No. 18-7887

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

RODNEY LYLE ROBERTS - PETITIONER, pro se

VS.

UNITED STATES OF AMERICA - RESPONDENT



ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

Prepared by:
Petitioner, pro se

Rodney Lyle Roberts, # 80689-380
FCC Oakdale II FPC
P.O.Box 5010
Oakdale, LA 71463
(no phone at this time)

## QUESTION PRESENTED

Whether the Fifth Circuit precedent, in their ruling in Parker v. Commissioner, 724 F.2d 469 (1984), becomes unassailable in holding that the Supreme Court judged that the Sixteenth Amendment provided the needed constitutional basis for the imposition of a direct non-apportioned income tax, even though the cited case, Brushaber v. Union Pacific R.Co., 240 U.S. 1 (1916), called the proposition that the Sixteenth Amendment allows a direct income tax without apportionment an "erroneous assumption?"

## LIST OF PARTIES

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

## TABLE OF CONTENTS



## INDEX TO APPENDICES

## TABLE OF AUTHORITIES CITED

## TABLE OF AUTHORITIES (con't)

CASES — PAGE NUMBER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

## OPINIONS BELOW

The opinion of the United States Court of Appeals, at Appendix A to the petition, and is unpublished.

## JURISDICTION

The date on which the United States Court of Appeals decided the subject case was October 22, 2018.

A timely petition for hearing en banc was denied by the United States Court of Appeals on October 22, 2018 in conjunction with the court's opinion, and the order denying the hearing en banc is included with the opinion at Appendix A.

The jursidiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"...direct taxes shall be apportioned among the several states..."

Article I, Section 2, Cl. 3, U.S.Constitution (1788)

"The Congress shall have power: To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;"

Article I, Section 8, Cl. 1, U.S.Constitution (1788)

"No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken."

Article I, Section 9, Cl. 4, U.S.Constitution (1788)

"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."

Amendment Sixteen, U.S.Constitution (1913)

## STATEMENT OF THE CASE

On October 6, 2017, Mr. Roberts was found guilty by a jury on four counts of Making and Subscribing a False Return on his federal income tax returns for tax years 2010, 2011, 2012, and 2013.

On January 2, 2018, Mr. Roberts was sentenced to 18 months imprisonment, restitution, and one year supervised release. Mr. Roberts objected to the taxable income and related tax liability used as the basis of the sentencing and the court overruled Mr. Roberts' objection.

On February 6, 2018, Mr. Roberts reported to FCC Oakdale Federal Prison Camp for incarceration where he remains at this filing.

On October 22, 2018, The United States Court of Appeals for the Fifth Circuit Affirmed the decisions of the District Court and Denied Mr. Roberts' Petition for Hearing en banc.

## REASONS FOR GRANTING THE PETITION

Mr. Roberts has never questioned the validity of federal income tax laws.

Contrary to the Appeals Court's framing of Mr. Roberts' contention as the federal income tax being an excise tax, Mr. Roberts, more appropriately, contends that the monies he received, which were derived from the excercise of his common law rights, if taxed, would constitute a **direct tax**, which is clearly authorized by the Constitution, but only with apportionment.

Also contrary to the Appeals Court panel's view, Mr. Roberts' primary legal contention is that, under Brushaber v. Union Pacific R.Co., 240 U.S. 1, 36 S.Ct. 278, 60 L.Ed. 493 (1916), the proposition that the 16th Amendment allows a **direct income tax without apportionment** is an "erroneous assumption."

The firm roots of the issue of direct taxes in United States law lie in the Supreme Court ruling in Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 15 S.Ct. 912, 39 L.Ed. 1108 (1895) where the Court determined:

> whether a tax on income was direct not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived,...
>
> Brushaber, supra., 240 U.S. at 18

By 1913 the 16th Amendment to the U.S.Constitution was ratified to combat the Supreme Court ruling in Pollock.

