No. 20-818

ORIGINAL

In the Supreme Court of the United States

BRUCE A. NORVELL,

Petitioner,

v.

SECRETARY OF THE TREASURY;
UNITED STATES INTERNAL REVENUE SERVICE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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DECEMBER 11, 2020

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QUESTIONS PRESENTED

Airbnb—a prominent tech company—did not report to the defendant IRS its 2017 payments of $4 billion to its USA hosts, and I informed the IRS Whistleblower Office of that fact on an "Application for Award for Original Information" ("Claim 2017"). The IRS advised me that my information would not be considered for an award.

Congress amended 26 U.S.C. § 7623 with Public Law 109-432, which mandates that the IRS Whistleblower Office "analyze information" of a certain criteria and (a) "investigate the matter," or (b) assign the matter to an IRS field office. It mandates an IRS award to the information provider if the IRS takes action that results in "collected proceeds" from such information.

The question presented is whether the United States has waived sovereign immunity under the Administrative Procedures Act, 5 U.S.C. §§ 701 *et seq.*, to exercise subject matter jurisdiction over my Claim 2017 regarding IRS inaction under 26 U.S.C. § 7623(b)(4).

The question presented involves the following issues:

a) Whether the Whistleblower Office "analyzed" —within the meaning of Pub. L. 109-432— the information that I provided in Claim 2017

and

b) Whether the Whistleblower Office made an award "determination"—within the meaning of Pub. L. 109-432.

PARTIES TO THE PROCEEDINGS

Petitioner

I (Petitioner Bruce Norvell) was the plaintiff in the district court and the appellant in the Ninth Circuit. I am an individual, thus there are no disclosures to be made regarding Supreme Court Rule 29.6.

Respondents

- Stephen Mnuchin, Secretary of the Treasury; and
- The United States Internal Revenue Service.

LIST OF PROCEEDINGS

Court of Appeals for the Ninth Circuit

Case No. 19-35156

Bruce A. Norvell, *Plaintiff-Appellant* v. Secretary of the Treasury; United States Internal Revenue Service, *Defendants-Appellees.*

Date of Final Opinion: September 15, 2020

United States District Court for the District of Idaho

Case No. 18-cv-251

Bruce A. Norvell, *Plaintiff* v. Secretary of the Treasury; Internal Revenue Service, *Defendants.*

Date of Final Order: April 23, 2019

GLOSSARY

App.	Appendix
IRC	Internal Revenue Code
IRM	Internal Revenue Manual
IRS	Internal Revenue Service
P.L. § 406	Public Law 109-432, Division A, Title IV, § 406
WB 2018 Report	IRS Whistleblower Program Fiscal Year 2018 Annual Report to the Congress
WO	Whistleblower Office

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PETITION FOR A WRIT OF CERTIORARI

Bruce Norvell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this matter.

OPINIONS BELOW

The unreported decision of the court of appeals is reprinted in the Appendix ("App.") at App.1a-3a. The unreported district court's opinion dated April 23, 2019 is reprinted at App.4a-7a. The unreported district court's opinion dated January 3, 2019 is reprinted at App.8a-15a.

JURISDICTION

The court of appeals entered its judgment on September 15, 2020. App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, § 1 of the United States Constitution provides "All Legislative Powers herein granted shall be vested in a Congress of the United States . . . .

Article II, § 1 of the United States Constitution provides "The executive Power shall be vested in a President of the United States of America."

Title 5 U.S.C. § 704 provides in pertinent part: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."

Title 5 U.S.C. § 706(1) provides in pertinent part: "The reviewing court shall—compel agency action unlawfully withheld or unreasonably delayed."

Title 28 U.S.C. § 1331 provides "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Public Law 109-432, Division A, Title IV, § 406 is reproduced in the Appendix at App.16a-21a.

STATEMENT OF THE CASE

I. INTRODUCTION

1. This matter concerns an issue of first impression.

2. I filed a complaint in a U.S. district court "to redress my harm that results from the defendant Internal Revenue Service's Whistleblower Office failing to observe the protocols required by IRC § 7623." The defendants brought a "facial" attack against my complaint, and the Idaho U.S. District Court dismissed it "Because § [IRC § 7623(b)(4)] provides another review proceeding and the APA excepts those claims from federal court jurisdiction."

3. I argue that IRC § 7623(b)(4) conditions "another review proceeding" (by the Tax Court) on the IRS making "any determination regarding an award," IRC § 7623(b)(4), that P.L. § 406(b)(1)(B) mandates an "analysis," and that a "determination" must be based upon an analysis of my information. Because the IRS failed to analyze my information, it was unable to make a determination and did not do so, thus the Tax Court may not attain jurisdiction in this matter. Because the Tax Court may not attain jurisdiction, the IRS inaction is subject to judicial review by a district court. 5 U.S.C. § 704.

4. My harm results from the Whistleblower Office failing to analyze my information and failing to make a determination. My harm does not result from a determination concerning my information, because there was none. I wish for a district court to address

this matter because it has the power to order the IRS to follow Congress' mandate—that my claim information be analyzed; the Tax Court lacks such power.

II. LAW

> 5. . . . final agency action for which there is no other adequate remedy in a court are subject to judicial review.

