Essay

Criminal Consequences and the Anti-Injunction Act

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INTRODUCTION

"People should not have to risk prison time in order to challenge the lawfulness of government action."[1] And usually they don't. The Supreme Court has said a person need not commit a crime to challenge an allegedly unconstitutional statute.[2] The same principle holds true in administrative law. One can seek review of a regulation without violating the agency's command and risking "criminal and civil penalties."[3] A straightforward principle cuts across doctrinal lines: no one should be put "to the choice between abandoning his rights or risking prosecution."[4]

The Anti-Injunction Act (AIA or the Act) says that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained"[5] and requires prospective litigants to challenge their liability in "refund suits after the tax has been

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1. CIC Servs., LLC v. IRS, 936 F.3d 501, 505 (6th Cir. 2019) (Thapar, J., dissenting) (dissenting from the denial of rehearing en banc).

2. *See* MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128–29 (2007) ("[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced.").

3. Abbott Labs. v. Gardner, 387 U.S. 136, 153 (1967).

4. *MedImmune, Inc.*, 549 U.S. at 129.

5. 26 U.S.C. § 7421(a) (2018).

paid, or in deficiency proceedings."[6] But the AIA bears its exceptions. It doesn't apply, for instance, if the prospective litigant lacks an alternative avenue to bring his case.[7]

What happens when the AIA conflicts with the general principle that no challenger should have to risk criminal prosecution to assert his rights? This doesn't happen often. The mine run of tax cases can be litigated through refund or deficiency actions—alternative avenues to judicial review.

Reporting regulations, however, pose a problem.[8] The Department of Treasury promulgates regulations that require taxpayers to provide the Internal Revenue Service (IRS) with information.[9] A violation of such a regulation can lead to civil penalties,[10] which the Internal Revenue Code treats as taxes under the AIA. Because 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.[11] But an intentional violation of a reporting regulation is a federal misdemeanor crime.[12] Prevailing law thus requires a regulated party to risk criminal prosecution to assert his rights.

6. Fla. Bankers Ass'n v. U.S. Dep't of the Treasury, 799 F.3d 1065, 1066 (D.C. Cir. 2015).

7. South Carolina v. Regan, 465 U.S. 367, 374 (1984).

8. This is not to say reporting regulations are the *only* instance in which the problem arises. For example, the IRS has criminally prosecuted tax advisers who promote abusive tax shelters in violation of Treasury regulations that interpret the Internal Revenue Code. Kristin E. Hickman, *Of Lenity, Chevron, and KPMG*, 26 VA. TAX REV. 905, 906 (2007).

9. *E.g.*, 26 C.F.R. §§ 1.6049-4, -8 (2017) (reporting requirements for banking interest paid to certain individuals).

10. The Internal Revenue Code speaks of "additions to the tax" and "assessable penalties." *See* 26 U.S.C. § 6665 (1989). I use the term "civil penalty" as a shorthand reference.

11. *See* CIC Servs., LLC v. IRS, 925 F.3d 247, 249 (6th Cir. 2019); Fla. Bankers Ass'n v. U.S. Dep't of the Treasury, 799 F.3d 1065, 1067 (D.C. Cir. 2015).

12. *E.g.*, 26 U.S.C. § 7203 (2018) ("Any person required under this title . . . or by regulations made under authority thereof to . . . supply any information, who willfully fails to . . . supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution.").

In this Essay, I argue that the AIA's no alternative avenue exception applies when a litigant must risk prison time to seek judicial review.[13] The question under the exception is whether a path to judicial review is functionally available. And the Supreme Court has held in related contexts—including under section 704 of the Administrative Procedure Act (APA)—that a remedy is unavailable if the challenger must risk prosecution.[14] This is a matter of commonsense: a remedy conditioned on prosecution amounts to no remedy at all. I also explain below why no special tax law policy justifies a different result under the AIA.

This is not just a thought experiment. A recent Sixth Circuit case—*CIC Services, LLC v. Internal Revenue Service*—applied the AIA to a reporting regulation and, along the way, rejected a no alternative avenue argument.[15] An unsuccessful petition for rehearing en banc prompted three more opinions.[16] The challengers have now petitioned for certiorari.[17] I offer a few thoughts on why the Supreme Court might expand the no alternative avenue exception rather than grapple with bigger questions about the AIA.

Here is where we are going. Part I provides background about the AIA and the no alternative avenue exception. It focuses in particular on *South Carolina v. Regan*—the case that first recognized the exception—and later developments in the courts of appeal. Part II then argues that the no alternative avenue exception applies if a challenger must risk prosecution to secure judicial review. It makes the affirmative case, responds to counterarguments, and explains why the Supreme Court might address the issue in *CIC Services*.

13. *See* South Carolina v. Regan, 465 U.S. 367, 374, 381 (1984) ("Because Congress did not prescribe an alternative remedy for the plaintiff in this case, the Act does not bar this suit.").

14. U.S. Army Corps of Engineers v. Hawkes Co., 136 S. Ct. 1807, 1813–15 (2016) (administrative proceeding was not an "adequate remedy in a court" because the challenger could potentially incur criminal sanctions and massive civil penalties); Sackett v. EPA, 566 U.S. 120, 127 (2012) (ditto); Ex parte Young, 209 U.S. 123, 163–65 (1908) (challenger lacked an adequate remedy at law when judicial review was contingent on risking criminal prosecution).

15. *CIC Servs., LLC*, 925 F.3d at 249.

16. *See, e.g.*, CIC Servs., LLC v. IRS, 936 F.3d 501, 505 (6th Cir. 2019) (Thapar, J., dissenting) (dissenting from the denial of rehearing en banc).

17. Petition for a Writ of Certiorari, CIC Servs., LLC v. IRS, No. 19-930 (filed Jan. 17, 2020), https://www.supremecourt.gov/DocketPDF/19/19-930/129097/20200117161827281_CIS%20Services%20LLC%20v%20IRS%20Petition.pdf [https://perma.cc/DE9U-EVQA].

I. BACKGROUND

A. SCOPE OF THE AIA

The AIA declares that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person."[18] Congress passed the Act shortly after the Civil War to facilitate the collection of the first federal income tax.[19] Its "manifest purpose," the Supreme Court has said, "is to permit the United States to assess and collect taxes alleged to be due without judicial intervention."[20] To that end, the AIA creates a system of pay first and litigate later.[21] A would-be litigant must file his tax return *before* challenging his tax liability through a refund or deficiency action.[22]

The AIA has often been understood in the broadest possible terms. At times,[23] the Supreme Court has suggested that the Act precludes "judicial review of virtually any case having to do with the federal tax laws."[24] Indeed, the Court has said "a suit to enjoin the assessment or collection *of anyone's* taxes triggers the literal terms" of the AIA.[25] The lower courts interpret this guidance to mean that the Act's "ban against judicial interference is applicable not only to the assessment or collection itself, but is equally applicable to activities which are intended to or may culminate in the assessment or collection of taxes."[26] IRS actions

18. 26 U.S.C. § 7421(a) (2018).

19. Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 VA. L. REV. 1683, 1719–27 (2017) (discussing the Civil War origins of the AIA).

20. Enochs v. Williams Packing & Nav. Co., 370 U.S. 1, 7 (1962).

21. 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.").

22. Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1169 (2008).

23. At other points, the Supreme Court has bristled at the implications of a broad AIA and has created exceptions to avoid the harshest of results. *See* Hickman & Kerska, *supra* note 19, at 1696–98 (collecting Supreme Court cases).

24. *Id.* at 1694.

25. Alexander v. Americans United Inc., 416 U.S. 752, 760 (1974) (emphasis added).

26. United States v. Dema, 544 F.2d 1373, 1376 (7th Cir. 1976); *see also* Dickens v. United States, 671 F.2d 969, 971 (6th Cir. 1982).

often culminate—if only indirectly—in the collection of taxes.[27] A broad AIA thus insulates much of what the IRS does from judicial review.

This strays from the ordinary principles of administrative law. The default presumption, laid down in *Abbott Laboratories v. Gardner*,[28] allows for pre-enforcement review.[29] Before bringing a challenge, a person need neither incur compliance costs nor risk the consequences of disobeying the agency's commands.[30] Not so for Treasury regulations, at least under prevailing law. IRS interpretations of the Internal Revenue Code, which appear in Treasury regulations, often have downstream effects on tax collection.[31] A broad AIA thus exempts such regulations from "the general administrative law" presumption in favor of "pre-enforcement review."[32]

Prevailing wisdom about the AIA was cast into doubt by the Supreme Court's decision in *Direct Marketing Association v. Brohl*.[33] The case involved a challenge to a Colorado statute that requires businesses to inform customers of their tax liability and to provide the Colorado Department of Revenue with certain tax-related information.[34] The Tax Injunction Act (TIA), a similarly worded cousin of the AIA, establishes that "the district courts shall not enjoin, suspend or restrain the assessment, levy or col-

27. *Cf.* Hickman, *A Problem of Remedy*, *supra* note 22, at 1168 ("The lower courts have followed the Supreme Court's lead, rejecting pre-enforcement judicial review of Treasury regulations whether or not they directly related to the individual liabilities of the taxpayers bringing suit."); *see also* Cohen v. United States, 650 F.3d 717, 726 (D.C. Cir. 2011) ("The IRS envisions a world in which no challenge to its actions is ever outside the closed loop of its taxing authority.").

28. *See generally* Abbott Labs. v. Gardner, 387 U.S. 136 (1967) (establishing a presumption in favor of pre-enforcement review).

29. *See* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1290 (2014) ("The presumption took its modern shape in the 1967 decision of *Abbott Laboratories v. Gardner*.").

30. *See Abbott Labs.*, 387 U.S. at 152–53 (describing the dilemma faced by challengers absent pre-enforcement review).

31. *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, 1799–1806 (2007).

32. Fla. Bankers Ass'n v. U.S. Dep't of the Treasury, 799 F.3d 1065, 1066 (D.C. Cir. 2015).

33. *See generally* Direct Mktg. Ass'n v. Brohl, 575 U.S. 1 (2015).

34. *Id.* at 4–6.

lection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."[35] The question in *Direct Marketing* was whether the TIA blocked the challenge to the Colorado statute.[36]

The Supreme Court unanimously answered in the negative.[37] It explained that the TIA applies only if a challenge stops—rather than merely inhibits—the discrete tax administration steps mentioned in the statute: "assessment," "levy," and "collection."[38] The Colorado statute created notice and reporting requirements, which although "intended to facilitate the collection of taxes," are not themselves acts of "assessment," "levy," or "collection."[39] Because the challenge wouldn't stop any of the three acts protected by the TIA, the Supreme Court determined that the TIA was inapplicable.[40]

The interplay between *Direct Marketing* and the AIA has prompted debate in the lower courts.[41] The D.C. Circuit issued a split decision in a case called *Florida Bankers Association v. United States Department of Treasury* over whether the AIA applies to an information reporting regulation enforced by an assessable penalty—a civil penalty that the Internal Revenue Code treats like a tax for AIA purposes.[42] A similar case, *CIC Services, LLC v. IRS*, recently worked its way through the Sixth Circuit.[43] The Sixth Circuit also issued a split decision, again applying the AIA because a successful challenge to the reporting regulation would invalidate (and thus prevent) collection of the assessable penalty for non-compliance.[44] An unsuccessful petition for rehearing en banc gave rise to two concurrences and another dissent.[45]

35. 28 U.S.C. § 1341 (2018).

36. *Direct Mktg. Ass'n*, 575 U.S. at 4.

37. *Id.*

38. *Id.* at 12–14.

39. *Id.* at 10–12.

40. *Id.* at 16.

41. *Direct Marketing* recognized that the "words used in both Acts are generally used in the same way." *Id.* at 8. But *Direct Marketing* also defined "restrain" narrowly, a definition hard to square with old AIA cases, which, as mentioned earlier, treat any lawsuit with tax implications as a restraint. *See* Bob Jones Univ. v. Simon, 416 U.S. 725, 738–39 (1974).

42. Fla. Bankers Ass'n v. U.S. Dep't of the Treasury, 799 F.3d 1065, 1066–67 (D.C. Cir. 2015); *id.* at 1072–84 (Henderson, J., dissenting).

43. *See generally* CIC Servs., LLC v. IRS, 925 F.3d 247, 249 (6th Cir. 2019).

44. *Id.*

45. *See generally* CIC Servs., LLC v. IRS, 936 F.3d 501 (6th Cir. 2019).

