No. 19-930

IN THE

Supreme Court of the United States

CIC SERVICES, LLC,

Petitioner,

v.

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

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American College of Tax Counsel (the "College") respectfully submits this brief as *amicus curiae* in support of petitioner CIC Services, LLC.[1]

STATEMENT OF INTEREST

The College is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The purposes of the College are:

- To foster and recognize the excellence of its members and to elevate standards in the practice of the profession of tax law;
- To stimulate development of skills and knowledge through participation in continuing legal education programs and seminars;
- To provide additional mechanisms for input by tax professionals in development of tax laws and policy; and

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel for the College provided timely notice of the College's intent to file this brief, and all parties have consented to its filing.

- To facilitate scholarly discussion and examination of tax policy issues.

The College is composed of approximately 700 Fellows recognized for their outstanding reputations and contributions to the field of tax law, and is governed by a Board of Regents consisting of one Regent from each federal judicial circuit, two Regents at large, the Officers of the College, and the last retiring President of the College.

This *amicus* brief is submitted by the College's Board of Regents and does not necessarily reflect the views of all members of the College, including those who are government employees.

This case presents an important and recurring issue in tax and administrative law—the ability of taxpayers to bring pre-enforcement challenges to federal tax regulations and other administrative tax guidance. The Fellows of the College regularly advise taxpayers on compliance with the tax laws, including onerous reporting and compliance requirements that do not affect the calculation of taxes imposed by the Internal Revenue Code. The Sixth Circuit's overly broad reading of the Anti-Injunction Act[2] effectively eliminates any meaningful ability to challenge the reporting and compliance requirements. This broad reading of the Anti-Injunction Act creates precisely the sort of Tax Exceptionalism—the outdated

[2] The Anti-Injunction Act, 26 U.S.C. § 7421(a), and the tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201, generally are interpreted conterminously. App. 5a; *Ecclesiastical Order of the ISM of AM, Inc. v. IRS*, 725 F.2d 398, 404–05 (6th Cir. 1984). References herein to the Anti-Injunction Act or AIA include both statutes.

doctrine that purports to exempt tax law from general administrative law principles—that this Court rejected in *Mayo Foundation for Medical Education and Research v. United States*, 562 U.S. 44 (2011), in the absence of unambiguous legislative justification for doing so.

The College is aware that the tax rule at issue in this case requires the collection of information regarding a type of "reportable transaction" that the Internal Revenue Service (the "Service" or "IRS") has identified as a "transaction of interest." The College has repeatedly voiced its support for the government's efforts to curtail tax shelters. However, the need for powerful enforcement tools in the attack on tax shelters does not justify the issuance of tax rules outside of the requirements of the Administrative Procedure Act ("APA") or other Congressionally enacted safeguards on regulatory action, or the insulation of such rules from judicial review on a pre-enforcement basis.

SUMMARY OF ARGUMENT

The IRS regularly issues rules regulating "an ever-expanding sphere of everyday life—from childcare and charity to healthcare and the environment." App. 62a. There is a problematic lack of clarity regarding when those rules can be challenged before enforcement.

If the AIA is read to preclude any pre-enforcement challenges to those rules, taxpayers will be left with no choice but to "'bet the farm' in order to bring an administrative challenge." *Id.* Such a result is particularly concerning for the Fellows of the College who advise taxpayers on how to comply with the tax

laws and whether to adhere to tax rules that were not issued in compliance with the Administrative Procedure Act or other congressionally mandated requirements, such as the Congressional Review Act, the Regulatory Flexibility Act and the Paperwork Reduction Act.

The Court has made clear that tax rules are subject to the same types of review as other administrative regulations when there is no explicit legislative justification for treating the regulations differently. *See, e.g.*, *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44 (2011). Although the AIA prohibits suits "for the purpose of restraining the assessment or collection of any tax," 26 U.S.C. § 7421(a), this Court recently explained that the terms "assessment" and "collection" do not extend to mere reporting requirements. *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 8 (2015). It follows that the AIA does not prevent taxpayers from bringing, or provide a basis for differential treatment regarding, pre-enforcement challenges to tax rules that do not involve the assessment or collection of taxes.

The College encourages the Court to conclude that the AIA does not preclude pre-enforcement challenges to regulatory reporting and compliance requirements that do not affect the assessment or collection of taxes imposed by the Internal Revenue Code.

