No. 19-1009

In The
Supreme Court of the United States

ALTERA CORPORATION & SUBSIDIARIES,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE CISCO SYSTEMS, INC., APPLE INC., APPLIED MATERIALS, DANAHER CORPORATION, DELL TECHNOLOGIES, INC., DOLBY LABORATORIES, INC., ELECTRONIC ARTS INC., EMERSON ELECTRIC CO., FACEBOOK, INC., FIREEYE, INC., GENERAL MILLS, INC., GOOGLE LLC, GOPRO, INC., HEWLETT PACKARD ENTERPRISE COMPANY, INTERNATIONAL PAPER COMPANY, JOHNSON CONTROLS, INC., MAXIM INTEGRATED, NETAPP, INC., NORTONLIFELOCK INC., PEPSICO, INC., PFIZER INC., QUALCOMM INCORPORATED, S&P GLOBAL INC., SURVEYMONKEY, AND XILINX, INC. IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

25 U.S. corporations representing more than $3.5 trillion in market capitalization join together as amici to draw this Court's attention to the harmful, real world implications of the Ninth Circuit's opinion in *Altera Corp. & Subsidiaries* v. *Commissioner*, Pet. App. 1a ("Altera").

Amici's various business activities draw from a broad and diverse spectrum of industries that are significant to the U.S. economy. Collectively and on an annual basis amici: (i) engage in hundreds of billions of dollars' worth of intercompany transactions subject to the transfer pricing regulations promulgated under 26 U.S.C. § 482, and (ii) spend many tens of billions of dollars on research and development ("R&D"). Many amici use cost-sharing arrangements for global R&D projects, acting cooperatively with foreign subsidiaries, as Altera did in this case. Amicus Cisco Systems alone has spent tens of billions of dollars on R&D pursuant to its cost-sharing arrangement.

The Ninth Circuit's decision dramatically departs from well-settled transfer pricing precedent, violates

[1] Both parties have consented to the filing of this brief by amici curiae. Pursuant to Supreme Court Rule 37.6, amici state that no counsel for any party to this proceeding authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than amici contributed money that was intended to fund preparing or submitting this brief. All parties have been timely notified of the submission of this Brief.

basic administrative law requirements, and spurns international norms. In doing so, the decision upends settled expectations and creates significant ongoing confusion and uncertainty for U.S. multinationals that have long relied on these precedents to conduct their global businesses. In particular, the decision leaves unclear the role of comparables in application of the arm's-length standard for transfer pricing—the keystone of § 482. The decision will cost U.S. corporations billions of dollars. It also creates ambiguity regarding the characterization of cost-sharing payments. The decision will also disrupt the international consensus on taxation of related party transactions, including R&D cost-sharing arrangements. And finally, the decision ignores the notice-and-comment requirements of the Administrative Procedure Act and inappropriately defers to the agency's post hoc litigation position. Amici submit this brief to highlight these concerns and urge this Court's immediate review.

SUMMARY OF THE ARGUMENT

In a divided decision, the Ninth Circuit disregarded basic requirements of administrative procedure and upended settled expectations—grounded in longstanding tax law—of U.S. multinational corporations and United States' treaty partners. It did so based on arguments the government adopted for the first time during litigation, without proper notice to affected parties and without allowing them an opportunity to respond through required administrative processes.

Specifically, the decision holds that the government may disregard evidence of comparable transactions when applying the arm's-length standard under § 482. Contrary to longstanding regulations, IRS pronouncements, and the language of § 482, the decision concludes that the "commensurate with income" standard added to § 482 in 1986 applies to development of intangibles in cost-sharing arrangements between related parties and allows evidence of comparable transactions to be ignored. To reach this startling decision, the Ninth Circuit majority accepted *and gave deference to* an agency argument that was not the basis for the rulemaking, in violation of basic tenets of administrative law and the *Chevron* doctrine.

As dissenting Ninth Circuit judges recognized, the decision "tramples on the longstanding reliance interests of American businesses."[2] The decision below will have dramatic impacts on amici and other multinational companies throughout all segments of the economy. The amount of tax at issue for amici is staggering, exceeding $5 billion. The decision also disrupts expectations of U.S. treaty partners and undermines the international consensus on transfer pricing. The IRS rulemaking at issue contained no hint of these shocking consequences; the IRS's position emerged only in litigation.

