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Amici Curiae Brief of Law Professors, Belk v. Commissioner, U.S. Court of Appeals for the Fourth Circuit

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No. 13-2161

In The
United States Court of Appeals
For The Fourth Circuit

B.V. BELK, JR., and HARRIET C. BELK,

Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES TAX COURT

AMICI CURIAE BRIEF OF LAW PROFESSORS IN SUPPORT OF AFFIRMANCE OF THE COMMISSIONER OF INTERNAL REVENUE

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Amici curiae submit this brief in support of the Commissioner urging the Court to affirm the Tax Court's judgment.[1]

IDENTITY OF AMICI, INTRODUCTION, AND SUMMARY OF ARGUMENT

The Amici are Roger Colinvaux, John Echeverria, John Leshy, Nancy McLaughlin, and Janet Milne, all professors who teach tax, nonprofit, property, land use, or natural resources law and have taught, lectured, and written about conservation easements. Based on their professional knowledge and personal experience, they believe allowing a charitable deduction for the easement in this case would be contrary to the plain language of the statute, the legislative history, and the Treasury regulations, and would open the door to abusive transactions that would produce little or no conservation benefit at significant cost to taxpayers. Amici file this brief to highlight arguments that powerfully support the Commissioner and to bring broader legal and policy issues to the Court's attention.

The Belks claimed a $10.5 million charitable deduction under § 170(h) of the Internal Revenue Code for donating a conservation easement to a land trust even though the easement permits development of the land ostensibly protected by the easement. Specifically, the easement allows the parties to engage in

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[1] No party's counsel authored any part of this brief, and no party, party's counsel, or other person besides Amici and their counsel contributed money to fund preparation or submission of this brief. No disclosure statement is required by Rule 26.1.

"substitutions" or "swaps" i.e, to release land from the easement restrictions in exchange for placing easement restrictions on some other land—subject to certain conditions of the parties' choosing. The Commissioner appropriately disallowed the deduction, contending that easements that can "float" across the landscape at the parties' discretion violate the requirements of § 170(h) and the regulations. The Tax Court affirmed the Commissioner, agreeing that § 170(h) requires that a deductible use restriction relate to a particular parcel and not be allowed to float from parcel to parcel.

Amici endorse the Tax Court's position. Section 170(h) allows a deduction for the donation of an easement that places perpetual restrictions on the use of the specific property that is the subject of the easement at the time of its donation. The legislative history and regulations confirm that the perpetual restrictions must apply to "the interest in the property retained by the donor." S. Rep. No. 96-1007, C.B. 599, at 605 (1980-82); Treas. Reg. § 1.170A-14(g)(1). There is one narrow exception: easement restrictions on the original property can be extinguished and replaced with restrictions on other property if changed conditions make "impossible or impractical" continued use of the original property for conservation purposes, the extinguishment is approved by a court, and the holder receives at least a minimum proportionate share of proceeds from the subsequent sale or exchange of the original property. Treas. Reg. § 1.170A-14(g)(6). The substitutions authorized by the Belk easement, which involve the extinguishment and replacement of restrictions, do not fit within this exception. Accordingly, the easement is not eligible for a charitable deduction.

Furthermore, the Belks' position, if accepted, would undermine the conservation utility of easements and waste taxpayer dollars by granting the parties broad discretion to lift easement restrictions off properties whenever they constrain development, leading to the destruction of the conservation values identified as worthy of protection when the easements were donated. It also would be exceedingly difficult, if not impossible, for the Commissioner to police whether post-donation "substitutions" involve interests in land with equivalent financial and conservation values.

ARGUMENT

I. The Internal Revenue Code, Legislative History, and Treasury Regulations Confirm that Floating Easements Are Not Entitled to Federal Tax Subsidies.

A party challenging a determination by the Commissioner to disallow a tax deduction bears the burden of showing the Commissioner erred. *Welch v. Helvering,* 290 U.S. 111, 115 (1933). Any reasonable reading of the Internal Revenue Code, the pertinent legislative history, and the regulations shows that a taxpayer is not entitled to a deduction for an easement that can "float." Therefore, the Tax Court's ruling should be affirmed.

A. The Statute

The plain language of § 170(h) contradicts the Belks' theory. To constitute a "qualified conservation contribution" under § 170(h)(1), the contribution must be (A) of "a qualified real property interest," (B) to "a qualified organization," and (C) "exclusively for conservation purposes." The main issue in this case is whether the Belks made a contribution of "a qualified real property interest."[2] The Belks contended that they met the qualified real property interest requirement because they contributed "a restriction (granted in perpetuity) on the use which may be made of the real property." § 170(h)(2)(C). The Tax Court correctly rejected this position.

