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 JOHN R. BROOKS AND DAVID GAMAGE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are leading scholars of tax law and policy. John R. Brooks is Professor of Law at Fordham University School of Law, and David Gamage is Professor of Law and William W. Oliver Chair in Tax Law at Indiana University, Bloomington, Maurer School of Law. Together, they are the coauthors of *Taxation and the Constitution, Reconsidered*, 76 Tax L. Rev. 75 (2022), and *"From Whatever Source Derived": The Sixteenth Amendment and Congress's Taxing Power* (Oct. 8, 2023), http://ssrn.com/abstract=4595884.

INTRODUCTION AND SUMMARY OF ARGUMENT

A person owns stock in a corporation. Federal law declares that a portion of the company's profits—which remain in the company's possession—is taxable as that person's "income." Can those undistributed corporate earnings legitimately be regarded as income of the shareholder and taxed as such? Yes, as this Court resolved more than 150 years ago. *See Collector of Internal Revenue v. Hubbard*, 79 U.S. 1 (1870). Petitioners' contrary position, that some form of "realization" is inherent in the meaning of income, is no more persuasive now than it was in 1870, and it should be just as firmly rejected.

When the Sixteenth Amendment gave Congress the power, or rather *restored* its power, to collect unapportioned "taxes on incomes, from whatever source derived," U.S. Const. amend. XVI, it did not silently

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

constrict the meaning of "income" by imposing a realization requirement never before recognized in constitutional law. On the contrary, the Amendment was adopted to return to the state of affairs before this Court's decisions in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); 158 U.S. 601 (1895), which held that taxing income "derived from" property was the same as taxing the property itself, *id.* at 618. And under that previous state of affairs, unrealized financial gains had long been taxed as "income."

Half a century before the Sixteenth Amendment was ratified, Congress taxed undistributed corporate earnings and other unrealized financial gains in the nation's earliest income-tax laws. Congress also included unrealized income in the 1894 income tax struck down in *Pollock*. Under a 1909 corporate income tax—enforced during the years the Sixteenth Amendment was being ratified—unrealized gains were taxed yet again. And in 1913, the very first personal income tax passed under the newly ratified Sixteenth Amendment once more taxed unrealized gains, specifically undistributed corporate earnings. *See* John R. Brooks & David Gamage, *"From Whatever Source Derived": The Sixteenth Amendment and Congress's Taxing Power* 36-43 (Oct. 8, 2023), http://ssrn.com/abstract=4595884 ("*Derived*").

Simply put, the "power to lay and collect taxes on incomes," U.S. Const. amend. XVI, was not a new concept in 1913. Congress had taxed incomes for decades and had repeatedly included unrealized gains in those taxes. Absolutely nothing in the Amendment's text or history suggests that it *narrowed* Congress's power to collect "taxes on incomes," departing from how that power had been exercised in the past, by exempting unrealized gains from taxation.

Instead, the Amendment's aim was just the opposite: to *restore* Congress's power to tax incomes in the way it had done before *Pollock*. That decision held that income "derived from … property" could no longer be taxed without apportionment. 158 U.S. at 618. The Amendment's undisputed purpose was to reverse that holding. And that helps illuminate a key phrase in the Amendment: "from whatever source derived." Rather than implying a heretofore-unknown realization requirement, this language made clear that the Amendment was overruling *Pollock*'s holding that the source of income determines whether an income tax must be apportioned. Indeed, "the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived." *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 187 (1916).

The Sixteenth Amendment was thus understood as restoring a preexisting constitutional framework under which the government had long collected income taxes—including taxes on undistributed corporate earnings and other unrealized gains. The Amendment "conferred no new power of taxation," but simply prevented income taxes from "being placed in the category of direct taxation … by a consideration of the sources from which the income was derived," under *Pollock*'s "mistaken theory." *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 112-13 (1916).

Moreover, the word "income" had a broad meaning in the ratification era that encompassed financial gains of virtually any kind, realized or unrealized. Petitioners' effort to show otherwise involves selectively quoting the narrowest dictionary definitions of this word while omitting broader definitions that appear in the same entries. Notably, none of Petitioners' dictionaries uses the term "realize" to define the word income,

even when those same dictionaries include entries for that term.

As for Petitioners' reliance on case law and treatises, the story is essentially the same. Through selective omissions, Petitioners obscure that many of their quoted sources are not even discussing the abstract concept of income, but rather are describing the coverage of particular statutory provisions. And while some academics from this period did argue that realization was a necessary element of income, each was advocating a *prescriptive* definition. Invariably, these same authors acknowledged that actual usage, including in statutes, did not conform to their prescriptions.

Thus, as text and history demonstrate, the Amendment's reference to "taxes on incomes" was meant to include "everything which by reasonable understanding can fairly be regarded as income." *Eisner v. Macomber*, 252 U.S. 189, 237 (1920) (Brandeis, J., dissenting). And as illustrated by a consistent line of legislation from the Civil War to 1913, a person's unrealized gains, including undistributed corporate earnings, *can* fairly be regarded as "income."

