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 *AMICI CURIAE* STATE OF WEST VIRGINIA AND 16 OTHER STATES 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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Constitutional Provisions

Other Authorities

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

Taxes may be necessary—a saying about "death and taxes" comes to mind—but they can also be noxious. Taxes are a "burden" that "may be laid so heavily as to destroy the thing taxed[] or render it valueless." *California* v. *Cent. Pac. R. Co.*, 127 U.S. 1, 41 (1888). The power to tax thus "carries with it inherently the power to embarrass and destroy." *Austin* v. *Aldermen of Boston*, 74 U.S. 694, 699 (1868). And "[o]f all the powers conferred upon government," "taxation is most liable to abuse." *Citizens' Sav. & Loan Ass'n* v. *City of Topeka*, 87 U.S. 655, 663 (1874). But "[t]he only security against the abuse of this power" comes from just one place: "the structure of the government itself." *McCulloch* v. *State*, 17 U.S. 316, 428 (1819).

Happily, "the structure of the government," embodied in our Constitution, provides good protection against destructive or abusive federal taxation. Direct taxes—taxes on "the ownership of land or personal property"—must be apportioned among the States. *Nat'l Fed'n of Indep. Bus.* v. *Sebelius (NFIB)*, 567 U.S. 519, 571 (2012); see U.S. CONST. art. 1., § 9, cl. 4; *id.* § 2, cl. 3. But this apportionment requirement has been seen as "political poison," giving Congress a substantial incentive not to go that route. Joseph M. Dodge, *The Netting of Costs Against Income Receipts (Including Damage Recoveries) Produced by Such Costs, Without Barring Congress from Disallowing Such Costs*, 27 VA. TAX REV. 297, 364 (2007); see, *e.g.*, Alex Zhang, *The Wealth Tax: Apportionment, Federalism, and Constitutionality*, 23 U. PA. J.L. & SOC. CHANGE 269, 285 (2020) (explaining how, under an apportioned wealth tax, West Virginia would pay 40% and the District of Columbia would pay 2%). And that leaves

only indirect or income taxes, which cabin the federal tax power to less vulnerable areas. U.S. CONST. art. 1., § 8, cl. 1; *id.* at amend. xvi. But to qualify as "income," a taxpayer must realize some gain through payment, exchange, or the like. See Pet.Br.1. So together, these provisions work to keep the federal tax power to a properly restrained terrain.

Unfortunately, the decision below threatens the structural limitations that prevent the federal tax power from running wild. By defining income without an eye toward realization, the Ninth Circuit has granted the federal government a permission slip to start taxing in all manner of new ways—ways better seen as the "direct taxes" with which our Constitution is most concerned. Perhaps a federal property tax could be on the table. Perhaps a federal wealth tax. Perhaps some other new and destructive idea.

The Amici States write to explain why this outcome conflicts with our Nation's history and worsens our present circumstances. The Framers were deeply concerned that a "Federal tax power would oppress the people, monopolize the sources of revenue, and thus destroy the state governments." Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights Constitutional Cultures*, 99 YALE L.J. 1711, 1736 n.142 (1990). Yet the Ninth Circuit's freewheeling approach is inconsistent with that longstanding concern. And redefining "income" to reach unrealized sums does more than create a few problems with history. It creates direct, negative tax consequences for the States and their citizens, undermining the States' traditional tax powers and harming their economies along the way.

"[W]hen one considers how vast is this power, how readily it yields to passion, excitement, prejudice or private schemes, and to what incompetent hands its execution is usually committed, it seems unreasonable to treat as unimportant[] any stretch of [the taxing] power, even the slightest." THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION INCLUDING THE LAW OF LOCAL ASSESSMENTS iv (1876). The decision below does more than stretch a little; it reconceives the federal taxing power. This Court should reverse it.

SUMMARY OF ARGUMENT

I. In this context, history matters. And Americans have been concerned about broad conceptions of central-government taxation from the very beginning. Their concerns lit the fuse of the Revolutionary War, drove delegates to the Constitutional Convention, and propelled a constitutional amendment on the front end of the twentieth century that would shape key world events. Along the way, the Colonies—and later the States—played a vital role in ensuring that any federal power to tax did not darken into a contested power to oppress. At bottom, all this history makes plain that the federal government was never meant to have a roving power to tax at will.

II. The problems with an overly broad federal tax power are not just relics of an earlier time. Taxes on *un*realized values and gains—property taxes, other ad valorem taxes, and similar taxes—are traditionally the States' domain. They make up an important part of the States' fiscal operations. If the Ninth Circuit's logic is extended to all the circuits, and the Court effectively empowers the federal government to extend its reach into those areas too, then state fiscal operations will suffer.

State and local taxes—and the critical operations that result from them—will be crowded out. And state economies will suffer, too. "Double taxes"—resulting from two sovereigns going after the same pot of money—have been shown repeatedly to hurt the taxpayers that labor under them.

