No. _____

In the Supreme Court of the United States

Brian E. Harriss,

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

This Court has held that non-apportioned direct taxes are Constitutionally prohibited and remain so after the adoption of Amendment XVI to the U.S. Constitution ("Amendment"), and that it is erroneous to assume that the Amendment gave Congress the "power to levy an income tax which, although direct, should not be subject to the regulation of apportionment applicable to all other direct taxes." *Brushaber v. Union Pacific R. Co.*, 240 U.S. 1, 11 (1916). This Court reaffirmed this holding in its decisions in *Stanton v. Baltic Mining Co.*, 240 U.S. 103 (1916), *Taft v. Bowers*, 278 U.S. 470, 481 (1929), and *So. Carolina v. Baker*, 485 U.S. 505 (1988).

This Court further observed that, in its earlier decision in *Pollock v. Farmer's Loan & Trust*, 157 U.S. 429 (1895),

> [we] recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it.

Brushaber, supra, 240 U.S. at 17.

The questions presented are:

1. Did the Ninth Circuit commit reversible and plain Constitutional error by recharacterizing, without evidence, Petitioner's right to refute

QUESTIONS PRESENTED – Continued

Commissioner's presumptive, and not conclusive, evidence of its correctness, that all of Petitioner's earnings are excisable gains?

2. Did the Ninth Circuit Court of Appeals, without evidence and in conflict with Constitutional restrictions on the implementation of Congressional taxing power, err by affirming deficiencies on the premise that all earnings, and not just excisable gains, may be taxed directly without apportionment?

3. Alternatively, under this Court's decisions, the Amendment notwithstanding, is the income tax, as it is currently administered throughout the country, effectively a non-apportioned tax on the revenue of the people that is prohibited, or subject to apportionment by the U.S. Constitution, Article 1, Sections 2 and 9?

RELATED CASES

- *Harriss v. Commissioner,* consolidated Nos. 12528-14 and 25358-14, United States Tax Court. Decision entered May 2, 2017.
- *Harriss v. Commissioner*, No. 17-72233, United States Court of Appeals for the Ninth Circuit. Memorandum Opinion filed August 27, 2019.

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PETITION FOR A WRIT OF *CERTIORARI*

Petitioner Brian E. Harriss, *pro se,* petitions this Court for a Writ of *Certiorari* to review and reverse the final judgment of the United States Court of Appeals for the Ninth Circuit affirming the decision of the United States Tax Court finding deficiencies in income tax and penalties for tax years 2010 and 2011 because Mr. Harriss did not report all of his earnings as taxable income.

OPINIONS BELOW

Petitioner has reproduced in his Appendix the Ninth Circuit's unpublished Memorandum Opinion issued on August 27, 2019 (A-15), the Tax Court's January 5, 2017 Memorandum Findings of Fact and Opinion (A-1) and its final Decisions issued on May 2, 2017 (A-13-A-14).

JURISDICTION

The opinion of the Court of Appeals was entered on August 27, 2019. Petitioner sought from this Court and obtained an extension to file this Petition until January 24, 2020. This Court has jurisdiction under 26 U.S.C. §7482(a)(1) and 28 U.S.C. §1254(1).[1]

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. Constitution, Article 1, Sections 2, 8 and 9; Amendment I; Amendment V; Amendment XVI (A-17).

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[1] All section references are to the 1986 Internal Revenue Code unless otherwise indicated.

STATEMENT OF THE CASE

In a three-paragraph, cursory ruling, on the stipulated fact that Mr. Harriss earned money in the relevant years, the Ninth Circuit Court of Appeals affirmed a proposed income tax deficiency against Mr. Harriss (as well as penalties) on the ground that he had received "compensation for services" and improperly omitted those amounts from gross income and that, therefore, he owed federal income tax on all of those earnings.

But Mr. Harriss had not stipulated—and, in fact, had denied—that he had been a service provider who received "compensation for services" or that he had engaged in activities of any kind relevant to the income tax. The evidence did not support a finding that he had engaged in taxable activity or had received *wages* or *trade or business* income or any other measure of activity subject to a Constitutionally-administered excise on incomes. The courts below simply reframed his Stipulations using terms defined by Congress, and declared that his receipts, thus re-named, were taxable.

