No. 19-930

IN THE
Supreme Court of the United States

CIC SERVICES, LLC,
Petitioner,

v.

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

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

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

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

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

STATEMENT OF INTEREST

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

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

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

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

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

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

The Sixth Circuit's decision in this case expanded a circuit split in an important and pervasive area of tax and administrative law—the ability of taxpayers to bring pre-enforcement challenges to federal tax regulations and other administrative tax guidance. That circuit split has created significant uncertainty in the tax community and prevents the uniform nationwide enforcement of the Internal Revenue Code. Moreover, the Sixth Circuit's broad reading of the Anti-Injunction Act[2] effectively eliminates any meaningful ability to challenge tax rules that impose reporting and compliance burdens but that do not affect the calculation of taxes imposed by the Internal Revenue Code. This broad reading of the Anti-Injunction Act creates precisely the sort of Tax Exceptionalism—the outdated doctrine that purports

[2] The Anti-Injunction Act, 26 U.S.C. § 7421(a), and the tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201, generally are interpreted conterminously. Pet. App. 5a. References herein to the Anti-Injunction Act or AIA include both statutes.

to exempt tax law from general administrative law principles—that this Court rejected in *Mayo Foundation for Medical Education and Research v. United States*, 562 U.S. 44 (2011).

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

SUMMARY OF ARGUMENT

The analysis in the Sixth Circuit's opinion claimed to find order amidst the "jurisprudential chaos" resulting from the absence of "an overarching theory of the [Anti-Injunction Act's] meaning and scope against which to evaluate" specific cases. Pet. App. 6a–7a (citation omitted). Yet as evidenced by Judge Sutton's concurrence in the denial of *en banc* rehearing, the Sixth Circuit's opinion further muddies the waters in understanding what this Court intended in *Direct Marketing Ass'n v. Brohl*, 575 U.S. 1 (2015), and how that decision applies in the context of regulatory burdens imposed by the Internal Revenue Service ("IRS") without notice and comment under the Administrative Procedure Act and under

other Congressionally enacted safeguards on regulatory action. The IRS regularly issues rules regulating "an ever-expanding sphere of everyday life—from childcare and charity to healthcare and the environment," Pet. App. 62a, and there is a problematic lack of clarity regarding when those rules can be challenged before enforcement. Clarification from this Court is needed to ensure the efficient nationwide administration of the Internal Revenue Code.

Moreover, if the AIA is read to preclude any pre-enforcement challenges to those rules, taxpayers will be left with no choice but to "'bet the farm' in order to bring an administrative challenge." *Id.* Such a result is particularly concerning for the Fellows of the College who advise taxpayers on how to comply with the tax laws and whether to adhere to tax rules that were not issued in compliance with the Administrative Procedure Act or other congressionally mandated requirements, such as the Congressional Review Act, the Regulatory Flexibility Act and the Paperwork Reduction Act.

This Court has made clear that tax rules are subject to the same types of review as other administrative regulations. *See, e.g.*, *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44 (2011). Although the AIA prohibits suits "for the purpose of restraining the assessment or collection of any tax," 26 U.S.C. § 7421(a), this Court recently explained that the terms "assessment" and "collection" do not extend to mere reporting requirements. *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 8 (2015). It follows that the AIA does not prevent taxpayers from bringing pre-enforcement challenges

to tax rules that do not involve the assessment or collection of taxes. Nevertheless, the conflicting decisions from the courts of appeals on the limits imposed by the AIA result in differing access to pre-enforcement challenges to taxpayers based on where they reside.

As Judge Sutton expressed in his concurrence in the denial of *en banc* rehearing, the combination of the decisions below and the D.C. Circuit's opinion in *Florida Bankers Ass'n v. United States Department of the Treasury*, 799 F.3d 1065 (D.C. Cir. 2015), "say all there is to say about the issue," leaving the conflicting views fully developed and ready for this Court to resolve. Pet. App. 57a. The College encourages the Court to grant the Petition for a Writ of Certiorari because a definitive ruling from this Court is necessary to preserve an effective national tax enforcement system based on uniform, predictable, and comprehensible rules.

ARGUMENT

I. This Court Should Resolve the Circuit Split Regarding Whether Taxpayers Can Bring Pre-Enforcement Challenges to Rules Issued in Contravention of the Administrative Procedure Act or other Congressionally Mandated Requirements.

Taxpayers need clarity and uniformity regarding their right to challenge rules that have the potential to touch nearly all aspects of life. Tax regulations are pervasive: Decisions on whether to buy a home and have children can be encouraged by the Code. *See, e.g.*, 26 U.S.C. § 163(h) (deduction for qualified

residence interest), 26 U.S.C. § 24 (child tax credit). Payments for medical care create deductions while disfavored health choices are made more costly and thus dissuaded. *See, e.g.*, 26 U.S.C. § 213 (itemized deduction for certain medical expenses); 26 U.S.C. § 5001 (distilled spirits tax). Congress may initiate relief to wrongly taxed veterans and promote philanthropy. *See, e.g.*, Combat-Insured Veterans Tax Fairness Act of 2016, Pub. L. No. 114-292; 26 U.S.C. § 170. The Code can also be used to punish, which Congress has chosen to do in certain instances of fraud, which can carry fines and penalties including prison. *See, e.g.*, 26 U.S.C. § 7206(1).

