

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

FACEBOOK, INC. AND SUBSIDIARIES,
Plaintiff,
v.
INTERNAL REVENUE SERVICE, et al.,
Defendants.

Case No. 17-cv-06490-LB
ORDER GRANTING MOTION TO DISMISS
Re: ECF No. 19

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1 **INTRODUCTION**

2 This case arises in connection with a petition that Facebook, Inc. filed in the U.S. Tax Court.
3 Facebook is contesting a determination by the Internal Revenue Service that it has been
4 underreporting its income for tax purposes since 2010. The IRS asserts that Facebook undervalued
5 certain intangible property that it transferred to its Ireland-based subsidiary by approximately \$7
6 billion; Facebook contests that assertion.

7 Facebook wants the IRS attorneys who are litigating its tax case before the Tax Court to refer
8 its case to the independent IRS Office of Appeals (“IRS Appeals”) for alternative dispute
9 resolution. Facebook maintains that it has an enforceable right to access IRS Appeals. Its main
10 argument is that the Protecting Americans from Tax Hikes Act of 2015 (“PATH Act”) enacted a
11 statutory “taxpayer bill of rights,” codified at 26 U.S.C. § 7803(a)(3), and that one of these rights
12 — “the right to appeal a decision of the Internal Revenue Service in an independent forum,” 26
13 U.S.C. § 7803(a)(3)(E) — gives it an enforceable right to take its tax case to IRS Appeals in lieu
14 of litigation before the Tax Court.

15 Facebook brings two claims under the Administrative Procedure Act (“APA”), alleging that
16 the IRS acted arbitrarily, capriciously, and in violation of law, in refusing to refer its tax case to
17 IRS Appeals. Facebook also brings a claim for mandamus, asking the court to order the IRS to
18 refer its tax case to IRS Appeals. The IRS moved to dismiss Facebook’s complaint under Federal
19 Rule of Civil Procedure 12(b)(1), arguing that Facebook lacks standing and that the IRS’s decision
20 not to refer Facebook’s tax case to IRS Appeals is not reviewable under the APA.¹ Facebook
21 opposed the IRS’s motion,² and the IRS filed a reply.³ The U.S. Chamber of Commerce filed an
22 amicus brief arguing against dismissal.⁴ The court held a hearing on April 19, 2018.

23
24
25 ¹ IRS Mot. – ECF No. 19. Citations refer to material in the Electronic Case File (“ECF”); pinpoint
citations are to the ECF-generated page numbers at the top of documents.

26 ² Facebook Opp’n – ECF No. 22.

27 ³ IRS Reply – ECF No. 32.

28 ⁴ Chamber of Commerce Br. – ECF No. 29.

1 Facebook does not have an enforceable right to take its tax case to IRS Appeals or to compel
2 the IRS to do so. Facebook therefore lacks Article III standing, because the deprivation of a
3 nonexistent right to access IRS Appeals does not constitute injury in fact. Additionally, the IRS’s
4 decision not to refer Facebook’s tax case to IRS Appeals is not reviewable under the APA. The
5 court therefore grants the IRS’s motion to dismiss this case. Because the defects in Facebook’s
6 complaint cannot be cured, dismissal is with prejudice.

7
8 **STATEMENT**

9 **1. The IRS Office of Appeals**

10 The IRS Office of Appeals is an independent office within the IRS. See Internal Revenue
11 Serv., Appeals – An Independent Organization (Nov. 16, 2017), [https://www.irs.gov/compliance/](https://www.irs.gov/compliance/appeals/appeals-an-independent-organization)
12 [appeals/appeals-an-independent-organization](https://www.irs.gov/compliance/appeals/appeals-an-independent-organization) (last visited May 14, 2018).⁵ IRS Appeals’s mission
13 is “[t]o resolve tax controversies, without litigation, on a basis which is fair and impartial to both
14 the Government and the taxpayer in a manner that will enhance voluntary compliance and public
15 confidence in the integrity and efficiency of the Service.” Id. “To resolve disputes effectively,
16 Appeals must show itself to be objective, impartial, and neutral in fact as well as appearance.” Id.
17 IRS Appeals officers are not to conduct tax-compliance actions. See Internal Revenue Serv., Fact
18 Sheet: IRS Clarifies Office of Appeals Policies (Oct. 1, 2016), available at [https://www.irs.gov/](https://www.irs.gov/pub/irs-utl/factsheet.pdf)
19 [pub/irs-utl/factsheet.pdf](https://www.irs.gov/pub/irs-utl/factsheet.pdf) (last visited May 14, 2018). Instead, they “attempt to settle a case after
20 IRS compliance functions (Accounts Management, Collection, and Examination) have made a
21 determination with which the taxpayer disagrees.” Id.

22 While IRS Appeals was administratively formed in 1927, there was no statutory requirement
23 for the IRS to maintain this internal appeals office prior to 1998. In 1998, Congress passed the
24 Internal Revenue Service Restructuring and Reform Act of 1998 (“RRA”). Pub. L. No. 105-206,
25

26 _____
27 ⁵ The court may take judicial notice of information on government websites that is not reasonably
28 subject to dispute, as a matter of public record. *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998–
99 (9th Cir. 2010).

1 112 Stat. 685 (1998). The RRA for the first time specified the creation of an “independent appeals
2 function within the Internal Revenue Service” as a statutory mandate. *Id.* § 1001(a), 112 Stat. at
3 689.

4 The RRA granted taxpayers statutory rights to take certain matters to IRS Appeals. For
5 example, under certain circumstances, the RRA granted taxpayers whose property is subject to an
6 IRS lien under 26 U.S.C. § 6321 a statutory right to a hearing before IRS Appeals. 26 U.S.C.
7 § 6320(b)(1) (enacted by RRA § 3401, 112 Stat. at 746). Similarly, under certain circumstances,
8 the RRA granted taxpayers the right to a hearing before IRS Appeals before the IRS levies the
9 taxpayer’s property or right to property. 26 U.S.C. § 6330(b)(1) (enacted by RRA § 3401, 112
10 Stat. at 748). The RRA also instructed the Treasury Department to establish procedures that allow
11 a taxpayer to appeal IRS rejections of proposed offer-in-compromise or installment agreements
12 under 26 U.S.C. §§ 6159 or 7122 to IRS Appeals. 26 U.S.C. § 7122(e) (enacted by RRA § 2462,
13 112 Stat. at 766).

14 The IRS maintains that the RRA did not establish a recognized right for taxpayers to take tax
15 cases to IRS Appeals generally. Before and after the RRA was enacted, the IRS maintained that it
16 had discretion as to whether tax cases would be referred to IRS Appeals. The relevant IRS
17 Revenue Procedure in place before the RRA was enacted provided that the Director of Tax
18 Litigation had the discretion (following consultations) to determine whether a tax case (or
19 particular issues within a case) “should not be considered by Appeals.” Rev. Proc. 87-24 § 2.08,
20 1987-1 C.B. 720, 721 (superseded by Rev. Proc. 2016-22, 2016-15 I.R.B. 577) (“The Director of
21 the Tax Litigation Division . . . may, after consulting with the Director of the Appeals Division
22 and the appropriate Regional Counsel, determine that a case, or an issue or issues in a case, should
23 not be considered by Appeals. In such a situation Appeals will forego settlement authority over
24 such case or issues.”). The IRS continued to maintain this procedure for over a decade after the
25 RRA was enacted in 1998 and did not recognize an enforceable right of taxpayers to take their
26 cases to IRS Appeals.

27 Courts have agreed that there was no general right to take tax cases to IRS Appeals. The Tax
28 Court — an Article I court independent of the IRS, see 26 U.S.C. § 7441 — affirmed in 1996

1 (before the RRA) and again in 2005 (after the RRA) that taxpayers did not have an enforceable
2 right to take tax cases to IRS Appeals. *Swanson v. Comm'r*, 106 T.C. 76, 99–100 (1996) (holding
3 that no right exists to an IRS Appeals conference once a taxpayer’s case is docketed in the Tax
4 Court); *Estate of Weiss v. Comm'r*, 90 T.C.M. (CCH) 566, 2005 WL 3418160, at *1–2 (2005)
5 (holding after enactment of the RRA that taxpayers did not have a substantive right to take their
6 case to IRS Appeals and that there was no statutory basis for such a right). Federal Article III
7 courts also agreed that there was no general right for a taxpayer to take its tax case to IRS Appeals.
8 *New Hope Servs., Inc. v. United States*, 285 F.3d 568, 572 (7th Cir. 2002) (“there is no provision
9 in the procedural rules for a taxpayer request for an Appeals Office conference” for a case
10 docketed in Tax Court) (citing *Swanson*, 106 T.C. at 99–100); *Vosters v. United States*, No. C-88-
11 20458-WAI, 1989 WL 90554, at *2 (N.D. Cal. June 2, 1989) (rejecting claim that “the IRS
12 violated its own procedural rules by denying the taxpayer an administrative hearing before the
13 Appellant Review Division” because the IRS’s “procedural rules are directory rather than
14 mandatory”) (citing *Rosenberg v. Comm'r*, 450 F.2d 529, 533 (10th Cir. 1971)).
15

16 2. The “Taxpayer Bill of Rights” (“TBOR”)⁶

17 2.1 The Taxpayer Advocate Service (“TAS”)’s 2007 Recommendation that Congress 18 Enact a Statutory TBOR

19 The Taxpayer Advocate Service is an independent organization within the IRS that advocates
20 on behalf of taxpayers at the IRS. See Taxpayer Advocate Serv., *Who We Are*,
21 <https://taxpayeradvocate.irs.gov/about/who-we-are> (last visited May 14, 2018). Among other
22 things, the TAS submits two reports to Congress each year: an annual report that analyzes
23 problems encountered by taxpayers and legislative and administrative recommendations for
24 solving those problems, and an objectives report that describes the goals and activities planned by
25 the Office of the Taxpayer Advocate for the coming fiscal year. See Internal Revenue Serv.,
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27 ⁶ This opinion uses “TBOR” to refer to the term “taxpayer bill of rights” generically and not to refer to
28 any particular legislative or administrative pronouncement or enactment.

