No. ____

In the

Supreme Court of the United States

MICHAEL LISSACK,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

ERICA L. BRADY-GITLIN
Counsel of Record
GREGORY S. LYNAM
SCOTT A. KNOTT
THE FERRARO LAW FIRM
600 Brickell Ave, Suite 3800
Miami, FL 33131
(202) 775-1630
ebrady@ferrarolaw.com
Counsel for Petitioner

October 17, 2023

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

QUESTIONS PRESENTED

Section 7623 of Title 26 governs the Internal Revenue Service's (hereinafter the "IRS") ability to pay awards to whistleblowers. Prior to 2006, awards under § 7623 were entirely discretionary and failed to attract well placed whistleblowers due to the difficulty in actually receiving an award. In order to attract well placed whistleblowers, Congress amended § 7623 in 2006, requiring the IRS to pay awards where the IRS proceeds with any administrative or judicial action based on the whistleblower's information, removing the IRS's discretion of whether to pay an award when § 7623(b) applies.

The statutory question underlying this petition is whether the IRS is required to pay an award where a whistleblower's information causes the IRS to open an audit of the taxpayer, but the IRS ultimately makes an adjustment to an issue other than the issue raised by the whistleblower. Under well-established principles of statutory construction, the answer would appear to be yes, as the IRS has proceeded in an administrative action based on the whistleblower's information (the audit) and collected additional proceeds from that administrative action. A panel of the D.C. Circuit answered "no" under *Chevron* because "the statute does not conclusively answer whether examinations into distinct tax issues" can be separate administrative actions.

The questions presented are:

1. Whether, under a proper application of *Chevron*, § 7623(b) requires the IRS to pay an award where the only reason the IRS opened the audit of the

taxpayer was the whistleblower's information, but assessed additional tax on a different issue.

2. Whether the Court should overrule *Chevron* or at least clarify that where Congress acts to remove discretion from an agency, regulations promulgated thereunder should not be deferred to.

PARTIES TO THE PROCEEDING

Petitioner (appellant below) is Dr. Michael Lissack.

Respondent (appellee below) is the Commissioner of Internal Revenue.

National Whistleblower Center was *amicus curiae* for appellant below.

Whistleblower 11099-13W was *amicus curiae* for appellant below.

Michael A. Humphreys was movant-*amicus curiae* for appellant below.

STATEMENT OF RELATED PROCEEDINGS

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

- *Lissack v. Commissioner of Internal Revenue*, No. 21-1268 (D.C. Cir.), judgment entered on May 26, 2023; Petition for Rehearing or Rehearing en Banc, denied by orders dated July 20, 2023;
- *Lissack v. Commissioner of Internal Revenue*, No. 399-18W (U.S. Tax Court), decision entered on August 18, 2021; Motion to Reconsideration of Findings or Opinion and Motion to Vacate or Revise, denied by order dated September 20, 2021.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Federal Statutes

Regulations

Other

PETITION FOR WRIT OF CERTIORARI

Congress has long recognized that properly incentivizing whistleblowers to come forward with information regarding the violation of Federal law is an efficient way to detect fraud. Since 1867, federal law has authorized whistleblower awards to informants for providing information to internal revenue officials about violations of federal tax law. In 1954, Congress codified the Secretary's ability to pay awards as § 7623.[1] Section 7623 has been amended several times, including, as most relevant here, in 2006 by the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, div. A, title IV, § 406(a)(1), 120 Stat. 2922, 2958-60 (the "2006 Act"). The 2006 Act amended § 7623, creating an obligation that the IRS pay awards to whistleblowers who meet certain requirements. The 2006 Act did so by designating § 7623, as it existed before December 6, 2006, as 7623(a), which allows the IRS the discretion to pay awards that do not meet the requirements of subsection (b). Thus, removing discretion from the IRS in circumstances described in § 7623(b)(5).

The 2006 Act also established additional oversight of the programs through the creation of the Whistleblower Office and by having judicial review claims under § 7623(b).

In 2014, Treasury Regulations for § 7623 were released in final form. *T.D. 9687, 79 FR* 47, 266 (Aug. 12 2014). The regulations attempt to apply definitions to words other than their standard meaning and

[1]All references to code sections are to the Internal Revenue Code, unless otherwise stated.

differently than they were applied at the time the 2006 Act was enacted. *See* Treas. Reg. § 301.7623-2. The application of the regulations ultimately returns discretion back to the IRS for when to pay an award. Doing so thwarts the will of Congress.

