No. 22-800

In the
Supreme Court of the United States

CHARLES G. MOORE, ET UX.,
Petitioners,

v.

UNITED STATES,
Respondent.

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

BRIEF OF SIXTEENTH AMENDMENT INSIGHTS, LLC AND JEFFREY N. SCHWARTZ AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus curiae Sixteenth Amendment Insights, LLC, is a New York limited liability company formed, among other purposes, to educate the general public regarding the history, meaning and function of the Sixteenth Amendment to the Constitution of the United States of America.[1]

Amicus curiae Jeffrey N. Schwartz is an attorney admitted to practice law in the State of New York who, in addition to his client work and work on various bar association reports and comment letters,[2] is the author of *The 16th Amendment, a National Wealth Tax, and More*, 164 Tax Notes Federal 663 (Special Report, July 29, 2019), and the founder of Sixteenth Amendment Insights, LLC.

In September, 2022, Mr. Schwartz and his wife, Loren F. Levine (together, the "**New York Resident Taxpayers**"), filed an Amended U.S. Individual

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[1] Pursuant to this Court's Rule 37.6, your *amici curiae* note that no part of this brief was authored by counsel for any party, and no person or entity other than the New York Resident Taxpayers referred to herein have made a monetary contribution to the preparation or submission of the brief.

[2] Mr. Schwartz has practiced law for over thirty years, primarily in the area of trusts and estates, and has served as a member of the Trusts, Estates and Surrogate's Court Committee and separate Committee on Estate and Gift Taxation of the New York City Bar Association, and as a member of the Executive Committee of the New York State Bar Association Tax Section during the period he served as a Co-Chair of its Committee on Estates and Trusts.

Income Tax Return (Form 1040X) with the Internal Revenue Service (the "**SALT Deduction Refund Claim**") requesting a refund of Federal individual income tax based on an analysis that certain limitations on the deductibility of state and local taxes on wealth and accessions to wealth are unconstitutional. The related conclusion of that analysis, which takes into consideration the Court's unanimous decision in *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1916), discussed below, is that these limitations must be stricken from the Internal Revenue Code of 1986, as amended, so that the Federal individual income tax can thereafter be categorized in its entirety as a properly uniform Federal *indirect* tax for purposes of Article I of the Constitution.

The Internal Revenue Service granted the SALT Deduction Refund Claim, in full, in March 2023.[3] While

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[3] Sixteenth Amendment Insights, LLC maintains a website at www.directtaxrefund.org where, once the government has filed its reply brief to the Moores' brief on the merits, the public will be able to download, without cost, a redacted version of the SALT Deduction Refund Claim. The website also contains links to materials reflecting the extraordinary public and private service of Charles Evans Hughes, and information relating to the formation and anticipated recognition of The Charles Evans Hughes Society, Inc, as a 501(c)(3) tax-exempt organization. Among his many accomplishments, Charles Evans Hughes played important roles in the ratification and interpretation of the Sixteenth Amendment during his service as: (i) the Governor of the State of New York during early debates over ratification; (ii) an Associate Justice of the Supreme Court of the United States who was a member of the Court that decided *Brushaber*; (iii) an attorney in private practice after his having resigned from the

the SALT Deduction Refund Claim did *not* involve the specific question presented in this case as to whether the petitioners (the "**Moores**") were subjected to a properly apportioned Federal tax on a properly measured amount of their "incomes" within the meaning of the Sixteenth Amendment ("**Sixteenth Amendment Incomes**"), including certain *unrealized* incomes, the SALT Deduction Refund Claim is based on an understanding of the function of Sixteenth Amendment as explained below, and a further analysis supporting the conclusion that Sixteenth Amendment Incomes must be measured "net" (and not "gross") of state and local taxes on wealth and accessions to wealth.

Accordingly, the *amici curiae* are directly interested in those aspects of this case relating to the function of the Sixteenth Amendment and the measurement of Sixteenth Amendment Incomes in general. They are not directly interested in how the Court may rule with respect to the specific provisions of the Mandatory Repatriation Tax being challenged by the Moores because, even assuming a proper measurement of Sixteenth Amendment Incomes may under appropriate circumstances include unrealized accessions to wealth of the type at issue in this case, this case does not involve the further question of whether those accessions (like all other accessions to the wealth of

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Supreme Court to run for President of the United States; and (iv) the subsequently appointed 11th Chief Justice of the United States, serving from 1930 to 1941. *See* notes 26, 28, and 30, *infra*. The government's reply brief is currently required to be filed on or before October 16, 2023.

individuals being subjected to Federal *indirect* income taxation) must also be measured net, and not gross, of state and local taxes on wealth and accessions to wealth.

