ESSAY

An Article I Body to Issue Declaratory Advisory Opinions on Competitor Challenges to Tax Regulations

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ABSTRACT

Caselaw demonstrates that Article III courts are unwilling to entertain claims brought by third parties that challenge Internal Revenue Service ("IRS") and Department of the Treasury ("Treasury") rulings for impermissibly favoring some taxpayers over others. In this Essay, I propose an Article I body that would enable private third parties to challenge Treasury and IRS regulations that favor competitors outside of an Article III court in an adversarial proceeding, resulting in declaratory, nonbinding advisory opinions. To illustrate the need for such a body, I consider one question raised by the 2017 Tax Cuts and Jobs Act in which the harm created by a favorable ruling to a competitor is clear—the meaning of "qualified trade or business" under section 199A. I then examine how such a body might work by turning to the model of the Government Accountability Office, which serves as an alternative to Article III courts for rulings on government contract bid protests. I argue that Congress should make the proposed body available to both competitors who suffer the traditional competitor injury that is recognized in areas outside of taxation and the Joint Committee on Taxation, which has a special interest in the proper implementation of the tax laws. Finally, I consider the

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benefits of an Article I body to issue declaratory advisory opinions on tax regulations.

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Introduction

This Essay accepts as well-established law that Article III courts will not hear claims brought by third parties that allege that Internal Revenue Service ("IRS") and Department of the Treasury ("Treasury") rulings impermissibly favor some taxpayers over others.[1] Due to this standing barrier, parties may remain injured by favorable agency rulings permitting competitors to pay less in taxes, and thus, to have a competitive advantage, without judicial recourse. This Essay proposes that third parties should be able to challenge Treasury and

[1] *See e.g.*, Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 28 (1976).

IRS regulations using the theory of competitor standing, which is available to plaintiffs challenging nontax laws, before an Article I body that would issue declaratory judgments. This body would hold adversarial proceedings and produce nonbinding advisory opinions. Part I of this Essay considers examples of competitor standing in areas beyond taxation, and then reviews caselaw that erects a standing barrier for private parties to challenge third-party competitors' tax-exemption status. Part II demonstrates the need for such a body by considering inequalities that can arise when determining what is a "qualified trade or business" under section 199A of the 2017 Tax Cuts and Jobs Act.[2] It then considers how an Article I body might function using the Government Accountability Office ("GAO"), a non-Article III body that rules on bid protests in an advisory capacity, as a model. Part II proposes that Congress should allow both competitors who have suffered a traditional competitor injury and the Joint Committee on Taxation ("JCT") to utilize the non-Article III body. Finally, Part III discusses the benefits of an Article I body providing declaratory advisory opinions on tax regulations.

I. The Standing Barriers to Challenge Tax Agency Rulings

Article III standing is a prerequisite to bringing suit and generally has three basic requirements: injury, traceability, and redressability.[3] More specifically, competitor standing dictates when a party can bring suit based upon facts that stem from its competition with another entity; for example, in the context of competing businesses.[4] When considering taxation, competitor standing is problematic to plaintiffs because caselaw indicates that Article III courts are unwilling to entertain claims that Treasury or IRS rulings impermissibly favor private third parties.[5]

A. Basic Requirements of Standing: Injury, Traceability, Redressability

Article III standing is a jurisdictional prerequisite for filing suit in federal court.[6] The Constitution limits the types of suits federal courts

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2 Pub. L. No. 115-97, 131 Stat. 2054 (2017) (codified as amended in scattered sections of 26 U.S.C.).

3 *E.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472–73 (1982).

4 *See, e.g.*, Fulani v. Brady, 935 F.2d 1324, 1327 (D.C. Cir. 1991).

5 *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984).

6 *Valley Forge*, 454 U.S. at 475–76.

can hear to those involving "[c]ases" and "[c]ontroversies."[7] Courts have interpreted this as requiring a plaintiff to allege: (1) an "actual or threatened injury" (2) "resulting from the action" challenged that (3) "is likely to be redressed by a favorable [judicial] decision."[8]

Injury must show that the plaintiff suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'"[9] To satisfy this requirement, a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[10] This injury must be "fairly traceable" to the "complained-of conduct of the defendant."[11] Finally, a decision in favor of the plaintiff must be "likely" to set right the plaintiff's injury.[12] Mere "specula[tion]" that the court's decision could remedy the injury is not sufficient.[13]

B. Competitor Standing

Although a plaintiff typically may not litigate the interest of a third party, the concept of competitor standing is well established in various areas of law.[14] Courts have "[u]nquestionably" recognized competitor standing in circumstances in which "a defendant's actions benefitted a plaintiff's competitors."[15]

Under this theory, the injury is the "plaintiff's subsequent disadvantage."[16] In *Ass'n of Data Processing Service Organizations, Inc. v. Camp* ("*ADAPSO*"),[17] the plaintiff successfully alleged injury in the form of "future loss of profits" arising from competition.[18] The plaintiff association was comprised of member businesses that sold data processing services, and filed suit in federal court challenging a ruling

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7 U.S. CONST. art. III, § 2, cl. 1; Allen v. Wright, 468 U.S. at 750.

8 *Valley Forge*, 454 U.S. at 472–73 (first quoting Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 99 (1979); and then quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 38, 41 (1976)).

9 Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

10 Warth v. Seldin, 422 U.S. 490, 499 (1975).

11 Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 (1998).

12 *Lujan*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38).

13 *Id.* (quoting *Simon*, 426 U.S. at 43).

14 Fulani v. Brady, 935 F.2d 1324, 1327 (D.C. Cir. 1991) (citing cases where the Supreme Court found competitor standing for data processing companies, securities brokers, and investment companies).

15 *Id.*

16 *Id.*

17 397 U.S. 150 (1970).