[2] Pet. App. 165a (dissent).

This Court's immediate review is warranted.

ARGUMENT

I. The Ninth Circuit Inappropriately Upended Well-Settled Tax Law.

A. A consistent and predictable application of the tax law is vital to protect settled expectations and to permit prudent business planning.

To operate efficiently in the global economy, amici and other multinational businesses must have uniform and predictable rules to govern the tax treatment of their cross-border intercompany transactions. This Court and others have long recognized that tax certainty is a bedrock of effective and efficient business planning. For this reason, the consistent and predictable application of tax law is of vital importance.

As this Court has explained, "[c]ourts properly have been reluctant to depart from an interpretation of tax law which has been generally accepted when the departure could have potentially far-reaching consequences."[3] Similarly, the Second Circuit explained that the object of dealing with tax statutes "must be, above that of all other acts, to maintain them and to expound them in a manner which will be consistent, and which will enable the subjects of this country to know what exactly is the amount of charge and burden

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[3] *United States* v. *Byrum*, 408 U.S. 125, 135 (1972).

which they are to sustain."[4] The risk of harm caused by departure from accepted interpretation is particularly important where—as here—the tax law in question is far-reaching and has ramifications for the tax treatment of intercompany and cross-border transactions worth many billions of dollars.

The Ninth Circuit decision violated bedrock principles of administrative law in order to defer to agency arguments that were never raised during the administrative process.[5] In so doing, the Ninth Circuit panel endorsed a position that disregards the administrative record in favor of post hoc rulemaking, ignores longstanding tax law and guidance, and tramples on the settled expectations of massive segments of the economy and U.S. treaty partners.

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[4] *Edwards* v. *Wabash Ry. Co.*, 264 F. 610, 617 (2d Cir. 1920).

[5] Pet. App. 159a (dissent) ("The 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 48a (dissent) ("The majority, thus, 'suppl[ies] a reasoned basis for the agency's action that the agency itself has not given.'" (quoting *Motor Vehicle Mfrs. Ass'n of the U.S.* v. *State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983))).

B. The Ninth Circuit departed from well-settled law in concluding that the government may disregard evidence of comparable transactions when applying § 482 to cost-sharing arrangements between related parties.

The arm's-length principle is firmly ingrained in U.S. and international transfer-pricing law. Since 1935, Treasury regulations have interpreted the first sentence of § 482 as requiring intercompany transactions to satisfy the arm's-length standard—i.e., "the results of [a related-party] transaction [must be] consistent with the results that would have been realized if uncontrolled [unrelated] taxpayers had engaged in the same transaction under the same circumstances (arm's length result)."[6] Whether a transaction produces an arm's-length result "generally will be determined by reference to the results of *comparable transactions* under comparable circumstances."[7] The arm's-length standard is important because *if* related companies transfer property or services amongst each other, and *if* what they charge for such property or services meets the arm's-length standard, the IRS cannot change that pricing—i.e., there will be no changes to the income reported (and hence the taxes owed) by each company.

The primacy of the arm's-length standard (with its emphasis on evaluating comparable transactions) has

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[6] *Id.* at 173a.

[7] *Id.* (emphasis added).

been reinforced by decades of pronouncements and guidance from Congress, Treasury, and the IRS. The Ninth Circuit has itself agreed that the arm's-length standard governs the pricing of intercompany transactions.[8] And as this Court acknowledged in *Barclay's Bank*, the arm's-length standard forms the basis of an international consensus on transfer pricing.[9]

Amici have relied on the arm's-length standard when determining pricing for their intercompany transactions. In so doing, amici have run their global businesses within a predictable tax framework for pricing intercompany transactions. This framework assesses the arm's-length nature of a transaction by way of reference to comparable transactions ("comparables").

The notion that comparables are paramount when applying the arm's-length standard is based on decades of authority; authority upon which amici and those like them have long relied.[10] The Ninth Circuit

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[8] See, *e.g.*, *id.* at 6a ("The parties agree that, under the governing tax statute, the 'arm's length' standard applies."); *Xilinx, Inc.* v. *Commissioner*, 598 F.3d 1191, 1197 (9th Cir. 2010) (describing the arm's-length standard as "the readily understandable international measure").

