No. 22-800

IN THE
Supreme Court of the United States

CHARLES G. MOORE AND KATHLEEN F. MOORE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* AMERICANS FOR TAX REFORM IN SUPPORT OF PETITION FOR CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

Americans for Tax Reform ("ATR") is a non-profit 501(c)(4) organization that represents the interests of American taxpayers at the federal, State, and local levels. Founded in 1985 at the request of President Reagan, ATR has for nearly 40 years publicly advocated for a system in which taxes are simpler, flatter, more visible, and lower than they are today. ATR educates citizens and government officials about sound tax policies to further these goals. Having premised the American Revolution upon objections to British taxes, the Founding generation knew well that the government's power to control the lives of the people derives from its power to tax them. ATR has consistently advocated for limits upon that power, often urging federal courts to safeguard the boundaries that the Framers inscribed in the Constitution.

The Ninth Circuit's decision departs from these well-established limitations. As a longstanding advocate for restraints on the taxing power, ATR is well-suited to provide additional insight into the original public meaning of the Sixteenth Amendment and the broad implications of the decision below for taxpayers across the country.

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[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation or submission. *Amicus curiae* further affirms that counsel of record for all parties received notice of ATR's intent to file this brief at least 10 days before its due date.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case affords this Court a clean opportunity to reaffirm the constitutional limitations on the federal government's taxing power in a case of considerable practical and constitutional importance. As the Petition demonstrates, the Ninth Circuit's decision contradicts this Court's precedents, conflicts with the decisions of at least two circuits, and empowers Congress to enact wealth taxes that violate the Constitution and upset the settled expectations of American taxpayers. ATR submits this brief to emphasize how the Ninth Circuit's erroneous interpretation flouts the Constitution's original public meaning and invites congressional overreach.

According to the Ninth Circuit, the "realization of income is not a constitutional requirement" before Congress may impose a direct tax exempt from Article I's apportionment requirement. Pet.App.12. That is incorrect. The Sixteenth Amendment carved out an exception to the requirement that "direct Taxes" be apportioned among the States according to their population, *see* U.S. Const. art. I, § 2, cl. 3, by permitting Congress to levy an unapportioned direct tax on "incomes." Yet, at the time of the Amendment, there was a widespread understanding that a taxpayer must *realize* a gain for it to be considered "income." This Court enshrined that understanding soon after the Amendment's ratification. *See Eisner v. Macomber*, 252 U.S. 189, 207 (1920).

The decision below obliterates that critical limitation. And it does so without any basis in the original public meaning of the Sixteenth Amendment.

Contemporary dictionary definitions, legal commentary, State legislation, and State case law in the lead up to the Sixteenth Amendment's ratification all reflected a shared understanding that unrealized gains do not qualify as "income." Consistent with that understanding, the statute implementing the federal income tax under the Sixteenth Amendment, followed by a century of historical practice, taxed only realized gains. By contrast, the Mandatory Repatriation Tax ("MRT") at issue here violates the Constitution because it is an unapportioned direct tax that reaches unrealized gains.

The decision below not only ignores the original meaning of "income," but it also threatens to place the federal judiciary on a crash course with the political branches. The MRT was adopted as part of larger reforms concerning foreign source income, but the Ninth Circuit's decision invites a much broader array of potential tax legislation. The President and certain Members of Congress have recently proposed several unapportioned wealth taxes aimed at the unrealized gains of those they claim have too much. But the income tax, too, was originally billed as a tax only on the wealthy. As history shows, new taxing powers inevitably sweep in more and more taxpayers. And with the Ninth Circuit having declared the realization requirement immaterial, the decision below will encourage the enactment of additional, unconstitutional taxes on wealth.

While this Court addressed the Sixteenth Amendment in the years after its adoption, it has not addressed the issue in decades. In the absence of this Court's guidance, uncertainty has developed among

the lower courts. Allowing the Ninth Circuit's decision to stand would deepen that uncertainty and embolden unconstitutional legislative efforts. ATR thus respectfully urges this Court to grant certiorari and confirm that the federal government may not impose an unapportioned tax on unrealized gains.

