No. 19-930

In the Supreme Court of the United States

CIC SERVICES, LLC, PETITIONER

v.

INTERNAL REVENUE SERVICE, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Anti-Injunction Act, 26 U.S.C. 7421(a), provides that, with certain exceptions, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." *Ibid.* The term "'tax'" in that provision is "deemed also to refer to the penalties * * * provided by" Subchapter 68B of the Internal Revenue Code, 26 U.S.C. 1 *et seq.* 26 U.S.C. 6671(a). Subchapter 68B of the Code, 26 U.S.C. 6671 *et seq.*, imposes civil penalties on (*inter alios*) taxpayers and certain tax professionals who fail to report to the Internal Revenue Service (IRS) information required by the Code and IRS regulations regarding transactions that the IRS has "determine[d] * * * hav[e] a potential for tax avoidance or evasion," 26 U.S.C. 6707A(c)(1)—or, in the case of material advisors, those persons who fail to maintain certain records regarding such a transaction, 26 U.S.C. 6112; see 26 U.S.C. 6011, 6111, 6112, 6707, 6707A, 6708; 26 C.F.R. 1.6011-4(b)(6). The question presented is as follows:

Whether the court of appeals correctly held that the Anti-Injunction Act required dismissal of petitioner's suit seeking to enjoin enforcement of an IRS determination that certain transactions are subject to reporting and recordkeeping requirements that are enforceable by monetary penalties that the Code deems to be taxes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 925 F.3d 247. The opinion of the district court (Pet. App. 38a-47a) is not published in the Federal Supplement but is available at 2017 WL 5015510.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2019. A petition for rehearing was denied on August 28, 2019 (Pet. App. 48a-66a). On October 28, 2019, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including January 3, 2020. On December 17, 2019, Justice Sotomayor further extended the time to and including January 17, 2020, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Internal Revenue Code (Code), 26 U.S.C. 1 *et seq.*, requires taxpayers to report certain tax-related information to the Internal Revenue Service (IRS). Section 6011(a) requires "any person made liable for any tax"—"[w]hen required by regulations prescribed by" the IRS—to "make a return or statement according to the forms and regulations prescribed by" the IRS and to "include therein the information required by such forms or regulations." 26 U.S.C. 6011(a). The IRS has adopted a variety of regulations and forms, such as the familiar Form 1040, for the reporting of required information.

IRS regulations require a taxpayer who has "participated" in one of certain transactions to file with its tax return a statement disclosing various information about the transaction. 26 C.F.R. 1.6011-4(a). Such transactions include (*inter alia*) those that the IRS has "identified by notice, regulation, or other form of published guidance" as either (1) a "listed transaction," meaning one that the IRS has determined is in fact a "tax avoidance transaction," 26 C.F.R. 1.6011-4(b)(2); or (2) a "transaction of interest," 26 C.F.R. 1.6011-4(b)(6), meaning a transaction that the IRS "believe[s] has a potential for tax avoidance or evasion, but for which" the IRS "lack[s] enough information" to classify it conclusively, 72 Fed. Reg. 43,146, 43,146 (Aug. 3, 2007).

Section 6707A of the Code states that "[a]ny person who fails to include on any return or statement any information with respect to a reportable transaction which is required under section 6011 to be included with such return or statement shall pay a penalty in the amount determined under" Section 6707A(b). 26 U.S.C.

6707A(a). A "'reportable transaction'" is "any transaction with respect to which information is required to be included with a return or statement because, as determined under regulations prescribed under section 6011, such transaction is of a type which the Secretary determines as having a potential for tax avoidance or evasion." 26 U.S.C. 6707A(c)(1). That definition encompasses both listed transactions and transactions of interest. For purposes of the Code, the penalty for failing to provide the required information about those transactions is "deemed" to be a tax by 26 U.S.C. 6671(a), which provides that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter," *ibid.*—*i.e.*, Subchapter 68B of Title 26, 26 U.S.C. 6671 *et seq.*, where Section 6707A appears. The amount of the penalty is "75 percent of the decrease in tax shown on the return as a result of such transaction," 26 U.S.C. 6707A(b)(1), subject to minimum and maximum amounts, 26 U.S.C. 6707A(b)(2) and (3).

The Code requires tax professionals who assist taxpayers with certain transactions to report information to the IRS and to maintain records subject to inspection. A "material advisor"—a person who provides material aid, assistance, or advice with respect to a reportable transaction and who derives a threshold amount of gross income from doing so, 26 U.S.C. 6111(b)—must file a return providing various information about the transaction, 26 U.S.C. 6111(a). A material advisor also must maintain certain records subject to inspection, including a list of persons for whom it served as a material advisor with respect to the transaction. 26 U.S.C. 6112(a).

A material advisor who either fails to file a timely return, files a return containing false or incomplete information, or fails (without reasonable cause) to make available to the IRS records required to be maintained regarding a reportable transaction is subject to a civil penalty under Subchapter 68B. See 26 U.S.C. 6707(a) and (b), 6708(a). Like the penalty imposed on a taxpayer who fails to report required information, that penalty is "deemed" to be a "'tax.'" 26 U.S.C. 6671(a). For listed transactions, the amount of the tax for noncompliance with the reporting requirement is 50% of the gross income that the material advisor derived from its work on the transaction (75% in the case of an intentional failure to act), or $200,000, whichever is greater. 26 U.S.C. 6707(b)(2). For other reporting violations, the amount of the tax is $50,000, and for recordkeeping violations the tax is $10,000 per day. 26 U.S.C. 6707(b)(1), 6708(a)(1).

b. A penalty that is assessed under Subchapter 68B, and deemed a tax under Section 6671(a) is subject to judicial review in a suit for a refund after the tax has been paid. See 26 U.S.C. 6532, 7422; *Florida Bankers Ass'n* v. *United States Dep't of the Treasury*, 799 F.3d 1065, 1066-1067 (D.C. Cir. 2015) (Kavanaugh, J.), cert. denied, 136 S. Ct. 2429 (2016). Pre-enforcement judicial review of such a tax is unavailable, however, "[b]ecause of the Anti-Injunction Act," codified at 26 U.S.C. 7421(a), which "bar[s] litigation to enjoin or otherwise obstruct the collection of taxes." *National Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 543 (2012) (*NFIB*). The Anti-Injunction Act 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." 26 U.S.C. 7421(a). With limited

exceptions that are not implicated here, district courts also generally cannot issue declaratory relief under the Declaratory Judgment Act, 28 U.S.C. 2201(a), "with respect to Federal taxes," *ibid.*

Certain taxes are also subject to review in the Tax Court after the IRS issues a notice of deficiency resulting from a person's failure to include the tax on a return. See 26 U.S.C. 6212, 6213. Other taxes, such as assessable penalties like those under Sections 6707, 6707A, and 6708, are subject to limited review in the Tax Court only in certain collection-related proceedings after assessment. See 26 U.S.C. 6320, 6330; see, *e.g.*, *Smith* v. *Commissioner*, 133 T.C. 424 (2009). Those forms of review are not at issue here.