ARGUMENT

I. When the Sixteenth Amendment Was Ratified, Federal Law Had Long Treated Unrealized Gains as Taxable Income.

A. The Civil War Income Tax

1. Congress established the first federal income tax in 1861. *See* John R. Brooks & David Gamage, *Taxation and the Constitution, Reconsidered*, 76 Tax L. Rev. 75, 105-06 (2022) ("*Taxation*"). And from the start, Congress made personal income taxable regardless of its source. Income was taxed "whether such income is derived from any kind of property, or from any

profession, ... or from any other source whatever." Act of Aug. 5, 1861, ch. 45, § 49, 12 Stat. 292, 309; *see also* Act of July 1, 1862, ch. 119, § 90, 12 Stat. 432, 473 (similar). Congress levied these income taxes under its authority to impose "excises" and "duties" without apportionment. *See id.*; U.S. Const. art. I, § 8, cl. i.

In 1864, Congress revised the federal income tax. This time, Congress specified that taxable income included a shareholder's portion of undistributed corporate earnings. And Congress expressly clarified that it was irrelevant whether a shareholder had realized his portion of those earnings or not. Under the statute, "the gains and profits of all companies, whether incorporated or partnership," with some enumerated exceptions, "shall be included in estimating the annual gains, profits, or income of any person entitled to the same, *whether divided or otherwise*." Act of June 30, 1864, ch. 173, § 117, 13 Stat. 223, 282 (emphasis added). "It was the design of Congress to tax the *undivided* gains and profits made by all corporations, as well as those which are divided among the stockholders." *Hubbard*, 79 U.S. at 7.

The 1864 statute made other forms of unrealized income taxable as well. When calculating a person's annual earnings, net gains from interest had to be "included and assessed as part of the income of such person ... *whether due and paid or not*, if good and collectable." Act of June 30, 1864, § 117, 13 Stat. at 281-82 (emphasis added); *see United States v. Frost*, 25 F. Cas. 1221, 1222 (N.D. Ill. 1869) (observing that the statute taxed "interest accruing, but not paid," on "notes, bonds, etc., bearing interest"). Likewise, "the increased value" of certain personal property relating to agriculture had to be included as well, "*whether sold or on hand*." Act of June 30, 1864, § 117, 13 Stat. at 282 (emphasis added); *see* Henry Campbell Black,

A Treatise on the Law of Income Taxation Under Federal and State Laws 15 (1913).

Notably, the 1864 statute taxed all these unrealized gains while simultaneously providing (like its predecessors) that the source from which income "derived" could not exempt it from taxation. *See* Act of June 30, 1864, § 116, 13 Stat. at 281 (taxing gains, profits, and income "whether derived from any kind of property, rents, interests, dividends, salaries, or from any profession ... or from any other source whatever").

In other words, the Congress that pioneered our national income tax flatly disagreed with Petitioners' strained textual argument—that for income to be "derived from" a source, it necessarily must have been severed from that source, converted into a different form, conveyed to a new party, or otherwise *realized*. *See* Pet. Br. 26-27. Congress taxed undistributed corporate earnings, unrealized interest gains, and appreciations in value while expressly recognizing that these forms of income all "derived from" a source, namely capital or property.[2]

The public was not likely under any misapprehension about the taxation of unrealized gains derived from these sources. Taxpayers had to report the

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[2] Moreover, while parts of the statute referred to "gains, profits, or income," all three terms were subsumed within the broader label "income." All three had to be reported by the taxpayer as "the amount of his or her income," Act of June 30, 1864, § 118, 13 Stat. at 282, and taxpayers had to report "the sources from which said income is derived," *id.*; *see id.* § 117, 13 Stat. at 281 (referring to the entire tax as "the national income tax"); *id.* § 119, 13 Stat. at 283 (referring to "the duties on incomes herein imposed"); *see also id.* § 117, 13 Stat. at 282 (specifying that unrealized accumulated interest and unrealized appreciations in value "shall be included and assessed as part of the income of such person").

amount of their annual income, "stating the sources from which said income is derived." Act of June 30, 1864, § 118, 13 Stat. at 282. Those sources included "the gains and profits of all companies" to which the taxpayer was entitled, "whether divided or otherwise," *id.* § 117, 13 Stat. at 282, any gains from interest, "whether due and paid or not," *id.*, and "the increased value" of certain property "whether sold or on hand," *id.*

2. When one taxpayer refused to report his share of undistributed corporate profits, the dispute reached this Court. The taxpayer offered the same arguments that Petitioners offer here—denying that "undivided profits" can fairly be regarded as "income." *Hubbard*, 79 U.S. at 4. The taxpayer also made the same claims about the necessity of realization—asserting that corporate profits "are mere increment and augmentation of the stock … until separated from the stock by declaring a dividend." *Id.* at 6 (quotation marks omitted). And he cited the same state court decisions in support. *Compare id.* (quoting *Minot v. Paine*, 99 Mass. 101 (1868)), *with* Pet. Br. 28 (quoting the same passage of *Minot*).

This Court was not persuaded—unanimously holding that "the tax was lawfully assessed." *Hubbard*, 79 U.S. at 16. The Court recognized that, as the taxpayer stressed, "the profits at the time of the assessment had not been divided nor had they been in any way set apart from the general assets of the respective corporations, nor had they been appropriated for the use of the stockholders." *Id.* at 10. Instead, "the corporations invested the profits in part in real estate, machinery, and raw material proper for carrying on their business." *Id.* at 10-11. But the Court also recognized that "the policy of Congress in that act was to tax all gains and profits, whether divided or undivided." *Id.* at 17.

