

No. _____

**In The
Supreme Court of the United States**

◆

DUQUESNE LIGHT HOLDINGS, INC. & SUBSIDIARIES
F/K/A DQE, INC. & SUBSIDIARIES, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE.

◆

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

◆

PETITION FOR A WRIT OF CERTIORARI

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JAMES C. MARTIN
REED SMITH LLP
225 Fifth Ave.
Pittsburgh, PA 15222

JAMES R. SIGEL
MORRISON & FOERSTER LLP
425 Market St.
San Francisco, CA 94015

DEANNE E. MAYNARD
Counsel of Record
JOSEPH R. PALMORE
EDWARD L. FROELICH
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-8740
DMaynard@mofocom
Counsel for Petitioners

FEBRUARY 14, 2018

QUESTION PRESENTED

In *Charles Ilfeld Co. v. Hernandez*, this Court stated that “[i]n the absence of a provision of the [Revenue] Act definitely requiring” what amounts to “the practical equivalent of double deduction,” such a purpose “will not be attributed to lawmakers.” 292 U.S. 62, 68 (1934). Some courts of appeals treat *Ilfeld* as establishing only a canon of statutory interpretation. But others, including the Third Circuit here, read *Ilfeld* to authorize the Internal Revenue Service to disregard even unambiguous statutory and regulatory provisions unless those provisions expressly provide that a taxpayer is entitled to a duplicative tax benefit. The question presented is:

When unambiguous statutory or regulatory provisions authorize a taxpayer to take two deductions for the same economic loss, may the IRS nonetheless disallow one of the authorized deductions unless the provisions also expressly state that taxpayers are entitled to duplicative benefits?

PARTIES TO THE PROCEEDING

Pursuant to Rules 14.1 and 29.6, petitioners state the following:

The parties to the proceeding are listed in the caption.

DQE Holdings, LLC is the parent company of the petitioners. No publicly held company owns 10% or more of DQE Holdings, LLC's stock.

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PETITION FOR A WRIT OF CERTIORARI

Duquesne Light Holdings, Inc. & Subsidiaries formerly known as DQE, Inc. & Subsidiaries (collectively, “Duquesne”) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-63a) is reported at 861 F.3d 396. The opinion of the Tax Court (App., *infra*, 64a-122a) is unreported but available at 2013 Tax Ct. Memo LEXIS 225.

JURISDICTION

The court of appeals entered judgment on June 29, 2017. Duquesne’s timely petition for rehearing was denied on November 17, 2017. App., *infra*, 123a-24a. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1).

REGULATORY PROVISIONS INVOLVED

The appendix includes relevant regulatory provisions. App., *infra*, 125a-30a.

INTRODUCTION

Taxpayers rely on the plain text of the Internal Revenue Code and its implementing regulations. But the Third Circuit has upended that reliance—invoking a precedent this Court has not applied in more than a half century. Deepening an existing division among

the courts of appeals, the Third Circuit concluded that even when a taxpayer complies with on-point and unambiguous regulations, the IRS may invoke a judicially created “no double deduction” rule to disallow the taxpayer’s claimed deduction and vastly increase its tax liability.

In *Charles Ifeld Co. v. Hernandez*, this Court stated that “[i]n the absence of a provision of the [Revenue] Act definitely requiring” what amounts to “the practical equivalent of double deduction,” such a purpose “will not be attributed to lawmakers.” 292 U.S. 62, 68 (1934). Multiple courts of appeals have held that this sentence from *Ifeld* articulated a canon of construction. Under this view, if two interpretations of a statute or regulation are reasonable, the one that prevents a taxpayer from receiving a duplicative benefit should prevail. If, however, the governing provisions are unambiguous, they control and the double benefit is allowed.

But other courts of appeals have read *Ifeld* to provide much more. They have held that *Ifeld* grants the IRS license to override even unambiguous statutory and regulatory provisions if application of their plain terms would result in a double tax benefit. Under this view, only if the applicable provisions expressly provide that a duplicative benefit is intended do they displace the uncodified *Ifeld* doctrine. These courts thus treat *Ifeld* as an independent, substantive rule that stands above even clear statutes and regulations, rather than as a mere canon of construction.

The Third Circuit has now joined the courts of appeals that treat *Ilfeld* as a stand-alone doctrine that trumps otherwise-controlling statutory and regulatory provisions. Duquesne claimed two sets of deductions for losses related to AquaSource, Inc., one of its subsidiaries. As has not been disputed, both of these deductions were fully consistent with the governing statutes and regulations. Nevertheless, the Third Circuit accepted the IRS's contention that *Ilfeld* precluded Duquesne from taking both sets of deductions. The court reasoned that because the regulatory provision authorizing Duquesne's later deductions did not also specifically state that Duquesne could take *both* sets of deductions, *Ilfeld* disallowed the portions the IRS deemed duplicative—approximately \$199 million worth.

As Judge Hardiman emphasized in his forceful dissent, the majority's "triple-authorization" standard (requiring express authorization for (1) the first deduction, (2) the second deduction, and (3) both together) contravenes black-letter principles of administrative law and subverts fundamental requirements of fair notice. An agency should not be permitted to override duly promulgated regulations on a case-by-case basis just because those regulations lead to a result the agency dislikes. That is particularly true of the IRS, as the Internal Revenue Code and its implementing regulations set forth taxpayers' obligations in meticulous, comprehensive detail.

The Third Circuit's erroneous interpretation of *Ilfeld* creates substantial uncertainty in an area where

certainty is paramount. See E. Foster, *Practitioners Troubled By Court Disallowing Double Deductions*, Tax Analysts Tax Notes Weekly (July 10, 2017) (noting that the Third Circuit’s ruling “could cause havoc” in this “highly technical and complex area of tax law”). Taxpayers can no longer be confident that compliance with controlling, on-point regulations will render their conduct permissible. Instead, they must contend with the possibility that the IRS will invoke an amorphous federal common-law rule to declare a supposed regulatory glitch and “correct” it when determining a taxpayer’s liability. The vagueness of this rule prevents taxpayers from planning for the future—and it grants the IRS a powerful tool to retroactively assess millions of dollars in tax liability (as it did here).

This Court’s review is necessary to put this uncertainty to rest. It should grant this petition and make clear that *Ilfeld* is a doctrine used only to resolve ambiguity, not to allow the IRS to create it.

