

No.
21-624

10/26/21

MD

IN THE
Supreme Court of the United States

Brian D. Swanson

Petitioner,

v.

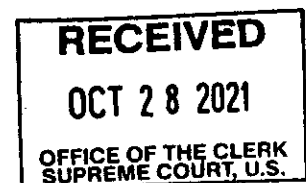
Commissioner of Internal Revenue,

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

Brian D. Swanson
Proceeding Pro Se
1805 Prince George Ave
Evans, Ga 30809
(831)601-0116
swansons6@hotmail.com



QUESTIONS PRESENTED

1. May the Commissioner of Internal Revenue collect a uniform direct tax on Petitioner's taxable income?
2. Does the decision of The Eleventh Circuit Court of Appeals mean that The Supreme Court's controlling precedent is frivolous?

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 Tax Court.

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The unpublished decision of the United States Court of Appeals for the Eleventh Circuit is attached as Appendix 1-6. The Commissioner of Internal Revenue's motion of summary affirmance and sanctions is attached as Appendix 7-12.

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 Oct 5, 2021.

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

The full measure of Congress' taxing power is defined by its authority to collect taxes using the rule of apportionment and the rule of uniformity.¹ Using these two rules, Congress can tax everything. However, since there are no apportioned taxes in 26 U.S.C.,² the full measure of Congress' taxing power is immediately cut in half and is limited to collecting revenue using only the rule of uniformity. The rule of uniformity is the controlling constitutional limitation on the Federal Income Tax and only applies to duties, imposts and excises.³ The Federal Income Tax must operate within the constitutional limits imposed by the rule of uniformity and is constitutionally limited to duties, imposts and excises. Since the Tax Code does not impose an excise on public schoolteachers, a tax on Petitioner's employment earnings cannot be collected using the rule of uniformity. The Commissioner of Internal Revenue has admitted that 26 U.S.C. §1 imposes a direct tax on Petitioner's taxable income and according to this Court's rulings, direct taxes are constitutionally excluded from the rule of uniformity. The Tax Court's order includes a tax deficiency of \$19,578 that is calculated using income excluded by law. The order permits The Commissioner of Internal Revenue to collect a uniform direct tax on Petitioner's taxable income in violation of the Constitution.

The Eleventh Circuit Court of Appeals has entered a decision in this case that directly

¹ US Constitution Art 1, § 2, 8, 9

² 26 USC § 1

³ *Knowlton v. Moore*, 178 U.S. 41 (1900), *Brushaber v. Union Pacific R. Co.*, 240 U.S. 1(1916)

contradicts the written opinion of the Supreme Court. The Eleventh Circuit has summarily upheld the Tax Court's order and ruled that The Commissioner of Internal Revenue may collect a non-apportioned and uniform direct tax on Petitioner's taxable income in violation of the Constitution and in direct contradiction of this Court's rulings in *Brushaber v. Union Pacific R. Co.*, 240 U.S. 1 (1916) and *Knowlton v. Moore*, 178 U.S. 41 (1900).

STATEMENT OF THE CASE

This case originated back in 2019 when Swanson initiated a tax refund suit in the Southern District of Georgia because the IRS had refused to issue his 2016 and 2017 refunds nearly two years after the returns had been submitted. The district court dismissed the suit and Swanson appealed to The Eleventh Circuit. *Swanson v. United States*, 799 F. App'x 668, 670 (11th Cir. 2020) (unpublished) The Eleventh Circuit upheld the decision and imposed an \$8,000 sanction for filing a frivolous appeal. Certiorari was denied (19-973).

The IRS issued a notice of deficiency for tax year 2017 after the Eleventh Circuit's decision. Swanson filed a petition in the Tax Court challenging the notice of deficiency on July 10, 2020. In his response to Swanson's petition, The Commissioner of Internal Revenue admitted that 26 U.S.C. §1 imposes a direct tax on Swanson's taxable income and he also admitted that taxable income is the subject of the income tax. Based on these admissions, Swanson filed a motion for summary judgment in the Tax Court and argued that this tax could not be collected on his earnings because, neither the Constitution nor the Sixteenth

Amendment authorize a direct tax collected by the rule of uniformity. The Tax Court dismissed his motion with prejudice. Swanson raised the same argument at trial and was met with a similar rebuke.

