No. 14-310

In the Supreme Court of the United States

NEILAND COHEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
TAMARA W. ASHFORD
Acting Assistant Attorney General
GILBERT S. ROTHENBERG
TERESA E. MCLAUGHLIN
ELLEN PAGE DELSOLE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Petitioners brought putative class actions challenging the adoption, without notice and comment, of a method established by the Internal Revenue Service (IRS) in I.R.S. Notice 2006-50, 2006-1 C.B. 1141, for obtaining the refund of a telephone excise tax that the IRS had ceased collecting in 2006. The district court concluded that the IRS should have engaged in notice-and-comment procedures before issuing the Notice, and the court vacated the Notice and remanded the matter to the IRS. The court of appeals affirmed. The question presented is as follows:

Whether the district court should have (1) ordered the IRS to supplement its existing refund-claim procedures by promulgating a new procedure governing claims for refunds of the tax at issue here and (2) issued specific instructions as to how the IRS should proceed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and regulations:

Statutes and regulations—Continued: Page

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 14-310

NEILAND COHEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-29a) is reported at 751 F.3d 629. The memorandum opinions of the district court are reported at 901 F. Supp. 2d 1 (Pet. App. 30a-52a) and 853 F. Supp. 2d 138 (Pet. App. 53a-66a). A previous opinion of the en banc court of appeals is reported at 650 F.3d 717, and previous opinions of the district court are reported at 539 F. Supp. 2d 281 and 501 F. Supp. 2d 34.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2014. A petition for rehearing was denied on July 2, 2014 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on September 11, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7422(a) of the Internal Revenue Code (Code) provides that "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected" unless the taxpayer has "duly filed" with the Internal Revenue Service (IRS) an administrative claim for a tax refund. 26 U.S.C. 7422(a). Pursuant to Congress's "broad" delegation to the IRS of the "the task of administering the tax laws of the Nation," *Commissioner* v. *Portland Cement Co.*, 450 U.S. 156, 169 (1981) (internal quotation marks and citation omitted), the agency has promulgated regulations governing claims for refunds of taxes that were erroneously collected. See 26 C.F.R. 301.6401-1 *et seq*. Those regulations establish the procedures that taxpayers must use to file administrative refund claims with the IRS. See, *e.g.*, 26 C.F.R. 301.6402-2(c) (with certain exceptions, "all claims by taxpayers for the refunding of taxes, interest, penalties, and additions to tax shall be made on Form 843").

The Code establishes strict limitations periods governing the time in which a taxpayer may file a claim for a refund. See *United States* v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 4 (2008). Section 6511(a) provides that an administrative "[c]laim for credit or refund of an overpayment of any tax imposed by [Title 26] * * * shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid," whichever is later. 26 U.S.C. 6511(a). Section 6511(b)(1) provides that "[n]o credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or

refund, unless a claim for credit or refund is filed by the taxpayer within such period." 26 U.S.C. 6511(b)(1). Section 6514 further provides that a refund "shall be considered erroneous" if the taxpayer did not file an administrative claim within the statutory time limit. 26 U.S.C. 6514(a)(1).

2. a. Section 4251 of the Code imposes an excise tax on "amounts paid for * * * toll telephone service," 26 U.S.C. 4251, if the price charged for the telephone calls varies based on the "distance and elapsed transmission time of each individual communication," 26 U.S.C. 4252(b)(1). Telephone service providers collect the tax by billing consumers, and the providers then pay the tax to the IRS. 26 U.S.C. 4291. Although telephone companies traditionally based their charges on the distance and duration of each call, they gradually abandoned that price structure in favor of flat per-minute rates. Pet. App. 4a.

Several taxpayers sought refunds of the excise tax from the IRS. They contended that, because the toll charge no longer "varie[d] in amount with the distance" spanned by the call, the service was not taxable as "toll telephone service" under 26 U.S.C. 4252(b)(1). Pet App. 4a-5a & n.1. Within a year's time, taxpayers had prevailed on the issue in five courts of appeals.[1] *Ibid.* In 2006, the IRS acquiesced in those decisions. *Id.* at 4a-5a.