This Court found nothing incongruous about taxing unrealized gains like undistributed corporate earnings as "income." Regardless of whether a shareholder has yet been paid those earnings or given title to them, *Hubbard* explained, he "holds the share with all its incidents," including "the right to receive all future dividends." *Id.* at 18. Simply put, "as an incident to the shares, undivided profits are property of the shareholder." *Id.* If such profits are reinvested in the company (like in this case), they become "investments in which the stockholders are interested." *Id.*

Ultimately, "the decisive answer" to the taxpayer's realization argument was that "Congress possesses the power to lay and collect taxes, duties, imposts, and excises, and it is as competent for Congress to tax annual gains and profits before they are divided among the holders of the stock as afterwards." *Id.* If Congress wanted to impose an "income tax on such proportion of the entire net profits made by the two companies as his stock bore to the whole stock of the corporations," *id.* at 11, it could do so.

3. This Court said nothing to the contrary two years later in *Gray v. Darlington*, 82 U.S. 63 (1872). *Gray* held that the profit from a sale of bonds was not taxable as annual income *under the terms of the income-tax statute*. The bonds had appreciated in value over several years, so attributing all this profit to the year of sale would lump together several years' worth of gains. But the statute attempted to tax only *annual* gains, and "[t]he advance in the value of property during a series of years can, in no just sense, be considered the gains, profits, or income of any one particular year of the series." *Id.* at 65. "Mere advance in value in no sense constitutes the gains, profits, or income *specified by the statute*." *Id.* at 66 (emphasis added); *cf.* Pet. Br. 27 (omitting the italicized words); *compare also Gray*,

82 U.S. at 65 (the statute is limited to "such gains or profits as may be realized *from a business transaction begun and completed during the preceding year*" (emphasis added)), *with* Pet. Br. 27 (omitting the italicized words).

Far from laying down any rule about the inherent nature of income, *Gray* noted that the statute included "exceptions" to this "general rule of assessment." 82 U.S. at 65. And as explained above, for some types of property the 1864 statute *did* require individuals to pay taxes on annual appreciation of value or net interest—regardless of whether the property was sold or the interest paid. The bonds at issue in *Gray* simply were not among those categories.

Petitioners' mishandling of *Gray* is characteristic of citations throughout their brief to judicial decisions from the late nineteenth and early twentieth centuries. These decisions involved *statutes* that opted to tax gains only after they were received by a taxpayer in monetary form. *E.g.*, *Maryland Cas. Co. v. United States*, 52 Ct. Cl. 201, 209 (1917) ("What is taxed *by the terms of the foregoing statutes* is 'net income received,' not income accruing or accrued which has not been received." (emphasis added)). The same decisions acknowledge Congress's freedom to depart from that approach:

> The word 'income,' as used in revenue legislation, has a settled legal meaning. The courts have uniformly construed it to include only the receipt of actual cash as opposed to contemplated revenue due but unpaid, *unless a contrary purpose is manifest from the language of the statute.*

Id. (emphasis added); *cf.* Pet. Br. 27 (omitting the italicized words). Whether to tax unrealized gains was a

question of legislative policy, not a limit inherent in the concept of income.

B. The 1894 Income Tax

The Civil War–era income tax lapsed after 1870. *See* Act of July 13, 1866, ch. 184, 14 Stat. 98, 138; Act of July 14, 1870, ch. 255, 16 Stat. 256. But in 1894, Congress established a new income tax, which "did not differ very materially" from the earlier ones. Black, *supra*, at 16. And in this new statute, unrealized gains continued to be taxed—specifically, "interest received *or accrued* upon all notes, bonds, mortgages, or other forms of indebtedness bearing interest, *whether paid or not*, if good and collectible." Act of Aug. 27, 1894, ch. 349, § 28, 28 Stat. 509, 553 (emphasis added); *see Pollock*, 157 U.S. at 654 n.2. Shareholders were no longer taxed on undistributed corporate earnings; the statute instead taxed corporations. *See* Act of Aug. 27, 1894, § 32, 28 Stat. at 556 (taxing corporate dividends and profits); *id.* § 28, 28 Stat. at 554 (excluding dividends from shareholder income if the corporation paid the tax). But that was a pragmatic choice about what to tax and where, not a change in Congress's understanding of what "income" meant. *See* Steven A. Bank, *Entity Theory as Myth in the Origins of the Corporate Income Tax*, 43 Wm. & Mary L. Rev. 447, 459-64 (2001) (discussing congressional debates).

As discussed later, this Court struck down the 1894 tax before it was enforced. But the unpaid-interest provision demonstrates that "[t]he period of modern activity in income tax legislation," Black, *supra*, at 15,

began with the taxation of unrealized gains—just like the initial period decades earlier.[3]

C. The 1909 Corporate Income Tax

Congress was not alone in understanding that unrealized gains fit easily within the meaning of "income." In 1909, Congress enacted a corporate income tax, and Treasury Department decisions construing that tax—*rendered while the Sixteenth Amendment was being ratified*—ruled that unrealized gain from appreciations in property value was taxable "income."

Formally speaking, the corporate income tax was an "excise" tax, Act of Aug. 5, 1909, ch. 6, § 38, 36 Stat. 11, 112, levied for the privilege of using the corporate form. *See Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911). The tax was measured, however, by a corporation's "net income." Act of Aug. 5, 1909, § 38, 36 Stat. at 112; *see Stratton's Indep., Ltd. v. Howbert*, 231 U.S. 399, 414 (1913).

