No. 19-930

IN THE
Supreme Court of the United States

CIC SERVICES, LLC,
Petitioner,
v.
INTERNAL REVENUE SERVICE, ET AL.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The National Taxpayers Union Foundation

[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *Amicus* represents that all parties were provided notice of *Amicus's* intention to file this brief on July 10, 2020. Letters from the parties consenting to the filing of the brief are filed with the Clerk of the Court.

submits this brief as *amicus curiae* in support of Petitioner in the above-captioned matter.

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect them. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels.

Because *Amicus* has testified and written extensively on the issues involved in this case, because this Court's decision may be looked to as authority by the many courts considering this issue, and because any decision will significantly impact taxpayers and tax administration, *Amicus* has an institutional interest in this Court's ruling.

SUMMARY OF ARGUMENT

This is not a dispute over taxes, but over potential penalties yet to be assessed. The Anti-Injunction Act (AIA) provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a). To be insulated by the AIA from immediate challenge, the levy at issue must be (a) a tax, with the suit (b) for the purpose (not merely the effect) of restraining the (c) assessment or collection of the levy. In this case, however, Notice 2016-66 is not a tax, the suit in question is not for the purpose of restraining assessment or collection, and no assessment or collection has occurred. The IRS can only prevail by convincing this Court that penalty is the same as tax, effect is the same as purpose, and pre-

assessment is the same as assessment.

It is no accident that the IRS position is that their regulation is both exempt from the Administrative Procedure Act (APA) and insulated from pre-enforcement review by the AIA. It is just one example of a consistent effort by the IRS to insulate its actions from outside review. If Notice 2016-66 is binding on the taxpayer, and able to result in penalties, it is more than just guidance and must go through the APA. If Notice 2016-66 is advisory and not binding, it cannot result in penalties and any challenge cannot be precluded by the AIA.

Assuming *arguendo* that the IRS is correct, and Notice 2016-66 is both exempt from the APA and insulated from pre-enforcement review by the AIA, then its issuance and enforcement is violative of the Due Process Clause. If the taxpayer's only remedy is "report to prison first [and] challenge later," App. 55a (Sutton, J., concurring), this is no longer about ensuring the continuity of revenue collection but rather about removing obstacles in the IRS's way as they seek "to impose sweeping 'guidance' across areas of public and private life, backed by civil and criminal sanctions, and left unchecked by administrative or judicial process." App. 62a (Thapar, J., dissenting).

These IRS abuses, while seemingly technical in nature, have real impacts. The struggle for taxpayer rights and safeguards against overreach from the Internal Revenue Service has occupied National Taxpayers Union Foundation and its sister organization National Taxpayers Union for the better part of five decades. We have noted since 2018 that the IRS must establish more transparent, reliable

rulemaking and hew more closely to the APA's safeguards. This Court can set the IRS on this path.

ARGUMENT

I. THE ANTI-INJUNCTION ACT SHOULD NOT APPLY BECAUSE TAXES ARE NOT AT ISSUE, THE PURPOSE OF THE SUIT IS NOT TO RESTRAIN REVENUE ASSESSMENT OR COLLECTION, AND ASSESSMENT OR COLLECTION HAS NOT OCCURRED.

The Anti-Injunction Act (AIA) provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a). To be protected by the AIA from immediate challenge, the levy at issue must be (a) a tax, with the suit (b) for the purpose (not merely the effect) of restraining the (c) assessment or collection of the levy. In this case, however, the levy is not a tax, the suit is not for the purpose of restraining assessment or collection, and no assessment or collection has occurred. The IRS can only prevail by convincing this Court that penalty is the same as tax, effect is the same as purpose, and pre-assessment is the same as assessment.

A. Penalties Are Not Taxes.

The IRS repeatedly cites 26 U.S.C. § 6671(a), which extends all references to "taxes" in Title 26 to also apply to associated penalties, as bringing the penalties in Notice 2016-66 within the scope of the Anti-Injunction Act (AIA). *See, e.g.*, Brief for the Respondents in Opposition at I ("The term 'tax' in that

