No. 20-2117

United States Court of Appeals

for the

Sixth Circuit

OAKBROOK LAND HOLDINGS, LLC, WILLIAM DUANE HORTON, TAX MATTERS PARTNER,

Petitioner/Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent/Appellee.

APPEAL FROM THE UNITED STATES TAX COURT

Docket No. 5444-13

(Hon. Mark V. Holmes)

APPELLANT'S PETITION FOR REHEARING *EN BANC*

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 20-2117 Case Name: Oakbrook Land et al v. CIR

Name of counsel: Michelle Abroms Levin

Pursuant to 6th Cir. R. 26.1, Oakbrook Land Holdings, LLC and William Duane Horton
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

N/A

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

N/A

CERTIFICATE OF SERVICE

I certify that on June 13, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Michelle Abroms Levin
Dentons Sirote, PC

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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RULE 35(b)(1) STATEMENT AND INTRODUCTION

This proceeding involves questions of exceptional importance as to agencies' obligations under the Administrative Procedure Act ("APA"). In ruling that the Department of Treasury ("Treasury") satisfied its APA obligations when issuing Treasury Regulation §1.170A-14(g)(6)(ii) (the "Proceeds Regulation" or "Regulation")—despite Treasury's failure to explain the Regulation or address 13 comments received concerning the Regulation—the panel majority set an unprecedentedly low bar for APA compliance. As the panel majority conceded, this decision created a circuit split with a recent unanimous decision of the Eleventh Circuit Court of Appeals, which held that Treasury's actions in issuing the Regulation "violated the APA's procedural requirements."[1] *See Hewitt v. Commissioner*, 21 F.4th 1336, 1353 (11th Cir. 2021); Opinion ("Op.") 19.

The panel majority's decision threatens to embolden Treasury and the IRS to issue rules without providing explanations and without considering public feedback, secure in the knowledge that the rules can be saved with post-hoc justifications. It also contravenes this Court's recent decision that "Courts must 'set aside' agency actions that fail to follow [the requirements of the APA]," *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1143 (6th Cir. 2022), and the Supreme Court's refusal

[1] This circuit split supports *en banc* rehearing under Federal Rule of Appellate Procedure 35(b)(1)(B).

to "carve out an approach to administrative review good for tax law only." *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55 (2011). Finally, it cannot be reconciled with the requirement that Treasury "articulate a satisfactory explanation for its action," *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), or the Federal Circuit's invalidation of a regulation because Treasury failed to provide a reasoned explanation for it. *Dominion Res., Inc. v. United States*, 681 F.3d 1313, 1319 (Fed. Cir. 2012).[2]

As Judge Guy cautioned in his concurring opinion, "the majority has rendered" the process of seeking public input about regulations "meaningless because Treasury provided no explanation for its decision, and Treasury ignored [one commenter's] *significant* comment and every other comment about the proceeds regulation." Op. 35. The panel majority's weakening of core APA requirements presents questions of exceptional importance that merit consideration by the full Court. Accordingly, Oakbrook Land Holdings, LLC ("Oakbrook") respectfully petitions the Court for *en banc* rehearing.

[2] This conflict supports *en banc* rehearing under Federal rule of Appellate Procedure 35(b)(1)(A).

ISSUE MERITING EN BANC CONSIDERATION

Whether the Proceeds Regulation is invalid under the APA because Treasury failed to respond to significant comments and provide a reasoned explanation for the regulation it adopted?

STATUTORY AND REGULATORY BACKGROUND

Section 170 of the Internal Revenue Code grants a charitable contribution deduction to taxpayers that donate a conservation easement over land that they own to a qualified charitable organization. The Code requires that taxpayers claiming the deduction ensure that the easement's legal terms protect the conservation purposes in perpetuity. 26 U.S.C. §170(h)(5)(A). Perpetuity—synonymic for "forever"—is a long time. Many things might happen, including the remote possibility that the government might extinguish the easement by taking the land (or a portion of it). But if theoretical possibilities of judicial extinguishment decades or centuries in the future were sufficient to violate the perpetuity requirement, no taxpayer could ever claim a deduction for donating a conservation easement. The Proceeds Regulation provides that an easement donation can meet the Code's perpetuity requirement (notwithstanding the remote possibility the easement will be judicially extinguished) if the deed requires that proceeds from any future taking be split between the landowner and the charitable organization as the Regulation requires.

