No. 22-800

In The
Supreme Court of the United States

CHARLES G. MOORE AND KATHLEEN F. MOORE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* SOUTHERN POLICY LAW INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Southern Policy Law Institute (SPLI) is a nonprofit, nonpartisan 501(c)(3) public policy educational research organization charged with researching, developing, and promoting public policy alternatives that advance individual liberties, support local self-government, and promote entrepreneurship and job creation. SPLI is substantially supported by contributions. Its activities include publications, public events, media commentary, invited executive and legislative consultation, and community outreach.

SPLI urges reversal because the Ninth Circuit's interpretation clearly errs and, if left unanswered, would hasten the demise of the present cash flow federal tax system and accelerate the rise of an accretion tax system that taxes economic value and accrued wealth.

SUMMARY OF ARGUMENT

In evaluating the constitutionality of this specific section of the Internal Revenue Code, and the Court of Appeals interpretation of that section, considering the Sixteenth Amendment to the Constitution, the Court should consider the entirety of our constitutional

[1] Rule 37. Statement: *Amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel has made monetary contributions to its preparation and submission.

history, with particular attention to the federalism arrangement between state and federal taxing powers. The powers of the federal government to lay and collect taxes from the people, or through the assistance or intervention of the States, were crucial and contested issues during the drafting and ratification of the Constitution.

The principal assurance that the supporters of the new Constitution could and did give to their critics, was the widely held presumption that the national government would rarely, if ever, need or resort to the direct taxation of the populace; rather, all considered the prospective revenues from customs duties, tariffs and imposts should more than suffice to the national government's peacetime needs. The Framers nonetheless retained in the document the federal government capacity to directly tax people and property, subject to the further restriction of apportionment among the States according to their population to be determined by the mandated census.

In practice over the next century and more, the apportionment requirement served to make direct federal taxation difficult enough to prevent the feared overreach and abuse. Yet the enactment of the Sixteenth Amendment in the Twentieth Century did not forego entirely that constraint, rather the decision was made deliberately and precisely to excuse only direct income taxes from the Constitution's prior safeguards.

Post Sixteenth Amendment cases of this Court have maintained and upheld the requirement for

realization of income before it can be taxed without apportionment. The persistent efforts of the advocates who would forego such restrictions and ignore the Sixteenth Amendment to the contrary, the existing balance and strictures imposed by the Framers in the original Constitution, as regards the respective tax powers of both States and federal government, remain in full effect. It is in light of those considerations that the Court should now review and reverse the decision of the Ninth Circuit.

Finally, the Court should observe that the operation of the MRT tax provision, left undisturbed as interpreted by the Ninth Circuit, would work in violation of settled and longstanding precepts of international law. No nation, without a universally accepted legal basis, can arbitrarily reach out to tax the property and assets sited within the other country's sovereign territory. Absent realization, the purported gains which the MRT seeks to tax fail to achieve the sufficient and necessary connection to American citizens who would provide a nationality principle basis for exercise of American tax jurisdiction. In addition, the operation of the MRT statute as envisioned by the Court of Appeals below, works a significant and unintended harm to the taxpayers in derogation of the India-U.S. Tax Treaty.

ARGUMENT

I. The Framers Designed Federalism with a Bias Toward State Taxation Rather than Federal Taxation.

A principal concern of both the supporters and the critics of the new federal Constitution was to strictly limit the powers of the United States government and protect the existing rights and powers of the people and the States. *See*, *e.g.*, James Madison, *Property* (Mar. 29, 1792) in 1 THE FOUNDERS' CONSTITUTION 598 (1987) ("arbitrary taxes invade the domestic sanctuaries of the rich, and excessive taxes grind the faces of the poor."); THOMAS G. WEST, THE POLITICAL THEORY OF THE AMERICAN FOUNDING 338-339 (2017). To that end, Article I, Section 9 of the Constitution places specific limits on the taxing power of the federal government. U.S. CONST. art. I, § 9.

