ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1015

In the

United States Court of Appeals

for the

District of Columbia Circuit

CROSS REFINED COAL, LLC;
USA REFINED COAL, LLC, TAX MATTERS PARTNER,

Petitioners-Appellees,

SCHNEIDER ELECTRIC USA, INC., SUCCESSOR IN INTEREST TO SCHNEIDER ELECTRIC INVESTMENTS 2, INC.; AJG COAL, INC.,

Interested Parties-Appellees,

– v. –

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellant.

On appeal from the United States Tax Court, Case No. 19502-17

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL MINING ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Except for the following, all parties, intervenors, and *amici* appearing before the Tax Court and in this Court are listed in the parties' principal briefs.

The Chamber of Commerce of the United States of America ("Chamber") and National Mining Association ("NMA") appear as *amici curiae*. Pursuant to Circuit Rule 26.1, each states that it is a national trade association representing businesses with an interest in this appeal. Neither has a corporate parent, and neither issues stock.

B. Rulings Under Review

References to the rulings at issue appear in the parties' principal briefs.

C. Related Cases

This case has not previously been before this Court or any other appellate court. *Amici* are unaware of any related cases currently pending in this Court or in any other court within the meaning of Circuit Rule 28(a)(1)(C).

/s/ *Michael B. Kimberly*

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INTEREST OF THE *AMICI CURIAE*

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies of every size, in every industry sector, and from every region of the country. A principal function of the Chamber is to represent its members' interests before the courts on issues that concern the nation's business community.[1]

NMA is a trade association representing over 260 corporations and organizations that produce most of America's coal, metals, and industrial and agricultural minerals. NMA's members include manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries.

Many of the Chamber's and NMA's members operate in industries in which Congress has used tax credits—like the refined coal tax credit at issue here—to encourage specific business activities. Where Congress has seen fit to authorize a tax credit to pursue these policy goals, the Commissioner should not discourage businesses from entering into partnerships and other

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief. All parties consented to the filing of this brief.

ventures for purposes of qualifying for that tax credit. Doing so undermines Congress's policy objectives, causes fundamental unfairness to businesses that relied on Congress's legislative action, and chills valuable economic activity.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is not merely about the correct tax treatment of one specific partnership formed by a few specific firms to pursue a particular tax credit. It is about whether Congress will retain the ability to use tax credits as an incentive for firms to pursue socially valuable, but otherwise unprofitable, activities. In other words, may the Commissioner override Congress's decision to encourage activities that are not profitable *pre*-tax by making them profitable by means of a tax credit?

The Commissioner's stunning answer to that question is *yes* whenever a partnership is involved. In his view, a partnership is not "bona fide" unless each partner has a "meaningful" *pre*-tax profit expectation in the venture.

That view rests on a misapprehension of the law, which does not impose any inflexible requirement that a partner have a pre-tax profit expectation, as long as the totality of the circumstances indicates that the partners genuinely intended to join together for a business purpose. To hold otherwise would thwart clear congressional purpose to encourage otherwise unprofitable activities and pointlessly deny taxpayers the ability to choose the form of business organization that best suits their needs. It also would

threaten harmful practical consequences: Because Congress uses business tax credits to encourage many activities that are not profitable on a pre-tax basis, the Commissioner's approach would make it much harder to qualify for those tax credits, dramatically inhibiting the socially advantageous commercial activities that Congress has chosen to promote.

The Tax Court did not accept the Commissioner's untenable position, and this Court should not, either. Instead, the Court should affirm the Tax Court's well-reasoned holding that when firms form a partnership to pursue an activity incentivized by tax credits, the Commissioner may not rely on the absence of a pre-tax profit expectation to disregard the partnership.

ARGUMENT

The Commissioner's argument that a partnership interest is not bona fide unless the partner has a meaningful, *pre*-tax profit expectation in the venture lacks merit. The law imposes no such requirement, and if adopted, the requirement would unduly restrict firms' choice of entity structure and undermine congressional purpose. It should be rejected outright.

