No. 25-4217

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STENSON TAMADDON, LLC,

Plaintiff-Appellant,

v.

UNITED STATES INTERNAL REVENUE SERVICE; UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants-Appellees.

On Appeal from the Judgment of the United States District Court for the District of Arizona

BRIEF FOR *AMICUS CURIAE* TAX LAW CENTER AT NYU LAW IN SUPPORT OF DEFENDANTS-APPELLEES

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INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT[1]

The Tax Law Center at NYU Law is a nonpartisan, nonprofit center dedicated to improving the integrity of the federal tax system. Its staff comprises tax law experts with experience in policymaking and administration as well as practice of tax law on behalf of clients. The Center aims to protect and preserve tax revenues, advance equity through the tax system, and improve tax administration. Drawing on its expertise in tax administration, the Center submits this brief on a question of administrative law raised in this case with substantial implications for the federal tax system.

The merits of this case turn on whether IRS Notice 2021-20 is an "interpretive" rule, which is "valid despite the absence of notice and comment procedures" under the Administrative Procedure Act, or a "legislative" rule, which "can issue only by using the notice and comment procedure described in the APA[.]" *Hemp Indus. Ass'n v. Drug Enf't Admin.*, 333 F.3d 1082, 1087 (9th Cir. 2003). Under this Court's

[1] This brief does not represent the views, if any, of NYU School of Law. No counsel for a party authored any part of this brief, no one other than *amicus curiae* paid for its preparation or submission, and respondent-appellees have consented to its filing.

precedent, a putatively interpretive rule is, in fact, legislative only if "in the absence of the rule, there would not be an adequate legislative basis for enforcement action; . . . the agency has explicitly invoked its general legislative authority; or . . . the rule effectively amends a prior legislative rule." *Id.* A rule is not presumptively legislative simply because it is consistently applied. Nor do agencies bear the burden to rebut any such presumption or otherwise demonstrate that a rule is interpretive. And the use of numerical thresholds, without more, does not indicate that a rule is legislative.

In support of its contrary position, appellant draws on authority interpreting the "good cause exception" under 5 U.S.C § 553(b)(B). But that authority is inapposite in cases where notice and comment procedures are not required in the first place—*e.g.,* in the case of an interpretive rule—and the good cause exception does not apply. 5 U.S.C § 553(b)(A). The analogy to this inapposite standard is particularly unwarranted where, as here, this Court's precedent provides the standard for distinguishing legislative from interpretive rules. *See Hemp Indus.*, 333 F.3d 1082.

Appellant's proposed standard—that "a rule is legislative when the agency treats it as a binding norm," (Appellant Br. 30)—would mean that an agency could never provide its interpretation of the law without notice and comment, which is binding on the agency as a matter of law because it is derived from an act of Congress. It would also mean that no safe harbor provision—even those that provide a simplified method for qualification which taxpayers can opt into, rather than a rebuttable presumption that taxpayers must overcome—could ever be promulgated without notice-and-comment procedures. That would be contrary to settled law, which makes clear that it is the substance of a rule, not the consistency of its application, on which its characterization as legislative or interpretive must turn.

Appellant's proposed standard would make it impossible for the IRS to issue even the most routine interpretive guidance documents (such as inflation-indexed tax tables) without notice and comment. The IRS would also be less able quickly and readily to provide clear guidance when implementing new law, undermining sound tax administration and creating more uncertainty and compliance burdens for many taxpayers.

This Court should reject this proposed standard for the reasons that follow.

ARGUMENT

I. Agencies do not bear the burden to demonstrate that a rule is interpretive.

It is not the case, as appellant incorrectly posits, that an agency bears the burden to show that its publication of interpretive guidance is excepted from notice and comment under 5 U.S.C. § 553(b). (Appellant Br. 27-28.) Interpretive rules are not governed by the standard appellant invokes. That standard—the "good cause" exception under 5 U.S.C. § 553(b)(B)—governs in a different rulemaking context, distinct from the circumstances on the record. Where, as here, a rule simply explains the agency's interpretation of a statute, the evidentiary showing required under the "good cause" exception does not apply. *Hemp Indus.*, 333 F.3d at 1087.