Prior to 1787, State governments were the sole taxing authorities in the new United States. States levied both direct and indirect taxes. *Cf*. THE FEDERALIST No. 36 (Alexander Hamilton). Indirect taxes acted upon goods and commerce through taxable events like sales or transfers.

Direct taxes were defined by their object as persons or items of property both real and personal. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §477 at *340 (1833). A "poll tax" consisted of equal amounts paid by all men without

regard to wealth or income.[2] An *ad valorem* tax operated to tax in proportion to the value of subject property. WEST, *supra*, at 339-40. (Maryland preferred *ad valorem* taxes, and the States of North Carolina, Virginia, and South Carolina all replaced their poll taxes with *ad valorem* taxes.).

The states had a form of income tax known as "faculty taxes," so named because a *faculty* meant a man's skill or ability. WEST, *supra*, at 340 (States of Connecticut, Delaware, Massachusetts, and Pennsylvania had faculty taxes, "however faculty taxes were never a major revenue source."); *see generally* EDWIN R.A. SELIGMAN, THE INCOME TAX 388-99 (2d ed. 1914) (detailing history of state faculty taxes). *See also Maryland v. Wynne*, 575 U.S. 542, 579 n.* (2015) (Thomas, J., dissenting) (discussing early history of state income taxation).

Participants in the Constitutional Convention discussed the limits of federal taxation and safeguards against overreach. Madison acknowledged the danger: "The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice." THE FEDERALIST No. 10, at 74 (James Madison) (Clinton Rossiter ed. 1961). In the context of

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[2] Massachusetts and New Hampshire constitutions mandated poll taxes. MASS. CONST. of 1780, ch. 1, §1 at 4; N.H. CONST. of 1784; N.H. CONST. of 1792. In addition to poll taxes, both states laid taxes on estates. *See* WEST, *supra*, at 339-40.

concurrent state and federal taxation, Madison noted, "How can taxes be judiciously imposed and effectually collected if they be not accommodated to the different laws and local circumstances relating to those objects in the different States?" THE FEDERALIST No. 53, at 330 (James Madison).

The ratifying conventions raised concerns about the scope and extent of the federal taxing power. "By virtue of their power of taxation, Congress may command the whole, or any part of the property of the people. They . . . may impose what land taxes, poll taxes, . . . in short, every species of taxation, whether of an external or internal nature." *The Address and Reasons of the Dissent of the Minority of the Convention of Pennsylvania to Their Constituents* (Dec. 18, 1787), in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 237, 243 (Ralph Ketcham ed. 1986).

To the Virginia Ratifying Convention, Patrick Henry proclaimed,

> I will never give up the power of direct taxation, but for a scourge: I am willing to give it conditionally; that is, after non-compliance with requisitions . . . I would give the best security for a punctual compliance with requisitions; but I beseech Gentlemen, at all hazards, not to give up this unlimited power of taxation.

Patrick Henry, *Speech to Virginia Ratifying Convention* (June 7, 1788) in THE ANTI-FEDERALIST PAPERS, *supra*, at 212. Similarly, in the New York Convention

Melancton Smith declared, "On the whole, it appears to me probable, that unless some certain, specific source of revenue is reserved to the states, their governments, with their dependency will be totally annihilated." Melancton Smith, *Speech to the New York Ratifying Convention* (June 27, 1788) in THE ANTI-FEDERALIST: WRITINGS BY THE OPPONENTS OF THE CONSTITUTION 356 (Herbert J. Storing ed. 1985).

Critics proposed amendments to the Constitution, restricting direct taxes, in the conventions for New Hampshire, Massachusetts,[3] Rhode Island,[4] New York, Pennsylvania, Maryland, Virginia,[5] and North Carolina. JACKSON TURNER MAIN, THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788 145-46 (1961).

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[3] "Fourthly, that Congress do not lay direct Taxes but when the Monies arising from the Impost and Excise are insufficient for the public exigencies nor then until Congress shall have first made a requisition upon the States . . . in such way and manner as the legislature of the States shall think best." *Amendments Proposed by the Massachusetts Convention* (Feb. 7, 1788) in THE ANTI-FEDERALIST PAPERS, *supra*, 217, 218.

