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 *AMICI CURIAE* PROFESSORS AKHIL REED AMAR AND VIKRAM DAVID AMAR IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Akhil Reed Amar and Vikram David Amar are constitutional scholars and historians who seek to aid this Court in its efforts to practice principled constitutional decision-making and faithful originalism.

SUMMARY OF ARGUMENT

Most of the other briefs in this case have missed the point. The Mandatory Repatriation Tax (MRT) passed by Congress and signed into law by President Trump in 2017 does not violate the Apportionment Clause of Article I, Section 2, *for the simple and decisive reason that the MRT is neither a head tax nor a real-estate tax, and thus is not a "direct tax" subject to the Constitution's apportionment requirement*. This is true regardless of the Sixteenth Amendment. In other words, it is true whether or not the MRT is an "income tax" within the meaning of that Amendment. A tax need not be an "income tax" to escape the apportionment requirement. It simply needs to be a revenue measure that is not a "direct tax," under Article I, Section 2.

Only head taxes and real-estate taxes are direct taxes within the meaning of the Founders' Constitution, as understood by—wow!—George Washington; Alexander Hamilton; the overwhelming majority of the 1794 Congress and later early Congresses; and *every* member of this Court to opine on the issue in *Hylton v. United States*, 3 U.S. (3 Dall.)

[1] No party or party's counsel authored or financially supported any of this brief.

171 (1796), the most important case this Court decided pre *Marbury*. Eventually, even James Madison and Thomas Jefferson repudiated their earlier Republican allies and came to agree with their Federalist counterparts on this issue. Post Founding, our approach also has on its side President Abraham Lincoln and Justice John Marshall Harlan the Elder, among countless others. On the other side: We admit that Congressman James Madison once thought otherwise—that is, before he saw the light and forever changed his tune as President of the United States.

We hasten to add that, like many other amici (and the Respondent) in this case, we believe the MRT can indeed be upheld under the Sixteenth Amendment. But the Court need not reach that question. Were the Court to reach that question and for some reason decide that the MRT is not a proper income tax, the MRT should nonetheless survive constitutional challenge (and the judgment below should be affirmed) for precisely the same reason that one of Congress's first major tax laws—a tax on luxury-carriage ownership—survived in *Hylton*: A Carriage Ownership Tax is not a direct tax—and the Mandatory Repatriation Tax is not a direct tax—because neither one taxes human heads or real estate.[2]

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[2] To the extent that the main or only reason that the Court granted certiorari in this case was to clarify the scope of the Sixteenth Amendment, the Court might well consider dismissing the writ of certiorari as improvidently granted. Alternatively, the Court could call for additional briefing on the meaning of "direct" taxes, the issue we focus on in this *amicus* brief. But it would be inappropriate for the Court to reverse the

If Petitioners are correct, then *Hylton* and the federal tax it upheld were wrong. If, instead, *Hylton* and its many Founding-era supporters are correct, then Petitioners are wrong. *Hylton* is the key, and we respectfully urge every member of this Court to read this landmark case carefully.

To be sure, as we explain below, after a century of faithfully and properly adhering to *Hylton*, this Court in the *Lochner-Plessy* era unjustifiably departed from *Hylton*'s clear prescription. And the Court paid a heavy price for its disobedience to the Constitution's text, history, structure, and correctly decided precedent: The first ruling that deviated from *Hylton*—*Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895)—was itself renounced by We the People of the United States via the Sixteenth Amendment.

By our count, on only three occasions in American history have the American People repudiated a Court ruling by constitutional amendment: *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); and *Pollock*.[3] Like the malodorous *Dred Scott*

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judgment below without engaging the fundamental question we discuss here.

[3] The Twenty-Sixth Amendment overturned the Court's ruling in *Oregon v. Mitchell*, 400 U.S. 112 (1970), but this Amendment was not premised on the claim that the *Mitchell* Court had misconstrued the Constitution. *Mitchell*'s holding that the Constitution, correctly read, did not give Congress power to lower the voting age for state elections was in fact a correct reading of the Constitution itself. The Twenty-Sixth Amendment thus amended the Constitution without rejecting

decision, *Pollock*'s mangling of the Constitution was tightly intertwined with slavery. Precisely because the direct-tax rules of the original Constitution were intricately bound up with slavery and the Three-Fifths Compromise, these rules should be narrowly construed, not broadly read—a point clearly made at the Founding in *Hylton* by Justice Paterson and post Reconstruction in dissent in *Pollock* by the first Justice Harlan.