The Proceeds Regulation is not a model of clarity (even by Treasury Regulation standards), and in recent years substantial litigation has focused on how to interpret its requirements. This case is one of many in which the IRS disallowed the entirety of the taxpayer's charitable contribution deduction by contending that the Regulation forbids landowners from including language in the deed providing

that, following eminent domain, the landowner can retain proceeds from the taking attributable to improvements (*i.e.*, a house) made by the landowner after the easement donation.

The Proceeds Regulation was proposed (along with other regulations governing conservation easement donations) in 1983. Qualified Conservation Contribution; Proposed Rulemaking, 48 Fed Reg. 22940, 22940-41 (proposed May 23, 1983) (to be codified at 26 C.F.R. pt. 1). Treasury received approximately 90 comments regarding the proposed regulations. Op. 5. Of those 90 comments, 13 directly addressed the Proceeds Regulation. Oakbrook identified the comments of the New York Landmarks Conservancy ("NYLC"), the Land Trust Exchange, the Landmarks Preservation Council of Illinois, and others as good examples of the types of concerns raised regarding the Regulation. The Eleventh Circuit in *Hewitt* and Judge Guy's concurring opinion noted the particular significance of NYLC's comment, which identified problematic and unintended consequences of the proposed Regulation and included a mathematical example demonstrating the problems with the core issue in this case—how to allocate takings proceeds attributable to post-donation improvements made by the donor. Op. 29-35; *Hewitt*, 21 F.4th at 1345, 1351.

In publishing the final regulations, Treasury issued a perfunctory, two-page, six-column preamble responding to the 90 comments and 200 pages of public

testimony. *See* JA643-45. The preamble contains no discussion of (1) the Proceeds Regulation's purpose, (2) Treasury's goal in issuing the Proceeds Regulation, (3) the negative (or any) comments received, or (4) Treasury's responses to those comments. *Id.* In fact, Treasury did not discuss the Proceeds Regulation *at all*. Op. 10.

PRIOR PROCEEDINGS

In 2008, Oakbrook donated a conservation easement on 100 acres on White Oak Mountain, near Chattanooga, Tennessee, to the Southeast Regional Land Conservancy (the "Conservancy"). The Commissioner subsequently totally disallowed Oakbrook's charitable deduction. In 2016, while Oakbrook's case was pending in Tax Court, the Commissioner adopted a new litigating position, arguing for the first time that Oakbrook's easement deed violated the Proceeds Regulation's requirement regarding how hypothetical future extinguishment proceeds should be divided between Oakbrook and the Conservancy.

Oakbrook challenged the Proceeds Regulation's validity under the APA. The Tax Court majority concluded that Treasury complied with the APA's procedural requirements. Judge Holmes, the trial judge in the case, penned a lengthy dissent explaining that the justifications adopted by the Tax Court majority for the Regulation were not offered by Treasury, and the Commissioner could not rely on

reasons that Treasury did not give. *See* 154 T.C. 180, 239-40, 252 (2020) (Holmes, J., dissenting).

Oakbrook appealed the Tax Court's decision. At the same time, the Eleventh Circuit considered *Hewitt*, which had been appealed following the Tax Court's disallowance of a charitable contribution deduction based on its *Oakbrook* ruling. *See* T.C. Memo. 2020-89 (2020). In December 2021, the Eleventh Circuit held that the Proceeds Regulation was procedurally invalid under the APA. *Hewitt*, 21 F.4th at 1339 n.1.

