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 OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, GLOBAL BUSINESS ALLIANCE, SILICON VALLEY TAX DIRECTORS GROUP, INFORMATION TECHNOLOGY INDUSTRY COUNCIL, NATIONAL FOREIGN TRADE COUNCIL, THE CATO INSTITUTE, AND REASON FOUNDATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

JOSEPH B. JUDKINS
Counsel of Record
A. DUANE WEBBER
GEORGE M. CLARKE
DANIEL A. ROSEN
JOSHUA ODINTZ
PHILLIP J. TAYLOR

ELAINE WILKINS
BAKER & MCKENZIE LLP
815 Connecticut Ave NW
Washington, DC 20006
(202) 452-7000
joseph.judkins@
bakermckenzie.com

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

Amici are trade associations, industry-membership organizations, and think tanks.

1. The National Federation of Independent Business Small Business Legal Center is a nonprofit, public-interest law firm established to support small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business ("NFIB") is an organization that represents the interests and concerns of America's small business owners and comprises approximately 300,000 member businesses.

2. The Global Business Alliance represents more than 200 major international companies with significant U.S. operations and actively promotes and defends an open economy that welcomes international companies to invest in America.

3. The Silicon Valley Tax Directors Group, composed of 105 company members, promotes sound, long-term

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[1] Both parties have consented to the filing of this brief by amici curae. Pursuant to this Court's Rule 37.6, amici state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have been timely notified of the submission of this Brief.

tax policies that support the global competitiveness of the U.S. high-technology industry.

4. The Information Technology Industry Council represents the interests of the information and communications technology industry, including member companies that are among the global leaders in innovation.

5. The National Foreign Trade Council, founded in 1914, represents more than 200 U.S. company members and promotes a rules-based world economy, including clear and fair tax laws.

6. The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government.

7. Reason Foundation is a nonpartisan and nonprofit organization, founded in 1978 to promote libertarian principles and policies, including free markets, individual liberty, and the rule of law.

Amici's members include taxpayers across the business community who are impacted by tax rules on a daily basis. Their diversity reflects the significance of the fundamental issue here—the right to know the tax law with certainty when tax rules are issued.

Applying the Anti-Injunction Act ("AIA"), section 7421(a),[2] to preclude pre-enforcement challenges to

[2] Unless otherwise noted, all "Code," "section," and "I.R.C." references are to the United States Internal Revenue Code of 1986, as amended (26 U.S.C.), and all "Treas. Reg. §" references are to the Treasury Regulations promulgated thereunder (26 C.F.R.).

tax rules perpetuates uncertainty about regulations of dubious validity. Amici are interested in a level playing field that does not "carve out an approach to administrative review good for tax law only." *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55 (2011). To that end, Amici respectfully request that this Court clarify that the AIA's scope is limited to its terms and that it does not prohibit pre-enforcement judicial review of tax rules.

SUMMARY OF ARGUMENT

Congress has consistently limited the AIA to apply only to IRS "assessment" and "collection" actions. Those steps in the taxation process occur well after Treasury and the IRS[3] engage in rulemaking or otherwise issue guidance with the force and effect of law (collectively, "rulemaking"). On its face, the AIA does not apply to block pre-enforcement suits under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, that seek to challenge the validity of a rulemaking.

In this case, the Court faces the question of how to balance the strictures of the AIA, on the one hand, with the Congressional mandate for thorough review of agency action, on the other. Though often overlooked, the thirteen enumerated exceptions in the first phrase of the AIA are useful guideposts in this analysis. Those exceptions support the conclusion that the AIA is now, and has always been, narrowly focused on suits that restrain assessment or collection. With the context provided by these exceptions, the AIA looks less like a statute that pre-

[3] Treasury and the IRS are hereinafter collectively referred to as "Treasury."

empts all suits affecting taxation and more like one that can exist comfortably alongside the APA and challenges to the validity of agency rulemaking. This is because each of the AIA's explicit exceptions considers a situation in which the IRS has targeted a particular taxpayer and taken specific action to assess or collect tax from that taxpayer. These exceptions collectively indicate that Congress did not intend to apply the AIA to other, earlier, steps in the taxation process, such as those seeking clarity on the law before any specific enforcement action.

An overbroad application of the AIA thus contradicts plain statutory language and rests on suspect policy grounds. Worse yet, it shields *all* Treasury regulations from pre-enforcement judicial review under the APA—even though assessment or collection against a specific taxpayer is not at issue in a garden-variety APA suit. The instant case illustrates some of the harms that follow from that lack of pre-enforcement review. The court below applied the AIA too broadly, leaving taxpayers to "report to prison first [and to] challenge later." *CIC Servs., LLC v. IRS*, 936 F.3d 501, 504 (6th Cir. 2019) (Sutton, J. concurring in the denial of rehearing en banc). A straightforward construction of the AIA highlights its proper scope and application. It also harmonizes with the APA's strong presumption of judicial review. And it facilitates much-needed certainty in the tax law—an area that "can give no quarter to uncertainty." *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522, 543 (1979).

Based on the foregoing, this Court should reject an overbroad application of the AIA and clarify that the

AIA does not prohibit pre-enforcement suits that challenge the validity of tax rules under the APA.

ARGUMENT

I. THE AIA'S ENUMERATED EXCEPTIONS SHOW THAT CONGRESS HAS ALWAYS FOCUSED ON LITIGATION THAT RESTRAINS ASSESSMENT AND COLLECTION ACTION, NOT ON LITIGATION THAT MIGHT GENERALLY AFFECT TAXATION.

