No. 17-1380

In The
Supreme Court of the United States

CHRISTOPHER and PAMELA J. CHAPMAN,
PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICI CURIAE*
OF JOSEPH BANISTER, STEVE HEMPFLING, AND PEYMON MOTTAHEDEH IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Joseph Banister, a Nevada citizen, has an accounting degree, formerly served as an Internal Revenue Service Special Agent, and currently works as an accountant for various clients. Since the late 1990s, he has extensively studied the federal income tax laws. Steve Hempfling, a Californian, is a founder of the Free Enterprise Society; the organization's purpose is to educate its members about constitutional and legal issues, including taxation. Peymon Mottahedeh, a Florida citizen and founder of Freedom Law School, has dedicated himself to informing members of their constitutional and legal rights as well as assisting with various federal income tax problems. Over the past decade and more, these men have publicly expressed concern about the proper application of the federal income tax laws. They believe the Chapmans' Petition for Writ of *Certiorari* has merit and is worthy of this Court's consideration, and reach this conclusion through an analysis of historical income tax acts to the present.

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[1] It is hereby certified that the parties have consented to the filing of this brief; that the parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party or a party to this case authored this brief in whole or in part; and that no person other than these *amici curiae*, and their friends, made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Petitioners, husband and wife Christopher and Pamela Chapman, litigated their cases in the United States Tax Court *pro se*, and suffered adverse judgments. Rather than rehashing the issues raised in Tax Court, they raised on appeal to the Eleventh Circuit two new and purely legal issues. In particular, they addressed the meaning and construction of "gross income" which Congress set forth in 26 U.S.C. §§ 61 and 83, and they addressed the reach and scope of 26 U.S.C. § 1, and its corresponding regulation, 26 C.F.R. § 1.1-1. Owing to the raising of these issues for the first time on appeal, the Circuit Court failed to consider them.

However, this Court has considered new issues on appeal in almost identical circumstances, because they raise questions of law rather than fact. In *Hormel v. Helvering*, 312 U.S. 552 (1941), Hormel raised before this Court for the first time in his litigation a question related to § 22 of the 1939 Internal Revenue Code, the predecessor to 26 U.S.C. § 61. This Court decided that new issue because it raised only a question of law that an appellate court may resolve, and did not raise any question of fact.

Justice requires the same conclusion here. Both Chapmans raised on appeal legal issues of the caliber raised in Hormel. The Eleventh Circuit's *Chapman* decisions thus conflict with this Court's *Hormel* decision. Therefore, this Court should grant the Chapmans' petition pursuant to Rule 10(c), and should reverse the related decisions of the Eleventh Circuit.

But what new, purely legal issues did the Chapmans raise that merit this Court's attention?

First, the Chapmans challenged conventional views regarding the meaning of "gross income" as determined by certain provisions of the Internal Revenue Code of 1986, specifically 26 U.S.C. §§ 61 and 83. They argued before the appellate court that the money they received for their work was exchanged for their labor of equal value.[2] By attributing this value to their labor and deducting such amount from the funds they were paid, they argued that they had no "gain or profit," which resulted in no income tax liability. The legal justification for this process was predicated on their construction of the legal terms set forth in 26 U.S.C. § 83.

Further, as another issue, the Chapmans mounted in the appellate court an attack on 26 U.S.C. § 1 and its corresponding regulation, 26 C.F.R. § 1.1-1. Section 1 of the Internal Revenue Code imposes an income tax on the taxable income of an "individual", without otherwise defining who that "individual" is. The relevant regulation, 26 C.F.R. § 1.1-1, *expands* the definition of "individual" to encompass citizens of the United States. The Chapmans argued in the Eleventh Circuit that the regulation constitutes a nullity as a consequence of its differing substantively from the statute.

The *Amici* assert that the foregoing questions are not "tax protester arguments" and have substantial merit, although they reach this conclusion by a separate analysis from that presented in the Chapmans' petition. While the Chapmans rely upon

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[2] This Court has declared that a party's labor is property. See *Butchers' Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co.*, 111 U.S. 746, 756-57 (1884); *Allgeyer v. Louisiana*, 165 U.S. 578, 589-90 (1897); and *Coppage v. Kansas*, 236 U.S. 1, 14 (1915).

current tax law for their analysis, the *Amici* rely upon historical income tax acts.