Yet even after the Sixteenth Amendment repudiated *Pollock*, the Court continued, during *Lochner*'s and *Plessy*'s heyday, to disregard *Hylton*'s lessons. *See Eisner v. Macomber*, 252 U.S. 189 (1920). Ultimately, the Court had to backpedal and do damage control. Today, various anti-*Hylton* cases from a century ago have been hollowed out. Now is the time for this Court—a Court openly and admirably committed to following the Constitution's text, history, and structure—to restore *Hylton* and abandon all cases that have broken faith with its originalist teachings.

Either we stand with President George Washington, Treasury Secretary Alexander Hamilton, and the unanimous Supreme Court in 1796—not to mention President Abraham Lincoln and the first Justice John Marshall Harlan—or we stand with Justice Mahlon Pitney and other members

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the Court's reasoning. (Similarly, Chief Justice John Marshall was correct in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), and the later Fourteenth Amendment was not premised on the claim that the *Barron* Court had erred, even though the Amendment did in effect overrule *Barron* on its facts. Ditto for this Court's unanimous ruling in *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875), and the later Nineteenth Amendment.)

of the *Lochner*-era Court, whose approach to constitutional adjudication was nicely captured by Chief Justice Roberts in his 2005 confirmation hearing: "You go to a case like the *Lochner* case . . . and it's quite clear that they're not interpreting the law, they're making the law." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 162 (2005).

Alas, very few of the briefs in today's case even mention, much less discuss, *Hylton*, notwithstanding its centrality. We shall try to redress that oversight here.

ARGUMENT

I. Hamilton and *Hylton* Strongly Support Respondent[4]

The dispute that gave rise to *Hylton* arose from military and fiscal realities in 1794. America needed to finance defense measures against Britain (which had yet to let go of a string of forts in America's northwestern backcountry) and hostile northwestern Indian tribes allied with Britain. At the urging of President Washington, Congress enacted a series of tax measures that included an annual assessment "levied, collected and paid, upon all carriages for the conveyance of persons, which shall be kept by or for any person, for his or her own use, or to be let out to hire, for the conveying of passengers." An Act Laying

[4] This section borrows heavily from AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760–1840, at 340–49 (2021)—a work composed long before the current MRT litigation commenced.

Duties upon Carriages for the Conveyance of Persons, ch. 45, 1 Stat. 373, 373–74 (1794) (repealed 1802).[5] This was a luxury tax upon the sort of high-status conveyances favored and flaunted by wealthy and genteel folk; the statute explicitly exempted from the duty "any carriage usually and chiefly employed in husbandry, or for transporting or carrying of goods, wares, merchandise, produce or commodities." 1 Stat. at 374. The tax was imposed on the ownership or possession of a carriage. How many trips the carriage actually made for personal or business purposes was, under the statute, beside the point.

In late 1794, a carriage-owning Virginian, Daniel Hylton, refused to pay. Led by the staunch states' rightist John Taylor, an anti-Administration former senator from Virginia, and a then anti-Administration Congressman James Madison, Hylton's legal team claimed that the act violated the Constitution because the law imposed a direct tax that was not apportioned among the states. At President Washington's urging, Alexander Hamilton, then in private practice, defended the law's constitutionality before the Supreme Court. In fact, Congress had adopted, and Washington had signed, this law in reliance upon Hamilton's own earlier writings and official reports to Congress. *Hylton* was the only case Alexander Hamilton ever argued to the United States Supreme Court.

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[5] Although Representative James Madison expressly objected on the House floor to the carriage tax as unconstitutional, the Act passed overwhelmingly in the House, by a vote of 49 to 22. 4 ANNALS OF CONG. 729–30 (May 29, 1794). Several days later, the Senate passed the Act by a 12–8 vote. *Id.* at 120 (June 4, 1794).

