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

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INTEREST OF AMICUS CURIAE[1]

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

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

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[1] Consistent with Supreme Court Rule 37.3(a), *Amicus* files this brief with the written consent of both parties. Consistent with Supreme Court Rule 37.6, *Amicus* hereby certifies that this brief was not authored in whole or in part by counsel for any party and that *Amicus* received no monetary contribution toward the preparation or submission of this brief other than the general financial support of the academic institution with which she is affiliated.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In 1967, the Supreme Court held that the Administrative Procedure Act (APA) "embodies a basic presumption" of pre-enforcement judicial review of agency regulatory actions that courts should disregard "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140–41 (1967). The Court also has recognized that Congress adopted the APA "to bring uniformity to a field full of variation and diversity," that of judicial review of administrative action. *Dickinson v. Zurko*, 527 U.S. 150, 155 (1999). In *Mayo Foundation for Medical Education and Research* v. *United States*, the Court extended that presumption of administrative law uniformity particularly to tax cases—declaring that the Court was "not inclined to carve out an approach to administrative review good for tax law only." 562 U.S. 44, 55 (2011).

The Anti-Injunction Act (AIA), 26 U.S.C. § 7421(a), provides in principal part that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."[2] The question

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

before the Court is whether the AIA—a provision adopted in 1867, long before the APA or the modern administrative state, and in support of a very different system of tax administration—is a statutory exception to these general principles. Put slightly differently, the question is whether the AIA clearly exempts Treasury Department (Treasury) and Internal Revenue Service (IRS) rules and regulations from pre-enforcement judicial review under *Abbott Labs* and its progeny, which as a practical matter in many cases would mean shielding them from judicial review altogether.

The Court's existing jurisprudence interpreting the AIA fails to answer this question. The fact patterns are too disparate, and the reasoning too variable, to chart a clear analytical through-line. The Court spoke sweepingly in *Bob Jones University v. Simon*, 416 U.S. 725 (1974), and its companion *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974), holding only that the AIA precluded judicial review of IRS decisions to revoke the tax-exempt status of a university and a nonprofit organization, respectively, but using terms that would seem to bar pre-enforcement judicial review in virtually any case with even the most tangential connection to an eventual tax assessment. But Congress adopted legislation to reverse the holdings in those cases. And since those cases, the Court repeatedly has allowed judicial review in tax cases notwithstanding the AIA, including where the reasoning in *Bob Jones University* and *"Americans United"* would seem clearly to apply. *See, e.g., NFIB v.*

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v. Apfel, 226 F.3d 291, 300–01 (4th Cir. 2000) ("[T]he two statutory texts are, in underlying intent and practical effect, coextensive.").

Sebelius, 567 U.S. 519, 543–46 (2012); *South Carolina v. Regan*, 465 U.S. 367, 378, 380–81 (1984); *Comm'r v. Shapiro*, 424 U.S. 614, 628–30 (1976); *Laing v. United States*, 423 U.S. 161, 183–84 (1976). Stare decisis has little to offer in this instance.

Setting aside the ebb and flow of the Court's past jurisprudence, the best interpretation of the AIA instead considers the more than 150 years of statutory text, history, and purpose of the AIA as part of a comprehensive statutory scheme of federal tax administration and enforcement. *See* Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 VA. L. REV. 1683, 1719–54 (2017) (conducting that analysis). That statutory and historical analysis supports a conclusion that the AIA's scope was, is, and should be limited to circumstances that are directly and temporally proximate to IRS enforcement efforts against specific taxpayers suspected of noncompliance with the tax laws. Moreover, that analysis allows the Court to harmonize and give simultaneous effect to the AIA and the APA—permitting the AIA to play its historic role of precluding judicial review where individual taxpayers seek to hinder the progress of actual and ongoing (rather than hypothetical) enforcement efforts, but also allowing pre-enforcement judicial review of claims under the APA that Treasury and IRS rules and regulations exceed statutory authority, violate procedural requirements, or are arbitrary and capricious.

The AIA was enacted to protect the government's revenue stream from judicial interference. Pre-enforcement judicial review of Treasury and IRS rules and regulations supports,

rather than undermines, that goal by enhancing public perceptions that the tax system is fairly administered. Treasury and the IRS have a poor track record of compliance with APA procedural and process requirements. Further, a growing percentage of Treasury and IRS rules and regulations implement social welfare and regulatory programs with only a tangential relationship to the tax system's traditional revenue raising mission. *See* Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717 (2014) (documenting the topical allocation of Treasury regulations); *cf. King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (recognizing the IRS's role in administering the Affordable Care Act as outside the agency's traditional expertise). Without pre-enforcement judicial review, many of those rules and regulations will evade judicial review entirely because the private parties subject to them cannot simply file a tax return and sue for a refund. Extending the AIA to preclude pre-enforcement judicial review of those rules and regulations would shield Treasury and the IRS from being held accountable for the consequences of their own noncompliance with the law. Pre-enforcement judicial review is necessary to preserve tax system integrity.

ARGUMENT

I. THE APA PRESUMES PRE-ENFORCEMENT JUDICIAL REVIEW OF AGENCY RULES AND REGULATIONS AND A POLICY OF ADMINISTRATIVE LAW UNIFORMITY ABSENT CLEAR EVIDENCE SUPPORTING A DEPARTURE.

