

No. 22-800

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**In the Supreme Court of the United States**

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

*v.*

UNITED STATES OF AMERICA,  
*Respondent.*

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

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**BRIEF OF THE PHILANTHROPY ROUNDTABLE  
AS *AMICUS CURIAE* IN  
SUPPORT OF PETITIONERS**

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**QUESTION PRESENTED**

Whether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states.

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

The Philanthropy Roundtable was founded in 1987, becoming an independent nonprofit organization in 1991 with the goal of promoting excellence in philanthropy, protecting philanthropic freedom, and helping donors advance liberty, opportunity, and personal responsibility. The staff at Philanthropy Roundtable publishes research to inform donors on effective charitable giving, advocates for policies that promote philanthropic freedom, and supports organizations that are working to advance liberty, opportunity, and personal responsibility.

The Philanthropy Roundtable supports a strong private sector as the bedrock for creating the private wealth that makes philanthropy possible. It also understands that by supporting civil society, private charitable giving not only helps people, it provides the competition and accountability necessary to improve the performance of government and contain its reach.

This case concerns the Philanthropy Roundtable because the American philanthropic movement strengthens our free society, but its effectiveness is highly dependent on the nature of the tax code. If the Mandatory Repatriation Tax is upheld, then it could open the door to a variety of taxes that are dangerous to effective philanthropy.

## SUMMARY OF ARGUMENT

Americans are remarkably charitable—in fact, the most charitable people in the world. Even during the

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<sup>1</sup> Rule 37 statement: No party's counsel authored this brief in any part and *amicus* alone funded its preparation and submission.

recent pandemic, when many feared for their financial future, Americans became *more* generous. Fifty-six percent donated to charity in 2021, 72 percent helped strangers, and 42 percent volunteered. Dawn Papan-drea, “56% of Americans Donated to Charity in 2021, at Average of \$574,” LendingTree.com, Nov. 29, 2021, <https://tinyurl.com/5yxrzyut>; Erica Pandey, “America the generous: U.S. leads the globe in giving,” Axios.com, May 12, 2022, <https://tinyurl.com/34hh6v4k>. Charities perform vital functions in our society, and the amount and character of charitable giving is inevitably tied to the tax code.

Congress has a broad power to tax—few dispute that—but that power is not unlimited. The constitutional limits on Congress’s taxing power should be well defined and predictable, and any fundamental changes to those powers should come only from properly enacted constitutional amendments—as occurred with the creation of the Sixteenth Amendment. The Ninth Circuit’s decision here, however, fundamentally changes the limits of the Sixteenth Amendment and imperils a fair and predictable tax code. America’s rich tradition of charitable giving is one of many things that depends on a fair and predictable tax code.

Charles and Kathleen Moore were levied a substantial tax on money they never earned. Like someone who holds on to a treasured keepsake baseball card that rises in value, the Moores bought and held stock in a company that has a mission they believe in. The value of those shares increased, yet the Moores did not realize any monetary gain from the stock. Taxing the value of that stock violates the Sixteenth Amendment’s command that unapportioned direct taxes can only be on “income” that is “derived” from a “source.”



The framers of both the original Constitution and the Sixteenth Amendment chose their words with care—as anyone would who is given such a significant task—and those words deserve to be fairly interpreted according to their original public meaning and the purposes of the taxing provisions of the Constitution. The power to tax was, of course, extremely important to the founding generation that fought a revolution partially under the mantra “no taxation without representation.” Limiting the power to tax was also important to the framers of the Sixteenth Amendment, who did not simply write the words “Congress has the power to tax whatever it wants.”

The Constitution was passed to increase the power of the federal government, including the power to tax. Richard Beeman, *Plain, Honest Men: The Making of the American Constitution* 37–38 (2009). One of the principal perceived defects of the Articles of Confederation was the inability to raise taxes to fund the “general government.” *Id.* Thus, the Constitution allowed Congress a broad power to pass “indirect” taxes but circumscribed the power to pass “direct” taxes. While these words might seem antiquated, they still describe important limits on taxation that are relevant today.