STATEMENT

A. Statutory And Regulatory Background

The Internal Revenue Code allows affiliated corporations—e.g., a parent company and its subsidiaries—to file consolidated tax returns. 26 U.S.C. § 1501. Congress has directed the Secretary of the Treasury to “prescribe such regulations as he may deem necessary” so that consolidated returns may be calculated “in such manner as clearly to reflect the income-tax liability” of the filers. *Id.* § 1502. Exercising this authority, the Treasury has issued a “lengthy and intricate set of

regulations,” altogether constituting a “formidable corpus of rules.” Boris Bittker & James Eustice, *Federal Income Taxation of Corporations and Shareholders*, ¶ 13.40 & n.306 (7th ed. Supp. 2017). These regulations “are legislative in character and have the force and effect of law.” *Falconwood Corp. v. United States*, 422 F.3d 1339, 1352 (Fed. Cir. 2005).

Before the particular transactions at issue here, the Treasury had promulgated two regulations intended to deal with losses attributable to the decline in value of a subsidiary’s assets. The first, 26 C.F.R. § 1.1502-32, “prevent[ed] duplicate recognition” of the losses incurred when a subsidiary first sells assets that have declined in value “and the parent member of the consolidated group later sells the subsidiary’s stock for a loss” attributable to that same decline. *Rite Aid Corp. v. United States*, 255 F.3d 1357, 1360 (Fed. Cir. 2001). In simplified terms, the regulation achieved that result by permitting the subsidiary to deduct its losses but then decreasing the parent’s basis (the amount of its capital investment for tax purposes) in the subsidiary’s stock by an amount equal to that loss. *See* 26 C.F.R. § 1.1502-32(a)(1) (2000). With that adjustment in basis, the parent would gain no tax benefit from the subsidiary’s loss when the parent subsequently sold the subsidiary’s stock.

A second regulation, 26 C.F.R. § 1.1502-20, addressed the reverse sequence of transactions, in which the parent corporation first sells the stock of a subsidiary and the subsidiary then sells its assets at a loss. *Rite Aid*, 255 F.3d at 1360. The regulation precluded

the parent corporation from deducting any loss resulting from the initial sale. 26 C.F.R. § 1.1502-20(a), (c) (2000).

In 2001, however, the Federal Circuit held that this second loss-disallowance rule exceeded the Treasury's authority. *Rite Aid*, 255 F.3d at 1360. In early 2002, the IRS announced that it would not continue to "litigate the validity of the loss duplication factor of § 1.1502-20." IRS Announces New Position With Regard To Consolidated Loss Disallowance Rule, IRS Notice 2002-11, 2002-1 C.B. 526 (Jan. 31, 2002). The agency advised consolidated taxpayers that it "intend[ed] to promulgate interim regulations that * * * require consolidated groups to determine the allowable loss on a sale or disposition of subsidiary stock under an amended § 1.337(d)-2." *Ibid*.

In March 2002, the IRS and Treasury issued the promised regulations setting forth the rules taxpayers were required to follow. Loss Limitation Rules, 67 Fed. Reg. 11034-01, 11035 (Mar. 12, 2002). Of particular relevance here was the newly promulgated 26 C.F.R. § 1.337(d)-2T. In paragraph (a)(1), this regulation set forth a "General rule":

No deduction is allowed for any loss recognized by a member of a consolidated group with respect to the disposition of stock of a subsidiary.

26 C.F.R. § 1.337(d)-2T(a)(1) (2002). Paragraph (b)(1) then established a new rule governing basis calculations. *Id.* § 1.337(d)-2T(b)(1). And in paragraph (c),

under the heading “Allowable Loss,” the regulation provided:

Loss is *not* disallowed under paragraph (a)(1) of this section and basis is *not* reduced under paragraph (b)(1) of this section to the extent the taxpayer establishes that the loss or basis is not attributable to the recognition of built-in gain on the disposition of an asset (including stock and securities).

Id. § 1.337(d)-2T(c)(2) (emphases added).

Thus, if a parent company could show that a loss resulting from its disposition of a subsidiary’s stock was not “attributable to the recognition of built-in gain,” then 26 C.F.R. § 1.337(d)-2T declared it an “Allowable Loss.” The parent company therefore could deduct that loss.

In a separate notice issued with these regulations, the IRS emphasized that the interim rules “do not disallow stock loss that reflects net operating losses or built-in asset losses of a subsidiary member.” IRS Announces Regulations Will Be Issued to Prevent Duplication of Losses Within a Consolidated Group on Dispositions of Member Stock, IRS Notice 2002-18, 2002-1 C.B. 644 (Mar. 9, 2002). Although the notice went on to state that “the IRS and Treasury believe a consolidated group should not be able to benefit more than once from one economic loss,” they expressed only an intention to address that issue at some point in the future:

Accordingly, the IRS and Treasury intend to issue regulations that will prevent a

consolidated group from obtaining a tax benefit from both the utilization of a loss from the disposition of stock (or another asset that reflects the basis of stock) and the utilization of a loss or deduction with respect to another asset that reflects the same economic loss.

Ibid. While the IRS and Treasury eventually did issue additional regulations (*e.g.*, Guidance Under Section 1502; Suspension of Losses on Certain Stock Dispositions, 67 Fed. Reg. 65060-01 (Oct. 23, 2002)), the IRS has acknowledged that none of them governs the loss deductions at issue here (C.A. Ans. Br. 44-45).

B. The *Ifeld* Doctrine

This Court confronted an earlier version of the consolidated return regulations in *Charles Ifeld Co. v. Hernandez*, 292 U.S. 62 (1934). In that case, the taxpayer filed consolidated returns that took into account the losses of two largely unprofitable subsidiaries. *Id.* at 64. The taxpayer later liquidated these subsidiaries, which distributed their remaining assets to the taxpayer. *Ibid.* Because the distributed amounts were substantially less than what the taxpayer had previously invested, the taxpayer attempted to deduct from its taxable income the investment losses it sustained. *Ibid.*

Ifeld held that the taxpayer could not deduct these investment losses. *Id.* at 65-69. The Court observed that “[i]n the absence of a provision in the Act or regulations that fairly may be read to authorize it, the deduction claimed is not allowable.” *Id.* at 66. The Court then concluded that neither of the regulations

invoked by the taxpayer authorized the deduction: one dealt with “distributions made *after* a consolidated return period” (but the distribution in *Ilfeld* had occurred *during* the consolidated return period), and the other related “exclusively to the sale of stock” (but “[n]o sale of stock was involved” in *Ilfeld*). *Ibid.* And two other regulations expressly prohibited the taxpayer from taking the deduction it sought: one forbade “the recognition of losses upon distribution during the consolidated return period,” and a second forbade “the deduction as bad debts of obligations which are the result of intercompany transactions.” *Id.* at 67.

