No. 19-930

IN THE

Supreme Court of the United States

CIC SERVICES, LLC,

Petitioner,

v.

INTERNAL REVENUE SERVICE, *ET AL.*,

Respondents.

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

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF is committed to ensuring federal agency rulemaking is subject to appropriate checks and balances, including meaningful judicial review. The issues addressed in the decision by the divided panel of the Sixth Circuit—including the proper application of the Anti-Injunction Act and the Internal Revenue Service's ("IRS") poor history of complying with the Administrative Procedure Act ("APA")—impact judicial oversight of agency decision-making power. AFPF also is committed to ensuring the due-process rights of parties subject to criminal sanctions.

AFPF believes federal agencies, like the IRS, should not be allowed to use the threat of massive civil

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[1] All parties have consented to the filing of this brief after receiving timely notice. No counsel for a party authored this brief in whole or in part and no person other than *amicus* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

penalties and imprisonment as a weapon to shield its actions from judicial review. Due process requires that Petitioner, and other taxpayers, not face an unconstitutional Hobson's choice: comply with an administrative requirement they believe unlawful or violate the law, bet their liberty, and risk prison.

SUMMARY OF ARGUMENT

Effective and accountable agency rulemaking requires both public input and robust judicial review of agency authority, the process the agency followed in promulgating its rules, and the record on which the rulemaking is based. The APA incorporates these principles and "guarantee[s] to the public an opportunity to participate in the rule making process," Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act § 4 (1947); *see* 5 U.S.C. § 553(b)–(c). The APA also "embodies the basic presumption of judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967); *see* 5 U.S.C. § 702.

When an agency circumvents APA procedures—as the IRS did here—judicial review takes on heightened importance. The IRS, however, often escapes judicial review of its rulemaking by invoking an overbroad reading of the Anti-Injunction Act ("AIA"). Here, a divided panel of the Sixth Circuit sided with the IRS, allowing it to escape judicial review of Notice 2016-66, which should have been available to Petitioner. If allowed to stand, the decision below will immunize a broad array of Treasury and IRS regulations and guidance documents from judicial review by giving taxpayers an unconstitutional choice: (1) comply and forgo *any* opportunity for judicial review or (2) violate

the law, incur massive civil penalties, bet their liberty, and risk imprisonment if the suit is lost.

The AIA does not strip federal courts of jurisdiction over this case for two reasons. *First*, the challenged provisions in Notice 2016-66 are reporting requirements, not the "assessment or collection" of a tax. This Court's decision in *Direct Marketing Ass'n v. Brohl*, 575 U.S. 1 (2015), holding that reporting requirements do not implicate the analogous Tax Injunction Act ("TIA"), should apply to the AIA. *Second*, even if Notice 2016-66 implicates the AIA, in *South Carolina v. Regan*, this Court recognized the AIA does not apply when Congress "has not provided an alternative remedy." 465 U.S. 367, 378 (1984). Petitioner lacks an adequate alternative remedy because its officers risk criminal punishment if they violate the challenged agency action. There is no alternative remedy for the deprivation of liberty.

Due process demands that Petitioner has a right to contest the validity of Notice 2016-66 without facing massive civil penalties and the possibility of imprisonment. The IRS cannot, consistent with the Constitution, force Petitioner to violate the law and risk those severe consequences. This sets the price of error so high that it constructs an unconstitutional barrier to judicial review.

The AIA does not condone, let alone require, such an absurd result. The AIA is meant to protect government revenue-raising efforts, *not* to encourage lawbreaking by regulated parties (upon pain of imprisonment) before they can challenge IRS regulations and guidance establishing recordkeeping and reporting requirements. Courts should construe

the AIA to respect due process by allowing pre-enforcement review of IRS regulations and guidance under the APA when there is no alternative remedy.

In sum, the Court should grant *certiorari* here to correct the Sixth Circuit's error of statutory interpretation for two reasons. *First*, the decision below conflicts with this Court's precedent in *Direct Marketing*. *Second*, if left to stand, the decision below will have profound, negative real-world impacts radiating far beyond this case by insulating an array of Treasury and IRS rules from judicial review, not only violating due process but rewarding the IRS's pattern of lawlessness. *See* Sup. Ct. Rule 10(c).

