No. 23-11739

In the United States Court of Appeals For the Eleventh Circuit

Brian D. Swanson

Appellant – Appellant,

v.

Commissioner of Internal Revenue

Respondent – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

THE HONORABLE J. RANDAL HALL

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED PARTIES

Bran Dean. Swanson v. Commissioner, Internal Revenue, Case No. 23-11739

Pursuant to 11th Circuit Rule 26.1-1, Appellant Brian D. Swanson furnishes a complete list of the following:

1. David A. Hubert, Deputy Assistant Attorney General
2. Paul A. Allulis, U.S. DOJ, Tax Div., Appellate Section
3. Jason W. Blanchard U.S. Attorney, Augusta Ga
4. Jikky E. Thankachan, U.S. DOJ, Attorney for Appellee
5. Honorable J. Randall Hall, Chief Judge United States District Court

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STATEMENT REGARDING ORAL ARGUMENT

The proceeding involves a constitutional question of exceptional importance that has never been asked or decided: Has Puerto Rico become an "incorporated" Territory and does this change is status affect the collection of the Federal Income Tax?

For the foregoing reasons, an oral brief is justified in this case.

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STATEMENT OF JURISDICTION

The courts of appeals have jurisdiction of appeals from all final decisions of the district courts of the United States. 28 U.S.C. § 1291. Appeals from reviewable decision of the district courts are taken to the court of appeals for the circuit embracing the district. 28 U.S.C. § 1294.

STATEMENT OF THE ISSUES

This appeal presents these distinct legal questions:

(i) Has Puerto Rico become an "incorporated" Territory and fully subject to the Constitution's Uniformity Clause when collecting the Federal Income Tax?

(ii) Does the tax imposed by 26 U.S.C. § 1 violate the Uniformity Clause because public schoolteachers in Georgia must pay the income tax while public schoolteachers in Puerto Rico do not?

(iii) Did the District Court err when it dismissed Appellant's claim for refund of $6,151.63 for lack of subject matter jurisdiction?

(iv) Did the District Court err when it dismissed Appellant's claim for refund of $2,254.00 for failure to state a claim?

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STATEMENT OF THE CASE

Procedural History

The Appellant filed his amended complaint on September 23, 2022 (Doc 8), and Defendant filed a Motion to Dismiss on October 28, 2022 (Doc 9). Appellant opposed the motion on November 2, 2022 (Doc 10) to which the Defendant filed an additional Reply on November 16, 2022 (Doc 12). Appellant replied in kind on November 17, 2022 (Doc 13). The District issued its Order on the Motion to Dismiss (Doc 15) and the final judgment (Doc 16) on May 15, 2023. Appellant filed an amended Notice of Appeal on May 24, 2023. (Doc 19)

Statement of the Facts

The following facts are submitted in support of this appeal:

1. At the time of filing of his 2020 income tax return, Appellant was a resident of Evans, Ga.

2. During the taxable year 2020, Appellant was employed by the McDuffie County Board of Education as a high school teacher and received wages in the amount of $86,317.

3. Appellant filed a timely Form 1040, U.S. Individual Income Tax Return, for the 2020 taxable year, claiming a refund of $8,405.63.

4. Appellant received Notice CP23 dated May 10, 2021 from the IRS claiming a balance and amount due of $2,254.

5. Appellant responded to the Notice CP23 on 9 May, 2021 and disagreed with the changes made to his account and requested that it be corrected.

6. IRS sent LTR 2644C dated Feb 1, 2022 requesting more time to review Appellant's letter.

7. IRS sent LTR 96C dated Feb 16, 2022 informing Appellant that his account was corrected and his refund was less than expected.

8. Appellant's 2020 IRS transcripts dated March 15, 2022 confirm that his refund was reduced from $8,405.63 to $6,151.63.

Standard of Review

For a Motion to dismiss complaint for failure to state a claim, review is *de novo*. The court accepts all allegations of the complaint as true and construes the facts in the light most favorable to the plaintiff. Harry v. Marchant, 237 F.3d 1315, 1317 (11th Cir. 2001).

Questions of subject matter jurisdiction are reviewed de novo. Pillow v. Bechtel Const., Inc., 201 F.3d 1348, 1351 (11th Cir. 2000).

For questions of law, review is *de novo*, *Collier v. Trupin,* 177 F.3d 1184, 1193 (11th Cir. 1999). The Appeals Court owes no deference to any lower court decision on questions of law. *Horton v. Zant,* 941 F.2d 1449 (11th Cir 1991).

SUMMARY OF ARGUMENT

Puerto Rico's status has changed from an "unincorporated" Territory to an "incorporated" Territory. The Uniformity Clause of the Constitution is fully applicable to Puerto Rico when collecting the Federal Income Tax, which means that American citizens in Georgia cannot be forced to pay more income tax than American citizens in Puerto Rico. The tax is not uniform throughout the United States and therefore, Appellant must be refunded the $2,254.00 in tax that he has paid because the tax is constitutionally void.

The District Court's erred when it dismissed this claim for failure to state a claim.

Appellant submitted a valid income tax return for tax year 2020, which constitutes a properly executed refund claim for $6,151.63. He calculated his income tax liability correctly according to all the statutes and requirements in Subtitle A of the Tax Code. IRS correspondence and official 2020 transcripts confirm that Appellant self-assessment is correct and that he is due a refund.

The District Court erred when it dismissed this claim for lack of subject matter jurisdiction.

ARGUMENT

I. THE DISTRICT COURT'S DISMISSAL FOR LACK OF JURISDICTION IS IN ERROR.

A. The District Court failed to consider facts and inferences in the light most favorable to the Appellant.

Appellant has properly invoked the District Court's jurisdiction and established a plausible claim for refund.

