No. 22-11770

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES W. TINDALL,

Petitioner,

v.

U.S. DEPARTMENT OF LABOR ADMINISTRATIVE REVIEW BOARD,

Respondent.

Petition for Review of Decision by the Administrative Review Board

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RESPONSE BRIEF FOR THE SECRETARY OF LABOR

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
200 Constitution Ave. NW, # N-2716
Washington, D.C. 20210
(202) 693-5566
Starrett.sarah@dol.gov

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (CIP)

Counsel for Respondent Department of Labor certifies that the following persons and entities have or may have an interest in the outcome of this case:

1. Auchterlonie, Jennifer D. (Counsel for U.S. Department of the Treasury);
2. Barsa, Kimberly S. (Counsel for U.S. Department of the Treasury);
3. Brand, Jennifer (Associate Solicitor, U.S. Department of Labor ("DOL"));
4. Dos Santos, Joshua Y. (Counsel for U.S. Department of Justice);
5. Ferek, John (employee, Treasury Inspector General Tax Administration);
6. Hon. Godek, Stephen M. (Administrative Appeals Judge, DOL Administrative Review Board ("ARB");
7. Guenther, Megan (Counsel for Whistleblower Programs, DOL);
8. Hon. Henley, Stephen R. (Chief Administrative Law Judge, DOL Office of Administrative Law Judges);
9. Hon. McGinley, James D. (Chief Administrative Appeals Judge, DOL ARB);
10. Marcus, Sarah K. (Deputy Associate Solicitor, DOL);
11. Nanda, Seema (Solicitor of Labor, DOL);
12. Occupational Safety and Health Administration ("OSHA") (DOL);
13. Directorate of Whistleblower Protection Programs (OSHA, DOL);

14. Starrett, Sarah J. (Counsel for DOL);

15. Thomas, Glenn (employee, Taxpayer Advocate Service);

16. Thomas, Jordan L. (Counsel for U.S. Department of the Treasury);

17. Tindall, James W. (Petitioner);

18. U.S. Department of Labor (Respondent);

19. U.S. Department of the Treasury (Respondent below);

20. Walsh, Marty (Secretary of Labor, DOL);

21. Wright, Abby (Counsel for U.S. Department of Justice).

No publicly traded company or corporation has an interest in the outcome of this appeal.

STATEMENT REGARDING ORAL ARGUMENT

Although the Secretary will gladly participate in any oral argument that the Court orders, the Secretary does not believe that oral argument is necessary because the question at issue may be resolved on the basis of the briefs filed with this Court.

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No. 22-11770

IN THE UNITED STATES COURT OF APPEALS
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JAMES W. TINDALL,

Petitioner,

v.

U.S. DEPARTMENT OF LABOR ADMINISTRATIVE REVIEW BOARD,

Respondent.

On Appeal from the Administrative Review Board, Case No. 2022-0030

RESPONSE BRIEF OF THE SECRETARY OF LABOR

The Secretary of Labor ("Secretary"), United States Department of Labor ("DOL" or "Department"), submits this brief on behalf of the Administrative Review Board ("ARB" or "Board"). For the reasons set forth below, the Secretary respectfully urges the Court to affirm the Administrative Review Board's dismissal of the underlying retaliation complaint as barred by sovereign immunity.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case arises under the employee protection (anti-retaliation) provisions of the Taxpayer First Act of 2019, 26 U.S.C. 7623(d) ("TFA" or the "Act") and the

regulations implementing the Act, found at 29 C.F.R. Part 1989, which generally authorize the Secretary to investigate complaints, conduct hearings, and order back pay and other remedies for retaliation in violation of the Act. James W. Tindall ("Tindall") filed a complaint with the Occupational Safety and Health Administration ("OSHA")[1] on or about June 4, 2021, alleging that his employer, the Department of the Treasury ("Treasury"), had retaliated against him in violation of 26 U.S.C. 7623(d). Appendix ("App.) Tab I, Exh. C. On May 16, 2022, the Department's Administrative Review Board ("Board" or "ARB")[2] dismissed the complaint for lack of subject matter jurisdiction because Tindall's claim against Treasury is barred by sovereign immunity. R.21, App. Tab L, ARB Decision and Order Dismissing Complaint, dated May 16, 2022.[3]

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[1] The Secretary has delegated authority and assigned responsibility to OSHA to receive and investigate complaints under various anti-retaliation laws, including the TFA. *See* Sec'y's Order No. 8-2020 (May 15, 2020), 85 Fed. Reg. 58,393, 2020 WL 5578580 (Sept. 18, 2020); *see also Interim Final Rule, Procedures for the Handling of Retaliation Complaints Under the Taxpayer First Act (TFA)*, 87 Fed. Reg. 12575 (March 7, 2022), codified at 29 C.F.R. Part 1989 (effective March 7, 2022).

[2] The Secretary has delegated authority to the ARB to issue final agency decisions in cases arising under the anti-retaliation provisions of TFA to the ARB. *See* Sec'y's Order No. 1-2020 (Feb. 21, 2020), 85 Fed. Reg. 13,186 (Mar. 6, 2020); *see also* 29 C.F.R. 1989.110(a).

[3] References to the official Agency Administrative Record as identified in the Certified List of Documents Filed of Record in the Administrative Proceeding,

Tindall filed a timely Petition for Review of the ARB's decision with this Court on June 1, 2022. This Court has appellate jurisdiction to review the ARB decision under 49 U.S.C. 42121(b)(4)(A), incorporated into the TFA by 26 U.S.C. 7623(d)(1)(B), and 29 C.F.R. 1989.112(a), because the complainant resides in Georgia.

