[ORAL ARGUMENT NOT YET SCHEDULED]

No. 17–1119

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WHISTLEBLOWER 21276-13W,
Petitioner-Appellee

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellant

Consolidated with No. 17-1120

On Appeal from the United States Tax Court

BRIEF OF FORMER FEDERAL PROSECUTORS AND TAX COURT PRACTITIONERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS-APPELLEES

Jeffrey Neiman
MARCUS NEIMAN & RASHBAUM LLP
100 Southeast Third Avenue
Suite 805
Fort Lauderdale, Florida 33394

Counsel for Amici Curiae

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rule 28(a)(1) and Circuit Rule 29, *amici curiae,* all former federal prosecutors and Tax Court practitioners, certify as follows:

(A) Parties and Amici

With the exception of *amici curiae* identified below, all parties, intervenors, and amici appearing before the Tax Court and in this Court are listed in the Brief for Appellant.

The former federal prosecutors and Tax Court practitioners who have joined together to file this brief in support of Petitioners-Appellees are:

John R. Byrne
Former Assistant United States Attorney

Joseph A. DiRuzzo, III

Daren H. Firestone
Former Trial Attorney, Department of Justice Tax Division

Justin K. Gelfand
Former Trial Attorney, Department of Justice Tax Division

Marcos Jimenez
Former United States Attorney for the Southern District of Florida

Jeffrey E. Marcus,
Former Assistant United States Attorney

Ryon McCabe
Former Assistant United States Attorney

Matthew J. Mueller
Former Trial Attorney, Department of Justice Tax Division

Jeffrey A. Neiman
Former Assistant United States Attorney and
Former Trial Attorney, Department of Justice Tax Division

Daniel L. Rashbaum
Former Assistant United States Attorney

Loren Washburn
Former Trial Attorney, Department of Justice Tax Division

(B) Rulings Under Review

References to the rulings under review appear in the Brief for Appellant.

(C) Related Cases

Amici are not aware of any related cases in this Court, in the Tax Court, or in any other court.

Amici respectfully submit this brief in support of Petitioners-Appellees Whistleblower 21276-13W and Whistleblower 21277-13W.

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IRS	Internal Revenue Service

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

Amici are a group of former federal prosecutors – many of whom worked for the Department of Justice Tax Division and specialized in complex tax investigations – and Tax Court practitioners who share an abiding commitment to the enforcement of our nation's tax laws and to the creation of a clear policy governing the payment of whistleblower awards that balances the needs of law enforcement and the interests of whistleblowers, without whom many of the most egregious tax violations would go unpunished. In our view, that balance was properly struck by the decision of the United States Tax Court, and would be seriously threatened if the Commissioner's interpretation of Section 7623(b) of the Internal Revenue Code were adopted by this Court.

Amici"s interest is exclusively in the legal issues raised on appeal, *i.e.*, whether criminal fines and civil forfeitures constitute "collected proceeds" on which whistleblower awards may be based under Section 7623(b). We lack knowledge of the factual record in this matter.

Pursuant to Fed. R. App. P. 29(a)(2), all parties consented to the filing of this brief.

STATEMENT OF AUTHORSHIP AND FINANICAL CONTRIBUTIONS

In accordance with Circuit Rule 29(a)(4)(E), *amici curiae*, former federal prosecutors and Tax Court practitioners, make the following statements:

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money intended to fund the preparation or submission of this brief. No persons (other than *amici curiae*) contributed money that was intended to fund the preparation or submission of this brief.

ARGUMENT

In 1867, Congress passed a law granting the government the discretion to pay individuals who provide information that leads to the detection and punishment of "persons guilty of violating the internal revenue laws, or conniving at the same." Act of Mar. 2, 1867, ch. 169 § 7, 14 Stat. 471, 437. In 1996, Congress clarified that the 1867 law – since codified at 26 U.S.C. § 7623 – was intended to provide awards for "civil violations, as well as criminal violations." H.R. Rept. No. 104-506 at 51 (1996). Section 7623(b), enacted as part of the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, sec. 406, 120 Stat. 2922, 2958, calls for mandatory whistleblower awards of between 15 and 30 percent of the "collected proceeds" so long as certain criteria are met.

