No. 22-800

IN THE
Supreme Court of the United States

CHARLES G. MOORE AND KATHLEEN F. MOORE,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF *AMICI CURIAE* THE BUCKEYE INSTITUTE AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. IN SUPPORT OF PETITIONERS

LARRY J. OBHOF, JR.
Counsel of Record
SHUMAKER, LOOP & KENDRICK, LLP
41 South High Street
Suite 2400
Columbus, OH 43215
(614) 463-9441
lobhof@shumaker.com

ROBERT ALT
DAVID C. TRYON
THE BUCKEYE INSTITUTE
88 East Broad Street
Suite 1300
Columbus, OH 43215
(614) 224-4422
robert@buckeyeinstitute.org
d.tryon@buckeyeinstitute.org

[ADDITIONAL COUNSEL LISTED ON INSIDE COVER]

ELIZABETH GAUDIO MILITO
PATRICK J. MORAN
NFIB SMALL BUSINESS
LEGAL CENTER, INC.
555 12th Street, NW
Ste. 1001
Washington, D.C. 20004
elizabeth.milito@nfib.org
patrick.moran@nfib.org

QUESTION PRESENTED

Whether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states.

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INTEREST OF *AMICI CURIAE*[1]

This amicus brief is submitted by The Buckeye Institute and the National Federation of Independent Business Small Business Legal Center, Inc.

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and education institution—a "think tank"—to formulate and promote free-market public policy in the States. The Buckeye Institute accomplishes its mission through timely and reliable research on key issues, compiling and synthesizing data, formulating sound free-market policies, and promoting those policy solutions for implementation in Ohio and across the country. Through its Legal Center, The Buckeye Institute works to restrain governmental overreach and engages in litigation in support of the rights and principles enshrined in the United States Constitution.

The Buckeye Institute supports the principles of limited government and individual liberty. To protect the citizens' rights and ensure the guarantee of individual liberty, The Buckeye Institute advocates that the Constitution and its Amendments be interpreted according to their original public meaning. The Buckeye Institute therefore has a strong interest

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[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amici*, their members, or their counsel make a monetary contribution to the preparation or submission of this brief.

in promoting adherence to the Sixteenth Amendment's text and the limitations on the taxing power found within Article I.

The National Federation of Independent Business Small Business Legal Center, Inc. ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. ("NFIB"), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents the interests of its members in Washington, D.C., and in all 50 state capitals.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. The NFIB Legal Center joins as *amicus curiae* in this case because the Ninth Circuit's decision would expand Congress' taxing powers beyond its constitutional limitations, and such an expansion would undoubtedly harm small and independent businesses.

SUMMARY OF ARGUMENT

This case presents a question of exceptional importance concerning Congress' taxing power. The Ninth Circuit's decision would effectively do away with settled constitutional limits on federal taxation.

This Court should therefore reverse the decision below and clarify the proper constitutional limits on the taxing power.

Amici curiae write to emphasize the significant harm that may occur if the decision below is permitted to stand. The Ninth Circuit's holding substantially broadens the scope of "income" to include unrealized appreciation of property. Such an outcome is inconsistent with the constitutional text and more than a century of this Court's precedents.

The Constitution requires that direct taxes be apportioned among the States in proportion to their populations. *See* U.S. CONST., art. I, § 2, cl. 3; U.S. CONST., art. 1, § 9, cl. 4. The Sixteenth Amendment created an exception to apportionment when Congress "lay[s] and collect[s] taxes on incomes, from whatever source derived." U.S. CONST. amend. XVI. For more than a century, this Court has applied the Sixteenth Amendment as written and has recognized that "income" must be "derived" from a "source." Other forms of taxation, such as taxes on property interests, must be apportioned notwithstanding the Sixteenth Amendment. *See Moore v. United States*, 53 F.4th 507, 508 (9th Cir. 2022) (Bumatay, J., dissenting from denial of rehearing en banc) (Pet. App. 38).

