No. _____

In the Supreme Court of the United States

THOMAS SHANDS,

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 Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2006, Congress amended 26 U.S.C. § 7623(b)(1) to require the Internal Revenue Service ("IRS") to issue a whistleblower award when it recovers proceeds as a result of administrative or judicial action based on information provided by a whistleblower. The amendment divests the IRS of any discretion to deny an award under § 7623(b)(1) when the statutory conditions are met. The IRS maintains that it can avoid the § 7623(b)(1) mandate by denying a whistleblower award based on an assertion that it took no action on the whistleblower's information. The IRS further contends that such a denial is insulated from judicial review. According to the IRS, an assertion that it took no action based on whistleblower information deprives the United States Tax Court of subject matter jurisdiction to review the denial under *Li v. Commissioner of Internal Revenue*, 22 F.4th 1014 (D.C. Cir. 2022). The questions presented are as follows:

I. Whether the IRS can deprive the United States Tax Court of subject matter jurisdiction to review the IRS's denial of a mandatory whistleblower award under § 7623(b)(1) by claiming it took no action?

II. Whether the IRS can deny a mandatory whistleblower award under § 7623(b)(1) by claiming it took no action, even when the undisputed facts demonstrate that the IRS did take action?

PARTIES TO THE PROCEEDING AND RELATED CASES

Dr. Thomas Shands was the petitioner in the United States Tax Court, the appellant in the United States Court of Appeals for the District of Columbia Circuit, and is the petitioner in this proceeding.

The Commissioner of Internal Revenue was the respondent in the United States Tax Court, the appellee in the United States Court of Appeals for the District of Columbia Circuit, and is the respondent in this proceeding.

Michael A. Humphreys was *amicus curiae* for appellant in the United States Court of Appeals for the District of Columbia Circuit.

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Shands v. Commissioner of Internal Revenue*, No. 23-1160, United States Court of Appeals for the District of Columbia Circuit: Judgment entered on July 16, 2024; Petition for Rehearing, denied by order dated October 4, 2024.
- *Shands v. Commissioner of Internal Revenue*, No. 13499-16W, United States Tax Court: Opinion filed on March 8, 2023 and Judgment entered on March 22, 2023.

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PETITION FOR WRIT OF CERTIORARI

In § 7623(b)(1) of the Internal Revenue Code, Congress prescribed a mandatory whistleblower award that the IRS must pay when the IRS takes administrative or judicial action based on whistleblower information that results in the IRS's collection of proceeds. From the outset, the IRS has exhibited hostility to the statutory mandate, complaining that the statutory requirements were forced on the IRS by Congress.[1] Notwithstanding the congressional mandate, and the elimination of any IRS discretion to deny such an award, the IRS remains intransigent in its refusal to pay mandatory whistleblower awards.

First, the IRS employs significant delays in its review of a whistleblower claim. On average, the IRS takes more than a decade to process a claim for a mandatory whistleblower award. In 2023, the processing time was 11.29 years.[2] Despite its lengthy

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[1] *See* Karie Davis Nozemack, & Sarah J. Webber, *Lost Opportunities: the Underuse of Tax Whistleblowers*, 67 ADMIN L. REV. 321, 334–35, 335 n.78 (2015); Letter from Siri Nelson, Executive Director, Nat'l Whistleblower Center, to Sen. Wyden, Chairman, Senate Whistleblower Protection Caucus, and Sen. Grassley, Chairman, Senate Whistleblower Protection Caucus (July 25, 2023) (on file with www.whistleblowers.org); Maureen Leddy, *Whistleblower Group Criticizes Delays in Awards Payments*, RIA Fed. Tax. Update, May 2, 2024, at 2024 WL 1928630; Maureen Leddy, *IRS Whistleblower Claims Processing Far Too Slow, Say Practitioners*, RIA Fed. Tax Update, July 1, 2024, at 2024 WL 3250900.

[2] IRS Whistleblower Office, Pub. 5241, Fiscal Year 2023 Annual Report, at 19 (2024).

review process, the IRS nonetheless denies most whistleblower claims based on an assertion that it took no action. Of the more than 10,000 whistleblower claims closed in 2023, the IRS denied 72% because it allegedly took no action.[3] The IRS thus requires, on average, more than ten years to take no action. The IRS made only 21 mandatory whistleblower awards in 2023, in less than .2% of the claims closed that same year.[4] Finally, the IRS shields its "no action" denials from judicial review by asserting that the United States Tax Court lacks subject matter jurisdiction to review a denial based on the purported failure of the IRS to take action on the whistleblower information. In 2022, whistleblowers filed 46 petitions in the Tax Court seeking review of the IRS's determination of a mandatory whistleblower award.[5] Over 40 of those petitions were dismissed for lack of subject matter jurisdiction following the D.C. Circuit's decision in *Li v. Commissioner*, 22 F.4th 1014 (D.C. Cir. 2022).[6]

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[3] *Id.* at 27.

[4] *Id.* at 18.

[5] United States Tax Court, Congressional Budget Justification: Fiscal Year 2024, at 19 (2023).

[6] *See* Keith Fogg, *Tax Court Vacates at Least 40 Dismissals of Whistleblower Cases*, Tax Notes (Sept. 12, 2022) https://www.taxnotes.com/procedurally-taxing/tax-court-vacates-least-40-dismissals-whistleblower-cases/2022/09/12/7h7kf.

Following the denial of the petition for certiorari in *Li*, the Tax Court reinstated its dismissals for lack of jurisdiction. *See, e.g., Fesko v. Comm'r*, No. 13918-19W, 2022 U.S. Tax Ct. LEXIS 1185 (T.C. Dec. 22, 2022); *Holman v. Comm'r*, No. 3319-20W,

The IRS's refusal to pay the mandatory whistleblower awards prescribed by Congress in § 7623(b)(1), and its successful argument in the D.C. Circuit that such refusals are insulated from judicial review, threaten important separation of powers protections that are the bedrock of the United States's system of government. Even more troubling than the concerns underpinning *Chevron* deference, here the IRS ignores a congressional mandate to pay mandatory whistleblower awards and the corresponding statute expressly providing for judicial review of the IRS's denial of mandatory awards. The IRS's exercise of unfettered discretion, expressly rejected by Congress, eviscerates important checks and balances on agency power.

This Court should grant review and reverse the determination below that the IRS can deprive the United States Tax Court of subject matter jurisdiction to review the IRS's denial of a mandatory whistleblower award by predicating the denial on an assertion that the IRS took no action on whistleblower information. The Court should also grant review and reverse the decision below that the IRS has the power to deny a mandatory whistleblower award on the purported ground that it took no action, even where the undisputed facts reveal that it did take action. On review, the Court should clarify that the United States Tax Court has subject matter jurisdiction to review all denials of mandatory whistleblower awards. Otherwise, the IRS can continue to insulate

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2022 U.S. Tax Ct. LEXIS 255 (T.C. July 12, 2022); *McCrory v. Comm'r*, No. 3443-18W, 2022 U.S. Tax Ct. LEXIS 1157 (T.C. Dec. 20, 2022).

from review its denial of mandatory whistleblower awards by the simple expedient of claiming, as it did in this case, that it took no action, even where it did.

OPINIONS BELOW

The D.C. Circuit's opinion is reported at 111 F.4th 1 and reproduced at App-1–App-23. The U.S. Tax Court's opinion, dated March 8, 2023, is reported at 160 T.C. 388 and reproduced at App-26–App-43. The D.C. Circuit's order denying Appellant's Petition for Rehearing, dated October 4, 2024, is reproduced at App-44–App-45.

JURISDICTION

The D.C. Circuit issued its opinion on July 16, 2024. Petitioner Thomas Shands filed a petition for rehearing on August 30, 2024. The D.C. Circuit denied the petition for rehearing on October 4, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions from 26 U.S.C. § 7623 are reproduced at App-46–App-49.

STATEMENT OF THE CASE

A. Legal Framework

i. The Whistleblower Statute

Federal law has long provided for whistleblower awards as a vehicle for encouraging informants to provide information about violations of

the federal tax laws. Enacted in 1954, § 7623 originally provided that whistleblower awards were paid entirely at the discretion of the IRS. In 2006, however, Congress amended § 7623 to create a mandatory whistleblower award that the IRS must pay when the statutory provisions are satisfied. Section 7623(b)(1) requires payment of a mandatory whistleblower award as follows:

> 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). In addition, § 7623(b)(5) provides that the amount at issue must exceed $2,000,000 and, in the case of an individual, the individual's gross income must exceed $200,000 for any taxable year subject to the action.

The accompanying Treasury Regulations define an "administrative action" to mean "all or a

portion of an [IRS] civil or criminal proceeding against any person that may result in collected proceeds … including, for example, an examination, a collection proceeding, a status determination proceeding, or a criminal investigation." 26 C.F.R § 301.7623-2(a)(2).

Congress also provided for judicial review of the IRS's determination of any whistleblower award. Section 7623(b)(4) states that "any determination regarding an award" under § 7623 (b)(1), (2), or (3) may be appealed to the United States Tax Court which "shall have jurisdiction with respect to such matter." Citing *Li v. Commissioner*, 22 F.4th 1014 (D.C. Cir. 2022), the Tax Court held that it has subject matter jurisdiction under § 7623(b)(4) to review the determination of a whistleblower award only if the IRS takes administrative or judicial action based on the whistleblower information.

ii. The IRS's Offshore Voluntary Disclosure Initiative

From February 8, 2011 to September 9, 2011, eligible U.S. taxpayers could apply for the IRS's 2011 Offshore Voluntary Disclosure Initiative ("OVDI") in an effort to avoid criminal prosecution and resolve their tax liability in connection with undisclosed offshore accounts or assets for tax years 2003 through 2010. The IRS assigned OVDI submissions to an examiner who undertook a comprehensive review of the information provided. The examiner was authorized to ask follow-up questions, request documents, and contact third parties to inquire about the information provided. If the IRS was dissatisfied

with the information provided by the taxpayer, it was authorized to conduct a full examination for the entire period of noncompliance. Moreover, if the taxpayer disagreed with the tax, interest, and penalty determined by the examiner, then the IRS would conduct a full examination of all issues.

Shands sought a mandatory whistleblower award under § 7623(b)(1) in connection with proceeds collected by the IRS in certain OVDI proceedings. The IRS took the position, and the United States Tax Court agreed, that the IRS took no action on Shands's whistleblower information because OVDI proceedings can never constitute administrative action or related action under § 7623(b)(1). *See* App-39. On appeal in the United States Court of Appeals for the District of Columbia Circuit, the IRS conceded the material point that OVDI proceedings do constitute administrative action where they involve an examination. Although the D.C. Circuit also recognized that OVDI proceedings can constitute administrative action, it nonetheless affirmed the Tax Court's decision that OVDI proceedings can never constitute administrative or related action. *See* App-14–App-15.

Based on its conclusion that OVDI proceedings can never constitute administrative or related action, the Tax Court determined that the IRS had taken no action on Shands's whistleblower claim. App-39. Accordingly, the Tax Court held it lacked subject matter jurisdiction to review the IRS's denial of Shands's whistleblower claim under *Li*. App-40. On appeal, the D.C. Circuit affirmed the Tax Court's jurisdictional dismissal. Notwithstanding the IRS's concession and its own acknowledgment that OVDI

proceedings can constitute administrative action, the D.C. Circuit affirmed the Tax Court's ruling that it lacked subject matter jurisdiction to review the denial of Shands's whistleblower claim because the IRS took no action. App-14–App-15.

B. Factual Background

In August 2010, petitioner Dr. Thomas Shands began providing detailed information to the United States Department of Justice ("DOJ") and the IRS Criminal Investigation Division in connection with their ongoing investigations of Swiss banks, bankers, and investment advisors who enabled U.S. taxpayers to conceal offshore financial assets. C.A. App. 314–315.

Shands's assistance to the DOJ and IRS was both extensive and direct. After providing financial records and hours of personal testimony, Shands became an official cooperator with both the DOJ and the IRS. Under IRS supervision, he made and recorded telephone calls to a Swiss banker, Martin Lack, the former Head of North American Operations at UBS. Those calls led to a November 6, 2010, meeting in Miami, Florida, with Renzo Gadola, Lack's Swiss investment banker partner. The meeting was surveilled by IRS agents and recorded by Shands using a concealed recording device furnished by the IRS. Two days later, Gadola was arrested by U.S. authorities based on the information recorded during the meeting with Shands. Gadola began cooperating with the IRS and DOJ, and subsequently pleaded guilty to conspiring to defraud the United States.

Shortly thereafter, and as a result of Shands's assistance, additional bankers Christos Bagios, Marco Parenti Adami, Emanuel Augustoni, Michele Bergantino, and Roger Schaerer were likewise charged with conspiracy to defraud the United States. In July 2011, the United States filed a superseding indictment that identified 35 U.S. taxpayer clients of the bankers. Finally, based on the original tape recordings of the telephone calls with Shands, Martin Lack was arrested and charged.

During his recorded calls with Lack, Shands (and the DOJ) learned that Lack had transferred Shands's UBS account to Basler Kantonalbank ("BKB"), a Swiss banking institution. In August 2018, BKB entered into a deferred prosecution agreement with the DOJ. Gadola and Lack had also assisted other U.S. clients in opening and maintaining undeclared accounts at BKB. As of 2010, BKB held approximately 1,144 accounts on behalf of U.S. clients with a total value of $813.2 million. C.A. App. 401. Following Gadola's arrest (based on the secretly recorded meeting with Shands), BKB ceased opening new accounts for U.S. domiciled clients.