The Tax Court entered its final order and decision April 20, 2021. Swanson timely appealed to the Eleventh Circuit Court of Appeals on May 6, 2021. Petitioner requested an initial hearing *en banc*, but the request was denied on September 23, 2021.

The Commissioner of Internal Revenue moved for summary affirmance and sanctions on May 27, 2021 asserting that Swanson's argument was frivolous. The Eleventh Circuit issued its opinion on October 5, 2021 and declared Swanson's constitutional argument is frivolous and summarily affirmed the authority of the Commissioner of Internal Revenue to collect a non-apportioned and uniform direct tax on his taxable income and imposed another \$8,000 sanction for filing a frivolous appeal.

REASONS FOR GRANTING THE PETITION

I. The decision of the Eleventh Circuit Court of Appeals directly contradicts the written opinions of the Supreme Court.

In his response to Petitioner's amended Tax Court Petition, The Commissioner of Internal Revenue admits that 26 U.S.C. §1 imposes a direct tax on Petitioner's taxable income and he also admits that taxable income is the subject of the income tax. These admissions invite constitutional scrutiny into the Commissioner's collection of this direct tax to ensure that it is in harmony with the Constitution.

Both the Petitioner and the Commissioner agree that 26 U.S.C. §1 imposes a direct tax on Petitioner's taxable income and therefore, these facts are not in dispute in this case. The dispute is whether this direct tax is being collected using the rule of uniformity and whether The Constitution authorizes a uniform direct tax.

The income tax operates as a direct tax because taxable income is the subject of the tax. Petitioner believes that no court in the history of income tax jurisprudence has explicitly identified the subject of the income tax in any decision, but The Commissioner admits that, in 26 U.S.C. §1, taxable income is the subject of the income tax. Taxable income is a sum total of money, and money is personal property. According to this Court in *National Federation of Independent Businesses (NFIB) v. Sebelius*, 567 U.S. 519. (2012), and according to the DC Circuit Court in *Murphy v. IRS*, 493 F.3d 170 (2007), a tax on personal property is a recognized category of direct tax. Therefore, a uniform tax cannot be collected on Petitioner's taxable income because The Constitution prohibits a uniform direct tax.

Petitioner argues that this Court's decisions in *Brushaber v. Union Pacific R. Co.*, 240 U.S. 1 (1916) and *Knowlton v. Moore*, 178 U.S. 41 (1900) hold that a uniform direct tax is not authorized by the Constitution. However, the Commissioner, the Tax Court and the Eleventh Circuit find no constitutional error in collecting a uniform direct tax. The Commissioner accurately presents the dispute in his motion for summary affirmance: "Whether the imposition of income tax on his teacher's salary in 2017 is unconstitutional because it amounts to a non-apportioned and uniform direct tax." (App. 10)

The Eleventh Circuit answered the question by summarily affirming the authority of the Commissioner to collect a uniform direct tax:

Swanson's argument his employment earnings are excluded from his gross income because the Constitution does not allow for direct, non-apportioned taxes to be imposed on taxable income is foreclosed in light of *Brushaber*. See *id.* (App. 5)

The Eleventh Circuit summarily affirmed that the income tax is a direct tax that is collected without apportionment, which means the tax is operating as either a uniform direct tax or an unlimited direct tax upon everyone's taxable income.

This question should not be in dispute because this Court has already answered the question in *Brushaber* and *Knowlton*, but many courts of appeals seem to contradict this Court's decisions. The Eleventh Circuit held in its decision that:

[T]he Supreme Court recognized that the Sixteenth Amendment authorizes a direct, non-apportioned income tax upon United States citizens throughout the country. See *Brushaber*, 240 U.S. at 12-19. (App. 3)

The Eleventh Circuit cites *Brushaber* for this erroneous holding. However, The Supreme Court said no such thing. *Brushaber* actually states that:

[T]he contention that the Amendment treats a tax on income as a direct tax although it is relieved from apportionment

and is necessarily therefore not subject to the rule of uniformity, as such rule only applies to taxes which are not direct, thus destroying the two great classifications which have been recognized and enforced from the beginning, is also wholly without foundation. *See Brushaber, 240 U.S. 18.*

In one sentence, The Supreme Court simultaneously demolishes the idea of a non-apportioned direct tax and a uniform direct tax. No direct tax is relieved from apportionment and no direct tax can be uniform. Yet, according to The Eleventh Circuit, *Brushaber* authorizes a direct, non-apportioned income tax upon United States citizens. How can this be? Will this Court refuse to correct this error?