The action of the courts below was not merely incorrect on the facts and the law. The deficiency determination under review was upheld on one of two grounds that demand this Court's attention and resolution. Either the Ninth Circuit simultaneously acknowledged the nature of the income tax as an excise (why else recharacterize Petitioners' stipulations to conform to statutory and historical definitions relevant to such a tax?) while it deprived him of his property in derogation of the Rules of Court and his Constitutional rights, or, it doesn't matter how his earnings were characterized (and all

argument concerning the tax as an excise was frivolous), because the Amendment authorized a new species of tax – *i.e.,* a non-apportioned, direct tax on all that comes in, and therefore Mr. Harriss's personal revenue, and not just the gain derived therefrom, was taxable directly. *See* §61 and the statutes on which that section is derived. A-18-A-22. Reply Brief, pp. 18-19.

The Constitutional conundrum that this case presents is of imperative public importance precisely because it is not unique, but, rather, represents the new norm. Calling the tax a Constitutional excise while taxing the public directly, without apportionment, is putting form over substance and subjecting the citizenry to exaction, which violates their rights to due process of law. 26 C.F.R. §601.106(f)(1). A-17; A-30. This is especially true in cases such as this one where the courts rewrote the facts to aid the government's cause and to give the decision a lawful veneer. Moreover, the current administration of the tax multiplies confusion and threatens to destroy both the productivity of the people and the Constitutional framework on which our nation rests. *See Brushaber, supra,* 240 U.S. at 12.

A. Background proceedings.

Mr. Harriss petitioned the U.S. Tax Court for a redetermination of an income tax deficiency proposed by Respondent for tax years 2010 and 2011. The cases eventually were consolidated. Despite the fact that Mr. Harriss and Respondent had arrived at, and jointly signed, a motion under Tax Court Rule 122 to submit the case as fully stipulated, Respondent's counsel mendaciously suggested to the trial court

that Mr. Harriss had objections to the record, might not show up in court, and was otherwise problematic. Based on these false representations, the Tax Court ordered the parties to appear at, and conduct, an unnecessary trial. At the trial, the Tax Court admitted patently inadmissible piles of documents into the record, and, in violation of Tax Court Rule 91, allowed Respondent's counsel to change or qualify Respondent's stipulations. Opening Brief, pp. 6-9. Cross motions for sanctions were denied. Post-trial simultaneous briefing was completed on March 25, 2016.

On January 5, 2017, the Tax Court issued its Memorandum Findings of Fact and Opinion upholding the proposed deficiencies. A-1. Many of the facts that the trial court found, but that had not been stipulated, had no evidentiary support. Even worse, the trial court erroneously characterized many of the facts found as stipulated, when actually they never had been. The Tax Court subsequently entered two separate decisions on May 2, 2017, one for each of the two cases that had been consolidated. Reply Brief, p. 1.

Mr. Harriss appealed the Tax Court decision to the Ninth Circuit Court of Appeals. The Ninth Circuit, claiming to have reviewed the legal conclusions *de novo* and the factual findings for clear error (A-15), apparently did not do so by resort to the record. It merely found, "the record showed that Harriss had earned taxable income, and the legal basis for Harriss's argument to the contrary was frivolous." Since the record did not show that Mr. Harriss engaged in an *excisable* activity, nor did the record contain the concessions or stipulations that the Tax Court attributed to him (*e.g.,* compare Trial

Tr. p. 24, Stipulation 12, and A-3), and since Respondent's inadmissible evidence was not offered to prove any of Respondent's late-raised assertions made in violation of Tax Court Rule 91 (Op. Br. 35-36; A-6-A-7), the decision of the Court of Appeals essentially was that Mr. Harriss was paid money and therefore owed federal income tax. But the Court of Appeals was careful to phrase it that Mr. Harriss earned "compensation for labor or services, paid in the form of wages or salary," A-16, things that Mr. Harriss had denied and for which there was no evidence. On this ground, the Court of Appeals also upheld the late-filing and accuracy-related penalties. A-16.

Petitioner seeks a writ of *certiorari*.

B. The basis for jurisdiction in the trial and appellate courts.

Under §6214(a), the U.S. Tax Court had subject matter jurisdiction to review and to redetermine the Commissioner's determination of a tax deficiency set forth in a statutory notice. On August 2, 2017, Petitioner timely filed his Notice of Appeal to the Court of Appeals of the May 2, 2017 final decision of the Tax Court.

REASONS WHY THIS PETITION SHOULD BE GRANTED

Either the Ninth Circuit's decision to uphold a tax deficiency against Mr. Harriss was in violation of the limits on income tax administration established in Article 1, sections 2, 8 and 9 of the U.S.

Constitution and therefore void,[2] or, in the alternative, the income tax itself, as administered today, is a direct tax that either must be apportioned or struck down as unconstitutional.

