tax notes
Volume 149, Number 12 ■ December 21, 2015

D.C. Circuit in *Florida Bankers* Misapplies Anti-Injunction Act

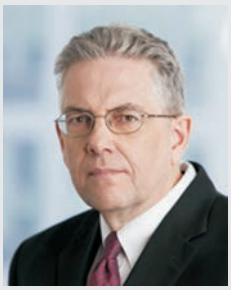
By Patrick J. Smith

Reprinted from *Tax Notes*, December 21, 2015, p. 1493

taxanalysts®

D.C. Circuit in *Florida Bankers* Misapplies Anti-Injunction Act

By Patrick J. Smith


Patrick J. Smith

Patrick J. Smith is a partner at Ivins, Phillips & Barker Chtd. in Washington.

In this report, Smith explains why a divided panel of the D.C. Circuit was incorrect in holding that the Anti-Injunction Act (AIA) bars a challenge to the IRS regulations at issue in *Florida Bankers*. He argues that the majority's decision is at odds with the Supreme Court's narrow interpretation of the analogous Tax Injunction Act in *Direct Marketing*. The most significant consequence of applying the reading of the AIA that is suggested by the *Direct Marketing* decision is that taxpayers would be able to bring direct challenges to the validity of tax regulations in federal district court under the judicial review provisions of the Administrative Procedure Act without having to engage in transactions that would be subject to those regulations.

Table of Contents

I. Introduction

A split panel of the D.C. Circuit recently refused to apply a narrow interpretation of the Anti-Injunction Act (AIA) in *Florida Bankers Association v. Treasury*,[1] contrary to the Supreme Court's narrow interpretation of the similarly worded Tax Injunction Act (TIA)[2] in *Direct Marketing Association v. Brohl*[3] earlier this year. The court of appeals on November 5 denied the plaintiffs' request for a rehearing *en banc*, setting the stage for the plaintiffs to file a petition for certiorari. This report explains how the majority opinion in *Florida Bankers* is inconsistent with *Direct Marketing*, as well as D.C. Circuit precedent on the AIA.

Codified at section 7421(a), the AIA imposes limitations on the types of lawsuits regarding federal taxes that may be brought in U.S. district courts. *Direct Marketing* involved the closely related TIA, which imposes similar limits on suits in U.S. district court regarding state taxes. The Supreme Court's unanimous opinion in that case strongly suggests that the AIA should be read as allowing taxpayers to bring direct challenges to tax regulations in federal district court under the Administrative Procedure Act (APA)[4] without first having the regulations applied to them, as required under the traditional interpretation of the AIA.[5] This would represent a substantial change in tax litigation.

However, the majority in *Florida Bankers* applied the traditional approach and held that the AIA barred a suit challenging IRS regulations. The plaintiffs petitioned for a rehearing *en banc*, which was denied. This report explains why the majority opinion in *Florida Bankers* was incorrect and why the Supreme Court should grant certiorari to clarify the implications of *Direct Marketing* for the AIA.[6]

---

[1]799 F.3d 1065 (D.C. Cir. 2015), *vacating* 19 F. Supp.3d 111 (D.D.C. 2014).

[2]28 U.S.C. section 1341.

[3]135 S. Ct. 1124 (2015).

[4]5 U.S.C. sections 701-706.

[5]*See* Patrick J. Smith, "Challenges to Tax Regulations: The APA and the Anti-Injunction Act," *Tax Notes*, May 25, 2015, p. 915.

[6]*See* Smith, "D.C. Circuit Majority Opinion in *Florida Bankers* Not Consistent With Supreme Court's *Direct Marketing* Decision (Part 1)," Procedurally Taxing blog (Aug. 17, 2015); and Smith, "D.C. Circuit Majority Opinion in *Florida Bankers* Not Consistent

(Footnote continued on next page.)

II. Challenges to Tax Regulations

There are traditionally two ways to litigate tax issues, including challenges to the validity of tax regulations. The first is for the taxpayer to pay the tax concerning an issue in dispute after receiving a deficiency notice from the IRS and then to sue for a refund of that tax in U.S. district court or the Court of Federal Claims. The second route, which does not require prepayment of the tax, is for the taxpayer to petition the Tax Court for a redetermination of the deficiency.

Outside the tax world, the standard way to challenge the validity of federal regulations is to file suit in district court immediately after they are issued, without waiting for the agency to apply them to the plaintiff. Such direct, pre-enforcement challenges are brought purely on the basis that the regulations have been issued and that they will harm the plaintiff. They are authorized by the judicial review provisions of the APA.[7]

However, the general belief has been that pre-enforcement challenges to the validity of tax regulations are barred by the AIA. 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.'' That provision has been the basis for the conventional thinking that tax regulations can be challenged only in refund suits and deficiency actions, not direct APA challenges.

The traditional route requires that the regulations first be applied to the taxpayer for a specific transaction (or set of transactions) for a particular tax year, as reflected in a deficiency notice issued by the IRS. The taxpayer would then challenge the regulations through either a Tax Court deficiency proceeding or a refund action brought in district court or the claims court.

That traditional route has at least two major disadvantages compared with direct APA challenges. First, judicial resolution of the regulations' validity comes much later than in a direct challenge. Second, the taxpayer must engage in at least one transaction to which the challenged regulations would apply. If the challenge fails, the taxpayer is burdened with the adverse tax consequences of that transaction. A direct APA challenge would not pose that risk, because the taxpayer would not be required to engage in a targeted transaction.

III. *Direct Marketing* and *Florida Bankers*

As noted above, 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.'' In *Bob Jones University v. Simon*[8] and *Alexander v. ''Americans United'' Inc.*,[9] companion cases decided the same day in 1974, the Supreme Court interpreted that provision in a way that has generally been considered to broadly apply the AIA. Courts have read those two decisions as meaning that any suit in district court concerning federal tax issues, other than a tax refund action, is barred by the AIA if success by the plaintiff could in any way adversely affect the amount of tax revenue received by the federal government.[10] That broad application has been the basis for the traditional view that direct district court challenges to tax regulations under the APA are almost always barred by the AIA.

Direct Marketing dealt with the TIA, which prohibits district courts from enjoining, suspending, or restraining the assessment, levy, or collection of state tax. The Supreme Court interpreted that provision narrowly, limiting its application.

The Court's analysis relied on the meanings of various terms in the tax code. In a previous report, I argued that because those terms also appear in the substantially similar AIA provision, the Court's narrow interpretation of the TIA in *Direct Marketing* should mean that the AIA will now be given a

---

With Supreme Court's *Direct Marketing* Decision (Part 2),'' Procedurally Taxing blog (Aug. 18, 2015).

[7]In *Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-141, 148-156 (1967), the Supreme Court made clear that pre-enforcement challenges to agency regulations are generally authorized under those provisions.

[8]416 U.S. 725 (1974).

[9]416 U.S. 752 (1974).

