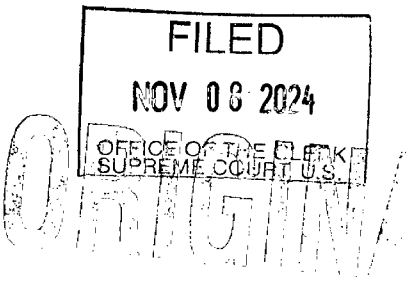
No. 24-659

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

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QUESTIONS PRESENTED

In light of this Court recent holding in *Moore et ux v. United States* (2024), that income taxes are indirect taxes subject to the Constitution's Uniformity Clause, the following questions are presented:

1. Did Puerto Rico become an incorporated Territory on July 3, 1952 when Congress approved its constitution and has it become fully subject to the Uniformity Clause when collecting the federal income tax?
   a. Alternately, is the uniform collection of the federal income tax a fundamental constitutional guarantee which applies in unincorporated Puerto Rico?
   b. Does the Territory Clause permit the Uniformity Clause to be violated?

2. Did the Commissioner of Internal Revenue violate The Tax Code when he computed Petitioner's Subtitle A income tax deficiency using employment tax income from Subtitle C, which is excluded by law from gross income?

3. Did the Tax Court abuse its discretion when it imposed an $15,000 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.

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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The unpublished decision of the United States Court of Appeals for the Eleventh Circuit is attached as Appendix 1-5. The Order denying rehearing *En Banc* is included as Appendix 6-7. Tax Court opinion is Appendix 8-27.

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 October 4, 2024. Petition for *En Banc* review was denied on October 22, 2024.

CONSTITUTIONAL PROVISIONS

1. 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."

2. 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."

STATEMENT OF THE CASE

This case presents two questions that affect every American Citizen who pays federal income tax. The first question is whether Puerto Rico became an incorporated Territory on July 3, 1952 and whether its incorporation affects the uniform collection of the tax. The uniform application of the federal income tax is a fundamental constitutional guarantee to which all American citizens are entitled. If Puerto Rico has crossed the threshold to become an incorporated Territory, then 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 second question is whether the Commissioner of Internal Revenue has been computing income tax deficiencies incorrectly for as long as taxpayers have

been paying income taxes. The Commissioner instructs taxpayers to compute income taxes using box 1 of a Form W2. However, this income is defined exclusively for purposes of employment tax in Subtitle C. This income is excluded by law from the computation of income tax in Subtitle A. The Commissioner is using the wrong income to compute the tax. As a result, nearly every enforcement action from penalties to imprisonment has been wrong and nearly every taxpayer has been injured by paying the legally incorrect amount of income tax.

A. Factual and Legal Background

1. In 2019 Brian Swanson was employed by McDuffie County Board of Education. His December Pay Statement shows that he was paid $87,500.55 by his employer.

2. His Employer issued a Form W2 which reports statutory "wages" in the amount of $86,733.51 for purposes of the employment tax imposed in chapter 21. This figure is found on box 5 of his Form W2. The W2 also reports statutory "wages" in the amount of $81,496.95 for purposes of the employment tax in chapter 24. This figure is found in box 1 of his Form W2. Mr. Swanson believes that the statutory definition of "wages" in each chapter determines how much of his $87,500.55 is subject to the respective employment taxes. Statutory "wages" for purposes of the income tax in chapter 1 are not reported on a Form W2.

3. Mr. Swanson filed a timely 2019 Form 1040 on January 21, 2020.

4. The Commissioner of Internal Revenue issued a Notice of Deficiency (NOD) on December 7, 2022 in the amount of $15,648.00 that was computed using

"wages" from box 1 of Mr. Swanson's Form W2 in the amount of $81,496.00.

B. Procedural History

Mr. Swanson filed a petition for redetermination of deficiency with the Tax Court on March 2, 2023. In his petition he challenged Puerto Rico's status as an unincorporated Territory and the computation of his alleged deficiency arguing that the Commissioner computed his deficiency using income that is excluded by law from gross income.

For these arguments, petitioner was sanctioned $15,000 by the Tax Court which affirmed the deficiency on April 8, 2024.

Mr. Swanson filed a timely Notice of Appeal with The Eleventh Circuit Court of Appeals on June 4, 2024. The Commissioner filed a motion for summary affirmance on July 19, 2024 and the Eleventh Circuit granted summary affirmance on October 4, 2024 ruling that Mr. Swanson's arguments are frivolous. Mr. Swanson petitioned for rehearing *en banc* on October 8, 2024 and that petition was denied on October 22, 2024.

REASONS FOR GRANTING THE PETITION

I. Puerto Rico Became an "Incorporated" Territory on July 3, 1952 When Congress Approved Its Constitution.

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*, cessation by treaty does not make conquered territory domestic territory in the sense of the revenue laws.

