8/22/23

No. 23-182

In The

Supreme Court of the United States

JAMES W. TINDALL,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.) Whether the doctrine of federal sovereign immunity has any basis in the U.S. Constitution or is precluded by the U.S. Const., Art. III, Sec. 2, which specifically defines the power of the judicial branch to include "*Controversies to which the United States shall be a Party*" without any limitation or constraint?

2.) Whether the doctrine of federal sovereign immunity (whatever its scope is determined to be) can possibly satisfy the appropriate constitutional standard of review (strict scrutiny) when that judicially-created doctrine limits petitioner's constitutional right to seek review by the judicial branch for the illegal conduct of the federal government (or its employees) and when that doctrine also infringes on petitioner's 1st Amendment right to free speech and to seek redress?

3.) If the doctrine of federal sovereign immunity has any basis in the U.S. Constitution, whether the doctrine of federal sovereign immunity is a broad power or is a narrow power that applies only when the federal government is wielding its limited and specifically-defined sovereign powers?

4.) Whether the lower court properly applied the numerous exceptions to the doctrine of federal sovereign immunity when the lower court declined to properly apply the *Ultra Vires* Exception, ignored the clear language of the APA Exception and ignored Congress' clear intent to allow for judicial review of respondent's determinations under 26 U.S.C. §7623(d)(2)(A)(i), which specifically incorporates the rules and procedures of 49 U.S.C. §42121(b) to allow for a direct appeal by the Court of Appeals?

PARTIES TO THE PROCEEDING

Petitioner James W. Tindall was the complainant in the proceeding before the U.S. Department of Labor's Office of Administrative Law Judges (the "OALJ"), the complainant before the U.S. Department of Labor's Administrative Review Board (the "ARB") and the appellant before the Court of Appeals for the Eleventh Circuit ("Eleventh Circuit").

Respondent U.S. Department of Labor's Administrative Review Board (the "ARB") was the appellee before the Court of Appeals for the Eleventh Circuit (the ARB was the party who reviewed the initial decision by the OALJ that applied the doctrine of federal sovereign immunity to allow federal employees to threaten, harass and retaliate against tax whistleblowers).

For clarity, petitioner's original complaint to respondent was filed against two named federal employees for their illegal threats, harassment and retaliation against a tax whistleblower in violation of 26 U.S.C. §7623(d). Despite this specific identification by petitioner of the two named federal employees whose conduct violated 26 U.S.C. §7623(d) in the original complaint before the OALJ, the OALJ mislabeled the U.S. Department of the Treasury as the party that petitioner had a filed a complaint against.

RELATED CASES

1. *James W. Tindall v. U.S. Department of Labor, Administrative Review Board*, No. 22-11770, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered on March 31, 2023. Rehearing and Rehearing En Banc denied on June 1, 2023.

2. *James W. Tindall v. United States Department of the Treasury*, ARB Case No. 2022-0030. Judgment entered on May 16, 2022.

3. *James W. Tindall v. United States Department of the Treasury*, OALJ Case No. 2021-TAX-00005. Judgment entered on March 4, 2022.

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PETITION FOR A WRIT OF CERTIORARI

James W. Tindall petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported as an unpublished opinion by the Eleventh Circuit at USCA11 Case # 22–11770 and is reproduced at App. 1–10.

The order by the ARB dismissing petitioner's original complaint for lack of subject matter jurisdiction is reproduced at App. 11–14.

The order by the OALJ dismissing petitioner's original complaint for lack of subject matter jurisdiction is reproduced at App. 15–28.

The Eleventh Circuit's denial of petitioner's motion for reconsideration and rehearing *en banc* is reproduced at App. 29–30.

JURISDICTION

The Eleventh Circuit entered judgment on March 31, 2023. App. 1–10.

The Eleventh Circuit denied a timely petition for reconsideration and rehearing *en banc* on June 1, 2023. App. 29–30.

Therefore, this Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case relates to the creation and grant of judicial power pursuant to U.S. Const., Art. III, Sec. 2, which specifically defines the power of the judicial branch to include "*Controversies to which the United States shall be a Party*"[1] without any limitation or constraint; relates to the unconstitutional abrogation by the judicial branch of those same duties; and relates to the unconstitutional limitation of petitioner's right to seek judicial review and redress under that same constitutional provision for the illegal conduct by federal employees in violation of 26 U.S.C. §7623(d).