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

In *Abbott Laboratories, Inc. v. Gardner*, this Court interpreted the APA's judicial review provisions as adopting a presumption in favor of pre-enforcement judicial review of final agency rules and regulations. 387 U.S. 136, 140–41 (1967). In considering the availability of pre-enforcement judicial review for regulations adopted by the Food and Drug Administration, the Court declined to read provisions of the Federal Food, Drug, and Cosmetic Act as supplanting that presumption absent "'clear and convincing evidence' of a contrary legislative intent." *Id.* at 141 (quoting *Rusk v. Cort*, 369 U.S. 367, 379–80 (1962)). Further, the Court cited as justification for this presumption "the very real dilemma" alternatively faced by parties subject to regulation—that of complying with regulations they believe to be invalid or "facing serious penalties attached to

noncompliance" should that belief prove wrong, simply to obtain judicial review of their concerns. *Id.* at 153.

Congress through APA § 559 instructed courts that "[s]ubsequent statute may not be held to supersede or modify" APA rulemaking requirements "except to the extent that it does so expressly." 5 U.S.C. § 559. Although the AIA predates the APA by several decades, and APA § 559 also provides that the APA "do[es] not limit or repeal additional requirements imposed by statute or otherwise recognized by law," the Court has understood APA § 559 generally as a command from Congress to read the APA and specific statutes like the AIA where possible to give maximum effect to both. Consistent with this understanding, the Court has adopted a policy of uniformity in administrative law absent clear evidence that a statute or other law requires otherwise. In *Dickinson v. Zurko*, for example, the Court read APA § 559 as demanding "more than a possibility ..., and indeed more than even a bare preponderance of evidence" that a departure from the APA was warranted. 527 U.S. 150, 154–55 (1990). Observing that "[t]he APA was meant to bring uniformity to a field full of variation and diversity," the Court emphasized "the importance of maintaining a uniform approach to judicial review of administrative action," and declared that ***not*** setting such a high bar before deviating from the APA would "frustrate that purpose." *Id.*

In *Mayo Foundation for Medical Education and Research*, the Court extended these principles to the tax context, declining "to carve out an approach to administrative review good for tax law only" and citing *Zurko*. 562 U.S. 44, 55 (2011).

II. STATUTORY TEXT, HISTORY, AND PURPOSE SUPPORT CONSTRUING THE AIA TO HARMONIZE WITH THE APA.

The AIA precludes any suit "for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." What does it mean to *restrain* the *assessment* and *collection* of a tax?

"Courts have a 'duty to construe statutes, not isolated provisions." *Graham County Soil & Water Conservation District v. United States*, 559 U.S. 280, 290 (2010) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995)). Assessment and collection are not abstract concepts, but rather defined functions within the Internal Revenue Code, 26 U.S.C. § 1 *et seq.* (hereinafter in citations, IRC). IRC Chapter 63, entitled "Assessment," describes an assessment as "made by recording the liability of the taxpayer in the office of the [Treasury] Secretary in accordance with rules or regulations prescribed by the Secretary," IRC § 6203, and contains several provisions detailing aspects of the assessment function. IRC §§ 6201–6255. Correspondingly, IRC Chapter 64, entitled "Collection," authorizes the IRS to "collect the taxes imposed by the internal revenue laws" according to the several provisions governing that function. IRC §§ 6301-6344. Many of those provisions concern the methods and modes of collection activities, including facilitating third-party withholding and other advance tax payments. *See, e.g.*, IRC §§ 6304, 6306, 6307 & 6311. Others are quite clear, however, in limiting IRS collection actions to the period after assessment has occurred. *See, e.g.*, IRC §§ 6303, 6305, 6322 & 6325. Most of the provisions governing levy and distraint fall

within the collection provisions of IRC Chapter 64. *See* I.R.C. §§ 6330–6332, 6342.[3]

Restrain, on the other hand, "can have several meanings," ranging from "merely inhibit" certain acts to "stop (or perhaps compel)" those acts. *Direct Marketing Ass'n v. Brohl*, 575 U.S. 1, 12–13 (2015). The Court in *Direct Marketing* chose "stop" in interpreting the Tax Injunction Act, 28 U.S.C. § 1341 (2012). *Direct Marketing*, 575 U.S. at 13. The Court in the past has interpreted the Tax Injunction Act and the AIA similarly. *See Hibbs v. Winn*, 542 U.S. 88, 102–104 (2004). Should the Court adopt the same interpretation of restrain for the AIA?

This Court once noted that no recorded legislative history concerning the AIA exists. *Bob Jones University v. Simon*, 416 U.S. 725, 736 (1974). Hence, the AIA's history and purpose have been described as "shrouded in darkness." Note, *Enjoining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition*, 49 Harv. L. Rev. 109 (1935). But committee reports and floor speeches are not the only tools for discerning congressional intent, and the lack of that history should not be allowed to unmoor the AIA from its statutory context. The AIA is part of a much larger scheme of tax administration and enforcement that dates back to the Civil War era and has been evolving ever since. The tax laws, from Civil War revenue legislation through the present Internal Revenue Code, establish a system of assessment, collection, and judicial review. When one reads the AIA in that statutory context, not just today but over

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[3] The limitations period for collection by levy is addressed among other limitations provisions in Chapter 66. *See* IRC § 6502.

the 150 years since the provision's enactment, it is apparent that the narrower construction of restrain-as-stop is the appropriate one.