The outcome depends entirely on whether this Court will uphold its prior decisions in *Brushaber, supra,* and *Stanton, supra*, among others, or whether it will declare that the Fifth, Seventh, Eighth, Tenth, and the Ninth Circuits have correctly held that the Amendment created a "new species of tax" called a non-apportioned direct tax on incomes. If this Court finds the latter, then the Amendment itself must be struck down because it has caused one portion of the Constitution to be in irreconcilable conflict with another, with all the evils attendant thereto. *See Brushaber, supra,* 240 U.S. at 11-12.

This Court should grant *certiorari* to resolve this crucial area of income tax law, because declining to do so will be seen as tacit approval to continue its unlawful administration.

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[2] If a direct tax is not apportioned, "not having been laid according to the requirements of the Constitution, it must be admitted that the laws imposing it, and the proceedings taken under them by the assessor and collector for its imposition and collection, were all void." *Springer v. United States*, 102 U.S. 586, 595 (1881) (sustaining the Civil War income tax laws, holding that the tax based on income was not a direct tax but was fundamentally an excise or duty and as such did not require apportionment among the States).

I. The decision of the Ninth Circuit Court of Appeals enforces the federal income tax law in a way that conflicts with this Court's decisions in *Brushaber, supra*, and *Stanton, supra*.

In 1895, in the *Pollock* case, this Court held sections 27-37 of the Revenue Act of 1894 invalid. The Court reasoned that to apply the tax to gains derived in connection with the ownership of property (either the stock on the basis of which dividends were paid or real estate from which rents were derived) amounted to a tax on the property itself, and thus failed to pass Constitutional muster for lack of apportionment in its administration.

By 1913, Amendment XVI was adopted to overrule the *Pollock* Court's holding that an income tax on rents and dividends must be apportioned simply because those excisable gains derived from property. Three years later, in *Brushaber, supra,* Chief Justice Edward White penned the landmark opinion for a unanimous Court, addressing and definitively settling the meaning and effect of the newly-adopted Amendment. Justice White understood that the Amendment simply eliminated *Pollock*'s shielding from the well-established income excise tax of privilege-based gains derived from dividends and rents.

In *Brushaber*, this Court reaffirmed its previous rulings that the income tax is an excise tax. Further, it clarified that the adoption of the Amendment did not change the character of the tax as an excise and that the Amendment did not, and could not, authorize a non-apportioned direct tax. *Brushaber,* 240 U.S. at 11.

> 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...

Id., 240 U.S. 10-11 (emphasis added). In fact, this Court held that the proposition that the Amendment could have established a non-apportioned direct tax is erroneous and repugnant to the Constitution, because such a tax would rely on, and create, an untenable Constitutional internal conflict.

> But it clearly results that the proposition and the contentions under it, if acceded to, would cause one provision of the Constitution to destroy another; that is, they would result in bringing the provisions of the Amendment exempting a direct tax from apportionment into irreconcilable conflict with the general requirement that all direct taxes be apportioned.

Id., 240 U.S. 11-12. In fact, this Court explained, if the Amendment authorized a direct tax that is not subject to the rule of apportionment, "instead of simplifying the situation and making clear the limitations on the taxing power, which obviously the Amendment must have been intended to accomplish, [this result] would create radical and destructive

changes in our constitutional system and multiply confusion." *Id.*, 240 U.S. 12.

The *Brushaber* Court was prescient. Today, as it increasingly has been since the mid-1940s,[3] and as clearly shown in the case below, the income tax law is being administered as if the Amendment had authorized a non-apportioned, direct tax on the revenue of the people. As this Court presaged, this unlawful administration has created "radical and destructive changes in our constitutional system" and has "multipl[ied] confusion."[4]

It is the opportunity, and obligation, of this Court to examine "the far-reaching effect of this erroneous assumption" (*id.*, 240 U.S. 11) about the nature of the tax, not only as it pertains to the individual Petitioner, Brian Harriss, but as it pertains to all taxpayers.

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[3] From 1913 to 1939, on average, only 9.4% of earning Americans filed tax documents and returns, and even during World War I and the 1920s, the highest annual percentage of income tax filings during that period was only a little over 17%. But in the early 40s and in the midst of World War II, in part due to state public appeal campaigns aimed at raising war-time revenues, the percentage rose to more than 80%. But, had the 1913 Amendment created a universal, non-apportioned tax on all revenue, no such campaigns would have been necessary, and the "compliance" would have neared today's rates before the date of the Brushaber decision. *See* chart at "Income Equality in the United States 1913 to 1958," Thomas Picketty, EHES, Paris, and Emmanual Saez, U.C. Berkeley and NBER, p. 65. https://eml.berkeley.edu/~saez/piketty-saezOUP04US.pdf

[4] Justice White then proceeded to conduct "a demonstration of the error of the fundamental proposition as to the significance of the Amendment." *Brushaber*, 240 U.S. 12.

