supposed to define. Absent IRS compliance with that statutory duty, there is no path and there are no corners. If providing the regulations the statute calls for were optional or discretionary, as the IRS has suggested, the IRS could take money from taxpayers without a colorable whisper of congressional authorization and simply keep it. No court would have jurisdiction to address any taxpayer complaint about refusal to return the expropriated funds. Any remedy would be a matter of administrative grace that the IRS in its unfettered discretion could bestow or deny—and in the case of denial, no one could do anything about it.

The offense to property and due process rights fatally implicit in that view strongly reinforces the conclusion that promulgating the regulations contemplated by § 7422(a) is a duty, not an option. The statutory words mean what they say. In a government of laws, § 7422 may not preclude behavior that it compels. It may not condition recognition of basic rights—the right to return of property lawlessly taken—on compliance with conditions to be prescribed and then make prescription of those conditions optional, thereby rendering compliance with them potentially impossible.

2. Even if IRC § 7422 did not require provision of a refund protocol, the IRS would be legally required to do so.

Even if § 7422 did not itself impose a requirement to define an applicable refund protocol by regulation, the IRS would nevertheless have a legal duty to do so. That duty would arise first of all from the statute authorizing the tax and limiting its collection to charges based on both distance and time. Inhering in that limitation by necessary implication is a duty to return any monies exacted under color of the statute but blatantly outside the scope of its authorization. *Cf. Aereolineas Argentinas v. United States*, 77 F.3d 1564, 1573 (Fed. Cir. 1996) (noting Tucker Act jurisdiction over claim arising from exaction of "payments that were the government's statutory obligation."). Such a duty arises from the very nature of limited government. The IRS, like every agency of the federal government, does not have all powers not denied to it by statute; it has only those powers affirmatively granted to it by statute.

Whether sovereign immunity might in a given case prevent enforcement of that duty in the courts is a separate question. The only issue for *Norton* purposes is whether that legal duty exists. If it does, then *Norton* does not bar the way to pursuit under the APA of substantive claims bearing on that duty.

Because of the importance of revenue collection and the grave difficulty that would be entailed by disrupting it or interfering with it, Congress has sharply limited the ways in which refund requests may be pursued. It has delegated to the IRS substantial discretion with respect

to the nuts and bolts of the process. Petitioners do not controvert those limitations. The critical point here is that Congress has conditioned those limitations on the IRS actually providing nuts and bolts that, with reasonable patience and attention to detail, will fit together coherently. The IRS cannot logically invoke its own failure to do so to shield itself from the very remedy for such failure that Congress has chosen to provide.

The conclusion is inescapable: provision by properly adopted regulation for pursuit by taxpayers of refunds of lawlessly exacted federal telephone excise taxes is a duty imposed upon the IRS by law. In *Norton* terms, it is "legally required."

C. The IRS has not complied with this legal duty.

It is easy to imagine the reaction that the discussion thus far must provoke: Surely the IRS *has* complied in some broad sense with this duty; surely it *has* adopted regulations that, perhaps imperfectly and with some gaps and anomalies, define a way for mobile-phone users to try to get refunds of tax payments that they did not legally owe.

Unfortunately, and remarkably, the IRS has not done so. This litigation is before this Court *because* the IRS has not done so. The IRS promulgated Notice 2006-50 (without compliance with the APA) precisely because it had not done so. In *Cohen I*, the D.C. Circuit explained this astonishing agency default in detail, and in the process repudiated the IRS's position that it actually had, in fact, sort of, somehow provided taxpayers with a refund route:

To go the "statutory" route, as the IRS suggests, places taxpayers in a virtual house of mirrors. Section 7422 requires taxpayers to file a refund claim "with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." [citing statute] Regulation, 26 CFR § 301.6402-2, enunciates the process for filing a refund claim. Of primary importance here, it dictates the appropriate form for the taxpayer to use. [citing regulation] It states in relevant part that "all claims by taxpayers for the refunding of taxes, interest, penalties, and additions to tax shall be made on Form 843." [citing regulation] Form 843, however, does not permit this type of refund claim. At the top of the form, it reads, "**Do not** use Form 843 if your claim is for . . . [a]n overpayment of excise taxes reported on Form(s) 11-c, 720, 730, or 2290." Form 720 is the Quarterly Federal Excise Tax Return on which communications excise taxes, including the excise tax at issue here, are reported by the service providers (who collect and remit the taxes). Therefore, taxpayers cannot use Form 843 to file their refund claim. The instructions for Form 843, however, suggest that taxpayers fill out Form 8849 "to claim a refund of excise taxes other than those resulting from adjustments to [their] reported liabilities" and refers them to IRS Publication 510, *Excise Taxes*, "for the appropriate forms to use to claim excise tax refunds." IRS Publication 510 states, "Do not use Form 8849, Form 720, or Form 843 to make

> claims for nontaxable service; the IRS will not process these claims." Even if the taxpayer ignored the reference to the IRS publication, Form 8849 itself cautions, "**Do not** use Form 8849 . . . to claim any amounts that were or will be claimed on **Schedule C (Form 720),** Claims . . . ." While this language sounds slightly more flexible, taxpayers have no way of knowing whether their service provider has or will claim the nontaxable funds at issue.

Cohen I, 578 F.3d at 10 (boldfacing, elisions, and parenthetical material are as they appear in court's opinion; note omitted; bracketed material added).

The court flatly rejected the IRS's suggestion that it would have had to accept a refund request on Form 843 or Form 8849, and that such requests would have been jurisdictionally sufficient. It noted sharply that "these assertions directly conflict with the cautionary instructions printed in bold typeface on the front of both forms and the explicit directions given in IRS Publication 510." *Id.* at p. 16. The court concluded that, outside the provisions of the improperly promulgated Notice 2006-50, "taxpayers . . . run into nothing but dead ends. The 'usual statutory procedures for claiming a refund of tax,' . . . provide no avenue by which individual taxpayers can fulfill their obligations in order to seek judicial review." *Id. Cf. Beverly Hospital v. Bowen*, 872 F.2d 483, 486 (D.C. Cir. 1989) (per curiam) ("We cannot fathom the sense of the Secretary's position on this point. The Secretary twice told the hospitals . . . to photocopy 'without cost.' Thus, under the Secretary's own pronouncements, photocopying for peer reviews was not a proper charge; the item had

no place on a cost report, and to put it there would have blatantly defied the Secretary's instruction.").

The IRS, in short, has emphatically *not* complied with either the directive in IRC § 7422 or the duty implicit in the statute under color of which it lawlessly acted (or, for that matter, the due process clause of the Constitution itself). The IRS promulgated Notice 2006-50 in a transparent effort to finesse the difficulty arising from its own default in this regard. That circumvention effort blew up in its face because in promulgating the Notice the IRS failed to give the APA's notice-and-comment requirements even a *pro forma* nod. The IRS stood before the courts below, and it stands before this Court, as an agency claiming that *Norton* insulates it from the consequences of its systematic disregard of its legal duties. That gets things backwards. It is the IRS's systematic disregard of duties required by law that deprive it of any help *Norton* might otherwise provide to it.

D. Requiring the IRS to Obey the Law Will not Impair Revenue Collection or Otherwise Prejudice the Public Interest.

A key point bears emphasis here. Petitioners are not suggesting that some path around the jurisdictional requirements for refund requests must be crafted by the courts in the interests of equity and natural justice. Nor are they seeking a judge-made loophole in the doctrine of sovereign immunity. The requirements in the jurisdictional statute are rather plain, and it is the IRS that has not complied with them. Petitioners are not asking that they be circumvented but that they be enforced.

Petitioners seek recognition of the fact that a pertinent legal obligation has been imposed by statute on the IRS, and that doing what the statute orders the IRS to do is therefore a duty imposed by law. From that premise it follows that *Norton* does not preclude appropriate judicial direction to comply with the law and to do so in an accountable fashion—*e.g.*, under a deadline that takes appropriately into account the IRS's long record of foot-dragging, stone-walling, legal defiance, and general recalcitrance.

If the IRS wishes to maintain in the review process that it may preclude any refund for a particular tax by the expedient of not providing a regulatory mechanism for seeking such refunds, it is free to do so. If it wishes to contend that § 7422 is compulsory for taxpayers but optional for the IRS, it is free to submit pleadings to that effect. Petitioners would welcome the opportunity to join issue on the obvious constitutional problem that such positions would create. What the IRS is not free to do is expropriate money in the teeth of congressional limitations on its authority and then shelter itself from judicial review of its conduct by claiming the sovereignty not of a republic of laws but of a divine right monarch.

The latter is what has happened in this case. The IRS has put itself about the law, above Congress and above the courts. It is up to this Court to bring the agency back down to Earth.[5]

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5. It is readily apparent from the IRS' actions over the course of this case that its conduct is not "substantially justified" within the meaning of the Equal Access to Justice Act. The decisions below to the contrary are erroneous and should also be reversed. *See Gurrola v. United States (In re Long-Distance Tel. Serv. Fed.*

II. THE APPELLATE COURT ALSO MISTAKENLY TRUNCATED ITS REMEDIAL AUTHORITY BY CONFLATING CORRECTION OF PAST AGENCY ACTION WITH COMPULSION OF AGENCY ACTION *AB INITIO*.

A second misreading of *Norton* implicated by the appellate court's decision is its erroneous conflation of efforts to use the courts to force administrative action *ab initio* with efforts to redress unlawful affirmative administrative action that has already taken place. *Norton* deals with the first. The problem that the plaintiffs had with the BLM in *Norton* was that, at least as they saw it, the BLM had *not* acted; it had not taken sufficient steps to regulate use of off-road vehicles in wilderness study areas. The *Norton* plaintiffs asked the courts to make the BLM do so.

Petitioners here complain that the IRS *has* acted; has acted wrongly and with baleful effect; has illegally implemented a "house of mirrors" return program consisting of false hopes and dead ends; and as a result has taken and kept billions of dollars that don't belong to it. Petitioners here are not asking the courts to write on a blank slate but to erase and correct erroneous scribbling already appearing there. By analyzing petitioners' claims solely under *Norton* and disregarding their efforts to obtain appropriate remedies for past actions that the IRS had in fact taken, the appellate court overlooked the core error-correcting role of the judiciary in administrative law.

Excise Tax Refund Litigation-MDL 1798), 751 F.3d 629, 641 (D.C. Cir. 2014) (noting that "the Government's lack of justification is plainly obvious.") (Brown, J., dissenting).

Norton has nothing to do with efforts under the APA to correct allegedly harmful effects of affirmative agency action that has already occurred—cases where the problem is not agency inaction but agency action (such as the lawless exaction of taxes and the establishment of a "house of mirrors" with an array of dead ends to thwart taxpayers who want to get their money back). By shoehorning *Norton* into a context disengaged from the facts and logic of that decision, the appellate court brought the *Norton* analysis into unnecessary tension with the core, error-correcting function of judicial review of administrative decisions—the judiciary's single most important job in the field of administrative law. Rectification of that error by this Court will prevent *Norton* from being improperly used as a restraint on judicial review of lawless agency behavior.

Beverly Hospital v. Bowen, 872 F.2d 483 (D.C. Cir. 1989) (per curiam), illustrates the importance of this distinction. The plaintiffs in *Beverly Hospital* were hospitals and health service associations that were being required by an HFCA regulation to make photocopies of medical records for peer review bodies at their own expense. *See Beverly*, 872 F.2d at 484. That regulation violated a statute (just as Notice 2006-50 did), and the district court in that case held that it was "null and void *ab initio*.'" *Id.* (quoting district court's opinion).

Like the District Court here, however, the district court in *Beverly Hospital*

> declined to consider redress for the period in which the agency imposed the unlawful regulation on hospitals participating in the program. It said that relief for the past, along

> with prospective change, "should await the outcome of rulemaking and any application by an aggrieved person for review of the regulation produced by that process."

Id. at 484 (quoting district court's opinion). In sharp contrast to the appellate court here, the D.C. Circuit in *Beverly* did not acquiesce in this error. The *Beverly* court held that, in taking the approach it did, the district court erred because the plaintiff hospitals had already "incurred large photocopying expenses" under the regime that the defendant agency had adopted. *Id.* Although "rulemaking is now in progress to fill the void left by the invalidation *ab initio*" of the challenged rule and was concededly the appropriate course for doing so, the D.C. Circuit said that this unsupervised process could not be counted on to redress retroactively the losses that had already resulted from the agency's default. *Id.* at 485-86.

The *Beverly Hospital* court's conclusion was emphatic—and quite instructive for present purposes:

> We hold that the District Court disassociated itself from this case too soon, and we therefore remand with instructions. Consistent with its declaration that HCFA's regulation was void *ab initio*, the District Court must retain the case until it is satisfied that, with respect to photocopying costs, the hospitals are accorded the treatment they would have received had the agency initially regulated in accordance with, and not contrary to, the terms of 42 U.S.C. § 1395cc(a)(1)(F).

Id. at 484.