A. The AIA Was A Civil War-Era Enforcement Backstop, Targeting Efforts To Stop Enforcement In Progress Against Individual Taxpayers.

The AIA's text dates back to a package of new internal taxes, including a short-lived income tax, adopted by Congress to finance the Civil War. See Revenue Act of 1861, ch. 45, § 49, 12 Stat. 292, 309. Before the Civil War, the federal government was financed mostly through external taxes (i.e., tariffs) administered through customhouses at ports and border crossings. *See* NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940, at 221–27 (2013). The federal government had no system in place for administering internal taxes like the new income tax, so initially it collected no revenue from these taxes. *See* HARRY EDWIN SMITH, THE UNITED STATES FEDERAL INCOME TAX HISTORY FROM 1861 TO 1871, at 271 (1914). Congress adopted the Revenue Act of 1862 in part to fill that void. *See* Act of July 1, 1862, ch. 119, 12 Stat. 432. The 1862 Act established a Commissioner of Internal Revenue to administer that tax; authorized the President to divide the country into collection districts; and empowered the President, with the advice and consent of the Senate, to appoint the "assessors" and "collectors" tasked with enforcing the new income tax. *Id.* Preamble & § 2. The 1862 Act provided for withholding income taxes from the wages of government employees and from payments of dividends and interest made by corporations, *see id.* at

§ 86, but otherwise relied on a statutory process of return filing, assessment, and collection to ensure that new internal taxes were paid.

Specifically, the 1862 Act created a set of "General Provisions" "for the purposes of assessing, levying, and collecting" all of the "duties or taxes" imposed by the Act, from which provisions were then modified as appropriate for different types of taxes. Act of July 1, 1862 §§ 2–38. Although the 1862 Act did not define either "assessment" or "collection," it used those terms when describing in some detail the work to be performed by assessors and collectors. *Id.* §§ 6–16, 18–24, 31. For example, taxpayers were required to file income tax returns with assistant assessors for their districts by May 1, but their income taxes were not due until June 30. *See id.* §§ 91–92. Instead, the assistant assessors received the income tax returns, then visited taxpayers in their districts to investigate whether additional taxes might be due; if a taxpayer either failed to file a return or submitted an inaccurate tax return, then the assistant assessors prepared a return on the taxpayer's behalf. *See id.* §§ 7, 9, 93; *see also* Joseph A. Hill, *The Civil War Income Tax*, 8 Q.J. ECON. 416, 435–36 (1894) (describing the process of assessing income taxes). Based on returns filed and investigations performed, assistant assessors had thirty days after the statutory filing deadline to provide the assessors with alphabetized lists of taxpayers and the taxes they allegedly owed. *See* Act of July 1, 1862, § 14. The assessors then posted and publicized the lists, which served both as notice and as tentative assessments, informing taxpayers of their proposed tax liabilities. *See id.* § 15; *see also* Hill, *supra*, at 436 (noting the common custom of publishing taxpayer incomes and tax liabilities in local

newspapers). Taxpayers could appeal from those proposed assessments, and assessors were responsible for considering such appeals before submitting final lists of "sums payable" to their respective collection districts. Act of July 1, 1862, §§ 6, 16. Upon receiving the final lists from the assessors, collectors were charged with publishing the lists again, this time designating the listed taxes as due and triggering the start of the statutory period for making payment: ten days generally but thirty days for income taxes. *See id.* §§ 19, 92; *see also* SMITH, *supra*, at 275 (describing the collection process). When citizens failed to pay their taxes, they were assessed a ten percent penalty and given ten days to comply—after which their personal or real property could be levied and ultimately distrained. *See* Act of July 1, 1862, §§ 19–21, 23.

In short, with the exception of very limited third-party withholding from government employees, all of assessment, collection, and payment of taxes took place after tax returns were filed, based on the enforcement efforts of government assessors and collectors. However, judicial review of claims for declaratory and injunctive relief threatened to derail the enforcement process established by the 1862 Act. When collectors brought suit to seize and liquidate the property of delinquent taxpayers, taxpayers fought back by requesting declaratory and injunctive relief on the grounds that the taxes were "erroneously or illegally assessed." *See, e.g.*, *Roback v. Taylor*, 2 Bond 36, 20 F. Cas. 852, 852, 854 (C.C.S.D. Ohio 1866); *Magee v. Denton*, 5 Blatchf. 130, 16 F. Cas. 382, 382–83 (C.C.N.D.N.Y. 1863); *cf. Snyder v. Marks*, 109 U.S. 189, 192 (1883) (dismissing a challenge to an assessment of tax liability on AIA grounds). Courts in the Civil War era generally were reluctant to interfere

with tax collections in this way, but exceptions abounded. *See* 1 JAMES L. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS § 484 (2d ed. 1880). Subjecting the federal collection process to judicial supervision threatened to slow tax collections and thereby deprive the government of a constant stream of revenue.