Treasury decisions applying this law concluded that unrealized gains, specifically appreciations in the value of property, qualified as taxable income. As one decision stated, "increase in the value of unsold property, if taken up on the books of the corporation, [are] to be included in income." T.D. 1675 § 37 (Feb. 14, 1911), 14 Treas. Dec. Int. Rev. 16, 19 (1911). Another

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[3] State laws also taxed unrealized gains as "income" in this period. Virginia, for example, taxed undistributed corporate earnings: "The word 'income' shall include … the shares of the gains and profits of all companies … of any person who would be entitled to the same if divided, *whether said profits have been divided or not*." Acts of Assembly, ch. 496, § 1, 1897–98 Va. Acts 527 (emphasis added); *see also* The Income Tax Act, ch. 658, § 1087m—2(1)(a), 1911 Wis. Laws 985 (taxing the estimated rental value of owner-occupied properties, where the owners received no actual rent payments).

decision elaborated: "Any increase in the value of capital assets, as determined by a physical revaluation and taken cognizance of by the corporation in book entries, is gain and must be accounted for as income for the year in which such increase is so recognized." T.D. 1742 § 48 (Dec. 15, 1911), 14 Treas. Dec. Int. Rev. 123, 127 (1911).

Yet another decision instructed that "appreciation in the value of securities," taken account of as a book entry, "should be accounted for as gross income." T.D. 1706 (June 9, 1911), 14 Treas. Dec. Int. Rev. 75 (1911). The decision explained: "The appreciation having actually occurred and being so entered and carried on your books as to show that the value of your assets was greater by this amount at the close of the year than at the beginning, this increase must be accounted for as income." *Id.* Indeed, an earlier decision instructed corporations to report as gross income *all* "increase[s] in value of unsold property," whether or not taken account of on the books, T.D. 1606 § 40 (Mar. 29, 1910), 13 Treas. Dec. Int. Rev. 39, 42 (1910), further underscoring how broadly the concept of income was regarded at the time.

The 1909 corporate income tax was enforced through 1913. Thus, the law in operation during the ratification of the Sixteenth Amendment, as authoritatively interpreted by the government, treated unrealized gains as "income." Although the 1909 tax addressed *corporate* incomes, this Court has recognized that the meaning of "income" in that statute is the same as in the income-tax laws passed after 1913 to implement the Sixteenth Amendment. *See, e.g., Stratton's Indep.*, 231 U.S. at 416-17; *S. Pac. Co. v. Lowe*, 247 U.S. 330, 335 (1918).

D. The 1913 Income Tax

The year the Sixteenth Amendment was ratified—five decades after Congress first imposed an income tax on undistributed corporate earnings—it was still understood that Congress could tax unrealized profits or gains as part of someone's "income." Indeed, that is precisely what Congress did in the first income tax passed after the Amendment's ratification.

The 1913 income tax, like its nineteenth-century antecedents, expressly included undistributed corporate earnings in the incomes of some individuals. Specifically, for certain high earners, the act provided that "the taxable income of any individual shall embrace the share to which he would be entitled of the gains and profits, *if* divided or distributed, *whether divided or distributed or not*," of all corporations and similar entities that were used "for the purpose of preventing the imposition of such tax" by "permitting such gains and profits to accumulate instead of being divided or distributed." Act of Oct. 3, 1913, ch. 16, 38 Stat. 114, 166 (emphasis added). All that was necessary for this shareholder tax to apply was a determination that the earnings had "accumulate[d] beyond the reasonable needs of the business." *Id.* at 167.

Thus, the very year the Sixteenth Amendment was adopted, Congress saw nothing odd in defining "the taxable income of any individual" as including his or her unrealized share of corporate gains and profits, "whether divided or distributed or not." *Id.* at 166. Although this measure applied only where tax avoidance may have been afoot, that choice was a matter of policy and pragmatism, not of Congress's *power* to tax this type of profit as income. Undistributed corporate earnings, after all, either can legitimately be regarded as "income" or they cannot.

Notably, too, the 1913 statute recognized—unlike Petitioners—that income can be *derived from* a source without being separated from that source, distributed, or otherwise realized. The income tax covered a person's "entire net income *arising or accruing from all sources* in the preceding calendar year," and everyone who was subject to the tax on undistributed corporate earnings had to "make a personal return of his total net income *from all sources*, corporate or otherwise." *Id.* (emphasis added). Under Petitioners' logic, it was nonsense for Congress to say that taxpayers could derive income "from" a "source" when the gains in question were never separated from that source and conveyed to them. But that is not how Congress understood things in 1913.

In sum, when the Sixteenth Amendment was ratified, Congress and the executive department that implemented its tax laws understood that taxable income could include unrealized gains—whether undistributed corporate earnings or increases in the value of unsold assets. That understanding traced back to the earliest years of a national income tax. Did the ratification of the Sixteenth Amendment change that by narrowly confining the word "income" through a constitutional realization requirement that never existed before? As discussed below, the answer is no.

II. The Sixteenth Amendment Restored the Broad Power to Tax Income that Congress Possessed Before *Pollock*, a Power that Included Taxing Unrealized Gains.

The history of the Sixteenth Amendment makes clear that its purpose was to undo a key holding of the *Pollock* decisions—that taxes on income "derived from" property must be apportioned because they are equivalent to taxing "the property itself." *Pollock*, 158 U.S. at 618. Simply put, "the command of the Amendment"

was "that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived." *Brushaber*, 240 U.S. at 18.

