No. 18-5019

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CIC SERVICES, LLC,
Plaintiff-Appellant,

v.

INTERNAL REVENUE SERVICE; DEPARTMENT OF TREASURY;
UNITED STATES OF AMERICA,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville

BRIEF OF PROFESSOR KRISTIN E. HICKMAN AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING *EN BANC* AND REVERSAL

PROF. KRISTIN E. HICKMAN
Amicus Curiae and Counsel of Record
University of Minnesota Law School
314 Mondale Hall
229 19th Avenue South
Minneapolis, MN 55455
(612) 624-2915
khickman@umn.edu

Date: July 15, 2019

RULE 26.1 DISCLOSURE STATEMENT

Consistent with Sixth Circuit Rule 26.1, *Amicus Curiae* makes the following disclosures:

1. Is *Amicus* a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly owned corporation, not a party to the appeal or an *amicus*, that has a financial interest in the outcome?

   No.

/s/ Kristin E. Hickman
KRISTIN E. HICKMAN

TABLE OF CONTENTS

Page

RULE 26.1 DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND ARGUMENT SUMMARY 2

ARGUMENT 3

I. THE PANEL MAJORITY'S DECISION DISREGARDS THE APA, RELEVANT SUPREME COURT PRECEDENT, AND THE AIA'S STATUTORY AND HISTORICAL CONTEXT 3

A. The Supreme Court's AIA Jurisprudence Does Not Resolve The Interaction Between The AIA And The APA 3

B. The APA and Relevant Supreme Court Precedent Support A Narrower Construction of the AIA 5

C. The AIA's Original Meaning and Statutory Context Support A Narrower Construction That Accommodates The APA 6

II. RESOLVING THE AIA'S MEANING AND SCOPE HAS SUBSTANTIAL IMPLICATIONS FOR FEDERAL TAX ADMINISTRATION 8

A. Treasury And The IRS Have A Poor Track Record Of Complying With APA Rulemaking Procedures 8

B. The Panel Majority's Interpretation Of The AIA Would Shield Many Tax Regulatory Actions From Judicial Review Permanently 10

CONCLUSION 12

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page(s)

CASES:

Abbott Laboratories. v. Gardner, 387 U.S. 136 (1967) 2, 5, 11

Alexander v. "Americans United" Inc., 416 U.S. 752 (1974) 4

Ambort v. United States, 392 F.3d 1138 (10th Cir. 2004) 2

Bob Jones University v. Simon, 416 U.S. 725 (1974) 4

Bulova Watch Co. v. United States, 365 U.S. 753 (1961) 5

CIC Services, LLC v. Internal Revenue Service, 925 F.3d 247 (3d Cir. 2019) 4

Cohen v. United States, 650 F.3d 717 (D.C. Cir. 2011) (en banc) 2

Commissioner v. Shapiro, 424 U.S. 614 (1976) 3

Dickenson v. Zurko, 527 U.S. 150 (1990) 5

Ecclesiastical Order of the ISM of AM, Inc. v. Internal Revenue Service, 725 F.2d 398 (6th Cir. 1984) 2

Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962) 4

Florida Bankers Ass'n v. U.S. Department of the Treasury, 799 F.3d 1065 (D.C. Cir. 2015) 4

King v. Burwell, 135 S. Ct. 2480, 2489 (2015) 10

Laing v. United States, 423 U.S. 161 (1976) 3

Mayo Foundation for Medical Education & Research v. United States, 562 U.S. 44 (2011) 5, 6

Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983) 9

National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012) 3, 4

Radzanlower v. Touche Ross & Co., 426 U.S. 148 (1976) 6

Sigmon Coal Co. v. Apfel, 226 F.3d 291 (4th Cir. 2000) 2

South Carolina v. Regan, 465 U.S. 367 (1984) 3

United States v. American Friends Service Committee, 419 U.S. 7 (1974) (per curiam) 3

United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1 (2008) 3

V*imar Seguros y Reaseguros, S.A. v. M/V Sky Reffer*, 515 U.S. 528 (1995) 6

STATUTES AND REGULATIONS:

5 U.S.C. §§ 701–706 2

5 U.S.C. § 706(2)(A) 7

26 U.S.C. § 6662(a)–(b)(1), (c) 8

26 U.S.C. § 7421(a) 2

28 U.S.C. § 2201(a) 2

Revenue Act of 1867, ch. 169, § 10, 14 Stat. 471, 475 6

Treas. Reg. § 1.6662–3(b)(2) 9

OTHER AUTHORITIES:

Michael Asimow, *Public Participation in the Adoption of Temporary Treasury Regulations*, 44 Tax Law. 343 (1991) 9

Introduction, IRB 2019-25 (June 17, 2019) 8

IRS Notice 2016-66, 2016-47 I.R.B. 745 ..... 1, 8, 9

Kristin E. Hickman, *Administering the Tax System We Have*, 63 Duke L.J. 1717 (2014) 11

Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance With Administrative Procedure Act Rulemaking Requirements*, 82 Notre Dame L. Rev. 1727 (2007) 9

Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 Mich. St. L. Rev. 239 9

Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 Va. L. Rev. 1683 (2017) 1, 4, 7

Patrick J. Smith, *The APA's Arbitrary and Capricious Standard and IRS Regulations*, 136 Tax Notes 271 (2012) 9

INTEREST OF *AMICUS CURIAE* [1]

Amicus is a Distinguished McKnight University Professor and the Harlan Albert Rogers Professor in Law at the University of Minnesota. She teaches and writes about tax law, administrative law, and tax administration. *Amicus* has written extensively about Treasury Department (Treasury) and Internal Revenue Service (IRS) regulatory practices; about judicial review of Treasury and IRS rules and regulations interpreting the Internal Revenue Code (IRC); and about the interaction between Administrative Procedure Act (APA) requirements and IRC provisions governing tax administration. The opinions of both Judge Clay for the panel majority and Judge Nalbandian in dissent in this case cited and addressed points raised in one of *Amicus*'s articles: Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 Va. L. Rev. 1683 (2017).

This case raises significant tax administration issues that reach far beyond the Appellant and the validity of IRS Notice 2016-66, 2016-47 I.R.B. 745. Consistent with her scholarly interests, *Amicus* submits this brief to inform the Court of the broader context and implications of this case for federal tax administration.

---

[1] Consistent with Federal Rule of Appellate Procedure 29(a)(4)(E), *Amicus* certifies that she authored this brief in whole, and that she received no monetary contribution toward the preparation or submission of this brief other than general financial support from the academic institution with which she is affiliated.

INTRODUCTION AND ARGUMENT SUMMARY

This case concerns the proper interpretation of the Anti-Injunction Act (AIA), 26 U.S.C. § 7421(a), as a limitation on judicial review in tax cases,[2] including how the AIA should be read in relation to the APA's judicial review provisions, 5 U.S.C. §§ 701–706. The AIA provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person ...." 26 U.S.C. § 7421(a). But the Supreme Court has long held that the APA "embodies a basic presumption" of pre-enforcement review of agency regulatory actions that courts should disregard "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140–41 (1967).

The Supreme Court has never addressed the interaction of the AIA and the APA. Moreover, the Court's past cases interpreting the AIA fail to offer a clear path for resolving the AIA's relationship with the APA.

---

[2] The Declaratory Judgment Act, 28 U.S.C. § 2201(a), also prohibits judicial review of declaratory suits "with respect to Federal taxes," but courts generally interpret that statute and the AIA coextensively. *See, e.g.*, *Cohen v. United States*, 650 F.3d 717, 730–31 (D.C. Cir. 2011) (en banc); *Ambort v. United States*, 392 F.3d 1138, 1140 (10th Cir. 2004); *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 300–01 (4th Cir. 2000); *cf. Ecclesiastical Order of the ISM of AM, Inc. v. Internal Revenue Service*, 725 F.2d 398, 404–05 (6th Cir. 1984) (Jones, J., concurring in part and dissenting in part).

The best interpretation of the AIA—consonant with not only its text but also its original meaning, history, and role in the larger tax administration context—would give effect to both statutes. Instead, the panel majority has adopted an unnecessarily broad interpretation of the AIA that will permanently shield a broad swath of Treasury and IRS regulatory actions from judicial review, contrary to the APA. In doing so, the panel majority facilitates Treasury and IRS noncompliance with APA requirements, without clear evidence of congressional intent. The negative consequences for federal tax administration are significant.

