No. 22-800

In The
Supreme Court of the United States

CHARLES G. MOORE AND KATHLEEN F. MOORE,

Petitioners,

v.

UNITED STATES,

Respondent.

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

BRIEF OF *AMICUS CURIAE* PROFESSOR AMANDEEP S. GREWAL IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is the Orville L. and Ermina D. Dykstra Professor in Income Tax Law at the University of Iowa. His scholarly research includes tax law and constitutional law. See, *e.g.*, Amandeep S. Grewal, *Billionaire Taxes and the Constitution*, 58 Ga. L. Rev. (forthcoming 2023). His interest in this case relates to the sound development of those areas of law.

SUMMARY OF ARGUMENT

The Ninth Circuit below dispensed with the realization requirement. *Amicus* believes that the lower court erroneously and unnecessarily did so. Section 965(a) follows the realization requirement and therefore satisfies the Sixteenth Amendment.[2] U.S. Const. Amend. XVI. The Ninth Circuit should not have "narrowly interpreted" *Eisner* v. *Macomber*, 252 U.S. 189 (1920), when it held for the United States. Pet. App. 14.

Others will ably explain why Section 965 observes realization principles. *Amicus* writes principally to encourage the Court to cautiously frame the

[1] Per Supreme Court Rule 37.6, *Amicus* hereby certifies that this brief was not authored in whole or in part by counsel for any party. *Amicus* received no monetary contribution toward the preparation or submission of this brief other than the general financial support of the academic institution with which he is affiliated. The views expressed in this brief are solely those of *Amicus*.

[2] Section references are to the Internal Revenue Code of 1986 (the tax code), codified in Title 26 of the U.S. Code, as in effect during the taxable years at issue.

constitutional question in this case. Though the parties describe Section 965 as establishing a "Mandatory Repatriation Tax," the statute's language tells a different story. Section 965(a) does not impose a tax but instead increases a taxpayer's "subpart F income" under Section 951(a)(1). Subpart F income itself gets blended with other income and deduction items, resulting in a tax base defined as "taxable income." See 26 U.S.C. 63(a). Section 1 imposes a tax on that base.[3]

The characterization of a tax turns on its base. "'A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes.'" *Trinova Corp.* v. *Michigan Dep't of Treasury*, 498 U.S. 358, 374 (1991) (internal citation omitted). Various courts, including this one, have sometimes focused on a single item within the federal income tax base when they examine constitutional limitations. See, *e.g.*, *Macomber*, 252 U.S. at 199–200 (applying the Sixteenth Amendment's realization requirement to the statutory language on pro-rata stock dividends). *Amicus* believes that this reflects the wrong interpretive approach. Rather than ask whether the Section 965(a) addition to the tax base follows Sixteenth Amendment realization principles (a "piecemeal approach"), courts should ask

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[3] Section 63(a) defines "taxable income" generally, and its definition applies to both individuals and corporations. However, individuals and corporations face different tax-imposing statutes. Individuals are taxed under Section 1, while corporations are taxed under Section 11. Because this case involves individuals, this brief will refer to Section 1. But similar principles would apply if this case instead involved a corporation subject to tax on taxable income through Section 11.

whether the entire base, taxable income under Section 1, follows those principles (a "holistic approach").

Under the holistic approach, individual items within the tax base may deviate from realization principles without changing Section 1's qualification as a "tax[] on incomes" under the Sixteenth Amendment. The question would be whether Section 1 primarily reaches realized income. A statutory provision that added unrealized income to the tax base would not change Section 1's predominant character as an income tax.

In the present context, the piecemeal and holistic approach each lead to the same result. Viewed alone, Section 965(a) follows the realization requirement. And Section 1, given that it primarily reaches realized income, also follows the realization requirement. However, the distinction between the piecemeal and holistic approaches will make a difference when an individual code section deviates from realization. *Amicus* thus urges the Court to expressly acknowledge the holistic approach and reserve on whether it may apply that approach in future cases.

The Court should make that reservation even if it accepts the taxpayer's arguments here. Some commentators believe that a holding for the Moores will cast severe constitutional doubts over many income tax provisions. Those concerns may be well-founded if the Court embraces a piecemeal approach. However, a holistic approach would protect the constitutionality of income tax provisions that do not strictly observe

realization. Though each party in this case takes a piecemeal approach, the Court should allow lower courts to consider the holistic approach in future constitutional challenges to income tax provisions.

