No. 11-139

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

HOME CONCRETE & SUPPLY, LLC, ET AL. ,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

RICHARD M. LIPTON
RUSSELL YOUNG
BAKER & MCKENZIE LLP
One Prudential Plaza
1300 East Randolph Dr.
Suite 3500
Chicago, IL 60601
(312) 861-7590

CLIFFORD M. SLOAN
Counsel of Record
PAMELA F. OLSON
JULIA M. KAZAKS
ARMANDO GOMEZ
DAVID W. FOSTER
MELISSA R. MIDDLETON
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

Attorneys for Amicus Curiae

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BRIEF OF AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

American College of Tax Counsel (the "College") respectfully submits this brief as *amicus curiae* in support of respondents Home Concrete & Supply, LLC, et al.[1]

STATEMENT OF INTEREST

The College is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The purposes of the College are:

- To foster and recognize the excellence of its members and to elevate standards in the practice of the profession of tax law;
- To stimulate development of skills and knowledge through participation in continuing legal education programs and seminars;

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Petitioner and respondents have filed with the Clerk of the Court letters granting blanket consent to the filing of amicus briefs.

- To provide additional mechanisms for input by tax professionals in development of tax laws and policy; and
- To facilitate scholarly discussion and examination of tax policy issues.

The College is composed of approximately 700 Fellows chosen in recognition of their outstanding reputations and contributions in the field of tax law, and is governed by a Board of Regents consisting of one Regent from each federal judicial circuit, two Regents at large, the Officers of the College, and the last retiring Chair of the College.

This *amicus* brief is submitted by the College's Board of Regents and does not necessarily reflect the views of all members of the College, including those who are government employees.

The College submits this *amicus* brief because it is deeply troubled by the reliance of the taxing authorities in this case on a so-called retroactive "fighting regulation," which is a regulation issued to change the outcome of pending litigation in the government's favor. If the government is permitted to claim deference for such regulations, taxpayers will have little incentive to challenge wrongful government action because the government can overturn judicial decisions by issuing regulations while the decisions are awaiting rehearing or appellate review. Reliance on retroactive fighting regulations, and the claim that they should have retroactive effect and receive substantial deference, undermines the development of a tax system premised on predictability.

The College is aware that this case and several companion cases involve transactions that the government claims are "tax shelters." The College has repeatedly voiced its support for the government's efforts to curtail tax shelters. However, the need for powerful enforcement tools in the attack on tax shelters does not justify the issuance of retroactive fighting regulations, which are inconsistent with the highest traditions of the rule of law.

SUMMARY OF ARGUMENT

In *Mayo Foundation for Medical Education & Research* v. *United States*, 131 S. Ct. 704 (2011), this Court resolved a longstanding dispute between taxpayers and the government when it held that Treasury regulations, like regulations issued by other administrative agencies, should be evaluated under the framework set forth in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The authority that the government claims in this case, however, goes far beyond that which this Court approved in *Mayo*. This case does not involve a straightforward question of deference to a statutory interpretation with prospective effect; instead, it involves a claim of deference for a regulation issued with retroactive effect to revive claims that were barred by the statute of limitations. Previously, this Court's decision in *Colony Inc.* v. *Commissioner*, 357 U.S. 28 (1958), had been interpreted to apply a three-year statute of limitations to overstatements of basis. After several IRS assessments due to alleged basis overstatements were rejected by courts as untimely, Treasury sought to have those decisions overturned on rehearing or on appeal by issuing a regulation that attempts to subject basis overstatements to a six-year statute of limitations. Moreover, Treasury is attempting to apply the new regulation, Treasury Regulation section 301.6501(e)-1(a)(1)(iii) (the "basis regulation"), with retroactive effect: Taxable years with respect to which the three-year statute had run before issuance of the regulation now would be reopened.

Retroactive "fighting" regulations like the basis regulation have two primary characteristics. First, they are issued by Treasury and the IRS to affect a "fight" with taxpayers, *i.e.*, to control the outcome of pending litigation. Second, the Treasury and the IRS claim that these regulations should have retroactive effect, *i.e.*, that they should change the tax consequences of closed transactions. Fighting regulations with retroactive effect should not be granted *Chevron* deference.

The retroactive fighting regulation in this case is especially problematic because it operates to revive claims that are otherwise barred under the applicable statute of limitations. Congress has made clear in section 7805(b) [2] that Treasury lacks authority to issue retroactive regulations except in limited circumstances that the government does not contend are present here. Moreover, the retroactive effect of the regulation also renders it impermissible

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[2] Unless otherwise indicated, section references are to the Internal Revenue Code of 1986 (26 U.S.C. §§ 1 et seq. (the "Code")), as amended.

under *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). Accordingly, it is not entitled to deference under *Chevron*.

