UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

IN THE MATTER OF:	)	
	)	
JAMES W. TINDALL,	)	
	)	ALJ Case No. 2021-TAX-00005
Complainant,	)	
	)	
v.	)	
	)	
U.S. DEPARTMENT OF THE TREASURY,	)	
	)	
	)	
Respondent.	)	

BRIEF FOR THE SOLICITOR OF LABOR AS AMICUS CURIAE

SEEMA NANDA
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

SARAH K. MARCUS
Deputy Associate Solicitor

MEGAN E. GUENTHER
Counsel for Whistleblower Programs

SARAH J. STARRETT
Attorney
Office of the Solicitor
U.S. Department of Labor
Suite N-2716
200 Constitution Ave. NW.
Washington, DC 20210
(202) 693-5566
Starrett.sarah@dol.gov

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The Solicitor of Labor, United States Department of Labor ("DOL" or "Department") hereby responds to the Order to Show Cause inviting the Solicitor to file an amicus brief regarding whether the above referenced complaint under the anti-retaliation provision of the Taxpayer First Act of 2019, 26 U.S.C. 7623(d) ("TFA"), is barred by sovereign immunity. Although the TFA anti-retaliation provision prohibits retaliation by "employers," the statutory text of its remedies provision authorizes complaints only against "persons," and the relevant definition does not include the United States or its departments or agencies as "persons." The statutory text contains no indication that Congress intended to permit such complaints. Therefore, consistent with Administrative Review Board ("ARB") and court decisions under similarly-structured whistleblower provisions, this tribunal should hold that the TFA does not expressly and unequivocally authorize employees to file retaliation complaints against the United States or a federal government agency such as the Department of the Treasury ("Treasury"). Because the statute does not waive Treasury's sovereign immunity against such complaints, this complaint should be dismissed for lack of subject matter jurisdiction.

I. STATEMENT OF THE ISSUE

Whether a complaint against an agency of the United States government under the anti-retaliation provision of TFA, 26 U.S.C. 7623(d), is barred by sovereign immunity.

II. STATEMENT OF THE CASE

This case arises under the anti-retaliation provision of the TFA, which protects employees from retaliation for providing information, assisting in an investigation, or participating in an action relating to an alleged underpayment of tax or any violation of the internal revenue laws. 26 U.S.C. 7623(d). The provision has two sections relevant to this case: (1) a prohibition on retaliation, which prohibits any "employer, … officer, employee, contractor, subcontractor, or agent of such employer…" from retaliating against an "employee" for engaging in lawful activity protected by the TFA, and (2) an enforcement provision which provides that "a person who alleges discharge or other reprisal *by any person* in violation of paragraph (1) may seek relief ..." by filing a complaint with the Secretary of Labor and following other procedural requirements. 26 U.S.C. 7623(d)(1), (2) (emphasis added). An employee who believes that they have been retaliated against in violation of TFA may file a complaint alleging such retaliation with the Occupational Safety and Health Administration ("OSHA"), which issues findings on the complaint, and any party may object to OSHA's determination and request a hearing before a DOL administrative law judge ("ALJ").[1] *See* 26 U.S.C. 7623(d)(2)(B)(i) (incorporating procedures set forth in the Wendell

[1] The Secretary of Labor has delegated authority and assigned responsibility to OSHA to receive and investigate complaints under the whistleblower laws. U.S. Dep't of Lab., Sec'y Order No. 8-2020 (May 15, 2020), 85 Fed. Reg. 58,393, 2020 WL 5578580 (Sept. 18, 2020); *see also* 29 C.F.R. Part 1979 (procedures for handling TFA whistleblower complaints until new regulations are promulgated).

H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. 42121(b); 29 C.F.R. 1979. An employee who prevails on a TFA retaliation claim is entitled to all relief necessary to make the employee whole, including reinstatement, backpay, damages, and other relief. 26 U.S.C. 7623(d)(3).

