No. 19-930

IN THE

Supreme Court of the United States

CIC SERVICES, LLC,

Petitioner,

v.

INTERNAL REVENUE SERVICE, *ET AL.*,

Respondents.

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

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF is committed to ensuring federal agency rulemaking is subject to appropriate checks and balances, including meaningful judicial review. The issues addressed in the decision by the divided panel of the Sixth Circuit—including the proper application of the Anti-Injunction Act ("AIA") and the Internal Revenue Service's ("IRS") poor history of complying with the Administrative Procedure Act ("APA")—impact judicial oversight of agency decision-making power. AFPF also is committed to ensuring the due-process rights of parties subject to criminal sanctions.

AFPF believes federal agencies, like the IRS, should not be allowed to use the threat of massive civil penalties and imprisonment as a weapon to shield its

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person other than *amicus* made any monetary contributions intended to fund the preparation or submission of this brief.

actions from judicial review. Due process requires that Petitioner, and other parties regulated by the IRS, not face an unconstitutional Hobson's choice: comply with an administrative requirement they believe is unlawful or violate the law, bet their liberty, and risk imprisonment.

SUMMARY OF ARGUMENT

Effective and accountable agency rulemaking requires both public input and robust judicial review of agency authority, its process in promulgating its rules, and the record on which the rulemaking is based. The APA incorporates these principles and "guarantee[s] to the public an opportunity to participate in the rule making process," Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act § 4 (1947); *see* 5 U.S.C. § 553(b)–(c). The APA also "embodies the basic presumption of judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967); *see* 5 U.S.C. § 702.

When an agency circumvents APA procedures—as the IRS did here—judicial review takes on heightened importance, especially when criminal consequences are involved. But the IRS often escapes judicial review of its rulemaking by invoking an overbroad reading of the AIA. Here, a divided panel of the Sixth Circuit sided with the agency, allowing it to escape the judicial review of Notice 2016-66 that should have been available to Petitioner. If allowed to stand, the decision below will immunize a broad array of Treasury and IRS regulations and guidance documents from judicial review. This would give regulated parties an unconstitutional choice: (1) comply and forgo *any* opportunity for judicial review

or (2) violate the law, incur massive civil penalties, bet their liberty, and risk imprisonment if the suit is lost.

The AIA does not strip federal courts of jurisdiction over this case for two reasons. *First*, the challenged provisions in Notice 2016-66 are reporting requirements, not the "assessment or collection" of a tax. This Court's decision in *Direct Marketing Ass'n v. Brohl*, 575 U.S. 1 (2015), holding that reporting requirements do not implicate the analogous Tax Injunction Act ("TIA"), should apply to the AIA. *Second*, even if Notice 2016-66 implicates the AIA, in *South Carolina v. Regan*, this Court recognized the AIA does not apply when Congress "has not provided an alternative remedy." 465 U.S. 367, 378 (1984). Petitioner lacks an adequate alternative remedy because its officers risk criminal punishment if they violate the challenged agency action. There is no alternative remedy for the deprivation of liberty.

Due process demands that Petitioner has a right to contest the validity of Notice 2016-66 without facing massive civil penalties and the possibility of imprisonment. The Constitution does not permit the IRS to force Petitioner to violate the law and risk those severe consequences to obtain judicial review.

The AIA does not condone, let alone require, such an absurd result. The AIA is meant to protect government revenue-raising efforts, *not* to encourage lawbreaking by regulated parties, upon pain of imprisonment, before they can challenge IRS rules creating recordkeeping and reporting requirements. This Court should construe the AIA to respect due process by allowing APA pre-enforcement review of IRS rules when there is no alternative remedy.

The decision below not only conflicts with this Court's precedent in *Direct Marketing* and the Constitution but it also undermines the rule of law and the separation of powers vital to liberty. If left to stand, the decision below will have profound, negative impacts radiating far beyond this case by insulating an array of Treasury and IRS rules from judicial review, rewarding the IRS's pattern of lawlessness. This Court should reject the IRS's proposal to immunize its actions from accountability. Petitioners are entitled to their day in court now.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *DIRECT MARKETING ASS'N V. BROHL*.