This Court's jurisprudence should not be read to permit the government to circumvent section 7805(b) and to claim *Chevron*'s substantial deference for regulations issued to bootstrap the IRS's litigating position and reverse judicial decisions in which the IRS has been on the losing end. The Court's historic distrust of retroactive lawmaking should foreclose any reliance on retroactive fighting regulations, at least in the tax enforcement context. Permitting the government to resort to retroactive fighting regulations would have negative effects on the tax system. Fair and efficient tax administration requires that taxpayers be entitled to rely on the law, including Treasury regulations, as it exists at the time that they engage in transactions or file their returns.

ARGUMENT

I. The Basis Regulation Operates Retroactively.

In the preamble to the final basis regulation, Treasury stated that "these regulations are not retroactive."[3] Pet. App. 62a (T.D. 9511, 2011-6 I.R.B. 455, 456). Adhering to Treasury's preamble statement, the United States asserts in its opening brief that the basis regulation does not operate in a retroactive manner because it is simply a

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[3] References to the Commissioner and the IRS include Treasury, where applicable.

restatement or clarification of existing law. (Brief for the United States ("CBr.") at 40-41.) The government's position lacks merit.

A simple example demonstrates that the regulation operates retroactively: A partnership and a partner filed the partnership and individual partner returns for the calendar year 2003 on April 15, 2004, and the IRS believes that the partner understated his gross income by more than 25% as a result of the partnership overstating its unrecovered cost or other basis. Prior to 2005, and at the time the taxpayer filed the return, the government had long considered *Colony Inc.* v. *Commissioner*, 357 U.S. 28 (1958), to be the governing law regarding section 6501. See IRS Non Docketed Service Advice Review ("NSAR") 11419, 2000 WL 34423427 (July 10, 2000) ("It has long been held that the extended statute of limitations provided in the case of a 25% omission is limited to when specific receipts or accruals are left out of the computation of gross income."); General Counsel Memorandum ("GCM") 36856 (Sept. 21, 1976) (*Colony* is "[t]he landmark case" interpreting section 6501(e), which the Court found to be "unambiguous").[4] The partner in the example would have expected the partnership to receive a Final Partnership Administrative

[4] Although neither NSARs nor GCMs are precedential under section 6110, this Court recently cited an NSAR as authority regarding the Commissioner's position in *Boulware* v. *United States*, 552 U.S. 421, 431 (2008); GCMs, moreover, "may be relevant . . . as indicating the IRS interpretation of its own regulations and procedures." *Vons Cos.* v. *United States*, 51 Fed. Cl. 1, 12 (2001).

Adjustment ("FPAA") within three years if the accuracy of the partnership return was contested (thereby giving him notice that items on his individual return may also be contested).[5] Thus, by April 16, 2007, if the IRS had not disputed the accuracy of the partnership return and issued an FPAA before that date, the partners could consider the partnership issues closed for 2003. See *United States* v. *Zacks*, 375 U.S. 59, 60 (1963) (explaining that the three year statute of limitations for filing refund claims "expired" three years after the taxpayers filed their returns; subsequent retroactive statutory change in the substantive law at issue could not revive taxpayer's time-barred claim for a refund). Under Treasury Regulation section 301.6501(e)-1, however, which became effective on September 24, 2009, the IRS would have had until January 1, 2010 to contest the partnership return. Thus, the regulation operates retroactively by permitting the IRS to reopen taxable years that were closed under the law that existed prior to the issuance of the regulation.

Here, the FPAA issued by the IRS in September 2006 was untimely under the law that existed when the taxpayers filed their returns in April 2000, when the three-year statute of limitations expired, and when the FPAA was issued. The new regulation, however, seeks to render timely the FPAA that was issued nearly six years after the return was filed based on a regulation that was not announced until

[5] The timely issuance of an FPAA suspends the running of the applicable assessment period for any individual partner. See 26 U.S.C. § 6229(d).

September 2009. This Court should not ignore the obvious fact that the regulation, "once effective, alter[s] the law applied in the past," *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 217 (1988) (Scalia, J., concurring), merely because the Secretary has labeled the regulation as non-retroactive and provided it a then-current effective date.[6]

II. Congress Has Generally Prohibited Treasury From Issuing Retroactive Regulations.

A. *Section 7805(b) Generally Forbids Retroactive Regulations.*

In determining whether the regulation can be applied to reopen taxable years for which the statute of limitations has expired, the "threshold question is whether the [Internal Revenue Code] authorizes retroactive rulemaking." *Bowen*, 488 U.S. at 208. In addition to its erroneous argument that "[t]he regulation is not retroactive in the relevant sense" (CBr. 40), the government maintains that the "Treasury Department has express statutory authority to promulgate retroactive rules" (CBr. 42). In support of this argument, the government invokes

[6] There is impermissible retroactivity at issue here because the regulation "alter[s] the *past* legal consequences of past actions." *Bowen*, 488 U.S. at 219 (Scalia, J. concurring). This is not a situation where the regulation creates mere "'secondary' retroactivity," *i.e.*, where it is has "exclusively future effect" that "*affect[s]* past transactions," for example by "rendering the previously established [transactions] less desirable in the future." *Id.* at 219-220.

section 7805(b)(8) as the "relevant statute," but its argument rests on a misquotation of that provision.

