No. 22-323

In the Supreme Court of the United States

OAKBROOK LAND HOLDINGS, LLC, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

A taxpayer that donates a conservation easement may qualify for a tax deduction if, among other things, the easement's conservation purpose is "protected in perpetuity." 26 U.S.C. 170(h)(5)(A). Under a regulation promulgated by the Commissioner of Internal Revenue in 1986 after notice-and-comment rulemaking, that perpetuity requirement may be considered satisfied if the donor and donee agree at the outset that, upon any judicial extinguishment of the easement because of changed circumstances, the donee will receive a proportionate share of the proceeds from any subsequent sale of the property, which it must then use in a manner consistent with the original conservation purpose. 26 C.F.R. 1.170A-14(g)(6)(ii). Some commenters objected to that allocation, but none of their comments addressed the statutory perpetuity requirement or proposed alternatives that would be consistent with that requirement. The Commissioner did not expressly respond to those comments in the preamble to the final rule. The question presented is:

Whether the Administrative Procedure Act, 5 U.S.C. 553(c), compelled the agency to expressly respond to comments that failed to address the statutory perpetuity requirement that the 1986 regulation was designed to implement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-59a) is reported at 28 F.4th 700. The opinion of the Tax Court (Pet. App. 61a-170a) is reported at 154 T.C. 180. Another opinion of the Tax Court (Pet. App. 171a-207a) is not published in the United States Tax Court Reports but is available at 2020 WL 2462832.

JURISDICTION

The judgment of the court of appeals (Pet. App. 60a) was entered on March 14, 2022. A petition for rehearing was denied on July 6, 2022 (Pet. App. 1a). The petition for a writ of certiorari was filed on October 4, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Internal Revenue Service (IRS) disallowed a deduction for a charitable contribution claimed by petitioners on a 2008 tax return. Following a bench trial, the United States Tax Court denied petitioners' petition for readjustment. Pet. App. 61a-170a, 171a-207a. The court of appeals affirmed. *Id.* at 2a-59a.

1. a. Although the Internal Revenue Code generally allows a taxpayer to claim a deduction for a "charitable contribution," 26 U.S.C. 170(a)(1), it generally does not allow deductions for charitable contributions of partial interests in property, 26 U.S.C. 170(f)(3)(A), such as easements. One exception to that disallowance is a "qualified conservation contribution." 26 U.S.C. 170(f)(3)(B)(iii). A "'qualified conservation contribution' means a contribution—(A) of a qualified real property interest, (B) to a qualified organization, (C) exclusively for conservation purposes." 26 U.S.C. 170(h)(1).

As relevant here, the first and third elements each contain a perpetuity requirement. A "'qualified real property interest' means * * * a restriction (*granted in perpetuity*) on the use which may be made of the real property." 26 U.S.C. 170(h)(2)(C) (emphasis added). And a "contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is *protected in perpetuity*." 26 U.S.C. 170(h)(5)(A) (emphasis added); see 26 U.S.C. 170(h)(4) (defining conservation purposes, such as the preservation of lands for recreation and the protection of certain habitats).

Congress added those perpetuity requirements in 1980, expanding upon and making permanent similar requirements it had temporarily imposed in 1977. See Act of Dec. 17, 1980, Pub. L. No. 96-541, § 6(b), 94 Stat. 3206-3207. Committee reports accompanying the 1980

legislation explained that although the general disallowance of deductions for partial property interests is intended to "prevent certain tax-avoidance transactions," the "preservation of our country's natural resources and cultural heritage is important" and deductions should thus be allowed for contributions of "conservation easements" in "certain cases where the contributions are likely to further significant conservation goals without presenting significant potential for abuse." S. Rep. No. 1007, 96th Cong., 2d Sess. 8-9 (1980) (Senate Report); see H.R. Rep. No. 1278, 96th Cong., 2d Sess. 15 (1980) (House Report). The reports further explained that the perpetuity requirements help to ensure that "the conservation purposes" warranting the tax deduction "will in practice be carried out." Senate Report 14; see House Report 19. Congress did not, however, address what to do when "unforeseen changes in the surrounding land undermine the easement's conservation goals or when a government entity condemns the property," thereby "frustrat[ing]" the ability to protect the original conservation purpose "in perpetuity." Pet. App. 5a.