2. In 2016, exercising its authority under 26 U.S.C. 6011, the IRS issued a notice that identified as "transaction[s] of interest" under 26 C.F.R. 1.6011-4(b)(6) certain "micro-captive transaction[s]," which the IRS determined "ha[ve] a potential for tax avoidance or evasion." Notice 2016-66, 2016-47 I.R.B. 745, 745 (Nov. 21, 2016), https://www.irs.gov/pub/irs-irbs/irb16-47.pdf (Pet. App. 91a); see also Notice 2017-08, 2017-3 I.R.B. 423, 424 (Jan. 17, 2017), https://www.irs.gov/pub/irs-irbs/irb17-03.pdf (extending certain deadlines). The micro-captive transaction described in Notice 2016-66 generally involves an attempt by a taxpayer and a related entity (the "captive") to reduce their taxable incomes through agreements that purport to be insurance contracts, but that in substance may not actually constitute insurance. See Notice 2016-66, 2016-47 I.R.B. at 745-746 (Pet. App. 91a-99a).

In the typical micro-captive transaction described in Notice 2016-66, the captive contracts to insure (or reinsure) a risk of the taxpayer, in exchange for putative

premiums. Notice 2016-66, 2016-47 I.R.B. at 745 (Pet. App. 91a-93a). The taxpayer deducts the amounts it pays as premiums under 26 U.S.C. 162. See Notice 2016-66, 2016-47 I.R.B. at 745-746 (Pet. App. 91a, 98a-99a). The captive also excludes the premiums from its own taxable income under 26 U.S.C. 831(b), which allows an insurer with net premiums below a certain threshold (currently $2.2 million per taxable year) to elect to be taxed solely on its investment income and not on its premium income. Notice 2016-66, 2016-47 I.R.B. at 745-747 (Pet. App. 91a, 99a).

The IRS observed that a taxpayer's use of a captive insurance company that elects to be taxed on its investment income under Section 831(b) may sometimes reflect legitimate "risk management purposes that do not involve tax avoidance." Notice 2016-66, 2016-47 I.R.B. at 746 (Pet. App. 99a). But the IRS "believe[d] that there are cases in which the use of such arrangements to claim the tax benefits of treating the Contract as an insurance contract is improper" because "the transaction does not constitute insurance" in substance, such that neither the taxpayer nor the captive may properly exclude the premiums from the income. *Ibid.* (Pet. App. 98a-99a).

The IRS acknowledged that it "lack[ed] sufficient information" to identify which transactions involving captive insurers making Section 831(b) elections "should be identified specifically as a tax avoidance transaction." Notice 2016-66, 2016-47 I.R.B. at 745 (Pet. App. 91a). But the agency identified several attributes that may indicate that a transaction is not properly viewed as constituting insurance. *Id.* at 745-746 (Pet. App. 94a-98a). For example, the scope of coverage provided may raise concerns if it "involves an implausible risk," "does not

match a business need or risk," is described in "vague, ambiguous, or illusory" terms, or "duplicates coverage" the taxpayer already has. *Id.* at 745 (Pet. App. 94a-95a). The premiums also may indicate the lack of a legitimate insurance relationship if (*inter alia*) they "are determined without an underwriting or actuarial analysis that conforms to insurance industry standards," or if they "significantly exceed the premium prevailing for coverage offered by unrelated, commercial" carriers. *Id.* at 746 (Pet. App. 95a). The IRS also observed that, in the transactions that gave rise to its concerns, the captive "uses the premium income for purposes other than administering and paying claims under the [c]ontract"— "[f]or instance," by "us[ing] premium income to provide a loan" to the putative insured. *Ibid.* (Pet. App. 98a); see *ibid.* (Pet. App. 96a).

In light of those concerns, the IRS designated certain micro-captive transactions as transactions of interest that taxpayers and material advisors must report to the IRS in their returns. Notice 2016-66, 2016-47 I.R.B. at 746-747 (Pet. App. 99a-101a). The designation covers transactions involving a taxpayer and a captive under at least partially common ownership in which: (1) the captive insures or reinsures a risk of the taxpayer; (2) the captive elects to be taxed on its investment income and not its premium income under Section 831(b); and (3) the captive either (A) has liability for insured losses and claim-administration expenses of less than 70% of its premiums earned or dividends it has paid, or (B) has transferred to the taxpayer or a common parent entity any portion of the payments the captive received. *Id.* at 747 (Pet. App. 99a-100a). The IRS specified what information about a transaction must be reported, and it noted that noncompliance with the reporting and

recordkeeping requirements may subject a taxpayer or material advisor to penalties imposed by 26 U.S.C. 6707, 6707A, and 6708. Notice 2016-66, 2016-47 I.R.B. at 747-748 (Pet. App. 103a-106a).

3. Petitioner is "a material advisor to taxpayers engaging in micro-captive transactions." Pet. App. 4a. Petitioner commenced this action, alleging that the IRS had issued Notice 2016-66 in violation of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.*, and the Congressional Review Act, 5 U.S.C. 801 *et seq.* Pet. App. 4a. Petitioner contended that Notice 2016-66 is a legislative rule for which the IRS was required but had failed to engage in notice-and-comment rulemaking; that Notice 2016-66 is arbitrary and capricious; and that the Notice was required to be, but had not been, submitted for congressional review before it took effect. *Ibid.* Petitioner's complaint sought a permanent injunction "enjoin[ing] the enforcement of Notice 2016-66," and a declaration that the Notice is unlawful. D. Ct. Doc. 1, at 16 (Mar. 27, 2017). Petitioner also separately moved for a preliminary injunction, D. Ct. Doc. 8 (Mar. 30, 2017), which the district court denied, Pet. App. 4a.