[9] *Barclays Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298, 305 (1994) (under the " 'separate accounting' method * * * used by all major developed nations * * * transactions between affiliated corporations must be scrutinized to ensure that they are reported on an 'arm's-length' basis").

[10] See, *e.g.*, Pet. App. 173a (whether a transaction produces an arm's-length result "generally will be determined by reference to the results of comparable transactions under comparable circumstances"); IRS, Notice 88-123, *A Study of Intercompany*

majority brushed this all aside, stating "[w]hile interpreting the ['commensurate with income' standard] to do away with reliance on comparables may not have been 'the only possible interpretation' of Congress's intent, it proves a reasonable one."[11] But the "commensurate with income" standard does not justify the Ninth Circuit's interpretation.

Congress added the "commensurate with income" standard to § 482 to address transfers of intangible property for which comparable information was unavailable or scarce. *Nowhere* in the text or legislative history of that change did Congress embrace or suggest

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Pricing Under Section 482 of the Code, 1988-2 C.B. 458, 473, 477 (emphasis added) (the "*White Paper*") ("Intangible transfer prices will * * * be determined on the basis of comparables if they exist," and where "there is a true comparable for a high profit intangible, the royalty rate must be set on the basis of the comparable because that remains the best measure of how third parties would allocate intangible income"); *Commissioner* v. *First Sec. Bank of Utah*, 405 U.S. 394, 400 (1972) ("The purpose of section 482 is to place a controlled taxpayer on a tax parity with an uncontrolled taxpayer* * * * The standard to be applied in every case is that of an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer." (quoting Treas. Reg. § 1.482-1(b)(1) (1971))); *Peck* v. *Commissioner*, 752 F.2d 469, 472 (9th Cir. 1985) (the failure to provide "reliable evidence that [the taxpayer's terms] are terms that would have been arrived at had the parties dealt at arm's-length" supported an adjustment under § 482).

[11] Pet. App. 29a (quoting *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009)).

ignoring comparables when they exist. When comparables are available, they remain crucial.[12]

When Congress enacted the "commensurate with income" standard in 1986, it directed Treasury to conduct a "comprehensive study" of intercompany transfer pricing rules.[13] Congress prompted this study "*at the same time* it added the 'commensurate with income' standard to § 482."[14] The study was a two-year undertaking and the resulting *White Paper* addressed, in particular, the sentence added by way of the "commensurate with income" amendment.[15] The *White Paper* concluded that the amendment did *not* displace reliance on comparables when they exist: "Intangible transfer prices will in any event be determined on the basis of comparables *if they exist*."[16]

In Treasury's 2003 final rulemaking, it purported to apply the longstanding arm's-length standard, which relies on comparables when they exist. In response to the proposed rulemaking, uncontradicted public comments stated, with support, that parties at arm's length would not share stock-based compensation costs. In the final rulemaking, Treasury noted "[t]he

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[12] "If the arm's length result is derived from the application of the comparable uncontrolled transaction method based on the transfer of a comparable intangible under comparable circumstances," no "commensurate with income" adjustment is permitted. Treas. Reg. § 1.482-4(f)(2)(ii)(B).

[13] H.R. REP. NO. 99-841, at II-638 (1986).

[14] Pet. App. 150a n.5 (dissent).

[15] See generally *White Paper*.

[16] *Id.* at 477 (emphasis added).

uncontrolled transactions cited by commentators do not share enough characteristics of [cost-sharing arrangements] involving the development of high-profit intangibles to establish that parties at arm's length would not take stock options into account in the context of an arrangement similar to a [cost-sharing arrangement]."[17] Amici naturally interpreted this statement to mean *not* that comparables are *irrelevant*, but that the proffered evidence of other transactions was not, in the government's view, comparable to cost-sharing arrangements under review ("do not share enough characteristics of"). Plainly, the government's outright rejection of comparables in this case "may [not] be reasonably discerned" from this rulemaking.[18] If it were at all "discernable," amici and the broader tax community would have provided detailed and extensive comments to express their concern. All 15 Tax Court judges unanimously agreed the rulemaking embraced the use of comparables in applying the arm's-length standard.[19]

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[17] Pet. App. 231a.

[18] *State Farm*, 463 U.S. at 43 ("We will * * * 'uphold [an agency] decision of less than ideal clarity if the agency's path may reasonably be discerned.' " (quoting *Bowman Transp., Inc.* v. *Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974))).