On November 10, 2011, the DOJ filed a supplemental Sentencing Memorandum in advance of Gadola's sentencing. In the Sentencing Memorandum, DOJ stated "[i]t cannot be doubted" that the torrent of publicity generated by Gadola's guilty plea, and his participation in the Lack and Bagios prosecutions (all of which were the direct result of the information provided by Shands) were of "great benefit to the IRS as it has spurred U.S. taxpayers to enter into the voluntary disclosure program." C.A. App. 302. The Sentencing

Memorandum explained that 12 of Gadola's U.S. Clients were prompted to initiate OVDI proceedings in which they disclosed their foreign accounts and identified Gadola as a banker who assisted them in concealing their assets. Those U.S. Clients estimated that their unreported income exceeded $2,000,000. At Gadola's sentencing hearing, counsel for DOJ described in detail the information Gadola provided about his U.S. Clients. The DOJ acknowledged that Gadola gave the United States access to his email communications with his U.S. Clients and, in five debriefings, "he went through client by client, colleague by colleague, laying out their various participation in various tax evasion schemes." C.A. App. 62–63. Counsel for DOJ explained that the information gave the United States a better understanding of how the tax evasion scheme worked from the Swiss bankers' side, "but as well how it operated from the U.S. client's side." C.A. App. 63.

Similarly, Shands's whistleblower information also provided the IRS with extensive information on the U.S. Clients of the other Swiss bankers and BKB. In Bagios's indictment, the United States described transactions involving nine of Bagios's U.S. Clients. In Lack's indictment, the United States described in detail meetings and transactions involving eight of Lack's U.S. Clients, in addition to his meetings with Shands. Further, as part of BKB's Deferred Prosecution Agreement, the United States required BKB to disclose the identity of, and other information related to, its U.S. account holders. As a further condition of BKB's deferred prosecution, the United States required BKB to conduct "extensive outreach to former U.S. customers in order to encourage their

participation in IRS-sponsored voluntary disclosure programs." C.A. App. 375.

On October 31, 2010, Thomas Shands filed a Form 211, Application for Award for Original Information, with the IRS's Whistleblower Office seeking a mandatory whistleblower award. In his Form 211, Shands stated that, in addition to the Swiss bankers and BKB, "[i]t is anticipated that such cooperation will result in the identification of U.S. persons who maintained undeclared offshore financial accounts." C.A. App. 272. Thus, Shands sought a whistleblower award in connection with actions or related actions involving both the Swiss bankers and BKB, and their U.S. clients ("U.S. Clients").

On June 18, 2012, Shands requested an additional claim number be assigned under his Form 211 for the U.S. Clients of Gadola, Lack, Bagios, Adami, Augustoni, Bergantino, Schaerer, and BKB from whom the IRS successfully collected proceeds through their participation in the 2011 OVDI ("U.S. Clients Claim"). The request for an additional claim number was premised on the original language in the Form 211 reflecting the expectation that Shands's cooperation would result in the collection of proceeds from U.S. Clients of the Swiss bankers and banks who maintained undeclared offshore financial accounts, as well as the DOJ's admissions in the Gadola Sentencing Memorandum. The IRS assigned the U.S. Clients Claim number 2012-007744.

Nearly four years later, on May 25, 2016, the IRS issued a final determination letter denying Shands's U.S. Clients Claim for a whistleblower

award pursuant to § 7623(b)(1). The denial stated the following:

> This related case has been recommended for denial because the IRS took no action based on the information that you provided with respect to the February 2011 Offshore Voluntary Disclosure Initiative (OVDI) or any of the taxpayers who participated in it. Further, this OVDI program and these taxpayers are not valid related actions to your Whistleblower claim for award under regulation 301.7623-2(c). Consequently, any collected proceeds from these sources cannot be attributed to your claim for award.

C.A. App. 48.

Shands's additional claims under the Form 211 remained pending. After the passage of another four years, the IRS reached a preliminary award recommendation on nine other claims under Shands's Form 211. The nine claims related to BKB, Gadola, Lack, Bagios, Adami, Augustoni, Bergantino, Zavieh, and another claim which was assigned by the IRS without notice to Shands. The recommended award

included no proceeds collected from any U.S. Client of the Swiss bankers or BKB.

C. Proceedings Below

Shands sought timely review of the IRS's denial of his U.S. Clients Claim in the United States Tax Court. *See* App-32. The Tax Court had jurisdiction over Shands's petition for review under § 7623(b)(4) which provides that "any determination regarding an award" under §§ 7623 (b)(1), (2), or (3) may be appealed to the United States Tax Court which "shall have jurisdiction with respect to such matter."

The parties litigated the U.S. Clients Claim in the Tax Court for six years until 2022. *See* App-32–App-33. Shortly after the D.C. Circuit's decision in *Li v. Commissioner*, 22 F.4th 1014 (D.C. Cir. 2022), the IRS filed a motion to dismiss Shands's Tax Court review petition. App-33. Based on *Li*, the IRS asserted that the Tax Court lacked subject matter jurisdiction to review the denial of Shands's U.S. Clients Claim because the IRS purportedly did not proceed with any administrative or judicial action. App-33. The IRS argued that OVDI proceedings do not, as a matter of law, constitute administrative action for purposes of § 7623(b)(1) because taxpayers initiate OVDI proceedings voluntarily. The IRS also argued that OVDI proceedings involving the U.S. Clients are not related actions to the actions involving the Swiss bankers and BKB. According to the IRS, related actions must constitute administrative or judicial action that is separate and in addition to the original action to which they relate.

The Tax Court agreed and dismissed Shands's petition for review. App-26–App-43. The Tax Court held that it lacked subject matter jurisdiction to hear Shands's review petition because the IRS did not take administrative or judicial action with respect to the U.S. Clients of the Swiss bankers or BKB. App-39. The Tax Court determined that OVDI proceedings are not, and can never be, administrative action as that term is used in § 7623(b)(1). App-39. The Tax Court explained "[w]e . . . reject petitioner's argument that inherently voluntary participation in OVDI *by a taxpayer* constitutes an administrative or judicial action *by the IRS*." App-39. The Tax Court further held that the U.S. Clients' participation in OVDI proceedings were not related actions to the actions against the Swiss bankers and BKB because "any related action the IRS took against other taxpayers must itself be an administrative or judicial action." App-39–App-40. Because it concluded that OVDI proceedings are not and can never be administrative action, the Tax Court likewise held that OVDI proceedings are not and can never be related action. App-39–App-40.

Shands timely appealed the Tax Court's final dismissal to the United States Court of Appeals for the District of Columbia Circuit. App-12. The D.C. Circuit had jurisdiction to review the Tax Court's decision pursuant to 26 U.S.C. § 7482(a)(1). In its Answer Brief, the IRS conceded the central issue on appeal, admitting that OVDI proceedings can constitute administrative action by the IRS. The IRS's concession is directly contrary to the purported basis for its denial of Shands's U.S. Clients Claim. It also contradicts the Tax Court's holding that OVDI

proceedings can never constitute administrative action. The IRS's concession on appeal eviscerated its wholesale denial of the U.S. Clients Claim, which was based on the purported ground that OVDI proceedings can never constitute administrative or related action. Similarly, the IRS's concession confirmed the error in the Tax Court's dismissal and required a reversal by the D.C. Circuit.

Although it expressly recognized that "a voluntary disclosure through the OVDI could result in an examination (that is, an audit) of the taxpayer by the IRS, which would be an administrative action by the agency against that taxpayer," the D.C. Circuit nonetheless affirmed the Tax Court's contrary ruling that OVDI proceedings can never constitute administrative action.[7] App-14–App-15. The D.C. Circuit also affirmed the Tax Court's jurisdictional ruling. App-15. Shands filed a petition for rehearing which was denied on October 4, 2024. App-44–App-45; App-50–App-69.

REASONS FOR GRANTING THE PETITION

The Court should grant review in this case because it presents exceptionally important separation of powers issues. If the decisions of the Tax Court and D.C. Circuit are left undisturbed, the IRS will have unchecked power to deny, at will, mandatory whistleblower awards under 26 U.S.C. §

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[7] In its opinion, the D.C. Circuit incorrectly stated that Shands waived several arguments on appeal. App-17–App-18. The panel's erroneous statements are addressed in Shands's petition for rehearing. *See* App-50–App-69.

7623(b)(1) by the simple expedient of claiming that it took no action, even in cases where it admittedly did take action. This result is directly at odds with the congressional mandate that the IRS has no discretion to deny mandatory whistleblower awards. Further, the IRS can insulate its denial from judicial review merely by claiming it took no action, which the Tax Court and D.C. Circuit have now said deprives the Tax Court of subject matter jurisdiction to review the denial.

The Court should also correct the result below because it is predicated on admittedly erroneous legal conclusions. Although undoubtedly important to Shands, the errors in this case are likewise important to the thousands of whistleblowers whose mandatory whistleblower claims have been denied and will continue to be denied by the IRS's indefensible assertions that it took no action. The IRS's own statistics confirm that a startling number of mandatory whistleblower claims have been denied entirely at the unsubstantiated whim of the IRS, and without the protection of any judicial review.

I. The Tax Court Has Subject Matter Jurisdiction to Review All Determinations Regarding Whistleblower Awards.

This Court should grant review to reject the faulty interpretation of § 7623(b)(4) advanced by the IRS and adopted by the Tax Court and the D.C. Circuit. This interpretation, untethered to the actual statutory language, allows the IRS to evade review of any denial of a whistleblower claim by the simple

expedient of claiming that it took no action—even in cases where it unquestionably did take action.

Section 7623(b)(4) provides that "any determination regarding an award" under § 7623 (b)(1), (2), or (3) may be appealed to the Tax Court which "shall have jurisdiction with respect to such matter." 26 U.S.C. § 7623(b)(4); *see also Whistleblower 972-17W v. Comm'r*, No. 972-17W, 2022 WL 2718766, at *3 (T.C. July 13, 2022). The IRS maintains that it can grant, reject, or deny a whistleblower's claim. "A rejection is appropriate when a whistleblower's claim fails to comply with the threshold requirements as to who may submit a claim or what information the claim must include." *Li v. Comm'r*, 22 F.4th 1014, 1016 (D.C. Cir. 2022) (quoting *Rogers v. Comm'r*, No. 17985-19W, 2021 WL 3284613, at *5 (T.C. Aug. 2, 2021)). In contrast, a denial of a whistleblower claim relates to the taxpayer information provided by the whistleblower. 26 C.F.R § 301.7623-3(c)(8). If a claim meets the threshold requirements, but the IRS does not proceed based on the information provided, or does not collect any proceeds as a result of that information, then the IRS will issue a denial of the whistleblower claim, not a rejection.

Prior to the D.C. Circuit's decision in *Li*, the Tax Court held that both rejections and denials of whistleblower claims constituted "determination[s] regarding an award," which the Tax Court had jurisdiction to review. *See, e.g., Lacey v. Comm'r*, 153 T.C. 146, 163 n.19 (2019) (holding that rejections and denials are both negative "determinations regarding an award" vesting the Tax Court with jurisdiction to review); *Cooper v. Comm'r*, 135 T.C. 70, 75 (2010)

(rejecting argument that a "determination regarding an award" exists for jurisdictional purposes only if the IRS undertakes administrative or judicial action). In *Li*, however, the D.C. Circuit rejected *Cooper* and *Lacey*, concluding that a threshold rejection is not a "determination regarding an award." 22 F.4th at 1017. As a result, the D.C. Circuit held that the Tax Court has no jurisdiction to review threshold rejections of whistleblower claims. *Id.*

After the decision in *Li*, the IRS immediately pushed to extend the holding, contending that, in addition to rejections, the Tax Court also lacked jurisdiction to review denials of whistleblower claims where the IRS purportedly took no action. Accordingly, the IRS moved to dismiss Shands's review petition, arguing that the Tax Court lacked subject matter jurisdiction because the IRS purportedly took no action with respect to any taxpayers in the OVDI program. App-33. The Tax Court and the D.C. Circuit agreed. App-15; App-43. That jurisdictional holding is based on a fundamental misapplication of § 7623(b)(4). *See* App-12–App-15; App-36–App-40.

The plain language of § 7623(b)(4) provides for review in the Tax Court of *any determination* regarding an award. There is no requirement that such a determination be made following administrative or judicial action by the IRS. Indeed, "any determination" regarding an award does not mean the same thing as a determination following

administrative or judicial action.[8] An interpretation of § 7623(b)(4) that conditions subject matter jurisdiction in the Tax Court on administrative or judicial action by the IRS changes the core meaning of the statute and insulates from judicial review even the most egregious misconduct by the IRS. For example, if the IRS denies an award based on a knowingly false statement that it took no action, even when it did, or on a legally erroneous conclusion about what constitutes administrative action, a whistleblower will have no ability to seek judicial review.

Further, to the extent the IRS relies on its regulations to impose the requirement of administrative or judicial action as a condition to judicial review, the regulations themselves run afoul of the plain language of the statute. By inserting the

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[8] Black's Law Dictionary defines "determination" as "[t]he act of deciding something officially; esp., a final decision by a court or administrative agency." *Determination*, BLACK'S LAW DICTIONARY (12th ed. 2024). The word "any" in the statute modifies "determination" to mean that the Tax Court shall have jurisdiction over a final decision made by the Whistleblower Office "without restriction." *See, e.g., Any*, MERRIAM-WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/any (last visited Dec. 27, 2024) ("1. one or some indiscriminately of whatever kind; a.: one or another taken at random; b.: every — used to indicate one selected without restriction."); *Any*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/any (last visited Dec. 27, 2024) ("one of or each of, or a stated amount of (something that is more than one or has a number of parts), without saying which particular part is meant"). Thus, the plain language of the statute does not support the additional requirement of an action as a condition to judicial review.

action requirement, the regulations impermissibly narrow the meaning of "any determination" to include *some* but not all determinations. The mandate from this Court is clear, however, that courts—not agencies—must determine the meaning of a statute. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (U.S. 2024). Thus, the IRS cannot limit the jurisdiction of the federal courts to review final determinations through the IRS's own regulations.

