NOS. 20-2117/20-2141

IN THE

United States Court Of Appeals

FOR THE SIXTH CIRCUIT

OAKBROOK LAND HOLDINGS, LLC, WILLIAM DUANE HORTON, TAX MATTERS PARTNER

Petitioner/Appellant/Cross-Appellee,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent/Appellee/Cross-Appellant.

Appeal from the United States Tax Court
Civil Action File No. 5444-13

BRIEF OF SOUTHEAST REGIONAL LAND CONSERVANCY AS AMICUS CURIAE IN SUPPORT OF PETITIONER/APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit Case Number: 20-2117 / 20-2141 Case Name: Oakbrook Land Holdings, LLC, et al. v. Commissioner of Internal Revenue

Name of counsel: Kip D. Nelson

Pursuant to 6th Cir. R. 26.1, Southeast Regional Land Conservancy (amicus curiae)
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

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I certify that on February 1, 2021 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF THE AMICUS CURIAE[1]

The Southeast Regional Land Conservancy, Inc. is a non-profit, charitable organization founded in 2002 and dedicated to conserving property throughout the Southeastern United States including in Tennessee. The land conservancy protects thousands of acres of wetlands, mountain ridges, piedmont forests, stream banks, and open spaces. One way that the organization accomplishes its mission is through conservation easements—legal agreements between the conservancy and landowners that permanently limit the use of land in order to protect its habitat and public enjoyment. The conservancy monitors its easements on an annual basis "to ensure that the owner is complying with the provisions of the easement agreement." (App. p. 384).

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

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[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.

hampering the ability of organizations like the Southeast Regional Land Conservancy to do their work.

STATEMENT OF THE ISSUE

In 2008, Petitioner donated an easement on 106 acres of valuable mountaintop property in Tennessee to the conservancy. *Oakbrook Land Holdings, LLC v. Comm'r*, 119 T.C.M. (CCH) 1352 [*5] (May 12, 2020). The purpose of the donation was to protect the scenic enjoyment of the ridgeline and preserve the water and habitat. (App. pp. 111-12). The easement was to be held exclusively for conservation purposes. (App. p. 121). The conservancy was given "the right to preserve and protect the Conservation Values of the Conservation Area in perpetuity." (App. p. 112). Thus, the conveyance prohibited Petitioner from undertaking any activity inconsistent with the easement's purpose. (App. p. 112). Similar to an easement that this Court previously upheld, the deed was "carefully drawn to prohibit any activity or use of the encumbered property that would undermine [its] stated conservation purpose." *See Glass v. Comm'r*, 471 F.3d 698, 710-11 (6th Cir. 2006).

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 based on the fair market value of the easement at the time of donation; the calculation of proceeds would not

include any increase in value attributable to any subsequent improvements that Petitioner made on the property. *Oakbrook Land Holdings*, 119 T.C.M. (CCH) 1352 [*6]. The deed language on this point is standard for the conservancy. *Id.* [*7].

After making the 2008 conveyance, Petitioner claimed a charitable deduction for the donation on its tax return. *Id.* [*8]. 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 years later, 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 Petitioner's deed but thousands of others.

Thus, the IRS disallowed Petitioner's deduction, and the Tax Court ultimately upheld that decision. The Tax Court held that the deed was impermissible because the conservancy "must be entitled" to a certain percentage of proceeds from extinguishment or condemnation "unadjusted by the value of any of Oakbrook's improvements." *Oakbrook Land Holdings*, 119 T.C.M. (CCH) 1352 [*40-41]. 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 contravenes congressional intent to encourage conservation easements, falls beyond the Commissioner's expertise, 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. The Tax Court's holding would *discourage* such donations, contrary to congressional intent. This holding is unnecessary as well, as land trusts are in the best position to protect their own interests.

Nor was the Tax Court required to follow the Regulation. The Regulation was the sole basis for the Tax Court's holding, but the Regulation is invalid and not subject to deference. As Petitioner correctly explained in its opening brief, the Regulation is both procedurally and substantively defective and therefore invalid under the Administrative Procedure Act.[2] But the Regulation is not entitled to

[2] 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.

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 also 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

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). For several decades, 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). The 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 would still be 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).

As explained below, the Tax Court erred in following the Commissioner's lead.

I. The Tax Court's Holding Discourages Conservation, Contrary to Congressional Intent.

This Court has already rejected an attempt to "unnecessarily preclude conservation donations permitted under the Tax Code." *Glass*, 471 F.3d at 712. Improperly restricting the deduction would contravene Congress' longstanding 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"). Congress has repeatedly reiterated its interest in preserving land through conservation donations, most recently in the culminating Protecting Americans from Tax Hikes (PATH) Act of 2015 that made the enhanced tax deduction for conservation easements permanent. This bill passed with bipartisan support even in the face of increased scrutiny by the IRS.

