No. 22-800

In the Supreme Court of the United States

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

v.

UNITED STATES

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

BRIEF OF THE PACIFIC RESEARCH INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTERESTS OF *AMICUS CURIAE*[1]

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

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

SUMMARY

Amicus agrees with Petitioners and Judge Bumatay that the decision below departs from nearly a century of precedent on the proper scope of the Sixteenth Amendment taxing power and from the text, history, and tradition of the power to "lay and collect

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus*, its members, and counsel, made a monetary contribution to the brief's preparation or submission.

taxes on incomes, from whatever source derived, without apportionment." U.S. Const. amend. XVI.

1. *Amicus* writes separately to note that, under this Court's recently reinvigorated focus on the original public meaning of constitutional text, as informed by history and tradition, the limited power to tax "incomes" without apportionment was not understood to include the power to tax mere increases in the value of property or other assets before such value was realized by the relevant taxpayer. Whatever economic gymnastics or logical transformations one might use to argue the equivalence of realized and unrealized gains, the framers and ratifiers of the Sixteenth Amendment in 1913, and the public for whom they acted, had a far simpler understanding of the concept of "income" in accordance with its ordinary public meaning.

As Petitioners extensively demonstrate, Pet. Br. 26-33, at the time of ratification, for something to be "income," it had to be *received* into the separate control of the taxpayer. For example, a shareholder who *receives* nothing, even though the corporation has receipts, "derives" no income from the corporation's gains. It is only if, as, and when the shareholder *receives* a dividend or sells the stock that such mere *potential* income is realized and becomes actual income. Only actual income derived or separated from the owned property (stock) can be taxed pursuant to the Sixteenth Amendment. That is how Webster's Dictionary, published in 1910, defined income: "The gain which proceeds from labor, business, or property of any kind; revenue; receipts; esp. the annual receipts

of a private person, or a corporation, from rents, business profits, etc."[2]

As Judge Learned Hand explained only a few years after the Amendment was enacted, the proper understanding of the word "income" was the understanding that could be "gathered from the implicit assumptions of its use in common speech." *United States* v. *Oregon-Washington R.R. & Nav. Co.*, 251 F. 211, 212 (2d Cir. 1918). It is the original *public* meaning of the Constitution that governs constitutional interpretation, see *District of Columbia* v. *Heller*, 554 U.S. 570, 605 (2008). The Ninth Circuit's departure from a century of precedent reflecting such narrower public understanding, and reliance on the evolution of the concept of *constructive* realization to conclude that wholly *un*realized gains could constitute "income," applied the wrong approach to reach the wrong result.

A proper interpretation of "income" marks the boundary between the limited power to tax incomes granted to Congress in the Sixteenth Amendment and a world where "*any* tax on property or other interests can be categorized as an 'income tax' and elude the requirement of apportionment." Pet. App. 40 (Bumatay, J., dissental) (emphasis in original); Pet. Br. 35-36. Because the Amendment's text, history, and tradition precludes the imposition of such a system, this Court should reverse.

2. The limited power to tax "incomes" without apportionment, granted by the Sixteenth Amendment, should also be read narrowly within the confines of its

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[2] *Income*, *Webster's Practical Dictionary* 198-199 (1910), https://tinyurl.com/43msjjud.

historical bounds because that is the only way to ensure the proper allocation of decision-making authority on major questions of constitutional import. As Petitioners have noted, at 5-8, the apportionment limitation on direct taxes was an important element of the Constitution to those who wrote and ratified it. The decision to exclude income taxes from that limit was likewise a major constitutional decision made through the amendment process. So too here, any decision to expand that power beyond its original and narrowly understood bounds, even if based on a theoretically plausible evolving comparison of imputed income and wealth accretion, represents such a sea change that it should be made by those with the proper power to delegate further authority to Congress—the People and the States—and not by Congress itself or the courts.

Just as this Court is reticent to presume the delegation by Congress of "major questions" to the discretion of administrative and executive agencies, so too should it hesitate to accept delegation to Congress or the courts of major constitutional questions challenging purposeful limits on the power to tax. Rather, any substantial expansion of the historically limited understanding of the Sixteenth Amendment should be decided by the principals, not the agents, via constitutional amendment.