B. EXCEPTIONS TO THE AIA

A lawsuit that falls under the AIA may still qualify for one of its many exceptions. Some appear in the statutory text,[46] including those allowing immediate judicial review of deficiency actions ("where the IRS seeks to enforce the tax laws by issuing a notice of deficiency that the taxpayer can then challenge in the U.S. Tax Court"),[47] refund actions ("where the taxpayer pays the disputed taxes and sues the IRS for a refund"),[48] exempt status determinations (where the IRS decides or fails to decide whether an organization qualifies for tax-exempt status),[49] and others still.[50]

Two additional exceptions are judicial creations. The first hails from *Enochs v. Williams Packing & Navigation Company*.[51] It applies when the government could prevail "under no circumstances" and "the taxpayer would suffer irreparable injury if collection were effected."[52] The bar is set high. The Supreme Court has never found the *Williams Packing* exception satisfied, and the courts of appeal have done so rarely.[53]

The second judge-made exception, and focus of this Essay, applies if Congress didn't provide "an alternative avenue for an aggrieved party to litigate its claims on its own behalf."[54] A deeper dive into *South Carolina v. Regan*—the case establishing the exception—and later developments in the courts of appeal is in order.

1. South Carolina v. Regan

The Supreme Court's first and last word on the no alternative avenue exception was *South Carolina v. Regan*.[55] The dispute was between the State of South Carolina and the United

46. *See* 26 U.S.C. § 7421(a) (2018).

47. Hickman & Kerska, *supra* note 19, at 1688.

48. *Id.*

49. *Id.*

50. *See* 26 U.S.C. § 7421(a) (2018) (listing thirteen exceptions).

51. 370 U.S. 1 (1962).

52. *Id.* at 7.

53. Hickman & Kerska, *supra* note 19, at 1693 n.43 ("Although not precisely systematic, a review of roughly 100 federal circuit court decisions applying the *Williams Packing* exception found only three in which the reviewing court claimed jurisdiction to consider the merits.").

54. South Carolina v. Regan, 465 U.S. 367, 381 (1984).

55. The Supreme Court has cited *South Carolina* on three occasions, but has said nothing of substance about the no alternative avenue exception. *See*

States Department of Treasury.[56] South Carolina issued bonds in bearer form—a financial instrument owned by its possessor rather than a registered investor.[57] The Internal Revenue Code historically exempted interest earned by any state-issued bond from an investor's income tax liability.[58] Congress then amended the Code to exclude bearer bonds from exempt treatment.[59] As a result, South Carolina would need to pay its bondholders a higher interest rate to make up for the new tax treatment, or to issue its bonds in registered form.[60]

The State filed an original jurisdiction action in the Supreme Court.[61] The Treasury Department invoked the AIA.[62] And the case seemed to be in the AIA's wheelhouse, at least at first glance. If successful, South Carolina's challenge would stop the government from collecting taxes on interest earned by state-issued bearer bonds—a downstream effect on revenue collection.[63]

The Supreme Court first recognized a new exception to the AIA. Congress passed the AIA to amend a statutory scheme that provided an aggrieved party with an administrative appeal of his tax liability.[64] According to the Supreme Court, Congress had "merely intended to require taxpayers to litigate their claims in a designated proceeding."[65] In other words, the AIA prevented litigants from using a court to skip the administrative process. The Supreme Court thus held that "the Act was intended to apply only when Congress has provided an alternative avenue for an aggrieved party to litigate its claims on its own behalf."[66]

Hibbs v. Winn, 542 U.S. 88, 120 (2004) (Kennedy, J., dissenting); Zadvydas v. Davis, 533 U.S. 678, 692 (2001) (citing Justice O'Connor's concurrence in *South Carolina* for reasons that have nothing to do with the AIA); Franchise Tax Bd. of California v. Alcan Aluminium Ltd., 493 U.S. 331, 339 (1990) (applying form-over-substance analysis to the TIA).

56. *South Carolina*, 465 U.S. at 370.

57. *Id.* at 371–72; *see also* Alan Farley, *Bearer Bonds: From Popular to Prohibited, Investopedia* (July 13, 2019), https://www.investopedia.com/articles/bonds/08/bearer-bond.asp [https://perma.cc/5VLA-LLG2].

58. *South Carolina*, 465 U.S. at 371.

59. *Id.* at 371–72.

60. *Id.*

61. *Id.* at 370.

62. *Id.*

63. *Id.* at 372–73.

64. *Id.* at 373–74.

65. *Id.* at 374.

66. *Id.* at 381.

The Supreme Court next determined that South Carolina's challenge qualified for the newly-recognized exception. South Carolina could not incur a tax and sue for a refund; only its bondholders would incur tax liability.[67] The ordinary administrative process was unavailable.[68] The federal government countered that South Carolina should persuade a bondholder to sue on its behalf.[69] The Supreme Court disagreed: "it is by no means certain that the State would be able to convince a taxpayer to raise its claims" and "reliance on the remedy suggested by the [federal government] would create the risk that the Anti-Injunction Act would entirely deprive the State of any opportunity to obtain review of its claims."[70] Because South Carolina had no avenue for litigating its own rights, the Supreme Court found the AIA inapplicable.[71]

The Supreme Court added one limitation to the no alternative avenue exception. In her concurrence, Justice O'Connor warned that the majority opinion would allow individuals to form taxpayer organizations as a backdoor method of challenging tax laws.[72] After all, such an organization would incur no tax in its own right. The majority disagreed. "Because taxpayers have alternative remedies, it would elevate form over substance to treat such organizations as if they did not possess alternative remedies."[73] "Such organizations could not successfully argue that the Act does not apply because they are without alternative remedies."[74]

2. No Alternative Avenue in the Circuits

The courts of appeal have had few opportunities to develop the no alternative avenue exception. Although the exception appears in over sixty opinions,[75] most feature litigants in a position to pay their taxes and sue for a refund, or to otherwise challenge

67. *Id.* at 379–80.

68. *Id.* at 373.

69. *Id.* at 380.

70. *Id.* at 380–81.

71. *Id.* at 381.

72. *Id.* at 394–95 (O'Connor, J., concurring) ("Non-taxpaying associations of taxpayers, and most other nontaxpayers, will now be allowed to sidestep Congress' policy against judicial resolution of abstract tax controversies.").

73. *Id.* at 381 n.19.

74. *Id.*

75. Westlaw lists 62 cases as citing *South Carolina*.

their liability in a deficiency action—both alternative avenues.[76] In many cases, then, a court need only cite the availability of a refund or deficiency action to do away with the challenger's meritless argument. No analysis required.

The no alternative avenue exception has a weak track record. Out of the sixty odd cases, the courts of appeal have only found the exception applicable three times.[77] The exception appears to have fared a bit better in district court but not much.[78]

The few court of appeals decisions of substance offer four teachings about the no alternative avenue exception.