ARGUMENT

I. Americans Have Long Thought That Central-Government Taxation Must Be Limited.

"[H]istorical understanding and practice" can guide this Court in construing the Constitution. *Printz* v. *United States*, 521 U.S. 898, 905 (1997). The "significance" of the Constitution's words "is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." *Ullmann* v. *United States*, 350 U.S. 422, 439 n.14 (1956). And relying "on history to inform the meaning of constitutional text" is "more legitimate, and more administrable, than asking judges to make difficult empirical judgments about the costs and benefits" of the laws at issue. *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 142 S. Ct. 2111, 2130 (2022) (cleaned up). Better to follow in the footsteps of our Founders than to shape the scope of federal power on the fly.

Here, all the relevant history—from start to finish—confirms that the Ninth Circuit's freewheeling conception of the federal tax power is wrong.

A. At the heart of our country's origin story is a potent antipathy towards unjust and oppressive taxation. "[T]he riots, mobs and political debates" leading up to the Revolutionary War were largely fueled by "American anger at English rule" through oppressive tax laws like

the Stamp Act and the Townshend Revenue Act of 1773. Arthur J. Cockfield & Jonah Mayles, *The Influence of Historical Tax Law Developments on Anglo-American Laws and Politics*, 5 COLUM. J. TAX. L. 40, 58 (2013). These early acts of resistance were not empty grumblings. Benjamin Franklin told Parliament that there were no means "of obliging [the colonists] to erase" their Stamp Act resolutions, and there was "[n]o power, how great soever, [would] force [the colonists] to change their opinions." Benjamin Franklin, *Petitions against the American Stampe Act*, *in* 16 THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803 138-59 (1813). And he was not exaggerating. Over-taxation had pushed the entire region to a breaking point.

This tax-induced anger, and the unity it forged, transformed America. Some say the Stamp Act protests brought "together the colonial governments for the first time to explore their common interests" and forge a new view of "themselves as part of a potentially greater political union"—that is, "as 'Americans' … prepared to take action" to oppose "arbitrary English rule." Cockfield & Mayles, *supra*, at 60. The colonists' united opposition eventually propelled them to war when the Tea Act failed to appease them and the Intolerable Acts sought to punish them (for their tea-tossing response). *Id.* at 61. The cause, of course, would eventually crystallize in the Declaration of Independence; that seminal document condemned English "Tyranny over the[] States" through "repeated injuries and usurpations," like "imposing Taxes on [the colonists] without [their] consent." The Declaration of Independence para. 2, 19 (U.S. 1776). And under that banner, the colonists marched on to war.

B. It soon became clear, however, that a hollowed out central government was not necessarily better than an oppressive one. The Articles of Confederation had deprived Congress of certain powers that may have saved the States from a few headaches that then set in over the next six years. Congress had no real power, for example, "to regulate interstate and foreign commerce or prohibit the individual state governments from taxing imports," including "products and goods grown or manufactured in other states" along with the vessels that carried them. ROGER H. BROWN, REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION 146 (1993). And the Articles of Confederation gave Congress "no independent taxing power." *Id.* at 11. Instead, the Articles left it to the States to "finance [the federal government's] operations" through requisitions for revenue that the States raised through their "exclusive power to levy taxes." *Id.* As these requisitions issued, "each state could determine how (and, as it turned out, if) its obligation would be satisfied." Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2338 (1997).

This arrangement left the Confederate Congress "dependent upon the cooperation of the individual states for requisitions and supplies." Bradford R. Clark, *Separation of Powers As A Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1346 (2001). But the requisition process was cumbersome and difficult to enforce. BROWN, *supra*, at 12. When it inevitably yielded a sub-40 percent state-government compliance rate, *id.*, the Confederation found itself "essentially at the mercy of delinquent states," *Safeguard*, *supra*, at 1346. See also Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1822 (2010) ("The Articles of

Confederation authorized Congress to command states to provide money, troops, and supplies to the central government, but provided no means of enforcement.").

This arrangement generated serious problems over time, and it exposed a host of key issues the federal government was "impotent … to face." John K. Bush & A.J. Jeffries, *The Horseless Carriage of Constitutional Interpretation: Corpus Linguistics and the Meaning of "Direct Taxes" in* Hylton *v.* United States, 45 HARV. J. L. & PUB. POL'Y 523, 527 (2022). When some of these problems flared up within specific states—like Shays' Rebellion over high taxes and debt collection—Congress was merely a sideline observer. See BROWN, *supra*, at 143. Other times, the government lacked the funds to push key achievements that were in turn necessary to "make the United States a more respectable nation," like retaliating "against the mercantilist trade policies of the European states." GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815 15, 86 (2009). Something had to be done.

