

No. 25-4217

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STENSON TAMADDON, LLC,

Plaintiff-Appellant

v.

INTERNAL REVENUE SERVICE; DEPARTMENT OF THE
TREASURY; UNITED STATES OF AMERICA; SCOTT BESSENT
in his official capacity as Secretary of the Treasury and his
official capacity as the Commissioner of Internal Revenue

Defendants-Appellees

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLEES

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GLOSSARY

APA	Administrative Procedure Act
CARES Act	Coronavirus Aid Relief and Economic Security Act (“CARES Act”) of 2020
ERC	Employee Retention Credit
IRS	Internal Revenue Service
“the Notice”	IRS Notice 2021-20
“the tax credit”	Employee Retention Credit
“Q & A no. __”	Question-and-Answer formatted guidance in Section III of IRS Notice 2021-20, which is also referred to as “Q/A” or “Q&A” in Appellant’s opening brief and as “FAQs” by the District Court
StenTam	Stenson Tamaddon, LLC
Tax Code	Internal Revenue Code, 26 U.S.C.

STATEMENT OF JURISDICTION

Stenson Tamaddon, LLC (StenTam) brought this suit for declaratory and injunctive relief against the United States, the Internal Revenue Service, the Department of the Treasury, and two individuals in their official capacity (collectively, “the Government”). (4-ER-623.)¹ In addition to claims that later became moot and were dismissed by stipulation, StenTam asserted claims under the Administrative Procedure Act challenging portions of an IRS publication, Notice 2021-20, that provided guidance to taxpayers about a pandemic-era tax credit called the “employee retention credit.” (4-ER-623–26.) The District Court lacked jurisdiction because, as we explain later in this brief, the Government has not waived its sovereign immunity to those challenges.

The District Court disagreed that it lacked jurisdiction, however, and proceeded to the merits of StenTam’s challenges to the Notice. (1-ER-7–10.) On June 20, 2025, the court granted summary judgment in favor of the Government and entered a final judgment disposing of all parties’ claims accordingly. (1-ER-29; 1-SER-3.) On July 8, 2025,

¹ “ER” refers to the excerpts of record filed with Appellant’s opening brief. “SER” refers to the supplemental excerpts of record filed with this brief. “Br.” refers to the Appellant’s opening brief.

StenTam filed a timely notice of appeal from that final judgment. (4-ER-678); 28 U.S.C. § 2107 (a), (b); Fed. R. App. P. 4(a). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Invoking the Administrative Procedure Act (“APA”), StenTam challenges a handful of provisions in IRS Notice 2021-20 that concern eligibility for the employee retention credit. The issues are as follows:

1. Whether StenTam’s claims fall outside the APA’s waiver of sovereign immunity—and the District Court therefore lacked jurisdiction—because the Tax Code provides its own specialized framework for judicial review of disputes over tax credits.

2. If the District Court did have jurisdiction, whether it correctly upheld the challenged Notice provisions, rejecting StenTam’s arguments that they are (a) legislative rules unlawfully promulgated without notice and comment, (b) arbitrary and capricious, and (c) in conflict with the underlying statute that affords the tax credit.

3. If any of the challenged Notice provisions are unlawful, whether this Court should remand the matter to the District Court to determine the proper scope of a remedy.

APPLICABLE STATUTES AND REGULATIONS

The statutes relevant to the disposition of this appeal are included as an addendum to this brief. *See* Fed. R. App. P. 28(f); 9th Cir. R. 28-2.7.

STATEMENT OF THE CASE

StenTam describes itself as a firm that helps businesses to prepare and submit claims for a federal tax credit called the “employee retention credit” (“ERC” or “the tax credit”). (Br. 20.) In this suit against the Government, StenTam asserts claims under the APA, 5 U.S.C. § 701 *et seq.*, challenging provisions of IRS Notice 2021-20 that concern eligibility for the ERC. The District Court rejected all those challenges on the merits and granted summary judgment in favor of the Government. StenTam then brought this appeal.

A. The Employee Retention Credit

Congress enacted the ERC in March 2020 as part of the Coronavirus Aid Relief and Economic Security Act (“CARES Act”). *See* Pub. L. 116-136, § 2301, 134 Stat. 281, 347 (Mar. 2020). The tax credit was designed to encourage employers impacted by the COVID-19 pandemic to keep employees on their payroll. (2-ER-93, 117.)

The ERC initially covered wages paid from March 12, 2020 to January 1, 2021. Pub. L. 116-136, § 2301, 134 Stat. at 351. Congress extended it in stages until it eventually covered wages paid until January 1, 2022, though the tax credit for the fourth quarter of 2021 is now only available to a smaller swath of businesses (namely, “recovery startup businesses”). (1-ER-3); *see* Pub. L. 116-260, 134 Stat. 1182, 3062 (Dec. 2020); Pub. L. 117-2, § 9651, 135 Stat. 4, 176, 182 (Mar. 2021); Pub. L. 117-58, § 80604, 135 Stat. 429, 1341 (Nov. 2021). Not every version of the ERC legislation was codified, but the current version of 26 U.S.C. § 3134 reflects the last iteration of the statutory provisions governing the ERC. (Br. 6 & n.2; 2-ER-149); 135 Stat. at 1341. Because differences among the iterations of the law providing for the ERC are not material to this appeal, this brief (like StenTam’s) cites only 26 U.S.C. § 3134 (in its current version) for the sake of simplicity.

The tax credit is applied against the employment tax liabilities of a business, and if the amount of the ERC owed to a business exceeds its employment tax liability, the business is “refunded” that excess amount. 26 U.S.C. § 3134(a), (b)(3). In general, entitlement to the ERC turns on whether an employer’s business (1) is of an eligible type and

(2) either (A) was at least partially suspended due to government orders addressing the pandemic and limiting commerce, travel or group meetings, or (B) faced a marked decline in gross receipts compared to the same time of year in 2019. *See* 26 U.S.C. § 3134(c)(2),(c)(5), (f). In turn, the amount of the tax credit to which an employer is entitled—up to a cap—depends on how much the employer pays its employees. *See* 26 U.S.C. § 3134(a), (b)(1).

B. IRS Notice 2021-20

The CARES Act authorized the Secretary of the Treasury to “issue forms, instructions, regulations and guidance as are necessary” for the IRS to facilitate the ERC program. (1-SER-4; 2-ER-95.) This authority included “prevent[ing] the avoidance of the purposes of the limitations” on eligibility set forth in the ERC statute. 26 U.S.C. § 3134(m)(3).

Pursuant to this authority, and soon after the ERC was enacted, the IRS started to post information about the credit on its website, including answers to frequently asked questions about the credit. (2-ER-95, 146–47.) This guidance was “coordinated with the highest levels of the Treasury Department.” (2-ER-96.) Still, the IRS received comments indicating that taxpayers wanted more formal and

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permanent guidance regarding the ERC. (2-ER-146.) At the same time, Congress was repeatedly tweaking the parameters of that tax credit. (1-SER-3; 2-ER-96, 146–47.) Accordingly, on March 1, 2021, the IRS issued Notice 2021-20 which incorporated the answers to frequently asked questions that it had earlier published on its website, along with additional information. (1-SER-4; 2-ER-95, 149; 3-ER-244.)

The Notice is entitled “Guidance on the Employee Retention Credit under Section 2301 of the Coronavirus Aid, Relief, and Economic Security Act. (3-ER-244.) It is divided into three sections. Section III, which is the bulk of the Notice and the subject of all StenTam’s challenges, contains guidance in the form of seventy-one questions-and-answers (Q & A’s) about claiming the credit. (2-ER-149–50, 3-ER-259–345.)

C. StenTam’s activities as a promoter of the ERC

StenTam alleges that it “operates as a consultant under the ERC program by helping businesses file ERC claims.” (4-ER-626.) Its services include “defending [ERC] claims that are challenged by the IRS.” (*Id.*) StenTam provides these services on a contingency basis, as it is “compensated from the proceeds of credits refunded to its clients”

and “does not receive compensation for [its] services” on claims that the IRS disallows. (*Id.*)

According to StenTam, “[t]he IRS has denied ERC refunds to StenTam clients” based on Notice 2021-20 and has thereby “reduce[d] StenTam’s compensation for services rendered.” (4-ER-627.)² StenTam blames those denials not on the positions asserted in its clients’ ERC claims, but on “rules” in Notice 2021-20. (*Id.*)

² Notably, the preparation of refund claims or tax returns in exchange for contingency fees is prohibited for many regulated tax professionals because contingent fee arrangements encourage preparers to take unduly aggressive positions with the hope their clients will not be audited. *See, e.g.*, AICPA Code of Professional Conduct § 1.000.010.14(c) (2014); Ariz. Admin. Code. § R4-1-455(A) & (B) (incorporating the AICPA Professional Standards and applying them to all registrants, even if they are not members of the AICPA); N.J. Admin. Code § 13:29-3.8(e); Cal. Code Regs. Tit. 16 § 62(a)(2) & (3); *see also* Regulations Governing Practice Before the Internal Revenue Service, 89 Fed. Reg. 104915, 104918 (Dec. 26, 2024). Recognizing this, the Treasury Department has proposed to amend its regulations governing practice before the IRS to define the charging of a contingent fee in connection with the preparation of a credit claim, refund claim, or tax return (except during an audit) as “disreputable conduct” for which a practitioner may be sanctioned. 89 Fed. Reg. at 104918, 104930. Describing such fee arrangements as “incompatible with ethical practice before the Treasury Department or the IRS,” Treasury explained that they “encourage[s] evasion or abuse of Federal tax laws” because “[a] practitioner with a direct, financial interest in the tax benefits of a client may be incentivized to increase such tax benefits” for “personal gain.” *Id.* at 104918.