ARGUMENT

I. THE PANEL MAJORITY'S DECISION DISREGARDS THE APA, RELEVANT SUPREME COURT PRECEDENT, AND THE AIA'S STATUTORY AND HISTORICAL CONTEXT.

A. The Supreme Court's AIA Jurisprudence Does Not Resolve The Interaction Between The AIA And The APA.

In recent decades, the Supreme Court has considered the AIA's meaning and scope several times without addressing whether the AIA allows pre-enforcement judicial review of APA-based claims against tax regulatory actions. *See, e.g.*, *National Federation of Independent Business (NFIB) v. Sebelius*, 567 U.S. 519 (2012); *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008); *South Carolina v. Regan*, 465 U.S. 367 (1984); *Commissioner v. Shapiro*, 424 U.S. 614 (1976); *Laing v. United States*, 423 U.S. 161 (1976); *United States v. American*

Friends Service Committee, 419 U.S. 7 (1974) (per curiam); *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974); *Bob Jones University v. Simon*, 416 U.S. 725 (1974); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962). The individual distinctiveness of these cases has allowed the Court to distinguish their circumstances and reach decisions without developing an overarching theory of the AIA's meaning and scope and without concern for unintended consequences. *See* Hickman & Kerska, *supra*, at 1690–97 (describing and analyzing these cases).

But the Court's ad hoc approach to AIA interpretation, and its occasionally-sweeping and inconsistent dicta, have created "jurisprudential chaos" for lower courts addressing the question at bar. *CIC Services, LLC v. Internal Revenue Service*, 925 F.3d 247, 251 (3d Cir. 2019) (quoting Hickman & Kerska, *supra*, at 1686). Moreover, the most recent judicial efforts to interpret the AIA have relied on shallow parsings of a few isolated phrases of current IRC text and cherry-picked support from the Court's haphazard dicta, with scant attention paid to the AIA's original meaning and long history, its interactive relationship with the IRC's other administrative provisions, or its role in the larger context of tax administration. *See NFIB*, 567 U.S. at 543–46; *see also, e.g., Florida Bankers Ass'n v. U.S. Department of the Treasury*, 799 F.3d 1065 (D.C. Cir. 2015). The panel majority's opinion follows this unfortunate trend.

B. The APA and Relevant Supreme Court Precedent Support A Narrower Construction of the AIA.

Meanwhile, the panel majority's decision ignored the Supreme Court's longstanding interpretation of the APA as adopting a presumption of pre-enforcement judicial review of agency rules and regulations. *See Abbott Labs*, 387 U.S. at 140–41. To overcome that presumption, the Court requires "'clear and convincing evidence' of a contrary legislative intent." *Id.* at 141 (quoting *Rusk v. Cort*, 369 U.S. 367, 379–80 (1962)). The Court justifies this presumption by recognizing "the very real dilemma" alternatively faced by regulated parties—that of (1) complying with agency rules they believe to be invalid or (2) facing penalties for noncompliance should that belief prove wrong, simply to obtain judicial review. *See id.* at 153.

Although "it is a familiar law that a specific statute controls over a general one," *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961), the Supreme Court has embraced a policy of reading the APA and specific statutes like the AIA to give maximum effect to both, absent clear congressional intent otherwise. *See Dickenson v. Zurko*, 527 U.S. 150, 155 (1990). Observing that "[t]he APA was meant to bring uniformity to a field full of variation and diversity," the *Zurko* Court emphasized "the importance of maintaining a uniform approach to judicial review of administrative action," and declared that not requiring statutory clarity to depart from APA norms would "frustrate that purpose." *Id.* In *Mayo Foundation for*

Medical Education & Research v. United States, 562 U.S. 44 (2011), the Court extended these principles to tax cases, citing *Zurko* while declining "to carve out an approach to administrative review good for tax law only." *Id.* at 55. The Court's policy regarding the APA and administrative law uniformity conforms to its more general advice to construe seemingly competing statutes harmoniously absent clear congressional intent otherwise. *See, e.g.*, *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reffer*, 515 U.S. 528, 533 (1995); *Radzanlower v. Touche Ross & Co.*, 426 U.S. 148, 154–55 (1976).