Notice 2006-50 was vacated prospectively rather than *ab initio*. Petitioners alleged, however, that it had had prejudicial impact during the period it was in force. For example, petitioners claimed, it erroneously shortened the appropriate refund period—a pure question of law that a court could and should answer without entangling itself in the details of agency policy judgments, and that it would be much more efficient to have answered *before* the IRS goes to work on a regulation rather than afterward. *See, e.g., Am. Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165, 182-89 (D.D.C. 2008) (court accompanies remand on procedural grounds of EPA re-definition of "navigable waters" under the Clean Water Act with extensive discussion of substantive legal merit of the re-definition, and remands for agency action "consistent with this opinion."). These were among the substantive challenges that the IRS falsely promised the District Court it might address if its request for naked remand were granted. That the District Court here believed that the IRS was telling the truth and had made this promise in good faith is perhaps not surprising. As in *Beverly Hospital*, however, the understandable but mistaken belief of the District Court that rulemaking to address the Notice's deficiencies was in immediate prospect did not deprive the court under *Norton* of authority to provide a remedy for the baleful past effects of the IRS's violations of the law during the Notice's short and unhappy life.

This is a case about relatively small amounts of money for each of scores of millions of American citizens. But it is also about something even more important than that. It is about a tax system that depends to a very large degree on voluntary compliance and that therefore assumes a reasonable degree of civic virtue on the part of the vast

majority of taxpayers. It is one thing to complain about exaction of taxes—something Americans were doing long before the Stamp Act, never mind the Internal Revenue Code. It is something else entirely for a corrosive cynicism to pervade that body of taxpayers—a cynicism born of the sense that a rogue agency steeped in a culture of lawlessness operates serenely above the checks and balances lying at the heart of the American idea of governance. If that cynicism ultimately has the effect of spreading passive-aggressive tax resistance from a tiny fringe of extremists to the broad base of taxpayers, the consequences will be grave indeed.

The present case provides this Court with an opportunity not just to re-focus the perspective of lower courts on the meaning and substance of *Norton*, but to reaffirm the critical principle that the Executive Branch is subject to, and not above, the laws made by the elected representatives of the people.

III. DEVELOPMENT IN COMPLIANCE WITH THE APA AND IN OBEDIENCE TO IRC § 7422(a) OF A REGULATION PROVIDING PHONE USERS WITH A WORKABLE ROUTE TO TELEPHONE EXCISE TAX REFUNDS IS DISCRETE AGENCY ACTION, NOT BROAD, PROGRAMMATIC POLICY-MAKING.

The appellate court did not address the second prong of the *Norton* test, *i.e.*, the requirement that judicial direction be limited to "discrete agency action" as opposed to "broad programmatic" challenges seeking orders "compelling compliance with broad statutory mandates" and thus entangling the courts "in abstract policy disagreements

. . . ." *Norton*, 542 U.S. at 66. Prudence nevertheless calls for discussion of that issue in this petition, for two reasons. First, it is likely that the Government will invoke the "discrete agency action" requirement as an alternative ground for denying review. Second, the "legally required" and "discrete agency action" requirements to some extent interact with each other. The broader and more abstract a statutory mandate is, the less likely it will be under *Norton* that concrete agency action is "legally required" by that statute; conversely, the more specific and concrete the statutory obligation—"adopt a regulation providing for tax refunds", for example—the more clearly compliance is "legally required" for *Norton* purposes.

Petitioners here are not seeking a broad, programmatic policy regulating future behavior. They are trying to obtain a reasonable, lawful, procedurally compliant, and non-arbitrary refund protocol for a discrete and clearly identified fund of unlawfully collected and unrefunded proceeds of a specific tax. The degree and specificity of judicial direction called for are matters to be determined in addressing petitioners' substantive claims—not excuses for failing to address them. (Necessarily informing consideration of that issue on remand, of course, will be the IRS's subsequent admission that its assurance to the District Court that it might address petitioners' substantive concerns was eyewash.) Provision of a refund protocol in substantive compliance with IRC § 7422 and in procedural compliance with the APA is a discrete agency action, not a broad, programmatic policy measure.

Norton, as noted above, arose from efforts to force the Bureau of Land Management to adopt a regulatory scheme to control use of off-road vehicles in certain

wilderness study areas—an issue implicating "'multiple use management'" and thus an "enormously complicated task", in this Court's judgment. *See Norton*, 542 U.S. at 58. *See also Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987) (attempt to force the EPA to regulate strip mines). These are subjects of vast scope and challenging complexity. The array of potential regulatory approaches in both areas is sweeping, with each approach featuring a daunting assortment of ramifications. The relief demanded in those cases was the epitome of broad, programmatic change.

There is simply no comparison between the epochal quests in *Norton* and *Sierra Club* and the modest, sharply focused relief sought in the case at bar. Petitioners here challenge a substantively and procedurally deficient refund protocol relating to one specific and clearly delimited abuse by the IRS of its own authority. They are trying to get it fixed. There are no endlessly ramifying or intricately interacting policy implications potentially stretching far into the future. Petitioners are not asking for re-examination of the entire array of tax refund regulations that are in place, or for development of an ambitious tax credit regimen for eco-friendly industries, or for rationalization of corporate deductions relating to off-shore business activity. Their focus is on a quantified bundle of dollars exacted during a legally definable (albeit disputed) time-period under a particular provision of the IRC. They are simply trying to remedy a specific flawed IRS approach—and to get money back from the IRS to the millions of people it belongs to.

The IRS is jealous of the broad discretion it enjoys in prescribing the rules that must be followed in seeking

tax refunds. It does not, however, have discretion to establish those rules in violation of the APA's procedural requirements, as it did when it promulgated Notice 2006-50. The essential question raised by this petition is even more important: Does the IRS have discretion to do what it has done here—nothing? Does it have discretion to close off any lawful path to request refunds of taxes that concededly were exacted unlawfully, and any judicial review of refusal to make those refunds, by the simple expedient of ignoring the statutory mandate to put jurisdictionally required regulations in place? Or, to ask the same question more concisely—does *Norton* put the IRS literally above the law?

CONCLUSION

Petitioners respectfully request that the petition for a writ of certiorari be granted for the purpose of bringing the above-referenced case to this Court for review and decision.

Respectfully submitted,

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September 11, 2014

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JULY 2, 2014

No. 12-5380

September Term, 2013
1:07-mc-00014-RCL
Filed On: July 2, 2014

In re: Long-distance Telephone Service Federal Excise Tax Refund Litigation-MDL 1798,

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OSCAR GURROLA, *et al.*,

Appellants,

ANTHONY BELLONI,

Appellee,

ROSALVA GURROLA AND BERNADETTE CAROL DUFFY,

Appellants,

v.

UNITED STATES OF AMERICA, ACTING BY AND THROUGH THE INTERNAL REVENUE SERVICE, *et al.*,

Appellees.

Appendix A

BEFORE: Garland, Chief Judge; Henderson*, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan*, Millett, Pillard*, and Wilkins, Circuit Judges; and Randolph, Senior Circuit Judge

O R D E R

Upon consideration of appellants' petition for rehearing *en banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Jennifer M. Clark
Deputy Clerk

* Circuit Judges Henderson, Srinivasan, and Pillard did not participate in this matter.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, FILED MAY 9, 2014

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5380

IN RE: LONG-DISTANCE TELEPHONE SERVICE FEDERAL EXCISE TAX REFUND LITIGATION-MDL 1798,

OSCAR GURROLA, *et al.*,

Appellants,

ANTHONY BELLONI,

Appellee,

ROSALVA GURROLA AND BERNADETTE CAROL DUFFY,

Appellants,

v.

UNITED STATES OF AMERICA, ACTING BY AND THROUGH THE INTERNAL REVENUE SERVICE, *et al.*,

Appellees.

Appendix B

Argued February 21, 2014
Decided May 9, 2014

Appeal from the United States District Court
for the District of Columbia. (No. 1:07-mc-00014)

Before: TATEL and BROWN, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge.*

Opinion for the court filed by *Senior Circuit Judge* RANDOLPH.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* BROWN.

I.

RANDOLPH, *Senior Circuit Judge*: This appeal has its genesis in 26 U.S.C. § 4251, which imposes an excise tax "on amounts paid for . . . toll telephone service." Telephone service is taxed only if its price "varies in amount with the distance and elapsed transmission time of each individual communication." *Id.* § 4252(b). Technological advances of the last few decades changed cost structures and, as a result, telephone companies began charging only by elapsed transmission time. The Internal Revenue Service, however, continued to collect the tax.

Beginning in 2005, the Service lost a series of cases challenging the tax. Five courts of appeals, including this court, held that § 4251 did not permit the Service to tax

telephone service with distance-invariant pricing.[1] Around that time, the three plaintiffs in this consolidated appeal (Cohen, Sloan, and Gurrola) filed separate putative class-action suits challenging the tax. Initially, plaintiffs raised a variety of constitutional and statutory claims, seeking refunds and other relief. *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.* (*Long Distance Tel. I*), 539 F. Supp. 2d 281, 288-89 (D.D.C. 2008). The Judicial Panel on Multidistrict Litigation consolidated the suits in the District Court for the District of Columbia. *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 469 F. Supp. 2d 1348 (J.P.M.L. 2006).

After two of the three plaintiffs—Cohen and Sloan—filed their complaints, the Service issued without notice and comment Notice 2006-50, 2006-1 C.B. 1141 (May 26, 2006). Citing the losses in the courts of appeals, the Notice declared that the Service would no longer tax telephone service priced without regard to distance, *id.* §§ 1(a), 4(c), and established a procedure to refund illegally collected excise taxes, *id.* § 5. Taxpayers could "request a credit or refund . . . on their 2006 Federal income tax returns." *Id.* § 5(a)(2). The Notice allowed taxpayers to claim as a refund either the amount of taxes actually overpaid or a safe harbor amount for which no documentation was required. *Id.* § 5(c).

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1. *Fortis, Inc. v. United States*, 447 F.3d 190 (2d Cir. 2006) (per curiam); *Reese Bros., Inc. v. United States*, 447 F.3d 229 (3d Cir. 2006); *Am. Bankers Ins. Grp. v. United States*, 408 F.3d 1328 (11th Cir. 2005); *Nat'l R.R. Passenger Corp. v. United States*, 431 F.3d 374, 369 U.S. App. D.C. 1 (D.C. Cir. 2005); *OfficeMax, Inc. v. United States*, 428 F.3d 583 (6th Cir. 2005).

Appendix B

Cohen and Sloan amended their complaints to add claims relating to Notice 2006-50 under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq. See Long Distance Tel. I*, 539 F. Supp. 2d at 288-89. Sloan squarely raised both substantive and procedural challenges, while Cohen made only a substantive APA argument. *Id.* The district court dismissed all three complaints. *Id.* at 287. Regarding the APA claims, the district court held that Notice 2006-50 was not judicially reviewable because it was "a statement of internal IRS policy without the force and effect of law." *Id.* at 307; *see id.* at 306-11.

Plaintiffs appealed the dismissal of their APA claims, and a panel of this court reversed,[2] concluding that Notice 2006-50 "operates as a substantive rule that binds the IRS, excise tax collectors, and taxpayers." *Cohen v. United States* (*Cohen I*), 578 F.3d 1, 6, 388 U.S. App. D.C. 80 (D.C. Cir. 2009). The court also rejected the Service's arguments that the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Tax Anti-Injunction Act, 26 U.S.C. § 7421, deprived it of jurisdiction. 578 F.3d at 12-14. Judge Kavanaugh dissented from the panel opinion. He argued that plaintiffs' APA claims were barred by the Declaratory Judgment Act, which prohibits suits seeking declaratory relief "with respect to Federal taxes." *See id.* at 17-20.

The full court granted the Service's petition for rehearing *en banc* to consider whether the Tax Anti-

2. Cohen (but not Gurrola or Sloan) also appealed the dismissal of his refund claims. We affirmed that part of the district court's judgment. *Cohen v. United States*, 578 F.3d 1, 14-15, 388 U.S. App. D.C. 80 (D.C. Cir. 2009).

Injunction Act or the Declaratory Judgment Act barred the court from hearing plaintiffs' suits. *Cohen v. United States*, 599 F.3d 652, 389 U.S. App. D.C. 390 (D.C. Cir. 2010) (*en banc*) (per curiam). The court determined that plaintiffs' APA claims could proceed. *Cohen v. United States* (*Cohen II*), 650 F.3d 717, 736, 397 U.S. App. D.C. 33 (D.C. Cir. 2011). Adopting much of the *Cohen I* panel's reasoning, the *en banc* majority ordered "the district court [to] consider the merits of [plaintiffs'] APA claim on remand." *Id.* Judge Kavanaugh, joined by Chief Judge Sentelle and Judge Henderson, dissented, arguing that an APA suit was unavailable because tax refund suits afforded plaintiffs an adequate legal remedy. *Id.* at 738-42.