The IRS moved to dismiss petitioner's suit, arguing that the suit was barred by the Anti-Injunction Act; that petitioner's challenges were unreviewable on other grounds; and that the complaint failed to state a claim on the merits. D. Ct. Doc. 25-1, at 6-25 (May 30, 2017). The district court granted the motion, concluding that petitioner's "claims and their requested injunction necessarily operate as a challenge to both the reporting requirement and the penalty or tax imposed for failure to comply with the reporting requirement." Pet. App.

46a; see *id.* at 38a-47a. The court reasoned that the penalty for noncompliance with the requirements "is a 'tax' within the [Anti-Injunction Act's] prohibition against injunctive relief," and that petitioner therefore "s[ought], at least in part, to restrain the IRS's assessment or collection of a tax." *Id.* at 43a, 46a (citations omitted); see *id.* at 43a-47a. The court did not reach the government's additional arguments for dismissal.

4. The court of appeals affirmed. Pet. App. 1a-24a.

a. The court of appeals held that petitioner's "complaint seeking to enjoin the enforcement of [Notice 2016-66] is properly characterized as a 'suit for the purpose of restraining the assessment or collection of any tax.'" Pet. App. 21a (citation omitted); see *id.* at 8a-21a. Like the district court, the court of appeals determined that "[t]he relevant taxes are * * * the penalties imposed for violation of the Notice's requirements." *Id.* at 14a. Those penalties, the court explained, are "treated as taxes themselves for purposes of the [Anti-Injunction Act]" because they are imposed by Subchapter 68B of the Code. *Ibid.*; see *id.* at 14a-15a & n.5; 26 U.S.C. 6671(a). The court noted that this Court "ha[d] explained as much" in *NFIB*, 567 U.S. at 544, and that "other circuits have consistently held as much." Pet. App. 14a-15a. The court of appeals concluded that the Anti-Injunction Act barred petitioner's suit because the "suit seeks to invalidate the Notice, which is the entire basis for that tax." *Id.* at 16a; see *id.* at 17a.

The court of appeals rejected petitioner's contention that *Direct Marketing Ass'n* v. *Brohl*, 575 U.S. 1 (2015), which addressed the Tax Injunction Act, 28 U.S.C. 1341, dictated a contrary conclusion. Pet. App. 8a-17a. The Tax Injunction Act 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 State." 28 U.S.C. 1341. This Court held that the Tax Injunction Act did not bar a suit to enjoin enforcement of a state law that required retailers to notify customers of, and to report to the State, certain information regarding sales on which the retailers had not collected sales or use taxes. 575 U.S. at 7-14. The Court explained that the notice and reporting requirements did not constitute the assessment, levy, or collection of a tax. *Id.* at 7-12. It also rejected an alternative argument that a judicial order barring enforcement of those notice and reporting requirements would "restrain" tax collection, in the sense that retailers' non-compliance would impede subsequent efforts to collect the underlying sales and use taxes. *Id.* at 12-14. The Court acknowledged that the term "restrain" in isolation is ambiguous. *Id.* at 12-13. But it concluded that, as used in the Tax Injunction Act, the term is limited to judicial relief that "stops 'assessment, levy or collection'" of a state-law tax, not relief that "'merely inhibits'" those activities. *Id.* at 14.

The court of appeals in the present case expressed uncertainty as to whether the term "restrain" should be given the same meaning in the Anti-Injunction Act that the *Direct Marketing* Court gave it in the Tax Injunction Act. Pet. App. 17a n.6 (citation omitted). The court concluded, however, that it "need not engage with" that issue in order to decide this case. *Id.* at 17a. The court explained that, "[e]ven assuming *arguendo* that the *Direct Marketing* definition" of "'restrain'" "should be extended from the [Tax Injunction Act] to the [Anti-Injunction Act]," the present suit still would be barred because it "'would have the effect of restraining—*fully*

stopping' the IRS from collecting the penalties imposed for violating the Notice's requirements." *Ibid.*

The court of appeals explained that petitioner's contrary argument rested on the erroneous premise that the only taxes relevant to the Anti-Injunction Act analysis were the taxes on the underlying micro-captive transaction, "the collection of which [Notice 2016-66] is designed to facilitate." Pet. App. 14a; see *id.* at 14a-17a. The court acknowledged that, if the *Direct Marketing* Court's interpretation of "restrain" in the Tax Injunction Act were extended to the Anti-Injunction Act, petitioner's suit likely would not restrain the assessment or collection of those distinct taxes. *Id.* at 17a. The court of appeals concluded, however, that the Anti-Injunction Act barred petitioner's suit because that suit if successful would preclude assessment and collection of the taxes imposed for noncompliance with Notice 2016-66. See *ibid.*

Petitioner also contended that the Anti-Injunction Act is inapplicable here because the "'purpose'" of its suit was to "challeng[e] the Notice's regulatory requirement and not the penalty." Pet. App. 18a (citation and emphasis omitted). The court of appeals rejected that argument. The court observed that "[a]ny distinction that once existed in [this] Court's [Anti-Injunction Act] jurisprudence between 'regulatory' taxes and 'revenue-raising' taxes appears to have been 'abandoned,'" and that the Court has "instead emphasized the effect of the plaintiff's suit." *Ibid.* (citations omitted). The court of appeals noted that this Court has "held that where the relief sought would 'necessarily preclude' the assessment or collection of the relevant tax, the suit 'falls squarely within the literal scope' of the [Anti-Injunction

Act]." *Ibid.* (quoting *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 732 (1974)).

The court of appeals acknowledged that "the purpose of the suit is still a factor" to be considered. Pet. App. 18a. It explained, however, that, under this Court's decisions, "a purpose to restrain the assessment or collection of taxes" may be "infer[red]" where a plaintiff is "trying to 'sidestep' the [Anti-Injunction Act]" through artful pleading. *Ibid.* (citation omitted). The court concluded that this was true here because petitioner's challenge to the "regulatory aspect of [the] regulatory tax"—the reporting and recordkeeping requirements—would, if successful, "'necessarily' invalidate" the "tax aspect of [the] regulatory tax." *Id.* at 21a (citation omitted). The court noted that a prior, arguably contrary decision of the circuit had been vacated by this Court and so "is no longer good law." *Id.* at 20a; see *id.* at 19a-20a (citing *Autocam Corp.* v. *Sebelius*, 730 F.3d 618, 622 (6th Cir. 2013), cert. granted, judgment vacated, and case remanded, 573 U.S. 956 (2014)).

