No. 19-930

In the Supreme Court of the United States

CIC SERVICES, LLC, PETITIONER

v.

INTERNAL REVENUE SERVICE, ET AL.

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

BRIEF FOR THE RESPONDENTS

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
RICHARD E. ZUCKERMAN
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
JONATHAN C. BOND
Assistant to the Solicitor General
ELLEN PAGE DELSOLE
BETHANY B. HAUSER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The Internal Revenue Code (Code), 26 U.S.C. 1 *et seq.*, requires taxpayers and tax professionals to report certain tax-related information to the Internal Revenue Service (IRS) within the Department of the Treasury (Treasury), and it requires tax professionals to maintain certain records and to provide those records to the IRS upon request. Subchapter 68B of the Code, 26 U.S.C. 6671 *et seq.*, imposes civil penalties on (*inter alios*) taxpayers and tax professionals who violate those requirements. The Anti-Injunction Act, 26 U.S.C. 7421(a), provides that, with certain exceptions, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." *Ibid.* The term "'tax'" in that provision is "deemed also to refer to the penalties * * * provided by" Subchapter 68B of the Code. 26 U.S.C. 6671(a).

In this case, petitioner's suit seeks to enjoin enforcement of an IRS determination that certain transactions are subject to reporting and recordkeeping requirements that are enforceable by monetary penalties that the Code deems to be taxes. The question presented is as follows:

Whether the court of appeals correctly held that the Anti-Injunction Act required dismissal of petitioner's suit.

TABLE OF CONTENTS

Page

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations—Continued: Page

In the Supreme Court of the United States

No. 19-930

CIC SERVICES, LLC, PETITIONER

v.

INTERNAL REVENUE SERVICE, ET AL.

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

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 925 F.3d 247. The opinion of the district court (Pet. App. 38a-47a) is not published in the Federal Supplement but is available at 2017 WL 5015510.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2019. A petition for rehearing was denied on August 28, 2019 (Pet. App. 48a-66a). On October 28, 2019, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including January 3, 2020. On December 17, 2019, Justice Sotomayor further extended the time to and including January 17, 2020, and the petition was filed on that date. The petition for a writ of certiorari was granted on May 4, 2020. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-40a.

STATEMENT

A. Statutory And Regulatory Background

1. The Internal Revenue Code (Code), 26 U.S.C. 1 *et seq*., requires taxpayers and tax professionals to report certain tax-related information to the Internal Revenue Service (IRS) within the Department of the Treasury (Treasury). Section 6011(a) requires "any person made liable for any tax"—"[w]hen required by regulations prescribed by the Secretary [of the Treasury]"—to "make a return or statement according to the forms and regulations prescribed by" the Secretary and to "include therein the information required by such forms or regulations." 26 U.S.C. 6011(a). Exercising that authority, the Secretary has adopted a wide range of regulations and forms, such as the familiar Form 1040, for the reporting of required information by taxpayers.

The Code additionally requires a "material advisor"—a person who provides material aid, assistance, or advice with respect to certain transactions and who derives a threshold amount of gross income from doing so, 26 U.S.C. 6111(b)—to file a return providing various information, 26 U.S.C. 6111(a). A material advisor also must maintain certain records subject to inspection, including a list of persons for whom it served as a material advisor with respect to a transaction. 26 U.S.C. 6112(a).

2. At issue here are requirements applicable to certain transactions, called "'reportable transactions,'" that the Secretary has determined "hav[e] a potential for tax avoidance or evasion." 26 U.S.C. 6707A(c)(1).

Those requirements stem from Congress's and Treasury's long-running efforts to address the "growing phenomenon of abusive tax shelters." S. Rep. No. 494, 97th Cong., 2d Sess. 266, 268 (1982). Such schemes have little or no real economic impact but are designed to generate large tax windfalls. See, *e.g.*, *United States* v. *Woods*, 571 U.S. 31, 33 (2013). By the 1980s, Congress had become concerned that tax-shelter schemes "undermine[] respect for the entire tax system" and "harm[]" "both the perception and the reality of fairness." S. Rep. No. 313, 99th Cong., 2d Sess. 518-519 (1986).

Congress sought to address the problem of abusive tax shelters legislatively, see Department of Treas., *The Problem of Corporate Tax Shelters: Discussion, Analysis and Legislative Proposals* 59-60 (July 1999), https://go.usa.gov/xftcn, but those efforts proved inadequate. Because "tax shelters 'appear in the guises of Proteus,' taking many different forms" and "structures," the problem cannot readily be addressed through generalized legislation. *Id.* at 11 (footnote and citation omitted). And piecemeal legislation to address specific tax-shelter schemes proved unworkable because creative taxpayers and advisors could circumvent targeted responses. *Id.* at 99. Meanwhile, tax-avoidance schemes posed a significant threat to the public fisc. *Id.* at i, iii-iv.

Treasury ultimately adopted a disclosure-focused approach that requires taxpayers and material advisors to report to the IRS certain "reportable transactions" that the Secretary specifies. 68 Fed. Reg. 10,161, 10,161 (Mar. 4, 2003); see *id.* at 10,163-10,169 (promulgating 26 C.F.R. 1.6011-4). Under Treasury's current regulations, "[r]eportable transactions" include (among others) any transaction that the IRS has "identified by notice, regulation, or other form of published guidance" as either (1) an abusive tax-avoidance transaction, called a "listed transaction," 26 C.F.R. 1.6011-4(b)(2) (emphasis omitted); or (2) a transaction the IRS "believe[s] has a potential for tax avoidance or evasion, but for which" the IRS "lack[s] enough information" to classify it conclusively, 72 Fed. Reg. 43,146, 43,146 (Aug. 3, 2007), called a "transaction of interest," 26 C.F.R. 1.6011-4(b)(6). By specifying these types of transactions in public guidance—rather than in individual audits—the IRS helps taxpayers identify in advance which transactions will trigger reporting requirements.

3. Congress subsequently incorporated Treasury's reportable-transaction framework (with certain modifications) into the Code and established a statutory enforcement mechanism. See Pub. L. No. 108-357, Tit. VIII, Subtit. B, Pt. I, §§ 811-819, 118 Stat. 1575-1585 (2004). Congress codified the Secretary's authority to specify reportable transactions by defining a "'reportable transaction'" as "any transaction with respect to which information is required to be included with a return or statement because, as determined under regulations prescribed under section 6011, such transaction is of a type which the Secretary determines as having a potential for tax avoidance or evasion." 26 U.S.C. 6707A(c)(1); see 26 U.S.C. 6111(b)(2), 6112(a), 6707(d). Congress contemplated that the Secretary would have flexibility to "modify" the list of transactions that are reportable based on their potential for tax evasion. H.R. Conf. Rep. No. 755, 108th Cong., 2d Sess. 597 n.462 (2004).

Taxpayers and material advisors who fail to comply with the foregoing requirements are subject to civil monetary penalties. For taxpayers, 26 U.S.C. 6707A states that "[a]ny person who fails to include on any return or statement any information with respect to a reportable transaction which is required under section 6011 to be included with such return or statement shall pay a penalty in the amount determined under" Section 6707A(b). 26 U.S.C. 6707A(a). The penalty amount is "75 percent of the decrease in tax shown on the return as a result of such transaction," 26 U.S.C. 6707A(b)(1), subject to minimum and maximum amounts, 26 U.S.C. 6707A(b)(2) and (3); see also 26 U.S.C. 6662A.

Under 26 U.S.C. 6707 and 6708, a material advisor who either fails to file a timely return under Section 6111(a), files a return containing false or incomplete information, or fails (without reasonable cause) to make available to the IRS records required to be maintained under Section 6112(a) regarding a reportable transaction is subject to a civil penalty under Subchapter 68B. See 26 U.S.C. 6707(a) and (b), 6708(a). For a listed transaction, the penalty amount is the greater of 50% of the gross income the material advisor derived from its work on the transaction (75% in the case of an intentional failure to act) and $200,000. 26 U.S.C. 6707(b)(2). For other reporting violations—including those involving transactions of interest—the penalty amount is $50,000, and for recordkeeping violations it is $10,000 per day. 26 U.S.C. 6707(b)(1), 6708(a)(1).

The Code "deem[s]" those penalties to be "'tax[es]'" for purposes of the Code. 26 U.S.C. 6671(a). Because of that classification, challenges to those penalties must be pursued through the administrative and judicial mechanisms that Congress has established for tax disputes. The usual mechanism for a taxpayer to bring such a challenge is to pay the tax and then seek a refund, 26 U.S.C. 6402, 6511, 6532; 28 U.S.C. 1346(a)(1), but limited exceptions exist, see, *e.g.*, 26 U.S.C. 6212-6213.

Congress has made those established review mechanisms exclusive. With limited exceptions, the Anti-Injunction Act, 26 U.S.C. 7421(a), 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." *Ibid.* An adjacent provision bars suits to recover amounts already "assessed or collected" until the taxpayer seeks a refund from the IRS. 26 U.S.C. 7422(a). And with limited exceptions, the Declaratory Judgment Act precludes issuance of declaratory relief "with respect to Federal taxes." 28 U.S.C. 2201(a).

A person who "willfully" fails to comply with the reporting requirements is guilty of a misdemeanor. 26 U.S.C. 7203. Criminal prosecutions under the Code are authorized and conducted by the Department of Justice. See 26 U.S.C. 7122, 7801; 28 U.S.C. 515(a); 28 C.F.R. 0.70(b); Department of Justice, *Justice Manual* §§ 6-1.110 *et seq.*, 6-4.010 *et seq.*; Internal Revenue Manual § 9.5.2, (Sept. 22, 2015); *id.* § 9.5.12 (Feb. 8, 2019); *id.* § 9.6.4 (May 4, 2012).

B. IRS Notice 2016-66

In 2016, exercising its authority under 26 U.S.C. 6011 and 26 C.F.R. 1.6011-4, the IRS identified certain "micro-captive transaction[s]" as "transaction[s] of interest," *i.e.*, as "ha[ving] a potential for tax avoidance or evasion." Notice 2016-66, 2016-47 I.R.B. 745, 745 (Nov. 21, 2016), https://go.usa.gov/xftN6 (Pet. App. 91a); see Notice 2017-08, 2017-3 I.R.B. 423, 424 (Jan. 17, 2017), https://go.usa.gov/xftNM (extending certain deadlines). The micro-captive transaction described in Notice 2016-66 generally involves an attempt by a taxpayer and a related entity (the "captive") to reduce their taxable incomes through agreements that purport to be insurance contracts, but that in substance may not actually constitute insurance. See Notice 2016-66, 2016-47 I.R.B. at 745-746 (Pet. App. 91a-99a). In the typical micro-captive transaction, the captive contracts to insure (or to reinsure) a putative risk of the taxpayer, in exchange for putative premiums. *Id.* at 745 (Pet. App. 91a-93a). The taxpayer deducts the amounts it pays as premiums under 26 U.S.C. 162, while the captive excludes the premiums from its own taxable income under 26 U.S.C. 831(b). Notice 2016-66, 2016-47 I.R.B. at 745-746 (Pet. App. 91a, 98a-99a).

The IRS "believe[d]" that cases exist in which claiming the tax benefits is "improper" because in substance "the transaction does not constitute insurance." Notice 2016-66, 2016-47 I.R.B. at 746 (Pet. App. 98a-99a); see, *e.g.*, *Avrahami* v. *Commissioner*, 149 T.C. 144 (2017); *Syzygy Ins. Co.* v. *Commissioner*, 117 T.C.M. (CCH) 1165 (2019). The IRS recognized that using a captive insurance company might sometimes reflect legitimate "risk management purposes that do not involve tax avoidance," and it acknowledged that it "lack[ed] sufficient information" to determine definitively which captive-insurance transactions constitute actual tax evasion. Notice 2016-66, 2016-47 I.R.B. at 745-746 (Pet. App. 91a, 99a). But the IRS identified several factors—such as coverage for an "implausible risk," premiums that "significantly exceed" prevailing rates, or the captive's use of premium income for purposes other than paying claims (such as loaning them to the putative insured)—that may indicate that a transaction does not properly constitute insurance. *Ibid.* (Pet. App. 94a-95a); see *ibid.* (Pet. App. 94a-98a).

The IRS accordingly designated certain micro-captive transactions as transactions of interest subject to the statutory reporting and recordkeeping requirements. Notice 2016-66, 2016-47 I.R.B. at 746-747 (Pet. App. 99a-101a). The IRS specified criteria identifying the types of transactions covered and what information must be reported. See *ibid.* It noted that noncompliance with those requirements may trigger penalties under 26 U.S.C. 6707, 6707A, and 6708. Notice 2016-66, 2016-47 I.R.B. at 747-748 (Pet. App. 103a-106a).

C. The Present Controversy

1. Petitioner is "a material advisor to taxpayers engaging in micro-captive transactions." Pet. App. 4a. Petitioner commenced this action against the IRS, Treasury, and the United States, alleging that the IRS had issued Notice 2016-66 in violation of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.*, and the Congressional Review Act, 5 U.S.C. 801 *et seq.* Pet. App. 4a. Petitioner contended that Notice 2016-66 is a legislative rule for which the IRS was required, but had failed, to engage in notice-and-comment rulemaking; that Notice 2016-66 is arbitrary and capricious; and that the Notice was required to be, but had not been, submitted for congressional review before it took effect. *Ibid.* Petitioner's complaint sought a permanent injunction "enjoin[ing] the enforcement of Notice 2016-66" and a "judgment declaring that Notice 2016-66 is unlawful." Compl. 16 (Mar. 27, 2017).

Petitioner also moved for a preliminary injunction, which the district court denied. Pet. App. 4a. During the preliminary-injunction proceedings, petitioner's founder (an attorney and certified public accountant) testified that captives "most definitely" could "be used for tax avoidance or evasion purposes." 4/19/17 Tr. 39-40; see *id.* at 14-15.

