UNITED STATES TAX COURT

In the Matter of:	)	
	)	
WHISTLEBLOWER 11099-13W	)	
	)	
Petitioner	)	
	)	Docket No. 11099-13W
v.	)	
	)	
COMMISSIONER OF INTERNAL REVENUE.	)	
	)	
Respondent	)	

Date: September 21, 2020

BRIEF OF *AMICUS CURIAE*
NATIONAL WHISTLEBLOWER CENTER
SUPPORTING PETITIONER URGING THAT THE U.S. TAX COURT DETERMINE THAT THE PROPER STANDARD AND SCOPE OF REVIEW IN THIS CASE IS DE NOVO

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Statement of Interest of *Amicus Curiae*

The National Whistleblower Center (the "NWC") respectfully submits this memorandum of law as *amicus curiae*. *Amicus* asks the Court to accept this brief and urges the Tax Court to rule in favor of Petitioner's motion for partial summary judgment determining that the proper standard and scope of review in this case is de novo.[1]

The NWC was founded in 1988 and has long been recognized as a leading voice for whistleblowers by policymakers in Washington, D.C. The NWC and attorneys associated with the NWC have supported whistleblowers in the courts and before Congress and achieved victories for environmental protection, government contract fraud, nuclear safety, and government and corporate accountability. The NWC and associated attorneys regularly work with tax whistleblowers who have filed submissions with the Internal Revenue Service (the "IRS") under Internal Revenue Code (IRC) § 7623(b) ("Section 7623(b)"). The NWC has also served as *amicus curiae* in several cases.[2]

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[1] Pet'r's Mot. for Partial Summ. J., *Whistleblower 11099-13W v. Comm'r*, No. 11099-13W (T.C.).

[2] *E.g.*, *Doe v. Chao*, 540 U.S. 614 (2004), *EEOC v. Waffle House*, 534 U.S. 279 (2002), *Beck v. Prupis*, 529 U.S. 494 (2000), *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000), *Haddle v. Garrison*, 525 U.S. 121 (1998), *English v. Gen. Elec.*, 496 U.S. 72 (1990), *Kan. Gas & Elec.Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *Mann v. Heckler & Koch*

Counsel for *amicus* are particularly well suited to provide this Court necessary insight into the legislative intent and historical backdrop behind the statute at issue. Dean Zerbe and Stephen M. Kohn are widely recognized as two of the nation's leading whistleblower attorneys, with both having represented some of the most successful tax whistleblowers in the program's history, including Bradley Birkenfeld, who obtained the largest whistleblower award in the history of the IRS Whistleblower Program. Dean Zerbe and Stephen Kohn have both successfully litigated influential tax whistleblower cases in this Court, including the seminal case of *Whistleblower 21276-13W v. Commissioner*, which clarified the definition of "collected proceeds," and was later codified by Congress.[3]

Particularly of note for this specific issue is Dean Zerbe's unique insight on the legislative history and intent behind the drafting of Section 7623(b)(1). From 2001 to 2008, Dean Zerbe served as Senior Counsel and Tax Counsel for Chairman of the Senate Finance Committee, and author of the statute, Senator Charles E. Grassley (hereinafter referred to as "Chairman Grassley"). As counsel, Dean Zerbe was instrumental in the drafting of the 2006 statute that ultimately established the

Defense, 630 F.3d 338 (4th Cir. 2010), *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239 (4th Cir. 2009).

[3] *Whistleblower 21276-13W v. Comm'r*, 147 T.C. 121 (2016).

IRS Whistleblower Office, awards program and appeals option for tax whistleblowers.

Amicus believes that this brief fits well within the goals for an *amicus* cited by the Tax Court in *Erwin v. Commissioner*.[4] *Amicus* believes that this brief brings to the Tax Court's attention issues that have not been completely briefed, or discussed, before the Court, especially as to the importance of the specific language used in the statute and Congress's clear intent when it enacted the law. *Amicus* will review the historical context and intent behind the statute as it was drafted, as well as the requirement for de novo review in light of the tax whistleblower's constitutional due process rights coupled with the constitutional-doubt canon of statutory construction.

Further, the importance of this case reaches far beyond Petitioner, as it hits at the very purpose of why the statute at issue was amended, which was to encourage tax whistleblowers to

[4] *Erwin v. Comm 'r*, T.C. Memo 1986-474, 5 (1986)("[T]he amicus may enlarge upon points which the party cannot, or prefers not to expound in detail. An amicus may be more knowledgeable than a party as to facts underlying particular arguments. An amicus would often be in a superior position "to inform the courts of interests other than those presented by the parties, and to focus the court's attention on the broader implication of various possible rulings' citing Robert L. Stern, Eugene Gressman, & Stephen M. Shapiro, Supreme Court Practice 570 (1986), citing Bruce J. Ennis, Effective Amicus Briefs 33 Cath. U.L. Rev. 603, 608 (1984). Fn ref. omitted.").

come forward by guaranteeing that the whistleblower would be entitled to a significant award payment, between 15 and 30 percent of collected proceeds; that the whistleblowers would not be subject to the historically arbitrary and capricious administration of the discretionary award program; that protection of a whistleblowers' right to an award would be protected by judicial review of the IRS Whistleblower Program through de novo review at the U.S. Tax Court; and that the creation of a Whistleblower Office at the IRS would give whistleblower submissions the close consideration and attention by the IRS that they deserve.

It is certainly not an overstatement to say that the future success of the IRS Whistleblower Program is in the hands of this Court. To allow the IRS to have full discretion over the decision making process for rewarding these whistleblowers without appropriate judicial review would result in an inevitable chilling effect on the IRS Whistleblower Program. To do so would return the program to the failures of the previous discretionary program with its arbitrary and capricious standard of review, exactly what Congress intended to prevent with the 2006 amendments. A failure to act by the Court would bring harm to those whistleblowers who have bravely stepped forward with critical details of tax evasion, and would create a disincentive

for future informants to come forward with beneficial information.

Introduction and Background

In determining the appropriate standard of review for claims brought under Section 7623(b)(1), the question before this Court is straightforward under the fixed-meaning canon of statutory construction, which states that words "must be given the meaning they had when the text was adopted."[5] A review of the statute through its legislative history, and considering the right of the whistleblower to constitutional due process, as well as the appropriate application of the constitutional-doubt canon, leave no doubt that the meaning of the words in the statute's text when adopted by Congress meant to provide for de novo by the Tax Court for 7623(b)(1) claims.[6] Unfortunately, the legislative history, constitutional due process and the applicable canons of statutory construction as to de novo review have never been addressed by the Tax Court, particularly in its decision in *Kasper v. Commissioner*.[7]

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[5] Anthony Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 78 (2012).

[6] *See* Norman Singer, 2A *Sutherland Statutory Construction* § 48:3 (7th ed.) (The fixed meaning canon also gives rise to the "circumstances under which an act was passed, the mischief at which it was aimed. And the statute's 'object' or 'purpose.'").

[7] *Kasper v. Comm'r*, 150 T.C. No. 2 (2018).

This will be the first opportunity for this Court to examine the legislative history of the whistleblower provision from its beginnings in 2004. The simple fact is that the Tax Court in *Kasper* only had the benefit of a one-sided submission by the IRS given that the *pro se* petitioner in *Kasper* ultimately took the side of the IRS regarding the issue of the correct standard of review. Therefore, the Tax Court in *Kasper* did not benefit from an adversary briefing on the issue. The *Kasper* opinion suffers from its overdependence on the IRS briefing, without the benefit of counter-argument that would have brought forward substantive issues.

As explained below: 1. The legislative history of Section 7623(b) shows that, from its first introduction in 2004, the statute was intended and understood to provide for "independent review," meaning de novo review by the Tax Court. Further changes in the statute from 2004 to 2006 also underscore that Congress intended for de novo review; 2. The context surrounding the statute also leads to a de novo review. Through enacted legislation, Congress sought to "strengthen" the IRS Whistleblower Program and address "perceived problems" related to the then-existent, and failing, tax whistleblower award program. This was done in a variety of ways, including transferring jurisdiction of tax whistleblower cases from the U.S. Court of Federal Claims, which utilized an arbitrary and

capricious review standard, to the Tax Court, with its long history and tradition of de novo review, further supporting a finding of de novo review; and, 3. The lack of constitutional due process for tax whistleblowers by the IRS brings forward the constitutional-doubt canon of statutory construction which also supports de novo review.

1. <u>The Legislative History of Section 7623(b) Supports De Novo Review</u>

a. The 2004 Amendment Creating Section 7623(b) had a Primary Goal of Creating "Greater Certainty" and Allowing for an "Independent Review"

As with historians who believe the story of America starts with the Mayflower, the IRS in its brief in *Kasper* inaccurately states that the legislative history of the modern IRS whistleblower provision starts on September 19, 2006.[8] The Court in *Kasper* unfortunately follows the IRS to Plymouth Rock, stating the legislative history of Section 7623(b) ". . . sheds no light on this darkness."[9] The Courts have found statements

[8] Opening Br. for Resp't, 23, *Kasper v. Comm'r,* No. 22242-11W (T.C.) ("While there is no legislative history concerning section 7623(b) . . . ").

[9] *See Kasper*, 150 T.C. No. 2 at 14 (2018) (Given that the Tax Court itself in *Kasper* acknowledges the importance of legislative history, *Amicus* will not burden the court with a long discussion on the benefits of legislative history to assist this Court in its work beyond referencing the U.S. Supreme Court's stance that although "legislative history can never defeat unambiguous statutory text, historical sources can be useful for a different purpose." (Quoting *Bostock v. Clayton Cnty., Ga.*, 140 S.Ct. 1731, 1750 (2001); *See also Milner v. Dept. of Navy*, 562 U.S. 562, 574 (2011) ("Legislative history,

regarding original bill iterations particularly relevant for the understanding of a statute, particularly when the language initially used was substantially carried forward into the final provision that became law, as is the case here.[10]

The reality is that the legislative history of Section 7623(b) starts not in September 2006, but in May 2004, when Chairman Grassley introduced Section 488 of the Jumpstart Our Business Strength (JOBS) Act, effectively creating Section 7623(b).[11] The provision proposed by Chairman Grassley was

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for those who take it into account, is meant to clear up ambiguity, not create it.").).

[10] *See United States v. Enmons*, 410 U.S. 396, 405 n. 14 (1973) (In quoting from remarks by Congressman Hobbs upon introduction of the original bill: "The remarks with respect to that bill, H.R. 653, 78th Cong., 1st Sess., which passed only the House, are wholly relevant to an understanding of the Hobbs act, since the operative language of the original bill was substantially carried forward into the Act...Surely an interpretation placed by the sponsor of a bill on the very language subsequently enacted by Congress cannot be dismissed out of hand, as to the dissent would have it, simply because the interpretation was given two years earlier."); *See also Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1347 n. 1 (2001) (On quoting a Committee report on the Whistleblower Protection Act (WPA): "This legislative history of this law relates to a version of the WPA that President Reagan pocket-vetoed after the 100th Congress adjourned. In the 101st Congress, the WPA was reintroduced, passed and signed into law on April 17, 1989. Congress did not release committee reports, but it is proper for us to look at the legislative history from the 100th Congress for guidance in interpreting the WPA, because the language did not change.").

[11] The Jumpstart Our Business Strength Act, S. 1637, 108th Cong. § 488 (2004), *available at* Tax Analysts, Grassley Amendment No. 3133 Passes Senate, Tax Notes, May 11, 2004; *See also Robinette v. Comm'r*, 439 F.3d 455 (8th Cir. 2006) (It should be noted that this proposal, which eventually failed to pass the House,

included in a manager's amendment that was passed by the Senate, and would have created a mandatory award ranging between 15 and 30 percent, provided for Tax Court review after transferring jurisdiction from the Court of Federal Claims, and created a Whistleblower Office within the IRS.[12] In short, in all of its key elements, the 2004 amendment creating Section 7623(b) was the same as what was ultimately signed into law in 2006.[13]

The Senate Finance Committee released a description of all the amendments adopted by the Senate in S. 1637, the Jumpstart Our Business Strength (JOBS) Act on May 13, 2004.[14] Regarding the creation of Section 7623(b), the summary stated:

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preceded the Sept. 19, 2006, U.S. Court of Appeals for the Eighth Circuit decision in *Robinette v. Comm'r*, by two years).

