

22-185 **ORIGINAL**

IN THE
Supreme Court of the United States

MANDY MOBLEY LI,
Petitioner,

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

v.
COMMISSIONER OF THE IRS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 704 of the Administrative Procedure Act subjects final agency actions to mandatory judicial review if no other adequate remedy exists in any court. When Congress enacts a specific remedy where previous remedies were tenuous, the remedy provided is generally regarded as exclusive. The Tax Relief and Health Care Act of 2006 provides jurisdiction for the United States Tax Court to review the denial of whistleblower award applications.

The questions presented are:

1. Whether threshold rejections of whistleblower award requests are immune from the judicial review process established through the Administrative Procedure Act
2. Whether 26 U.S.C. § 7623 grants jurisdiction to the United States Tax Court to review rejections made under § 7623(a)
3. Whether the Whistleblower Office of the Internal Revenue Service may avoid its statutory and regulatory responsibilities by rejecting claims for award

RELATED CASES

Li v. Comm'r, No. 5070-19W, U.S. Tax Court.
Judgment entered April 6, 2020.

Li v. Comm'r, No. 20-1245, U.S. Court of Appeals
for the District of Columbia Circuit. Judgment
entered January 11, 2022. Denial of motion for panel
rehearing and rehearing en banc entered March 18,
2022.

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PETITION FOR A WRIT OF CERTIORARI

Mandy Mobley Li, the petitioner in this action, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this matter on January 11, 2022.

INTRODUCTION

Stare decisis and the separation of powers are indispensable elements of the American system of government. Before overruling precedent, the Court often requires that a party first request the overruling. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2347 n.5 (2020). An agency decision to reject a claim, prior to reaching a decision not to institute enforcement proceedings, is not an action committed to agency discretion and is not immune from judicial review where Congress has provided the Court with “law to apply.” C.f. *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2567-69 (2019).

But for one particular precedent and one particular agency, these ordinary judicial and administrative principles apparently do not apply. Public citizens who volunteer to assist the IRS with recapturing missing tax dollars, but who are later rejected by offices responsible for considering their offers of help, instead face differing legal standards throughout the country regarding whether their rejections are eligible for judicial review.

Some courts, like the Court of Appeals for the Eleventh and Federal Circuits and the pre-2021 Tax Court, follow the plain language of the governing

statute, 26 U.S.C. § 7623. These courts vest exclusive jurisdiction in the Tax Court over all claims rejected under 26 U.S.C. § 7623. Other courts, such as the post-2020 Tax Court, take a narrower approach to judicial review. Those courts assert that judicial review is available only for determinations made under 26 U.S.C. § 7623(b).

In the opinion below, the District of Columbia Circuit transferred itself from the plain language group of courts to the narrower approach camp. The majority opinion concluded that the Tax Court lacked jurisdiction to hear appeals from threshold rejections of whistleblower award requests. But, in doing so, the D.C. Circuit overturned twelve-year-old precedent that neither party requested of the court.

The text of the Tax Relief and Health Care Act of 2006 (“TRHCA”) does not support this narrower interpretation of 26 U.S.C. § 7623. To the contrary, this recent version frustrates the command that courts set aside agency action that is an abuse of discretion.

With courts applying inconsistent statutory interpretations, whistleblowers must navigate a labyrinth of conflicting jurisdictions to effectuate judicial review of their rejected claims. And even within the duration of a single case, a court may adopt one statutory interpretation upon initial review but find itself applying a second statutory interpretation upon remand, as is the case in this instant matter.

