NO. 20-13700

IN THE

United States Court Of Appeals

FOR THE ELEVENTH CIRCUIT

DAVID F. HEWITT and TAMMY K. HEWITT

Petitioners/Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent/Appellee.

Appeal from the United States Tax Court
Civil Action File No. 23809-17

BRIEF OF SOUTHERN CONSERVATION TRUST, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS/APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel for the amicus curiae certifies that the following persons and entities have an interest in the outcome of the case:

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Goeke, Joseph Robert, Judge, United States Tax Court;

Hewitt, David F., Petitioner/Appellant;

Hewitt, Tammy K., Petitioner/Appellant;

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CERTIFICATION PURSUANT TO 11TH CIR R. 26.1-3(b)

No publicly traded company or corporation has an interest in the outcome of the case or appeal.

Respectfully submitted, this 17th day of December, 2020.

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INTEREST OF THE AMICUS CURIAE[1]

Southern Conservation Trust, Inc. was founded in 1993 as an organization dedicated to conserving property throughout the Southeastern United States. The trust develops nature areas, provides environmental education, and conserves tens of thousands of acres of land, waterways, and valuable habitat each year. One way that the organization accomplishes its mission is through conservation easements—legal agreements between the trust and landowners that permanently limit the use of land in order to protect its habitat and public enjoyment.

The trust is interested in ensuring that conservation easements are permitted as Congress intended, which in turn furthers the trust's ability to pursue its mission. In the opinion below, the Tax Court upheld the IRS' decision to disallow a deduction for Petitioners' conservation easement. This ruling directly impacts organizations like the trust. Indeed, the Tax Court's ruling would disincentivize landowners from dedicating conservation easements in the first place, hampering the ability of organizations like the trust to do their work.

[1] This brief is filed with the consent of all parties. The undersigned counsel certify that no party's counsel authored this brief in whole or in part and that no party, party's counsel, or other person (other than the amicus curiae, its members, and its counsel) contributed money that was intended to fund the brief.

STATEMENT OF THE ISSUE

In 2012, Petitioners donated an easement on 257 acres of valuable Alabama property to Pelican Coast Conservancy, Inc., a charitable organization similar in purpose to the Southern Conservation Trust. *Hewitt v. Comm'r*, 119 T.C.M. (CCH) 1593, at *6 (June 17, 2020). The purpose of the donation was to preserve and protect the scenic enjoyment of the land and water. *Id.* The conveyance prohibited Petitioners from undertaking any activity inconsistent with the easement's purposes. *Id.* By donating the easement, Petitioners intended to protect the easement property in perpetuity. *Id.*

The deed also provided for the sharing of proceeds in the rare event that the easement were ever involuntarily extinguished, such as by eminent domain. In that case, the conservancy would enjoy its share of the proceeds, but the calculation of proceeds would not include any increase in value attributable to any subsequent improvements that Petitioners made on the property. *Id.* at *8. The deed language on this point tracked the model language for conservation easements promulgated by the Land Trust Alliance. *Id.*

After making the 2012 conveyance, Petitioners claimed a charitable deduction for the donation on their tax returns. *Id.* After all, Congress has declared that such a deduction is permitted for a conservation easement so long as the conservation purpose is protected in perpetuity. 26 U.S.C. §§ 170(h)(1), 170(h)(5)(A).

But in 2016, the Commissioner began focusing on a regulation that had been on the books (but largely ignored) since 1986. Under the Commissioner's new interpretation of the regulation, hypothetical proceeds given to a donee upon a hypothetical condemnation must include proceeds related to post-conveyance improvements on the property. In one fell swoop, the Commissioner sought to invalidate not only Petitioners' deed but thousands of others.

Thus, the IRS disallowed Petitioners' deduction, and the Tax Court ultimately upheld that decision. The Tax Court concluded that the deduction was impermissible "because the deed would not allocate to the donee a share of the proceeds in the event the property is sold following a judicial extinguishment of the easement." *Hewitt*, 119 T.C.M. (CCH) 1593, at *2. The sole basis for the Tax Court's holding was Treasury Regulation § 1.170A-14(g)(6)(ii) (the "Regulation").

The issue presented is whether the Regulation purporting to apportion condemnation proceeds is entitled to deference when the Regulation falls beyond the Commissioner's expertise, contravenes the language and purpose of Congress' deduction, and contradicts the Commissioner's own longstanding interpretation of the statute.

