No. 22-323

In the Supreme Court of the United States

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

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

Introduction.. 1

I. The Circuit Split is Real, the Legal Issues are Fully Developed, and There are Costs to Deferring Resolution of the Conflict. 2

II. The Proceeds Regulation is Procedurally Invalid. 5

III. There is No Vehicle Problem. 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES:

Baker's Farm Nature Reserve, LLC, Five Rivers Conservation Group, LLC, Tax Matters Partner v. Commissioner, No. 13758-20, Order (T.C. Nov. 17, 2022) 3

Encino Motorcars, LLC v. Navarro, 579 U.S. 211 (2016) 7

Excelsior Aggregates, LLC, Big Escambia Ventures, LLC, Tax Matters Partner v. Commissioner, No. 20608-19, Order (T.C. Dec. 9, 2022) 3

Glade Creek Partner, LLC v. Commissioner, No. 231-11251, 2022 WL 3582113 (11th Cir. Aug. 22, 2022) 3

Green Valley Investors, LLC v. Commissioner, 159 T.C. No. 5 (2022) 11

Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718 (2017) 6

Hewitt v. Commissioner, 21 F.4th 1336 (11th Cir. 2021) ....*passim*

Mann Construction, Inc. v. United States, 27 F.4th 1138 (6th Cir. 2022) 11

Sells v. Commissioner,
T.C. Memo. 2021-12.................................... 10

Smith v. Phillips,
455 U.S. 209 (1982) 9

Stone v. INS,
514 U.S. 386 (1995) 10

TOT Property Holdings, LLC v. Commissioner,
1 F.4th 1354 (11th Cir. 2021).................... 2, 3

United States v. Irvine,
511 U.S. 224 (1994) 4

United States v. Nova Scotia Food Products Corp.,
568 F.2d 240 (2d Cir. 1977).......................... 6

United States v. Pelzer,
312 U.S. 339 (1941) 4

Upper Skagit Indian Tribe v. Lundgren,
138 S. Ct. 1649 (2018) 9

STATUTES AND REGULATIONS:

26 U.S.C. § 170(h) 8

26 U.S.C. § 170(h)(2) 9

26 U.S.C. § 170(h)(5)(A) 8, 10

Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818............................... 11

OTHER AUTHORITIES:

IRS Announcement 2022-28,
https://www.irs.gov/pub/irs-drop/a-22-28.pdf. 11

Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 Nw. U. L. Rev. 1137 (2014) 8

Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18832 (Apr. 5, 2011) 7

INTRODUCTION

The IRS has invoked the Proceeds Regulation to deny charitable contribution deductions "to hundreds or thousands of taxpayers who donated the conservation easements that protect perhaps millions of acres." App. 131a (Holmes, J., dissenting). When that regulation was promulgated, members of the public submitted comments about the problems the proposed regulation would cause. The IRS and the Treasury Department did not even acknowledge the comments, much less respond to them.

Instead, IRS attorneys declared in the Federal Register that the IRS is exempt from the requirements of the Administrative Procedure Act ("APA"): "[T]he Internal Revenue Service concluded when the notice was issued that the regulations are interpretative and that the notice and public comment procedure requirement of 5 U.S.C. § 553 did not apply." App. 251a-252a. Those who confidently proclaim that they are exempt from the rules rarely do so as a precursor to strict compliance.

The Courts of Appeals are squarely split on the issue of whether the APA allowed the IRS to ignore the public comments that it received. The Eleventh Circuit invalidated the Proceeds Regulation, and the Sixth Circuit acknowledged it was creating a circuit split when it upheld it. App. 26a. The administrative law issues have been thoroughly developed. Further percolation would serve only to increase litigation, consume judicial resources, and prolong the confusion and uncertainty for taxpayers across the country.

The Sixth Circuit's opinion is incorrect, and there is significant risk that both the IRS and other

administrative agencies will invoke it to undermine the important procedural protections provided by the APA's requirement that administrative agencies engage with the public comments that they receive.

Finally, this case is an appropriate vehicle for resolving the circuit split. The Sixth Circuit correctly refused to consider the IRS's statutory argument because it was based on data that the IRS had downloaded from the Internet but not introduced into the Tax Court record. Moreover, the IRS's statutory argument is both incorrect and inconsistent with the very Proceeds Regulation that it drafted.

I. The Circuit Split is Real, the Legal Issues are Fully Developed, and There are Costs to Deferring Resolution of the Conflict.

