No. 22-800

In the
Supreme Court of the United States

CHARLES G. MOORE, ET UX.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* PROFESSORS OF LAW AND LINGUISTICS IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Amici are professors of law and linguistics who use corpus linguistic tools in resolving empirical questions at the heart of the ordinary meaning of the language of law.[2] These tools can help inform the Court's assessment of the original public meaning of the Sixth Amendment's use of the phrase "incomes, from whatever source derived."

This brief draws from the more extensive treatment presented in the online article, Thomas R. Lee, Lawrence B. Solum, James C. Phillips, and Jesse A. Egbert, *Corpus Linguistics and the Original Public Meaning of the Sixteenth Amendment* (Sept. 2, 2023) (hereinafter "*Corpus Linguistics and the Sixteenth Amendment*").[3] *Amici* take no position on the ultimate outcome of the case. Their interest lies in the basis for

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici* and their counsel, made any monetary contribution toward the preparation or submission of this brief.

[2] Thomas R. Lee, Rex and Maureen Rawlinson Professor of Law, Brigham Young University; Lawrence B. Solum, William L. Matheson and Robert M. Morgenthau Distinguished Professor of Law, University of Virginia School of Law; Jesse Egbert, Associate Professor of Applied Linguistics, Northern Arizona University; James C. Phillips, Associate Professor of Law, Dale E. Fowler School of Law, Chapman University. Institutional affiliations are for identification purposes only and do not represent endorsements of the brief by the respective institutions.

[3] Available at https://ssrn.com/abstract=4560166. This is a working article and will be revised before publication.

the Court's decision. If the Court roots its decision in an assessment of the original public meaning of the Sixteenth Amendment, *amici* think it should do so in light of empirical evidence available through corpus linguistic tools. *Amici* present such evidence for the Court's consideration.

INTRODUCTION

Under the Sixteenth Amendment, Congress has "power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states." The scope of that power turns on the original public meaning of this provision—in particular, the ordinary, common, or natural meaning of "incomes" "derived" from any source at the time the Sixteenth Amendment was ratified in 1913.

The key question presented is whether this meaning encompasses a realization requirement. Dictionaries can help answer that question, but they fall short of painting a complete picture by tending to highlight ambiguity in the meaning of "income" rather than resolve it, offering no basis for assessing which sense of "income" was more ordinary at the time of ratification, and failing to account for the phrasal meaning of "income" "derived" from a source.

Corpus linguistic evidence can fill these gaps. A search in the Corpus of Historical American English (COHA) uncovers hundreds of uses of "income" (and "incomes") by the general public that ratified the Sixteenth Amendment. Refining that inquiry further identifies dozens of instances in which the public spoke of such "income(s)" as "derived" from a source. This provides a determinate, replicable basis for an assessment of the ordinary, common use of the relevant constitutional text by the general public. An academic article by *amici* develops in greater detail corpus linguistic methods and their use in resolving

this question. *See Corpus Linguistics and the Sixteenth Amendment*.[4]

Such methods reveal no use of the term "income(s)" in the early 1900s that referred to an economic gain without a realization event. In the hundreds of instances in which the linguistic context makes the meaning clear, "income(s)" was used without exception to refer to an economic gain involving realization.

The picture is even clearer upon refining the search to focus on "income(s)" "derived" from a source. The context added by "derived" makes the element of realization in the meaning of income more explicit. And it confirms that the general public did not use the language of the Sixteenth Amendment to refer to unrealized gains.

The *concept* of an unrealized gain was known and discussed in this historical period. The historical record shows that people spoke of economic gains derived from an unrealized increase in an asset's value. When they did so, however, they did not call it "income." They spoke of an "increase" in the "value" of property, in terms sometimes contrasting that increase with "income."

That is significant. It shows that the general public in 1913 knew what an unrealized gain was, but would not have understood the terms of the Sixteenth Amendment to describe it.

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[4] Available at https://ssrn.com/abstract=4560166.

