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 U.S. Court of Appeals for the Ninth Circuit

BRIEF OF INDIVIDUAL TAXPAYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

This brief describes the real-world impact of the Mandatory Repatriation Tax, enacted as part of the Tax Cuts and Jobs Act of 2017, 131 Stat. 2054.[1] *Amici* are individual United States citizens—living both domestically and abroad—who hold shares in controlled foreign corporations for a variety of legitimate reasons. They are law-abiding taxpayers who consistently file and pay taxes in both the United States and the relevant foreign jurisdictions. Though each has a different experience with the Mandatory Repatriation Tax ("MRT"), all have suffered the consequences of having to face personal tax liability for corporate earnings that never made their way to these taxpayers' pockets.

INTRODUCTION AND SUMMARY OF ARGUMENT

The tax at issue unfairly (and unconstitutionally) harms real human beings—from small business owners to leaders of industry, and from passive investors to active entrepreneurs. *Amici* submit this brief to tell some of their stories.

The Constitution limits Congress's taxing power to the taxes expressly enumerated in Article I, as well as "taxes on incomes" as described in the Sixteenth Amendment. Because "direct" taxes must be apportioned across the several States (U.S. Const., art. I, § 2, cl. 3 and § 9, cl. 4), few, if any, federal taxes are established as direct taxes. Indeed, when Congress passed the MRT, it did not even try to set up a mechanism that would comply with Article I. Instead,

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

Congress invoked its power under the Sixteenth Amendment to tax "income."

But labels alone cannot alter the inherent nature of a tax. Though Congress labeled the MRT as a tax on "income," the levying of tax on unrealized gains in property interests is, in reality, a tax on the property interests themselves. By definition, the taxpayer has not taken any "income" from the property itself, so paying the tax requires the taxpayer to find or liquidate other assets.

Amici are individual U.S. citizens who own shares in controlled foreign corporations. They are from different walks of life, with different backgrounds, different businesses, and different tax liabilities. But all were left scrambling and confused when the IRS came to assess the MRT. For each of them, complying with the MRT has had tremendous practical and financial implications. And all have been left wondering how they can continue to do business and meet their tax obligations in a post-MRT world.

ARGUMENT

I. The Constitution protects *amici* and other taxpayers from direct taxes on property, such as the Mandatory Repatriation Tax.

Amici are all thoughtful taxpayers who have relied on some of the best legal and financial advisors available to develop sound financial plans. They understand that others depend on their judgment, and they have long track records of making fiscal choices with prudence and consideration.

As part of that process, *amici* naturally considered the tax consequences of their investment strategies. Those considerations were all developed against the

backdrop of what taxes the Constitution permits—and what taxes, like the MRT, it prohibits.

The Constitution grants Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises." U.S. Const., art. I, § 8 cl. 1. This power to tax is limited by the Constitution's Apportionment Clause and Direct Tax Clause, which command that "direct Taxes shall be apportioned among the several States" and that "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." *Id.* § 2, cl. 3; *id.* § 9, cl. 4.

The Sixteenth Amendment was promulgated in response to this Court's decision in *Pollock* v. *Farmers' Loan & Trust*, which held that a tax on income earned from real estate or investment property was a direct tax on the property itself and thus required apportionment. 158 U.S. 601, 637 (1895). Addressing the issue decided in *Pollock*, the Amendment carved an exception to Article I, allowing Congress to tax "incomes" without apportionment:

> 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 of enumeration.

In fashioning a federal income tax as an exception to apportionment, the Sixteenth Amendment preserved the constitutional default: direct taxes cannot be imposed without apportionment.

A survey of the congressional record confirms this. Twice, Senator Anselm McLaurin of Mississippi floated a broader amendment that would remove any reference to direct taxes—and twice, Congress rejected it. Erik M. Jensen, *The Taxing Power, the*

Sixteenth Amendment, and the Meaning of "Incomes," 33 ARIZ. ST. L.J. 1057, 1116, 1121 (2001). The Sixteenth Amendment's sponsor—Senator Norris Brown of Nebraska—responded to this proposal by confirming that his "purpose [was] to confine [the Sixteenth Amendment] to income taxes alone." *Id.* at 1116 (quoting 44 Cong. Rec. 3377 (June 17, 1909)). Any other direct taxes on property would still be subject to apportionment. *See Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 570–71 (2012) (recognizing that taxes on personal property are still direct taxes that "must be apportioned among the several States").