A. The Ninth Circuit erred in ruling on the premise, already discredited by this Court in *Brushaber, supra,* and *Stanton, supra,* that the Amendment authorized a non-apportioned direct tax.

1. *Brushaber* set aside the notion of a non-apportioned direct tax on incomes as an "erroneous assumption."

Brushaber essentially held that the purpose and effect of the Amendment is merely the overruling of a mistaken reasoning of the majority of this Court in the 1895 *Pollock* decision that, when applied to dividends and rent, taxation must be viewed in light of the personal-property sources from which those particular gains are derived. Based on that faulty reasoning, the 1895 Court had held that even the then-33-year-old income tax, when applied to such gains, must be treated as a property tax requiring apportionment.

After this Court's decision in *Brushaber*, this Court reaffirmed the holding that, after adoption of the Amendment—which, by overruling the *Pollock* treatment of gains derived from rents and dividends, only underscored the excise nature of the tax—the income tax remains an excise and that non-apportioned direct taxes remain prohibited.

> [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, supra, 240 U.S. at 113.

Twenty years after *Brushaber*, in *Steward Machine Co. v. Collector of Internal Revenue,* 301 U.S. 548 (1937), this Court rejected the argument that a federal tax on "income" (in this case under the provisions of the Social Security act) can be construed as a direct non-apportioned tax authorized by the Amendment:

> 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. Brooks*, 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 Whether the [income] tax is to be classified as an "excise" is in truth not of critical importance [for purposes of this analysis]. If not that, it is an "impost," or a "duty." **A capitation or other "direct" tax it certainly is not.**

Steward, supra, 301 U.S. at 581. (Emphasis added.)

2. Capitations that are not apportioned are prohibited by the Constitution.

A capitation is a direct tax, like other "taxes directly on property because of its ownership." *Brushaber*, 240 U.S. 15. As this Court had explained previously, "Direct taxes bear immediately upon persons, upon the possession and enjoyments of rights;...." *Knowlton v. Moore*, 178 U.S. 41, 47 (1900).

In contrast, an excise is a privilege tax. *See*, generally, *Waters v. Chumley*, No. E2006-02225-COA-RV-CV (Tenn. App. 2007), which pointed out that, with respect to state taxation on the conduct of business, for example, "[c]ase law recognizes no distinction between a privilege tax and an excise tax," citing 71 AM JUR.2d State and Local Taxation §24, ("The term 'excise tax' is synonymous with 'privilege tax,...."). The principle applies equally to any excise, and it is its nature *as* an excise that allows the income tax to pass Constitutional muster. *See,* generally, *Chase Nat. Bank v. United States*, 278 U.S. 327, 334 and 336-337 (1929) (in which this Court treated an "excise or privilege tax" synonymously and held that it is the privilege which Constitutionally may be taxed without apportionment). "Privilege" is defined as:

> A particular benefit or advantage enjoyed by a person, company, or class beyond the common advantages of other citizens....A particular right, advantage, exemption, power, franchise, or immunity held by a person or class, not generally possessed by others.

Black's Law Dictionary, 6th Edition.

Excises are avoidable and fall on privileges, consumption, and use, whereas direct taxes are unavoidable and fall on property, ownership, and persons, their revenue, and their possession and enjoyment of rights. In line with this reasoning, the tax act levying a tax without apportionment on carriages "for the conveyance of persons," passed on by this Court in *Hylton v. United States*, 3 Dall. 171 in 1796, "was not levied directly on property because of its ownership but rather on its use and was therefore an excise, duty or impost." *Brushaber*, 240 U.S. 14. In *Pollock*, this Court had concluded that "the classification of direct was adopted for the purpose of rendering it impossible to burden by taxation accumulations of property, real or personal, except subject to the regulation of apportionment,..." *Brushaber*, 240 U.S. 16.

