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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Anti-Injunction Act's bar on lawsuits for the purpose of restraining the assessment or collection of *taxes* also bars challenges to unlawful regulatory mandates that are not taxes.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is CIC Services, LLC. It was the plaintiff in the district court and appellant in the court of appeals. As stated in its certiorari petition, CIC Services has no parent companies or publicly held companies with a 10% or greater ownership interest in it.

Ryan, LLC was also a plaintiff in the district court and appellant in the court of appeals. Shortly after the notice of appeal was filed, the court of appeals granted an unopposed motion to voluntarily dismiss Ryan, LLC. Ryan has no parent companies or publicly held companies with a 10% or greater ownership interest in it.

Respondents are the Internal Revenue Service, the Department of Treasury, and the United States of America. Respondents were defendants in the district court and appellees in the court of appeals.

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit is reported at 925 F.3d 247 and is reproduced in the Petition Appendix ("App.") at 1a-37a. The opinion of the U.S. District Court for the Eastern District of Tennessee is unpublished but is available at 2017 WL 5015510 and is reproduced at App. 38a-47a. The Sixth Circuit's order denying the petition for rehearing is reported at 936 F.3d 501 and is reproduced at App. 48a-66a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit was entered on May 22, 2019. The full Sixth Circuit denied CIC's petition for rehearing en banc on August 28, 2019. This Court subsequently extended the time to file the petition for writ of certiorari until January 17, 2020. *See* 19A440. CIC filed its petition on January 17, 2020, and this Court granted it on May 4, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutory and regulatory provisions involved in this case are: 26 U.S.C. §§6707, 6707A, 6708, 6011(a), 6111, 6112, 7203, 7421(a); 26 C.F.R. §§1.6011-4(b), 301.6111-3(a)-(b)(1); Notice 2016-66, 2016-47 I.R.B. 745 (Nov. 1, 2016). These provisions are reproduced in the Petition Appendix at App. 67a-106a.

INTRODUCTION

Preenforcement review is the backbone of administrative law. Under the Administrative Procedure Act, law-abiding citizens can proactively challenge an illegal regulation in court; they do not have to violate the regulation first and then raise its invalidity as a defense to an enforcement action. Without preenforcement review, plaintiffs would have to "'bet the farm'" to "'test[] the validity'" of agency action—a risk most would understandably never take. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 490-91 (2010).

The IRS is not exempt from the APA. But in certain cases, plaintiffs confront the Anti-Injunction Act, which bars suits "for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. §7421(a). A Civil War-era statute, the Act codified an "old and familiar rule" of equity that barred injunctions against tax assessors and collectors. *Pullan v. Kinsinger*, 20 F. Cas. 44, 48 (C.C.S.D. Ohio 1870). Instead of stopping assessment or collection, the Act requires plaintiffs to pay the tax and sue for a refund afterward. The reason for this pay-now-and-litigate-later rule is simple: the treasury wants its money immediately, and it does not want taxpayers using meritless lawsuits to delay their tax bills.

Here, CIC Services, LLC challenged IRS guidance that requires its industry to comply with onerous reporting requirements. Violations of those reporting requirements are punishable by, among other things, a fiscal penalty that is designated as a tax. This Court has made clear that challenges to tax-reporting requirements do not implicate the Anti-Injunction

Act. *Direct Mktg. Ass'n v. Brohl,* 135 S. Ct. 1124 (2015). Does the answer change when one consequence of violating the reporting requirement is a tax penalty?

It shouldn't. Plaintiffs like CIC are suing to challenge the agency's mandate, not the tax penalties that happen to be attached to it. Their injuries are the crushing costs of complying with the mandate, not their hypothetical liability for tax penalties that the IRS has not assessed (and may never). The mandate imposes duties independent of the tax penalties, appears in a separate statutory provision, and would injure CIC even if the tax penalties were eliminated. Run-of-the-mill APA cases like this one do not threaten the ability of the government to collect taxes—after all, the tax penalty is designed to ensure compliance, not generate revenue. This case lacks the direct connection to "assessment or collection" of taxes that the Anti-Injunction Act requires.

The courts below disagreed, placing CIC in an untenable bind. CIC could either comply with a highly burdensome reporting obligation that violates the APA. Or it could deliberately disobey the reporting requirement—subjecting itself to reputational harm, crushing financial penalties, and even prison time—just for the chance to raise its arguments in court. Nothing in the Anti-Injunction Act's text, history, or caselaw requires this absurd result. If it did, the Constitution would require a safety valve that permits this suit. This Court should reverse the decision below and let CIC challenge the IRS's unlawful guidance.

STATEMENT OF THE CASE

A. Factual Background

This case concerns the IRS's attempt to regulate captive insurance. Businesses purchase insurance to protect against various risks: professional malpractice, products liability, lawsuits from employees, and more. Businesses usually purchase that insurance from third-party commercial insurers. But those insurers do not always provide the type of coverage that companies need, or they charge too much. "Captive insurers" allow businesses to fill those gaps.

Though captive insurers take many forms, the simplest one is an entity created by a parent company to provide insurance to that parent company. *See* C. Anastopoulo, *Taking No Prisoners: Captive Insurance as an Alternative to Traditional or Commercial Insurance*, 8 Ohio St. Entrep. Bus. L.J. 209, 213, 221-23 (2013). Like third-party insurers, the captive insurer receives premiums from the parent company in exchange for coverage. The only difference is that the insured (the parent) controls the insurer (the captive). *See id.* at 221-25 (outlining the various types of captive insurers).

Captive insurers provide several benefits over third-party commercial insurers. Besides more affordable coverage, a captive insurer can underwrite more customized policies than those available on the open market. *See id.* at 216. Captive insurers can tailor deductible and premium amounts, coverage scope, and risk tolerance because these insurers "address risk positions for the parent based solely on the

parent's actual risk exposure and history, rather than an industry-wide calculation." *Id.* This is especially important for industries where ordinary commercial insurers have a hard time evaluating the relevant risks. *Id.* at 213-14, 216.

Captive insurers also offer a more seamless claims process. *Id.* at 216-17. Submitting claims to a commercial insurer that has "the incentive to deny claims or delay in paying claims" is time-consuming, adversarial, and litigious. *Id.* at 217. By contrast, the parent and captive have "the same incentive to pay the claim from the captive's reserves." *Id.* at 216. And if the claims do not exceed the premiums that the parent paid, the captive insurer earns additional income. *Id.* at 217.