The government moved to dismiss the suit, arguing (as relevant here) that it is barred by the Anti-Injunction Act, 26 U.S.C. 7421(a), and the tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201(a). D. Ct. Doc. 25-1, at 7-10 & n.5 (May 30, 2017). The district court granted the motion. Pet. App. 38a-47a. The court determined that the suit was barred because the penalty for noncompliance with the reporting and recordkeeping requirements "is a 'tax' within the [Anti-Injunction Act's] prohibition," and petitioner "s[ought], at least in part, to restrain the IRS's assessment or collection of a tax." *Id.* at 43a, 46a (citations omitted).

2. A divided panel of the court of appeals affirmed. Pet. App. 1a-24a.

a. The court of appeals held that petitioner's "complaint seeking to enjoin the enforcement of [Notice 2016-66]" is barred by the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act because it "is properly characterized as a 'suit for the purpose of restraining the assessment or collection of any tax.'" Pet. App. 21a (citation omitted); see *id.* at 5a n.3, 8a-21a. It agreed with the district court that, under 26 U.S.C. 6671(a), the penalties that enforce the reporting and recordkeeping requirements made applicable by Notice 2016-66 are "treated as taxes themselves for purposes of the [Anti-Injunction Act]." Pet. App. 14a; see *id.* at 14a-15a & n.5. The court of appeals concluded that petitioner's suit seeks to "'restrain (indeed eliminate)'" that tax by "invalidat[ing] the Notice, which is the entire basis for that tax." *Id.* at 16a (citation omitted). The court agreed with the D.C. Circuit's decision in *Florida Bankers Ass'n* v. *United States Department of the Treasury*, 799 F.3d 1065 (2015) (Kavanaugh, J.), cert. denied, 136 S. Ct. 2429 (2016), which had held that the Anti-Injunction Act barred a similar suit to enjoin other reporting requirements. Pet. App. 7a-21a.

The court of appeals rejected petitioner's contention that *Direct Marketing Ass'n* v. *Brohl*, 575 U.S. 1 (2015), dictated a contrary conclusion. Pet. App. 8a-17a. The Court in *Direct Marketing* had held that the Tax Injunction Act, 28 U.S.C. 1341—which bars suits to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law," *ibid.*—did not bar a suit to enjoin enforcement of a state law that required retailers to notify customers of, and to report to the State, certain information regarding sales on which the retailers had not collected sales or use taxes. 575 U.S. at 7-14. The *Direct Marketing* Court rejected an argument that enjoining those requirements "'restrain[ed]'" assessment or collection of sales and use taxes, construing the term "restrain" to encompass only "orders that stop (or perhaps compel) acts of 'assessment, levy or collection.'" *Id.* at 12-13 (citations omitted).

The court of appeals reserved judgment on whether *Direct Marketing*'s interpretation of the Tax Injunction Act also applies to the Anti-Injunction Act. Pet. App. 17a & n.6. It explained that, even assuming the two statutes impose equivalent restrictions on pre-payment tax challenges, petitioner's suit is barred because the relief it requests "'would have the effect of restraining—*fully stopping*' the IRS from collecting the penalties imposed for violating the Notice's requirements." *Id.* at 17a (citation omitted). The court noted that *Direct Marketing* had addressed whether a suit to enjoin Colorado's notice and reporting requirements was one to restrain the *underlying* (sales and use) taxes whose assessment and collection those requirements facilitated. *Id.* at 12a, 14a. In contrast, the court explained, "[t]he relevant taxes" here are "the penalties imposed for violation of [Notice 2016-66's] requirements." *Id.* at 14a, 16a.

The court of appeals also rejected petitioner's contention that the "'purpose'" of its suit was to "challeng[e] the Notice's regulatory requirement and not the penalty." Pet. App. 18a (citation and emphasis omitted). The court explained that "[a]ny distinction that once existed in [this] Court's [Anti-Injunction Act] jurisprudence between 'regulatory' taxes and 'revenue-raising' taxes" has "been 'abandoned.'" *Ibid.* (citations omitted).

b. Judge Nalbandian dissented. Pet. App. 25a-37a. In his view, the Anti-Injunction Act did not bar this suit because petitioner "d[id] not allege tax liability as its injury" and instead challenged the reporting and recordkeeping requirements themselves, and "[e]njoining a reporting requirement enforced by a tax does not necessarily bar the assessment or collection of that tax." *Id.* at 26a, 29a (citation and emphasis omitted).

3. The court of appeals denied a petition for rehearing en banc. Pet. App. 48a-49a. Judges Clay and Sutton issued opinions concurring in the denial of rehearing. *Id.* at 50a-54a, 55a-57a. Judge Thapar, joined by six other judges, dissented from the denial of rehearing. *Id.* at 58a-66a; C.A. Doc. 65-2, at 1, 8-13 (Aug. 28, 2019).

SUMMARY OF ARGUMENT

The court of appeals correctly held that the Anti-Injunction Act, 26 U.S.C. 7421(a), bars this suit.

A. The Anti-Injunction Act forbids any "suit for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. 7421(a). The Declaratory Judgment Act's tax exception, 28 U.S.C. 2201(a), which "is at least as broad as the Anti-Injunction Act," *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 733 n.7 (1974), reinforces that bar. With exceptions that are inapplicable here, those provisions channel disputes over taxes to post-payment proceedings—the approach American law has followed since the Founding.

Petitioner's suit falls squarely within the Anti-Injunction Act's bar. That suit seeks to enjoin the enforcement of, and declare unlawful, Notice 2016-66, which extends certain reporting and recordkeeping requirements that are enforced by penalties the Code "deem[s]" to be "'tax[es].'" 26 U.S.C. 6671(a). If petitioner prevails, the IRS will be prohibited from "assess[ing]" or "collect[ing]" those taxes, 26 U.S.C. 7421(a), based on petitioner's noncompliance with the Notice's requirements. The suit therefore is one to restrain assessment or collection of a tax.

B. Petitioner's contrary arguments lack merit.

1. Relying on *Direct Marketing Ass'n* v. *Brohl*, 575 U.S. 1 (2015), petitioner contends (Br. 17-24) that suits to enjoin reporting and similar requirements that facilitate assessment and collection of taxes are not suits to restrain the acts of tax assessment and collection themselves. But *Direct Marketing*'s analysis and conclusion are inapposite here. This Court held there that enjoining reporting and similar requirements did not "restrain" assessment and collection of the *underlying* taxes that were the subject of those requirements. Unlike the requirements made applicable by Notice 2016-66, the requirements at issue in *Direct Marketing* were not enforced by taxes. The case therefore did not present, and the Court did not decide, the question whether a suit to enjoin the enforcement of reporting and other requirements that *are* enforced by taxes is one to restrain tax assessment or collection.

2. Petitioner contends (Br. 24-29) that its suit does not seek to restrain tax assessment or collection because petitioner has not yet violated the reporting and recordkeeping requirements and therefore has not incurred any tax liability. But petitioner's suit seeks an advance judicial determination that would forbid assessing and collecting the tax if petitioner violates those requirements. Petitioner's situation is no different from that of any other taxpayer who is contemplating an activity with potential tax consequences, and who seeks a judicial ruling that would preemptively shield the activity from those consequences. The Anti-Injunction Act and the Declaratory Judgment Act squarely foreclose such suits. Decisions of this Court and lower courts confirm that commonsense conclusion.

3. Petitioner contends (Br. 29-31) that its purpose in bringing suit is not to restrain the taxes for violating the reporting and recordkeeping requirements but to invalidate the requirements themselves. But the relief sought in petitioner's complaint—a judicial order barring an enforcement mechanism that the Code treats as a tax—shows that the suit's purpose is to restrain a tax. This Court has repeatedly held that the Act bars suits seeking relief that would preclude the assessment or collection of taxes, even where a plaintiff has purported to challenge only other requirements that the taxes enforced.

C. Petitioner's additional arguments (Br. 31-37) also lack merit.

1. Petitioner contends (Br. 31-34) that applying the Anti-Injunction Act to bar this suit would undermine the APA and a presumption favoring judicial review that the APA embodies. That is incorrect. Although the APA generally authorizes judicial review of final agency

action, it does not override, but instead expressly contemplates, limitations on review established by other laws, 5 U.S.C. 701(a)(1), 702(1). Those limitations include the bar on pre-payment tax suits imposed by the Anti-Injunction Act and the Declaratory Judgment Act. The APA also does not authorize review where another adequate judicial remedy is available. 5 U.S.C. 704. Petitioner has such a remedy in the form of a post-payment refund suit, which this Court has long recognized to be adequate.

2. Petitioner contends (Br. 15, 35) that applying the Anti-Injunction Act to bar this suit would "likely" violate "[d]ue process" principles. See Pet. Br. 34-37. That argument lacks merit. This Court has long held that post-payment review in a refund suit satisfies due process. That remedy would be available to petitioner here.

Petitioner asserts (Br. 34-35) that it could not bring a refund suit without first committing a criminal offense under 26 U.S.C. 7203 by "willfully" failing to submit required returns, *ibid.* That is incorrect. A taxpayer can bring a refund suit after withholding the challenged information from a filed return and incurring the penalty. Withholding the challenged information on a timely return, based on a good-faith belief that supplying it is not legally required, does not violate Section 7203 where the taxpayer informs the IRS of that position. And because petitioner has not shown any credible prospect that it would be criminally prosecuted if it pursued that course of action, it would lack standing to sue to enjoin such a hypothetical prosecution. It cannot violate due process to construe the Anti-Injunction Act to bar a suit that Article III already forecloses.

Petitioner asserts (Br. 35) that a refund suit is inadequate because the IRS might not assess penalties even if petitioner violates the reporting and recordkeeping requirements. In that event, however, petitioner would suffer no injury. And this Court's decisions foreclose petitioner's contention (*ibid.*) that pre-enforcement review is needed because petitioner might be unable to pay the taxes before seeking a refund.

ARGUMENT

THE ANTI-INJUNCTION ACT REQUIRES DISMISSAL OF PETITIONER'S SUIT TO ENJOIN ENFORCEMENT OF IRS NOTICE 2016-66

Petitioner seeks a judicial order that would allow it to violate reporting and recordkeeping requirements imposed by Notice 2016-66, without incurring potential liability for statutory penalties that the Code deems to be taxes. The court of appeals correctly held that the Anti-Injunction Act, 26 U.S.C. 7421(a), requires dismissal of petitioner's suit. That conclusion follows from the text of the Anti-Injunction Act and a century of this Court's precedent. Petitioner's contrary interpretation misreads the statutory language and this Court's decisions.

A. The Anti-Injunction Act Bars Petitioner's Suit

1. The Anti-Injunction Act bars suits for the purpose of restraining the assessment or collection of any tax

The Anti-Injunction Act provides that, with certain enumerated exceptions, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. 7421(a). That "broad and mandatory language," *United States* v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 12 (2008), "could scarcely be more explicit" in precluding pre-payment suits. *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 736 (1974) (*Bob Jones*).

a. The Anti-Injunction Act does not foreclose judicial review of tax disputes. The Code establishes a comprehensive scheme of administrative and judicial avenues that Congress determined are the appropriate mechanisms to resolve such disputes. The Anti-Injunction Act is one of several provisions that channel disputes into those avenues.

The principal mechanism by which taxpayers can dispute the assessment or collection of taxes is a refund suit. A taxpayer may pay the tax and request a refund from the IRS. 26 U.S.C. 6402(a), 6511; 26 C.F.R. 301.6402-2; see generally 15 *Mertens Law of Federal Income Taxation* § 58:1 *et seq.* (Scott Shimick ed., Aug. 2020 update) (*Mertens*). If the refund is denied, the taxpayer may then bring suit in district court (or the Court of Federal Claims) to recover sums "alleged to have been erroneously or illegally assessed or collected." 28 U.S.C. 1346(a)(1); see 26 U.S.C. 6532, 7422(a); *Clintwood Elkhorn*, 553 U.S. at 4; see generally 15 *Mertens* § 58A:1 *et seq.* (Edward J. Smith ed., Aug. 2020 update) To bring a refund suit, a taxpayer ordinarily must pay the tax owed in full, *Flora* v. *United States*, 357 U.S. 63, 64-75 (1958), aff'd on reh'g, 362 U.S. 145 (1960), except in limited circumstances where Congress has authorized suits following a partial payment, see, *e.g.*, 26 U.S.C. 6694(c), 6703(c), 7422(g)(1). The refund-suit remedy "offer[s] [a taxpayer] a full, albeit delayed, opportunity to litigate the legality" of a disputed tax. *Bob Jones*, 416 U.S. at 746. Other taxpayers challenging IRS notices similar to Notice 2016-66 have pursued that path. *Mann Constr., Inc.* v. *United States*, No. 20-cv-11307 (E.D. Mich. filed May 26, 2020); *McGowan* v. *United States*, No. 19-cv-1073 (N.D. Ohio filed May 13, 2019).

In certain circumstances, the Code provides for alternative forms of review. For example, for certain taxes not at issue here, the IRS must issue a notice of deficiency to a taxpayer, who may then file a prepayment suit in the Tax Court to challenge the deficiency. 26 U.S.C. 6212(a), 6213(a). The Code also affords taxpayers limited administrative and judicial review (known as "collection due process" proceedings) before the IRS undertakes certain collection measures. See 26 U.S.C. 6320, 6330. Apart from those and other statutory exceptions, however, the avenue Congress provided for review is a post-payment refund suit.