A. The Commissioner's rigid approach to "bona fide" partnerships is misguided

1. The Commissioner urges this Court to apply a narrow and rigid test to determine whether the investors' interest in the Cross Coal partnership should be respected for tax purposes. Under that test, a taxpayer's partnership interest is not "bona fide" unless (1) the taxpayer has "downside

risk," in that it may not be able to "recoup amounts invested in the enterprise" (Opening Br. 36-37); (2) the taxpayer has *pre*-tax "upside potential" (*id.* at 48); and (3) the taxpayer's exposure to profits and losses is "meaningful" when compared with the tax benefit of the transaction (*id.* at 31). The Court should reject that test, which does not accurately reflect the law and would upset the expectations of countless taxpayers.

The bona fide partnership test that the Supreme Court articulated in *Commissioner v. Culbertson*, 337 U.S. 733 (1949), is more flexible than the Commissioner suggests. The Court there held that the operative question is whether "the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise." *Id*. at 742. This inquiry is a totality of the circumstances test that takes into account "all the facts." *Id.* That is why, when applying *Culbertson*, the Tax Court looks to numerous factors, "none of which is conclusive." *Luna v. Commissioner*, 42 T.C. 1067, 1077 (1964). Simply put, a "meaningful" exposure to profits and losses apart from any tax considerations is not a per se requirement for a valid partnership—particularly where the vast majority of the relevant factors indicate that a partnership is bona fide, as the Commissioner admitted they do here. Doc. 178 at 38.

2. The Commissioner's approach not only misstates the law; it is also bad policy, in that it threatens the ability of taxpayers to choose forms of business organization that suit their enterprises best.

The Internal Revenue Code generally allows a taxpayer "to adopt such organization for his affairs as he may choose," including by selecting among corporate forms as appropriate. *Higgins v. Smith*, 308 U.S. 473, 477 (1940). But the Commissioner's approach puts a strong thumb on the scale *against* the use of partnerships to conduct businesses like appellees', by limiting the range of perfectly legitimate circumstances in which partnerships will be treated as "bona fide" for tax purposes.

The Commissioner's position also ignores the compelling business reasons that firms have for entering into partnerships when pursuing this kind of venture. As the Tax Court's opinion explains, the technology used at the Cross facility was a relatively new technology that appellee AJG Coal helped develop and was responsible for bringing to market. In that endeavor, it made greater business sense for AJG Coal to partner with different investors to establish coal refining operations than to wholly own and operate each coal refining facility itself. "Bringing in other investors would enable [AJG Coal] to spread its own investment risk over a larger number of projects, to benefit from lessons being learned at a greater number of facilities, to earn royalties on all those projects, and to accrue section 45 credits in an amount it could optimally use." Doc. 178 at 15-16. It is alarming to posit that federal tax authorities could declare such a partnership akin to a sham tax shelter simply because it depends on tax

credits to make a profit or does not otherwise involve what the regulator believes is an adequate ratio of risk to reward.

The same is true in other industries. The developer or licensor of a new technology is often not the entity best positioned to commercialize it, and must therefore partner with another company to do so. Partnerships also help reduce the risk involved in implementing a new technology, by spreading it across a number of different ventures.

Scrutinizing each of these partnerships under the Commissioner's rigid "pre-tax upside" and "meaningful exposure" tests would deny the business community of one of its best tools for facilitating collaboration between firms bringing a new technology to market. Accordingly, the Court should reject the Commissioner's formulation of the bona fide partnership test and reaffirm that the *Culbertson* inquiry is a flexible one that can be adapted to different circumstances.

B. At a minimum, no pre-tax profit expectation should be required for tax credit partnerships

When applying *Culbertson*, courts should be especially reluctant to disregard partnerships formed to pursue activities that Congress has chosen to incentivize through tax credits. These activities are frequently unprofitable but for the tax credits that participants receive—overcoming unprofitability is the very point of the tax credit. This does not mean that partnerships pursuing these activities are tax shelters or not bona fide;

rather, it means that the tax credit enables them to engage in commercial activity that they would not otherwise—which is the very purpose of the credit. Thus, at a minimum, the Commissioner's position that a partnership where a partner lacks a "meaningful" pretax profit potential is invalid must be rejected as applied to tax credit partnerships like the one here.

