No. 18-5019

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CIC SERVICES, LLC,
Plaintiff–Appellant,

v.

INTERNAL REVENUE SERVICE, *et al.*,
Defendants–Appellees.

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

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* CAUSE OF ACTION INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING *EN BANC*

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July 15, 2019

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Under Federal Rule of Appellate Procedure 29(b), Cause of Action Institute ("CoA Institute") respectfully moves for leave to file the accompanying *amicus curiae* brief in support of Plaintiff-Appellant's Petition for Rehearing *En Banc*. In support of its motion, CoA Institute states as follows.

CoA Institute is a 501(c)(3) nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public about how government accountability, transparency, and the rule of law protect liberty and economic opportunity. As part of its mission, CoA Institute works to expose and prevent government misuse of power by, *inter alia*, appearing as *amicus curiae* before federal courts. *See, e.g.*, *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing CoA Institute brief).

CoA Institute has a particular interest in opposing government overreach, protecting the rule of law, and ensuring that federal agency rulemaking is subject to appropriate checks and balances. The issues addressed in the decision of the divided panel of this Court that is the subject of the Petition for Rehearing *En Banc*—including proper

application of the Anti-Injunction Act and the Internal Revenue Service's ("IRS") poor history of complying with the Administrative Procedure Act ("APA") and other procedural rulemaking requirements—impact judicial oversight of agency decision-making power and are central to CoA Institute's mission.

CoA Institute recently issued an investigative report detailing the lack of IRS compliance with regulatory procedural requirements titled: *Evading Oversight: The Origins and Implications of the IRS Claim That Its Rules Do Not Have an Economic Impact*.[1] The research underlying that report featured prominently in an *amicus curiae* brief filed in the proceeding before the divided panel of this Court. CoA Institute's experience monitoring the rulemaking process and its participation in related judicial proceedings, brought both in its own name and as *amicus curiae*, gives it a unique perspective on the issues presented here.

For these reasons, CoA Institute respectfully requests that the Court grant it leave to participate as *amicus curiae* and to file the

[1] *See* CoA Inst., Evading Oversight: The Origins and Implications of the IRS Claim That Its Rules Do Not Have an Economic Impact (Jan. 2018), *available at* http://coainst.org/2mgpYAu.

accompanying brief in support of Plaintiff-Appellant's Petition for Rehearing *En Banc*.

July 15, 2019

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BRIEF OF *AMICUS CURIAE* CAUSE OF ACTION INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING *EN BANC*

Under Federal Rule of Appellate Procedure 29, Cause of Action Institute ("CoA Institute") respectfully submits this *amicus curiae* brief in support of Plaintiff-Appellant CIC Services, LLC.[2]

INTEREST OF THE AMICUS CURIAE AND CORPORATE DISCLOSURE STATEMENT

As stated in its motion for leave to file this *amicus curiae* brief, CoA Institute is a 501(c)(3) nonprofit, nonpartisan government oversight organization.[3] As part of its mission, CoA Institute has a particular interest in ensuring that federal agency rulemaking is subject to appropriate checks and balances. The issues addressed here—including proper application of the Anti-Injunction Act 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 and are central to CoA Institute's mission.

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[2] No counsel for a party authored this brief in whole or in part, and neither the parties, their counsel, nor anyone except CoA Institute financially contributed to preparing this brief.

[3] CoA Inst., *About*, http://www.causeofaction.org/about. CoA Institute is not a publicly traded corporation and has no parent companies or subsidiaries that have issued shares or debt securities to the public.

SUMMARY OF ARGUMENT

Effective and accountable agency rulemaking requires both public input and robust judicial review of agency authority, the process the agency followed in promulgating its rules, and the record on which the rulemaking is based. The 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); *see* 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); *see* 5 U.S.C. § 702.

When an agency circumvents APA procedures—as the IRS did here—judicial review takes on heightened importance. The IRS often escapes judicial review of its rulemaking, however, by invoking an overbroad reading of the Anti-Injunction Act. The divided panel of this Court sided with the IRS, allowing it to escape the judicial review that should have been available to CIC Services in this case.