This case is about the meaning of terms contained in the various federal income tax laws. The terms in question include "income," "wages," "salaries," and "compensation for personal service," and the manner in which these terms have been used in the income tax laws. The *Amici* rely upon the meaning of these words appearing in the income tax laws in effect for more than 40 years prior to 1954. The Petitioners' argument centers on these and related terms as they have been used in the tax code in effect since 1954.

People commonly and popularly understand "wages" and "salaries" to mean the recipient's "income." However, these words in the federal income tax laws have meanings entirely different from their popular perception. Well-established rules of statutory construction hold that each word appearing in a law must have a different, independent meaning from the surrounding words. For example, according to the common rules of statutory construction, each word in the phrase, "gains, profits, and income derived from salaries, wages, or compensation for personal service," differs in meaning from every other word in the phrase. So "income" differs in meaning from all of these words: "salaries, wages, or compensation for personal service."

"Gross income" for federal income tax purposes is defined by 26 U.S.C. § 61, which provides that "[e]xcept as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following …" Although this section reaches the full scope of the

power to tax incomes pursuant to the Sixteenth Amendment, it does not specifically mention "salaries" and "wages."

However, the predecessor to § 61, § 22 of the Internal Revenue Code of 1939, did mention them. This Court previously determined that § 22 expressed the full power to tax incomes as authorized by the Sixteenth Amendment to the United States Constitution. Section 22 defined "gross income" as including the "gains, profits, and income ***derived from*** salaries, wages, or compensation for personal service." Using the well-established rules of statutory construction mentioned *supra* leads to the conclusion that "gross income" is not the same as "salaries" and "wages," but separately arises[3] from "salaries" and "wages," much like an apple is derived from an apple tree and a grape is derived from a grapevine.

The other issue raised by the Chapmans concerns the meaning of the word "individual" as it appears in 26 U.S.C. § 1, and it is also meritorious. Before 1928, federal tax laws identified the parties whose income was subject to tax as including citizens, but the income tax acts in effect now and for many decades in the past have not identified citizens in the section imposing the tax, but instead have identified those whose "income" is taxed as "individuals." 26 C.F.R. § 1.1-1 supplies this deficiency by defining "individuals" in 26 U.S.C. § 1 as including citizens. The evident problem is that the regulation is broader than the statute, and is thus void as a consequence. See *Commissioner v. Acker*, 361 U.S. 87, 93-94 (1959).

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[3] See *Eisner v. Macomber*, 252 U.S. 189, 207 (1920).

ARGUMENT

I.
The meaning of "wages" and "salaries" in the income tax laws.

Art. 1, Sec. 2, Cl. 3 of the United States Constitution requires that Congress apportion all direct taxes among the States. In *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, aff. reh., 158 U.S. 601 (1895), this Court held as unconstitutional the income tax part of the Tariff Act of 1894, 28 Stat. 509, 553, ch. 349, and determined that it constituted an unapportioned direct tax. This decision led to the adoption of the Sixteenth Amendment to the Constitution, after which Congress enacted the Tariff Act of 1913, which imposed, at Section II, another income tax. 38 Stat. 114, 166, ch. 16. In consequence of this Court's decision in *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1916), Congress repealed the 1913 income tax and enacted another one in 1916. 39 Stat. 756, ch. 463. Virtually every two years thereafter, Congress amended that act, eventually enacting the Internal Revenue Code of 1939. 53 Stat. Part 1. In August, 1954, Congress re-arranged the provisions of the 1939 Code by means of the Internal Revenue Code of 1954, 68A Stat. The current 1986 tax code is simply the renamed 1954 Internal Revenue Code. Pub. L. 99–514, 100 Stat. 2085, 2095 (§ 2).

This Court has repeatedly observed that, through these income tax acts, Congress reached the full extent of the taxing power authorized by the Sixteenth Amendment. See *Eisner v. Macomber*, 252 U.S. 189, 203 (1920) ("we are unable to see how it

can be brought within the meaning of 'incomes' in the Sixteenth Amendment, it being very clear that Congress intended in that act to exert its power to the extent permitted by the amendment."); *Irwin v. Gavit*, 268 U.S. 161, 166 (1925) ("Congress intended to use its power to the full extent."); *Douglas v. Willcuts*, 296 U.S. 1, 9 (1935) ("We think that the definitions of gross income * * * are broad enough to cover income of that description. They are to be considered in the light of the evident intent of the Congress 'to use its power to the full extent.'"); *Helvering v. Clifford*, 309 U.S. 331, 334 (1940) ("The broad sweep of this language indicates the purpose of Congress to use the full measure of its taxing power within those definable categories."); and *Commissioner v. Kowalski*, 434 U.S. 77, 82 (1977) ("The starting point in the determination of the scope of 'gross income' is the cardinal principle that Congress in creating the income tax intended 'to use the full measure of its taxing power.'").