SUMMARY OF ARGUMENT

The Sixteenth Amendment is not a standalone authorization for Congress to impose taxes on incomes, including because that authority is granted under Article I of the Constitution.[4]

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[4] Your *amici curiae* respectfully note how the difficulties, and risks of misinterpretation, associated with the manner in which the Sixteenth Amendment functions to overturn the result of an earlier decision of this Court while, at the same time, preserving as much of related jurisprudence as possible, are highlighted by relevant legislative history involving Senator Norris Brown of Nebraska. *See* Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 Ariz. St. L. J. 1057, 1114-20 (2001) (explaining that: (i) Senator "Brown proposed the following language [prior to this Court's decision in *Knowlton* categorizing an inheritance tax as an indirect tax]: 'The Congress shall have power to lay and collect taxes on incomes and inheritances.' … However meritorious a constitutional amendment might have been in the abstract, Senator Isidor Rayner of Maryland quickly pointed out that Brown's language was useless. Congress already had the power to tax incomes and inheritances, he noted. The problem, at least with an income tax, was that the Court had said such a tax must be apportioned [among the States by population]: '[I]f this amendment … were to go through, it would not affect the [direct-tax clauses] and there would still have to be an apportionment [by population].' [citations omitted] Rayner was obviously right, and this Brown proposal went nowhere[;]" (ii) Senator Brown proposed a second draft amendment that expressly authorized Congress to lay and collect direct taxes on incomes without apportionment in the manner required of all direct taxes; (iii) Senator Brown's second draft was subsequently

Instead, the Court's unanimous decision in *Brushaber* makes clear how the Sixteenth Amendment eliminates the very last, incremental element of otherwise applicable jurisprudence to cause a Federal tax on a properly measured amount of an individual taxpayer's Sixteenth Amendment Incomes to be properly categorized in *its entirety* as an *indirect* tax for Article I purposes, irrespective of the sources from which any one or more or all of the incomes being subjected to Federal tax are derived.[5]

Accordingly, the Ninth Circuit was mistaken in describing the Sixteenth Amendment as if it were a provision that *exempts* an expansive category of Federal taxes on "incomes, from whatever source derived" from the apportionment requirement otherwise applicable to all Federal *direct* taxes under

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modified before passage; and (iv) the further modifications were made by a Finance Committee chaired by Nelson Aldrich of Rhode Island (who is often characterized as an anti-tax villain). Of note, if Senator Brown's second draft had been adopted, it would have authorized Congress to impose Federal taxes falling within the category of "direct taxes on incomes" free of *both* the special rule of apportionment applicable to *direct* taxes *and* the uniformity requirement contained in Art. I, section 8, cl. 1, because the uniformity requirement applies *only* to *indirect* taxes, and thereby would have caused the very "radical and destructive changes in our constitutional system" identified in *Brushaber* as part of the Court's rejection of related contentions as part of its validation of the first post-Sixteenth Amendment Federal tax on the incomes of individuals as a properly uniform *indirect* tax. *See* note 21, *infra*.

[5] *See* note 4, *supra*, and notes 21-22, *infra*.

Article I.[6] A more accurate description of the Sixteenth Amendment is that it overturns the result of *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), by modifying relevant jurisprudence so that a post-Sixteenth Amendment Federal tax on a properly measured amount of Sixteenth Amendment Incomes must be categorized *in its entirety* as a tax other than a "direct tax" for Article I purposes, irrespective of the sources of any one or more of the incomes being subjected to Federal tax.

Moreover, for the reasons explained below, even if a proper measurement of Sixteenth Amendment Incomes may, under appropriate circumstances, include *unrealized* accessions to wealth over which an individual taxpayer is able to exercise complete dominion, the statutory provisions at issue in this case value relevant *unrealized* accessions to wealth of certain shareholders in an amount *in excess* of the value those shareholders could have realized if, for example, they had sold or otherwise disposed of the entirety of their *non-controlling, minority* interests.[7]

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[6] *See Moore v. United States*, 36 F.4th 930, 935 (9th Cir. 2022) (explaining as part of the court's analysis that "[t]he Sixteenth Amendment, ratified in 1913, exempts from the apportionment requirement [applicable to direct taxes] the expansive category of 'incomes, from whatever source derived.' *See* U.S. Const. amend. XVI.").

[7] Your *amici curiae* respectfully note that the underlying fact pattern and related measurement issues are significantly different from, for example, those in which Congress has made a reasonable effort to impute a reasonable measurement of "unrealized" interest income to individual taxpayers in the form of an amortization of "original issue discount" within the meaning of

Based on this observation and the further explanation of relevant jurisprudence included below, it is clear that the statutory provisions at issue in this case include an unconstitutional, improperly apportioned Federal *direct* tax.

Accordingly, the decision appealed from should be reversed[8] or, at a minimum, vacated and remanded for further briefing, argument and consideration based upon a proper understanding of the function of the Sixteenth Amendment and of the Court's holdings in

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26 U.S.C. § 1272 or as interest income deemed to have been received in respect of a "below-market rate loan" under 26 U.S.C. § 7872. The underlying fact pattern is also significantly different than the one that would arise if Congress were to attempt to tax some properly measured amount of *unrealized* appreciation in respect of property held for personal investment purposes that, if the relevant property had been sold or otherwise voluntarily disposed of, would have generated an equivalent amount of *realized gains* for Federal individual income tax purposes.

[8] Your *amici curiae* respectfully note that reversal may not require related statutory provisions to be stricken as they relate to all taxpayers who, like the Moores, are non-controlling, minority shareholder equivalents. *See* 26 U.S.C. § 7852(a) ("If any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby") and *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911) and *Stanton v. Baltic Mining Co.*, 240 U.S. 103 (1916) (reflecting how the Federal corporate income tax is subject to recharacterization in its entirety as a franchise tax, *i.e.*, as an excise tax on the privilege of conducting business in corporate form, and therefore properly categorized for Article I purposes as an indirect tax, even if relevant statutory provisions include a Federal tax on a corporation's wealth or accessions to its wealth in excess of Sixteenth Amendment Incomes).

Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895) ("***Pollock I***"), *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895) ("***Pollock II***"), *Knowlton v. Moore*, 178 U.S. 41 (1900), *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1916), *Eisner v. Macomber*, 252 U.S. 189 (1920), and subsequent, related jurisprudence discussed below.

ARGUMENT

I. THE COURT SHOULD REVERSE OR, AT A MINIMUM, VACATE THE DECISION AND REMAND THE CASE FOR FURTHER BRIEFING, ARGUMENT AND CONSIDERATION BASED UPON A PROPER UNDERSTANDING OF THE FUNCTION OF THE SIXTEENTH AMENDMENT

a. Direct and Indirect Taxes and Related Tax Apportionment Rules In General

Under Article I of the Constitution (i) all Federal "Capitation[s]" and "other direct" taxes must be apportioned in the same manner as representation in the House of Representatives (*i.e.*, among the several States based upon relative populations as determined by a periodic census or enumeration)[9] and (ii) all Federal taxes *other than direct taxes* (often referred to as "indirect taxes" although that term does not appear in the Constitution itself) must be apportioned by the application of geographically uniform rates of Federal *indirect* taxation to geographically uniform measurements of the relevant matter or thing being

[9] *See* U.S. Const., Art. I, section 2, cl. 3 and section 9, cl. 4.

subjected to Federal *indirect* taxation (*e.g.*, properly measured Sixteenth Amendment Incomes).[10]

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[10] Although Federal *indirec*t taxes are sometimes referred to as being "unapportioned" because they do not have to meet the special rule of apportionment requiring all Federal *direct* taxes to be apportioned among the States by population, the only tax that is truly "unapportioned" is a tax that raises no revenue or, perhaps, a tax on a matter or thing located in a single jurisdiction that raises all of its revenue from a single taxpayer. If a tax raises revenue from multiple taxpayers or is imposed on a matter or thing located, held, generated or otherwise properly sourced in multiple jurisdictions, the aggregate revenue collected by that tax must, as a matter of mathematics, (i) be paid by one taxpayer relative to another, or from one jurisdiction relative to another, in proportion to something and (ii) therefore also be apportioned "by" something. A Federal *indirect* tax is apportioned by the application of geographically uniform rates to geographically uniform measurements of the matter or thing being subjected to Federal tax. *See* U.S. Const., Art. I, section 8, cl. 1; *Knowlton*, 178 U.S. at 106-07 ("[T]hose who opposed the ratification of the Constitution clearly understood that the uniformity clause as to taxation imported but a geographical uniformity, and made that fact a distinct ground of complaint. Thus in the report made to the legislature of Maryland by Luther Martin, attorney general of the State, detailing and commenting upon the proceedings of the convention of 1787, of which convention Mr. Martin was a delegate, in the course of comments upon the tax clause of the Constitution Mr. Martin said (1 Elliott, Debates p. 369): 'Though there is a provision that all duties, imposts and excises shall be uniform—*that is, to be laid to the same amount* [(*i.e.*, to the same rate and measurement)] *on the same articles in each State*—yet this will not prevent Congress from having it in their power to cause them to fall very unequally and much heavier on some States than on others, because these duties may be laid on articles but little or not at all used in some other States, and of absolute necessity for the use and consumption in others; in which case, the first would pay little or no part of the revenue arising therefrom, while the whole or nearly the whole of it would be paid by the last,

b. *Pollock I, Pollock II* and Other Jurisprudence in Effect at the Passage and Ratification of the Sixteenth Amendment

In *Pollock II*, the Court reconsidered certain of its analysis in *Pollock I* relating to a Federal tax on incomes from any source whatever that Congress believed to be a properly apportioned Federal *indirect* tax.[11] The Court struck down the relevant statutory provisions in their entirety based upon an analysis that they included an improperly apportioned Federal *direct* tax on the incomes of individuals derived from their

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to wit, the States which use and consume the articles on which imposts and excises are laid.'") (emphasis original); and *United States v. Ptasynski*, 462 U.S. 74, 84-85 (1983) ("Where Congress defines the subject of a[n indirect] tax in nongeographic terms [and imposes a uniform rate of tax on a uniform measurement of that subject], the Uniformity Clause is satisfied.... But where Congress does choose to frame a tax in geographic terms, [the Federal courts] will examine the classification closely to see if there is actual geographic discrimination.").