Several constitutional clauses framed the great constitutional debate in *Hylton*. Article I, Section 8, opened as follows: "The Congress shall have power to lay and collect Taxes, Duties, Imposts and Excises." With not one, not two, not three, but four distinct nouns, the Constitution proclaimed, in the longest section of its first and longest article, that the new Congress would have sweeping power to reach into constituents' pockets. Less than a dozen years after staging an anti-tax revolution in July 1776, Americans had quite evidently drafted an avowedly pro-tax Constitution.

Law commands but rarely explains. However, in two key instances—the Preamble and the Tax Clause—the Constitution did explain itself. Indeed, the two clauses tightly interlinked, textually. Article I, Section 8, proclaimed that Congress needed comprehensive taxing authority, to "Pay the Debts and provide for the common Defence and general Welfare of the United States," an obvious echo of the Preamble's overarching purposes—"common defence" and "general Welfare." Thus, the Tax Clause highlighted the importance of taxation to the Constitution's entire project.

But what, exactly, were the differences between the four nouns—taxes, duties, imposts and excises? Did it matter? The clause implied that for at least one purpose it did: three of these four categories—all "Duties, Imposts and Excises"—would need to be "uniform [that is, governed by the same rates] throughout the United States." By strong negative implication, not all *taxes* (the fourth category) would need to be uniform. In fact, at least one kind of tax, a "direct" tax, would explicitly need to

be *non*-uniform. Under Article I, Section 2, such a tax would have to be apportioned among the states to correspond to the number of seats each state would hold in the U.S. House of Representatives. "Representatives *and direct Taxes* shall be apportioned among the several States . . . according to their respective Numbers." U.S. CONST. art. I, § 2 (emphasis added). This fixed ratio would inevitably oblige the federal government to vary the direct tax, state by state—making the tax non-uniform—in order to raise the same proportional revenue from each state.

The carriage tax offered a clear illustration of all this. If an annual tax on the keeping of carriages was properly characterized as a "Duty," the duty per carriage would need to be the same—uniform—in every state. That is precisely what the 1794 Carriage Act provided—a uniform schedule of carriage taxes that applied identically in all states and territories. But suppose instead that the carriage tax were best viewed as a "direct tax." Given that Virginia, under the most recent decennial census (1790), had nineteen seats in the House of Representatives, and Massachusetts had fourteen, any federal "direct tax" on carriages would have to bring in nineteen dollars from Virginians for every fourteen from Massachusetts residents. Carriage ownership per capita would doubtless vary from state to state. Thus, to meet the requisite nineteen-to-fourteen ratio, the tax owed on each carriage could not be uniform; the government would need to jigger the tax state by state. For every nineteen carriage-tax dollars flowing into federal coffers from Virginia and every fourteen from Massachusetts, exactly thirteen carriage-tax

dollars would need to flow from Pennsylvania, ten from New York, and so on.

If the direct-tax concept were construed and defined broadly, its requirement of equal ratios across more than a dozen states would be an administrative nightmare. It would be a nearly insurmountable obstacle to the enactment of a carriage tax. Consider: If, among two equal-size states, one state had one hundred carriages and another had eight hundred, the tax-per-luxury-carriage would need to be eight times higher in the former (most likely poorer!) state to equalize tax revenue and satisfy the dictates of apportionment.

Or suppose that in one particularly austere state, no one kept carriages at all. No carriage-tax revenue would come from that state. Therefore, no carriage-tax revenue could legally come from *any* state. A single ascetic state could thus make it literally impossible for the tax to be imposed *anywhere* consistent with the requirement of equal ratios across all the states! So could a single ornery state that, say, outlawed carriages just to stymie the federal government!

In oral argument in *Hylton*, Hamilton highlighted these mathematical absurdities. A facile and overly broad definition of the direct-tax category could easily generate "ruinous" tax rates in relatively carriage-free states, or, perhaps worse still, simply "defeat the power of laying" the tax altogether. "This is a consequence," he sensibly warned, "that ought not result from construction" if a more practical and minimally plausible alternative reading were available. "[N]o construction ought to prevail

calculated to defeat the express and necessary authority of the government. It would be contrary to reason, and to every rule of sound construction, to adopt a principle for regulating the exercise of a clear constitutional power which would defeat the exercise of the power." Alexander Hamilton, *Carriage Tax*, *in* 8 THE WORKS OF ALEXANDER HAMILTON 380 (Henry Cabot Lodge ed., 1904).

