Case No: 23-3045

IN THE SUPREME COURT OF THE UNITED STATES

CAROL ANN MCBRATNIE

Petitioner

v.

CHARLES PAUL RETTIG, IRS Commissioner, *et. al.*
Respondents

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

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pro se Petitioner

QUESTION(s) PRESENTED

EMBEDDED IN ALL CLAIMS AT ALL COURT LEVELS
ARE *CONSTITUTIONAL* CHALLENGES TO

- ADMINISTRATIVE PROCEDURES ACT IN CONJUNCTION WITH IRS ADMINISTRATIVE REMEDY PROCESSING
- THE IRS'S FEDERAL PAYMENT LEVY PROGRAM
  - 28 USC §2680(c) as interpreted
  - 26 USC §7436 as interpreted

THE UNITED STATES IS A PARTY

The questions presented are:

- What does the jurisdictional checkbox on Tax Court Form 2 represent ? Is it restricted to 26 USC §7436 and businesses only, or do workers such as McBratnie and *Mrs. Harrold-Jones* have jurisdiction ? *Mrs. Harrold-Jones* and McBratnie received different USTC treatment in checking this box.
- Did the US Court of Appeals for the Sixth Circuit err in dismissal of the entire Complaint and Preliminary Injunction, by failure to address any of the "actual facts and claims" as presented in the Complaint and Motion for Preliminary Injunction ?
- Is Gross Negligence adequately understood to be: the IRS policy actions/inactions by: pre: assigned taxation; and post: failure to remove assigned taxation; in between: absent communications on the SS-8 itself, which circumvented Judicial Due Process; such that it matters not whether the SS-8 was processed, but whether its' status was communicated ?
- Is McBratnie's FTCA Gross Negligence Claim fully established for resolution ?

- Did the US Court of Appeals for the Sixth Circuit err by dismissal of the entire Complaint failing to correctly comprehend or address the Fraud on the US Tax Court ?
- Was McBratnie's: "official capacity" side (not the damages side) of the USTC Fraud on the Court fully established for resolution ?
- Are processing of Administrative Remedies of the IRS mandatory where taxation is assigned and not removed ? Processing includes communication of intentions.
- If Administrative Remedies remain unprocessed past the statute of limitations for any Agency, should not the citizen's assertion be deemed correct due to Abdication of Procedural Due Process ?
- Can the IRS compartmentalize a tax year's taxation debt ?
- Can the Federal Government refuse to provide service addresses of individual capacity Federal Workers, after being Placed on Notice of needing such, and themselves thereafter, Motion to dismiss a Complaint's Claims against the individual capacity Federal Workers, due to insufficient service or insufficient service of process ?

The US Supreme Court has become the Court of last resort for supervisory powers. Re:

- **Fraud on the Courts, particularly by the Appeals Court dismissing an entire Complaint on facts / claims different than those in the Complaint**
- **The *Constitutionality* of select statutes: 28 USC §2680(c) and 26 USC §7436**
- **The *Constitutionality* of the Federal Payment Levy Program of the IRS, that turns the USTC Docket into a hiring "Black-List".**
- **The *Constitutionality* of IRS handling of Administrative Remedies**

PARTIES TO THE PROCEEDINGS

The Petitioner, the plaintiff-appellant in the 6th Circuit Court of Appeals, is

Carol Ann McBratnie, *MSN-RN ANP-BC, pro se.*

The Respondents, the defendant-appellee's in the 6th Circuit Court of Appeals, are:

CHARLES PAUL RETTIG, IRS Commissioner;
MARY BETH MURPHY, Former Commissioner SB/SE Unit;
MAURICE B. FOLEY, Chief Justice USTC;
CHARLES V. DUMAS, IRS Attorney;
JENNY LINGL, IRS Attorney;
MICHAEL J. DESMOND, Chief Counsel IRS;
JOSEPH W. SPIRES, SBSE Division Counsel, IRS;
REBECCA M CLARK, SBSE Area Counsel 4, IRS;
ELKE E. FRANKLIN, SBSE Associate Area Counsel Detroit Group 2, IRS; BRUCE K. MENEELY, SBSE Division Counsel, IRS;
G. CARBERRY, IRS personnel;
M. MORAN, IRS personnel;
L. MERCORELLA,
LISA CHAN, Examination Operation Manager;
DENNIS A. KRINGS, Field Director, Compliance Svcs, PA Svc Cntr; DELL E. JONES, Appeals Office;
VERNEIDA C SANDERS, Appeals Team Manager;
S. GABRIELLI, Brookhaven Service Center;
DIANE E. MUSE, Operations Manager, Exam;
NINA BOLIN,
John Doe, Additional IRS employees etc., not yet identified

CORPORATE DISCLOSURE STATEMENT

A corporate disclosure statement is not required because McBratnie is not a corporation. *See* Sup. Ct. R.29.6.

STATEMENT OF RELATED CASES

McBratnie is aware of no directly related proceedings arising from the same lower court cases as this case, other than those proceedings appealed here.

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ABBREVIATIONS

AIA:	Anti-Injunction Act, 26 USC §7421
APA:	Administrative Procedures Act, Title 5 of the US Code
Appeals Court:	US Court of Appeals for the 6th Circuit
ESI:	Electronically Stored Information
Form 9423:	IRS Administrative Remedy: Collections Appeal Hearing Request
FPLP:	IRS Federal Payment Levy Program
FRE:	Federal Rules of Evidence
IRC:	Internal Revenue Code, Title 26 of the US Code
	Sections of the Internal Revenue Code are not always preceded by 26 USC, but where such is absent from the identified Statute, it is part of Title 26
Proofs Docketed:	equates to proofs are already filed in the cases
SB/SE	Small Business / Self Employed unit of the IRS
SS-8:	IRS Administrative Remedy: Worker-Classification Determination
TIGTA:	Treasury Inspector General for Taxation Administration
TY:	Tax Year
US District Court:	US District Court for the Eastern District of Michigan
USTC:	US Tax Court

OPINIONS

JURISDICTIONAL STATEMENT

The 6th Circuit Court of Appeals [Appeals Court] issued their Order on August 14, 2023. *En Banc* rehearing was denied November 13, 2023. This petition was timely filed February 9, 2024 (28 USC §2101(c)). Supreme Court has jurisdiction under 28 USC § 1254(1). US District Court Jurisdiction was under: *U.S. Const. art. III, Section 2*: US Constitution, US Statutes and US Government as a party (28 USC §§ 2671-2680; 18 USC §§ 1961-1968; 28 USC §§ 1331, 1340, 1346, 1357, 1366, and 1367; 28 USC § 1343 and 42 USC § 1983; 26 USC § 7433 and 26 USC § 301.7433-1). Detailed Discourse: App.49a-53a.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The relevant Constitutional and statutory provisions are at App.86a-127a.

INTRODUCTION

The IRS created an Administrative Remedy to resolve worker misclassification issues between businesses and workers, titled: *SS-8 Determination of Worker Status* [SS-8]. This instant case centers on IRS mismanagement of this policy decision that culminates in a 5th Amendment deprivation of the Right to Judicial Due Process. It matters not, whether the SS-8 was processed. **Negligence is caused by what the IRS does before: assignment of taxation; and after: failure to remove assigned taxation, when they do nothing with an SS-8 in between.** Necessary for resolution throughout, and impeding due process in USTC, is a dispute of what a jurisdictional checkbox on Tax Court Form 2 represents. A second Administrative Remedy: *Collections Appeal Hearing Request* was unprocessed and suffered similar consequences.

Respondents focus of the case: SS-8 processing in isolation. App.5a:

> Here, McBratnie's FTCA claim is based on an allegation that the IRS negligently failed to process her SS-8 forms[1] for certain tax years.

