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).
8. 26 U.S.C. §7623(b).
9. 26 U.S.C. §7623(d).
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.**
>
> . . .
>
> **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.

the ARB and the Eleventh Circuit have all failed to do. **The inability of any party or reviewing judge to this dispute to identify the constitutional basis for the doctrine of federal sovereign immunity confirms petitioner's position that there is no such power granted to the federal government by the U.S. Constitution.**

B. The U.S. Constitution Precludes the Existence of a Doctrine of Federal Sovereign Immunity

In addition to the absence of any constitutional basis for a federal doctrine of sovereign immunity, the U.S. Constitution clearly states the contrary where it provides that the judicial branch has authority over "*Controversies to which the United States shall be a Party.*"[26]

This clear statement in the U.S. Constitution confirms that the federal government can be a party to controversies before the judicial branch and logically negates the existence of an undefined generalized broad doctrine of federal sovereign immunity. **Thus, the U.S. Constitution, by its own terms, specifically negates the possible existence of a doctrine of federal sovereign immunity.**

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[26] U.S. Const., Article III, Sec. 2.

C. The Federal Government is a Subservient Entity and is Not the 'Sovereign'

The judicial precedents that discuss a doctrine of federal sovereign immunity frequently allude to the 'English Common Law' as the panacea for the absence of support in the U.S. Constitution for a doctrine of federal sovereign immunity.

Unfortunately for respondent, the historical context of the U.S. Constitution and the creation of the limited federal government that was and is subservient to the states and their citizens undermine this notion as a basis for a doctrine of federal sovereign immunity.

While American jurisprudence adopts many concepts from the 'English Common Law', it only does so where the legal basis and foundations for those precepts under the 'English Common Law' are replicated in American jurisprudence. As it relates to the concept of a doctrine of federal sovereign immunity, however, the legal foundation found in the 'English Common Law' supporting the English doctrine of sovereign immunity was specifically and vigorously rejected by our founding fathers with the American Revolution.

The basis under the 'English Common Law' for the doctrine of sovereign immunity is the Divine Right of Kings, which is founded on the belief that the king wields divine power as God's leader on earth. Because the king wields divine power, questioning the king is the same as questioning God. Thus, the sovereign king

is immune from suit, because, as God's representative, the sovereign king is cloaked in God's perfection.

Following the American Revolution, however, none of that applied in American jurisprudence. The sovereign states had just fought (and won) the American Revolution to denounce the power and authority of the king. The victorious sovereign states replaced the British sovereign king with a constitutional republic that did not possess the Divine Right of Kings. As the legal basis for the doctrine of sovereign immunity in the 'English Common Law' had just been rejected, a doctrine of federal sovereign immunity based on the Divine Right of Kings has no legal basis in American jurisprudence.

In any event, the U.S. Constitution makes it clear that respondent is part of a limited federal government, with limited and enumerated powers that are **delegated** to it by the sovereign states.[27] The federal government is the created entity that has been delegated defined and specific powers by the creating sovereign states (and the people). **As such, the federal government is a subservient entity, is not a '*sovereign*' entity and is not entitled to any protections that might exist for a '*sovereign*' entity based on the rejected Divine Right of Kings.**

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

D. The Federalist Papers vs. the Antifederalist Papers – No Refuge for the "*Inherent*" or Implied Doctrine of Sovereign Immunity

As described above, a doctrine of federal sovereign immunity has no basis in the U.S. Constitution. Proponents of uncontrolled federal power, however, frequently refer to the Federalist Papers as a possible refuge for an implied doctrine of federal sovereign immunity. Unfortunately, the Federalist Papers are not part of the U.S. Constitution, are not the legislative history of the U.S. Constitution and are not a broader description of the U.S. Constitution as understood by all the founding fathers.