SUMMARY OF THE ARGUMENT

Congress made the policy decision to allow for a tax deduction for the donation of a conservation easement. Such a deduction encourages the voluntary

donation of property that has important conservation value. For a qualified real property interest given to a qualified organization, the statute declares that the deduction is allowed so long as "the conservation purpose is protected in perpetuity." 26 U.S.C. §§ 170(h)(1), 170(h)(5)(A).

The Tax Court affirmed that Petitioners intended the conservation purpose of their donation to be protected in perpetuity. In other words, everyone agrees that Petitioners intended to satisfy the statute as written.

But the Regulation, as now interpreted by the Commissioner, goes a step further and imposes an additional, extra-statutory requirement. It requires that the *monetary value* of a donee's property interest increase in tandem with any change in the value of the property overall, even if that change results from post-donation improvements to the land by the donor. Thus, the Tax Court held that Petitioners' easement did not qualify for the deduction because, in the unlikely event of condemnation, any just compensation apportioned to the donee would not include appreciation due to improvements to the land made by Petitioners. According to the Tax Court, "[t]he value of posteasement improvements may not be subtracted out of the proceeds before determining the donee's proportionate share." *Hewitt*, 119 T.C.M. (CCH) 1593, at *19.

The Regulation was the sole basis for this holding. However, the Regulation is invalid and not subject to deference. As Petitioners correctly explained in their

opening brief, the Regulation is procedurally defective and therefore invalid under the Administrative Procedure Act. But the Regulation is not entitled to deference for another, fundamental reason as well: it does not fall within the Commissioner's substantive area of expertise. The allocation of condemnation proceeds is a matter traditionally reserved for *state* law, and there is no indication that Congress intended the IRS to jettison basic principles of federalism by invading this area.

The Tax Court's reliance on the Regulation was also misplaced because the Regulation contravenes the statutory scheme laid out by Congress. The legislature has declared that a donor can donate a partial interest in property, but the Regulation requires the donor to give something more. Just as important, the Commissioner's new interpretation of the Regulation runs directly contrary to Congress' intent to encourage conservation easements.

Finally, the Tax Court erred in relying on the Regulation because it contradicts the Commissioner's own interpretation of the statutory scheme. The public is entitled to predictable enforcement of statutes like these. And in this area, the Commissioner had already recognized—through another regulation and a private letter ruling—that hypothetical proceeds from a hypothetical extinguishment are not relevant to the deduction. The Tax Court erred in permitting the Commissioner to reverse course without explanation.

For all of these reasons, the Tax Court's judgment should be reversed.

ARGUMENT AND CITATIONS OF AUTHORITY

I. Congress Sought to Encourage Conservation by Providing a Deduction for Conservation Easements.

This case is about deference to an administrative regulation. The threshold question in such a situation is whether the regulation fits within the agency's substantive expertise. *Martin v. Soc. Sec. Admin., Comm'r*, 903 F.3d 1154, 1159-60 (11th Cir. 2018) (per curiam) (discussing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). If it does, then courts analyze whether the relevant statute is ambiguous and whether the regulation is a permissible interpretation of that statute. *Id.* at 1159. Even if a regulation is otherwise permissible, the agency's *interpretation* of that regulation must be reasonable. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

Here, the Internal Revenue Code allows a charitable deduction for a donation of a real property interest when that donation is a "qualified conservation contribution." 26 U.S.C. § 170(b)(1)(E)(i). Since 1976, this deduction has been permitted even when the donation comprises something less than a fee simple interest in the property (such as an easement). *Id.* § 170(f)(3); *Whitehouse Hotel Ltd. P'ship v. Comm'r*, 615 F.3d 321, 329 (5th Cir. 2010). This deduction "has enjoyed decades of bipartisan support." *BC Ranch II, L.P. v. Comm'r*, 867 F.3d 547, 551 (5th Cir. 2017).