James W. ("Whit") Tindall ("Tindall") filed a TFA complaint with OSHA on or about June 4, 2021, alleging that Treasury, his employer, retaliated against him. Specifically, he alleged that Treasury officials threatened to investigate him after he filed a complaint with the Taxpayer Advocate Service and requested its assistance with obtaining payment of a whistleblower award which he was officially awarded in 2019 under 26 U.S.C. 7623(a), but had not received.[2] OSHA dismissed Tindall's retaliation complaint, concluding there was no reasonable cause to believe a violation of the TFA anti-retaliation provision occurred because Respondent is "a federal agency and is NOT a person" covered by the statute. OSHA

[2] The IRS administers two "whistleblower award" programs separate from the anti-retaliation protections in 26 U.S.C. 7623(d). The award programs provide payments to individuals who provide information to the IRS regarding underpayment of tax or tax law violations. The award program under 26 U.S.C. 7623(a) provides for awards of up to 15% or $10 million to individuals who report underpayment of tax to be paid from any underpayment collected. The award program under 26 U.S.C. 7623(b) provides for payment of no less than 15 percent but not more than 30 percent of collected proceeds in cases in which the IRS determines that the information submitted substantially contributed to the IRS's detection and recovery of unpaid tax. *See* https://www.irs.gov/compliance/what-happens-to-a-claim-for-an-informant-award-whistleblower. Tindall applied for awards under both programs, and was granted an award under section 7623(a) but not under sec. 7623(b). He appealed the denial of the 7623(b) award and the events at issue in his complaint to DOL appear to have arisen in connection with Tindall's disagreement with Treasury's allegedly improper failure to pay his sec. 7623(a) award pending the outcome of that appeal.

Findings (emphasis in original).[3] Tindall filed timely objections and requested a de novo hearing.

The ALJ issued an Order to Show Cause, directing both parties to file briefs regarding why the petition should not be dismissed for lack of subject matter jurisdiction, on the basis of sovereign immunity. *See* ALJ Notice of Docketing and Order to Show Cause Why Matter Should Not be Dismissed for Lack of Subject Matter Jurisdiction, dated Sept. 8, 2021. The ALJ also invited the Solicitor to file an amicus brief within 60 days. Tindall filed a Response asserting that Federal sovereign immunity has been waived for TFA whistleblower complaints, while Treasury disagreed, urging the ALJ to dismiss the claim on the basis that the TFA contains no such waiver. *See* Complainant's Response to Order to Show Cause, filed Sept. 17, 2021 ("Tindall Resp."); Respondent's Response to Order to Show Cause, filed Oct. 14, 2021 ("Treas. Resp.").

III. ARGUMENT:

THE TFA ANTI-RETALIATION PROVISION DOES NOT WAIVE FEDERAL SOVEREIGN IMMUNITY

This case should be dismissed for lack of subject matter jurisdiction because Treasury's sovereign immunity is not waived under TFA. In order to proceed against a federal agency, a complainant must show that Congress has expressly and unequivocally waived the Federal government's sovereign immunity. Tindall has not and cannot make the required showing.

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[3] OSHA's findings in this matter erroneously cited 29 U.S.C. 652(4), which contains the Occupational Safety and Health Act's definition of "person." As discussed below, the correct citation for the applicable definition of "person" is 26 U.S.C. 7701(a)(1).

A. A Waiver of Sovereign Immunity Requires an Unequivocal Expression of Congressional Intent in the Enforcement Provision of a Whistleblower Statute.

Before an individual can sue a federal agency, there must be a valid and unequivocal waiver of the United States' sovereign immunity. "The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *See Block v. North Dakota*, 461 U.S. 273, 287 (1983). The waiver must be clearly established by the statute itself, and statutes that waive sovereign immunity are strictly construed; any doubt or ambiguity is resolved in favor of immunity. S*ee Lane v. Pena*, 518 U.S. 187, 192 (1996); *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992). "[T]he Supreme Court has made crystal clear "that a waiver of sovereign immunity must be 'unequivocally expressed' in statutory text." *Peck v. United States Department of Labor, Administrative Review Board*, 996 F. 3d 224, 229 (4th Cir. 2021) ("*Peck II"*) (quoting *FAA v. Cooper*, 566 U.S. 284, 290 (2012)), *aff'g Peck v. Nuclear Regul. Comm'n*, ARB No. 2017-0062, 2019 WL 7285749 (ARB Dec. 19, 2019) (*en banc*) ("*Peck I"*) (holding that sovereign immunity barred a whistleblower complaint under the Energy Reorganization Act ("ERA"), 42 U.S.C. 5851, against a U.S. government agency). *See also Nordic Vill.*, 503 U.S. at 37 ("the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text.") (internal citations omitted).