First, the exception extends beyond the unique facts of *South Carolina v. Regan* to private litigants who lack an alternative avenue. The Fourth and Eleventh Circuits so concluded in cases involving bankrupt companies that wished to challenge "the imposition of Coal Act successor liability on the purchasers

76. *See, e.g.*, Maze v. IRS, 862 F.3d 1087, 1093 (D.C. Cir. 2017) (Henderson, J.) ("Their ability to initiate a refund suit—an adequate alternative avenue—means that the AIA applies with full force to their action." (citation omitted)); Gulf Coast Mar. Supply, Inc. v. United States, 867 F.3d 123, 130 n.1 (D.C. Cir. 2017); Liberty Univ., Inc. v. Geithner, 671 F.3d 391, 414 n.15 (4th Cir. 2011); Ambort v. United States, 392 F.3d 1138, 1140 (10th Cir. 2004); SEC v. Credit Bancorp., Ltd., 297 F.3d 127, 139 (2d Cir. 2002); Woods v. IRS, 3 F.3d 403, 404 (11th Cir. 1993); Laughlin v. IRS, 912 F.2d 197, 199 (8th Cir. 1990); Matter of LaSalle Rolling Mills, Inc., 832 F.2d 390, 393 (7th Cir. 1987); Leves v. IRS, 796 F.2d 1433, 1435 (11th Cir. 1986); *see also* In re Am. Bicycle Ass'n, 895 F.2d 1277, 1281 (9th Cir. 1990) (a challenger sues to stop assessment but doesn't claim the tax is unlawful).

77. *See* In re Walter Energy, Inc., 911 F.3d 1121, 1142 (11th Cir. 2018); Z St. v. Koskinen, 791 F.3d 24, 32 (D.C. Cir. 2015); In re Leckie Smokeless Coal Co., 99 F.3d 573, 584 (4th Cir. 1996). The D.C. Circuit also suggested in *Seven-Sky v. Holder* that certain individuals might lack an alternative avenue to challenge Obamacare's individual-mandate penalty. 661 F.3d 1, 13 (D.C. Cir. 2011), *abrogated on other grounds by* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

78. *See, e.g.*, State of New York v. Mnuchin, No. 18-CV-6427 (JPO), 2019 WL 4805709, at *10 (S.D.N.Y. Sept. 30, 2019) (New York's challenge to a change in the SALT deduction); Texas v. United States, 300 F. Supp. 3d 810, 836 (N.D. Tex. 2018) (Texas' challenge to a Health and Human Services regulation); United Mine Workers of Am. Combined Benefit Fund v. Walter Energy, Inc., No. 2:16-CV-00064-RDP, 2016 WL 470815, at *4 (N.D. Ala. Feb. 8, 2016) (Mine operator challenge to the imposition of Coal Act premiums on prospective successor-in-interest); NorCal Tea Party Patriots v. IRS, No. 1:13-CV-341, 2014 WL 3547369, at *11 (S.D. Ohio July 17, 2014) (claim that the IRS engaged in viewpoint discrimination while making a 503(c)(4) status determination); Nat'l Fed'n of Republican Assemblies v. United States, 148 F. Supp. 2d 1273, 1283 (S.D. Ala. 2001) (a contributor's challenge to campaign finance laws concerning political organizations).

of their assets."[79] The Coal Act requires mine operators—and their successors in interest—to pay premiums to support healthcare and death benefits for miners.[80] A bankrupt operator might struggle to sell its assets unless a prospective purchaser knows whether he will become a successor in interest.[81] The Coal Act premiums count as taxes under the Internal Revenue Code.[82] The AIA thus bars a bankrupt mine operator from challenging the assessment of future premiums against its prospective asset purchaser.

The Fourth and Eleventh Circuits applied the no alternative avenue exception.[83] The mine operators would never incur future premiums and thus could not sue for a refund.[84] Nor did the Coal Act provide a way for them to challenge the successor-in-interest determinations.[85] The mine operators occupied the same position as South Carolina: "they need to know, not whether they can themselves be held liable for particular taxes, but whether those taxes can be assessed against a third party."[86] The Fourth and Eleventh Circuits found the exception applicable with ease. There was no discussion of the fact that the mine operators, unlike South Carolina, were private entities.

Second, the analysis under the no alternative avenue exception focuses on whether the litigant has a forum for challenging his legal injury, not whether a general administrative proceeding is available.

The case here is *Z Street v. Koskinen* from the D.C. Circuit.[87] Z Street, a nonprofit organization, applied for a section 501(c)(3) tax exemption.[88] The IRS allegedly delayed processing the application for political reasons—a violation of Z Street's First

79. *In re Leckie Smokeless Coal Co.*, 99 F.3d at 584; *see also In re Walter Energy, Inc.*, 911 F.3d at 1138–39.

80. *In re Leckie Smokeless Coal Co.*, 99 F.3d at 576–77.

81. *Id.* at 584 ("More specifically, the debtors need to know whether they can sell their assets free and clear of liability for their Coal Act premiums.").

82. *Id.* at 583 ("[W]e must first determine whether Coal Act premiums are taxes. We hold that they are.").

83. *Id.* at 584; *In re Walter Energy, Inc.*, 911 F.3d at 1138–39.

84. *In re Leckie Smokeless Coal Co.*, 99 F.3d at 584.

85. *Id.*

86. *Id.*

87. 791 F.3d 24 (D.C. Cir. 2015).

88. *Id.* at 26.

Amendment rights.[89] Z Street sued.[90] The IRS invoked the AIA because the challenge might interfere with its 501(c)(3) status determination.[91] The Internal Revenue Code provides for judicial review of a status determination if the IRS takes longer than 270 days to issue a decision.[92] The IRS claimed that Z Street must wait out the statutory period before suing.[93]

The D.C. Circuit disagreed. The IRS identified an alternative avenue—waiting out the statutory period—that could lead only to a determination of Z Street's tax-exempt status.[94] But Z Street's asserted injury had nothing to do with its tax-exempt status; it alleged a violation of its First Amendment rights.[95] The D.C. Circuit explained that there was no "statutory procedure to contest the constitutionality . . . of the delay allegedly caused by the IRS's" political discrimination.[96] So Z Street lacked an alternative avenue and its lawsuit could go forward.[97]

Third, the courts of appeal have applied and extended *South Carolina*'s limitation on an organization's ability to use the no alternative avenue exception. The D.C. Circuit has held that a taxpayer advocacy organization can't sue on behalf of its members, who themselves can simply bring a refund or deficiency action.[98] The Sixth and Ninth Circuits have extended the limitation to when an organization-litigant's interests are "inextricably intertwined" with a third party able to sue.[99] In one case, a manufacturer challenged an IRS determination that its retailers were liable for an excise tax;[100] the other involved an Indian tribe that challenged a tax on its members.[101] The Sixth and Ninth Circuits found the no alternative avenue exception inapplicable because the direct subjects of the disputed taxes—

