19-366

No. 19-_____

In The
Supreme Court of the United States

Walter C. Lange,
Petitioner

v.

Commissioner of Internal Revenue
Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Petitioner

QUESTIONS PRESENTED

Whether the income tax under Title 26 of the U.S. Code is an indirect tax and therefore exclusively an excise, duty or impost arising from the exercise of a federal privilege,

whether Petitioner's adhering to this legal precept and historical fact can be judicially considered frivolous and sanctionable,

whether codifying a statute without repealing its prior version leaves the prior statute controlling as a matter of Fifth Amendment due process,

whether a Tax Court's *de novo* review of a prior IRS administrative ruling reached below that ruling and redefined the objectionable conduct without prior notice in violation of the due process clause of the Fifth Amendment,

whether the final decision regarding frivolous conduct was based on language that should be considered void under the vagueness doctrine of the Fifth Amendment, and

whether each Court's monetary sanction is excessive or inflicts cruel and unusual punishment in violation either of the Eighth Amendment or Petitioner's good faith exercise of his valid beliefs and his First Amendment rights to petition the government for redress of grievance.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b) the caption of this case contains the names of all the parties.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other

PETITION FOR A WRIT OF CERTIORARI

Petitioner Walter C. Lange respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 20) was ordered not published. The Fifth Circuit's order denying rehearing (Pet. App. 22) in its case number 18-60582 is also unpublished. The order of the United States Tax Court (Pet. App. 24) in cause number 11492-17L is unpublished.

JURISDICTION

The judgment of the court of the court of appeals was entered on January 24, 2019. (Pet. App. 20) The court of appeals denied a timely petition for rehearing on April 8, 2019.

RELEVANT STATUTORY PROVISIONS

The United States Constitution Article 1, Section 9 defines a direct tax. The Sixteenth Amendment to the United States Constitution did not create a new tax. The Fifth Amendment to the United States Constitution frames our due process rights.

INTRODUCTION

Petitioner relied on a line of cases by this Court holding that the income tax is an indirect tax under the Constitution and therefore an excise tax arising only upon the exercise of a federal privilege. To activate this reliance Petitioner rebutted all testimony of taxable income in the form of the 1099-R by use of form 4852. Receipts from entities "external" to the Federal Corporation were adjusted to zero and then reported to the "Internal" Revenue Service (the Service) on form 1040. Receipts from the Social Security Administration were reported but were insufficient to be taxable.

The Service eventually responded by claiming these 1040 reports were frivolous and assessing penalties of $5,000 each assessment. Several, but not all, were abated by the Tax Court for technical defects leaving $10,000 in penalties as affirmed. An additional sanction of $2,500 was assessed by the Tax Court and $8,000 more was assessed by the 5th Circuit.

Petitioner's basic claim was never addressed by any opposing Counsel or any Court. Receipts of monies not arising from the exercise of a federal privilege are not taxable. Receipt of funds from the Employee Retirement System of Texas (ERS of TX) is not the exercise of a federal privilege. The ERS of TX is not internal to the Federal Corporation.

The statute 28 U.S.C. 3002(15) clearly defines the United States as a federal corporation and lists many of its subdivisions and instrumentalities. The Several

States are not listed and Texas is not part of the Federal Corporation.

STATEMENT OF THE CASE

Act 1. The filing: Each 1040 return of Petitioner rebutted payer testimony as supplied on the 1099-R. Form 4852 was included with each 1040 and the "income" blank was reduced to zero since the remuneration from the ERS of TX was not from the exercise of a federal privilege and therefore not in the nature of an excise taxable activity. The authority for this position is extensive.

The 16th amendment did not create a new tax that was neither a direct tax with apportionment nor an indirect tax with uniformity. By affirming the present case the Fifth Circuit Court of Appeals (5th CCA) has violated the principle set out by this Court and other authorities. The 16th amendment does not originate the tax nor authorize a tax that is a "non-apportioned direct tax."