[10]*See, e.g., United States v. Dema*, 544 F.2d 1373, 1376 (7th Cir. 1976) (''This 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.''); *Blech v. United States*, 595 F.2d 462, 466 (9th Cir. 1979) (quoting that language from *Dema*); *Kemlon Products & Development Co. v. United States*, 638 F.2d 1315, 1320 (5th Cir. 1981) (same), *modified on other grounds*, 646 F.2d 223 (5th Cir. 1981); *Dickens v. United States*, 671 F.2d 969, 971 (6th Cir. 1982) (same); and *Lewis v. Sandler*, 498 F.2d 395, 399 (4th Cir. 1974) (''We also conclude that the Anti-Injunction Act is broad enough to prohibit enjoining the local officials from furnishing information to the Service about persons suspected of selling narcotics. Since the information is used by the Service for assessment and levy, an injunction drying up the source of the information would unwarrantedly impede collection of the revenue.''). However, all these cases involved tax liabilities of specific individuals based on their conduct before the suits were filed. *See Seven-Sky v. Holder*, 661 F.3d 1, 10 (D.C. Cir. 2011) (''To be sure, it has been held that suits that do not directly seek to restrain tax assessment or collection are nonetheless barred if they are directed at the means by which the IRS achieves those ends. . . . But those cases merely stand for the proposition that the Act bars suits that interfere with ancillary functions to tax collection.'').

narrow interpretation, which would represent a significant shift from *Bob Jones* and "*Americans United*."[11]

As noted, a narrow reading of the AIA would allow taxpayers to directly challenge the validity of IRS regulations in district court under the APA and thus avoid the disadvantages of the traditional route. However, the D.C. Circuit's panel majority in *Florida Bankers* refused to narrowly interpret the AIA, despite *Direct Marketing*. The majority instead applied the broad interpretation that has generally been thought to be required under *Bob Jones* and "*Americans United*."

Florida Bankers, a suit by two bankers associations, involves a challenge to the validity of regulations requiring U.S. banks to report interest earned on accounts held by nonresident aliens. Although the interest is not subject to U.S. taxation, the IRS and Treasury contend that the reporting requirement is critical to the United States' compliance with information exchange agreements with countries that provide information on offshore bank accounts held by U.S. citizens.

The panel majority, in an opinion by Judge Brett M. Kavanaugh, held that the AIA bars the suit. The majority agreed with the government that the penalty to which the banks would be subject for violating the reporting requirement is treated as a tax for AIA purposes. It thus concluded that the AIA "applies because the suit, if successful, would invalidate the regulation and thereby directly prevent collection of the tax."

For the reasons detailed in Judge Karen LeCraft Henderson's dissenting opinion, the connection between invalidation of the regulation and collection of the penalty is insufficient to trigger application of the AIA. As further explained below, the majority's conclusion is inconsistent with several prior D.C. Circuit decisions, as well as the *Direct Marketing* Court's interpretation of statutory terms that appear in both the TIA and the AIA.

Even if the *Florida Bankers* majority was correct that the penalty for violating the reporting requirement is properly treated as a tax for AIA purposes, the AIA does not bar this suit under the Supreme Court's reasoning in *Direct Marketing*. That is because, as the district court in *Florida Bankers* noted, no member of the plaintiff-bankers associations has either violated the challenged reporting requirement or threatened to do so.[12] And as discussed in Henderson's dissent, the severe consequences of a violation make it unlikely that any bank will violate the requirement in the future.

When no plaintiff or member of an organizational plaintiff has engaged in the conduct that would trigger the penalty at issue, the AIA does not bar a suit challenging the validity of the regulation whose violation would result in imposition of the penalty. Such a suit does not have the purpose of "restraining" the "assessment" or "collection" of the tax within the meanings given to those words in *Direct Marketing*.

A suit challenging the validity of the regulation at issue in *Florida Bankers* could not have that purpose unless, while the suit is pending, the penalty could be imposed on the challengers without any further conduct by them. Thus, the suit could have the purpose of restraining the assessment or collection of the penalty only if the challengers had violated the reporting requirement when they brought the suit or while the challenge was pending.

Although *Direct Marketing* involved a different statute, the reasoning and the result in that case are relevant in interpreting the AIA for several reasons. First is the close historical relationship between the AIA and the TIA. Second is the fact that many of the same operative terms appear in both provisions. Third, because of the first two considerations, the Supreme Court in *Direct Marketing* interpreted the central operative terms in the TIA by reference to the narrow, technical meanings they have in the tax code.

Therefore, the meanings the Court gave those operative terms should be equally applicable in interpreting the AIA. Under the Court's reading, assessment and collection are precisely defined phases in the overall revenue-raising process. Assessment and collection of a penalty cannot occur unless the plaintiffs, either before the challenge or during its pendency, have engaged in the conduct that would trigger the penalty — namely, violation of the regulation.

The situation in *Florida Bankers* is somewhat different from the more typical scenario in which taxpayers challenge the validity of tax regulations. In the typical scenario, the regulations concern a substantive provision of the tax code rather than an information reporting requirement, and they impose tax consequences on a taxpayer who engages in a particular transaction that are more adverse than the challenger believes is warranted under the statute to which the regulations relate.

As noted, the traditional methods for challenging the validity of a regulation in this more typical situation have disadvantages over a direct APA challenge. But those disadvantages are not usually significant enough to render the traditional routes untenable. In most cases, risking the adverse tax consequences of engaging in a transaction targeted

[11]Smith, "Challenges to Tax Regulations," *supra* note 5.
[12]*Florida Bankers*, 19 F. Supp.2d at 121.

by the challenged regulations is not an overwhelming burden for the plaintiff-taxpayer, although clearly the taxpayer would prefer to avoid those consequences.

Yet the traditional route would not be a tenable option for any bank challenging the regulation at issue in *Florida Bankers*. Instead of imposing adverse substantive tax consequences on particular types of transactions, the regulation requires the reporting of specific information that does not directly relate to any taxpayer's U.S. tax liability. However, the reporting requirement is subject to a noncompliance penalty that according to the government, is treated as a tax for AIA purposes.

To challenge the regulation using the traditional route, a bank would need to violate the reporting requirement and have the penalty imposed by the IRS. The bank would then need to pay the penalty and sue for a refund. As Henderson noted in her dissent, such a willful violation of the reporting requirement is a misdemeanor and is subject to criminal sanctions under the applicable code provisions. Moreover, any bank that violated the reporting requirement would risk having its FDIC insurance on depositors' accounts terminated.

Thus, the situation in *Florida Bankers* presents a particularly compelling case for applying a narrow reading of the AIA. Because this is distinguishable from the more typical scenario, a Supreme Court victory for the plaintiffs in *Florida Bankers* on the AIA issue would not necessarily remove all preenforcement challenges to tax regulations from the reach of the AIA. It would, however, be a necessary and helpful step toward that goal.

IV. *Direct Marketing* Applies to the AIA

Direct Marketing had been brought in U.S. district court to enjoin notice and reporting requirements imposed by Colorado on out-of-state Internet retailers for goods sold to Colorado residents. The purpose of the notice and reporting requirements was to assist the state in collecting use tax on such sales.

At issue was whether the suit was barred by the TIA, which requires that some suits concerning state taxes be pursued in state courts rather than federal courts. The Supreme Court held that the TIA did not bar the district court from hearing the case.