By requiring that a contribution constitute "*a* qualified real property interest," in the form of "*a* restriction (granted in perpetuity) on the use which may be made of *the* real property" (emphases added), § 170(h)(2)(C) indicates that an easement donation must place permanent legal restrictions on the use of a specific property, not simply any property. Use of the word "a" in the phrase "a qualified real property interest" as well as in the phrase "a restriction" naturally suggests a restriction on a specific stick in the bundle of sticks associated with a specific

[2] While it was uncontested that the Belks' contribution was made to a "qualified organization," the Commissioner disputed that the contribution was made "exclusively for conservation purposes." The Tax Court did not consider that issue. *See Belk v. Comm'r*, 140 T.C. 1, 8 n.12 (2013). Amici agree that the Belks' contribution also violated that requirement.

parcel of property. More to the point, use of the word “the” in § 170(h)(2)(C) indicates that the donation of the qualified real property interest must ensure perpetual protection of the specific property on which the donor placed the easement. If Congress had wished to adopt the Belks’ position—that the restriction need not relate to a specific parcel—it would have omitted “the,” or it might have substituted the word “any” for the word “the.” But Congress did neither. Instead, it used language indicating that a deduction is available only for perpetual restrictions fixed to “the” specific parcel of land.

Other language in § 170(h) bolsters this plain meaning of § 170(h)(2)(C). Section 170(h)(1)(C) requires that the contribution be “exclusively for conservation purposes.” Section 170(h)(5)(A) defines “exclusively for conservation purposes” in part, by stating that a “contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity.” Reading § 170(h)(2)(C) and § 170(h)(5)(A) together, a taxpayer is eligible for a deduction only if the restrictions on use are perpetually affixed to a specific property in order to achieve a permanent conservation goal. The legislative history and regulations, discussed below, also confirm this reading. Both provide that the perpetual restrictions must apply to the specific property retained by the donor at the time of the donation.

The Belks seek to rebut this straightforward reading of § 170(h) by pointing out that the regulations authorize extinguishment of conservation easements in the event of changed circumstances. (Belk Brief, at 20). They argue that the authority to extinguish an easement in the event of impossibility or impracticality precludes the conclusion that § 170(h) requires perpetual protection of specific property. But the extinguishment regulation does not contradict the statute. It simply reflects the practical reality that continuing to protect the conservation values of a property will sometimes become impossible or impractical due to changed conditions, that the easement will be subject to extinguishment by a court in such circumstances, and that a mechanism was needed to protect the public investment in this unfortunate (and rare) eventuality. *See* Treas. Reg. § 1.170A-14(g)(6).

For comparison, under the contract law doctrine of impossibility, the obligation to carry out a contract is excused if performance becomes impossible. *See* Restatement (Second) of Contracts § 261 (1981). But the fact that contract obligations may be excused under the doctrine of impossibility does not mean that contracts are unenforceable absent impossibility. Just as the reality of impossibility can be read into the law of contracts without destroying the sanctity of contract obligations in general, so too impossibility can be read into § 170(h) without destroying the requirement that only donations of easements that permanently protect specific properties qualify for a deduction.

B. Legislative History

1. *Senate Report*

The legislative history of § 170(h) supports this reading of the statute. The Senate Finance Committee Report on the Tax Treatment Extension Act of 1980 provides detailed guidance on what Congress intended when it adopted § 170(h) in 1980. S. Rep. No. 96-1007, C.B. 599 (1980-82). It states that a deductible conservation easement "must involve legally enforceable restrictions on *the interest in the property retained by the donor* that would prevent uses of *the retained interest* inconsistent with the conservation purposes." *Id*. at 605 (emphasis added). The report's explicit reference to restrictions on "the interest in the property retained by the donor" indicates that the committee contemplated that taxpayers would be eligible for deductions for placing restrictions on specific property, not simply any land.

Other passages from the report reinforce the conclusion that Congress intended to allow deductions only for permanent restrictions attached to specific property. The report explains that the committee intended to subsidize easement donations that would "further significant conservation goals without presenting significant potential for abuse." *Id*. at 603. As discussed in more detail below, allowing the parties to move easements across the landscape in unregulated and unsupervised transactions would open the door to widespread abuse, contrary to

Congress's intent.