Appellant submitted a valid income tax return for tax year 2020, which constitutes a properly executed refund claim for $6,151.63. The District Court did not consider all facts alleged in the complaint in the light most favorable to

Plaintiff and therefore, the case was improperly dismissed. See Belanger v. Salvation Army, 556 F.3d 1153 1155 (11th Cir. 2009)

Appellant submitted with his argument, correspondence between him and the Internal Revenue Service ("IRS"), which shows that the IRS performed an audit of Appellant's account and concluded that he was due a refund, though at a slightly reduced amount. (Exhibits 1-5) The District Court did not consider these facts in its decision, although it chose to consider exhibits provided by the Defendant. (Order at 3, footnote 1) (Exhibits 6-7) This third-party reporting is not, on its own, evidence of a tax liability.[1] The IRS did not assert that Appellant's tax return was frivolous or improperly executed. The tax return was treated as valid in all respects and Appellant's official 2020 IRS Transcript shows the refund was reduced from $8,405.63 to $6,151.63 in accordance with the IRS correspondence, which confirms that a tax refund is due for tax year 2020.

To this date, the refund has not been received and the IRS has not sent any correspondence contradicting the finding in its audit. This suit is based on the IRS determination that a refund is due and the fact that no refund has been received at the time of this appeal.

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[1] Estate of Gryder v. Commissioner, T.C. Memo. 1993-141, 1993 WL 97427, 65 T.C.M. (CCH) 2298, T.C.M. (RIA) 93,141 (1993)

Appellant's official transcript and correspondence from the IRS were not considered by the District Court. This evidence is sufficient to establish a plausible claim for refund and to invoke the District Court's jurisdiction. This case was improperly dismissed and This Court should allow the case to proceed.

B. Appellant submitted a properly executed 2020 tax return and a valid claim for refund.

Appellant reported all income on his 2020 Form 1040 that the statutes in Subtitle A require him to report as "gross income." All wages are income and all income are taxable, but all wages are not required to be reported as "gross income" in Subtitle A of the Tax Code. The District Court's ruling seems to confuse the requirements of Subtitle A with the requirements of Subtitle C of the Tax Code and wrongly judges on how much wages are required to be reported as "gross income" in chapter 1. Appellant submitted a properly executed tax return that constitutes a valid refund claim and the District Court has subject matter jurisdiction in this case.

The District Court's order states that Appellant's "wages as a public school teacher are subject to income tax." (Order at 7) This statement is unequivocally true, and Appellant makes not argument to the contrary. The District Court goes on to say that, "Plaintiff's wages of $86,317 from McDuffie County Board of Education were reportable as wage income" (Order at 8) and this is where the

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District Court errs. What is reportable as "gross income" is controlled and determined in Subtitle A of the Tax Code, not in Subtitle C.

There are at least two different wages in the Tax Code and this creates confusion over how much wages to report as gross income in chapter 1. "Wages" and wages are two different terms. With quotes, "wages" is a precise legal term defined in a specific chapter of the Tax Code, but without quotes, wages is a generic dictionary term. Chapter 1 does not include "wages," but it does include wages.

"Wages" is defined in Subtitle C of the Tax Code. In chapter 21, the definition of "wages" in found in § 3121(a) and reads as follows:

> ***For purposes of this chapter***, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash

"For the purpose of this chapter" is a caveat that cannot be ignored. This chapter is known as the "Federal Insurance Contributions Act,"[2] and this definition of "wages" is used to determine how much Social Security and other federal insurance an employee must pay. The Social Security tax is imposed on "all remuneration for employment." This definition of "wages" applies only in chapter 21 and has no

[2] 26 U.S.C. § 3128

legal force in chapter 1 and is not used to determine how much "compensation for services" must be reported as "gross income."

There is also a definition of "wages" found in chapter 24. The definition of "wages" is found in § 3401(a) and reads as follows:

> ***For purposes of this chapter***, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash

"For the purpose of this chapter" is a caveat that cannot be ignored. In chapter 24, known as "Collection of Income Tax at Source on Wages," this definition of "wages" is used to determine how much an employer must deduct and withhold from an employee's "wages." Withholding is based on "all remuneration for services," and is made in anticipation of a future tax liability. Again, this definition of "wages" is only applicable in chapter 24 and is not used to determine an actual income tax liability in chapter 1.

To calculate "taxable income," a taxpayer must look to chapter 1 of the Tax Code. Chapter 1 is where "taxable income" and "gross income" are calculated. Chapter 1 is where a taxpayer's actual income tax liability is determined. "Taxable income" is calculated using the following statutes: 26 U.S.C. § 1, § 63, § 61(a), and § 83. It is also helpful to use 26 C.F.R. § 1.61-1. All of these statutes and regulations are found in Subtitle A, chapter 1.

When calculating "gross income" in Subtitle A, it is necessary to understand that the term "wages" is not defined in chapter 1 of the Tax Code. To the extent that wages (without quotes) are used to calculate an income tax liability, wages must be subject to the statutes and requirements of chapter 1.