The framers of both the original Constitution and the Sixteenth Amendment broadly agreed that the power to tax should not be unlimited and that it should be relatively predictable. They also believed that the private sphere is as important as the public sphere, and that especially includes philanthropy.

A broad and relatively unfettered power to tax unquestionably affects philanthropy. Not only is the

MRT unconstitutional, as explained more fully by Petitioners and other *amici*, it is unwise and dangerous to American philanthropy.

## ARGUMENT

### I. PHILANTHROPY IS A VITAL PART OF AMERICAN SOCIETY AND THE TAX CODE SHOULD FACILITATE GIVING

Philanthropy helps create a vibrant, caring, and dynamic society. While effective public expenditures can maintain our welfare and security, and private businesses have long increased societal wealth and created new products and opportunities, there is an indispensable role for philanthropy in a free society. There are some functions that simply would not be performed—or be performed much less—without philanthropy.

Philanthropic organizations—from large nonprofits like the Salvation Army to small, community-oriented groups—can perform many necessary and socially beneficial tasks better than government. Governments tend to propose monolithic solutions to complex problems, and they often lack the on-the-ground knowledge and experience. Private nonprofits can also be entrepreneurial and experimental in ways that government programs often are not.

As Tocqueville observed two centuries ago, Americans have a predilection to form civic-minded associations for the purposes of accomplishing non-pecuniary tasks: “Americans of all ages, of all conditions, of all minds, constantly unite.” Alexis de Tocqueville, *Democracy in America* 896 (Liberty Fund 2010) (1835).

Those Americans “associate to celebrate holidays, establish seminaries, build inns, erect churches, distribute books, send missionaries to the Antipodes; in this way they create hospitals, prisons, schools.” *Id.* According to a 2016 report, Americans donate three to nine times as much (as a percentage of GDP) as Europeans. Charities Aid Foundation, “Gross Domestic Philanthropy: An International Analysis of GDP, Tax, and Giving,” Jan. 2016, <https://tinyurl.com/bdhchh4h>.

In 2022, the total charitable giving in the U.S. was \$499.33 billion, a slight decline from previous years, which had seen record levels. Lily Family School of Philanthropy, “Giving USA: Total U.S. charitable giving declined in 2022 to \$499.33 billion following two years of record generosity,” June 20, 2023, <https://tinyurl.com/yc5xwp68>. The decline is likely due to many factors—such as inflation and readjusting the economy post-pandemic—but declines in giving are also rare, having fallen only three times in the last 40 years, all years of economic hardship (1987, 2008, and 2009). *Id.* And while the total amount given to charity seems big, it represents only about 2 percent of GDP. Philanthropy Roundtable, “Statistics on U.S. Generosity,” <https://tinyurl.com/2wfw9kmn>. Of that charitable giving, the majority—64 percent—comes from individuals. Moreover, Americans are charitable with their time as well as their money, with 60.7 million people volunteering between 2020–21, at an estimated value of \$122.9 billion. AmeriCorps, “Volunteering and Civic Life in America,” <https://tinyurl.com/yh58cucb>.

But that charity is not assured, and economic, social, and governmental factors of course affect the level of giving. In 2000, about two-thirds of households gave to charity. Lily Family School of Philanthropy, “The

Giving Environment: Understanding Pre-Pandemic Trends in Charitable Giving,” Lily Family School of Philanthropy, July 2021, <https://tinyurl.com/ywwrm4x2>. Since 2008, however, there has been a decline in the percentage of households that give to charity. *Id.* at 5. Why that number has declined is difficult to identify, but changes in income and wealth seem to be responsible for about a third of the decline. *Id.* at 24. Moreover, small donors—who are the majority—are increasingly giving less. There has been a 7 percent decrease in one-time donors and donors giving less than \$500, and a 13 percent decrease in donors giving less than \$100. AFPGlobal.org, “Quarterly Fundraising Report,” <https://tinyurl.com/4wzyeyjy>. Formal volunteering also decreased by 7 percent between 2019 and 2021. AmeriCorps, “Volunteering and Civic Life in America,” *supra*.