C. The AIA's Original Meaning and Statutory Context Support A Narrower Construction That Accommodates The APA.

Of course, if the AIA clearly precluded pre-enforcement judicial review of tax regulatory actions, then that would be the end of the inquiry. Such is not the case.

The panel majority's opinion disregards that the AIA is not a modern congressional enactment, but rather dates back to the Civil War era—long before the modern income tax, the APA, and the emergence of the modern regulatory state. *See* Revenue Act of 1867, ch. 169, § 10, 14 Stat. 471, 475 (amending Act of July 13, 1866, ch. 184, § 19, 14 Stat. 98, 152). Congress adopted the AIA in service of a vastly different system of tax administration than we have today. Key AIA terms like "assessment" and "collection" remain the same, but the nature of those functions has changed substantially, prompting misunderstanding regarding the AIA's

meaning. *See* Hickman & Kerska, *supra*, at 1719–38 (documenting the AIA's evolving statutory context from 1867 to the present).

For example, in the 1860s, taxpayers did not pay their taxes until several weeks after filing their returns, and after the IRS first audited those returns and pursued an assessment process that included notice and an opportunity for administrative appeal. *See id.* at 1722–25. Without the AIA, taxpayers could avoid paying their taxes by seeking an injunction after filing a return, either before or after assessment. *See id.* at 1749–53. Today, most taxes are paid through third-party withholding and estimated payments months before a tax return is filed and assessment occurs. *See id.* at 1734–38. For most taxpayers, assessment is an automated and meaningless bookkeeping entry. *See id.* at 1736–37.

As in 1867, the AIA still plays an important role in backstopping IRS enforcement efforts by preventing taxpayers from running to court to stop an audit or thwart a levy. But a narrower construction of the AIA that emphasizes direct enforcement efforts and allows pre-enforcement review of tax regulatory actions is most consistent with the AIA's original meaning and statutory context, as well as its text. *See id.* at 1754–56.

II. RESOLVING THE AIA'S MEANING AND SCOPE HAS SUBSTANTIAL IMPLICATIONS FOR FEDERAL TAX ADMINISTRATION.

The question whether the AIA forecloses the Appellant's challenge to IRS Notice 2016-66 for its failure to comply with the APA may seem arcane, but really is anything but. To understand why, some background on Treasury and IRS administrative practices may be useful.

A. Treasury And The IRS Have A Poor Track Record Of Complying With APA Rulemaking Procedures.

Treasury and the IRS promulgate interpretations of the IRC using two main types of formats. The first consists of Treasury regulations, which Treasury adopts pursuant to specific or general statutory authority and issues in proposed, temporary, and final form. The second type is a collection of official and authoritative subregulatory guidance documents that the IRS publishes weekly in the Internal Revenue Bulletin (IRB). *See, e.g.*, *Introduction*, IRB 2019-25 (June 17, 2019) ("The [IRB] is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the [IRS] ...."). The most prominent of these guidance documents are Revenue Rulings, Revenue Procedures, and Notices. IRS Notice 2016–66 falls into this second category of tax regulatory actions. Noncompliance with Treasury regulations or IRS guidance documents can lead to penalties imposed by IRC Chapter 68. *See, e.g.*, 26 U.S.C. § 6662(a)–(b)(1), (c) (imposing penalties for failing to comply with "rules and regulations"); Treas.

Reg. § 1.6662–3(b)(2) (defining "rules and regulations" as including Revenue Rulings and IRS Notices in addition to regulations).

Legal scholars have long complained about a weak Treasury and IRS record of compliance with APA requirements. In the 1990s, Michael Asimow argued that Treasury's frequent use of temporary regulations without pre-promulgation notice and comment raised APA noncompliance concerns. *See* Michael Asimow, *Public Participation in the Adoption of Temporary Treasury Regulations*, 44 Tax Law. 343 (1991). In 2007, *Amicus* documented that 40% of Treasury regulations issued over three years failed to satisfy APA procedural requirements. *See* Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 Notre Dame L. Rev. 1727 (2007). Patrick Smith observed in 2012 that, contrary to the Supreme Court's interpretation of APA § 706(2)(A) in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), "IRS preambles to regulations ordinarily do not explain why the IRS decided to adopt the particular rules in regulations." Patrick J. Smith, *The APA's Arbitrary and Capricious Standard and IRS Regulations*, 136 Tax Notes 271, 274–75 (2012). *Amicus* also has documented questionable IRS use of guidance documents like Notice 2016–66. *See* Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 Mich. St. L. Rev. 239.

