No. 19-930

# In the Supreme Court of the United States

CIC SERVICES, LLC,

*Petitioner*,

*v.*

INTERNAL REVENUE SERVICE; DEPARTMENT OF TREASURY; UNITED STATES OF AMERICA,

*Respondents.*

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

## REPLY BRIEF FOR PETITIONER


Adam R. Webber
ELLIOTT, FAULKNER & WEBBER
4244 Indian Ripple Rd.,
Suite 150
Beavercreek, OH 45440
(937) 264-8710

Patrick Strawbridge
*Counsel of Record*
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

Kenneth A. Lazarus
LAZARUS & ASSOCIATES
1025 Thomas Jefferson St. NW
Washington, DC 20007
(202) 295-2330

Bryan Weir
Cameron T. Norris
CONSOVOY MCCARTHY PLLC
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423

*Attorneys for Petitioner*


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## INTRODUCTION

The IRS claims it can distinguish every relevant precedent. But after it's done bobbing and weaving through the caselaw, it's left with a position that has no basis in the text of the Anti-Injunction Act. The IRS distinguishes *Direct Marketing* because that regulation was not enforced by tax penalties. And the IRS distinguishes *Hobby Lobby* because, even though that regulation was enforced by tax penalties, the regulation was not promulgated by the IRS. At the end of the day, then, the IRS's position is that it can invoke the Anti-Injunction Act when its regulations are enforced by tax penalties, but other agencies cannot. This is naked "tax exceptionalism," Hickman-Amicus-Br. 28, Am.-College-Amicus-Br. 16, not a serious attempt to interpret the words "for the purpose of restraining the assessment or collection of any tax," 26 U.S.C. §7421. Instead of "carrv[ing] out an approach to administrative review good for tax law only," *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55 (2011), this Court should hold that preenforcement suits like this one are not barred by the Anti-Injunction Act.

## ARGUMENT

CIC filed this suit to challenge a guidance document that triggers reporting requirements that, if violated, can lead to tax penalties. Depriving CIC of preenforcement review has no basis in the text of the Anti-Injunction Act, furthers none of the Act's purposes, and raises constitutional concerns that this Court's precedents do not tolerate. The Sixth Circuit's judgment should be reversed.

## I. The Anti-Injunction Act's text favors CIC.

### A. Under *Direct Marketing*, CIC's suit does not have the purpose of restraining the assessment or collection of any tax.

CIC's opening brief explains, in detail, why *Direct Marketing*'s careful analysis of the Tax Injunction Act also governs the Anti-Injunction Act. CIC-Br. 17-24. The IRS "assum[es] arguendo" that *Direct Marketing* applies here, IRS-Br. 26, and offers no counterarguments for why it wouldn't.

One of the IRS's amici tries to distinguish the two statutes, Camp-Amicus-Br. 25-30, but no meaningful distinction exists. The Tax Injunction Act was "modeled on" the Anti-Injunction Act, and *Direct Marketing* relied almost entirely on "the Federal Tax Code at the time the TIA was enacted (as well as today)." 575 U.S. at 8. The main portions of the statutes have only minor differences: the addition of "enjoin," "suspend," and "levy" in the Tax Injunction Act, and the addition of "for the purpose of" in the Anti-Injunction Act.

| Tax Injunction Act | Anti-Injunction Act |
|---|---|
| district courts shall not | no suit [shall be maintained] |
| | ***for the purpose of*** |
| ***enjoin, suspend*** or restrain | restraining |
| the assessment***, levy*** or collection of | the assessment or collection of |
| any tax under State law | any tax |

These small differences provide no basis to read the Anti-Injunction Act more broadly than the Tax Injunction Act. The absence of "levy" in the Anti-Injunction Act is meaningless because, under the federal tax code, levy is just "a specific mode of collection." *Direct Mktg.*, 525 U.S. at 9. And while the Tax Injunction Act's use of "enjoin" and "suspend" confirms that the statute uses "restrain" in a narrow, equitable sense, the Anti-Injunction Act's history confirms that it uses "restraining" in that same "equitable sense." *Id.* at 13-14. The Anti-Injunction Act's "purpose" requirement, moreover, mostly *narrows* it vis-à-vis the Tax Injunction Act. CIC-Br. 29-30.

Accordingly, this Court has no need to "assume arguendo" that *Direct Marketing* applies here. IRS-Br. 26. It applies, plain and simple. And because *Direct Marketing* applies, CIC's suit does not implicate the Anti-Injunction Act.