---

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

b. When it decided to acquiesce in the circuit-court decisions, the IRS announced its new policy in I.R.S. Notice 2006-50 (Notice). 2006-1 C.B. 1141, amplified, clarified and modified, I.R.S. Notice 2007-11, 2007-1 C.B. 405. The IRS explained that its acquiescence applied to telephone services billed to customers after February 23, 2003, and it directed telephone companies to cease collecting and paying over the tax for services billed after July 31, 2006. I.R.S. Notice 2006-50, §§ 1, 4, 2006-1 C.B. at 1141-1142; see Pet. App. 5a.

Because the IRS anticipated that millions of taxpayers would request a refund of the excise tax, the Notice established a refund procedure that was intended to be simple and workable for both the agency and taxpayers. The IRS stated that it would refund the tax collected for service billed after February 28, 2003, and before August 1, 2006, if the taxpayer requested the refund in the manner prescribed. With exceptions not relevant here, taxpayers could claim the refund by requesting it on the taxpayer's income tax return for 2006. I.R.S. Notice 2006-50, § 5, 2006-1 C.B. at 1142. Individuals were allowed to claim refunds of a safe-harbor amount (from $30 to $60, depending on the number of applicable exemptions) without the substantiation that would ordinarily be required, simply by checking a box on Form 1040. Alternatively, a taxpayer could seek a refund of the actual amount he had paid by using Form 8913 and substantiating his claims. *Id.* § 5(c), 2006-1 C.B. at 1142-1143; I.R.S. Notice 2007-11, §§ 3(b) and (d)-(e), 13, 2007-1 C.B. at 405, 409. In a subsequent announcement, the IRS indicated that it would continue to process claims in the form contemplated in Notice 2006-50 until July 27, 2012. I.R.S. Announcement

2012-16, 2012-18 I.R.B. 876. Ultimately, more than 100 million taxpayers obtained refunds pursuant to the Notice. Pet. App. 63a.

3. a. In 2006, petitioners filed these putative class actions, which challenged the excise tax and raised constitutional and statutory claims. Pet. App. 5a. The suits were eventually consolidated in the District Court for the District of Columbia. *Ibid.* After Notice 2006-50 was issued, petitioners amended their complaints to challenge the Notice under the Administrative Procedure Act (APA), 5 U.S.C. 551-559, 701-706. Petitioners contended that (1) the Notice was procedurally deficient because the IRS had published the Notice without following notice-and-comment rulemaking procedures; and (2) the Notice was arbitrary and capricious because it undercompensated certain taxpayers and was substantively flawed in various other respects. Pet. App. 32a-33a, 55a.[2]

b. The district court dismissed petitioners' APA claims for failure to state a claim, holding that the Notice was not subject to judicial review under the APA. 539 F. Supp. 2d 281, 306-307. A panel of the court of appeals reversed, holding that the Notice was subject to APA review. 578 F.3d 1. Judge Kavanaugh dissented in relevant part. *Id.* at 15-22.

c. The full court of appeals granted the government's petition for rehearing en banc, 599 F.3d 652, and subsequently held that petitioners' APA suit could proceed. 650 F.3d 717. The court first rejected the government's argument that petitioners' APA suit was barred by the Anti-Injunction Act (AIA), 26 U.S.C.

---

[2] Eventually, all of petitioners' non-APA claims were dismissed or abandoned. See Pet. App. 54a n.1; 1:07-cv-14 Docket entry No. 74, at 4-5 (Jan. 20, 2012).

7421(a), and the federal-tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201(a). 650 F.3d at 724-731. The court also rejected the government's contention that petitioners' APA claims were barred under 5 U.S.C. 704, which limits APA review to claims for which "there is no other adequate remedy in a court." *Ibid.*; 650 F.3d at 731-734. The court held that a suit for a refund under 26 U.S.C. 7422 would not provide an adequate means of challenging the procedural sufficiency and substantive reasonableness of Notice 2006-50. 650 F.3d at 732-733.

