No. 19-930

In the Supreme Court of the United States

CIC SERVICES, LLC,
Petitioner,

v.

INTERNAL REVENUE SERVICE, *et al.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* FORMER GOVERNMENT OFFICIALS IN SUPPORT OF RESPONDENTS

DANIEL J. HEMEL
111 East 60th Street
Chicago, IL 60637

SUSAN C. MORSE
727 East Dean Keeton Street
Austin, TX 78705

CLINTON G. WALLACE
1525 Senate Street
Columbia, SC 29208

JONATHAN E. TAYLOR
Counsel of Record
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741
jon@guptawessler.com

NEIL K. SAWHNEY
GUPTA WESSLER PLLC
100 Pine Street, Suite 1250
San Francisco, CA 94111
(415) 573-0336

Counsel for Amici Curiae

September 15, 2020

TABLE OF CONTENTS

Table of authorities iii

Interest of *amici curiae* 1

Summary of Argument 2

Argument 4

I. The Anti-Injunction Act and the American Jobs Creation Act play an essential role in the battle against abusive tax shelters. 4

A. Congress passed the Anti-Injunction Act to protect the federal income tax from early attacks. 4

B. Congress responded to a new wave of abusive tax shelters with the disclosure and penalty provisions of the American Jobs Creation Act of 2004. 6

C. Treasury and the IRS have used the AJCA provisions to combat micro-captive insurance abuse. 11

II. A ruling for petitioner would be a serious setback in the fight against abusive tax shelters. 14

A. Injunctions against the enforcement of tax-shelter-reporting requirements would significantly impede tax-collection efforts. 14

B. Lifting the Anti-Injunction Act's bar here would disrupt the statutory framework for tax-shelter litigation. 18

III. Equitable exceptions to the Anti-Injunction Act should not be expanded to block tax-shelter disclosures. 20

A. Petitioner has not shown irreparable injury or certainty of success on the merits. 21

B. Petitioner has ample opportunities to contest the tax-shelter disclosure rules without running afoul of the Anti-Injunction Act. 23

Conclusion 29

TABLE OF AUTHORITIES

Cases

American Horse Protection Association v. Lyng,
812 F.2d 1 (D.C. Cir. 1987) 28

Auer v. Robbins,
519 U.S. 452 (1997) 28

Avrahami v. Commissioner of Internal Revenue,
149 T.C. 144 (2017) 11, 13, 16

Bailey v. George,
259 U.S. 16 (1922) 27

Bank for Savings v. Collector,
70 U.S. (3 Wall.) 495 (1865) 4

Bob Jones University v. Simon,
416 U.S. 725 (1974) 5, 20, 21

Cheek v. United States,
498 U.S. 192 (1991) 25, 26

CIC Services v. Internal Revenue Service,
925 F.3d 247 (6th Cir. 2019) 10

Department of Homeland Security v. New York,
140 S. Ct. 599 (2020) 20

Diversified Group v. United States,
123 Fed. Cl. 442 (2015) 10

Endeavor Partners Fund v. Commissioner,
T.C.M. (CCH) 1055 (2016) 10

Enochs v. Williams Packing & Navigation Co.,
370 U.S. 1 (1962) 21

Florida Bankers Association v. United States Department of the Treasury,
799 F.3d 1065 (D.C. Cir. 2015) 5, 20

Foodservice & Lodging Institute v. Regan,
809 F.2d 842 (D.C. Cir. 1987) 24

Frank Sawyer Trust of May 1992 v. Commissioner of Internal Revenue,
712 F.3d 597 (1st Cir. 2013) 17

Gardner v. Toilet Goods Association,
387 U.S. 167 (1967) 20

George v. Bailey,
274 F. 639 (W.D.N.C. 1921) 27

Hibbs v. Winn,
542 U.S. 88 (2004) 24

Hylton v. United States,
3 U.S. (Dall.) 171 (1796) 24

In re Bryen,
433 B.R. 503 (Bankr. E.D. Pa. 2010) 17

In re United States,
669 F.3d 1333 (Fed. Cir. 2012) 19

In re Wyly,
552 B.R. 338 (Bankr. N.D. Tex. 2016) 17

Insurance Co. v. Ritchie,
72 U.S. (5 Wall.) 541 (1866) 4

Larson v. United States,
888 F.3d 578 (2d Cir. 2018) 10

Magee v. Denton,
16 F. Cas. 382 (C.C.N.D.N.Y. 1863) 4

Massachusetts v. Environmental Protection Agency,
549 U.S. 497 (2007) 28

Montanans for Multiple Use v. Barbouletos,
568 F.3d 225 (D.C. Cir. 2009) 23

Moore v. United States,
2015 WL 1510007 (W.D. Wash., Apr. 1 2015) 28

National Federation of Independent Business v. Sebelius,
567 U.S. 519 (2012) 5, 20

Order of Railroad Telegraphers v. Railway Express Agency, Inc.,
321 U.S. 342 (1944) 16

Pension Benefit Guarantee Corp. v. LTV Corp.,
496 U.S. 633 (1990) 28

Pfaff v. United States,
No. 14-cv-03349, 2016 U.S. Dist. LEXIS 30844 (D. Colo. Mar. 10, 2016) 10

Roback v. Taylor,
20 F. Cas. 852 (C.C.S.D. Ohio 1866) 4

Simon v. Eastern Kentucky Welfare Rights Organization,
426 U.S. 26 (1976) 28

South Carolina v. Regan,
465 U.S. 367 (1984) 21, 23, 24, 27

United States v. Home Concrete & Supply, LLC,
566 U.S. 478 (2012) 15, 16

United States v. Pennsylvania Industrial Chemical Corp.,
411 U.S. 655 (1973) 26

United States v. Windsor,
570 U.S. 744 (2013) 24

Statutes and Regulations

5 U.S.C. § 555(e) 28

28 U.S.C. § 1346(a)(1) 24

Abusive Tax Shelter Shutdown and Taxpayer Accountability Act of 2003, H.R. 1555, 108th Cong., 1st Sess. 9

Act of July 13, 1866, 14 Stat. 98 5

Act of Mar. 2, 1867, 14 Stat. 471 4

American Competitiveness and Corporate Accountability Act of 2002, H.R. 5095, 107th Cong., 2nd Sess. 9

American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 .... 9, 22

Federal Tax Lien Act of 1966, Pub. L. No. 89-
719, § 110(c), 80 Stat. 1125, 1144 5

I.R.C. § 162(a) 12

I.R.C. § 469 6

I.R.C. § 6103(a) 18

I.R.C. § 6103(h) 18

I.R.C. § 6103(h)(2) 18

I.R.C. § 6103(h)(4)(B) 18

I.R.C. § 6111(b)(1) 22

I.R.C. § 6501(a) 15

I.R.C. § 6501(e) 15

I.R.C. § 6671(a) 2

I.R.C. § 6707A(c)(1) 14, 19

I.R.C. § 7203 24

I.R.C. § 7421 3

I.R.C. § 7421(a) 5

Injunctive Authority Clarification Act of 2018,
H.R. 6730, 115th Cong. 20

Injunctive Authority Clarification Act of 2019,
H.R. 77, 116th Cong. § 2 20

Tax Reform Act of 1986, Pub. L. No. 99-514,
100 Stat 2085 6

Tax Shelter and Tax Haven Reform Act, S. 2210, 108th Cong., 2d Sess. (2004) 9

Tax Shelter Transparency and Enforcement Act, S. 1937, 108th Cong., 1st Sess. (2003) 9

