No. 23-3772

In the

United States Court of Appeals

for the

Eighth Circuit

3M COMPANY & SUBSIDIARIES,
Appellant,

– v. –

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

On Appeal from the United States Tax Court
Case No. 5816-13 – 160 T.C. No. 3

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Local Appellate Rule 26.1A, *amicus* discloses that:

The National Association of Manufacturers (NAM) is a nonprofit, tax-exempt organization located in the District of Columbia. The NAM has no parent corporation, and no publicly held company has 10% or greater ownership in it.

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INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*[1]

This is a case of a federal agency gone rogue. The Internal Revenue Service (IRS) is authorized under 26 U.S.C. § 482 to allocate income among commonly controlled entities to "reflect" their true income. More than fifty years ago, the Supreme Court announced an important limitation on that authority: The IRS cannot allocate "income" to a taxpayer that the taxpayer did not receive, and could not receive, because receiving such income would be prohibited by law. *Commissioner v. First Security Bank of Utah, N.A.*, 405 U.S. 394, 401, 406 (1972); *see also Procter & Gamble Co. v. Commissioner*, 961 F.2d 1255, 1259 (6th Cir. 1992) (*First Security* applies to foreign legal prohibitions).

Undeterred, the Department of the Treasury promulgated a rule in 1994 that disregards the holding of *First Security* and gives the IRS the authority to ignore foreign legal restrictions on income unless certain additional criteria are met, and thus allocate income to U.S. taxpayers even when the payments that would have given rise to that income are illegal

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[1] All parties have consented to the filing of this brief. The brief was not authored by any party's counsel, in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of the brief; and no person, other than the *amicus curiae*, its members, or its counsel, contributed money intended to fund the preparation or submission of the brief.

under foreign law. That is not only unlawful, but undermines important values of finality, notice, and the separation of powers.

Not satisfied with disregarding binding Supreme Court precedent, Treasury also flouted its Administrative Procedure Act (APA) obligations when it promulgated its blocked-income rule. Based on a now-discredited belief that Treasury is somehow immune from standard APA responsibilities, neither the proposed rule nor final rule articulated any rationale for the new blocked income regulation. Treasury also failed to respond to—or even mention—public comments challenging its authority to issue the rule on various grounds, including that the rule contravened *First Security*.

As 3M's brief explains, the blocked-income rule is therefore procedurally invalid for want of compliance with the APA's requirements, and the Tax Court's opinion inventing hypothetical reasoning the agency *might* have relied on—and then upholding the IRS's income allocation on the basis of that hypothetical reasoning—should be set aside. As set out below, such blatant disregard of the APA's procedural requirements unsettles critical legal protections and the structural values underlying the APA.

* * *

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large

manufacturers in every industrial sector and in all 50 states. Manufacturing employs 13 million men and women, contributes $2.85 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

As manufacturers, the NAM's members rely on settled and predictable legal rules to structure their transactions and order their affairs, and naturally have an interest in the IRS's application of the blocked-income rule. More broadly, the NAM's members span different industries and are thus subject to the jurisdiction of numerous and varied federal agencies. The NAM therefore submits this brief to emphasize and elaborate on several specific points relevant to its members' interactions with different agencies, including the harms that result when agencies are permitted to contradict existing precedents, whether through promulgated regulations or specific agency adjudications, and the important values that are eroded when agencies ignore their APA obligations.

ARGUMENT

I. Allowing agencies to contradict controlling precedent erodes the rule of law and upends the public's settled expectations.

As 3M's brief describes, the Internal Revenue Service (IRS) allocated $23.65 million in income from intellectual property royalties to 3M Company, despite knowing that such royalties were not paid, and legally *could* not be paid, to 3M under applicable foreign law. The IRS's decision to do so disregards controlling Supreme Court precedent that has been on the books for over fifty years: *Commissioner v. First Security Bank of Utah, N.A.*, 405 U.S. 394, 401-406 (1972). There, the Supreme Court held the IRS cannot allocate income to a taxpayer when the payments that would have given rise to that income are prohibited by law. Permitting an agency to ignore settled Supreme Court precedent in this manner undercuts the stability and predictability in the law that *stare decisis* is meant to provide, and raises serious separation-of-powers concerns.