Thus, the Amendment did not introduce a new concept of income taxation—rather, it was designed to return to the pre-*Pollock* status quo, in which income taxes never required apportionment, regardless of the source of the taxed income. *See* Brooks & Gamage, *Derived*, *supra*, at 28-35. And those unapportioned income taxes, as shown above, had long taxed unrealized gains.

A. "The great object of the Constitution was, to give Congress a power to lay taxes, adequate to the exigencies of government." *Hylton v. United States*, 3 U.S. 171, 173 (1796) (Chase, J.). That authority has *always* included the "complete and plenary power of income taxation." *Stanton*, 240 U.S. at 112.

The Founders specified, however, that any "direct" tax must be apportioned among the states by population. U.S. Const. art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 4. It "was unclear" exactly what a "direct" tax meant, "other than a capitation (also known as a 'head tax' or a 'poll tax')." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012); *see* Brooks & Gamage, *Taxation*, *supra*, at 75-99. The opinions in *Hylton* suggested "that only two forms of taxation were direct: capitations and land taxes," and that view "persisted for a century." *Sebelius*, 567 U.S. at 571. Thus, this Court concluded that the Civil War income tax was not a direct tax, but rather fell "within the category of an excise or duty," *Springer v. United States*, 102 U.S. 586, 602 (1880), which need not be apportioned. *See* Brooks & Gamage, *Taxation*, *supra*, at 106-09.

It shocked the nation, therefore, when this Court abruptly reversed itself in *Pollock*, overturning the 1894 income tax under the apportionment rule. According to the Court, taxing income derived from property was equivalent to taxing the property itself, making it a direct tax. *Pollock*, 158 U.S. at 618.[4]

Critically for understanding how the Sixteenth Amendment was later phrased, however, *Pollock* did *not* hold that all income taxes require apportionment—only taxes on income *derived from property*. It did not question the settled rule that income from all other sources, such as "gains or profits from business, privileges, or employments," 158 U.S. at 635, could be taxed without apportionment. *Pollock* struck down the entire 1894 income tax only by concluding that its taxes on income from property could not be severed from its taxes on income from "professions, trades, employments, or vocations." *Id.* at 635, 637.

The obstacle that *Pollock* imposed to an income tax, therefore, was its new source-based analysis, in which the need for apportionment hinged on "the source whence the income was derived." *Id.* at 618.

B. *Pollock* caused an uproar. President Taft later observed: "Nothing has ever injured the prestige of the Supreme Court more." 1 Archibald Butt, *Taft and Roosevelt* 134 (1930). In 1909, while discussing the proposed Sixteenth Amendment, one Congressman recounted "the spectacle" of the Court "turning backward, and uprooting the established laws of more than three generations. Is it any wonder that the populace

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[4] *Pollock* also innovated by holding that taxes on ownership of *personal* property (not just real property) were direct taxes, *see id.*, but that aspect of the decision is not relevant here.

stood aghast and the bar was amazed?" 44 Cong. Rec. 4413 (Rep. Henry).

The aim of the Sixteenth Amendment was thus "to restore to the people and to Congress their right to levy and collect taxes for the support of the Government in the way it had been done … prior to this decision." *Id.* at 4409 (Rep. Bartlett). Because *Pollock* "decided that *certain* incomes could not be taxed," an amendment was needed to reestablish "a *complete grant of power to tax all incomes*." Harry Hubbard, *"From Whatever Source Derived,"* 6 A.B.A. J. 202, 204 (1920).

This history helps illuminate a key phrase in the Amendment: "from whatever source derived." While Petitioners depict this language as implying a heretofore-unknown realization requirement, its function was instead to overrule the flawed analysis of *Pollock*—its holding that the source of income determines whether an income tax must be apportioned. Indeed, "the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment" based on "the source whence the income was derived." *Brushaber*, 240 U.S. at 18.

The Sixteenth Amendment was thus understood as restoring a preexisting constitutional framework under which the government had long collected income taxes—including taxes on undistributed corporate earnings and other unrealized gains. The Amendment "conferred no new power of taxation," but simply prevented income taxes from "being placed in the category of direct taxation ... by a consideration of the sources from which the income was derived," under *Pollock*'s "mistaken theory." *Stanton*, 240 U.S. at 112-13.

That purpose explains the conspicuous lack of discussion during the Amendment's drafting about the meaning of "income." Its Framers were not

establishing a new concept, because Congress had already exercised the "power to lay and collect taxes on incomes, from whatever source derived." U.S. Const. amend. XVI. And in doing so, Congress had taxed unrealized gains.

C. The historical record bears this out. In April 1909, Senator Norris Brown introduced a proposed amendment, recounting how this Court "first held that Congress could pass an income-tax law, and later, in the Pollock case, held that it could not." 44 Cong. Rec. 1568. Quoting extensively from Justice Harlan's dissent, Brown said: "I do not believe the fathers ever contemplated that income taxes must be apportioned according to population, but the courts have said that they did. I am here to-day presenting an amendment to the Constitution which will compel the courts to announce the contrary doctrine." *Id.* at 1570; *cf. id.* at 1569 (citing the Civil War income taxes).

