No. 15-969

IN THE

Supreme Court of the United States

FLORIDA BANKERS ASSOCIATION
AND TEXAS BANKERS ASSOCIATION,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE TREASURY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR *AMICUS CURIAE* CAUSE OF ACTION INSTITUTE IN SUPPORT OF PETITIONERS

ALFRED J. LECHNER, JR.
Counsel of Record
LEE A. STEVEN
R. JAMES VALVO, III
CAUSE OF ACTION INSTITUTE
1919 Pennsylvania Ave., N.W.
Suite 650
Washington, DC 20006
(202) 499-4232
jlechner@causeofaction.org

Counsel for Amicus Curiae

February 26, 2016

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

BRIEF OF *AMICUS CURIAE* CAUSE OF ACTION INSTITUTE IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, Cause of Action Institute ("CA Institute") respectfully submits this *amicus curiae* brief on its own behalf and in support of Petitioners.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae CA Institute is a nonprofit, non-partisan government oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law protect liberty and economic opportunity.[2] As part of this mission, it works to expose and prevent government and agency misuse of power by, *inter alia*, appearing as *amicus curiae* before this and other federal courts. *See, e.g.*, *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing brief).

CA Institute has a particular interest in opposing governmental overreach, protecting the rule of law, and ensuring that federal agency rulemaking is subject to appropriate checks and balances. The decision below, if allowed to stand, would undermine and impede judicial oversight of agency decision-making power and, thus, is of direct interest to CA Institute.

---

[1] In accordance with Supreme Court Rule 37.2(a), CA Institute notified the counsel of record for all parties at least 10 days prior to the due date of this brief and all parties consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and neither the parties, their counsel, nor anyone except CA Institute financially contributed to preparing this brief.

[2] CA Institute, *About*, http://www.causeofaction.org/about (last visited Feb. 21, 2016).

SUMMARY OF ARGUMENT

Effective and accountable agency rulemaking requires both public input and robust judicial review of agency authority, the process followed in promulgating rules, and the record upon which the rulemaking is based. The Administrative Procedure Act ("APA") embodies these principles. It is designed "to guarantee 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); 5 U.S.C. § 553(b)-(c), and "embodies the basic presumption of judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967); 5 U.S.C. § 702.

Executive Order 12,866 (Sept. 30, 1993), 58 Fed. Reg. 51,735 [hereinafter EO 12866],[3] furthers these principles by establishing the Office of Information and Regulatory Affairs ("OIRA") to review proposed regulatory actions by Executive Branch agencies. The purpose of EO 12866 is to strengthen the planning and coordination of both new and existing regulations, ensure proper regulatory review and oversight, and increase the transparency of the rulemaking process.

When an agency routinely circumvents both APA procedures and EO 12866 evaluation—as the Internal Revenue Service ("IRS") does, and did, in this case—judicial review takes on heightened importance. The IRS often escapes that judicial review, however, by invoking an expansive reading of the Anti-Injunction Act that conflicts with this Court's jurisprudence.

---

[3] EO 12866 was supplemented by Executive Order 13,563 (Jan. 18, 2011), 76 Fed. Reg. 3821, to reaffirm "the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993."

This Court should grant the petition for a writ of certiorari, correct the lower court's misreading of this Court's controlling precedent on the meaning and scope of the Anti-Injunction Act, and ensure that IRS rules such as the one at issue here are subject to the appropriate judicial review.

ARGUMENT

I. ROBUST JUDICIAL REVIEW OF IRS RULEMAKING IS NECESSARY BECAUSE THE AGENCY ACTS TO AVOID OVERSIGHT

Reversal of the lower court decision so as to allow judicial review in this case is justified because the IRS routinely avoids effective oversight of its rulemaking process.

A. The IRS Often Escapes Review under the APA

To ensure proper oversight and stakeholder input, the APA requires agencies to follow particular procedures to promulgate legislative rules, including public notice and allowing interested parties to submit comments before the rule is finalized. 5 U.S.C. § 553(b)-(c). The IRS often avoids these requirements, however, by asserting that its rules are interpretative and exempt from APA notice and comment. *See* Internal Rev. Manual § 32.1.5.4.7.5.1.3.