Judge Kavanaugh dissented, joined by Judges Sentelle and Henderson. 650 F.3d at 736-745. The dissenting judges would have held that petitioners' claims were barred under 5 U.S.C. 704 because petitioners had "an adequate alternative judicial remedy, namely tax refund suits." 650 F.3d at 738.

4. On remand, the district court held that, because the court of appeals had concluded that the Notice was binding on both the IRS and taxpayers, the IRS had "violated the procedural requirements of the APA" by failing to engage in notice-and-comment rulemaking. Pet. App. 60a; see *id.* at 53a-66a. Turning to the appropriate remedy, the district court concluded that it should vacate the Notice on a prospective basis and remand the matter to the IRS. *Id.* at 63a.

Petitioners argued that the district court should also (a) order the IRS to "specifically address how it proposes to return the remaining un-refunded [tax] to taxpayers without further delay" and (b) provide the IRS with "'clear instructions' * * * as to 'how to proceed.'" Pet. App. 64a (brackets in original) (quoting 1:07-mc-14 Docket entry No. 75, at 11, 12 (Feb. 6, 2012) (Pls.' Resp.)). The district court declined to

issue such directives. The court explained that, under *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-65 (2004), "this court cannot order the IRS to act unless the law unequivocally requires such action." Pet. App. 64a. The district court further explained that petitioners had not identified any statute or regulation that required the IRS to "execute" petitioners' preferred refund program. *Id.* at 64a-65a.

Having vacated the Notice based on the IRS's failure to undertake notice-and-comment rulemaking, the district court declined to address petitioners' substantive challenges to the refund procedures established by the Notice. Pet. App. 65a n.2.

5. The court of appeals affirmed. Pet. App. 3a-29a.

a. The court of appeals first concluded that the district court's order was likely appealable, even though that court had remanded the matter to the IRS. Pet. App. 8a-10a. The court acknowledged that, in suits challenging agency action, a decision remanding to the agency usually is not appealable until the agency has completed its proceedings on remand. *Id.* at 8a. The court concluded, however, that an exception to that usual rule applied in this case because the government had confirmed that the IRS was "not planning to engage in future rulemaking" concerning the procedures governing refunds of the excise tax. *Id.* at 9a (internal quotation marks omitted). The court explained that the IRS "has no reason to act" because the "three-year statute of limitations for filing refund claims, 26 U.S.C. § 6511(a), has likely expired for most potential claimants and there is no need to streamline the refund process * * * as there was when Notice 2006-50 was issued eight years ago." *Ibid.*

"Bypass[ing] [the] complex question[]" of jurisdiction, the court of appeals turned to the merits. Pet. App. 9a. The court rejected, as "plainly insubstantial," petitioners' argument that the district court should have ordered the IRS to establish a new refund procedure. *Id.* at 10a (citation omitted). The court of appeals explained that, under 5 U.S.C. 706(1), which permits courts to "compel agency action unlawfully withheld or unreasonably delayed," *ibid.*, a court can order an agency to take action only if that action is both "legally *required*" and "*discrete*." Pet. App. 10a (quoting *Norton*, 542 U.S. at 63-64).

Petitioners argued that those prerequisites were satisfied here because 26 U.S.C. 7422(a), which states that taxpayers must exhaust administrative remedies before filing a refund suit in court, required the IRS to craft a new refund procedure to govern refunds of the telephone excise tax. See Pet. App. 11a. The court of appeals rejected that argument. The court explained that Section 7422(a) does not require the IRS to establish "a specific refund procedure for the telephone excise tax," but at most requires the IRS to maintain "*some* form of tax refund procedure." *Ibid.* The court observed that the IRS had satisfied that requirement by maintaining generally applicable refund regulations. *Ibid.*; 26 C.F.R. 301.6401-1 *et seq.* The court further explained that, even if Section 7422(a) required the IRS to create a new excise-tax procedure, the IRS would have "great discretion to design the details," and "[u]nder *Norton*, that discretion forecloses the detailed order plaintiffs seek." Pet. App. 11a. Having concluded that *Norton*'s "legally required" element was not satisfied, the court did not address *Norton*'s "discrete action" requirement.