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Taxpayer Advocate Serv., Reports to Congress, <https://taxpayeradvocate.irs.gov/reports> (last visited May 14, 2018).

In its 2007 annual report, the TAS recommended that (among other things) Congress enact a statutory taxpayer bill of rights. The TAS report stated:

The Internal Revenue Code does not currently contain a concise and explicit list of taxpayer rights and obligations. . . .

. . . .

While the Internal Revenue Code contains significant rights, protections, and expectations of taxpayers, these provisions are scattered throughout the Code and the [Internal Revenue Manual]. They are not easily accessible to taxpayers, nor are they written in language that is readily understandable by many taxpayers.

. . . .

The National Taxpayer Advocate believes that taxpayers will be reassured in the essential fairness of the tax system and more disposed to voluntarily comply with the tax laws if they can see and understand a clear declaration of their rights as taxpayers. As taxpayers understand that specific statutory protections flow from these rights, they will be able to better avail themselves of these protections. IRS employees, in turn, will better understand why these specific protections exist. Moreover, a clear linkage between taxpayer rights and responsibilities will establish expectations of taxpayer behavior that are easily understandable and fulfilled.

Establishing a statutory Taxpayer Bill of Rights will reassure taxpayers that the tax system is essentially fair and just, and inform taxpayers of the treatment they can expect from their government as well as of the behavior the government expects of them. Revising Publication 1 so that it sets forth the Taxpayer Bill of Rights in its entirety and then relates specific statutory protections and obligations to those rights will enable taxpayers to avail themselves of those rights and conform their behavior accordingly.

Taxpayer Advocate Serv., 2007 Annual Report to Congress at 481, 485 (2007) (2007 TAS Report), available at <https://www.irs.gov/advocate/national-taxpayer-advocates-2007-annual-report-to-congress> (last visited May 14, 2018). The TAS recommended a taxpayer bill of ten rights: (1) the “right to be informed,” (2) the “right to be assisted,” (3) the “right to be heard,” (4) the “right to pay no more than the correct amount of tax,” (5) the “right of appeal,” (6) the “right to certainty,” (7) the “right to privacy,” (8) the “right to confidentiality,” (9) the “right to representation,” and (10) the “right to a fair and just tax system.” *Id.* at 486–88 (capitalization removed).

1 For the fifth right — the “right of appeal” — the TAS recommended that:

2 Taxpayers have the right to be advised of and avail themselves of a prompt
3 administrative appeal that provides an impartial review of all compliance actions
4 (unless expressly barred by statute) and an explanation of the appeals decision.
5 Taxpayers have the right to expect that Appeals personnel will not engage in ex
parte communications with IRS compliance personnel except in statutorily
permitted circumstances.

6 Id. at 487.

7 **2.2 Legislative Proposals for a TBOR Between 2008 and 2013**

8 Between 2008 and 2012, several representatives and senators, led by Representative Xavier
9 Becerra and Senator Jeff Bingaman, introduced proposed legislation several times that would
10 require the Treasury Department, in consultation with the National Taxpayer Advocate, to publish
11 a TBOR along the lines proposed by the TAS. H.R. 5716, 110th Cong. (introduced Apr. 8, 2008);
12 H.R. 5047, 111th Cong. (introduced Apr. 15, 2010); S. 3215, 111th Cong. (introduced Apr. 15,
13 2010); H.R. 6050, 112th Cong. (introduced June 28, 2012); S. 3355, 112th Cong. (introduced June
14 28, 2012). Each of these legislative bills stated that the proposed TBOR statute would “not create
15 or confer any rights or obligations not otherwise provided for under this title” (i.e., Title 26, the
16 Internal Revenue Code). Instead, the purpose of the proposed TBOR legislation was so that
17 taxpayers would have an easy-to-understand list of the rights and obligations established in other
18 sections of the tax code. See 156 Cong. Rec. E559 (daily ed. Apr. 15, 2010) (statement of Rep.
19 Becerra) (“[T]his legislation would require Treasury to publish an easy-to-understand Taxpayer
20 Bill of Rights that would enumerate all taxpayers’ rights and obligations, as well as their location
21 in the tax code. Currently, these rights and obligations are scattered throughout the tax code and
22 Internal Revenue Manual, making them neither accessible nor written in plain language that most
23 taxpayers can understand.”). None of these bills was enacted into law.

24 In 2013, Representative Peter Roskam introduced new proposed TBOR legislation. H.R. 2768,
25 113th Cong. (introduced July 22, 2013). Whereas the prior legislative bills had required the
26 Treasury Department to publish a TBOR, Representative Roskam’s version proposed amending
27 the Internal Revenue Code “to clarify that a duty of the Commissioner of Internal Revenue is to
28 ensure that Internal Revenue Service employees are familiar with and act in accord with certain

1 taxpayer rights.” Id. In his introductory remarks, Representative Roskam explained that the ten
2 rights in his bill were all preexisting rights under current law but that he was introducing this
3 proposed legislation because the Commissioner of Internal Revenue apparently did not view it as
4 his responsibility to make sure that both he and other IRS employees knew about those rights:

5 Taxpayers have the right to be informed, the right to be assisted, the right to be
6 heard, the right to pay no more than the correct amount of tax, the right of appeal,
7 the right of certainty, the right of privacy, the right of confidentiality, the right to
8 representation, and the right to a fair and just tax system. That’s current law, but
9 here is where parts of things get lost in the shuffle in that, apparently, the
Commissioner of the Internal Revenue Service doesn’t view that as that person’s
responsibility to make sure, A, that the Commissioner knows it and, B, that other
employees know it.

10 159 Cong. Rec. H5211 (daily ed. July 31, 2013) (statement of Rep. Roskam). Representative
11 Roskam stated that his bill was meant to “unambiguously say[]” that the Commissioner had a duty
12 to ensure that IRS employees complied with those rights. Id. The House of Representatives passed
13 the bill by voice vote and transmitted it to the Senate with the explanation that it was a bill “to
14 clarify that a duty of the Commissioner of Internal Revenue is to ensure that Internal Revenue
15 Service employees are familiar with and act in accord with certain taxpayer rights.” 159 Cong.
16 Rec. S6198 (daily ed. Aug. 1, 2013). The bill was not enacted into law.

17 **2.3 The TAS’s 2013 Recommendations that the IRS Adopt a TBOR**

18 In November 2013, the National Taxpayer Advocate issued a report entitled Toward a More
19 Perfect Tax System: A Taxpayer Bill of Rights as a Framework for Effective Tax Administration
20 (2013) (Toward a More Perfect Tax System), available at [https://taxpayeradvocate.irs.gov/2013-
21 Annual-Report/downloads/Toward-a-More-Perfect-Tax-System-A-Taxpayer-Bill-of-Rights-as-a-
22 Framework-for-Effective-Tax-Administration.pdf](https://taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/Toward-a-More-Perfect-Tax-System-A-Taxpayer-Bill-of-Rights-as-a-Framework-for-Effective-Tax-Administration.pdf) (last visited May 14, 2018). The introduction
23 explained:

24 The good news on this front is that the Internal Revenue Code provides dozens
25 of taxpayer rights. Real rights. Substantive rights. Rights that in most cases provide
26 taxpayers with opportunities to challenge arbitrary and capricious government
27 actions. The bad news is that most taxpayers have no idea what their rights are and
28 therefore often cannot take advantage of them. That is because taxpayer rights are
scattered throughout the code and are not presented in a coherent way. Not
surprisingly, in response to a taxpayer survey conducted for our office in 2012, less
than half of all U.S. taxpayers said they believed they have rights before the IRS,
and only 11 percent said they knew what those rights are.

1 We can and must do a better job of making taxpayers aware of their rights and
2 enabling them to assert these rights. Since 2007, I have repeatedly recommended
3 adoption of a Taxpayer Bill of Rights that takes the multiple existing rights
4 embedded in the code and groups them into ten broad categories, modeled on the
5 U.S. Constitution’s Bill of Rights. Why? Because I believe a thematic, principle-
6 based list of core taxpayer rights would provide a foundational framework for
7 taxpayers and IRS employees alike that would promote effective tax
8 administration.

