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

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents an underlying membership of three million businesses and professional organizations of every size, in every economic sector, and from every region of the country. More than 96% of the Chamber's members are small businesses with 100 or fewer employees.

An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community. The instant case raises a recurring concern that the Chamber has addressed in a number of cases before this Court: namely, the judicial creation of impediments to pre-enforcement review of administrative agency action, which leaves "regulated parties caught between a hammer and an anvil" requiring them either to risk financial and reputational destruction for non-compliance or else to absorb the significant financial costs of acquiescence for lack of a clear pathway to judicial review. Pet. App. 25a (Nalbandian, J., dissenting).

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[1] All parties have consented to the filing of this brief and received timely notice of *amicus'* intent to file as required by Rule 37. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The legitimacy of administrative law presumes the ability to obtain pre-enforcement judicial review of administrative agency actions. This bulwark cabins unelected governmental power and offers individuals and businesses, large and small, an opportunity to seek clarity and certainty in a regulatory environment that is increasingly difficult to navigate. Without this avenue for judicial review, agencies would be able to coerce "voluntary" compliance by threatening ruinous penalties for any violation of their edicts. Unchecked agency power would grow; business would suffer; and the rule of law itself would be the ultimate victim.

Joining one other Court of Appeals while rejecting the view of two others, the Sixth Circuit has now set down that troubling path. A divided panel ruled that one federal agency—the IRS—is uniquely immune from the promise of pre-enforcement judicial review made by the Administrative Procedure Act ("APA"). Petitioner and other enterprises within the Rust Belt (and the Beltway) now face a Morton's fork and must either acquiesce to the IRS and yield to potentially unlawful regulatory mandates or risk the imposition of untenable civil and criminal penalties—including even the possibility of imprisonment. This lose-lose scenario—rejected by this Court at least three times in the last eight years[2]—is "precisely the bind that pre-enforcement judicial review was meant to avoid." Pet. App. 35a (Nalbandian, J., dissenting).

[2] *See, e.g., U.S. Army Corps of Eng'rs v. Hawkes Co.,* 136 S. Ct. 1807 (2016); *Direct Mktg. Ass'n v. Brohl,* 575 U.S. 1 (2015); *Sackett v. EPA,* 566 U.S. 120 (2012).

This Court should grant certiorari and reverse. As Petitioner has showed, this question has divided the circuits. Indeed, the Sixth Circuit would have granted rehearing en banc had Judge Sutton not felt that this Court was already "in a well-informed position," based on lower court opinions that "say all there is to say about the issue," to definitively "resolve the point." Pet. App. 57a (Sutton, J., concurring in denial of rehearing en banc); *see also* Pet. App. 58a (Thapar, J., dissenting from denial of rehearing en banc). And the question presented is important and recurring. Without pre-enforcement review, many dubious IRS regulations will go without review altogether, as businesses often cannot afford chancing the financial and reputational consequences of non-compliance.

The decision below is also wrong. The panel thought pre-enforcement review of tax regulations is foreclosed by the Anti-Injunction Act, 26 U.S.C. § 7421 ("AIA"). But that statute forbids only suits undertaken "for the purpose of restraining the assessment or collection of any tax." As this Court explained when it construed parallel text in *Direct Marketing Ass'n v. Brohl,* 575 U.S. 1, 8 (2015), that proscription does not sweep in a challenge to a step *antecedent* to tax "assessment," even if the lawsuit would have downstream effects on taxation. Moreover, the objective of the AIA—to allow the federal Treasury to keep disputed sums during the pendency of disputes over taxes—is not implicated by a pre-enforcement legal challenge to an agency rule or guidance. By definition, there *are no* disputed sums in the context of a pre-enforcement challenge. In short, neither the text nor the purpose of the AIA shields the regulations of an entire agency of government from ordinary judicial review under the APA.

ARGUMENT

It is uncontested that the Sixth Circuit's decision exacerbates a conflict within the Courts of Appeals over the breadth of the AIA, and in particular whether it precludes pre-enforcement review of IRS regulatory mandates that are enforced through tax penalties. *See* Pet. App. 61a (Thapar, J., dissenting from denial of rehearing en banc). That alone is grounds for this Court's review. The Chamber writes to explain why pre-enforcement review is so important to the business community, and why the Sixth Circuit badly erred by reading the AIA to imperil that critical tool.

