No. 22-800

IN THE

Supreme Court of the United States

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

v.

UNITED STATES,
Respondent.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION AND YOUNG AMERICA'S FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates to protect individual rights and the framework set forth to protect such rights in the Constitution. This aspect of its advocacy is reflected in the regular representation of those challenging actions in violation of the constitutional framework. *See, e.g.*, *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018). SLF also regularly files *amicus curiae* briefs with this Court about issues of agency overreach and deference. *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

Young America's Foundation (YAF) is a 501(c)(3) public charity whose mission is to educate and inspire young Americans from middle school through college with the ideas of individual freedom, a strong national defense, free enterprise, and traditional values. This case is important to YAF because it presents the Court an opportunity to curb unconstitutional government overreach and strengthen the fundamental principle of private property, without which the American

[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief.

experiment would not exist. The People are most able to pursue life, liberty, and happiness, and in the best position to contribute to America's economy, when the government stays out of their pocketbooks.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Constitution's Framers "knew that unrestrained and unregulated taxation had been, in all the experiences of the world, the chief instruments of tyranny." George F. Edmunds, *Salutary Results of the Income Tax Decision*, 19 The Forum 513, 516 (1895). And "while it was indispensable to the existence of the nation, it was not the less necessary that it should be kept within definite bounds." *Id.* Thus, they drafted the Constitution's tax provisions in a "context defined by the desire to prevent abuses of the power of taxation." Owen M. Fiss, *Troubled Beginnings of the Modern State*, 1888-1910, 88-89 (1993). *See also* E.L. Godkin, 60 The Nation 214 (Mar. 21, 1895) ("Unrestricted power of taxation is the greatest power over accumulated wealth, manufactures, industry, and personal freedom which any government can have; for liberty … cannot be worth much to a man who may be taxed in any way some other man pleases.").

This case concerns an expansion of Congress's taxing power. As part of the Tax Cuts and Jobs Act of 2017, Congress enacted the Mandatory Repatriation Act. That law deemed certain foreign corporations' retained earnings as income, and taxed U.S. shareholders on that "income" in proportion their ownership stakes—even though no money was ever distributed. In upholding this novel wealth tax, the Ninth Circuit held (for the first time) that "realization of income is not a constitutional requirement" for Congress to impose a tax exempt from apportionment under the Sixteenth Amendment. App. 12. In so

holding, the court left Petitioners on the hook for thousands of dollars in income taxes despite not having received any actual income. As Judge Bumatay recognized, this holding "seriously undermines the constitutional apportionment requirement." App. 55 (Bumatay, J., dissenting from the denial of rehearing en banc).

Amici agree with Petitioners that the decision below should be reversed and write separately to explain how it conflicts with the Sixteenth Amendment's "ordinary meaning, history, and precedent." App. 39 (Bumatay, J.). "Neither the text and history of the Sixteenth Amendment nor precedent support levying a direct tax on unrealized gains. Ratification-era sources confirm that the prevailing understanding of 'income' entailed some form of realization. And a hundred years of precedent establishes that only realized gains are taxable as 'income' under the Sixteenth Amendment." App. 39 (Bumatay, J.). This Court has never "abandoned the core requirement that income must be realized to be taxable without apportionment under the Sixteenth Amendment." *Id.* It should reaffirm that requirement by reversing the decision below.

ARGUMENT

I. The history leading up to the adoption of the Sixteenth Amendment, the Amendment's text, and this Court's precedent all demonstrate that a tax on unrealized gains is unconstitutional.

A. The Ninth Circuit's novel expansion of the power to tax income cannot be squared with the history of the Sixteenth Amendment.

Before the Sixteenth Amendment, the Constitution limited the power of Congress to levy "direct Taxes" on property and income by requiring that such taxes be "apportioned among the several States … according to their respective Numbers." U.S. Const., art. I, §2, cl. 3. Apportionment for direct taxes was "deemed by the framers of the constitution so important," David J. Brewer, The Income Tax Cases and Some Comments Thereon, 5 (1898), that they expressly provided for it a second time: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census." U.S. Const., art. I, §9, cl. 4. Indeed, the "apportionment rule is the sole restriction on Congress to be placed in the Constitution in two separate sections." James W. Ely Jr., *'One of the Safeguards of the Constitution:' The Direct Tax Clauses Revisited*, 12 Brigham-Kanner Prop. Rts. J. (Vanderbilt L. Rsch. Working Paper, No. 23-02, Feb. 2, 2023), bit.ly/3FygLgb.