On remand, the district court held that Notice 2006-50 was promulgated without notice and comment in violation of the APA. *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.* (*Long Distance Tel. II*), 853 F. Supp. 2d 138, 142-43 (D.D.C. 2012). Having found a violation of the APA, the district court prospectively vacated the Notice and remanded to the Service. *Id.* at 146. The court declined to set a timetable for any further action by the Service because no "law unequivocally requires such action." *Id.*

Plaintiffs then moved for entry of final judgment and an interim award of attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(b) & (d). The district court entered final judgment in favor of plaintiff Sloan only on her procedural APA claim. It entered judgment in favor of the government against both Cohen, who raised only substantive APA challenges that the court did not need to address, and Gurrola, who failed to

raise any APA arguments. *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.* (*Long Distance Tel. III*), 901 F. Supp. 2d 1, 5-7 (D.D.C. 2012). The district court denied plaintiffs' motion for attorney's fees. It first found that plaintiffs could not recover fees under a "common benefit" theory because the litigation's costs could not be shifted to its large, difficult-to-ascertain class of beneficiaries with any exactitude. *Id.* at 8-10. The court rejected plaintiffs' alternative argument for fees under 28 U.S.C. § 2412(d) because it found the government's position was "substantially justified." *Id.* at 11-12. Plaintiffs have appealed from the court's refusal to direct the Service on remand to issue a refund rule and from its denial of their interim request for fees.

II.

The government argues that we have no jurisdiction to hear plaintiffs' appeal because district court orders remanding to agencies are not final appealable decisions. *See* 28 U.S.C. § 1291; *Sierra Club v. USDA*, 716 F.3d 653, 656-57, 405 U.S. App. D.C. 86 (D.C. Cir. 2013).[3] Typically, that is true. A remand order usually allows the agency to correct mistakes in earlier proceedings. Delaying review prevents duplicative appeals from both a district court's remand order and an agency's later action. *See In re St. Charles Pres. Investors, Ltd.*, 916 F.2d 727, 729, 286 U.S. App. D.C. 312 (D.C. Cir. 1990) (per curiam).

3. Plaintiffs do not argue that the denial of attorney's fees is, in itself, a final appealable decision. *See Pigford v. Veneman*, 369 F.3d 545, 361 U.S. App. D.C. 345 (D.C. Cir. 2004).

But the rule is not absolute. The government may appeal these sorts of remand orders because, unlike most private parties, the government may wind up with "no opportunity to appeal" later, after it has conducted proceedings in compliance with the remand order. *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 330, 277 U.S. App. D.C. 112 (D.C. Cir. 1989); *see Sierra Club*, 716 F.3d at 657. Plaintiffs here face a similar predicament. The Service has not taken any reviewable action in the two years since the district court's remand order. Indeed the Service has no reason to act. The three-year statute of limitations for filing refund claims, 26 U.S.C. § 6511(a), has likely expired for most potential claimants and there is no need to streamline the refund process for hundreds of millions of taxpayers as there was when Notice 2006-50 issued eight years ago. We find it particularly important that at oral argument government counsel conceded that the Service is "not planning" to engage in future rulemaking on the subject. Oral Arg. Tr. at 23:16. In these unusual circumstances, treating the district court's remand order as unappealable would "effectively preclude[]" plaintiffs from ever challenging the district court's decisions. *Sierra Club*, 716 F.3d at 658; *see Ringsby Truck Lines, Inc. v. United States*, 490 F.2d 620 (10th Cir. 1974).

We may, in any case, bypass complex questions dealing with appellate jurisdiction when addressing the merits would not require us to "reach[] a question of law that otherwise would have gone unaddressed." *See Sherrod v. Breitbart*, 720 F.3d 932, 936-37, 405 U.S. App. D.C. 395 (D.C. Cir. 2013) (quoting *Steel Co. v. Citizens for a Better*

Env't, 523 U.S. 83, 98, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1988)). The law governing plaintiffs' challenges is well-established and renders the merits "plainly insubstantial." *Id.* (quoting *Norton v. Mathews*, 427 U.S. 524, 530, 96 S. Ct. 2771, 49 L. Ed. 2d 672 (1976)). In such a case we may proceed to decide the merits.

The Supreme Court has endorsed this "practical" approach to finality, particularly in the "twilight zone" where "it is impossible to devise a formula to resolve all marginal cases." *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964); *see also* 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Fed. Practice & Procedure: Jurisdiction § 3913 (2d ed. 1992). We therefore turn to the merits of plaintiffs' claims, recognizing that in the mine run of decisions remanding to an agency, § 1291 will foreclose a private-party appeal.

III.

Plaintiffs allege that the district court erred in vacating Notice 2006-50 and remanding, without specifically instructing the Service to promulgate a new refund procedure. When, as here, a rule is promulgated without notice and comment, the APA directs the court to "hold unlawful and set aside [the] agency action." 5 U.S.C. § 706(2). The APA also permits a court to "compel agency action unlawfully withheld." *Id.* § 706(1). But that provision applies only to "*discrete* action" that is "legally *required* . . . about which an official had no discretion whatever." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63-

64, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (2004) (internal brackets and quotation marks omitted). Consequently, courts issue "detailed remedial orders" to an agency "[o]nly in extraordinary circumstances." *N.C. Fisheries Ass'n v. Gutierrez*, 550 F.3d 16, 20, 384 U.S. App. D.C. 16 (D.C. Cir. 2008).

Plaintiffs have not satisfied § 706(1)'s exacting requirements. 26 U.S.C. § 7422(a), which plaintiffs cite, at most requires *some* form of tax refund procedure. Yet one already exists. *See* 26 C.F.R. §§ 301.6401-1 *et seq*. Section 7422 does not come close to requiring what plaintiffs seek—a specific refund procedure for the telephone excise tax. Even if the code did require some excise-tax-specific procedure, it affords the Secretary of the Treasury great discretion to design the details: what procedural requirements to impose, how much time must elapse before a claimant may sue, and which forms may be used. *Cf. Comm'r v. Portland Cement Co.*, 450 U.S. 156, 169, 101 S. Ct. 1037, 67 L. Ed. 2d 140 (1981) (noting the Court's "customary deference" to treasury regulations administering the tax code). Under *Norton*, that discretion forecloses the detailed order plaintiffs seek. 542 U.S. at 63-64.

Plaintiffs argue that here, unlike in *Norton*, the Service has already acted and therefore must correct its error. But that distinction—between acting and failing to act—is irrelevant under the APA. Courts review both types of "agency action" the same way. *Id.* at 62 (quoting 5 U.S.C. §§ 702, 704, 706). A court's authority to remedy either type of error depends entirely on the underlying

statutory obligation of the agency. *Id*. at 62-63. Here, the only statutory failure was of notice and comment. Absent a statutory duty to promulgate a new rule, a court cannot order it.

IV.

A.

This brings us to the request for attorney's fees. The government contends that plaintiffs may recover attorney's fees only under 26 U.S.C. § 7430, which applies to "proceeding[s] . . . [brought] in connection with the determination, collection, or refund of any tax." Plaintiffs argue that the general fees provisions of the Equal Access to Justice Act, 28 U.S.C. § 2412(b) & (d), apply.

Both statutes allow only a "prevailing party" to recover fees. A prevailing party is one who obtains a "material alteration of the legal relationship of the parties" through a "judgment on the merits" or a "settlement agreement enforced through a consent decree." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res*., 532 U.S. 598, 604, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001) (internal quotation marks omitted). Gurrola and Cohen, having failed to obtain either judgments in their favor or settlements, are not prevailing parties. *Long Distance Tel. III*, 901 F. Supp. 2d at 11.

Plaintiffs protest that this reasoning is overly formalistic because both Gurrola and Cohen raised potentially meritorious substantive challenges to Notice

2006-50 that the district court never reached. We disagree. One does not become a prevailing party "by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined) . . . without obtaining any judicial relief." *Buckhannon Bd. & Care Home*, 532 U.S. at 606. Gurrola and Cohen never obtained "judicial relief" and so they are not entitled to fees.

Sloan is a prevailing party. But we do not decide whether her request for fees is governed by 26 U.S.C. § 7430 or 28 U.S.C. § 2412 because she cannot succeed under either provision. A party may not recover fees under § 7430 without first exhausting administrative remedies. Sloan does not argue that she has done so here. That leaves § 2412.

B.

Sloan argues that she may recover attorney's fees under 28 U.S.C. § 2412(b), which makes the government liable for fees "to the same extent that any other party would be liable under the common law." She invokes the common benefit theory, which applies when "the burden of litigation . . . benefitted others who in equity should share the expenses." 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure: Civil § 2675 (3d ed. 1998). But that theory "ill suits litigation in which the purported benefits accrue to the general public" and is available only when "the class[] of beneficiaries [is] small in number and easily identifiable," "[t]he benefits c[an] be traced with some accuracy, and there [i]s reason for confidence that the

costs c[an] indeed be shifted with some exactitude to those benefiting." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 264 n.39, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975); *see also Grace v. Burger*, 763 F.2d 457, 459-60, 246 U.S. App. D.C. 167 (D.C. Cir. 1985) (holding that "the common benefit theory is inapplicable in cases . . . where plaintiffs seek injunctive relief against the government" (quoting *Trujillo v. Heckler*, 587 F. Supp. 928, 930 (D. Colo. 1984))).

None of the *Alyeska Pipeline* criteria are satisfied here. The class of beneficiaries of this litigation is potentially massive, including millions of taxpayers who used telephones. But that class is nearly impossible to ascertain with any precision because it excludes taxpayers who already claimed a refund and those who were never entitled to a refund. Even if the class could be identified, the benefits of the litigation cannot be estimated, much less determined with exactitude. That is because Sloan did not secure refunds but, at most, made it slightly easier to obtain one. Sloan makes no attempt to estimate the value of the procedural benefit her litigation actually conferred.[4]

C.

Sloan also argues that she is entitled to attorney's fees under 28 U.S.C. § 2412(d), which awards fees to parties

4. In her reply brief Sloan seems to suggest *Alyeska Pipeline*'s criteria do not apply because the government is not entitled to the money it collected under the excise tax. Sloan has not cited, and we have not found, any authority supporting that argument.

prevailing against the government "unless the court finds that the position of the United States was substantially justified." Whether the government's position "was substantially justified shall be determined on the basis of the record (including . . . action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought." *Id.* § 2412(d)(1)(B). The government's position is substantially justified if it is "justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person." *LePage's 2000, Inc. v. Postal Regulatory Comm'n*, 674 F.3d 862, 866, 400 U.S. App. D.C. 79 (D.C. Cir. 2012) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988)). Substantial justification is a "multifarious . . . question, little susceptible of useful generalization." *Underwood*, 487 U.S. at 562. Because the inquiry is fact-intensive and "the district court may have insights not conveyed by the record" we review decisions awarding or denying fees under 28 U.S.C. § 2412(d) for abuse of discretion. *Id.* at 557-63.

Although the question is close we do not think the district court abused its discretion in denying fees. The district court found the government's position to be substantially justified because several circuit judges agreed with the government and dissented from the *Cohen I* and *Cohen II* opinions. *Long Distance Tel. III*, 901 F. Supp. 2d at 12.

Sloan cites opinions suggesting that an earlier dissent does not conclusively show the government's position was substantially justified. But those cases acknowledge

that prior dissents are still "properly considered when conducting th[e substantial justification] inquiry." *Friends of Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir. 1995); *see id.* at 884-86; *EEOC v. Clay Printing Co.*, 13 F.3d 813, 816 (4th Cir.1994).

Here, the existence of several dissenting opinions is particularly persuasive evidence of substantial justification for two reasons. First, the court granted *en banc* rehearing, which is reserved for "question[s] of exceptional importance" or to preserve "uniformity of the court's decisions." FED. R. APP. P. 35(a). If existing law had plainly favored plaintiffs, there would have been no cause for *en banc* review, even of a high-stakes problem. *See Coal. for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 U.S. App. LEXIS 25997, 2012 WL 6621785 (D.C. Cir. Dec. 20, 2012) (Sentelle, C.J., concurring in the denials of rehearing *en banc*).

Second, the legal issues in the earlier appeals were difficult and amenable to reasonable disagreement. Whether Notice 2006-50 was a reviewable final rule or a policy statement, *Cohen I*, 578 F.3d at 6-12, is an amorphous and challenging legal question. *See Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946, 260 U.S. App. D.C. 294 (D.C. Cir. 1987). Similarly, the meaning of the Declaratory Judgment Act is hardly self-evident, because the Act's text is "intrinsically ambiguous." *See Cohen II*, 650 F.3d at 727-31.

Against that evidence of substantial justification, Sloan argues that the Service unjustifiably failed to acquiesce to the Eleventh Circuit's *American Bankers* decision

invalidating the excise tax. *See Am. Bankers Ins. Grp. v. United States*, 408 F.3d 1328 (11th Cir. 2005). But that conduct is irrelevant because it did not occur "in the civil action for which fees . . . are sought." 28 U.S.C. § 2412(d)(1)(B). Furthermore, Sloan conceded at oral argument that the government complied with the *American Bankers* court's order. *See* Oral Arg. Tr. at 14:20-17:5. We have recognized agencies' rights not to acquiesce in one court's legal conclusions in a different case. *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1261-62, 320 U.S. App. D.C. 107 (D.C. Cir. 1996) (Rogers, J., dissenting); *see id.* at 1260 n.3 (majority agreeing).

Sloan also argues that the Service's position was not substantially justified because it promulgated Notice 2006-50 without notice and comment. Standing alone, a notice and comment violation establishes that the government's conduct was arbitrary and capricious. But "arbitrary and capricious conduct is not per se unreasonable" for purposes of attorney's fees. *Andrew v. Bowen*, 837 F.2d 875, 878 (9th Cir. 1988).

