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 Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF THE MANHATTAN INSTITUTE FOR POLICY RESEARCH AND PROFESSORS ERIK M. JENSEN AND JAMES W. ELY IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF THE *AMICI CURIAE**

The Manhattan Institute for Policy Research is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship regarding tax policies that allow free enterprise and economic choice to flourish. MI's Constitutional Studies Program aims to preserve the original public meaning of the Constitution, including its limitations on the taxing power.

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Amici all have a keen interest in the original public meaning of the federal taxing power, which has been a subject of their research and advocacy for decades. In

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* No counsel for any party authored this brief in whole or in part, and no person other than amici's counsel made a monetary contribution to fund the preparation or submission of this brief. Counsel for the parties received timely notice of the intent to file this brief.

their collective view, this case presents the Court with an ideal opportunity to clarify that taxes on unrealized gains, such as wealth taxes, are direct taxes that are unconstitutional if not apportioned among the states.

INTRODUCTION AND SUMMARY OF ARGUMENT

Inspired by their friend's mission to empower subsistence farmers in India, Charles and Kathleen Moore made a modest investment in 2006 in KisanKraft Machine Tools Private Limited, a small social enterprise in Bangalore. Pet. App. 40. With just a 13% stake in the company, the Moores have had no say in its operations, no power to compel distributions of income, and no interest in doing so. Pet. App. 41. The company, and thus their investment, turned out to be a success. But for the Moores, that was never the point. They were satisfied in knowing that their contribution lived on to employ hundreds of people and "improve the lives of small and marginal farmers." *Ibid.* They never sought or expected a penny of income from their investment, and they never received one.

But that did not stop the federal government from taxing them as though they had. To the Moores' surprise, the government "deemed" every dollar of net income received by and reinvested in KisanKraft over the years to have been distributed to them as dividend income—even though it was not.

As part of the 2017 Tax Cuts and Jobs Act, Congress enacted the one-time Mandatory Repatriation Tax (MRT), which targeted retained earnings of so-called "controlled foreign corporations," or CFCs. These are foreign-based companies with over 50% American-based ownership. See I.R.C. §§ 965, 957. The MRT taxed American shareholders with a 10% stake or greater in any CFC a proportional amount of the "deferred foreign

income" that the company had retained and reinvested since 1986, despite that the income had never actually been distributed to its shareholders. *Id.* § 965. For the Moores, this meant a tax bill of roughly $15,000, all for phantom income that they never received. Pet. App. 42.

The Moores challenged the tax assessment as impermissible under the Constitution. The MRT is not, they argued, a tax on "incomes" within the meaning of the Sixteenth Amendment, and it thus constitutes a direct tax that must be apportioned among the states pursuant to article I, section 2, clause 3; and section 9, clause 4. But the Ninth Circuit upheld the tax against the Moores' challenge, debuting an all-new conception of "income" that is as alien to the Federal Reporters as it would have been to the drafters of the Sixteenth Amendment. "Whether the taxpayer has realized income does not," according to the Ninth Circuit, "determine whether a tax is constitutional." Pet. App. 12.

That holding cannot be squared with the Sixteenth Amendment's text or history. The framers of the Constitution barred direct federal taxes—including taxes on incomes and property—unless the tax was apportioned among the states according to population. This ensured that less prosperous states could not freeride on the hard work and good public policies of more prosperous states. It also forestalled the risk of abuse and oppression, which was fresh in the minds of the Founding Generation. One-and-a-quarter centuries later, the drafters of the Sixteenth Amendment respected this concern and sought to balance it against the revenue needs of the central government by excepting only a very narrow band of direct taxes from the apportionment requirement—those on "incomes," as then understood.

The Ninth Circuit's decision runs contrary to this settled history and thereby works an unprecedented

expansion of federal taxing power. By contorting the meaning of "income" beyond recognition, the opinion opens the door to a federal taxation of wealth and property that would have been odious to the Founders and the ratifiers of the Sixteenth Amendment alike. It also invites ruinous public policies that will be destructive of economic choice and social flourishing.

