No.

IN THE
Supreme Court of the United States

Brian D. Swanson

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the Respondent collect a direct tax on Petitioner's capital without going through the rule of apportionment?

2. May Respondent use Petitioner's federal tax return to evade the apportionment requirement for collecting a direct tax on his capital and use Petitioner to confiscate the State of Georgia's constitutionally protected source of revenue?

3. Are Petitioner's employment earnings capital or income?

4. Does distinguishing between capital and income, when calculating a personal income tax liability, establish a sufficient factual matter to claim an income tax refund and to survive a Rule 12(b)(6) motion to dismiss?

5. Did the Eleventh Circuit abuse its discretion by imposing an $8,000 sanction on Petitioner when it ignored both the constitutional questions presented to it and Respondent's contradictory handling of his tax returns?

LIST OF PARTIES

All the parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Brian D. Swanson ("Swanson," "I," "me") having first-hand knowledge of the events in this case respectfully petitions for writ of certiorari to review the judgement of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") and the United States District Court for the Southern District of Georgia.

The legal citations and arguments used are those of a layperson without any formal or informal legal training. Therein, Brian D. Swanson respectfully asks this Court's indulgence.

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Eleventh Circuit is attached as Appendix 1-9. The unpublished decision and order of the United States District Court for the Southern District of Georgia granting motion to dismiss in favor of Respondent is Appendix 10-14.

STATEMENT OF JURISDICTION

This Court has jurisdiction under Article III of the Constitution of the United States of America as the Court of appellate jurisdiction of all controversies to which the United States is party and pursuant to 28 U.S.C §1254(1). Judgment for review was entered by a panel for the Eleventh Circuit Court of Appeals on Jan 7, 2020.

CONSTITUTIONAL PROVISIONS

1. Article I Section 2
   "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers"

2. Article I Section 8
   "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises...but all Duties, Imposts and Excises shall be uniform throughout the United States."

3. Article I Section 9
   "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken"

4. Sixteenth Amendment
   "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

INTRODUCTION

Is there capital in personal finance or are all financial gains income?

Swanson asks this Court to decide if The United States is attempting to collect a direct tax on his capital without apportionment. If true, this error has catastrophic constitutional consequences for both the individual taxpayer and each State Government. If this error is not corrected, Swanson will pay an

unconstitutional tax and the Constitution's federal structure will be severely compromised.

Swanson contends that all financial gains fall into one of two categories: Income or capital. Some financial gains are income and some financial gains are capital and the legal distinction between the two must be strictly enforced because they are taxed differently. Financial gains that are income are subject to the authority of the Sixteenth Amendment, but financial gains that are capital are not. However, the Internal Revenue Service attempts to collect a tax on all financial gains without apportionment, not just income. When the IRS collects a direct tax on capital without going through the rule of apportionment, two errors occur. First, the taxpayer pays a tax that is not due and second, the United States seizes from the States their constitutionally protected source of revenue.

STATEMENT OF THE CASE

Swanson is a public school teacher whose employment earnings are his source of capital. These earnings do not qualify as "gross income" as defined in the Internal Revenue Code and all capital that was erroneously withheld from his 2016 and 2017 earnings must be returned. The District Court dismissed Swanson's refund suit. The Eleventh Circuit AFFIRMED and sanctioned Swanson $8,000 for filing a frivolous appeal.

Swanson submitted his first tax return with the understanding that his employment earnings are not "wages," as defined in the Internal Revenue Code, in tax year 2015. The IRS responded by challenging the calculations on that return and after Swanson

provided a written explanation, the IRS issued a full and complete refund.

Based in good faith on the IRS determination that his 2015 tax return was correct, Swanson submitted his 2016 and 2017 tax returns in the same manner as his 2015 return. In both years he submitted a Form 4852 indicating that the W-2s that he received from his employer were incorrect because they reported capital that may only be taxed by apportionment as "wages." Swanson corrected the erroneous entries by indicating he earned $0 "wages" as defined in the Internal Revenue Code because his capital did not qualify as "wages." The returns were filed requesting that all erroneously withheld capital be returned. Swanson's 2016 and 2017 IRS transcripts show that refunds are due. The IRS did not process either return, and after two years of waiting, Swanson filed a suit for refund.

Swanson submitted his 2018 tax return in the same manner as his 2015, 2016 and 2017 returns. Without hassle or protest, the IRS has refunded all $7,611.35 of his erroneously withheld capital and applied the refund to an amount owed from a previous year. The IRS issued refunds for 2015 and 2018 but is withholding the refunds for 2016 and 2017 and declared the latter returns frivolous.

Subsequent to filing suit, the IRS has now issued Notices of Deficiency and is attempting to collect frivolous penalties on both the 2016 and 2017 returns. The contradiction in the IRS's handling of Swanson's various returns was ignored by both the District Court and the Eleventh Circuit.

Distinguishing between capital and income in personal finance is not a frivolous argument but is a constitutional question of critical importance. If a taxpayer misreports capital on a federal income tax

form, the United States would collect a direct tax on capital without apportionment and steal from the States their constitutionally protected source of revenue.

REASONS FOR GRANTING THE PETITION

I. Respondent is violating the Constitution by collecting a direct tax on Petitioner's capital without going through the rule of apportionment.