To stop judicial review from thwarting that revenue stream, in the Revenue Act of 1867, Congress amended Section 19 of the 1862 Act to include the language paralleling that of the current AIA, preventing suits "restraining the assessment or collection of any tax." Revenue Act of 1867, ch. 169, § 10, 14 Stat. 471, 475. Congress did not elaborate on the scope of the amendment, but it had no need to do so. Section 19 was the part of the 1862 Act that provided the procedures for collecting taxes after the assessors supplied the collectors with the lists of taxes assessed. *See* Act of July 1, 1862, § 19. As the original § 19 described *how* revenue would be collected once taxes had been assessed, the new AIA language *facilitated* that specific process by ensuring that *individual cases* of assessment and collection in progress would not be stalled by judicial review. Congress did not need to include more terms in the AIA, such as "levy" or "distrain," because all were encompassed in the single provision describing the collection function. The association would have been understood from the AIA's textual context. *See id.* § 19 (including levy and distraint in describing the collection process for delinquent tax payments).

B. Changes In Tax Administration Have Reduced The AIA's Significance In Protecting The Government's Revenue Stream.

Since 1867, tax administration has changed quite a bit, particularly as regards the timing of return filing and tax payment vis-à-vis the formal assessment and collection functions. The assessment and collection functions themselves have not changed as much.

Congress allowed the Civil War income tax to expire in 1871 and abolished the assessor positions in 1872, but left in place a few internal taxes, and with them the remaining assessment and collection provisions of the 1860s revenue laws, including the AIA. *See* 1 Rev. Stat. §§ 3172–3231 (1875). Even as it adopted the corporate income tax in 1909 and the modern individual income tax in 1913, Congress initially retained much of the existing administrative structure that dated back to the Civil War, including the provisions governing the assessment and collection functions. *See* Revenue Act of 1913, ch. 16, § II.A–E, 38 Stat. 114, 166–71, 179–80. Employers other than the government were tasked briefly with withholding income taxes for the first time in 1913, but this unpopular measure was repealed for years later. *See* Anuj C. Desai, *What a History of Tax Withholding Tells Us About the Relationship Between Statutes and Constitutional Law*, 108 NW. U. L. REV. 859, 882 (2014). Otherwise, much as before, each taxpayer subject to the income tax needed to file a tax return, just with his home district collector rather than an assessor, and by March 1 rather than May 1. *See* Revenue Act of 1913, § II.D. As it did in the Civil War era, the IRS initially tried to examine virtually every

income tax return filed, and collectors (performing the function of the Civil War assistant assessors) could increase a tax liability upon giving notice to the affected person. Taxpayers could appeal such decisions to the Commissioner of Internal Revenue, who made assessments and notified taxpayers of their liability by June 1. Taxes again became due on June 30. Collectors had the same tools (levy and distraint) to bring recalcitrant taxpayers into compliance. *See id.*

Over the next forty years, however, Congress slowly modified these procedures until modern income tax administration took shape and diminished the practical significance of the post-return assessment and collection functions as the primary mechanism for funding the government. The expansion of the individual income tax and the addition of excess profits taxes to fund World War I, and the attendant difficulties of reviewing tax returns before assessing taxes, prompted Congress to make income tax payments due at the same time as the tax returns themselves, although taxpayers could elect to pay their taxes in four installments over the following year. *See* Revenue Act of 1918, ch. 18, §§ 227(a) & 250(a), 40 Stat. 1057, 1075, 1082–83 (1919); *see also* Harold Dubroff & Brant J. Hellwig, *The United States Tax Court: An Historical Analysis* 14–15 (2d ed. 2014) (describing administrative problems caused by World War I revenue legislation). After receiving the returns, the Commissioner of Internal Revenue still needed to make final lists assessing the tax liability of each person, which lists were then certified and sent to the district collectors, who would then take steps as necessary to bring taxpayers into compliance. *See* 1 Rev. Stat. § 3176. But, obviously, the IRS would no longer have the opportunity to evaluate the accuracy

of tax returns, propose adjustments, and consider appeals thereof prior to taxes becoming due.

The New Deal and World War II expanded the individual income tax again and also altered the timing of tax payments further, introducing the concept of "pay-as-you-go taxation." Carolyn C. Jones, *Class Tax to Mass Tax*, 37 BUFF. L. REV. 685, 703 (1989). The Social Security Act provided for employment taxes equal to a percentage of employees' wages to be withheld and paid to the government by employers along with information returns filed quarterly. *See* Desai, *supra*, at 889–95 (describing early Social Security Act administration). Because many people struggled to make lump sum income payments annually or even quarterly, Congress again turned to wage withholding by employers as the wages were earned. *See* Revenue Act of 1942, ch. 619, § 172, 56 Stat. 798, 887–92; Current Tax Payment Act of 1943, ch. 120, § 2, 57 Stat. 126, 128; *see also* Desai, *supra*, at 896–97 (describing the history of World War II wage withholding provisions in greater depth). For individuals whose income was not subject to wage withholding, and later for corporations, Congress instituted a system of advance installment payments of estimated income taxes. *See* Current Tax Payment Act of 1943, § 5, 57 Stat. 126, 141–45; Internal Revenue Code of 1954, ch. 62, § 6154, 68A Stat. 760. As a result of these changes, most taxes now are paid before tax returns are ever filed and the IRS assessment and collection functions are triggered. Roughly 86% of federal revenues come from individual income taxes and payroll taxes, most of which are received long before annual returns are filed as a result of third-party withholding by employers and others. *See, e.g.*, Joint Comm. on Tax'n, Overview of

the Federal Tax System As In Effect For 2019, JCX-9-19 (Mar. 20, 2019).