ARGUMENT

I. The Constitution Prohibits Congress From Levying An Unapportioned Direct Tax On Unrealized Gains.

The MRT is an unapportioned direct tax on personal property. This Court's precedent confirms as much. Thus, the MRT passes constitutional muster only if it is a tax on "incomes" within the meaning of the Sixteenth Amendment. Although the Ninth Circuit recognized that the MRT is a tax on unrealized gains, the court viewed realization as merely a matter of administrative convenience, rather than a constitutional requirement. But the realization requirement was inherent to the public meaning of "income" when the Sixteenth Amendment was ratified. The Sixteenth Amendment's text, history, and tradition—not to mention this Court's precedent—all confirm that realization is part and parcel of the constitutional definition of income.

A. The Mandatory Repatriation Tax Is An Unapportioned Direct Tax.

The Framers recognized that a chief defect of the Articles of Confederation was that the federal government could not raise its own revenues, but instead could rely only upon requisitions from the States. *See, e.g.*, The Federalist No. 30, at 184–85

(Alexander Hamilton) (Clinton Rossiter ed., 1961). Yet, at the same time, there was considerable resistance to vesting a plenary taxing power in a remote central government that might prefer one region to another. *See* Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 Colum. L. Rev. 2334, 2337, 2380–84 (1997).

The Framers thus struck a careful balance in defining Congress's power to tax. They vested Congress with the power to "lay and collect Taxes, Duties, Imposts and Excises." U.S. Const. art. I, § 8, cl. 1. But they qualified that power by providing that "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census." *Id.* art. I, § 9, cl. 4; *see also id.* art. I, § 2, cl. 3 ("[D]irect Taxes shall be apportioned among the several States . . . according to their respective Numbers . . . ."); 1 The Records of the Federal Convention of 1787, at 592 (Max Farrand ed., 1911) (statement of Gouverneur Morris) ("[R]estraining the rule to direct taxation" so that "[w]ith regard to indirect taxes on exports & imports & on consumption, the rule would be inapplicable."). "This requirement means that any 'direct Tax' must be apportioned so that each State pays in proportion to its population." *NFIB v. Sebelius*, 567 U.S. 519, 570 (2012).

The reason for this limitation was straightforward. "[W]hat the Constitution intended to guard against was the exercise by the general government of the power of directly taxing persons and property within any State through a majority made up from the other States." *Pollock v. Farmers' Loan & Tr. Co.*, 157 U.S.

429, 582 (1895). After all, "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). And "direct taxes were a special concern precisely because such taxes do not contain natural limitations on their use." Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct Tax Clauses*, 15 J.L. & Pol. 687, 694 (1999).

The Framers expected that the federal government would rely principally on duties, imposts, and excises—*i.e.*, indirect taxes—which as "taxes on articles of consumption . . . contain in their own nature a security against excess." The Federalist No. 21, at 138 (Alexander Hamilton). "The amount to be contributed by each citizen will in a degree be at his own option, and can be regulated by an attention to his resources." *Id.* If the tax is too high, then consumption would decrease, and so would revenue from the tax. *See id.*

Direct taxes do not contain the same protection. The government imposes them directly on an individual or her property, *see NFIB*, 567 U.S. at 571, thereby limiting a person's ability to shift the burden or avoid it altogether. Though wary of such taxes if left unchecked, the Framers did not deprive Congress of the power to impose them entirely. Instead, they protected against the risk of unequal treatment through a system of apportionment that "effectually shuts the door to partiality or oppression." The Federalist No. 36, at 216 (Alexander Hamilton).

After this Court enforced these limitations against an initial version of the income tax in *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 637 (1895), the Sixteenth Amendment created a limited exception

to the apportionment requirement. The Amendment authorizes Congress to "lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States." U.S. Const. amend. XVI. Yet it remains clear that any direct tax that does not fall on "incomes" must still comply with the apportionment requirement. *See Stanton v. Baltic Mining Co.*, 240 U.S. 103, 112 (1916).