The IRS's argument that the Eleventh Circuit invalidated only the IRS's "*interpretation*" of the Proceeds Regulation, and not "the proceeds regulation as such," Opp. 19, depends on a misreading of the procedural history in *Hewitt v. Commissioner*, 21 F.4th 1336 (11th Cir. 2021). As set forth in the petition, *see* Pet. 4, although the Proceeds Regulation was finalized in 1986, it was not until thirty years later in 2016 that the IRS began to interpret the Proceeds Regulation to deny charitable deductions to taxpayers who had made charitable gifts using the model deed published by a leading conservation organization. Mr. and Mrs. Hewitt made two arguments in their Eleventh Circuit opening brief. First, they argued that their charitable deduction should be allowed because the IRS and the Tax Court had incorrectly interpreted the Proceeds Regulation. *Hewitt*, 21 F.4th at 1339. While their appeal was pending, the Eleventh Circuit rejected that argument in *TOT Property Holdings, LLC v.*

Commissioner, 1 F.4th 1354 (11th Cir. 2021). Second, the Hewitts also argued that the Proceeds Regulation (as interpreted by the IRS and later by *TOT Property Holdings*) was invalid under the APA. *Hewitt*, 21 F.4th at 1339. The *Hewitt* opinion's language about the IRS's interpretation of the Proceeds Regulation being invalid under the APA is nothing more than an acknowledgement of the Hewitts' first argument. *Id.* at 1353.

The fact that *Hewitt* invalidated the Proceeds Regulation is confirmed by subsequent opinions and orders in the Sixth Circuit, the Eleventh Circuit, and the Tax Court. The Sixth Circuit in this case observed that "[t]he petitioners also direct us to a recent decision by the Eleventh Circuit that held the proceeds regulation to be procedurally invalid under the APA." App. 27a. The Eleventh Circuit recently confirmed in an unpublished opinion that "*Hewitt* invalidated the regulation on which the tax court relied." Pet. 34 (quoting *Glade Creek Partner, LLC v. Commissioner*, No. 21-11251, 2022 WL 3582113, at *3 (11th Cir. Aug. 22, 2022)). And Judge Lauber, the Tax Court judge who authored the majority opinion in this case, *see* App. 62a, recently issued an order basing an evidentiary ruling on the fact that "this regulation has been invalidated by the U.S. Court of Appeals for the Eleventh Circuit." Order at 2, *Excelsior Aggregates, LLC, Big Escambia Ventures, LLC, Tax Matters Partner v. Commissioner*, No. 20608-19 (T.C. Dec. 9, 2022) (citing *Hewitt*); *see also* Order at 1, *Baker's Farm Nature Reserve, LLC, Five Rivers Conservation Group, LLC, Tax Matters Partner v. Commissioner*, No. 13758-20 (T.C. Nov. 17, 2022) ("[T]he Eleventh Circuit held that Treas. Reg. § 1.170A-14(g)(6) was procedurally invalid under the Administrative Procedure Act (APA), due to

the Department of Treasury's failure to address a 'significant' comment raised during the notice-and-comment process."). Both the Courts of Appeals and the Tax Court, which is charged with applying *Hewitt* and *Oakbrook*, perceive a direct conflict.

The IRS argues that the Court should permit further percolation of the administrative law issues that are the subject of the conflict. *See* Opp. 19. Because the validity of the Proceeds Regulation turns on the administrative record, further percolation would not result in any additional *factual* development, and the IRS does not identify any under-developed *legal* arguments. In any event, seventeen Tax Court judges have considered these issues in three lengthy opinions in this case, *see* App. 61a-170a, and the opinions by Judge Moore and Judge Guy in the Sixth Circuit and by Judge Lagoa in the Eleventh Circuit have fully aired the competing arguments.

Moreover, the IRS does not address the difficult position in which the Tax Court has been placed in cases appealable to other Courts of Appeals—reaffirm *Oakbrook* or follow *Hewitt*? The petition explained that the Tax Court has been deferring that decision, likely awaiting this Court's consideration whether to grant this petition to resolve the conflict. *See* Pet. 28-29. There are significant costs to the judicial system and to taxpayers in deferring review of this conflict, especially in light of this Court's repeated admonition that "[t]he revenue laws are to be construed in light of their general purpose to establish a nationwide scheme of taxation uniform in its application." *United States v. Irvine*, 511 U.S. 224, 238 (1994) (quoting *United States v. Pelzer*, 312 U.S. 399, 402-403 (1941)).

The split is real, and it is ripe for resolution.

II. The Proceeds Regulation is Procedurally Invalid.

The Proceeds Regulation is invalid under the APA because the IRS did not respond to significant comments that it received. The IRS's arguments in defense of the Sixth Circuit's opinion are incorrect and inconsistent with the record.