We live in a capitalist society and all economic activity is dependent upon capital. Distinguishing between capital and income in personal finance is the single most important act when calculating an income tax liability because they are taxed differently: Income is subject to the Sixteenth Amendment but capital is not. Senators who revived the Income Tax after the ratification of the Sixteenth Amendment had to define their terms and the distinction between capital and income is preserved in their debates. Senator Cummins said:

> When the people of the country granted to Congress the right to levy a tax on incomes, that right was granted with reference to the legal meaning and interpretation of the word "income" as it was then or as it might thereafter be defined or understood in legal procedure. **If we could call anything income that we pleased, we could**

obliterate all the distinction between income and principal[1]

The Senator understood that income and principal are taxed differently:

> If it were within the power of Congress to enlarge the meaning of the word "income," it could, as I suggested a moment ago, obliterate all difference between income and principal, and obviously the people of this country did not intend to give to Congress the power to levy a direct tax upon all the property of this country without apportionment.[2]

All income can be taxed without apportionment, but all the property (money) of the country cannot. This Court agreed with Congress that the distinction must be maintained in *Doyle v. Mitchell Bros. Co. (247 U.S. 179, 1918):*

> Whatever difficulty there may be about a precise and scientific definition of "income," it imports, as used here, something entirely distinct from principal or capital either as a subject of taxation or as a measure of the tax.

Obliterating the distinction between income and principal has been the Internal Revenue Services' single greatest achievement. By obliterating this distinction, the IRS has, for many years, succeed in

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[1] 1913 Congressional Record, Vol L, Part 4, pg. 3843
[2]Ibid, pg. 3844

evading the Constitution by collecting a direct tax on the nation's capital without going through the rule of apportionment.

A. LABOR CREATES CAPITAL.

Capital (principal) is a store of wealth and money is capital in its financial form. Capital is a financial gain that comes from one's own labor. When creating the income tax in 1913, the Senators explained the origin of capital (principal):

> The earnings of any person from any occupation or profession would, if not spent in like manner, become principal. If by professional effort any person should earn a given sum annually and he spends half of it, he saves the other half. The half so saved in turn becomes principal. That principal is property.[3]

When distinguishing between income and principal, earnings that are not spent become the principal. And Senator Williams reminds the reader that money is property:

> **Money is as much property as is anything else,** and when a man earns $20,000 in money during a year he has got that much in property.[4]

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[3] Ibid, p. 3843
[4] Ibid, p. 3838

> [S]o that the man whose **property** consists in **dollars** which he earns in a year is the least taxed of all men[5]

Capital is money that is earned from one's own labor and, according to this Court in *Butchers' Union v. Crescent City Co. (111 U.S. 746, 1884)*, one's own labor is property. The property one has in their own labor is the most sacred and inviolable because it represents part of one's life. When one sacrifices a part of their life in exchange for money, that money represents minutes, hours and days of their life that cannot be recovered and this is what makes money property.

Life and labor are a person's most valuable capital assets, and when a capital asset is converted into money, the money remains capital. This Court has recognized the distinction between "income" and the conversion of capital into money. In *Doyle,* this Court observed:

> Income may be defined as the gain derived from capital, from labor, or from both combined." Understanding the term in this natural and obvious sense, it cannot be said that a conversion of capital assets invariably produces income

Doyle explains that when a capital asset is converted into money, the money remains capital:

> When the act took effect, Petitioner's timber lands, with whatever value they

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[5] Ibid, p. 3839

> then possessed, were a part of its capital assets, and a subsequent change of form by conversion into money did not change the essence.

When timber is converted into money, the essence isn't changed and the money remains capital. In *Stratton's Independence v. Howbert (231 U.S. 399, 1913)* it was observed:

> The sale outright of a mining property might be fairly described as a mere conversion of the capital from land into money

When land is converted into money, the money remains capital. Again in *Doyle* The Court held:

> Yet it is plain, we think, by the true intent and meaning of the act, the entire proceeds of a mere conversion of capital assets were not to be treated as income.

The principles expressed here are applicable to all capital assets including one's own labor. When labor is converted into money, the money is likewise capital. In his First Annual Message, President Lincoln observed:

> Labor is prior to and independent of capital. **Capital is only the fruit of labor**, and could never have existed if labor had not first existed.[6]

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[6] Abraham Lincoln, First Annual Message Dec, 1861

Financial capital is the fruit of one's own labor and usually comes in the form of a paycheck. At the end of a work week, forty hours of life's capital has been exhausted and in return one receives forty hours of financial capital. The paycheck restores capital so that at the end of the week, one has the same amount of capital as at the beginning. The capital is merely in a different form and the "change of form by conversion into money did not change the essence." When life and labor are converted into money, the money remains capital. Swanson contends that his employment earnings are the "entire proceeds of a mere conversion of capital" from labor into money and are in no true sense income. In a practical sense, if investment earnings are income and employment earnings are also income, then there is no capital in personal finance, and Swanson believes that this would be financially and constitutionally absurd. Where does capital originate if not from one's own labor?

Swanson had two sources of capital in the tax years at issue. His employment earnings from McDuffie County, Georgia and his military pension are his two sources of capital.