But what constitutes the full reach of the federal income tax as authorized by the Sixteenth Amendment? To what extent are "salaries" and "wages" within the scope of this amendment and the federal income tax laws? Do prior income tax acts and applicable regulations assist in answering this question?

A fundamental rule of statutory construction is that acts in *pari materia* are to be read and construed together. "[A]ll acts in *pari materia* are to be taken together, as if they were one law." *United States v. Stewart*, 311 U.S. 60, 64 (1940). See also *Sanford's Estate v. Commissioner*, 308 U.S. 39, 44 (1939); and *Harrington v. United States,* 78 U.S. 356, 365 (1877). This is particularly true regarding the

federal tax laws. While there are many such acts, all of them are regarded as parts of one system of taxation, and construction of any one act may be assisted by review of other acts in this same "system." See *United States v. Collier*, Fed.Cas.No. 14,833 (Cir. Ct. S.D.N.Y. 1855). A prior tax act, even one which has been repealed, still is to be considered as explanatory of later acts. See *Southern Ry. Co. v. McNeill*, 155 F. 756, 769 (Cir. Ct. E.D.N.C. 1907).

The 1894 federal income tax act, which was a part of the Tariff Act of 1894, imposed the tax on the "gains, profits, or income * * * 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." 28 Stat. 553. In the Tariff Act of 1913, the section imposing the tax was worded slightly differently:

> [T]he net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent. 38 Stat. 167.

After this Court's decision in *Brushaber*, *supra*, Congress repealed the 1913 income tax act and enacted a new one. The Revenue Act of 1916, 39 Stat. 756, 757, ch. 463, followed its predecessors and defined the subject of the tax, "income," as follows:

> INCOME DEFINED.
> SEC. 2. (a) That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

A year later, Congress amended the 1916 act by the Revenue Act of 1917, 40 Stat. 300, 329, ch. 63, but retained the same definition of income. The Revenue Act of 1918, 40 Stat. 1057, 1065, ch. 18, contained this "gains, profits, and income" phrase in its section defining "gross income":

> GROSS INCOME DEFINED.
> SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—

> (a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

This same language was used to define "gross income" in sections 213 of the Revenue Act of 1921 (42 Stat. 227, 237-38, ch. 136); the Revenue Act of 1924 (43 Stat. 253, 267, ch. 234); and the Revenue Act of 1926 (44 Stat. 9, 23-24, ch. 27).

The Revenue Act of 1928, 45 Stat. 791, 797, ch. 852, established a different format and section numbering for this income tax act, and § 22 thus became the section defining "gross income":

> SEC. 22. GROSS INCOME.
> (a) General definition.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in what-

> ever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

The subsequent income tax acts also defined gross income in this same manner. Section 22 of the Revenue Act of 1932, 47 Stat. 169, 178, ch. 209, contained the phrase, "'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service," as did the same section in the Revenue Act of 1934, 48 Stat. 680, 686-87, ch. 277. Section 22 of the Revenue Act of 1936, 49 Stat. 1648, 1657, ch. 690, and the same section in the Revenue Act of 1938, 52 Stat. 447, 457, ch. 289 also contained this phrase.

The 1939 Internal Revenue Code, 53 Stat. Part 1, codified all of the then-effective tax laws into one act. Virtually every section of the income tax provisions in the Revenue Act of 1938 was incorporated into this Code, including § 22 as set forth above.

In August, 1954, Congress essentially rearranged the provisions of the Internal Revenue Code of 1939 to create the Internal Revenue Code of 1954, 68A Stat. Now "gross income" for federal income tax purposes was, and is, defined by 26 U.S.C. § 61, which omits the terms "wages" and "salaries" as sources from which income can be derived:

> (a) General definition.

> Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
> (1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
> (2) Gross income derived from business;
> (3) Gains derived from dealings in property;
> (4) Interest;
> (5) Rents;
> (6) Royalties;
> (7) Dividends;
> (8) Alimony and separate maintenance payments;
> (9) Annuities;
> (10) Income from life insurance and endowment contracts;
> (11) Pensions;
> (12) Income from discharge of indebted-ness;
> (13) Distributive share of partnership gross income;
> (14) Income in respect of a decedent; and
> (15) Income from an interest in an estate or trust.

Despite this omission from the statute, the relevant Congressional Committees' published reports clearly state that § 61 of the Internal Revenue Code of 1954 was based upon § 22 of the 1939 Internal Revenue Code, and the simplification does not affect the nature of statutory gross income:

> § 61. Gross income defined.
> This section corresponds to section 22(a)

> of the 1939 Code. While the language in existing section 22(a) has been simplified, the all-inclusive nature of statutory gross income has not been affected thereby. Section 61(a) is as broad in scope as section 22(a).
>
> Section 61(a) provides that gross income includes 'all income from whatever source derived.' This definition is based upon the 16th Amendment and the word 'income' is used in its constitutional sense. Therefore, although the section 22(a) phrase 'in whatever form paid' has been eliminated, statutory gross income will continue to include income realized in any form.[4]

Thus, § 61 of the 1954 Internal Revenue Code has the same meaning, reach and scope as § 22 of the 1939 Code. Determining the meaning of the phrase, "gains, profits, and income derived from salaries, wages, or compensation for personal service," is thus important, even today. What, then, does this phrase mean, since it expresses the full reach and scope of the Sixteenth Amendment?

Canons of statutory construction dictate that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage. Similarly, words in a statute cannot be defined so as to render other provisions of the same statute inconsistent, meaningless or superfluous. See *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *United States v. Lexington Mill & Elevator Co.*, 232

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[4] House Report 1337, 83rd Congress, 2nd Session, at A18-19. See also Senate Report 1622, 83rd Congress, 2nd Session, at 168.

U.S. 399, 410 (1914); and *Montclair v. Ramsdell*, 107 U. S. 147, 152 (1883).

The common understanding of the word "salary" is that it is payment for work based on a weekly, monthly or annual basis. Similarly, a "wage" is generally understood as payment for work on an hourly basis. And these words have a meaning different from "compensation for personal service," both in common parlance and the federal income tax laws.

When the Revenue Act of 1918 was enacted, the Commissioner of Internal Revenue was required to determine what its various terms meant and inform employees of the Bureau of Internal Revenue of the uniform construction to be given to the various provisions of that law. The first attempt to define the meaning of "compensation for personal service" was made by the Commissioner of Internal Revenue on April 16, 1919 by means of Regulations 45 for the Revenue Act of 1918.[5] This set of regulations defined the phrase as follows:

> ART. 32. Compensation for personal services. – Where no determination of compensation is had until the completion of the services, the amount received is income for the taxable year of its determination, if the return is rendered on the accrual basis; or, for the taxable year in which received, if the return is rendered on a receipts and disbursements basis. Commissions paid salesmen, compensation for services on the

[5] Treasury Decision 2831, 21 Treasury Decisions Under Internal Revenue Laws 170.

> basis of a percentage of profits, commissions on insurance premiums, tips, retired pay of Federal and other officers, and pensions or retiring allowances paid by the United States or private persons, are income to the recipients; as are also marriage fees, baptismal offerings, sums paid for saying masses for the dead, and other contributions received by a clergyman, evangelist, or religious worker for services rendered. However, so-called pensions awarded by one to whom no services have been rendered are mere gifts or gratuities and are not taxable. The salaries of Federal officers and employees are subject to tax, except that, in view of the provisions of the Constitution of the United States as construed by the Supreme Court, the salaries of the President of the United States and Federal judges are not subject to the tax if elected or appointed to office prior to the passage of the taxing statute. But see article 86. See further articles 85 and 105-108.

The Commissioner defined "compensation for personal service" identically in Art. 32, Regulations 62 for the Revenue Act of 1921,[6] and Art. 32, Regulations 65 for the Revenue Act of 1924.[7] Clearly, "compensation for personal service" is entirely different from "salaries" and "wages."

Black's Law Dictionary, Fifth Edition (1979),

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[6] Treasury Decision 3295, 24 Treasury Decisions Under Internal Revenue Laws 207.

