

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 *AMICUS CURIAE* THE CHAMBER
OF COMMERCE OF THE UNITED STATES OF
AMERICA IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICI CURIAE*¹

The Chamber of Commerce of the United States of America is the world’s largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation’s business community.

Businesses rely on predictability and certainty in tax laws to plan their affairs. The Ninth Circuit’s reasoning destroys that predictability. Realization has long been the defining event that turns something from an asset holding value to *income* subject to federal tax under the Sixteenth Amendment. The decision below did away with that constitutional line. If income can be redefined as easily as the Ninth Circuit says, then businesses and their shareholders could be subject to taxes on *anything* that the government later deems “income”—even increases in value that could disappear as valuations or markets fluctuate. Such a realization-free approach risks profound uncertainty in an area of the law that demands certainty. The Chamber therefore files this brief to urge the Court to reverse.

¹ Pursuant to Supreme Court Rule 37, *amici* state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amici* and their counsel made any monetary contribution toward the preparation and submission of this brief. Petitioner filed a blanket consent with this Court, and the United States provided its consent.

INTRODUCTION AND SUMMARY

Petitioners Charles and Kathleen Moore invested in a friend's startup company in 2005 and have received nothing from that investment—except a tax bill. Although the Moores have not seen a dime since making their initial investment, the Ninth Circuit held that Congress has the power to tax the Moores' unrealized gains as “income” regardless of any realization requirement. That theory is wrong. It departs from constitutional requirements, a century of practice, and will unsettle consumer and business expectations. From families putting money into investment accounts to businesses investing in appreciating assets, no one expects to be taxed until realizing some income from their investments. The Moores have realized nothing.

This Court has long recognized that “[c]ommon understanding and experience are the touchstones for the interpretation of the revenue laws.” *Helvering v. Horst*, 311 U.S. 112, 118 (1940). The Ninth Circuit abandoned those touchstones to uphold the imposition of a federal tax that even the Ninth Circuit recognized was “novel.” To do so, the court of appeals did away with the Sixteenth Amendment's central limiting principle—the authority to tax “incomes” brings with it some form of a realization requirement. By holding that there is no constitutional realization requirement *at all*, however, the Ninth Circuit made a fundamental error. But the hysteria from some *amici* and commentators about the possible consequences to existing tax laws of reversing that error is badly overblown. To resolve this case, the Court need only reaffirm the limiting principle that has been in place since the Sixteenth Amendment's adoption—realization—and require that the constitutionality of the Moores' tax under the so-called Mandatory Repatriation Tax (MRT) be adjudicated against that requirement.

ARGUMENT**I. THE NINTH CIRCUIT'S REALIZATION HOLDING IS WRONG.**

Since the adoption of the Sixteenth Amendment, realization has been the boundary that defines the federal power to levy “taxes on income.” The Ninth Circuit’s contrary holding is mistaken.

A. The Meaning of “Income” in the Sixteenth Amendment Requires Realization.

The Constitution did not originally contemplate income taxes. Instead, Congress could enact direct and indirect taxes. Indirect taxes include taxes on goods levied at the time they are purchased (for example, a tax on gas at the pump) and taxes on imports and exports. U.S. Const. art. I, § 8, cl. 1. Direct taxes include capitations (uniform, per-person taxes) and a few other categories. U.S. Const. art. I, § 2, cl. 3; U.S. Const. art. I, § 9, cl. 4. Further, direct taxes are subject to a nearly insurmountable apportionment rule that requires each State to pay in proportion to its population. U.S. Const. art. I, § 2, cl. 3; U.S. Const. art. I, § 9, cl. 4.

After this Court invalidated a federal income tax as an unapportioned direct tax, *Pollock v. Farmers’ Loan & Tr. Co.*, 158 U.S. 601 (1895), Congress and the States approved the Sixteenth Amendment. It provides:

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration. U.S. Const. amend. XVI.

Like all congressional powers, that power has always been limited—here, it extends only to “incomes, from whatever source derived.”

“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 ... 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.” *Merchs.’ Loan & Tr. Co. v. Smietanka*, 255 U.S. 509, 519 (1921). The people who adopted the Sixteenth Amendment had in mind the plain and longstanding meaning of “income”: for something to be “income,” it must, in some way, “come in.” Black’s Law Dictionary defined the term as “*the return in money* from one’s business, labor, or capital invested; gains, profit, or private revenue.” Pet. App. 46–49 (Bumatay, J., dissenting) (quoting *Income*, Black’s Law Dictionary (2d ed. 1910)) (emphasis added). Other dictionary definitions from the ratification era define income similarly. *Id.* (citing such definitional sources). These sources confirm that “income” requires realization.

