No. 19-1009

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

BRIEF FOR PRICEWATERHOUSECOOPERS LLP, DELOITTE TAX LLP, AND KPMG LLP AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

PricewaterhouseCoopers LLP, Deloitte Tax LLP, and KPMG LLP (collectively, "amici") are professional services firms that provide tax services, including services related to transfer pricing, in the United States. The networks of professional firms to which amici belong provide such services in over 150 countries around the world. Amici and their respective networks represent three of the world's "Big Four" accounting, tax, and advisory professional service organizations.[2]

PricewaterhouseCoopers LLP, a Delaware limited liability partnership, is the United States member firm of the global network of member firms of PricewaterhouseCoopers International Limited, a UK private company limited by guarantee. Each member firm is a separate and independent legal entity. The member firms in the PricewaterhouseCoopers global network provide audit, assurance, advisory, and tax services to many of the world's largest corporations. Member firms in the PricewaterhouseCoopers global network include more than 276,000 people across offices in 157 countries, and provided services to 85

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[1] The parties have consented in writing to the filing of this brief, and received timely notice of the intent to file. No counsel for a party authored this brief in whole or in part; and no such counsel, any party, or any other person or entity—other than amici curiae and their counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Ernst & Young LLP is the financial statement auditor of Intel Corporation, Altera Corporation's parent company, and accordingly declined to participate as an amicus curiae.

percent of the companies comprising the Fortune Global 500 during its 2019 fiscal year.

Deloitte Tax LLP, a Delaware limited liability partnership owned by Deloitte LLP and its individual partners and principals who actively participate in its business, provides tax services to a variety of clients located in the United States and throughout the world. Deloitte LLP is the United States member firm of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee. Deloitte Touche Tohmatsu Limited's global network of member firms consists of separate and independent legal entities with approximately 312,000 people in more than 150 countries and territories, and is a leading global provider of audit and assurance, consulting, financial advisory, risk advisory, tax, and related services, serving four out of five Fortune Global 500 companies.

KPMG LLP, a Delaware limited liability partnership, is the United States member firm of the KPMG International network of independent member firms affiliated with KPMG International, a Swiss cooperative. Each member firm is an independent entity and describes itself as such. KPMG LLP, with cooperation from other members of the KPMG International network, provides audit, advisory, and tax services to many of the world's largest corporations. KPMG International's member firms have more than 162,000 professionals, including more than 10,500 partners, in 152 countries.

Firms in amici's global networks audit client financial statements in accordance with applicable auditing standards to provide an opinion on whether the financial statements present fairly, in all material respects, the client's financial position and the results of its operations and cash flows in accordance with generally accepted accounting principles. Auditing and accounting are vital to the integrity of our capital markets.

In addition, amici assist hundreds of multinational enterprises with issues related to transfer pricing. These transfer pricing services are designed to assist multinational enterprises in their preparation of accurate tax returns in the countries where they operate. As three of the Big Four firms that provide audit, tax, and advisory services, amici have a global perspective on—and substantial expertise and interest in—transfer pricing matters. Amici are thus in a unique position to discuss the significance of the Ninth Circuit's decision, the uncertainty it has created, and the adverse collateral consequences that may result.

Amici do not have a practice of joining together to provide this Court with their views at the certiorari stage and, in fact, have only rarely done so in the past. Amici are doing so here not only because of their particular perspectives on the issues involved, but also because they strongly believe this case is exceptionally important and warrants this Court's review. *See* Sup. Ct. R. 10(c).

INTRODUCTION AND SUMMARY OF ARGUMENT

Multinational enterprises engage in trillions of dollars of cross-border intercompany transactions each year. *See, e.g.*, Pol Antràs & Stephen R. Yeaple, *Multinational Firms and the Structure of International Trade*, *in* 4 Handbook of International Economics 55, 55–56 (Gita Gopinath, Elhanan Helpman & Kenneth Rogoff eds., 2014). When they do so, they must determine the price for the transaction—*i.e.*, the transfer price. The transfer price is, in essence, the price an affiliate in one country charges an affiliate in another country in conjunction with a particular transaction, like the sale of a good or service. It affects the income and expenses of each affiliate and, ultimately, how the enterprise's taxable income is allocated across the jurisdictions where it operates. As a result, getting transfer prices right is important to taxpayers and taxing authorities alike.

