No. 22-800

In the Supreme Court of the United States

CHARLES G. MOORE, ET AL., *Petitioners,*

v.

UNITED STATES

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

BRIEF OF THE PACIFIC RESEARCH INSTITUTE AND PROFESSOR HANK ADLER AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

The Pacific Research Institute (PRI) is a nonprofit nonpartisan 501(c)(3) organization that champions freedom, opportunity, and personal responsibility by advancing free market policy solutions to the issues that impact the daily lives of all Americans. It shows how free interaction among consumers, businesses, and voluntary associations is more effective than government action at providing the important results we all seek—good schools, quality health care, a clean environment, and economic growth. Founded in 1979 and with offices in Pasadena and Sacramento, PRI is supported by private contributions. Its activities include publications, public events, media commentary, invited legislative testimony, and community outreach.

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici*, their members and counsel, made a monetary contribution to the brief's preparation or submission. The parties were given the requisite 10-day notice.

Amici are interested in this case both as a matter of constitutional principle and because they are concerned about the harms that would flow to the many families who have "plan[ned] their financial futures" around the understanding that unrealized gains cannot constitutionally be taxed if the decision below were left to stand. Pet. 22.

SUMMARY

Amici agree with Petitioners and Judge Bumatay that the decision below departs from nearly a century of precedent on the proper scope of the Sixteenth Amendment taxing power and with the history and tradition of the power to "lay and collect taxes on incomes." U.S. Const. amend. XVI. They also agree that the question presented is "not only politically important, but practically important, as American families and businesses plan their financial futures" against the backdrop of the Ninth Circuit's demolition of their "heretofore settled expectation that federal taxation of property and wealth was effectively impossible." Pet. 22.

Amici write separately to note two points. First, they emphasize that even the heightened *prospect* of the federal government exercising the newly expanded authority created by the Ninth Circuit will cause substantial economic uncertainty. It thus presents an important question to be resolved now rather than being deferred until the upending of settled expectations regarding taxes turns from a current, yet still damaging, potentiality into an actual outcome that wreaks even greater havoc.

Second, under this Court's recently invigorated focus on the original public meaning of constitutional

text, as informed by history and tradition, the power to tax "incomes" was not understood to include the power to tax mere increases in the value of property or other assets until such value was actually realized. Whatever economic gymnastics or logical transformations one might use to argue the equivalence of realized and unrealized gains, the framers and ratifiers of the Sixteenth Amendment in 1913, and the public for whom they acted, had a far simpler laymen's understanding of the concept of "income" in accordance with its ordinary meaning. "Income" requires that something be *received*. A shareholder who *receives* nothing, even though the corporation has receipts, experiences no income. It is only if, as, and when the shareholder *receives* a dividend or sells the stock that the mere potentiality of income is realized. That is how Webster's Dictionary, published in 1910, defined income: "The gain which proceeds from labor, business, or property of any kind: revenue; receipts; esp. the annual receipts of a private person, or a corporation, from rents, business profits, etc."[2]

As Judge Learned Hand explained only a few years after the Amendment was enacted, the proper understanding of the word "income" was the understanding that could be "gathered from the implicit assumptions of its use in common speech." *United States* v. *Oregon-Washington R.R. & Nav. Co.*, 251 F. 211, 212 (2d Cir. 1918). And because it is the original *public* meaning of the Constitution that governs constitutional interpretation, see *District of Columbia* v. *Heller*, 554 U.S. 570, 605 (2008), the Ninth Circuit's departure from a cen-

[2] *Income*, Webster's *Practical Dictionary* 198-199 (1910).

tury of precedent reflecting such narrower public understanding to conclude that "income" could possibly include unrealized gains applies the wrong approach to reach the wrong result.

A proper interpretation of "income" defines the difference between the limited additional power granted to Congress in the Sixteenth Amendment and a world where "*any* tax on property or other interests can be categorized as an 'income tax' and elude the requirement of apportionment." Pet. App. 40 (Bumatay, J., dissental) (emphasis in original). For this reason, faithfully respecting the Amendment's text, history, and tradition is exceptionally important.

REASONS FOR GRANTING THE PETITION

I. This Case Presents an Important Question with Tremendous Economic Implications that Should Be Resolved Sooner Rather than Later Given the High Costs of Uncertainty.