1. Congress frequently employs tax credits as a means of encouraging socially valuable business activity

Congress has long used tax credits and deductions as a tool to stimulate economic investment and encourage socially desirable activities. Today, "there are a vast number of [policy] programs implemented through the tax system" with tax credits. David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 Yale L.J. 955, 964 (2004). Some of the better-known "tax expenditures" in the tax code, such as the mortgage interest deduction and the earned income tax credit, are aimed at individuals. But corporate taxpayers are eligible for numerous tax credits as well. To name just a few:

- Businesses that invest in developing low-income housing are entitled to a tax credit, calculated as a percentage of the cost of developing a project. I.R.C. § 42.
- Small businesses are entitled to a tax credit for a portion of their expenses to comply with the Americans with Disabilities Act. I.R.C. § 44.
- Businesses that produce energy from renewable resources such as wind, geothermal energy, solar energy, and hydropower are

entitled to a tax credit based on the number of kilowatt hours of such energy they sell. I.R.C. § 45.

- Companies that conduct clinical tests on drugs intended to treat rare diseases or conditions are entitled to claim a portion of their testing expenses as a tax credit. I.R.C. § 45C.
- Investors who provide capital for investments in low-income communities are entitled to the New Markets Tax Credit. I.R.C. § 45D.
- Businesses that produce low sulfur diesel fuel are entitled to a tax credit (up to a certain cap) based on the amount of fuel produced. I.R.C. § 45H.
- Businesses are entitled to a tax credit for each metric ton of carbon emissions they capture using carbon capture equipment at qualified industrial facilities. I.R.C. § 45Q.

Just like the refined coal tax credit at issue in this case, each of these credits alters the tax consequences that would otherwise influence businesses' profits and losses. That is to say, they change—and make more favorable—the ordinary economic incentives that apply in the marketplace. This is an especially effective way for Congress to encourage particular economic activity and to correct so-called market failures.

The classic market failure occurs when a private market overproduces goods and services that impose harmful spillover costs, or "externalities," on parties other than producers—for example, pollution. Absent a correction to economic incentives, producers may overproduce such goods because they do not bear the cost of the pollution involved in production. Rather, the costs

of pollution are borne by society as a whole. *See* GAO-13-167SP: Guide for Evaluating Tax Expenditures at 11-12 (Nov. 2012).

But market failure also occurs in the inverse scenario, when the market *under*-produces socially valuable goods and services because producers are not fully rewarded for the positive externalities that those goods and services create. For example, auto manufacturers may produce fewer than the socially optimal number of electric vehicles because they are unable to reap a reward for the social benefit that these vehicles create through reduced pollution. Or, as Congress found when it passed the Orphan Drug Act, a drug company may forgo developing a socially valuable treatment for a rare disease because it "expect[s] the drug to generate relatively small sales in comparison to the cost of developing the drug." Pub. L. No. 97-414, § 1(b)(4), 96 Stat. 2049, 2049 (1983).

Tax credits reflect Congress's effort to correct these market failures by giving firms an additional economic incentive to engage in socially beneficial activity. For instance, a tax credit for developing a drug to treat a rare disease may make it economically viable for a drug sponsor to bring the drug to market, notwithstanding the risk that the drug may not otherwise be profitable. And a tax credit for developing low-income housing can make it economically rational for a developer to invest in that kind of property, rather than luxury condos.

The tax credit at issue here works in just this way. Refined coal produces less pollution than unrefined coal; it has been treated with chemicals that reduce harmful emissions. Doc. 178 at 10. But the same processes that make refined coal better for the environment also change its chemical properties in ways that make it riskier to use in power generation than unrefined coal. A utility that burns refined coal risks "potential damage to equipment, uncertainty as to the efficacy of the product, and interference with the utility's compliance with environmental regulations." *Id.* at 11-12. For this reason, utilities will not use refined coal unless they can buy it at a discount to the price of raw coal. *Id.* at 12.

Because coal refiners must sell refined coal at a discount, they are effectively guaranteed "a before-tax loss for each ton of refined coal sold." Doc. 178 at 13. And the economic detriment only intensifies the more refined coal a refiner produces: "[T]he more successful the producer [is] in producing and selling refined coal to the utility, the greater that before-tax loss would be." *Id.* Worse, coal refiners face constant risk that utilities will simply choose to stop using refined coal—leaving the refiners holding the bag. *Id.* In short, without some economic incentive—like a tax credit—the environmental advantages of refined coal would never be realized because no rational company would produce refined coal.