Cost sharing arrangements can simplify transfer pricing issues. The Treasury Regulations have sanctioned the use of cost sharing arrangements for over 50 years. They have become common, crucial tools for multinational enterprises to manage their business and tax affairs, covering billions of dollars of costs. And they are typically long term. A clear understanding of the scope and meaning of the cost sharing rules is thus essential to determining the tax liabilities of multinational enterprises in the United States and elsewhere.

This case concerns a key aspect of cost sharing arrangements—namely, whether the participants in a cost sharing arrangement must share stock-based compensation. More fundamentally, though, it concerns the standard that has governed transfer pricing for more than eight decades: the arm's length standard. Under that standard, transfer prices between related entities are evaluated for consistency with the results that unrelated, arm's length parties would realize in the same transaction under the same circumstances. The arm's length standard underlies an international transfer pricing system—*i.e.*, common approaches to transfer pricing and a network of international tax treaties—that nations around the world have developed collaboratively over the course of more than 80 years. The arm's length standard is thus a foundational principle used by taxpayers and taxing authorities to allocate a multinational enterprise's income between the countries in which the enterprise operates. In this regard, the arm's length standard serves the critical role of providing the accepted framework for dividing taxing rights between and among countries.

The Ninth Circuit's split decision raises questions about the arm's length standard generally, and the treatment of stock-based compensation in cost sharing arrangements specifically, that are important to amici.

First, as petitioners explain, the decision below departed from the arm's length standard—even though the Treasury Department purported to apply that standard when promulgating the transfer pricing regulation at issue here, 26 C.F.R. § 1.482-7A(d)(2). *See* Pet. 17–19. The decision below has prompted confusion and uncertainty among taxpayers regarding the application of the arm's length standard. Continued uncertainty could lead to more transfer pricing disputes—beyond just cost sharing disputes—which would impose significant costs on both multinational enterprises and taxing authorities. Amici would have had the opportunity to express these concerns during the administrative rulemaking process if the Treasury Department had advanced the same justification for § 1.482-7A(d)(2) that the Ninth Circuit adopted on appeal.

Second, § 1.482-7A(d)(2) itself directly affects the tax and financial reporting of billions of dollars of stock-based compensation each year. Amici have been closely watching this case, and amici expect that, although many taxpayers will follow the decision below and treat the regulation as valid, many others may not, relying instead on the 15-0 Tax Court opinion going the other way. Amici are unaware of any other case presenting the same issue—and it would likely take a decade or more for another case to reach this Court. Without this Court's intervention, disuniformity and uncertainty created by the decision below will not be resolved any time soon.

ARGUMENT

I. THE ROLE OF THE ARM'S LENGTH STANDARD IN TRANSFER PRICING IS EXCEPTIONALLY IMPORTANT

The Ninth Circuit's split decision upheld the stock-based compensation regulation on a basis other than the one articulated by the Treasury Department during the rulemaking process. The meaning and applicability of the arm's length standard are exceptionally important to amici, and the Ninth Circuit's decision to circumvent the administrative rulemaking process warrants this Court's review.

A. The Ninth Circuit Departed From The Arm's Length Standard And Circumvented The Rulemaking Process

1. Multinational enterprises must comply with the tax laws of every country where they operate. Doing so is complex, and when countries use different rules, there is a significant risk that multiple jurisdictions will seek to tax the same income. *See, e.g.*, United Nations, *Manual for the Negotiation of Bilateral Tax Treaties Between Developed and*

Developing Countries 2019, at 4 (2019).[3] A key objective of the international tax treaty network is to ensure that taxing authorities use consistent principles in order to minimize double taxation.

The arm's length standard is one such principle. Under that standard, income and expense allocations between related entities are tested for tax purposes by reference to what the allocations would be if there were an arm's length relationship between the entities. *See, e.g.*, 26 C.F.R. § 1.482-1(b)(1), (d)(1); U.S. Dep't of the Treasury, *United States Model Technical Explanation Accompanying the United States Model Income Tax Convention of November 15, 2006*, at 30 (2006).[4] Over the course of more than 80 years, the United States and many other countries have coalesced around the arm's length standard to allocate the income and deductions of a multinational enterprise among the countries where it operates—which helps ensure that the income earned in each country is taxed only once.

