No. 22-323

IN THE
Supreme Court of the United States

OAKBROOK LAND HOLDINGS, LLC, ET AL.,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JOSEPH D. HENCHMAN*
Counsel of Record
NATIONAL TAXPAYERS UNION FOUNDATION
122 C Street N.W. #700
Washington, DC 20001
jbh@ntu.org
(703) 683-5700

November 7, 2022

MOTION FOR LEAVE TO FILE
***AMICUS CURIAE* BRIEF**
IN SUPPORT OF THE PETITION

Pursuant to Rule 37.2(b), the National Taxpayers Union Foundation (NTUF) respectfully requests leave to submit a brief as *amicus curiae* in support of the petition for writ of certiorari filed by petitioners Oakbrook Land Holdings, LLC, et al. As required under Rule 37.2(a), National Taxpayers Union Foundation timely provided notice to all parties' counsel of its intent to file this brief. Petitioner consented to the filing of this brief. Respondent Commissioner of Internal Revenue did not respond to multiple emails seeking consent.

National Taxpayers Union Foundation (NTUF) provides crucial, impactful research that shows Americans how taxes, government spending, and regulations affect them. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in litigation upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce.[1]

NTUF seeks to assist the Court by providing background information highlighting the importance

---

[1] *See*, *e.g.*, *National Pork Producers Council v. Ross*, U.S. No. 21-468 (argued Oct. 11, 2022); *Boechler v. Commissioner of Internal Revenue*, 596 U.S. ___, 142 S.Ct. 1493 (2022); *CIC Services, LLC v. Internal Revenue Service*, 593 U.S. ___, 141 S. Ct. 1582 (2021); *Arizona v. California*, 589 U.S. ___, 140 S. Ct. 684 (2020); *South Dakota v. Wayfair, Inc.*, 585 U.S. ___, 138 S. Ct. 2080 (2018).

of coherence and national clarity in administrative regulations generally and the conservation easement tax deduction in particular, and the importance of such coherence and clarity for a fair tax administration system. This information may be helpful for the Court in evaluating the petition for certiorari.

Because *Amicus* has written extensively on the issues involved in this case, because this Court's decision may be looked to as authority, and because any decision will significantly impact taxpayers and tax administration, *Amicus* has an institutional interest in this Court's ruling.

For these reasons, National Taxpayers Union Foundation respectfully requests that this Court grant this motion for leave to file a brief as *amicus curiae*.

Respectfully submitted,

JOSEPH D. HENCHMAN*
**Counsel of Record*
NATIONAL TAXPAYERS
UNION FOUNDATION
122 C Street N.W. #700
Washington, DC 20001
jbh@ntu.org
(703) 683-5700

November 7, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[2]

National Taxpayers Union Foundation (NTUF) provides crucial, impactful research that shows Americans how taxes, government spending, and regulations affect them. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in litigation upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce.

Because *Amicus* has written extensively on the issues involved in this case, because this Court's decision may be looked to as authority, and because any decision will significantly impact taxpayers and tax administration, *Amicus* has an institutional interest in this Court's ruling.

[2] Pursuant to Supreme Court Rule 37, Counsel for *Amici* represents that none of the parties or their counsel, nor any other person or entity other than *Amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Congress has authorized conservation easement deductions, but the Internal Revenue Service has decided to use every tool in its well-stocked toolbox to punish partnerships who dare to claim it. In addition to automatic audits, intrusive paperwork requirements, and stiff penalties, the IRS is challenging easement deeds that fail to correctly follow an unclear regulation and their shifting interpretations of that regulation. The result is law-abiding taxpayers who try to do the right thing are treated as wrongdoers by the IRS, with attendant effects on compliance and respect for the law.

Two federal appellate courts have reached opposite conclusions on whether a key underlying Treasury Department regulation was validly promulgated, based on whether Treasury truly responded to all significant comments submitted. *Compare Hewitt v. Commissioner*, 21 F.4th 1336 (11th Cir. 2021) *with Oakbrook Land Holdings, LLC v. Commissioner*, 28 F.4th 700 (6th Cir. 2022). Treasury did not respond to all comments submitted but instead used boilerplate and non-specific statements, and not explain to the public why it went the way it did despite adverse comments recommending otherwise.

