

No. 22-800

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In the Supreme Court of the United States

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

*v.*

UNITED STATES

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

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**BRIEF FOR INDEPENDENT WOMEN'S  
LAW CENTER AS *AMICUS CURIAE*  
SUPPORTING PETITIONERS**

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## INTRODUCTION AND INTEREST OF *AMICUS CURIAE*<sup>1</sup>

The decision below allows the federal government to circumvent constitutional limits on one of its most consequential and even dangerous powers: the power to tax its citizens. As originally adopted, the Constitution barred Congress from imposing any direct taxes on the American people unless they are apportioned equally among the States. U.S. Const. art. I, § 2, cl. 3; *id.* § 9, cl. 4. After this Court applied that apportionment requirement to invalidate a federal income tax in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), and *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), the Constitution was amended to allow Congress to tax “incomes” without apportionment. U.S. Const. amend. XVI. But “income” is not the boundless term the Ninth Circuit held it to be. The court of appeals’ ruling that *unrealized* gains are taxable without apportionment represents a huge expansion of the federal taxing power and a stark departure from the constitutional text.

A decision permitting the taxation of unrealized gains has especially harsh consequences for women. This is so because women tend to hold their investments for a longer term than men. In addition, when operating their own businesses, women are more reliant on their own capital than men. The errors

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<sup>1</sup> No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

made by the Ninth Circuit thus are of great concern to *amicus* Independent Women’s Law Center (IWLC). IWLC is a project of Independent Women’s Forum (IWF), a nonprofit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic policy issues. IWF promotes access to free markets and the marketplace of ideas and supports policies that expand liberty, encourage personal responsibility, and limit the reach of government. IWLC supports this mission by advocating for equal opportunity, individual liberty, and respect for the American constitutional order.

IWLC agrees with Petitioners that the court of appeals erred in its interpretation of the constitutional tax clauses, which do not permit taxation of unrealized gains without apportionment. IWLC writes further to highlight the historical reasons why the Framers limited the federal taxing power and the ways in which the taxes permitted by the court of appeals’ erroneous decision burden women.

### **SUMMARY OF ARGUMENT**

Because the Framers who drafted the Constitution were wary of a national taxing power, they provided the federal government with only limited authority to tax. Direct taxes, such as taxes on an individual’s property, can be imposed under the Constitution only if they are apportioned equally among the States or fall within the limited exception of the Sixteenth Amendment. Unrealized gains do not constitute “income[]” under that Amendment, and thus they may not be taxed without apportionment.



The court of appeals' decision to the contrary permits Congress to saddle individuals with precisely the type of unbounded liability the Framers feared. It also permits Congress to impose a particularly onerous burden on women, who tend to invest for a longer duration than men and, when working as entrepreneurs, often have no choice but to rely on their own capital rather than external investment. For these reasons, and the reasons stated by Petitioners, the decision below and its atextual expansion of the federal taxing power should be reversed.

## ARGUMENT

### **I. The Ninth Circuit's Decision Erroneously Expands Federal Taxing Powers Beyond Their Constitutional Limits.**

It is well established that the American system of government is one of limited powers. *New York v. United States*, 505 U.S. 144, 155 (1992). The power to tax is no exception. Congress cannot impose a direct tax on the American people unless it apportions that tax equally among the States or taxes "income[]" as permitted by the Sixteen Amendment.

#### **A. The Framers Deliberately Cabined Congress's Power to Tax.**

"Most Founders feared a national taxing power."<sup>2</sup> They had, after all, just fought an entire war over

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<sup>2</sup> Erik M. Jensen, *The Constitution Matters in Taxation*, 100 Tax Notes 821, 823 (2003) (hereinafter "Jensen, *Constitution Matters*").

taxation.<sup>3</sup> It is no wonder they were disinclined to provide their new government with a similar authority to abuse. In fact, the Founders were so skeptical of nationwide taxation that the Articles of Confederation left the federal government to rely on “requisitions” to the States to meet revenue needs.<sup>4</sup> But those requisitions often fell on deaf ears, and the federal government found itself with insufficient funds to run a nation. All of this led the Framers to bestow in the Constitution a new “Power To lay and collect Taxes, Duties, Imposts and Excises.” U.S. Const. art. I, § 8, cl. 1. The Constitution also mandated, however, that those taxes be “uniform,” *ibid.*, and that “direct Taxes \* \* \* be apportioned among the several States which may be included within this Union, according to their respective Numbers.” U.S. Const. art. I, § 2, cl. 3. The apportionment requirement was so important that the Framers included it twice, reiterating: “No 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. I, § 9, cl. 4.