Prior to July 1996, section 7805(b) stated that "[t]he Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect." 26 U.S.C. § 7805(b) (1994). The statutory language at that time, which granted the Secretary authority to issue regulations without retroactive effect, thus reflected an understanding that Treasury regulations generally could be applied retroactively. However, as part of the "Taxpayer Bill of Rights 2" in 1996, Congress amended the language of section 7805(b) to reflect its view that "it is generally inappropriate for Treasury to issue retroactive regulations." H. Rep. No. 506, 104th Cong., 2d Sess., 44 (1996).

Accordingly, the current version of the statute provides that:

> Except as otherwise provided in this subsection, no temporary, proposed, or final regulation relating to the internal revenue laws shall apply to any taxable period ending before the earliest of the following dates:
>
> (A) The date on which such regulation is filed with the Federal Register [;]
>
> (B) In the case of any final regulation, the date on which any proposed or temporary regulation to which such final regulation relates was filed with the Federal Register [;]

> (C) The date on which any notice substantially describing the expected contents of any temporary, proposed, or final regulation is issued to the public.

26 U.S.C. § 7805(b)(1)(A)-(C).

The statute then lists seven exceptions to its general prohibition on retroactive regulations. See 26 U.S.C. § 7805(b)(2)-(8). Without quoting the general prohibition on retroactive regulations in section 7805(b)(1), the government argues that one of these exceptions recognizes its authority to issue retroactive regulations such as the one at issue here: "The relevant statute, 26 U.S.C. 7805(b)(8), authorizes the Treasury Department to 'prescribe the extent, if any, to which any * * * regulation relating to the internal revenue laws shall be applied without retroactive effect.'" (CBr. 42.) But the government's use of the ellipsis deletes important statutory language.[7] The full text of section 7805(b)(8) actually provides: "The Secretary may prescribe the extent, if any, to which any ruling (including any judicial decision or any administrative determination other than by regulation) relating to the internal revenue laws shall be applied without retroactive effect." 26 U.S.C. § 7805(b)(8). The part of this provision the government submerges in ellipsis is crucial to its meaning.

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[7] The government's quotation also fails to indicate the deletion of the closing parenthesis between "regulation" and "relating."

The full text shows that section 7805(b)(8) explicitly does not apply to *regulations*, much less recognize Treasury's authority to issue them retroactively. Instead, section 7805(b)(8) provides an explanation for how the new presumption against retroactivity applies to *rulings* (and notably is entitled "Application to Rulings"). See *Schuman Aviation Co.* v. *United States*, Civ. No. 08-289, 2011 U.S. Dist. LEXIS 100142 (D. Haw. Oct. 31, 2011) (finding that section "7805(b)(8) by its plain language, merely gives the IRS discretion to waive retroactive application of its rulings"). Section 7805(b)(8) specifically says that it applies to rulings, including administrative decisions "other than by regulation."[8]

Unlike the statute in *Bowen*, which authorized on its face some form of retroactive action by the agency, *Bowen*, 488 U.S. at 209, the government has not identified any provision in section 7805(b) or elsewhere in the Code that authorizes the government to issue the retroactive regulation at issue in this case. Instead, the government is faced with express language of Congress prohibiting this very type of regulation.

[8] *Automobile Club of Michigan* v. *Commissioner*, 353 U.S. 180 (1957), which the Commissioner also cites, was decided in 1957 and interpreted the pre-Taxpayer Bill of Rights 2 section 7805(b)—not current section 7805(b)(8), which does not apply to regulations. Thus, that case is not relevant to the interpretation of current section 7805(b)(8) as the government suggests.

B. *The Current Version of Section 7805(b) Applies in This Case.*

The position the government takes in its brief with respect to section 7805(b) is inconsistent with the position that Treasury took in promulgating the basis regulation. The government now admits that the current version of section 7805(b) is the "relevant statute," (CBr. at 42), for determining whether Treasury has the authority to promulgate retroactive regulations. But in the next paragraph of its brief, the government observes that Treasury rejected that position in adopting the basis regulation (*Id*. at 43 (quoting Pet. App. 62a-63a)). Instead, Treasury concluded in the preamble to the final basis regulation that, fifteen years after its enactment, the current version of section 7805(b) had yet to take effect with respect to regulations promulgated under section 6501(e) because section 6501 was first enacted before the Taxpayer Bill of Rights 2. See Pet. App. 62a-63a (T.D. 9511, 2011-6 I.R.B. 455, 456).

The government does not address the inconsistency between its current litigating position and its prior interpretation. Well-established principles of administrative law prohibit the government from taking new positions in litigation to justify administrative action that rested on a different position. See *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 168-169 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action; [*SEC v.*] *Chenery* [*Corp.*, 332 U. S. 194 (1947),] requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself.”).

