Nos. 23-1135, 23-1136, 23-1242, 23-1243

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TRIBUNE MEDIA COMPANY,
formerly known as TRIBUNE COMPANY & AFFILIATES,
Petitioner-Appellee-Cross-Appellant,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellant-Cross-Appellee

CHICAGO BASEBALL HOLDINGS LLC, et al.,
Petitioners-Appellees-Cross-Appellants,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellant-Cross-Appellee

On Appeal from the United States Tax Court, Nos. 20940-16 & 20941-16

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Pursuant to Federal Rule of Appellate Procedure 29(b), the Chamber of Commerce of the United States of America (the "Chamber") respectfully requests leave to file the accompanying brief as *amicus curiae* in support of Petitioners' Opening and Response Brief.

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amicus curiae is the Chamber of Commerce of the United States of America, the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and

professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

REASONS THE BRIEF OF *AMICUS CURIAE* IS DESIRABLE AND RELEVANT TO THE DISPOSITION OF THE CASE

The Chamber respectfully submits that its brief "will assist the judges by presenting ideas, arguments, . . . [and] insights" that will not be found in the parties' briefs. *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J., in chambers). The Chamber's members' broad and deep experience running businesses and structuring transactions according to established tax regulations gives the Chamber a unique vantage point from which to "highlight[] factual, historical, or legal nuance glossed over by the parties," and "provid[e] practical perspectives on the consequences of potential outcomes." *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, No. 18-3544, Slip. Op. at 3–4, 2020 U.S. App. LEXIS 31380, at *4–5 (7th Cir., Sept. 24, 2020) (Scudder, J., in chambers).

Specifically, the Chamber's proposed Brief of *Amicus Curiae* offers nuanced factual, legal, and practical perspectives on:

- How businesses have understood the constructive-liquidation test governing debt-financed distributions and how that test has promoted economic growth and economic freedom;
- How discarding on-point regulations such as the constructive-liquidation test in litigation significantly damages the rule of law on which businesses depend to structure their provision of goods and services;

- How interpreting anti-abuse rules as a freestanding mechanism to disregard tax treatment the government dislikes, as the Commissioner seeks to do in this case, also violates the rule of law and inhibits prosperity.

Accordingly, pursuant to Rule 29, the Chamber respectfully requests leave to file the accompanying *amicus curiae* brief in support of Petitioners' Opening and Response Brief. If such leave is granted, the Chamber requests that the accompanying *amicus curiae* brief be considered filed as of the date of this motion's filing, August 15, 2023.

August 15, 2023

Respectfully submitted,

/s/ Stephen M. Judge

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2023, I electronically filed the foregoing Motion with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: August 15, 2023

/s/ Stephen M. Judge
Stephen M. Judge

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BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS-APPELLEES AND AFFIRMANCE

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-1135, 23-1136, 23-1242, 23-1243

Short Caption: Tribune Media Company v. CIR

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
The Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
SouthBank Legal, LLC

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

None

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

None

Attorney's Signature: Stephen M. Judge Date: August 15, 2023

Attorney's Printed Name: Stephen M. Judge

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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None

Attorney's Signature: Tiernan B. Kane Date: August 15, 2023

Attorney's Printed Name: Tiernan B. Kane

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☐

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None

Attorney's Signature: Tyler S. Badgley Date: August 15, 2023

Attorney's Printed Name: Tyler S. Badgley

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☐

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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Attorney's Signature: Kevin R. Palmer Date: August 15, 2023

Attorney's Printed Name: Kevin R. Palmer

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☐

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

Businesses rely on predictability and certainty in tax laws to plan their affairs. The Commissioner's approach seeks to destroy that predictability, by destroying the ability of a business to comply with and rely on clear and targeted tax regulations. Such sudden change would precipitate profound uncertainty in an area of the law—taxes—that demands certainty. The Chamber therefore files this brief to urge the Seventh Circuit to affirm the Tax Court's well reasoned opinion supporting bedrock principles ensuring tax certainty and rejecting the Commissioner's effort to discard its own on-point regulations.