One circuit court understands that this is not sufficient for notice-and-comment, but one circuit court chose to defer to the agency. This split has caused uncertainty for taxpayers contemplating conservation easement donations, but also for anyone trying to stay in compliance with an administrative agency where they use similar shortcuts, boilerplate, and non-responses instead of the full notice-and-comment process. The IRS recently added 200 lawyers to continue to press its positions on conservation easement deductions, even after it has lost the same arguments in previous cases; dozens of such cases are now pending before the Tax Court and federal courts. *See, e.g.*, Internal Revenue Service, "IRS Chief Counsel looking for 200 experienced attorneys to focus on abusive tax deals; job openings posted," Jan. 21, 2022, https://tinyurl.com/y4mmvx6b; Theresa Schliep, "Tax Court Denies IRS Early Win In $15M Easement Fight," Aug. 29, 2022, Law360, https://tinyurl.com/3z5f72th; Emlyn Cameron, "Tax Court Denies IRS Win on Easement Purpose Protection Issue," Jul. 20, 2022, Law360, https://tinyurl.com/33xzhye7; Emlyn Cameron, "IRS Denied Win On Deed Validity In $26M Easement Case," Law360, https://tinyurl.com/mvavc9ep; Guinevere Moore, "Courts Are Deciding Some Conservation Easement Cases In Favor of Taxpayers – At Least In Part. Is It Time To Rethink Settlement?," Forbes, Dec. 17, 2020, https://tinyurl.com/3jtbz3md; Pete Sepp, "Shortsighted: How the IRS's Campaign Against Conservation Easement Deductions Threatens Taxpayers and the Environment," National Taxpayers Union, Nov. 29, 2018, https://tinyurl.com/22z2cewd.

The issue decided in opposite ways in *Hewitt* and *Oakbrook* will keep being appealed until this Court resolves it, and this case presents an excellent opportunity to do so.

ARGUMENT

I. THE IRS'S SHIFTING POSITIONS ON CONSERVATION EASEMENT DEDUCTIONS AND THE EXISTING CIRCUIT SPLIT MAKE COMPLIANCE IMPOSSIBLE AND UNDERMINE RESPECT FOR THE LAW.

A. Congress Has Expressed a Clear Goal to Increase Conservation Through Allowing Easement Deductions.

More than 32 million acres of vital wildlife habitat, open spaces, wetlands and rangelands, historically important property, and areas for public enjoyment have been set aside for conservation voluntarily through more than 190,000 conservation easements. *See* Trust for Public Land, National Conservation Easement Database, www.conservationeasement.us, Feb. 1, 2021. Growth in voluntarily conserved land has also been considerable, increasing eight-fold in the past 30 years. One key to this growth has been the establishment and expansion of the federal charitable income tax deduction for conservation easements.

It was the IRS itself, in 1964, that first opened the door for federal tax deductions related to conservation easements. *See* Revenue Ruling 64-205 (1964) ("A gratuitous conveyance to the United States of America of a restrictive easement in real property to enable the Federal Government to preserve the scenic view afforded certain public properties, is a charitable contribution within the meaning of section 170 of the Internal Revenue Code of 1954."). While in 1969 Congress disallowed charitable contributions deductions for donating partial interests in property, Congress codified a statutory deduction as 26 U.S.C. § 170(h) for conservation-related charitable contributions in 1976:

> "Congress believes that the rehabilitation and preservation of historic structures and neighborhoods is an important national goal. Congress believes that the achievement of this goal is largely dependent on whether private funds can be enlisted in the preservation movement."

Joint Committee on Taxation, "General Explanation of the Tax Reform Act of 1976" (1976). Legislation one year later renewed the provision and required easements to be "in perpetuity" to qualify for a deduction, and 1980 legislation made the deduction a more permanent provision of the tax code. The 1980 enactment spurred the 1983-86 regulation at issue in this case.

Confronted with claims that some taxpayers were abusing easement deductions by obtaining inflated valuations instead of appraisals reflective of fair market value of the development rights being forfeited, Congress in 2006 both tightened rules and made the deduction more generous. The *Washington Post* in 2003 and 2004 had drawn attention to inflated valuations for historic building and land preservation, spurring the IRS to step up audit and enforcement activity. *See, e.g.*, Joe Stephens & David B. Ottaway, "Developers Find Payoff in Preservation," *Washington Post*, Dec. 21, 2003. The 2006 legislation widened applicability of accuracy-related penalties and added statutory definitions for what constituted qualified appraisals and their appraisers, but also enhanced easement deductibility rules to 50 percent of adjusted gross income and 15 years of carryover, compared to other capital assets of 30 percent and 5 years.