This case also relates to the proper definition of "*employer*" under 26 U.S.C. §7623(d) and whether it should be sourced from Title 26, where the tax whistleblower protections are, or from Title 29.

Copies of the constitutional and statutory provisions are included in the Appendix.

1. U.S. Const., Article III, Sec. 2.

[1] U.S. Const., Art. III, Sec. 2.

2. U.S. Const., 1st Amendment.
3. U.S. Const., 5th Amendment.
4. U.S. Const., 10th Amendment.
5. 26 U.S.C. §3401(c).
6. 26 U.S.C. §3401(d).
7. 26 U.S.C. §7623(a).
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10. 26 U.S.C. §7701(a)(28).
11. 29 U.S.C. §652.
12. 49 U.S.C. §42121(b)(1) through (4).

INTRODUCTION AND STATEMENT OF THE CASE

The initial issue of this dispute was whether federal employees tasked with enforcing this nation's tax code are themselves exempt from complying with that same set of statutes [i.e., may federal employees threaten, harass and retaliate against tax whistleblowers in violation of 26 U.S.C. §7623(d)?].

The overarching issue of this appeal, however, is the long-standing abrogation by the judicial branch of its constitutional duties under U.S. Const., Art. III, Sec. 2 and petitioner's constitutional right to seek judicial redress as a party aggrieved by the illegal conduct of

the federal government (or its employees) under that same constitutional provision [i.e., does an extra-constitutional doctrine of federal sovereign immunity apply to shield federal employees from the consequences of their acts in threatening, harassing and retaliating against tax whistleblowers in violation of 26 U.S.C. §7623(d)?].

This case is significant in that it seeks to correct that long-standing unconstitutional abrogation by the judicial branch, to determine the proper constitutional standard of review for when a doctrine of federal sovereign might apply (if one is found to exist in the U.S. Constitution), to determine the proper scope of any doctrine of federal sovereign immunity, and to re-assert the power of the judicial branch as one of the three (3) co-equal branches of the federal government as enshrined by our founding fathers in the U.S. Constitution.

The case also raises the issues of how to properly apply the *Ultra Vires* Exception, the APA Exception and the exception under 26 U.S.C. §7623(d)(2)(A)(i) to a doctrine of federal sovereign immunity.

Background Facts

Petitioner is a tax whistleblower under 26 U.S.C. §7623(a) and (b).

On March 5, 2019, the Internal Revenue Service's Whistleblower Office ("IRS WBO") issued its 'Final

Award Decision Under Section 7623(a)' and determined that petitioner was entitled to a tax whistleblower award under 26 U.S.C. §7623(a) (the "§7623(a) award letter").

The IRS WBO is obligated to pay that award

> *"as **promptly** as the circumstances permit, but not until there has been **a final determination** of tax with respect to the action(s) . . . the Whistleblower Office has determined the award, and all appeals of the Whistleblower Office's determination are final".*[2]

An award determination under 26 U.S.C. §7623(a) is not reviewable by any court in the world[3] and is utterly final in every sense of that word once the IRS WBO issues its §7623(a) award letter.

Despite having the clear obligation to "*promptly*" pay out final tax whistleblower awards, in the intervening fifty-two (52) months since the IRS WBO issued its §7623(a) award letter, the IRS WBO has still not paid petitioner his §7623(a) award.

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[2] Treas. Reg. §301.7623-4(d)(1) and Internal Revenue Manual 25.2.2.8.2.1(2)(c).

[3] See Whistleblower 10084-16W v. Commissioner, T.C. Memo 2021-73 (2021) (where the court stated that *"[a]wards under section 7623(a) are discretionary, and we do not have jurisdiction to review discretionary awards."*). See also Dacosta vs. U.S., 82 Fed. Cl. 549 (2008) (where the court stated that *"[i]n 2006, . . . new subsections were added, providing for non-discretionary awards in certain circumstances and also providing for whistleblower appeal rights"*).

On May 8, 2020, petitioner requested assistance from the National Taxpayer Advocate ("the NTA"), because the IRS WBO was ignoring its own regulations and processes by refusing to promptly pay petitioner his §7623(a) award.

On June 4, 2021, instead of determining why the IRS WBO was refusing to comply with its own regulations and processes, Mr. Glenn Thomas, an employee with the NTA, threatened to have petitioner investigated by the Treasury Inspector General – Tax Administration ("TIGTA").