18 *Id.* at 152.

by the Comptroller of the Currency that would allow national banks to enter the data processing field.[19] The plaintiff alleged injury in the form of future profit losses that could arise from the new competition its members would face from national banks entering the data processing services industry.[20] Characterizing the case as a "*competitor's* suit" for Article III standing purposes, the Court held that there could be "no doubt" that the plaintiff satisfied the "injury in fact" prong of standing.[21]

Relying on *ADAPSO*, in *Investment Co. Institute v. Camp*,[22] the Court held that the plaintiff—an association of open-ended investment companies and individual companies—suffered sufficient injury for standing purposes when the Comptroller of the Currency issued a regulation that authorized banks to operate collective investment funds, thereby harming the plaintiff.[23] Finally, the Court in *Clarke v. Securities Industry Ass'n*[24] found a trade association "representing securities brokers, underwriters, and investment bankers" had standing to challenge the Comptroller of the Currency's ruling that national banks could act as discount brokers.[25] Once again, the Court held the allegation that "profits will suffer if national banks are allowed to operate brokerage subsidiaries in competition with them" to be a "sufficient injury to confer standing."[26] Though these cases occurred prior to the firm establishment of "traceability" and "redressability" terminology, the Court, having accepted the alleged injuries as sufficient to find standing, had little difficulty attributing the harm to the Comptroller's actions; the Court could presumably redress the plaintiffs' injuries by reversing agency rulings.[27]

Although *ADAPSO* is perhaps the best-known case dealing with competitor standing, competitor standing is by no means limited to challenges to Comptroller rulings and regulations. For example, more recently in *Mendoza v. Perez*,[28] former U.S. sheep, goat, and cattle

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19 Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 279 F. Supp. 675, 677 (D. Minn. 1968); *ADAPSO*, 397 U.S. at 151.

20 *ADAPSO*, 397 U.S. at 152.

21 *Id.*

22 401 U.S. 617 (1971).

23 *Id.* at 618–20.

24 479 U.S. 388 (1987).

25 *Id.* at 392–94.

26 Sec. Indus. Ass'n v. Comptroller of the Currency, 577 F. Supp. 252, 258 (D.D.C. 1983).

27 *See ADAPSO*, 397 U.S. at 152 ("The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact . . . . There can be no doubt but that petitioners have satisfied this test.").

28 754 F.3d 1002 (D.C. Cir. 2014).

herders challenged Department of Labor guidelines in two Training and Employment Guidance Letters that allowed foreign herders to obtain visas more easily and that imposed a different minimum wage and lower housing standards.[29] The plaintiffs argued that "they ha[d] been forced out of the [herding] industry by the substandard wages and working conditions they attribute[d] to the easy availability of foreign herders."[30] To establish standing, the D.C. Circuit said the plaintiffs must show injury, "such as increased competition or lost opportunity," had occurred.[31] The court held this was satisfied "when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition."[32] Thus, the court concluded that the guidance letters had caused the former herders' injury and that they had satisfied Article III standing.[33]

Congress has also recognized the interest plaintiffs may have in litigating third-party interests and rights in a variety of contexts. The Lanham Act,[34] for example, allows plaintiffs to litigate claims alleging that competitors have engaged in false advertising and unfair competition.[35] Under the Act, "any person who believes that he or she is or is likely to be damaged by such [a false or misleading advertisement]" may bring suit to hold liable a violator.[36] The Tariff Act of 1930[37] also permits a party to protest inadequate duties paid by a competitor.[38] The Secretary of Commerce, upon request, will provide the party with the merchandise classification and duty rate.[39] If the party wants to challenge the rate imposed on the competitor, it may do so with the Secretary and it may pursue the matter with the United States Court of International Trade, an Article III court.[40] The Tariff Act is particularly notable because it provides a clear example of Congress recognizing the need for and right of private parties to challenge

29 *Id.* at 1007–09.

30 *Id.* at 1007.

31 *Id.* at 1010.

32 *Id.* at 1011 (quoting La. Energy & Power Auth. v. FERC, 141 F.3d 364, 367 (D.C. Cir. 1998)).

33 *See id.* at 1015.

34 Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified as amended in scattered sections of 15 U.S.C.).

35 *See* 15 U.S.C. § 1125.

36 *Id.* Courts interpret "any person" to mean "competitors." *See* Serbin v. Ziebart Int'l Corp., 11 F.3d 1163, 1165 (3d Cir. 1993).

37 19 U.S.C. §§ 1201–1641.

38 19 U.S.C. § 1516.

39 *See id.*

40 *See id.*

government agencies' tax rulings that favor private third-party competitors. Congress, in remedying the lack of a mechanism to challenge the impact of taxes on third-party competitors, did so using an Article III court. The Tariff Act demonstrates both congressional recognition of a right to challenge agency tax rulings relating to third parties and its willingness to use an Article III court to do so. Additionally, the government has yet to challenge the constitutionality of such a mechanism.

C. Barriers to Private Party's Use of Article III Courts to Adjudicate Treasury and IRS Tax Rulings that Favor a Third Party

Although private competitors have successfully challenged agencies' treatment of third parties in various areas of law in Article III courts, caselaw indicates that Article III courts are unwilling to entertain claims that Treasury or IRS rulings impermissibly favor private third parties.

In *Simon v. Eastern Kentucky Welfare Rights Organization*,[41] the Court held that low income plaintiffs, and organizations representing their interests, did not have standing to challenge an IRS Revenue Ruling that granted certain hospitals favorable tax treatment despite the hospitals not accepting patients unable to pay for full services.[42] The Court held that the organizations, which purported to promote the accessibility of healthcare services to low income individuals, could not establish standing solely based upon having such a special interest.[43] The individual plaintiffs, who each alleged being denied hospital services due to an inability to pay, also could not establish standing because the Court viewed their alleged injuries as either not traceable to the IRS or too speculative.[44] Although the plaintiffs may have suffered a concrete injury from the hospital's refusal of care, the Court reasoned that such an injury could not be traced to the Department of Treasury and was instead an "injury that result[ed] from the independent action of some third party not before the court."[45] The Court also rejected the argument that injury arose from the Revenue Ruling, which allegedly "encouraged" hospitals to deny services to those unable to pay, because it viewed the connection as "purely spec-

41 426 U.S. 26 (1976).

