No. 19-1009

In The Supreme Court of the United States

ALTERA CORPORATION AND SUBSIDIARIES,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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March 13, 2020

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

This case presents issues of exceptional importance to the Chamber and its members regarding the relationship between tax regulations and the Administrative Procedure Act ("APA") and related administrative law doctrines. As Federal Circuit Judge O'Malley (sitting by designation) details in her dissent from the Ninth Circuit's opinion, the IRS failed in a number of critical respects to engage in reasoned decisionmaking as required by the APA and Supreme Court precedent. Such arbitrary and capricious rulemaking—which,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, or any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amicus* represent that all parties were provided notice of *amicus*'s intention to file this brief at least 10 days before its due date and that all parties have consented to the filing of this brief.

contrary to blackletter administrative law, the Ninth Circuit endorses here—imposes tremendous negative consequences for the Nation's business community.

The business community has a particular interest in the interpretation and application of the rules governing the administrative process. Businesses face a growing array of regulations, with tax regulations being among the most complex. When planning their operations and investing for the future, businesses have no choice but to rely on those regulations. Businesses, moreover, critically depend on the procedures and protections that the APA provides against arbitrary or otherwise unlawful agency action. The IRS's arbitrary and capricious actions in this case alone would disrupt billions of dollars in reliance interests of the affected businesses.

The Chamber has a broad and diverse membership and a long history of successfully challenging regulations that violate the APA—including IRS regulations. *See, e.g.*, *Chamber of Commerce v. IRS*, No. 1:16-CV-944, 2017 WL 4682050 (W.D. Tex. Oct. 6, 2017). The Chamber is therefore uniquely positioned to speak to the administrative law principles implicated by this case as well as the consequences to the Nation's business community from arbitrary agency regulatory activities that upset settled expectations in violation of the APA.

INTRODUCTION AND SUMMARY

This Court, the D.C. Circuit, and now the Tax Court have properly rejected the IRS's "tax exceptionalism" position that its regulatory activities are not fully governed by the APA and related administrative law doctrines. That rejection is particularly important here, where the IRS seeks *Chevron* deference for its regulatory activities while attempting to evade the APA's protections against arbitrary and capricious agency action. This case thus presents issues of exceptional importance for businesses subject to tax rulemaking that are worthy of review under this Court's Rule 10.

I. Although purporting to remain in line with well-established administrative law doctrines, the Ninth Circuit strays far afield from this Court's precedents in three respects.

First, the Ninth Circuit transforms the APA's reasoned-decisionmaking requirement into what Judge O'Malley aptly terms a "scavenger hunt" in search of the agency's reasoning. As the fifteen members of the Tax Court unanimously detailed in their decision, the IRS committed a number of fatal errors during its rulemaking process. Among them, the IRS failed to collect, much less examine, the relevant data to engage in reasoned decisionmaking. And it did not respond to numerous significant comments made during the comment period.

Second, once in court, the IRS improperly attempted to justify its final rule based on alternative grounds not raised during the rulemaking process—grounds that

would result in a change in the IRS's longstanding position without any accompanying explanation. By blessing these post-hoc rationalizations offered by the IRS for the first time in the litigation itself, the Ninth Circuit eviscerates the APA's guarantee that the public have fair notice of regulatory obligations and a meaningful opportunity to participate in the notice-and-comment rulemaking process.

Third, the Ninth Circuit disregards this Court's command that *Chevron* deference does not apply where an agency engages in a procedurally defective rulemaking. In recent years, there has been a growing call, including by some members of this Court, to narrow or eliminate *Chevron* deference. *See, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring); *Michigan v. EPA*, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring); *Gutierrez–Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring). Whatever one's views on *Chevron* deference generally, the Ninth Circuit's decision to accord *Chevron* deference to an agency's statutory interpretation made for the first time in litigation is squarely foreclosed by this Court's precedent.

These are not garden-variety errors. The Ninth Circuit's departure from this Court's established decisions on the procedural requirements of the APA is egregious. And the Court of Appeals' casual expansion of *Chevron*—notwithstanding the recent calls of current and former Justices to revisit *Chevron* entirely—is also worthy of this Court's plenary review.