I. THE SIXTH CIRCUIT'S OVERBROAD READING OF THE AIA THREATENS TO SHUT DOWN JUDICIAL REVIEW OF UNLAWFUL AGENCY ACTION.

Under the decision below, an entity faced with an IRS regulatory mandate has only two choices: violate it and risk incurring the attendant costs if the courts ultimately sustain the agency's actions, or waive any challenge to the mandate by "voluntarily" complying. That is precisely the dilemma that pre-enforcement APA review was meant to solve. Without such review, businesses are left with no palatable way to challenge lawless agency action, impairing the rule of law.

1. Judicial review is what keeps administrative agencies honest. By allowing agency actions to be challenged in court, the APA checks executive power and ensures that agencies exercise their discretion in accordance with statutory parameters. In the absence of judicial review, substantive rights and procedural protections would be meaningless, because "[a] right without a remedy is as if it were not." *Von Hoffman v. City of Quincy*, 71 U.S. 535, 554 (1866).

As this Court has long recognized, however, the *timing* of judicial review can be as important as its existence. Imagine a regulation that purports to direct individuals or businesses to take (or not take) certain action—on pain on a large financial penalty, or even a criminal sanction. Of course, the regulated party may always dispute the validity of the regulation after the fact—as a defense to an enforcement proceeding upon violation of the mandate. But that approach carries an obvious and often-unacceptable risk: If the court ultimately sustains the regulation, then the party will be liable for the resulting penalty. That risk may well be untenable. If so—and if this is the *only* opportunity for judicial review—then the regulated community may have no choice but to comply with the mandate and thus forfeit, as a practical matter, any challenge to its validity. In other words, penalties for violating a directive may be "so enormous ... as to intimidate" a party from "resorting to the courts to test [its] validity." *Ex parte Young,* 209 U.S. 123, 147 (1908).

The solution to that problem is pre-enforcement review—the ability to challenge and test a statute, regulation, or other agency action *before* violating it and thereby triggering an enforcement proceeding with potential penalties. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (explaining that, when there is a "sufficiently imminent" threat of enforcement, "an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law"). After all, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). Declaratory relief, in particular, is available sooner. 28 U.S.C. § 2201(a).

In the administrative context, the availability of pre-enforcement judicial review was "reinforced by the enactment of the Administrative Procedure Act." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). When final agency action imposes harm on a regulated party by requiring costly or burdensome compliance, the party may seek relief from the courts immediately, without risking the penalties that could flow from non-compliance. *Id.* at 152-53; *see also U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (reiterating that "parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of 'serious criminal and civil penalties'").

2. The inadequacy of *ex post* judicial review and the concomitant importance of pre-enforcement review are heightened for the business community, which bears the brunt of modern agency regulation.

On the one hand, as the Court recognized in *Abbott Labs*, the risks of non-compliance for a business may be higher than merely the potential financial penalty. Being the target of an agency enforcement proceeding may itself be a prohibitive cost, if it scares customers, spooks partners, or emboldens competitors. *See* 387 U.S. at 153 (observing that "petitioners deal in a sensitive industry, in which public confidence in their drug products is especially important," so requiring them "to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily"). And these risks have only grown in the digital era, where public notice of a government investigation can tear through social media in a flash, causing irreversible harm to a business's reputation and stock value.

On the other hand, compliance with burdensome regulations can also be immensely damaging to a business enterprise. Capital that could otherwise be spent on research and development, training, or hiring employees must be "invested" in satisfying technical, government-imposed regulatory obligations. To offset these costs, the regulated businesses must increase their prices—and, in turn, consumers on the margin seek options elsewhere. It is one thing to accept these market distortions as the cost of *legitimate* regulation; it is quite another to swallow them just to comply with potentially *unlawful* regulations.

Businesses are therefore faced with a particularly unattractive version of the classic "dilemma" that pre-enforcement review was meant to solve. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 124 (2007). They must either violate regulatory directives and thereby expose themselves to potentially ruinous financial and reputational harms, or else embrace legal uncertainty and absorb the costs of complying with potentially *ultra vires* regulations. Neither course is conducive to a stable business climate or economic growth.