3. Finally, *Amicus* agrees with Petitioners, at 47-53, that maintaining the realization requirement for "income" would not unduly disrupt the tax code in the manner the Ninth Circuit and the government suggest. Many of the common and sensible tax code provisions addressing partnerships, S Corps, and improper tax avoidance schemes reflect genuine

instances of *constructive* realization. Where the ultimate taxpayers exercise genuine authority or dominion over income received by a business entity, they may indeed be said to have realized or "derived" the income in question, even if they then use their dominion in a manner other than taking immediate individual possession of such gains.

While the extent of separate dominion and control may pose realization questions on the margin, those raise the ordinary factual and interpretive issues that can be resolved as needed in appropriate cases. Whether any particular attempt to impute income to a taxpayer will be deemed a proper application of constructive realization should not deter this Court from maintaining the historical and well-established realization requirement generally or in this case. As Petitioners note, at 44-47, the tax here is nowhere near the realization line, there was no actual or constructively realized income, and the Ninth Circuit's total abandonment of the realization requirement was gross constitutional error that should be reversed.

ARGUMENT

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

The Sixteenth Amendment grants Congress the limited power to "lay and collect taxes on incomes, from whatever source derived, without apportionment." U.S. Const. amend. XVI. At issue here is the meaning of "incomes." The Ninth Circuit's

expansive approach of allowing Congress to deem unrealized gains to be income despite the lack of receipt or dominion by the taxpayer ignores the text, history, and tradition of the Sixteenth Amendment, elevates imagined dilution of the realization requirement above the original public meaning of the constitutional text, and would allow any merely *potential* gain or temporary growth in capital to count as taxable "income."

This Court's recent cases, however, take a more concrete and grounded approach, reemphasizing the requirement to look to the public meaning of the constitutional text, illuminated by history and tradition, at the time the text was adopted. Realization was and remains the touchstone for defining income, and the fact that receipt of and dominion over income may sometimes occur constructively does not change that constitutional touchstone or allow Congress and the courts to ignore it.

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

In reaching its startling conclusion that realization is not a requirement for determining what is "income" under the Sixteenth Amendment, the Ninth Circuit ignored the text and history of the Amendment, citing instead a string of cases, mostly decided decades after the Sixteenth Amendment, that the court incorrectly viewed as weakening the realization requirement. See, *e.g.*, Pet. App. 12-13. Where the Ninth Circuit did address the two key cases in which this Court specifically addressed the realization requirement,

Eisner v. *Macomber*, 252 U.S. 189 (1920) and *Commissioner of Internal Revenue* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955), it ignored what they said, labored to limit them to their facts, and created a theory that "income" does not mean only "income" as originally understood, but something broader and amorphous. Pet. App. 14-16. That approach was wrong at its very foundation, using "postratification history" to contradict the "uniformly consistent" evidence of original public meaning supporting *Macomber*'s realization rule. *Smith* v. *United States*, 143 S. Ct. 1594, 1608 n.16 (2023) (discussing limited utility of supposedly contrary postratification history where text and contemporaneous evidence of public meaning are consistent).

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

Court has recently emphasized that the constitutional text, history, and tradition, rather than the judicially created means-ends balancing of the past, is the proper standard to apply when deciding "how we protect other constitutional rights." *Bruen*, 142 S. Ct. at 2130. That standard is no less applicable when deciding how to enforce the limits on the taxing authority granted to Congress.

The Sixteenth Amendment was written as a narrow exception to the apportionment requirement for the limited purpose of allowing an income tax while maintaining a check on other direct taxes. Pet. Br. 16. As this Court noted not long after the Sixteenth Amendment was adopted:

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

Merchants' Loan & Tr. Co. v. *Smietanka*, 255 U.S. 509, 519 (1921). Judge Learned Hand also applied such an approach, explaining that the meaning of the word "income" was "not to be found in its bare etymological derivation," but was "rather to be gathered from the implicit assumptions of its use in common speech."