The deduction "creates an incentive for taxpayers to donate real property interests to nonprofit organizations and government entities for 'conservation purposes.'" *Kaufman v. Shulman*, 687 F.3d 21, 23 (1st Cir. 2012) (quoting 26 U.S.C. § 170(h)(1)(C)). The deduction is statutorily permitted so long as three criteria are satisfied: it is a contribution of a 1) qualified real property interest, 2) made to a qualified organization, 3) for conservation purposes. 26 U.S.C. § 170(h)(1). The only criterion at issue here is the third—whether the contribution was made "exclusively for conservation purposes." *See id.*

Regarding this exclusivity requirement, the statute's only limitation is one of duration: the donation is considered exclusive so long as the conservation purpose is protected in perpetuity. *Id.* § 170(h)(5)(A). Thus, a grant with a right of reversion would not satisfy the statute.

Of course, there are rare instances in which a conservation purpose could be negated by some external occurrence beyond the control of the donor and donee. For example, the parties cannot prevent the government from later condemning the property through its power of eminent domain. No matter; so long as the donee's proceeds from the condemnation are used "exclusively for conservation purposes," the statute is still satisfied. In other words, even if a judicial proceeding extinguishes the conservation restrictions on a parcel at some point in the future, everyone agrees that the original contribution can still be deemed "in perpetuity" so long as the donee

uses its ultimate proceeds for conservation purposes. *See* Treas. Reg. § 1.170A-14(g)(6)(i).

That should have ended this case. But the Commissioner no longer likes conservation easements. As one Tax Court judge colorfully explained, conservation easements have become "to the Commissioner what aunts are to Bertie Wooster: It is no use telling me there are bad aunts and good aunts. At the core, they are all alike. Sooner or later, out pops the cloven hoof." *Rajagopalan v. Comm'r*, T.C.M. (RIA) 2020-159 (Nov. 19, 2020) (internal quotation omitted).

Thus, the Commissioner has, of late, earnestly sought to disallow conservation easements throughout the country. This appeal is merely one in a long line of cases in which the Commissioner has sought to use his rule-making authority as a sword to further his idiosyncratic distaste for what Congress has allowed. *See, e.g.*, *Pine Mountain Pres., LLLP v. Comm'r*, 978 F.3d 1200 (11th Cir. 2020); *Champions Retreat Golf Founders, LLC v. Comm'r*, 959 F.3d 1033 (11th Cir. 2020).

Nevertheless, in this case, the Tax Court blindly accepted the Regulation as binding and followed the Commissioner's lead. This was error.

II. The Regulation Is Not Entitled to Deference Because It Fails at *Chevron* Step Zero.

By providing for the charitable deduction in Section 170, Congress declared that a conservation easement is proper so long as the conservation purpose of the donation is protected in perpetuity. Congress did *not* address the valuation of

interests among various stakeholders. This is not surprising, since issues regarding proportionate value between ownership interests in real property are governed by state law. In particular, states have traditionally decided how condemnation proceeds are apportioned.

Thus, Congress would not have expected the Commissioner to promulgate regulations purporting to dictate the ownership rights among individuals with varying ownership interests in property; that apportionment is supposed to be determined by state judges and juries. Yet, the Regulation takes that role away from the states and instead declares that a deduction is only allowed if proceeds are apportioned as *the Commissioner* wants them to be.

That Regulation is not entitled to deference because it falls beyond the Commissioner's substantive expertise. The threshold requirement for deference—sometimes termed "*Chevron* Step Zero"[2]—is that the rule falls within the agency's substantive expertise.

This step has always been implied in any analysis of agency deference. After all, deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). But Congress

[2] *See, e.g.*, *Martin*, 903 F.3d at 1159-60; Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187 (2006).

does not give agencies carte blanche to add whatever they want to a statute. Thus, "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 325 (2014). This is what the Supreme Court has deemed "the core administrative-law principle": that an agency may not change legislation "to suit its own sense of how the statute should operate." *Id.* at 328; *see also Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) ("[I]t is fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction.").

In fact, the Supreme Court has specifically applied this principle to the IRS Commissioner. In *King v. Burwell*, 135 S. Ct. 2480 (2015), the Court invalidated an IRS rule that made tax credits available under the Patient Protection and Affordable Care Act. Although the government argued that the IRS rule was entitled to deference, the Court rejected that notion because the IRS "has no expertise in crafting health insurance policy of this sort." *Id.* at 2489. The Court explained that "had Congress wished to assign that question to an agency, it surely would have done so expressly." *Id.*

The Supreme Court recently reaffirmed this principle in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). There, the Court reiterated that deference is unwarranted when "an interpretation does not reflect an agency's authoritative, expertise-based, fair, or considered judgment." *Id.* at 2414 (internal quotation and alteration omitted).