5 U.S.C. 704.

> 6. . . . persons engaged in a trade or business and making payment in the course of such trade or business to another person, of rent, . . . compensations, or other fixed or determinable . . . income . . . shall

report the payment to the Internal Revenue Service Secretary ("IRS") on IRS Form 1099-MISC. IRC § 6041(a), and 26 C.F.R. § 1.6041-3(a)-(q).

7. IRC § 6721(a) imposes penalties upon the payor in the case of its failure to report information on Form 1099-MISC as required by §§ 6041(a), and § 6721(e) provides enhanced penalties in the case of intentional disregard of reporting requirements. §§ 6722(a) and § 6722(e) provide for the same penalties in the case of failure to provide Forms 1099-MISC to payees.

8. Public Law 109-432, Division A, Title IV, § 406 ("P.L. § 406") significantly amended the Internal Revenue Code (Title 26 U.S.C., or ("IRC") whistleblower provisions. It is contained at App.16a-21a; App.21a indicates whether and where the provisions are encoded. P.L. § 406 amendments pertinent to this matter include:

a) The Whistleblower Office is established. P.L. § 406 (b)(1); encoded at IRC § 7623 "Notes" section.

b) The Whistleblower Office "shall *analyze* information [of certain criteria] . . . and either investigate the matter itself or assign it to the appropriate Internal Revenue Service office." P.L. § 406(b)(1)(B), encoded at the IRC § 7623 "Notes" section. (Emphasis supplied).

c) Having analyzed information of certain criteria, the Whistleblower Office must "*determine*" to proceed or not "for any reason including lack of resources." IRM 25.2.1.3.5.1 and 25.2.1.1.3. (Emphasis supplied).

d) If the IRS proceeds with an action based upon information provided to the Whistleblower Office, it shall *determine* an award of 15-30% of collected proceeds. IRC § 7623(b)(1). (Emphasis supplied).

e) A "determination regarding an award" may be appealed to the Tax Court. *Id.*, § 7623(b)(4).

f) "The Secretary of the Treasury shall each year conduct a study and report to Congress on the use of section 7623 . . . including—(1) an analysis of the use of such section . . . and the results of such use, and (2) any legislative or administrative recommendations . . . ." App.21a.

9. The following passage mandates that an IRC § 7623(b)(4) "determination" be founded upon an "analysis:"

> Off-code provisions of the 2006 Act [P.L. § 406(b)(1)(B)] explicitly provide that the IRS *will analyze* information received under section 7623 and investigate the matter. . . .

> this requirement *must be satisfied* by the IRS with respect to all information provided . . .

79 Federal Register No. 155, page 47,251. (Emphasis supplied).

10. The MERRIAM-WEBSTER DICTIONARY defines the word "determination" as "the resolving of a question by argument or reasoning," "the act of deciding definitely and firmly," "also: the result of such an act of decision." BLACK'S LAW DICTIONARY defines the word as "The decision of a court of justice." These dictionary definitions—and common sense—have a "determination" entailing a decision that results from the overt *analysis* of a scenario's pertinent facts.

11. P.L. § 406(b)(1)(B) mandates that the Whistleblower Office "shall analyze information" from whistleblowers—of information that meets certain criteria. This mandate is seemingly redundant and unnecessary for an IRC § 7623(b)(4) "determination," because "analysis" of pertinent information is a requisite step for every determination. *See ante*, at ¶ 10. Stated differently, each IRS "determination" entails an "analysis" of pertinent information, notwithstanding the mandate of this paragraph's first sentence.

12. The IRS has worked diligently to "improve the process by which whistleblower information is considered for action. These [enumerated] targets . . . ensure that the decision on whether to proceed with compliance action *considers all relevant information.*" IRM 25.2.1.1.1.1. (Emphasis supplied).

13. The Tax Court case of *O'Donnell, George E. and James G. v. Commissioner of Internal Revenue Service*, Docket No. 9752-11W (2012) illustrates the importance of district court as opposed to Tax Court

jurisdiction. The Tax Court ordered summary judgment for the IRS in *O'Donnell* and noted:

> Various statements contained in various documents submitted by petitioners suggest that respondent has failed to properly consider the information they submitted, or that respondent otherwise failed to proceed as required by section 7623.

The Tax Court's jurisdiction is limited to circumstances based upon an award determination, but the record indicates that there had been no determination within the meaning of IRC § 7623(b)(4). The proper avenue for redress, in my view, was to seek a district court ordering the IRS to make a determination, the avenue which I take in this matter.

14. In considering a Federal Rule of Civil Procedure Rule 12(b)(1) dismissal motion for lack of subject matter jurisdiction, the Court's task is limited in reviewing the sufficiency of the complaint.

> The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the *allegations* of the complaint should be *construed favorably to the pleader.*
>
> . . . a complaint should not be dismissed for failure to state a claim unless it *appears beyond doubt* that the plaintiff can prove no set of facts in support of his claim . . .

Scheuer v. Rhodes, 416 U.S. 232, 236 (Sp. Ct. 1974). (Emphasis supplied).