provision is 'deemed also to refer to the penalties...'"); *id.* ("...the Code deems to be taxes."); *id.* at 3 ("...the penalty for failing to provide the required information about those transactions is deemed to be a tax by 26 U.S.C. 6671(a)...."); *id.* at 4 ("Like the penalty imposed on a taxpayer who fails to report required information, that penalty is 'deemed' to be a 'tax.'"); *id.* at 13 ("...the Code 'deems the penalties' imposed for noncompliance with those requirements to be 'taxes.'"); *id.* at 15 ("The penalty...is deemed a tax for purposes of the Code...."); *id.* at 16 ("Subchapter 68B...states in pertinent part that 'except as otherwise provided, any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter...."); *id.* at 19 ("The decision to deem penalties was made by Congress in the language of Section 6671(a)...."); *id.* at 20 ("[B]y deeming 'penalties' imposed by Subchapter 68B to be 'taxes' for purposes of the Code, 26 U.S.C. 6671(a), Congress made clear that the term 'tax' is not confined to an undefined subset of 'revenue-generating' measures."); *id.* at 21 ("Congress's decision to deem specified penalties to be taxes...."); *id.* at 22 ("...statutory penalties that the Code deems to be taxes."); *id.* at 26 ("...the penalty, which is deemed to be a tax....").

But penalties are not taxes. The purpose of the levy, not the label that happens to be used by the legislature, is controlling: a tax is a charge imposed by the government for the primary purpose of raising revenue; a penalty is a charge imposed by the government for the primary purpose of punishing or changing behavior; a fee is a charge with the primary purpose of recouping the costs of providing a

particularized service to the payer. *See, e.g., United States v. New York*, 315 U.S. 510, 515-16 (1942) ("But a tax for purposes of [the Bankruptcy Code] includes any pecuniary burden laid upon individuals or property for the purpose of supporting the government, by whatever name it may be called.") (internal citations omitted); *United States v. La Franca*, 282 U.S. 568, 572 (1931) ("A 'tax' is an enforced contribution to provide for the support of government . . . ."); *Millard v. Roberts*, 202 U.S. 429, 436 (1906), *quoting* 1 Story Const. § 880; 4 Cooley, *The Law of Taxation*, ch. 29 § 1784 (4th ed. 1924) ("If revenue is the primary purpose and regulation is merely incidental the imposition is a tax; while if regulation is the primary purpose the mere fact that incidentally revenue is also obtained does not make the imposition a tax...."); *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992). Here, the charges operate as penalties and not taxes, and should not enjoy the protection of the AIA, notwithstanding the incidental revenue they raise.[2]

Admittedly, in *NFIB v. Sebelius*, this Court held that Congress defines the scope of the Anti-Injunction Act and can deem non-taxes to be taxes for purposes of the Act, independent of an accepted definition of "tax" or "penalty." *See, e.g., NFIB v. Sebelius*, 567 U.S. 519, 544 (2012) ("Congress can, of course, describe something as a penalty but direct that it nonetheless

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[2] It is worth noting that not all penalties assessed by the IRS are linked to taxes. While some penalties (such as for paying late) are based on the percentage of the tax due or income unreported, other penalties (such as for failing to file certain information returns) are flat amounts irrespective of tax.

be treated as a tax for purposes of the Anti-Injunction Act."). However, in doing so, the Court rejected a broad reading that any money collected by the IRS be considered within the scope of the AIA. *See id.* at 546 ("There would, for example, be no need for §6671(a) to deem 'tax' to refer to certain assessable penalties if the Code already included all such penalties in the term 'tax.'[...] The Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the Anti-Injunction Act.").

The IRS is effectively making that broad argument here, that any regulation coupled with penalties drawn from Title 26 are precluded from pre-enforcement review by the AIA. *See* Brief for the Respondents in Opposition at 16 ("The penalties at issue here are imposed by 26 U.S.C. 6707, 6707A, and 6708, which appear in Subchapter 68B. References in the Code to 'tax[es],' including the Anti-Injunction Act, thus encompass those penalties."). This Court should reject this broad reading. *NFIB* stands for the position that if a penalty is not a tax, the AIA does not apply; this does not mean that if a penalty is a tax then the AIA must necessarily apply. *See Florida Bankers Ass'n v. U.S. Dep't of the Treasury*, 799 F.3d 1065, 1080 (D.C. Cir. 2015) (Henderson, J., dissenting). To the extent this Court must clarify its statements in *NFIB* to make this understood, this Court should consider doing so.

B. Effect Is Not Purpose.

Lacking any no evidence that Petitioner's suit is for the "purpose" of restraining revenue collection, Respondent argues that any "challenge to a regulatory

tax comes within the scope of the Anti-Injunction Act, even if the plaintiff claims to be targeting the regulatory aspect of the regulatory tax." *See* Brief for the Respondents in Opposition at 22, *citing Alexander v. Americans United, Inc.*, 412 U.S. 752, 760-61 (1974) (seeking to prevent removal of tax-exempt status); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 746-47 (1974) (seeking to prevent removal of tax-exempt status); *Florida Bankers Ass'n*, 799 F.3d at 1066 (challenge to penalty for failure to report interest paid to foreign account-holders).

