No. 19-930

In the Supreme Court of the United States

CIC Services, LLC,

Petitioner,

v.

Internal Revenue Service,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* PROFESSOR KRISTIN E. HICKMAN IN SUPPORT OF PETITIONERS

Prof. Kristin E. Hickman
Counsel of Record and Amicus Curiae
University of Minnesota Law School
229 – 19th Avenue South
Minneapolis, MN 55455
(612) 624-2915
khickman@umn.edu

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Interest of Amicus Curiae[1]

Amicus is a Distinguished McKnight University Professor and the Harlan Albert Rogers Professor in Law at the University of Minnesota Law School. She teaches and writes in the areas of tax law, administrative law, and tax administration. *Amicus* has written extensively about Treasury Department and Internal Revenue Service administrative practices in adopting rules and regulations interpreting the Internal Revenue Code; about the interaction between Administrative Procedure Act requirements and tax administrative practices; and about judicial review in the tax context.

This case raises significant issues of tax administration and administrative law that reach far beyond the Petitioners, the validity of IRS Notice 2016-66, 2016-47 I.R.B. 745, and reporting requirements for micro-captive transactions. Consistent with her scholarly interests and expertise, *Amicus* submits this brief to inform the Court of the broader context and implications of the case for federal tax administration.

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[1] Consistent with Supreme Court Rule 37.2(a), *Amicus* files this brief with the written consent of both parties. Consistent with Supreme Court Rule 37.6, *Amicus* hereby certifies that this brief was not authored in whole or in part by counsel for any party and that *Amicus* received no monetary contribution toward the preparation or submission of this brief other than the general financial support of the academic institution with which she is affiliated.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Anti-Injunction Act (AIA), 26 U.S.C. § 7421(a), 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, whether or not such person is the person against whom such tax was assessed."[2] By comparison, the Supreme Court has long held that the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq., "embodies a basic presumption" of pre-enforcement review of agency regulatory actions that courts should disregard "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140–41 (1967).

In this case, with no regard for the APA or *Abbott Labs*, the Sixth Circuit adopted an expansive interpretation of the AIA that would preclude not just the Petitioner's claims but virtually any pre-enforcement APA challenge to Treasury Department (Treasury) and Internal Revenue Service (IRS) rules and regulations. The Sixth Circuit also disregarded entirely the AIA's origins, its textual context, and its role in the larger scheme of tax administration, from the AIA's adoption in 1867 as part of the Civil War income tax to today.

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[2] The Declaratory Judgment Act, 28 U.S.C. § 2201(a), also prohibits judicial review of declaratory suits "with respect to Federal taxes," but courts generally interpret the Declaratory Judgment Act and the AIA to mean the same thing. *See, e.g.*, *Cohen v. United States*, 650 F.3d 717, 730-31 (D.C. Cir. 2011) (en banc) (describing the two statutes as "coterminous"); *Ambort v. United State*s, 392 F.3d 1138, 1140 (10th Cir. 2004) ("In practical effect, these two statutes are coextensive … ."); *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 300-01 (4th Cir. 2000) ("[T]he two statutory texts are, in underlying intent and practical effect, coextensive.").

The Supreme Court has never addressed the interaction of the AIA and the APA, and the Court's past interpretations of the AIA fail to offer a clear path for resolving the AIA's relationship with the APA. But the Court has embraced a doctrine of administrative law uniformity and rejected tax exceptionalism from general administrative law doctrines, requirements, and norms absent clear justification. *See Mayo Found. For Med. Educ. & Research v. United States*, 562 U.S. 44, 55 2011). The Court has adopted an interpretation of the almost-identically-worded Tax Injunction Act (TIA), 28 U.S.C. § 1341, that, if extended to the AIA, would go a long way toward harmonizing the AIA and the APA. *See Direct Marketing Ass'n v. Brohl*, 575 U.S. 1, 8–14 (2015). And the Court has emphasized interpreting the AIA and the TIA consistently, as the latter was modeled on the former. *See id.* at 8; *cf. Hibbs v. Winn*, 542 U.S. 88, 102–04 (2004); *Jefferson Co. v. Acker*, 527 U.S. 423, 434–35 (1999) (same). The Sixth Circuit either cursorily dismissed or outright ignored most of this guidance.