This case presents the fundamentally important question of whether the IRS has the power to deprive the federal judiciary of subject matter jurisdiction to review the IRS's denial of a mandatory whistleblower award based on the purported ground that it took no action, even in cases where that assertion is demonstrably false.[9]

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[9] This Court has repeatedly granted *certiorari* petitions to determine whether an agency has exceeded its statutory authority. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160-61 (2000) (holding that the agency did not have authority to regulate tobacco products based on the plain language of the statute); *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994) (holding that the agency did not have authority to make fundamental changes to the tariff-filing requirement based on the plain meaning of the statute); *see also Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2257 (U.S. 2024) ("The Framers also envisioned that the final 'interpretation of the laws' would be 'the proper and peculiar province of the courts.'" (quoting The Federalist No. 78, at 525 (A. Hamilton))).

II. The IRS's Denial of Shands's Mandatory Whistleblower Award Is Admittedly Erroneous.

The IRS's effort to deprive the Tax Court of jurisdiction is particularly troubling in this case because the IRS denied Shands's U.S. Clients whistleblower claim for the admittedly erroneous reason that it took no action with respect to the U.S. Clients. The IRS indisputably did take action with respect to numerous U.S. Clients through OVDI proceedings.

The IRS never denied that the U.S. Clients participated in OVDI proceedings, or that the IRS collected proceeds from them as a result. Instead, the IRS maintained that OVDI proceedings cannot, as a matter of law, constitute "administrative action" as that term is used in the whistleblower statute because taxpayers initiate OVDI proceedings voluntarily. According to the IRS, ". . . taxpayer applications to enter OVDI are voluntary in nature and, therefore, there were no actions taken by the IRS related to the OVDI program that originated from or resulted from Whistleblower information." C.A. App. 321. The Tax Court agreed, explaining "[w]e likewise reject petitioner's argument that inherently voluntary participation in OVDI *by a taxpayer* constitutes an administrative or judicial action *by the IRS*." App-39 (emphasis in original).

But those conclusions are erroneous as a matter of law and both the IRS and the D.C. Circuit were forced to acknowledge as much. On Shands's appeal to the D.C. Circuit, the IRS and the D.C. Circuit expressly acknowledged that OVDI

proceedings do constitute administrative action when they involve an examination. *See* App-14–App-15. The D.C. Circuit nonetheless affirmed the contrary Tax Court decision that OVDI proceedings can ***never*** constitute administrative or related action under § 7623(b)(1). *Id.* The Court should grant review to correct that facial error.

It is also undisputed that the IRS took administrative action with respect to numerous U.S. Clients through OVDI proceedings that did not involve an examination. Indeed, in its Award Memorandum, the IRS admitted that it took compliance actions against U.S. taxpayers after they voluntarily entered the 2011 OVDI program.[10] The character of the OVDI proceedings themselves indisputably reflect administrative action by the IRS. The IRS required participating taxpayers to submit their original tax returns, complete and accurate amended tax returns correcting prior omissions, all off-shore related informational returns (including FBARs), as well as statements identifying offshore financial accounts and assets, foreign institutions where accounts were held, and facilitators who assisted with offshore assets. The IRS also required the taxpayers to enter into agreements extending the statutes of limitation for assessing taxes and

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[10] Similarly, during the pendency of the U.S. Clients Claim, Shands's repeated requests for information on the status of the claim were met with the IRS's statement that "a number of actions . . . must be completed before a determination is made." C.A. App. 247. Certainly, the IRS recognized that it took action on Shands's whistleblower information during the four years the U.S. Clients Claim was under consideration.

penalties. The IRS then assigned the matter to an examiner who undertook a comprehensive review of the information provided. The examiner was authorized to ask follow-up questions, request additional documents, and contact third parties to inquire about the information provided. If the IRS was dissatisfied with the information provided by the taxpayer it was authorized to conduct a full examination for the entire period of noncompliance. Moreover, if the taxpayer disagreed with the tax, interest, and penalty determined by the examiner, then the IRS would conduct a full examination of all issues. As a condition of participation, the IRS also required taxpayers to pay the full amount of tax, interest, and penalties, or to make good faith arrangements to pay the amounts the IRS ultimately determined were due. Finally, participation in the OVDI program did not guarantee taxpayers immunity from criminal prosecution. The IRS retained the authority to recommend criminal prosecution.

Here, the IRS proceeded against the specifically targeted U.S. Clients of the Swiss bankers and BKB through OVDI proceedings—administrative proceedings established and supervised by the IRS for the specific purpose of collecting proceeds from noncompliant taxpayers while easing the administrative burden on the IRS. There is nothing in the history or operating procedures of the OVDI program that suggests it is the equivalent of "no action" by the IRS. That is particularly true in this case where the U.S. Clients were under the threat of criminal prosecution. Indeed, the IRS required the Swiss bankers and BKB to disclose the identity of

their clients and then inform those clients that their names and account information had been disclosed to the United States. The IRS further required that the Swiss bankers and BKB encourage their clients to participate in the OVDI program if they wished to avoid criminal prosecution.

In the Gadola Sentencing Memorandum, DOJ recognized that the publicity surrounding the Gadola, Lack, and Bagios prosecutions (all of which were the direct result of the information provided by Shands) were of "great benefit to the IRS as it has spurred U.S. taxpayers to enter into the voluntary disclosure program." C.A. App. 302. The Sentencing Memorandum further explained that 12 of Gadola's U.S. Clients were prompted to initiate OVDI proceedings in which they disclosed their foreign accounts and identified Gadola as a banker who assisted them in concealing their assets. C.A. App. 298. In Bagios's indictment, the United States described transactions involving nine of Bagios's U.S. Clients. Similarly, in Lack's indictment, the United States described in detail meetings and transactions involving eight of Lack's U.S. Clients. Further, as part of BKB's Deferred Prosecution Agreement, the United States required BKB to disclose the identity of, and other information related to, its U.S. account holders, and to conduct "extensive outreach to former U.S. customers in order to encourage their participation in IRS-sponsored voluntary disclosure programs." C.A. App. 388–389, 412–413.

At Gadola's sentencing hearing, counsel for DOJ acknowledged that Gadola gave the United States access to his email communications with his U.S. Clients and, in five debriefings "he went through

client by client, colleague by colleague, laying out their various participation in various tax evasion schemes." C.A. App. 62–63. Counsel for DOJ admitted that the information allowed the United States to understand how the tax evasion scheme worked not only from the Swiss bankers' side, "but as well how it operated from the U.S. client's side." C.A. App. 63. After trumpeting how helpful Shands's information proved to be with respect to more than two dozen U.S. Clients, the IRS's unsubstantiated contention that it took no action is indefensible. The Court should grant review to clarify that OVDI proceedings constitute administrative action for purposes of mandatory whistleblower awards under § 7623(b).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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December 31, 2024

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 2, 2024 Decided July 18, 2024

Reissued August 7, 2024

No. 23-1160

THOMAS SHANDS,
APPELLANT

V.

COMMISSIONER OF INTERNAL REVENUE,
APPELLEE

On Appeal from the
United States Tax Court

Stacy D. Blank argued the cause for appellant. With her on the briefs were *Alexander Olama* and *Avery A. Holloman*.

Julie Ciamporcero Avetta, Attorney, U.S. Department of Justice, argued the cause for appellee. With her on the brief was *Bruce R. Ellisen*, Attorney.

Before: PILLARD, WALKER and PAN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* PAN.

Concurring opinion filed by *Circuit Judge* PILLARD.

PAN, *Circuit Judge*: The federal government launched a criminal investigation of a tax-evasion scheme in which Swiss bankers and a Swiss bank hid the assets of certain U.S. taxpayers in undisclosed, offshore accounts. Thomas Shands was a cooperator in the investigation. He received immunity from prosecution and a whistleblower award of $8.5 million in exchange for his assistance. But Shands wanted more. He claimed that he was entitled to an additional award because the information he provided led to the government's collection of over $2.3 billion through an Internal Revenue Service ("IRS") program that encouraged voluntary disclosures of tax violations. The IRS denied Shands's claim, and the Tax Court dismissed his petition for review because it determined that it lacked jurisdiction under *Li v. Commissioner*, 22 F.4th 1014 (D.C. Cir. 2022). Because we agree that Shands failed to carry his burden to establish the Tax Court's jurisdiction, we affirm.

I.

A.

The IRS rewards individuals who provide information to the agency that results in the collection

of tax proceeds. Such "whistleblowers" are entitled to awards of as much as 30 percent of the money collected if the IRS "proceeds" with an "administrative or judicial action" against a taxpayer based on the whistleblower's information. 26 U.S.C. § 7623(b)(1).[1] An award also must be granted if the whistleblower's information results in the collection of tax proceeds in a separate but "related" action against a person who was not identified by the whistleblower. *Id.*[2]

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[1] Specifically, 26 U.S.C. § 7623(b)(1) provides:

> If the Secretary proceeds with any administrative or judicial action described in subsection (a) [regarding detection of tax violations or underpayments] based on information brought to the Secretary's attention by an individual, such individual shall . . . 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 . . . .

[2] The Whistleblower Statute does not define "related actions," but the Treasury Department's regulations provide that a related action must be connected to the original action in three ways:

> (i) The facts relating to the underpayment of tax or violations of the internal revenue laws by the other person [subject to the related action] are substantially the same as the facts described and documented in the information provided (with respect to the person(s) subject to the original action);

Whistleblowers who provide information to the IRS may request an award by filing a Form 211 with the Whistleblower Office. *See* 26 C.F.R. § 301.7623-1(c)(1)–(2). The Whistleblower Office then determines whether to reject, deny, or approve the whistleblower claim. The Office *rejects* a claim that is invalid for reasons "relate[d] solely to the whistleblower and the information on the face of the claim that pertains to the whistleblower." *Id.* § 301.7623-3(c)(7). For example, a claim is properly rejected if the Form 211 does not include required information (such as the whistleblower's name or date of birth); or if the whistleblower is ineligible for an award (perhaps because he obtained the information through federal employment). *See id.* § 301.7623-1(b)(2), (c)(2), (c)(4). Thus, a rejection typically occurs without any referral to an IRS operating division for investigation of the claim. By contrast, the Whistleblower Office will *deny* a claim due to an issue that "relates to or implicates [the] taxpayer information" that was provided by the whistleblower.

(ii) The IRS proceeds with the action against the other person based on the specific facts described and documented in the information provided [by the whistleblower]; and

(iii) The other, unidentified person is related to the person identified in the information provided [by the whistleblower]. For purposes of this paragraph, an unidentified person is related to the person identified in the information provided if the IRS can identify the unidentified person using the information provided (without first having to use the information provided to identify any other person or having to independently obtain additional information).

26 C.F.R. § 307.7623-2(c)(1).

Id. § 301.7623-3(c)(8). A denial usually occurs after the Form 211 is referred for investigation and may be appropriate because, for example, "the IRS either did not proceed based on the information provided by the whistleblower . . . or did not collect proceeds." *Id.* Finally, if the Whistleblower Office determines that an award is justified after examining the Form 211 and the results of any associated investigation, it will calculate and pay the award to the whistleblower. *See id.* § 301.7623-3(c)(1)–(6).

A whistleblower may appeal the IRS's "determination regarding [a whistleblower] award" to the Tax Court, which shall have jurisdiction with respect to such matter." 26 U.S.C. § 7623(b)(4) ("Any determination regarding an award under [26 U.S.C. § 7623(b)(1), (2), or (3)—the Whistleblower Statute] may . . . be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter)."). We interpreted that jurisdictional provision in *Li v. Commissioner*, 22 F.4th 1014 (D.C. Cir. 2022). There, we held that an appealable "determination regarding an award" does not include a threshold rejection of a whistleblower claim. *Id.* at 1017 (expressly abrogating *Cooper v. Comm'r*, 135 T.C. 70 (2010), and *Lacey v. Comm'r*, 153 T.C. 146 (2019)). We explained that "an award determination by the IRS arises only when the IRS '*proceeds* with any administrative or judicial action . . . based on information brought to the Secretary's attention by [the whistleblower].'" *Id.* (emphasis and alteration in original) (quoting 26 U.S.C. § 7623(b)(1)). Thus, the Whistleblower Office's rejection of a claim on its face, without referring the information to an IRS operating

division, does not constitute an "award determination" because such "[a] threshold rejection of a Form 211 by nature means the IRS is not *proceeding* with an action against the target taxpayer." *Id.* at 1017. And absent an "award determination," there is no Tax Court jurisdiction under § 7623(b)(4). *Id.*

The parties also cite *Lissack v. Commissioner*, in which we explained that, so long as the IRS "proceed[ed] with an administrative action that was based on the information [the whistleblower] brought to the [IRS's] attention," the Tax Court had jurisdiction over the whistleblower's appeal of an award denial. 68 F.4th 1312, 1321 (D.C. Cir. 2023) (cleaned up). In *Lissack*, unlike in *Li*, the Whistleblower Office referred the whistleblower's submission to an operating division of the IRS, which initiated an examination of the issue Lissack identified. *Id.* The fact that the IRS did not collect any proceeds based on the whistleblower's information was a reason for his claim to fail on the merits—not for lack of jurisdiction. *Id.*

The Supreme Court subsequently vacated *Lissack* on other grounds. *See Lissack v. Comm'r*, __ S. Ct. __, 2024 WL 3259664 (July 2, 2024((Mem.). It did so because *Lissack* upheld the regulations defining "administrative action" and "related action" under the *Chevron* framework. *See* 68 F.4th at 1322–26 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). The Supreme Court remanded and instructed us to "further consider[]" the case "in light of *Loper Bright*

Enterprises v. Raimondo, 603 U.S. __ (2024)," which overruled *Chevron*. *Lissack*, __ S. Ct. __, 2024 WL 3259664; *see Loper Bright Enters.*, 603 U.S. at __. We do not rely on our prior opinion in *Lissack* to resolve this appeal. As discussed *infra*, our reasoning turns on the text of the Whistleblower Statute, which requires that the IRS "proceed" with an action "against any taxpayer," as well as *Li*'s interpretation of the statutory text. *See Li*, 22 F.4th at 1017 (quoting 26 U.S.C. § 7623(b)(1)); 26 U.S.C. § 7623(b)(5)). Moreover, the remand proceeding in *Lissack* does not affect our resolution of this appeal because Shands does not question the validity or applicability of the regulations at issue in that case. *See Al-Tamimi v. Adelson*, 916 F.3d 1, 6 (D.C. Cir. 2019) (noting arguments not raised on appeal are forfeited).

