**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 Petition for a 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


JONATHAN D. URICK
TYLER S. BADGLEY
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

GORDON D. TODD*
JOSHUA J. FOUGERE
BROOKE B. BOYD
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
gtodd@sidley.com

*Counsel for Amicus Curiae*


March 27, 2023


* Counsel of Record

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ........................................ ii

INTEREST OF *AMICUS CURIAE* ............................. 1

INTRODUCTION AND SUMMARY ........................... 2

ARGUMENT ................................................................ 3

I. THE COURT SHOULD GRANT REVIEW BECAUSE THE NINTH CIRCUIT'S REALIZATION HOLDING IS WRONG. ......... 3

A. Income Has A Plain Meaning and Requires Realization. ............................................. 3

B. The Ninth Circuit's Holding Eviscerates The Sixteenth Amendment's Income Requirement. .......................................... 6

II. THE COURT SHOULD GRANT REVIEW BECAUSE THE QUESTION PRESENTED IS PRESSING AND IMPORTANT. ...................... 7

A. The Ninth Circuit's Decision Creates Uncertainty that Negatively Impacts Businesses and the Economy. ................ 7

B. By Eliminating the Realization Requirement, the Ninth Circuit Eliminated the Constitutional Limiting Principle. ...... 10

C. Correcting the Ninth Circuit's Reasoning Is Necessary to Realign the Interpretation of the Sixteenth Amendment With Established Constitutional Boundaries. .......................................... 13

CONCLUSION ........................................................ 15

## TABLE OF AUTHORITIES

CASES Page

*Bessenyey* v. *Comm'r*, 379 F.2d 252 (2d Cir. 1967) ........ 7
*Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1 (1916) ........ 14
*Burk-Waggoner Oil Ass'n* v. *Hopkins*, 269 U.S. 110 (1925) ........ 6
*Chapman* v. *Comm'r*, 618 F.2d 856 (1st Cir. 1980) ........ 8
*Comm'r* v. *Banks*, 543 U.S. 426 (2005) ........ 10
*Comm'r* v. *Bilder*, 369 U.S. 499 (1962) ........ 7
*Comm'r* v. *First Sec. Bank of Utah*, 405 U.S. 394 (1972) ........ 10
*Comm'r* v. *Glenshaw Glass*, 348 U.S. 426 (1955) ........ 5, 10
*E. Enters.* v. *Apfel*, 524 U.S. 498 (1998) ........ 14
*Eisner* v. *Macomber*, 252 U.S. 189 (1920) ........ 4
*Fir Tree Value Master Fund, LP v. Jarden Corp.*, 236 A.3d 313 (Del. 2020) ........ 8
*Helvering* v. *Horst*, 311 U.S. 112 (1940) ........ 5
*Ivan Allen Co.* v. *United States*, 422 U.S. 617 (1975) ........ 5
*Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994) ........ 13
*Louisiana* v. *Biden*, 55 F.4th 1017 (5th Cir. 2022) ........ 12
*No Mid-Currituck Bridge-Concerned Citizens* v. *N.C. Dep't of Transp.*, 60 F.4th 794 (4th Cir. 2023) ........ 11
*Okla. Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450 (1995) ........ 7
*Pollock* v. *Farmers' Loan & Tr. Co.*, 157 U.S. 429 (1895) ........ 4
*Thor Power Tool Co.* v. *Comm'r*, 439 U.S. 522 (1979) ........ 7

Page

*United States* v. *Byrum*, 408 U.S. 125 (1972) ........ 8
*United States* v. *Carlton*, 512 U.S. 26 (1994) ........ 10, 13
*United States* v. *Generes*, 405 U.S. 93 (1972) ........ 7
*United States* v. *Rahimi*, 61 F.4th 443 (5th Cir. 2023), *petition for cert. filed* (U.S. Mar. 21, 2023) (No. 22-915) ........ 11

CONSTITUTION

U.S. Const. amend. XVI ........ 4
U.S. Const. art. I, § 2, cl. 3 ........ 3, 4
U.S. Const. art. I, § 8, cl. 1 ........ 3
U.S. Const. art. I, § 9, cl. 4 ........ 3, 4

