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 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 PETITIONERS

BRIAN A. KULP
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104

STEVEN A. ENGEL
Counsel of Record
MICHAEL H. MCGINLEY
ERIC D. HAGEMAN
JUSTIN W. AIMONETTI
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
(202) 261-3369
steven.engel@dechert.com

Counsel for Amicus Curiae

September 6, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes and Legislation

Other Authorities

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.

---

[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.

INTRODUCTION AND SUMMARY OF ARGUMENT

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." U.S. Const. amend. XVI. This case tests the boundaries of that exception to the Constitution's constraints on direct taxes.

When the Sixteenth Amendment was ratified, it was widely understood that "income" required that a taxpayer *realize* a gain. Contemporaneous dictionary definitions, legal commentary, state legislation, and case law surrounding the Sixteenth Amendment's ratification all reflected a shared understanding that unrealized gains do not qualify as "income." Pre-ratification cases similarly regarded "income" as synonymous with realization. And, consistent with that definition, the statute implementing the federal income tax under the Sixteenth Amendment taxed only realized gains. This Court confirmed that constitutional requirement soon after the Amendment's ratification. *See Eisner v. Macomber*, 252 U.S. 189, 207 (1920). And a century of historical practice has followed that settled understanding.

Despite *Macomber*, its progeny, and a litany of historical evidence supporting the realization requirement, the Ninth Circuit held below that 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 holding is indefensible as an original matter. And taken to its logical extreme, the

Ninth Circuit's view opens the door to Congress enacting unconstitutional wealth taxes that upset the settled expectations of American taxpayers.

Although this case involves the Mandatory Repatriation Tax ("MRT"), its implications are far broader. 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. It thus falls to this Court to recognize and enforce the Sixteenth Amendment's realization requirement and the constitutional limit upon direct taxation.

In short, the MRT exceeds Congress's taxing power because it is an unapportioned direct tax on unrealized gains. Endorsing the Ninth Circuit's diluted view of the Sixteenth Amendment would give Congress an unbounded license to tax unrealized wealth as "income." And it would thereby upset the balance that the people struck for Congress's taxing power when they adopted the Sixteenth Amendment. ATR thus respectfully urges this Court to reverse the decision below and confirm that Congress may not impose unapportioned taxes on unrealized gains.

ARGUMENT

I. Congress May Not Levy 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. The Sixteenth Amendment's text and history, as well as this Court's precedents, all confirm that realization is part of the constitutional definition of income. But the Ninth Circuit viewed realization as merely a matter of administrative convenience, rather than a constitutional requirement. This Court should reject that unprecedented view.

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 and was instead entirely reliant on requisitions from the States. *See, e.g.*, The Federalist No. 30, at 184–85 (Alexander Hamilton) (Clinton Rossiter ed., 2003). Yet, at the same time, there was considerable resistance to vesting a plenary taxing power in a central government that might prefer one region over 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 granted Congress 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." (italics omitted)). "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).

At the same time, the Framers expected that the federal government would rely principally on duties, imposts, and excises—*i.e.*, indirect taxes—to raise revenue. *See, e.g.*, Jensen, *Apportionment*, *supra* at 2382. Those "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 will naturally decrease, and so will revenue from the tax. *See id.* In that way, indirect taxes "prescribe their own limit." *Id.*

Direct taxes do not contain the same protection. The government imposes them directly on an individual or her property, thereby limiting her 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*, the Sixteenth Amendment created a targeted 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 Macomber*, 252 U.S. at 206.

The MRT falls on petitioners, not because they (or anyone else) engaged in a taxable transaction, but solely because they hold shares in a foreign company. That is a direct, non-apportioned tax on personal property. *See NFIB*, 567 U.S. at 571 (observing that the Court has "continued to consider taxes on personal property to be direct taxes"). The only dispute then is

whether the MRT is authorized by the Sixteenth Amendment as a tax on "incomes." 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 original public meaning of the term "incomes" did not include unrealized gains of personal property. And this Court's precedents, along with the history underlying the income tax, remove any reasonable doubt.