But what, precisely, was the proper definition of a "direct tax" within the meaning of the Constitution? We know from the Constitution's text that one kind of tax *is* "direct"—a so-called capitation, or per-head tax. *See* U.S. CONST. art. I, § 9 ("No Capitation, or *other* direct, Tax . . . .") (emphasis added). Why, we might ask, were capitations subject to *apportionment* rather than *uniformity*? The embarrassing answer is slavery: The direct-tax and capitation rules were part of a broad pro-slavery deal.

Here's how the deal worked. Because a capitation tax was a direct tax subject to apportionment, Congress could not tax slave property—and thus effectively move the country towards abolition—simply by taxing all slave ownership uniformly. The heads of slaves could not be taxed in the same way as heads of cattle or heads of lettuce (the latter two of which would simply be subject to the requirement of uniformity). A tax on slave property would have to raise as much money from abolitionist Massachusetts as it did from slave-dense Virginia (accounting for different size in the two states' House delegations), making a tax on slavery completely impossible.

As Justice Paterson, himself a Philadelphia delegate, later put the point in *Hylton*:

> The southern states, if no provision had been introduced in the constitution, would have been wholly at the mercy of the other states. Congress in such case, might tax slaves, at discretion or arbitrarily, and land in every part of the Union after the same rate or measure: so much a head in the first instance, and so much an acre in the second. To guard them against imposition in these particulars, was the reason of introducing the clause in the constitution . . . .

Hylton, 3 U.S. at 178 (opinion of Paterson, J.).

The direct-tax category served to protect slavery in another way, too, by distracting popular attention from the pro-slavery bias of the Three-Fifths Clause. The main purpose of that fractional clause was to give the South additional representation in the House and thus in the Electoral College. Slaves would count in apportioning representatives, albeit at a reduced rate, even though slaves were not permitted to vote and were in fact unrepresented by those in their state who could vote. To disguise this ugly fact in the impending ratification process, the delegates drafted obfuscating language that tied the three-fifths rule not just to representation in Congress, but also to taxation: "Representatives *and direct Taxes* shall be apportioned . . . ." U.S. CONST. art. I, § 2 (emphasis added). Thus, although the South received increased representation from their slaves, the clause appeared to counterbalance that benefit with a penalty of

increased taxes for slavery. In reality, the clause frustrated efforts to tax slave property uniformly nationwide.

Beyond capitations, what else fell into the category of direct taxes? Article I, Section 9, referred to "other" direct taxes and thus suggested that capitations were not the *only* direct taxes. Hamilton at oral argument had an answer. The old Congress under the Articles of Confederation had linked land assessments with head counts and had linked both with properly apportioned state-by-state taxes. Unlike fleeting, consumable, and easily alienable assets like carriages, whiskey, tobacco, etc., land was fixed and permanent. It was possible to imagine a state with zero carriages but not one with zero land. (Remember, zero of any direct-taxable item in any state made state apportionment mathematically impossible.) Like population, land values could be made part of a manageable decennial census, unlike many other items that would be much harder to count in every census—whiskey barrels, tobacco hogsheads, and the like.

A definition of direct taxes as subsuming essentially only head taxes and land taxes was not merely historically grounded and functional, but also forceful as a textual matter. A "direct" tax can sensibly be understood as a tax that is impossible, or at least very difficult, to avoid. A carriage tax was easy to avoid: simply stop possessing carriages! But a human head tax could be avoided only by death itself, and a land tax, whose escape would require selling one's homestead, could impose extreme hardship on the many Americans in the 1780s who were land-rich but cash poor. In the illiquid economy that was early

America—a nation short on specie and banks—many a young farmer inherited his family's land but would lack ready money to pay a substantial real-estate tax.[6]

Hamilton himself made this distinction in his *Hylton* oral argument. Indeed, in a letter to his wife extolling Hamilton's argument, Justice Iredell stressed this precise point: "Having occasion to observe, how proper a subject it [a carriage] was for taxation, since it was a *mere article of luxury, which man might either use, or not, as was convenient to him*, he [Hamilton] added, 'It so happens, that I once had a carriage myself, and found it convenient to dispense with it. But my happiness is not in the least diminished.'" AMAR, *supra* note 4, at 347.