Having held that the applicable regulations foreclosed the taxpayer’s deductions, the Court then observed that “[t]he allowance claimed would permit [the taxpayer] twice to use the subsidiaries’ losses for the reduction of its taxable income.” *Id.* at 68. It continued: “If allowed, this would be the practical equivalent of double deduction. In the absence of a provision of the Act definitely requiring it, a purpose so opposed to precedent and equality of treatment of taxpayers will not be attributed to lawmakers.” *Ibid.*

This Court applied this “no double deduction” principle outside the context of the consolidated return regime in *United States v. Skelly Oil Co.*, 394 U.S. 678 (1969). There, the Court confronted a taxpayer’s argument that it was entitled to a percentage depletion deduction for natural gas income in one year, and then a full deduction for that same income in a subsequent year when it had to reimburse its customers. *Id.* at 679-80. Invoking the *Ilfeld* principle that “the Code should not be interpreted to allow [the taxpayer] ‘the practical

equivalent of double deduction’ absent a clear declaration of intent by Congress,” the Court held that the Code provisions relied on by the taxpayer could not be read to authorize “a deduction for refunding money that was not taxed when received.” *Id.* at 684, 685 (internal citation omitted) (quoting *Ilfeld*, 292 U.S. at 68). This Court has not relied on *Ilfeld* since.

C. Factual Background

In 1997, AquaSource, then an indirect, wholly owned subsidiary of Duquesne, began acquiring a number of water and wastewater companies. App., *infra*, 66a. Duquesne’s substantial investments in AquaSource funded these acquisitions. App., *infra*, 66a. Three years later, however, Duquesne reevaluated its position and determined that it would instead redirect its attention to its core electrical energy interests. App., *infra*, 66a.

In December 2001, Duquesne exchanged 50,000 shares of AquaSource for services valued at \$4 million. App., *infra*, 68a-69a. At this price, the exchange resulted in a capital loss of approximately \$199 million. App., *infra*, 69a.

The Duquesne group deducted this loss in its 2001 consolidated return, carrying it back to the 2000 tax year. App., *infra*, 69a. This deduction complied with the controlling regulations in the aftermath of the *Rite Aid* decision. Specifically, for stock sales before March 7, 2002, consolidated groups were permitted to calculate capital losses “without regard to the [§ 1.1502-20] duplicated loss factor” that the Federal

Circuit had set aside. 67 Fed. Reg. at 11035. For that reason, Duquesne could deduct the loss under 26 U.S.C. § 165, which provides: “There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.”

In the next two years, AquaSource sold its stock in various subsidiaries. C.A. App. 306-09. As a result, it incurred capital losses of approximately \$60 million in 2002 and \$193 million in 2003. App., *infra*, 70a, 71a-72a.

The Duquesne group deducted these capital losses in its consolidated returns for the 2002 and 2003 tax years (again carrying the losses back to the 2000 tax year). As was true of the 2001 loss deduction, these deductions complied with the then-governing regulations. In particular, Section 1.337(d)-2T provided that losses from stock sales were “not disallowed” so long as they were not “attributable to the recognition of built-in gain.” 26 C.F.R. § 1.337(d)-2T(c)(2). Because AquaSource’s losses were not attributable to “built-in gain[s],” they were “Allowable Loss[es].” *Id.* § 1.337(d)-2T(c).

D. The IRS’s Notice Of Deficiency

The IRS initially audited and accepted Duquesne’s tax returns for both 2001 and 2002. C.A. App. 81-83, 136-37. But in auditing Duquesne’s 2003 return, the IRS reversed course. It concluded that \$199 million of the deductions Duquesne claimed in 2002 and 2003 respecting AquaSource’s asset sales should be

disallowed. App., *infra*, 76a. The IRS thus issued a notice of deficiency determining that Duquesne owed nearly \$37 million in federal taxes. App., *infra*, 76a; C.A. App. 92.

In making this determination, the IRS did not dispute Duquesne’s understanding of the applicable regulations. Indeed, the IRS examination team’s report acknowledged that no regulation prevented Duquesne from taking these deductions. C.A. App. 316. The IRS instead declared that the losses “should be disallowed by application of the doctrine of *Charles Ilfeld Co. v. Hernandez*, 292 U.S. 62 (1934).” App., *infra*, 74a. Counsel for the IRS explained in a letter to Duquesne that “[t]he application of the [*Ilfeld*] doctrine is on a facts and circumstances basis.” App., *infra*, 76a.¹

E. Tax Court Proceedings

Duquesne petitioned the Tax Court for review, asserting that because *Ilfeld* was “only an interpretive principle, not a stand-alone doctrine,” the IRS could not deploy it as a freestanding, substantive rule to preclude deductions that the controlling regulations authorized Duquesne to take. C.A. App. 213, 647. The IRS countered that “[n]o further authority, regulatory or otherwise, [was] required to disallow” Duquesne’s losses. C.A. App. 484. It acknowledged that “to preclude the losses via regulation, it would have been necessary to promulgate retroactive regulations (which

¹ The IRS asserted, in the alternative, that the 2001 losses were not bona fide. C.A. App. 102-03. Neither the Tax Court nor the Third Circuit addressed this contention: the judgment below rests on the *Ilfeld* rationale.

are generally precluded by [26 U.S.C. §] 7805(b)), to fundamentally change the regulatory scheme, or to issue new regulations establishing special rules applicable” to taxpayers like Duquesne. C.A. App. 727-28. But the IRS maintained that it did not need to take those steps because *Ilfeld* alone was enough to disallow the deductions. C.A. App. 727-28.

The Tax Court agreed with the IRS, holding that *Ilfeld* itself authorized the IRS to deny Duquesne’s deductions. App., *infra*, 116a. The Tax Court relied in large part on one of its own recent decisions, which had applied *Ilfeld* to disallow a taxpayer’s purportedly duplicative deduction related to environmental remediation expenses. *See Thrifty Oil Co. v. Commissioner*, 139 T.C. 198, 213-15 (2012); *see* App., *infra*, 86a-94a. Although that earlier decision had been appealable to the Ninth Circuit and thus governed by that Circuit’s law, the Tax Court concluded the Third Circuit would apply *Ilfeld* in the same manner. App., *infra*, 95a, 102a. It therefore rejected Duquesne’s reliance on *Rite Aid* and the regulations issued in its aftermath, stating that they “do not prohibit the Court from determining whether under *Charles Ilfeld Co.* duplicate deductions for the same economic loss are allowable.” App., *infra*, 116a.