b. In 1983, the Commissioner of Internal Revenue issued a notice of proposed rulemaking to implement the 1980 statute. See 48 Fed. Reg. 22,940 (May 23, 1983). The agency explained that the proposed regulations "reflect the major policy decisions made by the Congress [in the 1980 statute] and expressed in th[e] committee reports." *Id.* at 22,940. As relevant here, the proposed rule included provisions that addressed application of the statutory protected-in-perpetuity requirement when a conservation easement is extinguished because of unforeseen circumstances. *Id.* at 22,946-22,947. Those provisions stated that three conditions

need to be satisfied to treat a conservation purpose as "protected in perpetuity" in the event that "a subsequent unexpected change in the conditions surrounding the property that is the subject of a donation" were to "make impossible or impractical the continued use of the property for conservation purposes." *Id.* at 22,946. First, "the restrictions [must be] extinguished by judicial proceeding." *Ibid.* Second, the "donee's proceeds * * * from a subsequent sale or exchange of the property" must be "determined under paragraph (g)(5)(ii)" of the proposed rule. *Ibid.* Third, the donee must use the resulting proceeds "in a manner consistent with the conservation purposes of the original contribution." *Ibid.*

As proposed, paragraph (g)(5)(ii)—what petitioners call (Pet. i) the "proceeds regulation"—would have provided that "at the time of the gift the donor must agree" that the donee receives an immediately vested property right "with a fair market value that is a minimum ascertainable proportion of the fair market value to the entire property." 48 Fed. Reg. at 22,946. The proposal would have further provided that the "original minimum proportionate value of the donee's property rights shall remain constant." *Ibid.* Accordingly, upon judicial extinguishment of the easement, the donee's proceeds "on a subsequent sale, exchange, or involuntary conversion of the subject property" generally would be required to be "at least equal to the original proportionate value of the perpetual conservation restriction." *Id.* at 22,946-22,947.

Ninety individuals or organizations submitted more than 700 pages of comments in response to the notice of proposed rulemaking. Pet. App. 70a. Thirteen of the comments cited the proposed rule addressing extin-

guishment; "most devoted only a few sentences to this subject, generally at the end of a submission that emphasized other matters"; and "[m]ost of the commenters who mentioned the judicial extinguishment provision supported it." *Ibid.* As relevant here, however, "[t]wo commenters were definitely opposed to the judicial extinguishment rule." *Id.* at 71a.

The New York Landmarks Conservancy (NYLC) raised three objections to the proposed proceeds regulation: (1) "based on undisclosed anecdotal evidence, the rule would deter donors from donating easements"; (2) "providing the donee with the value of post-donation improvements made by the donor was inequitable"; and (3) "it was 'possible' that the regulation's allocation of proceeds would conflict with some states' condemnation laws." Pet. App. 23a (citation omitted); see *id.* at 71a; C.A. App. 670-672. The Landmarks Preservation Council of Illinois also objected to "the 'proportionate value' approach" when "applied to facade easements on 'endangered historic properties in downtown commercial areas,'" Pet. App. 71a (ellipsis omitted), on the ground that it could "put a donor at risk of having to pay the donee additional funds if a condemnation award did not cover the amount of money calculated by the rule," *id.* at 23a-24a; see C.A. App. 774-789.

After the comment period closed in September 1983, the agency held a public hearing, which lasted more than five hours and at which 30 members of the public spoke. Pet. App. 117a.

The agency promulgated final regulations in 1986. 51 Fed. Reg. 1496 (Jan. 14, 1986). Although the preamble did not specifically identify or address the comments from NYLC and others regarding the proceeds regulation, the agency explained that it had adopted the final

regulations "[a]fter consideration of all comments regarding the proposed" regulations. *Id.* at 1496. The agency also modified the proceeds regulation from the version in the notice of proposed rulemaking: The final regulation provided that the fair market value of a qualifying easement must be "at least equal to the proportionate value that the perpetual conservation restriction at the time of the gift[] bears to the value of the property as a whole at that time." *Id.* at 1505. In addition, the agency made "three other technical and conforming changes" to the regulation. Pet. App. 73a. The proceeds regulation appears today at 26 C.F.R. 1.170A-14(g)(6)(ii).

c. In 2007, petitioners purchased a 143-acre parcel of land in Tennessee for $1.7 million. Pet. App. 9a. The following year, petitioners donated to a charitable conservancy a conservation easement on approximately 100 acres of that parcel. *Ibid.* Petitioners then claimed a deduction for that contribution in the 2008 tax year, asserting that the fair market value of the easement—and thus the amount of the deduction—was more than $9.5 million. *Id.* at 10a.