The TIA's limitations on cases concerning state taxes are very similar to those imposed by the AIA on actions concerning federal taxes. The TIA provides that "the district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law."[13] The AIA provides that with several listed exceptions, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person."

In interpreting the TIA, the Supreme Court in *Direct Marketing* relied on the textual similarities between the two statutes. It also relied on their historical relationship, noting that the AIA (originally enacted in 1867) was the model for the TIA (enacted in 1937):

> In defining the terms of the TIA, we have looked to federal tax law as a guide. Although the TIA does not concern federal taxes, it was modeled on the Anti-Injunction Act (AIA), which does.[14]

The Court focused on the close relationship between the TIA and the AIA to give a narrow, technical reading to the terms "assessment," "collection," and "restrain," all of which appear in both statutes:

> We assume that words used in both Acts are generally used in the same way, and we discern the meaning of the terms in the AIA by reference to the broader Tax Code.[15]

The Court relied on the fact that in the tax code, where the AIA is located, the terms "assessment," "levy," and "collection" have narrow, precise, and technical meanings:

> These three terms refer to discrete phases of the taxation process that do not include informational notices or private reports of information relevant to tax liability.[16]

Although the TIA includes the term "levy" and the AIA does not, that slight difference should not significantly alter the interpretation of the terms that appear in both provisions. As the Court noted:

> To begin, the Federal Tax Code has long treated information gathering as a phase of tax administration procedure that occurs before assessment, levy, or collection. This step includes private reporting of information used to determine tax liability, including reports by third parties who do not owe the tax.
>
> "Assessment" . . . refers to the official recording of a taxpayer's liability, which occurs after information relevant to the calculation of that liability is reported to the taxing authority. . . .
>
> Finally, "collection" is the act of obtaining payment of taxes due.[17]

[13]28 U.S.C. section 1341.

[14]*Direct Marketing*, 135 S. Ct. at 1129.
[15]*Id.*
[16]*Id.*
[17]*Id.* at 1129-1130.

Based on the meanings of assessment, levy, and collection in the tax code, the Court held that ''these terms do not encompass Colorado's enforcement of its notice and reporting requirements.''[18] The Court noted that although Colorado did not contend that the term ''levy'' was applicable, it argued that assessment and collection were implicated by the notice and reporting requirements at issue. The Court disagreed, finding that ''the notice and reporting requirements precede the steps of 'assessment' and 'collection.'''[19] The Court explained:

> Enforcement of the notice and reporting requirements may improve Colorado's ability to assess and ultimately collect its sales and use taxes from consumers, but the TIA is not keyed to all activities that may improve a State's ability to assess and collect taxes. . . . The TIA is keyed to the acts of assessment, levy, and collection themselves, and enforcement of the notice and reporting requirements is none of these.[20]

The Tenth Circuit, in holding that the TIA barred the suit, had relied on a broad meaning of the word ''restrain,'' which appears in both the TIA and the AIA. As the Supreme Court observed, it had interpreted the term to mean any action that would adversely affect the receipt of tax revenue:

> Specifically, the Court of Appeals concluded that the TIA bars any suit that would ''limit, restrict, or hold back'' the assessment, levy, or collection of state taxes. Because the notice and reporting requirements are intended to facilitate collection of taxes, the Court of Appeals reasoned that the relief Direct Marketing Association sought and received would ''limit, restrict, or hold back'' the Department [of Revenue]'s collection efforts.[21]

The Supreme Court's reasoning in rejecting that interpretation applies equally to the AIA:

> As used in the TIA, ''restrain'' acts on a carefully selected list of technical terms — ''assessment, levy, collection'' — not on an all-encompassing term, like ''taxation.'' To give ''restrain'' the broad meaning selected by the Court of Appeals would be to defeat the precision of that list, as virtually any court action related to any phase of taxation might be said to ''hold back collection.''
>
> Applying 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.[22]

Because the Supreme Court interpreted terms that appear in both the TIA and the AIA by reference to their precise meanings in the tax code, where the AIA is located, those meanings should be even more controlling in the AIA context than in the TIA context. Based on *Direct Marketing*, the mere fact that a suit in U.S. district court, if successful, could adversely affect the amount of tax revenue received by the government is not enough to trigger the AIA.

The relationship between the suit and the effect on the assessment or collection of a tax must be much more direct for the AIA to apply. At a minimum, the suit must concern the assessment or collection of a tax that could be assessed when the suit is pending, based on the factual situation at that time.

In *Direct Marketing*, the conduct that gave rise to the use tax that the Colorado notice and reporting requirements were intended to help collect — the purchases of taxable products by Colorado residents from out-of-state retailers that were members of the plaintiff-association — had already occurred when the suit was brought. However, that fact alone was insufficient to trigger the TIA. The Court held that because information reporting is a step in the overall revenue-raising activity that precedes the technically defined steps of assessment and collection, a suit to enjoin the enforcement of the notice and reporting requirements was not barred by the TIA.

When, as in *Florida Bankers*, the only possible AIA-implicating impact of a suit is a penalty for violating a reporting requirement imposed by the challenged regulation and the plaintiffs have not engaged in conduct that would trigger that penalty, the suit does not concern the ''assessment'' or ''collection'' of a tax under the meanings given to those terms by *Direct Marketing*. The factual situation necessary for imposition of the penalty does not exist while the suit is pending.

V. Justice Ginsburg's Concurring Opinion

Based on the Supreme Court's reasoning in *Direct Marketing*, *Florida Bankers* is not barred by the AIA. Justice Ruth Bader Ginsburg filed a concurring opinion in *Direct Marketing* that made two observations about the Court's opinion in the case. First, she pointed out that a different TIA issue would be raised by a suit to enjoin tax reporting obligations

[18] *Id.* at 1131.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 1132.
[22] *Id.* at 1132-1133.

brought by a party that itself would be liable for either paying or collecting the tax to which they related:

> *First*, as the Court has observed, Congress designed the Tax Injunction Act not "to prevent federal-court interference with all aspects of state tax administration," *Hibbs v. Winn*, 542 U.S. 88, 105 (2004) (internal quotation marks omitted), but more modestly to stop litigants from using federal courts to circumvent States' "pay without delay, then sue for a refund" regimes. See *id.*, at 104-105 ("[I]n enacting the [Tax Injunction Act], Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority."). This suit does not implicate that congressional objective. The Direct Marketing Association is not challenging its own or anyone else's tax liability or tax collection responsibilities. And the claim is not one likely to be pursued in a state refund action. A different question would be posed, however, by a suit to enjoin reporting obligations imposed on a taxpayer or tax collector, *e.g.*, an employer or an in-state retailer, [or] litigation in lieu of a direct challenge to an "assessment," "levy," or "collection." The Court does not reach today the question whether the claims in such a suit, *i.e.*, claims suitable for a refund action, are barred by the Tax Injunction Act. On that understanding, I join the Court's opinion.[23]

This portion of Ginsburg's concurring opinion was joined by Justices Stephen G. Breyer and Sonia Sotomayor. The second observation in Ginsburg's concurring opinion was simply that the Court's prior decision in *Hibbs v. Winn*[24] is in no way affected by the *Direct Marketing* decision.