James Madison considered the direct tax provisions "one of safeguards of the Constitution." 4 Annals of Cong. 729-30 (1794). And Chief Justice

Marshall later declared that "the principle of apportionment" provided security "from any oppressive exercise of the power to lay and collect direct taxes." *Loughborough v. Blake*, 18 U.S. 317, 325 (1820). The Framers thus "clearly regarded the limitation on the imposition of direct taxes to be important." Ely, *supra*, at 5.

At the time, it was commonly understood that taxes on personal property and incomes were direct taxes requiring apportionment under these provisions. In 1796, for example, future Treasury Secretary Albert Gallatin reported that "[t]he most generally received opinion … [was] that, by direct taxes in the constitution, those are meant which are raised on the capital or revenue of the [people.]" *Pollock v. Farmers' Loan & Tr. Co.*, 157 U.S. 429, 569 (1895) (quoting 3 Gall. Writings (Adams ed.) 74, 75).

To be sure, this Court at first took an improperly constrained view of "direct Taxes." After "Congress passed a tax on ownership of carriages, over James Madison's objection that it was an unapportioned direct tax," *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (*NFIB*), the Court upheld that tax. In *Hylton v. United States*, 3 U.S. 171 (1796), the Court suggested "that only two forms of taxation were direct: capitations and land taxes." *NFIB*, 567 U.S. at 571; *see Hylton*, 3 U.S. at 175 (opinion of Chase, J.) (direct taxes included only "a capitation, or poll tax, simply, without regard to property, profession, or any other circumstances; and a tax on LAND"). Since a tax

on the use of carriages was neither, the Court held that it need not be apportioned.[2]

But numerous scholars have called *Hylton*'s validity into question. Because of the "lack of meaningful engagement … with the rationale for the direct tax clauses," several scholars have decried the "questionable strength of *Hylton* as a precedent." Ely, *supra*, at 13, 16 n.69. To start, only three of six justices participated in the case,[3] and "[a]ll were ardent Federalists, anxious to uphold the authority of the fledging national government." *Id.* at 13. "Moreover, this case was the first before the Supreme Court to present a challenge to the constitutionality of a congressional measure." *Id.* And pre-*Marbury*, the Court appeared hesitant to assert its judicial review power. Justice Chase explained that "if the court have such power [to declare an act of Congress void], I am free to declare, that I will never exercise it, but in a very clear case." *Hylton*, 3 U.S. at 175. By refusing to declare the tax void, the Court avoided the thorny question of judicial review.

A leading Sixteenth Amendment scholar has gone so far as to call *Hylton* "a phony dispute, with manufactured 'facts,'" and decried that "it's hard to see why the Court decided this case except to make a

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[2] The carriage tax was a tax on consumption (effectively, the gas tax of its era), as well as a tax on a particular luxury item.

[3] Justice Wilson additionally expressed his "sentiments[] in favor of the constitutionality of the tax" but did not join any of the decisions since he "had before expressed a judicial opinion on the subject[] in the Circuit Court of Virginia." *Hylton*, 3 U.S. at 183 (opinion of Wilson, J.).

statement about Federalist power." Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 Const. Comment. 355, 380 (2004). And another has lamented that "[i]t is hard to avoid the conclusion that the *Hylton* Court was more concerned to affirm broad taxing authority in Congress than to seriously investigate the purpose of the direct tax clauses." Ely, *supra*, 16. All of this suggests that the Court was motivated more by external concerns than by adherence to the original meaning of the Constitution.

In any event, the Court followed Justice Chase's dicta in *Hylton* for nearly a century, *see Springer v. United States*, 102 U.S. 586, 602 (1881), until it returned to applying the original meaning of "direct taxes" in 1895. *See Pollock v. Farmers' Loan & Tr. Co.* 157 U.S. 429 (1895). The realization that the Constitution did, in fact, subject both property and income taxes to the apportionment requirement had been simmering for some time. In 1894, Representative James Maguire of California recognized that the income tax wouldn't reach unrealized appreciation in land value and proposed a direct tax on that value. 26 Cong. Rec. 1739 (Jan. 31, 1894); *accord* Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 Ariz. St. L.J. 1057, 1129 n.375 (2001). One year later, the *Pollock* Court struck down an income tax in the Wilson Tariff Act of 1894, reasoning that the tax on income from personal property was direct and therefore required apportionment. 157 U.S. at 583.