These definitions also align with the historical context. At the founding, the Framers realized that “a signal advantage” of indirect taxes on goods was that “they contain in their own nature a security against excess”—higher taxes mean that consumers buy less. *The Federalist* No. 21 (Alexander Hamilton). For direct taxes, however, “no limits to the discretion of the government are to be found in the nature of things.” *Id.* The apportionment requirement therefore provided the necessary check on that direct taxation power. Rather than undo that balance, the Sixteenth Amendment created a narrow exception for incomes. As this Court noted from the start, “[t]he Sixteenth

Amendment must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the Amendment was adopted.” *Eisner v. Macomber*, 252 U.S. 189, 205 (1920). Given the history and the Amendment’s text, “this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function.” *Id.* at 206.

B. The Court’s Unbroken Line of Precedent Confirms the Realization Requirement.

Realization is a threshold requirement for the text’s clear “income” command. It “generally requires some sort of identifiable event prior to gain or loss recognition.” Rodney P. Mock & Jeffrey Tolin, *Realization and Its Evil Twin Deemed Realization*, 31 Va. Tax Rev. 573, 575 (2012). This Court has consistently maintained that line.

Just seven years after the Amendment was adopted, the Court held that “income” requires realization. The “characteristic and distinguishing attribute of income” is thus a gain “coming in, being ‘derived’—that is, received or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal.” *Macomber*, 252 U.S. at 206–07 (emphases omitted). Applying that definition in *Macomber*, the Court was “brought irresistibly to the conclusion that neither under the Sixteenth Amendment nor otherwise has Congress power to tax without apportionment ... accumulated profits [of a corporation] ... as income of the stockholder.” *Id.* at 219.

Since then, the Court has continued to enforce the requirement. The “Court has in no post-*Eisner v. Macomber* case indicated the slightest relaxation in the rule that realization is necessary before there can be taxable income.” Edward T. Roehner & Sheila M. Roehner, *Realization: Administrative Convenience Or Constitutional Requirement?*, 8 Tax L. Rev. 173, 174 (1953). For instance, the collection of punitive damages was deemed “income,” because the damages received were “accessions to wealth, *clearly realized*, and over which the taxpayers have complete dominion.” *Comm’r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955) (emphasis added). The Court approvingly cited *Macomber* as recently as 2012. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 571 (2012).

Realization is “usually” satisfied by the “receipt of [income] by the taxpayer,” but can also occur when “the final event of enjoyment of the income” is “consummated by some event other than the taxpayer’s personal receipt of money.” *Horst*, 311 U.S. at 116. Giving away income before collecting it did not allow the taxpayer to evade realization for tax purposes, the Court has held, because the taxpayer “*realized* [the enjoyment of the economic benefit accruing to him] as completely as ... if he had collected the interest in dollars.” *Id.* at 117 (emphasis added).

Although a “[g]ain may occur as a result of exchange of property, payment of the taxpayer’s indebtedness, relief from a liability, or other profit realized from the completion of a transaction,” *Helvering v. Bruun*, 309 U.S. 461, 469 (1940), it remains true that “only gain or profit may be taxed under the Sixteenth Amendment,” *Burnet v. Sanford & Brooks Co.*, 282 U.S. 359, 362–63 (1931). That is because “[t]he dominant purpose of the revenue laws is the taxation of income to those who

earn or otherwise create the right to receive it and *enjoy the benefit of it when paid.*” *Horst*, 311 U.S. at 119 (emphasis added).

The realization requirement accomplishes that purpose. It explains how a lessor-landowner “realized taxable gain from the forfeiture of a leasehold” after the lessee had constructed a new building on the land. *Bruun*, 309 U.S. at 464. The lessor “actually received something new. He came into possession of his property and found a new and valuable building thereon.” *Roehner & Roehner*, supra, at 178. At the same time, “the [Sixteenth] Amendment isn’t an unlimited expansion of the taxing power”; the power is limited by the realization requirement. Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of ‘Incomes,’* 33 *Ariz. State L.J.* 1057, 1061 (2001).

C. The Ninth Circuit Erased Settled Constitutional Lines.

Because the Moores undisputedly did not realize any income, the Constitution precludes their investment from being deemed “income” subject to taxation.

