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 TAX CLINIC AT THE LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

T. KEITH FOGG
CARLTON SMITH
(*Counsel of Record*)
TAX CLINIC AT THE LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL
122 Boylston Street
Jamaica Plain, MA 02130
617.390.2532
csmith@law.harvard.edu
kfogg@law.harvard.edu

LESLIE BOOK, PROFESSOR
VILLANOVA LAW SCHOOL
299 N. Spring Mill Road
Villanova, PA 19085
610.246.1494
book@law.villanova.edu

MEAGAN HORN
Pro Bono Contributor to Tax Clinic at the Legal Services Center of Harvard Law School
THOMPSON & KNIGHT, LLC
1722 Routh Street
Suite 1500
Dallas, TX 75201
214.969.1167
meagan.horn@tklaw.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

The Tax Clinic at the Legal Services Center of Harvard Law School (the Tax Clinic) represents low-income taxpayers in controversies with the IRS, both before the IRS and in federal court, with the goal of maximizing financial well-being and protecting taxpayer rights. We write to describe to this Court how a broad application of *Florida Bankers Assoc. v. U.S. Dept. of Treas.*, 799 F.3d 1065 (D.C. Cir. 2015) coupled with a narrow reading of the *South Carolina v. Regan*, 465 U.S. 367 (1984) exception to the AIA harms low-income taxpayers. Upon written consent of all parties involved in this matter, the Tax Clinic submits the following brief.[1]

SUMMARY OF THE ARGUMENT

The Tax Clinic at the Legal Services Center of Harvard Law School requests that the Supreme Court grant certiorari in this case because the Sixth Circuit's opinion improperly restricts taxpayers from challenging certain tax rules. In sum, the Sixth Circuit's

[1] Timely notice was provided and consent to file this brief was requested of the parties. On January 28, 2020, counsel for CIC Services, LLC provided its written consent, and on February 6, 2020, the Solicitor General provided his written consent. Pursuant to Rule 37.6, it is hereby noted that this brief was not drafted in whole or in part by either counsel to the parties, nor did any of the parties or counsel thereto provide any monetary contributions intended to fund the preparation or submission of the brief.

interpretation of the Anti-Injunction Act (AIA) is overly-broad. When the Sixth Circuit's decision is imposed on low-income taxpaying citizens, it becomes apparent that the ruling places such a burden upon low-income taxpayers seeking to contest the impact of IRS guidance that, in some cases, the application of the decision completely eliminates their right to do so.

The Sixth Circuit reasoned that the presence of a potential penalty that is "assessed and collected in the same manner as taxes" under the Internal Revenue Code was enough to shield the regulation from any scrutiny under the Administrative Procedure Act. However, a review of the historical context surrounding the AIA and the Administrative Procedure Act (APA) demonstrates that the AIA was not enacted to protect the IRS's right to collection of information. This reasoning is directly in line with this Court's holding in *Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1124 (2015). This reasoning does not change just because the Internal Revenue Service unilaterally determines to threaten taxpayers with a potential penalty if they do not comply with the rule-making (even if such penalty is "assessed and collected in the same manner as taxes" under the Code).

If the Sixth Circuit's overly-broad interpretation stands, low-income taxpayers will be subjected to severe adverse effects. The IRS will hold the unilateral right to shield their rule-making from APA scrutiny by choosing to include the right to impose a potential penalty for noncompliance. The low-income taxpayer will be at the mercy of the IRS in these circumstances with

no pre-payment or administrative remedy. Many anti-poverty programs are delivered via the Internal Revenue Code (a use of the tax code not contemplated in the 1860s when the AIA was enacted). Citizens should have the same protections under the APA regardless of whether they receive such governmental assistance via the Internal Revenue Code or via other governmental departments (e.g., the Department of Health and Human Services). But the Sixth Circuit's overly-broad reading of the AIA prevents this parity.

For these reasons, the Clinic argues that the Supreme Court should grant certiorari, reverse the decision of the Sixth Circuit and provide clarity to the ability of taxpayers to contest the validity of tax rules.