The IRS contends that "none of the comments that petitioners cite addressed the statutory perpetuity requirement." Opp. at 14. That is incorrect. The Trust for Public Land submitted the following comment:

> If the concern is to assure the *perpetuity of the gift* for conservation purposes, we think this provision goes further than the regulations need to go. The remote future event rule of § 1.170A-13(g)(2) should suffice. The possibility that a conservation gift will become obsolete, although certain to be realized in some cases, must be negligible at the time a particular gift is made in order for it to qualify under the rule. *The perpetuity requirement need demand no more than this*.

App. 242a (emphasis added). The Trust for Public Land did indeed address the statutory perpetuity requirement (explicitly and by name). Moreover, it argued that the proposed regulation demanded more of easement donors than the statute required and suggested that the statutory perpetuity requirement could be met by a different part of the proposed regulation (the remote future event rule). The Trust for Public Land challenged a fundamental premise underlying the proposed regulation, and the IRS failed even to acknowledge the concern.

The IRS next contends that "the agency was not required to expressly respond to comments that failed to address the statutory requirement." Opp. at 15. The IRS provides no citation for this assertion, and there is no basis for it. Fundamentally, many of the comments informed the IRS that its proposed rule would have unintended consequences that would undermine other policy goals reflected in the statute. In responding to comments identifying unintended consequences, an agency has many options, including (a) revising the proposed regulation and (b) explaining why the statute mandates the proposed rule notwithstanding the unintended consequences. But the IRS is wrong that unless a comment directly addresses the statutory requirement itself, that comment is *per se* insignificant.

United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977), squarely refutes the IRS's argument. There, the goal of the proposed regulation was to ensure that the fish was "safe for human consumption." App. 22a. Commenters informed the agency that the proposed safety standards would render the product *inedible* (not *unsafe*). (There are many foods that are safe for human consumption that nonetheless could accurately be described as inedible.) *See, e.g.*, *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1722 (2017) (observing that "*burnt* toast is inedible"). Notwithstanding the fact that the comment did not address the statutory goal of *safety for consumption*, the Second Circuit correctly found that the comment was significant and merited a response from the agency.

The IRS also argues that, to the extent a response was required, the cursory statement that "the agency's acknowledgment that it promulgated the final rule

'[a]fter consideration of *all* comments regarding the proposed amendments'" was sufficient. Opp. at 15 (quoting App. 244a) (alterations and emphasis in Opp.). This contention cannot be squared with *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211 (2016), which held that an agency's response to comments was insufficient notwithstanding the agency's assertion that "in reaching its decision, it had 'carefully considered all of the comments, analyses, and arguments made for and against the proposed changes.'" *Id.* at 223 (quoting Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18832 (Apr. 5, 2011)).

The IRS's brief in opposition suggests that "[t]he agency's reasons for not responding *in detail* to the comments from NYLC and others are reasonably discernable." Opp. 17-18 (emphasis added). But the issue here is not the level of *detail* of the agency's response; the issue is that the agency did not respond to the comments *at all*. *See* App. 142a (Holmes, J., dissenting) ("We turn our attention to Treasury's response. . . . What we hear is the chirping of crickets."); *Hewitt*, 21 F.4th at 1346 ("Treasury did not discuss or respond to the comments made by NYLC or the other six commenters concerning the extinguishment proceeds regulation.").

As set forth in the Petition, the comments submitted by the public were significant, and IRS and the Treasury Department violated the APA when they did not address them.

III. There is No Vehicle Problem.

Finally, in an attempt to create a vehicle problem, the IRS recycles the statutory argument that the Court of Appeals correctly held it had forfeited. *See* Opp. at 21-24. The argument fails on both procedural and substantive grounds, and as a result, this case is an appropriate vehicle for resolving the circuit split.

Before the Tax Court, the only statutory argument that the IRS raised under 26 U.S.C. § 170(h) was that the easement deed did not adequately define the physical area to be conserved. *See* App. 12a. The Commissioner did not claim that the deed did not comply with the statute's perpetuity requirement found in 26 U.S.C. § 170(h)(5)(A). *See* App. 12a-13a. As the Court of Appeals found, "Judge Toro's concurrence in the Tax Court's opinion raised this issue *sua sponte* with neither the majority nor the dissent addressing it." App. 13a.

The Court of Appeals held that the IRS had forfeited the argument because it "relies on an assessment of the projected economic worth of the property interest, which is not in the record." *Id.* The Court of Appeals observed that the IRS relied in its Sixth Circuit brief on data from commercial real estate websites—Zillow.com and Neighborhoodscout.com—that the IRS had not introduced into the trial court record and thus that Petitioner had no opportunity to test or rebut. *See id.* n.4; *see also* Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 Nw. U. L. Rev. 1137, 1179 (2014) ("[T]he real author of the information about a particular home's value is not Zillow, but another whose knowledge, biases, and motives are unknown."). The Court of Appeals made the

reasonable observation that "we are hesitant to rely on economic projections that have not been vetted by the adversarial process, provide no supporting evidence, and are based on commercial real estate websites." App. 13a n.4.