[12] *Id.*

[13] Commentators have erroneously viewed that the sole impetus behind the Section 7623(b) amendments was a TIGTA report of 2006. While the TIGTA report, done at the request of Chairman Grassley, was helpful and important, the Senate Finance Committee staff had been conducting a review of the IRS Whistleblower Program even before the 2004 amendment. The Senate Finance Committee staff review made clear the host of problems in the whistleblower program at the time—both the administration by the IRS as well as the limitations of judicial review by the Court of Federal Claims. These issues, particularly the maladministration of the whistleblower program were later amplified and confirmed by the TIGTA report; *See Report of Treasury Inspector General for Tax Administration,* The Informants' Rewards Program Needs More Centralized Management Oversight, No. 2006-30-092 (June 2006), *available at* http://www.whistleblowers.org/storage/whistleblowers/docs/birk/tigtareport2006-30-092.pdf.

[14] Tax Analysts, U.S. Senate Finance Committee Sums Up JOBS Act Amendments, Tax Notes, May 13, 2004; The 2004 Grassley amendment creating Section 7623(b) was well-known in the tax community;

> The proposal provides *greater certainty* and *independent review* for whistleblowers who are seeking a cash award for providing assistance to the IRS. In addition, the proposal creates a Whistleblower Office at the IRS that will be dedicated to working with whistleblowers providing valuable information about tax violations.[15]

Also critical to note is that on May 12, 2004, Chairman Grassley stated of the Senate passing the amendment in 2004 creating Section 7623(b):

> Right now, the IRS is allowed to pay rewards to whistleblowers, but there's no guarantee of a reward and, therefore, less incentive for whistleblowers. This provision models an IRS rewards program on the False Claims Act. It provides *greater certainty* and *independent review* for whistleblowers who are seeking a cash award for providing assistance to the IRS.[16]

Allen Kennedy, News Analysis: Critics Question Whistleblower Proposal in Senate ETI Bill, Tax Notes, July 12, 2004; (It should be noted that Chairman Grassley's proposed amendment did not go unnoticed, with critics questioning the proposal heavily).

[15] *Id.* (emphasis added); (The U.S. Court of Appeals for the Eighth Circuit in *Robinette v. Commissioner* acknowledged the IRS and the Petitioner agreeing to an abuse of discretion review standard for Section 6330 disputes, explicitly citing to a House Report using language to that effect. Here, the IRS attempts to ignore the above cited commentary from the Senate Finance Committee clearly indicating the legislature's intent to "greater certainty" through an "independent review," meaning a de novo review.) (*See Robinette v. Comm'r*, 439 F.3d 455, 458 (8th Cir. 2006)).

[16] Press Release, United States Senate Committee on Finance, Grassley Praises Senate Passage of IRS Whistleblower Help, Civil Rights Tax Reform, Charitable Giving Reform, Ban on Deduction of Government Fines, "Son of Boss" Item (May 12, 2004), *available at* https://www.finance.senate.gov/chairmans-news/grassley-praises-senate-passage-of-irs-whistleblower-help-civil-rights-tax-reform-charitable-giving-reform-ban-on-deduction-of-government-fines-son-of-boss-item (This Court has frequently cited to press release statements as useful context for legislative interpretation (emphasis added). *See, e.g., Blak*

The Tax Court has long understood and interpreted "independent review" to mean de novo review.[17] As important, the Tax Court has long understood and interpreted "arbitrary and capricious" to *not* mean independent review.[18] Further, "greater certainty" is fairly read as speaking to de novo review given that whistleblowers were already subject to the arbitrary and capricious review standard by the Court of Federal Claims. This Court must therefore read "greater certainty" as an improvement

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Invs. v. Comm'r, 133 T.C, 431, 442 (2009); *In re Devries,* 2020 WL 2121260, 4 (Bankr. N.D. Iowa 2020); *United States ex rel. Ervin v. Hamilton Sec.*, 332 F. Supp. 2d 10 (D.D.C. 2003); *Tinsley v. Comm'r,* T.C. Memo. 1992-195 (1992); *United States ex rel. Merena v. Smithkline Beecham Corp.*, 205 F.3d 97, 106 (3d Cir. 2000)).

[17] *See Estate of Lassiter v. Comm'r*, T.C. Memo. 2000-324, 8 (2000) ("As we have previously established, a trial before the Tax Court is a proceeding *de novo*… In carrying out this mandate here, we cannot substitute selected conclusions made by respondent in administrative papers for our own. We instead must engage in an *independent review* of the facts and application of law thereto." (emphasis added)); *See also Marshall v. Marshall,* 547 U.S. 293, 303 (2006) ("In noncore matters, a bankruptcy court may not enter final judgment; it has authority to issue only proposed findings of fact and conclusions of law, which are reviewed *de novo* by the district court. See § 157(c)(1). Accordingly, the District Court treated the Bankruptcy Court's judgment as "proposed[,] rather than final," and undertook a "comprehensive, complete, and *independent review* of" the Bankruptcy Court's determinations." (emphasis added)).

[18] *See Murphy v. Comm'r*, 125 T.C. 301, 320 (2005) ("We do not conduct an independent review of what would be an acceptable offer in compromise. *Fowler v. Commissioner*, T.C. Memo. 2004-163. The extent of our review is to determine whether the Appeals officer's decision to reject the offer in compromise actually submitted by the taxpayer was arbitrary, capricious, or without sound basis in fact or law. *Skrizowski v. Commissioner*, T.C. Memo. 2004–229; *Fowler v. Commissioner*, supra; see *Woodral v. Commissioner*, 112 T.C. 19, 23, 1999 WL 9947 (1999).").

over the then-current judicial review of arbitrary and capricious. As discussed later, the creation of judicial review in the Tax Court is against a back drop that it was well-established and understood that the strong presumption was that a trial in the Tax Court is a proceeding of de novo.[19]

The IRS has never cited or noted the legislative history of the 2004 amendment and the accompanying statements calling for "greater certainty" and "independent review" in its briefings to the Tax Court. Consequently, this is the first chance the Tax Court has had to consider this illuminating statement of intent by both the author of Section 7623(b) and the Senate Finance Committee. The statements by Chairman Grassley and the Finance Committee certainly provide clear support as to the question of de novo review. Additional legislative history, as shown below, further bolsters this finding.

b. The 2005 Amendment and Subsequent Response

The 2004 amendment creating Section 7623(b) passed the Senate, but was later dropped in the House-Senate conference.[20] However, Chairman Grassley revived the amendment creating

[19] *Jones v. Comm'r*, 97 T.C. 7, 18 (1991) (It is well-established that "a trial before this Court is a proceeding de novo.").
[20] The Jumpstart Our Business Strength Act, S. 1637, 108th Cong. § 488 (2004), *available at* Tax Analysts, Grassley Amendment No. 3133 Passes Senate, Tax Notes, May 11, 2004.

Section 7623(b) in 2005, introducing it as Section 5508 of H.R. 3, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (the "Highway Bill").[21] The language used in the 2005 amendment was essentially the same as the language in the 2004 amendment.[22] The Senate Finance Committee released a public memorandum describing the provisions, including the whistleblower provision, and again stated: "This provision provides *greater certainty and independent review for whistleblowers* who are seeking a cash award for providing assistance to the IRS."[23] Again, the Highway Bill amendment passed the Senate, but the whistleblower provisions were again dropped in conference.[24] However, the 2005

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[21] Safe, Accountable, Flexible, Efficient Transportation Equity Act: Legacy for Users, H.R.3, 109th Cong. § 5508 (2005), *available at* Tax Analysts, Safe, Accountable, Flexible, Efficient, Transportation Equity Act: A Legacy for Users (P.L. 109-59), Tax Notes, August 10, 2005.

[22] It should be noted that the 2005 provision did add Section 7623(b)(3), an anti-abuse provision stating that the Whistleblower Office *may* reduce awards where the whistleblower planned and initiated the action; and that the Whistleblower Office *shall* deny an award if the whistleblower is convicted of criminal conduct arising from the role of planning and initiating. The 2005 provision also made clear that it was in the *sole discretion* of the whistleblower office to ask for additional assistance from the whistleblower or their lawyer.

[23] Senate Finance Committee Staff Summarizes Revenue Offsets for SAFETEA Bill, Tax Notes, May 10, 2005, *available at* https://www.taxnotes.com/tax-notes-today-federal/excise-taxation/senate-finance-committee-staff-summarizes-revenue-offsets-safetea-bill/2005/05/11/y8w5 (emphasis added).

[24] *Id.*

amendment inspired an alternative bill as well as commentary that also support a finding of de novo review.

Senator Carl Levin proposed legislation in 2005 that followed the language in Chairman Grassley's Section 7623(b) in most ways, except in one key aspect. Senator Levin's bill specifically gave the IRS *full discretion* in administering awards to whistleblowers.[25] Senator Levin's bill stated that the determination of any whistleblower award was to "be determined at the *sole discretion* of the Whistleblower Office."[26] In a statement made on July 29, 2005, Senator Levin, introducing the legislation, said that the whistleblower provision in his legislation was very similar to the provision developed by the Senate Finance Committee, however he noted one key difference:

> ". . . we would continue to give the IRS the discretion to determine the amount of money paid to an individual whistleblower; our bill would not enable whistleblowers to appeal to a court to obtain additional sums. The fact-specific analysis that goes into evaluating a whistleblower's assistance and calculating a reward makes court review inadvisable. The existence of an appeal also invites litigation and necessitates the expenditure of taxpayer dollars – not for tax enforcement but for a court dispute."[27]

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[25] Tax Shelter and Tax Haven Reform Act of 2005, S. 1565, 109th Cong. § 206 (2005).
[26] *Id.*
[27] 151 Cong. Rec. S. 9472, 9484.

Senator Levin's comments on the 2004 and 2005 Section 7623(b) provisions put forward by Chairman Grassley and the Senate Finance Committee allowing for Tax Court review can be fairly read that Senator Levin interpreted Chairman Grassley's Section 7623(b) language as providing for de novo review, as he complains about "the fact-specific analysis" and the time and expenses involved. Senator Levin surely would not have used this description if he viewed the Tax Court review as involving the comparatively simple, quick, pro forma, rubber stamp review using an arbitrary and capricious standard. Also important to note was Chairman Grassley, in his 2006 amendments, and Congress, in accepting the Grassley amendments, explicitly rejecting Senator Levin's proposal to eliminate Tax Court review; as well as Senator Levin's proposal to have award determinations be made in the "sole discretion" of the whistleblower office.[28] Senator Levin's direct criticism of a fact-intensive, costly review only bolsters the notion that Senator Grassley's Section 7623(b) language, the language ultimately signed into law, was meant to provide de novo review.

[28] It should be noted that Chairman Grassley, in the first 2006 provision, did accept and modify Senator Levin's proposal to allow the Whistleblower Office to, at its sole discretion, request assistance from the whistleblower and her attorney *and* reimburse the attorney. However, the reimbursement potion was dropped before final passage.

Just as Senator Levin's statement presumes de novo review, informed commentators at the time discussed at length that the judicial review of whistleblower awards should be done by U.S. federal district courts given their experience with *qui tam* actions, experience that the Tax Court did not possess.[29] If these informed commentators, which included a former attorney-advisor to a Tax Court judge and the American Bar Association (the "ABA"), viewed that there would be an arbitrary and capricious review standard at the Tax Court, as opposed to a de novo standard of review as is the case for *qui tam* cases in federal district court, the point would undoubtedly have been raised.[30] The commentators failed to raise this point because it was widely understood that the judicial review in the Tax Court provided for by the 2004 and 2005 Section 7623(b) whistleblower amendments would be the standard of review the Tax Court had presumptively used: de novo.

Again, none of this legislative history, particularly Senator Levin's critique and counterproposal, have been brought

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[29] Kenneth W. Gideon, ABA Tax Section Suggests Modifications to Highway Bill, Tax Notes, June 13, 2005.