This Court should grant a writ of certiorari to provide clarification and uniformity to this unsettled area of law. Both are immediately necessary.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the District of Columbia Circuit (App. 1) is reported at 22 F.4th 1014. The orders of the D.C. Circuit Court denying a panel rehearing (App. 9) and rehearing *en banc* (App. 10) are unreported. The opinion of the U.S. Tax Court (App. 11) is also unreported.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit entered its judgment on January 11, 2022, and denied the petition for a panel rehearing and rehearing *en banc* on March 18, 2022. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The following statutes and regulations are involved in this case. Due to their length, the pertinent sections of their text shall be set forth in the appendix, at the corresponding page numbers:

5 U.S.C. § 704	App. 23
26 U.S.C. § 7623	App. 23

STATEMENT OF THE CASE

This case arises under Section 406 of the Tax Relief and Health Care Act of 2006, 26 U.S.C. § 7623, and presents an issue of public importance regarding judicial review of wrongful rejections of claims by federal agencies.

At issue are the Whistleblower Office's ("WO") actions in rejecting a valid claim "because the information provided was speculative and/or did not provide specific or credible information regarding tax underpayments or violations of internal revenue laws."

Specifically, this Court must determine whether § 7623(b)(4) and the provisions of the Administrative Procedure Act ("APA") apply to appeals from threshold rejections of whistleblower award requests. The disposition of this case will affect the legal rights of other whistleblowers with pending appeals and will resolve a circuit split.

A. Procedural Posture

This is a whistleblower case brought by Mandy Mobley Li on March 13, 2019, pursuant to 26 U.S.C. § 7623(b)(4). Li's petition, filed in the United States Tax Court, disputed a specific IRS action, "Notice of Determination Under 7623 Concerning Whistleblower Action." JA002.

The respondent is the Commissioner of the IRS. *Id.* On February 8, 2019, the IRS WO issued a letter, addressed to Li, which rejected Li's claim to be

considered for the whistleblower award program. JA004.

The letter alleged that the WO “considered [Li’s] Form 211, Application for Award of Original Information, dated 11/30/2018.” *Id.* ¶ 1. The letter stated that “[t]he claim has been rejected because the information provided was speculative and/or did not provide specific or credible information regarding tax underpayments or violations of internal revenue laws.” *Id.* ¶ 2. The WO considered the rejection of Li’s claim as “a final determination for purposes of filing a petition with the United States Tax Court.” *Id.* ¶ 3.

Line 11 of Form 211 instructs an individual claimant to “[a]ttach a detailed explanation and include all supporting information in your possession and describe the availability and location of any additional supporting information not in your possession.” SA0035. As instructed, Li attached detailed explanations of four alleged violations of income tax law; included twelve pages of supporting information in her possession, and described income tax returns not in her possession. SA0035-47. Based on the detailed explanations and supporting information provided by Li, three of the four alleged violations could have only occurred in taxable year 2015. Li Reply Br. 30-35.

Pursuant to the WO’s explicit instructions in the February 8th letter, Li “file[d] a petition with the Tax Court” because Li “disagree[d] with [the WO’s] determination.” JA004 ¶ 3. On December 5, 2019, the Commissioner moved for summary judgment JA010-18, to which Li objected because the WO “did not give

adequate consideration to her allegations regarding the 2015 tax year.” JA024-27, JA043. Despite Li’s objections, the Tax Court “concluded that [Li] did not provide information that adequately substantiated a violation of the internal revenue laws for the 2015 tax year.” JA044. The Tax Court granted the Commissioner’s motion for summary judgment and sustained the WO’s final determination rejecting the whistleblower claim. JA046-47.

Li appealed the Tax Court’s decision to the United States Court of Appeals for the District of Columbia Circuit. JA064-66. Both the Commissioner and Li confirmed, and did not dispute, the Tax Court’s authority over the earlier proceeding in their opening briefs. Li Br. 5, Comm’r Br. 2. Nevertheless, the D.C. Circuit appointed *amicus curiae* “to assist the court by addressing this court’s jurisdiction.” Order ¶ 1 (June 15, 2021).