The implications for tax administration are substantial. Treasury and the IRS have a poor track record of complying with APA procedural and process requirements. Those requirements, and pre-enforcement judicial review of agency regulations to enforce agency compliance therewith, ensure that agencies act reasonably and that the public perceives agency actions as fair and legitimate. By precluding pre-enforcement judicial review of Treasury and IRS rules and regulations so sweepingly, the Sixth Circuit's interpretation of the AIA threatens to undermine the public's faith in the integrity of federal tax administration, and thus to discourage compliance with the tax laws.

ARGUMENT

I. The Sixth Circuit's Interpretation Of The AIA Is Fundamentally Flawed.

The Sixth Circuit in this case interpreted the AIA as precluding judicial consideration of the Petitioner's claim that the IRS violated the APA in issuing Notice 2016-66, 2016-47 I.R.B. 745. The Sixth Circuit's broad interpretation of the AIA reaches far beyond Notice 2016-66. Its reasoning would preclude pre-enforcement judicial review of APA challenges against virtually any Treasury and IRS rule or regulation interpreting the tax laws. Of course, if it were clear that Congress sought with the AIA to cut off pre-enforcement judicial review of APA claims in the tax context, then the Court would be compelled to comply. Such is not the case.

A. The Sixth Circuit Disregarded The AIA's Origins, Its Textual And Historical Context, And Its Role In Tax Administration.

In interpreting the AIA, the Sixth Circuit focused largely on the fact that penalties for noncompliance with the tax laws are taxes for AIA purposes. Maybe so. But the Sixth Circuit entirely ignored that the AIA is not a modern congressional enactment designed with the APA in mind, but rather dates back to the Civil War era—long before the modern income tax, the APA, and the emergence of the contemporary regulatory state. There is no recorded legislative history concerning the AIA. *See Bob Jones Jones University v. Simon*, 416 U.S. 725, 736 (1974). Nevertheless, even without committee reports or floor speeches, the textual context and historical backdrop

of the AIA make clear that Congress did not and simply could not have intended for courts to interpret the AIA as precluding judicial review of pre-enforcement challenges to Treasury and IRS rules and regulations under the APA. *See* Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 Va. L. Rev. 1683, 1719–38 (2017) (documenting the AIA's history and its evolving statutory context from 1867 to the present).

Congress originally enacted the AIA in 1867 to support the administration of a short-lived income tax, which in turn Congress adopted in 1861 to finance the Civil War. *See* Revenue Act of 1861, ch. 45, § 49, 12 Stat. 292, 309 (enacting the Civil War income tax). To administer the new income tax, in 1862, Congress created the Commissioner of Internal Revenue; authorized the President to divide the country into geographic collection districts; and empowered the President, with the advice and consent of the Senate, to appoint the "assessors" and "collectors" tasked with enforcing the new income tax. Act of July 1, 1862, ch. 119, Preamble & § 2, 12 Stat. 432, 432–33. Much of the 1862 Act was dedicated to providing a detailed process of "assessment" and "collection." Act of July 1, 1862, ch. 119, §§ 6–16, 18–19, 12 Stat. 432, 434–40; *see also* Joseph A. Hill, *The Civil War Income Tax*, 8 Q.J. Econ. 416, 434–36 (1894) (describing Civil War tax administration).

When collectors brought suit to seize and liquidate the property of delinquent taxpayers under the 1862 Act, some taxpayers successfully fought back by requesting declaratory and injunctive relief on the grounds that the taxes were "erroneously or illegally assessed." *See, e.g.*, *Roback v. Taylor*, 2 Bond 36, 20 F.Cas. 852 (S.D. Ohio 1866); *Magee v. Denton*, 5 Blatchf. 130, 16 F.Cas. 382 (N.D. NY 1863); *cf. Snyder v. Marks*, 109 U.S. 189, 192 (1883). Congress adopted

the AIA in 1867, amending § 19 of the 1862 Act governing the collection process, to resolve that problem. *See* Revenue Act of 1867, ch. 169, § 10, 14 Stat. 471, 475.