89. *Id.*
90. *Id.* at 27.
91. *Id.*
92. 26 U.S.C. § 7428(b)(2) (2018).
93. *Z St.*, 791 F.3d at 29.
94. *Id.* at 29–32.
95. *Id.*
96. *Id.* at 31–32 (citations omitted).
97. *Id.* at 32.
98. Nat'l Taxpayers Union, Inc. v. United States, 68 F.3d 1428, 1436 (D.C. Cir. 1995).
99. Confederated Tribes & Bands of Yakama Indian Nation v. Alcohol & Tobacco Tax & Trade Bureau, 843 F.3d 810, 815 (9th Cir. 2016); RYO Mach., LLC v. U.S. Dep't of Treasury, 696 F.3d 467, 473 (6th Cir. 2012).
100. *RYO Mach.*, 696 F.3d at 468.
101. *Confederated Tribes*, 843 F.3d at 811.

the retailers and tribe members—had a strong incentive to sue in their own right.[102] This was unlike *South Carolina*, the courts reasoned, since South Carolina's bondholders could buy a different financial instrument and thus lacked a reason to sue on the State's behalf.[103]

Fourth, the cases often observe that the no alternative avenue exception is "very narrow."[104] The observation has no express basis in *South Carolina*. Courts (apparently) infer the narrowness for a couple of reasons: a strong policy in favor of protecting revenue collection animates the AIA and demands "strict construction of any possible exceptions";[105] and the facts of *South Carolina* were "sympathetic, almost unique."[106] Indeed, a few opinions even suggest that constitutional concerns about denying a state access to judicial review underpinned the Supreme Court's decision.[107]

II. NO ALTERNATIVE AVENUE AND CRIMINAL CONSEQUENCES

The *South Carolina* cases have so far failed to wrestle with an important question: Is an alternative avenue available if the challenger must risk criminal prosecution to secure judicial review?

102. *Confederated Tribes*, 843 F.3d at 815 ("This narrow exception is inapplicable here. Most critically, in *Regan*, the state's interest in issuing bonds in the form it chose existed separately from the bondholders' interest in avoiding taxation."); *RYO Mach.*, 696 F.3d at 472 ("Furthermore, the Companies' interests are inextricably intertwined with those of the retailers.").

103. *E.g.*, *Confederated Tribes*, 843 F.3d at 815 (distinguishing *South Carolina* because the challenger's interest was aligned with a third party who could sue).

104. *RYO Mach*, 696 F.3d at 472; *see also* CIC Servs., LLC v. IRS, 925 F.3d 247, 258 (6th Cir. 2019); Foodservice & Lodging Inst., Inc. v. Regan, 809 F.2d 842, 844 (D.C. Cir. 1987) (describing *South Carolina* as creating a "narrow exception to the Anti-Injunction Act").

105. *See, e.g.*, In re American Bicycle Ass'n, 895 F.2d 1277, 1281 (9th Cir.1990) ("Promoting the purpose behind the Act requires a strict construction of any possible exceptions.").

106. Judicial Watch, Inc. v. Rossotti, 317 F.3d 401, 408 n.3 (4th Cir. 2003).

107. *See* Matter of LaSalle Rolling Mills, Inc., 832 F.2d 390, 393 (7th Cir. 1987) ("*South Carolina v. Regan* could be distinguished for a host of reasons, including the fact that the Court construed the statute in light of a claim that barring the suit would be an unconstitutional restriction of the Supreme Court's original jurisdiction.").

The issue comes up in the context of reporting regulations.[108] The Internal Revenue Code requires individuals (and organizations) to provide the IRS with certain information.[109] The IRS can create additional requirements in regulations.[110] A violation of a reporting regulation carries a civil penalty—a penalty treated like a tax under the AIA.[111] And a willful violation—acting "intentionally in violation of a known legal duty"[112]—qualifies as a misdemeanor criminal offense punishable by heady fines and up to a year in prison.[113]

Suppose someone wants to challenge a new reporting regulation—say one involving micro-captive transactions.[114] Under prevailing law, the AIA forecloses review. The challenge, "if successful, would invalidate the reporting requirement and restrain (indeed eliminate) the assessment and collection of the tax paid for" non-compliance.[115] To get judicial review, the prospective litigant must "decline to submit a required report, pay the penalty, and then sue for a refund."[116]

Here's the catch: this arrangement conditions judicial review on committing a federal crime. If the prospective litigant follows the reporting regulation, he will never incur an assessable penalty and therefore can't sue for a refund. He must commit a violation.[117] But intentional non-compliance no doubt qualifies

108. As noted above, I focus on reporting regulations but acknowledge there may be other instances when the Internal Revenue Code puts challengers in a similar predicament.

109. *E.g.*, Manoj Viswanathan, *Tax Compliance in A Decentralizing Economy*, 34 GA. ST. U. L. REV. 283, 284 (2018) (providing examples of Internal Revenue Code information reporting requirements).

110. *See* 26 U.S.C. § 7805(a) (2018) ("Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue."). *See, e.g.*, 26 C.F.R. §§ 1.6049-4, -8 (2017) (reporting requirements for banking interest paid to certain individuals); 26 C.F.R. § 1.6011-4 (2010) (reporting requirements for, among other things, micro-captive transactions).

111. 26 U.S.C. § 7203 (2018).

112. United States v. Burton, 737 F.2d 439, 441 (5th Cir. 1984).

113. 26 U.S.C. § 7203 (2018).

114. This is the situation in CIC Servs., Inc. v. IRS, 925 F.3d 247, 249 (6th Cir. 2019).

115. Fla. Bankers Ass'n v. U.S. Dep't of the Treasury, 799 F.3d 1065, 1067 (D.C. Cir. 2015).

116. *Id.*

117. *Id.*

as a "willful violation" of a reporting requirement—a misdemeanor offense.[118]

A. AFFIRMATIVE ARGUMENT

I return to the opening question: does a person have an alternative avenue if he must risk criminal prosecution to secure judicial review of a Treasury regulation? The answer must be no for three reasons. First, the no alternative avenue exception analyzes functional availability, not technical availability. Second, the Supreme Court has held in closely related contexts that a remedy is not functionally available if the challenger must risk prosecution. Third, no special tax policy requires a different result under the AIA, for a reporting regulation challenge doesn't implicate the Act's core purpose of facilitating revenue collection.