As Petitioner explains, *see* Pet. Br. 16–31, a straightforward application of this Court's decision in *Direct Marketing* forecloses the Sixth Circuit's holding that the AIA bars pre-enforcement review of Petitioner's challenge to Notice 2016-66's reporting requirements. In *Direct Marketing*, this Court held the "[TIA], which provides that federal district courts 'shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law'" does not "bar[] a suit to enjoin the enforcement of" a state law "requiring retailers that do not collect Colorado sales or use tax to notify Colorado customers of their use-tax liability and to report tax-related information to customers and the . . . Department of Revenue." 575 U.S. at 4. The TIA is functionally indistinguishable

from, and modeled after, the AIA.[2] This Court "assume[s] that words used in both Acts are generally used in the same way." *Id.* at 8.

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 here, the underlying regulatory command is not the assessment or collection of a tax but instead creates a new transaction of interest, a type of reportable transaction. *See* Notice 2016-66. As this Court unanimously ruled in *Direct Marketing*, "reporting requirements precede . . . 'assessment' and 'collection'" and so challenges to them do not implicate the same concerns. 575 U.S. at 11.

As *Direct Marketing* teaches, the AIA's text applies only to suits seeking to enjoin the IRS from taking steps, as part of the formal taxation process, to assess or collect tax that is allegedly due. *See* 26 U.S.C. § 7421(a); *see also Chamber of Commerce of the U.S. v. IRS,* No. 16-944, 2017 U.S. Dist. LEXIS 166985, at *8–11 (W.D. Tex. Oct. 6, 2017) (applying *Direct Marketing* to find the AIA does not bar APA challenge to rule addressing who is subject to taxation under

[2] Unlike the TIA, the AIA does not place a jurisdictional limitation on a court's power to reach the merits; instead, it is a claims-processing rule. *See Hobby Lobby Stores, Inc. v. Sebelius,* 723 F.3d 1114, 1157–59 (10th Cir. 2013) (en banc) (Gorsuch, J., concurring) (explaining AIA is a claims-processing rule); *see also* Erin Morrow Hawley, *The Equitable Anti-Injunction Act*, 90 Notre Dame L. Rev. 81, 90–110, 125–32 (2014). The Sixth Circuit erred in holding otherwise. *See* Pet. App. 5a, 21a, 24a (referring to the AIA as depriving courts of subject-matter jurisdiction).

other provisions of the IRC). This is not that.[3] Notice 2016-66's reporting and recordkeeping provisions do not collect a penny of tax revenue for the Government. And "[a]ssessment and collection of taxes does not include all activities that may improve the government's ability to assess and collect taxes." *Chamber of Commerce*, 2017 U.S. Dist. LEXIS 166985, at *9 (citing *Direct Marketing*). *Cf. Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 543-46 (2012) (AIA does not bar constitutional challenge to IRC provision establishing penalty). The AIA therefore does not bar the courthouse doors to APA challenges when, as here, no tax is allegedly due, and the object of the suit is to determine the legality of reporting and recordkeeping requirements.

II. DUE PROCESS REQUIRES PERMITTING PRE-ENFORCEMENT REVIEW OF NOTICE 2016-66.

If a court construed the AIA to bar pre-enforcement review of Notice 2016-66—forcing Petitioner's officers to risk prison to challenge its legality—that construction would violate due process.

Notice 2016-66 deems a subset of "micro-captive transactions" to be "transactions of interest," making them reportable transactions that material advisors like Petitioner must report to the IRS or face civil and criminal penalties. *See* Pet. App. 3a–4a. Under the Sixth Circuit's decision, Petitioner "only has two

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[3] *Cf. Foodservice & Lodging Inst. v. Regan*, 809 F.2d 842, 846 (D.C. Cir. 1987) (AIA does not bar pre-enforcement challenge to "regulation [that] does not relate to the assessment or collection of taxes, but to IRS efforts to determine the extent of tip compliance in the food and beverage industry.").

options: (1) acquiesce to a potentially unlawful reporting requirement that will cost it significant money and reputational harm, or (2) flout the requirement, *i.e.*, 'break the law,' to the tune of $50,000 in penalties for each transaction it fails to report." Pet. App. 34a (Nalbandian, J., dissenting) (citing 26 U.S.C. § 6707(a)–(b)). Petitioner can only obtain judicial review by breaking the law "and only when (or if) the Government comes to collect the penalty[.]" Pet. App. 34a (Nalbandian, J., dissenting).

