No.

In the Supreme Court of the United States

ALTERA CORPORATION & SUBSIDIARIES,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For nearly a century, federal tax treatment of agreements between related companies (such as parents and subsidiaries) has depended on the "arm's-length" standard: If unrelated companies operating at arm's length would share a cost, then related companies must share the cost as well. 26 U.S.C. 482; 26 C.F.R. 1.482-1(b)(1). The United States has incorporated the arm's-length standard into many tax treaties, and all major developed nations now follow it.

In 2003, the Treasury Department promulgated a regulation, purporting to follow the arm's-length standard, in which it required related companies to share the cost of stock-based employee compensation. 26 C.F.R. 1.482-7(d)(2) (2003). In a 15-0 decision, the Tax Court invalidated the regulation as arbitrary and capricious. On appeal, the government abandoned the arm's-length standard and proposed a new rationale never advanced during the rulemaking process. A divided panel of the Ninth Circuit upheld the regulation as "permissible" and therefore entitled to deference under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The questions presented are:

1. Whether the Treasury Department's regulation is arbitrary and capricious and thus invalid under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*

2. Whether, under *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), the regulation may be upheld on a rationale the agency never advanced during rulemaking.

3. Whether a procedurally defective regulation may be upheld under *Chevron* on the ground that the agency has offered a "permissible" interpretation of the statute in litigation.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Altera Corporation and its subsidiaries. Petitioners are wholly-owned subsidiaries of Intel Corporation. Intel Corporation is a publicly-held company, and no publicly-held company owns 10% or more of its stock.

Respondent is the Commissioner of Internal Revenue.

RELATED PROCEEDINGS

United States Tax Court:

Altera Corp. v. *Commissioner*,
No. 31538-15 (Dec. 18, 2015)

Altera Corp. v. *Commissioner*,
No. 674-18 (Jan. 11, 2018)

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INTRODUCTION

This is a clear case of administrative agency overreaching, rubber-stamped by a court of appeals. The Treasury Department promulgated a regulation addressing a tax issue about stock-based compensation that is worth billions of dollars. The agency purported to apply a longstanding tax-law standard (the arm's-length standard), but provided no evidence to satisfy that standard and ignored the voluminous evidence to the contrary. In a 15-0 decision, the judges of the Tax Court invalidated the regulation as a paradigmatic example of arbitrary and capricious decisionmaking.

On appeal, the IRS recognized that it could not prevail based on the settled legal standard and the administrative record. So it made a new statutory argument – one it had never advanced in the rulemaking. A divided panel of the Ninth Circuit not only accepted that new rationale, but gave it *Chevron* deference – without ever solving the fundamental problems identified by the Tax Court.

The government and the Ninth Circuit did not follow the basic rules of administrative law set out by this Court. Those rules exist for good reason. An agency must give interested parties fair notice and an opportunity to comment on a proposed rule, to ensure that regulated entities understand their legal obligations, and to produce a rule that reflects the collective expertise of industry participants. See *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins.*, 463 U.S. 29, 46-57 (1983). If the agency wants to change its longstanding position, it must acknowledge and explain the change. *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125-2126 (2016). A reviewing court "must judge the propriety of [agency] action solely by the grounds invoked by the agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). And when a regulation is arbitrary and capricious, a reviewing court cannot ignore the rule's problems and "fix" the rule by giving a new agency interpretation *Chevron* deference. See *Judulang* v. *Holder*, 565 U.S. 42, 52 & n.7 (2011).

The Ninth Circuit's decision to ignore the settled rules applicable to administrative agencies will have serious consequences if uncorrected. The government is seeking to impose billions of dollars in taxes on companies across the United States based on a position it made up in litigation. The government's new position reflects a dramatic departure from its decades-long approach to cost sharing and upends many companies' research-and-development agreements. The destabilizing effects of the Ninth Circuit's decision go well beyond the particular tax issue here, because the decision upsets settled principles of tax law embodied in domestic law and in virtually all tax treaties with foreign nations. More broadly, the Ninth Circuit's dramatic expansion of *Chevron* paves the way for other administrative agencies to ignore the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and evade meaningful judicial review.

The government's bait-and-switch is indefensible. The Ninth Circuit's errors are glaring, and the issues are exceptionally important. This Court should grant certiorari.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-78a) is reported at 926 F.3d 1061. The opinion of the Tax Court (App., *infra*, 79a-139a) is reported at 145 T.C. 91.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2019. A timely petition for rehearing was denied on November 12, 2019 (App., *infra*, 140a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutes and regulations are reprinted in the appendix to this petition. App., *infra*, 168a-194a.

STATEMENT

A. Multinational Companies' Use Of Cost-Sharing Agreements

Petitioner Altera Corporation was the U.S. parent company of a group of companies that made programmable logic devices (electronic components used to build circuits) and related hardware and software. App., *infra*, 18a-19a, 82a-83a. Altera entered into agreements with one of its foreign subsidiaries to work together to develop intangible property. *Ibid.* Under those agreements, the two companies would share research-and-development costs, and each would have rights in the property created. *Ibid.*

Agreements like that are common. Both related and unrelated companies routinely enter into them to share the costs and the risks of a new venture. IRS, *APA Training: Cost Sharing* 5 (Oct. 15, 2001), https://perma.cc/3Q5W-TYHY. If the venture is successful, each company can use the jointly developed intellectual property without paying a royalty. *Id.* at 4. The IRS has long recognized and encouraged the use of these cost-sharing arrangements. See IRS, Notice 88-123, *A Study of Intercompany Pricing Under Section 482 of the Code*, 1988-2 C.B. 458, 493 (*White Paper*).

B. Tax Treatment Of Related-Company Transactions And The Arm's-Length Standard

1. This case concerns the federal tax treatment of cost-sharing agreements between commonly controlled companies, such as a parent and subsidiary. Those agreements create taxable income when one company reimburses the other for its share of the costs.