F. Third Circuit Proceedings

A divided panel of the Third Circuit affirmed. App., *infra*, 3a.

1. The majority began by stating its view that while there was substantial uncertainty regarding

Ilfeld's "scope"—that is, "whether it applies outside the consolidated return context"—it "remains good law in the consolidated-return context." App., *infra*, 20a, 23a-24a. And where applicable, the majority held, *Ilfeld* requires a "clear declaration in statutory text or a properly authorized regulation" to "overcome" the "presumption that statutes and regulations do not allow a double deduction for the same economic loss." App., *infra*, 24a (internal quotation marks and alteration omitted).

The majority illustrated precisely how it understood this so-called "presumption" to work. It acknowledged that, if "literally applied," § 1.337(d)-2T would authorize Duquesne's 2002 and 2003 losses. App., *infra*, 37a. But the majority nevertheless concluded that this authorization was insufficient because "there is no mention in the regulation of approval for a loss deduction that duplicates another already taken for the underlying economic loss." App., *infra*, 37a-38a. In other words, the majority reasoned, because § 1.337(d)-2T "does not clearly allow in the future losses *already taken* on consolidated returns," *Ilfeld* controlled. App., *infra*, 38a (emphasis added). The majority buttressed this conclusion by pointing to the IRS's statement (in the notice issued contemporaneously with this regulation) that it "believe[d] that a consolidated group should not be able to benefit more than once from one

economic loss.” App., *infra*, 38a (quoting IRS Notice 2002-18, 2002-1 C.B. 644).²

2. Judge Hardiman dissented. App., *infra*, 43a. Unlike the majority, Judge Hardiman refused to read *Ilfeld* to impose a “triple-authorization requirement,” such that “even if the Code separately allows Deduction A and Deduction B, the taxpayer could not take both deductions unless a provision authorized them to be taken simultaneously.” App., *infra*, 44a. As he reasoned, while the “‘definitely requir[es]’” language in *Ilfeld* might suggest such a rule if read in isolation, *Ilfeld* also stated that a “double” deduction is allowable where there is “a provision in the act or regulations *that fairly may be read to authorize it*.” App., *infra*, 45a (quoting *Ilfeld*, 292 U.S. at 66) (emphasis in original). Judge Hardiman thus would have construed *Ilfeld* as merely imposing a fair-reading requirement when interpreting statutes and regulations, not as a doctrine overriding anything except an express statute or regulation specifically authorizing and acknowledging a duplicative benefit. App., *infra*, 45a-46a.

In this respect, Judge Hardiman explained, *Ilfeld* is a canon of statutory interpretation akin to the “avoid absurd results rule.” App., *infra*, 46a-47a. And he recognized that other courts of appeals take this “modest view of *Ilfeld*’s scope.” App., *infra*, 47a n.2 (citing, *inter alia*, *Transco Expl. Co. v. Comm’r of Internal Revenue*,

² The majority also rejected Duquesne’s other arguments for reversing the Tax Court’s decision. App., *infra*, 10a-19a, 39a-42a. These holdings are not at issue here.

949 F.2d 837, 841 (5th Cir. 1992), and *Textron, Inc. v. United States*, 561 F.2d 1023, 1026 (1st Cir. 1977)). These courts thus have not “required the triple authorization that the [m]ajority” imposed here. App., *infra*, 46a. This more restrained understanding of *Ilfeld*, Judge Hardiman continued, was consistent with this Court’s recent decisions indicating that any “‘clear statement’ rule yields in the face of compliance with applicable laws and regulations.” App., *infra*, 48a. In particular, in *Gitlitz v. Commissioner of Internal Revenue*, this Court held that receipt by the shareholders of an S corporation of a “double windfall” with respect to debt cancellation provided no basis to disregard the provisions authorizing that tax benefit; only the *dissent* in *Gitlitz* would have “required an explicit authorization in the Code allowing for both tax benefits to be reaped simultaneously.” App., *infra*, 49a (citing 531 U.S. 206, 218-20 (2001) and *id.* at 223-24 (Breyer, J., dissenting)).

Turning to the specific regulations at issue in this case, Judge Hardiman concluded that, under a proper understanding of *Ilfeld*, Section 1.337(d)-2T must be read to authorize Duquesne’s deductions. App., *infra*, 53a-54a. He construed the regulation in a straightforward manner: “a subsidiary’s stock loss is allowed unless it relates to a built-in gain,” a requirement it was “undisputed” Duquesne had met. App., *infra*, 54a; *see also* App., *infra*, 61a (“When the IRS writes that a deduction is ‘not disallowed,’ we should accept that it is not.”). The majority’s contrary conclusion, by contrast, was “off track” because “its triple-authorization

standard oblige[d] the regulation to bear much more weight than the caselaw demands.” App., *infra*, 52a n.5.

Judge Hardiman also criticized the majority’s deference to the IRS’s general statement that it “‘believed’” a consolidated group should not receive a double deduction—“the IRS must do more than believe something for it to become law.” App., *infra*, 55a. As Judge Hardiman emphasized, “it seems unnatural for the IRS to write a regulation that literally authorizes a specific action, only to expect taxpayers to appreciate that the regulation is undermined by common-law doctrines lurking in the shadows.” App., *infra*, 57a.

3. The court of appeals denied Duquesne’s rehearing petition. App., *infra*, 123a-24a.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE IN IRRECONCILABLE CONFLICT ON THE SCOPE OF *ILFELD*

The courts of appeals are in deep conflict on the critical question that divided the Third Circuit panel in this case. Multiple courts of appeals—the First, Fifth, and Tenth Circuits—have held that *Ilfeld* is a mere interpretive canon that is inapplicable where each of a taxpayer’s two deductions is authorized by statute or regulation. But others—including the Eighth, Ninth, and now the Third Circuits—instead have treated *Ilfeld* as a substantive rule that permits the IRS to override any statutory or regulatory

provision that does not expressly authorize a taxpayer to take a *double* deduction. Only this Court can resolve that conflict.