The principles of sovereign immunity apply equally to federal agencies, officers, and employees acting in their official capacity. *See Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471 (1994); *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). The doctrine of sovereign immunity is jurisdictional in nature, and "the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). This rule also applies to administrative adjudications, including whistleblower proceedings before DOL's ALJs and ARB. *Peck I*, 2019 WL 7285749, at *4, n.18, citing *Fed. Mar. Comm'n v. S.C. State Ports*

Auth., 535 U.S. 743, 761 (2002); *Mull v. Salisbury Veterans Admin. Med. Center*, ARB No. 09-107, ALJ No. 2008-ERA-008, 2011 WL 3882479 (ARB Aug. 31, 2011), at *4. Such waivers are forum-specific: a statute waiving sovereign immunity for court actions does not necessarily apply to administrative agency tribunals like the ARB and OALJ. *Id.*; *see also United States v. Puerto Rico*, 287 F.3d 212, 214 (1st Cir. 2002) (statute waiving federal sovereign immunity for court actions did not apply to state administrative proceedings).

In whistleblower proceedings before a DOL ALJ or the ARB, the complainant must establish that their complaint falls within an applicable waiver. Sovereign immunity is an immunity "from suit." *Dep't of Army v. Blue Fox, Inc*., 525 U.S. 255, 260 (1999) (citing *Meyer,* 510 U.S. at 475). Thus, both the courts and the ARB have held that the focus of any sovereign immunity inquiry must be on the whistleblower statute's enforcement provision, not its substantive protections against retaliation, and that the adjudicator should therefore examine whether the statutory text relating to liability contains or points to an express waiver. *Peck I,* 2019 WL 7285749, at *4 n.19 (citing *Balk v. U.S. Nuclear Regul. Comm'n*, ARB No. 2002-0041 (ARB Sept. 29, 2003), slip op. at 4, and *Pastor v. Dep't of Veterans Affairs*, ARB No. 99-071, ALJ No. 99-ERA-11, slip op. at 6 (ARB May 30, 2003; *Peck II*, 996 F.3d at 229.

Even if a statute's substantive provisions apply to federal government agencies, both the ARB and courts have concluded that sovereign immunity is not waived unless the statute's enforcement provision clearly and unambiguously authorizes a litigant to bring an action against the Federal government. Thus, for instance, in *Peck*, the Fourth Circuit agreed with the ARB that even though the Nuclear Regulatory Commission ("NRC") was expressly included as an "employer" subject to the prohibition on retaliation in the ERA, "it is clear that

the statute does not contemplate the government as a possible respondent in such an action because the statute uses 'person' rather than 'employer' in the pertinent subsections," which are the provisions allowing for remedies, judicial review and enforcement. *Peck II*, 996 F.3d at 230; *Peck I*, slip op. at *5 (construing 42 U.S.C. 5851(b), (c), & (d)). Noting the strict standard for finding a waiver of sovereign immunity, as described above, both the Board and the court held that Congress intentionally used different words in the two provisions, and that the word "person" is generally presumed to exclude federal agencies. *See id*. at *5 (citing *Lane*, 518 U.S. at 192, 200; *United States v. Williams*, 514 U.S. 527, 531 (1995); *Nordic Vill.*, 503 U.S. at 37; and quoting *Return Mail, Inc. v. U.S. Postal Serv*., 139 S. Ct. 1853, 1861-62 (2019)). As a result, the Board and the court held that the ERA "does not contain an unequivocal expression of intent to waive sovereign immunity, and, as such, the United States has not waived sovereign immunity for ERA whistleblower claims." *Peck I*, 2019 WL 7285749 at *6. *See also Mull,* 2011 WL 3882479; *Pastor*, ARB No. 99-071, slip op. at 6 ("To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims.").