Congress has recognized the benefit that captive insurers provide to small and medium-sized businesses. Generally speaking, third-party insurers must pay taxes on "the sum of the amount earned from underwriting income and from investment income." S. Rep. No. 114-16 (2015). But in 1986, Congress created an exception to that rule "for certain small companies." An Act to Reform the Internal Revenue Laws of the United States, Pub. L. No. 99-514, §1024, 100 Stat. 2085 (1986) (codified at 26 U.S.C. §831(b)). The exception allowed insurance companies receiving less than $1.2 million in premiums—the typical size for smaller captives—to "elect to be taxed only on taxable investment income." S. Rep. No. 114-16. That means the insurers' underwriting income is not taxable, making it easier to start a captive insurer and pay its overhead. In 2015, Congress expanded this

benefit by increasing the premium limit to $2.2 million. *See* Protecting Americans from Tax Hikes Act of 2015, Pub. L. No. 114-113, §333, 129 Stat. 3123, 3108 (2015).

The IRS does not share Congress's support for captive insurance. It "has long been hostile" to the entire concept. B. Dexter, *Rethinking "Insurance," Especially After AIG*, 87 Denv. U. L. Rev. 59, 60 (2009). This skepticism has manifested itself in many ways. *See id.* at 70-81. Despite Congress's decision to *increase* the number of companies who qualify for the captive tax benefit, the IRS added captive insurers to its blacklist of supposed tax scams. *See IRS Warns of Abusive Tax Shelters on 2017 "Dirty Dozen" List of Tax Scams* (Feb. 14, 2017), bit.ly/3gVmldQ.

This dispute involves the IRS's most recent attempt to undermine captives. In 2004, Congress made taxpayers include information about "reportable transactions" with their tax returns. American Jobs Creation Act of 2004, Pub. L. No. 108-357, §811, 118 Stat. 1418 (2004) (codified at 26 U.S.C. §6707A(c)). Congress also made the "material advisors" who assist taxpayers report these transactions to the IRS. 26 U.S.C. §6111. And it made material advisors maintain a list of the taxpayers they assist. §6112.

Congress imposed stiff penalties for failing to comply with these new reporting requirements. A taxpayer who doesn't report the required information risks a penalty of up to $200,000. §6707A(b). A material advisor likewise faces a penalty of at least $50,000, with no maximum. §6707(b). Material

advisors are separately penalized if they fail to furnish a client list. That misstep carries a penalty of $10,000 per day until it is remedied. §6708(a). Aside from these penalties, willful violators of the reporting requirements are guilty of a misdemeanor and can be punished up to a year in prison. §7203.

Congress never identified which transactions count as "reportable"; it instead defined reportable transactions as those that the IRS, "under *regulations*," identifies as having "a potential for tax avoidance or evasion." §6707A(c)(1) (emphasis added). The IRS has identified only a handful of "reportable transactions" via "regulation." 26 C.F.R. §§1.6011-4(b)(2)-(5). It promulgated a catchall regulation, however, that defines "reportable transactions" as any "transaction of interest." §1.6011-4(b)(6). The IRS then defined a "transaction of interest," quite circularly, as a "transaction" that the "IRS has identified … as a transaction of interest" via "notice, regulation or other form of published guidance." *Id.* In other words, Congress told the IRS to use regulations, but the IRS granted itself permission to use guidance.

Using this self-granted power, the IRS issued Notice 2016-66. App. 91a-106a; *see* IRS, Notice 2016-66 (Nov. 1, 2016), bit.ly/3euItLx. The Notice identifies transactions by captive-insurance companies as "transactions of interest." App. 99a-101a. Notice 2016-66 was effective immediately, applied retroactively to tax years 2006 to 2015, and gave taxpayers and their material advisors a few months to report any captive-insurance transactions over the last decade. App. 102a-103a; 26 C.F.R. §§1.6011-4(e)(2)(i), 301.6111-

3(e). The IRS later extended the deadline an additional 90 days. *See* IRS, Notice 2017-08 (Dec. 29, 2016), bit.ly/3gXDDHu. Notice 2016-66 did not go through notice-and-comment rulemaking and was not published in the Federal Register.

B. Proceedings Below

CIC advises taxpayers who engage in captive-insurance transactions. It is thus a "material advisor" covered by the reporting and list-maintenance requirements of Notice 2016-16. Compliance with the Notice costs CIC hundreds of hours of labor and tens of thousands of dollars each year. D.C. Doc. 1 ¶40 (Compl.).

In March 2017, CIC filed a federal lawsuit in the Eastern District of Tennessee. CIC mainly argued that Notice 2016-66, although deemed "guidance" by the IRS, is really a "rule" that must go through notice-and-comment rulemaking. ¶¶27-40. CIC's challenge was preenforcement: The first reporting date was still a month away, ¶40, and CIC had never violated any reporting requirements or failed to pay any taxes. CIC "d[id] not allege tax liability as its injury," but instead "t[ook] issue with the hundreds of hours of labor and tens of thousands of dollars" that it took to comply with the Notice's reporting requirements. App. 26a (Nalbandian, J., dissenting); *accord* App. 60a (Thapar, J., dissenting from the denial of rehearing en banc). CIC asked the court to "permanently enjoin the enforcement of Notice 2016-66" and to "[e]nter judgment declaring that Notice 2016-66 is unlawful" under the APA. Compl. 16.

The IRS moved to dismiss. It argued that the Court lacked "subject matter jurisdiction" because the Anti-Injunction Act bars "pre-enforcement regulatory challenges" that "would have the purpose or effect of restraining" taxes. D.C. Doc. 25-1 at 6-7. Because the penalties for violating the reporting requirements are *tax* penalties, the IRS argued, an order enjoining Notice 2016-66 would effectively "prevent the IRS from assessing a tax" against anyone who violates the Notice's reporting requirements. *Id.* at 9.[1]

The district court agreed, App. 46a, and a divided panel of the Sixth Circuit affirmed. The majority assumed that, under this Court's decision in *Direct Marketing Ass'n v. Brohl*, 575 U.S. 1 (2015), challenges to tax-reporting requirements do not implicate the Anti-Injunction Act. App. 17a. But because the Notice's reporting requirements are enforced by a tax penalty, the majority concluded that CIC's challenge was "focused on *that* tax's assessment or collection." App. 16a. In the majority's view, CIC's suit "'would have the effect of restraining' … the IRS from collecting the penalties imposed for violating the Notice's requirements." App. 17a. "Thus," the majority concluded, CIC's "complaint is within the purview of the AIA and the district court does not have subject matter jurisdiction over it." App. 21a.