9 Id. at 1. The report recommended a taxpayer bill of ten rights: (1) “the right to be informed,”
10 (2) “the right to quality service,” (3) “the right to pay no more than the correct amount of tax,”
11 (4) “the right to challenge the IRS’s position and be heard,” (5) “the right to appeal an IRS
12 decision in an independent forum,” (6) “the right to finality,” (7) “the right to privacy,” (8) “the
13 right to confidentiality,” (9) “the right to retain representation,” and (10) “the right to a fair and
14 just tax system, including access to the Taxpayer Advocate Service.” Id. at 2–3 (capitalization
15 removed). The report directed its recommendation for adoption of its proposed TBOR to the
16 Commissioner of Internal Revenue (as opposed to Congress). Id. at 12.

17 The report stated that its recommended TBOR “does not aim to create new rights or remedies,
18 only to group existing rights into categories that are easier for taxpayers and IRS employees to
19 understand and remember. . . . Thus, a TBOR does not create new rights, but provides organizing
20 principles — a framework — for statutory rights.” Id. at 4, 6. The report further characterized its
21 proposed TBOR as a statement of general rights, not absolute rights without exception,
22 analogizing them to the Bill of Rights in the U.S. Constitution. See id. at 2. The report stated:

23 Simply put, labels and presentation matter. Almost all Americans know we have a
24 Bill of Rights, and many can name specific ones. The First Amendment right to
25 free speech, for example, is widely known. When one digs deeper, it becomes clear
26 that the right is not absolute (e.g., the First Amendment does not protect an
27 individual’s right to falsely scream “Fire!” in a crowded theater), and there are
28 dozens of Supreme Court decisions that delineate the scope of the right. But the
simplicity and clarity of a thematic Bill of Rights help Americans understand their
rights in general terms, and this knowledge empowers them to assert their rights
and learn the nuances when the need arises.

Id. at 2.

For the fifth right — the “right to appeal an IRS decision in an independent forum” — the
report recommended that:

Taxpayers are entitled to a prompt and impartial administrative appeal of IRS
actions and have the right to receive a written response explaining the Appeals

1 Division's decision. Taxpayers generally have the right to take their cases to court
2 to challenge an adverse final determination.

3 Id. at 10.

4 The report faulted IRS employees for not knowing about or not communicating information
5 about these rights to taxpayers:

6 While the Internal Revenue Code guarantees certain specific taxpayer
7 protections, employees do not always communicate these rights to taxpayers at
8 appropriate times. Generally, employees learn about specific taxpayer rights in a
9 piecemeal way, without gaining a comprehensive perspective. Thus, IRS
10 employees lack education and training on how fundamental rights apply throughout
11 the tax filing and tax controversy process. Additionally, employees do not learn
12 about the importance of taxpayer protections in reassuring taxpayers of the
13 fundamental fairness of the tax system. While some employees receive initial
14 training about taxpayer rights, that training is not regularly reinforced during later
15 periodic trainings, such as Continuing Professional Education (CPE). Providing
16 employees with a larger background of taxpayer rights is necessary to fully carry
17 out the TBOR.

18

19 TAS has found that even when employees receive initial training on taxpayer
20 rights, they may not receive reminders or updates on this training. So while
21 employees may remember that the TBOR includes fundamental taxpayer rights,
22 such as the right to appeal or the right to be heard, they may not remember at what
23 times these rights arise or realize when certain actions deprive taxpayers of them.
24 Without continued education on taxpayer rights throughout his or her career, an
25 employee may fail to incorporate a working knowledge of taxpayer rights into daily
26 activities and interactions with taxpayers.

27 Id. at 23, 24–25. For example, the report discussed IRS employees' not knowing the significance
28 of Tax Court deadlines and why those deadlines were important to taxpayers:

[Internal Revenue Manual] sections sometimes include reminders for employees to
ensure that they have taken a specific action to protect taxpayer rights. For
example, in examination cases where the IRS issues a statutory notice of deficiency
and the taxpayer has requested additional time to respond, the IRM advises
employees to inform the taxpayer that any extension to submit additional
documentation will not extend the time to petition Tax Court. However, employees
may not understand why this is important for taxpayers: that if the taxpayer does
not petition the Tax Court within a certain number of days, he or she will lose the
ability to challenge the liability determination in Tax Court, thereby undermining
the taxpayer's right to an appeal in an independent forum.

Id. at 27–28 (emphasis in original).

In its December 2013 annual report to Congress, the TAS largely repeated the
recommendations from its November 2013 report that the Commissioner and the IRS adopt a
TBOR. Taxpayer Advocate Serv., 2013 Annual Report to Congress at 5–19 (2013), available at

1 <https://taxpayeradvocate.irs.gov/2013-Annual-Report/full-2013-annual-report-to-congress.html>
2 (last visited May 14, 2018).

3 **2.4 The IRS’s 2014 Adoption of a TBOR**

4 The IRS engaged in “extensive discussions” with the TAS regarding a TBOR. See I.R.S. News
5 Release IR-2014-72, 2014 WL 2590817, at *1 (June 10, 2014). Following these discussions, on
6 June 10, 2014, the IRS announced the adoption of a TBOR, which it described as “tak[ing] the
7 multiple existing rights embedded in the tax code and group[ing] them into 10 broad categories,
8 making them more visible and easier for taxpayers to find on IRS.gov.” Id. The IRS also updated
9 its “Publication 1” describing the adopted TBOR. Internal Revenue Serv., Publication 1: Your
10 Rights as a Taxpayer (Rev. 12-2014), available at <https://www.irs.gov/pub/irs-prior/p1--2014.pdf>
11 (last visited May 14, 2018).

12 For the fifth right — the “right to appeal an IRS decision in an independent forum” — the
13 IRS’s revised Publication 1 stated:

14 Taxpayers are entitled to a fair and impartial administrative appeal of most IRS
15 decisions, including many penalties, and have the right to receive a written
16 response regarding the Office of Appeals’ decision. Taxpayers generally have the
17 right to take their cases to court.

18 Id. at 1.

19 The IRS did not revise Revenue Procedure 87-24 (which gave the Director of the Tax
20 Litigation Division discretion following consultations to determine that a tax case should not be
21 considered by IRS Appeals) in response to the adoption of this TBOR.

22 **2.5 The TAS’s 2014 Recommendation that Congress Enact a Statutory TBOR**

23 In its 2014 annual report, the TAS recommended that Congress enact the IRS’s TBOR into
24 statutory law. Taxpayer Advocate Serv., 2014 Annual Report to Congress at 275–310 (2014)
25 (2014 TAS Report), available at <https://taxpayeradvocate.irs.gov/reports-to-congress/2014-annual-report-to-congress/full-report> (last visited May 14, 2018). The report stated:

26 In response to these concerns raised by the National Taxpayer Advocate, on June
27 10, 2014, the IRS formally adopted the Taxpayer Bill of Rights (TBOR). While this
28 was a significant achievement for increasing taxpayers’ awareness of their rights,
and an important first step toward integrating taxpayer rights into all aspects of tax
administration, more can be done to cement these fundamental concepts as a

1 permanent part of our tax system. Specifically, placing a list of the ten core
2 taxpayer rights and five taxpayer responsibilities in the Code would reassure
3 taxpayers that these rights are a fundamental part of our tax system. Furthermore, it
would reinforce the unwritten social contract between taxpayers and the IRS by
laying out in clear language what is expected of taxpayers and what rights they can
expect the IRS to honor.

4 *Id.* at 275. For the fifth right — the “right to appeal an IRS decision in an independent forum” —
5 the report made recommendations with respect to appeals before both IRS Appeals and the Tax
6 Court. See *id.* at 284–88.

7 **2.6 Congress’s 2015 Enactment of a Statutory TBOR**

8 In February 2015, Representative Roskam re-introduced his proposed legislation to enact a
9 statutory TBOR. H.R. 1058, 114th Cong. (introduced Feb. 25, 2015). The bill was referred to the
10 House Ways and Means Committee, which revised Representative Roskam’s bill so that the ten
11 rights listed in the proposed statutory TBOR exactly tracked the language of the IRS’s 2014
12 TBOR. Compare H.R. 1058, 114th Cong. (reported Apr. 13, 2015) with I.R.S. News Release IR-
13 2014-72, 2014 WL 2590817, at *1.⁷ The Committee reported the reason that the proposed
14 legislation was needed:

15 The Committee has found examples of IRS employees showing disregard for the
16 rights and protections afforded taxpayers under the Code, and that such disregard
17 may be a result of lack of emphasis on the importance of such rights. Any public
18 perception that such disregard is common and not taken seriously by upper
19 management at the IRS undermines trust in the integrity of the IRS. The Committee
20 believes that the public trust that the top management of the IRS is committed to
ensuring such rights is imperative to good tax administration. Although the IRS has
recently published a Taxpayer Bill of Rights, such publication does not itself carry
force of law or impose any obligations on the management or employees of the
IRS. Accordingly, codifying the requirement that the Commissioner assume
responsibility to implement the bill of rights is warranted to ensure public trust.

21 H.R. Rep. No. 114-70, at 4 (2015). The Committee reported that the proposed legislation “adds to
22 the Commissioner’s duties the requirement to ensure that employees of the IRS are familiar with
23 and act in accordance with taxpayer rights as afforded by other provisions of the Internal Revenue
24

25 ⁷ The House Ways and Means Committee’s version had three technical changes from the IRS’s
26 version: in the fourth and fifth rights, the language “IRS’s Position” and “IRS Decision” was changed
27 to “the position of the Internal Revenue Service” and “a decision of the Internal Revenue Service,”
28 respectively, and the word “and” was added between the ninth and tenth right. The wording is
otherwise identical.