B.

Thomas Shands asked a banker at UBS, Martin Lack, to open an account for him. Lack (purportedly unbeknownst to Shands) opened a Swiss bank account for Shands at Basler Kantonalbank ("BKB"). Shands did not disclose the account or its assets to the IRS, as required. *See* 31 C.F.R. § 103.24 (2010). When Shands eventually attempted to voluntarily disclose the account, he learned that he was already a subject of an IRS criminal investigation. In return for criminal immunity, Shands cooperated in the investigation of certain bankers for their use of offshore accounts to hide client assets from the IRS. Shands's cooperation included, among other things, recording telephone calls with Lack and meeting with Lack's colleague,

Renzo Gadola, while using a concealed recording device. The government prosecuted Lack and Gadola, and expanded its criminal investigation to encompass BKB, other Swiss banking professionals, and a few U.S. accountholders.

In October 2010, early in his cooperation with the IRS, Shands submitted a Form 211 to claim a whistleblower award. He stated in the form that the relevant information "will become available as a result of my cooperation with the Department of Justice and IRS Criminal Investigation Division in ongoing investigations, including but not limited to cooperation against Martin Lack and Renzo [Gadola]," and that "[i]t is anticipated that such cooperation will result in the identification of U.S. persons who have maintained undeclared offshore financial accounts." J.A. 272. Based on that single Form 211, the IRS created separate claim numbers related to Lack, Gadola, BKB, a handful of other Swiss bankers, and a few of their individual U.S. clients. Shands collected more than $8.5 million in whistleblower awards based on nine claims.

As the Swiss banking investigation developed, the IRS launched the IRS Offshore Voluntary Disclosure Initiative in February 2011 ("OVDI"). The 2011 OVDI, building off a similar 2009 program, incentivized taxpayers to voluntarily disclose offshore accounts and pay past-due taxes, interest, and penalties arising from the previous non-disclosure of those accounts. *See* I.R.S. News Release IR-2011-14 (Feb. 8, 2011). In a typical OVDI case, a taxpayer could disclose offshore accounts for tax years 2003 to

2010; file corrected tax returns; and pay all taxes, interest, and penalties calculated under the OVDI's uniform penalty structure. Such voluntary disclosures usually would not lead the IRS to conduct an "examination," that is, a formal audit, *see* IRS, *The Examination (Audit) Process*, FS-2006-10 (Jan. 2006), available at https://perma.cc/6PBM-873W. Instead, an examiner would review a voluntary disclosure only to certify its accuracy and completeness, and the IRS and taxpayer then would sign a "Closing Agreement" to resolve the tax liability for the relevant years. Nevertheless, the IRS reserved the right to conduct an examination following a voluntary disclosure, and a taxpayer's participation in the OVDI did not provide criminal immunity even though it greatly reduced the risk of prosecution. By 2015, the IRS had collected over $2.3 billion in taxes, interest, and penalties through the OVDI.

In June 2012, Shands sent a letter to the IRS requesting an additional claim number so that he could apply for a whistleblower award based on the money collected by the IRS through the 2011 OVDI. Shands's OVDI claim relied on his role in the successful prosecutions of Gadola and Lack. According to Shands, he was entitled to a whistleblower award because the OVDI is an "administrative or judicial action" or a "related action[]" that was "based on" the information he provided about Gadola and Lack. *See* 26 U.S.C. § 7623(b)(1). He noted that prosecutors stated at Gadola's sentencing that "Gadola's guilty plea as well as the very public nature of his cooperation in the prosecution of Martin Lack and Christos Bagios has

been of great benefit to the IRS as it has spurred U.S. taxpayers to enter into the [OVDI] program." J.A. 302.

Shands also claims credit for BKB's cooperation with the government and entry into a deferred prosecution agreement in 2018. As noted in that agreement, BKB's cooperation included disclosing information regarding illegal offshore accounts and "[c]onducting extensive outreach to former U.S. customers in order to encourage their participation in IRS-sponsored voluntary disclosure programs." J.A. 387, 389.

Thus, Shands asserted that the success of the OVDI was attributable to the prosecutions of Gadola and Lack (and, later, BKB), and those prosecutions depended on the information that he had provided. Although Shands's position on the amount of the requested award has not been consistent, he at times has sought between 15 and 30 percent of the entire $2.3 billion that the IRS collected through the OVDI. *See* J.A. 244 (letter from Shands attorney to IRS stating "Shands is entitled to an award on the roughly two billion dollars collected as a result of the 2011 [OVDI]"); *id.* at 320 (Whistleblower Office analyst stating that Shands is "seeking an award on the billions of dollars recovered from [the OVDI]").

An analyst in the Whistleblower Office reviewed Shands's OVDI claim. The analyst recommended denying the claim without referring it to another division for investigation. According to the analyst, "[t]he strongest reason to deny this OVDI

claim . . . is because unidentified taxpayers who entered the February 2011 OVDI program clearly do not meet the definition of 'related action.'" J.A. 321. Furthermore, "the information provided [about Lack, Gadola, and BKB] established no valid link or relationship to the OVDI program." *Id.* at 322. The analyst explained that the "unusual nature" of Shands's case justified a denial of the OVDI claim without referring the matter to an IRS operating division. *Id.* at 320. Based on that recommendation, the IRS made a preliminary decision to deny Shands's OVDI claim. The agency then gave Shands an opportunity to submit comments before sending him a final denial letter. The final letter "den[ied]" his claim and explained that "the IRS took no action based on the information that you provided with respect to [the OVDI]," and that "this OVDI program and these taxpayers are not valid related actions to your Whistleblower claim." *Id.* at 48.

Shands filed a petition for review in the Tax Court to challenge the denial of his OVDI claim. While cross-motions for summary judgment were pending in the Tax Court, we issued our opinion in *Li v. Commissioner*. The government moved to dismiss the petition for lack of jurisdiction under *Li*, and the Tax Court granted the motion. The Tax Court reasoned that because each OVDI case is triggered by a taxpayer's voluntary disclosure, no individual OVDI case is a "civil or criminal proceeding against any person." *Shands v. Comm'r*, 160 T.C. No. 5, No. 13499-16W, 2023 WL 2399912, at *4 (Mar. 8, 2023). Thus, an OVDI case does not fall under the applicable regulatory definition of "administrative action" or

"judicial action," and cannot provide a basis for jurisdiction under *Li*. *Id.* The Tax Court also concluded that OVDI cases cannot be "related actions" because any related action must be an "administrative action" or "judicial action" under the regulatory definitions of those terms. *See id.* Shands timely appealed.

II.

We generally review Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." 26 U.S.C. § 7482(a)(1). Our jurisdiction over the merits of Shands's claim, if any, comes from 26 U.S.C. § 7482(a)(1) and "is predicated upon the Tax Court having jurisdiction." *Li*, 22 F.4th at 1015. We consider the jurisdictional question *de novo*. *Myers v. Comm'r*, 928 F.3d 1025, 1031 (D.C. Cir. 2019). Shands has the burden to establish jurisdiction because he is the party asserting it. *See Cause of Action Inst. v. Off. of Mgmt. & Budget*, 10 F.4th 849, 854 (D.C. Cir. 2021); *Le v. Comm'r*, 114 T.C. 268, 270 (2000).

III.

A.

Under *Li*, Tax Court jurisdiction "arises only when the IRS '*proceeds* with any administrative or judicial action . . . based on information brought to the Secretary's attention by [the whistleblower].'" *Li*, 22 F.4th at 1017 (emphasis and final alteration in original) (quoting 26 U.S.C. § 7623(b)(1)). And the

relevant portion of the Whistleblower Statute — including the jurisdictional provision at issue here — applies only to actions "*against* any taxpayer." 26 U.S.C. § 7623(b)(5) (emphasis added). Applying that standard, we must decide in this case whether the OVDI cases that allegedly flowed from Shands's cooperation entailed the IRS "proceed[ing]" with some "administrative or judicial action" that was "against any taxpayer." *Id.*; *Li*, 22 F.4th at 1017. Shands argues that "OVDI proceedings are administrative actions, and the IRS did take action with respect to the U.S. Clients [of Lack, Gadola, and BKB] who participated in the 2011 OVDI program." Shands Br. 26. We disagree.

OVDI cases do not generally give rise to Tax Court jurisdiction because they typically are not "against" any taxpayer. Rather, a taxpayer who participates in the OVDI chooses to disclose overseas accounts; calculates the taxes, interest, and penalties associated with the voluntary disclosure; and then pays the amount that is owed. That process is initiated and directed by the taxpayer. It therefore cannot be fairly characterized as the *IRS* proceeding with an action *against the taxpayer*. *See Li*, 22 F.4th at 1017. Indeed, the defining features of the OVDI program are the taxpayer's *voluntary* disclosures and payments: The OVDI thus bears no resemblance to the IRS-driven actions that are listed as examples of "administrative actions" in the applicable regulation, *see* 26 C.F.R. § 301.7623-2(a)(2) (citing as examples "an examination, a collection proceeding, a status determination proceeding, or a criminal investigation").

Shands contends that OVDI cases confer jurisdiction because they are "administrative proceedings established and supervised by the IRS for the specific purpose of collecting proceeds." Shands Br. 37. But that description, even if accurate, falls outside the bounds of an "administrative action" under the law because "proceedings established and supervised by the IRS" do not necessarily involve an action *against* any person. In fact, the normal procedure for paying income taxes is an administrative process "established and supervised by the IRS for the specific purpose of collecting proceeds," *id.*, but that routine process is not generally viewed as the IRS taking an "action" that is "against" the millions of Americans who file their tax returns every year. *See Am. Forest & Paper Ass'n v. FERC*, 550 F.3d 1179, 1182 (D.C. Cir. 2008) ("[T]he words of statutes . . . should be interpreted where possible in their ordinary, everyday senses." (second alteration in original) (quoting *Malat v. Riddell*, 383 U.S. 569, 571 (1966)).

We acknowledge that OVDI cases or other voluntary-disclosure programs could lead to administrative or judicial actions that might justify a whistleblower award under circumstances not at issue here. For example, a voluntary disclosure through the OVDI could result in an examination (that is, an audit) of the taxpayer by the IRS, which would be an administrative action by the agency against that taxpayer. *See* 26 C.F.R. § 301.7623-2(a)(2). Shands, however, argues only that OVDI cases themselves — i.e., the taxpayer's voluntary

disclosure of assets and payment of taxes, interest, and penalties — are "administrative actions." That claim falls short.

Because Shands does not demonstrate that the IRS "proceed[ed]" with any "administrative or judicial action" that was "against" any taxpayer who participated in the OVDI — regardless of whether any such taxpayer was spurred to action by his cooperation in the Swiss banking scheme — he fails to carry his burden to establish jurisdiction. *See Li*, 22 F.4th at 1017.

B.

We find Shands's contrary arguments unpersuasive. He first contends that *Li* governs only rejections, not denials. In Shands's view, the fact that the IRS stated in its final letter to him that it *denied* rather than *rejected* his claim distinguishes this case from Li and establishes Tax Court jurisdiction. *See Li*, 22 F.4th at 1017. But Li's jurisdictional rule does not turn on whether the IRS labeled its decision a "rejection" or a "denial." Jurisdiction is a creation of statute, *see Owens v. Republic of Sudan*, 531 F.3d 884, 887 (D.C. Cir. 2008), and the statutory grant of jurisdiction over "determination[s] regarding [a whistleblower] award" does not mention "rejections" or contrast them with "denials." *See* 26 U.S.C. § 7623(b)(4). Instead, our jurisdictional inquiry focuses on what the IRS *did* — *i.e.*, whether it "*proceed[ed]* with any administrative or judicial action," Li, 22 F.4th at 1017 (emphasis in original) (quoting 26 U.S.C. § 7623(b)(1)) — and not on the words used by

the agency in a letter to the whistleblower. Here, for the reasons already explained, Shands has not demonstrated that the IRS "proceed[ed]" with any action against OVDI participants.

Shands next reasons that the Tax Court had jurisdiction because a taxpayer's voluntary disclosure under the OVDI sometimes can lead to the IRS "proceed[ing]" with an "administrative action." He cites a GAO report and prior Tax Court cases that have suggested that the IRS has or can provide whistleblower awards despite voluntary disclosure by the subject-taxpayer, as well as the IRS's apparent agreement that such a scenario is possible. But as we have already explained, the mere possibility that an OVDI case could evolve into an "administrative action" taken by the IRS against a taxpayer does not provide a basis for jurisdiction where no such evolution has been identified. Shands does not, for example, point to any taxpayer who participated in the OVDI as a result of Shands's cooperation and then faced an audit that was triggered by the OVDI disclosure.