> The Congress shall have power to lay and collect taxes on income, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.
>
> United States Constitution, Amendment 16 (1913)

Shortly after the ratification of the 16th Amendment, Congress passed the Tariff Act of 1913 containing an income tax provision. That law was tested in the courts, resulting in Brushaber. The Court made it clear that the purpose of the 16th Amendment was to defeat the grounds of Pollock, saying:

> Indeed, in the light of the history which we have given and of the decision in the Pollock case, and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the [sixteenth] Amendment was drawn for the purpose of doing away for the future with the principle upon which the Pollock case was decided...
>
> Brushaber, supra., 240 U.S. at 18

The Brushaber opinion, however, reaffirmed several key points of law from Pollock, to include the broad categorization of direct and indirect taxes, and it also ruled on several other points of law unrelated to Pollock. Brushaber has been cited as authority many times over the last century and still stands as precedent for several points of law.

The reason that this court should grant Mr. Roberts' petition for a writ of certiorari is to protect the integrity of the Court, damaged when lower courts misinterpret Supreme Court rulings in a way that is not consistent with the language of their opinion. This occured in Brushaber as the lower courts distilled the over 10 pages of the opinion down to a broad statement that says, in effect, that "the 16th Amendment means only what the words say". The petition should also be granted to reclaim an accurate Supreme Court reading of the United States Constitution.

Income tax laws have been inacted and changed by Congress over the last hundred years. The Brushaber opinion, with regard to its language about a direct income tax, lay dormant for over

sixty years, until the current income tax law became blatantly onerous.

In 1984 Alton M. Parker advanced an argument very simular to that of Mr. Roberts, claiming that the 16th Amendment does not give Congress the power to levy a **direct income tax without apportionment.** Parker cited Brushaber as authority. The U.S.Tax Court (formerly the Board of Tax Appeals, an administrative court), in ruling against Parker, issued a misleading statement, conflating a true, yet incomplete, quote from Brushaber with a quote from an earlier simular case which did not have the benefits of the Brushaber opinion in view.

On appeal to the Fifth Circuit, the appeals court affirmed the Tax Court's ruling and took the Tax Court's misleading conflated statement and attributed the whole to Brushaber. The Fifth Circuit, in affirming the Parker ruling wrote:

> Appellant cites Brushaber..., for the proposition that the sixteenth amendment does not give Congress the power to levy an income tax. This proposition is only partially correct, and in its critical aspect, is incorrect. In its early consideration of the sixteenth amendment the Court recognized that the amendment does not bestow the taxing power. The bestowal of such authority is not necessary, for the Court pointedly noted in Brushaber:
>
> > The authority conferred upon Congress by § 8 of article 1 "to lay and collect taxes, duties, imposts and excises" is exhaustive and embraces every conceivable power of taxation has never been questioned, or, if it has, has been so often authoritatively declared as to render it necessary only to state the doctrine. And it has also never been questioned from the foundation... that the authority was given...to lay and collect taxes. **(break)** 240 U.S. at 12-13, 36 C.Ct. at 239-240. The sixteenth amendment merely eliminates the requirement that direct income taxes be apportioned among the states. The immediate recognition of the validity of the sixteenth amendment continues in an unbroken line. See e.g. United States v. McCarty, 665 F.2d 596 (5th Cir. 1982); Lonsdale v. CIR.
>
> Parker v. Commissioner, 724 F.2d 469 471 (5th Cir. 1984) (**break** added)

To better understand the misleading nature of the conflated statement attributed to Brushaber, it is instructive to look at the complete text of the passage that the Tax Court chose to stop mid-thought, which makes it clear that the Tax Court chopped off the Brushaber quote to obscure the true and complete meaning of the passage.

> The authority conferred upon Congress by § 8 of article 1 "to lay and collect taxes, duties, imposts and excises" is exhaustive and embraces every conceivable power of taxation has never been questioned, or, if it has, has been so often authoritatively declared as to render it necessary only to state the doctrine. And it has also never been questioned from the foundation... that there was authority given...to lay and collect income taxes. **Again, it has never moreover been questioned that the conceded complete and all-embracing taxing power was subject, so far as they were respectively applicable, to limitations resulting from the requirements of Art. I, § 8, cl. 1, that "all duties, imposts and excises shall be uniform throughout the United States." and to the limitations of Art. I, § 2, cl. 3, that "direct taxes shall be apportioned among the several states," and Art. I, § 9, cl. 4, that "no capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken." In fact, the two great subdivisions embracing the complete and perfect delegation of the power to tax and the two correlated limitations as to such power were thus aptly stated by Mr. Chief Justice Fuller in Pollock v. Farmers' Loan & Trust Co., supra, at 157 U.S. 557:...**
>
> Brushaber, supra., 240 U.S. at 12-13 (**emphasis** and formatting added)

The bolded text above represents the portion of the relevant text from Brushaber which was chopped off to better support the Tax Court's opinion and which never made it to the minds of the Fifth Circuit to better inform their opinion. This more complete text clearly changes the passage's meaning from: 'Congress can tax in any manner it wants,' to 'Congress can tax in any manner it wants, within the limits of the Constitution.'

