

No.

IN THE

Supreme Court of the United States

Brad Stephen Francis and
Christine Carol Francis,
Petitioners,

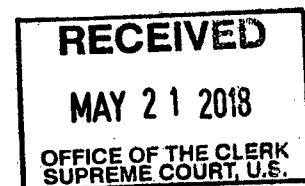
v.

United States of America,
Respondent..

On Petition For Writ of Certiorari
To The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented For Review

This is a call for the Court to exercise its supervisory power over the lower courts: Did the Court of Appeals for the Eighth Circuit abdicate its duty in issuing a *Per Curiam Affirmance*, and denying a *petition for rehearing en banc*, by sanctioning violations of the Federal Rules of Civil Procedure and gross misrepresentation of the facts?

1. Is the Eighth Circuit's denial of *Petition for Rehearing En Banc* in conflict Missouri's Supreme Court Operating Rule 22.01?
2. Is the Eighth Circuit's *Per Curiam Affirmance* in violation of Federal Rule of Appellate Procedure 47(b) by sanctioning violation of the Federal Rules of Civil Procedure?
3. Does the Eighth Circuit's *Per Curiam Affirmance* sanction departure from the Eighth Circuit's ruling in *Osborn v. United States*, 918 F. 2d 724, n.6 (8th Cir. 1990)?
4. Does the Eighth Circuit's PCA summation circumvent the rights of due process during the *Petition for Rehearing En Banc* by grossly misrepresenting the nature of the action?
5. Does the Eighth Circuit's PCA sanction gross misrepresentation of the findings?

Parties to the Proceeding

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The United States of America
The Department of the Treasury
– Internal Revenue Service
The Department of Justice

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The opinion of the court of appeals, submitted December 28, 2017, and filed January 3, 2018, is unpublished; Case No. 17-2070.

The opinion and judgment of the district court, dated May 4, 2017, is unpublished; Case No. 4:16-cv-00672-DGK.

JURISDICTION

The *Per Curiam Affirmance* of the court of appeals was submitted December 28, 2017, and filed on January 3, 2018. A petition for *rehearing en banc* was denied on February 26, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*; of the Federal Rules of Civil Procedure; of the Federal Rules of Appellate Procedure; of Title 26 of the United States Code; and of Title 26 of the Code of Federal Regulations are reproduced in the appendix to the petition (App. *infra*, 50a-72a).

STATEMENT

CAUSES OF ACTION:

5 U.S.C. §702, Right of Judicial Review &

26 U.S.C. § 7433 Unauthorized Collection Activities

The Francis' Family filed timely non-frivolous *administrative claims* with the Internal Revenue Service for tax periods 2010 through 2015.

The *administrative claims* were set forth on the Commissioner's prescribed forms and in the Commissioner's prescribed manner.

The *administrative claims* are signed under penalties of perjury using the Commissioner's unaltered jurats and the autographs were witnessed by an officer of the Court and a Notary Public.

The *administrative claims* purport to be true and sincere *administrative claims* made in fulfillment of the law.

The *administrative claims* were accompanied by affidavits (of mailing) from an Officer of the Court and affidavits (non-frivolous position) from the Francis' Family.

In response to the *administrative claims*, the Internal Revenue Service (IRS) used an unpublished¹ informal rule in the guise of a formal rule that is required at 26 U.S.C. § 6702(c) to declare the *administrative claims* to be frivolous. By using the unpublished informal rule the IRS was able to circumvent their burden at 26 U.S.C. § 6703.

¹ Unpublished in the Federal Register

After issuing the determinations, *supra*, the IRS issued penalties based on the determinations but refused to sign the assessments in accordance with 26 C.F.R. § 301.6203-1.

Next, the IRS issued notices of intent to seize the Francis' Family's property by exceeding their narrowly defined statutory authority codified at 26 U.S.C. § 6331.

After giving the IRS plenary notice of these violations of statutory and constitutional law (due process), *supra*, the Francis' Family issued *Notice of Exhaustion of Administrative Remedies* pursuant to 26 C.F.R. § 301.7433-1(e) as a necessary prerequisite to filing suit under 26 U.S.C. § 7433.

