No. 23-413

In the

Supreme Court of the United States

MICHAEL LISSACK,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Congress removed the Internal Revenue Service's ("IRS") discretion regarding the paying of a whistleblower award in certain circumstances by amending section 7623 in 2006 as part of the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, div. A, title IV, § 406(a)(1), 120 Stat. 2958 (the "2006 Act"). The 2006 Act amended § 7623, creating an obligation that the IRS pay awards to whistleblowers who meet certain requirements, described in § 7623(b)(5). The 2006 Act did so by designating § 7623, as it existed before December 6, 2006, as 7623(a), which allows the IRS the discretion to pay awards that do not meet the requirements of subsection (b). Congress found these changes necessary because Congress had determined that the discretionary IRS whistleblower program was underutilized because awards, when they were paid at all, were arbitrary with little oversight or consistency.

The 2006 Act expressly removed the discretion from the IRS as to whether or not to pay awards when certain requirements were met. The mandate that the IRS pay whistleblower awards within a prescribed range is found in the first sentence of § 7623(b)(1). The amount of the award within the range set in the first sentence is determined according to the second sentence of § 7623(b)(1).

The first sentence reads:

> If the Secretary proceeds with any administrative … action described in subsection (a) based on information brought to the Secretary's attention by

> an individual, such individual shall, subject to paragraph (2), receive as an award at least 15 percent but not more than 30 percent of the proceeds collected as a result of the action (including any related actions) or from any settlement in response to such action (determined without regard to whether such proceeds are available to the Secretary).

26 U.S.C. § 7623(b)(1).

The language of § 7623(b) is drafted broadly to fit the wide array of whistleblowers that come forward to the IRS to provide information about all kinds of taxpayers, but the language is clear. Nevertheless, the regulations issued under this statute attempt to rewrite the statute to return discretion to the IRS and impose additional criteria that are not required by the statute as written.

In this case, the regulations thwart the will of Congress by denying an award to a whistleblower that caused an audit that otherwise would not have been opened, which resulted in the collection of millions of dollars.

Petitioner agrees that the Court should hold the petition for writ of certiorari in this case pending the resolution of *Loper Bright Enterprises v. Raimondo*, No. 22-451 (argued Jan. 17, 2024), and *Relentless, Inc. v. Dept. ov Commerce*, No. 22-1219 (argued Jan. 17, 2024), and then decide if any questions remain to be decided by this Court or then dispose of the petition as appropriate. Depending on how narrow this Court writes its opinion in *Loper*

Bright and *Relentless*, this Court may not reach the question of whether deference under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) applies when Congress has acted to remove agency discretion.

I. *Chevron* Deference Is Should Not Be Given Where Congress Has Removed Agency Discretion.

This case is different from *Loper Bright* and *Relentless* because this case involves a statute that was amended to remove discretion from the administrative agency that administered this program and is responsible for promulgating regulations under the statute. Congress mandated that the IRS pay whistleblower awards when the IRS proceeds in an administrative or judicial action based on the whistleblower's information. When the IRS proceeds in an action based on the whistleblower's information, the IRS must pay an award based on the amounts collected from that action. This mandated action is different from *Loper Bright* and *Relentless* where Congress was silent as to how the statute applied to herring vessels.

Here, the Congressional action of amending § 7623 to create a duty to pay awards where the IRS acted upon a whistleblower's information and proceeds are collected, which were previously discretionary, shows that Congress intended to remove discretion from the IRS. Allowing the agency to then turn around and write regulations that are deferred to by the U.S. Tax Court and the D.C. Court of Appeals defies logic and the separation of powers.

Congress acted to explicitly remove agency discretion. The regulations functionally return that discretion to the IRS. By courts deferring to the agency's interpretation in these regulations, the executive branch is becoming the branch that not only is responsible for executing the law, but also its interpretation functionally becomes law as courts defer to the agency's interpretation.