15. Where a defendant moves to dismiss a complaint under Rule 12(b)(1) using a "facial" attack—as in this matter—"it accepts the truth of the plaintiff's allegations but asserts that they are insufficient on their face to invoke federal jurisdiction." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

16. In a matter concerning a Rule 12(b)(6) dismissal of a *pro se* plaintiff's complaint, the Supreme Court held that his "inartfully pleaded" allegations

> are sufficient to call for the *opportunity to offer supporting evidence*. We *cannot say* with assurance that under the allegations of the *pro se* complaint, which we hold *to less stringent standards* than formal pleadings drafted by lawyers, *it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim . . .'" Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Haines v. Kerner, 404 U.S. 519, 520-21 (Sp. Ct. 1972). (Emphasis supplied).

III. FACTS

A. The Two Claims

17. San Francisco-based Airbnb, Inc. failed to report to the IRS in any manner its 2017 payments to its United States hosts of $4.4 billion. I reported this failure by filing IRS Form 211 "Application for Award for Original Information" dated February 12, 2018 ("Claim 2017").

18. I allege that the defendant IRS failed to process and consider Claim 2017—in violation of the P.L § 406(b)(1) mandate and INTERNAL REVENUE MANUAL ("IRM") 25.2.1.2.3 requirement that it "analyze" the Claim 2017 information. " . . . the Whistleblower Office coordinates with other IRS units, analyzes information submitted, and makes award determinations." IRM 25.2.1.1.1.2. (Emphasis supplied).

19. Because of the above failure, the IRS will not proceed with any action based upon my information, and thus will not assess Airbnb penalties for this failure, which I compute to be approximately $885 million. The 2017 award payable to me if the IRS had proceeded against Airbnb based upon my information would have been $133 to $266 million. IRC § 7623(b).

20. Because of the failure noted *ante* at ¶ 18, the IRS is unable to and did not make a "determination regarding an award," and the Tax Court thus cannot attain jurisdiction with respect to this matter. IRC § 7623(b)(4).

21. I filed an IRS Form 211 Application for Award dated 4/10/2017 ("Claim 2016") regarding Airbnb's reporting to the IRS on Forms 1099–K—instead of reporting on Form 1099-MISC—its payments to its US hosts for the seven years ended 2016. Receiving payment information on the correct form is important to the IRS—it matches all payment information received on Form 1099-MISC to payees' reported tax return income, but not for information received on Form 1099–K.

22. The IRS assigned a number to Claim 2016 and rejected it by letter dated 8/16/17, contending

that it was "speculative and/or did not provide specific or credible information . . . "

23. Addressing Claim 2017, the Whistleblower Office advised me by letter dated 3/13/18:

> We received your *request for reconsideration* dated February 12, 2018. Your claim was previously rejected. A copy of that decision is enclosed.

The 3/13/18 IRS letter used the same claim number that it had used in correspondence regarding Claim 2016.

24. Succinctly stated, Claim 2017 concerns a vastly different scenario than does Claim 2016. Claim 2016 concerns Airbnb's payments to hosts through 2016, incorrect interpretation and implementation of IRC § 6050W, the IRC § 6050W(e) de minimis rule, and IRS Form 1099–K. Claim 2017 addresses the fact of Airbnb reporting to the IRS *none of its 2017 payments* to hosts on any version of IRS Form 1099 or in any other manner and also relates the facts contained on Claim 2016.

B. Whistleblower Office Claims Processing Procedures

25. Overview, Whistleblower Office processing for IRC § 7623(b) claims:

> The Initial Claim Evaluation (ICE) Unit conducts an initial review of the whistleblower's Form 211 submission to identify potential IRC § 7623(b) claims. ICE then forwards the potential claims to subject matter experts (SMEs) in the IRS operating divisions. The

> SME then *determines* whether the whistleblower's information will be provided to field offices for further investigation, taking into *consideration the quality of the information* provided, IRS enforcement priorities and, in some cases, legal limitations on the use of the information submitted.

IRS WHISTLEBLOWER PROGRAM FISCAL YEAR 2018 ANNUAL REPORT TO THE CONGRESS, ("WB 2018 Report") at 14. (Emphasis supplied).

26. The assignment of a claim number is the first review function of the Whistleblower Office before claims are "forwarded to the appropriate operating division for classification." IRM 25.2.1.2(3)-(4).

27. "Classification's role is only to determine if the information on the Form 211 warrants further review." Claims not forwarded are rejected "based on the classification's rationale." IRM 25.2.1.3.1. This rejection "reflects an enforcement decision of the operating division. . . . IRM 25.2.1.3.5. Classification reports to the Whistleblower Office its determination of *whether* a claim warrants further review. If it rejects the claim it must indicate the reason; *an examination area not having sufficient resources is a common reason for rejection.* IRM 25.2.1.3.5. (Emphasis supplied).

28. Where claims forwarded from Classification are later "surveyed" / not examined, the specific reason must be documented, which might be "Lack of resources to perform an examination." IRM 25.2.1.5.5.2.

29. I note that the procedures outlined *antes*, at ¶¶ 25–28 are consistent with the responsibilities that

Congress vested in the Whistleblower Office with P.L. § 406.

C. The Whistleblower Office Failed to Analyze Claim 2017 Before Rejecting It

30. The Whistleblower Office failure to "analyze" Claim 2017, and its resulting inability to "determine" whether to forward or "reject" Claim 2017 within IRM parameters, is the crux of my complaint. The Whistleblower Office failure to assign a claim number to Claim 2017—being its first task in considering each claim—*antes* at ¶ 26—evinces the IRS failure to execute its "analyze" and "determine" responsibilities.