The Ninth Circuit described the MRT and its structure as “a novel concept.” Pet. App. 8. After “dwelling ... on some general principles,” *id.*, the court of appeals analyzed the novel statute’s constitutionality by reasoning:

- The Sixteenth Amendment allows the federal government to tax income without apportionment. *Id.* at 11.
- Income is difficult to define. *Id.*
- Realization of income is not a constitutional requirement. *Id.* at 12.

- Taxable gains are construed broadly and are not always shielded by the corporate form. *Id.* at 12–13.
- The MRT is thus constitutional. *Id.* at 13–14.

Nowhere in that reasoning did the court explain how the Moores’ interest in the business can qualify as having given rise to income. The Moores never made any “profit gained through sale or conversion of capital assets.” *Smietanka*, 255 U.S. at 517–18 (quoting *Macomber*, 252 U.S. at 207). Even if the concept of income might be “flexible,” or determined “case by case,” that did not authorize the Ninth Circuit to disavow applying any concept of realization to an admittedly “novel” tax scheme. Pet. App. 8, 11. “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), and flexibility is not a license to avoid a definition altogether. To the contrary, “the term ‘income’ still retains realization as a definitional requirement.” Pet. App. 54 (Bumatay, J., dissenting).

The Moores have not “received ‘income’ from [their investment] under the Sixteenth Amendment.” Pet. App. 55. The Ninth Circuit’s contrary decision conflicts with a century of precedent, the original meaning of the Sixteenth Amendment, and the meaning of “income.”

II. THE COURT SHOULD REAFFIRM THAT REALIZATION IS CRITICAL TO THE CONSTITUTION’S LIMITATION ON FEDERAL TAXATION POWER.

The realization requirement provides a critical constitutional check on the federal taxation power. That requirement is also an essential piece of the constitutional framework against which application of the MRT must be interpreted and analyzed. The court of

appeals instead jettisoned that requirement in a ruling that is both wrong and contrary to this Court's repeated admonition about the need for predictable and administrable tax laws.

A. The Realization Requirement Provides Predictability.

This Court has often “accommodate[d] the reality that tax administration requires predictability.” *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 459–60 (1995). “[I]n tax law,” the Court has said, “certainty is desirable.” *United States v. Generes*, 405 U.S. 93, 105 (1972). Or, even more strongly, “tax law ... can give no quarter to uncertainty.” *Thor Power Tool Co. v. Comm’r*, 439 U.S. 522, 543 (1979). There is, in short, a long-established “need for ... uniform rule[s] on” questions of tax law. *Comm’r v. Bilder*, 369 U.S. 499, 501 (1962); see also *Besseney v. Comm’r*, 379 F.2d 252, 257 (2d Cir. 1967) (“predictability [is] peculiarly essential in tax matters”).

The reason is simple: “[w]hen courts readily undertake [the] task[]” of “reexamin[ing]” tax law principles, taxpayers lose the ability to “rely with assurance on what appear to be established rules.” *United States v. Byrum*, 408 U.S. 125, 135 (1972). Indeed, “much tax planning must proceed on the basis of settled rules. Avoidance of risk and uncertainty are often the keys to a successful transaction.” *Chapman v. Comm’r*, 618 F.2d 856, 874 (1st Cir. 1980).

The realization requirement has long provided the requisite, understandable, and administrable limit on the definition of “income.” One motivating “principle” is “that income should be taxed to the party who earns the income and enjoys the consequent benefits.” *Comm’r v. Banks*, 543 U.S. 426, 435 (2005). That prin-

principle allows taxpayers to know when they will be subject to tax, thus providing the certainty and predictability about “income” that they need. Indeed, the principle is so foundational that, according to this Court, “[t]he underlying assumption *always* has been that in order to be taxed for income, a taxpayer must have complete dominion over it.” *Comm’r v. First Sec. Bank of Utah*, 405 U.S. 394, 403 (1972) (emphasis added).

B. The Tax At Issue Here Goes Well Beyond Boundaries of Realization That This Court Has Recognized.

It is certainly true that, in a narrow set of circumstances, this Court has held that a tax may satisfy the realization requirement when the taxpayer’s relationship with an asset is so close as to be functionally equivalent to realization. That functional equivalence is sometimes called “constructive realization,” and the Court has generally looked to factors like proximity and certainty when considering it.