Notwithstanding widespread third-party withholding and estimated payments, the assessment procedures in particular continued to strongly resemble their 1860s counterparts until 1954. *Compare, e.g.*, 1 Rev. Stat. § 3182 (1875) *with* 26 U.S.C. §§ 102 (1926). By 1954, however, Congress recognized that sending millions of tax returns to Washington, D.C. for inspection and certification prior to assessment was inefficient. Accordingly, Congress reformed the process by turning assessments into an automatic function effectively akin to a mere bookkeeping entry. *See* S. Rep. 83-1622, at 572–73 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4621, 5221 (explaining that the change was to "provide[] that the assessments shall be made by recording the liability of the taxpayer ... through machine operations or through any other modern procedure"); H.R. Rep. No. 83-1337, at A405 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4017, 4552 (same). This automatic assessment process remains in place today. Now, when a taxpayer files a tax return, her tax liability is automatically recorded. *See* IRC §6203. If the IRS has reason to believe an assessment is inaccurate, then officials may pursue a supplemental assessment, for example by conducting an audit to verify the taxpayer's liability. *See* IRC § 6204.

Regarding collection procedures, again, most taxes are now paid in advance through pay-as-you-go withholding as well as advance estimated tax payments. Much of the IRS's collection authority, by contrast, still arises after assessment. *See* IRC §§ 6303, 6305, 6322 & 6325. Employers and other third

parties who fail to withhold and remit as required by law are subject to penalties for that failure, *see* IRC § 6672(a); individuals and corporations who fail to make estimated payments must pay interest to compensate the government for paying belatedly. *See* IRC §§ 6621(a)(2), 6654(a), 6655(a). Reminiscent of Civil War-era collection provisions, when taxes have not been paid through withholding, through estimated payments, or with a tax return, the IRS first demands payment by letter, then may levy, distrain, and ultimately sell the property of taxpayers to satisfy the outstanding tax liability. *Compare* IRC §§ 6303 & 6321 *with* 1 Rev. Stat. §§ 3184, 3187, 3188.

In summary, when the AIA was adopted in 1867 and even in the early days of the modern income tax, examinations and agency-level appeals could and often did occur in the period between the filing of a return and the acts of assessing taxes, anticipating payment, and pursuing collections based on that return. Most taxes did not become due and were not paid until after returns were filed and assessments were made. Thus, the post-return, pre-assessment and pre-collection period was a critical one in which a taxpayer might seek injunctive relief upon becoming aware than an adjustment had been proposed. But, even more significantly, without the AIA to protect the government's ability to pursue the assessment and collection functions unimpeded by judicial review, the government actually might have been unable to obtain the funds it needed to operate.

Today, by contrast, because of third-party withholding and advance estimated tax payments, most taxes are paid long before annual returns are filed and assessments are made. Subsequent

examinations may lead to additional assessments, and the IRS often must pursue collection of assessed but unpaid taxes. Consistent with its meaning in 1867, the AIA still prevents taxpayers facing an audit or other IRS enforcement efforts from seeking injunctive and declaratory relief to stop those assessment and collection efforts, rather than pursuing the agency-level processes provided by the Internal Revenue Code. Nothing about this history suggests, however, that Congress intended the AIA to apply to pre-enforcement judicial review of Treasury and IRS rules and regulations.

C. The AIA Has Not Changed Much Since 1867, But Its Placement In The Statute Has.

In fact, despite all of the changes in tax administration more generally, the AIA's core prohibition, barring any suit "for the purpose of restraining the assessment or collection of any tax," remains entirely unchanged since 1867. Congress has amended the language surrounding that core prohibition on several occasions. All of those amendments, however, have addressed the availability of judicial review in different types of individualized enforcement scenarios.

The most extensive change was in the Federal Tax Lien Act of 1966, 80 Stat. 1125, 1144, which added the phrase "whether or not such person is the person against whom the tax was assessed" to the end of the AIA's core prohibition. Although the added language seems expansive, the reason for the change was actually the opposite. The new language was paired with a new provision that provided a mechanism for third parties to seek judicial review when the IRS

levied or sold their property to satisfy the tax liability of another, as might occur when property is jointly owned. *See* IRC § 7426. The two additions, when read together, ensured that the courts would confine the new authorization of third-party suits to the terms of the new provision without eroding the overall scope of the AIA's core text. *See also* S. Rep. 89-1708 (1966), *reprinted* at 1966 U.S.C.C.A.N. 3722, 3750–52 (describing the provisions).