A tax on unprivileged activities or occupations is a capitation, a type of direct tax. On the Framers' understanding and use of the term, this Court, in *Pollock, supra,* drew upon the analysis of Albert Gallatin.[5]

> Albert Gallatin, in his Sketch of the Finances of the United States, published in November, 1796, said: 'The most generally received opinion, however, is that, **by direct taxes in the constitution, those are meant which are raised on the capital or revenue of the people**; by indirect, such as are raised on their expense....' He then

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[5] Albert Gallatin was a United States senator, a member of the House of Representatives, an ambassador to the United Kingdom and France, and the longest-serving Secretary of the Treasury in U.S. history.
https://www.federalreservehistory.org/people/albert_gallatin

> quotes from [Adam] Smith's Wealth of Nations, and continues: 'The remarkable coincidence of the clause of the Constitution with this passage in using the word "capitation" as a generic expression, including the different species of direct taxes, an acceptation of the word peculiar, it is believed, to Dr. Smith, leaves little doubt that the framers of the one had the other in view at the time, and that they, as well as he, **by direct taxes, meant those paid directly from, and falling immediately on, the revenue**;...'

Pollock, supra, 157 U.S. at 569-570 (emphasis added). Adam Smith described capitations in *Wealth of Nations*, as "taxes which, it is intended, should fall indifferently upon every different species of revenue....Capitation taxes, so far as they are levied upon the lower ranks of people, are direct taxes upon the wages of labour, and are attended with all the inconveniences of such taxes." Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Book V, Ch.II, Art. IV (1776) (Smith was referring to wages in its common sense and not the custom-defined legal term found in the Internal Revenue Code.)

Also found in Gallatin's treatise is the following description of a direct tax on personal property which requires apportionment in its application. Today, this passage could be describing our modern-day income tax as it is currently applied:

> Personal property, perpetually shifting, requires a yearly valuation. . . . His capital employed in commerce, the debts which are due to him (from which must be deducted those he owes), his money, and even his stock in goods, must either

> be assessed according to his own declaration, or be estimated in an arbitrary manner. And when the tax is laid upon the revenue and not upon the capital of persons, when the profits of their industry are also to be calculated, it may truly be asserted that... the most odious of [vexatious excises] would be less oppressive, unequal, and unjust than a direct tax levied in that manner.

Albert Gallatin, *The Writings of Albert Gallatin*, ed. Henry Adams (Philadelphia: J.B. Lippincott, 1879). 3 vols. 1/12/2020, p . 167.[6]

Gallatin observed that, in France, for example, such capitations "laid with a regard to the conditions of persons, and assessed according to a conjectural proportion of fortunes, industry, and professions, were equally oppressive to the contributors and injurious to the nation." *Id.* Gallatin concluded that "lands and houses are the proper objects of direct taxation, that almost every other species of property must be reached indirectly by taxes on consumption." *Id.* at 168; *Springer, supra,* 102 U.S. at 602.

> So far as the objections raised in the *Pollock* case are concerned, the principle applied to corporations under the act of 1909 with the approval of the Supreme Court might have been extended to individuals engaged in business. In that way investment income of most individuals as well as of corporations could doubtless have been brought under the terms of the act. **And the field of income could have been completely covered by applying the principle that the ownership and management of investment**

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[6] https://oll.libertyfund.org/titles/1950#Gallatin_1358-03_421

> **property is an activity or privilege with respect to which Congress may impose an excise.**
>
> However that may be, Congress chose to remove all doubt by an amendment to the Constitution.

House Congressional Record, March 27, 1943, p. 2580, statement of Rep. Carlson of Kansas incorporating as his own statement a report of former Treasury Department legislative draftsman F. Morse Hubbard ("Congressional Record") (emphasis added).

Clearly, the Framers of the Constitution not only did not intend that the earnings from jobs of common right would be taxed without apportionment, but they took strong measures to protect the citizenry from the burden of such a tax on their ordinary revenue. And at the time of the adoption of the Amendment, it was *not* this undistinguished revenue that Congress termed "income."

Judge Gustafson of the Tax Court recently observed in his concurring/dissenting opinion in *Northern California Small Business Assistants Inc. v. Commissioner of Internal Revenue*, 153 T.C. No. 4 (2019) ("NCSBA") that this Court has emphasized the fact that "income" in a tax context is something other than gross receipts, and must be considered in its Constitutional sense.

> A proper regard for ... [the] genesis [of the Sixteenth Amendment], as well as its very clear language, requires also that this amendment shall not be extended by loose construction....
>
> [I]t becomes essential to distinguish between what is and is not "income," as the term is there used, and to apply the distinction, as

> cases arise, according to truth and substance, without regard to form....
>
> "Income may be defined as the gain derived from capital, from labor, or from both combined"....

Eisner v. Macomber, 252 U.S. 189, 206-207 (1920) (emphasis added) (quoting *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 185 (1918))...."[T]he essential matter...[is] a gain, a profit." *Eisner v. Macomber*, 252 U.S. at 207; *see also Doyle*, 247 U.S. at 184-189 ("'income'...convey[s]...the idea of gain or increase arising from corporate activities")....