Congress adopted the AIA in service of a vastly different system of tax administration than we have today. Key AIA terms like "assessment" and "collection" remain the same, but the nature of those functions has changed substantially, prompting misunderstanding regarding the AIA's meaning. *See* Hickman & Kerska, *supra*, at 1719–38. For example, in the 1860s, taxpayers did not pay their taxes until several weeks after filing their tax returns, and after the IRS first audited those returns and pursued an assessment process that included notice and opportunity for an administrative appeal. *See id.* at 1722–25. Without the AIA, taxpayers could avoid paying their taxes by seeking an injunction after filing a return, either before or after assessment. *See id.* at 1749–53. Today, most taxes are paid through third-party withholding and estimated payments months before a tax return is filed and assessment occurs. *See id.* at 1734–38. For most taxpayers, assessment is an automated and meaningless bookkeeping entry. *See id.* at 1736–37.

As in 1867, the AIA still plays an important role in backstopping IRS enforcement efforts by preventing taxpayers from running to court to stop an audit or thwart a levy after the IRS comes calling. The vast majority of contemporary cases applying the AIA resemble this scenario. *See id* at 1691–92 (documenting examples). A narrower construction of the AIA that emphasizes direct enforcement efforts while allowing pre-enforcement review of Treasury and IRS rules and regulations is entirely consistent with the AIA's origins, textual and historical context, and role in tax administration. *See id.* at 1754–56.

B. The Sixth Circuit Ignored The APA, *Abbott Labs*, And The Supreme Court's Preference For Uniformity In Administrative Review.

By comparison, the Supreme Court has long interpreted the APA as adopting a presumption in favor of pre-enforcement judicial review of agency regulatory actions that courts should disregard "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Abbott Labs*, 387 U.S. at 140–41 (1967). In considering the availability of pre-enforcement judicial review for regulations adopted by the Food and Drug Administration, the Court declined to read provisions of the Federal Food, Drug, and Cosmetic Act as supplanting that presumption absent "'clear and convincing evidence' of a contrary legislative intent." *Id.* at 141 (quoting *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962). Further, the Court cited as justification for this presumption "the very real dilemma" alternatively faced by parties subject to regulation—that of complying with regulations they believe to be invalid or "facing serious penalties attached to noncompliance" should that belief prove wrong, simply to obtain judicial review of their concerns. *Id.* at 153.

Although "it is familiar law that a specific statute controls over a general one," *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961), this Court also favors construing seemingly competing statutes harmoniously to give maximum effect to both, unless it is clear that Congress intended otherwise. *See, e.g.*, *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reffer*, 515 U.S. 528, 533 (1995); *Radzanlower v. Touche Ross & Co.*, 426 U.S. 148, 154–55 (1976).

Consistent with this advice, this Court has adopted a policy of uniformity in administrative law,

absent clear congressional intent to the contrary. *See, e.g.*, *Dickinson v. Zurko*, 527 U.S. 150, 154-55 (1990). Observing that "[t]he APA was meant to bring uniformity to a field full of variation and diversity," the Court emphasized "the importance of maintaining a uniform approach to judicial review of administrative action," and declared that ***not*** requiring statutory clarity to depart from APA norms would "frustrate that purpose." *Id.* In *Mayo Foundoundation for Medical Education and Research v. United States*, the Court extended these principles to the tax context, declining "to carve out an approach to administrative review good for tax law only" absent clear justification. 562 U.S. 44, 55 (2011) (citing *Zurko*).

The Sixth Circuit's interpretation of the AIA ignored all of the APA, *Abbott Labs*, and this Court's pronouncements favoring uniformity in administrative review. Instead, the Sixth Circuit's interpretation of the AIA embraced the very tax exceptionalism that the Court rejected in *Mayo Foundation*, despite the lack of clear congressional intent for such an outcome.

C. The Sixth Circuit Rejected An Interpretation, Suggested By Supreme Court Precedent, That Would Harmonize The AIA and The APA.