The language of § 7623(b) is clear and drafted to fit the wide array of whistleblowers that come forward to the IRS to provide information about all kinds of taxpayers. Section 7623(b) provides that:

> [i]f 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) …

I.R.C. § 7623(b)(1). This language is clear. Congress intends for whistleblowers to be paid where the IRS uses the whistleblower's information to proceed with an action that results in additional collections of tax and other amounts.

Nevertheless, the regulations promulgated under this section attempt to narrow the action taken by the IRS to just the issues directly raised by the whistleblower, even in cases where the whistleblower's information caused the IRS to proceed by opening an audit that without the whistleblower's information would not have been opened and the amounts collected from that audit would not have been collected.

The regulations combined with the IRS's inherent prosecutorial discretion results in cases where the IRS denied a whistleblower's claim for award where the whistleblower's information caused the IRS to open the audit of a taxpayer, who was previously unknown to the IRS, and the IRS has assessed and collected taxes on an issue that can be differentiated from the issue the whistleblower provided information.

Curiously, before the 2006 Act was enacted, the IRS regularly paid an award to whistleblowers that identified a noncompliant taxpayer that the IRS pursued, but assessed tax on an issue other than the one brought forward by the whistleblower. *See* Staff of J. Comm. On Taxation, *Technical Explanation of H.R. 6408, "The Tax Relief And Health Care Act Of 2006," As Introduced In The House On December 7, 2006,* JCX-50-06 (2006); *see also* I.R.M 25.2.2*, Exhibit 25.2.2-2, Award Calculation Computation Guidelines* (06-18-2010) (superseded). An outcome that is clearly intended to continue under the statutory language of § 7623(b).

Additionally, the D.C. Circuit looked to the second sentence of § 7623(b)(1) to find that Congress intended the award only for substantial contributions, but then failed to look at what Congress had statutorily defined as a less than substantial contribution in § 7623(b)(2).

Instead, the D.C. Circuit panel deferred to the agency by purporting that the statutory language did not conclusively answer the question, which it perceived as an ambiguity that called for *Chevron* deference. That is either a fundamental overreading of *Chevron* or a powerful argument for its overruling.

Either way, this Court should grant review to impose sensible limits on agency deference.

The decision below poses a threat to Congressional efforts to alter agency programs. When Congress enacts legislation specifically to remove discretion from an agency, logic dictates that the agency should not then be allowed to interpret the law as it sees fit. Especially when that interpretation serves to return much of the discretion Congress had removed. Here, Congress attempted to make the IRS whistleblower program more predictable by removing discretion from the agency in certain cases. However, through *Chevron* deference, statutory language and Congressional intent were relegated to less important than agency interpretation. Whether by clarifying *Chevron* or overruling it, this Court should grant review and reverse the clear agency overreach at issue here.

OPINIONS BELOW

The D.C. Circuit's opinion is reported at 68 F.4th 1312 and reproduced at App.1-33. The U.S. Tax Court's opinion is reported at 157 T.C. 63 and reproduced at App.38-59. The D.C. Circuit's order denying Appellant's Petition for Rehearing, dated July 20, 2023, is reproduced at App.60. The D.C. Circuit's order denying Appellant's Petition for Rehearing *En Banc*, dated July 20, 2023, is reproduced at App.61.

JURISDICTION

The D.C. Circuit issued its opinion on May 26, 2023. Petitioner filed a Petition for rehearing or

rehearing en banc on July 7, 2021, The D.C. Circuit denied this petition on July 20, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions are reproduced at App.61.

STATEMENT OF THE CASE

A. Legal Framework

Since 1867, federal law has authorized whistleblower awards to informants for providing information to internal revenue officials about violations of federal tax law. See Act of Mar. 2, 1867, ch. 169, § 7, 14 Stat. 471, 473 (codified by ch. 11, § 3463, 35 Rev. Stat. 686 (1873-74)). In 1954, Congress codified the Secretary's ability to pay awards as § 7623. Act of Aug. 16, 1954, ch. 736, 68A Stat. 904. Section 7623 has been amended several times. At issue here are 2006 amendments to § 7623 as part of the 2006 Act.