The central role of the arm's length standard in transfer pricing is reflected in decades of case law, regulations, and administrative practice, as well as in the worldwide network of international tax treaties. *See, e.g.*, *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 305 (1994); *A Study of Intercompany Pricing Under Section 482 of the Code*, I.R.S. Notice 88-123, 1988-2 C.B. 458, 459–61 ("*White Paper*") (tracing the history of the arm's length

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[3] Available at https://www.un.org/esa/ffd/wp-content/uploads/2019/06/manual-bilateral-tax-treaties-update-2019.pdf.

[4] Available at https://www.irs.gov/pub/irs-trty/temod006.pdf.

standard); Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.-Mex., art. 9, Sept. 18, 1992, T.I.A.S. No. 93-1228.[5] Indeed, as the Organisation for Economic Co-operation and Development ("OECD") has put it, "the arm's length principle . . . is the international transfer pricing standard that OECD member countries"—including the United States—"have agreed should be used for tax purposes by [multinational enterprise] groups and tax administrations." OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* 33 (July 2017) ("*OECD Transfer Pricing Guidelines*").[6] For transfer pricing to effectively prevent double taxation, then, taxpayers and taxing authorities must adhere to and consistently apply the arm's length standard.

2. During the rulemaking process for § 1.482-7A(d)(2), the Treasury Department purported to apply the arm's length standard. *See* 67 Fed. Reg. 48,997, 49,000 (July 29, 2002) (notice of proposed rulemaking); 68 Fed. Reg. 51,171, 51,172–73 (Aug. 26, 2003) (preamble to final rule).[7]

Amici and others submitted comments explaining that, in fact, the proposed rule was inconsistent with the arm's length standard the Treasury Department was purporting to apply. For example, amicus KPMG

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[5] Available at https://www.state.gov/wp-content/uploads/2019/02/93-1228-Mexico-Tax-Convention.pdf.

[6] Available at https://dx.doi.org/10.1787/tpg-2017-en.

[7] The substance of § 1.482-7A(d)(2) was incorporated into a comprehensive set of cost sharing regulations that was promulgated in 2011, and is currently codified at 26 C.F.R. § 1.482-7(d)(3). *See* 76 Fed. Reg. 80,082, 80,096 (Dec. 22, 2011).

LLP explained that evidence showed that "[u]nrelated third parties do not include compensatory stock options in the pool of 'costs' to be shared in cost sharing arrangements and analogous joint ventures." C.A. Suppl. Excerpts of Record ("SER") 183. Amicus PricewaterhouseCoopers LLP agreed that the rule was "fundamentally flawed" because "[t]he evidence from both private sector and government contracts demonstrates that independent parties do not, in fact, agree to share any amounts based on the other party's employee stock options." *Id.* at 192–93. Likewise, representatives of amicus Deloitte Tax LLP raised the proposed regulation's inconsistency with the arm's length standard. *See* Attachment to Letter from Alan Shapiro & Darcy Alamuddin, Deloitte & Touche LLP, to Commissioner, Internal Revenue Service (Mar. 26, 2003) ("The proposals engendered a storm of protest arguing that [they] are inconsistent with the arm's length standard . . . . The authors are generally in agreement with these comments . . . .").[8] In short, amici all took the Treasury Department at its word that the arm's length standard was the relevant governing standard under Section 482, and submitted comments that accorded with that understanding.

3. As petitioners explain, the Ninth Circuit's decision circumvented the notice-and-comment process. In upholding § 1.482-7A(d)(2), the Ninth Circuit justified a *departure* from the arm's length standard by giving significant weight to statutory language requiring that "income with respect to [the]

[8] The attachment was a copy of an article that the authors had published. *See* Alan Shapiro & Darcy Alamuddin, *Proposed Cost Sharing Stock Option Regulations: IRS Opens Another Front in the Battle*, World Corp. Fin. Rev. 3, 3 (BNA Feb. 2003).

transfer or license" of intangible property "be commensurate with the income attributable to the intangible." 26 U.S.C. § 482; *see* Pet. 17–19; *see also* Pet. App. 63a–65a, 158a–59a (dissenting opinions of judges below expressing the same view). But when the Treasury Department proposed (and then finalized) § 1.482-7A(d)(2), it barely even mentioned that standard. Had the agency intended to use "commensurate with income" as a separate standard to justify the regulation, it should have made that clear during the rulemaking process. And if it had, amici would have had the chance to submit comments explaining that such an approach would cause confusion about the arm's length standard and raise serious policy considerations—both nationally and internationally.