Since then, broad congressional support for conservation easement deductions has endured despite often bitter disputes over the overall direction of tax policy between Democrats and Republicans. The enhanced deduction from 2006 was made permanent in 2015 in a bipartisan vote. The conservation easement provisions were drawn from an earlier bill, H.R. 641, where they were praised by Republicans ("the temporary rule doubled the number of conservation easement donations in comparison to the two prior years, and increased the acreage conserved by about 32 percent"), with Democrats explaining their objection was to a piecemeal approach and overall policy, not the deduction itself ("The markup was not to debate the conservation efforts across the country, or the merits of H.R. 641, which would make permanent provisions to encourage taxpayers to make qualified conservation contributions."). House of Representatives, 114th Congress, 1st Session, H. Rep. 114-17, "Conservation Easement Incentive Act of 2015 Report, Together With Dissenting Views," (Feb. 2015).

Congress likely sees the deduction as a bargain, generating more benefits per dollar compared with agency-administered conservation. Approximately \$2 billion to \$9 billion each year is deducted for noncash contributions of easements, which would mean taxpayers save between \$1 billion and \$5 billion from taxes they would otherwise owe. *See, e.g.*, Internal Revenue Service, SOI Tax Stats – Individual Noncash Charitable Contributions; National Taxpayer

Advocate, 2020 Annual Report to Congress at 217; Letter from IRS Acting Commissioner David J. Kautter to Sen. Orrin Hatch, Supplement to IRS Notice 207-10 (Jul. 12, 2018). By contrast, federal and state governments spend over $30 billion a year managing publicly-owned lands, often with poor oversight and enormous maintenance backlogs. *See, e.g.*, Congressional Research Service, "Federal Land Ownership: Overview and Data" (Mar. 2017) (estimating $18.6 billion maintenance backlog for the National Park Service, Bureau of Land Management, Fish and Wildlife Service, and Forest Service); Government Accountability Office, "Efforts Made But Challenges Remain in Reducing Unneeded Facilities" (Sep. 2016) (cataloging poor utilization of properties sitting on federal lands); National Taxpayers Union, "Letter Endorsing Chabot-Blumenauer Tongass Effort" (Mar. 2015) (calculating that the Forest Service spent $139 million supporting timber sales in the Tongass National Forest compared to $9 million in revenues); Alison Berry, "Two Forests Under the Big Sky: Tribal vs. Federal Land Management," Property & Environment Research Center Policy Series No. 45 (2009) (comparing the 11 cents in benefits from every spent dollar in a federal forest, versus the $1.04 return of a neighboring privately-run forest). The National Park Service administers 85 million acres (two-thirds of that in Alaska) with 20,000 employees and 315,000 volunteers; private land trusts administer 55 million acres with 8,000 staff and 208,000 volunteers. On a per-acre basis, land trusts manage 40 percent more area per employee than NPS. One study of Colorado conservation easement tax credits and grants concluded that each dollar of tax credits or grants returns between $4 and $12 in public environmental benefits. *See* Mary Guiden, "Investment in conservation easements reap benefits for Colorado," Colorado State University (2017).

It is also important to remember that private land conservation efforts are not cost-free. The costs of securing an easement, which include title search, appraisal, and surveying, were estimated in 2000 to be approximately $83 per acre. *See* James Boyd, "The Law and Economics of Habitat Conservation: Lessons From An Analysis of Easement Acquisitions," 19 Stan. Envtl. Law J. 209 (2000). These costs have risen as stepped-up IRS enforcement activities mean appraisers willing to value easements have become scarcer, and the necessity of hiring tax practitioners to audit-proof transactions.

B. The IRS Has Launched A Campaign to Subvert Congressional Intent on Conservation Easements.

"Unless someone has been living under the proverbial rock the past few years, he is aware that the IRS is aggressively attacking 'syndicated' partnerships that donate conservation easements to charity and claim the related tax deductions. This is common knowledge. What many people do not realize, though, is that the IRS is pursuing others involved with easement donations, and methodically changing the rules to achieve its goals." Hale E. Sheppard, *Conservation Easement Enforcement: IRS Quietly Eliminates Procedural Protections for Appraisers*, Journal of Taxation at 17 (May 2020).