By affirming the present case the 5th CCA has also affirmed this erroneous holding set out in *Parker v. Comm'r*, 724 F.2d 469 (5 th CA, 1984). But the 5th CCA is not the only court to fail to understand the *Brushaber* ruling. *Brushaber v. Union Pacific R. Co.*, 240 U.S. 1 (1916) The 8th CCA has also made a similar error in *United States v. Francisco*, 614 F.2d 617, 619 (8th Cir. 1980).

The confusion caused by this divergence from the *Brushaber* line of authorities is harmful to Petitioner and others seeking to follow the rule of law.

The *Brushaber* court holds that the sole purpose and effect of the 16th amendment is to undo and overrule its conclusion in *Pollock v. Farmer's Loan & Trust*, 158 U.S. 601 (1895) that a tax on otherwise excise-taxable dividends and rent becomes a property tax in those particular applications. The *Pollock* court had reasoned that the linkage of dividends and rent to their personal property sources-- the stock or the real estate from which they are derived-- transforms the income excise on those gains into a property tax on the sources, which therefore required apportionment in its imposition.

The 16th Amendment, says the *Brushaber* court, severs (prohibits) the "source" linkage imagined by the *Pollock* court. This overruling of *Pollock* allows the by-then 51-year-old income tax statute to be revived and to resume application as the excise tax it always has been.

The *Brushaber* court very expressly rules that the 16th Amendment does **not** accomplish its task by creating some kind of hybrid tax which can have the character of a capitation or other direct tax and yet not be subject to the apportionment rule-- a "non-apportioned direct tax". This was, in fact, the exact contention of Frank Brushaber (against whom the court ruled), who reasoned from this faulty notion the confused conclusion that the post-amendment revival of the income tax created a Constitutional conflict.

Here is what the unanimous Supreme Court says (among much else in this very long, thoughtful and comprehensive ruling):

"We are of opinion, however, that the confusion is not inherent, but rather arises from the conclusion that the 16th Amendment provides for a hitherto unknown power of taxation; that is, a power to levy an income tax which, although direct, should not be subject to the regulation of apportionment applicable to all other direct taxes. And the far-reaching effect of this **erroneous assumption** will be made clear by generalizing the many contentions advanced in argument to support it...." *Brushaber v. Union Pacific R. Co.*, 240 U.S. 1 (1916) (emphasis added).

The court goes on to point out that the very suggestion of a non-apportioned direct tax is completely incoherent, because that would cause:

"...one provision of the Constitution [to] destroy another; that is, [it] would result in bringing the provisions of the Amendment [supposedly] exempting a direct tax from apportionment into irreconcilable conflict with the general requirement that all direct taxes be apportioned. ... This result, instead of simplifying the situation and making clear the limitations on the taxing power, which obviously the Amendment must have been intended to accomplish, would create radical and destructive changes in our constitutional system and multiply confusion."

...and re-iterates its repeated pre-16th Amendment holdings that:

"[T]axation on income [is] in its nature an excise, entitled to be enforced as such...."

The unanimous *Brushaber* court flatly holds that the income tax was, is, and remains an excise tax, and that the 16th Amendment in no way whatever authorizes a "non-apportioned direct tax." Every possible authority agrees about what the *Brushaber* court says:

> "**The Sixteenth Amendment does not permit a new class of a direct tax... The Amendment**, the [Supreme] court said, judged by the purpose for which it was passed, **does not treat income taxes as direct taxes but simply removed the ground which led to their being considered as such in the *Pollock* case**, namely, the source of the income. Therefore, **they are again to be classified in the class of indirect taxes to which they by nature belong.**" Cornell Law Quarterly, 1 Cornell L. Q. pp. 298, 301 (1915-16) (emphasis added).
>
> "In *Brushaber v. Union Pacific Railroad Co.*, Mr. C. J. White, upholding the income tax imposed by the Tariff Act of 1913, construed the Amendment as a declaration that **an income tax is "indirect," rather than ... an exception to the rule that direct taxes must be apportioned.**" Harvard Law Review, 29 Harv. L. Rev, p. 536, (1915-1916) (emphasis added).