The AIA prohibits suits "for the purpose of restraining the assessment or collection of any tax." I.R.C. § 7421(a). In *Direct Marketing Association v. Brohl*, 575 U.S. 1 (2015), this Court determined the meaning of "restrain" in the Tax Injunction Act, 28 U.S.C. § 1341, which was modeled on and used the same operative terms as the AIA. "Restrain" means to "stop," and "a suit cannot be understood to 'restrain' the 'assessment, levy or collection' of a state tax if it merely inhibits those activities." *Id.* at 14. Given their shared lineage, the same must hold true for the AIA.

As in the TIA, the word "restraining" in the AIA acts on "a carefully selected list of technical terms . . . not on an all-encompassing term, like 'taxation.'" *Id.* at 13. In particular, "restraining" acts on "assessment" and "collection." "Assessment" is "the official recording of a taxpayer's liability," and "collection" is "the act of obtaining payment of taxes due." *Id.* at 9-10; I.R.C. § 6203 ("The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary . . . .")[4]; I.R.C. § 6302 (describing the mode of tax collection).

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[4] Although a taxpayer may colloquially be said to "self-assess" tax liability by filing a return, the Code clarifies that the IRS,

However, the various steps in the taxation process require, as a prerequisite, clarity in the agency's tax *laws*—that body of regulatory and other administrative precedent that governs taxpayers' relationship with our Government. This Court faces the question of whether and to what extent the AIA precludes judicial review of APA challenges. Because the AIA applies only to "assessment" or "collection" action, a pre-enforcement challenge to agency rulemaking brought independently of any enforcement action should not trigger the AIA's prohibitions.

The initial phrase of the AIA supports this conclusion. That phrase contains thirteen enumerated exceptions—"sections 6015(e), 6212(a) and (c), 6213(a), 6232(c), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436"— that preclude the IRS from asserting the AIA in an array of situations. I.R.C. § 7421(a). As with all exceptions, each sheds additional light on the rule it excepts. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("broader context of the statute as a whole" clarifies statutory meaning). Collectively, these exceptions show that Congress has targeted the AIA at suits by particular taxpayers to enjoin ongoing assessment or collection action, not on litigation far removed from, and predicate to, those actions. The AIA's exceptions also show that the traditional rationale for a broad application of the AIA—*i.e.*, to ensure the flow of tax

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not the taxpayer, makes the actual, technical assessment. I.R.C. § 6203; *Hibbs v. Winn*, 542 U.S. 88, 100 n.3 (2004) ("The word 'self-assessment,' however, is not a technical term; as IRC § 6201(a) indicates, the IRS executes the formal act of income-tax assessment.").

dollars to the federal fisc—is mistaken. In fact, most tax litigation occurs before taxpayers are required to pay the disputed tax.

A. The Prepayment-Litigation Exceptions. Six AIA exceptions relate to "prepayment" litigation, which arises before taxpayers must pay the disputed tax.

1. Tax Court Litigation. Three exceptions—6212(a) and (c) and 6213(a)—relate to "deficiency"[5] litigation in the Tax Court. Deficiency litigation occurs on a "prepayment" basis—taxpayers who are already involved in the assessment phase of the taxation process have the ability to challenge their alleged tax liability without paying any amount of tax.[6]

These exceptions have been part of the Code for nearly 100 years. In 1924, Congress created the Board of Tax Appeals (the Tax Court's predecessor), which had jurisdiction to determine whether a particular taxpayer was liable for tax. Revenue Act of 1924, Pub. L. No. 68-176, ch. 234, §§ 274, 308, 900, 43 Stat. 253, 297, 308, 336. Two years later, in the predecessor to current section 6213(a), Congress clarified that the IRS could not assess or collect tax from the taxpayer

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[5] In general, a tax "deficiency" results when the full amount of the correct tax exceeds the amount reported on the return. I.R.C. § 6211; Saltzman & Book, IRS Practice and Procedure ¶10.03[1].

[6] By contrast, "refund" litigation occurs after a taxpayer has paid the tax liability, filed a timely claim for refund, and then filed suit in the appropriate U.S. federal district court or the U.S. Court of Federal Claims. *See* I.R.C. § 7422; Kafka & Cavanagh, *Litig. of Fed. Civil Tax Controversies* ¶ 1.01 (Thomson Reuters/Tax & Acct. June 2020).

during those proceedings. Revenue Act of 1926, Pub. L. No. 69-20, ch. 27, §§ 274(b), 308(a), 44 Stat. 9, 55, 75; *see* Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 Va. L. Rev. 1683, 1729 (2017). Congress renumbered the provisions and updated the cross-references in subsequent iterations of the Code, but the substantive text and fundamental concepts have remained intact. Hickman & Kerska, *supra*, at 1730.

Currently, section 6212(a) authorizes the IRS to send a notice of deficiency to a particular taxpayer for an amount of tax allegedly due. That notice serves as the taxpayer's "ticket to the Tax Court" to challenge the alleged tax liability before paying any taxes allegedly owed. If the taxpayer files a Tax Court petition, section 6212(c) prohibits the IRS from determining additional deficiencies except under specifically enumerated circumstances, including fraud and math errors.

Section 6213(a) describes the requirements for filing a petition and precludes the IRS from assessing tax until the case has become final. That exception to the AIA allows the Tax Court (or another federal court with jurisdiction) to enjoin any IRS assessment or collection action regarding the tax year at issue.