[30] *Id*; *See also Church of Scientology of Cal. v. IRS*, 108 S.Ct. 271, 276 (1987) ("All in all, we think this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle's 'dog that didn't bark,' that an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill.").

forward by the IRS, nor been considered and weighed by the Tax Court. In sum, Senator Levin's rejected 2005 amendment, as well as the commentary surrounding the proposal, all support a finding that the meaning of the text when it was adopted was an independent, de novo review. Thus, keeping with the Tax Court's view that independent review is de novo review, not arbitrary and capricious review.[31]

c. The 2006 Statute Further Supports De Novo Review

There were only minor changes made to the Section 7623(b) amendment from its first introduction in 2004 and 2005, to the final passage in December 2006. A close read of the statutory language first introduced, and finally passed in 2006, support a finding of de novo review.

i. Different Words, Different Meanings

The Tax Court has correctly viewed as axiomatic for statutory construction that different language used in the same statute must have different meanings, and has applied this canon of statutory construction specifically to Section 7623(b), saying that when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally

[31] *See Estate of Lassiter v. Comm'r*, T.C. Memo. 2000-324 at 8 (2000).

and purposely in the disparate inclusion or exclusion."[32] The decision in *Kasper* failed to analyze and consider that Congress acted intentionally and purposely in the use of the words "shall," "determination," "may," and "sole discretion." Those words have a direct impact on the standard of review that should be applied.

While the Tax Court in *Kasper* didn't consider whether the use of different words in Section 7623(b) mattered, or whether these words signaled a specific standard of review, the Tax Court in the recent case of *Van Bemmelen v. Commissioner* did correctly note that the language of "sole discretion" in the above cited off-code provision, combined with no meaningful standard by which to judge the Whistleblower Office's exercise of discretion, meant that such actions are immune from judicial review.[33]

However, although the Tax Court in *Bemmelen* recognized that the "sole discretion" language signaled the standard of review, or the lack of a review, the Tax Court has never addressed the fact that there are marked differences in the use of "may" as

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[32] *Whistleblower 21276-13W v. Comm'r*, Supp. 144 T.C. 290 (2016) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)); *See also Whistleblower 22716-13W v. Comm'r*, 146 T.C., 97.

[33] *Van Bemmelen v. Comm'r*, 155 T.C. 4, 33 (2020).

discretionary language in Section 7623(b)(2) and (3), as well as the words "shall" and "determination" as mandatory award language in Section 7623(b)(1) and (3), and the resulting impact on judicial review. The Court's decision in *Kasper* leads to a result that treats the mandatory language in Section 7623(b)(1), and the discretionary language in Section 7623(b)(2) and (3), as all subject to the same arbitrary and capricious standard of review.

The Tax Court in *Kasper* also did not consider whether there was any purpose or intention in the selection and use of the specific language of "shall," "determine," and "may" in Sections 7623(b)(1), (b)(2), or (3), to inform the standard of review of the Tax Court. Congress expressly signaled its intent for the proper standard of review with its language of "shall," "determine," "may," and "sole discretion." Congress was very specific in terms of what instances "shall," "determine," "may," and "sole discretion" would apply under Section 7623(b), and what actions would be subject to Tax Court review under Section 7623(b)(4).

Again, Congress was careful in its choice of these words as they relate to actions by the IRS Whistleblower Office. While all Section 7263(b) cases are subject to de novo review in terms of the Tax Court determining the facts and law, the word choices

signal the proper standards of review for the determination by the IRS. They are as follows: de novo for Section 7623(b)(1) awards, de novo for determinations of whether the anti-abuse provisions are triggered for Section 7623(b)(2) and (3), arbitrary and capricious for payment determinations for the anti-abuse provisions of Section 7623(b)(2) and (3), and no review for electing to bring in the whistleblower or whistleblower's counsel to assist—within the IRS' "sole discretion." This analysis is reinforced by Section 7263(b)(4), which directs that appeals to the Tax Court are for any determinations under Section 7623(b)(1)(2) and (3), while providing no provision for appeals for the off-code provision's "sole discretion" language, the matter at issue in *Bemmelen*. A leading treatise, "The United States Tax Court: An Historical Analysis," by Harold Dubroff and Brant J. Hellwig, arrived at the same conclusion in its consideration of the proper standard of review, stating:

> One would expect determinations that are not the product of agency discretion under 7623(b) (e.g. whether the information provided by the petitioner led to administrative or judicial action that resulted in the collection of tax so as to warrant a minimum award under 7623(b)); whether the information provided constituted a "less substantial contribution" within the meaning of 7623(b)(2)(A) warranting a reduced ceiling on the award percentage; whether the petitioner planned or initiated the actions that led to the underpayment of tax or violation of tax laws so as to warrant a reduction in the award under 7623(b)(3) will be reviewed by the Tax Court on *a de novo basis*. On the other hand, to the

> extent a determination under 7623(b) rests in the discretion of the Commissioner (e.g. the determination concerning the particular percentage award to be paid within the 15 percent and 30 percent parameters of 7623(b)(1); the appropriate amount of reduction in the amount of the award pursuant to 7623(b)(2) or (b)(3) a more deferential abuse-of discretion standard of review would appear appropriate.[34]

These words, "shall," "may," "determine," and "discretion", and more importantly, the difference between the words used, is never raised by the IRS in its briefs, and consequently is not addressed or considered in *Kasper*. These words, which are both materially different and used intentionally to signal a specific standard of review, support a finding, based on their meaning at the time Section 7623(b) was adopted, that Section 7623(b)(1) cases were subject to de novo review.

ii. The 2006 Amendments Strengthen Judicial Review by Providing for Appellate Review

In addition to Tax Court review, the 2004 and 2005 amendments for Section 7623(b) provided that awards would be petitioned for review under the simplified rules of Section 7463 without regard to the amount in dispute.[35] However, Section

[34] Harold Dubroff & Brant J. Hellwig, The United States Tax Court: An Historical Analysis 535 (2014) (emphasis added).
[35] Tax Analysts, Grassley Amendment No. 3133 Passes Senate, Tax Notes, May 11, 2004; (("Any determination regarding an award under paragraph (1) or (2) shall be subject to the filing by the individual described in such paragraph of a petition for review with the Tax Court under rules similar to the rules under section 7463 (without regard to the amount in dispute) and such

7463(b) does not provide for an appeal of the determination. With the 2006 amendments, one small change included the removal of the Section 7463 provision rules, which were replaced with a provision allowing the cases to be assigned to Special Trial Judges.[36] More importantly, the removal of the Section 7463 language clarified and confirmed that Tax Court cases would be subject to appeals, further strengthening the judicial review. The clear direction of Congress' actions, from 2004 to 2006, led to the strengthening of judicial review of whistleblower cases by ensuring "independent review" as put forward by Chairman Grassley from the very beginning.

d. A 2007 Clarification: "Persuasive" to a Finding of De Novo Review

After the legislation creating Section 7623(b) was signed into law in December 2006, Chairman Grassley sought to create minor changes to the newly-enacted statute within weeks. These proposed changes mostly reflected the earlier drafts of the legislation, and were included as Section 543 of the Senate version of H.R. 1591 that passed the House and Senate, but was later vetoed.[37] The changes offered to Section 7623(b) included

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review shall be subject to the rules under section 7461(b)(1).").

[36] 26 U.S.C. § 7443A.

[37] *See* Senate Amendment to Emergency Supplemental Funding Bill Available, Tax Notes, March 27, 2007; *See also* Veto Message on H.R. 1591, 110th Cong., May 2, 2007, *available at* https://www.govinfo.gov/content/pkg/CDOC-110hdoc31/pdf/CDOC-

reducing the floor for mandatory awards from $2,000,000 to $20,000, and providing reimbursement for whistleblowers' attorneys that assisted the IRS. Of particular relevance, however, is the proposed provision creating Section 7623(b)(4)(B), reading:

> Notwithstanding sections 7458 and 7461, the Tax Court may, in order to preserve the anonymity, privacy or confidentiality of any person under this subsection, provide by rules adopted under section 7453 that portions of filings, *hearings, testimony, evidence and reports* in connection with proceedings under this subsection may be closed to the public or to inspection by the public.[38]

The language of "hearings, testimony, evidence and reports" fairly reads as the language commonly used to describe a trial before the Tax Court, which again would require a de novo review.[39] Review of whistleblower cases in the Tax Court under the arbitrary and capricious standard, combined with the limited

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110hdoc31.pdf*;* (It should be noted that the administration voiced no opposition to the whistleblower provisions in its explanatory veto message on H.R. 1591).

[38] *Id.* (emphasis added).

[39] *See Jones v. Comm'r*, 97 T.C. 7, 18; *See also Robinette v. Comm'r*, 123 T.C. 85, 128 (2004) (Judges Halpern and Holmes, dissenting, citing the clear link between testimony and trials de novo.) ("("To allow oral testimony as to facts not otherwise in the administrative record to be introduced in evidence in a section 7428 declaratory judgment proceeding would convert that proceeding from a judicial review of administrative action to a trial de novo" and "would permit an applicant [for tax-exempt status] to withhold information from the Internal Revenue Service and then to introduce it before the Court"); *Tamko Asphalt Prods., Inc. v. Commissioner*, 71 T.C. 824, 837 (1979).").

scope of review, have been significantly circumscribed and limited. These types of reviews certainly do not feature the expansive hearings, testimony, evidence, and reports encompassed by this provision. Further, the provision, unlike the other 2007 proposed amendments to Section 7623(b), was to take effect "as if included in the amendments made by section 406 of the Tax Relief and Health Care Act of 2006."[40] This clearly signaled that Congress intended that the provision be viewed as part of the original legislation.

The Supreme Court has been guarded about post-enactment legislative history, viewing, in short, that it ". . . should be relevant to the extent it is persuasive." [41] Here, the legislation was written by the author of Section 7623(b) and was also both introduced and passed by the Congress within weeks of passing the statute at issue. The provision reflects an effort to ensure protection of confidential information that the legislature anticipated to be provided as part of a Tax Court de

[40] Senate Amendment to Emergency Supplemental Funding Bill Available, March 27, 2007, Tax Notes, March 27, 2007.
[41] *United States v. Woods*, 571 U.S. 31, 48 (2013) (Finding that a Joint Committee on Taxation Blue Book is a "post-enactment explanation," with the Supreme Court stating in its opinion, "Of course the Blue Book, like a law review article, may be relevant to the extent it is persuasive."); By comparison, the 2007 provision is not "post-enactment explanation," but instead legislation passed by Congress that was written by the author of the previous language that was signed into law just a few weeks earlier.

novo review under the newly passed statute. These unique circumstances speak in support of the "persuasiveness" of the legislation. While this 2007 language did not become law, it does reflect an understanding of the legislation of Section 7623(b) as passed, and is "persuasive" in understanding how Senator Grassley intended the meaning of the words of the text when Section 7623(b) was enacted, which was to provide de novo review.[42]

e. Conclusion

The legislative history, one that has never been put before this Court by the IRS, clearly shows that when Section 7623(b) was first introduced and passed by the Senate in 2004, combined with the Senate Finance Committee's release alongside the chief drafter and advocate, Chairman Grassley, stating the language was to provide whistleblowers "greater certainty" and "independent review," the legislation's words were understood to establish a de novo review.[43] The Senate Finance Committee, again in 2005, stated that the Senate-passed legislation was to provide whistleblowers "greater certainty" and "independent

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[42] This Court noted the provision when it passed New Rule 345, "Privacy Protections for Filings in Whistleblower Provisions"; *See* U.S.T.C. R. Prac. & Proc. (Rule 345 n. 1).

[43] *Agyeman v. INS*, 296 F.3d 871, 876 (9th Cir. 2002) (Citing *Perez-Lastor v. INS*, 208 F.3d 773, 777 (9th Cir. 2000)) ("Because our standard of review is de novo, we conduct an independent examination of the entire record.").

review." Further, as shown by the legislative history of the Section 7623(b) provision in 2005, statements made by Senator Levin and other commentators at the time further supports a finding of a de novo review standard. The discussion of the relevant provisions of the statute, and the changes in the statute from 2004 to 2006, all support a finding for de novo review.

