No. 03-184

In The
Supreme Court of the United States

CLAUDE M. BALLARD AND MARY B. BALLARD
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF ON THE MERITS

Steven S. Brown
Royal B. Martin
William G. Sullivan
MARTIN, BROWN & SULLIVAN
321 S. Plymouth Ct., 10th Flr.
Chicago, Illinois 60604
(312) 360-5000

Vester T. Hughes, Jr.
Counsel of Record
Robert E. Davis
David J. Schenck
Christopher D. Kratovil
HUGHES & LUCE, LLP
1717 Main Street, Suite 2800
Dallas, Texas 75201
(214) 939-5500

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SUMMARY OF THE REPLY

The Rule 183(b) report represents the ***only record*** of the presumptively correct factual findings made independently by the only judicial officer to attend the trial and observe the testimony. Yet despite the obvious importance of the STJ's fact-findings, the IRS argues that a copy of the Rule 183(b) Report need not be included with the record provided to reviewing Article III courts—including this Court. The IRS contends that reviewing Article III courts should be denied the ability to verify that the Tax Court's final opinion did indeed treat the Rule 183(b) Report with "due regard," or to review the basis for any actual "modification" or "rejection" of an STJ report. The Tax Court's insistence on keeping the original fact findings secret from both the Article III courts and the parties is plainly contrary to the requirement of Article III review, and, in addition, so radically departs from traditional American practice as to violate Due Process guarantees.

As it has throughout these proceedings, the IRS again fails to distinguish between the Rule 183(b) Report that the Special Trial Judge ("STJ") is required to prepare and the final decision that is ultimately released by the Tax Court. There ***is only one*** Rule 183(b) Report: by rule it is prepared by the STJ in the wake of the trial and submitted to the Chief Judge of the Tax Court. Indeed, the STJ submits his Rule 183(b) Report ***before*** a regular Tax Court Judge is assigned to the case, and this submission under the rule ends the STJ's formal participation in the case. Thereafter, a regular Tax Court Judge may: (1) adopt the report; (2) modify it; or (3) hear additional testimony or

argument.[1] In this case, as in apparently ***every*** case decided by the Tax Court since the implementation of its current Rule 183, the final record indicates only that the Rule 183(b) Report was "adopted." No reviewing Article III court has confirmed that the original fact-finder's report was given the "regard" and deference that it is indisputably "due," as required by the text of the Rule, the command of Congress, and Due Process.

Contrary to the IRS's contention, the Rule 183(b) Report is in no way part of the Tax Court's internal deliberative process. Indeed, no where in the Tax Court's rules (or anywhere else—at least until the briefing in this case) is there any suggestion the Rule 183(b) Report will be a "collaborative effort" or that its post-submission review will include the STJ's acceptance of any modifications made by the Regular Tax Court Judge.

Congress has commanded[2] that the Article III courts of appeals review decisions from the Tax Court "in the same manner and to the same extent as decisions of the districts courts"—and this compels inclusion of the Rule 183(b) Report in the record. The IRS ignores the fact that the Article III district courts ***always*** include the fact finding from the trier of fact in the record. Congress requires no less of the Tax Court.

As part of its effort to perpetuate the secrecy surrounding the STJ's Rule 183(b) Report, the IRS makes several arguments that simply miss the mark:

- Contrary to the IRS's contention, because this was a fraud trial hinging entirely on credibility determinations, the principle articulated by this Court in *United States*

[1] The Regular Tax Court Judge may also recall the STJ into the case by "recommit[ing] the report with instruction." *See* Tax Court Rule 183(c). This provision merely confirms that, absent recommitment, the submission of the STJ's Rule 183(b) Report ends his participation in the case. Notably, the record does not indicate that any recommitment of the Report was ordered in this case.