42 *Id.* at 28.

43 *Id.* at 39–40.

44 *Id.* at 40, 42–43.

45 *Id.* at 41–42.

ulative."[46] Notably, Justice Stewart concurred, writing "I add only that I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else."[47]

Justice Stewart's view that a private party could not challenge the tax liability of a third party has persisted. In *American Society of Travel Agents v. Blumenthal*,[48] the D.C. Circuit recognized the idea of competitor standing raised in *ADAPSO*, but reasoned that competitor standing has not been extended to taxation.[49] In that case, the D.C. Circuit held that travel agencies lacked standing to bring suit against the Secretary of Treasury for failure to assess taxes on certain types of income belonging to tax exempt organizations.[50] In the first paragraph of the opinion, the court immediately identified the "fatal" flaw of seeking to adjudicate "the administration of federal tax laws, not in relation to the tax liabilities of plaintiffs-appellants, but as to third parties not before the court."[51] The plaintiffs filed suit over the Treasury's failure to assess tax on various income types of certain tax-exempt organizations.[52] For example, the plaintiffs asserted that the income from travel programs run by the American Jewish Congress was not taxed.[53] The plaintiffs then argued that their injury, "that the tax-exempt status of these organizations has enabled them to sell tour packages at prices lower than those which private travel agents must charge in order to earn a reasonable profit," was caused by the Treasury's allegedly improper application of the Internal Revenue Code.[54] The court rejected the injury, finding that the travel agencies had "not indicated with sufficient specificity either the manner in which their alleged injury occurred or the nature of that injury."[55] In the absence of specific evidence to show a loss of customers to the tax-exempt organizations, the court found the injury to be "too speculative to support standing."[56] It further declared that it "do[es] not believe that [*ADAPSO*] should be read to endorse standing for any private busi-

46 *Id.* at 42–43.
47 *Id.* at 46 (Stewart, J., concurring).
48 566 F.2d 145 (D.C. Cir. 1977).
49 *Id.* at 151.
50 *Id.* at 147, 151.
51 *Id.* at 147.
52 *Id.*
53 *Id.*
54 *Id.* at 148.
55 *Id.*
56 *Id.* at 148–49.

ness, individual or corporate, which wishes to contest the tax treatment of a competitor."[57] The court reasoned that while in *ADAPSO*, a court could have prevented the entrance of banks into the data processing field entirely, in the present case, the imposition of taxation on certain income would not prevent the tax-exempt organizations from pursuing their travel programs.[58] Therefore, in addition to and because of the absence of an injury, the imposition of income tax on certain income tax-exempt organizations could not redress the alleged competition injury.[59]

Over a decade later, the D.C. Circuit's position remained the same. In *Fulani v. Brady*,[60] Lenora Fulani, a minor-party presidential candidate, challenged an IRS ruling that the Commission for Presidential Debates ("CPD") had § 503(c)(1) tax-exempt status, and sought revocation of the tax-exempt status and assessment of taxes due absent such status.[61] She alleged injury as a result of the CPD engaging in political misinformation in the form of limited coverage of only two-party positions.[62] Under Fulani's theory, the court "should recognize her right to challenge tax benefits that the CPD used to benefit her competitors."[63] The court rejected this argument, once again noting that *ADAPSO* does not apply to taxation.[64]

Finally, in *Allen v. Wright*,[65] the Supreme Court ruled that the parents of black children who attended public schools could not challenge an IRS regulation regarding the tax-exempt status of private schools because their alleged injury was too speculative.[66] The parents argued that the regulation allowed private schools to attain tax-exempt status while engaging in racial discrimination.[67] This, in turn, arguably allowed the schools to attract white children from the public schools, which perpetuated segregation in the public education system.[68] Yet, the Court held that the parents lacked standing because the injury was "entirely speculative."[69] As such, it was also neither

57 *Id.* at 151.
58 *Id.*
59 *See id.* at 151 n.7.
60 935 F.2d 1324 (D.C. Cir. 1991).
61 *Id.* at 1325–26.
62 *Id.*
63 *Id.* at 1327.
64 *Id.* (citing *Am. Soc'y of Travel Agents*, 566 F.2d at 151).
65 468 U.S. 737 (1984).
66 *Id.* at 758.
67 *Id.* at 739–40.
68 *Id.* at 756.
69 *Id.* at 758.

traceable nor redressable by the Court because it was not possible to show that requiring the IRS to change the regulations would result in white parents deciding to stay in or return to the public school system.[70] Taken in conjunction, these cases demonstrate that it is established law that Article III courts will not entertain a claim that IRS or Treasury rulings impermissibly favor some taxpayers when the claim is brought by an interested third party.

II. Example and Model System

The purpose of the proposed Article I body would be to produce declaratory advisory opinions resulting from an adversarial proceeding that would aid in transparency and more equal application of the law. One criticism of Article III standing is that it allows courts to reject cases they do not want to adjudicate, leaving those plaintiffs with little recourse.[71] An Article I proceeding would allow plaintiffs to challenge what they perceive as an unequal or unfavorable application of the law without proving injury to the same extent as would be required in an Article III court. To illustrate the need for such a body in an instance in which competitor injury is clear, Part II considers the example of inequities arising from the determination of what satisfies the meaning of "qualified trade or business" under section 199A of the Tax Cuts and Jobs Act of 2017.[72] It then explores how an Article I body might function using the model of the GAO—an advisory body that hears bid protests in lieu of a traditional Article III court. It further suggests that taxpayers would have standing under the competitor theory and that the JCT should be able to bring claims.