The issue in *Eisner v. Macomber* was the taxability of a stock dividend (raising questions admittedly different from those in this case and in Alpenglow), and the Supreme Court did indeed observe in [*Commissioner v.*] *Glenshaw Glass*, 348 U.S. [426] at 431 [(1955)], that the definition in *Eisner v. Macomber* "was not meant to provide a touchstone to all future gross income questions."

However, even after *Glenshaw Glass*, one can still say: "Implicit in this construction [in *Eisner v. Macomber* of "income" as it is used in the Sixteenth Amendment] is the concept that gain is an indispensable ingredient of 'income,' and it is this concept which provides the standard by which we must determine whether the tax...is a tax on 'income' within the meaning of the 16th amendment." *Penn Mut. Indem. Co. v. Commissioner*, 32 T.C. 653, 680 (1959) (Train, J., dissenting; emphasis in original), *aff'd*, 277 F.2d 16 (3d Cir. 1960). Again, *Eisner v. Macomber*, 252 U.S. at 207, held that "the essential matter...[is]

> a gain, a profit", and this "essential" point is hardly dictum.

NCSBA, supra, 153 T.C. No. 4, *27-32.

Congress taxes something other than a taxpayer's "income" when it taxes gross receipts without accounting for whether those receipts constituted a *gain* from excisable activities.

Since income taxation was inherently indirect even before the adoption of the Amendment, the Amendment did not extend Congress's "taxing power to new or excepted subjects." *Peck v. Lowe*, 247 U.S. 165, 172 (1918); *compare Taft, supra*, 278 U.S. at 481 (the Amendment "confers no power upon Congress to define and tax as income without apportionment something which theretofore could not have been properly regarded as income"); *So. Carolina v. Baker, supra*, 485 U.S. at 522, fn. 13 ("The legislative history merely shows that the words 'from whatever source derived' of the Sixteenth Amendment were not affirmatively intended to authorize Congress to tax state bond interest **or to have any other effect on which incomes were subject to federal taxation**, and that the sole purpose of the Sixteenth Amendment was to remove the apportionment requirement for whichever incomes **were otherwise taxable**," citing 45 Cong. Rec. 2245-2246 (1910)) (emphasis added.)

B. Petitioner raised a dispute in his tax returns grounded on the assumption that this Court's decision in *Brushaber* correctly identified the income tax as a Constitutional excise on distinguished activities.

In the case below, Petitioner had availed himself of his Constitutional right to raise a dispute concerning items of income reported by third parties on information returns, and to disclose that dispute to the IRS on his tax returns. U.S. Constitution, Amendment I. Petitioner's dispute of the characterization of his non-distinguished payments as *wages* or other excise-taxable income was well-grounded in several statutes in which Congress contemplated such a dispute, *e.g.,* 26 U.S.C. §§ 6201(d), 6662(B)(ii)(II), 7491(a)(1), and in the decisions of this Court upholding the income tax as a Constitutional excise. *Hylton, supra; Pollock, supra; Brushaber, supra; Stanton, supra, etc.* Further, legislative draftsmen over the years consistently have explained that, even after the advent of the Amendment, the income tax is still an excise, and non-apportioned direct taxes are still prohibited by the Constitution.

> 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....

Congressional Record, p. 2580;

> 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).

This Court has made a "deliberate determination as to the fundamental nature of the tax" (Congressional Record, 2579) as an excise, *Springer, supra,* 102 U.S. 602, and this character was "firmly fixed in the minds of those charged with its administration." Congressional Record, 2579. Even while striking portions of the Revenue Act of 1894 as unconstitutional in the *Pollock* case, this Court "still recognized that the income tax was in essence an excise tax." Congressional Record, 2580.

But because the Court of Appeals upheld a deficiency merely on the fact that the Petitioner had stipulated to receiving some kind of payment for his work, the merits of that dispute became irrelevant, as were the statutes, legal definitions and Supreme Court jurisprudence on which Mr. Harriss had relied. A-18-A-30. Indeed, like the Tax Court, the Court of Appeals ignored the evidence, changed the stipulated

facts, and avoided any mention of the governing law in determining that Mr. Harriss had more taxable receipts than he had reported and thus, by court decree, owed a deficiency of tax.