McBratnie's focus of the case: is absence of communications of any kind regarding the SS-8. The IRS policy first assigned a changed worker-classification resulting in increased taxation acquisition of taxes already paid. The IRS directed McBratnie to file an SS-8 to dispute their change. The IRS withheld communications and processing of this SS-8. Court jurisdiction is precluded on non-exhausted Administrative Remedies. The IRS thereafter exceeded the Statute of Limitations, precluding McBratnie filing for a refund of assigned taxation. Due Process guaranteed by the 5th Amendment is circumvented by the Administrative Procedures Act [APA] in this sequence. The Treasury Inspector General for Taxation Administration [TIGTA] identified this negligence in a published report. App.56a-85a.

Necessary for understanding these matters is the first step: that worker-classification and resultant taxation is assigned by software heuristics based upon the form income is reported on, which is always the opposite for misclassified workers. Assigned taxation remains in place until Court Jurisdiction is had. Court Jurisdiction was circumvented.

Also necessary for understanding throughout, is if the IRS processes an SS-8 absent a full audit of the business/employer, compliance with any determination letter issued is voluntary. If the IRS issued a Determination through their SS-8 process, and did not audit McBratnie's business/employer, it would not matter what worker-classification they asserted McBratnie was, as their decision would only be binding on themselves. Per the TIGTA Report at App.81a para.2 as written by the IRS Commissioner of SB/SE:

> Determination Letters are not binding on the worker or employer/business. An examination of the employer/business must be conducted for any determination to be considered binding.

This statement translates to the "voluntary compliance initiative" in *B G Painting, Inc., infra,* (App.132a left column last para). The Appeals Court conflated a "voluntary compliance initiative" upon the business/employer, with FTCA discretionary processing of SS-8s for the IRS. App.7a para 3. Failure to process an SS-8 should revert worker-classification to what the worker asserts, as the business/employer is never audited. Presently, the default remains assigned.

Upon expiration of the Statute of Limitations, automatic refunding of disputed taxes needs to be initiated from the SS-8 process. Two Administrative Remedies (SS-8 and refund) are interdependent, where a non-exhausted SS-8, restricts access to another administrative process for refunding. When Respondent IRS does nothing with an SS-8, they lock in their higher

taxation assignment using one administrative remedy (SS-8) to preclude access to the other (refund). Respondent IRS's sequence of actions, allows them to shift and retain taxes the business/employer owed, onto the worker, with the worker deprived of Judicial Due Process.

Per TIGTA, employers shifted tax burdens onto workers of $15 billion per year. App.58a ($44.3b). If an SS-8 is processed with an audit of the business, the IRS generally cannot collect from the business due to section 530 relief. The IRS work-around is to assign worker-classification and resultant taxation based upon the form income is reported on. Then all the IRS needs to do is create a barrier in applying for a refund of assigned taxation. The non-exhausted SS-8 is that barrier. If Respondent IRS communicates any intentions regarding the submitted SS-8, Court jurisdiction and review is obtainable. Thus the benefit to Respondent IRS of being silent regarding the SS-8, making it appear to be unprocessed.

No Statute exists identifying a time-frame required for processing SS-8s (App.82a para 2: "*There is no requirement to respond to SS-8 determination requests within 180 days.*"). Respondent IRS doing absolutely nothing with the submitted SS-8 ensures all Courts never have jurisdiction, and assigned taxation remains in place and unchallengeable in Court. Respondent IRS doing absolutely nothing with the submitted SS-8, allows Respondent to force the worker to pay the employer's share of employment taxes. Respondent IRS has implemented a work-around of the APA, the Judicial Branch, and *The Constitution* regarding 5th Amendment Rights. Respondent IRS holds hostage, misclassified workers and all Courts, via the SS-8 and the Administrative Procedures Act by doing nothing.

TIGTA's published report placed the IRS on Notice that their negligent or absent processing of SS-8 submissions by workers, was resulting in permanent harm to workers, due to processing if any being 'untimely'. To be useful to a worker, would mean they would be able to file for a refund. If a worker could achieve refund status, there would be no need to write this report. TIGTA stated [App.58a right column]:

> Furthermore, the SS-8 Program does not process SS-8 requests timely enough for the determinations to be useful to workers who file requests for assistance.

US Supreme Court discernment as to what this statement and the Report articulates is required. The TIGTA Report has to be read with an understanding of the processes in place.

For some of the unprocessed SS-8s, Respondent IRS issues a Notice of Deficiency, forcing the worker to file in Tax Court. The Tax Court lacks jurisdiction over the worker-classification and assigned self-employment taxation due to non-exhaustion. This compartmentalizes a workers full tax picture such that Respondent IRS locks in higher self-employment taxation, and thereafter tries to negotiate higher income taxes, in isolation, on the assigned worker-classification. For McBratnie this involved relocation of business expenses from Schedule C to Schedule A. App.188a-189a. Compartmentalizing taxation becomes a win-win for the Respondent IRS. Assigned taxation remains locked in place until Respondent IRS, untimely if ever, processes the SS-8.

To hide these behaviors in McBratnie's case, Respondent IRS and DOJ Attorneys have engaged in Obstruction of Justice by Fraud on the Courts. This was accomplished by: withholding key material discovery; conflating hearsay for facts; lying to the Courts (not attorney misunderstanding their client); conflating "voluntary compliance initiative' with

discretionary or mandatory duty of processing the SS-8; asserting that 26 USC §7436 disentitles workers to Judicial Due Process; reframing claims presented; distorting the facts presented in the pleadings; and focusing on the "what ifs" instead of "what occurred". Proofs Docketed.

Fraud on the Courts has occurred with full dismissal of the entire US District Court Complaint, along with unarticulated disposition of the true claims presented.

I. *DE NOVO* STANDARD OF REVIEW

The US District Court Order quoted (similar in the Appeals Court):

> To survive a Rule 12(b)(6) motion, complaints must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007)).
>
> Courts must "construe the complaint in the light most favorable to the plaintiff and accept all factual allegations as true." *Laborers' Loc. 265 Pension Fund v. iShares Trust*, 769 F.3d 399, 403 (6th Cir. 2014).

Therefore, the "true facts and claims" are to be drawn from the Complaint. Both Courts relied on Respondent DOJ's reframed claims and mis-stated facts, causing improper Court Analysis, resulting in Dismissal of the Complaint in error.

The Complaint is an unwieldy step-by-step chronology at 213 pages. The Complaint contained an incorporation by reference of the Motion for Preliminary Injunction's allegations, for which the Preliminary Injunction was dismissed as well.

II. DISTINGUISHING HEARSAY FROM FACT

Tied to all matters is distinguishing hearsay from fact. Specifically, assuming a fact not in evidence: *That the SS-8 was unprocessed.* Respondents have not produced any version of the SS-8 submitted for Court examination whilst admitting its existence. Examination of the final version will have a "*For IRS use only, case number*" in the upper right corner of the first page that ties it to IRS computer documents that may indicate that the SS-8 was indeed processed or the reason it was not. App.167a-170a. Respondent DOJ asserts the reason the SS-8 was not processed is irrelevant. Since failure to communicate IRS intentions regarding this document occurred, the reason it was purportedly not processed is significant. Discretionary choice would require knowing and communicating why you did not process an SS-8, so timely Court jurisdiction could be secured by the taxpayer. Absence of Due Care in processing a document that you engendered reliance on is negligence. *Indian Towing Co. v. United States,* 350 U.S. 61, 76 (1955), "*operational level*", App.142a "*The over-all impression...*".; *United States v. Gaubert,* 499 U.S. 315, 321 (1991) *"operational actions" "operational in nature",* App.166a.