[11] *See* Act of Aug. 27, 1894, ch. 349, § 27, 28 Stat. 509, 553 ("from and after the first day of January, eighteen hundred and ninety-five ... *there shall be assessed, levied, collected, and paid annually upon the gains, profits, and [other] income received in the preceding calendar year* by every citizen of the United States ... and every person residing therein, whether said gains, profits, or income be derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, *or from any* other *source whatever*, a tax of two percentum on the amount so derived over and above four thousand dollars, and a like tax shall be levied, collected, and paid annually upon the gains, profits, and income from all property owned and of every business, trade, or profession carried on in the United States by persons residing without the United States.") (emphasis added).

continued ownership of property, real or personal, held for personal use or investment purposes, and the fact that relevant statutory provisions had been enacted as a whole.[12]

Pollock I includes an analysis explaining why "direct" taxation includes both (i) "property taxes" on real estate held by individuals for personal use or investment purposes (as contrasted to "corporate franchise taxes" that might include the value of real estate held by a corporation as part of the relevant tax base[13]), and (ii) taxes on the accessions to the wealth of individuals derived from the continued ownership of real estate held for personal use or investment purposes (*e.g.,* on rents derived from renting a personal residence while temporarily living at another location as contrasted to profits derived from being engaged in the rental of real estate as an active trade or business).[14]

Pollock II then expands upon the jurisprudence of *Pollock I* by categorizing Federal taxes on an individual's ownership of real estate *and/or personal property* held for personal use or investment purposes (*e.g.*, a Federal "intangibles tax" on stocks and bonds held for personal investment purposes) as a *direct* tax and, correspondingly, also includes in the direct tax category taxes on accessions to wealth derived from the

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[12] *See* note 15, *infra.*

[13] *See* cases cited in note 8, *supra*, and reference to taxes on privileges in note 15, *infra.*

[14] *See* note 15, *infra.*

continued ownership of real estate *and/or personal property* held for personal use or investment purposes (*e.g.*, taxes on cash dividends derived from owning common stock held as a personal investment as contrasted to profits derived from trading in that same stock as a broker-dealer).[15]

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[15] *See Pollock II*, 158 U.S. at 635, 637 ("We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, [from continued ownership thereof only] and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such…. We do not mean to say that an act laying by apportionment a direct tax on all real estate or personal property, or the income thereof, might not also lay [indirect taxes such as] excise taxes on business, privileges, employments and vocations…. Our conclusions may, therefore, be summed up as follows: First. We adhere to the opinion already announced [in *Pollock I*], that, taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes. Second. We are of opinion that taxes on personal property, or on the income of personal property, are likewise direct taxes. Third. The tax imposed by sections twenty-seven to thirty-seven, inclusive, of the act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, all those sections, constituting one entire scheme of [income] taxation, are necessarily invalid."). *See also id.* at 672 ("When, therefore, this court adjudges, as it does now adjudge, that Congress cannot impose a duty or tax upon personal property [which post-*Knowlton* constraint is not addressed by the Sixteenth Amendment], or upon income arising either from rents of real estate or from personal property, including invested personal property, bonds, stocks, and investments of all kinds, except by apportioning the sum to be so raised among the States according to population, it practically

Although subsequent pre-Sixteenth Amendment decisions of this Court did not expand *Pollock I* and *Pollock II* beyond income and wealth taxes,[16] they also did not permit Congress to impose *indirect* taxes on the wealth of individuals or on accessions to that wealth derived from the mere continued ownership of property.[17]

c. Meaning and Function of the Sixteenth Amendment

As explained in portions of Chief Justice Roberts' opinion in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) ("***NFIB***") representing

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decides that, without an amendment of the Constitution,—two-thirds of both Houses of Congress and three-fourths of the States concurring,—such property and incomes can never be made to contribute to the support of the national government.") (Harlan, J., dissenting).

[16] *See, e.g.*, *Knowlton*, 178 U.S. at 47, 106-07 (explaining in the context of categorizing an inheritance tax as an *indirect* tax during the period in which the Sixteenth Amendment was drafted that "the public contribution which death duties exact is predicated on the passing of property as the result of death, as distinct from a [direct] tax on property disassociated from its transmission or receipt by will or as the result of intestacy"). *See also Fernandez v. Wiener*, 326 U.S. 340, 362 (1945) ("A tax imposed upon the exercise of some of the numerous rights of property is clearly distinguishable from a direct tax, which falls upon the owner merely because he is owner, regardless of his use or disposition of the property.").

[17] Correspondingly, while Senator Brown's first draft of the Sixteenth Amendment referred to taxes on both incomes and inheritances, his second draft introduced after *Knowlton* referred only to income taxes. *See* notes 4 and 16, *supra*.

the views of a majority of the Court, the Sixteenth Amendment was adopted to overturn the result of *Pollock II*.[18]

Read in isolation, the Sixteenth Amendment can be easily misunderstood as a standalone authorization for Congress to lay and collect taxes on "incomes, from whatever source derived."[19] This is clearly not the case, however, including because the actual grant of Congressional authority to lay and collect taxes on incomes, from whatever source derived, is contained in provisions of Article I that predate the adoption and ratification of the Sixteenth Amendment.[20]

The function of the Sixteenth Amendment is analyzed in the Court's unanimous opinion in *Brushaber* validating the first post-Sixteenth Amendment Federal tax on the incomes of individuals (the "**Revenue Act of 1913**") as a properly apportioned

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[18] *See NFIB*, 567 U.S. at 570-71 ("In 1895, we expanded our interpretation to include taxes on personal property and income from personal property, in the course of striking down aspects of the federal income tax. *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 618 (1895). That result was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes. *See Eisner v. Macomber*, 252 U.S. 189, 218-219 (1920).").