INTRODUCTION

Businesses are social enterprises that serve social ends—efficiently. Whether they provide goods or services, widgets or wonders, any good business, any business that lasts, takes costs into account. And among those costs are taxes. So when businesses seek to plan their affairs and avoid unnecessary costs, as all must, they rely on the Internal Revenue Code ("Code"), the Treasury regulations issued thereunder, and the established approach concerning the applicability of both. In short, businesses rely

[1] Pursuant to Rule 29(4)(E), *Amicus* states that no counsel for any party authored this brief in whole or in part, and no person, other than *Amicus*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

on predictability and certainty in tax laws to plan their affairs. Such practices generally promote the common good, not least by protecting individual liberty, minimizing wasted resources, and training society members who execute these practices to do the same. In this case, however, the Internal Revenue Service forgets all that and disregards the rule of law.

At issue are Treasury regulations determining when loan proceeds that a partner receives from a partnership are taxable. As written and regularly applied, the regulations establish that such proceeds are not taxable while the partner bears economic risk of loss on the loan. The regulations are clear on this point and the taxpayers in this case, Petitioners-Appellees, abided by them. Nevertheless, the IRS seeks more taxes sooner from Petitioners-Appellees and indeed seeks to ignore or rewrite its regulations to do so. The Tax Court rejected this effort to abandon fundamental legal principles, and *Amicus* urges this court to do the same.

The Commissioner's approach would harm American business. First, the current regulations favor the free flow of partnership capital with rules that are fair and administrable, unlike the regime the IRS now seeks to impose via enforcement. Moreover, the IRS's attempt to amend its regulations by and through litigation rather than by its established procedure violates the rule of law. Society as a whole benefits when government adheres to its procedures until it properly changes them. In contrast, the IRS's attempted procedural end-run would effect an unfair and unpredictable regulatory regime that depresses business activity, economic growth, and the social goods they promote. This Court should not abet that harm.

BACKGROUND

In 2009, Tribune Media Co. ("Tribune") handed over control of the storied but then struggling Chicago Cubs baseball team, transferring ownership to a new partnership, Chicago Baseball Holdings LLC ("CBH"). SA.8–9; *see* B.5–7, B.523–24. As a partner

in CBH, Tribune maintained a small ownership stake in the Cubs but otherwise freed up resources to focus on its media operations. SA.11. The complex transaction transferring Cubs ownership to CBH centrally included a debt-financed distribution wherein Tribune received proceeds from loans taken out by CBH in exchange for a guarantee by Tribune that it would pay off the loan under specified circumstances. SA.30, 33. It is undisputed on appeal that this agreement creates economic risk of loss on Tribune's part due to the loan. *See* App't's Op'g Br. ("IRS Br.") at 2; Pet'r' Op'g & Resp. Br. at 13–14, 32, 34. As a consequence of this debt-financed distribution, Tribune and CBH deferred certain tax liability at the time of the distribution.

The IRS objected to that result and has been striving to undo it. In the Tax Court, the IRS argued that Tribune bore no economic risk of loss on the loans. SA.94. But the court found such risk existed, SA.95–98, and the IRS does not now challenge that finding. Instead, it now argues that economic risk was not enough, notwithstanding that the longstanding constructive-liquidation test under 26 C.F.R. § 1.752-2(a) required no more. According to the IRS, other regulations should be marshalled to override the result required by the agency's own on-point regulation. Under these regulations, the IRS argues, only a "meaningful" risk of economic loss precluded tax liability upon receipt of the loan proceeds. IRS Br. 40, 49–57.

ARGUMENT

The IRS is misstating the tax rules for debt-financed distributions—and improperly seeking to change those rules. Under the applicable tax regulations, so long as a true partner receiving loan proceeds from the partnership bears some economic risk of loss on the loans, that partner is presumptively not subject to tax when it receives those proceeds. The regulations make exceptions to this general rule only in narrow circumstances, such as when a partner arranges to eliminate or avoid economic risk

altogether or when an apparent partnership is in fact a sham. That established regulatory framework fits Congress's policy of minimizing interference in the flow of capital within a partnership and provides clear guidance that is fair and administrable, unlike the opaque and untested meaningful-risk standard that the government now asks this Court to impose. The regulations make good sense, but that should not even be up for debate in this case. If the IRS insists on applying different regulations, it should at least abide by the rule of law in doing so; otherwise, it will inflict, at least, the substantial harm that inconsistent and arbitrary regulation causes to the economy and society. Allowing the IRS's approach to regulation through litigation in this case will systemically infect our tax regime with uncertainty, significantly impairing businesses' ability to reliably plan for the tax consequences of their actions.[2]

A. The Tax Court's interpretation of the constructive-liquidation test establishes a bright-line framework that provides taxpayer certainty and predictability.