Worse, if Petitioner follows this sole path to judicial review, its officers will be subject to criminal penalties. "The Tax Code makes it a misdemeanor for any person who 'willfully fails' to 'make any return, keep any records, or supply any information' required under its title and its regulations."[4] Pet. App. 35a (Nalbandian, J., dissenting) (citing 26 U.S.C. § 7203). And because those criminal penalties are not limited to transactions of interest, the Sixth Circuit's rationale would apply to a host of Treasury and IRS rules. Thus, it would insulate a wide swath of actions from judicial review by forcing regulated parties to risk criminal liability to have their day in court.

This is precisely a "situation in which compliance is sufficiently onerous and coercive penalties sufficiently potent that a constitutionally intolerable

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[4] Section 7203 states: "Any person required . . . required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to . . . make such return, keep such records, or supply such information . . . shall . . . be guilty of a misdemeanor[.]" 26 U.S.C. § 7203.

choice might be presented." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994). To impose on a party "the burden of obtaining a judicial decision of such a question . . . only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines . . . is, in effect, to close up all approaches to the courts." *Ex parte Young*, 209 U.S. 123, 148 (1908) (holding unconstitutional the provisions of an act precluding pre-enforcement judicial review of rates and associated penalties for failure to comply). "The constitutional defect in *Young* was that the dilemma of either obeying the law and thereby for-going any possibility of judicial review, or risking 'enormous' and 'severe' penalties, effectively cut off all access to the courts." *Thunder Basin*, 510 U.S. at 221 (Scalia, J., concurring). So too here.

According to the Sixth Circuit, "having to break the law by violating the Notice, and then suing for a refund . . . is exactly what the AIA is designed to require." Pet. App. 23a (cleaned up). But Petitioner does not have "the option of complying *and then* bringing a judicial challenge." *Thunder Basin*, 510 U.S. at 221 (Scalia, J., concurring). Instead, the IRS's so-called alternative remedy is one that would only permit judicial access to fanatical gamblers willing to bet their liberty and risk prison to challenge the agency.[5] This renders the "fair price of adventure"

[5] The IRS's alternate remedy only theoretically works for those with money to pay the penalty and "buy" district-court jurisdiction. *See Larson v. United States*, No. 16-245, 2016 U.S. Dist. LEXIS 179314 (S.D.N.Y. Dec. 28, 2016) (taxpayer who could pay only $1 million of a $160 million penalty barred from refund action seeking judicial review). To challenge Notice 2016-66, a taxpayer would risk up to $50,000 for *each* failed disclosure.

intolerably high. *See Ford Motor Co. v. Coleman*, 402 F. Supp. 475, 502 (D.D.C. 1975) (Hart, J., dissenting). In effect, under these circumstances, "operation of the [AIA] would mean that the aggrieved party has no access to judicial review[.]" *Nat'l Rest. Ass'n. v. Simon*, 411 F. Supp. 993, 996 (D.D.C. 1976) (finding the AIA did not bar APA challenge to IRS revenue ruling). Thus, like *Ex parte Young*, "the practical effect of coercive penalties for noncompliance [is] to foreclose all access to the courts." *Thunder Basin*, 510 U.S. at 218. That is unconstitutional and offends the Fifth Amendment's Due Process Clause.

As Judge Thapar explained: "[O]ne might think, the IRS's interpretation would still allow people to bring a challenge after they violate the reporting requirement and pay the penalty. True enough. But only if people are also willing to spend up to a year in prison."[6] Pet. App. 62a (Thapar, J., dissenting from denial of rehearing en banc) (citing 26 U.S.C. § 7203).

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[6] "If that seems like it must be wrong, think again." Pet. App. 35a n.5 (Nalbandian, J., dissenting). Pointedly, the IRS does not deny or foreclose the possibility that, under their interpretation of the AIA, regulated parties like Petitioner risk criminal liability as a condition precedent to having their day in court. Instead, the IRS says, "[i]t is not clear . . . whether such a [criminal sanction under I.R.C. § 7203] could properly be imposed on a material advisor who demonstrates a good-faith intent to submit its challenge for judicial resolution." IRS Resp. to Pet. Reh'g En Banc at 8, Dkt. 56, *CIC Services, LLC v. IRS*, No. 18-5019 (8th Cir. filed July 19, 2019); *see* IRS Br. at 57–59, Dkt. 32, *CIC Services, LLC v. IRS*, No. 18-5019 (8th Cir. filed May 31, 2018). Interestingly, the IRS's brief in opposition to CIC's cert petition conspicuously omits discussion of the criminal penalties parties face if they violate the reporting requirements in a bid to obtain judicial review.