A. Agencies that countermand controlling precedent undermine principles of *stare decisis*.

The Supreme Court has long held that "once [it] ha[s] determined a statute's meaning, [the Court will] adhere to [its] ruling under the doctrine of *stare decisis*, and … assess an agency's later interpretation of the statute against that settled law." *Neal v. United States*, 516 U.S. 284, 295 (1996)

(quoting *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536–537 (1992)). The narrow exception to this principle announced in *Brand X*—misapplied by the Tax Court below—is applicable only when the prior precedent recognized a statutory ambiguity that Congress intended the agency to fill. *See Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 985 (2005).

To the extent that the *Brand X* exception remains good law,[2] it does not apply "where 'the exercise of statutory interpretation makes clear the court's view that the plain language of the statute was controlling and that there existed no room for contrary agency interpretation.'" *Texas v. Alabama-Coushatta Tribe of Texas*, 918 F.3d 440, 447-448 (5th Cir. 2019) (quoting *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 398 (5th Circ. 2014)). This limitation on *Brand X* flows directly from the doctrine of *stare decisis*. A court interpreting a statute is no more free to disregard prior binding precedent interpreting statutory language than it would be to disregard binding precedent interpreting the U.S. Constitution. *Neal*, 516 U.S. at 295.

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[2] The Supreme Court is currently considering whether to overrule or narrow *Chevron*. *Loper-Bright Enterprises v. Raimondo*, cert. granted, No. 22-451; *Relentless, Inc. v. Department of Commerce*, cert. granted, No. 22-1219 (both argued Jan. 17, 2024). Given that *Brand X* itself announced that its outcome "follow[ed] from *Chevron*" (*Brand X*, 545 U.S. at 982), the *Brand X* exception is also on unstable footing as a whole.

In fact, the Supreme Court teaches that "*stare decisis* carries enhanced force when a [prior] decision … interprets a statute," because "unlike in a constitutional case," critics of the Court's ruling "can take their objections across the street, and Congress can correct any mistake it sees." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). When a Supreme Court decision interprets a statute, that decision, "in whatever way reasoned, effectively become[s] part of the statutory scheme, subject (just like the rest [of the statutory scheme]) to congressional change." *Id*.; *see also Neal*, 516 U.S. at 295 ("Congress is free to change [the Supreme Court's] interpretation of its legislation."); *id.* at 296 ("Were we to alter our statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair.").

Adherence to precedent—and *especially* to precedents interpreting statutory language—"is 'a foundation stone of the rule of law.'" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019). "It promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* (quotation marks and citations omitted). "It also reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." *Kimble*, 576 U.S. at 455.

It is for those reasons that the power to override statutory interpretation through amendment of the statutory text must remain with Congress, rather than unelected bureaucrats within the Executive Branch. Indeed, "[i]f Congress could hand off all its legislative powers to unelected agency officials, it would dash the whole scheme of our Constitution and enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 125 (2022) (Gorsuch, J., concurring). Yet, that is exactly what the Tax Court has allowed the IRS to do in this case, and why this Court must reverse.

Regulated businesses and industries depend on predictable rules, and *stare decisis* promotes predictability and stability in the law. This is especially the case when those rules serve as the backdrop for multi-year, investment-backed choices involving hundreds of millions of dollars, such as opening a new factory or acquiring another company. Due to such settled expectations, the Supreme Court is especially unwilling to overturn precedents that parties have relied on to organize their affairs and "structure[] their business transactions." *Kimble*, 576 U.S. at 457-458. When businesses have structured transactions in reliance on Supreme Court precedents,

overturning those precedents would "upset expectations" and "unsettle stable law." *Id.* Allowing a federal agency to jettison Supreme Court precedents would do the same, undermining the "foundation stone of the rule of law" that *stare decisis* represents. *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 798 (2014).