In reaching those conclusions, the court of appeals agreed with the D.C. Circuit's resolution of a similar question in *Florida Bankers*, *supra*. Pet. App. 14a, 20a-21a; see *id.* at 10a-21a. In *Florida Bankers*, the D.C. Circuit had held that the Anti-Injunction Act barred a suit that sought to "enjoin the enforcement of an IRS regulation requiring banks to report certain interest payments made to account holders," noncompliance with which would subject a person to penalties under Subchapter 68B of the Code. *Id.* at 13a (citing 799 F.3d at 1067); see *id.* at 10a-12a. The court found that those penalties constituted "tax[es]" under 26 U.S.C. 6671(a), and that the plaintiffs' "suit would have the effect of restraining (indeed eliminating) the

assessment and collection of that tax." 799 F.3d at 1068. Like the court of appeals here, the D.C. Circuit held that *Direct Marketing* was distinguishable because "the penalty" imposed for noncompliance with the reporting requirement in *Direct Marketing* "was not itself a tax, or at least it was never argued or suggested that the penalty in that case was itself a tax." *Id.* at 1069. The D.C. Circuit also rejected the plaintiffs' argument that the purpose of its suit was to challenge only an underlying regulatory requirement and not the tax imposed by the Code as a penalty for noncompliance. The court explained that "invalidating the regulation would directly prevent collection of the tax." *Id.* at 1071.

b. Judge Nalbandian dissented. Pet. App. 25a-37a. In his view, the Anti-Injunction Act did not bar petitioner's suit because petitioner "d[id] not allege tax liability as its injury" and instead challenged the reporting and recordkeeping requirements themselves. *Id.* at 26a. He acknowledged that the Code "deems th[e] penalties" imposed for noncompliance with those requirements to be "'taxes.'" *Id.* at 29a (citation omitted). He concluded, however, that "[e]njoining a reporting requirement enforced by a tax does not necessarily bar the assessment or collection of that tax * * * because the tax does not result from the requirement per se," but rather from a party's violation of the requirement. *Ibid.* (emphasis omitted).

5. The court of appeals denied a petition for rehearing en banc. Pet. App. 48a-49a. Judges Clay and Sutton issued opinions concurring in the denial of rehearing. *Id.* at 50a-54a, 55a-57a. Judge Thapar, joined by six other judges, dissented from the denial of rehearing. *Id.* at 58a-66a; see C.A. Doc. 65-2, at 1, 8-13 (Aug. 28, 2019).

ARGUMENT

The court of appeals correctly held that the Anti-Injunction Act, 26 U.S.C. 7421(a), required the dismissal of petitioner's suit seeking to enjoin the enforcement of Notice 2016-66. Neither the court's ultimate conclusion, nor its analysis applying the Anti-Injunction Act to the circumstances of this case, conflicts with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioner argues (Pet. 11-23, 25-30) that the Anti-Injunction Act does not cover its suit. The court of appeals correctly rejected that contention.

a. The Anti-Injunction Act provides that, with certain enumerated exceptions, "no suit for the purpose of restraining the assessment or collection of any [federal] tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. 7421(a). The enumerated exceptions—none of which applies here—and other provisions of the Code instead channel nearly all litigation over federal taxes into several specified avenues. "Because of the Anti-Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund," *National Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 543 (2012); see 26 U.S.C. 6532, 7422, or (in circumstances not implicated here) by seeking review in the Tax Court of a notice of deficiency issued by the IRS before the tax is assessed, see 26 U.S.C. 6212-6215, 7482; see also *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 746-747 (1974); *Florida Bankers Ass'n* v. *United States Dep't of the Treasury*, 799 F.3d 1065, 1066 (D.C. Cir. 2015) (Kavanaugh, J.), cert. denied, 136 S. Ct. 2429 (2016). "This statute protects the Government's ability to collect a consistent stream

of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes." *NFIB*, 567 U.S. at 543.

Although in most legal contexts a litigant might seek declaratory relief as an alternative to an injunction, the Declaratory Judgment Act generally bars federal courts from granting declaratory judgments "with respect to Federal taxes." 28 U.S.C. 2201(a). That prohibition is also subject to limited exceptions—including for (*inter alia*) actions seeking review of a determination of an entity's tax-exempt status, and certain tax determinations in bankruptcy proceedings—but none is implicated here. *Ibid.*; see 11 U.S.C. 505; 26 U.S.C. 7428. Apart from those exceptions, "the federal tax exception to the Declaratory Judgment Act is at least as broad as the Anti-Injunction Act." *Bob Jones Univ.*, 416 U.S. at 733 n.7; cf. *Florida Bankers*, 799 F.3d at 1067 (stating that tax exception to Declaratory Judgment Act and Anti-Injunction Act are "coterminous" (citation omitted)).

Petitioner's suit seeking injunctive and declaratory relief with respect to enforcement of Notice 2016-66 thus cannot proceed if the suit is covered by the Anti-Injunction Act. The court of appeals correctly held that it is. The penalty that the Code imposes for noncompliance with the reporting and recordkeeping requirements—which Notice 2016-66 made applicable to micro-captive transactions on which petitioner advises its clients—is deemed a "tax[]" for purposes of the Code, including the Anti-Injunction Act. Pet. App. 14a; see 26 U.S.C. 6671(a). And petitioner's suit, if successful, would necessarily preclude the collection of that tax. Pet. App. 21a.

i. The civil monetary penalties imposed for noncompliance with the reporting and recordkeeping requirements are "tax[es]" within the meaning of the Anti-Injunction Act. Section 6671(a) of the Code—which

appears in Subchapter 68B—states in pertinent part that, "[e]xcept as otherwise provided, any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter," *i.e.*, Subchapter 68B. 26 U.S.C. 6671(a). The penalties at issue here are imposed by 26 U.S.C. 6707, 6707A, and 6708, which appear in Subchapter 68B. References in the Code to "tax[es]," including in the Anti-Injunction Act, thus encompass those penalties.