On June 4, 2021, Mr. John Ferek, a special agent with TIGTA, contacted petitioner at his place of employment about petitioner's request to the NTA, confirming Mr. Glenn Thomas' threat to have petitioner investigated by TIGTA and confirming Mr. Glenn Thomas's overt act in furtherance of his threat to have petitioner investigated by TIGTA.

On June 4, 2021, petitioner filed his complaint with respondent against these two federal employees for their attempts to threaten, harass and retaliate against petitioner as a tax whistleblower despite the clear prohibition against that behavior in 26 U.S.C. §7623(d).

On June 15, 2021, petitioner supplemented his earlier complaint with respondent about the conduct by these two federal employees who threatened, harassed and retaliated against petitioner.

In petitioner's complaint and supplement, petitioner specifically identified the two federal employees by name and described their individual conduct.

On July 23, 2021, respondent concluded its investigation and issued its 3-page conclusion. In its letter, dated July 23, 2021, respondent concluded that:

> *"US Department of Treasury (IRS) is a federal agency and is NOT a person within the meaning of 29 U.S.C. §652(4)"*; and
>
> petitioner, as a federal employee, is *"NOT an employee within the meaning of 29 U.S.C. §652(6)"*.

Despite Congress' clear intent to place the tax whistleblower protections in Title 26, which does define *"employer"* to include the federal government, respondent decided to apply the definitions from Title 29 to the statutory language protecting tax whistleblowers in Title 26.

At no point in respondent's 3-page conclusion, dated July 23, 2021, did respondent refer to the doctrine of federal sovereign immunity as the basis for its decision to allow federal employees to threaten, harass and retaliate against tax whistleblowers.

On July 24, 2021, petitioner filed his "Notice of Objection and Request for a Hearing" with respondent's OALJ.

On September 8, 2021, and before any discovery occurred, the OALJ issued its Order to Show Cause on

the issue of the applicability of the doctrine of federal sovereign immunity ("OALJ's Order").

On September 17, 2021, less than 10-days after being notified that the doctrine of federal sovereign immunity was being considered by the OALJ, petitioner timely filed his response to the OALJ's Order to address the doctrine of federal sovereign immunity, which specifically raised the *Ultra Vires* Exception to the doctrine of federal sovereign immunity.[4]

On March 4, 2022, the OALJ dismissed petitioner's complaint for lack of subject matter jurisdiction, concluding that the doctrine of federal sovereign immunity broadly shielded the federal government from judicial review unless the federal government consented to such review.

In that order, the OALJ dismissed the application of the *Ultra Vires* Exception, because *"the exception only applies where a claim is brought against a government employee and not the sovereign"* and *"Complainant names only the Department of the Treasury and not an individual employee"*.[5]

Contrary to this second statement by the OALJ, petitioner specifically named Mr. Glenn Thomas and Mr. John Ferek in his original complaint and specifically identified those individual employees' conduct as being the basis for petitioner's complaint against those

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[4] See *Complainant's Response To Order To Show Cause*, pages 9–11, dated September 17, 2021.

[5] App. 26.

two named individuals. Additionally, this second statement by the OALJ, which is foundational to its original finding that the *Ultra Vires* Exception does not apply, ignored petitioner's Motion to Correct Caption, dated September 10, 2021, filed with the OALJ in attempt to correct the OALJ's mistake in mis-naming the U.S. Treasury as the party.[6]

On May 16, 2022, respondent's Administrative Review Board ("ARB") affirmed the OALJ's Order by relying on respondent's interim final regulation issued only on March 22, 2022 (many months after respondent concluded its investigation on July 23, 2021), which attempted to arbitrarily narrow the broad statutory definitions in 26 U.S.C. §7623(d). This regulation was not in existence when the illegal conduct occurred, when petitioner filed his complaint or when respondent issued its conclusion and is an impermissible attempt to narrow the clear and broad language of 26 U.S.C. §7623(d).

In its order affirming the OALJ's Order, the ARB addressed petitioner's arguments about the applicability of the *Ultra Vires* Exception and the Administrative Procedures Act ("APA") Exception in a single sentence footnote without any analysis or discussion, when it stated

> *"In affirming the ALJ's Order, we reject the Complainant's argument on appeal that the ALJ erred by concluding neither the waiver of sovereign immunity in the Administrative*

[6] *Id.*

> *Procedure Act of the ultra vires exception to sovereign immunity were applicable to the current case*".[7]

On March 31, 2023, the Eleventh Circuit affirmed the ARB's Order dismissing petitioner's complaint.