2. The Employment-Tax-Litigation Exception. Another exception relates to employment taxes, including taxes under the Federal Insurance Compensation Act ("FICA") and the Federal Unemployment Tax Act ("FUTA"), and to wage-withholding requirements. I.R.C. Subtitle C, chs. 21-25. Generally, employers must withhold tax from compensation paid to their employees but not to independent contractors. I.R.C. §§ 3121(c), 3402. The

classification of workers as one or the other sometimes leads to disputes, so section 7436 allows taxpayers to sue in the Tax Court to resolve worker-classification issues and thereby determine the taxpayer's employment-tax liabilities. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1454, 111 Stat. 788, 1055-56. Section 7436(d)(1) applies the same principles of deficiency litigation to worker-classification determinations. Thus, the IRS cannot assess or collect the disputed employment tax until the litigation is final.

3. The Jeopardy-Assessment-Litigation Exception. If a taxpayer "is preparing to do something that will endanger the collection of his taxes," the IRS can terminate that taxpayer's current tax year and make the taxes for that year "due and payable immediately." *Laing v. United States*, 423 U.S. 161, 169-70 (1976). In *Laing*, this Court held that the AIA didn't prohibit a taxpayer from suing to enjoin the IRS from collecting a jeopardy deficiency (because in that case the IRS failed to follow certain statutory procedures). *Id.* at 184 n.27. Congress amended the Code partially in response to *Laing*. Staff of Joint Comm. on Taxation, 94th Cong., General Explanation of the Tax Reform Act of 1976, at 356-64 (Comm. Print 1976). Section 7429(b) authorizes taxpayers to sue the government for failing to follow the procedures required for a jeopardy assessment or levy. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1204(c)(11), 90 Stat. 1520, 1699. It also clarifies that the AIA does not bar a suit to enjoin IRS collection activity during the pendency of such litigation.

4. The Partnership-Litigation Exception. The most recent AIA carve-out is section 6232(c), which is part of the new partnership-audit regime. Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 1101(c)(1), 129 Stat. 584, 633. Under that regime, if the IRS determines that the net adjustments to partnership income reflect an understatement of the tax liability of the partners of the partnership for a particular year, the IRS will determine the amount allegedly owed—the "imputed underpayment." I.R.C. § 6225(b)(1). That determination—of a particular notional tax liability for a particular partnership—triggers certain procedural options for challenging the specific tax liability, including the ability of the partnership to file a petition in a federal court within 90 days for a readjustment of the alleged underpayment. I.R.C. § 6234(b)(1). Section 6232(c) prohibits the IRS from assessing or collecting tax on the alleged underpayment during the 90-day period for filing a petition and until the court's decision is final.

These six exceptions go to the heart of the AIA—they all contemplate (and except) challenges to the IRS's actions to assess and collect tax from particular taxpayers with specific tax liabilities and with whom the IRS has already taken some assessment or collection action. The focal point of judicial review in each of these exceptions, as with the AIA itself, is a particular taxpayer's tax liability—not a purely legal dispute regarding a regulation's validity that occurs at a stage of the taxation process that precedes assessment or collection.

B. The Collection-Litigation Exceptions. The other seven exceptions preclude the government from

taking collection action when the taxpayer is already challenging an ongoing IRS collection action.

1. Collection-Due-Process Proceedings. After assessing a particular taxpayer's tax liability, the IRS may levy—seize and sell—the taxpayer's property to satisfy the unpaid liability. *See* I.R.C. Subtitle F, ch. 64 (Collection). To challenge that action, the taxpayer can ask the IRS Office of Appeals to hear various defenses to the collection action, challenges to the appropriateness of collection actions, and collection alternatives. I.R.C. § 6330(a)(3)(B), (c)(2). If a taxpayer requests a hearing, then section 6330(e)(1) prohibits the IRS from levying on property to satisfy the taxpayer's tax liability. That prohibition continues if (1) the taxpayer and IRS Appeals cannot resolve the disputed issues, (2) the IRS issues a notice of determination, and (3) the taxpayer petitions the Tax Court to review the determination. Again, this AIA exception applies to specific action against a specific taxpayer to collect a specific tax liability.

2. Divisible-Tax Litigation. Divisible taxes are taxes on "each transaction or event." *Flora v. United States*, 362 U.S. 145, 171 n.37 (1960). They include certain excise taxes as well as FICA, FUTA, income-withholding taxes, and the 100% penalty under section 6672. *See* Kafka & Cavanagh, *supra*, ¶ 15.03[2]. The Tax Court lacks jurisdiction over such taxes, so litigation occurs in refund forums. *Id.*; *see also* I.R.C. § 6211 (limiting Tax Court jurisdiction to income, estate, gift, and other specified taxes). Normally, a taxpayer must pay the full amount of the disputed tax to litigate in a refund forum. *Flora*, 362 U.S. at 177. Yet in disputes involving divisible taxes, the taxpayer need pay only the amount related to a

single transaction or event. Section 6331(i) prohibits the IRS from collecting tax by levy from particular taxpayers if the taxpayer has pending federal litigation for the recovery of a divisible tax.