The full Court should correct the panel's misreading of the meaning and scope of the Anti-Injunction Act and ensure that IRS rules, including the one at issue, are subject to appropriate oversight and judicial review.

ARGUMENT

I. Judicial Review Is Needed In This Case Because The IRS, As It Has With Many of Its Previous Rulemakings, Avoided APA Procedural Safeguards In Promulgating The Rule At Issue.

The legal doctrines that affirm the constitutionality of administrative processes rest on effective review of those actions by the Judicial Branch. *See, e.g.*, *Kucana v. Holder*, 558 U.S. 233, 252 (2010) (narrowly construing jurisdictional bar because otherwise "the Executive would have a free hand to shelter its own decisions from . . . court review"). In particular, judicial review is critical to "appropriately guard the liberty of regulated parties when agencies overstep." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 106 (D.C. Cir. 2018); *see City of Arlington v. Fed. Commc'ns Comm'n*, 569 U.S. 290, 310 (2013) (Breyer, J., concurring in part and in the judgment) ("The question whether Congress has delegated to an agency the authority to provide an interpretation that carries the force of law is for the judge to answer independently.").

To help ensure proper oversight and stakeholder input, the APA requires agencies to follow certain procedures when they promulgate legislative rules, including public notice and allowing interested parties

to comment before a rule is finalized. *See* 5 U.S.C. § 553(b)–(c). The IRS often avoids these requirements 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. As with many of its rules, the micro-captive transactions rule at issue was not subjected to proper APA notice-and-comment procedures and did not appear in the *Federal Register*.

In most cases, an agency assertion that its rule is interpretative and exempt from the 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) (recognizing the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness"); *Chamber of Commerce of U.S. v. Occupational Safety & Health Admin.*, 636 F.2d 464, 468 (D.C. Cir. 1980) (noting that courts "do not classify a rule as interpretive just because the agency says it is"). But unlike other agencies, the IRS often prevents that review by invoking the Anti-Injunction Act—as it did here.

The regime the IRS uses to insulate itself from proper oversight undermines the legitimacy of its actions. The ability to bind parties on

the date a notice issues,[4] combined with the avoidance of other APA procedures and an effective immunity from pre-enforcement judicial review, enables the IRS to subvert legitimate rulemaking. As one commentator noted on an IRS notice about 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.

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.

The example above is not an isolated one. 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.

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[4] Although the APA provides a final rule must be published 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).

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 APA's actual requirements. *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 the Supreme Court's decision in *Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1124 (2015)—to allow judicial review of the rule at issue in this case.

II. The Anti-Injunction Act Should Not Be Construed To Require Regulated Parties To Violate the Law Before They Can Challenge It.

Given the lack of IRS compliance with APA notice-and-comment procedures for the micro-captive transactions rule at issue, judicial review remains the only available oversight mechanism here. Yet the IRS insists, and a majority of the divided panel of this Court agreed, that the Anti-Injunction Act protects the rule at issue from pre-enforcement

judicial review because violation of the rule would result in a penalty and the Act bars pre-enforcement review of such penalties. *See CIC Servs., LLC v. Internal Revenue Serv.*, 925 F.3d 247 (6th Cir. 2019).

This overly formalistic interpretation expands the Anti-Injunction Act's narrow exemption from judicial review and grants the IRS another powerful shield to hide the abuse of its discretionary power. The problem with this approach to pre-enforcement review "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." Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 Va. L. Rev. 1683, 1748–49 (2017).

The majority of this Court's divided panel found that the Anti-Injunction Act applied because CIC Services had an alternative remedy: all it needed to do was to violate the law and then sue for a refund once the IRS enforced against it. *CIC Servs., LLC*, 925 F.3d at 258. But, in the context of Fifth Amendment Takings Claims, the Supreme Court has recently called into question whether *post hoc* remedies are sufficient to erase the original violation. In *Knick*, the Supreme Court wrote that the

"availability of a subsequent compensation remedy for a taking without compensation no more means there never was a constitutional violation in the first place than the availability of a damages action renders negligent conduct compliant with the duty of care." *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2172 (2019).