Justice Kagan explained that "the agency's interpretation must in some way implicate its substantive expertise." *Id.* at 2417. In other words, "the basis for deference ebbs when the subject matter of the dispute is distant from the agency's ordinary duties." *Id.* (internal quotation and alterations omitted).

Notably, the Court explained that "[s]ome interpretive issues may fall more naturally into a judge's bailiwick." *Id.* The Court gave the particular example of "a simple common-law property term." *Id.* (citing *Jicarilla Apache Tribe v. FERC*, 578 F.2d 289, 292-93 (10th Cir. 1978)).

This principle—that federal agencies deserve no deference outside their area of expertise—is particularly important for matters traditionally governed by state law. Rights in real property are created under state law, and an agency of the federal government has no authority to reallocate the property interests of parties by regulation. *See, e.g.*, *Aquilino v. United States*, 363 U.S. 509, 512-13 (1960). It has long been the rule that *state law* defines a taxpayer's property interest, with the tax consequences of those interests dictated by *federal law*. *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 722 (1985). That is, a federal tax statute "itself creates no property rights but merely attaches consequences, federally defined, to rights created under state law." *United States v. Craft*, 535 U.S. 274, 278 (2002); *see also Drye v. United States*, 528 U.S. 49, 58 (1999) ("We look initially to state law to determine what rights the taxpayer has in the property the Government seeks to

reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation."). In other words, "[s]tate law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed." *Morgan v. Comm'r*, 309 U.S. 78, 80 (1940); *see also United States v. Mitchell*, 403 U.S. 190, 197 (1971); *United States v. Smith*, 768 F. App'x 926, 931 (11th Cir. 2019) (per curiam); *Austin & Laurato, P.A. v. United States*, 539 F. App'x 957, 961 (11th Cir. 2013) (per curiam).

As relevant here, the distribution of proceeds upon extinguishment of a property right is a matter traditionally reserved for state law. *See, e.g.*, *Texas v. Figueroa*, 389 F.2d 251 (5th Cir. 1968) (per curiam) (affirming a 50% distribution of proceeds to a surface rights owner under Texas law); *United States v. 403.15 Acres of Land*, 316 F. Supp. 655, 657 (M.D. Tenn. 1970) (looking to Tennessee law to distribute a condemnation award from a federal taking).

The Commissioner does not have the expertise to determine property rights under the states' varying schemes for apportionment. For example, under Alabama law (which would apply to Petitioners' easement in this case), the court or jury determines the apportionment and distribution of condemnation proceeds among those with an interest in the property. *Drummond Coal Co. v. State*, 548 So.2d 430, 431 (Ala. 1989); *State v. Ward*, 706 So.2d 1248, 1250 (Ala. Ct. App. 1997). "In all

cases where property taken for public use is in multiple ownership, each of the owners of an interest in the property has a corresponding right to share in the award. The award is thus apportioned in accordance with the respective interests of such owners." *Harco Drug, Inc. v. Notsla, Inc.*, 382 So.2d 1, 3 (Ala. 1980). Because "the funds derived from condemnation stand in lieu of the lands condemned," the proceeds "must be fairly apportioned so as to care for and protect all such interests." *Brugh v. White*, 103 So.2d 800, 805 (Ala. 1957). Thus, the factfinder must determine "the adjudicated valuation of their interests." *City of Dothan v. Wilkes*, 114 So.2d 237, 240 (Ala. 1959).

The Regulation, however, takes that issue out of the factfinder's purview and places it in the Commissioner's hands. According to the new interpretation of the Regulation, the value of the donee's interest must increase in a predetermined amount along with any appreciation over time—regardless of whether the donor spends money, time, and effort to improve the property after the donation.

Moreover, the Commissioner's attempt to confer a property interest in a donee greater than what the donor granted under state law has constitutional implications. U.S. Const. amend. V ("No person . . . shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."); Ala. Const. art. XII, § 235 (ensuring that upon a condemnation an owner of an interest in property will receive just compensation).

If the Tax Court's reliance on the Regulation were upheld, the Regulation would require Petitioners to give up just compensation to which they are otherwise entitled. By the same token, the Regulation could grant the donee an interest in the donor's property greater than what the donee would receive under state law. There is no indication that Congress intended the Commissioner to promulgate regulations to do so.