Treas. Reg. § 1.162-1(a) 12

Treas. Reg. § 1.6011-4(b)(2) 14, 22

Treas. Reg. § 301.6111-3(b) 22

Legislative Materials

65 Fed. Reg. 11,205 (Mar. 2, 2000) 8, 22

65 Fed. Reg. 11,206 (Mar. 2, 2020) 22

65 Fed. Reg. 11,211 (Mar. 2, 2000) 8

65 Fed. Reg. 11,215 (Mar. 2, 2000) 8

Abusive Tax Shelters: Hearing Before the Senate Subcommittee on Oversight of the Internal Revenue Service, 98th Cong. (1983) 6

Comment Request for Form 8918, 83 Fed. Reg. 62,674 (Dec. 4, 2018) 21

Corporate Tax Shelters: Looking Under the Roof, Hearing Before the Senate Committee on Finance, 107th Cong. (2002) 8

H.R. Rep. No. 108-548, 108th Cong., 2d Sess. 1 (2004) 8

The 2017 Tax Filing Season: Internal Revenue Service Operations and the Taxpayer Experience, Hearing Before the Senate Committee on Finance, 115th Cong. (2017) 11

U.S. Tax Shelter Industry: The Role of Accountants, Lawyers, and Financial Professionals: Hearing Before the Senate Permanent Subcommittee on Investigations, 108th Cong. (2003) 7

United States Government Accounting Office, GAO/GGD-98-128, Tax Administration: IRS Measures Could Provide a More Balanced Picture of Audit Results and Costs, 10 tbl.2 (1998) 17

United States Government Accountability Office, GAO-04-104T, Internal Revenue Service: Challenges Remain in Combating Abusive Tax Shelters (2003) 7

United States Government Accountability Office, GAO-07-391T, Tax Compliance: Multiple Approaches Are Needed to Reduce the Tax Gap (2007) 17

United States Government Accountability Office, GAO-11-493, Abusive Tax Avoidance Transactions: IRS Needs Better Data to Inform Decisions about Transactions (2011) 11

United States Government Accountability Office, GAO-20-589, Abusive Tax Schemes: Offshore Insurance Products and Associated Compliance Risks (July 2020)................. 17

Other Authorities

Charlene Luke, *Captivating Deductions*, 46 Hofstra L. Rev. 855 (2018)... 12

David Weisbach, *It's Time to Get Serious About Shelters*, Tax Notes (Sept. 27, 2000) 7

Erin Morrow Hawley, *The Equitable Anti-Injunction Act*, 90 Notre Dame L. Rev. 81 (2014)... 20

Insurance Information Institute, *Captives by State* (last visited Aug. 30, 2020), https://perma.cc/24GJ-9NXP...................................... 19

Internal Revenue Manual (2005)...................................... 18

Internal Revenue Manual 9.5.3.2.9 (2020)........................ 25

Internal Revenue Service, *Examination Coverage and Recommended Additional Tax After Examination, by Type and Size of Return: Tax Years 2010–2018*, https://perma.cc/8ZT3-N5DC...................................... 15

Internal Revenue Service, *Federal Tax Compliance Research: Tax Gap Estimates for Tax Years 2011-13* (Sept. 2019), https://www.irs.gov/pub/irs-pdf/p1415.pdf........... 15, 23

Jay Adkinson, *Treasury To Study Possible Abuses of Small Captive Insurance Companies*, Forbes (May 11, 2015), https://perma.cc/4RR2-4TZ9 12

Joseph Bankman, *The Tax Shelter Problem*, 57 Nat'l Tax J. 925 (2004) 2, 8

Notice 2016-66, 2016-47 I.R.B. 745 (Nov. 3, 2016) 10, 13, 14

Notice 2017-08, 2017-3 I.R.B. 423 (Dec. 29, 2016) 10

Paul Sullivan, *A Lucrative Way to Insure Against the Improbable*, New York Times, Apr. 11, 2015, at B5 13

Press Release, Internal Revenue Service, *Abusive Tax Shelters Again on the IRS "Dirty Dozen" List of Tax Scams for the 2015 Filing Season* (Feb. 3, 2015) 12

Press Release, Internal Revenue Service, *IRS Takes Next Step on Abusive Micro-captive Transactions: Nearly 80 Percent Accept Settlement, 12 New Audit Teams Established* (Jan. 31, 2020) 11

Press Release, Internal Revenue Service, *Robust Response for Executive Stock Option Initiative; Son of Boss Settlement Heading for $4 Billion* (July 11, 2005) 11

Randy Sandler, Principal & CMO, CIC Services, *For Business Owners—How To Significantly Grow Wealth By Starting Another Business*, *CIC Servs.: Captivating Thinking* (June 3, 2015), https://perma.cc/GQY8-KNU8 13

Recognized Abusive and Listed Transactions, Internal Revenue Service, https://perma.cc/JK2M-M37C (last updated Jan. 31, 2020) 10, 23

Ronald A. Pearlman, *Demystifying Disclosure: First Steps*, 55 Tax L. Rev. 289 (2002)... 15

Saltzman & Book, *IRS Practice and Procedure* § 12.02[6] (2020).. 25

Tanina Rostain & Milton C. Regan Jr., *Confidence Games: Lawyers, Accountants, and the Tax Shelter Industry* 41 (2014).. 6, 7

Thomas M. Cooley, *A Treatise on the Law of Taxation* (1886) 4

Transactions of Interest, Internal Revenue Service, https://perma.cc/HM3E-G6HY (last updated Jan. 31, 2020).. 10

W. Elliott Brownlee, *Federal Taxation in America: A History* (3d ed. 2016)................................. 4

INTEREST OF *AMICI CURIAE*[1]

Amici are former senior officials of the U.S. Department of the Treasury, the U.S. Department of Justice, the Internal Revenue Service (IRS), the Joint Committee on Taxation, and the Senate Finance Committee.

Lily Batchelder was Majority Chief Tax Counsel, Senate Committee on Finance (2010–2014) and Deputy Director, National Economic Council (2014–2015).

Mark Mazur was Staff Economist, Joint Committee on Taxation (1989–1993); Director of Research, Analysis, and Statistics of Income, IRS (2001–2009); Deputy Assistant Secretary of the Treasury for Tax Analysis (2009–2012); and Assistant Secretary of the Treasury for Tax Policy (2012–2017).

Eileen J. O'Connor was Assistant Attorney General of the United States, responsible for the Tax Division of the Department of Justice (2001–2007).

Leslie Samuels was Assistant Secretary of the Treasury for Tax Policy (1993–1996).

Stephen Shay was International Tax Counsel, U.S. Department of the Treasury (1986–1987) and Deputy Assistant Secretary of the Treasury for International Tax Affairs (2009–2011).

---

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. *Amici* submit this brief to offer their perspective based on their former service in government. The views set forth in the brief should not be understood to also represent the views of their employers.

George Yin was Chief of Staff, Joint Committee on Taxation (2003–2005).

Amici submit this brief to shed light on the statutory and historical context of the present dispute.

SUMMARY OF ARGUMENT

This is a case about tax shelters. It presents a narrow legal question: May people and companies that promote abusive tax shelters sue to block enforcement of monetary penalties for failing to disclose those tax-avoidance transactions to the IRS? But the practical question is far broader. At stake is whether the tax-shelter industry will be permitted to use waves of strategic pre-enforcement lawsuits to hobble the IRS's efforts to combat abusive tax shelters.

