**Taxpayer Groups Know a Dangerous Bill When They See One:**
**Oppose the Retroactive, Precedent-Setting**
**Charitable Conservation Easement Program Integrity Act**

July 28, 2021

The Honorable Nancy Pelosi
Speaker, U.S. House of Representatives
Washington, DC 20515

The Honorable Kevin McCarthy
Republican Leader, U.S. House of Representatives
Washington, DC 20515

The Honorable Charles E. Schumer
Majority Leader, United States Senate
Washington, DC 20510

The Honorable Mitch McConnell
Republican Leader, United States Senate
Washington, DC 20510

Dear Speaker Pelosi, Leader McCarthy, Leader Schumer, and Leader McConnell:

On behalf of the undersigned organizations, which advocate for millions of taxpayers across America, we write to oppose the Charitable Conservation Easement Program Integrity Act. The latest versions of this legislation (H.R. 4164 and S. 2256) are even more flawed than their predecessors, and would create dangerous precedents for the entire system of tax administration. The most egregious aspect is that the legislation would impose a six-year retroactive tax increase and a twelve-year retroactive increase in penalties – running contrary to most notions of sound tax policy and due process.

Section 170(h) of the Tax Code, providing a charitable tax deduction for property donated on behalf of conservation or historic preservation, has been enhanced and affirmed through several acts of Congress over nearly five decades. More recently, however, the Internal Revenue Service has embarked on a controversial strategy against certain easement deductions facilitated through

partnerships of taxpayers, beginning with a listed transaction notice in 2016 and continuing today with aggressive auditing and litigation. H.R. 4164 and S. 2256 would do nothing to restore balance to this aggressive IRS strategy. Among our concerns:

- **Endorsing Excessive Retroactivity.** In the past, Congress has occasionally allowed limited periods of retroactivity based on the need for consistent application of provisions of tax law to serve certain policy goals. However, a six-year period of retroactivity (twelve years in the case of penalty increases) proposed in this legislation, based on shifting interpretations of those tax laws that effectively say Americans should have known years ago that the government would someday change its mind, is ludicrously unfair. We would suggest that one motivation for penalizing taxpayers who followed tax law and procedure as it was understood at the time is revenue-related. A prospective approach, while fairer, simply will not yield the billions in claw-backs that bare-knuckled retroactivity can extract from taxpayers.

  A recent open letter to Congressional leadership from conservation groups has dismissed objections to this Act's retroactivity as "disingenuous," claiming that the IRS has "issued fair and repeated warnings to the bad actors …" This statement is, itself, inaccurate. IRS Notice 2017-10, creating a listed transaction process for certain partnership easement arrangements, was predicated on increased scrutiny of the valuation appraisals behind those easements. This message, which the IRS telegraphed to taxpayers around the time the notice was issued, quickly gave way to tactics that had no relation whatsoever to legitimate questions of valuation. After a string of court losses where the government fatuously argued zero or minimal value to all the easements under scrutiny, further waves of IRS litigation made far more exotic contentions about "foot faults" involving highly technical details of easement agreements themselves – details that the entire conservation and historic preservation communities had long regarded as settled features.

- **Threatening Taxpayer Rights.** Instead of working to halt the worsening depredations to taxpayer rights that threaten the entire filing population, H.R. 4164 and S. 2256 would accelerate them. A new provision in the current legislation would deem penalties for gross valuation misstatements to apply to any amount of deduction disallowed for the taxpayer back to January 1, 2010. Thus, the bill allows even less discretion for facts and circumstances of individual cases – precisely the opposite of what the National Taxpayer Advocate has generally recommended for all types of collection due process situations.