President Taft expressed similar views in a letter read to the Senate. *Pollock*, he wrote, "deprived the National Government of a power which, by reason of previous decisions of the court, it was generally supposed that Government had." *Id.* at 3344. Taft therefore endorsed an amendment "conferring the power to levy an income tax ... without apportionment." *Id.*

Many legislators made the same points. *E.g.*, *id.* at 4408 (Rep. Bartlett). One Congressman, specifically referencing the Civil War income taxes, said that *Pollock* severed an "unbroken chain of decisions ... so strong that Abraham Lincoln girded it about the Republic in its darkest hour in the war between the States." *Id.* at 4398 (Rep. James). Others similarly denounced *Pollock* and advocated its overthrow. *E.g.*, *id.* at 4401 (Rep. Hull) (calling *Pollock* "clearly unsound" and exhorting legislators "to secure to Congress its taxing power lost under this decision").

D. The genesis of the phrase "from whatever source derived" also belies the notion that it implies a narrow concept of income. This language was added by the Senate Finance Committee, *see id.* at 3377 (referral to committee); *id.* at 3900 (revised language), and the Senator who reportedly suggested the addition did so to make the language "as broad as 'incomes' themselves could possibly be," Hubbard, *supra*, at 203. The Amendment's initial sponsor, Senator Brown, later said that these words "neither add to *nor take away from* the power of the Government to reach the incomes of the country." 45 Cong. Rec. 1699 (1910) (emphasis added).

The phrase "from whatever source derived" also echoed the income-tax statutes of the past. *E.g.*, Act of Aug. 27, 1894, § 28, 28 Stat. at 553 ("income derived from any source whatever"); Act of June 30, 1864, § 116, 13 Stat. at 281 ("derived ... from any other source whatever"). As that similarity underscores, the aim was to return to an earlier era—one in which, notably, "the gains and profits of all companies" were treated as part of a shareholder's personal income, "whether divided or otherwise." *Id.* § 117, 13 Stat. at 282.

E. To support their narrow construction of the Amendment, Petitioners point to the following episode: after the Senate Finance Committee had shaped the Amendment's language into its final form, 44 Cong. Rec. 3900, the Senate rejected a floor amendment offered by one Senator—on the day the amendment passed the Senate—that would have taken an entirely different approach by striking the Constitution's direct-tax clauses. *Id.* at 4120.

Petitioners say this shows that Congress eschewed a "broader" approach and "carved out" only a "limited"

new sphere for income taxes. Pet. Br. 34. But the evidence is to the contrary.

First, apart from the ill-timing of the substitute amendment, striking words from the existing text of the Constitution was not how previous constitutional amendments had ever been effected. *See* U.S. Const. amend. I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV.

More importantly, the choice to focus exclusively on income taxes does not imply that the Framers and ratifiers thought they were establishing a newly parsimonious definition of "income." Throughout the congressional and ratification debates, no one argued that the Amendment would give Congress *less* power "to lay and collect taxes on incomes" than Congress had exercised before *Pollock*. The power the Amendment restored had been used to tax unrealized gains in the past, and Congress used it to tax such gains once again as soon as the Amendment was ratified. Just as income was still distinct from the accumulated wealth that produced it, *see Stratton's Indep.*, 231 U.S. at 415 ("the gain derived from capital"), it was still taxable before realization or separation from that initial capital. Petitioners offer no evidence that anyone understood "taxes on incomes" under the Amendment to mean something narrower than the taxes on incomes that Congress had levied in the past—which repeatedly included unrealized gains.

Instead, the choice to focus only on "incomes" reflected the Amendment's purpose: reversing *Pollock*'s new apportionment requirement for taxing income derived from property. The Amendment's phrasing was chosen to make this purpose clear. That is precisely what Senator Brown said in his *full* response to the idea of repealing the direct-tax clauses: "my purpose is to confine it to income taxes alone, *and to forever settle*

the dispute by referring the subject to the several States." 44 Cong. Rec. 3377 (emphasis added). As Brown remarked when introducing the amendment, the goal was "to amend the Constitution and to make it so definite and so certain that no question can ever be raised again of the power of Congress to legislate on the subject." *Id.* at 1568.

Thus, the idea that the Amendment entrenched a new constitutional rule against taxing unrealized gains has no support in history. Nor in the Amendment's text, as discussed below.

III. The Word "Income" Had an Expansive Meaning in the Ratification Era that Encompassed Virtually Any Financial Gain, Realized or Unrealized.

Whether one looks to general-use dictionaries or specialized treatises, "income" had a broad meaning in 1913 that encompassed financial gains of virtually any kind, realized or unrealized. *See* Brooks & Gamage, *Derived*, *supra*, at 44-54. Petitioners' attempt to show otherwise falls apart under scrutiny.

A. Dictionaries

Contemporary dictionaries all offered extremely general definitions of "income" that did not imply any need for realization.