For example, amici (and other commentators) could have reminded the Treasury Department that it had long emphasized the importance of the arm's length standard and construed the "commensurate with income" standard to operate consistently with it. *See, e.g.*, *White Paper*, *supra*, 1988-2 C.B. at 472–80; U.S. Dep't of the Treasury, *United States Model Income Tax Convention of September 20, 1996: Technical Explanation*, at 29 (1996).[9] Amici could have pointed out that justifying the regulation on the basis of the "commensurate with income" standard as distinct from the arm's length standard would have broken from that longstanding position and improperly diminished the role of the arm's length standard. And amici could have explained the potential for conflict with the United States' tax treaty obligations and how such a change in position

[9] Available at https://www.irs.gov/pub/irs-trty/usmtech.pdf.

could undermine the arm's length standard more generally. Faced with such comments, the Treasury Department would have had to respond, make clear its position, and explain whether and why it was changing its understanding of the "commensurate with income" standard. It did none of those things.

In short, these points should have been raised and thoughtfully debated on the rulemaking record. By adopting a justification for § 1.482-7A(d)(2) that the Treasury Department offered only on appeal, the Ninth Circuit circumvented the administrative rulemaking process.

B. The Consequences Of The Ninth Circuit's Decision Are Significant

1. There can be little question that the Ninth Circuit's decision employed reasoning that has sown confusion about whether and how the arm's length standard should be applied. Indeed, many taxpayers have approached amici with questions about the decision below and its effect on the arm's length standard.

That confusion likely stems from three main aspects of the Ninth Circuit majority's opinion. *First*, that opinion characterized the arm's length standard as "flexible" and "fluid" based on case law that did not apply, or even purport to apply, the arm's length standard. Pet. App. 28a, 38a; *see id.* at 9a–10a (discussing *Frank v. Int'l Canadian Corp.*, 308 F.2d 520, 528–29 (9th Cir. 1962)). Thus, the Ninth Circuit left unclear whether the arm's length standard remains the applicable standard—as it had been until the decision below was issued—or whether it is instead one transfer pricing standard among many.

Second, the decision below downplayed the role of comparability with uncontrolled transactions in applying the arm's length standard. The transfer pricing regulations specifically emphasize the importance of comparability in applying the arm's length standard. *See, e.g.*, 26 C.F.R. §§ 1.482-1(c)(2), (d)(1), -6(c)(3)(ii)(B). So do international transfer pricing guidelines. *See, e.g.*, *OECD Transfer Pricing Guidelines*, *supra*, at 35. But the Ninth Circuit held that a comparability analysis was not required—and it upheld § 1.482-7A(d)(2) even though the evidence provided to the agency during the rulemaking process pointed to the conclusion that uncontrolled parties would *not* share stock-based compensation. *See* Pet. App. 26a–27a; *see also id.* at 102a–03a (noting the lack of evidence). The decision below thus raises questions about whether taxpayers and the Internal Revenue Service ("IRS") must first look for market-based evidence of arm's length results when evaluating transfer prices, or whether other factors stand on equal footing with comparability in all cases.

Third, the decision below gave mixed messages about the meaning of the "commensurate with income" standard. The Ninth Circuit discussed that standard in several different ways that obscure its effect on and relationship with the arm's length standard. For example, the court of appeals cited scholarship and other authorities suggesting that the "'commensurate with income standard is not really a new approach to § 482'" and is "consistent with the arm's length standard." Pet. App. 12a, 15a (citation omitted). But elsewhere, the Ninth Circuit both hinted that the addition of the "commensurate with income" standard changed the meaning of the arm's length standard, *id.* at 29a–30a, and implied that the arm's length and "commensurate with income" standards operate independently, *id.* at 39a–40a. The "commensurate with income" standard either is a manifestation of the traditional arm's length standard, changed that standard, or is independent of that standard; it cannot be all three.

The lack of consistency and clarity creates confusion about what standard or standards taxpayers must comply with going forward.

2. The United States is a leader in, and often sets the tone on, transfer pricing issues. Foreign taxing authorities take note of the Treasury Department and IRS's positions on the arm's length standard and monitor significant transfer pricing cases. Sometimes, foreign taxing authorities even rely on court opinions from cases like this one when developing their positions in transfer pricing disputes. If the Ninth Circuit's decision is allowed to stand, numerous adverse collateral consequences will likely follow.