31. With the Whistleblower Office and lower courts contending that Claim 2017 was a reconsideration request of Claim 2016, *see* ¶¶ 23, 38 and 36, and the Whistleblower Office rejecting Claim 2016 because it was "speculative and/or did not provide specific or credible information . . . ," *see ante* at ¶ 22, the Whistleblower Office and lower courts thus embrace the Claim 2016 repudiation rationale for Claim 2017.

The fact of IRC § 6041(a) mandating Airbnb's reporting to the IRS its 2017 host payments of $4.4 billion is self-evident, and a simple/inexpensive inquiry would allay the "specific" or "speculative" concern. The fact that Claim 2017 was not forwarded as a "potential claim" to subject matter experts as required, *see ante* at ¶ 25, evinces the fact of Claim 2017 not being considered.

32. The Whistleblower Office summarizes, in its annual reports to Congress, the number of claims closed into categories. "Claim Rejected"—where "allegations

are not specific, credible, or are speculative in nature"—account for 64% of claims closed during fiscal year 2018, and the remaining closures were in several "claim denied" or claims paid categories. WB 2018 Report at 18.

33. Its WB 2018 Report related the Whistleblower Office priorities:

> " . . . the Whistleblower Office will continue to focus IRS resources on claims that lead to *significant returns* to the government."

Id., at 8. (Emphasis supplied). Of the 217 claims for which awards were made during 2018, 31 were under IRC § 7623(b) (for claims that exceed $2 million). The awards during 2018 related to civil and criminal collections of $631 and $810 million, respectively. *Id.*, at 2. The fact of Claim 2016 and Claim 2017 indicating penalties that exceed the total collections during 2018—for which all awards were made—is *wildly inconsistent* with the stated focus of the Whistleblower Office, and its repudiation of Claim 2017. Simply stated, no classification officer, upon considering Claim 2017, would have failed to route it to an examination field office. This fact is further evidence that Claim 2017 was not "analyzed" within the meaning of P.L. § 406(b)(1)(B), thus a determination could not have been made within the meaning of IRC § 7623(b)(4).

D. The Lower Courts' Decisions

34. The district court characterized this matter as follows:

> At issue in the instant motion to dismiss is whether this Court has jurisdiction to hear Plaintiff's APA challenge to the IRS Whistle-

> blower Office's alleged inaction under IRC § 7623(b). . . . Here, Defendants bring a 'facial' attack against Plaintiff's Complaint . . . the motion to dismiss is granted only if the non-moving party fails to allege an element necessary for subject matter jurisdiction."

App.11a.

35. The district court granted the defendants' dismissal motion because "The Court lacks jurisdiction under the APA because . . . § 7623 provides another review proceeding . . . " and observed:

> "[a]ny determination regarding an award under paragraph (1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter)."

App.14a. (Emphasis supplied).

36. The Ninth Circuit affirmed the district court's dismissal "because Norvell failed to show that the APA waiver of sovereign immunity applies to his claims," and held

> We reject as without merit Norvell's contention that the IRS's disposition of [Claim 2017] was not a 'determination' within the meaning of § 7623(b)(4).

App.2a.

IV. How the Lower Courts Erred

37. The district court summarized this matter:

> Norvell filed this action alleging the IRS failed to consider his application for a whistleblower

> award as required by IRC § 7623(b). His complaint alleges that the IRS's failure to act violates the requirements of the Administrative Procedures Act (APA), 5 U.S.C. §§ 701 *et seq.*

App.5a. More precisely, I filed this action because the IRS failed to "analyze" the information in Claim 2017. The IRS was thus incapable of making a "determination"—a condition of Tax Court jurisdiction.

38. The district court characterized Claim 2017 as "containing new material"—apparently being material differing from that in Claim 2016—and noted that the *IRS had characterized* Claim 2017 as "your request for reconsideration." App.6a.[1] It further characterized Claim 2017 as "alleging the same pattern of historical conduct." App.10a. The district court held "Despite his efforts to cast in a different light, Norvell's [3/21/18] letter[2] was a request for reconsideration." App.6a.

39. I emphasize three critical points regarding the district court's findings:

a) Airbnb's "historical conduct" that I report in Claim 2017 differs sharply from that reported in Claim 2016. *See ante* at ¶ 24.

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[1] The Appendix pages 4a-7a contain the district court order dated 4/23/20 that the district court initially filed as ECF Number 20. The district court later substituted those pages with the current content—being the *Ninth Circuit* order filed 9/15/20, ECF Number 26-1.

[2] My 3/21/18 letter to the Whistleblower Office differentiated Claim 2017 from Claim 2016, and I stated "the two claims concern different periods and different facts, I request that your office assign a separate number for my recent claim, and treat it as a separate claim."

b) The district court made impermissible findings of fact in differentiating Claim 2017 from Claim 2016, *and* in holding that Claim 2017 was a request for reconsideration, and

c) Whether Claim 2017 may be fairly termed a request for reconsideration of Claim 2016 is important to nothing. *See* post at ¶ 48(a).

