No. 19-930

IN THE

Supreme Court of the United States

CIC SERVICES, LLC,

Petitioner,

v.

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

Respondents.

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

REPLY BRIEF

Adam R. Webber
ELLIOTT, FAULKNER & WEBBER
4244 Indian Ripple Rd.,
Suite 150
Beavercreek, OH 45440
(937) 264-8710

Kenneth A. Lazarus
LAZARUS & ASSOCIATES
1025 Thomas Jefferson St NW
Washington, DC 20007
(202) 295-2330

Patrick Strawbridge
Counsel of Record
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

Jeffrey M. Harris
Alexa R. Baltes
CONSOVOY MCCARTHY PLLC
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423

Date: April 3, 2020

Attorneys for Petitioner

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REPLY BRIEF FOR PETITIONER

The court of appeals applied the Anti-Injunction Act to bar a claim that has nothing to do with the collection of a tax. Review is warranted to prevent federal agencies from misusing the Anti-Injunction Act to insulate illegal agency action from pre-enforcement review. Respondents nevertheless urge the Court to deny certiorari because, in their view, the Anti-Injunction Act bars all suits that have any *effect* on the assessment or collection of taxes. That is mistaken. Respondents' arguments cannot be squared with the plain text of the Anti-Injunction Act, this Court's precedent, and decisions from other circuits. This Court should grant certiorari to clarify the law, restore uniformity among the circuits, and prevent federal agencies from evading review of unlawful action.

I. The petition raises important federal questions that warrant this Court's review.

The decision below allows federal agencies to insulate illegal agency action from challenge by forcing would-be plaintiffs to not only "'bet the farm,'" *see Free Enter. Fund v. PCAOB*, 561 U.S. 477, 490 (2010), but risk their freedom as well, *see* 26 U.S.C. §7203. Respondents spend several pages discussing the regulatory scheme in painstaking detail, BIO at 2-8; *see also* BIO 28-29, but they fail to even mention, let alone contest, the fact that CIC could face *criminal penalties* if it is forced to violate the law in order to

obtain judicial review of the regulatory mandate. *See* Pet. 26-28.

The threat of criminal prosecution and prison time is decisive here because it wholly undermines the legitimacy and feasibility of an "alternative legal way" to challenge Notice 2016-66. *See South Carolina v. Regan*, 465 U.S. 367, 373 (1984); *see also* Gerald S. Kerska, *Criminal Consequences and the Anti-Injunction Act*, 52 Minn. L. Rev. 51 (2020). Respondents' position is also inconsistent with this Court's oft-repeated holding that a plaintiff should not have to "first expose himself to actual arrest or prosecution to be entitled to challenge" an illegal mandate. *See Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *see also* App. 55a (Sutton, J., concurring in the denial of rehearing en banc).

But even aside from the "financial ruin and criminal prosecution," App. 35a (Nalbandian, J., dissenting), that "make the reporting requirements in this case (and many others) unreviewable," App. 62a (Thapar, J., dissenting from denial of rehearing en banc), the power to circumvent pre-enforcement review of *any* agency action by slapping a tax penalty on it threatens "unchecked" and unwelcome government action in all areas of daily life, *id.* at 62a-63a; *see* Pet. 25-28. The Sixth Circuit's decision also subverts ordinary principles of administrative law, namely expedient pre-enforcement judicial review. Pet. 28-29. Respondents offer two responses to these points, both unavailing.

First, they argue (at 26-28) that the Administrative Procedure Act "readily encompass[es]" the Anti-Injunction Act exception to pre-enforcement review. But that line of reasoning is question-begging. The issue is not whether the Anti-Injunction Act bars pre-enforcement review in *some* cases; it unquestionably does. Instead, the issue here is whether the Anti-Injunction Act applies to a lawsuit challenging an independent regulatory mandate that is merely enforced by a tax penalty. Under Respondents' view of the law, the Anti Injunction Act's "exception[]," BIO 26, would swallow the ordinary principle of administrative law favoring pre-enforcement review, *see* Pet. 28-29.

Second, Respondents attack (at 19-20) both CIC's and Judge Sutton's understanding of the respective roles served by Congress and the IRS. Judge Sutton shared CIC's concern that the panel effectively "ban[ned] all prospective relief whenever *the IRS* enforces a regulation with a penalty that *it chooses to call a 'tax.'*" App. 55a (Sutton, J.) (emphasis added). Respondents assert (at 19) that the "decision to deem [the] penalties … to be taxes was made by Congress." Fair enough. But as Respondents acknowledge (at 20), the decision to impose reporting requirements on micro-captive transactions—backed by a penalty that Congress had already deemed a tax—was made by the IRS. And the very point of CIC's lawsuit is that the IRS's decision *abused* its "separate authority," BIO at 20—authority limited to defining *under regulations*, not guidance documents, the reportable transactions that must be submitted with tax returns. Pet. 5-6. The panel's approach to the Anti-

Injunction Act thus gives administrative agencies the tools to play fast and loose with statutory and constitutional constraints on their powers. That invitation for abuse runs counter to bedrock principles of administrative law and warrants this Court's review.