B. The Panel Majority's Interpretation Of The AIA Would Shield Many Tax Regulatory Actions From Judicial Review Permanently.

Historically, most Treasury regulations and IRS guidance documents that affected the rights and obligations of taxpayers directly concerned the determination of the amount of tax each taxpayer owed in a given taxable year. Consequently, at least in theory, judicial review of such provisions could be obtained either (1) by preparing a compliant tax return and seeking a refund, or (2) by preparing a noncompliant tax return and disclosing the noncompliance, prompting a deficiency notice that could be challenged before the U.S. Tax Court. Thus, even if the AIA had barred pre-enforcement judicial review of tax regulatory actions, taxpayers arguably had realistic avenues for getting to court to raise APA challenges.

This traditional understanding of judicial review in tax cases has been complicated by a decades-long legislative trend of incorporating social welfare and regulatory programs with only tangential connections to revenue raising into the IRC. *Cf. King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (recognizing the IRS's role in administering the Affordable Care Act as outside the agency's traditional expertise). Anti-poverty programs aimed at families and the working poor are structured as refundable tax credits rather than direct subsidies. Treasury and the IRS are key pension and health care regulators through ERISA and the Affordable Care Act, the provisions of which are enforced by denying eligibility for deductions and exclusions or imposing penalties labeled as taxes that nobody pays. Treasury and the

IRS are the principal regulators of a vast nonprofit sector, as eligibility for tax-exempt status is contingent upon complying with regulatory requirements contained in the IRC. *See* Kristin E. Hickman, *Administering the Tax System We Have*, 63 Duke L.J. 1717 (2014) (documenting these and other examples). In one recent five-year period, a substantial plurality of Treasury regulations promulgated concerned such matters, rather than traditional revenue raising issues. *See id.* at 1746–53. Where regulations lead, guidance documents follow.

These sorts of tax regulatory actions at most indirectly concern the computation of taxpayers' annual tax liabilities. Parties subject to these pronouncements cannot just pay more tax and sue for a refund or file a return documenting their noncompliance to generate a deficiency notice. Absent pre-enforcement judicial review, parties subject to those pronouncements are in precisely the position decried by the Supreme Court: comply with agency rules they believe to be legally invalid, or face civil or even criminal penalties for noncompliance just to obtain judicial review. *Abbott Labs*, 387 U.S. at 153. Given that choice, most regulated parties will simply comply. Valid APA claims against Treasury and the IRS will never be heard. Given those agencies' growing reputation for disregarding the APA, the predictable results will be decreased respect for the legitimacy of the tax system and, ultimately, reduced compliance with the tax laws.

CONCLUSION

Congress did not adopt the AIA to prevent courts from protecting the tax system's legitimacy through pre-enforcement judicial review of APA challenges to tax regulatory actions. This Court should grant the petition for rehearing en banc and reverse the panel majority's error.

Respectfully submitted,

PROF. KRISTIN E. HICKMAN
Amicus Curiae and Counsel of Record
University of Minnesota Law School
314 Mondale Hall
229 19th Avenue South
Minneapolis, MN 55455
(612) 624-2915
khickman@umn.edu

Date: July 15, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(b)(4).

1. In compliance with Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), the brief has been prepared in proportionally spaced Times New Roman font with 14-point type using Microsoft Word 2013.

2. Excluding the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B) and Sixth Circuit Rule 32(b)(1), the brief contains 2,596 words. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), I have relied upon the word count feature of Microsoft Word 2013 in preparing this certificate.

/s/ Kristin E. Hickman
KRISTIN E. HICKMAN

Dated: July 15, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2019, I electronically filed the foregoing Brief of Professor Kristin E. Hickman as *Amicus Curiae* in Support of Appellant's Petition for Rehearing *En Banc* and Reversal with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit. Counsel for all parties to the case will be served by the Clerk of the Court.

/s/ Kristin E. Hickman
KRISTIN E. HICKMAN