  Sadly, this departure from prudent safeguards in the system of tax administration is not new. In its zeal to target taxpayers claiming 170(h) deductions, the IRS has trampled on key protections that our organizations have supported for many years, including supervisor approval requirements for penalty determinations, due process for appraisers, access to independent administrative appeals, the acknowledgment of facts process for information document requests, confidentiality of communication between taxpayers and advisors, and Administrative Procedure Act conventions in crafting guidance. Again, the legislation does nothing to repair this damage and essentially rewards the Service's reckless actions. The conservation group signatories of the aforementioned letter approvingly note that H.R. 4164 and S. 2256 reflect the Senate Finance Committee's endorsement of IRS enforcement actions against Section 170(h) taxpayers. Over the past

several decades our organizations have borne witness to the results of such careless signals from the legislative to the executive branch. In many cases, tactics developed against a relatively small number of taxpayers are, over time, deployed against millions more in entirely different contexts.

- **Causing Collateral Damage.** While supposedly written to focus on a certain type of charitable conservation easement deduction transaction, H.R. 4164 and S. 2256 effectively ratify the IRS's increasingly indiscriminate behavior toward taxpayers outside the partnership space. Nowhere does this legislation instruct the Service to repeal Notice 2017-10, or even express the intent of Congress that the agency exercise forbearance with its pursuit of foot faults in easement agreements going forward. The result could be continued flux and administrative chaos. As David Wooldridge, an attorney representing taxpayers in a conservation easement case, *Belair Woods, LLC*, recently noted, "Proceeds clauses similar to the one in *Belair* appear in most conservation easement deeds that were granted prior to IRS raising this issue in *Rose Hill*, and many granted afterwards. These include the so-called syndicated conservation easements, but they also include most easements that would be considered 'traditional.' The Service's position therefore would invalidate easement deductions for a majority of existing conservation easements, both traditional and 'syndicated.'" This comes as the Biden Administration seeks all manner of policy tools to achieve its goal of 30 percent of lands and oceans by the year 2030. If conservation groups, including the ones signing the letter referenced above, genuinely believe that H.R. 4614 and S. 2256 will (according to the letter's text) "ensur[e] that the federal tax incentive for land conservation and historic preservation remains available for genuine philanthropists," they should be supporting additional guardrails in the legislation to prevent IRS overreach going forward. To do otherwise would be irresponsible.

These are but a few reasons why the Charitable Conservation Easement Program Integrity Act should raise major warning flags with thoughtful Members of Congress who recognize the history of taxpayer rights abuses that preceded major managerial reforms of the IRS between 1988 and 2019. But this history need not repeat itself if lawmakers chart a different course now. Just a few appropriate legislative alternatives to H.R. 4164 and S. 2256 could consist of:

- A legislative branch directive for the IRS to develop "safe harbor" guidance surrounding easement deduction structures (a process the National Taxpayer Advocate has recommended in reports to Congress, and which Treasury Secretary Yellen expressed interest in pursuing earlier this year);

- Creation of an expert panel to resolve complex questions of valuation in easements, modeled after a similar body created to provide clarity for donations of art;

- Follow-on legislation that would clarify and require vigorous implementation of the Taxpayer First Act of 2019, including a taxpayer's right to appeal; and

- Where possible, adopting by statute the recommendations for conservation easement deductions offered by the IRS Advisory Council through a detailed report in 2009.

Solving the administrative issues that have arisen under Section 170(h) in a fair, responsible, and consistent manner would serve the government, taxpayers, and practitioners far better than retroactive, punitive legislation giving cover to an IRS that has lost all perspective on this area of law – and, in the process, threatening taxpayers who will never even contemplate claiming conservation easements.

The time to avoid a tragic mistake is now, by rejecting the Charitable Conservation Easement Program Integrity Act and embracing more sensible reforms. Should you wish to discuss this or any other tax administration issue further, we would certainly welcome the opportunity. Thank you for your consideration.

Sincerely,

Pete Sepp, President
National Taxpayers Union

Grover Norquist, President
Americans for Tax Reform

Ryan Ellis, President
Center for a Free Economy

cc: Chairs, Ranking Members, and Members of the Committee on Ways and Means, U.S. House of Representatives, and Committee on Finance, U.S. Senate