"In other words, the only lawful means a person has of challenging the reporting requirement here is to violate the law and risk financial ruin and criminal prosecution. That is enough to test the intestinal fortitude of anyone . . . [and is] precisely the bind that pre-enforcement judicial review was meant to avoid." Pet. App. 35a (Nalbandian, J., dissenting); *cf. Nat'l Rest. Ass'n*, 411 F. Supp. at 996 (holding AIA did not bar challenge to IRS revenue ruling, oting, "refusing to file the required information, and contesting a possible government assessment of a fine . . . puts the plaintiffs in the untenable position of either complying, with no judicial review, or of defying the government's interpretation of their legal obligations under the code, of being in essence a lawbreaker.").

Under the Sixth Circuit's decision, "the path to judicial review is fraught with threats of penalties, fines, and prosecution—all intended to encourage compliance with a reporting requirement that collects not a penny for the Government." Pet. App. 37a (Nalbandian, J., dissenting). "[W]hen the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts . . . , the result is the same as if the law . . . prohibited . . . [judicial review] of laws which deeply affect its rights." *Ex parte Young*, 209 U.S. at 147. The right to judicial review "is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law." *Wadley S. Ry. Co. v. Georgia*, 235 U.S. 651, 661 (1915). As in *Ex Parte Young*, "these criminal sanctions make the reporting

requirement in this case (and many others) unreviewable." Pet. App. 62a (Thapar, J., dissenting from denial of rehearing en banc).

That violates due process. *See Lipke v. Lederer*, 259 U.S. 557, 561–62 (1922) (suggesting that if criminal penalties are implicated, the Due Process Clause forecloses application of the AIA to bar review); *see also Okla. Operating Co. v. Love*, 252 U.S. 331, 336–37 (1920) (forcing party to violate regulation and trigger contempt proceeding to obtain judicial review violates due process). "It is a denial of due process of law if . . . [judicial] review can be effected by appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality than to ask the protection of the law." *Wadley*, 235 U.S. at 656. "The price of error may be so heavy as to erect an unfair barrier against the endeavor of an honest litigant to obtain the judgment of a court. In that event, the Constitution intervenes and keeps the court room open." *Life & Cas. Ins. Co. v. McCray*, 291 U.S. 566, 574–75 (1934) (Cardozo, J.).

Due process requires that "[b]efore the Government can impose severe civil and criminal penalties; the defendant is entitled to a full and fair hearing before an impartial tribunal 'at a meaningful time and in a meaningful manner.'" *TVA v. Whitman*, 336 F.3d 1236, 1258 (11th Cir. 2003) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). At the very least, the Sixth Circuit has deprived Petitioner of a hearing *at a meaningful time*—that is, before exposure to civil penalties and criminal liability. As this Court made clear, "one has a due process right to contest the validity of a legislative or administrative order affecting his affairs without

necessarily having to face ruinous penalties if the suit is lost." *Brown & Williamson Tobacco Corp. v. Engman*, 527 F.2d 1115, 1119 (2d Cir. 1975) (discussing relevant Supreme Court precedent).

"Ordinarily, administrative law does not intend to leave regulated parties caught between a hammer and an anvil." Pet. App. 25a (Nalbandian, J., dissenting). For as Chief Justice Marshall observed:

> It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to [the citizen] no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.

United States v. Nourse, 34 U.S. 8, 28–29 (1835).

"Yet the IRS seems to think people should bet their liberty" for a chance at judicial review of IRS reporting requirements. Pet. App. 62a (Thapar, J., dissenting from denial of rehearing en banc). But "[i]n this country, people should not have to risk prison time in order to challenge the lawfulness of government action." Pet. App. 58a (Thapar, J., dissenting from denial of rehearing en banc). "Obviously a judicial review beset by such deterrents does not satisfy the

constitutional requirements, even if otherwise adequate." *Okla. Operating Co.*, 252 U.S. at 336–37. "[T]he Due Process Clause requires an exception to the [AIA] when the tax is so high as to render the purported tax not just a disincentive or civil penalty, but a criminal prohibition." *Seven-Sky v. Holder*, 661 F.3d 1, 43 n.31 (D.C. Cir. 2011) (Kavanaugh, J., dissenting on jurisdiction and not deciding the merits). So too here where there is an actual criminal prohibition. *See* 26 U.S.C. § 7203.[7]