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[1] The IRS also moved to dismiss CIC's request for declaratory relief, relying on the tax exception to the Declaratory Judgment Act, 28 U.S.C. §2201(a). Because the tax exception and the Anti-Injunction Act are "'coterminous,'" BIO 15, CIC's request for declaratory relief rises or falls with its request for injunctive relief.

Judge Nalbandian dissented. Under *Direct Marketing*, he explained, "a suit to enjoin the enforcement of a *reporting requirement* is not a 'suit for the purpose of restraining the *assessment* or *collection* of any tax.'" App. 26a-28a. That the reporting requirements here are enforced by a tax penalty did not change the application of *Direct Marketing*, according to Judge Nalbandian. "CIC seeks to enjoin an IRS notice," not the tax penalty, and it "does not allege tax liability as its injury." App. 26a. Any relationship between CIC's suit and the assessment or collection of future tax penalties is too "attenuated" to implicate the Anti-Injunction Act. App. 30a, 32a. Barring CIC's preenforcement suit, Judge Nalbandian continued, does not serve the goals of the Anti-Injunction Act and puts CIC in "precisely the bind" that the APA seeks to avoid: forcing litigants who want judicial review to "violate the law and risk financial ruin and criminal prosecution." App. 34a-37a.

On a 9-7 vote, the full Sixth Circuit denied CIC's petition for rehearing en banc. App. 49a. Judge Thapar, writing for himself and six others, dissented. For the same reasons as Judge Nalbandian, Judge Thapar agreed that "this is not a case about taxes." App. 60a. He also stressed the serious and far-reaching implications of the panel's decision. Because litigants like CIC cannot obtain judicial review unless they "violate the reporting requirement," "pay the penalty," and risk "spend[ing] up to a year in prison," the panel's decision would "make the reporting requirement in this case (and many others) unreviewable." App. 62a. That lack of accountability is troubling at a time when the IRS "has begun to regulate an ever-expanding

sphere of everyday life—from childcare and charity to healthcare and the environment." App. 62a.

In a separate concurring opinion, Judge Sutton agreed that Judge Nalbandian's dissent seemed "right as an original matter." App. 55a. He "doubt[ed]" that the Anti-Injunction Act "ban[s] all prospective relief whenever the IRS enforces a regulation with a penalty that it chooses to call a 'tax.'" App. 55a. And he "especially doubt[ed] that conclusion in this setting—where the taxpayer's only remedy is not to 'pay first challenge later' but to 'report to prison first challenge later.'" App. 55a. But Judge Sutton concurred in the denial of rehearing en banc because he thought *this* Court was best positioned to decide the question. "[R]eading between the lines of Supreme Court decisions is a tricky business," he explained—one that "poses fewer difficulties for the Supreme Court than it does for us." App. 56a-57a.

SUMMARY OF ARGUMENT

The Anti-Injunction Act prohibits only those suits that were filed "for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. §7421(a). The words "assessment" and "collection" are terms of art that refer to specific phases of the taxation process, distinct from the reporting requirements that are triggered by Notice 2016-66. The word "restrain" also has a narrow, equitable meaning. It covers suits that actually stop the assessment or collection of a tax—not suits that merely inhibit future assessment or collection. That analysis is all spelled out in *Direct Marketing*, a case that used the

Anti-Injunction Act to shed light on the Tax Injunction Act, a similarly worded, state-tax analog.

That violations of the reporting requirements here are punished, among other ways, by a tax penalty changes nothing. CIC is challenging a single guidance document, not hypothetical penalties that the IRS might impose for violations of reporting requirements. CIC has not violated those reporting requirements or incurred any tax penalties. It is a law-abiding company, and violations risk not just tax penalties but massive fines and criminal liability. True, if CIC's suit is successful, the IRS might not be able to collect some tax penalties from some people who might violate the reporting requirements at some time in the future. But that attenuated connection to the assessment and collection of taxes does not implicate the Anti-Injunction Act.

Further, the Anti-Injunction Act prohibits only actions brought "*for the purpose* of restraining the assessment or collection of any tax." §7421(a) (emphasis added). This suit is not brought for that purpose. CIC wants relief from Notice 2016-66, and its injuries flow entirely from the burdens of complying with the reporting requirements that the Notice imposes. If the tax penalties for violating those requirements were eliminated tomorrow, nothing about this case would change. Win or lose, the IRS will collect no additional revenue from CIC. The Court of Appeals never found otherwise. Instead, it effectively "rewr[ote] the Anti-Injunction Act to say 'effect' rather than 'purpose.'" App. 64a n.1 (Thapar, J., dissental).

Affirming the Court of Appeals would frustrate the APA's strong preference for preenforcement review, which allows individuals to challenge the lawfulness of agency actions without putting themselves or their property in peril. The IRS is not exempt from the APA, and precluding preenforcement review in this context would serve none of the Anti-Injunction Act's goals. Indeed, if the Act required CIC to risk criminal punishment before it could challenge Notice 2016-66, as the Court of Appeals held, then the Act is unconstitutional. Due process would require this Court to allow preenforcement review, either as a matter of constitutional avoidance or under the safety valve recognized in *South Carolina v. Regan*, 465 U.S. 367 (1984). This Court should reverse the Court of Appeals and allow CIC to litigate its claims on the merits.

ARGUMENT

The APA provides that "[a] person suffering legal wrong because of agency action … is entitled to judicial review thereof." 5 U.S.C. §702. It embodies not only a "strong presumption" of judicial review, *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986), but a strong presumption of "*preenforcement* judicial review," *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 45 (2000) (Thomas, J., dissenting). Exceptions to this strong presumption are narrowly construed. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967).

The Anti-Injunction Act does not bar CIC's right to preenforcement review. The text of the Act does not apply to this suit. The purposes of the Act are not implicated by this suit. And the Act could not apply to this suit without violating the Constitution.

I. The text of the Anti-Injunction Act does not cover CIC's suit.

The Anti-Injunction Act states, with textual exceptions not relevant here, 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). Congress enacted the Act in the aftermath of the Civil War. *See* Act of March 2, 1867, ch. 169, §10, 14 Stat. 471, 475 (1867). It "has no recorded legislative history," *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974), and its operative text has never been meaningfully amended.