If the established administrative law rules are faithfully applied, it is not a close call that the IRS's actions must be vacated as arbitrary and capricious under the APA. Indeed, of the twenty-two federal judges who have ruled on the propriety of the IRS's actions here, nineteen—all fifteen Tax Court judges, a Federal Circuit judge dissenting from the panel opinions, and three Ninth Circuit judges dissenting from denial of rehearing en banc—have agreed that the IRS fell far short of its obligations under the APA.[2]

II. The Ninth Circuit's decision to allow the IRS to skirt its procedural obligations under the APA has substantial negative consequences for the Nation's business community and thus the national economy. The amount of money implicated by this one regulation is in the billions. Moreover, as Judge Milan Smith notes in his dissent from denial of rehearing en banc, the business community now faces great uncertainty due to potential disuniformity in federal tax law. Businesses within the nine states governed by the Ninth Circuit are bound by this invalid tax regulation, whereas those in the rest of the country are not due to the Tax Court's nationwide jurisdiction.

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[2] It is worth noting that ten judges were recused from participating in the Ninth Circuit's en banc process. *See* Pet. App. 146a ("Judges McKeown, Wardlaw, Bybee, Bea, Watford, Owens, Friedland, Miller, Collins, and Lee were recused and did not participate in the vote."). At least one of them has written forcefully against tax exceptionalism. *See Wilson v. Comm'r of Internal Revenue*, 705 F.3d 980, 999 (9th Cir. 2013) (Bybee, J., dissenting) (arguing that the IRS and the Tax Court are bound by the APA).

More critically, arbitrary and capricious changes to federal regulations uproot settled expectations among regulated businesses. This is particularly true in the context of tax regulation, where individuals and businesses rely heavily on the existing law when directing their business operations and implementing their investment strategies. This case alone will upset billions of dollars in reliance interests. But the precedent the Ninth Circuit has set for arbitrary tax administration in the western fifth of the country has the potential to cause even greater damage to the national economy.

In *Mayo Foundation for Medical Education and Research v. United States*, 562 U.S. 44, 55–56 (2011), the Court held that administrative law applies to tax regulation, refusing "to carve out an approach to administrative review good for tax law only." Apparently, the IRS has still not learned this lesson. Nor has the Ninth Circuit. It is imperative that the Court send a clear message that the IRS must follow the same rules that apply to the rest of the administrative state.

ARGUMENT

I. The Ninth Circuit's Judgment Departs from Supreme Court Precedent and Its Uniform Application in the Circuit Courts

For decades, tax law suffered from what has been coined "tax exceptionalism"—the misperception that tax regulations are not governed by the same long-standing rules of administrative law that generally

apply to any federal agency action.[3] In recent years, however, this Court and the lower courts have correctly rejected tax exceptionalism.[4] In the decision below, fifteen members of the Tax Court unanimously joined that trend, holding that the IRS is bound by the same rules—the APA and related administrative law doctrines—that govern the rest of the federal regulatory state. *See* Pet. App. 108a–121a.

Although the Ninth Circuit purports to follow suit, its misapplication of administrative law reflects a tax exceptionalist approach inconsistent with Supreme Court precedent and the uniform application of that precedent in the circuit courts. The Court need not rely on just petitioners and *amici* to appreciate the Ninth Circuit's errors. The panel opinion drew a trenchant, 32-page dissent from Judge O'Malley, a Federal Circuit judge sitting by designation (Pet. App. 47a–78a), as well as a 22-page dissent from denial of

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[3] *See* Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 Minn. L. Rev. 1537, 1541 (2006) (describing the "perception of tax exceptionalism that intrudes upon much contemporary tax scholarship and jurisprudence").

[4] *See, e.g.*, *Mayo Foundation*, 562 U.S. at 55–56 (refusing to apply a different standard of review to an IRS interpretation of the tax code than is applied to other federal regulations); *Cohen v. United States*, 650 F.3d 717, 736 (D.C. Cir. 2011) (en banc) (holding that the APA's judicial review provisions apply with full force to a form of IRS guidance known as a notice). *See generally* Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 Minn. L. Rev. 221, 222–24 (2014) (chronicling how federal courts have rejected tax exceptionalism).

rehearing en banc from Judge Smith, joined by Judges Callahan and Bade (Pet. App. 146a–167a).

As Judge O'Malley exhaustively documents in her dissent, the Ninth Circuit's opinion "stretches" administrative law "beyond its breaking point" in a manner "inconsistent with [] fundamental [APA] principle[s]." Pet. App. 48a–49a. As Judge Smith concludes in his dissent, "Treasury's actions in this case are the epitome of arbitrary and capricious rulemaking." Pet. App. 146a. In upholding the agency's actions here, the Ninth Circuit "tramples on the reliance interests of American businesses, threatens the uniform enforcement of the Tax Code, and drastically lowers the bar for compliance with the Administrative Procedure Act." *Id.* at 146a–147a.