The 1913 edition of *Webster's*, for instance, broadly defined income as including "[t]hat gain which proceeds from labor, business, property, or capital of any kind, as ... the profits of commerce or of occupation, or the interest of money or stock in funds, etc." *Webster's Revised Unabridged Dictionary* (1913). Nothing here requires one's "gain" to be separated from the underlying source that generated it, converted into a new form, or personally received by the owner. Petitioners

try to wring that implication from the statement that gain "proceeds from" a source, but that does not follow. Interest that accumulates in a bank account, for instance, "proceeds from" the initial deposit whether or not the interest is withdrawn. *Cf. id.* (defining the verb "proceed" as "to come from"). Under *Webster's* definition, income is merely *distinct* from whatever "labor, business, property, or capital" produced it—it is the "gain" from those sources. *Id.* And "gain" included the "amassing of profit or valuable possession; acquisition; accumulation." *Id.* Accordingly, *Webster's* supplies a long list of synonyms for "income," some of which may entail realization but others of which clearly do not: "Gain; profit; proceeds; salary; revenue; receipts; interest; emolument; produce." *Id.*

Other definitions of "income" were similarly broad and lacked any realization requirement. *See, e.g.*, Joseph E. Worcester, *Dictionary of the English Language* (1884) ("[g]ain derived from any business or property; produce; profit"); Robert Hunter & Charles Morris, *Universal Dictionary of the English Language* (1897) ("[t]hat gain which a person derives from ... property of any kind").

Petitioners' arguments from dictionary definitions all suffer from the same flaw: they beg the question. For example, one cited dictionary defined income as "[t]hat which *comes in to a person* as payment ... or as gain from lands, business, the investment of capital, etc." 4 *Century Dictionary and Cyclopedia* (1903) (emphasis added). But what does it mean for a financial gain to "come in" to a person? Does it necessarily exclude situations in which the new funds are held by a corporation that the person partially owns? The definition does not answer that question.

Legal dictionaries also defined "income" expansively to include gains and profits of all kinds, realized

or not. *Black's Law Dictionary* defined it both as the "return in money from one's business, labor, or capital" and *also* as "gains, profit, or private revenue." *Black's Law Dictionary* (2d ed. 1910). Significantly, the same entry defined "Income tax" in comparably sweeping terms: "A tax on the yearly profits arising from property, professions, trades, and offices." *Id.*

Likewise, *Bouvier's Law Dictionary* defined income as "[t]he gain which proceeds from property, labor, or business." *Bouvier's Law Dictionary* (8th ed. 1914). "The word is sometimes considered synonymous with 'profits,'" and the "income" of an estate "may mean 'money' *or the expectation of receiving money*." *Id.* (emphasis added). Other legal dictionaries were in accord. *E.g.*, *Concise Legal Dictionary* (1909) ("profit or gains from business; property or other sources of wealth"); *Dictionary of American and English Law* (1888) ("[g]ains, or private revenue, from business, labor, or the investment of property").

Strikingly, although Petitioners insist that "income" invariably demanded realization, *none* of the dictionaries they cite actually use that word in defining "income," even when those same dictionaries contained entries for "realize." *E.g.*, *Webster's*, *supra* (defining "realize" as "[t]o convert any kind of property into money, especially property representing investments"); 6 *Century Dictionary and Cyclopedia*, *supra* ("[t]o bring into form for actual or ready use; exchange for cash or ready means"); Worcester, *supra* ("[t]o convert into land or real estate, as money," or "[t]o make certain; to substantiate"); *Black's Law Dictionary*, *supra* ("[t]o convert any kind of property into money; but especially to receive the returns from an investment").

Even if "income" was most frequently used in 1913 in contexts involving realization, that speaks at most to the core of the word's meaning, not its outer bounds.

There is no reason to think that Americans believed they were endorsing only the narrowest conception of that word in the Sixteenth Amendment. And the history described above suggests exactly the opposite—that "[t]hey intended to include thereby everything which by reasonable understanding can fairly be regarded as income." *Macomber*, 252 U.S. at 237 (Brandeis, J., dissenting). As shown by the long tradition of taxing unrealized gains, such gains not only *can* be fairly regarded as income—they *were* so regarded. Nothing in the Amendment's text or history suggests otherwise.

B. Treatises

Contemporary treatises likewise recognized that "income" had a broad meaning, encompassing unrealized gains.

1. "Unless limited by the context," Henry Campbell Black explained, "the word 'income' is one of very broad and comprehensive meaning." *Treatise on the Law of Income Taxation*, *supra*, at 76; *cf. id.* at 1 ("[a]n income tax is in effect a tax upon earnings, *taking that term in its broadest sense*" (emphasis added)).

Even academics who advocated a narrower view of "income" recognized that it was used more comprehensively in tax law. "[T]he concept of income adopted in the law is a compromise. The tax is imposed not merely on 'income' in the strict economic sense but in certain cases on appreciation of property values as well." Robert H. Montgomery, *Income Tax Procedure* 196-97 (1919); *see id.* (noting that some laws taxed income that was not "reduced to money").

Furthermore, other academics took a broader view of income. According to the influential economist Robert Murray Haig, income was "the money value of the net accretion to one's economic power between two

points of time." *The Concept of Income—Economic and Legal Aspects*, *in The Federal Income Tax* 1, 7 (Robert Murray Haig ed., 1921). Although "one might urge that no tax be placed on a gain arising from the appreciation of a fixed asset until it is actually sold," following that approach was merely a "concession[]" to "exigencies." *Id.* at 14. The inherent meaning of "income" did not compel such a limit, for "[t]he economic fact is that the owner of that asset comes into possession of economic income whenever the increase in the value of that asset is sufficient in amount and definite enough in character to be susceptible of precise evaluation in terms of money." *Id.* Notably, this view of income was in accord with contemporaneous accounting practice. *See, e.g.*, Arthur Lowes Dickinson, *Accounting Practice and Procedure* 68 (1914) ("every appreciation of assets is a profit, and every depreciation a loss"); *see also* Brooks & Gamage, *Derived*, *supra*, at 54-56.