SUMMARY OF ARGUMENT

Corpus linguistic tools are a mainstay of linguistic analysis, and they are increasingly brought to bear on questions of the ordinary meaning of the language of law.[5] Rightly so, as they are particularly suited to questions that turn on an empirical inquiry into the ordinary or common usage of words among members of a speech community that is over a century removed from our own. Words change meanings over time; linguists call this phenomenon "linguistic drift." Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 17 (2015); *see* Sol Steinmetz, *Semantic Antics: How and Why Words Change Meaning* 49–50 (2008).

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[5] *See Lucia v. SEC*, 138 S. Ct. 2044, 2056–57 (2018) (Thomas, J., concurring) (citing corpus linguistic analysis in support of originalist interpretation of "Officers of the United States" in the Appointments Clause); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1769 (2020) (Alito, J., dissenting) (citing corpus linguistic analysis of the meaning of "sex"); *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1174–75 (2021) (Alito, J., dissenting) (citing *Judging Ordinary Meaning* and suggesting that corpus tools may help mediate the tension between the rule of the last antecedent and the series qualifier canon); *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2178 (2022) (Breyer, J., dissenting) (citing corpus linguistic evidence in support of the conclusion that "bear arms" in the Second Amendment "was overwhelmingly used to refer to 'war, soldiering, or other forms of armed action by a group rather than an individual'"); *see also* Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 PENN L. REV. 261 (2019) (identifying ways that corpus tools can refine an originalist inquiry).

The Court should interpret the Sixteenth Amendment in accordance with its original public meaning—the ordinary, "common" meaning, *State of Rhode Island v. Palmer*, 253 U.S. 350, 398 (1920), understood by "ordinary citizens." *District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008); *accord New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022). That meaning cannot be reliably established by the tools most commonly utilized in the originalist inquiry. Historical dictionaries provide period definitions of "income(s)." But those definitions cannot tell us whether the ordinary, common use of that term encompasses a realization event. And they do not account for the broader linguistic context of the Sixteenth Amendment—not just "income" in isolation, but the phrase "incomes, from whatever source derived." Corpus linguistic tools can provide such evidence.

ARGUMENT

I. The Court should interpret the Sixteenth Amendment in accordance with its original public meaning—the common understanding of its text by the general public in 1913.

Our understanding of the Constitution should be viewed through the lens of popular sovereignty. The Constitution was ratified by "the People." *See* U.S. CONST. Preamble.[6] It was written to be understood by

[6] *See also* Joseph L. Story, *Commentaries on the Constitution of the United States* § 451 (1833) (noting that "Constitutions are not designed for metaphysical or logical subtleties, for niceties of

"ordinary citizens." *Heller*, 554 U.S. at 577. And its text should thus be "expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it." *Palmer*, 253 U.S. at 398 (quotation omitted).[7] These are the foundations of this Court's commitment to the original public meaning of the Constitution. That commitment encompasses two key components.

The first is the idea that constitutional interpretation should recover the *original* meaning of the constitutional text. This is "the Fixed-Meaning Canon"—the notion that "[w]ords must be given the meaning they had when the text was adopted." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 78 (2012); *see also* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 15 (2015) (explaining that "[t]he object of constitutional interpretation is the communicative content of the constitutional text, and that content was fixed when each provision was framed and/or ratified"); *New York State Rifle & Pistol Ass'n*, 142 S. Ct. at 2132 (interpreting the Second Amendment in accordance with the view that the Constitution's

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expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research," but "are instruments of a practical nature, founded on the common business of human life").

[7] *See* Joseph L. Story, *Commentaries on the Constitution of the United States* § 451 (1833) ("The people make [Constitutions], the people adopt them, the people must be supposed to read them, with the help of common sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss.").

"meaning is fixed according to the understandings of those who ratified it").

The second component is that the Court looks to *public* meaning—the ordinary, common, or natural meaning of the text for citizens or members of the public. This is the Ordinary Meaning Canon—the principle that "[w]ords are to be understood in their ordinary, everyday meanings," "unless the context indicates that they bear a technical sense." Scalia & Garner, *Reading Law*, 72; *see also* Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1963 (2021) (explaining that "[t]he original meaning of the constitutional text is best understood as the content communicated or made accessible to the public at the time each provision was framed and ratified—in other words, the original communicative content").