Also, if the Court concludes that Section 965(a) violates the realization requirement, the Court should consider a remand in this case. The lower courts should consider whether the Taxing Clause alone supports Section 965(a), even if the Sixteenth Amendment does not.

ARGUMENT

I. The Mandatory Repatriation Tax Is Not a Tax

The Ninth Circuit described Section 965(a) as imposing a "Mandatory Repatriation Tax." See Pet. App. 4–5. The parties use similar phrasing. However, Section 965(a) does not itself create a tax. Instead, it creates a new item of income.

Section 965(a) falls within the tax code's elaborate "subpart F" regime. See 26 U.S.C. 951–65. That regime limits a U.S. shareholder's ability to defer the inclusion of income derived through a foreign corporation. Under Section 951(a), the U.S. shareholder must immediately include in gross income some earned but undistributed foreign corporation earnings. Historically, this immediate income inclusion rule applied only to passive or mobile earnings. The foreign corporation's

active, business earnings were not immediately included in the U.S. shareholder's income. Thus, U.S. shareholders could escape tax unless and until the foreign corporation made a distribution. See Jeff Sommer, *A Stranded $2 Trillion Overseas Stash Gets Closer to Coming Home*, N.Y. Times (Nov. 4, 2016) (discussing potential legislative reforms that would reach offshore accumulated earnings).

In 2017, Congress adopted Section 965(a) as part of a switch to a new international tax framework. Section 965(a), shorn of technical details, increases the amount of income subject to the subpart F regime. That is, under the statute, the shareholder immediately includes in income his share of the foreign corporation's post-1986 accumulated earnings. Section 965(a) thus adds an element to the tax base. It does not create a tax.

This Court has recognized the commonsense distinction between a tax and the items within its base. In *Trinova Corp.* v. *Michigan Dept. of Treasury*, 498 U.S. 358 (1991), the taxpayer challenged Michigan's business activity tax. The base of that tax included three separate elements. See *id.* at 374. The taxpayer believed that dormant Commerce Clause limitations applied separately to each element. See U.S. Const. Art. I, § 8, Cl. 3. That is, the taxpayer wanted to "dissect the tax base as if the [tax] were three separate and independent taxes." *Trinova*, 498 U.S. at 358. But the Court rejected the taxpayer's approach. The business activity tax was "not three separate and independent taxes." *Id.* at 375. Instead, its three components were

inseparable parts of a "broader tax base." *Id.* at 378. The Court thus applied the dormant Commerce Clause to the business activity tax as a whole and found that it satisfied the relevant constitutional requirements. See *id.*

Trinova dealt with a state tax law, but similar principles apply in the federal context. Congress has not created numerous separate federal income taxes for every item of income. Instead, various income items blend together to form gross income. See 26 U.S.C. 61. Then, deductions are taken against that figure to establish a single tax base (that is, taxable income). See 26 U.S.C. 63(a). Section 1 then imposes a tax on that base.

Congress has thus created a single income tax whose base includes, among many other things, amounts described in 965(a). A taxpayer who faces subpart F inclusions through Section 965(a) ultimately determines his tax liability through Section 1. That is, his subpart F inclusions get blended with other income items, and he takes deductions to arrive at an integrated figure (taxable income).

Section 965 contains a special rule that might make one think that the statute establishes a standalone tax. Under Section 965(h), a taxpayer identifies the increase in his taxes that stems from his 965(a) inclusion. The taxpayer does not need to immediately pay this Section 965 "net tax liability." Instead, he can spread his payments over 8 years. This may ease taxpayer hardships. (Recall that Section 965 relates to

massive amounts of accumulated but undistributed earnings.)

Section 965(h) might suggest that Section 965 imposes a tax. Why else would the statute describe a "net tax liability" under Section 965? However, the technical details behind Section 965(h) confirm that Section 965 does not impose a tax. In short, Section 965(h)(6) says that the Section 965 "net tax liability" refers to the difference between the taxpayer's real tax liability and the liability that he would face if Section 965 did not exist. This means that income described in Section 965(a) might not create any tax liabilities at all. For example, suppose a taxpayer has $10,000 of income under Section 965(a) and $50,000 of deductions under other provisions. Without Section 965(a), his tax liability is zero (he has a $50,000 tax loss, not taxable income). With Section 965(a), his liability remains zero, because he still has a net loss (this time, $40,000), rather than income.