SCHOLARLY AUTHORITIES

Dustin Chambers et al., *How Do Federal Regulations Affect Consumer Prices? An Analysis of the Regressive Effects of Regulation*, 180 Pub. Choice 57 (July 2019) ..... 9
Jason J. Fichtner & Jacob M. Feldman, Mercatus Ctr., *The Hidden Costs of Tax Compliance* (2013) ........ 8
Erik M. Jensen, *Murphy v. Internal Revenue Service, the Meaning of Income, and Sky-is-Falling Tax Commentary*, 60 Case W. Rsrv. L. Rev. 751 (2010) ........ 6, 14
Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of 'Incomes'*, 33 Ariz. St. L.J. 1057 (2001) ..... 14

TABLE OF AUTHORITIES – Continued

Page

Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and its Broader Application,* 97 Nw. U. L. Rev. 189 (2002) .......................... 14

Rodney P. Mock & Jeffrey Tolin, *Realization and Its Evil Twin Deemed Realization*, 31 Va. Tax Rev. 573 (2012) ............................ 4, 11

Henry Ordower, *Revisiting Realization: Accretion Taxation, the Constitution, Macomber, and Mark to Market*, 13 Va. Tax Rev. 1 (1993) ...................................... 5

Leigh Osofsky, *The Case Against Strategic Tax Law Uncertainty,* 64 Tax L. Rev. 489 (2011) ......................................................... 9

OTHER AUTHORITIES

Laura Alix, Am. Banker, *Rising Compliance Costs are Hurting Customers, Banks Say* (Apr. 12, 2018) ........................................... 8

Steven J. Davis et al., Am. Enter. Inst., *Business Class: Policy Uncertainty Is Choking Recovery* (Oct. 6, 2011) .............................. 9

The Federalist No. 21 (Alexander Hamilton) ................................................. 14

Monika Ghosh, Jumpstart, *Do Startups Pay Dividends?* (Mar. 5, 2021) ......................... 10

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) ... 8

## INTEREST OF *AMICUS 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. Until now, realization has 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 (or de-defined) 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 later disappear as valuations or markets fluctuate. Companies no longer control their own realization decisions; Congress does. Such sudden change would precipitate profound uncertainty in an area of

---

[1] Pursuant to Supreme Court Rule 37, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from *amicus*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for the parties received notice of the intent to file an *amicus* brief at least ten days prior to filing.

the law—taxes—that demands certainty. The Chamber therefore files this brief to urge the Court to grant certiorari and reverse.

## INTRODUCTION AND SUMMARY

Countless times every day, the basic fact pattern underlying this case plays out in office buildings and households across the country. Businesses make investments in manufacturing plants or equipment or stocks. Families put money into retirement accounts or make purchases that they hope (and expect) will increase in value over time—anything from baseball cards to jewelry to real estate. That is what petitioners Charles and Kathleen Moore did in 2005, when they invested in a friend's startup company that supplies tools to underserved farmers in India. Like the purchaser of a plant still owned, the contributor to a retirement account still awaiting retirement, or the collector of baseball cards still under a childhood bed, the Moores have not seen or realized a dime since making their initial investment.

What happened to them at the end of 2017, however, was what the court of appeals called "novel." App. 8. With the stroke of a pen, Congress enacted a statute that suddenly declared *the company's* profits, accumulated since *the company* began earning money, to be part of the Moores' 2017 "income." Strange. How could money accumulated across ten years by a company in India be considered income for the Moores in the United States for one specific year? Well, that depends on the definition of income—or it should have. Income has always been marked by the taxpayer's realization of a gain, but the Moores have realized nothing.

The Ninth Circuit's decision upholding this "novel" redefinition of income warrants review. Shrugging at the "difficulty in defining income," the Ninth Circuit

held that, whatever income means, "realization of income is not a constitutional requirement." App. 11–12. That is as wrong as it is perilous. As the dissent aptly summarized, "[w]ithout the guardrails of a realization component, the federal government has unfettered latitude to redefine 'income' and redraw the boundaries of its power to tax without apportionment." *Id.* at 53–54 (Bumatay, J., dissenting from denial of rehearing en banc). Without those guardrails, moreover, congressional experimentation with taxing unrealized increases in value would be a costly mess to administrate, harming businesses and dragging down the economy. The Court should grant certiorari and reverse.

## ARGUMENT

### I. THE COURT SHOULD GRANT REVIEW BECAUSE THE NINTH CIRCUIT'S REALIZATION HOLDING IS WRONG.

Since 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. Income Has a Plain Meaning and Requires Realization.