It is true that the panel and *en banc* majority opinions described the Service's position in harsh terms. On that basis, one might reasonably conclude that the Service's position was not substantially justified. *See, e.g., LePage's 2000*, 674 F.3d at 867-68. But one might also reasonably conclude that, absent other factors, dissenting opinions on difficult questions are sufficient evidence of substantial justification. We therefore cannot say that the district court abused its discretion. The judgment below is

Affirmed.

Appendix B

BROWN, *Circuit Judge, concurring in part and dissenting in part.* This is a complicated and frustrating case. It has lasted five years and accomplished nothing. In this litigation, the Internal Revenue Service (IRS) has lost every round, but, as the court's opinion confirms, the odds are always with the house.

Round one was *Cohen I*, 578 F.3d 1, 388 U.S. App. D.C. 80 (D.C. Cir. 2009), where we determined the taxpayers could move forward with a challenge to Notice 2006-50. The Service, rocked but undaunted, tried again with a larger group of judges in *Cohen II*, 650 F.3d 717, 397 U.S. App. D.C. 33 (D.C. Cir. 2011) (en banc), arguing it was immune to suit outside the narrow confines of the refund process. Again, it failed—by split decision, the taxpayers won. On remand—round three—the district court found the IRS had violated the APA and vacated the offending notice, but it declined to set any timetable for further action.

The Service announced the demise of the refund notice and resolutely refused to take any other remedial action. Though there is no dispute about the unauthorized nature of the exaction, it intends to keep the unrefunded portions of its ill-gotten gains—a few billion dollars. Indeed, the Service fares better than the Las Vegas casinos: even when they lose, they win. Since no law "unequivocally" requires the IRS to do the right thing, they have the discretion to do wrong. The taxpayers are out of luck. It was not always thus.

I join—without reservation—the court's jurisdictional conclusion. As for the merits, however, I cannot say the

same. The Service's recalcitrance is disconcerting, and I do not share my colleagues' confidence that no law imposes a duty upon the Service to create a *workable* refund scheme. In addition, I view the majority's EAJA analysis as reasonable, but incomplete. I therefore respectfully dissent.

I.

This appeal is not a refund case. But it is about refunds. It has long been understood that there is a part-legal, part-equitable right to reclaim what the government has wrongfully taken away. *Cf. Stone v. White*, 301 U.S. 532, 534, 57 S. Ct. 851, 81 L. Ed. 1265, 1937-1 C.B. 224 (1937) ("The action, brought to recover a tax erroneously paid, although an action at law, is equitable in its function."). Before Congress let down a narrow drawbridge into the otherwise impenetrable fortress of sovereign immunity so that taxpayers could seek recovery directly from the United States, federal courts entertained *indebitatus assumpsit* suits against the collectors whom the taxpayers paid. *See City of Phila. v. The Collector*, 72 U.S. (5 Wall.) 720, 732-33, 18 L. Ed. 614 (1866) ("[The] [a]ppropriate remedy to recover . . . money paid under protest on account of duties or taxes erroneously or illegally assessed, is an action of assumpsit for money had and received."). This curious fiction existed as an end-run around sovereign immunity, *see id.* at 733, and was long recognized as such, *see George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 382-83, 53 S. Ct. 620, 77 L. Ed. 1265, 1933-1 C.B. 341 (1933) ("A suit against a collector . . . is to-day an anomalous relic of bygone modes of thought . . . .").

The fiction, like most, caused a few headaches. *See* William T. Plumb, Jr., *Refund Suits Against Collectors*, 60 HARV. L. REV. 685, 697-98 (1947) (describing the procedural pitfalls commonly encountered by taxpayers attempting to obtain refunds from collectors). But it endured because taxpayers needed *some* workable mechanism to recover funds illegally demanded. Refunds were considered to be obligations of "natural justice and equity," not gifts of statutory grace. *See Cary v. Curtis*, 44 U.S. (3 How.) 236, 246-47, 11 L. Ed. 576 (1845); *see also Bull v. United States*, 295 U.S. 247, 260, 55 S. Ct. 695, 79 L. Ed. 1421, 81 Ct. Cl. 974, 1935-1 C.B. 310 (1935) ("In a proceeding for the collection of estate tax, the United States through a palpable mistake took more than it was entitled to. Retention of the money *was against morality and conscience*." (emphasis added)). And that is no less true today.

The Service has maintained it has no affirmative obligation to provide refunds. Nearly 170 years ago, Justice Story pointed out the problem with the Service's position. When the Court in *Cary v. Curtis*, 44 U.S. (3 How.) 236, 11 L. Ed. 576 (1845), interpreted a newly revised statute as *precluding* suits against collectors, *see id.* at 244, Justice Story explained that depriving taxpayers of all recourse for challenging wrongful collections is repulsive to the constitutional tradition. To him, the question was

> [w]hether Congress have a right to take from the citizens all right of action in any court to recover back money claimed illegally, and extorted by compulsion, by its officers under

> color of law, but without any legal authority, and thus to deny them all remedy for an admitted wrong, and to clothe the Secretary of the Treasury with the sole and exclusive authority to withhold or restore that money according to his own notions of justice or right?

Id. at 253 (Story, J., dissenting). He never arrived at an answer, but he felt no need to—the idea was so unimaginable that Justice Story felt Congress could not have possibly intended a dramatic measure that would trigger a structural constitutional crisis. *See id.* at 257. In the end, he was right—Congress apparently did not intend the bar against collector suits, and it patched the law in record time. *See* George Stewart Brown, *A Dissenting Opinion of Mr. Justice Story Enacted as Law Within Thirty-Six Days*, 26 VA. L. REV. 759, 760 (1940) ("In thirty-six days Congress passed, and President Tyler signed, [the law] which recalled the majority ruling in [*Cary*] and made Judge Story's opinion the law of the land.").

As the Service has made amply clear, there are "off-label" ways a taxpayer can take back the money he never owed in the first place. *See* Appellee's Br. at 22 ("[The Service] announced that it would continue to process claims for refund of the defunct telephone tax, either on Form 843 or on the 1040 series of income tax returns . . . .").[1] But this approach requires some faith that the Service

1. As we noted in *Cohen I*, Form 843 facially does not allow for an excise-tax refund claim. *See* 578 F.3d at 9-10. It is unclear whether the 1040 series is still a viable claim mechanism, as the regulation that permitted the use of that series for excise-tax

will agree to honor a taxpayer's claim without having its fingers crossed behind its back. It could instead choose to be capricious and deny the refund, citing the taxpayer's failure to complete a refund process that, if depicted, looks something like an M.C. Escher drawing. *Cf. Cohen I*, 578 F.3d at 11 ("According to the IRS, taxpayers should have realized all the options the Service said were closed to them—using forms that proclaim their inapplicability in bold letter or filing informal claims that could not be perfected—were nonetheless sufficient to fulfill their administrative refund obligations and to serve as a prerequisite to judicial review."). And the Service could point to that failure as the basis for denying judicial review. *See id.* at 10 ("The 'usual statutory procedures for claiming a refund of tax,' provide no avenue by which individual taxpayers can fulfill their obligations in order to seek judicial review." (citation omitted)).[2]

What a racket. To quote Justice Story, "[w]here then is the remedy which is supposed to exist?" *Cary*, 44 U.S. at 256 (Story, J., dissenting). The Service's answer? Refunds are given by its grace alone. *See* Appellee's Br. at 37-38 ("Nothing in the Internal Revenue Code or regulations thereunder requires the IRS to develop a scheme to achieve the making of refunds of any tax to taxpayers

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refund claims was prospectively vacated. *See* I.R.S. Notice 2006-50 ("Forms 1040 (series), 1041, 1065, 1120 (series), and 990-T will include a line for requesting the overpayment amount.").

2. For the plaintiffs of this case, of course, the Service will suggest the statute of limitations is an insurmountable hurdle barring any further efforts at obtaining redress.

who have made no claim."). But, once again, Justice Story provides an apt rejoinder:

> No court, no jury, nay, not even the ordinary rules of evidence, are to pass between [the Treasury] and the injured claimant, to try his rights or to secure him adequate redress. . . . So that in most, if not in all cases where a controversy arises, the Secretary of the Treasury has already pronounced his own judgment. Of what use then, practically speaking, is the appeal to him, since he has already given his decision?

Cary, 44 U.S. at 256-57.

To remedy an agency's failure to act, the agency's action must be "legally required" or "unlawfully withheld." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (2004). Nowhere in the APA does it say that the obligation must inhere in statute, as the court seems to suggest. *See* Maj. Op. at 8 ("A court's authority to remedy either type of error depends entirely on the *underlying statutory obligation* of the agency." (emphasis added)). If the structure of the Constitution—and perhaps other provisions therein—compels an agency to provide a workable refund scheme, that should suffice for the APA. After all, the Constitution is law, and a supreme one at that. *See* U.S. Const. art. VI, cl. 2.

The Appellants' position—and the court's *arguendo* assumption—that § 7422(a) imposes some sort of duty

to provide a workable refund scheme—seems dubious. Nowadays, to treat a statute as both jurisdictional and substantive, as the Appellants suggest we do with § 7422(a), is odd. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006) ("But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."); *see also id.* (noting "the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue"). *But see United States v. Mize*, 756 F.2d 353, 355-56 (5th Cir. 1985) (concluding the definition of "member bank" and "insured bank" for purposes of a bank fraud statute "serve[d] a dual purpose, constituting both a jurisdictional predicate and an essential substantive element of the criminal offenses"), *overruled on other grounds by United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). But what about the Tax Code itself, in addition to the long-understood common law refund right? Surely, if the Code refers to a right of refund in all but substance, we can infer that right and a duty arising therefrom. *See, e.g.*, 26 U.S.C. §§ 6415, 6511. After all, in *City of Philadelphia v. The Collector*, 72 U.S. (5 Wall.) 720, 18 L. Ed. 614 (1866), that is precisely what the Court did—infer the right from the statutory scheme. *See id.* at 730 ("On the contrary, the several acts of Congress for the assessment and collection of internal duties contain many provisions wholly consistent with any such theory, and which, when considered together, afford an entirely satisfactory basis for the opposite conclusion.").

The majority alternatively posits the Secretary has fulfilled whatever duty is owed; because he possesses "great discretion to design the details," no further action can be compelled. *See* Maj. Op. at 8. The duty, however, is to create a *workable* refund scheme. What might work well to correct an individual overpayment is a completely inadequate response to a systemic irregularity. If one looks at the Service's voluminous forms, announcements, notices, and rules, one would see a labyrinth with no exit. That makes me quite reluctant to join the court's conclusion about the adequacy of the district court's remand order.

II.

Nor do I think the mere presence of a dissenting opinion gives "substantial justification" to the Government's position. The district court concluded there was substantial justification because of (1) a reasoned district court opinion that we ultimately disagreed with; and (2) a dissent by three members of an *en banc* court. The court's opinion relies on only the latter. But neither consideration should be the basis of denying an EAJA award. *See United States v. Paisley*, 957 F.2d 1161, 1167 (4th Cir. 1992) ("As a practical matter, the substantial justification issue cannot be transformed into an up-or-down judgment on the relative reasoning powers of Article III judges who may have disagreed on the merits of a Government litigation position.").

First, Judge Urbina's opinion on the plaintiffs' APA claims cannot be the basis for determining the

Government's position was substantially justified. "The most powerful indicator of the reasonableness of an ultimately rejected position is a decision on the merits and the rationale which supports that decision." *Friends of Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir. 1995). If a district court's contrary opinion can provide the Government with substantial justification, then a district court theoretically can never award EAJA fees in cases involving an appeal that does not result in affirmance. Surely, attorney's fees do not depend upon a plaintiff's success at *every* stage of litigation.

As for the *en banc* dissent, I do not think it to be as potent as the court makes it out to be. For purposes of the EAJA, I put little stock into the "exceptional importance" language of Rule 35. Improbable as it may sound, there exists a possibility that a case presenting a question of exceptional importance can nevertheless draw unanimous agreement from an *en banc* court. *See, e.g., In re Sealed Case No. 97-3112*, 181 F.3d 128, 337 U.S. App. D.C. 17 (D.C. Cir. 1999) (en banc) (deciding a case with no dissents or concurrences in the judgment only, despite a contrary panel opinion); *see also id.* at 142 (Edwards, C.J. and Tatel, J., concurring) ("We originally viewed this case as turning on the difference between two distinct departure factors . . . but now we are persuaded otherwise."); *id.* at 144 (Sentelle, J., concurring) ("I do not disagree with any part of the court's thorough opinion affirming the district court."); *id.* at 145 (Henderson, J., concurring) ("I wholeheartedly agree with the majority's holding which disposes of this case with clarity and in full accord with the decisions of courts, including ours, that have ruled on the issue.").

Rehearing or no rehearing, a district court should certainly *consider* whether there is a dissenting opinion in appellate consideration of the merits of a case. But dissent alone cannot provide the Government with substantial justification. *See EEOC v. Clay Printing Co.*, 13 F.3d 813, 816 (4th Cir. 1994) ("We agree that the dissenting judge's views should be considered, but this factor alone (and it is alone) is not enough to convince us that the district court's assessment of the case constituted an abuse of discretion."). This is especially true when the Government's lack of justification is plainly obvious. *See Friends of Boundary Waters Wilderness*, 53 F.3d at 885.