The amendments in the 2006 Act were prompted by a report issued by the Treasury Inspector General for Tax Administration at the request of the Senate Finance Committee. The report concluded that the existing award program had significantly contributed to the enforcement of the tax laws but that the program would be more effective if procedures were centralized and standardized with increased oversight. See Treasury Inspector General for Tax Administration, *The Informants' Rewards Program Needs More Centralized Management Oversight,* Report No. 2006-30-092 (June 6 2006) (available at

http://www.tax-whistleblower.com/resources/200630092fr.pdf).

The amendments in the 2006 Act added the provisions for mandatory awards as § 7623(b), creating an obligation that the IRS pay awards to whistleblowers who meet certain requirements, and designated § 7623, as it existed before December 6, 2006, as 7623(a), which allows the IRS the discretion to pay awards that do not meet the requirements of subsection (b). Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, div. A, title IV, § 406(a)(1), 120 Stat. 2922, 2958-60. Section 7623(b)(5) provides that subsection (b) applies where the amount at issue is greater than $2,000,000 and, in the case of an individual, the individual has gross income in excess of $200,000 for any taxable year subject to the action. I.R.C. § 7623(b)(5). Thus, if these requirements are met, and the IRS proceeds with the action based on the whistleblower's information, the IRS is required to pay an award of between 15 and 30 percent of the amount collected from the action taken due to the whistleblower's information, including, importantly, any related actions or from any settlement in response to the action. I.R.C. § 7623(b)(1).

The 2006 Act made the existing program more robust by not only designating that certain whistleblower claims would receive a mandatory award under subsection (b), but also establishing additional oversight of the programs through the creation of the Whistleblower Office and by having judicial review claims under § 7623(b). As Congress retained the previously existing award program, the history and the administration of that program should be considered when interpreting § 7623(b).

Particularly the portion of subsection (b) that links to § 7623(a). *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit,* 547 U.S. 71, 85-86 (2006).

Section 7623 envisions granting awards to a whistleblower whose information leads the IRS to take administrative or judicial action that leads to the recovery of collected proceeds. This dispute here involves what actions taken by the IRS are attributed to the whistleblower. Petitioner argues that "administrative or judicial action as described in subsection (a)" in § 7623(b)(1) is a clearly defined term that relies on language that has been consistently applied for decades and is intended to adjust to the particular facts and circumstances of whistleblower's information and the taxpayers to which it relates.

B. Factual Background

The most important fact in this case is agreed to by all parties: without Petitioner's assistance, the IRS would not have collected a single dollar from the taxpayers to whom Petitioner's information related.

On February 6, 2009, the Whistleblower Office received Petitioner's Form 211, Application for Award for Original Information. App.40. In his Form 211, Petitioner identified an affiliated group of entities ("Taxpayers") who were believed to have mischaracterized income as debt on their 2008 tax returns. App.40-41.

The Whistleblower Office assigned nine claim numbers to Petitioner's case, corresponding to the various entities comprising Taxpayers. App.41. The claim was referred to Nora Beardsley, a Whistleblower Office Senior Tax Analyst. App.41. Ms.

Beardsley reviewed Petitioner's claim and forwarded the case to the IRS Large Business & International Division. App.41. A Revenue Agent, Mr. Patrick Shanahan in that division, reviewed Petitioner's information by researching Taxpayers and analyzing the group's tax returns and IRS account transcripts. App.41. An audit was opened for Taxpayers based on Petitioner's information. App.41.

Mr. Shanahan stated in his first Form 11369, Confidential Evaluation Report on Claim for Award, in July of 2011, that "no audit or investigation [had been] planned" by the IRS but that the "[i]nformation submitted by the whistleblower was sufficient to warrant beginning of examination." App.41.

In 2013, Mr. Shanahan completed the audits, and the IRS issued notices of proposed adjustment to Taxpayers. App.42. The proposed adjustments included the disallowance of a $60 million bad debt deduction and several other relatively minor adjustments for 2009. App.42. There were no adjustments for Petitioner's debt issue. App.41-42.