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

The term "incomes" in the Sixteenth Amendment included a realization requirement "in the minds of the people when they adopted" it. *Merchants' Loan & Tr. Co. v. Smietanka*, 255 U.S. 509, 519 (1921). Consequently, the ratifying public understood 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 plethora of sources makes this clear.

a. Contemporaneous Dictionary Definitions

Contemporaneous dictionary definitions show that to qualify as "income," new property must make its way from a source to the income earner and come under his control. For example, a 1913 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). The phrases "proceeds from" and "comes in" denote movement of the property from a source to its new owner. This is the core of the realization requirement: that the taxpayer exercises control over that which is taxed.

Similar phrases abound in other dictionaries from that time. For instance, some 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 E. Worcester, *Dictionary of the English Language* 735 (1860) ("Gain derived from any business or property"). And Black's Law Dictionary likewise explained that income "means that which *comes in* or is *received from* any business or investment of capital." *Black's Law Dictionary* 612 (2d ed. 1910) (emphases added; citation omitted). Black's further sub-defined "income tax" as "[a] tax on the yearly profits arising from property, professions, trades, and offices." *Id.*

b. Contemporaneous Legal Authorities

Tax commentators of the time similarly defined "income" to include only realized gains. For example, Professor Edwin Seligman wrote that "income is a flow

of wealth." *The Income Tax* 19 (1911). And he stressed that "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. Thomas Cooley, for instance, recognized that one downside of an income tax is that "those holding lands for the rise in value escape it altogether—at least until they sell." *A Treatise on the Law of Taxation Including the Law of Local Assessments* 20 (1876). And that, of course, is because a mere increase in value is not "income." *See id.* at 160 n.1 ("Income means that which comes in and is received from any business or investment of capital."). Likewise, Charles Edward Clark, former dean of Yale Law School and Second Circuit judge, noted that the "mere general appreciation in value of capital should not be deemed income so long as it is unrealized to the owner." Eisner v. Macomber *and Some Income Tax Problems*, 29 Yale L.J. 735, 738 (1920).

The original author of Black's Law Dictionary, Henry Campbell Black, similarly explained that an income tax "is not a tax upon accumulated wealth, but upon its periodical accretions." *A Treatise on the Law of Income Taxation* 1 (1913). And many other contemporaries shared similar views. *See, e.g.*, 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."); Thomas Gold Frost, *A Treatise on the Federal Income Tax Law of 1913*, at 7, 15 (1913) (explaining that "the new Federal Income Tax is in no sense a tax upon property" and defining income as "that which comes in or is received"); Godfrey N. Nelson, *Income Tax Law and Accounting* 19, 36 (1918) (defining taxable income as "gains, profits, salaries and wages received" and explaining that an "increase in the book value of assets" is not "taxable as income"); *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."); *Taxation of Increment in Capital Value Before Acquisition as Income to Donee*, 37 Yale L.J. 392, 393 (1928) (noting that "gains must be realized by the actual sale or conversation of the assets" for them to be taxable); *Improvements by Lessee as Income to the Lessor*, 51 Harv. L. Rev. 1113, 1114 (1938) (noting that "the voluntary erection of the building by the lessee is not taxable income to the lessor under the Sixteenth Amendment until it is realized by the sale or other disposition of the land").

c. Textual Context

The context of the term "incomes" 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 "derive" a gain unless he "fully realize[s]" it "for his separate use and benefit"); *Solomon v. Cosby (In re Solomon)*, 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)). It follows that unrealized gains are not taxable under the Sixteenth Amendment. *See Macomber*, 252 U.S. at 207.

d. Pre-Ratification Case Law

Case law preceding the Sixteenth Amendment similarly understood that "income" entailed realization. Consider *State ex rel. Tait & Meggett v. Elfe*, 34 S.C.L. 395 (S.C. App. L. 1849), a case interpreting whether an early local income tax covered certain profits. 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 a mere booked increase in wealth was not income, reasoning that for something to be income, it must be "realized and ascertained." *Id.* at 399; *see also Mayor & Aldermen of the City of Charleston v. State ex rel. Adger*, 29 S.C.L. 719, 730–31 (S.C. App. L. 1844) (similar).