For this worker-classification dispute, the IRS owed McBratnie $12,212 of already collected "self-employment" taxes paid on business expenses. If worker-classification remains assigned and hidden, the IRS keeps that $12,212. Additionally, Respondent IRS sought the marginal income tax rate on business expenses or $20,000 spanning three different tax years. An unprocessed SS-8 allows Respondent IRS to pursue $32,212 of taxes not due by compartmentalization.

An SS-8 unit stamp mark is contained on McBratnie's predecessor version identifying receipt in the SS-8 unit on January 26, 2018 (App.170a). This date is two months after actual receipt, December 4, 2017. App.170a bottom right. Processing may have occurred with a decision hidden. The difference between this SS-8 and the final SS-8, requiring resubmission was a missing 2017 w-2. This should have been requested under separate cover per Respondent IRS *SS-8 processing handbook,* as confirmed by TIGTA (App.72a para.1). This second SS-8 submission was acceptable for processing and a copy was admitted as being kept. Discovery is needed on the handwritten case numbers for any actions taken regarding any of the SS-8s.

This establishes the significance of the withheld discovery in USTC, where Respondent Judge Foley ignored *Federal Rules of Evidence* and allowed Respondent IRS hearsay instead ("*Instead, petitioner refers to Form SS-8 determination requests filed with respondent that have yet to be processed.*"). Asserting the document was unprocessed challenges USTC jurisdiction. Respondent Judge Foley granted the Motion without articulating a basis for granting, or examining the "hearsay" himself (App.46a). Federal Rules of Evidence does not allow hearsay where the evidence exists.

In USTC, Respondent IRS first asserted the SS-8 document "did not exist" in their Motion to Dismiss Worker-Classification issues. On proof that it used to exist, Respondent IRS attorneys admitted its existence but did not attach a copy to their Reply. The final/third SS-8 was requested as a discovery item. This was not produced as it "did not exist". Respondent IRS was not forthcoming with a copy upon admitting it was found. Thereafter, Respondent IRS Attorney outright refused to produce a copy of the SS-8. Proofs Docketed. App.186a-187a #3.

Respondent IRS's APA manipulations, achieve compartmentalization of "Self-Employment taxes" from "Income taxes" precluding reviewing the total tax picture. When Respondent IRS issues a premature Notice of Deficiency, court jurisdiction on "Self-Employment" taxes is foreclosed while the "worker-classification" is locked in. Respondent IRS is then free to negotiate higher "income taxes" on that changed worker-classification. Self-Employment taxes and Income taxes are interdependent in worker misclassification. This establishes a continuing reason to withhold requested discovery of the SS-8, proffering hearsay instead. Withheld discovery affected McBratnie's answer, which may have affected the Judicial decision. Respondent Judge Foley still demonstrated bias (violating FRE) favoring the IRS, and participated in the Fraud on the USTC.

III. SS-8 PROCESSING: DISCRETIONARY OR MANDATORY 28 USC §2680(a)

The Appeals Court stated:

> Indeed, we have found no case supporting the proposition that an IRS official has a legal duty to process an SS-8 form, and the relevant authority suggests otherwise." App.7a.

The Appeals Court engaged in incorrect analysis regarding differentiation between a discretionary versus mandatory duty under the FTCA. The false "relevant authority" is 26 USC §7436 below. A "relevant authority" would not be found in the IRC (a law unto themselves), but under the FTCA. The Appeals Court has deemed TIGTA not a *relevant authority*, or could not comprehend or was not on the lookout that a 5th Amendment Right was being violated. SS-8 processing is mandatory in the presence of assigned taxation where no judicial review can be achieved. When Respondents assert SS-8 processing is discretionary, the intended outcome is that their assigned taxation is to be without judicial review of any kind.

Indian Towing Co. v. United States, 350 U.S. 61 (1955) App.134a-142a, is an FTCA case precedent that speaks to when an activity is discretionary and when it is mandatory (operationalized). Applying *Indian Towing*, the discretionary act was when Respondent IRS chose to create an internal process for worker-classification handling (including the SS-8) or directed McBratnie to use such, holding themselves out as an arbiter of such disputes. *Indian Towing* identified that after the discretionary policy choice was made, Respondent IRS was under mandatory compulsion to provide due care in their handling of such submission towards persons they caused to be reliant on such (operationalized). *Indian Towing Co. v. United States*, 350 U.S. 61, 69-76 (1955):

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act. App.138a.
>
> ...
>
> The over-all impression from the majority opinion is that it makes the Government liable under the Act for negligence in the conduct of "any governmental activity on the 'operational level.'" App.142a.

The IRS in operating their SS-8 worker-classification determination process, assigned worker-classification favoring the employer and shifted the resultant taxes onto the worker as the workers tax debt. Worker-classification based on the form income is reported on is an improperly made determination. This efficiency only works if there are no misclassifications. When this "efficiency" is challenged as incorrect, Respondent IRS then has a duty to process that SS-8, or revert their assignment. McBratnie's Complaint asserted that it is the "combining of actions" causing gross negligence that make *Indian Towing Co.* applicable. When any Agency

operationalizes a discretionary policy choice, they have to provide due care in those duties lest they be held accountable under the FTCA for resultant harm. *Indian Towing Co.* was a negligence claim by inaction. Respondent IRS was also negligent by inaction. Respondent IRS assigned higher taxation and withheld processing of an SS-8 without any communications on the issue, subverting Court jurisdiction. The IRS examiner for TY:2015, memorialized recommending the SS-8 process (Proofs Docketed), thus engendering reliance on Respondent IRS to properly carry out their duty. Respondents Policy on worker-classification starts at assignment based on the form income is reported on, with a process in place to challenge this.

McBratnie has asserted that 28 USC §2680(a) is the only exception that could apply. Statute 28 USC §2680(a) the Discretionary Function Exception states:

> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Due Care would be heeding your Inspector General when they identify that you are violating *The Constitution* and harming workers. Due Care would be communicating intentions to not process an SS-8 or processing it. Not communicating in any manner on the SS-8 was a legal strategy to preclude Judicial Due Process. It is not a discretionary activity for the Federal Government to violate *The Constitution* by policy choices and implemented strategies:

> *Limone v. United States*, 579 F.3d 79, 101 (1st Cir. 2009):
>
> > It is elementary that the discretionary function exception does not immunize the government from liability for actions proscribed by federal statute or regulation. *Bolduc*, 402 F.3d at 60. Nor does it shield conduct that transgresses the Constitution.; App.155a.
>
> *Raz v. United States,* 343 F.3d 945, 948 (8th Cir. 2003):
>
> > concluding that government's actions "f[e]ll outside the FTCA's discretionary-function exception because [the plaintiff] alleged they were conducted in violation of [the Constitution]". App.159a second to last para.

Medina v. United States, 259 F.3d 220, 225 (4th Cir. 2001)

> "[F]ederal officials do not possess discretion to violate constitutional rights . . . ." (quoting *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988)). App.156a. App.165a.

Nurse v. United States, 226 F.3d 996, 1002 n.2 (9th Cir. 2000)

> "The Constitution can limit the discretion of federal officials such that the FTCA's discretionary function exception will not apply.". App.157a.

The US Supreme Court needs to determine if Respondent IRS's processing of the submitted SS-8 under the complete circumstances and consequences, was a mandatory versus a discretionary duty as articulated by the precedential case of *Indian Towing.* App.134a-142a. Processing an SS-8 would include communicating intentions not to process it.

IV. FALSE PREDICATE FACTS

> US District Court Order App.29a predicate factual basis:
>
> (1) processing Plaintiff's Form SS-8 was discretionary; (2) the tax court lacked jurisdiction over Plaintiff's Worker-Classification claim; and (3) Plaintiff had opportunities for judicial review.