B. INCOME IS DERIVED FROM CAPITAL.

Income is a financial gain that comes from investment. Income is the "gain derived from capital," it cannot be the capital itself. From *Eisner v. Macomber (252 U.S. 189, 1920)*, this Court's oft quoted definition of "income" is:

> Income may be defined as the gain derived from capital, from labor, or from

> both combined," provided it be understood to include profit gained through a sale or conversion of capital assets

This definition describes an investment gain. This Court rebuked the government for trying to expand the meaning of "income" to mean any financial "gain:"

> The government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word "gain," which was extended to include a variety of meanings; while the significance of the next three words was either overlooked or misconceived. "*Derived from capital;*" "the *gain derived from capital,*" etc. Here, we have the essential matter:

The "gain derived from capital" is the *essential matter* when identifying a gain that qualifies as "income." There can be no "gain derived from capital, from labor, or from both combined," without first investing capital. Income is the product of invested capital: Without capital, there can be no income. Income is a luxury. Nobody needs an income, but a person cannot survive without capital.

Swanson is a public school teacher and this job is his source of capital. The "source" reference in the Sixteenth Amendment and in 26 U.S.C. § 61(a) means a "source of capital." If "source" meant "source of income" it would render § 61(a) logically, grammatically and economically absurd:

> "Gross income means all income from whatever source [of income] derived..."

Gross income means all income derived from a source of income? The verb "derived" means *to obtain from a parent substance.* A thing is not derived from itself. In this case, the parent substance is capital: Income is derived from capital, but the capital may originate from many different sources. Any job, any trade, any occupation or profession whatsoever is a source of capital. One works to create capital and from invested capital, one derives income. The statute must be read:

> "Gross income means all income from whatever source [of capital] derived..."

The Sixteenth Amendment must be read the same way. Swanson's employment earnings are his source of capital and his capital must be invested to derive income.

The relationship between capital and income is elementary: One works to create capital, and from invested capital, one derives income – it's simple. It only becomes complicated when taxing authorities, through craft and subterfuge, attempt to tax capital as though it were income. *Eisner* described that revenue agents have been in the business of confusing these ideas for some time by placing, "chief emphasis on the word 'gain,' which was extended to include a variety of meanings." Adopting a variety of meanings for "gain" in an effort to tax capital as if it were income is not new. Creating capital is a financial gain, but it is not income. *Eisner* warns us to distinguish between what is and is not "income":

> It becomes essential to distinguish between what is and what 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.

Money that is "not income" is capital, and the meaning of "income," must be understood according to truth and substance, not form or rhetorical trickery. Unfortunately, the meanings of these terms have been altered to confuse modern Americans. Consider these examples from the 1913 Congressional debates on the income tax:

> Mr. CRAWFORD. I should like to ask the Senator if he seriously asserts that politicians have an income?
>
> Mr. WILLIAMS. Well, after they get through with the year they have not much left. [Laughter.]
>
> Mr. BRANDEGEE. No net income.
>
> Mr. WILLIAMS. **But they have at least had a *salary* and an opportunity to have an *income*.**[7]

This exchange makes little sense today, considering the way these terms are confused. Today, "salary" and "income" have become synonyms, whereas in the exchange above, the salary is capital, and depending how that capital might be invested, would give a

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[7]1913 Congressional Record, p. 3838, supra

senator the *opportunity to have an income.* The salary is not income. This observation from Senator Lodge is similar:

> Of course the men of **small *earnings* and small *incomes*** pay taxes to the Government of the United States in the indirect form.[8]

Here is another example of how the proper distinction in terms has been obliterated. As in the previous example, "earnings" and "incomes" have also become synonyms although, according to truth and substance, "earnings" are capital.

In our capitalist society, capital drives all economic activity and one must acquire capital before generating an income. Labor creates capital. Once acquired, capital may be spent, saved or invested. It is from invested capital that one may derive an income.

In the tax years at issue, Swanson's only income was the interest derived from capital deposited in his bank accounts.

C. WHAT IS "GROSS INCOME"

The Federal Income Tax is collected on both capital and income. "Income" is a constitutional term that is defined by the Courts, but "gross income" is a legal term that is defined by Congress. "Gross income" includes all financial gains that Congress may tax using the constitutional rule of uniformity, which includes all income and some capital; it does

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[8]Ibid, p. 3839

not include any financial gains that must be taxed by apportionment.

Congress has two powers of taxation. It may impose taxes that are apportioned among the States and it may impose taxes that are uniform throughout the United States.[9] Unless Swanson is mistaken, there are no apportioned taxes in the Internal Revenue Code. Congress may include apportioned taxes in the Internal Revenue Code, but at this time it has chosen not to do so. Therefore, the legal definition of "gross income" is aligned with Congress' power to tax, not economics, and includes all financial gains taxed by the rule of uniformity. As a result, all financial gains that are included in "gross income" must conform to the Constitution's rule for uniformity and must be taxed as a duty, an impost or an excise. This requirement is imposed on both the income and the capital that are included in "gross income."

After the Sixteenth Amendment, all income may be taxed "without apportionment," which means it must be taxed with uniformity. In *Knowlton v. Moore (178 U.S. 41, 1900),* it was determined that the rule of uniformity is imposed "only on duties, imposts and excises." Therefore, any tax on income must conform to the Constitution's rule for uniformity and must be taxed as a duty, an impost or an excise. All income is taxed as an excise by the rule of uniformity and all income is included in the legal definition of "gross income."