It is no coincidence that such harmful tax policy is unconstitutional. The Framers disfavored direct taxation at the federal level because it was detrimental to economic liberty, oppressive of the public, and unmoored from local needs. The decision below ignores the text, history, and tradition of the Constitution's taxation provisions and announces a new and expansive definition of income with troubling practical implications. The Court should grant the petition to reinforce the constitutional limits on the federal taxing power by forestalling extra-constitutional taxation mechanisms on unrealized capital gains and other phantom or "imputed" income.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THE ORIGINAL MEANING AND HISTORICAL UNDERSTANDING OF THE CONSTITUTION'S TAXATION PROVISIONS

The Constitution requires direct taxes to be apportioned among the states. The Framers drafted this provision as a meaningful limit on the federal taxing power. Indeed, it is the only item in the Constitution to appear in two places. The drafters and ratifiers of the Sixteenth Amendment did not set out in the early 20th Century to displace that limitation, but rather expressly and overwhelmingly voted to preserve it. The amendment excused the apportionment requirement for only one type of tax: a tax on "incomes," which was under-

stood then, just as it is now, to mean *realized* gains over which the recipient obtains dominion and control. The MRT is a direct tax on *unrealized* gains—meaning it is a tax on indirect property interests or wealth. Because it is not apportioned among the states, it is unconstitutional. The Court should grant certiorari and so hold.

A. The Framers intended the Apportionment Clause to be a hard limit on the central government's taxing power

1. The scope of the federal taxing power was a dominant concern for the Constitution's Framers. With the Articles of Confederation fresh in mind, the central government's need for a more efficient, fair system for raising revenue was manifest. As Alexander Hamilton explained, "authorizing the national government to raise its own revenues in its own way" was essential to curing the "evils" of the Articles of Confederation, whose "quotas and requisitions" based on the value of property in each state were inequitable and prone to race-to-the-bottom gamesmanship. The Federalist No. 21, at 142 (Clinton Rossiter ed., 1961).

Yet the lingering memory of the abuses and overreaches of colonial rule—much of which boiled down to grievances over the burdens and caprice of British taxation—never ceased to frame the debate over how the new nation's government should function. In fact, "during the revolutionary era, taxation was at the very center of popular consciousness," "[t]he break with Britain was motivated largely by this issue," and "debate [on the topic] continued unabated throughout the 1780s." Bruce Ackerman, *Taxation and the Constitution,* 99 Colum. L. Rev. 1, 6 (1999).

Accordingly, many of the Constitution's greatest skeptics were preoccupied with the dangers of the federal taxing power. *See, e.g.,* Calvin H. Johnson, *Appor-*

tionment of Direct Taxes: The Foul-Up in the Core of the Constitution, 7 William & Mary Bill of Rights J. 1, 27 n.63 (1998) (collecting examples of anti-Federalists expressing concern over the federal taxing power). And the Constitution's most ardent advocates sought to reassure them that the document would constrain federal power to lay and collect taxes, even as they sought to expand it. *Id.* at 31-32 n. 74 (collecting examples of Federalists stating that the federal government would seldom utilize direct taxes).

2. Ultimately, the Framers reached a consensus on the taxing power: indirect taxes—duties, imposts, and excises levied on consumable goods—could be levied by the federal government as it saw fit. But direct taxes—taxes levied directly on individuals and their property—would have to be apportioned among the states according to population. See U.S. Const. art. I, § 2, cl. 3; art. I § 9, cl. 4. See also *id.* art. I, § 8, cl. 1.

The Constitution's drafters offered several justifications for bifurcating direct and indirect taxation in this way. For one thing, it was progressive and more respectful of economic liberty, allowing taxpayers to decide—according to how they used their money—to opt in or out of federal taxation. "Imposts, excises, and, in general, all duties upon articles of consumption," explained Hamilton, "may be compared to a fluid, which will, in time, find its level with the means of paying them." The Federalist No. 21, at 142 (Clinton Rossiter ed., 1961). "The amount to be contributed by each citizen will in a degree be at his own option, and can be regulated by an attention to his resources." *Ibid.* As James Wilson similarly remarked at the Pennsylvania ratifying convention, "[n]o man is obligated to consume more than he pleases," and thus indirect taxes are "voluntary." 2 Jonathan Elliot, The Debates in the Sev-

eral State Conventions on the Adoption of the Federal Constitution 191 (1876) (Dec. 4, 1787). By contrast, direct taxes are ineluctable; they apply simply for being.