Circumstances have changed since 1901. The people of Puerto Rico acquired U.S. Citizenship in 1917[1] and Congress officially approved Puerto Rico's constitution on July 3, 1952.[2] While *Balzac v. Porto Rico* tells us that, "in these latter days, incorporation is not to be assumed without express declaration or an implication so strong as to exclude any other view," petitioner believes that these conditions have been satisfied. Congressional approval of Puerto Rico's constitution represents either an express declaration or an implication too strong to ignore. On July 3, 1952, Puerto Rico's treaty relationship with the United States ended and its constitutional relationship began. With an approved constitution, Puerto Rico became part of our constitutional system and is now domestic territory in the sense of the revenue laws. Puerto Rico became fully subject to the Uniformity Clause when collecting the federal income tax on July 3, 1952.

Additionally, Puerto Rico is on the path to statehood and an "incorporated" Territory is one that is "surely destined for statehood." *Boumedienne v. Bush*, 553 U.S. 244 (2008). This means that an unincorporated Territory cannot become a state. Puerto Rico's most recent petition for statehood was H.R. 1522 in 2020.[3] Section 2, paragraph 20 of H.R. 1522 states:

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[1] Public Law 64-368, 39 Stat. 951; Section 5

[2] Public Law 82-447, 66 Stat. 327

[3] HR 1522 (2021)

> 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. Considering statehood for Puerto Rico is another congressional act that strongly implies that Puerto Rico has crossed the threshold to become an incorporated Territory. Congress cannot consider statehood for an unincorporated Territory.

The uniform application of federal tax law is a fundamental constitutional guarantee that protects all American Citizens. The Uniformity Clause ensures that some Americans are not forced to pay a federal tax from which other Americans are exempt based on geographical location within the United States. The incorporation theory includes the suggestion that certain constitutional protections are fundamental and apply to all American Citizens even in distant unincorporated Territories. *Dorr v. United States*195 U.S. 138, 148-149 (1904). Creating a tax haven in Puerto Rico to which American Citizens may flee to avoid the federal income tax violates this fundamental constitutional guarantee by increasing the income tax burden on the remaining federal taxpayers. Even if Puerto Rico has not become an incorporated Territory, as argued by petitioner, then he believes that the uniform application of federal tax law is sufficiently fundamental to apply in unincorporated Puerto Rico.

The Territory Clause of the Constitution has been 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"[4] for the Territories, but it does not amend or alter Congress' powers of taxation. It is not *needful* to violate the Uniformity Clause. This Court explained in *Loughborough v. Blake* (1820) that the rule of uniformity applies in the territories as well as in the 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

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[4] U.S. Constitution Art 4 § 3

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 when collecting income taxes according to this Court's holding in *Moore.* 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, petitioner 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. It also means that the people of Puerto Rico should be paying federal income tax and they should be receiving their SSI benefits.

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

II. The Eleventh Circuit's Opinion Plainly Conflicts with This Court's Holding in *Moore et ux v. United States.*

The tax imposed by 26 U.S.C. § 1 must obey the Uniformity Clause according to this Court's recent holding in *Moore et ux v. United* States (2024). However, the Eleventh Circuit rejected petitioner's

argument that Puerto Rico has become an incorporated Territory and that it is fully subject to the Uniformity Clause when collecting income taxes. The appeals court declared the argument to be frivolous and upheld a $15,000 sanction for filing a frivolous argument in the Tax Court. The Eleventh Circuit adheres to *Motes v. United States,* 785 F.2d 928(11th Cir 1986) and the Fifth Circuit precedent in *Parker v. Comm'r,* 724 F.2d 469, (5th Cir, 1984) which holds that the Sixteenth Amendment "provided the needed constitutional basis for the imposition of a direct non-apportioned income tax." [5] In rejecting petitioner's Puerto Rico argument the Eleventh Circuit stated, "First, it is not clear that the Uniformity Clause applies to income taxes." (App at 4) Petitioner argued that after *Moore,* it has become crystal clear that the Uniformity Clause applies to income taxes, but the Eleventh Circuit refuses to be corrected by a *pro se* litigant.

Additional Courts of Appeals also hold the income tax to be a direct tax and merit this Court's correction. For example:

> The Eighth Circuit has ruled in *United States v. Francisco,* 614 F.2d 617 (8thCir, 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.

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[5] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

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 panel decision of the Eleventh Circuit conflicts with this Court's holding in *Moore et ux v. United* States (2024) and a rehearing *en* banc was denied. The Eleventh Circuit refused to consider whether Puerto Rico's incorporation affects the uniform collection of the federal income tax because the Eleventh Circuit refuses to concede that the Uniformity Clause applies to income taxes.