Capital is not subject to the Sixteenth Amendment. Capital may be taxed either by the rule of uniformity or by the rule of apportionment depending on the nature of the capital. Capital that

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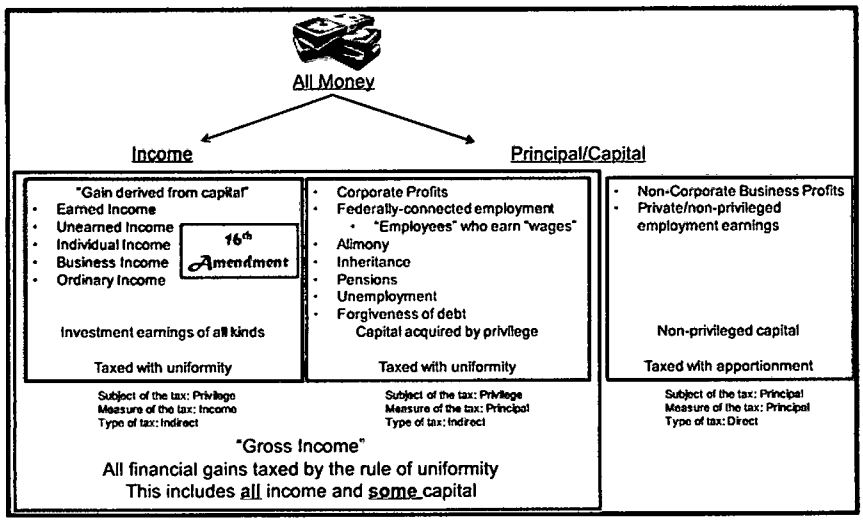
[9] US Constitution, Art I, Section 2, 8, 9

may be taxed by the rule of uniformity may be included in "gross income," but any capital that must be taxed by apportionment is constitutionally excluded from "gross income." Some capital is included in the legal definition of "gross income" and some capital is not.

"Gross income" is summarized in the following chart:



This chart provides a visual representation of everything Swanson is litigating: First, separate capital from income; second, identify which capital can be included in "gross income" and which capital cannot. The Sixteenth Amendment applies to income only, so the analysis on capital requires greater scrutiny to determine if it may be included in "gross income."

26 U.S.C. § 61(a) cannot be understood in a vacuum or analyzed alone. It must be juxtaposed with the Constitution and considered jointly because the constitutional requirements establish the

limitations of the statute. §61(a) defines "gross income" as:

> GENERAL DEFINITION: except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
>
> (1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
> (2) Gross income derived from business;
> (3) Gains derived from dealings in property;
> (4) Interest;
> (5) Rents;
> (6) Royalties;
> (7) Dividends;
> (8) Alimony and separate maintenance payments;
> (9) Annuities;
> (10) Income from life insurance and endowment contracts;
> (11) Pensions;
> (12) Income from discharge of indebtedness;
> (13) Distributive share of partnership gross income;
> (14) Income in respect of a decedent; and
> (15) Income from an interest in an estate or trust.

"Gross income" does not include any financial gains taxed by apportionment and therefore, all gains are taxed with uniformity and the Sixteenth Amendment did not change the rules for uniformity. The rule for uniformity becomes an unwritten

constitutional caveat upon every tax statue and *the full measure of Congress' taxing power* is automatically limited to those objects and activities that may be taxed as a duty, an impost or an excise. Both capital and income are scrambled together in the foregoing list that defines "gross income" and every item on this list must be taxed as a duty, an impost or an excise. This is the constitutional limitation on the meaning of "gross income." If money paid as compensation for service can be taxed indirectly, then such compensation may be included in "gross income." However, any compensation for service that must be taxed by apportionment is constitutionally excluded from "gross income." Employment is a source of capital and some employment may be taxed as a duty an impost or an excise, and some employment may not. In contrast, because of the Sixteenth Amendment, the income on this list is only taxed by the rule of uniformity and is always included in "gross income."

The Eleventh Circuit erred by ignoring the constitutional limitations on the meaning of the statutory terms in the Internal Revenue Code. In its decision, the Eleventh Circuit ruled that

> "Section 3401 of the Tax Code provides that, for the purposes of withholding income taxes, 'wages' refers to 'all remuneration (other than fees paid to a public official) for services performed by an employee for his employer'"

It also said that under Section 3121, "wages 'means all remuneration for employment.'" But the statute does not mean all remuneration for employment; it means *all remuneration for employment that may be*

taxed as a duty, an impost or an excise, because the constitutional limitations are automatically imposed on the statute. Any remuneration for employment that must be taxed by apportionment is constitutionally excluded from the meaning of "wages." Some salaries qualify as "wages" and others do not. The Eleventh Circuit's decision ignores the constitutional limitations on the statutory definitions in the Tax Code

Swanson is a public school teacher who works in the legal jurisdiction of the State of Georgia and his 2016 and 2017 employment earnings cannot be taxed as a duty, an impost or an excise. He did not report his employment earnings on his 2016 or 2017 tax returns and for this reason they have been judged frivolous by The United States and the Courts. The only way for Congress to tax Swanson's employment earnings is to tax them as property using the rule of apportionment. By withholding Swanson's income tax refunds, The United States is attempting to collect a direct tax on Swanson's capital without going through the rule of apportionment and is violating the Constitution.