Shands blames the IRS for his failure to cite any specific OVDI-related administrative action that arose from his cooperation. He highlights the Tax Court's denial of his motion to compel the IRS to turn over information identifying all taxpayers who participated in the OVDI program — a ruling that assertedly prevented him from identifying actions taken by the IRS against OVDI participants. Shands claims that disclosure of the information he sought might have revealed "the extent to which the IRS

relied on information provided by Shands in . . . OVDI proceedings [and] whether the IRS conducted a full examination of any U.S. Client who applied for OVDI." Reply Br. 14. But Shands made no mention of the discovery motion in his opening brief, and "[a]rguments raised for the first time in a reply brief are forfeited." *Fore River Residents Against the Compressor Station v. FERC*, 77 F.4th 882, 889 (D.C. Cir. 2023). In any event, Shands's motion to compel sought the disclosure of extensive records pertaining to all OVDI participants, without tailoring his request to the information relevant to the jurisdictional inquiry — *i.e.*, whether the IRS took action against any of the participants in response to their voluntary disclosures. The Tax Court thus did not abuse its discretion in denying such a motion. *See In re Sealed Case (Med. Recs.)*, 381 F.3d 1205, 1211 (D.C. Cir. 2004) ("We review a district court's discovery rulings for abuse of discretion."); 26 U.S.C. § 7482(a)(1) (instructing courts to "review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury").

Finally, we take no position on an alternative theory of jurisdiction that Shands declined to raise. *See United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 497 (D.C. Cir. 2004) (noting that we generally do not reach arguments that parties fail to make on appeal); *Bronner on Behalf of Am. Stud. Ass'n v. Duggan*, 962 F.3d 596, 611 (D.C. Cir. 2020) (explaining that arguments in favor of jurisdiction can be waived). Shands has expressly disavowed the potentially meritorious argument that the IRS

"proceeded" with the original actions (against Lack, Gadola, and BKB), and that those actions are sufficient to establish jurisdiction over an asserted related-action claim (involving the OVDI program). When asked at oral argument if treating the OVDI claim as an asserted related action provided an alternative theory of jurisdiction, counsel for Shands responded: "I would not say that it's an alternative theory. I think that the related action addresses the concern that the government raised that the participants in the OVDI proceedings were not specifically identified." Oral Arg. at 2:45–3:10. And when the court later suggested that the original actions, distinct from the purportedly related action, could be relevant to jurisdiction, counsel stated: "It would seem to be a very strange state of affairs where the taxpayer could rely on the overarching action to get into court, but then say no action was taken with respect to me for purposes of the merits." *Id.* at 29:00–29:20; *see also id.* at 31:09–31:22 ("I'm not sure that the jurisdictional section or *Li* would support . . . splitting actions into one for jurisdiction and one for merits."). Shands thus has waived any reliance on the original actions against Lack, Gadola, and BKB as a basis for jurisdiction over the OVDI claim.

Shands devotes a significant portion of his briefing to explaining why certain OVDI cases were "related actions to the original actions against the Swiss bankers and BKB." Shands Br. 39. As explained, Shands does not offer this analysis as an alternative theory of jurisdiction, but instead as a merits argument regarding his entitlement to an award. We do not reach his merits arguments because

he has failed to establish the Tax Court's jurisdiction over his OVDI claim.

* * *

For the foregoing reasons, Shands has not carried his burden to establish the Tax Court's jurisdiction over his OVDI claim under 26 U.S.C. § 7623(b)(4). We therefore affirm the Tax Court's dismissal of his petition for review.

So ordered.

PILLARD, *Circuit Judge*, concurring: I agree with the majority's treatment of the sole argument in favor of jurisdiction that Thomas Shands pressed on appeal, which fails under our decision in *Li v. Commissioner*, 22 F.4th 1014, 1017 (D.C. Cir. 2022). The Tax Court has jurisdiction to hear appeals of "[a]ny determination regarding an award" under the whistleblower statute. 26 U.S.C. § 7623(b)(4). We held in Li that the Internal Revenue Service only makes such an appealable determination if it "'*proceeds* with any administrative or judicial action' . . . against the target taxpayer" identified by the whistleblower. Li, 22 F.4th at 1017 (emphasis in original) (quoting 26 U.S.C. § 7623(b)(1)).

Shands argued that his cooperation in the investigation against the Swiss bankers Renzo Gadola and Martin Lack led to their well-publicized guilty pleas, which spurred U.S. clients of those bankers and their conspirators to come forward and disclose their tax violations to the Service through the

2011 Offshore Voluntary Disclosure Initiative (OVDI). Shands sought a whistleblower award on the proceeds collected from those clients' voluntary disclosures. He argued that the Service took action against those OVDI participants, so the Tax Court had jurisdiction over his claim. But he failed to demonstrate that the Service's process of collecting from those self-reported nonpayers rose to the level of "administrative or judicial action[s]," such as audits or prosecutions. 26 U.S.C. § 7623(b)(1). He therefore did not satisfy the jurisdictional requirement set out in *Li*—that he show the Service proceeded with administrative or judicial action against the target taxpayers. 22 F.4th at 1017.

I write separately to provide further context for our holding. The rule set out by *Li* is not a demanding one. It simply requires the appellant to establish that the IRS took some enforcement action. That rule reflects the Tax Court's lack of jurisdiction over appeals from a decision by the Service not to pursue a putative whistleblower's tip.

A closer look at *Li* itself reveals its limits. *Li* filed an application for a whistleblower award, alleging that a target taxpayer underpaid taxes by, among other things, falsely claiming dependent children and alimony payments. *See* Order and Decision, *Li v. Comm'r*, No. 5070-19W (T.C. Apr. 6, 2020). The Whistleblower Office reviewed the allegations and the target taxpayer's returns but declined to forward Li's information to a Service examiner for any potential action, so no action was taken; the Office simply rejected Li's award

application. *Li*, 22 F.4th at 1015. Li's petition for Tax Court review was not an "appeal of [an] award determination," 26 U.S.C. § 7623(b)(4), but an attempt to appeal the Service's non-enforcement decision: She argued that the Service did not adequately consider the evidence she submitted and should have proceeded with action against the target taxpayer. *See generally* Brief for Appellant, *Li*, 22 F.4th 1014 (No. 20-1245). The Tax Court lacks jurisdiction over such a non-enforcement decision, as do we.

Li erected no novel or formidable obstacle to the Tax Court's jurisdiction. Congress endowed the Tax Court with jurisdiction over appeals of "award determination[s]," 26 U.S.C. § 7623(b)(4)—not exercises of non-enforcement discretion. Our decision in *Li* that the Tax Court lacked jurisdiction over that appeal reflects the "general unsuitability for judicial review of agency decisions to refuse enforcement." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). In keeping with the strong presumption against treating statutory preconditions to relief as jurisdictional, we did not read into the whistleblower statute any unusual jurisdictional threshold. *See MOAC Mall Holdings v. Transform Holdco LLC*, 598 U.S. 288, 297 (2023). We have continued to honor the terms of the whistleblower statute's jurisdictional grant, which "ma[k]e[s] generous provision for judicial review of Whistleblower Office award decisions." *Lissack v. Comm'r*, 68 F.4th 1312, 1320 (D.C. Cir. 2023), *vacated on other grounds*, __ S. Ct. __, 2024 WL 3259664 (mem.) (July 2, 2024).

Our conclusion that the Tax Court lacked jurisdiction over Mr. Shands's appeal is not to the contrary but reflects his casespecific litigation strategy. As the opinion for the court describes, Shands asserted the Tax Court had jurisdiction because the OVDI is an "administrative or judicial action," Op. 8, but that argument lacks merit, *id.* at 11-13. He also asserted that the OVDI was a "related action" that was "based on" the information he provided about the Swiss bankers. The "related action" inquiry goes not to jurisdiction, however, but to a claimant's entitlement to relief.

Recall the whistleblower statute's directive:

> If the Secretary proceeds with any administrative or judicial action . . . based on information brought to the Secretary's attention by an individual, such individual shall . . . 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) . . . .

26 U.S.C. § 7623(b)(1). The statute does not define "related actions," but the relevant regulations, unchallenged in this appeal, explain that a "related action" is "an action against a person other than the person(s) identified in the information provided and subject to the original action(s)" that has specified factual ties to the original action. 26 C.F.R. § 301.7623-2(c)(1) (2014). Shands urges that the OVDI proceedings constitute such "related actions" to the

original actions against the Swiss bankers. Whether he is right on that point cannot help him clear the jurisdictional hurdle, however, because whether the OVDI proceedings could ultimately qualify as "related actions" goes not to jurisdiction, but to the merits.

There is an argument in a case like this one that could support the Tax Court's jurisdiction over such a related-action claim. For starters, the Service clearly proceeded with judicial actions based on Shands's information: It referred for prosecution the individuals against whom Shands cooperated, including Swiss bankers Gadola and Lack. That is why the Service has already awarded Shands over $8.5 million. The same judicial actions could have supported Tax Court jurisdiction over any appeal regarding an award determination involving Shands's claims for proceeds collected "as a result" of those actions against the Swiss bankers or "any related actions." 26 U.S.C. § 7623(b)(1).

But Shands did not contend that the Tax Court's jurisdiction over his putative related-action claim stems from the Service's actions against the Swiss bankers. Instead, as our opinion notes, his counsel affirmatively and repeatedly disavowed that theory of jurisdiction. Op. 15-16. He therefore forfeited the point. *See Int'l Longshore & Warehouse Union v. NLRB*, 971 F.3d 356, 363 (D.C. Cir. 2020).

Appendix B

UNITED STATES COURT TAX COURT
Washington, DC 20217

THOMAS SHANDS, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent	Docket No. 13499-16W

ORDER AND ORDER OF DISMISSAL FOR LACK OF JURISDICTION

Pursuant to the determination of this Court, as set forth in its Opinion (160 T.C. No. 5), filed March 8, 2023, it is

ORDERED that respondent's motion for summary judgment, filed December 7, 2017, is denied. It is further

ORDERED that petitioner's motion to compel production of documents, filed December 30, 2020, is denied. It is further

ORDERED that petitioner's motion to compel response to interrogatories, filed December 30, 2020, is denied. It is further

ORDERED that respondent's motion for extension of time, filed March 30, 2021, is denied as moot. It is further

ORDERED that petitioner's motion to strike, filed June 9, 2021, is denied. It is further

ORDERED that petitioner's motion for partial summary judgment, filed September 8, 2021, is denied. It is further

ORDERED that respondent's motion to dismiss for lack of jurisdiction, filed July 6, 2022, is granted and this case is dismissed for lack of jurisdiction.

(Signed) Travis A. Greaves
Judge

Entered and Served 03/22/23

Appendix C

UNITED STATES TAX COURT

160 T.C. No. 5

THOMAS SHANDS,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 13499-16W. Filed March 8, 2023.

P filed a claim with the Internal Revenue Service (IRS) Whistleblower Office (WBO) requesting an I.R.C. § 7623(b) nondiscretionary award of 30% of the revenue collected from the 2011 Offshore Voluntary Disclosure Initiative (OVDI), in which the IRS offered lenient treatment for U.S. taxpayers that disclosed and paid back taxes on foreign accounts. The claim asserted that P's collaboration with federal agents in securing the highly publicized arrest and cooperation of Swiss banker Renzo Gadola led to widespread participation in OVDI.

The WBO denied P's claim, P appealed the denial in Tax Court, and the parties filed Cross Motions for Summary Judgment and Partial Summary Judgment as to whether the creation of OVDI or any taxpayer's participation in OVDI were I.R.C. § 7623(b)(1) related actions that entitle P to an award. R then moved to dismiss the case on the ground that the IRS did not proceed with an I.R.C. § 7623(b)(1) administrative or judicial action based on information brought to its attention by P.

Held: The Court lacks jurisdiction to review the WBO's denial because the IRS did not proceed with an administrative or judicial action by creating OVDI or by virtue of any taxpayer's participation in OVDI.

Alexander R. Olama, William M. Sharp, James P. Dawson, Robert F. Katzberg, and *Nicole M. Elliott*, for petitioner.

Rachel G. Borden, Cathy Fung, and *Anna L. Boning*, for respondent.

OPINION

GREAVES, *Judge*: The Internal Revenue Service (IRS) Whistleblower Office (WBO) denied petitioner's claim of a section 7623(b) nondiscretionary award for his alleged contribution to the success of the 2011 Offshore Voluntary Disclosure Initiative (OVDI), an IRS program that encouraged taxpayers to come into compliance with tax reporting

obligations by voluntarily disclosing foreign accounts and other assets.[1] Currently before us are respondent's Motion to Dismiss for Lack of Jurisdiction under Rules 40 and 53 and Motion for Summary Judgment under Rule 121, as well as petitioner's Cross Motion for Partial Summary Judgment under Rule 121 and discovery Motions under Rules 71(c), 72(b), and 104(b).

This Court lacks jurisdiction over a whistleblower case unless the IRS "*proceeds* with any administrative or judicial action . . . based on information brought to the [IRS's] attention" by the whistleblower. *Li v. Commissioner*, 22 F.4th 1014, 1017 (D.C. Cir. 2022) (quoting section 7623(b)(1)). We disagree with petitioner that the IRS proceeded with an administrative or judicial action by creating OVDI or by virtue of taxpayers' participation in OVDI. Accordingly, we will grant respondent's Motion to Dismiss.

Background

The Court derives the following facts, other than the description of IRS voluntary disclosure programs, from the pleadings and Motion papers and from the administrative record, which respondent

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[1] Unless otherwise indicated, all statutory references are to the Internal Revenue Code (Code), Title 26 U.S.C., in effect at all relevant times, all regulation references are to the Code of Federal Regulations, Title 26 (Treas. Reg.), in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

submitted on January 26, 2018, as an Exhibit to his Motion in Limine. Petitioner resided in Mississippi when he petitioned this Court.