"Gross income" is defined in Subtitle A, chapter 1. 26 U.S.C. § 61(a) reads, in part, as follows:

> **(a)** GENERAL DEFINITION: **Except as otherwise provided in this subtitle**, gross income means all income from whatever source derived, including (but not limited to) the following items:
>
> **(1)** Compensation for services, **including fees, commissions, fringe benefits, and similar items;** **(emphasis added)**

"Except as otherwise provided in this subtitle" is a caveat that cannot be ignored. This caveat confirms that "gross income" is calculated exclusively in Subtitle A, and terms and definitions outside of Subtitle A are not used here. "Gross income" is calculated using "compensation for services," not "wages" from Subtitle C. This caveat puts the taxpayer on notice to search the subtitle for amplifying information to correctly determine the meaning of "compensation for services." The logical place to search for amplifying information is the implementing regulation 26 C.F.R. § 1.61-1, which reads:

> **§ 1.61-1 Gross income.**
>
> **(a)** ***General definition.*** Gross income means all income from whatever source derived, **unless excluded by law**.

> **(b)** ***Cross references.*** Cross references to other provisions of the Code are to be found throughout the regulations under section 61. The purpose of these cross references is to direct attention to the more common items which are included in or excluded from gross income entirely, or treated in some special manner. **To the extent that another section of the Code or of the regulations thereunder, provides specific treatment for any item of income, such other provision shall apply notwithstanding section 61** and the regulations thereunder. The cross references do not cover all possible items. **(emphasis added)**

"Unless excluded by law" is a caveat that cannot be ignored. Taxpayers must search the subtitle to determine which income is included in, and which income is excluded from, "gross income." 26 U.S.C. § 83 provides specific treatment for the item of income called "compensation for services" and this provision applies notwithstanding section 61. Taxpayers must apply § 83 to correctly report their "compensation for services" as "gross income."

26 U.S.C. § 83 is part of chapter 1 of the Tax Code where "gross income" is calculated. §83 explains precisely what to include as gross income. § 83 reads:

> (a) GENERAL RULE: If, in connection with the **performance of services, property is transferred to any person** other than the person for whom such services are performed, **the excess of—**
>
> > **(1) the fair market value of such property** (determined without regard to any restriction other than a restriction which by its terms will never lapse) at the first time the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier, **over**

> (2) **the amount (if any) paid for such property, shall be included in the gross income of the person who performed such services** in the first taxable year in which the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever is applicable. The preceding sentence shall not apply if such person sells or otherwise disposes of such property in an arm's length transaction before his rights in such property become transferable or not subject to a substantial risk of forfeiture.

In chapter 1, "compensation for services" is measured as a certain amount of property that is transferred to the taxpayer. This section applies to any and all property transferred in connection with "performance of services." In Section 83, "property" means everything that the law recognizes as property. Numerous federal regulations embrace the all-encompassing nature of property and that it includes, among other things, money. For example, 31 C.F.R. states:

> **§ 536.310 Property; property interest.**
>
> The terms *property* and *property interest* include, but are not limited to, ***money***, checks, drafts, bullion, bank deposits, savings accounts, debts, indebtedness, obligations, notes, guarantees, debentures, stocks, bonds, coupons, any other financial instruments, bankers acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership or indebtedness, letters of credit and any documents relating to any rights or obligations thereunder, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendors sales agreements, land contracts, leaseholds, ground rents, real estate and any other interest therein, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling

> agreements, **services of any nature whatsoever**, contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent.

Similar references equating money and property can be found in 31 C.F.R. §515.311, and 31 C.F.R. §595.310. In chapter 1, 26 U.S.C. § 317 states:

> **(a)PROPERTY**
> For purposes of this part, the term "property" means **money**, securities, and any other property; except that such term does not include stock in the corporation making the distribution (or rights to acquire such stock).

Any compensation received for "services of any nature whatsoever" is considered property in chapter 1 and is controlled by § 83 of the Tax Code. § 83 controls how much property is reportable as "gross income." Appellant determined his "gross income" as follows: Appellant performed the service of a public schoolteacher for McDuffie County Board of Education; compensation for services includes Appellant's wages of $86,317; his wages were paid in money; money is property; property is controlled by § 83 of the Tax Code; property in excess of the fair market value must be reported as gross income. This is the methodology for determining "gross income" in chapter 1. The District Court did not follow this methodology when it declared, "Plaintiff's wages of $86,317 from McDuffie County Board of Education were reportable as wage income." The District Court is using "wages" from Subtitle C and wrongly concludes that "all remuneration for

employment" is reportable as "gross income." The Social Security tax is measured by the amount of "wages," but the income tax is not measured by the amount of "wages" a taxpayer earns. In Subtitle A, a wage is property that is transferred in connection with performance of services and only the "excess of the fair market value" of the property is reportable as "gross income." The Tax Code provides no other way to calculate "gross income" from "compensation for services" in Subtitle A. Wages are included in gross income as property according to requirements of chapter 1, not the requirements of chapter 21 or chapter 24. In Subtitle A, "compensation for services" is a measure of the "property" transferred, and not a measure of "wages" or "all remuneration for employment" from Subtitle C.

Appellant's salary of $86,317 is the fair market value for his service as a public schoolteacher based on the Supreme Court's determination in *United States v. Cartwright*, 411 U.S. 546 (1973):

> The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.
>
> The willing buyer-willing seller test of fair market value is nearly as old as the federal income, estate, and gift taxes themselves and is not challenged here.

It is said here that the willing buyer-willing seller test for fair market value is as old as the income tax itself, but how many use this formula to calculate their "gross

income"? Appellant would guess not many, because taxpayers are not taught to calculate their income tax liability using the statues. Both Appellant and his employer willingly agreed to the amount of his salary. Appellant's salary of $86,317 satisfies the willing buyer-willing seller test for fair market value according to the Supreme Court's determination.[3] This salary is the property that was transferred to Appellant in connection with performance of services according to the statutes and rules in chapter 1. His wages of $86,317 are the fair market value of the property and this income excluded by law in accordance with 26 C.F.R. § 1-61-1; this income excluded from "gross income" because it is not required to be included. In chapter 1, "compensation for services" is property and the "excess of the fair market value" of the property must be reported as "gross income," but the fair market value is not reported.