This predicate basis were: two falsities and a truth:

- False: (1) **processing of an SS-8 is a discretionary activity.** Respondent argument conflated the business owner's voluntary compliance with the end result of the processed SS-8, with the actual processing of an SS-8 being a discretionary choice of Respondent IRS. *See* 26 USC §7436 below.
- Truth: (2) **the USTC indeed lacked jurisdiction** over this issue by intentional strategy of Respondent IRS.
- False: (3) **opportunities for judicial review**: Judicial Review only exist on alternate "what if" scenarios presented by Respondent DOJ. Judicial Review is 100% precluded based on "what occurred". The Court should address the legal strategy implemented.

These predicate facts were the basis to discard the Complaint. These should now be understandable as mis-stated facts and analysis affecting the re-framed claims of the Respondents. The US Supreme Court should address "what occurred" and if it was a valid mechanism to deal with assigned taxation (acceptable IRS Administrative Procedure), then ascertain what went wrong operationally to determine accountability under the FTCA.

V. *CONSTITUTIONALITY* OF 26 USC §7436 AS APPLIED App.117a-118a

The Constitution: Supremacy Clause: Article VI: clause 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ...

A *Constitutional* law is one that is made in pursuance of *The Constitution*. A law which is not made in pursuance of *The Constitution* is not, in fact, a law; but is 'null, void, and of no effect'. *Gibbons v. Ogden*, 22 U.S. 1, 211-212 (1824). "The nullity of any act, [law] inconsistent with *The Constitution*, is produced by the declaration, that *The Constitution* is the supreme law". App.133a.

US District Court asserted McBratnie caused her own problem by filing under incorrect §7436 jurisdiction in USTC:

> The SS-8 Forms were at issue in the Tax Court litigation where Plaintiff asserted a worker-classification claim under 26 U.S.C. § 7436. The Tax Court dismissed that claim as beyond its limited jurisdiction.

Backpeddling occurred in Respondent IRS's USTC Reply where they stated:

> Nonetheless, to the extent the petition in this case seeks to invoke the jurisdiction of the Tax Court pursuant to section 7436(a),

The question was: *Did McBratnie's petition seek jurisdiction under §7436* ? Respondents should identify anywhere throughout all pleadings where McBratnie ever asserted §7436 had any jurisdiction over her cases. Applicability of §7436 to McBratnie's cases was the machinations of Respondents (App.180a "*Issues in your case*"), disputing the meaning of a check box on *Tax Court Form 2*. App.193a. Both McBratnie and *Mrs. Harrold-Jones* in *Jones v. Comm'r, infra,* checked the same box on this form. A §7436 argument was not made against *Mrs. Harrold-Jones*. Judge Urda of the USTC case for TY:2015, did not agree with this §7436 interpretation and requested Respondent IRS attorneys articulate how §7436 spoke about the rights of the worker, or unprocessed SS-8s.

Respondents assert that the checkbox on Tax Court Form 2 App.193a, only grants business owners the right to litigate worker-classification determinations App.180a "Issues in

your case". Respondents asserted McBratnie was not a business owner and therefore had no Due Process Right for Judicial Review. Respondent IRS predicated their interpretation of the checkbox on §7436(b)(1). Respondent stated in USTC (App.178a #6)

> However, a pleading may be filed under section 7436 only by the person for whom services are performed. I.R.C.§7436(b).

The foci of the argument is misinterpretation of §7436(b)(1) (App.117a):

> A pleading may be filed under this section only by the person for whom the services are performed.

Respondents translated this subchapter to disentitlement of workers to Judicial Review. McBratnie asserts §7436(b)(1) "person" refers to "business" entities that subcontract out work, subcontracting many levels deep, and hence the pleading may only be filed by the ultimate "person" or payor of wages to the worker. Also consider: "joint employers" effect on this section as all joint employers would not have the right to file under §7436. The *Supremacy Clause of The Constitution* would render §7436 immediately null and void if it deprived "workers" of Due Process.

> The Appeals Court wrote:
>
> Indeed, we have found no case supporting the proposition that an IRS official has a legal duty to process an SS-8 form, and the relevant authority suggests otherwise.
>
> See 26 U.S.C. § 7436 ("the Tax Court may determine" whether an employment tax amount is correct) (emphasis added);
>
> see also *B G Painting, Inc. v. Commissioner*, 111 T.C.M. (CCH) 1282, 2016 WL 1375160, at*10 (T.C. 2016) (noting that "[t]he Form SS-8 process is an entirely voluntary compliance initiative" and is not part of the IRS's normal audit and examination procedures). App.7a.

The Appeals Court blended two different legal concepts: "discretionary versus mandatory" issues under FTCA 28 USC §2680(a), with a "voluntary compliance initiative".

Section §7436's purpose was to "*create a remedy*" allowing business owners to use the tax court without paying a tax demand first. All one needs to comprehend §7436, is to replace "person" with the word "business". Tax Court jurisdiction for workers is under §6211-§6216 *Deficiency Procedures*.

Respondents' checkbox interpretation is countered by another USTC Case precedent cited by Respondent DOJ in US District Court Reply brief, citing the case of *Jones v. Comm'r*, T.C. Memo. 2014-125 (June 23, 2014) App.143a-154a. *Jones* was a consolidated case of both *Mr. Jones* and *Mrs. Harrold-Jones*. *Mrs. Harrold-Jones* was the wife and contractor to *Mr. Jones'* Law Firm. The IRS asserted *Mrs. Harrold-Jones* was actually an employee. The USTC sided with *Mrs. Harrold-Jones* in that she was actually a contractor. *Mrs. Harrold-Jones* was allowed to litigate an IRS worker-classification determination that was reduced to paper, as it affected the amount of taxes demanded. McBratnie's worker-classification change was implemented by software heuristics, but not reduced to paper, but was the trigger for the increased taxation, as asserted by Respondent DOJ in the Appeals Court pleadings. Section §7436 did not preclude *Mrs. Harrold-Jones'* ability to litigate this changed status and tax consequences in US Tax Court, and no such precluding §7436 Motion or argument was made in her case. Directly stated in *Mrs. Harrold-Jones* case App.147a left bottom para:

> We have regularly allowed taxpayers in income tax deficiency proceedings to challenge a change in their worker classification when the change caused any portion of their deficiency. See, e.g., *Weber v. Commissioner* 103 T.C. 378 (1994), aff'd per curiam, 60 F.3d 1104 (4th Cir. 1995).

At the USTC level McBratnie's case and *Mrs. Harrold-Jones* received different treatment. Respondent IRS has demonstrated inconsistent litigation tactics between *Jones v. Comm'r* and McBratnie's case. The statement above was "*a change in their worker classification that caused any portion of their deficiency*" and not whether an SS-8 was processed properly.

The US Supreme Court needs to determine whether USTC jurisdiction is allowed only on processed SS-8s (*Mrs. Harrold-Jones*), and disallowed on unprocessed SS-8s (McBratnie) both with a changed worker-classification that affected the amount of taxes demanded. Additionally, whether §7436 disentitles workers to Judicial Due Process or has any authority over workers at all.

Two Misapplied Case Precedents on "Voluntary Compliance Initiative"

TIGTA articulated this "Voluntary Compliance Initiative" in their Report where in the absence of a full business audit, IRS Worker-Classification Determinations are only binding on the IRS. TIGTA stated App.63a 2nd full para:

> Because SS-8 Program determinations are not examinations under the law, determination letters are binding only on the IRS based on the facts presented. This means that the IRS allows the worker [not forces the worker] to file according to the determination made; however, the IRS cannot compel a business to change a worker's classification unless it conducts an examination. Results from a prior Treasury Inspector General for Tax Administration (TIGTA) review showed that approximately 19 percent of businesses that were asked to change the way they classify their employees **did not comply** with the determination.

Hence a "voluntary compliance initiative".