The narrow legal question can and should be decided based on the plain statutory text. Petitioner seeks to permanently restrain the IRS from imposing penalties for failure to disclose certain "micro-captive insurance" transactions that taxpayers use to claim losses. Petitioner has advertised these transactions as "tax shelters."[2] Congress has deemed these penalties to be "taxes" for purposes of the Anti-Injunction Act. *See* I.R.C. § 6671(a).

---

[2] There is no one agreed-upon meaning of the term "tax shelter." Sometimes the term is used to describe a transaction that generates significant tax benefits, even when those benefits are consistent with congressional intent. But that is not the sort of tax shelter at issue here. This case involves what are referred to as "abusive tax shelters." Professor Joseph Bankman has defined the term as a "tax-motivated" transaction "unrelated to a taxpayer's normal business operations" that, "under a literal reading of some relevant legal authority," appears to generate a tax loss "in excess of any economic loss" and "in a manner inconsistent with legislative intent or purpose." Joseph Bankman, *The Tax Shelter Problem*, 57 Nat'l Tax J. 925, 925 (2004).

And that Act expressly bars any "suit for the purpose of restraining the assessment or collection of any tax" by "any person." *Id.* § 7421. Petitioner's suit therefore seeks to "restrain" the "assessment" of a penalty that Congress has defined as a "tax." That alone is enough to resolve this case. *See* U.S. Br. 15-40.

But, as this brief shows, broader historical context and practical consequences confirm why it is important for this Court to follow the plain statutory text. This case does not arise in a vacuum. It arises against the backdrop of a decades-long struggle between the federal agency charged with responsibility for administering and enforcing the internal revenue laws and an industry consisting of accountants, lawyers, bankers, insurance companies, and others working in concert to defeat those laws. A ruling for petitioner would mark a resounding win for the tax-shelter industry and a significant setback for the government in its ongoing effort to reveal and challenge abusive tax shelters. It could cost the federal treasury billions of dollars annually. Petitioner's effort to frustrate tax assessment is exactly the kind of demand that the Anti-Injunction Act seeks to prevent. Rather than hand the tax-shelter industry a powerful new tool to thwart the assessment of taxes on a massive scale, this Court should apply the statute as written and affirm.

ARGUMENT

I. The Anti-Injunction Act and the American Jobs Creation Act play an essential role in the battle against abusive tax shelters.

A. Congress passed the Anti-Injunction Act to protect the federal income tax from early attacks.

For nearly a century and a half, the Anti-Injunction Act has played a critical role in protecting the federal treasury and preserving the federal government's ability to assess and collect taxes. Its origins date back to the federal taxes enacted in the 1860s to raise funds for the Union effort in the Civil War. W. Elliott Brownlee, *Federal Taxation in America: A History* 64-69 (3d ed. 2016). Resisters to these taxes sought injunctions in state and federal court. *See, e.g.*, *Bank for Savs. v. Collector*, 70 U.S. (3 Wall.) 495 (1865); *Ins. Co. v. Ritchie*, 72 U.S. (5 Wall.) 541 (1866); *Magee v. Denton*, 16 F. Cas. 382 (C.C.N.D.N.Y. 1863). Even when these suits ultimately failed, temporary injunctions against tax-collection efforts disrupted the flow of revenue to the federal government. *See, e.g.*, *Roback v. Taylor*, 20 F. Cas. 852 (C.C.S.D. Ohio 1866); Thomas M. Cooley, *A Treatise on the Law of Taxation* (1886) (noting that "improvident employment of the writ of injunction" resulted in "serious … embarrassments" to revenue collection).

Congress responded with the Anti-Injunction Act of 1867. That law provided that "no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat. 471, 475. Instead, objecting taxpayers, after exhausting administrative remedies, could bring their claims in refund suits. *See* Act of July 13, 1866, ch. 173,

§ 19, 14 Stat. 98, 152. Congress subsequently clarified that the prohibition applies to "*any* tax" and to suits brought by "*any* person, whether or not such person is the person against whom such tax was assessed." Federal Tax Lien Act of 1966, Pub. L. No. 89-719, § 110(c), 80 Stat. 1125, 1144 (codified as I.R.C. § 7421(a)). The Anti-Injunction Act's language remains much the same today. Congress has enacted limited exceptions to the Act, but none are asserted here.

Since its enactment, this Court has given the Anti-Injunction Act "almost literal effect." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 737 (1974). To "restrain" means, at a minimum, to enjoin. *Id.* at 738-39. And "tax" means any charge that Congress has classified as a tax for Anti-Injunction Act purposes. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012). As this Court has explained:

> 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. For example, 26 U.S.C. §6671(a) provides that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by" Subchapter 68B of the Internal Revenue Code. Penalties in Subchapter 68B are thus treated as taxes under Title 26, which includes the Anti-Injunction Act.

Id. at 544-45; *see also Fla. Bankers Ass'n v. U.S. Dep't of Treas.*, 799 F.3d 1065, 1067 (D.C. Cir. 2015) (Kavanaugh, J.) ("The Tax Code provides that penalties in Chapter 68, Subchapter B are treated as taxes under the Anti-Injunction Act. The Supreme Court explicitly confirmed as much in *NFIB* . . . ." (citation omitted)). Thus, the rule

under this Court's precedents is clear: when Congress enacts a new penalty and classifies it as a "tax," the Anti-Injunction Act applies with full force.

B. Congress responded to a new wave of abusive tax shelters with the disclosure and penalty provisions of the American Jobs Creation Act of 2004.

The Anti-Injunction Act addressed—and ultimately quashed—one tax-defeating maneuver. But a century later, a new and harder-to-tame threat materialized. Starting in the 1960s, a rising number of lawyers, accountants, and other professional tax-shelter promoters started to market sophisticated strategies that allowed (or purported to allow) high-income clients to eliminate tax liabilities. *Abusive Tax Shelters: Hearing Before the S. Subcomm. on Oversight of the Internal Revenue Serv.*, 98th Cong. 45-46 (1983) (statement of Philip E. Coates, Acting Comm'r of Internal Revenue). Often these "tax shelters" would come with cookie-cutter tax opinions from seemingly reputable attorneys claiming to protect clients from fraud penalties. By 1986, the number of returns that IRS examiners identified annually as reflecting tax-shelter activity topped 400,000. *See* Tanina Rostain & Milton C. Regan Jr., *Confidence Games: Lawyers, Accountants, and the Tax Shelter Industry* 41 (2014).

Congress struck back with the bipartisan Tax Reform Act of 1986, signed into law by President Reagan. Pub. L. No. 99-514, 100 Stat. 2085 (I.R.C. of 1986). That statute—and, in particular, its limitations on "passive activity losses," I.R.C. § 469—curtailed tax-shelter activity significantly. *See* Rostain & Regan, *supra*, at 42. But its triumph proved to be temporary. By the late 1990s, a number of accounting firms and law firms had devised new

strategies that escaped the 1986 Act's limitations, purportedly allowing corporate and individual clients to claim large deductions unrelated to economic losses. *See id.* at 249.