ARGUMENT

I. INTRODUCTION: THE CURRENT SCOPE OF THE AIA AS INTERPRETED BY THE SIXTH CIRCUIT REACHES TOO BROADLY

It may seem odd that a low-income taxpayer clinic is weighing in on a case involving a tax advisor to § 831(b) captive insurance companies. After all, our clients generally do not encounter the same type of tax shelter scrutiny facing CIC Services (hereinafter CIC). However, this case exposes a fundamental tension between the Administrative Procedure Act (APA) and the Anti-Injunction Act (AIA) which, if resolved incorrectly, would disproportionately harm low-income taxpayers.

The Tax Clinic made a similar argument to the Second Circuit in the case of *Larson v. United States*, 888 F.3d 578 (2d Cir. 2018), which also involved activity targeted by the IRS as a tax shelter. While the *Larson* case differs factually and procedurally from this case, the same fundamental issue of access to the courts exists in both cases. In *Larson*, the Tax Clinic argued that the proliferation of assessable tax penalties over the past few decades necessitates a reconsideration of the 'payment-first' rule established by this court in *Flora v. United States*, 362 U.S. 145 (1960). In particular, assessable penalties can only be challenged in District Court and, under *Flora*, only after payment. Such a rule juxtaposed with an increase in assessable penalties creates a barrier to access to the court system not contemplated in a different era.

While the CIC case does not seek to overturn the *Flora* decision, it does expose yet another example of a rule created long ago that has the effect of denying access to courts given the modern uses of the tax code. This clash of laws created in different eras combined with the modern use of the tax system to deliver social welfare benefits to low-income taxpayers, brings low-income taxpayers into a system not designed with their interest and capabilities in mind. This has the effect of denying them a realistic opportunity to seek redress in court in many situations.

In this case, CIC argued that IRS Notice 2016-66 was impermissibly issued and compliance with the Notice would strain its profit margin. After reviewing CIC's arguments, the Sixth Circuit issued a holding

that effectively immunized from all pre-enforcement scrutiny any IRS guidance that the IRS subjects to an assessable penalty. The Sixth Circuit's holding reduces any challenge to the rule-making process as just "nifty" wordplay that serves as an attempt at an end-run around the AIA's prohibition against pre-enforcement challenges to tax collection. If a similar IRS action were targeted at low-income taxpayers, the situation could be insurmountable. The holding in *CIC Services, LLC v. IRS*, No. 18-5019 (6th Cir. 2019) leaves taxpayers the choice of either incurring the expenses of compliance or ignoring the law and incurring steep civil penalties in order to challenge the rule-making in court. For most low-income taxpayers, this choice is untenable. Low-income taxpayers are far less likely to have the resources either to adapt to costly information-gathering requirements or to pay the penalties that enable them to be heard in court. Accordingly, they are particularly vulnerable to this decision's overbroad reading of the AIA.

The Sixth Circuit's holding that forces taxpayers to choose to disregard rules and incur penalties in order to challenge an arbitrary and capricious regulation does not constitute the kind of adequate forum for litigation to which the Court found taxpayers entitled in *South Carolina v. Regan*, 465 U.S. 367, 381 (1984). This Court has held that plaintiffs need not "'bet the farm . . . by taking the violative action' before 'testing the validity of the law.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118,

129 (2007)). Yet, this is exactly what the Sixth Circuit requires here.

As the Court considers the request for writ of certiorari, it should be noted that this is not a situation where the taxpayer should look to the legislative branch to solve the issue. Indeed, Congress has already addressed this issue. The AIA was not intended to present taxpayers with a choice between either jeopardizing their financial well-being or acquiescing to one governmental branch's decision-making that inappropriately imposes requirements or unnecessary burdens. Furthermore, Congress enacted the APA to allow the judicial branch to hear a broad array of pre-enforcement challenges, and the Sixth Circuit did not properly exercise its authority in refusing to hear the pre-enforcement challenge to the reporting requirements at issue here. As this issue implicates fundamental constitutional values that are threatened by this far-reaching administrative decision, it is vital that it is resolved by the Supreme Court.

For these reasons, we write in support of the request that the Supreme Court grant the petition for a writ of certiorari.