More importantly, regulated parties should not be required to violate the law and even risk, as in this case, criminal indictment before they can challenge a law or regulation. *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 divided panel of this Court followed the D.C. Circuit's decision in *Florida Bankers* and found that the Anti-Injunction Act presents such a statutory bar by creating an "exception to the general administrative

law principle that pre-enforcement review of agency regulations is available[.]" *Fla. Bankers Ass'n v. Dep't of the Treasury*, 799 F.3d 1065, 1066 (D.C. Cir. 2015) (citation omitted).[5] 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." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2582 (2012).

This 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 are involved in the assessment or collection of a tax. This is so for two reasons.

First, penalties like the one at issue are, by their nature, designed to encourage compliance with a regulatory scheme, not to generate

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[5] The district court treated the Anti-Injunction Act as a jurisdictional bar. *CIC Servs., LLC v. Internal Revenue Serv.*, No. 17-110, 2017 WL 5015510, at *4 (E.D. Tenn. Nov. 2, 2017) ("Defendants' motion to dismiss is GRANTED . . . because the Court lacks subject-matter jurisdiction[.]"). The divided panel affirmed. *CIC Servs.*, 927 F.3d a 258–59. *But see* Erin Morrow Hawley, *The Equitable Anti-Injunction Act*, 90 Notre Dame L. Rev. 81 (2014) (arguing the Act is an exhaustion requirement and thus a quintessential non-jurisdictional claims-processing rule).

revenue. As Judge Henderson stated in her dissent in *Florida Bankers*, "[a] tax penalty is meant to deter violations of the underlying regulatory requirement: 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." 799 F.3d at 1078 (Henderson, J., dissenting). The Supreme Court also has stated that if a provision is "unrelated to the protection of the revenues," then the Anti-Injunction Act should not prevent judicial review. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 740 (1974). And this Court agreed when it wrote that a "suit is not precluded by the AIA because . . . plaintiffs seek to enjoin a part of the coverage requirements imposed by the mandate, not the IRS's mechanism for collecting 'tax' from noncompliant employers." *Autocam Corp. v. Sebelius*, 730 F.3d 618, 622 (6th Cir. 2013), *vacated on other grounds*, 573 U.S. 956 (2014).

Second, the underlying regulatory command is not an assessment or collection of a tax but instead creates a new transaction of interest, a type of reportable transaction. *See* Notice 2016-66. As the Supreme Court unanimously ruled in *Direct Marketing*, "reporting requirements

precede . . . 'assessment' and 'collection'" and so challenges to reporting requirements do not implicate the same concerns. 135 S. Ct. at 1131.[6]

The Supreme 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. Professor Hickman argues that although the Supreme Court "provided no test for determining precisely where to draw the line operationally between stopping and inhibiting the assessment and collection" of taxes, by looking to the Anti-Injunction Act's original meaning and purpose courts can both honor Congress's goal of protecting revenue assessment and collection and also "bring[] the [Anti-Injunction Act] into harmony with the APA and the Supreme Court's interpretation . . . by clearing the way for pre-enforcement challenges to Treasury regulations, restoring transparency and public accountability to tax administration." Hickman & Kerska, *Restoring the Lost Anti-Injunction Act*, 103 Va. L. Rev. at 1749.

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[6] *Direct Marketing* addressed the Tax Injunction Act, which was modeled off the Anti-Injunction Act. And the Supreme Court explained that it "assume[s] that words used in both Acts are generally used in the same way[.]" *Direct Mktg.*, 135 S. Ct. at 1129.

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

CONCLUSION

For these reasons, the petition for rehearing *en banc* should be granted and the full Court should reverse the panel decision.

July 15, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Under Federal Rules of Appellate Procedure 29 and 32 and Sixth Circuit Rule 32, I hereby certify that this brief complies with the type-volume limitation because it contains 2085 words, excluding the parts of the brief exempted. I hereby certify that this brief also complies with the typeface and the type-style requirements because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Century Schoolbook 14-point font.

Date: July 15, 2019

/s/ John. J. Vecchione
John J. Vecchione

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

Date: July 15, 2019

/s/ John. J. Vecchione
John J. Vecchione