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

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AND BRIEF OF PARTNERSHIP FOR CONSERVATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AND BRIEF OF PARTNERSHIP FOR CONSERVATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37, the Partnership for Conservation as *Amicus Curie* moves for leave to file an amicus brief out of time in support of the Petitioner.

Three copies of this motion and amicus brief are being sent via overnight mail to the parties required. An electronic copy of the amicus brief was e-filed in camera ready format on July 22, 2020 and is being re-submitted in hard copy herein on July 28, 2020.

The Partnership for Conservation as *Amicus Curie* respectfully submits that the accompanying brief was filed electronically on the date that it was due, July 22, 2020, however misinterpreted the April 15, 2020 COVID order as applicable to this brief and did not submit 40 paper copies of the brief in booklet format to the Court. In the brief, the Partnership for Conservation as *Amicus Curie* brings to the attention of the Court relevant matter not already brought to its attention by the parties and may be of considerable help to the Court. Accordingly, the Partnership for Conservation as *Amicus Curie* respectfully requests leave to file the accompanying amicus brief out of time.

Dated: July 28, 2020

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae, Partnership for Conservation (P4C), is a nonprofit, tax-exempt entity established to ensure the long-term availability and integrity of donations of conservation easements.[1] Members of *Amicus* include individuals, private companies, land trusts, sportsmen's organizations, and conservation groups. Like petitioner, *Amicus* members have been subject to burdensome and costly reporting requirements triggered by the issuance of an Internal Revenue Service (IRS) notice. Similar to the notice being challenged by petitioner, the notice was issued without notice-and-comment rulemaking required under the Administrative Procedure Act (APA) and was not submitted to Congress for consideration under the Congressional Review Act (CRA).

Amicus writes to inform the Court how its members have been harmed by respondent's unlawful actions and to support *petitioner's* position that the Anti-Injunction Act (AIA) should not bar petitioner's challenge.

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[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *Amicus Curiae* made a monetary contribution intended to fund the preparation or submission of the brief. *Amicus* provided timely notice to both parties of its intention to file this brief, and both parties have consented to the filing of this brief.

BACKGROUND

A. INTERNAL REVENUE CODE SECTION 170(H)

A conservation easement is a legally binding agreement that limits the future use, modification, or development of land in perpetuity.[2] Millions of acres of land are protected through conservation easements.[3] The ecological value and economic benefit of conservation easements are well-documented.[4]

Property owners often subject land to a conservation easement in favor of a charitable organization (or governmental entity) because of the federal tax incentives for doing so. Specifically, in 1980, Congress added Section 170(h) to the Internal Revenue Code (Code), allowing landowners to claim a tax deduction for the donation of a conservation easement.[5] Since then, Congress has modified, extended, and enhanced the provision.

In 2006, Congress made significant changes to the Code to combat concerns raised *over* alleged abuse

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[2] *See* 26 U.S.C. § 170(h)(2).

[3] The Land Trust Alliance, 2015 National Land Trust Census Report, Our Common Ground and Collective Impact 5 (2015), http://s3.amazonaws.com/landtrustalliance.org/2015NationalLandTrustCensusReport.pdf.

[4] *E.g.,* Andrew Seidl et al., Colorado's return on investments in conservation easements: Conservation Easement Tax Credit program and Great Outdoors Colorado (Colorado State University 2017).