The remaining amendments to the AIA cross-reference other provisions of the Internal Revenue Code that allow for judicial review under particularized circumstances—most significantly deficiency actions to be filed in United States Tax Court under IRC §§ 6212 and 6213 but also, for example, innocent spouse relief from joint and several liability for unpaid taxes under IRC § 6015 and collection due process cases under IRC § 6330. *See* Hickman & Kerska, *supra*, at 1726–30 (detailing the amendments at length). Some of those amendments have come after this Court interpreted the AIA to cut off judicial review in a manner that Congress deemed unfair. *See* Tax Reform Act of 1976, § 1306, 90 Stat. 1520, 1718 (amending the AIA and otherwise providing for judicial review of exempt status determinations and revocations); *see also* H.R. Rep. 94-658, at 282–86 (1975), *reprinted at* 1976 U.S.C.C.A.N. 2897, 3179–81 (relating those changes to congressional disapproval of judicial review limitations imposed by *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974), and *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974)).

Other cross-references were reactions to pro-taxpayer interpretations of the AIA by the Court,

clarifying the statute to expanding the availability of judicial review. *See* Tax Reform Act of 1976, § 1204(c)(11), 90 Stat. 1520, 1699 (amending the AIA and provisions governing jeopardy and termination assessments to expand the availability of judicial review); *see also* Staff of J. Comm. on Tax'n, 94th Cong., General Explanation of the Tax Reform Act of 1976, at 356–64 (Comm. Print. 1976) (discussing *Laing v. United States*, 423 U.S. 161 (1976), and *Commissioner v. Shapiro*, 424 U.S. 614 (1976), in explaining those legislative changes).

Although the AIA's core text has remained constant since the 1860s, its placement within the codified tax laws has changed significantly, which may have caused at least some of the confusion regarding the AIA's proper scope. Yet, historical evidence makes clear that Congress did not intend changes in the AIA's statutory location to alter its meaning.

As noted above, in adopting the AIA in 1867, Congress embedded it within the principal statutory provision governing the collection process, Section 19 of the 1862 revenue act, thus associating the AIA directly with the undertaking of that process. *See* Act of July 1, 1862, ch. 119, § 19, 12 Stat. 432, 439. In 1874, Congress revised and codified all then-existing statutes. Title 35 of the Revised Statutes contained all of the tax provisions. Chapter 2 of Title 35, entitled "Of Assessments and Collections," divided the statutory text governing those two functions into a few dozen separate provisions, one of which—Section 3224—was the AIA. *See* 1 Rev. Stat. §§ 3172–3231 (1875). Courts and commentators at the time took the view that the AIA's codification in a separate provision in the Revised Statutes did not alter its meaning or scope.

See, e.g., *Snyder v. Marks*, 109 U.S. 189, 192 (1883) (acknowledging that the AIA codified separately as Section 3224 had the same meaning as when it was part of Section 19). Throughout all of the above-described changes in tax administration more generally between 1874 and 1954, the AIA's placement among the collection provisions remained the same, suggesting its continued close, proximate relationship with the actual pursuit of the assessment and collection functions. *Compare* 2 Comp. Stat. 2088, § 3224 (John A. Mallory) (1902), *with* U.S. Comp. Stat. 934, § 5947 (John A. Mallory) (1918); 26 U.S.C. § 154 (1926); *and* 26 U.S.C. § 3653 (1940). Nevertheless, isolating the AIA in its own provision removed its more immediate statutory association with the collection functions.

The placement of the AIA within the codified tax laws changed further when Congress reorganized and recodified Title 26 of the U.S. Code (by then also known as the Internal Revenue Code) in 1954. On this occasion, Congress sought to revisit the tax laws holistically, incorporating substantive changes as well as "rearrang[ing] the provisions to place them in a more logical sequence." S. Rep. 83-1622 (1954), *reprinted at* 1954 U.S.C.C.A.N. 4621, 4629. As part of that overhaul, Congress moved the AIA from the subchapter on collections to a new chapter addressing judicial review and designated the AIA as § 7421(a). Internal Revenue Code of 1954, ch. 76, § 7421(a), 68A Stat. 876. The AIA remains there today. *See* IRC § 7421(a). Legislative history to the 1954 reorganization reports, however, that moving the AIA's placement within the Internal Revenue Code made "no material change in existing law." S. Rep. 83-1622 (1954), *reprinted at* 1954 U.S.C.C.A.N. 4621, 5620.

Nevertheless, detaching the AIA from its historic position among the collections provisions and including it among the provisions concerning judicial review likely contributed to contemporary perceptions that the AIA's scope might be broader than historically understood.

III. APA Legislative History Does Not Support Interpreting the AIA to Preclude Pre-Enforcement Judicial Review.

In its brief opposing certiorari in this case, the government identified a single piece of legislative history that it said "indicates that Congress had the Anti-Injunction Act specifically in mind when it enacted [APA] Section 702(1)." *See* Brief for the Respondents in Opposition at 26–27, 2020 WL 1479920 (2020) (No. 19-930) (citing H.R. Rep. 94-1656, 12–13 & n.35 (1976)). Contrary to the government's characterization, however, the House Report in question offers no insight regarding the AIA's scope and pre-enforcement judicial review of Treasury and IRS rules and regulations.

In 1976, Congress amended APA § 702, which had originally addressed only the standing of affected persons to challenge agency action. The added language included a limited waiver of sovereign immunity. *See* 5 U.S.C. § 702; Pub. L. No. 94-574, 90 Stat. 2721, 2721 (1976). Legislative history describes Congress's goal as removing "technical barriers to consideration on the merits of citizens' complaints against the Federal Government, its agencies or employees" by, among other things, reversing the conclusions of some courts that sovereign immunity

barred suits against agencies for declaratory and injunctive relief. H.R. Rep. 94-1656 (1976), *reprinted at* 1976 U.S.C.C.A.N. 6121, 6123, 6126–28.