The holding below "dislodge[s]" these "settled constitutional limits on federal taxation." *Id.* at 515 (Pet. App. 55). Specifically, the Ninth Circuit panel held that "realization of income is not a constitutional requirement" for Congress to impose a tax that is exempt from apportionment. *Moore v. United States*,

36 F.4th 930, 936 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 2656 (2023) (Pet. App. 12). Such reasoning sidesteps the limitations in the Sixteenth Amendment and Article I. If allowed to stand, the decision below would greatly expand Congress' power by allowing it to directly tax property interests without apportionment.

This presents an issue of great importance that goes beyond the constitutionality of the tax provisions at issue here. If the power to lay income taxes is untethered from the realization of income, the safeguards against direct taxation found in Article I will be severely weakened if not effectively nullified. Congress could deem appreciations in property to be "income"—and could then tax them as such—without apportionment. The principle applies whether the subject is minority ownership of a corporation, the assessment of one's home, or the value of a family's farmland. This would be a dramatic expansion of Congress' ability to lay and collect "taxes on incomes" under the Sixteenth Amendment. U.S. CONST. amend. XVI.

Amici curiae respectfully submit that the provisions of Article I, including the Direct Tax Clause, require apportionment for direct taxes upon property interests. The Sixteenth Amendment allows taxes on income without apportionment, but only when the taxpayer realizes income that is "derived" from a "source." The Sixteenth Amendment does not empower Congress to lay and collect unapportioned taxes on unrealized gains merely by mislabeling them as "income."

This Court should clarify the proper interpretation of the Sixteenth Amendment and restore the constitutional limitations on Congress' taxing power. The holding of the Ninth Circuit should be reversed.

Finally, in fashioning an appropriate remedy, this Court should sever any invalid provisions from the remainder of the Tax Cuts and Jobs Act ("TCJA"). The Internal Revenue Code ("IRC") contains a "separability clause," which clearly requires that if any provision if the IRC is held invalid, the remaining sections of the IRC are not affected. *See* 26 U.S.C. § 7852(a).

ARGUMENT

I. The Ninth Circuit's Decision is Erroneous and Displaces Settled Constitutional Limits on Federal Taxation.

Congress' taxing power, however broad, is subject to a number of key limitations included in Article I and in the Sixteenth Amendment. The Ninth Circuit's decision abandons those limitations and risks substantially expanding the scope of Congress' taxing power.

Specifically, when confronted with the novel approach of the Mandatory Repatriation Tax ("MRT"), the Ninth Circuit held that "realization of income is not a constitutional requirement." *Moore*, 36 F.4th at 936 (Pet. App. 12); *see* 26 U.S.C. § 965(a), (c); 26 U.S.C. § 951(a). Although that may be true of some taxes, this Court has consistently held that the Sixteenth

Amendment's exemption from apportionment is limited to taxes on realized gains.

As Petitioners explain, the Ninth Circuit's decision "sweeps away *the* essential restraint on Congress's taxing power, opening the door to unapportioned taxes on property …." Pet. Br. at 14 (emphasis in original). Such a dramatic expansion of the taxing power is inconsistent with the constitutional text and this Court's precedents. This Court should make clear that realization of income *is* a constitutional requirement and reverse the Ninth Circuit's erroneous decision to the contrary.

A. The Ninth Circuit's Holding is Incongruous with the Constitutional Text and this Court's Precedents.

The Constitution contains a number of limitations on Congress' direct taxing power that are relevant here.[2] It requires direct taxes to be apportioned among the States "according to their respective Numbers." U.S. CONST., art. I, § 2, cl. 3. Likewise, the Direct Tax Clause specifies that "[n]o Capitation, or other direct, Tax shall be laid, unless in proportion to the Census or enumeration herein before directed to be taken." U.S. CONST., art. 1, § 9, cl. 4. These provisions are clear. Direct taxes must be apportioned among the States according to their populations.

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[2] The Constitution contains a separate provision related to indirect taxes. Indirect taxes such as "Duties, Imposts, and Excises" must be levied "uniform[ly] throughout the United States." U.S. CONST., art. I, § 8, cl. 1.

