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# *CIC Services, LLC v. Internal Revenue Service*: An Unlikely Win for Low-income Taxpayers

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# *CIC SERVICES, LLC V. INTERNAL REVENUE SERVICE*: AN UNLIKELY WIN FOR LOW-INCOME TAXPAYERS

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## INTRODUCTION

In *CIC Services, LLC v. Internal Revenue Service*,[1] the United States Supreme Court considered an important question: whether the Anti-Injunction Act (AIA)[2] "prohibits a suit seeking to set aside an information-reporting requirement that is backed by both civil tax penalties and criminal penalties."[3] Writing for the majority, Justice Kagan answered no.[4] The Court held the suit brought by CIC Services, LLC (CIC Services) to enjoin Internal Revenue Service (IRS) Notice 2016-66 ("the Notice") was not prohibited by the AIA.[5]

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."[6] As a result, generally, taxpayers must first pay a tax and then sue for a refund to challenge any given tax.[7] In *CIC Services,* the petitioner sued prior to paying a penalty associated with IRS Notice 2016-66, alleging that, among other things, the IRS violated the notice-and-comment procedures under the Administrative Procedure Act (APA).[8] The government argued that if the Court allowed the petitioner to challenge the Notice prior to paying the penalty, the Court would open the floodgates of pre-payment tax litigation, running afoul of the



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1 CIC Servs., LLC v. Internal Revenue Serv., 141 S. Ct. 1582, 1586 (2021).

2 *Id.*; I.R.C. § 7421(a). The author uses Anti-injunction Act and AIA interchangeably.

3 *CIC Servs., LLC*, 141 S. Ct. at 1586.

4 *Id.*

5 *See CIC Servs., LLC*, 141 S. Ct. at 1594 ("CIC's suit . . . does not trigger the Anti-Injunction Act.").

6 I.R.C. § 7421(a).

7 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 543 (2012) ("Because of the Anti–Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund.") (citing Enochs v. Williams Packing & Nav. Co., 370 U.S. 1, 7–8 (1962)).

8 *CIC Servs., LLC*, 140 S. Ct. at 1588.

AIA.[9] The Court disagreed, holding that the AIA did not apply because the issue in the case was not about tax, but rather about an information-reporting rule.[10]

This case is timely.[11] Issues around the wealthy paying their "fair share" of tax are widely debated.[12] But this case sheds light on how access to justice in challenging the Department of Treasury's rules also deserves spotlight in the national conversation.[13] This Note argues that a narrow reading of the AIA is not only true to its origins, but also better protects low-income taxpayers.[14]

This Note continues in four main parts. Part I provides an overview of the case.[15] Part II explores the case's legal background, including the history of the AIA, along with the Administrative Procedure Act.[16] Part III discusses the Court's reasoning.[17] Part IV analyzes the Court's decision.[18] Part V concludes.[19]

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[9] *Id.* at 1592 (explaining "[t]he Government worries that a ruling for CIC will enfeeble the Anti-Injunction Act. If CIC can bring this suit now, the Government claims, a wave of pre-enforcement actions will follow.").

[10] *Id.*

[11] Thanks in large part to the work of scholars like Professor Dorothy Brown, the tax system has been under increasing scrutiny as one place to look for social justice issues. *See* Jennifer Ludden, *Here's One Reason Why America's Racial Wealth Gap Persists Across Generations*, Npr (Aug. 13, 2022, 7:00 AM), https://www.npr.org/2022/08/13/1113814920/racial-wealth-gap-economic-inequality.

[12] *See, e.g.*, Monica Prasad, *Why It's So Hard to Tax the Rich*, POLITICO (Nov. 2, 2021, 4:30 AM), https://www.politico.com/news/magazine/2021/11/02/hard-tax-rich-518383 ("taxing the wealthy is popular, with a majority of Americans telling pollsters that they think the wealthy don't pay their fair share.").

[13] *See* Lynn D. Lu, *Standing in the Shadow of Tax Exceptionalism: Expanding Access to Judicial Review of Federal Agency Rul*es, 66 ADMIN. L. REV. 73, 89-90 (2014) (explaining that "[f]or sectors of the public who lack the political power to influence the rulemaking process, access to judicial review may provide the only means for effective and meaningful oversight of agency regulation on important matters in which they have a direct stake. Yet many regulatory stakeholders—particularly members of historically or politically marginalized social groups—face substantial limits in their ability to play a role of consequence in IRS decisionmaking that affects their interests.").

[14] *See infra* Section IV.A.

[15] *See infra* Part I.

[16] *See infra* Part II.

[17] *See infra* Part III.

[18] *See infra* Part IV.

[19] *See infra* Part V.

## I. THE CASE

In November 2016, the IRS issued Notice 2016-66.[20] Notice 2016-66 classified micro-captive transactions as reportable transactions.[21] Reportable transactions are transactions that the Secretary of the Treasury, acting through authority delegated by Congress, identifies as having the "potential for tax avoidance or evasion."[22] Once classified as a reportable transaction, taxpayers and advisors involved in such transactions are required to disclose certain information to the IRS. [23] This information is used by the IRS to "check for facts" and determine whether the reportable transaction is in fact tax avoiding or evasive.[24] In other words, the IRS needs more information to determine whether the transaction is legitimate.[25]

Notice 2016-66 was one such effort by the IRS to help determine whether any given micro-captive transaction is tax avoiding or evasive.[26]

A micro-captive transaction is when a "taxpayer attempts to reduce the aggregate taxable income of the taxpayer, related persons, or both, using contracts that the parties treat as insurance contracts and a related company that the parties treat as a captive insurance company."[27] The parties involved in such transactions claim deductions for premiums on insurance coverage.[28] Additionally, "[t]he related company that the parties treat as a captive insurance company elects under § 831(b) of the Internal Revenue Code (the 'Code') to be taxed only on investment income[.]"[29] In effect, the taxable income is reduced.[30]

The problem with micro-captive transactions is that not all micro-captive transactions are tax avoiding or tax evasive.[31] As a result,

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20 I.R.S. Notice 2016-66, 2016-47 I.R.B. 745.

21 CIC Servs., LLC v. Internal Revenue Serv., 141 S. Ct. 1582, 1587 (2021).

22 *Id.* (citing I.R.C. §§ 6011, 6707A(c)(1)).

23 *See id.* ("So the IRS issued Notice 2016–66 identifying certain micro-captive agreements as reportable transactions. *See* 2016–47 Cum. Bull. 745. That Notice compels taxpayers and material advisors associated with such an agreement to (among other things) 'describe the transaction in sufficient detail for the IRS to be able to understand [its] tax structure.'").

24 *Id.* (citing I.R.S. Notice 2016-66, 2016-47 I.R.B. 745-746).