1 Code.” Id. The House of Representatives passed the bill in April 2015 by voice vote and
2 transmitted it to the Senate.⁸

3 H.R. 1058 was not enacted as a stand-alone law. But the TBOR language from H.R. 1058 was
4 added — unchanged from the version reported on by the House Ways and Means Committee and
5 that the House passed in April 2015 and transmitted to the Senate — as part of the Protecting
6 Americans from Tax Hikes Act of 2015, which the House added to the Senate’s version of the
7 Consolidated Appropriations Act, 2016. H.R. 2029, div. Q, tit. IV, subtit. A, § 401, 114th Cong.
8 (engrossed House amendment Dec. 18, 2015). The Consolidated Appropriations Act, which
9 included the PATH Act and its TBOR, was signed into law on December 18, 2015. Pub. L. No.
10 114-113, 129 Stat. 2242 (2015).

11 The PATH Act added a new paragraph (a)(3) to 26 U.S.C. § 7803. Following enactment of the
12 PATH Act, 26 U.S.C. § 7803(a)(3) reads:

13 In discharging his duties, the Commissioner shall ensure that employees of the
14 Internal Revenue Service are familiar with and act in accord with taxpayer rights as
afforded by other provisions of this title, including--

- 15 (A) the right to be informed,
- 16 (B) the right to quality service,
- 17 (C) the right to pay no more than the correct amount of tax,
- 18 (D) the right to challenge the position of the Internal Revenue Service and be heard,
- 19 (E) the right to appeal a decision of the Internal Revenue Service in an independent
20 forum,
- 21 (F) the right to finality,
- 22 (G) the right to privacy,
- 23 (H) the right to confidentiality,
- 24 (I) the right to retain representation, and
- 25 (J) the right to a fair and just tax system.

26 _____
27 ⁸ Several other bills with similarly worded proposed TBORs also were introduced in 2015. See, e.g., S.
28 943, 114th Cong. (introduced Apr. 15, 2015); S. 951, 114th Cong. (introduced Apr. 15, 2015).

1 **3. The IRS’s Current Revenue Procedure Regarding Referring Tax Cases to IRS Appeals**

2 In October 2015, the IRS published a notice that it was proposing revisions to Revenue
3 Procedure 87-24 “to more accurately reflect the procedures utilized in managing the flow of
4 docketed cases between the Office of Appeals (Appeals) and the Office of Chief Counsel
5 (Counsel).” I.R.S. Notice 2015-72, 2015-44 I.R.B. 613, 613. The notice stated that “[t]he proposed
6 update to Rev. Proc. 87-24 is not intended to materially modify the current practice of referring
7 docketed cases to Appeals for settlement currently utilized in the vast majority of cases” and that
8 “[t]he proposed revenue procedure clarifies that, except in rare circumstances, Counsel will refer
9 cases docketed in Tax Court to Appeals for settlement consideration.” Id. But the notice stated,
10 “the proposed revenue procedure recognizes that there are cases and issues that should not be
11 referred to Appeals or for which Counsel needs additional time before referring the case to
12 Appeals. The proposed revenue procedure clarifies the procedures for when those situations arise.”
13 Id. Among other things, the IRS proposed revising the Revenue Procedure to provide that:

14 Counsel will not refer to Appeals any docketed case or issue that has been
15 designated for litigation by Counsel. In limited circumstances, a docketed case or
16 issue will not be referred to Appeals if Division Counsel or a higher level Counsel
17 official determines that referral is not in the interest of sound tax administration.
18 For example, Counsel may decide not to refer a docketed case to Appeals in cases
19 involving a significant issue common to other cases in litigation for which it is
important that the IRS maintain a consistent position or in cases related to a case
over which the Department of Justice has jurisdiction. If Counsel determines that a
docketed case or issue will not be referred to Appeals, Counsel will notify the
taxpayer that the case will not be referred to Appeals.

20 Id. § 3.03, 2015-44 I.R.B. at 614. The IRS invited public comment on its proposed revisions. Id. at
21 613.

22 The IRS received four comments in response to its notice. 2016-15 I.R.B. 577, 578. One of
23 these comments was from the American Bar Association Section of Taxation, which asked the
24 IRS to clarify the “sound tax administration” standard. Letter from Am. Bar Ass’n Section of
25 Taxation to John Koskinen, Comm’r, Internal Revenue Serv. (Nov. 16, 2015), available at
26 <https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/111615comments>.

1 authcheckdam.pdf (last visited May 14, 2018).⁹ The ABA Section of Taxation observed that
2 “[u]nder the language in the draft revenue procedure, . . . determination [of whether or not to refer
3 a case to IRS Appeals] is wholly within the discretion of Division Counsel under a new but
4 undefined standard of ‘sound tax administration.’ Appeals has no role in the procedure. National
5 Office Counsel has no required role.” Id. at 7. The ABA Section of Taxation “respectfully
6 suggest[ed] that the checks and balances imbedded in the current provision be retained and that the
7 final revenue procedure elaborate and clarify the limited circumstances in which docketed cases
8 will be ineligible to be returned to Appeals due to ‘sound tax administration’” and “respectfully
9 request[ed] that provisions be added to allow for taxpayer input into the decision similar to those
10 in the designation process under [Internal Revenue Manual] § 33.3.6.2.” Id.

11 On March 23, 2016, the IRS released Revenue Procedure 2016-22, which adopted the
12 proposed October 2015 procedure revisions. Other than one “clarifying modification,”¹⁰ the IRS
13 did not make any changes to Section 3.03 from its October 2015 proposal. Under Revenue
14 Procedure 2016-22 — which remains operative today — “Counsel will not refer to Appeals any
15 docketed case or issue that has been designated for litigation by Counsel. In limited circumstances,
16 a docketed case or issue that has not been designated for litigation will not be referred to Appeals
17 if Division Counsel or a higher level Counsel official determines that referral is not in the interest
18 of sound tax administration.” Rev. Proc. 2016-22 § 3.03, 2016-15 I.R.B. 577, 578.

19

20 **4. Facebook’s Tax Case**

21 In November 2011, the IRS initiated an audit of Facebook’s tax years ending December 31,
22 2008 and December 31, 2009.¹¹ In January 2013, the IRS expanded its audit to include Facebook’s

23

24 ⁹ The letter has also been attached to Facebook’s opposition as an exhibit. Facebook Opp’n Ex. F –
ECF No. 23-6.

25 ¹⁰ I.R.B. 2016-15 at 578 (“Treasury and the Service considered all comments received and adopted
26 several of the suggestions by making clarifying modifications.”). The final Revenue Procedure added
27 the words “that has not been designated for litigation” to the second sentence of Section 3.03
(presumably to clarify the contrast with the first sentence, which concerns cases or issues that have
28 been designated for litigation).

¹¹ Compl. – ECF No. 1 at 7 (¶ 34).

28

1 tax year ending December 31, 2010.¹² Facebook produced thousands of pages of documents in
2 response to more than 200 IRS requests, made employees available for interviews, and voluntarily
3 extended the statute of limitations five times.¹³

4 On January 25, 2016, the IRS asked Facebook to extend of the statute of limitations again.¹⁴
5 Between February and May 2016, Facebook and the IRS discussed whether Facebook would
6 extend the statute of limitations with certain conditions, including that the IRS would agree to
7 issue a “30-day letter” that would give Facebook an opportunity to appeal the IRS Examination
8 team’s proposed tax adjustments to IRS Appeals.¹⁵ Facebook and the IRS did not reach agreement
9 about conditions whereby Facebook would extend the statute of limitations.¹⁶

10 On July 26, 2016, the IRS issued a Statutory Notice of Deficiency to Facebook.¹⁷ On October
11 11, 2016, Facebook filed a petition before the U.S. Tax Court, seeking a redetermination of the tax
12 deficiency that the IRS had determined.¹⁸ On March 16, 2017, the IRS sent a letter to Facebook
13 stating that it “will refuse to transfer Facebook’s tax case to IRS Appeals,” pursuant to Revenue
14 Procedure 2016-22, and stating that referral to IRS Appeals “is not in the interest of sound tax
15 administration.”¹⁹ The IRS has never provided Facebook an explanation of why IRS Counsel
16 concluded that providing Facebook access to IRS Appeals was not in the interest of sound tax
17 administration.²⁰

18 ¹² Id.

19 ¹³ Id. (¶ 35).

20 ¹⁴ Id. (¶ 36).

21 ¹⁵ Id. Subject to certain exceptions, “[i]n any case in which the district director has issued a
22 preliminary or ‘30-day letter’ and the taxpayer requests Appeals consideration and files a written
23 protest when required . . . against the proposed determination of tax liability, . . . the taxpayer has the
right (and will be so advised by the district director) of administrative appeal to the Appeals
organization.” 26 C.F.R. § 601.106(b).

24 ¹⁶ Compl. – ECF No. 1 at 7 (¶ 37).

25 ¹⁷ Id. (¶ 38).