The effective date of the current version of section 7805(b) is set forth in section 1101(a) of The Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1101(a), 110 Stat. 1452, 1469 (1996) and is entitled “Relief from Retroactive Application of Treasury Department Regulations.” *Id.* at 1468. The effective date provision, which was not codified in the Code, states that the amendment “shall apply with respect to regulations which relate to statutory provisions enacted on or after the date of the enactment of this Act,” (July 30, 1996). *Id.* at 1469.

The interpretive question is whether the phrase “enacted on or after the date of the enactment of this Act” should be read to modify “regulations” or “statutory provisions.” The correct reading of this language is that the amendment applies to regulations that both (1) relate to statutory provisions and (2) were enacted on or after the Taxpayer Bill of Rights 2. The first requirement serves to make clear that the new general prohibition on retroactive regulations relates only to regulations that interpret the internal revenue laws and does not apply to regulations that pertain to internal Treasury Department policies, practices, and procedures. [9] The second requirement

[9] Similar language in other parts of section 7805 makes clear that Congress was aware that not all Treasury regulations interpret or relate to “Internal Revenue laws.” See section 7805(b)(1) (“no temporary, proposed, or final regulation *relating to the internal revenue laws* shall apply to any taxable period ending

(cont’d)

immediately implements Congress's judgment that retroactive regulations were improper for all regulations enacted after the Taxpayer Bill of Rights 2 went into effect.[10]

By contrast, Treasury's interpretation makes little sense in the context of the statute. Most of the sections of the Internal Revenue Code are longstanding and thus were enacted prior to July 30, 1996. Treasury's interpretation of section

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before the earliest of the following dates . . . ." (emphasis added)); section 7805(b)(5) ("The limitation in paragraph (1) shall not apply to any regulation relating to internal Treasury Department policies, practices, or procedures.").

[10] The law is clear that the word "enacted" is not limited to congressional action, and Courts and the IRS consider regulations to be "enacted." See I.R.M. 1.15.2.4 ("[s]pecific laws and regulations were enacted"); see also *Burks* v. *United States*, 633 F.3d 347, 350 & 360 n.9 (5th Cir. 2011) (referring to "recently enacted Treasury Regulations" and finding the government's allowance "for notice and comment after the final Regulations were enacted [was] not an acceptable substitute for prepromulgation notice and comment."), *petition for cert. pending*, 80 BNA U.S.L.W. 3090 (Aug 11, 2011) (No. 11-178); *Transpac Drilling Venture 1982-12* v. *Commissioner*, 147 F.3d 221, 225-226 (2d Cir. 1998) (citations omitted) ("[Respondent's argument] seeks to ground itself on Temporary Treasury Regulation § 301.6231(c)-5T ("Criminal Investigations Regulation"), which was enacted pursuant to TEFRA . . . ."); see also S. Rep. No. 169, 98th Cong., 2d Sess., 247 (1984) (referring to "Treasury regulations enacted following the Tax Reform Act of 1969").

7805(b)(1)'s effective date is that the new prohibition on retroactive regulations would apply only to the few sections that were enacted for the first time (not amended) after July 30, 1996. As discussed below, this interpretation of the effective date provision is contrary to the language of section 7805(b)(1), the purpose of the statute, the legislative history, at least four court cases, and the government's own arguments in other cases.

Had Congress meant to limit its retraction of the government's power such that section 7805(b)(1) would apply to almost no regulations, "this intent would have been made explicit," *Bowen*, 488 U.S. at 210, and not buried in an unclear effective date provision that could be read to undermine the entire amendment to the statute. The correct interpretation of the effective date provision is one that is consistent with Congress's stated intent to grant general "Relief from Retroactive Application of Treasury Department Regulations," The Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1101, 110 Stat. 1452, 1468 (1996), because "it is generally inappropriate for Treasury to issue retroactive regulations," H. Rep. No. 506, 104th Cong., 2d Sess., 44 (1996).

The legislative history indicates Congress's intent to issue a blanket prohibition against the issuance of retroactive regulations that relate to the internal revenue laws; Congress did not express an intention to narrow the scope of section 7805(b) such that it would apply only to regulations that deal with entirely new statutory provisions and not the bulk of the existing Internal Revenue Code. Instead, Congress intended to remove the government's "stifling, awesome power . . . once and for all." 138 Cong. Rec. S15356 (daily ed. Sept. 26, 1992).[11]

Treasury's interpretation of the effective date is inconsistent with the government's position in two other cases. In *Murfam Farms* v. *United States*, 88 Fed. Cl. 516 (2009), the Court of Federal Claims applied the current version of section 7805(b) to a regulation that related to section 752, even though section 752 was originally enacted in 1954. Nowhere in the opinion was there a discussion of the purported narrow application of the effective date provision of section 7805(b). Instead, the current version of section 7805(b) was presumed to apply because the regulation at issue was issued after July 30, 1996. See *Murfam Farms*, 88 Fed. Cl. at 522-523. Notably, the government argued that the current version of section 7805(b) applied to the Code provision enacted in 1954, asserting that the