The statute of limitations barring action under 26 U.S.C. § 7433 is frequently miscalculated².

Knowing the statute of limitations for bringing suit under 26 U.S.C. § 7433 is often miscalculated, the IRS rushed issuance of a 90-day letter³ without following deficiency procedures.

By avoiding deficiency procedures the IRS was able to situate the expiration of the 90 day period, *supra*, within 5 days (i.e. June 28, 2016) of the statute of limitations (i.e. June 23, 2016) for the anticipated action under 26 U.S.C. § 7433 for *Unauthorized Collection Activities*.

² *Section 7433's Statute of Limitations: How Courts Have Wrongly Turned a Taxpayer's Exclusive Sword into the IRS's Shield Against Damages*, 61 Clev. St. L. Rev. 195 (2013), Diana Leyden.

³ Notice of Deficiency, 26 U.S.C. § 6211 *et seq.*

The Francis' Family filed suit under the Administrative Procedure Act⁴, 5 U.S.C. § 702, (hereinafter the APA) on June 22, 2016, claiming, inter alia, we were adversely affected by agency action within the meaning of various statutes, supra, in the Internal Revenue Code.

The Francis' Family also claimed the IRS had utilized *Unauthorized Collection Activities* under the cause of action codified at 26 U.S.C. § 7433.

-UNITED STATES DISTRICT COURT-
Case No. 4:16-cv-00672-DGK

MOTION TO DISMISS BY THE DEPARTMENT OF JUSTICE

The Department of Justice (hereinafter DOJ) moved⁵ to dismiss the Francis' Family's action in district court under Federal Rules of Civil Procedure 12(b)(1) for *lack of subject matter jurisdiction*; and 12(b)(6) for *failure to state a claim upon which relief may be granted*.

The DOJ waived all arguments related to the APA in their *Motion to Dismiss*, supra, and the APA was not listed in their table of authorities in that motion.

Rather than addressing the APA, the DOJ mischaracterized the Francis' Family's action as a suit for refund under 26 U.S.C. § 7422.

⁴ Administrative Procedure Act, 5 U.S.C. § 702, Right of Judicial Review

⁵ Document 15, Case No. 4:16-cv-00672-DGK, Suggestions in Support of Motion to Dismiss

Then, based on the presupposition the suit was a refund action under 26 U.S.C. § 7422, the DOJ argued that the IRS' determination that the Francis' Family's *administrative claims* were frivolous *administrative claims* barred the district court from hearing the case under 26 U.S.C. § 7422.

Thus, the IRS argued because section 7422 requires a valid *administrative claim* to be filed as a prerequisite to filing a suit under 26 U.S.C. § 7422 the district court lacked subject matter jurisdiction over the Francis' Family suit while ignoring that the suit was brought under the APA and 26 U.S.C. § 7433.

THE DISTRICT COURT'S DETERMINATION

Upon receiving the Motion to Dismiss, the district court established a Standard of *Osborn v. United States*, 918 F. 2d 724, n.6 (8th Cir. 1990).

The district court stipulated in the ORDER⁶ GRANTING MOTION TO DISMISS: "Because Defendant's subject matter jurisdiction arguments are dispositive, the Court need not address the 12(b)(6) arguments."

Having thus limited the scope of their determination to Fed. R. Civ. P. 12(b)(1) arguments the Court correctly acknowledged⁷ that the Justice Department's 12(b)(1) motion was a *facial attacking* motion: "The pending motion is a facial attack

⁶ Page2, Document 29, Case No. 4:16-cv-00672-DGK

⁷ Page 3, *supra*

because Defendant argues that even if the First Amended Complaint's allegations are true, the Court lacks subject matter jurisdiction because . . ."

The district court further acknowledged⁸ that, "...the Court assumes the allegations in the complaint are true."