Florida Bankers does not present the situation Ginsburg described in the quoted passage. She noted that the Court's opinion in *Hibbs* had made clear that the purpose of the TIA is "to stop litigants from using federal courts to circumvent States' 'pay without delay, then sue for a refund' regimes." As discussed below, the purpose of the AIA has been described in similar terms. That policy rationale applies only if, when the challenge is brought, the plaintiff has a tax liability that would be affected by it. This is clearly supported by the language from *Hibbs* quoted by Ginsburg, stating that the TIA is directed against "taxpayers who *sought to avoid paying their tax bill* by pursuing a challenge route other than the one specified by the taxing authority" (emphasis added).

The only taxpayers that can accurately be described as seeking to avoid paying their tax bill are those that actually have a tax bill to avoid — namely, those that have engaged in conduct that would result in imposition of a tax liability. The members of the plaintiff-associations in *Florida Bankers* do not have a tax bill to avoid. Those banks have not violated the challenged reporting requirement and thus have not incurred liability for the resulting penalty, which would be the only possible basis for invoking the AIA in that case.

Ginsburg also observed that the refund suit policy rationale behind the TIA was not implicated in the Direct Marketing Association's challenge because the out-of-state retailer-members that make sales to Colorado residents are not themselves subject to paying or collecting the tax that Colorado was attempting to collect through the challenged notice and reporting requirements. She noted that a different issue would be presented in a suit challenging information reporting requirements brought by a party that itself is subject to either paying or collecting the tax to which they relate.

Again, that is not the situation in *Florida Bankers*. Ginsburg clearly had in mind the type of information reporting requirement an employer is subject to for wages paid to employees — that is, an information reporting requirement accompanied by a requirement to withhold tax on the wages to which the reporting requirement relates. She was referring to the situation in which a party bringing a challenge to an information reporting requirement engages in an ongoing course of conduct in the ordinary course of business, such as employing workers, and that conduct results in an ongoing responsibility to withhold taxes on wages paid to the employees. In that case, the conduct giving rise to the liability to withhold tax has necessarily already occurred when the challenge is brought, although of course, that conduct would also necessarily continue in the future.

The relationship between the challenge in *Florida Bankers* and the penalty, the only possible basis for invoking the AIA, is very different from the scenario to which Ginsburg referred. The penalty for violating the information reporting requirement challenged in *Florida Bankers* is not a tax imposed on the ordinary course of business of the banks that are members of the plaintiff-associations. The banks can avoid liability for the penalty by complying with the information reporting requirement, which is what they have done in light of the severe adverse consequences of noncompliance. The information reporting requirement relates not to the

[23]*Id.* at 1136 (Ginsburg, J., concurring) (emphasis in original).
[24]542 U.S. 88 (2004).

penalty itself, but rather to interest income that is not subject to tax in the United States and that therefore raises no issue under the AIA. Thus, the concerns raised in this portion of Ginsburg's concurring opinion are clearly not implicated in *Florida Bankers*.

VI. Prior Supreme Court Decisions

The panel majority in *Florida Bankers* relied on *Bob Jones* and "*Americans United*" as the bases for its holding that the AIA applies broadly to bar any suit involving federal taxes, other than a tax refund suit, when success by the plaintiff could adversely affect the amount of tax revenue received by the federal government, no matter how indirect the connection between the suit and the government's receipt of tax revenue. The government has argued that applying the reasoning from *Direct Marketing* to interpret the AIA more narrowly would require overruling those 1974 Supreme Court decisions. However, as Henderson argued in her *Florida Bankers* dissent, *Bob Jones* and "*Americans United*" are readily distinguishable from the situation in *Florida Bankers*.

A. *Williams Packing*

Any discussion of *Bob Jones* and "*Americans United*" requires first looking at *Enochs v. Williams Packing & Navigation Co. Inc.*,[25] a 1962 Supreme Court decision on which they both relied. The Court in *Williams Packing* described the purpose of the AIA in the following terms:

> The manifest purpose of section 7421(a) is 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 the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue.[26]

The taxes at issue in *Williams Packing* were allegedly past-due Social Security and unemployment taxes.[27]

If the purpose of the AIA is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, that purpose clearly does not extend to a situation in which no tax could possibly be alleged to be due at the time of the challenge. As noted, no member of the plaintiff-associations in *Florida Bankers* has violated the challenged reporting requirement. Thus, no tax could be alleged to be due because of the penalty for violating the challenged regulation. Clearly, the manifest purpose of the AIA is inapplicable under the facts of that case.

The *Williams Packing* opinion also states:

> Thus, in general, the Act prohibits suits for injunctions barring the collection of federal taxes when the collecting officers have made the assessment and claim that it is valid.[28]

Once again, the Court's description of the circumstances in which the AIA applies clearly does not encompass a situation like that in *Florida Bankers* in which no tax has yet been assessed, and could not possibly be assessed, because the plaintiff (or its members) has not engaged in the conduct that would result in liability for the tax. In contrast, the conduct giving rise to the liability for allegedly past-due Social Security and employment taxes in *Williams Packing* had already taken place. Thus, nothing in *Williams Packing* supports applying the AIA in a case such as *Florida Bankers* when the conduct that would result in liability for the AIA-implicating tax or penalty has not occurred before or during the pendency of the challenge to the IRS action.

For the same reason, *Bob Jones* and "*Americans United*" do not support extending the AIA to a situation like that in *Florida Bankers*. In those 1974 cases, as in *Williams Packing*, the conduct giving rise to the tax liability that was the basis for applying the AIA had already occurred when they were pending.

B. *Bob Jones*

The taxpayer in *Bob Jones* sought an injunction to prevent the IRS from revoking its tax-exempt status under section 501(c)(3). The Supreme Court held that the suit was barred by the AIA. It based that holding on three effects the suit would have on the assessment or collection of taxes if it were allowed to proceed and the plaintiff succeeded on the merits: (1) the suit would affect the organization's liability to pay income tax; (2) the suit would affect the organization's liability to pay FICA and FUTA taxes on wages paid to its employees; and (3) the suit would affect the deductibility of contributions to the organization and thus the income tax liability of donors. The Court stated:

> Because an injunction preventing the Service from withdrawing a section 501(c)(3) ruling letter would necessarily preclude the collection of FICA, FUTA, and possibly income taxes from the affected organization, as well as the

[25]370 U.S. 1 (1962).
[26]*Id.* at 7 (emphasis added).
[27]*Id.* at 2.
[28]*Id.* at 8.

> denial of section 170(c)(2) charitable deductions to donors to the organization, a suit seeking such relief falls squarely within the literal scope of the Act.[29]

The district court decision was in 1971,[30] and the Supreme Court decision was in 1974. In response to the favorable Supreme Court decision, the IRS revoked the taxpayer's tax exemption in 1976, with retroactive effect to 1970.[31] Thus, the revocation applied retroactively to actual tax liabilities of both the organization and its donors for a substantial period while the lawsuit was pending. As a result, the conduct by both the organization and its donors giving rise to a tax liability that would be affected by the substantive outcome of the case had clearly already occurred when the suit was pending.

C. *'Americans United'*

"*Americans United*" also involved the revocation of an organization's tax-exempt status under section 501(c)(3). In this case, however, the revocation had already taken place before the suit was filed, and the purpose of the suit was to reverse it.