STATEMENT OF THE ISSUE

Whether the ARB correctly dismissed Tindall's administrative complaint against an agency of the United States government under the anti-retaliation provision of the TFA, 26 U.S.C. 7623(d), as barred by sovereign immunity.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

This case arises under the anti-retaliation provision of the TFA, which generally protects employees from retaliation by an employer or other listed respondent for providing information or taking certain other actions relating to an alleged underpayment of tax, tax fraud, or any violation of the internal revenue laws. 26 U.S.C. 7623(d). The provision has two sections relevant to this case: (1) the prohibition on retaliation, which prohibits any "employer, … officer, employee, contractor, subcontractor, or agent of such employer" from retaliating

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which was filed with this Court on July 8, 2022, are denoted "R." followed by the document number and original page number.

against an "employee" for engaging in lawful activity protected by the TFA, and (2) an administrative 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 the TFA may file a complaint alleging such retaliation with OSHA, which investigates the complaint and issues findings. *See* 26 U.S.C. 7623(d)(2)(B)(i) (incorporating procedures set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21")); 49 U.S.C. 42121(b); 29 C.F.R. 1989.103-1989.105. Any party may object to OSHA's determination and request a hearing before a DOL administrative law judge ("ALJ"). 29 C.F.R. 1989.106. The ALJ may hear the case or decide the case on a dispositive motion if appropriate. *See* 29 C.F.R. 1989.107 (incorporating the DOL ALJ rules of procedure at 29 C.F.R. Part 18). Any party that desires review of an ALJ decision, including judicial review, must appeal the ALJ's decision administratively to the ARB, and once the ARB's decision becomes final, it may be appealed to a U.S. court of appeals. *See* 29 C.F.R. 1989.109, 1989.110, 1989.112. An employee who prevails on a TFA retaliation claim is entitled to all relief necessary to make the employee

whole, including reinstatement, double backpay, damages, and other relief. 26 U.S.C. 7623(d)(3).

Here, Tindall filed a TFA complaint alleging that Treasury, his employer, had retaliated against him.[4] Specifically, his complaint alleged that Treasury officials threatened to investigate him after he filed a complaint with its Taxpayer Advocate Service ("TAS") and requested its assistance with obtaining payment of an unpaid whistleblower award that he was officially awarded in 2019 under 26 U.S.C. 7623(a), which provides for certain monetary awards to individuals who report underpayment of tax to be paid from any underpayment collected. Tindall had received a Final Award Decision under Section 7623(a) granting him an award, but he had not yet received the payment.[5] OSHA dismissed Tindall's

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[4] Tindall's complaint to OSHA and OSHA's response to that complaint are described in his Request for Hearing and the OSHA Findings attached to that request. *See* R.1, App. Tab A, Notice of Objection and Request for Hearing dated July 24, 2021.

[5] The Internal Revenue Service ("IRS") administers a "whistleblower award" program separate from the anti-retaliation protections in 26 U.S.C. 7623(d). The whistleblower award program authorizes payments to individuals who provide information necessary to detect underpayments of tax or internal revenue law violations. Under 26 U.S.C. 7623(a), the IRS Whistleblower Office has discretionary authority to pay awards to individuals who report underpayments of tax or internal revenue law violations, which are paid from any proceeds collected. Under 26 U.S.C. 7623(b), the IRS must pay awards of at least 15 percent but not more than 30 percent of proceeds collected in cases in which the IRS determines

retaliation complaint, concluding there was no reasonable cause to believe a violation of the TFA anti-retaliation provision had occurred because Treasury is a federal agency and therefore not a "person" covered by the statute. R.1, App. Tab A, OSHA Findings.[6] Tindall filed timely objections and requested a de novo hearing before an ALJ.

B. Decision of the ALJ

After docketing the case, the ALJ issued an Order to Show Cause, directing the parties to file briefs regarding why the petition should not be dismissed for lack of subject matter jurisdiction on the basis of sovereign immunity. R.2, App. Tab B, ALJ Notice of Docketing and Order to Show Cause, dated September 8, 2021. On March 4, 2022, the ALJ dismissed the complaint, holding that the remedial provision of the TFA's anti-retaliation provision does not clearly and unequivocally waive sovereign immunity, since it authorizes such actions only against a "person" and the case law clearly supports a finding that "person" does not include Treasury. *See* App. Tab G. The ALJ also dismissed Tindall's

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that the information submitted substantially contributed to the IRS's action. *See* https://www.irs.gov/compliance/whistleblower-office

[6] 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." The ALJ decision, however, corrected that error. *See* R.12, App. Tab G, ALJ Decision and Order Dismissing Complaint for Lack of Subject Matter Jurisdiction, dated March 4, 2022 at 2, n.4.

arguments that either the ultra vires exception to sovereign immunity or the Administrative Procedure Act ("APA") exception in 5 U.S.C. 702 applied. *Id*.

C. Decision of the ARB

Tindall petitioned for the ARB to review the case, and the ARB affirmed and adopted the ALJ's decision. R.21, App. Tab L. The ARB explained that it agreed with the ALJ that the remedial provision of the TFA's anti-retaliation provision does not clearly waive Treasury's sovereign immunity. *Id.* In reaching that decision, the ARB also noted that the Department had recently promulgated a rule governing TFA retaliation complaints that defined the term "person" as an "individual, partnership, company, corporation, association (incorporated or unincorporated), trust, or estate." *Id*. at 3 (quoting 29 C.F.R. 1989.101). That definition did not identify Treasury or other governmental entities as a "person" from whom relief could be sought. *Id.* Tindall then petitioned for this Court to review the ARB's decision.