In essence, Congress did not leave a "gap" for the Commissioner to fill. The Commissioner's promulgation of the Regulation went beyond his "unique expertise" and does not reflect the agency's "***expertise-based***, fair, or considered judgment'"—and is therefore not entitled to deference. *See Kisor*, 139 S. Ct. at 2414 (emphasis added; internal quotation and alterations omitted).

The Tax Court erred in assuming that the Commissioner is in the best position to allocate proceeds upon a judicial extinguishment of an easement. That is not how administrative deference works. As the Supreme Court said in *King*, "[t]his is not a case for the IRS." 135 S. Ct. at 2489. Indeed:

> Expert discretion is the lifeblood of the administrative process, but unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 (1962) (internal quotations and citations omitted).

III. The Regulation Is Not Entitled to Deference Because It Is Contrary to the Statutory Language and Congressional Intent.

The Regulation is also not entitled to deference because it contravenes the deduction as permitted by the legislature.[3] It is "Congress, not the Commissioner, [which] prescribes the tax laws." *Dixon v. United States*, 381 U.S. 68, 73 (1965). Thus, "the rights of the taxpayer are defined by the statute, which establishes the standard by which such rights must be measured." *In re Quality Stores, Inc.*, 693 F.3d 605, 619-20 (6th Cir. 2012), *rev'd on other grounds sub. nom by United States v. Quality Stores, Inc.*, 572 U.S. 141 (2014). Simply put, "a promulgated Treasury regulation has no power to alter a statute Congress enacted." *Id.* at 620; *see also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213 (1976) ("The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law.").

A. The Regulation contravenes the plain language of the statute.

The relevant statute merely requires that the conservation *purpose* of a donation be protected in perpetuity—it says nothing about the economic value of the conveyance. As the Tax Court has previously acknowledged, the statute "contains no further specific guidance as to when a contribution of a qualified real property

[3] No appellate court has addressed the validity of the Regulation. The Tax Court's decision made passing reference to *PBBM-Rose Hill, Ltd. v. Commissioner*, 900 F.3d 193 (5th Cir. 2018), but in that case the Fifth Circuit specifically declined to address the issue. *Id.* at 209 n.8.

interest that is protected in perpetuity will be exclusively for conservation purposes." *Glass v. Comm'r*, 124 T.C. 258, 277 (2005), *aff'd*, 471 F.3d 698 (6th Cir. 2006). Thus, as stated in the decision below, "[t]he statute is silent as to the effect of a possible extinguishment of the conservation easement." *Hewitt*, 119 T.C.M. (CCH) 1593, at *16.

Yet the Commissioner's interpretation of the Regulation requires the *donee* to receive extinguishment proceeds attributable to any increase in the value of the improvements on the property owned by the *donor*. This regulatory interpretation of the statute directly conflicts with the congressional requirement that the donee only be entitled to the "interest" in property that it is given at the time of donation. Notably, even some of the Tax Court judges have recognized as much. *See Oakbrook Land Holdings, LLC v. Comm'r*, --- T.C. ---, 2020 WL 2395992 (May 12, 2020) (Toro, J., concurring) (explaining that the Regulation is an unreasonable interpretation of the statute and therefore invalid), *appeal docketed*, No. 20-2117 (6th Cir. Nov. 16, 2020). "Whatever the purpose of a contribution, that purpose may not be invoked to require the donor to give the donee, as a precondition to receiving a deduction for his contribution, a right to receive compensation properly attributed to the real property interest that the Code permits the donor to retain." *Id.*

Further, the congressional intent is evident. The drafters of the statutory provision were concerned with whether the conversation purpose would "in practice

be carried out"—not with whatever possible benefit a donor might receive in the future if a hypothetical condemnation ever occurred. *See* H.R. Rep. No. 95-263, at 30-31 (1977). Thus, the few courts that have analyzed the "perpetuity" requirement have only questioned whether the conservation *purpose* would continue. *See, e.g.*, *Simmons v. Comm'r*, 98 T.C.M. (CCH) 211 (Sept. 15, 2009) ("A restriction granted in perpetuity on the use of the property must be based upon legally enforceable restrictions that will prevent uses of the retained interest in the property that are inconsistent with the conservation purposes of the contribution."), *aff'd sub. nom by Comm'r v. Simmons*, 646 F.3d 6 (D.C. Cir. 2011).