Chapter 1 makes it clear that some wages are includible in gross income and some wages are not. §32(c)(2) reads:

> **(A)**The term "earned income" means—
> **(i)** wages, salaries, tips, and other employee compensation, ***but only if*** such amounts are includible in gross income for the taxable year

"But only if" is a caveat that cannot be ignored. It is a condition that eliminates all other options. Wages only qualify as "earned income" if they are includible in

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[3] Many Treasury Regulations say the same thing. For example, 26 CFR § 20.2031-1(b) "Valuation of property in general," includes "The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts."

gross income. If **all wages** are **always includible** in gross income, then § 32 is a meaningless and nonsensical statute. This statute confirms that some wages qualify as gross income, and some wages do not. Wages that are judged to be in excess of the fair market value according to the statutes in chapter 1 will be includible in gross income. Wages that are merely equal to the fair market value are not includible in gross income. The District Court ruling seems to assume that all wages are includible in gross income, which is an incorrect assumption because it is using "wages" from Subtitle C in its order. In Subtitle C, "wages" means "all remuneration for employment." In Subtitle A, a wage is property that is transferred in connection with performance of services. While Congress may tax everything including all wages, all income and all property, Congress exercised its discretion in chapter 1 and only required property (wages, money, bullion, stocks, etc.) that is in excess of the fair market value to be reported as "gross income."

The Social Security tax is measured in "wages," but the income tax includes more than just "wages." The reason is that the subjects of each tax are different. In Subtitle C, the Social Security tax is literally imposed on the "wages" § 3101(a) reads:

> **(a) OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE**
>
> In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to **6.2 percent of the wages** (as defined

> in section 3121(a)) received by the individual with respect to employment (as defined in section 3121(b)).

The Social Security tax is measured in "wages." The tax is imposed on 6.2 percent of the "wages" and therefore, "wages" is the subject of the tax. But, in Subtitle A, the tax is not imposed on "wages." § 1 reads:

> **(c) UNMARRIED INDIVIDUALS**
>
> There is hereby imposed on the **taxable income** of every individual (other than a surviving spouse as defined in section 2(a) or the head of a household as defined in section 2(b)) who is not a married individual (as defined in section 7703) **a tax** determined in accordance with the following table:

In Subtitle A, "taxable income" is the subject of the tax and it includes more than just "wages." It includes all "property" received for performance of services including money, stocks, bonds, checks, drafts, bullion and "services of any nature whatsoever," etc. In accordance with the statues in chapter 1, only the "excess of the fair market value" of the property is includible in "taxable income." "Compensation for services" is included in the income tax as a measure of property and the amount of property being taxed is controlled by § 83 of the Tax Code.

In summary, the Social Security tax in Subtitle C is imposed on a different dollar amount than the Income Tax in Subtitle A. The methodology for determining the Social Security tax is different than the methodology for determining the Income Tax. In Subtitle C, the Social Security tax is imposed on

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"wages," which means "all remuneration for employment." In Subtitle A, a wage is property that is transferred in connection with performance of services and only the "excess of the fair market value" is required to be reported as "gross income." Appellant followed this methodology and determined that none of his wages exceed the fair market value and therefore he has no "compensation for services" to report as "gross income." Therefore, he reported zero dollars on his Form 1040.

The District Court's order relied heavily on third-party reporting of Appellant's earnings according to footnote 1 (Order at 3) (Exhibits 6-7) However, this is merely the raw data. The U.S. District Court in the Eastern District of Washington noted that third-party reports are not equivalent to a tax liability

> Defendants are correct that the 1099s, on their own, do not create tax liability. Form 1099 is an informational return, filed by a third party to the relationship between the IRS and the taxpayer, which reports income as that third party believes it to be. The Internal Revenue Code makes it clear that a Form 1099 is not the final word on what a taxpayer's taxable income is ... The Tax Court has held that a Form 1099 is insufficient, on its own, to establish a taxpayer's taxable income. See Estate of Gryder v. Commissioner, T.C. Memo. 1993-141, 1993 WL 97427, 65 T.C.M. (CCH) 2298, T.C.M. (RIA) 93,141 (1993), citing Portillo v. Commissioner, 932 F.2d 1128 (5th Cir.1991).[4]

Information returns in the form of W2s and 1099s do not create a tax liability. But this is the only information the District Court used to determine that Appellant's

[4] Daines v. Alcatel 105 F. Supp. 2d 1153 (E.D. Wash. 2000)

$86,317 was reportable. The statutes in chapter 1 must be applied to the raw data to determine how much of this property must be reported as "gross income." The District Court did not apply the statutes in chapter 1 to Appellant's earnings. While the District Court is correct that Appellant's "wages as a public school teacher are subject to income tax," his wages are subject to income tax according to a different set of statutory requirements than the social security tax; his wages are subject to income tax as property not as "all remuneration for employment." All of Appellant's $86,317 in "wages" are subject to the social security tax in Subtitle C, but only a fraction of his wages are subject to the income tax in Subtitle A. For 2020, Appellant believes that fraction is zero. If the fraction is greater than zero, the District Court did not explain how much of Appellant's wages qualify as "gross income" according to the statutes in chapter 1 and the District Court did not provide any statutory justification for overriding the IRS's conclusion that Appellant is due a refund of $6,151.63.