The first issue is whether the no alternative avenue exception analyzes technical or functional availability. If technical availability is relevant, criminal sanctions should not justify applying the exception. After all, judicial review is available in theory to anyone willing to pay the price of admission—potential prison time. If functional availability is relevant, however, criminal sanctions might justify applying the no alternative avenue exception, at least if we think a remedy conditioned on potential prosecution amounts to no remedy at all.

The exception analyzes functional availability. *South Carolina* rooted the exception in the AIA's early history and structure.[119] At the time, a taxpayer could challenge his liability through an IRS administrative proceeding.[120] The AIA was not designed to block judicial review; it was meant to force taxpayers into the administrative process.[121] That is why the Supreme Court said the AIA doesn't apply if Congress "has not provided an alternative remedy."[122] Technical availability is thus the wrong yardstick. If the challenger can't litigate as a functional matter, the AIA has closed off judicial review, rather than served its core function of channeling the dispute into the administrative process.

118. 26 U.S.C. § 7203 (2018).
119. South Carolina v. Regan, 465 U.S. 367, 374 (1984).
120. *Id.*
121. *Id.* at 378.
122. *Id.*

This functional view finds even more support in *South Carolina*. Recall that Justice O'Connor raised concerns that the majority opinion would allow organizations to sue on behalf of their members and evade the AIA.[123] In response, the majority explained that no such gamesmanship was possible.[124] Why? The no alternative avenue exception accounts for "form over substance."[125] It is a functional analysis.

We arrive at the second issue: is a forum functionally unavailable if the challenger must risk prosecution to sue? This issue has come up before in related contexts. And each time the Supreme Court has determined that a litigant lacks an alternative remedy if prison time is the price of judicial review.

Start with the APA. Section 704 limits judicial review to final agency action "for which there is no other adequate remedy in a court."[126] This provision codifies an "exhaustion requirement" and makes clear that "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action."[127] Section 704 and the AIA serve a similar function: force litigants to use available administrative remedies. And the Supreme Court has twice held that a proceeding doesn't qualify as an adequate remedy under the APA if the challenger must violate a regulatory command and risk criminal prosecution to get his day in court.

The most recent case was *United States Army Corps of Engineers v. Hawkes Company, Inc*.[128] It involved a convoluted administrative scheme under which the Army Corps issues jurisdictional determinations about whether a landowner's property is subject to Clean Water Act requirements.[129] Landowners could get judicial review two ways.[130] One was to ignore the Army Corps, violate the Clean Water Act, and challenge the jurisdictional determination in an enforcement proceeding, which could lead to civil damages and criminal prosecution.[131] The other was to apply for a permit through an "arduous, expensive, and long"

123. *See id.* at 394–95 (O'Connor, J., concurring).
124. *See id.* at 381 n.19.
125. *Id.*
126. 5 U.S.C. § 704 (2018).
127. Bowen v. Massachusetts, 487 U.S. 879, 903 (1988).
128. 136 S. Ct. 1807 (2016).
129. *Id.* at 1815.
130. *Id.*
131. *Id.*

process and "then seek judicial review in the event of an unfavorable decision."[132]

The issue in *Hawkes* was whether the two methods were "adequate remedies" under the APA.[133] The Supreme Court thought not: "as we have long held, parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of serious criminal and civil penalties."[134] If the landowners violated Clean Water Act requirements, moreover, "they would expose themselves to civil penalties of up to $37,500 for each day they violated the Act, to say nothing of potential criminal liability."[135] The Supreme Court held that an enforcement proceeding was an inadequate remedy.[136]

Sackett v. Environmental Protection Agency is of a piece.[137] The case asked whether landowners could challenge an EPA compliance order under the APA.[138] The compliance order, like the jurisdictional determination at issue in *Hawkes*, classified property as falling under the Clean Water Act.[139] The Supreme Court rejected out of hand the possibility that violating the order and challenging the EPA's analysis in an enforcement proceeding was an "adequate remedy."[140]

A Supreme Court case interpreting the limits on equitable relief offers similar wisdom. A court can't provide equitable relief unless a challenger lacks an adequate remedy at law.[141] The analysis is flexible[142] and considers whether a legal remedy is as

132. *Id.*

133. *Id.*

134. *Id.* (internal quotation marks omitted).

135. *Id.*

136. *Id.* at 1816.

137. 566 U.S. 120 (2012).

138. *Id.* at 127.

139. *Id.* at 122–25.

140. *Id.* at 127.

141. *E.g.*, Morales v. Trans World Airlines, Inc., 504 U.S. 374, 381 (1992) ("It is a 'basic doctrine of equity jurisprudence that courts of equity should not act when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.'" (ellipses omitted) (quoting O'Shea v. Littleton, 414 U.S. 488, 499 (1974)); Watson v. Sutherland, 72 U.S. 74, 76 (1866) ("The absence of a *plain* and *adequate* remedy at law affords the only test of equity jurisdiction").

142. *E.g.*, *Watson*, 72 U.S. at 76 (stating that adequacy analysis "must depend altogether upon the character of the case, as disclosed in the proceedings").

"plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."[143]

In *Ex parte Young*, the Supreme Court held that an adequate remedy at law was unavailable when the challenger needed to risk prosecution to secure judicial review.[144] The dust-up was over a Minnesota statute setting railroad prices.[145] Railroad company stockholders sued to enjoin the law; the State of Minnesota claimed an adequate remedy was available: commit a violation and defend yourself on the basis that the statute is unlawful.[146]

The Supreme Court saw things differently. It explained that to allow judicial review "only upon the condition that, if unsuccessful," the challenger "must suffer imprisonment and pay fines . . . is, in effect, to close up all approaches to the courts."[147] Of course, the railroad company could pay the civil fine on the challenger's behalf, "but the imprisonment the agent would have to suffer personally."[148] "It would not be wonderful if, under such circumstances, there would not be a crowd of agents offering to disobey the law."[149] "The wonder," the Court explained, "would be that a single agent should be found ready to take the risk."[150] The challengers lacked an adequate remedy.[151]

For my money, *Hawkes*, *Sackett*, and *Ex parte Young* resolve whether a forum is functionally available if the challenger must risk criminal prosecution. It is not. Sure, the inquiries are slightly different. The APA and equity jurisdiction consider "adequacy," which can differ from availability. But the cases didn't address adequacy. They focused on the same fundamental question asked under the no alternative avenue exception: does the litigant have an available forum to litigate his case? If judicial review hinges on potential prosecution, the Supreme Court has said the answer is no.