II. THE RULE-MAKING PROCESS SHOULD NOT BE IMMUNE FROM REVIEW BY THE MERE PRESENCE OF A *POTENTIAL* ASSESSABLE PENALTY

This brief does not suggest that the Court address whether the AIA precludes pre-enforcement judicial

review of the imposition of an assessable penalty. This question is not at issue in this case. Here, we ask the Court to consider whether the IRS's single-handed decision to subject taxpayers to a *potential* assessable penalty is enough to immunize an otherwise alleged arbitrary and capricious rule-making from APA review.

a. Brief Historical Context of the AIA and APA

In 1867, when Congress first introduced the concepts found in the present-day version of the AIA, the Internal Revenue Service was just five years old.[2] The Civil War had exponentially increased the government's revenue needs, leading it to implement a system of internal taxation where previously it had relied primarily on tariff revenue. Predictably, this new government intrusion elicited a flurry of lawsuits by disgruntled taxpayers seeking to enjoin the assessment and collection of taxes.[3]

These injunctive suits had the power to cripple the new tax system because taxes at the time were collected in lump sum payments due at the end of each tax period, rather than through a wage-withholding regime as they are today. Litigious taxpayers who

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[2] The AIA was originally enacted as part of Pub. L. No. 39-169 on March 2, 1867. The modern equivalent is found in the IRC, Section 7421(a).

[3] *See* Kristin E. Hickman and Geral Kerska, *Restoring the Lost Anti-Injunction Act*, 103 Va. L. Rev. (2017) (discussing the history of the Anti-Injunction Act).

impeded the collection of these large lump sums threatened the ability of the government to gather enough reliable funding to conduct its business. Congress thus responded by passing the AIA, which disallowed suits brought "for the purpose of restraining the assessment or collection of any tax."

In the mid-20th century, Congress restructured the IRS's tax collection process from the lump sum payment model to a pay-as-you-go model that used wage withholdings to ensure steady and reliable revenue collection. Such restructuring rendered the AIA far less important since a large portion of the government's revenue was deposited directly from taxpayers' employers. While Congress has not repealed the AIA, it has responded to the ever-expanding system of federal taxation by limiting its power out of concern for the taxpayer, with the modern-day AIA found in Section 7421(a) citing several exceptions to the rule where the taxpayer is provided a pre-payment forum to dispute the imposition of a tax.[4]

In addition to the pre-payment judicial forum exceptions to the general rule, Congress also enacted the APA, which provides taxpayers protection from

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[4] *See* I.R.C. Section 7421(a), which provides, "***Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6232(c), 6330(e)(1), 6331(i), 6672(c), 6694(c), and 7426(a) and (b)(1), 7429(b), and 7436***, no suit for the purpose restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." (Emphasis added).

"arbitrary and capricious" rule-making.[5] Congress intended for the APA to be interpreted broadly, stating:

> To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.[6]

This Court has acknowledged as much, noting that the APA embodies the "basic presumption of judicial review" and that its "generous review provisions" be given "hospitable" interpretation.[7]

The historical context, Congressional history, and this Court's consistent jurisprudence of the AIA and APA all make clear that the AIA should not be given an unnecessarily broad reading to extend its application to protect information-gathering activities, even in situations where noncompliance with such activities *could* result in a penalty that is treated as a tax under the Internal Revenue Code (IRC).

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[5] *See* Administrative Procedure Act, Pub. L. No. 79-404.

[6] *See* H.R. Rep. No. 1980, 79th Cong., 2d Sess., 41 (1946).

[7] *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-141 (1967), citing *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955).

b. The AIA Does Not Bar a Challenge to Rule-Making that Merely Restrains the Collection of Information

The Sixth Circuit's interpretation of the AIA contradicts both the original intended purpose of the AIA and this Court's interpretation of what it means to restrain a tax assessment, as explained in *Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1124 (2015).