[5] Act of Dec. 17, 1980, Pub. L. No. 96-541, § 6(a), 94 Stat. 3204, 3206-08 (1980).

of the Code § 170(h) tax deduction.[6] Among other things, the Pension Protection Act of 2006 (PPA) modified Code § 170(h) by providing a statutory definition of "qualified appraisers" (i.e., those appraisers who had the requisite qualifications to value the donation for tax purposes),[7] and modified Code § 6662 to lower the threshold at which the IRS could assess penalties for inaccurate valuations.[8]

The PPA also enhanced the Code § 170(h) tax deduction. Specifically, for donations made in 2006 and 2007, the PPA allowed donors to deduct up to 50% of their adjusted gross income (versus 30% previously) and allowed donors to carry forward unused deductions to future tax years – up to fifteen years (versus the previous five-*year* carryforward period) for donations of conservations easements.[9] Congress extended these enhancements in 2008,[10] 2010,[11]

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[6] *See, e.g.,* Joe Stephens & David B. Ottaway, *Developers Find Payoff in Preservation*, WASH. POST, Dec. 21, 2003; Staff of the Comm. on Finance, U.S. Senate, Report of Staff Investigation of The Nature Conservancy, S. Prt. 109-27 (2005).

[7] Pension Protection Act of 2006, Pub. L. No. 109–280, § 1219, 120 Stat. 780, 1083 (2006).

[8] *Id.*

[9] *Id*. at § 1206. For a full description of the changes made by the PPA, see Jt. Comm. Taxation, JCX-38-06, Technical Explanation of H.R. 4, The "Pension Protection Act Of 2006," as passed by the House on July 28, 2006, and as Considered by the Senate on August 3, 2006 (2006).

[10] Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 15302, 122 Stat 1651, 2263 (2008).

[11] Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 723 124 Stat. 3295, 3316 (2010).

2012,[12] and 2014.[13] Congress made the enhancements permanent in 2015.[14]

When modifying the conservation easement rules most recently in 2015, Congress had before it the suggestions of the U.S. Department of Treasury to make the enhanced tax incentives permanent (which Congress did) and several modifications to restrict the rules (which Congress did not do).[15] By enhancing the Code § 170(h) tax deduction repeatedly but not acting to further restrict the law, Congress has consistently shown support for donations of conservation easements.

To assist it in reviewing claimed deductions, the IRS requires significant information from donors of conservation easements. Specifically, donors are typically required to file IRS Form 8283, *Noncash Charitable Contributions*, on which (or attached to which) they must provide significant detail about the property, their ownership of it, the conservation easement, the donation of the easement, and the

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[12] American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 206, 126 Stat. 2313, 2324 (2013).

[13] Tax Increase Prevention Act of 2014, Pub. L. No. 113-295, § 106, 128 Stat. 4010, 4013 (2014).

[14] Protecting Americans from Tax Hikes Act of 2015, Pub. L. No. 114-113, § 111, 129 Stat 2242, 3046-47 (2015).

[15] U.S. Dept. of Treasury, General Explanations of the Administration's Fiscal Year 2016 Revenue Proposals, 193-196 (2015), https://home.treasury.gov/system/files/131/General-Explanations-FY2016.pdf.

valuation of the donation.[16] For donations valued at over $500,000, donors are also required to attach a qualified appraisal to the Form 8283.[17] Failure to file the form, or filing the form with incorrect or incomplete information, can result in significant penalties and disallowance of the tax *deduction*.[18]

Donees of conservation easements must be "qualified organizations,"[19] a category that includes charitable organizations *under* 26 U.S.C. § 501(c)(3). These organizations are tasked with monitoring the land and enforcing the easement and, as charitable organizations, must file IRS Form 990, *Return of Organization Exempt From Income Tax*.[20] Schedule D to Form 990 contains Part II, *Conservation Easements*, which requires such organizations to report information about the easements they received.[21] Failure to file the form, or filing it with incorrect or incomplete information, can result in

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[16] Form 8283, Noncash Charitable Contributions (2019), https://www.irs.gov/pub/irs-pdf/f8283.pdf.

[17] Instructions for Form 8283 (2019), https://www.irs.gov/pub/irs-pdf/i8283.pdf.

[18] 26 U.S.C. § 6662; see e.g., *RERI Holdings I, LLC et al. v. Comm'r*, 149 T.C. 1 (2017) (denying Code § 170 tax deduction when Form 8283 was missing information).