United States v. *Oregon-Washington R.R. & Nav. Co.*, 251 F. 211, 212 (2d Cir. 1918).[3]

Later scholarship addressing this Court's cases immediately after the Sixteenth Amendment was enacted confirm the importance this Court placed on looking to income's ordinary meaning—the "information we have concerning the meaning of the word 'incomes' in the sixteenth amendment points to its ordinary language usage;[] indeed it is difficult to see how it could point elsewhere when we recall that we are dealing with a self-assessing system of income taxation."[4]

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

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

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

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

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

1. Starting with the text, Judge Bumatay explained that "[r]atification-era dictionaries suggest that the ordinary meaning of 'income' was confined to realized gains." Pet. App. 46 (Bumatay, J., dissental). The definitions of "income" that Judge Bumatay cites, moreover, were not unique to those dictionaries he chose to cite or new to the time period, a point that the Petitioner emphasizes. Pet. Br. 28-29 (collecting other dictionary definitions).

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

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

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

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

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

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

44 Cong. Rec. 4389, 4412 (1909) (statement of Rep. Robert L. Henry) (quoting Adam Smith, *An Inquiry into the Nature and Causes of Wealth of Nations* (1776)). For "income" to be "revenue" that can be "enjoy[ed] under the protection of the State," its benefits must first be realized.[5]

Immediately following ratification in 1913, courts recognized this limited scope of what constituted "income" under the Sixteenth Amendment and statutes involving the taxation of income. *E.g.*, *Hays* v. *Gauley Mountain Coal Co.*, 247 U.S. 189 (1918) (construing the Corporate Tax Act of 1909 as allowing the taxation of gains received in the year of sale). As Petitioners comprehensively detail, at 17-26, Supreme Court cases following the adoption of the Sixteenth Amendment routinely recognized this common-sense definition of "income" as distinct from unrealized growth in the value of assets. In case after case, this Court has been unequivocal about what "income" meant at the time of the Sixteenth Amendment's ratification. "Income" has always been "a gain derived from capital, *not a gain accruing to capital*, nor a growth or increment of value in the investment, but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested, and coming in, that is, *received* or drawn by the claimant for his separate use, benefit, and disposal." *United States* v. *Phellis*, 257 U.S. 156,

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[5] Of course, the concept of "income" is commonly understood as realized gain, *i.e.*, net revenue, not merely money flowing in regardless of expense. See Pet. Br. 31.

169 (1921) (emphasis added) (citing *Macomber*, 252 U.S. at 207).

The requirement that the gain be severed from the underlying capital is essential to maintain the distinction between permissible taxes on income and taxes on property or capital, which would need to be apportioned. Indeed, throughout the decades of discussion concerning the line between direct and indirect taxes, one thing all sides agreed upon was that direct taxes at least included property taxes. See 44 Cong. Rec. 4389, 4413 (1909) (statement of Rep. Robert L. Henry) (recognizing that "direct taxes" include "capitation taxes," "taxes on land, and perhaps taxes on personal property by general valuation and assessment" (quoting *Pollock*, 158 U.S. at 653)); *id.* at 4414 (statement of Rep. Robert L. Henry) ("[T]axes on real estate being direct taxes, taxes on rent or income therefrom are also direct taxes. * * * * [T]axes on personal property or on the income therefrom are direct taxes."); *id.* at 4437 (statement of Rep. Cyrus Cline) (arguing as a "universally accepted principle of taxation" that "in addition to the tax on articles of consumption there should be a direct tax on incomes, properly graduated").[6]

A tax on the unrealized value of property is every bit as much a tax on the property, and not a tax on income at all. As Georgetown Professor Frank Nash noted, the Supreme Court's "concept of taxable income

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

includes the idea of gain severed from capital, that is, realization." Frank C. Nash, *Book Reviews*, 25 Geo. L.J. 769, 804, 807 (1937) (reviewing Roswell Magill, *Taxable Income* (1936)). A 1920 note in the Michigan Law Review—much closer to the period of ratification—looked to this Court's opinion in *Gray* v. *Darlington*, 82 U.S. 63 (1872), to reach the same conclusion. George D. Clapperton, Note, *Profits from Sale of Capital Assets as Income: Taxable Under Sixteenth Amendment*, 19 Mich. L. Rev. 854, 857 (1921).