[19] *See* U.S. Const. amend. XVI. ("The Congress shall have the 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.").

[20] *See* U.S. Const., Art. I, section 8, cl. 1. and note 4, *supra*.

Federal *indirect* tax.[21] As explained in *Brushaber*, the Sixteenth Amendment overturns the result of *Pollock II* by:

(i) leaving in place the pre-existing Article I tax categorization and apportionment system;

(ii) eliminating the very last (and only the very last), incremental element of relevant jurisprudence that led the Court in *Pollock II*

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[21] The Court in *Brushaber* specifically rejected the notion that the Sixteenth Amendment created some new, third category of Federal taxation, or permits a Federal direct tax to be imposed other than with an apportionment among the States by population. *See Brushaber*, 240 U.S. at 11-12 ("[T]he confusion is not inherent, but rather arises from the [erroneous] conclusion that the Sixteenth Amendment provides for a hitherto unknown power of taxation, that is, a power to levy an income tax which, although direct, should not be subject to the regulation of apportionment applicable to all other direct taxes…. But it clearly results that the proposition and the contentions under it, if acceded to, would cause one provision of the Constitution to destroy another; that is, they would result in bringing the provisions of the Amendment exempting a direct tax from apportionment into irreconcilable conflict with the general requirement that all direct taxes be apportioned. Moreover, the tax authorized by the Amendment, being direct, would not come under the rule of uniformity applicable under the Constitution to other than direct taxes, and thus it would come to pass that the result of the Amendment would be to authorize a particular direct tax not subject either to apportionment or to the rule of geographical uniformity, thus giving power to impose a different tax in one state or states than was levied in another state or states. This result, instead of simplifying the situation and making clear the limitations on the taxing power, which obviously the Amendment must have been intended to accomplish, would create radical and destructive changes in our constitutional system and multiply confusion.").

to categorize a tax on a properly measured amount of Sixteenth Amendment Incomes as one including one or more *direct* taxes, *i.e.*, a consideration of the fact that the incomes being subjected to Federal tax included incomes derived by individuals from the continued ownership of property, real and personal;[22] and

(iii) thereby causing a post-Sixteenth Amendment Federal tax on a properly measured amount of Sixteenth Amendment Incomes to be properly categorized *in its entirety* as a Federal *indirect* tax, irrespective

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[22] *See Brushaber*, 240 U.S. at 18-19 ("[T]he command of the Amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived, forbids the application to such taxes of the rule applied in the Pollock Case by which alone such taxes were removed from the great class of excises, duties and imposts subject to the rule of uniformity and were placed under the other or direct class. This must be unless it can be said that although the Constitution as a result of the Amendment in express terms excludes the criterion of source of income, that criterion yet remains for the purpose of destroying the classifications of the Constitution by taking an excise out of the class to which it belongs and transferring it to a class in which it cannot be placed consistently with the requirements of the Constitution. Indeed, from another point of view, the Amendment demonstrates that no such purpose was intended and on the contrary shows that it was drawn with the object of maintaining the limitations of the Constitution and harmonizing their operation.").

> of the sources of the income being subjected to Federal *indirect* taxation.[23]

Brushaber further explains how the use of this particular mechanism to overturn the result of *Pollock II*—a narrowly tailored and limited modification to otherwise applicable jurisprudence —also implicitly incorporated the unmodified jurisprudence, as it existed immediately prior to the adoption and ratification of the Sixteenth Amendment, into the Constitution itself as the basis upon which to analyze whether a post-Sixteenth Amendment Federal tax on the ownership of property (*e.g.*, a so-called "national wealth tax"), or on a measurement of the accessions to the wealth of an individual in excess of a properly measured amount of Sixteenth Amendment Incomes, is to be categorized as either "direct" or "indirect" for Article I purposes.[24] This secondary

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[23] *See* note 21, *supra*, and the related discussion of Senator Brown's second, unsuccessful attempt at drafting an amendment contained in note 4, *supra*.

[24] *See Brushaber*, 240 U.S. at 19 ("[T]he Amendment contains nothing repudiating or challenging the ruling in the Pollock Case that the word direct had a broader significance since it embraced also taxes levied directly on personal property because of its ownership, ***and therefore the Amendment at least impliedly makes such wider significance a part of the Constitution***,—a condition which clearly demonstrates that the purpose was not to change the existing interpretation [under relevant jurisprudence, including *Pollock I, Pollock II* and *Knowlton*] except to the extent necessary to accomplish the result intended, that is, the prevention of the resort to the sources from which a taxed income was derived in order to cause a direct tax on the income to be a direct tax on the source itself, and thereby [on the basis of the source of properly

function and purpose of the Sixteenth Amendment—preservation of as much of the Article I direct vs. indirect tax categorization and apportionment system and related jurisprudence as possible—is the generally "underappreciated" or "unknown" purpose of the Amendment that is the counterpart of the "known purpose" of the Sixteenth Amendment referred to by Justice Holmes in his separate dissent in *Macomber*.[25] From Justice Holmes'

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measured income] to take an income tax out of the class of excises, duties, and imposts [referred to as indirect taxes], and place it in the class of direct taxes," with the result that a tax on a properly measured amount of one or more Sixteenth Amendment Incomes remains an indirect tax, irrespective of the sources from which those properly measured incomes are derived, but a tax on an improperly measured amount of those incomes, or on the ownership property, is still subject to potential categorization as direct tax.) (emphasis added). *See also* note 15, *supra* (containing Justice Harlan's description of *Pollock II* that identifies concerns not addressed by the Sixteenth Amendment, *e.g.*, limitations on Congress's authority to tax ownership of personal property).