40. The district court held "There is no dispute that the IRS denial of [Claim 2016] was a determination that could be appealed to the Tax Court." App.5a. I sharply disagree with the court's interpretation of IRC § 7623(b)(4)—that the IRS repudiation of Claim 2016 was a "determination." As discussed, *ante at* ¶¶ 10-11, a "determination" entails a decision that results from the overt *analysis* of a scenario's pertinent facts. I allege in Claim 2016 that Airbnb should be assessed penalties in the amount of $795 million for transgressions in reporting payments to hosts through the year 2016. Common sense and having investigated dozens of Form 211 claims while employed by the Treasury Department, has me contend that Claim 2016 could not have been reviewed as a potential IRC § 7623(b) claim under the procedures noted *ante* at ¶ 25. An individual initially reviewing Claim 2016 would have sent it to classification to be "analyzed," because the apparent probable return on IRS investment would have been off the charts. Without being analyzed, there could not have been a determination made regarding Claim 2016.

41. The parties agree that § 7623(b)(4) provides whistleblowers an option to appeal "any determination regarding an award under" § 7623(b) to the Tax Court. They disagree about the meaning of "determination," and thus the circumstances by which the Tax Court

has an opportunity for jurisdiction. I contend that there is nothing in the record that establishes the IRS making a "determination" regarding Claim 2017.

42. Disclosure. I was ignorant of the P.L. § 406(b)(1)(B) mandate for "analysis," encoded in the "Notes" section of IRC § 7623, in preparing briefs for the lower courts. I contend that this mandate—that the Whistleblower Office "shall analyze information"—is dispositive of this matter.

43. The word "determine" is significant in IRC parlance. Before the IRS Secretary sends a notice of tax deficiency to a taxpayer, it first "determines" the deficiency based upon its analysis of facts and applicable law. IRC § 6212(a). Where a taxpayer petitions the Tax Court to protest a notice of deficiency, the IRS may not "determine" any additional tax for the same year. IRC § 6212(c)(1).

44. In support of its posture of the IRS making a determination regarding Claim 2017, the district court noted that "other federal courts have consistently dismissed attempts to challenge IRS inaction under § 7623 for lack of jurisdiction," and cited *Medinger v. Commissioner of Internal Revenue*, 662 F. App'x 774, 776 (11th Cir. 2016), *Amsinger v. United States*, 99 Fed. Cl. 254, 258 (Fed. Cl. 2011) and *Dacosta v. United States*, 82 Fed. Cl. 549, 555 (2008). App.15a.

45. In fact, *Medinger* does not concern whether the IRS made a "determination." Instead, the Eleventh Circuit in *Medinger* held that Medinger (the petitioner) must appeal his adverse Tax Court decision to "the applicable Circuit Court of Appeals, not to a district court." *Medinger* noted, "Nothing in [IRC § 7623(b)(4)] confers jurisdiction on the district court to review

determinations made by the Whistleblower's Officer or the Tax Court." *Medinger*, s*upra*, at 1. (Emphasis supplied). I emphasize that this matter concerns the failure of the IRS to make a determination; it does not concern the *propriety of* a determination having been made. Therefore, *Medinger* does not serve as district court authority for this matter.

46. *Amsinger* and *Dacosta* do not serve as authority for the district court posture because they concern information provided before the enactment of IRC § 7623(b)—which conditions Tax Court jurisdiction upon an IRS "determination."

47. The following district court passage reflects its *erroneous* understanding of the word "determination:"

> Norvell did get a determination from the IRS on [Claim 2017]. In the IRS letter of April 5, 2018, the IRS rejects Norvell's argument that the claims are separate and *treats both claims the same, rejecting the second claim* on the same grounds as the first. That may be a clear error, according to Norvell, but it is nevertheless a rejection that treats both claims the same. *Rejections of whistleblower claims are defined as "determinations"* in the implementing regulations. *See* 26 C.F.R. § 301.7623-(3)(c)(7). The IRS's *rejection* of Norvell's second claim *constitutes the required determination* that Norvell needs to appeal to the Tax Court.

App.6a. (Emphasis supplied).

48. I respond to the italicized portions of the above passage:

(a) Whether somebody characterizes the two claims as being the same claim is irrelevant. A common-sense construction of P.L. § 406(b)(1)(B) and the word "determination" requires the IRS to analyze all my information however characterized. Where a [Claim] "is related to a previously submitted Form 211, the Whistleblower Office will review the claims and determine if the new Form 211 should be processed as a new claim or associated with the prior claim." IRM 25.2.1.2.(2)a. Characterization of my information does not implicate the Whistleblower Office requirement to analyze the information, and the district court cites no authority for its opposing posture.

(b) 26 C.F.R. § 301.7623-(3)(c)(7) reads in pertinent part:

> "Rejections. A rejection is a determination that relates solely to the whistleblower and the information on the face of the claim that pertains to the whistleblower."

The district court's duty is ascribing the meaning of "determination" as used at IRC § 7623(b)(4)—not the meaning of "rejection." The author of the last–quoted phrase would believe—from the supposition "a wave is a mass of water"—that water is a wave.

The IRS relates its IRC § 7623 responsibilities at IRM 25.2 *Information and Whistleblower Awards.* IRM 25.2.1.1.3(7) defines "rejection:"

> A rejection is a determination that relates to the whistleblower's eligibility to file a claim for award, or the submission of information and claims for award (*i.e.*,

> [1] the claim did not contain a tax issue, [2] the information on the Form 211 was not specific/credible information, [3] the claim was purely speculative in nature, or [4] the Service was unable to identify the taxpayer based on the information provided by the whistleblower).