But the majority's reliance on judicial dissent is but a quibble. The Service's unwillingness to own up to its confusing and dysfunctional "refund scheme" is cause enough for granting an EAJA award.

The EAJA requires the Government to act reasonably during *all* stages of litigation, from the inception of agency action (or lack thereof) to the conclusion of judicial review. *See Hill v. Gould*, 555 F.3d 1003, 1006, 384 U.S. App. D.C. 356 (D.C. Cir. 2009) (noting the Government's position is "substantially justified" if "the underlying agency action and the legal arguments in defense of the action had 'a reasonable basis both in law and fact'" (quoting *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988))); *see also U.S. SEC v. Zahareas*, 374 F.3d 624, 627 (8th Cir. 2004) ("[T]he government must show 'that it acted reasonably at all stages of the litigation." (citation omitted)); *Keasler v. United States*, 766 F.2d 1227, 1231 (8th Cir. 1985) ("[T]he 'position of the United States'

includes the government's position at both the prelitigation and litigation stages."). Here, the Service may have been justified as to the jurisdictional issue. But what about the events that led up to this case, which must be considered under the EAJA?

Throughout this litigation, one of the Service's main contentions has been that refunds are readily available under its current schemes, even notwithstanding Notice 2006-50. In fact, that's not true at all. The confusing morass of a process that we identified in *Cohen I* still exists, having been present in this case since its genesis. *See* Oral Arg. Tr. at 33 (acknowledging the "confusing language" of Form 843 and conceding the Service's failure to rectify the confusion). *Compare* Oral Arg. Tr. at 26 ("[F]or taxes other than income taxes, which would include this excise tax[,] you use form 843 . . . ."), *with* I.R.S. Announcement 2012-16, 2012-18 I.R.B. 876 (Apr. 5, 2012) ("Taxpayers should make their requests on the appropriate 2006 income tax return. . . . Taxpayers who wish to request actual amounts of excise taxes paid rather than the safe harbor amounts described in Notice 2007-11 should use Form 8913 . . . ."), I.R.S. Form 843, *Claim for Refund and Request for Abatement* ("Do not use Form 843 if your claim or request involves . . . an overpayment of excise taxes reported on Form(s) 11-C, 720, 730, or 2290."), *and Cohen I*, 578 F.3d at 9-10 ("Form 843, however, does not permit this type of refund claim."). It is one thing to say the regulatory scheme provides for a workable refund process; it is another to present a procedural boondoggle, where refunds are available only with the governmental equivalent of a wink and nod.

So when the Service says a workable refund scheme exists under the current legal and regulatory regime, its contention is, at best, unreasonable, and, at worst, dishonest. Though it may be only a small part of the Service's case, that is reason enough for me to conclude the district court abused its discretion in declining to award fees to the *Sloan* plaintiffs.

III.

Once upon a time, public law concerned itself with notions of what was morally right, not just what was minimally required. But, as counsel for the Service has repeatedly reminded us throughout this litigation, those days are part of the dim (and not to be recaptured) past. *See* Appellee's Br. at 37 ("After making the concession that limited the scope of 'toll telephone service' to which I.R.C. § 4252(b)(1) applied, the IRS was by no means required to notify every taxpayer potentially entitled to a refund, or even to publicize the availability of refunds."). These days, no matter how unwarranted its exactions, whether the Service returns anything to the taxpayers—when circumstances do not fit the usual paradigm—is a decision within its sole discretion. Following the Service's reasoning to its logical conclusion, the more larcenously it behaves, the lighter its obligations to plundered taxpayers become. No doubt this is a sign of the times, but it seems more an artifact of an administrative state gone deeply awry.

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED OCTOBER 31, 2012

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

07-mc-0014 (RCL)
MDL Docket No. 1798
07-cv-0051 (RCL)
07-cv-0050 (RCL)
06-cv-0483 (RCL)

In re LONG-DISTANCE TELEPHONE SERVICE FEDERAL EXCISE TAX REFUND LITIGATION

This Document Relates to
Cohen v. United States,
Gurrola v. United States,
Sloan v. United States

October 29, 2012, Decided

MEMORANDUM OPINION

I. INTRODUCTION

Pending before this Court is plaintiffs' Motion to Enter Judgment and for an Interim Award of Attorneys' Fees and Litigation Expenses [83]. This Court will GRANT plaintiffs' motion for final judgment in part and DENY the motion in part. The Court will enter final judgment

in favor of the *Sloan* plaintiffs on their procedural APA claim and for the government with respect to all other claims. The Court will enter final judgment in favor of the government on all claims raised by the *Cohen* and the *Gurrola* plaintiffs. The Court will DENY plaintiffs' motion for an interim award of attorneys' fees.

II. BACKGROUND

For decades, the IRS collected an excise tax on long-distance calls based on the distance and duration of calls. *See Cohen v. United States*, 650 F.3d 717, 719-20, 397 U.S. App. D.C. 33 (D.C. Cir. 2011) (*en banc*). The service providers collected the tax and paid it over to the IRS. *Id.* However, as technology changed, service providers no longer calculated the distance of the call in their billing and the IRS began to base the tax solely on duration. *Id.* at 720. Multiple plaintiffs brought cases challenging this new method, seeking refunds and injunctive relief. Even after the IRS lost on this issue in the Eleventh Circuit, *see Am. Bankers Ins. Grp. v. United States*, 408 F.3d 1328 (11th Cir. 2005), the Service continued to defend the tax in court and directed phone service providers to continue collecting it — even within the Eleventh Circuit's jurisdiction. *Cohen*, 650 F.3d at 720 (citing IRS Notice 2005-79). Only after four other circuits held that the tax was illegal, *see Reese Bros., Inc. v. United States*, 447 F.3d 229, 234 (3d Cir. 2006); *Fortis, Inc. v. United States*, 447 F.3d 190, 190 (2d Cir. 2006); *Nat'l R.R. Passenger Corp. v. United States*, 431 F.3d 374, 379, 369 U.S. App. D.C. 1 (D.C. Cir. 2005); *OfficeMax, Inc. v. United States*, 428 F.3d 583, 600 (6th Cir. 2005), did the IRS finally change its position. *See Cohen*, 650 F.3d at 720.

Appendix C

In May 2006, without notice or opportunity for public comment, the IRS issued Notice 2006-50. This Notice discontinued the collection of the tax and provided a limited procedure that allowed some taxpayers to obtain a refund for taxes that had been illegally collected. *See Cohen*, 650 F.3d at 720. More litigation ensued challenging the lawfulness and adequacy of this refund process. *Id.* at 720-21.

Three cases are involved in the present dispute.

Cohen v. United States, 05-cv-1237 (E.D. Wis. 2005) was filed in 2005 as a putative class action, seeking refunds, an injunction against the collection of further taxes, and other relief. After the IRS issued Notice 2006-50, Mr. Cohen amended his class action complaint by adding a challenge to the notice as an "arbitrary and unreasonable administrative action" under the Administrative Procedure Act (APA). *See* Second Amended Complaint [75] at 8, *Cohen*, 05-cv-1237. Mr. Cohen's amended Complaint alleges that the "restitution procedure adopted by the government arbitrarily, unreasonably, and unlawfully limits restitution of the funds unlawfully exacted from phone-users" in several enumerated respects. The Complaint does not refer to the absence of notice and comment, or otherwise to the procedures used in issuing the Notice. *See id.*

Sloan v. United States, 06-cv-483 (D.D.C. 2006) was filed in March 2006 as a putative class action seeking refunds, an injunction against the collection of further taxes, and other relief. After the IRS adopted Notice 2006-

50, the *Sloan* plaintiffs amended their Complaint, adding substantive and procedural APA challenges to the notice. Second Amended Complaint at 18-20, *Sloan v. United States*, 06-cv-483 (D.D.C. 2006). The Complaint's sixth Cause of Action alleges that the IRS failed to comply with the APA's notice and comment requirements. *See id.* at 19.

Gurrola v. United States, 06-cv-3425 (C.D. Cal. 2006) was filed in June 2006, after Notice 2006-50 had already been issued. The Complaint does not include any claims for relief based on the APA, but the plaintiffs' response to the governments' motion to dismiss their claim did allege that Notice 2006-50 had been promulgated "without any public notice, public comment or evidence." Plaintiffs' Response in Opposition to Motion of Defendant United States' To Dismiss Plaintiffs' Complaint at 3, *Gurrola v. United States*, 06-cv-3425 (C.D. Cal. 2006).

In late 2006, the Multidistrict Litigation ("MDL") Panel transferred *Cohen* and *Gurrola* to this Court where they were consolidated with *Sloan* "for pretrial proceedings." *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.,* 469 F. Supp. 2d 1348, 1350 (J.P.M.L. 2006) (Transfer Order); *accord* Practice and Procedure Order Establishing the Governing Practice and Procedure Upon Transfer Pursuant to 28 U.S.C. § 1407(a) at 1, *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 07-mc-14, Docket No. 8 (Jan. 29, 2007) (noting that these actions are "consolidated for pretrial purposes"); *see also Cohen*, 650 F.3d at 721. Plaintiffs declined to file a consolidated amended complaint "[i]n light of the extensive prior briefing in all the actions, and in light of the fact that

such briefing is complete." *See* Joint Status Report, *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 07-mc-14, Docket No. 20 (D.D.C. Mar. 30, 2007).

Judge Urbina dismissed the consolidated cases. *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 539 F. Supp. 2d 281, 287 (D.D.C. 2008). He concluded that plaintiffs failed to exhaust their administrative remedies, to state valid claims under federal law, and that Notice 2006-50 constituted unreviewable agency action. *Id.*

The D.C. Circuit reversed. *Cohen v. United States*, 578 F.3d 1, 4-14, 388 U.S. App. D.C. 80 (D.C. Cir. 2009). Judge Rogers Brown, joined by Judge Garland, concluded that Notice 2006-50 constituted final agency action reviewable under the APA, and rejected the government's jurisdictional challenges. *Id.* Judge Kavanaugh dissented, arguing that plaintiffs' claims were barred by the Anti-Injunction Act and the ripeness doctrine. *Id.* at 16-21 (Kavanaugh, J., dissenting).

The D.C. Circuit granted the government's petition for rehearing *en banc*. *Cohen v. United States*, 599 F.3d 652, 389 U.S. App. D.C. 390 (D.C. Cir. 2010). The *en banc* court affirmed the decision of the panel, and remanded to this Court to consider the merits of plaintiffs' APA claims. *Cohen*, 650 F.3d 717, 397 U.S. App. D.C. 33. Judge Kavanaugh reiterated his objections to reaching the merits of these claims, and was joined in dissent by Chief Judge Sentelle and Judge Henderson. *See id.* at 736-745 (Kavanaugh, J., dissenting).

On remand, Judge Urbina found that the D.C. Circuit's *en banc* opinion had concluded that the IRS violated the APA's procedural notice-and-comment requirements by issuing Notice 2006-50. He prospectively vacated the Notice, and remanded to the IRS for further action. *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 853 F. Supp. 2d 138 (D.D.C. 2012).

In May 2012, plaintiffs filed a motion seeking entry of judgment in favor of all plaintiffs and an interim award of attorneys' fees of more than $6.5 million in fees and expenses, and seeking the court's permission to allow them to file an additional motion for attorneys' fees when the IRS takes further actions. Pl. Br. at 10.[1]

The case was reassigned to the undersigned Judge upon Judge Urbina's retirement from the bench.

III. ANALYSIS

A. Final Judgment

Plaintiffs move for an entry of final judgment in favor of the *Cohen, Gurrola* and *Sloan* plaintiffs on their procedural APA claim. This Court will enter final judgment only in favor of the *Sloan* plaintiffs, and only on this single claim. It will enter judgment in favor of the government on all other claims and with respect to the other two cases.

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1. Reference here and throughout is to plaintiffs' Corrected Memorandum of Law, Docket No. 84-2.

Appendix C

"Every judgment and amended judgment must be set out in a separate document . . . ." Fed. R. Civ. P. 58(a). A party may move for final judgment. Fed. R. Civ. P. 58(a). A court must "promptly approve the form of judgment" to be entered by the clerk. Fed. R. Civ. P. 58(b)(2)(B).

Plaintiffs initially sought an entry of judgment "in favor of Plaintiffs and against the United States with respect to Plaintiffs' claims for a procedural violation of the Administrative Procedure Act." *See* Plaintiffs' [Proposed] Order [83-1]. While some language in plaintiffs' opening brief suggested they might seek an even broader entry of judgment, *see, e.g.*, Pl. Br. at 2-3 (enumerating favorable IRS actions taken after commencement of this litigation), plaintiffs' proposed order confirms that they only seek final judgment based on the single procedural APA claim. This Court takes it as conceded that the procedural APA claim is the only proper source of judgment in favor of plaintiffs here.

In the government's Response, it notes that the three cases at issue here were consolidated solely for pre-trial purposes, so that "separate judgments must be entered for the three cases, rather than the one universal judgment that plaintiffs seek." Def. Judgment Br. at 1 (citing *In re Long-Distance,* 469 F. Supp. 2d at 1350 (Transfer Order)). The government further argued that only one of the three cases (*Sloan*) actually stated the procedural APA claim in its complaint, and so final judgment may only be granted with respect to those plaintiffs on that particular claim. *Id.* at 4-10.