This is the only situation where a litigant's interpretation is deferred to by a court. In cases where Congress has sought to limit the agency's discretion, it cannot be the correct answer that the agency's interpretation, which restores said discretion, is still deferred to by the courts.

II. Congress Was Clear In Its Mandate That The IRS Should Pay Whistleblowers And The Regulations Attempt To Walk That Back.

The language of § 7623(b) is clear. The ambiguity that has been read in to the statute is because § 7623(b)(1) is two sentences, the first sentence is the mandate to pay the award and the second sentence is how the amount of the award is determined. The first sentence of § 7623(b)(1) does not require that a whistleblower provide substantial assistance. The first sentence of § 7623(b)(1) states:

> If the Secretary proceeds with any administrative or judicial action described in subsection (a) based on information brought to the Secretary's attention by an individual, such individual shall, subject to paragraph

> (2), receive as an award at least 15 percent but not more than 30 percent of the proceeds collected as a result of the action (including any related actions) or from any settlement in response to such action.

26 U.S.C. § 7623(b)(1).

There is no mention of a substantial contribution in the sentence that mandates that the IRS pay an award. In fact, this is recognized in Treasury Regulation § 301.7623-2(b)(1), which establishes a "but for" test as part of the definition of "proceeds based on". Treasury Regulation § 301.7623-2(b)(1) reads:

> the IRS proceeds based on information provided by a whistleblower when the information provided substantially contributes to an action against a person identified by the whistleblower. For example, **the IRS proceeds based on the information provided when the IRS initiates a new action**, expands the scope of an ongoing action, or continues to pursue an ongoing action, **that the IRS would not have initiated**, expanded the scope of, or continued to pursue, **but for the information provided.**

26 C.F.R. § 301.7623-2(b)(1) (emphasis added).

Section 7623(b)(1) envisions granting awards to a whistleblower whose information leads the IRS to

take administrative or judicial action that leads to the recovery of collected proceeds. Once the fact of the award is determined by the mandate in the first sentence of § 7623(b)(1), the second sentence describes how the amount of the award is to be determined within the mandated range.

Nevertheless, the D.C. Circuit read these sentences as a single mandate, importing substantially into the mandate to pay an award, but ignored Congress's definition of what a less than substantial contribution is. Rather than look to the statutory language in § 7623(b)(2), the D.C. Circuit claimed ambiguity in the statute and deferred to agency regulations.

Congress was equally clear that the action on which the IRS proceeds is the action on which the IRS must pay an award under § 7623(b)(1). Section 7623(b)(1) requires that awards paid shall be, subject to certain conditions, "at least 15 percent but not more than 30 percent of the collected proceeds (including penalties, interest, additions to tax, and additional amounts) resulting from the action (including any related actions) or from any settlement in response to such action." 26 U.S.C. § 7623(b)(1). The phrases "the action" and "such action" used in this portion of § 7623(b)(1) reference the administrative or judicial actions, as described in subsection (a), earlier in the sentence. The structure of the sentence makes clear that "the action" and "such action" are referring to the administrative or judicial action at the beginning of the sentence and should be applied as such. The same or similar terms in a statute are generally interpreted

in the same way. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992).

The word "action" is rightly read to refer to the same action throughout the subsection. For example, if the IRS opens an audit based on a whistleblower's information, the whistleblower's award is based on the full amount collected from that audit because the "action" that the IRS took based on the whistleblower's information was opening a previously unplanned audit.

Regulations cannot be allowed to rewrite the statute to create an extra requirement in order to deny an individual a statutorily mandated payment.

Petitioner brought the IRS information that Taxpayers misreported income as debt. Respondent readily admits that the only reason that audits were opened for the Taxpayers was Petitioner's information. Thus, the audits are the administrative action described in subsection (a)(1) that the Secretary proceeded with based on information brought to the Secretary's attention by Petitioner. Under the plain language of the statute, Petitioner is entitled to an award of at least 15 percent but not more than 30 percent of the collected proceeds collected from of the audits.