Even as the Founders granted this new power to the federal government, they assured a skeptical populace that the authority to tax would be cabined. In *The Federalist Papers*, for example, Alexander Hamilton explained that indirect taxes—such as excise taxes imposed on goods and paid by merchants but (indirectly) passed on to the purchaser—would

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<sup>3</sup> Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct-Tax Clauses*, 15 J. L. & Pol. 687, 690 (2006) (hereinafter “Jensen, *Taxation*”).

<sup>4</sup> *Id.* at 689.

“contain in their own nature a security against excess”<sup>5</sup>: if the taxes are too steep, people will simply stop purchasing the taxed goods and cut off the source of revenue. Future Supreme Court Justice and Pennsylvania delegate to the Constitutional Convention James Wilson accordingly described indirect taxation as essentially “voluntary. No one is obliged to consume more than he pleases, and each buys only in proportion to his consumption.”<sup>6</sup> As a consequence, and because the Framers believed that self-regulating indirect taxes were likely “for a long time [to] constitute the chief part of the revenue raised in this country,”<sup>7</sup> the federal taxing power was unlikely to be abused.

The Framers acknowledged that “direct” taxes were “a branch of taxation where no limits to the discretion of the government are to be found in the nature of things.”<sup>8</sup> But there was a reason the Framers believed direct taxes would comprise only a small portion of revenue raised: “the establishment of a fixed rule”<sup>9</sup> that would allow the government to impose direct taxes only if they were apportioned among each of the States. U.S. Const. art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 4. No less an authority than James

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<sup>5</sup> The Federalist No. 21 (Wash. D.C.: Libr. of Cong.) (A. Hamilton), <https://tinyurl.com/utubwkj2>.

<sup>6</sup> Jensen, *Taxation*, *supra* note 3, at 695 (quoting James Wilson, Speech (Pa. Convention, Dec. 4, 1787), reprinted in *Friends of the Constitution: Writings of the “Other” Federalists 1787-1788*, at 245 (C. Sheehan & G. McDowell eds. 1998)).

<sup>7</sup> The Federalist No. 21, *supra* note 5.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

Madison recognized the apportionment requirement as “one of the safeguards of the Constitution.”<sup>10</sup> And, indeed, that rule “had teeth”—the mandate that each tax be paid in the same amount by each State, regardless of population, “made direct taxes difficult to impose.”<sup>11</sup>

While the Constitution granted the federal government the power to tax, therefore, it was a carefully limited authority. It would take a constitutional amendment to allow to the government to dip into individuals’ pockets more broadly.

**B. Although the Sixteenth Amendment Provides a Limited Exception to the Apportionment Rule, It Does Not Extend as Far as the Ninth Circuit Held.**

Congress eventually concluded its indirect tax revenue was insufficient and sought more funds by imposing on the people a direct—but unapportioned—income tax. This Court held that tax unconstitutional because it was not apportioned in *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895), and *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601 (1895).

Congress responded by asking the States to adopt the Sixteenth Amendment, which, as ratified, allows the federal government to tax “incomes, from whatever source derived, without apportionment among the several States.” U.S. Const. amend. XVI. Although this Amendment extends the government’s

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<sup>10</sup> Jensen, *Constitution Matters*, *supra* note 2, at 824 n.28 (quoting 4 Annals of Cong. 730 (1794)).

<sup>11</sup> Jensen, *Taxation*, *supra* note 3, at 704.

taxing power, it does so in a circumscribed way, authorizing only one particular type of tax—“on incomes”—without apportionment.

The scope of the Amendment was purposefully restricted: the Senate at several points in its deliberations over the Amendment’s text had “explicitly considered, and rejected, proposals to convert the Amendment into a full-fledged repeal of the Direct-Tax Clauses” and their apportionment requirements.<sup>12</sup> The Senators had good reason for doing so: many supporters feared that even an amendment geared toward the income tax might not pass when sent to the States.<sup>13</sup>

This Court has, therefore, correctly recognized that the scope of the Sixteenth Amendment is limited. See, e.g., *Eisner v. Macomber*, 252 U.S. 189, 206, 218-219 (1920) (warning that the Amendment “shall not be extended by loose construction” and holding that it did not permit Congress to tax without apportionment a stock dividend that resulted in the taxpayer receiving additional shares of corporate stock); *Helvering v. Independent Life Ins. Co.*, 292 U.S. 371, 378-379 (1934) (explaining that “the rental value of the building used by the owner does not constitute income within the meaning of the Sixteenth Amendment”); see also *Bowers v. Kerbaugh-Empire Co.*, 271 U.S. 170, 173-174 (1926) (“It was not the purpose or effect of that amendment to bring any new subject within the taxing

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<sup>12</sup> Jensen, *Constitution Matters*, *supra* note 2, at 830.