A. Types of Claims: Determining What Is a Qualified Trade or Business

The Tax Cuts and Jobs Act ("TCJA") was enacted under the Trump Administration in 2017.[73] A main argument for the TCJA is that it would level the playing field for passthrough entities that pay taxes based on individual income tax returns, so that they may remain competitive with their C corporation counterparts,[74] which are taxed separately from their owners under the TCJA at 21%, down from

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70 *Id.* at 753–61.

71 Heather Elliott, *The Functions of Standing*, 61 Stan. L. Rev. 459, 476 (2008).

72 Pub. L. No. 115-97, § 199, 131 Stat. 2054, 2063 (2017).

73 *Id.*

74 *Forming a Corporation*, Internal Revenue Serv., https://www.irs.gov/businesses/small-businesses-self-employed/forming-a-corporation [https://perma.cc/U62Y-U3VF] ("For federal income tax purposes, a C corporation is recognized as a separate taxpaying entity.").

35%.[75] However, the TCJA has also been criticized as picking "winners and losers,"[76] a criticism which extends to IRS and Treasury rulings that further favor some while leaving competitors with no recourse.[77]

Under section 199A of the TCJA, which is effective through December 31, 2025, an individual (as a sole proprietor, in a partnership, or in an S corporation[78]), trust, cooperative, or estate can deduct 20% of "qualified business income" from their taxable income.[79] The JCT commented that the purpose was "[t]o treat corporate and noncorporate business income more similarly under the income tax."[80] Although the intent of section 199A is clear, its implementation has resulted in uncertainty, unequal treatment of different businesses, and numerous regulations that seek to further interpret it.[81] To qualify for the deduction, one must be a "qualified trade or business."[82] The IRS and Treasury, pursuant to broad authority in the TCJA,[83] issue regulations for section 199A, among them the definition of a qualified trade or business.[84] Determining what is a qualified trade or business will have a direct impact on competitors who may be in the same industry, but, due to regulations, must pay more in taxes because they cannot deduct certain income. Under the proposed Article I body, a competitor within the same industry could challenge a Treasury or IRS ruling.

A "qualified trade or business" is a trade or business that is not "a specified service trade or business" ("SSTB") or one that is not "performing services as an employee."[85] So an SSTB will not be a

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75 *See* Karen C. Burke, *Section 199A and Choice of Passthrough Entity*, 72 TAX LAW. 551, 552 (2019).

76 Benjamin M. Willis & Jed Bodger, *Biden-Harris's High Hopes for a Fairer Tax Code*, TAXNOTES (Sept. 14, 2020), https://www.taxnotes.com/featured-analysis/biden-harriss-high-hopes-fairer-tax-code/2020/09/11/2cy5n [https://perma.cc/8B59-NEHJ]; Burke, *supra* note 75, at 566.

77 *See* Burke, *supra* note 75, at 566.

78 *S Corporations*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/s-corporations [https://perma.cc/MFG3-PJ56] ("S corporations are corporations that elect to pass corporate income, losses, deductions, and credits through to their shareholders for federal tax purposes.").

79 I.R.C. § 199A.

80 H.R. REP. NO. 115-409, at 129 (2017).

81 *See* Craig W. Benson, *Section 199A: A Magic Dance Through the Labyrinth*, 58 WASHBURN L.J. 187, 192 (2019); Andrew L. Snyder, Note, *The Lawyer, the Engineer, and the Gigger: § 199A Framed as an Equitable Deduction for Middle-Class Business Owners and Gig Economy Workers*, 25 FORDHAM J. CORP. & FIN. L. 615, 626–29 (2020).

82 I.R.C. § 199A(c)(1); *id.* § 199A(d)(1).

83 *Id.* § 199A(f)(4).

84 26 C.F.R. §§ 1.199A-1 to 1.199A-6.

85 I.R.C. § 199A(d).

qualified trade or business and will not be able to take a deduction. However, a non-SSTB will be a qualified trade or business and will be able to take a deduction. Although Congress has provided a list of SSTBs, Treasury and IRS can create potentially troublesome and inequitable regulations.[86] For example, one Treasury regulation, 26 C.F.R. § 1.199A-5, creates a *de minimis* rule: a trade or business that has gross receipts of $25 million or less for the taxable year will not be deemed a SSTB if less than 10% of its gross receipts come from services that would normally be considered from SSTBs.[87] This rule allows certain businesses that engage in what would otherwise be considered a SSTB (thus *not* a qualified trade or business and *not* able to take the 20% deduction) not to be considered a SSTB (allowing them to still take the deduction). Although Treasury implemented the *de minimis* rule to prevent a trade or business that received even such a small amount as one dollar from being barred as being a qualified trade or business, the results could be interpreted as being inequitable between parties engaging in the same type of trade or business.[88]

Consider a hypothetical in which Human Resource Company A, LLC ("H.R. A LLC") received $25 million in gross receipts. Say $23 million came from selling software designed for companies' human resources needs (non-SSTB activity). The other $2 million came from revenue earned from providing consulting services to meet clients' human resources needs (SSTB activity). Under the *de minimis* rule, H.R. A LLC would not be considered an SSTB, and none of their income would be considered from an SSTB because the $2 million is within the allowed 10% gross receipt that can come from an SSTB. It is therefore a qualified trade or business, and it can take a deduction.[89] However, another company, Human Resource Company, S Corporation ("H.R. S Corp."), only provides consulting services to meet clients' human resource needs (SSTB activity) and earns a total of $2

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86 *See id.*; Shu-Yi Oei & Leigh Osofsky, *Legislation and Comment: The Making of the § 199A Regulations*, 69 EMORY L.J. 209, 243 (2019).

87 26 C.F.R. § 1.199A-5(c)(1)(i). Additionally, a trade or business that has gross receipts of more than $25 million for the taxable year will not be deemed an SSTB if less than 5% of its gross receipts come from services that would normally be considered from SSTBs. *Id.* § 1.199A-5(c)(1)(ii).

88 Eric Yauch, *Treasury Clarifies 199A De Minimis Rule Have Cliff Effect*, TAXNOTES (Oct. 9, 2018), https://www.taxnotes.com/featured-analysis/treasury-clarifies-199a-de-minimis-rules-have-cliff-effect/2018/10/05/28hc4 [https://perma.cc/UU4A-4HZW].