[19] 26 U.S.C. § 170(h)(1)(B).

[20] Instructions for Form 990 Return of Organization Exempt From Income Tax (2020), https://www.irs.gov/pub/irs-pdf/i990.pdf.

[21] Form 990, Schedule D, Supplemental Financial Statements, https://www.irs.gov/pub/irs-pdf/f990sd.pdf.

significant penalties and possible revocation of the organization's tax-exempt status.[22]

B. IRS NOTICE 2017-10

In December 2016, the IRS issued Notice 2017-10 (Notice).[23] The Notice describes certain conservation easement donations and designates them as "listed transactions." Specifically, the Notice describes a donation in which an investor receives promotional materials that offer the investment in a pass-through entity (such as a partnership or limited liability company) with the possibility of a donation of a conservation easement and a resulting tax deduction of an amount that is equal to, or greater than, two and one-half times the amount of the investor's investment. The Notice also designates as "listed transactions" those donations "substantially similar" to those described.[24]

The Notice is similar to Notice 2016-66 for which petitioner seeks redress. As with Notice 2016-66, the IRS issued the Notice without notice-and-comment rulemaking under the APA. The Notice imposes burdensome and costly new reporting requirements on donors of conservation easements

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[22] 26 U.S.C. § 6652(c)(1)(A); 26 U.S.C. § 6033(j).

[23] I.R.S. Notice 2017-10, 2017-4 I.R.B. 544.

[24] "Substantially similar" is described broadly by the IRS as "any transaction that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or similar tax strategy." 26 C.F.R. § 1.6011-4(c)(4). Furthermore, the IRS requires that the term be broadly construed in favor of disclosure. *Id*.

and material advisors that assist in the donation. Perhaps most impactful – like Notice 2016-66 – the Notice applies retroactively six years, requiring reporting and investor list maintenance for donations made after January 1, 2010.[25]

In contrast, the Notice designates certain conservation easement donations as "listed transactions," while Notice 2016-66 designates certain captive insurance transactions as "transactions of interest." Both designations are categories of "reportable transactions" carrying the same burdensome and costly requirements of reporting and investor list maintenance. However, because the "listed transaction" designation carries with it the label of "tax avoidance transaction"[26] and "prohibited tax shelter transaction"[27] it is even more deserving of notice-and-comment rulemaking under the APA. In addition, although the general rule is that the IRS has three years after filing of a return to make an assessment, for a listed transaction designation the statute of limitations is extended until one year after the reporting is filed.[28]

Finally, while the penalties for failure to comply with the reporting requirements imposed under both notices are triggered by Code § 6707A, the listed transaction designation carries with it

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[25] I.R.S. Notice 2017-10, 2017-4 I.R.B. 544; I.R.S. Notice 2016-66, 2016-47 I.R.B. 745.
[26] 26 C.F.R. § 1.6011-4(b)(2).
[27] 26 U.S.C. § 4965(e)(1).
[28] *Compare* 26 U.S.C § 6501(a)(1) *with* § 6501(c)(10).

increased penalty exposure. Donors of conservation easements who fail to comply are subject to a maximum penalty of $200,000 ($100,000 for natural persons).[29] This is significantly higher than the penalty of $50,000 maximum ($10,000 for natural persons) applicable to other reportable transactions.[30] There is no reasonable cause exception to excuse noncompliance, but rather penalties apply strictly and, unlike penalties associated with other reportable transactions, cannot be rescinded by the IRS.[31]

A material advisor for a listed transaction (e.g., appraisers, attorneys, and accountants) who fails to comply can face a penalty of the greater of $200,000 or 50% (75% for intentional failures) of the income earned in assisting or advising in the transaction.[32] This is in contrast to the $50,000 penalty for material advisor reporting failures with respect to all other reportable transactions.[33] Material advisors can also be penalized if they fail to furnish to the IRS an investor list. Like Notice 2016-66, the Notice carries with it the additional threat of criminal sanctions for both donors and material advisors.[34]