[2] 26 U.S.C. § 7482

v. Raddatz, 447 U.S. 667, 681, n.7 (1980), must apply: the Regular Tax Court Judge is not entitled to reject the credibility determinations found in the Rule 183(b) Report "without seeing and hearing the witnesses or witnesses whose credibility is in question." No case cited by the IRS supports the notion that the right to a fair trial in a fraud case involving millions of dollars and the personal reputations of individual taxpayers is somehow subject to the reduced procedural protections associated with governmental welfare benefits or other administrative matters.

- It is simply inaccurate to assert that Petitioners seek to invade the deliberative process of the Tax Court by deposing judges or serving written discovery. Petitioners merely seek the disclosure of the Rule 183(b) Report to the reviewing appellate courts on remand, and no discovery of any kind is necessary to achieve this result.
- As with any question of fact or law, the Tax Court may err ***without engaging in any misconduct*** by denying the Rule 183(b) Report its presumption of correctness. The inclusion of the Rule 183(b) Report in the record is obviously necessary to guard against this sort of error, regardless of the presence or absence of judicial impropriety.
- The IRS' attack based on the Judge Dawson's opinion regarding Petitioners' character is both legally irrelevant and factually inaccurate. By assuming the correctness of the Tax Court's published decision, the IRS's comments beg the question at issue. Until the Rule 183(b) Report is reviewed by an Article III court

of appeals, it is entirely inappropriate to rely on the factual recitation in the opinion—particularly as the basis for derogatory comments concerning the Petitioners.

- This Court's grant of certiorari was not improvident, as no hypothetical future case could more perfectly frame the issue of whether the Rule 183(b) report must be included in the record. Because the Tax Court ***always*** purports to "adopt" the STJ's Rule 183(b) Report and the STJ's Report is ***never*** included in the record, this issue could not reach this Court in any other posture.

ARGUMENT IN REPLY

I. THERE IS ONLY ONE RULE 183(b) REPORT, AND NO ARTICLE III COURT KNOWS WHAT IT SAID.

A. The Rule 183(b) Report Constitutes Presumptively Correct Fact Findings

Throughout these proceedings, the IRS has offered divergent, inconsistent and, in all events, entirely new explanations for the role of the STJ in the decision making process at the Tax Court.[3] However, as even a brief review of Tax Court Rule 183(b) reveals, the STJ's Report is a distinct, legally required document authored exclusively by the STJ in the immediate wake of trial and ***before*** a Regular Tax Court Judge is assigned to the case. The Rule 183(b) Report must be understood as the original fact finding in the case, and for that reason, is presumptively correct. Hence, no meaningful Article III appellate review is possible without access to the Report.

[3] Ballard's Br. at 17-22.

The IRS' shifting characterization of the role of the STJ notwithstanding, the Tax Court's use of an STJ under its Rule 183 to adjudicate a case involves several clear and distinct steps:

(1) The STJ is the only judicial officer present at the trial and presides;[4]

(2) Following trial and the submission of briefs from the parties, the STJ prepares his Rule 183(b) Report, containing his findings of fact and opinions of law;

(3) The STJ submits his Rule 183(b) Report to the Chief Judge of the Tax Court, thereby ending the STJ's formal participation in the case;

(4) Thereafter, the Chief Judge assigns the case to a Regular Tax Court Judge and forwards the STJ's Rule 183 Report to that Judge;

(5) The Regular Tax Court Judge is obligated to afford the findings of fact in the STJ's Rule 183(b) a presumption of correctness, but he is ultimately responsible for preparing the Tax Court's final decision, and he may recall witnesses to assist him in doing so; and

(6) In preparing the final decision, the Tax Court Judge may "adopt" or "modify" or "reject in whole or in part" the STJ's Rule 183(b) Report, but despite these options, he remains obligated to give the STJ's Report "due regard" and to treat its fact findings as "presumptively correct."