(Emphasis supplied). While the Whistleblower Office used the word "rejected" in repudiating Claim 2017—*see ante* at ¶ 25—the repudiation is not a "rejection" as defined above, not being based upon a "determination" regarding my eligibility to file a claim, nor upon any of the circumstances numbered [1]–[4] in the last quoted passage.

(c) 26 C.F.R. § 301.7623-(3)(c)(7) is the sole rationale for the district court holding that the IRS rejection "constitutes the required determination." That rationale must be rejected for the same reason that the Supreme Court rejected the regulations underlying Title VI of the Civil Rights Act of 1964, § 602. The court in *Alexander v. Sandoval*, 532 U.S. 275, 278 (Sp. Ct. 2001) rejected the regulations because they "do not simply apply § 601—since they indeed forbid conduct that § 601 permits . . . " " . . . it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress." *Id.*, at 291. Conversely, the Congressional mandate of IRC § 7623(b)(4)—that Tax Court jurisdiction is conditioned by an IRS "determination"—may not be dispatched by a regulation. While P.L. § 406(b)(1)(B) mandates an analysis of my information, 26 C.F.R. § 301.7623-

(3)(c)(7) would allow the IRS to reject a claim without an analysis. The regulation must be rebuffed because it subverts a Congressional mandate.

REASONS FOR GRANTING THE PETITION

49. Having retired from the U.S. Treasury Department after 29 years of investigating federal tax crimes, I believe that the effectiveness of the Internal Revenue Service lies with the public perception of its competency. Word gets around—the public's perception of IRS competency is certainly eroded, where a prominent company fails to report—as required by IRC § 6041 (a)—$4+ billion of "compensations" to 600,000 U.S. individuals.

50. The "Final Four" international CPA firm that advises Airbnb regarding the scenarios I discuss *ante* at ¶ 24 is testing the waters. Airbnb's continuing evasion of its reporting responsibilities will embolden that firm to share the evasion tactic with and recommend it to other clients.

51. I'm mindful of the difficulty in evincing a criminal case, or an IRC § 6694(b) preparer penalty for "Understatement Due To Willful Or Reckless Conduct." But the evidence in this matter is compelling that at least one—and probably multiple—individuals are liable for IRC § 6694(b) sanctions. For three years running, I thoroughly explained to Airbnb why their conduct was unlawful, and sternly reminded it of their reporting responsibilities.

52. The federal government announced in a press release dated 10/22/20[3] that it had awarded a whistleblower $114 million, which

> marks the highest award in the program's history, and eclipses the next highest award of $50 million made to an individual in June 2020. . . . Whistleblowers make important contributions to the enforcement of securities laws and we are committed to getting more money to whistleblowers as quickly and as efficiently as possible."

I allege in Claim 2017 that Airbnb should be penalized $885 million regarding its failure to report its 2017 payments to hosts and $795 million for prior years. The 15%—30% award range associated with the Claim 2017 penalties is 221% to 442% of the record award announced 10/22/20.

53. "The Whistleblower Office has strategy, policy, administration . . . responsibility for the IRS Whistleblower Program. In this capacity, the WO ensures the service–wide handling of whistleblower claims is consistent with relevant laws, regulations, policies . . ." IRM 25.2.10.1.3 Roles and Responsibilities. While the INTERNAL REVENUE MANUAL thoroughly acknowledges the Whistleblower Office responsibilities mandated by P.L. § 406, its failure to consider Claim 2017 (and Claim 2016) is dispositive evidence of it running amok.

54. P.L. § 406(c) mandates the IRS to annually "conduct a study and report to Congress on the use of section 7623," and submit "recommendations regarding the provisions of such section and its application."

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[3] At https://www.sec.gov/news/press-release/2020-266

App.21a. The IRM mandate is emphatic: "The Secretary of the Treasury must conduct a study . . . including . . . results of such use." IRM 25.2.2.12. The Whistleblower Office failure to "analyze" Claim 2017 precludes it from satisfying the P.L. § 406(c) and IRM 25.2.2.12 mandates to produce information regarding IRC § 7623 effectiveness—which would enable the Whistleblower Office to identify the resources that should be budgeted for Whistleblower Office operations. The inaction thus thoroughly subverts Congressional intent, regarding the "program [which] has been one of the IRS's most cost-effective sources of recovering unpaid taxes." John Myrick, "Million-Dollar Dirt: A Look at the IRS Whistleblower Program," TAX NOTES, April 4, 2016, at 105.

> 55. It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.

Montclair v. Ramsdell, 107 U.S. 147, 152 (Sp. Ct. 1883). (Emphasis supplied). Congress employed the word "determination" twice in the thirty-six words of IRC § 7623(b)(4). There can be no disagreement, that P.L. § 406(b)(3) requires the IRS to "analyze" my Claim 2017 information, and a "determination" is dependent upon an analysis. Congress meant what it said, and said what it meant—in selecting those words—and in mandating annual recommendations and a substantive report regarding IRC § 7623. P.L. § 406(c).

> This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end.

> The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.

Bostock v. Clayton County, 140 Sp. Ct. 1731, 1749 (Sp. Ct. 2020).