D. Standard of Review

This case comes before the Court for review of final agency action pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. 706. Under this deferential standard, the ARB's final decision and order must be upheld unless the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "unsupported by substantial evidence." 5 U.S.C.

706(2)(A), (E). The Court reviews the ARB's legal conclusions "de novo, keeping in mind that agencies often receive deference in construing the statutes they administer." *DeKalb Cty. v. U.S. Dep't of Labor*, 812 F.3d 1015, 1020 (11th Cir. 2016) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)). It may reverse the agency's factual findings only if "unsupported by substantial evidence" on the record as a whole. *DeKalb Cty.*, 812 F.3d at 1020 (quoting 5 U.S.C. 706(2)(E)); *Stone & Webster Constr., Inc. v. U.S. Dep't of Labor*, 684 F.3d 1127, 1132 (11th Cir. 2012)).

SUMMARY OF ARGUMENT

The Court should affirm the decision of the ARB that the TFA's anti-retaliation provision does not clearly and unequivocally waive sovereign immunity against the Federal government or its agencies, since they are not included as "person[s]" within the meaning of the Act. In the TFA, Congress enacted a substantive provision that prohibits "employer[s]", their agents and contractors from retaliating against employees for protected activities, 26 U.S.C. 7623(d)(1)(A). But in the administrative enforcement provision that immediately follows, Congress provided for relief by administrative action only for a "discharge or other reprisal by any *person*." 26 U.S.C. 7623(d)(2)(A) (emphasis added). That difference in language precludes the necessary finding of a clear and unequivocal waiver of sovereign immunity under the administrative enforcement provision,

even if the federal government were considered an "employer" under the TFA.

The definition of "person" in the Internal Revenue Code ("IRC") at 26 U.S.C. 7701(a) applies to the TFA "where not otherwise distinctly expressed or manifestly incompatible with the intent thereof," and that section excludes the federal government from the definition of "person." In addition, courts presume the word "person" does not include the sovereign and therefore excludes federal agencies. *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, at 1863 (2019) ("[T]he Government is not a 'person' . . . absent an affirmative showing to the contrary."). Consistent with longstanding principles of statutory interpretation, because Congress chose to use the word "'person' rather than 'employer' in the pertinent subsections," "it is clear that the statute does not contemplate the government as a possible respondent in [an administrative] action." *Peck v. United States Dep't of Labor, Admin. Review Bd. ("Peck II")*, 996 F.3d 224 at 230 (4th Cir. 2021), *cert. denied*, 142 S.Ct. 902 (2022), *aff'g Peck v. Nuclear Regul. Comm'n*, ARB No. 2017-0062, 2019 WL 7285749 (ARB Dec. 19, 2019) (*en banc*) ("*Peck I"*). For that reason, the Department recently promulgated a rule governing TFA retaliation complaints that defined the term "person" as excluding the government, in accordance with 26 U.S.C. 7701(a)(1). 29 C.F.R. 1989.101. And even if the statutory question were closer, "[a]ny ambiguities in the statutory language are to be construed in favor of immunity," which means that sovereign

immunity applies "if there is a plausible interpretation of the statute that would not authorize money damages against the Government." *Davila v. Gladden*, 777 F.3d 1198, 1209 (11th Cir. 2015) (quoting *FAA v. Cooper*, 566 U.S. 284, 290 (2012)).

The fact that the TFA may apply to Treasury as an "employer" is not sufficient to waive Treasury's sovereign immunity. As this Court and the Supreme Court have recognized, Congress may enact a substantive requirement applicable to a sovereign without waiving sovereign immunity and making the government liable for money damages in a proceeding. *See Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1132 (11th Cir. 1999) (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). For similar reasons, none of the authorities Tindall cites (the U.S. Constitution, the *ultra vires* exception to sovereign immunity, Section 702 of the Administrative Procedure Act, or the First or Fifth Amendments to the Constitution) authorize subject matter jurisdiction over Tindall's TFA retaliation complaint. Tindall's constitutional arguments have no merit, and neither the *ultra vires* exception nor the Administrative Procedure Act exception to sovereign immunity are applicable to this case.

The Court should reject Tindall's arguments and affirm the decision of the ARB dismissing Tindall's complaint as barred by sovereign immunity.

ARGUMENT

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

The court should uphold the ARB's dismissal of the administrative petition for lack of subject matter jurisdiction, because the TFA does not clearly waive Treasury's sovereign immunity. Tindall has not and cannot show that Congress expressly and unequivocally waived the Federal government's sovereign immunity in enacting the remedial provision of the TFA.

A. A Waiver of Sovereign Immunity Requires an Unequivocal Expression of Congressional Intent in the Enforcement Provision of an Anti-Retaliation Statute.

Before an individual can sue a federal agency, they must show 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." *Block v. North Dakota*, 461 U.S. 273, 287 (1983). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit. ... Sovereign immunity is jurisdictional in nature." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) (citations omitted).

"According to the Supreme Court, 'a waiver of sovereign immunity must be unequivocally expressed in statutory text.'" *Davila*, 777 F.3d at 1209 (quoting *Cooper*, 566 U.S. at 290). Thus, this Circuit recognizes that "Congress may

abrogate a sovereign's immunity 'only by making its intention unmistakably clear in the language of the statute'; legislative history and 'inferences from general statutory language' are insufficient." *Fla. Paraplegic Ass'n*, 166 F.3d at 1132 (quoting *Atascadero State Hosp.*, 473 U.S. at 242. "Any ambiguities in the statutory language are to be construed in favor of immunity, so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires. . . . Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government." *Davila*, 777 F.3d at 1209 (quoting *Cooper*, 566 U.S. at 290).