For starters, CIC's suit would not "restrain[]" the "assessment or collection" of any tax. §7421. To restrain assessment means to "stop" the "official recording of a taxpayer's liability." 525 U.S. at 13, 9. But this suit is preenforcement: CIC has not done anything that could trigger an assessment, and the IRS does not argue otherwise. Nor would the relief that CIC seeks—an order barring the IRS from enforcing Notice 2016-66—stop the act of assessment "itself." *Id.* at 12. It would merely stop the enforcement of a guidance document. True, that guidance document applies certain reporting requirements to CIC, and violations of those reporting requirements can be enforced with tax

penalties. But assessing those penalties requires "further action" by the IRS. *Id.* at 11. Most notably, the reporting requirements must be violated, the IRS must detect the violation, the IRS must decide to punish the violation, and the IRS must choose tax penalties as the punishment. Because "none of these" enforcement steps are "the acts of assessment [or] collection themselves," the Act does not apply here. *Id.* at 12; *accord Chamber of Commerce of U.S. v. IRS*, 2017 WL 4682050, at *3 (W.D. Tex. Oct. 6, 2017) (holding that the Act did not bar a preenforcement challenge to an IRS rule because "[e]nforcement of the Rule precedes any assessment or collection of taxes").

Even if CIC's suit would restrain assessment or collection, the Act still wouldn't apply because that is not the suit's "purpose." §7421. The IRS does not dispute that the purpose requirement is an independent hurdle to the Act's application, that "purpose" does not mean "effect," and that a suit's "purpose" is its "'conscious objective'" or "'aim[].'" CIC-Br. 30. Under any metric, CIC's purpose is not to restrain the assessment or collection of taxes. The "substance of the suit," IRS-Br. 40, is a preenforcement challenge to a guidance document, not a post-enforcement dispute over tax penalties. The "relief requested," IRS-Br. 40, is tied to the guidance document, not the IRS's collection or assessment efforts. CIC's alleged injury—and its only basis for Article III standing—is the reputational and monetary costs of complying with the guidance document, not tax penalties. And if the tax penalties were repealed tomorrow, CIC's injuries, standing, claims, relief, and incentive to litigate would not change. Captive-Ins.-Ass'ns-Amicus-Br. 10-20. CIC's

suit has everything to do with Notice 2016-66, and nothing to do with tax penalties.

### B. The IRS's contrary arguments all mischaracterize CIC's suit.

To prove that CIC's "purpose" is "restraining" the "assessment or collection" of taxes, §7421, the IRS tries to shoehorn CIC's suit into past precedents. Citing *NFIB*, the IRS contends that CIC is challenging the tax penalties themselves. Citing *Bailey v. George*, the IRS contends that CIC is challenging a "regulatory tax." And citing *Bob Jones* and *Americans United*, the IRS contends that CIC wants an "advance judicial determination" of its tax liability.

These arguments-by-analogy are flawed at the outset. This case presents a question of first impression: "none of the [aforementioned] precedents is precisely on point" because this Court has never considered whether the Act applies to a preenforcement challenge to an IRS regulation enforced by tax penalties. Pet. App. 56a (Sutton, J., concurring). And this Court's most recent precedent is *Direct Marketing*, which substantially clarified the meaning of the key terms. Most of all, the IRS's analogies fundamentally mischaracterize CIC's lawsuit.

#### 1. CIC is not challenging the tax penalties themselves.

The IRS describes this case as "a suit to prevent the collection of penalties." IRS-Br. 26. CIC's ultimate goal, according to the IRS's awkward framing, is to "violate Notice 2016-66's reporting and recordkeeping requirements without incurring the tax penalties."

IRS-Br. 31; *accord* IRS-Br. 32-33 (asserting that CIC wants to "disregard [its] obligations" and "violate the requirements").

These descriptions of CIC's suit are so stilted that they illustrate why the Anti-Injunction Act is a poor fit here. CIC is not trying to "prevent the collection of penalties" or "'challeng[e] its own or anyone else's tax liability.'" IRS-Br. 26. The IRS has not threatened any penalties (let alone "assessed" them), and CIC has done nothing to warrant penalties (and has no intention of ever doing so). CIC simply wants to challenge Notice 2016-66. CIC is also not trying to "violate" Notice 2016-66's "requirements" and "obligations" "without incurring the tax penalties." IRS-Br. 31-32. CIC is challenging the *validity* of Notice 2016-66. If it prevails, the Notice's "requirements" and "obligations" will no longer *be* requirements and obligations. If it fails, the Notice will be valid and CIC will comply—as it has been this entire time.