[7] Treasury Decision 3640, 26 Treasury Decisions Under Internal Revenue Laws 745.

defines the word "derive" as "[t]o receive from a specified source or origin," and the same dictionary defines "derived" as "[r]eceived from a specified source." The above phrase, "gains, profits, and income derived from salaries, wages, or compensation for personal service," indicates that "income" is ***derived from*** the "sources" of "salaries, wages, or compensation for personal service." Thus, neither "salaries," "wages" nor "compensation for personal service," standing alone, is "income."

One of the first tax regulations adopted by the Commissioner of Internal Revenue to define wages and salaries was Regulations 115, authorized by § 2 of the Current Tax Payment Act of 1943, 57 Stat. 126, ch. 120.[8] In § 404.101 of Regulations 115, 8 F.R. 12262 (Sept. 7, 1943), wages included such items as "pensions and retired pay," "traveling and other expenses," "vacation allowances," and "dismissal payments," among other minor items. Clearly, vacation allowances, sick pay, dismissal payments and retirement benefits are identified as items of "income" *apart from* wages paid for labor and are therefore items ***derived from*** wages (as well as salaries). See also 26 C.F.R. § 31.3401(a)-1.

In summary, the phrase, "gains, profits, and income ***derived from*** salaries, wages, or compensation for personal service," clearly expresses a limit to the reach and scope of the federal income tax laws. This phrase appeared in those income tax laws from 1894 through the summer of 1954, when it was replaced by means of the amended language in § 61 of the 1954 Code. But § 22 of the 1939 Code and § 61

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[8] Current wage withholding pursuant to 26 U.S.C. § 3401, *et seq.,* is based on the Current Tax Payment Act, as amended.

of the 1954 Code mean the same thing, as shown *supra*. Based on this phrase, as well as established rules of statutory construction, "income" does not have the same meaning as "salaries," "wages," and "compensation for personal service."[9]

How does the discussion of old tax laws and regulations assist the Chapmans? Their petition indicates that Pamela is a housewife, and Christopher is a contractor who built and installed pools for homeowners living in Florida. From the Internal Revenue Service's analysis of the bank records for Christopher's business, the IRS apparently contends that the difference between the gross receipts of that business and its expenses constitutes "taxable income." However, Christopher maintains that compensation for his labor is not "compensation for personal service," and that he likewise has no "fringe benefits" such as vacation pay, sick pay, dismissal payments or retirement benefits that would constitute "taxable income."

The Chapmans contend that 26 U.S.C. § 83 addresses this issue regarding the legal meaning of these terms, and their conclusions are supported by this analysis.

II.
The validity of 26 C.F.R. § 1.1-1.

As Justice Story stated, "it is * * * a general rule in the interpretation of all statutes, levying taxes or duties upon subjects or citizens, not to extend their provisions, by implication, beyond the clear import of

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[9] Compensation for labor is different from compensation for personal service.

the language used, or to enlarge their operation so as to embrace matters, not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the government and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import." *United States v. Wigglesworth*, Fed. Cas. No. 16,690 (Cir.Ct. D. Mass. 1842). See also *Gould v. Gould*, 245 U.S. 151 (1917); *Crocker v. Malley*, 249 U.S. 223 (1919); *United States v. Field*, 255 U.S. 257 (1921); *Smietanka v. First Trust & Sav. Bank*, 257 U.S. 602 (1922); *United States v. Merriam*, 263 U.S. 179 (1923); *Bowers v. New York & Albany Lighterage Co.*, 273 U.S. 346 (1927); *Reinecke v. Northern Trust Co.*, 278 U.S. 339 (1929); *Miller v. Standard Nut Margarine Co. of Florida*, 284 U.S. 498 (1932); *Old Colony R. Co. v. Commissioner*, 284 U.S. 552 (1932); and *White v. Aronson*, 302 U.S. 16 (1937).