Ms. Beardsley recommended that the Whistleblower Office deny Petitioner's claim for an award because although "there was an assessment for additional taxes," the information Petitioner supplied "was not relevant to those issues." App.42-43. The Whistleblower Office issued a final determination letter on December 7, 2017, denying Petitioner's claim. App.43.

C. Proceedings Below

Petitioner is a whistleblower that provided information to the IRS on Form 211 in 2009. App.40.

The IRS used Dr. Lissack's information to open an audit of the taxpayers at issue. App.41. The IRS ultimately collected additional taxes on a different debt issue. App.42. On December 7, 2017, the IRS denied Dr. Lissack's claim for an award. App.43. On January 8, 2018, Dr. Lissack timely filed suit alleging, as relevant here, that he was due an award based on the amounts collected from the audit started solely because of the information he provided to the IRS under § 7623(b). App.43. Respondent moved for summary judgment, and Petitioner cross-moved for partial summary judgment. App.43. The U.S. Tax Court granted Respondent's motion for summary judgment in an opinion dated August 18, 2021. App.37. In its opinion the U.S. Tax Court held that the Petitioner is not entitled to an award because the IRS did not collect proceeds in "the action" that was taken based on Petitioner's information because the IRS collected proceeds on issues other than what Petitioner described. App.49-53. To reach this conclusion, the court disregarded statutory language. App.51. The U.S. Tax Court then followed step two under *Chevron* and relied on an example in the regulations to fill the ambiguity left by disregarding statutory language, and changed the action that the IRS initially took based on Petitioner's information. App.53-56.

On August 18, 2021, the U.S. Tax Court entered its decision in favor of Respondent. App.37. Petitioner timely filed a Motion for Reconsideration and a Motion to Vacate with the U.S. Tax Court on September 15, 2021. The U.S. Tax Court denied these motions on September 20, 2021. App.37.

Petitioner timely filed his Notice of Appeal to the D.C. Circuit on December 16, 2021. On May 26, 2023, a panel of the D.C. Circuit affirmed the decision of the U.S. Tax Court. App.33. Writing for the majority, Judge Pillard found Lissack "'fails to show that the language of [Section 7623 of the Internal Revenue Code] unambiguously compels' his interpretation." App.22. And then deferred to the agency's interpretation under *Chevron* as a reasonable interpretation of the statute. App.23.

In its reasoning, the D.C. Circuit found that the statute does not unambiguously require a whistleblower to receive an award under these circumstances. App.20. The D.C. Circuit stated that the statute does not define "administrative action" beyond the cross reference to subsection (a) and then looked to the phrases "based on" and "substantially contributed" in § 7623(b)(1). App.20-21. In doing so, the D.C. Circuit conflated the mandate to pay an award under § 7623(b) (found in the first sentence of § 7623(b)(1)) with the description of how the amount of the award is determined (found in the second sentence of § 7623(b)(1)). App.21-22. In doing so, the D.C. Circuit failed to consider that Congress had already provided that a less substantial contribution in this context means a public disclosure bar as stated in § 7623(b)(2).

The D.C. Circuit then turned to the second step of its *Chevron* analysis, "deferring to the agency's interpretation as long as it is consistent with the statutory terms and is reasonable." App.23 (quotation marks omitted). The D.C. Circuit held that the regulations reasonably interpret § 7623. App.24. That the meaning of "administrative action" "may in this

context sensibly be limited to action on the discrete tax issue or issues the whistleblower's information identifies." App.23. The D.C. Circuit justified this approach writing that "there is ample reason to doubt that Congress meant to entitle whistleblowers to substantial awards just for raising plausible but meritless concerns about taxpayers who, on investigation by the IRS, turn out to be noncompliant in some other, unrelated way." App.23-24.

Petitioner filed a Petitioner for Rehearing or Rehearing *En Banc* on July 7, 2023. The D.C. Circuit denied the petitions on July 20, 2023. App.60 & App.61.

REASONS FOR GRANTING THE PETITION

The decision below got an exceptionally important issue exceptionally wrong. When Congress removes discretion from an agency, Courts should not presume that Congress implicitly delegated that same agency authority to interpret the statute because that agency cannot take back the same discretion Congress had removed through agency action. The decision below affirms the regulations that return the very discretion that Congress sought to remove by amending § 7623 with the 2006 Act.