[25] *See Macomber*, 252 U.S. at 219-20 ("I think that *Towne v. Eisner*, 245 U.S. 418, was right in its reasoning and result and that on sound principles the stock dividend was not income. But it was clearly intimated in that case that the construction of the statute then before the Court might be different from that of the Constitution. 245 U.S. 425. I think that the word 'incomes' in the Sixteenth Amendment should be read in 'a sense most obvious to the common understanding at the time of its adoption.' *Bishop v. State*, 149 Ind. 223, 230; *State v. Butler*, 70 Fla. 102, 133. For it was for public adoption that it was proposed. *McCulloch v. Maryland*, 4 Wheat. 316, 407. The ***known purpose*** of this Amendment was to get rid of nice questions as to what might be direct taxes, and I cannot doubt that most people not lawyers would suppose when they voted for it that they put a question like the present to rest. I am of opinion that the Amendment justifies

emphasis on the "known purpose" of the Sixteenth Amendment, one can also deduce that the views of the majority of the Court in *Macomber* must have correspondingly been influenced, at least in part, by the corresponding "less appreciated" or even "unknown to the general public" purpose.

The analysis of the unanimous Court in *Brushaber* (that included Justice Holmes[26]) is ultimately the basis

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the tax. *See Tax Commissioner v. Putnam,* 227 Mass. 522, 532, 533.") (Holmes, J. dissenting) (emphasis added).

[26] Your *amici curiae* respectfully note that the unanimous opinion in *Brushaber* was written by Chief Justice White, joined by Justices McKenna, Holmes, Day, Hughes, Devanter and Pitney, and with Justice McReynolds having taken no part in the consideration or decision of the case. As an Associate Justice, Chief Justice White had dissented in *Pollock I* and *Pollock II* and subsequently wrote the opinion of the Court in *Knowlton*. Associate Justice White's opinion in *Knowlton* was joined by Chief Justice Fuller (the author of the majority decision in *Pollock II*) and Associate Justices Harlan, Gray, Brewer, Brown, Shiras, and McKenna, but with Justice Brewer dissenting from so much of the opinion as held that a progressive rate of tax could be imposed as part of a Federal *indirect* tax (and in other respects concurring), a further dissent written by Justice Harlan and joined by Justice McKenna relating to a matter of statutory construction (and in other respects concurring) and Justice Peckham having taken no part in the decision. Because Justice Hughes joined in the unanimous opinion in *Brushaber*, it is also reasonable to conclude that the logic of *Brushaber* reflects the reasoning that convinced him during the early debates over the ratification of the Sixteenth Amendment, when he was serving as Governor of the State of New York, to drop his opposition to the ratification of the Sixteenth Amendment. This historical fact is also relevant to a proper understanding of matters addressed in the SALT Deduction Refund Claim. *See* Erik M. Jensen, *The Taxing Power, the*

for why, as noted by Chief Justice Roberts in *NFIB* (citing to pages 218-219 of *Macomber*), this Court continued, even after the ratification of the Sixteenth Amendment, to apply relevant pre-Sixteenth Amendment jurisprudence to categorize a tax on personal property as a direct tax.[27]

Macomber addressed a constitutional issue relating to the Federal income taxation of stock dividends that had previously been addressed as a matter of statutory interpretation in this Court's earlier decision in *Towne v. Eisner*, 245 U.S. 418 (1918). In *Towne*, a unanimous Court held the stock dividend at issue in that case *not* to be "net income" within the meaning of the Revenue Act of 1913. The majority in *Macomber* were of the view that the same type of stock dividend that had been determined not to be "net income" for statutory purposes in *Towne*, but that was expressly made subject to Federal income tax under the second post-Sixteenth Amendment Federal tax on the incomes of

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Sixteenth Amendment, and the Meaning of "Incomes," 33 Ariz. St. L. J. 1057 at 1122 (2001) ("The ratification fight was often intense, but the Amendment was ratified quickly, in less than four years…. There were bumps along the way, most significantly opposition from New York Governor Charles Evans Hughes…. Opponents of the Amendment latched onto the Hughes argument, which delayed ratification in a few states, but Hughes received assurances that the Amendment was intended to remove apportionment only for income taxes already within congressional power, not to extend taxing power to new categories of income. Thereafter, ratification went surprisingly fast.") (Citations omitted).

[27] *See* note 18, *supra*.

individuals, should also *not* be considered "income" within the meaning of the Sixteenth Amendment.[28]

The connection between *Brushaber* and *Macomber*, and to the continued relevance of pre-Sixteenth Amendment jurisprudence, is implicit in additional analysis appearing on page 217 of *Macomber* (the page immediately preceding the pages cited by Chief Justice Roberts in *NFIB*).[29] This connection is also reflected in

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[28] Your *amici curiae* respectfully note how the analysis in *Towne* and *Macomber* focuses, in part, on trusts and estates fiduciary accounting rules, and that there are additional fiduciary accounting rules for when gains and losses are to be "realized" for those purposes as well. The syllabi of *Towne* and *Macomber* also reflect former Associate Justice (and future Chief Justice) Charles Evans Hughes as having participated in each case as an attorney for the ultimately successful taxpayers. *See Towne*, 245 U.S. at 419, *Macomber*, 252 U.S. at 194.