The IRS ultimately relents and admits that, "on the face of the complaint," CIC seeks to enjoin "'the enforcement *of Notice 2016-66.*'" IRS-Br. 21 (emphasis added). It concedes that CIC's focus is the "reporting and recordkeeping requirements" precipitated by Notice 2016-66. IRS-Br. 21. Even so, the IRS insists that the Anti-Injunction Act applies because enjoining Notice 2016-66 would, in effect, reduce the tax penalties that the IRS can collect (since there will be fewer people eligible to violate the reporting requirements). IRS-Br. 20-27. Echoing the courts below, the IRS argues that this Court "impli[ed]" this conclusion in *NFIB*. IRS-Br. 22. Because *NFIB* held that the Act did

not apply to a non-tax penalty, the IRS believes *NFIB* implied the inverse—that the Act "'would have applied'" if the penalty had been a tax. IRS-Br. 22.

*NFIB* did not hold that preenforcement challenges to regulations enforced by tax penalties are barred by the Anti-Injunction Act. The penalty in *NFIB*, after all, was *not* a tax for purposes of the Act. 567 U.S. at 546. True, the Court distinguished that penalty from the tax penalties that appear in Subchapter 68B (like the penalties here). But the Court never said that, if the individual mandate had been enforced by a penalty in Subchapter 68B, then "'the Anti-Injunction Act *would have applied*.'" IRS-Br. 22 (emphasis added). The Court said that, if the individual mandate had been enforced by a penalty in Subchapter 68B, then that penalty would have been "*treated as a tax* for purposes of the Anti-Injunction Act." 567 U.S. at 544 (emphasis added).

Saying that something would be treated as a "tax" is not the same thing as saying that a suit would have the "purpose" of "restrain[ing]" the "assessment or collection" of that tax. *Fla. Bankers*, 799 F.3d at 1079-80 (Henderson, J., dissenting); Pet. App. 33a-34a (Nalbandian, J., dissenting); Pet. App. 64a-65a (Thapar, J., dissenting). Indeed, in *NFIB*, the parties,[1] lower

[1] *See Fla. Bankers*, 799 F.3d at 1080 & n.6 (Henderson, J., dissenting) (collecting over "eighty pages of briefing" in *NFIB* on this question).

courts,[2] and this Court[3] all explored reasons why the Anti-Injunction Act might not apply even if the penalty were a tax. This Court did not have to reach that question given its conclusion that the penalty was not a tax. And contrary to the IRS's suggestion, this Court would not have decided such an important question implicitly or obliquely, with no recognition that it was doing so.

Anyway, the IRS does not really believe that *NFIB* would have come out differently had the penalty there been a tax. The IRS reveals this when it concedes that *some* regulations enforced by tax penalties can be challenged in preenforcement suits, notwithstanding the Anti-Injunction Act. For example, the IRS agrees with CIC that challenges to HHS's contraceptive mandate or EPA's diesel-fuel standards are not barred by the Act, even though those regulations are enforced

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[2] *E.g.*, *Seven-Sky v. Holder*, 661 F.3d 1, 7-11 (D.C. Cir. 2011) (holding that the penalty was not a tax and that, even if it were, the plaintiffs were challenging the individual mandate, not the penalty); *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 413 n.14 (4th Cir. 2011) (disagreeing and collecting cases).

[3] *E.g.*, *NFIB* O.A. Transcript (Mar. 26, 2012) at 24:12-22 (Justice Ginsburg: "all this talk about tax penalty – it's all beside the point because this suit is not challenging the penalty. This is a suit that is challenging the must-buy provision," which is "stated separately from the penalty"); 26:4-6 (Justice Alito: "your argument puts them in the position of having to disobey the law in order to obtain review of their claim"); 18:5-6 (Justice Breyer: "an advance attack on this [mandate] does not interfere with the collection of revenues"); 27:15-28:2 (Justice Kagan: "the statute … [is] a regulatory command and a penalty attached to that command," not a single regulatory command).

with tax penalties. IRS-Br. 36-37, 43-44. The difference between those regulations and Notice 2016-66, according to the IRS, is that those regulations are not enforced *by the IRS* (as the individual mandate wasn't in *NFIB*).

To illustrate its reading of the Act, the IRS offers the following hypothetical about an EPA regulation that is enforced by tax penalties:

> 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 [tax] penalty.

IRS-Br. 44.