25 *Id.*

26 *Id.*

27 I.R.S. Notice 2016-66, 2016-47 I.R.B. 745. This Note sometimes refers to Notice-2016-66 as "Notice."

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.* ("[T]he Treasury Department and the IRS lack sufficient information to identify which § 831(b) arrangements should be identified specifically as a tax avoidance transaction and may

Notice 2016-66 alerted parties involved in micro-captive transactions to information-reporting obligations to help the IRS distinguish legitimate transactions.[32] Part of the information-reporting scheme the *CIC Services* Court considered involved criminal penalties attached for non-compliance with information-reporting, including substantial fines, and a non-tax criminal penalty involving up to one year of jail time.[33]

In *CIC Services,* CIC, a manager of captive insurance companies, and Ryan, LLC (Ryan), an accounting and tax services corporation, initiated an action in the United States District Court for the Eastern District of Tennessee, seeking a preliminary injunction prohibiting the IRS from enforcing Notice 2016-66.[34] CIC and Ryan asserted that complying with Notice 2016-66 would be prohibitively expensive.[35] CIC and Ryan also asserted that Notice 2016-66 violates the notice-and-comment procedures of the APA[36] and "fails to comply with the requirements of the Congressional Review of Agency Rule-Making Act."[37]

The district court rejected Ryan and CIC's request for a preliminary injunction after determining that the court lacked subject-matter jurisdiction because of the Anti-Injunction Act.[38] The Court of Appeals for the Sixth Circuit affirmed.[39] The Supreme Court granted certiorari to determine whether the Anti-Injunction Act "prohibits a suit seeking to set aside an information-reporting requirement that is backed by both civil tax penalties and criminal penalties."[40]

lack sufficient information to define the characteristics that distinguish the tax avoidance transactions from other § 831(b) related—party transactions.").

32 *Id.*

33 CIC Servs., LLC v. Internal Revenue Serv., 141 S. Ct. 1582, 1587-88 (2021) ("Noncompliance with Notice 2016–66 subjects a taxpayer or material advisor to stiff penalties—at last bringing us to the tax involved in this case, as well as to non-tax criminal consequences.").

34 CIC Servs., LLC v. Internal Revenue Serv., No. 3:17-cv-110, 2017 WL 5015510, at *1-2 (E.D. Tenn. Nov. 2, 2017), *aff'd*, 925 F.3d 247 (6th Cir. 2019), *rev'd and remanded*, 141 S. Ct. 1582 (2021), *vacated and remanded*, No. 18-5019, 2021 WL 4467660 (6th Cir. June 23, 2021).

35 *Id.* at *1.

36 *See* 5 U.S.C. § 552.

37 *CIC Servs., LLC*, 2017 WL 5015510, at *1.

38 *Id.* at *4.

39 CIC Servs., LLC v. Internal Revenue Serv., 925 F.3d 247, 259 (6th Cir. 2019), *rev'd and remanded*, 141 S. Ct. 1582 (2021).

40 CIC Servs., LLC v. Internal Revenue Serv., 141 S. Ct. 1582, 1586 (2021).

## II. LEGAL BACKGROUND

Although much remains unknown about the Anti-Injunction Act because of its limited congressional history,[41] the  was passed, in part, to help administer taxes created to fund the Civil War.[42] Section II.A provides an overview of the legal landscape of the tax system prior to the Anti-Injunction Act.[43] Section II.B briefly examines a few of the first cases brought after the passage of the Anti-Injunction Act.[44] Section II.C surveys the modern judicial history of the Anti-Injunction Act.[45] Finally, Section II.D provides an overview of the Administrative Procedure Act, critical to understanding the Court's reasoning in *CIC Services*.[46]

### *A. The Tax System Before the Passage of the Anti-Injunction Act*

The first income taxes in the United States were created to finance the Civil War.[47] With a robust new tax system underway to help fund the war, however, courts started facing a litany of lawsuits brought by delinquent taxpayers alleging that taxes were illegally assessed.[48]

In *Roback v. Taylor*, for example, a case cited by the Court in *CIC Services* to demonstrate the legal landscape prior to the AIA,[49] a taxpayer from Ohio brought a lawsuit challenging the sale of a business qualifying as taxable income.[50] The taxpayer alleged that the tax assessment was "unjust and contrary to law; and prays that the said collector and all others may be perpetually enjoined from the collection thereof, and that upon final hearing, the same may be decreed to be illegal and void."[51]

At the district court, an injunction was granted by Justice Swayne, who suspected that the Court may not have had the jurisdiction

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41 Bob Jones Univ. v. Simon, 416 U.S. 725, 736 & n.9 (1974) ("The Anti-Injunction Act apparently has no recorded legislative history. . .") (citing Note, *Enjoining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition*, 49 HARV. L. REV. 109, 109 n.9 (1935)).

42 *See CIC Servs., LLC*, 141 S. Ct. at 1586.

43 *See infra* Section II.A.

44 *See infra* Section II.B.

45 *See infra* Section II.C.

46 *See infra* Section II.D.

47 *CIC Servs., LLC*, 141 S. Ct. at 1586.

48 *See, e.g.*, Roback v. Taylor, 20 F. Cas. 852 (C.C.S.D. Ohio 1866) (No. 11877).

49 *CIC Servs., LLC*, 141 S. Ct. at 1586 ("Some taxpayers, alleging the taxes illegal, sought to enjoin collection efforts. And some courts granted the requested relief.") (citing Roback v. Taylor, 20 F. Cas. 852, 854 (C.C.S.D. Ohio 1866) (No. 11877)).

50 *Roback*, 20 F. Cas. at 852.

51 *Id.*

to hear the case, but nonetheless "thought it due the complainant to restrain further proceedings for enforcing the collection of the alleged illegal tax until the case could be more fully heard."[52] In practice, this means that the government was barred from collecting on the tax while the suit was proceeding, likely for over one year.[53] The circuit court ultimately lifted the injunction, holding that the court lacked jurisdiction.[54] The court held that federal question jurisdiction was also not applicable until Congress "designate[s] the court in which jurisdiction shall vest, and shall declare in what manner it shall be exercised[.]"[55]

### *B. Congress Passes the Anti-Injunction Act*

Congress realized that it had to respond to the lawsuits that "disrupted the flow of revenue to the Federal Government."[56] Accordingly, one year after cases such as *Roback v. Taylor*, Congress amended the Revenue Act of 1862 and added language akin to the modern Anti-Injunction Act in 1867.[57] The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court."[58]

In an early suit after the AIA, *Snyder v. Marks* relied on the AIA to dismiss a suit for lack of jurisdiction unless the taxpayer paid and then sued for a refund.[59] Similarly, explaining in clear terms the purpose of the AIA, *Delaware R. Co. v. Prettyman* rejected the petitioner-

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52 *Id.* at 853.

53 *Id.* at 852-53 (explaining that injunction granted "on the 5th of August last" and the opinion was issued on Oct. 1, 1866, which means the tax was barred from collection for over one year).

54 *Id.* at 854.

55 *Id.* at 853.

56 CIC Servs., LLC v. Internal Revenue Serv., 141 S. Ct. 1582, 1586 (2021).

57 Congress enacted the Anti-Injunction Act in 1867. *See* Act of Mar. 2, 1867, § 10, 14 Stat. 475.

58 I.R.C. § 7421(a).

59 Snyder v. Marks, 109 U.S. 189, 193 (1883); *see also* Pullan v. Kinsinger, 20 F. Cas. 44, 48 (C.C.S.D. Ohio 1870) (No. 11463) (holding suit restrained by AIA and explaining that "[i]n order to save the citizen the delay and expense of a suit to recover back the payment which he deems unlawful, a speedy and inexpensive appeal is given to the commissioner, who is directed to refund all moneys paid upon illegal assessment. If dissatisfied with his decision, the citizen may sue in the courts, which, up to that of last resort, are open. He may sue his government as freely as his neighbor, and when judgment is recovered, the national treasury is devoted to its payment. Neither judicial forms nor trial by jury is denied."); Robbins v. Freeland, 20 F. Cas. 863, 863 (C.C.E.D.N.Y. 1871) (No. 11883) ("After this decision there is nothing left for taxpayers who wish to engage in legal proceedings to avoid the tax on their incomes except to pay the tax under protest, and an appeal will have to be made to the internal revenue commissioner and suits brought to recover the money.").