For instance, in *Davila*, this Court applied these principles to find that Congress did not unequivocally waive its sovereign immunity in passing the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. 2000bb. Although it acknowledged that the purpose of the law was generally to permit individuals to sue for deprivation of religious rights, the court held that the law's provision for "appropriate relief against a government" was too ambiguous to authorize suits for money damages against the government or government employees in their official capacity. *Davila*, 777 F.3d at 1208-09 (quoting 42 U.S.C. 2000bb-1(c)). It relied on Supreme Court cases holding that the "context here -- where the defendant is a sovereign -- suggests, if anything, that monetary damages are not suitable or proper," and that "[a]ny ambiguities in the statutory language are to be construed

in favor of immunity," *id*. at 1209 (quoting *Sossamon v. Texas*, 563 U.S. 277, 286 (2011) and *Cooper*, 566 U.S. at 290), and concluded that RFRA's statutory text therefore does not unequivocally waive sovereign immunity by clearly authorizing suits for money damages against federal officers in their official capacities. *See also Rosser v. United States*, 9 F.3d 1519 (11th Cir. 1993) ("The doctrine of federal sovereign immunity provides that the United States may be forced to pay monetary relief only to the extent that Congress has expressly consented to the imposition of such liability."); *First Ala. Bank, N.A. v. United States*, 981 F.2d 1226, 1228 (11th Cir. 1993) (same).

Similarly, in *Fla. Paraplegic Ass'n*, the court applied the same strict standard in deciding that an Indian tribe has sovereign immunity from private lawsuits under Title III of the Americans with Disabilities Act, 42 U.S.C. 12181 *et seq*., since Congress has not "unequivocally expressed" its intent to abrogate Indian tribes' sovereign immunity under that statute. 166 F.3d at 1131 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("a [Congressional] waiver of [Indian tribal] sovereign immunity cannot be implied but must be unequivocally expressed")). The court recognized that other provisions in the statute did apply to the tribe, and that "the omission of this remedy may seem inconsistent with the rights granted by Title III, and even patently unfair, [but

noted that] '[i]mmunity doctrines inevitably carry within them the seeds of occasional inequities...." *Id.*, 166 F.3d at 1135 (internal quotation omitted).

These principles of sovereign immunity apply equally to federal agencies, officers, and employees acting in their official capacity. *Asociacion de Empleados del Area Canalera (ASEDAC) v. Panama Canal Comm'n*, 453 F.3d 1309, 1315 (11th Cir. 2006) (citing *Meyer*, 510 U.S. at 475); *Ishler v. Internal Revenue*, 237 F. App'x 394, 398 (11th Cir. 2007) (per curiam). They also apply in administrative adjudications, including retaliation proceedings before the Department of Labor. *See, e.g., Fed. Mar. Comm'n v. South Carolina State Ports Auth*., 535 U.S. 743, 761 (2002); *Peck II*, 996 F. 3d at 229; *Peck I,* 2017-0062, 2019 WL 7285749 (holding that sovereign immunity barred a retaliation complaint against a U.S. government agency under the Energy Reorganization Act ("ERA"), 42 U.S.C. 5851).

Furthermore, as explained in *Fla. Paraplegic Ass'n* and *Peck*, the focus of any sovereign immunity inquiry must be on the cited statute's enforcement provision, not its substantive provisions, because sovereign immunity is an immunity from suit. *See, e.g.*, *Fla. Paraplegic Ass'n*, 166 F.3d at 1133-35, *Peck II*, 996 F.3d at 229. Thus, even if a statute's substantive provisions apply to Federal government agencies, the statute does not waive sovereign immunity unless its enforcement provision clearly and unambiguously authorizes a litigant to

seek monetary remedies against the Federal government. *Id.* at 229-230; *see also* *Lane v. Peña*, 518 U.S. 187, 192-93 (1996); *Robinson v. U.S. Dep't of Educ.*, 917 F.3d 799, 806 (4th Cir. 2019).

B. The TFA Does Not Unequivocally Waive Treasury's Sovereign Immunity Because Neither the Text of the TFA Enforcement Provision Nor Any Other Statutory Text Clearly Authorizes Retaliation Complaints Against the United States or a Federal Government Agency

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

The statutory text of the TFA's enforcement provision neither contains nor points to any "unequivocally expressed" waiver of sovereign immunity for TFA retaliation claims against the Federal government or its agencies, as required by *Davila*, 777 F.3d at 1209, and *Cooper*, 566 U.S. at 290. In the TFA, Congress prohibited an "employer, … officer, employee, contractor, subcontractor, or agent of such employer…" from retaliating against employees for engaging in lawful protected activity, but did not define the term "employer." 26 U.S.C. 7623(d)(1)(A). But in the administrative enforcement provision immediately following, Congress provided an avenue of administrative relief only for states that "a … discharge or other reprisal by any *person* in violation of paragraph (1) . . . ." 26 U.S.C. 7623(d)(2)(A) (emphasis added). The word "person" in the

administrative enforcement provision does not include the federal government, and at a minimum does not clearly waive sovereign immunity.

The IRC provides a general definition of "person" at 26 U.S.C. 7701(a) that applies to the entirety of Title 26, including the TFA, "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"—not the Federal government. The Department of Labor regulations implementing the TFA adopt essentially the same definition. Under the regulations, "[p]erson means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, or estate." 29 C.F.R. 1989.101. The preamble to the regulations indicates that the regulatory definition is based on the statutory definition at 26 U.S.C. 7701(a)(1). *See* 87 Fed. Reg. at 12577. Neither the general definition of "person" in 26 U.S.C. 7701(a)(1) nor the parallel definition in the TFA regulations explicitly includes either the United States or agencies of the United States.