Federal tax law provides a straightforward way to determine whether related companies must share a cost: Whether the government can require *related* companies to share a cost depends on whether *unrelated* companies would do so. That comes from the Internal Revenue Code itself. The Code authorizes the Secretary of the Treasury to allocate income, deductions, credits, or allowances between related organizations "clearly to reflect the income" of each organization. 26 U.S.C. 482. "[C]learly to reflect the income" reflects the tax parity principle – the principle that related parties should be treated the same as unrelated parties for tax purposes. *Commissioner* v. *First Sec. Bank of Utah, N.A.*, 405 U.S. 394, 400 (1972); see 26 C.F.R. 1.482-1(a)(1) (defining tax parity).

The arm's-length standard is the method used to ensure tax parity. Treasury regulations require the Commissioner to use the arm's-length standard "in every case" under Section 482. 26 C.F.R. 1.482-1(b)(1). The regulations specify how that standard works: Look to "the results of comparable transactions under comparable circumstances" – meaning how unrelated parties actually behave. 26 C.F.R. 1.482-1(b)(1) and (c). That empirical analysis of unrelated-party behavior is "essentially and intensely factual." *Procacci* v. *Commissioner*, 94 T.C. 397, 412 (1990).

2. The arm's-length standard has been a settled feature of federal tax law for nearly a century. The Internal Revenue Code has included the tax parity principle since 1928. Revenue Act of 1928, Pub. L. No. 70-562, § 45, 45 Stat. 791, 806. Since 1935, Treasury regulations have required the Commissioner to use the arm's-length standard "in every case" to ensure tax parity under the statute. Treas. Reg. 86, art. 45-1(b) (1935). And tax regulations have for decades applied the arm's-length standard to cost-sharing arrangements. See 26 C.F.R. 1.482-2(d)(4) (1968).

The United States has incorporated the arm's-length standard into tax treaties for at least 80 years. See, *e.g.*, Convention Concerning Double Taxation, Fr.-U.S., art. IV, Apr. 27, 1932, 49 Stat. 3145, 3145-3146 (1935); see also App., *infra*, 85a-86a. As a result, the arm's-length standard is the "international norm" for determining the tax treatment of related-company transactions. *White Paper* 475. The standard provides certainty about how to measure income and prevents double taxation when related companies operate in different jurisdictions. *Ibid.*

C. The Treasury Department's Regulation On Stock-Based Compensation

1. The question here is whether the government can require related companies that have agreed to share research-and-development costs to share stock-based compensation that one company pays to its employees.

In the 1990s, as stock options and other forms of stock-based compensation became more common, the Treasury Department decided to require related parties to treat stock-based compensation as a shared cost. App., *infra*, 16a-17a. The problem for the government is that unrelated companies that enter into joint research-and-development ventures do not treat stock-based compensation as a shared cost. *Id.* at 34a. That is because stock-based compensation is speculative, difficult to value, and dependent on factors outside the issuing company's control. *Id.* at 133a; see *Wisconsin Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2070-2071 (2018) (explaining how stock options are not like money). So the actual evidence of arm's-length transactions in the real world contradicts the government's position.

In 1995, the Treasury Department promulgated a regulation requiring related taxpayers to share "all of the costs" of developing intangible property, 26 C.F.R. 1.482-7(d)(1) (1995), and it interpreted "all of the costs" to include stock-based compensation, *Xilinx Inc.* v. *Commissioner*, 125 T.C. 37, 52 (2005), aff'd, 598 F.3d 1191 (9th Cir. 2010).

The Tax Court rejected that interpretation, explaining that the government could not require related companies to share stock-based compensation when it "presented no evidence or testimony" showing that unrelated companies would do so. *Xilinx*, 125 T.C. at 54. The Ninth Circuit affirmed. 598 F.3d at 1197.

2. In 2003, the Treasury Department issued a new cost-sharing regulation – the regulation at issue here. That regulation expressly requires related parties that enter into cost-sharing agreements to share stock-based compensation. See 26 C.F.R. 1.482-7(d)(2) (2003) (now numbered 26 C.F.R. 1.482-7A(d)(2)) (operating expenses "include all costs attributable to compensation, including stock-based compensation"); see also 26 C.F.R. 1.482-7(d)(1) (2003) (requiring related parties in a cost-sharing agreement to share all operating expenses).

In the notice of proposed rulemaking, the government asserted that the new rule would satisfy the arm's-length standard. App., *infra*, 210a. But industry groups, accounting firms, and tax experts disagreed. *Id.* at 229a. They provided overwhelming, undisputed evidence that unrelated parties do not share stock-based compensation in any kind of transaction, including in comparable research-and-development agreements. *Id.* at 98a-101a; see *id.* at 229a-231a.

That evidence included examples of agreements in which unrelated companies did not share stock-based compensation costs, App., *infra*, 99a-100a, 230a-232a; results of surveys and SEC queries reporting no such agreements, *id.* at 99a; statements from tax professionals that they knew of no such agreements, *id.* at 99a, 101a; federal government contracting regulations that prohibit treating stock-based compensation as a cost in cost-plus contracts, *id.* at 100a-101a, 229a-

230a; and detailed economic analyses explaining why unrelated parties do not share stock-based compensation costs, *id.* at 101a.

In the final rule, the government dismissed all of that evidence. App., *infra*, 229a-234a. It disregarded the examples of arm's-length transactions provided by the commentators as insufficiently comparable. *Id.* at 231a. Instead of providing its own evidence, the government relied on its "belie[f]" that unrelated parties would share stock-based compensation costs, and on a hypothetical comparable transaction the agency made up to support its belief. *Id.* at 230a, 232a-233a.

The government never said that it was abandoning the arm's-length standard or adopting a new approach to cost-sharing. Instead, it claimed that requiring related companies to share stock-based compensation "is consistent with the arm's length standard." App., *infra*, 234a-235a, 238a, 246a; see *id.* at 228a (agency's statement that it was applying "established principles under section 482").

The IRS applied its new regulation to petitioners and issued notices of deficiency for 2004 through 2007. App., *infra*, 20a. Petitioners challenged those determinations in the Tax Court. *Ibid.*; see 26 U.S.C. 6213(a) (Tax Court's jurisdiction).

D. The Tax Court's Decision

In a 15-0 decision, the Tax Court invalidated the regulation as arbitrary and capricious and therefore invalid under the APA. App., *infra*, 79a-139a. The Tax Court observed that the relevant statute and regulations require the government to use the arm's-length standard. *Id.* at 117a-118a. The court concluded that the government failed to justify its regulation under that standard, because the government did not provide "any evidence of any actual transaction between unrelated parties" in which stock-based compensation was shared, or any "expert opinions, empirical data, or published or unpublished articles, papers, surveys, or reports" supporting its view. *Id.* at 102a-103a.