Thus, with the refined coal tax credit, Congress "manifestly decided" that "the market, unassisted by credits, was not producing refined coal on

the scale that Congress thought beneficial," and that "if refined coal was to be produced in sufficient quantity, money beyond that which the market would offer would need to be added to the mix." Doc. 178 at 53. Here, in particular, "[w]ithout the [tax] credits," appellees' coal refining operation "would have always necessarily been a losing proposition." *Id.* at 27.

Moreover, Congress doubled down over time on encouraging refined coal production. As originally enacted, the credit required a refiner to (1) meet certain emission reduction standards and (2) increase the market value of the coal by at least 50%. Pub. L. No. 108-357, § 710(a), 118 Stat. 1418, 1553 (2004). But when the value-enhancement requirement proved too difficult to meet, Congress removed it (while tightening the emission reduction standards). Pub. L. No. 110-343, div. B, § 101, 122 Stat. 3765, 3808 (2008). Congress's decision to relax the requirements for the credit when it initially failed to yield the results that Congress wanted underscores Congress's strong policy preference to encourage refined coal production—even if producing refined coal was economically a "losing proposition" otherwise. Doc. 178 at 54.

The Commissioner's position that the partnership at issue here had to show pre-tax profits in order to qualify as a bona fide partnership is therefore flatly at odds with Congress's clear objective to encourage refined coal production *despite* the unprofitability of such activity without the credit.

2. Courts should not require pre-tax profit potential when evaluating tax credit partnerships like Cross

Firms often form partnerships or other joint ventures when pursuing projects, such as energy production projects, that may be eligible for tax credits. Including multiple participants in these projects makes good business sense, not only because it spreads risk, but because the firm that actively develops a project may not be able to make complete use of the tax credit. In other words, without the partnership, the tax credit often cannot fully be applied and therefore cannot fully do its job encouraging the activity that Congress meant to encourage.

For this reason, the Commissioner has issued several guidance documents outlining "safe harbors" for purposes of other tax credits in the Internal Revenue Code. *See* Rev. Proc. 2014-12, 2014-3 I.R.B. 415 (2014) (safe harbor for I.R.C. § 47 rehabilitation tax credit); Rev. Proc. 2007-65, 2007-45 I.R.B. 967 (2007) (safe harbor for I.R.C. § 45 wind energy production tax credit). If partnerships meet the requirements of these safe harbors (*e.g.*, requirements for each partner's minimum ownership interest), the Commissioner will not challenge their allocations of tax credits among the partners. These safe harbors reflect the Commissioner's recognition that it is frequently appropriate and necessary to form partnerships for the purpose of allocating tax credits and making energy production and other activities possible.

The same principle applies to the refined coal tax credit. The Commissioner has not promulgated a regulatory safe harbor for participants in refined coal production. But in enacting the refined coal tax credit, Congress acknowledged that the credit might be split among multiple entities, by expressly providing for how the credit should be allocated among the various owners of a production facility. I.R.C. § 45(e)(3) (2009). As a general matter, therefore, there is nothing unusual or inappropriate about sharing refined coal tax credits among the members of a partnership, as appellees did here. On the contrary, that is exactly what Congress expects firms to do.

Nor is there anything inappropriate about claiming the refined coal tax credit for a refined coal business that was incapable of generating pre-tax profit. As the Tax Court explained, "[t]he intended result of the credit was that investors, knowing they could obtain the credits, made decisions to produce refined coal—decisions that they did not make and would not make unless they could be sure that they would receive the credits." Doc. 178 at 53-54. In other words, even if the only profit potential in a refined coal business like Cross is the opportunity to earn tax credits, it does not show that a partnership operating the business is not bona fide—it shows that the tax credit is working as intended.

Indeed, in the context of partnerships formed to carry on an activity that Congress has chosen to incentivize through tax credits, a requirement that the partnership produce profits apart from tax credits makes no sense.

The Ninth Circuit's decision in *Sacks v. Commissioner*, 69 F.3d 982 (9th Cir. 1995), states the point well. There, the Commissioner had disallowed tax credits claimed by an investor in a solar water heating business. The Tax Court upheld that determination, finding that the taxpayer's investment was a sham transaction because the taxpayer was "unlikely to make money from his solar water heaters, but for the tax benefits." *Id.* at 990.