Finally, the court of appeals denied petitioners' request for attorney's fees. Pet. App. 12a-17a.

b. Judge Brown concurred in part and dissented in part. Pet. App. 18a-29a. She agreed with the court's conclusion that it had appellate jurisdiction. *Id.* at 18a. Judge Brown stated, however, that she was "quite reluctant to join the court's conclusion about the adequacy of the district court's remand order" because, in her view, the IRS had not maintained a "workable refund scheme." *Id.* at 25a (emphasis omitted). Judge Brown also would have held that certain petitioners were entitled to attorney's fees. *Id.* at 29a.

ARGUMENT

Petitioners contend (Pet. 8-30) that the district court (a) should have ordered the IRS to "specifically address how it proposes to return the un-refunded [tax] to taxpayers without further delay," and (b) should have provided the IRS with "'clear instructions' * * * as to 'how to proceed'" and a time limit for doing so. Pet. App. 64a (brackets in original) (quoting Pls.' Resp. 11, 12). The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. In addition, this case is moot. As the court of appeals observed, the limitations period for seeking refunds of the excise tax has expired. *Id.* at 9a. Petitioners therefore have no remaining stake in the litigation, since they would not be eligible for any refund even if they could obtain a judicial order requiring the IRS to promulgate a new refund procedure. Further review is not warranted.

1. The court of appeals correctly held that, under *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-65 (2004), petitioners were not entitled to

an order requiring the IRS to establish a new refund procedure governing the telephone excise tax and instructing the IRS as to how to do so. Petitioners do not contend that the decision below conflicts with the decision of any other court.

In *Norton*, this Court held that 5 U.S.C. 706(1), which authorizes a court to "compel agency action unlawfully withheld or unreasonably delayed," *ibid.*, permits a court to compel an agency only to "take a *discrete* agency action that it is *required to take*." *Norton*, 542 U.S. at 64. The Court explained that an action is "discrete" if it involves a specific agency action, such as promulgating a rule, rather than "broad programmatic" actions or "*wholesale* improvement of [a] program." *Ibid.* (quoting *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990)). The Court further explained that an action is "legally *required*" if it is a "ministerial or non-discretionary act" required by the relevant statute. *Id.* at 63 (citation omitted). The APA, the Court stated, "carried forward the traditional practice prior to its passage," in which "judicial review was achieved through use of the so-called prerogative writs—principally writs of mandamus," which could be used only to enforce a "specific, unequivocal command." *Ibid.* (citation omitted).

As the court of appeals correctly explained, petitioners are not entitled to an order instructing the IRS to promulgate a new refund procedure to replace Notice 2006-50. The IRS is not "legally *required*," *Norton*, 542 U.S. at 63, to develop specific refund procedures to supplement its already-existing, generally-applicable regulations. In arguing that the IRS has such a duty, petitioners rely on 26 U.S.C. 7422(a),

which provides that taxpayers may not sue for a refund unless they have first sought a refund from the IRS "according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof," *ibid.* That provision clearly presupposes that the IRS will maintain "*some* form of tax refund procedure." Pet. App. 11a. The IRS has satisfied that obligation, however, by promulgating regulations governing all refund requests. See 26 C.F.R. 301.6402-2(c) (setting forth procedures for requesting a refund). Nothing in Section 7422(a)'s text requires the IRS to establish any particular refund procedure, or to promulgate specific procedures to govern specific situations. To the contrary, by providing that taxpayers must seek refunds "according to * * * the regulations of the Secretary," 26 U.S.C. 7422(a), the Code gives the agency broad discretion to determine the nature and content of its refund procedures.