In fact, the Tax Court found that all the evidence in the administrative record supported the *opposite* view. App., *infra*, 135a-136a. When faced with that evidence, the government simply ignored or discounted it, and failed to "meaningfully respond to numerous relevant and significant comments." *Id.* at 130a-135a. The Tax Court emphasized that the agency based its rule on its own "belief," rather than on any relevant experience or technical expertise. *Id.* at 127a.

The Tax Court concluded that the government's "*ipse dixit* conclusion, coupled with its failure to respond to contrary arguments resting on solid data, epitomize[d] arbitrary and capricious decisionmaking." App., *infra*, 139a (internal quotation marks omitted); see *id.* at 138a (concluding that "the final rule fails to satisfy *State Farm*'s reasoned decisionmaking standard and therefore is invalid"). All fifteen Tax Court judges understood the agency to be using the settled arm's-length standard; not one judge read the regulation to dispense with that standard. See *id.* at 118a-119a ("[T]he preamble to the final rule does not justify the final rule on the basis of any modification or abandonment of the arm's-length standard.").

E. The Ninth Circuit's Decision

1. On appeal, the IRS changed position. Rather than attempt to justify the regulation under the settled arm's-length standard, the IRS claimed that the

regulation had "changed the legal landscape" so that now "comparability analysis plays no role in determining" what costs must be shared. IRS C.A. Br. 30. The IRS asserted that a different part of the underlying statute allows it to make its own "internal" judgment about what would be an "arm's length result," without consideration of what unrelated parties actually do in the real world. *Id*. at 50.[1]

That different part of the statute addresses how to value transfers of intangible property from one related entity to another. It provides: "In the case of any transfer (or license) of intangible property," an organization's "income with respect to such transfer or license shall be commensurate with the income attributable to" that property. 26 U.S.C. 482. That language does not apply here; it is limited to transfers and licenses of existing intangible property, and only when there are no comparable transactions. App., *infra*, 52a-54a (O'Malley, J., dissenting).

The IRS previously had acknowledged that this language was *not* intended to override the settled arm's-length standard. *White Paper* 475 & n.149 (concluding that Congress "intended no departure from the arm's length standard" when it enacted the "commensurate with the income" language). And in the final rulemaking, the Treasury Department stated that the "commensurate with the income" language was "*consistent with* the arm's length standard." App., *infra*, 230a (emphasis added).

Nonetheless, the IRS told the court of appeals that the "commensurate with the income" language permits it to abandon the settled arm's-length standard

[1] The IRS suggested this argument to the Tax Court, IRS T.C. Partial Summ. J. Mem. 41, but the Tax Court declined to consider it because it was not the basis for the rule, App., *infra*, 122a.

and make up a new way of deciding whether stock-based compensation costs should be shared. IRS C.A. Br. 49-50. The IRS's new rationale appeared nowhere in the rulemaking record. If it had, many industry groups, tax professionals, and other interested parties would have had a chance to respond, and undoubtedly would have explained the many problems that would follow from abandoning the settled arm's-length standard.

2. A divided panel of the court of appeals accepted the IRS's argument. See App., *infra*, 262a-322a. Judge Reinhardt was a member of the panel majority, and the opinion was issued after his death. *Id.* at 262a n.*; see *Yovino* v. *Rizo*, 139 S. Ct. 706, 707 n.* (2019) (per curiam). The court withdrew the opinion and re-heard the case with a new judge. App., *infra*, 323a.

3. The new panel of the court of appeals again reversed, again over a dissent. App., *infra*, 1a-78a. The panel majority first asked (*id.* at 23a) whether the IRS's new interpretation of the statute was "permissible" under *Chevron, U.S.A., Inc.* v. *Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984) – even though that interpretation had been raised for the first time in litigation, and even though the Tax Court had found the regulation procedurally defective and therefore ineligible for *Chevron* deference.

Relying on the "commensurate with the income" language and its own view of the statute's "purpose," the panel accepted the IRS's new interpretation. App., *infra*, 25a-29a. The panel concluded that it was "reasonable" for the IRS to ignore all evidence of what unrelated parties do and use its own "purely internal methodology" instead. *Id.* at 36a-37a.

After applying *Chevron* deference, the panel decided that the regulation was not arbitrary or capricious. It took the view that the passing "citations to legislative history" of the "commensurate with the income" language gave sufficient notice during the rulemaking that the agency was "do[ing] away with analysis of comparable transactions." App., *infra*, 36a-37a. The panel also concluded that because the agency abandoned the settled standard, it was not required to respond to the many comments about how its rule does not meet that standard. *Ibid.* That is, the panel used its *Chevron* analysis to excuse the problems the Tax Court found with the regulation. *Id.* at 37a.

In dissent, Judge O'Malley explained that the panel violated foundational principles of administrative law by upholding the regulation on a "justification [the agency] never provided" during the rulemaking process. App., *infra*, 48a. She agreed with the Tax Court that the regulation is arbitrary and capricious, *id.* at 58a-67a, and explained that a court cannot save an invalid regulation by giving it *Chevron* deference, especially using an argument made for the first time in litigation, *id.* at 70a, 75a.

4. The court of appeals denied rehearing *en banc.* App., *infra*, 146a. Ten judges recused themselves. *Ibid.*

Judge Milan Smith dissented, joined by Judges Callahan and Bade. App., *infra*, 146a-167a. He explained that "[t]he APA does not allow an agency to reclassify the reasoning it articulated to the public as 'extraneous observations,' ignore public comments pointing out the failures in such reasoning, and then defend its rule in litigation using reasoning the public never had notice of." *Id.* at 159a (citation omitted).