D. The IRS’s temporary moratorium on processing new ERC claims

By late 2023, as claims for the ERC continued to “flood” the IRS, there were “growing concerns” among the IRS and tax professionals, as well as media reports, that a “substantial share of new claims” within “the aging [ERC] program” were not just “ineligible,” but driven by “aggressive promoters ‘hustling to get a hefty contingency fee.’” (4-ER-662–63.) Explaining that “honest small business owners” were “being scammed by [these] unscrupulous actors” into claiming the ERC regardless of eligibility, the IRS announced a moratorium on processing claims submitted after September 14, 2023. (*Id.*) The moratorium was intended to “protect against fraud” and to “protect taxpayers”—in particular, “small businesses who were misled by promoters” and thereby placed at “financial risk” of having to repay improperly received ERC refunds and “facing penalties or interest payments.” (*Id.*)

E. District Court proceedings

In May 2024, StenTam brought this suit under the Administrative Procedure Act challenging (1) the IRS’s moratorium on processing new ERC claims, and (2) certain provisions of IRS Notice 2021-20. (4-ER-623–60.) Soon after, StenTam filed a motion for preliminary injunction

targeted at the IRS moratorium. (Br. 21; 4-ER-578, 716.) The District Court denied that motion on its merits after rejecting the Government's threshold jurisdictional arguments (4-ER-614–15.) The next month, the IRS lifted the moratorium, and the parties then stipulated to a dismissal of StenTam's claims about it. (1-ER-6; 4-ER-718.)

StenTam and the Government then cross-moved for summary judgment on StenTam's APA claims concerning the Notice. (1-ER-2.) StenTam argued, as it now does on appeal, that the challenged provisions in the Notice were legislative rules unlawfully promulgated without notice and comment, were arbitrary and capricious, and conflicted with the ERC statute. (2-ER-220–36.) The Government contested each of these assertions and also argued as a threshold matter that the District Court lacked jurisdiction both because StenTam lacked standing to challenge the Notice and because StenTam's claims about the Notice did not fall within the APA's waiver of sovereign immunity. (2-ER-170–75.) The parties also sparred over the proper remedy in the event StenTam prevailed in its challenge to the contested provisions of the Notice, with StenTam urging “a clear

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and unequivocal nationwide injunction” against the entire Notice. (2-ER-49, 76, 185–86, 236.)

The District Court rejected the Government’s threshold jurisdictional arguments but agreed with the Government on the merits of StenTam’s APA claims against the Notice. After an extensive analysis, it held that the challenged provisions in the Notice were interpretive rules rather than legislative ones and were therefore exempt from the APA’s notice-and-comment requirements. (1-ER-10–23.) It also held that those provisions were neither arbitrary and capricious nor “beyond the IRS’s statutory authority.” (1-ER-23–28.) And having thus rejected StenTam’s claims, the court did not reach the question of remedy. The court then issued its judgment in favor of the Government. (1-SER-3.)

SUMMARY OF ARGUMENT

1. Although the District Court’s analysis rejecting the merits of StenTam’s claims is correct in every respect, the court should have rejected those claims at the threshold for lack of subject-matter jurisdiction because Congress has not waived the Government’s sovereign immunity from claims like StenTam’s. StenTam relies on the

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judicial review provisions of the APA to challenge various aspects of IRS Notice 2021-20. But the APA does not waive sovereign immunity where other statutes provide more specialized statutory frameworks that limit, channel, and condition judicial review of agency action in certain areas. And for disputes like this one, about the conditions of eligibility for a tax credit, the APA gives way to the specialized judicial review provisions of the Tax Code, which provide the exclusive mechanism for obtaining judicial review of the Notice—namely, a refund suit brought by a taxpayer whose ERC claim was denied.

Indeed, the District Court agreed that a taxpayer claiming the ERC—and taking issue with the same provisions of the Notice with which StenTam takes issue—could challenge those provisions only by filing a tax refund suit as prescribed by the Tax Code. But the court failed to recognize the corollary proposition: that StenTam cannot use the APA to bypass the Tax Code’s requirements for obtaining judicial review precisely *because* it is *not* a taxpayer denied the credit and thereby entitled to sue for a refund. Before a taxpayer can sue for a refund, the taxpayer must pay in full the tax liability assessed, timely file an administrative refund claim, and allow the IRS at least six

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months to render a decision. As the Supreme Court has observed, “[w]here a statute provides that particular agency action is reviewable at the instance of one party, who must first exhaust administrative remedies, the inference that it is not reviewable at the instance of other parties, who are not *subject* to the administrative process, is strong.” *Sackett v. E.P.A.*, 566 U.S. 120, 130 (2012).

2. Even if the court had jurisdiction to hear StenTam’s various attacks on IRS Notice 2021-20, the court correctly concluded that none of those attacks has merit. The IRS was not required to follow the APA’s “notice and comment” procedures before issuing the Notice provisions at issue because those provisions are interpretive rules, not legislative rules. And StenTam failed to demonstrate that those interpretive rules are either arbitrary and capricious or contrary to the underlying ERC statute.

(a) The Notice provisions that StenTam challenges merely construe statutory language in 26 U.S.C. § 3134 that limits eligibility for the ERC to employers whose business is “partially or fully suspended,” whose suspension is “due to orders from an appropriate governmental authority,” and so on. Thus, the provisions are derived

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from, and do nothing but more crisply delineate, pre-existing eligibility requirements found in the ERC statute. Accordingly, under the criteria that this Court adopted in *Hemp Industries Ass’n v. DEA*, 333 F.3d 1082, 1087–88 (9th Cir. 2003), those provisions are interpretive rules. In arguing that the Notice provisions are legislative rules subject to notice-and-comment, StenTam acknowledges that it departs from the *Hemp Industries* criteria to focus instead on whether the provisions are “binding” and whether they set forth minimum requirements rather than optional safe harbors. But courts time and again have emphasized that those inquiries do little to distinguish legislative rules from interpretive ones, so much of StenTam’s parsing is beside the point.

(b) A court’s review of agency action under the arbitrary-and-capricious standard is “deferential” and meant simply to ensure “that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.” *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). The Notice provisions that StenTam challenges are not only interpretations of statutory phrases but *reasonable* ones. Certainly, StenTam does not show how, in issuing these interpretations, the IRS

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“relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Defs. of Wildlife v. Zinke*, 856 F.3d 1248, 1257 (9th Cir. 2017). Indeed, StenTam does not even try to show that the provisions are arbitrary and capricious under this standard, but rather once again jettisons established criteria to focus on (at best) ancillary questions.

(c) StenTam’s last attack on the Notice provisions fails alongside its earlier ones. StenTam asserts in conclusory fashion that the Notice conflicts with the ERC statute by imposing novel requirements that are incompatible with the statute’s eligibility requirements. But for the same reasons that its other arguments fail—that the provisions track pre-existing statutory language and do it in a reasonable way—StenTam’s repackaged “contrary to the statute” argument likewise fails.

3. Finally, even if this Court were to conclude that the District Court both had jurisdiction and erred on the merits, the APA would not require that the Notice be vacated, as StenTam suggests. Instead,

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deciding the proper remedy would require a remand for the District Court to exercise its equitable discretion and determine whether unlawful portions of the Notice could be severed and to whom any “set aside” order should apply.

ARGUMENT

I

The District Court lacked jurisdiction over StenTam’s challenge under the Administrative Procedure Act to IRS Notice 2021-20

Standard of review

Because sovereign immunity “is jurisdictional in nature,” it “deprives courts of the power to hear suits against the United States absent Congress’s express consent.” *United States v. Miller*, 145 S. Ct. 839, 849 (2025); accord *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *Halverson v. Burgum*, 148 F.4th 1089, 1093 (9th Cir. 2025) (“[F]ederal sovereign immunity is jurisdictional.”) Statutes waiving the government’s sovereign immunity are read narrowly, and any ambiguities in the scope of the waiver are construed in favor of the sovereign. *Miller*, 145 S. Ct. at 852-53. This Court reviews de novo whether sovereign immunity applies. *Halverson*, 148 F.4th at 1093.

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A. StenTam's claims under the APA are precluded by the Tax Code's specialized framework for judicial review of disputes about tax credits

As we will explain, the District Court was right that StenTam's challenges to the IRS Notice lack merit. But as a threshold matter, the District Court lacked jurisdiction to reach the merits because StenTam's challenges fall outside the Administrative Procedure Act's waiver of sovereign immunity. In holding otherwise (1-SER-9–10), the District Court erred, even though it ultimately reached the right outcome on the merits.