The committee report also emphasizes that strict standards apply when determining the types of properties eligible for conservation tax subsidies, standards that would be seriously eroded if easements could "float" from parcel to parcel. The report states that "deductions for conservation easements should be directed at the preservation of unique or otherwise significant land areas or structures." *Id*. at 603. To ensure that only qualifying easements receive deductions, the committee expressed its "expectation" that taxpayers could obtain "prior administrative determination[s]" on whether their donations would qualify. *Id*. at 605. Such determinations are based on detailed analyses of the attributes of the specific properties that will be the subject of the easements. *See, e.g.*, I.R.S. P.L.R. 200836014 (Sept. 5, 2008). The committee also said it expected Treasury to make publication of regulations interpreting § 170(h) a "highest priority." S. Rep. No. 96-1007, C.B. 599, at 605 (1980-82). These expressions of concern about the need to ensure that only eligible conservation easements protecting specific properties receive tax subsidies would have been nonsensical if the committee contemplated that the parties could, after the initial donations, move the restrictions across the landscape at their discretion.

Finally, the committee's instructions regarding the narrow circumstances in which a donee may transfer an easement confirm that Congress did not intend to authorize deductions for easements that permit "substitutions." Substitutions involve the transfer of some or all of the easement restrictions back to the donor or subsequent owner of the land in exchange for replacement restrictions on some other land. However, the report states that deductions should be limited to easements that "require that the donee (or successor in interest) hold the conservation easement … exclusively for conservation purposes." *Id*. at 606. The report explains that a qualified organization that receives an easement donation should be permitted to transfer the easement only to another qualified organization, and only so long as the transferee organization "also will hold the perpetual restriction … exclusively for conservation purposes." *Id*. These instructions make it clear that the committee did not intend for donees to have the power to freely transfer easements back to the donors or subsequent property owners through swaps.

2. *Extinguishment*

The legislative history regarding when a perpetual easement might be extinguished further highlights that deductible easements must be linked to specific properties. Congress was aware that, in rare cases, circumstances might change so dramatically that it becomes impossible or impractical for an easement to continue to serve the purposes for which it was donated and, in such cases, a court could extinguish the easement. In anticipation of a congressional hearing on proposed

§ 170(h), the Joint Committee on Taxation prepared a report that raised the issue of whether § 170(h) ought to include rules to cover the situation "where a transferred partial interest in real property, for which a deduction was allowed because it served a conservation purpose, ceases to be used in furtherance of the conservation purpose." *See* Staff of J. Comm. on Taxation, 96th Cong., Description of Misc. Tax Bills Scheduled for Hearing before Subcomm. on Select Revenue Measures of Comm. on Ways & Means June 26, 1980, JCS-33-80, at 27 (Comm. Print 1980). In response to this report, the president of a land trust, on behalf of nineteen land trusts, provided the following testimony:

> A question raised in the Joint Committee Description . . . is: should rules be provided to take care of the remote contingency that at some time in the future a property subject to a conservation easement might cease to be used for that conservation purpose?
>
> We believe that with a well-planned easement program this is most unlikely to occur, but it is not impossible. It is conceivable for example, that a farm, or a natural habitat, might become so closely surrounded by heavy industry at some future time that it would become impossible to continue the original conservation purpose. In the such situation the then owner of the land might, under common law "change of circumstances" doctrine, obtain equitable relief from the burden of the easement in court. Certainly if that were to happen equity would seem to call for a return to the public of the price originally paid for the public benefit provided by the easement, whether that price had been paid directly by purchase or indirectly by a tax deduction. It also seems very difficult, however, to provide for this unlikely occurrence in the Revenue Code itself. We would hope that some Regulation for this purpose could be developed by those most interested, i.e., The Revenue Service and the Treasury Department, which would not interfere with the main operation of the easement program.

Minor Tax Bills: Hearings Before the Subcomm. on Select Revenue Measures of the H. Comm. on Ways & Means, 96th Cong. 245 (1980) (statement of Samuel Morris, President, French and Pickering Creeks Conservation Trust). Congress accepted the advice offered in this testimony and did not include standards and procedures governing extinguishment of conservation easements in light of changed circumstances in § 170(h), leaving it to Treasury to address the issue in regulations. Treasury did so by incorporating a version of the doctrine of *cy pres* into the regulations. Treas. Reg. § 1.170A-14(g)(6); *Kaufman v. Comm'r*, 136 T.C. No. 13, *9 (2011), vacated and remanded on other grounds, *Kaufman v. Shulman*, 687 F.3d 21 (1st Cir. 2012).

The critical point for present purposes is that Congress carefully considered how best to address the "unlikely occurrence" of extinguishment of a conservation easement in the event its purpose becomes impossible due to changed conditions. This precludes the notion that Congress contemplated that easements could be freely extinguished at the parties' discretion, as the Belks suggest.