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *DIRECT MARKETING ASS'N V. BROHL*.

As Petitioners explain, *see* Pet. 12–23, a straightforward application of this Court's decision in *Direct Marketing* forecloses the panel majority's erroneous holding that the AIA bars pre-enforcement review of Petitioner's APA challenge to Notice 2016-66's reporting and recordkeeping requirements. In *Direct Marketing*, this Court held the "[TIA], which provides that federal district courts 'shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law'" does not "bar[] a suit to enjoin the enforcement of" a state law "requiring retailers that do not collect Colorado sales or use tax to notify Colorado customers of their use-tax liability and to report tax-related information to customers and the . . . Department of Revenue." 575 U.S. at 4.

The TIA is functionally indistinguishable from, and modeled after, the AIA.[2] This Court specifically explained that it "assume[s] that words used in both Acts are generally used in the same way." *Id.* at 8.

The AIA provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person[.]" 26 U.S.C. § 7421(a). The underlying regulatory command here is not the assessment or collection of a tax but creates a new transaction of interest, a type of reportable transaction. *See* Notice 2016-66. As this Court unanimously ruled in *Direct Marketing*, "reporting requirements precede . . . 'assessment' and 'collection'" and so challenges to them do not implicate the same concerns. 575 U.S. at 11.

As *Direct Marketing* confirms, the AIA's text applies only to suits seeking to enjoin the IRS from taking steps, as part of the formal taxation process, to assess or collect tax that is allegedly due. *See* 26 U.S.C. § 7421(a); *see also Chamber of Commerce of the U.S. v. IRS,* No. 16-944, 2017 U.S. Dist. LEXIS 166985, at *8–11 (W.D. Tex. Oct. 6, 2017) (applying *Direct Marketing* to find the AIA does not bar APA challenge to Treasury/IRS regulation addressing who

[2] Unlike the TIA, the AIA does not place a jurisdictional limitation on a court's power to reach the merits; instead, it is a claims-processing rule. *See Hobby Lobby Stores, Inc. v. Sebelius,* 723 F.3d 1114, 1157–59 (10th Cir. 2013) (en banc) (Gorsuch, J., concurring) (explaining the AIA is a claims-processing rule); *see also* Erin Morrow Hawley, *The Equitable Anti-Injunction Act*, 90 Notre Dame L. Rev. 81, 90–110, 125–32 (2014). The Sixth Circuit erred in holding otherwise. *See CIC Servs., LLC v. IRS,* 925 F.3d 247, 257, 259 (6th Cir. 2019) (characterizing the AIA as depriving courts of subject matter jurisdiction).

is subject to taxation under other provisions of the IRC). This is not that.[3] Notice 2016-66's reporting and recordkeeping provisions do not collect a penny of tax revenue for the Government. And "[a]ssessment and collection of taxes does not include all activities that may improve the government's ability to assess and collect taxes." *Chamber of Commerce*, 2017 U.S. Dist. LEXIS 166985, at *9 (citing *Direct Marketing*). The AIA therefore does not bar the courthouse doors to APA challenges when, as here, no tax is allegedly due, and the object of the suit is to determine the legality of reporting and recordkeeping requirements.

II. DUE PROCESS REQUIRES PERMITTING PRE-ENFORCEMENT REVIEW OF NOTICE 2016-66.

Even if a court construed the AIA to bar pre-enforcement review of Notice 2016-66—thereby forcing Petitioner's officers to risk prison to challenge its legality—that application of the AIA would violate the most-basic requirements of due process.