Agencies reversing existing precedent through regulation also creates substantial confusion and uncertainty in the law, as regulated parties struggle to discern what the law is and conform their conduct to it. The case at hand presents a clear example of this conundrum. The Supreme Court decided *First Security* in 1972. Its holding—that the IRS cannot allocate income to a taxpayer when the payments that would have given rise to that income are prohibited by law—was consistently applied by the courts of appeals thereafter: in *Texaco, Inc. v. Commissioner*, 98 F.3d 825, 828-830 (5th Cir. 1996) (finding *First Security* bars the Commissioner from allocating income to a taxpayer based on sales of Saudi crude oil at higher price, as sales were subject to a mandatory price restriction) and *Procter & Gamble Co. v. Commissioner*, 961 F.2d 1255, 1258-1260 (6th Cir. 1992) (rejecting IRS allocations of income to taxpayers based on payments barred by foreign law), as well as by the Tax Court itself in *Tower Loan of Mississippi, Inc. v. Comm'r*, 71 T.C.M. (CCH) 2581, 2583 (T.C. 1996) ("We understand the Supreme Court's opinion [in *First Security*] to forbid allocation of income to a

taxpayer when restrictions imposed by law prohibit the taxpayer from receiving such income."). *See also Salyersville National Bank v. United States*, 613 F.2d 650, 652-653 (6th Cir. 1980) (applying *First Security*).

Then, in 1994, Treasury finalized its blocked-income rule, 26 C.F.R. § 1.482-1(h)(2), apparently as a direct response to its loss in *Procter & Gamble*. Under the rule, the IRS will disregard a foreign legal restriction, and allocate the income to the U.S. affiliate, unless additional, non-statutory criteria are met. In essence, the IRS's blocked-income rule overturns *First Security*—in Treasury's view, *some* income may still be allocated to a U.S. affiliate even if foreign law prohibits the affiliate from receiving that income. But Treasury announced this rule without so much as acknowledging the settled Supreme Court and circuit precedent against which this change was promulgated. *See* 3M Addendum (Add.) 316 (Toro, J., dissenting) ("Treasury should have explained why it disagreed with the considered views expressed in the caselaw.").[3]

[3] Indeed, Treasury entirely disregarded comments filed at the time that "pointed out that the proposed rule contradicted the Supreme Court's decision in *First Security* and the decisions of this Court and the U.S. Court of Appeals for the Sixth Circuit in *Procter & Gamble*." Add. 322 (Toro, J., dissenting). For the reasons discussed *infra* and in Appellant's brief, this failure also likely renders Treasury's rulemaking arbitrary and capricious under the APA.

Treasury thus effectively purported to overrule *First Security* without expressly claiming or acknowledging that it did so, further muddying the waters and leaving companies unsure of which standard applies—the Supreme Court's rule in *First Security*, or the Treasury's regulations. Thus, businesses are forced to choose between two conflicting and yet (apparently) operative laws, unsure of which to follow.

This concern is particularly acute in the tax context, where the Anti-Injunction Act prohibits pre-enforcement challenges to an unlawful agency rule. *See* I.R.C. § 7421(a). Thus, businesses and individuals must wait for the agency to assess a deficiency based on the rule before it can be challenged. Add. 344-345 (Toro, J., dissenting). If the Treasury adopts rules contrary to Supreme Court precedents, those unlawful rules could remain on the books for decades before a taxpayer is able to challenge them, further eroding the stability and predictability in the law that *stare decisis* is intended to foster.