"[J]udicial review must be substantial, adequate *and safely available*[.]" *Wadley*, 235 U.S. at 661 (emphasis added). Outside of the AIA context, this Court has repeatedly held a party "need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of serious criminal and civil penalties." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (cleaned up); *see Sackett v. EPA*, 566 U.S. 120 (2012); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490–91 (2010) ("We . . . do not require plaintiffs to bet the farm . . . by taking the violative action before testing the validity of the law[.]") (cleaned up). As this Court has long made clear, one need not "first expose himself to actual arrest or prosecution to be entitled to challenge" the validity of a government mandate. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *see Gardner v. Toilet Goods Ass'n,* 387 U.S. 167, 172 (1967) (forcing regulated entities to "refuse to comply . . . and test the

[7] The IRS has not foreclosed the possibility of criminally prosecuting violations of Notice 2016-66's reporting requirements. *See* Pet. App. 35a n.5 (Nalbandian, J., dissenting) (citing Gov't's Br. at 58).

regulations by defending against government criminal, seizure, or injunctive suits against them" is not "a satisfactory alternative to" pre-enforcement judicial review). So too here.

To be sure, "[t]he IRS envisions 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 as Judge Sutton explained:

> I doubt that the words of the [AIA] . . . ban all prospective relief whenever the IRS enforces a regulation with a penalty that it chooses to call a "tax." And I especially doubt that conclusion in this setting—where the taxpayer's only remedy is not to "pay first challenge later" but to "report to prison first challenge later." As today's case appears to confirm, the meaning of the [AIA] has crossed the bar from its port of birth.

Pet. App. 55a (Sutton, J., concurring in the denial of rehearing). The IRS's interpretation of the AIA essentially forecloses judicial review of Notice 2016-66 and is more than a bridge too far. That interpretation is untethered from the AIA's text, structure, and history. *See* Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 Va. L. Rev. 1683 (2017). It is also unconstitutional.

The IRS cannot effectively insulate its rules enforced by civil and criminal penalties from judicial review through the simple expedient of labeling those penalties a "tax" subject to the AIA. *See Regal Drug*

Corp. v. Wardell, 260 U.S. 386, 391–92 (1922) ("The function of a tax, it was said 'is to provide for the support of the government,' the function of a penalty clearly involves the 'idea of punishment for infraction of the law[.]'"). "The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid. . . . Before collection of taxes levied by statutes enacted in plain pursuance of the taxing power can be enforced, the taxpayer must be given fair opportunity for hearing—this is essential to due process of law." *Lipke*, 259 U.S. at 561–62.

Finally, application of the AIA here would also fail the now-familiar *Matthews v. Eldridge* test, if it applies. 424 U.S. 319 (1976). "Under the *Mathews* balancing test, a court evaluates (A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake." *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017).

All three considerations weigh against the IRS. *First*, the private interest at stake is Petitioner's interest in judicial review of an IRS notice without the deterrent effect of facing imprisonment. *Second*, the risk of erroneous deprivation of that interest is high, as explained above: as a practical matter, forcing people to risk prison to obtain judicial review of administrative actions will coerce them into complying and preclude them from asserting meritorious APA challenges. *Third*, the government interest is low: the challenged Notice does not relate to revenue raising, and the IRS presumably does not have a legitimate interest in barring the courthouse doors to challenges to the legality of its actions.

III. THIS COURT SHOULD CONSTRUE THE AIA TO RESPECT DUE PROCESS AND AVOID CONSTITUTIONAL INFIRMITY.

The Sixth Circuit erroneously held regulated parties must risk prison to challenge reporting requirements. In so doing, the Sixth Circuit effectively insulated the IRS's actions from judicial review. *Cf.* Gerald S. Kerska, *Criminal Consequences and the Anti-Injunction Act*, 104 Minn. L. Rev. Headnotes 51, 65 (2020) ("[D]oes a person have an alternative avenue [to judicial review] if he must risk criminal prosecution to secure judicial review of a Treasury regulation? The answer must be no[.]"). If left to stand, the decision below "carries us another step down the road of . . . leaving the disposition of private rights and liberties to bureaucratic mercy." *Thryv, Inc. v. Click-To-Call Techs.*, LP, 140 S. Ct. 1367, 1378 (2020) (Gorsuch, J., dissenting). It would also violate due process.