Notice 2016-66 deems a subset of "micro-captive transactions" to be "transactions of interest," which are thus reportable transactions that material advisors like Petitioner must report to the IRS or face civil and criminal penalties. *See CIC Servs.*, 925 F.3d at 249–50. Under the Sixth Circuit's decision, Petitioner "only has two options: (1) acquiesce to a potentially unlawful reporting requirement that will

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[3] *Cf. Foodservice & Lodging Inst. v. Regan*, 809 F.2d 842, 846 (D.C. Cir. 1987) (AIA does not bar pre-enforcement challenge to "regulation [that] does not relate to the assessment or collection of taxes, but to IRS efforts to determine the extent of tip compliance in the food and beverage industry.").

cost it significant money and reputational harm, or (2) flout the requirement, *i.e.*, 'break the law,' to the tune of $50,000 in penalties for each transaction it fails to report." *Id.* at 263 (Nalbandian, J., dissenting) (citing 26 U.S.C. § 6707(a)–(b)). Petitioner can only obtain judicial review by breaking the law "and only when (or if) the Government comes to collect the penalty[.]" *Id.*

Worse, if Petitioner follows this sole path to judicial review, its officers will be subject to criminal penalties. "The Tax Code makes it a misdemeanor for any person who 'willfully fails' to 'make any return, keep any records, or supply any information' required under its title and its regulations."[4] *Id.* (citing 26 U.S.C. § 7203). Further, because 26 U.S.C. § 7203 is not limited to transactions of interest or micro-captive transactions, the Sixth Circuit's rationale would apply to a host of Treasury regulations and IRS guidance documents. Thus, it would insulate a wide swath of IRS rules from judicial review by forcing taxpayers to risk criminal liability to have their day in court.

This is precisely a "situation in which compliance is sufficiently onerous and coercive penalties sufficiently potent that a constitutionally intolerable choice might be presented." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218, (1994). To impose on a party "the burden of obtaining a judicial decision of

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[4] Section 7203 states: "Any person required . . . required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to . . . make such return, keep such records, or supply such information . . . shall . . . be guilty of a misdemeanor[.]" 26 U.S.C. § 7203.

such a question . . . only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines . . . is, in effect, to close up all approaches to the courts." *Ex parte Young*, 209 U.S. 123, 148 (1908) (holding unconstitutional the provisions of an act precluding pre-enforcement judicial review of rates and associated penalties for failure to comply). "The constitutional defect in *Young* was that the dilemma of either obeying the law and thereby for-going any possibility of judicial review, or risking 'enormous' and 'severe' penalties, effectively cut off all access to the courts." *Thunder Basin*, 510 U.S. at 221 (Scalia, J., concurring). So too here.

According to the panel majority and responding to Petitioner "that having to 'break the law' by violating the Notice, and then su[ing] for a refund, is 'no remedy at all.' . . . [T]hat is exactly what the AIA is designed to require." *CIC Servs.*, 925 F.3d at 258. But Petitioner does not have "the option of complying *and then* bringing a judicial challenge." *Thunder Basin*, 510 U.S. at 221 (Scalia, J., concurring). Instead, the IRS's so-called alternative remedy is one that would only permit judicial access to fanatical gamblers willing to bet their liberty and risk prison to challenge the agency.[5] This renders the "fair price of adventure" intolerably high. *See Ford Motor Co. v. Coleman*, 402 F. Supp. 475, 502 (D.D.C. 1975) (Hart, J., dissenting).

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[5] The IRS's alternate remedy only theoretically works for those with money to pay the penalty to "buy" district court jurisdiction. *See Larson v. United States*, No. 16-245, 2016 U.S. Dist. LEXIS 179314 (S.D.N.Y. Dec. 28, 2016) (taxpayer who could pay only $1 million of a $160 million penalty could not pursue refund action seeking judicial review). To challenge Notice 2016-66, a taxpayer would have to first pay up to $50,000 for *each* failed disclosure.

In effect, under these circumstances, "operation of the [AIA] would mean that the aggrieved party has no access to judicial review[.]" *Nat'l Rest. Ass'n. v. Simon*, 411 F. Supp. 993, 996 (D.D.C. 1976) (finding the AIA did not bar APA challenge to IRS revenue ruling). Thus, like *Ex parte Young*, "the practical effect of coercive penalties for noncompliance [is] to foreclose all access to the courts." *Thunder Basin*, 510 U.S. at 218. That is unconstitutional and repugnant to the Due Process Clause of the Fifth Amendment.