II. The Sixth Circuit's decision was wrong.

A. The plain text of the Anti-Injunction Act does not reach CIC's lawsuit.

The Anti-Injunction Act bars suits "for the *purpose* of restraining the assessment or collection of any tax." 26 U.S.C. §7421(a) (emphasis added). The purpose of CIC's suit has nothing to do with the collection of a hypothetical tax penalty that may or may not materialize in the future. Pet. 6, 15, 18-21. Instead, CIC's purpose is "to obtain relief from costs the company must pay today." App. 64a (Thapar, J.).

Respondents have no answer to the plain text of the statute. They argue (at 21) that the text of the Anti-Injunction Act does not make the "subjective goal in bringing suit the touchstone." But whether the inquiry is deemed objective or subjective, the text of the Anti-Injunction Act makes the *purpose* of the suit (*e.g.*, its *goal*) the touchstone. *See Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1 (2015). Certainly, the Court may have an obligation to ensure that the plaintiff's stated goal is not pretext or crafty pleading. *See, e.g.*, *Bob Jones Univ. v. Simon*, 416 U.S. 725, 738 (1974); *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 760-61 (1974); *see also Cohen v. United States*, 650 F.3d 717, 727 (D.C. Cir. 2011) (en banc) (courts can

readily discern the objective of a suit). But that is not a concern here; it is undisputed that the challenged agency action causes CIC significant harm—independent of any tax penalty—in the form of tens of thousands of dollars and hundreds of hours of labor. Pet. 6.

Thus, despite claiming to carry the mantle (at 19) of "the straightforward application of the Anti-Injunction Act's text," Respondents ultimately endorse an explicitly atextual reading of the statute that champions the *effects* of a plaintiff's suit over its purpose. *See* BIO 11, 22. Respondents contend (at 22) that because invalidating the agency action here would "'directly prevent'" the collection of a tax penalty, the suit is barred by the Anti-Injunction Act. Even setting aside the fact that it is actually *Respondents'* purpose to do that which they claim to be repugnant to the Act—that is, "prevent" the collection of the of the tax penalty by compelling compliance with the mandate, Pet. 28—any incidental *effects* of CIC's challenge are irrelevant. *See* App. 64a & n.1 (Thapar, J.). The statutory text unambiguously refers to the purpose of the suit, and this Court routinely emphasizes the distinction between purpose and effect. *See, e.g.*, *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). Congress does too. *See, e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 331-32 (2000). And when Congress wants the Tax Code to reach purpose *or* effect, it says so. *See, e.g.*, 26 U.S.C. §302(b)(2)(D) ("any redemption made pursuant to a plan the purpose or effect of which is …"). The Court should not permit Respondents, or the Sixth Circuit, to rewrite

the Anti-Injunction Act to bar legitimate challenges to agency action where the clear purpose is to enjoin non-tax regulatory mandates.

Respondents occasionally shift their focus from the tax penalty to the downstream tax that a successful challenge to the reporting requirements would "frustrate," *see* BIO 17-18. This argument still fails. Downstream effects are still effects. But, more fundamentally, *Direct Marketing* directly forecloses this line of reasoning. 575 U.S. at 12-13. "[O]rders that [would] merely *inhibit*" tax processes, absent a direct *restraint* on the assessment or collection of taxes, are not barred by the Anti-Injunction Act.[1] *Id.*

At bottom, whether Respondents hang their hat on the tax penalty or the downstream taxes that the notice and reporting requirements may facilitate, there is no question that "the notice and reporting requirements *precede* the steps of 'assessment' and 'collection.'" *Id.* at 11 (emphasis added). There is simply no tax here that operates as a self-executing

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[1] Respondents suggest (at 24-25) that the Court should read "restrain" more broadly in the Anti-Injunction Act than it did when applying the Tax Injunction Act in *Direct Marketing*. But the Court "assume[s] that words used in both Acts are generally used in the same way." *Direct Mktg.*, 575 U.S. at 8; *Hibbs v. Winn*, 542 U.S. 88, 115 (2004) (Kennedy, J., dissenting). The mere fact that the term "restrain" has multiple meanings, BIO 24, does nothing to overcome the presumption favoring the narrower meaning. As with the Tax Injunction Act, "[t]o give 'restrain' the broad meaning ... would be to defeat the precision of [the statute], as virtually any court action related to any phase of taxation might be said to 'hold back' 'collection.'" *Direct Mktg.*, 575 U.S. at 13.

accompaniment to the reporting requirements in Notice 2016-66. CIC must violate the mandate—something it has not done—before the tax penalty could be assessed or collected. Under the plain text of the Anti-Injunction Act, as construed in *Direct Marketing*, CIC's suit should be allowed to proceed.