But as Judge Thapar explained, "the law does not condone—let alone require—that result[.]" Pet. App. 58a (Thapar, J., dissenting from denial of rehearing en banc); *see also Regan*, 465 U.S. at 378 (holding Congress did not intend the [AIA] to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy). "[W]hat Congress has written . . . must be construed with an eye to possible constitutional limitations so as to avoid doubts as to its validity." *United States v. Rumely*, 345 U.S. 41, 45 (1953) (cleaned up). So too here. The doctrine of constitutional avoidance warrants construing the AIA consistent with due process. *E.g.,* Kerska, 104 Minn. L. Rev. Headnotes at 70 ([T]he no alternative avenue exception should apply if a

challenger must otherwise risk criminal prosecution to secure judicial review.").

This is particularly true because the AIA does not limit the power of Article III courts to reach the merits of cases, as it does not limit courts' subject-matter jurisdiction. Instead, the AIA is a claims-processing rule, which does not limit the jurisdiction of Article III courts to hear pre-enforcement challenges and is subject to equitable exceptions. *See Hobby Lobby Stores, Inc. v. Sebelius,* 723 F.3d 1114, 1157–59 (10th Cir. 2013) (en banc) (Gorsuch, J., concurring); Hawley, 90 Notre Dame L. Rev. at 90–110, 125–32.

"Jurisdiction . . . is a word of many, too many, meanings." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006) (cleaned up). And courts "ha[ve] sometimes been profligate in [their] use of the term," *Id.*, as the Sixth Circuit was here.[8] "[J]urisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties[.]" *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 274 (1994) (cleaned up). "[A] rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction." *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (cleaned up). Conversely, among the rules "that should not be described as jurisdictional are . . . claim-processing rules. These are rules that seek to promote the orderly progress of litigation by requiring that the

[8] The Sixth Circuit erroneously characterized the AIA as a "jurisdictional" statute limiting the subject-matter jurisdiction of Article III courts. *See* Pet. App. 21a ("Plaintiff's complaint is within the purview of the AIA and the district court *does not have subject matter jurisdiction* over it[.]") (emphasis added).

parties take certain procedural steps at certain specified times." *Id.* Because the AIA does not govern courts' adjudicatory capacity, it is not jurisdictional.

Given the drastic consequences that flow from treating a statutory requirement as jurisdictional, this Court has made clear that courts should not do so lightly. *See Gonzalez v. Thaler,* 565 U.S. 134 (2012). Thus, "[a] rule is jurisdictional '[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional.'" *Id.* at 141–42 (quoting *Arbaugh*, 546 U.S. at 515). "But if 'Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional.'" *Id.* at 142 (quoting *Arbaugh*, 546 U.S. at 516)). This Court has "adopted a readily administrable bright line for determining whether to classify a statutory limitation as jurisdictional. . . . [A]bsent . . . a clear statement" by Congress that a statute bars the courthouse doors, "courts should treat the restriction as nonjurisdictional in character." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013) (cleaned up).

Congress did not do so here. To begin with, the AIA does not use the word "jurisdiction" or otherwise speak in jurisdictional language. *See* 26 U.S.C. § 7421(a); *Hobby Lobby*, 723 F.3d at 1158 (Gorsuch, J., concurring). In fact, "the AIA does not even appear in the same title of the Code as most statutes bearing on federal courts' jurisdiction. Instead, Congress chose to place the AIA in Title 26, in a chapter of the tax code discussing claims processing rules in proceedings brought by 'Taxpayers and Third Parties.'" *Hobby Lobby*, 723 F.3d at 1158 (Gorsuch, J., concurring) (citation omitted). "[I]n both of these respects . . . the

AIA contrasts sharply with its cousin, the . . . [TIA], . . . [which] speaks directly to courts rather than to the parties" and "is located within the same chapter of the same title of the U.S. Code as the other principal statutes governing federal jurisdiction." *Id.* The AIA's text and structure, particularly as juxtaposed against that of the TIA, squarely forecloses attaching to it a "jurisdictional" label.