As noted in the Petition, at 22, a congressional power to levy a direct, non-apportioned tax on unrealized gains in the value of property or capital has the potential for tremendous mischief that would be deeply unsettling to businesses, investors, property owners, and average citizens whose retirement savings fluctuate with the market. Millions of persons and businesses currently rely on the settled understanding of income taxes that unrealized appreciation in property cannot and does not trigger tax liability. The deferral of federal taxes on unrealized investment gains has created investments and expectations that would be radically altered by the Ninth Circuit's alternative view. Even the prospect of taxation of unrealized gains

(especially if imposed retroactively) would almost certainly have an adverse effect on risk assessments, lending and banking, and economic growth and stability.[3]

People have long had confidence in making investments, operating their businesses, and planning their retirements on the understanding that it is beyond the power of the federal government to tax merely *potential* future receipts as if they were actual "income" today. This is true both as a constitutional matter and as historical practice. But the tax in this case, and future taxes levied under the boundless authority granted by the Ninth Circuit, upend that long-settled understanding. Not only may such taxes appropriate potential gains before a taxpayer has received any income from them, but those taxes may be infinitely retroactive and may totally disregard the requirement and practical limitation of apportionment.

There is every reason to expect that, absent judicial clarity on the point, legislators will move to exploit their newly granted powers. There are currently proposals to impose "wealth" taxes and many in Congress, including the chairs of tax-writing committees, have proposed such taxes,[4] notwithstanding warnings from

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[3] John Breaux, *Taxing Unrealized Gains Would Be an Unmitigated Loss*, Wall St. J.: Opinion (Mar. 23, 2023), https://tinyurl.com/2c6thc9t.

[4] Christopher Cox & Hank Adler, *The Ninth Circuit Upholds a Wealth Tax*, Wall St. J.: Opinion (Jan. 25, 2023), https://tinyurl.com/yckp4v24; Laura Davison & Justin Sink, *Biden to Urge 25% Billionaire Tax, Levies on Rich Investors*, Bloomberg (Mar. 8, 2023), https://tinyurl.com/3epr2etb.

many quarters of the unintended and disastrous consequences.[5]

Even the mere possibility of such taxes now being on the table to sate the federal government's seemingly uncontrollable appetite for spending would likely add uncertainty and fear into an already jittery market and banking system. Whether such taxes might be based as direct apportioned taxes poses far less of a threat. The requirement of apportionment and the need for each State to then collect and remit the amount in question would add a meaningful counterbalance and check on the political ability to adopt such taxes, as the constitutional design provides.

While such nationwide consequences are always an important consideration for this Court in deciding what cases to take up, current events and the economic fallout from COVID, disruptive global aggression, inflation, and bank failures and destabilization increase the need for legal stability on such an economically consequential issue. The prudent course would be to address the issue before billions or trillions of dollars in taxes are at stake. Correcting the Ninth Circuit's novel expansion of the power to tax "incomes" will avoid the significant economic uncertainty and stress by adding clarity when it is most needed for the

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[5] The problems with taxing unrealized gains are well documented (often in articles bearing some variation of the same name). Frank Holmes, *The Unintended Consequences of Taxing Unrealized Capital Gains*, Forbes (Mar. 31, 2022), https://tinyurl.com/b67d646t; Elisabeth Dellinger, *The Many Problems With Taxing Unrealized Capital Gains*, Fisher Invs. (Oct. 25, 2021), https://tinyurl.com/23hjp8z7; Alex Hendrie, *10 Problems with Taxing Unrealized Gains*, Ams. for Tax Reform (Oct. 26, 2021), https://tinyurl.com/9h454zay.

guidance of both Congress and the taxpaying citizenry.

II. The Text of the Sixteenth Amendment, as Understood in Light of its History and Tradition, Does Not Include Unrealized Gains in Value to Capital and Other Property as "Income" that Can Be Taxed without Apportionment.

The Sixteenth Amendment grants Congress the power to "lay and collect taxes on incomes." U.S. Const. amend. XVI. At issue here is the meaning of "incomes." The Ninth Circuit's expansive approach of seeking equivalences, analogies, and transformations has driven to a result that will allow any new tax to count as an "income" tax if it is drafted with sufficient creativity. This Court's recent cases, however, have taken a more concrete and grounded approach, renewing the requirement to look to the public meaning of the constitutional text, as interpreted in light of its history and tradition, at the time the text was adopted.

