[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 21-5116

MONTE SILVER, ET AL.

Plaintiffs-Appellants,

-v-

INTERNAL REVENUE SERVICE, ET AL.

Defendants-Appellees

ON APPEAL FROM THE ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLANTS' FINAL REPLY BRIEF

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INTRODUCTION

According to the GAO, Treasury and the IRS have circumvented the RFA in 99.5% of their regulations.[1] Here, prior to issuing the final regulations, Defendants knew that the Transition Tax significantly harmed a substantial number of small businesses.[2] In fact, before issuing the regulations, they provided small businesses two forms of relief to address the harm. ECF 47-2, at 3 [JA 36]. Nonetheless, they circumvented the RFA via a bogus certification. The AR does not contain a scintilla of evidence that the government even considered it. ECF 61, at 2. Treasury actually claimed that the RFA did not even apply. ECF 39-3, at 14 [JA 33].

Congress amended the RFA in 1996 in three principal ways: (1) explicitly imposed the RFA on Treasury and the IRS; (2) provided judicial

[1] *See* ECF 47-1, at 15, fn. 6. *See* https://www.gao.gov/products/gao-16-720; Eric D. Phelps, *The Cunning of Clever Bureaucrats: Why the SBREFA Is Not Working*, 31 PUB. CONT. LAW J. 123 (Fall 2001).
[2] It is estimated that at as many as 200,000 small businesses and 1,000,000 people were directly impacted. ECF 47-2, at 3,5 & 9 [JA 36, 38, 42].

review for "adversely affected or aggrieved" small businesses; and (3) made the remedy mandatory.[3]

The present litigation shows how the government exploits its disproportionate power to make it impossible for a small business to prevail. The government has **(1)** made bogus §605(b) certifications; **(2)** artificially constricted the term "small business;" ECF 61-5, at 1 [JA 127]; **(3)** invoked procedural ploys to undermine this litigation; **(4)** failed to provide a complete AR; **(5)** objected to supplementing the AR (ECF 39); and **(6)** publicly disclosed Plaintiffs' tax information to pressure them to concede a central jurisdictional fact. Such conduct is fundamentally at odds with congressional intent.

Plaintiffs brought this action to address the crippling impact which the regulations had and continue to have on them and other small businesses.

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[3] Senate Congressional Record March 29, 1996, at 3244-3245 ("One of the primary purposes of the RFA is to reduce the compliance burden of small businesses whenever possible under the statute. To accomplish this purpose, the IRS should take an expansive approach […]"). *See also* House of Representatives Report 104-49 part 1. February 23, 1995 ("The Act needs to be amended to provide judicial review so that needed 'teeth' are put into the law.")

SUMMARY OF ARGUMENT

Plaintiffs have Article III standing to maintain their RFA lawsuit because they showed both past and future injury that is redressable by granting the relief provided for in 5 U.S.C. §611(a)(4).

Plaintiffs' RFA claims are not barred by the Anti-Injunction Act because the lawsuit's purpose is not to enjoin the collection or assessment of a tax.

Plaintiffs are "small entities" that are "adversely affected" [5 U.S.C. §611(a)(1)] by the final regulations and are therefore eligible to maintain their RFA claims.

Last, the government's public disclosure of Plaintiffs' tax information was prohibited under 26 U.S.C. §6103 because their RFA claims have nothing to do with "tax administration."

ARGUMENT

I. Plaintiffs have Article III Standing

A. Plaintiffs' past injury is sufficient to established Article III standing in this RFA case

1. It is undisputed that Plaintiffs suffered past injury

That Plaintiffs were injured by incurring compliance costs was never disputed by the government. The district court, too, found that Plaintiffs had established past injury. ECF 67, at 17 [JA 146]. Plaintiffs' past injury is sufficient to entitle them to relief under 5 U.S.C. §611.