Petitioners' deed conveying the easement provided that in the event of a judicial extinguishment and subsequent sale, the conservancy "shall be entitled to a portion of the proceeds equal to the fair market value of the [easement] as provided" in the deed. Pet. App. 64a. The deed provided that the "fair market value" to which the conservancy would be entitled is "the difference" between "the fair market value of the [100-acre portion] as if not burdened by [the easement]" and "the fair market value of the [100-acre portion] burdened by [the easement], as such values are determined as of the date of this [easement]." *Ibid.* The deed additionally pro-

vided that the fair market value would be further reduced by any "amounts for improvements made by [petitioners] in the [100-acre portion] subsequent to the date of [the easement]." *Ibid.*

After examining the claimed deduction, the IRS disallowed it in full. Pet. App. 10a. The IRS explained that the contribution "failed to satisfy the requirements for a charitable contribution deduction under the applicable provisions of the Internal Revenue Code and regulations, including but not limited to * * * a failure to make a contribution of a qualified real property interest exclusively for conservation purposes." C.A. App. 29.

Petitioners petitioned the Tax Court for a readjustment. There, petitioners asserted among other things that the deed conveying the easement satisfied the proceeds regulation or, in the alternative, that the regulation was procedurally invalid on the ground that the agency had failed to adequately respond to the comments criticizing the proposed regulation during the rulemaking process. Pet. App. 10a-11a.

2. Following an October 2016 bench trial, the Tax Court denied the petition for readjustment. Pet. App. 61a-170a, 171a-207a.

a. As relevant here, the full Tax Court rejected petitioners' arguments that the proceeds regulation was procedurally invalid under the Administrative Procedure Act (APA), 5 U.S.C. 553(c). Pet. App. 61a-170a.

i. In an opinion for 12 judges in full and Judge Gustafson in relevant part, the Tax Court held that the agency had adequately considered the comments it received about the proceeds regulation. Pet. App. 73a-81a. The court observed that an agency engaged in informal rulemaking must "publish a notice of proposed rulemaking in the Federal Register"; "provide 'inter-

ested persons an opportunity to participate through submission of written data, views, or arguments'"; and "'after consideration of the relevant matter presented, incorporate in the rules adopted a concise general statement of their basis and purpose.'" *Id.* at 75a (brackets, citation, and ellipses omitted); see 5 U.S.C. 553(c). The court observed that petitioners "d[id] not dispute" that the agency had "satisfied the first two requirements." Pet. App. 75a.

As to the third requirement, the Tax Court observed that petitioners alleged that the agency did not adequately address comments on "two aspects of the 'judicial extinguishment' rule": "the requirement that the donee receive a proportional share of the proceeds" and the "fact that the 'proportionate share' formula does not account for the possibility of donor improvements" to the area subject to the easement. Pet. App. 78a. The court held that the agency "clearly considered the comments it received on the first point because it substantially revised the text" of the proposed proceeds regulation "in response to those comments." *Ibid.*; compare 51 Fed. Reg. at 1505, with 48 Fed. Reg. at 22,946. On the second point, the court observed that "[o]nly one of the 90 commenters [NYLC] mentioned donor improvements, and it devoted exactly one paragraph to this subject." Pet. App. 78a. The court further observed that "NYLC offered no suggestion about how the subject of donor improvements might be handled" other than to delete the entire provision. *Ibid.* Accordingly, the court held that its "review of the administrative record leaves us with no doubt that [the agency] considered the relevant matter presented to it." *Id.* at 79a.

ii. Judge Toro, joined in relevant part by three other judges (including Judge Gustafson), concurred in the

result. Pet. App. 89a-130a. As relevant here, he concluded that petitioners' easement violated the plain terms of the statute itself, thus obviating the need to address the validity of the proceeds regulation. *Id.* at 89a.

Judge Toro explained that 26 U.S.C. 170(h)(2) requires the donor to "grant to a donee an 'interest in real property,'" and that "[o]ne of the rights inherent in a real property interest * * * is the property holder's right to be compensated at fair market value upon a subsequent transfer or taking." Pet. App. 94a (Toro, J., concurring in the result) (brackets and citation omitted). He observed that petitioners' easement, however, guaranteed the donee "a fixed dollar amount equal to the fair market value of the easement as of the grant date." *Id.* at 96a. Accordingly, Judge Toro concluded that "the donee never received the type of 'interest in real property' contemplated by" 26 U.S.C. 170(h)(2)(C). Pet. App. 96a (brackets and citation omitted).