The MRT is a direct tax. Indeed, the Ninth Circuit did not question whether the MRT qualified as such, and the MRT has not been apportioned among the States. That is because the MRT is a non-apportioned tax on personal property, namely shares in certain foreign corporations. *See NFIB*, 567 U.S. at 571 (observing that the Court has "continued to consider taxes on personal property to be direct taxes"). Thus, the dispute here boils down to whether the MRT is a tax on "incomes" within the meaning of the Sixteenth Amendment, which would excuse the tax from the apportionment requirement. A thorough examination of the original public meaning of the term "incomes" demonstrates that the answer is an emphatic no.

B. The Mandatory Repatriation Tax Is Not A Tax On "Incomes."

The Ninth Circuit's holding that realization was not part of the constitutional definition of income contradicts the original understanding of the Sixteenth Amendment. The ratifying public understood that "incomes" did not include the unrealized gains of personal property, and the historical treatment of unrealized gains resolves any ambiguity. The Sixteenth Amendment's exemption

from apportionment does not apply to unrealized gains.

1. The Original Public Meaning of "Incomes" Does Not Include Unrealized Gains.

The Sixteenth Amendment provides that "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." U.S. Const. amend. XVI (emphasis added). The original public meaning of "incomes" included a realization requirement "in the minds of the people when they adopted" it. *See Merchants' Loan & Tr. Co. v. Smietanka*, 255 U.S. 509, 519 (1921). Consequently, it was understood by the ratifying public that "income not realized is not income." Henry C. Simons, *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy* 81 (1938).

a. Contemporary Dictionary Definitions

Start with contemporaneous dictionary definitions. Webster's Dictionary defined "income" as "[t]hat gain which *proceeds from* labor, business, property, or capital of any kind . . . revenue; receipts; salary." Income, *Webster's Revised Unabridged Dictionary* (1913) (emphasis added); *see also Webster's American Dictionary of the English Language* 674 (1889) ("That gain which proceeds from labor, business, or property of any kind"). The Century Dictionary defined income similarly as "[t]hat which *comes in* to a person as payment for labor or services rendered in some office, or as gains from lands, business, the investment of

capital, etc." 4 *Century Dictionary and Cyclopedia* 3040 (1899) (emphasis added).

Other dictionaries from the time also defined income as encompassing some type of realized gain. One leading dictionary specified that "income" is the "gain which a person *derives from* his labour, business, profession, or property of any kind." 2 Robert Hunter & Charles Morris, *Universal Dictionary of the English Language* 2636 (1897) (emphasis added); *see also* Joseph Worcester, *Dictionary of the English Language* 735 (1860) ("Gain derived from any business or property."). Black's Law Dictionary likewise defined the word income as "[t]he return in money from one's business, labor, or capital invested; gains, profit, or private revenue." *Black's Law Dictionary* 612 (2d ed. 1910). Black's further sub-defined "income tax" as "[a] tax on the yearly profits arising from property, professions, trades, and offices." *Id.*

b. Contemporary Legal Authorities

Contemporary tax commentators similarly defined "income" as including only realized gains. Because "income is a flow of wealth, it must always be estimated for a definite period, so that when we speak of income for purposes of taxation, we really mean annual income." Edwin R. A. Seligman, *The Income Tax* 19 (1911). Professor Seligman continued: "income as contrasted with capital denotes that amount of wealth which flows in during a definite period and which is at the disposal of the owner for purposes of consumption, so that in consuming it, his capital remains unimpaired." *Id.*