The no alternative avenue exception—when so understood—keeps the AIA in line with the foundational principle that

143. *E.g.*, Teadtke v. Havranek, 777 N.W.2d 810, 818 (Neb. 2010).
144. 209 U.S. 123, 148 (1908).
145. *Id.* at 127.
146. *Id.* at 129.
147. *Id.* at 148.
148. *Id.* at 164.
149. *Id.*
150. *Id.*
151. *Id.* at 165.

no one should have to choose "between abandoning his rights" and "risking prosecution."[152] This is important because the Supreme Court has expressed an unwillingness, absent justification, "to carve out an approach to administrative review good for tax law only."[153]

We come then to issue three: does a unique tax law policy require the AIA to apply even if judicial review hinges on potential prosecution?[154] The AIA's singular focus is on facilitating the efficient collection of revenue.[155] As an original matter, the Act "reflected 'appropriate concern about the danger that a multitude of spurious suits, or even suits with possible merit, would so interrupt the free flow of revenues as to jeopardize the Nation's fiscal stability.'"[156]

A reporting regulation challenge doesn't implicate the AIA's core purpose.[157] Recall that the "tax" at issue in a reporting regulation case is the assessable penalty for non-compliance.[158] The IRS has no interest in collecting such "taxes." If everyone complies with a reporting regulation, the IRS will not assess any non-compliance penalties and thus will not collect any revenue. And the IRS must prefer compliance with its regulations to non-compliance—otherwise, why promulgate them at all? In an ideal world, then, the IRS collects no revenue from reporting regulation assessable penalties and, accordingly, cannot claim a revenue-raising interest in avoiding judicial review. Because the IRS

152. MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 129 (2007).

153. Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 55 (2011).

154. *Cf. id.* (the Supreme Court was disinclined, absent justification, to give tax law special treatment).

155. Bob Jones Univ. v. Simon, 416 U.S. 725, 736 (1974). I guess the purpose is technically not singular since the AIA also protects "the collector from litigation pending a suit for refund." Enochs v. Williams Packing & Nav. Co., 370 U.S. 1, 8 (1962).

156. Cohen v. United States, 650 F.3d 717, 724 (D.C. Cir. 2011) (ellipses omitted) (quoting Alexander v. Americans United Inc., 416 U.S. 752, 769 (1974) (Blackmun, J., dissenting)).

157. *See* CIC Servs., LLC v. IRS, 925 F.3d 247, 264 (6th Cir. 2019) (Nalbandian, J., dissenting) ("[T]he point of the penalty is to incentivize compliance with the requirement—not to incentivize its own assessment and collection.").

158. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 544 (2012) (assessable penalties are taxes under the AIA).

has no revenue-raising interest, there is no justification for applying the AIA in reporting regulation cases.[159]

In sum: the no alternative avenue exception should apply if a challenger must otherwise risk criminal prosecution to secure judicial review. The AIA should not therefore block pre-enforcement review of reporting regulations.

B. POTENTIAL COUNTERARGUMENTS

The Sixth Circuit concluded otherwise in *CIC Services, LLC v. Internal Revenue Service*—a challenge to a reporting regulation.[160] The challenger there invoked the no alternative avenue exception.[161] It argued "that having to break the law" and "then sue for a refund" is "no remedy at all."[162] The Sixth Circuit disagreed in short order:

> Contrary to Plaintiff's contention however, that is exactly what the AIA is designed to require. The AIA serves two related purposes, to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to disputed sums be determined in a suit for refund. Thus, we hold that Plaintiff's complaint does not fall into the *South Carolina* exception to the AIA.[163]

The Sixth Circuit later upheld the dismissal of the case on AIA grounds.[164] Nowhere did the panel majority confront the reality that "breaking the law" would expose the challenger to criminal prosecution.[165]

159. One might also question whether the AIA remains necessary to protect revenue collection in light of contemporary tax administration. *See generally* Hickman & Kerska, *supra* note 19, at 1734–38 (discussing the historical development of tax assessment and collection procedures and their implications for the AIA).

160. The D.C. Circuit has also applied the AIA when the challenger would need to violate a regulatory requirement and pay a penalty to secure judicial review. Foodservice & Lodging Inst., Inc. v. Regan, 809 F.2d 842, 844–45 (D.C. Cir. 1987). The opinion doesn't grapple with *South Carolina*; it offered only the ukase that the AIA applied because the challenger could violate the law and sue for a refund. *See id.* ("With respect to both the allocation requirement and the ten-employee rule, employers can refuse to comply, pay the statutory fine, and sue for a refund.").

161. *CIC Servs.*, 925 F.3d at 258.

162. *Id.*

163. *Id.* (internal citations omitted).

164. *Id.* at 258–59.

165. *But see id.* at 263 (Nalbandian, J., dissenting) ("[T]he only lawful means a person has of challenging the reporting requirement here is to violate the law and risk financial ruin and criminal prosecution.").

Count me among the unpersuaded. True enough, the AIA generally requires a challenger to bring his tax controversy through a refund or deficiency action. But the Supreme Court recognized the no alternative avenue *exception* to depart from the general rule in limited cases.[166] The whole question in *CIC Services* was whether the case falls under the general rule or its exception. It is no answer to say, as the majority did, that an exception doesn't apply because the general rule exists. An exception is—by definition—a deviation from the rule.

Another counterargument is that potential criminal sanctions do not make a forum unavailable because the government would never actually prosecute.[167] The Supreme Court long ago squashed this form of argumentation.[168] Indeed, the government in *Abbott Labs* claimed "that the threat of criminal sanctions for noncompliance with a judicially untested regulation [was] unrealistic."[169] The Supreme Court refused to "accept this argument as a sufficient answer to petitioners' petition."[170]

Another counterargument still is that the no alternative avenue exception is "very narrow" and not to be extended.[171] This argument might have had heft had the courts of appeal limited the exception to the facts of *South Carolina*. That is not what has happened. Three circuits have applied the exception to private litigants.[172] And two circuits have extended the taxpayer organization limitation to cover other situations in which an organization-challenger may rely on a third party to sue.[173] The case law

166. South Carolina v. Regan, 465 U.S. 367, 378 (1984) ("In sum, the Act's purpose and the circumstances of its enactment indicate that Congress did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy.").

167. *See* Brief for Appellees at 58–59, CIC Services, Inc. v. IRS, 925 F.3d 247 (6th Cir. 2019) (No. 18-5019), 2018 WL 2759684 at *58–59 (beating around the bush about whether the government could prosecute someone for intentionally violating a reporting regulation).

168. *E.g.*, United States v. Stevens, 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

169. 387 U.S. 136, 154 (1967).

170. *Id.*

171. *See supra* notes 104–107.