If Section 965(a) itself imposed a "Mandatory Repatriation Tax," one would expect that the taxpayer's $10,000 of income would always face taxation.[4] But

[4] Section 965 also includes a complex provision that pairs a Section 965(a) income inclusion with a deduction in some circumstances. Section 965(c) allows a deduction that, roughly speaking, lowers the tax increase that would otherwise result from adding to gross income the amounts described in Section 965(a). One might believe that this shows that Section 965(a) establishes a standalone tax. The provision seems to have its own tax rate. But that interpretation is incorrect. Section 965(c) shows that Section 965(a) inclusions are deeply integrated into the broader income tax system. Congress could not simply announce a low tax rate

income described in Section 965(a) or any other income inclusion provision does not necessarily face taxation.[5] Income described in Section 965(a) gets blended into subpart F income. Subpart F income, along with the taxpayer's other income and deduction items, form taxable income. Then, Section 1 imposes a tax on that integrated figure. The Section 965 "Mandatory

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for Section 965(a) income, as it could if the statute established a standalone tax. Instead, Congress, through Section 965(c), needed to use the broader tax system and its deduction machinery to provide special treatment to Section 965(a) income. Though Section 965(c) is complex, its approach is not unique. Congress has, at other times, adopted byzantine deduction measures to limit the force of an income inclusion provision. See, *e.g.*, Revenue Act of 1951, Pub. L. No. 82-183, § 322(a)(2), 65 Stat. 452, 499 (providing a 50 percent deduction for capital gain income); 26 U.S.C. 243 (offering deductions to corporations, under a varying schedule, for dividends received).

[5] Although Section 965(h) provides a special rule for income inclusions under Section 965(a), any income inclusion provision can require an analysis of a taxpayer's tax increase related to that provision. Section 1341(a) illustrates this. That provision applies when a taxpayer includes income in her return for a given year and, in a later year, it is established that she must give back the income. The taxpayer typically enjoys a deduction when she gives the income back. But tax rates may have been high when she included the income and low when she returned the income. Section 1341(a) offers relief to address the rate disparities. See *United States* v. *Skelly Oil Co.*, 394 U.S. 678, 681 (1969). When the taxpayer applies Section 1341(a), she must determine how much her tax liability would have decreased in the prior year if she had excluded the income which she has now given back. See 26 U.S.C. 1341(a)(5)(B). That income could be of any type. That is, the income could potentially be described in any income inclusion provision. Thus, every income inclusion provision potentially has a "net tax liability" under Section 1341(a), analogous to the one described in Section 965(h).

Repatriation Tax" exists in the colloquial sense, but not in the sense for proper constitutional analysis.

II. THE COURT SHOULD RESERVE ON WHETHER THE SIXTEENTH AMENDMENT PROPERLY APPLIES TO TAXES OR INSTEAD TAX ITEMS

The Sixteenth Amendment allows Congress to impose "taxes on incomes" without apportionment. *Amicus* believes that this requirement should apply on a holistic basis, rather than on a piecemeal basis. That is, where the government asserts that a federal levy qualifies as an income tax, the Court should examine whether that levy *primarily* reaches income. The levy should qualify as an income tax even if some items in the tax base deviate from strict income definitions.

An approach that allows Congress to tax something other than income may seem aggressive. But, on some level, everyone agrees that Congress can tax non-income under the Sixteenth Amendment. We know this because Congress, without any serious objections, does not actually tax income. The income tax laws routinely deviate from income principles because Congress uses the tax system to pursue numerous policy goals. This means that the income tax laws contain various exclusions for realized gains. See, *e.g.*, 26 U.S.C. 103 (exclusion for interest received on municipal bonds); 26 U.S.C. 121 (exclusion for gain on the sale of a principal residence). Also, though the concept of income requires cost recovery deductions only for income-producing

activities, Congress has established deductions for expenditures that have nothing to do with those activities. See, *e.g.*, 26 U.S.C. 213(a) (deduction for personal medical expenses); 26 U.S.C. 219 (deduction for some retirement contributions). In the end, Congress taxes something ("taxable income" under Section 63(a)) that is motivated by income principles but that does not perfectly conform to them.