26 ¹⁸ *Petition, Facebook, Inc. v. Comm’r*, No. 21959-16 (T.C. filed Oct. 11, 2016) (attached as IRS Mot.
to Dismiss App’x 1 – ECF No. 19-1). The court may take judicial notice of court filings, as a matter of
public record. *Mahoney v. Sessions*, 871 F.3d 873, 876 n.2 (9th Cir. 2017).

27 ¹⁹ Compl. – ECF No. 1 at 8 (¶ 42).

28 ²⁰ Id. (¶ 44).

1 **5. Facebook’s Legal Claims**

2 Facebook brings two claims under the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq.
3 First, Facebook alleges that the IRS’s issuing Revenue Procedure 2016-22 (which granted IRS
4 Counsel the authority to deny taxpayers access to IRS Appeals if referral is “not in the interest of
5 sound tax administration”) was arbitrary, capricious, an abuse of discretion, not in accordance with
6 the law, exceeded statutory jurisdiction, authority, or limitation, or was short of a statutory right.²¹
7 Second, Facebook alleges that the IRS’s denying Facebook access to IRS Appeals for its tax case
8 was arbitrary, capricious, an abuse of discretion, not in accordance with the law, exceeded
9 statutory jurisdiction, authority, or limitation, or was short of a statutory right.²² Facebook also
10 brings a claim for “mandamus-like relief,” alleging that it has the right to access IRS Appeals and
11 asking that this court order the IRS to refer its tax case to IRS Appeals.²³

12
13 **STANDARD OF REVIEW**

14 A complaint must contain a short and plain statement of the ground for the court’s jurisdiction.
15 Fed. R. Civ. P. 8(a)(1). The plaintiff has the burden of establishing jurisdiction. *Kokkonen v.*
16 *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Farmers Ins. Exch. v. Portage La*
17 *Prairie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir. 1990).

18 The IRS has moved to dismiss Facebook’s complaint under Federal Rule of Civil Procedure
19 12(b)(1) for lack of subject-matter jurisdiction.²⁴ A defendant’s Rule 12(b)(1) jurisdictional attack
20 can be either facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). “A ‘facial’ attack
21 asserts that a complaint’s allegations are themselves insufficient to invoke jurisdiction, while a
22 ‘factual’ attack asserts that the complaint’s allegations, though adequate on their face to invoke
23 jurisdiction, are untrue.” *Courthouse News Serv. v. Planet*, 750 F.3d 776, 780 n.3 (9th Cir. 2014).

24
25 _____
26 ²¹ *Id.* at 9–10 (¶ 55).

27 ²² *Id.* at 10 (¶ 60).

28 ²³ *Id.* at 10–11 (¶¶ 65–67 and Request for Relief).

²⁴ IRS Mot. – ECF No. 19 at 8.

1 This is a facial attack. The court thus “accept[s] all allegations of fact in the complaint as true and
2 construe[s] them in the light most favorable to the plaintiff[.]” *Warren v. Fox Family Worldwide,*
3 *Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

4 The IRS raises two main arguments in its Rule 12(b)(1) motion: (1) Facebook lacks standing
5 and (2) the IRS’s decision not to refer Facebook’s tax case is not reviewable under the APA.
6 Standing pertains to the court’s subject-matter jurisdiction and thus is properly raised in a Rule
7 12(b)(1) motion to dismiss. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121–22
8 (9th Cir. 2010) (citing *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989)). APA
9 reviewability also pertains to the court’s subject-matter jurisdiction: the government has sovereign
10 immunity (which limits the subject-matter jurisdiction of federal courts) and can be sued only to
11 the extent that it has waived its immunity, and the scope of its immunity waiver (e.g., through the
12 APA) thus is also properly raised on a Rule 12(b)(1) motion to dismiss. *Vacek v. U.S. Postal Serv.*,
13 447 F.3d 1248, 1250 (9th Cir. 2006) (citing *Dep’t of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260
14 (1999)).

15 If a court dismisses a complaint, it ordinarily will grant leave to amend, but “[i]t is not an
16 abuse of discretion to deny leave to amend when any proposed amendment would be futile.”
17 *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990) (citing *Klamath-Lake Pharm. Ass’n*
18 *v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1292–93 (9th Cir. 1983)).

19

20

ANALYSIS

21

1. Standing

22

1.1 Governing Law

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24

Federal-court jurisdiction extends only to “cases” and “controversies.” *Raines v. Byrd*,
25 521 U.S. 811, 818 (1997). “Standing to sue is a doctrine rooted in the traditional understanding of
26 a case or controversy.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

27

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“The ‘irreducible constitutional minimum’ of standing consists of three elements.” *Id.* (citing
27 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). “The plaintiff must have (1) suffered an
28 injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is

1 likely to be redressed by a favorable judicial decision.” Id. (citing Lujan, 504 U.S. at 560; Friends
2 of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000)). “The
3 plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these
4 elements.” Id. (citing FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990)). “Where, as here,
5 a case is at the pleading stage, the plaintiff must ‘clearly allege facts demonstrating’ each
6 element.” Id. (internal ellipsis omitted) (quoting Warth v. Seldin, 422 U.S. 490, 518 (1975)).

7 To establish the first of these elements — injury in fact — “a plaintiff must show that he or she
8 suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and
9 ‘actual or imminent, not conjectural or hypothetical.’” Id. at 1548 (quoting Lujan, 504 U.S. at
10 560).

11

12 **1.2 Application**

13 The sole injury that Facebook alleges is that “it was denied access to a statutorily mandated
14 appeals process,” i.e., the right to take its tax case to IRS Appeals.²⁵ But Facebook fails to
15 establish that it has a legally protected right to take its tax case to IRS Appeals. First, taxpayers did
16 not have an enforceable right to take tax cases to IRS Appeals before the 2015 PATH Act and the
17 statutory enactment of a TBOR. Second, the 2015 TBOR did not grant taxpayers new substantive
18 rights. Third, even if the TBOR had granted taxpayers new rights, Facebook fails to establish that
19 the TBOR right on which it relies — “the right to appeal a decision of the Internal Revenue
20 Service in an independent forum,” 26 U.S.C. § 7803(a)(3)(E) — refers to a right to take its tax
21 case to IRS Appeals, as opposed to another independent forum such as the Tax Court. Because
22 Facebook has no legally enforceable right to take its tax case to IRS Appeals, the IRS has not
23 invaded a legally protected interest by refusing to refer Facebook’s case to IRS Appeals, and
24 Facebook consequently lacks standing.

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²⁵ Facebook Opp’n – ECF No. 22 at 26–27; see Compl. – ECF No. 1 at 2 (¶ 1), 8 (¶¶ 41, 46), 9 (¶ 52).

1 **1.2.1 Facebook has no pre-TBOR enforceable right to take its tax case to IRS Appeals**
2

3 The 1998 RRA imposed a statutory requirement for the IRS to create and maintain an
4 independent Office of Appeals. The RRA also granted taxpayers an enforceable right to take
5 certain matters to IRS Appeals, such as certain matters relating to liens and levies. 26 U.S.C.
6 §§ 6320(b)(1), 6330(b)(1). But that does not mean that Facebook has a right to take its tax case to
7 IRS Appeals. Courts have held that taxpayers in Facebook’s situation do not have an enforceable
8 right to take their tax cases to IRS Appeals. *New Hope Servs.*, 285 F.3d at 572; *Estate of Weiss*,
9 2005 WL 3418160, at *1–2; *Swanson*, 106 T.C. at 99–100; *Vosters*, 1989 WL 90554, at *2.
10 Facebook does not cite anything in the RRA or any pre-TBOR law that compels a contrary
11 conclusion.

12 Instead of statutes or case law, Facebook cites various statements by IRS executives and IRS
13 publications that it claims establish that taxpayers had an enforceable right to take their cases to
14 IRS Appeals.²⁶ But these statements and publications are not binding and do not have the force of
15 law. See, e.g., *Gerstenbluth v. Credit Suisse Sec. (USA) LLC*, 728 F.3d 139, 147 (2d Cir. 2013)
16 (“IRS publications . . . do not have the force of law.”) (quoting *United States v. Josephberg*, 562
17 F.3d 478, 498 (2d. Cir. 2009)); *Qureshi v. United States*, 67 Fed. Cl. 783, 788 (2005) (“[O]ral
18 statements of IRS employees are not binding on the government.”) (citing *Estate of Akin v. United*
19 *States*, 31 Fed. Cl. 89, 97 (1994), *aff’d*, 43 F.3d 1487 (Fed. Cir. 1994)), *aff’d*, 200 F. App’x 973
20 (Fed. Cir. 2006).²⁷ Similarly, Facebook cites to IRS procedural rules that it claims establish that
21

22 _____
23 ²⁶ See Facebook Opp’n – ECF No. 22 at 16, 24–25 (citing statements and publications).