Appellant followed the statues in chapter 1 of the Tax Code in a step-by-step manner using 26 U.S.C. § 1, § 63, § 61(a), § 83 and 26 C.F.R. § 1.61-1 to calculate his income tax liability. He performed his duty to pay income tax in good faith and his calculations are true and correct to the best of his knowledge. Appellant is a pro se litigant with no formal or informal legal training, but he analyzed his duty to pay income tax according to the statutes to the best of his ability. The correspondence

that Appellant received from the IRS confirms that a tax refund of $6,151.63 for overpaid tax is due for tax year 2020 and that Appellant's self-assessment is correct. Therefore, Appellant properly executed an income tax return that constitutes a refund claim and the District Court has subject matter jurisdiction to hear this case under Rule 12(b)(1).

II. APPELLANT HAS STATED A CLAIM ON WHICH RELIEF MAY BE GRANTED.

A. Public schoolteachers in Georgia cannot be forced to pay more income tax than public schoolteachers in Puerto Rico under the Constitution's Uniformity Clause.

Appellant seeks a refund of $2,254.00 in taxes paid because the tax imposed by 26 US.C. §1 is not uniform throughout the United States and is void.[5] The District Court issued a judgment that Appellant's uniformity argument is frivolous. This judgment is difficult to understand because Appellant provided a detailed explanation why he believes that Puerto Rico has become an "incorporated" Territory and why this change in status affects the collection of the Federal Income Tax. This belief is based on a combination of specific actions to advance statehood for Puerto Rico and current events. To Appellant's knowledge, whether Puerto Rico has crossed the threshold for becoming an "incorporated" Territory has never been presented to any court. The District Court cited a decision by the Tax Court

[5] 2020 IRS Transcripts (Exhibit 5)

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as its only authority on this important question regarding the Uniformity Clause of the Constitution.[6] This decision by the Tax Court does not address any of the issues that Appellant argued in his opposition to dismiss the suit. The District Court erred in judging that Appellant failed to state a claim according to Rule 12(b)(6).

Puerto Rico has become an "incorporated" Territory and 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 uniform throughout the United States and is void.

Puerto Rico had been considered an "unincorporated" Territory, 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.

Puerto Rico was acquired by the United States after the Spanish-American War in 1898. A series of cases known as 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. The following

[6] Buchbinder v. Comm'r, 60 T.C.M. (CCH) 1421 (1990), (Order at 9)

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are some of the criteria that have been used to identify an "unincorporated" Territory:

a. An "unincorporated" Territory is one that is, "inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought," and therefore, "the administration of government and justice according to Anglo-Saxon principles may ***for a time*** be impossible. *Downes v. Bidwell* (1901)
b. An "incorporated" Territory is one that is "surely destined for statehood." *Boumedienne v. Bush* (2008)
c. An "unincorporated" Territory is one that is "not clearly destined for statehood." *United States v. Verdugo-Urquidez* (1990)
d. "In some cases, Congress might express an intention to 'incorporate' a Territory into the United States at a future date; in a territory like that the Constitution must apply fully and immediately." *United States v. Vaello Madero* (2022)

Puerto Rico no longer satisfies any of these criteria for an 'unincorporated' Territory.

Puerto Rico was acquired in 1898. A reasonable person may conclude that after 125 years enough time has passed that the people of Puerto Rico are no longer considered alien races incompatible with government according to Anglo-Saxon principles. *See Downes.* The idea of incorporation is based on bigotry and racism: The people of Puerto Rico are not good enough to be protected by our Constitution. This flawed idea should be overruled.

Puerto Rico is on the path to statehood. The people of Puerto Rico acquired

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U.S. Citizenship in 1917.[7] Congress officially approved Puerto Rico's constitution in 1952.[8] The people of Puerto Rico formally petitioned for statehood in 2020.[9] Finally, bills have been submitted to Congress to consider admitting Puerto Rico into the union as a state.[10] 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." *See Balzac.* This epiphany requires that, "the Constitution must apply fully and immediately."[11] If the actions taken thus far to advance statehood for Puerto Rico do not officially "incorporate" the Territory, then they do, "express an intention" to incorporate the territory at a future date, and in either case, "the Constitution must apply fully and immediately." Puerto Rico appears to be destined for statehood and it is therefore, an "incorporated" Territory

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[7] Public Law 64-368, 39 Stat. 951; Section 5 (Exhibit 9)
[8] Public Law 82-447, 66 Stat. 327 (Exhibit 10)
[9] HR 1522 (2021) (Exhibit 11)
[10] HR 4901 (Exhibit 12) HR 1522 (Exhibit 11)
[11] Justice Gorsuch, concurring *Vaello v. Madero* (2022) (Exhibit 8)

and is fully subject to the Constitution's Uniformity Clause when collecting the Federal Income Tax.

Analyzing the logical inverse yields the same result. An "unincorporated" Territory is "not clearly destined for statehood." See *Verdugo-Urquidez*. 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. An "unincorporated" Territory cannot be considered for statehood; there can be no bills in Congress to admit an "unincorporated" Territory as a state. Simply considering a territory for statehood voids its status as an "unincorporated" Territory. It is unequivocally true that Puerto Rico does not qualify as an "unincorporated" Territory because it is being considered for statehood. The only conclusion is that Puerto Rico has become an "incorporated" Territory and is fully subject to the Constitution's Uniformity Clause when collecting the Federal Income Tax.