The Sixteenth Amendment provides an exemption from apportionment when Congress "lay[s] and collect[s] taxes on incomes, from whatever source derived." U.S. CONST. amend. XVI. For more than a century, this Court has applied the Sixteenth Amendment as written. In order to fall within the Sixteenth Amendment's exemption, a tax must be laid on income that is "derived" from a "source." *See id.*

This Court has consistently recognized that the meaning of "income," as used in the Sixteenth Amendment, requires the realization of some gain. In *Eisner v. Macomber*, 252 U.S. 189 (1920), the Court addressed whether a stockholder's receipt of a dividend was income for purposes of the Sixteenth Amendment. The Court defined "income" as "'the gain derived from capital, from labor, or from both combined.'" *Id.* at 207 (quoting *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 185 (1918)). The *Macomber* Court explained that income is "*not* a gain *accruing to* capital [and] not a *growth* or *increment* of value *in* the investment." *Id.* (emphasis in original). Rather, income is "something of exchangeable value, *proceeding from* the property, *severed from* the capital, … and *coming in*, being '*derived*' … that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal." *Id.* (emphasis in original). Thus, the dividend did not constitute "income" until it was actually "realize[d]" as a profit or gain. *Id.* at 209.

The *Macomber* Court's reasoning was consistent with the ordinary plain meaning of the Sixteenth Amendment. Contemporaneous dictionaries suggest

that "income" was commonly understood to include realized gains. Black's Law Dictionary, for example, defined "income" to include "that which comes in or is received from any business or investment of capital." BLACK'S LAW DICTIONARY 612 (2d ed. 1910). Likewise, a leading treatise by Henry Campbell Black described an income tax as "not a tax upon accumulated wealth, but upon its periodical accretions." Henry Campbell Black, A TREATISE ON THE LAW OF INCOME TAXATION 1 (1913). Webster's Dictionary similarly defined "income" as "that gain *which proceeds from* labor, business, property or capital …." WEBSTER'S REVISED UNABRIDGED DICTIONARY (1913) (emphasis added). Critically, this Court contemporaneously found that "Congress cannot make a thing income which is not so in fact." *Burk-Waggoner Oil Ass'n v. Hopkins*, 269 U.S. 110, 114 (1925).

In the century since this Court decided *Macomber*, the Court has expanded or clarified what qualifies as income or as a realized gain. However, the "core requirement that income must be realized to be taxable without apportionment" remains. *Moore*, 53 4th at 508 (Bumatay, J., dissenting from denial of rehearing en banc) (Pet. App. 39).

The case law bears this out. In *McLaughlin v. Alliance Ins. Co. of Philadelphia*, 286 U.S. 244 (1932), this Court held that Congress lawfully taxed appreciation which occurred prior to the law's enactment, but which was realized thereafter. The Court reasoned that a gain from capital investment, "*when realized*," is "regarded as income within the meaning of the Sixteenth Amendment and taxable as

such in the period when realized." *Id.* at 249 (emphasis added). In *Helvering v Bruun*, 309 U.S. 461 (1940), this Court reiterated that "realization of gain"—while not always taxable as income—occurs through payment, relief from indebtedness, or some "other profit realized from the completion of a transaction." *Id.* at 469.

The Ninth Circuit relies on *Helvering v. Horst*, 311 U.S. 112 (1940), for the proposition that a taxpayer cannot "escape taxation because he did not actually receive the money." *Moore*, 36 F.4th at 937 (Pet. App. 15) (quoting *Horst*, 311 U.S. at 116). Yet *Horst* does not remove the requirement of realization—it specifically states that "income is not taxable until realized." *Horst*, 311 U.S. at 116. The taxpayer in that case had directed a payment to a family member instead of himself. *See id.* at 116-17. The Court reasoned that this constituted "realization of the income" by the person who exercised the power to procure payment to another. *Id.* at 118. Thus, although *Horst* refined what kind of activity may constitute realization of income, it did not hold that realization is unnecessary under the Sixteenth Amendment.

Likewise, in *Commissioner of Internal Revenue v. Glenshaw Glass Co.*, 348 U.S. 426 (1955), this Court followed *Macomber*'s holding regarding realization in determining that punitive damages awards are taxable income. The Court noted that although *Macomber*'s definition of income serves the "useful purpose" of "distinguishing gain from capital," it "was

not meant to provide a touchstone to all future gross income questions." *Id.* at 431. Yet the Court nonetheless held that the damages were income, because they were "undeniable accessions to wealth, *clearly realized*, and over which the taxpayers have complete dominion." *Id.* (emphasis added).