The revocation did not subject the organization to income tax liability because the IRS had reclassified it as a section 501(c)(4) social welfare organization. But the IRS action did render donors' contributions nondeductible. That effect was sufficient to trigger the AIA, according to the Supreme Court:

> Respondent would not be interested in obtaining the declaratory and injunctive relief requested if that relief did not effectively restrain the taxation of its contributors. Thus we think it circular to conclude, as did the Court of Appeals, that respondent's "primary design" was not "to remove the burden of taxation from those presently contributing but rather to avoid the disposition of contributed funds away from the corporation." . . . The latter goal is merely a restatement of the former and can be accomplished only by restraining the assessment and collection of a tax in contravention of section 7421(a).[32]

That description of the suit's purpose — to "remove the burden of taxation from those presently contributing" — makes clear that the conduct whose tax treatment would be affected by the outcome of the case was in fact occurring while the case was pending, just as in *Bob Jones*. The Court noted that revocation of the organization's tax-exempt status "caused a substantial decrease in its contributions,"[33] but that statement does not suggest that contributions ceased entirely. Thus, as long as contributions continued at some level while the case was pending, the tax liability of the donors would have been affected by a successful challenge to the IRS action.

D. Conclusion

Both *Bob Jones* and "*Americans United*" involved situations in which the potentially affected tax liabilities concerned conduct that occurred while the suits were pending. Consequently, the IRS could have assessed those tax liabilities but for the pendency of the cases.

Therefore, these cases do not support the conclusion of the *Florida Bankers* majority that the AIA applies when, at the time the case is pending, the plaintiffs have not engaged in the conduct that would give the IRS the ability to assess the tax or penalty that provides the only possible rationale for applying the AIA. Moreover, it is unnecessary for these cases to be overruled in order to give the AIA the narrow reading suggested by the *Direct Marketing* decision.

VII. Prior D.C. Circuit Decisions

The majority opinion in *Florida Bankers* is inconsistent not only with the Supreme Court's *Direct Marketing* decision but also with several prior D.C. Circuit decisions. Under the approach adopted by the majority in *Florida Bankers*, the AIA bars any suit in district court that challenges IRS action concerning taxes, other than a tax refund suit, if the ultimate effect of success on the merits could in any way reduce the amount of tax revenue received by the government. However, the D.C. Circuit, sitting *en banc* in *Cohen v. United States*,[34] clearly rejected that extremely broad approach.

A. *Cohen*

Cohen was a challenge to the procedures adopted by the IRS in Notice 2006-50, 2006-1 C.B. 1141, for refunding the former excise tax on long-distance telephone service after several circuits held that the IRS had improperly collected it.

Before reaching the AIA issue, the *en banc* court in *Cohen* rejected the notion that the waiver of sovereign immunity in section 702 of the APA does not apply to suits that complain of IRS action but do not seek money damages:

---

[29] *Bob Jones*, 416 U.S. at 731-732.
[30] 341 F. Supp. 277 (D.S.C. 1971).
[31] *See Bob Jones University v. United States*, 461 U.S. 574, 581 (1983).
[32] "*Americans United*," 416 U.S. at 761.
[33] *Id.* at 756.
[34] 650 F.3d 717 (D.C. Cir. 2011) (*en banc*).

> Even construing section 702 "strictly," as the Service requests, there is no doubt Congress lifted the bar of sovereign immunity in actions not seeking money damages. *The IRS is not special in this regard; no exception exists shielding it — unlike the rest of the Federal Government — from suit under the APA*.[35]

Although this passage is located in the portion of the *Cohen* opinion dealing with sovereign immunity, its statement that there is no exception shielding the IRS from suit under the APA clearly means that the AIA is not a broadly applicable exception that would shield the IRS from any suit under the APA that could reduce the amount of tax revenue received by the government.

The *Cohen* court then considered the applicability of the AIA. It rejected the IRS's position that the act bars any non-refund suit in district court concerning federal taxes:

> The IRS envisions a world in which no challenge to its actions is ever outside the closed loop of its taxing authority. It argues assessment and collection are part of a "*single* mechanism" that ultimately determines the amount of revenue the Treasury retains. Because this suit will ultimately affect the money Treasury retains, the IRS argues, it involves "assessment and collection." But the Supreme Court rejected this "single mechanism" theory of assessment and collection in *Hibbs*, choosing instead to define "assessment and collection" as is done in the Internal Revenue Code. "[A]ssessment" is not "synonymous with the entire plan of taxation," but rather with "the trigger for levy and collection efforts," and "collection" is the actual imposition of a tax against a plaintiff, and does not concern third-parties trying to contest the validity of a tax or to stop its collection. . . .
>
> The IRS argues, as did the dissent at the panel stage, that the AIA bars Appellants' APA claims because a complex regulatory scheme requires that "challenges to tax laws, regulations, decisions, or actions ordinarily be brought in refund suits after plaintiffs have sought a refund from, and exhausted their administrative remedies with, the IRS." *Cohen*, 578 F.3d at 17 (Kavanaugh, J., dissenting). But this neglects the nuance. The Supreme Court, this court, and other circuits have allowed challenges to tax laws outside the context of a 26 U.S.C. section 7422(a) proceeding (a refund suit). . . .
>
> [Proper application of the AIA] requires a careful inquiry into the remedy sought, the statutory basis for that remedy, and any implication the remedy may have on assessment and collection.[36]

The *en banc* D.C. Circuit in *Cohen* thus explicitly and indisputably rejected the broad scope of the AIA expressed by Kavanaugh in a dissenting panel opinion in that case — the same view he expressed and applied in the *Florida Bankers* majority opinion.

The *en banc* court in *Cohen* also rejected a related argument made in Kavanaugh's dissent at the *en banc* stage in that case, namely, that the ripeness requirement was a bar to the suit:

> The practical consequence of the dissent's ripeness argument is a judicially created exemption for the IRS from suit under the APA. There may be good policy reasons to exempt IRS action from judicial review. Revenue protection is one. But Congress has not made that call. And we are in no position to usurp that choice on the basis of ripeness. *Cf. Mayo Found. for Med. Educ. & Res. v. United States*, [562] U.S. [44, 55], 131 S. Ct. 704, 713 (2011) (noting in the context of tax regulations "the importance of maintaining a uniform approach to judicial review of administrative action") (quoting *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999)).[37]

Once again, the *en banc* court in *Cohen* rejected the notion that there is any general and broadly applicable "exemption for the IRS from suit under the APA." *Cohen* was decided four years before the Supreme Court's *Direct Marketing* decision. The D.C. Circuit therefore did not have the benefit of that decision in interpreting the AIA. The *en banc* court did, however, rely on *Hibbs*, which applied a narrow interpretation of the TIA similar to that later applied in *Direct Marketing*.

Kavanaugh's panel majority opinion in *Florida Bankers* did not address that aspect of *Cohen*. It cited *Cohen* only for the proposition that the AIA and the Declaratory Judgment Act are coterminous,[38] just as it failed to address the Supreme Court's reasoning in *Direct Marketing* in applying a narrow, technical meaning for terms that appear in both the TIA and the AIA. Kavanaugh instead distinguished *Direct Marketing* on a basis that played no role in the decision in that case. The broad view of the AIA he applied in *Florida Bankers* had already been rejected by the *en banc* D.C. Circuit in *Cohen*.