The problem for the IRS is that its hypothetical equally describes *this case*. Like the hypothetical suit against EPA, CIC's suit "seek[s] relief directed solely to [IRS's] enforcement of the statutory and regulatory provisions that agency administers." IRS-Br. 44. Also like the hypothetical suit against EPA, CIC's suit would have no effect on the assessment or collection of taxes other than "an eventual downstream impact on the IRS's collection of the [tax] penalty." IRS-Br. 44.

That CIC's suit challenges an IRS regulation, instead of an EPA regulation, cannot possibly matter. Absent any tax penalties, a tax-reporting regulation implicates the Act just as much as a diesel-fuel regulation—not at all. *Direct Marketing*, 575 U.S. at 12. If attaching a tax penalty does not bring a challenge to the EPA regulation under the Act, then it cannot bring a challenge to an IRS regulation under the Act. Enjoining a regulation that is enforced with tax penalties would either "'have the effect of … *fully stopping*' the IRS from collecting the penalties" or it wouldn't. Pet. App. 17a. This syllogism (which formed the entire basis for the Sixth Circuit's decision) does not turn on the *identity* of the agency that promulgated the regulation.

The IRS clearly hopes this Court will announce a rule that is "good for [the IRS] only." *Mayo Found.*, 562 U.S. at 55. But that rule would have no plausible basis in the Anti-Injunction Act. "The text" of the Act contains no hidden "balancing test, whereby a suit becomes barred once it is sufficiently 'related to' taxes or sufficiently important to the IRS." *Fla. Bankers*, 799 F.3d at 1081 (Henderson, J., dissenting). Accepting the IRS's position would not only add words to the Anti-Injunction Act that aren't there, but it would depart from "'a uniform approach to judicial review of administrative action.'" *Mayo Found.*, 562 U.S. at 55.

### 2. CIC is not challenging a regulatory tax.

The IRS next characterizes CIC's suit as an attempt "'to challenge only the regulatory aspect of a

regulatory tax.'" IRS-Br. 38. The reporting requirements that Notice 2016-66 imposes and the tax penalties that enforce those requirements are, according to the IRS, "two sides of the same coin." IRS-Br. 37. The IRS compares this case to *Bailey v. George*, 259 U.S. 16 (1922), where this Court deemed a challenge to a child-labor tax barred by the Anti-Injunction Act. IRS-Br. 39. Unlike *George*, however, this case involves no "regulatory tax."

A regulatory tax is one that is primarily meant to change or punish undesirable behavior, rather than raise revenue. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922). The child-labor tax, for example, required certain companies to pay "an excise tax [on their annual] net profits." 40 Stat. 1138. In *George*, this Court held that, because regulatory taxes are still taxes for purposes of the Anti-Injunction Act, a company that had been "assessed the sum of $2,098.06" could not sue to "permanently enjoin[]" the collection. 259 U.S. at 19. The individual mandate in *NFIB* might be another example of a regulatory tax. The mandate could be construed that way, according to *NFIB*, because violating it had no "negative legal consequences … beyond requiring a payment to the IRS." 567 U.S. at 568.[4]

[4] In *Texas v. California*, No. 19-840, this Court may reconsider the nature of the individual mandate, now that Congress has zeroed out the penalty. But its decision in that case will have no bearing on this one. The reporting requirements here unquestionably have negative legal consequences beyond tax penalties—violations are a crime, for example. CIC-Br. 26.

In this case, CIC is not trying to enjoin a "regulatory tax." Notice 2016-66 is a guidance document published by the IRS, not a tax imposed by Congress. And the reporting and recordkeeping requirements triggered by the Notice are not taxes either. *Direct Mktg.*, 575 U.S. at 12. These requirements are standalone commands with independent legal force. *See, e.g.*, §6011(a) (individuals "*shall* make a return" and "*shall* include therein the information required" (emphases added)). Violating them risks not just tax penalties, §§6707-08, but also criminal liability, §7203. The regulatory burdens of Notice 2016-66 and the tax penalties for violating the reporting requirements are thus not "two sides of the same coin." IRS-Br. 37. They are two different coins.

The IRS does not meaningfully argue otherwise. While it notes that, in practice, the reporting requirements are enforced "almost exclusively" with tax penalties, IRS-Br. 44, that empirical observation is irrelevant. That the IRS prefers to use one punishment over another does not change the nature of the requirements, or somehow convert these independent regulatory mandates into taxes themselves. Nor is the threat of tax penalties the only "obstacle" standing in the way of someone who wants to violate the reporting requirements. IRS-Br. 37. The threat of criminal liability is another obstacle—indeed, a much more daunting one—that would induce compliance on its own. The IRS's attempt to characterize this case as a challenge to a "regulatory tax" is thus unpersuasive.