[11] Several bills prohibiting retroactive regulations passed Congress between 1988 and 1996, but were vetoed by the President on other grounds. The purposes of those bills, which carried over to the Taxpayer Bill of Rights 2 enacted in 1996, demonstrate Congress's intent to limit the Commissioner's ability to "change midstream the rules imposed on the American taxpayer," protecting against the Commissioner's "unfettered discretion" to apply the regulations retroactively, and preventing unfair "abuse of the use of promulgating and implementing retroactive regulations." 138 Cong. Rec. S15356 (daily ed. Sept. 26, 1992); see also Benjamin J. Cohen & Catherine A. Harrington, *Is the Internal Revenue Service Bound by Its Own Regulations and Rulings?*, 51 Tax Law. 675, 698-699 (1998) (describing legislative history of Taxpayer Bill of Rights 2).

"prevention of abuse" exception to the prohibition on retroactivity set forth in section 7805(b)(3) applied, but the Court held that the exception did not apply. *Id.* at 526-527.

In *Stobie Creek Investments LLC* v. *United States*, 82 Fed. Cl. 636, 668 (2008), *aff'd on other grounds*, 608 F.3d 1366 (Fed. Cir. 2010), the Court of Federal Claims also applied the current version of section 7805(b) to regulations that relate to section 752, even though section 752 was originally enacted in 1954. As in *Murfam*, the government argued that retroactive application of its regulations was permitted by the current version of section 7805(b)(3), but the Court held that exception did not apply. *Id.* at 668-670.

Other Courts also have applied the new version of section 7805(b) to regulations relating to statutory provisions that were enacted before July 1996. See *Cemco Investors, LLC* v. *United States*, 515 F.3d 749 (7th Cir. 2008) (applying current version of section 7805(b) to regulations relating to section 752, which was enacted prior to July 1996); *Sala* v. *United States*, 552 F. Supp. 2d 1167, 1197-1198 (D. Colo. 2008) (same), *rev'd on other grounds*, 613 F.3d 1249 (10th Cir. 2010) (no discussion of section 7805(b)); *Kandi* v. *United State*s, No. C05-0840C, 2006 WL 83463 (W.D. Wash. Jan. 11, 2006) (applying current version of section 7805(b) to proposed regulations relating to section 7701, which was enacted prior to July 1996), *aff'd in unpublished decision*, 295 F. App'x 873 (9th Cir. 2008); but see *Salman Ranch Ltd.* v. *Commissioner*, 647 F.3d 929, 943 n.15 (10th Cir. 2011), *petition for cert. pending*, 80 BNA U.S.L.W. 3322 (Nov. 7, 2011) (No. 11-583); *Grapevine*

Imports, Ltd. v. *United States*, 636 F.3d 1368, 1381 n.6 (Fed. Cir. 2011), *petition for cert. pending*, 80 BNA U.S.L.W. 3090 (Aug. 5, 2011) (No. 11-163).[12]

At the very least, the effective date provision should be read to apply the current version of section 7805(b) to regulations that relate to statutory provisions that have been enacted, amended, or modified after July 30, 1996. Congress has enacted thirteen statutory provisions relating to section 6501 since 1996, at least one of which relates to section 6501(e)(1). See, *e.g.*, American Jobs Creation Act of 2004, Pub. L. No. 108-357, §§ 413(c)(28), 814(a), 118 Stat. 1418, 1509, 1581. Therefore, because section 6501 has been amended since July 30, 1996, the regulation at issue cannot operate retroactively under section 7805(b)(1).

III. The Basis Regulation Is Impermissibly Retroactive Under *Landgraf* v. *USI Film Products.*

Even if this Court were to conclude that Treasury retains some authority to issue retroactive regulations, the basis regulation nevertheless is impermissibly retroactive under this Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). In *Landgraf*, this Court reaffirmed that "the presumption against retroactive legislation is deeply rooted in our jurisprudence." *Id.* at 265. In reaffirming this longstanding presumption, this

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[12] In both *Salman* and *Grapevine*, however, the taxpayers did not contest the application of the older version of section 7805(b) and the courts addressed the effective date provision in footnotes only.

Court stated that the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Id.* (citation omitted); see also *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 532 (1998) (plurality op.) ("Retroactivity is generally disfavored in the law . . . ."); *id.* at 547 (Kennedy, J., concurring in the judgment and dissenting in part) ("[F]or centuries our law has harbored a singular distrust of retroactive statutes.").

Landgraf established a two-step test for judging applicability of a statute enacted after the events in the suit:

> [T]he court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 280.

Under *Landgraf's* first step, there is no express congressional command because, after *Colony*, Congress never addressed extending the statute of limitations for basis overstatements from three years to six years. The general presumption against retroactivity thus applies to the basis regulation.