Staffmore, LLC v. Comr., T.C. Memo. 2013-87 referenced a business owner that classified Mental Health Counselors as contractors. *Staffmore, LLC* objected to the publishing by the IRS of their worker-classification determination in a public forum. For jurisdiction in USTC, *Staffmore, LLC* cited §7436. No audit of *Staffmore, LLC* had occurred. The Court in that case articulated that the Worker-Classification Determination that was to be published itself, was a voluntary compliance initiative since no audit of *Staffmore, LLC* had occurred. *Staffmore, LLC* was not required by law to reclassify their workers, and further that the USTC lacked jurisdiction to direct the IRS not to publish the determination.

B G Painting, Inc. v. Comm'r, T.C. Memo. 2016-62, was a case where the IRS issued a Worker-Classification Determination, but did not audit *B G Painting, Inc.* Since the business itself was not audited, the US Tax Court lacked jurisdiction under §7436. The Court in *B G Painting, Inc.* clarified that without an audit, that this letter did not have to be obeyed ("voluntary compliance initiative"). App.132a left column.

The US Supreme Court needs to interpret what a "voluntary compliance initiative" meant in the context of these two cited cases with the TIGTA report. Respondents conflated "voluntary compliance initiative" upon the business, with "discretionary versus mandatory duty" of the IRS under the FTCA.

VI. FTCA GROSS NEGLIGENCE CLAIM FOCUS

Respondent IRS, ignoring TIGTA's Report is an official capacity action. The TIGTA Report identified negligence. Awareness of negligence, followed by inaction, engenders Gross Negligence. Gross Negligence is ignoring and violating *The Constitution.*

It was a policy choice of Respondent IRS to streamline operations by assigning worker-classification based upon the tax form income is reported on. Thereafter, for misclassified workers, Respondent IRS created an internal Administrative Process for disputing the assigned worker-classification. Respondent asserts that processing of SS-8s is a discretionary "choice". If the "choice" is communicated, court jurisdiction can be obtained. If the "choice" to not process an SS-8 is made, reverting worker-classification to what the worker asserts should occur since any outcome from the SS-8 process is only binding on the worker if the business is audited. Neither occurred, but Respondent IRS did use a premature Notice of Deficiency to negotiate increased income taxes on the assigned worker-classification.

Respondents re-framed the FTCA claim, making it the action of an individual IRS employee, failing to process an SS-8, asserting it was a discretionary choice (above). stated:

> Here, McBratnie's FTCA claim is based on an allegation that the IRS negligently failed to process her SS-8 forms[1] for certain tax years. Accordingly, the district court properly dismissed McBratnie's due process, RICO, and FTCA claims against the IRS and the individual defendants in their official capacities for lack of jurisdiction App.5a.

Respondents also stated they do not know why the SS-8 was not processed. App.183a fn8. Discretionary choices are only for policy decisions, but discretionary choices otherwise, do not occur by accident.

McBratnie's focus has been the combined defaulted worker-classification assignment left in place with the preclusion of ever achieving the ability to receive a proper determination or Court Due Process. It is the combination of actions that make up the FTCA gross negligence claim and not the submission or processing of an SS-8 in isolation.

Upon consideration of the *Constitutionality* of 28 USC §2680(c) below, McBratnie believes her FTCA Gross Negligence Claim is fully made out.

Constitutionality **of 28 USC §2680(c) App.123a**

Respondents all reframed McBratnie's FTCA claim as being about the failure of a single IRS worker, failing to process McBratnie's SS-8. Failure to process a submitted document is absence of due care in an operationalized process which is 28 USC §2680(a). Respondents all assert that 28 USC §2680(c), the FTCA exception related to collection or assessment of taxes, precludes IRS accountability. Perhaps Respondents believe 28 USC §2680(c) applies to every action of the Respondent IRS. This FTCA exception was to protect individual IRS workers, and the IRS Agency as *Respondeat Superior*, should individual IRS workers violate *The Constitution* or Statutes whilst trying to accurately determine and collect correct taxation. All Respondent 28

USC §2680(c) cases cited, occurred one-on-one between an IRS worker and an individual taxpayer.

The harms inflicted on McBratnie were not targeted at McBratnie, and were not the independent action of an isolated worker. This was an intentional policy framework choice of the IRS Agency. The TIGTA Report discussed policy shortcomings. Under FTCA exceptions the IRS as an Agency itself was not exempted, only the one-on-one interactions between IRS workers and taxpayers.

Respondents' interpretation of 28 USC §2680(c), protects the IRS against every FTCA claim. If true, the IRS then becomes free to violate *The Constitution* by their policies, precluding Judicial review, or the required checks and balances between three co-equal branches of government. This interpretation implies, that 28 USC §2680(c) came into existence explicitly to override *Constitutional Protections,* by "policy choices" of Respondent IRS, which would render 28 USC §2680(c) immediately null and void upon its creation (*Gibbons v. Ogden*, 22 U.S. 1, 211-212 (1824), "*The nullity of any act inconsistent with The Constitution* ...(App.133a)*;* and Article VI: clause 2: the Supremacy Clause of *The Constitution* App.86a).

The US Supreme Court will need to identify who and what role 28 USC §2680(c) was intended to protect as regards the FTCA. Specifically, if 28 USC §2680(c) is made 'null and void', in the manner asserted by Respondents applying it to the internal policy of assigning taxation and precluding access to Due Process. Otherwise 28 USC §2680(c) was misinterpreted and misapplied in McBratnie's case resulting in dismissal in error of the FTCA Gross Negligence claim.

Additional on the FTCA Gross Negligence Claim

The SS-8 process is a legal dispute the IRS adjudicates. Assignment of Worker-Classification based on the form income is reported on, results in favoritism bias to the business. Leaving such in place demonstrates partiality/bias by Respondent IRS against the worker. Taxation has now become arbitrary, assigned or negotiated by Respondent IRS and not assessed. For McBratnie's TY:2016, excess "self-employment" taxes needing refund were $5,138. Respondent IRS negotiated increased "income taxes" of $2,402 after removing the Worker-Classification portion of the case from Judicial Review by Fraud on the Court. Complaint ¶95:

> 95. Defendant IRS Counsel, once they got Defendant Judge Foley to remove the unprocessed SS-8 from the court case, turned around and tried to leverage Defendant IRS Agency's failure to process the SS-8 into a win by extorting higher taxes by relocation of Plaintiff's Business Travel Expenses from Schedule C as filed to Schedule A in their negotiated settlement since they now had the upper hand.

Respondent IRS admitted the basis of the negotiated income taxes was predicated on that changed worker-classification. App.188a-189a. Proofs Docketed. So it appears, removal of Worker-Classification issues by a Motion to Dismiss, still allows the Respondent IRS Attorney to negotiate the worker-classification change on the income tax side, and only precludes McBratnie's needs for a refund of self-employment taxes.

Three policy actions are necessary to counter assigned taxation and prevent Gross Negligence. If the IRS, upon receipt of a filed SS-8 reverted the worker-classification software assignment until such is processed; and if the software precluded the issuing of Notices of Deficiency with unprocessed Administrative Remedies; and if automatic refunding occurred when an Administrative Remedy remained unprocessed past the statute of limitations, then

FTCA Gross Negligence would not occur. The SS-8 itself would not matter whether it was processed or not.

If premature Notices of Deficiency resulted in IRS forfeiture on non-exhausted Administrative Remedies, then the full tax debt picture could be addressed. To avoid this consequence, Respondent IRS would be required to be careful to avoid premature Notices of Deficiency. Presently, premature Notices of Deficiency secure arbitrary taxation.

Assignment of taxation is the initiating factor that requires resolve to avoid Gross Negligence. There is no FTCA Gross Negligence claim if assignment of taxation does not first occur.