As part of this process, legislators recognized that the tax deduction "provides an increased incentive to make charitable contributions of partial interests in real property for conservation purposes" and "is an important way of encouraging conservation and preservation." H.R. Rep. No. 114-17, at 7 (2015). Members of both parties commended conservation efforts and supported making the tax

deduction permanent to encourage taxpayers to continue donating land. For example, the Committee report explained:

> By reinstating and making permanent the increased deduction limits for qualified conservation contributions, [the bill] restores an important incentive for contributions of conservation easements for the benefit of the nation's communities and the environment. The deduction for qualified conservation contributions was intended to spur new donations of conservation easements. According to testimony received by the Committee, in the first two years following its original enactment, 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. [The bill] . . . will continue these results by providing certainty and stability to individuals and businesses seeking to contribute conservation easements.

Id., at 2. This was not an isolated sentiment. *See, e.g.*, 161 Cong. Rec. H1004 (daily ed. Feb. 12, 2015) ("This is so basic [to] who we are as Americans. We are saying, Let's preserve what we have. Let's just keep what we have. Let's make sure that our kids can hunt, hike, and swim. Let's make sure that they can fish. Let's make sure they can do all those wonderful things that this land affords us to do."); 161 Cong. Rec. H1008 (daily ed. Feb. 12, 2015) ("They are important to people who live in rural areas and they are important to people who live in urban areas. Nowhere is that more apparent than what happened in New York. We were able to save New York City from having to spend $8 billion in building a water filtration system because we were able to protect their watershed area, in large part through conservation easements. We all know that these are important. Every one of us knows it is important.").

And the tax deduction has been successful in conserving land. The amount of conserved land in the United States has grown significantly since the tax deduction first started. *See 2015 National Land Trust Census Report*, Land Trust Alliance, at 6. There are almost 200,000 conservation easements in effect today, protecting more than 32 million acres of vital wildlife habitat, unique landscapes, and areas for public enjoyment. *See* National Conservation Easement Database, https://www.conservationeasement.us (last visited Feb. 1, 2021). This land provides both economic and health benefits for the public, including jobs, recreational opportunities, and taxpayer money. *See* Mary Guiden, Investment in Conservation Easements Reap Benefits for Colorado (Jul. 17, 2017) (concluding that each dollar invested in conservation easements returns between $4 and $12 in public environmental benefits); Trust for Public Land, *Virginia's Return on Investment in Land Conservation* (Aug. 2016) (concluding that open lands require significantly less investment in services paid for by local taxes and that land conservation promotes fiscal health for state economies).

In addition to the environmental and public health benefits, conservation easements also provide a social benefit to local, grassroots conservation efforts, giving local land trusts and conservationists more power against pro-development interest groups. *See* Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 Harv. Envtl. L. Rev. 119,

150-51 (2010) ("[C]onservation easements may have value because of the potential bridging social capital created by the local and regional land trusts that hold them – at least insofar as these local and regional land trusts are able to provide the members of their communities with opportunities for rewarding civic involvement."). Conservation easements also help local and regional communities generate beneficial competition for residents. *Id*. at 152. In other words, conservation easements allow communities to demonstrate their commitment to local property protection through landowner donation as opposed to zoning restrictions. *Id*. Increased public access to land, through conservation easements, also attracts and retains residents. *See id*. at 161.

Thus, conservation easements provide tangible public benefits. Congress intended to encourage them by providing a tax deduction. By contrast, the Tax Court's cabined approach to the deduction 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). This Court should reject an approach that would lead to fewer land donations, jeopardize the long-term health of wildlife habitats, historical sites, watersheds, and natural resources, and threaten future generations' continued opportunities for ranching, fishing, hunting, and other outdoor recreational activities.

II. Land Trusts Are in the Best Position to Protect Their Interests.

Another problem with the Tax Court's holding is that it gives short shrift to the donees of conservation easements—the very entities that are entrusted with conserving the property. Here, for example, the conservancy used a deed that it believed would best protect its interest. As it relates to proceeds from a hypothetical condemnation, the deed provided that the conservancy would be entitled to "a portion of the proceeds equal to the fair market value of the Conservation Easement." *Oakbrook Land Holdings*, 119 T.C.M. (CCH) 1352 [*6]. And the conservancy would then use those proceeds to further the conservation purpose of the easement. *Id.* [*7]. The conservancy did *not* negotiate for an interest in improvements that may later be made on the property.

Nor was that surprising. Jim Wright, the conservancy's executive director, testified at the trial of this matter and explained the conservancy's general process for considering potential easements as well as the process for this easement in particular. (App. pp. 381-86). The conservancy's attorney prepared the initial draft of the deed, believing that it complied with all requirements of the Internal Revenue Code.[3] (App. p. 387). The conservancy used the standard language explaining how proceeds would be apportioned in the event of a hypothetical condemnation. (App.

[3] In the proceedings below, Judge Holmes found that Petitioner "was reasonable in inferring that the Conservancy's experience meant that the deeds it had drafted conformed to the Code and regulations." *Oakbrook Land Holdings*, 119 T.C.M. (CCH) 1352 [*6].

p. 388). The deed did not contemplate proceeds from any improvements made by the donor, since "whatever happens that affects the value of the property, subsequent to that date, is irrelevant to the value of the easement." (App. pp. 390-91). The conservancy "did not pay for those improvements" and has "no property interest in those improvements." (App. p. 391). The finder of fact found this testimony to be credible. *Oakbrook Land Holdings*, 119 T.C.M. (CCH) 1352 [*8].