This Court's reasoning in *NFIB* confirms that conclusion. In *NFIB*, the Court held that the penalty for failing to comply with the requirement to purchase health insurance under the Patient Protection and Affordable Care Act (Affordable Care Act), Pub. L. No. 111-148, 124 Stat. 119, known as the "individual mandate," was not a "tax" within the meaning of the Anti-Injunction Act. 567 U.S. at 543-546. The Court recognized that "Congress can, of course, describe something as a penalty but direct that it nonetheless be treated as a tax for purposes of the Anti-Injunction Act." *Id.* at 544. As an example, the Court observed that Section 6671(a) "'deem[s]'" penalties imposed by Subchapter 68B to be taxes, and that "[p]enalties in Subchapter 68B are thus treated as taxes under Title 26, which includes the Anti-Injunction Act." *Id.* at 544-545. The *NFIB* Court concluded, however, that Congress had not deemed the penalty for noncompliance with the individual mandate a tax because the mandate "is not in Subchapter 68B of the Code," and no "other provision state[s] that references to taxes in Title 26 shall also be 'deemed' to apply to the individual mandate." *Id.* at 545.

As the D.C. Circuit explained in *Florida Bankers*, the clear implication of the *NFIB* Court's reasoning is that,

"[h]ad the penalty at issue in *NFIB* been located in Chapter 68, Subchapter B, the Anti-Injunction Act would have applied." 799 F.3d at 1068. Here, as in *Florida Bankers*—which addressed penalties under Section 6721(a)—but "unlike in *NFIB*, the penalty is located in Chapter 68, Subchapter B." *Ibid.* The penalty therefore "is a 'tax' under the Anti–Injunction Act." *Ibid.*

Congress's classification of the penalties at issue here as taxes was particularly apt. The Code imposes those penalties when a taxpayer or a material advisor fails to report required information or to keep required records about a type of transaction that the IRS has determined either is or has the potential to be tax avoidance or evasion. 26 U.S.C. 6707A(c); see 26 U.S.C. 6707(d), 6708(a). Requiring taxpayers and tax professionals to report information (and tax professionals to keep records) about such transactions enables the IRS to ensure that taxes applicable to them are not evaded but are properly assessed and collected.

The penalties the Code imposes on a taxpayer or material advisor who refuses to report such information or to provide required records upon request can be viewed as embodying a presumption that—in the absence of exonerating information reported (or records supplied) by the taxpayer or material advisor—the suspicious transaction is in fact an instance of tax avoidance or evasion, and some tax liability should be imposed. Indeed, in many instances, the penalties are calculated (within certain limits) as a percentage of the tax savings a taxpayer achieved or the income a material advisor earned. 26 U.S.C. 6707(b)(2)(B), 6707A(b)(1). Rather than allow a failure to report required information (or to maintain relevant records) to frustrate the assessment and collection of taxes, which would encourage tax evasion,

those provisions establish an alternative basis for imposing a tax on such persons. In all events, the definition of "tax" for purposes of the Anti-Injunction Act "is up to Congress," *NFIB*, 567 U.S. at 544, and the Code unambiguously classifies a penalty for noncompliance with the statutory reporting and recordkeeping requirements as a tax for purposes of the Anti-Injunction Act.

ii. Petitioner's action is a "suit for the purpose of restraining the assessment or collection of [that] tax." 26 U.S.C. 7421(a). The first item of relief requested in petitioner's complaint is that the district court "[p]ermanently enjoin the enforcement of Notice 2016-66." D. Ct. Doc. 1, at 16. Notice 2016-66 is enforced by the taxes imposed by Sections 6707, 6707A, and 6708 for noncompliance with the reporting and recordkeeping requirements. Because an order enjoining the enforcement of Notice 2016-66 would "necessarily preclude the collection of" those taxes, the suit "falls squarely within the literal scope of the Act." *Bob Jones Univ.*, 416 U.S. at 732; see *id.* at 731-732 (Because "an injunction preventing the [IRS] from withdrawing a § 501(c)(3) ruling letter would necessarily preclude the collection of" certain taxes, "a suit seeking such relief falls squarely within the literal scope of the Act.").

Petitioner's request for declaratory relief, in the form of a "judgment declaring that Notice 2016-66 is unlawful," D. Ct. Doc. 1, at 16, is likewise barred. The federal-tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201(a), "is at least as broad as the Anti-Injunction Act." *Bob Jones Univ.*, 416 U.S. at 733 n.7; see *Florida Bankers*, 799 F.3d at 1067. And the declaratory relief petitioner seeks would also necessarily preclude enforcement of Notice 2016-66. If that Notice's

designation of micro-captive transactions as subject to the reporting and recordkeeping requirements is invalid, the IRS would lack a legal basis for imposing the taxes that Sections 6707, 6707A, and 6708 establish for noncompliance. As in *Florida Bankers*, petitioner's "suit, if successful, would invalidate the reporting requirement and restrain (indeed eliminate) the assessment and collection of the tax paid for not complying with the reporting requirement." 799 F.3d at 1067; see Pet. App. 17a (noting petitioner's statement that "the IRS certainly could never collect any penalties . . . for noncompliance if Notice 2016-66 is struck down" (quoting Pet. C.A. Reply Br. 7)).

b. Although petitioner disputes (Pet. 16-23) that conclusion, it identifies no sound reason for resisting the straightforward application of the Anti-Injunction Act's text.

Petitioner acknowledges (Pet. 17-18) that "the penalty enforcing the reporting requirement * * * in this case is—according to the Tax Code—to be treated as a tax." Petitioner sometimes appears, however, to characterize the decision to classify those penalties as taxes as having been made by the IRS. *E.g.*, Pet. 3 (asserting that the Anti-Injunction Act should not preclude "pre-enforcement review whenever an agency enforces [an] action with a penalty that *it labels* as a tax" (emphasis added)). That characterization is incorrect. The decision to deem penalties imposed by Sections 6707, 6707A, and 6708 to be taxes was made by Congress in the language of Section 6671(a), and in Congress's enactment of Sections 6707, 6707A, and 6708 and its placement of them in Subchapter 68B. See American Jobs Creation Act of 2004, Pub. L. No. 108-357, Tit. VIII, Subtit. B, sec. 811(a), § 6707A,

118 Stat. 1575-1576 (enacting 26 U.S.C. 6707A in "subchapter B of chapter 68"); Tax Reform Act of 1984, Pub. L. No. 98-369, Div. A, Subtit. K, Pt. I, secs. 141(b), 142(b), §§ 6707, 6708, 98 Stat. 680, 682 (same regarding 26 U.S.C. 6707 and 6708). In Notice 2016-66, the IRS merely exercised the separate authority the Code confers on the agency to identify a particular category of transactions as one subject to the Code's reporting and recordkeeping requirements and penalties. See 26 U.S.C. 6011(a), 6111(a) and (b)(2), 6112(a)(2), 6707(d), 6707A(c), 6708(a).