"[B]y the [*Brushaber*] ruling, it was settled that **the provisions of the Sixteenth Amendment** conferred no new power of taxation, but **simply prohibited** the previous complete and plenary power of **income taxation** possessed by Congress from the beginning **from being taken out of the category of indirect taxation to which it inherently belonged**, and being placed in the category of direct taxation subject to apportionment by a consideration of the sources from which the income was derived -- that is, by testing the tax not by what it was, a tax on income, but by a mistaken theory deduced from the origin or source of the income taxed." *Stanton v. Baltic Mining Co.*, 240 U.S. 103 (1916) (emphasis added).

"**If [a] tax is a direct one, it shall be apportioned according to the census or enumeration**. If it is a duty, impost, or excise, it shall be uniform throughout the United States. Together, these classes include every form of tax appropriate to sovereignty. Cf. *Burnet v. Brook*s, 288 U. S. 378, 288 U. S. 403, 288 U. S. 405; *Brushaber v. Union Pacific R. Co.*, 240 U. S. 1, 240 U. S. 12." *Steward Machine Co. v. Collector of Internal Revenue*, 301 U.S. 548 (1937) (emphasis added).

"**The income tax ... is an excise tax with respect to certain activities and privileges** which is measured by reference to the income which they produce. The income is not the subject

of the tax; it is the basis for determining the amount of tax." ...

"[T]he amendment made it possible to bring investment income within the scope of the general income-tax law, but did not change the character of the tax. It is still fundamentally an excise or duty..." House Congressional Record, March 27, 1943, p. 2580, testimony of Former Treasury Department legislative draftsman F. Morse Hubbard, (emphasis added).

"The Supreme Court, in a decision written by Chief Justice White, first noted that the Sixteenth Amendment did not authorize any new type of tax, nor did it repeal or revoke the tax clauses of Article I of the Constitution, quoted above. **Direct taxes were**, notwithstanding the advent of the Sixteenth Amendment, **still subject to the rule of apportionment....**" Report No. 80-19A, 'Some Constitutional Questions Regarding the Federal Income Tax Laws' by Howard M. Zaritsky, Legislative Attorney of the American Law Division of the Library of Congress (1979) (emphasis added).

"[T]he sole purpose of the Sixteenth Amendment was to remove the apportionment requirement **for whichever incomes were otherwise taxable**. 45 Cong. Rec. 2245-2246 (1910); *id.* at 2539; *see also Brushaber v. Union Pacific R. Co.*, 240 U. S. 1, 240 U. S. 17-18 (1916)" *South Carolina v. Baker*, 485 U.S. 505 (1988), fn 13 (emphasis added).

As stated, the authorities agree, the income tax is an excise tax subject to the rule of uniformity. The present case stands on this rule of law and the prior court should have so held.

Act 2. The betrayal: The due process clause of the Fifth Amendment appears violated in at least 3 instances.

First, since the returns were valid under existing law, it was error not to process them as submitted by Petitioner.

Second, the assessment of a frivolous penalty under Internal Revenue Bulletin 2010-17 III position argument (44) (ARG 44) (claimed a religious organization was involved) was clearly a false assessment under a fraudulent scheme and therefore a betrayal of the truth.

Third, during the hearing, Counsel for the Service admitted the fact that Petitioner had never claimed contact with a religious organization on any form 1040 and abandoned that ARG 44 claim, but she requested the Court re-assess the penalty under something called the "flush language" of the same bulletin. This request was without notice in any pleading and beyond the scope of even a 'de novo' review of the due process hearing by the Service.

Further due process issues exist within the "flush language" of I. R. Bulletin 2010-17.