In reviewing these steps, it becomes obvious that that there is only ***one*** Rule 183(b) report—the document prepared by the STJ after trial and submitted to the Chief Judge of the Tax Court. Thus, the IRS's insinuation that there are multiple versions of the Rule 183(b) Report or that it is merely some sort of "draft" of the Tax Court's final decision is simply inaccurate.[5] Nor, contrary to the IRS's position, does the

[4] *Freytag v. CIR*, 501 U.S. 868, 881-82 (1991) (noting that as the lone judicial officer presiding at trial, the STJ has to power to "take testimony, conduct trials, rule on the admissibility of evidence, and . . . enforce compliance with discovery orders.").

[5] Resp. Br. at 20, 24.

Rule 183(b) Report stem from any sort of "collaborative" effort between the STJ and the Regular Trial Judge. The STJ cannot, as a practical matter, collaborate with a regular Tax Court Judge in the preparation the Report because it is completed and submitted ***before*** the case is even assigned to a particular Tax Court Judge. As a result, the STJ was alone to observe the witnesses and make all of the credibility determinations. Moreover, the submission of the Rule 183(b) Report to the Chief Judge ends the STJ's formal role in the case, as no Tax Court rule or procedure provides for any sort of post-submission collaboration between the STJ and the Regular Tax Court Judge. Thus, properly understood, the Rule 183(b) Report is the legally required and exclusive final product of the STJ, who has no role in the case after he submits his Report.[6]

The Regular Tax Court Judge's right to "modify" or "reject" the STJ's Rule 183(b) Report does not eliminate his obligation to give the Report "due regard" or to treat its factual conclusions as "presumptively correct." Indeed, the legal status of the Rule 183(b) Report as the original fact findings in the case is ultimately unaffected by the Regular Tax Court Judge's treatment of the Report. For example, if the Regular Tax Court Judge decides to "reject" or "modify" the Report's fact findings, it must be because the presumption of correctness attached to those findings was properly overcome. And, yet, the Tax Court refuses to permit the Article III courts—including even this Highest Court—to know whether the Regular Tax Court Judge decided to "reject" or "modify" the Report's fact findings, let alone to examine whether such action was proper. As it is,

[6] As mentioned *supra* in note 1, the Report could also be "recommitted" to the STJ by the Regular Tax Court Judge, but there is no indication that this procedure was used in this case.

no Article III court is in a position to determine whether or not the Regular Tax Court Judge actually gave the Rule 183(b) Report the deference that it is indisputably owed.

Indeed, the problem with the IRS's position is that it would let the Tax Court have its cake and eat it too. The Tax Court could, if it desired, refuse to employ STJs.[7] Instead, the regular Tax Court judges could simply conduct all trials themselves, with the assistance of law clerks. If that were the case, the law clerks' memoranda would not be publicly released, nor would they be given any official recognition as worthy of "due regard." At the other end of the spectrum – as Petitioners here suggest – the Tax Court can and should acknowledge that where the STJ is the sole judge who conducted the trial and viewed the witnesses, and where his official fact-finding report is required by statute to be reviewed by a higher judge, that report should (at a bare minimum) be part of the record.

But here, the IRS's theory is that the Tax Court should have the best of both worlds. By the government's argument, the Tax Court (1) should have the freedom and flexibility to allow a subordinate judge acting alone to conduct a trial, while (2) treating that judge's fact-finding report as nothing more than the equivalent of a law clerk's preliminary memorandum. This is an unprecedented result. The Tax Court must make a choice: If it means to hire the equivalent of law clerks, it cannot assign trials to be solely conducted by them. But if it gives STJs the responsibility of conducting trials and

[7] After all, Congress left it to the Chief Judge's discretion whether STJs will be used. *See* 26 U.S.C. § 7443A.

finding facts based upon evidence, it must make their fact-finding reports part of the record, just as is done in every other context known to the American legal system.

B. The Tax Court's Final Opinion and the Rule 183(b) Report are Distinct and Different, Regardless of Whether the STJ Ultimately "Joins" the Final Opinion.