This new tide of abusive tax shelters quickly turned into a tsunami. As one respected tax-law scholar wrote at the time: "[A]lmost everyone . . . agrees that there is a serious problem with shelters. The system is broken." David Weisbach, *It's Time to Get Serious About Shelters*, Tax Notes (Sept. 27, 2000). By 2003, the IRS estimated that the federal government's potential revenue losses attributable to identified shelters had reached $33 billion. *See* U.S. Gov't Accountability Off., GAO-04-104T, Internal Revenue Service: Challenges Remain in Combating Abusive Tax Shelters 3 (2003). Members of Congress from both parties voiced increasing alarm. *See, e.g.*, *U.S. Tax Shelter Industry: The Role of Accountants, Lawyers, and Financial Professionals: Hearing Before the S. Permanent Subcomm. on Investigations*, 108th Cong. 2 (2003) (statement of Sen. Coleman (R-MN)) ("This is not a victimless crime. . . . It is the people of America, average working families who will bear the brunt of lost revenues so that a handful of rich lawyers, accountants, and their clients can manipulate legitimate business practices to make a profit."); *id.* at 9 (statement of Sen. Levin (D-MI)) ("The engine of deception and greed needs to be turned off, dismantled, and consigned to the junkyard where it belongs.").

Treasury and the IRS initially responded to this fresh wave of abusive tax shelters with a series of regulations requiring disclosure of shelter transactions. In 2000, temporary Treasury regulations created a new category of "reportable transactions"—transactions that the IRS

would identify in published guidance as abusive or potentially abusive transactions. The regulations required taxpayers to disclose those transactions on their returns. Furthermore, and foreshadowing one of the requirements at issue here, the regulations mandated that organizers and sellers of abusive tax shelters ("material advisors") maintain records of clients for whom they had facilitated these transactions, and required that advisors furnish those lists to the IRS upon written request. *See* 65 Fed. Reg. 11,205 (Mar. 2, 2000); 65 Fed. Reg. 11,215 (Mar. 2, 2000); 65 Fed. Reg. 11,211 (Mar. 2, 2000).

The reportable transaction disclosure regulations have played an important part in the ongoing anti-tax-shelter effort. One high-ranking IRS official called these new requirements "the key to shutting down tax shelters." *Corporate Tax Shelters: Looking Under the Roof, Hearing Before the S. Comm. on Fin.*, 107th Cong. 12 (2002) (statement of Larry Langdon, Comm'r of Large & Medium Bus. Div., Internal Revenue Serv.). Professor Bankman, a noted scholar of the subject, called them the "most important step the government has taken" in the anti-shelter fight. *See The Tax Shelter Problem*, 57 Nat'l Tax J. at 929.

Support for Treasury's disclosure regime cut across party lines. President Clinton's administration initiated the program; President George W. Bush's administration expanded it; and lawmakers on both sides immediately applauded it. Members of Congress agreed with Treasury and the IRS that "the best way to combat tax shelters is to be aware of them." H.R. Rep. No. 108-548, 108th Cong., 2d Sess. 1, 261 (2004). To that end, lawmakers of both parties in both chambers introduced materially identical legislation to strengthen the tax-shelter-disclosure

requirements and—most importantly—to impose substantial monetary penalties for violations. *See, e.g.*, Tax Shelter and Tax Haven Reform Act, S. 2210, 108th Cong., 2d Sess. (2004) (introduced by Sens. Coleman and Levin); Tax Shelter Transparency and Enforcement Act, S. 1937, 108th Cong., 1st Sess. (2003) (introduced by Sens. Baucus, Grassley, and three others); American Competitiveness and Corporate Accountability Act of 2002, H.R. 5095, 107th Cong., 2nd Sess. (introduced by Rep. Thomas and three others); Abusive Tax Shelter Shutdown and Taxpayer Accountability Act of 2003, H.R. 1555, 108th Cong., 1st Sess. (introduced by Rep. Doggett and 27 others).

That legislation became law with the American Jobs Creation Act of 2004 (AJCA), signed by President Bush. Pub. L. No. 108-357, 118 Stat. 1418. The law bolstered and broadened the existing disclosure framework in several ways. It imposed a new mandate on material advisors to file returns informing the IRS of certain "reportable transactions" from which they earned more than $50,000 (or more than $250,000 for corporate clients). *Id.* § 815(a), 118 Stat. at 1581 (I.R.C. § 6111). It added a new penalty of $50,000 on material advisors who failed to file the required returns. *Id.* § 816(a), 118 Stat. at 1583 (I.R.C. § 6707). And it codified the requirement that material advisors maintain lists of clients involved in reportable transactions, and imposed a penalty of $10,000 on advisors who failed to furnish those lists to the IRS upon request. *Id.* § 817(a), 118 Stat. at 1583-1584 (I.R.C. § 6708). Finally, it also imposed heightened penalties on taxpayers who engage in reportable transactions and fail to disclose those transactions on their own returns. *Id.* § 811, 118 Stat. at 1575 (I.R.C. § 6707A).

The AJCA placed the new penalty provisions in Subchapter 68B of the Internal Revenue Code. That placement was no accident. Previous versions of the legislation proposed in the House and Senate—more than two dozen in total—all put the penalty provisions in the same location. And, as noted above, Congress has instructed that penalties in Subchapter 68B must be treated as "taxes" for purposes of the Anti-Injunction Act. For this reason, every court to consider the question has concluded that the Act bars prepayment challenges to the AJCA's tax-shelter penalties. *See Larson v. United States*, 888 F.3d 578, 587 (2d Cir. 2018); *Pfaff v. United States*, No. 14-cv-03349, 2016 U.S. Dist. LEXIS 30844, at *13 (D. Colo. Mar. 10, 2016); *Diversified Grp. v. United States*, 123 Fed. Cl. 442, 447-48, 456 n.8 (2015); *Endeavor Partners Fund v. Comm'r*, T.C.M. (CCH) 1055, 8-10 (2016); *accord CIC Servs. v. Internal Revenue Serv.*, 925 F.3d 247, 250-59 (6th Cir. 2019) (decision below).

Since the AJCA's passage, Treasury and the IRS have designated a dozen new reportable transactions, on top of thirty pre-AJCA designations still in effect. *See* Recognized Abusive and Listed Transactions, Internal Revenue Serv., https://perma.cc/JK2M-M37C (last updated Jan 31, 2020); Transactions of Interest, Internal Revenue Serv., https://perma.cc/HM3E-G6HY (last updated Jan. 31, 2020). The designations generally come by way of a notice published in the Internal Revenue Bulletin. Treasury and the IRS consider comments from taxpayers regarding these notices and often modify their guidance to reflect those comments. Indeed, they did so here. *See* Notice 2016-66, 2016-47 I.R.B. 745, 748 (Nov. 3, 2016) (requesting comments); Notice 2017-08, 2017-3 I.R.B. 423 (Dec. 29, 2016) (extending time for compliance in response to comments); *see also The 2017 Tax Filing*

Season: Internal Revenue Service Operations and the Taxpayer Experience, *Hearing Before the S. Comm. on Fin.*, 115th Cong. 48 (2017) (statement of John Koskinen, Comm'r of Internal Revenue) (noting that IRS "met with every group that requested a meeting to discuss the application of the [micro-captive insurance] notice and hear their concerns").