The Anti-Injunction Act is one of several statutes that prevent a taxpayer from circumventing or short-circuiting the review framework Congress established. By barring suits to "restrain[] the assessment or collection of any tax," 26 U.S.C. 7421(a), the Act precludes taxpayers from preemptively litigating the validity or applicability of a tax. Instead, the plaintiff must pay the tax and then dispute it in a refund suit. See *National Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 543 (2012) (*NFIB*) ("Because of the Anti-Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund."); see also *Florida Bankers Ass'n* v. *United States Dep't of the Treas.*, 799 F.3d 1065, 1066 (D.C. Cir. 2015) (Kavanaugh, J.), cert. denied, 136 S. Ct. 2429 (2016). Section 7422 similarly prevents circumvention of the statutory framework by barring suits to recover taxes that have already been assessed or collected until "a claim for refund or credit has been duly filed with the Secretary" in accordance with

IRS procedures. 26 U.S.C. 7422(a). And although in many other legal contexts a litigant might alternatively seek declaratory relief under the Declaratory Judgment Act, 28 U.S.C. 2201(a), that Act does not authorize declaratory judgments "with respect to Federal taxes." *Ibid.*; see *Flora*, 357 U.S. at 75. "[T]he federal tax exception to the Declaratory Judgment Act is at least as broad as the Anti-Injunction Act." *Bob Jones*, 416 U.S. at 733 n.7.

b. That bright-line bar on suits outside the established framework serves to prevent frustration of tax-collection efforts. "[T]he principal purpose of [the Anti-Injunction Act's] language" is "the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference." *Bob Jones*, 416 U.S. at 736. To that end, the Act "'require[s] that the legal right to the disputed sums be determined in a suit for [a] refund.'" *Ibid.* (citation omitted); accord *NFIB*, 567 U.S. at 543.

The Code's "pay first and litigate later" approach (*Flora*, 357 U.S. at 75 (citation omitted)) also embodies the longstanding tradition of Anglo-American law. From "[t]ime out of mind," *Bull* v. *United States*, 295 U.S. 247, 259 (1935), English law permitted the government to collect taxes by summary administrative proceedings, granting taxpayers the right to dispute those taxes only by paying the tax and suing for a refund, see *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277-278 (1856). In the early years of the Republic, those traditional procedures were incorporated from the familiar procedures of English law and the laws of the States. See *id.* at 278-280. In 1867, Congress carried that tradition forward when it enacted the Anti-Injunction Act, Act of

Mar. 2, 1867, ch. 169, § 10, 14 Stat. 475-476, to protect the federal tax system from being inundated by injunctive suits that were then sweeping over state tax systems, see *South Carolina* v. *Regan*, 465 U.S. 367, 386-387 (1984) (O'Connor, J., concurring in the judgment). And Congress added the tax exception to the Declaratory Judgment Act, see Revenue Act of 1935, ch. 829, § 405, 49 Stat. 1027, to prevent requests for declaratory relief from circumventing the "long-continued policy of Congress" against anticipatory tax suits, S. Rep. No. 1240, 74th Cong., 1st Sess. 11 (1935).

Since 1867, Congress has repeatedly reenacted the Anti-Injunction Act at times when it was "obviously aware of the continuously increasing complexity of the federal tax system." *Bob Jones*, 416 U.S. at 741-742; see *id.* at 743. And it has made minor changes to the Act's scope while leaving it otherwise intact. See, *e.g.*, Pub. L. No. 114-74, Tit. XI, § 1101(f)(10), 129 Stat. 638 (2015); Pub. L. No. 105-206, Tit. III, Subtit. C, § 3201(e)(3), 112 Stat. 740 (1998). Those reenactments and amendments confirm that the core prohibition retains its full force.

c. Although the Anti-Injunction Act and the Declaratory Judgment Act include limited express exceptions, none applies here. And the narrow scope of those exceptions underscores the reach of the general rule.

For example, the Anti-Injunction Act exempts from its general bar the judicial proceedings the Code itself establishes for taxes that are subject to the notice-of-deficiency procedure or collection-due-process proceedings noted above. See 26 U.S.C. 7421(a); see, *e.g.*, *Our Country Home Enters., Inc.* v. *Commissioner*, 855 F.3d 773 (7th Cir. 2017). Those procedures are not at issue here. And the Declaratory Judgment Act exempts actions seeking review of a determination of an entity's tax-exempt status under 26 U.S. 7428; certain tax determinations in bankruptcy proceedings; and certain suits concerning "antidumping or countervailing dut[ies]." 28 U.S.C. 2201. Those narrow, context-specific exceptions reflect Congress's policy judgment that, apart from the few areas where Congress has deemed pre-payment review appropriate, the general bar on such review controls.

This Court also has construed the Anti-Injunction Act not to bar suits in two other, limited circumstances, but neither applies here. The Court has held that, if "equity jurisdiction otherwise exists" and it is "clear that under no circumstances could the Government ultimately prevail * * * under the most liberal view of the law and the facts," a pre-payment suit can go forward on the theory that such an "exaction is merely in 'the guise of a tax.'" *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962) (citation omitted). Petitioner does not invoke that exception. The Court also has held that the Act does not bar suit where a taxpayer lacks any "alternative legal avenue by which to contest the legality of a particular tax," such as "a suit for a refund." *South Carolina*, 465 U.S. at 373-374. That exception is inapplicable because petitioner can pursue a refund suit if it incurs and pays the tax and a refund is denied. Pet. App. 23a (noting that petitioner "d[id] not contest that it has this alternative remedy" of "'a suit for a refund'" (citation omitted)); see pp. 44-45, *infra*.

2. Petitioner's suit is one for the purpose of restraining the assessment or collection of a tax

Petitioner's suit accordingly cannot "be maintained" if it is covered by the Anti-Injunction Act's general rule barring "suit[s] for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. 7421(a). The court of appeals correctly held that it is. Pet. App. 7a-22a.

a. Petitioner's suit challenges the "enforcement" of reporting and recordkeeping requirements that Notice 2016-66 makes applicable to certain captive-insurance transactions. Compl. 16; see Pet. Br. 4-5, 10, 30. Those requirements are enforced by penalties under 26 U.S.C. 6707, 6707A, and 6708. And "[e]xcept as otherwise provided, any reference in [Title 26] to 'tax' imposed by [Title 26] shall be deemed also to refer to the penalties and liabilities provided by [Subchapter 68B]." 26 U.S.C. 6671(a). Because Sections 6707, 6707A, and 6708 appear in Subchapter 68B, the penalties those provisions impose are taxes under the Anti-Injunction Act, which appears in Title 26.

This Court's reasoning in *NFIB* confirms that conclusion. The Court in *NFIB* held that the penalty for failing to comply with the requirement to purchase health insurance under the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), known as the "individual mandate," was not a "tax" within the meaning of the Anti-Injunction Act. 567 U.S. at 543-546. In explaining why that was so, however, the Court contrasted that penalty with those imposed by Subchapter 68B, which *are* "treated as taxes under Title 26, which includes the Anti-Injunction Act." *Id.* at 544. The Court explained that, by "'deeming'" Subchapter 68B penalties to be taxes, Congress had "direct[ed]" that such a penalty "be treated as a tax for purposes of the Anti-Injunction Act." *Ibid.* (citation omitted). The sanction for violating the individual mandate fell outside the Anti-Injunction Act, not because of that sanction's denomination as a "penalty" standing alone, but because it "[wa]s not in Subchapter 68B." *Id.* at 545. The clear implication of the *NFIB* Court's reasoning is that, if that penalty "[h]ad * * * been located in Chapter 68, Subchapter B, the Anti-Injunction Act would have applied." *Florida Bankers*, 799 F.3d at 1068. Congress mandated that result for the penalties at issue here by placing them in Subchapter 68B.

Congress's classification of the penalties here as taxes was particularly apt. The Code imposes those penalties when a taxpayer or a material advisor fails to report required information or to provide required records about a type of transaction that the IRS has determined either is or "ha[s] a potential" to be "tax avoidance or evasion." 26 U.S.C. 6707A(c)(1); see 26 U.S.C. 6707(d), 6708(a). Requiring taxpayers and tax professionals to report and to provide records about such transactions enables the IRS to ensure that taxes applicable to them are not evaded but are properly assessed and collected.

The penalties the Code imposes on a taxpayer or material advisor who refuses to report such information or to provide required records can be viewed as embodying a presumption that the suspicious transaction may be an instance of actual or attempted tax avoidance or evasion, and that some tax liability should be imposed on the taxpayer or material advisor for depriving the IRS of the opportunity to scrutinize the transaction. Indeed, in many instances, the penalties are calculated (within certain limits) as a percentage of the tax savings a taxpayer achieved or of the income a material advisor earned. 26 U.S.C. 6707(b)(2)(B), 6707A(b)(1). Rather than allow a failure to report required information (or to provide relevant records) to frustrate the assessment and collection of taxes, those provisions establish an alternative basis for imposing a tax on such persons, functioning as a type of substitute for tax revenue that may potentially be forgone.

b. Petitioner's suit also is one "for the purpose of" restraining the assessment or collection of a tax. 26 U.S.C. 7421(a). The suit's "purpose" (*ibid.*) is apparent on the face of the complaint, where the first item of relief sought is an order "[p]ermanently enjoin[ing] the enforcement of Notice 2016-66." Compl. 16. Notice 2016-66 is enforced by the taxes that Sections 6707, 6707A, and 6708 impose for noncompliance with the statutory reporting and recordkeeping requirements. If the district court enjoined the enforcement of Notice 2016-66, the IRS could not assess and collect those taxes even if petitioner violated the requirements. The suit thus "falls squarely within the literal scope of the Act" as one "'for the purpose of restraining the assessment or collection of [a] tax.'" *Bob Jones*, 416 U.S. at 731-732 (citation omitted).

The only other particular remedy that petitioner's complaint requested was a "judgment declaring that Notice 2016-66 is unlawful." Compl. 16. As petitioner acknowledges (Br. 11 n.1), its "request for declaratory relief rises or falls with its request for injunctive relief." The federal-tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201(a), "is at least as broad as the Anti-Injunction Act." *Bob Jones*, 416 U.S. at 733 n.7. And as petitioner acknowledged below, Pet. App. 17a, a declaration that Notice 2016-66 is unlawful would necessarily preclude enforcement of that Notice through the imposition of taxes under 26 U.S.C. 6707, 6707A, and 6708. See Pet. C.A. Reply Br. 7 ("[T]he IRS certainly could never collect any penalties—valid or invalid—for non-compliance if Notice 2016-66 is struck down.").

B. Petitioner's Contrary Interpretation Reflects A Misreading Of The Statutory Text And This Court's Precedent

Petitioner advances (Br. 16-31) several arguments that its suit falls outside the Anti-Injunction Act's text. Those contentions lack merit.

1. Petitioner's suit to restrain the taxes that enforce the reporting and recordkeeping requirements is barred regardless of the suit's potential effect on the assessment and collection of other taxes

Petitioner contends (Br. 17-24) that this Court's decision in *Direct Marketing Ass'n* v. *Brohl*, 575 U.S. 1 (2015), effectively resolved the question presented in this case. The Court in *Direct Marketing* held that the Tax Injunction Act, 28 U.S.C. 1341, did not bar a suit challenging state-law notice and reporting requirements that were intended to facilitate the assessment and collection of taxes owed by the State's residents. The court of appeals correctly explained why *Direct Marketing* is not controlling here. Pet. App. 8a-17a.

a. The plaintiff in *Direct Marketing* challenged a Colorado law that "requir[ed] retailers that do not collect Colorado sales or use tax to notify Colorado customers of their use-tax liability and to report tax-related information to customers and the Colorado Department of Revenue." 575 U.S. at 4. The district court enjoined the notice and reporting requirements, but the Tenth Circuit reversed, holding that the suit was barred by the Tax Injunction Act. *Id.* at 7. That Act provides that "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. 1341. This Court reversed, holding that the Tax Injunction Act did not bar the suit. 575 U.S. at 7-14.

The *Direct Marketing* Court first held that the district court's order enjoining Colorado's notice and reporting requirements had not "enjoin[ed]" the "'assessment, levy or collection'" of any "tax." 575 U.S. at 7-8 (citation omitted); see *id.* at 7-12. The State did not argue that compliance with the notice and reporting requirements "involve[d] a 'levy.'" *Id.* at 11. And the Court concluded that barring "enforcement of [Colorado's] notice and reporting requirements" did not restrain "assessment" or "collection" of the underlying sales and use taxes. *Ibid.* The Court reasoned that providing notice to customers of their tax obligations, and reporting transactions to the State, are distinct from and "precede the steps of 'assessment' and 'collection'" of taxes. *Ibid.*

The *Direct Marketing* Court also rejected an argument that, "[b]ecause the notice and reporting requirements [we]re intended to facilitate collection" of sales and use taxes, an order enjoining those requirements "'restrain[ed]'" collection of the underlying sales and use taxes, by "'limit[ing], restrict[ing], or hold[ing] back'" their assessment and collection. 575 U.S. at 12 (citation omitted). The Court held that this potential downstream effect did not trigger the Tax Injunction Act's bar on federal-court orders that "restrain" state-tax assessment or collection. *Id.* at 12-14. Finding the term "restrain" ambiguous within that particular statutory context, the Court construed it to encompass only "orders that stop (or perhaps compel)" assessment or collection, not orders that "merely inhibit[ ] those activities." *Id.* at 13-14.

b. *Direct Marketing* does not speak to the question whether the Anti-Injunction Act bars a suit to prevent the collection of penalties that the Code treats as taxes. A retailer that failed to comply with Colorado's notice or reporting requirements was subject to a financial penalty—$5 for each transaction for which the retailer failed to provide the required notice to a customer, and $10 for each required report the retailer failed to submit to the State—which an injunction against the notice and reporting requirements would preclude. See *Direct Marketing*, 575 U.S. at 5-6. But that financial penalty "was not itself a tax, or at least it was never argued or suggested that the penalty in that case was itself a tax." *Florida Bankers*, 799 F.3d at 1069. Two concurring Justices in *Direct Marketing* stressed that the plaintiff "[wa]s not challenging its own or anyone else's tax liability." 575 U.S. at 19 (Ginsburg, J., joined by Breyer, J., concurring). The Court therefore did not address the Tax Injunction Act's application to a suit challenging state-law informational requirements whose violation triggers a tax.