But the Act's history and purpose are no mystery. *See generally* K. Hickman & G. Kerska, *Restoring the Lost Anti-Injunction Act*, 103 Va. L. Rev. 1683 (2017). The Act's "manifest purpose" is to ensure the "prompt collection" of "lawful revenue." *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962). It "was part of a much larger reconstruction bill … aimed at maintaining revenues sufficient to pay down Civil War debt." E. Hawley, *The Equitable Anti-Injunction Act*, 90 Notre Dame L. Rev. 81, 95 (2014). The Act codified "an old familiar rule" of equity. *Pullan v. Kinsinger*, 20 F. Cas. 44, 48 (C.C.S.D. Ohio 1870). Courts of equity "generally followed" the rule that "a

suit will not lie to restrain the collection of a tax upon the sole ground of its illegality." *Miller v. Standard Nut Margarine Co. of Fla.*, 284 U.S. 498, 509 (1932). Such suits would allow tax delinquents "to delay payment or possibly to escape their lawful burden, and so to interfere with [and] thwart the collection of revenues for the support of the government." *Id.*

As this discussion suggests, CIC's suit has nothing to do with the Anti-Injunction Act. It challenges a reporting requirement, not the assessment or collection of taxes. And it is indifferent to the fact that one of the penalties is a tax. The purpose of CIC's suit, moreover, is to avoid the burdens of the reporting requirement—not to avoid or dispute any tax liability.

A. Under *Direct Marketing*, the Anti-Injunction Act does not bar preenforcement challenges to tax-reporting requirements.

This Court already held in *Direct Marketing* that preenforcement challenges to tax-reporting requirements are not barred by the Tax Injunction Act—the statute that is for state taxes what the Anti-Injunction Act is for federal taxes. The holding of *Direct Marketing* applies equally to the Anti-Injunction Act.

Direct Marketing was a preenforcement challenge to a Colorado law that required internet retailers to report certain tax information about their customers. 575 U.S. at 4-6. Colorado enforced this reporting requirement with a $10 penalty. *Id.* at 5-6. In defense of the law, Colorado invoked the Tax Injunction Act,

which bars federal courts from "enjoin[ing], suspend-[ing] or restrain[ing] the assessment, levy or collection of any tax under State law." 28 U.S.C. §1341.

This Court, in a unanimous opinion by Justice Thomas, held that the Tax Injunction Act did not bar the suit. Notably for purposes of this case, *Direct Marketing* drew this conclusion based almost entirely on *federal* statutes and precedents. It could do so, this Court explained, because the Tax Injunction Act "was modeled on the Anti-Injunction Act" and "words used in both Acts are generally used in the same way." 575 U.S. at 8. Using the Anti-Injunction Act as a model, this Court concluded that preenforcement challenges to tax-reporting requirements do not trigger the Tax Injunction Act for three main reasons.

First, reporting requirements do not involve the "assessment" or "collection" of taxes. Using "federal tax law as a guide," this Court explained that assessment is "the official recording of a taxpayer's liability" (and maybe also "the process by which that amount is calculated"). *Id.* at 8-9. Collection, moreover, is "the act of obtaining payment of taxes due" (and maybe also "the receipt of a tax payment before a formal assessment occurs"). *Id.* at 10. Whatever their precise definitions, assessment and collection occur *after* the "information gathering" that reporting requirements facilitate. *Id.* at 8; *see also id.* at 11 ("[N]otice and reporting requirements precede the steps of 'assessment' and 'collection.'"). Even after reports are filed and reviewed, the taxing authority "still needs to take further action" before assessment or collection occurs. *Id.* at 11. That reporting requirements are at least one

step removed from assessment and collection was crucial, according to the Court, because the Tax Injunction Act "is keyed to the acts of assessment, levy, and collection themselves." *Id.* at 12.

Second, injunctions against reporting requirements do not "restrain" the assessment or collection of taxes. This Court read the word "restrain" to embrace orders that "stop" assessment or collection, not orders that "merely *inhibit*," "limit, restrict, or hold back" assessment or collection. *Id.* The term "acts on a carefully selected list of technical terms—'assessment, levy, collection'—not an all-encompassing term, like 'taxation.'" *Id.* at 13. Construing "restrain" broadly would "defeat the precision of that list, as virtually any court action related to any phase of taxation might be said to 'hold back' 'collection.'" *Id.* Further, like the Anti-Injunction Act, the Tax Injunction Act "has its roots in equity practice." *Id.* Courts of equity "did not refuse to hear every suit that would have a negative impact on [tax] revenues." *Id.* at 14. That "history thus further supports the conclusion that Congress used 'restrain' in its narrower, equitable sense." *Id.*

Third, any reading of the Tax Injunction Act that reached reporting requirements would violate "the rule that jurisdictional rules should be clear." *Id.* at 11, 14 (cleaned up; citing, *inter alia*, *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010)). A loose, nontechnical definition of the Act's terms would produce "a vague and obscure boundary that would result in both needless litigation and uncalled-for dismissal, all in the name of a jurisdictional statute meant to protect

state resources." *Id.* at 14 (cleaned up; citing *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in the judgment)).

All of this reasoning from *Direct Marketing* easily transposes to the Anti-Injunction Act. That's unsurprising, since *Direct Marketing*'s analysis of the Tax Injunction Act was largely derived from the Anti-Injunction Act itself. The former was "modeled on" the latter, the two statutes use similar language, and the Court assumes their overlapping terms "are generally used in the same way." *Direct Mktg.*, 575 U.S. at 8; *accord Hibbs v. Winn*, 542 U.S. 88, 102 (2004) ("In composing the TIA's text, Congress drew particularly on … the Anti-Injunction Act."); *Enochs*, 370 U.S. at 6 ("[T]he comparable Tax Injunction Act of 1937 … throws light on the proper construction" of the Anti-Injunction Act). While the Anti-Injunction Act omits a few words that appear in the Tax Injunction Act ("enjoin," "suspend," "levy"), those minor differences do not alter the core reasoning of *Direct Marketing*.