The courts appear to have adopted the position urged by the government, *i.e.*, that what is being enforced is a non-apportioned, direct tax on everything that comes in, in which case this Court must declare that the tax is subject to apportionment, or that it is being unconstitutionally administered. Indeed, the courts below treated Petitioner's dispute—grounded on the notion that the tax is an excise on distinguished activities and gains derived therefrom—as misplaced and even frivolous. The Tax Court declined to hold Respondent to his burden of proof under §6201(d) because the "position" wrongly attributed to Mr. Harriss—that "his wages are not taxable"—does not constitute even a "reasonable dispute" of an item of income. A-5.

The courts below created the pretense that Petitioner's argument was something patently frivolous and easily debunked by attributing to Petitioner an argument that he was careful not to make: "that his wages are not taxable." But Mr. Harriss did not argue that his *wages* were not taxable – he disputed that what he was paid even *constituted* wages, as that term is relevantly, and distinctly, defined by Congress. Petitioner also never argued, as the trial court said he did, that the term wages "does not encompass the compensation he received from his employers." A-7, fn. 4.

Likewise, the Tax Court held that the notices of deficiency were presumed correct because of a third party characterization that his retirement account

was a federal IRA (defined at §408) (see Trial Tr. 24 and A-3) and because Mr. Harriss stipulated that he had received non-distinguished pay for his work (the Tax Court then reframed this stipulation as a concession that he received "compensation for services." A-7. *But see, e.g.,* Classification Act of 1923, Sec. 2, A-20-21). Op. Br. 22-23, 25, 32.

This is the heart of the matter – the Tax Court treated *wages* as both generic (*i.e.,* earnings generally) to conclude that all his receipts were *wages* and his dispute was inherently frivolous, and as specific to the tax (*i.e.,* excisable gain as defined, the only *wages* reportable on an information return) to conclude that his receipts were taxable. The "findings of fact" and conclusions of law therefore were schizophrenic and led to an absurdly unjust result, which was adopted in whole by the Court of Appeals.

This treatment suggests that the courts are, indeed, enforcing the income tax law in conflict with the Constitution and, in the case below, with Mr. Harriss's rights. The income tax is, and always has been, an excise on the gains derived from distinguished activities, but the Ninth Circuit committed reversible, and Constitutional, error by recharacterizing, without evidence, all of Mr. Harriss's earnings as excisable gains, or by treating the matter of the character of his earnings as irrelevant to the non-apportioned income tax.

C. Ruling on the mistaken premise that the Amendment authorized such a tax, the Ninth Circuit wrongly upheld a capitation on Mr. Harriss's revenue.

The proposed deficiency of tax against Mr. Harriss was a capitation enforced as if such a tax were lawful. This explains why the Ninth Circuit found no error in the Tax Court's Findings of Fact and Conclusions of Law. A-15-A-16. After all, if the income tax is *not* an excise or duty, but is, instead, a capitation, then Mr. Harriss's record is sufficient to sustain at least the receipt of revenue on which such a direct tax may be imposed. But such a capitation may not be imposed if it is not apportioned. U.S. Const., Article 1, Sec. 2, Clause 3 and Sec. 9. A-17.

If the income tax deficiency upheld by the Court of Appeals is, rather, tax on distinguished activities measured by the gains those activities produce, and therefore Constitutionally subject to an excise, then the Ninth Circuit erred in failing to hold the government to its burdens of proof, and to hold the Tax Court to its duty to apply the Rules of Court. Worse, it erred grievously in allowing the evidence, and lack thereof, to be construed as establishing taxable activity on which such an excise may lawfully be imposed without apportionment.

Alternatively, the Ninth Circuit disposed of this case summarily on the mistaken and destructive notion that there is a third species of tax to which Mr. Harriss is subject – a non-apportioned, direct tax on everything Mr. Harriss received for his work of common right.

II. The Ninth Circuit Court of Appeals' misapplication of the law to its erroneous findings of fact revealed an inherent and fundamental question of the federal tax law and its administration that must be resolved by this Court.

The misapprehension of the *Brushaber* decision, and the unconstitutional imposition and collection of income taxes, is systemic and must be corrected.

The confusion, and erosion of the Constitutional framework, has only grown over the years. The Seventh Circuit observed in 1954: "Before the Sixteenth Amendment Congress could not levy a direct tax without apportionment among the states." *Commissioner v. Obear-Nester Glass Co.*, 217 F.2d 56, 58 (7th Cir. 1954), citing *Pollock*. But this statement implies a view that *after* the adoption of the Amendment, such a tax *could* be levied. Directly after this statement, however, the Seventh Circuit seemed to recognize "income" as a special or distinguished subclass of earnings, even though it may only have been an expression of confusion as to the effect of the Amendment:

> The Amendment allows a tax on "income" without apportionment, but an unapportioned direct tax on anything that is not income would still, under the rule of the *Pollock* case, be unconstitutional.