### 3. CIC is not seeking an advance judicial determination of its tax liability.

Lastly, the IRS claims that CIC's real aim is to obtain an "advance judicial determination" of its potential tax liability. IRS-Br. 32. The IRS does this to fit this case within *Bob Jones University v. Simon*, 416 U.S. 725 (1974), and *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974), where organizations sued to challenge the revocation of their tax-exempt status. IRS-Br. 32-34.

But unlike *Bob Jones* and *Americans United*, CIC's suit was not brought for the "purpose" of resolving its (or anyone else's) tax liability. The plaintiffs in *Bob Jones* and *Americans United* were "defeated by [their] own pleadings, since the *only* injuries [they] identified involved tax liability." *Seven-Sky*, 661 F.3d at 10. In both cases, this Court carefully reviewed the pleadings and concluded that the plaintiffs' "'primary' and 'obvious purpose'" was to restrain the assessment and collection of taxes against them and their donors. Pet. App. 64a (Thapar, J., dissenting). Here, by contrast, "CIC has a clear interest—separate from any potential 'tax' liability—in avoiding the substantial costs of the reporting requirement. The 'purpose' of its lawsuit is to obtain relief from costs the company must pay today, not to restrain a penalty it might have to pay tomorrow." Pet. App. 64a; *accord* Pet. App. 32a (Nalbandian, J., dissenting).

The IRS reads *Bob Jones* and *Americans United* expansively to cover all sorts of preenforcement challenges to all sorts of IRS actions. IRS-Br. 33-35. No surprise there, as the "IRS has long envision[ed] a

world in which no challenge to its actions is ever outside the closed loop of its taxing authority." *Cohen v. United States*, 650 F.3d 717, 726 (D.C. Cir. 2011) (en banc).

But this Court has never applied *Bob Jones* and *Americans United* so expansively. Pet. App. 64a n.1 (Thapar, J., dissenting). It has repeatedly—and recently—refused to adopt "broad" prohibitions on preenforcement review that would cover "any court action related to any phase of taxation," or that would "defeat the precision" of the Act's key terms. *Direct Mktg.*, 575 U.S. at 13. Congress shares this Court's restraint, as it amended the tax code after *Bob Jones* and *Americans United* to permit the kind of challenge that those decisions barred. §7428. While the IRS believes these amendments reflect Congress's *agreement* with *Bob Jones* and *Americans United*, IRS-Br. 34, the amendments could just as easily reflect Congress's attempt to restore the code's original meaning, *see* Smith-Amicus-Br. 7-15.

This Court need not definitely resolve how *Bob Jones* and *Americans United* fit into the overall legal landscape. Even accepting those decisions as written, it "'does not follow'" that they would bar a preenforcement suit that challenges "'a discrete regulatory requirement" and that alleges injuries "other than tax liability." *Fla. Bankers*, 799 F.3d at 1078-79 (Henderson, J., dissenting). CIC's suit does precisely that.

## II. The Anti-Injunction Act's purposes favor CIC.

CIC's interpretation is not only the better reading of the Act's text, but it also better reflects "the Act's purpose and the circumstances of its enactment." *South Carolina v. Regan*, 465 U.S. 367, 378 (1984); *see Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962) (declining to apply the Act to a new context where its "central purpose" was "inapplicable"). After consulting the Act's "text," this Court has said that the Act serves "twin purposes": helping the IRS "'assess and collect taxes as expeditiously as possible,'" and requiring "'the legal right to the disputed sums be determined in a suit for refund.'" *Hibbs v. Winn*, 542 U.S. 88, 103 (2004). Applying the Act here serves neither purpose.

CIC's suit is not an obstacle to the Government's "prompt collection of its lawful revenue." *Williams Packing*, 370 U.S. at 7. True, if CIC successfully challenges Notice 2016-66, then the IRS might receive less information about captive insurers, and that lack of knowledge might lessen its "ability to assess and ultimately collect … taxes" from these companies. *Direct Mktg.*, 575 U.S. at 11; *but see* D.C. Doc. 1 ¶¶41-57; Captive-Ins.-Ass'n-Amicus-Br. 13-15. Nevertheless, any negative effects on these "downstream" taxes are irrelevant to the Anti-Injunction Act, as the IRS admits. IRS-Br. 25. The only "revenue" that CIC's suit could possibly jeopardize, then, is the tax penalties that the IRS could collect if anyone ever violates Notice 2016-66. But these penalties are not "the lifeblood of government." *Bull v. United States*, 295 U.S. 247, 259 (1935). If these penalties were *never* collected, the

IRS would presumably be happier, since individuals would be complying with the underlying tax-reporting requirements. CIC's challenge to Notice 2016-66 does not imperil these tax penalties any more than its compliance with Notice 2016-66 does.