In principle, an agency assertion that its rule is interpretative and exempt from notice-and-comment rulemaking requirements is subject to judicial review under the APA. *See Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (the APA "sets forth the full extent of judicial authority to review executive agency action for

procedural correctness"); *Chamber of Commerce of the U.S. v. Occupational Safety & Health Admin.*, 636 F.2d 464, 468 (D.C. Cir. 1980) (the courts "do not classify a rule as interpretive just because the agency says it is"). Unlike other agencies, however, the IRS is able to prevent such review through the invocation of the Anti-Injunction Act—as it did in this case. Such reliance grants the IRS effective immunity from judicial review in a large number of its rulemakings and removes a proper check on its discretionary power.

The ability to bind parties on the date a notice issues,[4] combined with an effective immunity from pre-enforcement review, enables the subversion of legitimate rulemaking. As one commentator has stated in the context of an IRS notice on tax inversion transactions:

> Given the intense political focus on halting inversion transactions by any means, and the government's position that informal administrative pronouncements like the Notice are immune to immediate legal challenge, one might wonder whether Treasury and the IRS strategically targeted inversion transactions in this manner to exploit the historic procedural rules promulgated in response to very different concerns in a different era. At the very least, the procedural limitations on timely challenges to Treasury and IRS action taken via notice suggest a need for greater

[4] Although the APA provides that publication of a final rule must be made at least thirty days before its effective date, 5 U.S.C. § 553(d), IRS rules have binding effect as early as the date on which "any notice substantially describing the expected contents of any temporary, proposed, or final regulation is issued to the public." 26 U.S.C. § 7805(b)(1)(C).

> temperance on the part of Treasury and the IRS when regulating via notice.

Christopher P. Bowers, *et al*., *Challenging the IRS Anti-Inversion Notice: A Hollow Threat*, Skadden's 2015 Insights – Regulatory (Jan. 2015), *available at* https://goo.gl/v39Ses.

This is not an isolated example. Professor Kristin Hickman of the University of Minnesota Law School has conducted an empirical study of compliance with APA rulemaking requirements by the Department of Treasury, 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 Requirements*, 82 Notre Dame L. Rev. 1727 (2007). She found that Treasury, even when issuing notice and soliciting comments, rarely complies with the actual requirements of the APA. *Id.* at 1748-50. In almost ninety-three percent of the cases she surveyed over a three-year period, "Treasury claimed explicitly that the rulemaking requirements of APA section 553(b) did not apply." *Id*. at 1750.

To avoid IRS abuse of the rulemaking process and ensure proper oversight, the Anti-Injunction Act should be construed—consistent with this Court's recent decision in *Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1124 (2015)[5]—to allow judicial review of the rule at issue in this case.

B. The IRS Rarely Complies with EO 12866

To oversee and implement effective rulemaking, EO 12866 requires Executive Branch agencies to submit

[5] *See infra* § II.

significant regulatory actions to OIRA for pre-publication review. The results of these reviews are an important part of the administrative record. *See, e.g.*, *Michigan v. Envtl. Prot. Agency*, 135 S. Ct. 2699, 2715, 2721-22 (2015) (Kagan, J. dissenting) (citing EO 12866 cost-benefit analysis from record); *R.J. Reynolds Tobacco Co. v. Fed. Drug Admin.*, 696 F.3d 1205, 1219 n.14 (D.C. Cir. 2012) (including EO 12866 in record review).[6]

Significant regulatory actions subject to EO 12866 include, *inter alia*, those with an annual economic impact of more than $100 million and those that raise novel legal or policy issues. EO 12866 § 3(f). Agencies are required to submit proposed rules to OIRA with a cost-benefit analysis, a cost-benefit analysis of other alternatives, and the reason that alternatives were not selected. *Id*. § 6(a)(3)(C). The Order also stipulates that "each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days." *Id.* § 6(a).

OIRA conducts interagency review of significant rules before publication, acting largely as a convener or facilitator. Although some may claim this process

---

[6] For judicial review of an agency's rulemaking to be meaningful, a court must have access to the "whole record" of the process. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971); 5 U.S.C. § 706. It is "especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decision to propose particular rules." *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982); *see also Am. Radio Relay League, Inc. v. Fed. Commc'ns Comm'n*, 524 F.3d 227, 236 (D.C. Cir. 2008) (collecting cases). Regulatory impact analyses are an important part of such disclosures.

is unnecessary, former OIRA Administrator Cass Sunstein has observed that "[t]here are countless instances in which the process of interagency comment during OIRA review . . . leads the agency to make changes quickly and with enthusiasm." Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 Harv. L. Rev. 1838, 1848 (2013). OIRA "may also have its own views on both process and substance[.]" *Id*. at 1856.