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

3. Other contemporary sources only confirm this understanding of "income."

Returning to Judge Hand's opinion in *United States* v. *Oregon-Washington Railroad & Navigation Company*, the "implicit assumptions" included in the use of the term "income" included "the current distinction between what is commonly treated as the increase or increment from the *exercise* of some economically productive power of one sort or another, and the power itself, and it should not include such wealth as is honestly appropriated to what would customarily be regarded as the capital of the corporation taxed." 251 F. at 213 (emphasis added). In other words, to Judge Hand, "income" and "capital" were constitutionally different, and it is in the *exercise* of capital—such as by selling it—that income was created.

The distinction between "income" and "capital" regularly made an appearance in non-judicial sources at or near the ratification of the Sixteenth Amendment as well. Henry Black defined "income" as "that which comes into or is received from any business or investment of capital."[7] As part of that definition, he explained the venerable principle that "nothing is to be considered as income except what represents value in money, that is, either money or something that is equivalent to money because it can be converted into money and the proceeds expended in any way the recipient may please."[8] Thus if a person has capital that he "sells, then the sum gained may constitute a part of his income, but it cannot be so described while

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[7] Henry Campbell Black, *A Treatise on the Law of Income Taxation Under Federal and State Laws* 73-74 (1913).

[8] *Id.* at 77.

he continues to hold the security."[9] Still another manual explained that to be "true income," it must be "realized income" resulting from a "closed transaction."[10] On that basis, it concluded that "[i]ncome is distinct from the capital or labor that produces it," and that "the appreciation in the value of the stock is not income until the increase is realized upon by a sale of the stock."[11] "[T]he inchoate or prospective income does not become income until it is separated from the capital" at the moment of sale.[12]

This understanding of "income" long predates the ratification of the Sixteenth Amendment too. In 1876, in his treatise on taxation, Justice Thomas Cooley of the Michigan Supreme Court wrote that one reason why imposing an income tax would be inadvisable in part because it would be "unequal because those holding lands for the rise in value escape it altogether—at least until they sell, though their actual increase in wealth may be great and sure."[13] That a leading jurist understood that merely holding onto an asset was enough to allow a person to "escape" an income tax is strong evidence that "income," at least as early as 1876, had an understood realization requirement.

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[9] *Id.*

[10] United States, *Standard Income Tax Manual 1920*, at 49 (1920), available at https://tinyurl.com/2u93ad8v.

[11] *Id.* at 49-50.

[12] *Id.* at 50.

[13] Thomas M. Cooley, *A Treatise on the Law of Taxation* 20 (Chicago, Callaghan & Co. 1876), available at https://tinyurl.com/2a2yw4ym.

Cases outside of the tax context also provide some clarity on the original public meaning of the word "income." In 1892, less than 20 years before the Sixteenth Amendment was introduced, the Supreme Court of Errors in Connecticut explained that while "[t]he word 'income' has a broad[] meaning," it was "hardly broad enough to include things not separated in some way from the principal" and was "not synonymous with 'increase.'" *Spooner* v. *Phillips*, 62 Conn. 62, 24 A. 524, 525 (1892). On this understanding, the court explained that, even though the "value of stock may be increased by good management, prospects of business, and the like," "such increase is not income." *Id.*; *Lauman* v. *Foster*, 157 Iowa 275, 135 N.W. 14, 16 (1912) (quoting and adopting the *Spooner* distinction between increase and income). The Court of Appeals of Maryland adopted a similar understanding in *Smith* v. *Hooper*, where—in examining a case where "a marvelous increase" in the value of a fund was "manifest"—it explained that "[i]ncrease and income are not synonymous terms[]" and that, until "detached or separated from the shares whose value it enhances, increase forms part" of the value, but is "in no sense income." 95 Md. 16, 51 A. 844, 846 (1902).