Citing nothing, the IRS suggests that the tax penalties here "could be viewed" as a kind of "substitute" tax—a "presumption" that the individual who violated the reporting requirement is engaged in tax evasion. IRS-Br. 22-23, 29. Even if this theory were true, it does not help answer the question presented. Whatever the penalties' policy aim, CIC's suit does not seek to restrain those penalties. *Supra* I.

In case it matters, though, the Government's "substitute tax" theory is not true. Like most tax penalties, the tax penalties here are not meant "to raise revenue"; they are meant "to achieve broad compliance with the regulatory regime through deterrence and punishment." *Korte v. Sebelius*, 735 F.3d 654, 670 (7th Cir. 2013). As the IRS explains in its own manual, the "purpose of these penalties is to encourage voluntary compliance" with the underlying requirements "by imposing an avoidable cost on non-compliant taxpayers." IRS, *Internal Revenue Manuals* §20.1.2.1.1(3) (Mar. 19, 2019), bit.ly/3izCKFf. The penalty for violating the recordkeeping requirement, for example, charges noncompliant individuals "$10,000 … each day" not to mimic lost tax revenue, but to force the individuals to submit the documents. §6708. The Government's theory makes even less sense for material advisors like CIC. These advisors report information about *other people's* transactions, so any penalties assessed

against them cannot possibly be a "substitute" tax for something *they* did.

As for the Act's second purpose—channeling litigation into refund suits—barring CIC's suit would undermine the rationale behind that goal as well. Refund suits reflect the "principle of 'pay first and litigate later.'" *Flora v. United States*, 357 U.S. 63, 75 (1958). Paying the tax is a lawful act of obedience that promotes "'the honor and orderly conduct of the government.'" *Id.* at 68. Because "our tax structure is based on a system of self-reporting," the Government "depends upon the good faith and integrity of each potential taxpayer." *United States v. Bisceglia*, 420 U.S. 141, 145 (1975). Under the IRS's interpretation of the Anti-Injunction Act, however, individuals would not initiate refund suits by lawfully paying a tax. They would initiate refund suits by violating the tax laws and defying the government. Congress could not have "intended such an anomalous result in a system which depends for its very existence on the principle of voluntary compliance." *Nat'l Rest. Ass'n v. Simon*, 411 F. Supp. 993, 996 (D.D.C. 1976); *see United States v. Generes*, 405 U.S. 93, 104 (1972).

Because it would serve no purpose of the Anti-Injunction Act, this case presents no basis to displace the APA's strong preference for preenforcement review. Some of the Government's amici fret that preenforcement review would make it harder for the IRS to prosecute "tax shelters." Former-Officials-Amicus-Br. 2. Never mind that captive insurance is a legitimate business, that Congress has repeatedly blessed it, and that the IRS admits it "lack[s] sufficient information"

to determine whether these transactions should be reportable. CIC-Br. 6-8, Captive-Ins.-Ass'ns-Amicus-Br. 5-8, 26-27. This is not "a case about tax shelters," Former-Officials-Amicus-Br. 2, but rather a case about whether the IRS's actions will be subject to preenforcement review under the APA. The answer to that question is profoundly important for all litigants, from low-income individuals who rely on IRS-administered benefits, to regulated businesses of all sizes. Ctr.-Amicus-Br. 21; Chamber-Amicus-Br. 4-9; NFIB-Amicus-Br. 23-31; Nat'l-Taxpayers-Union-Amicus-Br. 13-14. And the answer affects an ever-expanding array of subjects, from healthcare to the environment to politics and much more. Hickman-Amicus-Br. 28-30; P'ship-Conserv.-Amicus-Br. 2-10; Inst.-Free-Speech-Amicus-Br. 4-11.

True, if CIC prevails, the IRS will need to improve its lackluster compliance with the APA. CIC-Br. 33. But the Government's amici provide no reason to think that the IRS cannot do its job while also complying with the basic procedural rules that govern the rest of the executive branch. No such reason exists.