That conclusion is reinforced by the structure of the Code's refund provisions and the policies undergirding those provisions. Congress has recognized that refund claims have the potential to "impede[] effective administration of the revenue laws." *United States* v. *A.S. Kreider Co.*, 313 U.S. 443, 447 (1941). "The nature and potential magnitude of the administrative problem" of processing "200 million returns" and "issu[ing] 90 million refunds" every year led Congress to place the burden on taxpayers to ascertain whether they have potential refund claims and to file timely administrative claims and suits. *United States* v. *Brockamp*, 519 U.S. 347, 352 (1997); see 26 U.S.C. 6511, 6532, 7422(a); see also *United States* v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 4 (2008) (In order to obtain a refund, "the taxpayer must comply

with the tax refund scheme established in the Code," which "provides that a claim for a refund must be filed with [the IRS] before suit can be brought."). In order to ensure that the system would be "workable," Congress also established strict time limits for seeking a refund, even at "the price of occasional unfairness in individual cases." *Brockamp*, 519 U.S. at 353. For the same reasons, the IRS, as the agency charged with administering the revenue laws, must have discretion to craft administrative refund procedures that strike the proper balance between enabling taxpayers to recover wrongly collected taxes and protecting the agency's ability to administer the revenue laws.

2. Petitioners argue (Pet. 10-30) that the district court should have ordered the IRS to promulgate a new refund procedure. That argument lacks merit.

a. Petitioners contend (Pet. 10-13) that, under *Norton*, a plaintiff need not demonstrate that the "specific remedy sought" (Pet. 12) is legally required. In petitioners' view, it is sufficient to show that "some discrete and pertinent agency action is required by law," and upon such a showing, the court may issue "detailed judicial direction" to the agency. Pet. 12-13.

Norton makes clear, however, that the specific action that a plaintiff seeks to compel an agency to perform must be both discrete and required by law under the circumstances presented. In *Norton*, the plaintiffs sought to compel the Bureau of Land Management (BLM) to limit the use of off-road vehicles in certain public lands. 542 U.S. at 60-61. In determining that the courts lacked authority to compel that action, this Court considered whether any statutory or regulatory provision imposed on the agency a non-discretionary duty to take the specific action of

limiting off-road vehicle use in the lands identified by the plaintiffs. *Id.* at 65-72. The Court concluded that, because the operative statutes and land-management plans gave the BLM discretion as to how to achieve broad preservation-related objectives, the agency had no mandatory duty to limit the use of off-road vehicles. *Id.* at 66, 71-72.

Here, the lower courts properly engaged in a similar analysis, considering whether the action petitioners sought to compel—the development of a new procedure for requesting refunds of the excise taxes—is the subject of a non-discretionary legal duty. Pet. App. 11a. Those courts correctly concluded that the IRS has broad discretion to determine the content of its refund procedures, and that issuing petitioners' desired "clear instructions," Pls.' Resp. 11, would interfere with that discretion. Pet. App. 11a, 61a, 64a. That analysis was fully consistent with this Court's admonition that the mandamus-based limitations on compelling agency action have the "principal purpose" of "protect[ing] agencies from undue judicial interference with their lawful discretion." *Norton*, 542 U.S. at 66.

b. Petitioners contend (Pet. 14-21) that the IRS's generally applicable refund regulations, see 26 C.F.R. 301.6402-2, did not provide a workable means of seeking a refund of the excise tax. That fact-specific contention does not warrant review.