taxpayers' argument that a tax alleged to be unlawful did not fall under the AIA.[60] As illustrated, early interpretations of the AIA clarified jurisdiction over tax issues.[61]

### *C. The Modern Judicial History of the Anti-Injunction Act*

To better illustrate the Court's reasoning in *CIC Services*, this section provides an overview of relevant case law interpreting the Anti-Injunction Act throughout the past fifty years.[62] While a comprehensive review of every AIA case in the Court's history is beyond the scope of this paper, the following limited selection of cases helped inform the *CIC Services* Court's opinion.[63]

#### *i. Bob Jones University v. Simon*

In *Bob Jones*, the question before the Court was "whether, prior to the assessment and collection of any tax, a court may enjoin the Service from revoking a ruling letter declaring that petitioner qualifies for tax-exempt status and from withdrawing advance assurance to donors that contributions to petitioner will constitute charitable deductions[.]"[64] The case involved Bob Jones University, which described "itself as the world's 'most unusual university.'"[65] The University was "devoted to the teaching…of its fundamentalist religious beliefs," and, significantly, did not admit Black students to its campus.[66] In 1970, the IRS "announced that it would no longer allow 501(c)(3) tax-exempt status for [universities that had racially] discriminatory admissions policies and that it would also no longer consider contributions to such schools as tax deductible."[67]

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60 Delaware R. Co. v. Prettyman, 7 F. Cas. 408, 409 (C.C.D. Del. 1872) (No. 3767).

61 *See id.* ("I think there is a rule which governs the case and is recognized by the courts as controlling the question of the applicability of the said act of congress. It is this: Whenever an assessor, in the exercise of his office, assesses a tax, which in his discretion and judgment he is authorized by an act of congress to assess, he being bound from the nature of his office to inquire and determine whether the thing in question is or is not the subject matter of taxation, he is then exercising a legitimate jurisdiction over the subject matter of taxation, and a tax thus assessed, although it may afterwards, in other proceedings, be declared unauthorized, comes within the description and meaning of that tax, the payment of which congress has forbidden to be resisted by bills of injunction."). *Id.*

62 *See infra* Section II.C.

63 *See infra* Section II.C..

64 Bob Jones Univ. v. Simon, 416 U.S. 725, 727 (1974).

65 *Id.* at 734.

66 *Id.* at 734-35.

67 *Id*.

Bob Jones University advised the IRS that it had a racially discriminatory policy and had no intention of altering it.[68] As a result, the IRS began the administrative process necessary to revoke Bob Jones University's tax-exempt status.[69] Soon after, however, Bob Jones University sued the IRS in the United States District Court for the District of South Carolina seeking a permanent injunction to prevent the IRS from revoking the tax-exempt status by claiming, among other things, that the revocation was a violation of the Free Exercise Clause of the First Amendment.[70] The district court held that the Anti-Injunction Act did not bar the suit from proceeding on the merits, while the Court of Appeals for the Fourth Circuit reversed, holding that the court lacked jurisdiction because of the AIA.[71]

The Supreme Court ultimately was unconvinced that the University's lawsuit was not about restraining the collection of tax as understood by the AIA.[72] Turning to the evidence submitted to the district court, the Court emphasized that the University's own pleading—the complaint and supporting documents—spoke about the detrimental impact federal income tax liability would have on its ability to operate, hire, and expand.[73] The Court therefore determined that "[t]hese allegations leave little doubt that a primary purpose of this lawsuit is to prevent the [Internal Revenue] Service from assessing and collecting income taxes from petitioner."[74] The Court also found that the University's lawsuit fell squarely within the AIA because the suit sought to prevent the IRS from collecting tax from the University's donors, whose own tax liability would increase once the University lost its tax-exempt status as a result of contributions to the University no longer being considered as tax deductible.[75] The *Bob Jones* Court held that the University's underlying lawsuit about the revocation of tax-exempt status was a suit restraining the assessment or collection of tax—and was therefore prohibited by the AIA.[76]

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68 *Id.*
69 *Id.*
70 *Id.* at 735-36.
71 *Id.* at 736.
72 *Id.* at 738.
73 *Id.*
74 *Id.*
75 *Id.* at 739.
76 *Id.* at 736-738.

ii. *National Federation of Independent Business v. Sebelius*

In *Sebelius*, the Supreme Court held that the AIA did not prohibit the Court from considering the constitutionality of the individual mandate provision of the Affordable Care Act.[77] There, two provisions of the Affordable Care Act were challenged as falling beyond Congress's power: (1) the provision requiring individuals to purchase certain minimum insurance coverage or pay a penalty for failing to do so, and (2) the provision providing funds to states on the condition they expand Medicaid to individuals below a certain income level.[78] The Court held that for purposes of the Anti-Injunction Act, the individual mandate was not a tax.[79]

The Court looked to the text of the Affordable Care Act, which labeled the individual mandate as a penalty, as opposed to other provisions in the ACA that were labeled as taxes.[80] The Court explained that "[w]here Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally."[81] Further, the Court found it significant that the individual mandate was not located in Subchapter 68B of the Internal Revenue Code, where penalties are treated as taxes under the Anti-Injunction Act.[82] The Court adopted a narrow reading of the AIA in order to reach the merits of the case, ultimately upholding the individual mandate but striking down the Medicaid expansion provision.[83]

iii. *Direct Marketing Association v. Brohl*

In *Direct Marketing Association v. Brohl*, the issue before the Court concerned whether the Tax Injunction Act (TIA), distinct from the Anti-Injunction Act,[84] barred a suit brought by online retailers.[85] Colorado has a sales-and-use tax regime.[86] Colorado charges 2.9% sales tax

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77 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 546 (2012) ("The Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the Anti–Injunction Act. The Anti-Injunction Act therefore does not apply to this suit, and we may proceed to the merits.").

78 *Id.* at 530-31.

79 *Id.* at 546.

80 *Id.*

81 *Id.* at 544 (citing Russello v. United States, 464 U.S. 16, 23 (1983)).

82 *Id.* at 544-45 (quoting 26 U.S.C. § 6671(a)).

83 *Id.* at 546, 588.

84 Direct Mktg. Ass'n v. Brohl, 575 U.S. 1, 8 (2015) (explaining that Tax Injunction Act "was modeled on the Anti–Injunction Act (AIA)").

85 *Id.* at 4.

86 *Id.*

on the sale of property within Colorado, and a use tax of 2.9%, on any property used or stored in the State for which a sales tax was not charged.[87] Because Colorado lacks the authority to require retailers that do not have a physical presence in the state to collect sales tax on its behalf,[88] the state requires residents who purchase property from retailers who do not collect sales tax to "fill out a return and remit the taxes to the [Colorado] Department [of Revenue] directly."[89] With the advent of online retail, Colorado passed a law requiring retailers who sold items to Colorado residents and did not charge sales tax to notify Colorado residents of their tax liability and to report tax-related information to customers and the Colorado Department of Revenue.[90]

Direct Marketing Association, a trade association of businesses that market to Colorado consumers, brought a suit challenging the constitutionality of the law.[91] The Association alleged the notice requirement "(1) discriminate[s] against interstate commerce and (2) impose[s] undue burdens on interstate commerce[.]"[92] Ultimately, the Court held that the suit was not barred by the TIA because, "the TIA is not keyed to all activities that may improve a State's ability to assess and collect taxes."[93] Regarding the word "restrain" in the TIA, the Court expressly rejected the Circuit Court's expansive reading of the word "restrain" that included "any suit that would 'limit, restrict, or hold back' the assessment, levy, or collection of state taxes."[94] Such a reading, the Court explained, would mean "virtually any court action related to any phase of taxation might be said to 'hold back' 'collection.'"[95] As illustrated, the Court's interpretation of the Anti-Injunction Act has changed over time, sometimes shifting into a narrower reading and other times a broader reading.[96]

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87 *Id.*

88 *Id.* (citing Quill Corp. v. North Dakota, 504 U.S. 298, 315-318 (1992).