Also instructive is the case of *Waring v. Mayor & Aldermen of the City of Savannah*, 60 Ga. 93 (1878). There, the City of Savannah adopted an ordinance that taxed the "income derived from certain kinds of business." *Id.* at 95. Mr. Waring filed a lawsuit, arguing that income constituted property, and that Georgia's constitution required property taxes to be "uniform on all species of property taxed." *Id.* at 97. The court upheld the ordinance, ruling that income does not always count as property. *Id.* at 100. In explaining its rationale, the court cautioned that it would "be a perversion of terms" if "income" were conflated with "property." *Id.* at 99. "[P]roperty is a tree; income is the fruit; labor is a tree; income, the fruit; capital, the tree; income, the fruit." *Id.* In other words, "income" is that which is "plucked to eat" by the taxpayer from some source. *Id.* It does not include that which remains on the metaphorical tree.

Other States also recognized that "income" requires the realization of gain. New York courts, for instance, understood income to mean "that which comes in, or is received from any business or investment of capital, without reference to the outgoing expenditures; while 'profits' generally mean the gain which is made upon any business or investment when both receipts and payments are taken into the account." *People ex rel. McMaster & Harvey v. Bd. of Supervisors of Niagara Cnty.*, 4 Hill 20, 23 (N.Y. Sup. Ct. 1842); *see also Matter of Gerry*, 18 Abb. N. Cas. 178, 183 (N.Y. 1886) (noting "the advantage of any extraordinary profits realized from the investments"). Pennsylvania courts embraced a similar conception, defining income as "'the gain which proceeds from property, labour, or business:'

. . . . When applied to a sum of money, or money in the public debt, it is equivalent to 'interest.'" *Sims's Appeal*, 44 Pa. 345, 347 (1863) (quoting Bouvier's Law Dictionary); *see Braun's Appeal*, 105 Pa. 414, 415–16 (1884) (similar); *McClintock v. Dana*, 106 Pa. 386, 391 (1884) (similar).

And a host of other state courts adopted a comparable understanding of income. *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."); *State ex rel. Mechanics' & Traders' Ins. Co. v. Bd. of Assessors*, 18 So. 462, 470 (La. 1895) (holding that "uncollected premiums of an insurance company" were not "income" because they were "assets which ha[d] not yet materialized into cash; not yet realized"); *Levi v. City of Louisville*, 30 S.W. 973, 974 (Ky. 1895) (noting that "the income tax" relates "to the product or income from property or from business pursuits"); *Judge v. Spencer*, 48 P. 1097, 1099 (Utah 1897) ("The products of the soil constitute the income of the owner. The interest on the money loaned constitutes the income of the holder of the mortgages."); *Busbey v. Russell*, 1898 WL 1419, at *3 (Ohio Cir. Ct. Nov. 1, 1898) ("[B]y the word 'income' was meant gross income; that it was used in the sense of product, revenue or receipts."); *Bates v. Porter*, 15 P. 732, 739 (Cal. 1887) ("'[I]ncome' means that which comes in, or is received from any business or investment of capital." (citation omitted)); *Smith v. Hooper*, 51 A. 844, 846 (Md. 1902) ("The word 'income' has a broader meaning, but hardly broad enough to include things not separated in some way from the principal. It is not synonymous with 'increase.'" (quoting *Spooner v. Phillips*, 24 A. 524, 525 (Conn.

1892)); *Minot v. Paine*, 99 Mass. 101, 111 (1868) ("The money in the hands of the directors may be income to the corporation; but it is not so to a stockholder till a dividend is made.").

The federal courts only reinforced that understanding: "[I]ncome must be taken to mean money, and not the expectation of receiving it, or the right to receive it, at a future time." *United States v. Schillinger*, 27 F. Cas. 973, 973 (C.C.S.D.N.Y. 1876); *see also Baldwin Locomotive Works v. McCoach*, 221 F. 59, 60 (3d Cir. 1915) ("The only thing done was to put upon the company's books an expression of expert opinion that certain property was worth a certain sum, and this can hardly be said to be income, or even gain, in any proper sense."). That is, income is that which has "actually been received"—has been realized—by the taxpayer. *Mut. Ben. Life Ins. Co. v. Herold*, 198 F. 199, 214–15 (D.N.J. 1912). As a result, the "[r]eserved and accumulated earnings" of a corporation are, to shareholders, "capital, and not income." *Gibbons v. Mahon*, 136 U.S. 549, 558 (1890); *see also Gray v. Darlington*, 82 U.S. (15 Wall.) 63, 66 (1872) ("Mere advance in value in no sense constitutes the gains, profits, or income specified by the statute. It constitutes and can be treated merely as increase of capital.").