Courts have held that many variants of these designated transactions claim illegal tax benefits. This is true for micro-captive insurance arrangements implicated by the notice here. *See Avrahami v. Comm'r of Internal Revenue*, 149 T.C. 144 (2017); *Syzygy Ins. Co. v. Comm'r*, T.C. Memo 2019-34. For some of these transactions, Treasury and the IRS have offered settlement initiatives, and taxpayers have responded by agreeing to pay billions of dollars of taxes, including penalties. *See* U.S. Gov't Accountability Off., GAO-11-493, Abusive Tax Avoidance Transactions: IRS Needs Better Data to Inform Decisions about Transactions 16–17 (2011); Press Release, Internal Revenue Serv., *Robust Response for Exec. Stock Option Initiative; Son of Boss Settlement Heading for $4 Billion* (July 11, 2005); Press Release, Internal Revenue Serv., *IRS Takes Next Step on Abusive Micro-captive Transactions: Nearly 80 Percent Accept Settlement, 12 New Audit Teams Established* (Jan. 31, 2020).

C. Treasury and the IRS have used the AJCA provisions to combat micro-captive insurance abuse.

Soon after the AJCA's passage, another tax-shelter transaction surged in popularity: micro-captive insurance arrangements used illicitly to shield business profit from tax. A number of legal and economic factors contributed to the rise of micro-captives, but by several accounts, the

success of the IRS in combating other shelters added to micro-captives' momentum. *See* Jay Adkinson, *Treasury To Study Possible Abuses of Small Captive Insurance Companies*, Forbes (May 11, 2015), https://perma.cc/4RR2-4TZ9 (attributing the rise of micro-captives, in part, to "the entry into the captive industry of a sizeable army of tax shelter promoters who had been driven by the IRS out of their previous tax shelter gigs").

Micro-captive insurance arrangements involve a small insurance company that provides coverage to a related party (i.e., a business under the same ownership). These small insurance companies make an election under I.R.C. § 831(b) that allows them to exclude up to $2.2 million per year in premiums from taxable income, thus paying tax only on investment earnings at corporate income tax rates. *See* Charlene Luke, *Captivating Deductions*, 46 Hofstra L. Rev. 855, 866 n.62 (2018). Taxpayers routinely claim that premium payments to captive insurers represent "ordinary and necessary" trade or business expenses, which can be deducted immediately. *See* I.R.C. § 162(a); Treas. Reg. § 1.162-1(a).

Micro-captive insurance arrangements enable businesses and self-employed individuals to achieve significant tax benefits. In some cases, these arrangements may indeed represent legitimate risk-management strategies. *See* Press Release, Internal Revenue Serv., *Abusive Tax Shelters Again on the IRS "Dirty Dozen" List of Tax Scams for the 2015 Filing Season* (Feb. 3, 2015), https://perma.cc/G4CX-6DUQ. In many other cases, though, micro-captive insurance arrangements operate as abusive tax shelters. *Id.* CIC Services itself advertises its products as providing a "legal

tax shelter" that "can often double a business owner's wealth." Randy Sandler, Principal & CMO, CIC Servs., *For Business Owners—How To Significantly Grow Wealth By Starting Another Business*, *CIC Servs.: Captivating Thinking* (June 3, 2015), https://perma.cc/GQY8-KNU8.

Consider the case of a Phoenix jeweler who used a captive scheme to insure against losses of property due to acts of terrorism, including from "biological and chemical agents." *Avrahami*, 149 T.C. at 166-67 (2017). The jewelry-store owners paid a whopping $360,000 a year in premiums for this coverage—amounts that, after passing through a web of entities, ended up back in the store owners' accounts. *Id.* at 186. By paying improbably high amounts for insurance against remote risks, the owners generated large deductions delinked from any economic loss. *See also* Paul Sullivan, *A Lucrative Way to Insure Against the Improbable*, N.Y. Times, Apr. 11, 2015, at B5 (reporting that a Los Angeles lawyer used captive insurance to shield his entire $840,000 of annual earnings from income tax).

In November 2016, the IRS responded to the micro-captive threat with a notice classifying a narrow subset of micro-captive transactions as "reportable transactions." Notice 2016-66, 2016-47 I.R.B. 745 (Nov. 3, 2016). The notice is limited to two types of transactions particularly likely to reflect taxpayer abuse: (1) those in which covered losses and claim-administration expenses are less than 70 percent of net premiums over a five-year period, and (2) those in which the insurer provides or guarantees loans or other financing to related parties. *Id.* Treasury and the IRS concluded that these transactions were "transactions of interest," with "a potential for tax avoidance or

evasion," but did not go so far as to declare all such transactions to be more abusive "listed transactions." *Id.; see* I.R.C. § 6707A(c)(1); Treas. Reg. § 1.6011-4(b)(2).

Notice 2016-66 triggers the AJCA penalty framework described above. Material advisors who fail to disclose transactions covered by the notice are subject to penalties under I.R.C. § 6707. Similarly, material advisors who refuse requests from the IRS for lists of clients who have engaged in covered transactions are subject to penalties under I.R.C. § 6708. And taxpayers who engage in covered micro-captive transactions and fail to disclose those transactions on their own returns are subject to penalties under I.R.C. § 6707A. All of these penalties—to repeat—are penalties that Congress has classified as "taxes" for purposes of the Anti-Injunction Act.

II. A ruling for petitioner would be a serious setback in the fight against abusive tax shelters.

The reason to affirm the decision below is that the plain statutory text requires that result. But interpreting the statute as written is also important because it avoids the practical problems posed by petitioner's atextual construction.

A. Injunctions against the enforcement of tax-shelter-reporting requirements would significantly impede tax-collection efforts.

Injunctions of tax-shelter-reporting requirements—even on a temporary basis—could inflict permanent damage on the federal treasury. Such injunctions would give rise to three risks in particular: non-detection, lapse of the statute of limitations, and non-collection.

Non-Detection. Especially in the context of a "complicated business tax return," an abusive tax shelter

is likely to be a "needle in the haystack." Ronald A. Pearlman, *Demystifying Disclosure: First Steps*, 55 Tax L. Rev. 289, 295 (2002). The shelter may be disclosed in one of "thousands of entries" on an annual return. Or it may not be disclosed at all. *See id.* at 295-96. Detection is even less likely in the individual-income-tax context, where the audit rate is only 2.6 percent even for returns with total income of $10 million or more. IRS, *Examination Coverage and Recommended Additional Tax After Examination, by Type and Size of Return: Tax Years 2010–2018*, https://perma.cc/8ZT3-N5DC. Without the disclosures required under the AJCA, many tax-shelter transactions would no doubt slip through the cracks. And without the disclosure mandate for material advisors, it is likely that fewer tax-shelter users would truthfully report. *See* IRS, *Federal Tax Compliance Research: Tax Gap Estimates for Tax Years 2011-13*, at 13 (Sept. 2019), https://www.irs.gov/pub/irs-pdf/p1415.pdf (reporting 99% compliance for items also subject to third-party reporting, compared to 55% for information subject to "little or no information reporting").

Lapse of the Statute of Limitations. Finding a needle in a haystack takes time. The IRS usually has three years to assess additional tax. I.R.C. § 6501(a). That window is extended three more years when the taxpayer omits certain items in excess of 25 percent of gross income, *see id.* § 6501(e), though not all shelters will trigger this extension. For example, overstatement-of-basis shelters, such as the infamous BOSS and Son of BOSS transactions, are subject to the three-year limitations window regardless of the amount involved. *See United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 480 (2012).