Historical context further confirms that the AIA has nothing to do with Article III courts' subject-matter jurisdiction and *power* to adjudicate cases on the merits. "[T]he Supreme Court has repeatedly recognized equitable exceptions to the AIA's application." *Id.*; *see also Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 510–11 (1932) (upholding pre-enforcement injunction, explaining that "enforcement of the Act against respondent would be arbitrary and oppressive, would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law. It is clear that, by reason of the special and extraordinary facts and circumstances, [the AIA] . . . does not apply."). So, too, have numerous early lower court decisions. *See* Hawley, 90 Notre Dame L. Rev. at 114 nn. 246–47 (collecting cases). If the AIA was a jurisdictional statute limiting the power of Article III courts to adjudicate concrete case and controversies, then courts could not have recognized equitable exceptions to its scope.[9] *See Hobby Lobby*, 723 F.3d at 1158–59 (Gorsuch, J., concurring). It is not. "In sum, neither

[9] That is because "courts have 'no authority to create equitable exceptions to jurisdictional requirements.'" *Hobby Lobby*, 723 F.3d at 1158 (Gorsuch, J., concurring) (quoting *Bowles v. Russell*, 551 U.S. 205 (2007)).

the text nor the structure nor the history of the AIA indicates that the statute is jurisdictional. As for the oft-relied upon 'long line' of precedent, that precedent points in the opposite direction—allowing waiver and equitable exceptions—demonstrating that the AIA cannot possibly be jurisdictional." Hawley, 90 Notre Dame L. Rev. at 110.

Nor is there any evidence, textual or otherwise, let alone the required "clear and convincing evidence," that Congress intended the AIA to displace the APA's bedrock presumption in favor of pre-enforcement review under the circumstances presented. *See Bowen v. Mich. Acad. of Family Physicians,* 476 U.S. 667, 670 (1986) (noting "strong presumption" in favor of judicial review under the APA that is only rebutted by "clear and convincing evidence"); *Kucana v. Holder*, 558 U.S. 233, 251–52 (2010).[10]

Plainly, the AIA does not foreclose a construction consistent with the constitutional requirements. "To require a would-be litigant to risk . . . [criminal] consequences before obtaining judicial review would present serious constitutional concerns." *Fla. Bankers Ass'n v. Dep't of the Treasury*, 799 F.3d 1065, 1083 (D.C. Cir. 2015) (Henderson, J., dissenting). This Court has a long tradition of construing the AIA consistent with due process. *See Lipke*, 259 U.S. at 562 (construing AIA to require pre-enforcement

[10] As the Court recently affirmed when a "provision is reasonably susceptible to divergent interpretation, [the Court] adopt[s] the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) (cleaned up).

review "in the absence of language admitting of no other construction"); *Liberty Univ., Inc. v. Geithner,* 671 F.3d 391, 426–27 (4th Cir. 2011) (Davis, J., dissenting) (discussing applicability of the doctrine of constitutional avoidance to the AIA); *Nat'l Rest. Ass'n*, 411 F. Supp. at 996 (concluding AIA did not bar pre-enforcement lawsuit, given "obvious constitutional problems" of requiring plaintiffs to break the law to obtain review); *cf. Regan,* 465 U.S. at 398–400 (O'Connor, J., concurring in the judgment) (applying doctrine of constitutional avoidance to AIA); *Comm'r v. Shapiro*, 424 U.S. 614, 629–30 (1976); *Laing v. United States,* 423 U.S. 161, 183–85 (1976).

The Court should do the same here. The Sixth Circuit's application of the AIA "raise[s] serious constitutional problems," and the Court is "obligated to construe the statute to avoid such problems." *INS v. St. Cyr*, 533 U.S. 289, 300 (2001).

IV. THE IRS'S PATTERN AND PRACTICE OF RULE-OF-LAW VIOLATIONS MUST BE SUBJECT TO JUDICIAL REVIEW.

Additional considerations militate in favor of allowing pre-enforcement review. The consequences of the Sixth Circuit's interpretation of the AIA radiate far beyond this case, as the panel majority recognized: "The broader legal context in which this case has been brought is not lost on this Court. Defendants 'do not have a great history of complying with APA procedures, having claimed for several decades that their rules and regulations are exempt from those

requirements.'"[11] Pet. App. 24a (quoting Hickman & Kerska, 103 Va. L. Rev. at 1712–13).

As this Court has held, the IRS is not a special agency and must comply with the APA just like every other federal agency. *See Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55–58 (2011).[12] Yet Treasury and the IRS have exhibited a systematic reluctance to do so. As Judge Thapar put it: "In recent years, the agency has begun to regulate an ever-expanding sphere of everyday life—from childcare and charity to healthcare and the environment. That might be okay if the IRS followed basic rules of administrative law. But it doesn't." Pet. App. 62a (Thapar, J., dissenting from denial of rehearing en banc). Professor Hickman has conducted an empirical study of Treasury's compliance with APA rulemaking requirements, the parent agency of the IRS. *See* Kristin E. Hickman, *Coloring Outside the Lines, Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking*

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[11] The IRS has a well-documented history of systematically claiming to be exempt from the legal constraints imposed by oversight mechanisms such as the Regulatory Flexibility Act, White House review under Executive Order 12,866, and the Congressional Review Act. *See, well*, James Valvo, *Evading Oversight: The Origins and Implications of the IRS Claim That Its Rules Do Not Have an Economic Impact*, Cause of Action Inst. (Jan. 2018), *available at* https://coainst.org/38EcPIg.