This Court has employed these components when interpreting the Sixteenth Amendment. In *Lynch v. Hornby*, the Court held that "Congress was at liberty under the amendment to tax as income, without apportionment, everything that became income, in the *ordinary sense of the word*." 247 U.S. 339, 343–44 (1918) (emphasis added). And in *Doyle v. Mitchell Bros. Co.*, the Court sought to credit the meaning of the term income in its "natural and obvious sense." 247 U.S. 179, 185 (1918).

The *Eisner v. McComber* Court was divided on whether the stock dividend at issue fell within the scope of "incomes" covered by the Sixteenth Amendment. But both the majority and dissent agreed on the focus of the interpretive inquiry—the "definition of the term 'income,' as used in *common*

speech," 252 U.S. 189, 206–07 (1920) (emphasis added), in other words, the "sense most obvious to the common understanding at the time" the Sixteenth Amendment was ratified. *Id.* at 219–20 (Holmes, J., dissenting) (emphasizing that the text of the amendment "was proposed" "for public adoption").

Some of the originalist analysis in this case has focused on a specialized meaning of "income(s)" in the early 1900s—as a legal term of art or a technical definition used by experts in accounting or economics. In opposing the petition for certiorari, for example, the United States cited Robert Murray Haig, *The Federal Income Tax* 7 (1921), as a "leading economist of the era" who "defined income as 'the money value of the net accretion to one's economic power between two points in time.'" Brief for the United States in Opposition at 18, *Moore v. United States*, 143 S. Ct. 2656 (2023) (No. 22-800). And it asserted that this was the specialized understanding "generally adopted as the definition of income in modern income tax acts." *Id.* (citing Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates, and Gifts* ¶ 3.1.1, 3-2 (3d ed. 1999)).

The modern Internal Revenue Code may classify economic states, events, or occurrences in a manner that accords with this standard. And a technical meaning of income might be desirable as a matter of tax policy. But the people who ratified the Sixteenth Amendment were not economists or tax lawyers. They were citizens informed by the common, ordinary understanding of "income(s)."

The Court should interpret the Sixteenth Amendment in accordance with that understanding. And neither Congress nor the IRS has the power to alter that meaning—through adoption of an Internal Revenue Code or regulations defining "income" as a matter of tax policy.[8]

II. The Court cannot reliably determine the original public meaning of the Sixteenth Amendment using traditional interpretive tools.

The opinions and briefs in this case claim to identify objective grounds for establishing the ordinary, common, natural meaning of "income, from whatever source derived." But the cited evidence is insufficient.

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[8] The same goes for definitions of income in state income tax schemes predating the Sixteenth Amendment and judicial opinions that interpret them. *See, e.g.*, Brief for Americans for Tax Reform as *Amicus Curiae* in Support of Petition for Certiorari at 11–12, *Moore v. United States*, 143 S. Ct. 2656 (2023) (No. 22-800) (discussing pre-ratification state-court interpretations of "income" under state law)**.** The legislatures that enacted these statutes were not bound by the Sixteenth Amendment and hence were not required to use the word "income" in its ordinary, common, or natural sense. Likewise, state court decisions that interpreted the word "income" as used in state statutes would have had no reason to restrict state legislatures to the ordinary meaning of "income." To the extent that a state legislature used "income" in a special, technical, or stipulated sense and the intent to do so was evident from the statute and its legislative history, the decisions of state courts interpreting a state income tax statute would be of very limited probative value as evidence of the original public meaning of the Sixteenth Amendment.