The passages in *Direct Marketing* on which petitioner relies (Pet. 18-21) all concerned whether the plaintiff's suit "restrain[ed]" the assessment or collection of the *underlying* sales or use taxes. 575 U.S. at 11-14. Even assuming arguendo that the *Direct Marketing* Court's interpretations of "restrain," "assessment," and "collection" in the Tax Injunction Act apply to the Anti-Injunction Act—an issue the court of appeals in this case expressly reserved (Pet. App. 17a)—that would mean only that petitioner's suit does not seek to restrain the "third-party taxes the collection of which

[Notice 2016-66] is designed to facilitate." *Id.* at 16a. The Notice facilitates collection of those underlying taxes by ensuring that the IRS obtains information that might lead it to identify micro-captive transactions that are being used to evade applicable taxes. An injunction barring enforcement of the Notice would hinder those efforts, but it would not legally bar the IRS from assessing and collecting any underlying taxes it found to be applicable, and it therefore would not "restrain" "assessment" or "collection" of those taxes as the *Direct Marketing* Court interpreted those terms. Such an injunction would, however, legally bar (and thereby "restrain") assessment and collection of a penalty that the Code treats as a "tax."

The injunctive and declaratory relief that petitioner seeks would not simply "inhibit[]" (*Direct Marketing*, 575 U.S. at 14) the assessment or collection of penalties for violating the reporting and recordkeeping requirements that Notice 2016-66 imposes. Rather, the requested relief would "'fully stop[]' the IRS from collecting the penalties imposed for violating" those reporting and recordkeeping requirements, through a judicial order prohibiting the collection of those penalties. Pet. App. 17a (citation and emphasis omitted). Petitioner's "suit *is* focused on *that* tax's assessment or collection," and "[i]f successful, [the] suit would 'restrain (indeed eliminate)' it." *Id.* at 16a (citation omitted).

c. Petitioner asserts (Br. 24-25 & n.3) that Congress's decision to penalize violations of the reporting and recordkeeping requirements through a "tax" (as opposed to other sanctions) should "make[] no difference," and that the absence of a tax for violating Colorado's requirements "didn't matter" in *Direct Marketing.* Petitioner downplays Congress's decision to "deem[ ]" the penalties to be "'tax[es]'" (26 U.S.C. 6671(a)) as happenstance that was somehow fortuitous or unforeseeable. See, *e.g.*, Pet. Br. 26 (Notice 2016-66 "happens to be enforced by, among other things, a tax penalty"); Pet. 12. That contention lacks merit.

The whole point (and predictable effect) of Congress's decision to "deem[ ]" specified "penalties" to be "'taxes'" (26 U.S.C. 6671(a)) is to ensure that the Code provisions governing tax assessment and collection will apply to those penalties. "That use of the word ['tax'] is not literal—any more than when Congress says something like 'a State "includes" Puerto Rico and the District of Columbia.'" *Advocate Health Care Network* v. *Stapleton*, 137 S. Ct. 1652, 1658 (2017). Instead, that provision "tells readers that a *different*" thing—*i.e.*, Subchapter 68B penalties—"should receive the same treatment" as taxes and thus be subject to the rest of the Code's provisions governing taxes. *Ibid.* And one—indeed, the principal—consequence of treating the penalties as taxes is to subject them to the Code provisions (including the Anti-Injunction Act) that bar pre-enforcement litigation and channel disputes to the refund-suit mechanism. "Congress can, of course, describe something as a penalty but direct that it nonetheless be treated as a tax for purposes of the Anti-Injunction Act." *NFIB*, 567 U.S. at 544. Petitioner's position would contravene Congress's direction by nullifying the primary effect of its designation of certain penalties as taxes.

Petitioner suggests (Br. 33) that Congress's designation of the penalties for noncompliance as "taxes" should be disregarded because those penalties "are meant to ensure compliance with" those requirements, "not [to] generate revenue." But regardless of the inferences that might otherwise have been drawn from the apparent purpose of those penalties, Congress unambiguously classified them as taxes for purposes of the Code. While this Court once "drew what it saw at the time as distinctions between regulatory and revenue-raising taxes," the Court "subsequently abandoned such distinctions." *Bob Jones*, 416 U.S. at 741 n.12; see *Florida Bankers*, 799 F.3d at 1070. And as explained above, Congress's classification of those penalties as taxes is especially understandable in this particular context, given the penalties' practical function as substitutes for taxes potentially evaded. See pp. 22-23, *supra*.

2. The application of the Anti-Injunction Act does not depend on whether petitioner has already violated the reporting and recordkeeping requirements

Petitioner contends (Br. 24-29) that its suit is not one to restrain assessment or collection of the tax penalties for noncompliance because petitioner has not yet violated the reporting and recordkeeping requirements and therefore is not currently subject to any penalty. Petitioner argues (Br. 25) that "assessment or collection of taxes" can occur only after a taxpayer "violate[s] the reporting requirement," the IRS "detect[s] the violation," and the IRS "impose[s] a tax penalty." Petitioner asserts (*ibid.*) that, "in a preenforcement suit, the plaintiff has not yet violated the reporting requirement, so no tax penalty has possibly been assessed (let alone collected)." Petitioner also states (Br. 14, 30) that, because it "has no intentions of ever incurring tax penalties," "the IRS will collect no additional revenue from [petitioner]" regardless of the outcome of petitioner's suit. Those contentions provide no basis for finding the Anti-Injunction Act inapplicable.

a. The Anti-Injunction Act may be most commonly invoked to bar a suit by a taxpayer who has already engaged in conduct that triggers a tax, and who seeks to block impending assessment and collection of that tax. But nothing in the Act's language or logic *limits* its broadly worded bar to that specific scenario. The statutory text does not refer to assessment or collection that is imminent, or to taxes for which the taxpayer is already liable.

Instead, the Anti-Injunction Act's text underscores Congress's intention to bar pre-payment suits categorically unless one of the narrow statutory exceptions applies. The Act states 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) (emphases added), even a suit by someone other than the taxpayer, see *ibid.* (Act applies "whether or not such person is the person against whom such tax was assessed"); cf. *Clintwood Elkhorn*, 553 U.S. at 7 (broadly construing similar language in 26 U.S.C. 7422(a) and observing that "[f]ive 'any's' in one sentence and it begins to seem that Congress meant the statute to have expansive reach").

The statutory structure reinforces that conclusion. The Anti-Injunction Act works together with 26 U.S.C. 7422(a) and the Declaratory Judgment Act to cover the waterfront. Taken together, those provisions encompass suits to restrain assessment and collection in advance, 26 U.S.C. 7421(a); to recover taxes paid after assessment and collection are complete (unless the taxpayer has sought a refund from the IRS), 26 U.S.C. 7422(a); and to declare the invalidity or inapplicability of a tax, 28 U.S.C. 2201(a). Given the lengths to which Congress has gone to bar suits challenging taxes in any posture outside the established avenues of review, Congress cannot plausibly be thought to have intended to permit suits to determine a taxpayer's liability for taxes not yet incurred.

b. Petitioner asserts (Br. 25) that its suit "would not stop" assessment and collection because, if the suit is unsuccessful, petitioner will not engage in conduct that would trigger the statutory penalties. But the "purpose" of petitioner's "suit" (26 U.S.C. 7421(a)) is properly gleaned from the relief the court will award if petitioner prevails, not what petitioner will do if it loses. If petitioner's suit is allowed to go forward and the district court enters the requested injunctive and declaratory relief, petitioner will be free to violate Notice 2016-66's reporting and recordkeeping requirements without incurring the tax penalties that the IRS could otherwise assess and collect. Whether the suit has any "current effect on the collection of taxes is of no import, for its 'purpose' is clearly restraint." *Investment Annuity, Inc.* v. *Blumenthal*, 609 F.2d 1, 4 (D.C. Cir. 1979), cert. denied, 446 U.S. 981 (1980); see *id.* at 4-5 (holding that the Anti-Injunction Act barred the plaintiffs' suit because, if the plaintiffs "were to prevail * * * , they surely would reinstitute" activities that would otherwise trigger tax liability, and an injunction "would operate to prevent IRS from assessing and collecting [those] taxes").

Petitioner does not dispute that, *if it prevails*, it will decline to perform the reporting and recordkeeping activities that Notice 2016-66 requires. Petitioner brought this suit so that it may disregard those obligations without adverse consequences, including the "penalties."

Compl. ¶ 40. Indeed, if petitioner did not intend to engage in conduct that would violate the requirements, Article III would impose an independent barrier to maintenance of this suit. See *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 159 (2014) (To establish injury-in-fact under Article III, a plaintiff bringing a "preenforcement challenge" to a law must show "'an intention to engage in a course of conduct'" that is "'proscribed by'" the law and "'a credible threat of prosecution thereunder.'" (citation omitted)).

Petitioner's situation is no different from that of any taxpayer who contemplates a particular activity and who seeks, before engaging in that conduct, to obtain a judicial ruling as to the federal tax consequences the activity would entail. Before committing to a commercial transaction that might subject it to a particular tax, a taxpayer might wish to obtain an advance judicial determination that the tax is inapplicable (or invalid), an injunction barring imposition of the tax if the transaction goes forward, or both. The Anti-Injunction Act and the Declaratory Judgment Act unambiguously bar that kind of preemptive relief, whose evident purpose and effect is to "restrain" the assessment and collection of a specified federal tax if and when the contemplated transaction occurs.

On petitioner's contrary view, however, such a taxpayer *could* bring an anticipatory suit so long as it had not yet committed to the transaction, or at least so long as the taxpayer credibly represented that it would abandon the transaction if the court ruled against it on the merits. Nothing in the statutory text or context supports that result. And petitioner identifies no reason why Congress would bar a challenge to imminent assessment and collection, but allow anticipatory suits seeking to preclude the IRS from collecting future taxes on hypothetical transactions that have not yet occurred. To the contrary, for more than a century Congress has chosen to retain the Anti-Injunction Act's categorical bar on pre-payment suits other than those Congress specifically authorized. And Congress made clearer still its intention to bar not only suits to enjoin imminent tax assessment or collection, but also anticipatory suits to resolve potential or hypothetical tax liability in advance, by barring suits for declaratory relief "with respect to Federal taxes" except in limited circumstances that Congress itself specified. 28 U.S.C. 2201(a).

c. Petitioner's narrow reading of the Anti-Injunction Act contradicts this Court's and other courts' precedent.

i. In both *Bob Jones* and *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752 (1974), decided the same day, this Court held that the Act barred suits by entities challenging the IRS's actual or anticipated revocation of their tax-exempt status. In *Bob Jones*, the IRS notified a university of the agency's intent to revoke the university's tax-exempt status based on the school's maintenance of a "racially discriminatory admissions polic[y]." 416 U.S. at 735. In *Americans United*, the IRS revoked the tax-exempt status of a nonprofit, educational organization because it had engaged in substantial lobbying. 416 U.S. at 754-755. The entities asserted that the revocations jeopardized charitable contributions they received from donors. They sought "advance assurance" that donors' contributions would remain "tax deductible," and the plaintiff in *Bob Jones* also sought to avoid an increase in its own future taxes. 416 U.S. at 739; see *id.* at 738-739; *Americans United*, 416 U.S. at 761.

This Court held that the Anti-Injunction Act barred both suits. *Bob Jones*, 416 U.S. at 739-740; *Americans United*, 416 U.S. at 760-761. That was true even though the taxes at issue had not yet been assessed or collected (the IRS had not yet taken steps to assess taxes against the plaintiff organizations or their donors, and in *Bob Jones* it had not yet revoked the plaintiff's tax-exempt status) and even though the plaintiffs sought judicial rulings as to the tax consequences of donations that had not yet been made. And it was true even though the plaintiffs purported to challenge only the prerequisites for tax-exempt status—the rules for admissions policies in *Bob Jones*, and the restrictions on lobbying in *Americans United*. See *ibid.* (After its tax-exempt status was revoked, the university in *Bob Jones* subsequently obtained judicial review by paying a tax and suing for a refund. See *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 579-583, 585-605 (1983).)

Two years after *Bob Jones* and *Americans United* were decided, Congress amended the Code and the Declaratory Judgment Act to permit declaratory relief regarding a taxpayer's tax-exempt status. See Pub. L. No. 94-455, Tit. XIII, § 1306(a) and (b)(8), 90 Stat. 1717-1720 (1976). Congress's targeted response to this Court's decisions—permitting judicial review of the particular issue this Court had addressed, while leaving the bar on pre-payment review otherwise intact—confirms Congress's continued determination that suits like petitioner's remain foreclosed.