The other authorities cited by the Tax Court in their ruling in Parker (United States v. McCarty, 665 F.2d 596 (5th Cir. 1982) and Lonsdale v. Commissioner, 661 F.2d 71 (5th Cir. 1981))

are earlier similar cases appealed to the Fifth Circuit which were correctly decided because they lacked the benefit of the view of the Brushaber opinion and were decided strictly on the common use language of the 16th Amendment.

The Fifth Circuit's major contribution to fixing the misinterpretation of Brushaber as precedent comes from a passage in their Parker opinion where they said:

> The Supreme Court promptly determined in Brushaber v. Union Pacific Ry. Co., 240 U.S. 1, 36 S.Ct. 236, 60 L.Ed 493 (1916), that the sixteenth amendment provided the needed constitutional basis for the imposition of a **direct non-apportioned income tax.**
>
> Parker, supra., 724 F.2d at 471 (**emphasis** added)

This statement, while in agreement with the Tax Court's opinion, is totally and demonstrably untrue. Notice that the opinion text attributed to Brushaber is not a direct quote, but a paraphrase from the minds of the Fifth Circuit panel of three judges, based upon the misinterpretation of Brushaber promoted by the Tax Court.

To gain clarity and a true understanding of the misinterpreted Brushaber opinion, we must rely on a long exposition of the actual relevent text:

> We are of the opinion, however, that the confusion is not inherent, but rather arises from the conclusion that the Sixteenth Amendment provides for a hither to unknown power of taxation - that is a power to **levy an income tax which, although direct, should not be subject to the regulation of apportionment** applicable to all other direct taxes. And the far-reaching effect of this **erroneous assumption** will be made clear by generalizing the many contentions advanced in argument to support it (the erroneous assumption) as follows:
>
> (a) The Amendment authorizes only a **particular character of direct tax without apportionment**, and therefore if a tax is levied under its assumed authority which does not partake of the characteristics exacted by the Amendment, it is outside of the Amendment, and **is void** as a direct tax in the general constitutional sense because not apportioned.

(b) As the Amendment authorizes **a tax only upon incomes "from whatever source derived".**, the exclusion from taxation of some income of designated persons and classes in not authorized and hence the constitutionality of the law must be tested by the general provisions of the Constitution as to taxation, and thus **the tax is void** for want of apportionment.

(c) As the right to **tax "incomes from whatever source derived"** for which the Amendment provides must be considered as exacting intrinsic uniformity, therefore no tax comes under the authority of the Amendment not conforming to such standard, hence all of the provisions of the assailed statute must once more be tested solely under the general and preexisting provisions of the Constitution, causing the statute again **to be void** in the absence of apportionment.

(d) As the power conferred by the Amendment is new and prospective, the attempt in the statute to make its provisions retroactively apply **is void** because...

... but it clearly results that the proposition (the erroneous assumption) and the contentions (a, b, c, d above) under it, if acceded to, **would cause one provision of the Constitution to destroy another;** that is, they would result in bringing the provision of the Amendment exempting a direct tax from apportionment into irreconcilable conflict with the general requirement that all direct taxes be apportioned.

Moreover, the tax authorized by the Amendment, being direct, would not come under the rule of uniformity applicable under the Constitution to other than direct (indirect) taxes (duties, imposts and excises), and thus it would come to pass that 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 levied in another state or states.

This result, instead of simplifying the situation and making clear the limitations on the taxing power, which obviously the Amendment intended to accomplish, would create **radical and destructive changes to our constitutional system** and multiply confusion.