[19] Pet. App. 118a ("Treasury necessarily decided an empirical question when it concluded that the final rule was consistent with the arm's-length standard* * * * [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* * * *"), *rev'd*, *id.* at 1a; see also *id.* at 119a n.15 ("[T]he preamble never suggests that the final rule could be consistent with the arm's-length standard if

The government's shift in this case—from its 2003 final rulemaking (which, as noted, signaled continuing vitality of reliance on comparables) to its newfound litigation position that comparables are irrelevant—is astounding. Yet, unfortunately, it is not an isolated example of aggressive litigation behavior by the IRS in this context. In *Xilinx, Inc.* v. *Commissioner*,[20] a case involving the treatment of stock options under prior cost-sharing regulations, the IRS litigation position was that the cost-sharing regulatory requirement to share "all of the costs" related to intangible development was immune to the steadfast, generally applicable requirement that "the standard to be applied in every case is that of a taxpayer dealing at arm's length with an uncontrolled taxpayer."[21] Xilinx provided substantial and uncontradicted evidence that uncontrolled parties would not share the cost of stock options. The Tax Court agreed with Xilinx. In a 2-1 decision, the Ninth Circuit ultimately affirmed the Tax Court,[22] noting that "taxpayers have not been given clear, fair notice of how the regulations will affect them."[23] The same is true here: the government's

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evidence showed that unrelated parties would not share stock-based compensation costs* * * *").

[20] 125 T.C. 37 (2005), *aff'd*, 598 F.3d 1191 (9th Cir. 2010).

[21] Pet. App. 173a.

[22] 598 F.3d 1191 (9th Cir. 2010).

[23] *Id.* at 1198.

outright rejection of comparables could not be "reasonably discerned" from Treasury's 2003 final rulemaking.[24]

Moreover, as the dissenting judges observed in their dissent to the denial of *en banc* review here, the arm's-length standard and its emphasis on comparables forms the basis of an international consensus on transfer pricing: "the arm's length method is 'used by all major developed nations,'" and "[t]he panel majority's interpretation of § 482 as allowing for the use of a *purely internal* standard to make cost and income allocations, i.e., without ever inquiring as to the behavior of parties *operating at arm's length*, greatly upsets this international uniformity."[25] Comparables are the touchstone of the arm's-length principle and are relevant to the pricing of all transactions between related companies. By ignoring comparable transactions where they exist, the Ninth Circuit has embraced a startling shift that "sows uncertainty over the fate of billions of dollars."[26]

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[24] Pet. App. 49a (dissent) ("Treasury did not provide adequate notice of its intent to change its longstanding practice of employing the arm's length standard and using a comparability analysis to get there."); *id.* at 158a (dissent) ("The panel majority ignores Treasury's clear statements in the preamble to its 2003 rule expressly justifying its treatment of stock-based compensation based on a traditional arm's length analysis employing (unsubstantiated) comparable transactions.").

[25] *Id.* at 166a (dissent) (quoting *Barclays*, 512 U.S. at 305).

[26] *Id.* at 167a (dissent).

C. The Ninth Circuit's characterization of cost-sharing arrangements also departs from longstanding law and settled expectations.

The government's position and the Ninth Circuit's decision also depart from longstanding law and settled expectations in their characterization of cost-sharing arrangements. By its terms, the "commensurate with income" standard only applies to "any transfer (or license) of intangible property (within the meaning of [§] 936(h)(3)(B))." The Ninth Circuit's decision is therefore premised on the court's view that "parties to a [cost-sharing arrangement] transfer cost-shared intangibles."[27] But that premise, too, is inconsistent with settled tax law and guidance.

Treasury's *White Paper*—provided to Congress only two years after the "commensurate with income" standard was enacted—made clear that cost sharing is "an appropriate method of attributing the ownership of intangibles *ab initio* to the user of the intangible, thus avoiding section 482 transfer pricing issues related to the licensing or other transfer of intangibles."[28] This means that when technology is developed under a cost-sharing arrangement, each participant immediately owns its appropriate share of the developed intangible property directly upon creation: there is no transfer to each participant of what it already owns.

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[27] *Id.* at 25a.

[28] *White Paper* at 474.