Courts of appeals have held that the Anti-Injunction Act and Declaratory Judgment Act barred suits challenging IRS guidance that would affect taxes that might be assessed or collected if the taxpayers engaged in particular future activity. See, *e.g.*, *Investment Annuity*, 609 F.2d at 4-10; *Educo, Inc.* v. *Alexander*, 557 F.2d 617, 619-622 (7th Cir. 1977). They have similarly held that both Acts barred suits asserting facial challenges to various tax laws, regulations, and rulings. See *e.g.*, *Hotze* v. *Burwell*, 784 F.3d 984, 996-999 (5th Cir. 2015), cert. denied, 136 S. Ct. 1165 (2016); *RYO Machine, LLC* v. *United States Dep't of Treas.*, 696 F.3d 467, 470-473 (6th Cir. 2012); *Mobile Republican Assembly* v. *United States*, 353 F.3d 1357, 1359-1363 (11th Cir. 2003); *Wyoming Trucking Ass'n* v. *Bentsen*, 82 F.3d 930, 931, 933-935 (10th Cir. 1996); *Foodservice & Lodging Inst., Inc.* v. *Regan*, 809 F.2d 842, 843-845 (D.C. Cir. 1987) (per curiam); *McCarthy* v. *Marshall*, 723 F.2d 1034, 1036-1038 (1st Cir. 1983).

ii. Petitioner asserts (Br. 26-29) that lower courts have routinely permitted pre-enforcement challenges to requirements enforced by taxes. But the decisions it cites do not support that assertion.

Petitioner cites (Br. 27) *National Petrochemical & Refiners Ass'n* v. *EPA*, 287 F.3d 1130 (D.C. Cir. 2002) (per curiam), in which a challenge to Environmental Protection Agency (EPA) fuel regulations was allowed to proceed. Petitioner asserts that, because Subchapter 68B of the Code imposes a penalty deemed a "tax" for the resale of diesel-fuel products that do not comply with EPA's regulations, that suit challenged requirements "enforced by penalties that the Tax Code designates as 'taxes.'" Pet. Br. 27 (citing 26 U.S.C. 6720A(a)). But the D.C. Circuit did not address whether the Anti-Injunction Act barred the suit as one to restrain those penalties—presumably because the penalties petitioner cites did not yet exist when the case was decided. They instead were enacted three years later, in 2005, see Pub. L. No. 109-59, Tit. XI, Subtit. E, § 11167(a), 119 Stat.

1977 (2005), to close a loophole Congress identified in diesel-fuel taxes, see H.R. Conf. Rep. No. 203, 109th Cong., 1st Sess. 1221-1222 (2005) (explaining that some taxpayers had sought to avoid diesel-fuel taxes by asserting that non-EPA-approved diesel products were tax-exempt).

Petitioner's remaining lower-court decisions (Br. 27-28) held that the Anti-Injunction Act did not bar challenges to a requirement adopted by the Department of Health and Human Services (HHS), under authority delegated by the ACA, 42 U.S.C. 300gg-13(a), mandating that certain health-insurance plans provide coverage for certain contraceptives. 77 Fed. Reg. 8725 (Feb. 15, 2012); see *Korte* v. *Sebelius*, 735 F.3d 654, 669 (7th Cir. 2013), cert. denied, 573 U.S. 958 (2014); *Autocam Corp.* v. *Sebelius*, 730 F.3d 618, 622 (6th Cir. 2013), cert. granted, judgment vacated, and case remanded, 573 U.S. 956 (2014); *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1127 (10th Cir. 2013), aff'd, 573 U.S. 682 (2014). A covered plan that did not comply with the mandate faced a penalty that was labeled a "tax," 26 U.S.C. 4980D(a). Those decisions are also inapposite.

As the government explained in litigation over that requirement, the "unique statutory structure" establishing the mandate "reflect[ed] congressional intent not to bar pre-enforcement challenges" to the mandate itself. Gov't Supp. Br. at 13, 15, *Hobby Lobby*, *supra* (No. 12-6294). The mandate had "resulted from express delegated authority outside the Treasury Department" to HHS; it "[wa]s enforced independently outside the Internal Revenue Code" by HHS, the Department of Labor, and the States; and it was "subject to immediate challenge by other regulated entities" who were not subject to the tax. *Id.* at 15; see *id.* at 13-15 (citing, *inter alia*, 29 U.S.C. 1132(a)(5) and 42 U.S.C. 300gg-13(a)(4), 300gg-22). The Seventh and Tenth Circuits agreed with the government's reading of that unusual provision. See *Korte*, 735 F.3d at 669-671; *Hobby Lobby*, 723 F.3d at 1127-1128. And although the Sixth Circuit in *Autocam* ruled on broader grounds similar to petitioner's position, that court subsequently rejected the reasoning of that decision (which had since been vacated on other grounds) in the decision below. Pet. App. 19a-20a.

3. *Petitioner's characterization of its objective in bringing suit does not render the Anti-Injunction Act inapplicable*

Petitioner contends (Br. 30) that its "suit was not brought for the purpose of restraining" the taxes for violating the reporting and recordkeeping requirements, but only to invalidate the requirements themselves. See Pet. Br. 29-31. Petitioner asserts (Br. 17, 30) that it seeks to avoid the "burdens" and "costs of complying" with those requirements, and that "it is indifferent to the fact that one of the penalties" for violating them "is a tax." That characterization of petitioner's goal in bringing suit provides no sound basis for viewing the Anti-Injunction Act as inapplicable.

Petitioner's stated desire to avoid the burdens and compliance costs that Notice 2016-66 entails is presumably sincere. But the obvious present obstacle to avoidance of such costs and burdens is that petitioner may be held liable for statutory penalties if it breaches its reporting and recordkeeping obligations. In this circumstance, avoiding the costs and burdens of compliance, and avoiding the penalties for noncompliance, are two sides of the same coin.

The pleading that commenced this suit requested an order "enjoin[ing] the enforcement of Notice 2016-66," and a "judgment declaring that Notice 2016-66 is unlawful." Compl. 16. Because Notice 2016-66 is "enforce[d]" (*ibid.*) by the statutory penalties for noncompliance, granting the requested relief would preclude assessment and collection of taxes. Pet. App. 17a. Petitioner does not appear to dispute that, if its complaint had expressly identified those penalties as the means of enforcement, the suit would be barred. And there is no material difference between a complaint specifying those penalties and petitioner's complaint seeking to enjoin "enforcement" because imposition of the penalties is what "enforcement" of the Notice means. A contrary rule would invite evasion of the Anti-Injunction Act through artful pleading.

Because both forms of relief petitioner sought would preclude assessment and collection of taxes, Pet. App. 17a, the suit's purpose includes restraining those taxes. That is so even if petitioner's ultimate objective is to avoid the burdens and costs associated with Notice 2016-66. And while petitioner may be indifferent to the fact that the penalties it seeks to restrain are deemed under the Code to be taxes, that fact is crucial to the Anti-Injunction Act's application.

The Court has employed that approach for nearly a century. The Court "has consistently ruled * * * that plaintiffs cannot evade the Anti–Injunction Act by purporting to challenge only the regulatory aspect of a regulatory tax." *Florida Bankers*, 799 F.3d at 1070. The Court has looked beyond plaintiffs' self-serving statements of their "goal[s]" to examine the relief the suit "seeks," *Bob Jones*, 416 U.S. at 738-739, and it has "abandoned" any "distinction[] between regulatory and revenue-raising taxes," *id.* at 741 n.12.

In *Bailey* v. *George*, 259 U.S. 16 (1922) (Taft, C.J.), the Court held that the Anti-Injunction Act barred a suit to enjoin collection of the tax imposed by the Child Labor Tax Act, ch. 18, Tit. XII, 40 Stat. 1138-1140. 259 U.S. at 19-20. "The suit targeted the regulatory aspect of the tax, but the Court still held that the Anti-Injunction Act applied and barred the suit." *Florida Bankers*, 799 F.3d at 1070. That holding did not insulate the statute from judicial review. The Court resolved the statute's validity in another decision issued the same day that arose in a refund-suit posture. See *Bailey* v. *Drexel Furniture Co. (Child Labor Tax Case)*, 259 U.S. 20, 34, 36-44 (1922); see also *Bob Jones*, 416 U.S. at 740-741.

Five decades later, relying on *George*, the Court followed the same approach in *Bob Jones* and *Americans United.* In *Bob Jones*, the plaintiff university contended that its suit "d[id] not truly involve taxes" because the university objected only to the underlying requirements for tax-exempt status, which it viewed as "an attempt to regulate the admissions policies of private universities." 416 U.S. at 739-740. Citing *George*, the Court rejected that argument. See *id.* at 740-741. The Court explained that a "suit seeking" an "injunction preventing the Service from withdrawing a § 501(c)(3) ruling letter would necessarily preclude the collection of" various taxes, and that the suit therefore fell "squarely within the literal scope of the Act" as one "'for the purpose of restraining the assessment or collection of any tax.'" *Id.* at 731-732 (citation omitted). Similarly in *Americans United*, the Court rejected the contention that "restraining the assessment or collection of taxes was 'at best a collateral effect'" of the suit. 416 U.S. at 760 (citation omitted). The Court explained that the "relief requested"—reinstatement of the plaintiff's tax-exempt status—showed that the suit's "obvious purpose" was restraining collection of taxes from the plaintiffs' donors. *Id.* at 760-761. As noted above, Congress responded by permitting pre-payment declaratory relief regarding the specific issue (tax-exempt status) that the plaintiffs in *Bob Jones* and *Americans United* had sought to raise, while otherwise leaving the bar on pre-payment review unaltered. See p. 34, *supra*.

This Court's precedents thus establish that "[a] 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." *Florida Bankers*, 799 F.3d at 1070. In circumstances like these, "a purpose to restrain the assessment or collection of taxes" may be "infer[red]" despite the plaintiff's effort "to 'sidestep' the [Anti-Injunction Act]" through artful pleading. Pet. App. 18a (citation omitted). It is the substance of the suit and the relief requested that control, not the plaintiff's characterization of the suit's objective.

C. Neither The APA Nor Constitutional-Avoidance Principles Support Petitioner's Interpretation Of The Anti-Injunction Act

Petitioner contends (Br. 31-37) that construing the Anti-Injunction Act to bar this suit would violate the APA and due-process principles. Those arguments lack merit.

1. The APA does not override the Anti-Injunction Act's bar on pre-enforcement suits to restrain taxes

Petitioner contends that applying the Anti-Injunction Act to bar this suit "undermines the APA" and violates a presumption "favor[ing] preenforcement review" that the APA purportedly reflects. Pet. Br. 31-32 (emphasis omitted); see *id.* at 31-34. That argument lacks merit.

The APA generally authorizes "judicial review" of "final agency action" "for which there is no other adequate remedy in a court," 5 U.S.C. 704, and it waives sovereign immunity for suits that seek relief other than money damages, 5 U.S.C. 702. The APA "embodies a basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. 702). By its own terms, however, the APA qualifies that presumption in various ways.

First, the APA's judicial-review provisions apply "except to the extent that * * * statutes preclude judicial review." 5 U.S.C. 701(a)(1). "The presumption favoring judicial review of administrative action is just that—a presumption," which "may be overcome" by other statutes. *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349 (1984); see *Abbott Labs.*, 387 U.S. at 140, 153 (presumption applies "so long as no statute precludes such relief," *i.e.*, "absent a statutory bar"). The APA's waiver of sovereign immunity also does not "affect[] other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702(1). The APA thus does not override, but instead effectively incorporates, other statutory limitations on review.

The Anti-Injunction Act and the tax exception to the Declaratory Judgment Act are among the statutory limitations on judicial review that Sections 701(a)(1) and 702(1) incorporate. See *Cypress* v. *United States*, 646 Fed. Appx. 748, 754-755 (11th Cir. 2016) (per curiam); *We the People Found., Inc.* v. *United States*, 485 F.3d 140, 142-143 (D.C. Cir. 2007) (Kavanaugh, J.), cert. denied, 552 U.S. 1102 (2008); *Fostvedt* v. *United States*, 978 F.2d 1201, 1203-1204 (10th Cir. 1992), cert. denied, 507 U.S. 988 (1993); *Hughes* v. *United States*, 953 F.2d 531, 537 (9th Cir. 1992); *Smith* v. *Booth*, 823 F.2d 94, 97-98 (5th Cir. 1987) (per curiam). Indeed, the legislative history indicates that Congress had the Anti-Injunction Act specifically in mind when it enacted Section 702(1). See, *e.g.*, H.R. Rep. No. 1656, 94th Cong., 2d Sess. 12-13 & n.35 (1976).

Second, the APA does not authorize review where "[an]other adequate remedy in a court" exists. 5 U.S.C. 704; see *Bowen* v. *Massachusetts*, 487 U.S. 879, 903 (1988). A taxpayer like petitioner has an adequate judicial remedy: a post-payment refund suit, which has been the default mechanism for litigating federal-tax disputes since the Founding, and which this Court has repeatedly recognized as sufficient to satisfy due-process requirements. See pp. 44-45, *infra*.

Petitioner's argument is also in significant tension with this Court's decisions recognizing that Congress may, without overcoming any special presumption, bar pre-enforcement judicial review by channeling "initial review" of claims—even constitutional claims—to an administrative process that is followed by judicial review. *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994); see *Elgin* v. *Department of the Treas.*, 567 U.S. 1, 8-10 (2012). Although the Court has required a "'clear'" indication from Congress to "'deny any judicial forum for a colorable constitutional claim,'" no clear-statement rule "appl[ies] where Congress simply channels" review to an administrative process that is followed by judicial review. *Elgin*, 567 U.S. at 9 (citations omitted). Courts ask only whether it is "fairly discernible in the statutory scheme" that Congress intended to disallow initial judicial review and whether "meaningful review" is ultimately available. *Id.* at 9-10 (citation omitted); see *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 19-20 (2000). *A fortiori*, no clear statement is necessary for Congress to channel *statutory* claims like petitioner's to administrative proceedings followed by judicial review.

Petitioner suggests (Br. 32) that, under the decision below, Congress could insulate whatever agency actions it wished from pre-enforcement judicial review simply by "attach[ing] a tax penalty" to conduct that is otherwise unrelated to taxes. But subject to due-process principles and other applicable constitutional limitations, Congress can directly bar pre-enforcement judicial review whenever it wishes. It therefore has no need for the indirect alternative petitioner posits.