In sum, by the time Congress proposed the Sixteenth Amendment to the States for ratification, courts across the land had reached a common understanding that "income" presupposed a realization requirement.

e. Contemporaneous State Statutes

Contemporaneous state legislation further demonstrates that the ratifying public connected income with realization. Wisconsin took the lead in modern efforts to tax income, considering an income-tax amendment to its constitution in 1903. *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 scope of taxable "income," and in 1911 "enacted the nation's first workable income tax law." *Id.* at 27; *see also id.* at 29–33. One historian has 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 Wisconsin law itself went, it defined "income" by six categories: "rent," "[i]nterest on loans," "wages, salaries, or fees derived from services," "dividends or profits from stock or from the purchase and sale of any property acquired within three years previously or from any business whatever," "[r]oyalties," and "[a]ll other income from any source." *State ex rel. Bolens v. Frear*, 134 N.W. 673, 676 (Wis. 1912) (quoting the text). Each of those defined subdivisions presumed realization. And so the

Wisconsin Supreme Court construed income consistent with its ordinary understanding 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.* at 691 (citation omitted). It also recognized that the meaning of "income" is fixed, and it confirmed that "things which are not in fact income cannot be made such by mere legislative fiat." *Id.* The same principle applies here. *See Burk-Waggoner Oil Ass'n v. Hopkins*, 269 U.S. 110, 114 (1925).

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 original meaning 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 (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" in the Act is defined to include "gains" and "profits" in all of their various forms. This definition aligns with the existing federal and state caselaw, and each of the examples provided in the statute (salaries, wages, interest, dividends, etc.), presupposes realization as a condition of income. Moreover, the Revenue Act reinforced that in order to be "income," new property must be "derived from" some source—and thus come into the control of the taxpayer—which is a realization requirement, if only by a different name. *Cf.* 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*).").

The Treasury Department recognized as much. Shortly after enactment of the income tax, it instructed tax collectors that "[r]eturnable and taxable income is that actually realized during the year." Robert H. Montgomery, *Income Tax Procedure* 20 (1917) (reprinting Letter to Collectors, Aug. 14, 1914). Mere "appreciation in the value of assets" was "held not to be income . . . until such appreciation, as a result of a completed, a closed transaction, has been converted into cash or its equivalent, that is, has been realized." *Id.* at 19–20.

Consistent with that understanding, early-twentieth-century discussions surrounding the implementation of an income tax settled upon realization as the event most relevant to measuring

income. In so doing, these commentators rejected an alternative by which the taxpayer's income would be measured by annual assessments based on changes to the taxpayer's wealth. *See, e.g.*, Simons, *supra*, at 207 ("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 id.* 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" and that 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.").

g. This Court's Early Cases

This Court's early-twentieth-century decisions also underscore the understanding that income requires realization. In one of the Court's first tax decisions following the adoption of the Sixteenth Amendment, it interpreted the Revenue Act of 1913 to hold that a stock dividend did not create a realization event for the shareholder, meaning that it fell outside the statutory definition of "income." *See Towne v. Eisner*, 245 U.S. 418, 425–26 (1918).

Then, after Congress revised the Revenue Act, the Court considered whether a stock dividend was

income under the Sixteenth Amendment itself. *See Macomber*, 252 U.S. at 205. In *Macomber*, the Court reaffirmed the realization requirement and held that "income" meant "the gain derived from capital, from labor, or from both combined." *Id.* at 207 (citation omitted). The "enrichment in value of capital investment is not income in any proper meaning of the term." *Id.* at 214–15. So unrealized gains like stock dividends could not qualify as income. *See id.* at 219.