[12] *But cf. Oakbrook Land Holdings v. Commissioner*, No. 5444-13, 2020 U.S. Tax Ct. LEXIS 12, at *77 n.2 (T.C. May 12, 2020) (Holmes, J., dissenting) ("Courts interpret . . . the AIA [to] 'generally bar[] pre-enforcement challenges to certain tax statutes and regulations.' This does make tax law exceptional, but even on this topic there has been one powerful dissental, and academic analysis that suggest a change may be coming.").

Requirements, 82 Notre Dame L. Rev. 1727 (2007). She found Treasury, even when issuing notice and soliciting comments, rarely complies with the APA's requirements. *Id.* at 1748–50. In almost *ninety-three percent* of the cases over a three-year period, "Treasury claimed . . . the rulemaking requirements of APA section 553(b) did not apply." *Id.* at 1750.

But the IRS is not above the law. "The IRS is not special in this regard; no exception exists shielding it—unlike the rest of the Federal Government—from suit under the APA." *Cohen*, 650 F.3d at 723. And "[f]ederal agencies [like the IRS] do not administer and have no relevant expertise in enforcing the boundaries of the courts' jurisdiction." *Allegheny Def. Project v. FERC*, No. 17-1098, 2020 U.S. App. LEXIS 20363, at *24 (D.C. Cir. June 30, 2020) (en banc). Nor has Congress "empower[ed] the . . . [IRS] to regulate the scope of the judicial power" of the federal courts. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990). The IRS's efforts to evade judicial review must end. *See* Hickman & Kerska, 103 Va. L. Rev. at 1706 ("Congress subjected the Treasury Department and IRS, like other executive agencies, to the requirements of the APA. Without judicial review, however, the good government principles embodied by the APA are largely left to the IRS's good intentions.").

The Sixth Circuit's overbroad and unconstitutional interpretation of the AIA, if allowed to stand, will have "alarming" consequences extending far beyond this case. Pet. App. 36a (Nalbandian, J., dissenting). As Judge Nalbandian explained, "[t]he inevitable consequence" of the Sixth Circuit's decision "is that 'many' . . . [Treasury and IRS] regulations and guidance documents will be rendered 'effectively

unreviewable.'" *Id.* (quoting Hickman & Kerska, 103 Va. L. Rev. at 1686). "[T]he problem with this approach should be obvious: it removes the courts as a critical check against sweeping IRS policymaking discretion, serving the convenience of the IRS and the courts, but disserving taxpayers and the credibility of the tax system as a whole." Hickman & Kerska, 103 Va. L. Rev. at 1747. That result not only harms untold taxpayers but also is an affront to the rule of law.

More broadly, unless this Court corrects the Sixth Circuit's plain error, "[g]oing forward . . . the IRS will have 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." Pet. App. 62a–63a (Thapar, J., dissenting from denial of rehearing en banc). As Judge Thapar suggested, that result is profoundly unconstitutional:

> [T]oday, the IRS . . . exercises the power to tax and to destroy, in ways that the Founders never would have envisioned. Courts accepted this departure from constitutional principle on the promise that Congress would still constrain agency power through statutes like the [APA]. We now see what many feared: that promise is often illusory.

Pet. App. 63a (Thapar, J., dissenting from denial of rehearing en banc) (citations omitted); *see also* Kristin E. Hickman, *Of Lenity, Chevron, and KPMG*, 26 Va. Tax Rev. 905, 911 (2007) (explaining that "the [Internal Revenue] Code includes many delegations of

authority to the Treasury Department more or less to make regulatory law out of whole cloth.").

The Court should protect the due-process right to meaningful judicial review and make clear the AIA does not displace the APA's presumption of pre-enforcement review when no other avenue of review is available and the regulated party faces the risk of criminal prosecution. The IRS is not above the law.

CONCLUSION

For these reasons, and those described by the Petitioner, the judgment below should be reversed.

Respectfully submitted,

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