A. The IRS issued Notice 2021-20 to a public in need of immediate guidance.

In early 2020, to "deliver urgently needed relief to our nation's families, workers, and businesses" affected by the COVID-19 pandemic, Congress enacted the bipartisan CARES Act. Pub. L. No. 116-136, 134 Stat. 281 (2020); Remarks on Signing the Coronavirus Aid, Relief, and

Economic Security Act and an Exchange With Reporters, 2020 DAILY COMP. PRES. DOC. 193 (March 27, 2020). This legislation provided multiple forms of relief to taxpayers affected by emergency orders, including, as relevant here, a tax credit (the "ERC credit") available to eligible employers whose business operations were affected by the pandemic. 3-ER-362; SER-15.

After the President signed the CARES Act into law on March 27, 2020, the IRS took immediate action to implement the ERC credit: it developed a rubric to process claims, set standards to ensure that claims were quickly processed at scale, and communicated these standards to the public. *See* 3-ER-363. To speed the delivery of relevant guidance to the taxpayer public, the IRS did not submit these standards for notice and comment in the Federal Register. 3-ER-363. Rather, the IRS published guidance directly to the public on a page of frequently asked questions, which was initially posted on the IRS website on April 29, 2020. *Id.*; *see* FAQs: Employee Retention Credit under the CARES Act, https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act (last updated May 29, 2025). As Congress continued to pass further pandemic-relief legislation modifying the ERC credit, the IRS

updated this website to respond to additional questions as they arose. 3-ER-363. After nearly a year, these frequently asked questions and answers were formally incorporated into IRS Notice 2021-20. *Id.*; *see* 3-ER-364.

An IRS Notice is distinct from a notice of proposed rulemaking, which is published in the Federal Register and indicates the commencement of notice and comment procedures on what will ultimately issue as a regulation. *See* 5 U.S.C. § 553(b). Instead, an IRS Notice is "a public pronouncement by the [Internal Revenue] Service that may contain guidance that involves substantive interpretations of the Internal Revenue Code or other provisions of the law" and is published in the Internal Revenue Bulletin. Internal Revenue Manual 32.2.2.3.3 (Aug. 11, 2004); *see, e.g.,* Treas. Reg. § 1.6662-3(b)(2) ("The term 'rules or regulations' includes the provisions of the Internal Revenue Code, temporary or final Treasury regulations issued under the Code, and revenue rulings or notices (other than notices of proposed rulemaking) issued by the Internal Revenue Service and published in the Internal Revenue Bulletin."). Unlike statutes or regulations which are intended to impose substantive obligations on taxpayers, IRS Notices are meant to

be "administrative pronouncements" that "do not have the force of law, are merely statements of the Commissioner's position, and are entitled to no special deference" in the courts. *Philips Petroleum Co. v. Commissioner*, 101 T.C. 78, 117 (1993), *aff'd*, 70 F.3d 1282 (10th Cir. 1995).

B. The District Court correctly characterized Notice 2021-20 as an interpretive rule.

Whether an agency rule is interpretive or legislative is a question of law reviewed *de novo*. *Hemp Indus. Ass'n v. Drug Enf't Admin.*, 333 F.3d 1082, 1086 (9th Cir. 2003). As the Supreme Court has recognized, "the critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers,'" and not as statements intended to "have the force and effect of law" or be "accorded that weight in the adjudicatory process." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015), *quoting Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)). Notice 2021-20 fits this definition of an interpretive rule: it neither affects the statutory conditions for relief nor imposes adverse consequences for noncompliance with the CARES Act provisions governing the ERC credit and is due no deference in any court. *Cf. Alcaraz v. Block*, 746 F.2d 593,

613 (9th Cir. 1984) ("No law was created; the regulations simply explained something the statute already required. . . . [T]hat the regulations may have altered administrative duties or other hardships does not make them substantive."). Rather, Notice 2021-20 served as an accessible platform to articulate the IRS's understanding of the ERC credit as it evolved through multiple statutory amendments and how the IRS would thus evaluate taxpayer claims of entitlement. 3-ER-364.