Brushaber, supra., 240 U.S. ar 11-12
(**emphasis**, (comments), and sentence separation added)

The Supreme Court's ruling in Brushaber successfully disconnected the excise taxable income from the non-excisable subject (the real or personal property), thus defeating that element of Pollock and fulfilling the purpose of the 16th Amendment. However, a fair and thorough reading of the Brushaber

opinion demonstrates that the 16th Amendment created no new Congressional taxing authority. The Court found that the income tax enacted in the Tariff Act of 1913 to be an excise tax and constitutional, but inferred that other income tax laws must each be tested for constitutionality. The Brushaber Court also reaffirmed that all direct taxes, including direct income taxes, must be apportioned. The Supreme Court called the notion of a **direct income tax without apportionment** an**"erroneous assumption"** and that such a construction of the 16th Amendment would be **"destructive"** to the Constitution this last statement being prophetic.

The canonizing of the misinterpretation of Brushaber in Parker as precedent became self-fulfilling; The Tax Court, using Fifth Circuit opinions, from cases that were decided without the benefit of Brushaber, which supported the Tax Court's opinion, supporting the **erroneous assumption**, conflated their opinions with an appropriate sounding passage from Brushaber, which supported the earlier Fifth Circuit opinions, and the result was the Fifth Circuit's opinion in Parker. Parker was now a new Fifth Circuit opinion, citing Brushaber as authority, which could now be used as precedent in supporting the **erroneous assumption**, a gross misinterpretation of Brushaber. With the circle now complete, the Fifth Circuit, and other courts, relied on Parker which carried an appropriate looking Supreme Court citation from Brushaber, the very case that defeats the **erroneous assumption** of a **direct income tax without apportionment.** Tragically, the Brushaber opinion will never have to be read again for this point of law, unless the Supreme Court agrees to grant

Mr. Roberts' petition for a writ of certiorari to correct the rupture of integrity caused by the Parker misinterpretation of this Court in Brushaber.

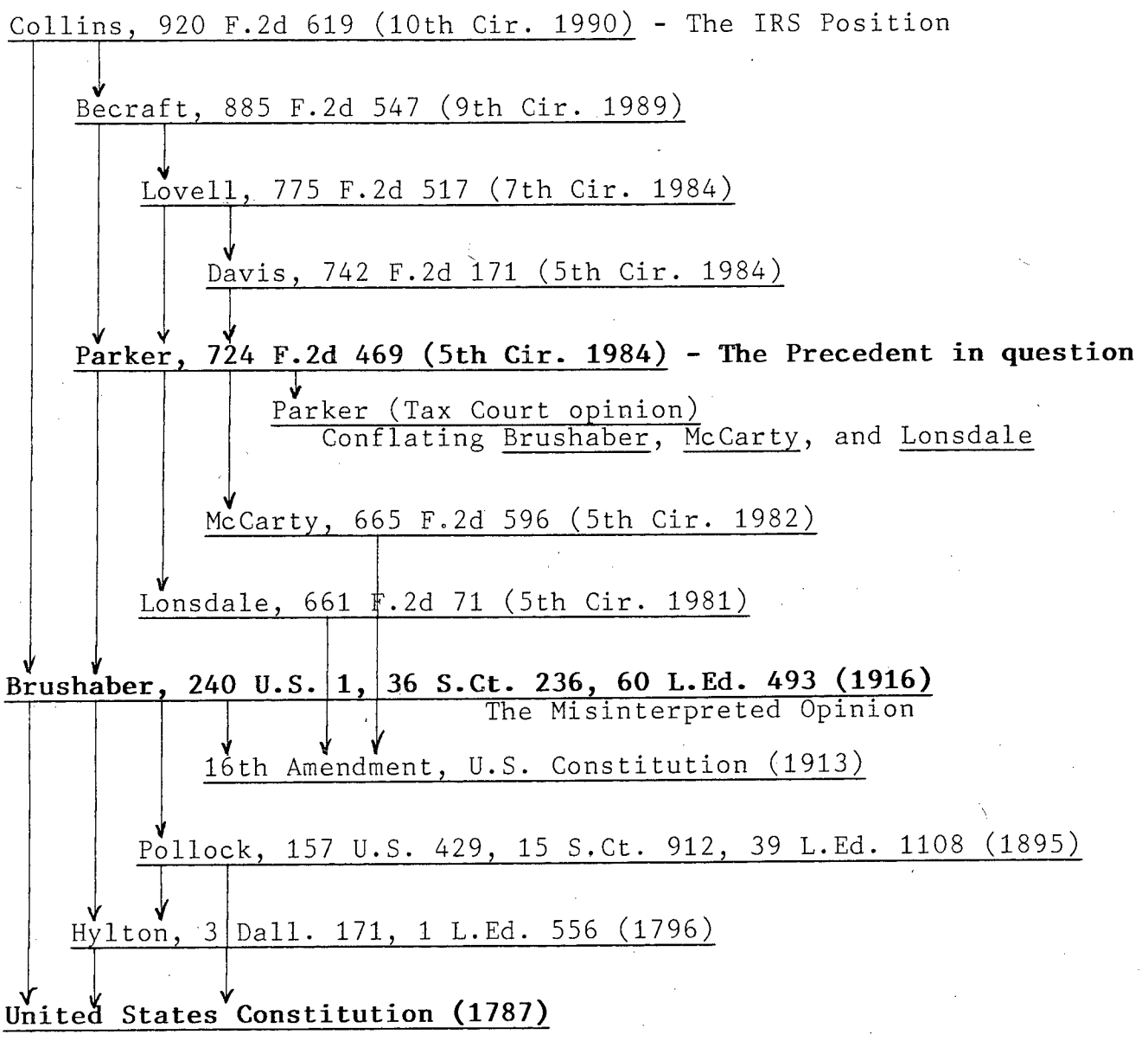
The flawed Parker opinion is the first case in a phalanx of well cultivated case law that leads to the Internal Revenue Service's (IRS) current position with regard to the need to apportion direct income taxes:

> The Law: The courts have both implicitly and explicitly recognized that the Sixteenth Amendment authorizes a **non-apportioned direct income tax** on United States citizens and that federal laws as applied are valid. In United States v. Collins, 920 F.2d 619 629 (10th Cir. 1990), cert. denied, 500 U.S. 920 (1991) the court cited Brushaber v. Union Pacific R.R., 240 U.S. 1 12-19 (1916), and noted that the U.S. Supreme Court has recognized that the "Sixteenth Amendment authorizes a **direct nonapportioned tax** upon United States citizens throughout the nation.
>
> www.irs.gov/businesses/small-businesses-self-employed/anti-tax-law-evasion-schemes-law-and-arguments-iv (**emphasis** added)

This progression of case law, from Parker to Collins, supporting **direct income taxes without apportionment** is depicted in figure 1 (page 12 below). While not exhaustive, figure 1 shows the key cases and their reliance back to Parker.

Year after year, thoughtful citizens read the words of Brushaber and were lead to challenge the unconstitutional concept of a **direct income tax without apportionment.** Each failed attempt added another case supporting the **erroneous assumption.** The outcry from confused citizens; reading the words of Brushaber and then the IRS position, has been an unbroken line of dispute, prompting the Parker court and other courts to threaten Rule 38 sanctions (see Fed.R.App.P, Rule 38) for pursuing the dispute in the appeals courts. Mr. Roberts joined this line of dispute and has paid the price with his freedom.

**Figure 1.**


Collins, 920 F.2d 619 (10th Cir. 1990) - The IRS Position
Becraft, 885 F.2d 547 (9th Cir. 1989)
Lovell, 775 F.2d 517 (7th Cir. 1984)
Davis, 742 F.2d 171 (5th Cir. 1984)
Parker, 724 F.2d 469 (5th Cir. 1984) - The Precedent in question
Parker (Tax Court opinion)
Conflating Brushaber, McCarty, and Lonsdale
McCarty, 665 F.2d 596 (5th Cir. 1982)
Lonsdale, 661 F.2d 71 (5th Cir. 1981)
Brushaber, 240 U.S. 1, 36 S.Ct. 236, 60 L.Ed. 493 (1916)
The Misinterpreted Opinion
16th Amendment, U.S. Constitution (1913)
Pollock, 157 U.S. 429, 15 S.Ct. 912, 39 L.Ed. 1108 (1895)
Hylton, 3 Dall. 171, 1 L.Ed. 556 (1796)
United States Constitution (1787)

Mr. Roberts was forced to act pro se during his sentencing hearing and for his appeal because his counsel refused to advance his dispute in open court. All of this disputation is the result of a lack of integrity in this point of law. Integrity being "the quality or state of being complete or undivided. syn see Honesty", (see Merriam-Webster Collegiate Dictionary, 11th Ed., pg 650, 2013) The dispute is triggered by the voracious and ever increasing demand for federal taxes, unchecked by the Constitution and assisted by the flawed Parker ruling and subsequent rulings standing on Parker. All of these cases (figure 1) support a **non-apportioned direct income tax**, or words to that effect, all citing Brushaber or Parker as authority.