Consistent with the inability of the OALJ and the ARB to identify the constitutional basis for the doctrine of federal sovereign immunity, however, the Eleventh Circuit was also unable to identify the constitutional language that created a doctrine of federal sovereign immunity.[8]

Aware of its inability to source the creation of a doctrine of federal sovereign immunity to the U.S. Constitution, as required by the 10th Amendment[9], the Eleventh Circuit then proceeded to raise several strawman arguments in support of its foundational error, which included:

- Resolving factual conflicts in the moving party's favor, contrary to the basic presumptions of jurisprudence and with no discovery having occurred[10];
- Concluding that the OALJ corrected petitioner's "*error*" in bringing his complaint

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[7] App. 14, footnote 13.

[8] App. 5.

[9] U.S. Const., 10th Amendment, which states that "*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*"

[10] App. 4.

against the two named federal employees, without addressing the OALJ's failure to resolve petitioner's Motion to Correct Caption, dated September 10, 2021[11];

- Identifying the two operational clauses under 26 U.S.C. §7623(d)(1) and (d)(2), which refer to "*employers*" and "*persons*", respectively, but then ignoring how these two clauses interrelate (i.e., "*persons*" specifically relates to "*employers*"), ignoring 26 U.S.C. §§3401 and 7701 and ignoring the fundamental rules of statutory construction to determine the meaning of "*employer*" and the related "*persons*"[12];
- Failing to address Congress' intentional decision to add the tax whistleblower protections to Title 26, which does apply to the federal government[13];
- Concluding that petitioner abandoned the *Ultra Vires* Exception argument, despite petitioner having consistently raised and addressed that exception repeatedly since less than ten (10) days after it was first raised by the OALJ[14];
- Addressing the *Ultra Vires* Exception without discussing the specific facts of the two named federal employees' conduct who violated 26 U.S.C. §7623(d), somehow concluding that threatening, harassing and retaliating

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[11] *Id.*

[12] App. 5–6.

[13] App. 7.

[14] App. 7.

against a tax whistleblower is within the scope of those federal employees' authority, while also ignoring the fact that petitioner's complaint specially named the two federal employees[15];

- Stating as fact that petitioner is only seeking declarative relief, when petitioner has previously stated that he is seeking declarative and injunctive relief[16] and the controlling statute broadly requires *"all relief necessary to make the employee whole"*[17];

- Including a laundry list of excuses for when the federal government may violate petitioner's 1st Amendment rights in a fact-free manner devoid of any legal analysis that might connect the identified authorities to the underlying facts that are not present in the record (e.g., the Eleventh Circuit refers to petitioner's status as a federal employee as being sufficient to defeat petitioner's 1st Amendment rights when he is not acting in his capacity as a federal employee nor acting in any way related to his employment, but rather when the federal government is using his employment as a way to suppress his constitutional and statutory rights as a tax whistleblower)[18]; and

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[15] App. 7–8.

[16] App. 8.

[17] 26 U.S.C. §7623(d)(3)(A) and (B).

[18] App. 9.

- Consistently referring to the absence of a waiver of federal sovereign immunity in the U.S. Constitution as being sufficient to defeat petitioner's constitutional rights, while blindly ignoring the obvious fact that the U.S. Constitution also makes no reference to a doctrine of federal sovereign immunity, which precludes that doctrine from being constitutional[19]. The Eleventh Circuit's argument on this point is patently absurd – the U.S. Constitution does not need to speak to any waivers of a power that it did not create and grant to the federal government[20].

As a matter of fact, petitioner specifically named Mr. Glenn Thomas and Mr. John Ferek in his original complaint to respondent and specifically identified those individual federal employees' conduct as being the basis for petitioner's original complaint against those two federal employees.

As a matter of law, the federal government is an employer – it is the employer of every judge of the Eleventh Circuit, who somehow concluded that the federal government is not an employer.