In addition, there is a well-settled presumption in federal law that the term "'person' does not include the sovereign." *See Return Mail,* 139 S. Ct. at 1861-62 (quoting *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780-81 (2000)); *Vt. Agency of Nat. Res.*, 529 U.S. at 781 ("[t]he "presumption that

'person' does not include the sovereign may only be disregarded upon some affirmative showing of statutory intent to the contrary."); *Savage Servs. Corp. v. United States*, 25 F.4th 925, 934 (11th Cir. 2022) (noting the "longstanding interpretive presumption that 'person' does not include the sovereign") (quoting *Vt. Agency of Natural Res.*, 529 U.S. at 781); *Peck II*, 996 F.3d at 230, 232 (same); *Alabama v. U.S. Dep't of Commerce*, 546 F.Supp.3d 1057, 1067 (M.D. Ala. 2021) (same). That principle is likewise confirmed by common usage and the default definition for "person" found in the Dictionary Act. *See, e.g.*, Person, Black's Law Dictionary (10th ed. 2014); 1 U.S.C. 1.

Here, Tindall has made no affirmative showing that Congress intended the term "person" in 26 U.S.C. 7623(d) to include the United States or any federal agency. Congress was presumably aware of this longstanding interpretative principle and the general definition of "person" in 26 U.S.C. 7701(a)(1) and the Dictionary Act. Yet nothing in the TFA indicates that Congress meant to depart from those principles. To the contrary, the fact that Congress used the word "person" in one provision and "employer" in another in close proximity strongly suggests that Congress viewed the words as having different meanings.

Furthermore, courts have applied a similar sovereign immunity analysis to find that "person" as defined in 26 U.S.C. 7701(a)(1) does not include 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 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)).

By contrast to the TFA, Congress has included clear language waiving sovereign immunity in other tax laws. For example, in enacting 26 U.S.C. 7422(f)(1), Congress expressly authorized taxpayer suits "against the United States" for refund of wrongly paid taxes, as long as such suits are brought within two years. *See Rosser*, 9 F.3d at 1521; *First Ala. Bank*, 981 F.2d at 1228. *See also* 26 U.S.C. 7432 (authorizing "a civil action for damages against the United States" for failure to release a tax lien); 26 U.S.C. 7433 (authorizing "a civil action for damages against the United States" for certain unauthorized tax collection actions). The TFA does not mention suits or actions against the United States or its agencies.

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 the remedy provisions of the relevant statute. *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 against IRS where plaintiff could not show explicit waiver, since any ambiguity in the statutory language must be construed in favor of immunity); *Boritz v. United States*, 685 F. Supp. 2d 113, 122 (D.D.C. 2010) (dismissing tax-related claims for lack of explicit waiver of sovereign immunity); *Doyal v. United States*, 308 F. Supp. 2d 1003, 1005 (D. Ariz. 2003) (dismissing tax-related claims as barred by sovereign immunity).

In sum, the statutory text of the TFA enforcement provision contains no clear and unequivocal expression of Congressional intent to waive federal sovereign immunity, and Tindall has pointed to none. Instead, the TFA's use of the term "person" in its liability provision, 26 U.S.C. 7623(d)(2)(A), the general definition of "person" in 26 U.S.C. 7701(a)(1), and the lack of any reference to complaints against the United States or its agencies anywhere in 26 U.S.C. 7623(d) or other relevant sections of the IRC suggest otherwise. Since Tindall has not shown that 26 U.S.C. 7623(d) itself or any other relevant provision waives

Treasury's sovereign immunity, the ARB's dismissal of Tindall's complaint should be affirmed.

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

Although 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 the TFA or any similar provision in the IRC, he appears to argue that the TFA waives sovereign immunity because its "operative provision" prohibits retaliation by "employers," Treasury is his employer, and the two provisions at issue should be read as a whole. Tindall Br. 26-27. But even if the Treasury Department were considered an "employer" for purposes of the TFA, it is well-established that "[t]he 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." *See, e.g., Peck II*, 996 F.3d at 230; *Fla. Paraplegic Ass'n*, 166 F.3d at 1132; *Robinson*, 917 F.3d at 806. As this Court and others have noted, Congress can reasonably choose to impose requirements on federal entities alongside non-federal entities, but to create judicially enforceable damages remedies (with their attendant burdens of litigation) only as to non-federal entities. *See, e.g., Fla. Paraplegic Ass'n*, 166 F.3d at 1132; *Alexander v. Sandoval*, 532 U.S. 275 (2001) (noting that Congress sometimes creates a right without a private remedy). Here, Congress chose to use

different wording for its administrative enforcement provision, and is presumed to know about the longstanding presumption that waivers of sovereign immunity must be express and that the word "person" generally does not include the federal government, not to mention that the Internal Revenue Code's general definition of "person" excludes the federal government. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (Congress is presumed to be "knowledgeable about existing law pertinent to the legislation it enacts"). In light of those principles, the fact that TFA's statutory text refers separately to both "employers" and "persons" in close proximity suggest that the two terms were intended to have different meanings, not that they are one and the same. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987); *Savage Servs. Corp.*, 25 F.4th at 934; *Peck II*, 996 F.3d at 232.