Others sang a similar tune. *See* Robert H. Montgomery, *Income Tax Procedure* 198 (1919) ("And the inquiry naturally extends itself into the right to tax any transaction unless there is an actual realization of income, as distinguished from the apparent income which may be and often is due to the temporary fluctuations in values."); Charles E. Clark, Eisner v. Macomber *and Some Income Tax Problems*, 29 Yale L.J. 735, 738 (1920) ("[M]ere general appreciation in value of capital should not be deemed income so long as it is unrealized to the owner . . . ."); Henry Campbell Black, *A Treatise on the Law of Income Taxation* 1 (1913) (noting that an income tax "is not a tax upon accumulated wealth, but upon its periodical accretions"); *The Federal Corporation Tax*, 70 Cent. L. J. 91, 91 (1910) ("[I]ncome does not vest in the shareholders, until it is formally set apart by the declaration of a dividend.").

c. Textual Context

The context of the term "income" confirms this settled meaning. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) (noting that courts must interpret words "in their context and with a view to their place in the overall . . . scheme"). The phrase "from whatever source *derived*" follows the word "incomes." Yet one does not "derive" anything from unrealized gains. *See* L. Hart Wright, *The Effect of the Source of Realized Benefits upon the Supreme Court's Concept of Taxable Receipts*, 8 Stan. L. Rev. 164, 177 (1956) (noting that one does not "realize, *i.e.*, derive," an unrealized gain); *Solomon v. Cosby*, 67 F.3d 1128, 1133 (4th Cir. 1995) (Wilkinson, J.) ("[I]ncome" is "derived, that is, received or drawn by the recipient for

his separate use, benefit, and disposal." (citation omitted)).

d. Pre-Ratification Case Law

Case law preceding the Sixteenth Amendment similarly understood that "income" presumed realization. Consider *State v. Elfe*, 34 S.C.L. 395 (S.C. App. L. 1849), a case interpreting whether an early local income tax covered certain profits. In doing so, the court asked: "What is profit or income; some possibility yet to arise; or something which has been realized?" *Id.* at 398. The court remarked that "[m]any engage in business, like the relators, and expect to realize wealth, when, instead of it, they experience loss!" *Id.* As a result, the court embraced the realization requirement, stating that "any one who would talk of such a result being profit or income, would be wiser or madder than all the rest of his race." *Id.* The court made clear that wealth was not income, reasoning that for something to be income, it must be "realized and ascertained." *Id.* at 399; *see also State v. City of Charleston*, 29 S.C.L. 719, 730–31 (S.C. App. L. 1844) (similar).

Other states also recognized "income" to require the realization of gain. *See, e.g.*, *Glasgow v. Rowse*, 43 Mo. 479, 484 (1869) ("Whatever was so received or realized by him is for that reason assessed as income."); *City of New Orleans v. Fassman*, 14 La. Ann. 865, 866 (1859) ("[I]t was not the intention of the Legislature to tax real property under the term of land, slaves, &c., and then to tax under the term of incomes the profits realised from such land, slaves, &c. It would be double taxation . . . ."); *Lott v. Hubbard*, 44 Ala. 593, 594 (1870) ("[P]laintiff had

expended the whole of his income, realized between the 1st of October, and the 31st December, 1866 . . . ."); *Appeal of Braun*, 105 Pa. 414, 415 (1884) (defining the term income as "that gain which proceeds from labor, business or property of any kind—the profits of commerce or business"); *State ex rel. Mechanics' & Traders' Ins. Co. v. Bd. of Assessors*, 18 So. 462, 470 (La. 1895) (noting that "uncollected premiums of an insurance company" are not income because they "are assets which have not yet materialized into cash; not yet realized"). By the time Congress considered the income tax, State courts had reached a common understanding that included realization.

e. Contemporary State Law

Contemporary State legislation further demonstrates that the ratifying public connected income with realization. Wisconsin took the lead in modern efforts to tax income, by first considering in 1903 a State constitutional amendment to permit State authorities to tax income. *See* John O. Stark, *The Establishment of Wisconsin's Income Tax*, 71 Wis. Mag. of Hist. 27, 29 (1987).