C. When it came to the federal funding issue, early Americans *would* do something. Indeed, these precise issues formed the backdrop against which "the call for the Philadelphia convention" grew more urgent. Michael J. Klarman, *Ratification: The People Debate the Constitution, 1787-1788*, 125 HARV. L. REV. 544, 550 (2011) (describing the call as "an act of desperation by the few delegates … who showed up in Annapolis in September 1786 to discuss commercial problems among the states, only to find too few delegates present to transact any business"); see DAVID O. STEWART, THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION 12 (2007) ("[W]hile the Annapolis delegates gathered," Shays' Rebellion grew closer to its

climax). The combined import and prevalence of these troubles "tested the ability of the new republic to maintain its independence," BROWN, *supra*, at 143, and "sustain any sort of republican government," GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 463-67 (1969). So fundamental changes were in order.

As to exactly *what* needed to change, most everyone seemed to agree: "[W]hen the delegates to the Constitutional Convention arrived in Philadelphia, taxation was near the top of the agenda." Bush & Jeffries, *supra*, at 527; see also BROWN, *supra*, at 8 ("[T]axation [was] at the center of the movement that produced the Constitution."). Indeed, "the debaters commonly perceived the issue of federal tax powers as the most important issue of the entire Constitutional debate." Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1, 26 (1998).

But while "[m]ost founders accepted the idea that the national government had to have power to impose taxes other than indirect taxes, at least in some circumstances," they also realized that "the [federal] government [ought not be given] unlimited taxing power." *Consumption Taxes*, *supra*, at 2383. "Government is necessary," of course, "and the Articles of Confederation were defective," no doubt, "but power must still be checked." *Id.* The States could provide that check. See, *e.g.*, *NFIB*, 567 U.S. at 536 ("The independent power of the States also serves as a check on the power of the Federal Government."). But the States could remain strong enough to afford a meaningful check on federal power *in general* only if the federal tax power *specifically* didn't neutralize them. After all, "an indefinite power of taxation in the [federal government] might, and probably would in

time, deprive the [States] of the means of providing for their own necessities; and would subject them entirely to the mercy of the national legislature." THE FEDERALIST NO. 31, at 191 (Alexander Hamilton) (Clinton Rossiter ed., 2003). Beyond that, many Founders were skeptical of the idea of double taxation from concurrent state and federal tax collectors at all. See Calvin H. Johnson, *Homage to Clio: The Historical Continuity from the Articles of Confederation into the Constitution*, 20 CONST. COMMENT. 463, 488–89 (2004) (describing how two collectors could harass, oppress, and fight to seize the same horse).

These concerns placed the issues of direct taxation and apportionment front and center. The Framers "distinguished a direct-tax regime from the ineffective requisitions process used under the Articles of Confederation." *Consumption Taxes*, *supra*, at 2338. But they filled the "[r]atification debates on the Constitution" with "reassurances that the bulk of governmental revenue would be raised through duties, imposts, and excises—none of which is a direct tax." *Consumption Taxes*, *supra*, at 2382. The doubts about direct federal taxation weren't just quixotically ideological or academic qualms. No, some early convention-goers even worried that a direct tax would empower Congress to send soldiers "to cut your throats, ravage and destroy your plantations, drive away your cattle and horses, abuse your wives, kill your infants, and ravish your daughters, and live in free quarters, until you get into a good humour, and pay all that they may think proper to ask of you." Johnson, *Apportionment of Direct Taxes*, *supra*, at 17.

So the Founders made sure to circumscribe federal taxing authority "by requiring apportionment [of direct taxes] and by vesting only the populist House of

Representatives with authority to introduce tax legislation." Alice G. Abreu & Richard K. Greenstein, *Tax: Different, Not Exceptional*, 71 ADMIN. L. REV. 663, 673 (2019) (citing U.S. CONST. art. I, § 2, cl. 1, 3; *id.* art. I, § 7). The federal government could impose direct taxes "directly on individual taxpayers" to, for example, "raise adequate revenue … in emergencies," but the limitations "ensure[d] the states would have a tax base." Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. ST. L.J. 1057, 1077 n.105 (2001). The Founders also "check[ed] the abusive potential" by adding "the interposition of state governments to filter national power" and "shut[] the door to partiality or oppression." *Consumption Taxes*, *supra*, at 2334, 2338 (citing THE FEDERALIST NO. 36). In other words, "[t]he founders had [several] perfectly good reasons to favor [this] special limitation on direct taxes," and they proceeded accordingly. *Taxing Power*, *supra*, at 1076-77. The Founders were not eager to run back towards the same oppressive top-down tax regime that had, just a few years earlier, led them to war with England.

The taxation language that the Founders crafted during the convention, then, tracked the overall goals of federalism that drove delegates to it: to preserve the States "as separate sources of authority and organs of administration," afford the States "a role of great importance in the composition and selection of the central government," and "formulate a distribution of authority between the nation and the states, in terms which gave some scope at least to legal processes for its enforcement." Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543-44 (1954). The provisions on taxation sought

to both "cabin this otherwise dangerous congressional power," Erik M. Jensen, *Did the Sixteenth Amendment Ever Matter? Does It Matter Today?*, 108 NW. U. L. REV. 799, 809 (2014), and avoid the "subordination" of the States, THE FEDERALIST NO. 34, at 215 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). These goals would remain prominent the next time the States considered the intersection of taxation and the Constitution—in the Sixteenth Amendment.