Because there is no transfer, the "commensurate with income" standard does not apply.

Treasury's own regulations further confirm this conclusion. As Judge Smith noted in his dissent to the denial of rehearing *en banc*, the cost-sharing regulations themselves characterize cost-sharing agreements as "arrangements for the development of high-profit intangibles."[29] The regulations say that interests in developed intangibles are *assigned* to the payor and that cost-sharing payments are "considered costs of developing intangibles of the payor."[30] As Judge O'Malley explained in her Ninth Circuit panel dissent, "[n]o rights are transferred when parties enter into an agreement to *develop* intangibles; this is because the rights to later-developed intangible property would spring *ab initio* to the parties who shared the development costs without any need to transfer the property."[31]

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[29] Pet. App. 156a (dissent) (quoting 68 Fed. Reg. at 51173).

[30] Treas. Reg. § 1.482-7A(a)(1); Treas. Reg. § 1.482-7A(h)(1).

[31] Pet. App. 70a (dissent).

II. The Ninth Circuit's Decision Has Immediate, Enormous Detrimental Effects That Require This Court's Review.

A. The impact of the Ninth Circuit's decision on amici and similarly situated companies throughout all sectors of the economy is staggering.

Amici are concerned not only by the government's flouting of decades of precedent regarding the role of comparables and the treatment of cost-sharing arrangements, but also by the Ninth Circuit's willingness to disregard core administrative law protections to endorse the government's new and unprincipled litigation position.

For years, U.S. multinationals like amici have structured intercompany transactions with the understanding that if their transfer pricing produced an arm's-length result—determined by reference to the results of comparable transactions under comparable circumstances—they would be free from tax adjustments. By disregarding comparable transactions, the Ninth Circuit unsettles these ground rules and turns a sound and workable regime on its head. Federal tax treatment of all intercompany transactions of U.S. multinationals is now exposed to the uncertainty that the government may in litigation argue against the relevance of comparables. As a result of the decision, companies in the Ninth Circuit are disadvantaged compared to companies in other circuits for sharing of stock-based compensation costs in a cost-sharing arrangement. Companies outside the Ninth Circuit can follow the Tax Court decision. As Judge Smith wrote for the *en banc* dissenters, "the panel majority's opinion tramples on the longstanding reliance interests of American businesses,"[32] and "threatens the uniform enforcement of the Tax Code."[33]

The tax amounts at stake in connection with cost-sharing of stock-based compensation as a consequence of the Ninth Circuit decision are enormous: amici face an aggregate tax burden of over $5 billion. For all companies nationwide the amount will undoubtedly be larger.

B. The Ninth Circuit's decision disrupts international consensus on the treatment of cost-sharing payments.

The Ninth Circuit's outright rejection of comparables and its holding on the transference of cost-shared intangibles shatters the international consensus on treatment of hundreds of billions of dollars of cost-sharing payments.

The United States, like many countries, imposes a "withholding tax" on certain outbound payments to foreign payees.[34] As the Organisation for Economic Co-operation and Development ("OECD") has recognized, there is an international consensus that cost-sharing payments should not be subject to withholding taxes.[35]

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[32] *Id.* at 165a (dissent).

[33] *Id.* at 147a (dissent).

[34] See 26 U.S.C. § 1442.

[35] OECD Comm. on Fiscal Affairs, *Transfer Pricing and Multinational Enterprises*, ¶ 123 (1979).

The *White Paper* reached the same conclusion, explaining that because cost-sharing payments are not gross income to the recipient, "no U.S. withholding tax would be imposed on outbound cost sharing payments made by a U.S. person to a foreign person."[36] The basis for this international consensus *not* to impose withholding tax on cost-sharing payments is—as explained in the *White Paper*—the widespread understanding that cost-sharing payments do not constitute gross income to the payee but rather are a reduction of its deductions. The U.S. cost-sharing regulations also embrace this treatment. Treas. Reg. § 1.482-7A(h)(1) provides that cost-sharing payments "will be considered costs of developing intangibles of the payor and reimbursements of the same kind of costs of developing intangibles of the payee." Once again, this characterization is a corollary of the conclusion that cost-shared intangibles are *not* transferred.