A. Multiple Courts Of Appeals Have Held That *Ilfeld* Merely Sets Forth An Interpretive Principle

As Judge Hardiman recognized in his dissent, other courts of appeals have rejected the construction of *Ilfeld* adopted and applied by the Third Circuit in this case. App., *infra*, 47a n.2. Far from construing *Ilfeld* to impose a triple-authorization requirement or magic-words test, these courts have treated it as articulating an interpretive principle used to resolve statutory and regulatory ambiguity. App., *infra*, 47a n.2.

1. The Fifth Circuit applied *Ilfeld* in this manner in *Transco Exploration Co. v. Commissioner of Internal Revenue*, 949 F.2d 837 (5th Cir. 1992). Transco leased properties for offshore drilling and paid “lease bonuses.” *Id.* at 838. In calculating its “taxable income” for the excise tax imposed on “windfall” oil profits, Transco excluded the amounts it spent on the lease bonus payments. *Ibid.* This exclusion was authorized by regulations defining the term “taxable income.” *Ibid.* Transco also deducted from its taxable income the allowable cost depletions associated with the properties and included the same lease bonus payments in its cost basis. *Ibid.* The inclusion of these payments was consistent with separate regulations governing cost depletion calculations. *Ibid.* But the IRS refused to allow the taxpayer to include these lease bonus payments in

calculating both its gross income and its cost depletion, reasoning (much as the Third Circuit did here) that doing so would “result[] in an improper double tax benefit.” *Id.* at 839.

The Fifth Circuit rejected this reasoning. It acknowledged that both *Ilfeld* and *Skelly* had interpreted the provisions at issue in those cases as not permitting “the practical equivalent of double deduction.” *Id.* at 840 (quoting *Skelly*, 394 U.S. at 684, and *Ilfeld*, 292 U.S. at 68). But the Fifth Circuit held that “this is only an interpretive principle,” and “[i]t does not require or license us to rewrite the Code or the Secretary’s regulations.” *Id.* at 841 (“Courts are particularly ill-equipped to overhaul complicated tax provisions whose function in the general tax scheme is often beyond their ken.”).

None of the applicable regulations expressly provided that the taxpayer could deduct lease bonus payments that *already* had been deducted elsewhere (as would be required under the Third Circuit’s approach). The Fifth Circuit nonetheless held that the plain terms of those regulations authorized the deduction. *Ibid.* Thus, while “the formula twice draws on lease bonuses,” the court was “unwilling to amend the regulations judicially to avoid this result.” *Ibid.*

2. The First Circuit reached a similar conclusion in *Textron, Inc. v. United States*, 561 F.2d 1023 (1st Cir. 1977). Textron had been the parent company of Hawaiian Textron, Inc., which provided passenger-ship service to Hawaii. *Id.* at 1024. This venture was

unprofitable, and in 1959 creditors foreclosed on Hawaiian Textron's assets. *Ibid.* Because Textron's investment in its subsidiary was now worthless, in 1959 Textron took a \$6 million bad debt and worthless stock deduction. *Ibid.* But Textron later used its Hawaiian subsidiary to acquire a new, successful business. *Ibid.* Consistent with an IRS revenue ruling, the subsidiary then carried forward nearly \$7 million in losses it had sustained in the operation of its passenger-ship service, deducting these losses from its taxable income in 1960, 1961, and 1962. *Ibid.* The IRS responded by disallowing Textron's 1959 worthless stock and bad debt deduction. *Ibid.*

The First Circuit held that Textron and its subsidiaries were entitled to take *both* sets of deductions. In reaching this conclusion, the court rejected the argument (relied upon by the *Textron* dissent) that "Textron's worthless stock and debt claim" should be disallowed under *Ilfeld* as a "double deduction." *Id.* at 1026 n.5. The court noted that, because the two corporations had not filed consolidated returns, there was no Code provision or regulation that would necessarily require treating them as a single entity. *Id.* at 1026. Moreover, the court continued, "corporate taxation is an area of careful planning, planning that will be seriously disrupted if courts simply ignore separate entities whenever it seems 'fairer' to do so." *Ibid.* The First Circuit therefore "decline[d] to inject so massive and unsettling a dose of 'equity' into the tax laws." *Ibid.* The Treasury might, the court reasoned, promulgate regulations that would prospectively prohibit this

result, as a taxpayer like Textron “had no inherent right to a double deduction.” *Id.* at 1024 n.2. Textron “did, however, have a right to have the government proceed in accordance with the Code and regulations.” *Ibid.*

3. The Tenth Circuit in *O’Brien v. Commissioner* likewise refused to apply *Ilfeld* to override plain regulatory language. 771 F.2d 476 (10th Cir. 1985). The taxpayers in *O’Brien* had paid approximately \$3,000 in wages in constructing a fence. *Id.* at 477. They claimed this amount as a “new jobs credit.” *Ibid.* They then also claimed an “investment tax credit” for the fence, incorporating this same \$3,000 in wages. *Ibid.* In support of that latter credit, the taxpayers relied on a regulation specifying that the basis for investment-credit property “include[d] all items properly included by the taxpayer in the depreciable basis of the property, such as installation and freight costs.” *Ibid.* (quoting 26 C.F.R. § 1.46-3(c)(1)).

The Tax Court held that the taxpayers could not claim an investment credit corresponding to the wages already used to compute the new jobs credit. *O’Brien v. Commissioner*, 79 T.C. 776, 784 (1982). The court acknowledged that the taxpayers were “correct in their argument that, under the literal language of the regulation, basis includes the full amount of wages paid.” *Ibid.* But the court declined to adhere to that “literal language,” instead invoking the “rule” of *Ilfeld* and *Skelly* that the Code “should not be interpreted to allow double deductions or their practical equivalent.” *Ibid.* Because there was “no specific statutory

authorization allowing a new jobs credit and an investment credit for the same expenditure,” the Tax Court disallowed the duplicative portion of the investment credit. *Id.* at 785.

The Tenth Circuit remanded, holding that the Tax Court had erred by ignoring the text of the investment-credit regulation. *O’Brien*, 771 F.2d at 477. The court of appeals declared that “[t]o disregard the plain language of section 1.46-3(c)(1) * * * is both unfair and unnecessary.” *Ibid.* Rather, the Tenth Circuit concluded that the investment-credit regulation should be “fully complied with at the same time that a double credit is disallowed,” as the new jobs credit could instead be reduced by the “amount of investment credit taken with respect to the wage expense.” *Id.* at 478. The Tenth Circuit therefore remanded the case for the Tax Court to determine the taxpayers’ liability under this alternative (and regulation-compliant) means of calculation. *Ibid.*

B. Other Courts Of Appeals Have Applied *Ilfeld* As A Freestanding, Substantive Tax Rule

In contrast to the courts that understand *Ilfeld* to articulate only a rule of construction, other courts of appeals have read it to announce a substantive rule, as the Third Circuit majority did here. Under that rule, the IRS may disallow expressly authorized deductions unless the governing statute or regulation explicitly states that two purportedly duplicative deductions may be taken.