Congress responded directly to the *Pollock* decision by adopting the Sixteenth Amendment. It

exempted taxes on income—and only income—from the apportionment requirement. That choice was intentional. When Senator Norris Brown of Nebraska introduced a joint resolution containing the Amendment on June 17, 1909, Senator Anselm McLaurin suggested that it would be more efficient to eliminate the apportionment requirement for direct taxes altogether. 44 Cong. Rec. 3377 (1909). Senator Brown rejected this suggestion, explaining that the "purpose" of introducing the Sixteenth Amendment was to "*confine it to income taxes alone*, and to forever settle the dispute by referring the subject to the several States." *Id.* (emphasis added). "Brown's understanding carried the day." Ely, *supra.*, at 41. "When McLaurin offered an amendment to remove the references to direct taxes in the Constitution, it was defeated, apparently by voice vote." *Id.* (citing 44 Cong. Rec. at 4120 (July 5, 1909)).

This history "clearly demonstrates that [] Congress adopted an important, but narrow … amendment tailored to authorize the levy of an income tax without apportionment." Ely, *supra*, at 41. Yet the Ninth Circuit ignored all this historical context. Instead, the court upheld a novel wealth tax, offering Congress the broad power to "redraw the boundaries of its power to tax without apportionment." App. 53-54 (Bumatay, J.). The court suggested that "[o]nce the federal government decides to tax something, then, subject to any constitutional limitations, its power to tax and flexibility as to how to accomplish that must necessarily be broad." App. 9. But the court failed to grapple with those constitutional limitations and ignored the history of the tax clauses.

B. The Sixteenth Amendment adopted the plain meaning of "income."

"The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary … meaning." *United States v. Sprague*, 282 U.S. 716, 731 (1931). "The Sixteenth Amendment, like other laws authorizing or imposing taxes, is to be taken as written, and is not to be extended beyond the meaning clearly indicated by the language used." *Edwards v. Cuba R. Co.*, 268 U.S. 628, 631 (1925). Despite this, the court below had "difficulty in defining income" in the Sixteenth Amendment. App. 11. It simply declared that the "concept of income is a flexible one" and noted that the definition of income "must be determined case by case." App. 11 (citations omitted). But the court below failed to closely examine the text or even consult any ratification-era sources defining income.

By its plain terms, the Sixteenth Amendment exempts income tax from the requirement that "any 'direct Tax' must be apportioned so that each State pays in proportion to its population." *NFIB*, 567 U.S. at 570. It gives Congress the "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. But this exemption from apportionment is limited to taxes on *realized* gains. Indeed, "[t]hat limitation is plain on the face of the Amendment's text, which contemplates that 'income' will be 'derived' from a 'source,' and is the only interpretation consistent with the universal

understanding of 'income' at the time of the Amendment's adoption." Pet. 2.

Start with the definition of "income." The decision below concluded that there is "no set definition of income under the Sixteenth Amendment." App. 16. Not so. "Income within the meaning of the Sixteenth Amendment … is income as the word is known in the common speech of men." *United States v. Safety Car Heating & Lighting Co.*, 297 U.S. 88, 99 (1936). And "income" at the time of ratification "ha[d] a settled legal meaning." *Md. Cas. Co. v. United States*, 52 Ct. Cl. 201, 209 (Ct. Cl. 1917). It "include[d] only the receipt of actual cash as opposed to contemplated revenue due but unpaid." *Id.* In other words, "the ordinary meaning of 'income' was confined to realized gains." App. 46 (Bumatay, J.).

Ratification-era dictionaries confirm that the Sixteenth Amendment adopts this plain meaning of "income." In 1910, Black's Law Dictionary defined "income" as "that which *comes in* or is *received from* any business or investment of capital." Black's Law Dictionary 612 (2d ed. 1910) (emphasis added). The 1913 edition of Webster's defined "income" as "that *gain* which *proceeds from* labor, business, property, or capital of any kind." *Income*, Webster's Revised Unabridged Dictionary (1913) (emphasis added). Bouvier's Law Dictionary adopted a nearly identical definition: "The gain which *proceeds from* property, labor, or business." *Income*, Bouvier Law Dictionary (6th ed. 1856) (emphasis added). And the Century Dictionary similarly defined "income" as "[t]hat 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." 4 The Century Dictionary and Cyclopedia 3040 (1901) (emphasis added). *See also Income,* Robert Hunter & Charles Morris, Universal Dictionary of the English Language 2636 (1897) ("That gain which a person derives from his labour, business, profession, or property of any kind."); *Income,* Joseph Emerson Worcester, Dictionary of the English Language 735 (1875) ("Gain derived from any business or property.").