As Judge Thapar explained: "[O]ne might think, the IRS's interpretation would still allow people to bring a challenge after they violate the reporting requirement and pay the penalty. True enough. But only if people are also willing to spend up to a year in prison."[6] *CIC Servs., LLC v. IRS*, 936 F.3d 501, 507 (6th Cir. 2019) (Thapar, J., dissenting from denial of rehearing en banc) (citing 26 U.S.C. § 7203). "In other words, the only lawful means a person has of challenging the reporting requirement here is to violate the law and risk financial ruin and criminal prosecution. That is enough to test the intestinal

[6] "If that seems like it must be wrong, think again." *CIC Servs.*, 925 F.3d at 263 n.5 (Nalbandian, J., dissenting). Pointedly, the IRS does not deny or foreclose the possibility that, under their interpretation of the AIA, regulated entities like Petitioner potentially risk criminal liability as a condition precedent to having their day in court. Instead, they say, "[i]t is not clear . . . whether such a [criminal sanction under I.R.C. § 7203] could properly be imposed on a material advisor who demonstrates a good-faith intent to submit its challenge for judicial resolution." IRS Resp. to Pet. Reh'g En Banc at 8, Dkt. 56, *CIC Services, LLC v. IRS*, No. 18-5019 (8th Cir. filed July 19, 2019); *see* IRS Br. at 57–59, Dkt. 32, *CIC Services, LLC v. IRS*, No. 18-5019 (8th Cir. filed May 31, 2018).

fortitude of anyone. And it leaves CIC in precisely the bind that pre-enforcement judicial review was meant to avoid." *CIC Servs., LLC v. IRS*, 925 F.3d at 263 (Nalbandian, J., dissenting); *cf. Nat'l Rest. Ass'n*, 411 F. Supp. at 996 (concluding AIA did not bar APA challenge to IRS revenue ruling, noting that "refusing to file the required information, and contesting a possible government assessment of a fine . . . puts the plaintiffs in the untenable position of either complying, with no judicial review, or of defying the government's interpretation of their legal obligations under the code, of being in essence a lawbreaker.").

Under the Sixth Circuit's decision, "the path to judicial review is fraught with threats of penalties, fines, and prosecution—all intended to encourage compliance with a reporting requirement that collects not a penny for the Government." *CIC Servs.*, 925 F.3d at 264 (Nalbandian, J., dissenting). "[W]hen the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts . . . , the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights." *Ex parte Young*, 209 U.S. at 147. The right to judicial review "is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law." *Wadley S. Ry. Co. v. Georgia*, 235 U.S. 651, 661 (1915). As in *Ex Parte Young*, "these criminal sanctions make the reporting requirement in this case (and many others)

unreviewable." *CIC Servs.*, 936 F.3d at 505 (Thapar, J., dissenting from denial of rehearing en banc).

That violates due process. *See Lipke v. Lederer*, 259 U.S. 557, 561–62 (1922) (suggesting that if criminal penalties are implicated, the Due Process Clause forecloses application of the AIA to bar review); *see also Okla. Operating Co. v. Love*, 252 U.S. 331, 336–37 (1920) (forcing party to violate regulation and trigger contempt proceeding to obtain judicial review violates due process). "It is a denial of due process of law if . . . [judicial] review can be effected by appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality than to ask the protection of the law." *Wadley*, 235 U.S. at 656. "The price of error may be so heavy as to erect an unfair barrier against the endeavor of an honest litigant to obtain the judgment of a court. In that event, the Constitution intervenes and keeps the court room open." *Life & Cas. Ins. Co. v. McCray*, 291 U.S. 566, 574–75 (1934) (Cardozo, J.).