Appellant incorrectly posits that an agency bears the burden to show that its publication of interpretive guidance is excepted from notice and comment under 5 U.S.C. § 553(b), or that "in close cases, courts should therefore err on the side of requiring rulemaking." Appellant Br. 27-28; *see Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 113-14 (2d Cir. 2018). Appellant confuses the judicial standard for the good cause exception to notice-and-comment with the exception for non-legislative rules. *See* 5 U.S.C. § 553(b)(A-B). The good cause exception to notice-and-comment procedures under section 553(b)(B) allows an agency to waive otherwise obligatory notice-and-comment procedures where the agency "for good cause finds" that those are "impracticable, unnecessary, or contrary to the public interest." *Id.*

The good cause exception is "essentially an emergency procedure." *United States v. Valverde*, 628 F.3d 1159, 1165 (9th Cir. 2010), *quoting Buschmann v. Schweiker,* 676 F.2d 352, 357 (9th Cir.1982); *see also Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 757 n.4 (9th Cir. 1992) ("Complying with the notice and comment provisions of the APA is not a matter of agency choice."). Conversely, no such conditions apply to the exception for interpretive or other non-legislative rules described under 553(b)(A), for which notice-and-comment procedures are not required in the first place. *See, e.g., Hemp Indus.*, 333 F.3d at 1087:

> An agency can issue a legislative rule only by using the notice and comment procedure described in the APA, unless it publishes a specific finding of good cause documenting why such procedures "are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b), (b)(B). In contrast, an agency need not follow the notice and comment procedure to issue an interpretive rule. § 553(b)(A). The distinction between the two procedures is key in this case. If the [agency's] rule is genuinely an interpretive rule, it is valid despite the absence of notice and comment procedures. If the [agency's] rule has the effect of a legislative rule, it is invalid because of the agency's failure to comply with the APA procedures.

This key distinction is supported in the implementation of the (b)(A) and (b)(B) exceptions, which have developed separate lines of case law.

Unlike the (b)(B) good cause exception—which must be supported by agency findings at the time of issuance, *see, e.g.*, *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 777 (9th Cir. 2018); *Action on Smoking & Health v. Civ. Aeronautics Bd.*, 713 F.2d 795, 801 n.6 (D.C. Cir. 1983)—the exceptions under 553(b)(A) may be raised for the first time on appeal. *Reno-Sparks Indian Colony v. EPA*, 336 F.3d 899, 910 n.12 (9th Cir. 2003); *see also Hemp Indus.*, 333 F.3d at 1085 (deciding whether a rule was legislative or interpretive even though the agency never considered the issue); *Alcaraz*, 746 F.2d at 613 (same). And while courts often invoke the legislative history of the APA for the proposition that none of the exceptions under 553(b) are meant to be an "escape clause" around notice-and-comment, these cases invariably do so in the context of the good cause exception, as does the committee report. *See, e.g.*, *Alcaraz*, 746 F.2d at 612; S. Rep. No. 752, 79th Cong., 1st Sess. (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT, 79TH CONG., LEGISLATIVE HISTORY, 1944-46, at 200, 201 (1946).[2] The law does not demand that an agency

[2] In relevant part, the committee report states: "Agencies are given discretion to dispense with notice (and consequently with public proceedings) in the case of interpretative rules, general statements of

defend, *ab initio*, every consumer-facing publication against potential allegations that the publication is the equivalent of a legislative rule.

II. The consistent application of a rule is not an indication that the rule is legislative.

Appellant's position—that "a rule is legislative when the agency treats it as a binding norm" (Appellant Br. 30) and that the agency has the burden to demonstrate otherwise (Appellant Br. 27-28)—should not persuade this Court. As a threshold matter, it cannot be the case that a rule is "legislative" simply because the agency follows it. No inference arises as to whether a rule is legislative or interpretive merely because the agency acts in accordance with stated policies and consistently applies the rule.

Both parties correctly observe that the ultimate distinction between a legislative and non-legislative rule is whether it has the force of law. Appellant Br. 26; Appellee Br. 29; *See Perez v. Mortg. Bankers Ass'n*, 575

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policy, or rules of agency organization, procedure, or practice. This does not mean, however, that agencies should not—where useful to them or helpful to the public—undertake public procedures in connection with such rule making. The exemption of situations of emergency or necessity is not an "escape clause" in the sense that any agency has discretion to disregard its terms or the facts. A true and supported or supportable finding of necessity or emergency must be made and published." *Id.*