Court-appointed *amicus* alleged that “[a]lthough the parties have not challenged this Court’s or the Tax Court’s jurisdiction, this Court has jurisdiction to determine both given its ‘jurisdiction to review the decisions of the Tax Court.’ 26 U.S.C. § 7482(a)(1).” Amicus Br. 1. The D.C. Circuit subsequently dismissed Li’s appeal after concluding that “the Tax Court had no jurisdiction to review [the WO’s rejection of] Li’s Form 211” and that “*Cooper* and *Lacey* were wrongly decided.” *Li v. Comm’r*, 22 F.4th 1014, 1017 (D.C. Cir. 2022) (citing *Cooper v. Comm’r*, 135 T.C. 70 (2010), *Lacey v. Comm’r*, 153 T.C. 146 (2019)).

Li filed a motion for panel rehearing and rehearing *en banc* with the D.C. Circuit, and the court denied

the motion on March 18, 2022. App. 9-10. Pursuant to 28 U.S.C. § 1254(1), Li filed the instant Petition for Writ of Certiorari with the United States Supreme Court on June 16, 2022.

B. Relevant Factual Background

In 1867, Congress first enacted a whistleblower program, which authorized the IRS to pay rewards to informants who reported tax law violations. *Dacosta v. United States*, 82 Fed. Cl. 549, 552 (2008). Prior to December 20, 2006, the U.S. Tax Court had no jurisdiction to review the IRS Commissioner's discretion in giving or denying rewards under 26 U.S.C. § 7623. *Wolf v. Comm'r*, 93 T.C.M. (CCH) 1273 (T.C. 2007).

In 1946, Congress provided a general authorization for review of agency action in the district courts, pursuant to the APA. 5 U.S.C. § 704. At the time the APA was enacted, a number of statutes creating administrative agencies defined the specific procedures to be followed in reviewing a particular agency's action. *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988).

In 2006, Congress provided specific authorization for review of reward claim denials in the U.S. Tax Court, pursuant to the TRHCA. *Wolf v. Comm'r*, 93 T.C.M. (CCH) 1273 (T.C. 2007). The Tax Court's jurisdiction is "dependent upon a finding that a 'determination' has been made by the Commissioner." *Lewis v. Comm'r*, T.C.M. (RIA) 2022-047 (T.C. 2022) (citing *McCrory v. Comm'r*, 156 T.C. 90, 94 (2021)).

The TRHCA also amended 26 U.S.C. § 7623 in two additional ways: (1) the former section 7623 became what is now subsection 7623(a), and (2) new subsections were added, providing for non-discretionary awards in certain circumstances. Pub.L. No. 109-432, Div. A, Title IV, § 406(a), 120 Stat. 2958 (2006).

REASONS FOR GRANTING THE WRIT

A. Whether § 7623(a) Rejections Are Reviewable Has Divided Federal Appellate Courts

Federal appellate courts issue conflicting opinions concerning the review authority granted to the U.S. Tax Court, pursuant to 26 U.S.C. § 7623. Some courts follow the plain language of § 7623(b)(4), while other courts infer statutory limitations that restrict judicial review to a subset of final determinations. As a result, whistleblowers, whose claims are rejected by the WO, face differing legal standards throughout the country regarding whether their rejections are eligible for judicial review.

For example, the Eleventh Circuit states, “[i]f the whistleblower disputes the determination regarding an award, the whistleblower may appeal the determination to the Tax Court.” *Ware v. Comm'r*, 499 F. App'x 957, 959 (11th Cir. 2012). Until 2006, the Court of Federal Claims decided such appeals. *Meidinger v. United States*, 989 F.3d 1353, 1356 (Fed. Cir. 2021). But the Commissioner himself agreed in the previous forum that jurisdiction over the denial of an award determination lies with the Tax Court. *Dacosta v. United States*, 82 Fed. Cl. 549, 554 (2008) (citing Staff of the Joint Comm. On Taxation, 109th Cong., Technical Explanation of H.R. 6408, p. 89 (“The provision [§ 7623(b)(4)] permits an individual to appeal the amount or denial of an award determination to the United States Tax Court”)).