Given this background, the piecemeal approach seems unnecessarily restrictive. The income tax laws do not tax actual income. Yet the piecemeal approach demands that income inclusion provisions strictly follow income principles.

Amicus acknowledges that the Court used a piecemeal approach in *Macomber*. In that case, the Court found a realization requirement violation in the slice of the Revenue Act of 1916, ch. 463, 39 Stat. 756, that required income inclusions for pro rata stock dividends. See *Macomber*, 252 U.S. at 199–200 (discussing the *proviso* found at the end of Section 2(a)). The Court thus did not follow a holistic approach. That is, the Court did not ask whether the Revenue Act of 1916 primarily reached realized income. The Court considered only whether pro rata stock dividends qualified as realized income.

Nonetheless, despite *Macomber*, there are several reasons that the Court should acknowledge that the holistic approach may provide the correct interpretive method for today's income tax laws:

First, the Court should recognize the changed statutory context. The Revenue Act of 1916 was a relatively simple statute that applied to few Americans. See Scott Hollenbeck & Maureen Keenan Kahr, *Ninety Years of Individual Income and Tax Statistics, 1916–2005*, Stat. of Income Bull., Winter 2008, at 144 (showing that only a few million returns were filed each year in the late 1910s). Today's income tax laws are prodigious, expansive, and tightly integrated. Whatever merit the piecemeal approach might have had in *Macomber* does not translate easily to the present context. The Revenue Act of 1916 defined "income" through two sections. See Revenue Act of 1916, ch. 463, §§ 2, 4, 39 Stat. 756, 757–59. The current tax code provides a long list of income items in one general provision, see 26 U.S.C. 61, and further defines gross income through countless other provisions. For today's laws, a piecemeal approach provides a highly cramped view of whether Congress has properly imposed "taxes on incomes" under the Sixteenth Amendment.

Second, subsequent to *Macomber*, the Court has recognized that a single tax base should not be sliced into small parts for constitutional analysis. In *Trinova*, the Court faulted the taxpayers for dissecting a "broader tax base" into separate elements. *Trinova*, 498 U.S. at 375. *Trinova* dealt with a Commerce Clause challenge to a state tax law. But the Sixteenth Amendment's text does not support a different approach in the federal income tax context. The amendment refers to congressional "taxes on incomes" imposed without apportionment. The amendment does not refer to "tax

increases attributable to tax items" imposed without apportionment. If the amendment referred to tax items rather than taxes, then a piecemeal approach would make sense.

Third, the piecemeal approach has sown confusion in this Court and in the lower courts. The D.C. Circuit even *sua sponte* vacated and eventually reversed a major decision on whether the Sixteenth Amendment permitted the inclusion of emotional distress awards in gross income. See *Murphy* v. *I.R.S.*, 460 F.3d 79 (D.C. Cir. 2006), vacated sua sponte, No. 05-5139, 2006 WL 4005276 (D.C. Cir. Dec. 22, 2006), opinion after reinstatement of appeal, 493 F.3d 170 (D.C. Cir. 2007). See also Amandeep S. Grewal, *Billionaire Taxes and the Constitution*, 58 Ga. L. Rev. – (forthcoming 2023) (discussing how the piecemeal approach has led to inconsistencies in this Court's excise power jurisprudence). The piecemeal approach could warrant retention if it yielded stable or predictable doctrine. But continued adherence to it will ensure that the Court gets more cases like this one. The piecemeal approach gives substantial incentive for taxpayers to challenge any income inclusion provision that even arguably deviates from realization principles.

Fourth, and continuing with the same theme, the piecemeal approach will lead to further uncertainty over several income tax provisions that deny cost recovery deductions for income-producing activities. The concept of "income" likely requires that a taxpayer face

taxation on his net gain, not his gross receipts.[6] Under a piecemeal approach, the various income tax provisions that deny deductions raise serious constitutional concerns.[7] Each deduction limitation provision creates a gross receipts tax, not an income tax. But under a holistic approach, the Sixteenth Amendment problem does not arise. The income tax code mostly allows cost recovery deductions for income-producing activities, such that Section 1's levy on "taxable income" qualifies as an income tax under the Sixteenth Amendment.