B. Allowing agencies to overturn precedent via regulation violates separation of powers principles.

The judiciary's role is to interpret statutes. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department say what the law is."); *see INS v. Chadha*, 462 U.S. 919, 987 n.20 (1983) (White, J., dissenting) (the separation-of-power

concerns animating Article I "are that legislative power be exercised by Congress, executive power by the President, and judicial power by the Courts."). Allowing agencies to overrule Supreme Court interpretations of statutes through regulations would condense the judicial function (interpreting statutes) with the executive function (to carry out Congress's enactments). *See Ass'n of Flight Attendants-CWA v. Chao*, 493 F.3d 155, 158 (D.C. Cir. 2007) (the specific function of federal agencies is to "implement[] the regulatory programs assigned by Congress.").

When an agency regulation purports to overrule the Supreme Court's definitive interpretation of a statute passed by Congress, it effectively usurps either the judicial power (to interpret the law) or the legislative power (to revise statutes in light of Supreme Court interpretations). *See Neal*, 516 U.S. at 295 (Congress may elect to change the Supreme Court's interpretation of its legislation by amending the statute); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 112 (2015) (Thomas, J., concurring in the judgment) (arguing that precedents that require "judges to defer to agency interpretations of regulations … effects a transfer of the judicial power to an executive agency."); *see also* pages 6-8, *supra*.

Thus, assigning the power to interpret statutes—more specifically, to overturn Supreme Court precedent interpreting statutes—to agencies undermines the carefully constructed constitutional order. That is, "[b]ecause

[an] agency is … not properly constituted to exercise the judicial power under the Constitution, the transfer of interpretive judgment raises serious separation-of-powers concerns." *Mortg. Bankers Ass'n*, 575 U.S. at 124 (Thomas, J., concurring).

Here, Treasury's blocked-income regulation *does* contradict established Supreme Court precedent and does not fall within the *Brand X* exception (to the extent *Brand X* remains good law). The Tax Court plurality's view that the Court's decision in *First Security* rested on Treasury's regulation (which it has leeway to revise), rather than on the unambiguous meaning of income under § 482, is belied by the text of *First Security* itself. Although it may not have used the magic word "unambiguous," the *First Security* Court grounded its decision in the Commissioner's power under § 482 and the inherent concept of income. The Court wrote: "In cases dealing with the concept of income, it has been assumed that the person to whom the income was attributed could have received it," and "we know of no decision of this Court wherein a person has been found to have taxable income that he did not receive and that he was prohibited from receiving." 405 U.S. at 403; *see also id.* at 399-400 (noting that the allocation at issue was "pursuant to [the Commissioner's] § 482 power to allocate income among controlled corporations"). The Court referenced the Commissioner's regulations only as support for its interpretation, noting the regulation was "consistent with

the control concept heretofore approved by this Court." *Id.* at 404. The Court further reiterated that holding as a statutory one in *U.S. v. Basye*, 410 U.S. 441, 453 n.13 (1973) ("[T]he Commissioner could not properly allocate income to one of a controlled group of corporations under 26 U.S.C. § 482 where that corporation could not have received that income as a matter of law.").

The cases that have considered *First Security* since it was decided have also viewed it as one of definitive statutory interpretation, not one that held § 482 ambiguous and granted the Treasury leeway to later revise its interpreting regulations. *See Procter & Gamble Co.*, 961 F.2d at 1259 ("The Supreme Court held in *First Security* that the Commissioner is authorized to allocate income *under section 482* only where a controlling interest has complete power to shift income among its subsidiaries and has exercised that power." (emphasis added)); *Texaco, Inc.*, 98 F.3d at 828 ("In *First Security*, the Court held that § 482 did not authorize the Commissioner to allocate income to a party prohibited by law from receiving it."); *Tower Loan*, 71 T.C.M. (CCH) at 2583 ("We understand the Supreme Court's opinion to forbid allocation of income to a taxpayer when restrictions imposed by law prohibit the taxpayer from receiving such income.").