Put another way, Congress's power to tax without apportionment is confined to "taxes on incomes." But what is "income"? That critical question is up to this Court, not Congress, to decide. As this Court has observed, "the Sixteenth Amendment confers no power upon Congress to define and tax as income without apportionment something which theretofore could not have been properly regarded as income." *Taft* v. *Bowers*, 278 U.S. 470, 481 (1929) (noting the "settled doctrine" in this Court's past decisions).

In the early 1900s, "income" from property was universally understood to mean *realized* gains. Contemporaneous dictionaries confirm this. *Black's Law Dictionary*, for example, defined "income" as "that which *comes in* or *is received from* any business or investment of capital." *Black's Law Dictionary* (2d ed. 1910) (emphasis added).

Debates about the federal income tax from 1894 to 1909 further support this understanding. An "income tax" was not to be a tax on the value of a person's assets; it was to be a tax on the *proceeds*. Jensen, *supra*, at 1128–29. Proponents of the Sixteenth Amendment "were talking about taxing '*earnings* of wealth,'" not

"measuring the tax by the *value* of a person's wealth." *Id.* at 1129 (emphasis added). As Senator Weldon Heyburn of Idaho observed:

> The value of real estate is not alone what it will bring as an income. It is the value for which you can sell it, even though it brings you no income. * * * An income tax is a tax upon an intangible thing—a thing that may vary over night or disappear in a day, a thing that may come and go. It is not the same kind of property as the thing from which an income may or may not be derived. * * * I think we must distinguish between the thing of value and the revenue which comes from it or does not come from it, according to the circumstances.

44 Cong. Rec. 2084 (May 17, 1909). Some Populists at the time "wished it were possible to impose a tax directly on land." Jensen, *supra*, at 1129. But "it was generally understood such a tax wouldn't fly politically and that, in any event, it would present insuperable constitutional problems." *Id.*

At the same time, members of Congress expressed concern that "dry taxes" on property and wealth would be burdensome to pay, and taxpayers would be forced to sell assets to cover them. Representative James Cox of Indiana expressed just such a concern on the House floor in 1909:

> You go to the homestead of a widow who has nothing but a roof to cover her head, and you levy your tax upon the entire value of the homestead and make her pay it, although she may have to sell the last shoat, the last chicken, the last egg to pay it.

44 Cong. Rec. 4423 (July 12, 1909) (quoting a floor statement given three decades earlier by Senator John Sherman of Ohio in arguing against a repeal of the existing income tax); *see also* Robert G. Natelson, *What the Constitution Means by "Duties, Imposts, and Excises"—and "Taxes" (Direct or Otherwise)*, 66 CASE W. RES. L. REV. 297, 336 (2015) ("It could be difficult even for well-to-do people to pay oppressive 'dry taxes' if their wealth was in illiquid form."). A federal tax on income? Good. A federal tax on property? Bad.

Parties have litigated the definition of "income" ever since. Several times, this Court has confirmed the original understanding that "income" includes only realized gains. A few years after the passage of the Sixteenth Amendment, the Court in *Eisner* v. *Macomber* considered "the characteristic and distinguishing attribute of income." 252 U.S. 189, 207 (1920). The Court addressed whether a stockholder's receipt of a stock dividend was "income" under the Sixteenth Amendment. *Id.* at 207–08. According to the Court, "income" is "a gain, a profit, something of exchangeable value, *proceeding from* the property, *severed from* the capital, however invested or employed, and *coming in*, being *'derived'*—that is, *received* or *drawn* by the recipient (the taxpayer) for his *separate* use, benefit and disposal." *Id.* at 207 (emphasis in original). Only when "the dividend * * * is payable in money" and is "so paid * * * does the stockholder realize a profit or gain which becomes his separate property, and thus derive income from the capital that he * * * has invested." *Id.* at 209.