This definition lines up with other ratification-era interpretations of "income." Black's Dictionary editor, Henry Campbell Black, for example, published a tax treatise within months of ratification defining "income" as "that *gain* which proceeds from labor, business, property, or capital of any kind." Henry Campbell Black, A Treatise on the Law of Income Taxation Under Federal and State Laws 73 (1913) (emphasis added). According to Black, realization was a critical part of income. An income tax, he explained, "is not a tax upon accumulated wealth, but upon its periodical accretions." *Id.* at 1. And accretions occurred only when gains were realized. For example, Black concluded that a bond owner "can realize a profit if he sells the [matured] bond, but not otherwise. If he sells, then the sum gained may constitute a part of his income, but it cannot be so described while he continues to hold the security." *Id.* at 77. Indeed, Black addressed the very issue in this case, explaining that while "[t]he value of corporate stock may be increased by good management, prospects of business, and the like, … such increase is not income. It may also be increased by the accumulation of a surplus

fund. But so long as that surplus is retained by the corporation, either as a surplus or as increased stock, it can in no proper sense be called income. It may become income-producing, but it is not income." *Id.* at 120.

A few years later, Robert Montgomery authored a tax treatise, explaining that "the taxation of capital … is not permitted" under the Constitution. Robert H. Montgomery, Income Tax Procedure 198 (1919). That reasoning, he wrote, "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." *Id.* (emphasis added).

Returning to the text of the Sixteenth Amendment, it provides that income can be taxed only when it is "derived" "from" a "source." U.S. Const. amend. XVI. For income to be "*derived*," it must be "*received* or *drawn by*" the taxpayer. *See Eisner v. Macomber*, 252 U.S. 189, 207 (1920) (emphasis in original). One ratification-era dictionary defined "derive" in this context to mean "to *take or receive* from a source or origin." *Derive,* Chambers' Twentieth Century Dictionary of the English Language (1903) (emphasis added). Another defined "derive" to mean "[t]o *receive*, as from a source or origin; to *obtain* by descent or by transmission; to draw." *Derive*, Webster's Revised Unabridged Dictionary (1913) (emphases added). "Taken collectively, these sources reinforce the common-sense notion" that "income"—"derived" from a "source"—"refers to the receipt of some economic benefit." App. 49 (Bumatay, J.).

Put simply, ratification-era sources establish that the word "income"—taken in its "natural and obvious sense," *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816)—inherently requires the realization of gain. Indeed, this "commonly understood meaning" was "in the minds of the people when they adopted the Sixteenth Amendment." *Merchants' Loan & Trust Co. v. Smietanka*, 255 U.S. 509, 519 (1921). Thus, neither Congress nor this Court may "make a thing income which is not so in fact." *Burk-Waggoner Oil Ass'n v. Hopkins*, 269 U.S. 110, 114 (1925).

C. This Court's precedents reaffirm that income refers to a realized gain.

Supreme Court precedent reaffirms that the Sixteenth Amendment adopted the ordinary meaning of income. Less than a decade after ratification, this Court considered it "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 v. Bowers*, 278 U.S. 470, 481 (1929). In holding that "realization of income is not a constitutional requirement" for Sixteenth Amendment "taxes on incomes," the decision below breaks with more than a century of this Court's decisions, which have consistently held the opposite. App. 42 (Bumatay, J.). But "Congress cannot make a thing income which is not so in fact." *Burk-Waggoner Oil Ass'n*, 269 U.S. at 114.

This Court first interpreted "income" under the Sixteenth Amendment in *Eisner v. Macomber*, 252

U.S. at 189. There, the Court addressed whether a stockholder's receipt of dividends counted as "income" under the Sixteenth Amendment. *Id.* at 207-08. The Court explained that the "clear definition of the term 'income,' as used in common speech" meant "the gain derived from capital, from labor, or from both combined." *Id.* at 206-07. Applying the definition to a stock dividend, the Court concluded, "[t]he dividend normally is payable in money … and when so paid, then only … does the stockholder realize a profit or gain which becomes his separate property, and thus derive income from the capital that he or his predecessor has invested." *Id.* at 209. "Put simply, *Macomber* says that stock dividends do not constitute 'income' until 'realize[d]' as profit or gain." App. 50 (Bumatay, J.).