The Internal Revenue Code and the tax regulations establish a clear and predictable test for resolving whether a transfer qualifies as a debt-financed distribution rather than a distribution of sales proceeds. As the Tax Court explained, Congress intended the disguised sale rules in Section 707(a)(2)(B) to minimize the use (or abuse) of the general rule of nonrecognition of partnership transfers to avoid or defer gain on transactions through a transaction structure that "disguises" a transaction that is "properly characterized as a sale or exchange or property" simply by passing the sale through a partnership by means of partnership contributions and distributions. *See* SA.49–50. At the same time, Congress did not want to undermine the fa-

[2] *Amicus* takes no position on, and this brief does not address, the second issue presented by Petitioners-Appellees: whether the subordinated debt in the Cubs transaction should be treated as debt or equity for tax purposes.

vorable tax treatment afforded to partnerships or to prohibit "non-abusive transactions that reflect the various economic contributions of the partners." SA.52 (quoting H.R. Rep. No. 98-432 (pt. 2) at 1220 (Mar. 5, 1984), 1984 U.S.C.C.A.N. 697, 884). Accordingly, the tax regulations promulgated under Section 707(a)(2)(B) seek to provide greater clarity to taxpayers by elaborating guidelines to help determine whether a particular transaction is a disguised sale and, relevant here, establishing several exceptions for transactions where the disguised sale rule would otherwise apply.

One such exception to the disguised sale rule is for a "debt-financed transaction" between a partnership and a partner. 26 C.F.R. § 1.707-5(b)(1). Under this rule, a partner may receive a debt-financed distribution of money or property as part of a disguised sale transaction without tax up to the amount of debt allocated to the partner, as long as the partner retains substantive liability for repayment. *Id.* Of course, it is not always self-evident which partner (if any) should receive allocation of a liability under real-world conditions—as the Tax Court explained, where a venture is successful, the partnership will pay its debts and no partner will ultimately be liable. SA.92. So, to provide additional clarity, the tax regulations provide the "constructive liquidation" test to determine which partner "bears the economic risk of loss" in the hypothetical worst-case scenario where a partnership is unable to pay off its own debts. Under this "constructive liquidation" test, if a partner would be obligated to pay on the loan if the partnership were liquidated and its assets were treated as worthless, then that partner bears economic risk of loss on the loan, and the partner's receipt of loan proceeds are not to be taxed as a disguised sale at the time of the transaction.[3] 26 C.F.R. § 1.752-2(b). Thus, as correctly interpreted by the Tax Court, the constructive-liquidation regulation draws a bright line that is straightforward to

[3] As Tribune explains in its Opening Brief, the debt-financed distribution does not mean that Tribune *never* had to pay taxes on the Cubs transaction—far from it—only that Tribune was not required to treat the entire distribution as sale proceeds *in 2009*.

administer without requiring taxpayers or the government to speculate regarding the actual likelihood that a partner will be called on to fulfil its repayment obligations. *See, e.g.*, *Bryan v. Comm'r*, T.C.M. (RIA) 2023-074, 2023 WL 4078696, at *8 (T.C. 2023); *Bordelon v. Comm'r*, 119 T.C.M. (CCH) 1157, 2020 WL 838538, at *11 (T.C. 2020); *IPO II v. Comm'r*, 122 T.C. 295, 300–01, 303 (2004).