A. The scope of the Sixteenth Amendment must be based on the original public meaning of its text, as understood through history and tradition.

In reaching its startling conclusion that realization is not a requirement for determining what is "income" under the Sixteenth Amendment, the Ninth Circuit ignored the text of the Amendment, citing instead a string of post-enactment cases—most of which were decided decades after the Sixteenth Amendment. See, *e.g.*, Pet. App. 12-13. Where the Ninth Circuit did address the two key cases in which this Court specifically

addressed the realization requirement, *Eisner* v. *Macomber*, 252 U.S. 189 (1920) and *Commissioner of Internal Revenue* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955), it ignored what they said, labored to limit them closely to their facts, and created a theory that "income" does not mean only "income" as originally understood, but something broader and amorphous. Pet. App. 14-16. That approach was wrong at its very foundation.

In recent cases, this Court has moved away from difficult-to-apply balancing tests and other amorphous or subjective approaches and turned back toward more objective and less malleable tests focused on the text of the Constitution and the history and tradition that gave meaning to the words at the time they were adopted. See *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 142 S. Ct. 2111, 2129-2130 (2022) (applying the text of the Second Amendment and looking to history and tradition to evaluate any claimed limits on the scope of such textual commands); *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) ("An analysis focused on original meaning and history, this Court has stressed, has long represented the rule[.]"); *Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228, 2248 (2022) (Fourteenth Amendment protections should be "guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty"). Indeed, this Court has recently emphasized that the constitutional text, history, and tradition, rather than the judicially created means-ends balancing of the past, is the proper standard to apply when deciding "how we protect other constitutional rights." *Bruen*, 142 S. Ct. at 2130.

The Ninth Circuit's approach in this case did not rest on a historical inquiry that gave objective content to the words used in 1913, but instead focused on case law from decades later that was itself unmoored from the text. Pet. App. 12-13. That approach opened the way for the court to treat the Sixteenth Amendment as an open-ended authorization for whatever might be the federal government's taxing ambitions, rather than a clearly limited constitutional power. In doing so, the panel discarded a vitally important check on the government's power to tax.

As Judge Bumatay explained, allowing courts to depart from "text, historical context, and early post-ratification interpretations" to determine the meaning of a constitutional provision would open the door to much mischief, including an expansive overreading of what was meant to be a narrowly construed grant of congressional authority. Pet. App. 39, 43 (Bumatay, J., dissental). And as this Court noted not long after the Sixteenth Amendment was adopted:

> In determining the definition of the word 'income' thus arrived at, this Court has consistently refused to enter into the refinements of lexicographers or economists, and has approved, in the definitions quoted, what it believed to be the commonly understood meaning of the term which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution.

Merchants' Loan & Trust Co. v. *Smietanka*, 255 U.S. 509, 519 (1921). Judge Learned Hand also applied such an approach, explaining that the meaning of the

word "income" was "not to be found in its bare etymological derivation," but was "rather to be gathered from the implicit assumptions of its use in common speech." *United States* v. *Oregon-Washington R.R. & Nav. Co.*, 251 F. 211, 212 (2d Cir. 1918).[6] Later scholarship addressing this Court's cases immediately after the Sixteenth Amendment was enacted confirm the importance that this Court placed on looking to income's ordinary meaning—the "information we have concerning the meaning of the word 'incomes' in the sixteenth amendment points to its ordinary language usage; indeed, it is difficult to see how it could point elsewhere when we recall that we are dealing with a self-assessing system of income taxation."[7]

Thus, when interpreting the Sixteenth Amendment—just as when interpreting other constitutional provisions—the practice of looking to the text, as informed by history and tradition, has a century-old pedigree.

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[6] To be sure, relying on the ordinary meaning of words adopted in the Constitution may generate its own debate and historical dispute. See Frank C. Nash, *Book Reviews*, 25 Geo. L. J. 769, 809-810 (1937) (reviewing Roswell Magill, *Taxable Income* (1936)) (arguing that the man-on-the street conception of "income" has at times been "elusive"). But such disputes are at least anchored in a fixed constitutional history rather than in the changing policy preferences of judges and legislators.

[7] Philip Mullock, *The Constitutional Problem of Taxing Gifts as Income*, 53 Minn. L. Rev. 247, 250 (1968).

B. The original public meaning of "income" does not include unrealized gains that have not been received by the taxpayer.