[29] *See* note 18, *supra*, and *Macomber*, 252 U.S. at 217 ("That Congress has power to tax shareholders upon their property interests in the stock of corporations is beyond question [because Congress may in all events lay and collect taxes on that subject in the form of a Federal "direct tax"], and that such interests might be valued [for purposes of measuring the matter or thing being subjected to Federal tax] in view of the condition of the company, including its accumulated and undivided profits, is equally clear. But that this would be taxation of property because of ownership [and not, for example, on actively doing something with property], and hence would require apportionment [as a "direct tax"] under the provisions of the Constitution, is settled beyond peradventure by previous decisions of this court [that include *Brushaber*, *Knowlton, Pollock II* and *Pollock I*].")

the analysis of later cases.[30] This Court has also previously rejected requests to reconsider *Macomber*.[31]

Accordingly, if a Federal tax on one or more "incomes" of individuals includes a tax on their wealth, or on a measurement of the accessions to their wealth in excess of a proper measurement of Sixteenth Amendment Incomes (*e.g.*, a tax on the particular type of non-cash dividend at issue in *Macomber*), then the tax on that wealth or excess income must be analyzed under the jurisprudence that existed immediately prior to the passage and ratification of the Sixteenth Amendment to determine whether that tax is, or is not, properly apportioned in its entirety. Under this pre-Sixteenth Amendment jurisprudence, a Federal tax on an individual's mere continued ownership of wealth, or on an accession to that wealth derived from the continued ownership of property, is to be categorized as a direct tax that, like capitations and all other direct taxes, must be apportioned in the same manner as representation in the House of Representatives (*i.e.*, among the States based on relative populations).

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[30] *See, e.g.*, *Helvering v. Indep. Life Ins. Co.*, 292 U.S. 371, 378-79 (1934) ("If the statute lays taxes on the part of the building occupied by the owner or upon the rental value of that space, it cannot be sustained, for that would be to lay a direct tax requiring apportionment.") (citing, *inter alia*, *Pollock I*, *Pollock II*, *Macomber* and *Brushaber*).

[31] *See Helvering v. Griffiths*, 318 U.S. 371, 374-75 (1943) (denying the Government's request to reconsider *Macomber* by deciding the issue in that case as a matter of statutory interpretation).

d. The Moores Were Subjected to a Tax That Is or Includes an Unconstitutional, Improperly Apportioned Federal Direct Tax

Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955), is often viewed as the beginning of a "modern era" of income tax jurisprudence, separate and distinct from the one including *Macomber*.[32] The reasoning of *Glenshaw Glass* begins with an observation that the punitive damages awards at issue in that case are "undeniable accessions to wealth, clearly realized, and over which the taxpayers ha[d] complete dominion," that ultimately leads to an expansion of earlier, and more limited, descriptions of Sixteenth Amendment Incomes (including the one in *Macomber*) as a result of this Court holding those accessions to wealth, as so described, to be "income" both within the meaning of relevant statutory provisions and within the meaning of the Sixteenth Amendment. *Id.* at 431.

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[32] *See Nathel v. Comm'r*, 615 F.3d 83, 88-89 (2d Cir. 2010) (explaining how "*Macomber*'s limited definition of income [for constitutional purposes] was expanded [as matter of statutory interpretation] in *United States v. Kirby Lumber Co.*, 284 U.S. 1, 3 (1931) (finding that discharge of indebtedness caused the corporation taxpayer to realize an 'accession to income' and was taxable under the Code). Subsequently, in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955), the Supreme Court adopted a broad definition of income [for both statutory and constitutional purposes] as 'instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.' … The Court distinguished the narrow definition of income in *Macomber*, but in doing so, it was careful to maintain the distinction between capital and income.").

Cottage Savings Ass'n v. Commissioner, 499 U.S. 554 (1991), later indicated that the realization element highlighted in *Glenshaw Glass* may not be constitutionally required, and instead may have been relevant only as a matter of statutory interpretation.[33] Nothing in *Cottage Savings* questions the constitutional relevance of the balance of the description of Sixteenth Amendment Incomes in *Glenshaw Glass*, thereby supporting the further conclusion that, even if Sixteenth Amendment Incomes may in certain instances include *unrealized* accessions to wealth, a proper measurement of those incomes cannot include unrealized accessions over which a taxpayer is unable to exercise "complete dominion."

In this context, one of the practical functions of an individual income tax realization requirement is to ensure a proper measurement of the amount or value of an individual taxpayer's gross incomes/accessions to wealth for a relevant measurement period. This is the case because the occurrence of a "realization event" provides an opportunity to properly measure the amount or value of a taxpayer's relevant gross "realized accession to wealth," thereby ensuring that an otherwise properly apportioned Federal *indirect* tax (*e.g.*, one generally imposing a properly uniform rate of Federal *indirect* taxation on a proper measurement the undeniable accessions to wealth over which the taxpayer is able to exercise complete dominion) does not in fact include either:

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[33] *See id.* at 559 (quoting *Helvering v. Horst*, 311 U.S. 112, 116 (1940) ("the concept of realization is 'founded on administrative convenience'")).