[4] "8. In cases of direct taxes, Congress shall first make requisitions on the several States, to assess, levy and pay, their respective portions of such requisitions, in such way and manner as the Legislatures of the several States shall judge best." *Amendments Proposed by The Rhode Island Convention* (Mar. 6, 1790) in THE ANTI-FEDERALIST PAPERS, *supra*, at 225.

[5] "3d. When the Congress shall lay direct taxes or excises, they shall immediately inform the executive power of each state, of the quota of each state, according to the census herein directed, which is proposed to be thereby raised; and if the legislature of any state shall pass a law which shall be effectual raising such quota at the time required by Congress, the taxes and excises laid by Congress shall not be collected in such state." *Amendments to the Constitution* in THE ANTI-FEDERALIST PAPERS, *supra*, at 222.

A common plan recurred across the state conventions: "the impost tax was to be granted; requisitions would continue, but if they were not paid Congress might then impose direct taxes." *Id*. at 183. "The solution was for the States themselves to control their internal taxes. Congress, after all, could get along very well on the revenue from import duties." *Id*. at 145. *Cf*. THE FEDERALIST No. 30 (Alexander Hamilton) (acknowledging the distinction between external and internal taxes and the proposal of "the more intelligent adversaries of the new Constitution" to "reserve to the State governments" the internal taxes and "they declare themselves willing to concede to the federal head" the external taxes "which they explain into commercial imposts, or rather duties on imported articles").

Published critics and skeptics not yet supporting the new Constitution, raised certain concerns and objections to the federal tax power. "Brutus," a frequent writer, early in the debate noted,

> not only is the power to lay taxes unlimited, as to the amount they may require, but it is perfect and absolute to raise them in any mode they please. No state legislature, or any power in the state governments, have any more to do in carrying this into effect, than the authority of one state has to do with that of another state.

Brutus, *Essay I* (Oct. 18, 1787) in THE ANTI-FEDERALIST PAPERS, *supra*, 270, 273. "It is proper here to remark, that the authority to lay and collect taxes is the most

important of any power that can be granted; it connects with it almost all other powers." *Id*.

> Two months later, Brutus wrote further,
>
> > A power that has such latitude, which reaches every person of the community in every conceivable circumstance, and lays hold of every species of property they possess, and which has no bounds set to it, but the discretion of those who exercise it, I say such a power must necessarily from its very nature swallow up all the power of the state governments.

Brutus, *Essay VI* (Dec. 27, 1787) in THE ANTI-FEDERALIST PAPERS, *supra*, 280, 284. Brutus continued, "Upon the whole, I conceive, that there cannot be a clearer position than this, that the state governments ought to have an uncontrollable power to raise a revenue, adequate to the exigencies of their governments; and, I presume, no such power is left them by this constitution." *Id*. at 287. *See also* JACKSON TURNER MAIN, *supra*, at 146 ("Thus the Antifederalists tried to make sure that the states would retain at least partial control over this critical power, and that the people would be safe from the union of purse and sword.").

Federalists answered these arguments by saying, essentially, "Trust us." While not foregoing the power to lay direct taxes, the advocates of the Constitution argued that it wouldn't be often necessary, that external taxes like imposts and customs duties would more than suffice anyway. James Wilson, *Speech to the State House* (Oct. 6, 1787), first printed in *The Pennsylvania*

Packet (Oct. 10, 1787), in FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS 1787-1788 102, 106 (Colleen A. Sheridan & Gary L. McDowell eds. 1998) ("I will venture to predict that the great revenue of the United States must, and always will, be raised by impost; for, being at once less obnoxious, and more productive [than direct taxes]."); "Socius," *Essay*, *Carlisle Gazette* (Nov. 14, 1787) in FRIENDS OF THE CONSTITUTION, *supra*, 164, 166 ("As the grand revenue will arise from another source, this mode [direct taxes] may never be applied to, but on such occasions, as may require great exertions."); A Citizen of New Haven [Roger Sherman], *Letter*, *The New Haven Gazette* (Dec. 18, 1788) in FRIENDS OF THE CONSTITUTION, *supra*, 263, 269 ("The principal sources of revenue will be imposts on goods imported, and sales of western lands, which will probably be sufficient to pay the debts and expences [sic] of the United States while peace continues"); THE FEDERALIST No. 12 (Alexander Hamilton), at 878 ("It is evident from the state of the country, from the habits of the people, from the experience we have had on the point itself, that it is impracticable to raise any very considerable sums by direct taxation.").