The government suggests that Congress lacks the constitutional power to enact procedural safeguards and define the injury required for procedural standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016). *Spokeo* stands for precisely the opposite proposition. "Thus, we said in *Lujan* that Congress may 'elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.' " *Spokeo*, 504 U. S., at 578. "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.*, at 580. In other words, a plaintiff in such a case need not allege any additional harm beyond the

one Congress has identified. *See Federal Election Comm'n v. Akins*, 524 U. S. 11, 25 (1998).

Similarly, *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), is inapposite, for two reasons: (1) *Lyons* was not an RFA case, where the remedy is specifically defined by statute. Rather it involved a conventional demand for equitable relief; (2) in *Lyons*, the plaintiff sought to enjoin the "choke-hold," but failed to show future use of the choke-hold was likely to occur.

The government contends that that "even if Congress could waive the requirements of Article III standing, Plaintiffs have identified nothing even remotely suggesting that Congress intended to do so for the RFA." Gv't Br., at 25. Plaintiffs have never argued that in enacting the RFA Congress intended to "waive" Art. III standing minima. Congress defined a new procedural injury.

2. Plaintiffs' past injury is redressable

Having demonstrated actual injury and causation, Plaintiffs are entitled to a judicial order under 5 U.S.C. §611(a)(4) remanding the final regulations to the agency for a proper RFA analysis. This is the remedy

prescribed by Congress for RFA non-compliance. Just as Congress delimited a new procedural injury, in enacting §611(a)(4), it defined a new avenue of redress for aggrieved small businesses. Plaintiffs' past injury is therefore redressable.[4]

[4] Thousands of small businesses, like Plaintiffs, have also been aggrieved and will continue to be injured as a result of the Transition Tax regulations. These businesses can be grouped into four categories: those who (1) paid the Transition Tax without either using the installment plan or making the §962 election; (2) paid the full tax using the installment plan; (3) paid or avoided paying the tax with the §962 election; and (4) chose to be non-compliant. The district court correctly noted that small businesses would naturally incur compliance costs [groups (1)-(3)]. *See* Hr'g Tr., at 26. Consequently, by prevailing in this action, most small businesses and individuals impacted by the regulations (*see supra*, fn. 2) would benefit. Requiring Defendants to comply with the RFA would provide Plaintiffs and other small businesses with effective relief for past injury. For example, Defendants could grant small businesses the same exemption from the tax that is available to small businesses under IRC 965(i) which grants a tax break where the foreign corporation is owned by a domestic S corporation. Such an exemption would clearly benefit small businesses in each of the foregoing categories.

B. Alternatively, Plaintiffs have established imminent future injury sufficient to meet Article III standing

1. As objects of the challenged regulations, Plaintiffs established injury-in-fact

In procedural injury cases, the Supreme Court has stated that "there is ordinarily little question" that an individual or entity which is the "object of the action" or regulation has standing to challenge the agency action. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992), *accord State Nat. Bank of Big Spring v. Lew*, 795 F.3d 48 (D.C. Cir. 2015); *see also Ctr. for L. & Educ. v. Dep' of Educ.*, 396 F.3d 1152, 1166 (D.C. Cir. 2005) (*Lujan* "embraced an expansive view of standing in the context of procedural rights."); *see also N. Carolina Fisheries Ass'n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62, 81 (D.D.C. 2007), appeal dismissed 550 F.3d 16 (D.C. Cir. 2008) (party's standing to seek review of administrative action is generally self-evident).

By failing to address Silver and Limited's status under the challenged regulations, the district court misapplied *Lujan* and its progeny. Silver and Silver Limited are clearly "objects" of the Final Regulations. Br., at 22. The government conceded this point. *See* ECF 57-

5, ¶7 [JA 94]. Even the district court acknowledged that Silver, individually, is "subject to" the Final Regulations, ECF 67, at 26 [JA 155] and Limited is "adversely affected" by those regulations. ECF 82, at 10, fn. 1 [JA 279]. As such, Plaintiffs benefit from a significantly more relaxed standard for Article III standing. Under *Lujan*, the district court should have determined that Plaintiffs, who were objects of the challenged regulations, established actual injury.