Treating direct and indirect taxes separately also served the purposes of federalism. Limiting the federal government's ability to impose direct taxes reserved that power for the states, which at the time badly needed sources of revenue free from federal intrusion. Opponents to the Constitution voiced concern that the federal government might "swallow[] up every object of taxation, and consequently plunder[] the several states of every means of support." Pennsylvania and the Federal Constitution, 1787-1788 at 260 (1888) (J. McMaster & F. Stone, eds.) (Robert Whitehill at the Pennsylvania ratifying convention, Dec. 12, 1787).

In response, the Constitution's supporters pointed to the firm limitation on the federal government's power to lay direct taxes. At the Connecticut ratifying convention, Oliver Ellsworth assured the assembly that, in light of the apportionment requirement, the federal government would seldom resort to direct taxes, leaving that space open for the states. *Id.* at 191 (Jan. 17, 1788). Given the unavailability at the time of any "common standard or barometer" to ascertain or characterize the "national wealth," the Framers understood that states were closer to their citizens and better equipped to understand how to tax them and their property directly according to the characteristics and needs of their respective communities. The Federalist No. 21, at 142 (Clinton Rossiter ed., 1961) (Alexander Hamilton).

Limiting direct taxes also staved off factionalism, preventing a majority in Congress from disproportionately raising revenue from a disfavored state, region, or class of citizens. Hamilton remarked on the Constitution's "guarded circumspection" in "shut[ting] the

door to partiality or oppression" by directly tying any direct taxation on property to each state's population—and thus, political representation—through apportionment. The Federalist No. 36, at 220 (Clinton Rossiter ed., 1961).

Apportionment also ensured that states cooperated with one another to form a trustworthy and functional national government. By providing that direct taxation and numerical representation were always to go hand-in-hand, the Constitution's framers brought "control and balance" to the otherwise "contrary temptation[s]" of states to inflate their census numbers to earn more seats in Congress or deflate them to carry a smaller share of the collective tax burden. The Federalist No. 54, at 340-341 (James Madison) (Clinton Rossiter ed., 1961).

And finally, perhaps most fundamentally, requiring direct taxes to be apportioned among the states simply imposed a meaningful constraint on the government's revenue-raising power—itself a first-order priority for the Founding Generation, for whom the leading foot soldier of tyrannical colonial rule had been the taxman. See, e.g., 1 Debate on the Constitution 502 (B. Bailyn ed. 1993) (stating concern by "Brutus" that the new Constitution would "ope[n] a door to the appointment of a swarm of revenue and excise officers to prey upon the honest and industrious part of the community"); Johnson, *Apportionment of Direct Taxes, supra*, at 27 n. 63 (collecting additional examples of concerns over the federal taxing power).

In response, the Framers were remarkably candid that because of apportionment, direct taxes would raise very little money for the federal government, as was the point. Speaking at the Connecticut ratifying convention, for instance, Oliver Ellsworth stated that "[d]irect taxation can go but little way towards raising a revenue,"

as the people would not be "provident" in giving up to the state "the tools of a man's business or the necessary utensils of his family." 3 Elliot, Debates, *supra*, at 191 (Jan. 17, 1788). Madison assured the members of the Virginia convention that direct taxation would "only be recurred to for great purposes," like "establish[ing] funds for extraordinary exigencies," such as the national defense in wartime, but was too "oppressive" a form of taxation to fund the day-to-day activity of the federal government, which should depend instead on excises and imposts. *Id.* at 95-96 (June 16, 1788). See also Johnson, *Apportionment of Direct Taxes, supra*, at 31-32 n. 74 (collecting additional examples). The Apportionment Clause helped make it so.

In light of this history, later tautological assertions that apportionment was meant to apply only when it was easy to apply, see, *e.g. Hylton* v. *United States*, 3 U.S. 171, 174 (1796) (Chase, J.), simply do not stand up. Apportionment was written into the Constitution, *twice*, to have teeth. See 4 Annals of Cong. 729-30 (1794) (James Madison) (calling the Apportionment Clause "one of the safeguards of the Constitution"). And the Framers had a very broad view of what kinds of taxes fell within the broad category of "direct" taxes. When Gouverneur Morris introduced the apportionment requirement at the constitutional convention, for example, he categorized indirect taxes as those "on exports & imports & on consumption," leaving all else to count as direct taxes that must be apportioned. 1 Max Farrand, The Records of the Federal Convention of 1787 at 592 (1911) (July 12, 1787). See also 2 Adam Smith, An Inquiry into the Nature and Cause of the Wealth of Nations 869 (1776) (Liberty Fund ed., 1981) (describing taxes on commodities as indirect taxes and implicitly categorizing other forms of taxation as direct).