### III. Constitutional avoidance favors CIC.

If any doubts remain, this Court should resolve them in favor of CIC, as the IRS's contrary interpretation "would raise serious constitutional problems." *Commissioner v. Shapiro*, 424 U.S. 614, 629 (1976). According to the IRS, litigants have *no* right to raise preenforcement claims when the IRS's policies are enforced by tax penalties—not "even constitutional

claims."[5] IRS-Br. 42. Litigants have only one path to judicial review in these circumstances—a refund suit. And that path requires litigants to break the law, incur hefty penalties, risk their professional licenses, and expose themselves to criminal fines and even prison. CIC-Br. 34-35. The Due Process Clause forbids the Government from throwing up this many roadblocks. CIC-Br. 35-36; Am.-Prosperity-Amicus-Br. 6-15.

The IRS does not dispute the basic contours of this constitutional problem. It concedes that Congress's power to bar preenforcement review is constrained by "due-process principles." IRS-Br. 43. And while it notes that the Act normally satisfies due process, it admits that the Act can violate due process when refund suits are not "'adequate.'" IRS-Br. 44-45 (quoting *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931)). The IRS does not deny that refund suits are inadequate when filing one requires the plaintiff to commit a federal crime.

The IRS instead denies the premise that CIC must commit a crime to bring a refund suit. Section 7203

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[5] Although CIC does not raise constitutional claims, its APA claims have a constitutional dimension. Congress can "'create a vast and varied bureaucracy,'" this Court has held, if that bureaucracy remains sufficiently "accountable to the people." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2207 (2020). "[F]ramed against a background of rapid expansion" of the administrative state, the APA is a vital judicial "check" that helps ensure agencies remain within constitutional bounds. *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950).

criminalizes only "willful[]" violations of reporting requirements, the IRS notes, and a violation is not willful if it is "based on a 'good-faith belief' that the reporting requirement does not apply." IRS-Br. 46 (quoting *Cheek v. United States*, 498 U.S. 192, 202 (1991)). The Government promises it would never prosecute someone who "failed to comply with a reporting requirement based on a good-faith belief that the requirement did not apply." IRS-Br. 47. But this argument is both wrong and irrelevant.

The IRS is wrong about how §7203 applies here. Willfulness means a "'voluntary, intentional violation of a known legal duty.'" *Cheek*, 498 U.S. at 201. True, a defendant does not act willfully if he honestly believes a reporting requirement does not apply to him. *See id.* at 202. But a defendant *does* act willfully if he knows a reporting requirement applies to him and argues that the requirement is "invalid and unenforceable." *Id.* at 205. Unlike "innocent mistakes" about the meaning of tax laws, a defendant's "views about the validity" of tax laws are "irrelevant to the issue of willfulness," even if those views "have substance" and are held in "good faith." *Id.* at 205-06. A defendant can "present his claims of invalidity" only as defenses to the criminal prosecution, where he "must take the risk" of going to prison if his legal arguments turn out to be "wrong." *Id.* at 206.

Citizens would thus act "willfully," §7203, if they deliberately failed to file a return in order to litigate the validity of a reporting requirement in a refund suit. A person in this position would not be confused about whether the reporting requirement applies to

her. She knows it applies; its application is precisely why she wants to challenge it. A person who would deliberately violate the law to gin up a test case necessarily acts willfully, since she has "full knowledge of the provisions at issue" and has reached "a studied conclusion … that those provisions are invalid and unenforceable." *Cheek*, 498 U.S. at 205. Such a defendant "must take the risk of being wrong"—a risk that includes not only tax penalties, but also "criminal prosecution under … §7203." *Id.* at 206. And *that* risk is one that the law does not require individuals to bear. *Fla. Bankers*, 799 F.3d at 1083-84 (Henderson, J., dissenting); Pet. App. 62a (Thapar, J., dissenting).

The Government's promise not to prosecute individuals who believe a reporting requirement "does not apply" to them, IRS-Br. 46, is thus irrelevant. A unilateral promise not to prosecute (in an appellate brief) could not resolve the constitutional problem created by the Government's interpretation anyway. *See Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018); *United States v. Stevens*, 559 U.S. 460, 480 (2010); *Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967). But even if it could, the Government does *not* promise that it will not prosecute individuals who deliberately disobey reporting requirements because they believe those requirements violate the APA (and want to litigate that claim in a refund suit). The Government refused to make that concession below. *See* Pet. App. 62a, 35a n.5. And its current Criminal Tax Manual warns that a defendant's "reason" for refusing to comply with a reporting requirement is "irrelevant"; a defendant who "fail[s] to file a return [as] an

attempt to test" the legality of a reporting requirement still violates §7203. DOJ, *Criminal Tax Manual* §10.05[5] (manual last updated Oct. 1, 2020), bit.ly/34n5Jah; *see also* §40.05[1] (rejecting as a valid defense the "claim that the tax laws are … invalid").