3. *State Law*

The legislative history also shows that Congress had a clear understanding of state law governing charitable contributions and intended the tax code to be consistent with state law. The Belks assert that the two parties to a donated conservation easement are free under state law to agree to substitutions even if the easement does not authorize substitutions. (*See* Belk Brief at 9-10, 33). That assertion is not correct. Donated conservation easements are, by definition, charitable gifts, and under state law charitable gifts must be administered in accordance with their terms and purposes. *See, e.g., Carpenter v. Comm'r*, T.C. Memo 2012-1 (the tax-deductible conservation easements are "restricted [charitable] gifts" under state law, that is, "contributions conditioned on the use of a gift in accordance with the donor's precise directions and limitations.") (citation omitted); *Carl J. Herzog Found. v. Univ. of Bridgeport*, 699 A.2d 995, 997–98 (Conn. 1997) ("equity will afford protection to a donor to a charitable corporation in that the attorney general may maintain a suit to compel the property to be held for the charitable purpose for which it was given") (quoting *Lefkowitz v. Lebensfeld*, 68 A.D. 2d 488, 494-95 (N.Y. 1979)). *See also* Unif. Conservation Easement Act, Prefatory Note and § 3 cmt. (2007) (discussing application of charitable principles to conservation easements); Unif. Trust Code § 414(e), cmt. (2000) (same). Accordingly, contrary to the Belks' assertion, the parties to a tax-deductible easement should not be free to engage in substitutions under state law. Rather, the holder should have a duty to enforce the easement with regard to the specific property in accordance with its terms.

Congress was well aware of these state law principles when it drafted

§ 170(h). At congressional hearings on proposed § 170(h), and in response to Treasury's concern that conservation organizations might not properly enforce easements, nineteen land trusts submitted testimony in which they acknowledged the status of tax-deductible easements as "charitable grants" and noted the power and duty of state courts and state attorneys general to enforce such grants. *See* Minor Tax Bills: Hearings Before Subcomm. on Select Revenue Measures of H. Comm. on Ways & Means, 96th Cong. 242 (1980) (App. to Testimony of French and Pickering Creeks Conservation Trust, the Brandywine Conservancy, and other Conservation Organizations re H.R. 7318 on June 26, 1980). Congress thus imposed the requirement that a tax-deductible easement constitute a restriction on use, granted in perpetuity, with regard to a specific parcel of property with the understanding that the perpetual restriction should be legally binding on both parties under state law. In other words, Congress anticipated that state law would be consistent with its intent to provide deductions with respect to conservation easements that would permanently protect specific properties.[3]

[3] The Belks cite Restatement (Third) of Property: Servitudes, § 4.8(3) to support their assertion that parties to an easement can freely agree to substitutions, Belk Brief at 34, n. 6, reflecting a gross misunderstanding of the Restatement's position on conservation easements. "Conservation servitudes" are separately defined in the Restatement and afforded "special protections" given the public interest and substantial public investment. Restatement § 1.6 cmt. b (2000). Most importantly, § 7.11 applies a special set of rules that are based on the doctrine of *cy pres* and require court approval for modification or termination of conservation

4. *Partial Interest Status*

Considering the history of § 170(h) in a broader context, it is important to recognize that Congress authorized charitable deductions for conservation easement donations despite its general distaste for deductions for contributions of partial interests in property. Donations of partial interests are disfavored because they often involve abusive arrangements where donors retain extensive control over the property and the public receives little benefit from the donation. In 1969, Congress adopted a general prohibition on deductions for contributions of partial interests, Act of Dec. 30, 1969, Pub. L. No. 91-172, § 201, and it has kept this general prohibition in place ever since. § 170(f)(3)(A).

Congress made an exception to this general prohibition for easement donations when it enacted §170(h) in 1980, but it imposed strict limits on the deduction because of the significant potential for abuse. *See* Stephen J. Small, The Federal Tax Law of Conservation Easements § 14.02, 2-2 to -3 (4th ed. 1997) ("As far as Congress … [was] concerned, a taxpayer who donates an easement continues to use and enjoy the property, and the requirements for taking an income tax deduction simply must be tighter to ensure that there is also a significant long-term

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servitudes held by governmental or charitable entities. Restatement § 7.11 cmts. b & c (2000). These special protections are completely inconsistent with the notion that easement restrictions can be extinguished and replaced at the discretion of the parties.

public benefit associated with the donation.”). The Tax Court’s ruling in *Belk* upholds the important limits Congress placed on the deduction to protect against abuse.