The U.S. Department of Justice Office of Legal Counsel ("DOJ OLC") and the ARB followed a similar approach in examining whether Congress had waived sovereign immunity under the whistleblower provisions of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. 1367, the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. 6971, and the Clean Air Act ("CAA"), 42 U.S.C. 7622. All three statutes, like the ERA, allow an employee to bring a retaliation claim against a "person" alleged to have engaged in discrimination in violation of the statute. None of the statutes contains a definition of "person" in the text of the whistleblower provision itself. However, each contains a definition of "person" in the general

text of the relevant environmental law that applies to all provisions of the law, including the whistleblower provision.

Looking to the definition of "person" in 33 U.S.C. 1362(5) applicable to the FWPCA, DOJ OLC and the ARB concluded that Congress had not waived sovereign immunity against a federal government agency under the FWPCA, because that statute does not include the federal government within the statutory definition of "person." *Waiver of Sovereign Immunity with Respect to Whistleblower Provisions of Env't Statutes*, 29 U.S. Op. Off. Legal Couns. 171, 2005 WL 6126793, *3 (2005) ("DOJ OLC Opinion") (construing 33 U.S.C. 1362(5), 1367(b)); *Erickson v. EPA*, ARB Nos. 03-002, -003, -004, -064 slip op. at 12-13, 2006 WL 1516646, at *8 (ARB May 31, 2006). By contrast, DOJ OLC and the ARB concluded that the CAA and the SWDA do contain clear waivers of federal sovereign immunity, since both statutes permit remedies against "any person" and expressly define "person" to include the federal government. *DOJ OLC Opinion*, 2005 WL 6126793, at *3 (construing 42 U.S.C. 6903(15), 6971(b); 7602(e), 7622(a), (b)(1)); *Erickson*, 2006 WL 1516646, *8, slip op. at 12-13.[4]

B. The TFA Does Not Unequivocally Waive Treasury's Sovereign Immunity Because Neither the Text of the TFA Remedies Provision or Any Other Statutory Text Clearly Authorizes Whistleblower Complaints Against the United States or a Federal Government Agency

Applying the same approach that the ARB and the courts have applied to other DOL whistleblower statutes to evaluate TFA, the TFA anti-retaliation provision lacks any indicia

[4] The ARB has held that the OLC opinion is binding on the Department of Labor, and has relied on it in many of its own sovereign immunity decisions. *See, e.g., Erickson*, 2006 WL 1516646 at *8; *Mull*, 2011 WL 3882479 (relying on OLC's analysis in concluding that the ERA whistleblower provision did not waive the sovereign immunity of a Federal agency, based on the ERA's failure to define "person" to include the federal government).

that Congress intended to waive the United States' sovereign immunity against TFA retaliation complaints. The statute falls far short of providing the clear and unequivocal authorization needed to find a waiver of sovereign immunity for such complaints against the United States or its agencies. Thus, the statute does not waive Treasury's sovereign immunity, and this complaint should be dismissed.

1. The TFA remedies provision itself does not expressly and unequivocally authorize employees to bring complaints against the Federal government or the Treasury Department.

Focusing on the statutory text that relates to liability--since it is the liability provision which must either contain or point to "an unequivocal expression of intent to waive sovereign immunity" for TFA whistleblower claims--TFA lacks a clear waiver of Treasury's sovereign immunity. As previously noted, TFA prohibits an "employer, … officer, employee, contractor, subcontractor, or agent of such employer…" from retaliating against employees for engaging in lawful activity protected by the TFA (26 U.S.C. 7623(d)(1)(A)) but provides, in the enforcement provision of the statute, that "a person who alleges discharge or other reprisal *by any person* in violation of paragraph (1) may seek relief . . . ." 26 U.S.C. 7623(d)(2)(A) (emphasis added). The term "person" is not defined in 26 U.S.C. 7623(d). Nor did Congress include any other type of explicit statement in 26 U.S.C. 7623(d) of an intention to waive the sovereign immunity of the United States or agencies of the United States. *Compare* 26 U.S.C. 7623(d) *to* 26 U.S.C. 7432 (authorizing "a civil action for damages against the United States" for failure to release a tax lien) *and* 26 U.S.C. 7433 (authorizing "a civil action for damages against the United States" for certain unauthorized tax collection actions).

