No. 23-413

In the Supreme Court of the United States

MICHAEL LISSACK, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the tax whistleblower statute, 26 U.S.C. 7623(b), requires the payment of a monetary award to a whistleblower who makes a meritless allegation if, in the course of investigating that allegation, the Internal Revenue Service discovers a different, unrelated tax issue that results in the collection of additional taxes.

2. Whether this Court should overrule its decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-33) is reported at 68 F.4th 1312. The opinion of the Tax Court (Pet. App. 38-36) is reported at 157 T.C. 5.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 2023. A petition for rehearing was denied on July 20, 2023 (Pet. App. 60-61). The petition for a writ of certiorari was filed on October 17, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. A federal statute, 26 U.S.C. 7623, authorizes the Secretary of the Treasury to pay monetary awards to whistleblowers. Section 7623(a) grants the Secretary discretion to pay awards for "detecting underpayments of tax" or for "detecting and bringing to trial and pun-

ishment persons guilty of violating the internal revenue laws or conniving at the same." 26 U.S.C. 7623(a). Section 7623(b), in turn, makes the awards mandatory in certain circumstances. See 26 U.S.C. 7623(b).

In particular, Section 7623(b) requires the payment of an award "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." 26 U.S.C. 7623(b)(1). In such a case, the whistleblower is generally entitled to 15% to 30% of "the proceeds collected as a result of the action (including any related actions)." *Ibid.* Within that range, the award's size depends "upon the extent to which the individual substantially contributed to such action." *Ibid.*

The Department of the Treasury has issued regulations interpreting those provisions. See 26 C.F.R. 301.7623-2. The regulations define the phrase "*administrative action*" to mean "all or a portion of an Internal Revenue Service (IRS) civil or criminal proceeding * * * that may result in collected proceeds." 26 C.F.R. 301.7623-2(a)(2). They also state that the Secretary "*proceeds based on* information provided by a whistleblower when the information provided substantially contributes to an action against a person identified by the whistleblower." 26 C.F.R. 301.7623-2(b)(1).

The regulations explain that, if the IRS conducts an examination based on a whistleblower's information, but in the course of that examination uncovers additional tax issues that are "unrelated to the activities described in the information provided by the whistleblower," the whistleblower would not be entitled to an award with respect to those additional tax issues. 26 C.F.R. 301.7623-2(b)(2) Ex. 2. In that scenario, "[t]he

portions of the IRS's examination * * * relating to the additional facts" would constitute a distinct "administrative action," and the whistleblower's information would not have "substantially contribute[d] to the action." *Ibid.*

2. Petitioner submitted information to the IRS alleging that a condominium development group had received golf-club-membership deposits but had failed to report those deposits as taxable income. Pet. App. 9. The IRS opened an examination, but concluded that the group had reported the membership deposits correctly. *Id.* at 9-10.

During the examination, the IRS found different tax issues that were unrelated to petitioner's allegations. Pet. App. 10. Among other things, the IRS found that the group had wrongly taken a $60 million deduction for bad debt. *Ibid.* The IRS adjusted the group's tax return to reflect those findings. *Ibid.* The revenue agent who conducted the examination reported that petitioner had not provided "any information for the adjusted issues." *Ibid.* (citation and emphasis omitted).

The IRS Whistleblower Office denied petitioner's claim for a whistleblower award. Pet. App. 10. The agency's final determination letter informed petitioner that it had denied his claim "because the IRS took no action on the issues [he] raised." *Ibid.* (citation omitted). The agency acknowledged that it had assessed additional taxes against the group, but it stated that "the information [he] provided was not relevant to those issues." *Id.* at 11 (citation omitted).

3. Petitioner sought judicial review in the Tax Court. See Pet. App. 43. The court granted summary judgment to the IRS. See *id.* at 38-59.

The Tax Court noted that Section 7623(b) requires the payment of an award only if the Secretary "proceeds with any administrative or judicial action * * * based on information brought to the Secretary's attention" by the whistleblower. 26 U.S.C. 7623(b)(1); see Pet. App. 44. It observed that Treasury had interpreted that language to mean that a whistleblower is not entitled to an award simply because, during an examination prompted by the whistleblower's information, the IRS discovers a separate tax issue "that is unrelated to the facts and issue identified by the whistleblower." Pet. App. 46 (citing 26 C.F.R. 301.7623-2). The court deferred to Treasury's interpretation under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See Pet. App. 49-57. Applying that interpretation, the court upheld the IRS Whistleblower Office's rejection of petitioner's claim. *Id.* at 47-49.