* * *

Treasury's blocked-income regulation and its application to 3M directly conflict with the Supreme Court's interpretation of § 482 in *First Security*. That precedent should resolve this case, as 3M ably explains. More broadly, however, Treasury's attempt to sidestep this precedent through regulation should not be countenanced. If agencies routinely acted as Treasury has here, their regulations would undermine the stability and predictability of the law on which parties rely to structure their affairs, to the ultimate detriment of the American economy and workforce. Such a practice would also erode fundamental separation of powers principles, as agencies are not generally given authority, under our constitutional system of checks and balances, either to overturn Supreme Court precedent or to rewrite laws duly enacted by Congress.

II. APA non-compliance undermines important structural values.

The APA sets forth certain basic procedural requirements that agencies must follow for their actions to be valid. First, an agency must "articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'" *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Encino Motorcars v. Navarro*, 579 U.S. 211, 221 (2016) ("One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions."). And, when the

agency engages in notice and comment rulemaking, it must "notify the public of the proposal, invite them to comment on its shortcomings, consider and respond to their arguments, and explain its final decision in a statement of the rule's basis and purpose." *Mortg. Bankers Ass'n*, 575 U.S. at 109 (Scalia, J., concurring in the judgment).

Treasury failed to adhere to these and other requirements, and those procedural failings should be enough to doom Treasury's blocked-income rule. As 3M explains in its brief, Treasury failed to give a reasoned explanation for the regulation at issue. When Treasury proposed the rule in 1993 as part of a larger package of regulations, it provided no reasoning regarding the rule's purpose or rationale whatsoever. *See* Proposed Rule, 58 Fed. Reg. 5310, 5310-5311 (Jan. 21, 1993). Moreover, Treasury failed to respond to significant comments it received during the notice-and-comment process that pointed out that Treasury's rule conflicts with controlling Supreme Court precedent. Indeed, specific commenters challenged Treasury's authority to adopt the rule at all, given the statutory language and *First Security*. Because these comments "cast serious doubt on the premise grounding the [agency's] explanation," the "failure to respond to them was arbitrary and capricious." *Menorah Medical Center v. Heckler*, 768 F.2d 292, 295-296 (8th Cir. 1985).

Treasury flouting its APA obligations should not be taken lightly. The APA's procedures are not an "idle and useless formality … [rather,] they serve important values of administrative law." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1909 (2020). Among other significant values, the APA:

1) Ensures fair treatment for those impacted by a rule (*Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977)), and therefore "takes some of the sting out of the inherently undemocratic and unaccountable rulemaking process" (*Regents*, 140 S. Ct. at 1929 n.13 (Thomas, J., concurring in the judgment and dissenting in part));

2) Safeguards important due process principles by preventing "unfair surprise" to regulated parties (*Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012));

3) Secures the values of government transparency and public participation through a fulsome notice and comment rulemaking process (*Iowa League of Cities v. EPA*, 711 F.3d. 844, 873 (8th Cir. 2013)), as "there must be an exchange of views, information, and criticism between interested persons and the agency" (*Home Box Office*, 567 F.2d at 35); and,

4) Promotes agency accountability to the public by enabling meaningful judicial review of agency action (*Home Box Office*, 567 F.2d at 36 ("A response [by the agency] is also mandated by *Overton Park*, which requires a reviewing court to assure itself that all relevant factors have been considered by the agency."); *see also id*. ("The record must enable [the court] to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did." (alterations incorporated, citation omitted)).

When agencies do not abide by their APA obligations, none of the important values of due process, accountability, and judicial review are served,

and serious harm results. Treasury's rule is a perfect example of the problems that result when agencies flout the APA's requirements.