The Internal Revenue Code ("IRC") provides a general definition for "person" in 26 U.S.C. 7701, which applies to the entire Title, including 26 U.S.C. 7623(d), "where not otherwise distinctly expressed or manifestly incompatible with the intent thereof." Under 26 U.S.C. 7701(a)(1), "person" "shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation." That definition does not explicitly include either the United States, or agencies of the United States.

Moreover, as the Board and the Fourth Circuit explained in *Peck*, the term "person" is "a term of art that generally excludes the federal government" and federal agencies. *See Peck I*, 2019 WL 7285749, at *5 (quoting *Return Mail*, 139 S. Ct. at 1861-62); *Peck II*, 996 F.3d at 230, 232 ("'The Government is not a 'person' … absent an affirmative showing to the contrary.") (quoting *Return Mail*, 139 S.Ct. at 1863). *See also Cooper*, 566 U.S. at 290-91 ("the United States is not ordinarily considered to be a person"). Thus, there is no basis to interpret the term "person" in 26 U.S.C. 7623(d) to include the United States or its agencies in the absence of express statutory language.[5]

And, although no court has directly addressed the issue of whether the use of the word "person" in 26 U.S.C. 7701(a)(1) evidences Congressional intent to preclude lawsuits against the Federal government, courts have applied a similar sovereign immunity analysis to find that States are not "persons" as defined in 26 U.S.C. 7701(a)(1), and therefore that the IRC does not abrogate sovereign immunity against States. For example, in a suit under 26 U.S.C. 7431(a)(2), which permits a taxpayer "to bring a civil action against [a] person," the court held that the IRC's definition of "person" in 26 U.S.C. 7701(a)(1) does not include States and

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[5] *Cf.* 26 U.S.C. 7432 (authorizing "a civil action for damages against the United States"); 26 U.S.C. 7433 (same).

that therefore the provision did not authorize actions against a State or its agencies. *Marsoun v. United States*, 525 F. Supp. 2d 206, 212-13 (D.D.C. 2007). The court explained that "[t]his result is consistent with the long-established precedent recognizing that 'in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it.'" *Id*. (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989) (quoting *Wilson v. Omaha Tribe*, 442 U.S. 653, 657 (1979) (alterations in original)). *See also Gouch v. Cal. Franchise Tax Bd*., No. CIV. A. 1:08-CV-3299, 2009 WL 2957284, at *3 (N.D. Ga. Sept. 15, 2009) (same; applying 26 U.S.C. 7701(a)(1), the court held that "the language of the statute, itself, bars the relief sought by plaintiff as the entity she has sued is not covered by the statute."). Thus, based on the use of the term "person" in 26 U.S.C. 7623(d) and the lack of explicit references to complaints against the United States (or other similar authorization) anywhere in 26 U.S.C. 7623(d) or other relevant sections of IRC, there is no indication, let alone any clear and unequivocal expression of Congressional intent, that Congress intended to waive federal sovereign immunity when drafting TFA.

Courts have not hesitated to dismiss tax-related complaints against the United States or its agencies for failure to show an explicit waiver of sovereign immunity in relevant sections of the IRC. *See, e.g., Diamond v. United States*, 688 F. App'x 429, 430 (9th Cir. 2017) (dismissing tax-related claims against the United States where plaintiff could not show explicit waiver); *Welborn v. Internal Revenue Service*, 218 F. Supp. 3d 64, 84-85 (D.D.C. 2016) (dismissing claim for negligence against Internal Revenue Service where plaintiff could not show explicit waiver, since any ambiguity in the statutory language must be construed in favor of immunity); *Doyal v. U.S.*, 308 F. Supp. 2d 1003, 1005 (D. Ariz. 2003) (dismissing tax-related claims as barred by the doctrine of sovereign immunity since "the United States, as

sovereign, may not be sued without its consent, and … no suit may be maintained against the United States unless it is brought in compliance with a specific statute under which the United States has consented to suit."). As neither 7623(d) itself nor any other relevant provision waives Treasury's sovereign immunity, this complaint should also be dismissed.

2. TFA's use of the term "employer" in its prohibition on retaliation is not sufficient to waive Treasury's sovereign immunity.

Tindall has not pointed to any statutory text or cases holding that the United States is a "person" against whom complaints may be brought under TFA or any similar provision in the IRC. Instead, Tindall argues that TFA waives sovereign immunity because it prohibits retaliation by "employers," and Treasury is an employer under the IRC. Courts and the ARB have repeatedly rejected this argument in the context of other whistleblower statutes.