McBratnie was secondarily harmed in her professional career the moment she was forced to put her name onto the US Tax Court Docket, a blacklist for healthcare providers caused by the unjust consequences of Respondent IRS's Federal Payment Levy Program below. The Appeals Court asserted a different basis:

> McBratnie's complaint focused on disputes between her and the IRS regarding her classification as an employee or independent contractor for income tax purposes.She alleged that these disputes and the IRS's mistreatment of her during administrative proceedings and tax-court litigation destroyed her career as a nurse practitioner. App.4a.

There were no Administrative Proceedings as the SS-8 was originally non-existent, then unprocessed. Search term "blacklist or black list" in the Complaint identifies how McBratnie asserts her career was destroyed. Foci: Complaint ¶604-618. McBratnie was harmed when her name appeared on the USTC Docket, which was triggered by the premature 2015 Notice of Deficiency. App.182a.

VII. PRELIMINARY INJUNCTION AND THE ANTI-INJUNCTION ACT

***In Pari Materia:* Competing Statutes Were Not Addressed**

26 USC §7421 Anti-Injunction Act App.112a versus all of the below

26 USC § 6330(e)(1) Collections Appeal Hearing App.94a
itself in conflict with
26 USC §6402(a) Authority to Make Credits or Refunds App.98a

26 USC §7433(a) Unauthorized collections App.114a in conjunction with
26 USC §7214(a)(7) Unlawful acts of revenue officers or agents:
fabrication of tax returns App.110a

Collections on an "unlawful" fabricated tax return, "Adjusted into Existence" with no supporting tax form data, is forbidden by statute: §7214(a)(7), as a §7433 unauthorized collection that violates another statute within the IRC.

> §7214(a): Unlawful Acts of Revenue Officers or Agents:
> Any officer or employee of the United States acting in connection with any revenue law of the United States --
> (7) who makes or signs any fraudulent entry in any book or makes or signs any fraudulent certificate, return, or statement or

The 2019 IRS tax transcript was "adjusted" into existence, something the taxpayer cannot do, as all tax form data fields are zeroes (App.173a-177a). Absent receiving proper accounting, only a restoration of the 2019 payment to the actual tax debt for 2019 was sought. Where is a signed 2019 tax return to compare this transcript with? Fabricated returns will not have signed source documents.

The TY:2017 Collections Appeals Hearing by Statute 26 USC §6330(e)(1), is an explicit exception to the Anti-Injunction Act [AIA] in section 26 USC §7421(a)(1):

> "Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6232(c), **6330(e)(1)**, 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

26 USC §6330(e)(1) is incorporated into 26 USC §6320(c) in pertinent part:

26 USC §6320(c):

> (c) Conduct of hearing; review; suspensions
> For purposes of this section, **subsections** (c), (d) (other than paragraph (3)(B) thereof), **(e)**, and (g) of **section 6330 shall apply**.

26 USC §6330(e)(1) states:

> Notwithstanding the provisions of section 7421(a), the beginning of a levy or proceeding during the time the suspension under this paragraph is in force **may be enjoined by a proceeding in the proper court [in this instant case US District Court]**, including the Tax Court.

Respondent DOJ has admitted receipt of Form 9423 seeking the Collections Appeal Hearing for 2017, and has admitted it was never had. So the 2017 tax debt is barred from collections by §6330(e)(1). Respondent DOJ has asserted Respondent IRS can unilaterally suspend this hearing request in order to collect via refund. No statute provides for such.

For TY:2015, USTC jurisdiction was dismissed for TY:2017 due to §6330(d)(1) granting Tax Court jurisdiction only after the hearing has been held. App.94a. Another unprocessed Administrative Remedy, circumvented Judicial intervention, due to Respondent IRS withholding a Collections Appeal Hearing. Complaint ¶501 under section III regarding unauthorized collections, summates this assertion:

> 501. Defendant IRS Agency proceeded on collections of tax year 2017 having failed to provide the statutory required hearing per 26 U.S.C. § 6320 - Notice and opportunity for hearing upon filing of notice of lien; for which the Defendant IRS Agency failed to

> follow proper process collecting on a tax lien, precluding Plaintiff from ever having any due process hearing before the taking of property.

The Appeals Court Wrote:

> When the Anti-Injunction Act applies, the district court is deprived of its jurisdiction and the suit must be dismissed. *Shifman v. IRS*, 103 F.3d 130 (6th Cir. 1996) (per curiam) (unpublished table decision). Therefore, to the extent that McBratnie sought a court order directing the IRS "to refund the proceeds improperly collected" against her based on "the difference caused by the unprocessed SS-8" forms or "a preliminary injunction barring further collections actions regarding tax years 2017 . . . and 2019," the Anti- Injunction Act bars the action. See *RYO Mach., LLC v. U.S. Dep't of Treasury*, 696 F.3d 467, 471 (6th Cir. 2012) (noting that the Anti-Injunction Act "has been interpreted broadly to encompass almost all premature interference with the assessment or collection of any federal tax"); ... App.8a-9a.

The Proposed Order (App.54a-55a) contained in the Preliminary Injunction:

- Requested the IRS to stop tampering with ESI; sought no refund; the SS-8 was only indirectly involved with TY:2017; sought to return the 2019 tax payment to the TY:2019 debt which the IRS was in possession of; and to hold at bay, the $749.54 debt of 2017 subject to 26 USC §6330(e)(1). Tax years 2015, 2016 were closed, 2018 was not involved, leaving just tax years 2017 and 2019 open seeking resolve.

The issue is: *Did the Anti-Injunction Act apply*? Per the above, the 2017 and 2019 debts are unauthorized collections violation of §7433. Therefore the AIA could not have applied to the Preliminary Injunction. The Appeals Court dismissed the Preliminary Injunction in error for TY:2017, 2019.

2017. McBratnie carried forward from 2013 overpaid taxes of $8,000 thereabouts as an estimated tax payment across TY:2014-2017. The 2017 tax lien levy represented a discrepancy of the carried forward amount. Identifying which year the discrepancy was triggered from would assist in its resolve. Respondent IRS Attorney Jenny Lingl USTC TY:2015 case, admitted in a status conference, that the tax transcript did not match the tax return, stating the Examiner moved

business expenses from Schedule C to Schedule A. This would have increased the amount of taxes extracted from the carried forward refund and would only manifest as a math error in the year it ran out: 2017. When the 2015 Notice of Deficiency was conceded, the tax transcript would not have been corrected to its original values. Discovery to compare the TY:2015 transcript and tax return is required. Discovery has not been had, and the Collections Appeal Hearing was never held. TY:2015 Judge Urda's notes would be useful discovery.

2019. Reassignment of the 2019 tax payment to TY:2017 was achieved, by data tampering (App.171a-177a). McBratnie's Proposed Order for the Preliminary Injunction requested the IRS to stop data tampering. When they reversed the 2019 payment, they may have covered up who (*John Doe*) originally tampered with the payments ESI. Circumstantial evidence by these IRS transcripts supports reassignment versus refund (hearsay), negating that transference was authorized by statute §6402(a).

Sections §6402(a) *Authority to make credits or refunds* and 6330(e)(1) are in conflict. If the Collections Appeals Hearing had not yet been held, then the liability is not yet established. A proper refund would also violate both §6330(e)(1) and §7433 unauthorized collections. A software "awaiting a hearing flag" barrier likely precluded collections of any type. Upon reversal of the payment back to TY:2019, the IRS sent a Notice of Intent to Lien Levy for 2017 again. The "awaiting a hearing" flag was not restored. Circumstantial evidence from the IRS transcripts support this.

VIII. 26 USC §7433 UNAUTHORIZED COLLECTIONS ACTIONS

The Appeals Court predicate for dismissal of 26 USC §7433 Unauthorized IRS Collections Actions claims:

> Because McBratnie's complaint failed to identify any provision under Title 26 or regulations promulgated thereunder that the IRS allegedly violated, she cannot prevail on her § 7433 claim. App.8a.