3. The "100%" Penalty. In general, employers must collect income tax from employees and pay those funds to the government. I.R.C. § 3402. If a person who is responsible for doing so fails to collect and pay over such taxes, then section 6672(a) imposes a 100% penalty on the full amount of taxes that were supposed to be paid over. To sue for a refund of the entire amount, a taxpayer need only pay the tax applicable to a single employee. *See, e.g.*, *Steele v. United States*, 280 F.2d 89, 91 (8th Cir. 1960) (responsible person may pay the portion of the penalty applicable to the withheld taxes of any individual employee, claim a refund, and sue to determine the penalty liability for all other employees). For an employer with many employees, this amount could be a small fraction of the disputed liability. If the "responsible person" properly files suit, then section 6672(c) prohibits the IRS from taking action to collect the rest of the disputed liability. Section 6672(c) does so by allowing a court to enforce that prohibition, notwithstanding the AIA.

4. Wrongful-Levy Litigation. Sometimes the IRS attempts to collect tax from the wrong person. To combat that error, Congress enacted section 7426(a) and (b)(1), which offer the exclusive remedy for third-party wrongful-levy claims. Federal Tax Lien Act of 1966, Pub. L. No. 89-719, § 110, 80 Stat. 1125, 1143. Thus, when the government attempts to seize and sell a person's property, and that property does not belong to the taxpayer who is subject to the levy action, the

third party can sue to contest the levy. *See EC Term of Years Trust v. United States*, 550 U.S. 429, 431-32 (2007). Section 7426(a) provides that an individual may sue the United States for wrongful levy. Section 7426(b)(1) authorizes the federal district court to enjoin the levy.

5. Return-Preparer-Penalty Litigation. Section 6694(a) and (b) penalize tax-return preparers who take unreasonable, willful, or reckless positions on tax returns that cause an understatement of the taxpayer's tax liability. Congress added these penalties to the Code in the Tax Reform Act of 1976 § 1203(b)(1). In 1978, Congress clarified that if a return preparer challenges the penalty, the government cannot invoke the AIA to bar an action against the IRS. Act of Nov. 10, 1978, Pub. L. No. 95-628, § 9(b)(1), 92 Stat. 3627, 3633. Currently, section 6694(c) allows a return preparer to pay only 15% of the asserted penalty and then file a refund claim to challenge the penalty. At that point, section 6694(c) precludes the IRS from taking levy action until final resolution of the dispute.

6. The Innocent-Spouse-Litigation Exception. The Internal Revenue Service Restructuring and Reform Act of 1998 included so-called innocent-spouse relief. Pub. L. No. 105-206, § 3201(a), 112 Stat. 685, 734. Typically, married taxpayers who file a joint return are jointly and severally liable for the entire tax liability. I.R.C. § 6013(d). Section 6015 provides equitable relief to spouses who, under certain facts and circumstances, should not be liable for the tax. If the IRS denies innocent-spouse relief, then section 6015(e) gives the

Tax Court jurisdiction to determine whether the IRS's denial was erroneous.

Collectively, the thirteen enumerated exceptions to the AIA confirm that the Act's focus is on litigation brought by specific taxpayers to enjoin currently pending IRS assessment or collection action. These exceptions were needed because the scope of the AIA would otherwise block such suits. Not a single exception concerns litigation—such as a pre-enforcement action under the APA—outside of currently pending enforcement action.

II. A STRAIGHTFORWARD APPLICATION OF THE PLAIN TERMS OF THE AIA CAN BE HARMONIZED WITH THE APA'S STRONG PRESUMPTION OF JUDICIAL REVIEW.

The AIA targets a particular remedy—the equitable remedy of injunction. It was enacted in 1867 to prevent taxpayers from filing suit in equity for a "bill to restrain" the assessment or collection of illegal tax against them. *See, e.g.*, Roger Foster & Everett V. Abbott, *A Treatise on the Federal Income Tax Under the Act of 1894* 231 (1895); *Cutting v. Gilbert*, 6 F. Cas. 1079 (C.C.S.D.N.Y. 1865) (suit for a "writ of injunction" to "stay the assessment and collection" of tax due on stock sales). These suits were problematic because they permitted taxpayers to grind ongoing assessment and collection to a halt. At the time, Congress was not concerned about pre-enforcement suits to challenge tax rules. Treasury did not issue extensive rules, and the administrative state as we know it had not yet materialized; the APA wasn't even a twinkle in Congress's eye.

Since the 1946 enactment of the APA, Congress has repeatedly amended and re-enacted the AIA and never sought to expand the AIA to cover pre-enforcement challenges to agency rulemaking. This is telling given the dramatic growth of the modern administrative state. *See City of Arlington, Tex. v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) ("The Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities.") (internal citation omitted).

Congress's choice to not amend the AIA to cover pre-enforcement challenges to agency rulemaking makes sense. A suit by a taxpayer to enjoin an assessment or collection action differs from a pre-enforcement challenge to agency rulemaking. Whereas suits to enjoin an assessment or collection action under the AIA are taxpayer-specific, challenges to an agency's rulemaking are not. Instead, a suit challenging agency rulemaking generally focuses on whether the statute authorizes the agency's action, whether the agency's decisionmaking process was reasoned, and whether the agency complied with pertinent procedural requirements. *See* 5 U.S.C. § 706(2)(A), (C), (D).

Correspondingly, while a taxpayer's challenge to an assessment or collection action will enjoin assessment or collection of tax if the suit is successful, a pre-enforcement challenge to agency rulemaking under the APA does not stop the IRS from assessing or collecting tax against any taxpayer. For example, even if a challenge to a regulation is successful and a court vacates the regulation due to a failure of

reasoned decisionmaking, the IRS's revenue and collection agents still may pursue assessment and collection actions against taxpayers under the applicable statute and any remaining *valid* regulations. The APA suit would simply have established that a given regulation was invalid. It does not stop the agency from doing anything.