Over the next decade, Wisconsin debated the definition of "income," and in 1911 "enacted the nation's first workable income tax law." *Id.* at 27; *see id.* at 33. Historians described the "Wisconsin income tax legislation of 1911 [as] a landmark and a beacon to the federal government and the forty-five other states which since have passed income tax laws and depend on them for a substantial share of their revenue." *Id.* at 27; *see also, e.g.*, *Final Report of the Board of Commissioners on Revenue and Taxation For the State of Utah* 27 (The Arrow Press Jan. 20, 1913)

("In 1911 the State of Wisconsin enacted an income tax law, the result of the labors of some of the most practical and experienced authorities on taxation matters in the United States.").

As far as the law itself went, Wisconsin's first income tax commissioner noted that the "law starts out with an attempt—always dangerous—to define income." Kossuth Kent Kennan, *Wisconsin Income Tax Law in State and Local Taxation* 103, 106 (1912). The Wisconsin law defined income by six categories, such as "rent," "[i]nterest on loans," "wages, salaries, or fees derived from services," "dividends or profits from stock," "[r]oyalties," and "[a]ll other income." *State ex rel. Bolens v. Frear*, 134 N.W. 673, 676 (Wis. 1912) (quoting the text). Each defined subdivision presumed realization.

It is not surprising, then, that the Wisconsin courts soon defined income to mean that which "comes in to a person as payment for labor or services rendered in some office, or as gain from lands, business, the investment of capital, etc." *Id.* (citation omitted). Later courts described "income" as the "fruits of property and labor." *State ex rel. Manitowoc Gas Co. v. Wis. Tax Comm'n*, 152 N.W. 848, 850 (Wis. 1915) ("Our income tax is a burden laid upon the recipient of the income, whether derived from real estate, personal property or labor, the amount of which is determined by the amount of the total net income derived from these sources, singly or combined."). Significantly, the Wisconsin courts recognized the meaning of "income" to be fixed and confirmed that "things which are not in fact income cannot be made such by mere legislative fiat." *Frear*, 134 N.W. at 691.

f. Federal Law Implementing the Income Tax

The Revenue Act of 1913, which Congress passed to implement a federal income tax, sheds additional light on the contemporaneous understanding of income. The Act stated that "there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States." Revenue Act of 1913, Pub. L. No. 63-16, § 2, 38 Stat. 114, 166–81 (1913). It further defined income to:

> include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent.

Id. at 167.

The word "income," as used in the Act, is preceded by the words "gains" and "profits." The location of gains and profits, which imply accessions to wealth, next to income limits the scope of the meaning of "income." *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195

(2012) ("Associated words bear on one another's meaning (*noscitur a sociis*).").

g. Administrative Concerns and Implementation

Furthermore, the recognition that income requires realization draws support from early twentieth-century discussions concerning the administrative feasibility of an income tax, which figured prominently in the early debate over whether the nation should adopt such a tax. Proponents of the income tax readily settled upon realization as the necessary event for measuring income. In so doing, these commentators rejected an alternative by which the taxpayer's income would be measured by annual assessments in the change in the taxpayer's wealth.

Early twentieth-century tax authorities and legal commentators consistently described the impracticability of the annual accrual system. *See* Kennan, *supra*, at 111 ("[I]t is generally conceded that the failure of state income taxes in this country has been due rather to lax and inefficient administration than to any inherent defect in the laws themselves."); *Final Report*, *supra*, at 27 ("We believe, however, that the enforcement of such a law would be attended with all the difficulties that have in the past prevented the collection of taxes against money and credits, and besides would have troubles of its own . . . ."); Simons, *supra*, at 207–08 ("The proper underlying conception of income cannot be directly and fully applied in the determination of year-to-year assessments. Outright abandonment of the realization criterion would be utter folly.").