Appendix C

In their Reply, plaintiffs seem to concede that judgment must be considered separately for each case. *See* Pl. Reply at 2-5. Instead, they insist that all plaintiffs have pursued the procedural APA claim and criticize the government's proposed readings of the *Cohen* and *Gurrola* complaints as "formalism at its worst." Pl. Reply at 5.

This Court agrees with the government and finds that the *Cohen* and *Gurrola* plaintiffs did not raise the procedural APA claim in their complaints and so cannot now be awarded final judgment on that claim. These cases were consolidated for "pretrial purposes" only, *see In re Long-Distance,* 469 F. Supp. 2d at 1350; Practice and Procedure Order at 1, *In re Long- Distance,* 07-mc-14, Docket No. 8 (Jan. 29, 2007); *Cohen*, 650 F.3d at 721, and plaintiffs declined to file a consolidated amended complaint. *see* Joint Status Report, *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 07-mc-14, Docket No. 20 (D.D.C. Mar. 30, 2007). Thus, for purposes of final judgment, plaintiffs must be evaluated separately on the basis of their complaints. Only the *Sloan* plaintiffs raised the procedural APA claim in their complaint and so only those plaintiffs are entitled to final judgment on that claim.

Mr. Cohen's complaint alleged, *inter alia*, a cause of action based on a "Review of Arbitrary and Unreasonable Administrative Action," and argued that Notice 2006-50 "arbitrarily, unreasonably, and unlawfully limits restitution of the funds unlawfully exacted from phone-users." Second Amended Complaint [75] at 8, *Cohen*, 05-cv-1237. This states only a substantive APA challenge,

not a procedural one. Mr. Cohen's complaint contains no reference to the lack of notice and comment procedures, nor does it refer otherwise to the procedures by which the Notice 2006-50 was promulgated. This complaint cannot be fairly read to state a procedural APA claim. Mr. Cohen did not pursue this procedural APA theory until his case had been consolidated with the *Sloan* case. Because these cases were consolidated for "pretrial purposes" only, and because plaintiffs declined to file a consolidated amended complaint incorporating all theories raised by separate plaintiffs into a single, unified document, this Court finds that Mr. Cohen did not pursue a procedural APA claim and must enter judgment in favor of the government with respect to all of Mr. Cohen's claims.

The *Gurrola* complaint alleged neither procedural nor substantive challenges under the APA. Plaintiffs point out that the *Gurrola* Complaint challenged the lawfulness of Notice 2006-50, and that their opposition brief to the government's motion to dismiss alleged that the Notice had been promulgated "without any public notice, public comment or evidence." Plaintiffs' Opposition to Defendant's Motion to Dismiss at 3, *Gurrola v. United States*, 06-cv-3425 (C.D. Cal. 2006). However, an unspecified challenge to the "lawfulness" of Notice 2006-50 cannot be reasonably read to state a procedural APA claim, and the fact that the *Gurrola* plaintiffs later raised this claim in subsequent briefs does not alleviate their failure to include this theory in the complaint. Because these cases were consolidated for "pretrial purposes" only, and because plaintiffs declined to file a consolidated amended complaint incorporating all theories raised by

separate plaintiffs into a single, unified document, this Court cannot enter judgment in favor of the *Gurrola* plaintiffs based on a claim they did not properly pursue.

Accordingly, final judgment will be entered in favor of the *Sloan* plaintiffs on the procedural APA claim and in favor of the government on all remaining claims including all claims raised by the *Cohen* and *Gurrola* cases.

B. Attorneys' Fees

Plaintiffs seek an Interim Award of Attorneys' Fees and Litigation Expenses. This Court will DENY this request.

1. Preliminary Issues

Before addressing the merits of plaintiffs' request for attorneys' fees, this Court first must resolve two preliminary questions: (i) whether there is a separate "need" requirement for an interim fee request; and (ii) whether the general fee shifting provision of the Equal Access to Justice Act (EAJA) or the more demanding provision of the Internal Revenue Code (IRC) governs plaintiffs' request. The Court agrees with plaintiffs on both issues, finding that (i) there is no additional "need" requirement for an interim fee request; and (ii) that the general EAJA provision applies.

Appendix C

i. There is No Additional "Need" Requirement For An Interim Fee Request

Plaintiffs seek an interim award. The motion comes before the entry of final judgment, and plaintiffs seek to reserve "the right to make a supplemental fee application to take appropriate credit for any . . . additional value created" by their work on these cases. Pl. Br. at 8.

As to the timing of plaintiffs' motion, the government concedes that "under this Court's Local Rules . . . a party may move for an interim application for attorneys' fees prior to final judgment." Def. Judg. Br. at 10 (citing Local Civ. R. 54.2(c)). However, the government insists that such a motion must demonstrate a special "need." *Id.* The government points to *Beltranena v. Clinton*, 770 F. Supp. 2d 175, 187 (D.D.C. 2011), wherein Judge Friedman rejected a party's request for interim fees as premature because (1) final judgment was not appropriate; and (2) the moving party had not demonstrated any need for interim fees. *See also Hussain v. U.S. Dep't of Homeland Sec.*, 674 F. Supp. 2d 260, 272 (D.D.C. 2009) (Friedman, J.) (making the same judgment).

This Court finds that a party need not demonstrate "need" to properly state a request for attorneys' fees before final judgment has been entered. Our Local Civil Rule 54.2 provides guidance to litigants and Courts in the D.D.C. on matters related to attorneys' fees. Rule 54.2(c) explains that "[n]othing in this Rule precludes interim applications for attorneys fees prior to final judgment." Nothing in the

text of this rule suggests any "need" requirement. This Court reads Judge Friedman's reasoning in *Beltranena* as expressing two *alternative* modes to pursue an interim motion, rather than two necessary elements. A party may state an interim award of fees before final judgment has been entered if (a) final judgment is subsequently deemed appropriate by the court after the motion is filed; or (b) plaintiff has demonstrated need. Here, as discussed above, final judgment is appropriate, and thus the interim motion is sufficient without any separate demonstration of need.

As to plaintiffs' reservation of the right to file a supplemental request at a later date, the Court declines to comment on that issue until it is raised on such a later date.

ii. The Equal Access to Justice Act Governs Plaintiffs' Request For Fees, Not Internal Revenue Code

Plaintiffs moved for attorneys' fees pursuant to two provisions in the EAJA: 28 U.S.C. §§ 2412(b) & (d). The government counters that because plaintiffs' cases challenged the collection of a tax, and sought refunds of that tax, any award of fees must be governed by a provision from the IRC, 26 U.S.C. § 7430(a), which applies to "any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title." 26 U.S.C. § 7430(a).

This Court agrees with plaintiffs. Though these cases began seeking refunds, those claims have long since

been dismissed. Thus, the D.C. Circuit's *en banc* decision concluded that "[t]his suit does not seek to restrain the assessment or collection of any tax." *Cohen*, 650 F.3d at 725. Earlier the Circuit panel explained:

> [T]his is not your typical tax case. In a run-of-the-mill case, taxpayers litigate who has the right to disputed funds . . . in the context of a suit for refund. . . . But this case is different: the fight is over process, not disputed funds . . . . Appellants no longer seek a refund in this suit. . . . They seek to challenge the procedural obstacles the IRS inserted between individual taxpayers and their right to file suit to recover unlawfully collected taxes.

Cohen, 578 F.3d at 5. Applying the IRC fee shifting provision as the government urges would contradict these statements. This Court concludes that the EAJA, not the IRC applies.

2. The Merits of Plaintiffs' Fee Request

Plaintiffs request fees under two provisions of the EAJA: §§ 2412 (b) & (d). This Court concludes that plaintiffs are not entitled to attorneys' fees pursuant to either provision.

Appendix C

i. Plaintiffs are Not Entitled to Fees under § 2412(b)

Section 2412(b) of U.S. Code Title 28 permits recovery of reasonable attorneys' fees, expenses and costs for a prevailing party in litigation against the United States "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award."

The government's brief erroneously seeks to apply the requirements of § 2412(d) which allows recovery of reasonable fees by a party unless the government's position is "substantially justified" and unless the movant's net worth exceeds $2,000,000 at the time the action was filed. The government's attempt to read the requirements of subsection (d) onto subsection (b) is incorrect. The "substantially justified" requirement appears only in subsection (d). Pursuant to the canon of construction *expressio unius est exclusio alterius*, the inclusion of this requirement in subsection (d) but not in subsection (b) implies that no such requirement applies to subsection (b). Similarly, the net worth requirement articulated in subsection (d)(2)(B)(i) explicitly applies only to "this subsection" — language that refers to subsection (d). Only the requirements of subsection (b) apply to plaintiffs' request for attorneys' fees under that subsection.

Plaintiffs' request for fees under § 2412(b) relies on the common law "common benefit" theory. This theory has been applied "to impose fees on a corporate or union defendant when the fruits of a named plaintiff's

victory, though nonmonetary, were spread evenly among shareholders or union members." *Grace v. Burger*, 763 F.2d 457, 459-60, 246 U.S. App. D.C. 167 (D.C. Cir. 1985) (citing *Hall v. Cole*, 412 U.S. 1, 8-9, 93 S. Ct. 1943, 36 L. Ed. 2d 702 (1973); *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 391-97, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970)). Specifically plaintiffs argue that this case has "generated a substantial benefit for more than 100 million taxpayers" who have "already received, or will in the future receive, at least partial refunds," and that counsel deserve fees for generating this common benefit. *See* Pl. Br. at 6.

In *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 247, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975), the Supreme Court articulated requirements that any "class" of beneficiaries must satisfy in order for prevailing attorneys to recover fees under the common-benefit doctrines:

> [1] the classes of beneficiaries [must be] small in number and [2] easily ascertainable. [3] The benefits [must be] traced with some accuracy, and [4] there [must be] reason for confidence that the costs [can] indeed be shifted with some exactitude to those benefitting.

Alyeska, 421 U.S. at 265 n. 39 (quoted in *Brzonkala v. Morrison*, 272 F.3d 688, 691 (4th Cir. 2001)). In *Grace v. Burger*, 763 F.2d 457, 459-60, 246 U.S. App. D.C. 167 (D.C. Cir. 1985), the D.C. Circuit categorically rejected the application of the "common benefit" theory to allow recovery of attorneys' fees under § 2412(b) in cases where

plaintiffs seek injunctive relief against the United States. The court adopted the reasoning of Judge Kane of the District of Colorado:

> [T]he defendant, United States, is more than just a representative of all the beneficiaries of the litigation. An award of attorney fees would ultimately be born[e] by all taxpayers, rather than just those benefiting from the injunctive order. As such, . . . *the common benefit theory is inapplicable in cases such as this where plaintiffs seek injunctive relief against the government*. . . . The common benefit theory is designed to avoid unjust enrichment of beneficiaries to a law suit who are not named plaintiffs. An award of fees here would not compel the beneficiaries to compensate the winning litigant who acted as their representative, but would assess costs against the unrelated losing party. This, clearly, is inconsistent with the American rule and the common benefit exception.

Id. at 460 (quoting *Trujillo v. Heckler*, 587 F. Supp. 928, 931 (D. Colo. 1984)) (emphasis added); *see also United States v. Instruments, S.A., Inc.*, 1993 U.S. Dist. LEXIS 7018, 1993 WL 198842 at *4 (D.D.C. May 26, 1993) (collecting cases that have rejected the applicability of the common benefit theory to recovery against the United States); 10 Moore's Federal Practice, § 54.171[2] [c] (3d ed. 1997) (noting that *Alyeska* "completely undermined" the application of the common-benefit doctrine against governmental entities).

Appendix C

In *Brzonkala*, the Fourth Circuit denied plaintiffs' request for fees from the government under the common-benefit doctrine. Plaintiffs' first purported class of beneficiaries — all U.S. taxpayers — was "not sufficiently 'small in number and easily identifiable' to withstand scrutiny under *Alyeska*." 272 F.3d at 691 (quoting *Alyeska*, 421 U.S. at 265 n.39). Their alternate proposed class of beneficiaries — the class of individuals spared liability thanks to the judicial decision plaintiffs' obtained — also failed because "even assuming it would be possible to identify such persons . . . , imposing fees on the United States would not 'shift [costs] with some exactitude to those benefitting,' as required by *Alyeska*." *Id.* at 692 (quoting *Alyeska*, 421 U.S. at 265 n. 39). The court also noted that "[a]ll federal taxpayers would bear the burden of fees, not merely the comparatively much smaller class of those who would otherwise have been prosecuted." *Id.*

This Court concludes that plaintiffs' request for fees from the government under the common benefit theory fails for several reasons. Plaintiffs' proposed class of "more than 100 million taxpayers" who have "already received, or will in the future receive, at least partial refunds" fails under *Alyeska's* stringent requirements that any class of beneficiaries must be "small in number," "easily ascertainable," the benefits "traced with some accuracy," and some "reason for confidence that the costs [can] indeed be shifted with some exactitude to those benefitting." *Alyeska*, 421 U.S. at 265 n. 39. This proposed class of beneficiaries fails on all counts.