On March 14, 2022, the panel issued its decision. The panel majority conceded that Treasury's basis and purpose statement "lacked an explanation for the policy rationale behind [the Proceeds Regulation] specifically." Op. 10. It claimed that the purpose could be found by "[j]uxtaposing the final version" of the Regulation with the "notice of proposed rulemaking" ("NPRM") and then inferring that "it was obvious that Treasury would need to craft a regulation that spoke" to post-extinguishment proceeds—though neither the legislative history nor the NPRM discussed the issue. Op. 11-12; s*ee, e.g.*, Qualified Conservation Contribution, 48 Fed. Reg. at 22940. The path taken by the panel majority, however, was not one drawn at the time by Treasury, but by the Commissioner in litigation.

The panel majority held that none of the 13 comments Treasury received merited any response because *none* were "significant" when they were "[s]ituat[ed]"

"in the context of the problem that Treasury sought to solve—providing a method for I.R.C. §170(h)(5)(A)'s perpetuity requirement to be met upon judicial extinguishment." Op. 16. In the panel majority's newly constructed context for the rule, NYLC's comment was not "significant" because it "did not engage" with the "perpetuity requirement and whether the rule served this end." *Id.* The panel majority dismissed the other comments made about the proposed Regulation as well.

Judge Guy's concurring opinion explained in detail why NYLC's comment was significant and merited Treasury's response. Op. 29-35.[3] He explained that the majority erred in assuming that Treasury focused solely on the perpetuity requirement to the exclusion of the congressional goal of encouraging land conservation when Congress clearly contemplated both goals in the legislative history. In his view, the majority had rendered the notice-and-comment process "meaningless because Treasury provided no explanation for its decision and Treasury ignored NYLC's *significant* comment and every other comment about the proceeds regulation." Op. 35. He further rejected the majority's reliance on a rationale that Treasury did not articulate when it finalized the Regulation: "We

[3] Judge Guy concurred, rather than dissented, based on an argument that the majority held the Commissioner waived by not raising it below. *Compare* Op. 8-9 *with* Op. 40-41. The fact that, almost four decades after it promulgated the Regulation, the Commissioner continues to conjure—before this Court—new post-hoc rationalizations for how the Regulation should be interpreted is another reason for *en banc* rehearing.

cannot rely on *post hoc* explanations; nor can a court offer the reasons that might have supported Treasury's decision." *Id.*

ARGUMENT

This Court should grant rehearing *en banc* to correct the panel majority's disregard of core APA principles that an administrative agency must "cogently explain why it has exercised its discretion in a given manner." *State Farm*, 463 U.S. at 48. And, in notice-and-comment rulemaking, agencies must "at the very least" address alternatives proposed or give "adequate reasons" for their "abandonment." *Id.* As members of this Court have observed, Treasury and the IRS do not "follow[] basic rules of administrative law." *CIC Servs., Inc. v. IRS*, 936 F.3d 501, 507 (6th Cir. 2019) (Thapar, J., dissenting from denial of reh'g *en banc*), *rev'd*, 141 S. Ct. 1582 (2021); *Mann*, 27 F.4th 1138 (invalidating IRS notice due to IRS failure to follow required APA procedures). The panel majority's disregard of the comments that Treasury received about the Proceeds Regulation as "insignificant," and its reliance on justifications for the Regulation articulated decades after its adoption, threaten to allow Treasury, the IRS, and all other administrative agencies to circumvent the APA's procedural safeguards.

A. The Panel Majority's Adoption of the Commissioner's Post-Hoc Rationalization Was Improper

The panel majority conceded that Treasury provided no "explanation for the policy rationale behind [the Proceeds Regulation]." Op. 10. That observation

should have ended this case. *See Dominion*, 681 F.3d at 1322 ("The outcome of this case can and should extend from *State Farm*. The government's failure to justify its regulation *ab initio* left open the [the issue in the case]") (Clevenger, J., concurring). "[W]here the agency has failed to provide even that minimum level of analysis, its action is arbitrary and capricious and so cannot carry the force of law." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).