These cases are not alone in their view. As Judge Bumatay noted, by 1913, Henry Black explained that any contrary view would be "contrary to all the weight of authority." Pet. App. 47 (quoting Black, *supra* n.12, at 120). As even this Court's cases show, Black was correct. See *Gibbons* v. *Mahon*, 136 U.S. 549, 558

(1890) ("Reserved and accumulated earnings, so long as they are held and invested by the corporation, being part of its corporate property, it follows that the interest therein, represented by each share, is capital, and not income, of that share, as between the tenant for life and the remainder-man, legal or equitable, thereof.").

These interpretations preceding or closely following ratification of the Sixteenth Amendment confirm the common understanding of "incomes" as limited to monies received or realized, not merely unrealized gains in value. See *Bruen*, 142 S. Ct. at 2136-2137 (discussing close-in-time understandings of the scope of constitutional concepts). The Ninth Circuit's efforts to expand "income" beyond such common understandings is inconsistent with this Court's repeated admonitions on the proper methodology of constitutional interpretation.

II. Other Interpretive Doctrines Support a Narrow Reading of what Constitutes "Income" that Can Be Taxed Pursuant to the Sixteenth Amendment.

When evaluating limited grants of constitutional power, particularly where there is ample evidence of concern with giving Congress a potentially unlimited power, this Court should take a narrow approach when interpreting such powers, for much the same reasons it often takes a narrow approach to congressional delegations of power to Executive branch or administrative agencies. Separation-of-powers principles that apply to inter-branch allocation of authority are equally powerful when applied to the division of power between the federal and state

governments or between the "People" and the federal government. Indeed, much like Congress bears the authority and responsibility to make "legislative" decisions, the People and the State, themselves bear the authority and responsibility to make constitutional decisions regarding whether and how far to delegate power to Congress. Where different interpretations of a given constitutional delegation of power implicates major questions or issues that would have been and should be decided by the source of ultimate authority, this Court should tread carefully in expanding a limited delegation. Such concerns are similar to those animating the major questions doctrine regarding delegation to agencies or the Executive and provide further basis for caution in allowing Congress or the Ninth Circuit to expand the constitutional definition of "income."

The major questions doctrine concerns *agency* efforts to expand their delegated authority through expansive readings that reach new or unanticipated matters of "major" import. The doctrine says such matters should be decided by the principal rather than the agent. In the case of Congress and executive agencies, the doctrine recognizes that there are certain "extraordinary cases" in which the "history and the breadth" of asserted authority provide "reason to hesitate before concluding that Congress meant to confer such authority." *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2608 (2022) (cleaned up). The doctrine is rooted in both "separation of powers principles" and "a practical understanding of legislative intent." *Id.* at 2609. Such prudential considerations must surely be heightened when the expansion of power would allow trillions of dollars in potential new taxes on unrealized

gains, and overrides a limit on taxation established not just in statute but in the Constitution itself.

In administrative law cases, the major questions doctrine requires "something more than a merely plausible textual basis for the agency action," and instead requires "clear congressional authorization for the power it claims." *Ibid.* (cleaned up). Applying this requirement to cases of "economic and political significance," the Court has explained, ensures that agencies are unable to claim a "transformative expansion" of their "regulatory authority" without a clear mandate from their principal—Congress. *Id.* at 2608, 2610 (cleaned up).

Similarly, expanding the Article I power of Congress to tax should require something more than a merely plausible textual ambiguity and subsequent deference to Congress's unconsidered abandonment of historical limits on what constitutes taxable income. Pet. Br. 3, 46. In this case, the Ninth Circuit has held for the first time that Congress has the power to levy a direct tax on the ownership of property itself without apportionment and without meeting the traditional definition of "incomes" in the Sixteenth Amendment. Whether the apportionment check should be thus diminished certainly qualifies as a major question.

By ignoring the limited historical meaning of the text of the Sixteenth Amendment, the Ninth Circuit treated that Amendment as an open-ended authorization for the federal government's taxing ambitions, rather than a narrow exception to the apportionment requirement for direct taxes.

