No. 22-323

In the Supreme Court of the United States

OAKBROOK LAND HOLDINGS, LLC, WILLIAM DUANE HORTON, Tax Matters Partner,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

AMICUS CURIAE BRIEF OF SILICON VALLEY TAX DIRECTORS GROUP IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Treasury's failure to respond to comments raising concerns about the Proceeds Regulation, 26 C.F.R. 1.170A-14(g)(6)(ii), violated the Administrative Procedure Act.

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INTEREST OF *AMICUS CURIAE* AND SUMMARY OF THE ARGUMENT[1]

Amicus Silicon Valley Tax Directors Group has over one hundred members whose collective market caps exceed $9 trillion, comprising a significant part of the U.S. economy. *Amicus* members rely on Treasury's numerous and complicated tax regulations every day, and those regulations materially affect how *amicus* members structure their businesses.

As a result, *amicus* and its members take seriously their right and duty to comment on federal tax regulations during the notice-and-comment period. *Amicus* and its members have spent millions of dollars and untold hours preparing and submitting comments on proposed Treasury regulations and participating in related hearings. The Sixth Circuit's decision calls into question whether any of this extensive investment of time and resources is worthwhile—despite the Administrative Procedure Act's guarantee of a robust notice-and-comment process.

The Sixth Circuit's decision shows excessive judicial deference to minimal agency APA compliance efforts. If the decision stands, it substantially lowers the administrative bar—allowing Treasury (and all

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[1] Pursuant to Rule 37.2, counsel of record for Petitioners and Respondent were timely notified of *amicus*'s intent to file this brief. Counsel for Petitioners and Respondent consented in writing. Pursuant to Rule 37.6, counsel for *amicus* affirm that no counsel for a party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus* and its counsel made such a monetary contribution.

agencies) to ignore comments showing that a proposed regulation will undermine clear congressional policies, to give at-best muddied descriptions of the policies motivating a proposed rulemaking, and then to engage in post hoc justifications of why public comments that failed to properly surmise the single policy rationale from among many possible rationales were ignored by the agency. If comments may be ignored because they do not precisely address a single policy the agency (secretly) is myopically focusing on—contrary to congressional commands to consider other policies too—why bother with the expense and hassle of commenting at all? Now, different circuits have different rules for what it takes to qualify as a "significant comment" to which agencies must respond, eroding predictability in commenting and agency notice-and-comment procedures and undermining this Court's recognition of "the importance of maintaining a uniform approach to judicial review of administrative action." *Mayo Found. for Med. Educ. & Rsch.* v. *United States*, 562 U.S. 44, 55 (2011).

The serious consequences of the Sixth Circuit's erroneous decision, and the resulting circuit split, will be compounded in the tax regulation context. The staggering volume and complexity of tax regulations is difficult to navigate, heightening the risk that Treasury will (as here) fail to properly balance all competing policy choices in issuing regulations. Given that complexity and Treasury's problematic history ignoring the APA's requirements, properly considering all significant comments on tax regulations is paramount. In practice, the Sixth Circuit's decision to permit Treasury not to do so flouts the Supreme

Court's clear mandate "not * * * to carve out an approach to administrative review good for tax law only," *ibid.*, and opens *amicus* members to arbitrary rulemaking. This Court should grant certiorari and reverse to avoid these troublesome results.

ARGUMENT

I. This Court Should Review the Crucial Question of When an Agency Must Consider a Comment as Significant Under the APA.

The question of when an agency must respond to comments during the notice-and-comment process is relevant to the APA's gatekeeper function for consequential regulations. This Court's resolution of the circuit split on what qualifies as a significant comment to which an agency must respond is an important and natural step in its APA jurisprudence and in fleshing out the foundational rule that if taxpayers must "turn square corners when they deal with the government," the government must "turn square corners when it deals with them," *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474, 1486 (2021)—a rule particularly important at the notice-and-comment stage.