i. The courts below did not address petitioners' argument, perhaps because petitioners did not clearly raise it as a justification for ordering the IRS to promulgate a new procedure. See Pet. App. 11a, 64a-66a. In the district court, petitioners did not argue that the IRS's generally-applicable refund procedures

were inadequate as applied to the excise tax. See Pls.' Resp. 11-17. In the court of appeals, petitioners did not clearly argue that the existing procedures were inadequate until their reply brief. Compare Pet. C.A. Final Br. 19-20 (stating without elaboration, and without citing or discussing IRS regulations and forms, that the "statutory" refund procedure "failed to comply" with the IRS's obligation to create a "reasonable" regulation), with Pet. C.A. Reply Br. 14-15 (arguing that existing regulations and forms did not provide an adequate means of seeking a refund). The court of appeals did not address petitioners' argument. Pet. App. 11a. That is sufficient reason to deny review. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

ii. At the present time, the procedures set forth in 26 C.F.R. 301.6402-2 would not provide a mechanism for obtaining refunds of telephone excise taxes collected between 2003 and 2006. The current unavailability of relief under those provisions, however, results not from any feature of those procedures that would render them inherently unsuitable for seeking telephone-excise-tax refunds, but from the expiration of the statutory limitations periods for seeking refunds of such taxes.[3] See 26 U.S.C. 6511(a)-(b). The fact that taxpayers are now time-barred from using

---

[3] Shortly after the district court vacated Notice 2006-50, the IRS took the position that taxpayers could use 26 C.F.R. 301.6402-2 to seek a refund of the excise tax until July 27, 2012 (the date on which the Notice would have expired if it had not been vacated). See I.R.S. Announcement 2012-16, 2012-18 I.R.B. at 876; IRS, *Telephone Excise Tax Refund* (June 1, 2012), http://www.irs.gov/uac/Newsroom/Telephone-Excise-Tax-Refund. That deadline has also expired.

the IRS's generally-applicable refund procedures to seek a refund of the excise tax does not provide any justification for ordering the IRS to establish a new refund procedure, because claims under any such procedure would likewise be time-barred. See pp. 18-20, *infra*.

Petitioners are wrong in contending (Pet. 18-21) that aspects of the procedures set forth in 26 C.F.R. 301.6402-2 rendered them unworkable for seeking telephone-excise-tax refunds. Before the IRS issued Notice 2006-50, taxpayers had successfully used the generally-applicable procedures to seek refunds of the excise tax. See p. 3 n.1, *supra*; *OfficeMax, Inc.* v. *United States*, 428 F.3d 583 (6th Cir. 2005); 26 C.F.R. 301.6402-2(c).[4] Indeed, one of the petitioners in this case (Cohen) used the procedure to seek a refund in 2005. See 578 F.3d at 14. Although the IRS declined to process Cohen's claim because the agency was still litigating whether the tax had been properly imposed, the fact that Cohen sought a refund indicates that the generally-applicable procedures provided a workable means of doing so.[5]

---

[4] See also, *e.g.*, *PNC Bank, N.A.* v. *United States*, No. 2:04CV1576, 2006 WL 1604678 (W.D. Pa. May 16, 2006); *Service-Master Co.* v. *United States*, No. 05 C 3141, 2006 WL 1343436 (N.D. Ill. May 16, 2006); *Hewlett-Packard Co.* v. *United States*, No. C-04-03832, 2005 WL 1865419 (N.D. Cal. Aug. 5, 2005); *America Online, Inc.* v. *United States*, 64 Fed. Cl. 571 (Fed. Cl. 2005); *Honeywell Int'l, Inc.* v. *United States*, 64 Fed. Cl. 188 (Fed. Cl. 2005), appeal dismissed, 185 Fed. Appx. 945 (Fed. Cir. 2006).

[5] The district court dismissed Cohen's refund claim on the ground that he had failed to wait six months after filing his refund claim before seeking the refund in court, as is required by 26 U.S.C. 6532(a)(1). The court of appeals affirmed. 578 F.3d at 14-15.