Amici understand that the IRS is taking the position that the term "collected proceeds" as used in Section 7623(b) does not include any amounts collected outside of Title 26, even if the underlying criminal violations sound in tax. We feel strongly that this interpretation is both inconsistent with the principles of Section 7623(b) – the purpose of which is to encourage whistleblowers to come forward with complete information on violations of tax law – and defies common sense.

The Internal Revenue Manual defines tax crimes broadly to include "those which are in violation of the criminal statutes of Title 26, Title 18 and/or Title 31 of the Code of Federal Regulations as applicable to Title 26." Internal Revenue Manual 9.5.3.1 (Apr. 19, 2006). The Department of Justice Criminal Tax Manual reads just as broadly, stating:

> In general, an offense is said to arise under the internal revenue laws when it involves (1) evasion of some responsibility imposed by the Internal Revenue Code, (2) obstruction or impairment of the Internal Revenue Service, or (3) an attempt to defraud the Government or others through the use of mechanisms established by the Internal Revenue Service for the filing of internal revenue documents or the payment, collection, or refund of taxes.

Dep't of Justice Criminal, Tax Div., *Criminal Tax Manual* § 1.02[2] (2012) ("DOJ Tax Manual").

While the IRS has the authority to investigate tax crimes, 26 U.S.C. § 7608(b)(1), it does not (and cannot) prosecute them. Instead, the Commissioner "refer[s] all criminal matters within the Commissioner's criminal investigative jurisdiction to the Department of Justice for grand jury investigation, criminal prosecution, or other criminal enforcement action requiring court order or Department of Justice approval." Treasury Order 150-35 (Jul. 10, 2000).

The mission of the Department of Justice Tax Division is to "protect the integrity of the federal income tax system by prosecuting criminals who defraud the [IRS]." DOJ Tax Manual § 1.01[1]. To do so, Tax Division prosecutors have an arsenal of potential charges at their disposal, including many that fall outside of Title 26, such as 18 U.S.C. § 287 (false claims), 18 U.S.C. § 371 (Klein conspiracies), 18 U.S.C. § 1001 (fraud and false statements in matters within the jurisdiction of a government agency), 18 U.S.C. § 1956 (money laundering), and 31 U.S.C. § 5322 (FBAR violations). The DOJ Tax Manual expressly requires its prosecutors to "authorize prosecution for the most serious readily provable offense," regardless of whether that offense is part of Title 26. *Id.* § 1.01[3]. Accordingly, there is no basis to silo Titles 18 and 31 from Title 26, as the Commissioner suggests.

Should this Court rule otherwise, it would be counter to Congress' intent and to the purpose of Section § 7623(b) because it would effectively render Section 7623(b) discretionary. Instead of issuing mandatory whistleblower awards, the government – which has virtually limitless discretion over what charges to bring and how to structure a party's financial obligations – would have the ability to categorize the crimes for

which the whistleblower's information was used in a manner that could deny the whistleblower's ability to collect an award or substantially decrease the amount of any award. Administrations hostile to the whistleblower program could reduce whistleblower rewards simply by categorizing recoveries as outside of Title 26.[1] That is not what Congress intended.

Most importantly, were this Court to adopt the Commissioner's interpretation, it would discourage whistleblowers from coming forward and reduce the number and effectiveness of enforcement actions. Each of us, especially those of us who have served as federal prosecutors, knows that so-called insiders are invaluable to investigations into criminal wrongdoing. Insider witnesses typically possess secret, first-hand information of misconduct and are often the ones who alert law

[1] *See, e.g.*, Jeremiah Coder, *Tax Analysts Exclusive: Conversations: Donald Korb*, 2010 TNT 11-7 (Jan. 19, 2010) (quoting then-IRS Chief Counsel Korb as stating, "The new whistleblower provisions Congress enacted a couple of years ago have the potential to be a real disaster for the tax system. I believe that it is unseemly in this country to encourage people to turn in their neighbors and employers to the IRS as contemplated by this particular program. The IRS didn't ask for these rules; they were forced on it by the Congress.").

enforcement to potential criminality of which authorities were otherwise unaware. The information that insiders bring often forms the basis of a criminal investigation and assists prosecutors in making appropriate charging decisions. An insider's anticipated testimony at trial will often lead a defendant to plead guilty. And at trial, it is the insider's testimony that usually serves as the foundation for the Government's case.