While Congress was not concerned with suits to challenge agency rulemaking when it enacted the AIA, Congress did thoroughly consider challenges to agency rulemaking when in enacted the APA. Congress enacted the APA to implement procedures to ensure that administrative agencies—which were taking an outsized role in lawmaking—were "accountable to the public and their actions subject to review by the courts." *Franklin v. Mass.*, 505 U.S. 788, 796 (1992). Consistent with that intent, the APA imposed notice-and-comment rulemaking requirements to ensure that regulated parties could participate meaningfully in the promulgation of rules. 5 U.S.C. § 553. The APA's rulemaking requirements facilitate "a genuine interchange" of views intended to yield "improved rules." *See Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 533 (D.C. Cir. 1982). "In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979).

For these requirements to have any teeth, Congress knew that the public had to be able to challenge the agency's rulemaking. This was critical

because "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking." *Judulang v. Holder*, 565 U.S. 42, 53 (2011). So Congress authorized judicial review under the APA, including judicial review of agency rulemaking, except to the extent precluded by statute. 5 U.S.C. § 701(a)(1). This Court has repeatedly sanctioned pre-enforcement judicial review of agency rulemaking. *See, e.g.*, *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967). Indeed, pre-enforcement judicial review is often the only effective way for regulated parties to obtain timely and meaningful administrative review. The APA thus contains a "strong presumption" in favor of judicial review, *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), and permits pre-enforcement challenges to agency rulemaking absent "clear and convincing evidence" of congressional intent to withhold judicial review. *Abbott Labs.*, 387 U.S. at 141 (quoting *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962)); *see also* H.R. Rep. No. 79-1980, at 41 (1946).

The APA does not exempt tax regulations from pre-enforcement challenges. "The IRS is not special in this regard; no exception exists shielding it—unlike the rest of the Federal Government—from suit under the APA." *Cohen v. United States*, 650 F.3d 717, 723 (D.C. Cir. 2011) (en banc). Permitting pre-enforcement challenges to tax rules harmonizes the text and purpose of the APA and AIA. Without pre-enforcement review, Treasury is insulated from the public accountability that Congress intended for *all* agencies. Giving tax regulations a free pass from prompt judicial scrutiny fosters uncertainty, delays resolution of viable questions of regulatory validity,

and forecloses judicial review of many tax regulations (given the financial and administrative difficulties of challenging a regulation post-enforcement). And, as detailed below, the uncertainty engendered by barring pre-enforcement challenges complicates compliance with the tax law and creates a drag on the economy.

Despite this uncertainty, and contrary to the APA's presumption of judicial review, some lower courts have elevated policy over plain statutory text out of concern that permitting a pre-enforcement challenge to a tax rule will allow taxpayers to recast their suits to enjoin the assessment and collection of their taxes as suits to challenge agency rulemaking. They worry that this will "reduce the [AIA] to dust." *CIC Servs., LLC v. IRS*, 925 F.3d 247, 254 (6th Cir. 2019) (quoting *Fla. Bankers Ass'n v. U.S. Dep't of the Treasury*, 799 F.3d 1065, 1071 (D.C. Cir. 2015)). So they apply the AIA beyond its original purpose and its natural textual bounds to cover pre-enforcement suits that might hamper taxation—as opposed to suits that actually enjoin the IRS from assessing or collecting tax against a particular taxpayer. This policy concern is flawed in at least three ways.

First, the fear of pulverizing the AIA is unfounded. The vast majority of IRS assessment and collection efforts do not implicate challenges to agency rulemaking. Suits that challenge a rulemaking constitute a minuscule percentage of taxpayer challenges to IRS action. The AIA would continue to apply to bar suits by taxpayers to enjoin assessment or collection actions, which was the sole problem that the AIA was enacted to solve.

Second, the related premise that pre-enforcement review will somehow hamper tax assessment and collection actions is also mistaken. Resolving an open question about a rule's validity sooner rather than later *facilitates* the assessment and collection of taxes rather than hampers it. Certainty in the law eliminates confusion and minimizes the administrative problems caused by a court decision that invalidates a regulation a decade or more after it is issued. *Abbott Labs.*, 387 U.S. at 154 (pre-enforcement review helps to "speed enforcement"). Perhaps more importantly, pre-enforcement review does not prevent the IRS from assessing or collecting tax against a particular taxpayer. Even if an agency's rule is set aside, the IRS may—depending on the circumstances—issue a new rule or continue to pursue assessment and collection of tax based on the applicable statute and on otherwise valid regulations.

Third, perceived policy concerns do not override plain statutory text. "The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Abbott Labs.*, 387 U.S. at 141 (quoting Jaffe, *Judicial Control of Admin. Action* 357 (1965). As shown above, Congress has not foreclosed pre-enforcement judicial review of tax rulemaking.

One additional policy concern merits particular scrutiny. Lower courts often depart from the AIA's plain text based on the notion that the "manifest purpose" of the AIA is to allow the IRS to assess and collect taxes "without judicial intervention" and "to require that the legal right to the disputed sums be determined in a suit for refund." *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962). This

process purportedly "assured [the United States] of prompt collection of its lawful revenue." *Id.* In the context of *Williams Packing*, that policy makes sense. If a particular taxpayer is already enmeshed in the IRS assessment and collection process, then the taxpayer must seek resolution through the proper procedural paths provided to challenge IRS assessment and collection actions. But taken out of that context, and applied more broadly to the wholly unrelated issue of pre-enforcement challenges to tax rules, those policy justifications collapse.