1. The Ninth Circuit’s decision in *Marwais Steel Co. v. Commissioner* illustrates this second view of *Ilfeld*. 354 F.2d 997 (9th Cir. 1965). Marwais Steel Company had loaned approximately \$58,000 to its subsidiary, Wilmington Metal Manufacturing Company. *Id.* at 997. Marwais ultimately deducted the total amount of these loans as business bad debts. *Id.* at 997-98. After Marwais liquidated Wilmington and acquired its remaining assets, it carried over and deducted Wilmington’s net operating losses of approximately \$60,000 in subsequent tax years. *Ibid.* In support of these latter deductions, Marwais pointed to Internal Revenue Code provisions expressly providing that “no gain or loss” was recognized when a corporation acquired the property of a liquidating corporation, and that the acquiring company was entitled to the “net operating loss carryovers” of the acquired company. *Id.* at 998 n.3 (quoting 26 U.S.C. §§ 332(a) and 338(c)(1)).

The Ninth Circuit found no fault with Marwais’s interpretation of these statutory provisions. *Id.* at 998. Indeed, the court described Marwais’s statutory argument as “very difficult to answer” and “near perfect in logic.” *Ibid.* Nevertheless, it agreed with the IRS that *Ilfeld* precluded the net-operating-loss deductions because they duplicated the loss recognized in the bad-debt deductions. *Ibid.* The court concluded that, as “plausible as the position of Marwais is, there is a message in *Ilfeld*.” *Ibid.* Although it acknowledged the taxpayer’s argument that what this Court said in *Ilfeld* was dicta, the Ninth Circuit explained that “[i]f what

[*Ilfeld*] said there was dicta, we believe that it is dicta the court will follow in cases having any similarity at all on double deductions for a single economic loss.” *Id.* at 998-99.

2. The Eighth Circuit applied the same analysis in *Comar Oil Co. v. Helvering*, 107 F.2d 709 (8th Cir. 1939). In 1926, the Comar Oil Company had reserved \$120,000 to be used for “losses which would be incurred” in subsequent years. *Id.* at 710. It then deducted that amount in its 1926 tax returns—apparently without any support in the governing statutes or regulations. *Ibid.* In 1929, Comar suffered total losses of approximately \$210,000, which it sought to deduct in its 1929 return. *Ibid.* But the Commissioner refused to allow Comar to deduct the portion of these losses that were covered by the funds in the reserve account (the basis for the 1926 deduction). *Id.* at 710-11. Because of the applicable statute of limitations, the Commissioner could not challenge the claimed 1926 deduction itself. *Id.* at 710. But in support of its challenge to the corresponding portion of Comar’s 1929 loss deduction, the Commissioner invoked a provision of the Revenue Act of 1928 and *Ilfeld*. *Id.* at 710-11.

The Eighth Circuit expressly rejected the Commissioner’s argument that the full amount of Comar’s 1929 losses was not authorized by the cited statutory provision. *Id.* at 711. But the court held that *Ilfeld* itself authorized the IRS to deny Comar’s claimed deduction. *Ibid.* In the Eighth Circuit’s view, the *Ilfeld* “principle” meant “that a taxpayer, having been once allowed a deduction for a loss of capital assets

sustained in one taxable year, is not entitled to take a deduction for the same loss in a subsequent year.” *Ibid.* The court rejected Comar’s contention that applying *Ilfeld* in this manner allowed for the improper evasion of the statutory bar against challenging the 1926 deduction. *Id.* at 712. It declared: “The persistent fact in this case is that the taxpayer has sustained but one loss of capital assets for which it has been allowed a deduction in its income tax return. It is not entitled to a second deduction for the same identical loss * * *.” *Ibid.*

C. These Conflicting Decisions Cannot Be Reconciled

In attempting to respond to Judge Hardiman’s dissent, the Third Circuit majority fleetingly suggested that the decisions rejecting its understanding of *Ilfeld* could be distinguished because they “occurred outside the consolidated-return context.” App., *infra*, at 22a. That is not so.

None of the decisions holding that *Ilfeld* is merely a canon of interpretation (*see* Part I.A., *supra*) limited that holding to the nonconsolidated-return context. Neither the Fifth Circuit’s decision in *Transco* nor the Tenth Circuit’s decision in *O’Brien* relied on the fact that those cases did not involve consolidated returns—or suggested that it mattered for the interpretation of *Ilfeld*. *Transco*, 949 F.2d at 840-41; *O’Brien*, 771 F.2d at 477. Only the First Circuit’s *Textron* decision even mentioned that *Ilfeld* involved consolidated returns,

but it did not suggest that the *Ilfeld* doctrine was inapplicable for that reason. 561 F.2d at 1026-27.

That these courts did not rely on consolidated-return-specific reasoning is unsurprising: they *could* not, as this Court has long made clear that *Ilfeld* applies outside the consolidated-return regime. *See Skelly*, 394 U.S. at 684-85. Indeed, both of the circuits that read *Ilfeld* as imposing the same sort of triple-authorization standard now imposed by the Third Circuit did so in cases involving nonconsolidated taxpayers. *Marwais*, 354 F.2d at 998-99; *Comar*, 107 F.2d at 711-12. There thus is no reason to think that *Ilfeld*'s scope or applicability turns on whether it is a consolidated taxpayer that claims a purported double deduction. As the IRS examination team's report in this case put it, *Ilfeld* has "thrived" "[o]utside the consolidated return context." C.A. App. 317.

The question that has divided the courts of appeals therefore is not, as the Third Circuit apparently believed, whether and how *Ilfeld* applies outside the context of consolidated returns. It is settled law that *Ilfeld* applies to all taxpayers. *Skelly*, 394 U.S. at 684-85. Rather, the question is exactly what it *means* for *Ilfeld* to apply: is it merely a canon of interpretation, or is it a doctrine that can override unambiguous statutes and regulations? W. Sutton, *Duquesne and Ilfeld: A Risen Phoenix Or An Entirely Different Animal?*, 41 J. CORP. TAX'N 28, 32-34 (2014) (recounting this division). The decision below brings yet another circuit into conflict over the answer.