Due process requires that "[b]efore the Government can impose severe civil and criminal penalties; the defendant is entitled to a full and fair hearing before an impartial tribunal 'at a meaningful time and in a meaningful manner.'" *TVA v. Whitman*, 336 F.3d 1236, 1258 (11th Cir. 2003) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). At the very least, the panel majority opinion operates to deprive Petitioner of a hearing *at a meaningful time*—that is, before exposure to civil penalties and criminal liability. As this Court made clear, "one has a due process right to contest the validity of a legislative or administrative order affecting his affairs without necessarily having to face ruinous penalties if the suit

is lost." *Brown & Williamson Tobacco Corp. v. Engman*, 527 F.2d 1115, 1119 (2d Cir. 1975) (discussing relevant Supreme Court precedent).

"Ordinarily, administrative law does not intend to leave regulated parties caught between a hammer and an anvil." *CIC Servs.*, 925 F.3d at 259 (Nalbandian, J., dissenting). "Yet the IRS seems to think people should bet their liberty" for a chance at judicial review of IRS reporting requirements. *CIC Servs.*, 936 F.3d at 507 (Thapar, J., dissenting from denial of rehearing en banc). But "[i]n this country, people should not have to risk prison time in order to challenge the lawfulness of government action." *Id.* at 505. "Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate." *Okla. Operating Co.*, 252 U.S. at 336–37. "[T]he Due Process Clause requires an exception to the [AIA] when the tax is so high as to render the purported tax not just a disincentive or civil penalty, but a criminal prohibition." *Seven-Sky v. Holder*, 661 F.3d 1, 43 n.31 (D.C. Cir. 2011) (Kavanaugh, J., dissenting on jurisdiction and not deciding the merits). So too here where there is an actual criminal prohibition. *See* 26 U.S.C. § 7203.[7]

"[J]udicial review must be substantial, adequate *and safely available*[.]" *Wadley*, 235 U.S. at 661 (emphasis added). Outside of the AIA context, this Court has repeatedly held a party "need not await enforcement proceedings before challenging final

[7] The IRS has not foreclosed the possibility of criminally prosecuting violations of Notice 2016-66's reporting requirements. *See CIC Servs.*, 925 F.3d at 263 n.5 (Nalbandian, J., dissenting) (citing Gov't's Br. at 58).

agency action where such proceedings carry the risk of serious criminal and civil penalties." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (cleaned up); *see Sackett v. EPA*, 566 U.S. 120 (2012). Regulated parties should not have to violate a law and risk criminal indictment before they can challenge it. *Cf. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490–91 (2010) ("We . . . do not require plaintiffs to bet the farm . . . by taking the violative action before testing the validity of the law[.]") (cleaned up). So too here.

To be sure, "[t]he IRS envisions a world in which no challenge to its actions is ever outside the closed loop of its taxing authority." *Cohen v. United States*, 650 F.3d 717, 726 (D.C. Cir. 2011) (en banc). But as Judge Sutton explained:

> I doubt that the words of the [AIA] . . . ban all prospective relief whenever the IRS enforces a regulation with a penalty that it chooses to call a "tax." And I especially doubt that conclusion in this setting—where the taxpayer's only remedy is not to "pay first challenge later" but to "report to prison first challenge later." As today's case appears to confirm, the meaning of the [AIA] has crossed the bar from its port of birth.

CIC Servs., 936 F.3d at 504 (Sutton, J., concurring in the denial of rehearing). The IRS's overreaching interpretation of the AIA essentially foreclosing all judicial review of Notice 2016-66 and is more than one bridge too far. That expansive interpretation is untethered from the AIA's text, structure, and history.

See Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 Va. L. Rev. 1683 (2017). It is also unconstitutional.

The IRS cannot effectively insulate its rules enforced by civil and criminal penalties from judicial review through the simple expedient of labeling those penalties a "tax" subject to the AIA. *See Regal Drug Corp. v. Wardell*, 260 U.S. 386, 391–92 (1922) ("The function of a tax, it was said 'is to provide for the support of the government,' the function of a penalty clearly involves the 'idea of punishment for infraction of the law[.]'"). "The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid. . . . Before collection of taxes levied by statutes enacted in plain pursuance of the taxing power can be enforced, the taxpayer must be given fair opportunity for hearing—this is essential to due process of law." *Lipke*, 259 U.S. at 561–62.