In complex criminal investigations, the role of an insider cannot be overstated. Without insider witnesses, investigations into complex corporate malfeasance are typically long, protracted affairs without any certainty of a viable prosecution. This is an important concern for the Department of Justice, which, without access to key insiders, would likely bring fewer prosecutions and secure a much lower conviction rate.

Whistleblowers are perhaps the most important type of insider. They risk their livelihood, and sometimes their safety, to bring criminal wrongdoing to the attention of law enforcement. Unlike insiders who come forward with information in the hopes of securing leniency at sentencing, whistleblowers come forward for one primary reason: the financial incentive.

In recognition of that fact, Congress created statutes like Section 7623(b) to ensure that whistleblowers receive an appropriate portion of the funds recovered by the United States through the information they provide. In doing so, Congress understood that without a robust whistleblower program, insiders would not have any practical incentive to come forward with actionable information. And without that information, many of the government's most successful prosecutions would not occur and the United States would recover nothing.

Through the efforts of whistleblowers, the United States has initiated thousands of tax prosecutions and recovered billions of dollars as a result. Since 2007, information submitted by whistleblowers has assisted the IRS in collecting $3.4 billion in revenue that otherwise would have been lost to fraud. IRS Whistleblower Program, Fiscal Year 2016 Annual Report to Congress, at 3. In 2016 alone, the IRS collected over $368 million in just 16 cases through whistleblower information. *Id.* at 10; *see also* Treasury Inspector General for Tax Administration, The Informants' Rewards Program Needs More Centralized Management Oversight, at 3 (Jun. 2006) ("TIGTA Report") (reflecting that from 2001 through 2005, the IRS has recovered more than $340 million).

Further, according to the TIGTA Report, prosecutions premised on whistleblower information are more productive and more cost-effective than those based on the IRS' usual method of selecting returns for examination. *Id.* at 4-5. For example, from 1996 through 1998, the IRS incurred costs of slightly more than 4 cents for each dollar collected through the whistleblower program, compared to a cost of over 10 cents per dollar collected through all enforcement programs. *Id.* at 4. In that same period, the IRS saw a higher dollar-yield per hour in cases based on whistleblower information. That is, for every hour of work the IRS dedicated to an informant-based case, the IRS reaped $946 in recommended adjustments, compared to just $548 per hour in actions resulting from the IRS' regular methods of review. *Id.* That trend has continued. Between 2003 and 2005, the IRS generated adjustments totaling $688 for every hour of investigation in whistleblower cases versus $382 for every hour of standard investigation. *Id.* at 5.

The IRS' interpretation of Section 7623(b) threatens future successes like these. By limiting the scope of "collected proceeds," the IRS will ensure that the most knowledgeable whistleblowers will choose to remain in the shadows, viewing it as not worth the risk. As a result,

the IRS, which has the potential to recover billions of dollars in unpaid taxes, will recover nothing simply because it does not want to give the whistleblowers a small percentage of what it collects. Such a short-sighted approach will, in turn, impact not only the whistleblower program, but general taxpayer compliance as well. Whistleblowers often make great sacrifice when they provide information to the United States Government and deserve to be compensated. To reduce a whistleblower's potential incentive is to reduce law enforcement's ability to enforce our laws and prosecute otherwise unknown tax violations.

CONCLUSION

For the foregoing reasons, the decisions of the Tax Court should be affirmed.

Dated: October 24, 2017

Respectfully submitted,

/s/ Jeffrey A. Neiman
MARCUS NEIMAN & RASHBAUM LLP
100 Southeast Third Avenue
Suite 805
Fort Lauderdale, Florida 33394

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

(Type-Volume Limitation, Typeface Requirements, and Type Style Requirements)

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 1519 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word version 2010, in 14-point Century font.

Dated: October 23, 2017

/s/ Jeffrey A. Neiman
Jeffrey A. Neiman

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d) and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that on this 24th day of October, 2017, I have filed the foregoing Amicus Brief with the Court via the Court's CM/ECF system, which will issue a Notice of Docket Activity that will constitute service of the document on all parties who have consented to electronic service.

/s/ Jeffrey A. Neiman
Jeffrey A. Neiman