<sup>13</sup> Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of “Incomes”*, 33 *Ariz. St. L.J.* 1057, 1113 (2001).

power.”). As Petitioners explain in detail, Pet. Br. 17-26, the Ninth Circuit erred in disregarding that precedent and giving “income[]” a broader definition than the term ever had or was meant to have.

## **II. Taxes on Unrealized Gains Harm Women Because of the Way Women Invest and Operate as Entrepreneurs.**

The Framers were correct to fear the consequences that would attend an unlimited taxing power of the sort approved by the court of appeals. Without the requirement of apportionment, Congress would be empowered to impose all sorts of taxes directly on individuals and could quickly hobble any chosen segment of the population. Taxes on unrealized gains exemplify these dangers in the way they burden women as a result of the manner in which women typically invest and operate as entrepreneurs.

### **A. Women Tend to Hold Investments for the Long Term.**

One reason taxes on unrealized gains weigh particularly heavily on women is because, as various scholars have recognized, women “differ dramatically” from men in the way they invest money in financial markets.<sup>14</sup> Women are far more likely to hold their investments for the long term than men, who trade in the markets more frequently.<sup>15</sup> One study in the

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<sup>14</sup> *E.g.*, Jennie Huang & Thomas J. De Luca, Vanguard Rsch., *The same but different: Gender and investor behavior in Vanguard retail accounts* 13 (2020), <https://tinyurl.com/mvn66s73>.

<sup>15</sup> *Ibid.*

Quarterly Journal of Economics found that men trade 45% more than women generally.<sup>16</sup> In fact, “the average turnover rate of common stocks for men is nearly one and a half times that for women.”<sup>17</sup> Men in the study turned over their investment portfolios 77% annually, while women moved only 53% of their portfolio each year.<sup>18</sup>

Recent research by investment companies is in accord. A 2020 Vanguard study of investing behavior determined that women trade “up to 50% less than men,”<sup>19</sup> and Fidelity’s 2021 review of its clients’ trading behavior found the same.<sup>20</sup> As the Vanguard report explained, “[w]omen’s investment behavior aligns with \* \* \* long-term investment principles,” not the more frequent buying and selling in which men often engage.<sup>21</sup> While men routinely engage in transactions that cause them to realize their gains (or losses) in the market, therefore, women are more likely to have unrealized gains from investments. Those gains do not constitute income, correctly understood. Disregarding the natural limits of that term would allow the government to adopt taxes that

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<sup>16</sup> Brad M. Barber & Terrance Odean, *Boys Will Be Boys: Gender, Overconfidence, and Common Stock Investment*, 116 Q.J. Econ. 261, 261 (2001).

<sup>17</sup> *Id.* at 262.

<sup>18</sup> *Id.* at 275.

<sup>19</sup> Huang & De Luca, *supra* note 14, at 1, 5.

<sup>20</sup> Ron Lieber, *Women May Be Better Investors Than Men. Let Me Mansplain Why.*, N.Y. Times (Oct. 29, 2021), <https://tinyurl.com/v7ryvhpj>.

<sup>21</sup> Huang & De Luca, *supra* note 14, at 1, 5.

particularly burden women because of the way they invest.

**B. Female Entrepreneurs Are Often Compelled to Rely Upon Their Own Capital.**

The court of appeals' decision to permit taxes on unrealized gains also poses difficulties for women who run their own businesses. In recent years, for example, government officials—ignoring the limitations inherent in the term “income[]”—have proposed that Congress impose a wealth tax on the American people.<sup>22</sup> These taxes would burden business owners in several ways.

1. First, like any tax on unrealized gains, wealth taxes can create challenging liquidity issues. Because these taxes are not based on actually incoming funds, they may force business owners to sell assets, even at a loss, to pay a tax bill.<sup>23</sup>

Next, because taxes on wealth and unrealized gains limit the accumulation of wealth, they decrease the funds entrepreneurs have available to start a new business. They also decrease the net profit a business can be expected to provide, which is “an important

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<sup>22</sup> See, e.g., Penn Wharton, Univ. of Pa., *Budgetary and Economic Effects of Senator Elizabeth Warren's Wealth Tax Legislation* 1-2 (Mar. 15, 2021), <https://tinyurl.com/ypabkwwm> (estimating that by 2050 Senator Warren's proposed wealth tax would decrease both GDP and the average hourly wage by 1.2%).