After the Tax Cuts and Jobs Act of 2017, of which the Mandatory Repatriation Tax (MRT) is part, charitable giving went down 1.1 percent. Richard Eisenberg, “How the tax overhaul contributed to a drop in charitable giving,” PBS.org, June 18, 2019, <https://tinyurl.com/mr67bhep>. Most have blamed the doubling of the standard deduction for the decrease. *Id.* That shows how much philanthropic activity is susceptible to changes in the tax code. While the MRT itself is not a particularly large or significant tax in the overall scheme of U.S. taxation, it’s an example of a type of unfettered tax that would disrupt charitable giving if the Court sustains the Ninth Circuit’s decision.

In particular, wealth taxes have been recently proposed by many significant political figures, including the president. Whizy Kim, “Biden’s plan to tax the

rich, explained,” Vox.com, Mar. 10, 2023, <https://tinyurl.com/2rr83ehn>. President Joe Biden’s tax plan includes a 25 percent tax on wealth over \$100 million. *Id.* The “Billionaire’s Minimum Income Tax Act” proposes a 20 percent tax on households with over \$100 million in wealth. *Id.* Sen. Elizabeth Warren (D-Mass.) has long championed a wealth tax, including in the “Ultra-Millionaire Tax Act,” which includes a 2 percent annual tax on the net worth of households and trusts between \$50 million and \$1 billion. Elizabeth McGuigan, “Wealth Tax Proposals Threaten Philanthropy,” Philanthropy Roundtable, July 2022, <https://tinyurl.com/2p8r5fzh>.

Some prominent politicians and commentators have even criticized the concept of private philanthropy, attacking a fundamental aspect of a free society. Embracing the idea that all or most money should be distributed by the government, Sen. Warren has said: “Last I saw, there aren’t many billionaires making charitable contributions to enforce serious environmental regulations, to enforce serious anti-monopoly regulations, to put in place a well-funded enforcement agency to make certain that people aren’t getting cheated on financial products. No, they want to direct money in the ways they want to spend it.” Anand Giridharadas, “Elizabeth Warren thinks the filibuster’s end is nigh,” The.Ink, Mar. 3, 2021, <https://tinyurl.com/3cxkb3rv>. Some, such as philosopher Emma Saunders-Hastings of Ohio State University, have argued that most types of philanthropy, especially from the wealthy, are illegitimate because we should honor “the democratic goal of ensuring that citizens share authority in an ongoing way over the social and political outcomes that affect them in common.” Nicholas

Lemann, “Would the World be Better Off Without Philanthropists?,” *New Yorker*, May 23, 2022, <http://tinyurl.com/zxzy5psv>.

Political philosophers can abstractly debate the role of philanthropy, but, under the Constitution, there is clearly a large role for philanthropic activity. The federal government has limited and enumerated powers, *United States v. Lopez*, 514 U.S. 549, 552 (1995) (“The Constitution creates a Federal Government of enumerated powers.”), and many things that depend on charitable activity—such as museums, education, and, of course, religious institutions—are nowhere to be found in the text of the Constitution. The Framers foresaw that such institutions would be funded either by state governments, which enjoy broader police powers, and/or private charities.

George Washington, one of the richest people of his time and probably the comparatively richest president in the nation’s history, was an extremely charitable man. Michael B. Sauter, Grant Suneson & Samuel Stebbins, “From Washington to Trump: This is the net worth of every American president,” *USA Today*, Nov. 5, 2020, <http://tinyurl.com/yu4m33ju>. As Washington wrote to his cousin (who managed Mount Vernon in his absence) at the beginning of the American Revolution: “Let the Hospitality of the House, with respect to the Poor, be kept up; Let no one go hungry away . . . and I have no objection to your giving my money in Charity to the amount of Forty or Fifty pounds a year, when you think it well bestowd. What I mean by having no objection, is, that it is my desire that it should be done.” Adrina Garbooshian-Huggins, “George Washington and Charity,” *WashingtonPapers.org*, Sept. 3,

2021, <http://tinyurl.com/mtz9wk2z>. Washington supported causes such as schools, poor relief, fire protection, publications, and churches. *Id.*