5. *Temporary Easements Rejected*

The conclusion that Congress never contemplated that easements could float from one property to another is further supported by the fact that, prior to adopting the 1980 legislation, Congress briefly experimented with the idea of allowing deductions for donations of easements that were temporary in nature, but quickly gave up on the experiment as wasteful of taxpayer dollars and ill-advised as a matter of conservation policy. The Tax Reform Act of 1976, Pub. L. No. 94-455, provided the first statutory authority for charitable deductions for conservation easement donations and authorized deductions for the donation of both perpetual easements and term easements with a minimum term of 30 years.

Land conservation groups such as The Nature Conservancy expressed concern that term easements would not effectively promote conservation goals. They believed term easements would be more likely, in the long run, to lead to the destruction of natural areas than to their permanent protection. *See* Stephen J. Small, The Tax Benefits of Donating Easements on Scenic and Historic Property, 7 Real Est. L.J. 304, 315–16 (1979). They also were concerned that the availability of deductions for term easements would discourage the donation of perpetual conservation easements. *Id.* at 304, 306.

Providing a deduction for term easements was also ill-advised from a tax policy standpoint because it created an expensive subsidy for taxpayers making long-term investments in land held for eventual development. Under the 1976 legislation, an investor making a 30-year investment in land on the urbanizing fringe of a metropolitan region could receive a deduction for donating an easement that would do little or nothing to advance conservation goals, given that the investor did not intend to develop the land for thirty years in any event. Such a deduction would merely reduce the carrying costs of this type of investment.

Accordingly, Congress quickly dropped the idea of temporary easements one year later, in 1977, and established a strict perpetuity requirement. Act of May 23, 1977, Pub. L. 95-30. Congress then stuck to this policy when it enacted § 170(h) in 1980 and has abided by it since. The Belks' request that the Court interpret § 170(h) as providing a deduction for the donation of temporary easements runs headlong into Congress's carefully considered judgment to reject that option and require permanent protection of specific parcels.

C. Regulations

Finally, the Treasury regulations emphatically support the Commissioner's position that tax deductions are not available for contributions of easements that float. The regulations confirm what both the statute and the legislative history teach: to qualify for a deduction, easement restrictions must permanently attach to the specific property on which the donor placed the restrictions for the purpose of claiming the deduction.

> In the case of any donation under this section, *any interest in the property retained by the donor* (and the donor's successors in interest) must be subject to legally enforceable restrictions (for example, by recordation in the land records in the jurisdiction in which *the property is located*) that will prevent uses of *the retained interest* inconsistent with the conservation purposes of the donation.

Treas. Reg. § 1.170A-14(g)(1) (emphases added). The emphasized phrases demonstrate that, to be eligible for a deduction, the perpetual restrictions that protect conservation values must attach to the specific property on which the donor placed the restrictions, not any property anywhere. Thus, the regulations, on their face, preclude floating easements.

Other provisions of the regulations are consistent with and support this conclusion. The regulations closely track the advice and direction provided in the Senate Finance Committee's report discussed above.

With respect to "transfers," the regulations pronounce a general rule that "[a] deduction shall be allowed for a contribution under this section only if in the instrument of conveyance the donor prohibits the donee from subsequently transferring the easement … whether or not for consideration." Treas. Reg.

§ 1.170A-14(c)(2). The regulations identify two exceptions to the no-transfer rule. First, a donee may transfer an easement to another "eligible donee" provided the donee requires, as a condition of any such transfer, "that the conservation purposes which the contribution was originally intended to advance continue to be carried out." Second, a transfer is allowed in the context of an extinguishment when "a later unexpected change in the conditions surrounding the property" makes "impossible or impractical the continued use of the property for conservation purposes" and "the property is sold and or exchanged and any proceeds are used by the donee organization in a manner consistent with the conservation purposes of the original contribution." The regulations also make clear that such an extinguishment can only be authorized by "judicial proceeding" and with a payment of a specified minimum proportionate share of proceeds to the holder. Treas. Reg. § 1.170A-14(g)(6).[4]

These exceptions, which are the *only* exceptions to the no-transfer rule, logically preclude the floating easement theory—that easement restrictions can be extinguished (i.e., transferred back to the donor or a subsequent owner of the

[4] The operative provision governing extinguishment is regulation §1.170A-14(g)(6). Regulation §1.170A-14(c)(2) merely provides that an extinguishment that satisfies the extinguishment regulation requirements will not violate the restriction-on-transfer requirements. The cross-reference to "(g)(5)(ii)" in the last sentence of regulation §1.170A-14(c)(2) should be to "(g)(6)(ii)." *See* Proposed Regulations §1.170A-13, 48 Fed. Reg. 22941 (May 23, 1983).