As a result of the Notice, many *Amicus* members who donated conservation easements had to file IRS Form 8886, *Reportable Transaction*

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[29] 26 U.S.C. § 6707A(b)(2)(A).
[30] 26 U.S.C. § 6707A(b)(2)(B).
[31] 26 U.S.C. §§ 6707A, (d)(1)-(2); *Keller Tank Servs. II v. Comm'r*, 854 F.3d. 1178, 1187-88 (10th Cir. 2017).
[32] 26 U.S.C. § 6707(b)(2).
[33] 26 U.S.C. § 6707(b)(1).
[34] 26 U.S.C. § 7203.

Disclosure Statement, often years after the donations. Per the IRS Form 8886 instructions, the estimated burden of this form is 21 hours and 31 minutes (recordkeeping, learning about the law or the form, preparing, copying assembling and sending the form to the IRS).[35] This reporting burden applies to each year affected by a particular reportable transaction.[36] In addition, the donor must file a copy with the IRS Office of Tax Shelter Analysis.[37] These reporting requirements apply separately with respect to each conservation donation in which a donor may have participated and, because the Notice was retroactive, can apply to all donations made in the six years prior to its issuance.

Amicus members who were considered material advisors had to file IRS Form 8918, *Material Advisor Disclosure Statement*. Per the IRS instructions, the estimated burden of this form is 14 hours and 31 minutes.[38] Because these disclosure obligations apply to activities in the normal course of business, any particular material advisor could have responsibility to file multiple Forms 8918. As a result of the Notice, material advisors must also maintain, and make available to the IRS, investor lists that involve significant documentation and recordkeeping.[39]

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[35] Instructions for Form 8886 (2019), https://www.irs.gov/pub/irs-pdf/i8886.pdf.
[36] *Id.*
[37] *Id.*; 26 C.F.R. § 1.6011-4(e)(1).
[38] Instructions for Form 8918 (2017), https://www.irs.gov/pub/irs-pdf/i8918.pdf.
[39] *See* 26 C.F.R. § 301.6112-1.

In addition to the filing of Forms 8886 and 8918 with the IRS, several states mirror the federal law or have laws that are triggered by the IRS listed transaction designation. As a result, many donors and material advisors had to file disclosures with state departments of revenue or face penalties for their failure to do so.[40]

Given the nature and amount of penalties involved, and possibility of an unlimited extension of the statute of limitations, *Amicus* members filed the newly required forms despite having no ability to challenge the burden, scope, and necessity of the Notice. Additionally, given the great uncertainty around what the IRS would consider "substantially similar" to the conservation easements donations described in the Notice, many Amicus members went to the cost and burden of filing "protective disclosures" – forms filed in an abundance of caution notwithstanding the fact that the donation was not with described with particularity in the Notice.[41]

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[40] *See e.g.*, California (Cal. Rev. & Tax. Code §§ 18628(a), 18648(a), 18407); New York (N.Y. Tax Law § 25; N.Y. Comp. Codes R. & Regs. tit. 20, § 2500.2); Minnesota (Minn. Stat. § 289A.12); West Virginia (W. Va. Code §§ 11-10E-8(a), 11-10E-9(a)).

[41] *See* 26 C.F.R. § 1.6011-4(f)(2) (describing how taxpayers may file protective disclosures when they are uncertain whether the transaction must be disclosed).

SUMMARY OF ARGUMENT

Like petitioner, *Amicus* members are a part of the "great history"[42] of the IRS's improper belief that the APA and CRA do not apply to many of its actions. If the Sixth Circuit decision is upheld by this Court such that the AIA blocks petitioner's pre-enforcement challenge to Notice 2016-66, *Amicus* members, having complied with the reporting requirements, will have no avenue to challenge Notice 2017-10. *Amicus* believes the AIA should not block such a challenge and it would be successful in challenging the Notice.