Contemporaneous with the Federalist Papers were the Antifederalist Papers, written and distributed by other founding fathers, as part of the debate and discussion surrounding the possible adoption of the U.S. Constitution. The discussions in the Antifederalist Papers No. 79-82 on "*The Power of the Judiciary*" preclude the creation of a doctrine of federal sovereign immunity by the U.S. Constitution, either specifically or by implication. The Antifederalist Papers No. 79-82 identified the foundational problem being discussed as that "*The supreme court under this constitution would be exalted above all other power in the government, and subject to no control*", and would be " . . . *a court of justice invested with such immense powers*" – both of which contradict the notion that a doctrine of federal sovereign immunity that limits

judicial review can be contemporaneously found in the U.S. Constitution.[28]

Quite simply, a doctrine of federal sovereign immunity rationally conflicts with the conclusion in Antifederalist Paper No. 82, which stated

> *"The just way of investigating any power given to a government, is to examine its operation supposing it to be put in exercise. If upon inquiry, it appears that the power, if exercised, would be prejudicial, it ought not to be given. For to answer objections made to a power given to a government, by saying it will never be exercised, is really admitting that the power ought not to be exercised, and therefore ought not to be granted."*[29]

In other words, if the exercise of judicial power identified in U.S. Const., Art. III, Sec. 2 is to be restrained by an implied doctrine of federal sovereign immunity, then that grant of judicial power should never have occurred in the first place. Yet, the U.S. Constitution clearly granted the judicial branch with the authority over *"Controversies to which the United States shall be a Party"*[30], which means that an unstated, implied doctrine of federal sovereign immunity that would restrain that specific power has no basis in the U.S. Constitution. Thus, a doctrine of federal sovereign immunity cannot exist by implication.

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[28] See Antifederalist Paper No. 78.

[29] See Antifederalist Paper No. 82.

[30] U.S. Const., Article III, Sec. 2.

II. Constitutional Standard of Review Applied to the Doctrine of Federal Sovereign Immunity

A. Constitutional Right To Seek Judicial Review of Cases Involving the Federal Government

As discussed above, the U.S. Constitution clearly states that the judicial branch has authority over "*Controversies to which the United States shall be a Party.*"[31]

The necessary corollary to that constitutional grant of judicial power over cases that involve the federal government as a party is that there is a second party who is seeking judicial review of behavior by the federal government. Thus, parties aggrieved by the conduct of the federal government have a clear constitutional right to seek judicial review of that conduct.

Yet, the judicially-created doctrine of federal sovereign immunity attempts to defeat a clear constitutional right on a very broad basis.

B. 1st Amendment Right to Free Speech and to Petition the Government for a Redress of Grievances

The 1st Amendment to the U.S. Constitution is a foundational principle and states that

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[31] *Id.*

> *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or* ***abridging the freedom of speech****, or of the press; or* ***the right of the people*** *peaceably to assemble, and* ***to petition the Government for a redress of grievances.***"(**bold** highlights added)[32]

Thus, petitioner has the right to file his complaints with NTA without being threatened pursuant to his exercise of his right to free speech and petitioner also has the right to seek judicial review of respondent's employees' illegal conduct in threatening a tax whistleblower pursuant to his right to petition the government for a redress of grievances.

Yet, the judicially-created doctrine of federal sovereign immunity attempts to defeat these two clear constitutional rights on a very broad basis.

C. 5th Amendment Right to Due Process (Substantive and Procedural)

The 5th Amendment to the U.S. Constitution states that

> *"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be*

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[32] U.S. Const., 1st Amendment.

> *twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself,* ***nor be deprived of life, liberty, or property, without due process of law;*** *nor shall private property be taken for public use, without just compensation."*(**bold** highlights added)[33]

As affirmed, the OALJ's Order provided petitioner with no due process to seek review of the federal government's unconstitutional acts, which is a clear violation of petitioner's 5th Amendment Right to Due Process.

Yet, the judicially-created doctrine of federal sovereign immunity attempts to defeat this clear constitutional right on a very broad basis.

D. Constitutional Standard of Review To Be Applied – Strict Scrutiny

Because the judicially-created doctrine of federal sovereign immunity is an attempt to defeat several of petitioner's clear constitutional rights by denying judicial review of illegal conduct by the federal government, the appropriate constitutional standard of review is strict scrutiny.[34]

In essence, to satisfy the strict scrutiny standard of review for a broad doctrine of

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[33] U.S. Const., 5th Amendment.

[34] See, e.g., Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997); Reno v. Flores, 507 U.S. 292, 301-02 (1993).

federal sovereign immunity, respondent must demonstrate a compelling state interest and that the doctrine of federal sovereign immunity is either necessary, narrowly-drawn, or narrowly-tailored to protect that interest.