Benjamin Franklin was also one of the most charitable men of the founding generation. Throughout his life he worked on a dizzying variety of causes, from creating the first volunteer fire department in Philadelphia to establishing a public library. “Hall of Fame: Benjamin Franklin,” [PhilanthropyRoundtable.org](http://PhilanthropyRoundtable.org), <http://tinyurl.com/y6k24utk>. Franklin also famously established the Academy of Philadelphia, which would become the University of Pennsylvania. *Id.* In his will, Franklin left a trust of £1,000 each to the cities of Boston and Philadelphia, designed to accrue interest for 200 years and then be used for public-spirited activities. *Id.*

Upholding a tax like the MRT—which taxes unrealized gains, as the government does not dispute—opens the door to taxes that could endanger the private philanthropy that has long been a crucial part of American society. Some proponents of wealth taxes, such as prominent economists Emmanuel Saez and Gabriel Zucman, have suggested that an effective wealth tax should also tax private charitable foundations. Emmanuel Saez & Gabriel Zucman, *Progressive Wealth Taxation* at 484, Brookings Papers on Economic Activity, Fall 2019, <http://tinyurl.com/4ya8etar>. The idea is that private charitable foundations could be used to avoid a wealth tax. As Saez and Zucman write, “To prevent tax avoidance, there needs to be clear rules that allocate such wealth to the individuals who control or benefit from it.” *Id.* Such novel ideas are inevitable when proposing a wealth tax because the tax is so difficult to administer.

Andrew Wilford, Andrew Moylan, & Jacob Plott, “The Wealth Tax’s Impact on Private Charities,” Nat’l Taxpayers Union Found., Dec. 9, 2019, <http://tinyurl.com/5n94nurb>. For those who consider charitable giving and other types of asset organization to be a form of pernicious tax avoidance, foundations could be seen as an illegitimate way to “avoid” what is owed through the wealth tax.

A wealth tax on private charitable foundations would be a disaster for charitable giving. If the foundation’s assets are attributed to the “heads” of the organization, as in Sen. Bernie Sanders’s (I-VT) plan, then charitable foundations like the Bill and Melinda Gates Foundation—which has spent approximately \$40 billion on global development and global health programs—could owe an annual tax of 24.4 percent. Dylan Matthews, “The surprising strategy behind the Gates Foundation’s success,” Vox.com, Feb. 11, 2020, <http://tinyurl.com/4xnwsx2>; Andrew Wilford, “Warren’s Recycled Wealth Tax Plan Suffers from All the Same Faults as Previous Versions,” Nat’l Taxpayers Union Found., Apr. 1, 2021, <http://tinyurl.com/yuprbn2t>. This would be a significant blow to the altruistic effects of private charities.

Moreover, if the total assets of a foundation are attributed to the founders for the purposes of a wealth tax, then foundations might refuse donations from outside donors. The Gates Foundation has three trustees, Bill and Melinda Gates, and Warren Buffett. Should the foundation’s wealth be considered held by all three equally? Zucman and Saez have argued that contributions from outside donors like Buffett should be included as part of the Gates’ wealth, thus Buffett’s char-



itable contribution could increase the Gates' tax burden. Wilford, Moylan, & Plott, *supra*, at 4. That would put charitable organizations into the troubling situation of actually refusing donations.

The consequences to private charities could be cataclysmic. If the foundation's wealth is considered part of the Gates' wealth, then the National Taxpayer Union Foundation has estimated that the tax burden would be \$3.8 billion, a staggering sum that almost matches the foundation's yearly giving. *Id.* at 5.

While the MRT is not a wealth tax, as a tax on non-income it is very similar. It is difficult to see how the MRT could be upheld without giving constitutional sanction to a possible wealth tax. Matt Ford, "The Supreme Court May Preemptively Ban a Federal Wealth Tax," *New Republic.com*, June 26, 2023, <http://tinyurl.com/bdcvcpyx>. This Court should clearly hold that the Sixteenth Amendment allows unapportioned taxes only on realized income.