A. The Ninth Circuit's Decision Transforms the APA's Reasoned-Decisionmaking Requirement into a "Scavenger Hunt" To Uncover the Agency's Reasoning

It is blackletter administrative law that, to survive arbitrary-and-capricious review under the APA, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). In what has been termed the APA's

reasoned-decisionmaking requirement (or "hard look" review), the *State Farm* Court further instructed:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: "We may not supply a reasoned basis for the agency's action that the agency itself has not given."

Id. (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (*Chenery II*)).

The Ninth Circuit's departure from this precedent becomes evident in the opinion's second paragraph: "Our task, of course, is not to assess the better tax policy, nor the wisdom of either approach, but rather to examine whether Treasury's regulations are permitted under the statute." Pet. App. 6a. *State Farm*, of course, requires more. It is not sufficient to conclude that the *substance* of the agency's final rule is permissible under the agency's governing statute. The reviewing court must ensure that the agency's regulatory *process* reflects reasoned decisionmaking. The Ninth Circuit's approach, by contrast, is more like "no look," rather

than a "hard look," into the agency's decisionmaking process.

Faithfully applying *State Farm*, the Tax Court (Pet. App. 121a–136a), Judge O'Malley (Pet. App. 58a–67a), and Judges Smith, Callahan, and Bade (Pet. App. 155a–166a) had little trouble concluding that the IRS flunked this APA test. The fifteen tax experts on the Tax Court unanimously agreed that "the final rule lacks a basis in fact," that "Treasury failed to rationally connect the choice it made with the facts found," and that "Treasury's conclusion that the final rule is consistent with the arm's-length standard is contrary to all of the evidence before it." Pet. App. 138a.

Critically, despite applying the traditionally fact-intensive arm's-length standard, the IRS did not even attempt to conduct any factfinding regarding the rule's central assumption that unrelated parties entering into qualified cost-sharing arrangements would generally share stock-based compensation costs. *See* Pet. App. 124a & n.20 (noting IRS's concession that it did no factfinding).[5] In other words, as the Tax Court

[5] As the Tax Court explained, the well-established arm's length standard is satisfied "if the results of the transaction are consistent with the results that would have been realized if uncontrolled taxpayers had engaged in the same transaction under the same circumstances (arm's length result)." Pet. App. 85a (quoting 26 C.F.R. § 1.482-1(b)(1)). Due to the fact that "identical transactions can rarely be located, whether a transaction produces an arm's length result generally will be determined by reference to the results of comparable transactions under comparable circumstances." *Id.* (quoting 26 C.F.R. § 1.482-1(b)(1)). Accordingly, this inquiry is necessarily fact intensive, yet "Treasury took the position

concluded, the IRS "entirely failed to consider an important [empirical] aspect of the problem." *State Farm*, 463 U.S. at 43; *see also* Pet. App. 127a (concluding that "Treasury failed to 'examine the relevant data' " (quoting *State Farm*, 463 U.S. at 43)).

The IRS also failed to consider, much less respond to, numerous relevant and significant comments lodged during the public comment period. This Court has repeatedly emphasized that "[a]n agency must consider and respond to significant comments received during the period for public comment." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). That is because this APA-guaranteed "opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977) (per curiam) (footnote omitted).

The Tax Court detailed at length the variety of significant comments to which the IRS provided no meaningful response. *See* Pet. App. 130a–135a. Many concerned the critical empirical inquiry into whether unrelated parties entering into qualified cost-sharing arrangements would generally share stock-based compensation costs. "Treasury's failure to adequately respond to commentators," the Tax Court concluded, "frustrates [the court's] review of the final rule and was prejudicial to the affected entities." *Id.* at 135a.

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that it was not obligated to engage in fact finding or to follow evidence gathering procedures." *Id.* at 124a.

The problem with the Ninth Circuit's refusal to enforce the APA's reasoned-decisionmaking requirement, Judge O'Malley astutely observes, is that it "endorses a practice of requiring interested parties to engage in a scavenger hunt to understand an agency's rulemaking proposals." Pet. App. 48a. The burden under the APA, however, is on the agency to give notice of its proposal and the reasons for it so that the regulated community can understand it and respond; the agency may then evaluate the comments received and adjust its proposal or explain why no changes are warranted in finalizing its rule. It is on the agency to "offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575–76 (2019). That standard process results in both better rules and fairer notice to the regulated community.

B. The Ninth Circuit's Decision Eviscerates the APA's Requirement of Fair Notice and Meaningful Participation in the Rulemaking Process for Tax Regulations

In an attempt to salvage its 2003 rule after the fact, the IRS argued in litigation that the rule can be justified under the commensurate-with-income standard and that the IRS could issue regulations that modify—or even abandon—the arm's-length standard. That argument violates two bedrock principles of administrative law.