U.S. 92, 96 (2015); *Hemp Indus.*, 333 F.3d at 1087; 5 U.S.C. 553(b)(A). However, testing whether a rule has the force of law depends on the type of non-legislative rule being considered. *See Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (emphasizing the distinction between interpretive rules and general statements of policy); Ronald M. Levin, Rulemaking and Guidance Exception, 70 Admin. L. Rev. 263 (2018) (noting that courts apply different analyses to interpretive rules and general statements of policy). As appellees correctly note, it is largely irrelevant that Notice 2021-20 leaves room for IRS discretion.[3] Appellee Br. 32, 47-49. Courts consider the "binding" effect of a rule only for general statements of policy, which are meant to advise the public on how an agency intends to exercise enforcement discretion. *See, e.g.*, *Mada-*

[3] As discussed *infra*, the 10 percent nominal effects test is interpretive in part because it is a safe harbor that encompasses only a subset of the circumstances contemplated by Congress when it made the ERC credit available to businesses "fully or partially suspended" by a government order. In implementing statutory standards such as this, the agency may be able to identify "easy calls" as an interpretive matter while other situations may require closer scrutiny. Here, the IRS has used the tools of statutory interpretation to determine that employers that satisfy the 10 percent nominal effects test are "easy calls" for meeting the statutory standard of "fully or partially suspended." The 10 percent test thus leaves IRS agents with discretion insofar as it requires the IRS to further interpret what it means to be "fully or partially suspended" for claims that fall outside the safe harbor.

Luna v. Fitzpatrick, 813 F.2d 1006, 1013 (9th Cir. 1987); *Am. Bus Ass'n v. United States*, 627 F.2d 525, 528-29 (D.C. Cir. 1980) (citing Attorney General's Manual on the Administrative Procedure Act (1947)). The "critical factor" distinguishing a general statement of policy from a legislative rule is the extent to which the agency retains "discretion to follow, or not to follow, the [announced] policy in an individual case." *Gill v. United States Dep't of Just.*, 913 F.3d 1179, 1186 (9th Cir. 2019) (citations omitted); *see also Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 40 (D.C. Cir. 1974) (a legislative rule is "finally determinative of [] rights and duties" whereas a general statement of policy "envisions further proceedings").

By contrast, interpretive rules are meant to advise the public on how an agency interprets the law. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92 (2015); *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995). Because an interpretive rule is not an exercise of discretion, it follows that the agency should consistently follow the rule. *See Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir. 1984); Saltzman & Book, *IRS Practice and Procedure: Exceptions Under The APA To The Notice-And-Comment Procedures* ¶ 3B.03 (2025) ("[I]nterpretative rules often have de facto

power in that they signal agency positions upon which the public can rely, and a failure to follow such rules may have negative consequences (such as the imposition of civil penalties) as a result of the agency taking action consistent with the interpretative rule."); Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 42 Duke. L.J. 1311, 1313 (1992) ("The sole category of exceptions—where an agency may permissibly attempt to make a substantive nonlegislative rulemaking document binding on private parties—is for interpretive rules."). An interpretive rule can be practically binding, even if a court later rules that the interpretation was wrong. *See Perez*, 575 U.S. at 109 (Scalia, J., concurring) ("An agency may use interpretive rules to *advise* the public by explaining its interpretation of the law. But an agency may not use interpretive rules to *bind* the public by making law, because it remains the responsibility of the court to decide whether the law means what the agency says it means").

This Court in *Hemp* thus adopted the three-factor test laid out by the D.C. Circuit in *American Mining* for good reason: both cases ultimately involved interpretive rules. *Hemp Indus.*, 333 F.3d at 1087-88;

Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993). As this Court explained in *Hemp*, interpretive rules "merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule." *Hemp Indus.*, 333 F.3d at 1087. The district court below appropriately applied the *Hemp* factors here, and—contrary to Appellant's claim (Appellant Br. 30-31)—even looked beyond the *Hemp* factors in considering the degree to which the IRS retained discretion in applying Notice 2021-20, and thus arguably applied a more stringent test than was necessary to evaluate a putatively interpretive rule. 1-ER-17. In applying this test, the District Court correctly accorded no weight to the degree of consistency of the IRS' conduct. *Id.*; *Cf. Hoctor v. Dep't of Agric.*, 82 F.3d 165, 171 (7th Cir. 1996) ("attach[ing] no weight to the Department's inconsistency" where notice and comment procedures were used in some similar circumstances, but not others). The fact that the IRS behaved in accordance with the guidance it issued in Notice 2021-20 does not elevate that rule to the force of law.