First, if the application of the arm's length standard is weakened, and taxing authorities begin to employ "flexible" or "fluid" standards (as the decision below suggests might be appropriate), resolution of international tax disputes will become more complex and time consuming, and less predictable and consistent. Tax treaty mutual agreement procedures provide countries with a mechanism to agree on the proper division of the tax base under the arm's length standard. *See, e.g.*, U.S. Dep't of the Treasury, *United States Model Income Tax Convention* 56–63 (2016).[10]

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[10] Available at https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-US%20Model-2016.pdf.

Although disagreements among taxing authorities do exist and negotiations between countries have material consequences for national income tax revenue, the international commitment to follow a single standard—the arm's length standard—has made agreement possible in almost all cases.

If one or another of the negotiating countries asserts the authority to abandon the internationally accepted arm's length standard in a particular situation, however, companies and taxing authorities will spend more time and more resources addressing such disputes as they seek to find common ground on the basic analytical framework applicable to each dispute. Moreover, companies and taxing authorities will be less likely to resolve tax disputes successfully and equitably, resulting in a higher incidence of double taxation.

Second, multinational enterprises' tax reporting burdens could increase markedly. Preparing consistent transfer pricing documentation across a number of jurisdictions is already difficult. If the relevant countries apply conflicting principles or standards, the ability of multinational enterprises to comply will be compromised, and amici's ability to advise multinational enterprises regarding the certainty of their compliance obligations will be diminished. Multinational enterprises will have to dedicate more time and resources to risk assessment and evaluation, and they will become far less confident in their ability to comply with their legal obligations in all the countries where they operate.

Third, the lack of clarity arising from the Ninth Circuit's decision could cause the preparation and auditing of multinational enterprises' financial statements to become more difficult and costly.

Uncertainty and complexity in tax compliance lead to greater uncertainty and complexity in financial reporting: Multinational enterprises must analyze—and make judgments about—whether tax benefits recognized under the arm's length standard may be recognized under the applicable financial reporting standard.[11] Taxpayers have already spent substantial time and resources wrestling with the proper treatment of stock-based compensation in cost sharing arrangements. If uncertainty in the application of the arm's length standard extended to other transfer pricing matters, that expenditure would multiply exponentially.

Finally, and relatedly, different companies and tax advisors may take different positions on the meaning and scope of the arm's length standard based on the decision below. Companies could also take different views of whether to report tax benefits from that standard in their financial statements. Such variations in reporting could make it more difficult for investors to compare financial statements across different companies.

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The decision below and the shift in justification for § 1.482-7A(d)(2) have increased uncertainty about the arm's length standard. Such uncertainty is counterproductive for multinational enterprises and

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[11] With respect to U.S. generally accepted accounting principles, the applicable standard is Accounting Standards Codification Topic 740 ("ASC 740"). Under ASC 740, the benefit of a tax position is recognized in a company's financial statements only if company management concludes that it is more likely than not that the position would be sustained based on its technical merits if taken to the court of last resort.

could increase the number and complexity of transfer pricing disputes in the future. The applicability and scope of the arm's length standard are exceptionally important to tax practitioners and taxpayers. Amici could have (and would have) expressed these concerns during the administrative rulemaking process—*if* the Treasury Department had justified § 1.482-7A(d)(2) on the basis ultimately sustained by the Ninth Circuit. Amici never had that chance. This Court's review is warranted.

II. WHETHER PARTICIPANTS IN A COST SHARING ARRANGEMENT MUST SHARE STOCK-BASED COMPENSATION IS IMPORTANT TOO

Beyond the overarching concerns raised by the Ninth Circuit's decision regarding the role and scope of the arm's length standard, the specific issue in this case is also an important one that will have significant consequences. Taxpayers and the IRS have long disputed whether participants in a cost sharing arrangement must share stock-based compensation. *See, e.g.*, Patricia Gimbel Lewis & Neal M. Kochman, *Option Wars: Upping the Ante for Cost Sharing Arrangements*, 31 Tax Mgmt. Int'l J. 547, 547 (2002) ("The IRS and taxpayers have been at loggerheads on this issue since the mid 1990s.").