In *Direct Marketing*, this Court narrowly interpreted the word "restrain" in the Tax Injunction Act (TIA), which is interpreted synonymously with the AIA, as meaning to stop the assessment, levy or collection rather than as encompassing actions that merely inhibit them. Shortly after the *Direct Marketing* opinion, the D.C. Circuit was presented with a suit challenging certain information reporting requirements, noncompliance with which was enforced by a penalty that is treated as a tax under Chapter 68, Subchapter B of the IRC.[8] The court rightfully noted that the terms in the TIA and AIA should be interpreted similarly, but distinguished the facts in *Florida Bankers* from those in *Direct Marketing* on the ground that the penalty at issue in *Florida Bankers* was deemed a tax under the IRC. Relying on *National Federation of Independent Business v. Sebelius*,[9] for the holding that Chapter 68, Subchapter B penalties are considered taxes for purposes of the AIA, the D.C. Circuit found that the AIA

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[8] *Florida Bankers Assoc. v. U.S. Dept. of Treas.*, 799 F.3d 1065 (D.C. Cir. 2015).

[9] 132 S. Ct. 2566 (2012).

barred the taxpayer from challenging the information reporting requirements because allowing such a challenge would in essence allow a challenge to the collection of the potential penalty/tax. The Sixth Circuit in *CIC Services* found *Florida Bankers* to be persuasive and followed the reasoning in reaching a similar conclusion in disallowing CIC Service's APA challenge to the burdensome information reporting requirements issued in an IRS Notice without review or comment.

This reasoning, however, is flawed. The AIA protects the government from suits that would interfere with the collection of taxes and the necessary raising of revenue. Here, the rule-making was centered squarely on an intent to collect information, not revenue. The IRS chose to impose a penalty in the event of noncompliance that had the principle purpose of inducing taxpayers to provide the requested information. In fact, if the IRS succeeded in inducing the behavior it intended, it would never have collected a cent from taxpayers, only information. Under these facts, it is disingenuous for the IRS to hide potentially faulty rule-making behind a law intended to protect the collection of revenue.

More concerning, however, is that the Sixth Circuit's holding inevitably provides AIA protection to any rule that carries even the whiff of a hypothetical penalty. The IRS and Treasury Department will gain the power to issue a myriad of rules and regulations that cannot be challenged meaningfully through pre-enforcement judicial review if the department makes the unilateral decision to punish potential noncompliance

with an assessable penalty treated as a tax under the IRC. This holding essentially hands the executive branch the power to decide when its own rule-making will be offered APA protections. The Sixth Circuit worried that to rule for the taxpayer would cause the AIA to be reduced to dust in the context of challenges to regulatory taxes, but in so holding, the court all but obliterated the congressionally provided pre-payment forum for necessary APA challenges.[10]

While corporate taxpayers and wealthier individual taxpayers may have the means to fight improper rule-making in a post-payment forum, the low-income taxpayer is particularly vulnerable to such a broad holding. In many cases such a taxpayer is left without any real protection at all.

III. ACTUAL EFFECTS ON LOW-INCOME TAXPAYERS

Corporations like CIC Services and/or wealthy individuals might find that, while painful, they are still able to bear the cost of noncompliance and sue for a refund in court. For many of our low-income taxpayer clients, however, even relatively small penalties will present insurmountable barriers to challenging unduly burdensome informational requirements. Immunizing regulations that apply to low-income taxpayers from pre-enforcement judicial review will not only disregard Congress's intent to limit the scope of the AIA

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[10] *See CIC Services v. IRS*, 925 F.3d 247, 257 (6th Cir. 2019), quoting *Florida Bankers*, 779 F.3d at 1071.

generally, but will also undermine Congress's substantive anti-poverty tax policies.

a. An Example

The hardship the Sixth Circuit's ruling places on the low-income taxpayer can best be illustrated with an example. Assume Mr. Smith is a divorced, working father of three school-aged children, earning $20,000 a year at his full-time job. As the "custodial" parent, he timely and properly claims the earned income tax credit (EITC) on his tax return. He uses the few extra thousand dollars this credit affords him to help him meet the basic needs of his three children.