Petitioner identifies no real-world instances where Congress has followed that circuitous path. The only purported example it cites (Br. 27) is the Code provision noted above that imposes a penalty (deemed a "'tax,'" 26 U.S.C. 6671(a)) for the resale of diesel fuel that does not satisfy EPA regulations. 26 U.S.C. 6720A(a). But petitioner has not shown that Section 6720A(a)—enacted to close a particular tax loophole, see pp. 35-36, *supra*—either was intended to preclude pre-enforcement review of EPA's regulations or would have that unintended effect.

EPA's diesel-fuel standards are enforced by EPA, not the IRS, under a statutory and regulatory framework independent of the Code. See 42 U.S.C. 7521 *et seq.*; 40 C.F.R. Pt. 80. To determine whether a suit has been brought "for the purpose of restraining the assessment or collection of any tax," 26 U.S.C. 7421(a), a court should look to the relief requested in the plaintiff's complaint. See pp. 37-40, *supra*. In a suit filed by a diesel seller or reseller against EPA, and seeking relief directed solely to EPA's enforcement of the statutory and regulatory provisions that agency administers, a court might well conclude that the suit was not one "for the purpose of restraining" tax assessment or collection, even if a judicial ruling in the plaintiff's favor might have an eventual downstream impact on the IRS's collection of the penalty imposed by 26 U.S.C. 6720A(a). Petitioner's suit, by contrast, was brought against the IRS, and it seeks an injunction against enforcement of Notice 2016-66, an IRS directive that is enforced almost exclusively through the assessment and collection of penalties that the Code deems to be taxes.

2. Constitutional-avoidance principles provide no basis to disregard the Anti-Injunction Act's text

Petitioner contends (Br. 15, 34) that "[c]onstitutional avoidance" requires reading the Anti-Injunction Act to permit this pre-enforcement suit, and that barring pre-enforcement review of Notice 2016-66 would violate "[d]ue process." That contention lacks merit.

a. The Anti-Injunction Act does not foreclose all judicial review of petitioner's challenges to Notice 2016-66. It merely channels such review to post-payment proceedings. If and when petitioner incurs a penalty, it may pay the tax and challenge the Notice in a refund suit. See pp. 16-17, 20, *supra*. It has been settled for more than a century that post-payment review satisfies due process. See *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 352 n.18 (1977) (collecting cases); see, *e.g.*, *Phillips* v. *Commissioner*, 283 U.S. 589, 595 (1931);

Dodge v. *Osborn*, 240 U.S. 118, 121-122 (1916); *Murray's Lessee*, 59 U.S. (18 How.) at 276-286. "[M]ere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." *Phillips*, 283 U.S. at 596-597. And the Court has long recognized that a refund suit to "recover the amount paid" is fully "adequate." *Id.* at 597, 601.

Petitioner notes that the Court in *South Carolina* read the Anti-Injunction Act not to apply where "Congress has not provided the plaintiff with an alternative legal way to challenge the validity of a tax." Pet. Br. 37 (quoting 465 U.S. at 373) (emphasis omitted). Petitioner suggests (Br. 36) that this holding may have rested on constitutional-avoidance principles. But as the court below explained, *South Carolina* undermines petitioner's position. Pet. App. 22a-23a.

In *South Carolina*, the Court noted its repeated prior holdings that the Anti-Injunction Act barred pre-enforcement suits where "the plaintiff had the option of paying the tax and bringing a suit for a refund." 465 U.S. at 374; see *id.* at 374-376. Distinguishing those decisions, the Court held that the Act did not apply in that case because the plaintiff, a State, lacked a refund-suit (or any other) remedy. See *id.* at 378-380. The State challenged taxes that would be owed by investors who bought bonds that the State would issue, not taxes the State itself would owe. *Ibid*. The Court held that the suit was not barred because the State "w[ould] be unable to utilize any statutory procedure to contest the constitutionality" of the tax. *Id.* at 380. Petitioner is not subject to any similar disability.

b. Petitioner contends (Br. 34) that it cannot pursue a refund suit without first committing a crime. That is incorrect. As petitioner notes, 26 U.S.C. 7203 makes "willfully fail[ing]" to report required information a misdemeanor. But petitioner need not violate that provision in order to incur a penalty and bring a refund suit.

"Willfulness" in Section 7203 "requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." *Cheek* v. *United States*, 498 U.S. 192, 201 (1991). Although willfulness does not require "evil intent," *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976) (per curiam) (citation omitted), a taxpayer does not "'willfully'" violate the Code by failing to report information based on a "good-faith belief" that the reporting requirement does not apply if it discloses that belief to the IRS in a timely return. *Cheek*, 498 U.S. at 202, 206; see *California* v. *Latimer*, 305 U.S. 255, 260-261 (1938) (expressing doubt as to "whether a refusal to comply with" a reporting requirement "would be deemed willful, if [that refusal is] based on an honest belief that the" requirement "is not applicable"). The Code does not make it a crime to take those steps in order to pursue the avenue of judicial review that Congress has established and made exclusive. A taxpayer who believes that it is not legally required to report specific information, but knows that the IRS has taken a different view, may file a return stating that it is omitting the information on that basis. Cf. *United States* v. *Sullivan*, 274 U.S. 259, 263 (1927) (proposing that procedure for taxpayer asserting Fifth Amendment right against self-incrimination).

To be sure, if petitioner follows that course, it "take[s] the risk of being wrong" and incurring a penalty that it might have avoided if it had received an advance judicial ruling that Notice 2016-66 is valid. *Cheek*, 498 U.S. at 206. That risk is not different in kind, however, from the risk faced by a person who must decide whether to enter into a particular transaction whose tax consequences are uncertain. See pp. 32-33, *supra*. And petitioner would face no plausible risk of criminal prosecution for simply pursuing the path to post-payment judicial review that Congress prescribed. Petitioner identifies no prosecution that has been brought under Section 7203 against a taxpayer who, in order to obtain administrative and judicial review, failed to comply with a reporting requirement based on a good-faith belief that the requirement did not apply, disclosed that belief to the IRS in a timely return, and incurred and paid a penalty. The government also is not aware of any such case.

The theoretical prospect of such a prosecution does not save this suit from dismissal. Under Article III (and principles of equity), no plaintiff may bring a pre-enforcement suit to challenge a law without showing (*inter alia*) at least a "credible threat of prosecution" under it. *Susan B. Anthony List*, 573 U.S. at 159 (citation omitted). Because petitioner has not made that showing, any suit it might bring to challenge a hypothetical future Section 7203 prosecution would be barred for reasons independent of the Anti-Injunction Act. Cf. *Latimer*, 305 U.S. at 259-261 (holding that the theoretical prospect of criminal prosecution for "willfully fail[ing]" to comply with certain reporting requirements did not warrant injunctive relief (citation omitted)). It cannot violate due process to construe the Act to preclude pre-enforcement suits that the Constitution already bars.

c. Petitioner's remaining arguments lack merit. Petitioner asserts (Br. 35) that a refund suit might be unavailable if the IRS *declined* to assess a penalty for petitioner's failure to report information or to provide records upon request. But in that event, petitioner would incur no injury and therefore would have no need for judicial review, since it would have avoided the costs and burdens of reporting and recordkeeping without facing any tax penalty or credible threat of prosecution.

Petitioner also posits (Br. 35) that a refund suit would provide insufficient protection if the IRS imposes a penalty that is too large for petitioner to pay. But this Court has long rejected contentions that the financial burden of paying a tax in full before seeking a refund entitles the taxpayer to seek pre-enforcement review. "Mere inconvenience to the taxpayer in raising the money with which to pay taxes is not uncommon, and is not a special circumstance which entitles one to resort to a suit for an injunction in order to test the validity or applicability of the tax." *Latimer*, 305 U.S. at 262; see *Flora,* 362 U.S. at 155 (full payment required for refund suit); *Murray's Lessee,* 59 U.S. (18 How.) at 275-286 (no pre-payment review of dispute concerning $1.37 million in 1838 dollars). Moreover, the current Code provides a process by which a taxpayer may propose alternative collection arrangements, such as payment plans, before the IRS takes certain steps (such as commencing a levy) to collect an unpaid tax. See 26 U.S.C. 6320, 6330. Petitioner's speculation that it might be unable to pay a tax it would incur for failing to comply with its tax-reporting obligations provides no sound basis to allow this pre-enforcement suit to proceed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
RICHARD E. ZUCKERMAN
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
JONATHAN C. BOND
Assistant to the Solicitor General
ELLEN PAGE DELSOLE
BETHANY B. HAUSER
Attorneys

SEPTEMBER 2020

APPENDIX

1. 5 U.S.C. 701(a) provides:

Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

2. 5 U.S.C. 702 provides:

Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

3. 5 U.S.C. 704 provides:

Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

4. 26 U.S.C. 6011(a) provides:

General requirement of return, statement, or list

(a) General rule

When required by regulations prescribed by the Secretary any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

5. 26 U.S.C. 6111 provides:

Disclosure of reportable transactions

(a) In general

Each material advisor with respect to any reportable transaction shall make a return (in such form as the Secretary may prescribe) setting forth—

(1) information identifying and describing the transaction,

(2) information describing any potential tax benefits expected to result from the transaction, and

(3) such other information as the Secretary may prescribe.

Such return shall be filed not later than the date specified by the Secretary.

(b) Definitions

For purposes of this section:

(1) Material advisor

(A) In general

The term "material advisor" means any person—

(i) who provides any material aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction, and

(ii) who directly or indirectly derives gross income in excess of the threshold amount (or such other amount as may be prescribed by the Secretary) for such aid, assistance, or advice.

(B) Threshold amount

For purposes of subparagraph (A), the threshold amount is—

(i) $50,000 in the case of a reportable transaction substantially all of the tax benefits from which are provided to natural persons, and

(ii) $250,000 in any other case.

(2) Reportable transaction

The term "reportable transaction" has the meaning given to such term by section 6707A(c).

(c) Regulations

The Secretary may prescribe regulations which provide—

(1) that only 1 person shall be required to meet the requirements of subsection (a) in cases in which 2 or more persons would otherwise be required to meet such requirements,

(2) exemptions from the requirements of this section, and

(3) such rules as may be necessary or appropriate to carry out the purposes of this section.

6. 26 U.S.C. 6112 provides:

Material advisors of reportable transactions must keep lists of advisees, etc.

(a) In general

Each material advisor (as defined in section 6111) with respect to any reportable transaction (as defined in section 6707A(c)) shall (whether or not required to file a return under section 6111 with respect to such transaction) maintain (in such manner as the Secretary may by regulations prescribe) a list—

(1) identifying each person with respect to whom such advisor acted as a material advisor with respect to such transaction, and

(2) containing such other information as the Secretary may by regulations require.

(b) Special rules

(1) Availability for inspection; retention of information on list

Any person who is required to maintain a list under subsection (a) (or was required to maintain a list under subsection (a) as in effect before the enactment of the American Jobs Creation Act of 2004)—

(A) shall make such list available to the Secretary for inspection upon written request by the Secretary, and

(B) except as otherwise provided under regulations prescribed by the Secretary, shall retain any information which is required to be included on such list for 7 years.

(2) Lists which would be required to be maintained by 2 or more persons

The Secretary may prescribe regulations which provide that, in cases in which 2 or more persons are required under subsection (a) to maintain the same list (or portion thereof), only 1 person shall be required to maintain such list (or portion).

7. 26 U.S.C. 6212(a) provides:

Notice of deficiency

(a) In general

If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43, or 44 he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail. Such notice shall include a notice to the taxpayer of the taxpayer's right to contact a local office of the taxpayer advocate and the location and phone number of the appropriate office.

8. 26 U.S.C. 6213 provides in pertinent part:

Restrictions applicable to deficiencies; petition to Tax Court

(a) Time for filing petition and restriction on assessment

Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court, and a refund may be ordered by such court of any amount collected within the period during which the Secretary is prohibited from collecting by levy or through a proceeding in court under the provisions of this subsection. The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition. Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed.

*   *   *   *   *

(c) Failure to file petition

If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary.

* * * * *

9. 26 U.S.C. 6320 provides:

Notice and opportunity for hearing upon filing of notice of lien

(a) Requirement of notice

(1) In general

The Secretary shall notify in writing the person described in section 6321 of the filing of a notice of lien under section 6323.

(2) Time and method for notice

The notice required under paragraph (1) shall be—

(A) given in person;

(B) left at the dwelling or usual place of business of such person; or

(C) sent by certified or registered mail to such person's last known address,

not more than 5 business days after the day of the filing of the notice of lien.

(3) Information included with notice

The notice required under paragraph (1) shall include in simple and nontechnical terms—

(A) the amount of unpaid tax;

(B) the right of the person to request a hearing during the 30-day period beginning on the day after the 5-day period described in paragraph (2);

(C) the administrative appeals available to the taxpayer with respect to such lien and the procedures relating to such appeals;

(D) the provisions of this title and procedures relating to the release of liens on property; and

(E) the provisions of section 7345 relating to the certification of seriously delinquent tax debts and the denial, revocation, or limitation of passports of individuals with such debts pursuant to section 32101 of the FAST Act.

(b) Right to fair hearing

(1) In general

If the person requests a hearing in writing under subsection (a)(3)(B) and states the grounds for the requested hearing, such hearing shall be held by the Internal Revenue Service Office of Appeals.

(2) One hearing per period

A person shall be entitled to only one hearing under this section with respect to the taxable period to which the unpaid tax specified in subsection (a)(3)(A) relates.

(3) Impartial officer

The hearing under this subsection shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax specified in subsection (a)(3)(A) before the first hearing under this section or section 6330. A taxpayer may waive the requirement of this paragraph.