The amendment to APA § 702 also added language specifying that "[n]othing herein (1) affects other limitations on judicial review of the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; ...." Pub. L. No. 94-574, 90 Stat. 2721, 2721 (1976). In discussing this language, the House Report flagged general justiciability limitations like express or implied preclusion, standing, and ripeness, as well as "[s]tatutory or rule provisions denying authority for injunctive relief" and offered the AIA as an example of the latter. H.R. Rep. 94-1656 (1976), *reprinted at* 1976 U.S.C.C.A.N. 6121, 6123, 6132–33. In a footnote, the Court again identified the AIA as the sort of limitation on judicial review that would remain unaffected by the legislation, and cited *Bob Jones University v. Simon*, 416 U.S. 725 (1974), as an example of the AIA in action. *Id.* at 6133 n.35.

Of course, in the Tax Reform Act of 1976, that same Congress amended the AIA and the Internal Revenue Code to overturn the Court's decisions in *Bob Jones University* and a companion case, *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974). *See* Tax Reform Act of 1976, § 1306, 90 Stat. 1520, 1718 (amending the AIA to allow judicial review of exempt status determinations and revocations); *see also* H.R. Rep. 94-658, at 282–86 (1975), *reprinted at* 1976 U.S.C.C.A.N. 2897, 3179–81 (relating the changes to congressional disapproval of judicial review limitations imposed by *Bob Jones University* and *"Americans United"*). Congress's reversal of the *Bob*

Jones decision by legislation would seem to undercut a citation to that case in a House Report issued a mere three months prior.

Regardless, the *Bob Jones University* case concerned a challenge to an IRS adjudicatory decision to revoke the University's tax-exempt status based on particularized facts and circumstances. In fact, as of 1976, most or even all AIA cases involved specific taxpayers seeking to avoid actual, in-progress IRS enforcement efforts. *See, e.g.*, *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962) (seeking to avoid collection of past due payroll taxes); *Professional Engineers, Inc. v. United States*, 527 F.2d 597 (4th Cir. 1975) (challenging levy on bank account for unpaid failure to file penalties); *Patrick v. United States*, 524 F.2d 1109, (7th Cir. 1975) (trying to stop collection of assessed and unpaid gambling taxes and interest). Absent the AIA, that revocation may have been reviewable under the APA as final agency action. *See* 5 U.S.C. § 704. Because the APA contemplates judicial review of agency adjudications as well as rulemakings, the AIA could preclude judicial review under the APA for a variety of IRS actions and still allow pre-enforcement judicial review of Treasury and IRS rules and regulations. The House Report says nothing about how to interpret the AIA.

IV. HARMONIZING THE AIA AND THE APA PROTECTS THE GOVERNMENT'S REVENUE STREAM BY PROMOTING TAX SYSTEM INTEGRITY.

It is often said that the purpose of the AIA is to "protect[] the Government's ability to collect a consistent stream of revenue." *NFIB v. Sebelius*, 567

U.S. 519, 543 (2012). Interpreting the AIA to exempt virtually all Treasury and IRS rules and regulations from pre-enforcement judicial review, however, would have the opposite effect by undermining public confidence in the integrity of the tax system.

A. APA Procedures And Judicial Review Promote The Legitimacy Of Agency Action Through Transparency And Accountability.

Congress has devolved an extensive amount of discretionary power to federal administrative agencies. With such delegations comes a need to ensure that exercises of discretion by unelected agency officials are perceived as legitimate and fair by those who are subject to agency mandates.

On numerous occasions, courts have recognized the important role the APA plays in promoting public confidence in the actions of federal agencies. *See, e.g.*, *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (describing APA procedures as "reintroduc[ing] public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies"). Through notice and comment rulemaking, agencies are required to promulgate regulations transparently and must provide the public with an opportunity to participate in the process. 5 U.S.C. § 553(b)–(c). Agencies must act reasonably and within the confines of statutory authority. 5 U.S.C. § 706(2)(A)–(C); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). Through the passage and interpretation of the Administrative Procedure Act, Congress and the courts have struck a complex

balance between efficient agency action and the legitimacy of agencies in the eyes of the public.

Pre-enforcement judicial review plays a substantial role in fostering the institutional legitimacy of administrative agencies. Judicial review of an agency's interpretations of the statutes it administers for consistency with statutory text, history, and purposes, an agency's compliance with congressionally-imposed procedural requirements, or an agency's contemporaneous reasoning in support of its discretionary choices, promotes transparency and accountability in agency decisionmaking. Without pre-enforcement review, regulated parties face a Hobson's choice between incurring the costs to organize their primary behavior to conform with rules they think may be invalid or suffering the uncertainty and potential penalties of noncompliance. *See Abbott Labs v. Gardner*, 387 U.S. 136, 152 (1967). *Abbott Labs* promotes the former and prevents the latter by creating a strong presumption that regulated parties may challenge agency rules and regulations as soon as they are finalized, rather than having to wait until they become entrenched.