The IRS campaign against conservation easement deductions taken by partnerships has fallen into five key areas, as identified by Sheppard, *id.*:

1. Making common technical arguments, as listed in a "Conservation Easement Issue Identification Worksheet" provided to IRS personnel. These include the appraisal not being timely, the appraiser not being a qualified appraiser, missing paperwork, outstanding mortgages on the property, the deed not being filed on time, eligibility of the donee, or (as alleged in this case) an improper extinguishment clause. *See, e.g.*, Letter from Senator Chris Murphy & Senator Richard Blumenthal to IRS Commissioner John Koskinen (Feb. 23, 2016) ("[W]e are deeply troubled by a trend recounted by a number of constituents who have chosen to conserve their properties, especially given Congress's strong and unambiguous support of the charitable deduction. These constituents describe audits focused on their donation of a conservation easement as antagonistic, aggressively adversarial, lengthy, and expensive—even when the final result is a 'no change' letter from the Service.").

2. Besmirching the conservation purpose, such as by disputing whether the habitat to be protected is significant, whether the habitat is in a natural state, whether there are sufficient numbers of protected species on the property, whether the public has access to the property, or whether the conservation will yield public benefits. *See, e.g.*, *Atkinson v. Commissioner*,

T.C. Memo 2015-236 (2015) (holding that two rare plants on “only 24%” of the easement property, or the sighting of a bald eagle, is too insignificant to be considered a natural habitat).

3. Legal and tax doctrines, in essence arguing that easement donations are simply unlawful and by their very nature lack economic substance. The IRS, using inflammatory language, frequently alleges that partnerships involved are shams with no real charitable intent. *See, e.g.*, *United States v. Zak*, 426 F.Supp.3d 1365 (N.D. Ga. 2019) (Complaint) (“Among other things, Defendants Zak, EcoVest, Solon, McCullough, and Teal knew or had reason to know that the customers were not entitled to the charitable contribution deductions claimed because: The conservation easement syndicates exist solely as a conduit for selling tax deductions; The conservation easement syndicates are shams; The conservation easement syndicates lack economic substance; The conservation easement syndicates are not organized for the purpose of carrying on of a business or joint venture; The conservation easement syndicates do not contribute a qualified real property interest as required to be a valid “qualified conservation contribution”; and The conservation easement donations are not made exclusively for conservation purposes.”).

4. Disputing valuations of foregone development as inflated, drawing on the valuation of the property for property tax purposes, for attempted but unsuccessful sales, for amount

paid by the partnership for the land, or the capital contributions made by the partners who receive tax benefits. *See, e.g.*, *TOT Property Holdings, LLC v. Commissioner*, 2019 WL 11880554 (T.C. Nov. 22, 2019) (focusing on original land purchase price of $486,000 versus claimed deduction value of $6.4 million, due to appraisal dispute over whether best use of land was recreational use and timber harvesting, or homebuilding).

5. Penalties, for alleged negligence, substantial understatement of tax, substantial valuation misstatement, gross valuation misstatement, or reportable transaction misstatement. The IRS guide says to "include a tiering of proposed penalties with multiple alternative positions." IRS, *Conservation Easement Audit Techniques Guide* at 77 (2016). Harsh penalties are generally invoked because the IRS routinely asserts the proper valuation of the deduction is zero. In 2020, the IRS substantially weakened its internal administrative review process that restrained improper assessment of penalties on appraisers. *See* IRS, "Interim Guidance on IRC 6695A Penalty Case Reviews," Doc. LB&I-20-0120-001 (Jan. 22, 2020); *see also Carter v. Commissioner*, T.C. Memo 2020-21 (invalidating $2 million in IRS-sought penalties because agent failed to follow procedures to obtain written approval first). Again, because the IRS believes the proper valuation to generally be zero, any appraiser conducting easement deduction valuations is subject to

> these harsh penalties, and these can now be assessed with fewer internal constraints.