Petitioner also asserts that the penalty imposed for noncompliance with those requirements "is not an affirmative, stand-alone tax for the purpose of 'protection of the revenues,'" and instead "'is meant to deter violations of the underlying regulatory requirement.'" Pet. 18 (citations and emphasis omitted). But the Anti-Injunction Act is not limited to "stand-alone tax[es]." *Ibid.* To the contrary, by deeming "penalties" imposed by Subchapter 68B to be "taxes" for purposes of the Code, 26 U.S.C. 6671(a), Congress made clear that the term "tax" is not confined to an undefined subset of "revenue-generating" measures. Although this Court's decisions once "drew what it saw at the time as distinctions between regulatory and revenue-raising taxes," the Court "subsequently abandoned such distinctions." *Bob Jones Univ.*, 416 U.S. at 741 n.12; see *Florida Bankers*, 799 F.3d at 1070. Petitioner suggests that the application of the Anti-Injunction Act to the penalties at issue here was somehow fortuitous or unforeseeable. See Pet. 12 (stating that the decision below precludes "any pre-enforcement challenge to any regulatory provision—no matter how divorced from tax liability—if it happens to be enforced by a penalty that is labeled as a tax"). But the whole point (and

predictable effect) of Congress's decision to deem specified penalties to be taxes is to ensure that the Code provisions governing tax assessment and collection will apply to those penalties.

Petitioner further asserts (Pet. 18-23) that its suit is not a "suit[] 'for the purpose of restraining the assessment or collection of any tax,'" Pet. 19 (quoting 26 U.S.C. 7421(a)), because "[petitioner's] sole purpose in bringing this action is to enjoin the reporting requirements," Pet. 20. The court below, again agreeing with the D.C. Circuit, correctly rejected that argument. Pet. App. 18a-20a; see *Florida Bankers*, 799 F.3d at 1070-1071. The Anti-Injunction Act's reference to a "suit for the purpose of restraining the assessment or collection of any tax," 26 U.S.C. 7421(a), does not make a plaintiff's subjective goal in bringing suit the touchstone. To the contrary, this Court "has consistently ruled * * * that plaintiffs cannot evade the Anti–Injunction Act by purporting to challenge only the regulatory aspect of a regulatory tax." *Florida Bankers*, 799 F.3d at 1070.

For example, the Court held in *Bailey* v. *George*, 259 U.S. 16 (1922) (Taft, C.J.), that the Anti-Injunction Act barred a suit to enjoin collection of the tax imposed by the Child Labor Tax Law, ch. 18, Tit. XII, 40 Stat. 1138. 259 U.S. at 19-20. "The suit targeted the regulatory aspect of the tax, but the Court still held that the Anti-Injunction Act applied and barred the suit." *Florida Bankers*, 799 F.3d at 1070. Fifty-two years later, the Court similarly held that the Anti-Injunction Act barred suits challenging the IRS's revocation of the plaintiff's tax-exempt status, despite the plaintiff's contention that its suit sought only to challenge certain requirements for maintaining tax-exempt status, not to prevent tax collection. See *Bob Jones*, 416 U.S. at 732,

738-739. The *Bob Jones* Court instead held it sufficient that an injunction barring the IRS from withdrawing that status "would necessarily preclude the collection of" certain taxes. *Id.* at 732. And in another decision the same day, the Court specifically rejected the contention that the purported purpose of the plaintiff's suit—challenging the underlying requirements to maintain tax-exempt status, rather than avoiding taxation—took the suit outside the Anti-Injunction Act. *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 760-761 (1974). The *Americans United* Court dismissed as "circular" a lower court's conclusion "that [the plaintiff's] 'primary design' was not 'to remove the burden of taxation from those presently contributing but rather to avoid the disposition of contributed funds away from the corporation.'" *Id.* at 761 (citation omitted). The Court observed that "[t]he latter goal is merely a restatement of the former and can be accomplished only by restraining the assessment and collection of a tax in contravention of § 7421(a)." *Ibid.*

This Court's precedents thus establish that "[a] challenge to a regulatory tax comes within the scope of the Anti-Injunction Act, even if the plaintiff claims to be targeting the regulatory aspect of the regulatory tax." *Florida Bankers*, 799 F.3d at 1070. "That is because invalidating the regulation would directly prevent collection of the tax, in violation of the Anti-Injunction Act." *Id.* at 1070-1071. Here, petitioner's evident objective is to obtain a judicial order ensuring that, if it fails to report and maintain records concerning the micro-captive transactions addressed by Notice 2016-66, it will not be subject to statutory penalties that the Code deems to be taxes. Petitioner cannot escape the Anti-Injunction

Act's effect by styling its suit as one "challeng[ing] only the regulatory aspect of a regulatory tax." *Id.* at 1070.

Under the contrary approach that petitioner advocates, "[a] taxpayer could almost always characterize a challenge to a regulatory tax as a challenge to the regulatory component of the tax." *Florida Bankers*, 799 F.3d at 1071. "That would reduce the Anti-Injunction Act to dust in the context of challenges to regulatory taxes," transforming the statute into a mere "pleading exercise." *Ibid.* Neither the Anti-Injunction Act's text nor this Court's precedents support that illogical result.

c. Petitioner's other contentions likewise lack merit.

i. Petitioner asserts (Pet. 3-4, 12-16) that, under this Court's decision in *Direct Marketing Ass'n* v. *Brohl*, 575 U.S. 1 (2015), petitioner's suit is not "an attempt to restrain the assessment or collection of a tax." Pet. 12 (emphasis omitted). The court below correctly rejected that argument. Pet. App. 8a-17a; accord *Florida Bankers*, 799 F.3d at 1068-1070.