Petitioner filed Form 211, Application for Award for Original Information, with the WBO on or about November 29, 2010, seeking a whistleblower award for any amounts emanating from his cooperation with the Department of Justice (DOJ) and the IRS Criminal Investigation Division (CI) in their investigations of Swiss bankers Martin Lack and Renzo Gadola. IRS agents arrested Mr. Gadola in Miami, Florida, in November 2010, the day after he had a meeting with petitioner in which petitioner wore a recording device provided by CI. Mr. Gadola revealed to prosecutors how he and others helped U.S. taxpayers open Swiss bank accounts to conceal income and assets from the IRS. He eventually pleaded guilty to conspiring to defraud the United States in violation of 18 U.S.C. § 371. The DOJ announced Mr. Gadola's guilty plea in a December 2010 press release, and the story received media coverage in 2010 and 2011.

In February 2011 the IRS announced OVDI, its second offshore voluntary disclosure program and a counterpart to CI's longstanding practice of allowing taxpayers to avoid criminal prosecution by disclosing noncompliance. *See* IRS Large Business & International Division Memorandum, LB&I-1-09-1118-014, at 1 (Nov. 20, 2018); Offshore Voluntary Disclosure Program Frequently Asked Questions and

Answers 2014, Q&A-3.[2] OVDI offered the same benefit, along with reduced penalties, for eligible taxpayers that voluntarily disclosed foreign accounts for tax years 2003–10. *See* 2011 OVDI Frequently Asked Questions and Answers, Q&A-4, -7, -9 (hereinafter OVDI Q&A). Taxpayers whose returns are under examination by the IRS or who are under investigation by CI could not participate in OVDI. *Id.* Q&A-14. Participating taxpayers had to provide information on offshore financial accounts, institutions, and facilitators, and pay back taxes, penalties, interest, and a "miscellaneous" penalty based on the highest aggregate balance in the foreign accounts over a specified period. *Id.* Q&A-7, -24.[3] The

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[2] The IRS offered the initial offshore voluntary disclosure program from March to October 2009. *See id.* OVDI was the second offshore voluntary disclosure program, and ran from February 8 to September 9, 2011. *Id.* A third offshore voluntary disclosure program began in 2012 and closed in 2018. *Id.* Q&A-1; Closing the 2014 Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers.

[3] In general, all U.S. citizens, wherever they reside, and all resident alien individuals must pay federal income tax on worldwide taxable income. Treas. Reg. § 1.1-1(b). The same goes for domestic corporations, trusts, and estates. *See* Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates and Gifts* ¶ 65.3.1 (2022), Westlaw FTXIEG. Such taxpayers were required to report foreign-source income on their federal income tax returns for the tax years in the OVDI disclosure period. *See, e.g.*, Instructions to Form 1040, U.S. Individual Income Tax Return 19 (2010). Taxpayers with foreign accounts of aggregate value greater than $10,000 were also

IRS reserved the right to conduct examinations with respect to OVDI disclosures, and a taxpayer that considered the OVDI penalty unacceptable could opt out of the program and have its case handled under the standard audit process. *Id.* Q&A-27, -51.

In a letter to the WBO dated June 18, 2012 (OVDI claim letter), petitioner claimed the IRS owed him a nondiscretionary whistleblower award under section 7623(b) "on the monies collected as a result of the February 2011 OVDI" (OVDI claim), which by that time totaled over $1 billion. Petitioner alleged that his undercover collaboration with federal agents brought about Mr. Gadola's arrest and cooperation, which in turn led to the success of OVDI. The letter quotes the prosecution's supplemental sentencing memorandum in Mr. Gadola's case, which asserts that Mr. Gadola's guilty plea and "the very public nature of his cooperation" with prosecutors were of "great benefit to the IRS," because they "spurred U.S. taxpayers to enter into the voluntary disclosure program." As compensation for providing information on Mr. Gadola, the same information referenced in his 2010 Form 211, petitioner sought a whistleblower award of 30% of the OVDI proceeds. Neither the OVDI claim letter nor petitioner's Motion papers claim a share of collections from associated

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required to disclose such accounts on Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR). 31 U.S.C. § 5314(a) (2000); 31 C.F.R. §§ 103.24, 103.27(c) (2010). Taxpayers not in compliance could face severe criminal and civil penalties, including civil fraud penalties, accuracy-related penalties, failure-to-file FBAR penalties, and failure-to-file and failure-to-pay additions to tax. *See* OVDI Q&A-5, -6.

enforcement actions, such as seizures of taxpayer assets or follow-up audits of OVDI participants, taxpayers who opted out of OVDI, or taxpayers not in compliance that the IRS discovered through OVDI disclosures.

The WBO processed the OVDI claim separately from petitioner's Form 211. WBO analyst Kenneth J. Chatham prepared the initial draft of an internal memorandum (Chatham memo) on June 6, 2013.[4] The final version of the Chatham memo, which is undated, recommends denying petitioner's claim for lack of a "related action" within the meaning of Treasury Regulation § 301.7623-2(c)(1).[5]

The WBO denied the OVDI claim in a letter dated May 25, 2016 (denial letter), explaining that "the IRS took no action based on the information [petitioner] provided with respect to [OVDI] or any of the taxpayers who participated in it," and that neither OVDI nor the participating taxpayers are "valid related actions to [petitioner's] Whistleblower claim." Petitioner appealed the denial in this Court on June 9, 2016, and argues that the creation of OVDI and certain taxpayers' participation in OVDI are section

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[4] Although the administrative record refers to a "claim *rejection* memo" (emphasis added), the Chatham memo recommends that the WBO *deny* petitioner's claim, which it did. *See infra* Part II (discussing rejections and denials).

[5] The Chatham memo refers to "Prop. Reg. 301.7623-2(d)(1)," which suggests the regulation may have remained in proposed form when Mr. Chatham completed the memorandum.

7623(b)(1) related actions that entitle him to an award. Petitioner argues that we cannot resolve this case without granting his discovery requests, which he says could demonstrate that the IRS created OVDI because of increased demand for voluntary disclosure following the Gadola case, or that the WBO withheld the denial letter until the regulations under section 7623(b) better supported a denial.

On January 11, 2022, the U.S. Court of Appeals for the D.C. Circuit held in *Li v. Commissioner*, 22 F.4th at 1017, that the Tax Court lacks jurisdiction under section 7623(b) if the IRS has not proceeded with an administrative or judicial action based on information the whistleblower brought to its attention.[6] Respondent then moved to dismiss, arguing that the IRS did not proceed with an administrative or judicial action that would confer jurisdiction on this Court.

Discussion

I. *Nondiscretionary Awards*

Section 7623 provides for both discretionary and mandatory awards to individuals (i.e., whistleblowers) who submit information about third parties that have underpaid their taxes or otherwise violated the internal revenue laws. Section 7623(a) authorizes discretionary awards, which are not

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[6] The D.C. Circuit is the appellate venue for this case absent a stipulation by the parties. *See* § 7482(b)(1) (flush text); *Kasper v. Commissioner*, 150 T.C. 8, 11 n.1 (2018).

subject to Tax Court review. By contrast, section 7623(b) authorizes nondiscretionary awards, discussed *infra*, which may be subject to our review.

If the IRS "proceeds with any administrative or judicial action described in subsection (a) based on information brought to [its] attention" by a whistleblower, section 7623(b)(1) provides that the whistleblower, subject to exceptions not relevant here, shall receive an award of 15% to 30% of the "collected proceeds . . . resulting from the action (including any related actions) or from any settlement in response to such action."[7] Although the Code does not define "related actions," Treasury Regulation § 301.7623-2(c)(1) describes "related actions" as certain administrative or judicial actions against persons other than the ones the whistleblower identified. The IRS must be able to identify the target of the action using the information the whistleblower provided, "without first having to use the information provided to identify any other person or having to

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[7] Section 7623(b)(1) refers to the "Secretary" rather than the IRS, and section 7701(a)(11)(B) defines "Secretary" as the Secretary of the Treasury or his delegate. The Secretary of the Treasury has delegated to the Commissioner responsibility for the administration and enforcement of the internal revenue laws. Treas. Order 150-10 (Apr. 22, 1982).

Congress amended the statutory text in the sentence accompanying this note, effective for information provided for which a final determination for an award has not been made before February 9, 2018. Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 41108(a)(2), (d), 132 Stat. 64, 158–59. The amended text does not apply because the WBO denied the OVDI claim on May 25, 2016.

independently obtain additional information." Treas. Reg. § 301.7623-2(c)(1)(iii).

II. *Rejections and Denials*

The statutory provisions governing whistleblower awards are succinct, and the Department of the Treasury and the IRS have adopted regulations supplementing the statutory scheme. *Rogers v. Commissioner*, 157 T.C. 20, 27 (2021). The regulations establish two distinct types of so-called determinations that by definition result in no award: rejections and denials. The WBO issues a rejection to a whistleblower whose claim fails to satisfy certain threshold requirements as to who may file a claim or what information the claim must include. *See* Treas. Reg. §§ 301.7623-1(b)(2), (c)(4), -3(c)(7); *see also Lacey v. Commissioner*, 153 T.C. 146, 168 (2019) ("One of the WBO's options is indeed to 'reject' a claim without substantive consideration of its information and allegations beyond the face of the claim . . . ."). For example, Treasury Regulation § 301.7623-1(c)(1) requires the whistleblower to submit "specific and credible information that the whistleblower believes will lead to collected proceeds from one or more persons whom the whistleblower believes have failed to comply with the internal revenue laws." Failure to provide such information may result in a rejection. *See, e.g., Frantz v. Commissioner*, T.C. Memo. 2020-64, at *7–8 (explaining that the WBO rejected a claim that failed to identify a tax issue).

When an eligible whistleblower files a conforming claim, the WBO issues a denial if "the IRS either did not proceed based on the information provided by the whistleblower," or "did not collect proceeds" despite proceeding based on the information. Treas. Reg. § 301.7623-3(c)(8). Accordingly, a denial is made after the WBO engages in some substantive consideration beyond the face of a claim. *Rogers*, 157 T.C. at 30.[8]

III. *Jurisdiction*

The Tax Court may exercise jurisdiction only to the extent authorized by Congress, *Naftel v. Commissioner*, 85 T.C. 527, 529 (1985) (first citing section 7442; and then citing *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418 (1943)), and a party invoking our jurisdiction bears the burden of proving that we have jurisdiction over the party's case, *see Fehrs v. Commissioner*, 65 T.C. 346, 348 (1975). We have jurisdiction to decide whether we have jurisdiction. *Snow v. Commissioner*, 142 T.C. 413, 419 (2014).

A. *"Administrative or Judicial Action" Prerequisite*

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[8] In the case of a rejection or a denial of a claim filed under section 7623(b), the WBO generally provides written notice to the whistleblower of the basis for its decision and, in the case of a rejection, inviting the whistleblower to submit comments or to perfect the claim. *See* Treas. Reg. §§ 301.7623-1(c)(4), -3(c)(7) and (8).

Section 7623(b)(4) grants the Tax Court jurisdiction to review any "determination regarding an award under paragraph (1)." Like Treasury Regulation § 301.7623-3(c), discussed *supra* Part II, the Tax Court interpreted "determination" to include rejections and denials. *See Lacey*, 153 T.C. at 163 n.19 ("[A] denial or rejection is a (negative) 'determination regarding an award', so the Tax Court has jurisdiction where, pursuant to the WBO's determination, the individual does *not* receive an award.").

The D.C. Circuit disagreed, holding in *Li* that the Tax Court does not have jurisdiction to review a rejection of a whistleblower claim. *Li* reasoned that an award determination by the IRS arises only when the IRS "*proceeds* with any administrative or judicial action" based on information brought to the IRS's attention by the whistleblower. *Li v. Commissioner*, 22 F.4th at 1017 (quoting section 7623(b)(1)). A rejection "by nature means the IRS is not *proceeding* with an action," the Court continued, meaning "there is no award determination, negative or otherwise, and no jurisdiction for the Tax Court." *Id.*

Although petitioner received a denial rather than a rejection, Part II *supra* (second paragraph) explains that the IRS may issue a denial where the IRS "did not proceed [with an administrative or judicial action] based on the information provided by the whistleblower," and the denial letter explained that the WBO denied petitioner's claim because "the IRS took no action based on the information [petitioner] provided." To have jurisdiction over petitioner's appeal, we must hold that the IRS

proceeded with an administrative or judicial action by creating OVDI or by virtue of taxpayers' participation in OVDI, the two administrative or judicial actions petitioner posits.

B. *No Administrative or Judicial Action*

Although section 7623(b)(1) refers to an "administrative or judicial action described in subsection (a)," neither subsection (a) nor subsection (b) defines an "administrative action" or a "judicial action." Treasury Regulation § 301.7623-2(a) defines both terms for claims open as of August 12, 2014. *See* Treas. Reg. § 301.7623-2(f). An "administrative action" is defined as "all or a portion of an [IRS] civil or criminal proceeding against any person that may result in collected proceeds, . . . including, for example, an examination, a collection proceeding, a status determination proceeding, or a criminal investigation." *Id.* para. (a)(2). A "judicial action" is defined as "all or a portion of a proceeding against any person in any court that may result in collected proceeds." *Id.* subpara. (3).

This Court found section 7623(b)(1) ambiguous for its failure to define "administrative or judicial action," and accepted the regulatory definition of "administrative action" as within the Treasury's "ample scope" to define these terms. *See Lissack v. Commissioner*, 157 T.C. 63, 71–76 (2021) (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984)). The same reasoning counsels deference to the regulatory definition of "judicial action." Furthermore, the Code 9 itself

anticipates a definition of "action" similar to the regulation's by restricting nondiscretionary awards to proceeds of any action "*against* any taxpayer." *See* § 7623(b)(5)(A) (emphasis added); *see also Hardin v. City Title & Escrow Co.*, 797 F.2d 1037, 1040 (D.C. Cir. 1986) ("Jurisdictional provisions in federal statutes are to be strictly construed.").