ARGUMENT

I. The AIA does not preclude pre-enforcement challenges to regulatory reporting requirements.

The AIA applies only to prevent restraints on the assessment and collection of taxes. 26 U.S.C. § 7421. That proscription does not sweep in a challenge to an antecedent step to assessment and collection even if the lawsuit would have downstream effects on taxation. The phase of information gathering is separate from the phases of assessment and collection, and therefore, the information gathering requirements of Notice 2016-66, 2016-47 I.R.B. 745, do not implicate the AIA.

A. *Direct Marketing makes clear that the phases of assessment and collection are distinct from and follow the phase of information gathering.*

The government's broad reading of the AIA conflicts with the Court's holding on the meaning of "assessment" and "collection" in *Direct Marketing*. The Court in *Direct Marketing* was asked to determine whether a challenge to a sales tax reporting requirement violated the Tax Injunction Act ("TIA"). The TIA is a "cousin" statute to the AIA that states district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 7 (2015) (quoting 28 U.S.C. § 1341).

In order to determine the meaning of "assessment" and "collection" under the TIA, the Court used the

AIA for guidance by observing "that words used in both Acts are generally used in the same way." *Id*. at 8. The Court explained that it discerned the meaning of the terms in the AIA "by reference to the broader Tax Code." *Id.* "Although the TIA does not concern federal taxes, it was modeled on the Anti-Injunction Act (AIA), which does." *Id.*; *see also Hibbs v. Winn*, 542 U.S. 88, 100–01 (2004). The Court's analysis of the TIA clearly applies to the words of the AIA because the AIA is the basis for the Court's reading of the TIA.

The Court explained that "the Federal Tax Code has long treated information gathering as a phase of tax administration procedure that occurs before assessment, levy, or collection." *Direct Mktg.*, 575 U.S. at 8. The Court looked to the Tax Code and Black's Law Dictionary to define "assessment" as the "official recording of a taxpayer's liability, which occurs *after* information relevant to the calculation of that liability is reported" and "collection" as the "act of obtaining payment of taxes due." *Id.* at 9–10 (emphasis added). These activities are separate and distinct from information gathering. *Id.* at 8. The Court further explained that "restrain" could not be understood to include any activity that "merely inhibits those activities" because that broad reading would render assessment and levy as mere surplusage to collection. *Id.* at 12–14. Restrain means to "stop" or to "prohibit." *Id.* at 13–14. The Court's interpretation created clear boundaries that could be enforced, instead of a "'vague and obscure' boundary that would result in both needless litigation and uncalled-for dismissal." *Id.* at 14 (citation omitted).

Similarly here, the AIA cannot be read to include challenges to information gathering because it is a separate and "discrete phase[] of the taxation process." *Id.* at 8. The approach of the Sixth Circuit reads the word "restrain" to act on the word "tax" rather than "assessment" and "collection. "Restrain" cannot be read to be so sweeping that it would envelop the procedures and protections afforded by the Administrative Procedure Act and similar statutes. The Court's holding in *Direct Marketing* that the TIA is to be read narrowly applies equally here to its cousin statute, the AIA.

Other courts have similarly held that the AIA does not preclude all pre-enforcement challenges to tax regulations. For example, in *Chamber of Commerce v. IRS*, the Service sought to dismiss the Chamber's challenge to a tax rule by invoking the AIA. *See* No. 1:16-CV-944-LY, 2017 WL 4682050, at *1–3 (W.D. Tex. Oct. 6, 2017), *appeal dismissed*, No. 17-51063, 2018 WL 3946143 (5th Cir. July 26, 2018). The district court there, relying on *Direct Marketing*, correctly rejected that bid: "Plaintiffs do not seek to restrain assessment or collection of a tax against or from them or one of their members. Rather, Plaintiffs challenge the validity of the Rule so that a reasoned decision can be made about whether to engage in a potential future transaction that would subject them to taxation under the Rule. Further, the Rule is not a tax, but a regulation determining who is subject to taxation under provisions of the Internal Revenue Code." *Id.* at *3.[3]

[3] *See also Silver v. IRS*, No. 19-cv-247 (APM), 2019 WL 7168625, at *2 (D.D.C. Dec. 24, 2019).