The IRS has posited that the Regular Tax Court Judge and the STJ collaborated in the preparation of the final opinion, *i.e.*, that the STJ ultimately came to agree with or "join" the Regular Tax Court Judge's final decision in the case.[8] Thus, the IRS's argument goes, the underlying Rule 183(b) Report is reduced to irrelevance and need not be part of the appellate record—notwithstanding lingering questions about whether an at-will employee could ultimately reject his superior's position.[9]

But this argument fails to take into account that the Rule 183(b) Report contains the original and unmodified findings of fact from the only judicial officer present at trial, or to explain what value the absent-from-trial Tax Court Judge adds to the credibility determinations made by the STJ. Beyond this, there is no mechanism in the Tax Court Rules or elsewhere by which the STJ can concur with or dissent from any "modifications" or "rejection" of the Rule 183(b) Report.[10] As such, the STJ's post-

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[8] Response Br. at 17-19.

[9] Ballard's Br. at 41-43.

[10] The STJ's inability to dissent, concur, or otherwise formally participate in the Tax Court's ultimate decision reveals the flaw in the IRS's attempt to analogize the STJ's role to that of a Regular Tax Court Judge whose opinion is reviewed by the *en banc* Tax Court. *See* Resp. Br. at 40. The IRS correctly notes that where the *en banc* Tax Court issues a decision, the individual Tax Court Judge's underlying opinion is not included in the record. The IRS argues that, by analogy, this procedure confirms that there is no need to include the STJ's Rule 183(b) Report in the record. However, while the Regular Tax Court judge is a voting member of the *en banc* Tax Court and may concur or dissent from its decision as he sees fit, the STJ, in contrast, has no vote or voice in the Regular Tax Court Judge's disposition of the Rule 183(b) Report. Because there is no mechanism by which the STJ can participate in the Regular Tax Court

submission statement purporting to "join" the Tax Court's final opinion has no legal value: it is the Rule 183(b) Report itself, not any perfunctory after-the-fact statement by the STJ, that is "presumed to be correct." In other words, nothing the STJ can say or do after the submission of his Rule 183(b) Report eliminates the need to include that Report in the record.

By way of analogy, a jury's fact-findings are not expunged from the record simply because a district judge issues a judgment as a matter of law and the jurors subsequently come to agree with the judge's reasoning. Nor does the fact that jurors changed their minds alter the standard of review applicable on appeal: the jury's original, uninfluenced, independent fact-findings remain part of the record and remain entitled to substantial deference regardless of any juror's post-verdict change of heart. Just as a reviewing court of appeals must determine whether a district judge granting JMOL afforded proper deference to the jury's verdict, so to must the courts of appeals be allowed to confirm that the Tax Court properly gave "due regard" to the presumptively correct fact findings contained in the Rule 183(b) Report—and this, obviously, requires access to the Report.

C. The STJ Is the Only Possible Fact-Finder.

The IRS's only answer to the obvious need to include the Rule 183(b) Report in the record is to deny that the STJ is actually the finder of fact and to contend that, as such, his Report is merely an internal court document.[11] In other words, the IRS envisions the "Special ***Trial Judge***" as something far less than a judge, and more akin to

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Judge's decision, or preserve his findings as part of the Article III appellate record, the IRS's *en banc* analogy fails.

[11] Resp. Br. at 31-32.

a stenographer who merely takes notes on behalf of the absent actual fact finder, the Regular Tax Court Judge. Because the STJ's Rule 183(b) Report is, under the IRS's theory, more akin to a summary of the transcript or, at best, law clerk's bench memo, it need not be included in the record.

The IRS's argument ignores the reality of practice before the Tax Court. As the only official observer of the testimony, the STJ cannot be analogized to a law clerk, secretary or other court employee whose work is inherently internal in nature. Quite the opposite, the STJ is the only possible trier of fact, and, as a legal consequence, his Rule 183(b) Report is therefore "presumed to be correct" and entitled to "due regard."