The Sixth Circuit also rejected a narrower alternative interpretation of the AIA that would (1) be more consistent with the AIA's origins, context, and role, (2) harmonize rather than distinguish the AIA and the APA, and (3) have the added bonus of maintaining consistency with this Court's interpretation of the TIA. Much like the AIA, the TIA provides that "district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax

under State Law where a plain, speedy and efficient remedy may be had in the courts of such a State." 28 U.S.C. § 1341. Congress passed the TIA in 1937 to protect state revenue collection, prompted by facts and circumstances similar to those preceding the APA. Although the wording of the TIA is slightly different from that of the AIA, Congress used the AIA as a model for the TIA. *See* Hickman & Kerska, *supra*, at 1707–08 (documenting the history of the TIA). Consequently, the Supreme Court repeatedly has emphasized the relationship between the two provisions and looked to one when interpreting the other. *See, e.g.*, *Direct Marketing Ass'n v. Brohl*, 575 U.S. 1, 8 (2015); *Hibbs v. Winn*, 542 U.S. 88, 102–04 (2004); *Jefferson Co. v. Acker*, 527 U.S. 423, 434–35 (1999).

In *Direct Marketing*, this Court recognized that the terms "assessment" and "collection" as used in the TIA refer to distinct phases of the tax administration process, and the Court determined the meaning of those terms by referring to past and present provisions of the Internal Revenue Code. For instance, assessment means "the official recording of a taxpayer's liability" and "an official action taken based on information already reported to the taxing authority." *Id.* at 9. Collection is "the act of obtaining payment of taxes due." *Id.* at 10. Finally, the Court adopted an interpretation of "restrain" that emphasized the term's roots in equity and would yield a closer temporal proximity with the assessment and collection functions. *See id*. at 12–14. According to the Court, lawsuits fall under the TIA when a taxpayer seeks, via judicial review, to stop state officials from taking those specific and discrete administrative steps. Adopting a corresponding interpretation of the AIA would be more consistent with that statute's origins, context, and role, would reconcile the AIA with

the APA as well as the TIA, would honor the concerns of *Abbott Labs*, and would respect the Court's preference for administrative uniformity.

II. Resolving The AIA's Scope Has Substantial Implications For Federal Tax Administration.

The consequences of the Sixth Circuit's interpretation of the AIA for federal tax administration are significant. Although this case directly concerns the validity of only a single IRS guidance document—Notice 2016-66— the reach of the Sixth Circuit's reasoning is much more sweeping.

The Sixth Circuit relied principally on a strained reading of this Court's decision in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 544 (2012), and a D.C. Circuit decision in *Florida Bankers Ass'n v. U.S. Department of the Treasury*, 799 F.3d 1065, 1068 (D.C. Cir. 2015), that did the same, to reach two related conclusions: first, that penalties imposed by Chapter 68, Subchapter B of the Internal Revenue Code are taxes for AIA purposes; and second, that invalidating a rule or regulation that could lead to such penalties in the event of noncompliance thus would restrain the assessment and collection of such taxes. Most of the tax code's penalty provisions are contained in Chapter 68, Subchapter B. Accordingly, the Sixth Circuit's reasoning would extend to preclude pre-enforcement judicial review of APA-based challenges to virtually any Treasury or IRS rule or regulation.

Meanwhile, because Congress has pursued for several decades a practice of utilizing the Internal Revenue Code to provide social welfare benefits and regulate various economic sectors (e.g., health care, employee benefits, and nonprofit organizations), a

substantial plurality of Treasury and IRS rules and regulations have only the most tenuous of connections to the revenue raising that animated the AIA's adoption. Parties subject to this sizeable subset of Treasury and IRS rules and regulations do not have the option of paying taxes and suing for a refund. Under the Sixth Circuit's interpretation of the AIA, the only way parties subject to such rules and regulations is to violate the law and suffer the consequences.

Consequently, as a practical matter, the Sixth Circuit's interpretation of the AIA would exempt a sizeable chunk of the modern administrative state from the longstanding administrative norm of pre-enforcement judicial review under *Abbott Labs*. Because Treasury and the IRS have a poor record of compliance with the APA, the Sixth Circuit's interpretation of the AIA poses a serious threat to public perceptions of fairness and legitimacy of the federal tax system and, in turn, public willingness to comply with the tax laws.