The clarity of the bright-line constructive-liquidation test—*any* real obligation to pay a loan satisfies the debt-financed distribution exception; *no* real obligation does not—provides taxpayers with the benefit of certainty about whether, when, and how a debt-financed distribution will be taxed. And "in tax law," as the Supreme Court has noted, "certainty is desirable." *See United States v. Generes*, 405 U.S. 93, 105 (1972). Certainty reduces administration and litigation costs for businesses, whereas uncertainty requires bankrolling lawyers and accountants and constant assessment of regulatory risk. *See* Scott Hodge, Tax Found'n, *The Tax Compliance Costs of IRS Regulations* (Aug. 23, 2022)[4] ("[T]he 6.5 billion hours needed to comply with the tax code conservatively computes to $313 billion each year in lost productivity"); Jason J. Fichtner & Jacob M. Feldman, Mercatus Ctr., *The Hidden Costs of Tax Compliance* 9 (2013) (explaining that estimated, aggregate compliance costs "exceed[] the profits of the United States' 25 largest corporations"). "The cost of those lawyers and accountants adds to the price of every product, but they do nothing to make our factories more efficient, our computers faster or our cars more durable"—nor, for that matter, our newspapers more informative, or our baseball teams more likely to win the World Series. Press Release, Dep't of the Treasury, *Treasury Secretary Paul O'Neill Statement on Treasury's Plan to Combat Abusive Tax Avoidance Transactions* (Mar. 20, 2002). Instead, increased compliance costs "raise prices and curtail innovation."

[4] Available at https://taxfoundation.org/blog/tax-compliance-costs-irs-regulations/.

Laura Alix, *Am. Banker, Rising Compliance Costs are Hurting Customers, Banks Say* (Apr. 12, 2018).

Granted, the constructive-liquidation test also maximizes tax freedom within the partnership. But this is exactly what Congress wanted. Congress has long recognized "the great number of business enterprises and ventures carried on in partnership form" and sought to enable this business organization. H.R. Rep. No. 83-1337 (Mar. 9. 1954), 1954 U.S.C.C.A.N. 4017, 4091. Partnerships forgo the strict separation of ownership and management and corresponding formality that mark the full-fledged corporate form. That makes them personal, dynamic, and accessible in a way that uniquely powers economic opportunity and growth. Accordingly, Congress has for generations promoted partnerships by tailoring tax treatment to their independent character and has particularly sought to "permit the tax-free transfer of property into or out of a partnership." *Id.* at 4096. A natural outgrowth of that congressional scheme is the IRS's constructive-liquidation test. As explained above, that test permits a tax-free transfer of a partnership's loan proceeds in exchange for any obligation to pay the loan undertaken by a partner—directly applying Congress's clear will to maximize the free flow of capital within a partnership. The test is thus an effective implementation of Congress' constitutional authority to pursue policy objectives through its taxation powers.

Accordingly, the constructive-liquidation test, as duly promulgated in the tax regulations and correctly applied by the Tax Court, provides a clear, workable framework for determining when a partner bears the economic risk of loss for purposes the debt-financed distribution exception to the disguised sales rules. Taxpayers are entitled to rely on this test to determine the appropriate tax treatment for a transaction. While these rules could be amended by Congress or the agency, the agency cannot amend a regulation through litigation, as it seeks to do here.

B. The government cannot discard its own on-point regulation just because the taxpayer wins under that regulation.

Despite the clear framework established in the tax regulations, relied upon by Tribune, and recognized by the Tax Court, the government now seeks effectively to re-write the debt-financed distribution rules so that only partners who bear a "meaningful" risk of having to pay qualify for the exception. As discussed above and at greater length by the Tax Court and in Tribune's brief, this interpretation directly contradicts the clear and longstanding constructive-liquidation rule, which deliberately employs a hypothetical test to avoid *any* inquiry into the likelihood a partner will be required to pay on a loan or guarantee—much less whether that likelihood is "meaningful."

1. *The government must follow its own regulations, not create new regulations in and for enforcement.*

Promulgating a regulation publicly defines in advance what the government is to do. The effect—and, indeed, the purpose—of doing so is to set expectations and direct actions, of both the regulated *and the regulator*. Just as regulated entities must do what a regulation requires, not what they wish it required, so too regulating agencies must enforce a regulation as it is, not as they wish it were. In short, government must abide by the rule of law.