Notably, the Rule 183(b) Report is not prepared as part of any "internal deliberation" process: the STJ alone heard the witnesses, made the credibility findings, prepared the Rule 183(b) Report, submitted it to the Chief Judge, and only thereafter was it provided to the Regular Tax Court Judge and modified (if it was indeed modified—no one outside of the Tax court knows).[12] Further, the Rule 183(b) Report is not a document that the STJ prepares as part of his own personal deliberative process, rather it is a document that he is ***required*** to prepare, and its submission marks the end of his formal role in the case. The Rule 183(b) Report ***is*** the STJ's decision, not some sort of draft, bench brief, or private notes. Whether or not the Regular Tax Court Judge ultimately

[12] Rule 183(b) appears to provide for arms-length dealings between the STJ and the after-assigned Regular Tax Court Judge. Thus, any argument that the Rule 183(b) Report is prepared merely as a starting point for some sort of ill-defined and secret "collaborative process" between the STJ and the Regular Tax Court Judge is inaccurate.

accepts the Rule 183(b) Report is, of course, another matter—but in no event should he be able to reject the Rule 183(b) Report in secret and without explanation.

The presumption of correctness that attaches to the Rule 183 Report flows not only from the explicit language of the Tax Court's own rule, but also, more importantly, from the STJ's status as the only person on hand at trial to make credibility determinations.[13] As such, to characterize, as the Government attempts to,[14] the STJ as anything other than the original finder of fact is disingenuous: there is simply no other *bona fide* candidate for the position.

II. BOTH CONGRESSIONAL COMMAND AND ARTICLE III REQUIRE INCLUSION OF THE RULE 183(b) REPORT IN THE RECORD.

A. Congress' Grant of Article III Review to the Taxpayers Necessitates Review "In the Same Manner and to the Same Extent" as Decisions from a Federal District Court.

The IRS has failed to answer the Petitioners' contention that the statutory command of Congress requires the inclusion of the Rule 183(b) Report in the appellate record. It is undisputed that Congress has given taxpayers the right to have their Tax Court cases reviewed by Article III courts "***in the same manner and to the same extent*** as decisions of the district courts in civil cases tried without a jury." 26 U.S.C. § 7482 (emphasis added). Consistent with this statutory command, the striking parallel between the language of FED. R. CIV. P. 52(a) and Tax Court Rule 183(c) confirms that the STJ is the only possible trier of fact. In establishing the role of the district judge as the trier of

[13] Such credibility determinations are, obviously, all the more important in a fraud case such as this, where the credibility of witnesses must be so strong as to prove the fraud element by "clear and convincing" evidence. Tax Court Rule 142(b).

[14] Resp. Br. at 31-32

fact in a bench trial, Rule 52(a) mandates that the judge's fact findings "shall not be set aside unless clearly erroneous, and ***due regard*** shall be given to the opportunity of the trial court to judge the credibility of the witnesses" (emphasis added).

Obviously, an Article III appellate court reviewing a decision from a bench trial before a district court has access to the findings of fact made by the district judge. Congress is presumed to be aware of how the courts of appeals review a bench trial, including the presence of the findings of fact in the record. Hence, in order to make possible appellate review of Tax Court decisions "in the same manner and to the same extent"[15] as decisions from a federal district judge, the STJ's Rule 183(b) Report must be included in the record. Thus, the best and only logical reading of the statute is that it calls for the reviewing Article III Court to have access to the findings of the STJ before they are "modified" or "rejected." This is precisely the statutory construction that this Court adopted in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951).

B. Article III Requires a Full Record for Meaningful Review.

Nor has the IRS countered Petitioners' argument that Article III requires that the reviewing court of appeals be provided with a full and accurate record, including the findings of fact. It is well established that adjudication in an Article I court is only valid so long as private parties have recourse to appellate review in an Article III court.[16] Meaningful Article III appellate review is, of course, entirely dependent on the existence

[15] 26 U.S.C. § 7482

[16] Ballard's Brief at 24-25 & n. 18.

of a full and complete record of the proceedings before Article I court—and, the availability of that record to the Article III court.