James McHenry, in the Maryland House of Delegates, repeated this sentiment.

> [I]t was the idea of everyone that government would seldom have recourse to direct Taxation, and that the objects of Commerce would be more than Sufficient to the common exigencies of the State, and should further supplies be necessary, the power of Congress

> would not be exercised, while the respective States would raise these supplies in any other manner more suitable to their own inclinations.

James McHenry, *Speech to the Maryland House of Delegates* (Nov. 29, 1787), in 3 THE FOUNDERS' CONSTITUTION, *supra*, at 149. Alexander Hamilton, writing as "Publius," concurred.

> The convention thought the concurrent jurisdiction [of taxing powers] preferable to that subordination [of States by the federal]; and it is evident that it has at least the merit of reconciling an indefinite constitutional power of taxation in the federal government with an adequate and independent power in the States to provide for their own necessities.

THE FEDERALIST No. 34 (Alexander Hamilton), *supra*, at 207. *See also id*. No. 32 (Alexander Hamilton) at 193 ("I am persuaded that the sense of the people, the resentments of the State governments, and a conviction of the utility and necessity of local administrations for local purposes, would be a complete barrier against the oppressive use of such a power").

Finally, some proponents asserted that the power of direct taxation was inherently necessary, and their opponents should just accept that. *See* A Landholder [Oliver Ellsworth], *Letter V*, *Connecticut Courant* (Hartford) (Nov. 3, 1787) in FRIENDS OF THE CONSTITUTION, *supra*, at 286, 301 ("The power of collecting money from the people is not to be rejected because it has sometimes been oppressive."); "America" [Noah

Webster], *Essay, Daily Advertiser (N.Y.)* (Dec. 31, 1787) in FRIENDS OF THE CONSTITUTION 169, 174 ("The different states have different modes of taxation, and I question much whether even *your* skill, Gentlemen, could invent a uniform system that should sit easy upon every State.") (emphasis original); A State Soldier, *Essay IV, Virginia Independent Chronicle* (Richmond) (Mar. 19, 1788) in FRIENDS OF THE CONSTITUTION, *supra*, at 358, 370 (the right of direct taxation "is among the powers already given up by the people, and necessary for the existence of every government . . . and the difference there will be, is, that less will be collected by the states individually, and more by the continent than now is").

After ratification, learned commentaries and discussions continuing into the next century all concurred that the federal government was limited in its tax power and, most especially, there was to be no opportunity or capability for a federal wealth tax to act generally upon the nation and its property. Surveying the federal tax power, Justice Joseph Story admitted of its limitations:

> [C]ongress has not an unlimited power of taxation; but it is limited to specific objects – the payment of the public debts, and providing for the common defence and general welfare. A tax, therefore, laid by congress for neither of these objects, would be unconstitutional, as an excess of its legislative authority.

STORY, *supra*, §464 at *330-31. Chancellor Kent, in his treatise, noted the continuing concerns about

concurrent federal and state jurisdiction to tax the same item:

> The author of the *Federalist* [No. 32 (Alexander Hamilton)] admits, that a state might lay a tax on a particular article, equal to what it would well bear, but the United States would still have a right to lay further tax on the same article; and that all collisions in a struggle between the two governments for revenue, must and would be avoided by a sense of mutual forbearance. He nowhere, however, meets and removes the difficulty, in the case of a want of this mutual forbearance, where there is a concurrent tax on the same subject, and which will not bear both taxes.

1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *368 (1826).