And any ambiguity in the statutory text of the TFA must be construed in favor of the sovereign and compels the conclusion that the TFA's failure to define "person" to include the federal government reflects Congress's intent not to waive sovereign immunity.[7]

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[7] Although the ARB did not address this issue, the ALJ noted that the TFA does not define the term "employer," and that it was not at all clear whether Congress intended to include the Treasury Department in the TFA's substantive anti-retaliation provisions. App. Tab G at 2, n.4. But even if it did, the sovereign immunity question is entirely distinct. As noted in *Peck II*, a statute may cover

3. Applicable Precedent Provides a Well-Established Framework for Analyzing Whether Sovereign Immunity is Waived under DOL-Administered Anti-Retaliation Statutes

The Fourth Circuit's decision in *Peck* and several prior ARB and court decisions under other DOL-administered anti-retaliation provisions similar in structure to the TFA demonstrate the application of these principles. Like the TFA, each of those statutes prohibits covered employers or persons from retaliating against an employee but has an enforcement provision that allows a complainant to bring an action for reinstatement, backpay and other damages for retaliation against any "person." Whether sovereign immunity is waived under each statute has depended on whether there is a clear and unambiguous waiver in the statute's enforcement provision such as a statement that a federal employer is a "person" within the meaning of the statute.

The Fourth Circuit decision in *Peck* involved an administrative complaint filed under the anti-retaliation provisions of the ERA, 42 U.S.C. 5851, which prohibits listed employers including the Nuclear Regulatory Commission ("NRC"), from retaliating against an employee for engaging in protected activity related to

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both private and governmental entities, yet "[its] '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 v. Peña*, 518 U.S. at 192).

nuclear safety but allows complainants to bring a claim against any "person." The court examined the enforcement and remedial provisions of the ERA and affirmed the ARB's decision that the NRC's sovereign immunity was not waived under the statute. It noted that the word "person" is generally presumed to exclude federal agencies and concluded that "it is clear that the statute does not contemplate the government as a possible respondent in [an administrative] action because the statute uses 'person' rather than 'employer' in the pertinent subsections." *Peck II*, 996 F.3d at 230 (construing 42 U.S.C. 5851(b), (c), & (d)). "The use of the two different words—"employer" and "person"—in close proximity indicates that Congress was conscious of the difference." *Id.* at 231. Given the strict standard for finding a waiver of sovereign immunity, as described above, and the lack of any definition of "person" in the remedial provision, coupled with the general presumption that "the word 'person' does not include the sovereign," the court held that Peck "failed to make the necessary affirmative showing with the required 'unequivocal[ ] express[ion]'" of Congressional intent needed to waive sovereign immunity under the ERA. *Id*. at 232 (quoting *Return Mail, Inc. v. U.S. Postal Serv*., 139 S. Ct. 1853, at 1863 (2019), and *Cooper*, 566 U.S. at 290). *See also Lane v. Peña*, 518 U.S. at 197 (holding that Congress' choice to use different words in the substantive and remedial provisions of the Rehabilitation Act "itself indicate[d] congressional intent to treat federal Executive agencies differently from

other . . . defendants for purposes of remedies"); *Galvan v. Federal Prison Industries,* 199 F.3d 461, 468 (D.C. Cir. 1999) (holding that False Claims Act's use of the word "person" did not waive sovereign immunity for a federal instrumentality).[8]

The ARB has followed a similar approach in determining whether Congress has waived sovereign immunity under other anti-retaliation provisions administered by the Department of Labor. In *Erickson v. EPA*, the ARB relied on an analysis by the Department of Justice Office of Legal Counsel which concluded that the Federal Water Pollution Control Act ("FWPCA") did not waive sovereign immunity because it did not include the federal government in the definition of "person" in 33 U.S.C. 1362(5). ARB Nos. 03-002, -003, -004, -064, 2006 WL 1516646, at *8 (ARB May 31, 2006), *aff'd sub nom. on other grounds Erickson v. U.S. Dep't of Labor*, 285 F. App'x 611, 614 (11th Cir. 2008) citing *Waiver of Sovereign Immunity with Respect to Whistleblower Provisions of Env't Statutes*, 29 Op. O.LC. 171, 2005 WL 6126793, *3 (2005) ("DOJ OLC Opinion") (construing 33 U.S.C. 1367, 1362(5) & 1367(b)). The ARB agreed, and therefore declined to

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[8] *See also Peck I*, 2019 WL 7285749 at *4-6; *Mull v. Salisbury Veterans Admin. Med. Clinic*, ARB No. 09-107, 2011 WL 3882479 (ARB Aug. 31, 2011) (finding that ERA did not contain an unequivocal expression of intent to waive Federal government sovereign immunity in its statutory text); *Pastor v. Dep't of Veterans Affairs*, ARB No. 99-071, 2003 WL 21269151 (ARB May 30, 2003) (same).

consider the merits of Erickson's FWPCA claim. *Erickson*, 2006 WL 1516646, at *8. But when faced with statutes that permit remedies against "any person" and expressly define "person" to include Federal government departments and agencies, the OLC concluded and the ARB held that the statutes satisfied the strict test for express statutory waivers of federal sovereign immunity. *See Erickson*, 2006 WL 1516646, at *8 (relying on *DOJ OLC Opinion*, 2005 WL 6126793, at *3 (construing the Clean Air Act, 42 U.S.C. 7622(a), (b)(1) & 7602(e), and the Solid Waste Disposal Act, 42 U.S.C. 6971, 6903(15) & 6971(b).