For one thing, interpreting the AIA as channeling all tax litigation to refund suits—in which a taxpayer must pay the full amount of tax before filing suit—contradicts multiple specific provisions of the Code, including most of the AIA exceptions. Most tax litigation is already "prepayment," in the Tax Court. According to IRS statistics, during the 10-year period from 2007 to 2017, there was an annual average of 29,400 docketed tax cases. The split between the deficiency forum and the refund forums is telling: 97% of these cases were docketed in the Tax Court, while all federal district courts and the Court of Federal Claims handled the remaining 3%.[7]

The dollars at issue tell a similar story. The average annual amounts in dispute over that same 10-year period were $32 billion, with about 68% litigated in the Tax Court and the remaining 32% split between the federal district courts and the Court

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[7] *See* Am. Bar Ass'n, Tax Section Court Procedure Comm., IRS Office of Chief Counsel FY 2018 & FY2019 2d Quarter presentation, slide 5, https://proceduralltaxing.com/statistics-on-cases-in-litigation-from-aba-tax-section-meeting-in-may/.

of Federal Claims.[8] The IRS apparently hasn't provided more detailed numbers, but some percentage of tax dollars at issue in the refund forums relates to taxpayers who sat on their rights and missed the 90-day window to petition the Tax Court or to situations in which Tax Court specifically lacked jurisdiction.

The vast majority of tax litigation thus arises under the Code sections listed in the AIA's thirteen enumerated exceptions, which authorize taxpayers to sue to preclude assessment or collection in many circumstances. That broad ability to sue before the IRS assesses or collects tax wholly undermines the tired, old canard that the AIA is necessary to keep tax dollars flowing to the federal fisc. If Congress had that concern, it wouldn't have allowed any of the AIA exceptions and instead would have forced all taxpayers into refund litigation.

If Congress was concerned about the effect of APA actions on the public fisc, it could have amended the APA or the Code to preclude judicial review of some category of challenges to tax regulations. Indeed, the APA contemplates that statutes may preclude judicial review. 5 U.S.C. § 701(a)(1) and (2). But these carve-outs are narrowly construed. *See Abbott Labs.*, 387 U.S. at 141 (the APA's "'generous review provisions' must be given a 'hospitable' interpretation") (quoting *Shaughnessy v. Pedreiro*, 349 U. S. 48, 51 (1955)).

In remarkably similar circumstances, this Court has rejected an agency's attempt to apply a statutory-reviewability prohibition beyond its terms. In *Reno v. American-Arab Anti-Discrimination Commission*,

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[8] *Id.* at slide 3.

525 U.S. 471, 478 (1999), the Justice Department contended that an immigration statute restricted judicial review of "all or nearly all deportation claims." The statute, 8 U.S.C. § 1252(g), generally prohibits a court from "hear[ing] any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this [Act]." This Court concluded that far from precluding review of all deportation claims, the statute was limited to the three specific agency actions mentioned in its text: the decisions to (1) commence proceedings, (2) adjudicate cases, and (3) execute removal orders. The statute did not apply more broadly to the "many other decisions or actions that may be part of the deportation process." *Reno*, 525 U.S. at 482. Congress's focus on these "three discrete events" was not "a shorthand way of referring to all claims arising from deportation proceedings." *Id.* This Court noted that it was "aware of no other instance in the United States Code in which language such as this has been used to impose a general jurisdictional limitation." *Id.* Yet that is precisely what the Government attempts to do with the AIA. Rather than giving meaning to "restrain[]," "assessment," and "collection," the Government (and the court below) erased those terms and penciled in "affect taxation." Two discrete parts of the taxation process do not embrace the whole. This Court should apply the AIA in the same way that it applied 8 U.S.C. § 1252(g)—by its terms, and consistent with the APA's strong presumption favoring judicial review.

III. AN OVERBROAD APPLICATION OF THE AIA PERPETUATES TREASURY'S LACK OF ACCOUNTABILITY AND FOSTERS UNCERTAINTY AMONG REGULATED PARTIES.

The government wants to use the AIA to insulate Treasury from any pre-enforcement judicial review. This blanket immunity is bad for everyone. It is bad for our judicial system because it makes it harder for courts to timely review agency rules. It is bad for Congress because it makes it harder to ensure that Treasury adheres to statutory mandates. It is bad for our tax system because it delays certainty and takes one or two decades simply to get clarity on whether a tax regulation is valid. It is bad for taxpayers because the resulting uncertainty makes it harder to conduct business and report and pay taxes. It is bad for the government because a dubious regulation makes it harder to audit taxpayers and ensure uniform application of the tax laws. And it is bad for the economy because uncertain tax laws increase compliance costs and result in less investment.

Prolonged uncertainty in the tax law festers and causes more pain for everyone. Flatly prohibiting pre-enforcement judicial review exacerbates the problem. Prompt judicial review resolves questions about an agency's rulemaking soon after the rulemaking is final. And prompt validity challenges facilitate clarity before any taxpayer files a tax return for the first affected taxable year.