First, this Court has long held that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) (*Chenery I*). As Judge O'Malley explains, neither the proposed rule nor the final rule suggested that the IRS intended to abandon the traditional arm's-length standard, and thus any mention of the commensurate-with-income standard in the rule was not a separate and independent rationale for the agency's decision. *See* Pet. App. 58a–67a.

Second, to the extent the IRS intended to change its longstanding position that the commensurate-with-income standard is consistent with the arm's-length standard, it was certainly required to at least recognize in the rulemaking process that it intended to change its position. In *FCC v. Fox Television Stations*, this Court held that the APA's "requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." 556 U.S. 502, 515 (2009); *see also id.* ("And of course the agency must show that there are good reasons for the new policy.").

The Ninth Circuit pardons the IRS's violations of these bedrock principles articulated in *Chenery I* and *Fox*. It argues that "*Chenery* does not require us to adopt Altera's position as to how the arm's length

standard operates. Instead, we must 'defer to an interpretation which was a necessary presupposition of [the agency's] decision,' if reasonable, even when alternative interpretations are available." Pet. App. 38a (quoting *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 419–20 (1992)).

But, as Judge O'Malley observes, "[t]he majority accepts the latest of the Commissioner's ever-evolving post-hoc rationalizations and then, amazingly, goes even further to justify what Treasury did here." Pet. App. 64a. The IRS's latest post-hoc rationalization is not a "necessary presupposition" of the agency's regulation, as the panel majority suggests to avoid the *Chenery I* bar. To be a "necessary presupposition," the agency's interpretation must be "the only reasonable reading of the [agency's action], and the only plausible explanation of the issues that the [agency] addressed after considering the factual submissions by all of the parties." *Nat'l R.R. Passenger*, 503 U.S. at 420. Judges O'Malley, Smith, Callahan, and Bade, as well as the fifteen judges on the Tax Court, would all beg to differ that the IRS's post-hoc rationalization was the *only* reasonable and *only* plausible reading of the regulation. Indeed, as detailed in Part I.A, they all agree that such a reading would be unreasonable and implausible.

"The APA's safeguards," as Judge O'Malley explains, "ensure that those regulated do not have to guess at the regulator's reasoning; just as importantly, they afford regulated parties a meaningful opportunity to respond to that reasoning." Pet. App. 66a. The

Chamber and its members are often involved in notice-and-comment rulemaking in a variety of regulatory contexts. Based on this extensive experience, the Chamber confirms Judge O'Malley's observation that "Treasury's notice of proposed rulemaking ran afoul of these safeguards by failing to put the relevant public on notice of its intention to depart from the traditional arm's length analysis." *Id.*

By contrast, as Judge Smith observes, "[b]y rewriting the reasoning supporting the rule, the [Ninth Circuit] renders extensive comments irrelevant, and is strangely untroubled by the idea that no member of the tax community noticed this alternative reasoning or submitted a relevant comment." Pet. App. 159a. Had the IRS provided notice of this dramatic change, Judge Smith is entirely correct based on the Chamber's extensive experience that the affected businesses and trade organizations would have responded vigorously and substantially during the comment period. And the IRS would have been required under the APA to "consider and respond to significant comments received during the period for public comment." *Mortgage Bankers*, 135 S. Ct. at 1203.

Simply put and contrary to the Ninth Circuit's conclusion, confining an agency to the positions it has taken in notice-and-comment rulemaking is a bedrock principle of administrative law. It ensures the agency engages in reasoned decisionmaking and exercises its discretion in a nonarbitrary manner.

C. The Ninth Circuit's Decision Disregards This Court's Command To Withhold *Chevron* Deference Where an Agency's Rulemaking Is Procedurally Defective

Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016), is controlling on whether the IRS is entitled to deference under *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 842–43 (1984). It is plain that the IRS is not entitled to any deference.

In *Encino Motorcars*, the Court concluded that the "regulation was issued without the reasoned explanation that was required in light of the [agency's] change in position and the significant reliance interests involved." *Id.* at 2126. The Court therefore refused to accord any deference. *Id.* at 2127. That is because, when agency "procedures are defective, a court should not accord *Chevron* deference to the agency interpretation." *Id.* at 2125.