In *Direct Marketing*, this Court held that a different federal statute, the Tax Injunction Act, 28 U.S.C. 1341, did not bar a suit to enjoin a Colorado "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 Colorado Department of Revenue." 575 U.S. at 4; see *id.* at 7-14. The Tax Injunction Act 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 State." 28 U.S.C. 1341. This Court first held that the lower court's order enjoining Colorado's notice and reporting requirements had not "enjoin[ed]" the "assessment, levy or collection" of a

tax. 575 U.S. at 7-8 (citation omitted); see *id.* at 7-12. The State did not argue that compliance with the notice and reporting requirements "involve[d] a 'levy'" as that term is used in the tax context. *Id.* at 11. The Court concluded that the words "assessment" and "collection" likewise "d[id] not encompass Colorado's enforcement of its notice and reporting requirements," because "the notice and reporting requirements precede[d] the steps of 'assessment' and 'collection'" of taxes. *Ibid.*

The *Direct Marketing* Court also rejected an alternative argument, adopted by the Tenth Circuit in that case, that enjoining enforcement of the state-law notice and reporting requirements would "restrain" the State's subsequent efforts to assess and collect taxes. 575 U.S. at 12; see *id.* at 12-14. The Tenth Circuit had interpreted "'restrain'" to mean "'limit, restrict, or hold back,'" and had concluded that enjoining the notice and reporting requirements "would 'limit, restrict, or hold back' the [State's] collection efforts" because those requirements "[we]re intended to facilitate collection of taxes." *Id.* at 12 (citation omitted). This Court acknowledged that "'[r]estrain,' standing alone, can have several meanings," including both the "broad meaning" adopted by the Tenth Circuit, and "[a]nother, narrower meaning" of "'to prohibit from action; to put compulsion upon . . . to enjoin,' which captures only those orders that stop (or perhaps compel) acts of 'assessment, levy or collection.'" *Id.* at 12-13 (brackets and citations omitted).

The *Direct Marketing* Court "resolve[d] th[at] ambiguity" by examining the particular statutory context of the Tax Injunction Act, including the surrounding terms (*e.g.*, "'enjoin' and 'suspend'") and the historical "'equity practice'" in which the Act "'has its roots.'"

575 U.S. at 13 (citations omitted). Based on that context, the Court held that "'restrain'" in the Tax Injunction Act refers only to "relief" that "to some degree *stops* 'assessment, levy or collection,'" not relief that "merely *inhibits*" one of those activities. *Id.* at 14 (emphases added; citation omitted). The Court concluded that the suit's potential to "inhibit[]" subsequent collection efforts was not sufficient to trigger the Tax Injunction Act's bar. *Ibid.*

Direct Marketing does not cast doubt on the straightforward application of the Anti-Injunction Act to suits like petitioner's. Pet. App. 7a-21a; see *Florida Bankers*, 799 F.3d at 1068-1070. The court of appeals found it "unclear" whether the *Direct Marketing* Court's understanding of the term "restrain" in the Tax Injunction Act carries over to the Anti-Injunction Act, and at least one court of appeals has concluded that it does not. Pet. App. 17a n.6 (citing *Green Solution Retail, Inc.* v. *United States*, 855 F.3d 1111, 1118 (10th Cir. 2017), cert. denied, 138 S. Ct. 1281 (2018)). The Court need not resolve that question here, however, because *Direct Marketing* is distinguishable in another respect as well.

A retailer that failed to comply with Colorado's notice or reporting requirements was subject to a financial penalty—$5 for each transaction for which the retailer failed to provide the required notice to a customer, and $10 for each required report the retailer failed to submit to the State. See *Direct Marketing*, 575 U.S. at 5-6. Enjoining the notice and reporting requirements would preclude imposition of that penalty. But that penalty "was not itself a tax, or at least it was never argued or suggested that the penalty in that case was itself a tax." *Florida Bankers*, 799 F.3d at 1069. The Court in *Direct Marketing* therefore had no occasion to address the

question whether the Tax Injunction Act bars a suit to enjoin enforcement of a penalty that constitutes a tax.

Here, as in *Florida* Bankers, the penalty imposed for noncompliance with the reporting and recordkeeping requirements *is* a tax for purposes of the Anti-Injunction Act. See pp. 15-18, *supra*; Pet. App. 14a; see also *Florida Bankers*, 799 F.3d at 1069. Whether or not the relief that petitioner seeks would "restrain" assessment or collection of taxes on the underlying micro-captive transactions covered by Notice 2016-66, enjoining enforcement of the reporting and recordkeeping requirements necessarily precludes assessment and collection of the penalty, which is deemed to be a tax, that the Code imposes for noncompliance.

ii. Petitioner contends (Pet. 2-3, 25-30) that construing the Anti-Injunction Act to bar its suit is inconsistent with the APA and with broader administrative-law principles that favor pre-enforcement judicial review of agency action. Those contentions also lack merit.

Petitioner suggests (Pet. 2-3, 25-28) that the decision below improperly "insulate[s]" IRS action from APA review. Pet. 25 (emphasis omitted). That is incorrect. Although the APA generally provides for judicial review of "final agency action," 5 U.S.C. 704, that authorization does not apply "to the extent that * * * statutes preclude judicial review," 5 U.S.C. 701(a)(1). And the APA provision that waives federal sovereign immunity, 5 U.S.C. 702, does not "affect[] other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground," 5 U.S.C. 702(1). Those exceptions to APA review readily encompass the Anti-Injunction Act (and the federal-tax exception to the Declaratory Judgment Act). See *Cypress* v. *United States*, 646 Fed.

Appx. 748, 754-755 (11th Cir. 2016) (per curiam); *We the People Found., Inc.* v. *United States*, 485 F.3d 140, 142-143 (D.C. Cir. 2007) (Kavanaugh, J.), cert. denied *sub nom. Schultz* v. *United States*, 552 U.S. 1102 (2008); *Fostvedt* v. *United States*, 978 F.2d 1201, 1203-1204 (10th Cir. 1992), cert. denied, 507 U.S. 988 (1993); *Hughes* v. *United States*, 953 F.2d 531, 537 (9th Cir. 1992); *Smith* v. *Booth*, 823 F.2d 94, 97-98 (5th Cir. 1987) (per curiam). Indeed, the legislative history indicates that Congress had the Anti-Injunction Act specifically in mind when it enacted Section 702(1). See, *e.g.*, H.R. Rep. No. 1656, 94th Cong., 2d Sess. 12-13 & n.35 (1976).