Congress expressly removed the IRS's discretion to pay whistleblower awards where the dollar limits of § 7623(b)(5) were met by requiring that the IRS pay awards,

> [i]f 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…
>
> I.R.C. § 7623(b)(1).

The mandate from Congress is clear. The IRS shall pay an award when it proceeds with any administrative or judicial action based on the whistleblower's information.

"Action" and "issue" are different. In this context, allowing the IRS to use a whistleblower's information to identify a noncompliant taxpayer that would otherwise not have been audited, and then assess and collect on an issue on which the whistleblower did not provide information in order to avoid paying an award to the whistleblower violates Congress's clear mandate to pay awards to whistleblowers where the IRS proceeds based on the whistleblower's information. In circumstances where the whistleblower's information causes an audit that would not have occurred but for their information, the "action" is the audit.

The IRS has prosecutorial discretion to pick and choose which of the more than 160 million returns it receives are audited. The IRS also has prosecutorial discretion to determine on which issues additional tax should ultimately be assessed. Thus, the IRS continues to exercise discretion to decide if a whistleblower should be paid if the D.C. Circuit's opinion is not reversed. Congress limited the IRS's discretion of when to pay an award with the 2006 Act. By replacing issue with action, the regulations seek to

take the very discretion Congress removed back. Doing so weakens the balance between the three branches of government, placing the executive branch as the first among supposed equals.

That the decision below reached that result by applying *Chevron* only heightens the stakes and the need for this Court's review. While the doctrine may have made sense in theory on the assumption that faithful application of principles of statutory interpretation would make step-one cases the rule and step-two cases the exception; however, practical application of *Chevron* has been the reverse. Lower courts see ambiguity everywhere that statutory language does not "unambiguously compel" a specific reading and have abdicated the core judicial responsibility of statutory interpretation to executive-branch agencies so long as the regulations are reasonable.

The decision below is a case in point and an ideal vehicle for this Court's review. Flexibility in statutory language or broad statutory language is not ambiguity, especially when the statute must be able to be applied in many different situations. If *Chevron* really requires deference in these circumstances, then *Chevron* can no longer be ignored, and must be overruled so that lower courts stop abdicating their duty to interpret statutes sensibly whenever they confront any language that can be labeled an ambiguity. But whether to clarify that agencies should not be deferred to when Congress has expressly removed discretion from the agency or to reconsider *Chevron* more broadly, this Court should not allow the extraordinary decision below to stand.

I. The D.C. Circuit's Decision Applying *Chevron* Deference Is Wrong.

A. Congress Did Not Intend for the IRS to have Discretion to Pay Awards.

This Court emphasized in *Chevron* that, "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984). Here, those tools—"text, structure, history, and so forth," *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019)—unambiguously confirm that Congress intended for whistleblowers to receive an award where the IRS proceeds in an action based on their information and the IRS collects proceeds from that action.

Starting with the text, § 7623(b) envisions granting awards to a whistleblower whose information leads the IRS to take administrative or judicial action that leads to the recovery of collected proceeds. This dispute here involves what actions taken by the IRS are attributed to the whistleblower. Petitioner argues that "administrative or judicial action" is clearly described in subsection (a) using language that has been consistently applied for decades and is intended to adjust to the particular facts and circumstances of whistleblower's information and the taxpayers to which it relates.

Section 7623(b)(1) at the time of the Whistleblower Office's final decision letter read:

> 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 proceeds collected as a result of the action (including any related actions) or from any settlement in response to such action (determined without regard to whether such proceeds are available to the Secretary). 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.

I.R.C. § 7623(b)(1) (emphasis added).

Congress specifically referred to the language in subsection (a) that describes both civil and criminal tax enforcement actions to describe which actions by the IRS were possible to form the basis of an award under § 7623(b)(1). Section 7623(a) reads:

> 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.

I.R.C. § 7623(a).