The IRS's procedural errors here are more egregious than the agency's in *Encino Motorcars*. Not only did the IRS fail to engage in reasoned decisionmaking as required by *State Farm* and the APA's arbitrary-and-capricious standard (Part I.A), but the IRS has attempted to advance a new statutory interpretation not proffered during the rulemaking, in contravention of *Chenery I*, *Fox*, and the APA's notice-and-comment rulemaking requirements (Part I.B). As this Court has emphasized, "[d]eference to what appears to be nothing more than an agency's convenient litigating

position would be entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988).

Whatever one's views on the legitimacy of *Chevron* deference generally, the Ninth Circuit's decision to defer to an agency's statutory interpretation advanced for the first time in litigation violates these principles and should be summarily reversed under this Court's precedent. Indeed, the Ninth Circuit's decision here would be among the most notable circuit-court applications of *Chevron* deference that Justice Kennedy could have imagined when he issued his recent call to revisit "the premises that underlie *Chevron* and how courts have implemented that decision." *Pereira*, 138 S. Ct. at 2121. Relying on prior opinions from the Chief Justice and Justices Thomas and Gorsuch, Justice Kennedy underscored that "[t]he proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary." *Id.* (citing *City of Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting); *Michigan v. EPA*, 135 S. Ct. at 2712–14 (Thomas, J., concurring); *Gutierrez–Brizuela*, 834 F.3d at 1149–58 (Gorsuch, J., concurring)).

II. The Ninth Circuit's Decision Introduces Uncertainty for the Business Community and Risks Undermining the National Economy

It is imperative that the Court reaffirm the Tax Court's core holding that the APA applies with full

force to IRS rulemaking. That holding is particularly important in light of the current efforts to implement the Tax Cuts and Jobs Act of 2017. This is a critical time for both the IRS and taxpayers to understand clearly and precisely what the rules of the road are and how they are to be applied by the courts on judicial review. If the IRS is free to follow its modish approach to administrative law, it imposes real-world and substantial impacts on the Chamber's members and the business community and the national economy more broadly.

As a preliminary matter, businesses are now subject to the IRS's novel interpretation of its 2003 regulation within the nine states encompassing the Ninth Circuit. As Petitioners report, companies in the Ninth Circuit have more than $5 billion at stake in this dispute alone. Pet. 31. Yet, as Judge Smith details in his dissent, due to the Tax Court's nationwide jurisdiction, the Ninth Circuit's "opinion will likely upset the uniform application of the challenged regulation in Tax Court, producing a situation akin to a circuit split." Pet. App. 164a–165a. Outside the Ninth Circuit, there are billions more at stake. *See* Pet. 26–28. As this Court has acknowledged, certiorari is warranted in such cases because of "the need for a uniform rule on" tax matters. *Commissioner of Internal Revenue v. Bilder*, 369 U.S. 499, 501 (1962); *see also Jewett v. Commissioner of Internal Revenue*, 455 U.S. 305, 308–09 (1982) (granting certiorari to resolve conflict between various courts of appeals and the Tax Court);

Diedrich v. Commissioner of Internal Revenue, 457 U.S. 191, 194 (1982) (same).

More fundamentally, businesses depend upon clear and predictable rules—and fair and nonarbitrary administrative processes—when planning their operations and investing for their businesses. This is particularly true of tax regulations, which are going through a once-in-a-generation change in light of 2017's historic tax reform to bolster American competitiveness. If it is not clear that the IRS is constrained by administrative law's procedural protections, there will be destabilizing uncertainty for the individuals, businesses, and industries regulated by those tax regulations. Arbitrary bureaucratic behavior, moreover, can disrupt an industry's settled expectations and investments, with profound economic consequences for the industry and, in turn, for the national economy. Judge Smith incisively notes in dissent that the Ninth Circuit here "tramples on longstanding reliance interests in American businesses" and "upsets not only domestic tax law, but international tax law as well." Pet. App. 165a–166a.

This does not mean, of course, that federal agencies can never alter the regulatory landscape. But when changing existing regulations, agencies must follow the APA and related administrative law doctrines, which ensure that agencies develop the regulations with the benefit of comments from the affected community and other experts, thus preserving democratic processes and producing the best possible rules. "In explaining its changed position," this Court has counseled,

"an agency must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars*, 136 S. Ct. at 2120 (quoting *Fox*, 556 U.S. at 515).

The IRS's rulemaking here fell far short of the reasoned decisionmaking required by the APA and this Court's precedents. In the process, the IRS arbitrarily upset settled expectations to the tune of billions of dollars. This Court should make clear that the IRS must play by the same rules of the road that govern the rest of the federal regulatory state. A summary reversal is warranted, though full merits briefing and argument may be helpful to further articulate the application of these bedrock administrative law principles to tax regulation.

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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March 13, 2020