Judge Toro further concluded that petitioners' easement did not comply with the perpetuity requirement in 26 U.S.C. 170(h)(5)(A) because "[t]he payment of a predetermined fixed amount would be insufficient as compensation for a right 'protected in perpetuity' if the fair market value of the property had appreciated since the date the easement was granted." Pet. App. 96a (Toro, J., concurring in the result).

iii. Judge Holmes dissented. Pet. App. 131a-170a. As relevant here, he viewed the proceeds regulation as procedurally invalid because the preamble to the final rule did not discuss that particular provision or mention "the proportionate-share or improvements problems" that commenters had raised. *Id.* at 142a.

b. Having found the proceeds regulation to be valid, the Tax Court held, based on the findings from the bench trial, that petitioners' easement did not comply with that regulation. Pet. App. 171a-207a. As the full court summarized, "the donee's share of the proceeds" under the deed was "(1) determined according to a fixed historical value" and "(2) reduced by the value of any improvements made by the donor." *Id.* at 63a. The court observed, however, that the regulation required the donee to be entitled to "a proportionate share of the proceeds" and did not make any allowance for reductions based on subsequent improvements. *Ibid.* The court thus concluded that the easement "did not satisfy the 'protected in perpetuity' requirement of [26 U.S.C.] 170(h)(5)(A) and [26 C.F.R.] 1.170A-14(g)(6)." *Ibid.*

3. The court of appeals affirmed. Pet. App. 2a-59a.

a. As relevant here, a majority of the court of appeals panel rejected petitioners' contention that "the agency deviated from the APA's notice and comment requirements" by "fail[ing] to respond to certain comments about the regulation, which, according to the petitioners, raised significant issues." Pet. App. 14a; see *id.* at 20a-29a. As an initial matter, the court declined to consider whether petitioners' deed violated the statute itself, holding that the government had forfeited that argument by not raising it in the Tax Court, where Judge Toro had addressed it *sua sponte*. *Id.* at 13a-14a.

Turning to the validity of the proceeds regulation, the court of appeals explained that the "APA's requirement of soliciting comments" carries an implicit "duty to respond to 'significant points raised by the public.'" Pet. App. 20a (citation omitted). But the court also recognized that "[r]equiring an agency to respond to every comment regardless of its content would transform

rulemaking" into "an administrative sport." *Id.* at 20a-21a. The court observed that it had therefore "repeatedly concluded that an agency must 'give reasoned responses to all *significant* comments in a rulemaking proceeding,' not that an agency must respond to *all* comments." *Id.* at 21a (citation omitted).

The court of appeals explained that "assessing significance is context dependent and requires reading the comment in light of both the rulemaking of which it was part and the statutory ends that the proposed rule is meant to serve." Pet. App. 21a. Citing this Court's decision in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), the court of appeals explained that a comment must be "significant enough to step over a threshold requirement of materiality" for an agency to be compelled to respond to it. Pet. App. 22a (citation omitted). And citing the D.C. Circuit's decision in *Carlson* v. *Postal Regulatory Commission*, 938 F.3d 337 (2019), the court stated that "an agency must respond to comments 'that can be thought to challenge a fundamental premise' underlying the proposed agency decision." Pet. App. 21a (citation omitted).

The court of appeals held that none of the comments on which petitioners relied qualified as significant under those standards. Pet. App. 23a-29a. The court explained that the comments must be evaluated "in the context of the problem that [the agency] sought to solve—providing a method for [26 U.S.C.] 170(h)(5)(A)'s perpetuity requirement to be met upon judicial extinguishment." *Id.* at 23a. The court observed that NYLC's comments raised three issues: "the rule would deter donors"; "providing the donee with the value of post-donation improvements made by the donor was in-

equitable"; and the rule may conflict with unidentified state laws. *Ibid.* But the court found that those comments "did not engage with [26 U.S.C.] 170(h)(5)(A)'s perpetuity requirement." *Ibid.* "Instead," the court reasoned, because "it left [the agency] to guess at the connection, if any, between [NYLC's] problems and the proceeds regulation's basis and purpose," the agency "was not required to respond to the comment." *Ibid.*

The court of appeals also found that the comments from the Landmarks Preservation Council of Illinois asserting that the rule "would put a donor at risk of having to pay the donee additional funds" was both "'purely speculative'" and "wrong," given the proportionate formula called for in the proceeds regulation, and the agency was thus "not obliged to respond [to] it." Pet. App. 23a-24a (citation omitted). The court similarly found that other comments were not significant enough to warrant a response because none of them addressed the perpetuity requirement in 26 U.S.C. 170(h)(5)(A). See Pet. App. 24a-25a.