Since then, the Court has reiterated *Macomber*'s basic understanding of "income." *See* Henry Ordower, *Revisiting Realization: Accretion, Taxation, the Constitution, Macomber & Mark to Market*, 13 VA. TAX REV. 1, 56 (1993) ("In *Macomber*, the Supreme Court

recognized a fundamental realization principle in the Sixteenth Amendment," and "[o]ver the years," the Court has "left the foundation of the principle intact."). For instance, in *Helvering* v. *Horst*, a father gave his son the right to collect interest payments on a bond. 311 U.S. 112, 114 (1940). The Court reviewed whether the father could be taxed for the interest paid to his son. Observing that a taxpayer could not escape taxation by assigning away income he would have received, the Court reiterated "the rule that income is not taxable until realized" and explained that the "power to procure the payment of income to another is the enjoyment and hence the *realization* of the income." *Id.* at 116–18 (emphasis added). The father must first realize the income—a taxable event—if he wanted to have money to give away at all.

Later, in *Commissioner* v. *Glenshaw Glass*, the Court held that punitive damages awards are taxable as income. 348 U.S. 426, 431 (1955). The Court underscored *Macomber*'s realization requirement and found that punitive damages awards were "income" because they were "undeniable accessions to wealth, *clearly realized*, and over which the taxpayers have complete dominion." *Id.* at 431 (emphasis added).

In short, the text, history, and this Court's analysis of the Sixteenth Amendment confirms that "income" includes only realized gains. Realization is what separates the gains from the property that produced them. In the corporate context, it is what moves the gains from the corporation to the shareholders themselves. As *Macomber* made clear, taxing a shareholder based on the company's "accumulated and undivided" profits, like the MRT does, "would be taxation of property because of ownership, and hence would require apportionment under the provisions of the Constitution." 252 U.S. at 217; *see also Brushaber* v.

Union Pac. R.R. Co., 240 U.S. 1, 19 (1916) (highlighting that nothing in the Sixteenth Amendment repudiates *Pollock*'s holding that "taxes levied directly on personal property" require apportionment).

Like the Moores, *amici* are law-abiding taxpayers who hold shares in foreign corporations. The MRT effectively imposes a tax on the property they own, not on the money they realized as a result of that ownership. The MRT is "best characterized as a direct tax on [*amici*'s] wealth" and on *amici*'s ownership interest in their companies. *See* Sean P. McElroy, *The Mandatory Repatriation Tax is Unconstitutional*, 36 YALE J. REG. BULL. 69 (2019); *see also* Natelson, *supra*, at 350 ("[A] tax was *direct* if laid on one's status," which include "taxes on property and wealth."). *Amici* have been forced to pay an unconstitutional tax.

II. Congress levied a direct tax on *amici*'s property interest in foreign corporations with unrealized earnings, thus evading the limits on the federal taxing power.

The accounts below illustrate the unintended and in some cases financially devastating consequences *amici* faced because of the unconstitutional tax. When Congress taxes unrealized gains, the shareholder has to come up with cash on the fly. This is not just temporary turbulence; it is an existential threat to how *amici*'s corporations operate and attract capital, how *amici* do business, and how *amici* save and invest for the future while navigating tax laws in multiple jurisdictions.

A. The Passive Investor

S.S. lives in a quiet New England town. He is an American citizen who has spent his entire life in the United States but enjoys traveling, and occasionally investing, abroad. In 2010, he stepped away from a

professional career in finance and tax and focused instead on passive investing. Now semi-retired, S.S. keeps a watchful eye on his portfolio, including private real estate investments he has made since 2010.

In the 2000s, S.S. met and worked with a potential business partner who was a dual citizen of the United States and Colombia. The two agreed that rapid economic development in Colombia might present a potentially profitable business opportunity. In 2011, S.S. joined a small investor group to construct and sell two high-rise condominium buildings. The target market focused on middle- and upper-middle class Colombians looking for a safe community to live in.

S.S. invested more than $400,000 in exchange for his minority stake, while his business partner took the operational lead and exercised control over the venture. S.S. recalls:

> *Our investment was always intended to be project-based and have a limited life, rather than operate as an ongoing business in perpetuity. At some point, all the condos would be sold, and we'd liquidate and be done.*

S.S. joined a Texas limited partnership that pooled U.S. investors' money and invested in a Colombian SAS (sociedad por acciones simplificada). Money went into the SAS, and the dual citizen on the ground managed the day-to-day construction and sales from Colombia. The capital investment and customer presales commitments were then used to obtain loans from a local Colombian bank during the construction phase. Under Colombian law and the local bank loan agreements, it would be impossible to draw funds out of the SAS while it was encumbered with loan and other obligations.