Instead, the panel majority looked to the congressional reports accompanying 26 U.S.C. §170(h), which Treasury referenced in support of the overall regulatory project.[4] Collapsing multiple legislative objectives outlined in congressional reports into a single "trump card" policy goal of "perpetuity" is problematic and inconsistent with the Eleventh Circuit's analysis of Congress's legislative goals. *See* Op. 34. However, the larger misstep was allowing the Commissioner to create a *post-hoc* explanation for Treasury's Regulation by drawing a circuitous route from the NPRM (which does not discuss post-extinguishment proceeds) through the legislative history (which also does not discuss post-extinguishment proceeds) to create an

[4] These reports were not cited by Treasury in connection with the Proceeds Regulation specifically. *See* Qualified Conservation Contribution, 48 Fed. Reg. at 22940-41; JA643-45.

"apparent"[5] and "obvious"[6] "illuminat[ion]"[7] of reasons that Treasury never delivered.[8] Applying the method adopted by the panel majority would generate an explanation for ***any*** agency regulation without the agency having to do a thing. Instead, a passing reference to the statute and legislative history suffices to later locate the agency's "explanation" for a regulation.

The standard adopted by the panel majority is contrary to established black-letter law. Agencies ***must explain*** the decisions they have made. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988); *Simms v. Nat'l Highway Traffic Safety Admin.*, 45 F.3d 999, 1003-04 (6th Cir. 1995); *PPG Indus., Inc. v. Costle*, 630 F.2d 462, 465-66 (6th Cir. 1980); *Limnia, Inc. v. U.S. Dep't of Energy*, 347 F. Supp. 3d 25, 33-34 (D. D.C. 2018) (holding that agencies must "**articulate**[] a rational connection between the facts found and the choice made" and that "one of 'the most elementary precepts of administrative law' holds that 'an agency has no choice but to provide a reasoned explanation for its actions'" (quoting *Encino*, 579 U.S. at 221;

[5] Op. 11.

[6] Op. 12.

[7] Op. 13.

[8] The "purpose" identified by the panel majority was not "obvious" or "apparent" to several commentors. In particular, NYLC dedicated three pages explaining why the Regulation, as proposed, would frustrate the statutory goal of encouraging conservation donations. *See* JA670-72.

Am. Rivers v. Fed. Energy Regulatory Comm'n, 895 F.3d 32, 45 (D.C. Cir. 2018) (emphasis added))).

The preamble did not articulate any facts found to support the required allocation in the Proceeds Regulation, or any facts found at all. Instead,

> Treasury left everyone to wonder: Why would the easement holder be entitled to receive a proportional percentage of the *actual value of* the donor's post-donation improvements . . . Why would the statutory tax deduction incentivize any donor to grant a conservation easement if it means the donor. . . must agree to give the donee . . . a proportional ratio of *any* future improvements . . . Or why would Treasury require that the value of separate property rights . . . *always* maintain a proportional value relationship when there is commonly little, if any, relation.

Op. 31 (internal quotations omitted); *Dominion*, 681 F.3d at 1319 (holding that no explanation in the NPRM or final regulations for a formula fails 5 U.S.C. § 706(2)). This error alone is sufficient to warrant *en banc* rehearing.

The panel majority compounded this error by adopting the "Commissioner's rationale" that the Proceeds Regulation's purpose is "to create an administrable rule which ensured that a donee would receive sufficient funds upon extinguishment to continue the conservation purpose" in perpetuity. Op. 25 (emphasis added).[9]

[9] This "purpose" cannot be reconciled with the other legislative policies identified by Treasury in promulgating the regulations, including encouraging conservation. *See Hewitt*, 21 F.4th at 1352 (holding that the "final regulations did not limit the purpose of the proceeds regulation in the way the Commissioner suggests"). The fact that the Eleventh Circuit and the panel's members cannot reach a consensus as to the Proceeds Regulation's "purpose" (whether it is merely to further perpetuity or part

However, as both Judge Guy of this Court and Judge Holmes of the Tax Court observed, this is not a reason Treasury gave. Op. 35 ("The problem is that Treasury did not provide these reasons at the time it promulgated the proceeds regulation."), *Oakbrook*, 154 T.C. at 258 ("The majority today comes up with as good a set of arguments as possible to justify the reasonableness of the regulatory choices that Treasury made . . . But Treasury didn't make them.") (Holmes, J., dissenting).