Having established the Standard of *Osborn*, supra, and having correctly identified the nature of the DOJ's motion and the district court's duties thereunder, the district court proceeded under Fed. R. Civ. P. 12(b)(6) without providing the protection of Fed. R. Civ. P. 12(d) as required under the circumstances:

That is, the district court depended on new matters presented outside the pleadings by the DOJ that the *administrative claims* were frivolous.

These new matters went to the central merits of the Francis' Family action making the district court's judgment an *ipso facto* ruling under Fed. R. Civ. P. 12(b)(6).

It must be inferred that the district court denied the allegations in the Francis' Family's complaint were true; i.e. they ruled that the Francis' Family's *administrative claims* (the merits) did not satisfy the prerequisite for action under 26 U.S.C. § 7422⁹.

⁸ Page 2, supra

⁹ Action was brought under 5 U.S.C. § 702 not 26 U.S.C. § 7422.

To wit, they denied the truth of Francis' Family's petition that alleged the *administrative claims* were non-frivolous.

Furthermore, they denied the truth of the Francis' Family's petition that the IRS determination was reached by fraudulent means.

The district court also denied the Francis' Family a plenary hearing in accordance with Fed. R. Civ. P. 12(d) and, therefore Fed. R. Civ. P. 56.

And, despite the district court's stated standard of *Osborn*, the district court dismissed the action under Fed. R. Civ. P. 12(b)(1) with prejudice in violation of Fed. R. Civ. P. 41(b).

Or, in the alternative, the district court feigned the standard of Fed. R. Civ. P. 12(b)(1) and ruled on the merits under Fed. R. Civ. P. 12(b)(6) in contradiction to their statement otherwise.

In order to dismiss action under 26 U.S.C. § 7433 the district court used gross misrepresentation of the complaint to determine that the Francis' Family's complaint only made claims against *assessment activities*.

The Francis' Family complaint did make an attempt at including a policy argument that 26 U.S.C. § 7433 should be expanded to include *assessment activities*.

However, an honest reading of the complaint shows the Francis' Family made lucid arguments related to *collection activities*. These arguments were grossly misrepresented as arguments regarding

assessment activities allowing the district court to dismiss the action.

The Francis' Family's complaint that their constitutional rights to due process had been violated were simply not addressed or mentioned by the district court. (*See*, Appendix B, page 3a to 11a)

~~-United States Court of Appeals-~~
~~-for the Eighth Circuit-~~
Case No. 17-2070

APPEAL

The Francis' Family appealed the district court's decision to the Eighth Circuit on May 15, 2017.

The opening appellants' brief was submitted on June 22, 2017, and the appellee's brief was submitted on August 17, 2017. The reply brief was filed on August 31, 2017.

Issues were hotly contested on the face of the opposing briefs regarding the Federal Rules of Civil Procedure and the cause of action [5 U.S.C. § 702 vs. 26 U.S.C. § 7422].

The Francis' Family made it clear that the lower court ruled on the merits without providing a Fed. R. Civ. P. 56 hearing when claiming a Standard of Fed. R. Civ. P. 12(b)(1) and *Osborn*, supra; and dismissing with prejudice under Fed. R. Civ. P. 12(b)(1).

The Eighth Circuit issued a *Per Curiam Affirmance* on December 28, 2017, that was filed on

January 3, 2018, that grossly misrepresented the action under the APA as a tax protester action:

Brad and Christine Francis appeal from the order of the District Court dismissing their civil suit challenging their liability for federal taxes and penalties under the Internal Revenue Code.

After careful review, we conclude that dismissal was proper for the reasons explained by the district court. See LeMay v. U.S. Postal Serv., 450 F. 3d 797, 799 (8th Cir. 2006) (standard of review). The judgment is affirmed. See 8th Cir. R. 47B. (Appendix A).

The Francis' Family timely sought a *rehearing en banc* on February 2, 2018.

On February 7, 2018, the Francis' Family moved the Eighth Circuit to correct the unofficial case summary.

The summary sent to the court removed references to the *Administrative Procedures Act*, replacing it with: suit challenging taxpayers' liability for federal taxes and penalties affirmed without comment.