> *One simply cannot strip profits out of the local entity for remittance back to US investors for any reason while the SAS has significant outstanding liabilities. Accounting profits are not cash profits and they must also not ignore the business's essential liabilities and ongoing needs. So, in our case, the SAS essentially needed to complete and sell the entire project in order for investors to realize any cash return.*

In 2015, Colombian customers began to take possession of condos on a rolling basis as they were completed. This led the SAS to recognize sales revenue and local accounting profit, though no cash was (or could be) paid out to the investors.

The MRT caught U.S.-based passive investors like S.S. by complete surprise in 2018. The project was approximately 79% complete in terms of sales, yet it still had significant local liabilities and a softening local economy to contend with. Despite this, the IRS allocated more than $140,000 as taxable income to S.S. based on his passive share in the venture and then assessed him more than $25,000 in tax, even though S.S. hadn't received a penny through 2018. S.S. was shocked.

> *The IRS wanted to tax me on my share of the SAS's earnings and profits, but ignored my minority, passive investment position, my inability to demand or receive any true cash, and that my principal amount invested had an unrealized loss due to foreign currency rates. So I was in the hole on my overall investment, yet still got taxed on it as if I had theoretically taken money out.*

S.S.'s own accountants were unsure what to do. They advised S.S. that it was a unique, one-time tax that appeared to operate independently and lacked the checks and balances one would expect when calculating tax liability. For example, S.S.'s accountants were confused as to why foreign tax credits for the high local taxes S.S. actually paid in Colombia on that very same income could not be credited towards the MRT. They also were uncertain how to interpret important details of the MRT given delays and changes in IRS guidance. S.S.'s accountants had never seen or expected a tax like this.

Further, S.S. had no authority to demand or draw funds from the SAS via the Texas Limited Partnership to pay the tax.

> *I had to liquidate other assets, totally unrelated to this investment, in order to pay the MRT. Doing so triggered even more tax.*

To soften the impact, S.S. elected to pay the tax on the eight-year installment payment plan offered by the IRS. S.S. hoped he might receive some cash in the near future from Colombia to match the installment payments. But the IRS unexpectedly withheld S.S.'s 2018 regular income tax refund check and unilaterally applied it to cover the MRT tax liability.

Meanwhile—and notwithstanding the accumulated local accounting profit that S.S. paid tax on—S.S. anticipates he will have a certain overall loss on his passive Colombian investment. As of August 2023, the SAS's U.S. investors have received only 64% of their invested capital back in the form of cash distributions, and there is little local cash left to distribute. The strong U.S. dollar versus the Colombian peso over the 2011-to-2023 investment period caused significant unrealized (through 2018) and now realized (2020

through 2023) losses on the original capital invested. The original capital invested has come home to the United States as fewer U.S. dollars. When the partnership winds down at the end of 2023, S.S. will not have come out ahead.

> *This tax focused narrowly on a point-in-time theoretical translation of local accounting profits into US dollars while ignoring my larger reality. The IRS ignored and gave me zero credit for all the local Colombian income taxes paid on the local accounting profit. They ignored all the transactional costs that I would have incurred had I actually tried to realize the profits, such as local dividend taxes and currency exchange rates. So I have an overall loss on this foreign investment, yet still paid a one-time, non-recoverable US income tax on it. If one accepts Congress's ability to pass at any time a one-time tax on a singular aspect of a U.S. investor's unrealized foreign investment position, it opens up Pandora's box. And, frankly, it intimidates and discourages small, passive investors like me from making any type of foreign investment.*

The MRT was a direct tax on S.S.'s property interest, blindsiding him with taxes based on his position as a passive, indirect, minority shareholder of a small controlled foreign corporation. Congress created "income" out of thin air by isolating a narrow, incomplete, and unrealized foreign corporate paper gain. The IRS then assessed a tax on S.S. based on his indirect share of that unrealized gain, taxed him in real U.S. dollars that had to come from sources unrelated to his investment, and made the tax non-recoverable.