Tax-shelter detection is thus a race against the clock. Oftentimes, the clock wins. Consider again the case of the Phoenix jeweler who paid exorbitant premiums to a micro-captive for terrorism insurance. *Avrahami*, 149 T.C. 144. The micro-captive transactions began in 2007, but the IRS assessed back taxes and penalties only for tax years 2009 and 2010. *Id.* at 172-74. By the time that the IRS detected the shelter and issued a notice of deficiency in May 2013, the three-year limitations period for the 2007 and 2008 tax years had expired. *See id.* at 171.

Congress, of course, could aid the IRS in this race against time by further extending the statute of limitations in tax cases. *See Home Concrete & Supply*, 566 U.S. at 504. But statutes of limitations serve purposes of their own. They "promote justice by preventing surprises through revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). Congress has thus struck a balance between the functions of statutes of limitations and the exigencies of tax enforcement by setting a relatively short limitations period while also enacting measures to increase the probability that the IRS will detect abusive tax shelters within the limitations window. A ruling for petitioner would upset that balance.

Non-Collection. Finally, even when the IRS is able to detect an abusive tax shelter within the limitations window—and even when it ultimately assesses back taxes—there is no guarantee that those taxes will be paid. Instead, the IRS must win another race against the clock in its effort to collect. According to the most recent statistics, 27 percent of amounts assessed in audits of

large corporations remained uncollected five years later. The figure is even higher (42 percent) for small corporations, and higher yet for individual taxpayers with business income (52 percent). *See* U.S. Gov't Accountability Off., GAO-07-391T, Tax Compliance: Multiple Approaches Are Needed to Reduce the Tax Gap 18 (2007); U.S. Gov't Accounting Office, GAO/GGD-98-128, Tax Administration: IRS Measures Could Provide a More Balanced Picture of Audit Results and Costs 10 tbl.2 (1998).

Taxes assessed in audits may go uncollected for a number of reasons. In some cases, audited corporations may have paid out all of their profits to shareholders as dividends or may have dissolved and distributed all of their assets. *See, e.g.*, *Frank Sawyer Tr. of May 1992 v. Comm'r of Internal Revenue*, 712 F.3d 597, 611 (1st Cir. 2013). In other cases, assets may be held in offshore bank accounts, often beyond the IRS's reach. *See* U.S. Gov't Accountability Off., GAO-20-589, Abusive Tax Schemes: Offshore Insurance Products and Associated Compliance Risks 10 (July 2020) (explaining how micro-captives can be used to shift assets to offshore jurisdictions whose laws protect those assets from claims against the U.S. parent business). In still other cases, the money may be gone because it was already spent—for example, to finance expensive lifestyles or repay personal debts. *See, e.g.*, *In re Wyly*, 552 B.R. 338 (Bankr. N.D. Tex. 2016); *In re Bryen*, 433 B.R. 503 (Bankr. E.D. Pa. 2010). By giving the government additional information to advance it in its race against the collections clock, the reportable-transaction disclosure requirements increase the likelihood that unpaid taxes will ultimately be collected.

B. Lifting the Anti-Injunction Act's bar here would disrupt the statutory framework for tax-shelter litigation.

If the Anti-Injunction Act were narrowed as petitioner requests, the resulting pre-enforcement challenges to reportable-transaction designations would put the government in an impossible position. This is because it often would not be allowed to use relevant information to respond effectively to the tax-shelter promoter's challenge. The IRS frequently identifies abusive transactions in the process of confidential audits. *See* Internal Revenue Manual § 4.51.2.3 (2005) (describing procedure through which examiners flag potential shelters). If a similar shelter emerges in a number of audits, the IRS may designate the shelter as a reportable transaction. But Congress's carefully crafted taxpayer-confidentiality provisions would interfere with the government's use of details from these audits to explain and defend its decision to designate a tax-shelter strategy as a reportable transaction. Confidentiality protections generally do not allow the IRS to disclose the return information of a taxpayer who is not a party to the case. *See* I.R.C. § 6103(a), (h). The IRS may even be barred from sharing the information with the Justice Department lawyers litigating on its behalf. *See id.* § 6103(h)(2).

Congress has carved out a limited exception to the nondisclosure rule for cases where the treatment of an item on another taxpayer's return is "directly related to the resolution of an issue in the proceeding." I.R.C. § 6103(h)(4)(B). But courts have construed this exception narrowly, and existing case law likely would not allow the IRS to disclose confidential details of one taxpayer's micro-captive insurance arrangement to defeat another

taxpayer's claim that micro-captive arrangements should not be "reportable transactions." *See In re United States*, 669 F.3d 1333, 1339 (Fed. Cir. 2012) ("[T]he treatment of an item on a third party's return is not related, never mind directly related, to the resolution of a taxpayer's issue when the only link between the third party and taxpayer is the same tax treatment for a similar item of liability, income, deduction, or credit."). Congress has not provided an exception for pre-enforcement challenges to reportable-transaction requirements because it did not think there would *be* pre-enforcement challenges to reportable-transaction requirements. All of this may make it quite difficult for the IRS to show in a pre-enforcement lawsuit, without the use of specific taxpayer information, that it correctly classified a transaction as "having a potential for tax avoidance or evasion" under I.R.C. § 6707A(c)(1).

And such lawsuits would likely come in droves. Captive insurers are domiciled in at least twenty-eight states and the District of Columbia, *see* Ins. Info. Inst., *Captives by State* (last visited Aug. 30, 2020), https://perma.cc/24GJ-9NXP, and given the large sums of money at stake, many would have an incentive to challenge the validity of Notice 2016-66. Even a temporary victory in a single judicial district could seriously impede the government's efforts to obtain needed information, in part because of the increased difficulty of matching tax-shelter users with tax-shelter promoters and in part because tax-shelter activity might respond by moving to a jurisdiction where reporting requirements were suspended.

Finally, the specter of a nationwide injunction raises the stakes in every lawsuit, because a finding of invalidity by any district court could doom a reportable-transaction

notice everywhere. Indeed, a nationwide injunction is the very remedy petitioner seeks. Compl. 16. To be sure, the difficulties posed by nationwide injunctions are not limited to tax cases. Members of this Court have expressed concerns about such injunctions in other contexts, *e.g.*, *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 183 (1967) (Fortas, J., dissenting in part and concurring in part), and members of Congress have proposed possible remedies. *See, e.g.*, Injunctive Authority Clarification Act of 2019, H.R. 77, 116th Cong. § 2 (introduced by Rep. Biggs); Injunctive Authority Clarification Act of 2018, H.R. 6730, 115th Cong. (introduced by Rep. Goodlatte and reported by the H. Comm. on the Judiciary). What makes the tax context different is that Congress already *has* prescribed a remedy—the Anti-Injunction Act—which, if interpreted according to its plain text, ought to put to rest the threat of pre-enforcement injunctions, nationwide or not.

III. Equitable exceptions to the Anti-Injunction Act should not be expanded to block tax-shelter disclosures.

As explained, the Anti-Injunction Act's text "could scarcely be more explicit," *see Bob Jones*, 416 U.S. at 736, and it bars suits like this one. *See NFIB*, 567 U.S. at 544-45; *Florida Bankers Ass'n*, 799 F.3d at 1067. Nonetheless, this Court has recognized two equitable exceptions to the Act. *See* Erin Morrow Hawley, *The Equitable Anti-Injunction Act*, 90 Notre Dame L. Rev. 81, 102-05 (2014). The first applies when a plaintiff can show both "irreparable injury" and "certainty of success on the merits." *Bob Jones*, 416 U.S. at 737. The second arises when Congress has provided the taxpayer with "no

alternative remedy." *South Carolina v. Regan*, 465 U.S. 367, 374 (1984). Neither exception applies here.