The Tax Court's refusal to provide the Article III courts with access to the original fact-findings from the trier of fact prevents valid Article III review.[17] Indeed, this Court has previously held that findings of fact from the Article I judge hearing the testimony are an essential part of the Article III appellate record: "Surely an examiner's report is as much a part of the record as the complaint or the testimony."[18] As Judge Cudahy observed in his opinion below, "No court of which I am aware has ever considered the ramifications of an agency's swallowing and refusing to regurgitate a preliminary factual finding in the manner done by the Tax Court here." *Kanter*, 337 F.3d at 886 (Cudahy, J., dissenting). However, one obvious "ramification" of this aberrant Tax Court procedure is the denial of the Article III review that both Congress and this Court's precedents require.[19]

III. DEFERENCE TO THE FACT FINDINGS CONTAINED IN THE STJ'S RULE 183(b) REPORT IS CONSTITUTIONALLY COMPELLED: THE *RADDATZ* PRINCIPLE APPLIES TO THIS FRAUD CASE.

Under this Court's precedents, credibility assessments made by a judge who observed the witnesses should rarely, if ever, be reversed on the basis of a cold record by

[17] Further, as discussed *supra*, it is not the prerogative of the Article I trial court to dictate to the Article III appellate court the contents of the record that it will review.

[18] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951) (Frankfurter, J.) (The Court went on to declare that "reviewing courts" should "give to the examiner's report such probative force as it intrinsically commands.")

[19] *See, e.g., Thomas v. Union Carbide Agric. Prods Co.*, 473 U.S. 568, 592 (1985) (upholding Article I adjudication of FIFRA claims because "FIFRA at a minimum allows private parties to secure Article III review of the arbitrator's 'findings and determination' for fraud, misconduct, or misrepresentation").

a reviewing judge who was not present at trial. *See United States v. Raddatz*, 447 U.S. 667, 681 (1980); *Peretz v. United States*, 501 U.S. 923, 939 (1991).[20] The relevant principle from *Raddatz* is that a judge cannot constitutionally reject the credibility assessments of a magistrate "without seeing and hearing the witnesses." *Id*. at 681 n.7.

This was a fraud case where credibility determinations were of vital importance. Indeed, in contrast to the vast majority of tax cases wherein the burden of proof falls on the petitioners, here the burden was on the IRS to prove by ***clear and convincing*** evidence that the Ballards had engaged in tax fraud.[21] The dispositive credibility determinations were, by necessity, made by the only judicial officer present at trial—the STJ—and memorialized in his Rule 183(b) Report. Consistent with the *Raddatz* principle, Due Process demands that the credibility determinations in the Rule 183(b) Report be given substantial deference.

Both of the IRS's arguments against the applicability of the *Raddatz* principle are flawed. First, although this case is not a criminal prosecution,[22] this tax fraud case is closer is form and consequence to a criminal matter than it is to the administrative proceedings invoked by the IRS. The elevated "clear and convincing" standard of proof

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[20] Ballard's Br. at 32-35.

[21] *See* 26 U.S.C. 7454(a) and Tax Court Rule 142(b). Armed with extensive supplemental briefing on the facts of this case, the Fifth Circuit found that the Tax Court's decision was ***not*** based "upon clear and convincing" evidence of fraud. *Lisle v. Commissioner of Internal Revenue*, 341 F.3d 364 (5th Cir. 2003). Notably, neither the Seventh nor the Eleventh Circuit was provided with such supplemental briefing.