Its failure to give any weight to Plaintiffs' status under the regulations similarly led the district court erroneously to rely on *Lujan* and *Summers v. Earth Island Inst*., 555 U.S. 488, 497 (2009). The *Lujan* Court made very clear that its restrictions on standing apply to challenges to agency action that regulates "someone else." *Lujan*, 504 U.S. at 562. Under those circumstances, "much more is needed" (*id.*) and standing is "substantially more difficult" to establish [*id.*, *quoting Allen v. Wright*, 468 U.S. 737, 757 (1984)]. The district court improperly held Plaintiffs to heightened standing requirements, notwithstanding that the challenged regulations do not regulate "someone else." They regulate Plaintiffs themselves.

Plaintiffs, as objects of the challenged regulations, have a "concrete interest" in vindicating their procedural rights under the RFA. *Summers.*, 555 U.S. at 497; *see also State Nat. Bank,* 795 F.3d at 316 (per Kavanaugh, J.) ("There is no doubt that the Bank is regulated by the Bureau. Under *Lujan*, the Bank therefore has standing to challenge the constitutionality of the Bureau.").

2. Plaintiffs' injury was imminent

The district court held that Plaintiffs failed to demonstrate injury-in-fact because that injury was not "imminent," even though the imminency component in procedural rights cases is relaxed. *Sierra Club v. FERC*, 827 F.3d 59, 65 (D.C. Cir. 2016). The district court explained that Plaintiffs "say nothing about when Silver Limited might issue a dividend to Silver that would trigger the claimed compliance obligations." ECF 67, at 24 [JA 153]. Contrary to the court's finding, Plaintiffs consistently noted that they would incur compliance costs each time Limited distributes a dividend. Plaintiffs testified that Limited would issue a dividend in 2021 to pay for Silver's family obligations. ECF 71-3

[JA 168-172].[5] As a small, closely held company, Limited's purpose is to generate income for the benefit of its sole shareholder (Silver). That income comes to Silver by way of a dividend, which, when distributed, will require Silver and Limited to incur compliance and reporting costs. The necessity to incur compliance costs is inherent in the very nature and purpose of the business structure adopted by Silver. Section 962(d) and the regulations at issue anticipate that businesses like Limited will, in the ordinary course, make dividend distributions.

The district court misunderstood *Lujan* in claiming that an "unadorned statement of future injury" was insufficient to withstand summary judgment. ECF 67, at 24 [JA 153]. *Lujan* did not deal with entities that are "objects" of the challenged regulations, like Plaintiffs.

Lujan posed a hypothetical in which an individual living adjacent to a dam construction site, would have standing to challenge an agency's failure to prepare a NEPA statement, even though he might not be able to establish with any certainty that the NEPA statement will cause the construction license to be withheld or altered, and even though the dam

[5] Although not reflected in the record, Plaintiffs wish to inform the Court that Limited, in fact, has paid to Silver the dividend referred to in ECF 71-3.

would not be completed for many years. *Id.*, at 572. The circumstances of this RFA case are even more compelling. Here, it is expected that Limited would pay Silver a dividend, thereby necessitating compliance costs. As a CFC, there is a "reasonable expectation" that Limited would distribute dividends in the ordinary course. *Cf. Hernandez v. Cremer*, 913 F.2d 230, 234 (5th Cir. 1990); *Wilwal v. Nielsen*, 346 F. Supp. 3d 1290 (D. Minn. 2018) (reasonable expectation to travel sufficient to establish future injury). This is exactly what has happened (*see supra* fn. 5). Accordingly, the district court erred in concluding that Plaintiffs failed to meet the injury-in-fact prong of Article III standing.