That question is now definitively resolved for stock-based compensation incurred before 2003—the year § 1.482-7A(d)(2) took effect. In *Xilinx Inc. v. Commissioner*, the Tax Court held that "the arm's-length standard is applicable in determining the appropriate allocation of costs" in a cost sharing arrangement. 125 T.C. 37, 55 (2005). Since the IRS had not shown that unrelated parties would share stock-based compensation costs, the Tax Court said, related entities that participate in a cost sharing arrangement need not share those costs either. *Id.* at 59–63. The Ninth Circuit affirmed the Tax Court's decision in 2010, and the IRS has acquiesced in it nationally. *See Xilinx, Inc. v. Commissioner*, 598 F.3d 1191 (9th Cir. 2010), *acq. in result*, 2010-33 I.R.B. 240.

In promulgating § 1.482-7A(d)(2), the Treasury Department departed from the result ultimately reached in *Xilinx* for stock-based compensation incurred beginning in 2003. *See* 68 Fed. Reg. at 51,172 (requiring that stock-based compensation be "taken into account in determining" shared intangible development costs). The Tax Court below found § 1.482-7A(d)(2) invalid—in a reviewed, 15-0 opinion—for reasons similar to those given in *Xilinx*: The Treasury Department failed to provide any evidence that unrelated parties would agree to share stock-based compensation—and failed to rebut ample evidence showing that unrelated parties would not. *See* Pet. App. 99a–103a, 121a–36a; *see also supra* at 8–11; SER183. In a split decision, the Ninth Circuit reversed. In upholding § 1.482-7A(d)(2), the two-judge majority deviated from the considered views of 15 Tax Court judges, a dissenting panel judge, and three judges who dissented from the denial of rehearing en banc. *See* Pet. App. 47a–167a.

The validity of § 1.482-7A(d)(2) is an issue of extraordinary importance to many taxpayers. As petitioners correctly note, the rule affects the tax and financial reporting of billions of dollars each year. *See* Pet. 26–27. Indeed, recent Securities & Exchange Commission ("SEC") filings show that companies have already reported over a billion dollars of accounting charges related to the Ninth Circuit's ruling. *See id.*; *see also* Pet. App. 324a–30a (listing SEC filings mentioning this case). And numerous companies have publicly mentioned this case, highlighting the lasting importance of the issue. *See, e.g.*, Pet. 25–26 (noting that over 100 companies have publicly said that this case and/or § 1.482-7A(d)(2) affect them). Many taxpayers have likewise told amici that they are interested in and affected by this issue.

The decision below is the first and only court of appeals opinion on the validity of § 1.482-7A(d)(2). Many taxpayers will treat it as dispositive—and it is especially important to them that this Court determine the validity of this regulation. To be sure, some taxpayers may assert that § 1.482-7A(d)(2) is invalid—and may rely on the Tax Court's opinion, which remains good law outside of the Ninth Circuit.[12] At a minimum, then, there will continue to be pervasive uncertainty about the regulation's validity, which could cause inconsistency in financial reporting and more international transfer pricing disputes, among other negative collateral consequences. *Cf. supra* at 13–15.

Amici are not currently aware of any pending cases—other than those involving petitioners—in which the validity of § 1.482-7A(d)(2) (or the 2011

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[12] The Tax Court follows an on-point court of appeals decision when appeal "lies to that Court of Appeals and to that court alone." *CNT Inv'rs, LLC v. Commissioner*, 144 T.C. 161, 183 (2015) (citation omitted). Moreover, a Tax Court opinion can provide a "reasonable basis" or "substantial authority" for a tax position, insulating the taxpayer from penalties, even if it has been overruled or reversed by a court of appeals "to which [the] taxpayer does not have a right of appeal." 26 C.F.R. §§ 1.6662-3(b)(3), -4(d)(3)(iii).

version of the regulation) is at issue. This is significant because it means that, without this Court's intervention, any uncertainty will persist for the indefinite future. Disputes about tax positions often take *more than a decade* to percolate through the administrative and judicial process before reaching the court of appeals—as this case exemplifies. *See* C.A. Excerpts of Record 1–9, 264–65, 298–99 (returns filed for tax years 2004 to 2007; notices of deficiency issued in 2011 and 2012; Tax Court decision issued in 2015); Pet. App. 1a (final Ninth Circuit decision issued in 2019). Only this Court can definitively resolve whether the participants in a cost sharing arrangement must comply with § 1.482-7A(d)(2) and share stock-based compensation. This Court should grant certiorari now rather than let the enormous financial and practical consequences compound for the foreseeable future.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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