Justice Gorsuch's concurring opinion in *United States v. Vaello Madero* suggests that "unincorporated" Territories do not exist in the Constitution and that the Insular Cases have been flawed from the start. He asserts:

> The flaws in the Insular Cases are as fundamental as they are shameful. Nothing in the Constitution speaks of "incorporated" and "unincorporated" Territories. Nothing in it extends to the latter only certain supposedly "fundamental" constitutional guarantees. Nothing in it authorizes judges to engage in the sordid business of segregating Territories and the people who live in them on the basis of race, ethnicity, or religion.

Whether Puerto Rico is an incorporated or an unincorporated Territory is likely irrelevant because it is destined to be decided that these terms have no meaning in the Constitution. The decisions in these cases are flawed and the Court knows it.

The Court is aware of the problems created by the Insular Cases and is looking for an appropriate case to overturn these embarrassing decisions. This may be the case. The relevant flaw in this case is that the Insular Cases have created a tax haven in Puerto Rico where American citizens can avoid their duty to pay income tax, which results in the injustice that Appellant must pay more income tax than other American citizens based on his geographical location. The income tax was not in force when these cases were decided and the effect of creating an unfair tax system did not influence these decisions. Appellant does not believe that it was the intent of these decisions to allow a tax on personal earnings that some American citizens must pay while other American citizens do not. Nor was it the intent to create a domestic tax haven to which some American citizens may flee to evade their responsibility to pay the income tax and support the government's finances. It is time to correct this error.

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The government is also aware of the problems created by the Insular Cases. The Department of Justice's analysis of H.R. 1522 (Exhibit 13) acknowledges that the tax rules in Puerto Rico are not in harmony with the Uniformity Clause. On page 7 of its analysis it states, "Under current federal tax and bankruptcy laws, for example, Puerto Rico is treated differently than the states … These uniformity requirements have not applied to Puerto Rico given its status as an unincorporated territory, but would become applicable upon Puerto Rico's becoming a state." The government thinks that it is possible for Puerto Rico to avoid "incorporation" and jump straight to statehood, "H.R. 1522 seems designed to postpone incorporation until the effective date in the President's declaration, at which time Puerto Rico would skip past the intermediate step of being considered an incorporated territory and be admitted directly into the Union as a state." (Exhibit 13 at 9) This is not possible because the mere consideration for statehood voids Puerto Rico's status as an "unincorporated" Territory as already analyzed. The government wants to wait until Puerto Rico becomes a state to correct these known errors and expresses support for a transition period to make the corrections, "We nevertheless believe that Congress should be able to enact legislation providing for a delayed or gradual application of the Constitution's uniformity requirement." (Exhibit 13 at 8) The time for a transition period has long passed. The government could have been proactive in correcting these known errors, but it has chosen to procrastinate. Its

procrastination comes with a price given the advent of Appellant's complaint. The Uniformity Clause applies to Puerto Rico before it becomes a state specifically to provide for the gradual application of the requirement for which the government advocates. The Uniformity Clause applies when Puerto Rico becomes an "incorporated" Territory. Nay, the Uniformity Clause applies at the mere "intention to incorporate" at a future date. It could be argued that Congress expressed an intention to incorporate Puerto Rico when it granted American citizenship to the people of Puerto Rico in 1917. Perhaps the intention to incorporate was expressed when Congress approved Puerto Rico's constitution in 1952. Perhaps the many referendums held in Puerto Rico in 1967, 1998, 2012, 2017 and 2020[12] to consider statehood expressed an intention to incorporate the Territory. Incorporation may have occurred when Puerto Rico formally petitioned for statehood in December 2020. Regardless, incorporation was completed no later than the introduction in Congress of H.R. 4901 on October 29, 2019 to consider statehood for Puerto Rico. None of these facts by themselves are an "express declaration" that Puerto Rico is incorporated, but Appellant believes that they express "an implication so strong as to exclude any other view," as explained in *Balzac v. Porto* Rico (1922). Puerto Rico is an "incorporated" Territory now and the "Constitution must apply fully and immediately," including the application of

[12] July 23, 1967; December 13, 1998; November 6, 2012; June 11, 2017; November 3, 2020;

the Uniformity Clause to the collection of the Federal Income Tax. The transition period to bring Puerto Rico's tax and bankruptcy laws into harmony with the Constitution is now, not after the territory becomes a state.

Appellant believes that Puerto Rico has been an "incorporated" Territory ever since Congress approved its constitution in 1952. When the western territories were being settled, writing a constitution was an important step toward statehood after the territory was organized and the requisite number of settlers resided in the territory. Puerto Rico has completed every step except final approval in what is known as the "Tennessee Plan" for admitting new states.[13] The very first step in that plan is to write a constitution. The door to statehood was opened to Puerto Rico once its constitution was approved by Congress. The proposition, "Puerto Rico is not clearly destined for statehood" has been false ever since that constitution was approved and from that moment, Puerto Rico no longer qualified as an "unincorporated" Territory. Puerto Rico has been "incorporated" and subject to the Constitution's Uniformity Clause when collecting the Federal Income Tax since 1952.

Is it possible that Puerto Rico has become an "incorporated" Territory secretly, under the radar – so to speak – without it being generally acknowledged? The reason for Puerto Rico's stealthy incorporation is that nobody really knows

[13] In Focus, Congressional Research Service, July 29, 2022 (Exhibit 14)

what these terms mean and it seems that nobody has been vigilant to consider whether the actions by Congress, both past and present, have had the effect of incorporating Puerto Rico. Justice Gorsuch notes:

> What provision of the Constitution could any judge rightly declare less than fundamental? On what basis could any judge profess the right to draw distinctions between incorporated and unincorporated Territories, terms nowhere mentioned in the Constitution and which in the past have turned on bigotry? There are no good answers to these bad questions.