ARGUMENT

I. THE ADMINISTRATIVE PROCEDURE ACT: NOTICE 2017-10 IS AN UNLAWFUL IRS ACTION AND WOULD BE SET ASIDE IF CHALLENGED

Like Notice 2016-66, Notice 2017-10 is a substantive, legislative-type rule; thus, to be lawful, it must be promulgated under the APA's notice-and-comment procedure.

Notice 2017-10 is a substantive, legislative-type rule because, as described below, it impacts *Amicus* members' rights and obligations.[43] The APA

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[42] *CIC Services, Inc. v. Internal Revenue Service*, 925 F.3d 247, 258 (6th Cir. 2019).

[43] *Dyer v. Secy. of Health & Human Servs*., 889 F.2d 682, 684 (6th Cir. 1989) (an agency pronouncement affecting individual rights and obligations is likely to be a substantive rule) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-302 (1979) (substantive rules

requires that such substantive, legislative-type rules go through a notice-and-comment procedure.[44] Such procedures are required to "assure fairness and mature consideration of rules of general application."[45]

By contrast, interpretive guidance and policy statements are exempt from APA procedural requirements, and as such are referred to as subregulatory guidance.[46] As recently as 2019, the IRS agreed with this distinction between APA rulemaking and subregulatory guidance. In a statement, the Treasury Department and the IRS stated that guidance documents like the Notice are "not intended to affect taxpayer rights or obligations."[47]

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are those "affecting individual rights and obligations"). *See also Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

[44] *Id.;* 5 U.S.C. § 553(b).

[45] *Chrysler Corp.*, 441 U.S. at 303 (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969)).

[46] 5 U.S.C. § 553(d)(2); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007) (notice-and-comment under the APA need not be followed for interpretative rules).

[47] *See* Dept. of the Treasury, Policy Statement on the Tax Regulatory Process, § III (2019). *See also Feigh v. Comm'r*, 152 T.C. 267, 274 (2019) ("IRS notices – as mere statements of the Commissioner's position – lack the force of law.") (citing *Phillips Petroleum Co. v. Comm'r*, 101 T.C. 78, 99 n.17 (1993), *aff'd*, 70 F.3d 1282 (10th Cir. 1995).

A. Obligations Of *Amicus* Members - Burden And Cost Of Notice 2017-10

In the most recent tally, the IRS reported that pursuant to the Notice it received 39,619 Forms 8886, *Reportable Transaction Disclosure Statements*, in calendar year 2017 and 15,499 in calendar year 2018.[48] The disclosures received in 2018 generally related to tax year 2017 donations and the disclosures received in 2017 related to tax year 2016 donations and earlier.

This IRS data, combined with the IRS burden estimates, provides an idea of the burden imposed by Notice 2017-10. For example, looking at 2017 only, multiplying the number of Forms 8886 received (39,619) with the stated burden of that form (21 hours and 31 minutes), produces the profound estimate that in 2017 donors of conservation easements spent, or paid professionals to spend, 852,469 hours on Forms 8886. This equates to the full-time work of 426 people (assuming 2,000 hours per person per year). At a conservative cost estimate of $50 per hour for professional time,[49] the 2017 cost to donors of

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[48] Letter from IRS Comm'r Charles P. Rettig to Senate Fin. Comm. Chairman Charles Grassley (Feb. 12, 2020) (available at https://www.finance.senate.gov/imo/media/doc/2020-02-12%20IRS%20to%20Grassley,%20Wyden%20(Syndicated%20Conservation%20Easement%20Transactions).pdf

[49] *See* Tax Foundation, The Compliance Costs of IRS Regulations (2016) (available at https://taxfoundation.org/compliance-costs-irs-

complying with the Notice was approximately $42.6 million. Donors continued to sustain similar burdens and costs for 2018 and later years. These are just the type of adverse regulatory impacts that the APA was intended to ameliorate through notice-and-comment rulemaking.