In December 2016, IRS pressure intensified when the tax agency issued Notice 2017-10 that declared certain “syndicated” conservation easement deduction arrangements to be “listed transactions.” IRS, Notice 2017-10. According to the IRS, such transactions “purport to give investors the opportunity to obtain charitable contribution deductions in amounts that significantly exceed the amount invested.” Listed transactions are the most severe level of the IRS’s suite of “reportable transactions” overseen by the Office of Tax Shelter Analysis at the Large Business and International Division of the IRS. Since their creation in 1990, a total of 36 listed transactions have been issued, only two of which have been announced since 2009.

As a result, any participant in a partnership-based easement since 2010 resulting in a deduction greater than 2.5 times the amount of the investment must file IRS Form 8886, a Reportable Transaction Disclosure Statement. People the IRS identifies as “Material Advisors” must file their own disclosures on IRS Form 8918. Taxpayers had six months to digest and implement the massive, retroactive changes to procedure that this notice entailed.

C. The IRS’s Overreliance on Enforcement as the Only Tool Undermines Public Trust in Fair Tax Administration and Discourages Compliance with Tax Laws.

The IRS’s draconian enforcement actions, new rules issued without public input and applying retroactively, and zealous valuation denials have had the result crowding the docket with hundreds of pending conservation easement cases. *See* Interview with IRS Chief Counsel Michael Desmond, *Talking Tax* (Jun. 27, 2019), https://tinyurl.com/yc2v7tf5 ("So we need to figure out what the long term solution is. It's not litigating to trial and win 500 cases and then we start settling."). In her 2019 and 2020 reports, the National Taxpayer Advocate recommended that the IRS "avoid litigation by providing model language taxpayers could use in deeds conveying conservation easements." National Taxpayer Advocate, Annual Report to Congress 2020 at 218, *citing* National Taxpayer Advocate, Annual Report to Congress 2019 at 203. The IRS declined to do so, citing "other workload priorities." *See* Pete Sepp & Joe Bishop-Henchman, "IRS Sends Settlement Offer Scare Tactic on Conservation Easements," National Taxpayers Union Foundation (Jul. 1, 2020), https://tinyurl.com/2jez8tf6. Yet the government's "workload," represented in no small part by the massive docket surrounding conservation easement issues, could be lightened with some prudent guidance formulation.

Last year, the IRS did send settlement offers to those with pending conservation easement litigation, demanding that the deduction be disallowed in full, partnerships agree to pay full penalties and interest, and investor partners allowed to deduct costs but services partners allowed to deduct none. *See id.*, *citing* IRS, IR-2020-130. Given the unfair terms, it is no surprise that "[i]t does not appear that many taxpayers have accepted the offer to date." National Taxpayer Advocate, Annual Report to Congress 2020 at 217.

The struggle for taxpayer rights and safeguards against overreach from the Internal Revenue Service has occupied National Taxpayers Union Foundation and our sister organization National Taxpayers Union (NTU) for the better part of five decades, involving at least 10 significant legislative or administrative reform initiatives such as the Taxpayer Bill of Rights, the IRS Restructuring and Reform Act, and the Taxpayer First Act. Each of these necessary course corrections has been preceded by a few seemingly small but telltale signs that the system of tax administration is headed for a major malfunction. Conventional, rarely-used tools of enforcement such as civil asset forfeiture, joint liability for couples in tax disputes, and the designated summons power for uncooperative taxpayers have become weaponized to threaten much larger portions of the filing population. These developments in turn often portend a more aggressive Service-wide stance toward taxpayers, one that requires swift intervention from policymakers.

These IRS abuses, while seemingly technical in nature, have real impacts. Customers of business owners under audit have been confronted with a raft of "routine questions" about how they conducted transactions with the taxpayer being investigated. Perfectly innocent and unrelated third parties to transactions under IRS scrutiny have been bombarded with Information Document Requests and tax form filing requirements. Advisors as well as professionals who perform arm's-length services for compiling information to substantiate a tax deduction are threatened with penalties and other disciplinary actions.

Where law-abiding taxpayers who try to do the right thing are treated as wrongdoers by the IRS, this has negative attendant effects on compliance and respect for the law. *See, e.g.*, Interview with Former National Taxpayer Advocate Nina Olson, Tax Notes (Jan. 31, 2020), https://tinyurl.com/2p9ux8tn ("I keep saying to IRS compliance employees: thinking about it through a taxpayer rights perspective does not lessen your tools to enforce the law. You still have all of those. It just makes sure that you use them in an appropriate way and in a legitimate way, and that itself will encourage taxpayer compliance.").