Brushaber continues to explain that if the Sixteenth Amendment authorized a non-apportioned direct tax that it would become an unlimited direct tax subject to neither apportionment nor uniformity. This is why such a tax cannot exist:

[T]hat the result of the Amendment would be to authorize a particular direct tax not subject either to apportionment or to the rule of geographical uniformity, thus giving power to impose a different tax in one state or states than was levied in another state or states. *See Brushaber, 240 U.S. at 12.*

The Constitution does not authorize an income tax subject to neither apportionment nor uniformity.

The fact that no direct tax can be collected by the rule of uniformity is also explained in *Knowlton*:

Thus, the qualification of uniformity is imposed not upon all taxes which the Constitution authorizes, but only on duties, imposts and excises. See *Knowlton* 178 U.S. 41 at 88.

Direct taxes are constitutionally excluded from the rule of uniformity because uniformity is imposed, "only on duties, imposts and excises." An income tax collected without apportionment must be collected with uniformity. An income tax collected with uniformity must be a duty, an impost or an excise. Excises are voluntary taxes on specific taxable activities. The Tax Code does not impose an excise on schoolteachers. Thus, Petitioner's earnings as a schoolteacher are constitutionally excluded from the tax. The Tax Code imposes a direct tax on taxable income and direct taxes are constitutionally excluded from the rule of uniformity.

The Eleventh Circuit's decision is a direct contradiction of This Court's written opinions in *Brushaber* and *Knowlton*. The Sixteenth Amendment does not authorize any non-apportioned and uniform direct tax.

As a result of the Eleventh Circuit's disregard for the written opinions of this Court and because of its summary affirmance of the Tax Court's order, the Commissioner of Internal Revenue is authorized to collect a non-apportioned and uniform direct tax on Petitioner's taxable income in violation of the Constitution.

II. The courts of appeals contradict each other regarding the nature of the income tax.

The Eleventh Circuit is not alone when it directly contradicts the opinion of the Supreme Court. Half of the courts of appeals have also ruled that the income tax is a non-apportioned direct tax. The remaining courts of appeals have held it to be an excise. Petitioner has a fundamental right to know what kind of tax he is being asked to pay, but the relevant authorities have reached opposing conclusions and therefore, he can have no certainty as to what the law requires. Is the income tax a direct tax or an excise? Is the tax a mandatory tax on property or a voluntary tax on taxable activities? The rulings of the courts of appeals leave a sincere taxpayer who is trying to understand his duties and responsibilities under the complexities of the Tax Code puzzled and confused. For example:

The DC Circuit has ruled in *Murphy v. IRS*, 493 F.3d 170 (DC Cir. 2007):

Only three taxes are definitely known to be direct: (1) a capitation, U.S. Const. art. I § 9, (2) a tax on real property, and (3) a tax upon personal property ... More specifically, excise taxes include ... income from employment.

The Second Circuit has ruled in *Ficalora v. Commissioner*, 751 F.2d 85, 87 (2nd Cir, 1984):

[T]he Supreme Court explicitly stated that taxes on income from one's

employment are not direct taxes and are not subject to the necessity of apportionment

The Fourth Circuit has ruled in *White Packing Co. v. Robertson* 89 F.2d 775, 779 (4th Cir, 1937):

The tax is, of course, an excise tax, as are all taxes on income

The Sixth Circuit has ruled in *United States v Gaumer*, 972 F.2d 723, 725 (6th Cir, 1992):

Brushaber and the Congressional Record excerpt do indeed state that for constitutional purposes, the income tax is an excise tax

The following courts of appeals have ruled that the income tax is a direct tax and generally impose sanctions on taxpayers who argue otherwise.

The Fifth Circuit has ruled in *Parker v. Comm'r*, 724 F.2d 469, (5th Cir, 1984):

The Supreme Court promptly determined in *Brushaber v. Union Pacific Ry. Co.* (240 U.S. 1, 36 S.Ct. 236, 60 Led. 493, 1916) that the Sixteenth Amendment provided the needed constitutional basis for the imposition of a direct non-apportioned income tax.