In support of its argument, the IRS cites *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982). *See* Opp. at 23. The relevant language that the IRS cites (but does not quote) is: "Respondent may, of course, defend the judgment below on any ground which the law *and the record* permit." (Emphasis added.) *See also* Opp. at 23 (citing *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018) ("[W]e have discretion to affirm on any ground supported by the law *and the record*." (Emphasis added.))). But the key point here is that the IRS did not enter into the Tax Court *record* the data on which it based its statutory argument on appeal. *Smith v. Phillips* and *Upper Skagit* thus do not apply. The Court of Appeals was well within its discretion to decline the IRS's implicit invitation to take judicial notice of material the IRS found on the Internet while preparing its appellate brief. In any event—whether or not based on the results of surfing the web—the IRS's statutory argument fails on its merits.

The text of 26 U.S.C. § 170(h)(2)(C) required Oakbrook to contribute "a restriction (granted in perpetuity) on the use which may be made of the real property." That is exactly what Oakbrook did. Of course, the easement could not prevent Tennessee or the United States from exercising their sovereign powers to modify the restrictions that Oakbrook granted (such as through the use of the eminent domain power). This does not change the fact that Oakbrook

granted forever a restriction over the use of the property.

The text of 26 U.S.C. § 170(h)(5)(A) requires that the conservation purpose provided for in the easement must be "protected in perpetuity." If the omnipresent possibility that Tennessee or the United States might modify the restrictions in the easement (a possibility of which Congress was no doubt aware when it enacted the tax incentive to conserve land) caused section 170(h)(5)(A)'s perpetuity requirement to be violated, Congress's amendment of the Internal Revenue Code to create a tax incentive to encourage conservation would be rendered a nullity. *See Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). Even the IRS does not advance that statutory interpretation.

Instead, the IRS contends that there is a statutory issue because "at least a portion of the value would revert to petitioners (who would be free to use those funds for other purposes)." Opp. at 22. But that can't be right. Otherwise, the Proceeds Regulation itself would violate the statute: The state law exception in the Proceeds Regulation's last clause provides that the perpetuity requirement can be met even when the landowner retains "the full proceeds" of an extinguishment. *See* Pet. at 9 (quoting the Proceeds Regulation) ("[U]nless state law provides that the donor is entitled to the full proceeds from the conversion without regard to the terms of the prior perpetual conservation restriction."); *see also Sells v. Commissioner*, T.C. Memo. 2021-12, at *19 (identifying California as "at least one state law that *does* seem to be governed by the last few lines in section 1.170A-14(g)(6)(ii)"). The

IRS cannot credibly and consistently defend its regulation and advance a statutory interpretation that would invalidate it.

No issues prevent the Court from using this case as a vehicle to resolve the circuit split between *Hewitt* and *Oakbrook*.

CONCLUSION

Congress recently appropriated nearly $80 billion in additional funding to the IRS, the lion's share of which is for the IRS to increase "tax enforcement activities." *See* Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 10301, 136 Stat. 1818, 1831. Meanwhile, the courts continue to admonish the IRS for enforcement activities that violate the APA. *See, e.g.*, *Mann Construction, Inc. v. United States*, 27 F.4th 1138 (6th Cir. 2022) (unanimously invalidating IRS notice for violating the APA); *Green Valley Investors, LLC v. Commissioner*, 159 T.C. No. 5 (2022) (same, by a 15-2 vote). Judicial opinions notwithstanding, the IRS insists that it is not subject to the APA's requirements: "The Treasury Department and the IRS disagree with the Tax Court's decision in *Green Valley* and the Sixth Circuit's decision in *Mann Construction* and continue to defend the validity of existing listing notices in litigation." IRS Announcement 2022-28, https://www.irs.gov/pub/irs-drop/a-22-28.pdf.

Regulations issued by the IRS through the Department of Treasury affect more members of the American public than the regulations of any other administrative agency. The APA, and its requirement that an agency engaged in rulemaking respond to the comments it receives from the public, provide important checks against arbitrary and capricious administrative agency action. So it is especially troubling that the IRS dismisses as insignificant the public comments that it received on the Proceeds Regulation and disclaims any APA responsibility to have responded to them.

How APA requirements apply to the IRS is an important issue worthy of this Court's review. The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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