property) and replaced with restrictions on some other property at the parties' discretion. The first exception allows an easement on a particular piece of property to be transferred from one eligible donee to another. The second exception permits an easement to be extinguished and replaced with restrictions on another property only if continued use of the original property for conservation purposes has become impossible or impractical due to changed conditions, the extinguishment is approved by a court, and the holder receives a minimum proportionate share of proceeds as specified in the extinguishment regulation. The Belks' interpretation of § 170(h) would render the restriction-on-transfer and extinguishment regulations superfluous, contrary to basic rules of construction. *See Corley v. United States*, 556 U.S. 303, 314 (2009).

Other regulatory provisions likewise reinforce the conclusion that the easement restrictions must apply to a particular property. *See, e.g.,* Treas. Reg. § 1.170A-14(g)(5)(i) ("the donor must [generally] make available to the donee … documentation sufficient to establish the condition of *the property at the time of the gift*. Such documentation is designed to protect the conservation interests associated with *the property*, *which although protected in perpetuity by the easement,* could be adversely affected by the exercise of the reserved rights.") (emphasis added); Treas. Reg. § 1.170A-14(g)(2) ("No deduction will be permitted … for an interest in property which is subject to a mortgage unless the mortgagee subordinates its rights in *the property* to the right of the qualified organization to enforce the conservation purposes of the gift in perpetuity.") (emphasis added); Treas. Reg. § 1.170A-14(g)(5)(ii) ("the terms of the donation must provide a right of the donee to enforce the conservation restrictions …, including … the right to require the *restoration of the property to its condition at the time of the donation*.") (emphasis added).

II. Neither *Simmons* Nor *Kaufman* Supports Tax Deductions for Floating Easements.

The Belks rely on two decisions involving façade easement donations, *Comm'r v. Simmons,* 646 F.3d 6 (D.C. Cir. 2011), and *Kaufman v. Shulman,* 687 F.3d. 21 (1st Cir. 2012), to support their theory that § 170(h) authorizes deductions for floating easements. These decisions do not support the Belks.[5]

Both cases involved donations of façade easements that granted the holder the right "to give its consent (e.g., to changes in a Façade) or to abandon some or all of its rights" under the easement. *Simmons* at 8. In both cases the government argued that this clause made the taxpayers ineligible for deductions. In both cases the courts ruled for the taxpayers, with the First Circuit in *Kaufman* following the D.C. Circuit's decision in *Simmons.*

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[5] Amici doubt that either *Simmons* or *Kaufman* was correctly decided, but the Court need not resolve that question to conclude that the decisions, neither of which represents binding precedent in this Circuit, do not provide apposite or persuasive authority in support of the Belks.

These cases do not support the Belks' floating easement theory for several reasons. First, neither case addressed whether a deduction could be taken for a floating easement, and neither addressed the qualified real property interest requirement or the regulations dealing with transfers and extinguishment that are so significant to the resolution of this case.

Second, the rulings in *Simmons* and *Kaufman* were based largely on factors totally unrelated to this case, including (1) a regulation applicable only to historic preservation easements that permits deductions if the easements require any future development to "conform with appropriate local, state, or Federal standards for construction or rehabilitation," Treas. Reg. § 1.170A-14(d)(5)(i), (2) the fact that the relevant local governments had established such standards, and (3) the fact that the easements specified that any work done on the subject historic structures had to comply with such standards, regardless of whether the holder consented. *See Comm'r v. Simmons*, 646 F.3d 6 (D.C. Cir. 2011). *See also Simmons v. Comm'r*, T.C. Memo 2009-208 at 2. On these special facts, the D.C. Circuit explained, "any change in the façade to which [the holder] might consent would have to comply with all applicable laws and regulations, including the District's historic preservation laws." 646 F.3d at 11. Thus, "the donated easements will prevent in perpetuity any changes to the properties inconsistent with conservation purposes." *Id*.

By contrast, the regulations applicable to easements other than historic preservation easements do not permit deductions if the easements require any future development to conform to appropriate local, state, or Federal standards. Outside of the historic preservation context, there is no backstop of local, state, or Federal standards to ensure that any changes to an easement will be consistent with the protection of the subject property's conservation values. Thus, the special legal rules at issue *Simmons* and *Kaufman* have no relevance to this case.