Fifth, the holistic approach permits congressional flexibility but does not allow for easy manipulation. The holistic approach relates to the Sixteenth Amendment and does not vitiate claims under the Constitution's

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[6] Edwin Seligman, an influential voice related to the ratification of the Sixteenth Amendment, wrote that "[i]ncome is, of course, to be distinguished from mere receipts or gross revenue" and that income always referred to "net income, as opposed to gross income." Edwin R.A. Seligman, *The Income Tax* 19 (2d ed. 1914).

[7] Judges and scholars have expressed different views about the extent to which Congress can deny deductions for income-producing activities. Compare, *e.g.*, *N. California Small Bus. Assistants, Inc.* v. *Comm'r*, 153 T.C. 65, 69–70 (2019) (expressing the view that Supreme Court doctrine establishes that Congress enjoys full discretion to grant or deny deductions), with *id.* at 81 (Gustafson, J., concurring in part and dissenting in part) (Congress has not taxed "income" unless it allows "the ordinary and necessary expenses that are incurred in the course of business."). See generally Erwin N. Griswold, *An Argument Against the Doctrine that Deductions Should be Narrowly Construed as a Matter of Legislative Grace*, 56 Harv. L. Rev. 1142 (1943). For present purposes, the ongoing debates need not be resolved. *Amicus* simply notes that under a piecemeal approach, those debates will be even sharper and lead to more litigation.

individual rights provisions. For example, suppose an income tax code provision said that members of a specific racial minority group must include unrealized gains from their retirement accounts in gross income. Under the holistic approach, a Sixteenth Amendment violation would not arise. Section 1 would primarily reach realized income, despite the discriminatory provision. However, a taxpayer subject to the discriminatory provision would have an easy Due Process Clause claim. See U.S. Const. Amend. V. A tax assessment directed towards him would violate the equal protection principles embodied in that clause. The Fifth Amendment's text provides specified protections for every "person." Thus, that clause allows individual-based challenges where the Sixteenth Amendment does not.

Sixth, the holistic approach will be workable. We know this because taxpayers and tax administrators routinely use a holistic approach to evaluate income tax systems. Under Section 901, a taxpayer enjoys a foreign tax credit when he pays income taxes to a foreign country. But it is not always clear whether he has paid a foreign income tax or a different type of tax. In *PPL Corp.* v. *Comm'r of Internal Rev*enue, 569 U.S. 329 (2013), the Court explained that a foreign government levy will qualify as an income tax when "[t]he predominant character of that tax is that of an income tax in the U.S. sense." *Id.* at 334 (quoting 26 C.F.R. 1.901–2(a)(1) (2013)). The regulations providing the "predominant character" standard "codifie[d] longstanding doctrine dating back to *Biddle* v. *Commissioner*, 302 U.S. 573, 578–579 (1938)." *Id.* at 329.

Under Treasury regulations, to qualify as an income tax, a foreign government levy must satisfy a realization requirement.[8] The regulations do *not* demand perfect adherence to the realization requirement.[9] For example, a foreign government levy might say that a taxpayer has "income" for the value associated with living in her own home. The U.S. system would not call such a thing income. Nonetheless, the foreign government levy will satisfy the realization requirement and qualify as an income tax if the levy mostly reaches income.[10]

The holistic framework in the regulations applies to an ever-changing class of government levies. Each year, U.S. taxpayers make countless payments to numerous foreign governments around the globe, under many different tax systems. Yet there are relatively few judicial disputes over whether a foreign government levy qualifies as an income tax. This implies that the holistic approach will be workable in the federal income tax context. If we can apply a holistic approach to an endless number of foreign laws enacted by foreign governments, we can apply a holistic approach to a U.S. law enacted by the U.S. Congress.

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[8] See 26 C.F.R. 1.901–2(b)(1) & (2).

[9] See 26 C.F.R. 1.901–2(b)(2)(i) (a foreign tax meets the realization requirement if amounts collected through non-realization events are insignificant relative to the amounts collected through realization events).