A. Treasury And The IRS Have A Poor Track Record Of Complying With APA Rulemaking Requirements.

Some background on Treasury and IRS administrative practices may be useful. Treasury and the IRS promulgate interpretations of the tax laws using two primary types of formats. The first consists of Treasury regulations, which can be adopted pursuant to specific or general authority, and which Treasury issues in proposed, temporary, and final form. Treasury regulations carry the force and effect of law. *See, e.g.*, *Mayo Found. For Med. Educ. & Research v. United States*, 562 U.S. 44, 57–8 (2011). Although Treasury and the IRS purport to utilize APA

notice-and-comment rulemaking in promulgating these regulations, they have a spotty track record of compliance in that regard. *See, e.g.*, Patrick J. Smith, *The APA's Arbitrary and Capricious Standard and IRS Regulations*, 136 Tax Notes 271, 274-75 (2012); 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); Michael Asimow, *Public Participation in the Adoption of Temporary Treasury Regulations*, 44 Tax Law. 343 (1991).

The second primary format—and the one most relevant to this case—is a collection of subregulatory but official and authoritative rulings that the IRS issues and publishes in the Internal Revenue Bulletin each week. *See, e.g.*, *Introduction to* INTERNAL REVENUE BULLETIN NO. 2020-7 (Feb. 10, 2020), https://www.irs.gov/pub/ irs-irbs/irb20-07.pdf ("The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the [IRS]."). The most prominent of these official and authoritative IRS rulings are revenue rulings, revenue procedures, and notices like Notice 2016-66. The most common descriptions of these formats resemble the following: revenue rulings publish the IRS's interpretation of the tax code; revenue procedures provide procedural rules; and notices offer informal statements of IRS policy regarding enforcement and other matters. In fact, as currently used by the IRS, the contents of these three formats overlap considerably, such that revenue procedures and notices contain substantive interpretations of law perhaps as often as revenue rulings do. *See, e.g.*, T.D. 8381, 1992-1 C.B. 374 (observing that "Notices published in the Internal Revenue Bulletin by the

[IRS] also contain substantive interpretations of Federal tax law"); *see also* Kristin E. Hickman, *Unpacking the Force of Law*, 66 Vand. L. Rev. 465, 502–05 (2013) (elaborating with examples how the IRS uses these formats); Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 Mich. St. L. Rev. 239 (same).

The precise characterization of these official and authoritative, yet subregulatory, guidance documents is an open question. On the one hand, the IRS contends that these documents "do not have the force and effect of Treasury Department Regulations," though they "may be used as precedents." *Id.* In issuing these documents, the IRS occasionally will solicit public comments. *See, e.g.*, IRS Notice 2019-27, 2019-31 I.R.B. 484 (seeking public comment regarding a proposed revenue procedure). Much more typically, however, the IRS assumes that these sorts of pronouncements are not legislative rules for APA purposes, and the IRS does not utilize notice-and-comment rulemaking when issuing them. Historically, courts treated revenue rulings, revenue procedures, and notices as nonbinding on taxpayers. *See, e.g.*, *Dixon v. United States*, 381 U.S. 68, 73 (1965) (declaring that Congress had not given IRS rulings the "force of law").

On the other hand—and significantly—contrary to standard administrative law expectations regarding subregulatory guidance documents issued by other agencies, failure to comply with revenue rulings, revenue procedures, and notices can lead to the imposition of penalties. In the Tax Reform Act of 1976, Congress adopted a new penalty for tax return preparers guilty of "negligent or intentional disregard of rules and regulations." Pub. L. No. 94-455, 90 Stat. 1520, 1689 (1976) (codified at 26 U.S.C. § 6694 (2001)). Committee reports for that legislation suggested that

"rules and regulations" for this and other penalty provisions include IRS rulings in addition to Treasury regulations. H.R. Rep. No. 94-658, at 278 (1975); S. Rep. No. 94-938, pt. 1, at 355-56 (1976); H.R. Rep. No. 94-155, at 484 (1976) (Conf. Rep.).

In 1991, citing this legislative history, Treasury adopted regulations interpreting another penalty provision—26 U.S.C. § 6662(b)(1), which imposes a 20% penalty for underpayment of taxes attributable to taxpayer "negligence or disregard of rules and regulations"—to include revenue rulings and notices as explicitly within its scope, *see* Treas. Reg. § 1.6662-3(b)(2), while suggesting in the preamble to those regulations that the same would be true of at least some revenue procedures "depending on all facts and circumstances." T.D. 8381, 1992-1 C.B. 374. Notice 2016-66, at the heart of this case, explicitly threatens penalties under § 6662, as well as additional penalties under 26 U.S.C. § 6707, for noncompliance with the directives contained therein.