Finally, application of the AIA here would also fail the now-familiar *Matthews v. Eldridge* test, if it applies. 424 U.S. 319 (1976). "Under the *Mathews* balancing test, a court evaluates (A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake." *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017).

All three considerations weigh against the IRS. *First*, the private interest at stake is Petitioner's interest in judicial review of an IRS notice without the deterrent effect of facing imprisonment. *Second*, the risk of erroneous deprivation of that interest is high, as explained above: as a practical matter, forcing

people to risk prison to obtain judicial review of administrative actions will coerce them into complying and preclude them from asserting meritorious APA challenges. *Third*, the government interest is low: the challenged Notice does not relate to revenue raising, and the IRS presumably does not have a legitimate interest in barring the courthouse doors to challenges to the legality of its actions.

III. THIS COURT SHOULD CONSTRUE THE AIA TO RESPECT DUE PROCESS AND AVOID CONSTITUTIONAL INFIRMITY.

The Sixth Circuit has erroneously held regulated parties must risk prison to challenge reporting requirements. But as Judge Thapar explained, "the law does not condone—let alone require—that result[.]" *CIC Servs*., 936 F.3d at 505 (Thapar, J., dissenting from denial of rehearing en banc); *see also Regan*, 465 U.S. at 378 (holding Congress did not intend the [AIA] to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy).

The doctrine of constitutional avoidance warrants construing the AIA consistent with due process. This is particularly true because the AIA is a claims-processing rule, which does not limit the jurisdiction of Article III courts to hear pre-enforcement challenges and is subject to equitable exceptions. *See Hobby Lobby Stores, Inc. v. Sebelius,* 723 F.3d 1114, 1157–59 (10th Cir. 2013) (en banc) (Gorsuch, J., concurring); Hawley, *supra* at 90–110, 125–32. Indeed, "the Supreme Court has repeatedly recognized equitable exceptions to the AIA's

application." *Hobby Lobby*, 723 F.3d at 1158 (Gorsuch, J., concurring).

Nor is there any evidence, textual or otherwise, let alone the required "clear and convincing evidence," that Congress intended the AIA to displace the APA's bedrock presumption in favor of pre-enforcement review under the circumstances presented. *See Bowen v. Mich. Acad. of Family Physicians,* 476 U.S. 667, 670 (1986) (noting "strong presumption" in favor of judicial review under the APA that is only rebutted by "clear and convincing evidence").

"To require a would-be litigant to risk . . . [criminal] consequences before obtaining judicial review would present serious constitutional concerns." *Fla. Bankers Ass'n v. Dep't of the Treasury*, 799 F.3d 1065, 1083 (2015) (Henderson, J., dissenting). This Court has a long tradition of construing the AIA consistent with due process. *See Lipke*, 259 U.S. at 562 (construing AIA to require pre-enforcement review "in the absence of language admitting of no other construction"); *Liberty Univ., Inc. v. Geithner,* 671 F.3d 391, 426–27 (4th Cir. 2011) (Davis, J., dissenting) (discussing applicability of the doctrine of constitutional avoidance to the AIA); *Nat'l Rest. Ass'n*, 411 F. Supp. at 996 (concluding AIA did not apply to bar pre-enforcement lawsuit, given "obvious constitutional problems" of requiring plaintiffs to break the law before obtaining judicial review); *cf. Regan,* 465 U.S. at 398–400 (O'Connor, J., concurring in the judgment) (applying doctrine of constitutional avoidance to AIA); *Comm'r v. Shapiro*, 424 U.S. 614, 629–30 (1976). This Court should do the same here.

The Sixth Circuit's application of the AIA "raise[s] serious constitutional problems," and this Court is "obligated to construe the statute to avoid such problems." *INS v. St. Cyr*, 533 U.S. 289, 300 (2001).

IV. THIS COURT SHOULD GRANT CERTIORARI TO ENSURE THE IRS'S PATTERN AND PRACTICE OF RULE-OF-LAW VIOLATIONS IS SUBJECT TO JUDICIAL REVIEW.