Unlike here, those cited cases involved "nifty wordplay," *Florida Bankers*, 799 F.3d at 1070, where the only claimed injuries were higher taxes and it was clear that the purpose of the lawsuits were to avoid tax liability. In this case, there is no evidence Petitioner's suit is for the "purpose" of restraining revenue collection. "The purpose of its lawsuit is to obtain relief from costs the company must pay today, not to restrain a penalty it might have to pay tomorrow." App. 64a (Thapar, J., dissenting).

If any taxpayer challenge to an IRS regulation will be deemed to be undertaken for the "purpose" of restraining revenue collection, even when there is no evidence showing that to be the case, then what will have happened is the AIA will have been judicially rewritten to define the word "purpose" as "effect," substantially weakening taxpayer protections and rejecting the plain meaning of the word used by Congress.

C. Pre-Assessment Is Not Assessment.

No dollar amount is in dispute in this case because nothing has been assessed or sought to be collected.

The IRS instead speaks about attenuated chains of events in the future tense, warning that Petitioner's suit will "frustrate the assessment and collection of taxes," Brief for the Respondents in Opposition at 17, and that invalidating Notice 2016-66 "necessarily precludes assessment and collection of the penalty," *id.* at 26.

In fact, the dollars collected by the IRS will likely be the same whether Petitioner prevails or not. If Petitioner succeeds in seeing Notice 2016-66 invalidated, no penalties will be authorized to be imposed. If Petitioner does not prevail, it is likely that it will comply with the regulations one way or another (either by satisfying the paperwork burden or by ceasing to provide services that trigger it), and will not pay the penalty. The only way the IRS will assess and collect revenue is if taxpayers affirmatively violate Notice 2016-66 after the measure is validated by this Court, at which time incidentally the IRS believes that a challenge could be entertained even though the revenue impacts would be real and not just potential. *See id.* at 28-29 ("Petitioner identifies no Code or regulatory provision that would preclude a taxpayer or material advisor who is assessed a tax for failing to comply with the reporting and recordkeeping requirements from challenging Notice 2016-66 in a refund suit."). It is easy to see why the IRS prefers this outcome: if any future potential assessment counts as present assessment, no one will ever dare challenge a regulation. It is hard to see why courts interested in fair play and plain reading of statutory text would entertain it. *Cf. Direct Marketing Ass'n v. Brohl*, 575 U.S. 1, 12 (2015) ("[T]he TIA is not keyed to all activities that may improve a State's ability to assess

and collect taxes.... The TIA is keyed to the acts of assessment, levy, and collection themselves, and enforcement of the notice and reporting requirements is none of these.").[3]

II. THE IRS POSITION THAT ITS GUIDANCE IS NOT BINDING FOR PURPOSES OF THE APA BUT BINDING FOR PURPOSES OF THE AIA ALLOWS ITS ACTIONS TO BE TOTALLY INSULATED FROM ADMINISTRATIVE AND JUDICIAL REVIEW IN VIOLATION OF THE DUE PROCESS CLAUSE.

If Notice 2016-66 is binding on the taxpayer and able to result in penalties, it is more than just guidance and must be subjected to the procedures laid out in the APA to allow for meaningful public input. If Notice 2016-66 is advisory and not binding, it cannot result in penalties and any challenge cannot be precluded by the AIA.

It is no accident that the IRS has maneuvered to this position, claiming that their regulation both need not comply with the APA and is insulated from pre-enforcement review by the AIA. It is rather just one example of a consistent effort by the IRS to insulate its actions from outside review. *See, e.g.*, *Cohen v. United States*, 650 F.3d 717, 726 (D.C. Cir. 2011) (en

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[3] While *DMA v. Brohl* dealt with the Tax Injunction Act (TIA), this Court held that the TIA "was modeled on the Anti-Injunction Act" and that "words used in both Acts are generally used in the same way, and we discern the meaning of the terms in the AIA by reference to the broader Tax Code." *Direct Marketing Ass'n v. Brohl*, 574 U.S. at 8, *citing Hibbs v. Winn*, 542 U.S. 88, 102-105 (2004).

banc) ("The IRS envisions a world in which no challenge to its actions is ever outside the closed loop of its taxing authority."); Pete Sepp, *Shortsighted: How the IRS's Campaign Against Conservation Easement Deductions Threatens Taxpayers and the Environment*, National Taxpayers Union, Nov. 2018 ("[T]ax administrators have trampled upon key protections of NTU-backed laws while pursuing their agenda, and taxpayers in all kinds of compliance and collection due process situations are now endangered from the precedents established by the government's capricious behavior."); Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 Va. L. Rev. 1683, 1714 (2017) ("Even after the Supreme Court's pronouncement in *Mayo Foundation* that both specific and general authority Treasury regulations carry the force of law, the government has continued to assert that many or even most Treasury regulations are exempt interpretative rules."); Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 Geo. Wash. L. Rev. 1153, 1214 (2008) ("Despite Treasury's claims to the contrary, the evidence is strong that Treasury has an APA compliance problem.").