3. Plaintiffs' future injury is redressable

Had the government conducted a proper RFA analysis under 5 U.S.C. §604, it could have provided relief to small businesses. Br., at 18. The government does not dispute that it could have addressed these issues had it conducted such an analysis. Rather, the government now argues that "there is no reason to believe that a remand might cause the Treasury Department to change course." Gv't. Br., at 31, 33. The government misconstrues the law of redressability in procedural rights cases. In such cases, a plaintiff need only "show that a procedural right,

if exercised, could protect their concrete interests." *Nat'l Wildlife Fed. v. U.S. Army Corps of Eng'rs*, 170 F. Supp. 3d 6, 16 (D.D.C. 2016) (emphasis in original, citation and internal quotations omitted). Because the government could change its course if the regulations are remanded, the redressability prong is satisfied.[6]

C. Plaintiffs' injuries are traceable to the challenged regulations

The Government does not dispute that Plaintiffs incurred compliance costs. *See* Gv't Br., at 34. The government continues to insist that to the extent Plaintiffs sustained any injury, that injury stemmed from the statute, not the regulations. Gv't. Br., at 34-35. The district court properly rejected this argument:

> […] this argument fundamentally misconstrues Plaintiffs' claims. Plaintiffs are not challenging any specific regulation that might or might not be traceable directly to the TCJA. Rather, Plaintiffs allege that the agencies neglected to undertake procedural measures designed to protect small business from the burden of unwieldy and cost-intensive regulations—namely, the publishing of an initial and a final regulatory flexibility analysis, 5 U.S.C. §§ 601, 603(a), and a certification that the regulation has reduced compliance burdens on small businesses, 44 U.S.C. § 3506. Plaintiffs alleged injuries are therefore traceable to Defendants' alleged violation of these separate statutory requirements, not the TCJA.

[6] *See* footnote 13 in Plaintiffs' Opening Brief.

ECF 29, at 3-4 [JA 28-29].

III. Plaintiffs' suit is not barred by the Anti-Injunction Act

A. The purpose of Plaintiffs' RFA lawsuit is not to enjoin the collection or assessment of a tax

Resurrecting a defense rejected by the district court on motion to dismiss, the government now argues that Plaintiffs' RFA claims are barred by the AIA. Under that statute, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. §7421(a).

In considering a suit's purpose, a court inquires "not into a taxpayer's subjective motive, but into the action's objective aim—essentially, the relief the suit requests. *CIC Servs., LLC v. Internal Revenue Serv.*, 141 S. Ct. 1582, 1589 (2021).

CIC involved an APA challenge to an IRS action which, if successful, would have directly resulted in the invalidation of a tax imposed by the IRS action. A unanimous Court allowed the action to proceed despite the AIA, finding that the lawsuit was not brought for the purpose of restraining the assessment of any tax.

The Supreme Court in *CIC* found that the complaint described "the relief requested as setting aside the IRS [notice], enjoining the enforcement of the notice as an unlawful IRS rule and declaring the notice is unlawful". *CIC Servs.,* 141 S. Ct. at 1590. Although the result may be the voidance of a tax, "it brings no legal claim against the separate statutory tax." *Id*. The *CIC* complaint prayed "for injunctive relief from the Notice's reporting rules, not from any impending or eventual tax obligation." *Id*.

The AIA only "kicks in when the target of a requested injunction is […] against the 'collection or assessment of a tax.' " *Id*., *citing Bob Jones Univ. v. Simon*, 416 U.S. 725, 731 (1974). In applying this standard, the Supreme Court concluded that the AIA does not bar a lawsuit the objective purpose of which is to "set aside" an IRS rule alleged to be "procedurally and substantively flawed." *CIC Servs*., 141 S. Ct. at 1590.

The objective purpose of Plaintiffs' RFA lawsuit is **not** to enjoin the government from collecting or assessing a tax. *First*, it is undisputed that Plaintiffs owe no tax and are not challenging the payment of any tax. Plaintiffs, like the plaintiff in *CIC*, complain of the compliance and reporting costs they will continue to incur as a result of the regulations.

ECF 5, ¶¶54-58 [JA 15-16]. *CIC*, 141 S. Ct. at 1590 (lawsuit challenging reporting requirements not barred by the AIA).