Applying the proper textual and historical approach on plenary review in this case will demonstrate that the original public understanding of "income" did not encompass unrealized appreciation in the value of one's capital and property. Rather, for there to be "income" it required that any gains be *realized* by the property holder. As Judge Bumatay explained below, "[n]either the text and history of the Sixteenth Amendment nor precedent support levying a direct tax on unrealized gains." Pet. App. 39 (Bumatay, J., dissental).

1. Starting here with the text, Judge Bumatay explained that "[r]atification-era dictionaries suggest that the ordinary meaning of 'income' was confined to realized gains." Pet. App. 46 (Bumatay, J., dissental). The definitions of "income" that Judge Bumatay cites, moreover, were not unique to those dictionaries he chose to cite or new to the time period, a point that the Petition emphasizes. Pet. 18-19 (collecting other dictionary definitions).

Later scholarship recognized this Court's application of the original public meaning of "incomes" in *Merchants' Loan*, *Macomber*, and elsewhere for what it was: recognition that separating income from capital—in other words, "realization"—was the "sine qua non" of the definition. Thomas N. Tarleau, *The Concept of Income for Federal Tax Purposes*, 20 Tenn. L. Rev. 568, 572 (1949). This was so in part because an "intelligent layman would probably have hesitated to consent to the taxation of income if as a general matter income could be taxed before it was realized." *Ibid.* To

Tarleau, whatever some select "*economist[s]*" might think of realization as the measure of income, "it is of the utmost practical effect" to the layman and remained "fundamental to our understanding of the legal concept of income." *Ibid.* (emphasis added). The "legal position" that gains are not "income" until realized "is probably the one that the man in the street would have adopted as his." *Id.* at 573.

2. That the ordinary understanding of "income" does not include unrealized gains is also reflected in historical practice and the debates concerning the Sixteenth Amendment. After this Court struck down the income tax provisions of the Wilson-Gorman Tariff Act of 1894 in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), as direct taxes subject to apportionment, there was extensive debate over whether the federal government had, or should be given, the power to tax incomes. But in those debates the scope of "incomes" was virtually taken for granted and, when addressed at all, emphasized that "income" is something received by a taxpayer, not merely an unreceived accretion in value.

Representative Henry, for example, in *supporting* an income tax of some kind, expressly equated "income" to "revenue" in quoting Adam Smith during the debates:

> The subjects of every State ought to contribute to the support of the Government, as nearly as possible in proportion to their respective abilities—that is, in proportion to the revenue which they respectively enjoy under the protection of the State. In the observation or neglect of this maxim consists

> what is called the 'equality or inequality of taxation.'

44 Cong. Rec. 4389, 4412 (1909) (statement of Rep. Robert L. Henry) (quoting Adam Smith, *An Inquiry into the Nature and Causes of Wealth of Nations* (1776)). For "income" to be "revenue" that can be "enjoy[ed] under the protection of the State," its benefits must first be realized.[8]

Immediately following ratification in 1913, courts recognized this limited scope of what constituted "income" under the Sixteenth Amendment and otherwise. *E.g.*, *Hays* v. *Gauley Mountain Coal Co.*, 247 U.S. 189 (1918) (construing the Corporate Tax Act of 1909 as allowing the taxation of gains received in the year of sale). As the Petition itself notes, at 2, Supreme Court cases following the adoption of the Sixteenth Amendment routinely recognized this common-sense definition of "income" as distinct from unrealized growth in the value of assets. In case after case, this Court has been unequivocal about what "income" meant at the time of the Sixteenth Amendment's ratification. "Income" has always been "a gain derived from capital, *not a gain accruing to capital*, nor a growth or increment of value in the investment, but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested, and coming in, that is, *received* or drawn by the claimant for his separate use, benefit, and disposal." *United States* v. *Phellis*, 257 U.S. 156, 169 (1921) (emphasis added) (citing *Macomber*, 252 U.S. at 207).

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[8] Of course, the concept of "income" is commonly understood as realized gain, *i.e.*, net revenue, not merely money flowing in regardless of expense.