III. The Commissioner Computes the Income Tax Using Income Excluded by Law, Which Injures Every American Who Pays Federal Income Tax.

The Commissioner of Internal Revenue has computed petitioner's 2019 income tax deficiency in Subtitle A using income that is legally defined exclusively for employment tax in Subtitle C. The Commissioner and the lower courts are confusing the income tax provisions of Subtitle A with the employment tax provisions of Subtitle C and are swapping statues between subtitles without any statutory authority. The Commissioner has been computing income tax incorrectly for as long as petitioner has been paying income tax because he uses

income that is excluded by law to compute the tax. Every taxpayer in the United States is being injured by the Commissioner's miscalculation of the income tax.

The provisions for computing income taxes are found in Subtitle A of the Tax Code. The individual taxpayer is liable for the income tax in Subtitle A. The provisions for computing employment taxes are found in Subtitle C. The employer is liable to pay the employment taxes. These taxes are mutually exclusive and it should be self-evident that employment tax statutes are not used to compute income tax.

However, the IRS Form 1040 instruction booklet instructs taxpayers to compute their gross income using box 1 of their Form W2. [6] The reporting requirement for box 1 of a Form W2 is found in 26 U.S.C. §6051(a)(3), which is "wages" as defined in 26 U.S.C. §3401(a). §3401(a) is found in Subtitle C and is defined exclusively for computing the employer's chapter 24 employment tax. The first five words of §3401(a) read, "For purposes of this chapter," and this statutory language limits this definition of "wages" to the chapter 24 employment tax. This income cannot be used in chapter 1 to compute income tax because this definition of "wages" applies the exclusions and deduction applicable to chapter 24, which reduce the employer's tax liability. "Wages" as defined in §3401(a) in the amount of $84,496.95 is the result of applying chapter 24 exclusions and deductions to petitioner's gross wages of $87,500.55. Income tax must be computed using exclusions and deductions to gross

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[6] 2019 IRS Form 1040 Instructions, p. 21: https://www.irs.gov/pub/irs-prior/i1040gi--2019.pdf

income found in chapter 1, which will reduce petitioner's income tax liability according to the statutes 26 U.S.C. §§61-291.

The IRS 1040 instruction booklet lacks the statutory authority to compute income tax using chapter 24 income. For example, the tax imposed in chapter 2 borrows the meaning of chapter 21 "wages" in 26 U.S.C. §1402(d) and uses this income to compute the chapter 2 tax. In contrast, no statute can be found that borrows "wages" from chapter 24 to compute the chapter 1 income tax. The Commissioner's use of chapter 24 income to compute income tax is arbitrary and capricious.

In addition, Subtitle A prohibits income as defined in other subtitles of the Tax Code to determine the meaning of "gross income." In 26 U.S.C. §61(a), the first ten words of this statute read, "Except as otherwise provided in this subtitle gross income means ..." This language excludes everything outside of "this subtitle" from the meaning of gross income. In this case, Subtitle C income is excluded from gross income in Subtitle A. 26 U.S.C. § 3401(a) is found in Subtitle C and is outside of "this subtitle." We are told in 26 C.F.R. § 1.61-1 that, "Gross income means all income from whatever source derived, *unless excluded by law*," and § 61(a) excludes income from Subtitle C by law, including box 1 of petitioner's Form W2 in the amount of $81,495.95. Subtitle C income is excluded by law from gross income, and so are Subtitle C exclusions and deductions because they are all outside of "this subtitle." The meaning of gross income must be derived exclusively from statutes in Subtitle A using the exclusions and deductions to income found in Subtitle A. The Commissioner computed the deficiency using the wrong income.

According to the Eleventh Circuit's panel opinion, petitioner argued that, "his earnings do not constitute income within the meaning of Subtitle A." (App at 2) In reality, petitioner argues that Subtitle A income tax cannot be computed using Subtitle C income. Rather, the income tax must be computed starting with petitioner's gross wages found on his December Pay Statement, and continue by applying the exclusions and deductions found in Subtitle A. Subchapter B, titled "Computation of Taxable Income," uses the statutes §§61-291 to reduce petitioner's gross income. §3401(a) does not fall within this statutory range and cannot be used to compute taxable income. The dollar figure that must be reported on a Form 1040 is not printed on any form and must be manually computed by the Commissioner when determining a deficiency. Unfortunately, neither the Commissioner nor taxpayers know how to compute this dollar figure because the Commissioner has been instructing taxpayers to use the wrong income from the start. Income tax cannot be computed using Subtitle C exclusions and deductions in the form of "wages" as defined in §3401(a) and found on box 1 of a Form W2.