Like all fifteen Tax Court judges, Judge Smith and the other dissenting judges described the agency's actions in this case as "the epitome of arbitrary and capricious rulemaking," App., *infra*, 146a, because the agency said it was applying the "traditional arm's length standard," yet "made no attempt to search for evidence supporting its conclusion" and ignored the record evidence that contradicted its view, *id.* at 156a-157a. The agency's rule cannot be resurrected using *Chevron* deference, Judge Smith explained, both because the rule is procedurally invalid, and because the agency's interpretation was nothing more than a "convenient litigating position." *Id.* at 158a-159a, 161a-163a. And Judge Smith expressed concern about the many "deleterious practical consequences" of the panel's decision, including that it "tramples on the longstanding reliance interests of American businesses"; upsets domestic tax law; and calls into question many international treaties that incorporate the arm's-length standard. *Id.* at 164a-166a.

REASONS FOR GRANTING THE PETITION

The Treasury Department and the IRS violated fundamental rules of administrative law in their rush to fill the federal coffers. The Ninth Circuit made it worse by expanding *Chevron* to defer to an interpretation offered for the first time in litigation and uphold a procedurally invalid rule. The Ninth Circuit's refusal to follow settled rules of administrative law, and its new and expansive interpretation of *Chevron*, warrant this Court's review.

If uncorrected, the Ninth Circuit's decision will have real and significant consequences. This is a paradigmatic case of agency overreaching that cries out for this Court's review. Nineteen federal judges described the agency's actions here as the "epitome of arbitrary and capricious rulemaking." App., *infra*, 146a (Smith, J., dissenting from denial of rehearing); *id.* at 49a (O'Malley, J., dissenting), *id.* at 139a (Tax Court).

The underlying federal tax issue about stock-based compensation is enormously important. It affects many companies across the United States, with billions of dollars at stake. The agency's decision to abandon the arm's-length standard in this context upsets domestic law and the settled expectations of the United States' treaty partners. The issues have been fully vetted and are ready for this Court's review. The Court should grant certiorari now.

A. The Ninth Circuit's Decision Violates Bedrock Principles Of Administrative Law

The Ninth Circuit committed three serious errors that warrant this Court's intervention. First, that court upheld an arbitrary and capricious regulation that is invalid under the APA. Second, the court upheld the regulation based on a rationale the agency developed for the first time in litigation. Third, the court tried to solve both of those problems through an unwarranted expansion of *Chevron*. This Court should grant certiorari to enforce the settled limits on administrative agency action and stop the further expansion of *Chevron*. See Sup. Ct. R. 10(a) and (c).

1. The Ninth Circuit upheld an arbitrary and capricious regulation

The Ninth Circuit exempted the Treasury Department and the IRS from the basic rules applicable to administrative agency rulemaking, in violation of *Motor Vehicle Manufacturers Association of the United States, Inc.* v. *State Farm Mutual Automobile Insurance*, 463 U.S. 29 (1983).

The APA mandates notice-and-comment rulemaking for regulations that have the force of law so that regulated parties have "fair notice" and can provide input to help the agency develop a well-reasoned, workable rule. See *Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019); *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 174 (2007); see also 5 U.S.C. 553(b) and (c). The APA requires agencies to give reasoned explanations for their decisions in the rulemaking process "to ensure that [they] offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public." *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2575-2576 (2019). Those rules apply to the Treasury Department and the IRS just as they apply to every other administrative agency. See *Mayo Found. for Med. Educ. & Research* v. *United States*, 562 U.S. 44, 55 (2011) (refusing to "carve out an approach to administrative review good for tax law only").

Throughout the rulemaking proceeding here, everyone understood that the settled arm's-length standard applied. As a result, the agency could require related parties to share stock-based compensation only if evidence established that unrelated parties operating at arm's length would do so. The Treasury Department purported to apply the arm's-length standard, and it stated that whether that standard is satisfied depends on an empirical and factual analysis of real-world behavior of unrelated parties. See App., *infra*, 231a, 234a; see also *id.* at 225a-261a (mentioning the arm's-length standard 33 times).

Accounting firms, organizations of tax professionals, industry groups, and other experts took the government at its word. They provided extensive evidence demonstrating that unrelated parties would not share stock-based compensation, including examples of arm's-length joint-development agreements in which parties did not share it; surveys of their members and searches of databases finding no agreements in which parties shared it; and model accounting procedures and federal government regulations prohibiting that sharing. App., *infra*, 99a-101a. The government did not question the accuracy or credibility of any of that evidence. *Id.* at 135a. Instead, the government ignored or dismissed that evidence because it was inconvenient. *Id.* at 134a-135a. The government had no empirical evidence of its own, so it cited its own "belie[f]" and a hypothetical comparable transaction. *Id.* at 232a-233a.

After examining the record, the Tax Court unanimously and correctly concluded that the regulation "epitomizes arbitrary and capricious decisionmaking." App., *infra*, 139a (internal quotation marks omitted). The Tax Court explained that the agency did not provide facts to support its view or respond to significant comments, and the agency's conclusion was "contrary to all of the evidence before it." *Id.* at 138a; see *id.* at 157a (Smith, J., dissenting from denial of rehearing) (agency's "stated reasons" for its rule were "belied by the evidence"; "no empirical data support[ed] [its] conclusion"; and it "made no attempt to search for evidence supporting its conclusion"). That should have "be[en] the end of [the] analysis," *id.* at 157a (Smith, J., dissenting from denial of rehearing), because the APA requires a reviewing court to set aside a regulation that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. 706(2)(A). Instead, the Ninth Circuit used *Chevron* deference to give the agency the green light to assess billions of dollars in taxes based on a rule that flunks the APA.

2. The Ninth Circuit upheld the regulation on a rationale advanced for the first time in litigation

Rather than review the agency's regulation on the rulemaking record, the Ninth Circuit upheld the regulation on a new rationale that the government advanced for the first time in litigation, in violation of *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947).

After the IRS lost in the Tax Court, it abandoned its longstanding position that it must satisfy the arm's-length standard. The government did not "meaningfully dispute the Tax Court's determination that [its] analysis under the arm's length standard was inadequate and unsupported." App., *infra*, 63a (O'Malley, J., dissenting). Instead, it attempted to achieve its desired result by interpreting the "commensurate with the income" language to allow it to adopt its own "purely internal" rule. IRS C.A. Br. 48-52. The government claimed that under its new interpretation, "comparability analysis plays no role in determining" what costs must be shared. *Id.* at 30.