3. The decision below imposes that dilemma on all businesses within the Sixth Circuit with respect to all actions taken by one agency—the IRS. By construing the AIA as precluding pre-enforcement review of any regulatory mandates that are enforced through taxes or tax penalties, the decision below gives regulated entities only two alternatives: If the party wants to challenge the regulation, it must violate it, incur the penalty, and then raise its legal challenge in litigation over that penalty. If, however, the entity is not willing to run the risk of incurring the penalty, its only option is to comply with the rule and forfeit its objection.

This dilemma illustrates why restricting the timing of judicial review will often result in no review at all. For firms that are not in a position to "bet the farm" by taking the risk of incurring penalties, *MedImmune*, 549 U.S. at 129, the only path forward is to comply with the agency's dictates. As a practical matter, this means the IRS, alone among administrative agencies, will have the disturbing power "to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review," *Sackett v. EPA*, 566 U.S. 120, 130–31 (2012), simply by attaching ruinous penalties to its regulations and mandates. As this Court recognized in *Abbott Labs* and reaffirmed in *Sackett* and *Hawkes*, that state of affairs presents a severe threat to the rule of law.

II. THE SIXTH CIRCUIT'S OVERBROAD READING OF THE AIA IS BADLY MISTAKEN.

The foregoing exposes not only the practical dangers of the Sixth Circuit's holding, but also its legal errors. To start, because pre-enforcement review is a fulcrum of the APA, the presumption must be in its favor. And nothing about the AIA's text or purpose suggests that it creates any exception to that rule. The AIA forbids suits to enjoin tax assessment, and thus ensures that the Treasury keeps all disputed sums during disputes over taxes. By its nature, however, pre-enforcement review involves no disputed sums and no "assessment" of taxes. Rather, the plaintiff seeks to challenge the validity of an antecedent agency action—and to do so *before violating it*, and thus before any tax has ever been triggered. Under those circumstances, there is no legitimate interest in deferring, and so potentially denying, judicial review of the agency action.

A. The APA Creates a Presumption in Favor of Pre-Enforcement Review.

As a general matter, the APA authorizes facial, pre-enforcement review of final agency actions that bear on the primary conduct of the regulated parties. *See Abbott Labs.*, 387 U.S. at 149-53. The decision below concludes that the AIA forecloses that review when the agency action is enforced by a tax or tax penalty. As a threshold matter, that interpretation of the AIA runs headlong into two canons of construction and for that reason should be disfavored. So long as the AIA can be *plausibly* read as preserving pre-enforcement review, it *must* be read in that way.

First, the APA "embodies the basic presumption to judicial review," and its text and history "manifest[] a congressional intention that it cover a broad spectrum of administrative actions." *Id.* at 140; *see also Sackett*, 566 U.S. at 129 (noting the "APA's presumption of reviewability for all final agency action"). Accordingly, its "generous review provisions" must be given a "hospitable" reading, with any ambiguity construed in favor of judicial review. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955). The burden is thus on the IRS to justify its expansive reading of the AIA by "clear and convincing evidence" that Congress wanted to override the "broadly remedial provisions" of the APA for tax regulatory challenges. *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962). Yet the Supreme Court has expressly rejected "carving out an approach to administrative review good for tax law only," *Mayo Foundation for Medical Education and Research v. United States*, 562 U.S. 44, 55 (2011), and the APA expressly includes the IRS as an "agency" subject to its requirements, 5 U.S.C. § 551(1).

Second, the Sixth Circuit's approach effectively repeals Chapter 7 of the APA, 5 U.S.C. §§ 701-706, as to IRS regulations and guidance, even though those agency actions often resolve policy "question[s] of deep 'economic and political significance.'" *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). "[R]epeals by implication," however, are highly disfavored; only where two statutes are "irreconcilable" may courts conclude that one has supplanted the other. *TVA v. Hill*, 437 U.S. 153, 189–90 (1978). Thus, the APA and AIA must be given effect wherever their provisions can be read to "co-exist." *Morton v. Mancari*, 417 U.S. 535, 550 (1974). For reasons explained below, there is no obstacle to reading the APA and the AIA in harmony, in a way that allows the statutes to "'make sense' in combination." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). Indeed, that is actually the far better reading of the provisions.