89 *See* Christine Sanchez, *QBI Deduction: De Minimis Rules Related to SSTBs*, HENRY+HORNE (Oct. 17, 2018), https://www.hhcpa.com/blogs/income-tax-accountants-cpa/de-minimis-rules-sstbs/ [https://perma.cc/6KGV-CQJU]; James P. de Bree, Jr., *Understanding the Qualified Business Income Deduction*, 9 TAX DEV. J. 11, 34 (2019).

million in gross revenue. H.R. S Corp. is an SSTB. It is therefore not a qualified trade or business, and none of its income would be eligible to be tax-deductible. Additionally, a third company, Human Resource Company B, LLC ("H.R. B LLC"), received $25 million in gross receipts, with $22 million coming from selling H.R. software (non-SSTB activity), and $3 million coming from revenue earned from providing human resources consulting services (SSTB activity). H.R. B is an SSTB because the $3 million is over the allowed 10% gross receipt that can come from an SSTB. It is therefore not a qualified trade or business, and none of its income would be eligible to be tax-deductible.[90]

In these scenarios, all three competitors are engaged in human resource consulting services, yet two are entirely barred from taking a deduction. H.R. S Corp. is barred because, although it has an identical gross receipt from its human resource consulting services as H.R. A LLC does, it does not make any additional revenue from a non-SSTB trade or business. H.R. B LLC is barred because, while it engages in an almost identical business model as H.R. A LLC, it unfortunately made a little more revenue in its consulting endeavor and a little less in its software sales. Thus, under this scheme, H.R. S Corp. and H.R. B LLC would pay more in taxes on revenue earned from similar business practices as H.R. A LLC. Although this Essay does not seek to comment on the underlying merits of the legal claims that H.R. S. Corp or H.R. B LLC might have, the hypothetical serves as an example of how a Treasury or IRS regulation can unequally treat similarly situated parties in a way Congress may not have envisioned. Providing competitors with a means to challenge such regulations could result in agency self-correction or at least bring to light potential inequities created in interpretations of the Internal Revenue Code for the public and Congress to consider.

B. The GAO's Role in Bid Protests as a Model for an Article I Alternative to Article III Courts

Using an Article I court would allow taxpayers to bring claims that are barred from being heard in Article III courts by standing. Article I courts and bodies are not subject to standing requirements imposed by Article III of the Constitution.[91] Thus, Congress may cre-

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90 de Bree, *supra* note 89, at 33 ("The rules defining what constitutes an SSTB are somewhat arbitrary . . . .").

91 *See* Allen v. Wright, 468 U.S. 737, 750 (1984); Lujan v. Defs. of Wildlife, 504 U.S. 555, 559 (1992).

ate Article I adjudicatory bodies with jurisdiction to preside over disputes not subject to Article III's cases and controversies requirement.[92] A congressionally created Article I body to address such claims could solve the problem of competitors not being able to challenge third-party tax rights due to inadequate Article III injury, causation, and redressability.

Instead of using Article III courts, the GAO exemplifies how an alternative non-Article III body could hear claims over agency actions in an advisory capacity. The GAO, a legislative agency, rules on bid protests—"challenge[s] to the terms of a solicitation or the award of a federal contract"—in an advisory capacity.[93] In fulfilling this role, the GAO seeks to "provide[] an objective, independent, and impartial forum for the resolution of disputes concerning the awards of federal contracts."[94] The GAO's role of overseeing bid protests gained popularity following the 1940 Supreme Court decision in *Perkins v. Lukens Steel Co.*,[95] in which the Court held that an unsuccessful bidder on a government contract did not have standing to sue because the procurement law did not grant bidders any enforceable rights.[96] Unsuccessful bidders did not have any recourse beyond the GAO until 1970 when the D.C. Circuit held that the Administrative Procedure Act, which allows judicial review of final agency actions, applied to the adjudications of bid protests.[97] Like the unsuccessful bidders seeking to challenge agency decisions that favored competitor bidders subsequent to *Lukens Steel*, taxpayers have no recourse to challenge Treasury or IRS rulings that do not directly impact their own tax liabilities, but that favor a competitor's tax status and rights. Due to the *Lukens Steel* decision, public demand for a forum in which to bring claims grew, and the GAO became the default mechanism to review allegedly illegal procurements.[98] The inability of parties to challenge tax regulations that favor other taxpayers creates a similar demand, yet no system is in place.[99] The success of the GAO shows that such a body

92 U.S. CONST. art. III, § 2, cl 1.

93 *See Bid Protest*, U.S. GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/legal/bid-protests [https://perma.cc/2RVR-8ZNH].

94 *Id.*

95 310 U.S. 113 (1940).

96 *See id.* at 129, 132; Robert S. Metzger & Daniel A. Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*, 2007 WIS. L. REV. 1225, 1229–30.

97 Metzger & Lyons, *supra* note 96, at 1230.

98 *Id.*

99 The IRS issues many rulings that have similar effects to regulations. *See Understanding IRS Guidance—A Brief Primer*, INTERNAL REVENUE SERV., https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer [https://perma.cc/G8BL-3KF8]. This Essay proposes

can be implemented, and Congress should borrow from the GAO model to create a similar body to issue advisory declaratory judgments regarding tax claims.