## **II. THE FRAMERS INTENTIONALLY CREATED A SYSTEM THAT MAKES IT DIFFICULT TO PASS DESTRUCTIVE TAXES SUCH AS THE MRT OR A WEALTH TAX**

The MRT may not be the most onerous tax in history, but it is a tax on unrealized gains, which makes it unique, unprecedented, and unconstitutional. The point of constraining government with a constitution is to make it more difficult to pass certain types of laws. These are the so-called "rules of the game" that are agreed upon at the outset. A tennis player may want the net to be lower when a particular shot hits it, but she agreed to the height of the net at the beginning

of the game. The rules created by the Constitution, as amended, should be taken seriously.

Prior to the Sixteenth Amendment, the federal government was mostly funded by indirect taxes, “duties, excises, and imposts—generally levies imposed on articles of consumption.” Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of “Incomes,”* 33 *Ariz. St. L.J.* 1057, 1075 (2001). While the terms “direct” and “indirect” are not how people usually speak of taxes today, the concepts as understood by the Framers are still significant. An indirect tax is one in which the cost of the tax could be shifted between people, as a tariff is ultimately shifted into the purchase price of the good. *Id.* at 1076. A direct tax, however, cannot be shifted and must be paid by the person or entity who is taxed. *Id.*

From a political-economy standpoint, this is an important distinction. For one, indirect taxes are generally easier to enact because the tax becomes part of the price of a product. Yet excessive indirect taxes can become a problem because they can discourage consumption. An excise tax of \$10 per gallon of gasoline would reduce gasoline consumption and decrease the amount raised by the tax. Politicians are thus “naturally” limited in their aspirations to fill the government’s coffers via indirect taxes. And if the tax is particularly excessive, it could encourage smuggling and tax evasion. Or, in the words of 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 own resources.” *The Federalist* No. 21 (Alexander Hamilton). A direct tax can’t be similarly avoided, so

they were thought more dangerous in the hands of government officials who coarsely desire more revenue. Jensen, *supra*, at 1078.

Like many parts of the Constitution, the distinction here makes sense, even if modern economists no longer use the same terms. The Framers, after all, partially met in Philadelphia to give the federal government the power to tax. Beeman, *supra*, at 25. Yet, like many things in the Constitution, the idea was to grant a power but to try to ensure that the power wouldn't be misused. The Framers understood that the power to tax is the power to destroy. *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819). Direct taxes are permitted by the Constitution but are also difficult to pass due to the apportionment requirement. If an emergency develops, such as war, an apportioned direct tax might be possible. In the words of James Wilson, direct taxes "should be within reach in all cases of emergency." Jensen, *supra*, at 1078. Generally, however, the Framers thought government should be funded by more politically accountable indirect taxes.

Some commentators have poignantly criticized the constitutional rules around taxation—particularly the apportionment requirement. Professor Bruce Ackerman has been quite dismissive that the idea of direct taxes and apportionment should be taken seriously: "the Founders didn't have a very clear sense in what they were doing in carving out a category of 'direct' taxes for special treatment." Bruce Ackerman, *Taxation and the Constitution*, 99 Colum. L. Rev. 1, 4 (1999). Rather than enacting "some great doctrine of eighteenth-century political economy," it was "political expediency, not economic principle, that was driving the Framers." *Id.*

Putting aside that the Constitution is full of compromises that are nevertheless the building blocks of our system of government, it would be odd if the attendees of the Constitutional Convention, who were deeply attuned to issues surrounding taxation, were so flippant about the meaning of direct taxes. Beeman, *supra*, at 298–305. When Gouverneur Morris suggested that direct taxes be proportioned to representation, the “delegates unanimously agreed to Morris’s proposal.” *Id.* at 302.

The Framers understood that taxes are both necessary and potentially destructive. By making certain types of taxes more difficult to pass, the Framers hoped to protect the liberties of the people. One of those liberties is certainly a robust system of private charity.

### CONCLUSION

For the foregoing reasons, and those expressed by the Petitioners, the Court should reverse the Ninth Circuit.

Respectfully submitted,

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