The APA does not waive sovereign immunity for StenTam's claims because taxpayer refund suits under the Tax Code provide the exclusive mechanism for obtaining judicial review of the Notice. StenTam is free to assist its clients whose ERC claims have been disallowed to bring such refund suits challenging the Notice. But what StenTam cannot do is use the APA to circumvent the Code's exclusive judicial-review mechanism by bringing its own lawsuit to challenge the Notice. To hold otherwise would "make a mush of the law," as this Court recognized in analogous circumstances in *City of Oakland v. Lynch*, 798 F.3d 1159, 1166 (9th Cir. 2015).

The APA waives sovereign immunity for certain suits against the government that concern agency action and seek relief other than money damages. 5 U.S.C. § 702; *Gallo Cattle Co. v. U.S. Dept. of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998). But the APA’s waiver of sovereign immunity is circumscribed in several ways. *Gallo Cattle Co.*, 159 F.3d at 1198. Among its other limitations, the APA does not permit judicial review of an agency action where another statute precludes it, 5 U.S.C. §§ 701(a)(1), 702, or where another statute “expressly or impliedly forbids the relief which is sought” under the APA, 5 U.S.C. § 702, or where there is some “other adequate remedy in a court” for the agency action in question, 5 U.S.C. § 704. Instead, the APA’s general grant of judicial review yields to specific provisions concerning judicial review in more specialized federal statutes. *See* 5 U.S.C. §§ 701(a)(1), 703, 704; *Hughes v. United States*, 953 F.2d 531, 537 (9th Cir. 1992).

In other words, the APA “does not provide additional remedies in situations where the Congress has provided special and adequate review procedures,” including “special statutory procedures relating to specific agencies.” *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). This “prevents plaintiffs from exploiting the APA’s waiver to evade

limitations on suit contained in other statutes.” *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, 567 U.S. 209, 215 (2012).

But that is just what StenTam is attempting here: to exploit the APA’s waiver of sovereign immunity to evade the Tax Code’s limitations on suit. The Tax Code, not the APA, provides the path to judicial review of the Notice. Specifically, a taxpayer denied the ERC based on criteria in the Notice can challenge that Notice in a tax-refund suit under 28 U.S.C. § 1346(a)(1). And in such a refund suit, the Notice would be reviewed under the same standards that govern judicial review of any other agency rule. *See, e.g., Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 55 (2011) (declining “to carve out an approach to administrative review good for tax law only” in refund suit challenging tax regulation).

The Tax Code’s interrelated provisions channel disputes about the Notice into this mechanism for judicial review. The ERC is first applied against the taxpayer’s employment tax liability, and to the extent the credit exceeds those taxes it becomes an overpayment to be refunded to the taxpayer. *See* 26 U.S.C. § 3134(a), (b)(3). Thus, a taxpayer (like any

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of StenTam's clients) that believes it has improperly been denied the ERC based on the Notice can pay the tax it owes, if any, after its ERC claim is disallowed and then seek a judicial determination that it is entitled to the ERC by suing the United States for a refund of tax equal to the amount of that credit. *See* 28 U.S.C. § 1346(a)(1). Accordingly, refund suits are the proper avenue for taxpayers to recover overpayments of tax based on refundable credits. *See Sorenson v. Sec'y of Treas. of U.S.*, 752 F.2d 1433, 1438 (9th Cir. 1985), *aff'd*, 475 U.S. 851 (1986); *see also Rueda v. Yellen*, No. 22-1584, 2023 WL 8271939, at *2 (4th Cir. Nov. 30, 2023) (noting that taxes and tax credits are "two sides of the same coin").

And before bringing a refund suit hinging on a disallowed ERC claim, a taxpayer would have to comply with a "detailed refund scheme that subjects complaining taxpayers to various requirements." *United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 11 (2008). Those pre-suit requirements include the taxpayer's full payment of the tax liability assessed, timely filing of an administrative refund claim, and forbearance from filing suit for at least six months unless the IRS renders a decision on the claim sooner. *See* 26 U.S.C. §§ 6511(b),

6532(a), 7422(a); *Clintwood Elkhorn*, 553 U.S. at 4–5, 11; *Flora v. United States*, 362 U.S. 145, 177 (1960). Thus, to obtain judicial review of the Notice in a refund suit, a taxpayer whose ERC claim was disallowed would first have to satisfy each of those prerequisites of the “detailed refund scheme.” *See, e.g., United States v. Dalm*, 494 U.S. 596, 610 (1990) (refusing to allow refund suit where taxpayer had failed to satisfy statutory prerequisites because it would “go beyond the authority Congress has given us in permitting suits against the Government” and thus violate the “principle [that] is central to our understanding of sovereign immunity”).

Consequently, as the District Court recognized, *taxpayers* claiming the ERC, like StenTam’s clients, could not challenge the Notice by bringing this APA suit because they “have an adequate alternative remedy in the form of refund suit.” (1-ER-10.) Of course, StenTam is not a taxpayer claiming the ERC and therefore cannot bring a refund suit. Where the District Court erred was in concluding that *because* StenTam is not a taxpayer able to bring a refund suit, StenTam can bypass the rigors of the Tax Code’s refund scheme and bring an APA suit instead.

That was exactly the *wrong* inference to draw from the Tax Code’s comprehensive framework. Rather, StenTam’s APA claim is *precluded* by the availability of taxpayer refund suits—that is, the Tax Code’s “special statutory review” mechanism for judicial review of the criteria for granting ERC claims. 5 U.S.C. § 703; *see also id.* §§ 702, 704; *Hinck v. United States*, 550 U.S. 501, 506 (2007) (discussing exclusive review mechanism within the Tax Code and noting that “in most contexts, a precisely drawn, detailed statute preempts more general remedies” (cleaned up)); *cf. Clintwood Elkhorn*, 553 U.S. at 9 (“The refund scheme in the [Tax] Code would have ‘no meaning whatever’ if taxpayers failing to comply with it were nonetheless allowed to bring suit [under the Tucker Act] subject only to the Tucker Act’s longer time bar.”).

That a refund suit can only be brought by taxpayers whose ERC claims have been disallowed, and only after they proceed through the Tax Code’s “detailed refund scheme,” does not mean that others are entitled to challenge the IRS notice under the APA. To the contrary, as the Supreme Court has said, “[w]here a statute provides that particular agency action is reviewable at the instance of one party, who must first exhaust administrative remedies, the inference that it is not reviewable

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at the instance of other parties, who are not *subject* to the administrative process, is strong.” *Sackett*, 566 U.S. at 130 (emphasis in the original); *see also Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984) (“[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded.”). Because the Tax Code provides for judicial review of the Notice in taxpayer refund suits, the District Court should have held that judicial review of the Notice at the behest of StenTam was precluded and that the court therefore lacked jurisdiction.

B. This Court’s decision in *City of Oakland* is more on point than Justice Kavanaugh’s concurrence in *Corner Post*

The Tax Code’s finely reticulated scheme for judicial review also undermines the District Court’s reliance on Justice Kavanaugh’s concurrence in *Corner Post, Inc. v. Board of Governors of Federal Reserve System*, 603 U.S. 799 (2024). The court cited that concurrence for the proposition that for StenTam, “as an unregulated party, the APA is the only avenue for relief which [it] can pursue.” (4-ER-594.) And to

be sure, as Justice Kavanaugh observed, “An unregulated plaintiff such as Corner Post often will sue under the APA to challenge an allegedly unlawful agency rule that regulates others but also has adverse downstream effects on the plaintiff.” *Corner Post*, 603 U.S. at 826 (Kavanaugh, J., concurring). But that general observation suggests nothing about situations like this one, where (as contemplated by 5 U.S.C. §§ 701, 702 and 704) a body of specialized law outside the APA channels and conditions judicial review of exactly the sort of agency action that is being challenged. After all—and in stark contrast to this case, where the Tax Code affords judicial review in a refund suit to a taxpayer denied the ERC—there is nothing in the *Corner Post* decision to suggest there was a statutory framework besides the APA for even *directly* regulated parties (*i.e.*, parties other than Corner Post) to challenge the agency action in question.

Meanwhile, in a case closer to this one, this Court held in *City of Oakland* that a plaintiff could not wield the APA to challenge a government forfeiture action against third-party property owners, even though the forfeiture would have an economic impact on the plaintiff. 798 F.3d at 1165–66. In that case, the forfeiture statute under which

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the government proceeded specified several things: a forum to challenge the forfeiture, a limited class of potential plaintiffs, a limitations period, a standard of review, and an authorization for judicial relief. *Id.* at 1166. Accordingly, this Court observed, permitting a different plaintiff to “file under the APA” and circumvent those requirements would “make a mush of the law.” *Id.* And this was true even though the Court recognized that the would-be APA plaintiff was *not* among those that could intervene in the forfeiture proceeding but was nonetheless “certain” to feel the economic effects of the forfeiture. *Id.* at 1164, 1166–67.

II

In any event, IRS Notice 2021-20 complies with the Administrative Procedure Act

Standard of review

If this Court concludes that the District Court had subject-matter jurisdiction over StenTam’s various APA-based challenges to IRS Notice 2021-20, then its review of the District Court’s rejection of those challenges on their merits is *de novo*. Whether an agency rule is interpretive or legislative is a question of law reviewed *de novo*. *Hemp Indus.*, 333 F.3d at 1086. This Court also reviews *de novo* whether

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agency action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” *Alaska Oil & Gas Ass’n v. Jewell*, 815 F.3d 544 (9th Cir. 2016).