University of Michigan Law Professor Steven Croley writes that OIRA review is important for at least two reasons. First, OIRA can dispassionately review the proposed rule and, consequently, offer a more objective analysis than the drafting agency. Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. Chi. L. Rev. 821, 831 (2003). Second, presidential oversight of agency rulemaking is necessary to "preserve the political and constitutional legitimacy of the regulatory state." *Id*. Without such oversight, agencies may "advance their own visions of good regulatory policy, but, electorally unaccountable, those visions lack political legitimacy." *Id*.

Although the IRS acknowledges that its rulemaking is subject to EO 12866, it almost always claims to be exempt from the requirements of EO 12866 because its rules do not qualify as "significant regulatory actions." *See* Internal Rev. Manual § 32.1.2.3.4; *see also* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 Harv. L. Rev. 1755, 1786-87 (2013) (discussing ways agencies avoid OIRA review, including by claiming rules are not significant).

The IRS claims that the rule at issue in this proceeding is not a significant regulatory action despite an estimated economic impact of more than $26 billion.

See Pet. Cert. 7; IRS, Guidance on Reporting Interest Paid to Nonresident Aliens, 77 Fed. Reg. 23,391, 23,393 (Apr. 19, 2012) (stating that the regulations are "not a significant regulatory action as defined in Executive Order 12866").

Over the past ten years, the IRS has submitted only eight rules to OIRA for regulatory review and deemed only one of those rules significant.[7] Those eight rules are less than one percent of the final rules the IRS published in the *Federal Register* over the same period.[8] The IRS routinely avoids the requirements of EO 12866 and the oversight checks that derive from OIRA and inter-agency review.[9] The consequence of this avoidance is overbroad and often unworkable rules.

A recent example was the attempt by the IRS to update its guidance on what constitutes political activity by nonprofit corporations following this Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). In November 2013, the IRS issued a notice of proposed rulemaking to change the rules governing political activity by section 501(c)(4) organizations. *See* IRS, Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535 (Nov.

---

[7] Statistics gathered from Historical Reports, Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, Exec. Office of the Pres., http://goo.gl/ntB0aB (last visited Feb. 21, 2016).

[8] From 2006-2015, the IRS published 868 final rules in the Federal Register. Statistics gathered from www.FederalRegister.gov (last visited Feb. 21, 2016).

[9] The Tax Court will not review IRS violations of EO 12866. *See BLAK Investments v. Comm'r*, 133 T.C. 431, 447 (2009) (finding "petitioner has no right to challenge compliance with [EO] 12866").

29, 2013). Per its usual practice, the IRS claimed that this rule was not significant and thus not subject to EO 12866. *Id*. at 71,540.[10]

The resulting proposed rule was so poorly conceived that a Center for Competitive Politics analysis found that ninety-four percent of public comments and ninety-seven percent of experts, organizations, and public officials either opposed or partially opposed the rule. Matt Nese & Kelsey Drapkin, Ctr. for Competitive Politics, Overwhelmingly Opposed 2 (July 2014), *available at* http://goo.gl/3Jnn9y. The comments "were not limited to one interest group or political party, but rather were from citizens and organizations of all political persuasions, tax statuses, and geographical locations." *Id*. Complaints about the rule ranged from overbroad terms to inconsistent definitions that made the rule unworkable in practice. *Id*. at 10-11.

This is the type of broad-ranging opposition to proposed rules that occurs when agencies attempt to regulate in a vacuum and appease a narrow group of interested parties without appropriate institutional checks. A finding that the Anti-Injunction Act allows judicial review in the instant case will enable much needed oversight of IRS rulemaking.

---

[10] CA Institute submitted a regulatory comment showing that the rulemaking was "significant" because it would have an economic impact of more than $100 million per year on the nonprofit sector and because it raised novel legal and policy issues. *See* Letter from CA Inst. to Internal Revenue Serv. 4-6 (Feb. 26, 2014), *available at* http://goo.gl/o74J4u. CA Institute also requested and participated in a meeting with OIRA urging the office to classify the rulemaking as significant. *See* Letter from CA Inst. to Hon. Howard A. Shelanski, Adm'r, Office of Info. & Regulatory Affairs (Feb. 5, 2014), *available at* http://goo.gl/3jGXu2.