First, like the Tax Injunction Act, the Anti-Injunction Act is not "keyed to all activities that may improve" the government's "ability to assess and collect taxes." *Direct Mktg.*, 575 U.S. at 11. It focuses on two distinct phases of taxation: "assessment" and "collection." Those terms have precise meanings under the Federal Tax Code "today," *id.* at 8, when the Tax Injunction Act was adopted, *id.*, and when the Anti-Injunction was adopted, *see, e.g.,* 1 J. Bouvier, Law Dictionary 132 (5th ed. 1854) ("assess" is "[t]o rate or to fix the proportion which every person has to pay of any particular tax"); *id.* at 241 ("[c]ollector" is "[o]ne

appointed to receive taxes or other impositions"). Under the Federal Tax Code, "'assessment' serves as the trigger for levy and collection efforts"; it is not "synonymous with the entire plan of taxation." *Hibbs*, 542 U.S. at 102. And the "Federal Tax Code has long treated information gathering as a phase of tax administration procedure that occurs before assessment, levy, or collection." *Direct Mktg.*, 575 U.S. at 8.[2]

Second, like the Tax Injunction Act, the Anti-Injunction Act uses the word "'restrain' in its narrower, equitable sense." *Direct Mktg.*, 575 U.S. at 14. This Court said so in *Direct Marketing*: it favorably cited a treatise for the proposition that "the word 'restraining' in the AIA" is used "in its equitable sense." *Id.* (citing 5 R. Paul & J. Mertens, Law of Federal Income Taxation §42.139 (1934)). The Court and the treatise writer are correct. The Anti-Injunction Act "was written against the background of general equitable principles disfavoring the issuance of federal injunctions against taxes." *Bob Jones*, 416 U.S.

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[2] Notably, although Congress moved the location of the Anti-Injunction Act several times, it always included it in the chapters of the Tax Code concerning "assessments" and "collections." *See* Rev. Stat. §3224 (1873); Act of June 30, 1926, ch. 712, 44 Stat. 777 (1926) (codified at 26 U.S.C. §154); An Act to Consolidate and Codify the Internal Revenue Laws of the United States, ch. 36, §3653(a), 53 Stat. 1, 446 (1939). When Congress reorganized the tax code again in 1954, it moved the Anti-Injunction Act to its current location alongside provisions discussing judicial review. *See* An Act to Revise the Internal Revenue Laws of the United States, ch. 736, §7421(a), 68A Stat. 3, 876 (1954). But that move was not intended to make a "material change in existing law." S. Rep. No. 83-1622, at 610 (1954), *as reprinted in* 1954 U.S.C.C.A.N. 4621, 5260.

at 742 n.16. One of those principles dictated that "a suit in equity will not lie to *restrain* collection on the sole ground that the tax is illegal." *California v. Latimer*, 305 U.S. 255, 262 (1938) (emphasis added). The Anti-Injunction Act "is declaratory of [that] principle" and "is to be construed as near as may be in harmony with it and the reasons upon which it rests." *Standard Nut*, 284 U.S. at 509.

The Anti-Injunction Act's equitable nature is clear from its history. *See generally* Hawley, *supra*. Until the mid-nineteenth century, the federal government relied on tariffs for revenue. Hickman & Kerska 1720. But when it came time to finance the Civil War, Congress enacted several new taxes. *See* Act of August 5, 1861, ch. 45, §§8, 49, 12 Stat. 292, 294-96, 309 (1861); Act of July 1, 1862, ch. 119, 12 Stat. 432 (1862) ("1862 Act"). Congress also created the machinery to administer those new taxes, including the appointment of "assessors" and "collectors." 1862 Act §§2-5. Assessors reviewed income tax returns, property, and accounts to determine the specific tax liability for each individual. §§6-9; *see Chrysler Corp. v. Brown*, 441 U.S. 281, 297 n.23 (1979). After assessors publicized lists of who owed what, 1862 Act §§14-15, they addressed taxpayers' objections and made final assessments, §§15-16. Collectors then published information about where and when to pay. §19. If taxpayers failed to pay up, a collector would personally visit them and demand payment. *Id.* Some taxpayers responded by seeking injunctions against the tax assessors and collectors. *See Roback v. Taylor*, 20 F. Cas. 852 (C.C.S.D. Ohio 1866); *Magee v. Denton*, 16 F. Cas. 382 (C.C.N.D.N.Y. 1863). Congress enacted

the Anti-Injunction Act to block those equitable suits, which explains its choice of the equitable word "restrain."

Third, like the Tax Injunction Act, a narrower reading of the Anti-Injunction Act "is consistent with the rule that jurisdictional rules should be clear." *Direct Mktg.*, 575 U.S. at 14 (cleaned up). While the Anti-Injunction Act is probably not jurisdictional, *see Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1557-59 (10th Cir. 2013) (en banc) (Gorsuch, J., concurring), the government certainly thinks it is, *see* D.C. Doc. 25-1 at 6. Whatever its precise status, the Anti-Injunction Act is at least a claim-processing rule that, when raised, requires cases to be dismissed for reasons unrelated to their merits. Claim-processing rules should be clear too. *See Sisson*, 497 U.S. at 375 (Scalia, J., concurring) ("[A] trial judge ought to be able to tell easily and fast what belongs in his court and what has no business there."). Like jurisdictional rules, vague claim-processing rules "complicate a case, eating up time and money as the parties litigate [questions other than] the merits," and generate needless satellite litigation that drains "[j]udicial resources." *Hertz Corp.*, 559 U.S. at 94. Failing to extend *Direct Marketing* to the Anti-Injunction Act would thus result in "needless litigation and uncalled-for dismissal[s], all in the name of a [procedural] statute meant to protect [federal tax] resources." *Direct Mktg.*, 575 U.S. at 14.

In sum, the holding of *Direct Marketing* applies to the Tax Injunction Act and Anti-Injunction Act alike. Injunctions against tax-reporting requirements do not

stop the assessment or collection of taxes, even if they deprive the IRS of information it claims it needs. Here, for example, an injunction against Notice 2016-66 would mean that captive insurers and their material advisors are no longer required to flag their activities as "reportable transactions." That might inhibit the IRS's ability to decide whether it wants to give closer scrutiny to captive insurers. *See* App. 102a. And that, in turn, might decrease the IRS's ability to detect tax fraud (doubtful, though, since captive insurers already provide much of this information on their tax returns). The IRS's decreased ability to detect tax fraud might lead it to assess and collect less in taxes. But that speculative, contingent possibility of future assessment and collection does not implicate the Anti-Injunction Act. *Direct Mktg.*, 575 U.S. at 14.

B. Preenforcement challenges to tax-reporting requirements are not barred by the Anti-Injunction Act, even when one penalty for noncompliance is a tax.