<sup>23</sup> Sarah Perrett, *Why Were Most Wealth Taxes Abandoned and Is This Time Different?*, 42 *Fiscal Studies* 539, 548 (2021).



driving force for potential entrepreneurs.”<sup>24</sup> Because access to one’s own capital “has been consistently found to be [an] important” factor in creating and maintaining entrepreneurial activity, wealth taxes negatively impact self-employment by limiting the funds entrepreneurs have to start their businesses and the funds they can reinvest in them.<sup>25</sup>

Indeed, economists have observed the negative effect wealth taxes have had on self-employment in countries that have imposed—and then, in large part, repealed—them.<sup>26</sup> In 2003, for example, countries in the Organization for Economic Co-operation and Development that imposed a wealth tax had 33% lower self-employment rates than countries that did not tax wealth.<sup>27</sup> Countries that abolished their wealth taxes also saw an increase in self-employment over those that did not. When Austria abolished its wealth tax in 1993, the country experienced an average yearly growth in self-employment of 2.3%, compared to an average decline of 1.5% in wealth tax countries and 0.6% in non-wealth tax countries.<sup>28</sup> The Netherlands had a similar experience: when the country removed its wealth tax in 2000, self-employment increased an average of 2.2%, compared

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<sup>24</sup> Asa Hansson, *The Wealth Tax and Entrepreneurial Activity*, 17 J. Entrepreneurship 139, 141 (2008).

<sup>25</sup> *Id.* at 140.

<sup>26</sup> Chris C. Edwards, *Tax & Budget Bulletin No. 85, Taxing Wealth and Capital Income*, Cato Inst., at 1 (2019) (describing “the international trend of declining tax rates on capital income and wealth”).

<sup>27</sup> Hansson, *supra* note 24, at 140.

<sup>28</sup> *Id.* at 147.

to a decline of 3.4% and 1.0% in other wealth and non-wealth tax countries.<sup>29</sup> Overall, a country's decision to abolish a wealth tax is believed to increase self-employment by 0.2 to 0.5 percentage points.<sup>30</sup>

In short, wealth taxes have a measurable, negative impact on self-employment. By limiting the funds available to start new businesses, and decreasing the profits expected from those businesses, these taxes burden entrepreneurs across the board.

2. The difficulties wealth taxes pose are particularly troubling for female entrepreneurs, who generally find it harder than men to obtain outside investment in their businesses. In 2018, for example, women owned 38% of all businesses in the United States, but they received only 2% of all venture financing.<sup>31</sup> Even when female entrepreneurs were able to raise money from venture capitalists, moreover, they obtained it “in amounts much lower than their male counterparts.”<sup>32</sup>

The same is true of female entrepreneurs who seek financing from banks. Studies have shown that women often “struggle to obtain bank financing” for

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<sup>29</sup> *Ibid.*

<sup>30</sup> *Id.* at 141.

<sup>31</sup> Laura Huang, *Why Female Entrepreneurs Have a Harder Time Raising Venture Capital*, *Scientific Am.* (June 5, 2018), <https://tinyurl.com/yv73k7p8>; see also Isabelle Solal & Kaisa Snellman, *For Female Founders, Fund-raising Only from Female VCs Comes at a Cost*, *Harv. Bus. Rev.* (Feb. 1, 2023), <https://tinyurl.com/4h5r6rxy> (finding companies founded solely by women received less than 3% of all venture capital investments).

<sup>32</sup> *Ibid.*

their businesses.<sup>33</sup> And, again, when women are able to obtain loans, they are charged higher interest rates and receive less money than men.<sup>34</sup> As a result, female entrepreneurs often find it critical to rely on their own capital—as well as capital from family and close friends—to run their businesses.<sup>35</sup> Taxes on unrealized gains (including taxes on wealth) would make it that much more difficult to do so.

All of this is especially concerning given that many women need to turn to self-employment in order to balance the demands of their personal and professional lives.<sup>36</sup> From 2017 to 2018, women started an average of 1,821 new businesses per day,<sup>37</sup> and between March 2020 and the summer of 2021, women started more new businesses than men.<sup>38</sup> Taxes on unrealized gains would burden this important economic outlet for American women, with no basis in the correct understanding of the term “income.”

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<sup>33</sup> Kimberly Eddleston, *Being Female Affects Business Loans from Family and Friends*, Entrepreneur & Innovation Exch., at 1 (Mar. 19, 2018), <https://tinyurl.com/y3xsnbzs>.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> See generally Liz Elting, *More And More Women Are Starting Businesses. Why Is That So Surprising?*, Forbes (July 23, 2021), <https://tinyurl.com/2jfbkcvz>.

<sup>37</sup> Ventureneer & CoreWoman for Am. Express, *The 2019 State of Women-Owned Businesses Report 4* (2019), <https://tinyurl.com/yc32d347>.

<sup>38</sup> Elting, *supra* note 36; Next Ins., *The Next Small Business Guide: How to Thrive From Day One* 46-48 (July 13, 2021), <https://tinyurl.com/5b6pyrat>.

**CONCLUSION**

The Framers carefully limited the federal government's ability to tax the populace directly, and the Sixteenth Amendment provides only a limited exception to that rule for gains an individual actually realizes. The Ninth Circuit erred in holding to the contrary, and the decision below should be reversed.

Respectfully submitted,

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