Almost five years ago, the IRS took its one-time tax and then got out. And it did so before S.S., his fellow investors, and their tax professionals could even determine and realize the final, overall financial result of a thirteen-year Colombian venture—a now-certain loss.

B. The Global Entrepreneur

E.C. owns a global sourcing organization based in Southeast Asia. He was born in Japan to American parents shortly after World War II. In the 1980s, he took over his father's business and grew it to have 1000 associates in offices across twenty countries. The company represents the interests of about 60 clients, mostly American, for merchandise they directly procure from thousands of overseas vendors. Its physical, boots-on-the-ground presence across the globe enables comprehensive oversight of its clients' supply chain. The company certifies factories for technical capability, as well as for social and environmental compliance. It provides engineering, production oversight, and quality-control services. It also monitors compliance with local laws, as well as with the law of the United States, United Kingdom, and European Union. The company represents its clients alone; it does not take compensation from its partner vendors.

> *Rigorous compliance is the company's value proposition.*

If a retailer in the United States wants to sell a t-shirt, E.C.'s company can line up the entire supply chain necessary to make that happen. And it will all be above board.

E.C.'s company is an intricate network of entities that allow E.C. to offer a suite of services that span the globe. He owns several U.S. companies that support the group, but the overwhelming majority of

entities and core business operations are outside the United States. Forty companies from around the world converge on one holding company at the top, wholly owned by E.C. Each company has its own tax filings and navigates various currency exchange rates and international tax laws.

> *My United States tax filing is now nearly six inches thick, costs $200,000 per year, and requires the constant attention of myself and my tax advisors to maintain compliance.*

Every year, E.C. draws a salary and bonus and receives dividends. He also declares passive "subpart F" income.

As one would expect from a company built on compliance, E.C. and his team keep detailed records. When the MRT hit, the IRS could look back all the way to 1986 and tax three full decades of retained corporate earnings. Through the MRT, the IRS calculated E.C.'s "income" at $29.5 million and assessed him a tax liability of $5.2 million. E.C. chose the eight-year installment plan because he did not have the cash on hand to cover the tax. If E.C. drew cash out of the company to pay the MRT, that too would be taxable income under the Global Intangible Low-Taxed Income rules.

> *We keep records going back forever. The IRS went back 30 years. The money was already used; it's not even there. We were trying to comply, be transparent, and file every year. But now the earnings from 1986 through 2017 just got taxed at 17.5%!*

For E.C., the retroactivity component intensified a tax that already felt fundamentally unfair. E.C. had always paid his taxes and complied with tax laws. For decades, E.C. and his company made decisions under

then-existing tax laws to manage, operate, and grow his business in over 20 countries. They did so under then-existing definitions of "income" and paid taxes accordingly. If Congress had given advanced notice to taxpayers that it intended to redefine "income" and apply that definition retroactively, E.C. would have taken steps to limit the harm. Instead, the MRT surprised E.C. with 30 years of new taxes and no action plan.

E.C. also felt like his company was collateral damage in a move really aimed at multinational corporations. Companies like Google, Amazon, or Exxon structured their businesses similarly to E.C.'s company (on a grander scale). E.C.'s company is structured this way out of necessity. Meanwhile, E.C. is trapped figuring out how to pay the tax, and the bigger corporations have simply adopted even more elaborate tax strategies.

But looking forward, E.C. has no idea how he will continue to operate a competitive business.

> *My main competition are Asian-owned companies with similar footprints, but without all the reporting requirements. With all the reporting requirements, do I really want to continue to do business? Extremely burdensome compliance requirements are a distraction that my competitors don't have. We operate companies in 20 countries around the world. For each year the MRT covered, do we have to do an exchange rate calculation in each country to come up with our own number? Is this going to happen again?*

E.C. knows other Americans who, when faced with this daunting tax regime, renounced their citizenship to maintain corporate competitiveness and

avoid tax. But E.C. is proud of his American citizenship and wishes to keep it. Raised by Americans in Asia immediately after World War II, E.C.'s identity is in part defined by the healing and growth that took place after that terrible struggle. His life's work has bridged the commercial gap between East and West, and while his vendors are global, his clients are predominately based in the United States. He does not want to choose between his company and his country, yet he is at a loss for how his company will continue to operate if unrealized gains can be taxed at any time.