If tax-reporting requirements do not implicate the Anti-Injunction Act, what about tax-reporting requirements that are enforced (among other ways) by tax penalties? Here, for example, the penalties for violating the relevant reporting requirements appear in Subchapter 68B of the Tax Code, and "[p]enalties in Subchapter 68B are … treated as taxes under … the Anti-Injunction Act." *NFIB v. Sebelius*, 567 U.S. 519, 544-45 (2012). That fact arguably distinguishes this case from *Direct Marketing*, where the penalty for violating the reporting requirement might not have

been a tax.[3] But any such distinction makes no difference under the Anti-Injunction Act.

Like the reporting requirements they enforce, tax penalties are several steps removed from the assessment or collection of taxes. Before any assessment or collection can occur, the regulated entity must violate the reporting requirement, the IRS must detect the violation, and the IRS must make the (discretionary) decision to impose a tax penalty. In other words, even after the underlying regulatory mandate is violated, the IRS "still needs to take further action to assess the taxpayer's … liability and to collect payment from him." *Direct Mktg.*, 575 U.S. at 11. Assessment and collection "are triggered after" the regulation has performed its role. *Id.*

Similarly, in a preenforcement suit, the plaintiff has not yet violated the reporting requirement, so no tax penalty has possibly been assessed (let alone collected). An injunction thus could not "stop" the "acts of assessment [or] collection themselves." *Id.* at 12-13. It would not stop "the official recording of a taxpayer's liability," "the process by which that amount is calculated," "the act of obtaining payment

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[3] This Court never asked whether the penalty in *Direct Marketing* was a tax. Its indifference suggests, as CIC argues now, that the answer didn't matter to the Court's analysis. *See* App. 34a (Nalbandian, J., dissenting) ("Nothing" in *Direct Marketing* indicates that the Court "would have held differently if someone had argued that the … penalties in that case were taxes."); *Fla. Bankers Ass'n v. U.S. Dep't of Treasury*, 799 F.3d 1065, 1077 n.4 (D.C. Cir. 2015) (Henderson, J., dissenting) (similar).

of taxes due," or "the receipt of a tax payment." *Id.* at 9-10. It would enjoin requirements that "precede [these] steps." *Id.* at 11.

Nor does the addition of a tax penalty somehow make the reporting requirement *itself* a tax. Notice 2016-66 is a guidance document, not a tax, and the reporting requirements that it extends to captive insurers and material advisors are not taxes either. They are independent requirements that appear in separate statutory provisions from the tax penalties. *Compare* 26 U.S.C. §§6011(a), 6111, 6112, 26 C.F.R. §§1.6011-4, 301.6111-3 (reporting and recordkeeping requirements), *with* 26 U.S.C. §§6707, 6707A (tax penalties). And they carry consequences beyond the tax penalties, including criminal liability. 26 U.S.C. §7203. If the tax penalties were eliminated today, the reporting requirements would remain in full force. And the tax penalties will remain in force if Notice 2016-66 is enjoined. Those statutory penalties will still apply to all reportable transactions; captive insurance will simply no longer be reportable. CIC's suit thus does not challenge "'the regulatory aspect of a regulatory tax.'" BIO 23. It challenges a regulation that is not a tax—more accurately, a guidance document that imposes a reporting requirement that happens to be enforced by, among other things, a tax penalty.

Courts have no trouble reaching this conclusion "in other regulatory contexts." *Autocam Corp. v. Sebelius*, 730 F.3d 618, 622 (6th Cir. 2013), *GVR'd in light of Burwell v. Hobby Lobby*, 573 U.S. 682 (2014). For example, EPA regulations of diesel fuels are

enforced by penalties that the Tax Code designates as "taxes." 26 U.S.C. §§6720A(a), 6671(a). Yet preenforcement challenges to EPA's fuel standards are common. *See, e.g.*, *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130 (D.C. Cir. 2002). No one insists that regulated entities must ship out dirty diesel fuel, get assessed a penalty, and sue for a refund. Courts understand that these suits challenge the standards themselves, not the tax penalties incidentally associated with their violation.

The litigation over the Affordable Care Act's contraceptive mandate is also instructive. The Affordable Care Act generally requires employers to provide "minimum essential coverage" to their employees, including "preventive care and screenings" for women. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696-97 (2014) (citing 42 U.S.C. §300gg-13(a)(4); 26 U.S.C. §§5000A(f)(2), 4980H(a),(c)(2)). When HHS issued regulations defining "preventive care" to include all FDA-approved contraceptives, *id.*, religious for-profit companies challenged that regulation under the Religious Freedom Restoration Act. But the "primary enforcement mechanism" for violations of the mandate was a "tax." *Autocam*, 730 F.3d at 621 (quoting 26 U.S.C. §4980D(a)); *see Hobby Lobby*, 573 U.S. at 720 (describing the mandate's penalty as a "ta[x]"). That tax penalty prompted several Courts of Appeals to consider whether the Anti-Injunction Act barred the suits.

The Courts of Appeals all agreed that the Anti-Injunction Act did not bar challenges to the contraceptive mandate, despite its tax penalty. As the Sixth

Circuit put it, "[t]he plaintiffs seek to enjoin a part of the coverage requirements imposed by the mandate, not the IRS's mechanism for collecting 'tax' from noncompliant employers." *Autocam*, 730 F.3d at 622; *accord Hobby Lobby*, 723 F.3d at 1127 (similar); *Korte v. Sebelius*, 735 F.3d 654, 669-70 (7th Cir. 2013) (similar). This Court did not disagree, as its decision in *Hobby Lobby* reached the merits and never even discussed the Anti-Injunction Act.

This Court was aware of the issue, though, because it also arose in *NFIB v. Sebelius*, 567 U.S. 519 (2012). There, the plaintiffs challenged the Affordable Care Act's individual mandate to purchase health insurance, which was enforced by a penalty that was arguably a tax. The parties agreed that the Anti-Injunction Act did not apply because the penalty was not a "tax" in the relevant sense. *Id.* at 545. But they disagreed over the plaintiffs' lead argument: that even if the penalty were a tax, the plaintiffs were challenging the mandate itself, not the assessment or collection of any tax penalties. *See Fla. Bankers*, 799 F.3d at 1071; *id.* at 1080 & n.6 (Henderson, J., dissenting) (discussing the briefing).