4. The D.C. Circuit affirmed. Pet. App. 1-33.

Like the Tax Court, the court of appeals accorded *Chevron* deference to Treasury's interpretation of Section 7623(b). See Pet. App. 18-24. The court determined that the terms "administrative action" and "proceeds based on" were ambiguous, *id.* at 20-23, and that Treasury's interpretation of those terms was reasonable, *id.* at 23-24. The court rejected petitioner's contention that the statute unambiguously required Treasury "to treat an entire examination as a single administrative action and to give an award to a whistleblower whose submission was a but-for cause of the examination." *Id.* at 22-23. The court then concluded that, under the interpretation to which it had deferred, petitioner was not entitled to a mandatory award. *Id.* at 32-33.

DISCUSSION

Petitioner contends (Pet. 14-21) that the tax whistleblower statute required the IRS to pay him a monetary award. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of another court of appeals. Petitioner also contends (Pet. 21-25) that this Court should overrule its holding in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), that courts owe deference to an agency's reasonable interpretation of an ambiguous statute that the agency administers. This Court has granted review in *Loper Bright Enterprises* v. *Raimondo*, No. 22-451 (argued Jan. 17, 2024), and *Relentless, Inc.* v. *Department of Commerce*, No. 22-1219 (argued Jan. 17, 2024), to decide whether to overrule *Chevron*. The Court should hold the petition for a writ of certiorari in this case pending the resolution of *Loper Bright* and *Relentless*, and it should then dispose of the petition as appropriate.

1. The tax whistleblower statute provides that, if the Secretary of the Treasury "proceeds with any administrative * * * action * * * based on information" provided by a whistleblower, the whistleblower is generally entitled to 15% to 30% of "the proceeds collected as a result of the action." 26 U.S.C. 7623(b)(1). The Department of the Treasury's regulations embody the best reading of the statute. At a minimum, the regulations embody a reasonable reading of ambiguous statutory language and thus warrant deference under *Chevron*.

Treasury correctly interpreted the term "*administrative action*" to mean "all or a portion" of an IRS proceeding that may result in the collection of taxes. 26 C.F.R. 301.7623-2(a)(2). "'Action'" means an "'act or deed,'" and "'administrative action' * * * generally re-

fers to acts of executive agencies." Pet. App. 21 (citation omitted). The relevant act can be a part, rather than the whole, of some broader agency proceeding. Cf. 5 U.S.C. 551(13) (defining the term "'agency action'" to include "the whole or a part" of an agency rule or order).

Treasury also correctly determined that the Secretary proceeds with an administrative action "*based on*" a whistleblower's information only if the information "substantially contribute[d]" to the action. 26 C.F.R. 301.7623-2(b)(1). The term "based on" usually connotes a substantial or important connection. See, *e.g.*, *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27, 35 (2015) ("[A]n action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit."); *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 358 (1993) (explaining that the term "'based upon'" "calls for something more than a mere connection"). The Secretary thus proceeds with an action "based on" a whistleblower's information only if the information "contributed in some substantial degree to the [IRS's] ability to proceed." Pet. App. 22.

Treasury's interpretation of the statute makes sense. "[T]here 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." Pet. App. 24. Requiring awards in such circumstances "would encourage whistleblowers to flyspeck major taxpayers, identifying any plausible underpayment in the hope of triggering an examination yielding some other, major adjustment." *Ibid.* Treasury's interpretation, in contrast, "calibrates mandatory awards to the fruits of the particular IRS actions that the whistleblower's information substantially assists." *Ibid.*

Given that understanding of the statute, petitioner is not entitled to a whistleblower award. The IRS did not proceed with the administrative action at issue—namely, the portions of the examination that concerned the bad-debt deduction and other tax adjustments—"based on" the information provided by petitioner. 26 U.S.C. 7623(b)(1). To the contrary, petitioner "had not 'provided *any* information for the adjusted issues,'" and "none of the adjustments had anything to do with" the issues raised by petitioner's information. Pet. App. 33 (citation omitted).

2. Petitioner contends (Pet. 21-26) that this Court should overrule or narrow its holding in *Chevron* that courts owe deference to an agency's reasonable interpretation of an ambiguous statute that the agency administers. The Court is currently considering whether to overrule *Chevron* in *Loper Bright* and *Relentless*. The Court should accordingly hold the petition for a writ of certiorari pending the resolution of those cases, and it should then dispose of the petition as appropriate.

CONCLUSION

This Court should hold the petition for a writ of certiorari pending the resolution of *Loper Bright Enterprises* v. *Raimondo*, No. 22-451 (argued Jan. 17, 2024), and *Relentless, Inc.* v. *Department of Commerce*, No. 22-1219 (argued Jan. 17, 2024), and should then dispose of the petition as appropriate.

Respectfully submitted.

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