When an agency promulgates a rule intended to create new law, rights, or duties, it must employ notice-and-comment rulemaking. 5 U.S.C. 553(b). This requirement "give[s] interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. 553(c). How and whether an agency responds to public input is an important factor in determining

whether the rulemaking process may survive judicial scrutiny.

That is because a fundamental tenet of administrative law is that final agency action is arbitrary and capricious if it "fail[s] to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "Whether an agency has overlooked 'an important aspect of the problem' * * * turns on what a relevant substantive statute makes 'important.'" *Oregon Nat. Res. Council* v. *Thomas*, 92 F.3d 792, 798 (9th Cir. 1996). As such, agencies must respond to significant comments identifying important aspects of the problem in line with statutory concerns; generalized assurances of agency compliance do not suffice. See, *e.g.*, *Hewitt* v. *Commissioner*, 21 F.4th 1336, 1351 (11th Cir. 2021) (Treasury's generic statement that it "considered 'all comments'" was not proof that it did.).

The Sixth Circuit's decision transgresses these principles—and creates a circuit split—by engaging in two key errors that this Court should correct. First, it permitted the agency to *rely on* its own myopia (its undisclosed decision to consider only one congressional policy concern to the exclusion of others) to ignore significant comments identifying ways the proposed regulation undermined *other* congressional concerns. Second, the Sixth Circuit also blessed Treasury's failure to *identify* the statutory policy it was considering in proposing, and later enacting, the relevant regulation. This double-fault violates established requirements for notice-and-comment procedures and fundamental principles of judicial review, and thus warrants this Court's review.

A. Agencies may not ignore significant comments based on their myopic focus on only some congressional policies.

The APA's notice-and-comment procedures at 5 U.S.C. 553(b)–(c) are no mere formality. They provide a crucial gatekeeping function against arbitrary and capricious regulations, intended both "to assist judicial review as well as to provide fair treatment for persons affected by a rule." *Home Box Off., Inc.* v. *F.C.C.*, 567 F.2d 9, 35 (D.C. Cir. 1977). They do this by requiring "an exchange of views, information, and criticism between interested persons and the agency." *Ibid.*

Crucial to that exchange is the APA's requirement that agencies "consider and respond to significant comments received during the period for public comment." *Perez* v. *Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015). Because "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public," *Home Box Off.*, 567 F.2d at 35–36, the APA requires agencies to respond to all "significant" comments. Under this framework, agencies must respond to comments "which, if true, raise points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule," *id.* at 35 n.58, and must address why the agency rejected proffered alternatives, see *Indep. U.S. Tanker Owners Comm.* v. *Dole*, 809 F.2d 847, 852 (D.C. Cir. 1987). Yet the Sixth Circuit's decision endorsed Treasury's choice to ignore this requirement, creating a circuit split and undermining a key APA protection.

At least three circuits have held that comments showing how a proposed regulation would undermine a congressional policy, even while aiming to achieve a separate statutory goal, are significant comments to which the agency must respond. The D.C. Circuit has held a comment that "challenged the [agency]'s primary rationale by raising substantial countervailing statutory considerations" was significant, and failure to respond required invalidating the regulation. *Carlson* v. *Postal Regulatory Comm'n*, 938 F.3d 337, 342 (D.C. Cir. 2019). The Second Circuit has held comments raising an important unintended consequence of a proposed regulation (the destruction of a commercial product in the name of making it safe) are significant even if the unintended consequence is not related to the congressional objective on which the agency is focused. See *United States* v. *Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 253 (2d Cir. 1977). And the Eleventh Circuit applied this rule in holding the very Proceeds Regulation at issue here is arbitrary and capricious. *Hewitt*, 21 F.4th at 1350–52.

Under the Sixth Circuit's logic, however, the comments in these cases would not be deemed significant. It held none of the comments here required a response because they did not engage with the "perpetuity requirement," the policy that was—commenters were told only later—Treasury's singular focus. Pet. App. 23a. And it held as much despite comments explaining why the proposed rule would undermine *other* congressional policies by discouraging easement donations altogether. See, *e.g.*, Pet. App. 226a (NYLC comment); Pet. App. 240a (LPCI comment). These comments showed serious unintended consequences,

Nova Scotia, 568 F.2d at 253, given "substantial countervailing statutory considerations," *Carlson*, 938 F.3d at 342—yet the Sixth Circuit held they could be ignored.