[35] *Id.* at 723 (citations omitted; emphasis added).

[36] *Id.* at 726-727 (footnotes and some citations omitted).
[37] *Id.* at 736 (some citations omitted; alterations added).
[38] *Florida Bankers*, 799 F.3d at 1067.

B. *Z Street*

The majority opinion in *Florida Bankers* is also inconsistent with a more recent decision, *Z Street v. Koskinen*,[39] in which the D.C. Circuit had the benefit of the *Direct Marketing* decision in its interpretation of the AIA.

Z Street was brought in district court by an organization that had applied to the IRS for tax-exempt status. The organization's purpose is to educate the public about the Middle East and Israel in particular. The suit alleges that the IRS has an "Israel special policy" under which exempt status applications submitted by organizations that espouse political views on Israel inconsistent with those of the Obama administration receive increased scrutiny. As a result, according to the complaint, the exemption applications of these organizations are processed more slowly than those of other types of organizations. The suit alleges that this policy was applied in the IRS's processing of the plaintiff-organization's application.

The D.C. Circuit rejected the government's argument that the suit was barred by the AIA. The court relied on the principle articulated by the Supreme Court in 1984 in *South Carolina v. Regan*,[40] involving South Carolina's challenge to a new IRC provision that eliminated the tax exemption for interest on state bearer bonds. Because the tax treatment of interest on the bonds affected the tax liability of only the bondholders, not the issuers, the state had no other way legally to challenge the provision. The Supreme Court held that the AIA should not be interpreted to bar challenges when Congress has provided the plaintiff no alternative remedy.

The D.C. Circuit in *Z Street* held that the principle articulated in *South Carolina* applied because the plaintiff-organization had no other judicial avenue to raise a challenge based on improper delays in processing an application for tax-exempt status. It did not rely on *Direct Marketing* as the basis for its *Z Street* holding, but it discussed the relevance of that decision for interpretation of the AIA:

> Our rejection of the Commissioner's broad reading of the Act finds support in the Supreme Court's recent decision in *Direct Marketing Association v. Brohl*. There, interpreting the Anti-Injunction Act's cousin, the Tax Injunction Act, which serves a similar function for federal court challenges to state taxes, the Court read "restrain" in that statute as having a "narrow meaning . . . captur[ing] only those orders that stop . . . assessment, levy and collection" rather than "merely inhibit" those activities. True, the two statutes differ: the Tax Injunction Act pairs "restrain" with "'enjoin' and 'suspend'" suggesting that the word is used "in its narrow sense," while the word "restraining" stands alone in the Anti-Injunction Act. Yet *Brohl*'s holding is significant here because the Court "assume[s] that words used in both Acts are generally used in the same way."[41]

Although the foregoing passage is dictum, it clearly reflects a rejection of the approach to the AIA taken by the panel majority in *Florida Bankers*. The court cited *Direct Marketing* as support for its rejection of "the Commissioner's broad reading of the Act"; however, that rejection was based primarily on the *Cohen* decision:

> The Commissioner nonetheless insists that *Bob Jones* and "*Americans United*" require a broad approach to what constitutes prohibited "tax litigation." . . . [H]owever, in *Cohen* we rejected this view of "a world in which no challenge to [the IRS's] actions is ever outside the closed loop of its taxing authority." . . . [W]e said in *Cohen* that . . . the Act "requires a careful inquiry into the remedy sought, the statutory basis for that remedy, and any implication the remedy may have on assessment and collection."[42]

Kavanaugh's panel majority opinion in *Florida Bankers* clearly did not engage in the "careful inquiry" referenced in that passage. Instead, Kavanaugh adopted the same broad reading of the AIA that was rejected by the D.C. Circuit in both *Cohen* and *Z Street*.

C. *Foodservice*

In her *Florida Bankers* dissent, Henderson argued that the majority's opinion is also inconsistent with the D.C. Circuit's 1987 decision in *Foodservice and Lodging Institute Inc. v. Regan*,[43] a case brought by an organization on behalf of employers in the restaurant industry. *Foodservice* was a challenge to the validity of various regulations that imposed several requirements on restaurant operators, including the reporting of tips allocated to specific restaurant employees.

The D.C. Circuit held that the challenges to the reporting requirements regarding the amounts of tip income earned by specific employees were barred by the AIA because they concerned "the

[39]791 F.3d 24 (D.C. Cir. 2015).
[40]465 U.S. 367 (1984).
[41]*Z Street*, 791 F.3d at 30-31 (alterations in original).
[42]*Id.* at 30 (citations omitted; alterations added).
[43]809 F.2d 842 (D.C. Cir. 1987).

assessment or collection of federal taxes.''[44] Although the court did not cite *Bob Jones* or ''*Americans United*'' as the basis for its approach to applying the AIA, the opinion adopts the broad interpretation of the act that those cases are generally believed to stand for. This is reflected in the court's statement that its holding is based on the fact that the challenges concern taxes. There is no careful analysis of the connection between the challenge and the assessment or collection of taxes, as required by the later *Cohen* decision. However, based on Ginsburg's concurring opinion in *Direct Marketing*, challenges such as those in *Foodservice* might still be barred by the AIA, even after the *Direct Marketing* decision, since the information reporting requirement was accompanied by a requirement to withhold tax on the amount of tip income reported.

Another reporting requirement challenged in *Foodservice* was for taxpayers engaged in the restaurant business to report the total amount of their gross receipts from providing food and beverages, their charged receipts on which tips were charged, and charged tips on those charged receipts. The D.C. Circuit held that the challenge was not barred by the AIA because this portion of the reporting requirements did ''not relate to the assessment or collection of taxes, but to IRS efforts to determine the extent of tip compliance in the food and beverage industry.''[45] The opinion made no reference to a penalty imposed on taxpayers in the restaurant business for noncompliance with the tip reporting requirements, including this one.

As discussed in Henderson's *Florida Bankers* dissent, the status of that penalty was changed by legislation while *Foodservice* was pending. When the suit was brought, the penalty for noncompliance with the tip reporting requirements was located in section 6652(a)(1)(A)(iv). The Tax Reform Act of 1986,[46] enacted October 22, 1986, added section 6721, which imposes penalties for failure to file information returns generally, including the tip information reports at issue in *Foodservice*. TRA 1986 also amended section 6652 so that it no longer applies to the tip information reports. Section 6721 is subject to the rule in section 6671(a) that treats some penalties as taxes. Section 6652 is not subject to that rule. The *Foodservice* opinion was issued January 13, 1987, a few months after the enactment of TRA 1986; however, the statutory changes affecting the penalty were effective only for information returns with a due date after December 31, 1986.

Henderson argued that given the timing of the *Foodservice* opinion, the court presumably was aware of and considered the statutory changes to the noncompliance penalty, including its treatment as a tax. She thus reasoned that the *Foodservice* opinion should be read as stating that a challenge to an IRS reporting requirement enforced by a tax penalty is not barred by the AIA. Under that reading, *Foodservice* would suggest the AIA likewise bars the challenge in *Florida Bankers*, even if the penalty for noncompliance is treated as a tax for purposes of the AIA.