As a result, the ratifiers of the Sixteenth Amendment understood that income would be accounted for by a realization system of accounting. *See* Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes"*, 33 Ariz. St. L.J. 1057, 1147 (2001) (noting that the "ratifiers understood that some conventions, like annual accounting, were consistent with the Amendment"); Simons, *supra*, at 80 (remarking that the inclusion of a realization requirement in the word "income" was "widely held by accountants, by the courts, and even by some economists. It derives clearly enough from the conventional practices of financial accounting."); Marjorie E. Kornhauser, *The Constitutional Meaning of Income and the Income Taxation of Gifts*, 25 Conn. L. Rev. 1, 14 (1992) ("This [realization] requirement not only fit the common understanding, but also fit some economic conceptions of income.").

h. This Court's Interpretation of Income

This Court's early-twentieth-century decisions analyzing the Sixteenth Amendment underscore the shared understanding that income required realization. In the Court's first decision following the adoption of the Sixteenth Amendment, the Court interpreted the Revenue Act of 1913 to hold that, under the statute, a stock dividend did not create a realization event for the shareholder, meaning that the federal government could levy no tax. *See Towne v. Eisner*, 245 U.S. 418, 425–26 (1918).

After Congress revisited the statute at issue in *Towne*, the Court considered whether the Sixteenth Amendment itself would permit a stock dividend to be taxed as "income." *See Macomber*, 252 U.S. at 205.

There, the Court reaffirmed the realization requirement and held that "income" should be defined under the Amendment as "the gain derived from capital, from labor, or from both combined." *Id.* at 207 (citation omitted). Under that definition, unrealized gains did not qualify as income.

Since *Macomber*, the Court has consistently treated realization as a critical component of taxable income. *See*, *e.g.*, *Weiss v. Stearn*, 265 U.S. 242, 253–54 (1924); *see also Burk-Waggoner Oil Ass'n v. Hopkins*, 269 U.S. 110, 114 (1925) ("Congress cannot make a thing income which is not so in fact."). In 1940, the Court reiterated "the rule that income is not taxable until realized." *Helvering v. Horst*, 311 U.S. 112, 116 (1940); *see also Taft v. Bowers*, 278 U.S. 470, 482 (1929) ("He would have been obliged to share the realized gain with the United States.").[2] And the Court has not departed from that rule ever since.

2. Consistent Practice Since the Sixteenth Amendment's Ratification Has Treated "Income" as Requiring Realization.

Even if there were any ambiguity in the original meaning of "incomes" under the Sixteenth

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[2] With telling ellipses, the Ninth Circuit quoted *Horst* as recognizing that "the rule that income is not taxable until realized . . . . [is] founded on administrative convenience" as though that meant it had no constitutional import. Pet.App.12 (alterations in original) (quoting *Horst*, 311 U.S. at 116). But *Horst* itself recognized a realization requirement, holding only that it could be "consummated by some event other than the taxpayer's personal receipt of money or property," such as the taxpayer's direction that his son receive the realized money in his stead. 311 U.S. at 116.

Amendment, the consistent practice since ratification demonstrates that realization is required.

This Court has recognized that "a regular course of practice can liquidate [and] settle the meaning of disputed or indeterminate terms [and] phrases in the Constitution." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2136 (2022) (quotation marks omitted). Deliberate practice from 1913 onward shows a common understanding that realization must occur for the government to tax a thing as income. As the First Circuit has noted, since *Macomber*, "the Supreme Court has described '"income" . . . in its constitutional sense,' as 'instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.'" *Quijano v. United States*, 93 F.3d 26, 30 (1st Cir. 1996) (quoting *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 432 n.11 (1955)).

Congress codified *Macomber* in the Revenue Act of 1921. *See* Pub. L. No. 67-98, 42 Stat. 227. The legislative history confirms this. *See* H.R. Rep. No. 67-350, at 8 (1921); S. Rep. No. 67-275, at 9 (1921). Shortly thereafter, this Court confirmed that "the settled doctrine is that the Sixteenth Amendment confers no power upon Congress to define and tax as income without apportionment something which theretofore could not have been properly regarded as income." *Taft*, 278 U.S. at 481. That "doctrine of realization has been intertwined with the federal tax definition of income since the early days of the U.S. income tax system." Rodney P. Mock & Jeffrey Tolin, *Realization and Its Evil Twin Deemed Realization*, 31 Va. Tax Rev. 573, 576 (2012).