In *James v. United States*, 366 U.S. 213 (1961), this Court found that embezzled funds are taxable as income. The Court reiterated that Congress' power to tax incomes includes "'accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.'" *Id.* at 219 (quoting *Glenshaw Glass Co.*, 348 U.S. at 431). As the Court explained, a gain is taxable income "'when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it.'" *Id.* (quoting *Rutkin v. United States*, 343 U.S. 130, 137 (1952)).

This Court followed the "complete dominion" reasoning in subsequent cases and in additional contexts. For example, in *Commissioner of Internal Revenue v. Indianapolis Power & Light Co.*, 493 U.S. 203 (1990), the Court held that customer deposits to an electric company were not taxable income because the company did not have "complete dominion" over deposits that were subject to repayment. *Id.* at 209 (citing *Glenshaw Glass Co.*, 348 U.S. at 431, and *James*, 366 U.S. at 219).

To be sure, over time the Court has not endorsed *Macomber* wholesale. *See, e.g.*, *Helvering v. Griffiths*, 318 U.S. 371, 393-94 (1943) (discussing *Bruun* and

Horst, and explaining that those decisions "rejected" or "undermined" portions of *Macomber* or its "theoretical bases"). This Court's Sixteenth Amendment decisions nonetheless share the common thread that the "Amendment's exemption from Article I's apportionment requirement is limited to taxes on a taxpayer's *realized* gains." Pet. Br. at 17 (emphasis in original). Judge Bumatay emphasized this in his dissent from the Ninth Circuit's denial of en banc review. "While there may be edge cases that test the outer limits of what constitutes a realized gain, the term 'income' still retains realization as a definitional requirement." *Moore*, 53 F.4th at 515 (Bumatay, J., dissenting from denial of rehearing en banc) (Pet. App. 54).

In contrast to these authorities, the Ninth Circuit panel held that "realization of income is not a constitutional requirement" for Congress to impose an income tax exempt from apportionment. *Moore*, 36 F.4th at 936 (Pet. App. 12). That reasoning cannot be squared with this Court's precedents.

Here, there is no dispute that Petitioners "did not realize income from KisanKraft." *Moore*, 53 F.4th at 509 (Bumatay, J., dissenting from denial of rehearing en banc) (Pet. App. 41). As minority shareholders they also "lacked the authority to compel a dividend payment constituting realized income." *Id.* Incredibly, although KisanKraft had not distributed "a penny to them," the MRT required the Moores to declare an additional $132,512 as taxable income. Pet. Br. at 2; *see also id.* at 12; Pet. App. 74-75.

The Moores did not enjoy some sort of constructive realization of their gains. Nor did they have "control" or "dominion" over gains that would allow them to "readily realiz[e] economic value." *Compare with James*, 366 U.S. at 219; *Glenshaw Glass Co.*, 348 U.S. at 431. They did not receive payments and they could not require payments, much less direct them to someone else. *Compare with Horst*, 311 U.S. at 116-17.

In short, this case presents the constitutional question cleanly without other factual and statutory disputes. A long line of this Court's precedents indicate that a realization of a gain is required for Congress to impose an income tax exempt from apportionment under the Sixteenth Amendment. The Ninth Circuit's holding to the contrary is error and should be reversed.

Furthermore, this Court should reject attempts to recast or redefine the MRT in order to sidestep its constitutional infirmities. For example, in its brief in opposition to certiorari, Respondent suggested that the MRT could be considered an excise tax. Resp. Br. in Opposition to Cert. at 23 ("To the extent that the MRT were regarded as something other than an income tax under the Sixteenth Amendment, it would be best understood as a constitutional '[e]xcise[]' tax that is 'uniform throughout the United States.'") (alteration in original) (quoting U.S. CONST., art. I, § 8, cl. 1). Respectfully, the MRT is not an excise tax, it is an unconstitutional tax on property—specifically, on ownership of shares in certain types of corporations.