Thus, it "has long been established that government officials must follow their own regulations"—"even if they were not compelled to have them at all." *Baude v. United States*, 955 F.3d 1290, 1304, 1306 (Fed. Cir. 2020) (cleaned up); *accord, e.g.*, *Zelaya Diaz v. Rosen*, 986 F.3d 687, 690 (7th Cir. 2021). An agency's position in an enforcement action should be a "'fair and considered judgment.'" *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019) (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)). It should not be "a merely convenient litigating position." *See id.* (cleaned up). Far less should it be "a *post hoc* rationalization advanced to defend

past agency action against attack." *See id.* (cleaned up). Nor should it shift the costs of a past agency oversight to a present regulated party.

All such positions, in effect, create a new regulatory scheme in and for enforcement and impose it retroactively to govern actions already past. "Retroactivity," however, "is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208–09 (1988). Indeed, even if "retroactive application of a new [regulation] would vindicate its purpose more fully," that "is not sufficient to rebut the presumption against retroactivity." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 285–86 (1994). Instead, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Id.* at 265–66.

In this case, the IRS has asserted a regulatory scheme that effectively abrogates the constructive-liquidation test and replaces it with a new, broader regulatory scheme that, for the first time, requires partners to take on "meaningful" risk in order to avoid taxation on loan proceeds they receive from a partnership. That is certainly a "convenient litigating position," but is "merely" that. In other words, it is an unjustified "*post hoc* rationalization" for taxing Tribune on a structure that adhered to the decades-old constructive-liquidation test. Even if the "meaningful" risk test would vindicate what the IRS claims to have been the original purpose of its regulations, that would not justify the IRS's instituting it just in time to tax Tribune in this case.

2. *If the government wants to change the currently applicable regulations it must do so through either through legislation or the agency rulemaking process.*

If the government indeed believes that its own constructive-liquidation test is "divorced from reality," "artificial," and "irrelevant" to the debt-financed distribution rules, IRS Br. at 45, 50, it has processes available to it to revise it. It may amend the rules in an appropriate manner through legislation or agency rulemaking that applies, and provides advance notice, to all, not with made-for-litigation interpretations

that seek to achieve its desired result in a particular case. But federal legislators have recently reviewed the law of partnership-partner transactions and considered changing it and decided not to do so. *Compare* Draft Legislation by Sen. Ron Wyden at 14–19 (Sept. 10, 2021) (proposing changes to Section 707(a)),[5] *with* 26 U.S.C. § 707[6] (unamended since 1986).

Notwithstanding Congress's considered lack of legislative action, the IRS may still seek to amend its own regulations through *rulemaking*. As this Court held in *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 170–71 (7th Cir. 1996), "[w]hen agencies base rules on arbitrary choices they are legislating, and so these rules are legislative or substantive and require notice and comment rulemaking . . . ." And this rulemaking process provides important procedural safeguards and benefits: "Notice and comment gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes—and it affords the agency a chance to avoid errors and make a more informed decision." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019) (citing 1 K. Hickman & R. Pierce, Administrative Law § 4.8 (6th ed. 2019)). It may well be that the agency determines that the current rules appropriately prioritize the benefits of significant simplicity and administrability, despite misgivings about appropriate tax treatment in certain cases like the one at hand. As this Court has recognized, a "rule-maker may stick with" a bright-line rule to "preserve the benefits of simplicity," even if such a rule "creates incentives to alter one's conduct to take maximum advantage." *City of Albany v. FERC*, 7 F.3d 671, 672 (7th Cir. 1993).

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[5] Available at https://www.finance.senate.gov/imo/media/doc/Pass-through%20Changes%20Discussion%20Draft%20Legislative%20Text.pdf (accessed via https://www.finance.senate.gov/chairmans-news/wyden-unveils-proposal-to-close-loopholes-allowing-wealthy-investors-mega-corporations-to-use-partnerships-to-avoid-paying-tax).

[6] Available at https://uscode.house.gov/view.xhtml?req=(title:26%20section:707%20edition:prelim)%20OR%20(granuleid:USC-prelim-title26-section707)&f=treesort&edition=prelim&num=0&jumpTo=true.