But even if CIC could bring a refund suit without violating §7203, it could not bring a refund suit without violating *some* federal law. CIC must, at the very least, violate a statutory reporting requirement. That violation could entail a penalty of $50,000 per unreported transaction, §6707(b)—penalties that CIC must be able to pay in full before it can sue, *Flora*, 357 U.S. 63. CIC also faces risks to its members' licenses and livelihoods. As accountants and attorneys, CIC's members and employees have ethical obligations that prevent them from deliberately violating federal tax law. CIC-Br. 35. For CIC then, no preenforcement review means no judicial review at all, even ignoring the risk of criminal liability. So too for countless low-income individuals and businesses. Ctr.-Amicus-Br. 6; Chamber-Amicus-Br. 6-9.

Separate from this constitutional problem, CIC's inability to bring a refund suit without violating federal law squarely implicates the exception from *South Carolina v. Regan*, 465 U.S. 367 (1984). Under that decision, the Anti-Injunction Act does not apply when a plaintiff has no "alternative legal way" to challenge the provision. *Id.* at 373. While this exception vindicates "due process" concerns, *id.* at 375, it is an *interpretation* of the Act that applies even when no constitutional concerns are present. (The plaintiff in *South Carolina* was a State, after all, and States have no

due-process rights.) True, as the IRS points out, this exception was easy to apply in *South Carolina* itself, where the plaintiff had no way to file a refund suit. IRS-Br. 45. But the exception is not limited to that circumstance. The "hold[ing]" of *South Carolina* is that the Act does not apply when "Congress has not provided the plaintiff with an alternative *legal* way to challenge the validity of a tax." 465 U.S. at 373 (emphasis added).

*South Carolina*'s use of the word "legal" was not accidental. When the Court insisted on an "alternative legal avenue," it meant an avenue that "Congress has provided," looking at the overall "statutory scheme." *Id.* at 374. And it meant an avenue that the plaintiff could freely initiate himself. "Congress did not intend the Act to apply where an aggrieved party" cannot obtain judicial review without "persuading a third party" first. *Id.* at 381. When Congress drafted the Act, it was concerned with "providing remedies" as much as "limiting remedies." *Id.* at 376 n.13. It did not tolerate even "the risk" that the Act would completely deprive someone of judicial review. *Id.* at 381.

*South Carolina*'s exception applies here. Without preenforcement review, CIC has no "legal" method to litigate its claims. *Id.* at 373. To initiate a refund suit, CIC would have to violate federal tax laws—the same laws that appear in the overall "statutory scheme" that Congress wanted taxpayers to follow. *Id.* at 374. This path "is obviously not the 'refund' action contemplated by the Act." *Nat'l Rest.*, 411 F. Supp. at 996. After breaking the law, CIC would also have to "persuad[e]" the IRS to assess a tax penalty against it, to

do so within a reasonable time, and to do so at an amount that CIC could afford to pay in full. *South Carolina*, 465 U.S. at 381. Those decisions are largely entrusted to the IRS's sole, unreviewable discretion. CIC-Br. 35. Forcing plaintiffs to get the IRS's permission before they can sue it is a requirement "not found in the ordinary refund litigation procedure." *Nat'l Rest.*, 411 F. Supp. at 996.

At bottom, there's a reason why a refund suit in this case would look nothing like a normal refund suit: "the Anti-Injunction Act was not intended to, and does not apply" here. *Id.* This Court should not transform "'pay first challenge later'" into "'report to prison first challenge later.'" Pet. App. 55a (Sutton, J., concurring).

## CONCLUSION

The Court should reverse the Sixth Circuit's judgment and remand for further proceedings.

Respectfully submitted,

Adam R. Webber
ELLIOTT, FAULKNER & WEBBER
4244 Indian Ripple Rd.,
Suite 150
Beavercreek, OH 45440
(937) 264-8710

Patrick Strawbridge
*Counsel of Record*
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

Kenneth A. Lazarus
LAZARUS & ASSOCIATES
1025 Thomas Jefferson St NW
Washington, DC 20007
(202) 295-2330

Bryan Weir
Cameron T. Norris
CONSOVOY MCCARTHY PLLC AN TONIN SCALIA LAW SCHOOL SUPREME COURT CLINIC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423

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*Attorneys for Petitioner*