The Ninth Circuit reversed, holding that the "[a]bsence of pre-tax profitability does not show whether the transaction had economic substance beyond the creation of tax benefits, where Congress has purposely used tax incentives to change investors' conduct." *Sacks*, 69 F.3d at 991 (citation and quotation marks omitted). The court explained that in creating the tax credit at issue, Congress "purposely skewed the neutrality of the tax system . . . because [it] sought to induce people to invest in solar energy." *Id.* "[U]s[ing] the reason Congress created the tax benefits as a ground for denying them," as the Commissioner proposed to do, would "violate[] the principle that statutes ought to be construed in light of their purpose." *Id.* at 992. Put another way, the transaction's lack of pre-tax profitability was not evidence of abuse by the taxpayer—rather, it was evidence that the transaction was consistent with Congress's purpose of "induc[ing] investments which otherwise would not have been made." *Id.*

To adopt the Commissioner's position in this appeal would turn these principles upside down. In effect, the Commissioner proposes to deny the

refined coal tax credit in precisely the circumstance where the credit is needed most. That cannot be correct.

Perhaps for this reason, the Commissioner has assumed throughout this litigation that the refined coal tax credit *is* available here—it simply must all go to AJG Coal, as though AJG Coal were a sole proprietor without partners. But that position is not logical. As the Tax Court found (Doc. 178 at 27), the Cross operation would have "necessarily been a losing proposition" on a pre-tax basis even if AJG Coal had operated Cross on its own. The Commissioner never explains why the lack of pre-tax profit makes a partnership a sham, precluding the tax credit, while applying a different rule to sole proprietorships.

This is not to say that every allocation of tax credits among partners must always be upheld; in cases where the relevant factors indicate that a partnership is truly illegitimate or an improper tax scam, the IRS may properly disregard that partnership for purposes of allocating tax credits. But it *is* to say that the Commissioner may not disregard a partnership on the ground that one or more members lacked any pre-tax upside in the venture. As Judge Sutton has observed in a different context, doctrines like the substance-over-form doctrine or the bona fide partnership doctrine are "tool[s] to prevent taxpayers from placing labels on transactions to avoid tax consequences they don't like"; they are not "tool[s] that allow[] the Commissioner to place labels on transactions to avoid textual consequences *he*

doesn't like." *Summa Holdings, Inc. v. Commissioner*, 848 F.3d 779, 787 (6th Cir. 2017) (emphasis added). Perhaps the Commissioner does not consider a tax partnership like Cross to be legitimate, but Congress plainly did, and Congress's judgment should prevail.

3. Accepting the Commissioner's arguments would create administrative difficulties, undermine the utility of tax credits, and chill business growth

Disregarding partnerships formed to pursue tax-incentivized businesses when they lack pre-tax profit potential is not only illogical; it would have significant detrimental consequences for economic and tax policy.

To begin with, the Commissioner's position—that, when auditing tax credits, he must determine whether each partner in a partnership had a sufficiently "meaningful" stake in the enterprise according to an arbitrary ratio test—would make it harder for firms in the marketplace to pursue joint ventures involving such credits. What it is to be "meaningful" is in the eye of the beholder, and the tax collector assuredly will find it less often than rational market participants. In effect, IRS employees would be second-guessing the validity of legitimate partnerships all across the country, overriding the partners' business judgment and upsetting their reasonable expectations, all in the name of a bureaucratically driven notion of what it means for an investment exposure to be "meaningful."

Even if the Commissioner were capable of drawing a line that sensibly and predictably distinguished between "meaningful" and "non-meaningful"

investments, moreover, doing so could be counterproductive. Firms seeking to claim a tax credit would have an incentive to engage in otherwise inefficient behaviors such as incurring unnecessary costs (moving offices to Manhattan rather than Raleigh, for example) and lowering their post-tax projections. That is the precise opposite of what the tax system should encourage: Americans are better off when businesses keep costs low and returns high, producing more rather than less. Any other conclusion offends common sense.

Worse, the Commissioner's approach would frustrate the policy goals that Congress pursued through tax credits. As the Ninth Circuit has explained, "[i]f the Commissioner were permitted to deny tax benefits when the investments would not have been made but for the tax advantages, then only those investments would be made which would have been made without the Congressional decision to favor them." *Sacks*, 69 F.3d at 992.