With respect to *Landgraf's* second step—"whether the new [regulation] would have retroactive effect," 511 U.S. at 280—the regulation at issue here undeniably does: It purports to change the law governing returns filed a decade ago, thereby depriving taxpayers of an affirmative defense they possessed when they filed their returns and "increase[ing] [the taxpayer's] liability for past conduct"—an increase they would not have faced under pre-regulation law. *In re Enter. Mortg. Acceptance Co., LLC Sec. Litig.*, 391 F.3d 401, 409-410 (2d Cir. 2004) (quoting *Landgraf*, 511 U.S. at 280). This is impermissible "absent clear congressional intent favoring such a result." *Landgraf*, 511 U.S. at 280; see also *Hughes Aircraft Co.* v. *United States*, 520 U.S. 939, 950 (1997) ("extending a statute of limitations after the pre-existing period of limitations has expired impermissibly revives a moribund cause of action"); *Enter. Mortg.*, 391 F.3d at 407 ("a statute of limitations may not be applied retroactively to revive a claim that would otherwise be stale under the old scheme" (quoting *Chenault* v. *U.S. Postal Serv.*, 37 F.3d 535, 538 (9th Cir. 1994)); *id.* at 410 ("In our view, the resurrection of previously time barred claims has an impermissible retroactive effect."); see also *Stogner* v. *California*, 539 U.S. 607, 632 (2003) (recognizing that California's extension of the statute of limitations for sex-related child abuse, where the prior limitations period had already expired, "retroactively [withdrew] a complete defense to prosecution after it ha[d] already attached" and thereby violated the Ex Post Facto Clause).

The government erroneously argues that the "regulation is not retroactive in the relevant sense" (CBr. at 40), and in defense of that position, the government argues that the regulation is procedural and "does not bear on the legality of the petitioners' conduct" (CBr. at 41). But this observation about the regulation does not cure its impermissibly retroactive effect, and it is in any event unsupported by the authority the government cites. The government quotes *Lindh* v. *Murphy*, 521 U.S. 320, 341 (1997) (CBr. at 42), in support of its argument, but it does not note that the language it quotes comes from Chief Justice Rehnquist's dissenting opinion, not from the Court's opinion. Moreover, this Court has cited its majority decision in *Lindh* as evidence of its painstaking effort "to dispel the 'suggestion that concerns about retroactivity have no application to procedural rules.'" *Martin* v. *Hadix*, 527 U.S. 343, 359 (1999) (citing *Landgraf*, 511 U.S. at 275; *Lindh*, 521 U.S. at 327-328) (alteration omitted). Thus, *Lindh* simply does not stand for the proposition for which the government cites it.

"When determining whether a new statute operates retroactively, it is not enough to attach a label (*e.g.*, 'procedural,' 'collateral') to the statute; [a court] must ask whether the statute operates retroactively." *Martin*, 527 U.S. at 359. Statutes of limitations "protect interests in reliance and repose," *Am. Trucking Ass'ns* v. *Smith*, 496 U.S. 167, 214 (1990), guard "against stale demands," *Bell* v. *Morrison*, 26 U.S. (1 Pet.) 351, 360 (1828), and limit the circumstances in which a reviewing court can grant relief, *In re Enter. Mortg. Acceptance Co., LLC Sec. Litig.*, 391 F.3d 401, 409 (2d Cir. 2004). "Because, in different contexts, a statute of limitations may fairly be described as either procedural or substantive," *id.*, this Court should decline the government's invitation to designate all statutes of limitations "procedural" and thereby sanction a revision to a statute of limitations that operates retroactively to re-open taxable years that previously were closed under existing law.[13]

[13] "[S]tatutes of limitations . . . are rationally capable of classification as either procedural or substantive." *Enter. Mortg.*, 391 F.3d at 409 n.6 (alteration in original) (quoting Fleming James, Jr., Geoffrey C. Hazard, Jr. & John Leubsdorf, *Civil Procedure* § 2.37, at 130-31 (4th ed. 1992)); *see also Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 722-29 (1988) (holding that statutes of limitations were properly treated as "procedural" for choice-of-law purposes in context of Full Faith and Credit Clause while noting that *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945), treated statutes of limitations as "substantive" for *Erie* doctrine purposes); *Wortman*, 486 U.S. at 727 ("[T]he words 'substantive' and 'procedural' themselves . . . do not have a precise content, even (indeed especially) as their usage has evolved.").

IV. The Government's Interpretation of the Effective Date of the Regulation Is Not Entitled to *Chevron* Deference.

The government candidly concedes that it enacted the regulation in this case to "reverse [the] judicial decisions" in which the government was the losing party. (CBr. 40.) It also asserts that, despite this litigation-strategy posture, *Chevron* deference should be given to the regulation in this case (and others pending) in which the three-year statute of limitations expired before issuance of the FPAA. This Court should not permit the government to claim deference for a regulation issued with retroactive effect to overturn its litigation losses in pending cases.

