

No. 29-301

IN THE  
**Supreme Court of the United States**

Brian D. Swanson

*Petitioner,*

v.

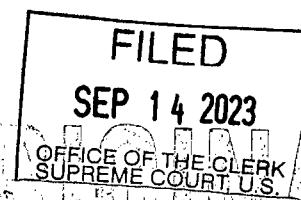
United States of America,

*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**

In the decision below, The Eleventh Circuit summarily affirmed the dismissal of petitioner's income tax refund suit, which challenged Puerto Rico's status as an "unincorporated" Territory. The court concluded that, "First, it is not clear that the Uniformity Clause applies to income taxes."

The questions are:

1. Has Puerto Rico become an "incorporated" Territory and become fully subject to the Constitution's Uniformity Clause when collecting the Federal Income Tax or does the Territory Clause permit the Uniformity Clause to be violated?
2. Are the Insular Cases fundamentally flawed because they create "incorporated" and "unincorporated" Territories, which compels Petitioner to pay more Federal Income Tax than other American citizens based on geographical location within the United States?
3. Did the Eleventh Circuit Court of Appeals abuse its discretion under Federal Rules of Appellate Procedure 38 when it imposed an \$8,000 frivolous sanction on Petitioner for asking the questions presented?

## **LIST OF PARTIES**

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

## TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
LIST OF PARTIES .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES.....	iv
PETITION FOR A WRIT OF CERTIORARI .....	1
OPINIOINS BELOW .....	1
STATEMENT OF JURISDICTION .....	1
CONSTITUTIONAL PROVISIONS .....	2
INTRODUCTION .....	3
STATEMENT OF THE CASE .....	5
REASONS FOR GRANTING THE WRIT .....	5
I.    Puerto Rico Has Become an “Incorporated” Territory .....	5
II.    The Eleventh Circuit’s Opinion Plainly Conflicts with This Court’s Precedents and Those of Other Appeals Courts .....	10
III.    The Eleventh Circuit abused its discretion when it sanctioned Petitioner \$8,000 for asking the questions presented .....	14
CONCLUSION .....	16

## APPENDICES

OPINION OF THE ELEVENTH CIRCUIT .....	App. 1
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## TABLE OF AUTHORITIES

### *Cases*

<i>Brushaber v. Union Pacific R. Co.,</i> 240 U.S. 1 (1916) .....	12
<i>Balzac v. Porto Rico</i> 285 U.S. 298 (1922) .....	7
<i>Boumedienne v. Bush,</i> 553 U.S. 753, 757 (2008) .....	6
<i>Downes v. Bidwell,</i> 182, U.S. 244 (1901) .....	6
<i>Ficalora v. Commissioner,</i> 751 F.2d 85, 87 (2 <sup>nd</sup> Cir, 1984) .....	11
<i>Gould v. Gould,</i> 245 U.S. 151 (1917) .....	11
<i>In re Becraft,</i> 885 F.2d 547, 548 (9 <sup>th</sup> Cir. 1989) .....	13
<i>Knowlton v. Moore,</i> 178 U.S. 41 (1900) .....	4, 10
<i>Loughborough v. Blake,</i> 18 U.S. 5 Wheat. 371 317 (1820) ....." .....	9
<i>Murphy v. IRS,</i> 493 F.3d 170 (DC Cir. 2007) .....	11
<i>Parker v. Comm'r,</i> 724 F.2d 469, (5 <sup>th</sup> Cir, 1984) .....	12

<i>Smith v. Commissioner,</i> T.C. Memo. 2019-111 .....	13
<i>United States v. Francisco,</i> 614 F.2d 617 (8 <sup>th</sup> Cir. 1980) .....	12
<i>United States v Gaumer,</i> 972 F.2d 723, 725 (6 <sup>th</sup> Cir. 1992) .....	12
<i>United States v. Vaello Madero,</i> 596 U.S. __ (2022) .....	8, 10, 15
<i>United States v. Verdugo-Urquidez,</i> 494 U.S. 259 (1990) .....	7
<i>White Packing Co. v. Robertson,</i> 89 F.2d 775, 779 (4 <sup>th</sup> Cir. 1937) .....	12
<b><i>Statutes</i></b>	
26 U.S.C. §1 .....	4, 6, 10, 14
<b><i>Other Authorities</i></b>	
H.R. 4901 (2019) .....	4, 8
H.R. 1522 (2021) .....	4, 7, 8
<i>In Focus</i> , Congressional Research Service, July 29, 2022 .....	6
Public Law 64-368, 39 Stat. 951; Section 5 .....	6
Public Law 82-447, 66 Stat. 327 .....	6

## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner, Brian D. Swanson, respectfully petitions for writ of certiorari to review the judgement of the United States Court of Appeals for the Eleventh Circuit (“Eleventh Circuit”).