Without pre-enforcement review, a taxpayer must wait until the first taxable year impacted by the regulation closes, prepare its tax return, and then challenge the rulemaking either through a refund or a deficiency suit. For a refund suit, the taxpayer must

pay the disputed tax, prepare and submit a refund claim, wait until the IRS acts (or fails to act) on that claim, and file suit. I.R.C. § 7422. Completing all of these steps may take several years. The issues in litigation are not limited to the validity of the rulemaking. The government may challenge any aspect of the taxpayer's tax liability to show that no refund is due. *Lewis v Reynolds*, 284 U.S. 281, 283 (1932) Accordingly, refund suits frequently involve extensive discovery and require resolution of issues beyond the challenged rulemaking. Resolving the issues in a refund suit could take a decade or more.

Deficiency suits take even longer. After filing a return, the taxpayer must wait for the IRS to begin an audit, which could take one to three years from the time the taxpayer files its income tax return. The IRS generally takes another two to five years to complete the audit and to determine adjustments by issuing a Notice of Deficiency. I.R.C. § 6212. Only then can the taxpayer bring a deficiency suit in the Tax Court, which could take several more years to resolve.

Forcing taxpayers to challenge tax rules only through refund or deficiency suits keeps invalid regulations in force for upwards of 20 years or more. *See, e.g.*, *Dominion Res., Inc. v. United States*, 681 F.3d 1313 (Fed. Cir. 2012) (tax regulation vacated 18 years after finalization). In the interim, affected taxpayers must deal with the resulting uncertainty, which increases compliance costs, complicates decisions as to whether to make a particular investment or pursue a particular business transaction, and exposes taxpayers to civil or criminal penalties for non-compliance with the potentially invalid regulation. *See* PricewaterhouseCoopers,

Paying Taxes: The Compliance Burden 10 (compliance costs increase by an average of 39% in systems in which tax rules are complicated or ambiguous); NFIB Research Found., *Regulations*, 13 Nat'l Small Bus. Poll 7 (2017) (tax rules cause the greatest difficulties of any type of regulation), http://www.411sbfacts.com/files/Regulations%202017.pdf. Public companies also must deal with financial-accounting reserves that distort financial reporting when based on uncertainty about whether particular IRS guidance has the force of law.

And if a regulation is ultimately held to be invalid, taxpayers must file amended returns to have their dollars returned, which increases costs and compliance burdens. Moreover, the long delay between the issuance of a rule and enforcement means that the millions of taxpayers that are unable to challenge invalid regulations post-enforcement often lose their right to recover the taxes unlawfully collected by the IRS—the Code generally bars suits for claims filed more than three years after the return is filed or more than two years after the tax is paid (whichever occurs later). I.R.C. § 6511(a). Taxpayers thus can lose hundreds of millions of dollars that the IRS had no legal right to collect.

Shrouding tax regulations in "a fog of uncertainty" undermines the entire purpose of written laws, which "are meant to be understood and lived by." *Wis. Cent. Ltd. v. United States*, 138 S.Ct. 2067, 2074 (2018). Uncertainty increases the number of tax disputes to the detriment of our judicial system, our system of tax administration, and our taxpayer community. *See* Staff of Joint Comm. on Taxation, Complexity in the Federal Tax System (JCX-49-15), at 16-17 (Mar. 6,

2015) (complexity and ambiguity in the tax laws may increase disputes and costs for the government and taxpayers). And it is an empirical fact that individuals and businesses (small and large) abandon certain investments and other economically productive activities because of uncertain tax laws. *See* Martin Jacob et al., *Real Effects of Tax Uncertainty: Evidence from Firm Capital Investments* (2019) ("finding that, on average, firms facing relatively higher tax uncertainty delayed large capital investments and had lower annual capital expenditures"), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2518243. This uncertainty could produce fewer jobs, reduce capital investments, and cripple U.S. competitiveness in the global marketplace.

Pre-enforcement review decreases the time in which the law is uncertain and eliminates the multitude of problems that arise when it takes one or two decades to fully resolve a question of regulatory validity. It also permits Treasury to fix procedural defects quickly. If a court invalidates a tax regulation in response to a timely pre-enforcement challenge, Treasury can cure any procedural errors promptly. In contrast, a regulation invalidated after 15 or 20 years limits Treasury's ability to take necessary corrective action. Hampering the IRS's ability to take prompt corrective action can deprive the public fisc of billions of dollars of tax revenues that it could have otherwise collected, creating the very problem that the AIA seeks to solve.[9] Moreover, pre-enforcement litigation that is relatively contemporaneous with issuance of a

[9] While section 7805(b)(4) allows Treasury to correct "procedural defects" retroactively, the scope of that remedy is limited by the timing restrictions of section 7805(b)(1).

tax regulation helps to ensure that the full administrative record is intact, easy to locate, and not obscured, lost, or destroyed over time.

Further, pre-enforcement review avoids placing taxpayers in the no-win position of having to risk substantial civil or criminal penalties by intentionally violating a dubious regulation in order to challenge the agency's rulemaking. I.R.C. § 6662(b)(1); Treas. Reg. § 1.6662-3(b)(2) (imposing 20-percent penalty for disregard of rules or regulations, which Treasury interprets to include temporary regulations and IRS Notices issued without notice-and-comment). Taxpayers should not be required to risk criminal exposure or serious financial penalties to challenge a tax regulation.