Both sides marshal dictionary definitions in support of their views. On the petitioners' side are narrow definitions focused on a (purportedly realized) "'gain which *proceeds from* labor, business, property, or capital,'" or "'[t]hat which *comes in* to a person as payment for labor'" or other services. Petition for Writ of Certiorari at 18, *Moore v. United States*, 143 S. Ct. 2656 (2023) (No. 22-800) (citing Webster's Revised Unabridged Dictionary (1913); Century Dictionary and Cyclopedia (1901)). And on the government's side are broader definitions encompassing any "'commercial revenue or receipts of any kind, including *** the return on investments,'" or "'receipts or emoluments regularly accruing.'" Brief for the United States in Opposition at 18–19, *Moore v. United States*, 143 S. Ct. 2656 (2023) (No. 22-800) (quoting Webster's New International Dictionary of the English Language 1089 (1911); The Century Dictionary and Cyclopedia 3040 (1911)).

Yet neither set of definitions clearly resolves the question presented: whether "incomes, from whatever source derived" require realization. The implication of petitioners' argument is that a gain does not "proceed from" labor or property or "come in" to a person without realization. But that depends on what we mean by "proceed from" or "come in." A gain in the value of an asset not subject to a realization event *could* be metaphysically viewed to "proceed from" property or even to "come in" to the person. That might not be the ordinary understanding of "proceed from"

and "come in." But dictionary definitions themselves don't tell us what is ordinary.

The government's definitions are similarly insufficient. Maybe the ordinary understanding of "revenue," "return[s]," and "receipts of any kind" would encompass unrealized gains. But that depends on the scope of the common, natural understanding of *those* terms. And again, dictionaries themselves don't tell us what is ordinary.

In some cases, a dictionary may do nothing more than tell us that "a particular meaning is linguistically permissible" in a given context. Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1375–76 (1994). In hard cases, both parties' preferred sense will be attested in the dictionary as "permissible." Where that is so, the dictionary tells us nothing about which sense is more ordinary, common, or natural. *See* James C. Phillips & Jesse Egbert, *A Corpus Linguistic Analysis of "Foreign Tribunal,"* 108 VA. L. REV. ONLINE 207, 215 (May 2022) ("[D]ictionaries do not indicate which sense of a word is the ordinary sense—that would depend on context.").

The narrow definitions of income may "suggest" a realization-based understanding. *See Moore v. United States*, 53 F.4th 507, 511 (9th Cir. 2022) (Bumatay, J., dissenting from denial of petition for rehearing en banc) (concluding that definitions framed in terms of "'*gain* which *proceeds from*" certain sources or "'[t]hat which *comes in*" to the recipient "*suggest* that the

ordinary meaning of 'income' was confined to realized gains") (third and fourth emphases added). But the broader definitions could undermine that view. And neither set of definitions is really determining or establishing original public meaning. Without more, they simply justify the parties' (or judge's) preferred view. *See* Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 PENN L. REV. 261, 286 (2019) (noting that "[t]he point" of a dictionary "is to list all known definitions or senses" and thus that a dictionary's listing of "alternative senses of a given term" "wouldn't tell you which is the one likely to be understood in a given linguistic context"); *id.* at 289 (citing concerns about "the risk of confirmation bias or motivated reasoning" in the face of cherry-picking).

Conceivably, a court could resolve a standoff between competing dictionary definitions by adding further linguistic context. The dictionary itself may not tell us which of two senses of income is more ordinary or common in the abstract. But one of those senses may predominate in a given semantic setting. Petitioners and their *amici* advance this view—in noting that the Sixteenth Amendment speaks of "income, from whatever source derived," and asserting that "income" is "derived" from a source only where the gain is realized. *See* Brief for the Petitioners at 28–29, *Moore v. United States*, 143 S. Ct. 2656 (2023) (No. 22-800) (arguing that "[r]atification-era dictionary definitions also recognized that realization is inherent to income"); *see, e.g.*, Brief of Amicus Curiae Southeastern Legal Foundation in Support of

Petitioners at 10–11, *Moore v. United States*, 143 S. Ct. 2656 (2023) (No. 22-800) (discussing "[r]atification-era dictionaries").

One could summon examples of phrases and sentences illustrating the point—as with "income derived from hourly labor," or "income derived from the sale of real estate." But without evidence showing that such examples reflect the ordinary, common usage of those words and phrases, invoking those examples in legal analysis is akin to cherry-picking.