No one involved in the rulemaking understood the agency to be abandoning the settled arm's-length standard and interpreting "commensurate with the income" to justify a new and different standard. As the Tax Court explained, the government "d[id] not justify the final rule on the basis of any modification or abandonment of the arm's-length standard." App., *infra*, 118a-119a. Instead, the government purported to use the arm's-length standard, calling it an "established principle[]" of tax law. *Id.* at 228a. The final rule mentioned the "commensurate with the income" language only once, and only to reaffirm that it is "consistent with the arm's length standard." *Id.* at 230a.

The Ninth Circuit recognized that the agency never articulated its new interpretation in the rulemaking record. App., *infra*, 46a. The best that court could do is claim that the agency's "citations to legislative history" made it "clear enough" that the Treasury Department had decided "to do away with analysis of comparable transactions." *Id.* at 36a. But that unsupported assertion is belied by the utter absence of comments on the subject from the affected companies, tax professionals, and others who commented extensively on the proposed regulation. Tellingly, not one of the fifteen Tax Court judges – experts who closely analyzed the rulemaking record – understood that record to reveal a proposal to change the settled arm's-length standard. See *id.* at 118a-119a.

If the agency wanted to change its longstanding position, it was required to expressly acknowledge and explain that change. See *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125-2126 (2016); *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *State Farm*, 463 U.S. at 42. Here, the agency did nothing of the sort, depriving the regulated community and other interested parties of the notice required by the APA and this Court's precedents. See *Coke*, 551 U.S. at 174; *National Lifeline Ass'n* v. *FCC*, 921 F.3d 1102, 1115 (D.C. Cir. 2019). If the agency had provided the required notice, the regulated community no doubt would have submitted extensive comments addressing the proposed change. See *Chisom* v. *Roemer*, 501 U.S. 380, 396 n.23 (1991).

As a result, the only way the court of appeals could uphold the rule was by accepting the IRS's "convenient litigating position" that "it permissibly jettisoned the traditional arm's length standard altogether." App., *infra*, 159a (Smith, J., dissenting from denial of rehearing). The problem, of course, is that a reviewing court "must judge the propriety of [the agency's] action solely by the grounds invoked by the agency" in the administrative record. *Chenery*, 332 U.S. at 196; see, *e.g.*, *Michigan* v. *EPA*, 135 S. Ct. 2699, 2710 (2015) (noting "the foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action"); *State Farm*, 463 U.S. at 50 (explaining that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself"). That rule ensures that an agency cannot say one thing in a rulemaking proceeding, and then change its mind as soon as the rule is challenged in court – just what the agency did here.

3. The Ninth Circuit impermissibly expanded* Chevron *to attempt to solve those problems

It would have been bad enough if the Ninth Circuit merely had overlooked the problems identified by the Tax Court, or upheld the regulation on a new rationale not advanced during rulemaking. But the Ninth Circuit went a step further, using the *Chevron* deference doctrine to paper over the serious problems with the regulation – problems that precluded the court from applying *Chevron* in the first place.

Chevron is a limited doctrine, authorizing courts to defer to an agency's reasonable interpretation of a statute Congress has authorized it to administer, when the agency has set out that interpretation through notice-and-comment rulemaking or a formal adjudication. *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); see *Encino Motorcars, LLC*, 136 S. Ct. at 2125. The Ninth Circuit's decision expands *Chevron* beyond its breaking point.

a. The Ninth Circuit began its legal analysis with *Chevron*, asking whether the agency's ultimate choice to "do away with" the settled arm's-length standard was a "reasonable" one. App., *infra*, 22a-23a, 26a, 36a. But the Tax Court had invalidated the regulation under the APA's reasoned-decisionmaking standard because the agency failed to support its rule with facts, failed to explain its conclusions, and failed to account for contrary evidence in the rulemaking record. *Id.* at 138a-139a.

A court cannot grant *Chevron* deference to a regulation that is "procedurally defective" because, for example, it failed to satisfy the reasoned-decisionmaking standard. *Encino Motorcars, LLC*, 136 S. Ct. at 2125. That is because a regulation invalidated under the APA "cannot carry the force of law," and so there is nothing to which a court can defer. *Id.* at 2126. If the rule were otherwise, the requirements of the APA would be meaningless. This Court made just that point in *Judulang* v. *Holder*, 565 U.S. 42 (2011), when it rejected the government's invitation to uphold an immigration regulation under *Chevron*, *id.* at 52 n.7. The Court explained that the regulation was arbitrary and capricious and therefore necessarily failed the second step of *Chevron*. *Ibid.*; see App., *infra*, 138a n.29 (Tax Court made the same point in this case).

The Ninth Circuit eventually addressed whether the Treasury Department's regulation complies with the APA. App., *infra*, 32a-38a. But it did not independently analyze that issue. Instead, it reasoned that because the government's new rationale was a "permissible" one under *Chevron*, *id.* at 29a, the rulemaking proceeding became irrelevant. The government did not have to address the comments about how the rule failed to satisfy the arm's-length standard, the court stated, because the government decided to "do away with analysis of comparable transactions." *Id.* at 36a. The Ninth Circuit only concluded that the APA was satisfied because it already had decided that the IRS's new view was an acceptable interpretation of the statute. By upholding the regulation under *Chevron*, the court retroactively excused the agency's failure to justify the regulation under the standard the agency itself claimed to apply.

b. The Ninth Circuit also seriously erred in giving *Chevron* deference to an agency interpretation offered for the first time in litigation. *Chevron* deference is available when an agency "proceed[s] through notice-and-comment rulemaking" because that "relatively formal administrative procedure is a very good indicator that Congress intended the regulation to carry the force of law." *Encino Motorcars, LLC*, 136 S. Ct. at 2125 (internal quotation marks omitted). Deference to an agency's "litigating position" is "entirely inappropriate," *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988), because the agency's formulation of its litigating position has none of the protections or benefits of the notice-and-comment process. Nevertheless, the Ninth Circuit here used *Chevron* to excuse any *Chenery* problem, on the ground that the agency's new rationale was "permissible" and therefore deserving of deference. App., *infra*, 29a; see *id.* at 38a.

