

App. No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

CIC SERVICES, LLC,

Applicant,

v.

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

Respondents.

**APPLICATION FOR EXTENSION OF TIME TO
FILE A PETITION FOR WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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

Jeffrey M. Harris
Counsel of Record
Alexa R. Baltes
CONSOVOY MCCARTHY PLLC
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(703) 243-9423
jeff@consovoymccarthy.com

Counsel for Applicant CIC Services, LLC

To the Honorable Sonia Sotomayor, as Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, Applicant CIC Services, LLC, respectfully requests that the time to file a petition for a writ of certiorari in this case be extended by 38 days, to January 3, 2020. The Sixth Circuit issued its opinion on May 22, 2019, and the court denied a timely petition for rehearing en banc on August 28, 2019. *See* Apps. A & B. Absent an extension of time, the petition for certiorari would be due on November 26, 2019. Applicant is filing this application at least ten days before that date. *See* Sup. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1254.

Background

The question presented in this case implicates the relationship between the Administrative Procedure Act and the Anti-Injunction Act: When a regulation does not *itself* implicate the “assessment or collection” of taxes, but one of the *consequences* for violating that regulation is a tax penalty, does the Anti-Injunction Act override the APA and insulate the regulation from pre-enforcement review?

1. Applicant CIC Services is a business whose attorneys and accountants advise taxpayers engaging in micro-captive transactions. *See* App. A. at 3. Micro-captives are small insurance companies that businesses use and own themselves, instead of hiring an insurer that offers coverage to the general public. *Id.* at 3 n.2. In 2016, the IRS published Notice 2016-66, 2016-47 I.R.B. 745 (Nov. 21, 2016), which imposed reporting requirements on all micro-captives and their advisors. *Id.* at 3. Failure to report can result in significant civil penalties. *See* App. B. at 8 (citing 26

U.S.C. §§ 6707-6708). And willful violation can result in criminal penalties, including imprisonment. *Id.* (citing 26 U.S.C. § 7203). Compliance with Notice 2016-66 costs CIC Services hundreds of hours of labor and tens of thousands of dollars. *Id.* at 9.

2. In March 2017, CIC filed suit against the IRS, arguing that the IRS promulgated Notice 2016-66 in violation of the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, and the Congressional Review Act, 5 U.S.C. § 801 *et seq.* The IRS moved to dismiss the complaint for lack of subject matter jurisdiction, asserting, as relevant here, that the complaint was barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a). The district court granted the IRS’s motion to dismiss on the ground that the Anti-Injunction Act bars suits for the purpose of restraining the assessment or collection of any tax.

A divided panel of the Sixth Circuit affirmed. CIC had argued that it was challenging the agencies’ *mandate*—the reporting requirement itself and not the hypothetical tax penalties that could be attached—which lacks the direct connection to “assessment or collection” of taxes that the Anti-Injunction Act requires. The panel agreed that challenges to tax-reporting requirements do not implicate the Anti-Injunction Act, but held that the Notice 2016-66 reporting requirements are different because one of the penalties for violating them is a tax. App. A. at 10-12. In the panel’s view, because CIC’s “suit ‘would have the effect of restraining—*fully stopping*’ the IRS from collecting the penalties imposed for violating the Notice’s requirements,” it “*is focused on that tax’s assessment or collection,*” and is therefore barred by the Anti-Injunction Act. App. A at 11. In reaching that conclusion, the panel rejected the

reasoning of the Sixth Circuit's prior precedent, *see Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013), *vacated on other grounds sub nom. Autocam Corp. v. Burwell*, 134 S. Ct. 2901 (2014), and instead followed the reasoning of a divided panel of the D.C. Circuit in an attempt to distinguish this case from this Court's most applicable precedent, *see Florida Bankers Ass'n v. U.S. Dep't of the Treasury*, 799 F.3d 1065, 1069 (D.C. Cir. 2015) (distinguishing *Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1124 (2015)).