Id., 217 F.2d 58.

Thus, the Seventh Circuit's view is either that there is a new species of tax—a direct, non-apportioned tax on all earnings (the broader sense of "income" as all that comes in) authorized by the

Amendment—or that there is a unique subset of earnings ("income" in the distinguished sense) that now, as before the Amendment, may be taxed as an excise (and thus, without apportionment). It is the latter view that this Court has taken in *Brushaber* and later decisions.

But more recently, some courts, including the Seventh Circuit, while obviously misreading this Court's ruling in *Brushaber*, have identified the income tax, as it has come to be administered, as a non-apportioned, direct tax without mention of the distinguished nature of the "incomes" subject to that tax. *See, e.g., Parker v. Commissioner,* 724 F.2d 469 (5th Cir. 1984) (stating this Court determined in *Brushaber* "that the sixteenth amendment provided the needed constitutional basis for the imposition of a direct non-apportioned income tax."); *Lovell v. United States,* 755 F. 2d 517, 519 (7th Cir. 1984) ("Plaintiffs also contend that the Constitution prohibits imposition of a direct tax without apportionment. They are wrong; it does not. U.S. Const. amend. XVI; *Parker v. Commissioner*, 724 F.2d 469, 471 (5th Cir.1984)") (emphasis added); *United States v. Francisco*, 614 F.2d 617 (8th Cir. 1980) ("the income tax is a direct tax,....*See Brushaber*....)(the purpose of the Sixteenth Amendment was to take the income tax "out of the class of excises, duties and imposts and place it in the class of direct taxes")."); *United States v. Collins*, 920 F.2d 619 (10th Cir. 1990) ("For seventy-five years, the Supreme Court has recognized that the sixteenth amendment authorizes a direct nonapportioned tax..., *see Brushaber*....").

The Ninth Circuit explicitly articulated this view in *In re Becraft*, 885 F.2d 547 (9th Cir. 1988). Even in

the context of attorney Becraft's purported argument that the issue is tied to residency and that "resident United States citizens are not subject to the federal income tax laws,"[7] which is mistaken, if not frivolous, the Ninth Circuit wholly adopted, as its own, the view that there is no longer only "two great subdivisions embracing the complete and perfect delegation of the power to tax and the two correlated limitations as to such power" as held by this Court (*Brushaber, supra,* 240 U.S. at 13; *Pollock, supra,* 157 U.S. at 557:

> For over 75 years, the Supreme Court and the lower federal courts have both implicitly and explicitly recognized the Sixteenth Amendment's authorization of a non-apportioned direct income tax. . . . [citing *Brushaber*, *Lovell* and *Parker.*]

In Re Becraft, supra, 885 F.2d at 548.

On this view, the Ninth Circuit in the case below held that everything paid to Mr. Harriss was rightly termed "income" and was subject to a direct tax without apportionment. Were these courts, and the Ninth Circuit below, correct in upholding the administration of the tax as a non-apportioned, direct tax? Or, instead, did these courts, as well as the courts below, enforce administration of the tax in violation of the Constitution by relying upon an incorrect interpretation (or a deliberate mis-construction) of this Court's earlier holdings as to the nature of the income tax and the effect of the Amendment? It is a critical question.

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[7] Petitioner says "purported" because it is possible (and common) that the Ninth Circuit recharacterized Becraft's argument, but, in any event, the citizenship point is wide of the mark and is not what petitioner is arguing here.

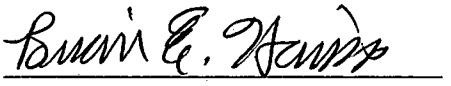
This Court should exercise its supervisory authority to curb the abuses in income tax administration, and to clarify the law to ensure uniform, national tax administration in harmony with, and obedience to, the Constitution.

Either the income tax law is Constitutional as written and the Ninth Circuit erred in affirming its unlawful administration, or the income tax law, as interpreted by the courts and as currently administered, has fundamentally changed. Setting aside form and examining substance, this Court now must declare it to be unconstitutional as administered, or declare that it is subject to apportionment. Either way, the tax to which Mr. Harriss has been subject for 2010 and 2011 must be declared "direct in the constitutional sense, and [] therefore void for want of apportionment" (*Brushaber, supra,* 240 U.S. at 16), and the decision below upholding a tax on his non-distinguished earnings must be reversed.

CONCLUSION

The writ should issue.

Respectfully submitted on January 24, 2020,



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