The language found in paragraphs (1) and (2) of subsection (a) describes the administrative and judicial actions that, when undertaken by the IRS, could result in an award under §7623. Congress avoided using terms such as audit or issue because it needed one term that could adjust to the wide array of facts and circumstances that would be presented by all whistleblowers because whistleblowers provide information on all sorts of taxpayers, and underpayments of tax are detected, assessed, and collected in a myriad of ways. The linked language also differentiates a tax enforcement action against the taxpayer at issue from an administrative or judicial proceeding concerning the award or the initial review of the information. Once the fact of the award is determined by the mandate in the first sentence of § 7623(b)(1), the second sentence describes how the amount of the award is to be determined within the mandated range.

The second sentence of § 7623(b)(1) provides that "[t]he determintion of the amount of such award by the Whistleblower Office shall depend upon the extent to which the individual substantially

contributed to such action." I.R.C. § 7623(b)(1). Congress has stated how the IRS is supposed to determine awards where there is less substantial contribution in § 7623(b)(2). Section 7623(b)(2)(A), addresses the capping of awards where the allegations being reported are "from a judicial or administrative hearing, from a governmental report, hearing, audit, or investigation, or from the news media." I.R.C. § 7623(b)(2)(A). In cases of less substantial contribution, as described by the statute, the award is capped at 10 percent of the proceeds. I.R.C. § 7623(b)(2)(A). Congress also expressly allowed for the reduction or denial of an award where the whistleblower had planned or initiated the tax underpayment. I.R.C. § 7623(b)(3).

Nevertheless, the D.C. Circuit read the two sentences of § 7623(b)(1) as a single mandate, importing substantially in to the mandate to pay an award, but ignored Congress's definition of what a less substantial contribution is and how it should be treated. Rather than look to the statutory language in § 7623(b)(2), the D.C. Circuit claimed ambiguity in the statute and deferred to agency regulations.

Congress was equally clear that the action on which the IRS proceeds is the action on which the IRS must pay an award under § 7623(b)(1). Section 7623(b)(1) requires that awards paid shall be, subject to certain conditions, "at least 15 percent but not more than 30 percent of the collected proceeds (including penalties, interest, additions to tax, and additional amounts) resulting from the action (including any related actions) or from any settlement in response to such action." I.R.C. § 7623(b)(1). The phrases "the action" and "such action" used in this portion of §

7623(b)(1) reference the administrative or judicial actions, as described in subsection (a), earlier in the sentence. The structure of the sentence makes clear that "the action" and "such action" are referring to the administrative or judicial action at the beginning of the sentence and should be applied as such. The same or similar terms in a statute are generally interpreted in the same way. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992).

The word "action" is rightly read to refer to the same action throughout the subsection. For example, if the IRS opens an audit based on a whistleblower's information, the whistleblower's award is based on the full amount collected from that audit because the "action" that the IRS took based on the whistleblower's information was opening a previously unplanned audit. Here, for example, Petitioner brought the IRS information that Taxpayers misreported income as debt. Respondent readily admits that the only reason that audits were opened for the Taxpayers was Petitioner's information. Thus, the audits are the administrative action described in subsection (a)(1) that the Secretary proceeded with based on information brought to the Secretary's attention by Petitioner. Under the plain language of the statute, Petitioner is entitled to an award of at least 15 percent but not more than 30 percent of the collected proceeds collected from the audits.

The D.C. Circuit dismissed Petitioner's arguments regarding how the program functioned before the 2006 Act. However, how the program functioned at the time of the 2006 Act is indicative of Congressional intent because the language used in the 2006 Act is where Congress sought to change the IRS

whistleblower program. Congress's intent to build upon the existing program is clear because Congress left the existing language largely in place and added subsection (b) rather than replace § 7623 entirely. For example, Congress expressly included interest in the list of proceeds specifically included in "collected proceeds" in the 2006 Act. This change signaled that Congress intended to include interest in the base amount that awards, a change from how § 7623 functioned prior to the 2006 Act. However, nothing in the language of § 7623(b)(1) suggests that Congress intended to change how the IRS treats whistleblowers who alert the IRS to a non-compliant taxpayer. In fact, the broad language of § 7623(b)(1) that expressly incorporates the existing program suggests the opposite.

Congress was aware that when a whistleblower's information caused an audit, the IRS had been treating the entire audit as the action for purposes of determining the award payable under the pre-2006 Act program because this was included in the Technical Explanation for the 2006 Act:

> For information, although not specific, that nonetheless caused the investigation and was of value in the determination of tax liabilities, the reward is not to exceed 10 percent of the amount recovered. For information that caused the investigation, but had no direct relationship to the determination of tax liabilities, the reward is not to exceed one percent of the amount recovered.