Can any subregulatory guidance document so explicitly associated with statutory penalties nevertheless lack the force of law and be exempt from notice-and-comment rulemaking requirements under the APA? This open question is at the heart of the Petitioner's underlying APA procedural challenge. *See also* Hickman, *Unpacking the Force of Law*, *supra*, at 502–29 (exploring this question).

B. APA Procedures And Judicial Review Promote The Legitimacy Of Agency Action Through Public Participation, Transparency, And Accountability.

As with most agencies, Congress has given Treasury broad authority to define the parameters of the law. *See, e.g.*, 26 U.S.C. § 7805(a). With such

delegations comes a need to ensure that exercises of discretion by unelected agency officials are perceived as legitimate and fair by those who are subject to agency mandates. These concerns are especially present in the tax context, where low IRS audit rates mean that the government relies heavily on taxpayers to comply with the tax laws and pay their taxes voluntarily.

The APA's procedural and process requirements are intended to facilitate such perceptions through public participation, transparency, and accountability. The APA's notice-and-comment rulemaking procedures do this by "'reintroduc[ing] public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies'" as well as "'assur[ing] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions.'" *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (quoting *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980), and *Guardian Fed. Sav. & Loan Ins. Corp. v. FSLIC*, 589 F.2d 658, 662 (D.C. Cir. 1978)). The *State Farm* doctrine's requirement that agencies engaged in rulemaking contemporaneously provide evidence of reasoned decisionmaking serves this purpose as well. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring an agency to demonstrate an action is not arbitrary under the APA by "articulat[ing] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'" (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).)

The APA's judicial review provisions further the same goals by enlisting the courts to ensure that

agencies fulfill their own procedural and reasoned decisionmaking requirements. Toward that end, in particular, the Supreme Court's aforementioned decision in *Abbott Labs* interprets the APA as incorporating a presumption in favor of pre-enforcement judicial review of agency regulations. 387 U.S. at 140–41. The Court cited as justification for that presumption "the very real dilemma" of having to comply with regulations they believe to be invalid or "facing serious penalties attached to noncompliance" should such beliefs prove wrong, simply to obtain judicial review of their concerns. *Id.* at 153. The Court recognized, rightly, that absent pre-enforcement review of agency rules and regulations, many if not most parties will opt simply to comply rather than risk penalties. Thus, without pre-enforcement review, many if not most concerns about agencies violating APA rulemaking requirements will never be heard, and the legitimacy of agency action will be diminished as a result.

C. Precluding Pre-Enforcement Judicial Review Would Shield Many Treasury And IRS Rules And Regulations From Judicial Review Permanently.

At one time, most Treasury and IRS rules and regulations that affected the rights and obligations of taxpayers related directly to the determination of the amount of tax each taxpayer owed in a given taxable year. Consequently, for much of the twentieth century, at least in theory, judicial review of such provisions could be obtained in one of two ways: (1) prepare a tax return in compliance with the rule or regulation, and seek a refund, or (2) prepare a noncompliant tax return and disclose the noncompliance, prompting the IRS to examine the tax

return, leading to a deficiency assessment that could then be challenged in the United States Tax Court or its predecessor, the U.S. Board of Tax Appeals. Thus, even if the AIA barred pre-enforcement judicial review of Treasury regulations, a taxpayer had an avenue to get to court to raise his challenge. *But see* Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 Geo. Wash. L. Rev. 1153, 1183-90 (2008) (documenting this under-standing but explaining why the reality of refund and deficiency actions is not quite so simple).