C. The Retirees

S.H. and T.H. are married retirees living in Canada. S.H. was born in the United States and moved to Canada as a child. T.H. was born in Canada and has U.S. citizenship through his American father, though he has never lived in the United States. Both are dual citizens.

S.H. and T.H. founded a successful media company that filmed high-quality commercials for its customers. At the recommendation of tax advisors, the two created a multi-tiered corporate structure. They placed the business in an operating company where they were the major shareholders and split control (though they gave a few shares to their lawyer). The business invoiced clients through the operating company, which held funds for operating costs. S.H. and T.H. then each drew a salary. The remainder went into a holding company. As dual citizens living in Canada, S.H. and T.H. could not access many of the retirement savings vehicles in either country. The holding company held their life savings.

S.H. and T.H. learned of the MRT in 2016, before it was passed into law. S.H. wrote letters urging

lawmakers and officials to give an exemption to controlled foreign corporations like theirs. In S.H. and T.H.'s eyes, there was little difference between their corporate structure and S-Corporations based in the United States that were exempt from a similar tax. Their pleas fell on deaf ears.

> *We went to two high-priced accountants. They looked at our position in 2016, and then worked to prepare us for 2017. We'd had some lean years with the company, but then a few extremely good years. We spent tens of thousands on the companies' taxes that year.*

When the MRT came, S.H. and T.H. owed about $20,000 in tax and paid about twice as much in Canadian and United States accounting fees that they had not planned for. They picked the repayment plan.

Meanwhile, S.H. and T.H. continue to incur individual tax liability every time they draw from the holding company to support their retirement, even though the MRT taxed the total unrealized gain up front. In effect, they are being taxed twice. They felt as if they were being punished for doing exactly what everyone advised them to do if they wanted to save for retirement. Their corporate structure complied with both Canadian and United States law at the time and was put together by a lawyer and an accountant. When they connected with other American citizens living abroad, they realized most were not paying U.S. taxes. Rather than renounce their citizenship or evade taxes, however, S.H. and T.H. joined likeminded American expatriates around the world to advocate for policy change while continuing to comply with existing tax laws.

D. The Small Business Owners

E.R. and L.R. are a dual-citizen couple who were at the height of their business success when they were hit by the MRT. Both born and raised in America, E.R. and L.R. met in Kansas and then moved to Canada together in the early-2000s. They founded a communications company a few years later.

> *At its apex, we led a talented team of around 40 employees and contractors.*

As American citizens with permanent residency (and later dual citizenship) in Canada, E.R. and L.R. set up a multi-tiered corporate structure to navigate the tax laws in both jurisdictions. They placed their business in an operating company and created a separate holding company.

> *We used a standard solution for American taxpayers in Canada. Canadian accountants would advise U.S. citizens to put everything into a corporate entity and keep your money there, withdrawing it gradually over time when you need it, especially during retirement.*

Prior to 2017, E.R. and L.R. would draw income from the operating company and then aggressively save in the holding company. By the time E.R. and L.R. were assessed the MRT, these savings represented more than ten years of work. Though it would be taxed whenever E.R. and L.R. started drawing from it, the United States wanted its cut now—and later, too.

> *The United States basically taxed us on our retirement savings. We received a tax bill for hundreds of thousands of dollars, plus $30,000 in filing costs, five times more than we previously paid. Our accountant also began requiring that we indemnify his firm for*

liabilities, noting that the ongoing vagaries and fluidity in new U.S. filing instructions meant that we would need to aim at a moving target. Alternatively, we could hire one of the major accounting firms, who might bear our risk by charging a few hundred thousand dollars per year. But we're not that big. We're a family business.

E.R. and L.R.'s only savings were in the holding company. They needed to take money from the holding company to pay the tax, incurring further tax liability.

To pay, we have to take it out of our corporation. So we have to pay personal tax in Canada to pay personal tax in the United States for corporate gains we never wanted to realize in the first place, making the MRT effectively a double tax to us.

E.R. and L.R. chose the payment plan. But it has been extremely difficult to pay their obligations. E.R. and L.R. kept a spreadsheet logging dozens of interactions with the IRS. Consistently, IRS employees were unfamiliar with the MRT, did not know how it worked, did not have the forms or computer systems necessary to process it, and did not know how to handle E.R. and L.R.'s return. To date, E.R. and L.R. have not received confirmation that the IRS correctly applied their 2023 installment payment to their MRT liability.