The broad doctrine of federal sovereign immunity, as currently applied by the OALJ, the ARB and the Eleventh Circuit fails to identify the compelling interest to be achieved and simultaneously fails to describe how a broad doctrine of federal sovereign immunity is narrowly-tailored to protect that compelling interest.

As a foundational matter, allowing the federal government to be immune from suit is not a compelling interest in a democratic republic. In fact, just the opposite is true.

The foundational basis for our republican system of government is that the federal government consists of three co-equal branches of government – each branch acting as a check-and-balance on the other two branches. Absent an ability to hold the federal government accountable in a judicial forum, there are no checks-and-balances by the judicial branch on the two other co-equal branches. This balance of power between the three co-equal branches is exactly why there is no mention of a broad power of federal sovereign immunity in the U.S. Constitution – such a broad grant of sovereign immunity would compromise the necessary balance of power between the three co-equal branches of the federal government.

As a simple matter, the inability to bring the federal government before the judicial branch and hold the federal government accountable for its behavior prevents aggrieved parties from using the judicial branch to force the federal government to change its behavior, which is exactly what the judicial branch was created to do. Without judicial consequences for its behavior, the federal government will not be motivated to change its behavior to comply with the laws and regulations. As anyone who has ever raised children knows, consequences encourage good behavior and discourage bad behavior. This same approach works for the federal government and its employees. Severing the connection between behavior and consequences is not even a rational approach to encouraging feedback that changes illegal behavior, much less is narrowly-tailored to achieve an undefined compelling state interest. Just the opposite is true – the failure to hold the federal government responsible for its conduct precludes the federal government from correcting its behavior to comply with the laws and regulations. Thus, the federal government has no legitimate interest in being immune from suit, much less a compelling state interest. At the same time, none of the OALJ, the ARB or the Eleventh Circuit identified the compelling state interest in threatening tax whistleblowers – in fact, the entire basis for 26 U.S.C. §7623(d) supports a contrary conclusion, which is to protect tax whistleblowers from threats and retaliation by their employers (which occurred in this case).

The strict scrutiny standard of review also requires respondent to identify how that broad doctrine of federal sovereign immunity is narrowly-tailored to achieve the unidentified compelling interest. The requirement for a narrowly-tailored solution is directly contradicted by the very broad nature of the doctrine of federal sovereign immunity created by the judicial branch.

Therefore, as created by the judicial branch, a broad doctrine of federal sovereign immunity cannot possibly satisfy the strict scrutiny standard of review necessary to infringe on a clear constitutional right (e.g., the right to seek judicial review where the federal government is a party to a controversy), because respondent has not identified the required compelling state interest and the broad doctrine of federal sovereign immunity is not narrowly-tailored to achieve that unidentified compelling interest.

Absent a legitimate compelling state interest, the interpretation of law affirmed by the Eleventh Circuit cannot stand, because it violates petitioner's 1st and 5th Amendment Rights.

E. The Doctrine of Federal Sovereign Immunity Cannot Satisfy Even the Rational Basis Standard of Review

As discussed above, the federal government has no state interest in being immune from suit, because such immunity violates the U.S. Constitution by denying the judicial branch any power to act as a sufficient

checks-and-balances on the other two co-equal branches of government.

Moreover, the federal government has no state interest in being immune from suit, because such immunity severs the link between behavior and consequences, which is a necessary logical connection to change future conduct to comply with the laws and regulations.

Finally, the United States has no state interest in harassing tax whistleblowers, because the entire basis for 26 U.S.C. §7623(d) is to protect tax whistleblowers from harassment and retaliation by their employers, which occurred in this case.

Therefore, the judicial branch's creation of a broad doctrine of federal sovereign immunity that defeats the constitutional right to seek judicial redress cannot satisfy even the rational basis standard of constitutional review, because there is no legitimate state interest for such a broad doctrine and there is no rational connection between the doctrine of federal sovereign immunity and the unidentified legitimate state interest.