(i) An unconstitutional, improperly apportioned Federal *direct* tax on that individual's continued ownership of wealth held for personal use or investment purposes (as contrasted to the tax being in its entirety a tax on accessions to that wealth); or

(ii) An unconstitutional, improperly apportioned Federal *direct* tax on some amount or value of that individual's accessions to wealth in excess of a properly measured amount of Sixteenth Amendment Incomes as the result of some form of mismeasurement or other matter.[34]

In the case of the Moores, it is also important to note how the relevant provisions of Federal tax law at issue in this case appear to have resulted in an overstated value of the *unrealized* accessions to wealth over which they could have exercised complete dominion. This is the case because of:

(i) The nature of the Moores' equity interest in KisanKraft (*i.e.*, their being minority equity owners of a company whose owners did not, or could not, voluntarily elect to be subjected

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[34] *See Winkler v. United States*, 230 F.2d 766 (1st Cir. 1956) (holding it unconstitutional for Congress to subject a bookmaker's profits on bets on horse racing to a Federal indirect tax without providing a deduction against the winnings from a single horse race for at least all of the losses incurred by the bookmaker from losing bets on the same race, and possibly unconstitutional not to allow the bookmaker to calculate his income for the entire period of taxation by netting his aggregate winnings against aggregate losses for the period covered).

to Federal income tax on a "flow-through" basis as a partnership or under the special flow-through type rules applicable to shareholders of so-called "S Corporations");

(ii) The apparent inability of the Moores, as the Federal tax equivalent of minority shareholders in a corporation, to exercise any meaningful control over KisanKraft's dividend policy; and

(iii) The failure to apply any lack of marketability, lack of control or other minority ownership type valuation discount typically applied by the Internal Revenue Service in other valuation measurement contexts.[35]

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[35] *See* Internal Revenue Manuals 4.48.4.2.3(6) (09-22-2020), *available at* https://www.irs.gov/irm/part4/irm_04-048-004 ("As appropriate for the assignment, and if not considered in the process of determining and weighing the indications of value provided by other procedures, the appraiser should separately consider the following factors in reaching a final conclusion of value:

a. Marketability, or lack thereof, considering the nature of the business, business ownership interest or security, the effect of relevant contractual and legal restrictions, and the condition of the markets.

b. Ability of the appraised interest to control the operation, sale, or liquidation of the relevant business.

c. Other levels of value considerations (consistent with the standard of value in IRM 4.48.4.2.2 (1) list item g) such as the impact of strategic or synergistic contributions to value.

In addition, attributing or imputing income earned by an entity or organization that is a partnership, trust or S corporation for Federal tax purposes to its partners, beneficiaries or shareholders, as applicable, is in no way the equivalent of an imputation or attribution of income involving individuals (meaning human beings) who own interests in a company that is not otherwise a "flow-through" entity or organization for Federal tax purposes.[36]

Accordingly, the provisions of Federal tax law at issue in the case result in (i) the imposition of a Federal tax on property held by individuals for personal investment purposes and/or unrealized accessions to

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d. Such other factors which, in the opinion of the appraiser, are appropriate for consideration.").

For example, if a corporation in which a shareholder has a 13% minority interest earns $100 of after-tax net income, the Internal Revenue Service generally would *not* expect the value of that minority interest to increase by a full $13 (13% of $100 of net income), but would instead expect the value of that interest to increase by some lesser amount after taking into consideration factors supporting related valuation discounts, *e.g.*, by $10.40, and not $13, if relevant factors supported a 20% valuation discount ($13 x (100%-20%) = $10.40). Correspondingly, if that 13% minority shareholder acquired its interest for $5 and sold that interest immediately after the corporation earned $100 of after-tax net income, but experienced no other changes in value, it is very unlikely that the minority interest could be reasonably valued at an amount equal to $5 + $13, as contrasted to some lesser amount taking into account appropriate, including arms-length negotiated, valuation discounts (*e.g.*, possibly $5 + $10.40 if a corresponding 20% valuation discount was appropriate under the relevant facts and circumstances).

[36] *See* Pet. Br. at 41-42, 51-52.

their wealth derived from their continued ownership of that property in excess of the value of the unrealized accessions over which they could have exercised complete dominion (and therefore a tax on their wealth or on their "incomes" derived from their continued ownership of personal property in excess of a proper measurement of their Sixteenth Amendment Incomes); and (ii) therefore, a Federal tax that is or includes an unconstitutional, improperly apportioned Federal direct tax.

This analysis supports reversal of the decision of the Ninth Circuit.

CONCLUSION

The Court should reverse or, at a minimum, vacate the decision, confirm its prior analysis of the function of the Sixteenth Amendment reflected in *Brushaber* and *Macomber* and, if the decision is vacated, otherwise remand the case for further analysis, briefing and argument by the parties in a manner that builds upon, and is consistent with, that jurisprudence.

Respectfully submitted,

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