Assuming *arguendo* that Respondent is correct, and Notice 2016-66 is both exempt from the APA and insulated from pre-enforcement review by the AIA, then its issuance and enforcement is violative of the Due Process Clause of the U.S. Constitution. If the taxpayer's only remedy is "report to prison first challenge later," App. 55a (Sutton, J., concurring), this is no longer about ensuring the continuity of revenue collection but rather about removing obstacles in the

IRS's way as they seek "to impose sweeping 'guidance' across areas of public and private life, backed by civil and criminal sanctions, and left unchecked by administrative or judicial process." App. 62a (Thapar, J., dissenting). *See also MedImmune, Inc. v. Genentech, Inc.*, 549 U. S. 118, 128–129 (2007) ("[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat"); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979), *citing Doe v. Bolton*, 410 U.S. 179, 188 (1973) ("[H]e should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."); *Steffel v. Thompson*, 415 U. S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights"); *Ex Parte Young*, 209 U.S. 123, 148 (1908) ("Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines, as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid."). Here, the IRS can only prevail if this Court validates its efforts to shut down the important transparency and public input processes of the APA and by twisting the AIA far beyond its purpose, intent, and statutory text.

The struggle for taxpayer rights and safeguards against overreach from the Internal Revenue Service

has occupied National Taxpayers Union Foundation and our sister organization National Taxpayers Union (NTU) for the better part of five decades, involving at least 10 significant legislative or administrative reform initiatives such as the Taxpayer Bill of Rights, the IRS Restructuring and Reform Act, and the Taxpayer First Act. Each of these necessary course corrections has been preceded by a few seemingly small but telltale signs that the system of tax administration is headed for a major malfunction. Conventional, rarely-used tools of enforcement such as civil asset forfeiture, joint liability for couples in tax disputes, and the designated summons power for uncooperative taxpayers have become weaponized to threaten much larger portions of the filing population. These developments in turn often portend a more aggressive Service-wide stance toward taxpayers, one that requires swift intervention from policymakers.

These IRS abuses, while seemingly technical in nature, have real impacts. Customers of business owners under audit have been confronted with a raft of "routine questions" about how they conducted transactions with the taxpayer being investigated. Perfectly innocent and unrelated third parties to transactions under IRS scrutiny have been bombarded with Information Document Requests and tax form filing requirements. Advisors as well as professionals who perform arm's-length services for compiling information to substantiate a tax deduction are threatened with penalties and other disciplinary actions. One of the most notorious cases that led to passage of the first Taxpayer Bill of Rights in 1988 was that of Pennsylvania businessman Tom Treadway, who lost his business due to a $247,000 tax

assessment that was later thrown revoked, but not until the tax agency raided his girlfriend's bank account in the process. In a 1990 Finance Committee proceeding, Kay Council (an NTU member) described how her husband, Alex, was driven to suicide after an IRS audit of the Councils' real estate development business disallowed a tax shelter. The tax agency never contacted the Councils or their accountant about the deficiency until four years after the fact, at which point the tax bill had soared to nearly $300,000. The IRS destroyed their business, and Kay Council only prevailed after spending tens of thousands of dollars on legal fees drawn partially from the life insurance policy of her deceased husband. In 2016, Congress discovered that the IRS had seized $40 million from 600 people: "individuals and families who have been forced to forfeit their assets even though they have not been proven guilty of any crimes." Statement of Pete Sepp to the House Subcommittee on Economic Growth, Tax, and Capital Access Regarding IRS Small Business Reforms, Jun. 22, 2016.

As we noted in 2018, the IRS must establish "more transparent, reliable rulemaking" by "hewing more closely to APA's safeguards, . . . winding back the doctrines that have built a wall of exemption between the tax agency and the accountability mechanisms . . . ." Pete Sepp, NTU Comments to the Acting IRS Commissioner on Tax Reform Implementation, Feb. 2018. This Court can set the IRS on this path.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that the decision of the court below be reversed.

Respectfully submitted,

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