And, in the end, if the IRS determines that the constructive-liquidation test, as currently formulated, is inadequate (in its view) to effectuate Congress's intent with regard to disguised sales and debt-financed distributions, the IRS may modify its rules (within the bounds of reason and process). It knows well how to do so.[7] What the IRS may *not* do, however, is bypass the rulemaking process entirely and "interpret" its existing regulations contrary to their plain meaning in order to achieve a desired result in litigation.

C. The government cannot rely on anti-abuse rules as a free-standing mechanism to disregard tax treatment it dislikes.

More concerning even than the government's attempt to rewrite the debt-financed distribution rules is its claim to find in anti-abuse rules a freestanding power to invalidate tax treatment expressly allowed by Congress and the Commissioner's specific rules. Thus, with respect to the specific anti-abuse rule in 26 C.F.R. § 1-752-2(j), the government contends that "economic risk of loss" means not what the regulation says, i.e. that "a partner bears the economic risk of loss for a partnership liability to the extent that, if the partnership constructively liquidated, the partner or related person would be obligated to make a payment," but something else entirely if the government concludes that the tax treatment is inappropriate. In other words, no risk" becomes "low risk," and the regulatory language means "just what [the agency] choose[s] it to mean—neither more nor less." Lewis Carroll, *Through the Looking Glass* 54 (1872).[8] And with respect to the general anti-abuse rule, the government takes the position that even when a transaction complies with the express requirements of the debt-financed distribution rule—including the specific anti-abuse rule—

[7] *See* 81 Fed. Reg. 69282 (Oct. 5, 2016) (publishing final and temporary regulations under Sections 707 and 752); 84 Fed. Reg. 54027 (Nov. 8, 2019) (withdrawing temporary regulations and reinstating previous regulations under Section 707); 84 Fed. Reg. 54014 (Oct. 9, 2019) (amending, e.g., 26 C.F.R. § 1.752-2(j)).

[8] Available at http://www.literaturepage.com/read/throughthelookingglass-54.html.

the government may *still* invalidate the tax treatment if it concludes that any single aspect of the transaction was selected for tax planning purposes. In other words, government's bottom line is that it can use the anti-abuse rules to advance its own ideas of what tax treatment is appropriate, even when the transaction is authorized by a statute and complies with all applicable statutory and regulatory provisions.

That is a breathtaking assertion of regulatory power that the Tax Court appropriately rejected; this Court should too. As an initial matter, the government's attempt to use increasingly general anti-abuse provisions to invalidate tax treatment that conforms to specific requirements carefully designed by legislation or regulation inverts the bedrock principle of legal interpretation that "normally the specific governs the general." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007); *see also Central Com. Co. v. Comm'r*, 337 F.2d 387, 389 (7th Cir. 1964). The government does not explain or justify this departure from this norm in the context of the Internal Revenue Code or tax regulations. But if applied more broadly by agencies in their interpretation and enforcement of statutes and regulations, the results would undermine the well settled expectations of businesses and individuals who have relied on the guidance of specific agency rules to comply with the statutory and regulatory requirements. Fortunately, courts have held regulations to these familiar principles, and this Court should continue to do so here. *See, e.g. Long Island Care at Home*, 551 U.S. at 170 (holding that the DOL's specific rules exempting third-party companionship services from the FLSA controlled the general definition of the kind of work that qualifies "domestic service" under the FLSA); *Hoops, LP v. Comm'r*, No. 22-2012, 2023 WL 5072538, at *5 (7th Cir. Aug. 9, 2023) (holding that "[I.R.C.] § 404(a)(5)'s specific regulation of nonqualified deferred-compensation plans must prevail over § 1.461-4(d)(5)(i)'s broader treatment of assumed liabilities in connection with the sale of businesses more generally").