Moreover, the conservancy's explanation of its entitlement to proceeds makes sense. If condemnation on conserved property occurs, it is almost invariably for a portion of property rather than the entire parcel. Giving the donee a proportion of the proceeds from a taking, rather than a definitive amount, actually harms the donee. Indeed, the "proportion" approach adopted by the Tax Court creates uncertainty. The conservancy sensibly protected its interest by providing that it would be entitled to the fair market value of the easement upon any taking and promising to use those proceeds to further the conservancy's mission. That approach best protects the conservation purpose of the easement.

By contrast, the Tax Court'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 interpretation 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 below 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). "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 conservation 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); *McLennan v. United States*, 24 Cl. Ct. 102 (1991) (holding that a contribution was exclusively for conservation purposes when the conservancy acquired an easement in furtherance of its

established preservation goals despite the fact that any compensation upon condemnation would be payed to the taxpayers), *aff'd*, 994 F.2d 839 (Fed. Cir. 1993).

In addition, 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 Tax Court's emphasis on hyper-technical issues is not for the benefit of land trusts. The hypothetical proceeds that may result from hypothetical condemnation is of no import to the donee—whose primary interest is in conserving the land. The Tax Court's holding will only serve to harm land trusts and require them to incur additional costs in trying to keep their forms up to date. That was certainly not Congress' intent.

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

Importantly, the Tax Court was not bound to follow the Regulation. 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"[4]—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*

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[4] *See, e.g.*, *Martin v. SSA, Comm'r*, 903 F.3d 1154, 1159-60 (11th Cir. 2018) (per curiam); Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187 (2006).

v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000). But Congress 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*, 576 U.S. 473 (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 486. 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). 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 Warda v. Comm'r*, 15 F.3d 533, 537 (6th Cir. 1994) ("Whether a taxpayer holds an interest in property, and the nature of that interest, is determined by reference to state law.").

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, Tennessee (whose law would apply to Petitioner's easement in this case) follows the "unitary rule" for the distribution of condemnation proceeds, meaning that "the total awards to various parties for their several interests in the property may not exceed the value of the property." *State ex rel. Shaw v. Shofner*, 573 S.W.2d 169, 174 (Tenn. Ct. App. 1978); *see also Gallatin Hous. Auth. v. Chambers*, 362 S.W.2d 270, 274 (Tenn. Ct. App. 1962) (explaining that when there multiple interests involved, "each of the owners of an undivided moiety, or an interest in or lien upon the property, has a corresponding right to share in the award").

Tennessee law thus requires an apportionment of a condemnation award according to the value of the respective interests of parties. *Shelby Cty. v. Barden*, 527 S.W.2d 124, 129 (Tenn. 1975); *State ex rel. Dep't of Transp. v. Gee*, 565 S.W.2d 498, 501 (Tenn. Ct. App. 1977). And it is up to the jury to make that determination. *State ex rel. Smith v. Hoganson*, 588 S.W.2d 863, 865 (Tenn. 1979); *City of Johnson City v. Outdoor West, Inc.*, 947 S.W.2d 855, 859-60 (Tenn. Ct. App. 1996).

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 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."); Tenn. Const., Art. I, Sec. 21 (ensuring that no man's property may be taken "without just compensation being made therefore"). If the Tax Court's reliance on the Regulation were upheld, the Regulation would require Petitioner to give up just compensation to which it is otherwise entitled. By the same

token, the Regulation could grant a donee (like the conservancy) 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). As the Supreme Court said in *King*, "[t]his is not a case for the IRS." 576 U.S. at 486. 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).

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." *Kisor*, 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. In addition to the issues explained in Petitioner's brief, 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

Petitioner 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.[5]

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,

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

proceeds could be divided without regard to any change in value of the property 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 v. Robbins*, 519 U.S. 452, 461 (1997). 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); *Comerica Bank, N.A. v. United States*, 93 F.3d 225, 230 (6th Cir. 1996). 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, private letter rulings are indicative of an agency's reasoned approach to an issue of statutory interpretation. *See, e.g.*, *Wolpaw v. Comm'r*, 47 F.3d 787, 794 (6th Cir. 1995). And 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, Topeka & Santa Fe Ry. 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, as this Court has explained, 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). "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.*, *INS 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 of the U.S. 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 explicitly relied upon by the conservancy in this case. (App. pp. 392-93). It was

also relied on by countless other donors and donees. Even the Tax Court has recognized that such reliance was reasonable. *Sells v. Comm'r*, No. 6267-12, 2021 WL 288484, at *14 (T.C. Jan. 28, 2021).

Yet, the Commissioner changed course in order to invalidate countless conservation easements. 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 1st day of February, 2021.

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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 6,485 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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