89 *Id.* at 4-5.

90 *Id.* at 5-6.

91 *Id.* at 6.

92 *Id.* at 6-7.

93 *Id.* at 11.

94 *Id.* at 12-13 (citing Direct Mktg. Ass'n v. Brohl, 735 F.3d 904, 913 (10th Cir. 2013)).

95 *Id.* at 13. The Court explained that "[a]pplying the correct definition, a suit cannot be understood to 'restrain' the 'assessment, levy or collection' of a state tax if it merely inhibits those activities." *Id.* at 14.

96 Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 VA. L. REV. 1683, 1697-98 (2017) (explaining Court's changing interpretation of AIA, "[f]rom this survey of the Supreme Court's AIA jurisprudence, it seems clear that the Court lacks any overarching theory regarding the AIA's meaning and scope, with the result that its decisions over the past fifty years seem very result oriented. And, given the Court's fragmented and inconsistent guidance, it is perhaps not too surprising that federal circuit court opinions are muddled

### *D. The Administrative Procedure Act Meets the Anti-Injunction Act*

To better illustrate the Court's reasoning in *CIC Services*, this section briefly explores the Administrative Procedure Act. In *CIC Services*, the petitioner brought a lawsuit asserting that the Department of Treasury violated the Administrative Procedure Act (APA), while the government argued that the lawsuit was preempted by the Anti-Injunction Act (AIA) because the petitioner's lawsuit sought to restrain the collection of tax.[97] The tensions between these two statutes, enacted in different eras, came to a head in *CIC Services*.[98]

Congress passed the APA in 1946.[99] The APA established "default rules for the modern administrative state, both as to the procedures agencies use in their rulemaking and adjudicative activities and as to the standards courts use when reviewing agency action."[100] The APA is generally regarded as a statute that encourages transparency in government decision-making.[101] Some consider the Department of Treasury implicitly exempt from the APA, a concept known as "tax exceptionalism."[102] The Supreme Court rejected tax exceptionalism head-on in *Mayo Foundation for Medical Education and Research v. United States*.[103] The APA's interaction with the AIA was especially brought to light in *CIC Services*.[104]

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as well regarding the reviewability of pre-enforcement claims that Treasury regulations and IRS guidance documents are invalid under the APA.").

97 CIC Servs., LLC v. Internal Revenue Serv., 141 S. Ct. 1582, 1588 (2021).

98 *See infra* Part IV.

99 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

100 Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 231-32 (2014).

101 Clinton G. Wallace & Jeffrey M. Blaylock, *Administering Taxes Democratically?*, 94 TEMP. L. REV. 49, 58 (2021) ("The procedural requirements imposed on executive branch agencies via the APA and related judicial precedents are designed to promote some degree of transparency.").

102 Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1541 (2006); Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 515-26 (2011).

103 562 U.S. 44, 55 (2011) ("Mayo has not advanced any justification for applying a less deferential standard of review to Treasury Department regulations than we apply to any other agency. In the absence of such justification, we are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly '[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.'") (citation omitted).

104 *See infra* Part III.

## III: THE COURT'S REASONING

In *CIC Services, LLC v. Internal Revenue Service*, the Supreme Court of the United States addressed whether the Anti-Injunction Act bars a lawsuit challenging an information requirement issued by the IRS that is backed by both civil and criminal penalties.[105] In a majority opinion by Justice Kagan, the Court held that the Anti-Injunction Act did not displace jurisdiction because CIC Services sought to challenge a "standalone reporting requirement" with criminal and civil penalties outside of the AIA's reach.[106]

How Justice Kagan framed the issue signaled where the Court was heading: "The question here is whether the [Anti-Injunction] Act prohibits a suit seeking to set aside an information-reporting requirement that is backed by both civil tax penalties and criminal penalties."[107] Turning to precedent, the Court first addressed *Direct Marketing Association v. Brohl*,[108] explaining that a suit about an information reporting requirement is not about the assessment or collection of taxes as contemplated by the AIA.[109] The Court distinguished the reporting obligations in *Direct Marketing* to the reporting obligations in Notice 2016-66 by identifying the statutory penalties triggered by noncompliance with Notice 2016-66.[110]

To determine whether a suit is for the purpose of restraining the assessment or collection of tax—as barred by the AIA—the Court, citing *Bob Jones University v. Simon*,[111] explained it looks not to subjective motives of a taxpayer, but rather objective motives, including the face of the complaint, injuries alleged, and relief requested.[112] While the government contended that CIC Services' suit sought to prohibit "the collection of tax itself[,]"[113] CIC Services argued its complaint "reveals the suit's aim as invalidating the Notice and thereby eliminating its onerous

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105 CIC Servs., LLC v. Internal Revenue Serv., 141 S. Ct. 1582, 1586 (2021).

106 *Id.* at 1594.

107 *Id.* at 1586.

108 575 U.S. 1, 11 (2015).

109 *CIC Servs. LLC*, 141 S. Ct. at 1588-89 (citing *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 1 (2015)).

110 *Id.* at 1589.

111 416 U.S. 725 (1974).

112 *CIC Servs., LLC*, 141 S. Ct. at 1589 (citing *Bob Jones Univ*. v. Simon, 416 U.S. 725, 740 (1974)).

113 *Id.* at 1590 (citing Brief for Respondent at 12*,* CIC Servs., LLC v. Internal Revenue Serv., 141 S. Ct. 1582 (No. 19-930)).

reporting requirements—not as blocking the downstream tax penalty that may sanction the Notice's breach."[114]

The Court agreed with CIC Services, both in its reading of its own complaint and in its reading of the AIA.[115] The Court addressed three main reasons for why CIC Services had the better reading: (1) "the Notice imposes affirmative reporting obligations[;]" (2) the Notice's reporting requirements and "tax penalty are several steps removed from each other[;]" and (3) "violation of the Notice is punishable…by separate criminal penalties."[116] Of the last point, the Court found it particularly troublesome that in order to contest the legality of the notice, the taxpayer was faced with risking the sanction of criminal law by violating the requirement and then seeking a refund of the monetary amount of the tax.[117] The Court held that CIC Services' lawsuit "targets the upstream reporting mandate, not the downstream tax[,]" and therefore, "the Anti-Injunction Act imposes no bar."[118] The Court reversed the judgement of the United States Court of Appeals for the Sixth Circuit and remanded the case for further proceedings.[119]

In a brief solo concurrence, Justice Sotomayor noted that the case might have turned out differently if it were brought by individual taxpayers rather than a material advisor.[120] In particular, "compared with their tax advisors, taxpayers may incur less expense in collecting and reporting their own financial information."[121] Justice Sotomayor explained that taxpayers, unlike tax advisors, would not face a steep cost because "[s]uch information, after all, is about those taxpayers' own activities and is likely to be in their possession," which may therefore change the analysis.[122] Conceding that the Court did not survey all the information reporting obligations backed by statutory penalties, nonetheless, Justice Sotomayor cautioned that such suits brought by

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114 *Id.* (citing Reply Brief for Petitioner at 6*,* CIC Servs., LLC v. Internal Revenue Serv., 141 S. Ct. 1582 (No. 19-930)).