The Eighth Circuit denied the Francis' Family motion to correct the case summary on February 12, 2018.

The petition for *rehearing en banc* was denied on February 26, 2018; (*See*, Appendix C, page 12a).

VOID: FEDERAL RULE OF CIVIL PROCEDURE 60(b)(4)

The Eighth Circuit issued the mandate on March 13, 2018.

After the mandate, the Francis' Family issued one last motion to the United States District Court, pursuant to Fed. R. Civ. P. 60(b)(4) asking the district court to correct the judgment and order on March 26, 2018.

The district court denied the motion on March 27, 2018. (*See*, Appendix D, page 13a)

REASONS WHY
THE PETITION SHOULD BE GRANTED

This is a call for the Court to exercise its supervisory power over the lower courts: the Court of Appeals for the Eighth Circuit abdicated its duty in issuing a *Per Curiam Affirmance* (herein after PCA) and denying a *rehearing en banc* in that: (1) this conflicts with Operating Rule 22.01 of the Missouri Supreme Court; and (2) sanctions plain violations of the Federal Rules of Civil Procedure, and (3) sanctions departure from a widely used *Standard* within the 8th Circuit, to wit:

ONE

The PCA conflicts with the Missouri Supreme Court's Operating Rule 22.01 COURT EN BANC REVIEW OF DIVISION OPINIONS that states:

“Each district of the court of appeals shall establish a procedure by local court rule requiring *en banc* review of a division opinion within the district that chooses not to follow a previous decision of an appellate court of this state. The procedure shall require that such case be reheard by the court *en banc*. The procedure also may include as an alternative to rehearing the case *en banc* that an order shall be entered indicating that the district has reviewed the opinion *en banc*.” (Appendix G, page 70a)

The Eighth Circuit’s PCA is in direct conflict with the Eighth Circuit’s prior ruling in *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990) and, therefore, the refusal to provide a *rehearing en banc* of the Eighth Circuit’s PCA that choose not to follow *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990) violates in principle the Missouri Supreme Court’s Operating Rule 22.01; see THREE, *infra*.

TWO

The Eighth Circuit’s PCA violates Federal Rule of Appellate Procedure 47 because the PCA sanctions violation of the Federal Rules of Civil Procedure, and Acts of Congress.

Federal Rule of Appellate Procedure 47(a) allows local courts to promulgate local rules. The

local rules must be consistent with Acts of Congress and the rules adopted under 28 U.S.C. § 2072.

Federal Rule of Appellate Procedure 47(b) allows courts of appeal to regulate practice in a particular case in any manner consistent with federal law, the rules of appellate procedure, and local rules of the circuit.

The Eighth Circuit's local RULE 47B allows AFFIRMANCE WITHOUT OPINION if the court determines an opinion would have no precedential value AND any of the following circumstances disposes of the matter submitted to the court for decision:

- (1) A judgment of the district court is based on findings of fact that are not clearly erroneous;
- (2) The evidence in support of a jury verdict is not insufficient;
- (3) The order of an administrative agency is supported by substantial evidence on the record as a whole; or
- (4) No error of law appears.

"The court in its discretion, with or without further explanation, may enter . . . the following orders: 'AFFIRMED. See 8th Cir. R. 47B¹⁰.'"

The PCA violates the followings laws and rules:

¹⁰ Relevant portion of 8th Circuit Local Rule 47B – see Appendix G, page 72a, for full statement of the local rule.