III. Corpus tools show that the ordinary, common understanding of "incomes, from whatever source derived" includes an element of realization.

To determine the ordinary, common, natural understanding of the constitutional text, we need a tool that can reliably uncover patterns of language usage in the years preceding the ratification of the Sixteenth Amendment. The Corpus of Historical American English (COHA) is appropriate for this task. It provides a transparent, systematic way of identifying historical patterns of language usage relevant to the original public meaning inquiry. And it opens the door to a replicable search of the historical use of "income(s)" across a large number of naturally occurring texts—to go beyond identifying the range of possible meanings of the constitutional language, by establishing the ordinary, common, or natural sense of the words.

Amici performed searches within COHA in two steps. *See Corpus Linguistics and the Sixteenth Amendment*.[9] This brief presents their results, with further detail and background available in appendices to their online article. Thomas R. Lee, Lawrence B. Solum, James C. Phillips, and Jesse A. Egbert, *Appendices to Corpus Linguistics and the Original Public Meaning of the Sixteenth Amendment* (Sept. 2, 2023) (hereinafter "*Appendices*").[10]

The first step involves a "words-to-meaning" analysis.[11] This is the standard, first-level move in originalism that starts with the constitutional *words* in question and searches for evidence of the ordinary *meaning* of those words historically. If available evidence shows that the words in the Constitution were used to denote a common, ordinary meaning, one can postulate that those words do not typically extend to other, alternative senses.[12]

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[9] Available at https://ssrn.com/abstract=4560166.

[10] Available at https://ssrn.com/abstract=4560186.

[11] In the philosophy of language, this would be called "semasiology." *See* Dirk Geeraerts, *The Scope of Diachronic Onomasiology* 29–30, *in* Das Wort. Seine strukturelle und kulturelle Dimension (Vilmos Agel, Andreas Gardt, Ulrike Hass-Zumkehr and Thorsten Roelcke eds. 2002) ("[S]emasiology takes its starting-point in the word as a form, and charts the meanings that the word can occur with.").

[12] *See Heller*, 554 U.S. at 577 (concluding, in rejecting a ban on handguns under the Second Amendment, that "to keep and bear arms" ordinarily meant an individual right to bear arms for defensive purposes unconnected with military service and thus could exclude "secret or technical meanings that would not have

Amici followed that approach by relying on a COHA search for each time the word "income(s)" appeared from 1900 to 1912 (978 instances in all), and a systematic analysis of the meaning "income(s)" in those contexts. *Appendices* at App. A.[13] They found that "income(s)" was universally used to refer to a gain attached to a realization event—a connection made even more explicit when "income(s)" appeared in close proximity to "derived." *Id.*

Amici's second step involved a "meaning-to-words" inquiry.[14] It starts with a hypothesized *meaning* and searches for the ordinary *words* used to express it. If the ordinary words used to express a given meaning are not the words the Constitution uses, that can reinforce the conclusion that the Constitution's text does not embrace that meaning. This step likewise finds support in case law.[15] Thus, if the word that

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been known to ordinary citizens in the founding generation"); *id.* at 647 (Stevens, J., dissenting) (asserting that "to keep and bear arms…refers most naturally to a military purpose" and should take that reading when "unadorned by" other terms).

[13] Available at https://ssrn.com/abstract=4560186.

[14] The technical term here is "onamasiology." Geeraerts, *The Scope of Diachronic Onomasiology* 29–30 ("[O]nomasiology takes its starting-point in a concept, and investigates by which different expressions the concept can be designated, or named.").

[15] *See Harmelin v. Michigan*, 501 U.S. 957, 977 (1991) (asserting, in rejecting a proportionality standard under the Eighth Amendment, that "cruel and unusual" would be "an exceedingly vague and oblique *way*" of capturing this concept, noting that various founding-era state constitutions included express

people ordinarily used to express the idea of an unrealized gain was not "income," then the power to tax such gains was not granted by the Sixteenth Amendment.