II. THE THIRD CIRCUIT'S INTERPRETATION OF *ILFELD* IS WRONG AND INCOMPATIBLE WITH SETTLED PRINCIPLES OF ADMINISTRATIVE LAW

The Third Circuit's understanding of the *Ilfeld* doctrine is contrary to both this Court's precedent and fundamental principles of administrative law.

A. This Court Has Never Adopted A Triple-Authorization Requirement

This Court has not adopted the rule ascribed to it by the Third, Eighth, and Ninth Circuits. This Court has never held that the IRS has license to disallow deductions expressly authorized by statute or regulation by resort to a common-law "no double deduction" rule.

Ilfeld itself had no need to adopt such a rule: as described above (*supra* pp. 8-9), the deductions sought by the taxpayer were expressly prohibited by at least two on-point regulations. 292 U.S. at 67. In declaring that the Code should not be presumed to allow "the practical equivalent of double deduction," this Court simply provided an additional rationale for why the terms of the applicable statutory and regulatory provisions should not be contorted to permit the taxpayer's claimed deductions. *Id.* at 68. *Ilfeld* thus reflects a case-specific application of the more general canon of interpretation this Court invoked earlier in its opinion: a deduction is allowed only where a provision "fairly may be read to authorize it." *Id.* at 66; see *Commissioner v. Schleier*, 515 U.S. 323, 328 (1995) (applying this canon). *Ilfeld* did not hold that a deduction

otherwise *authorized* by the applicable regulations could be labelled duplicative and disallowed through application of a general, uncodified principle. No such situation was before the Court.

Subsequent decisions of this Court are consistent with this understanding of *Ifeld*. As recounted previously, *Skelly* applied *Ifeld* in construing general tax Code provisions as not permitting the deductions at issue; it did not use *Ifeld* to override specific regulations that authorized those deductions, as there were no such regulations. *Skelly*, 394 U.S. at 683-84. Similarly, in *McLaughlin v. Pacific Lumber Co.*, a decision cited by the Third Circuit majority (App., *infra*, 22a), this Court did not confront the question whether *Ifeld* could trump unambiguous regulations because the taxpayer cited *no* regulation that might authorize its claimed deductions. *McLaughlin*, 293 U.S. 351, 355-56 (1934).

Even assuming these decisions left some uncertainty as to *Ifeld*'s scope, this Court's decision in *Gitlitz v. Commissioner* removed it. In *Gitlitz*, the shareholders of an S corporation excluded from the corporation's income a discharge of indebtedness, then used that same discharge in calculating their stock bases in the corporation. 531 U.S. 206, 210 (2001). This Court examined the statutory provisions on which the taxpayers relied and concluded that they authorized each of the taxpayers' steps and their sequencing. *Id.* at 212-19. Although the dissent in *Gitlitz* invoked *Ifeld* to reject the taxpayers' argument, *id.* at 224 (Breyer, J., dissenting), the majority denied the relevance of any "double windfall," succinctly holding:

“Because the Code’s plain text permits the taxpayers here to receive these benefits, we need not address this policy concern,” *id.* at 220 (majority opinion). As Judge Hardiman emphasized in his dissent below, the *Gitlitz* majority was “satisfied that the combined provisions ‘permit[ted] the taxpayers to receive the[] benefits,’ without requiring an additional statement that the two benefits could be concurrently utilized.” App., *infra*, 49a.

**B. The Third Circuit’s Rule Is Irreconcilable
With Bedrock Principles Of Administrative
Law**

The Third Circuit’s conclusion that *Ilfeld* authorizes the IRS to override the Internal Revenue Code and its own regulations also conflicts with fundamental principles of administrative law.

1. This Court has made clear that a statute or regulation’s “plain and unambiguous language” must be enforced “according to its terms.” *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010); see *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536 (D.C. Cir. 1986) (Scalia, J.) (“It is axiomatic that an agency must adhere to its own regulations.”). Strict adherence to the plain terms of governing regulations is necessary to further the “notice and predictability purposes of rulemaking” by ensuring that agencies have provided “regulated parties fair warning of the conduct a regulation prohibits or requires.” *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156, 158 (2012) (internal quotation marks omitted); *cf. Zuni*

Public School Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 119 (2007) (Scalia, J., dissenting) (“Citizens arrange their affairs not on the basis of their legislators’ unexpressed intent, but on the basis of the law as it is written and promulgated.”).

These fundamental principles are, of course, fully applicable to the federal tax laws. See *Mayo Found. for Medical Educ. and Research v. United States*, 562 U.S. 44, 55 (2011) (“[W]e are not inclined to carve out an approach to administrative review good for tax law only.”). As *Gitlitz* illustrates, generalized “policy concern[s]” cannot be used to override the plain language of the Internal Revenue Code or its implementing regulations. 531 U.S. at 220. In particular, when straightforward application of statutes and IRS regulations provides a tax benefit that the IRS does not like, the agency is not free to jettison binding authority and deny the benefit. *Hanover Bank v. Commissioner*, 369 U.S. 672, 687 (1962) (“[W]e are not at liberty, notwithstanding the apparent tax-saving windfall bestowed upon taxpayers, to add to or alter the words employed to effect a purpose which does not appear on the face of the statute.”); *Lewyt Corp. v. Commissioner*, 349 U.S. 237, 240 (1955) (“[W]here the benefit claimed by the taxpayer is fairly within the statutory language and the construction sought is in harmony with the statute as an organic whole, the benefits will not be withheld from the taxpayer though they represent an unexpected windfall.”). Indeed, given the “highly reticulated” nature of the Revenue Code and its implementing regulations, “of all areas of law that should

resist judicial innovation based on misty calls to higher purpose, this would seem to be it.” *Summa Holdings, Inc. v. Commissioner*, 848 F.3d 779, 789 (6th Cir. 2017) (Sutton, J.).

Yet the Third Circuit’s interpretation of *Ilfeld* discards these basic principles. No longer is it sufficient for a taxpayer to adhere strictly to the Code and implementing regulations in structuring its activities and calculating its tax liability. Instead, a taxpayer must contend with the possibility that, notwithstanding the taxpayer’s regulatory compliance, the IRS will deem some portion of a deduction or other asserted tax benefit “duplicative,” declaring it invalid based on an uncodified, judicially created doctrine. “If the government can undo transactions that the terms of the Code expressly authorize, it’s fair to ask what the point of making these terms accessible to the taxpayer and binding on the tax collector is.” *Summa Holdings*, 848 F.3d at 782.