It is the substance of a rule, not the consistency of its application, on which its characterization as legislative or interpretive must turn. *See*

Alcaraz, 746 F.2d at 614 ("all rules are 'binding' on the regulated parties in the sense that they set, for the time, the legal minima of behavioral standards"). To hold otherwise would place the burden on agencies to self-inculpate: if a rule applied consistently is a "binding norm" presumptively subject to notice and comment procedures, that presumption could only be rebutted by an agency's own evidence that the agency *failed* to follow the rule consistently. This Court should reject appellant's invitation to do so here.

III. The use of numerical thresholds, without more, does not indicate that a rule is legislative.

The presence of a numerical threshold in a rule does not immediately categorize that rule as legislative, or preclude it being interpretive. Courts of appeals have frequently "upheld agencies' numeric interpretations of qualitative regulatory terms." *United States v. McIntosh*, 124 F.4th 199, 209 n.6 (3d Cir. 2024) (collecting cases); *see* Appellee Br. 35-36. Indeed, the IRS routinely interprets code provisions through numerical thresholds without notice and comment. *See, e.g.*, Rev. Proc. 2025-32 (setting forth rate tables and other inflation adjustments for tax year 2026 pursuant to section 1(f)); Notice 2025-14 (providing updated interest rate guidance for purposes of administering minimum

funding rules for defined benefit and pension plans pursuant to sections 417 and 430).

As the *Hemp* factors would suggest, the key factor in determining whether a numerical threshold is an interpretive rule is the extent to which the threshold is derived from the underlying standard it purports to interpret. *Hoctor*, 82 F.3d at 170. The more attenuated the numeric threshold is from the text, the more likely it involves the use of delegated policymaking discretion and is therefore a legislative rule. *See id.* at 171. This test is more demanding for bright line rules where the line alone is dispositive than for safe harbors within a broader, non-numerical standard.[4] In *Hoctor*, for example, the court held that a strict eight-foot minimum fence height requirement was not "derivable from" the underlying regulation imposing a "duty of secure containment" for animal enclosures because "[t]here is no way to reason to an eight-foot

[4] Of course, some statutes require the agency to come up with a bright line, single numerical threshold and therefore would not permit a safe harbor rule. An obvious example is section 1(f), noted supra at 16, which provides detailed instructions for the Secretary to update the tax tables annually for inflation. The analysis here focuses on statutes and regulations that require the agency to interpret a non-numeric standard, such as the requirement that animal enclosures be "structurally sound" (as in *Hoctor*), or as here, that an eligible employer be "fully or partially suspended."

perimeter-fence rule as opposed to a seven-and-a-half foot fence or a nine-foot fence or a ten-foot fence." *Id.* at 170-71. As noted by appellees, the rule in *Hoctor* could not be interpretive because there was no "intrinsic relationship" between "the underlying regulation's focus on structural soundness and the challenged rule's focus on height." Appellee Br. 39. The *Hoctor* court suggested that if, instead of the strict height requirement, the agency adopted a height standard as a "rule of thumb to guide the application of [the] general norm," it would be "legitimately interpretive." *Hoctor*, 82 F.3d at 171 ("Had the Department of Agriculture said in the internal memorandum that it could not imagine a case in which a perimeter fence for dangerous animals that was lower than eight feet would provide secure containment, and would therefore presume, subject to rebuttal, that a lower fence was insecure, it would have been on stronger ground. For it would have been tying the rule to the animating standard, that of secure containment, rather than making it stand free of the standard, self-contained, unbending, arbitrary.").

Similarly, in *United States v. Riccardi*, commentary on a sentencing guideline establishing a mandatory minimum loss of $500 for access device crimes was found to be a substantive legislative rule subject to

notice-and-comment because "even if there is some ambiguity in § 2B1.1's use of the word 'loss,' the commentary's *bright-line rule* requiring a $500 loss amount for every gift card does not fall 'within the zone of ambiguity' that exists." 989 F.3d 476, 480 (6th Cir. 2021) (*quoting Kisor v. Wilkie*, 588 U.S. 558, 576 (2019) (emphasis added)). And in *Catholic Health Initiatives v. Sebelius*, "[w]ith respect to the ten percent limits 'it is impossible to give a reasoned distinction between numbers just a hair on the OK side of the line and ones just a hair on the not-OK side.'" 617 F.3d 490, 496 (D.C. Cir. 2010) (*quoting Mo. Pub. Serv. Comm'n v. FERC*, 215 F.3d 1, 4 (D.C. Cir. 2000)).