Prior income tax acts clearly stated their application to citizens. The tax-imposed section of the Tariff Act of 1894, 28 Stat. 509, 553, read:

> Sec. 27. That from and after the first day of January, eighteen hundred and ninety-five, and until the first day of January, nineteen hundred, there shall be assessed, levied, collected, and paid annually upon the gains, profits, and income received in the preceding calendar year *by every citizen of the United States*, whether residing at home or abroad, and every person residing therein, whether said gains, profits, or income be derived from any kind of property, rents, interest, divi-

> dends, 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 per centum 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]

The tax-imposed section of the Tariff Act of 1913, 38 Stat. 114, 166, read as follows:

> SECTION II.
> A. Subdivision 1. That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year *to every citizen of the United States*, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided; and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere. [emphasis added]

But starting with the Revenue Act of 1928, the

word "citizen" was eliminated from the "tax imposed" section of these income tax laws, and § 11 of that act simply stated, "There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax equal to the sum of the following: …" 45 Stat. 795. Thereafter, the tax-imposed section of all of the income tax laws adopted by Congress read the same way. The Commissioner of Internal Revenue has supplied this clear omission by regulation, a situation that persists to this day.

A number of times, this Court has voided regulations which were broader than the controlling statute. See *United States v. Calamaro*, 354 U.S. 351, 359 (1957) ("… we cannot but regard this Treasury Regulation as no more than an attempted addition to the statute of something which is not there. As such the regulation can furnish no sustenance to the statute") and *Commissioner v. Acker*, 361 U.S. 87, 93-94 (1959) ("The questioned regulation must therefore be regarded 'as no more than an attempted addition to the statute of something which is not there.'"). See also *Lynch v. Tilden Produce Co.*, 265 U.S. 315, 321, (1924); *Iselin v. United States*, 270 U.S. 245, 251 (1926); *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936); *Koshland v. Helvering*, 298 U.S. 441, 447 (1936); *Helvering v. Credit Alliance Corp.*, 316 U.S. 107, 113 (1942); and *Dixon v. United States*, 381 U.S. 68, 74 (1965).

Here, 26 U.S.C. § 1 imposes a tax on the taxable income of "individual[s]," not "citizens." Only 26 C.F.R. § 1.1-1 defines "individual" as encompassing a citizen, and thus the regulation is broader than the statute.

This important question should be addressed by this Court.

CONCLUSION

The Petition for Writ of *Certiorari* should be granted.

Respectfully submitted,

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APPENDEX

CONSTITUTIONAL PROVISIONS

Article 1, Section 2, Clause 3

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

Sixteenth Amendment

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

STATUTES (pertinent portions)

26 U.S.C. § 1

§1. Tax imposed

(a) Married individuals filing joint returns and surviving spouses

There is hereby imposed on the taxable income of-

(1) every married individual (as defined in section 7703) who makes a single return jointly with his spouse under section 6013, and

(2) every surviving spouse (as defined in section 2(a)), a tax determined in accordance with the following table: [table omitted]

(b) Heads of households

There is hereby imposed on the taxable income of every head of a household (as defined in section 2(b)) a tax determined in accordance with the following table: [table omitted]

(c) Unmarried individuals (other than surviving spouses and heads of households)

There is hereby imposed on the taxable income of every individual (other than a surviving spouse as defined in section 2(a) or the head of a household as defined in section 2(b)) who is not a married individual (as defined in section 7703) a tax determined in accordance with the following table: [table omitted]

(d) Married individuals filing separate returns

There is hereby imposed on the taxable income of every married individual (as defined in section 7703) who does not make a single return jointly with his spouse under section 6013, a tax determined in accordance with the following table: [table omitted]

26 U.S.C. § 61

[Set forth at pp. 11-12 of the brief]

26 U.S.C. § 83

§83. Property transferred in connection with performance of services

(a) General rule

If, in connection with the performance of services, property is transferred to any person other than the person for whom such services are performed, the excess of-

(1) the fair market value of such property (determined without regard to any restriction other than a restriction which by its terms will never lapse) at the first time the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier, over

(2) the amount (if any) paid for such property, shall be included in the gross income of the person who performed such services in the first taxable year in which the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever is applicable.

The preceding sentence shall not apply if such person sells or otherwise disposes of such property in an arm's length transaction before his rights in such property become transferable or not subject to a substantial risk of forfeiture. …

REGULATIONS

26 C.F.R. § 1.1-1

§1.1-1 Income tax on individuals.