These new reporting requirements imposed under the Notice are in addition to the longstanding reporting requirements otherwise applicable to conservation easement donors and donees (e.g., Forms 8283 and 990), as discussed above. The above burden estimate does not take into account the cost or burden to comply with these longstanding requirements or with reporting requirements applicable at the state level.

B. Rights of Amicus Members -The Impermissible Purpose of Notice 2017-10

While the Notice requires donors and material advisors to submit burdensome and costly reporting to the IRS, that was not the main apparent goal of the Notice. Rather, the goal of the IRS was to declare as tax law violations a particular class of transactions (certain conservation easement donations) even though Congress has not done so but rather has been

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regulations/#:~:text=Americans%20will%20spend%20more%20than,economy%20%24409%20billion%20this%20year).

supportive of conservation easement donations for many years.

As noted above, there were and are longstanding reporting requirements under which donors and donees must report information on donated conservation easements. A review of the number of conservation easement donation cases in the U.S. Tax Court predating the Notice indicates that the IRS did not need additional information to pursue tax enforcement and the Notice does not include a statement of such need as would be required under the APA.

IRS statements made around the time and subsequent to issuance of the Notice indicate the real purpose of the Notice was to put an end to the conservation easement donations so described. Comments from IRS Comm'r Charles Rettig include: "Putting an end to these abusive schemes is a high priority for the IRS." [50] and "[e]nding these abusive schemes remains a top priority for the IRS."[51] IRS hostility to these donations is also illustrated by other actions taken by the IRS. For example, as with certain captive insurance transactions, the IRS included conservation easement donations in its 2019 "Dirty

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[50] I.R.S. News Release IR-2019-182 (Nov. 12, 2019) (available at https://www.irs.gov/newsroom/irs-increases-enforcement-action-on-syndicated-conservation-easements).

[51] I.R.S. News Release IR-2020-130 (June 25, 2020) (available at https://www.irs.gov/newsroom/irs-offers-settlement-for-syndicated-conservation-easements-letters-being-mailed-to-certain-taxpayers-with-pending-litigation).

Dozen" campaign.[52] By fiat, and without any court ever declaring the described conservation easement donations unlawful, the IRS sought to "put an end" to certain donations of conservation easements.

The U.S. Constitution clearly vests legislative authority with Congress, the only branch of our Government that can amend the law to "put an end" to these types of donations. Congress has repeatedly and recently expressed its policy preference for Code § 170(h) by enhancing the conservation easement tax incentive, and has not added new limitations. In fact, after the Notice was issued, some members of Congress introduced legislation in an effort to codify the Notice. This legislation, H.R. 4459 (115th Congress), H.R. 1992 (116th Congress); S. 2436 (115th Congress) and S. 170 (116th Congress), would essentially eliminate the tax deduction under Code § 170(h) for conservation easement donations described in the Notice. Congress, however, has not been willing to pass this legislation: the pending legislation currently has less than 30 members of the U.S. House of Representative as co-sponsors, and the support of fewer than 10 senators.

The IRS has sought to supplant the role of Congress and violated the basic principles of government. IRS did so by retroactively labeling the described donations as "tax avoidance transactions"

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[52] I.R.S. News Release IR 2019-49 (Mar. 20, 2019) (available at https://www.irs.gov/newsroom/irs-concludes-dirty-dozen-list-of-tax-scams-for-2019-agency-encourages-taxpayers-to-remain-vigilant-year-round).

and "prohibited tax shelter transactions." In addition to the burden and cost of the reporting and compliance requirements, *Amicus* member rights have been impacted by the stigma associated with the listed transaction designation.