The court of appeals acknowledged that its conclusion differed from that reached by the Eleventh Circuit in *Hewitt* v. *Commissioner*, 21 F.4th 1336 (2021), but found "that decision's reasoning to be unpersuasive." Pet. App. 27a. The court observed that *Hewitt*'s holding that the agency erred in not responding to NYLC's comment concerning improvements to the encumbered property relied heavily on the Eleventh Circuit's view that "one of [26 U.S.C.] 170's aims is 'to allow deductions for the donation of conservation easements to encourage donation for such easements.'" *Ibid.* (quoting *Hewitt*, 21 F.4th at 1352). The court explained that "[a]lthough encouraging the donation of conservation easements is undeniably a goal of the statute, highlight-

ing this point overlooks a crucial condition that Congress demanded be met by donors seeking deductions: an easement's conservation purpose must be 'protected in perpetuity.'" *Ibid.* (citation omitted).

b. Judge Guy concurred in the judgment. Pet. App. 39a-59a. As relevant here, he would have affirmed the disallowance of petitioners' deduction on the ground, set forth by Judge Toro below, that the easement did not comply with the perpetuity requirement in 26 U.S.C. 170(h)(2)(C) itself. Pet. App. 53a-59a. Judge Guy would not have found the government to have forfeited that ground for affirmance, explaining that it was not a "separate *claim*[]," but instead merely a "separate *argument*[] in support of a single claim." *Id.* at 58a-59a (quoting *Yee* v. *City of Escondido*, 503 U.S. 519, 534-535 (1992)).

ARGUMENT

Petitioners renew their contention (*e.g.*, Pet. 6-7) that the proceeds regulation is procedurally invalid on the ground that the agency purportedly failed to consider and respond to certain comments during the rulemaking process. The court of appeals correctly rejected that contention, and any conflict with the Eleventh Circuit's decision in *Hewitt* v. *Commissioner*, 21 F.4th 1336 (2021), does not merit this Court's review. Moreover, this case would be a poor vehicle in which to address the question presented because the statute itself compels disallowance of petitioners' deduction, rendering the validity of the challenged regulation academic. Further review is unwarranted.

1. The court of appeals correctly held that the proceeds regulation is not procedurally invalid under the APA. This Court has construed the APA to require an agency engaged in informal rulemaking to "consider

and respond to significant comments received during the period for public comment." *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015); cf. 5 U.S.C. 553(c) ("After consideration of the relevant matter presented, the agency shall" provide "a concise general statement of [a rule's] basis and purpose."). The Court has emphasized, however, that "[c]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1978) (citation omitted). A comment that "merely state[s] that a particular mistake was made" is generally insufficient to cross that threshold. *Ibid.* (citation omitted). On the other hand, "an agency must respond to comments 'that can be thought to challenge a fundamental premise' underlying the proposed agency decision." *Carlson* v. *Postal Regulatory Commission*, 938 F.3d 337, 344 (D.C. Cir. 2019) (citation omitted).

The court of appeals cited (Pet. App. 21a-22a) and correctly applied those principles to the facts of this case. The proceeds regulation specifically implements the statutory protected-in-perpetuity requirement against the contingency that a conservation easement might later be extinguished by judicial order; indeed, the regulation is housed in a subsection entitled "Enforceable in perpetuity." 26 C.F.R. 1.170A-14(g) (emphasis omitted); see 51 Fed. Reg. at 1503. As the court observed (Pet. App. 23a-25a), however, none of the comments that petitioners cite addressed the statutory perpetuity requirement.