The longstanding "principle of agency accountability . . . means that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Bowen*, 476 U.S. at 643 (internal quotations omitted). Adoption of "belated justifications" of agency action is impermissible because it "upset[s] 'the orderly functioning of the process of review,' forcing both litigants and courts to chase a moving target." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)). Oakbrook, the Hewitts, and hundreds (if not thousands) of taxpayers have been chasing a moving target as a direct result of Treasury's lack of explanation. *See Oakbrook*, 154 T.C. at 230-31 (Holmes, J., dissenting). Rather than adopting the Commissioner's newly formulated explanation for the Regulation, the Court was

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of a larger regulatory scheme to encourage conservation of natural resources) is further evidence that Treasury failed to explain its Regulation.

required to set aside the unexplained action as invalid. *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 167 (1962).

Finally, even the post-hoc explanation for the Regulation does not answer the issues raised in the comments, such as (1) why "Treasury *created a formula* for the division of proceeds from the sale of discrete property interests based upon the word 'perpetuity;'"[10] (2) why the formulaic proportion used equates protection in perpetuity;[11] or (3) why Treasury thought monetary proceeds were equivalent to protecting conservation purposes in perpetuity.[12] Because comments should *inform* the basis and purpose statement, Treasury's total nonresponse and lack of explanation is even more problematic.

The APA requires that agencies explain "in detail the thinking that has animated the form of a proposed rule and the data upon which the rule is based" to benefit agencies, regulated parties, and courts. *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 35 (D.C. Cir. 1977); *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019); *Encino*, 579 U.S. at 223. The standard adopted by the panel majority will create more uncertainty for regulated parties and the courts who must consider the

[10] Op. 33 n.3.

[11] JA685.

[12] NYLC thought money a poor substitute for protecting conservation purposes in perpetuity. JA671.

entire legislative history to locate an agency's reasoning for its regulation. Rehearing *en banc* is requested to address this expanded standard and reinstate confidence in the rulemaking process.

B. The Comments Treasury Received Are "Significant"

The panel majority also created an untenable standard that public comments must meet to be "significant." If an agency can deem all 13 comments about a proposed rule (out of 90 comments total) so insignificant that they need not be acknowledged (let alone addressed), the rule-making process becomes obscured, and the public can no longer see what major policies were ventilated. *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968).

The Eleventh Circuit and Judge Guy persuasively explained why NYLC's comment is significant in that it clearly demonstrated how the proposed Regulation would have the unintended consequences of (1) discouraging conservation donations that §170(h) was enacted to incentivize, and (2) misallocating eminent domain proceeds due to the landowner.[13] Op. 29-34; *Hewitt*, 21 F.4th at 1351-1352.

By contrast, the panel majority held that NYLC's comment and 12 others were not "significant" because they did not address the Proceeds Regulation's unarticulated purpose of perpetually protecting conservation purposes. *See* Op. 16-

[13] Other comments about the proposed Proceeds Regulation were also significant, but this petition focuses on NYLC's comment.

18. However, as Judge Guy notes, there is no authority to "treat[] one . . . statutory goal perpetuity as a trump card, such that Treasury was free to ignore any comment unless the comment showed that the regulation 'fail[ed] to satisfy' the 'perpetuity requirement.'" Op. 34; *Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) ("Even when an agency has significant discretion in deciding how much weight to accord each statutory factor, that does not mean it is free to ignore any individual factor entirely.") (internal quotations omitted).