The Ninth Circuit's decision stands in clear contrast to decisions from other circuits, none of which allows an agency to give *Chevron* deference to an agency interpretation presented for the first time in litigation. See, *e.g.*, *Comsat Corp.* v. *FCC*, 250 F.3d 931, 938 n.7 (5th Cir. 2001); *America's Cmty. Bankers* v. *FDIC*, 200 F.3d 822, 825 (D.C. Cir. 2000); *American Trucking Ass'ns* v. *Federal Highway Admin.*, 51 F.3d 405, 411 (4th Cir. 1995). That consensus makes sense, because when an agency violates *Chenery*, it deprives the regulated parties of the fair notice required before a court can defer to an agency's interpretation. See *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2417-2418 (2019) ("[A] court may not defer to a new interpretation, whether or not introduced in litigation, that creates unfair surprise to regulated parties." (internal quotation marks omitted)).

Because the agency's new interpretation could not be discerned from the final rule, the new interpretation escaped meaningful judicial scrutiny. See *State Farm*, 463 U.S. at 43. The Tax Court never considered whether "Treasury would be free to modify or abandon the arm's-length standard" because "it ha[d] not done so" in the rulemaking proceeding. App., *infra*, 119a. The court of appeals simply made up arguments in support of the agency's new interpretation, relying on its own view of the statute's purposes and some misunderstood snippets of legislative history. *Id.* at 26a-29a; see *id.* at 67a (O'Malley, J., dissenting) (the IRS urged the court of appeals to "recreate the record" and interpret the statute "in a way it never asked the Tax Court to do in order to supply a post-hoc justification for its decisionmaking").

The Ninth Circuit's expansive application of *Chevron* warrants this Court's plenary review. In the alternative, the Court should summarily reverse the Ninth Circuit's decision based on the settled legal principles described above.

B. This Case Is Exceptionally Important

This case has garnered substantial media attention because of the importance of the issues involved.[2]

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[2] See, *e.g.*, Natalie Olivo, *Admin. Law Could Pave Way for High Court Tax Regs Fight*, Law360 (Nov. 15, 2019), https://perma.cc/

The many serious legal and practical consequences of the Ninth Circuit's decision justify this Court's review.

1. This an egregious case of administrative agency overreaching

Several Justices of this Court have expressed concern about the broad, often unchecked power of administrative agencies. See, *e.g.*, *Kisor*, 139 S. Ct. at 2423 (noting the "far-reaching influence of agencies and the opportunities such power carries for abuse"); *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010) (noting that administrative agencies "wield[] vast power and touch[] almost every aspect of daily life"); *City of Arlington* v. *FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) ("[T]he danger posed by the growing power of the administrative state cannot be dismissed.").

This case vividly illustrates just how far an agency will go if left unchecked. The IRS is seeking to impose tax liability essentially by administrative fiat, rather than though any formal agency action. When the Tax Court appropriately invalidated the Treasury Department's regulation as arbitrary and capricious, the agency ignored the Tax Court's concerns and proposed

LXL3-PLUP; Richard Rubin & Theo Francis, *Yearslong Tax Dispute Could Cost Big Tech Companies Billions*, Wall Street J. (Sept. 3, 2019), https://perma.cc/N6XL-Y5KM; Sony Kassam, *IRS's Renewed Focus on Cost-Sharing May Prompt New Tax Disputes*, Bloomberg Tax (Aug. 6, 2019), https://perma.cc/G776-4G6Q; Carolina Vargas & Siri Bulusu, *2019 Outlook: Four Legal Issues Tax Attorneys Are Watching*, Bloomberg Tax (Dec. 31, 2018), https://perma.cc/7NKY-ZYLX; Peter J. Reilly, *Ninth Circuit Pulls Back Big IRS Victory Issued After Judge's Death*, Forbes (Aug. 7, 2018), https://perma.cc/K6XS-7H4L; Natalie Olivo, *International Tax Cases to Watch in 2018*, Law360 (Jan. 2, 2018), https://perma.cc/7TN5-8DJ8.

a new rationale to the Ninth Circuit, hoping the Ninth Circuit would bite – and the Ninth Circuit did.

If ever the government should have played by the rules, it is in this case. The tax issue affects companies across the United States, and vast sums of money are at stake. The companies and tax professionals affected by the regulation took the Treasury Department at its word in the rulemaking process – then were blindsided by the government's about-face in litigation. That is a reckless way to make any rule, and it is a particularly reckless way to proceed when an agency is effecting a wholesale "change[] [in] the legal landscape" (IRS C.A. Br. 30) in order to charge billions more in taxes. The IRS cannot say one thing in rulemaking and another in litigation. The days of tax exceptionalism are gone; the IRS must play by the same rules as everyone else. See *Mayo*, 562 U.S. at 55.

This case is particularly troubling because of the Ninth Circuit's extravagant interpretation of *Chevron*. The Ninth Circuit used *Chevron* to legitimize a new interpretation presented for the first time in litigation, even though it was directly contrary to the agency's rationale in the rulemaking record. And the Ninth Circuit used *Chevron* to retroactively excuse serious failures in the administrative process.

Several Justices have questioned the continuing vitality of the *Chevron* doctrine. *E.g.*, *Kisor*, 139 S. Ct. at 2446 n.114 (Gorsuch, J., concurring); *PDR Network, LLC* v. *Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2057 (2019) (Thomas, J., concurring). The Ninth Circuit's decision takes *Chevron* well beyond its original scope, to become a cure-all for any agency woes. This Court should not allow the Ninth Circuit's decision to go unchecked, paving the way for other administrative agencies to evade the requirements of notice-and-comment rulemaking and judicial review and further expanding the "vast power" of the administrative state. *Free Enter. Fund*, 561 U.S. at 499.

2. *This issue affects a large number of companies across the U.S. economy*

Whether related parties must share stock-based compensation is an important and recurring issue. Multinational companies often use cost-sharing agreements when parents and subsidiaries work together to develop intangible property. *E.g.*, Aysha Bagchi, *Google, Facebook, Apple Weigh in on Altera Tax Case*, Bloomberg Tax (Aug. 2, 2019), https://perma.cc/QAM8-ESXA. Many of those companies grant their employees stock options or some other form of stock-based compensation (a term the regulation defines very broadly, to include any compensation in the form of stock, stock options, or other forms of equity, see 26 C.F.R. 1.482-7(d)(2) (2003)).