56. While employed with the U.S. Treasury Department, I learned that payees report only 42% of compensation on their income tax returns, which is not reported to the IRS on Form 1099. Airbnb's failure to report $4.4 billion of compensation payments to its hosts in 2017 is a recurring problem—it *repeated this transgression for its 2018 payments.*

57. Unofficially, the IRS monitors the "return" on examiner's time spent on cases. "For every dollar collected from the informant program in audits of 1996-1998 returns, the IRS incurred slightly over four cents in cost . . . At its best, the whistleblower program should provide the IRS with direct information on tax fraud and put good, usable evidence in the hands of agents." Myrick, *supra*, at 106. I'm confident that an examiner's "return"—on time spent reviewing Claim 2017—would be off the charts.

58. Potential effectiveness aside, the Whistleblower program is a political football. Senator Harry Reid, D-Nev., described it as the "Award for Rats Program," *id.*, at 105. But the IRS is criticized for "aggressively seeking to minimize payments to whistleblowers and step around the generous award provisions of the tax code," and Senate Finance Committee member Chuck Grassley, R-Iowa, expressed those feelings in questioning IRS Commissioner John

Koskinen about the IRS Office of Chief Counsel's disdain for the Whistleblower program:

> I again find myself frustrated with an IRS Chief Counsel office that [seeks to] . . . undermine the whistleblower program both in the courts and the awards. I am especially concerned that chief counsel is throwing every argument it can think of against whistleblowers in Tax Court.

Id., at 111. Given the conflicting views, the Supreme Court should be especially concerned to respect the intent and plain text of P.L. § 406.

59. *Heckler v. Chaney* is instructive to this matter, as both matters concern agency inaction. *Heckler* upholds the rebuttable presumption—that courts " . . . defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute." *Id.*, at 470 US 821, 832 (Sp. Ct. 1985). *Heckler* holds that the presumption allows for APA review, "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.*, at 833.

60. Any presumption in favor of the Whistleblower Office posture is rebutted in this matter because IRC § 7623(b) mandates that a "determination" be based upon an "analysis"—which is *required by* P.L. § 406 (b)(1)(B). Succinctly, Congress accords the IRS no discretion about (a) analyzing my Claim 2017 information, then (b) determining whether to proceed as noted *ante* at ¶ 8(c).

61. Justice Marshall would have agreed that a commonsense construction of P.L. § 406(c) mandates

the inclusion—in an annual report to Congress—of the Whistleblower Office failing to consider or analyze Claim 2017. Without Claim 2017 information—which concerns a significant and recurring problem—the IRS is unable to rationally allocate its resources.

> If inaction can be reviewed to assure that it does not result . . . from factors that offend principles of rational and fair administrative process, it would seem that *a court must always inquire* into the reasons for the agency's action before deciding whether the presumption applies.

Id., at 883. (Emphasis supplied). Justice Marshall concurring opinion.

62. This matter is reminiscent of *Adams v. Richardson*, 480 F.2d 1159 (DC Cir. 1973), where the court upheld injunctions issued by a district court, to compel enforcement proceedings against multiple school districts. As in this matter, a government agency failed to execute a *discrete responsibility* mandated by Congress. The *Adams* court was swayed by the fact—which it emphasized—that the statute "sets forth *specific* enforcement procedures," which had not been observed. *Id.* at 1162. (Emphasis supplied).

63. *Massachusetts v. EPA*, 127 Sp. Ct. 1438 (2007) also concerned federal agency inaction, with the court heavily influenced by the EPA ignoring a *discrete* procedure. The Clean Air Act at 42 U.S.C. § 7521(a)(1) provides that the Environmental Protection Agency ("EPA")

> shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from . . . new motor vehicles . . . which in

> [the EPA's] judgment causes or contributes to, air pollution . . .

Id., at 1447. Several persons petitioned the EPA to regulate carbon dioxide, it refused to do so, and the Court held that the EPA *must judge* whether an air pollutant

> cause[s], or contribute[s] to, air pollution . . . 'judgment' is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits . . . If EPA makes a finding of endangerment, the Clean Air Act requires the Agency to regulate emissions.

Id., at 1462. (Emphasis supplied). Most of the above quote was cited with approval in *American Electric Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2539 (Sp. Ct. 2011). The court held that the reasons the EPA cites for failing to comply with the "clear statutory command"

> . . . have nothing to do with whether greenhouse gas emissions contribute to climate change . . . [and] less do they amount to a reasoned justification for declining to form a scientific *judgment*. . . . The statutory question is whether sufficient information exists to make an endangerment finding.

Massachusetts, supra, at 1462-63. (Emphasis supplied). Under the *Massachusetts* and *American Electric* rationale, the IRS must analyze my Claim 2017 information, without regard to whether it has resources to proceed if the information looks promising. If my information seems to have merit but the IRS determines not to proceed, it satisfies its P.L. § 406 mandates by reporting

its inaction in its annual report to Congress. P.L. §§ 406(b)(1)(B) and (c).

64. The EPA argued against it regulating carbon dioxide emissions because doing so would require it to tighten mileage standards, a task that Congress had assigned to the Department of Transportation. The Court characterized the EPA's 42 U.S.C. § 7521(a)(1) mandate as "protecting the public's 'health' and 'welfare,'" and declared the mandate "a statutory obligation wholly independent of DOT's mandate to promote energy efficiency." *Id.*, at 1462. The IRS is similarly burdened by a statutory obligation—budget constraints or a prominent senator and chief counsel's aversion to the "rats program" notwithstanding.