1. It violates LOCAL RULE 47(B) in that the findings of fact of the district court are clearly erroneous (on the face of the document 29) because: (A) The district court claimed not to consider the merits under Fed. R. Civ. P. 12(b)(6) but it ruled on the merits; and (B) The district court was obligated, and stated it was obligated, to believe the truth of the complaint which it did not; and (C) the merits of the case are the same as administrative prerequisite (i.e. *administrative claim*) resulting in an inadequate remedy under 26 U.S.C. § 7422; and (D) the suit was brought under the APA and 26 U.S.C. § 7433 not under 26 U.S.C. § 7422.
2. It violates LOCAL RULE 47(B) in that error of law clearly appears on the face of the district court order in that: (A) the district court's standard that declared not to consider Fed. R. Civ. P. 12(b)(6) arguments but to the contrary erroneously ruled on the merits under Fed. R. Civ. P. 12(b)(1); and (B) the district court dismissed action under Fed. R. Civ. P. 12(b)(1) with prejudice in violation of Fed. R. Civ. P. 41(b); and (C) the district court depended upon new matters outside the pleadings in ruling on the merits but without providing the protection required by Fed. R. Civ. P. 12(d) which required a Rule 56 hearing.

3. It violated Fed. R. App. P. 47 in that it violates: (A) rules adopted under 28 U.S.C. § 2072¹¹; and (B) it violates Acts of Congress in that it denies due process¹² of law; and (C) in that it is not consistent with *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990).
4. It violated the principles of justice including a failure to correctly assign the burden of persuasion to the DOJ on the face of the district court order regarding the allegations – i.e. the merits – of the complaint.
5. It completely ignored allegations that the IRS violated constitutional rights to due process.

THREE

The Eighth Circuit's PCA conflicts with the Eighth's Circuits decision in *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990)¹³. The district court stipulated in the Standard¹⁴, that it only considered Fed. R. Civ. P. 12(b)(1) arguments.

The standard of *Osborn* stipulates that the district court restrict itself to the face of the pleadings under a Fed. R. Civ. P. 12(b)(1) motion,

¹¹ For example, see violations of the Federal Rules of Civil Procedure.

¹² Such as the right to a reasoned opinion; and the right to judicial review; and the right to an impartial hearing tribunal; and the opportunity to submit rebuttal evidence, etc.

¹³ Appendix E, page 15a

¹⁴ Page 2 of Document 29; see, Appendix B, page 4a.

and the non-moving party (i.e. the Francis' Family) receives the same protection as it would defending against a motion brought under Rule 12(b)(6).

That protection – i.e. a plenary hearing under Fed. R. Civ. P. 12(d) was not given the Francis' Family when the district court ventured beyond the face of the pleadings by depending upon new matters raised by the DOJ – on the face of the district court order.

Osborn also stipulates that, “The general rule is that a complaint should not be dismissed ‘unless¹⁵ it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

The face of the Francis' Family's complaint contains plenary prima facie evidence from Freedom of Information Act disclosures that provided adequate grounds to believe that the Francis' Family would be able to prove facts in support of our claim that would entitle us to relief.

FOUR

The Eighth Circuits alteration of the administrative summary of the case on unofficial case summary violated the Francis' Family's right of due process because it grossly misrepresented the action to the court for purposes of *rehearing en banc*

¹⁵ The *Osborn* court quotes *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974).

and thus failed to provide NOTICE to the court en banc on behalf of the Francis' Family.

The Civil Sheet from the district court clearly stipulates the cause of action as the Administrative Procedure Act but the clerk of the Eighth Circuit summarized the case as, "Federal Tax. Dismissal of civil suit challenging taxpayers' liability for federal taxes and penalties affirmed without comment."

This summary, *supra*, imparts significant prejudice through the use of gross misrepresentation.

The Francis' Family filed a petition for *rehearing en banc* on February 2, 2018. The Francis' Family moved the Eighth Circuit to amend the unofficial summary on February 7, 2018. On February 12, 2018, the motion to correct the summation was denied. On February 26, 2017, the petition for *rehearing en banc* was denied.

FIVE

The Eighth Circuit's PCA sanctions **gross misrepresentation** by the lower court as follows:

A. Gross Misrepresentation of Requested Relief:

The district court erroneously states in relevant part:

"All of the claims seek injunctive relief * * *
instructing the Kansas City Area Director of
the IRS to * * * **REFRAIN FROM IMPOSING TAX
PENALTIES ON THEM OR OTHERWISE USE HIS**

AUTHORITY AGAINST THEM. *** (emphasis added).