B. *The remedy sought here is review of a reporting requirement, not restraint on the assessment and collection of taxes.*

1. *The AIA prohibits lawsuits that restrain the assessment and collection of taxes, and CIC's suit does neither.*

The AIA is intended to prohibit only lawsuits that seek to restrain the assessment and collection of taxes. Notice and reporting requirements are not themselves taxes—they are distinguishable precursors to the assessment or collection of a tax. *See Cohen v. United States*, 650 F.3d 717, 727 (D.C. Cir. 2011) (determining the applicability of the Anti-Injunction Act requires "careful inquiry into the remedy sought, the statutory basis for that remedy, and any implication the remedy may have on assessment and collection").

The remedy CIC sought in bringing this action is to enjoin the reporting requirements of Notice 2016-66. Pet'r's Br. 10. Notice 2016-66 is not a revenue generating provision. It only asks taxpayers to make disclosures of information for the Service to determine if a transaction is problematic. CIC has demonstrated "a clear interest—separate from any potential 'tax' liability—in avoiding the substantial costs of the reporting requirement. The 'purpose' of its lawsuit is to obtain relief from costs the company must pay today, not to restrain a penalty it might have to pay tomorrow." App. 64a (Thapar, J., dissenting from denial of rehearing en banc). CIC would not pay a tax at all with respect to the

challenged reporting requirement; at most, the "tax" would be the potential penalty for not meeting the reporting requirement.

Further, Notice 2016-66 states its purpose: "[T]he Treasury Department and the IRS lack sufficient information to identify which § 831(b) arrangements should be identified specifically as a tax avoidance transaction and may lack sufficient information to define the characteristics that distinguish the tax avoidance transactions from other § 831(b) related-party transactions." The Department and the Service are fact gathering to determine if a transaction is a tax avoidance transaction. Prior to a concrete conflict over actual dollars, there are no disputed sums to be lodged in the Treasury or recovered in a refund suit. Thus, there is no justification to convert the AIA's mechanism for funneling tax liability disputes through refund actions into a ban on challenging unlawful tax regulations.

As Justices Ginsburg and Breyer aptly pointed out, the congressional intention of the TIA is to prevent taxpayers from circumventing the "pay without delay, then sue for refund" regime. *See Direct Mktg.*, 575 U.S. at 19 (Ginsburg, J., concurring). "This suit does not implicate that congressional objective. The Direct Marketing Association is not challenging its own or anyone else's tax liability or tax collection responsibilities. And the claim is not one likely to be pursued in a state refund action." *Id.* So too, here, because CIC is not challenging its own or anyone else's tax liability or tax payment obligations, the congressional objective of the AIA is not implicated in this case.

2. *The penalty imposed by Notice 2016-66 is a regulatory tax and not a tax that the AIA intends to protect.*

Courts have found that not everything labeled a tax by the Service is a tax for purposes of the AIA. Some payments for violations are regulatory or punitive taxes and not revenue raising mandates.

In *Korte v. Sebelius*, the Seventh Circuit was asked to determine, in part, whether the AIA barred plaintiffs' challenge of the contraception mandate, and concluded "no." The court held, "[t]he contraception mandate is not itself a tax provision" and therefore the AIA did not preclude the lawsuit. 735 F.3d 654, 669 (7th Cir. 2013). The court acknowledged that if plaintiffs were successful they would also avoid any potential tax liability, but emphasized that the AIA "does not reach 'all disputes tangentially related to taxes.'" *Id.* at 670 (quoting *Cohen*, 650 F.3d at 727). "[R]estraining the assessment or collection of a tax must be the primary purpose of the lawsuit, not an incidental effect of it, for the Anti–Injunction Act to apply." *Id.* The court explained that the AIA does not apply to regulatory and punitive taxes and that "[t]he obvious aim of § 4980D is not to raise revenue but to achieve broad compliance with the regulatory regime through deterrence and punishment." *Id.* The distinction between a regulatory/punitive tax and a revenue generating tax was essential to the AIA analysis.

The Tenth Circuit reached a similar conclusion in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby*

Lobby Stores, Inc., 573 U.S. 682 (2014). Plaintiffs there also challenged the contraception mandate and the government argued that the AIA barred judicial review. The Tenth Circuit noted that "the AIA 'protects the Government's ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes.'" *Id.* at 1127 (quoting *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 543 (2012)).