The requirement that the gain be severed from the underlying capital is essential to maintain the distinction between permissible taxes on income and taxes on property or capital, which would need to be apportioned. Indeed, throughout the decades of discussion concerning the line between direct and indirect taxes, one thing all sides agreed upon was that direct taxes at least included property taxes. See 44 Cong. Rec. 4389, 4413 (1909) (statement of Rep. Robert L. Henry) (recognizing that "direct taxes" include "capitation taxes," "taxes on land, and perhaps taxes on personal property by general valuation and assessment" (quoting *Pollock*, 158 U.S. at 653)); *id.* at 4414 (statement of Rep. Robert L. Henry) ("[T]axes on real estate being direct taxes, taxes on rent or income therefrom are also direct taxes. * * * * [T]axes on personal property or on the income therefrom are direct taxes."); *id.* at 4437 (statement of Rep. Cyrus Cline) (arguing as a "universally accepted principle of taxation" that "in addition to the tax on articles of consumption there should be a direct tax on incomes, properly graduated").[9]

A tax on the unrealized value of property is every bit as much a direct tax on the property, and not a tax on income at all. As Georgetown Professor Frank Nash noted, the Supreme Court's "concept of taxable income includes the idea of gain severed from capital, that is, realization." Frank C. Nash, *Book Reviews*, 25 Geo. L.

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[9] See also Christopher Cox & Hank Adler, *The Ninth Circuit Upholds a Wealth Tax*, Wall St. J.: Opinion (Jan. 25, 2023), https://tinyurl.com/yckp4v24 (explaining that tying the "rate of tax" to a "corporation's balance-sheet liquidity"—as the tax at issue here does—is a direct "tax on a corporation's balance sheet, passed through to individual shareholders").

J. 804, 807 (1937) (reviewing Roswell Magill, *Taxable Income* (1936)). A 1920 note in the Michigan Law Review—much closer to the period of ratification—looked to this Court's opinion in *Gray* v. *Darlington*, (1872) to reach the same conclusion. George D. Clapperton, Note, *Profits from Sale of Capital Assets as Income: Taxable Under Sixteenth Amendment*, 19 Mich. L. Rev. 854, 857 (1921).

In *Darlington*, this Court examined the income tax of 1867, which taxed income "derived" from "any source." 82 U.S. at 63. As relevant here, the *Darlington* court explained that "[t]his language has only one meaning": "the assessment, collection, and payment prescribed are to be made upon the annual products or income of one's property or labor, or such gains or profits as may be realized from a business transaction begun and completed during the preceding year." *Id.* at 65. *Darlington*'s requirement that there be a completed business transaction before gains or profits could be taxed thus recognized that Congress had imposed in the 1867 law a realization requirement. And because this 1867 tax used similar language to the Revenue Act of 1916, which addressed income "received" from all sources, the 1920 law review note reflects the broader public understanding when it concludes that, under either scheme, there was "no income at all until the act of conversion." Clapperton, *supra*, 19 Mich. L. Rev. at 857.

These interpretations preceding or closely following ratification of the Sixteenth Amendment confirm the common understanding of "incomes" as limited to monies received or realized, not merely unrealized gains in value. See *Bruen*, 142 S. Ct. at 2136-2137

(discussing close-in-time understandings of the scope of constitutional concepts).

C. Other interpretive doctrines support a narrow reading of "income."

A further basis for caution in allowing Congress to expand the constitutional definition of "income" can be found in an analogy to the major questions doctrine. That doctrine concerns *agency* efforts to expand their delegated authority through expansive readings that reach new or unanticipated matters of "major" import. The doctrine says such matters should be decided by the principal rather than the agent. In the case of Congress and executive agencies, the doctrine recognizes that there are certain "extraordinary cases" in which the "history and the breadth" of asserted authority provide "reason to hesitate before concluding that Congress meant to confer such authority." *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2608 (2022) (cleaned up). The doctrine is rooted in both "separation of powers principles" and "a practical understanding of legislative intent." *Id.* at 2609. Such prudential considerations must surely be heightened when the expansion of power involves potentially trillions of dollars, and the limitation on power that will be exceeded is one established not just in statute but the Constitution itself.

In administrative law cases, the major questions doctrine requires "something more than a merely plausible textual basis for the agency action," and instead requires "clear congressional authorization for the power it claims." *Ibid.* (cleaned up). Applying this requirement to cases of "economic and political significance," the Court has explained, ensures that agencies are unable to claim a "transformative expansion"

of their "regulatory authority" without a clear mandate from their principal—Congress. *Id.* at 2610 (cleaned up).