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 1-8.

### **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 August 30, 2023.

## 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. Article IV Section 3

“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”

### 5. 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

All American citizens should be taxed uniformly when collecting the Federal Income Tax. Under the Uniformity Clause of the Constitution, American citizens in Georgia cannot be forced to pay more income tax than American citizens in Puerto Rico based on geographical location.

The Income Tax was not in force when the Insular Cases were decided and the effect of creating an unjust tax system, which imposes a tax on the personal earnings of some American citizens while excluding others, did not influence these decisions. The effect of the Insular Cases is to create a tax haven in Puerto Rico to which American citizens may flee to avoid the income tax. This error must be corrected.

The Insular Cases create an unworkable contradiction when Congress collects taxes. All taxes enacted by Congress must be collected using either the rule of apportionment or the rule of uniformity; Congress has no other power of taxation. If neither of these two rules apply in Puerto Rico, then Congress would have no power to collect any tax in the Territory. The Territory Clause does not permit the Uniformity Clause to be violated. However, the theory of “incorporated” and “unincorporated” Territories has permitted the unconstitutional violation of the Uniformity Clause when collecting the Federal Income Tax. The error must be corrected.

Even under the precedent set by the Insular Cases, Puerto Rico has become an “incorporated” Territory and is fully subject to the Uniformity Clause when collecting the Federal Income Tax. It’s been 125 years since Puerto Rico was acquired from Spain and its people can no longer be considered conquered alien races. Puerto Rico has been operating under an Anglo-

Saxon-style government ever since Congress approved its constitution in 1952. The door to statehood was opened to Puerto Rico once its constitution was approved and from that moment it ceased to be an “unincorporated” Territory. Since then, numerous referendums on statehood have been held in Puerto Rico and two bills have been introduced in Congress to consider statehood for the island: H.R. 4901 and H.R. 1522; an “unincorporated” Territory cannot be considered for statehood. Puerto Rico has become an “incorporated” Territory and the time to bring its tax and bankruptcy laws into harmony with the Constitution is now, not after it becomes a state. This error must be corrected.

In order for Puerto Rico to be subject to the Uniformity Clause when collecting the Federal Income Tax, it must be proven that the tax imposed by 26 U.S.C. §1 satisfies the constitutional requirements for uniformity set forth in this Court’s decision *Knowlton v. Moore*, 178 U.S. 41 (1900): The income tax must operate as a duty, impost or an excise and the tax must be geographically uniform throughout the United States. The tax fails both of these requirements. This error must be corrected.

Petitioner was sanctioned \$8,000 by the Eleventh Circuit Court of Appeals because the Court determined that the foregoing questions are frivolous.

Petitioner, Brian D. Swanson, is being forced to pay more income tax than other American citizens based on his geographical location within the United States and this error must be corrected.

## STATEMENT OF THE CASE

Petitioner, Brian D. Swanson, is a public schoolteacher who is a bona fide resident of the State of Georgia. He filed a refund suit in the Southern District of Georgia on September 2, 2022 to recover a tax refund that the IRS confirmed was due, but was never issued. In addition, Swanson also sued to recover taxes paid because the tax imposed failed the Constitution's Uniformity Clause. The United States filed a motion to dismiss on October 28, 2022. The District Court granted the United States motion on May 15, 2023 and dismissed the suit for lack of subject matter jurisdiction and for failure to state a claim.

Swanson filed a timely appeal to the Eleventh Circuit Court of Appeals on May 19, 2023. The United States filed a motion for summary affirmance and for sanctions on June 20, 2023. The Eleventh Circuit granted the United States motion on August 30, 2023 and summarily affirmed the decision of the District Court and imposed \$8,000 in sanctions.