Second, the RFA relief sought by Plaintiffs has nothing to do with taxes. Rather, Plaintiffs only seek the relief specifically provided under the RFA – that the court remand the rule to the agency and defer the enforcement of the rule against small entities, until such time as the government performs a proper and *bona fide* RFA Analysis. 5 U.S.C. §611(a)(4). ECF 5, at 19 ("Prayer for Relief") [JA 19]. Relief seeking to set aside agency action on procedural grounds is not barred by the AIA. *CIC Servs.*, 141 S. Ct. at 1590; *Cohen v. United States*, 650 F.3d 717, 728 (D.C. Cir. 2011) (APA challenge to tax rule not barred by AIA); *Z Street v. Koskinen,* 791 F.3d 24, 32 (D.C. Cir. 2015) (AIA does not prevent suit to obtain relief from unconstitutional delay in ruling on application for tax exemption). What is more, accepting the government's position would effectively bar RFA lawsuits challenging IRS regulations, on AIA grounds. In amending the RFA in 1996, Congress aimed to put an end to Treasury and IRS recalcitrance in complying with the statute.

The government asserts without foundation that "plaintiffs' manifest purpose is to restrain the assessment and collection of tax."

Gv't. Br., at 39. But, as we have shown, this argument not only ignores the essence of this litigation, but contravenes the analysis of *CIC*.

The government next misquotes *CIC* for the proposition that the AIA bars pre-enforcement review when the "legal rule at issue is a tax provision." Gv't. Br., at 39, *quoting CIC Servs.*, 141 S. Ct. at 1593. The legal rule at issue in this case is not a tax provision. The legal rule is the government's compliance with the RFA.[7]

Accordingly, the AIA does not bar the exercise of federal jurisdiction to adjudicate IRS compliance with the RFA.

B. The *South Carolina* exception applies

Under *South Carolina v. Regan*, 465 U.S. 367 (1994), the AIA does not apply where a plaintiff has no alternative forum in which to pursue

[7] Similarly, by analogy with the case law under the Tax Injunction Act, the current action does not seek to "restrain" the assessment or collection of any tax. In interpreting the meaning of the word "restrain," the Supreme Court, in a unanimous ruling held that the "statutory context provide several clues that lead us to conclude that the TIA uses the word "restrain" in its narrower sense." *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 13 (2015). The Court noted that the term "restrain" as used in the TIA, acts "on a carefully selected list of technical terms—assessment, levy, collection—not on an all-encompassing term [...]"

her claims. *Id.*, at 373 (the AIA "was not intended to bar an action where, as here, Congress has not provided the plaintiff with an alternative legal way to challenge the validity of a tax." *Z Street.*, 791 F.3d at 31 (applying the *South Carolina* exception to the AIA).

Plaintiffs easily satisfy the *South Carolina* exception to the AIA because applying the AIA here would leave them with no alternative procedural mechanism for raising their RFA claims. Plaintiffs do not have any tax liability under §965 and, hence, would never be able to bring any type of post-enforcement action.

Nevertheless, the government argues that Silver:

> could have filed an income tax return reporting the transition tax that he owed under I.R.C. §965 and the accompanying regulations; paid the tax; and then submitted a refund claim based on his theory that the I.R.C. § 965 regulations were invalid because of Treasury's alleged violation of the RFA. If the IRS denied his claim or six months elapsed without a decision thereon, then Silver could have filed a refund suit in district court or the Court of Federal Claims.
>
> Gv't. Br. at 44.

To suggest that Plaintiffs incur compliance costs, pay a tax that they do not owe (a point which the government concedes), file a refund claim and, subsequently, a lawsuit, to challenge the Final Regulations

under the RFA is ludicrous. As this Court has made clear, plaintiffs do not need to "concoct extravagant scenario[s] in an effort to show that a refund suit would be an adequate alternative remedy." *Cohen,* 650 F.3d at 734.[8] *Accord, Z St.,* 791 F.3d at 31-32 (holding that no procedural remedy under the tax code would allow plaintiffs to raise their delay challenge in a timely manner).[9]

IV. Plaintiffs are eligible to obtain relief under the RFA

A. Silver is a small entity

According to the government, Silver is ineligible to maintain his RFA suit because he is "not an *entity*." Gv't. Br., a 46-47 (emphasis added).[10] However, sole proprietors are eligible to bring suit under the

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[8] Even assuming, for argument's sake, that the government's elaborately complex and time-consuming procedural pathway is appropriate, it is far from certain that Plaintiffs' RFA challenge could be maintained. *See, for example,* 5 U.S.C. §611 (imposing a one-year statute of limitations for RFA challenges).