Other early cases followed *Macomber*'s lead and treated realization as a critical component of taxable income. *See, e.g.*, *Weiss v. Stearn*, 265 U.S. 242, 253–54 (1924); *Taft v. Bowers*, 278 U.S. 470, 482 (1929). And this Court confirmed early on that "Congress cannot make a thing income which is not so in fact." *Burk-Waggoner Oil Ass'n*, 269 U.S. at 114. In 1940, the Court reiterated "the rule that income is not taxable until realized." *Helvering v. Horst*, 311 U.S. 112, 116 (1940).[2] And the Court has not departed from that rule ever since. *See* Pet.Br. at 24–26.

---

[2] The Ninth Circuit quoted *Horst* as suggesting 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 116–17. In that case, "income is 'realized' by the assignor because he, who owns or controls the source of the income, also controls the disposition of that which he could have received himself and diverts the payment from himself to others as the means of

2. A Realization Requirement Respects The Balance Struck By The Sixteenth Amendment's Framers.

If any doubts remain as to the meaning of "income," they are dispelled by the historical context surrounding the Sixteenth Amendment's passage.

This Court has long recognized that a constitutional amendment must be read "in connection with the known condition of affairs out of which the occasion for its adoption may have arisen." *Maxwell v. Dow*, 176 U.S. 581, 602 (1900), *abrogated on other grounds by Williams v. Florida*, 399 U.S. 78 (1970). And, with that historical context in mind, courts should construe the constitutional text "in a way, so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted." *Id.*; *see Hans v. Louisiana*, 134 U.S. 1, 11–12, 15 (1890); Scalia & Garner, *supra*, at 20 ("The evident purpose of what a text seeks to achieve is an essential element of context that gives meaning to [the] words.").

Here, the Sixteenth Amendment sought to accomplish the limited goal of overruling this Court's decision in *Pollock*. As Representative (and future Secretary of State) Cordell Hull of Tennessee explained in 1913:

> The *Pollock* decision held the income tax invalid not on the ground that income

---

procuring the satisfaction of his wants." *Id.*; *see also id.* at 118 ("The exercise of that power to procure the payment of income to another is the enjoyment, and hence the realization, of the income by him who exercises it.").

> could become capital and escape the tax, but on account of its origin; that it was, in effect, a tax on realty and personalty. The only proper inquiry in the light of the recent amendment, therefore, is not as to the origin or disposition of the income in question, but what amount of income accrued to a taxable individual during a given period. It must follow that the account of annual income required of a citizen for the purpose solely of ascertaining what amount of tax ought to be imposed upon him in consequence of his having made profits and collected by the Government not necessarily out of the specific income in question but from the general property of the taxpayer as well.

Memorandum for the Attorney General by T. M. Gordon, July 31, 1913, in S. Doc. No. 171, 63d Cong., 1st Sess. 6, at 5 (1913), *reprinted in* 93 *A guide and analytical index to the Internal Revenue Acts of the United States, 1909–1950* (Bernard D. Reams ed., 1979) (emphases omitted). Representative Hull not only equated the proper amount of taxable income with the "profits" a citizen has made each year, but he also identified the purpose of the Sixteenth Amendment: to overrule *Pollock*.

That view aligns with the historical record. Progressive political figures were clearly dismayed in the aftermath of *Pollock*. *See* Theodore Roosevelt, *Sixth Annual Message*, The Am. Presidency Project (Dec. 3, 1906), https://bit.ly/3OCup5H; Roy G. Blakey

& Gladys C. Blakey, *The Federal Income Tax* 20–23 (2006). Many who still supported a federal income tax had to decide whether to push for removing the Constitution's apportionment requirements altogether or for passing a constitutional amendment that would carve out income taxes—and only income taxes—from the apportionment requirement. *See* Robert Stanley, *Dimensions of Law in the Service of Order: Origins of the Federal Income Tax, 1861–1913* at 177 (1993).