Facilitating judicial review also reduces non-compliance with the APA's rulemaking requirements by holding Treasury more accountable through timely judicial review. Treasury has a long and troubling history of disregarding the APA's notice-and-comment rulemaking requirements. *See, e.g.*, Kristin Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 Notre Dame L. Rev. 1727 (2007) (detailing Treasury's spotty track record of compliance with the APA's notice-and-comment requirements). The IRS's regulatory-drafting guidance encourages this non-compliance by contending that "most IRS/Treasury regulations are interpretative, and therefore not subject to the notice-and-comment provisions of the APA." IRM 32.1.5.4.7.4.1(3) (Aug. 21, 2018). Yet despite this Court's holdings that legislative rules have the force and effect of law and interpretive rules do not (*see,*

e.g., *Perez v. Mortgage Bankers Association*, 575 U.S. 92, 95-97 (2015)), the IRS claims that "IRS/Treasury regulations have the force and effect of law even though they are interpretative regulations." IRM 32.1.5.4.7.4.1(9) (Aug. 21, 2018).

Even when Treasury acknowledges applicability of the APA, it has attempted to bypass the notice-and-comment process by inappropriately invoking the APA's good-cause exception. Although that exception typically applies only "in emergency situations, or where delay could result in serious harm," *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (internal citation omitted), Treasury asserts good cause for dispensing with notice-and-comment rulemaking because delaying the effective date "would provide taxpayers with the opportunity to engage in the transactions to which these rules relate with confidence that they achieve the intended tax avoidance results absent the applicability of the regulations." *See, e.g.*, 84 Fed. Reg. 28,398, 28,406. This generic assertion could apply to any Treasury regulation and pales in comparison to the life-or-death situations courts have recognized as actually constituting good cause.

Although Treasury's threadbare explanation would likely fail to withstand a procedural challenge, an overbroad application of the AIA precludes such a challenge, which generally needs to be made immediately, as long-delayed challenges are either flatly rejected or met with judicial skepticism. *See, e.g.*, *Publ. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 152 (D.C. Cir. 1990) (emphasizing the circuit's rule that "a statutory review period permanently limits the time within which a petitioner

may claim that an agency action was procedurally defective"). In the absence of pre-enforcement challenges, Treasury is encouraged to ignore basic procedural requirements and then later to argue that a taxpayer's APA suit is time-barred. This creates "a world in which no challenge to [the IRS's] actions is ever outside the closed loop of its taxing authority." *Cohen*, 650 F.3d at 726.

More problematic than disregarding the APA's procedural requirements, Treasury has taken a step further, promulgating regulations that are contrary to statute. Three examples from Treasury's recent regulations under the Tax Cuts and Jobs Act, Pub. L. No. 115-97, 94 Stat. 2390 (2017) ("TCJA"), are illustrative.

The TCJA profoundly altered the U.S. system of international taxation, implementing the most sweeping reform in decades. Dissatisfied by some of Congress's policy choices, Treasury undertook to "rectify" those policy decisions under the guise of interpreting the law. First, in Treasury Regulation section 1.78-1(c), Treasury instituted a "special applicability date," altering the effective date Congress prescribed for amendments to section 78. Second, in Treasury Regulation section 1.245A-5T(c), Treasury disallowed a deduction under section 245A with respect to amounts that meet all the statutory requirements Congress established for the deduction. Third, in Treasury Regulation section 1.965-5(c)(1)(ii), Treasury ignored limiting language ("for purposes of") under section 965(b)(4)(A), thereby expanding the scope of the statute and denying foreign tax credits that Congress expressly authorized.

These examples highlight Treasury's disregard for the bounds of statutory authority and its propensity for substituting its own policy judgment for the policy choice in the statute, blatantly ignoring this Court's mandate that an agency "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Although the tax community has widely acknowledged the invalidity of Treasury's rules in the above examples, such rules nonetheless purport to have the effect of law, and taxpayers who disregard the rules are threatened with substantial penalties. As noted above, if challengers are denied a voice until enforcement, they face fact-intensive litigation often involving extensive discovery, an extensive stipulation process, analysis of wholly collateral issues, and a host of other factors increasing the time and resources necessary to bring a challenge.

Because few taxpayers are willing and able to make the investment required to hold Treasury accountable on a post-enforcement basis, an overbroad reading of the AIA inhibits the judicial check needed to ensure that Treasury acts only in accordance with delegated authority. Agencies can issue rules with the force and effect of law, but "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9. As discussed above, the AIA was intended to preclude interference with the IRS's tax enforcement actions, not to shield regulatory interpretations from judicial review.

In sum, the AIA does not justify the stark disparity between tax and other areas of regulation, in which regulated parties can bring pre-enforcement challenges to agency action to obtain clarity in the law and avoid inconsistent and inefficient outcomes. Treasury's failure to comply with the APA and its disregard for the bounds of executive authority create uncertainty within a body of law that demands clarity. A fair and historically faithful reading of the AIA enables pre-enforcement judicial review and restores Treasury to accountability.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and clarify that the AIA does not bar pre-enforcement challenges to the validity of tax rules under the APA.

Respectfully submitted,

JOSEPH B. JUDKINS
Counsel of Record
A. DUANE WEBBER
GEORGE M. CLARKE
DANIEL A. ROSEN
JOSHUA ODINTZ
PHILLIP J. TAYLOR

ELAINE WILKINS
BAKER & MCKENZIE LLP
815 Connecticut Ave NW
Washington, DC 20006
(202) 452-7000
joseph.judkins@
bakermckenzie.com

Counsel for Amici Curiae

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