Finally, in the context of examining tribal sovereign immunity, the Tenth Circuit applied the same approach to affirm DOL's holding that the Safe Drinking Water Act ("SDWA") anti-retaliation provision waived tribal sovereign immunity. *See Osage Tribal Council ex rel. Osage Tribe of Indians v. U.S. Dep't of Labor*, 187 F.3d 1174, 1181 (10th Cir. 1999). The SDWA, like the TFA and the other statutes cited herein, prohibits an employer from retaliating against an employee but permits claims to be brought against any "person." 42 U.S.C. 300j-9(i). The Tenth Circuit focused on the enforcement provision's use of the word "person," and held that the statute waived sovereign immunity because the word "person" was defined to include an "Indian tribe." *Id.* As in those cases, this Court should closely examine the TFA's enforcement provision and should affirm the ARB's

determination that Congress did not "unequivocally express" its intent to waive Federal sovereign immunity when enacting the TFA.

II. NEITHER THE U.S. CONSTITUTION, THE ULTRA VIRES EXCEPTION TO SOVEREIGN IMMUNITY, OR THE ADMINISTRATIVE PROCEDURE ACT AUTHORIZES JURISDICTION OVER TINDALL'S TFA RETALIATION COMPLAINT.

Tindall also contends that jurisdiction over his complaint is authorized by the U.S. Constitution generally and by the First and Fifth Amendments specifically, under the *ultra vires* exception to the United States' sovereign immunity, and by the Administrative Procedure Act. None of these arguments have merit.

A. The Constitution Does Not Preclude the Existence of Federal Sovereign Immunity.

Tindall asserts that the U.S. Constitution "precludes the existence of a doctrine of federal sovereign immunity," that "the federal government is a subservient entity and not the 'sovereign'" and that there is "no constitutional basis for a doctrine of federal sovereign immunity." Br. 14-18. In his view, because the Constitution does not expressly mention the sovereign immunity doctrine, it must be unconstitutional.

Tindall cites no case law in support of this novel argument because there is none. In fact, both the Supreme Court and this Court have long recognized the

existence of sovereign immunity. *See, e.g., United States v. Clarke*, 33 U.S. (8 Pet.) 436, 444 (1834) (Marshall, C.J.) ("the United States [is] not suable of common right," and "the party who institutes such a suit must bring his case within the authority of some act of [C]ongress."); *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (it is well-settled that "the terms of [the government's] consent to be sued" are jurisdictional); *United States v. Mitchell*, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."); *Meyer*, 510 U.S. 471; *Davila*, 777 F.3d at 1209; *Fla. Paraplegic Ass'n*, 166 F.3d at 1132. Tindall's theories that the Tenth Amendment to the U.S. Constitution somehow "precludes" or "negates" the doctrine of federal sovereign immunity," and that "the federal government is a subservient entity, [and] is not 'sovereign,'" Br. 14-19, also lack any support in the case law. The Court should disregard Tindall's novel arguments in this regard.

B. The "Ultra Vires" Exception To Sovereign Immunity Does Not Apply Here.

Tindall next asserts that the "*ultra vires*" exception to sovereign immunity grants jurisdiction over his complaint against Treasury, despite the lack of any statutory waiver of sovereign immunity. Br. 19 (citing *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689 (1949)). The ARB correctly rejected this argument. App. Tab L at 3, n.13. Tindall points to no precedent applying such an

exception in administrative proceedings generally, or in anti-retaliation proceedings before DOL specifically.

More fundamentally, 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 individual officer, rather than damages or other relief against the sovereign. *See generally Nalls v. Bureau of Prisons of U.S.*, 359 F. App'x 99, 100 (11th Cir. 2009) (per curiam) (noting that sovereign immunity generally applies in official capacity suits, which are akin to a suit against the official's agency or entity); *E.V. v. Robinson*, 906 F. 3d 1082, 1091, 1095 (9th Cir. 2018) (citing *Larson*, 337 U.S. 682). Here, Tindall's complaint was filed only against Treasury itself, not any individual Treasury officer or employee, and did not set forth either "the statutory limitation on which he relies" or the specific relief he seeks against any individual officer, as expressly required by *Larson*. *Id.*, 337 U.S. at 689-90. *See* App. Tab I, Exh. C.

Tindall now argues that he sufficiently alleged in his complaint that "the IRS WBO"[Whistleblower Office] acted outside its grant of power from Congress by refusing to comply with 26 U.S.C. 7623 and that "TAS filed a baseless complaint with TIGTA in an effort to illegally threaten and harass" him, and that such actions were *ultra vires* (outside of their authority). Br. 19-20. As such, Tindall argues that he should now be permitted to bring a TFA complaint against "these

employees" to challenge those actions. However, he did not name any individual employees as respondents in his original complaint, and the ARB correctly rejected this argument.[9] *See* App. Tab I, Exh. C at 216 (describing "threats of retaliation by the US Department of the Treasury and the National Advocate's Office").

Finally, the *ultra vires* exception does not apply to official-capacity lawsuits seeking damages or action by the government itself, which appears to be what Tindall is seeking here. "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 Nalls*,

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[9] Tindall himself also described his complaint to OSHA as "about the US Department of Treasury's retaliation," not as against any individual employee or officer. *See* App. Tab A. Although he did mention two employees, courts have repeatedly held that merely mentioning an individual in the body of a complaint was insufficient for administrative exhaustion of a retaliation complaint. *See, e.g., Bozeman v. Per-Se Technologies, Inc.*, 456 F. Supp. 2d 1282, 1357-58 (N.D. Ga. 2006); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1104 (D. Colo. 2013) (dismissing individual defendants for failure to exhaust where OSHA complaint did not name them as respondents); *Wadler v. Bio-Rad Labs., Inc.*, 141 F.Supp.3d 1005, 1021-22 (N.D. Cal. 2015) (finding that plaintiff had exhausted remedies against CEO but not against other individual directors, and dismissing other individuals).