B. The drafters of the Sixteenth Amendment intended a narrow definition of "incomes" as traditionally understood

Neither the text of the Sixteenth Amendment, nor the history of its ratification, suggests that its drafters intended to transform or disrupt the settled understanding of the distinction between indirect taxes and direct taxes that must be apportioned. The amendment's proponents aimed to open only one narrow lane for raising additional federal tax revenue without apportionment, one that many of them believed had been open all along as the Constitution was originally written.

1. The Sixteenth Amendment was adopted in response to this Court's reasoning in *Pollock* v. *Farmers' Loan and Trust Company*, which produced two opinions published at 157 U.S. 429 (1895), and on rehearing at 158 U.S. 601 (1895). In *Pollock*, the Court held that a federal tax on income from land and personal property was a direct tax that must be apportioned among the states. On its way to that conclusion, the Court observed that "the constitution divided federal taxation into two great classes—the class of direct taxes, and the class of duties, imposts, and excises." 158 U.S., at 617-618. And after surveying the relevant history, it concluded that a tax on income *from* property or labor is not "so different from a tax upon the property [or person] itself that it is not a direct, but an indirect, tax, in the meaning of the constitution." 158 U.S. at 618.

Soon after *Pollock* was decided, Congress and the White House began campaigning in support of a constitutional amendment providing that a federal income tax need not be apportioned among the states. But the framers of the amendment were clear that only *income* taxes were on the agenda. Senator Norris Brown, who introduced the amendment, emphatically rejected a

proposal by another senator to eliminate the apportionment requirement for direct taxes altogether, explaining that his "purpose [was] to confine [the amendment] to income taxes alone." 44 Cong. Rec. 3377 (June 17, 1909). The full Senate quickly followed suit, voting down the more transformative proposal by voice vote. *Id.* at 4120 (July 5, 1909).

The Sixteenth Amendment was thus laser-focused on the exclusive subject of income taxes, leaving unaltered the meaning and scope of the categories of direct and indirect taxation. Indeed, soon after the amendment's passage, the Court remarked that "the 16th Amendment conferred no new power of taxation" and left intact the categories indirect and direct taxes as they always had existed; it merely excepted "taxes on incomes" from the tax clauses' apportionment requirement. *Stanton* v. *Baltic Mining Company*, 240 U.S. 103, 112-113 (1916).

2. The Sixteenth Amendment was thus modest in both purpose and scope. And it should go without saying that it conferred "no power upon Congress to define and tax as income without apportionment something which theretofore could not have been properly regarded as income." *Taft* v. *Bowers*, 278 U.S. 470, 481 (1929).

Inherent in the concept of income at the time, just as today, was the requirement of *realization*. Thomas Cooley was the nation's foremost expert on taxation in the late 19th Century and undoubtedly an influential source for the ratifying Congress of the early 20th Century. He tellingly wrote in his seminal treatise on taxation that one of principal downsides of an income tax was the fact that "those holding lands for the rise in value escape it altogether—*at least until they sell.*" Thomas Cooley, A Treatise on the Law of Taxation Including the Law of Local Assessments 20 (1876)

(emphasis added). That is, a tax on income does not reach unrealized gains, because mere fluctuations in the value of capital assets do not of themselves constitute incomes or losses "until they sell." *Id.* Put even more simply, "[i]ncome means that which *comes in and is received* from any business or investment of capital." *Id.* at 160 n.1 (emphasis added).

Many other ratification-era materials confirm that realization was an inherent element of income from property. Around the time of ratification, Black's Law Dictionary conformed to Cooley's definition: Income was "that which comes in or is received from any business or investment of capital." *Income,* Black's Law Dictionary (2d ed. 1910). And in a treatise on income taxation, Black further elaborated that "income" was not synonymous with a mere "increase" in the value of property, but was characterized by "acquisition[]" or as "money coming to one." Henry Campbell Black, A Treatise on the Law of Income Taxation Under Federal and State Laws 1, 2 (1913).