Respondents argue (at 25-26) that *Direct Marketing* is inapposite. In their view, because no one "'argued or suggested'" that the penalty in *Direct Marketing* was a tax, a case involving a tax penalty should come out differently. BIO 25 (quoting *Florida Bankers Ass'n v. U.S. Dep't of the Treasury*, 799 F.3d 1065, 1069 (D.C. Cir. 2015))). But the fact that the Court never addressed or considered the character of the fine in *Direct Marketing* underscores that this fact did not have case-altering significance. Pet. 17. Moreover, whether or not *Direct Marketing* decided the issue, its *analysis* of the Tax Injunction Act's application to a downstream tax is highly pertinent to the Anti-Injunction Act's application to the tax penalty here. *Supra* II.A; Pet. 12-23.

B. Neither this Court's precedent nor Respondents' concerns about crafty pleading compel a different result.

Respondents assert (at 16-17) that "the clear implication" of this Court's decision in *NFIB v. Sebelius*, 567 U.S. 519 (2012), is that, had the penalty in that case been a tax, the Anti-Injunction Act would have barred the suit. But the only "clear implication" that can be drawn from *NFIB* is that if the penalty had been a tax, then the Court would have had to

engage the issues raised here. *NFIB* simply cannot stand for a proposition it never addressed. Pet. 21-23. When this Court fails to specifically address a point, "the unexplained silences of [its] decisions lack precedential weight." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 n.6 (1995).

Respondents' reliance (at 21-22) on *Bob Jones University v. Simon* and *Alexander v. "Americans United" Inc.* is similarly misplaced. Pet. 20-21. As Respondents acknowledge, those cases hold that when a lawsuit is obviously aimed at restraining the assessment or collection of a tax—regardless of the plaintiff's "purported" purpose—the Anti-Injunction Act bars the suit. BIO 21-22 (citing *Bob Jones*, 416 U.S. at 732, 738-39; *"Americans United,"* 416 U.S. at 760-61). In those cases, the plaintiffs' purposes could not have been plausibly characterized as anything other than a desire to escape the tax liability associated with losing tax-exempt status.

Bob Jones did note in passing that barring the IRS from removing the plaintiff's tax-exempt status "would necessarily preclude the collection" of certain taxes. 416 U.S. at 732; *see* BIO 22. That "stray phrase has never since been invoked by the Court," but it has caused confusion in the lower courts. *See* App. 64a n.1 (Thapar, J.). Read in context, however, and taken together with the text of the Anti-Injunction Act, *supra* 4-6, the Court was simply saying that *in that case* the effects of the lawsuit provided compelling *evidence* of its purpose. Again, if successful, the plaintiff's lawsuit would have achieved the only thing that really mattered to it—avoiding tax liability. But

to the extent the dictum in *Bob Jones* is unclear and has spawned confusion, that only underscores the need for this Court to grant certiorari to directly address these important and recurring issues.[2]

Lacking both statutory and precedential support, Respondents resort to the slippery slope, claiming that if CIC prevails, any plaintiff will be able plead around the Anti-Injunction Act's bar by characterizing challenges to regulatory taxes as challenges to regulatory mandates. BIO 12, 23. But that suggestion blinks reality. Courts routinely see through pretextual attempts to plead around the Anti-Injunction Act—and the Court need look no further than *"Americans United"* and *Bob Jones* to confirm. *See supra* 8-9. The possibility of artful pleading—which is adequately addressed through other doctrines—provides no basis to deprive plaintiffs such as CIC of their ability to obtain judicial review of non-tax regulatory mandates.

III. The Sixth Circuit's decision deepens a circuit split on whether a challenge to a regulatory mandate can be distinguished from the tax penalty that enforces it.

Respondents do not dispute that the Seventh and Tenth Circuits have held that a challenge to a regulatory mandate is (1) distinguishable from the tax

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[2] Respondents also cite (at 21) *Bailey v. George*, 259 U.S. 16 (1922), but it is distinguishable for the same reasons. The purpose of that suit was to "permanently enjoin[] the collector from proceeding to collect" a tax that had already been assessed. *Id.* at 19.

penalty enforcing it and (2) not barred by the Anti-Injunction Act. Instead, Respondents argue (at 29-30) that *Korte v. Sebelius*, 735 F.3d 654, 669 (7th Cir. 2013), and *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1127 (10th Cir. 2013) (en banc), are inapposite based on two purported distinctions. Both arguments lack merit.