[9] The government also claims that the district court erred in deferring the question whether §611(a)(4)(B) relief sought by Plaintiffs was barred by the AIA to the merits stage. ECF 29, at 6, fn. 1 [JA 31]; Gv't. Br., at 40-41. As we have shown, the AIA does not apply to bar adjudication of Plaintiffs' RFA claims, irrespective of the stage of litigation.

[10] The government argues for the first time on appeal that Silver is not an "entity" within the meaning of the RFA and SBA. This argument was

RFA [15 C.F.R. §121.105] and therefore must be considered "entities" for purposes of the law. Otherwise, no sole proprietorship would ever be able to challenge a government act under the RFA. Clearly, such an interpretation of the RFA would render it inapplicable for millions of small businesses. *See In re Great W. Cities, Inc. of New Mexico*, 107 B.R. 116, 119 (N.D. Tex. 1989) ("An individual is an "entity" for purposes of the Bankruptcy Code."); *see also* 11 U.S.C. §101(41) (defining "person" to include "corporation."); 37 C.F.R. §1.27 (defining a "small entity" as including an individual person); *Alarm Indus. Commc'ns Comittee v. F.C.C.*, 131 F.3d 1066, 1068 (D.C. Cir. 1997) (defining entity as "an organization or being that possesses separate existence for tax purposes"), *citing* Black's Law Dictionary 532 (6th ed. 1990).

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never raised below or adjudicated by the district court. This Circuit has a "well-established rule against allowing parties to initiate new claims on appeal." *Akhmetshin v. Browder*, 993 F.3d 922, 966 (D.C. Cir. 2021). Therefore, this argument is not properly before the court and should be disregarded.

For the reasons already set forth in the Opening Brief and above, Silver is eligible to bring his RFA lawsuit as a small entity.[11]

B. Limited is subject to the challenged regulations

It is undisputed that Limited is a "small entity" for purposes of the RFA. The district court erred in holding that Limited was not "subject to" the challenged regulations. ECF 67, at 26-28 [JA 155-157]; ECF 82, at 9-10 [JA 278-279]. This holding ignores the language and effect of the statute and challenged regulations. Br., at 22; 26 U.S.C. §965(a).[12] The Court is also respectfully referred to ECF 71-2 [JA 166-167], an

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[11] Additionally, Silver should be treated as a corporate entity for purposes of the Final Regulations. Br., at 21. The government argues that "plaintiffs mischaracterize 26 U.S.C. §965 and §962, neither of which merges Silver and Limited into a single party." Gv't Br., at 49. Yet, §965 and Subpart F do exactly that: they disregard the corporate veil and attribute all the Subpart F income to the shareholder individually. If Silver and Limited are merged for tax purposes, they are also merged for RFA purposes.

[12] 26 U.S.C. §965(a):

> In the case of the last taxable year of a deferred foreign income corporation which begins before January 1, 2018, the subpart F income of such foreign corporation (as otherwise determined for such taxable year under section 952) *shall be increased* […]

(emphasis added)

explanatory chart delineating a CFC's obligations under the Transition Tax regime.

This ruling is also inconsistent with the district court's conclusion that, for purposes of statutory standing under the RFA, Limited was "adversely affected or aggrieved by" the challenged regulations. ECF 82, fn. 1 [JA 279]. *See Aeronautical Repair Station Ass'n, Inc. v. F.A.A.*, 494 F.3d 161, 177 (D.C. Cir. 2007) ("contractors and subcontractors are directly affected *and therefore* regulated by the challenged regulations.") (emphasis added). Under the district court's final disposition, an entity can have standing to challenge a regulation under the RFA, but the agency can ignore the entity in conducting an RFA analysis under §§604-605. This is a *non sequitur*.