NYLC's comments, for instance, claimed only that the proceeds regulation might deter some donors and

that the allocation of proceeds could be inequitable or potentially conflict with (unidentified) state laws. Pet. App. 23a; see C.A. App. 670-672. Other comments either misapprehended how the proportionate allocation of proceeds worked, Pet. App. 23a-24a; see C.A. App. 778, or claimed with little explanation that the proceeds regulation was unnecessary, Pet. App. 25a; see C.A. App. 685. Still others urged the agency to categorically deem the likelihood of any potential extinguishment to be "so remote as to be negligible," Pet. App. 24a (citation omitted), without any explanation of how that would be rational or consistent with the statutory protected-in-perpetuity requirement. *Id.* at 24a-25a; see C.A. App. 685, 795. And as the court of appeals found, "no comment that addressed the regulation raised a concern about it[s] failing to satisfy [that statutory] perpetuity requirement." Pet. App. 25a.

Because the proceeds regulation was specifically aimed at implementing the protected-in-perpetuity requirement in the case of extinguishment, the agency was not required to expressly respond to comments that failed to address that statutory requirement. Comments that wholly ignore the statutory basis for a regulation generally cannot "be thought to challenge a fundamental premise" of the regulation, *Carlson*, 938 F.3d at 344 (citation omitted), and thus are not "significant" enough to warrant an express response, *Mortgage Bankers*, 575 U.S. at 96. Here, the agency's acknowledgment that it promulgated the final rule "[a]fter consideration of *all* comments regarding the proposed amendments," 51 Fed. Reg. at 1496 (emphasis added), was sufficient to satisfy the APA's requirement that an agency set forth a "concise general statement of [a rule's] basis and purpose"—which the petition for a writ

of certiorari does not dispute the agency did—"[a]fter consideration of the relevant matter presented" during the comment period, 5 U.S.C. 553(c).

Petitioners cite (Pet. 26-27) *Hewitt*'s conclusion that NYLC's comments challenged a fundamental premise of the proceeds regulation on the ground that they asserted that the regulation would be contrary to Congress's policy choice, expressed in committee reports accompanying the statute, to encourage conservation contributions. See *Hewitt*, 21 F.4th at 1352. That conclusion is incorrect. For one thing, policy choices expressed in committee reports cannot displace clear statutory commands, such as the requirement here that the conservation purpose be "protected in perpetuity," 26 U.S.C. 170(h)(5)(A). See Pet. App. 28a; see also *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."). For another, the very Senate report invoked by the Eleventh Circuit in *Hewitt* (21 F.4th at 1352) and by petitioners (Pet. 2, 10) makes clear that Congress wanted to "further significant conservation goals *without presenting significant potential for abuse.*" Senate Report 9 (emphasis added). Congress struck that balance by requiring that the conservation purpose "be protected in perpetuity" and that "the perpetual restrictions must be enforceable by the donee." *Id.* at 14. Thus, a bare desire to "further significant conservation goals," *id.* at 9, without limitation, was *not* one of the "major policy decisions made by the Congress and expressed in these committee reports" that the agency said its regulations "reflect[ed]," 48 Fed. Reg. at 22,940.

Finally, and at all events, "no statute yet known 'pursues its stated purpose at all costs,'" much less a pur-

pose stated in a committee report. *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (brackets and citation omitted). As the court of appeals observed (Pet. App. 28a-29a), the statutory text itself indicates that "what Congress sought to encourage is not simply the donation of conservation easements," but instead "the donations of only those easements that met a highly circumscribed set of prerequisites," including the express perpetuity requirement in 26 U.S.C. 170(h)(5)(A). Congress surely understood that the protected-in-perpetuity requirement (like all requirements) inevitably will, at the margins, deter some donors from donating conservation easements (and claiming the concomitant tax deduction). Contrary to petitioners' arguments below, such "deterrence" does not undermine the statute's purposes; it furthers them.

Petitioners' suggestion (Pet. 7) that the court of appeals relied on "post-hoc justifications for [the agency's] failure to respond to comments" lacks merit. The court cited the statutory text, the proceeds regulation, the notice of proposed rulemaking, and the congressional reports cited in that notice in order to examine "the basis and purpose of the rule." Pet. App. 16a; see *id.* at 16a-19a. Petitioners cite no authority for the proposition that a reviewing court may not rely on such contemporaneous sources in determining whether any particular comment submitted during the rulemaking process was sufficiently "significant" to require an express response. Moreover, this Court has made clear that "a reviewing court must 'uphold' even 'a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *Garland* v. *Ming Dai*, 141 S. Ct. 1669, 1679 (2021) (citation omitted). The agency's reasons for not responding in detail to the comments from NYLC

and others are reasonably discernable from: (1) the statute's requirement that the conservation purpose be "protected in perpetuity," 26 U.S.C. 170(h)(5)(A); (2) the proceeds regulation's express focus on implementing that perpetuity requirement, including its location in a subsection entitled "Enforceable in perpetuity," 26 C.F.R. 1.170A-14(g); and (3) the lack of any mention (much less analysis) of that perpetuity requirement in the comments submitted by NYLC and others. Those circumstances, combined with the agency's express statement that it was promulgating the final regulation only after "consideration of all comments regarding the proposed" regulation, 51 Fed. Reg. at 1496, are sufficient to demonstrate that the agency satisfied its duty under the APA to take "consideration of the relevant matter presented," 5 U.S.C. 553(c).