This Court has held that "[d]eference to what appears to be nothing more than an agency's convenient litigating position" is "entirely inappropriate." *Bowen*, 488 U.S. at 213; see also *Burks*, 633 F.3d at 360 n.9 (finding that even if the statute were not unambiguous, it is "unclear whether the Regulations would be entitled to *Chevron* deference under *Mayo*" because "in *Mayo* the Supreme Court was not faced with a situation where, during the pendency of the suit, the treasury promulgated determinative, retroactive regulations following prior adverse judicial decisions on the identical legal issue"); *Chock Full O' Nuts Corp*. v. *United States*, 453 F.2d 300, 303 (2d Cir. 1971) ("[T]he Commissioner may not take advantage of his power to promulgate retroactive regulations during the course of a litigation for the purpose of providing himself with a defense based on the presumption of validity accorded to such regulations.").

There are strong reasons for this Court to reject Treasury's attempt to bootstrap the IRS litigating position through regulations. As an initial matter, permitting the government to overturn its litigation losses in pending cases by issuing retroactive regulations discourages taxpayers from bringing meritorious challenges to unlawful IRS or Treasury action. There is little reason to challenge the government if it can simply rewrite the rules retroactively when it is losing. Moreover, deference in these circumstances discourages the IRS from devoting resources to conducting efficient, timely audits, and it instead encourages the IRS to rely on retroactive regulations to remedy its tax administration failures. Finally, when Treasury and the IRS adopt retroactive fighting regulations, there is reason to believe that the regulations are prompted by the government's distaste for losing as much as by its expert administrative judgment that the law should be clarified or altered. For these reasons, *Chevron* deference is not appropriate for retroactive fighting regulations.

To defeat application of *Landgraf*, *Bowen*, and current section 7805(b)(1), the government relies on this Court's decisions in *Mayo Foundation for Medical Education & Research* v. *United States*, 131 S. Ct. 704 (2011) and *United States* v. *Morton*, 467 U.S. 822 (1984). As explained below, those cases do not grant the government the authority that it claims.

A. Mayo *Did Not Involve a Retroactive Regulation.*

In *Mayo*, this Court stated that it is "immaterial to [its] analysis that a 'regulation was prompted by litigation.'" *Mayo*, 131 S. Ct. 704, 712 (2011) (citation omitted). In so stating, this Court was not faced with a regulation that operated to undo a multitude of cases that had already been litigated at both the trial and appellate levels because the regulation at issue in *Mayo* notably *did not* operate retroactively. Because the regulation at issue in *Mayo* was not retroactive, this Court's decision to defer to the regulation did not operate to reverse the outcome of *United States* v. *Mayo Foundation for Medical Education and Research*, 282 F. Supp. 2d 997 (D. Minn. 2003), which prompted the government to issue the regulation in 2004 after it lost that case in 2003. The regulation at issue here goes beyond what this Court addressed in *Mayo*—this regulation was not just "prompted" by litigation, it was issued with the stated purpose of *reversing* judicial decisions, and not just in the sense of changing the outcome of future cases by setting favorable precedent, but with the stated purpose of reversing decisions in which the government was the losing party. *Mayo* thus did not present this Court with an opportunity to consider the interaction between its prior decisions disfavoring retroactive lawmaking, see, *e.g.*, *Landgraf* and *Bowen*, and its decision in *Chevron* (in addition to addressing the change in law of section 7805(b)).

Unlike here, in *Mayo*, the government lost a decision in 2003 and amended the regulation to change the law on a *prospective basis only*, leaving undisturbed the result reached by the district court in 2003 for the 1994-1996 tax years. The government did not try to "reverse" a court decision that it lost. The government's actions in *Mayo* are consistent with the prohibition on retroactive regulations found in section 7805(b)(1).[14]

In *Mayo*, this Court noted that it has in the past invited the Treasury Department to amend its regulations if it is "troubled by the consequences of [the Court's] resolution of the case." *Mayo*, 131 S. Ct. at 712-713 (citing *United Dominion Industries, Inc.* v. *United States*, 532 U.S. 822, 838 (2001)). Notably, the Court in *Dominion Industries* did not invite the Treasury Department to reverse the Court's very decision by issuing a retroactive regulation *to undo that decision*—instead, this Court's invitation can properly be viewed as an invitation to change the law on a prospective basis. Limiting Treasury's power to change the law on a prospective basis except in limited circumstances is

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[14] This Court's decision in *Smiley* v. *Citibank (South Dakota), N.A*, 517 U.S. 735 (1996), also addressed regulations that were prompted by litigation. However, the banking regulation at issue in *Smiley* was not retroactive, did not change the outcome of the litigation that prompted it, and was not issued by a party to that litigation (The Comptroller of the Currency was *amicus curiae* in the litigation prompting the subsequent issuance of the regulation). Both the majority opinion and the concurrence in *Bowen* suggest that, if the regulation in *Smiley* had the characteristics of the regulation at issue here, this Court might have reached a different result regarding the deference point.

proper because "agencies are not a law unto themselves. No less than any other organ of government, they operate in a system in which the last words in law belong to Congress and the Supreme Court." *Home Concrete & Supply, LLC* v. *United States*, 634 F.3d 249, 259 (4th Cir. 2011) (Wilkinson, J., concurring).