Hamilton knew his stuff when it came to taxes. At the 1787 Philadelphia Convention, Hamilton drafted his own constitutional plan that defined "direct taxes" almost exactly the way he and the Court did in *Hylton* nine years later: "Taxes on lands, houses, and other real estate, and capitation taxes shall be proportioned in each State . . . ." 3 THE RECORD OF THE FEDERAL CONVENTION OF 1787, at 628 (Max Farrand ed., 1911).

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[6] For more analysis of this point, see AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005), at 613–14 n.6. Because capital markets are far more liquid today, with easy ways to borrow money against owned assets and to assess and access the current market value of many assets that trade on public exchanges, the illiquidity issues that made land taxes a special hardship in 1787 generally do not apply nowadays for the lion's share of investment assets—a key point missed by notable *amici*, see *infra* pp. 24–25.

Most important of all, Hamilton had publicly laid out his various tax theories for all would-be ratifiers to peruse and ponder. He devoted no fewer than seven (!) *Federalist* essays to the topic of taxation. His analysis in *Federalist* No. 36, where he expressly discussed "direct" and "indirect" taxes, is perfectly on point today. As contrasted with "indirect taxes," he wrote, "direct taxes" beyond capitations simply meant taxes on "real property or . . . houses and lands."[7]

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[7] In a rough draft of his *Hylton* oral-argument notes, Hamilton apparently crafted a slightly broader direct-tax definition that included taxes on the "whole real or personal estate" of individuals. *See Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 572 (1895) (quoting 7 THE WORKS OF ALEXANDER HAMILTON 332 (Henry Cabot Lodge ed., 1885). As actually delivered, his oral argument likely defined direct taxes as involving only heads and land—the two and only two things mentioned by Justice Chase and the other Justices in their seriatim opinions that obviously built on Hamilton's oral advocacy. If Hamilton's actual oral argument—nowhere recorded verbatim—promoted any other definition of direct taxes besides heads and lands, none of the Justices bought it.

As noted above, the heads-and-land formulation aligns perfectly with Hamilton's explication of direct taxes in *Federalist* No. 36, perhaps the most widely distributed ratification-period essay on the meaning of direct taxes. A heads-and-land definition also meshes perfectly with Hamilton's direct-tax ideas at the Philadelphia Convention itself. *See supra* p. 13. Finally, even were one to read Hamilton's rough notes broadly—to mean that a tax imposed on a person's whole estate (which includes real *and* personal property) might by virtue of the ownership of land implicate the concept of direct taxation—these notes speak not of any concern about wealth taxes generally or income taxes generally but only taxes that prominently and explicitly include "real . . . estate"—that is, land. Thus, at most, these rough notes might imply that a non-apportioned wealth tax today might need to exempt real estate (but not anything else).

In ruling unanimously in support of the Carriage Tax, of the Congress, and, indeed, of President Washington himself (who had signed the law and strongly backed it), this Court not only embraced Hamilton's result, but also echoed his reasoning. Justice Samuel Chase reiterated Hamilton's textual, holistic and functional argument that the category of "direct" taxes should include only those that meshed with a workable census-apportionment rule:

> The Constitution evidently contemplated no taxes as direct taxes, but only such as Congress could lay in proportion to the census. The rule of apportionment is only to be adopted in such cases where it can reasonably apply; and the subject taxed, must ever determine the application of the rule. If it is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say, that the Constitution intended such tax should be laid by that rule.

Hylton, 3 U.S. at 174 (1796) (opinion of Chase, J.). Chase concluded by backing Hamilton's view that "*direct taxes contemplated by the Constitution, are only two, to wit, a capitation . . . and a tax on LAND.*" *Id.* at 175 (emphasis added).

Justice William Paterson, who had been Hamilton's fellow delegate at Philadelphia, likewise argued for a narrow reading of the direct-tax category: "The provision was made [by the Philadelphia

drafters] in favor of the southern States [that] possessed a large number of slaves," and thus should not be broadly applied in other contexts. "The rule of apportionment is . . . radically wrong; it cannot be supported by any solid reasoning. Why should slaves, who are a species of property, be represented more than any other property? The rule, therefore, ought not to be extended by construction." *Id.* at 177–78 (opinion of Paterson, J.).