The Seventh Circuit has ruled in *Lovell v. United States*, 755 F.2d 517, 518-20 (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

The Eighth Circuit has ruled in *United States v. Francisco*, 614 F.2d 617 (8th Cir, 1980):

The cases cited by Francisco clearly establish that the income tax is a direct tax, thus refuting the argument based on his first theory.

The Ninth Circuit has ruled in *In re Becraft*, 885 F.2d 547, 548 (9th Cir. 1989):

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 on United States citizens residing in the United States.

The Tenth Circuit has ruled in *United States v. Collins*, 920 F.2d 619 (10th Cir, 1990):

Dickstein's argument that the Sixteenth Amendment does not authorize a direct, non-apportioned tax on United States

citizens similarly is devoid of any arguable basis in law.

The Tax Court has also explicitly ruled that the income tax is not an excise in *Hill v. Commissioner*, T.C. Memo 2013-264 and *Heisey v. Commissioner*, T.C. Memo 2002-41. In *Smith v. Commissioner*, T.C. Memo. 2019-111, the Tax Court ruled:

Petitioner's final argument is that the income tax is an excise tax...Numerous courts, including this Court, have rejected that argument as meritless, and we see no need to entertain it any further.

One thing is certain, the income tax cannot be an excise and a direct tax simultaneously, as the contradictions among the courts of appeals suggest, because excises and direct taxes are fundamentally different. Excises are imposed on activities; direct taxes are imposed on property. Excises are voluntary; direct taxes are mandatory. Excises are paid by individual taxpayers; direct taxes are paid by the state governments. Excises can be collected by the rule of uniformity; Direct taxes cannot. Which tax is Petitioner being asked to pay? It would seem that nobody knows.

Conflict among the courts of appeals is one of the main criteria for granting certiorari. When, at the same time, many of those courts of appeals directly contradict the rulings of the Supreme Court, this Court must intervene and correct the error. If this Court chooses to ignore the blatant disregard for

its own rulings as shown above, then the Constitution is already dead.

III. Did The Eleventh Circuit Court of Appeals rule that the Supreme Court's controlling precedent is frivolous when it sanctioned Petitioner \$8,000 for relying in good faith on the High Court's opinion?

From the beginning of this case in the Tax Court, Petitioner has asked one specific question that the courts refuse to answer. Based on the Commissioner's admission that 26 U.S.C. §1 imposes a direct tax on Petitioner's taxable income, Swanson asks the courts: *Can a direct tax be collected by the rule of uniformity?* Instead of answering the question, the courts have altered the substance of the question, and then sanctioned Petitioner for a question that he never asked. The courts' answer to their fictitious question has the effect of declaring that the Supreme Court's controlling precedent is frivolous.

Swanson filed a motion for summary judgment in the Tax Court based on the Commissioner's admission. He argued that no direct tax can be collected by the rule of uniformity and therefore, the tax fails. The Tax Court altered his argument, and then called its fictitious question frivolous. The Commissioner's motion for summary affirmance records the duplicity:

Mr. Swanson contended that the tax on his income was unconstitutional because Federal income taxes are directly and uniformly collected, and "[n]either [t]he Constitution nor the

Sixteenth Amendment authorize any 'direct tax' collected by the rule of uniformity." (App. 8)

The Tax Court denied the motion and:

In doing so, the court found "[his] arguments that neither the Constitution nor the Sixteenth Amendment authorize[s] a direct non-apportioned Federal income tax to be frivolous and groundless." (App. 9)

The question is whether the income tax is a uniform direct tax, not whether it is a direct non-apportioned income tax. The Tax Court altered Swanson's argument and then declared it frivolous. Can a direct tax be collected by the rule of uniformity? The courts refuse to answer.

Swanson presented three questions to the Eleventh Circuit in his opening brief:

1. Can a direct tax be collected by the rule of uniformity?
2. What is the subject of the income tax: Is it a person, property or an event?
3. Is the tax deficiency of \$19,578, as determined by the Tax Court, calculated using income that is excluded by law from "gross income"?