Finally, the decision in *Simmons* makes clear that the D.C. Circuit did not endorse the notion that conservation easements can be swapped. The court stated that "[Ms.] Simmons's deeds in particular make express [the land trust's] intention to ensure *her properties* 'remain essentially unchanged.'" 646 F.3d. at 10 (emphasis added). The court further explains that "any change in *the façade* to which [the land trust] might consent would have to comply with all applicable laws and regulations, including the District's historic preservation laws," and, thus, the terms of "the donated easements will prevent in perpetuity any changes to *the properties* inconsistent with conservation purposes." *Id.* at 11 (emphasis added). These statements indicate that the D.C. Circuit contemplated that the easements would prevent, in perpetuity, any changes to the particular properties encumbered by the easements that would be inconsistent with the easements' conservation purposes, and not that the easements could be lifted off those properties in the discretion of the parties and floated to some new buildings elsewhere.

The Tax Court has repeatedly and appropriately rejected invitations by taxpayers to interpret *Simmons* and *Kaufman* expansively. *See Mitchell v. Comm'r,* 138 T.C. No. 16 (2012) (distinguishing *Simmons*); *Mitchell v. Comm'r,* T.C. Memo 2013-204 (distinguishing *Kaufman*); *Carpenter v. Comm'r,* T.C. Memo 2013-172 (distinguishing *Kaufman*); *Belk v. Comm'r,* T.C. Memo 2013-154 (distinguishing *Simmons*). Simply put, the holdings in *Simmons* and *Kaufman* are fact-specific and cannot logically be applied to excuse failures to comply with statutory and regulatory requirements that were not analyzed in those cases.

III. Adoption of Taxpayer's Theory Would Foment the Abuse Congress Sought to Avoid by Requiring that Easements Permanently Restrict Development of Specific Properties.

Adoption of the Belks' position would lead to precisely the kind of waste of taxpayer dollars and anemic conservation benefits that Congress sought to avoid over thirty years ago when it mandated that tax-deductible conservation easements protect the conservation values of specific properties in perpetuity.

As discussed, Congress repudiated the idea of granting tax deductions for temporary conservation easements based on the concern that such an approach would undermine the goal of conservation and waste taxpayer dollars. The very evils Congress sought to avoid by closing the temporary-easement loophole would occur if this Court were to embrace taxpayers' floating easement theory. Under the Belks' position, any time an easement threatens to serve its intended purpose by actually constraining the development of land, the donor, with the concurrence of a willing land trust, could eliminate the constraint by shifting the easement to some other land not currently slated for development. If at some future time the relocated easement constricted some new development, that easement could be relocated to yet another property. And so on *ad infinitum*. The upshot would be that the tax benefit provided for the donated easement might ultimately serve no valuable conservation purpose by actually restricting development. While the Belks propose to place substitute restrictions on contiguous land they own, there is nothing in their theory that would require such a limitation.

To be sure, at all times a legal restriction would rest someplace on the landscape, providing *theoretical* protection of conservation values. But since the restrictions could be moved out of the way of proposed development at any time to suit the interests of the landowner, the tax subsidy would, in reality, provide little or no public benefit in exchange for the tax expenditure.

In addition, the conservation benefits associated with easements would be severely compromised if easement restrictions could be moved about the landscape. Under the terms of the Belks' easement, restrictions on the substitute property would supposedly have equivalent economic and conservation value to the easement restrictions being lifted. But this type of equivalence would inevitably be in the eyes of the beholder. There would be a serious risk that the substitute easement would have less public value than the original easement. While the original charitable donor might have an incentive to try to create a substitute easement of equivalent conservation and economic value, there is no reason to suppose subsequent owners would have the same proclivities and, in fact, the opposite would likely be true.

Moreover, transferability of easement restrictions as the Belks suggest would severely undermine the statutory and regulatory requirements governing the deduction, which are designed to ensure that only "unique or otherwise significant land areas or structures" receive conservation subsidies and that the conservation values of those properties are protected in perpetuity. To make an easement contribution eligible for a deduction, the taxpayer must, among many other things, prepare "baseline" documentation of the status of the property at the time of the donation to facilitate enforcement, *see* Treas. Reg. § 1.170A-14(g)(5)(i), obtain a subordination agreement from any lender holding a mortgage on the property to protect the easement from extinguishment in a foreclosure, *see* Treas. Reg. § 1.170A-14(g)(2), and comply with detailed conservation easement-specific valuation rules, see Treas. Reg. § 1.170A-14(h)(3). Under the floating easement theory, new restrictions imposed on new properties would be created in a vacuum in which none of these or any other statutory and regulatory requirements would apply. In addition, none of the indirect policing that occurs as part of the Internal Revenue Service's tax return review and audit process in connection with the original easement donations would apply. Congress could not have intended to make compliance with § 170(h)'s detailed statutory and regulatory requirements at the time of donation a pointless exercise by allowing compliant restrictions to be traded out for restrictions that are not subject to the same strict requirements the following day.