24 ²⁷ Facebook cites *United States v. Santos*, 372 F.2d 177 (2d Cir. 1967), and *Walsonavich v. United*
25 *States*, 335 F.2d 96 (3d Cir. 1964), for the proposition that IRS publications are binding with respect to
26 legal interpretations. Its reliance on these cases is misplaced. *Santos* was a criminal prosecution for
27 assault, and the statement at issue was an affidavit by a narcotics agent (who witnessed the assault)
28 identifying the assailant. *Santos*, 372 F.2d at 179. That case does not apply to the question presented
here regarding agency statements and publications. *Walsonavich* involved an agreement between the
IRS and an individual taxpayer extending the time that the IRS could assess taxes (which the court
held also extended the time the taxpayer had to seek a refund). *Walsonavich*, 335 F.2d at 100–01. The
court held that the IRS was bound by the actions of its agents in entering into that agreement with the
taxpayer. *Id.* at 101. But that case does not apply to the question presented here, which concerns

(cont’d)

1 taxpayers had an enforceable right to take their cases to IRS Appeals.²⁸ But these procedural rules
 2 are not binding and do not have the force of law. See, e.g., *Ward v. Comm’r*, 784 F.2d 1424, 1431
 3 (9th Cir. 1986) (IRS procedural rules “do[] not have the force and effect of law”); *Estate of Weiss*,
 4 2005 WL 3418160, at *1 (“[N]either Rev. Proc. 87-24, supra, nor section 601.106, Statement of
 5 Procedural Rules, affords the estate a substantive right to take its case to Appeals. It is well
 6 established that general statements of policy and rules governing internal agency operations or
 7 ‘housekeeping’ matters, which do not have the force and effect of law, are not binding on the
 8 agency issuing them and do not create substantive rights in the public.”) (internal quotation marks
 9 omitted) (citing cases); *Vosters*, 1989 WL 90554, at *2 (the IRS’s “procedural rules are directory
 10 rather than mandatory”). Facebook cites to no statutes or case law that establish that it had a pre-
 11 TBOR right to take its case to IRS Appeals.²⁹

12 **1.2.2 The 2015 TBOR did not grant Facebook any new enforceable rights**

13 The statutory TBOR enacted as part of the 2015 PATH Act did not grant new enforceable
 14 rights. To the contrary, the statutory text explicitly states that the ten rights listed in the TBOR
 15 were all “taxpayer rights afforded by other provisions of [Title 26],” 26 U.S.C. § 7803(a)(3)
 16 (emphasis added) — meaning, no right was a new right created by the TBOR itself. If a right did
 17 not exist before the enactment of the TBOR, the TBOR did not create it as a new right.

18
 19
 20 agency statements and publications generally, not an agreement that the IRS entered into with
 Facebook specifically.

21 ²⁸ See Facebook Opp’n – ECF No. 22 at 16 (citing 26 C.F.R. § 601.106(b)).

22 ²⁹ Facebook raised a new argument at the April 19, 2018 hearing, claiming that the RRA gave
 23 taxpayers a right to an early referral of one or more unresolved tax issues to IRS Appeals. 26 U.S.C.
 § 7123(a) (enacted by RRA § 3465, 112 Stat. at 768). Facebook argued that it would make no sense
 24 for Congress to establish a right to take early issues to IRS Appeals but not a right to take the rest of
 the issues to IRS Appeals. But the RRA did not give taxpayers a right to early referral to IRS Appeals;
 25 it instructed the Treasury Department to “prescribe procedures by which any taxpayer may request
 early referral” to IRS Appeals. *Id.* (emphasis added). The IRS prescribed procedures by which a
 26 taxpayer can request early referral. Rev. Proc. 99-28, 1999-2 C.B. 109. But the procedures also provide
 that IRS Collection or Examination has the right to approve or deny the request, and the taxpayer has
 27 no right to appeal if IRS Collection or Examination decides not to approve the request. *Id.* §§ 2.02(2),
 2.09, 1999-2 C.B. at 109–10. Facebook cites nothing establishing that the RRA granted taxpayers an
 28 enforceable right to compel an early referral of issues to IRS Appeals.

1 Instead, what the statutory TBOR did was to impose an affirmative obligation on the
2 Commissioner of Internal Revenue to “ensure that employees of the Internal Revenue Service are
3 familiar with and act in accord with” preexisting taxpayer rights established in other provisions of
4 the Internal Revenue Code. In other words, the TBOR directed the Commissioner to, for example,
5 better manage and train IRS employees to ensure that IRS employees know what rights taxpayers
6 have and act in a way that respects those rights.

7 The legislative history confirms this plain reading of the statutory language. While there is no
8 direct legislative history for the 2015 PATH Act or the Consolidated Appropriations Act relating
9 to the TBOR, there is legislative history for the earlier 2015 TBOR bill that the House Ways and
10 Means Committee reported on and the House passed and referred to the Senate (TBOR language
11 that was later enacted without alteration in the PATH Act). The House Ways and Means
12 Committee reported that the reason for the legislation was not to grant taxpayers new rights but
13 instead was to address the issue of “IRS employees showing disregard for the rights and
14 protections afforded taxpayers under the Code” by “add[ing] to the Commissioner’s duties the
15 requirement to ensure that employees of the IRS are familiar with and act in accordance with
16 taxpayer rights as afforded by other provisions of the Internal Revenue Code.” H.R. Rep. No. 114-
17 70, at 4. While this legislative history is not dispositive, it is consistent with the plain-text reading
18 of the statutory text that the TBOR did not grant new rights but instead imposed a management-
19 and-training obligation on the Commissioner to make sure that IRS employees knew about and
20 acted in accordance with preexisting rights. Facebook does not cite any legislative history from
21 any of the attempts to enact a statutory TBOR that suggests that any proposal would have granted
22 new substantive rights. Instead, the legislative history shows that none of the proposed TBORs
23 was intended to create new rights. See, e.g., H.R. 5716, 110th Cong. (introduced Apr. 8, 2008)
24 (“This statement of rights and obligations does not create or confer any rights or obligations not
25 otherwise provided for under this title.”); H.R. 5047, 111th Cong. (introduced Apr. 15, 2010)
26 (same); S. 3215, 111th Cong. (introduced Apr. 15, 2010) (same); H.R. 6050, 112th Cong.
27 (introduced June 28, 2012) (same); S. 3355, 112th Cong. (introduced June 28, 2012) (same); 159
28 Cong. Rec. H5211 (daily ed. July 31, 2013) (statement of Rep. Roskam) (describing TBOR rights

1 as “current law”); see also *Toward a More Perfect Tax System* at 4, 6 (proposed TBOR “does not
2 aim to create new rights or remedies, only to group existing rights into categories that are easier
3 for taxpayers and IRS employees to understand and remember. . . . Thus, a TBOR does not create
4 new rights, but provides organizing principles — a framework — for statutory rights.”); I.R.S.
5 News Release IR-2014-72, 2014 WL 2590817, at *1 (TBOR is made up of “multiple existing
6 rights embedded in the tax code”).

7 Facebook argues that the PATH Act’s statutory TBOR must have created new rights “beyond
8 those existing prior to [the TBOR’s] codification,” because if it created no new rights, it would be
9 a nullity.³⁰ Not so. First, the statutory TBOR imposes duties on the IRS Commissioner to manage
10 and train IRS employees regarding taxpayer rights. See generally *Toward a More Perfect Tax*
11 *System* at 23–36 (discussing proposals for improved management and training of IRS employees);
12 Amanda Bartmann, *Making Taxpayer Rights Real: Overcoming Challenges to Integrate Taxpayer*
13 *Rights into a Tax Agency’s Operations*, 69 *Tax Law.* 597, 614–24 (2016) (same). Second,
14 Facebook’s interpretation that the TBOR itself created new rights ignores the statutory language
15 that the TBOR rights are “afforded by other provisions of this title.” 26 U.S.C. § 7803(a)(3)
16 (emphasis added).

17 Moreover, Facebook’s argument makes no sense when one considers the ten TBOR rights
18 collectively. Cf. *Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm’n*, 366 F.3d
19 692, 700 (9th Cir. 2004) (“A ‘basic rule of statutory construction is that one provision should not
20 be interpreted in a way which is internally contradictory or that renders other provisions of the
21 same statute inconsistent or meaningless.”) (quoting *Hughes Air Corp. v. Pub. Utils. Comm’n*,
22 644 F.2d 1334, 1338 (9th Cir. 1981)). Facebook focuses on only one TBOR right — “the right to
23 appeal a decision of the Internal Revenue Service in an independent forum” — but Facebook’s
24 arguments, if they were correct, would apply to the other nine rights too. For example, the first
25

26
27 ³⁰ See Facebook Opp’n – ECF No. 22 at 21 (arguing that “[t]he effect of [the TBOR] is to ensure a
28 right beyond those existing prior to codification,” as an interpretation that the TBOR did not create
new rights “essentially reads TBOR out of existence”).