115 *Id.*

116 *Id.* at 1590-92.

117 *Id.* at 1592.

118 *Id.*

119 *Id.* at 1594. While an analysis of the case's entire subsequent procedural history is beyond the scope of this paper, the author notes that in 2022, the United States District Court for the Eastern District of Tennessee vacated Notice 2016-66 in its entirety after finding that the Department of Treasury's actions in issuing Notice 2016-66 outside of the notice-and-comment procedures proscribed by the APA was arbitrary and capricious. CIC Servs., LLC v. Internal Revenue Serv., No. 3:17-CV-110, 2022 WL 985619, at *7 (E.D. Tenn. Mar. 21, 2022), *on reconsideration*, No. 3:17-CV-110, 2022 WL 2078036 (E.D. Tenn. June 2, 2022).

120 CIC Servs., LLC, 141 S. Ct. at 1594 (Sotomayor, J., concurring).

121 *Id.*

122 *Id.* at 1594-95.

individual taxpayers would have to be fact specific and courts would have to look to the specific relief sought and the aspects of the regulatory scheme.[123]

Justice Kavanaugh concurred separately to acknowledge the "remains" of *Alexander v. "Americans United" Inc.* and *Bob Jones University. v. Simon.*[124] Recognizing that the Court in those cases established an "effects" test under the AIA, Justice Kavanaugh wrote that the Court's narrowing of the effects test into the "object" of the suit test fits better under the text of the AIA.[125] Put simply, "pre-enforcement suits challenging regulations backed by tax penalties are ordinarily not barred, even though those suits, if successful, would necessarily preclude the collection or assessment of what the Tax Code refers to as a tax."[126]

## IV: LEGAL ANALYSIS

The Supreme Court in *CIC Services* was correct: the Anti-Injunction Act (AIA) should be interpreted narrowly because, although the AIA has limited congressional history, its historical context reveals that "suit[s] for the purpose of restraining the assessment or collection" [127] of tax are different from suits brought by taxpayers seeking to invoke their rights under the Administrative Procedure Act for an information reporting obligation.[128]

### *A. A Narrow Reading of the Anti-Injunction Act Could Protect Low-Income Taxpayers*

The majority in *CIC Services* recognized the history of the AIA as one rooted in the Civil War era,[129] but the IRS that functions today is far different, and the recognition of this difference should play a role in the Court's analysis of which suits are barred by the AIA.[130] Today, the

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123 *Id.* at 1595.

124 *Id.* at 1595 (Kavanaugh, J., concurring) (first citing Alexander v. "Americans United" Inc., 416 U.S. 752 (1974); then citing Bob Jones Univ. v. Simon, 416 U.S. 725 (1974)).

125 *Id.* at 1595-96.

126 *Id.* at 1596.

127 26 U.S.C. § 7421(a).

128 *See* Francine J. Lipman*, Access to Tax InJustice*, 40 PEPP. L. REV. 1173, 1179-80 (2013) (explaining transformation of IRS over time).

129 *CIC Servs., LLC*, 141 S. Ct. at 1586.

130 Lipman*, supra* note 128; Leslie Book & Marilyn Ames, *The Morass of the Anti-Injunction Act: A Review of the Cases and Major Issues*, 73 TAX LAW. 773, 774 (2020) (explaining

IRS administers many social programs, including the Earned Income Tax Credit (EITC),[131] and most recently was the administrator of economic stimulus payments through the Coronavirus Aid, Relief, and Economic Security Act.[132] Additionally, the IRS has broad power to request information to substantiate tax returns[133] and can impose intense reporting obligations on any transaction it deems tax avoiding or tax evasive.[134] Further, the consequences of failing to pay tax or penalties assessed by the IRS are far-reaching because of the government having the power to garnish wages or social security benefits,[135] withhold refunds,[136] take property,[137] revoke passports,[138] or deprive liberty.[139] In

how "Congress gives the Service more tasks to perform beyond its functions of assessing and collecting taxes[.]").

131 Lipman, *supra* note 128.

132 Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (codified at 15 U.S.C. §§ 9001-9080) (authorizing $1,200 plus $500 for each qualifying child).; I.R.C. § 6428(a)-(c).

133 *CIC Servs., LLC*, 141 S. Ct. at 1586-87. ("As every taxpayer knows, the Internal Revenue Service (IRS) has broad power to require the submission of tax-related information that it believes helpful in assessing and collecting taxes.") (citing I.R.C. § 6011(a)).

134 *Id.* at 1587 ("The Code describes those transactions simply as ones that 'hav[e] a potential for tax avoidance or evasion.' Rather than give further specifics, the Code delegates to the Secretary of the Treasury, acting through the IRS, the task of identifying particular transactions with the requisite risk of tax abuse.") (citation omitted) (quoting I.R.C. § 6707A(c)(1)) (citing I.R.C. §§ 6011, 6707A(c)(1)).

135 I.R.C. § 6331 ("Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official."); *Social Security Benefits Eligible for the Federal Payment Levy Program*, IRS (Aug. 11, 2022) https://www.irs.gov/individuals/social-security-benefits-eligible-for-the-federal-payment-levy-program.

136 I.R.C. § 6402(a) ("In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c), (d), (e), and (f), refund any balance to such person.").

137 I.R.C. § 6321 ("If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.").

138 I.R.C. § 7345 ("If the Secretary receives certification by the Commissioner of Internal Revenue that an individual has a seriously delinquent tax debt, the Secretary shall transmit such certification to the Secretary of State for action with respect to denial, revocation, or limitation of a passport pursuant to section 32101 of the FAST Act.").

139 I.R.C. § 7202 ("Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.").

short, the IRS's power is broad.[140] The AIA should therefore be interpreted narrowly to give low-income taxpayers the opportunity to hold the IRS accountable under the APA.[141]

The framers of the AIA lived in the midst of the Civil War, where litigious taxpayers contesting the legality of taxes were disrupting the flow of revenue the government needed to fund the War.[142] This is a far cry from low-income taxpayers today—who may want to challenge information reporting requirements backed by statutory penalties as arbitrary and capricious under the APA, a law passed well after the AIA,[143] and a law "aimed at restraining the growing power of administrative agencies in America's governmental structure because the potential for abuse of that power was palpable."[144]

Had the Supreme Court agreed with the Sixth Circuit's interpretation of the AIA in *CIC Services*, taxpayers would essentially be forced to break the law to invoke their rights under the APA.[145] That is, Notice-2016-66 was a reporting obligation authorized by the IRS and failure to comply led to civil penalties which the IRS treats as taxes under the AIA.[146] As scholar Gerald Kerska explains, "[b]ecause the civil penalties count as taxes, the D.C. and Sixth Circuits have held that the AIA bars a challenge to a reporting regulation until the prospective litigant commits a violation, pays the civil penalty (really a tax), and then sues the IRS for a refund."[147] That alone might not bad. But the Court in *CIC Services* correctly emphasized the *criminal* penalties attached for noncompliance, which "is not the kind of thing an ordinary person risks,

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140 CIC Servs., LLC v. Internal Revenue Serv., 141 S. Ct. 1582, 1586-87 (2021) ("As every taxpayer knows, the Internal Revenue Service (IRS) has broad power to require the submission of tax-related information that it believes helpful in assessing and collecting taxes.") (citing 26 U.S.C. § 6011(a)).