Staff of J. Comm. On Taxation, *Technical Explanation of H.R. 6408, "The Tax Relief And Health Care Act Of 2006," As Introduced In The House On December 7, 2006,* JCX-50-06 (2006).

The program as it existed in 2006 included payments for identifying non-compliant taxpayers. Had Congress intended to exclude whistleblowers who caused the audit or examination but did not provide information on the specific issues on which the IRS ultimately collects, it could have easily either (1) removed these claims from consideration by limiting awards to issues the whistleblower raised or to the issues directly related to the whistleblower's information; or (2) included these cases in § 7623(b)(2) as a less than substantial contribution. Congress did not do so. Instead, Congress referenced the existing language and incorporated its existing rules, making clear that it intended to keep much of the pre-2006 Act whistleblower program in place following the 2006 Act, which added subsection (b) to section 7623.

Indeed, the broader statutory context makes clear that Congress knew how to draft language that restricts awards to whistleblowers because Congress limited the application of § 7623(b). Congress limited the application of § 7623(b) to awards where the amount in dispute exceeds $2,000,000 and, in the case of an individual taxpayer, the individual's gross income exceeds $200,000 for any year subject to such action. I.R.C. § 7623(b)(5). Congress prohibited those convicted of criminal conduct arising from their role in planning and initiating the tax underpayment. I.R.C. § 7623(b)(3). Congress also provided two exceptions for when the IRS could pay less than 15 percent of the amounts collected from the action in § 7623(b)(2) and

(3). Section 7623(b)(2) caps the award at 10 percent of amounts collected when the information is determined to be based principally on disclosures of specific allegations resulting from "from a judicial or administrative hearing, from a governmental report, hearing, audit, or investigation, or from the news media" unless the whistleblower is the original source of the information. I.R.C. § 7623(b)(2). The first sentence of § 7623(b)(3) allows for the award percentage to be reduced below 15 percent where the whistleblower is found to have been responsible for the planning or initiating of the tax underpayment. I.R.C. § 7623(b)(3).

By interpreting § 7623 in a manner that would allow the IRS to have full discretion over if awards are paid to whistleblowers, the D.C. Circuit's opinion raises grave separation-of-powers concerns by disregarding the express will of Congress to deprive whistleblowers of amounts that Congress mandated be paid. This Court's precedent teaches that, "[w]hen a serious doubt is raised about the constitutionality of an act of Congress, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (quotation marks omitted). Petitioner's interpretation of § 7623 does exactly that.

B. If *Chevron* Tolerates the Result Below, the Court Should Overrule It or Clarify Its Limits.

As the foregoing demonstrates, a proper application of *Chevron* leaves no doubt that the decision below is plainly wrong. But if the decision

below is somehow consistent with *Chevron*, rather than an overreading of *Chevron*, the Court should overrule that decision or at least clarify its limits—in particular, by explaining that the use of broad language does not create ambiguity, especially when Congress has expressly sought to remove discretion from the agency. Given the problems with *Chevron* recognized by members of this Court, it is understandable that the Court has declined to mention *Chevron* even in cases where it is directly at issue. *See, e.g.,* S*ackett v. EPA,* 143 S. Ct. 1322 (2023); and *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022). But, as this case well illustrates, lower courts continue to feel obligated to apply it because the Court has not yet formally overruled it. Creating two separate bodies of law. One for those fortunate enough to be reviewed by this Court, where statutory language controls. And a second one, where any whiff of ambiguity leads to deference to agency rule making.

The decision below provides an opportunity to clarify that deference is not appropriate where Congress has removed agency discretion. This Court has made clear that courts are supposed to exhaust the statutory-construction toolkit before declaring an ambiguity that causes the tie to go to the agency. *See, e.g.,* K*isor,* 139 S. Ct. at 2415. Among the most obvious and important tools are that mandatory words impose a duty, and the rule of the last antecedent. Both of which strongly indicate that the broad language used for when an award is due is not ambiguous and mandates that an award be paid where the conditions are met, as they are here.