A. As the District Court correctly concluded, the Notice sets forth interpretive rules that did not require notice and comment

The APA distinguishes between “legislative rules” and all other kinds of agency pronouncements, including “interpretive rules” and “general statements of policy.” *See* 5 U.S.C. § 553; *Hemp Indus.*, 333 F.3d at 1084 (noting courts use the more common term “interpretive” though the APA uses “interpretative”); *Erringer v. Thompson*, 371 F.3d 625, 629 n.8 (9th Cir. 2004) (using “legislative rules” interchangeably with the category of “substantive rules” described in the APA.) That distinction matters here because the APA’s notice-and-comment requirements, 5 U.S.C. § 553, apply only to legislative rules. They do not apply to interpretive rules, general statements of policy, or really any kind of agency pronouncement that is *not* a legislative rule. *See* 5 U.S.C. § 553(b)(B); *Hemp Indus.*, 333 F.3d at 1087.

Challenging several of the Notice’s Q & A provisions, StenTam argues that they are legislative rules promulgated without notice and

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comment in violation of the APA (Br. 26), but the District Court correctly rejected that argument. The challenged provisions merely republish FAQs about the ERC that the IRS had earlier posted on its website. And as the District Court correctly held, they are interpretative rules, not legislative rules, and therefore exempt from the time-consuming notice-and-comment procedures of the APA.

Indeed, StenTam's argument, at bottom, is that the APA *prohibited* the IRS from promptly giving the public even nonbinding guidance about a new and *immediately available* tax credit providing *emergency* pandemic relief. That is precisely the sort of nonsensical result, plainly contrary to the public interest, that the exception for interpretive rules is intended to prevent. As Judge Posner explained in *Hoctor v. U.S. Department of Agriculture*, 82 F.3d 165 (7th Cir. 1996):

Every governmental agency that enforces a less than crystalline statute must interpret the statute, and it does the public a favor if it announces the interpretation in advance of enforcement It would be no favor to the public to discourage the announcement of agencies' interpretations by burdening the interpretive process with cumbersome formalities.

Id. at 167 (discussing the APA's treatment of interpretive rules); *accord Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111–

12 (D.C. Cir. 1993) (recognizing that because “an agency can simply let its interpretation evolve ad hoc in the process of enforcement or other applications”—which “affords less notice, or less convenient notice, to affected parties”—“[t]he protection that Congress sought to secure by requiring notice and comment for legislative rules is not advanced by reading the exemption for ‘interpretive rule’ so narrowly”).

The IRS is charged with administering the ERC statute, whether it announces its interpretation of the statute in advance or not. *See* 26 U.S.C. § 7803(a)(2)(A). The IRS could have taken an ad hoc approach, leaving taxpayers guessing while it interpreted the statute on a claim-by-claim basis, but the IRS instead did taxpayers the “favor” of promptly announcing its understanding of the statute’s requirements. *Hoctor*, 82 F.3d at 167. StenTam would have this Court discourage the IRS and other federal agencies from providing such timely guidance in the future, but the Court should instead affirm the District Court’s holding that the challenged Notice provisions are interpretative rules exempt from notice-and-comment requirements.

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1. The key distinction between interpretive rules and legislative rules is that interpretive rules do not have the force of law

Legislative rules are those which are “issued by an agency pursuant to statutory authority and which implement the statute. . . . *Such rules have the force and effect of law.*” *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (emphasis added) (citing Attorney General’s Manual on the Administrative Procedure Act (1947)). Interpretive rules, in contrast, are those “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.” *Id.* Similarly, general statements of policy are “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.” *Id.*

Thus, as this Court explained in *Hemp Industries*, “interpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule. Legislative rules, on the other hand, create rights, impose obligations or effect a

change in existing law pursuant to authority delegated by Congress.”

333 F.3d at 1087 (citations omitted).

Accordingly, the key distinction between the two is that legislative rules, unlike interpretive ones, have “the force of law.” *Id.* Of course, “[i]f the agency says that it is issuing a rule with the force of law”—by, for example, promulgating the rule as a regulation following notice and comment—then “a court can simply take the agency at its word. The agency has no incentive to falsify its intention in that situation.”

Hickman & Pierce, *Administrative Law Treatise* § 4.5.1 (7th ed. 2025); see, e.g., *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007) (holding that rule was legally binding where agency used notice-and-comment procedures and treated the rule as binding).

But where, as here, an agency has not manifested an intention to create a legally binding rule, this Court applies a framework set forth by the D.C. Circuit that identifies three independent circumstances in which a rule nevertheless has “the force of law”: (1) when, in the absence of the rule, there would not be an adequate legislative basis for enforcement action; (2) when the agency has explicitly invoked its general legislative authority; or (3) when the rule effectively amends a

prior legislative rule. *Hemp Indus.*, 333 F.3d at 1087 (citing *Am. Min. Cong.*, 995 F.2d at 1109). StenTam does not contend that the Notice provisions are legislative rules under criteria (2) or (3). (See Br. 8, 14, 31, 47-48).

Thus, the question before this Court is whether the Notice has “the force of law” in that, without the Notice, the IRS would lack an adequate legislative basis to allow or deny an ERC claim based on the same considerations as those articulated in the Notice.³ The District Court correctly held that the Notice does not have the force of law in this respect (or any other)—and that the challenged Notice provisions are therefore interpretive rules exempt from notice-and-comment procedures—because the ERC statute provides the necessary “adequate legislative basis.”

³ Although *Hemp Industries* refers to “enforcement action,” this Court has read that broadly to include an agency’s decision to approve or deny a claim for benefits. See *Erringer*, 371 F.3d at 630–31; see also *Am. Min. Cong.*, 995 F.2d at 1110, 1112. The allowance or disallowance of a tax-credit claim is “enforcement action” in the same sense.

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2. The Notice provisions at issue do not carry the force of law and are therefore interpretive because the IRS could make the same decisions on ERC claims based on the statute alone

StenTam challenges various eligibility conditions mentioned in Q & A's within the Notice. Using StenTam's labels and grouping, the challenged provisions of the Notice are as follows:

- a. the interlocking “nominal portion” and “10 percent” provisions that relate to whether an employer's business is “fully or partially suspended”;
- b. the “supply chain disruption,” “customer base” and “comparable operation” provisions concerning the causal nexus between the suspension of a business and a government order; and
- c. the recordkeeping requirements for establishing eligibility.

(Br. 9, 14-19, 32, 38-42.) StenTam argues that these conditions are legislative rules because, in its view, they “imposed a series of additional restrictions that narrowed ERC eligibility beyond the statutory text.” (Br. 14.)

But StenTam is wrong because the challenged Notice provisions do not have the force law. Indeed, StenTam does not seriously contend otherwise, and that alone is a sufficient basis for affirmance. Although

it sometimes uses the phrase “force of law” (Br. 31), StenTam appears to mean only that Notice provisions (particularly the “10 percent” provision) deprive IRS personnel of discretion in reviewing ERC claims for eligibility. But even if that were true, it is irrelevant. *See infra* pp. 47–49.

As explained above, the crucial question is whether, *absent the Notice*, the IRS would have an “adequate legislative basis” in the ERC statute to deny an ERC claim based on the same considerations that are articulated in the Notice—for example, that the business’s gross receipts decreased by less than 10 percent or that its lost sales were due to government orders affecting only its customer base. *See Erringer*, 371 F.3d at 630–31 (inquiring whether, absent the rule in question, the statute would nonetheless impose an “overarching duty”). Put otherwise, the question is whether the challenged provisions in the Notice are derived from *pre-existing* eligibility requirements set forth in the ERC statute or instead create new requirements from whole cloth. *See id.*; *see also Am. Min. Cong.*, 995 F.2d at 1110 (status of agency rules as legislative or interpretive turns on “prior existence or non-existence of legal duties or rights”); *Fertilizer Inst. v. U.S. E.P.A.*, 935

F.2d 1303, 1306, 1309 (D.C. Cir. 1991) (an interpretive rule “reminds’ affected parties of existing duties”).

Under this standard, a rule is interpretive if it “derives a proposition from an existing document whose meaning compels or logically justifies the proposition. The substance of the derived proposition must flow fairly from the substance of the existing document.” *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494 (D.C. Cir. 2010). This does not mean, however, that interpretive rules can only “parrot statutory or regulatory language.” *Cent. Tex. Tel. Co-op. v. F.C.C.*, 402 F.3d 205, 214 (D.C. Cir. 2005). Rather, agencies may use interpretive rules “to transform ‘a vague statutory duty or right into a sharply delineated duty or right,’” *id.* (citation omitted), and to “suppl[y] crisper and more detailed lines than the authority being interpreted,” *Am. Min. Cong.*, 995 F.2d at 1112.⁴ Because the

⁴ Of course, “[m]any legislative rules” promulgated through notice and comment likewise “interpret statutes.” *Hickman & Pierce, supra* § 4.5. But again, there is no question in that circumstance that the rule is intended to have the force of law. *See supra*, p. 29. The analytical framework adopted by this Court in *Hemp Industries* (and applied also in the other above-cited cases) addresses whether rules, like the Notice here, that are published *without* notice and comment and that the agency contends are interpretive *nevertheless* have the force of law and are therefore actually legislative.