> "Returns or submissions that contain positions not listed above, which on their face have no

> basis for validity in existing law, or which have been deemed frivolous in a published opinion of the United States Tax Court or other court of competent jurisdiction, may be determined to reflect a desire to delay or impede the administration of Federal tax laws and thereby subject to the $5,000 penalty." Internal Revenue Bulletin 2010-17 III

A second reading may be needed. It states that a return with "no basis for validity in existing law, or...". So we must presume the converse must be possible. A return that does have a basis for validity in existing law can take the second choice following the conjunction "or" to be a position deemed frivolous. A valid return can be frivolous if a tax court so states. That could mean any return could be frivolous, especially one that used the appeal process since that causes delay.

To follow the "flush language" would permit a return that was valid in existing law to be determined to reflect a desire to delay or impede. This language permits a valid return to be sanctioned. There is no objective standard stated that can be measured and applied uniformly. This abuse of legislature's delegation of authority to administrators has become so extensive that it has lead to arbitrary prosecution. This "flush language" should be stricken under the 'void for vagueness' doctrine of the Fifth Amendment.

Further, to abandon the argument 44 language that had been outlined in the FOIA requests in the middle of the hearing in Tax Court and then substituting another without notice to Petitioner is trial

by ambush. Petitioner had no opportunity to review this claim in advance of the trial. No advance warning was given that arg 44 would be abandoned and no warning that another basis would be advanced. This is yet another violation of due process standards.

Act 3. The Overreach: After failing to process the returns as self-assessed, and after assessing frivolous penalties that were fraudulently declared, the Service sent "notice of intent to levy." During the due process hearing Petitioner attempted to explain that the levy process was not available in this instance. The implementing language of the original Internal Revenue Code (IRC) made it clear that the codification process did not change the existing law. Even further, all conflict between the IRC and the Revised Statutes must be resolved in favor of the Revised Statutes.

> "By 1 U.S.C. 54(a), 1 U.S.C.A. 54(a) the Code establishes 'prima facie' the laws of the United States. But the very meaning of 'prima facie' is that the Code cannot prevail over the Statutes at Large when the two are inconsistent." *Stephan v. United States*, 319 U.S. 423 (1943). [The section 1 U.S.C. 54(a) to which the court refers is now 1 USC 204]

The power to levy is set out at 26 U.S.C. 6331 and employs language that seems expansive and sweeping in scope. However, the derivation table for section 6331 of the current code shows the source as section 3310(a) of the 1939 IRC. Section 3310(a), in turn, show the source as R S. 3185. The point of interest is that Revised Statutes section 3185 limits the

power of restraint to monthly filers and "all returns for which no provision is otherwise made."

> R. S. Sec. 3185. "All returns required to be made **monthly** by any person liable to tax shall be made on or before the tenth day of each month, and the tax assessed or due thereon shall be returned by the Commissioner of Internal Revenue to the collector on or before the last day of each month. All returns for which **no provision** is otherwise made shall be made on or before the tenth day of the month succeeding the time when the tax is due and liable to be assessed, and the tax thereon shall be returned as herein provided for monthly returns, and shall be due and payable on or before the last day of the month in which the assessment is so made. When the said tax is not paid on or before the last day of the month, as aforesaid, the collector shall add a penalty of five per centum, together with interest at the rate of one per centum per month, upon such tax from the time the same became due; but no interest for a fraction of a month shall be demanded: Provided, that notice of the time when such tax becomes due and payable is given in such manner as may be prescribed by the Commissioner of Internal Revenue. It shall then be the duty of the collector, in case of the non-payment of said tax on or before the last day of the month, as aforesaid, to demand payment thereof, with five per centum added thereto, and interest at the rate of one per centum per month, as aforesaid, in the manner prescribed by law;

> and if said tax, penalty, and interest, are not paid within ten days after such demand, it shall be lawful for the collector or his deputy to make distraint therefor, as provided by law." (The interest rate established in this statute was changed to 6% per annum by section 404 of the Revenue Act of 1935.) (Emphasis added)

Persons required to file a 1040 return must do so on an annual basis. No provision is provided for distraint where returns are required annually. No exception to this rule was found in the IRC. The levy process does not extend to accruals from the 1040 returns. Any attempt to levy on deficiencies from a 1040 filing is a nullity under present law.