II. THE ANTI-INJUNCTION ACT SHOULD NOT BE CONSTRUED TO REQUIRE REGULATED PARTIES TO VIOLATE THE LAW BEFORE THEY CAN CHALLENGE IT

The IRS insists, and the majority of the divided lower court agreed, that the Anti-Injunction Act protects the rule at issue from pre-enforcement judicial review because the penalty for noncompliance is included in Chapter 68, Subchapter B of the Internal Revenue Code. App. to Pet. Cert. 41a. This overly formalistic interpretation expands the Anti-Injunction Act's narrow exemption from judicial review and grants the IRS a powerful shield to hide the abuse of its discretionary power. It also contradicts this Court's interpretation of the similar Tax Injunction Act announced in the recent case *Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1124 (2015). The Court should grant the petition for a writ of certiorari and reverse the lower court's decision to reestablish necessary oversight over IRS rulemaking and harmonize Anti-Injunction Act and Tax Injunction Act jurisprudence.

It is established that regulated parties should not be required to violate the law before they can challenge it in court. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010) ("We normally do not require plaintiffs to 'bet the farm . . . by taking the violative action' before 'testing the validity of the law[.]'" (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007)). When a "regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts . . . must be permitted, absent a statutory bar[.]" *Abbott Labs.*, 387 U.S. at 153.

The majority in the lower court held that the Anti-Injunction Act presents such a statutory bar, creating "a narrow exception to the general administrative law principle that pre-enforcement review of agency regulations is available[.]" App. to Pet. Cert. 40a (citing *Abbott Labs.*, 387 U.S. at 152-53).[11] In relevant part, the Anti-Injunction Act states 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). This exception exists to "protect[] the Government's ability to collect a consistent stream of revenue." App. to Pet. Cert. 40a (citing *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2582 (2012)).

The instant case, however, does not implicate the government's ability to collect a consistent stream of revenue because neither the penalty nor the regulatory command to which it is attached is involved in the assessment or collection of a tax. This is so for two reasons.

First, penalties like the one at issue in this case are by their nature designed to incentivize compliance with a regulatory scheme, not to generate revenue. If "the penalty is avoided—and presumably this is the Government's intent—then individuals will have complied with the regulation and the IRS will collect zero revenue." App. to Pet. Cert. 66a (Henderson, J., dissenting). This Court has previously implied that if an IRS provision is "unrelated to the protection of the

---

[11] The lower court considered the Anti-Injunction Act to be a jurisdictional bar. App. to Pet. Cert. 42a n.1; *but see* Erin Morrow Hawley, *The Equitable Anti-Injunction Act*, 90 Notre Dame L. Rev. 81 (2014) (arguing that the Act is an exhaustion requirement and thus a quintessential non-jurisdictional claims processing rule).

revenues," then the Anti-Injunction Act should not apply to prevent judicial review. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 740 (1974).

Second, the underlying regulatory command is not an assessment or collection of a tax but instead a reporting requirement. As this Court unanimously ruled last term in *Direct Marketing*, "reporting requirements precede the steps of 'assessment' and 'collection'" and therefore challenges to reporting requirements do not implicate the same concerns. 135 S. Ct. at 1131.[12] This Court also instructed that a lawsuit does not restrain the assessment or collection of a tax "if it merely inhibits those activities." *Id.* at 1133.

As the penalty here is not intended to generate revenue and the reporting requirement does not restrain collection or assessment, the Anti-Injunction Act does not bar pre-enforcement judicial review of the IRS rule at issue in this case.

---

[12] The statute at issue in *Direct Marketing* was the Tax Injunction Act, which was modeled off the Anti-Injunction Act. This Court explained that "[w]e assume that words used in both Acts are generally used in the same way, and we discern the meaning of the terms in the AIA by reference to the broader Tax Code." *Direct Mktg.*, 135 S. Ct. at 1129.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALFRED J. LECHNER, JR.
Counsel of Record
LEE A. STEVEN
R. JAMES VALVO, III
CAUSE OF ACTION INSTITUTE
1919 Pennsylvania Ave., N.W.
Suite 650
Washington, DC 20006
(202) 499-4232
jlechner@causeofaction.org

Counsel for Amicus Curiae

February 26, 2016