At an earlier stage of this litigation, two members of a court of appeals panel expressed the view that the procedures set forth in 26 C.F.R. 301.6402-2 create "a virtual house of mirrors" for taxpayers seeking refunds of the excise tax.[6] 578 F.3d at 9-10; see Pet. 19-20 (quoting 578 F.3d at 9-10). That characterization was incorrect. The IRS's regulations specify, with exceptions not relevant here, that "all claims by taxpayers for the refunding of taxes, interest, penalties, and additions to tax shall be made on Form 843." 26 C.F.R. 301.6402-2(c). The panel majority believed that Form 843's instruction that the form should not be used for "[a]n overpayment of excise taxes reported on Form(s) 11-C, 720, 730, or 2290" would mislead taxpayers into thinking that they should not use Form 843, and would result in confusion about which, if any, form could be used. 578 F.3d at 9-10 (brackets in original). Form 720 states, however, that it is to be used to report excise taxes the filer—*i.e.*, the telephone service provider—has previously collected. A taxpayer therefore could reasonably understand Form 843's instruction to be inapplicable to individual taxpayers seeking a refund of the excise tax. That conclusion draws support from the fact that, before the IRS issued Notice 2006-50, taxpayers were able to use Form 843 to request refunds. See p. 15, *supra*. In any event, the fact- and case-specific question whether the language of the relevant forms rendered the IRS's refund procedure ineffective with respect to the telephone excise tax presents no issue of continuing importance warranting this Court's review.

---

[6] That portion of the panel's opinion was vacated by the grant of en banc review. 599 F.3d at 652.

c. Petitioners argue (Pet. 23-27) that *Norton* does not apply here because *Norton* "has nothing to do with efforts under the APA to correct allegedly harmful effects of affirmative agency action that has already occurred." Pet. 24. In describing this case as one involving unlawful "affirmative agency action," petitioners argue that Notice 2006-50 was substantively deficient in a number of ways, and that the deficiencies "had prejudicial impact during the period [the Notice] was in force." Pet. 26; see Pet. 24.

Petitioners' argument overlooks the fact that the district court declined to adjudicate petitioners' substantive challenges to Notice 2006-50.[7] Pet. App. 65a n.2. The district court could not appropriately have ordered the IRS to correct alleged deficiencies in the Notice that had not been adjudicated and found by the court.[8] See *Alabama* v. *Centers for Medicare & Medicaid Servs.*, 674 F.3d 1241, 1244-1245 (11th Cir. 2012) (where district court found that agency had improper-

---

[7] Petitioners do not appear to contend that the IRS's failure to use notice-and-comment procedures before issuing Notice 2006-50 is itself affirmative unlawful conduct that the court should have redressed by compelling further action. Pet. 23-27.

[8] Petitioners' reliance (Pet. 24) on *Beverly Hospital* v. *Bowen*, 872 F.2d 483 (D.C. Cir. 1989) (per curiam), is misplaced. There, the agency had conceded that a regulation requiring healthcare providers to pay copying expenses violated the relevant statute. *Id.* at 484, 486. The court of appeals held that the agency's proposed rule permitting reimbursement was substantively deficient because it did not provide complete reimbursement. The court of appeals therefore remanded the case to the district court, instructing that court to "assure that the agency affords the hospitals a fair opportunity to recover photocopying costs." *Id.* at 487. The decision thus did not address the extent of the district court's authority to order the agency to take particular actions. And even if it had, the decision predates *Norton*.

ly failed to use notice-and-comment procedures, appropriate remedy was vacatur; the court properly declined to issue injunction requiring particular actions because the court had not ruled on plaintiffs' substantive challenges to the policy); cf. *Cobell* v. *Norton*, 392 F.3d 461, 477 (D.C. Cir. 2004) (remedial injunction must be "tied to" the court's finding of "specific legal violations cognizable under the APA"). This case therefore does not present any question about the extent to which *Norton* limits a court's authority, once the court has found that the agency engaged in specific unlawful actions, to order an agency to remedy the violations found by the court.[9]

3. Even if the issues on which petitioners seek review otherwise warranted this Court's consideration, the petition should be denied because the case is moot. Petitioners contend that the IRS should be ordered to promulgate a more favorable procedure that would enable them to claim refunds of the telephone excise tax. Because the limitations period has expired, however, the Code would require the IRS to deny any refund claims petitioners might file. See Pet. App. 9a (acknowledging that limitations period has expired). Petitioners therefore would derive no tangible benefit from an order directing the IRS to establish a new procedure governing claims for refunds of the excise tax.