What the Complaint says:

* * * “AND, PETITIONER, Brad S. & Christine C. Francis, do move this honorable court to enter a Writ of Mandamus enjoining RESPONDENT, with the responsible party being the Kansas City Area Director of Internal Revenue Service, from utilizing color of law, color of authority, the knowing use of invalid statutory Authority (to be construed as antecedent of Notice to the Kansas City Area Director), or violating any other laws including the United States Constitution in interactions with PETITIONER, such Order being transferable to other Area Directors of the Internal Revenue Service should PETITIONER's domicile change; in perpetuity under risk of penalty of Contempt of this Court's just and lawful Order; “ * * *

B. Gross Misrepresentation of the Complaint:

The district court erroneously states in relevant part:

“Plaintiffs argue paragraphs ¶276 through ¶293 specifically make allegations regarding collection activities, a close

reading of these allegations shows that they all rest on claims that Defendant erred in assessing their taxes and imposing penalties. See, e.g. Am. Compl. ¶¶ 276, 278. The Amended Complaint does not allege the IRS disregarded any Internal Revenue statute or regulation in connection with any *collection* activities against them." [Appendix B]

What the complaint says:

¶282. PETITIONER did give RESPONDENT NOTICE (¶194) of their authorized application of statutory authority codified at 26 U.S.C. § 6331, and the fraudulent frivolous penalty at its root, on **November 12, 2014** (¶176), and many sundry times (¶110) thereafter, often, but not exclusively, as NOTICE UCA66-6331 Color of Law: Issuance of Intent to Levy (Seize) Property Outside of Statutory Authority, dated January 15, 2016:

Included in ¶282 is a reproduction of NOTICE UCA66-6331 that shows that section 6331 is derived from section 3310(a),(b) of the 1939 Internal Revenue Code. It further shows that section 3310(a),(b) is derived from section 3185 of the Revised Statutes and, in both cases, the Revised Statutes and the 1939 IRC indicate the authority codified at section 6331 is narrowly limited to monthly and special returns such

as alcohol, tobacco and banking; (see Appendix G, pages 51a through 53a).

Rather than believing the truthfulness of the Francis' Family's complaint (as *Osborn*, supra, required of the district court) the district court twisted and grossly misrepresented the complaint in order that they might dismiss the action.

A fair minded court would have dismissed the action without prejudice so that the complaint under 26 U.S.C. § 7433 might be amended and refiled if there were any doubts about the allegations asserting collection activities.

C. Gross Misrepresentation of the Merits:

1. The Court was obligated to believe the truth of the Francis' Family complaint including that their administrative claims were valid.
2. The DOJ never submitted copies of the Francis' Family administrative claims to the district court.
3. The DOJ made false accusations regarding the Francis' Family's administrative claims that the Court relied upon under a Rule 12(b)(1) motion while denying a Rule 56 hearing to make the following statement:

*** “Plaintiffs purported tax returns improperly identifying zero income are not duly filed refund claims.” *** (Appendix B)

Here the court is providing its own testimony which simply reflects that of the DOJ but absent a Rule 56 hearing and under a Rule 12(b)(1) motion where the Francis’ Family was required by the district court to improperly carry the burden regarding the “improper tax returns”.

The Francis’ Family’s complaint was not believed as required by Osborn, supra.

These misrepresentations, supra, were strewn throughout the district court’s opinion and wrongly painted the Francis’ Family as tax protesters – a libel difficult to overcome in appeals.

The DOJ never submitted copies of the Francis’ Family administrative claims (i.e. tax returns) and these statements are made out of uninformed prejudice without seeing the face of the returns.

CONCLUSION

The petition for writ of certiorari to the Eighth Circuit should be granted because the lower courts have departed from the principles of justice as embodied in the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure and the Acts of Congress.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the statements in this petition for writ of certiorari are true and correct.

Executed this 11th day of May, 2018, in Kansas City, Missouri.

► /s/ Brad S. Francis

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