First, Respondents assert (at 30) that, here, "[t]he Code unambiguously classifies the penalty [at issue] as a tax." But drawing any meaning from that fact wholly discounts the Seventh and Tenth Circuits' analysis. Both *Korte* and *Hobby Lobby* understood the penalties enforcing the regulatory mandate to be "tax penalties." *See Korte*, 735 F.3d at 669; *Hobby Lobby*, 723 F.3d at 1125. And both held that even though successful challenges to the mandate would "incidentally" "insulate[]" the plaintiffs from "the tax penalty" as well as "other means of enforcement,"[3] neither was a suit for the purpose of restraining a tax. *See Korte*, 735 F.3d at 669-70; *Hobby Lobby*, 723 F.3d at 1127. Indeed, the Anti-Injunction Act does not concern itself with "incidental[]" or "'tangential[]'" tax ramifications; it bars only those lawsuits that have the *purpose* of targeting and restraining tax liability. *Korte*, 735 F.3d at 669-70 (quoting *Cohen*, 650 F.3d at 727); *Hobby Lobby*, 723 F.3d at 1127 (same). This

[3] As *Korte* explained, the fact that the mandate was enforced a number of ways made "clear" that the dispute was about the mandate itself and not a particular mode of enforcement. *See* 735 F.3d at 669-70. So too here. *Supra* 1-2.

reasoning is directly at odds with the decision below.

To be sure, as further support for this conclusion, *Korte* suggested that the tax penalty at issue there was not a "tax" for purposes of the Anti-Injunction Act. *See* 735 F.3d at 670-71. Read in context, however, the Seventh Circuit was simply commenting on the disconnect of attempting to apply the Anti-Injunction Act to a regulation enforced by a tax *penalty*. *Id.* at 670 ("When Congress … makes noncompliance painful by exacting severe and disproportionate monetary consequences, the primary purpose of the scheme must be understood as regulatory and punitive rather than revenue raising…. The obvious aim of [the tax penalty] is not to raise revenue but to achieve broad compliance with the regulatory regime through deterrence and punishment.").

Hobby Lobby makes the same analysis explicit by using the terms "regulatory tax" and "penalty" interchangeably: "the tax at issue here is no more than a penalty for violating regulations …, and the AIA does not apply to 'the exaction of a purely regulatory tax.'" 723 F.3d at 1128. Whether or not a regulatory tax can ever implicate the Anti-Injunction Act, the point is that targeting a regulatory mandate is different than targeting the tax penalty that enforces it. That point is consistent with a statute designed to protect revenue-raising taxes, Pet. 17-18, and flatly inconsistent with the Sixth Circuit's reasoning.

Second, Respondents suggest (at 30) that the Seventh and Tenth Circuits' reasoning is inapplicable here because those cases involved a mandate related to healthcare and this one involves a mandate related to taxes. But that suggestion runs headlong into *Direct Marketing*, 575 U.S. at 12-13, which reversed a decision premised in part on the distinction between "a health insurance regulation" and a "tax" regulation, *see Direct Mktg. Ass'n v. Brohl*, 735 F.3d 904, 916-17 (10th Cir. 2013). It is therefore not a basis for distinguishing away the circuit split. The Sixth Circuit's decision departs from *Direct Marketing* and conflicts with the Seventh and Tenth Circuits' decisions holding that a challenge to a regulatory mandate is not a challenge to the tax penalty that enforces it.[4]

[4] The petition that was denied in *Florida Bankers* did not identify the circuit split. *See* Petition for a Writ of Certiorari, *Florida Bankers*, 2016 WL 369508 (No. 15-969). Moreover, since *Florida Bankers*, at least six more judges have weighed in on this issue. *See* App. 1a-37a (opinions of Judges Clay and Nalbandian); App. 50a-66a (opinions of Judges Clay, Sutton, and Thapar); App. 38a-47a (opinion of Judge McDonough); *Chamber of Commerce v. IRS*, 2017 WL 4682049 (W.D. Tex. Sept. 29, 2017) (opinion of Judge Yeakel, supporting CIC's position). As Judge Sutton articulated, together these opinions "say all there is to say about the issue from a lower court judge's perspective." App. 57a. No more percolation would be helpful for this Court to "resolve the point." *Id.*

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

Adam R. Webber
ELLIOTT, FAULKNER & WEBBER
4244 Indian Ripple Rd.,
Suite 150
Beavercreek, OH 45440
(937) 264-8710

Kenneth A. Lazarus
LAZARUS & ASSOCIATES
1025 Thomas Jefferson St NW
Washington, DC 20007
(202) 295-2330

Patrick Strawbridge
Counsel of Record
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

Jeffrey M. Harris
Alexa R. Baltes
CONSOVOY MCCARTHY PLLC
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
1600 Wilson Blvd., Ste. 700
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Attorneys for Petitioner