Indeed, early commentators recognized that the Court had settled the relationship between realization and income: "Gain is not income in the constitutional sense until it is 'derived' or 'drawn from' that in which it has been inhering." Thomas Reed Powell, *Income from Corporate Dividends*, 35 Harv. L. Rev. 363, 377 (1922); *see also id.* at 380 ("If it means gain accrued but not realized, it is incorrect to call it income."); *Recent Cases*, 51 Harv. L. Rev. 1286, 1297 (1938) (noting that recent case law indicated "a trend toward treating any realized increment to wealth as income within the meaning of the 16th Amendment").

Lest there be any doubt over the original public meaning of "incomes," the historical practice since the Sixteenth Amendment's ratification has consistently linked income with realization.

II. This Court Should Intervene Before Congress Accepts The Ninth Circuit's Invitation To Enact More Wealth Taxes.

This Court has not squarely addressed the meaning of income under the Sixteenth Amendment in decades. *See, e.g.*, *Glenshaw Glass Co.*, 348 U.S. 426; *James v. United States*, 366 U.S. 213, 217–18 (1961). And the lodestar of current realization doctrine, *Macomber*, was decided a century ago. Though *Macomber*'s proximity to the Sixteenth Amendment's ratification makes it more probative of the Amendment's meaning, *see* Bryan A. Garner et al., *The Law of Judicial Precedent* 176–77 (2016), the absence of recent guidance has emboldened proponents of sweeping tax proposals that conflict with the Amendment's original meaning.

In dispensing with the realization requirement, the Ninth Circuit has now subjected over 66 million Americans to an unconstitutional wealth tax and has invited Congress to adopt similarly unconstitutional proposals. As Judge Bumatay explained, "[d]ivorcing income from realization opens the door to new federal taxes on all sorts of wealth and property without the constitutional requirement of apportionment." Pet.App.55. This Court should grant certiorari because this case raises an issue of immediate and exceptional national significance concerning Congress's taxing power, and the law would benefit from this Court's clarification.

The MRT is just the tip of the iceberg. Recent years have seen a slurry of proposed wealth taxes. Some of these proposals seek to impose a wealth tax on the net unrealized gains of wealthy taxpayers. *See, e.g.*, H.R. 8558, 117th Cong. (2022) (The Billionaire Minimum Income Tax Act would generally impose a minimum 20% tax on the net unrealized gains plus taxable income of any person whose net worth exceeds $100 million.); S. 510, 117th Cong. § 2901(b) (2021) (The Ultra-Millionaire Tax Act of 2022 would collect up to 8% annually on the net value of all covered assets in excess of $1 billion.); H.R. 1459, 117th Cong. (2021) (similar to the Ultra-Millionaire Tax Act of 2022); Senate Finance Committee Democrats, *Treat Wealth Like Wages* 4 (Sept. 12, 2019), https://bit.ly/3mkKqk8 (describing "mark-to-market" proposal that would tax unrealized capital gains on an annual basis); Senate Finance Committee, *Elimination of Deferral*, https://bit.ly/423u5Df (proposal to tax unrealized capital gains of wealthy taxpayers).

President Biden's 2024 budget proposal contains an annual 20% tax on unrealized gains on capital exceeding $100 million. *See* Mike Palicz, *List of Tax Hikes in Biden's Budget*, Americans for Tax Reform (Mar. 9, 2023), http://bit.ly/3mHFqbD; *see also Remarks of President Joe Biden – State of the Union Address as Prepared for Delivery* (Feb. 7, 2023), bit.ly/3XxeEjb ("Pass my proposal for a billionaire minimum tax."). This proposal echoes a previous proposal to tax unrealized capital gains on taxpayers worth over $100 million. *See* Alex Hendrie, *Ten Reasons to Be Concerned with Biden's 20 Percent Tax on Unrealized Gains*, Americans for Tax Reform (Mar. 28, 2022), bit.ly/3LTDpUD.