Moreover, regardless of whether the government's interpretation can be justified under the traditional canons of interpretation, it should be rejected because it advances an *ad hoc* approach to enforcing the debt-financed distribution rule and the constructive-liquidation test. This *ad hoc* enforcement is at odds with the purposes of agency rulemaking and fundamentally in tension with the cherished notion that we are governed by laws, not the whim of a regulator reinterpreting the laws at any given moment. When the IRS or any other regulator creates specific rules authorizing particular conduct under, given conditions, it invites regulated parties to structure their conduct accordingly, and businesses to invest significant resources in such compliance. But if the regulator can simply rely on more general principles to invalidate such carefully planned compliance with specific regulatory requirements, it creates uncertainty and increases the cost of doing business across the board. It is well established that consistent policies tend to advance governmental interests better than *ad hoc* ones. *E.g.*, Finn E. Kydland & Edward C. Prescott, *Rules rather than discretion: The inconsistency of optimal plans*, 85 J. of Pol. Econ. 473 (1977); *accord, e.g.*, *The Federalist* No. 62 (James Madison) (In government, "a continual change even of good measures is inconsistent with every rule of prudence and every prospect of success."); U.S. Dep't of Health & Hum. Servs., *Policy on Redundant, Overlapping, or Inconsistent Regulations & Request for Information* (Nov. 24, 2020) ("Redundant, overlapping, or inconsistent regulations undermine department goals by creating uncertainty and imposing costs and burdens with no public benefit.")).[9] For example, consistency helps those applying the rules, including by encouraging the sense of their legitimacy. Nadine van Engen et al., *Do consistent government policies lead to greater meaningfulness and legitimacy on the front line?,* 97 Public Admin. 907 (2019).

[9] Available at https://www.hhs.gov/regulations/policy-on-redundant-overlapping-or-inconsistent-regulations-and-request-for-information/index.html.

Critically, consistent enforcement also directly helps those following the rules. Inconsistent enforcement causes uncertainty about taxes—and, by extension, the myriad other regulations governing every facet of business in our regulatory state—which leads businesses, even after consulting with experts, to "adopt a cautious stance" because "it is costly to make a . . . mistake." Steven J. Davis et al., Am. Enter. Inst., *Business Class: Policy Uncertainty Is Choking Recovery* (Oct. 6, 2011). This may take the form of overreporting tax burdens to avoid an audit. *See* Leigh Osofsky, *The Case Against Strategic Tax Law Uncertainty*, 64 Tax L. Rev. 489, 499–501 (2011) (outlining risk-aversion models that predict over-reporting in the face of uncertainty "to avoid a higher perceived chance of audit and resulting costs"). That in turn leads businesses to withhold capital that would otherwise go to beneficial investments. In addition, businesses may avoid otherwise profitable investments based on uncertainty over how the results will be taxed. Worse still, this may lead businesses to channel investments outside of the United States altogether.

Ultimately, the harmful effects of inconsistent regulation reach well beyond businesses. "[O]ne cannot deny that compliance with regulations translates into higher costs for would-be entrants and/or incumbent businesses, which ultimately increases prices for consumers." *See* Dustin Chambers et al., *How Do Federal Regulations Affect Consumer Prices? An Analysis of the Regressive Effects of Regulation*, 180 Pub. Choice 57, 58 (July 2019). Thus, members of the public have to pay twice for inconsistent regulation—suffering the generalized depressive effect of deadweight loss on the economy while also paying more for goods and services.

For all these reasons, the government's attempt to use its anti-abuse rules to invalidate tax treatment that is specifically authorized in the Internal Revenue Code and tax regulations should be rejected.

CONCLUSION

The Tax Court's ruling that the distribution to Tribune was a debt-financed distribution to the extent of the senior debt should be AFFIRMED.

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Respectfully submitted,

/s/ Stephen M. Judge

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 29(a)(4)(G) and 32(g) of the Federal Rules of Appellate Procedure, I certify that this Brief complies with the type-volume limitation of Rule 29(b)(4). This Brief contains 4,458 words, excluding the contents of those sections listed in Federal Rule of Appellate Procedure 32(f) as exempt from the word count. In submitting this certificate, I relied upon the word count of the word processing system (Microsoft Word for Mac v. 16.75) used to prepare the Brief. I performed the word count with the feature "include footnotes and endnotes" turned on.

I also certify that this brief complies with Federal Rules of Appellate Procedure 32(a)(5)–(6), as modified by Circuit Rule 32. This Brief has been prepared in 12-point Century Schoolbook, a proportionally-spaced font with serifs.

Dated: August 15, 2023

/s/ Stephen M. Judge
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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2023, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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