1 right is “the right to be informed[.]” 28 U.S.C. § 7803(a)(3)(A). Applying Facebook’s argument,
2 this provision must have created a new substantive right “beyond those existing prior to [the
3 TBOR’s] codification.”³¹ A new right to be informed about what? And when? The TBOR does not
4 say, and neither does Facebook. It is implausible that the TBOR created ten new substantive rights
5 that it defined so poorly. The logical reading of the TBOR is not that it created some new, wholly
6 nebulous rights, but that it created no new rights at all, and instead that Congress meant what it
7 said when it said that the TBOR rights were rights “afforded by other provisions of this title,” not
8 new rights created by the TBOR itself.³²

9 **1.2.3 Even assuming that the 2015 TBOR granted Facebook a new enforceable**
10 **right to appeal “in an independent forum,” Facebook fails to establish that**
11 **the “independent forum” must be IRS Appeals**

12 Even assuming that the statutory TBOR granted taxpayers new enforceable rights, Facebook
13 does not establish that “the right to appeal a decision of the Internal Revenue Service in an
14 independent forum,” 26 U.S.C. § 7803(a)(3)(E), necessarily confers a right to take its tax case to
15 IRS Appeals, as opposed to other independent forums such as the Tax Court.³³

16 When Congress intends to grant a right of access to IRS Appeals, it says “the Internal Revenue
17 Service Office of Appeals.” See, e.g., 26 U.S.C. §§ 6320(b)(1), 6330(b)(1), 7122(e)(2). Congress
18 could have chosen to similarly codify a right to appeal to IRS Appeals in the 2015 TBOR. It did
19 not. Instead, it used the term “independent forum” — which includes other forums such as Tax
20 Court. See *A. & A. Tool & Supply Co. v. Comm’r*, 182 F.3d 300, 304 (10th Cir. 1950) (“The Tax
21 Court and the Board of Tax Appeals, which it succeeded, was created to afford a taxpayer an
22 independent forum where he could be heard speedily, equitably and impartially on a tax
23 assessment which he thought had been improperly levied or assessed.”). Indeed, in the PATH Act

24 _____
25 ³¹ Cf. *id.*

26 ³² “The right to be informed,” for example, is delineated in numerous other provisions of Title 26, not
27 in the TBOR itself. See, e.g., 26 U.S.C. §§ 6212(a), 6320(a), 6330(a).

28 ³³ The right for a taxpayer to file a petition in the Tax Court is delineated in Title 26, see, e.g., 26
U.S.C. § 6213(a), and thus is consistent with the TBOR’s statement that the TBOR rights are rights
“afforded by other provisions of this title,” 26 U.S.C. § 7803(a)(3).

1 that enacted the 2015 statutory TBOR, Congress amended the Tax Court’s establishing statute to
 2 clarify that the Tax Court is an independent forum. PATH Act, tit. IV, subtit. B, pt. 3, § 441, 129
 3 Stat. at 3126 (“The Tax Court is not an agency of, and shall be independent of, the executive
 4 branch of the Government.”) (amending 26 U.S.C. § 7441).

5 Facebook points to the lead-in to the statutory TBOR, which reads, “the Commissioner shall
 6 ensure that employees of the Internal Revenue Service . . . act in accord with taxpayer rights as
 7 afforded by other provisions of this title.”³⁴ Facebook claims that “[t]his language can have only
 8 one meaning: the independent forum referenced by Congress must be one that can be controlled
 9 by the Commissioner or employees of the IRS[.]”³⁵ Facebook argues that IRS Appeals is
 10 controlled by IRS employees, whereas the Tax Court is not, and thus only IRS Appeals can be the
 11 “independent forum” referenced in the TBOR.³⁶ But Facebook’s conclusion — that the
 12 “independent forum” must be controlled by IRS employees — does not follow from the statutory
 13 lead-in language it cites. That the TBOR requires the Commissioner to ensure that IRS employees
 14 act in accord with certain rights does not mean that IRS employees must control the means
 15 through which these rights are provided.

16 As before, it is helpful to look at the ten TBOR rights collectively. All of them are subject to
 17 the same lead-in language. For example, the ninth TBOR right is “the right to retain
 18 representation[.]” 28 U.S.C. § 7803(a)(3)(I). Facebook’s interpretation of the lead-in language
 19 obviously does not apply because a taxpayer’s representation cannot “be controlled by the
 20 Commissioner or employees of the IRS.”³⁷ The TBOR “right to retain representation” is a right for
 21 taxpayers to retain independent representation as delineated in other provisions of Title 26. See,
 22 e.g., 26 U.S.C. § 7521(b)(2), (c). It is not a requirement that IRS employees must control the
 23 representation. Similarly, the TBOR “right to appeal . . . in an independent forum” is a right for
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25 ³⁴ Facebook Opp’n – ECF No. 22 at 19 (emphasis and ellipsis in original).

26 ³⁵ Id.

27 ³⁶ See id. at 19 & n.12.

28 ³⁷ Cf. id. at 19.

1 taxpayers to appeal in an independent forum as delineated in other provisions of Title 26. It is not
2 a requirement that IRS employees must control the forum. Nothing in the TBOR says that the
3 independent forum must be only IRS Appeals, see, e.g., 26 U.S.C. §§ 6320(b)(1), 6330(b)(1), and
4 cannot be another forum such as the Tax Court, see, e.g., 26 U.S.C. § 6213(a).

5 Facebook argues that the TBOR’s “independent forum” cannot include the Tax Court because
6 access to the Tax Court was guaranteed by statute before the enactment of the TBOR.³⁸ But that
7 guarantee is consistent with the TBOR’s pronouncement that its rights are “afforded by other
8 provisions of [Title 26],” not rights conferred by the TBOR itself. 26 U.S.C. § 7803(a)(3).

9 Facebook argues that because access to the Tax Court is guaranteed by statute, IRS employees
10 cannot deny taxpayers access to the Tax Court, and hence a TBOR guarantee of access to the Tax
11 Court is meaningless.³⁹ But whether a right exists in statute is separate from whether IRS
12 employees know about and act in accord with that right. The TAS explained this distinction:

13 “[w]hile the Internal Revenue Code guarantees specific taxpayer protections, employees do not
14 always communicate these rights to taxpayers at appropriate times. . . . [and] may not remember at
15 what times these rights arise or realize when certain actions deprive taxpayers of them.” *Toward a
16 More Perfect Tax System* at 23–24. The TBOR does not create statutory rights; instead, it
17 addresses IRS employees’ interactions with taxpayers.

18 Facebook claims that “the legislative history of the RRA, the advocacy by the TAS, and the
19 legislative history of the PATH Act each compels the conclusion that 26 U.S.C. § 7803 refers to
20 an independent administrative forum,” and hence it must refer to IRS Appeals (and not to non-
21 administrative forums like the Tax Court).⁴⁰ This is incorrect. As discussed above, the RRA
22 granted taxpayers in certain situations a right to take their cases to IRS Appeals, but it did not
23 grant a right to take cases to IRS Appeals generally. And the advocacy by the TAS and the
24 legislative history of the proposed TBOR bills in Congress confirm that “the right to appeal . . . in

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26 ³⁸ See *id.* at 22.

27 ³⁹ See *id.*

28 ⁴⁰ *Id.* at 22–23 (emphasis in original).

1 an independent forum” encompassed the right to appeal in a judicial forum like the Tax Court, in
2 addition to any rights a taxpayer might have to access IRS Appeals. While the TAS’s 2007 annual
3 report to Congress envisioned “the right of appeal” as encompassing administrative appeals to IRS
4 Appeals, 2007 TAS Report at 487, the TAS’s later reports leading up to the enactment of the
5 statutory TBOR understood “the right to appeal . . . in an independent forum” to include petitions
6 in the Tax Court. *Toward a More Perfect Tax System* at 10 (“Taxpayers generally have the right to
7 take their cases to court to challenge an adverse final determination.”); *id.* at 27–28 (“[I]f the
8 taxpayer does not petition the Tax Court within a certain number of days, he or she will lose the
9 ability to challenge the liability determination in Tax Court, thereby undermining the taxpayer’s
10 right to an appeal in an independent forum.”) (emphasis in original); 2014 TAS Report at 284–88
11 (making recommendations in connection with “the right to appeal . . . in an independent forum”
12 for both IRS Appeals and the Tax Court); see also *Toward a More Perfect Tax System* at 2 (rights
13 in a bill of rights are “not absolute” and are subject to “nuances”). Facebook cites to nothing that
14 establishes that “the right to appeal . . . in an independent forum” codified in 26 U.S.C.
15 § 7803(a)(3)(E) refers to an “independent administrative forum” to the exclusion of other forums
16 such as the Tax Court. Facebook argues that “[t]he words ‘Tax Court’ do not even appear in the
17 Senate or House reports for the PATH Act.”⁴¹ But the words “Tax Court” appear in the statutory
18 text of the PATH Act, which amended the Tax Court’s establishing statute to clarify that it is an
19 independent forum. PATH Act, tit. IV, subtit. B, pt. 3, § 441, 129 Stat. at 3126 (“The Tax Court is
20 not an agency of, and shall be independent of, the executive branch of the Government.”)
21 (amending 26 U.S.C. § 7441).

22 * * *

23 Facebook did not have an enforceable right to take its tax case to IRS Appeals under the RRA
24 or at any point before the enactment of the PATH Act. *New Hope Servs.*, 285 F.3d at 572; *Estate*
25 *of Weiss*, 2005 WL 3418160, at *1–2; *Swanson*, 106 T.C. at 99–100; *Vosters*, 1989 WL 90554, at
26

27 _____
28 ⁴¹ *Id.* at 23.