The GAO follows procedures, particularly those relating to notification and timing, that could also be used by a body overseeing challenges to tax regulations. First, the GAO immediately notifies the relevant government agency once a protest has been filed.[100] Notification in the context of taxation regulations would involve notifying Treasury or the IRS, and would aid in appraising the agencies of current issues and reoccurring grievances. Second, the GAO typically issues a decision within sixty-five to one hundred days after a protest is filed.[101]

Expeditious ruling on cases brought before the body relating to tax regulations is particularly relevant given the yearly filing requirement.[102] Additionally, if an agency does not follow the GAO's recommendations, the agency must report the decision to the Comptroller General within sixty days of the decision, and the Comptroller General must file a report with the relevant congressional committees detailing the bid protest and including any recommendations they find necessary.[103] Finally, the Comptroller General must file with Congress an end-of-the-year report that summarizes all instances in which an agency did not follow GAO recommendations.[104] Similarly, requiring the IRS and Treasury to report to the Secretary of Treasury, who would, in turn, report to the JCT and Congress, strengthens transparency. Such a system would allow private parties who are impacted by competitor-favoring tax regulations to publicize their claims and alert Congress of any erroneous Internal Revenue Code applications that Congress might want to consider rectifying through legislation.

The GAO has been successful and prolific as an advisory body. Each year, the GAO presides over thousands of disputes and does so relatively inexpensively compared to Article III adjudication.[105] Although GAO decisions are nonbinding, agencies almost always follow

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tackling regulatory inequities because their broad reach has the most significant impact on taxpayers. It is possible, however, for the proposed solution to expand to rulings beyond regulations.

100 4 C.F.R. § 21.3(a) (2020).

101 *Id.* §§ 21.9(a), 21.9(b).

102 31 U.S.C. § 3554(a)(1); 4 C.F.R. § 21.9(a) (2020).

103 31 U.S.C. § 3554(b)(3), (e)(1).

104 *Id.* § 3554(e)(2).

105 *See* Metzger & Lyons, *supra* note 96, at 1227.

their recommendations.[106] Courts have acknowledged the GAO's wealth of experience and expertise in government contracts and treat the decisions with a high level of deference.[107] The impact that the GAO has on parties and agencies shows that, despite lacking the force of law, its decisions are effective in bringing about change and attention to instances in which agencies do not comply. An Article I body that presides over tax claims could be similarly effective without usurping Article III judicial or legislative power.

C. Competitors Bringing Suit

One practical result of the standing requirement of Article III is the prevention of a deluge of frivolous suits.[108] Conversely, standing can also be seen as an obstacle barring legitimate claims regarding questions of significant public concern, such as those in *Allen v. Wright*.[109] Instead, Congress could enable an Article I body to oversee taxpayer challenges to agency regulations, balancing the need to reduce the number of unmeritorious suits with the need to ensure meaningful claims are heard. The body could accomplish this by limiting the parties who may bring suit to those that have a genuine interest in the proceeding. In other areas of law, mechanisms to limit the number of requested decisions have been successfully implemented. For example, states that allow advisory opinions generally limit requests to those from the governor and legislature.[110] The GAO also typically limits those who may file a protest to "interested parties" which, when challenging an award, usually means "an actual bidder that did not win the contract."[111] The GAO will also consider a "bidder's standing in the competition and the nature of the issues raised" when determining who is an interested party.[112]

Congress, in creating the Article I body to consider tax regulations, should limit the types of claims heard by the body to those that are brought only by competitors—entities in the same or similar busi-

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106 *See id.*

107 *See id.*

108 *See* Jeffrey T. Hammons, Note, *Public Interest Standing and Judicial Review of Environmental Matters: A Comparative Approach*, 41 COLUM. J. ENV'T L. 515, 542 (2016).

109 *See* 468 U.S. 737, 739–40 (1984) (finding plaintiffs, who were parents of Black children, did not have standing because the claim that IRS harmed them by prohibiting their children from receiving education in desegregated public schools lacked a direct, traceable injury).

110 Lucas Moench, Note, *State Court Advisory Opinions: Implications for Legislative Power and Prerogatives*, 97 B.U. L. REV. 2243, 2249–50 (2017).

111 *Bid Protests: FAQs*, U.S. GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/legal/bid-protests/faqs [https://perma.cc/RD7B-PTVE].

112 *Id.*

ness or trade as the party whose rights they seek to challenge—under traditional competitor standing standards.[113] Doing so preserves the adversarial nature of the proceeding by ensuring that plaintiffs have a concrete interest in the harm they perceive due to unfair competitor advantage. Limiting cases to those brought between competitor parties would also reduce the number of claims, preserving the body's resources. For example, in the Section II.A hypothetical, only businesses engaged in human resources consulting similar to H.R. A LLC, such as H.R. S Corp. and H.R. B LLC, could bring claims against H.R. A LLC to seek an advisory opinion on the proper application of 26 C.F.R. § 1.199A-5. Businesses are unlikely to bring patently frivolous claims because they will most certainly assume a cost-benefit approach as to whether to file a claim. Moreover, businesses are unlikely to bring meritless claims because it may trigger equally frivolous claims brought against them by their own competitors. By enabling competitors to bring suit, Congress would increase the opportunity for private parties to challenge agency tax regulations that would have otherwise been barred in Article III courts due to standing. At the same time, it would not open the doors to a deluge of claims that lack merit and slow down the court systems.

D. JCT Bringing Suit

Although the proposed Article I body would primarily serve as a venue for private parties to challenge tax regulations favorable to its competitors, it is also possible that other select parties might be given standing to raise a claim. The ability of state governors and legislatures to request advisory opinions underscores the special interest government entities have in obtaining judicial opinions on subject matters relevant to them performing their duties.[114] Similarly, the GAO's consideration of "the nature of the issues" recognizes that certain circumstances require more flexibility than a blanket rule only allowing competitors to file a bid protest.[115] In the tax regulation context, it would be appropriate to expand the parties permitted to challenge tax regulations to include the JCT.

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113 *See supra* Section I.B.

114 *See* Moench, *supra* note 110 at 2254 ("[Some governors] have claimed that their duty to 'take care that the laws be faithfully executed' allows them to request advisory opinions regarding any laws that they have roles in implementing." (quoting *In re* Advisory Opinion to the Governor—State Revenue Cap, 658 So. 2d 77, 78 (Fla. 1995))).

115 *See Bid Protests: FAQs*, *supra* note 111.