Essential to the Sixth Circuit's reasoning is the idea that an agency may myopically focus on a single "end" (like ensuring perpetuity) and use its own myopia to justify ignoring comments highlighting how the rule will undermine *other* policies identified by Congress (like encouraging easement donations). See Pet. App. 32a. But that rule will undermine a crucial function of the notice-and-comment process: requiring agencies to grapple with the deleterious consequences their proposed regulations may cause. See *Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019) ("Notice and comment gives affected parties * * * an opportunity to be heard on [proposed legal] changes—and it affords the agency a chance to avoid errors and make a more informed decision.").

An agency's myopia in rulemaking—looking only to a single policy—cannot justify ignoring public comments signaling that other valid statutory policy considerations will be harmed or otherwise affected by the rule. The myopic focus on a single policy *is* the problem the agency must at least respond to. See *Motor Vehicle Mfrs.*, 463 U.S. at 43 (an agency action is "arbitrary and capricious if the agency * * * entirely failed to consider an important aspect of the problem"); cf. also *Michigan* v. *E.P.A.*, 576 U.S. 743, 752–53 (2015) (reversing agency action for considering some interests but ignoring others, namely cost). As the dissenting judge noted below, one "statutory goal" may not be used "as a trump card" to permit an agency

to "ignore any comment" invoking other competing statutory goals. Pet. App. 48a–49a.

An agency's silence in such circumstances is unacceptable. More than that, it is arbitrary and capricious. See, *e.g.*, *Physicians for Soc. Resp.* v. *Wheeler*, 956 F.3d 634, 647 (D.C. Cir. 2020) (EPA "failed to consider an important aspect of the problem" when it did not consider how its policy affected statutory mandates); *Gresham* v. *Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020), *vacated as moot*, 142 S. Ct. 1665 (2022) ("[C]oncerns raised in the comments were enough to alert the Secretary that coverage loss was an important aspect of the problem," and the Secretary's "[f]ailure to consider whether the project will result in coverage loss [contrary to an important Medicaid objective] is arbitrary and capricious."); *North Carolina Grower's Ass'n* v. *United Farm Workers*, 702 F.3d 755, 763, 771 (4th Cir. 2012) (agency's refusal to consider comments concerning the substance and merit of the rulemaking was a "failure to consider important aspects of the problem," and therefore arbitrary and capricious).

Nor can an agency's blanket response that all comments have been considered satisfy its APA requirements. See Pet. App. 244a (Treasury stating its rule followed "consideration of all comments"); Pet. App. 158a (tax court dissent noting this "phrase is from a form in Treasury's regulation-drafting guide"). Such statements are not satisfactory explanations of the agency's action, *Dominion Res., Inc.* v. *United States*, 681 F.3d 1313, 1319 (Fed. Cir. 2012), and this Court has invalidated regulations with such vague incantations, *Encino Motorcars, LLC* v. *Navarro*, 579 U.S.

211, 223 (2016) (agency stating it had "carefully considered all of the comments" is no substitute for actually "explaining the 'good reasons for the new policy'"); see also *Gresham*, 950 F.3d at 103 ("Nodding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking.").

It is arbitrary and capricious for agencies to ignore comments showing how their pursuit of one statutory goal would undermine other congressional policies. The Court should grant certiorari to resolve the circuit split on this exceptionally important issue.

B. Agencies may not hide the ball on the policy considerations underlying their proposed regulations.

Even if it is not arbitrary and capricious (but it is) for an agency to narrow its focus to one congressional policy by disregarding all other congressional policies, the agency is required to disclose at the outset the true policies animating its proposed regulations. Put differently, the agency's notice to the public "must disclose in detail the thinking that has animated the form of a proposed rule" and what policy considerations it views as supporting that rule. *Home Box Off.*, 567 F.2d at 35. If an agency desires to focus only on a narrow range of policy considerations, it must be clear up front about what policies informed its drafting of the rule.