D. Antipathy towards unjust and oppressive taxation, the need for a functional respect and meaningful role for the States, unified and lasting support for a check on unlimited federal taxing power—each of these principles remained front of mind as the States considered ratifying a federal income tax constitutional amendment decades later. And they would together ensure that the Sixteenth Amendment gave the States exactly what they bargained for: a limited amendment that would not expand federal taxing power beyond the limited category of realized "income."

In deciding to ratify the Sixteenth Amendment, the States kept the experience of the decades before firmly in mind. Cf. *Eisner* v. *Macomber*, 252 U.S. 189, 205 (1920) ("The Sixteenth Amendment must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the amendment was adopted."). Relatedly, and as Petitioners have already explained, Pet.Br.1, the Sixteenth Amendment was meant largely "to restore the 1894 constitutional status quo with respect to the federal taxing power." Dodge, *supra*, at 364 (referring to how the amendment was meant to address the Court's 1895 decisions in *Pollock* v. *Farmers Loan & Trust Co.*, 157 U.S. 429, 592-608 (1895), *aff'd on reh'g*, 158 U.S. 601, 618

(1895)); see also, *e.g.*, *Did the Sixteenth Amendment Ever Matter?*, *supra*, at 819-20 & n.125 (explaining why 1894 and 1909 debates, along with preceding history, suggests that the Sixteenth Amendment was not intended to greenlight taxes on unrealized value). So any understanding of the Sixteenth Amendment requires a full understanding of the years before its ratification.

At the federal level, the apportionment requirement, while still important, had developed certain "impracticalities and inequities" that "made it difficult for the federal government to impose a direct tax." Pet.App.44 (Bumatay, J., dissenting from denial of rehearing en banc). In fact, the federal government had tried to impose a direct tax only in a few sporadic instances. See *Springer* v. *United States*, 102 U.S. 586, 598-99 (1880) (cataloguing examples). The results weren't great; one of those times spurred another tax rebellion. See PAUL DOUGLAS NEWMAN, FRIES'S REBELLION: THE ENDURING STRUGGLE FOR THE AMERICAN REVOLUTION x (2004) (explaining how Fries's Rebellion was "direct action … accompanying … constitutional arguments" against a direct tax). And the federal government wasn't just reluctant to impose direct taxes. From the end of the War of 1812 until the Civil War,"[t]here were no federal income taxes, direct taxes, or excise taxes—in short, no internal taxes of any kind." Anuj C. Desai, *What a History of Tax Withholding Tells Us About the Relationship Between Statutes and Constitutional Law*, 108 NW. U. L. REV. 859, 871 (2014).

Within the States, property tax was king. "With the exception of the Deep South, property taxes became the primary source of local revenue for most American states by the nineteenth century." Steven V. Melnik & David S. Cenedella, *Real Property Taxation and Assessment*

Processes: A Case for A Better Model, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 259, 263 (2009). Property tax only grew more important as the years went on. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 430 (2005) ("In 1890, the general property tax "produced 72 percent of state revenues [and] 92 percent of local revenues."). And it remained important at the turn of the century, as state expenditures shot up to fund "education and public services required in the industrializing environment." ROBERT STANLEY, DIMENSIONS OF LAW IN THE SERVICE OF ORDER 204-205 (1993).

In contrast, States were more reluctant to tax beyond unrealized property value. To be sure, States had started to impose inheritance and income taxes around the last 1800s because of the apparent "utility of the taxation of accumulated wealth, at very low but progressive rates, using very high exemption levels." STANLEY, *supra*, at 203. But the numbers were still insignificant: "inheritance tax generated, as a proportion of the total of all of the states' revenues, only 7 percent in 1913, and income taxation far less than 1 percent." *Id.* at 205. "States had been [especially] reluctant to impose" income taxes—"primarily for administrative reasons: evasion under inheritance taxation was far more difficult." *Id.* at 179. Whatever the reason, the bottom line was the same for both types of taxes: States generally aimed to tax the value of sums that were *unrealized* by the taxpayer.

So when a constitutional amendment endorsing federal income tax came on the radar, States did not initially fret that their existing revenue streams were in danger. Instead, vocal critics of the proposed amendment, like New York Governor Charles Evans Hughes, "worried that the language 'from whatever source derived'" would subject "incomes derived from State and municipal

securities" to federal taxation. *Taxing Power*, *supra*, at 1122. And some States would have been "less than enthusiastic" if a federal tax on inheritance had been proposed instead of one on income, as "they did not wish competition from Congress" for access to that pot. STANLEY, *supra*, at 178, 209. Still other States offered ambiguous "states' rights" arguments—premised sometimes on a fear that tax collectors might target certain regions—but those complaints were driven chiefly by a fear that the amendment was a Trojan horse to "augment[] federal power" more generally. John D. Buenker, *The Ratification of the Federal Income Tax Amendment*, 1 CATO J. 183, 192, 204 (1981); see also, *e.g.*, Robin L. Einhorn, *Look Away Dixieland: The South and the Federal Income Tax*, 108 NW. U. L. REV. 773, 792-93 (2014).