(4) Coordination with section 6330

To the extent practicable, a hearing under this section shall be held in conjunction with a hearing under section 6330.

(c) Conduct of hearing; review; suspensions

For purposes of this section, subsections (c), (d) (other than paragraph (3)(B) thereof), (e), and (g) of section 6330 shall apply.

10. 26 U.S.C. 6330 provides:

Notice and opportunity for hearing before levy

(a) Requirement of notice before levy

(1) In general

No levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made. Such notice shall be required only once for the taxable period to which the unpaid tax specified in paragraph (3)(A) relates.

(2) Time and method for notice

The notice required under paragraph (1) shall be—

(A) given in person;

(B) left at the dwelling or usual place of business of such person; or

(C) sent by certified or registered mail, return receipt requested, to such person's last known address;

not less than 30 days before the day of the first levy with respect to the amount of the unpaid tax for the taxable period.

(3) Information included with notice

The notice required under paragraph (1) shall include in simple and nontechnical terms—

(A) the amount of unpaid tax;

(B) the right of the person to request a hearing during the 30-day period under paragraph (2); and

(C) the proposed action by the Secretary and the rights of the person with respect to such action, including a brief statement which sets forth—

(i) the provisions of this title relating to levy and sale of property;

(ii) the procedures applicable to the levy and sale of property under this title;

(iii) the administrative appeals available to the taxpayer with respect to such levy and sale and the procedures relating to such appeals;

(iv) the alternatives available to taxpayers which could prevent levy on property (including installment agreements under section 6159); and

(v) the provisions of this title and procedures relating to redemption of property and release of liens on property.

(b) Right to fair hearing

(1) In general

If the person requests a hearing in writing under subsection (a)(3)(B) and states the grounds for the requested hearing, such hearing shall be held by the Internal Revenue Service Office of Appeals.

(2) One hearing per period

A person shall be entitled to only one hearing under this section with respect to the taxable period to which the unpaid tax specified in subsection (a)(3)(A) relates.

(3) Impartial officer

The hearing under this subsection shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax specified in subsection (a)(3)(A) before the first hearing under this section or section 6320. A taxpayer may waive the requirement of this paragraph.

(c) Matters considered at hearing

In the case of any hearing conducted under this section—

(1) Requirement of investigation

The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.

(2) Issues at hearing

(A) In general

The person may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy, including—

(i) appropriate spousal defenses;

(ii) challenges to the appropriateness of collection actions; and

(iii) offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise.

(B) Underlying liability

The person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

(3) Basis for the determination

The determination by an appeals officer under this subsection shall take into consideration—

(A) the verification presented under paragraph (1);

(B) the issues raised under paragraph (2); and

(C) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.

(4) Certain issues precluded

An issue may not be raised at the hearing if—

(A)(i) the issue was raised and considered at a previous hearing under section 6320 or in any other previous administrative or judicial proceeding; and

(ii) the person seeking to raise the issue participated meaningfully in such hearing or proceeding;

(B) the issue meets the requirement of clause (i) or (ii) of section 6702(b)(2)(A); or

(C) a final determination has been made with respect to such issue in a proceeding brought under subchapter C of chapter 63.

This paragraph shall not apply to any issue with respect to which subsection (d)(2)(B) applies.

(d) Proceeding after hearing

(1) Petition for review by Tax Court

The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).

(2) Suspension of running of period for filing petition in title 11 cases

In the case of a person who is prohibited by reason of a case under title 11, United States Code, from filing a petition under paragraph (1) with respect to a determination under this section, the running of the period prescribed by such subsection for filing such a petition with respect to such determination shall be suspended for the period during which the person is so prohibited from filing such a petition, and for 30 days thereafter, and

(3) Jurisdiction retained at IRS Independent Office of Appeals

The Internal Revenue Service Office of Appeals shall retain jurisdiction with respect to any determination made under this section, including subsequent hearings requested by the person who requested the original hearing on issues regarding—

(A) collection actions taken or proposed with respect to such determination; and

(B) after the person has exhausted all administrative remedies, a change in circumstances with respect to such person which affects such determination.

(e) Suspension of collections and statute of limitations

(1) In general

Except as provided in paragraph (2), if a hearing is requested under subsection (a)(3)(B), the levy actions which are the subject of the requested hearing and the running of any period of limitations under section 6502 (relating to collection after assessment), section 6531 (relating to criminal prosecutions), or section 6532 (relating to other suits) shall be suspended for the period during which such hearing, and appeals therein, are pending. In no event shall any such period expire before the 90th day after the day on which there is a final determination in such hearing. Notwithstanding the provisions of section 7421(a), the beginning of a levy or proceeding during the time the suspension under this paragraph is in force may be enjoined by a proceeding in the proper court, including the Tax Court. The Tax Court shall have no jurisdiction under this paragraph to enjoin any action or proceeding unless a timely appeal has been filed under subsection (d)(1) and then only in respect of the unpaid tax or proposed levy to which the determination being appealed relates.

(2) Levy upon appeal

Paragraph (1) shall not apply to a levy action while an appeal is pending if the underlying tax liability is not at issue in the appeal and the court determines that the Secretary has shown good cause not to suspend the levy.

(f) Exceptions

If—

(1) the Secretary has made a finding under the last sentence of section 6331(a) that the collection of tax is in jeopardy,

(2) the Secretary has served a levy on a State to collect a Federal tax liability from a State tax refund,

(3) the Secretary has served a disqualified employment tax levy, or

(4) the Secretary has served a Federal contractor levy,

this section shall not apply, except that the taxpayer shall be given the opportunity for the hearing described in this section within a reasonable period of time after the levy.

(g) Frivolous requests for hearing, etc.

Notwithstanding any other provision of this section, if the Secretary determines that any portion of a request for a hearing under this section or section 6320 meets the requirement of clause (i) or (ii) of section 6702(b)(2)(A), then the Secretary may treat such portion as if it were never submitted and such portion shall not be subject to any further administrative or judicial review.

(h) Definitions related to exceptions

For purposes of subsection (f)—

(1) Disqualified employment tax levy

A disqualified employment tax levy is any levy in connection with the collection of employment taxes for any taxable period if the person subject to the levy (or any predecessor thereof) requested a hearing under this section with respect to unpaid employment taxes arising in the most recent 2-year period before the beginning of the taxable period with respect to which the levy is served. For purposes of the preceding sentence, the term "employment taxes" means any taxes under chapter 21, 22, 23, or 24.

(2) Federal contractor levy

A Federal contractor levy is any levy if the person whose property is subject to the levy (or any predecessor thereof) is a Federal contractor.

11. 26 U.S.C. 6671 provides:

Rules for application of assessable penalties

(a) Penalty assessed as tax

The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. 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.

(b) Person defined

The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

12. 26 U.S.C. 6707 provides:

Failure to furnish information regarding reportable transactions

(a) In general

If a person who is required to file a return under section 6111(a) with respect to any reportable transaction—

(1) fails to file such return on or before the date prescribed therefor, or

(2) files false or incomplete information with the Secretary with respect to such transaction,

such person shall pay a penalty with respect to such return in the amount determined under subsection (b).

(b) Amount of penalty

(1) In general

Except as provided in paragraph (2), the penalty imposed under subsection (a) with respect to any failure shall be $50,000.

(2) Listed transactions

The penalty imposed under subsection (a) with respect to any listed transaction shall be an amount equal to the greater of—

(A) $200,000, or

(B) 50 percent of the gross income derived by such person with respect to aid, assistance, or advice which is provided with respect to the listed transaction before the date the return is filed under section 6111.

Subparagraph (B) shall be applied by substituting "75 percent" for "50 percent" in the case of an intentional failure or act described in subsection (a).

(c) Rescission authority

The provisions of section 6707A(d) (relating to authority of Commissioner to rescind penalty) shall apply to any penalty imposed under this section.

(d) Reportable and listed transactions

For purposes of this section, the terms "reportable transaction" and "listed transaction" have the respective meanings given to such terms by section 6707A(c).

13. 26 U.S.C. 6707A provides:

Penalty for failure to include reportable transaction information with return

(a) Imposition of penalty

Any person who fails to include on any return or statement any information with respect to a reportable transaction which is required under section 6011 to be included with such return or statement shall pay a penalty in the amount determined under subsection (b).

(b) Amount of penalty

(1) In general

Except as otherwise provided in this subsection, the amount of the penalty under subsection (a) with respect to any reportable transaction shall be 75 percent of the decrease in tax shown on the return as a result of such transaction (or which would have resulted from such transaction if such transaction were respected for Federal tax purposes).

(2) Maximum penalty

The amount of the penalty under subsection (a) with respect to any reportable transaction shall not exceed—

(A) in the case of a listed transaction, $200,000 ($100,000 in the case of a natural person), or

(B) in the case of any other reportable transaction, $50,000 ($10,000 in the case of a natural person).

(3) Minimum penalty

The amount of the penalty under subsection (a) with respect to any transaction shall not be less than $10,000 ($5,000 in the case of a natural person).

(c) Definitions

For purposes of this section:

(1) Reportable transaction

The term "reportable transaction" means any transaction with respect to which information is required to be included with a return or statement because, as determined under regulations prescribed under section 6011, such transaction is of a type which the Secretary determines as having a potential for tax avoidance or evasion.

(2) Listed transaction

The term "listed transaction" means a reportable transaction which is the same as, or substantially similar to, a transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of section 6011.

(d) Authority to rescind penalty

(1) In general

The Commissioner of Internal Revenue may rescind all or any portion of any penalty imposed by this section with respect to any violation if—

(A) the violation is with respect to a reportable transaction other than a listed transaction, and

(B) rescinding the penalty would promote compliance with the requirements of this title and effective tax administration.

(2) No judicial appeal

Notwithstanding any other provision of law, any determination under this subsection may not be reviewed in any judicial proceeding.

(3) Records

If a penalty is rescinded under paragraph (1), the Commissioner shall place in the file in the Office of the Commissioner the opinion of the Commissioner with respect to the determination, including—

(A) a statement of the facts and circumstances relating to the violation,

(B) the reasons for the rescission, and

(C) the amount of the penalty rescinded.

(e) Penalty reported to SEC

In the case of a person—

(1) which is required to file periodic reports under section 13 or 15(d) of the Securities Exchange Act of 1934 or is required to be consolidated with another person for purposes of such reports, and

(2) which—

(A) is required to pay a penalty under this section with respect to a listed transaction,

(B) is required to pay a penalty under section 6662A with respect to any reportable transaction at a rate prescribed under section 6662A(c), or

(C) is required to pay a penalty under section 6662(h) with respect to any reportable transaction and would (but for section 6662A(e)(2)(B)) have been subject to penalty under section 6662A at a rate prescribed under section 6662A(c),

the requirement to pay such penalty shall be disclosed in such reports filed by such person for such periods as the Secretary shall specify. Failure to make a disclosure in accordance with the preceding sentence shall be treated as a failure to which the penalty under subsection (b)(2) applies.

(f) Coordination with other penalties

The penalty imposed by this section shall be in addition to any other penalty imposed by this title.

14. 26 U.S.C. 6708 provides:

Failure to maintain lists of advisees with respect to reportable transactions

(a) Imposition of penalty

(1) In general

If any person who is required to maintain a list under section 6112(a) fails to make such list available upon written request to the Secretary in accordance with section 6112(b) within 20 business days after the date of such request, such person shall pay a penalty of $10,000 for each day of such failure after such 20th day.

(2) Reasonable cause exception

No penalty shall be imposed by paragraph (1) with respect to the failure on any day if such failure is due to reasonable cause.

(b) Penalty in addition to other penalties

The penalty imposed by this section shall be in addition to any other penalty provided by law.

15. 26 U.S.C. 7203 provides:

Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".

16. 26 U.S.C. 7421 provides:

Prohibition of suits to restrain assessment or collection

(a) Tax

Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, 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.

(b) Liability of transferee or fiduciary

No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of—

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3713(b) of title 31, United States Code in respect of any such tax.

17. 26 U.S.C. 7422(a)-(b) provides:

Civil actions for refund

(a) No suit prior to filing claim for refund

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(b) Protest or duress

Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress.

18. 26 U.S.C. 7428(a)-(b) provides:

Declaratory judgments relating to status and classification of organizations under section 501(c)(3), etc.

(a) Creation of remedy

In a case of actual controversy involving—

(1) a determination by the Secretary—

(A) with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c)(3) which is exempt from tax under section 501(a) or as an organization described in section 170(c)(2),

(B) with respect to the initial classification or continuing classification of an organization as a private foundation (as defined in section 509(a)),

(C) with respect to the initial classification or continuing classification of an organization as a private operating foundation (as defined in section 4942(j)(3)),

(D) with respect to the initial classification or continuing classification of a cooperative as an organization described in section 521(b) which is exempt from tax under section 521(a), or

(E) with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c) (other than paragraph (3)) or 501(d) and exempt from tax under section 501(a), or

(2) a failure by the Secretary to make a determination with respect to an issue referred to in paragraph (1),

upon the filing of an appropriate pleading, the United States Tax Court, the United States Claims Court, or the district court of the United States for the District of Columbia may make a declaration with respect to such initial qualification or continuing qualification or with respect to such initial classification or continuing classification. Any such declaration shall have the force and effect of a decision of the Tax Court or a final judgment or decree of the district court or the Claims Court, as the case may be, and shall be reviewable as such. For purposes of this section, a determination with respect to a continuing qualification or continuing classification includes any revocation of or other change in a qualification or classification.

(b) Limitations

(1) Petitioner

A pleading may be filed under this section only by the organization the qualification or classification of which is at issue.