All of these elements combined, the legislative history as well as the statutory language and how it evolved over time, all support a clear finding that the meaning of the statute's words at the time the text was adopted require a de novo review. The entire thrust of the statutory change was to enhance judicial review. As will be shown below, it is at best counterintuitive to believe that Congress was merely changing venues when adopting the amendments to the statute, and not enhancing the standard of review previously utilized by the Court of Federal Claims.

2. <u>The Context Surrounding Section 7623(b) Supports De Novo Review</u>

The Courts have long recognized that context can be key in correctly interpreting a statute with the use of the canons of presumption against ineffectiveness and the whole-text canon. First, the presumption against ineffectiveness ". . . ensures

that a text's manifest purpose is furthered, not hindered."[44] "This canon follows inevitably from the facts that (1) interpretation always depends on context, (2) context always includes evident purpose, and (3) evident purpose always includes effectiveness."[45] In a similar vein, the whole-text canon " . . . calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." [46]

In that light, what is the context of Section 7623(b), and what was the problem that Congress was seeking to address? The Tax Court has stated in a number of cases, including *Whistleblower 11332-13W v. Commissioner*, that Congress enacted the statute in 2006 to address "perceived problems" with the awards program:

> Congress enacted TRHCA in 2006 to address perceived problems with the discretionary award regime. TRHCA sec. 406(a), 120 Stat. at 2958, amended section 7623 to require the Secretary to pay nondiscretionary whistleblower awards under certain circumstances and to *provide this Court with jurisdiction to review such award determinations*.[47]

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[44] Anthony Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 63 (2012).
[45] *Id.*
[46] *Id.* at 167; *See also Taylor v. Comm'r*, T.C. Memo. 2017-132, 15 (2017) (Citing *K Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988)) (Looking "to the particular statutory language at issue, as well as the language and design of the statute as a whole.").
[47] *Whistleblower 11332-13W v. Comm'r*, 142 T.C. 396, 400 (2014) (emphasis added).

The Tax Court recognized that part of the context of Section 7623(b), and fixing the perceived problems, was judicial review—particularly by providing the Tax Court jurisdiction.

a. What "Perceived Problems" Did Congress Face with the IRS Whistleblower Program?

It is beneficial to understand in detail what the "perceived problems" motivating the enactment of Section 7623(b) were. As noted earlier, prior to 2004, the Senate Finance Committee had been reviewing and conducting oversight of the problems of the whistleblower program. In discussions with informed practitioners, particularly lawyers with experience in the False Claims Act, academics, and briefings by the IRS, it was clear to Committee investigators that the program, including judicial review by the Court of Federal Claims, was in shambles.

Dennis Ventry Jr., now a Professor of Law at UC Davis, offered a bleak analysis of the IRS whistleblower program at the time, finding that it "failed to provide such an incentive, with paltry bounties, stingy administrators, inadequate protection for whistleblowers, and unreceptive courts."[48] The state of play for the IRS Whistleblower Program and judicial review of whistleblower decisions in early 2000 is also well-reflected in

[48] Dennis Ventry, Jr., Whistleblowers and Qui Tam for Tax, Tax Lawyer, Vol. 61, No. 2, 357, 3678 (2007).

a detailed review of the program and incentives provided by Terri Gutierrez, an accounting professor who in 1999 put forward a thoughtful analysis in *Tax Notes*.[49] Particularly concerning was Professor Gutierrez's finding that the IRS "does not seem to follow its own guidelines . . .."[50] More important for this brief, Professor Gutierrez conducted a survey of every case brought by whistleblowers to the Court of Federal Claims, previously known as the U.S. Court of Claims, seeking to obtain an award from 1941 to 1998.[51] There were 19 cases in total, and as Professor Gutierrez notes, the IRS won every single case—the court finding that in each instance, the IRS had not abused its discretion.[52]

Regarding this dismal record for whistleblowers at the Court of Federal Claims, Professor Gutierrez noted that, "While the decisions seem egregious on the issue of fairness, the wording of the statute gives the commissioner such complete discretion in determining whether and how much reward will be paid, that the courts are wont to rule otherwise."[53] Professor Gutierrez also found that the IRS failed to follow its own whistleblower award guidelines, while noting how difficult it

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[49] Terri Gutierrez, IRS Informants Reward Program: Is it Fair?, Tax Notes, Aug, 23, 1999.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*

was for whistleblowers to make a case. According to Professor Gutierrez, "courts are reluctant to override administrative authority where Congress has given duties to department heads that require them to exercise judgment and discretion unless there is evidence that the decisions are clearly wrong."[54]

In short, the Finance Committee, from its discussions with practitioners as well as review of available materials and analyses surrounding the IRS Whistleblower Program, perceived that a significant problem with the program at the time was a lack of meaningful "independent review" by the courts. This, of course, was highlighted by the arbitrary and capricious standard applied by the Court of Federal Claims to whistleblower cases, which was contrary to the de novo judicial review applied to cases under the False Claims Act.

The Finance Committee, in addition to its investigation and oversight of the program, also heard testimony from whistleblowers that directly spoke to the problems within the IRS Whistleblower Program. One example included an anonymous whistleblower given the name "Mr. ABC," who spoke of his experience trying to blow the whistle on ENRON to the IRS:

> In providing all this information, my experience with the IRS has been extremely frustrating and discouraging. What I have encountered is an agency that is resistant

[54] *Id.*

> to and suspicious of confidential informants . . . that is, private citizens who are trying to do the right thing by coming forward and blowing the whistle on significant tax fraud. I have also encountered an agency that is disorganized, and that is generally not equipped to deal with complex and sophisticated tax shelters in an effective fashion.[55]

Mr. ABC went on to detail the basic problems he faced related to the IRS processing his Form 211, treating him with suspicion, and the agency's general resistance to taking "serious outside information from knowledgeable insiders."[56]

Then came the release of the TIGTA report on June 9, 2006.[57] The report, titled "The Informants' Rewards Program Needs More Centralized Management Oversight," was created at the request of Chairman Grassley.[58] The TIGTA report provided a devastating indictment as to the IRS Whistleblower Program, with Chairman Grassley commenting on its release:

> TIGTA's report makes clear that the IRS and Treasury still are far short in having a professional, effective office to benefit from whistleblowers. For example, in 76 percent of the claims rejected, TIGTA was unable to

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[55] Tax Analysts, Whistle-Blower Criticizes IRS Response to Shelters Before Senate Finance, Tax Notes, Aug, 23, 1999.
[56] *Id.*
[57] *See Report of Treasury Inspector General for Tax Administration,* The Informants' Rewards Program Needs More Centralized Management Oversight, No. 2006-30-092 (June 2006), *available at* http://www.whistleblowers.org/storage/whistleblowers/docs/birk/tigtareport2006-30-092.pdf.
[58] *Id.*

> determine the rationale for the reviewer's decision to reject the claim. This has to stop.[59]

The TIGTA report made it clear that the chances of an erroneous decision as to a whistleblower award were extremely high. The report stated:

> ". . . in 32 percent of the paid claims, we were unable to determine the justification for the percentage granted. In most of these cases, the reviews simply entered the percentage on the Form 11369 and did not provide any explanation for the decision.
>
> For a rejected claim, the reason for rejection is of major significance. In 76 percent of the rejected informant claims included in our review, we were unable to determine the rational for the reviewer's decision to reject the claim, based on information in the case file."[60]

To add insult to injury, approximately 14 percent of the files reviewed lacked important information such as copies of

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[59] Press Release, United States Senate Committee on Finance, Grassley: Report Shows IRS Could Better Use Whistleblowers to Catch Tax Cheats (June 9, 2006), *available at* https://www.finance.senate.gov/chairmans-news/grassley-report-shows-irs-could-better-use-whistleblowers-to-catch-tax-cheats.

[60] *See Report of Treasury Inspector General for Tax Administration,* The Informants' Rewards Program Needs More Centralized Management Oversight at 2 and 7 (noting that the pre-2006 IRS Whistleblower Program lacked "standardized procedures," was plagued by "limited management oversight," and that up to 45 percent of claims filed had "basic control issues," including missing forms); *See also* S. Rep. No. 110-1, at 66 (2007); *See also Cooper v. Comm'r*, 135 T.C. 70, 73-74 (2010) (noting that discretionary whistleblower awards under prior law had been "arbitrary and inconsistent," contrasting prior law with the 2006 Act, which "require[s] the Secretary to pay nondiscretionary awards").

key forms and correspondence with informants.[61] Other claims could not be found by the Whistleblower Office altogether, and, of those whistleblowers who actually received awards, only 32 percent received evidence justifying the percentage paid.[62] The Joint Committee on Taxation Bluebook description of Section 7623(b) specifically cites to the TIGTA report and the need for IRS guidance related to Section 7623(b) to address the recommendations in the report.[63]

The Tax Court has also repeatedly recognized the TIGTA report as a key factor in the passage of Section 7623(b), and has cited to the findings of TIGTA. For example, in one of the first Tax Court cases addressing Section 7623(b), *Cooper v. Commissioner*, the Court cites to the TIGTA report, stating: "The discretionary whistleblower awards have been *arbitrary and inconsistent*, however, because of a lack of standardized procedures and limited managerial oversight."[64] This Court also

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[61] *See Report of Treasury Inspector General for Tax Administration,* The Informants' Rewards Program Needs More Centralized Management Oversight at 6.
[62] *See Report of Treasury Inspector General for Tax Administration,* The Informants' Rewards Program Needs More Centralized Management Oversight at 7; (While not necessarily relevant to the understanding of the context of the 2006 legislation, it may be useful for the Tax Court to understand that the passing of the law did not provide a "fix-all" for the IRS Whistleblower Program.).
[63] S. Rep. No. 31-502, at 745 (2007).
[64] *Cooper v. Comm'r*, 135 T.C. 70, 72-73 (2010) (emphasis added).

noted in *Cooper* that most rejected claims did not provide a rationale for the reviewer's decision.[65]

Thus, it is well established that the "perceived problems" Chairman Grassley and Congress sought to address with Section 7623(b) were fourfold. One, basic management and administration of the IRS Whistleblower Program had been arbitrary and woefully inadequate; two, whistleblowers were not incentivized to come forward and were ignored when they did come forward; three, the denials of awards, as well as the award percentages, were haphazard, inconsistent, and not properly documented; and four, compounding all these problems, whistleblowers had no place to turn for relief given they were provided no independent review by the Court of Federal Claims. In short, the decisions by the IRS were inherently arbitrary and coupled with a wholly inadequate judicial review by the Court of Federal Claims based on an arbitrary and capricious standard of review.

b. Congress Responds to the "Perceived Problems" by Working to "Strengthen" the IRS Whistleblower Program Using "Broad and Sweeping" Statutory Language

The answers to these perceived problems were threefold.[66] One, create a whistleblower office at the IRS to both centralize

[65] *Id.* at 73.

[66] Of note, Chairman Grassley introduced "United States Tax Court Modernization" provisions in 2004 as Section 601 of the Telephone Excise Tax Repeal and Taxpayer Protection and Assistance Act of 2006. The Committee Report notes under Reasons

the processing of claims and awards while also serving as an advocate for whistleblowers and their submissions; two, provide whistleblowers a mandatory award of 15 to 30 percent of collected proceeds; and three, provide judicial review of "any determination" by the IRS of Section 7623(b) cases to the Tax Court, a court that was understood to have a deep tradition and practice of de novo review.[67]

The Tax Court has well understood that Congress addressed the "perceived problems" by passing Section 7623(b) ". . . to

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for Change the need for the Tax Court to have ". . . independence from the Executive Branch and its responsibility for reviewing determinations of the [IRS]." In the same amendment, Senator Grassley includes a number of provisions expanding the Tax Court's authority, all with the underlying understanding of the "need for independence." In addition, the Tax Court Modernization provision assigned to Special Trial Judges certain employment status cases. The reason for the change, according to the Committee Report, was to ". . . improve the operations and internal functioning of the Tax Court." The great sweep of the Tax Court Modernization provisions, contained in the same amendment by Chairman Grassley as the tax whistleblower amendment, is a view of the Tax Court providing an independent review and Chairman Grassley's wish to bolster and expand both the scope and range of the Tax Court's independent review both with the Tax Court Modernization provisions and also the whistleblower program. *See* Telephone Excise Tax Repeal and Taxpayer Protection and Assistance Act of 2006, S. 1321, 109th Cong. § 601 (2004); *See also* S. Rep. No. 109-336, at 94 and 98 (2007); *See also United States v. Price*, 361 U.S. 304, 328-329 (1960) ("In creating the Tax Court (originally known as the Board of Tax Appeals), Congress provided a forum in which taxpayers could obtain an 'independent review of the Commissioner of Internal Revenue's determination of additional income taxes by the Board in advance of their paying the tax found by the Commissioner to be due.' *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 721 (1929).").