The Eleventh Circuit's decision states that questioning the Uniformity Clause is frivolous, questioning Puerto Rico's status as an "unincorporated" Territory is frivolous and questioning how much wages is being taxed in Subtitle A of the Tax Code is frivolous.

## REASONS FOR GRANTING THE PETITION

### I. Puerto Rico Has Become an "Incorporated" Territory.

Puerto Rico has been considered an "unincorporated" Territory since it was acquired in 1898, but its status has changed. Puerto Rico has been

subject to the Constitution's Uniformity Clause when collecting the Federal Income Tax ever since it became an "incorporated" Territory. This means that American citizens in Georgia cannot be forced to pay more income tax than American citizens in Puerto Rico based on geographical location. The tax imposed by 26 U.S.C. § 1 is not uniform throughout the United States.

Puerto Rico was acquired by the United States after the Spanish-American War in 1898. The Insular Cases determined that Puerto Rico was an "unincorporated" Territory and was not fully subject to the Constitution, especially in terms of taxation and revenue collection. According to *Downes v. Bidwell*, an "unincorporated" Territory is a conquered territory inhabited by alien races who are incompatible with Western-style government. A reasonable person may conclude that after 125 years, enough time has passed so that the people of Puerto Rico are no longer conquered alien races incompatible with government according to Anglo-Saxon principles.

Additionally, Puerto Rico is on the path to statehood and an "incorporated" Territory is one that is "surely destined for statehood." *Boumediinne v. Bush*, 553 U.S. 244 (2008). Puerto Rico has completed every step except final approval in what is known as the "Tennessee Plan" for admitting new states:<sup>1</sup> The people of Puerto Rico acquired U.S. Citizenship in 1917,<sup>2</sup> Congress officially approved Puerto Rico's constitution in 1952,<sup>3</sup> and the people of Puerto Rico

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<sup>1</sup> In Focus, Congressional Research Service, July 29, 2022

<sup>2</sup> Public Law 64-368, 39 Stat. 951; Section 5

<sup>3</sup> Public Law 82-447, 66 Stat. 327

formally petitioned for statehood in 2020.<sup>4</sup> Section 2, paragraph 20 of H.R. 1522 states:

No large and populous United States territory inhabited by American citizens that has petitioned for statehood has been denied admission into the Union.

This appears to be a statement of destiny. Puerto Rico will not be denied statehood. Thus far, the bills may have died in committee, but it is only a matter of time until statehood is approved. While these acts may not be an “express declaration” that Puerto Rico is an “incorporated” Territory, they certainly express “an implication so strong as to exclude any other view.” *Balzac v. Porto Rico* 285 U.S. 298 (1922). When Congress approved Puerto Rico’s constitution in 1952, it officially declared that Puerto Rico is ready for the administration of government and justice according to Anglo-Saxon principles and from that moment, Puerto Rico ceased to be an “unincorporated” Territory. The door to statehood was opened to Puerto Rico once its constitution was approved and therefore, Puerto Rico is fully subject to the Constitution’s Uniformity Clause when collecting the Federal Income Tax. The government wants to wait until Puerto Rico becomes a state to correct these errors and believes that Puerto Rico can skip “incorporation” and jump straight to statehood.<sup>5</sup> Now is the time to bring Puerto Rico’s tax laws into harmony with the Constitution, not after it becomes a state.

Analyzing the logical inverse yields the same result. An “unincorporated” Territory is “not clearly destined for statehood.” *Verdugo-Urquidez* 494 U.S.

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<sup>4</sup> HR 1522 (2021)

<sup>5</sup> DOJ Analysis of HR 1522, p. 9

259 (1990). Given the facts in the previous paragraph, it is certainly true that Puerto Rico might be destined for statehood. The mere possibility of statehood means that the proposition, “Puerto Rico is not clearly destined for statehood” is FALSE. Therefore, Puerto Rico does not qualify as an “unincorporated” Territory.

“Incorporated” and “unincorporated” Territories do not appear in the Constitution and nobody really knows what these terms mean. Swanson has simplified the terms in his own mind and concluded that “surely destined for statehood” means that an “incorporated” Territory can become a state. In contrast, “not clearly destined for statehood” means that an “unincorporated” Territory cannot become a state. If both “incorporated” and “unincorporated” Territories are eligible for statehood, then there is no meaningful distinction between the terms. An “unincorporated” Territory cannot be considered for statehood and there can be no bills in Congress to admit an “unincorporated” Territory as a state. The bills H.R. 4901 and H.R. 1522 are evidence that Puerto Rico has crossed the threshold to become an “incorporated” Territory.