Congress entertained both options and chose the latter. Senator Anselm McLaurin advocated for removing the apportionment components of the Constitution entirely. *See* 44 Cong. Rec. 3377 (June 17, 1909); 44 Cong. Rec. 4109 (July 5, 1909). But the Senate rejected McLaurin's sweeping proposal, which "would have had the effect of allowing future Congresses to levy any type of taxes without limitation, including a tax on real property." James W. Ely Jr., *"One of the Safeguards of the Constitution:" The Direct Tax Clauses Revisited*, 12 Brigham-Kanner Prop. Rts. J., at 41 (Vanderbilt L. Rsch., Working Paper No. 23-02, last revised Feb. 2, 2023), bit.ly/3FygLgb. Senator Norris Brown of Nebraska, speaking against Senator McLaurin's proposal, explained that the purpose behind his own proposed amendment was "to confine [the amendment] to income taxes alone, and to forever settle the dispute by referring the matter to the several states." 44 Cong. Rec. 3377 (1909) (June 17, 1909). Congress chose Senator Brown's position over Senator McLaurin's, and the States ratified it.

Failing to honor the realization requirement would upset that choice. And it would open the door to a limitless new federal tax power. As Judge Bumatay put it: "Divorcing 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. For "without a realization requirement to cabin the scope of 'incomes,'" he explained, "it is hard to see how the apportionment requirement has any remaining relevance." *Id.*

Indeed, the Sixteenth Amendment's relationship with *Pollock* is similar to the Eleventh Amendment's relationship with *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). In *Chisholm*, this Court held that Georgia could be sued by a citizen of another State, abandoning state sovereign immunity. *See id.* The country reacted to that decision with the passage of the Eleventh Amendment, which restored state sovereign immunity. This Court has construed that amendment against the backdrop of *Chisholm*. *See, e.g.*, *Hans*, 134 U.S. at 11–12. And it should do the same thing here for the Sixteenth Amendment, just as it has from the beginning. *See Macomber*, 252 U.S. at 205. In *Pollock*, as in *Chisholm*, "the highest authority of this country was in accord rather with the minority than with the majority of the court." *Hans*, 134 U.S. at 12.[3]

---

[3] Representative Charles Bartlett of Georgia noted as much during the debates over the Sixteenth Amendment:

> [T]he American people are again presented with the proposition to amend their fundamental law because of an extraordinary decision by the Supreme Court of [the]

3. Post-Ratification History Has Consistently Treated "Income" As Requiring Realization.

Since *Macomber*, this Court has described income as "instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). And Congress codified *Macomber*'s core holding in the Revenue Act of 1921, Pub. L. No. 67-98, 42 Stat. 227 (1921). 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 "the settled doctrine" 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. The line between income and not-income, then, has always been realization.

Indeed, early commentators recognized that this Court had settled the relationship between realization

---

> United States [in *Pollock*]. In the case of *Chisholm v. Georgia* the court held that the sovereign State of Georgia was subject to be sued by a private citizen of another State, and in that case the court abandoned the universal and accepted rule that the sovereign could not be sued except by its own consent. This so aroused the people and the representatives of the people in Congress that they insisted that the rule so promulgated by the Supreme Court of the United States, that a sovereign State should be subject to be dragged into court against its consent by a private citizen, should be cured by an amendment to the Constitution.

44 Cong. Rec. 4408 (July 12, 1909).

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). So when it comes to a "gain accrued but not realized, it is incorrect to call it income." *Id.* at 380; *see also Recent Cases*, 51 Harv. L. Rev. 1286, 1297 (1938) (noting that case law indicated "a trend toward treating any realized increment to wealth as income within the meaning of the 16th Amendment"). Early courts similarly recognized this Court's settled law holding that a gain is "not taxable until it is realized." *Staples v. United States*, 21 F. Supp. 737, 739 (E.D. Pa. 1937) (citing *N. Am. Oil Consol. v. Burnet*, 286 U.S. 417 (1932)).

Congress has consistently rejected tax proposals targeting unrealized gains on this very basis. *See* John R. Brooks & David Gamage, *Taxation and the Constitution, Reconsidered*, 76 Tax. L. Rev. 201, 257 (forthcoming 2023), bit.ly/3Ev9a1f ("When Congress previously considered substantial income tax reforms to reach unrealized gains—such as taxing shareholders on certain undistributed profits in 1962, or taxing unrealized gains at death in 1963—there was controversy over whether the Supreme Court would uphold those reforms without apportionment, and that controversy played a role in those reforms being defeated." (citing Marjorie E. Kornhauser, *The Story of* Macomber*: The Continuing Legacy of Realization*, in *Tax Stories: An In-Depth Look At Ten Leading Federal Income Tax Cases* 112, 129–30 (Paul L. Caron ed., 2d ed. 2009))).