[10] See 26 C.F.R. 1.901–2(b)(2)(i) (a foreign levy may meet the realization requirement even if its base includes "imputed rental income from a personal residence used by the owner").

If a party to this litigation advanced the holistic approach, *Amicus* would encourage the Court to adopt it. However, each party here understandably follows the piecemeal approach adopted in *Macomber*. Thus, the Court should hold for the United States under the piecemeal approach. In doing so, the Court should expressly leave open whether, in a future case, the holistic approach may provide the correct interpretive method for determining whether Congress has imposed "taxes on incomes" under the Sixteenth Amendment.

III. THE COURT SHOULD MAKE RESERVATIONS ON THE SIXTEENTH AMENDMENT EVEN IF THE COURT CONCLUDES THAT THE MANDATORY REPATRIATION TAX IS A TAX

Amicus believes that the United States should prevail in this case. However, the Court might find for the taxpayers. It might conclude that (i) Section 965(a) establishes a standalone Mandatory Repatriation Tax, and that (ii) Section 965(a) violates the realization requirement. If the Court adopts that analysis, the Court should still make reservations about how the Sixteenth Amendment applies to the income tax laws.

If the Court finds that Section 965(a) establishes a standalone Mandatory Repatriation Tax, the Court should offer reservations about whether other income tax provisions establish standalone taxes. The Court has previously stated that when it "pass[es] on the

constitutionality of a tax law," it is "concerned only with its practical operation," rather than "the precise form of descriptive words." *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941) (quoting *Lawrence* v. *State Tax Comm'n*, 286 U.S. 276, 280 (1932)). Using that approach, the Court might conclude that, though Section 965(a)'s words create only an income inclusion, the statute, by reaching extraordinary amounts of accumulated earnings, creates a standalone tax in "its practical operation." *Id.* If the Court follows that analysis, the Court should note a distinction between Section 965(a) and other income tax provisions. Very few provisions even arguably establish standalone taxes in "practical operation." *Id*. Section 965(a), designed as a massive one-time income inclusion, adopts a unique mechanism. A finding that Section 965(a) establishes a standalone tax should be coupled with a reservation about whether other income tax provisions do so.

That reservation, along with a reservation about whether the holistic approach provides the best interpretive method for the Sixteenth Amendment, will help address many concerns expressed about the taxpayers' potential win in this case. Some believe that a holding for the Moores will jeopardize other income tax provisions. See Letter from Thomas Barthold, Chief of Staff, Joint Comm. on Tax'n, to Richard Neal, Ranking Member, House Ways & Means Comm. (Oct. 3, 2023) (describing tax code provisions "that could be affected by a ruling for the petitioners in *Moore*"). However, if Section 965(a) establishes a standalone tax and other income tax provisions do not, then the implications for

the broader tax system may be limited. Other provisions that allegedly require the inclusion of unrealized income may be saved because, under the holistic approach, those inclusions become integrated into "taxable income," a figure that primarily reaches realized income. The Section 965(a) inclusion, as a standalone tax, would not be so integrated and the holistic approach would not save it.[11]

IV. THE TAXING CLAUSE ALONE MIGHT SUPPORT SECTION 965(a)

If the Court concludes that Section 965(a) establishes a standalone tax and that it reaches unrealized income, the Court should not immediately declare the statute unconstitutional. Instead, the Court should consider a remand to address whether the statute may be upheld under the Taxing Clause. See U.S. Const. Art. I, § 8, Cl. 1. Realization inheres in the word "income," see *Macomber*, 252 U.S. at 207–08, and thus restricts only those laws that rest on the Sixteenth Amendment.[12] If Section 965(a) establishes a

[11] *Amicus* is compelled to once again express his view that Section 965(a) is integrated into the regular income tax system and reaches realized gains, and thus should not be struck down for exceeding the authority conferred by the Sixteenth Amendment.

[12] The realization requirement should not be understood too strictly. The requirement does not contemplate, for example, that Congress can tax as "income" only cash or property physically received by a taxpayer. Some commentators who dismiss the realization requirement may have had in mind an almost-caricature like version of it. A fairer version of the realization requirement contemplates that unrealized appreciation in property does not

standalone tax, separate from the regular income tax system, it might not need the Sixteenth Amendment to survive. See also Resp. Br. 45–49 (arguing that Section 965 may be viewed as an excise under the Taxing Clause).