However, the AIA applies to suits whose purpose is restraining the assessment or collection of any tax. It could be argued that when a suit is brought before the enactment of a particular statutory amendment, the suit's purpose cannot be to achieve a result that is unachievable until the amendment takes effect.

Consequently, it may be more appropriate to evaluate the tax status of the penalty in *Foodservice* by reference to the law in effect when the suit was brought rather than the law when the case was decided. A counterargument is that because the AIA provides that no suit ''shall be maintained'' to restrain the assessment or collection of any tax, an evaluation of the suit's purpose might take into account any period during which the suit is pending, because a suit is ''maintained'' throughout its pendency, not just when it is brought.

In any event, even if Henderson is correct that the status of the noncompliance penalty in *Foodservice* should be evaluated as of the decision's issuance, the opinion in that case does not discuss the penalty or its significance to the AIA issue. The *Foodservice* decision is thus less relevant than other D.C. Circuit cases, such as *Cohen* and *Z Street*, for the resolution of the AIA issue in *Florida Bankers*. However, those other cases, as well as the *Direct Marketing* decision, provide ample support for the conclusion that the panel majority opinion in *Florida Bankers* is incorrect.

D. *Seven-Sky*

One of those other D.C. Circuit cases is *Seven-Sky v. Holder*,[47] on which Henderson's dissent in *Florida Bankers* heavily relies. *Seven-Sky* addressed issues later resolved by the Supreme Court's decision in *National Federation of Independent Business v. Sebelius* (*NFIB*),[48] namely, challenges to the constitutionality of the individual mandate imposed by the Affordable Care Act.

[44]*Id.* at 844.
[45]*Id.* at 846.
[46]P.L. 99-514.

[47]661 F.3d 1.
[48]132 S. Ct. 2566 (2012).

The majority in *Seven-Sky* held that the existence of a penalty for noncompliance with the mandate did not implicate the AIA. Kavanaugh dissented, arguing that the AIA barred the suit based on the same broad reading of the act as in his prior panel dissent in *Cohen* and his future panel majority opinion in *Florida Bankers*.

As discussed in Henderson's *Florida Bankers* dissent, the *Seven-Sky* majority gave two reasons for finding the AIA inapplicable. The first was the same reason later given by the Supreme Court in *NFIB* — that the penalty for noncompliance with the individual mandate is not treated as a tax for purposes of the AIA.[49] Henderson considered the second rationale, stated below, relevant for resolution of the AIA issue in *Florida Bankers*:

> The nature of appellants' challenge also demonstrates why the Anti-Injunction Act, by its own terms, does not apply to this suit. Appellants have brought suit for the purpose of enjoining a regulatory command, the individual mandate, that requires them to purchase health insurance from private companies, produces no revenues for the Government, and imposes obligations independent of the shared responsibility payment. They seek injunctive and declaratory relief to prevent anyone from being subject to the mandate, irrespective of whether they intend to comply with it, and irrespective of the means Congress chooses to implement it. The harms appellants allege — the cost of purchasing health insurance from private companies, and violation of their religious belief that insurance expresses skepticism in God's ability to provide — exist as a result of the mandate, not the penalty.[50]

Henderson argued that the same analysis is applicable in *Florida Bankers*:

> Here, the Associations seek declaratory and injunctive relief from the *regulatory requirement* that their members report the interest earned by non-resident aliens, not the *tax penalty* for failing to comply with that requirement. The "harms [they] allege" — mainly, capital flight — "exist as a result of the [reporting requirement], not the penalty." *Seven-Sky*, 661 F.3d at 9. The Associations challenge the 2012 Rule "irrespective of whether they intend to comply with it, and irrespective of the means Congress chooses to implement it." *Id.* at 8-9. Moreover, their challenge comes before enforcement: none of their members has been assessed a tax penalty and, thus, they do not seek to "restrain" the "assessment" — much less "collection" — of a tax. *See Direct Mktg.*, 135 S. Ct. at 1131, 1133; *Seven-Sky*, 661 F.3d at 10.
>
> Granted, if the Associations succeed, the IRS will never collect *any* tax penalties under the 2012 Rule because there will be no Rule for the banks to violate. This argument, however, applies with equal force to the challenge in *Seven-Sky* but we allowed that challenge to proceed. Indeed, like the *Seven-Sky* suit, the Associations' challenge hardly implicates the purpose of the AIA: "protect[ing] the Government's ability to collect a consistent stream of revenue." *NFIB*, 132 S. Ct. at 2582. A tax penalty is meant to *deter* violations of the underlying regulatory requirement: if the penalty is avoided — and presumably this is the Government's intent — then individuals will have complied with the regulation and the IRS will collect zero revenue. *See Seven-Sky*, 661 F.3d at 6 ("[T]he aim of the shared responsibility payment is to encourage everyone to purchase insurance; the goal is universal coverage, not revenues from penalties."). A tax penalty like the one attached to the 2012 Rule is "unrelated to the protection of the revenues," a point that further demonstrates why this suit is not barred by the AIA. *Id.* at 13-14 (quoting *Bob Jones Univ. v. Simon*, 416 U.S. 725, 740 (1974)).[51]

Henderson is entirely correct in her discussion of the applicability of the analysis of the individual mandate penalty in the second AIA rationale in *Seven-Sky*. In both *Seven-Sky* and *Florida Bankers*, the purpose of the penalty is not to collect revenue but rather to deter the behavior that would trigger imposition of it. Thus, as Henderson argues, the second rationale in *Seven-Sky* for holding that the AIA is inapplicable clearly supports the conclusion that the AIA is likewise inapplicable in *Florida Bankers*, contrary to Kavanaugh's panel majority opinion.

As noted earlier, Kavanaugh dissented in *Seven-Sky*, expressing the same broad view of the AIA that he adopted in his panel dissent in *Cohen* and his panel majority opinion in *Florida Bankers* — the same broad view rejected by the *en banc* majority opinion in *Cohen* and by the court in *Z Street*:

> Under the Anti-Injunction Act, a taxpayer seeking to challenge a tax law must first pay

[49]*Seven-Sky*, 661 F.3d at 6-8.
[50]*Id.* at 8-9.
[51]*Florida Bankers*, 799 F.3d at 1078 (Henderson, J., dissenting) (some citations omitted).

> the disputed tax and then bring a refund suit, at which time the courts will consider the taxpayer's legal arguments. Or a taxpayer may raise legal arguments in defending against an IRS enforcement action. But a taxpayer may not bring a pre-enforcement suit. . . .
>
> The Anti-Injunction Act applies here because plaintiffs' pre-enforcement suit, if successful, would prevent the IRS from assessing or collecting tax penalties from citizens who do not have health insurance.[52]

The majority in *Seven-Sky* clearly had a different view.