2. None of the treatises Petitioners quote shows any consensus that income required realization. Instead, they show the opposite.

Many of these quotations are not even discussing the concept of income, but rather are describing the *coverage of particular income-tax statutes*. *E.g.*, Thomas Gold Frost, *A Treatise on the Federal Income Tax Law* 7 (1913) ("*the new Federal Income Tax* is in no sense a tax upon property" (emphasis added)). Petitioners selectively omit language to suggest, incorrectly, that these passages concern the abstract meaning of "income." *Compare* Godfrey Nelson, *Income Tax Law and Accounting* 19 (1918) ("Income, *for the purpose of the tax*, comprehends ... gains, profits, salaries and wages received ...." (emphasis added)), *with* Pet. Br. 33 (omitting the italicized words); *compare also* Nelson, *supra*, at 36, *with* Pet. Br. 33 (similar).

Thus, when Thomas Cooley objected that "those holding lands for the rise in value escape [income taxation] altogether—at least until they sell," he did not attribute that flaw to any inherent limit in what "income" can mean, but rather to "[t]he taxes imposed on incomes by the United States during and immediately following the late war," which indeed did not attempt to tax appreciations in the value of land. *Treatise on the Law of Taxation* 20 (1876). On the contrary, Cooley endorsed the broader concept of income that hinges on increases in economic power: he criticized the Civil War–era tax statutes for failing to include increases in the value of landowners' property, even though "their actual increase in wealth may be great and sure," regardless of whether they have sold the land and realized that profit. *Id.*

Other passages Petitioners cite merely explain that income is distinct from the underlying capital that produced it—a point that is fully compatible with taxing this income before it is separated from the capital. *E.g.*, Black, *supra*, at 1 (an income tax "is not a tax upon accumulated wealth, *but upon its periodical accretions*" (emphasis added)).

Still other passages address general corporate-law principles about whether the shareholder or the company has title to its earnings. *E.g.*, Edwin Howes, *The American Law Relating to Income and Principal* 17 (1905). This Court explained in 1870 why such principles are no bar to Congress treating the earnings as "income" before they are distributed. *Hubbard*, 79 U.S. at 18. Indeed, the same treatises recognize that "[a]ny increase in the property of the corporation in whatever form would usually increase proportionately the value of the shares of stock." Howes, *supra*, at 26.

3. It is true that some authors of this period did argue that realization should be considered a

necessary element of income. But critically, each was advocating a *prescriptive* definition of income. Invariably, these writers acknowledged that actual practice did not conform to their prescriptions.

In a passage Petitioners partially quote, for instance, Black writes that "it cannot be too strongly insisted upon that the word 'income,' *when properly used*, is applicable only to receipts in cash," thus excluding the increased value of an unsold bond. Black, *supra,* at 76-77 (emphasis added). The caveat "when properly used" highlights the existence of "improper" usage to the contrary. Indeed, Black fully acknowledged the gap between reality and his prescriptions. While he thought that interest "*is not properly described* as income until it is received," he conceded that "statutes have expressly included such items." *Id.* at 77, 108 (emphasis added). And while he believed undistributed corporate earnings should not be thought of as personal income, he acknowledged: "These are taxable under the act of Congress of 1913, as income of the stockholder," in some situations. *Id.* at 119.

Black was hardly alone in offering a prescriptive definition of "income" that concededly did not reflect actual usage. *See, e.g.*, Frost, *supra*, at 15 ("It is undoubtedly true that 'profits' and 'income' are sometimes used as synonymous terms," but "strictly speaking" they are different.). Montgomery, for instance, did *not* write that "the federal government has no 'right to tax any transaction unless there is an actual realization of income.'" Pet. Br. 33. Rather, having acknowledged that the government did exactly that, he wrote: "In the circumstances, *no apology is needed for a close inquiry into* the right of Congress or the Treasury Department to ... tax any transaction unless there is an actual realization of income." Montgomery, *supra*, at 198 (emphasis added).

Similarly, when Edwin Seligman discussed realization, "purely from the economic point of view," *Are Stock Dividends Income?*, 9 Am. Econ. Rev. 517, 517 (1919), he acknowledged it was often a "difficult problem" to decide "whether a particular gain is income." *Id.* at 523. Illustrating the point, Seligman did not view mere appreciations in value as income, but he felt differently about the reinvestment of earnings—the issue here. Seligman regarded reinvested earnings as income ("accumulated or reconverted income") because at one point the income had been "separated from the principal." *Id.* at 523. "While indeed it is now again merged with the principal," nevertheless "the gain, even though added to the capital, is pure income." *Id.*

Such esoteric distinctions were part of academic debate in the ratification era, but neither legislation nor common usage reflected the narrower definitions of "income" that some academic authors were prescribing—as those authors themselves recognized.

* * *

As soon as the Sixteenth Amendment was ratified, Congress taxed unrealized financial gains as income, as it did two decades before in the law that *Pollock* struck down and two decades before that under the earliest federal income taxes. By the ratification era, there was a long tradition of treating undistributed corporate earnings, appreciations in value, and other unrealized gains as taxable "income." The Sixteenth Amendment, as everyone understood, simply restored the legal regime under which Congress could levy such taxes without apportionment. Not a shred of evidence suggests that in returning to that status quo, Americans gave Congress any less power "to lay and collect taxes on incomes, from whatever source derived," U.S. Const. amend. XVI, than Congress had long exercised.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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