Section 3310 of the 1939 IRC states the areas where restraint is granted more clearly. Please note there is no separate subsection for annual returns. This is further evidence that distraint was not contemplated by legislature for persons filing on an annual basis. An annual filer is not in the class to which the related provisions apply.

> SEC. 3310. RETURNS AND PAYMENT OF TAX.
>
> (a) MONTHLY RETURNS.—All returns required to be made monthly by any person liable to tax shall be made on or before the 10th day of each month, and the tax assessed or due thereon shall be returned by the Commissioner to the collector on or before the last day of each month.
>
> (b) OTHER RETURNS.—All returns for which no provision is otherwise made shall be made on or

> before the 10th day of the month succeeding the time when the tax is due and liable to be assessed, and the tax thereon shall be returned as herein provided for monthly returns, and shall be due and payable on or before the last day of the month in which the assessment is so made. Section 3310(a), (b) of the 1939 IRC

Since we must exclude a widely held rule of law it is important that statutory construction support this. As one researcher stated, "*The doctrine is simple and standard in statutory construction: when an element of a statute has once been promulgated, it remains the law, whether spelled out in a future version or not, unless explicitly repealed.*" Peter Eric Hendrickson, Cracking the Code p.72 (15th ed. 2016).

This interpretive stance is again affirmed by this court in 1993.

> "We note that the statute as codified in the United States Code refers to "any form of reconsiderations," with the last word being in the plural. The version of 10(c) as currently enacted however, uses the singular "reconsideration." See this note supra, at 138. We quote the text as enacted in the Statutes at Large. See *Stephan v. United States*, 319 U.S. 423, 426 (1943) ("[T]he Code cannot prevail over the Statutes at Large when the two are inconsistent") *Darby v. Cisneros*, 509 U.S. 137 (1993)

The Act of June 30, 1926, H.R. 10000, was in fact the Act in which Congress authorized the "United

States Code", and this act is still in effect. The preamble of this Act clearly states that the coding process does not have the effect of "repealing or amending any such law, or as enacting as new law any matter contained in the Code."

> "AN ACT TO consolidate, codify, and set forth the general and permanent laws of the United States in force December seventh, one thousand nine hundred and twenty-five
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the fifty titles hereinafter set forth are intended to embrace the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925, compiled into a single volume under the authority of Congress, and designated "The Code of the Laws of the United States of America."
>
> Sec. 2. In all courts, tribunals, and public offices of the United States, at home or abroad, of the District of Columbia, and of each State, Territory, or insular possession of the United States --
>
> (a) The matter set forth in the Code, evidenced as hereinafter in this section provided, shall establish prima facie the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925; but nothing in this Act shall be construed as

repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments.

(b) Copies of this Act printed at the Government Printing Office and bearing its imprint shall be conclusive evidence of the original of the Code in the custody of the Secretary of State."

(c) The Code may be cited as "U.S.C." Title 1 U.S.C. preamble, June 30, 1926. H.R. 10000.

Petitioner asks the Court to find there is no statutory authority to levy on Petitioner for any sums of money arising from the filing the annual 1040 returns. Any attempt to so levy is overreaching statutory permissions.

Further overreach is each Court leveling monetary sanctions on Petitioner as punishment for the exercise of his First Amendment right to state his valid beliefs and opinions and to petition the government for redress of grievance. To punish this right is excessive and/or inflicts cruel and unusual punishment in violation of the Eighth Amendment.