Alexander Hamilton's math made sense, and Daniel Hylton's did not, declared Paterson: "In some states there are many carriages, and in others but few. Shall the whole sum fall on one or two individuals in a state, who may happen to own and possess carriages? The thing would be absurd, and inequitable." *Id.* at 179.

Justice James Iredell also embraced Hamilton's holistic functionalism: "As all direct taxes must be apportioned, it is evident that the Constitution contemplated none as direct but such as could be apportioned. If this cannot be apportioned, it is, therefore, not a direct tax in the sense of the Constitution." *Id.* at 181 (opinion of Iredell, J.). And, indeed, a carriage tax could not be sensibly apportioned because of . . . math, as Hamilton had argued: "If any state had no carriages, there could be no apportionment at all. This mode is too manifestly absurd to be supported." *Id.* at 182.

In the most important of this Court's cases in the eighteenth century, the Justices thus

unanimously[8] backed Hamilton's reasoning, and the tax that had been inspired by Hamilton himself.

II. More Recent Case Law Should Be Harmonized with *Hylton*

In its most important modern tax case, *National Federation of Independent Business (NFIB) v. Sebelius*, 567 U.S. 519 (2012), this Court properly recognized *Hylton*'s significance and nicely summarized its core holding and key reasoning. As Chief Justice Roberts wrote for the Court:

> Soon after the framing, Congress passed a tax on ownership of carriages, over James Madison's objection that it was an unapportioned direct tax. This Court upheld the tax, in part reasoning that apportioning such a tax would make little sense, because it would have required taxing carriage owners at dramatically different rates depending on how many carriages were in their home State. See *Hylton v. United States*, 3 Dall. 171, 174 (1796) (opinion of Chase, J.). The [*Hylton*] Court was unanimous, and those Justices who wrote opinions either directly asserted or strongly

[8] Justice James Wilson, who had ruled against Hylton in the circuit court, did not offer elaborate remarks when the case reached the Supreme Court, but he pointedly noted the unanimity of his colleagues and said that "my sentiments in favor of the constitutionality of the tax in question have not been changed." *Hylton*, 3 U.S. at 184 (opinion of Wilson, J.). Chief Justice Oliver Ellsworth and Justice William Cushing did not take part in the case.

> suggested that only two forms of taxation were direct: capitations and land taxes. See *id.*, at 175; *id.*, at 177 (opinion of Paterson, J.); *id.*, at 183 (opinion of Iredell, J.). That narrow view of what a direct tax might be persisted for a century.

NFIB, 567 U.S. at 570–71 (citation omitted).

Unfortunately, not all post-*Hylton* case law proved faithful to its vision. As the *NFIB* Court went on to observe:

> In 1880, for example, we explained that "*direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate." *Springer*, [102 U.S.] at 602. 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, 218–19 (1920).

NFIB, 567 U.S. at 571.

But, as Professor Bruce Ackerman has demonstrated, the Court's rulings in *Pollock* and

Macomber departed from the originalist understandings that were embodied in *Hylton* and then re-embraced in *Springer* (which properly upheld the President Lincoln-backed income tax enacted to fund the defense of the Union during the Civil War). Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1 (1999). *Pollock* was handed down just a year before *Plessy v. Ferguson*, 163 U.S. 537 (1896), and shared some its racial amnesia. Rather than follow Justice Paterson's admonition in *Hylton* to construe the "direct tax" concept narrowly given the concept's pro-slavery background, the *Pollock* Court, without articulating any historically or textually coherent limiting principle, "blew [the direct-tax provisions of the Constitution] up to unprecedented proportions." Ackerman, *supra*, at 28.

The first Justice Harlan penned a powerful dissent (as he did again a year later in *Plessy*), pointing out how the *Pollock* majority had betrayed the originalist and limited scope of the direct-tax concept. Justice Harlan also pointedly echoed Justice Paterson in noting the links between slavery and the Constitution's special apportionment rules for direct taxes: The *Pollock* majority's ruling, wrote Harlan, was a "disaster to the country. . . . It so interprets constitutional provisions, *originally designed to protect the slave property* against oppressive taxation, as to give privileges and immunities never contemplated by the founders of the government." *Pollock*, 158 U.S. at 684 (Harlan, J., dissenting) (emphasis added).