The United States Claims Court addressed this issue in *McLennan v. United States*, 24 Cl. Ct. 102 (1991), *aff'd*, 994 F.2d 839 (Fed. Cir. 1993). There, taxpayers contributed a scenic easement to a conservancy but provided that the easement would revert upon condemnation of the underlying property (and any compensation would be payed to the taxpayers). *Id.* at 104. Notwithstanding that condition, the court held that the contribution was exclusively for conservation purposes because the conservancy acquired the easement in furtherance of its established preservation goals. *Id.* at 107.

By contrast, the new interpretation of the Regulation engrafts an additional requirement that cannot be found anywhere in the statute. The Tax Court erred in blindly following the Regulation without stopping to ask whether the Regulation is

consistent with the statutory scheme laid out by Congress. *See Oakbrook Land Holdings*, 2020 WL 2395992, at *19 (Toro, J., concurring) ("Under *Chevron*, Treasury is entitled to draw lines on the page provided by Congress; *Chevron* does not give Treasury legislative authority to substitute a different page for the one Congress enacted into law.").

It is undisputed that the Commissioner has wide discretion in applying ambiguous provisions of the Internal Revenue Code. But the Commissioner's "discretion" does not equate to authority to add to the Code on a whim. *See W. Co. of N. Am. v. United States*, 323 F.3d 1024, 1033 (Fed. Cir. 2003). Given the explicit limitations provided by Congress on permissible conservation easements, this Regulation's "treatment of this statute is not an interpretation but a rewrite." *See Ind. Mich. Power Co. v. DOE*, 88 F.3d 1272, 1276 (D.C. Cir. 1996).

For that reason, the Regulation is entitled to no deference. The applicable statute is not ambiguous, and therefore the deference typically afforded to agency interpretations of ambiguous statutes is inapplicable. *See, e.g.*, *Reese Bros., Inc. v. United States*, 447 F.3d 229, 237 (3d Cir. 2006). "[I]f the meaning of the statute is clear," courts "have the responsibility to apply the statute as written, not to defer to a contrary regulatory interpretation." *Robinson v. United States*, 335 F.3d 1365, 1372 (Fed. Cir. 2003).

The Regulation's singular focus on a remote chance of a future economic benefit to the donor simply goes beyond the statutory language—which only requires that the conservation purpose be protected in perpetuity. By preserving the conservation purpose here, Petitioners' deed did "all the Commissioner can reasonably demand to prevent uses of the properties inconsistent with conservation purposes." *See Simmons*, 646 F.3d at 10 (internal quotation omitted). To the extent the Regulation requires something more, it is invalid.

B. The Regulation contravenes congressional intent to encourage conservation easements.

The Tax Court's cabined approach to the charitable deduction also ignores the fact that conservation easements "provide a general benefit to society by restricting the donor's full use of the property and thereby preserving in an undeveloped state uniquely scenic land, buildings, and natural resources." *Stanley Works & Subsidiaries v. Comm'r*, 87 T.C. 389, 399 (1986). Improperly restricting the deduction would contravene Congress' recognition that the preservation of our country's natural resources and cultural heritage are important and that conservation easements play an important role in this preservation. *See* S. Rep. No. 96-1007, at 9 (1980); *see also* Stephen J. Small, *The Tax Benefits of Donating Easements in Scenic and Historic Property*, 7 Real Est. L.J. 304, 305 (1979) (explaining that Congress "made the basic policy decision that the preservation of historic property

is a worthy goal and one that is appropriate to encourage through the medium of the tax code").

Further, the Tax Court's interpretation ignores the practicalities involved in these transactions. A donee has no rights beyond what the donor chooses to give. The donee accepts what it is given, at the time of the donation—and that is what is negotiated. The donee has no interest in subsequent increase in value due to improvements that the donor may make on the property after the donation has been completed. The Tax Court's holding interferes in that process and requires the donor to give something more than either the donor or the donee has the right to expect.

And of course, the Commissioner's recent emphasis on hyper-technical issues is not for the benefit of land trusts. For example, the hypothetical proceeds that may result from hypothetical condemnation is of no import to the donee—whose interest is in conserving the land. If anything, the Commissioner's about-face has harmed land trusts and required them to incur additional costs in trying to keep their forms up to date. That was certainly not Congress' intent.