172. *See* In re Walter Energy, Inc., 911 F.3d 1121, 1142 (11th Cir. 2018) (extending the exception to private litigants); In re Leckie Smokeless Coal Co., 99 F.3d 573, 584 (4th Cir. 1996) (same).

173. *See* Confederated Tribes & Bands of Yakama Indian Nation v. Alcohol & Tobacco Tax & Trade Bureau, 843 F.3d 810, 815 (9th Cir. 2016) (narrowing

has moved on from the facts of *South Carolina*. Additional extensions must be viewed on their own merits.

In all events, my argument has a limiting principle that prevents erosion of the AIA. It covers only those situations when a challenger must risk criminal prosecution to seek judicial review.[174] The distinction between criminal and civil sanctions serves as a bright line. A court would have no trouble distinguishing future efforts to raise new forms of functional unavailability.

C. POTENTIAL VEHICLE

The challengers in *CIC Services* petitioned for certiorari in the Supreme Court.[175] The petition focuses most heavily on the AIA's overall scope.[176] For reasons explained at length elsewhere, I would prefer that the Supreme Court revisit its AIA case law above all else.[177]

the exception); RYO Mach., LLC v. U.S. Dep't of Treasury, 696 F.3d 467, 473 (6th Cir. 2012) (same).

174. Section 7203 of the Internal Revenue Code also criminalizes willful failures to (among other things) pay a tax or file a tax return. 26 U.S.C. § 7203 (2018). A litigant cannot use the no-alternative avenue exception and these provisions to create a backdoor method of challenging his tax liability—that is, refuse to pay a tax and claim the threat of prosecution excuses application of the AIA. Such a litigant has an alternative avenue available to him through a refund or deficiency action, and his voluntary choice to forgo those alternatives does not somehow leave him without a remedy. *See* Maze v. IRS, 862 F.3d 1087, 1093 (D.C. Cir. 2017) (Henderson, J.) ("Their ability to initiate a refund suit—an adequate alternative avenue—means that the AIA applies with full force to their action." (citation omitted)).

175. Petition for a Writ of Certiorari, CIC Servs., LLC v. IRS, No. 19-930 (filed Jan. 17, 2020), https://www.supremecourt.gov/DocketPDF/19/19-930/129097/20200117161827281_CIS%20Services%20LLC%20v%20IRS%20Petition.pdf [https://perma.cc/DE9U-EVQA].

176. *Id.*

177. *See generally* Hickman & Kerska, *supra* note 19 (explaining why the AIA's original meaning, the AIA's history, general principles of administrative review, and *Direct Marketing* all weigh in favor of narrower interpretation).

But the Supreme Court may not be ready to do so. Its AIA precedent is inscrutable[178]—even worse now with *Direct Marketing* in the mix.[179] And no clear circuit split needs cleaning up: the Sixth and D.C. Circuits agree that a reporting regulation enforced with an assessable penalty falls under the AIA.[180] Because the problem is complex, the Supreme Court may well wait for a few more circuits to weigh in.

The no alternative avenue exception offers a potential compromise: fix part of the problem now and leave the rest for later. The status quo makes potential criminal prosecution the price of challenging a reporting regulation. This defies ordinary principles of judicial review and basic notions of fairness. It insulates Treasury regulations from judicial scrutiny with no appreciable benefits for revenue collection.[181] The Supreme Court could solve the problem with relative ease and without tinkering with the AIA as a whole. It need only issue a narrow decision on no alternative avenue grounds.

Not for nothing, the criminal prosecution problem is unlikely to be solved without Supreme Court intervention. Dicta about the no alternative avenue exception's narrowness has

178. *See* Hickman & Kerska, *supra* note 19, at 1691–704 (compiling Supreme Court AIA cases). *Cf.* CIC Servs., LLC v. IRS, 936 F.3d 501, 505 (6th Cir. 2019) (Sutton, J., concurring) (explaining that addressing a reporting regulation challenge is "not easy because none of the Court's precedents is precisely on point and because language from these one-off decisions leans in different directions").

179. *See* CIC Servs., LLC v. IRS, 925 F.3d 247, 261 n.3 (6th Cir. 2019) (Nalbandian, J., dissenting) ("[U]nsurprisingly, commentators have recognized the tension between *Florida Bankers* and *Direct Marketing*.").

180. The challengers in *CIC Services* assert that the Sixth and D.C. Circuits created a split with the Seventh and Tenth Circuits, which have held that challenges to Obamacare's individual and contraceptive mandates could go forward, even though a violation of those regulatory commands carries civil penalties. Petition for Rehearing En Banc at 12–15, CIC Services, LLC v. IRS, 936 F.3d 501 (6th Cir. 2019) (No. 18-5019) (6th Cir. July 8, 2019). The issue is complicated. The Supreme Court held in *NFIB v. Sebelius* that the civil penalty for violating the individual mandate is a "penalty" under the AIA and so the AIA, which concerns only taxes, doesn't apply. 567 U.S. 519, 544–46 (2012). This is unlike other penalties, which the Internal Revenue Code treats as taxes under the AIA. *Id.* If the Seventh and Tenth Circuit opinions analyze penalties that count as penalties under the AIA, the Obamacare mandates, there's no split because the Sixth and D.C. Circuit opinions analyzed penalties that count as taxes. I take no position on the issue one way or the other.

181. This problem is all the worse given Treasury's well-documented record of thumbing its nose at APA requirements. *See, e.g.*, Hickman, *supra* note 31.

spread through the pages of the federal reporters.[182] As a result, lower courts are unlikely on their own to recognize a further extension, no matter how warranted the extension might be. The Sixth Circuit's *CIC Services* opinion—issued over a strong dissent—is case in point.[183] Similar arguments elsewhere will likely meet a similar fate.

CONCLUSION

The Supreme Court has said that no litigant should have to choose between asserting his rights and risking prosecution. That is precisely what the AIA now requires for those who wish to challenge reporting regulations. The result is unnecessary and unwise. It is unnecessary because the no alternative avenue exception—properly understood—applies when the price of judicial review is potential prison time. It is unwise because reporting regulation challenges, and others like them, do not implicate the AIA's core purpose—the efficient collection of tax revenue. *CIC Services* offers the perfect opportunity to end this unjustified "approach to administrative review good for tax law only."[184]

182. *See supra* notes 104–107.

183. *Compare* CIC Servs., 925 F.3d at 258–59 (no mention of criminal sanctions), *with id.* at 263 (Nalbandian, J., dissenting) ("[T]he only lawful means a person has of challenging the reporting requirement here is to violate the law and risk financial ruin and criminal prosecution.").

184. Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 55 (2011).