Plaintiffs point to *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261, 1266-71, 303 U.S. App. D.C. 94 (D.C. Cir. 1993) but, this case does not help plaintiffs here. *See* Pl. Br. at 7. In that case, under a court-approved settlement, the Department of Health and Human Services agreed to pay $27.8 million into a fund for distribution among the members of the class. *See Swedish Hosp. Corp. v. Sullivan,* 89-1693, 1991 U.S. Dist. LEXIS 18913, 1991 WL 319154 at *1 (D.D.C. Dec. 20, 1991). Judge Oberdorfer calculated that the plaintiffs' lawyers were only responsible for a portion of that fund, and calculated the attorneys' fees by taking 20% of that portion. *Id.* On appeal, the Circuit approved the use of this percentage-of-the-benefit method in common fund cases. *Swedish Hosp.*, 1 F.3d at 1266-71. In that case the dispute was over the proper measure of attorneys' fees to be drawn from a formally fixed pool of money that had been drawn from the government in the course of a judicially approved settlement. 1 F.3d at 1266-71. In the present case, by contrast, there is no such common fund. Here, in fact, plaintiffs tried and failed to obtain monetary relief from the government. Plaintiffs analogize the value that their litigation has generated to other taxpayers with the common fund in *Swedish Hospital*, but *Swedish Hospital* simply provides no support for this position.

Finally, as in *Brzonkala*, "[a]ll federal taxpayers would bear the burden of fees, not merely the comparatively much smaller class of those who" allegedly benefitted from plaintiffs' work on these cases. *See* 272 F.3d at 691.

Because of our circuit's demonstrated hostility towards applying the common benefit theory to cases against the government, *Grace v. Burger*, 763 F.2d at 459-60, plaintiffs' failure to cite any authority supporting its theory, the failure of plaintiffs' proposed class to satisfy the requirements of *Alyeska*, and the fact that the burden would be borne by all taxpayers to compensate for a benefit allegedly received by only some of them, this Court will DENY plaintiffs' request for attorneys' fees pursuant to § 2412(b).

ii. Plaintiffs are Not Entitled to Fees Under § 2412(d)

In their Reply, plaintiffs argue that they are entitled to recover fees under § 2412(d). This argument also fails.

Section 2412(d) provides that a "prevailing party" is entitled to recover fees from the United States "unless the court finds that the position of the United States was substantially justified." *See* § 2412(d)(1)(A). "Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought." § 2412(d)(1)(B). The "'position of the United States' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." § 2412(d)(2)(D). Recovery is limited to individuals "whose net worth did not exceed $2,000,000 at the time the civil action was filed." § 2412(d)(2)(B)(i).

Appendix C

a. Only Sloan *and not* Cohen *or* Gurrola *Plaintiffs are "Prevailing Parties"*

Prevailing party status is only conferred on a plaintiff who obtains a "material alteration of the legal relationship of the parties" either through judgment or a court-ordered consent decree. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600-04, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001). A party who produced agency change through litigation without securing such an order is not a "prevailing party." *Id.* Where a plaintiff has obtained such a court-ordered material alteration, his counsel may be entitled to fees for "all hours reasonably expended on the litigation" including time spent pursuing alternative legal grounds for a desired outcome. *See Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). A party who seeks and obtains a judicial order vacating an agency order is a prevailing party. *LePage's 2000, Inc. v. Postal Regulatory Comm'n,* 674 F.3d 862, 866, 400 U.S. App. D.C. 79 (D.C. Cir. 2012).

Plaintiffs claim that they are "prevailing parties" here both because of their success in court on the procedural APA violation claim and because the IRS's decision to stop collecting the tax and issue Notice 2006-50 was allegedly occasioned by their legal actions. *See* Pl. Reply at 8-10.

Plaintiffs' success on the procedural APA claim constitutes a "material alteration of the legal relationship of the parties" through judgment. *See Buckhannon*, 532 U.S. at 600-04; *see also LePage's 2000,* 674 F.3d at 866.

However, as discussed above, only the *Sloan* plaintiffs properly pursued this claim, and so only these are entitled to "prevailing party" status. Neither Mr. Cohen nor the *Gurrola* plaintiffs are entitled to "prevailing party" status because they did not properly pursue the procedural APA claim. And, any other results these plaintiffs might have otherwised accomplished through the litigation — *e.g.*, by catalyzing the IRS to change positions -- do not qualify them as prevailing parties under the principles of *Buckhannon*. Accordingly, Mr. Cohen and the *Gurrola* plaintiffs' request for attorneys' fees is DENIED.

b. The "Government's Position" Was Substantially Justified With Respect To Sloan

Section 2412(d) provides that substantial justification must be provided not only for "the position taken by the United States in the civil action" but also "the action or failure to act by the agency upon which the civil action is based." § 2412(d)(2)(D). "Substantially justified" means "justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person." *LePage's 2000*, 674 F.3d at 866 (D.C. Cir. 2012) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988)). "[D]effects common to positions that are not substantially justified" include actions that are "flatly at odds with controlling case law" or which are taken "in the face of an unbroken line of authority." *Hill v. Gould*, 555 F.3d 1003, 1008, 384 U.S. App. D.C. 356 (D.C. Cir. 2009). The burden is on the government to demonstrate that it was "substantially justified." *Halverson v. Slater*, 206 F.3d 1205, 1208, 340 U.S. App. D.C. 413 (D.C. Cir. 2000).

Here, the government must demonstrate "substantial justification" for the IRS' action in issuing Notice 2006-50 and for the government's legal defense of that Notice. It has done so.

Judges of this Court and the Court of Appeals have written opinions finding that the Notice was not subject to judicial review. *See, e.g., Cohen*, 650 F.3d at 736-45 (Kavanaugh, J., dissenting) (joined by Chief Judge Sentelle and Judge Henderson); *In re Long-Distance*, 539 F. Supp. 2d at 308-311 (Urbina, J.). This fact provides an adequate basis to allow this Court to conclude that the government was substantially justified both in issuing the Notice and defending it in court.

Plaintiffs' reliance on *LaPage's 2000* is misplaced. *See* Pl. Reply at 8 (citing *LaPage's 2000*, 674 F.3d at 866). In that case, the Court of Appeals held that an agency was not substantially justified in issuing an order that it struck down under a substantive APA challenge as arbitrary and capricious based on numerous internal inconsistencies and anomalies — problems that would have been apparent on the face of the order. In the present case, by contrast, the challenged order was struck down on procedural APA challenge only after overcoming obstacles to judicial review — obstacles that had the well-reasoned support of Judges Urbina, Kavanaugh and Henderson and Chief Judge Sentelle.

Thus, the position of the government was substantially justified, and plaintiffs are not entitled to Attorneys Fees under § 2412(d).

IV. CONCLUSION

For the foregoing reasons, plaintiffs' Motion to Enter Judgment and for an Interim Award of Attorneys' Fees and Litigation Expenses will be GRANTED in part and DENIED in part. Separate orders consistent with this Opinion shall issue on this date.

Signed by Royce C. Lamberth, Chief Judge, on October 29, 2012.

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED APRIL 10, 2012

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Miscellaneous Action No.: 07-014 (RMU)

Re Document No.: 74

IN RE LONG-DISTANCE TELEPHONE SERVICE
FEDERAL EXCISE TAX REFUND LITIGATION

April 10, 2012, Decided

MEMORANDUM OPINION

Granting the Defendant's Motion For Determination of Mandate's Scope; Remanding to the Internal Revenue Service and Prospectively Vacating Notice 2006-50

I. INTRODUCTION

The plaintiffs challenge the adequacy of a tax refund process instituted by the Internal Revenue Service ("IRS" or "the defendant"). The court previously dismissed the plaintiffs' Administrative Procedure Act ("APA") claim, but the Circuit remanded, instructing this court to consider the merits of the plaintiffs' APA claim in accordance with the Circuit's opinion. The matter is now before the court on the defendant's motion to determine

the effect of the Circuit's opinion on the plaintiffs' APA claim.[1]

The parties agree that the Circuit's opinion may suggest that the defendant violated the APA by failing to comply with the required notice-and-comment procedures. The parties further agree that if that is the case, then the only remaining issue for this court to decide is the appropriate remedy. As discussed below, the court determines that the Circuit's opinion, in conjunction with the parties' representations, indicate that a procedural APA violation occurred. Furthermore, the court concludes that a prospective vacatur is an appropriate remedy.

II. BACKGROUND

For decades, the IRS has collected a 3% excise tax on all long-distance communications. *Cohen v. United States*, 650 F.3d 717, 719-20, 397 U.S. App. D.C. 33 (D.C. Cir. 2011). With technological advancements, the IRS was unable to base the tax on distance and therefore began to base the tax solely on the duration of a call. *Id.* at 720. Litigation ensued, challenging the legality of the tax based solely on the duration of a call. *Id.* Eventually, five circuits held that the tax was illegal, and the IRS thus discontinued the excise tax based solely on transmission time. *Id.*

The IRS provided notice of a one-time exclusive mechanism for taxpayers to obtain a refund for those

1. The parties agree that the plaintiffs' non-APA claims are no longer viable at this juncture. Def.'s Reply at 1; Pls.' Opp'n at 1.

excise taxes erroneously collected between February 2003 and August 2006 ("Notice 2006-50"). *Id.* Notice 2006-50 required that individual taxpayers request this refund on their 2006 federal income tax returns. *Id.* at 721.

Various lawsuits arose challenging the adequacy of the refund process. *Id.* The Judicial Panel on Multidistrict Litigation transferred two of those cases, *Cohen v. United States*, Civ. No. 05-1237 (E.D. Wis. 2005) and *Gurrola v. United States*, Civ. No. 06-3425 (C.D. Cal. 2006), to this court, where they were consolidated with *Sloan v. United States*, Civ. No. 06-483 (D.D.C. 2006). *Id.* Put succinctly, the plaintiffs allege that Notice 2006-50 is substantively flawed because it undercompensates many taxpayers for the actual excise taxes paid, and that it is procedurally flawed because the IRS did not comply with the APA's notice-and-comment procedures. *Id.*

This court previously dismissed the case after concluding that the plaintiffs had failed to exhaust their administrative remedies for their refund claims and failed to state valid claims under federal law. *Id.* In so holding, the court determined that the Notice was an "internal policy" that did not adversely affect the plaintiffs' rights, and that therefore the agency action was unreviewable. *Id.* The plaintiffs appealed, and a divided Circuit panel reversed, holding that the Notice constituted a final agency action reviewable under the APA and that the court maintained proper jurisdiction. *Id.* at 722. The IRS petitioned for en banc review. *Id.* The Circuit "granted rehearing en banc only to determine whether [it had] the authority to hear the case." *Id.* at 719.

The Circuit held that it had authority to hear the case. *Id.* at 736. As a threshold matter, the Circuit determined that the government had waived its sovereign immunity. *Id.* at 723. The Circuit further decided that other limitations to judicial review, namely, the Anti-Injunction Act and the Declaratory Judgment Act, did not apply to the plaintiffs' APA claims. *Id.* at 724-25. More specifically, the Circuit ruled that the plaintiffs were not required to exhaust their administrative remedies to pursue their claims because they were challenging the adequacy of the agency procedure itself. *Id.* at 726. Accordingly, the Circuit reversed this court's dismissal and remanded the case, instructing this court "to consider the merits of [the plaintiffs'] APA claim, in accordance with the opinion of [the Circuit]." *Id.* at 736.

Upon remand, the defendant filed a motion asking this court to decide the effect of the Circuit's mandate on the plaintiffs' remaining APA claims. *See generally* Def.'s Mot. The plaintiffs have filed a response, clarifying those areas in which they are in agreement and disagreement with the defendant. *See generally* Pls.' Response. With the defendant's motion now ripe for the court's consideration, the court turns to the parties' positions and the applicable legal standards.

III. ANALYSIS

A. Procedural APA Violation

The defendant asks that the court clarify "whether the [Circuit] has already decided [the] plaintiffs' procedural

APA claim in [the plaintiffs'] favor," noting that "[t]he mandate is unclear on this point." Def.'s Mot. at 1, 6. If indeed "a procedural APA violation is now [the] law of the case," the defendants conclude, "then the question is the proper remedy and its effect on further proceedings." *Id.* at 7. The plaintiffs, for their part, assert that the "only reasonable interpretation" of the Circuit's decision is that the defendant violated the APA's notice-and-comment requirements. Pls.' Response at 5-6 (emphasis omitted). As such, the plaintiffs maintain that "the primary issue now before this [c]ourt is the determination of the appropriate remedy for this APA violation." *Id.* at 6.

In its decision, the *en banc* Circuit panel explained that it had "no occasion to visit the merits of [the plaintiffs'] claims," instead limiting its review "to determine whether [the courts] have authority to hear the case." *Cohen v. United States*, 650 F.3d 717, 719, 397 U.S. App. D.C. 33 (D.C. Cir. 2011). Indeed, the Circuit's mandate directs this court to now "consider the merits of [the plaintiffs'] APA claim." Mandate (Dec. 9, 2011). Nevertheless, the parties urge the court to consider whether the Circuit, in deciding the jurisdictional issues, may have determined that the defendant indeed committed a procedural APA violation. The court thus turns to consider that decision, but first pauses to describe the legal standards guiding a court's determination that an APA procedural violation has occurred due to the absence of notice-and-comment rulemaking.