II. Respondent is attempting to use Petitioner's federal tax return to evade the apportionment requirement for collecting a direct tax on his capital and use Petitioner to confiscate the State of Georgia's constitutionally protected source of revenue.

Our federal system of government divides power between the Federal Government and the State Governments and financial power is divided as surely as political power is divided. Swanson

believes that he has re-discovered a forgotten element of federalism during his research. The division of financial power may have been forever lost to history had it not been preserved in *Pollock v. Farmers' Loan & Trust Co. (158 U.S. 601 & 618, 1895):*

> In distributing the power of taxation, the Constitution retained to the State the absolute power of direct taxation, but granted to the Federal government the power of the same taxation upon condition that, in its exercise, such taxes should be apportioned among the several States according to number, and this was done in order to protect to the States, who were surrendering to the Federal government so many sources of income, the power of direct taxation, which was their principal remaining resource.

From this powerful summary found in the syllabus, we learn that the power of taxation is divided to fairly allocate financial resources and that apportionment exists to discourage the Federal Government from encroaching on the States' constitutionally protected source of revenue. Direct taxes are the States' principal financial resource, and all revenue derived from direct taxes belongs to the States unless apportioned for federal use. The States surrendered numerous sources of revenue to the Federal Government when ratifying the Constitution, so the absolute power of direct taxation is meant to compensate them and ensure they have a sufficient financial resource to fund their

constitutional obligations. The following excerpt from Chief Justice Fuller's opinion in *Pollock* is quoted at length to provide authoritative evidence that, in the opinion of The Court, the Founders and the Constitution intentionally divided financial resources between the States and Federal Government, and that apportionment exists specifically to enforce the separation of financial power.

> The reasons for the clauses of the Constitution in respect of direct taxation are not far to seek. **The States, respectively, possessed plenary powers of taxation.** They could tax the property of their citizens in such manner and to such extent as they saw fit; they had unrestricted powers to impose duties or imposts on imports from abroad, and excises on manufactures, consumable commodities, or otherwise. **They gave up the great sources of revenue derived from commerce**; they retained the concurrent power of levying excises, and duties if covering anything other than excises; but, in respect of them, the range of taxation was narrowed by the power granted over interstate commerce, and by the danger of being put at disadvantage in dealing with excises on manufactures. **They retained the power of direct taxation, and to that they looked as their chief resource**; but, even in respect of that, they granted the concurrent power, and if the tax were placed by both governments on the

> same subject, the claim of the United States had preference. Therefore, they did not grant the power of direct taxation without regard to their own condition and resources as States; but they granted the power of apportioned direct taxation, a power just as efficacious to serve the needs of the general government, **but securing to the States the opportunity to pay the amount apportioned, and to recoup from their own citizens in the most feasible way**, and in harmony with their systems of local self-government.
>
> The founders anticipated that the expenditures of the States, their counties, cities, and towns, would chiefly be met by direct taxation on accumulated property, while they expected that those of the Federal government would be, for the most part, met by indirect taxes. **And in order that the power of direct taxation by the general government should not be exercised, except on necessity ... the qualified grant was made.**

While the States possess the absolute power of direct taxation, the Federal Government's power of direct taxation is "qualified" meaning that it must go through the rule of apportionment. The reason that the Federal Government must go through the rule of apportionment to enact direct taxes is that apportionment is difficult by design and this

difficulty acts as a barrier to "protect to the States ... the power of direct taxation."

Therefore, the meaning of "direct taxes" is important because they are sources of revenue reserved to the States. In 2012, this Court issued an authoritative analysis on what is and what is not a direct tax in *National Federation of Independent Business (NFIB) v. Sebelius (567 U.S. 519, 2012)* when it was argued that the Obamacare penalty amounted to a direct tax that must be apportioned. Chief Justice Roberts responded with this analysis:

> That narrow view of what a direct tax might be persisted for a century. In 1880, for example, we explained that "direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate." *Springer*, supra, at 602. In 1895, we expanded our interpretation to include taxes on personal property and income from personal property, in the course of striking down aspects of the federal income tax. *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 618 (1895). That result was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes. See *Eisner v. Macomber*, 252 U.S. 189–219 (1920).

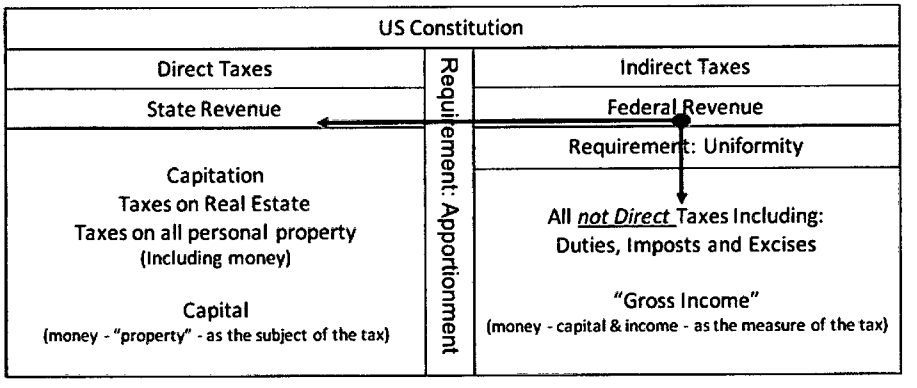
One will not find a more lucid or concise summary of the constitutional meaning of "direct taxes." First, they included only capitation taxes and taxes on real estate. *Pollock* expanded that interpretation to include "taxes on personal property and income from