(2) Exhaustion of administrative remedies

A declaratory judgment or decree under this section shall not be issued in any proceeding unless the Tax Court, the Claims Court, or the district court of the United States for the District of Columbia determines that the organization involved has exhausted administrative remedies available to it within the Internal Revenue Service. An organization requesting the determination of an issue referred to in subsection (a)(1) shall be deemed to have exhausted its administrative remedies with respect to a failure by the Secretary to make a determination with respect to such issue at the expiration of 270 days after the date on which the request for such determination was made if the organization has taken, in a timely manner, all reasonable steps to secure such determination.

(3) Time for bringing action

If the Secretary sends by certified or registered mail notice of his determination with respect to an issue referred to in subsection (a)(1) to the organization referred to in paragraph (1), no proceeding may be initiated under this section by such organization unless the pleading is filed before the 91st day after the date of such mailing.

(4) Nonapplication for certain revocations

No action may be brought under this section with respect to any revocation of status described in section 6033(j)(1).

19. 28 U.S.C. 1341 provides:

Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

20. 28 U.S.C. 1346(a)(1) provides:

United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

21. 28 U.S.C. 2201(a) provides:

Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

22. 26 C.F.R. 1.6011-4 provides in pertinent part:

Requirement of statement disclosing participation in certain transactions by taxpayers.

(a) *In general.* Every taxpayer that has participated, as described in paragraph (c)(3) of this section, in a reportable transaction within the meaning of paragraph (b) of this section and who is required to file a tax return must file within the time prescribed in paragraph (e) of this section a disclosure statement in the form prescribed by paragraph (d) of this section. The fact that a transaction is a reportable transaction shall not affect the legal determination of whether the taxpayer's treatment of the transaction is proper.

(b) *Reportable transactions*—(1) *In general.* A reportable transaction is a transaction described in any of the paragraphs (b)(2) through (7) of this section. The term transaction includes all of the factual elements relevant to the expected tax treatment of any investment, entity, plan, or arrangement, and includes any series of steps carried out as part of a plan.

(2) *Listed transactions.* A listed transaction is a transaction that is the same as or substantially similar to one of the types of transactions that the Internal Revenue Service (IRS) has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction.

(3) *Confidential transactions*—(i) *In general.* A confidential transaction is a transaction that is offered to a taxpayer under conditions of confidentiality and for which the taxpayer has paid an advisor a minimum fee.

(ii) *Conditions of confidentiality.* A transaction is considered to be offered to a taxpayer under conditions of confidentiality if the advisor who is paid the minimum fee places a limitation on disclosure by the taxpayer of the tax treatment or tax structure of the transaction and the limitation on disclosure protects the confidentiality of that advisor's tax strategies. A transaction is treated as confidential even if the conditions of confidentiality are not legally binding on the taxpayer. A claim that a transaction is proprietary or exclusive is not treated as a limitation on disclosure if the advisor confirms to the taxpayer that there is no limitation on disclosure of the tax treatment or tax structure of the transaction.

(iii) *Minimum fee.* For purposes of this paragraph (b)(3), the minimum fee is (A) $250,000 for a transaction if the taxpayer is a corporation;

(B) $50,000 for all other transactions unless the taxpayer is a partnership or trust, all of the owners or beneficiaries of which are corporations (looking through any partners or beneficiaries that are themselves partnerships or trusts), in which case the minimum fee is $250,000.

(iv) *Determination of minimum fee.* For purposes of this paragraph (b)(3), in determining the minimum fee, all fees for a tax strategy or for services for advice (whether or not tax advice) or for the implementation of a transaction are taken into account. Fees include consideration in whatever form paid, whether in cash or in kind, for services to analyze the transaction (whether or not related to the tax consequences of the transaction), for services to implement the transaction, for services to document the transaction, and for services to prepare tax returns to the extent return preparation fees are unreasonable in light of the facts and circumstances. For purposes of this paragraph (b)(3), a taxpayer also is treated as paying fees to an advisor if the taxpayer knows or should know that the amount it pays will be paid indirectly to the advisor, such as through a referral fee or fee-sharing arrangement. A fee does not include amounts paid to a person, including an advisor, in that person's capacity as a party to the transaction. For example, a fee does not include reasonable charges for the use of capital or the sale or use of property. The IRS will scrutinize carefully all of the facts and circumstances in determining whether consideration received in connection with a confidential transaction constitutes fees.

(v) *Related parties.* For purposes of this paragraph (b)(3), persons who bear a relationship to each other as described in section 267(b) or 707(b) will be treated as the same person.

(4) *Transactions with contractual protection*—(i) *In general.* A transaction with contractual protection is a transaction for which the taxpayer or a related party (as described in section 267(b) or 707(b)) has the right to a full or partial refund of fees (as described in paragraph (b)(4)(ii) of this section) if all or part of the intended tax consequences from the transaction are not sustained. A transaction with contractual protection also is a transaction for which fees (as described in paragraph (b)(4)(ii) of this section) are contingent on the taxpayer's realization of tax benefits from the transaction. All the facts and circumstances relating to the transaction will be considered when determining whether a fee is refundable or contingent, including the right to reimbursements of amounts that the parties to the transaction have not designated as fees or any agreement to provide services without reasonable compensation.

(ii) *Fees.* Paragraph (b)(4)(i) of this section only applies with respect to fees paid by or on behalf of the taxpayer or a related party to any person who makes or provides a statement, oral or written, to the taxpayer or related party (or for whose benefit a statement is made or provided to the taxpayer or related party) as to the potential tax consequences that may result from the transaction.

(iii) *Exceptions*—(A) *Termination of transaction.* A transaction is not considered to have contractual protection solely because a party to the transaction has the right to terminate the transaction upon the happening of an event affecting the taxation of one or more parties to the transaction.

(B) *Previously reported transaction.* If a person makes or provides a statement to a taxpayer as to the potential tax consequences that may result from a transaction only after the taxpayer has entered into the transaction and reported the consequences of the transaction on a filed tax return, and the person has not previously received fees from the taxpayer relating to the transaction, then any refundable or contingent fees are not taken into account in determining whether the transaction has contractual protection. This paragraph (b)(4) does not provide any substantive rules regarding when a person may charge refundable or contingent fees with respect to a transaction. See Circular 230, 31 CFR part 10, for the regulations governing practice before the IRS.

(5) *Loss transactions*—(i) *In general.* A loss transaction is any transaction resulting in the taxpayer claiming a loss under section 165 of at least—

(A) $10 million in any single taxable year or $20 million in any combination of taxable years for corporations;

(B) $10 million in any single taxable year or $20 million in any combination of taxable years for partnerships that have only corporations as partners (looking through any partners that are themselves partnerships), whether or not any losses flow through to one or more partners; or

(C) $2 million in any single taxable year or $4 million in any combination of taxable years for all other partnerships, whether or not any losses flow through to one or more partners;

(D) $2 million in any single taxable year or $4 million in any combination of taxable years for individuals, S corporations, or trusts, whether or not any losses flow through to one or more shareholders or beneficiaries; or

(E) $50,000 in any single taxable year for individuals or trusts, whether or not the loss flows through from an S corporation or partnership, if the loss arises with respect to a section 988 transaction (as defined in section 988(c)(1) relating to foreign currency transactions).

(ii) *Cumulative losses.* In determining whether a transaction results in a taxpayer claiming a loss that meets the threshold amounts over a combination of taxable years as described in paragraph (b)(5)(i) of this section, only losses claimed in the taxable year that the transaction is entered into and the five succeeding taxable years are combined.

(iii) *Section 165 loss*—(A) For purposes of this section, in determining the thresholds in paragraph (b)(5)(i) of this section, the amount of a section 165 loss is adjusted for any salvage value and for any insurance or other compensation received. See § 1.165-1(c)(4). However, a section 165 loss does not take into account offsetting gains, or other income or limitations. For example, a section 165 loss does not take into account the limitation in section 165(d) (relating to wagering losses) or the limitations in sections 165(f), 1211, and 1212 (relating to capital losses). The full amount of a section 165 loss is taken into account for the year in which the loss is sustained, regardless of whether all or part of the loss enters into the computation of a net operating loss under section 172 or a net capital loss under section 1212 that is a carryback or carryover to another year. A section 165 loss does not include any portion of a loss, attributable to a capital loss carryback or carryover from another year, that is treated as a deemed capital loss under section 1212.

(B) For purposes of this section, a section 165 loss includes an amount deductible pursuant to a provision that treats a transaction as a sale or other disposition, or otherwise results in a deduction under section 165. A section 165 loss includes, for example, a loss resulting from a sale or exchange of a partnership interest under section 741 and a loss resulting from a section 988 transaction.

(6) *Transactions of interest.* A transaction of interest is a transaction that is the same as or substantially similar to one of the types of transactions that the IRS has identified by notice, regulation, or other form of published guidance as a transaction of interest.

(7) [Reserved]

(8) *Exceptions*—(i) *In general.* A transaction will not be considered a reportable transaction, or will be excluded from any individual category of reportable transaction under paragraphs (b)(3) through (7) of this section, if the Commissioner makes a determination by published guidance that the transaction is not subject to the reporting requirements of this section. The Commissioner may make a determination by individual letter ruling under paragraph (f) of this section that an individual letter ruling request on a specific transaction satisfies the reporting requirements of this section with regard to that transaction for the taxpayer who requests the individual letter ruling.

(ii) *Special rule for RICs.* For purposes of this section, a regulated investment company (RIC) as defined in section 851 or an investment vehicle that is owned 95 percent or more by one or more RICs at all times during the course of the transaction is not required to disclose a transaction that is described in any of paragraphs (b)(3) through (5) and (b)(7) of this section unless the transaction is also a listed transaction or a transaction of interest.

* * * * *

(e) *Time of providing disclosure*—(1) *In general.* The disclosure statement for a reportable transaction must be attached to the taxpayer's tax return for each taxable year for which a taxpayer participates in a reportable transaction. In addition, a disclosure statement for a reportable transaction must be attached to each amended return that reflects a taxpayer's participation in a reportable transaction. A copy of the disclosure statement must be sent to OTSA at the same time that any disclosure statement is first filed by the taxpayer pertaining to a particular reportable transaction. If a reportable transaction results in a loss which is carried back to a prior year, the disclosure statement for the reportable transaction must be attached to the taxpayer's application for tentative refund or amended tax return for that prior year. In the case of a taxpayer that is a partnership, an S corporation, or a trust, the disclosure statement for a reportable transaction must be attached to the partnership, S corporation, or trust's tax return for each taxable year in which the partnership, S corporation, or trust participates in the transaction under the rules of paragraph (c)(3)(i) of this section. If a taxpayer who is a partner in a partnership, a shareholder in an S corporation, or a beneficiary of a trust receives a timely Schedule K-1 less than 10 calendar days before the due date of the taxpayer's return (including extensions) and, based on receipt of the timely Schedule K-1, the taxpayer determines that the taxpayer participated in a reportable transaction within the meaning of paragraph (c)(3) of this section, the disclosure statement will not be considered late if the taxpayer discloses the reportable transaction by filing a disclosure statement with OTSA within 60 calendar days after the due date of the taxpayer's return (including extensions). The Commissioner in his discretion may issue in published guidance other provisions for disclosure under § 1.6011-4.

(2) *Special rules*—(i) *Listed transactions and transactions of interest.* In general, if a transaction becomes a listed transaction or a transaction of interest after the filing of a taxpayer's tax return (including an amended return) reflecting the taxpayer's participation in the listed transaction or transaction of interest and

before the end of the period of limitations for assessment of tax for any taxable year in which the taxpayer participated in the listed transaction or transaction of interest, then a disclosure statement must be filed, regardless of whether the taxpayer participated in the transaction in the year the transaction became a listed transaction or a transaction of interest, with OTSA within 90 calendar days after the date on which the transaction became a listed transaction or a transaction of interest. The Commissioner also may determine the time for disclosure of listed transactions and transactions of interest in the published guidance identifying the transaction.

(ii) *Loss transactions.* If a transaction becomes a loss transaction because the losses equal or exceed the threshold amounts as described in paragraph (b)(5)(i) of this section, a disclosure statement must be filed as an attachment to the taxpayer's tax return for the first taxable year in which the threshold amount is reached and to any subsequent tax return that reflects any amount of section 165 loss from the transaction.

(3) *Multiple disclosures.* The taxpayer must disclose the transaction in the time and manner provided for under the provisions of this section regardless of whether the taxpayer also plans to disclose the transaction under other published guidance, for example, § 1.6662-3(c)(2).

* * * * *

(f) *Rulings and protective disclosures*—(1) *Rulings.* If a taxpayer requests a ruling on the merits of a specific transaction on or before the date that disclosure would otherwise be required under this section, and receives a favorable ruling as to the transaction, the disclosure rules under this section will be deemed to have been satisfied by that taxpayer with regard to that transaction, so long as the request fully discloses all relevant facts relating to the transaction which would otherwise be required to be disclosed under this section. If a taxpayer requests a ruling as to whether a specific transaction is a reportable transaction on or before the date that disclosure would otherwise be required under this section, the Commissioner in his discretion may determine that the submission satisfies the disclosure rules under this section for the taxpayer requesting the ruling for that transaction if the request fully discloses all relevant facts relating to the transaction which would otherwise be required to be disclosed under this section. The potential obligation of the taxpayer to disclose the transaction under this section will not be suspended during the period that the ruling request is pending.

(2) *Protective disclosures.* If a taxpayer is uncertain whether a transaction must be disclosed under this section, the taxpayer may disclose the transaction in accordance with the requirements of this section and comply with all the provisions of this section, and indicate on the disclosure statement that the disclosure statement is being filed on a protective basis. The IRS will not treat disclosure statements filed on a protective basis any differently than other disclosure statements filed under this section. For a protective disclosure to be effective, the taxpayer must comply with these disclosure regulations by providing to the IRS all information requested by the IRS under this section.

* * * * *