IV. The Commissioner's Interpretation of the Regulation Is Not Entitled to Deference Because It Contradicts His Longstanding Interpretation of the Statute

A. Consistency is important.

Even if the Regulation were within the Commissioner's general expertise, that does not mean that his interpretation of the Regulation necessarily controls. Agencies have a special obligation to provide predictability and stability.

To that end, an agency's interpretation must reflect its "fair and considered judgment." 139 S. Ct. at 2417 (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)). A court should decline to defer, for example, to a merely "convenient litigating position" or to a new interpretation that creates "unfair surprise" to regulated parties. *Id.* at 2417-18; *see also U.S. Freightways Corp. v. Comm'r*, 270 F.3d 1137, 1139 (7th Cir. 2001) (rejecting the Commissioner's proffered interpretation based on "the lack of any sound basis behind the Commissioner's interpretation, coupled with a lack of consistency on the Commissioner's own part").

Here, the plain language of the Regulation does not address post-conveyance improvements. It does not contemplate change in property value at all, which is perhaps an implicit recognition that those issues are not in the Commissioner's bailiwick. Indeed, the Commissioner's early arguments regarding the requirement

were solely focused on the *duration* of the conveyance rather than *value* given to the donee. *See Stotler v. Comm'r,* 53 T.C.M. (CCH) 973 (June 4, 1987).

It was not until 2016, in the course of litigation, that the Commissioner asserted for the first time that *value* is relevant to *duration*, suggesting that hypothetical proceeds must include the value of post-conveyance improvements in order for the easement to be deemed "in perpetuity." The problem is that the Commissioner had long relied on a different interpretation of the perpetuity requirement. The Tax Court erred in accepting this newfound interpretation without any explanation for the change in position.

B. The Commissioner's newfound interpretation contradicts the "remote event" regulation.

The Commissioner's interpretation requiring the value of post-conveyance improvements to be given to the donee violates another regulation. At the same time he promulgated the Regulation here, the Commissioner also promulgated a regulation stating that a deduction is *not* disallowed based on "the performance of some act or the happening of some event, if on the date of the gift it appears that the possibility that such act or event will occur is so remote as to be negligible." Treas. Reg. § 1.170A-14(g)(3) (the "remote event" regulation).

Here, the Commissioner's theory rests on the assumption that improvements will be made on the property *and* that judicial extinguishment will occur *and* that Petitioners will seek to deduct the cost of the improvements from the proceeds. This

hypothetical chain of unlikely events is insufficient to disallow the deduction. *See, e.g.*, *Simmons*, 646 F.3d at 10 ("Simmons's deductions cannot be disallowed based upon the remote possibility L'Enfant will abandon the easements."); *United States v. Leonhardt*, No. 74-253-Orl-Civ-Y, 1976 WL 1046, at *5 (M.D. Fla. Mar. 31, 1976) ("[T]his Court finds that the possibility of the Trustee exercising his power of invasion here is so remote as to be negligible."). Indeed, the undersigned are not aware of any situation in which conserved property has been improved and been the subject of a taking.

Further, the remote event regulation reflects a practical reality: even when parties intend for a donation to be perpetual, there are certain circumstances that are out of the parties' control. A tax deduction should not be disallowed merely because one of those things *might* happen in the future. Yet, the Tax Court ignored this regulation altogether—and instead credited the Commissioner's interpretation of the proceeds Regulation based on an entirely hypothetical chain of unlikely events.[4]

C. The Commissioner's newfound interpretation contradicts his 2008 private letter ruling.

Exacerbating the problem, the Commissioner had issued a private letter ruling in 2008 that embodied the prevailing interpretation of the statute—meaning, proceeds could be divided without regard to any change in value of the property

[4] To the extent that the Commissioner believes the two regulations can be harmonized, he has never proffered such an explanation.

subsequent to the conveyance. I.R.S. P.L.R. 200836014 (Sept. 5, 2008). In that ruling, the Commissioner approved a proposed conservation easement that would subtract increased value due to improvements from the proceeds received by the donee. Specifically, the Commissioner ruled that the conservation purpose would still be deemed in perpetuity even if the easement were judicially extinguished and even if the proceeds received by the donee were reduced by "an amount attributable to the value of a permissible improvement made by Grantors." *Id.*

Because this interpretation was neither plainly erroneous nor inconsistent with the regulation, it should have been controlling in the proceedings below. *See Auer*, 519 U.S. at 461. The Tax Court erred in holding otherwise.