(a) General rule. (1) Section 1 of the Code imposes an income tax on the income of every individual who is a citizen or resident of the United States and, to the extent provided by section 871(b) or 877(b), on the income of a nonresident alien individual. For op-

tional tax in the case of taxpayers with adjusted gross income of less than $10,000 (less than $5,000 for taxable years beginning before January 1, 1970) see section 3. The tax imposed is upon taxable income (determined by subtracting the allowable deductions from gross income). The tax is determined in accordance with the table contained in section 1. See subparagraph (2) of this paragraph for reference guides to the appropriate table for taxable years beginning on or after January 1, 1964, and before January 1, 1965, taxable years beginning after December 31, 1964, and before January 1, 1971, and taxable years beginning after December 31, 1970. In certain cases credits are allowed against the amount of the tax. See part IV (section 31 and following), subchapter A, chapter 1 of the Code. In general, the tax is payable upon the basis of returns rendered by persons liable therefor (subchapter A (sections 6001 and following), chapter 61 of the Code) or at the source of the income by withholding. …

(b) *Citizens or residents of the United States liable to tax.* In general, all citizens of the United States, wherever resident, and all resident alien individuals are liable to the income taxes imposed by the Code whether the income is received from sources within or without the United States. Pursuant to section 876, a nonresident alien individual who is a bona fide resident of a section 931 possession (as defined in §1.931-1(c)(1) of this chapter) or Puerto Rico during the entire taxable year is, except as provided in section 931 or 933 with respect to income from sources within such possessions, subject to taxation in the same manner as a resident alien individual. As to tax on nonresident alien individuals, see sections 871 and 877.

(c) *Who is a citizen.* Every person born or naturalized in the United States and subject to its jurisdiction is a citizen. For other rules governing the acquisition of citizenship, see chapters 1 and 2 of title III of the Immigration and Nationality Act (8 U.S.C. 1401-1459). For rules governing loss of citizenship, see sections 349 to 357, inclusive, of such Act (8 U.S.C. 1481-1489), Schneider v. Rusk, (1964) 377 U.S. 163, and Rev. Rul. 70-506, C.B. 1970-2, 1. For rules pertaining to persons who are nationals but not citizens at birth, e.g., a person born in American Samoa, see section 308 of such Act (8 U.S.C. 1408). For special rules applicable to certain expatriates who have lost citizenship with a principal purpose of avoiding certain taxes, see section 877. A foreigner who has filed his declaration of intention of becoming a citizen but who has not yet been admitted to citizenship by a final order of a naturalization court is an alien.
(d) *Effective/applicability date.* The second sentence of paragraph (b) of this section applies to taxable years ending after April 9, 2008.

26 C.F.R. § 31.3401(a)-1

§31.3401(a)-1 Wages.
(a) *In general.* (1) The term "wages" means all remuneration for services performed by an employee for his employer unless specifically excepted under section 3401(a) or excepted under section 3402(e).
(2) The name by which the remuneration for services is designated is immaterial. Thus, salaries, fees, bonuses, commissions on sales or on insurance premiums, pensions, and retired pay are wages within the meaning of the statute if paid as compen-

sation for services performed by the employee for his employer.

(3) The basis upon which the remuneration is paid is immaterial in determining whether the remuneration constitutes wages. Thus, it may be paid on the basis of piecework, or a percentage of profits; and may be paid hourly, daily, weekly, monthly, or annually.

(4) Generally the medium in which remuneration is paid is also immaterial. It may be paid in cash or in something other than cash, as for example, stocks, bonds, or other forms of property. (See, however, §31.3401(a)(11)-1, relating to the exclusion from wages of remuneration paid in any medium other than cash for services not in the course of the employer's trade or business, and §31.3401(a)(16)-1, relating to the exclusion from wages of tips paid in any medium other than cash.) If services are paid for in a medium other than cash, the fair market value of the thing taken in payment is the amount to be included as wages. If the services were rendered at a stipulated price, in the absence of evidence to the contrary, such price will be presumed to be the fair value of the remuneration received. If a corporation transfers to its employees its own stock as remuneration for services rendered by the employee, the amount of such remuneration is the fair market value of the stock at the time of the transfer.

(5) Remuneration for services, unless such remuneration is specifically excepted by the statute, constitutes wages even though at the time paid the relationship of employer and employee no longer exists between the person in whose employ the services were performed and the individual who performed them.