II. THE ESSENTIAL TAXPAYER PROTECTION OF THE ADMINISTRATIVE PROCEDURE ACT IS RENDERED MEANINGLESS IF BOILERPLATE LANGUAGE AND NOT RESPONDING TO SUBMITTED COMMENTS ARE SUFFICIENT TO SATISFY ITS REQUIREMENTS.

The Eleventh Circuit, in *Hewitt*, concluded that the regulation at issue in this case was invalid because "Treasury did not discuss or respond to the comments made by NYLC or the other six commenters concerning the extinguishment proceeds regulation," *Hewitt*, 21 F.4th at 1346, and that the NYLC comment "was significant and required a response by Treasury to satisfy the APA's procedural requirements." *Id.* at 1351. *See also Oakbrook*, 28 F.4th at 728 (Guy, J., concurring in the judgment) ("Treasury's decision to remain silent has consequences: We cannot rely on post hoc explanations; nor can a court offer the reasons that might have supported Treasury's decision."); *Oakbrook Land Holdings, LLC v.*

Commissioner of Internal Revenue, 154 T.C. 180, 235 (2020) (Toro, J., concurring in the result) ("Treasury failed to respond to significant points and consider all relevant factors raised by the public comments.") (internal citations omitted); *id.* at 252 (Holmes, J., dissenting) ("The Supreme Court in *Encino Motorcars* invalidated a regulation from an agency that offered 'barely any explanation.' Here we have none.") (internal citation omitted).

The Sixth Circuit, by contrast, reviewed the exact same issue and despite "Treasury's lack of a response to these comments," *Oakbrook*, 28 F.4th at 718, the court was able to "discern [Treasury's regulation and purpose] from the information that Treasury provided during the rulemaking…." *Oakbrook*, 28 F.4th at 713. The court below further concluded that the regulation was valid because while the New York Land Conservancy "noted three issues with the proceeds regulation" and warned that "providing the donee with the value of post-donation improvements made by the donor was inequitable," ultimately it and similar comments "do not qualify as significant." *Id.* at 715. *See also Oakbrook*, 154 T.C. at 195 ("The broad statements of purpose contained in the preambles to the final and proposed regulations, coupled with obvious inferences drawn from the regulations themselves, are more than adequate to enable us to perform judicial review.").

It should be observed that the regulation's term "proportionate value" is incoherent. *See* Treasury Regulation § 1.170A-14(g)(6) ("[A] fair market value that is at least equal to the proportionate value that the perpetual conservation restriction at the time of the gift, bears to the value of the property as a whole at the time."). There is *proportionate share* – a fraction whose value changes as the overall value changes – and there is *value* – a fixed amount whose proportion changes as the overall value changes. Judge Holmes, in writing the memorandum opinion for the Tax Court, observed that both parties are each essentially rewriting "proportionate value" into one of those terms. *See Oakbrook Land Holdings, LLC v. Commissioner*, T.C. Memo 2020-54 (2020) at 8 ("Notice that both of these conflicting readings require tinkering with the actual language of the regulation. The Commissioner would be happier with a regulation that said 'proportionate share' instead of 'proportionate value,' and Oakbrook would be happier with a regulation that deleted the word 'proportionate' from the phrase 'proportionate value.'"). Judge Holmes identifies one statute and two Treasury regulations that use "proportionate value" and concludes that in those instances a fraction is meant (mainly by ignoring the phrase "proportionate value" and relying on other nearby sentences), and so applies the same conclusion here. *See id.* at 10. But three uses of an incoherent term do not make it coherent.

Is the donee entitled, if the easement is later extinguished by judicial order, to its *fraction* at the time of the gift, or the *dollar amount* at the time of the gift? Treasury was aware that this regulation was not clear, as comments submitted by the New York Landmarks Conservancy, The Trust for Public Land, the Nature Conservancy, the Maine Coast Heritage Trust, the Brandywine Conservancy, and the Land Trust Exchange raised the question of judicial extinguishment and proceeds disposition with some offering (differing) solutions. The final regulation remained ambiguous, with no explanation as to why any of the approaches proposed by these commenters were not incorporated. Their use of boilerplate language does not rise to the "minimal level of analysis" required to not be arbitrary and capricious. *Encino Motorcars, LLC v. Navarro*, 579 U.S ____, 136 S. Ct. 2117 (2016). While the Tax Court concluded that picking one interpretation was reasonable, the reasons they gave "are not the ones that Treasury itself offered at the time it issued the regulation." *Oakbrook*, 154 T.C. at 44 (Holmes, J., dissenting).