This Court did not have to reach the plaintiffs' lead argument in *NFIB* because it agreed that the penalty was not a tax for purposes of the Anti-Injunction Act. 567 U.S. at 543-46; *see* App. 64a-65a (Thapar, J., dissental); App. 33a-34a (Nalbandian, J., dissenting); *Fla. Bankers*, 799 F.3d at 1079-80 (Henderson, J., dissenting). But other courts considered the plaintiffs' lead argument and found it persuasive. *See Seven-Sky v. Holder*, 661 F.3d 1, 8-9 (D.C. Cir.

2011). That argument is especially persuasive here, where all agree that, even if the tax penalties were eliminated, the reporting requirements would continue to have independent regulatory force.[4]

C. CIC's suit was not brought for the "purpose" of restraining the assessment or collection of any tax.

Unlike the Tax Injunction Act, the Anti-Injunction Act applies only to suits that are brought "for the *purpose* of" restraining the assessment or collection of taxes. 26 U.S.C. §7421(a) (emphasis added). CIC's suit does not have that purpose, as seven judges found below, App. 26a, 60a, and the government largely concedes, *see* BIO 21 (agreeing this is not CIC's "subjective goal").

Unless this "purpose" language is superfluous, it imposes an additional hurdle that narrows the Anti-Injunction Act. *See Inter-Modal Rail Emps. Ass'n v. Atchison, Topeka, and Santa Fe Ry. Co.*, 520 U.S. 510, 516 (1997); *United States v. Maze*, 414 U.S. 395, 405

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[4] In *Florida Bankers*, the D.C. Circuit concluded that *NFIB* implicitly rejected the plaintiffs' lead argument. 799 F.3d at 1071. CIC respectfully disagrees. But the D.C. Circuit's efforts to read between the lines of *NFIB* is understandable, since circuit precedent required it to treat this Court's dicta "as authoritative." *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003). This Court, by contrast, "refus[es] to be bound" by its own dicta. *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 528 (2002); *see Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013) ("[W]e are not necessarily bound by dicta should more complete argument demonstrate that the dicta is not correct.").

(1974). As one court has explained, the Anti-Injunction Act's purpose requirement excludes lawsuits where "restraining the assessment or collection of a tax" is "an incidental effect" of the suit, but not its purpose. *Korte*, 735 F.3d at 669-70; *see, e.g.*, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 275-76 (1993) ("for the purpose of" means '*aimed at*'" or "a conscious objective of," not mere "effect" or "aware-[ness]"). After all, if Congress wanted the Anti-Injunction Act to cover suits with the "purpose *or effect*" of restraining the assessment or collection of taxes, it knew how to say so. *See, e.g.*, 26 U.S.C. §302(b)(2)(D) ("pursuant to a plan the purpose or effect of").

CIC's suit was not brought for the purpose of restraining the assessment or collection of taxes. CIC challenges only Notice 2016-66. It does not challenge the separate statutes where the tax penalties appear, or the decision to use those penalties as a punishment for violating the reporting requirements. CIC's injuries are the costs of complying with the Notice's onerous reporting requirements. CIC's injury is not its (or anyone else's) "tax liability." *Cf. Bob Jones*, 416 U.S. at 738-39. To the contrary, CIC is a law-abiding company that currently complies with Notice 2016-66 and has no intentions of ever incurring tax penalties. Nor has the IRS alleged any violations of the reporting requirements or begun the process of assessing or collecting any tax penalties. *Cf. Bailey v. George*, 259 U.S. 16, 19 (1922). Even if the tax penalties were repealed, CIC's "interes[t]" in this lawsuit would remain exactly the same. *Cf. Alexander v. "Americans United" Inc.*, 416 U.S. 752, 761 (1974).

The Court of Appeals never held otherwise. It stressed the supposed "effect" of CIC's lawsuit. App. 17a, 18a. But that analysis has "the inconvenient feature of rewriting the Anti-Injunction Act to say 'effect' rather than 'purpose.'" App. 64a n.1 (Thapar, J., dissental). And it's not even accurate. CIC's suit would not "necessarily preclude" the assessment or collection of tax penalties. App. 18a. If captive insurers and material advisers all comply with Notice 2016-66, or if the IRS declines to impose tax penalties, then CIC's suit will not deprive the treasury of one penny of tax-penalty revenue. In fact, it is CIC's *compliance* with Notice 2016-66—not its lawsuit—that "fully stops" the assessment and collection of the tax-penalty. Win or lose here, CIC will not pay any more taxes than it already does. "Put simply, this is not a dispute over taxes." App. 26a (Nalbandian, J., dissenting).

II. Barring CIC's suit undermines the APA without furthering any goal of the Anti-Injunction Act.

The decision below reconciles the APA and the Anti-Injunction Act in a way that serves the purposes of neither statute. It eliminates preenforcement review for most IRS regulations, while accomplishing none of the concerns that animate the Anti-Injunction Act. These "anomalous implications" further prove that the Court of Appeals gave an "anomalous reading" to both statutes. App. 37a (Nalbandian, J., dissenting).

As mentioned, the APA strongly favors preenforcement review. Preenforcement review often represents the only realistic way to obtain judicial review of unlawful agency action. Injured parties cannot be expected to invite the agency to "'drop the hammer' in order to have their day in court." *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016). This observation applies with equal force to the IRS. Because "[t]he APA was meant to bring uniformity to a field full of variation and diversity," *Dickinson v. Zurko*, 527 U.S. 150, 155 (1999) (cleaned up), this Court has "recognized the importance of maintaining a uniform approach to judicial review of administrative action," *Mayo Found. for Medical Educ. & Research v. United States*, 562 U.S. 44, 55 (2011). It has refused "to carve out an approach to administrative review good for tax law only." *Id.*

The decision below deals a serious blow to preenforcement review under the APA. Under its logic, *any* agency action can be made immune from preenforcement review—just attach a tax penalty to it. After all, if the "relevant tax is the penalty," then the agency could always argue that enjoining its action would remove "the entire basis for that tax." App. 16a.