The government continues to argue that the words Congress wrote could not mean what they say in part because giving meaning to the words of the statute as written could cause whistleblowers to come forward to raise meritless concerns in hopes of starting an audit. Petitioner has pointed out that this concern is clearly not a practical concern. First,

whistleblowers must sign a Form 211 under penalties of perjury in order to submit the claim for an award. No rational person would commit perjury in hopes of possibly collecting an award more than a decade later if the IRS did act on the information. Second, the IRS has proven itself at being highly adept at rejecting speculative cases that lack merit. According to the most recent IRS Whistleblower Office Report to Congress, 71% of closures in Fiscal Year 2022 (8,193 claims) were because the IRS determined that there was no actionable issue. IRS Whistleblower Office, Fiscal Year 2022 Annual Report, Pub. 5241 (Rev. 6-2023). This argument comes down to the theory that to prevent a hypothetical problem a very real problem must be created.

The U.S. Court of Appeals for the District of Columbia's language is telling in that it states that "there is ample reason to doubt that Congress meant to entitle whistleblowers" App-23. Then deferring to Treasury's interpretation claiming that it calibrated mandatory awards to actions where the whistleblower's information substantially assists. However, § 7623(b)(1) does not require substantial assistance by the whistleblower. Further, Congress already described what a less than substantial contribution is and how a less than substantial contribution is treated in section 7623(b)(2).

The IRS has broad prosecutorial discretion to choose which cases and which issues to pursue. This prosecutorial discretion combined with example 2 of Treasury Regulation § 301.7623-2(b)(2), allows the IRS to use a whistleblower's information to identify a noncompliant taxpayer, audit the whistleblower's

issue, and then assess and collect on a similar issue without paying the whistleblower an award. In cases such as this the whistleblower has identified a taxpayer they believe to have improperly avoided paying tax the whistleblower has identified, under penalty of perjury, a taxpayer that they believe to be noncompliant out of the more than 165 million tax returns that were filed.

Treasury cannot impose its own will and alter the requirements of § 7623(b)(1) simple because it disagrees with the results under the statute.

III. This Case Is An Ideal Vehicle To Resolve Exceptionally Important Issues.

This case is profoundly important on multiple levels. Section 7623(b) was enacted to incentivize whistleblowers to bring information to the IRS so the IRS could more effectively, efficiently, and fairly administer internal revenue laws. The tax gap for 2014 – 2016 was estimated by the IRS to be $496 billion per year, a $58 billion per year increase from the prior estimate. www.irs.gov/newsroom/the-tax-gap. Of this, $398 billion is from underreporting.

The 2006 Act could be a powerful tool to help close the tax gap and incentivize those with knowledge of tax noncompliance to come forward and report what they know to the IRS. By mandating awards, Congress wanted to ensure that those who came forward were paid an award to compensate them for the risk they undertook to come forward. The IRS rather than embracing § 7623 as a tool to make tax administration more efficient, enacted regulations

that returned its discretion and has looked for ways to avoid paying whistleblowers.

But the importance of this case is by no means limited to whistleblowers or tax administration. Courts and litigants alike have an undeniable interest in whether agencies can avoid mandates from Congress to act and the current state of *Chevron*, which applies to countless statutes involving every federal agency. Virtually every agency has a mandate from Congress to act. Accordingly, if agencies have carte blanche to use rulemaking to avoid these mandates and get away with it under *Chevron*, the threat to the separation of powers will grow only more pronounced.

This case is an ideal vehicle to resolve these issues. There is simply no substitute for granting review either to stop the overreading of *Chevron* or to start its overruling.

CONCLUSION

For the foregoing reasons, this Court should hold the petition for writ of certiorari in this case pending the resolution of *Loper Bright* and *Relentless*. Once those cases have been decided, if any questions remain to be decided by this Court, then this Court should grant the petition for certiorari, or return the case for proceedings in line with *Loper Bright* and *Relentless*.

Respectfully submitted,

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