There is no path forward. Our retirement savings are devastated. Our Canadian business can no longer compete due to U.S. tax burdens. IRS Form 5471—which is required each year for every "foreign" corporation owned by an American—is now extremely complicated and

expensive following the Tax Cuts & Jobs Act. Can you even assess unrealized earnings—imaginary wealth—on an annual basis? There is no accounting standard for it. Our accountant makes an educated guess that we can support. But if we get it wrong—and we're told no one can get these tax forms right beyond arguable doubt—then there's a $10,000 automatic administrative fine for each form, plus any penalties.

E.R. and L.R. are exhausted. They value their American roots and are raising a new generation of devoted U.S. citizens. But they struggle to understand how future direct taxes on unrealized earnings are even viable. The cost of compliance, and fiscal uncertainty, is just too great. E.R. and L.R. have begun the arduous process of identifying a new business structure that alleviates some burdens, but it will upend how their company operates.

It is the end of an era for us.

E. The Consultant

E.M., a dual citizen of the United States and Sweden, moved to Sweden later in life. In the 1990s, fresh out of college, E.M. experienced quick success in her career as an advertising and marketing professional. In her late twenties, E.M. opened the European headquarters of a multinational consumer goods company. She split her time between Europe and the United States. She always had a complicated tax situation, but her company paid for the filings. E.M. continued working with the same U.S. tax professional long after she left the company.

E.M. met her Swedish husband at a leadership training workshop in Colorado. She followed him to

Sweden soon after, and E.M. split her time 50/50 between Sweden and the United States.

E.M. formed her own management consulting business in 2007. A few years later, she changed her domicile to Sweden, received permanent residency status, and placed her business in a Swedish corporation. She then became a dual citizen as well.

E.M.'s consulting business was moderately successful. She had ups and downs. One year, E.M. grossed less than $40,000 and had barely any net income. Her gross receipts occasionally crossed the $100,000 mark, but her income was well below that. Despite these modest earnings, E.M. paid $3,000 a year in filing fees. In fact, her most profitable years were right before the MRT, catching E.M. at a high-water mark. After industry shifts in 2018, her consulting business took a turn for the worse, and she never experienced such success again.

> *My best years as a consultant were right before 2017. It was the only time I actually had unrealized gains in the company. The timing was the worst.*

E.M. was assessed a $5,000 tax under the MRT, on top of everything she already paid. Given the size of E.M.'s company, these were big tax hits.

> *Compliance was already taxing, and when this came along, you realized that they can do anything at any time.*

E.M. selected the installment plan and then shut down her company. It was no longer economically viable to have a business in her own name. Whereas before, E.M. and her husband had separate small businesses, on paper E.M. is now her husband's employee.

> *A lot of decisions are impacted in the weirdest way by U.S. tax law. They do anything at any point in time, so what's the point? Why keep trying to make this go? Just step back and become more dependent on my husband. I was extremely independent, and now I'm not nearly as much.*

The MRT's direct tax on E.M.'s unrealized earnings ended E.M.'s business and upended the increasingly tenuous status quo that E.M. had navigated as a foreign-based taxpayer.

> *The ground can shift beneath my feet at any time, and they can tax me in any way. From a risk management perspective, it would be stupid to keep going like that.*

Like other *amici*, E.M. knows that some American expatriates do not pay taxes, and some choose to renounce their citizenship. But E.M. has no interest in giving up her American identity.

> *When you are born American, it is not that easy to let it go. I resent that it would be something I am forced to choose. I am American. I'm a loyal American. I love America. It's a big deal to hand over your passport and say, "I'm no longer going back to America." If something were to happen to my husband, I would probably move back to the United States.*

CONCLUSION

Amici are all diligently working to meet their obligations under the MRT. But compliance has come at a cost. The direct tax on unrealized earnings has raised difficult questions about their duties as U.S. citizens, their financial security into the future, and the very existence of the businesses they worked so hard to build. Their experiences are a direct consequence of Congress's departure from the constitutional limit on its taxing power—a departure that has real implications for real people at a variety of income levels. The judgment below should be reversed.

Respectfully submitted.

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