[67] *Jones v. Comm'r*, 97 T.C. 7, 18 (1991).

strengthen the IRS whistleblower program."[68] Further, the Tax Court recognized that Congress accomplished this strengthening of the program with "broad and sweeping" words to create an "expansive rewards program."[69]

When focusing on judicial review, it is useful to recognize what Congress chose not to do, which was require or mandate a review process internally within the IRS for whistleblower awards. This sort of internal review process is mandated for other Code provisions that are subject to arbitrary and capricious review by the Tax Court, such as collection due process cases brought under Section 6330.[70] These cases require a detailed review before an independent appeals officer at the IRS.[71] Further, whistleblower awards and denials had traditionally never been subject to IRS Appeals. Understandably, it is inconceivable for any lawmaker in 2006 to have had faith and confidence in the agency to successfully manage and administer the IRS Whistleblower Program, one that for years had been so problematic. Any confidence in the IRS management of the program would be particularly low given the known hostility by the IRS to Congress passing Section 7623(b).[72] The natural answer

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[68] *Whistleblower 21276-13W v. Comm'r*, 144 T.C. 290, 302 (2015).
[69] *Whistleblower 21276-13W v. Comm'r*, 147 T.C. 121, 129 (2016).
[70] 26 U.S.C. § 6330 (a)(1).
[71] 26 U.S.C. § 6330(b) and (c).
[72] *See, e.g.*, Jeremiah Coder, Tax Analysts Exclusive: Conversations: Donald Korb, 2010 TNT 11-7 (Jan. 19, 2010)

for Congress was to look to the Tax Court for the independent review process performed outside the IRS.

Further, in anticipating an argument that the expectation of a newly formed IRS Whistleblower Office would bring "sunshine and roses," and not require a higher standard of review, is to subscribe an unjustified naïve outlook to Chairman Grassley. Chairman Grassley has had to work with recalcitrant and reluctant agencies on whistleblower issues for years, including the IRS prior to the passage of Section 7623(b). This argument is also undercut by the fact that problems have persisted in the IRS administration of the whistleblower program since the creation of the new Whistleblower Office. A 2009 TIGTA report found that the independent IRS Whistleblower Office had not made noticeable improvement.[73] For rejected claims, auditors could not determine the Whistleblower Office's rationale for rejection in

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(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.").

[73] *See Report of Treasury Inspector General for Tax Administration,* Deficiencies Exist in the Control and Timely Resolution of Whistleblower Claims, No. 2009-30-114 (August 2009), *available at* https://www.treasury.gov/tigta/auditreports/2009reports/200930114fr.pdf.

75 percent of reviewed cases.[74] A follow-up review conducted in 2012 found that the IRS "did not fully and adequately address the prior cited internal control weaknesses" discovered in prior reviews.[75]

In sum, the context of Section 7623(b)(4) was to address the "perceived problem" of the judicial review formerly offered at the Court of Federal Claims that was toothless, providing an arbitrary and capricious review process that was considering and rubberstamping determinations made by the IRS that were inherently incomplete, inadequate, and arbitrary. The answer was an "independent review," as stated by Chairman Grassley and enacted by Congress.[76] One conducted by this Court, with its experience and knowledge of both the tax code along with tax administration and, as important, a tradition of de novo review.

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[74] *Id.* at 4 (Finding that 45 percent of claims had problems with basic control issues, such as missing copies of key forms. Further, 32 percent did not provide sufficient documentation to justify the award percentage.).

[75] *See Report of Treasury Inspector General for Tax Administration,* Improved Oversight Is Needed to Effectively Process Whistleblower Claims, No. 2012-30-045 (April 2012), *available at* https://www.treasury.gov/tigta/auditreports/2012reports/201230045fr.pdf.

[76] Press Release, United States Senate Committee on Finance, Grassley Praises Senate Passage of IRS Whistleblower Help, Civil Rights Tax Reform, Charitable Giving Reform, Ban on Deduction of Government Fines, "Son of Boss" Item (May 12, 2004), *available at* https://www.finance.senate.gov/chairmans-news/grassley-praises-senate-passage-of-irs-whistleblower-help-civil-rights-tax-reform-charitable-giving-reform-ban-on-deduction-of-government-fines-son-of-boss-item.

The overall context and purpose of Section 7623(b) was to strengthen the whistleblower program by creating a mandatory whistleblower program, the creation of a whistleblower office, and the establishment of a de novo review in the Tax Court to serve as a check to the significant shortcomings of the poor administration of the program by the IRS.

c. The U.S. Court of Federal Claims: Closing the Whistleblower's Graveyard

The *Kasper* decision makes the statement that prior to "December 2006 such awards were completely discretionary and *not subject to judicial review*."[77] As discussed above, and underscored by Professor Guttierez's analysis, whistleblower cases were actually subject to judicial review with a number of cases considered by the Court of Federal Claims.[78] The Tax Court itself has recognized that whistleblower cases were subject to judicial review by the Court of Federal Claims under the Tucker Act.[79]

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[77] *See Kasper*, 150 T.C. No. 2, 13 (2018) (emphasis added).
[78] *E.g., Merrick v. United States,* 846 F.2d 725, 726 (Fed.Cir.1988).
[79] *Whistleblower 14106-10W v. Comm'r*, 137 T.C. 183, 186 n.6 (2011) ("Judicial review of claims arising under the pre-2006 version of sec. 7623 has been confined to contractual claims brought under the Tucker Act, 28 U.S.C. sec. 1491(a)(1) (2000 & Supp. 2005), in limited circumstances where the informant and the IRS had entered into a binding agreement by negotiating and fixing a specific amount for a whistleblower award. See, e.g.,

That the Tax Court in *Kasper* did not consider that whistleblower cases were subject to judicial review prior to Section 7623(b) reveals a critical gap in this Court's analysis. Again, *Kasper* was a case that went without the benefit of adversarial briefings. At the time of the amendments, judicial review for whistleblower determinations that was in place with the Court of Federal Claims, a venue that Congress decidedly rejected when it transferred jurisdiction to this Court in 2006.

The Court of Federal Claims was a graveyard for whistleblowers, with not a single victory under the requirements of an arbitrary and capricious review, coupled with stringent requirements for the whistleblower to have a contract with the IRS in order to enforce an award in court.[80] Instead, Congress elected in 2004, when first putting forward Section 7623(b), to provide judicial review for mandatory whistleblower awards to the Tax Court. At the time, a jurisdictional grant to the court was to adopt the Tax Court's traditional de novo review procedures.[81] As Judge Thornton explained in detail in his concurring opinion in *Porter v. Commissioner*, de novo review is inextricably intertwined with the history and purpose of the Tax

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Merrick v. United States, 846 F.2d 725, 726 (Fed. Cir. 1988); *Colman v. United States*, 96 Fed. Cl. 633, 637–638 (2011).").

[80] Terri Gutierrez, IRS Informants Reward Program: Is it Fair?, Tax Notes, Aug, 23, 1999.

[81] *Jones v. Comm'r*, 97 T.C. 7, 18 (1991).

Court.[82] Again, as both the Senate Finance Committee and Chairman Grassley, the author of Section 7623(b), stated at the time, the intent of Section 7623(b) was to provide "independent review," which was recognized by the Tax Court as de novo and not arbitrary and capricious review.[83]

The "independent review" stated by Chairman Grassley was achieved by requiring that mandatory award determinations be reviewed by the Tax Court.[84] This signaled Congress' desire to ensure that the Tucker Act, and its requirements for arbitrary and capricious review, would not be looked to by the Tax Court. The elimination of a contract requirement in Section 7623(b), which was included in the 2004 amendment along with every version thereafter, also helped to further separate the new whistleblower provision from the Tucker Act, stating: "No contract with the Internal Revenue Service is necessary for any individual to receive an award under this subsection."[85] The Tax Court in *Kasper* gave no consideration to this statutory

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[82] *Porter v. Comm'r*, 130 T.C. No. 10, 25-34 (2008).
[83] *See Murphy v. Comm'r*, 125 T.C. 301, 320 (2005) ("We do not conduct an independent review of what would be an acceptable offer in compromise. *Fowler v. Commissioner*, T.C. Memo.2004-163. The extent of our review is to determine whether the Appeals officer's decision to reject the offer in compromise actually submitted by the taxpayer was arbitrary, capricious, or without sound basis in fact or law. *Skrizowski v. Commissioner*, T.C. Memo.2004-229; *Fowler v. Commissioner*, supra; see *Woodral v. Commissioner*, 112 T.C. 19, 23, 1999 WL 9947 (1999).").
[84] 26 U.S.C. § 7623(b)(4).
[85] 26 U.S.C. § 7623(b)(6)(A).

language, which confirmed that the Tucker Act, along with its standard of arbitrary and capricious, was not applicable for judicial review.

The "no contract" provision also confirms that, from the beginning of Section 7623(b) first being introduced in 2004, Congress was aware of the problems surrounding the review of whistleblower cases in the Court of Federal Claims, and wanted to bypass the graveyard.[86] The "no contract" provision of Section 7623(b)(6)(A) is not surplusage, it was intended to ensure that the Tax Court would not view itself to be bound by the Tucker Act and its arbitrary and capricious review standard, helping the stated goal of "independent review." The *Kasper* decision not only fails to contend with the graveyard history of judicial review in the Court of Federal Claims, but also does not consider the entire context of the legislation discussed above, from the original design to passage, including Congressional recognition of the extraordinary shortcomings of the IRS

[86] *See Dacosta v. United States*, 82 Fed. Cl. 549, 555-556 (2008) ("And, just as Congress enacted subsection 6404(h) against a 'backdrop of decisions uniformly rejecting the possibility of any review for taxpayers wishing to challenge the Secretary's § 6404(e) determination,' here Congress amended section 7623 against a backdrop of caselaw holding that the prior version of section 7623 gave the Secretary discretion to pay or not to pay a reward and therefore did not provide for a substantive right to money damages that would confer jurisdiction upon this court. *See, e.g., Destefano v. United States*, 52 Fed. Cl. 291 (2002); *Confidential Informant v. United States*, 46 Fed. Cl. 1 (2000).").

administration of the whistleblower program that were shown to be arbitrary to the extreme.[87]

d. The Use of "Magic Words" in Section 7623(b) is Unnecessary for the Tax Court to Embrace a De Novo Review Standard

The Supreme Court has provided guidance that, in interpreting statutes, we should "consider not only the bare meaning of the words but also its placement and purpose in the statutory scheme."[88] In saying this, the Supreme Court has correctly noted the importance of context when interpreting statutes.[89] Instead of considering the canons of statutory construction of context, the IRS, in its opening brief in *Kasper*, instead seeks to lead this Court down a path of error in the form of a "magic word" test[90], positing that Congress was

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[87] The decision in *Kasper* also leads to an odd result, where there are now two courts for whistleblower provisions, the Court of Federal Claims for Section 7623(a) claims and the Tax Court for Section 7623(b) claims, with both venues applying the same arbitrary and capricious standard.

[88] *Bailey v. United States*, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. '[T]he meaning of statutory language, plain or not, depends on context.' *Brown v. Gardner*, 513 U.S. 115, 118, (1994) (citing *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991)).").

[89] *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013). ("We consider 'context, including this Court's interpretations of similar provisions in many years past,' as probative of whether Congress intended a particular provision to rank as jurisdictional." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168, (2010); *see also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133–134, (2008).").

[90] *See* Opening Br. for Resp't, 30, *Kasper v. Comm'r,* No. 22242-11W (T.C.) ("First, Congress could have specified that the Tax

required to include explicit language in the statute directing this Court to review cases under a de novo standard of review.[91] All of this comes, of course, after the Government has incorrectly stated that there is no legislative history on the appropriate standard of review.[92] However, the use of "magic words" has been deemed unnecessary by a variety of courts, including this one.