Both the ARB and the courts have explained that whether a government entity is defined as an "employer" under the anti-retaliation section of a whistleblower statute has no bearing on whether Congress has "unequivocally expressed" its intention to waive sovereign immunity in a statute that authorizes complaints against a "person." For instance, in *Peck*, the ARB rejected the argument that simply because a respondent may be an "employer" under an anti-retaliation provision, it is also a "person" amenable to suit under a separate remedy provision. *Peck I*, 2019 WL 7285749 at *4-5 (citing *Mull*, slip op. at 10). And the Fourth Circuit agreed: "The inclusion of a government agency as a regulated entity is not sufficient to find that Congress has waived sovereign immunity for the purposes of enforcement." *Peck II*, 996 F.3d at 230. Thus, both the ARB and the court rejected Peck's argument that the inclusion of the NRC as an "employer" was sufficient to waive sovereign immunity and include it as a "person" amenable to suit under the remedy provision. Both tribunals agreed that the sovereign immunity inquiry must focus solely on the ERA's remedies provision,

which only authorized complaints against "person[s]," and contained no affirmative indication that Congress intended to include the NRC or any government agency in the term "person." *See, e.g., Peck I*, 2019 WL 7285749 at *4-5; *Peck II*, 996 F.3d at 231; *Mull,* 2011 WL 3882479, at *8, slip op. at 9-10. As the *Peck* court explained, "The use of the two different words—"employer" and "person"—in close proximity indicates that Congress was conscious of the difference." *Peck II,* 996 F.3d at 231. And both tribunals focused solely on the remedy provision in concluding that sovereign immunity was not waived. *See Peck I*, 2019 WL 7285749 at *4 (The "lack of any language [in the ERA] including the federal government as an entity against which complaints can be filed or otherwise waiving its sovereign immunity, tends to suggest that Congress did not intend the federal government's sovereign immunity to be waived."); *Peck II*, 996 F.3d at 232 (the lack of any definition of "person" in the remedies provision, coupled with the general presumption that "the Government is not a 'person' ... absent an affirmative showing to the contrary," meant that Peck failed to show "the required "unequivocal[ ] express[ion]" needed to waive sovereign immunity under the ERA) (quoting *Return Mail*, 139 S.Ct. at 1863, and *Cooper*, 566 U.S. at 290).

The same is true here. The TFA, like the ERA whistleblower statute at issue in *Peck, Mull*, and *Pastor,* contains a substantive anti-retaliation provision which prohibits an "employer" from retaliating against employees for engaging in certain protected activities. 26 U.S.C. 7623(d)(1). However, as explained above, the critical question for sovereign immunity purposes is not whether Treasury is an "employer" subject to section 7623(d)(1), but whether it is a "person" against whom Congress has expressly authorized complaints to be brought under TFA's enforcement provision, 26 U.S.C. 7623(d)(2). Because TFA does not define the term "person," and because of the general presumption that "the Government is not

a 'person' ... absent an affirmative showing to the contrary," *Peck II,* 996 F.3d at 232, TFA also does not demonstrate any "unequivocal expression" of Congressional intent to waive the government's sovereign immunity in its statutory text.

Even if one were to assume, as Tindall does here, that the TFA's substantive provision could encompass the United States or a government agency as an "employer,"[6] such a construction would not operate to waive sovereign immunity under TFA, any more than it did under the ERA in *Peck*. There, the ARB held that the relationship between the terms "employer" and "person" in the two ERA provisions was at best "ambiguous," and lacked the "clarity" and "precision" needed to find that Congress intended to waive sovereign immunity. Instead, it explained that

> '[w]hen one reading of a statutory text could plausibly support a finding of waiver, but another reading that is incompatible with waiver is also plausible, the latter must prevail. That is because the very presence of ambiguity precludes a finding of waiver.' The ambiguity in the statutory text [of the ERA], considered in favor of the sovereign, compels us to conclude that the ERA does not contain an unequivocal expression of legislative intent to waive immunity.