The IRS cannot alter the fundamental rights and obligations of conservation easement donors or those of material advisors whose professions and livelihoods are supported by such donations, and certainly should not be allowed to do so via subregulatory, interpretive guidance. Although Congress explicitly required the IRS to designate listed transactions "under regulations,"[53] the IRS through a self-serving regulation gave itself additional authority to define listed transactions through "notice, regulation, or other form of published guidance."[54] This Court has noted that such interpretive guidance does not have the force and effect of regulations and cannot overturn the plain language of a statute.[55]

As a substantive, legislative-type of rule, altering the fundamental rights and obligations of donors and material advisors, the IRS was required to follow the APA's notice-and-comment process. The

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[53] 26 U.S.C. §6707A(c)(1).

[54] 26 C.F.R. § 1.6011-4(b)(2).

[55] *Comm'r v. Schleier*, 515 U.S. 323, 336 n.8 (1995). *See also Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (a regulation, "affect[s] individual rights and obligations," and is "issued by an agency pursuant to statutory authority."); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) (legislative rules have the "force and effect of law.").

APA and the Code require it. Respondent's failures to adhere to the APA render Notice 2016-66 and the Notice unlawful and invalid.[56]

By issuing the Notice as subregulatory guidance, the IRS also deprived Congress of its right of review under the CRA. Under the CRA, Congress can overturn rules issued by agencies that are faithful to congressional intent.[57] While the IRS deprived Congress of a CRA review, such a review could have been a fruitful avenue for Congressional members who expressed concern with the IRS approach on donations on conservation easements.[58]

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[56] Agency action that a court finds to be "without observance of procedure required by law" must be set aside. 5 U.S.C. § 706(2)(D). *See also Chamber of Commerce of U.S.A. v. IRS*, No. 1:16-CV-944-LY, 2017 WL 4682050 (W.D. Tex. Oct. 6, 2017) (holding that the reviewing court shall hold unlawful and set aside agency action "carried out 'without observance of procedure required by law'") (emphasis added).

[57] Cong. Research Serv., The Congressional Review Act (CRA): Frequently Asked Questions (2020).

[58] Letter from Sens. Christopher S. Murphy and Richard Blumenthal to IRS Comm'r John Koskinen (Feb. 23, 2016) (available at https://www.murphy.senate.gov/download/22316-irs-letter).

II. THE ANTI- INJUNCTION ACT: A PRE-ENFORCEMENT CHALLENGE SHOULD NOT BE BLOCKED BY THE AIA

A. APA Review Does Not Violate The AIA's Prohibition On Restraining Tax Assessment Or Collection

Pre-enforcement judicial review under the APA and the AIA's barriers to litigation are not mutually exclusive and can coexist. This is true here where the Notice seeks to force new reporting requirements and a challenge would not restrain assessment or collection of tax. The same arguments are applicable in petitioner's case.

The AIA prohibits litigation the purpose of which is to restrain assessment or collection of any tax.[59] "Assessment" and "collection" have distinct meanings, and proper interpretation of those terms renders the AIA inapplicable to bar judicial review of a challenge to procedurally deficient rules. "Assessment" is one step of the tax administration process and it simply refers to an official recording of a taxpayer's liability.[60] Even under the broadest interpretation, it "refers to little more than the calculation or recording of a tax liability."[61] Accordingly, "assessment" is a step of the tax process

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[59] 26 U.S.C. § 7421(a).
[60] *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 9 (2015).
[61] *United States v. Galetti*, 541 U.S. 114, 122 (2004).

that is separate, distinct, and subsequent to information reporting.[62]

"Collection" is nothing more than the act of obtaining payment for the amount of tax owed, and a step in the tax process initiated by the assessment.[63] Again, even under a broader interpretation, "collection" could be construed as a tax payment before assessment (e.g., withholding), but still is merely one step of the tax process that is separate from assessment and information reporting.[64]