Even these few state-based concerns eventually fell by the wayside once States received some promises that the amendment was not meant to inflate the federal tax power. "Hughes received assurances that the Amendment was intended to remove apportionment only for income taxes already within congressional power, not to extend taxing power to new categories of income." *Taxing Power*, *supra*, at 1122. And the states' rights critics were reassured that the amendment was not meant to "destroy state sovereignty." Buenker, *supra*, at 192. With clarifications like these, States had "little reason to oppose the measure." STANLEY, *supra*, at 178 (discussing how "[s]tate legislators had already applied to their own systems the centrist analysis which had animated Congress," and "state judiciaries had fully accepted these efforts," and concluding that "[t]hey saw no conflict with Congress over income taxation of the sort which they opposed over inheritance taxation"); see also *id.* at 206 (describing "overwhelmingly receptive" state courts).

Once everyone agreed, "ratification went surprisingly fast." *Taxing Power*, *supra*, at 1122.

And sure enough, consistent with the reassurances, this Court agreed just five years after the Sixteenth Amendment's ratification that the amendment would appropriately reach the "realization" of a corporate interest or some other value—the ordinary understanding of income. *Lynch* v. *Hornby*, 247 U.S. 339, 344 (1918); see also, *e.g.*, *Knowlton* v. *Moore*, 178 U.S. 41, 81 (1900) (holding that a tax "imposed upon property solely by reason of its ownership" cannot be removed from the apportionment requirement solely "by affixing to it the qualification" of a different label). That view aligned with some of the few income tax laws that had preceded the Sixteenth Amendment, which looked to realized net receipts and payments. See Floyd W. Windal, *Legal Background for the Accounting Concept of Realization*, 38 ACCT. REV. 29, 29-30 (1963).

This runup to ratification goes to show that, with the States' buy-in, the Sixteenth Amendment "struck a delicate balance for federal taxing power—freeing Congress from the unwieldy requirement of apportionment, but only for taxes on 'incomes.'" Pet.App.38 (Bumatay, J., dissenting from denial of rehearing en banc). It did not, however, "reliev[e] Congress of its duty to apportion other forms of direct taxation, such as a tax on property interests." Pet.App.38 (Bumatay, J., dissenting from denial of rehearing en banc). And it did not afford the "federal government [] unfettered latitude to redefine 'income' and redraw the boundaries of its power to tax without apportionment." Pet.App.53-54 (Bumatay, J., dissenting from denial of rehearing en banc). Loosening the reins in that way would

depart from the very assurances that led the States to ratify.

Yet the Ninth Circuit's reading of the Sixteenth Amendment relaxes the limits on the federal tax power in exactly the way that the States had initially feared before ratification—and does so against a long narrative of taxation antipathy that the court should not have skipped. Again: the States ratified the Sixteenth Amendment with the expectation that it would be applied narrowly, not to erase "any remaining relevance" of the apportionment requirement. Pet.App.55 (Bumatay, J., dissenting from denial of rehearing en banc). Yet the Ninth Circuit's broad reading is not narrow in any sense; it licenses the federal government to tax the unrealized sums that States thought were still shielded away from federal reach. To affirm would thus cut against everything the States bought into at the time of the Sixteenth Amendment's ratification, the principles the Framers agreed upon at the Constitutional Convention, and the things that motivated the colonists' decision to break from their English overlords in the beginning.

II. Redefining "Income" To Reach Unrealized Gains Directly Harms The States And Their Citizens.

The Ninth Circuit's approach presents more than a historical problem. The federal government also "cannot exercise its power of taxation so as to destroy the State governments, or embarrass their lawful action." *Union Pac. R. Co.* v. *Peniston*, 85 U.S. 5, 30 (1873). But if the Court agrees with the Ninth Circuit and holds that the federal government can tax any item of value, realized or unrealized, on the premise that it constitutes income, then the Court will "unleash a principle of constitutional law

that would have no obvious stopping place"—one that could very well "embarrass" or even "destroy" the States. *Luis* v. *United States*, 578 U.S. 5, 21 (2016). In particular, the federal government will be empowered to overrun traditional state authority over property and other ad valorem taxes while dangerously weakening state economies and fiscs. See Joseph Bankman & Daniel Shaviro, *Piketty in America: A Tale of Two Literatures*, 68 TAX L. REV. 453, 489-91 (2015) (explaining why conventional wealth taxes, premised on unrealized sums, are property taxes that in turn constitute direct taxes, even when labelled as an income tax).