The foregoing common view of taxation and its principles continued through the Nineteenth Century.

> [I]t is of the very essence of taxation that it be equal and uniform; and to this end, that there should be some system of apportionment. . . . Taxes by the poll are justly regarded as odious, and are seldom resorted to for the collection of revenue; and when levied upon property there must be an apportionment with reference to a uniform standard, or they degenerate into mere arbitrary exactions.

THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 495

(1868). With respect to the balance between concurrent state and federal taxation, the principal divide remained internal versus external objects.

> Taxes may assume the form of duties, imposts and excises; and those collected by the national government are very largely of this character. . . . Or they may be direct, upon property, in proportion to its value, or upon some other basis of apportionment, which the legislature shall regard as just, and which shall keep in view the general idea of uniformity. The taxes collected by the States are mostly of the latter class. . . .

Id. *See also Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317 (1820) (Congress may lay direct taxes upon territory of the District of Columbia yet remains subject to constitutional requirement of apportionment).

The drafters and ratifiers of the Sixteenth Amendment were careful to limit and proscribe the exemption from apportionment only to income taxes and no other direct taxes, leaving the restrictions in place and effect as before on all other federal taxes. Upon Congress's submission of the proposed amendment to the States for ratification, then-Governor of New York (and later Chief Justice) Charles Evans Hughes opposed the amendment on grounds it would undermine the States' access to finance in the municipal bond market. SELIGMAN, *supra*, at 596.

The Supreme Court ruling prompting the Sixteenth Amendment, *Pollock v. Farmers' Loan & Trust Co*., 158 U.S. 601 (1895), held "taxes . . . on the income

of personal property" to be direct taxes requiring apportionment. *Id*. at 637. Proposals and discussions leading to the enactment of the Sixteenth Amendment included those to abolish the apportionment of direct taxes altogether. *See* SELIGMAN, *supra*, at 594; Edward B. Whitney, *The Income Tax and the Constitution*, 20 HARV. L. REV. 96 (1907). But Congress soundly defeated the efforts of Mississippi's Senator Anselm McLaurin to delete "direct taxes" and apportionment language, restricting the breadth of the proposed Amendment to "taxes on incomes." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 571 (2012). *See* 44 CONG. REC. 4109, 4120 (1909) (failure of proposal by Sen. McLaurin to delete "direct taxes" language).

So the general prohibition remains, that the federal government is not to be permitted to embark upon a general wealth tax. But the "deemed repatriation" of 26 U.S.C. § 965 using the foreign income inclusion under 26 U.S.C. § 951 [also known as the Mandatory Repatriation Tax or MRT] and the Ninth Circuit Court of Appeals have instead set out to do just that.

II. The MRT As Interpreted by the Ninth Circuit Upsets the Framers' Balance of Tax Powers and Opens the Door to Federal Wealth Taxes.

There is a difference between realized revenues and gains and appreciation in value. Recognized income or gain is a prediction or estimate, whereas realized income and gain is determinable and precise. The

former is economic or "paper income," while the latter is actual and "derived." For a cash-basis taxpayer, absent the extension of credit, income is realized when earned and received.[6]

Inseparable from the concept of realization, the realization event presents a useful, definite, and precise tool. Realization is the point when taxable financial income is "derived" – that is, received or obtained – from the source. Such was the understanding of the concept of "income" at the time of the Sixteenth Amendment's enactment. Realization and the realization event avoid the complexity of alternative economic models, a benefit to both the taxpayer and administrator.

In *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429, *aff'd on reh'g*, 158 U.S. 601 (1895), the Court overturned the second income tax championed by William Jennings Bryan in the Wilson-Gorman Tariff Act. Two decades of argument later, public and political opinions shifted, and passage of the Sixteenth Amendment seemed a reasonable compromise at that time. ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895 159-172, 185-200 (1976).

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[6] *Compare* 26 U.S.C. §§ 1001(a)-(c), *with* 26 C.F.R. § 1.61-1. Income means that which comes in or is received from any business or investment of capital, without reference to outgoing expenditures; while "'profits'" generally means the gain which is made upon any business or investment when both receipts and payments are taken into account. *Income*, BLACK'S LAW DICTIONARY 612 (2d ed. 1910).