The Court in *Direct Marketing* held that the Tax Injunction Act (TIA) did not prohibit a challenge to legislation requiring certain retailers to report information to the Colorado Department of Revenue. The Court noted that "information gathering has long been treated as a phase of tax administration that occurs before assessment … or collection."[65] The Court further opined that enforcement of the information reporting rule might improve the state's assessment and collection functions, but the term "restrain" should be construed narrowly and the TIA should not apply to actions that merely inhibit assessment or collection.[66] The rationale applied in *Direct Marketing* is applicable to *Amicus* members affected by the Notice and in petitioner's case. In issuing Notice 2017-10 and Notice 2016-66, the IRS was not acting \to

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[62] *Direct Mktg.*, 575 U.S. at 9.
[63] *Id.* at 10.
[64] *Id.*
[65] *Id.* at 11.
[66] *Id.* at 11-12.

collect taxes: IRS Forms 8886 and 8918 do not assess or collect any tax — each is a disclosure statement requiring the filer to provide information to the IRS.

B. The AIA Does Not Prohibit All Judicial Review Even Where Assessment And Collection Might Be Restrained

Amicus has demonstrated that it would be successful in an APA procedural challenge of the Notice. Further, *Amicus* members have suffered irreparable harm[67] the Notice has caused. These two factors, taken together, and equally applicable in petitioner's case militate against the AIA prohibiting APA pre-enforcement review. This Court previously concluded that the AIA does not apply if the taxpayer would prevail on the merits of the case and would be caused irreparable harm.[68] In *Williams Packing*, the Court stated that the AIA's purpose was to allow the United States to assess and collect taxes without judicial intervention, but that where the government would be unable to prevail on the merits and collection would harm the taxpayer, the "attempted collection"

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[67] In certain instances, economic harm is sufficient to establish irreparable harm where recovery from harm is unlikely and monetary damages cannot adequately compensate. *Hillyer v. Comm'r*, 817 F. Supp. 532, 537 (M.D. Pa. 1993) (forced sale of home would leave taxpayer homeless) (citing *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962)).

[68] *See Enochs v. Williams Packing & Navigation Co.,* 370 U.S. 1 (1962).

could be enjoined because "the exaction is merely in 'the guise of a tax.'"[69]

With respect to the Notice, it is an uncontroverted fact that the IRS did not follow the APA's notice-and-comment rulemaking procedures. *Amicus* would prevail on the merits were it to litigate the Notice as unlawful agency action. Similar to petitioner, the harm facing *Amicus* members for failing to comply with the Notice are irreparable, and include the impacts to reputation and livelihood, particularly to material advisors, many of whom have developed a profession around facilitating conservation easement donations. Accordingly, the Court should follow *Williams Packing* and hold that the AIA does not bar APA judicial review of the Notice.

Alternatively, if the AIA applies under *Williams Packing*, the Court should apply the same exception it applied in *South Carolina v. Regan*[70] and hold that the AIA should not bar a pre-enforcement judicial review when there is no other recourse to challenge. The penalties facing those who fail to comply with the Notice are so draconian that *Amicus* members complied to avoid that result. This Court previously ruled that the AIA "was intended to apply only when Congress has provided an alternative avenue for an aggrieved to litigate its claims on its own behalf," and the lack of an alternative remedy defeated the AIA's bar to a suit seeking an injunction

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[69] *Id.* at 7 (quoting *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932)).
[70] 465 U.S. 367 (1984).

against a law eliminating the tax-exempt status of bearer bonds.[71] *Amicus* members and petitioner lack an alternative remedy; therefore, the AIA should not bar APA judicial review.

CONCLUSION

To be clear, Amicus believes the IRS should enforce the Code § 170(h) tax deduction rules for conservation easement donations. However, the Notice is unlawful. Petitioner is similarly situated. Unless this Court finds in favor of petitioner, Amicus members will continue to be a part of the IRS's great history of adversely impacting the rights and obligations of taxpayers though informal interpretative guidance that circumvents the required process of APA notice-and-comment rulemaking.

Dated: July 28, 2020

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[71] *Id*. at 381.