The Code "establishes strict timeframes" for filing refund claims, and it authorizes the IRS to grant refunds only if those claims comply with the statutory

---

[9] In a footnote (Pet. 22 n.5), petitioners challenge the court of appeals' decision that petitioners are not entitled to attorneys' fees. That factbound issue is not fairly included in the question presented, see Pet. i, and it does not warrant the Court's review.

deadlines. *Clintwood Elkhorn Mining Co.*, 553 U.S. at 4. Under Section 6511(a), a taxpayer must file an administrative claim for a refund "within 3 years from the time the return was filed or 2 years from the time the tax was paid," whichever is later.[10] 26 U.S.C. 6511(a). Section 6511(b) limits the IRS's authority to grant refunds, providing that "[n]o credit or refund shall be allowed or made" if the claim was not filed within the limitations period. 26 U.S.C. 6511(b)(1); see 26 U.S.C. 6514 (refunds that do not comply with time limitations "shall be considered erroneous"). The time limits set forth in Section 6511(a) are mandatory and not subject to equitable tolling or waiver by the IRS. *Brockamp*, 519 U.S. at 350, 352; see *United States* v. *Garbutt Oil Co.*, 302 U.S. 528, 533-535 (1938); *Overhauser* v. *United States*, 45 F.3d 1085, 1088 (7th Cir. 1995).

Because the IRS stopped collecting the excise tax in August 2006, the two- and three-year periods set forth in Section 6511(a) have expired.[11] Even if peti-

---

[10] Section 6511(a)'s limitations period applies to taxes paid by means of a return. 26 U.S.C. 6511(a). The excise tax at issue here is such a tax. See *RadioShack Corp.* v. *United States*, 566 F.3d 1358, 1361-1363 (Fed. Cir. 2009) (holding that time for seeking refunds of excise tax is governed by Section 6511(a), even though consumer seeking refund did not itself pay the tax by means of a return, because telephone service providers collected the tax and paid by means of a return).

[11] When the IRS issued Notice 2006-50 in 2006, before the limitations period had expired, the agency stated that it would "authorize the scheduling of an overassessment under [26 U.S.C.] 6407 to keep the period of limitations open for these requests." I.R.S. Notice 2006-50, § 1(b), 2006-1 C.B. at 1141. Although the IRS ultimately extended the time for filing claims under the Notice until July 27, 2012, that deadline has now passed. Because the

tioners obtained a judicial order requiring the IRS to promulgate a more favorable refund procedure, and the IRS established a new procedure in accordance with the court's directive, any refund claims petitioners might file pursuant to that procedure would be untimely. The Code would require the IRS to deny such claims. 26 U.S.C. 6511(b), 6514. Because petitioners would derive no tangible benefit from the judicial order they seek, this case is moot. See *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992) (case is moot where events subsequent to the filing of a lawsuit "make[] it impossible for the court to grant 'any effectual relief whatever' to a prevailing party") (citation omitted); see *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990) (bank's dormant Commerce Clause challenge to State's denial of its application to operate in Florida was rendered moot by an amendment to federal law that had the effect of authorizing Florida to deny the bank's application); *Montgomery Envtl. Coal.* v. *Costle*, 646 F.2d 568, 579 (D.C. Cir. 1980) (challenge to EPA permit was moot where permit had expired and authority to issue a new permit had been transferred to the State).

---

statutory limitations period has expired with respect to all excise-tax refund claims that have not yet been filed, the agency lacks authority to allow any claims for refund of the excise tax that may be filed in the future. See 26 U.S.C. 6511(b), 6514.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
TAMARA W. ASHFORD
Acting Assistant Attorney General
GILBERT S. ROTHENBERG
TERESA E. MCLAUGHLIN
ELLEN PAGE DELSOLE
Attorneys

NOVEMBER 2014