The APA's notice-and-comment requirements "serve the salutary purposes of '(1) ensuring that agency

regulations are tested via exposure to diverse public comment, (2) ensuring fairness to affected parties, and (3) giving affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.'" *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 91 (D.D.C. 2007) (citing *Intl Union, UMW v. MSHA*, 407 F.3d 1250, 1259, 366 U.S. App. D.C. 54 (D.C. Cir. 2005)) (internal alterations omitted)). If an agency issues a binding pronouncement, the agency "must observe the APA's legislative rulemaking procedures," including notice-and-comment requirements. *General Electric Co. v. Envt'l Prot. Agency*, 290 F.3d 377, 382-383, 351 U.S. App. D.C. 291 (D.C. Cir. 2002); *cf. Cement Kiln Recycling Coalition v. Envt'l Prot. Agency*, 493 F.3d 207 n.14, 377 U.S. App. D.C. 234 (D.C. Cir. 2007) (noting that an agency may be exempt from notice-and-comment requirements if the pronouncement qualifies as a mere "policy statement," *i.e.*, a non-binding discretionary agency pronouncement that does not impose any rights and obligations).

An agency may nevertheless be excused from notice-and-comment procedures for "good cause." *AFL-CIO v. Chao*, 496 F. Supp. 2d at 89 ("The APA puts the agency to a simple either/or choice: either notice-and-comment procedures or the good-cause exception."). An agency invoking the "good cause" exception "must support [its claim] with something more than bald assertions that [it does] not believe comments would be useful." *Id.*

In addition, the court must determine whether the agency's failure to engage in notice-and-comment

rulemaking constitutes harmless error. *Id.* at 88 ("The D.C. Circuit has repeatedly conducted some form of harmless-error analysis where it has determined that an agency failed to comply with the APA's notice-and-comment requirement."). "[A]n utter failure to comply with notice and comment," according to the Circuit, "cannot be considered harmless if there is any uncertainty at all as to the effect of that failure." *Id.* at 89 (quoting *Sugar Cane Growers Co-Op. v. Veneman*, 289 F.3d 89, 96, 351 U.S. App. D.C. 214 (D.C. Cir. 2002)). With these legal principles in mind, the court now turns to the Circuit's opinion.

As noted earlier, *see supra* Part II, the Circuit determined that the government waived its sovereign immunity under the APA. *Cohen*, 650 F.3d at 723. As the Circuit noted, 5 U.S.C. § 702 provides a waiver of sovereign immunity only for actions "stating a claim that an agency . . . acted or failed to act." *Id.* The defendant had argued to the Circuit that such a waiver was not applicable because the plaintiffs were challenging actions "committed to agency discretion." *Id.* The Circuit rejected that argument, however, holding that "Notice 2006-50 binds the IRS." *Id.* Because the Notice was binding, the Circuit concluded that the government had waived its sovereign immunity with respect to the plaintiffs' suit. *Id.* Thus, at this juncture, this court is required to treat Notice 2006-50 as binding on the IRS. *See Sherley v. Sebelius*, 776 F. Supp. 2d 1, 15 (D.D.C. 2011) (explaining that the hierarchy court system requires that "a lower court on remand be bound by the law of the case established on appeal" (internal citations omitted)). The binding nature of

Notice 2006-50 is, of course, critical in analyzing whether the defendant was required to abide by the APA's notice-and-comment rulemaking.

Simply stated, because Notice 2006-50 is binding, *Cohen*, 650 F.3d at 723, the defendant was required to abide by the APA's notice-and-comment requirements, *see General Electric Co.*, 290 F.3d at 382-383, or to, alternatively, provide good-cause for not doing so, *AFL-CIO v. Chao*, 496 F. Supp. 2d at 89. The defendant, however, concedes that it did not promulgate Notice 2006-50 through notice-and-comment rulemaking. *See* Def.'s Mot. at 7. Moreover, it has not invoked any good-cause exception to notice-and-comment rulemaking despite recognizing that the APA allows for such an exception. Def.'s Reply at 8. Finally, the defendant's "utter failure to comply with notice and comment" cannot be considered harmless error since there is "uncertainty . . . as to the effect of that failure." *AFL-CIO*, 496 F. Supp. 2d at 89. There is no way for the court to know what effect a notice-and-comment process would have had on the issuance of Notice 2006-50. Accordingly, the court concludes that the defendant violated the procedural requirements of the APA. *See General Electric Co.*, 290 F.3d at 384 (determining that an agency violated the APA by issuing a binding agency pronouncement without first complying with the notice-and-comment requirements).

B. Appropriate Remedy

The defendant argues that if the court determines that a procedural APA violation has occurred, the court

should remand the matter to the IRS and possibly (although not necessarily) prospectively vacate Notice 2006-50. Def.'s Mot. at 7. The defendant maintains "Notice 2006-50 should not be vacated retroactively," because "over 100 million taxpayers have now obtained payment under Notice 2006-50, and casting doubt on the validity of those payments would be an invitation to chaos." *Id.* at 8 (internal quotations omitted). Finally, the defendant urges the court to "reject any request by [the] plaintiffs for a detailed order specifying particular actions to be taken by the IRS upon remand," and instead asks that the court provide "only a simple remand to the IRS for 'further proceedings consistent with this Order.'" *Id.*

The plaintiffs urge the court to exercise its discretion and prospectively vacate Notice 2006-50. Pls.' Response at 6. Although the plaintiffs agree that retroactive vacatur is not suitable under the circumstances, it maintains that a prospective vacatur is an appropriate remedy "given the seriousness of the conceded APA violations by the [defendant]." *Id.* at 6-7. In addition to a prospective vacatur, the plaintiffs seek to have the matter "remanded [to the IRS] for proper notice and comment proceedings (subject to appropriate oversight) to ensure that appropriate steps are taken," so that taxpayers eventually receive a proper refund. *Id.* at 8. Specifically, the plaintiffs ask the court to provide the IRS with "clear instructions" as to "how to proceed," and order the IRS to "work promptly on remand" and to "specifically address how it proposes to return the remaining un-refunded [tax] to taxpayers without further delay." *Id.* at 11. The plaintiffs contend that "[g]iven the failure of the I.R.S. to craft an adequate or fair remedy to

date, Plaintiffs' counsel should be involved in the process to ensure that the rights of the proposed class members are protected." *Id.* at 13. They warn that without such oversight, the IRS may promulgate yet another notice (after engaging in notice-and-comment) containing the same substantive flaws as Notice 2006-50. *Id.*

When notice-and-comment is absent, the Circuit has regularly opted for vacatur. *Sprint Corp. v. Fed. Commc'n Comm'n*, 315 F.3d 369, 354 U.S. App. D.C. 288 (D.C. Cir. 2003) (noting that the Circuit has "opted for vacatur recently with some regularity" when notice-and-comment is absent). That said, "vacatur is not the *required* remedy." *AFL-CIO*, 496 F. Supp. 2d at 91 (emphasis added). Instead, "the decision whether to vacate depends on [(1)] the 'seriousness' of the [Notice's] deficiencies" as well as (2) "the disruptive consequences of an interim change that may itself be changed." *Sugar Cane Growers Co-op. of Florida v. Veneman*, 289 F.3d 89, 98, 351 U.S. App. D.C. 214 (D.C. Cir. 2002).

The court agrees with the plaintiffs that the defendant's "failure to comply with the APA's notice-and-comment requirements is unquestionably a 'serious' deficiency." *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 91 (D.D.C. 2007). Indeed, the Circuit has noted that an agency's "[f]ailure to provide the required notice and to invite public comment . . . is a fundamental flaw that normally requires vacatur of the rule." *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199, 386 U.S. App. D.C. 10 (D.C. Cir. 2009)). Thus, this factor weighs in favor of vacating Notice 2006-50.

The second factor to consider, the likelihood of a disruption due to a vacatur, weighs against granting a retroactive vacatur. As the parties have explained, granting a retroactive vacatur would call into question the tax refunds already processed for the "over 100 million taypayers [who] have now obtained payment under Notice 2006-50." Def.'s Mot. at 8; Pls.' Response at 8. The court therefore agrees that casting doubt on those payments would be an "invitation to chaos" and therefore that a retroactive vacatur would be inappropriate under the circumstances. *Sugar Cane Growers*, 289 F.3d at 97 (ordering the district court to remand to the agency for further proceeding without vacatur because "the egg has been scrambled and there is no apparent way to restore the status quo ante").

With respect to the possibility of a prospective vacatur of Notice 2006-50, the defendant asks that the court "take into consideration that the IRS continues to receive, each week, a significant number of requests for payment under Notice 2006-50." Def.'s Mot. at 8. The defendant, however, does not argue that the constant flow of requests for refunds under Notice 2006-50 should factor against allowing prospective vacatur. *See generally* Def.'s Mot.; Pls.' Response. Indeed, the defendant seems to recognize that a prospective vacatur would be a proper remedy for the defendant's procedural APA violation. Def.'s Reply at 2 ("The United States contends that a simple remand to the IRS is in order, including, at most, prospective vacatur of the Notice."). Accordingly, the court orders that Notice 2006-50 be prospectively vacated for failure to comply with the APA's procedural requirements.

Finally, the court turns to consider the plaintiffs' request for a court order that (1) includes "clear instructions" for the defendant as to "how to proceed," (2) requires the IRS to "work promptly on remand," and (3) requires the IRS to "specifically address how it proposes to return the remaining un-refunded [tax] to taxpayers without further delay." Pls.' Response at 11-13. Although the plaintiffs' frustration and desire for a fair and efficient refund process is understandable, under the APA, this court cannot order the IRS to act unless the law unequivocally requires such action. *Sierra Club v. Thomas*, 828 F.2d 783, 793, 264 U.S. App. D.C. 203 (D.C. Cir. 1987). As the Supreme Court has explained,

> [T]he only agency action that can be compelled under the APA is action legally required. . . . The limitation to required agency action rules out judicial direction of even discrete agency action that is not demanded by law (which includes, of course, agency regulations that have the force of law). Thus, when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be.

Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 63-65, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (U.S. 2004).

The plaintiffs' additional requested instructions are beyond the purview of the court in an APA action. The plaintiff has pointed to no statute or regulation that

requires the IRS to execute this refund program. *See generally* Pls.' Response. Indeed, the Circuit's opinion recognized that even if the plaintiffs were to succeed in this APA action and Notice 2006-50 was vacated, the plaintiffs would then have to "succeed in substituting a more 'effective' (and perhaps more fruitful) refund mechanism in its stead." *Cohen*, 650 F.3d at 732 n.12. Because the plaintiffs have not pointed the court to a law which would require the defendant to institute the tax refund process at issue, much less to do so by a certain date, the court cannot remand with specific instructions of the type requested by the plaintiff.[2] *Long Term Care*

2. The plaintiffs further request — in the event that the court declines to provide additional oversight upon remand — to advance with this litigation and be allowed to present their substantive challenge to Notice 2006-50. Pls.' Response at 13-14. The court will not do so. Once the court vacates Notice 2006-50, it will no longer have any legal effect. *AFL-CIO*, 496 F. Supp. 2d at 85-86 (noting that a vacated agency rule is "deprived of force"). Yet the plaintiffs insist that judicial review is necessary because the IRS might issue a similar notice to Notice 2006-50 sometime in the future. Because the plaintiffs essentially ask this court to review an agency action that will no longer be in existence (Notice 2006-50) and because any future agency action is hypothetical at this point, the court does not deem it appropriate to entertain the plaintiffs' substantive claims under the APA and declines to do so. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 371 U.S. App. D.C. 422 (D.C. Cir. 2006) (explaining that an agency action is final and reviewable under the APA if the action is not "of a merely tentative or interlocutory nature" and "one by which rights or obligations have been determined or from which legal consequences flow" (internal quotations and citation omitted)); *see also Fertilizer Inst. v. United States EPA*, 935 F.2d 1303, 1310, 290 U.S. App. D.C. 184 (D.C. Cir. 1991) (not reaching the appellants' substantive APA claim because the Circuit had already

Pharm. Alliance v. Leavitt, 530 F. Supp. 2d 173, 185-87 (D.D.C. 2008) ("[A] litigant 'cannot seek wholesale improvement of [a] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made. Under the terms of the APA, the litigant must direct its attack against some particular agency action that causes it harm." (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 879, 890, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990) (internal alterations omitted))).

IV. CONCLUSION

For the foregoing reasons, the court grants the defendant's motion to determine the mandate's scope. Further, the court prospectively vacates Notice 2006-50 and remands the matter to the IRS. An Order consistent with this Memorandum Opinion is separately and contemporaneously issued this 10th day of April, 2012.

RICARDO M. URBINA
United States District Judge

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determined that a notice-and-comment violation occurred); *AFL-CIO v. Donovan*, 757 F.2d 330, 338, 244 U.S. App. D.C. 255 (D.C. Cir. 1985) ("If there was inadequate notice, this specific regulation must fall on procedural grounds, and the substantive validity of the change accordingly need not be examined."); *NRDC v. United States EPA*, 676 F. Supp. 2d 307, 317 (S.D.N.Y. 2009) ("Since this Opinion concludes that remand with vacatur is the proper remedy for the [agency's] procedural errors, it is unnecessary to reach the cross-motions for summary judgment on the plaintiffs' allegations of the EPA's substantive errors.")