[22] Resp. Br at 47-48.

applies. The imposition of fines[23] and other purely punitive measures upon Petitioner will accompany a finding of guilt. Moreover, in the business world fraud carries with it a stigma akin to that of a criminal conviction, and here it is an individual, rather than any institution, who must personally bear that stigma.[24]

As the liberty or property interest at issue increases, so too does the level of due process protection that must be afforded.[25] Indeed, this Court's precedents reveal that where, as here, a court's actions will "engender adverse social consequences to the individual" or result in a "stigma" an increased level of due process protection is warranted.[26] Because Petitioners' property interest and the potential "adverse social consequences" stemming from a finding of tax fraud are both quite high, application of the *Raddatz* Due Process principle is therefore warranted.

The IRS cites no cases holding that an absent-from-trial judge is permitted to make fact-findings in a quasi-criminal case such as this. Quite to the contrary, the handful of cases that the IRS has identified in which the trier of fact was not present at trial all involve dry, impersonal and highly technical administrative proceedings—far removed from cases in which an individual person's reputation and financial solvency are

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[23] The penalty for tax fraud is a fine of 75% of any tax deficiency attributable to fraud, plus payment of the underlying tax deficiency. 26 U.S.C. § 6663. Hence, Petitioner's property interest at issue in this case was quite substantial.

[24] Because he was a well-respected and prominent business figure, the quasi-criminal stigma surrounding a finding of tax fraud has impacted Claude M. Ballard's life in multiple material and negative ways. For example, Mr. Ballard has been forced to resign from several boards of directors on which he formerly sat. His reputation has been damaged and he has endured various business and social consequences as a result of the Tax Court's finding of fraud. **[In a joint Reply Brief, insert similar comments regarding Prof. Kanter here].**

[25] *Addington v. Texas*, 441 U.S. 418, 426 (1979).

[26] *Id.*

on the line. **[Insert FN Revealing Administrative Nature of IRS's cases and differentiating them from our case].** Stated another way, while it may be constitutionally permissible for an absent-from-trial trier of fact to make findings in technical "parts per billion" administrative cases, such absentee fact finding is unacceptable in the context of a fraud trial whose outcome hinges entirely on the credibility of witnesses.

The IRS also urges that because the Regular Tax Court Judge has the ***ability*** to recall witnesses and hear evidence, the credibility determinations of the STJ may suddenly be reviewed *de novo*—even when the Tax Court Judge has not actually exercised his power to recall witnesses or take evidence.[27] But the fact that the Tax Court Judge is permitted to entertain new evidence does not somehow authorize him to *sub silentio* disregard the presumption of correctness that surrounds the findings in the Rule 183(b) Report—particularly where, as here, his power to hear evidence remains ***unexercised***.

IV. NO ADDITIONAL DISCOVERY IS NEEDED AND ANY ACCUSATION OF IMPROPRIETY IS IRRELEVANT TO THE LEGAL QUESTION PRESENTED.

The IRS's focus on allegations of judicial impropriety is a red herring.[28] All that Petitioners seek to determine in this case is whether the STJ's Rule 183(b) Report was given the deference to which it is indisputably entitled. This can be easily ascertained by simply allowing an Article III court to compare the Rule 183(b) Report with the Tax

[27] Resp. Br. at 49-50.

[28] Resp. Br. at 25-28.

Court's final decision. That is all the relief that Petitioners seek, and it has nothing to do with judicial misconduct. Regardless of the ***cause*** (impropriety or otherwise) of the Tax Court's failure to give "due regard" to the Rule 183(b) Report, the fact remains that no Article III court is capable of detecting such an error without access to the Report.

Indeed, the implication of impropriety discussed in the IRS's brief[29] is relevant only as background information, as it explains what originally spurred Petitioners to seek disclosure of the Rule 183(b) Report. But any questions of judicial impropriety are simply irrelevant, as the only issue before the Court is whether meaningful Article III review of the Tax Court's decision is possible without the inclusion of the original fact findings (i.e., the Rule 183(b) Report) in the record.