As described above, the Sixth Circuit decided an important federal question in a way that conflicts with this Court's decision in *Direct Marketing* and due process. *See* Sup. Ct. Rule 10(c). The consequences of the Sixth Circuit's interpretation of the AIA radiate far beyond this case, as the panel majority recognized: "The broader legal context in which this case has been brought is not lost on this Court. Defendants 'do not have a great history of complying with APA procedures, having claimed for several decades that their rules and regulations are exempt from those requirements.'"[8] *CIC Servs.*, 925 F.3d at 258 (quoting Hickman & Kerska, 103 Va. L. Rev. at 1712–13).

As this Court has held, the IRS is not a special agency and must comply with the APA just like every other federal agency. *See Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55–58

[8] The IRS has a well-documented history of systematically claiming to be exempt from the legal constraints imposed by oversight mechanisms such as the Regulatory Flexibility Act, White House review under Executive Order 12,866, and the Congressional Review Act. *See* James Valvo, *Evading Oversight: The Origins and Implications of the IRS Claim That Its Rules Do Not Have an Economic Impact*, Cause of Action Inst. (Jan. 2018), *available at* https://coainst.org/38EcPIg.

(2011). Yet Treasury and the IRS have exhibited a systematic reluctance to do so. Professor Hickman has conducted an empirical study of Treasury's compliance with APA rulemaking requirements, the parent agency of the IRS. *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). Professor Hickman found that Treasury, even when issuing notice and soliciting comments, rarely complies with the APA's actual requirements. *Id.* at 1748–50. In almost *ninety-three percent* of the cases she surveyed over a three-year period, "Treasury claimed . . . the rulemaking requirements of APA section 553(b) did not apply." *Id.* at 1750.

But the IRS is not above the law. "The IRS is not special in this regard; no exception exists shielding it—unlike the rest of the Federal Government—from suit under the APA." *Cohen*, 650 F.3d at 723. The IRS's efforts to evade judicial review must end. Petitioner's lawsuit should be allowed to proceed.

The Sixth Circuit's overbroad and unconstitutional interpretation of the AIA, if allowed to stand, will have "alarming" consequences extending far beyond this case. *CIC Servs.,* 925 F.3d at 264 (Nalbandian, J., dissenting). As Judge Nalbandian explained, "[t]he inevitable consequence" of the Sixth Circuit's decision "is that 'many' . . . [Treasury and IRS] regulations and guidance documents will be rendered 'effectively unreviewable.'" *Id.* (quoting Hickman & Kerska, 103 Va. L. Rev. at 1686). "[T]he problem with this approach should be obvious: it removes the courts as a critical check against sweeping IRS policymaking discretion, serving the convenience of the IRS and the

courts, but disserving taxpayers and the credibility of the tax system as a whole." Hickman & Kerska, *supra* at 1747. That result not only harms untold taxpayers but also is an affront to the rule of law.

More broadly, unless this Court grants *certiorari* to correct the Sixth Circuit's plain error, "[g]oing forward in [that] circuit, the IRS will have the power to impose sweeping 'guidance' across areas of public and private life, backed by civil and criminal sanctions, and left unchecked by administrative or judicial process." *CIC Servs.*, 936 F.3d at 507 (Thapar, J., dissenting from denial of rehearing en banc). As Judge Thapar suggested, that result is profoundly unconstitutional:

> [T]oday, the IRS . . . exercises the power to tax and to destroy, in ways that the Founders never would have envisioned. Courts accepted this departure from constitutional principle on the promise that Congress would still constrain agency power through statutes like the [APA]. We now see what many feared: that promise is often illusory.

Id. This Court should grant *certiorari* to protect the due-process right to meaningful judicial review and to make clear the AIA does not displace the APA's bedrock presumption in favor of pre-enforcement review when no other avenue of review is available and the regulated party faces the risk of criminal prosecution. The IRS is not uniquely above the law.

CONCLUSION

For these reasons, and those described by the Petitioner, this Court should grant the Petition for a writ of *certiorari* to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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