A. A State's taxing power "extends over all persons and property within the sphere of its territorial jurisdiction." *City of St. Louis* v. *Wiggins Ferry Co.*, 78 U.S. 423, 429 (1870); see also *State Bd. of Tax Comm'rs of Ind.* v. *Jackson*, 283 U.S. 527, 537 (1931) ("The power of taxation is fundamental to the very existence of the government of the states."). Because of that wide-reaching authority—far broader than the federal government's—the States and their local governments have long enjoyed some areas of near exclusive tax control. Certain sales taxes, property taxes, and many other ad valorem and use taxes have been the domain of state and local actors in modern times, just as they were in earlier years.[*] Peter A. Prescott, *One Tax to Rule Them All: Rethinking Fiscal Federalism's Tax-Assignment Problem*, 96 NEB. L. REV. 1, 6 (2017). For its part, the federal government then focuses on income taxes, excises, and levies. "The idea here is that state

[*] When we talk here of States, we include the local governments that merely serve as "convenient agencies for exercising … the governmental powers of the State." *Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 433 (2002).

governments tax sales [and property] heavily because the federal government has largely crowded them out of taxing income." Lior Jacob Strahilevitz, *The Uneasy Case for Devolution of the Individual Income Tax*, 85 IOWA L. REV. 907, 982 n.325 (2000). So "[i]f the states [we]re deprived … of the property tax [and other ad valorem taxes], they w[ould] commit gradual but sure economic suicide; and our dual form of government will soon be at an end." Robert C. Brown, *State Property Taxes and the Federal Supreme Court*, 14 IND. L. J. 491, 491 (1939).

The hard numbers confirm that these areas of presently exclusive state taxation—particularly taxes on *unrealized* property values—are critical to state governments. Studies have found that property taxes comprise between twenty and thirty percent of state and local revenue. See, *e.g.*, *Briefing Book: The State of State (and Local) Tax Policy,* TAX POL'Y CTR., https://bit.ly/45wndPR (last visited Sept. 1, 2023); KATHERINE LOUGHEAD ET AL., TAX FOUND., FISCAL FACT NO. 797, UNPACKING THE STATE AND LOCAL TAX TOOLKIT: SOURCES OF STATE AND LOCAL TAX COLLECTIONS (FY 2020) 5 (2022), https://bit.ly/3R22WgL. Tangible personal property taxes make up another sizeable portion of the state tax base. GARRETT WATSON, TAX FOUND., FISCAL FACT NO. 668, STATES SHOULD CONTINUE TO REFORM TAXES ON TANGIBLE PERSONAL PROPERTY 1 (2019), https://bit.ly/45uhIBr. And sales taxes generate another third of the state revenue stream. LOUGHEAD, *supra*, at 1.

These protected tax pools are especially important to sub-state-level local governments. "Property taxes are the financial backbone of local governments." Linna Zhu & Sheryl Pardo, *Understanding the Impact of Property Taxes Is Critical For Effective Local Policymaking*,

URBAN INST. (Nov. 5, 2020), https://bit.ly/3qWzv55. "As the largest source of revenue raised by local governments, a well-functioning property tax system is critical for promoting municipal fiscal health." LINCOLN INST. OF LAND POL'Y & MINN. CTR. FOR FISCAL EXCELLENCE, 50-STATE PROPERTY TAX COMPARISON STUDY: FOR TAXES PAID IN 2021 1 (2022), https://bit.ly/3PiLfs5. These taxes in turn pay for quintessential local functions like education, police, parks, and street maintenance.

Again, none of these tax pools are subject to any competing federal taxes, most probably because most are direct taxes that would need to be apportioned. See, *e.g.*, *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 639 (1997) (Thomas, J., dissenting) (noting how property taxes are classic examples of direct taxes); *Union Elec. Co.* v. *United States*, 363 F.3d 1292, 1302 (Fed. Cir. 2004) (explaining that an unapportioned "general tax on the whole of one's personal property or … a broad class of personal property" is an "impermissible direct tax"). And as it turns out, the literature suggests that this loose allocation of responsibilities produces optimal policy outcomes. See John R. Brooks II, *Fiscal Federalism As Risk-Sharing: The Insurance Role of Redistributive Taxation*, 68 TAX L. REV. 89, 110 (2014). So in a sense, everyone wins.

But this division of responsibilities would break down if suddenly the federal government can redefine "income" to encompass even unrealized bumps in value. If any item that can appreciate in value becomes fair game, bad things will follow. Most obviously, the federal taxes might then "crowd out" the state taxes. Ruth Mason, *Federalism and the Taxing Power*, 99 CAL. L. REV. 975, 994 (2011). Quite simply, "unless … there is no limit to the amount of money that can be squeezed out of taxpayers, heavy federal

taxation diminishes the practical ability of States to collect their own taxes." *NFIB*, 567 U.S. at 680 n.13 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). More federal taxing power in more areas will also "reduce[] the scope for state policy experimentation and competition." Mason, *supra*, at 993; accord Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50 VAND. L. REV. 1137, 1220–21 (1997) (noting that more federal taxes "reduce[] state and local autonomy by restricting the scope of tax policy decisions"). And if the federal government uses its newfound tax authority "to regulate areas traditionally or constitutionally reserved to the states, then such tax regulation raises federalism concerns similar to those raised when Congress makes conditional grants to the states." Mason, *supra*, at 992. In short, the federal government could "abuse" its tax power to "impair the separate existence and independent self-government of the States." *Veazie Bank* v. *Fenno*, 75 U.S. 533, 541 (1869).