The later cases also reflected the political mood of the day. The case of *Eisner v. Macomber*, 252 U.S. 189 (1920) overturned a federal tax that taxed stock dividends as income, and introduced an excess profits tax on corporations without any provision for "invested capital." Following *Macomber*, Justice Clarke reiterated the Court's understanding of the term "income,"

> [T]his Court has consistently refused to enter into the refinements of lexicographers or economists, and has approved, in the definitions quoted, what it believed to be the commonly understood meaning of the term which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution.

Merchants' Loan & Trust Co. v. Smietanka, 255 U.S. 509, 519 (1921) *citing Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 185 (1918); *Eisner v. Macomber*, 252 U.S. at 206-207.

In *Helvering v. Griffiths*, 318 U.S. 371 (1943), the Court declined to overrule *Macomber*. 318 U.S. at 394-404. Critics heralded the "end of one era in our tax history" and an opportunity to broaden the tax base. Stanley S. Surrey, *The Supreme Court and the Federal Income Tax: Some Implications of the Recent Decisions*, 35 ILL. L. REV. 779, 781-794 (1941) ("[N]ever again will we see the legislative judgment restricted by a constitutional decision turning on the meaning of income in the Sixteenth Amendment"). But as Judge Bumatay's dissent notes, 53 F.4th 507, 515, these critics ignored

an important premise of *Griffiths* as discussed in the *Horst* opinion:

> While *Horst* noted that the realization requirement is "founded on administrative convenience," 311 U.S. at 116, those words didn't open the door for our court to redefine the meaning of "income." Indeed, the realization requirement was assumed in *Horst*; the Court stated that "[t]he sole question for decision" was whether the gift of an interest payment constituted "the realization of income taxable to the donor." *Id*. at 114. So *Horst* did not reject the realization requirement; it just held that a taxpayer can't transfer the cash receipts to someone else and avoid taxation. *Id*. at 117.

Moore v. United States, 53 F.4th 507, 515 (9th Cir. 2022) (Bumatay, J., dissenting from denial of rehearing *en banc*).

The Court once again employed realization to find both punitive damages awards taxable as income, *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955), and embezzled funds taxable as income, *James v. United States*, 366 U.S. 213, 218-219 (1961). More recent and current reformers agitate to tax recognized income and gains using various mark-to-market schemes to measure wealth.[7]

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[7] David Gamage & Darien Shanske, "Phased Mark-to-Market for Billionaire Income Tax Reforms," TAX ANALYSTS TAXNOTES, Sep. 19, 2022; Dep't of Treasury, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2024 REVENUE PROPOSALS, 82-83 (2022) (The Biden Administration proposes wealth

For the normal individual taxpayer, realization is focused and essential. Without an actual distribution, current earnings, period measurement of performance, or any action on the part of the taxpayer, the Court necessarily confronts a question of constitutionality.[8] Mark Berg & Fred Feingold, *The Deemed Repatriation Tax – A Bridge Too Far?*, 158 TAXNOTES 1345, Mar. 5, 2018. Depending upon the taxpayer, Section 965 transition tax is no mere amendment of Subpart F. In the Moores' case, the MRT undisputedly lacks any realization event, constructive or otherwise, and, therefore, it acts as a direct tax on their purported wealth "merely because [they are] owner, regardless of the use or disposition." *Bromley v. McCaughn*, 280 U.S. 124, 137 (1929).

III. Without Realization, the MRT Becomes an Unlawful Exercise of Sovereignty Against International Law.

"[A]n act of congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)

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tax on unrealized gains and income in the form of "prepayments" and credits based on imputed valuation of assets). The literature favoring a shift away from realization-based taxation is extensive. Henry M. Ordower, *Abandoning Realization and the Transition Tax: Toward a Comprehensive Tax Base*, SCHOLARSHIP COMMONS, St. Louis Univ. School of Law (2018).