Thus, Black went on to explain, a bondholder whose bond has appreciated in value "is in a position where he can realize a profit *if* he sells the bond, but not otherwise." Black, Treatise on the Law of Income, *supra*, at 76-77 (emphasis added). And "a farmer's crop is not his income" until "converted into cash" in a sale, so that "the proceeds [may be] expended in any way the recipient may please." *Id.* at 77. In other words, "a proper definition of the word 'income,'" at the time of the Sixteenth Amendment's ratification, "would be all that a man receives in cash during the year." *Id.* at 78. This Court itself had held similarly even before *Pollock* was decided: "Mere advance in value in no sense constitutes the gains, profits, or income" and instead must

"be treated merely as increase of capital." *Gray* v. *Darlington*, 82 U.S. 63, 66 (1872).

These are the background principles against which the Sixteenth Amendment was drafted and adopted. In this context, like any other, the relevant language should be given "the meaning generally accepted in the legal community at the time" it was adopted. *Department of Labor* v. *Greenwich Collieries*, 512 U.S. 267, 275 (1994) (statutory construction).

These sources were surely well known by the Congress that passed the Sixteenth Amendment and the state legislatures that ratified it. Arguably, what appealed most about the income tax to the drafters and ratifiers of the Sixteenth Amendment was the idea that a person's tax liability should be closely connected to their "ability to pay." See Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of Incomes*, 33 Ariz. St. L.J. 1057, 1123-28 (2001) (collecting numerous examples); see also Black, Treatise on the Law of Income*, supra*, at 20 ("If the state only demands a part of the income *actually earned*, it works no hardship on its citizens") (emphasis added). Of course, a taxpayer's "ability to pay" depends on what they have actually received, not the abstract, paper-only fluctuations in the values of assets.

C. The Mandatory Repatriation Tax is unconstitutional, at least as applied here

1. The framers of the Sixteenth Amendment would be startled to learn that a tax on unrealized, "imputed" gains arising from an investment in a foreign corporation could be treated as directly taxable income without apportionment.

The point is not complicated: "[I]t is shocking to the common sense of business men to call that 'income' of

the year which has not been received or 'come in.'" Black, Treatise on the Law of Income, *supra*, at 110. As one district court put it around the time of the amendment's adoption, "[i]t seems almost to border upon absurdity to speak of income as including that which has not been received, and which in the ordinary uncertainties of business may never be received." *Mutual Benefit Life Insurance Co.* v. *Herold*, 198 F. 199, 216 (D.N.J. 1912). Accord *People* v. *San Francisco Savings Union*, 72 Cal. 199, 203 (1887) ("It is not easy to comprehend how profits or surplus profits [to a corporation] can consist of earnings [to the shareholder] never yet received.").

Nor is this a concept foreign to this Court. Soon after the amendment's adoption, the Court "gave great consideration to the nature of income and stock dividends" for taxation purposes and concluded that "within the meaning of the Sixteenth Amendment, income from capital is gain *severed therefrom and received by the taxpayer for his separate use*." *Weiss* v. *Stearn*, 265 U.S. 242, 253 (1924) (emphasis added) (citing *Eisner* v. *Macomber*, 252 U.S. 189 (1919)). According to this approach, "the essential and controlling fact is that the recipient receives nothing out of the company's assets for his separate use and benefit," in which case he has not received *income*. *Ibid.*

The Mandatory Repatriation Tax and the Ninth Circuit's decision below are wholly out of step with these settled principles and thus rewrite the amendment. That the MRT is a direct tax within the Constitution's original meaning cannot be doubted. As described above, the Framers understood that any unavoidable tax upon a person or property constitutes a direct tax. A tax based solely on the imputed value of stock holdings obviously fits the bill. And because the Moores have never realized

a cent of income—none of the money has ever "come in" to them (Black, Treatise on the Law of Income, *supra*, at 110)—the Sixteenth Amendment cannot save the MRT from the apportionment requirement. The MRT therefore must fall under the clear meaning of the apportionment clauses and the Sixteenth Amendment.