The government contends that because Limited had no "legal" obligation to assist Silver in preparing his tax returns it should be not considered subject to the Final Regulations. Gv't. Br., at 52-53. This is wrong. *First*, under the statute and regulations, Limited **must** carry out extensive accounting and tax procedures to provide Silver with the exact amount to report. *Second*, IRS Form 5471 ("Information Return of U.S.

Persons With Respect to Certain Foreign Corporations"),[13] filed as part of the Transition Tax, requires CFCs – like Limited – to gather financial and accounting information, and complete pages and schedules full of corporate financial data. *Third*, any taxes due by the shareholder would come from the coffers of the CFC.

The government cites *Aeronautical Repair Station Ass'n, Inc. v. F.A.A.*, which actually supports Plaintiffs' position. There, the Court noted that the FAA regulation applied to air carriers who were required to ensure that employees of contractors and lower-tier subcontractors be tested for drug use. The contractors and lower-tier subcontractors were under no legal obligation to conduct drug testing. But, for RFA purposes, the Court held that they were directly affected by the regulation because their compliance and cooperation was necessary so the air carriers could meet their obligations under the regulations at issue. Consequently, when an entity necessarily must comply with a regulation – like Limited – it is affected by, and, therefore, subject to, the regulation.

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[13] Form 5471 is available online at https://www.irs.gov/pub/irs-pdf/f5471.pdf

Here, in the context of the Transition Tax regime, without a CFC's cooperation and compliance, a shareholder cannot comply. Br., at 22. Under these circumstances, to say that Limited is not subject to the Final Regulations is to ignore the manner in which CFCs like Limited conduct their business in the ordinary course.

V. The disclosure of appellants' tax returns is prohibited by 26 U.S.C. §6103

A. The issue is ripe

This Court should rule on the appeal of the district court's March 28, 2021, Memorandum Opinion and Order. ECF 69 [JA 161-165]. In that Order, the district court ruled that the government was permitted to publicly disclose Plaintiffs' tax returns because this case was one pertaining to "tax administration." 26 U.S.C. §6103(h)(4). This ruling is final.

The government argues that the issue is not ripe for appellate review because the district court has not yet ruled as to whether certain documents should nonetheless be sealed pursuant to the doctrine announced in *United States v. Hubbard*, 650 F.2d 293, 317–22 (D.C. Cir. 1980). Plaintiffs' position was and remains that disclosure *vel non* of their

tax returns was illegal under 26 U.S.C. §6103 and, therefore, the *Hubbard* analysis is inapplicable.

B. Plaintiffs' tax returns and information are entitled to strict privacy protection

The legislative history makes clear that 26 U.S.C. §6103 was enacted to protect the taxpayer's privacy and prevent governmental abuse:

> The Congress believes that the American citizen is compelled by our tax laws to disclose to the IRS is entitled to essentially the same degree of privacy as those private papers maintained in his home.

General Explanation of the Tax Reform Act of 1976, at 323. Joint Committee on Taxation, December 29,1976.

Realizing the paramount importance of taxpayer privacy, the government issued regulations setting forth the exact same standards. Disclosure "of a return or return information to a person other than the taxpayer to whom such return or return information relates [...] should be made [...] only if such purpose or activity cannot otherwise properly be accomplished without making such disclosure." 26 C.F.R. §301.6103(h)(2)-1(b)(1).

C. Plaintiffs' RFA lawsuit does not pertain to tax administration

In examining whether an action involves tax administration, we look to the government's own publication. *Diamond v. United States,* 944 F.2d 431 (8th Cir. 1991). According to the IRS, when a proceeding is based on a separate law, such as a bankruptcy proceeding, special consideration is required in dealing with disclosure. *See* NOTICE, *Disclosures of Return and Return Information in Bankruptcy Cases*, CC-2010-009 (May 11, 2010), available at https://www.irs.gov/pub/irs-ccdm/cc-2010-009.pdf (last accessed on May 23, 2022) ("NOTICE"); IRS Publication 4639 (Rev. 10-2012), at 3-10 ("Publication 4639").