Moreover, because this understanding of *Ilfeld* allows the IRS to depart from its regulations on a “facts and circumstances basis” (App., *infra*, 76a), nothing constrains its determination as to *which* of the supposedly duplicative deductions must be disallowed. The agency’s essentially arbitrary decision to preclude one deduction rather than another will often have significant tax consequences, further compounding the uncertainty taxpayers will now confront because they are unable to rely on the regulations as written.

In effect, the Third Circuit has authorized the IRS to take administrative actions that contradict the unambiguous text of its own regulations—actions that nevertheless must be accepted by the judiciary so long as the IRS’s actions are consistent with an asserted general policy interest in eliminating duplicative tax benefits. Members of this Court already have expressed unease with the doctrines of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Auer v. Robbins*, 519 U.S. 452 (1997), which extend deference to agencies’ interpretations of ambiguous statutes and regulations. *E.g.*, *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of petition for certiorari) (collecting cases and observing that “[m]embers of this Court have repeatedly called for [Auer’s] reconsideration in an appropriate case”); *Michigan v. EPA*, 135 S. Ct. 2699, 2713-14 (2015) (Thomas, J., concurring) (questioning constitutional validity of *Chevron*); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) (same). But the Third Circuit’s understanding of the *Ilfeld* doctrine goes far beyond both *Chevron* and *Auer*, effectively extending deference to the IRS’s decision *not* to follow the written rules on which the taxpayer relied. “It is one thing to expect regulated parties to conform their conduct to an agency’s interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency’s interpretations in advance or else be held liable when the agency announces its interpretations for

the first time in an enforcement proceeding.” *Christopher*, 567 U.S. at 159.

2. The particular circumstances of this case well illustrate these concerns. Duquesne was required to follow the applicable statutes and regulations, and it did so. As neither the Third Circuit majority nor even the IRS disputed, the controlling regulations expressly authorized all of the deductions Duquesne claimed. Most important, the 2002 and 2003 losses that the IRS deemed disallowed “by application of the doctrine of *Charles Ilfeld Co. v. Hernandez*” (App., *infra*, 74a), were characterized as “Allowed Losses” and declared “not disallowed” by 26 C.F.R. § 1.337(d)-2T. Notwithstanding Duquesne’s adherence to the plain terms of § 1.337(d)-2T, the IRS rejected its claimed deduction and increased its tax liability by some \$37 million.

But just like taxpayers, the IRS should be bound by the regulations. This is especially true here, given the exceedingly detailed nature of the scheme of which § 1.337(d)-2T is a part—not to mention the IRS’s dictate that consolidated taxpayers were “require[d]” to adhere to that scheme. IRS Notice 2002-11, 2002-1 C.B. 526. Taxpayers should not be left to guess whether the IRS will instead (and at its discretion) diverge from its own duly promulgated regulations by invoking common-law principles. After all, as Judge Hardiman observed, “[w]hy have § 1.337(d)-2T or § 1.1502-32”—regulations specifically designed to deal with the problem of duplicative deductions—“if *Ilfeld* is the panacea for all consolidated-return, double-deduction ills?” App., *infra*, 57a.

These fundamental fair-notice problems are further exacerbated by the Third Circuit majority's reliance on the IRS's general statement that the "IRS and Treasury believe that a consolidated group should not be able to benefit more than once from one economic loss." App., *infra*, 37a-38a. That statement was not, of course, contained in any regulation, but rather in a general IRS "Notice"—which is not, and does not purport to be, binding authority. App., *infra*, 38a. An agency's "belief" does not have the force of law. What is more, the notice specifically stated that this general "belief" would be the basis for *future* regulations, demonstrating that the *existing* regulations did not yet prohibit any and all supposedly duplicative deductions. IRS Notice 2002-18, 2002-1 C.B. 644; *see* App., *infra*, 56a-57a.

But the Third Circuit nevertheless permitted the IRS to convert this general policy statement into binding law and apply it retroactively to Duquesne. App., *infra*, 37a-38a. This Court has refused to accord deference to an agency's interpretation of an unambiguous regulation, as doing so "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). It should not allow the IRS to use policy statements to impose effectively new regulations that directly contradict the regulations actually promulgated.

III. THE ISSUE IS IMPORTANT AND WARRANTS THIS COURT'S REVIEW

This Court has emphasized that the tax laws “can give no quarter to uncertainty.” *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522, 543 (1979). But the Third Circuit’s decision deepens a conflict among the circuits, producing uncertainty that “could cause havoc” in this “highly technical and complex area of tax law.” *Foster, supra*.

First, given the circuit conflict over the meaning of *Ilfeld*, a taxpayer’s liability may depend on its particular geographic location (or locations). *See Aquilino v. United States*, 363 U.S. 509, 514 (1960) (recognizing “the necessity for a uniform administration of the federal revenue statutes”). Taxpayers should not face arbitrary differences in treatment depending on the jurisdiction in which they are able to challenge IRS action.

Second, those taxpayers potentially subject to the application of the *Ilfeld* rule as construed by the Third Circuit and the circuits it joined face the additional uncertainty of being unsure whether and to what extent they may rely on the statutory and regulatory provisions that would otherwise seem to govern their tax liability. App., *infra*, 50a-52a. Given the Third Circuit’s robust endorsement of *Ilfeld* as a stand-alone deduction-disallowance rule, the IRS can be expected increasingly to use the gambit of invoking *Ilfeld* to correct what it perceives, in hindsight, to be insufficiencies in its own regulations or defects in the

Internal Revenue Code. W. Sutton, *An Error In Judgment: Revisiting Duquesne Light Holdings*, 44 J. CORP. TAX'N 25, 30 (2017).

Agencies should not be able to pick and choose the regulations to which they will adhere. That is particularly true of the IRS. This Court's review is necessary to remove the multiple layers of uncertainty aggravated by the Third Circuit's decision so that taxpayers can order their affairs with confidence that they can discern the rules that will actually govern them.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES C. MARTIN
REED SMITH LLP
225 Fifth Ave.
Pittsburgh, PA 15222

JAMES R. SIGEL
MORRISON & FOERSTER LLP
425 Market St.
San Francisco, CA 94015

DEANNE E. MAYNARD
Counsel of Record
JOSEPH R. PALMORE
EDWARD L. FROELICH
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-8740
DMaynard@mofo.com

Counsel for Petitioners

FEBRUARY 14, 2018