The Constitution originally contemplated two kinds of taxes: direct and indirect. 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. Direct taxes, moreover, 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.

Today, the Constitution also contemplates another and more specific form of tax: income tax. After this Court struck down a federal income tax as a direct tax that had not been apportioned, *Pollock* v. *Farmers' Loan & Tr. Co.*, 157 U.S. 429 (1895), the people responded, and the Sixteenth Amendment was born. 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. That constitutional greenlight thus applies explicitly and only to "incomes, from whatever source derived."

Income has a plain and longstanding meaning: for something to be "in-come," it must, in some way, "come in." 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." *Eisner* v. *Macomber*, 252 U.S. 189, 206–07 (1920); see also App. 46–49 (Bumatay, J., dissenting) (citing ratification era dictionaries and definitional sources). 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." 252 U.S. at 219.

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. Early on, the Court recognized that 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." *Helvering* v. *Horst*, 311 U.S. 112, 116 (1940). Giving away income before collecting it did not allow the taxpayer to evade realization for tax purposes, the Court held, because the taxpayer "*realized* [the enjoyment of the economic benefit accruing to him] as completely as … if he had he collected the interest in dollars." *Id.* at 117.

Subsequent cases are in accord. 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*, 348 U.S. 426, 431 (1955) (emphasis added). But the inverse is also true. For a tax on a corporation's "accumulated taxable income," for example, it was "essential" to "at once eliminate[], from the measure of the tax itself, any *unrealized* appreciation in the value of the taxpayer's portfolio securities over cost, for any such *unrealized* appreciation does not enter into the computation of the corporation's 'income' and 'earnings and profits.'" *Ivan Allen Co.* v. *United States*, 422 U.S. 617, 627 (1975) (emphases added). In either direction, realization marked the border between what was and was not taxable income. See also Henry Ordower, *Revisiting Realization: Accretion Taxation, the Constitution, Macomber, and Mark to Market*, 13 Va. Tax Rev. 1, 56 (1993) (stating that the Court has "recognized" and "left … intact" a "fundamental realization principle in the Sixteenth Amendment").

### B. The Ninth Circuit's Holding Eviscerates the Sixteenth Amendment's Income Requirement.

The Ninth Circuit described the Mandatory Repatriation Tax (MRT) and its structure as "a novel concept." App. 8. After "dwelling … on some general principles," *id.*, here is how the court of appeals analyzed the novel statute's constitutionality:

- 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 what income actually *is*, much less how the Moores' business interest, undisputedly lacking any realization, can still qualify as income. Even if the concept of income might be "flexible," or determined "case by case," that did not authorize the Ninth Circuit to disavow applying a definition *in this case* to an admittedly "novel" tax scheme. 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 dispense with a definition altogether. See also Erik M. Jensen, *Murphy v. Internal Revenue Service, the Meaning of Income, and Sky-is-Falling Tax Commentary*, 60 Case W. Rsrv. L. Rev. 751, 773–74 (2010) ("Congress should not have the

power, by an artful choice of labels, to sidestep constitutional requirements."). On the contrary, "the term 'income' still retains realization as a definitional requirement." App. 54 (Bumatay, J., dissenting). Applied here, the Moores, who have received no money, have not "received 'income' from [their investment] under the Sixteenth Amendment." *Id.* at 55. The Ninth Circuit's contrary decision conflicts with a century of precedent.

## II. THE COURT SHOULD GRANT REVIEW BECAUSE THE QUESTION PRESENTED IS PRESSING AND IMPORTANT.

The decision below is not only misguided but risks major practical consequences that are contrary to this Court's repeated admonition about the need for predictable and administrable tax laws.

### A. The Ninth Circuit's Decision Creates Uncertainty that Negatively Impacts Businesses and the Economy.

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 *Bessenyey* 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).

Without certainty, businesses and the economy as a whole are bound to suffer well-documented consequences.

First, uncertainty simply costs businesses money, as they are forced to hire lawyers and accountants to navigate the uncertainty, a deadweight loss to the nation's economy. See Jason J. Fichtner & Jacob M. Feldman, Mercatus Ctr., *The Hidden Costs of Tax Compliance* 18 (2013) (explaining that estimated, aggregate compliance costs "exceed[] the profits of the United States' 25 largest corporations"). "The 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). If Congress can tax unrealized amounts, moreover, the government would need to rely on 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 discount cash flow models that, in the end, the models were unhelpful to the court"). The potential for expensive legal disputes will be overwhelming. Such increased compliance costs "raise prices and curtail innovation." Laura Alix, Am. Banker, *Rising Compliance Costs are Hurting Customers, Banks Say* (Apr. 12, 2018).