This traditional understanding of judicial review in tax cases has been complicated by a legislative trend of incorporating into the tax code hundreds of social welfare and regulatory programs with only a tangential relationship to revenue raising. *Cf. King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (recognizing the IRS's role in administering the Affordable Care Act as outside the agency's traditional expertise). The tax code contains hundreds of tax expenditure items representing more than $1 trillion of indirect government spending each year. Anti-poverty programs like the Earned Income Tax Credit and the Child Tax Credit aimed at the working poor are structured as refundable tax credits rather than direct subsidies. Subsidies for the purchase of health insurance are also structured as tax credits rather than as direct payments. Treasury and the IRS are key health care and pension regulators through ERISA and the Affordable Care Act, the provisions of which are enforced by denying eligibility for deductions or exclusions or by imposing penalties labeled as excise taxes that few people actually pay. Treasury and the IRS are key regulators of the vast nonprofit sector, as Congress has made eligibility for tax-exempt status contingent upon compliance with a

variety of different regulatory requirements contained in the Internal Revenue Code. *See* Kristin E. Hickman, *Administering the Tax System We Have*, 63 Duke L.J. 1717 (2014) (documenting these examples and more). Contemporary Treasury and IRS rules and regulations implement policies concerning, among other topics, the environment, conservation, green energy, manufacturing, innovation, education, saving, retirement, corporate governance, export promotion, charitable giving, and economic development. *See* Pamela F. Olson, *Woodworth Memorial Lecture: And Then Cnut Told Reagan…Lessons from the Tax Reform Act of 1986*, (May 6, 2010), in 38 Ohio N.U. L. Rev. 1, 12–13 (2011) (citations omitted). In one recent five-year period, a substantial plurality of Treasury regulations promulgated concerned such matters, rather than more traditional revenue raising. *See* Hickman, *Administering the Tax System We Have*, *supra* at 1746–53 (documenting study results).

Consequently, many contemporary Treasury and IRS rules and regulations do not directly relate to the computation of a taxpayer's annual tax liability at all but rather are more akin to the rules and regulations adopted by other agencies. As with Notice 2016-66 in this case, parties subject to these rules and regulations are not in the traditional position of paying more tax with their tax return and suing for a refund or filing a return documenting their noncompliance to generate a deficiency notice. Again, however, such parties can be subject to civil or even criminal penalties for noncompliance with applicable Treasury and IRS rules and regulations.

Absent pre-enforcement judicial review, parties subject to those Treasury and IRS rules and regulations who believe the same to be noncompliant with APA requirements will be in precisely the position decried by this Court in *Abbott Labs*—comply

with rules and regulations they believe to be invalid or face penalties for noncompliance in order to obtain judicial review of their claims. *See* 387 U.S. at 153. In most such instances, regulated parties will simply choose to comply, meaning their APA claims will never be heard. Treasury and the IRS will not be held accountable for their errors under the APA. And because Treasury and the IRS have a growing reputation for noncompliance with APA requirements, the likely result will be decreased respect for the fairness and legitimacy of federal tax administration and, correspondingly, a decline in voluntary compliance with the tax laws.

CONCLUSION

The AIA's objective of protecting the government's revenue stream is worthwhile, but the AIA's role in accomplishing that goal has diminished substantially in modern times and is largely an artifact of an earlier era. Meanwhile, Treasury and IRS noncompliance with the APA threatens taxpayer perceptions regarding the fairness and legitimacy of tax administration. Taxpayers who perceive tax administration as unfair or rigged against them are less likely to comply maximally with the tax laws. Pre-enforcement judicial review of Treasury and IRS rules and regulations would bolster the integrity of the tax system in this regard.

Congress did not intend the AIA to prevent the courts from protecting public perceptions of the fairness and legitimacy of tax administration through pre-enforcement judicial review of claims that Treasury and IRS rules and regulations violate the APA. The AIA's origins, textual and historical context, and role in tax administration, as well as the APA and this Court's precedents, all overwhelmingly support

allowing pre-enforcement judicial review of APA-based challenges to Treasury and IRS rules and regulations. The Sixth Circuit's interpretation of the AIA to the contrary is substantially flawed.

The Court should grant certiorari in this case to fix the Sixth Circuit's error, to clarify its own jurisprudence regarding the proper interpretation of the AIA, and to put an end to yet another instance of unjustified tax exceptionalism.

Respectfully submitted,

Prof. Kristin E. Hickman
Counsel of Record and Amicus Curiae
University of Minnesota Law School
229 – 19th Avenue South
Minneapolis, MN 55455
(612) 624-2915
khickman@umn.edu

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