In its decision, The Eleventh Circuit pretends that Swanson asks a different question:

Here, Swanson raises a different argument, that the federal income tax is

unconstitutional because it is a direct tax without apportionment. Nevertheless, it, too, is frivolous under our precedent. *See Motes*, 785 F.2d at 928. The Supreme Court has held the Sixteenth Amendment authorizes a direct, non-apportioned income tax upon United States citizens. *See Brushaber*, 240 U.S. at 12-19. (App. 4)

Like the Tax Court before it, the Eleventh Circuit altered the substance of Swanson's argument, declared it frivolous and then imposed sanctions:

Swanson's arguments in this appeal have already been held to be frivolous ...

Thus, we GRANT the government's motion for sanctions and award \$8,000 in sanctions. (App. 6)

Is it an abuse of discretion to impose a sanction on a *pro se* litigant for a question that he never asked? What kind of legal system do we have when judges deliberately alter a litigant's argument and then rule that he filed a frivolous appeal for the purpose of imposing sanctions? The power to sanction is the power to destroy and the abuse of that power should be disciplined.

The consequence of altering Swanson's question is that both the Tax Court and the Eleventh Circuit have blundered into the absurdity of declaring that the Supreme Court's controlling precedent is frivolous. Whether the income tax is a non-apportioned direct tax is a question that The High Court has already answered. In the *Brushaber*

decision, the Supreme Court describes the idea of a non-apportioned direct tax as an "irreconcilable conflict" that would create "radical and destructive changes in our Constitutional system." See *Brushaber*, 240 U.S. at 12. Specifically, the High Court ruled, "[T]he contention that the Amendment treats a tax on income as a direct tax although it is relieved from apportionment ... is also wholly without foundation." See *Brushaber*, 240 U.S. at 18. By ignoring Swanson's actual question, the Courts have answered the question of their own choosing in direct conflict with the Supreme Court's controlling precedent and have, in effect, declared that The Supreme Court's opinion is frivolous.

In his first appeal to the Eleventh Circuit, Swanson argued that the income tax was an indirect tax in order to align with the *Brushaber* decision, "[T]hat taxation on income was in its nature an excise entitled to be enforced as such." See *Brushaber*, 240 U.S. at 17. The Eleventh Circuit sanctioned him \$8,000 for filing a frivolous appeal. In the present appeal, Swanson has aligned his argument with the government's admission that the income tax is a direct tax and has shown that such a tax fails because a uniform direct tax does not exist. That inconvenient truth has earned him another \$8,000 sanction. It does not matter whether a taxpayer argues that the income tax is a direct tax or an indirect tax, for both arguments will earn the taxpayer a sanction by the Eleventh Circuit. Again the question must be asked, what kind of tax is this?

These sanctions are wholly inappropriate. First, no litigant should be sanctioned for relying in good faith on the written opinion of the Supreme Court, and *pro se* litigants ought to be permitted some leniency when dealing with a subject as

complicated as the Tax Code. Second, how can a litigant be guilty of willfully filing a frivolous appeal when the nature of the income tax is so uncertain that even the courts of appeals contradict each other? It is impossible for Swanson to consult the law and guide himself by the established legal precedents when the courts' opinions are wildly contradictory. Finally, The Eleventh Circuit has no precedent regarding a uniform direct tax, so the Court altered Swanson's argument to pretend that it satisfied an existing precedent, which it then declared to be frivolous. The imposition of both of his sanctions should be reversed.

CONCLUSION

The Eleventh Circuit Court of Appeals has summarily affirmed the authority of the Commissioner of Internal Revenue to collect a non-apportioned and uniform direct tax on Petitioner's taxable income in direct contradiction of this Court's previous rulings. This Court has already rejected the existence of a uniform direct tax, but the Eleventh Circuit has declared that this Court's written opinion is frivolous and summarily imposed an \$8,000 sanction on Petitioner for the temerity of invoking this Court's written opinion in his argument. If This Court rejects the opportunity provided by this case to correct this persistent error among the courts of appeals and chooses to sit mute as Petitioner and others are sanctioned for relying in good faith on the written opinion of The Supreme Court, then perhaps the Constitution died decades ago.

For the foregoing reasons, this petition for a writ of certiorari should be granted, and the decision

of the Eleventh Circuit Court of Appeals and the imposition of sanctions should be summarily reversed in accordance with This Court's controlling precedent on this subject.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Elaine Evans', written over a horizontal line.

Petitioner, pro se

1805 Prince George Ave
Evans, Ga 30809
(831)601-0116

October 22, 2021