Respondent cites *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), in support of its argument. Yet Respondents find no refuge in *Pollock*. The *Pollock* Court held that "taxes on personal property, or on the income of personal property, are likewise direct taxes." *Pollock*, 158 U.S. at 637. Furthermore, in ascertaining the meaning of duty and excise taxes in the Constitution, the Court turned to the Federalist Papers, in which Alexander Hamilton described excise taxes as taxes on "articles of consumption." *Id.* at 624 (quoting The Federalist No. 36 (Hamilton)). Unrealized gains plainly do not qualify as articles of consumption.

Later cases upheld excise taxes that were laid "upon the particular privilege of doing business in a corporate capacity." *Flint v. Stone Tracy Co.*, 220 U.S. 107, 151 (1911) (*overruled on other grounds*); *see also Spreckels Sugar Ref. Co. v. McClain*, 192 U.S. 397, 411 (1904) (upholding an excise tax on "gross annual receipts" not as property, "but only in respect of the carrying on or doing the business of refining sugar"). Unlike those taxes, the MRT does not tax the privilege of doing business or the gross receipts of a company. It taxes shareholders based on the ownership of property (shares in a corporation). *See* Pet. Br. at 45 ("Whether a taxpayer is subject to the MRT turns on ownership of an asset at a particular time ….").

B. The Erroneous Reasoning of the Decision Below Would Expand Congress' Taxing Power Beyond its Constitutional Limitations.

The Ninth Circuit's erroneous holding on realization risks expanding the federal taxing power beyond its constitutional limits. This Court has "continued to consider taxes on personal property to be direct taxes" that must be apportioned. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 571 (2012) (citing *Macomber*, 252 U.S. at 218-19). As Petitioners explain, however, the decision below would remove "*the* essential restraint … opening the door to unapportioned taxes on property … and anything else Congress might deem to be a given taxpayer's income." Pet. Br. at 14. Indeed, in dissenting from the Ninth Circuit's denial of en banc review, Judge Bumatay warned of this exact result. "Now, I fear, *any* tax on property or other interests can be categorized as an 'income tax' and elude the requirement of apportionment." *Moore*, 53 F.4th at 508 (Bumatay, J., dissenting from denial of rehearing en banc) (Pet. App. 40) (emphasis in original).

This presents an issue of great importance that goes beyond the constitutionality of the specific tax provisions at issue here. The Ninth Circuit's reasoning must be rejected before more harm can manifest.

This Court made clear long ago that the Sixteenth Amendment "is to be taken as written, and is not to be extended beyond the meaning clearly indicated by the language used." *Edwards v. Cuba R. Co.*, 268 U.S.

628, 631 (1925). Nor may Congress sidestep its constitutional limitations by simply redefining income to include gains without realization. *See, e.g., Taft v. Bowers*, 278 U.S. 470, 481 (1929) ("[T]he Sixteenth Amendment confers no power upon Congress to define and tax as income without apportionment something which theretofore could not have been properly regarded as income."); *Burk-Waggoner Oil Ass'n*, 269 U.S. at 114.

This is, however, precisely what the Ninth Circuit's decision would do. By ignoring the realization requirement, the court has allowed Congress to define Petitioners' unrealized gains as "income" when it "is not so in fact." *Burk-Waggoner Oil Ass'n*, 269 U.S. at 114.

If the power to lay income taxes is untethered from the realization of income, as a practical matter the safeguards of Article I will be lost. Congress could deem a wide variety of appreciations in property to be "income" and then tax them as such. Importantly, this extends well beyond the MRT challenged by Petitioners here.

The logic of the Ninth Circuit's decision could apply to a wide range of situations where a taxpayer experiences unrealized gains. Perhaps the most obvious example is stock held by millions of Americans in their retirement and investment accounts. *See* Pet. at 23. The Ninth Circuit's reasoning would permit Congress, if it so chooses, to tax each of them on the retained earnings of corporations in which they have invested. These shareholders are functionally no

different than the Moores—minority investors who do not have the power to require a payment.

Nor is the harm from such errors limited to owners of stock or other investments. Under the longstanding interpretation of the Sixteenth Amendment, Congress cannot lay an unapportioned tax on farmland. Under the Ninth Circuit's reasoning, however, Congress *could* impose an unapportioned tax on farmers or other landowners for unrealized appreciation to their property. All that would be required is some legislative creativity, such as Congress defining the properties' appreciation as "income." *See also* Pet. at 24 (arguing that under the Ninth Circuit's decision, Congress could "tax farmers on the imputed rental value of their land" by deeming it "income"). Yet in that scenario the farmer has not realized any gain or received any new income—he has simply gained additional tax liability.