B. Pre-Enforcement Judicial Review Will Protect The Government's Revenue Stream, Enhancing Tax System Legitimacy By Encouraging Treasury And IRS Compliance With The APA.

As with most agencies, Congress has given Treasury and the IRS broad authority to adopt legally-binding rules and regulations interpreting the various provisions of the Internal Revenue Code. *See, e.g.*, IRC §§ 482, 1502, & 7805(a). Treasury and the IRS purport

to follow the APA in issuing those rules and regulations. It is well known among scholars and commentators, however, that Treasury and the IRS have a weak record of compliance in that regard. *See, e.g.*, Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 491–509 (2013); Patrick J. Smith, *The APA's Arbitrary and Capricious Standard and IRS Regulations*, 136 TAX NOTES 271, 274–75 (2012); Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727 (2007); Michael Asimow, *Public Participation in the Adoption of Temporary Treasury Regulations*, 44 TAX LAW. 343, 347 (1991).

In *Bull v. United States*, the Court wrote "taxes are the life-blood of government, and their prompt and certain availability an imperious need." 295 U.S. 247, 259–60 (1935). Defenders of tax exceptionalism from general administrative law requirements, doctrines, and norms often invoke the importance of revenue raising. To be sure, Treasury and IRS rules and regulations are important to ensuring a constant stream of government revenue.

In recent decades, however, Congress increasingly has turned to the Internal Revenue Code as a mechanism for accomplishing regulatory and social welfare goals that bear, at best, a tangential relationship to the tax laws' historic revenue raising function. The federal government's largest anti-poverty programs—the Earned Income Tax Credit and the Child Tax Credit—are structured as refundable tax credits rather than as direct subsidies, and thus are administered by Treasury and the IRS. *See, e.g.*,

MICHELLE LYON DRUMBL, TAX CREDITS FOR THE WORKING POOR: A CALL FOR REFORM 25 (2019). The Employee Retirement Income Security Act of 1974 (ERISA) and the Patient Protection and Affordable Care Act assign Treasury and the IRS a leading role in administering the regulation of health care, health plan coverage, and employee pension plans, through various tax credits, deductions, and penalties styled as excise taxes. *See, e.g.*, COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW 95–96 (3d ed. 2018) (listing Internal Revenue Code and corollary ERISA provisions); *cf. King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (addressing interpretation of one such tax credit, and recognizing the issue as outside the IRS's traditional expertise). Treasury and the IRS are extensively involved in regulating a vast nonprofit sector through determining and monitoring organizations' eligibility for tax-exempt status and administering the deduction for charitable contributions. *See generally* Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299 (1976) (highlighting at length the complexities and scope of nonprofit sector regulation through the Internal Revenue Code). As former Assistant Secretary of the Treasury for Tax Policy Pam Olson summarized, Treasury and the IRS are responsible for administering "policies aimed at the environment, conservation, green energy, manufacturing, innovation, education, saving, retirement, corporate governance, export promotion, charitable giving, and economic development, to name a few." Pamela F. Olson, *Woodworth Memorial Lecture: And Then Cnut Told Reagan...Lessons from the Tax Reform Act of 1986*, (May 6, 2010), in 38 OHIO N.U. L. REV. 1, 12–13 (2011) (citations omitted).

As a result, a sizeable plurality of new Treasury and IRS rules and regulations address issues with little to no relationship to the tax system's historic function of assessing and collecting taxes. *See* Kristin E. Hickman, *Administering the Tax System We Have*, *supra*.63 DUKE L.J. 1717, 1746–53 (2014) (finding that between 30 and 40 percent of regulations adopted from 2008 through 2012 concerned social welfare and regulatory programs, purposes, and functions, and another 25 percent arguably served dual functions). If any of these programs had been structured outside the Internal Revenue Code, there would be no question that implementing rules and regulations would be subject to pre-enforcement judicial review under the APA and *Abbott Labs*. No evidence exists to support the conclusion that, by embedding these programs in the Internal Revenue Code, Congress intended to exempt implementing rules and regulations from pre-enforcement judicial review.

Without pre-enforcement judicial review, many challenges to Treasury and IRS rules and regulations simply will never be heard. Private parties subject to many of these rules and regulations do not have the traditional option of paying the tax and suing for a refund, because the rules and regulations themselves have little to do directly with the calculation of anyone's tax liability. Private parties whose rights and obligations are determined by these rules and regulations will simply face the choice between bearing the costs of compliance with agency actions they believe to be invalid or facing the uncertainty and potential penalties of noncompliance. Congressional goals embedded in the APA of promoting accountability, public participation, and transparency will be undermined. Little if any additional revenue

for the government will be raised. But people will perceive the tax system as less fair, and may be less inclined to comply with the tax laws as a result. *Cf.* Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 376–78 (2006) (linking legitimacy, defined as "the belief that authorities, institutions, and social arrangements are appropriate, proper, and just," with voluntary compliance with legal requirements).

CONCLUSION

For all of these reasons, the Court should resist the government's invitation to disregard the APA and expand the scope of the AIA beyond what careful consideration of statutory text, history, and purpose support. The best interpretation of the AIA is consistent with, rather than contrary to, the APA's presumption in favor of pre-enforcement judicial review of Treasury and IRS rules and regulations.

Respectfully submitted,

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