The Supreme Court has long refuted a "magic words" test in regards to the statutory interpretation of legal texts.[93] The high court has also rejected a "magic words" test when the

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Court should conduct de novo trials in whistleblower appeals but it did not.").

[91] *See* Resp't's Resp. to Mot. for Partial Summ. J., 23, *Whistleblower 11099-13W v. Comm'r,* No. 11099-13W (T.C.) ("It follows that Congress's use of the word 'appeal' in section 7623(b)(4) instead of 'determine' or 'redetermine' shows that Congress did not intend de novo review.").

[92] *See* Resp't Resp. to Mot. For Partial Summ. J., 15, *Kasper v. Comm'r,* No. 22242-11W (T.C.) ("There is no actual legislative history for Section 7623 that speaks to the applicable scope and standard of review.") As discussed above, this is directly refuted, inter alia, by Chairman Grassley's statement that Section 7623(b) is to provide "independent review." *See* n. 75.

[93] *FAA v. Cooper*, 566 U.S. 284, 291 (2012) ("Although this canon of interpretation requires an unmistakable statutory expression of congressional intent to waive the Government's immunity, Congress need not state its intent in any particular way. We have never required that Congress use magic words. To the contrary, we have observed that the sovereign immunity canon 'is a tool for interpreting the law' and that it does not "displac[e] the other traditional tools of statutory construction." *Richlin Security Service Co. v. Chertoff*, 553 U.S. 571, 589 (2008). What we thus require is that the scope of Congress' waiver be clearly discernable from the statutory text in light of traditional interpretive tools. If it is not, then we take the interpretation most favorable to the Government.").

statute is related to tax.[94] Critically, the U.S. Court of Appeals for the D.C. Circuit has directly rejected a "magic words" test in a case considering the precise statutory provision in consideration here. In *Myers v. Commissioner*, the D.C. Circuit cited to the Supreme Court in its analysis of Section 7623(b), stating "…we are not saying the Congress must 'incant magic words in order to speak clearly.'"[95] The issue in *Myers* was whether the 30-day filing period under Section 7623(b)(4) was jurisdictional. After finding in favor of the whistleblower, ruling that timely filing is not a jurisdictional prerequisite, the D.C. Circuit then considered whether the 30-day filing was subject to equitable tolling. To answer that question, the *Myers* Court engaged in a review of the legislative intent and context of the legislation to assist in its determination in favor of the whistleblower finding that the

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[94] *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 565 (2012) ("[M]agic words or labels should not 'disable an otherwise constitutional levy' *Nelson v. Sears, Roebuck & Co*., 312, U.S. 359, 363 (1941) ('In passing on the constitutionality of a tax law, we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it'); *United States v. Sotelo*, 436 U.S. 268, 275 (1978).").

[95] *Myers v. Comm'r*, 928 F.3d 1025, 1035 (D.C.C. 2019) (citing *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. at 153, 133 S.Ct. 817.) ("The Congress need only include words linking the time period for filing to the grant of jurisdiction. *See, e.g., Nauflett v. Comm'r*, 892 F.3d 649, 652 (4th Cir. 2018); *Rubel v. Comm'r*, 856 F.3d 301, 306 (3d Cir. 2017); *Matuszak v. Comm'r*, 862 F.3d 192, 197-98 (2d Cir. 2017).").

filing period for Section 7623(b)(4) is subject to equitable tolling.[96] It should be noted that the D.C. Circuit's opinion in favor of the whistleblower, which rejected a "magic words" test for Section 7623(b)(4), was decided in 2019, after this Court's ruling in *Kasper*.

Just as the D.C. Circuit in *Myers* rejected a "magic words" test for the statute at issue, instead looking to the statute's context and legislative history, so the Supreme Court found in *Crandon v. United States*, finding that, "In determining the meaning of a statute, we look not only to the particular statutory language, but to the design of the statute as a whole and its object and policy."[97] Similarly, in deciding how to interpret and apply statutes like the one at issue, the courts, including the Tax Court, have traditionally looked at the fundamentals, primarily the text of the statute, and have decided that words "must be given the meaning they had when the text was adopted."[98]

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[96] *Id.* at 1037. ("None of these other indicators of legislative intent is present in this case: The Tax Court is not an 'internal' 'administrative body' and Tax Court petitioners are typically pro se, individual taxpayers who have never petitioned the Tax Court before. Moreover, the IRS points to no regulation or history of legislative revision that might contradict the *Irwin* presumption.").

[97] *Crandon v. United States*, 494 U.S. 152, 154 (1990).

[98] *See* Anthony Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 78 (2012). *See also Castigliola v. Comm'r*, T.C. Memo. 2017-62, 9 (2017) ("It is a well-established rule of construction that if a statute does not define a term,

The Court should reject the IRS' invitation to embrace a requirement for "magic words" and instead look to the context and legislative history of Section 7623(b), which supports a finding of de novo review for mandatory awards under Section 7623(b).

e. Conclusion

Again, the Tax Court in *Kasper* did not appreciate that there was, in fact, judicial review of whistleblower cases prior to 2004 when Section 7623(b) was first introduced. The absence of this legislative history understandably led the Court to not give any thought to the great lengths that Congress went through to ensure that judicial review would no longer fall with the Court of Federal Claims, and would no longer be subject to the Tucker Act, while actively ensuring that judicial review would be with the Tax Court with its tradition of de novo review.

The *Kasper* case fails to consider the greater context of the perceived problems that Congress was seeking to address. Essentially, there is no context in the *Kasper* decision that provides an understanding of the evident purpose behind Section 7623(b) or the effectiveness of the provisions. Nor does *Kasper* recognize that Section 7623(b), as a whole, was enacted to

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the term is to be given its ordinary meaning at the time of enactment. *Gates v. Commissioner*, 135 T.C. 1, 6 (2010); see *Perrin v. United States*, 444 U.S. 37, 42 (1979).").

strengthen all elements of the IRS Whistleblower Program, including mandatory awards, administration of the program, and judicial review.

Further, the Tax Court should not be led astray by Respondent's contention that Congress needed to explicitly call for de novo review in the statutory language used. Courts have continuously rejected the notion that "magic words" are required to express Congressional intent, which in this case was a de novo review at the Tax Court. A consideration of Section 7623(b) in context, with legislative history as a guide, as well as understanding the perceived problems that were to be fixed, and rejecting the notion that Congress did not speak clearly when it enacted the statute, all point to the conclusion that the meaning of the words of Section 7623(b) at the time it was first introduced, and later adopted, was de novo review by the Tax Court. Again, a review before the Tax Court is presumed to be de novo.[99] There is nothing to suggest that Congress wanted an arbitrary and capricious review for tax whistleblower awards, with the legislative history and context of the legislation strongly pointing in favor of a finding that the legislature intended and understood it would be de novo review.

[99] *Jones v. Comm'r*, 97 T.C. 7, 18 (1991).

3. **A Lack of Due Process and the Constitutional-Doubt Canon Support De Novo Review**

As this Court duly noted in *Kasper*, "Congress clearly intended to provide a whistleblower with due process; i.e. notice and an opportunity to be heard."[100] However, tax whistleblowers receive in practice no substantive due process, neither from the Tax Court as Congress intended, nor from the IRS in regards to its administration of the mandatory whistleblower award program. The lack of substantive due process is highlighted by the fact that the IRS administration of the whistleblower award program was managed in an unreliable and haphazard manner, failing to provide necessary safeguards against error or worse.

While Section 7623(b) can be read broadly enough to allow for substantive due process, the lack of such due process provided by the IRS necessitates that this Court apply the constitutional-doubt canon, "to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question."[101] Here, the answer for the Tax Court is straightforward: to interpret Section 7623(b)(4) as providing

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[100] *Kasper v. Commissioner*, 137 T.C. No. 4, 9 (2011).
[101] *Gomez v. United States* 490 U.S. 858, 864 (1989) (citations omitted).

for de novo review and avoiding the constitutional question of the lack of substantive due process. The lack of due process for whistleblowers and the canon of statutory construction of constitutional-doubt were never considered or briefed for this Court in the pro se case of *Kasper*.

a. There is No Due Process Offered for Whistleblowers at the Agency Level

As this Court recognized in *Doudney v. Commissioner*, due process requires that whistleblowers are offered an opportunity to showcase their position in a "meaningful time and in a meaningful manner."[102] This Court should recognize that an independent review at the Tax Court, with a de novo standard of review, would indeed allow for an adequate opportunity for whistleblowers to showcase their position in a meaningful way that satisfies the due process requirements highlighted in *Doudney*. Other agencies, such as the Securities and Exchange Commission (the "SEC"), have directly acknowledged the necessity of providing due process to claimants who come forward with

[102] *Doudney v. Comm'r*, T.C. Memo. 2005-267, 5 (2005) ("Due process requires that an "adequate opportunity . . . [be] afforded for a later judicial determination of the legal rights" of the taxpayer. *Phillips v. Commissioner*, 283 U.S. 589, 595 (1931). An adequate opportunity requires that the taxpayer be heard "'at a meaningful time and in a meaningful manner."' *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); see also *Harper v. Commissioner*, 99 T.C. 533, 542 (1992).").

vital information. The SEC, whose review of whistleblower claims is detailed below, explained in a 2013 order ("Order 70772") that the due process provided to SEC whistleblowers follows the landmark Supreme Court decision in *Mathews v. Eldridge.*[103] The Supreme Court noted in the *Mathews* decision the critical necessity of providing substantial safeguards against erroneous decisions and allowing for the whistleblower to "mold" an argument to respond to the precise issues.[104] Order 70772 quotes from *Mathews*, finding it to be analogous to its own rules:

> Allowing the disability recipient's representatives full access to all information relied upon by the state agency . . . Opportunity is then afforded the recipient to submit additional evidence or arguments enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions. These procedures . . . enable the recipient to "mold" his argument to respond to the precise issues which the decisionmaker regards as crucial.[105]

In its Response, the IRS provides the Court a misleading and incomplete picture of what it considers to be the "due process" afforded to a whistleblower.[106] Respondent, hoping that this Court will not take note, glosses over the fact that, in

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[103] *Id.*; *See also Mathews v. Eldridge*, 424 U.S. 319 (1976).
[104] *Matthews* at 344.
[105] Order Denying Whistleblower Award Claim, *SEC Whistleblower Award Proceeding, In the Matter of the Claim for Award in Connection with SEC v. Adv. Tech. Group Ltd., Alexander Stelmak, and Abelis Raskas, LLC, File No. 2014-1, Release No. 70772* at 16-17 (October 30, 2013).
[106] *See* Resp't's Resp. to Mot. for Partial Summ. J., 28, *Whistleblower 11099-13W v. Comm'r,* No. 11099-13W (T.C.).

the case of a denial, a whistleblower receives no supporting information or meaningful background material about the agency's decision. Essentially, the whistleblower receives a form letter with, at best, two sentences of boilerplate giving an option for the claimant to appeal the agency's decision within 30 days. The lack of information and the denial of an opportunity to review the administrative file places the whistleblower in an impossible position given that they will not know what actions the IRS took against third-party taxpayer(s) listed in the whistleblower's claim, nor will the whistleblower know what actions the third-party taxpayer has taken in response to the agency's audit.[107] Thus, there is effectively no opportunity for a whistleblower to appeal an agency denial in a "meaningful" manner, or have any substantive due process.[108]

As with the case at hand, the overwhelming majority of the cases before the Tax Court involve a whistleblower whose claim has been denied. However, in cases where whistleblowers actually receive an award, or partial award, based on their claim to the IRS, the opportunity to provide meaningful commentary or

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[107] *See* Order, *Vallee v. Comm'r*, No. 13513-16W (T.C.) (This Court notes that a Petitioner in a typical Tax Court case has "superior access to the relevant information (since it concerns his own transactions)," in contrast to a whistleblower case where the subject matter is the action taken by the IRS as to a third party.).