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challenged Notice provisions do no more than this, the ERC statute from which they are derived provides an “independent legislative basis” for the IRS’s decisions on ERC claims. Consequently, the Notice provisions do not have “the force of law” within the meaning of *Hemp Industries* and are therefore interpretive rules.

a. The Notice’s “nominal portion” and “10 percent” provisions interpret the statutory requirement that an employer’s business be “fully or partially suspended”

The ERC statute limits the scope of eligible employers to those whose trade or business “is fully or partially suspended” during a specified time. 26 U.S.C. § 3134. In Q & A no. 11, the Notice interprets this to mean that “more than a nominal portion” of a business must be suspended. (3-ER-270.) And its so-called “10 percent” provision elaborates:

[A] portion of an employer’s business operations will be deemed to constitute more than a nominal portion of its business operations if either (i) the gross receipts from that portion of the business operations [are] not less than 10 percent of the total gross receipts (both determined using the gross receipts of the same calendar quarter in 2019), or (ii) the hours of service performed by employees in that portion of the business is not less than 10 percent of the total numbers of hours of service performed by all employees in the employer’s business (both determined using the number

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of hours of service performed by employees in the same calendar quarter in 2019).

(3-ER-271.)

These provisions in Q & A no. 11 thus supply “crisper and more detailed” guidelines, *Am. Min. Cong.*, 995 F.2d at 1112, for what the statute means by its requirement that a business be “fully or partially suspended.” The view that even a partial suspension must be more than a “nominal” or de minimis suspension is readily derived from the statute’s use of the phrase “fully or partially suspended” (as opposed, to say, the phrase “suspended to any degree”). *See, e.g., Erringer*, 371 F.3d at 627-28, 630-31 (holding agency guidelines to be interpretive rules where they delineated what expenses were “reasonable and necessary” as that phrase was used in the underlying statute).

And the Notice’s numerical threshold of 10 percent sets a plausible and concrete standard for what is more than nominal. Indeed, “many courts of appeals have . . . upheld agencies’ numeric interpretations of qualitative terms.” *United States v. McIntosh*, 124 F.4th 199, 209 (3d Cir. 2024) (collecting cases); *see, e.g., United States v. Trumbull*, 114 F.4th 1114, 1120 (9th Cir. 2024) (where agency pronouncement interpreted the word “large” in the phrase “large

capacity magazine” to indicate a firearm that can carry more than fifteen rounds of ammunition); *Warshauer v. Solis*, 577 F.3d 1330, 1333, 1337, 1340 (11th Cir. 2009) (where agency assigned a fixed dollar amount (\$250) to the phrase “insubstantial value” in a regulation addressing the reporting of gifts); *Am. Min. Cong.*, 995 F.2d at 1108 (where agency interpreted “diagnosis” by specifying a numerical threshold in a rating system that measures the “concentration of opacities” in X-ray images).

Because the “nominal portion” and “10 percent” provisions merely provide more detailed guidelines on the statutory requirement that a business’s operations be “fully or partially suspended,” it is that *statutory* requirement that provides an “adequate legislative basis” for the IRS to deny an ERC claim. Even without the Notice, the statutory requirement itself would allow the IRS to deny an ERC claim based on the same considerations that are embodied in the Notice’s “nominal portion” and “ten percent” provisions.

That makes these provisions of the Notice interpretive rules, rather than legislative rules, under the framework that this Court adopted in *Hemp Industries*, 333 F.3d at 1087. Whether the “nominal

portion” or “10 percent” provisions are *compelled* by the statutory phrase “fully or partially suspended” (*see* Br. 34) is irrelevant. *See Cent. Tex. Tel. Co-op.*, 402 F.3d at 212; *Am. Min. Cong.*, 995 F.2d at 1113. By publishing those interpretive rules, the IRS was merely advising the public how it interprets the underlying statutory language, which the APA *encourages* by exempting interpretive rules from notice-and-comment requirements.

Furthermore, as the District Court correctly concluded, the “10 percent” provision simply establishes a “safe harbor.” (1-ER-15–16.) The language of the Notice speaks of sufficient—though not *necessary*—conditions in which it “will be deemed” that more than a nominal portion of a business’s operations have been suspended. (3-ER-271); *see Pub. Emps. Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 172 (1989) (describing an “interpretive bulletin” issued by an agency that provided a “safe harbor,” i.e. a “nonexclusive objective test” that regulated parties could use to be “certain” they met legal requirement); *Animal Legal Def. Fund v. Veneman*, 469 F.3d 826, 839–40 (9th Cir. 2006), *vacated due to settlement pending rehearing en banc*, 490 F.3d 725 (9th Cir. 2007).

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Thus, if a business satisfies the 10 percent provision, then it *will* be deemed to have suffered a “more than nominal”—and thus at least “partial”—suspension. (1-ER-15–16.) That is a quintessential safe harbor. In reading the 10 percent provision otherwise, StenTam erroneously swaps an “if” with an “*only* if,” as the District Court correctly explained, (1-ER-15–16.). And as a safe harbor, the 10 percent provision is conclusively an interpretive rather than legislative rule because it merely provides ERC claimants with a guideline to *ensure* they will meet the pre-existing eligibility requirement that their trade or business be “fully or partially suspended.” 26 U.S.C. § 3134(c)(2)(ii)(I).

Finally, the cases that StenTam cites provide a helpful contrast to the rules here and drive home the point in favor of the Government. It is true (Br. 34–35) that in *Hector*, the Seventh Circuit rejected the agency’s contention that an eight-foot height requirement for perimeter fences was an interpretation of a regulation about the “structural strength” of enclosures for animals. 82 F.3d at 167–69. But that is because the regulation was “concerned with the strength of enclosures rather than their height.” *Id.* at 169. In other words, it was the

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categorical mismatch between the underlying regulation’s focus on structural soundness and the challenged rule’s focus on height—two parameters with no intrinsic relationship—that doomed the agency’s characterization of the height requirement as an interpretive rule. *See id.* (“The regulation appears only to require that pens and other animal housing be sturdy enough in design and construction, and sufficiently well maintained, to prevent the animals from breaking through the enclosure—not that any enclosure. . . be high enough to prevent the animals from escaping by jumping[.]”).

Here, in contrast, the nominal portion and 10 percent rules are self-evidently tied to whether a business is “fully or partially suspended.” They merely quantify the degree to which a business must be suspended.

Similarly unhelpful to *StenTam* (Br. 36), is the D.C. Circuit’s opinion in *Catholic Health Initiatives*, in which the court reviewed an agency rule that set forth detailed limitations on investment decisions by a certain kind of insurer that provided coverage to hospitals. 617 F.3d at 491–93. The agency defended the rule as an interpretation of an underlying rule restricting hospitals’ reimbursement to “reasonable

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costs” for insurance premiums. *Id.* at 493. But the court disagreed, ruling that “there is no way an interpretation of ‘reasonable costs’ can produce the sort of detailed—and rigid—investment code” for insurers that the agency had pronounced. *Id.* at 496. Likening the agency’s position to saying that “the detailed provisions of the Clean Air Act were interpretations of the language of the Constitution,” the court concluded that the connection was simply “too attenuated.” *Id.*

Here, in contrast, the connection between the statutory requirement that a business’s operations be “fully or partially suspended” and the “nominal portion” and “10 percent” provisions that elaborate on that requirement is not attenuated at all.

b. The Notice’s “supply chain disruption,” “customer base,” and “comparable operation” provisions interpret the statutory requirement that the suspension be “due to” a government order

The ERC statute further limits the scope of eligible businesses to those whose operations are suspended, in whole or in part, “due to orders from an appropriate governmental authority” limiting certain activities. 26 U.S.C. § 3134(c)(2)(A)(ii)(I). In turn, Q & A nos. 12, 13, 14, 15 and 16 of the Notice interpret that limitation by elaborating on

the circumstances in which a suspension of business is “due to” such a government order. (3-ER-271–77). For example, the Notice explains that a business may be suspended “due to” a government order addressing a third party (such as an order that suspends the operations of a *supplier* of the business). (3-ER-271.)⁵ In other instances, the Notice concludes that the chain of causation between a government order and a business suspension is too attenuated for the latter to be “due to” the former—for example, where a government order leads to less customer demand for a business’s products or services, and the business then suspends its operations in response to that lack of demand. (3-ER-272.)⁶ And finally, the Notice also interprets the “due

⁵ StenTam’s mentions the “supplier-disruption rule” set out in Q & A no. 12 only once and never explains its quarrel with this provision. (Br. 14.) In any event, its sole mention of the rule appears to overread it. According to StenTam, the rule restricts eligibility to those businesses whose suppliers are “physically closed by government order,” excluding those with “indirect supplier impacts” (whatever that means). (Br. 14.) But the rule never even mentions a “physical[] clos[ure]” order against the supplier.

⁶ Though, as the Notice points out, a drastic enough downturn in customer demand might lead a business to be eligible for the ERC credit through a *separate* statutory provision that kicks in where there is a “significant decline in gross receipts” of an employer. (3-ER-272); *see* 26 U.S.C. § 3134 (c)(2)(A)(ii)(II).

to” requirement to exclude circumstances where even though an employer’s workplace is closed due to a government order, the employer could nonetheless, with telework, “continue operations comparable to its operations prior to the closure” but chooses not to. (*See* 3-ER-273–76.) StenTam objects to all of these Notice provisions as legislative rules unlawfully promulgated without notice and comment. (Br. 14-16.)