Because these conclusions are contrary to the facts and law, these conclusions are in error. Ultimately, the Eleventh Circuit erroneously concluded that federal

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[19] U.S. Const., 10th Amendment, which states that "*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*"

[20] App. 9.

employees may threaten, harass and retaliate against tax whistleblowers without consequence despite 26 U.S.C. §7623(d) prohibiting that exact conduct.

REASONS FOR GRANTING THE PETITION

This Court should grant review (1) to determine if the doctrine of federal sovereign immunity has any basis in the U.S. Constitution; (2) to determine the proper constitutional standard of review to be applied when applying a constitutionally-compliant doctrine of federal sovereign immunity; (3) to determine the applicable scope of the doctrine of federal sovereign immunity; and (4) to determine how the *Ultra Vires* Exception, the APA Exception and the exception under 26 U.S.C. §7623(d)(2)(A)(i) apply to a constitutionally-compliant doctrine of federal sovereign immunity.

Quite simply, there is no basis in the U.S. Constitution for the judicially-created doctrine of federal sovereign immunity. Neither the OALJ, the ARB nor the Eleventh Circuit could identify the source language in the U.S. Constitution for the judicially-created doctrine of federal sovereign immunity[21].

[21] They are joined by the Supreme Court of the United States in this fruitless search for a constitutional basis. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 708 (1949) (where Justice Frankfurter stated in his dissenting opinion that "*As to the States, legal irresponsibility was written into the*

At the same time, neither the OALJ, the ARB nor the Eleventh Circuit addressed the fact that the philosophical basis for a doctrine of federal sovereign immunity contradicts the clear language of U.S. Const., Art. III, Sec. 2, which necessarily creates the constitutional right to seek judicial redress in actions where the federal government is a party. None of the judicial precedents (or the predecessor cases to which they refer) relied on by the OALJ, the ARB and the Eleventh Circuit identified the constitutional basis for the judicially-created doctrine of federal sovereign immunity. If none of those judicial precedents can point to the U.S. Constitution for the basis of this judicially-created doctrine of federal sovereign immunity, then it is well past time for this unconstitutional doctrine to be put to rest.

To the extent a doctrine of federal sovereign immunity does exist to limit the constitutional right of aggrieved parties to seek judicial review in cases where the federal government is a party, however, such a power must necessarily satisfy the appropriate constitutional standard of review. Because the judicially-created doctrine of federal sovereign immunity attempts to limit a fundamental constitutional right, the proper constitutional standard for review is strict scrutiny, which requires that the doctrine under review be narrowly-tailored to achieve a compelling state interest.

Constitution by the Eleventh Amendment; as to the United States, it is derived by implication. . . . The sources of the immunity are formally different".)

Regardless of which constitutional standard of review ultimately applies, however, the doctrine of federal sovereign immunity (as currently created and interpreted by the judicial branch) cannot satisfy even the lowest constitutional standard of being rationally related to a legitimate government interest, because violating the U.S. Constitution (i.e., Art. III, Sec. 2 and the 1st and 5th Amendments) cannot ever be a legitimate government interest.

At the same time, by its own terms, a doctrine of federal sovereign immunity should only possibly apply when the federal government is exercising one of its limited specific sovereign powers. In all the other cases where the federal government acts outside its limited specific sovereign powers, the federal government is not acting in its sovereignty and those extra-sovereign acts should not be protected by sovereign immunity. Because retaliating against tax whistleblowers is not one of the specific and limited sovereign powers granted by the U.S. Constitution to the federal government, a doctrine of federal sovereign immunity does not protect the federal government (and its employees) when it acts in a non-sovereign capacity.

Finally, in creating a doctrine of federal sovereign immunity, the judicial branch has had to also create an ever evolving web of exceptions and exceptions to the exceptions. One such exception to the doctrine of federal sovereign immunity is the *Ultra Vires* Exception raised by petitioner at the first possible opportunity in response to the OALJ's request that the parties address the issue of sovereign immunity. The Eleventh

Circuit's conclusion regarding the application of the *Ultra Vires* Exception is incorrect, because the Eleventh Circuit ignored basic principles of jurisprudence in resolving the factual conflicts in the underlying record against the non-moving party (those factual conflicts exist, because no discovery has occurred).