While Mr. Smith takes great care to ensure his tax returns are properly completed, the IRS determines that certain noncustodial taxpayers *may* be fraudulently claiming the EITC. The IRS, based on its access to external databases, believes that most of the erroneous claims of the EITC are attributable to noncustodial fathers. To address its concerns, the IRS issues information-gathering guidance requiring all noncustodial parents claiming the earned income tax credit who file a Head of Household tax return to submit copious amounts of records to substantiate that the child for which the credit is claimed complies with the definition of "qualifying child" under Section 152(c) of the IRC. The IRS unilaterally determines this guidance is merely interpretative guidance as defined by the APA and therefore it is issued without any public review or comment. Further, to ensure compliance, the IRS states that

returns that claim the credit without the additional required substantiation documentation attached, even if the credit is otherwise proper, will be considered improperly claimed, resulting in denial of the current year credit, imposition of the erroneous refund claim penalty under Section 6676 of the IRC and potentially triggering a disallowance of the credit for the 2 or 10 year period, as provided under Section 32(k) of the IRC.[11]

The substantiation requirements are onerous and the monthly cost and time required for Mr. Smith to assemble and retain the required documents quickly becomes one that impacts his family's access to basic needs. Mr. Smith and other taxpayers believe the guidance to be arbitrary and capricious as defined under

[11] Section 32(k) of the IRC provides that in the case of taxpayers who recklessly or intentionally disregard the rules and regulations will not be allowed to claim the credit for 2 years; for taxpayers who fraudulently claim the credit, the disallowance period will be 10 years. Section 6676 of the IRC is an assessable penalty, treated as a tax under the IRC, in the amount of 20% for refund claims filed without a "reasonable cause." The IRS's invocation of either of these penalty provisions would likely result in the same AIA protection as was provided in *CIC Services*. Specifically, the Section 6676 assessable penalty is exactly the same type of penalty treated as a tax under the IRC as the penalty at issue in *CIC Services*. The Section 32(k) penalty would likely be treated similarly, in that a disallowance of the credit results in a higher tax bill in many cases, such that a challenge to the penalty would likely be seen as a challenge to the additional tax the taxpayer faced without the benefit of the earned income tax credit. In this example the IRS can trigger either or both consequences by issuing subregulatory guidance. The result of the guidance puts low-income taxpayers in a difficult position should they seek court review.

the APA. Yet, under the Sixth Circuit's holding in *CIC*, Mr. Smith's challenge of the information-gathering guidance would be turned away at first glance as creative pleading disguised as a challenge to some *potential* assessment of penalty/tax upon a *potential* noncompliance event.

Under this holding, Mr. Smith has no access to judicial review unless he knowingly fails to comply with the guidance causing the disallowance of the benefit of the credit and potentially the assertion of penalties. Most low-income taxpayers we assist are not interested in knowingly filing incorrect returns and inviting additional stress, hassle, legal issues and monetary concerns to an already difficult situation. Beyond the difficulties litigation invites into one's life, low-income taxpayers often do not have the excess cash available to tie up in a legal challenge for what could be years.

In this case, the Sixth Circuit's holding leaves this taxpayer without timely recourse against the loss of the congressionally provided subsidy. Mr. Smith's choices are to (1) forgo the earned income tax credit in its entirety, (2) pay the expense of compliance, offsetting the benefit of the earned income tax credit, or (3) knowingly invite steep penalties in order to seek judicial review of the rule-making. In all cases, the IRS's unilateral, unreviewed information gathering requirements are immediately detrimental to Mr. Smith's economic situation, prior to the rule-making being subjected to judicial review, if it ever is so subjected.

b. The Example Above is Unfortunately Not a Fanciful Hypothetical

We chose to highlight the implications of the Sixth Circuit's holding to low-income taxpayers using the earned income tax credit because it continues to be an anti-poverty initiative highly favored by both Congress and taxpayers alike. However, because of the complexity in claiming the credit and the unfortunate abuse of the benefit by some, the credit suffers some of the highest improper payout rates, and therefore continually draws the IRS's ire.[12]

Currently the Schedule EIC the taxpayer must prepare in order to claim the earned income tax credit asks a few general questions to confirm the children's identity being claimed on the form and their relationship to the taxpayer, but the IRS warns taxpayers that it may ask for additional documentation to support any child claimed, including birth certificates, school records, child care records, documents proving the taxpayer lived with the child, etc.[13] Considering the IRS's