[8] Section 965 creates "income" only through the Internal Revenue Service's acceptance of the Moores' filing of a 2017/2018 IRC 965 Transition Tax Statement.

(Marshall, C.J.). The Ninth Circuit interpretation of MRT transgresses principles of international law, as well as it contravenes provisions of the U.S. – India tax treaty.

A little noted but important fact in this case is that the MRT exercises United States taxation power over assets and property located extraterritorially in another nation. If the Ninth Circuit interpretation remains undisturbed, the statute violates both general principles of international law and the specific tax treaty in effect between the United States and India.

In international law, nation states may wield their sovereign power on two principal bases of jurisdiction. The "territorial principle" undergirds jurisdiction to prescribe law over territory, including persons and property found within the boundaries of that territory. RESTATEMENT (THIRD) OF THE FOREIGN REL. LAW OF THE U.S. §402(1) ("a state has jurisdiction to prescribe law with respect to . . . the status of persons, or interests in things, present within its territory"). The "nationality principle" justifies jurisdiction over persons who owe allegiance or other direct association with the nation state. RESTATEMENT (THIRD) §402(2) (Nation state as jurisdiction over "activities, interests, status or relations of its nationals outside as well as within its territory"). *See Blackmer v. United States*, 284 U.S. 421, 436 (1932) ("although resident abroad, the petitioner remained subject to the taxing power of the United States.").

Whatever happens on the territory of a nation state is of that state's primary concern (the territorial principle). As stated by Chief Justice Marshall,

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which would impose such a restriction.
>
> All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.). *See also Blackmer*, 284 U.S. at 437 ("the legislation of Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States"); *United States v. Aluminum Corp. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) ("it is quite true that we are not to read general words, such as those in this act, without regard to the limitations customarily observed by nations upon the exercise of their powers.").

If the MRT required realization, the MRT would fall comfortably within accepted international tax practice, in that the United States would be taxing the

property in the custody or control of its citizens. The Government would be acting *in personam* against the taxpayer to assess and collect the MRT tax.

However, because the MRT does not require realization, the Government purports to exercise its sovereign authority over assets and property that remain unchanged in their location and status: The property remained unmoved and located squarely within the sovereign territory of a foreign nation, namely India. Such an act would operate *in rem* against the assets or property, and in effect would directly wield United States sovereign power within the recognized and exclusive territorial boundaries of India, a separate and sovereign nation. This violates longstanding principles of international law. *See* HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW §78 at *138 (1866) (principle that "no State can, by its laws, directly affect, bind or regulate property beyond its own territory").

Furthermore, there is in effect a tax treaty between the United States and India. Tax Convention with the Republic of India, India-U.S., Sept. 12, 1989, 90 TIAS 1218. That treaty's Article 10 provides India the right to impose a 25 percent tax on dividends paid to a U.S. resident shareholder. *Id*. art. 10, ¶2. Because the U.S. has a tax treaty with India, the dividends received from the India company are "qualified dividends," which means they are taxable at long-term capital gains rates (maximum 20 percent). 26 U.S.C. § 1(h)(1)(D). The Moores would have the benefit of the U.S. foreign tax credit rules, which would allow them to credit the 20 percent U.S. tax with the previously paid 25 percent tax paid to India.

Article 25 of the India-U.S. Treaty specifically confers the benefit on the residents of a Contracting State. "The United States must grant the benefits of this Article to its citizens and residents, notwithstanding any less beneficial [Internal Revenue] Code provisions to the contrary." U.S. Treasury Department Technical Explanation: Convention and Protocol U.S.-India, "Relief from Double Taxation" (June 14, 1990). This credit would have eliminated any U.S. tax liability on the Moores' deemed income of $132,512 from the foreign corporation. Instead, if the MRT were not to require realization, the Moores' total tax rate is 36 percent (plus the foreign company may owe 20 percent in corporate tax as well).

CONCLUSION

The court should reverse the decision of the Ninth Circuit and rule for Petitioners.

Respectfully submitted,

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