Example. A is employed by R during the month of January 1955 and is entitled to receive remuneration of $100 for the services performed for R, the employer, during the month. A leaves the employ of R at the close of business on January 31, 1955. On February 15, 1955 (when A is no longer an employee of R), R pays A the remuneration of $100 which was earned for the services performed in January. The $100 is wages within the meaning of the statute.

(b) *Certain specific items*—(1) *Pensions and retirement pay.* (i) In general, pensions and retired pay are wages subject to withholding. However, no withholding is required with respect to amounts paid to an employee upon retirement which are taxable as annuities under the provisions of section 72 or 403. So-called pensions awarded by one to whom no services have been rendered are mere gifts or gratuities and do not constitute wages. Those payments of pensions or other benefits by the Federal Government under title 38 of the United States Code which are excluded from gross income are not wages subject to withholding.

(ii) Amounts received as retirement pay for service in the Armed Forces of the United States, the Coast and Geodetic Survey, or the Public Health Service or as a disability annuity paid under the provisions of section 831 of the Foreign Service Act of 1946, as amended (22) U.S.C. 1081; 60 Stat. 1021), are subject to withholding unless such pay or disability annuity is excluded from gross income under section 104(a)(4), or is taxable as an annuity under the provisions of section 72. Where such retirement pay or disability annuity (not excluded from gross income under section 104(a)(4) and not taxable as an annuity under the provisions of section 72) is paid to a

nonresident alien individual, withholding is required only in the case of such amounts paid to a nonresident alien individual who is a resident of Puerto Rico.

(2) *Traveling and other expenses.* Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages and are not subject to withholding. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment. For amounts that are received by an employee on or after July 1, 1990, with respect to expenses paid or incurred on or after July 1, 1990, see §31.3401 (a)-4.

(3) *Vacation allowances.* Amounts of so-called "vacation allowances" paid to an employee constitute wages. Thus, the salary of an employee on vacation, paid notwithstanding his absence from work, constitutes wages.

(4) *Dismissal payments.* Any payments made by an employer to an employee on account of dismissal, that is, involuntary separation from the service of the employer, constitute wages regardless of whether the employer is legally bound by contract, statute, or otherwise to make such payments.

(5) *Deductions by employer from remuneration of an employee.* Any amount deducted by an employer from the remuneration of an employee is considered to be a part of the employee's remuneration and is considered to be paid to the employee as remuneration at the time that the deduction is made. It is immaterial

that any act of Congress, or the law of any State or of Puerto Rico, requires or permits such deductions and the payment of the amounts thereof to the United States, a State, a Territory, Puerto Rico, or the District of Columbia, or any political subdivision of any one or more of the foregoing.

(6) *Payment by an employer of employee's tax, or employee's contributions under a State law.* The term "wages" includes the amount paid by an employer on behalf of an employee (without deduction from the remuneration of, or other reimbursement from, the employee) on account of any payment required from an employee under a State unemployment compensation law, or on account of any tax imposed upon the employee by any taxing authority, including the taxes imposed by sections 3101 and 3201.

(7) *Remuneration for services as employee of nonresident alien individual or foreign entity.* The term "wages" includes remuneration for services performed by a citizen or resident (including, in regard to wages paid after February 28, 1979, an individual treated as a resident under section 6013 (g) or (h)) of the United States as an employee of a nonresident alien individual, foreign partnership, or foreign corporation whether or not such alien individual or foreign entity is engaged in trade or business within the United States. Any person paying wages on behalf of a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States (including Puerto Rico as if a part of the United States), is subject to all the provisions of law and regulations applicable with respect to an employer. See §31.3401(d)-1, relating to the term "employer", and §31.3401(a)(8)(C)-1, relating to remuneration paid for

services performed by a citizen of the United States in Puerto Rico.

(8) *Amounts paid under accident or health plans*—(i) *Amounts paid in taxable years beginning on or after January 1, 1977*—(*a*) *In general.* Withholding is required on all payments of amounts includible in gross income under section 105(a) and §1.105-1 (relating to amounts attributable to employer contributions), made in taxable years beginning on or after January 1, 1977, to an employee under an accident or health plan for a period of absence from work on account of personal injuries or sickness. Payments on which withholding is required by this subdivision are wages as defined in section 3401(a), and the employer shall deduct and withhold in accordance with the requirements of chapter 24 of subtitle C of the Code. Third party payments of sick pay, as defined in section 3402(o) and the regulations thereunder, are not wages for purposes of this section. …