2. These ideas are not radical, and their proper application in this case will work no untoward mischief. That is in large measure because "the Sixteenth Amendment and income laws enacted thereunder" must be evaluated with "regard [to] matters of substance and not mere form." *Weiss*, 265 U.S. at 253.

If, in this case, KisanKraft's retained earnings had, in substance, been within the Moores' control "for [their] separate use" (*Weiss,* 265 U.S. at 253), taxation of those earnings as income may well have been appropriate. But it comes down to control. Subpart F of the I.R.C.—in which the MRT is embedded—can be understood to recognize that in certain circumstances, the retained earnings of a CFC are really income to a parent corporation. If a CFC is entirely dominated by a U.S. taxpayer, it may be defensible to treat undistributed income to the CFC as income to the domestic taxpayer.

Indeed, a person gaining dominion over gains is a widely acknowledged characteristic of realized income. As the Court put it in *Commissioner* v. *First Security Bank of Utah*, 405 U.S. 394 (1972), "[t]he underlying assumption always has been that in order to be taxed for income, a taxpayer must have complete dominion over it." *Id.* at 403. In other words, "[a] gain constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it," even if it has not been distributed as a technically realized cash gain. *James* v. *United States,* 366 U.S. 213, 219 (1961). Accord *Corliss*

v. *Bowers*, 281 U.S. 376, 378 (1930) ("The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not.")

But that is not this case. And this case does not present the broader question of whether "deemed" income under other provisions of the Internal Revenue Code is taxable without apportionment under the Sixteenth Amendment. It asks only whether the Moores—who have no control over KisanKraft or its resources—may be deemed to have received income from the company despite that its earnings were never "severed therefrom and received by [them] for [their] separate use." *Weiss*, 265 U.S. at 253. If the word "income" means anything, the answer to that question must be *no.*

The tax here was manifestly a direct tax on the Moore's property without apportionment. It is thus unconstitutional and unenforceable.

II. FURTHER REVIEW IS ESSENTIAL TO PRESERVING THE FREE ENTERPRISE THAT A CONSTITUTIONALLY LIMITED FEDERAL GOVERNMENT FACILITATES

1. The Ninth Circuit's decision below posits, for the first time by any court of appeals, that "the realization of income does not determine [a] tax's constitutionality." Pet. App. 3. That is a stark departure from the Court's precedents, the decisions of other circuits, the history of the amendment, and common sense alike. And if it allowed to stand, it will invite further taxation of wealth that would be deeply harmful to the nation.

For more than a century since the Sixteenth Amendment's ratification, the Court and federal taxing authorities have (until now) consistently acknowledged that realization is inherent in the concept of income.

"From the beginning the revenue laws have been interpreted as defining 'realization' of income as the taxable event rather than the acquisition of the right to receive it." *Helvering* v. *Horst*, 311 U.S. 112 (1940)). The Court thus declared not so long ago that it knew "of no decision of this Court wherein a person has been found to have taxable income that he did not receive." *First Security Bank*, 405 U.S. at 403.

In breaking from that settled understanding, the decision below has dramatic implications not just for the Moores—who have been hit with a tax bill they could never have anticipated—but potentially scores of future taxpayers who could likewise become prey to unconstitutional direct taxes. Although direct, unapportioned federal taxes on wealth and property remain unusual in the federal tax system, they are not unusual in political stump speeches, policy white papers, proposed legislation, or presidential budget proposals.*

The question presented is therefore a matter of urgent practical importance. As efforts to design new federal tax systems with potentially troubling constitutional infirmities continue to pick up steam, this case

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* See, *e.g.*, *Wealth Taxes*, Politico (Feb. 26, 2020) perma.cc/RM37-SSX5 (listing at least three 2020 presidential candidates with declared policies in support of direct taxes on accumulated wealth); David Gamage, et al., *How to Measure and Value Wealth for a Federal Wealth Tax Reform*, Roosevelt Institute (2021), perma.cc/-WJE5-UWXV (white paper proposing wealth tax); Press Release, *Warren, Jayapal, Boyle Introduce Ultra-Millionaire Tax on Fortunes Over $50 Million* (March 31, 2021), perma.cc/9FXY-2DVP (press report concerning proposed legislation); White House Office of Management and Budget, *Budget of the U.S. Government Fiscal Year 2024* at 44-45 (Mar. 2023), perma.cc/A2QT-QQFX (proposing a 25% minimum tax on unrealized gains of individuals with $100 million in wealth).

provides an appropriate opportunity to clarify the limits of Congress's taxing power before the train has begun rolling unstoppably down the hill. The Moores' case is a clean vehicle to resolve the fundamental and pressing question of whether unrealized gains over which the taxpayer has no control can be taxed as "incomes" without apportionment—a question that was not heretofore controversial.