NFIB v. *Sebelius*, 567 U.S. 519 (2012), shows how a government levy may be upheld under the Taxing Clause alone. *NFIB* addressed Section 5000A of the tax code. That provision imposed a shared responsibility payment on individuals for failures to purchase health

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qualify as income. This helps ensure that the power to tax incomes under the Sixteenth Amendment does not nullify the direct tax limitation. See *Baldwin Locomotive Works* v. *McCoach*, 221 F. 59, 60 (3d Cir. 1915) (rejecting the Treasury Department's position that under the Corporation Tax Act, ch. 6, § 38, 36 Stat. 112, unrealized appreciation shown on internal books could be treated as income). Cf. also T.D. 2005, 16 Treas. Dec. Int. Rev. 111, 111 (1914) (rejecting losses for mere "*fluctuating* valuation" under the first income law passed after the Sixteenth Amendment, see Tariff of 1913, ch. 16, § 2.A.2, 38 Stat. 114, 166); T.D. 2130, 17 Treas. Dec. Int. Rev. 33 (1915) (noting that the Treasury's rejection of unrealized losses in T.D. 2005 generated inquiries about how to treat unrealized items under the Corporation Tax Act). Given these principles, Section 965(a) would present a poor candidate for invalidation under the Sixteenth Amendment, even if it were a standalone tax. The income included under that section refers to the accumulated, undeniably realized earnings of the foreign corporation. If a taxpayer believes that Congress has selected the wrong person to tax on that income, then a challenge would most naturally arise under the Due Process Clause. See U.S. Const. Amend. V. Note, however, that when a due process challenge to federal tax legislation arises, the Court adopts a deferential approach towards Congress. See *United States* v. *Carlton*, 512 U.S. 26, 30 (1994) ("enactments in the sphere of economic policy" are reviewed under an " 'arbitrary and irrational' " standard) (internal citation omitted).

insurance. See 26 U.S.C. 5000A(b)(1) & (c)(1). The payment amount turned on various factors, including household income. See *NFIB*, 567 U.S. at 539 (describing Section 5000A(c)).

Section 5000A did not follow realization principles. A failure to purchase health insurance (inactivity) does not qualify as a realization event. But the Court upheld the statute under the Taxing Clause. Under that clause, Congress could tax "inactivity." *Id*. at 572. The Court did not discuss *Macomber*'s realization requirement, likely because Section 5000A did not rest on the Sixteenth Amendment.

The joint dissent in *NFIB* challenged the Court's conclusion that the Taxing Clause supported Section 5000A. See *id.* at 668 ("Congress imposed a regulatory penalty, not a tax."). The joint dissent asserted that, even if Section 5000A were a tax, that tax might be an unapportioned, unconstitutional direct tax. See *id.* at 669 (raising issues under Art. I, § 9, Cl. 4). The joint dissent did not claim that the realization requirement applied to Section 5000A.

Thus, in *NFIB*, the majority opinion and the joint dissent each implicitly acknowledged that the realization requirement applies only to laws that rely on the Sixteenth Amendment. That Section 5000A partly used income to determine the shared responsibility payment did not mean the statute established an income tax.[13] *Cf. id.* at 667 (joint dissent) ("[V]arying a

[13] If Section 5000A had imposed a shared responsibility payment based only on a percentage of one's income, then the statute

penalty according to ability to pay is an utterly familiar practice.").

Amicus expresses no opinion about whether, if Section 965(a) establishes a standalone tax, the Taxing Clause supports the statute. But before the Court strikes down Section 965(a), the Court should give the lower courts the opportunity to address that issue.

CONCLUSION

This Court should affirm the decision below, while expressing the reservations about the realization requirement and the Sixteenth Amendment suggested here.

Respectfully submitted,

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would almost certainly qualify as an income tax, for which the realization requirement would apply. However, the shared responsibility payment was bound by both a floor and a ceiling. See 567 U.S. at 539. The floor was a specified dollar amount and the ceiling depended on existing private health insurance rates. See *id.* These boundaries likely established that Section 5000A was not an income tax, even though income was one part of the payment computation.