That outcome would be harmful not only to investors in these enterprises, but to congressional policy as a whole. As we have noted, tax credits are provided with respect to activities that Congress believes to be socially beneficial. Here, for example, Congress had reason to believe that there would be environmental benefits from replacing unrefined coal with refined coal, given that in 2004, coal accounted for roughly half of all electricity generation in the United States. *See* U.S. Energy Info. Admin., *Electricity in the United States* (Mar. 20, 2020), perma.cc/E4GL-ZSR9. And the

incentive served its purpose: U.S. refined coal production has increased significantly in years since, even as overall U.S. coal production has been on a general *decline* since 2008. *See* U.S. Energy Info. Admin., *U.S. production and use of refined coal continues to increase* (Feb. 8, 2019), perma.cc/VT59-DW7Z.

Under the Commissioner's approach, these results would never have been achieved. The Commissioner's requirement that a transaction be profitable from a pre-tax perspective would have prevented all refined coal investors from qualifying for the tax credit through a partnership like Cross, because "[w]ithout the credit[]," "refined coal activity [is] a losing proposition." Doc. 178 at 54. Accordingly, investors would never have gotten into the refined coal business in the first place. *Cf. id.* at 52 ("[N]o rational actor would have invested in the refined coal facility without the credits."). The result would be greater pollution from the burning of coal.

The Commissioner's approach would similarly frustrate the goals of many of the other business credits in the tax code. For example, if development of an orphan drug were required to be profitable on a pre-tax basis before a firm could claim the Orphan Drug Tax Credit, drug companies would develop only those drugs that would have been developed without the credit. Without the incentive provided by the credit, as many as one third of orphan drugs would never be brought to market. *See* Ernst & Young, *Impact of the Orphan Drug Tax Credit on treatments for rare diseases* at ii (June

2015), perma.cc/D8TJ-PMSJ ("[I]f the ODTC were repealed, it is estimated that . . . 33%[] fewer new orphan drugs would be approved over the next 10 years.").

Similarly, the Commissioner's view would undermine the I.R.C. § 45Q tax credit for carbon oxide sequestration. This tax credit seeks to encourage firms to deploy and operate carbon capture technology, which has "emerged as a critical solution" in the United States' attempt to reduce carbon emissions. *See* Mahmoud Abouelnaga, Center for Climate and Energy Solutions, *Carbon capture and the race to net zero* (Sept. 14, 2020), perma.cc/2P7P-GLNK. Absent the credit, there would not be sufficient incentive for most carbon emitters to engage in carbon capture activity, and the deployment of this critical technology would be slowed.

So too with respect to the New Markets Tax Credit, which is available to investors in the economic development of low-income communities. The middleman "community development entities" that choose which investments to fund are encouraged to select projects that would not have been developed—many that would not have been profitable—but for the tax incentive. U.S. Dep't of Treas. CDFI Fund, *Compliance Review of New Markets Tax Credit Program* at 36-38 (Aug. 2017), perma.cc/Z4YX-9EY7. But if the Commissioner were permitted to deny tax credits to investors whose funding went to such projects, on the theory that the projects must

be profitable pre-tax, the tax funding for those projects would dry up, and struggling communities would be the worse for it.

The Court should not accept a view that leads to such results, which countermand Congress's objectives. Instead, the Court should uphold the ability of firms to form partnerships to pursue activities that Congress has chosen to incentivize through tax credits, irrespective of whether the activity is profitable without those credits.

CONCLUSION

The judgment of the Tax Court should be affirmed.

Dated: January 13, 2021

Respectfully submitted,

/s/ *Michael B. Kimberly*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for *amici curiae* certifies that this brief:

(i) complies with the type-volume limitation of Rule 29(a)(5) because it contains 4,627 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f) and Circuit Rule 32(e)(1); and

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

Dated: January 13, 2021 /s/ *Michael B. Kimberly*

CERTIFICATE OF SERVICE

I hereby certify that that on January 13, 2021, I filed the foregoing brief via the Court's CM/ECF system, which effected service on all registered parties to this case.

Dated: January 13, 2021 /s/ *Michael B. Kimberly*