Amici also followed this approach by using COHA. Searching for instances in which people were describing something increasing in value, which can be described in various ways, *amici* found that people used terms other than "income(s)" to describe unrealized gains each time they did so. This evidence increases the probability that *amici*'s first finding—that "incomes(s)" is not used to refer to unrealized gains—is not merely a function of unrealized gains not being discussed in the corpus. And this one-two corpus linguistic punch provides potent evidence that, in the years leading up to the adoption of the Sixteenth Amendment, "income(s)" was used in ordinary parlance to refer only to realized gains.

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requirements that penalties be "proportionate" or "proportioned" to the offense, and stating that the failure to use that ordinary terminology is a basis for concluding that the concept of proportionality falls outside the ordinary meaning (emphasis added)); *NLRB v. Noel Canning*, 573 U.S. 513, 595 (2014) (Scalia, J., concurring in the judgment) (asserting that the words of the Recess Appointments Clause "would have been a surpassingly odd way of giving the President" the power "to fill all vacancies that might exist during a recess, regardless of when they arose"; claiming that a more common way of stating that would be to "refer[] to 'all Vacancies that may exist during the Recess,'" or to "authorize[] the President to 'fill up all Vacancies during the Recess'").

A. From 1900 to 1912, the word "income(s)" was used universally to refer to an economic gain tied to a realization event—and that connection was more explicit as to "income(s)" "derived" from a source.

1. Amici *produced their results by coding instances of usage in the Corpus of Historical American English.*

Amici's corpus analysis is based in COHA, a large corpus of more than 475 million words drawn from over 115,000 individual texts. *See* Corpus of Historical American English, https://www.english-corpora.org/coha/ (last visited Sept. 1, 2023). COHA is balanced between fiction and non-fiction (including newspapers and magazines). *Id.* It is thus well-suited to an assessment of the language of the general population that voted to ratify the Sixteenth Amendment.[16]

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[16] COHA also contains popular fiction and periodicals that were widely circulated during the relevant time period. While this corpus does not contain language from every text type produced by ordinary people (such as everyday conversation or personal letters), it contains a large and varied sample from the domain of published American English that allows us to confidently generalize our findings to the language that ordinary people would have read, and thus been familiar with, during the time period. For an extensive discussion of corpus representativeness and generalizability, *see* Jesse Egbert, Douglas Biber, & Bethany Gray, *Designing and Evaluating Language Corpora: A Practical Framework for Corpus Representativeness* 68–71 (Cambridge Univ. Press 2022).

Amici searched COHA for every instance of "income" or "incomes" from 1900 to 1912. This produced a total of 978 results, called "concordance lines"—881 instances of "income" and 97 instances of "incomes." *Appendices* at App. A.[17] Appendices to *amici*'s online article contain the results of this search, with the date, source, and genre of each result specified. *See id.* Each search result initially presents a sample of 20 to 30 words surrounding "income(s)."[18] An expanded context is also available, showing 250 to 300 surrounding words, in Appendix E. *Id.* at App. E.

2. Multiple coders applied a framework to assemble consistent and determinate results with respect to realization as an element of income.

Amici developed a replicable coding framework for assessing whether or not the historical uses of "income(s)" referred to a realized or unrealized economic gain. *Id.* at App. D. Three law students each analyzed and coded one-third of the 978 results of the search for "income(s)" from 1900-1912 in COHA. Each coded for determinacy (Is there sufficient evidence to determine whether there was a realization event?) and realization (If yes, was there a realization event?). They also noted the nature of the income (if apparent)

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[17] Available at https://ssrn.com/abstract=4560186.

[18] *See, e.g.*, *id.* at result 936 ("worse thing is a society so scantily provided with productive agents that there are no incomes for either idlers or workers to pocket. As to the all-wise State bureau that").

and the contextual basis for their findings on determinacy and realization. And they then coded 10% of the results initially coded by the other two students to blindly cross check their work. *Id*. at App. D.

To be both determinate and realized, a result had to include *explicit* contextual evidence of "[a] gain which becomes . . . separate property" of the one to whom the "income" is ascribed. *Eisner*, 252 U.S. at 209. So a reference to "income(s)" could be coded as determinate and realized only if the context clearly showed that it yielded separate and usable property for the recipient. A bare reference to "income(s)" without such context would have been coded as indeterminate.