Neither of the purported administrative or judicial actions petitioner identifies fits the definitions in Treasury Regulation § 301.7623-2(a). By creating OVDI, the IRS did not undertake a "civil or criminal proceeding against any person" along the lines of the examples provided in the regulation, let alone a court proceeding. The program required voluntary disclosure of foreign accounts and assets, and excluded participation by taxpayers already under examination or investigation. We likewise reject petitioner's argument that inherently voluntary participation in OVDI *by a taxpayer* constitutes an administrative or judicial action *by the IRS*. This Court has recognized that a taxpayer's voluntary compliance absent an examination entailed no administrative action, even if IRS scrutiny prompted the taxpayer's compliance. *See Whistleblower 16158-14W v. Commissioner*, 148 T.C. 300, 304 (2017).

We therefore reject petitioner's argument that the creation of, and the participation by unidentified third-party taxpayers in, OVDI are "related actions." Assuming arguendo that the IRS proceeded with an administrative or judicial action against Mr. Gadola based on information petitioner brought to its

attention, any related action the IRS took against other taxpayers must itself be an administrative or judicial action. *See* § 7623(b)(1) (granting an award of collected proceeds "resulting from the action (including any related actions)"); Treas. Reg. § 301.7623-2(a)(1) (defining an "action" as an administrative or judicial action); *id.* para. (c)(1) ("[T]he term related action means an *action* . . . ." (emphasis added)). Because neither of petitioner's proposed "actions" is an administrative or judicial action, neither can be a related action.

C. *Applicability of the Regulations*

Petitioner also challenges the process by which the WBO denied his claim. He submitted the OVDI claim in 2012, and the WBO sent the denial letter in 2016. He suggests that the "initial decision" to deny his claim occurred on June 6, 2013, the date of the first draft of the Chatham memo, and alleges that the WBO may have sought to shore up the legal 10 basis for its decision by withholding the denial letter until the definitions in Treasury Regulation § 301.7623-2 took effect in 2014.

Invoking the Administrative Procedure Act, *see* 5 U.S.C. § 706(2) (2018), petitioner asks us to "set aside" the denial as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," because the OVDI claim "must be evaluated based on the law applicable as of the date of respondent's initial decision to deny petitioner's claim." Petitioner argues

that we must evaluate his claim by applying the plain meaning of the Code, and disregard regulations that took effect after the initial draft of the Chatham memo.

The D.C. Circuit encountered a similar argument from Bergerco Canada, a company that sought to collect a debt from an Iraqi entity on the eve of the Gulf War. When Iraq invaded Kuwait in August 1990, President Bush froze Iraqi property interests in the United States, including funds on deposit with the U.S. bank from which Bergerco would receive payment. *Bergerco Can. v. U.S. Treas. Dep't, Office of Foreign Assets Control*, 129 F.3d 189, 190–91 (D.C. Cir. 1997). On August 15, 1990, the Office of Foreign Assets Control (OFAC) announced regulatory criteria for the award of licenses for payment of blocked funds, and Bergerco promptly applied for a license. *Id.* at 191. OFAC then revised the regulation on October 18, adopting new criteria that Bergerco did not meet, and denied Bergerco's application on November 20 based on the new criteria. *Id.*

The D.C. Circuit rejected Bergerco's argument that application of the revised rule was impermissibly retroactive. *Id.* at 190. A regulation has retroactive effect, the Court explained, when it impairs rights a party had when it undertook some prior action. *See id.* at 193.[9] The key action in Bergerco's case was

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[9] The D.C. Circuit derived this principle from *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), and

filing a license application, which did not confer protection from any subsequent rule-made variation in licensing standards. *See id.* at 194 (first citing *DIRECTV v. FCC*, 110 F.3d 816, 825–26 (D.C. Cir. 1997); and then citing *Chadmoore Commc'ns, Inc. v. FCC*, 113 F.3d 235, 240–41 (D.C. Cir. 1997)). The D.C. Circuit sustained OFAC's use of the October 18 criteria, irrespective of the agency's motive in deferring action on Bergerco's application until November 20, and despite the fact that the August 15 regulation gave Bergerco "a very good chance of securing the license." *Id.* at 190.

The same reasoning permits us to apply the regulatory definition of "administrative or judicial action" adopted while petitioner's claim was pending. Petitioner cites no authority requiring the WBO or the Tax Court to ignore the regulation in reviewing claims filed before its effective date, and he identifies no other action he took that would entitle him to such review. We do not inquire into the IRS's reasons for issuing the regulation before the denial letter. *Cf. Lissack*, 157 T.C. at 63–68, 71–76 (applying the regulatory definition where the WBO may have had enough information to deny the claim nearly three years before its effective date).

Landgraf v. USI Film Products, 511 U.S. 244 (1994). *See Bergerco*, 129 F.3d at 193. The Court appeared to derive the injunction against retroactive regulations from 5 U.S.C. § 551(4) (1994), which defined a "rule" as "the whole or a part of an agency statement of general or particular applicability *and future effect*." *Bergerco*, 129 F.3d at 192 n.2 (emphasis added) (citing *Bowen*, 488 U.S. at 216 (Scalia, J., concurring)).

IV. *Conclusion*

The Court lacks jurisdiction to review the WBO denial of the OVDI claim because petitioner has the burden of proving jurisdiction, which requires that the IRS proceeded with an administrative or judicial action, and Treasury Regulation § 301.7623-2(a) does not encompass the purported administrative or judicial actions petitioner identifies. This holding moots petitioner's argument that either the creation of OVDI or taxpayers' participation in OVDI is a related action, which section 7623(b)(1) and Treasury Regulation § 301.7623-2(c)(1) define as a type of administrative or judicial action. Granting petitioner's request to discover why the IRS created OVDI would not change this result.

To reflect the foregoing,

An order and order of dismissal for lack of jurisdiction will be entered.

Appendix D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-1160 **September Term, 2024**

USTC-13499-16W

Filed on: October 4, 2024

Thomas Shands,

Appellant

v.

Commissioner of Internal Revenue,

Appellee

BEFORE: Pillard, Walker, and Pan, Circuit Judges

ORDER

Upon consideration of appellant's petition for panel rehearing filed August 30, 2024; the motion of Michael A. Humphreys for leave to file an amicus curiae brief in support of appellant's petition for rehearing; the lodged corrected amicus curiae brief;

and the corrected certificate of compliance to the motion for leave to file an amicus brief, it is

ORDERED that the motion be granted. The Clerk is directed to file the lodged corrected amicus brief. It is

FURTHER ORDERED that the petition for rehearing be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer,
Court

BY: /s/
Daniel J. Reidy
Deputy Clerk

Appendix E

Internal Revenue Code of 1986 (26 U.S.C.)

§ 7623. Expenses of detection of underpayments and fraud, etc.

(a) In general.–The Secretary, under regulations prescribed by the Secretary, is authorized to pay such sums as he deems necessary for–

(1) detecting underpayments of tax, or

(2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same,

in cases where such expenses are not otherwise provided for by law. Any amount payable under the preceding sentence shall be paid from the proceeds of amounts collected by reason of the information provided, and any amount so collected shall be available for such payments.

(b) Awards to whistleblowers.–

(1) In general.–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 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. The

determination of the amount of such award by the Whistleblower Office shall depend upon the extent to which the individual substantially contributed to such action.

(2) Award in case of less substantial contribution.–

(A) In general.– In the event the action described in paragraph (1) is one which the Whistleblower Office determines to be based principally on disclosures of specific allegations (other than information provided by the individual described in paragraph (1)) resulting from a judicial or administrative hearing, from a governmental report, hearing, audit, or investigation, or from the news media, the Whistleblower Office may award such sums as it considers appropriate, but in no case more than 10 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, taking into account the significance of the individual's information and the role of such individual and any legal representative of such individual in contributing to such action.

(B) Nonapplication of paragraph where individual is original source of

information.–Subparagraph (A) shall not apply if the information resulting in the initiation of the action described in paragraph (1) was originally provided by the individual described in paragraph (1).

(3) Reduction in or denial of award.– If the Whistleblower Office determines that the claim for an award under paragraph (1) or (2) is brought by an individual who planned and initiated the actions that led to the underpayment of tax or actions described in subsection (a)(2), then the Whistleblower Office may appropriately reduce such award. If such individual is convicted of criminal conduct arising from the role described in the preceding sentence, the Whistleblower Office shall deny any award.

(4) Appeal of award determination.– Any determination regarding an award under paragraph (1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

(5) Application of this subsection.– This subsection shall apply with respect to any action–

(A) against any taxpayer, but in the case of any individual, only if such individual's gross income exceeds

$200,000 for any taxable year subject to such action, and

(B) if the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed $2,000,000. (6) Additional rules.– (A) No contract necessary.– No contract with the Internal Revenue Service is necessary for any individual to receive an award under this subsection. (B) Representation.– Any individual described in paragraph (1) or (2) may be represented by counsel. (C) Submission of information.– No award may be made under this subsection based on information submitted to the Secretary unless such information is submitted under penalty of perjury.

Appendix F

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 23-1160

Dr. Thomas Shands,
Appellant (Petitioner)

v.

Commissioner of Internal Revenue,
Appellee (Respondent)

On Appeal from the United States Tax Court
No. 13499-16W

APPELLANT DR. THOMAS SHANDS'S PETITION FOR PANEL REHEARING

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GLOSSARY OF ABBREVIATIONS

BKB	Basler Kantonalbank
DOJ	United States Department of Justice
IRS	Internal Revenue Service
JA	Joint Appendix
OVDI	2011 Offshore Voluntary Disclosure Initiative
Tax Court	United States Tax Court

PETITION FOR PANEL REHEARING

Pursuant to Federal Rule of Appellate Procedure 40, and D.C. Circuit Rule 35, appellant Dr. Thomas Shands seeks rehearing of the panel's July 16, 2024 opinion ("Opinion").[1] The panel Opinion overlooks, misapprehends, or misstates key points of law and fact. Each of these points has a material impact on the panel's decision. Because correction of these critical points will change the decision in this case, Shands respectfully requests rehearing.

I. The Panel Mistakenly Concludes Shands Disavowed His Related Action Jurisdictional Argument.

The panel acknowledges on page 16 of its Opinion that Shands argued extensively in his Opening and Reply Briefs that the "OVDI cases were 'related actions to the original actions against the Swiss bankers and BKB.'" The panel further concedes that this is a potentially meritorious argument demonstrating the Tax Court's jurisdiction. Opinion, p. 16. The panel, however, does not consider this argument because it mistakenly concluded that during oral argument counsel for Shands disavowed the argument as a basis for Tax Court jurisdiction, choosing instead to rely on the argument solely in support of arguments on the merits. The panel states the following:

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[1] The Opinion was filed publicly on August 7, 2024.

> Shands devotes a significant portion of his briefing to explaining why certain OVDI cases were "related actions to the original actions against the Swiss bankers and BKB." As explained, Shands does not offer this analysis as an alternative theory of jurisdiction, but instead as a merits argument regarding his entitlement to an award.

Opinion, p. 16. A careful review of the questions and answers during the oral argument, however, reveals that the panel misapprehends counsel's response. Counsel did not disavow the jurisdictional argument, but instead repeatedly advanced the related action argument to demonstrate that the IRS took administrative action against the U.S. Clients who participated in the OVDI program for the purposes of ***both*** jurisdiction and the merits.

In its Opinion, the panel provides the following summary of the colloquy during the argument:

> And when the court later suggested that the original actions, distinct from the purportedly related action, could be relevant to jurisdiction, counsel stated: "It would seem to be a very strange state of affairs where the taxpayer could rely on the overarching action to get into court, but then say no action was taken with respect to me for the purposes of the merits."

Opinion, p. 16. This summary reflects a misapprehension of the series of questions asked of counsel and the responses given. Transcript of April 2, 2024, Oral Argument ("Transcript"), 23:5-30:13.

Counsel was asked in various ways if the original actions against the Swiss bankers and BKB could satisfy the requirement of an administrative action against the related U.S. Clients for jurisdictional purposes, but at the same time not satisfy the requirement of an administrative action against the related U.S. Clients for merits purposes. Judge Pan clarified the point, "Even if we think that there was jurisdiction based on the original action, it would still on the merits not be an action and you would lose on the merits for the same reason." Transcript, 23:25-24:3. Counsel responded that it would "make no sense to conclude that what happened is administrative action for purposes of jurisdiction but not administrative action for purposes of the merits." Transcript, 24:7-10. Counsel then reiterated, "… it would seem to be a very strange state of affairs where the taxpayer could rely on the overarching action to get into court but then say no action was taken with respect to me for purposes of the merits." Transcript, 26:9-12.

Counsel's point was that because the OVDI proceedings were related actions the requirement of an administrative action against the related U.S. Clients was satisfied for both jurisdictional and merits purposes. Counsel did not in any way disclaim the extensive argument in Shands's briefing that the Tax Court had jurisdiction because the OVDI proceedings were related claims to the original claims. Instead, counsel argued only that it would make no sense to conclude that the original action constituted administrative action against the related U.S. Clients for purposes of jurisdiction, but did not constitute administrative action on the merits. The

panel's disagreement with Shands's argument that a related action need not constitute a separate administrative action on the merits does not in any way demonstrate that counsel for Shands disavowed the jurisdictional argument.