The Ninth Circuit holding that cost-shared intangibles are transferred is inconsistent with what had been an agreed upon, multijurisdictional framework. This framework prevented opportunistic behavior by any particular country, which might otherwise be inclined to enrich itself (at the expense of other countries) by imposing withholding taxes on outbound cost-sharing payments. Fissures in internationally agreed treatment of transactions produce tax uncertainty that hinders multinational companies from making prudent business decisions. Additionally,

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[36] *White Paper* at 497.

cracks in the internationally agreed treatment of transactions can also—in the case of imposition by foreign countries of withholding taxes not fully mitigated by tax treaties—erode the U.S. fisc if such foreign taxes can be credited, or lead to double taxation of the same corporate income if they cannot.

There is no evidence the Ninth Circuit majority contemplated the inconsistency and confusion its opinion would create either at home or abroad. What *is* clear is that Treasury's 2003 final rulemaking never said a peep about the abandonment of comparables or cost-shared intangibles being transferred, nor was there any acknowledgement of the inconsistency and confusion that results from the adoption of the government's litigating position. Nowhere in the *White Paper* was Congress told that Treasury might later—to advance its litigation interests—completely abandon its studied positions. Nowhere in the process leading to the 2003 final rulemaking did Treasury signal any departure from the *White Paper*. If Treasury had asserted these positions in its rulemaking, then amici (and likely foreign governments, keen to preserve international consensus) would have commented to correct these misinterpretations.

C. The Ninth Circuit's decision sows great confusion concerning the proper application of the "commensurate with income" standard.

The Ninth Circuit majority swallowed whole the government's litigation arguments that the "commensurate with income" standard applied to the development of intangibles in a cost-sharing arrangement, and that the standard contained the heretofore hidden notion that the government could ignore comparables in determining cost-sharing costs. The decision creates major confusion regarding the application of the "commensurate with income" standard not only in the context of cost-sharing arrangements, but also as to *actual* transfers of intangible property, where the "commensurate with income" standard was *meant* to apply.

When Treasury and the IRS wrote regulations codifying the "commensurate with income" standard, they told taxpayers to interpret that standard in a manner consistent with the arm's-length standard.[37] Their regulations enshrined the primacy of comparables: in the case of an *actual* transfer of intangibles, *no* "commensurate with income" adjustment would be made if the taxpayer had suitable evidence of comparables.[38] In those circumstances, comparables trump

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[37] "Adjustments made pursuant to this paragraph * * * shall be consistent with the arm's length standard and the provisions of § 1.482-1." Treas. Reg. § 1.482-4(f)(2).

[38] "If the arm's length result is derived from the application of the comparable uncontrolled transaction method based on the

"commensurate with income" as Treasury's *own* regulations direct.[39] So the Ninth Circuit decision leaves amici—who conduct many billions of dollars of *actual* intangibles transfers each year—exposed to a government "convenient litigating position"[40] that comparables are irrelevant, in place of what the regulations plainly instruct.

III. Conclusion.

The Ninth Circuit decision turned a number of well-settled administrative and tax law principles on their head and disrupted the international consensus on the relevance of comparables and the treatment of cost-sharing payments. In so doing, the decision "tramples on the longstanding reliance interests of American businesses"[41] and leaves U.S. multinationals with tremendous uncertainty as to the application of the arm's-length standard, the proper characterization of cost-sharing payments, and the relevance of comparables to actual transfers of intangible property. In the absence of a predictable framework governing the tax

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transfer of a comparable intangible under comparable circumstances," no "commensurate with income" adjustment is permitted. Treas. Reg. § 1.482-4(f)(2)(ii)(B).

[39] The absurdity of the IRS arguing on appeal that "commensurate with income" in one context (cost sharing) allows it to ignore comparables, but "commensurate with income" in its intended context (*actual* intangibles transfers) is subject to regulations saying comparables are paramount, will not be lost on this Court.

[40] Pet. App. 161a (dissent).

[41] *Id.* at 165a (dissent).

treatment of cross-border intercompany transactions, amici and other similarly situated multinational businesses face many billions of dollars in unexpected tax liabilities.

As Petitioner demonstrates, the regulation upheld below suffers from a number of significant procedural defects. The Ninth Circuit decision inappropriately endorsed the government's new and unprincipled litigation position reinterpreting its flawed rulemaking. This Court's immediate review is justified and desperately needed.

Respectfully submitted,

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