McBratnie's Complaint under Section III titled for §7433, ¶422-597, specifically Complaint ¶470, ¶477 and ¶501 counters:

> 470. FTCA Collection violation 26 U.S.C. § 7433 in conjunction with **26 U.S.C. § 7214** Unlawful acts of revenue officers or agents (a)(7) fabrication of tax returns) occurred and is articulated in Plaintiff's Motion for Preliminary and Permanent Injunction in reference to tax year 2019.
>
> 477. *Insert Plaintiff's Motion in Support of Preliminary and Permanent Injunction here.*
>
> 501. Defendant IRS Agency proceeded on collections of tax year 2017 having failed to provide the statutory required hearing per **26 U.S.C. § 6320** - Notice and opportunity for hearing upon filing of notice of lien; for which the Defendant IRS Agency failed to follow proper process collecting on a tax lien, precluding Plaintiff from ever having any due process hearing before the taking of property.

Respondent DOJ acknowledged, the incorporation of the "Preliminary Injunction by reference" in the Complaint, in their Motion to Dismiss (ECF No. 31, PageID.1166):

> Her motion for preliminary injunction (ECF No. 14, incorporated in Complaint by reference, see ¶ 477) … .

The Appeals Court predicated the dismissal of §7433, based on the statutes of the IRC that were violated resulting in unauthorized collections actions, were unarticulated. This is false. This claim was dismissed in error.

Three intentional counts of §7433 unauthorized collections by statute occurred:

- Violating 26 USC §6320 by reassigning the 2019 tax payment to TY:2017 (App.171a).
- Violating 26 USC §6320 a second time during these proceedings by threatening collection by seizure of bank accounts (US District Court Docket entry 52)
- Violating 26 USC §7214(a)(7) by demanding payment on a fabricated tax return (App.173a-177a).

Three other unauthorized collections violated *The Constitution,* secondary to an unprocessed SS-8. *The Constitution* cannot be restricted by codification inside a statute, begging the issue if they would still be considered §7433 unauthorized collections claims.

Respondent DOJ asserts that the IRS has to actually collect for an issue to be jurisdictionally under §7433, citing by example McBratnie's TY:2015 case, asserting the IRS collected nothing, due to concession. The IRS did not collect additional "income taxes", but the assigned worker-classification secured excess "self-employment" taxes already collected. Respondent IRS circumvented access to a refund. The US Supreme Court needs to articulate whether hidden "self-employment taxes unrefunded" are indeed an unauthorized collection by statute under the entire set of circumstances where Due Process is precluded by Respondent IRS.

IX. FEDERAL PAYMENT LEVY PROGRAM *CONSTITUTIONALITY*

The FTCA harms to McBratnie are compounded by Respondent IRS Federal Payment Levy Program [FPLP] turning the Judicial USTC Docket system into a hiring blacklist, challenging FPLP Constitutionality, as it steals the intangible value of the careers of persons subject to the FPLP when their name is forced onto this publicly viewable docket list.

The FPLP App.191a last para., steals lump-sum Medicare compensation towards a medical practice that embeds the overhead of the practice, including the wages of ancillary personnel, into a lump sum payment tendered in the name of the provider. Other individuals are harmed when Respondent IRS seizes 100% of Medicare proceeds due in the provider's name. Respondent IRS is securing one individual's outstanding tax debt (healthcare provider) from other persons embedded compensation in the lump sum Medicare payment. These other individuals have no due process rights. The US Supreme Court needs to articulate on the

Constitutionality of attaching one person's tax debt to a lump-sum arrangement to pay for Medicare Insureds treatments, adverse effect on other non-involved parties.

X. TRUE CLAIMS MADE

Three Official Capacity Claims Made

1. **FTCA Gross Negligence Claim**. Party: Respondent IRS Agency. McBratnie's FTCA claim is discoursed herein and excerpted from the Complaint App.181a ¶5 and ¶6. McBratnie's primary damages are the unrefunded excess self-employment taxes; the secondary damages were caused by the Federal Payment Levy Program hiring "docket blacklist". App.182a ¶738. FTCA Exceptions do not apply in this case. Action sought: Damages: $3.5 million.
2. **Fraud on the USTC**. Parties: Respondent IRS Attorneys of the 2016 USTC Motion, who have not been served; and Respondent Chief Justice Foley of USTC who has been served. Action sought against Respondent Judge Foley's Official Capacity: vitiation of the USTC proceedings and removal from office. Action Sought Against: Respondent IRS Attorneys: disbarment should be a consideration. Relief articulated in the Complaint.
3. **26 USC §7433 Unauthorized Collections Actions**. Party: Respondent IRS Agency. Claim articulated in section *VIII*. Three instances of intentional unauthorized collection by statute have occurred. The unprocessed SS-8-Due Process violations, unauthorized collections, requires a Supreme Court decision. Action Sought: Damages submitted were at $3.5 million ($1 million in damages per claim up to actual damages sustained).

Two Individual Capacity Claims Were Made

In accord with *Nurse v. United States*, 226 F.3d 996, 1004 n.2 (9th Cir. 2000), "*... the federal government's waiver or non-waiver of sovereign immunity under the FTCA is irrelevant to appellant's individual capacity claims*". App.158a. The individual capacity defendants are unserved save Respondent Judge Foley. These claims need to be reversed and remanded.

1. **Civil RICO claim for damages.** Party: the "individual capacity" of IRS SB/SE Commissioner Mary Beth Murphy. McBratnie's jurisdictional basis 28 USC §2679 (Complaint ¶727 and ¶728). Complaint ¶729 and ¶735:

   > 729. But the pervasiveness which ultimately benefits the Defendant IRS Agency cannot be ignored. Therefore, an assertion against the Defendant IRS Mary Beth Murphy, as the Syndicate Leader, in her individual capacity is made ...
   >
   > 735. Plaintiff has standing: 18 U.S.C. § 1964 - Civil remedies (c) under RICO provides: Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains

   The Court dismissed RICO claims against "official capacity" defendants only.

2. ***Constitutional* Damages** for Fraud on the USTC / Judicial or Quasi-Judicial Immunity:.

   Parties: Judge Foley and IRS Counsel for Fraud on the Court, deprivation of a fair trial in a fair tribunal, a 5th Amendment Right.

   The Appeals Court stated:

   > To state a claim under Bivens, McBratnie must allege that she was "deprived of rights secured by the Constitution or laws of the United States" and that "the defendants who allegedly deprived [her] of those rights acted under color of federal law." App.9a.

   The Motion to Dismiss the worker-classification determination from USTC proceedings was predicated on the SS-8 document not being findable, with subsequent admission it

existed. Respondent IRS asserted they did not take any direct action in changing McBratnie's, as filed, Independent Contractor status to Employee. The direct action was by IRS Software Heuristics. Respondent IRS asserted that §7436 specifically codifies that *We the People* "workers" are disentitled to Judicial Due Process regarding the taking of property. There remains no basis for Respondent Judge Foley granting the Motion to Dismiss Worker-Classification. The damages side requires ascertainment if these Respondents knowingly engaged in Fraud on the Court. Proof is in the USTC pleadings database for all cases. If any of these Respondents ever litigated or presided over a case like [*Mrs. Harrold-*] *Jones v. Comm'r, supra.*, then Fraud on the Court was knowingly accomplished.

The Appeals Court stated as their basis to dismiss the Fraud on the USTC:

> McBratnie's complaint did not allege that Judge Foley or the IRS attorneys acted in a non-judicial capacity or in the complete absence of all jurisdiction. Accordingly, Judge Foley and the IRS attorneys are immune from civil suit for money damages, and the district court properly dismissed McBratnie's claims against those defendants pursuant to Rule 12(b)(6). App.6a.