There are also other, dissimilar but related, statements in other opinions that use Brushaber as a misinterpreted authority:

"All income taxes are excise taxes"
White Packing Co. v. Robertson, 89 F.2d 775 780 (4th Cir. 1937); Apache Bend Apartments, Ltd. v. United States, 702 F.Supp 1285 1296 (5th Cir. 1988)

"All income may be taxed, regardless the source"
Perkins v. Commissioner, 746 F.2d 1187 1188 (6th Cir. 1984); United States v. Francisco, 614 F.2d 617 619 (8th Cir. 1979); Hayward v. Day, 619 F.2d 716 (8th Cir. 1980)

"All income may be taxed without apportionment"
Broughton v. United States, 632 F.2d 706 707 (8th Cir. 1980); Pledge v. Commissioner, 749 F.2d 287 290 (5th Cir. 1981)

While all of the foregoing statements use Brushaber as authority, none of them accurately convey what is actually said,

never approaching near the words or intents of Brushaber about the 16th Amendment, income taxes, or apportionment. The positions of the foregoing statements all suffer from the same root flaw and have the same foretold destructive impact on the Constitution.

The Appeals Court ruling, which is the subject of this petition for a writ of certiorari, quoted the Parker court's lament that:

> [A]t this late date, it seems incredible that we should again be required to hold that the Constitution, as ammended, empowers the Congress to levy an income tax against any source of income, without the need to apportion the tax equally among the states, or to classify it as an excise tax applicable to specific categories of activities.
>
> Parker, supra., 724 F.2d at 471-72 (5th Cir. 1984)

While these words don't actually "hold" the position lamented, they simply identify the requirement to hold the lamentable position. It seems a small thing, but words have meaning and judges may find solice in couching a flawed position with technically meaningless words. Dispite the words, the action, in Parker, affirming the flawed judgement of the Tax Court carries the desired effect: the continuance of the status quo, a **direct income tax without apportionment**, inspite of the Supreme Court ruling in Brushaber actually "holding" the opposite position.

The Appeals Court ruling at issue identified Mr. Roberts' underlying legal argument foreclosed by Parker and, therefore, that Mr. Roberts' challenges lacked merit. This foreclosure and lack of merit are based upon the legal doctrine of stare decisis, or the rule of precedents, where one panel of the circuit court may not overrule the decision of another panel, as in Parker, unless there is some intervening contrary or superseding

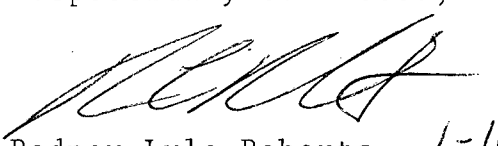
decision by the Supreme Court or the circuit court sits en banc.

In petitioning the Fifth Circuit Court for a hearing en banc, the circuit panel again rejected Mr. Roberts' request because there was already uniformity of the court's decision, although the related court decisions were uniformly based upon the misinterpretation of Brushaber. The court also determined that Mr. Roberts' petition for a hearing en banc did not involve a question of exceptional importance. One can understand the court's reluctance to disturb the national taxing status quo, but here Mr. Roberts offers the legal maxim "Fiat justitia pereat mundus," translated, "Let justice be done though the world perish." Mr. Roberts does not mean justice for himself; he is almost finished spending many months in prison for his belief, Mr. Roberts speaks of the justice of a rightly read United States Constitution. The Parker ruling and the related usurptation of authority by the Fifth Circuit Court of the Supreme Court's proper authority is damaging; Damaging to the rule of law, damaging to the proper checks and balances of the Constitution to restrain the over-reach of power by the Executive and Legislative branchs, damage to the confidence of ordinary citizens, like Mr. Roberts, who can read the words of Brushaber and Parker and see the disconnect, the lack of integrity.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Rodney Lyle Roberts
Petitioner, pro se

1-11-19
Date

Rodney Roberts, # 80689-380
FCC Oakdale II FPC
P.O.Box 5010
Oakdale, LA 71463