> The statutory scheme makes clear that the tax at issue here is no more than a penalty for violating regulations related to health care and employer-provided insurance, *see, e.g.*, 42 U.S.C. § 300gg-22(b)(2)(C)(i) (calculating the maximum 'penalty' that the Secretary of HHS can impose on non-compliant insurers in the same way that 26 U.S.C. § 4980D(b)(1) calculates the 'tax' for non-compliant employers, namely '$100 for each day for each individual with respect to which such a failure occurs'), and the AIA does not apply to 'the exaction of a purely regulatory tax,' *Robertson v. United States*, 582 F.2d 1126, 1127 (7th Cir. 1978).

Hobby Lobby Stores, 723 F.3d at 1127–28.

As explained above, Notice 2016-66 is not a revenue generating provision. It imposes only a penalty for noncompliance with its reporting requirements. This is not a challenge to CIC's or anyone else's tax liability or tax collection responsibilities. *See Direct Mktg.*, 575 U.S. at 19 (Ginsburg, J., concurring). The Court does not face a

situation where the taxpayer is paying the Service to then dispute the amount the Service alleges is owed. Here, the Service has not determined whether the transaction will generate a tax liability. The Service notes as much stating, "[t]he Treasury Department and the IRS recognize that related parties may use captive insurance companies that make elections under § 831(b) for risk management purposes that do not involve tax avoidance." *See* Notice 2016-66. The AIA applies in cases where the government is seeking to assess or collect taxes due, but cannot be fairly read to apply in cases where there has not been—and may never be—any determination by the IRS of an assessed or to-be-collected tax liability.

II. Under the Administrative Procedure Act, citizens are permitted to challenge other laws, regulations and administrative guidance on a pre-enforcement basis unless the law clearly preempts such actions.

The College is an association of tax lawyers who are called upon to advise taxpayers on how to navigate the complex tax system Congress created, the extensive regulations Congress authorized Treasury to generate, and the innumerable notices, rulings, and other pronouncements the Service issues. One of the limitations on the agency's regulatory leeway is the Administrative Procedure Act. Reading the AIA to permit pre-enforcement review of the information gathering requirement at issue here preserves the purpose of the APA. And ensuring that rules created by Treasury and the Service comply with the requirements of the APA is essential to the efficient functioning of the tax system.

A. *The APA presumes pre-enforcement review of agency regulations and guidance.*

In other contexts, citizens are permitted to challenge laws, regulations, and other administrative guidance on a pre-enforcement basis, especially where civil and criminal penalties are imposed for noncompliance. *See, e.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) ("As we have long held, parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of 'serious criminal and civil penalties.'" (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967))).

The APA has a "presumption of reviewability for all final agency action." *Sackett v. Envtl. Prot. Agency*, 566 U.S. 120, 129 (2012). Its "generous review provisions" must be given a "hospitable" reading, with any ambiguity construed in favor of judicial review. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955). The burden is on the Service to justify its expansive reading of the AIA by "clear and convincing evidence" that Congress wanted to override the "broadly remedial provisions" of the APA for tax regulatory challenges. *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977). For the reasons set forth in the next section, the Service cannot meet this burden.

B. *Even when the law appears to preempt the APA, the APA will prevail if the law does not provide an adequate remedy.*

Respondents' position is inconsistent with this Court's oft-repeated holding that a plaintiff should not have to "bet the farm" to have their challenge to the law addressed. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490–91 (2010) (citation omitted). "Ordinarily, administrative law does not intend to leave regulated parties caught between a hammer and an anvil." App. 25a (Nalbandian, J., dissenting). The right to judicial review "is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law." *Wadley S. Ry. Co. v. Georgia*, 235 U.S. 651, 661 (1915).

Reading the AIA to require CIC to violate the challenged administrative guidance and incur the risk of daily penalties cannot be reconciled with the APA. Notice 2016-66 threatens to impose monetary penalties on a taxpayer per occurrence and per day for failing to comply with its reporting requirements.

> Persons required to disclose these transactions under § 1.6011-4 who fail to do so may be subject to the penalty under § 6707A. Persons required to disclose these transactions under § 6111 who fail to do so may be subject to the penalty under § 6707(a). Persons required to maintain lists of advisees under § 6112 who fail to do so (or who fail to provide such lists

> when requested by the IRS) may be subject to the penalty under § 6708(a).