3. All codable instances of "income" and "income" proximate to "derived" involve realization.

Under this conservative coding framework, the coders identified 280 results of the search for "income(s)" that included enough context to code as determinate. *Appendices* at App. A. And in every single one of those 280 results, the context expressly indicated that the "income(s)" in question was separate, usable property of the recipient; there were no examples of "income(s)" clearly referring to an unrealized gain. *Id*.

References to "income(s)" were coded as realized where, for example, the context referred to:

- a source of income understood as separate and usable (such as wages, salary, or a pension);[19] or

- a use or expenditure of income that could only have been produced after realization.[20]

This shows that "income(s)" in its ordinary, common, natural sense referred to a realized gain.

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[19] *See, e.g.*, *id.* at App. E result 821 ("Until lately Miss Conrad was an important contributor to the family income. While she was earning $18 a week by working"); *id.* at result 208 ("In most cases the Italian farmer, in addition to managing his own place, plows and clears land for American farmers, and works at odd jobs during the winter to increase the family income. Frequently the whole family goes as berry pickers to the better strawberry region further south, as well as for later crops in Hammonton. Cranberry picking is considered so remunerative that well-to-do Italians leave their farms to earn $75 for a good season."); *id.* at result 397 ("The pension means a doctor's care or care in a hospital, medicines, and an income of from fifty cents to a dollar and a half a week for the family of the incumbent, according as the class in which he is insured provides.").

[20] *See, e.g.*, *id.*, App. E at result 595 ("[H]e spent on me and himself during our married life an income of between $20,000 and $25,000 annually."); *id.*, App. A at result 275 ("The average rent is nine dollars a month. The average monthly income of the husband (if husband there be) is only fifteen dollars. So it takes over two weeks' work to pay one month's rent."); *id.* at result 930 ("In the capitals of Europe the cost of maintaining a suitable establishment is so great that the majority of our Ambassadors and Ministers today disburse most, if not all, of the money they receive for their service in house rent alone. *** These as well as the other officials in the foreign service must make up all additional expense out of their private incomes. Few, if any, secure revenue from fees or other perquisites in connection with their official duties.").

The same conclusion holds when one considers the use of terminology even closer to the constitutional text—the use of "income" within six words of some variation of the word "derive." This search yielded 36 results. *See id.* at App. C. And the same picture emerges—if anything a bit more clearly.

Here, the level of determinacy was higher. Half, or 18 of the 36 results, were determinate, and thus codable for realization. *See id.* at App. C. Adding "derive" seemed to correlate more consistently with a reference to the nature of source of "income(s)," and that correlation led to an even stronger indication that realization is required to bring "incomes, from whatever source derived" within the original public meaning of the Sixteenth Amendment.

4. Indeterminate instances of usage do not undermine these conclusions

This conclusion is not undermined by the 698 results coded as indeterminate. *Amici* found no basis for suspecting that the indeterminate results might skew in favor of unrealized income. If anything, they might skew the other way.

In many of the results coded as indeterminate, the coder's intuition suggested a high likelihood of a realized gain. One result, for example, referenced people who "maintain[ed] a condition of chronic poverty by the simple expedient of living beyond their incomes." *Id.* at App. A result 951. Another spoke of a "peasant" who "lived in one parish and derived most of his income from land situated in another." *Id.* at result

521. Perhaps the coders could have presumed that those living "beyond their incomes" in "chronic poverty" were cashing out (and thus realizing) any sources of "incomes" available, or that a "peasant" deriving "income from land" was a laborer earning wages and not a real estate speculator. But, in *amici*'s conservative framework, these (and other) results were coded as indeterminate in the absence of any explicit contextual basis for treating the income as involving a realized gain.