141 *See* Rimma Tsvasman, *No More Excuses: A Case for the IRS's Full Compliance with the Administrative Procedure Act*, 76 BROOK. L. REV. 837, 849 (2011) ("[A]dhering to the APA would increase taxpayer confidence in the system, and would in turn help the IRS accomplish its goal of reducing the tax gap. And finally, engaging the IRS in the notice-and-comment rulemaking process would uphold the integrity of the law[.]").

142 *CIC Servs., LLC*, 141 S. Ct. at 1586.

143 The APA was enacted in 1946 while the AIA was enacted in 1867. *See supra* notes 57, 99 and accompanying text.

144 Tsvasman, *supra* note 141, at 841.

145 CIC Servs., L.L.C. v. Internal Revenue Serv., 925 F.3d 247, 263 (6th Cir. 2019), *rev'd and remanded*, 141 S. Ct. 1582 (2021) (Nalbandian, J., dissenting) (explaining that under the majority's view, CIC could challenge reporting scheme only by "violat[ing] the law" and risking "criminal prosecution.").

146 *CIC Servs., LLC*, 141 S. Ct. at 1589.

147 Gerald S. Kerska, *Criminal Consequences and the Anti-Injunction Act*, 104 MINN. L. REV. HEADNOTES 51, 52 (2020).

even to contest the most burdensome regulation."[148] The Supreme Court correctly held that the AIA should not function in this way: leaving taxpayers with this untenable choice of breaking the law or asserting their rights under the APA.[149]

Additionally, the AIA should be read narrowly to protect low-income taxpayers who are subject to the IRS's power to impose criminal penalties for non-compliance with information reporting requirements.[150] In *Alexander v. "Americans United" Inc.*, Justice Blackmun wrote that he was "disturbingly aware of the overwhelming power of the Internal Revenue Service."[151] Elaborating further, Justice Blackmun explained that he wrote "to express what [he felt was] a needed word of caution about governmental power where the means to challenge that power are unfavorable and unsatisfactory at best."[152] Judge Henderson, dissenting in *Florida Bankers Association v. Department of the Treasury*, also elaborated on the "poor public policy" implications of such an approach to the AIA.[153] Judge Henderson reminded the Court that refusing to comply with reporting obligations "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."[154] Henderson correctly warned that, one "cannot imagine that the Congress intended such an anomalous result in a system which depends for its very existence on the principle of voluntary compliance."[155]

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148 *CIC Servs., LLC*, 141 S. Ct. at 1592.

149 *Id.* at 1591-92 ("[V]iolation of the Notice is punishable not only by a tax, but by separate criminal penalties. As noted above, any '[w]illful failure' to comply with the Notice's reporting rules can lead to as much as a year in prison. That fact clinches the case for treating a suit brought to set aside the Notice as different from one brought to restrain its back-up tax. . . . So the criminal penalties here practically necessitate a pre-enforcement, rather than a refund, suit—if there is to be a suit at all.") (citation omitted) (quoting 26 U.S.C. § 7203)).

150 26 U.S.C.A. § 7203 (West) (providing that any person who willfully breaches an IRS reporting requirement is subject to criminal penalties).

151 Alexander v. "Americans United" Inc., 416 U.S. 752, 763 (1974) (Blackmun, J., dissenting).

152 *Id.*

153 Fla. Bankers Ass'n v. U.S. Dep't of the Treasury, 799 F.3d 1065, 1084 (D.C. Cir. 2015) (Henderson, J., dissenting).

154 *Id.* (quoting Cohen v. United States, 650 F.3d. 717, 723 (D.C. Cir 2011) (*en banc*)).

155 *Id.*

### *B. Adherance to the Administrative Procedure Act Protects Low-Income Taxpayers*

The Administrative Procedure Act is a powerful statute that can help protect low-income taxpayers from the sweeping power of the federal government.[156] Professor Kristin Hickman's scholarship in this area created a paradigm shift.[157] The Court in *CIC Services* seemed to acknowledge the reach of the IRS's power, in particular emphasizing the criminal penalties attached for non-compliance.[158] But the Court missed an opportunity to address how the APA fosters fairness for low-income taxpayers in particular, who stand to benefit from increased transparency in the IRS's rulemaking and examination of the broad sweeps of information the IRS can readily request from taxpayers.[159]

Justice Sotomayor's concurrence suggests that the Court's analysis would not apply in the same way for individual taxpayers because the information the IRS seeks is likely already in an individual taxpayer's possession.[160] But whether or not a taxpayer *could* comply with an information reporting requirement does not address whether a taxpayer *should* have to comply with an information reporting requirement that she believes is arbitrary and capricious, especially because pre-enforcement review "is the lifeblood of administrative law."[161] Further, "[f]or many . . . low-income taxpayers . . . even relatively small penalties will present insurmountable barriers to challenging unduly

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156 Stephanie Hunter McMahon, *The Perfect Process Is the Enemy of the Good Tax: Tax's Exceptional Regulatory Process*, 35 VA. TAX REV. 553, 596-97 (2016) (discussing ways to include the representation of "underrepresented voices in the creation of tax guidance.").

157 David Berke, *Reworking the Revolution: Treasury Rulemaking & Administrative Law*, J. MICH. J. ENV'T & ADMIN. L. 353, 354-55 (2018). *See, e.g.,* Hickman, *supra* note 102.

158 CIC Servs., LLC v. Internal Revenue Serv., 141 S. Ct. 1582, 1592 (2021).

159 *See* 26 U.S.C.A. § 7602 (West) (describing audit authority "[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability . . . ."); J.B. v. United States, 916 F.3d 1161, 1172-73 (9th Cir. 2019) (holding that the IRS must provide reasonable notice in advance to taxpayer when it contacts third parties to request sensitive information of a taxpayer "so as to maintain [taxpayers] privacy and avoid the potential embarrassment of IRS contact with third parties, such as their employers."); Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX REV. 517, 527 (2012) [hereinafter Book I] ("[G]reater public participation in the IRS's rulemaking process with respect to issues relating to low-income or disadvantaged taxpayers will improve the quality of administrative rules that regulate such taxpayers.").

160 *See supra* notes 120-23 and accompanying text.

161 *See* Book & Ames, *supra* note 130, at 775 (explaining that "[p]re-enforcement review 'is the lifeblood of administrative law'") (citing Petition for Writ of Certiorari at 2, CIC Servs., LLC v. Internal Revenue Serv. (2020) (No. 19-930)).

burdensome informational requirements."[162] Take, for example, the Earned Income Tax Credit, audits of which are known to impact low-income taxpayers disproportionally.[163]

A rejection of tax exceptionalism is particularly important for low-income taxpayers, because "provisions [like the EITC] can make the difference between poverty and the ability to pay rent and meet levels of basic sustenance for the disadvantaged taxpayer."[164] As the Harvard Low-Income Tax Clinic described in an amicus brief to the United States Supreme Court in *CIC Services*, the IRS could decide that some taxpayers seeking the Earned Income Tax Credit may make fraudulent claims.[165] As a result of this suspicion, the IRS could require such taxpayers to oblige with extensive information reporting requirements, such as "submit[ting] copious amounts of records to substantiate that the child for which the credit is claimed complies with the definition of 'qualifying child' under Section 152(c) of the IRC."[166] Under the *CIC Services* holding, unfortunately, this additional information reporting requirement likely would still be considered aimed at restraining the collection of tax, and would therefore be barred by the AIA, but future cases could lead to increased transparency.[167]

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[162] Brief of the Center for Taxpayer Rights as Amicus Curiae in Support of Petitioner at 16, CIC Servs., LLC v. Internal Revenue Serv. 141 S. Ct. 1582 (2021) (No. 19-930).