The Territory Clause of the Constitution has been often cited as an authority for the differing tax policies in the Territories. *United States v. Vaello Madero*, 596 U.S. \_\_ (2022) The Territory Clause grants to Congress the power to make “needful rules”<sup>6</sup> for the Territories, but it does not grant to Congress any new powers of taxation. All taxes enacted by Congress must be collected by either the rule of apportionment or the rule of uniformity; Congress has no other powers of taxation. The only reason that Puerto Rico has been excluded from these rules is because of its

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<sup>6</sup> U.S. Constitution Art 4 § 3

constitutionally-questionable status as an “unincorporated” Territory. This creates an unworkable contradiction because if neither the rule of apportionment nor the rule of uniformity operate in Puerto Rico, then Congress has no power to collect any tax in the Territory. This Court’s controlling precedent in *Loughborough v. Blake* (1820) states:

The power then to lay and collect duties, imposts, and excises may be exercised and must be exercised throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of states and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania, and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other.

The rule of uniformity is supposed to operate equally in both the territories as well as the states and so the Territory Clause does not permit the Uniformity Clause to be violated. However, the theory of “unincorporated” Territories has permitted the unconstitutional violation of the Uniformity Clause when collecting the Federal Income Tax. This theory no longer applies to Puerto Rico because it is now an “incorporated” Territory.

It is unfair that public schoolteachers in Georgia must pay the income tax while public schoolteachers in Puerto Rico do not. It is unfair that American citizens can flee to Puerto Rico to evade their responsibility to pay the income tax. It is more than unfair - it is unconstitutional; all American citizens must be taxed uniformly. In *Vaello Madero*, Justice Gorsuch laments that, "Because no party asks us to overrule the Insular Cases to resolve today's dispute, I join the Court's opinion." However, Appellant does ask this Court to overrule the Insular Cases, or to recognize Puerto Rico's incorporation, and to acknowledge that Puerto Rico is fully subject to the Constitution's Uniformity Clause when collecting The Federal Income Tax. This means that American citizens in Georgia cannot be forced to pay more income tax than American citizens in Puerto Rico based on geographical location.

The tax imposed by 26 U.S.C. § 1 is not geographically uniform throughout the United States and must be corrected.

## **II. The Eleventh Circuit's Opinion Plainly Conflicts with This Court's Precedents and Those of Other Appeals Courts.**

The tax imposed by 26 U.S.C. § 1 must operate as a duty, an impost or an excise if the Uniformity Clause applies to collecting income taxes in Puerto Rico. *Knowlton v. Moore* 178 U.S. 41, 88 (1900). Unfortunately, the tax is so ambiguous and uncertain that the courts of appeals cannot agree on which tax is imposed or which constitutional rule governs its collection. In the present case, The Eleventh Circuit stated, "First, it is not clear that the Uniformity

Clause applies to income taxes." (App at 6) If it is not clear, then how is the tax enforced? The Eleventh Circuit is supposed to be the authority on this subject. If the interpretation of statutes levying taxes is in doubt, they are construed most strongly against the government and in favor of the citizen. *Gould v. Gould*, 245 U.S. 151 (1917). The confusion is not limited to the Eleventh Circuit. There is no agreement among the courts of appeals regarding the nature of the income tax, but this has not stopped these courts from imposing sanctions on taxpayers, including Swanson, who request answers. For example, these courts have ruled that the income tax is an excise:

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

The Second Circuit has ruled in *Ficalora v. Commissioner*, 751 F.2d 85, 87 (2<sup>nd</sup> 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 (4<sup>th</sup> 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 (6<sup>th</sup> 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, (5<sup>th</sup> 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 Eighth Circuit has ruled in *United States v. Francisco*, 614 F.2d 617 (8<sup>th</sup> 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 Becroft*, 885 F.2d 547, 548 (9<sup>th</sup> 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 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.