359 F. App'x at 100 (dismissing official-capacity damages claims against individual defendants as barred by sovereign immunity); *Hatfill v. Gonzales,* 519 F. Supp. 2d 13, 27-28 (D.D.C. 2007) (dismissing *ultra vires* claims against individual defendants in their personal capacities since relief sought can be obtained only from the defendants in their official capacities). Even if Tindall had properly named individual governmental officials as required to fall within the *ultra vires* exception, the 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.

C. The APA Does Not Waive Treasury's Sovereign Immunity Against Administrative Proceedings Like The Underlying Case.

Tindall also contends that he was entitled to resolution of his TFA retaliation claims under Section 702 of the APA, 5 U.S.C. 702. Br. 21-22. However, he ignores the obvious fact that DOL administrative proceedings are not actions in Article III courts but are administrative in nature. Section 702 of the APA contains a limited waiver of sovereign immunity by providing for "*judicial review*" of final 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). This provision does not apply to administrative proceedings, but only to actions "in a court." *Miami*

Herald Media Co. v. Fla. Dep't of Transp., 345 F. Supp. 3d 1349, 1370 (N.D. Fla. 2018) ("By its plain terms, [5 U.S.C.] 702 applies to actions 'in a court of the United States'. . . "). *See also McGuire v. United States*, 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).

The ARB has also held that the APA does not waive federal sovereign immunity of federal agency respondents in DOL administrative proceedings. 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. … 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." *Mull*, ARB No. 09-107, 2011 WL 3882479, at *4; *see also Magers v. Seneca Re-Ad Indus., Inc.,* ARB Nos. 16-038, 16-054, 2017 WL 512658, at **14-15 & 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)). Thus, contrary to Tindall's claims, the APA exception does not waive

Treasury's sovereign immunity with respect to administrative proceedings under 26 U.S.C. 7623(d).[10]

D. Neither the First Amendment Nor the Fifth Amendment Grant Jurisdiction Over Tindall's TFA Retaliation Complaint.

Finally, Tindall asserts that the ARB's dismissal of his TFA case somehow violates his constitutional rights under the First and Fifth Amendments. Br. 27-29. He appears to contend that either the ARB's Order or the alleged retaliation itself (or both) violate his First Amendment right of free speech and/or his Fifth Amendment right to due process, and that the ARB should have applied a strict scrutiny standard to its sovereign immunity analysis.

Tindall's arguments seem to conflate his administrative whistleblower complaint asserting violations of the TFA with a court action challenging violations of the constitution, sometimes called a "constitutional tort" lawsuit. *See, e.g., Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing implied cause of action for violation of Fourth Amendment rights). However, Tindall did not file this claim in court under

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[10] Furthermore, it is questionable whether Tindall could properly allege an APA claim in a judicial forum on these facts. For example, such actions are only available to challenge "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. 704, and here the TFA itself provides for judicial review in appropriate cases. *See* 26 U.S.C. 7623(d)(1)(B), incorporating 49 U.S.C. 42121(b)(4)(A); 29 C.F.R. 1989.112(a).

Bivens; instead, he filed an administrative whistleblower complaint with OSHA alleging violations of the TFA, an entirely different animal.

And neither of the constitutional provisions he cites waive Federal sovereign immunity or authorize jurisdiction over a TFA complaint (or over DOL administrative proceedings generally). *See, e.g., Meyer*, 510 U.S. at 475 (absent a valid waiver of sovereign immunity, federal agencies are immune from lawsuits for due process violations under the Fifth Amendment); *United States v. 1461 West 42nd Street, Hialeah, Fla*., 251 F.3d 1329, 1338 (11th Cir. 2001) (same); *McCollum v. Bolger*, 794 F.2d 602, 607-08 (11th Cir. 1986) (holding that federal employees may not sue their employers for violations of their First or Fifth Amendment rights, and dismissing claims for lack of subject matter jurisdiction and on sovereign immunity grounds); *United States v. Timmons*, 672 F.2d 1373, 1380 (11th Cir. 1982) (upholding dismissal of Fifth Amendment claims on the basis of sovereign immunity); *Williams v. Cheatham*, 548 F.Supp.3d 1174, 1181 (M.D. Fla. 2021) (dismissing First Amendment claims against government officials on the basis of sovereign immunity); *Ivey v. United States*, 873 F.Supp. 663, 669 (N.D. Ga. 1995) (dismissing First Amendment and other claims against federal government for failure to exhaust administrative remedies and on the basis of sovereign immunity). *See also Jacobs v. U.S. Dep't of Labor*, 806 F. App'x 832, 836 (11th Cir. 2020) (dismissing due process claim raised in connection with

petition for review of DOL anti-retaliation administrative decision where petitioner "ma[de] blanket assertions that his due process rights were violated throughout the administrative process," but failed to state a claim or to substantiate his allegations) (citing *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003)). Therefore, the Court should dismiss Tindall's First Amendment and Fifth Amendment claims.

CONCLUSION

For the foregoing reasons, this Court should affirm the ARB's dismissal of the complaint 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 COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

Pursuant to Fed. R. Pet. P. 32(a), the undersigned certifies that the foregoing Response Brief for the Secretary of Labor:

(1) Complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7745 words, including footnotes but excluding the parts of the brief exempted by Fed. R. App. Proc. 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word 365 utilizing plain roman style, with exceptions for case names and emphasis, and using Times New Roman 14-point font, which is a proportionately spaced font, including serifs.

Dated: Oct. 4, 2022

Respectfully submitted,

s/ Sarah J. Starrett
SARAH J. STARRETT