The discussion then pivoted to what the IRS must consider to determine if the claimant is entitled to a recovery on the merits. Judge Pillard accurately summarized Shands's argument on the merits with the following question: "So I guess my question for you is, if the administrative proceeding with respect to the top-line taxpayers suffices to provide jurisdiction for the claims against the OVDI participants, or the money recovered from them, then one would look at whether those recoveries were based on or related to the original – the information originally provided. Is that your – the framework you're using?" Transcript, 28:18-25. Judge Walker then followed up with a virtually identical hypothetical. Transcript, 29:2-30:9. Judge Walker asked whether the Tax Court has jurisdiction to consider a purportedly related action where the IRS determined that the proceeds collected have no relationship to the information provided in connection with the original action. Counsel for Shands stated that the Tax Court would have jurisdiction even if the related claim failed on the merits due to the lack of the necessary causal relationship. Transcript, 30:6-9. As counsel explained during the argument, this inquiry – whether the collected proceeds resulted from information provided by Shands – goes to the merits of the claim, including particularly the causation requirement, and not jurisdiction. For example, if the IRS recovered no proceeds from the U.S. Clients, or

those proceeds were not causally linked to the information Shands provided, then he would not prevail on the merits. But this is not the question asked by Judge Pan – that is, whether the IRS has taken administrative action for purposes of jurisdiction but has taken no administrative action for purposes of the merits. Under Judge Walker's hypothetical there would be administrative action taken for purposes of both jurisdiction and the merits. The claim would simply fail on the merits due to insufficient evidence of causation. That result does not call into question whether the IRS took administrative action against the U.S. Clients for purposes of jurisdiction or the merits. Counsel never abandoned the jurisdictional argument, but instead answered the panel's questions relating to the merits.

In further support of its conclusion that Shands abandoned the potentially meritorious jurisdictional argument, the panel recites the following question and answer:

> When asked at oral argument if treating the OVDI claim as an asserted related action provided an alternative theory of jurisdiction, counsel for Shands responded: "I would not say that it's an alternative theory."

Opinion, p. 16. The panel misapprehends the point of counsel's answer. Shands's position was simply that the characterization of the related action argument as an "alternative" theory of jurisdiction missed the point. Judge Pillard confirmed the point, "So whether it's based on or related, your argument is – in a sense, it's beside the point whether there was any

administrative proceeding separate and distinct from the undisputed administrative proceeding that already supports the whistleblower award that Mr. Shands has received." Transcript, 7:3-8. Judge Pillard appeared to recognize quite clearly that Shands did not intend to disavow the argument that the original actions gave the Tax Court jurisdiction over the related actions. Counsel simply disagreed with the characterization of the argument as an "alternative" theory. As Judge Pillard noted, Shands's argument was that the original actions gave the Tax Court jurisdiction over the related actions and rendered it beside the point whether the related actions were themselves separate administrative actions. Counsel for Shands continued to advance the argument that the original actions afforded the Tax Court jurisdiction over the related actions notwithstanding its disagreement with the panel's characterization of that argument as an "alternative" theory.

II. The Panel Misapprehends Shands's Argument That OVDI Proceedings Constitute Administrative Action.

The panel also misapprehends the scope of Shands's argument that OVDI proceedings constitute administrative action, as well as the facts underlying that argument. On page 13 of the Opinion, the panel acknowledges that "a voluntary disclosure through the OVDI could result in an examination (that is, an audit) of the taxpayer by the IRS, which would be an administrative action by the agency against that taxpayer." The panel, however, then mistakenly

states that Shands argued ***only*** that OVDI cases themselves – *i.e.* the taxpayer's voluntary disclosure of assets and payment of taxes, interest, and penalties – are administrative actions. According to the panel, Shands never argued that an OVDI proceeding which resulted in an examination constitutes administrative action against the taxpayer:

> Shands, however, argues only that OVDI cases themselves – *i.e.* the taxpayer's voluntary disclosure of assets and payment of taxes, interest, and penalties – are 'administrative actions.'

Opinion, p. 13. The panel's statement is simply not accurate.

Indeed, the panel acknowledges as much on page 14 of the Opinion when it explains, "Shands next reasons that the Tax Court had jurisdiction because a taxpayer's voluntary disclosure under the OVDI sometimes can lead to the IRS 'proceed[ing]' with an 'administrative action.'" This is the very argument the panel says Shands never made.

In his Opening Brief, Shands argued as follows:

> If the IRS was dissatisfied with the information provided by the taxpayer it was authorized to conduct a full examination for the entire period of noncompliance. (2011 OVDI Frequently Asked Questions, Q. 27; Add. 52). Moreover, if the taxpayer disagreed with the tax, interest, and penalty determined by the examiner, then the IRS would conduct a full

> examination of all issues. (2011 OVDI Frequently Asked Questions, Q. 27; Add. 52).

Opening Brief, pp. 13, 30-31. Shands then argued "Despite purportedly taking 'no action' with respect to the U.S. taxpayers, the IRS, in fact, undertook a comprehensive examination of the taxpayer submissions, including follow-up interviews and documents requests ***and, in some cases, a full examination of the taxpayer on all issues***." Opening Brief, pp. 30-31 (emphasis added). Further, Shands added the following:

> …[T]the OVDI proceedings at issue in this case reflect extensive administrative action by the IRS. … Indeed, the procedures governing the OVDI expressly provide that the IRS will undertake a comprehensive examination of the information submitted by participating taxpayers, including at a minimum an examination of the lookback period ***and potentially a full examination of the entire period of noncompliance***.

Opening Brief, p. 38 (emphasis added).

Strikingly, the Tax Court held that OVDI proceedings can never, as a matter of law, constitute administrative action for purposes of the whistleblower statute. In its Answer Brief, the IRS conceded the Tax Court's error, acknowledging that OVDI proceedings can constitute administrative action, at least in those cases in which the IRS

conducts an examination of the OVDI participant.[2] The IRS contended, however, that Shands failed to identify which of the U.S. Clients were examined by the IRS in connection with their OVDI proceedings. The IRS's response confirms that Shands argued in his Opening Brief the IRS took administrative action against U.S. Clients by conducting an examination of those taxpayers. Indeed, the IRS responded directly to that argument. In short, despite the panel's express acknowledgement on page 14 of the Opinion that Shands made this precise argument, the panel somehow drew the opposite conclusion in support of its rejection of Shands's appeal. Opinion, p. 13.

A core issue is the panel's misapprehension of the OVDI process. The panel likens OVDI proceedings to the normal tax return filing and tax payment procedures. The panel mistakenly explains that, like the filing of a tax return, "That [OVDI] process is initiated and directed by the taxpayer." Opinion, p. 12. That statement is not accurate. To the contrary, OVDI proceedings are directed by the IRS. As Shands pointed out in his Opening Brief, the IRS assigns an OVDI submission to an examiner who undertakes a comprehensive review of the information provided, including by propounding follow-up questions, requesting documents,

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[2] The limitation urged by the IRS actually leads to a nonsensical result. A whistleblower award would be due only where the OVDI participant opts of OVDI or otherwise refuses to cooperate. It makes no logical sense to deny a whistleblower award because the information provided by the whistleblower permits the IRS to collect proceeds from OVDI participants without a fight. The whistleblower would be rewarded for providing information that is actually less valuable to the IRS.

conducting third-party interviews, and issuing a final certification. Opening Brief, pp. 13, 30. This review is in no way directed by the taxpayer. Unlike the filing of annual tax returns, which are exceedingly unlikely to result in taxpayers being contacted to respond to questions seeking additional information or the production of additional documents, the OVDI process specifically anticipates such follow-up and review by the IRS before an application can be granted. The panel's likening of OVDI proceedings to the filing of a regular tax return reveals the panel's fundamental misunderstanding of the operation of the OVDI program and undermines the rationale for the Opinion.

III. Shands Did Not Waive His Discovery Argument.

In response to the IRS's argument that Shands failed to identify any U.S. Client the IRS examined in connection with OVDI participation, Shands argued that the IRS resisted the discovery it needed to make this showing. Shands propounded discovery seeking the identity of the U.S. Clients who participated in the OVDI program, including those who were examined by the IRS. The IRS refused to respond to the discovery requests and the Tax Court denied Shands's motions to compel. The panel concludes Shands waived this argument by failing to raise it in his Opening Brief:

> But Shands made no mention of the discovery motion in his opening brief, and "[a]rguments raised for the first time in a reply brief are forfeited."

Opinion, p. 15. But the panel misapprehends the applicable law on this point. Although an appellant must generally raise issues for the first time in the opening brief, "an appellant generally may, in a reply brief, 'respond to arguments raised for the first time in the appellee's brief.'" *See, e.g., United States v. Powers*, 885 F.3d 728, 732 (D.C. Cir. 2018). As this Court explained in *Powers*, an appellant is not required to predict, and address preemptively, arguments the appellee has not previously raised. *See Powers*, 885 F.3d at 732 (appellant did not forfeit argument by waiting to raise it in reply brief in response to appellee's brief). That is precisely the circumstance here. Shands's Opening Brief was focused on challenging the Tax Court's conclusion that OVDI proceedings can never constitute administrative action. Shands was not required to anticipate the new argument the IRS raised for the first time in its brief to blunt the effect of its concession that the Tax Court erred. Shands was entitled to respond to that new argument and did not forfeit its right to do so. The panel has misapprehended the law on this point and should grant rehearing.

IV. The Panel Misapprehends the Applicability of the Supreme Court's *Lissack* and *Loper* Decisions.

The panel should also grant rehearing in light of the United States Supreme Court's new decisions in *Lissack v. Commissioner*, -- S. Ct. --, 2024 WL 3259664 (July 2, 2024) and *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). The panel

misapprehends the import of the new decisions on this case by stating that Shands did not question in his appeal the validity or applicability of the regulations at issue in *Lissack*. The panel appears to mistakenly conclude that because Shands did not challenge *Chevron* deference on appeal, he forfeited any arguments that the panel must apply the new Supreme Court decisions and remand for consideration of those decisions on the regulatory arguments Shands raised in the Tax Court. The panel states the following:

> Moreover, the remand proceeding in *Lissack* does not affect our resolution of this appeal because Shands does not question the validity or applicability of the regulations at issue in that case. *See Al-Tamimi v. Adelson*, 916 F.3d 1, 6 (D.C. Cir. 2019) (noting arguments not raised on appeal are forfeited).

Opinion, p. 6. The panel is required to apply the law in effect at the time of its decision even if the particular issues implicated in the new law have not been raised in the pending appeal. *See Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711(1974); *Litton Sys., Inc. v. Am. Tel. & Tel. Co.*, 746 F.2d 168, 171 (2d Cir. 1984) (holding that no party to an appeal should be held to a standard that permits appellate court to apply intervening change in the law only where the issue is already pending in the appeal). Any contrary conclusion would make no sense. For example, the panel's conclusion here would require every appellant to have challenged *Chevron* deference on the off-chance the law would change during the pendency of the appeal.

Shands challenged both the applicability and the validity of the regulations in the Tax Court. Shands first raised this argument in response to the Tax Court's January 13, 2022 order to show cause and then again in his response to the IRS's motion to dismiss. JA 503. As the Court noted in its opinion, the determination of whether the OVDI proceedings are related actions is a central question in this case. Opinion, p. 16. In light of the recent Supreme Court decisions, this Court is now required to exercise their own independent discretion to determine whether the definition of related actions is within the agency's statutory authority. Thus, the panel misapprehend the importance of deciding whether the regulations defining related actions are valid as a matter of law and should grant rehearing.

V. The Panel Opinion Includes Key Factual Misstatements.

Finally, the panel Opinion reflects the following important factual misstatement:

> **Thomas Shands asked a banker at UBS, Martin Lack, to open an account for him.**

Opinion p. 7. The panel's statement is not entirely accurate. Shands did not approach Lack to open the account at issue. Shands and his siblings inherited the account, which their father had opened at UBS decades earlier. JA 313. At the time of the father's death, Lack had left UBS but controlled the funds as an asset manager. JA 313. After the OVDI program was announced, Shands contacted Lack to obtain the account records that would enable him and his

siblings to participate in the voluntary disclosure program. JA 313. Lack refused to cooperate and Shands subsequently learned that Lack had moved the UBS account to BKB without Shands's knowledge or consent to keep it concealed. The panel mistakenly confuses the account at issue in this case with a request by Shands to open a different, fully-disclosed account to invest and manage funds for the long-term care of his disabled son. JA 313-314.

The panel Opinion also states several times that Shands received immunity from criminal prosecution. Opinion, pp. 2, 7. He did not. Neither Shands nor his siblings, who inherited equal shares of the account and were in the same legal situation, were ever contacted by the IRS or the DOJ. Shands was never a target of any investigation and accordingly received no formal grant of immunity.

This factual mistake colors the unfortunate portrait of Shands painted by the panel in the Opinion. The panel's factual mistake is key to its conclusion that, notwithstanding his purported grant of immunity from prosecution and his receipt of a whistleblower award in connection with the Swiss bankers and BKB, Shands was greedy and overreaching because he "wanted more." In fact, Shands is entitled to more. The panel should grant rehearing to consider Shands's arguments based on the language of the statute and the regulations, free from the panel's negative view of Shands which appears to be predicated on a factual mistake.

CONCLUSION

For all the forgoing reasons, Shands respectfully requests that the panel grant rehearing of its July 16, 2024 Opinion and reverse the Tax Court's decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel for appellant Dr. Thomas Shands certifies that this petition complies with Federal Rule of Appellate Procedure 35(b)(2)(A) because it contains 3,347 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1), as calculated by the word processing program. Counsel for appellant Dr. Thomas Shands further certifies that this petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface

using Microsoft Word in Times New Roman 14-point font.

/s/ Stacy D. Blank
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 30, 2024, I electronically filed the foregoing document with the clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel of record identified via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Stacy D. Blank
Attorney