The need for clarity regarding the availability of pre-enforcement challenges is particularly acute now. Congress enacted the Tax Cuts and Jobs Act ("TCJA"), Public Law Number 115-97, in December 2017. Many provisions of TCJA delegated authority to the Treasury Department to implement and administer the law. The Treasury Department and the IRS have spent several years promulgating a large volume of regulatory guidance in the form of regulations and other administrative pronouncements. There are serious arguments whether certain elements of that guidance were issued in compliance with the Administrative Procedure Act and other applicable requirements. Fellows of the College have been asked by their clients for advice on pre-enforcement challenges to this TCJA guidance, and they have been hampered in giving that advice due to the circuit split. *Compare* Pet. App. 1a–37a, *and Fla. Bankers Ass'n v. U.S. Dep't of the Treasury*, 799 F.3d 1065 (D.C. Cir. 2015), *with Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013), *and Hobby*

Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (en banc).

The lack of clarity regarding the limits on pre-enforcement challenges continues to generate litigation in the district courts. For example, in *Silver v. IRS*, the plaintiffs are challenging regulations implementing a transition tax created under the TCJA. The plaintiffs have alleged that they were injured by the cost of complying with the TCJA's transition tax regulations, "which include certain 'collection of information' and 'recordkeeping obligations.'" *Silver v. IRS*, No. 19-cv-247 (APM), 2019 WL 7168625, at *2 (D.D.C. Dec. 24, 2019) (citation omitted). The district court rejected the government's arguments that the suit was barred by the AIA, concluding that the taxpayers did not "seek a refund or to impede revenue collection." *Id.* at *3.

A Western District of Texas court was similarly asked to determine whether the challenge to a temporary regulation would result in a restraint on the assessment and collection of taxes, and thus be barred by the AIA. *Chamber of Commerce of U.S. v. IRS*, No. 1:16-CV-944-LY, 2017 WL 4682050, at *3 (W.D. Tex. Oct. 6, 2017), *appeal dismissed*, No. 17-51063, 2018 WL 3946143 (5th Cir. July 26, 2018). Citing this Court's decision in *Direct Marketing*, the district court reasoned that the AIA did not implicate "all activities that may improve the government's ability to assess and collect taxes." *Id.*

Absent guidance from this Court, the College expects continued litigation in the district courts and courts of appeals over the scope of the AIA. In his concurrence in the denial of *en banc* rehearing, Judge

Sutton emphasized that that the courts of appeals have said all there is to say about pre-enforcement challenges to the guidance. The issue is fully developed for this Court to clarify the rights of taxpayers and the procedural avenues they may pursue for pre-enforcement relief.

II. A Broad Reading of the AIA is Inconsistent with this Court's Rejection of Tax Exceptionalism.

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

The AIA applies only to prevent restraints on the assessment and collection of taxes. 26 U.S.C. § 7421. Because reporting requirements do not involve assessment or collection of taxes, the Court's decision in *Direct Marketing* fundamentally supports the right to challenge tax rules regarding reporting requirements prior to enforcement.

The Court in *Direct Marketing* was asked to determine whether a challenge to a sales tax reporting requirement violated the Tax Injunction Act ("TIA"). The TIA is a "cousin" statute to the AIA that states district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 8 (2015); 28 U.S.C. § 1341. In order to determine the meaning of "assessment" and "collection" under the TIA, the Court used the AIA for guidance assuming "that words used in both Acts are generally used in the same way." *Direct Mktg.*, 575

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

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

The government's broad reading of the AIA conflicts with the Court's holding on the meaning of "assessment" and "collection." The AIA cannot be read

to include challenges on information gathering because it is a separate and "discrete phase[] of the taxation process." *Id.* at 8. Further, "restrain" cannot be read to be so sweeping that it would envelop the procedures and protections afforded by the APA. The Court held that a narrow reading of the TIA applied and it is equally applicable to its cousin statute, the AIA.

B. *Citizens are permitted to challenge other laws, regulations and administrative guidance on a pre-enforcement basis.*

In other contexts, citizens are permitted to challenge laws, regulations, and other administrative guidance on a pre-enforcement basis, especially where civil and criminal penalties are imposed for noncompliance. *See, e.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) ("As we have long held, parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of 'serious criminal and civil penalties.'" (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967))). The law does not require a citizen to "bet the farm" to have their challenge to the law addressed. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490-91 (2010).

C. *The decision below conflicts with the Court's rejection of Tax Exceptionalism.*

The Court firmly rejected Tax Exceptionalism in the context of administrative deference in *Mayo Foundation for Medical Education and Research v.*

United States, 562 U.S. 44 (2011). In *Mayo*, the parties argued over whether Treasury Department regulations were entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or whether they were subject to the less deferential standard announced in *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1979). The Court held that the Chevron standard applied and expressly rejected the view that Treasury Department regulations issued under general authority are owed "less deference" than those "issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision." *Mayo*, 562 U.S. at 56 (citation omitted). The Court stressed "the importance of maintaining a uniform approach to judicial review of administrative action." *Id.* at 55 (quoting *Dickinson v. Zurko,* 527 U.S. 150, 154 (1999)). "We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations." *Id*. at 56.

By effectively requiring taxpayers to "bet the farm" to challenge the types of tax rules at issue in this case, the Sixth Circuit revives the doctrine of Tax Exceptionalism by insulating tax rules—and only tax rules—from effective judicial review. This departure from the general administrative law right to pre-enforcement review is not mandated by the text of the AIA. Pre-enforcement review of an information gathering requirement does not stop or prohibit the assessment or collection of taxes and thus is not within the ambit and purpose of the AIA.

The Court should clarify the reach of the AIA to preserve an effective national tax enforcement system based on uniform, predictable, and comprehensible rules.

CONCLUSION

For the foregoing reasons, the College respectfully requests that the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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