Even if the damage could be limited to agency actions by the IRS, the consequences would still be severe. The IRS regulates "an ever-expanding sphere of everyday life." App. 62a (Thapar, J., dissental). It administers some of Congress's most far-reaching laws. *E.g.*, *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1657, 1661-62 (2017) (ERISA). Most recently, the IRS played an outsized role in

implementing the Affordable Care Act and its many new mandates, penalties, subsidies, exemptions, and taxes. *See* IRS, "Affordable Care Act Tax Provisions" (Feb. 18, 2020), bit.ly/2YyY9aP. In doing so, it resolved everything from religious accommodations to wellness programs. *See* K. Hickman, *Administering the Tax System We Have*, 63 Duke L.J. 1717, 1730-32 (2014). Meanwhile, the IRS has a poor track record of complying with the basic rules of administrative law. *See* App. 24a (citing Hickman & Kerska 1712-13); *id.* at 62a (Thapar, J., dissental). Because "most if not all Treasury regulations and IRS guidance documents" implicate tax penalties, the decision below would insulate the IRS's unlawful—or even unconstitutional—actions in more and more areas. *Id.* at 36a (Nalbandian, J., dissenting) (citing Hickman & Kerska 1685).[5]

"And to what end?" *Id.* Barring preenforcement review and forcing taxpayers to *violate* tax-reporting requirements does not further any goal of the Anti-Injunction Act. It does not increase federal tax revenue: tax penalties are meant to ensure compliance with the underlying mandate, not generate revenue. Nor does a bar on preenforcement review encourage taxpayers to "'pay without delay, then sue for a refund.'" *Direct Mktg.*, 575 U.S. at 19 (Ginsburg,

[5] As Judge Nalbandian noted, the Sixth Circuit's logic would even foreclose preenforcement challenges to a racially discriminatory regulatory mandate that was "enforced by a penalty in Chapter 68, Subchapter B of the Tax Code." App. 30a-31a. Though the obvious purpose of that suit "would be to end discriminatory action by the Government," the "tax in that hypothetical is no further removed … than the tax in this case." App. 31a.

J., concurring). CIC's "claim is not one likely to be pursued in a [federal] refund action" because the price of judicial review is not the payment of a tax, but the commission of a crime. *Id.*

Notably, the Anti-Injunction Act normally encourages taxpayers to pay their taxes—to *comply* with federal tax law. But applying it here tells taxpayers the opposite—to become "a lawbreaker." *Fla. Bankers*, 799 F.3d at 1084 (Henderson, J., dissenting) (quoting *Nat'l Rest. Ass'n v. Simon*, 411 F. Supp. 993, 996 (D.D.C. 1976) (Bryant, J.)). It is difficult to "imagine that the Congress intended such an anomalous result in a system which depends for its very existence on the principle of voluntary compliance." *Id.* Yet that anomaly is what the Court of Appeals' decision requires.

III. Constitutional avoidance counsels in favor of CIC's interpretation.

There is no question that, if CIC cannot obtain preenforcement review, it cannot realistically obtain review at all. To raise its claims in a refund suit, litigants like CIC would have to run a multi-step gauntlet—each step "fraught" with difficulties. App. 37a (Nalbandian, J., dissenting).

For starters, CIC would have to violate the reporting requirements imposed by Notice 2016-66. Because CIC would be intentionally violating the requirement to obtain judicial review, it's hard to see how its violation would not be "willful." 26 U.S.C. §7203. Thus, CIC would be exposing itself to *criminal* liability, including prison time and large fines. And by

breaking the law, its attorney- and accountant-members would be violating the ethical strictures of their professions and jeopardizing their licenses. *Cf.* ABA Model Rule Prof. Cond. 8.4, cmt. 2.

Next, even if CIC were willing to break the law, it could not obtain judicial review unless the IRS decided to assess a tax penalty for CIC's violation. The decision to assess a tax penalty is committed to the IRS's unreviewable discretion, 26 U.S.C. §§6707A(d), 6707(c)—making the IRS the sole arbiter of whether CIC can sue. Because the IRS knows it would be the defendant in a refund suit challenging the legality of its action, the agency might have a powerful incentive to withhold the penalty.

Finally, if the IRS did decide to issue a tax penalty, CIC could not initiate a refund suit unless it could afford to pay the penalty—"to the tune of $50,000 … for *each* transaction [CIC] fails to report." App. 34a (Nalbandian, J., dissenting). Not every company could pay such hefty fines, especially if the IRS waited until the penalties accrued to a large amount. *Cf. Larson v. United States*, No. 16-cv-245, 2016 WL 7471338 (S.D.N.Y. Dec. 28, 2016) (taxpayer denied an APA challenge because he was able to pay *only* $1.43 million of an assessed $160 million in tax penalties). Nor is it clear that the IRS, sensing a lawsuit was imminent, couldn't defeat judicial review by simply cancelling the penalty's assessment.

A system like this one, where judicial review requires criminal exposure and the government's consent, is likely unconstitutional. A plaintiff should

not have to "first expose himself to actual arrest or prosecution to be entitled to challenge" an illegal mandate. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *accord Doe v. Bolton*, 410 U.S. 179, 188 (1973); *MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 128-29 (2007). Otherwise, his compliance with potentially illegal laws is "effectively coerced." *MedImmune,* 549 U.S. at 129.

When the government, "in an effort to prevent any inquiry of the validity of a particular [law], so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious [constitutional] question." *Cotting v. Godard*, 183 U.S. 79, 102 (1901); *see also Ex parte Young*, 209 U.S. 123, 148 (1908) ("[T]he acts … by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face."); *Okla. Operating Co. v. Love*, 252 U.S. 331, 336-37 (1920) (where enduring severe financial penalties is the only avenue for judicial review, the "judicial review beset by such deterrents does not satisfy the constitutional requirements" of due process). Constitutional avoidance militates against such a reading of the Anti-Injunction Act. *See Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

Perhaps to avoid this constitutional issue, *see Bob Jones*, 416 U.S. at 746-47, this Court has recognized an exception to the Anti-Injunction Act that applies when refund suits do not provide a meaningful alternative for review. In *South Carolina v. Regan*, this

Court held that the Anti-Injunction Act "was not intended to bar an action where … Congress has not provided the plaintiff with an alternative *legal* way to challenge the validity of a tax." 465 U.S. 367, 373 (1984) (emphasis added).

That exception applies here. Breaking the law is, by definition, not a "legal" way to challenge Notice 2016-66. *See Hawkes Co.*, 136 S. Ct. at 1814; *Ex parte Young*, 209 U.S. at 164-65. Even if this route is technically available, it is not functionally available because litigants cannot be expected to risk criminal liability for the chance to raise their administrative-law challenges. *See* G. Kerska, *Criminal Consequences and the Anti-Injunction Act*, 52 Minn. L. Rev. 51, 65-70 (2020). If the Anti-Injunction Act truly deprives taxpayers like CIC of "any opportunity to obtain review," *Regan*, 465 U.S. at 380-81, then the Constitution requires it to be set aside.

CONCLUSION

The Court should reverse the decision below and remand for further proceedings.

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