The Federal Circuit Court agrees with the Eleventh Circuit. “[T]he Tax Court has exclusive jurisdiction over claims based on § 7623.” *Id.* at 1358. The Eleventh Circuit further clarifies, “appeals from the denial of a Form 211 application are to be filed with the Tax Court.” *Meidinger v. Comm'r*, 662 F. App'x 774, 776 (11th Cir. 2016). “26 U.S.C. § 7623(b)(4) makes [that] clear.” *Id.*

Prior to the D.C. Circuit issuing the opinion below, the Tax Court also followed the plain language of § 7623(b)(4).

Having been given jurisdiction over “[a]ny determination regarding an award”, sec. 7623(b)(4), and having been charged with the review of the WBO’s exercise of its discretion, we do have authority to review its abuse of discretion in a decision to reject a claim for failure to meet threshold requirements without referring it to an IRS operating division.

Lacey v. Comm'r, 153 T.C. 146, 166–67 (2019). “[W]e find that our jurisdiction ... includes any determination to deny an award.” *Cooper v. Comm'r*, 135 T.C. 70, 75 (2010).

But after the D.C. Circuit, *sua sponte*, overruled both *Cooper* and *Lacey* earlier this year, the Tax Court is now inferring statutory limitations that restrict judicial review to a subset of final determinations. For example, in *Kennedy v. Comm'r*, the Tax Court now announces, “[a] whistleblower may appeal a determination made under sec. 7623(a) to this Court,

but our review in that instance is limited to determining whether the [WO] erred in classifying a claim as not meeting the threshold limitation.” 121 T.C.M. (CCH) 1008 (T.C. 2021) (pending appeal to D.C. Cir.). Judicial review “is available only for determinations made under sec. 7623(b).” *Id.*

The D.C. Circuit has so far departed from the accepted and usual course of judicial proceedings. Thus, the Court should exercise supervisory power to resolve whether judicial review is available for all final determinations, including those made under § 7623(a).

B. The Administrative Procedure Act Prohibits Threshold Rejections of Whistleblower Award Requests from Being Immune to Judicial Review

Here, the D.C. Circuit held that the Tax Court lacks jurisdiction to hear appeals from threshold rejections of whistleblower award requests. *Li v. Comm'r*, 22 F.4th 1014, 1017 (D.C. Cir. 2022). But the fact that the Tax Court is precluded from hearing this instant appeal does not remove the statutory obligation to provide some form of judicial review of the WO final decision. If threshold rejections of whistleblower award requests are not reviewable by the Tax Court, then another court must have the judicial review authority. Take away judicial review entirely, and threshold rejections of whistleblower award requests are immune from judicial review.

Agency actions, including claim denials and rejections, are not immune from judicial review.

Cambridge v. United States, 558 F.3d 1331, 1340 (Fed. Cir. 2009) (J. Newman, dissenting) (“discretion accorded to the IRS ... is reviewable within that framework”). This Court has found jurisdiction in the Tax Court over the denial of similar claims. See *Hinck v. United States*, 550 U.S. 501 (2007) (“the Tax Court provides the exclusive forum for judicial review of a refusal to abate interest”).

In this instant matter, the issue is not whether the Tax Court has jurisdiction, but whether the appeal of the WO’s final decision here received sufficient judicial review to satisfy statutory requirements. It did not receive such review, based on the Tax Court’s grant of summary judgment and the D.C. Circuit’s dismissal, and thus the Court should exercise its certiorari jurisdiction to review the decision below and conclusively answer the following important question: whether the APA’s judicial review provisions apply to threshold rejections of whistleblower award claims.

C. This Case Squarely Presents the Questions Presented, And Is an Ideal Vehicle for Resolving the Recent Circuit Split

Exposing misconduct is a matter of considerable importance. *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006). Obligations arising from applicable whistleblower statutes provide checks on agencies who may otherwise order inappropriate actions. *Id.* at 425–26. The Court should exercise its certiorari jurisdiction to rebalance our delicate system.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,



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