According to Henderson's *Florida Bankers* dissent, Kavanaugh's panel majority opinion argues that the second AIA rationale in *Seven-Sky* was overruled by the Supreme Court's decision in *NFIB*. Kavanaugh discusses *Seven-Sky* only in a footnote, but *NFIB* clearly plays a central role in his opinion. Henderson is correct that Kavanaugh's opinion reads *NFIB* as having said that if the individual mandate penalty had been treated as a tax for purposes of the AIA, the AIA would have barred the challenge. However, as Henderson argues, *NFIB* did not in fact say that.

Surprisingly, Kavanaugh's *Florida Bankers* opinion does not cite or quote the following passage in *NFIB*, which seems to provide the strongest support for his position:

> The penalty for not complying with the Affordable Care Act's individual mandate first becomes enforceable in 2014. *The present challenge to the mandate thus seeks to restrain the penalty's future collection*.[53]

This passage comes closer than anything else in the *NFIB* opinion to saying that if the individual mandate penalty were treated as a tax for purposes of the AIA, the act would be applicable and bar the challenge. However, by using the adjective "future" to modify the term "collection," the opinion is signaling that this statement should not be read as having that implication. The AIA refers to restraining collection, not restraining future collection. Presumably, that is why Kavanaugh chose not to refer to this passage.

The footnote in Kavanaugh's opinion discussing *Seven-Sky* makes the following assertion regarding *NFIB*:

> In all events, as we have explained, *NFIB* (which post-dated *Seven-Sky*) indicated that a party may not avoid the Anti-Injunction Act by purporting to challenge only the regulatory aspect of a regulatory tax.[54]

Contrary to Kavanaugh's assertion, nothing in the AIA section of the *NFIB* opinion says anything about characterizing the suit as a challenge to "the regulatory aspect of a regulatory tax." Instead, the entire discussion is focused on whether the individual mandate penalty is properly treated as a tax for purposes of the AIA.

The *NFIB* Court actually concluded the following about the individual mandate penalty and the AIA:

> 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.[55]

As Henderson's dissent in *Florida Bankers* persuasively explains, the statement in *NFIB* that the AIA does not apply to a suit involving a penalty not treated as a tax for purposes of the AIA is not logically equivalent to saying that a suit involving a penalty treated as a tax for purposes of the AIA is always barred by the AIA:

> Although a suit that does not implicate any "tax" is not barred by the AIA, it does not follow that a suit implicating a tax is *necessarily* barred: the suit may nonetheless not seek to "restrain the assessment or collection" of said tax.[56]

However, under Kavanaugh's view of the AIA, as expressed in his *Cohen* panel dissent, his *Seven-Sky* dissent, and his panel majority opinion in *Florida Bankers*, any district court suit involving federal taxes that is not a tax refund suit is always barred by the AIA. Thus, he believes that any such suit that involves a penalty treated as a tax for purposes of the AIA is necessarily barred by the AIA. However, this is not the view of the AIA expressed by the *en banc* majority in *Cohen*, the majority in *Seven-Sky*, and the court in *Z Street*, and it is clearly inconsistent with the reading the Supreme Court in *Direct Marketing* gave to the key terms that appear in both the AIA and the TIA.

As Henderson's dissent argues:

> Our alternative holding in *Seven-Sky* was the subject of at least eighty pages of briefing in *NFIB*. If the Supreme Court meant to overrule

[52]*Seven-Sky*, 661 F.3d at 22 (Kavanaugh, J., dissenting).
[53]132 S. Ct. at 2582 (emphasis added).
[54]*Florida Bankers*, 799 F.3d at 1072 n.3.
[55]132 S. Ct. at 2584.
[56]*Florida Bankers*, 799 F.3d at 1080 (Henderson, J., dissenting).

it, the two passages the majority identifies would be an awfully cryptic way to do so.[57]

The third member of the *Florida Bankers* panel, Judge A. Raymond Randolph, wrote a brief concurring opinion:

> I join the court's opinion, in part because I do not agree that *Seven-Sky v. Holder* stands for the "alternative holding" the dissent describes. *The majority opinion in* Seven-Sky *never said, much less held, that the Anti-Injunction Act would not apply even if the penalty in that case were a tax within the meaning of the Act, which it was not*.[58]

Randolph's assertions about what the *Seven-Sky* majority opinion said are technically correct. However, the *Seven-Sky* opinion clearly presented the alternative rationale as separate and distinct from the primary rationale — separated from the discussion of that first rationale by three asterisks. The clear implication of presenting that alternative rationale is that if the penalty were a tax for purposes of the AIA, the act would still be inapplicable.

Randolph's concurring opinion can be slightly rephrased in a way that represents a much more accurate description of *NFIB* than of *Seven-Sky*:

> The majority opinion in [*NFIB*] never said, much less held, that the Anti-Injunction Act would apply if the penalty in that case were a tax within the meaning of the Act, which it was not.

E. Summary of D.C. Circuit Decisions

In his panel majority opinion in *Florida Bankers*, Kavanaugh espoused the view that any suit in district court regarding federal taxes, other than a tax refund suit, is barred by the AIA if success on the merits by the plaintiffs could adversely affect the amount of federal tax revenue received by the government, regardless of the nature of the connection between the suit and that revenue effect. Under that broad view, the only way for a taxpayer to challenge IRS positions on federal tax issues in district court is to (1) incur a tax liability based on the application of the IRS position to the taxpayer, (2) pay the tax, or (3) sue for a refund of the tax. This is precisely the view of the AIA that the D.C. Circuit rejected in *Cohen* and *Z Street*.

More directly on point, *Z Street*, albeit in dictum, clearly indicated that *Direct Marketing* is relevant to the application of the AIA and supports giving the terms that appear in both the AIA and the TIA the same narrow, technical meanings for purposes of the AIA that *Direct Marketing* gave them for purposes of the TIA. Even more specifically, the alternative rationale on the AIA in *Seven-Sky* supports the conclusion that the existence of a penalty imposed by the tax code to deter the conduct that would result in imposition of the penalty is insufficient to make the AIA applicable in a challenge to the prohibition or mandate whose violation triggers the penalty. *Cohen*, *Z Street*, and *Seven-Sky* provide clear support for the conclusion that Kavanaugh's panel majority opinion in *Florida Bankers* is incorrect.

VIII. Conclusion

The panel majority opinion in *Florida Bankers* is at odds with the Supreme Court's *Direct Marketing* decision. In interpreting the TIA, the Court in *Direct Marketing* gave the terms "assessment," "collection," and "restrain" narrow, technical meanings based on their meaning in the tax code. Those same terms appear in the AIA and should therefore be given the same narrow, technical meanings. Under that reading of the AIA, it would not apply to the challenge in *Florida Bankers*.

If, while an IRS regulation challenge is pending, the plaintiff has not engaged in conduct that would trigger imposition of an AIA-implicating tax or penalty treated as a tax, success on the merits would not restrain the assessment or collection of the tax or penalty under the meanings of the terms "assessment," "collection," and "restrain" as interpreted in *Direct Marketing*. The AIA can apply only if, while the challenge is pending, the factual situation exists that would make it possible for the IRS to assess the tax or penalty that forms the only possible basis for application of the AIA.

---

[57]*Id.* (footnote omitted).

[58]*Id.* at 1072 (Randolph, J., concurring) (citations omitted; emphasis added).