The harm from such a policy would be tremendous. In The Buckeye Institute's home state of Ohio, for example, there are more than 75,000 farms, and 90 percent of those farms are run by families and individuals.[3] It is foreseeable that many of those families could not afford to pay "income taxes" (however misnamed) on the unrealized appreciation of their property. Some, perhaps many, would be faced with the prospect of selling or otherwise losing their property.

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[3] *See* Ohio Secretary of State, Ohio Agriculture, *available at* https://www.ohiosos.gov/profile-ohio/things/ohio-agriculture/ (last visited Aug. 23, 2023).

Likewise, taxation of unrealized appreciation could impose substantial burdens on small businesses. As with the prior examples, if the Ninth Circuit's flawed reasoning is upheld, Congress could impose an unapportioned tax on small business owners for the unrealized appreciation to their businesses, or for earnings that would otherwise be reinvested in the businesses. Indeed, that is what the MRT does now for the subset of business owners who fall within the requirements of 26 U.S.C. § 965. Yet there is no reason that such taxes must be limited to ownership of foreign corporations. Under the Ninth Circuit's holding, all small business owners would have a Sword of Damocles hanging over their heads. They must keep their fingers crossed and hope that Congress does not one day deem their business earnings or appreciation to be "income."

The Ninth Circuit's reasoning could negatively impact small businesses in particular by altering the incentives of small business owners. *See also* Amicus Br. of Chamber of Commerce of the United States (filed Mar. 27, 2023) at 9-10. If earnings that are reinvested into a small business are deemed "income," and are taxed as such, business owners will face government-created financial incentives to take money out rather than reinvest in their businesses. Indeed, some may *need* to do so in order to pay for the increased tax burden on unrealized gains. In short, taxation untethered from the realization of income would systematically hinder reinvestment in small businesses.

Again, the impact of such policies would be substantial. Small businesses make up the vast majority of businesses across the nation and employ more than 60 million people.[4] In Ohio alone, more than 900,000 small businesses are responsible for roughly 2.2 million employees—44.7% of all employees in the State.[5]

It bears repeating that the Ninth Circuit's novel reinterpretation of the requirements of the Sixteenth Amendment is not limited to any specific kind of property. As Judge Bumatay emphasized below, "[d]ivorcing income from realization opens the door to new federal taxes on all sorts of wealth and property without the constitutional requirement of apportionment." *Moore*, 53 F.4th at 515 (Bumatay, J., dissenting from denial of rehearing en banc) (Pet. App. 55). This would be true whether one is considering stock holdings or a retirement plan, or a family farm, or any other type of property that may someday appreciate in value.

The threat of additional taxes on unrealized gains is not some farfetched hypothetical. The President's

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[4] *See* U.S. Small Business Administration, Office of Advocacy, Frequently Asked Questions (revised Dec. 2021), *available at* https://advocacy.sba.gov/wp-content/uploads/2021/12/Small-Business-FAQ-Revised-December-2021.pdf (last visited Aug. 26, 2023).

[5] *See* U.S. Small Business Administration, Office of Advocacy, 2022 Small Business Profile – Ohio, *available at* https://advocacy.sba.gov/wp-content/uploads/2022/08/Small-Business-Economic-Profile-OH.pdf (last visited Aug. 26, 2023).

proposed budget for Fiscal Year 2023 proposed "a minimum tax of 20 percent on total income, generally inclusive of unrealized capital gains," for certain high-wealth taxpayers. *See* U.S. Dep't of Treas., General Explanations of the Administration's Fiscal Year 2023 Revenue Proposals 34 (2022), *available at* https://home.treasury.gov/system/files/131/General-Explanations-FY2023.pdf (last visited Aug. 23, 2023). The Fiscal Year 2024 proposal would increase that rate to 25 percent. *See* U.S. Dep't of Treas., General Explanations of the Administration's Fiscal Year 2024 Revenue Proposals 82 (2023), *available at* https://home.treasury.gov/system/files/131/General-Explanations-FY2024.pdf (last visited Aug. 23, 2023).