Indeed, since *Macomber*, courts have "uniformly construed" the word "income" "to include only the receipt of actual cash as opposed to contemplated revenue due but unpaid." *Md. Cas. Co.*, 52 Ct. Cl. at 209. In *Taft*, this Court held "[t]he gain derived from capital, within the definition [of income], *is not* … a growth or increment of value in the investment, but a *gain*, a profit, … that is, received or drawn by the claimant for his separate use, benefit and disposal." 278 U.S. at 481 (citing *United States v. Phellis*, 257 U.S. 156, 169 (1921)) (internal quotations omitted) (emphasis added). This Court again highlighted that only "gain actually resulting from the increased value of capital can be treated as taxable income." *Id.* at 484.

In the 1940s, the Court reaffirmed this principle, stating that "the rule [is] that income is not taxable until realized." *Helvering v. Horst*, 311 U.S. 112, 116

(1940). "From the beginning," the Court explained, "the revenue laws have been interpreted as defining 'realization' of income as the taxable event … [a]nd 'realization' is not deemed to occur until the income is paid." *Id.* at 115. The same year in *Helvering v. Bruun*, the Court again recognized that a "realization of gain" is required. 309 U.S. 461, 468-69 (1940).

The Court yet again reaffirmed its adherence to the realization requirement in *CIR v. Glenshaw Glass Co.*, 348 U.S. 426 (1955). It noted that income may reach "instances of undeniable accessions to wealth, *clearly realized*, and over which the taxpayers have complete dominion." *Id.* at 431 (emphasis added).

Since then, this Court has never deviated from the core principle that that income must be realized to be taxable without apportionment under the Sixteenth Amendment.

A pair of law professors has recently argued that corporate taxes prior to the Sixteenth Amendment show that the original meaning of "income" does not require realization. *See* John R. Brooks & David Gamage, Forthcoming Paper: Moore v. United States *and the Original Meaning of Income* (July 2, 2023). In support, they point to Treasury Decisions made under the 1909 Corporation Excise Tax Act that include "increase in the value" of certain assets as income. *Id.* at 17. But this is not evidence of a broad understanding of income. That Act, as its name indicates, imposed an *excise tax* on "the conduct of business in a corporate capacity" in an amount determined by the taxed corporation's net income. *Stratton's Independence, Ltd. v. Howbert*, 231 U.S.

399, 414, 417 (1913). In other words, this was as an excise "on the privilege of doing business in corporate form" that was "'measured by income;'" it was not an income tax itself. Cong. Research Service, The Constitution of the United States of America: Analysis and Interpretation, Centennial ed. 2275 (2013) (quoting *Stratton's Indep.,* 231 U.S. at 414, 417).

More importantly, the Third Circuit ultimately disagreed with the Treasury Decisions' interpretation of income in the Act. "[I]ncrease in valuation" the court held, "can hardly be said to be income, or even gain, in any proper sense." *Baldwin Locomotive Works v. McCoach*, 221 F. 59, 60 (3d Cir. 1915). A "company could not become either richer or poorer by making a few book entries that merely recorded a new estimate of how much it was worth." *Id.*; *see also Lynch v. Turrish*, 247 U.S. 221, 230-31 (1918) (explaining that "advance in value is not income at all, but merely increase of capital and not subject to tax as income"); *S. Pac. Co. v. Lowe*, 247 U.S. 330, 335 (1918) (rejecting the contention that "all receipts—everything that comes in—are income within the proper definition of the term 'gross income'"). Having been rejected by the Third Circuit, the Treasury Decisions do nothing to detract from the Court's post-ratification cases requiring realization for gains to count as income.

* * *

At bottom, the Sixteenth Amendment requires that "an income tax must be a tax on realized income." App. 39 (Bumatay, J.). Based on text, history, and precedent, the court below erred in disregarding that realization requirement. "[W]ithout the guardrails of

a realization component, the federal government has unfettered latitude to redefine 'income' and redraw the boundaries of its power to tax without apportionment." *Id.* at 53-54. This case illustrates as much. The decision below leaves Petitioners on the hook for thousands of dollars in income taxes despite not having received any income. Such a scheme "seriously undermines the constitutional apportionment requirement." App. 55 (Bumatay, J.).

CONCLUSION

For these reasons, the Court should reverse the decision below.

Respectfully submitted,

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