B. The AIA Prevents Interference with Tax Collection, Not Pre-Enforcement Review of Tax-Related Regulations.

Neither the text nor the purpose of the AIA suggests any inconsistency with the fundamental principle that regulated parties should be entitled to seek judicial review *before* their primary conduct is influenced by agency regulation. To the contrary, the AIA's concern is with maintaining the integrity of tax assessment and collection processes *once a tax has been triggered*. Put simply: The APA entitles taxpayers to seek review of IRS action without first incurring a tax (including a tax penalty). Once the tax has been incurred, however, the AIA prescribes a particular procedure for litigating any dispute over it, one that allows the IRS to retain the disputed funds in the interim.

So understood, nothing about the AIA prevents Petitioner from pursuing a pre-enforcement challenge to the reporting obligation that the IRS codified in a guidance document—or, for that matter, prevents any affected party from seeking to set aside under the APA any final IRS action that threatens to alter primary conduct by imposing tax consequences on that conduct. These are pre-enforcement suits to set aside agency actions when no taxes are (yet) disputed, not suits to interfere with IRS assessment or collection procedures by enjoining taxes that have already been incurred.

1. By its terms, the AIA prohibits only suits that are "for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a). That has no application to facial challenges to rules under the APA, where no "tax" is allegedly due, no "assessment or collection" efforts are underway; and there is nothing to "restrai[n]." In that scenario, the only issue is whether a generally applicable agency action complies with the APA (in substance and procedure); if not, it must be "set aside." 5 U.S.C. § 706(2).

This Court's decision in *Direct Marketing Association*, provides the dispositive construction of the AIA's terms. *Direct Marketing* explained that "assessment" and "collection" are terms of art that "refer to discrete phases of the taxation process" only. 575 U.S. at 7–8, 10–11. Specifically, "assessment" is "the official recording of a taxpayer's liability"—a step that "occurs after information relevant to the calculation of that liability is reported to the taxing authority"—and "collection" is "the act of obtaining payment of taxes due." *Id.* at 9–10. The AIA bars suits to "restrain" those activities; this rule must be read "narrow[ly]," reaching only "injunctions" that "stop[]"

those phases of taxation (as opposed to "merely inhibit[] them"). *Id.* at 14. The AIA thus applies only to suits to enjoin these phases of the taxation process; it does not reach challenges to antecedent steps, even if those steps impact the "ability to assess and ultimately collect" taxes. *Id.* at 7–8, 11.[3]

The AIA's text, as interpreted in *Direct Marketing*, applies only to suits seeking to enjoin the IRS from taking steps, as part of the formal taxation process, to assess or collect a tax that is allegedly due or owing. It does not bar the courthouse doors to APA challenges to generally applicable regulations, where no tax is allegedly due and the object of the suit is to clarify legal rules that could govern taxes or penalties down the road. Specifically, *Direct Marketing* made clear that the AIA's text, in three different ways, applies only to as-applied disputes over taxes incurred by particular taxpayers, not to challenges to general rules simply because they have a downstream tax effect.

First, the AIA concerns suits directed toward the "assessment or collection" of taxes, those being "discrete phases of the taxation process." *Id.* at 8. In particular, an "assessment" is a determination about a particular taxpayer: the "official recording of a taxpayer's liability" based on "information relevant to the calculation of that liability [that] is reported to the taxing authority." *Id.* at 9; *see also Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("assessment" is an "official

[3] *Direct Marketing* technically involved the Tax Injunction Act ("TIA"), the analogue to the AIA for state taxes, but the Court specifically noted that the TIA "was modeled on the [AIA]" and "[w]e assume that words used in both Acts are generally used in the same way." 575 U.S. at 8.

recording of liability that triggers levy and collection efforts"). But there is no such "assessment" of a taxpayer's "liability" unless and until a tax rule is applied to him. A regulation is not an assessment, even if the *violation* of that regulation could *result* in the assessment of a tax or tax penalty.

Second, the AIA bars efforts to block the assessment or collection of "any tax." But in the context of a pre-enforcement facial challenge to a regulation, there is no "tax" even arguably due. Instead, the point of the challenge is to clarify the rules that would apply to potential future activity, so that a reasoned, informed decision can be made about whether to engage in that activity. *See Abbott Labs.*, 387 U.S. at 152-54. In such a case there is no tax—even according to the IRS—allegedly due. No *tax* is in dispute; only the validity of the *regulation* is being contested.