Notably, although private letter rulings are not *binding*, courts often rely on them as reasoned interpretations of a statute. *See, e.g.*, *Hanover Bank v. Comm'r*, 369 U.S. 672 686-87 (1962); *Davis v. Comm'r*, 716 F.3d 560, 569 n.26 (11th Cir. 2013). Private letter rulings are important in this regard because they "reveal the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws." *Hanover Bank*, 369 U.S. at 686. Thus, adherence to private letter rulings is indicative of an agency's reasoned approach to an issue of statutory interpretation. *See, e.g.*, *Taproot Admin. Servs., Inc. v. Comm'r*, 679 F.3d 1109, 1113 1119-20 (9th Cir. 2012); *Wells Fargo & Co. & Subsidiaries v. Comm'r*, 224 F.3d 874, 886 (8th Cir. 2000); *Wolpaw v. Comm'r*, 47 F.3d 787, 794 (6th Cir.

1995). A private letter ruling interpreting a statute prior to litigation is a significant indication of how an agency truly interprets the statute. *See Estate of Spencer v. Comm'r*, 43 F.3d 226, 234 (6th Cir. 1995) (finding a previous private letter ruling to be "significant" and explaining "the fact that the IRS has done an about face since 1986 makes us even more reluctant to adopt their interpretation of this statute").

On the other hand, the fact that the Commissioner *changes* his position from a private letter ruling is likewise important. *Cf. Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973) (explaining that a "settled course of behavior embodies the agency's informed judgment" and creates "at least a presumption that [Congress'] policies will be carried out best if the settled rule is adhered to"). In that situation, the private letter ruling is "persuasive authority" for refuting the newfound position. *Glass*, 471 F.3d at 709, 711; *see also Ford Motor Co. v. United States*, 768 F.3d 580, 592 n.4 (6th Cir. 2014) (noting the discrepancy between a private letter ruling and the argument advanced in litigation); *ABC Rentals of San Antonio, Inc. v. Comm'r*, 142 F.3d 1200, 1207 n.5 (10th Cir. 1998) (similar); *Estate of Clayton v. Comm'r*, 976 F.2d 1486, 1499 (5th Cir. 1992) (similar). "Although the Commissioner is entitled to change his mind, he ought to do more than stride to the dais and simply argue in the opposite direction." *Transco Expl. Co. v. Comm'r*, 949 F.2d 837, 840 (5th Cir. 1992).

This is a well-established principle of administrative law. *See, e.g.*, *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987). Deference to an agency is "unwarranted when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question," such as "when the agency's interpretation conflicts with a prior interpretation." *Christopher*, 567 U.S. at 156; *see also Tax & Accounting Software Corp. v. United States*, 301 F.3d 1254, 1261 (10th Cir. 2002) ("[G]iven the IRS's changing position on this issue, we believe that deference is inappropriate here.").

Given the Commissioner's longstanding interpretation of the statutory perpetuity requirement, his newfound interpretation of the Regulation is not entitled to deference. The Commissioner provided no reason for his changed interpretation from 2008 and no evidence that would justify a change in circumstances. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (explaining that when an agency changes its position, it must "display awareness that it is changing position" and "show that there are good reasons for the new policy"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) ("An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis.").

This failure is all the more important when a prior interpretation has "engendered serious reliance interests." *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009). Here, the Commissioner's previous interpretation was not only relied upon by the Petitioners in this case but also by countless other donors and donees—including the Southern Conservation Trust.

Courts are reluctant to enforce such "an impromptu reading that is not compelled and would defeat the purpose of the statute." *Kaufman*, 687 F.3d at 27. For this reason as well, the Tax Court's reliance on the Regulation should be rejected.

CONCLUSION

For the foregoing reasons, the amicus curiae respectfully suggests that the decision of the Tax Court should be reversed and this matter remanded for trial.

This 17th day of December, 2020.

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CERTIFICATE OF COMPLIANCE

In compliance with Federal Rules of Appellate Procedure 29(a) and 32(a)(7)(B)(i), the undersigned counsel hereby certifies that this Brief is typed in 14-point Times New Roman and contains 6,199 words.

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CERTIFICATE OF SERVICE

This is to certify that I have caused a true and correct copy of the foregoing to be served via the Court's CM/ECF system, which shall send notification of such filing to all counsel of record as follows:

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