In public filings with the SEC, over 80 companies have disclosed that the outcome of this case may materially affect their financial statements. See App., *infra*, 324a-330a; see also 17 C.F.R. 229.303(a)(3)(i) and (ii) (requirement to report on issues that companies "reasonably expect[]" to "materially affect[]" income). Those companies span a wide range of industries, from technology (*e.g.*, Apple, Microsoft) to pharmaceuticals (*e.g.*, Gilead Sciences, McKesson) to apparel (*e.g.*, Skechers, Stitch Fix) and beyond. This list includes not only household names, but also smaller companies. *E.g.*, A10 Networks, Inc., Form 10-K at 43 (Mar. 18, 2019) (company that makes network hardware); Anaplan, Inc., Form 10-K at 54 (Mar. 29, 2019) (company that provides cloud-computing services).

Additional companies have expressed their interest in this matter through court filings. Beyond the companies mentioned above, 24 companies have stated in *amicus* filings that the stock-based compensation regulation affects them. See Cisco et al. C.A. Reh'g *Amicus* Br. 2 (Cisco Br.); Amazon C.A. *Amicus* Br. vi. Further, industry groups representing "companies from virtually every sector of our economy" have indicated that a wide swath of their members are "subject to the Treasury regulations at issue." Nat'l Ass'n of Mfrs. et al. C.A. Reh'g *Amicus* Br. 1-2, 18-19 (NAM Br.).

These companies relied on the arm's-length standard when they entered into cost-sharing agreements. The Ninth Circuit "trample[d] on [their] reliance interests" when it approved the government's abandonment of that settled standard for stock-based compensation. App., *infra*, 146a (Smith, J., dissenting from denial of rehearing).

3. This issue is worth billions of dollars

The amount of money at stake is enormous. The Ninth Circuit's decision will require companies to pay billions of dollars in additional taxes. See, *e.g.*, Richard Rubin, *Google's Parent Could Be Big Winner in Intel Tax Dispute*, Wall Street J. (Feb. 29, 2016), https://perma.cc/U7GZ-BJGD.

Public SEC filings document the vast sums of money involved. Although relatively few companies have publicly quantified the potential impact, those that have establish that the issue is worth billions of dollars. Two companies have estimated that the issue is worth over $1 billion to each of them individually. See Alphabet Inc., Form 10-K at 78 (Feb. 2, 2017) (reporting $4.4 billion at stake through 2016); Facebook Inc., Form 10-K at 59 (Jan. 30, 2020) (reporting $1.1 billion at stake through 2019). And fourteen other companies (including Altera) estimate the impact to be in the tens of millions of dollars. See App., *infra*, 324a-330a. Some of those estimates are for only specific reporting periods, so the total impact on those companies is likely much, much larger. *E.g.*, Twitter, Inc., Form 10-Q at 37 (Oct. 30, 2019) (recording $80 million impact for the first nine months of 2019). And those estimates necessarily understate the full amount at stake, because not all of the public companies that have filed disclosures have quantified the financial impact, and many affected companies are private companies that are not required to file SEC disclosures.

Further, those estimates are only for past tax years. They do not include the future tax amounts, which will continue to be substantial. Although this case concerns the 2003 regulation, the Treasury Department promulgated a new cost-sharing regulation in 2011 with no material changes. See Section 482: Methods to Determine Taxable Income in Connection With a Cost Sharing Arrangement, 76 Fed. Reg. 80,082 (Dec. 22, 2011). The 2011 regulation includes the same rule for stock-based compensation as the 2003 regulation, without offering any new analysis or evidence. *Ibid.*; compare 26 C.F.R. 1.482-7(d)(3) (current version), with 26 C.F.R. 1.482-7(d)(2) (2003). So the stock-based compensation issue will continue to have great prospective significance.

The "enormous potential liability" here is a "strong factor" in favor of granting certiorari. *Fidelity Fed. Bank & Tr.* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., joined by Alito, J., concurring in the denial of certiorari). This Court routinely has granted certiorari in cases with similar financial stakes. For example, this Term the Court granted review of a statutory-interpretation issue worth billions of dollars in *Moda Health Plan, Inc.* v. *United States*, No. 18-1028 (argued Dec. 10, 2019). See Pet. at 33, *Moda*, *supra*.

And in recent years, the Court has granted certiorari in several other cases with similar financial impacts.[3] The number of companies affected and amount of money at stake amply justify this Court's review.

4. This issue will have serious domestic and international tax consequences

The arm's-length standard has been a settled feature of tax law for decades. See, *e.g.*, *Commissioner* v. *First Sec. Bank of Utah, N.A.*, 405 U.S. 394, 400 (1972). The IRS itself previously conceded that the arm's-length standard is "[i]mplicit" in the statute, IRS C.A. Br. 49-50, and federal regulations still require its use, 26 C.F.R. 1.482-1(b) and (c). Yet the Ninth Circuit allowed the agency to cast the standard aside for stock-based compensation. And nothing in the Ninth Circuit's decision limits the government's abandonment of the arm's-length standard to the stock-based compensation context.

U.S. companies "engage annually in trillions of dollars of cross-border intercompany transactions," transactions that up to this point incorporated the settled arm's-length transaction standard. NAM Br. 18; see Cisco Br. 2. The Ninth Circuit's decision calls into question the domestic tax treatment of all of those related-company transactions.

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[3] See, *e.g.*, Pet. at 27, 29, *Ohio* v. *American Express Co.*, 138 S. Ct. 2274 (2018) (No. 16-1454) (issue affected "22.2 billion transactions on credit cards" each year, which lead to over "$52 billion in credit-card transaction fees"); EnerNOC Pet. at 32-33, *FERC* v. *Electric Power Supply Ass'n*, 136 S. Ct. 760 (2016) (No. 14-841) (decision below threatened "billions of dollars" in investments by private companies and the federal government); Nazarian Pet. at 18, *Hughes* v. *Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016) (No. 14-614) (decision below "jeopardize[d] * * * billions in private investment").

The potential international tax consequences are even more serious. The arm's-length standard is "the international standard" for allocating income between related companies. OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* 33 (July 10, 2017), https://perma.cc/T9NB-L49H (*OECD Guidelines*). It is "used by all major developed nations." *Barclays Bank PLC* v. *Franchise Tax Bd. of Cal.*, 512 U.S. 298, 305 (1994).