As Petitioners correctly emphasize, at 5-8, many of the framers at the time of the Founding discussed the

harms they foresaw if the Constitution included a broad power to levy direct taxes on the people. Luther Martin, in his noteworthy letter to the Speaker of the Maryland House of Delegates, expressed his concern that, without a check on the power to collect direct taxes, the Congress—which already was being given the "power to lay what duties they please on goods imported; to lay what duties they please, afterwards, on whatever we use or consume; to impose stamp duties to what amount they please, and in whatever case they please"—would have excessive additional power "to impose on the people direct taxes * * * to what amount they choose, and thus to sluice them at every vein as long as they have a drop of blood, without any control, limitation, or restraint."[14] While he would have restricted the power of direct taxation to "cases of absolute necessity,"[15] his concern still reflects the broader desire to limit Congress's power to lay tax.

Similarly, the North Carolina delegates, in presenting the proposed Constitution to Governor Caswell, emphasized that while they had "many things to hope from a National Government," the "chief thing [they] had to fear from such a Government was the Risque of unequal or heavy Taxation."[16] And they viewed the apportionment requirement on direct

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[14] Luther Martin's Letter on the Federal Convention of 1787, *in* 1 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787,* at 368 (Jonathan Elliott ed., 2d ed. 1836), available at https://tinyurl.com/23jc4dcj.

[15] *Id.* at 453.

[16] 3 *The Records of the Federal Convention of 1787*, at 83 (Max Farrand ed., Yale Univ. Press 1911), available at https://tinyurl.com/49xztakf.

taxes as a check so powerful that it would ensure that "a considerable Share of the National Taxes will be collected by Impost, Duties and Excises," which were required to "*be uniform* throughout the United States."[17] And James McHenry, a delegate from Maryland, explained that the apportionment requirement "was thought a necessary precaution" even though "it was the idea of every one that government would seldom have recourse to direct Taxation" because "the objects of Commerce" that were granted to Congress were considered "more than Sufficient to answer the common exigencies of State."[18]

The Founders accordingly considered the apportionment requirement to be a necessary check on federal power. And, as Judge Bumatay explained below, allowing courts to depart from "text, historical context, and early post-ratification interpretations" to determine the meaning of a constitutional provision would open the door to much mischief and distort the balance struck by the framers. Pet. App. 39, 43 (Bumatay, J., dissental).

This expanded power to lay direct taxes will be of enormous consequence, as other *amici* will undoubtedly discuss. Any such expansion should be accomplished through constitutional amendment consistent with Article V. U.S. Const. art. V.[19]

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[17] *Id.* at 84 (emphasis in original).

[18] *Id.* at 149.

[19] Indeed, as Judge Bumatay explained, it was this understanding that led to the enactment of the Sixteenth Amendment itself, as this Court, in striking down the income-tax

Creating vast new powers for Congress based on a novel and ahistorical reading of constitutional text amounts to circumvention of the amendment process mandated by Article V and again inverts the role of agent and principal—here the People and the States—in deciding major questions regarding the scope of delegated constitutional authority.

Not only does the Ninth Circuit's opinion upend a century of precedent and congressional practice, allowing the taxation of unrealized gains also raises countless further constitutional problems and concerns. Taxing unrealized gains unquestionably conflicts with the expectations of millions of Americans (and their pension and retirement funds) who purchased stocks on the understanding that they would be taxed only when they sold those stocks or received dividends. The frustration of those expectations might well be deemed a taking. See *Penn Cent. Transp. Co.* v. *City of New York*, 438 U.S. 104, 127 (1978).

Further, new taxes on unrealized gains likely cannot comport with due process when they apply retroactively to securities obtained over decades during which realization remained the *sine qua non* on income taxation. See *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 733 (1984) (recognizing that retroactive civil legislation can violate due process if it is "particularly harsh and oppressive" or

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provisions of the Wilson-Gorman Tariff Act of 1894, explained: "'[i]f it be true that the constitution should have been so framed that a tax of this kind could be laid, the instrument defines the way for its amendment.'" Pet. App. 44 (citing *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601, 635 (1895)).