[163] Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 808 (2007) ("A recent GAO report provided data that showed audits of high-income taxpayers were more productive than audits of their low-income counterparts. Yet the IRS has conducted annually approximately 400,000 EITC audits. Virtually all EITC audits are 'correspondence audits' conducted entirely by mail and as a result use less administrative resources and are significantly less expensive than office or field audits. Although correspondence audits can be used for high-income taxpayers, a majority of audits of taxpayers reporting more than $100,000 of income are 'face-to-face' audits. Why does the IRS use correspondence audits for low-income taxpayers, which only require paper to travel back and forth, and use face-to-face audits for high-income taxpayers?").

[164] Book I, *supra* note 159, at 526.

[165] Brief of the Center for Taxpayer Rights as Amicus Curiae in Support of Petitioner, *supra* note 162, at 17-21.

[166] *Id.* at 18.

[167] The Court went out of its way to narrow its holding. *See* CIC Servs., LLC v. Internal Revenue Serv., 141 S. Ct. 1582, 1594 (2021) ("One last time: CIC's action challenges, in both its substantive allegations and its request for an injunction, a regulatory mandate—a reporting requirement—separate from any tax."). Nonetheless, the Notice was ultimately deemed arbitrary and capricious, leading the way for the Treasury Department to be more cautious in issuing rules that may violate the APA. *See* CIC Servs., LLC v. Internal Revenue Serv., No. 3:17-CV-110, 2022 WL 2078036, at *1 (E.D. Tenn. June 2, 2022) (explaining procedural history of case and noting that it "was appropriate to set aside the Notice as agency action that was arbitrary and capricious."). *See also* Mann Constr., Inc. v. United States, 27 F.4th 1138, 1148 (6th Cir. 2022) (setting aside IRS notice because the "IRS's process for issuing Notice 2007-83 did not satisfy the notice-and-comment procedures for promulgating legislative rules under the APA."); Hewitt v. Comm'r, 21 F.4th 1336, 1352 (11th Cir. 2021) (holding IRS violated APA by, in part,

Of course, the question remains, what does transparency really mean? Therein lies the APA: a statute which promotes transparency by "instruct[ing] reviewing courts to set aside agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[168] The APA's notice-and-comment process "shines a light on delegations of authority from Congress to an executive-branch agency to ensure they remain subject to public scrutiny."[169] Put differently, "[n]otice and comment gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes—and it affords the agency a chance to avoid errors and make a more informed decision."[170]

The APA's notice-and-comment procedures made headlines when, for example, during the Federal Trade Commission's "four-month notice-and-comment period prior to the December 2017 vote on net neutrality," twenty-two million comments poured in.[171] Many scholars quickly noted that many of these comments were fraudulent.[172] But others recognized that, despite the existence of fraud or big business interests potentially controlling the process, the larger takeaway is that it got people talking.[173] Additionally, another more recent display of the APA's importance in agency decision-making is when the IRS issued "an online post in the form of a frequently asked question (FAQ)," announcing its change in position that incarcerated individuals would no longer receive stimulus checks though the CARES Act.[174] As Professor Leslie Book explains, two impacted individuals sued, and the court found that the IRS's change in position was arbitrary and capricious under the APA.[175] As demonstrated, although costly, time-consuming, and

failing to respond to significant comments about a proposed regulation in the notice-and-comment procedure).

168 Dep't of Com. v. New York, 139 S. Ct. 2551, 2567 (2019) (citing 5 U.S.C. § 706(2)(A)).

169 *Mann Constr., Inc*., 27 F.4th at 1142-43.

170 *Id.* at 1142 (citation omitted).

171 Katherine Krems, *Crowdsourcing, Kind of*, 71 FED. COMMC'NS. L.J. 63, 68 (2018).

172 *Id.* at 66 n.17, 68 n.37, 68-69.

173 Aja Romano, *The FCC Asked for Net Neutrality Opinions, Then Rejected Most of Them*, VOX (Dec. 1, 2017, 9:10 AM), https://www.vox.com/technology/2017/12/1/16715274/fcc-net-neutrality-spambots-comments-pew (explaining that the FCC rejecting duplicate comments hurts the democratic process, because, "[e]ssentially, the FCC's decision to reject duplicate comments means that a system of website autogeneration that was intended to make democratic participation easier has ultimately made it moot.").

174 *See* Leslie Book, *Tax Administration and Racial Justice: The Illegal Denial of Tax-Based Pandemic Relief to the Nation's Incarcerated Population*, 72 S.C. L. REV. 667, 669-72 (2021) [hereinafter Book II] (demonstrating that Frequently Asked Questions (FAQs) are vital tools to effectuate the APA as they ensure that agencies explain policy decisions and changes).

175 *Id.* at 671-72.

littered with its own imperfections, public participation in agency-rule-making matters.[176]

Not all scholars agree that the APA is as useful a tool in promoting transparency for the IRS.[177] For example, Professor Nicholas Bagley recently wrote an article asserting that, "[t]he fact of the matter is that the public neither knows nor cares if the IRS cuts the APA's procedural corners."[178] On the other hand, scholar David Berke critiqued both sides of what he termed the "revolutionaries and counterrevolutionaries" of the tax-exceptionalism debate: scholars who reject tax-exceptionalism and call for the IRS to follow a formalistic approach to the APA and scholars who "advocate for some version of tax exceptionalism as the superior model."[179] Berke argued that the most reasonable approach accommodates interests on both sides of the debate, and ultimately that the IRS should follow the APA, but in a "workable" manner.[180]

There are drawbacks to a formalist approach to the APA that leaves agency rules hanging in the legal balance.[181] But this concern should be balanced with a consideration of the power of the IRS,[182] along with the IRS's impact on low-income individuals due to its outsized role in administering social benefits.[183] *CIC Services* sheds light on how important access to justice is to challenge the IRS's rules under the APA.[184]

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176 *See supra* notes 170-76 and accompanying text.

177 *See, e.g.*, Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 384 (2019) (asserting that the public does not care if the IRS "cuts the APA's procedural corners.").

178 *Id.*

179 Berke, *supra* note 157, at 354-55.

180 *Id.* at 355.

181 *Id.* at 354-55 (explaining that "the path-breaking legal scholarship that fomented this administrative paradigm-shift— chiefly the work of Professor Kristin Hickman—has imported into the tax law an overly formalistic interpretation of the APA and what it requires. This formalistic APA interpretation has made the paradigm-shift into a destabilizing force in tax administration, given that it threatens, for instance, to invalidate a wide swath of Treasury Regulations and thus to imperil the integrity of the tax system more broadly.").

182 *See* United States v. Richards, 631 F.2d 341, 344-45 (4th Cir. 1980) ("Section 7602 of the Internal Revenue Code, 26 U.S.C. § 7602, represents a broad grant of investigatory power to the I.R.S. which the Supreme Court has analogized to that of a grand jury which can investigate 'merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'") (quoting United States v. Powell, 379 U.S. 48, 57 (1964)).

183 *See, e.g.*, 26 U.S.C. § 32 (authorizing Earned Income Tax Credit).

184 *See* CIC Servs., LLC v. Internal Revenue Serv., 141 S. Ct. 1582, 1592 (2021) (explaining that if the AIA were to prohibit CIC's suit, the taxpayer would have to essentially break the law in order to bring APA action).