The Commissioner of Internal Revenue has confused the tax imposed in Subtitle A with the tax imposed in Subtitle C and has been miscalculating the income tax for as long as petitioner has been paying income taxes. It is wrong to compute income tax using box 1 of a Form W2 and it has always been wrong to compute income tax using a W2 because the income reported on a W2 is defined exclusively for employment taxes imposed in Subtitle C. The W2 provides evidence of an employer's employment tax liability, but it does not provide evidence of an individual's income tax liability. The W2 is being misused to convert an employment tax liability in

Subtitle C into an income tax liability in Subtitle A and this error has injured nearly every American who pays income taxes. The computation of their tax liability is wrong as a matter of law because the Commissioner uses income excluded by law to compute the income tax. This means that nearly every enforcement action by the Commissioner has also been wrong: Every penalty, every sanction, every levy, every prosecution and nearly every imprisonment has been wrong.

The Commissioner of Internal Revenue computed petitioner's 2019 income tax deficiency, in the amount of $15,648.00, as shown on his Notice of Deficiency, using chapter 24 income. This income is excluded by law from gross income and therefore, the alleged deficiency must be recomputed using only the statutes in Subtitle A. This argument is not frivolous and is not subject to a 26 U.S.C. §6673 sanction.

IV. All Parties Agree That the Notice of Deficiency Is Likely Erroneous Therefore, Summary Affirmance Was Not Warranted

The Tax Court sanctioned Swanson $15,000 for questioning Puerto Rico's status as an "unincorporated" Territory and for questioning whether the Commissioner computed his income tax deficiency using income excluded by law. The Tax Court concluded that the purpose of Swanson's litigation was to protest the income tax. (App at 25) The Eleventh Circuit affirmed the sanction. These arguments are not frivolous and do not qualify for a sanction under 26 U.S.C. § 6673.

All parties have acknowledged in their own way that the Commissioner's Notice of Deficiency (NOD) may be erroneous. If the NOD is erroneous, then Mr.

Swanson has met his burden to prove error and he should not be liable for the 26 U.S.C. §6673 frivolous sanction in the amount of $15,000 and summary affirmance should be reversed.

The Tax Court acknowledged the possibility of error on the NOD in its bench decision: "Even if the NOD (like the Form W-2 on which is was based) was incorrect in understating Mr. Swanson's compensation amount as $81,496, that would simply constitute an error on the NOD." (App at 20) An error is all Mr. Swanson needs to prove as the Tax Court admitted, "Generally, the Commissioner's determination of a deficiency is presumed correct and the taxpayer has the burden of proving it wrong." (App at 14) The Tax Court acknowledges that there could be an error on the NOD, but leaves the question hanging and does not answer it: Computing the deficiency using $81,495 is an error that must be corrected. Since chapter 24 deductions are only applicable to the chapter 24 employment tax, the NOD is erroneous. If the computation of the deficiency using $81,496 is wrong as a matter of law, then Mr. Swanson has met his burden to prove error and summary affirmance should not have been granted.

The Commissioner acknowledged the possibility of error in his motion for summary affirmance on page 13 where he states, "But even if taxpayer were correct that his employer should not have reduced his reported earnings by these amounts, that would only mean that the taxpayer would owe more in income tax than determined by the Commissioner." The employer did not err by reducing Mr. Swanson's reported earnings for purposes of computing employment taxes. However, the Commissioner erred when he computed income tax by using the employment tax reductions in Subtitle C instead of using the income tax reductions

found in Subtitle A. Nevertheless, if the Commissioner is correct that Mr. Swanson owes more income tax than determined by the Commissioner, then the NOD is erroneous and he should not be liable for the 26 U.S.C. §6673 frivolous sanction in the amount of $15,000 and summary affirmance should be reversed.

Mr. Swanson believes that when Subtitle A exclusion and deduction are properly applied to his salary of $87,500.55 that he will owe less tax. However, he accepts the possibility that he may owe more tax, but whether he owes more tax or less tax is irrelevant. If the Notice is in error, then Mr. Swanson is not liable for a 26 U.S.C. §6673 penalty in the amount of $15,000 and the Tax Court has abused its discretion. If there is even a slight possibility that there is an error on the NOD, then summary affirmance is not warranted.

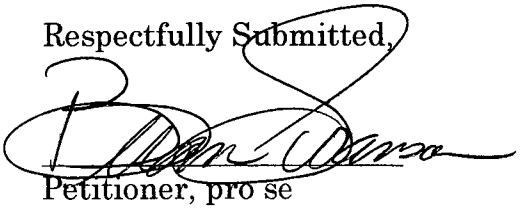
Because the panel decision refused to consider the acknowledgement by both the Tax Court and the Commissioner that the NOD may be erroneous, the appeal is not frivolous.

Therefore, the Commissioner's position is not clearly right as a matter of law and the appeal is not frivolous. Summary affirmance is not warranted and should be reversed.

CONCLUSION

The Court should grant the petition.

Respectfully Submitted,



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