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[12] Specifically, despite the IRS's efforts over the past 15+ years to solve the over-reporting issues involved with this credit, the improper payout rates have hovered consistently around 25% over the last several years. *See* National Taxpayer Advocate, Volume 3 – Special Report to Congress on the Earned Income Tax Credit, Objectives Report 2020, p. 1; *see* Treasury Inspector General for Tax Administration (TIGTA), Ref. No. 2018-40-032, The Internal Revenue Service is Not in Compliance With Improper Payment Requirements (Apr. 2018) and Center on Budget and Policy Priorities, "Reducing Overpayments in the Earned Income Tax Credit" (Jan. 31, 2019).

[13] *See* IRS Publication 596 (2018), Earned Income Credit (EIC). Proposals to expand recordkeeping and form submission

continual fight against improperly filed earned income tax credit claims, it is not a stretch to imagine a situation where the IRS would take the steps described in the hypothetical to ensure taxpayer compliance.

Furthermore, ill-advised rule-making that negatively impacts thousands of low-income taxpayers prior to receiving any level of appropriate review is not mere fantasy.[14]

The IRS's PMTA 2010-001 issued in 2009 is one such example.[15] Without review by even the branch chief in the Chief Counsel's Office, the Office of Chief Counsel issued an opinion that supported the IRS's systematic and automatic imposition of IRC Section 6662 accuracy-related penalties in essentially all EITC cases where it was determined (rightfully or wrongfully) that the taxpayer had over-claimed the

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requirements are not uncommon. *See*, *e.g.*, S. Rept. 114-97 (2016) for an example of Congress proposing that the Department of Treasury impose additional documentation requirements on claimants of the earned income tax credit who prepare their own tax returns. *See also* Bob Probusco, "The EITC Ban – Further Thoughts: Part One" September 27, 2019 https://procedurallytaxing.com/the-eitc-ban-further-thoughts-part-one/.

[14] *See* Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 Notre Dame L. Rev. 1727 (2007) (noting that 40% of Treasury regulations issued over a three-year period did not comply with APA requirements).

[15] While this guidance was issued as a PMTA, it could have just as easily and permissibly been issued as a Revenue Procedure, which is a similar type of guidance discussed in our example.

EITC.[16] Low-income taxpayers were bombarded with penalties and lacked the means and know-how to fight the penalties.

This continued for several years until 2012, when a new Chief Counsel advisory opinion notified the IRS that its prior guidance had reached too far and that the penalty should not be imposed on taxpayers who never actually received the credit. The situation was further remediated in 2014 when the IRS announced that it agreed with the Tax Court's holding in *Rand v. Commissioner*, that underpayment penalties could not be asserted against negative tax (as in the case of refundable credits, like the earned income tax credit).[17]

As a result of this corrected understanding, the IRS abated penalties for taxpayers who had been assessed a penalty on refunds never issued to them and the IRS conceded the penalties on open tax cases where the penalty had been asserted on the negative tax. But the IRS did not abate the penalties on the thousands of similarly situated taxpayers who had been penalized based on the negative tax. These taxpayers were irreparably harmed by the IRS's flawed rule-making in a manner not unlike the taxpayers in the hypothetical above.

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[16] Keith Fogg, "Chief Counsel Guidance on the Reversal of Rand" (Jan. 6, 2016) https://procedurallytaxing.com/chief-counsel-guidance-on-the-reversal-of-rand/.