The JCT is a congressional committee established by the Revenue Act of 1926.[116] It is comprised of ten members: five from the Committee of Finance of the Senate and five from the Committee of Ways and Means of the House of Representatives (for both, three from the majority party and two from the minority party).[117] Professional staff with economic and taxation expertise aid the committee members.[118] The JCT "is closely involved with every aspect of the tax legislative process."[119] In performing its duties, the JCT aids tax-writing committees and Members of Congress in developing and analyzing legislative proposals, and investigates the federal tax system.[120] The JCT was borne out of a desire to investigate the Bureau of Internal Revenue (the former name of the IRS) due to concerns over inefficiency and the potential for fraud in tax refunds.[121] When creating the JCT, the Senate Select Committee acknowledged the need for a new approach to tax policy:

> [A] procedure by which the Congress could be better advised as to the systems and methods employed in the administration of the internal-revenue laws with a view to the needs for legislation in the future, simplification and clarification of administration, and generally a closer understanding of the detailed problems with which both the taxpayer and the Bureau of Internal Revenue are confronted.[122]

As a government entity with a special interest in the administration of the Internal Revenue Code, the JCT could benefit from the advisory opinions without being suspect of abusing the body with frivolous requests. The JCT was developed specifically out of a need to advise Congress on the administration of internal revenue laws and to provide Congress with a better understanding of, among other things, issues facing taxpayers.[123] By being able to bring claims and participate in cases involving challenges to Treasury and IRS regulations as they relate to third parties, the JCT would be fulfilling the purpose originally intended by the Senate Select Committee. Additionally, al-

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116 *Overview*, JOINT COMM. ON TAX'N, https://www.jct.gov/about-us/overview/ [https://perma.cc/JFZ7-XP5D]; *see* 26 U.S.C. § 8001.

117 26 U.S.C. § 8002.

118 *See id.* § 8004; *see, e.g.*, *Current Staff*, JOINT COMM. ON TAX'N, https://www.jct.gov/about-us/current-staff/ [https://perma.cc/29JY-UA5G].

119 *Overview*, *supra* note 116.

120 *Id.*

121 *History*, JOINT COMM. ON TAX'N, https://www.jct.gov/about-us/history/ [https://perma.cc/W8PL-WDPC].

122 S. REP. NO. 69-52, at 14 (1926).

123 *Id.*

lowing the JCT to bring claims is in line with its role of investigating the federal tax system. Finally, the knowledge gained from participation would put the JCT in a better position to alert and inform tax-writing committees and Members of Congress of issues they may want to address when drafting tax legislation. Therefore, the inclusion of the JCT as a party who may bring relevant claims would be well aligned with the JCT's tax investigative and oversight purposes. The JCT could serve as a bridge between agencies and plaintiffs to alert Congress to regulatory taxation issues that Congress may want to remedy.

III. Benefits of an Impartial Article I Body to Issue Declaratory Advisory Opinions for Competitor Taxation Claims

Article III often limits standing for cases seeking review of challenges to taxation.[124] Although issuing advisory opinions as a result of an adversarial Article I tribunal would not be binding upon the parties nor upon Article III courts, it would provide taxpayers with greater means to alert the legislature to troublesome regulations in a democratic manner, building public trust without running into Article III standing barriers. At the same time, the adversarial nature of the proceeding confers the benefits of a specific and focused dispute, while the advisory aspect allows for a lower stakes outcome that will not impermissibly violate separation of powers.[125] Furthermore, an Article I tribunal would provide a forum for parties to advocate and receive equal treatment under the law.

A. Democratic Application of Laws

A system that allows advisory opinions to be made from an adversarial contexts supports a more robust, democratic application of tax laws and regulations. One major criticism of the standing doctrine is that it allows courts to reject cases they do not want to adjudicate, leaving plaintiffs with little recourse.[126] The common response is that the political system is better suited for such cases.[127] The likelihood,

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124 *See generally* 13B Fed. Prac. & Proc. *Taxpayer Suits* § 3531.10.1, Westlaw (database updated Apr. 2021) ("[A] workably clear description can be provided as to federal taxpayer standing to challenge federal programs—standing is allowed only in a narrow range of Establishment Clause cases, and might yet be limited even further.").

125 *See* Note, *Advisory Opinions and the Influence of the Supreme Court over American Policymaking*, 124 Harv. L. Rev. 2064, 2064 (2011).

126 Elliott, *supra* note 71, at 477.

127 *Id.*

however, that a party can resolve their grievance regarding fair interpretation of tax laws or regulations through the political process is unrealistic.[128] An Article I proceeding—with third-party participants as adverse parties—that produces an advisory opinion accomplishes the democratic goal of increased private-party participation and enables plaintiffs and third parties to voice their interests. Indeed, a goal of issuing advisory opinions would be to encourage agencies and the legislative bodies—not the courts—to respond to inequitable and problematic regulations. Increased public disclosure through advisory opinions allows for greater dialogue, both positive and negative, regarding Treasury and IRS interpretations. For example, following the release of several IRS notices about alterations to the application of a Troubled Asset Relief Program section in the wake of the 2008 financial crisis, Congress held hearings and ultimately introduced legislation to reverse the effect of the notices.[129] By issuing publicly available, nonbinding advisory opinions, the Article I body could similarly help draw increased attention to issues surrounding the equitable application of potentially troublesome tax regulations. Such opinions could be used to support legislative action, but would force neither the legislature nor federal judiciary to act.

Additionally, an adversarial proceeding with competitors as parties avoids the perverse incentive that tax agencies have to issue overly lenient regulations to a particular group. Although taxpayers face additional barriers when challenging tax regulations, they can sue the IRS or Treasury for the application of regulations that disfavor them after the regulation's enforcement.[130] Because the agency cannot be sued for more generous treatment, but may be sued for being perceived as too harsh, there may be a perverse incentive to issue overly lenient regulations directed towards a group. By allowing private parties to challenge regulations that are too lenient towards competitors, the problem of having an absent party in cases is addressed, further helping to monitor regulations that overly favor a particular group. Enabling not only those regulated, but also competitors of those regulated to challenge regulations can help achieve a more robust democratic application. This is achieved by increasing private party participation in the regulatory system and by putting Treasury and

128 *See id.* at 516.