First, as to proximity, the Court has held that realization requires the taxpayer to have some level of “dominion” over the assets. *Glenshaw Glass*, 348 U.S. at 431. For example, “[t]he exercise of that power to procure the payment of income to another is the enjoyment, and hence the realization, of the income by him who exercises it.” *Horst*, 311 U.S. at 118. Or, the Court has held that obtaining the benefit of the economic transaction can be akin to realization: “[t]he income that is subject to a man’s unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not.” *Corliss v. Bowers*, 281 U.S. 376, 378 (1930). “This may occur when [a taxpayer] has made such use or disposition of his power to receive or control the income as to procure in its place other satisfactions which are of economic worth.” *Horst*, 311 U.S. at 116.

Proximity also helps explain why some assets fall on the “income” side of the line, while others do not. The Court has held, for instance, that taxpayers who create trusts for others but retained control over those trusts could be taxed on the trust’s income. *Corliss*, 281 U.S. at 378. By contrast, when a “stockholder has received nothing out of the company’s assets for his separate use and benefit[,] ... he has received nothing that answers the definition of income within the meaning of the Sixteenth Amendment.” *Macomber*, 252 U.S. at 211. Or, the Court has held, “[t]he rental value of the building used by the owner does not constitute income within the meaning of the Sixteenth Amendment,” because it does not add (or make any difference) to the taxpayer’s income. *Helvering v. Indep. Life Ins. Co.*, 292 U.S. 371, 379 (1934).

Second, the realization requirement yields added certainty. The Court has rejected taxes that would eliminate any semblance of certainty. One example is labeling a corporation’s profits the “income” of a stockholder. In that setting, this Court refused to “disregard the essential truth ...; ignore the substantial difference between corporation and stockholder; treat the entire organization as unreal ...; and indulge the fiction that they have received and realized a share of the profits of the company which in truth they have neither received nor realized.” *Macomber*, 252 U.S. at 213–14. Acknowledging the possibility of constructive realization by corporate shareholders, the Court recognized that the law may “look through the form of the corporation and determine the question of the stockholder’s right, in order to ascertain whether he has received income taxable by Congress without apportionment.” *Id.* at 213. But those stockholders in *Macomber* had no “claim against the going concern for any particular sum of money, or a right to any particular portion

of the assets or any share in them unless or until the directors conclude that dividends shall be made.” *Id.* at 209. “Nor [wa]s it the interest of an owner in the assets themselves, since the corporation has full title, legal and equitable, to the whole.” *Id.* at 208. “The essential and controlling fact [wa]s that the stockholder has received nothing out of the company’s assets.” *Id.* at 211.

The Court need not revisit any of these precedents or principles here, because this application of the MRT is *nothing like* constructive realization taxation schemes that the Court has upheld against constitutional challenges. The Moores have zero proximity to their investment in their friend’s startup company: what the Ninth Circuit deemed their “income” is half-way around the world, being reinvested in farming equipment. See *id.* at 209–10 (“Often, especially in a growing business, only a part, sometimes a small part, of the year’s profits is in property capable of division; the remainder having been absorbed in the acquisition of increased plant, equipment, stock in trade, or accounts receivable, or in decrease of outstanding liabilities.”). They have no control over it, or any certainty that they will ever see a penny from the investment: “every dollar of [the Moores’] original investment ... still remains the property of the company, and subject to business risks which may result in wiping out the entire investment.” *Id.* at 211. Indeed, there is no serious dispute that Moores’ business interest lacks realization—or anything that even comes close to what this Court has previously held to be realized income.

That is enough to decide this case for the Moores. The realization requirement *is* a constitutional requirement, and the constitutionality of applying the MRT here must be assessed against that requirement.

The Ninth Circuit’s decision to dodge that question entirely was error.

C. Reaffirming Realization’s Constitutional Foundation Is Important For Businesses and the Economy.

“In many respects,” the realization requirement is “the only governor restricting Congress’s ability to tax economic gains.” Mock & Tolin, *supra*, at 600. Taking off that constitutional governor, as the Ninth Circuit did, risks emboldening lawmakers and risks significant practical consequences. As the dissent put it, “[d]ivorcing income from realization” could “open[] the door to new federal taxes on all sorts of wealth and property without the constitutional requirement of apportionment.” Pet. App. 55.

The possibilities stretch as wide as the congressional imagination might take them. Congress could, theoretically, try to tax property based on unrealized gains or rental value. This would result in tax to corporations on the assets used in their businesses as well as on shareholders of those entities whose stock has appreciated, often just temporarily. Or Congress could target certain corporate assets to score political points. Similar implications are possible for financial markets, where assets famously see their values swing day to day. Consider, for instance, a stock price that fluctuates wildly in response to trading activity—moving from around \$20, to more than \$300, back down to about \$60 in less than a month. Nothing would stop Congress, under the Ninth Circuit’s reasoning, from calling intermittent gains “income.” But owners deemed to be swimming in “income” after the bump soon saw those potential gains plummet. It makes no sense that investors who hold assets may end up paying taxes on investments while never receiving a dollar from them.