Moreover, the panel majority's standard is at odds with the purpose of notice-and-comment procedures, which is to identify problems for the agency to address. *State Farm*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency . . . failed to consider an important aspect of the problem."). In *United States v. Nova Scotia Food Products Corporation*, the case relied upon by the panel majority, the commentor did exactly that, and the agency's failure to respond rendered the rule invalid. 568 F.2d 240, 253 (2d Cir. 1977). The FDA proposed a regulation for the purpose of ensuring that inland fish could be safely consumed without the risk of botulism. *See* Op. 15. Nova Scotia wrote a comment stating that if the whitefish it sold was cooked at the temperature that the proposed regulation required, the fish would be "safe," but inedible. Op. 16. It suggested an alternative wording for the regulation that tailored the temperature to the fish species to avoid destroying the fish. *Id.* Under the panel majority's standard, this comment

is insignificant because the comment does not concern the regulation's primary purpose—food safety. Instead, the comment centered on the unintended consequence of the proposed rule: making the fish inedible.

NYLC's comment did exactly what Nova Scotia's comment did. It pointed out how the proposed Regulation would have the unintended consequence of discouraging the conservation easement donations and would improperly divert funds to the donee that are attributable to the landowner's home or other improvements. *See* Op. 29-30. NYLC's comment also suggested alternatives to ensure that the unintended consequence did not occur. *Id.* The significant comment in *Carlson* does much the same by pointing out how a regulation seeking to promote simplicity of structure contradicted the other statutory goal of maintaining a reasonable rate schedule. Op. 33-34. None of the cases cited by the panel majority support its conclusion that Treasury was permitted to fully ignore the comments submitted by NYLC and 12 others concerning the Proceeds Regulation.[14] Treasury's total silence is antithetical to the APA's notice-and-comment process,

[14] In *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc.*, the agency considered the feedback provided and asked the commentor for more information. 435 U.S. 519, 529-30 (1978). In *United States v. Utesch*, there was no dispute about whether the agency had responded to comments. 596 F.3d 302, 310 (6th Cir. 2010). In *PPG Industries*, the agency's rule was vacated because the administrative record did not demonstrate that the EPA had sufficiently considered comments. 630 F.2d at 466-67.

which "shines a light on delegations of authority from Congress to an executive-branch agency to ensure they remain subject to public scrutiny." *See Mann*, 27 F.4th at 1142-43.

The panel majority's new standard for significant comments turns the "two-way street" between agencies and commenters described in *HBO* into a one-way street. *See* 567 F.2d at 35-36. The question presented by the panel majority's decision is of exceptional public importance because it leaves agencies free to ignore problems identified in comments if the agency determines they are not aligned closely enough to the regulation's goal. This new standard will yield unwieldy and expansive comments in the hopes that all possible problems identified are addressed. Or worse, this new standard will discourage the public from submitting ***any comments*** because, as the panel majority concluded, 13 of the 90 stakeholders who expended significant efforts to prepare comments specifically addressing the proposed Proceeds Regulation were unable to craft a single one worthy of Treasury's attention.

It is a matter of exceptional public importance that the APA requires a certain amount of dialogue between an agency and commenters to inform the public as to what is required and to provide the courts with the necessary record to review the agency's decision making. Adopting post-hoc rationalizations and sanctioning silence in the face of legitimate concerns raised by multiple stakeholders, as the

panel majority did, undermines this important process. Accordingly, Oakbrook respectfully requests rehearing *en banc*.

Dated: June 13, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this petition complies with the length limit permitted by Federal Rules of Appellate Procedure 35(b)(2)(A) and 40(b)(1). This petition is 3,893 words, excluding the portions exempted by Federal Rules of Appellate Procedure 32(f). The brief's type size and type face comply with Federal Rules of Appellate Procedure 32(a)(5) and (6).

/s/*MICHELLE ABROMS LEVIN*
Michelle Abroms Levin

Dated: June 13, 2022

CERTIFICATE OF SERVICE

It is hereby certified that on June 13, 2022, this petition was electronically filed with the Clerk of the Court of the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system, which will send notice of such filing to all registered CM/ECF users. Participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

/s/MICHELLE ABROMS LEVIN
Michelle Abroms Levin