III. Constitutionally-Permissible Scope of the Doctrine of Federal Sovereign Immunity – Necessarily Limited to the Exercise of Specific Sovereign Power(s)

A. Both Standards of Review Require a State Interest

As discussed above, if a doctrine of federal sovereign immunity is to be constitutional, it must necessarily satisfy the proper constitutional standard of review. If the strict scrutiny standard applies, then the doctrine of federal sovereign immunity must be narrowly-tailored to achieve a compelling state interest. If the rational basis standard applies, then the doctrine of federal sovereign immunity must be rationally-related to a legitimate state interest.

Under the strict scrutiny standard, the scope of a constitutionally-permissible doctrine of federal sovereign immunity must be narrowly-tailored and limited to the exercise of constitutional sovereign powers by the federal government. Thus, under the strict scrutiny standard of review, a doctrine of federal sovereign immunity could only apply when the federal government is exercising specific sovereign powers identified in the U.S. Constitution, but would not apply to other behavior by the federal government when it acts in any non-sovereign capacity (i.e., as a market participant or when breaking the law).

Consistent with the analysis above, even under the rational basis standard, the scope of a constitutionally-permissible doctrine of federal sovereign

immunity rationally relates only to the exercise of constitutional sovereign powers by the federal government. Thus, under the rational basis standard of review, a doctrine of federal sovereign immunity could only apply when the federal government is exercising specific sovereign powers identified in the U.S. Constitution, but would not apply to other behavior by the federal government when it acts in any non-sovereign capacity (i.e., as a market participant or when breaking the law).

Because whistleblowers have an important role in the proper function of the federal government, protecting whistleblowers from threats, harassment and retaliation is more closely aligned with the exercise of a specific power by the United States than removing those same protections would be. As such, the federal government only has an interest in protecting whistleblowers and does not have a legally-recognizable interest in threatening, harassing or retaliating against whistleblowers.

Thus, regardless of the constitutional standard of review to be applied, any doctrine of federal sovereign immunity can only apply when the federal government has identified its legally-recognized state interest that it is attempting to achieve.

B. Any Doctrine of Federal Sovereign Immunity Applies Only When Exercising an Enumerated Sovereign Power

The federal courts have long recognized the principle that the U.S. Constitution only applies to the federal government when the federal government is acting in its sovereignty.[35] In Sunrez, the US Court of Federal Claims held that the Takings clause did not apply, because the Takings clause only constrained sovereign acts, whereas in the context of a breach of contract claim, the federal government was not acting in its sovereign capacity, but rather merely as a

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[35] See Sunrez Corp. v. United States, Ct. of Fed. Claims No. 21-568 (filed January 20, 2022) (where the court stated

> ""*[W]hen the government itself breaches a contract, a party must seek compensation from the government in contract rather than under a takings claim.*" Piszel, 833 F.3d at 1376. "*Taking claims rarely arise under government contracts because the Government acts in its commercial or proprietary capacity in entering contracts, rather than in its sovereign capacity. Accordingly, remedies arise from the contracts themselves, rather than from the constitutional protection of private property rights.*" Hughes Commc'n Galaxy, Inc. v. United States, 271 F.3d 1060, 1070 (Fed. Cir. 2001) (citations omitted); see also A & D Auto Sales, Inc., 748 F.3d at 1156 (explaining remedies available under a breach of contract theory make takings liability redundant); St. Christopher Assocs., L.P., 511 F.3d at 1385 ("*In general, takings claims do not arise under a government contract because, as stated by the Court of Federal Claims, the government is acting in its proprietary rather than its sovereign capacity, and because remedies are provided by the contract.*")").

participant in the market place.[36] Given the wide-ranging rule of law adopted by the federal judiciary that the U.S. Constitution only applies to the federal government when the federal government is wielding one of its sovereign powers, then the corollary must also be true – a doctrine of federal sovereign immunity can only serve to shield the federal government when it is wielding one of its defined and specific enumerated powers. In other words, any doctrine of federal sovereign immunity only shields the federal government when it is acting in its sovereign capacity, but does not shield the federal government when it is acting in a non-sovereign capacity.

The Eleventh Circuit improperly applied a broad doctrine of federal sovereign immunity to all acts by the federal government (and its employees) even those that clearly fall outside the scope of the federal government's limited and defined powers, which contravenes this wide-ranging principle established by the federal judiciary.

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[36] While petitioner disagrees with this principle that the U.S. Constitution only applies to constrain the federal government 'sometimes' based on the role the federal government might have, the judicial precedents on this point are clear and wide-ranging.