1 *2. The PATH Act and its statutory TBOR did not grant Facebook any new enforceable rights.
2 And even if they had, they did not grant Facebook a new enforceable right to take its tax case to
3 IRS Appeals specifically, as opposed to other independent forums such as the Tax Court.
4 Facebook has no legally protected right to take its tax case to IRS Appeals. Facebook therefore
5 does not meet the essential element of Article III standing that it suffered an invasion to a legally
6 protected interest. *Spokeo*, 136 S. Ct. at 1548; see, e.g., *Claybrook v. Slater*, 111 F.3d 904, 907
7 (D.C. Cir. 1997) (“[I]f the plaintiff’s claim has no foundation in law, he has no legally protected
8 interest and thus no standing to sue.”); *Arjay, Inc. v. Bush*, 891 F.2d 894, 898 (Fed. Cir. 1989)
9 (plaintiffs lack standing where “the injury they assert is to a nonexistent right”).⁴²

11 2. The Administrative Procedure Act

12 2.1 Governing Law

13 “Sovereign immunity is an important limitation on the subject matter jurisdiction of federal
14 courts.” *Vacek*, 447 F.3d at 1250. “The United States, as sovereign, can only be sued to the extent
15 it has waived its sovereign immunity.” *Id.* (citing *Blue Fox*, 525 U.S. at 260). “The Supreme Court
16 has ‘frequently held that a waiver of sovereign immunity is to be strictly construed, in terms of its
17 scope, in favor of the sovereign.’” *Id.* (internal ellipsis omitted) (quoting *Blue Fox*, 525 U.S. at
18 261).⁴³

19 The United States enacted a limited waiver of sovereign immunity in Section 702 of the APA,
20 which reads, in relevant part:

21 A person suffering legal wrong because of agency action, or adversely affected or
22 aggrieved by agency action within the meaning of a relevant statute, is entitled to
23 judicial review thereof. An action in a court of the United States seeking relief

24 ⁴² Several bills have been introduced in Congress that would require the IRS to allow the taxpayer an
25 opportunity for administrative review by IRS Appeals before the IRS may issue a Statutory Notice of
26 Deficiency. See, e.g., S. 2809, 114th Cong. (introduced Apr. 18, 2016); H.R. 3220, 115th Cong.
(introduced July 13, 2017). But those bills are not the current law, and under current law, Facebook
does not have an enforceable right to take its tax case to IRS Appeals.

27 ⁴³ The United States’s sovereign immunity extends to agencies and officers of the United States acting
28 in their official capacity. *Balser v. Dep’t of Justice, Office of U.S. Trustee*, 327 F.3d 903, 907 (9th Cir.
2003).

1 other than money damages and stating a claim that an agency or an officer or
2 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[.]

3 5 U.S.C. § 702. Facebook relies on the APA in bringing its claims against the IRS here.

4 The APA sets out several requirements for plaintiffs bringing APA claims. Among other
5 things, for a claim to proceed under the APA, the challenged agency action (if not made
6 reviewable by statute⁴⁴) must be a “final agency action for which there is no other adequate
7 remedy in a court[.]” 5 U.S.C. § 704; see *Navajo Nation v. Dep’t of the Interior*, 876 F.3d 1144,
8 1171 (9th Cir. 2017) (“§ 704’s requirement that to proceed under the APA, agency action must be
9 final or otherwise reviewable by statute is an independent element without which courts may not
10 determine APA claims.”).⁴⁵ To constitute a “final agency action,” two conditions must be met:
11 ““first, the action must mark the consummation of the agency’s decision making process . . . it
12 must not be of a merely tentative or interlocutory nature. And second, the action must be one by
13 which rights or obligations have been determined, or from which legal consequences will flow.””
14 *Gallo Cattle Co. v. U.S. Dep’t of Agric.*, 159 F.3d 1194, 1198–99 (9th Cir. 1998) (ellipsis in
15 original) (quoting *W. Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1196 (9th Cir. 1997)).

17 2.2 Application

18 2.2.1 The IRS’s issuance of Revenue Procedure 2016-22 is not reviewable because 19 it was not a final agency action

20 The IRS’s issuance of Revenue Procedure 2016-22 is not a final agency action because it is
21 not an action “by which rights or obligations have been determined, or from which legal
22 consequences will flow.” Revenue Procedure 2016-22 is an internal procedural rule that does not
23 create or determine any rights, obligations, or legal consequences. See, e.g., *Estate of Shapiro v.*
24 *Comm’r*, 111 F.3d 1010, 1018 (2d Cir. 1997) (a Revenue Procedure “is not considered as a rule

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26 ⁴⁴ Facebook does not claim that any agency action here was made reviewable by statute.

27 ⁴⁵ The Ninth Circuit has held that Section 704’s requirement that the challenged agency action must be
28 a “final agency action” is not a limit on Section 702’s waiver of sovereign immunity, but it is a limit
the justiciability of APA claims in a federal court. *Navajo Nation*, 876 F.3d at 1172.

1 which confers rights upon taxpayers but rather is a mere internal procedural guide and is not
2 mandatory”); Estate of Weiss, 2005 WL 3418160, at *1 (“It is well established that general
3 statements of policy and rules governing internal agency operations or ‘housekeeping’ matters,
4 which do not have the force and effect of law, are not binding on the agency issuing them and do
5 not create substantive rights in the public.”) (internal quotation marks omitted) (citing cases). It is
6 thus not reviewable under the APA. Cf. Alliance for the Wild Rockies v. U.S. Forest Serv., 351 F.
7 App’x 167, 168 (9th Cir. 2009) (holding that internal rule set was not reviewable under the APA
8 because it “was simply an internal document that is not final agency action”) (citing Franklin v.
9 Massachusetts, 505 U.S. 788, 797 (1992); Stauffer Chem. Co. v. FDA, 670 F.2d 106, 108 (9th Cir.
10 1982)). Facebook’s argument to the contrary depends on its assumption that taxpayers had an
11 enforceable right to take their tax cases to IRS Appeals, and that the IRS’s issuance of Revenue
12 Procedure 2016-22 altered or abrogated that right. But as described above, taxpayers do not have
13 an enforceable right to take their tax cases to IRS Appeals. Revenue Procedure 2016-22 did not
14 alter this non-right or otherwise determine any rights, obligations, or legal consequences. It
15 therefore is not a final agency action that is reviewable under the APA.

16
17 **2.2.2 The IRS’s decision not to refer Facebook’s tax case to IRS Appeals is not
reviewable because it was not a final agency action**

18 The IRS’s decision not to refer Facebook’s tax case to IRS Appeals similarly is not a final
19 agency action because it is not an action “by which rights or obligations have been determined, or
20 from which legal consequences will flow.” Facebook retains its right to challenge the IRS’s tax-
21 deficiency determination before the Tax Court (or to try to negotiate a settlement with IRS
22 Counsel), and it is Facebook’s and the IRS’s litigation (and/or negotiation) going forward that will
23 ultimately determine the parties’ rights, obligations, and legal consequences. Cf. City of Oakland
24 v. Holder, 798 F.3d 1159, 1166–67 (9th Cir. 2015) (government decision to file a lawsuit is not a
25 final agency action, because filing a lawsuit does not determine any rights or obligations; “any
26 rights, obligations, and legal consequences are to be determined later by a judge”). Again,
27 Facebook’s argument to the contrary depends on its assumption that it had an enforceable right to
28 take its tax case to IRS Appeals, and that the IRS’s decision not to refer its case to IRS Appeals

1 foreclosed that right. But as described above, Facebook does not have this right. The IRS’s
2 decision not to refer Facebook’s tax case to IRS appeals did not alter this non-right or otherwise
3 determine any rights, obligations, or legal consequences. It therefore is not a final agency action
4 that is reviewable under the APA.

5 * * *

6 Neither of the agency actions that Facebook challenges is a final agency action. The court
7 therefore may not determine Facebook’s APA claims and must dismiss them for lack of subject-
8 matter jurisdiction. *Navajo Nation*, 876 F.3d at 1171; *Gallo Cattle*, 159 F.3d at 1198.

9
10 **3. Mandamus**

11 “The district courts shall have original jurisdiction of any action in the nature of mandamus to
12 compel an officer or employee of the United States or any agency thereof to perform a duty owed
13 to the plaintiff.” 28 U.S.C. § 1361. “Mandamus is available only when ‘(1) the plaintiff’s claim is
14 clear and certain; (2) the duty is ministerial and so plainly prescribed as to be free from doubt; and
15 (3) no other adequate remedy is available.’” *Lowry v. Barnhart*, 329 F.3d 1019, 1021 (9th Cir.
16 2003) (quoting *Or. Natural Res. Council v. Harrell*, 52 F.3d 1499, 1508 (9th Cir. 1995)). “If a
17 plaintiff has no legal entitlement to the relief sought, a ‘clear and certain’ claim cannot exist, and
18 the writ will not lie.” *Id.*

19 Facebook’s claim is not clear, certain, or free from doubt, and it has no legal entitlement to the
20 relief sought. The court thus denies Facebook’s claim for mandamus.

21
22 **CONCLUSION**

23 The court grants the IRS’s motion to dismiss.

24 Because the court rules as a matter of law that Facebook has no legally enforceable right to
25 compel the IRS to refer its case to IRS Appeals, the court dismisses the complaint with
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prejudice. There are no deficiencies in the complaint that can be cured, and thus leave to amend would be futile. Cf. Serra v. Lapin, 600 F.3d 1191, 1195 (9th Cir. 2010).

IT IS SO ORDERED.

Dated: May 14, 2018



LAUREL BEELER
United States Magistrate Judge