One of the main benefits of notice and comment rulemaking is "afford[ing] the agency a chance to avoid errors and make a more informed decision." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019). Considering and responding to significant comments also improves the quality of agency decisionmaking; an agency can respond to comments by modifying, and improving, its proposed rule before the rule is finalized. Even if the agency adopts the rule as proposed, taking the time to respond to significant comments ensures that regulated parties are "treated with fairness and transparency after due consideration and industry participation." *Iowa League of Cities*, 711 F.3d at 871. Finally, requiring an agency to put forth its rationale for rejecting the views of certain commenters enhances the quality of eventual judicial review. *See Judulang v. Holder*, 565 U.S. 42, 53 (2011) ("[C]ourts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking."); Add. 316 (Toro, J., dissenting) ("Treasury should have explained why it disagreed with the considered views expressed in the caselaw.").

Had Treasury actually "consider[ed] and respond[ed]" to the commenters' arguments (*Mortg. Bankers Ass'n*, 575 U.S. at 109 (Scalia, J., concurring in the judgment)), it may have adopted a different, or modified, rule

that was more in line with existing precedent. Or, if Treasury adopted the rule as it was proposed, responding to the commenters would have given Treasury an opportunity to explain how its rule was consistent with existing precedent, the reasons why a departure from precedent was appropriate, or both. This, in turn, would have obviated the need for the Tax Court to inappropriately undertake the "laborious examination of the record" necessary to "formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution." *Home Box Office*, 567 F.2d at 36 (citation omitted).

Treasury's lack of reasoned explanation thus frustrates effective judicial review: As evinced by the plurality opinion, courts that face such a bare record may be tempted to simply assume the agency considered certain important issues or invent their own justifications for the agency's action. This, of course, is not permitted. *State Farm*, 463 U.S. at 43 (the Court "may not supply a reasoned basis for the agency's action that the agency itself has not given"); *see also id.* (the "reviewing court should not attempt itself to make up for … deficiencies" in the agency's explanation of its rule). Compliance with the APA's requirements in this instance would have thus furthered the important goals of facilitating judicial review and promoting the agency's accountability to the public. Instead, both goals were thwarted by Treasury's lack of reasoned and deliberative decisionmaking.

Treasury's lack of reasoned explanation and lack of engagement with commenters further undermines transparency and accountability between the agency and regulated parties—another one of the core values the APA is supposed to serve. "In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979); *see Iowa League of Cities*, 711 F.3d at 873 ("Notice and comment procedures secure the values of government transparency and public participation.").

That opportunity is a mere chimera, however, if the agency has no intention of actually considering the comments and responding to them. *See Home Box Office*, 567 F.2d at 35-36 ("[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public."); *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998) ("An agency is required to provide a meaningful opportunity for comments, which means that the agency's mind must be open to considering them.") (citing *McLouth Steel Prods. Corp. v. Thomas,* 838 F.2d 1317, 1323 (D.C. Cir. 1988)). Indeed, "[t]he fundamental purpose of the response re-

quirement is … to show that the agency has indeed considered all significant points articulated by the public." *Nat. Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 188 (D.C. Cir. 1988).

The requirement that agencies meaningfully respond to significant comments is thus not a "useless formality," but a substantive requirement that forces the agency to engage with the public. Responding to the public's comments also safeguards the principles of due process within administrative decisionmaking, as it can indicate to regulated entities and the public that an agency is not acting with an "unalterably closed mind on matters critical to the disposition of the rulemaking." *Ass'n of Nat. Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1154 (D.C. Cir. 1979). When the agency responds to significant comments with silence, as Treasury did here, it not only fails the basic procedural requirements of the APA, but undermines the very values embodied in it.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Tax Court.

Dated: February 14, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7) because it contains 4,466 words, excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in New Century Schoolbook LT Std font in a size equivalent to 14 points or larger.

Dated: February 14, 2024 /s/ *Paul W. Hughes*

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2024, I electronically filed the foregoing brief with the Clerk of this Court using the CM/ECF system, and counsel for all parties will be served by the CM/ECF system.

Dated: February 14, 2024 /s/ *Paul W. Hughes*