Harlan was not the only one who denounced the *Pollock* majority. "Nothing has ever injured the prestige of the Supreme Court more," sighed

President and future Chief Justice William Howard Taft.[9] Via the Sixteenth Amendment, the American people registered their emphatic disapproval of *Pollock*.

One might have thought that such a powerful repudiation would chasten the Justices of the early twentieth century, but the Court of that era—most often associated with *Lochner v. New York*, 198 U.S. 45 (1905)—is not known for its general wisdom or institutional restraint. Thus, it is perhaps not completely surprising that the Court in *Macomber* in 1920 reiterated *Pollock*'s mistake: the expansion of the "direct-tax" beyond head-count and real-estate taxes. At issue in *Macomber* was the Standard Oil Company of California's issuance of a two-for-one stock swap for its shareholders; the stock exchange left each shareholder owning the same percentage of the company as before. For this reason, the Court (for whom Justice Pitney wrote) ruled that there was no income generated within the meaning of the Sixteenth Amendment, and therefore Congress could not (absent apportionment) impose any taxes on this event. But whether "income" was generated within the meaning of the Sixteenth Amendment does not answer the real question at issue: whether Congress had the power to impose a tax under these circumstances. As Professor Ackerman explains:

> Let us assume, with Justice Pitney, that Congress's tax on the stock dividend was not within the power vested in it by the

[9] As quoted in a private letter of July 1, 1909 to Taft's close aide, Major Archie Butt. *See* 1 ARCHIBALD BUTT, TAFT AND ROOSEVELT 134 (1930).

> Sixteenth Amendment. This hardly implies that it could not be vindicated by the original grant of power "to lay and collect Taxes, Duties, Imposts and Excises." To the contrary, until *Pollock*, the Court had consistently decided that the "direct tax" clauses included "only capitation taxes . . . and taxes on real estate"—and not shares in firms such as the Standard Oil Company of California! But Justice Pitney cited neither *Hylton* nor any of its progeny—including especially the unanimous decision of the [*Springer*] Court in 1881, upholding the Reconstruction Income Tax . . . . He writes as if *Pollock*'s unprecedented extension of the "direct tax" category to include all forms of property could continue to serve as an unquestionable starting point [notwithstanding the clear repudiation of that case by the American People with the Sixteenth Amendment].

Ackerman, *supra*, at 42.

Happily, the Court has since issued rulings that would permit the tax at issue in *Macomber* (and all of the kinds of taxes at issue in *Pollock*, for that matter). *See United States v. Phellis*, 257 U.S. 156 (1921) (shares in a subsidiary corporation that were issued to stockholders in the parent corporation were taxable as income); *Helvering v. Bruun*, 369 U.S. 461 (1940) (repudiating *Macomber*'s suggestion that "severance" is required before income can be realized); *South Carolina v. Baker*, 485 U.S. 505, 515–25 (1988)

(overruling another aspect of *Pollock*, dealing with Congress's ability to tax income from bonds issued by state and local governments). *See generally* Ackerman, *supra*, at 46–51.

But although the *Lochner* approach to constitutional interpretation has been thoroughly discredited and "*Pollock* was left amongst the doctrinal debris scattered on the landscape[,] [n]one of the landmark New Deal decisions had explicitly swept it away. . . ." *Id.* at 47. For this reason, *Pollock*'s fundamental sin—in disregarding Founding understandings of "direct" taxes—has not explicitly been acknowledged and rectified by this Court.

Like *Plessy* and *Lochner*, *Pollock* and *Macomber* were—to borrow language from this Court in a recent landmark case—"egregiously wrong from the start." Their "reasoning was exceptionally weak, and the decision[s] ha[ve] had damaging consequences." *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). The time is ripe to lay these erroneous *Plessy-Lochner* era cases to rest.

III. The Meese-Calabresi-Lawson *Amicus* Brief Should Not Be Embraced

Although the parties and most of the *amici* have not engaged the foundational questions we address in this brief, one notable *amicus* brief in support of Petitioner, by the Honorable Edwin Meese III, Professor Stephen Gow Calabresi and Professor Gary Lawson, does address *Hylton*. But like the *Pollock* and *Macomber* Courts, the Meese-Calabresi-Lawson brief ("MCL brief") does not offer any

coherent or convincing arguments for disregarding the key teachings of *Hylton*.