personal property," but that expanded interpretation was overturned by the Sixteenth Amendment. Therefore, while taxes on personal property are still considered "direct taxes," after the Sixteenth Amendment, taxes on income are not "direct taxes." The three recognized categories of "direct tax" are: A capitation, a tax on real estate, and a tax on personal property (including money). The DC Court of Appeals said much the same thing in *Murphy v. IRS 493 F.3d 170,179 (2007)*:

> Only three taxes are definitely known to be direct: (1) a capitation, U.S. Const. art. I, § 9, (2) a tax upon real property, and (3) a tax upon personal property.

These three categories of "direct tax" are sources of revenue the Constitution reserves to the States.

The tax structure is summarized in the chart below, which shows the division of the taxing power and also how apportionment separates financial resources.



Those who understand American government may admire how beautifully the Founders incorporated

federalism into the tax structure. This chart shows that when collecting federal revenue, Congress must use the rule of uniformity when it enacts duties, imposts and excises, but if Congress wishes to impose a "direct tax," and intrude on the States' primary source of revenue, it must go through the rule of apportionment. "Gross income" includes all financial gains taxed by the rule of uniformity where money (capital and income) can be taxed as a duty, an impost or an excise. Money that cannot be taxed indirectly is capital that must be taxed as property by the rule of apportionment

Additionally, when Congress enacts a "direct tax," the State Governments are the taxpayers, and "pay the amount apportioned" and then "recoup from their own citizens"[10] the amount of the federal tax. Individuals do not pay a "direct tax" to the United States because that is not how the federal system is designed to operate. In "Federalist 39," James Madison concluded that our federal system is neither wholly national nor wholly federal, but a combination of both, explaining the difference this way:

> The difference between a federal and national government, as it relates to the operation of the government, is supposed to consist in this, that in the former the powers operate on the political bodies composing the Confederacy, in their political capacities; in the latter, on the individual citizens composing the nation, in their individual capacities.

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[10] See Pollcok

The federal and national principles of government are manifest in the tax structure. The rule of uniformity has the effect of stripping away the State boundaries to collect indirect taxes on citizens composing the nation, in their individual capacities, as if the country is one consolidated republic. In contrast, "direct taxes" are apportioned and collected from each of the States in their political capacities. The rule of uniformity promotes the national principle while the rule of apportionment promotes the federal principle, and in harmony with Madison's conclusion, the tax structure is partly national and partly federal. This means that individual citizens pay indirect taxes, while the State Governments pay "direct taxes". Justice Paterson, in *Hylton v. United States (3 U.S. 3 Dall. 171 171, 1796)*, observed:

> **Apportionment is an operation on states**, and involves valuations and assessments which are arbitrary, and should not be resorted to but in case of necessity. **Uniformity is an instant operation on individuals** without the intervention of assessments or any regard to states, and is at once easy, certain, and efficacious

Using simple logic, it is easy to conclude that:

- "Direct taxes" are apportioned and operate on States.
- Indirect taxes are uniform and operate on individuals.

These rules determine the operation of the tax: Uniform taxes operate on individuals and apportioned taxes operate on States. The Constitution does not permit these rules to be

altered or rearranged for the sake of convenience. The Constitution does not authorize a uniform "direct tax" or an apportioned indirect tax, and neither Congress nor the IRS can invent a new tax. Therefore, "direct taxes" do not operate on individuals and indirect taxes do not operate on States. It is commonly, but wrongly, asserted that the Sixteenth Amendment allows a non-apportioned "direct tax" upon income as shown on the IRS website:

> Numerous 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 are valid as applied.[11]

If a tax is non-apportioned and direct, at the same time, then which constitutional rule would apply and upon whom or what would it operate?

Chief Justice Roberts provided contemporary analysis to support the premise that the States pay "direct taxes" in *NFIB*, where he explains Article 1 Section 9:

> That clause provides: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." This requirement means that any "direct Tax" must be apportioned so