[108] *See* IRM 25.2.2.8.1(3).

response is only modestly better. In these cases, the whistleblower and their counsel only have an opportunity to review an administrative file, which is often heavily redacted, related to their claim for five to six hours at the IRS's offices.[109] However, this review does not even allow for copies to be made of relevant documents.[110] While this review is of minor benefit, the limitations of time, the material involved being limited to the redacted administrative file, and the restriction of copying records becomes problematic, especially in cases where the administrative file might be quite large.

Unfortunately, the administrative records produced by the IRS have at times been devoid of any details surrounding what information or disclosures were considered by the Whistleblower Office, or what their explicit rationale was in accepting or rejecting a given claim. These limitations simply do not allow for any meaningful review, and were not lost on Section 7623(b)'s original author, Chairman Grassley, who in 2012 expressed his frustration with the program's progress, saying:

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[109] It should be noted that this privilege is not available today due to COVID-19 restrictions, per a September 2020 IRS Whistleblower Office bulletin that also announced the suspension of award payment processing for electing claimants. *See* Internal Revenue Service Whistleblower Office, Review of the Administrative File Suspended, bulletin delivered via electronic mail on Sept. 14, 2020.

[110] *See* IRM 25.2.2.8.2.2.

> "The way the IRS and Treasury Department have handled the whistleblower program enacted more than five years ago is inexcusable. Any improvements have been made only under duress and in response to holds I've put on administration nominees, and those changes are far less than what ought to be the standard," Grassley said. "The lack of progress is demoralizing valuable whistleblowers who often put their own livelihood sat risk to speak up about wrongdoing."[111]

Compare the IRS adjudication of a whistleblower award with the actual due process provided to a whistleblower by the SEC. The SEC whistleblower statute, which is similar to the IRS whistleblower statute, provides all materials that formed the basis of a preliminary determination to all whistleblowers whose claims were approved or denied and make such a request.[112] These materials include sworn declarations by enforcement staff with direct knowledge of the case as well as any other material upon which the SEC staff relied.[113] Finally, if challenged, the preliminary determination by the SEC is elevated, if requested by any Commissioner, to an independent review. This review

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[111] Press Release, Chuck Grassley United States Senator for Iowa, Grassley Presses Treasury Department and IRS to Effectively Implement Whistleblower Program, (June 21, 2012), *available at* https://www.grassley.senate.gov/news/news-releases/grassley-presses-treasury-department-and-irs-effectively-implement-whistleblower.

[112] 17 C.F.R. § 240.21F-10(e)(1)(i).

[113] Order Denying Whistleblower Award Claim, *SEC Whistleblower Award Proceeding, In the Matter of the Claim for Award in Connection with SEC v. Adv. Tech. Group Ltd., Alexander Stelmak, and Abelis Raskas, LLC, File No. 2014-1, Release No. 70772* at 14-15 (October 30, 2013). ("Claimant has been given a fair proceeding in accordance with the Commission's rules and due process requirements.").

allows the SEC Commissioners to consider the issues and facts raised by the whistleblower. The SEC Commission conducts an independent review of staff determinations and recommendations without deference.[114]

The difference between the extraordinary limited due process offered by the IRS and the due process provided to whistleblowers by the SEC is night and day, a yawning chasm, with the IRS whistleblower guessing blindly in the dark as to the facts of the IRS handling of the case and the issues involved. The IRS whistleblower is given no chance to effectively "mold" their arguments, and there are no substantial safeguards against erroneous IRS decisions. The process of having a whistleblower claim vetted by the IRS already takes an average of several years, a painstaking process.[115] The IRS's current adjudication process only compounds this issue, and violates the due process rights of the whistleblower by failing to provide the whistleblower an opportunity to provide their

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[114] *See also Kilgour v. SEC*, 942 F.3d 113, 123 – 124 (2nd Cir. 2019) (The Appellate Court addresses the question of whether the SEC violated the whistleblowers due process rights by failing to provide certain materials. The Circuit Court cited to the materials provided to the whistleblower under Rule 21F, those material that formed the basis of the preliminary determination, and found that the whistleblower had been provided due process).

[115] Internal Revenue Service, Whistleblower Program Fiscal Year 2019 Annual Report to Congress, Feb. 3, 2020, *available at* https://www.irs.gov/pub/whistleblower/fy19_wo_annual_report_final.pdf.

position in a "meaningful time and in a meaningful manner" as due process requires, and as the Tax Court echoed in *Doudney*.[116]

b. There are effectively no substantial safeguards against erroneous IRS decisions

The Supreme Court has held that "de novo review is authorized when the action is adjudicatory in nature and the agency fact finding procedures are inadequate."[117] When the statute creating the IRS whistleblower mandatory award was first drafted in 2004, it was already clear from the Senate Finance Committee's oversight and authoritative reviews in academia, such as Professor Gutierrez analysis of "perceived problems" discussed above, that the chances of an erroneous decision by the IRS were high thanks to the maladministration of the program. This chance for erroneous decision was further confirmed and underscored by the 2006 TIGTA report that was released, and referenced by the Joint Committee on Taxation

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[116] *Doudney v. Comm'r*, T.C. Memo. 2005-267, 5 (2005) ("Due process requires that an 'adequate opportunity . . . [be] afforded for a later judicial determination of the legal rights' of the taxpayer. *Phillips v. Commissioner*, 283 U.S. 589, 595 (1931). An adequate opportunity requires that the taxpayer be heard "'at a meaningful time and in a meaningful manner."' *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); see also *Harper v. Commissioner*, 99 T.C. 533, 542 (1992).").

[117] *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

report on the final version of Section 7623(b) that became law in 2006. Again, according to the 2006 TIGTA report:

> " . . . in 32 percent of the paid claims, we were unable to determine the justification for the percentage granted. In most of these cases, the reviews simply entered the percentage on the Form 11369 and did not provide any explanation for the decision.
>
> For a rejected claim, the reason for rejection is of major significance. In 76 percent of the rejected informant claims included in our review, we were unable to determine the rational for the reviewer's decision to reject the claim, based on information in the case file."[118]

Regarding the documents provided to the whistleblower, which typically amount to a letter with a one to two sentence description of the issue, reflect no meaningful discussion, the possibility for an erroneous outcome is readily apparent. Further, there is no real opportunity to determine whether this is the case, nor to correct such errors. While there certainly have been improvements in the administration of the IRS Whistleblower Program, it is important to remember that, as informed by the fixed-meaning canon, that this Court look to Congress' understanding and perception of the administration of

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[118] *See Report of Treasury Inspector General for Tax Administration,* The Informants' Rewards Program Needs More Centralized Management Oversight at 2 and 7 (noting that the pre-2006 IRS Whistleblower Program lacked "standardized procedures," was plagued by "limited management oversight," and that up to 45 percent of claims filed had "basic control issues," including missing forms); *See also* S. Rep. No. 110-1, at 66 (2007).

the whistleblower program at the time the statute was drafted and adopted.[119]

During the drafting and enactment of the statute, from 2004 to 2006, as shown by the academic reviews and TIGTA reports, there were no substantial safeguards against erroneous decisions within the IRS as to the review of an award, and no substantive due process. It is with this lack of due process and lack of safeguards as background that Chairman Grassley first put forward the Section 7623(b) legislation, and stated that the intent was to give whistleblowers "greater certainty" and "independent review." The legislation accomplished this "greater certainty" and "independent review" again by creating an independent Tax Court review, understood to be de novo, of mandatory whistleblower awards, in turn providing safeguards against erroneous decisions and substantive due process.

The concerns surrounding an erroneous decision are highlighted by the case of *Whistleblower 21276-13W*.[120] In the case, the Tax Court found after a partial trial that the IRS dismissed, out-of-hand and with boilerplate language, the whistleblower's submission.[121] Contrary to the IRS' denial, the

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[119] Anthony Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 78 (2012).
[120] *Whistleblower 21276-13W v. Comm'r*, 144 T.C. 90 (2015).
[121] *Id.* at 299-300.

Tax Court, after conducting its own finding of facts as allowed with a de novo review, found that the Federal Bureau of Investigation (the "FBI") and the Assistant U.S. Attorney leading the case against the taxpayers, were effusive in their praise of the role of the whistleblowers.[122] It is only thanks to the Tax Court conducting a partial trial to determine the facts in *Whistleblower 21276-13W* that this critical evidence was brought forward, the denial was reversed, and the whistleblower received their due award.[123]

The decision in *Whistleblower 21276-13W* also underscores the limits and problems of the Form 11369 itself. While the IRS Whistleblower Office staff are certainly dedicated and hard-working, albeit understaffed like much of the IRS, they are dependent on the Form 11369, which is prepared by the IRS field office and serves as the key document for the review and consideration by the Whistleblower Office of an award determination. The IRS has historically provided limited guidance and training for those in the field who are tasked with

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[122] *Id.* at 299.

[123] *Kasper v. Comm'r*, 150 T.C. No. 2 at 14 (2018) (The Court in *Kasper*, in its discussion of scope of review and whether to limit review to the administrative record, stated, "We have no whistleblower cases on point . . . ") (The IRS in its briefings in *Kasper* does not seek to harmonize its position with the two decisions in *Whistleblower 21276-13W*. In its decision, the Court therefore did not consider the two cases, with their hearing, testimony, affidavits, and evidence submitted in keeping with a de novo hearing.).

completing the Forms 11369. In fact, in the case at hand, Petitioner has illustrated that the Forms 11369 were "riddled with errors and material omissions."[124] In addition, under current practice, the IRS does not solicit commentary or input from individuals involved in the case but outside of the IRS in drafting a Form 11369. Thus, the statements from the FBI and the Assistant U.S. Attorney in the case of *Whistleblower 21276-13W* would not be received, solicited, or included in the Form 11369. Further, the agency does not obtain commentary or input for a Form 11369 from IRS employees who worked on an examination but have since left the agency.

In short, both non-IRS government employees and former IRS employees involved in an examination are shut out of the preparation of Form 11369 drafting process. Thus, it is not uncommon, given the long time frame for an examination and collection, that the most informed government individuals are not involved in drafting this key document. Finally, while the IRS Whistleblower Office has recently expanded guidance on the Form 11369 in May 2020, this comes after this case and other cases currently before the Tax Court.[125] Therefore, it is common that the Form 11369s currently seen by this Court are filled out

[124] Pet'r's Mot. for Partial Summ. J., 24, *Whistleblower 11099-13W v. Comm'r*, No. 11099-13W (T.C.).
[125] *See* IRM 21.2.1.5.5 and 25.2.2.8.1(3).

by IRS employees who have limited awareness or familiarity with the IRS mandatory whistleblower law, and who possess limited knowledge, training, or instruction on the Form 11369. In the end, this creates an environment of marked chances for an erroneous decision. A de novo review involves the opportunity for the whistleblower to understand all the actions taken by the IRS and the taxpayer, makes clear the reasons for denial, enables the whistleblower to be in the best position to "mold" their arguments, and brings forward evidence and material that supports her position in order to counter the position of the IRS. This advantage was seen firsthand in the case of *Whistleblower 21276-13W*.[126]

Again, since as there is no opportunity for whistleblowers to showcase their position in a "meaningful time and in a meaningful manner," the IRS adjudication process falls gravely short of providing the necessary constitutional due process for whistleblowers who have been denied an award.[127] The lack of any information provided to the whistleblower, such as the case file and material that the agency relied on in making its decision, combined with a lacking Form 11369, all speak to the fact that there are no substantial safeguards against erroneous decisions,

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[126] *See Whistleblower 21276-13W v. Comm'r*, 144 T.C. 290, 302 (2015); *See also Whistleblower 21276-13W v. Comm'r*, 147 T.C. 121 (2016).
[127] *Doudney v. Comm'r*, T.C. Memo. 2005-267, 5 (2005).

and that the necessary substantive due process, as required by *Mathews,* is not being provided. Given the failure of the IRS to provide the whistleblower the material that served as the basis for the determination, there is literally no chance for the whistleblower to mold their response given the limited access to the facts at issue, rendering the agency's fact-finding procedures inadequate, and a de novo review necessary.[128]

In sum, *Mathews* requires this Court, in analyzing due process claims, to consider one, the private interest affected; two, the risk of erroneous deprivation of that interest through the procedures used; and three, the governmental interest at stake.[129] Here, for Section 7623(b)(1) cases, the private interest is significant, often a significant whistleblower award for a whistleblower who has in many cases risked his or her job and career to assist the government. As shown above, the risk of erroneous deprivation of that interest is very high. Further, the governmental interest at stake, erroneous decisions and a failure to provide proper due process, will in the long-term harm the IRS Whistleblower Program. The program is a source of

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[128] *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

[129] *See Nelson v. Colorado*, 137 S.Ct. 1249, 1251 (2017) ("Under the *Mathews* balancing test, a court evaluates (A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake. 424 U.S., at 335, 96 S.Ct. 893.").

hundreds of millions of dollars in annual revenue to the Treasury, and a lack of due process discourages whistleblowers from coming forward, a problem that certainly can be remedied with minimum burden by providing de novo review in Tax Court.

c. Whistleblower Is Seeking Adjudication of a Partial Assignment of Interest

Further, the whistleblower has a constitutionally protected interest in the award, the "property" at issue, and the government has "deprived" the whistleblower of that interest. As a reminder, if an independent source of law creates a property right, in this case Section 7623(b), the holder of that right, in this case the whistleblower, is entitled to the protections provided by due process, not to some lower level of protection provided by the statute in question.[130]

As the Court reviews the substantive due process rights of the whistleblower and their property interest, it may be useful to consider that the whistleblower is essentially seeking the adjudication of a partial assignment of interest. The Supreme Court, in describing the interest of a whistleblower in a False Claims Act case, stated that: "The FCA can reasonably be regarded as effecting a partial assignment of the Government's

[130] *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

damages claim."[131] Similarly here, the whistleblower in a tax case has a partial interest in the collected proceeds that the government receives based on proceeding with an action based on information provided by the whistleblower.