Perhaps more important, the coders found no counter-examples—no results where they identified a subjective basis for believing that "income(s)" referred to an unrealized gain. Thus, if anything, the conservative coding criteria may have understated the results connecting "income(s)" to realized gains. And *amici*'s coding is open for anyone to question and put to the test. *See generally id*.[21]

B. Unrealized gains are attested in COHA but referred to using words other than income(s).

A lack of evidence of the use of "income(s)" to describe unrealized gains might not be conclusive if unrealized gains were simply unattested in COHA. In that event, *amici*'s "words-to-meaning" evidence might just reflect the absence of the *phenomenon* of unrealized gains, and not that such gains fall outside the ordinary meaning of "income(s)." *See* Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the*

[21] Available at https://ssrn.com/abstract=4560186.

Critics, 88 U. CHI. L. REV. 275, 355 (2021) (acknowledging this concern with corpus analysis while explaining that it can be addressed by testing whether the phenomenon "is generally expressed using" words "other than" those at issue).

But this is where "meaning-to-words" analysis comes into play. At this step, one searches for the concept of unrealized gains in the corpus and asks what words are ordinarily used to express that concept. If the concept of unrealized gains appears but is ordinarily expressed using words other than "income(s)," the above objection evaporates and the meaning-to-text analysis stands: an unrealized gain falls outside the ordinary meaning of income(s).

Amici found numerous references to unrealized increases in the value of property. To do so, *amici* searched for all forms of the word "increase" within six words of "value" from 1900 to 1912. *See Appendices* at App. C.[22] That search yielded 94 results, which *amici* winnowed to 34 that involved an increase in monetary value of an asset without a realization event. *Id.* Within those remaining 34 results, *amici* examined whether "income(s)" or some other words were used to characterize the unrealized increase in value.

Again the evidence supports that "income(s)" does not refer to unrealized gains. None of the 34 results that refer to unrealized gains spoke of such gains as "income(s)." The word "income" did appear in the

[22] Available at https://ssrn.com/abstract=4560186.

expanded context of 5 of these 34 results. But in none of those results was "income" used to refer to or describe the unrealized gain. To the contrary, in at least some of those results, "income" was used in *contrast* to unrealized gains.

Consider results 80 and 81 of the (increase value) data subset. *See id* at App. C. These results both appear in the same text and speak of increased "income" from cotton mills leading to increased "value" of property. This is not increased value as income—the causal direction goes the other way, with income leading to increased value of property. Results 36 and 38 also cut against the idea of "income" as ordinary words for the concept of increased value. Both of these results discuss "increased value" and "income" as distinct concepts, with "income" being the money that flows from an estate and the unrealized gains brought to the estate by land improvements being a separate issue. *Id*.

Result 62 is also telling. This result speaks of a person who "possesses a fortune of about $635,000, with an income of $30,000 a year. … Under his stewardship the property has increased in value from about $300,000 to $635,000." *Id*. Here, income is separated from the $335,000 in gains and is only used to describe the money that actually flows to the owner. The income is later discussed to determine how much of it was being spent. This is a clear example of ordinary usage not only using a term other than "income" to refer to unrealized economic gains, but

also using the term "income" to refer to the distinct meaning of realized gains.

Amici found a similar example in the words-to-meaning dataset (Appendix A). Result 567 of that dataset speaks of a farmer "raising the value" of his "land" by "ridding the farm of weeds." But this result makes clear that this unrealized increase in land value is not "income." The farmer is described as receiving "income" (and avoiding a "dead loss") only upon a realization event—the sale of the weeds for their "medicinal purposes." The unrealized increase in the value of the farm is thus not "income"; the farmer would be left with a "dead loss"—and no "income"—without the sale of the weeds.

The concept of unrealized gain is thus attested in COHA. But that concept is not spoken of as "income"; it is often differentiated from it.

CONCLUSION

This case requires the Court to determine whether unrealized gains count as "incomes" under the Sixteenth Amendment. The original public meaning of the constitutional text should inform that inquiry. Both the petitioners and the government urge the Court to use insufficient tools to surmise that meaning. Rather than settle for such tools, *amici* urge the Court to rely on corpus linguistic methodology to help resolve the Sixteenth Amendment's original public meaning in deciding this case.

Respectfully submitted,

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September 6, 2023

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