That the underlying statute does not reference donor improvements, and that the regulation is susceptible to multiple meanings, should be enough to deny deference to the IRS's interpretation under *Chevron*, *Auer*, or *State Farm*. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (adopting an agency interpretation of a regulation where (1) Congress has not directly spoken to the precise question at issue and (2) it is a reasonable interpretation of the statute); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding that giving an agency interpretation of a regulation "controlling" weight unless it is "plainly erroneous or inconsistent with the regulation"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that agency must provide a reasoned explanation for adopting a regulation). If Treasury's decision-making was reasonable and the regulation unambiguous, thousands of conservation easements would not have adopted the judicial extinguishment language present in Oakbrook's deed, following model language widely used by land trusts that had been developed by experts in the property transfer field in the absence of contrary Treasury guidance.

While the IRS did in 2008 issue a private letter ruling construing "proportionate value" to be a "percentage interest," the same letter ruling acknowledged that this amount would be "less an amount attributable to the value of a permissible improvement made by Grantors, if any, after the date of the contribution of the Easement." IRS Priv. Ltr. Rul. 2008-36014 (Sep. 5, 2008). The IRS later changed its mind, stating its position in litigation in 2016 that any reduction for improvements violates the regulation, despite the regulation's silence on the topic and the IRS's own 2008 position blessing reductions for improvements. *See, e.g.*, *Carroll v. Commissioner*, 146 T.C. 196, 201 n.7, 208, 219 (2016). The IRS also asserts that a taxpayer should have understood this before 2016, notwithstanding the regulation's silence on donor improvements, thousands of deeds with now-troublesome in Treasury's estimation) language on proportionate share, and the 2008 letter ruling. The IRS is in essence seeking retroactive application of a new position taken up first in 2016.

Treasury and the IRS have a long-standing view that it need not fully comply with the APA. *See, e.g.*, *CIC Services, LLC v. IRS*, 925 F.3d 247, 258 (6th Cir. 2019) ("Defendants do not have a great history of complying with APA procedures, having claimed for several decades that their rules and regulations are exempt from those requirements."); *Cohen v. United States*, 650 F.3d 717, 726 (D.C. Cir. 2011) (en banc) ("The IRS envisions a world in which no challenge to its actions is ever outside the closed loop of its taxing authority."); Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 Va. L. Rev. 1683, 1714 (2017) ("Even after the Supreme Court's pronouncement in *Mayo Foundation* that both specific and general authority Treasury regulations carry the force of law, the government has continued to assert that many or even most Treasury regulations are exempt interpretative rules."); 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, 1214 (2008) ("Despite Treasury's claims to the contrary, the evidence is strong that Treasury has an APA compliance problem."). The 1986 regulation was a product of this defiance, with Treasury using two pages of the Federal Register "to address more than 700 pages of timely comments and more than 200 pages of public testimony." *Oakbrook*, 154 T.C. at 221 (Toro, J., concurring in the result). A "dialogue" that "responds to significant points raised by the public" it was not. *See Home Box Office v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977).

This IRS position, which itself is often motivated by the perspective that all taxpayers are suspect and thus deserve the full weight of enforcement authority used against them as a first resort, is unfortunate. Most taxpayers want to comply with the law. Given the IRS's shifting interpretations, ambiguous language, and refusal to explain how partnership taxpayers can take conservation easement deductions without running afoul of the IRS, they have made it impossible. The court below was wrong to conclude this all squares with the Administrative Procedure Act, the principles of agency deference, and common sense.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court grant the petition for a writ of *certiorari*.

Respectfully submitted,

JOSEPH D. HENCHMAN*
**Counsel of Record*
NATIONAL TAXPAYERS
UNION FOUNDATION
122 C Street N.W. #700
Washington, DC 20001
jbh@ntu.org
(703) 683-5700

November 7, 2022