Select allegations from the Complaint counter this:

> ¶54. Defendant Judge Foley is accused herein of Actual Demonstrated Bias culminating in denial of Due Process, violating his Oath of Office, and subsequent loss of jurisdiction over US Tax Court Case: 18713-19.
>
> ¶133. The ultimate Fraud on the Court was a jurisdictional absence, judicial order based on no evidence, a fraud on the Judicial Machinery which is the Court Process itself as committed by Defendant Judge Foley in his individual capacity, making the US Tax Court a "Kangaroo Court".
>
> ¶135. If Defendant Judge Foley granted the motion not on the merits and based on no evidence, then Defendant IRS Counsel succeeded in convincing Defendant Judge Foley: that Defendant IRS Collective did not have to follow Federal Rules of Evidence and was privileged above Plaintiff ('actual bias / prejudice demonstrated'); that Plaintiff / citizen was not entitled to her 5th Amendment Right to Due Process; that Plaintiff was not entitled to view or challenge this false evidence; that Plaintiff was Constitutionally disequal before the law.

> ¶136. Therefore Defendant Judge Foley himself violated 42 U.S.C. § 1983 Civil Action for Deprivation of Rights under color of law in his own person, violating his Oath of Office to uphold the Constitution by privileging one litigant over another, resulting in loss of jurisdiction, as caused by inherent bias of his mindset before granting this Motion. The bias pre-existed in Defendant Judge Foley's mind before he 'put pen to paper'.
>
> ¶172. Defendant Judge Foley's order granted Defendant IRS Collective's Motion to Dismiss on anonymous personal testimony over real evidence. This is Actual Demonstrated Bias. A "Kangaroo Court".

The Appeals Court dismissed individual capacity actions for damages (28 USC §2679), without addressing the knowing and intentional action of: Fraud on the Court. If such were intentional and knowingly engaged, then these federal workers are also without immunity due to transgressing *The Constitution*. The Chief Justice of the USTC should be an expert on tax law. So should IRS attorneys. Proving intentionality is straightforward.

Proving intentional Fraud on the Court would remove immunity arguments. Although a *Bivens Remedy* (Federal Employees), or 42 USC §1983 Deprivation of Rights under Color of Law ("*Kangaroo Court*" Officers), and other actions could apply to Respondents IRS Attorneys and Judge Foley, these circumstances are different. *Bivens Remedies* have been applied to other Federal workers. But in this instance there are dual roles of being a Federal Worker, and also Officers of the Court. Damages for *Constitutional Right* deprivation of a fair trial in a fair tribunal need awarding and Supreme Court discernment for a new *Bivens* Remedy might be appropriate for Judicial Officers.

The Appeals Court articulated the standard for lack of individual capacity immunity, by their own supporting logic:

> Qualified immunity shields government officials from "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). App.6a.

The question is: *Is Fraud on the Court "conduct that violates clearly established ... Constitutional Rights" that Respondents Judge Foley and IRS Counsel, all of them attorneys, would be aware of?*

> "[F]ederal officials do not possess discretion to violate constitutional rights . . . ." (quoting U.S. Fid. & Guar. Co. v. United States, 837 F.2d 116, 120 (3d Cir. 1988)). App.165a.
>
> [*See Limone v. United States*, supra, *Raz v. United States*, supra, *Nurse v. United States*, supra., and *Medina v. United States*, supra,]

XI. INDIVIDUAL CAPACITY DEFENDANTS NOT SERVED

Individual capacity Defendants have not been served, excepting Respondent Judge Foley. Respondent IRS refused to provide service addresses of employees. Respondent IRS Agency and DOJ were Placed On Notice: Complaint p.26:

> The DOJ will have to ascertain whether Defendant IRS Agency personnel were operating in their official or individual capacities, related to the RICO assertions, Statutory violations and Constitutional violations. **For service to be made upon Defendant IRS Agency persons in their individual capacity as needed, Defendant IRS Agency will need to provide those process of service addresses.**

Had either Respondent produced said addresses, then if McBratnie failed to make service, dismissal would be appropriate. Respondents were not forthcoming with service addresses at any time up to and including the submission of this *Writ for Certiorari.*

Respondent DOJ US District Court attorney Edward Murphy, filed no Notice of Appearance. The first Respondent document filed was on the 93rd day from case filing. Ninety days are allowed to make service.

The actions of Respondents to ensure Individual Capacity Defendant employees are not held accountable for statutory and *Constitutional* violations, and Fraud on the Court, are being accomplished by withholding service addresses to preclude timely service. Other allegations of insufficient service or process of service will require looking at the proof of services filed.

REASONS FOR GRANTING THE PETITION

I Federal Officials Do Not Possess Discretion To Violate Constitutional Rights

The Constitution needs to exert itself to foreclose loopholes created by abusing the Administrative Procedures Act, that have an end result of circumventing Judicial Due Process. Improper analysis occurred on whether Governmental Administrative Remedy processing was a discretionary choice, or a mandatory duty owed. *Indian Towing* is the correct standard for distinguishing between discretionary policy choices, and their day-to-day operationalized mandatory duties owed.

Without correction of the improper analysis that occurred regarding FTCA discretionary versus mandatory obligations, Agencies will implement their decisions as *de facto* law. The strategy described herein, could exist in other IRS Agency Administrative Remedies, and will likely spread inside the IRS and outside in other Agencies.

This tactic is to assign a decision, provide an Administrative Remedy allowing the decision to be challenged, and thereafter ignore the Administrative Remedy. Unprocessed Administrative Remedies precludes premature Court interference. Then all that is necessary to preclude interference in an Agency decision, is to allow the Statute of Limitations to expire.

Deprivation of Constitutional Rights is a severe injury.

Assigning a decision, and precluding judicial review, eliminates the other two branches of government, making executive branch Agencies decisions a law unto themselves. This subverts the checks and balances of the three branches of government, as well as *The Constitution*. For this reason alone, the *writ of certiorari* should be granted

II Discretionary v Mandatory Duties of an Agency Policy Action

The Supreme Court in *Indian Towing, supra*, a precedential case on the FTCA, was usurped by a badly made argument of the Appeals Court asserting statutes from the IRC as the standard to determine whether an Administrative Remedy is a mandatory duty, or a discretionary process under the FTCA. Ignoring the bad argument made, it would be appropriate to put forth a standard for Agency Administrative Remedies that closes the legal loophole created, articulating when Administrative Remedies are operationally mandatory duties upon the Agency so as to avoid a 5th Amendment Violation, allowing that the Agency can concede the issue that required the filing of the Administrative Remedy. Additionally, if that Administrative Remedy remains unprocessed at the end of the Statute of Limitations, automatic presumption in favor of the citizen should be the default, as the Agency did not feel strongly enough about their choice to properly review their original decision. *Indian Towing* has already differentiated discretionary v mandatory (operational) actions, it has just not yet been applied to Administrative Remedies.

III *in pari materia*: Anti-Injunction Act, Unlawful Acts of Revenue Officers or Agents And Unauthorized Collections

It should be axiomatic that fabricated tax returns by IRS employees should not create a demand upon the citizens to pay such first before judicial review can be had. However, this was not codified in the Anti-Injunction Acts statute. The Appeals Court needs a specific decision that interprets these statutes *in pari materia.*

Requiring a fabricated tax return or known demands that are unauthorized collections to be paid first before judicial review can be had, can financially cripple any citizen, such that Due Process cannot be achieved. The scale of harms that could ensue, if fabricated tax returns have to be paid first before a Court will review such, is unfathomable.

CONCLUSION

The petition for *writ of certiorari* should be granted and the decision of the 6th Circuit Court of Appeals and US District Court summarily reversed. Where appropriate, The Supreme Court is requested to decide what can be decided, and remand the case for settlement, processing, or service.

Respectfully submitted.

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