Notice 2016-66; *see also* 26 U.S.C. § 6707 (imposing a $50,000 penalty for a failure to file a return in a reportable transaction); 26 U.S.C. § 6707A (imposing a maximum penalty of $200,000 for failure to file a return for a "listed transaction"); 26 U.S.C. § 6708 (imposing daily penalties of $10,000 if lists of advisees are not kept by a person required to keep such lists). These penalties are so burdensome that they may cause taxpayers not to bring meritorious challenges to the regulations.

> [W]hen the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts . . ., the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

Ex parte Young, 209 U.S. 123, 147 (1908). Under the Sixth Circuit's view, the taxpayers subject to Notice 2016-66 are rendered without any remedy in the face of ever mounting penalties if they do not comply. The APA does not allow such a conclusion even in the face of a statute that could preempt it.

Further, the Sixth Circuit's application of the AIA "raise[s] serious constitutional problems," and this Court is "obligated to construe the statute to avoid such problems." *INS v. St. Cyr*, 533 U.S. 289, 300 (2001). The doctrine of constitutional avoidance warrants construing the AIA consistent with due process. This is particularly true because the AIA is

a claims processing rule, which does not limit the jurisdiction of Article III courts to hear pre-enforcement challenges and is subject to equitable exceptions. *See Hobby Lobby Stores*, 723 F.3d at 1157–59 (en banc) (Gorsuch, J., concurring). "[O]ne has a due process right to contest the Validity of a legislative or administrative order affecting his affairs without necessarily having to face ruinous penalties if the suit is lost." *Brown & Williamson Tobacco Corp. v. Engman*, 527 F.2d 1115, 1119 (2d Cir. 1975).

The AIA must be read in harmony with the Due Process Clause and the APA. When a lawsuit seeks to prevent the assessment and collection of taxes, the taxpayer has a remedy via a refund suit. In this situation the APA is not affronted. When an information gathering requirement like Notice 2016-66 imposes substantial penalties, the taxpayer must violate the challenged administrative guidance and risk those penalties or forgo any remedy. That is an outcome the APA and the Due Process Clause cannot allow.

III. The decision below conflicts with this Court's rejection of Tax Exceptionalism.

The Court has rejected Tax Exceptionalism, the theory that tax operates under a different framework than other regulatory areas. This conclusion is ever more important as the Tax Code is used to legislate almost every aspect of our lives. Tax affects decisions on whether to buy a home and have children. *See, e.g.*, 26 U.S.C. § 163(h)(3) (deduction for qualified residence interest); 26 U.S.C. § 24 (child tax credit). Payments for medical care create deductions while

disfavored health choices are made more costly and thus dissuaded. *See, e.g.*, 26 U.S.C. § 213 (itemized deduction for certain medical expenses); 26 U.S.C. § 5001 (distilled spirits tax). Using the Tax Code, Congress may initiate relief to wrongly taxed veterans and promote philanthropy. *See, e.g.*, Combat-Injured Veterans Tax Fairness Act of 2016, Pub. L. No. 114-292, 130 Stat. 1500; 26 U.S.C. § 170.

The Court firmly rejected Tax Exceptionalism in the context of administrative deference in *Mayo Foundation for Medical Education & Research v. United States*, 562 U.S. 44 (2011). In *Mayo*, the parties argued over whether Treasury Department regulations were entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or whether they were subject to the less deferential standard announced in *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1979). The Court held that the *Chevron* standard applied and expressly rejected the view that Treasury Department regulations issued under general authority are owed "less deference" than those "issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision." *Mayo*, 562 U.S. at 56 (citation omitted). The Court explained that "[a]side from our past citation of *National Muffler*, Mayo has not advanced any justification for applying a less deferential standard of review to Treasury Department regulations than we apply to the rules of any other agency. In the absence of such justification, we are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly '[r]ecogniz[ed] the

importance of maintaining a uniform approach to judicial review of administrative action.'" *Id.* at 55 (quoting *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999)). "We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations." *Id.* at 56.

The AIA creates an exception from the general rule under the APA that executive branch rules are subject to pre-enforcement review. That exception preserves the requirement that taxpayers pay taxes when assessed and then sue for refunds. Thus, the justification for the exception is cabined by the language of the AIA on whether the lawsuit was filed "for the purpose of restraining the assessment or collection of any tax." Because the regulatory reporting requirement at issue here falls outside of the express terms of the AIA, exempting the rule from pre-enforcement review cannot be justified.