Whether the action is related to tax

> depends on the nature and purpose of the statute and the facts and circumstances in which the statute is being enforced or administered. These statutes cannot be considered related [to tax] in all situations but only when being enforced by IRS or DOJ personnel in matters arising out of or in connection with the enforcement of Title 26.

Publication 4639, at 3-11.

Similarly, there "must be a nexus between the bankruptcy proceeding and the application of the internal revenue laws in the

proceeding in order to consider the bankruptcy case a tax administration proceeding. NOTICE, at 1.

The government's sole argument on this issue is that Publication 4639 is not binding. Gv't Br., at 63. The government cites *Miller v. Commissioner*, 114 T.C. 184, 195 (2000) which involved an informal document written for the general public. However, in this case, as in *Diamond*, the publication is an internal document intended for IRS officers and attorneys. The publication is "provided by the Office of the Associate Chief Counsel (Procedure & Administration)." Publication 4639, at iii. This office "is also responsible for defending litigation filed pursuant to I.R.C. §§ 6103 and 6110, FOIA, and the Privacy Act." *Id.* In other words, the very office that defends the government against §6103 claims, drafted and issued Publication 4639.

The practical and necessary outcome of the district court's ruling – if upheld – is that any and all RFA challenges to a tax-related regulation will grant the government a blank check to publicly disclose the plaintiffs' confidential and private tax information.

The district court's interpretation of 26 U.S.C. §6103(a)(4)(B) not only runs afoul of the purpose and scheme of the RFA, but also is

inconsistent with the Supreme Court's rulings in *CIC Servs., LLC v. Internal Revenue Serv.*, 141 S. Ct. 1582 (2021) and *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 9 (2015). As discussed above, in *CIC* the Supreme Court ruled that an APA challenge to IRS Notice 2016–66 was not a tax matter as the tax issues were "downstream."

In our case, the issue for which Plaintiffs' tax returns were disclosed had absolutely nothing to do with tax administration. By disclosing the tax returns, the government sought to establish that Plaintiffs lacked standing under the RFA. That is the **only** issue for which the government publicly disclosed Plaintiffs' tax returns. There is clearly no nexus between "tax administration" and anything for which the disclosure was made. *See* ECF 75.

D. Disclosure is authorized as a last resort

Under 26 C.F.R. §301.6103(h)(2)-1(b)(1), disclosure is authorized as a last resort. As previously discussed, the government failed to comply with this last resort requirement by disclosing Plaintiffs' tax returns without first discussing the matter with them. Br., at 27. The government states that this regulation applies only to §6103(h)(2) and "has no application to disclosures under" §6103(h)(4). Gv't. Br., at 65.

However, as the district court noted, both (h)(2) and (h)(4) are relevant to the current appeal, ECF 69, at 2 [JA 162], and, more importantly, the "standards under the latter provision are the narrower of the two." *Id*. Thus, if 26 C.F.R. §301.6103(h)(2)-1(b)(1) is applicable to §6103(h)(2), it is all the more applicable to disclosure under §6103(h)(4).

In this case, prior to disclosing the tax returns, the government failed to contact Plaintiffs to stipulate to the minor issues for which the disclosure was sought. Moreover, the facts for which the disclosure was made were readily available on the internet. *See* ECF 61-3 [JA 113-126].

E. Disclosure under §6103(h)(4) does not apply to disclosure via PACER

Section 6103(h)(4) was enacted prior to the advent of PACER and the ECF/CM filing system. Congress never intended – and §6103(h)(4) does not authorize –a taxpayer's private information to be exposed to the entire world with the click of a button. The proper interpretation and application of §6103(h)(4) is that, to the extent disclosure is appropriate, it must be in documentary – not digital – format. *General Explanation of the Tax Reform Act of 1976*, 94th Cong., 2d Sess., at 339 (1976) ("It is intended that, to the extent practical, all disclosures of return

information be made in *documentary* form in order to protect the privacy of the taxpayer […]").

Respectfully submitted,

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