If the income tax is an excise, as many courts of appeals have concluded, then the Uniformity Clause is applicable to income taxes. If the income tax is a direct tax, as the other courts of appeals have concluded, then the Uniformity Clause is not applicable to income taxes. Which tax is Swanson being asked to pay? It would seem that nobody knows.

Looking to the statute 26 U.S.C. § 1 does not provide any clarity. The statute reads:

There is hereby imposed on the taxable income of every individual .... a tax determined in accordance with the following table

What is "a tax" and which rule governs its collection? Must "a tax" be apportioned or must it be uniform? Congress may impose a direct tax on taxable income or it may impose a duty, an impost or an excise on taxable income, but Congress may not impose "a tax" on taxable income." It is impossible to identify this "tax" and it is impossible to determine which rule governs its collection. The meaning of this statute is in doubt and whether this tax must operate with uniformity in Puerto Rico cannot be determined. The ambiguity of the statute may partly explain the conflict among the courts of appeals.

This Court should take the opportunity presented by this petition to resolve the conflict among the courts of appeals once and for all.

**III. The Eleventh Circuit Abused its Discretion When it Sanctioned Petitioner \$8,000 for Asking the Questions Presented.**

The Eleventh Circuit sanctioned Swanson \$8,000 for questioning Puerto Rico's status as an "unincorporated" Territory and for questioning whether the income tax obeys the Uniformity Clause. It would appear that *pro se* litigants are not permitted to present these questions to the Eleventh Circuit. These arguments are not frivolous and do not qualify for a sanction under the Federal Rules of Appellate Procedure 38.

Swanson's inquiry is partly inspired by Justice Gorsuch's concurring opinion in *United States v. Vaello Madero*. His opinion strongly condemns the Insular Cases and provides support for overruling them. In his brief to the Eleventh Circuit, Swanson acknowledged that the majority opinion in that case still permits Puerto Rico to be treated differently but noted that the majority opinion is based on the shared premise of both parties that Puerto Rico is an "unincorporated" Territory. Swanson rejects that shared premise, both here and in his brief to the Eleventh Circuit, and argues that Puerto Rico has become an "incorporated" Territory. The Eleventh Circuit cited the majority opinion to justify sanctions for filing a frivolous appeal, but it refused to acknowledge Swanson's argument. Whether Justice Gorsuch is correct that the Insular Cases should be overruled, or whether Swanson is correct that Puerto Rico has become an "incorporated" Territory, the result is the same: Puerto Rico is fully subject to the Constitution's Uniformity Clause when collecting the Federal Income Tax. By what twist of logic does the Eleventh Circuit rule that this ripe controversy is frivolous and worthy of a sanction?

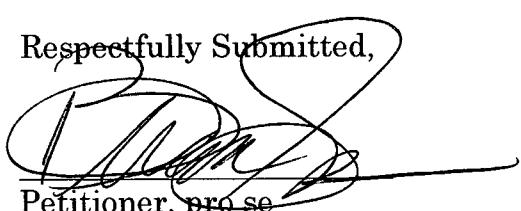
The courts have not considered whether Puerto Rico's status has changed or whether becoming an "incorporated" Territory would affect the collection of the Federal Income Tax. Additionally, the courts of appeals cannot agree on whether the income tax is subject to the Constitution's Uniformity Clause. If the Eleventh Circuit is uncertain, how is the question frivolous? It is clearly an abuse of discretion to impose a sanction for asking these questions. The Eleventh Circuit's imposition of an \$8,000 sanction for filing a frivolous appeal should be reversed.

## CONCLUSION

The Eleventh Circuit Court of Appeals has summarily affirmed the dismissal of Swanson's refund suit without considering whether Puerto Rico has become an "incorporated" Territory or whether its change in status affects the collection of the Federal Income Tax. The court confessed that it does not know whether the Uniformity Clause applies to income taxes but still sanctioned Swanson for asking these questions. The Eleventh Circuit erred when it summarily affirmed the dismissal of Swanson's suit for lack of subject matter jurisdiction and for failure to state a claim. The Eleventh Circuit also abused its discretion when it sanctioned Swanson \$8,000 for asking the questions presented.

For the foregoing reasons, this Court should grant the petition and the Eleventh Circuit's imposition of sanctions should be reversed.

Respectfully Submitted,



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September 15, 2023