"arbitrary and irrational"). Many other difficult constitutional problems likewise would arise if unrealized gains were taxable, including the treatment of unrealized losses, the proper timeframe for determining any *net* gain from fluctuations in value, and whether the eventual sale of an appreciated asset still constitutes "income" when the unrealized gain has already been taxed.

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

The Ninth Circuit's ruling represents a vast expansion of the congressional taxing power. Such a momentous change affecting millions of people should—at the very least—require a clear basis in the constitutional text. Here, however, the text and the well understood meaning of "income" point in the opposite direction of the Ninth Circuit's conclusion on unrealized gains.

III. A Constitutionally Proper Focus on Realization of Income Would Not Disrupt Ordinary Taxation Involving Pass-Through Entities or Constructively Realized Income.

Maintaining the long-understood constitutional requirement that abstract gain does not constitute "income" until it is realized by the relevant taxpayer will not upend the taxing system, as Respondent has suggested. BIO at 19-20. Many business structures intentionally create only limited, if any, separation between the business and underlying individual. Thus, income received and realized by the business is similarly received by the underlying individual. S-Corporations are a simple example, set up as pass-through entities where the owner(s) are in full control of the receipts and understood such control and pass-through obligations from the outset. Indeed, in such cases, the corporation itself is not taxed as a separate entity at all. In this case, by contrast, the corporation in which the Moore's owned shares was lawfully established as its own taxable entity and was not subject to control by the minority shareholders.

Partnerships likewise are treated as mere aggregates of individual owners, and the underlying partners set up their structure with full awareness

that income would be treated as received by each of them directly and taxed accordingly.

Even corporate entities or other legal structures claiming separate taxpayer status might well be insufficient to forestall realization by the underlying owner/taxpayer, particularly where corporate income is simply being held and stored and the underlying taxpayer has full control and dominion on how such banked income is used. A wholly-owned corporate entity functioning as a mere waystation or bank account might be an example where the owner has constructively realized income even if it is held in the corporate shell solely for tax avoidance or circumvention. The relevant fact-specific considerations would involve actual and separate control or dominion, not merely paper distinctions with no substance.

By contrast in this case, whatever net income the corporation earned at the end of each fiscal year was reinvested in expanding the business of helping poor farmers, not merely stored for the Moores to access if and when they pleased. Such reinvested income remained part of the working capital of the corporation, used for an obvious business purpose beyond mere tax avoidance, and hence can hardly be said to be "severed" from the underlying business. Similarly, the Moores have no control over the distribution of such cash, could not force the payment of a dividend, and hence cannot be said to have "received" any income, whether actually or constructively. To pay taxes on such unrealized income they might well be forced to sell a portion of their assets (minority interests in a closely held corporations would potentially have little or no market

value), a forced transformation that is both practically and economically destructive to investment. Neither the public that understood the meaning of income in the Sixteenth Amendment, nor the taxing authorities for virtually all the time since, imagined that the limited power to tax income included the power to force such economic destruction in order to pay tax on unrealized income. Yet that is what the Ninth Circuit's decision implies.

Finally, whatever other difficult issues may arise regarding the proper line between actual and constructive realization, or between the proper unity or separation between different business forms, none of them would impact this case or a more basic tax on unrealized gain. Maintaining a practical and functional approach, focused on the text and historical understanding that income must be received (whether actually or constructively) by the person to be taxed, will provide ample guidance even on any close questions. This case, however, is not close, and no supposed parade of horribles regarding other minor provision in the tax code should drive an incorrect answer in this case or more generally. Confirming that realization is a basic requirement for taxable income under the Sixteenth Amendment will resolve the vast bulk of any future disputes. Questions on the margin will sort themselves in due course, as they always do.

CONCLUSION

The Sixteenth Amendment does not allow for the taxation of unrealized gains. Because the Ninth Circuit reached a contrary conclusion, this Court should reverse.

Respectfully submitted,

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September 6, 2023