Peck I, 2019 WL 7285749, at *5 (quoting *Pastor*, ARB No. 99-071, slip op. at 17 and citing *Nordic Vill.*, 503 U.S. at 37). *See also id*. n.31 ("One can argue that … Congress would have also defined "person" to include the federal government if it intended to waive immunity"); *Cooper*, 566 U.S. at 290 ("Ambiguity exists if there is a plausible interpretation of the statute

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[6] Unlike the ERA, which specifically defines "employer" in 42 U.S.C. 5851(a) to include certain government agencies (and their licensees and contractors), the TFA does not contain any definition of "employer," so it is not at all clear whether Congress intended to include the Treasury Department in the TFA's substantive anti-retaliation provisions. But even if it did, the sovereign immunity question is entirely distinct. As noted in *Peck II*, it is not unusual for a statute to cover both private and governmental entities, yet "their 'waiver of sovereign immunity must extend unambiguously to … monetary claims [against the latter] to prevent a scheme encompassing certain private entities from extending inadvertently to the federal government." 996 F.3d at 229-230 (quoting *Lane*, 518 U.S. at 192).

that would not authorize [suit] against the Government"); *Peck II*, 996 F.3d at 232 ("All ambiguities in the statutory text must be construed 'in favor of immunity.'") (quoting *Williams*, 514 U.S. at 531). Here, as well, any ambiguity in the statutory text of the TFA must be construed in favor of the sovereign, and compels the conclusion that the TFA does not contain the unequivocal, clear expression of legislative intent needed to waive immunity.

C. Tindall's Reliance on the Administrative Procedure Act and on the Ultra Vires Exception to Sovereign Immunity is Misplaced.

Tindall also contends that his claim is authorized because Treasury's sovereign immunity is waived by the Administrative Procedure Act ("APA"), 5 U.S.C. 702, and the *ultra vires* exception to the United States' sovereign immunity, which permits suit "when the underlying suit is against an officer of the government for actions beyond the scope of the officer's authority." *See* Tindall Resp. 9. Neither of these contentions has merit.

1. The APA does not waive Treasury's sovereign immunity against administrative proceedings like this one.

Section 702 of the Administrative Procedure Act ("APA") waives sovereign immunity by providing for "*judicial review*" of agency action, through "*an action in a court* of the United States seeking relief other than money damages." 5 U.S.C. 702 (emphasis added). However, the ARB has squarely held that this provision does not apply to administrative proceedings, but only to actions "in a court." *Mull*, ARB No. 09-107, 2011 WL 3882479, at *4, slip op. at 5 ("This section is not applicable to appeals reviewed by an appellate board within the administrative process; it applies [only] to the judiciary." In *Mull*, the ARB explained that "waiver of sovereign immunity in one forum does not affect waiver in other forums; thus, while 5 U.S.C.A. § 702 may waive the federal government's sovereign immunity before judicial courts, it does not apply to administrative agency tribunals, and does

not waive immunity in this forum." *Id.*; *see also Magers v. Seneca Re-Ad Indus., Inc.,* ARB Nos. 16-038, 16-054, ALJ Case No. 2016-FLS-003, 2017 WL 512658, slip op. at 20-21, nn.71-75 (ARB Jan. 12, 2017) (distinguishing between court "actions" and administrative proceedings) (citing *Unexcelled Chem. Corp. v. United States*, 345 U.S. 59, 66 (1953) and *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91-92 (2006)); *McGuire v. U.S.*, 550 F.3d 903, 913 (9th Cir. 2008) ("the Supreme Court has recognized that a waiver of sovereign immunity can be forum-specific: '[I]t rests with Congress to determine not only whether the United States may be sued, but [where] the suit may be brought.'") (internal quotations omitted); *Miami Herald Media Co. v. Fla. Dep't of Transp.*, 345 F. Supp. 3d 1349, 1370 (N.D. Fla. 2018) ("By its plain terms, § 702 applies to actions 'in a court of the United States' and not to actions in state court."). Thus, the APA exception does not waive Treasury's sovereign immunity with respect to an action pending before DOL under 26 U.S.C. 7623(d).