Second, 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., Am. Enter. Inst., *Business Class: Policy Uncertainty Is Choking Recovery* (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"). In overpaying taxes, 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 or, worse still, channel investments outside of the United States altogether.

Businesses' necessary and predictable responses to tax uncertainty benefit no one in the long run. Consumers are affirmatively harmed, as they have to pay twice—suffering the generalized depressive effect of deadweight loss on the economy while also paying more for goods and services. Indeed, "one cannot deny that compliance with regulations translates into higher costs for would-be entrants and/or incumbent businesses, which ultimately increases prices for consumers." See Dustin Chambers et al., *How Do Federal Regulations Affect Consumer Prices? An Analysis of the Regressive Effects of Regulation*, 180 Pub. Choice 57, 58 (July 2019).

Finally, permitting taxes on unrealized gains—as the decision below does—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 reinvestment of profits can be deemed "income," then investors may simply demand dividends early and often in order to actually *realize* their potential income. Particularly for small or startup businesses, however, 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 expansion strategies," which may include investing in research, property, or equipment. Monika Ghosh, Jumpstart, *Do Startups Pay Dividends?* (Mar. 5, 2021). These norms are all in jeopardy under the Ninth Circuit's reasoning.

### B. By Eliminating the Realization Requirement, the Ninth Circuit Eliminated the Constitutional Limiting Principle.

The realization requirement has long provided the requisite, understandable, and administrable limit on the definition of "income." Not only that, but taxpayers generally control when gains are realized, thus providing precisely the kind of certainty and predictability over "income" that taxpayers need. Gains have been recognized as income, for example, when they are "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Glenshaw Glass*, 348 U.S. at 431. "Looking to control over the income-generating asset," moreover, "preserves the principle 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). Put another way, "[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). Statements like

these are why, "[i]n many respects," the realization requirement is "the *only* governor restricting Congress's ability to tax economic gains." Mock & Tolin, *supra*, at 600 (emphasis added).

The Ninth Circuit threw out that governor, providing no limiting principle in its place. That alone seriously undermines the court's analysis. See, *e.g.*, *United States* v. *Rahimi*, 61 F.4th 443, 453 (5th Cir. 2023) (detailing the parade of horribles that might result when an interpretation "admits to no true limiting principle"), *petition for cert. filed* (U.S. Mar. 21, 2023) (No. 22-915); *No Mid-Currituck Bridge-Concerned Citizens* v. *N.C. Dep't of Transp.*, 60 F.4th 794, 802 (4th Cir. 2023) (rejecting argument after "see[ing] no limiting principle to th[e] standard").

"Worse yet, by dispensing with the realization requirement for income without offering any other limiting principle, [the Ninth Circuit] open[ed] the door to expansion of the federal taxing power beyond the limits placed by the Constitution." App. 39 (Bumatay, J., dissenting). "Indeed, without a realization requirement to cabin the scope of 'incomes,' it is hard to see how the apportionment requirement has any remaining relevance." *Id.* at 55.

The dissent properly recognized that "the consequences of [the court's] decision extend far beyond the Mandatory Repatriation Tax" and invite "new federal taxes on all sorts of wealth and property." App. 55. The possibilities stretch as wide as the congressional imagination might take them. Why not, for example, a tax on corporate property based on unrealized gains or rental value? Congress could even target certain corporate assets to score political points—such as by taxing automation equipment that replaces employees.

Similar implications are possible for the famously fluctuating financial markets. A tax on unrealized gains for holding companies or investment companies seems perfectly within the Ninth Circuit's view—even though holding and trading assets is what those companies do. Or Congress could reach more broadly. Last year, for instance, after a series of high-profile ads, many people and companies purchased cryptocurrencies that rapidly increased in value. Nothing would have stopped Congress, under the Ninth Circuit's reasoning, from calling those gains "income," free of constitutional encumberment. But owners deemed to be swimming in "income" after the bump soon saw those gains plummet. It makes absolutely no sense that investors who hold assets may wind up never receiving a thing for their investments—except a tax bill.