The absence of justification is particularly important because the Service's position would effectively deny taxpayers a meaningful opportunity to challenge the validity of its regulatory reporting requirement. In addition to its daily effects on personal lives, as a practical matter, the risks of non-compliance for a business may be higher than merely the potential financial penalty. Being the target of an agency enforcement proceeding may itself be a prohibitive cost, if it scares customers, troubles partners, or emboldens competitors. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967) (observing that "petitioners deal in a sensitive industry, in which public confidence in their drug products is especially important," so requiring them "to challenge these

regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily"), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977). These risks have only grown in the age of social media which can cause irreversible harm to a business's reputation and stock value.[4] By effectively requiring taxpayers to "bet the farm" to challenge the types of tax rules at issue in this case, i.e., to intentionally not comply and then have that headline reported in the papers, and splayed across social media, the Sixth Circuit revives the doctrine of Tax Exceptionalism by insulating tax rules—and only tax rules—from effective judicial review.

Lastly, reading the AIA to preclude pre-enforcement challenges to regulatory reporting requirements would require tax lawyers, including Fellows of the College, to advise their clients to intentionally violate an administrative tax rule in order to challenge the provision. Such a reading of the AIA puts lawyers in an ethical quandary because lawyers may not counsel a client to engage in criminal conduct or conduct that is prejudicial to the administration of justice, but lawyers may assert a position for which there is a basis in law or fact that is not frivolous. Model Rules of Prof'l Conduct r. 1.2(d); 3.1; 8.4 (c), (d) (Am. Bar Ass'n 1983). Requiring tax lawyers to advise their clients not to file a required return in order to obtain review

[4] The risks are even more acute for low-income taxpayers. *See generally* Br. of The Center for Taxpayer Rights as *Amicus Curiae* in Support of Pet'r.

of the regulatory requirement forces lawyers to sail between Scylla and Charybdis as they navigate these ethical rules and their ill-defined duties to the tax system.[5]

Further, various professional organizations and licensing boards regulating other tax professionals likewise prohibit such intentional violations of known administrative requirements. For example, Standard No. 11 of The National Association of Tax Professionals Standards of Professional Conduct states: "A member has a responsibility to comply with laws and regulations, including, but not limited to, the timely filing, payment, and accurate preparation of all personal and business tax related documents and obligations relating to the member or his/her business." Treasury Department Circular 230 § 10.34(b)(2) states "[a] practitioner may not advise a client to submit a document, affidavit or other paper to the Internal Revenue Service – (i) The purpose of which is to delay or impede the administration of Federal tax laws; . . . or (iii) That contains or omits information in a manner that demonstrates an

[5] *See, e.g.*, John S. Dzienkowski & Robert J. Peroni, *The Decline in Tax Adviser Professionalism in American Society*, 84 Fordham L. Rev. 2721, 2725 (2016) (describing the longstanding debate over the tax lawyer's role and arguing that, although the lawyer has a duty to the system, "concrete guidance" on the scope of that duty is needed); Camilla E. Watson, *Tax Lawyers, Ethical Obligations, and the Duty to the System*, 47 U. Kan. L. Rev. 847, 851 (1999) (recognizing the contested question of how a tax lawyer's duties conflict and arguing that there is no discrete duty by the lawyer to the tax system); Linda Galler, *The Tax Lawyer's Duty to the System*, 16 Va. Tax Rev. 681, 688 (1997) (taking the position that when a lawyer's two duties collide, the duty to the system takes priority).

intentional disregard of a rule or regulation unless the practitioner also advises the client to submit a document that evidences a good faith challenge to the rule or regulation." There is no way to accomplish "a good faith challenge to the rule or regulation" here as one cannot challenge Notice 2016-66 while complying with its mandate. The Court can alleviate this tension by allowing pre-enforcement review of administrative rules like Notice 2016-66 that do not generate revenue for the Service. The AIA does not prohibit challenges to these rules, and the Court need not leave the Petitioners without due process or a remedy.

CONCLUSION

The Sixth Circuit's departure from the general administrative law right to pre-enforcement review is not mandated by the text of the AIA. Pre-enforcement review of an information gathering requirement does not stop or prohibit the assessment or collection of taxes and thus is not within the ambit and purpose of the AIA. The Court should therefore confirm the limited reach of the AIA to preserve an effective national tax enforcement system based on uniform, predictable, and comprehensible rules.

Respectfully submitted,

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