2. The decision below does not implicate any conflict with a decision of another court of appeals that warrants this Court's review.

a. Petitioners principally rely (Pet. 1, 6-7, 25-29) on the Eleventh Circuit's decision in *Hewitt*, *supra*. But any conflict between the decision below and *Hewitt* does not warrant further review for several reasons. First, both *Hewitt* and the court of appeals in this case agreed on the governing principles of law: namely, that agencies must explicitly respond to "significant" comments offered during rulemaking, and that "significant" comments are those that cross a threshold materiality requirement and challenge a fundamental premise underlying the proposed regulation. Compare *Hewitt*, 21 F.4th at 1351-1352, with Pet. App. 21a-22a. The two courts differed only in their application of those principles to the particular regulation at issue in this case.

Second, *Hewitt* addressed only the narrow issue of subtracting from the donee's proceeds any amount attributable to improvements made on the property by the donor. See 21 F.4th at 1350. The deed in *Hewitt* did not contain the two additional relevant features of the deed in this case: computing the donee's proceeds as a fixed value (rather than a proportionate one), and doing so based on the fair market value of the easement at the time of the grant (rather than at the time of extinguishment). *Hewitt* accordingly did not address the proceeds regulation's treatment of those separate and (as explained below, see pp. 21-22, *infra*) far more significant features. Moreover, even with respect to the narrow issue it did address, *Hewitt* did not purport to vacate or otherwise invalidate the proceeds regulation as such; instead, it held only that "the Commissioner's *interpretation* of § 1.170A-14(g)(6)(ii), to disallow the subtraction of the value of post-donation improvements to the easement property in the extinguishment proceeds allocated to the donee, is arbitrary and capricious and therefore invalid." 21 F.4th at 1353 (emphasis added).

Third, petitioners do not identify any other court of appeals that has addressed whether the agency adequately responded to comments when promulgating the proceeds regulation nearly 40 years ago, and the government is not aware of any. Indeed, it appears that this case was the first in which the Tax Court itself opined on the issue. The issue would therefore benefit from further percolation in the regional courts of appeals, counseling against this Court's review in this case at this time.

b. Petitioners further contend (Pet. 29-33) that the court of appeals' decision conflicts with the D.C. Circuit's decision in *Carlson*, *supra*, and the Second Cir-

cuit's decision in *United States* v. *Nova Scotia Food Products Corp.*, 568 F.2d 240 (1977), regarding what constitutes a "significant" comment requiring an agency response. That contention is incorrect. The court below expressly quoted and relied on *Carlson*'s "fundamental premise" standard, Pet. App. 21a-22a, and the court's factbound application of that standard to the proceeds regulation in this case does not create any conflict with the D.C. Circuit's application of that same standard to the postal order at issue in *Carlson*.

As for *Nova Scotia*, the Second Circuit expressly relied on multiple D.C. Circuit precedents in holding that the agency in that case improperly failed to respond to certain comments, see 568 F.2d at 252-253, undermining petitioners' suggestion of a circuit conflict on the legal standard applied in that case as well. Indeed, the court of appeals here expressly distinguished the factual circumstances in *Nova Scotia* from the ones in this case. There, the agency did not respond to comments stating that the high temperatures required by a proposed fish-preparation regulation would "'completely destroy'" certain smoked whitefish and "that nitrite and salt as additives could safely lower the high temperature otherwise required." *Id.* at 245. As the court below emphasized, "making a fish product *inedible*" would undermine the regulation's stated "goal of rendering fish safe for human *consumption*." Pet. App. 22a (emphases added). Here, by contrast, the comments from NYLC and others on which petitioners rely did not even address the proceeds regulation's stated goal of implementing the statute's protected-in-perpetuity requirement. See *id.* at 22a-23a. And unlike the comments in *Nova Scotia*, none of the comments in this case pro-

posed any alternatives to the proceeds regulation that would have satisfied that perpetuity requirement.