2. As we have shown, the Constitution does forbid such taxes without apportionment. And it forbids them for good reason. Taxes on wealth undermine fundamental principles of economic liberty, discouraging entrepreneurship, innovation, and upward mobility. By subjecting such taxes to the onerous requirement of apportionment, the Framers thus established a sound bulwark against ruinous tax policy.

To start, wealth taxes simply do not work. Wealth taxes face a threshold conundrum: "wealth is inherently more difficult to measure" than income. Allison Schrager & Beth Akers, *Issues 2020: What's Wrong with a Wealth Tax*, Manhattan Institute Issue Brief (Oct. 8, 2020), perma.cc/ELZ9-HPBV.

For instance, privately held companies without public stock prices are often very difficult to value. Moreover, wealth takes many forms—it includes not just stock portfolios, real estate, and bank accounts, but also art and intellectual property. A federal wealth tax requires an expansive and invasive regulatory apparatus to surveille and calculate private citizens' wealth, which would alienate and frustrate the populace and invite arbitrary enforcement. Michael Hendrix, *The Impoverished Idea of a Wealth Tax*, Governing (Jan. 11, 2021), perma.cc/A4W5-49Z4.

These difficulties directly undercut the ostensive purpose of a wealth tax, which is (plainly enough) to

raise revenue. Recently, for instance, India repealed its national wealth tax; due to the difficulties in assessing wealth and the ease of evading the tax, it had proven to be "high cost and low yield." Matt Philips, *Forget Inequality, India is Scrapping its Wealth Tax*, Quartz (March 4, 2015), perma.cc/92K9-E8U8. India is hardly alone. Of the twelve European countries that have experimented with wealth taxes, only three have retained them in any form, after finding them onerous to administer and disappointing as revenue sources. Chris Edwards, *Taxing Wealth and Capital Income*, Cato Institute Tax & Budget Bulletin No. 85 at 3 (Aug. 1, 2019), perma.cc/L4EN-KU5A.

Overall, such taxes do far more harm than good. Taxes on wealth distort behavior; they "discourage saving and investment" by "lower[ing] the return on these activities," "[e]ven at low rates." Schrager & Akers, *Wealth Tax*, *supra* (citing John H. Cochrane, *Wealth and Taxes*, Cato Institute Tax & Budget Bulletin No. 86 (February 25, 2020), perma.cc/NF35-NZ8V. Moreover, "wealth and capital income are responsive tax bases," meaning that "[h]igh rates make the tax base shrink" as wealth—which is almost by definition highly mobile—seeks out friendlier tax environments. Edwards, *Taxing Wealth*, *supra*, at 6. See also James Brumby & Michael Keen, *Game-Changers and Whistle-Blowers: Taxing Wealth, International Monetary Fund*, IMF Blog (February 13, 2018) perma.cc/W5S6-KTR2 ("[T]he rich have proved adept avoiding or evading taxes by placing their wealth abroad in low tax jurisdictions."). Ultimately, wealth taxes rot out the rungs of upward mobility, making it harder for entrepreneurs to access the capital they need to start and grow business ventures by making investment more expensive and less attractive.

The Moores, for their part, are a case study in the importance of economic choice. With a modest investment in a transformative social enterprise, they were able to put their money to its best possible use, one that served their values and interests while also serving more needy individuals on the other side of the world. The MRT undermines these values, taxing the Moores for the rising value of property put to use in service of others—not on any income they ever received (or intended to receive). The Court should grant the petition for a writ of certiorari and reverse the decision below.

CONCLUSION

The Court should grant the petition for a writ of certiorari and thereafter reverse.

Respectfully submitted.

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