It gets worse. If Congress can tax increases in value—even value that may disappear—then fairness would require that taxpayers can deduct unrealized losses. That just increases administrability headaches for everyone: taxpayers would presumably claim such benefits to reduce tax bills whenever possible, and that would surely prompt increased government scrutiny and examination. What is more, government tax revenues could rise and fall as the markets rise and fall, but compliance costs would be a one-way ratchet—always up.

While such hypotheticals might seem "outlandish," they pointedly expose the flaws in the Ninth Circuit's approach: because the Ninth Circuit provides "no dividing line by which a court might rule out the one and uphold the other," there is functionally "no line at all." *Louisiana* v. *Biden*, 55 F.4th 1017, 1031 (5th Cir. 2022). The potential risks to companies are endless.

### C. Correcting the Ninth Circuit's Reasoning Is Necessary to Realign the Interpretation of the Sixteenth Amendment With Established Constitutional Boundaries.

The Constitution imposes numerous safeguards that prevent the government from making rapid changes that would unsettle expectations. Such principles "find[] expression in several [constitutional] provisions," *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994), and often implicate tax laws.

First, "a retroactive tax provision [can be] so harsh and oppressive as to transgress the constitutional limitation" of due process. *Carlton*, 512 U.S. at 30. When "Congress act[s] promptly and establishe[s] only a modest period of retroactivity," like "only slightly greater than one year," a tax law's retroactive effect has been deemed permissible. *Id.* at 32–33. But a tax law that deals with a "novel development" regarding "a transfer that occurred 12 years earlier" has been held unconstitutional. *Id.* at 34 (discussing *Nichols* v. *Coolidge*, 274 U.S. 531 (1927)). Here, of course, the Ninth Circuit called the MRT a "novel concept," and it reached back—not one, not twelve—but more than *thirty years* into the past, long after companies made decisions about where to locate their long-term assets.[2] App 6. The MRT's aggressive retroactivity showcases the danger of unmooring income from its defining principle of realization. Erasing the realization requirement upends taxpayer expectations—leaving them looking over their shoulders for what unrealized gain Congress might next call "income."

---

[2] Although the business in which the Moores invested began accumulating profits in 2006, the MRT's retroactivity period reaches all the way back to 1986.

Second, "the label 'tax' confers no immunity to the principles of the Takings Clause." Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and its Broader Application,* 97 Nw. U. L. Rev. 189, 190 (2002). In that setting, too, "investment-backed expectations" play an important role in reining in government overreach. See, *e.g.*, *E. Enters.* v. *Apfel*, 524 U.S. 498, 523 (1998) (plurality opinion). And whatever latitude the government has to tax, it cannot be "so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property." *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1, 24–25 (1916). Redefining the very basis for Sixteenth Amendment taxation power—income—invites just that sort of arbitrary and confiscatory conduct.

The Constitution's tax-specific provisions have long reflected these same principles. 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. See *Sky-is-Falling*, *supra*, at 778 ("It was because government can more easily abuse direct taxes that many Founders wanted explicit restraint on their use."); Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of 'Incomes'*, 33 Ariz. St. L.J. 1057, 1078 (2001) ("Unless apportionment is interpreted as a significant limitation on the taxing power, why is the rule in the Constitution?").

The Sixteenth Amendment's expansion to taxes on "income" likewise came with a built-in check: realization cabins what Congress can call "income." And realization allows the taxpayer to maintain agency over the decision to engage in a taxable event. The Ninth Circuit's decision takes all of that away. "Divorcing income from realization," however, "opens the door to new federal taxes on all sorts of wealth and property without the constitutional requirement of apportionment." App. 55. The Court should grant certiorari and slam that door back shut.

## CONCLUSION

For the foregoing reasons, and those set forth by the petitioners, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,


| | |
|---|---|
| JONATHAN D. URICK | GORDON D. TODD* |
| TYLER S. BADGLEY | JOSHUA J. FOUGERE |
| U.S. CHAMBER LITIGATION CENTER | BROOKE B. BOYD |
| 1615 H Street, NW | SIDLEY AUSTIN LLP |
| Washington, DC 20062 | 1501 K Street, NW |
| | Washington, DC 20005 |
| | (202) 736-8000 |
| | gtodd@sidley.com |

*Counsel for Amicus Curiae*

March 27, 2023   * Counsel of Record