The MCL brief's assertions that *Hylton* was "obviously contrived" and that the "Court had no jurisdiction" are beside the point. Landmark cases from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), to *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), may in some respects be "contrived" in the sense that the parties had agendas in bringing these cases. In *Marbury*, the Court in the end expressly held that it lacked jurisdiction; but that has not stopped the rest of the opinion, discussing a wide range of merits questions, from being perhaps the most influential set of pronouncements in the history of the U.S. Reports. As a Founding-era precedent, *Hylton* stands on even stronger ground, given that the Court most emphatically held that it *did* have jurisdiction.

All the Justices in *Hylton* understood and accepted the parties' *ad damnum* stipulations and were eager to rule on the merits to settle an important question of fiscal and national-security policy. Had the circuit court not heard *Hylton*, the same issues could and would have been litigated in state court and come to the Supreme Court by a different appellate mechanism, though perhaps less briskly. *The key point for originalists is that, on the merits, all the participating Justices in fact agreed with Washington and Hamilton and the early Congress*.

Had the Justices said what they said in a newspaper essay instead of a case, their considered views should still carry great weight today. Indeed, the fact that they may have indulged a pleading fiction to officially rule on the merits only shows how

important they considered the underlying issue to be. Over the centuries, this Court has cited *Hylton* in countless cases and has *never* suggested that the case is somehow non-precedential.

The MCL brief also errs in suggesting that the carriage tax technically taxed use, not ownership or possession. In fact, the measure quite explicitly taxed "carriages *kept* by or for any person, for his or her own use . . . ." 1 Stat. 373–74 (1794) (emphasis added). The *carriages*, or the *keeping* of the carriages, were what was taxed, not each particular use. No member of the *Hylton* Court relied upon any kind of use/possession distinction.

Finally, the MCL brief suggests that real estate accounted for much more wealth in the late eighteenth century than it does today. This brief goes on to argue that today taxes on financial instruments—which the brief views as the twenty-first-century equivalent of large real-estate holdings—should be immune from federal taxation absent apportionment. This argument's basic historical and analogic premise fails. Real-estate taxes at the Founding were subject to apportionment (which would make them difficult to levy) not because real estate represented *great wealth* but because real estate often represented *subsistence assets*. In a world where a middling landowner who inherited a family home and some acreage could not easily sell (or borrow on) this land to pay real-estate taxes and thus save the homestead, national real-estate taxes threatened not to soak the rich but to drown the cash-poor. The Carriage Tax in *Hylton* was upheld precisely because it was a tax that burdened only the

wealthy, those with the means to own or possess avoidable luxury items like carriages.

CONCLUSION

Making mistakes is part of life. But doubling down for no good reason on proven errors is another matter. Minds as fine as James Madison's at first botched the direct-indirect tax distinction; as late as 1799 he denounced the carriage tax upheld in *Hylton* as unconstitutional. But over the ensuing years he reversed his stance, and in 1813 as President he signed into law another carriage tax identical in all relevant respects to the one he had previously decried. An Act Laying Duties on Carriages for the Conveyance of Persons, ch. 24, 3 Stat. 40 (1813). *See generally* AMAR, *supra* note 4, at 364–76, 459–60, 770 n.63 (discussing the various factors that led Madison to abandon his early oppositional positions on carriage taxes and the national bank, once he ceased being a mere representative of an anti-Federalist Virginia district and became President of the entire United States). Thomas Jefferson evidently agreed with Madison's change of mind. As President, Jefferson gave no pardons to people who failed to pay the tax, in contrast to the pardons he issued for violations of the Sedition Act, the unconstitutionality of which he (properly) maintained his whole career. Indeed, in 1802, Jefferson himself signed into law a bill that preserved carriage-tax liability for past carriage taxes due, even as the bill repealed the carriage tax prospectively (until its revival under Madison in 1813). *Id*. at 459–60; An Act to Repeal the Internal Taxes, ch. 19, 2 Stat. 148 (1802).

Today's Court should follow Jefferson's and Madison's lead. Thus, it should squarely embrace Hamilton and *Hylton* and, on that basis, should affirm the judgment below. In the process, the Court should formally inter *Pollock* and *Macomber*.

Respectfully submitted,

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