There are numerous problems with allowing Congress to tax unrealized amounts like this. To start, it would be profoundly unworkable. For any non-publicly traded assets, taxpayers and the government would need valuations, which are both costly to obtain and notoriously subjective. See *Fir Tree Value Master Fund, LP v. Jarden Corp.*, 236 A.3d 313, 315 (Del. 2020) (In a valuation dispute, “the parties’ experts presented such wildly divergent discounted cash flow models that, in the end, the models were unhelpful to the court”). And what about declines in valuation when stocks are down—would individuals get to claim losses? That would mean that in time of recession, when the government needs funds the most, it would face endless tax refund claims.

Even if it were workable, permitting taxes on unrealized gains risks drastically changing the incentives for businesses and their investors. “[T]he tax consequences of commercial transactions are a relevant, and sometimes dispositive, consideration in a taxpayer’s decisions regarding the use of his capital.” *United States v. Carlton*, 512 U.S. 26, 38 (1994) (O’Connor, J., concurring in the judgment). If a company’s profits that it reinvests can nonetheless be deemed “income” to its shareholders, then investors may simply demand dividends early and often to realize their potential income. This will deprive small and large companies of funds needed to invest in replacing property, plant, and equipment or to fund cutting edge technological research to keep America at the forefront of innovation. Particularly for small or startup businesses, moreover, paying out dividends is almost never the right decision because such entities “usually” and rightly “choose to reinvest their earnings into the business ... to support their development, growth, and ex-

pansion strategies,” which may include investing in research, property, or equipment. Monika Ghosh, *Do Startups Pay Dividends?*, Jumpstart (Mar. 5, 2021). These norms are all in jeopardy under the Ninth Circuit’s reasoning.

Abandoning the realization requirement also creates broader risks for the economy as a whole. Uncertainty costs businesses money. They are forced to hire lawyers and accountants to navigate the uncertainty, creating a deadweight loss to the nation’s economy. See Jason J. Fichtner & Jacob M. Feldman, *The Hidden Costs of Tax Compliance*, Mercatus Ctr. 9 (May 20, 2013) (explaining that estimated, aggregate compliance costs “exceed[] the profits of the United States’ 25 largest corporations”). As Treasury says, “[t]he cost of those lawyers and accountants adds to the price of every product, but they do nothing to make our factories more efficient, our computers faster or our cars more durable.” Press Release, Dep’t of the Treasury, *Treasury Secretary Paul O’Neill Statement on Treasury’s Plan to Combat Abusive Tax Avoidance Transactions* (Mar. 20, 2002). Such increased compliance costs “raise prices and curtail innovation.” Laura Alix, *Rising Compliance Costs are Hurting Customers*, *Banks Say*, Am. Banker (Apr. 12, 2018).

Even after consulting with experts, “[w]hen businesses are uncertain about taxes,” they “adopt a cautious stance” because “it is costly to make a ... mistake.” Steven J. Davis et al., *Business Class: Policy Uncertainty Is Choking Recovery*, Am. Enter. Inst. (Oct. 6, 2011). They may over-report their tax burdens to avoid an audit. See Leigh Osofsky, *The Case Against Strategic Tax Law Uncertainty*, 64 Tax L. Rev. 489, 499–501 (2011) (outlining risk-aversion models that predict over-reporting in the face of uncertainty “to avoid a higher perceived chance of audit and resulting costs”).

Consider the risk of a tax on unrealized appreciation in assets: that would mean that businesses withhold capital that would otherwise go to beneficial investments. Businesses may also avoid otherwise profitable endeavors because of uncertainty over how the results of such investments will be taxed.

In short, businesses' responses to tax uncertainty create significant economic harms. They face unnecessary compliance costs and difficulty navigating perverse incentives. And consumers could have to pay many times over—suffering the generalized depressive effect of deadweight loss on the economy while also paying more for goods and services while also themselves being subject to tax as shareholders on a company's undistributed earnings. The Sixteenth Amendment's realization requirement helps protect against these harms. The Court should reaffirm its validity and, in doing so, reinstate the predictability and stability that the realization requirement brings to businesses and the economy.

CONCLUSION

The Court should reverse the decision below and send this case back to the Ninth Circuit.

Respectfully submitted,

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