2. The "ultra vires" exception to sovereign immunity also does not apply to Tindall's complaint against Treasury.

Finally, Tindall incorrectly claims that the "*ultra vires*" exception to sovereign immunity grants the OALJ jurisdiction over his complaint against the Treasury Department, despite the lack of any statutory waiver of sovereign immunity. Tindall Resp. 9. It is true that courts have recognized such an exception for lawsuits brought against an officer of the government acting in their individual capacity, or where the named officer acted outside their statutory authority. *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689 (1949). However, the ARB has never held that the *ultra vires* exception authorizes jurisdiction in administrative proceedings generally, or in whistleblower proceedings before a DOL ALJ specifically, and Tindall cites to no precedent holding that it does.

In addition, it is well-settled that such lawsuits must be brought against the individual offending officer, not against the sovereign, and must seek "specific relief" against that officer, rather than relief against the sovereign. *See generally E. V. v. Robinson*, 906 F. 3d 1082, 1091(9th Cir. 2018) (citing *Larson*, 337 U.S. 682). By contrast, Tindall's complaint was not filed in any court, names only Treasury itself, not any individual Treasury officer or employee, and does not set forth either "the statutory limitation on which he relies" or the specific relief he seeks against any individual officer, as required by *Larson*. *Id*., 337 U.S. at 689-90.

Furthermore, it is not clear whether any of the relief Tindall seeks falls within the *ultra vires* exception, as relief against an individual defendant rather than relief against the Treasury itself. "Regardless of the manner by which a plaintiff designates the action, a suit should be regarded as an official-capacity suit, subject to the defense of sovereign immunity, when [the] 'judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.'" *Howe v. Bank for Intern. Settlements*, 194 F. Supp. 2d 6, 19 (D. Mass. 2002) (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)); *see also Hatfill v. Gonzales*, 519 F. Supp. 2d 13, 24 (D.D.C. 2007) (same). To the extent that Tindall seeks an order requiring that the IRS pay him the whistleblower award he believes he is due, payment or non-payment of a whistleblower award is an "official act" that can only be taken by the United States. To the extent Tindall alleges that IRS officials acted outside their authority by filing an Inspector General complaint, he has failed to adequately assert such a claim, by failing to name any specific individual defendant, and failing to specify the statutory limitation on which he relies or the specific relief he seeks. And to the extent that Tindall

seeks "injunctive [relief] (for [IRS] employees to stop doing what they are not supposed to be doing) and … for [IRS] employees to start doing what they should be doing," Tindall Resp. 12, the effect of the judgment would clearly be "to restrain the Government from acting, or to compel it to act." The *ultra vires* exception does not apply to such official-capacity lawsuits. *See Hatfill*, 519 F.Supp. 2d at 27-28 (dismissing *ultra vires* claims against individual defendants in their personal capacities since injunctive relief sought can be obtained only from the defendants in their official capacities).

Even if Tindall had attempted to name any governmental officials as required to fall within the ultra vires exception, the injunctive relief which he appears to seek is only available from the government itself, through government employees acting in their official capacities, not from any individual defendant in their personal capacity. For all these reasons, the *ultra vires* exception does not apply to this administrative proceeding.

IV. CONCLUSION

For the foregoing reasons, the complaint should be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,

SEEMA NANDA
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

SARAH K. MARCUS
Deputy Associate Solicitor

MEGAN E. GUENTHER
Counsel for Whistleblower Programs

s/ Sarah J. Starrett
SARAH J. STARRETT
Attorney

Office of the Solicitor
U.S. Department of Labor
Suite N-2716
200 Constitution Ave. NW.
Washington, DC 20210
(202) 693-5566
Starrett.sarah@dol.gov

CERTIFICATE OF SERVICE

I hereby certify that on this November 8, 2021, a true and correct copy of the foregoing Amicus Brief for the Solicitor of Labor was electronically filed with the OALJ using the eFile-eServe system, and that service on complainant and counsel of record will be accomplished by this system.

In addition, a copy of the foregoing was also served on counsel for Respondent by e-mail to:

Jennifer D. Auchterlonie
Special Counsel
Procedure and Administration
IRS Office of Chief Counsel
1111 Constitution Ave. NW, Rm. 5503
Washington, DC 20224
Ph. (202) 317-5210
Jennifer.Auchterlonie@irscounsel.treas.gov

s/ Sarah J. Starrett
SARAH J. STARRETT