The Belks assert that the public interest is protected because the substitutions require the concurrence of the land trust. But Congress specifically did not grant the qualified organizations eligible to accept easement donations the power to engage in substitutions. Instead, Congress mandated that easements be granted in perpetuity with respect to specific properties and that the qualified organizations be, among other things (1) required to hold the easements exclusively for conservation purposes and (2) prohibited from transferring the easements except to other qualified organizations that also will hold them exclusively for conservation purposes. S. Rep. No. 96-1007, C.B. 599, at 606 (1980-82). Because of the significant potential for abuse in this partial interest donation context, Congress demanded far more protection of what has grown to be a multi-billion dollar federal taxpayer investment than the holders' status as qualified organizations.

IV. Adoption of Taxpayer's Position Would Transform the Traditional Understanding of Tax Deductible Perpetual Easements.

Adoption of the Belks' position would transform taxpayer-subsidized land conservation as it has long been practiced and understood in the United States. Landowners have donated thousands of conservation easements to ensure perpetual protection of specific lands that have special personal significance to them, their families, and their communities. The Nature Conservancy, the nation's largest land trust, explains:

> Often landowners have no intention of subdividing their properties for development. But a conservation easement is still attractive to them because it reaches beyond their own lifetimes to ensure the conservation purposes are met forever. An easement binds heirs and other future landowners to comply with the easement's terms…. It can give peace-of-mind to current landowners worried about the future of a beloved property, whether forest or ranch, stretch of river or family farm.

Conservation Easements, In Perpetuity, http://www.nature.org/about-us/private-lands-conservation/conservation-easements/all-about-conservation-easements.xml.

In a similar vein, the Jackson Hole Land Trust explains:

> Easements are donated or sold by the landowner to the land trust, which then has the authority and obligation to enforce the terms of the easement in perpetuity. When a parcel of land is placed under easement, the landowner still owns the property, which remains freely transferable, but the easement stays with the land forever.

Conserve Your Land, http://jhlandtrust.org/land-protection/conserve-your-land/.

And, on the other side of the country, the Vermont Land Trust explains:

> With each conservation success comes a deep and permanent responsibility: we have promised to look after, or steward, the conservation protections placed on this land forever.

Stewardship: A Perpetual Commitment to Conservation, http://www.vlt.org/land-stewardship.

Assurances of perpetual protection of specific parcels of land have served as a powerful incentive in the growth of the land conservation movement in the United States over the last several decades. Amici submit that the preservation of this traditional understanding of the nature of the perpetual conservation easement is essential to protect both the legitimate expectations of conservation easement donors and the substantial public investment in tax deductible easements.

The Belks argue that the Tax Court's interpretation of § 170(h)(2)(C) to preclude a deduction for floating easements is "novel, overbroad, and unsupported." (Belk Brief at 14). However, it is the Belks' interpretation that fits that description. It is not surprising that some landowners and even some land trusts may seek to take advantage of the federal subsidies for land conservation while avoiding the conditions attached to these subsidies to protect the public interest. The importance of this case lies in the fact that the Court's ruling will either arrest this destructive, ill-advised line of thinking, or greatly accelerate its adoption and implementation.

As conservation easements age and properties change hands, new owners will commonly find themselves in a situation of conflict with the holders of the easements. New owners of easement-encumbered land will often have a strong economic interest in seeking to free themselves of the constraints imposed by the easements. Under current law, a responsible land trust presented with a proposal to lift easement restrictions from one property in exchange for placing an easement on some other land has a ready answer: such a transfer is prohibited by § 170(h) and the governing regulations. But if this Court were to reverse the Tax Court's decision, even well-meaning land trusts would be subject to relentless pressure from landowners seeking to lift easement restrictions in exchange for the protection of ostensibly equivalent land in unsupervised and unregulated transactions. Both the cause of land conservation and the American taxpayer would end up the losers.

CONCLUSION

For the foregoing reasons, Amici urge the Court to affirm the Tax Court's well–reasoned decision.

Respectfully submitted this 20th day of June, 2014.

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FOR THE FOURTH CIRCUIT

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Dated: June 20, 2014

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I hereby certify that, on this 20th day of June, 2014, the foregoing brief was filed with the Clerk of the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. Counsel for parties were served by using the CM/ECF system on the same date.

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