Here, the 10 percent safe harbor is an interpretation of what constitutes a partial suspension because it is not an "unbending" line or even the line itself. Rather, it is a separate threshold that lies within the broader and vaguer standard of what constitutes a "fully or partially suspended" business. The 10 percent safe harbor is an interpretation of the statute that identifies a set of circumstances that clearly fall within the meaning of "fully or partially suspended" without deciding where or how to draw the line in every case. The 10 percent safe harbor is thus akin to the hypothetical rebuttable presumption considered in *Hoctor*,

and arguably even more flexible, in that it creates a simplified method for qualification which taxpayers can opt into, rather than a rebuttable presumption that taxpayers must overcome.

A. Safe harbors can improve IRS administration and provide taxpayer certainty.

A safe harbor rule can be legislative rule, interpretive rule, or a general statement of policy. *See* Emily Cauble, *Safe Harbors in Tax Law*, 47 Conn. L. Rev. 1385, 1392 (2015) (explaining that safe harbors exist in statute, regulations, and in IRS sub-regulatory guidance). Whether a safe harbor can be deployed as an interpretive rule depends on the underlying statute or regulation; where, as here, a statute can be interpreted through a safe harbor, there are compelling policy reasons to do so.

Maintaining that interpretive rules can establish numerical safe harbors is important to the IRS's enforcement capabilities and taxpayer planning and certainty. Safe harbors provide a way for both agencies and regulated entities to employ clear, ex ante rules while maintaining flexible, ex post standards, and are employed throughout tax law. *Id.* at 1390, 1392; s*ee, e.g.* Notice 2026-13 (providing safe harbor language that retirement plan administrators can use to comply with notice

requirements under section 402(f); Notice 2025-8 (updating the safe harbor framework for taxpayers to qualify for the domestic bonus credit).

Compared to flexible standards, safe harbors help reduce risk and ambiguity for taxpayers, which in turn can help ensure continued fairness and confidence in the tax system because ambiguity is more likely to be exploited by the most aggressive taxpayers. Cauble, *Safe Harbors in Tax Law* at 1406 ("Taxpayers who seek to push boundaries and game the system as much as possible will try to take advantage of additional risk and ambiguity by structuring their transactions more aggressively… [which] could contribute to the perception that taxpayers who exploit the system are not subject to the same rules that apply to the rest of us"). "A safe harbor reduces risk for a taxpayer who qualifies for it because the taxpayer's chances of obtaining a favorable outcome will be 100% (or nearly 100%)." *Id.* at 1399.

Employing safe harbors also allows the IRS to conserve scarce resources by focusing enforcement on claims that fall outside the safe harbor. *See* Susan C. Morse, *The Truth About Safe Harbors*, 92 Tenn. L. Rev. 743, 756 (2024). ("A reasonable, nonarbitrary response to limited enforcement resources is to treat some fact patterns as legal, while

leaving others open for future decision.") Efficient use of IRS enforcement resources is especially important now, as the IRS lost a full quarter of its workforce in 2025 and Congress recently passed a nearly $1 billion budget cut that continues chronic underfunding of the agency. April 1, 2025 — September 30, 2025 Treasury Inspector Gen. for Tax Admin., Semiannual Rep. to Cong., https://www.tigta.gov/sites/default/files/reports/2025-11/TIGTA-SA-FALL-2025.pdf; H.R. 7148, 119th Cong. § (2026); Greg Leiserson, *Senate Appropriations Bill Would Set the IRS Up to Fail When IRA Funds Run Out*, The Tax Law Center Blog (Dec. 11, 2025), https://taxlawcenter.org/blog/senate-appropriations-bill-would-set-the-irs-up-to-fail-when-ira-funds-run-out. The IRS's ability to direct its enforcement resources as needed will only grow more imperative amidst these changes.

CONCLUSION

This Court should affirm the District Court's decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

I am the attorney or self-represented party.

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I certify that on February 6, 2026, a true and correct copy of the foregoing brief was filed with the Clerk of the Court using the ACMS system, which will send notice of electronic filing to all ACMS participants, resulting in service upon all counsel of record.

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