These proposals relate to high-wealth individuals. However, without the requirement of realization as a limiting principle, such taxes could also be levied against a much broader range of taxpayers. History bears this out. For example, in 1913 "less than 1 percent of the population paid income taxes at the rate of only 1 percent of net income." U.S. National Archives & Records Admin., 16th Amendment to the U.S. Constitution: Federal Income Tax (1913), National Archives, *available at* https://www.archives.gov/milestone-documents/16th-amendment#:~:text=Passed%20by%20Congress%20on%20July,impose%20a%20Federal%20income%20tax (last visited Aug. 23, 2023). Yet in 2020, taxpayers filed 157.5 million tax returns, with an average income tax rate of 13.6 percent. *See* Tax Foundation, Summary of the Latest Federal Income Tax Data, 2023 Update (Jan. 26, 2023), *available at*

https://taxfoundation.org/publications/latest-federal-income-tax-data/ (last visited Aug. 23, 2023).

There is little reason to believe that Congress, over time, would limit the scope of taxation on unrealized gains to high-wealth individuals. If the federal government is allowed to ignore the constitutional restraints on direct taxation, there are few (if any) boundaries to the expansion of those taxes to different types of property and different groups of taxpayers.

To be clear, *amici curiae* do not ask this Court to weigh in on the wisdom or relative merits of such policies. Adherence to the constitutional text, and to this Court's precedents, is all that is required. Realization has long been an essential component of "income" under the Sixteenth Amendment. *Amici* respectfully request that this Court clarify the meaning of its prior holdings and reject the novel and erroneous approach of the Court of Appeals.

II. The MRT is Severable From the Remainder of the Tax Cuts and Jobs Act.

Finally, in fashioning appropriate remedies in this case, this Court should give careful attention to the severability of section 965 of the Internal Revenue Code of 1986 ("IRC") or any invalid application thereof. IRC section 965, at issue in this case, was enacted by section 14103 of the statute commonly known as the Tax Cuts and Jobs Act ("TCJA") (Public law 115-97, December 22, 2017). The TJCA enacted many other IRC provisions, including IRC section 199A enacted by section 11011 of the TCJA, relating

to the qualified business income deduction, which is of vital importance to many small businesses.

The TCJA itself did not contain a provision (commonly called a severability provision or a separability provision) directing whether or to what extent, in the case of a judicial determination of the invalidity of a provision of the Act or an application of a provision of the Act, to treat the provisions of the Act as severable and strike down only the invalid part, or instead treat them as a single, integrated whole and strike down the entire Act.

But the IRC contains a separability clause that applies to sections 965, 199A, and every other provision of the IRC. Section 7852(a) of the IRC states in reference to the entirety of the IRC as title 26 of the U.S. Code: "Separability Clause—If any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby." 26 U.S.C. § 7852(a). Accordingly, a holding by the federal courts that IRC section 965, or an application thereof, is invalid, has no effect on other provisions of the IRC, including section 199A of the IRC. Rather, section 7852(a) directs the federal courts to sever from the remainder of the IRC the invalid section 965 or the invalid application of section 965.

This Court should hold in accordance with section 7852(a) and sever the MRT from the remainder of the TCJA.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

LARRY J. OBHOF, JR.
Counsel of Record
SHUMAKER, LOOP & KENDRICK, LLP
41 South High Street
Suite 2400
Columbus, OH 43215
(614) 463-9441
lobhof@shumaker.com

ROBERT ALT
DAVID C. TRYON
THE BUCKEYE INSTITUTE
88 East Broad Street
Suite 1300
Columbus, OH 43215
(614) 224-4422
robert@buckeyeinstitute.org
d.tryon@buckeyeinstitute.org

ELIZABETH GAUDIO MILITO
PATRICK J. MORAN
NFIB SMALL BUSINESS
LEGAL CENTER, INC.
555 12th Street, NW
Ste. 1001
Washington, D.C. 20004
elizabeth.milito@nfib.org
patrick.moran@nfib.org

Counsel for Amici Curiae