Yet, here, the Sixth Circuit permitted the agency to obfuscate, through generalities, the policies underlying its decision. In proposing the regulation at issue, Treasury referred generally to "the major policy

decisions made by the Congress and expressed in these committee reports." Pet. App. 219a (citing H.R. Rep. No. 96-1278 and S. Rep. No. 96-1007). Those committee reports identified three overarching policies: "preservation of our country's natural resources and cultural heritage," encouraging more easement donations, and ensuring that an easement's conservation purpose is protected in perpetuity. See S. Rep. No. 96-1007 at 9. The agency's notice did *not* restrict or clarify any subset of the three specific policies identified in the reports on which the agency was focused.

Integral to the Sixth Circuit's reasoning was that Treasury only had to respond to comments engaging the "perpetuity requirement and whether the rule served th[at] end." Pet. App. 23a. But Treasury never said the proposed regulation was based solely on the perpetuity requirement. And "belated justifications" tailored for litigation and offered forty years after the fact cannot suffice to restrict the range of public comment that requires consideration and response. *Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) ("Considering only contemporaneous explanations for agency action * * * instills confidence that the reasons given are not simply 'convenient litigating position[s]'" and ensures "that parties and the public can respond fully and in a timely manner to an agency's exercise of authority."); see also *Sec. & Exch. Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943) ("[T]he orderly functioning of the process of [judicial] review requires that the grounds upon which the administrative agency acted b[e] clearly disclosed and adequately sustained" at the time.).

The Sixth Circuit's decision thus undermines the APA's requirement for agencies not only to give "a reasoned explanation" for adopting the regulation, *Dominion Res.*, 681 F.3d at 1319, but also to engage in a genuine exchange of animating policies and information during the notice-and-comment process, *Home Box Off.*, 567 F.2d at 35. Without that exchange, public confidence in the integrity of notice-and-comment rulemaking and the even-handed administration of justice will erode—especially among commentors who, absent contemporaneous justifications, must shoot at a "moving target" while blindfolded. *Dep't of Homeland Sec.*, 140 S. Ct. at 1909.

* * *

This Court should grant certiorari to make clear that an agency must (i) respond to all significant comments, including those comments identifying *other* congressional policies the proposed rule may undermine, and (ii) at the very least, announce at the outset of its rulemaking the congressional policies it views as supporting its proposed regulations.

II. The Sixth Circuit's Erroneous Decision Will Have Especially Deleterious Consequences for Tax Regulations.

The Sixth Circuit's erroneous decision (and the resulting circuit split) upends the rules governing all agencies' notice-and-comment procedures. See *Mayo Found.*, 562 U.S. at 55 (forbidding applying a unique "approach to administrative review" of tax regulations). But it will have especially deleterious conse-

quences in the important area of federal tax regulations—negatively affecting taxpayers and warranting this Court's review—for at least three reasons.

1. The APA's procedural safeguards are distinctly important for Treasury regulations because of the sheer volume and staggering complexity of the Internal Revenue Code. The Code reflects myriad congressional policy choices regarding macro tax policies and micro tax policies specific to certain taxes, credits, deductions, etc. This complex, interconnected structure heightens the risk that Treasury, in issuing proposed regulations, may either overlook or fail to properly weigh potentially competing policy choices.