This case is only about punishment! The Service set about to punish Petitioner by leveling fines. These fines were based on a deliberately falsified assessment

under argument 44. The Service may have realized that Petitioner's 1040 filing was correct and could only retaliate with economic sanctions. The Tax Court, in turn, fined Petitioner for some unnamed utterance during trial. The Court granted relief from the offense of an argument 44 claim and then went on to find another claim.

In the chambers conference prior to trial the Tax Court promised petitioner he would level sanctions if frivolous arguments were raised. When asked what those arguments were, he only asserted that Petitioner would know. The Fifth Circuit then leveled another fine without naming the specific offense and while misstating Petitioners case and facts. These acts are reminiscent of a Hamlet quote, to paraphrase, the government "doth protest too much, methinks."

Now the judicial fines total even more than the remaining fines by the Service and are clearly excessive and designed to be cruel. Whether they are called sanctions or fines they are certainly intended to punish and to limit the exercise of Petitioners right to free speech and right to petition the government for redress of grievance.

In *Austin v. United States*, 509 U.S. 602 (1993), this Court noted that the application of the Excessive Fines Clause to civil forfeiture did not depend on whether it was in a civil or criminal procedure. In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the Court states there is no constitutional distinction between fact and opinion. Therefore, Petitioners statements in Tax Court were opinions about the

statutes supporting the income tax. These opinions were offered in an attempt to resolve differences of opinion. The statements of fact were readily verifiable by checking each statute. The statutes supporting these fines are too vague to be constitutional.

REASONS FOR GRANTING THE PETITION

I. Decisions of the courts of appeals that enforce Title 26 are divided and some are contrary to this Court's opinion on whether the income tax is direct or indirect. As stated above, the Fifth Circuit and the Eighth Circuit have entered rulings holding that there is something called a direct tax without apportionment. This has lead to misleading information from the Service.

For example: on the website and in many of the publications produced by the IRS this same false claim is made, as in the example below:

> The Law: The courts have both implicitly and explicitly recognized that the Sixteenth Amendment authorizes a non-apportioned direct income tax on United States citizens and that the federal tax laws as applied are valid. In *United States v. Collins*, 920 F.2d 619, 629 (10th Cir. 1990), cert. denied, 500 U.S. 920 (1991), the court cited *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 12-19 (1916), and noted that the U.S. Supreme Court has recognized that the "Sixteenth Amendment authorizes a direct nonapportioned tax upon United States citizens throughout the nation."

https://www.irs.gov/businesses/small-businesses-self-employed/anti-tax-law-evasion-schemes-law-and-arguments-section-iv (last entry on the page).

II. The questions presented are exceptionally important. It is impossible to measure the total impact on the payment of this tax should these questions be answered as requested. But the unfair application of this tax is profoundly extensive. Defending the Constitution against incorrect interpretation is this Courts highest purpose. The right to contract, firmly protected in the Constitution, is the engine that drives the Federal Corporation called the United States. Each and every contract carries with it the Federal Privilege and is therefore subject to this excise tax. The categories are extensive when considering the legitimate and constitutionally sound application of the income tax. Some examples could be T-bill holders, railroad workers, federal employees and many others. Of greater importance is the damage done if this contradiction in the application of this legal standard is left open and not resolved.

III. This case offers an ideal vehicle to resolve these issues of Constitutional dimension. As more individuals become aware of this conflict in the law, more will challenge these false rulings and false claims made by the Service. In this case both examples exist. The Service made a false claim regarding the argument 44 when the 1040 carried no such claim. Should this writ be approved, the ensuing brief will illustrate how this false claim was deliberately designed in the Internal Revenue Manual (IRM). The burden to

the Service to pursue false deficiencies is enormous. At some point the return on this investment will diminish.

The false claims regarding the nature of the tax and the false claims regarding the entries on the returns will have to stop. This case has both. This case can help clear up these legal issues.

The Fifth Circuit's decision is wrong in this case and in the *Parker* case. It takes a long time for a case that is so clearly on point to get to this level. Please accept this effort and contribution to greater clarity in the Rule of Law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted


Walter C. Lange