The use of the word "shall" is a clear indication that the agency lacks the power to narrow the class of

persons Congress sought to reward because the IRS should not be permitted to interpret the statute in a way that returns the discretion Congress removed. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 11, at p. 112 (2012). That would seem to be particularly clear in a context like this. This is confirmed by looking at the text of the statute. The word "substantially" is only used once in § 7623(b)(1). It is only used in the second sentence which discusses the determination of the amount of such award being dependent on "the extent to which the individual substantially contributed to such action." It is clear for the context of the statute that substantially was not intended as a limiting requirement for the payment of an award, but used to determine where within the statutorily required range the award should fall. *Lockhart v. United States*, 136 S. Ct. 958, 963 (2016).

If *Chevron* really supports the result below, then it is no longer sufficient for this Court to ignore *Chevron*. Whatever theoretical benefits might have been perceived with *Chevron* when it was decided, decades of practice have exposed its many flaws. To begin with, *Chevron* "wrests from Courts the ultimate interpretative authority to 'say what the law is'" and places it in the executive's hands. *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring). When a law is truly unambiguous, there is little need for statutory construction. Statutory construction concerns statutory text that the litigants have interpreted differently and is therefore ambiguous. Such a low bar for ambiguity would result in deference to agency interpretation in virtually all litigation where the government has engaged in some sort of

agency rule making. Thus, a doctrine that defers to the executive at the first sign of ambiguity is nothing short of an "abdication of the judicial duty." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

Moreover, because the judiciary defers to the executive branch's interpretation under *Chevron*, the doctrine also encourages the executive branch to engage in agency rulemaking rather than to work with Congress to enact new laws. In the years since *Chevron* was decided only three years have had fewer than 25 economically significant final rules published. *See GW Columbian College of Arts & Sciences, Regulatory Studies Center, Reg Stats,* https://regulatorystudies.columbian.gwu.edu/reg-stats (2023). Those years were 1985, 1986, and 2017. It is far easier to engage in agency rulemaking than it is navigate the legislative process. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring in part) ("Both by design and as a matter of fact, enacting new legislation is difficult."). Worse still, if the D.C. Circuit's opinion is allowed to stand, even after new legislation is passed, the executive branch is then able to effectively repeal the statute through agency rule making, which will then be deferred to by the courts.

As bad as *Chevron* has been for the judiciary and the Congress, the real loser has been the citizenry. One would expect the rule to be that, when there is doubt about how the law applies to the citizenry, the tie would go to the citizenry. But *Chevron* turns this on its head. Any time there is a whiff of ambiguity, courts declare the government the winner, effectively removing the citizenry's ability to

challenge agency interpretation so long as it has gone through the show engaging in notice and comment. The difficulties for the citizenry take more subtle forms as well. It is perhaps a tolerable fiction that the citizenry can master the various provisions of the United States Code. But "[u]nder *Chevron* the people aren't just charged with awareness of and the duty to conform their conduct to the fairest reading of the law that a detached magistrate can muster. Instead, they are charged with an awareness of *Chevron*; required to guess whether the statute will be declared 'ambiguous' (courts often disagree on what qualifies); and required to guess (again) whether an agency's interpretation will be deemed 'reasonable.'" *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring).

In sum, the decision below vividly illustrates that *Chevron* is overdue for either a reboot or an overruling. Simply ignoring it will just lead to more problematic results like the decision below.

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

This case is profoundly important on multiple levels. Section 7623(b) was enacted to incentivize whistleblowers to bring information to the IRS so the IRS could more effectively, efficiently, and fairly administer internal revenue laws. The tax gap for 2014 – 2016 was estimated by the IRS to be $496 billion per year, a $58 billion per year increase from the prior estimate. IRS, *The Tax Gap*, www.irs.gov/newsroom/the-tax-gap (Oct. 12, 2023). Of this total, $398 billion is from underreporting.

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

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

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

CONCLUSION

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

Respectfully submitted,

ERICA L. BRADY-GITLIN
Counsel of Record
GREGORY S. LYNAM
SCOTT A. KNOTT
THE FERRARO LAW FIRM
600 Brickell Ave, Suite 3800
Miami, FL 33131
(202) 775-1630
ebrady@ferrarolaw.com
Counsel for Petitioner

October 17, 2023