Additionally, the Eleventh Circuit's rote dismissal of the application of the APA Exception was also incorrect. This broad waiver of federal sovereign immunity by Congress applies in the current case, because petitioner is suffering a legal wrong, specifically:

i. the IRS WBO's refusal to promptly pay over the 26 U.S.C. §7623(a) award to petitioner;

ii. the threat by a federal employee with NTA to file a complaint against petitioner with TIGTA;

iii. the actual filing of a complaint by a federal employee with TIGTA that triggered an investigation of petitioner by TIGTA; and

iv. respondent's improper dismissal of petitioner's complaint when respondent's investigator applied a statutorily-impermissible definition of "*employer*" and "*person*".

All of these wrongs were performed by federal employees within the context of an agency action and the relief sought by petitioner is within the broad definition of remedies required under 26 U.S.C. §7623(d)(3)(A) and (B). The Eleventh Circuit's decision under review failed to properly apply this exception.

Thus, this Court should grant review to identify the constitutional basis for the doctrine of federal sovereign immunity, to clarify the appropriate constitutional standard for review to be applied when parties seek judicial review where the federal government is a party, to determine the proper constitutionally-permissible scope of the doctrine of federal sovereign immunity and to properly apply the *Ultra Vires* Exception, the APA Exception and the exception under 26 U.S.C. §7623(d)(2)(A)(i) only after a doctrine of federal sovereign immunity is properly applied in a constitutionally-compliant manner.

I. The U.S. Constitution and the Doctrine of Federal Sovereign Immunity

The fundamental beginning point for any discussion of a constitutional power or limitation is the U.S. Constitution.

Unfortunately, the OALJ, the ARB and the Eleventh Circuit skipped this necessary first step in their hurry to consider the judicial precedents for applying the doctrine of federal sovereign immunity. Regrettably, none of the judicial precedents cited by the OALJ, the ARB or the Eleventh Circuit (or their predecessors) identify the constitutional language that creates a doctrine of federal sovereign immunity.

A. No Constitutional Basis for a Doctrine of Federal Sovereign Immunity

The U.S. Constitution contains no reference whatsoever to a doctrine of federal sovereign immunity.

> **[PETITIONER KINDLY INVITES THE READER TO TAKE A 10-MINUTE PAUSE AND BRIEFLY REVIEW THE TEXT OF THE U.S. CONSTITUTION. PLEASE DO NOT RELY ON WHAT YOU 'THINK' YOU KNOW, BUT GO SPEND 10-MINUTES SKIMMING THE U.S. CONSTITUTION.**
>
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> **HAVING CONFIRMED PETITIONER'S STATEMENT THAT THE U.S. CONSTITUTION IS INDEED SILENT ABOUT THE EXISTENCE OF A DOCTRINE OF FEDERAL SOVEREIGN IMMUNITY, PETITIONER INVITES THE READER TO CONTINUE.]**

As the federal government is a creature of defined and limited powers described in the U.S. Constitution, the absence of a description or reference to a doctrine of federal sovereign immunity in the U.S. Constitution precludes such a power from being delegated to the federal government by the sovereign states.[22] Specifically, the 10th Amendment provides that:

> *"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."*[23]

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[22] U.S. Const., 10th Amendment.

[23] *Id.*

In its recently-concluded 2021-2022 term, the Supreme Court reaffirmed this principle in Dobbs, State Health Officer of the Mississippi Department of Health, *et al.* v. Jackson Women's Health Organization, *et al.*, 597 U.S. ___ (Slip Opinion) (2022) ("Dobbs"). In Dobbs, the Supreme Court held that *"[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision"*[24] and then concluded that *"[i]t is time to heed the Constitution and return the issue of abortion to the people's elected representatives"*[25].

Consistent with this recent reaffirmation of the controlling constitutional principle, the notable absence of such an all-encompassing grant of sovereign immunity to the federal government in the U.S. Constitution precludes a federal doctrine of sovereign immunity from being a power granted to the federal government by the U.S. Constitution. **Thus, there is no constitutional basis for a doctrine of federal sovereign immunity.**

To rebut petitioner's position, respondent's only legally-sufficient reply is to identify the specific constitutional provision that creates the doctrine of federal sovereign immunity (i.e., the Article and Section of the U.S. Constitution that creates and assigns this right from the states to the government), which the OALJ,

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[24] Dobbs, State Health Officer of the Mississippi Department of Health, *et al.* v. Jackson Women's Health Organization, *et al.*, 597 U.S. ___ (Slip Opinion, page 5) (2022).

[25] *Id.* at Slip Opinion, page 6.