As noted above, in discussing the statute's legislative history, it has long been understood that Section 7623(b) was modeled after the False Claims Act. This partial assignment of the Government's collected proceeds to the tax whistleblower further strengthens the notion that the whistleblower is entitled to substantive due process through de novo review.

d. The Lack of Due Process Afforded to Tax Whistleblowers Raises Concerns Under the Constitutional-Doubt Canon of Statutory Construction

The IRS's violation of the whistleblower's constitutional right to due process, as to the current process relating to a mandatory whistleblower awards, can be remedied through the application of a key rule of statutory construction showcased by the Supreme Court in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg.*, where the high court stated, " . . . here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construct the statute to avoid such problems unless such construction is

[131] *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000)

plainly contrary to the intent of Congress."[132] The Supreme Court noted this "cardinal principle" of statutory construction in *DeBartolo Corp.*, adding that, "The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it."[133]

As discussed above, when Chairman Grassley put forward the Section 7623(b) legislation in 2004, the Finance Committee was well aware of the problems surrounding the maladministration of the IRS Whistleblower Program, as well as the fact that whistleblowers were getting no meaningful independent review by in the Court of Federal Claims.[134] The TIGTA findings in 2006 reinforced and showcased the woefully inadequate administration of the whistleblower program. In 2006, the IRS did not provide for agency appeals to review the whistleblower determinations, a practice that continues to this day. As discussed, the only avenue for redress related to discretionary awards prior to the 2006 amendments was the Court of Federal Claims, the graveyard for whistleblower claims under an arbitrary and capricious standard. When Congress created the Whistleblower Office in 2006

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[132] *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg.,* 485 U.S. 568, 575 (1988).
[133] *Id.*
[134] Terri Gutierrez, IRS Informants Reward Program: Is it Fair?, Tax Notes, Aug, 23, 1999.

to make award determinations, it intended to provide constitutional due process and substantial safeguards against error by allowing for de novo Tax Court review.

Chairman Grassley did not choose the path of leaving the making of mandatory whistleblower awards to the "sole discretion" of the newly-created IRS Whistleblower Office, as advocated for by Senator Levin, nor did he seek to create or require procedures within the agency.[135] Looking to the 2006 TIGTA report and other informed commentary, Congress would have no faith or confidence in the IRS awards process, one that was shown to be inherently inadequate, incomplete and haphazard—and failed to follow its own guidelines.[136] Further, it would have been reckless in the extreme to trust the fate of whistleblowers to an organization that had so poorly administered the program, and whose senior leadership had expressed strong opposition to both the 2004 and later 2006 amendments that created the mandatory whistleblower award program.[137] Instead, Congress, looking to "strengthen" the whistleblower program, provided for substantial safeguards against erroneous decisions and the

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[135] 151 Cong. Rec. S. 9472, 9484.
[136] *See* Terri Gutierrez, IRS Informants Reward Program: Is it Fair?, Tax Notes, Aug, 23, 1999 (". . . the IRS does not seem to follow the guidelines set forth in the IRM to pay a fair amount of reward to informants who actually do provide information of substance.").
[137] *See* Jeremiah Coder, Tax Analysts Exclusive: Conversations: Donald Korb, 2010 TNT 11-7 (Jan. 19, 2010).

appropriate constitutional due process by vesting review of awards with the Tax Court, a court that again was widely understood by Congress, and this Court, to conduct de novo review. As discussed above, this notion was reinforced by Chairman Grassley, who stated at the time Section 7623(b) first passed the Senate in 2004 that the legislation was to provide whistleblowers "greater certainty" and "independent review."[138]

Respondent invites this Court to believe that Congress, in enacting a mandatory whistleblower program, decided that the safeguards against erroneous decisions and substantive due process would best reside in having faith in an IRS process that had been shown by TIGTA to be embarrassingly flawed. Further, the agency asks the Tax Court to suggest that in seeking to provide "greater certainty" and "independent review" that Congress sought to replicate the same arbitrary and capricious review that was already in place with the Court of Federal Claims.

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[138] Press Release, United States Senate Committee on Finance, Grassley Praises Senate Passage of IRS Whistleblower Help, Civil Rights Tax Reform, Charitable Giving Reform, Ban on Deduction of Government Fines, "Son of Boss" Item (May 12, 2004), *available at* https://www.finance.senate.gov/chairmans-news/grassley-praises-senate-passage-of-irs-whistleblower-help-civil-rights-tax-reform-charitable-giving-reform-ban-on-deduction-of-government-fines-son-of-boss-item.

The better answer, one that is supported by the Supreme Court's guidance in *Gomez* and *DeBartolo Corp.*, is a reasonable construction of the statute that doesn't raise constitutional questions or infringe on constitutionally protected liberties. The Supreme Court followed exactly this approach in *Laing v. U.S.*, adopting a construction of the word "deficiency" in the tax code that made it unnecessary to address the taxpayer's claim that his constitutional due process rights were violated.[139] The reasonable construction of the statute would find that the 2006 amendments provide for de novo review, thus ensuring that there are strong safeguards in place against erroneous decisions and adequate due process rights for whistleblowers eligible for a mandatory award program. As this Court recognized in *Catania*, the Constitution's due process requirements are satisfied when there is an opportunity for a judicial determination of legal rights.[140] The Tax Court should

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[139] *Laing v. United States*, 423 U.S. 161, 210 n. 26 (1976); ("As a final reason for adopting their construction of the Code, the taxpayers argue that the Government's reading would violate the Due Process Clause of the Fifth Amendment. . .Because we agree with the taxpayers' construction of the Code, we need not decide whether the procedures available under the Government's theory would, in fact, violate the Constitution."); *Id.* at 185-186 (Brennan concurring) ("I join the Court's opinion and the statutory construction that makes unnecessary the Court's addressing the claims of Mr. Laing and Mrs. Hall that they were denied procedural due process secured by the Fifth Amendment.")

[140] *Catania v. Comm'r*, T.C. Memo. 1986-437 (1998) ("The Constitution's due process requirements are satisfied where an adequate opportunity is afforded for a later judicial

recognize the same need for an opportunity for judicial determination for tax whistleblowers here.

e. Applying the Constitutional-Doubt Canon Provides the Necessary Cure

The first and only time that a whistleblower who has been denied an award is afforded their "day in court," with knowledge of the facts that the IRS relied on, and an opportunity to mold those facts to the specific arguments behind the IRS' denial, is before the Tax Court. However, even then, this Court binding itself to an arbitrary and capricious review standard disallows any adequate fact finding procedure by an independent review party as it fails to allow for the necessary testimony, evidence, or hearings that would create a meaningful opportunity for the whistleblower to establish their position. This runs counter to what Congress intended, a move that is particularly concerning given that, as shown above, the IRS procedures leave wide opportunity for error or incompleteness in the facts.

There are not substantial safeguards against erroneous decisions within the internal IRS process. In addition, there is

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determination of the legal rights' involved. *Phillips v. Commissioner,* 283 U.S. 589, 595 (1931). That requirement is satisfied by petitioner's right to a trial in this Court."); *See also Doudney v. Comm'r*, T.C. Memo. 2005-267, 5 (2005) (A de novo trial at the Tax Court, citing *Catania*, found Petitioner's right to a trial in this Court satisfies the due process requirement.).

not the necessary constitutional due process for the whistleblower within the IRS internal review. The lack of due process is further compounded by the rubber stamp review that the IRS wishes to force upon the Tax Court. The cure for this unconstitutional regime is for this Court to apply the constitutional-doubt canon and embrace the reasonable and correct interpretation of the statute that Congress, with the statute's meaning at the time, intended—to protect the due process rights of the whistleblower by providing for an "independent" de novo review as called for by Congress.

The current approach to review of mandatory awards at both the agency and court level serves to the detriment of the whistleblower program, and also runs counter to the Congressional intent. Perpetual discovery battles, issues with remand, and delays in processing whistleblower claims continue to hurt the program, and repeatedly chip away at the core intent of the statute. The purpose of Section 7623(b) is apparent on its face, to encourage whistleblowers to come forward with information that is useful to the government by rewarding them if the government takes action and collects proceeds based on that information, while at the same time giving the whistleblower confidence that they will receive an award in such situations by providing de novo review of IRS action. The Service itself states it similarly: "The primary purpose of the

Act was to encourage people with knowledge of significant tax noncompliance to provide that information to the IRS."[141] A process without any opportunity to meaningfully review and challenge the facts that led to the agency's decision provides whistleblowers with little incentive to come forward with critical information that oftentimes puts their career, or livelihood, at risk.[142] The Whistleblower Program will ultimately be severely crippled in its ability to entice future whistleblowers to come forward if this severely wanting arbitrary and capricious review standard is upheld. This chilling effect could be avoided, however, if claimants were to be offered due process through a guaranteed, complete judicial review of the agency's determination.

f. Conclusion

The internal IRS processes for vetting whistleblower claims offer no substantial safeguards against erroneous decisions. Further, the necessary constitutional due process for whistleblowers within the IRS internal review is lacking, which

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[141] Internal Revenue Service, Fiscal Year 2013 Report to the Congress on the Use of Section 7623, *available at* https://www.irs.gov/pub/whistleblower/WhistleblowerAnnualreportFY13371452549.pdf.

[142] Kath Peters, Lauretta Luck, Marie Hutchinson, Lesley Wilkes, Sharon Andrew & Debra Jackson, The Emotional Sequelae of Whistleblowing: Finding from a Qualitative Study, Journal of Clinical Nursing, 20 (2011).

is further compounded by the rubber stamp review that the IRS wishes to have in place. The cure for this unconstitutional regime is for the Tax Court to apply the constitutional-doubt canon and embrace the reasonable, and correct, interpretation of the statute. One that recognizes that the statute's meaning at the time of enactment was to protect the due process rights of the whistleblower by providing for de novo review of mandatory whistleblower awards at the Tax Court.

Conclusion

The statutory history, fixed meaning, venue of challenge, as well as the historic and current execution of the IRS Whistleblower Statute alongside the judicial review provided by the U.S. Court of Federal Claims, leans heavily in favor of de novo review. To the extent that Section 7623(b)(1) is ambiguous, all the above argues that the statute should be construed in favor of whistleblowers, allowing for a thorough independent judicial review process that takes all facts and circumstances surrounding the disputed claim into consideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Motion of NWC for Motion to File Brief as *amicus curiae*, the proposed order to grant the motion to file as *amicus curiae*, and the *amicus curiae* brief were served by regular mail, first class on the following persons of the following addresses on this 21st day of September, 2020:

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