Judge Nalbandian dissented. In his view, because CIC's alleged injury was not tax liability but rather the significant amount of labor and money required to comply with the reporting requirement, it did not fall within the reach of the Anti-Injunction Act. App. A at 16-17. According to *Direct Marketing*, he explained, a suit to enjoin the enforcement of a reporting requirement is not a suit for the purpose of restraining assessment or collection of taxes. App. A at 17. Because *Direct Marketing* interpreted the similarly worded Tax-Injunction Act, Judge Nalbandian would have applied its reasoning to this case. *Id.* at 17-18. He also rejected the D.C. Circuit's attempt to distinguish cases like this one from *Direct Marketing* on the ground that the tax is inextricably linked to the regulation. *Id.* at 18-20. Unlike the cases that *Florida Bankers* relied on—cases in which the alleged injury was the tax liability that would result from revoking tax-exempt status—“the regulation that CIC seeks to enjoin does not directly result in any tax liability.” *Id.* at 20. Here, there is no tax at all unless a party is first found to have *violated* the reporting requirement. *Id.*

Judge Nalbandian also emphasized the stakes of the panel’s opinion. First, it means that the only way for parties like CIC to challenge the reporting requirement “is to violate the law and risk financial ruin and criminal prosecution”—“precisely the bind that pre-enforcement judicial review was meant to avoid.” *Id.* at 22. Second, it has the effect of rendering *any* regulatory requirement unreviewable, so long as the agency slaps a tax penalty on it. *Id.* at 23. In sum, Judge Nalbandian concluded that the panel majority’s interpretation of the Anti-Injunction Act did not fit with the text, precedent, or purpose of the statute.

CIC filed a timely petition for rehearing en banc, which was denied on August 28, 2019. *See* App. B. But multiple judges wrote separately to highlight the panel’s errors and emphasize the importance of the issue. Judge Sutton concurred in the denial of rehearing on banc, explaining that while Judge Nalbandian’s dissent was correct, *id.* at 6, there was a conflict within and among the circuits that could be resolved only by this Court, *id.* at 6-7. Judge Thapar, writing for himself and six other judges, dissented from the denial of rehearing en banc. *Id.* at 8-13. He reiterated the points raised by Judge Nalbandian’s panel dissent, and argued that the panel’s decision conflicted with the Sixth Circuit’s own precedent and two other courts of appeals, and stood in significant tension with this Court’s decision in *Direct Marketing*. *Id.* at 8-10. Moreover, Judge Thapar stressed that the panel’s opinion gives the IRS “the power to impose sweeping ‘guidance’ across areas of public and private life, backed by civil and criminal sanctions, and left unchecked by administrative or judicial process.” *Id.* at 11.

Reasons for Granting an Extension of Time

The time to file a petition for a writ of certiorari should be extended by 38 days, to January 3, 2020, for several reasons:

1. The forthcoming petition will present an important question of federal law that this Court should resolve. There is currently a split among the circuits on whether the Anti-Injunction Act bars challenges to regulatory mandates that are enforced by tax penalties. *Compare Korte v. Sebelius*, 735 F.3d 654, 699-70 (7th Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1126-27 (10th Cir. 2013) (en banc); *Autocam Corp. v. Sebelius*, 730 F.3d 618, 621-22 (6th Cir. 2013), *vacated on other grounds sub nom. Autocam Corp. v. Burwell*, 134 S. Ct. 2901 (2014); *with Florida Bankers Ass'n v. U.S. Dep't of the Treasury*, 799 F.3d 1065, 1067-69 (D.C. Cir. 2015); App. A at 5. Moreover, the panel's decision, like the D.C. Circuit's decision in *Florida Bankers*, stands in significant tension with this Court's decision in *Direct Marketing*. See 135 S. Ct. at 1127. As CIC will explain in its certiorari petition, this Court's intervention is warranted to restore uniformity to this critical area of administrative law.

2. Counsel of record for CIC, Jeffrey M. Harris, has significant briefing and argument obligations in other cases between now and the current due date of the petition. Mr. Harris will be presenting oral argument in the U.S. Court of Appeals for the Ninth Circuit on November 5, 2019, in *Higginson v. Becerra*, No. 19-55275. Mr. Harris also has briefs due in *Speech First v. Fenves*, No. 19-50529 (5th Cir.) (reply brief due November 20th), and *Worman v. Healy*, No. 19-404 (S. Ct.) (amicus brief

due October 25th). The requested extension of time will ensure that counsel has sufficient time to research the relevant issues and prepare a clear and concise petition for certiorari.

3. This is Applicant's first request for an extension of time, and no prejudice will result to Respondent if this extension is granted.

Conclusion

For the foregoing reasons, the time to file a petition for a writ of certiorari in this matter should be extended by 38 days, to January 3, 2020.

Dated: October 21, 2019

Adam R. Webber
ELLIOT, FAULKNER & WEBBER
4244 Indian Ripple Rd., Suite 150
Beavercreek, OH 45440
(937) 264-8710
awebber@elliottfaulknerlaw.com

Respectfully submitted,

/s/ Jeffrey M. Harris
Jeffrey M. Harris
Alexa R. Baltes
CONSOVOY MCCARTHY PLLC
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(703) 243-9423
jeff@consovoymccarthy.com