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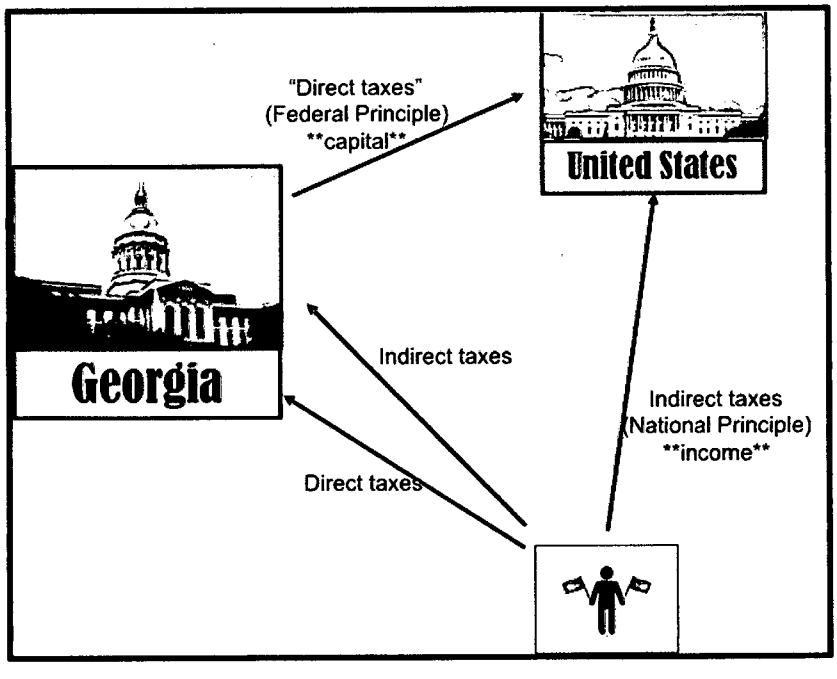
[11] https://www.irs.gov/privacy-disclosure/the-truth-about-frivolous-tax-arguments-section-i-d-to-e#D7

> that each State pays in proportion to its population.

The Chief Justice explains that when Congress enacts any "direct tax," "each State pays in proportion to its population," from which it can be concluded that the individual does not pay the "direct tax." When Congress enacts a "direct tax," the State Governments write the checks to pay it. Therefore, not only is the power of taxation divided between the States and the Federal Government, but who pays the tax is also divided. In our federal system of government, "direct taxes" are collected federally, not nationally, and are paid by the States, not by individuals.

The federal and national elements of the tax structure are shown in the following graphic:



Both the States and The United States collect direct and indirect taxes, but they are collected by different means. The States collect both direct and indirect taxes from the individual taxpayers in the State. The States collect a direct tax in the economic sense as defined by economists like Adam Smith. The United States collect an indirect tax nationally from individuals, but it collects a "direct tax" federally from the State Governments. The United States collects a "direct tax" in the constitutional sense as defined by The U. S. Supreme Court, not economists. As shown in the graphic, if Congress does not exercise the apportionment option, then all revenue derived from direct taxes remains with the States.

The Constitution divides financial power as surely as it divides political power. The tax on "gross income" is an indirect tax and serves as a primary source of revenue for the Federal Government. However, a direct tax on capital is a source of revenue the Constitution reserves to the States.

If Swanson does not correctly distinguish between capital and income when calculating his income tax liability, not only will he pay a tax he doesn't owe, but he will also defraud the State of Georgia by enabling the United States to tax his capital without going through the rule of apportionment. By misreporting his capital on his federal income tax forms he would become an unwitting middleman acting for the benefit of the United States as it seizes from the State of Georgia its constitutionally protected source of revenue. The United States is attempting use Swanson's federal tax return as the vehicle to evade the apportionment requirement for collecting a direct tax on capital by encouraging Swanson to conceal his capital in the return and transfer the money into the federal

treasury in an ostensibly legitimate transaction. Taxpayers who do not understand the constitutional limitations on the taxes imposed by the Internal Revenue Code may not correctly distinguish between those salaries and wages that may be taxed by the rule of uniformity and those that must be taxed by apportionment. The federal tax form would become the instrument by which the State's protected financial assets are confiscated if capital, that may only be taxed by apportionment, is reported on a form 1040. If Swanson misreports his capital when calculating his federal income tax liability, he would simultaneously pay a tax he doesn't owe and he would also become the agent of fraud who threatens the foundation of our entire federal system of government.

In like manner, each and every State Government is being defrauded by individual citizens nationwide who, either through confusion, deception or coercion, misreport their capital as income. As a result, an illegal non-apportioned "direct tax" upon the nation's capital operates undetected and vast sums of the State Governments' protected financial assets are diverted into the federal treasury in violation of the Constitution. Swanson has no intention of paying more tax than is legally required and he will not be used as an unwitting patsy to undermine our federal system of government.

Swanson did not report any of his capital that must be taxed by the rule of apportionment on either his 2016 or 2017 federal tax forms. However, The United States has withheld his refunds in an attempt to collect a "direct tax" without apportionment on his capital and covertly confiscate protected financial assets from the State of Georgia.

III. The Eleventh Circuit imposed an $8,000 sanction on Petitioner but ignored both the constitutional questions presented to it and Respondent's contradictions.

The distinction between capital and income is a constitutional question because the Sixteenth Amendment applies to income, but not to capital. Whether employment earnings are capital or income is a question of fact that the Courts refuse to acknowledge. When deciding individual income tax cases, courts at all levels of the judiciary sidestep questions that require them to acknowledge the existence of capital in personal finance and rule on something else, as the Courts did in Swanson's case.

One of Swanson's allegations in his complaint states, "(8) Life and labor are capital assets and the mere conversion of these assets into money is financial capital, not income." However, the District Court ignored the allegation and dismissed the complaint stating "Arguments that wages are not taxable income have 'been rejected by courts at all levels of the judiciary and are patently frivolous."[12] The word "wages" does not even appear in Swanson's complaint and the Court's reasoning seems like legal spin to avoid Swanson's actual argument which is simply: Are employment earnings capital or income?