> 65. . . . with respect to the legislative power, when Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court.

U.S. v. Windsor, 133 S. Ct. 2675, 2689 (2013). Yale Law School professors Love, and Garg observe that

> the principal concern in Madison's day was a Congress run amok. But . . . the president's refusal to enforce duly enacted statutes—what we call "presidential inaction"—will often dictate national policy but will receive virtually none of Madison's checks and balances.

Arpit K. Garg and Jeffrey A. Love, "Presidential Inaction and the Separation of Powers," MICHIGAN

LAW REVIEW Volume 112, Issue 7, (2014), at 1195. They conclude

> In a world in which presidential administration is the policymaking norm and yet Madisonian checks are valued, presidential inaction can, at least in principle, violate the most basic structural features of our constitutional order.

Id., at 1211.

66. The Supreme Court in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (Sp. Ct. 2004) considered the operation of 5 U.S.C. § 706(1)—which mandates that a reviewing court "compel agency action unlawfully withheld"—in the face of 5 U.S.C. § 704—which permits judicial review in the absence of another adequate remedy in a court. *Norton* holds that § 706(1)

> empowers a court only to compel an agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter, without directing how it shall act.'

Id., at 64. (Citations omitted). As with this matter, the claims in Norton "involve assertions that [an agency] failed to take action . . . that it was required to take." *Id.*, at 61. *Norton* held that an agency's "failure to act"

> is simply the omission of an action without formally rejecting a request—for example, the failure to promulgate a rule or take some decision by a statutory deadline. The important point is that a 'failure to act' is properly

> understood to be limited, as are the other items in § 551(13), to a *discrete* action.

Id., at 63. (Emphasis in original). Further, "the only agency action that can be compelled under the APA is action legally required," *id.*, such as

> a specific, unequivocal command, the ordering of a 'precise, definite act . . . about which [an official] had no discretion whatever'

Id. (Citations omitted). "Under the terms of the APA, [the original plaintiff] must direct its attack against some particular 'agency action' that causes it harm." *Id.*, at 64. (Emphasis supplied).

67. Professors Garg and Love contend "constitutional concerns arise when the president fails to meet the baseline for enforcement as established by the relevant duly enacted statute," *id.* at 1212, the baseline being

> language in a duly enacted law that requires the president to act . . . the inaction in question is presumptively (although not definitively) invalid.

Id. (Emphasis supplied). This presumption is refuted where the president has a "constitutionally justified rationale for failing to enforce," *id.*, while evidence that inaction is "the result of the president's own policy preferences" indicates a separation of powers violation. *Id.*

68. Underenforcement of federal statutes may violate the Take Care Clause, which provides the President "shall take Care that the Laws be faithfully executed." U.S. Constitution, Article I, § 3. It "allows the Executive to effectively repeal laws, which

is a legislative power." Jentry Lanza, "Agency Underenforcement as Reviewable Abdication," NORTHWESTERN UNIVERSITY LAW REVIEW, 112 No. 5 (2018), at 1203-4.

69. If our government

> is to be one of true checks and balances, then scholars, judges, and legislators alike will have to recognize that [Executive Branch] inaction is a real and growing problem.

Id., at 1250. In the next paragraph, I note the distinct failure of the Whistleblower Office to take discrete actions. These failures invade my interests and those of the United States Treasury and implicate our government's separation-of-powers bedrock.

70. In summary, the Whistleblower Office's failure to analyze Claim 2017 starkly violates its P.L. § 406(b)(1)(B) mandate to do so. The Whistleblower Office failure to "determine" an award under IRC § 7623(b)(4)—which may be nothing due to resource constraints—violates its P.L. § 406(a)(1)(D) and IRC § 7623(b)(4) mandates to do so. The Whistleblower Office failure to determine an award under IRC § 7623 (b)(4)—which may be nothing—precludes Tax Court jurisdiction regarding an award; the district court thus has original jurisdiction in this matter because Tax Court jurisdiction has been precluded. The Whistleblower Office's failure to analyze Claim 2017 precludes it from reporting to Congress in a substantive manner as required by P.L. § 406(c). The IRS will continue ignoring these Congressional mandates absent Supreme Court review.

71. The lower court's rationale in dismissing my complaint—that the Whistleblower Office had made a "determination" regarding Claim 2017—must be

rejected because it is based upon an impermissible finding of fact. *See ante* at ¶ 39(b). Also, their rationale is not consistent with the commonly accepted meaning of the word "determination." *See ante* at ¶¶ 9–10 and 42. Further, their rationale is *sharply inconsistent* with the obvious failure of the Whistleblower Office to "analyze" Claim 2017—which P.L. § 406(b)(1)(B) mandates—because analysis is the bedrock of any "determination."

72. Because the Whistleblower Office failed to make "any determination regarding an award" within the meaning of IRC § 7623(b)(4), I have no other remedy for the WO inaction than judicial review by a district court.

73. My dismissal should be vacated because it does not appear beyond doubt that I cannot prove facts in support of my claims.

Respectfully submitted,

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DECEMBER 11, 2020