But once again, these provisions merely set forth the IRS’s interpretation—in this case, its interpretation of the statutory requirement that a business suspension be “*due to* orders from an appropriate governmental authority limiting commerce, travel, or group meetings.” 26 U.S.C. § 3134 (c)(2)(A)(ii)(I) (emphasis added). The limits of the phrase “due to,” or what is often called “traceability,” are hardly self-evident. *See, e.g., Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 415–16 (2013) (even if plaintiffs concerns were not “fanciful, paranoid, or otherwise unreasonable,” costs they incurred to protect against threat of possible government action were still not “fairly traceable” to the government action they sought to challenge). And as the District Court correctly concluded, the IRS’s unpacking of the statutory “due to” language did not drift so far from that language that it cannot be

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considered an act of interpretation. (1-ER-14 (citing *Warshauer*, 577 F.3d at 1338).)

Thus, even without the Notice, the statutory requirement that a business suspension be “due to” a governmental order would provide an “adequate legislative basis” for the IRS to deny ERC claims where the causal relationship between the suspension and the order is attenuated—for example, where the more direct cause of the suspension was a decrease in customer demand or the taxpayer’s choice not to continued its operations through telework. That makes these provisions interpretive rules rather than legislative rules. *See Erringer*, 37 F.3d at 630-31, *Hemp Indus.*, 333 F.3d at 1087.

c. The Notice’s ERC-specific record-keeping provisions interpret requirements already established by regulations governing employment-tax refunds

The final provision of the Notice that StenTam challenges as a purported legislative rule is Q & A no. 70, which addresses the documentation that is sufficient to establish an employer’s eligibility for the ERC. (Br. 18, 40-42; 3-ER-343–44). An ERC claimant need not submit this documentation with its credit claim; rather, the documentation must be maintained by the taxpayer and made available

to the IRS in case it seeks substantiation of the claim. (3-ER-344.)

There are several reasons why this guidance is not a legislative rule.

First, an existing regulation already requires that any taxpayer claiming an employment tax credit “shall keep a complete and detailed record with respect to the tax, interest, addition to the tax, additional amount, or assessable penalty to which the claim relates.” 26 C.F.R. § 31.6001-1(c). So regardless of the Notice, a taxpayer claiming the ERC has a pre-existing duty to maintain a complete and detailed record related to that credit claim. *Id.*; *see also, e.g., Audio Technica U.S., Inc. v. United States*, 963 F.3d 569, 578 (6th Cir. 2020) (taxpayers must prove their entitlement to federal tax credits because such credits “are matters of ‘legislative grace’ and are strictly construed in favor of the government”). The Notice does no more than describe what will constitute “a complete and detailed record” for an ERC claim, specifically. (3-ER-343.); *cf. Erringer*, 371 F.3d at 627-28, 30-31; *see also Am. Min. Cong.*, 995 F.2d at 1110 (rule is interpretive when it “spells out the scope of an agency’s or regulated entity’s pre-existing duty”).

Second, the guidance in the Notice is not mandatory. It identifies what is sufficient—without dictating what is *necessary*—by specifying

what kinds of documentation “will adequately substantiate eligibility” for the ERC. (3-ER-343.) In this way, it establishes a “safe harbor” in which taxpayers can be assured they are complying with their pre-existing duty to maintain a “complete and detailed record” relating to their ERC claim. This sort of safe harbor is a hallmark of an interpretive rule. *See Betts*, 492 U.S. at 172; *Animal Legal Def. Fund*, 469 F.3d at 839–40. And because IRS employees can still exercise their discretion to conclude that a taxpayer has substantiated its eligibility for the ERC using other documentation, the provision is not even “binding” on employees in the narrow way StenTam (mistakenly) focuses on. (Br. 29–30.)⁷

Once again, StenTam’s main case citation offers a contrast that helps drive home all of the above. StenTam relies (Br. 40) on *Mann Construction, Inc. v. United States*, 27 F.4th 1138 (6th Cir. 2022), which concerned provisions of the Tax Code that require certain persons to report information about “reportable” and “listed” transactions. *Id.* at

⁷ As explained in more detail *infra*, pp. 47–49, StenTam’s focus on whether the rule “binds” agency personnel is misdirected because that question is of little use in distinguishing between legislative rules and interpretive rules.

1141-42. The IRS had published a notice that designated a particular type of transaction as a “listed” transaction that had to be reported under the statute. *Id.* at 1142. Rejecting the Government’s argument that the notice was interpretive, the Sixth Circuit concluded that it was a legislative rule because, before the notice designated the transaction as a listed transaction, the taxpayers had no independent, preexisting duty to report it. *Id.* at 1143. Here, in contrast, the Notice describes how ERC claimants can satisfy their *pre-existing* duty to “keep a complete and detailed record with respect to the tax . . . to which the [credit] claim relates.” 26 C.F.R. § 31.6001-1(c).

3. StenTam’s proposed alternative criteria for distinguishing legislative rules from interpretive rules contravene *Hemp Industries*

StenTam focuses on the wrong things in arguing that the Notice provisions are legislative rules. It asserts that the criteria this Court adopted in *Hemp Industries* for separating legislative from interpretive rules are not exclusive and then, for most of its brief, focuses instead on whether the Notice provisions are “binding” on the IRS and, in particular, whether the “ten percent” rule is a “safe harbor” or instead a “numerical cutoff.” (Br. 2, 10-11, 23, 30, 32–34, 37–38.) These inquiries

are red herrings. Although they can help sort legislative rules from “general statements of policy” (which also do not require notice-and-comment rulemaking), they do little to separate legislative rules from interpretive ones.

StenTam leads with a foundational error of law, pronouncing: “In short, a rule is legislative when the agency treats it as a binding norm . . . Courts therefore look to whether the rule strips agency personnel of discretion, either on its face or in practice.” (Br. 30.) That is wrong. The Fifth Circuit case that StenTam cites is drawing the line between rules (which are “binding” on the agency, though they can be either interpretive or legislative) and policy statements (which are not even “binding” on the agency). *See Texas v. United States*, 809 F.3d 134, 171–176 (5th Cir. 2015). And the same is true of another case that StenTam cites: *Gill v. United States Department of Justice*, 913 F.3d 1179, 1186 (9th Cir. 2019), where the dispute was between the plaintiffs contention that the agency standard at issue was a binding legislative rule and the Government’s contention that it was a policy guidance statement that allowed agency employees to “exercise discretion.”

As the D.C. Circuit most forcefully put it, whether an agency pronouncement binds agency personnel or instead allows them discretion is helpful in “distinguishing *policy statements*, rather than interpretive rules, from legislative norms,” but “restricting discretion tells one little about whether a rule is interpretive.” *Am. Min. Cong.*, 995 F.2d at 1111. So while the binding nature of a norm “may be of use when drawing a line between *policy statements* and legislative rules . . . the endeavor miscarries in the interpretive/legislative rule context.” *Id.* This Court has similarly considered whether an agency document, if promulgated, would be “binding” on the agency in distinguishing between a statement of policy and an *interpretive* rule. *Animal Legal Def. Fund*, 469 F.3d at 839-40. And this Court concluded that the agency document would be an interpretive rule, because it would be binding on the agency. *Id.*⁸ Other circuits, too, have expressly rejected

⁸ Even though both are exempt from notice-and-comment requirements, the distinction between policy statements and interpretive rules can be important in other contexts, because some policy statements—given their tentative nature—do not even create “legal consequences” and are thus not subject to judicial review, period. *See Animal Legal Def. Fund*, 469 F.3d at 838-40; *see also Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 452 F.3d 798, 807-810 (D.C. Cir. 2006). Confusion can arise because of all the closely

(continued...)

the inquiry into whether a rule is “binding” as helpful in sorting an interpretive rule from a legislative one. *Flight Training Int’l, Inc. v. Fed. Aviation Admin.*, 58 F.4th 234, 242 (5th Cir. 2023) (“We therefore join other Circuits in rejecting the proposition that a rule cannot be interpretive if it limits discretion or uses binding language.”) (collecting cases); *Dismas Charities, Inc. v. U.S Dep’t of Justice*, 401 F.3d 666, 681 (6th Cir. 2005).⁹

StenTam also disputes that the “10 percent” provision establishes a safe harbor, but as we have explained, StenTam is wrong: the District Court correctly held that it is a safe harbor rather than a hard floor. (1-ER-15–17.) Even if it were not a safe harbor, however, that would not

clustering terminology: an agency action must have “legal consequences” to be reviewable at all, but that is not the same as having the “force and effect of law” characteristic of legislative rules alone (else all “final agency actions” that were reviewable would also necessarily be legislative rules). *See Cal. Cmty. Against Toxics v. E.P.A.*, 934 F.3d 627, 634–36 (D.C. Cir. 2019).

⁹ Of course, there is one sense in which *only* a legislative rule can be “binding,” and that is the sense in which “binding” means the rule binds not only agency personnel, but also tribunals (like courts) outside the agency, and thus has “the force of law.” *See Erringer*, 371 F.3d at 631; *Hemp Indus.*, 333 F.3d at 1087-88; *Warder v. Shalala*, 149 F.3d 73, 82-83 (1st Cir. 1998). But no party contends that the Notice is binding in this stronger sense.