Swanson also alleged in is complaint that:

> (11) The Sixteenth Amendment applies to income only and by refusing to issue Plaintiff's 2016 and 2017 refunds, Defendant is attempting to collect tax without apportionment on Plaintiff's

[12] District Court Order, Appendix pg. 12

> capital, which violates the Sixteenth Amendment.

Here is another constitutional argument that is based on correctly distinguishing between capital and income in personal finance, which the District Court adroitly evaded stating:

> "[A]rguments that "wages are not income subject to tax but are a tax on property such as their labor; that only public servants are subject to tax liability; [and] that withholding of tax from wages is a direct tax on the source of income without apportionment in violation of the Sixteenth Amendment . . . are frivolous."[13]

The Court did not answer the question whether employment earnings are capital or income.

Swanson appealed the same questions to the Eleventh Circuit and the response was similar. The Court noted in the introduction that:

> Swanson contends (1) employment earnings constitute a return of capital rather than income, and (2) his employment earnings did not constitute "wages" within the meaning of our prior precedent because his salary was not taxable as a privilege or derived from privileged employment.

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[13] District Court Order, Appendix pg. 12

Contention one is in the ballpark, but it was ignored and there is no analysis of it in the opinion. The entire opinion is focused on defeating contention two when "wages" is not in the original complaint, and only two pages of his 37-page brief discusses it. The opinion ignores whether employment earnings are capital; whether his capital is being taxed without apportionment; and whether Georgia's financial assets are being confiscated. The opinion is nearly identical to the District Court's: "Swanson's argument his salary was not taxable as income is frivolous under our precedent," [14] and also "Swanson's argument his salary is not taxable as income is also frivolous pursuant to the Department of the Treasury notice," [15] and finally "Swanson's contention his salary was not "wages" is contrary to the statutory definition of the term."[16] The Eleventh Circuit's opinion lectures Swanson by repeating its precedent regarding the taxability of "wages," reviewing the contents of Treasury notices and misinterpreting the statutory definition of "wages," but it never considered Swanson's actual question: Are employment earnings capital or income? According to Congress, the question is for the courts:

> The people have granted us the power to levy a tax on incomes, and it will always be a judicial question as to whether a particular thing is income or whether it is principal.[17]

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[14] Eleventh Circuit Opinion, Appendix pg. 4
[15] Ibid, pg 4
[16] Ibid, pg 5
[17] 1913 Congressional Record, Vol L Part IV pg. 3844

If the distinction between capital and income is always a judicial question (because it's a constitutional question), and the Courts refuse to answer the question when it is presented for their review, then the taxpayer will always be in a financial quagmire for the answer is necessary to correctly calculate one's income tax liability. One must first separate capital from income and then determine which capital is subject to the Income Tax and which capital is not. If employment earnings are income, then they always qualify as "gross income." If employment earnings are capital then, contrary to the Eleventh Circuit's opinion, only some salaries qualify as "gross income," but other salaries do not. It becomes Swanson's responsibility to understand the difference and to report his own money correctly. Swanson deserves an answer.

Swanson's suit was dismissed for failure to state a claim and the Eleventh Circuit also held that the District Court lacked jurisdiction because the refund claim was invalid. Both of these rulings are incorrect. Distinguishing between capital and income in personal finance is a sufficient factual matter to claim an income tax refund and is plausible on its face. Also, both of Swanson's returns are valid claims for refund as shown by the refunds he has already received for tax year's 2015 and 2018. The District Court had lawful jurisdiction and a proper claim for refund has been made. How can the Courts dismiss Swanson's suit for failure to state a claim when they refuse to rule on the factual matter of whether his employment earnings are capital or income? When the Appeals Court performs a *de novo* review of a motion to dismiss for failure to state a claim, it is supposed to accept "all allegations of the complaint as true and construes the facts in the light most

favorable to the plaintiff."[18] It does not appear that Swanson was granted that courtesy in this case.

The record shows that in 2015 the IRS challenged Swanson's first tax return that was submitted with the understanding that his earning did not qualify for the tax. After Swanson's written explanation, the return was processed and the full refund was issued. Every tax return since 2015 has been submitted in the same manner and two refunds have been issued and two returns have been deemed frivolous. How can this be? This contradiction has been raised with both the District Court and the Eleventh Circuit but both have refused to acknowledge that Swanson's returns at issue are based in good-faith on the IRS's determination that his 2015 and 2018 returns are correct. Swanson has earned an $8,000 sanction as a reward for Respondent's contradictions.

Swanson has been sanctioned $8,000 for making a frivolous appeal. When imposing sanctions, the Eleventh Circuit abused its discretion by ignoring both Swanson's constitutional arguments and Respondent's contradictory processing of his returns. Swanson did not file a frivolous appeal because distinguishing between capital and income is a plausible fact that is not frivolous. Therefore, Rule 38 sanctions are not appropriate.

CONCLUSION

The United States is attempting to collect a direct tax without apportionment on Swanson's capital. This error has catastrophic constitutional consequences for both the individual taxpayer and

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[18] *Harry v. Marchant*, 237 F.3d 1315, 1317 (11th Cir. 2001)

each State Government. If this error is not corrected, Swanson will pay an unconstitutional tax and the Constitution's federal structure will be severely compromised. For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully Submitted,

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