These proposals purport to target a small number of wealthy taxpayers. But history has shown that, if adopted, Congress is not likely to stop there. The federal income tax itself began as a 1 to 7% assessment that applied to fewer than 400,000 Americans. *See* Americans for Tax Reform, *104 Years of the Income Tax: Then and Now* (Apr. 13, 2017), bit.ly/3YXK9Dz. Yet, in 2017, almost 150 million Americans filed tax returns, and tax revenues were nearly 200 times what they were in 1913, adjusted for inflation. *Id.*

The alternative minimum tax ("AMT"), too, began as a seedling. Congress enacted the AMT in 1969, spurred by outrage over just 155 taxpayers who paid no income tax on incomes over $200,000. *See* Blake Seitz, *AMT Set to Lasso 27 Million More Taxpayers in 2013*, Americans for Tax Reform (July 6, 2012), bit.ly/3yXZERf; Benjamin H. Harris et al., *The Individual AMT: Problems and Potential Solutions*, Brookings (Sept. 18, 2002), bit.ly/3LMBQYm. By

2017, the AMT had ballooned to cover over 5 million taxpayers. *See* Tax Policy Center, *What Is the AMT?* (May 2020), http://bit.ly/3yANhe0.

The federal income tax and the AMT teach a lesson: When it comes to taxation, Congress may test the waters with a small number of wealthy taxpayers. But eventually Congress's appetite for new revenue ensnares far more Americans. Indeed, nearly 60% of Americans own securities, making them susceptible to congressional attempts to tax unrealized capital gains. *See* Lydia Saad & Jeffrey M. Jones, *What Percentage of Americans Own Stock?*, Gallup (May 12, 2022), http://bit.ly/3yvPrvr. Taking the Ninth Circuit at its word, the decision below authorizes Congress to tax every single American's retirement and investment accounts before they are liquidated.

Although the MRT itself is levied on a relatively small amount of foreign-source income, the Ninth Circuit's holding extends to the unrealized appreciation of any asset. Under that view, Congress could seize annually the increase in a taxpayer's 401k or the value of her home, and call such levies "income." As Judge Bumatay recognized, the decision below opens the door to all such unapportioned taxes. Pet.App.55. Without the realization requirement, the Sixteenth Amendment becomes the exception that swallows the rule.

The interests of federalism also weigh in favor of review. "The state taxing power is one of the fundamental powers of state government." George J. Argeris, *State Authority to Tax Private Interests in Federal Property*, 13 Wyo. L.J. 229, 229 (1959). States may impose and collect their own taxes to fund their

affairs. Those taxes come in a variety of forms, including income taxes, sales taxes, property taxes, and even wealth taxes. *See Soc'y for Sav. v. Coite*, 73 U.S. (6 Wall.) 594, 604–05 (1868) ("[T]he States may tax all subjects over which the sovereign power of the State extends."). By decoupling "income" from realization, Congress may intrude upon the States' established tax base.

As the Governor of Kentucky stated in opposition to the ratification of the Sixteenth Amendment: "This income tax amendment, authorizing the Federal Government to levy this new great class of taxes on the States, which it could not levy before, is the most serious encroachment on the States' rights since the organization of our Government." Augustus E. Wilson, *The Income Tax Amendment*, 43 Chi. Legal News 249, 251 (1911). As predicted, the Sixteenth Amendment fueled a massive expansion of federal power, at the ultimate expense of the States. Yet, while a significant new power, the Sixteenth Amendment remained confined to taxing realized gains. The Ninth Circuit's decision eliminates that well-established limitation.

Granting this petition would allow the Court to reaffirm the Sixteenth Amendment's realization requirement. Absent such intervention, the panel's decision threatens to upend the longstanding norm that unrealized gains do not qualify as income in the constitutional sense. The Court should step in now to enforce the textual and historical limits on the Sixteenth Amendment.

CONCLUSION

For the foregoing reasons, ATR respectfully urges this Court to grant the petition for certiorari.

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