B. Morton *Involved a Newly-Enacted Statute that Specifically Authorized the Challenged Regulation.*

In *Morton*, this Court stated in a footnote that the regulation was permissible even if it was issued in response to litigation because Congress had specifically authorized the agency to issue regulations to interpret the newly enacted statute to which the regulation related. *Morton*, 467 U.S. at 836 n.21. That is not the case here. Section 6501 is not newly enacted and does not contain a specific grant of authority for Treasury to issue regulations relating to that section. The regulation at issue here was issued pursuant to Treasury's general regulatory authority under section 7805(a). More importantly, unlike in *Morton* where Congress sought to have administrative problems of the type at issue in that litigation addressed by the agency through regulations, Congress has *expressly prohibited* Treasury from issuing retroactive regulations such as the ones at issue here.

If section 6501 were a newly enacted statute as was the case in *Morton*, then Treasury would have been authorized to issue retroactive regulations dating back to the date of enactment of the statute pursuant to section 7805(b)(2)—the exception for "promptly issued regulations." That exception does not apply here, however, because Treasury was not completing "the task which Congress ha[d] assigned it." *Morton*, 467 U.S. at 836 n.21.

Treasury lacks authority to issue retroactive regulations given the express language in section 7805(b)(1) and the clear legislative history further evidencing Congress's intent to ban this practice once and for all. As a result, its regulation is not entitled to deference.

V. Retroactivity Has an Adverse Effect on the Tax System.

The College supports the IRS' efforts to challenge "tax shelter" transactions that have the effect of reducing tax liability in a manner unintended by Congress. The College recognizes that taxpayers' success in avoiding their tax liabilities can have a corrosive effect on the tax system. The College further recognizes that the government promulgated the basis regulation as part of its effort to curtail what it views as inappropriate tax avoidance. That said, ends do not always justify means. While the College believes it is critical for the proper functioning of the tax system that the IRS prevent inappropriate tax avoidance, it also believes that the issuance of retroactive fighting regulations to change the outcome of pending litigation is inherently unfair, is inconsistent with the highest traditions of the rule of law, and will undermine support for the tax system.

The prohibition against retroactive regulations is derived from the sound tax policy that taxpayers are entitled to rely on the law, including Treasury regulations, as it exists at the time they engage in transactions or file their tax returns. Looking in particular at the policy of the statute of limitations, Congress decided that it was not in the best interests of the tax system to have tax cases begun more than three years after returns are filed, with all of the attendant issues relating to recordkeeping and reconstruction of transactions, subject only to an exception if the taxpayer's return omits substantial gross income and therefore justifies an extension of the otherwise applicable statute of limitations. The statute of limitations also has the beneficial effect of encouraging the IRS to conduct timely, efficient audits of taxpayers' returns.

In promulgating retroactive regulations to support ongoing litigation, the government sends the wrong message to the taxpaying public. In order for a self-reporting tax system such as ours to function properly, taxpayers must have confidence in the fairness and efficiency of the system and its administration. Fair and efficient tax administration, in turn, requires that taxpayers be able to rely on the law as it exists at the time that they engage in transactions and file their tax returns. Statutes of limitations are an important aspect of tax administration, and all taxpayers should be allowed to rely on them, regardless of one's view of the propriety of the result occasioned by the expiration of the limitations period.[15]

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[15] Although the subject of this case is the retroactive application of the basis regulation to a transaction that the IRS contends is a "tax shelter," the government

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As a general matter, the College long has supported the government's effort to combat "tax shelters" and otherwise curtail inappropriate tax avoidance. But as laudable as the government's goal may be, the important principles of fairness and predictability underlying the strong public policy against retroactivity prevent the government from using retroactive fighting regulations to administer the tax system.

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acknowledges that the basis regulation applies to situations that do not involve tax shelters. Pet. for Cert. Reply Brief at 4.

CONCLUSION

For the foregoing reasons, this Court should not accord deference to the basis regulation, Treas. Reg. section 301.6501(e)-1(a)(1)(iii).

Respectfully submitted,

RICHARD M. LIPTON
RUSSELL YOUNG
BAKER & MCKENZIE LLP
One Prudential Plaza
1300 East Randolph Dr.
Suite 3500
Chicago, IL 60601
(312) 861-7590

CLIFFORD M. SLOAN
Counsel of Record
PAMELA F. OLSON
JULIA M. KAZAKS
ARMANDO GOMEZ
DAVID W. FOSTER
MELISSA R. MIDDLETON
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

Attorneys for Amicus Curiae

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