Puerto Rico has quietly become incorporated because nobody has been paying much attention to the consequence of considering Puerto Rico for statehood given that the meanings of "incorporated" and "unincorporated" are shockingly imprecise. Appellant may be the first to recognize that the status of Puerto Rico has changed and may be the first to formally challenge its status.

The Territory Clause of the Constitution has been often cited as the authority for the differing tax policies in the Territories. This view is incorrect. The Territory Clause grants to Congress the power to make "needful rules" 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 power of taxation. The only reason that Puerto Rico has been excluded from these rules is because of its bizarre and constitutionally-questionable status as an "unincorporated" Territory. This creates

an unworkable contradiction because if neither the rule of apportionment nor the rule of uniformity apply in Puerto Rico, then Congress would have no power to collect any tax in the Territory. The High Court observed in *Loughborough v. Blake*:

> 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 flawed theory of "unincorporated" Territories has permitted the unconstitutional violation of the Uniformity Clause when collecting the Federal Income Tax. This flawed theory no longer applies to Puerto Rico because it is now an "incorporated" Territory.

Some of the analysis in this brief is based on Justice Gorsuch's concurring opinion on *United States v. Vaello Madero* (2022). The majority opinion in that case still permits Puerto Rico to be treated differently based on current precedent.

As Justice Gorsuch noted, that decision was based on the "shared premise" of both parties that Puerto Rico is an "unincorporated" Territory. The majority decision reflects that shared premise. Appellant's argument rejects that premise and argues that Puerto Rico's status has changed and it is now an "incorporated" Territory. Appellant's argument changes the rules of the income-tax game. Justice Kavanaugh noted in the majority opinion that:

> And if this Court were to require identical treatment on the benefits side, residents of the States could presumably insist that federal *taxes* be imposed on residents of Puerto Rico and other Territories in the same way that those taxes are imposed on residents of the States.

This is precisely what Appellant demands. All American citizens must be taxed uniformly when collecting the Federal Income Tax, whether those citizens live in the Territories or the States. Whether Appellant is correct that Puerto Rico has become an "incorporated" Territory or whether Justice Gorsuch is correct that the Insular Cases are fundamentally flawed and should be overruled, the result is the same: Puerto Rico is fully subject to the Uniformity Clause when collecting the Federal Income Tax.

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. Justice Gorsuch laments, "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 the courts to overrule the Insular Cases 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. Therefore, Appellant has stated a valid claim on which relief may be granted in accordance with Rule 12(b)(6).

B. Where is Puerto Rico?

The scrutiny of Puerto Rico will open a Pandora's Box of income tax errors that must be resolved.

First, because of the confusion surrounding Puerto Rico's status, the Tax Code has usurped the authority to decide when the Territories are part of the United States and when they are not. The Tax Code does not have this authority. In 26 U.S.C. §3121, the definition of "United States" reads:

> **(e)(2) UNITED STATES**
> The term "United States" when used in a geographical sense includes the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

In this definition, the Territories are part of the geographical sense of the "United States." However, in 26 U.S.C. § 7701, definition of "United States" reads:

> **(a)(9) UNITED STATES**
> The term "United States" when used in a geographical sense includes only the States and the District of Columbia.

In this definition, the Territories are not part of the geographical sense of the "United States." This is impossible. Defining the "geographical sense" of the United States is invoking the Uniformity Clause because duties, imposts and excises must be collected with geographical uniformity. In Subtitle C, under §3121, the Uniformity Clause applies to Puerto Rico, and the residents of Puerto Rico must pay the FICA taxes. But in § 7701, for the rest of the Tax Code, the Uniformity Clause does not apply and the residents of Puerto Rico do not have to pay the income tax. The Tax Code cannot alter when the Constitution applies to the Territories and when it does not.

Whether the Territories are part of the United States is determined by the Constitution, not the statutes. If the Territories are part of the United States, then they must be part of the United States for the whole Tax Code. If the Territories are not part of the United States, then they are excluded for the whole Tax Code. The Tax Code does not have the power to alter the Territories relationship to the United States. This error must be corrected.

Second, in Chapter 1, Subchapter N, Part 3 of the Tax Code Puerto Rico is considered to be "without the United States," the same as France. § 911 applies to

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American citizens who have income from within a foreign country. Does "without the United States" mean "within a foreign country?" If it does, how can Puerto Rico be within a foreign country and does Congress have the authority to collect taxes inside a foreign country?

In *McCullough v. Maryland*, 17 U.S. 316 (1819), The Supreme Court explained that a state's taxing authority is co-extensive with jurisdiction:

> It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a State extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.
> The sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission.

These principles apply equally to the United States as well as to all the individual States, and to all nations of the world. Can any sovereign state collect taxes within another sovereign's territory? Does Congress have the power to collect taxes beyond its jurisdiction? Do the economic activities in France exist by the authority of the United States or are they introduced by its permission? If the sovereign power of the United States does not extend to objects in France, then it is supposed to be self-evident that these objects are exempt from taxation. By what authority does the IRS collect taxes on worldwide income?

The Constitution grants to Congress the power to collect taxes by either the rule of apportionment or the rule of uniformity?[14] Which of these two rules operate in France? Can a tax that is apportioned among the several states operate in France? Can a tax that is uniform throughout the United States operate in France? Are American citizens who earn income in France beyond the taxing authority of the United States government and are they beyond the reach of the IRS? The answer is self-evident.

In the Tax Code, both Puerto Rico and France are "without the United States," but American citizens who earn income in Puerto Rico are exempt from the tax in § 933, while American citizens who earn income in France are not exempt. What sense does it make to collect the income tax from American citizens in France, but not from American citizens in Puerto Rico?