Perhaps the federal government would insist that it won't race onto the field that would open by rolling back the realization requirement—but there's little reason to trust such reassurances this time around. Cf. *United States* v. *Stevens*, 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."). Just witness the growth of the income tax and federal power more generally since the Sixteenth Amendment's adoption. Since 1913, the federal government has increased its revenue "enormously," creating a correspondingly "enormous increase in its power over the states." Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 FLA. L. REV. 1, 17 (2011). Wartime expansion of federal income taxes during World War I and

World War II birthed a muscular American federal structure. Indeed, according to some, "[t]he Sixteenth Amendment worked as profound a change in American federalism as the Fourteenth." Laycock, *supra*, at 1737; see also Anthony Johnstone, *The Future of Federalism, from the Bottom Up*, 76 MONT. L. REV. 1, 8 n.39 (2015) (describing the views of some that "the Sixteenth Amendment's constitutional confirmation of the federal income tax, and the resulting increase in federal spending power with strings attached, [served] as a leading force for centralization").

Ultimately, the federal government has seized the opening that the Sixteenth Amendment offered to usher in an era of "federal dominance." Richard A. Epstein & Mario Loyola, *The United State of America: Washington Is Expanding Its Power by Turning State Governments into Instruments of Federal Policy*, THE ATL. (July 31, 2014, 12:01 a.m.), http://perma.cc/XM6A-D7MN. So it's only reasonable to assume that the federal government will seize the opportunity again if the amendment is construed in a way that makes that opening wider. Considering our system's respect for federalism and the original intentions of those behind our Constitution, the Court should not give it the chance.

B. It's not just the States as institutions that would suffer if "incomes" can come to mean unrealized sums of all kinds—state economies will suffer too.

Start with first principles: Taxes generally hurt the economy. "[A]ll taxes are inherently inefficient since they invariably affect choices in the marketplace." Eric J. Gouvin, *Radical Tax Reform, Municipal Finance, and the Conservative Agenda*, 56 RUTGERS L. REV. 409, 433 (2004); CONGR. RSCH. SERV., R44342, CONSUMPTION TAXES: AN OVERVIEW i (2023), https://bit.ly/3YUziMo

("Broadly, taxes tend to distort individual decisions by altering price signals within the economy."). So any time taxes are collected and then spent in ways that are even slightly different from how consumers might prefer, "distortion" results. Robert William Alexander, *The Collision of Tribal Natural Resource Development and State Taxation: An Economic Analysis*, 27 N.M. L. REV. 387, 408 (1997). For reasons like these, a meta-survey of "twenty-six peer-reviewed academic studies on the empirical relationship between taxes and economic growth" found that all but three of those studies showed "a negative effect of taxes on growth." Joseph D. Henchman & Christopher L. Stephens, *Playing Fair: Distribution, Economic Growth, and Fairness in Federal and State Tax Debates*, 51 HARV. J. ON LEGIS. 89, 108 (2014). In inviting more kinds of federal taxes, then, the Ninth Circuit's view invites more of these bad results.

State and local governments are better able to mitigate at least some of these ill effects. They can use their "own tax revenue to acquire governmental benefits that are locally customized to fit the preferences of its residents." Prescott, *supra*, at 9. They can also use their knowledge of local conditions to avoid taxes that might be particularly problematic in their specific communities. And intergovernmental tax competition among state and local governments should encourage legislators not to overreach when they decide whether and how to tax. Mason, *supra*, at 994. That competition is a lesser concern at the federal level, where leaving the country entirely may be the only option for intergovernmental tax avoidance.

But by unleashing the federal government to impose taxes on unrealized gains—direct taxes in everything but name—the Ninth Circuit has further fed into the related

problem of double taxation. In battles between co-sovereigns before, this Court has sought to "act as a defense" against taxes that "give rise to serious concerns of double taxation." *Trinova Corp.* v. *Mich. Dep't of Treasury*, 498 U.S. 358, 386 (1991). In fact, "courts do not permit double taxation in the state or international arena due to the harms it causes." Adam Crepelle, *Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce*, 122 W. VA. L. REV. 999, 1017 (2020).