It should come as no surprise, then, that "[o]ne of the foundational principles of the Internal Revenue Code is that gains and losses are subject to taxation only when they are realized, and only to the extent that the amount realized exceeds the adjusted basis." Note, Benjamin G. Barokh, *The Meaning of "Incomes" in the Sixteenth Amendment*, 15 Geo. J.L. & Pub. Pol'y 409, 419 (2017) (internal footnote omitted) (citing 26 U.S.C. §§ 1001(a), 1011); *see* Rodney P. Mock & Jeffrey Tolin, *Realization and Its Evil Twin Deemed Realization*, 31 Va. Tax Rev. 573, 576 (2012) ("The doctrine of realization has been intertwined with the federal tax definition of income since the early days of the U.S. income tax system."); Boris I. Bittker, *Fundamentals of Federal Income Taxation* ¶ 1.5, at 1–36 (Richard L. Doernberg et al. eds., 1983) ("[D]espite occasional judicial statements that all gains are embraced by I.R.C. § 61(a) unless specifically excluded by statute, realization is so basic to the taxing structure of existing law that the general principle is simply not challenged.").

The MRT clearly and abruptly departs from this practice. Even the Ninth Circuit recognized its "novel[ty]." Pet.App.8. And this Court has noted in other constitutional contexts that such a lack of "a foundation in historical practice" can be a sign of an unconstitutional statutory scheme. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2192 (2020); *see also NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) ("[T]he longstanding practice of the government . . . can inform our determination of what the law is" (internal citations and quotation marks omitted)).

II. The Ninth Circuit's Decision Invites Future Efforts To Expand Congress's Taxing Power Beyond Constitutional Constraints.

Though *Macomber*'s proximity to the Sixteenth Amendment's ratification makes it especially 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.

Recent years have seen a slurry of proposed wealth taxes. Some of these proposals try to seize the net unrealized gains of wealthy taxpayers. *See, e.g.*, H.R. 8558, 117th Cong. (2022) (Billionaire Minimum Income Tax Act that 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) (Ultra-Millionaire Tax Act of 2021 that would collect 2% annually on the net value of all covered assets in excess of $50 million, and up to 8% on the value in excess of $ 1 billion); H.R. 1459, 117th Cong. (2021) (similar to Ultra-Millionaire Tax Act of 2021); 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 similarly contains an annual minimum 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 echoes a previous proposal of his 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 Congress will not 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 circumscribed attack on the wealthy. Congress enacted the AMT in 1969, spurred by outrage over just 155 taxpayers with incomes over $200,000 who paid no income tax. *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 will test the waters with a small number of wealthy taxpayers. But, eventually, Congress's appetite for new revenue ensnares far more Americans. Indeed, over 60% of Americans own securities, making them susceptible to congressional attempts to tax unrealized capital gains. *See* Jeffrey M. Jones, *What Percentage of Americans Own Stock?*, Gallup (May 24, 2023), 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 number of taxpayers, 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. *See* Pet.App.55. Without the realization requirement, the Sixteenth Amendment becomes the exception that swallows the rule.

The interests of federalism also counsel against the Ninth Circuit's view. "The state taxing power is one of the fundamental powers of state government." Note, 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[.]"). But 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. But, until the decision below, it was widely recognized that the Sixteenth Amendment's reach was strictly limited to realized gains. This Court should reaffirm that longstanding rule and reverse.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

BRIAN A. KULP
DECHERT LLP
CIRA CENTRE
2929 Arch Street
Philadelphia, PA 19104

STEVEN A. ENGEL
Counsel of Record
MICHAEL H. MCGINLEY
ERIC D. HAGEMAN
JUSTIN W. AIMONETTI
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
(202) 261-3369
steven.engel@dechert.com

Counsel for Amicus Curiae

September 6, 2023