Relying on *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), petitioner contends (Pet. 2, 28-29) that the decision below conflicts with a broader principle that "law-abiding citizens can challenge illegal regulations in court, without having to violate the regulation first." That is incorrect. In the first passage of *Abbott Laboratories* that petitioner cites (Pet. 2, 28), the Court observed that the APA "embodies the basic presumption of judicial review" and held that Congress had not, in a particular later statute, "intended to forbid pre-enforcement review" of certain regulations adopted by the Commissioner of Food and Drugs. 387 U.S. at 139-140; see *id.* at 139-148. The other portion of the *Abbott Laboratories* decision that petitioner cites (Pet. 2) concerned whether a suit seeking review of the food-and-drug regulations at issue, even though not statutorily precluded, was ripe for judicial resolution. See *Abbott Labs.*, 387 U.S. at 152-153; see also *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891-892 (1990). Nothing in *Abbott Laboratories* mandates that agency action must be subject to pre-enforcement judicial review where, as here, Congress has unambiguously

precluded such review and has channeled litigation over the agency's action to post-enforcement proceedings. To the contrary, the Court in *Abbott Laboratories* expressly qualified the rule it announced by observing that "access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act" is available in appropriate circumstances "absent a statutory bar or some other unusual circumstance." 387 U.S. at 153.

Finally, petitioner speculates that the decision below risks "depriv[ing] aggrieved taxpayers of 'any opportunity to obtain review,'" Pet. 28 (quoting *South Carolina* v. *Regan*, 465 U.S. 367, 380-381 (1984)). Petitioner suggests in passing (Pet. 28 n.6) that the Anti-Injunction Act would be unconstitutional if it were construed to have that effect. Petitioner's argument lacks merit.

In *South Carolina*, the Court held that the Anti-Injunction Act did not bar a suit "where * * * Congress ha[d] not provided the plaintiff with an alternative legal way to challenge the validity of a tax." 465 U.S. at 373. The Court emphasized that the plaintiff State had *no* avenue of seeking review, *id.* at 378-380, contrasting the State's situation with that of typical tax plaintiffs who have "the alternative remedy of a suit for a refund," *id.* at 374; see *id.* at 374-376. Here, as the court of appeals explained, Pet. App. 23a, the Code affords taxpayers and material advisors precisely that alternative remedy: they may "decline to submit a required report, pay the penalty, and then sue for a refund." *Florida Bankers*, 799 F.3d at 1067; see 26 U.S.C. 6532, 7422.

Petitioner identifies no Code or regulatory provision that would preclude a taxpayer or material advisor who is assessed a tax for failing to comply with the reporting and recordkeeping requirements from challenging Notice

2016-66 in a refund suit. Petitioner "d[id] not contest" below "that it has this alternative remedy." Pet. App. 23a. Petitioner instead suggests (Pet. 27-28) that, if it fails to comply, the IRS might not impose the statutorily required penalty. Petitioner does not identify any injury it would suffer in that scenario. And because the same possibility of government non-enforcement exists with respect to every tax to which the Anti-Injunction Act applies, that possibility provides no sound basis for an exception to the Act's ban on pre-enforcement review.

2. Petitioner contends that the decision below conflicts with decisions of the Seventh and Tenth Circuits. Pet. 23-25 (citing *Korte* v. *Sebelius*, 735 F.3d 654 (7th Cir. 2013), cert. denied, 573 U.S. 958 (2014), and *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), aff'd, 573 U.S. 682 (2014)). That is incorrect.

Neither *Korte* nor *Hobby Lobby* involved a challenge to enforcement of Notice 2016-66 or to another analogous tax-reporting requirement. Instead, each case involved a challenge to a requirement adopted by the Department of Health and Human Services (HHS), under authority delegated to that agency by the Affordable Care Act, 42 U.S.C. 300gg-13(a), mandating that covered health-insurance plans provide coverage for certain contraceptives. *Korte*, 735 F.3d at 659-665; *Hobby Lobby*, 723 F.3d at 1122-1123; see 77 Fed. Reg. 8725 (Feb. 15, 2012). Although a covered plan that did not comply with that requirement was subject to a penalty that was labeled a "tax," 26 U.S.C. 4980D(a), the government construed the Anti-Injunction Act not to bar those challenges to the contraceptive-coverage mandate itself. *Korte*, 735 F.3d at 666 & n.7; *Hobby Lobby*, 723 F.3d at 1126. The government explained that the mandate had "resulted from

express delegated authority outside the Treasury Department" to HHS; that it "[wa]s enforced independently outside the Internal Revenue Code" by HHS, the Department of Labor, and the States; and that it was "subject to immediate challenge by other regulated entities" who were not subject to the tax. Gov't Supp. Br. at 15, *Hobby Lobby*, *supra* (No. 12-6294); see *id.* at 13-15 (citing, *inter alia*, 29 U.S.C. 1132(a)(5) and 42 U.S.C. 300gg-13(a)(4), 300gg-22). The government viewed that "unique" statutory structure as evincing "congressional intent not to bar pre-enforcement challenges to" the contraceptive-coverage mandate. *Id.* at 13, 15.

The Seventh and Tenth Circuits agreed with the government's reading. See *Korte*, 735 F.3d at 669-671 (explaining that the contraceptive-coverage "mandate [wa]s not structured as a predicate to the imposition of a tax but is instead an independent regulatory mandate," and that the mandate was not "properly classified as a 'tax' within the meaning of the Anti-Injunction Act" in light of the statutory context and purpose, including the attributes the government had identified); *Hobby Lobby*, 723 F.3d at 1127-1128 (similar). Neither of those decisions conflicts with the holding of the court below. The Code unambiguously classifies the penalty imposed for noncompliance with the reportable-transaction requirements as a tax, and the injunctive and declaratory relief petitioner seeks would necessarily preclude collection of that tax. See pp. 15-23, *supra*. And unlike the contraceptive-coverage mandate, the requirements at issue here did not result from any exercise of authority conferred independent of the Code on an agency outside the Treasury; they are not enforced by agencies other than the IRS; and they are not subject to pre-enforcement challenges by other persons.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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