A. Petitioner has not shown irreparable injury or certainty of success on the merits.

Although this Court has acknowledged the possibility of relief from the Anti-Injunction Act where a plaintiff shows both "irreparable injury" and "certainty of success on the merits," *see Bob Jones*, 416 U.S. at 737, the Court has not found that the exception applied in any case in more than eighty years. *See Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 3 & n.2 (1962) (collecting cases). This case ought not snap that streak.

First, petitioner will not suffer an "irreparable injury" as a result of the tax-shelter-reporting requirements. Form 8918, the material-advisor disclosure statement, imposes an estimated annual burden of 14 hours, 33 minutes per respondent upon the approximately 350 respondents who file the form. *See* Comment Request for Form 8918, 83 Fed. Reg. 62,674 (Dec. 4, 2018). Petitioner claims (Br. 10) that compliance costs "hundreds of hours of labor and tens of thousands of dollars each year." Even if this estimate, far in excess of the official figure, were correct, it is not enough to trigger the *Williams Packing* exception. This Court has suggested that "ruination of the taxpayer's enterprise" may constitute "irreparable injury" for purposes of this exception, *see Williams Packing*, 370 U.S. at 6, but it would be quite a stretch to say that a somewhat time-consuming form rises to that level. Promoters who choose not to comply with the requirements—and instead to pay a $50,000 penalty and sue for a refund—also are not injured irreparably. To even trigger the reporting requirement, and hence the $50,000 penalty, an advisor must earn more than $50,000 in fees

from a single transaction (or more than $250,000 if the client is a corporation). I.R.C. § 6111(b)(1); Treas. Reg. § 301.6111-3(b). And, of course, if petitioner succeeds in its refund suit, it will recover its $50,000 in full (plus interest).

Second, even if petitioner faced an irreparable injury, it cannot meet the further requirement that it show certainty of success on the merits. Petitioner's one colorable claim is that Treasury and the IRS violated the Administrative Procedure Act by promulgating Notice 2016-66 without following the notice-and-comment procedure prescribed in 5 U.S.C. § 553(b). But Treasury and the IRS have a strong argument that their practice of designating reportable transactions via published guidance—rather than through notice-and-comment rulemaking—conforms to Congress's instructions.

The American Jobs Creation Act of 2004 explicitly instructs Treasury and the IRS to designate reportable transactions "under regulations prescribed under section 6011." Pub. L. No. 108-357, § 811, 118 Stat. at 1575-76 (I.R.C. § 6707A(c)(1)). Then and now, the § 6011 regulations have provided for reportable-transaction designations via "published guidance." 65 Fed. Reg. 11,205, 11,206 (Mar. 2, 2000) ("reportable transactions" include "any transaction that is the same as or substantially similar to one of the specified types of tax avoidance transactions that the IRS has identified by published guidance"); Treas. Reg. § 1.6011-4(b)(2) (allowing for designation by "notice, regulation, or other form of published guidance"). Before the AJCA's passage, the IRS had issued more than twenty reportable-transaction designations via revenue ruling or notice in the Internal Revenue Bulletin without going through § 553 rulemaking. *See* Recognized Abusive and Listed

Transactions, *supra*. Petitioner can hardly show a certainty of success on its procedural claim where the IRS has adhered to the very procedure that Congress told the agency to follow.[3]

B. Petitioner has ample opportunities to contest the tax-shelter disclosure rules without running afoul of the Anti-Injunction Act.

Petitioner also claims that it falls within the equitable exception recognized in *South Carolina v. Regan*, which covers cases where Congress has provided no "alternative remedy" to the aggrieved party. 465 U.S. at 378. But applying *South Carolina* to this case would transform a strictly limited exception into a capacious one—fatally undermining the Anti-Injunction Act.

In *South Carolina*, the state brought a constitutional challenge to an act of Congress classifying certain state-issued "bearer bonds" as taxable. The statute effectively required South Carolina to pay a higher interest rate to holders of bearer bonds. *Id.* at 371. But the state would not pay any additional tax itself, so it "could not bring a suit for a refund." *Id.* at 374. Because the state was "unable to utilize *any* statutory procedure to contest the

---

[3] Petitioner's two other claims are meritless. One is that requiring material advisors to report "transactions of interest" is unnecessary because the IRS can collect the needed information from taxpayers themselves. This claim ignores the mountain of evidence establishing the importance of third-party reporting to tax compliance. *See* IRS, Federal Tax Compliance Research, *supra*, at 13. The other is that the district court should void Notice 2016-66 for noncompliance with the Congressional Review Act. *Contra Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 229 (D.C. Cir. 2009) (Kavanaugh, J.) (stating that the language of the Congressional Review Act is "unequivocal" and that it "denies courts the power to void rules on the basis of agency noncompliance with the Act").

constitutionality" of the statute at issue, the Court held that the Anti-Injunction Act did not bar South Carolina's action. *Id.* at 380 (emphasis added); *see also Hibbs v. Winn*, 542 U.S. 88, 103 n.6 (2004) (describing the circumstances in *South Carolina* as "unique"); *id.* at 120 (Kennedy, J., dissenting) (noting that, absent an exception, "there would have been no available forum at all" in *South Carolina*); *Foodservice & Lodging Inst. v. Regan*, 809 F.2d 842, 844 (D.C. Cir. 1987) (per curiam opinion of Judges Robinson, Edwards, and Scalia) (characterizing *South Carolina* as a "narrow exception to the Anti-Injunction Act" reserved for cases in which "the aggrieved party has no alternative remedy").

Petitioner's circumstances are strikingly different from South Carolina's. Most important, petitioner has access to the exact remedy that Congress contemplated when it passed the Anti-Injunction Act in 1867: an action for a refund. Petitioner can decline to file a disclosure form, pay a tax penalty under § 6707, and then sue for a refund in federal district court or the Court of Federal Claims. 28 U.S.C. § 1346(a)(1). This is the time-tested route for taxpayers seeking judicial review of their argument that a tax statute or regulation is invalid. *See, e.g.*, *Hylton v. United States*, 3 U.S. (Dall.) 171 (1796); *United States v. Windsor*, 570 U.S. 744 (2013).

Petitioner argues that this refund remedy is not an "alternative remedy" within the meaning of *South Carolina* because failure to disclose a reportable transaction could, *in theory*, trigger misdemeanor liability. *See* I.R.C. § 7203. This argument is improbable, for at least five reasons.

First, the chance of such a charge is vanishingly small. *See* Camp Amicus Br. 33. The government's policy is to pursue criminal charges for failure to file a required

return in the "most egregious" cases, where the refusal to file is "frivolous." *See* Internal Revenue Manual 9.5.3.2.9 (2020). No one has suggested that petitioner's notice-and-comment argument is frivolous or that its pursuit of a refund remedy would be an egregious flouting of the tax laws. Petitioner has not cited—and *amici* are not aware of—any instance in which the government has prosecuted a taxpayer for failing to file a return or disclose information when the taxpayer came forward with a plausible argument that the filing or disclosure requirement was invalid on statutory grounds. *Cf.* Saltzman & Book, *IRS Practice and Procedure* § 12.02[6] (2020) (noting that the government is "normally more than tolerant toward delinquent tax filers for potential criminal penalties" under I.R.C. § 7203).