Where is Puerto Rico? Is it "within the United States" or "without the United States?" What do these terms mean? Do they mean "inside the jurisdiction of the United States government" and "outside the jurisdiction of the United States government?" Or, do they mean, "inside federal territory," and "outside federal territory?" If they mean the latter, is the operation of the income tax greatly reduced? If they mean the former, by what authority does Congress collect a tax outside of its jurisdiction?

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[14] U.S. Constitution Art 1 § 2, 8, 9

"Houston, we have a problem!"

We will close Pandora's Box for now before this analysis becomes too uncomfortable. But, these errors must be corrected.

C. 26 USC § 1 fails both of the Constitution's requirements for uniformity

All taxes enacted by Congress must be collected by either the rule of apportionment or the rule of uniformity. There are no apportioned taxes in the Internal Revenue Code. Therefore, all taxes in the Tax Code must be collected using the rule of uniformity.

The Supreme Court in *Knowlton v. Moore,* 178 U.S. 41 (1900) lays down two criteria that must be obeyed when collecting a tax by the rule of uniformity. The first criteria is geographical uniformity:

> But what the Constitution commands is the imposition of a tax by the rule of geographical uniformity

And the second criteria limits uniformity to duties, imposts and excises:

> Thus, the qualification of uniformity is imposed not upon all taxes which the Constitution authorizes, **but only on duties, imposts, and excises.** The conclusion that inherent equality and uniformity is contemplated involves, therefore, the proposition that the rule of intrinsic uniformity is applied by the Constitution to taxation by means of duties, imposts, and excises, **and it is not applicable to any other form of taxes.**

Uniformity does not apply to any other kind of tax except duties, imposts and excises and this is true even after the Sixteenth Amendment. In *Brushaber v. Union Pacific R.Co.* 240 U.S. 1 (1916):

> Second, that the contention that the Amendment treats a tax on income as a direct tax although it is relieved from apportionment **and is necessarily therefore not subject to the rule of uniformity as such rule only applies to taxes which are *not direct*,** thus destroying the two great classifications which have been recognized and enforced from the beginning, is also wholly without foundation

Brushaber analyzed the effect of the Sixteenth Amendment on Congress' taxing power and decided that no direct tax can be uniform. This means that after the Sixteenth Amendment, the rule of uniformity still only applies to duties, imposts and excises and is not applicable to any other form of taxes

The analysis of Puerto Rico addressed the issue of geographical uniformity and provides sufficient evidence that the income tax is not geographically uniform if Puerto Rico is an "incorporated" Territory.

In addition, the tax imposed by 26 USC § 1 also fails the test for uniformity because the tax is not a duty, an impost or an excise. Numerous courts have boldly declared that the income tax is not an excise and sanction those who argue otherwise. See, e.g., Smith v. Commissioner, T.C. Memo. 2019-111, Hill v. Commissioner, T.C. Memo 2013-264, Heisey v. Commissioner, T.C. Memo. 2002-

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41, *Parker v. Commissioner*, 724 F.2d 469, 472 (5th Cir. 1984). For instance, the Tax Court has declared:

> 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.[15]

The Uniformity Clause of the Constitution is not applicable to Puerto Rico when collecting the income tax unless it can be proven that the tax is a duty, an impost or an excise according The Supreme Court's ruling in *Knowlton v. Moore* (1900).

Thus, the tax imposed by 26 USC § 1 fails both of the constitutional requirements for uniformity. The tax is not a duty, impost or an excise and the tax is not geographically uniform throughout the United States.

Appellant's uniformity argument is not frivolous.

CONCLUSION

Puerto Rico's status has changed from an "unincorporated" Territory to an "incorporated" Territory. The Uniformity Clause of the Constitution is fully applicable to Puerto Rico when collecting the Federal Income Tax, which means that American citizens in Georgia cannot be forced to pay more income tax than American citizens in Puerto Rico. The tax is not uniform throughout the United

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[15] Smith v. Commissioner, T.C. Memo. 2019-111

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States and therefore, Appellant must be refunded the $2,254.00 in tax that he has paid because the tax is constitutionally void. The District Court's erred when it dismissed this claim for failure to state a claim.

Appellant submitted a valid income tax return for tax year 2020, which constitutes a properly executed refund claim for $6,151.63 in overpaid tax. He calculated his income tax liability correctly according to all the statutes and requirements in Subtitle A of the Tax Code. IRS correspondence and his official 2020 transcripts confirm that Appellant's self-assessment is correct and that he is due a refund. The District Court erred when it dismissed this claim for lack of subject matter jurisdiction.

For the foregoing reasons, this Court should enter a judgment in Appellant's favor or remand this case to the District Court for further consideration.

Dated: June 1, 2023

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This is to certify that this petition complies with Federal Rule of Appellate Procedure 32(a)(7)(b)(i). This petition is submitted in 14-point Times New Roman font, and it contains 9,100 words.

CERTIFICATE OF SERVICE

I Hereby certify that on this 1st day of June, 2023, a copy of this brief was served on the following individuals by United States Postal Service:

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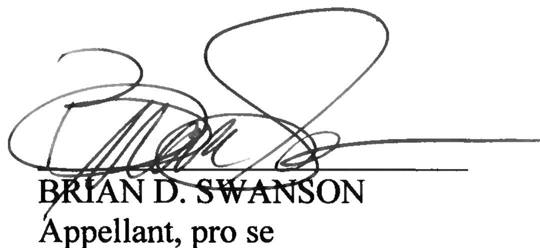

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