Finally, the Court in *Direct Marketing* held that "to restrain" bears its traditional "meaning in equity" of orders that "stop" the agency's activities; it does not encompass suits that "merely inhibit[]" future "assessments." 575 U.S. at 12–14. A regulatory challenge does not seek "to restrain" tax assessment. Such a challenge at most "*inhibits*" an assessment against a future taxpayer by removing the flawed legal basis for such a hypothesized assessment. Plus, a suit under the APA does not "stop" or "enjoin" *anything*. The APA authorizes courts to "set aside" unlawful rules. 5 U.S.C. § 706(2). "When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are *vacated*—not that their application to the individual petitioners is *proscribed*." *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) (emphases added).

In short, the AIA requires disputes over specific tax liabilities to be routed through refund suits. But with respect to a pre-enforcement facial challenge brought under the APA to the substantive or procedural validity of a generally applicable rule, there is no live, particularized *tax dispute* between the parties. None of the IRS's assessment or collection machinery is yet at work, and there is no request (or need) to restrain that machinery by judicial order. All that is at issue is the legitimacy, on its face, of an agency rule. And the only request is for the Court to set it aside. Nothing in the AIA's text bars such an action.

2. Nor would the AIA's purposes be advanced by foreclosing pre-enforcement challenges to IRS actions. Precedent establishes that the AIA's purpose is not to shield lawless IRS actions from judicial review, but to ensure that disputes with taxpayers over amounts due to the public fisc are decided in refund suits so that contested funds are held by Treasury in the interim. Consequently, the AIA requires that the taxpayer turn over the disputed amounts and then sue to get them back, by precluding the taxpayer from prospectively enjoining the IRS from obtaining the sums through the ordinary assessment and collection process. But the Government's interest in resolving taxpayer disputes through refund suits in no way supports precluding challenges to unlawful IRS regulations well before any dispute arises, assessment occurs, or penalty is imposed. Prior to a concrete conflict over actual dollars, there are no disputed sums to be lodged in the Treasury or recovered in a refund suit. Thus, there is no valid reason to convert the AIA's channeling of tax disputes through refund suits into a ban on challenging unlawful tax regulations.

The AIA's "manifest purpose" is "to permit the United States to assess and collect taxes *alleged to be due* without judicial intervention, and to require that the legal right to the *disputed sums* be determined in a *suit for refund*." *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962) (emphases added). That procedure ensures "prompt collection" of "lawful revenue," *id.*, in light of the "Government's need to assess and collect taxes as expeditiously as possible," *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974); *see also Jones v. United States*, 889 F.2d 1448, 1449–50 (5th Cir. 1989) ("The Act insures that, once a tax has been assessed, the taxpayer ordinarily has no power to prevent the IRS from collecting it."); *cf. Hibbs*, 542 U.S. at 104. The Act was "intended to require taxpayers to litigate their claims in a designated proceeding"—specifically, "a suit for a refund"—but not to foreclose judicial review entirely. *South Carolina v. Regan*, 465 U.S. 367, 374 (1984).

That requirement makes sense where, to use *Williams Packing*'s terms, a specific tax is "alleged to be due." 370 U.S. at 7. If a taxpayer could defer the payment of an allegedly due tax just by filing suit and seeking preliminary injunctive relief against the IRS, that would throw a wrench into administration of the tax system; funds the Government needs now would be held hostage by the vagaries of litigation, with no predictability for Treasury. Thus, where a taxpayer challenges an assessment or other particularized IRS determination upon which taxes hinge, there is an obvious interest in deferring the challenge until *after* the disputed sum is in Treasury's hands, so that the federal government may maintain control of the funds during the pendency of the dispute.

By contrast, when no tax is "alleged to be due" and the plaintiff is instead challenging the facial validity of a Treasury regulation or other generally applicable administrative action, it makes no sense to foreclose a prospective, pre-enforcement challenge. There is no allegation that anyone (yet) owes taxes; there are no "disputed sums" to be adjudicated, collected, or held by one party or the other. *Id.* Indeed, as explained above, if pre-enforcement review is not permitted, Treasury may well *never* assess any tax penalties for violation of the challenged rule, because regulated parties like Petitioner may choose to comply rather than risk the costs of violation. Meanwhile, allowing the lawsuit to proceed will not interfere with the "prompt collection" of "lawful revenue," *id.* at 7, or adversely affect how "expeditiously" Treasury can collect, *Bob Jones*, 416 U.S. at 736.