3. In any event, this case would be an unsuitable vehicle in which to review the question presented because petitioners' claimed deduction would be disallowed under the statute itself.

As Judge Guy explained, petitioners' deed "violates the plain language" of 26 U.S.C. 170(h)(2)(C), which requires a "qualified real property interest" to be "granted in perpetuity," because the deed "calls for the donee to receive a *fixed amount* in the event of a judicial extinguishment," Pet. App. 53a (Guy, J., concurring in the judgment). Judge Guy observed that under "the blackletter law of property" at the time Section 170(h)(2)(C) was enacted, "'upon the extinguishment of an easement by eminent domain, the owner of the easement is entitled to compensation *measured by the value of the easement*.'" *Id.* at 55a (brackets and citation omitted). And, he noted, Tennessee law "follows the same rules." *Ibid.*; see *id.* at 55a n.6.

Petitioners' deed, however, "limits the donee's proceeds to a fixed amount determined *at the time of the grant*." Pet. App. 56a (Guy, J., concurring in the judgment). The donee, therefore, is not properly viewed as holding "the easement right at the time of judicial extinguishment," for a party who actually held that right would be entitled to its value at the time of extinguishment. *Ibid.* And because the donee would not hold the easement interest at the time of a future extinguishment, petitioners necessarily did not grant that interest "in perpetuity" within the meaning of 26 U.S.C. 170(h)(2)(C).

As Judge Toro recognized, petitioners' deed also violates 26 U.S.C. 170(h)(5)(A), which provides that a con-

tribution is "exclusively for conservation purposes" only if the conservation purpose is "protected in perpetuity." Pet. App. 96a-97a (Toro, J., concurring in the result). At a minimum, perpetuity would require the donee to direct all of the proceeds of any extinguished easement toward another qualifying conservation purpose. 26 U.S.C. 170(h)(5)(A); see 26 U.S.C. 170(h)(4)(A) (listing conservation purposes). But because petitioners' deed calls for the "payment of a predetermined fixed amount" upon extinguishment of the easement, the donee could potentially receive "less than the fair market value of its 'interest in real property' as of the time of the conversion of its interest into cash." Pet. App. 96a-97a (Toro, J., concurring in the result) (brackets omitted). In that circumstance, even if the donee redirected all of its proceeds toward another conservation purpose, the original contribution would not have been "*exclusively* for conservation purposes" because at least a portion of the value would revert to petitioners (who would be free to use those funds for other purposes)—or, put differently, at least a portion of the original conservation purposes would not have been "protected in perpetuity." 26 U.S.C. 170(h)(5)(A) (emphasis added).

Petitioners' deduction for the conservation easement contribution thus would be disallowed under the plain statutory text, irrespective of the proceeds regulation. See Pet. App. 53a-57a (Guy, J., concurring in the judgment); *id.* at 89a-97a (Toro, J., concurring in the result). Accordingly, petitioners would not be entitled to relief even if the question presented were resolved in their favor, making this case a poor vehicle in which to address that question.

Petitioners incorrectly assert (Pet. 35) that the government waived any statutory argument. As this Court

has long explained, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992); see *Citizens United* v. *FEC*, 558 U.S. 310, 330-331 (2010); *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995). This case has involved only a single claim—petitioners' challenge to the disallowance of the deduction on the 2008 return—and the statutory text provides additional arguments in support of that disallowance. Although the government did not raise those particular statutory arguments in the Tax Court, four judges ruled in the government's favor on that basis. See Pet. App. 89a-97a (Toro, J., concurring in the result). The government then raised those statutory arguments in the court of appeals (indeed, they were the government's principal arguments), Gov't C.A. Br. 31-39, and although the panel majority "decline[d] to address" them, Pet. App. 14a, Judge Guy not only addressed the arguments, but adopted them, see *id.* at 53a-57a (Guy, J., concurring in the judgment).

The government prevailed both in the Tax Court and in the court of appeals, and "[t]he prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970); see *Upper Skagit Indian Tribe* v. *Lundgren*, 138 S. Ct. 1649, 1654 (2018); *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982). Furthermore, "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and

apply the proper construction of governing law." *Kamen* v. *Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991). Either of those principles would entitle the government to defend the judgment below on statutory grounds, making this case a poor vehicle in which to address the procedural validity of the challenged regulation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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