Since 1935, the United States has exported the arm's-length standard to the rest of the world through tax treaties. IRS, Notice 88-123, *A Study of Intercompany Pricing Under Section 482 of the Code*, 1988-2 C.B. 458, 475 (*White Paper*). The United States includes the arm's-length standard in its model tax convention, which is "the baseline text the Treasury Department uses when it negotiates tax treaties." U.S. Dep't of the Treas., *Treasury Announces Release of 2016 U.S. Model Income Tax Treaty* (Feb. 17, 2016), https://perma.cc/G9R7-B62G; see U.S. Dep't of the Treas., United States Model Income Tax Convention, art. 9 (Feb. 17, 2016), https://perma.cc/GY49-H3ES.

As a result, the arm's-length standard appears in almost every U.S. tax treaty. See App., *infra*, 331a-338a (listing 57 U.S. tax treaties that incorporate the arm's-length standard).[4] The arm's-length standard also is incorporated into "most tax treaties to which the United States is not a party." *White Paper* 475. And it is included in the model tax convention published by the OECD, which represents a "consensus

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[4] The IRS's website lists U.S. tax treaties; all but one (with the former U.S.S.R.) incorporate the arm's-length standard. See IRS, *United States Income Tax Treaties – A to Z* (last updated Jan. 8, 2020), https://perma.cc/24AF-LF9W.

on international taxation principles." *OECD Guidelines* 16; see OECD, OECD Model Tax Convention on Income and on Capital, art. 9 (July 22, 2010), https://perma.cc/3JW9-N5U3.

The arm's-length standard fosters certainty and predictability and prevents double taxation when multinational companies operate in more than one jurisdiction. *OECD Guidelines* 38; *White Paper* 475. The IRS itself has warned that "[a]ny deviation from the arm's length standard would contradict long-standing international norms and would raise substantial concerns among U.S. treaty partners." IRS, *Report on Application and Administration of Section 482* at 4-12 (1992). In fact, in the preamble to the final rule here, the agency explained that it was required to use "the arm's length standard" to comply with "the obligations of the United States under its income tax treaties." App., *infra*, 230a.

Although the IRS abandoned that view in this litigation, the Secretary of the Treasury continues to emphasize the importance of the arm's-length standard in international negotiations. When a dispute recently arose at the OECD about taxation of digital services, the Secretary urged foreign nations to adhere to the arm's-length standard, calling it a "longstanding pillar[] of the international tax system upon which U.S. taxpayers rely." Ltr. from Steven T. Mnuchin, Sec'y of the Treas., to José Ángel Gurría, Sec'y-Gen., OECD 1 (Dec. 3, 2019), https://perma.cc/2SF6-P2UU.

This Court has warned that "depart[ing] from an interpretation of tax law which has been generally accepted" "could have potentially far-reaching consequences." *United States* v. *Byrum*, 408 U.S. 125, 135 (1972). Here, the Ninth Circuit's decision threatens the international consensus on use of the arm's-length standard. "If * * * 'arm's length' can be anything one country declares it to be, then there is no way to fairly resolve disputes [about how to allocate income between related parties] or mitigate double taxation." Foreign Tax Officials C.A. Reh'g *Amicus* Br. 16.

5. The Court should grant certiorari now

This Court should grant review now. The issues have been fully vetted. The Treasury Department and the IRS have pursued the stock-based compensation issue aggressively. Fifteen judges on the Tax Court and two panels of the court of appeals considered the issues, and the panel's ultimate decision prompted a vehement dissent from three additional judges on the court of appeals. Many interested parties filed *amicus* briefs, providing the court of appeals with a wide variety of perspectives and arguments on the issues. See Docket, *Altera Corp.* v. *Commissioner*, Nos. 16-70496 & 16-70497 (9th Cir.) (sixteen *amicus* briefs filed in this case).

The Court should review the Ninth Circuit's decision rather than waiting for the issue to arise in another circuit. Although the stock-based compensation issue affects companies throughout the United States, most of them are in the Ninth Circuit. For example, of the 82 companies that mention this case in their public filings, 67 are in the Ninth Circuit. App., *infra*, 324a-330a. More than $5 billion is at stake just for Ninth Circuit companies alone. See *ibid.* If the Court does not review the Ninth Circuit's decision, those companies will be out of luck.

Both the government and taxpayers have treated this as the definitive case on the validity of the regulation. The IRS put all cases involving stock-based compensation on hold pending the resolution of this case. See Mem. from Douglas W. O'Donnell, Comm'r, Large Business & Int'l Div., IRS, to Large Business &

Int'l Div. Examiners 1 (Jan. 12, 2018), https://perma.cc/J67L-MB4D.[5] Many companies are treating this case as determinative: They have amended their cost-sharing agreements to provide for sharing of stock-based compensation costs, while also filing protective refund claims to take advantage of a favorable ruling in this case. See *Amazon.com, Inc.* v. *Commissioner*, 148 T.C. 108, 149 (2017).

Further, there are no cases pending that could reach another court of appeals anytime soon. That is because the government and taxpayers are awaiting final resolution of this case. Accordingly, it could be years before another court of appeals might consider the issue. This Court should step in now.

* * * * *

The Ninth Circuit permitted a startling departure from accepted rules of administrative law, and its expansion of *Chevron* validates the concerns many Justices have raised about that doctrine. The Tax Court rejected the agency's position in an opinion that was striking for its "uncommon unanimity and severity of censure," yet the court of appeals simply "assume[d] away" the regulation's problems, "send[ing] a signal that executive agencies can bypass proper notice-and-comment procedures as long as they come up with a clever post-hoc rationalization by the time their rules are litigated." App., *infra*, 160a, 165a, 167a (Smith, J., dissenting from denial of rehearing). It is time for this Court to step in.

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[5] For example, the IRS sought to impose taxes on petitioners for additional tax years, and the Tax Court stayed those cases pending the outcome of this one. See Order at 1-2, *Altera Corp.* v. *Commissioner*, No. 31538-15 (T.C. Oct. 31, 2016).

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should grant the petition and summarily reverse the decision of the court of appeals.

Respectfully submitted.

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