Second, to carry its burden on a § 7203 charge, the government must prove that the defendant "voluntarily and intentionally" violated a known legal duty. *Cheek v. United States*, 498 U.S. 192, 201 (1991) (construing "willfulness"). This Court held in *Cheek* that a defendant "cannot be aware that the law imposes a duty upon him" if he holds a "good-faith belief" that "the duty does not exist." *Id.* at 202. The *Cheek* Court added that "good faith" would not excuse a defendant's refusal to file returns and pay taxes because the defendant believed the tax laws were *unconstitutional*, but it added that in such a case, an individual would be "free to pay the tax that the law purported to require, file for a refund and, if denied, present his claims of invalidity, constitutional or otherwise, to the courts." *Id.* at 206.

Cheek affords petitioner with a defense to misdemeanor liability and confirms the availability of an alternative remedy. Petitioner may be mistaken in its

argument that Notice 2016-16 is invalid, but no one has denied that petitioner makes its argument in good faith. *Cheek*'s qualification regarding claims of constitutional invalidity has no bearing here, because petitioner is raising an APA claim, not a constitutional challenge.[4] And the alternative remedy available to petitioner—a refund action—is the same remedy that the Court said Cheek was free to pursue. Indeed, petitioner's good-faith defense would be particularly rock-solid where, as here, the government has represented that petitioner can take the steps necessary to raise its claims in a refund action without any fear of misdemeanor liability. U.S. Br. 46 ("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."). *Cf. United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 674 (1973) (where agency's statements "deprived [defendant] of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution").

[4] In a concurrence in *Cheek*, Justice Scalia suggested that the logic of the Court's opinion would extend criminal liability to taxpayers who act upon a good-faith belief that certain Treasury regulations or rulings are invalid. *See* 498 U.S. at 208-09 (Scalia, J., concurring in the judgment). But the Court did not endorse Justice Scalia's reading of its opinion, and Justice Scalia himself said that a good-faith belief in the invalidity of a Treasury regulation or ruling should *not* trigger criminal liability. *See id.* Thus, no justice in *Cheek* endorsed petitioner's suggestion here that a good-faith belief in the invalidity of a regulation or ruling ought to be sufficient to establish willfulness under § 7203.

Third, even in a case where there is a theoretical risk of a criminal charge, that fact does not entitle petitioner to an exemption from the Anti-Injunction Act. This Court confronted such a scenario in *Bailey v. George*, 259 U.S. 16 (1922), and held that the Anti-Injunction Act barred a prepayment challenge to a federal tax on the profits of manufacturers employing children. The Court explained that the manufacturers could continue to employ minors, pay the tax under protest, and then sue for a refund. *Id.* at 19-20. It did not matter that, under state law at the time, employing children under the age of 14 in a mill was a criminal offense. *See George v. Bailey*, 274 F. 639, 643 (W.D.N.C. 1921). As this Court put it: "There must be some extraordinary and exceptional circumstance not here averred or shown to make the provisions of the section inapplicable." *Bailey*, 259 U.S. at 20. There was such an "exceptional circumstance" in *South Carolina v. Regan*, because there was no way for the state to challenge the amendment to the tax-exempt bond interest rules absent pre-enforcement review. But this case is not like that one.[5]

Fourth, the APA provides an additional route for petitioner to raise its only colorable claim without relying on the refund remedy. Specifically, it can file a petition under 5 U.S.C. § 553(e) asking Treasury and the IRS to initiate notice-and-comment rulemaking with respect to

---

[5] Petitioner selectively cites this Court's statement that the *South Carolina* exception applies when "Congress has not provided the plaintiff with an alternative *legal* way to challenge the validity of a tax." Pet. Br. 37 (citing 465 U.S. at 373) (emphasis added by petitioner). The adjective "legal" here—in the context of injunctive relief—is in contradistinction to *equitable* remedies. But petitioner's claim fails regardless, because a refund suit provides a remedy at law that petitioner could pursue without crossing any criminal line.

the designation of micro-captive insurance as a reportable transaction. If Treasury and the IRS were to deny the petition, the agencies would need to provide "a brief statement of the grounds for denial." 5 U.S.C. § 555(e). That denial, in turn, could be appealed to the courts. *See Auer v. Robbins*, 519 U.S. 452, 456-59 (1997); *see, e.g.*, *Moore v. United States*, 2015 WL 1510007, *8 (W.D. Wash., Apr. 1, 2015) (ordering the IRS to provide a more complete explanation in response to a § 553(e) petition).

If the reviewing court were to agree with petitioner's argument that § 553(b) applies to the designation of micro-captives as reportable transactions, the court could order Treasury and the IRS to initiate rulemaking or, in the alternative, justify their decision not to. This is a remedy afforded to plaintiffs bringing claims analogous to petitioner's in other contexts. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 532-35 (2007); *Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 7-8 (D.C. Cir. 1987); *see also Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 51 (1976) (Brennan, J., concurring in the judgment) (noting availability of § 553(e) in tax case). It would fully address petitioner's complaint that it has been subjected to a rule promulgated in violation of § 553(b). And since such an order would not enjoin the enforcement of any penalty that Congress has classified as a "tax," the Anti-Injunction Act would present no obstacle.

Finally, petitioner's argument proves too much. If the theoretical possibility of a § 7203 misdemeanor charge were all it took to allow a judicial exception to the Anti-Injunction Act, then any return requirement enforceable under § 7203 could be enjoined in a pre-enforcement proceeding without violating the Act. This would mean that the most central elements of the federal tax system

would be susceptible to pre-enforcement challenge. Under petitioner's theory, a court could enjoin, for example, an employer's requirement to provide employees with a Form W-2 wage and tax statement, a payor's obligation to supply other payees with a Form 1099 information return, and a financial institution's obligation to report interest payments on Forms 1099-INT.[6] Under this theory, *South Carolina v. Regan*'s "unique" and "narrow" exception would come quite close to swallowing the rule.

In short, petitioner can pursue its notice-and-comment challenge to the micro-captive reporting requirements without encountering the Anti-Injunction Act. There is, by contrast, no way for the government to challenge abusive tax-shelter transactions if it does not know about them. Petitioner's rule would result in many more abusive tax shelters going undetected, and billions of dollars of rightfully due taxes going uncollected. Fortunately, the plain text of the Anti-Injunction Act precludes that result.

CONCLUSION

The decision below should be affirmed.

[6] For these familiar forms, the penalty structure is the exact same as in this case. Failure to file the required form or to furnish payees with the required information triggers penalties under Subchapter 68B that are classified as "taxes" for Anti-Injunction Act purposes. *See* I.R.C. § 6721, 6722. Willful failures are, in theory, punishable as misdemeanors under § 7203.

Respectfully submitted,

JONATHAN E. TAYLOR
Counsel of Record
Gupta Wessler PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741
jon@guptawessler.com

NEIL K. SAWHNEY
Gupta Wessler PLLC
100 Pine Street, Suite 1250
San Francisco, CA 94111
(415) 573-0336

DANIEL J. HEMEL
111 East 60th Street
Chicago, IL 60637

SUSAN C. MORSE
727 East Dean Keeton Street
Austin, TX 78705

CLINTON G. WALLACE
1525 Senate Street
Columbia, SC 29208

September 15, 2020 *Counsel for Amici Curiae*