The Court has not considered double taxation by federal and state authorities to be a constitutional concern, see, *e.g.*, *Frick* v. *Pennsylvania*, 268 U.S. 473, 499 (1925), but harms from the federal-state double dip arise just the same. "[D]ouble taxation of the same tax base is contrary to fair and appropriate taxation and should be prevented if at all possible." William B. Barker, *The Tax Cuts and Jobs Act of 2017: The Salt Deduction, Tax Competition, and Double Taxation*, 56 SAN DIEGO L. REV. 73, 94 (2019). The unfairness results in part because "one cannot assume that one legislature understands the burden created by multiple taxes and will adjust its tax laws to ensure appropriate burdens." *Id.* at 96. "Limiting double taxation … also seeks to maintain the overarching tax policy goal of tax neutrality, specifically locational neutrality." Mark J. Cowan, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues*, 2 PITT. TAX REV. 93, 126 (2005). And fundamentally, "our dual income tax system … is [already] inefficient," Erin Adele Scharff, *Laboratories of Bureaucracy: Administrative Cooperation Between State and Federal Tax Authorities*, 68 TAX L. REV. 699, 699 (2015), so extending this doubling-up to other contexts will only worsen those inefficiencies.

The experience of Indian Tribes shows that these problems aren't hypothetical ones. States may impose certain taxes on certain sources in Indian Country; so too may Tribes. That creates a potential conflict, as the only way to avoid double taxation is for either the State or the Tribes to forgo taxing those sources entirely. And "if Tribes [and States] were to impose their own taxes on these same sources, the resulting double taxation would discourage economic growth." *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 811 (2014) (Sotomayor, J., concurring). President Peterson Zah of the Navajo Nation, for example, confirmed how this double-taxation problem had deprived the tribal nations of much-needed revenue streams or driven businesses away entirely to lower-tax pastures. See ENTERPRISE ZONES: HEARINGS BEFORE THE SUBCOMMITTEE ON SELECT REVENUE MEASURES OF THE HOUSE COMMITTEE ON WAYS AND MEANS, 102D CONG., 1ST SESS., JUNE 25 AND JULY 11, 1991, at 234 (Gov't Printing Off. 1991), *available at* https://bit.ly/3EqYrVo; see also Pippa Browde, *From Zero-Sum to Economic Partners: Reframing State Tax Policies in Indian Country in the Post-Covid Economy*, 52 N.M. L. REV. 1, 15 (2022). In other words, "[a]s a practical matter," the state and tribal taxes "cannot coexist." *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95, 116 (2005) (Ginsburg, J., dissenting). "The 'double tax problem,' by discouraging private investment in Indian country, thus contributes to the deplorable economic conditions that exist on most Indian reservations." Cowan, *supra*, at 96.

And now is not the time to introduce financial challenges like these. America is in the midst of a housing shortage. See Anna Bahney, *The US Housing Market Is Short 6.5 Million Homes*, CNN (Mar. 8, 2023 8:57 a.m.), https://bit.ly/3EqqzrD. Opening the gate for the federal

government to tax unrealized gains—like gains in home values—would only worsen that crisis. In fact, "modest-income households" would likely suffer the most harm from new federal-level taxes on unrealized gains like property values. See, *e.g.*, *Exploring the Impacts of Rising Property Taxes in Changing Neighborhoods*, INST. FOR HOUS. STUD. (Jan. 27, 2023), https://bit.ly/3P01loV. Meanwhile, new federal taxes might also drive businesses to shift operations abroad through inversions or otherwise, especially as markets tighten from macroeconomic shifts. See CONGR. BUDGET OFF., AN ANALYSIS OF CORPORATE INVERSIONS 1 (2017), https://bit.ly/3PhzAd2. Investing in domestic markets would become less desirable all around. See Yen Nee Lee, *Oaktree's Howard Marks Says This Tax Proposal In the U.S. Makes Investing Less Attractive*, CNBC (Jan. 20, 2021 3:37 a.m.), https://bit.ly/3QY6ocj. Charitable giving could decline. See Jack Salmon, *Taxing Unrealized Gains Could Hurt the Charitable Sector*, PHILANTHROPY ROUNDTABLE (June 15, 2023), https://bit.ly/3PllJT8. And workers would be hurt. One study of two proposed taxes on unrealized gains concluded that those taxes would cost workers $1.2 trillion and $1.6 trillion in just ten years. Douglas Holtz-Eakin & Gordon Gray, *Wealth Taxes and Workers*, AM. ACTION F. (Jan. 10, 2020), https://bit.ly/3PkEgPq.

States' economies cannot tolerate such painful consequences from novel and unconstitutional ways to tax. So it is better to stick with the understanding that has held in this country from the beginning: Income means realized value—money that has, literally, "come in"—and not any bit of monetary value that the government might hunt down in the ledger-books of American workers and businesses. If the Court were to hold only that, it would "appraise correctly the force of the term 'income' as used

in the Sixteenth Amendment, or at least to give practical effect to it," in the same way the Court did a century ago. *Eisner*, 252 U.S. at 213.

CONCLUSION

The Court should reverse.

Respectfully submitted.

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