[17] 141 T.C. No. 12 (2013).

c. The Administrative Regime Does Not Provide an Adequate Solution

The IRS Office of Appeals in many cases provides taxpayers with an opportunity for an administrative, pre-payment forum to address the tax issues. However, in cases like here, where the taxpayer's concern is with the IRS rule-making, the IRS Office of Appeals has no jurisdiction. Therefore, if Mr. Smith were to flout the information documentation rules and purposefully draw a penalty from the IRS, assuming the IRS permitted an appeal of the issue, then the IRS Office of Appeals could reach a conclusion on the imposition of the penalty, but the larger issue of whether the documentation requirements were a proper rule-making would not be addressed.[18]

While it is possible that Mr. Smith is successful in getting the penalty waived in a pre-enforcement setting with the IRS Office of Appeals**,** what is more likely is that the Office of Appeals either does not settle at all

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[18] Note that, in most cases, the IRS does permit the taxpayer the right to an appeal. There is also a separate pre-payment administrative forum under Sections 6320 and 6330 of the IRC that allow taxpayers to have an additional administrative hearing with the possibility of judicial review to discuss proposed collection action and, if not already provided the opportunity to do so, to discuss the merits of the underlying liability. However, under Section 6330 of the IRC, a taxpayer may not take advantage of this administrative opportunity if the taxpayer was provided a prior administrative opportunity to challenge the liability – i.e., an appeal to the IRS Office of Appeals. Since the vast majority of taxpayers are offered the opportunity to have their case heard by the IRS Office of Appeals, this Section 6330 safeguard does not provide the typical taxpayer any protection.

on the penalty issue (as, in our example, Mr. Smith admittedly and intentionally failed to follow the IRS rule-making), or it settles on some hazards of litigation formula, reducing the penalty but not eliminating it. In this most likely of scenarios, Mr. Smith must then pay the assessed penalty, with money he likely doesn't have, prior to filing suit for a refund – all in order for his challenge to an improper rule-making to be heard. Our low-income citizens should not be forced into a position to have to choose between accepting assistance to meet their family's basic needs or fall even further into poverty in order to lawfully challenge the IRS's rule-making process.

d. Social Programs Should Receive Similar APA Protections, Regardless of Whether They are Administered through the IRC

When the taxing regime first began in this country, it was strictly a vehicle for collecting revenue for the government. As discussed above, it was on this background that the AIA was enacted. Since that time, however, the IRC has transformed into one that increasingly delivers welfare-type benefits to the working low-income population. As discussed, the earned income tax credit is one of the country's largest anti-poverty programs.

While the tax system administers a substantial number of anti-poverty programs, it is not the exclusive vehicle for such programs. For example, the U.S.

Department of Health and Human Services administers a wide array of programs for citizens in need.

The APA provides U.S. citizens protection from arbitrary and capricious rule-making by all of the nation's agencies, whether the Internal Revenue Service, Treasury Department, or Department of Health and Human Services. But the AIA only limits the APA with respect to those anti-poverty programs delivered via the taxing regime. The Sixth Circuit's extremely broad interpretation of the AIA puts the citizens that rely on the anti-poverty programs delivered via the IRC at a far greater risk of executive branch whim than the citizens who rely on governmental assistance outside of the taxing regime. In all cases Congress has determined that the social assistance program should be available to the citizens; accordingly, there is no reason why one delivery vehicle should be favored and more protected than another. Ensuring that governmental agencies aiming to achieve similar functions did not apply inconsistent approaches is exactly the reason the APA was enacted in the first place.

CONCLUSION

The AIA, as interpreted by the Sixth Circuit, creates unnecessary and impermissible barriers to court review in situations never intended when the AIA was created. This court should review and reverse the decision of the Sixth Circuit in order to allow judicial review of regulatory and subregulatory guidance issued by the IRS in appropriate circumstances without

requiring that the taxpayer first pay the tax or flout the guidance.

Respectfully submitted,

T. KEITH FOGG
CARLTON SMITH
(*Counsel of Record*)
TAX CLINIC AT THE LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL
122 Boylston Street
Jamaica Plain, MA 02130
617.390.2532
csmith@law.harvard.edu
kfogg@law.harvard.edu

LESLIE BOOK, PROFESSOR
VILLANOVA LAW SCHOOL
299 N. Spring Mill Road
Villanova, PA 19085
610.246.1494
book@law.villanova.edu

MEAGAN HORN
Pro Bono Contributor to
Tax Clinic at the
Legal Services Center
of Harvard Law School
THOMPSON & KNIGHT, LLC
1722 Routh Street
Suite 1500
Dallas, TX 75201
214.969.1167
meagan.horn@tklaw.com