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change the interpretive nature of the rule. In arguing otherwise, StenTam again conflates what *excludes* an agency pronouncement from being a legislative rule with what establishes that a pronouncement *is* a legislative rule. That a rule establishes a safe harbor is sufficient, but not necessary, to make it an interpretive rule. So just as StenTam cannot show that the Notice provisions are legislative rules by showing that they are binding on the IRS (which would establish only that the provisions are not policy statements), StenTam cannot demonstrate that the 10 percent rule is legislative by establishing that it is not a safe harbor. As we have explained, *supra* pp. 35–36, this Court and others have held rules establishing numerical cutoffs (and *not* just safe harbors) to be interpretive. Meanwhile, StenTam points to no authority suggesting that numerical rules are interpretive only if they do create safe harbors.

Certainly, *Hector* does not stand for that notion. There, the Seventh Circuit was “not saying that an interpretive rule can never have a numerical component,” or that such rules must be relegated to establishing safe harbors. *Hector*, 82 F.3d at 171. Indeed, “[e]ven in a nontechnical area the use of a number as a rule of thumb to guide the

application of a general norm will often be legitimately interpretive.”

Id. Thus, in characterizing the numerical requirement at issue as legislative and not interpretive, the Seventh Circuit did not rely on broad observations about rules incorporating numerical cutoffs. Rather, the crux of the Seventh Circuit’s reasoning was that a fence *height* requirement could not be derived from the pre-existing duty to ensure the structural *strength* of an animal enclosure. *Hoctor*, 82 F.3d at 170.

Last, to the extent that StenTam suggests that the Notice provisions are legislative just because they impact ERC claimants, that would be wrong, too. *See Chief Prob. Off’rs of Cal. v. Shalala*, 118 F.3d 1327, 1335 (9th Cir. 1997) (“[T]his Court has made it clear that ‘impact’ is not a basis for finding a rule not to be interpretive.”); *Cent. Tex. Tel. Co-op., Inc.*, 402 F.3d at 214; *Am. Min. Cong.*, 995 F.2d at 1112.

B. StenTam fails to show that the Notice is arbitrary and capricious

“The APA’s arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained.” *Prometheus Radio Project*, 592 U.S. at 423. A court’s review of agency action under the arbitrary-and-capricious standard is “deferential” and meant simply to ensure “that the agency has acted within a zone of reasonableness

and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.” *Id.* And a court should “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” *Motor Vehicles Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

An agency action flunks this deferential standard of review “only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered and explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Defs. of Wildlife v. Zinke*, 856 F.3d 1248, 1257 (9th Cir. 2017). StenTam fails to even mention these criteria, much less engage with them. So it fails from the outset to show that the Notice is arbitrary and capricious. Its argument can be rejected on that ground alone.

Instead, as it does throughout the brief, StenTam invents criteria for establishing an APA violation. StenTam focuses on what it claims are (a) a lack of “identifiable factual evidence” in the nature of “analysis, data or findings” for the Notice provisions that it challenges,

and (b) the (inherently) “arbitrary” nature of the 10 percent threshold in the “ten percent” rule. (Br. 49-52.)

As the District Court pointed out, the provisions of the Notice cannot be said to run “counter to the evidence before the agency” because there *was* no “identifiable factual evidence to consider—just the text of the statute.” (1-ER-26.) StenTam tries to wield this observation against the Government on appeal, suggesting that the IRS’s failure to produce “evidence” to justify the standards in Notice 2021-20 is precisely what makes the Notice provisions arbitrary. (Br. 50.) But, as the District Court observed, a lack of “analysis, data or findings” comes as no surprise where the agency rule being challenged is the interpretation of statutory phrases like “fully or partially suspended,” “due to orders,” and the like. (1-ER-26.) Data and factual findings are simply inapposite to the “reasonableness” of this particular interpretive endeavor.

To be sure, conducting arbitrary-and-capricious review of agency action often involves “examin[ing] the relevant data” and inquiring whether there is a “rational connection between the facts found and the choice made.” *State Farm*, 463 U.S. at 43. That inquiry makes sense

where the challenged agency rule incorporates a “predictive judgment” about regulated entities, because then the reasonableness of that rule naturally turns on whether there are facts to ground that prediction. *Cf. Prometheus Radio Project*, 592 U.S. at 420–22; *State Farm*, 463 U.S. at 34, 38, 47–50. But that does not mean that data-gathering and fact-finding is a *sine qua non* of reasoned agency action of any sort.

Rather, in this case, as the District Court correctly observed, “no facts or data” are needed to reasonably interpret a statutory phrase like “fully or partially suspended.” (*See* 1-ER-25–26.) And tellingly, while StenTam complains about a lack of “analysis, data or findings,” it does not identify what sort of further analysis, data or findings would have been helpful or pertinent. (Br. 50.) Regardless, the ultimate question is not whether the agency marshaled facts (no matter how redundant to its endeavor) but instead whether the agency action is both reasonable and reasonably explained.

As explained above, *supra* p. 34–46, all of the Notice provisions are at least reasonable interpretations of underlying statutory requirements. Indeed, in trying to delineate the contours of the broadly phrased ERC statutory requirements, the IRS tracked Congress’s own

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elaborations on the meaning of the statute and may even have been more generous than Congress at times. For instance, in its report on the tax provisions of the CARES Act, JCX-12R-20 (Apr. 23, 2020), the Joint Committee on Taxation (“the Committee”) offers an accounting firm as an example in discussing ERC eligibility. And, in discussing the firm’s eligibility for the ERC, the Committee appears to presuppose that the firm requires employees who *can* work from home *to* work from home. (See 1-SER-16.) In this regard, the Committee’s remarks square with the later “comparable operations” requirement in Q & A no. 12 to which StenTam objects. (Br. 15–16, 39; 3-ER-273.)

The IRS’s interpretations are reasonably explained, too, insofar as the IRS connects each of the conditions set forth in the Q & A’s at issue to the statutory language that underlays that condition. (3-ER-270–77.) Whether or not the IRS could have explained its reasoning in greater detail, its interpretive choices can “reasonably be discerned” from the explanations in the Notice, and the APA requires nothing more. *See State Farm*, 463 U.S. at 43.

Arguing that the 10 percent rule in particular is arbitrary, StenTam faults the IRS for not explaining why “10 percent was the

correct figure” and points to the District Court’s acknowledgment (in upholding the rule) that “any classification based on a percentage or amount is necessarily somewhat arbitrary.” (Br. 50, 51; 1-ER-27.) But that sort of arbitrariness inheres in drawing *any* lines based on a percentage or amount (after all, one could always ask: why not one percentage point more, or less). *See, e.g., 10 East 40th St. Bldg. v. Callus*, 325 U.S. 578, 584 (1945) (“On the terms in which Congress drew the legislation we cannot escape the duty of drawing lines. And when lines have to be drawn they are bound to appear arbitrary when judged solely by bordering cases.”); *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting) (“When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn . . . to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary.”).

That arbitrariness inherent in all line-drawing cannot establish an APA violation, or else *every* such line would violate the APA. (See 1-ER-27 (citing *Cohen v. Beneficial Indus. Loan Corp.* 337 U.S. 541, 553

(1949)); *see also Fishermen’s Dock Co-op., Inc. v. Brown*, 75 F.3d 164, 171–72 (4th Cir. 1996) (while the agency’s choice of an “81%” certainty threshold over a “59%” certainty threshold was “in a sense, arbitrary,” the agency “indulged only in the kind of arbitrariness that is inherent in the exercise of discretion amid uncertainty and not in the kind of arbitrariness that the [APA] condemns when it exists in tandem with capriciousness.”); *Leather Indus. of Am. v. EPA*, 40 F.3d 392, 409 (D.C. Cir.1994) (“Where the agency’s line-drawing does not appear irrational and the [challenger] has not shown that the consequences of the line-drawing are in any respect dire . . . we will leave that line-drawing to the agency’s discretion.”)

C. StenTam fails to explain how the Notice conflicts with the statute that allows for the tax credit

For the same reasons that the Notice’s rules are neither legislative nor arbitrary and capricious, StenTam’s argument (Br. 53-55) that the Notice conflicts with the ERC statute also fails. That argument rests on contentions that the Court must have already rejected if it has rejected StenTam’s arguments discussed above. For that reason, the District Court, too, rejected this argument as foreclosed by its rulings on StenTam’s earlier points. (1-ER-27–28.) For instance, in arguing that

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the Notice is contrary to the ERC statute, StenTam posits that the Notice “added an eligibility restriction that Congress intentionally omitted.” (Br. 53.) But that presupposes that the Notice sets out legislative rules, a contention that the Court would have already rejected if it is reaching StenTam’s argument that the Notice conflicts with the ERC statute (after all, if the Notice set out legislative rules, then StenTam would have prevailed already, because those rules would be procedurally invalid for lack of notice and comment regardless of any substantive conflict with the statute).

StenTam fails to explain how the Court could conclude that the IRS, in publishing a rule that is both interpretive of a statutory duty *and* not arbitrary or capricious, nonetheless “acted beyond its authority” and in a manner “inconsistent with the underlying statute.” (Br. 53-54.) Regardless, StenTam fails to show that the Notice is “contrary to the express language” of any part of 26 U.S.C. § 3134.