Barring Petitioner's suit would thus accomplish nothing for the interest at the heart of the AIA. Its only impact would be to deprive regulated parties of the opportunity for clarity on the applicable law. Even the Government does not have a legitimate interest in sowing ambiguity. To the contrary, the APA is meant to provide advance clarity to regulated parties otherwise facing a "dilemma" over how to structure their affairs, *Abbott Labs.*, 387 U.S. at 153, and that interest fully applies in the tax context.

3. This dichotomy—with pre-enforcement review available before any tax is incurred, but channeled to an alternative procedure once the IRS machinery is triggered—is a familiar one. This Court has in fact adopted a similar approach in the context of federal challenges to state criminal prosecutions.

Under the doctrine known as *Younger* abstention, a federal court "must refrain from enjoining" a criminal "state prosecution." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013). Out of a "concern for comity and federalism," the federal courts will decline to step in. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 367 (1989).

The Court has refused to extend that principle, however, to situations where prosecution by the state is not yet pending, but merely "threatened" to occur if the regulated party engages in certain conduct. *Steffel v. Thompson*, 415 U.S. 452, 454 (1974). In that situation, "federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system." *Id.* at 462. And, under those circumstances, "a refusal on the part of the federal courts to intervene ... may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Id.*

The AIA represents the same basic policy in the tax context as this Court adopted in *Younger* for the state criminal context. When a taxpayer has incurred a tax, exercising federal equitable power would disrupt the IRS's assessment and collection protocols. But when a tax is merely threatened if the taxpayer engages in certain future conduct, the federal courts must remain open. A contrary approach, like that adopted below, would "place the hapless plaintiff between the Scylla of intentionally flouting [IRS regulatory mandates] and the Charybdis of forgoing what he believes to be [lawful] activity in order to avoid becoming enmeshed in a [tax assessment] proceeding." *Id.*

C. The Chamber Has Successfully Litigated This Issue Before.

The Chamber previously litigated the scope of the AIA in a case of its own—and prevailed. The court in that case, unlike the Sixth Circuit here, understood the distinction between an action to enjoin collection of a tax and a pre-enforcement APA challenge.

The Chamber's case involved an IRS regulation that sought to discourage certain corporate transactions, called "inversions," by disregarding those transactions when determining whether the corporation is foreign or domestic (which carries notable tax consequences). Among other deficiencies, the IRS had promulgated this rule without notice or the opportunity to comment, in violation of basic APA norms. Members of the Chamber wanted to pursue possible inversion deals, but were deterred from doing so by the regulation, which gave them standing to challenge it. *Chamber of Commerce v. IRS*, No. 1:16-CV-944, 2017 WL 4682049, at *1-3 (W.D. Tex. Sept. 29, 2017).

The IRS sought to dismiss the Chamber's challenge by invoking the AIA. But the district court, relying on *Direct Marketing*, correctly rejected that bid:

> Plaintiffs do not seek to restrain assessment or collection of a tax against or from them or one of their members. Rather, Plaintiffs challenge the validity of the Rule so that a reasoned decision can be made about whether to engage in a potential future transaction that would subject them to taxation under the Rule. Further, the Rule is not a tax, but a regulation determining who is subject to taxation under provisions of the Internal Revenue Code. Enforcement of the

> Rule precedes any assessment or collection of taxes. Although the Rule may improve the government's ability to assess and collect taxes, enforcement of the Rule does not involve assessment or collection of a tax.

Id. at *3 (citations omitted).

The Chamber could not put it any better. A pre-enforcement APA challenge to an IRS regulation is not a suit to restrain the assessment or collection of taxes, and does not implicate the concerns that underlie the AIA. The Sixth Circuit panel majority fundamentally erred by missing this critical distinction; this Court should grant review to resolve the circuit split, correct the mistaken decision below, and reconfirm again the APA's guarantee of meaningful, timely judicial review of administrative agency regulation.

CONCLUSION

The Court should grant certiorari and reverse the decision below.

February 24, 2020

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