129 Joshua D. Blank, *The Timing of Tax Transparency*, 90 S. CAL. L. REV. 449, 486 (2017).

130 *See* 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, 1164 (2008) (discussing post-enforcement taxpayer litigation).

IRS on notice that they are subject to litigation—both for harsh regulations and those that lean too far towards inequitable leniency.

B. Transparency and Public Trust

In the taxation context, transparency can be achieved through government openness regarding tax rules, agency interpretations, decision making, and enforcement.[131] Increased transparency facilitates greater public trust and democratic governance.[132] Private parties are able to play a monitoring role if allowed to participate in challenges, which would hold agencies further accountable for their regulations.[133] Additionally, Congress recognizes the essential role public trust plays in the taxation system. In enacting the requirement that written determinations be available for public inspection, Congress acknowledged the potential of "reduce[d] public confidence in the tax laws."[134] A public determination of taxpayers' equal treatment under tax laws and regulations builds upon the necessity for transparency to facilitate public trust.

C. Adversarial Nature

Allowing parties to challenge Treasury's or the IRS's treatment of competitors under a tax regulation creates an adversarial proceeding that accomplishes many Article III case and controversy goals, while avoiding binding decisions that may be troublesome for agencies and legislatures. Generally, advisory opinions, which avoid Article III standing requirements, need not address a specific case or controversy.[135] For example, state courts often issue advisory opinions relating to a governor's or the legislature's authority upon the request of the corresponding bodies.[136] Such decision making, however, suffers from the clarity brought to a proceeding by adverse parties advocating for their interests. By issuing advisory opinions only at the request of a party affected by a favorable treatment of a competitor under a regulation, parties will be required to have a "genuine interest and stake"

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131 Blank, *supra* note 129, at 459; *see also* James Alm, *What Motivates Tax Compliance?*, 33 J. ECON. SURVS. 353, 370 (2019) (describing ways to improve tax administration through enforcement, services for taxpayers, and trust between taxpayers and the agency).

132 *See* Blank, *supra* note 129, at 459, 485.

133 *See* Lawrence B. Solum, *Legal Theory Lexicon 015: Transparency*, LEGAL THEORY LEXICON (May 23, 2021), http://lsolum.typepad.com/legal_theory_lexicon/2003/12/ [https://perma.cc/5LJP-PYEA].

134 S. REP. NO. 94-938, at 305 (1976).

135 *See* Moench, *supra* note 110, at 2268.

136 *Id.*

in the outcome of the proceeding.[137] Thus, just as standing ensures that cases have "proper adversarial presentation," cases brought before the proposed Article I body would retain the benefits of the adversarial context.[138] The adversarial context is said to "sharpen[] the presentation of issues."[139] Just as the requirement of an adversarial process in Article III courts facilitates good decision making,[140] entertaining an adversarial proceeding to determine the application of tax regulations will further sharpen the case for the decisionmaker and illuminate the implications of ruling in a certain way.

D. Limited Separation of Powers Concerns

Advisory opinions in the proposed context, would not be binding opinions the legislative branch might view as overreaching. Separation of powers concerns in a proceeding between parties over a Treasury or IRS interpretation of a tax regulation is minimal. Standing has been argued to ensure that federal courts are limited to carrying out the roles the founders envisioned for them and that they do not usurp legislative or executive power.[141] Determination of how a particular tax regulation applies to specific parties does not seek to rule on "'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the [legislative] branches."[142] Rather, an Article I body issuing advisory determinations regarding parties' treatment under tax regulations bears more similarities to the enforcement of private rights because it is more concerned with ensuring equal treatment of parties than it is with broad and abstract questions concerning the extent and legality of legislative or executive branch actions.

E. Equal Treatment Under the Law

Allowing parties to pursue advisory determinations of competitors' treatment under tax regulations is in the interest of ensuring

137 Bradford C. Mank, *Judge Posner's "Practical" Theory of Standing: Closer to Justice Breyer's Approach to Standing than to Justice Scalia's*, 50 HOUS. L. REV. 71, 77–78 (2012).

138 Massachusetts v. EPA, 549 U.S. 497, 517 (2007); *see* Mank, *supra* note 137, at 78.

139 Lujan v. Defs. of Wildlife, 504 U.S. 555, 583 (1992) (Stevens, J., concurring in judgment) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

140 Elliott, *supra* note 71, at 471.

141 F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 684–85, 690 (2017); Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.").

142 *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982) (quoting Warth v. Seldin, 422 U.S. 490, 499–500 (1975)).

equal treatment under the Internal Revenue Code. Although the IRS provides written determinations for individual requesting parties,[143] there is no mechanism for an entity to assert its interest in maintaining equal treatment when a regulation applies only favorably to a competitor. The existence of an Article I body to hear claims could also help promote equal treatment prior to unfavorable regulations being issued by putting agencies on notice that their determinations might be scrutinized for cross-party consistency. Certainly, during the proceeding, parties could advocate for their right to equal treatment more effectively than through the current system, in which parties may request written determinations on how tax regulations apply only to themselves.

Conclusion

The refusal of Article III courts to hear third-party claims that IRS and Treasury rulings favor some taxpayers over others leaves private citizens powerless to challenge potentially impermissible regulations that adversely impact them. Both the judiciary and Congress, through competitor standing and legislation, have recognized private parties' interests in adjudicating cases that result in direct harm due to competitor advantage. Congress should enact legislation, as it has previously done in similar contexts, to enable competitors—who suffer what courts have recognized outside the tax area as a valid competitor injury—and the JCT to pursue their claims before an Article I body that issues declaratory advisory opinions.

143 Blank, *supra* note 129, at 485.