Last, StenTam’s invocation of *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), is misplaced. (Br. 53.) That case addressed whether a court must defer to the agency’s interpretation of a statute. *Id.* at 377, 379. There is no question of deference here. The

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only questions are whether the challenged Notice provisions are interpretive rules under the APA, and if so, whether those provisions are arbitrary and capricious.

III

Were this Court to hold that IRS Notice 2021-20 violates the APA, the District Court should determine the proper remedy in the first instance

Even if this Court were to hold that the challenged provisions within IRS Notice 2021-20 violated the APA, StenTam's proposal to vacate the Notice does not follow. (Br. 56.) To be sure, the APA directs courts to "set aside" agency action that does not pass muster under the APA. 5 U.S.C. § 706. But there are at least two questions about the appropriate scope of any "set aside" remedy that the District Court should address in the first instance.

First, there is the question of severability—*i.e.*, whether the challenged Notice provisions can be "set aside" while the rest of the Notice remains in force. As the District Court noted, StenTam challenges only twelve of seventy-one instances of Q & A guidance in the Notice, covering only four out of fourteen of the topics covered by the Notice. (1-ER-12; 3-ER-259–344.) And as StenTam itself acknowledges

(Br. 55), it is often possible for a court to sever and set aside only the invalid portion of an agency action, leaving the rest in place. *See, e.g., Epsilon Elecs., Inc. v. U.S. Dep’t of Treas.*, 857 F.3d 913, 211 (D.C. Cir. 2017.) While StenTam tries to foreclose this option by asserting that the Q & A’s that it challenges are inextricable from the rest of the Notice, its analysis on this point is brisk, to say the least, and should be taken up in the first instance by the District Court. (Br. 56.)

Second, there is the question of the geographical scope of any “set aside” order; that is, whether the Notice (or only some of its provisions) should be set aside “nationwide” as to all ERC claimants or only set aside as to a smaller class of them, such as those within the District of Arizona, or the Ninth Circuit, or that are clients of StenTam (wherever they may be). StenTam does not touch on this question at all in its brief, though in the proceedings below it urged an “unequivocal nationwide injunction” against the Notice. (Br. 56; 2-ER-236.) But this question—about the appropriate reach of a “set aside” order—is “a matter of intense and active controversy” in the courts. *Innovation Law Lab. v. Wolf*, 951 F.3d 986, 990 (9th Cir. 2020) (collecting cases). Indeed, this Court has cautioned prudence in issuing nationwide

injunctions and has narrowed the scope of several district court orders after finding that nationwide relief was not appropriate. *See, e.g., California v. Azar*, 911 F.3d 558, 5583 (9th Cir. 2018); *City and Cnty. of S.F. v. Trump*, 897 F.3d 1225, 1245 (9th Cir. 2018); *see also Innovation Law Lab*, 951 F.3d at 990 (staying the district court’s injunction “insofar as it operates outside the geographical boundaries of the Ninth Circuit”).

Resolving these questions would involve contested questions of law and of fact that require briefing and a record not before this Court. *See City and Cnty. of S.F.*, 897 F.3d at 1245 (noting “the record is insufficiently developed as to the question of the national scope of the injunction”). And it would implicate the equitable discretion of the courts. 33 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 8385 (2d ed. 2025) (discussing the remedies afforded by the APA and noting that “like injunctive relief ... issuance of declaratory relief does implicate the equitable discretion of the courts.”)

So in the event that this Court decides both that the District Court had jurisdiction and that any portion of the Notice violated the APA, the determination of the appropriate remedy is best left to the

District Court in the first instance. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136–37 (2007) (because the Declaratory Judgment Act provides for discretion in remedy, it is “more consistent with the statute” to “vest district courts with discretion in the first instance, because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp”) (internal citations omitted); *Dunlop v. Saghatelian*, 520 F.2d 788, 789 (9th Cir. 1975) (where a statute did not impose “an automatic or mandatory remedy” but rather “implicitly recognize[d] that there may be cases calling for one remedy but not another . . . these choices are, of course, left in the first instance to the district courts.”) (internal citations omitted).

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CONCLUSION

The judgment of the District Court should be vacated and the case remanded with instructions to dismiss it for lack of subject-matter jurisdiction. Alternatively, the District Court's judgment should be affirmed. And in no event should this Court order, or remand with instructions for the District Court to order, the nationwide vacatur of the entirety of Notice 2021-20.

Respectfully submitted,

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5 U.S.C. § 701—Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

. . .

5 U.S.C. § 702—Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 703—Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. § 704—Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 706—Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

...

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

...

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

26 U.S.C. § 3134—Employee retention credit for employers subject to closure due to COVID-19

(a) In general—In the case of an eligible employer, there shall be allowed as a credit against applicable employment taxes for each calendar quarter an amount equal to 70 percent of the qualified wages with respect to each employee of such employer for such calendar quarter.

(b) Limitations and refundability—

(1) In general—

(A) Wages taken into account—The amount of qualified wages with respect to any employee which may be taken into account under subsection (a) by the eligible employer for any calendar quarter shall not exceed \$10,000.

(B) Recovery startup businesses—In the case of an eligible employer which is a recovery startup business (as defined in subsection (c)(5)), the amount of the credit allowed under subsection (a) (after application of subparagraph (A)) for any calendar quarter shall not exceed \$50,000.

(2) Credit limited to employment taxes—The credit allowed by subsection (a) with respect to any calendar quarter shall not exceed the applicable employment taxes (reduced by any credits allowed under sections 3131 and 3132) on the wages paid with respect to the employment of all the employees of the eligible employer for such calendar quarter.

(3) Refundability of excess credit—If the amount of the credit under subsection (a) exceeds the limitation of paragraph (2) for any calendar quarter, such excess shall be treated as an overpayment that shall be refunded under sections 6402(a) and 6413(b).

(c) Definitions—For purposes of this section—

(1) Applicable employment taxes—The term “applicable employment taxes” means the following:

(A) The taxes imposed under section 3111(b).

(B) So much of the taxes imposed under section 3221(a) as are attributable to the rate in effect under section 3111(b).

(2) Eligible employer—

(A) In general—The term “eligible employer” means any employer—

(i) which was carrying on a trade or business during the calendar quarter for which the credit is determined under subsection (a), and

(ii) with respect to any calendar quarter, for which—

(I) the operation of the trade or business described in clause (i) is fully or partially suspended during the calendar quarter due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to the coronavirus disease 2019 (COVID-19),

(II) the gross receipts (within the meaning of section 448(c)) of such employer for such calendar quarter are less than 80 percent of the gross receipts of such employer for the same calendar quarter in calendar year 2019, or

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(III) the employer is a recovery startup business (as defined in paragraph (5)).

With respect to any employer for any calendar quarter, if such employer was not in existence as of the beginning of the same calendar quarter in calendar year 2019, clause (ii)(II) shall be applied by substituting “2020” for “2019”.

. . .

(m) Regulations and guidance—The Secretary shall issue such forms, instructions, regulations, and other guidance as are necessary—

(1) to allow the advance payment of the credit under subsection (a) as provided in subsection (j)(2), subject to the limitations provided in this section, based on such information as the Secretary shall require,

(2) with respect to the application of the credit under subsection (a) to third party payors (including professional employer organizations, certified professional employer organizations, or agents under section 3504), including regulations or guidance allowing such payors to submit documentation necessary to substantiate the eligible employer status of employers that use such payors, and

(3) to prevent the avoidance of the purposes of the limitations under this section, including through the leaseback of employees.

Any forms, instructions, regulations, or other guidance described in paragraph (2) shall require the customer to be responsible for the accounting of the credit and for any liability for improperly claimed credits and shall require the certified professional employer organization or other third party payor to accurately report such tax credits based on the information provided by the customer.

26 U.S.C. § 6532—Periods of limitations on suits**(a) Suits by taxpayers for refund**

(1) General rule—No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

(2) Extension of time—The 2-year period prescribed in paragraph (1) shall be extended for such period as may be agreed upon in writing between the taxpayer and the Secretary.

(3) Waiver of notice of disallowance—If any person files a written waiver of the requirement that he be mailed a notice of disallowance, the 2-year period prescribed in paragraph (1) shall begin on the date such waiver is filed.

(4) Reconsideration after mailing of notice—Any consideration, reconsideration, or action by the Secretary with respect to such claim following the mailing of a notice by certified mail or registered mail of disallowance shall not operate to extend the period within which suit may be begun.

(5) Cross reference—For substitution of 120-day period for the 6-month period contained in paragraph (1) in a title 11 case, see section 505(a)(2) of title 11 of the United States Code.

26 U.S.C. § 7422—Civil actions for refund

(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.

...

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STATEMENT OF RELATED CASES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form17instructions.pdf>

9th Cir. Case Number(s) 25-4217

The undersigned attorney or self-represented party states the following:

- ☐ I am unaware of any related cases currently pending in this court.
- ☒ I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.
- ☐ I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature s/ Nishant Kumar

Date January 30, 2026

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CERTIFICATE OF COMPLIANCE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 25-2417

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This brief contains 12,611 **words**, including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

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