In fact, Treasury has a problematic history of disregarding the APA's requirements, which exacerbates the need for review in this case. Treasury historically hedged its bets, asserting that its proposed regulations were not subject to APA notice-and-comment rulemaking requirements, but nonetheless inviting comments and providing some general discussion of those comments in promulgating final regulations. See, *e.g.*, 48 Fed. Reg. at 22941 (claiming "the regulations proposed herein are interpretative and the notice and public procedure requirements of 5 U.S.C. 553 do not apply"). Eventually, this Court "rejected the idea that tax law deserves special treatment under the [APA]." *Mann Constr., Inc.* v. *United States*, 27 F.4th 1138, 1148 (6th Cir. 2022) (citing *Mayo Found.*, 562 U.S. at 55). Only recently has Treasury started to take comments more seriously, responding more frequently. See, *e.g.*, Pet. App. 119a n.17 (noting recent examples from 2016 and 2019 of Treasury spending 80 and 30 pages, respectively, responding to

comments "when it consider[ed] itself bound by the notice and comment requirements of the APA").

This history demonstrates that Treasury adapts its rulemaking to what courts say about its APA obligations. Absent this Court's intervention, the Sixth Circuit's decision will reverse Treasury's recent practice of hewing to APA reasoned decision-making requirements and encourage a return to Treasury's former practice of eschewing its APA requirements. That regression would return us to the previous status quo of Treasury's blasé attitude seen in this case toward overlooked and potentially conflicting policy concerns—intolerable for all the reasons discussed herein and in the petition.

2. Given the volume and complexity of tax laws, this Court and the federal courts of appeals have long held uniformity of application of federal tax statutes and regulations is critical. See *United States* v. *Irvine*, 511 U.S. 224, 238 (1994) ("[T]he revenue laws are to be construed in the light of their general purpose to establish a nationwide scheme of taxation uniform in its application." (alteration in original) (quoting *United States* v. *Pelzer*, 312 U.S. 399, 402 (1941))); *Dobson* v. *Comm'r of Internal Revenue*, 320 U.S. 489, 499 (1943) (discussing importance of "uniform" and "expeditious" tax administration); see also *Wash. Energy Co.* v. *United States*, 94 F.3d 1557, 1561 (Fed. Cir. 1996) ("[A]s the courts of appeals have long recognized, the need for uniformity of decision applies with special force in tax matters."). Uniformity of tax rules is crucial to predictability for multinational companies like *amicus* members as they structure their busi-

nesses in line with uniform tax obligations. And uniformity is also essential to inherent fairness concerns (and due process) for all taxpayers.

The Sixth Circuit's decision, by contrast, shrugs off these principles of tax uniformity. It consciously opens a circuit conflict with the Eleventh Circuit over the validity of the Proceeds Regulation at issue in this case and—more importantly—the procedures Treasury must follow going forward during the notice-and-comment process. See Pet. App. 27a (citing *Hewitt*, 21 F.4th at 1339).

3. Finally, taxpayers may not challenge the validity of tax regulations before an enforcement action is brought against them. Typically, regulated parties may bring pre-enforcement challenges against federal non-tax regulations issued under other U.S.C. provisions. See, *e.g.*, *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 160 (1967) (noting other statutes permit "pre-enforcement suit[s] under the [APA] and the Declaratory Judgment Act," assuming the regulation is ripe for review). But the Anti-Injunction Act forbids suits for "the purpose of restraining the assessment or collection of any tax." 26 U.S.C. 7421(a). So, taxpayers that want to challenge the validity of a tax regulation typically must wait until the IRS asserts a tax deficiency and then fight it in court—or else pay the tax and sue for a refund. See, *e.g.*, *CIC Servs., LLC* v. *Internal Revenue Serv.*, 141 S. Ct. 1582, 1586 (2021); *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 727 (1974). Both of those strategies entail obvious, attendant risks that may functionally prohibit many lawsuits challenging tax regulations.

These restrictions on taxpayers' ability to challenge tax regulations make strict compliance with the APA's notice-and-comment requirements on the frontend even more crucial in the tax context. They also counsel strongly in favor of this Court granting certiorari and reversing the Sixth Circuit in this case to warn Treasury not to return to its historic lassitude toward turning square corners in rulemaking.

CONCLUSION

For these reasons, *amicus* requests that the Court grant the petition for certiorari and reverse the judgment of the Sixth Circuit.

Respectfully submitted,

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