Similarly, expanding the Article I power of Congress to tax should require something more than a merely plausible textual basis. In this case, the Ninth Circuit has held for the first time that Congress has the power to levy a direct tax without apportionment and without meeting the traditional definition of "incomes" in the Sixteenth Amendment. This new power will be, without question, of enormous consequence. The panel decision reached this result without clear *constitutional* authorization, and in the process discarded history and tradition that have read the word "incomes" in the Sixteenth Amendment far more narrowly. Any such expansion should be accomplished through constitutional amendment consistent with Article V. U.S. Const. art. V.[10] Creating vast new powers for Congress based on a novel reading of constitutional text amounts to circumvention of the amendment process mandated by Article V and again inverts the role of agent and principal—here the People—in deciding major questions regarding the scope of delegated constitutional authority.

As addressed in Part I, the Ninth Circuit's opinion upends a century of precedent and, as the Petition ex-

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[10] Indeed, as Judge Bumatay explained, it was this understanding that led to the enactment of the Sixteenth Amendment itself, as this Court, in striking down the income-tax provisions of the Wilson-Gorman Tariff Act of 1894, explained: "'[i]f it be true that the constitution should have been so framed that a tax of this kind could be laid, the instrument defines the way for its amendment.'" Pet. App. 44 (citing *Pollock*, 158 U.S. at 635).

plains (at 22-23), congressional practice. And the decision allowing for the taxation of unrealized gains raises more questions than it answers. Taxing unrealized gains unquestionably conflicts with the expectations of Americans who purchased stock on the understanding that they would be taxed only when they sold those stocks or received dividends. The frustration of those expectations might well be deemed a taking, and certainly raises that troubling question. See *Penn Cent. Transp. Co.* v. *City of New York*, 438 U.S. 104, 127 (1978).

Further, new taxes on unrealized gains likely cannot comport with the notice and opportunity-to-be-heard requirements of due process when they apply retroactively to securities obtained over decades during which realization remained the *sine qua non* on income taxation. See *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 733 (1984) (recognizing that retroactive civil legislation can violate due process if it is "particularly harsh and oppressive" or "arbitrary and irrational"). Many other difficult constitutional questions likewise would arise if unrealized gains were taxable, including the treatment of unrealized losses, the proper timeframe for determining any *net* gain from fluctuations in value, and whether the eventual sale of an appreciated asset still constitutes "income" when the unrealized gain has already been taxed.

Undermining the apportionment check, and the role of the States as intermediaries and counterweights, is the direct result of the Ninth Circuit's far-reaching decision. It is this Court's proper constitutional concern and duty to ensure that Congress cannot evade the apportionment hurdle for direct taxes

simply by recategorizing a tax on unrealized asset appreciation as "income."

All of the foregoing constitutional questions raised by the Ninth Circuit's redefinition of "income" serve as a further caution sign against expanding the historical understanding of "income" from the beginning of the 1900s. The panel's unwarranted broad reading of what was thought to be a strictly limited constitutional power raises not only its own constitutional questions but would beget a host of new ones. Such further constitutional problems that would arise from an expansive reading of "incomes" in the Sixteenth Amendment counsels against such a reading unless strictly necessary. Avoidance of a constitutional interpretation that begets still more constitutional problems is similar to the statutory doctrine of constitutional avoidance, which can serve as a cautionary analogy. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (Constitutional-avoidance canon "reflects the prudential concern that constitutional issues not be needlessly confronted"). The far more prudent course is to avoid all such thorny matters by hewing to the long-standing meaning of "income" that requires gains to be realized. The constitutional amendment process, and not freewheeling judicial reinterpretation, is the proper course if taxation of assets, unrealized gains, and the like are deemed necessary supplements to the income tax authorized in the Sixteenth Amendment.

The Ninth Circuit's ruling represents a vast expansion of the congressional taxing power. Such a momentous change affecting so many millions of people should—at the very least—require a clear statement in the constitutional text. Here, however, the text and

the well understood meaning of "income" point in the opposite direction of the Ninth Circuit's conclusion on unrealized gains.

In sum, text, history, and tradition show the Ninth Circuit's legal error. Congress's discovery of a new power for the first time in a century should have given the Ninth Circuit pause before it gave Congress its imprimatur. This Court's review is necessary to correct that error.

CONCLUSION

The questions presented are crucial to the proper functioning of the American economy, and this Court should grant the petition to resolve them.

Respectfully submitted,

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