### *C. Procedural Justice Can Help the IRS Build Trust with Low-Income Taxpayers*

"The tax law . . . is a window into the nation's views about justice[.]"[185] Low-income taxpayers' relationship with the tax system speaks broadly to issues around transparency,[186] privacy,[187] dignity,[188] and procedural justice between a government and its citizens.[189] Public trust in government is near historic lows.[190] Under the doctrine of procedural justice, increased transparency by the IRS in its rulemaking capacities can help build trust between low-income taxpayers and the tax system.[191]

Procedural justice stems from the concept of procedural due process.[192] Former National Taxpayer Advocate Nina Olson described procedural due process as a part of procedural justice, and as providing "the individual with the ability to interact with the government, to be treated as a person and with dignity. It requires that there be a *conversation* about what is being done to that person and why it is being done."[193] In the tax context, procedural justice and transparency "is essential because

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185 Michael J. Graetz, *2001 Erwin N. Griswold Lecture Before the American College of Tax Counsel: Erwin Griswold's Tax Law–and Ours*, 56 TAX LAW. 173, 174 (2002) (cleaned up).

186 *See* Connecticut State Police Union v. Rovella, 36 F.4th 54, 63-64 (2d Cir. 2022) (upholding decision to strike down FOIA exception for police records to promote transparency in government action).

187 *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018) (holding that a warrantless search of cell phone location data violates the Fourth Amendment because an individual has a legitimate expectation of privacy in the record of physical movements as obtained through a wireless carrier); Michelle Lyon Drumbl, *#Audited: Social Media and Tax Enforcement*, 99 OR. L. REV. 301, 305 (2021) ("[L]ow-income taxpayers are already subject to disproportionate rates of tax enforcement relative to most other income bands. Moreover, this economically vulnerable population is also subject to intrusive and judgmental monitoring in other contexts. On balance, it strikes me that to use social media mining as a tax enforcement tool is to simply add a layer of further indignity onto a population that is already subject to increased digital surveillance by virtue of lacking income or wealth.").

188 Obergefell v. Hodges, 576 U.S. 644, 663 (2015) (holding that same-sex couples cannot be deprived of the right to marry by explaining that Due Process Clause of the Fourteenth Amendment protects, amongst other things, "individual dignity and autonomy").

189 Nina E. Olson, *2010 Erwin N. Griswold Lecture Before the American College of Tax Counsel Taking the Bull by Its Horns: Some Thoughts on Constitutional Due Process in Tax Collection*, 63 TAX LAW. 227, 229 (2010).

190 *Public Trust in Government: 1958-2021*, PEW RSCH. CTR. (June 6, 2022), https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/.

191 Adam B. Thimmesch*, Taxing Honesty*, 118 W. VA. L. REV. 147, 177-78 (2015).

192 Olson, *supra* note 189.

193 *Id.*; *Nina E. Olson*, Harv. Kennedy Sch., https://www.hks.harvard.edu/about/nina-e-olson (last visited Nov. 28, 2022).

it enables us to identify problems and affords us the opportunity to change things."[194]

Of course, procedure could only take us so far, because, significantly, the IRS exists within a government where racism and classism have only continued to evolve.[195] As scholars Palma Joy Strand and Nicholas A. Mirkay put it, "[t]he history of racism in the United States is one of evolution."[196] Today, one cannot look at the modern tax system and not see a reflection of some of the wealth inequities present in the United States.[197]

As a result, recently, many scholars have looked to the tax system to address wealth and racial inequities, including Professor Dorothy Brown through her groundbreaking book, *The Whiteness of Wealth*.[198] Additionally, scholar James T. Smith in his 2021 Comment examined the Baby Bond Proposal and thoughtfully discussed how tax principles can be used to close the racial wealth gap in the United States.[199] Around the same time, Professor Book engaged in rigorous scholarship regarding the IRS's denial of tax-based pandemic relief to incarcerated individuals.[200] What this growing scholarship reveals is that while the tax code may not have always been the most natural place to advocate for

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194 *Id.* at 235.

195 Palma Joy Strand & Nicholas A. Mirkay, *Racialized Tax Inequity: Wealth, Racism, and the U.S. System of Taxation*, 15 NW. J. L. & SOC. POL'Y 265, 279 (2020).

196 *Id.* at 272.

197 *Id.* at 278-79. ("The first constant is the inverse relationship between progressive taxation and inequality: higher levels of redistribution lead to lower inequality. . . . [T]he counters to an inherent tendency in the wealth system for the rich to get richer and the poor to get poorer are public in nature. . . . [T]ax expenditures for individuals have skewed to largely benefiting wealthier, higher-income taxpayers, disguising government benefits for these citizens and leaving poorer, lower-income taxpayers to scramble for other, non-tax-supported resources. Concurrently, support for direct expenditures for public infrastructure that supports everyone has declined."); *see* also James T. Smith, *Nurturing the Baby Bond Proposal: How Tax Principles Can Close the Racial Wealth Gap in the United States*, 94 TEMP. L. REV. 147, 147 (2021) ("The United States of America is the wealthiest country in the world, but, paradoxically, it has the largest wealth gap in the world. The wealth gap in the United States is starkest between races—Black wealth per family has declined by approximately 50% since 1983, while White wealth per family has increased by 33%.").

198 Ben Steverman, *A Tax Code Optimized for White Wealth Leaves Black Americans Behind,* BLOOMBERG (Mar. 10, 2021, 5:00 AM), https://www.bloomberg.com/news/features/2021-03-10/america-s-tax-code-leaves-black-people-behind-dorothy-brown; DOROTHY A. BROWN, THE WHITENESS OF WEALTH: HOW THE TAX SYSTEMS IMPOVERISHES BLACK AMERICANS AND HOW WE CAN FIX IT 5 (2021).

199 *See generally* Smith, *supra* note 197.

200 *See generally* Book II, *supra* note 174.

social justice,[201] now, it may be.[202] Increased spotlight on tax administration creates an opportunity for the Treasury Department to more readily comply with the APA, in part by ensuring that low-income taxpayers are informed of their rights under the tax code—which, after all, is "*first* of the ten fundamental taxpayer rights in the Taxpayer Bill of Rights."[203]

## V: CONCLUSION

The Supreme Court of the United States in *CIC Services* distinguished an information reporting obligation backed by statutory tax penalties as distinct from a tax barred by pre-enforcement litigation by the Anti-Injunction Act.[204] The Court was correct in drawing a narrow reading of the AIA.[205] The IRS has broad power to request information from taxpayers in order to fulfill its tax-collection duties, but in doing so, should not be immunized from the procedural guarantees afforded under the Administrative Procedure Act.[206] The Court's narrow reading of the AIA is particularly important for low-income taxpayers who should not have to violate an information-reporting requirement and face criminal liability in order to contest the legality of such a requirement in court.[207]

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201 *See id.* at 673 (examining IRS rulemaking by looking at the way that stimulus checks were distributed to incarcerated individuals through the CARES Act "reveal[s] how the mundane world of tax administration can exacerbate racial disparities and inequity.").

202 Steverman, *supra* note 198.

203 TAXPAYER ADVOC. SERV., INTERNAL REVENUE SERV., *Transparency and Clarity: The IRS Lacks Proactive Transparency and Fails to Provide Timely, Accurate, and Clear Information*, ANN. REP. TO CONG. 81, 81 (2021), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2022/01/ARC21_Full-Report.pdf (emphasis added).

204 *See infra* Part III.

205 *See infra* Part IV.

206 *See infra* Section IV.B.

207 *See infra* Section IV.A.