In other words, to accommodate and rationalize both of these doctrines created by the judicial branch (i.e., the doctrine of federal sovereign immunity and the principle that the U.S. Constitution only limits the federal government when it is acting in its sovereign capacity), a single statement summarizing the applicable rule(s) of law of a federal doctrine of sovereign immunity (and its exceptions) would be:

> ***The doctrine of federal sovereign immunity only applies when the federal government is properly exercising one of its enumerated sovereign powers.***

When the federal government is acting outside the scope of its limited sovereign powers (e.g., as a market participant, as a party committing torts, as a party violating citizens' constitutional rights or as a party retaliating against tax whistleblowers), then the limited federal government is subject to the laws like all other parties, because in those instances the federal government is acting like all other parties in a non-sovereign capacity. The federal government is only sovereign and entitled to the protection of a doctrine of federal sovereign immunity when wielding its enumerated sovereign powers – none of which include retaliating against tax whistleblowers.

IV. Judicially-recognized Defenses to the Doctrine of Federal Sovereign Immunity

A. *Ultra Vires* Exception

The *Ultra Vires* Exception applies when the underlying suit is against an officer of the government for actions beyond the scope of the officer's authority. As this Court stated in Larson, "*the relief can be granted, without impleading the sovereign, only because the officer's lack of delegated power.*" [37]

In the current dispute, two federal employees threatened, harassed and retaliated against petitioner, which is well outside the scope of their defined duties and in contravention of 26 U.S.C. §7623(d).

At the same time, respondent's employees intentionally applied a definition of "*employer*" from 29 U.S.C. §652 that is statutorily limited to Title 29, Chapter 15, instead of the definition of "*employer*" found in Title 26, which is not limited by the pre-amble to 29 U.S.C. §652, which means that respondent's employees are acting outside the grant of power from Congress by applying statutory definitions to terms that clearly fall outside their applicable statutory framework.

Thus, the *Ultra Vires* Exception to the doctrine of federal sovereign immunity precludes that doctrine of federal sovereign immunity from insulating these employees from suit for

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[37] Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689 (1949) ("Larson").

their intentional decisions to act outside the grant of power by Congress.

B. APA Exception under 5 U.S.C. §702

The APA Exception applies to actions taken by agencies of the federal government[38] – in this case, through its employees (i.e., wrongfully refusing to promptly pay over petitioner's §7623(a) award, threatening and retaliating against petitioner as a tax whistleblower and applying an incorrectly-sourced definition of "*employer*" and "*employee*").

All of these agency actions are reviewable by the judicial branch under 26 U.S.C. §7623(d)(2)(A)(i), which incorporates 49 U.S.C. §42121(b)(1) through (4) and its specific access to judicial review. **Thus, Congress has clearly waived federal sovereign immunity under the APA.**

C. Specific Waiver under 26 U.S.C. §7623(d)(2)(A)(i)

Petitioner's original complaint filed with respondent under 26 U.S.C. §7623(d)(2)(A)(i) "*shall be governed under the rules and procedures set forth in section 42121(b) of Title 49*"[39], which allows for a direct appeal

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[38] 5 U.S.C. §702, which is described as "*Pub. L. 94–574 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.*"

[39] 26 U.S.C. §7623(d)(2)(B)(i).

to the Court of Appeals (i.e., judicial review).[40] **Thus, Congress has specifically waived sovereign immunity under the Taxpayer First Act for petitioner's original complaint to respondent about the two named federal employees and their conduct.**

CONCLUSION – RELIEF SOUGHT

For the reasons set forth above, the United States Court of Appeals for the Eleventh Circuit's Order of Dismissal, dated March 31, 2023, contradicts the clear language of U.S. Constitution, its historical basis and the proper constitutional standard of review.

As such, this Court should grant this petition for a writ of certiorari to allow this Court to review the constitutional basis for the doctrine of federal sovereign immunity, to determine the proper constitutional standard of review when applying a constitutionally-compliant doctrine of federal sovereign immunity, to determine its proper scope (if sovereign immunity is found to exist) and 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 constitutionally-complaint doctrine of federal sovereign immunity.

[40] 49 U.S.C. §42121(b)(1) through (4).

Respectfully submitted this the 22nd day of August, 2023,

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