Similarly, the IRS's concern that Petitioners are seeking the depositions of the Judges involved below[30] is a naked "scare tactic." The IRS's argument that this Court has never subjected judges to examination regarding their decisional process misses the point, as no such examination is requested or needed. It is not any judge's personal decision-making process that is at issue here, but rather a comparison of the respective factual ***conclusions*** reached by the STJ and, subsequently, the Regular Tax Court Judge. A simple comparison of the Rule 183(b) Report with the Tax Court's decision will preliminarily confirm whether or not "due regard" was paid to the presumptively correct fact findings contained in the Report. As this Court is well aware, contrary to the IRS's

[29] Resp. Br. at 8-9, 25-28

[30] Resp. Br. at 28-30.

argument,[31] such comparisons do not require any allegation of impropriety, nor do they invade the decisional process or subject any judge to deposition.[32]

Finally, the IRS's attempt to portray the Petitioners in a negative light is both legally irrelevant and factually inaccurate. While entirely irrelevant to the legal question before this Court, the IRS's derogatory comments concerning the Petitioners are based exclusively upon the Tax Court's decision.[33] Thus, in addition to being unseemly, the IRS's "fact" based attack errs by assuming the accuracy of the very document whose validity is in question.[34] The IRS's reliance on the Tax Court's decision as a basis for its attack (or any other purpose) is misplaced, unless the accuracy of the fact findings in that decision is confirmed by allowing an Article III court to compare it with the "presumptively correct" fact-findings contained in the STJ's Rule 183(b) Report.

V. CERTIORARI WAS NOT IMPROVIDENTLY GRANTED

The IRS argues that this is not the proper case for this Court to consider whether the STJ's Rule 183(b) Report must be included as part of the appellate record. Because

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[31] Resp. Br. at 30.

[32] Far from being an improper invasion of the decisional process, the comparison of legal and factual conclusions is something that this Court and the courts of appeals regularly undertake in a variety of contexts. For example, this Court regularly examines whether a court of appeal applied the proper standard of review to a district court decision. The courts of appeal themselves regularly compare the factual conclusions reached by district judges to the factual conclusions reached by magistrates or bankruptcy judges.

[33] Response Br. at 5-8 (citing exclusively to the Tax Court's decision).

[34] Independent of the legal question presented in this case, the Fifth Circuit's holding in *Lisle* that the IRS failed to prove its fraud case by clear and convincing evidence calls into question the accuracy of the IRS's derogatory "factual" comments concerning the Petitioners. *Lisle*, 341 F.3d 364. The IRS reliance on the Judge Dawson's finding of fraud is further undermined by the report of the revenue agent in this case, which concluded that "No intent to defraud was found per this agent and the prior agents exam, discussions with involved parties and professional judgment." *See* Tr. 3184-86, 3194-200, 3202-3204.

the Rule 183(b) Report was purportedly "adopted" by the Tax Court's final opinion, the IRS argues, there is no need to include the Rule 183(b) Report in the appellate record.[35] Thus, the IRS argues that simply because the Tax Court says it has "adopted" the Rule 183(b) Report and states that it gave appropriate deference to the fact finder, there is no need to allow an Article III court to confirm how or whether this adoption occurred.

Of course the Tax Court ***always*** purports to simply adopt the STJ's Rule 183(b) Report,[36] even as it claims the right to make corrections before it releases the opinion "adopting" the Rule 183(b) Report's fact-finding. The IRS insists that, despite its universal claim to "adopt" the STJ's Report, the Tax Court need not make a record of any contrary action, such as the "modification" or partial "rejection" of the Report prior to its ultimate "adoption." Given this reality, when would any case ever present this issue for review?

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be vacated in its entirety, and this case remanded for further proceedings consistent with this Court's opinion, including an order that the report of the Special Trial Judge be provided to the parties and made part of the appellate record.

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[35] Resp. Br. at 18-20.

[36] *Kanter*, 337 F.3d at 876 (Cudahy, J., dissenting).