No. 22-800

In the Supreme Court of the United States

CHARLES G. MOORE, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Sixteenth Amendment states that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. Const. Amend. XVI. In 2017, Congress passed and President Trump signed the Tax Cuts and Jobs Act (TCJA), Pub. L. No. 115-97, 131 Stat. 2054. The TCJA included a one-time mandatory repatriation tax (MRT) to offset other tax benefits granted to U.S. corporations. The MRT classifies a U.S.-taxpayer-controlled foreign corporation's (CFC) "accumulated post-1986 deferred foreign income" as part of the CFC's taxable income in 2017. 26 U.S.C. 965(a) and (b). Correspondingly, under the MRT, U.S. shareholders owning 10% or more of a CFC could be required to pay a one-time tax due to their obligation to "include in [their 2017] gross income" their "pro rata share" of the CFC's relevant "income for such year." 26 U.S.C. 951(a)(1)(A). The question presented is:

Whether the MRT is a "tax[] on incomes, from whatever source derived," U.S. Const. Amend. XVI, within the meaning of the Sixteenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 36 F.4th 930. The order of the district court (Pet. App. 21-34) is unreported but is available at 2020 WL 6799022.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2022. A petition for rehearing was denied on November 22, 2022 (Pet. App. 35-36). The petition for a writ of certiorari was filed on February 21, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Constitution empowers Congress "To lay and collect Taxes." U.S. Const. Art. I, § 8, Cl. 1. One of

the few limitations on that taxing power is 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." U.S. Const., Art. I, § 9, Cl. 4. "This requirement means that any 'direct Tax' must be apportioned so that each State pays in proportion to its population." *National Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 570 (2012) (opinion of Roberts, C.J.) (*NFIB*). For over a century, the Court held that "*direct taxes*, within the meaning of the Constitution, are only capitation taxes * * * and taxes on real estate." *Springer* v. *United States*, 102 U.S. 586, 602 (1880). Then, in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), the Court held that a tax on income from real and personal property also qualified as a direct tax. *Id.* at 618.

In 1913, the Sixteenth Amendment was ratified to "overturn[]" *Pollock*. *NFIB*, 567 U.S. at 571. The Sixteenth Amendment provides that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. Const. Amend. XVI. Nothing in the Amendment's text refers to the concept of realized gains.

b. In 1962, Congress enacted Subpart F of the Internal Revenue Code, which requires U.S. shareholders of certain foreign corporations to pay taxes on their pro rata shares of the corporations' foreign income. See Revenue Act of 1962, Pub. L. No. 87-834, § 12, 76 Stat. 1006-1031. Before Subpart F's enactment, U.S. shareholders of foreign corporations were generally taxed on the earnings of those corporations only if the earnings were distributed to U.S. shareholders as dividends. See

S. Rep. No. 1881, 87th Cong., 2d Sess. 78 (1962). That regime encouraged U.S. shareholders of foreign corporations to avoid payment of U.S. taxes by keeping their foreign earnings offshore. *Ibid.*

Subpart F limits that tax-avoidance practice by requiring U.S. shareholders owning 10% or more of U.S.-taxpayer-controlled foreign corporations (CFCs) to "include in [their] gross income" their "pro rata share * * * of the corporation's subpart F income for such year." 26 U.S.C. 951(a)(1)(A); see 26 U.S.C. 951(b). That requirement applies even where the CFC's earnings have not been distributed to the U.S. shareholders. See 26 U.S.C. 951(a). But Subpart F income includes only some forms of income, such as certain interest, sales, and investment income. See 26 U.S.C. 951(a), 954, and 956. It generally does not include "the CFC's active business income attributable to the CFC's own business held offshore, such as when a CFC manufactures and sells products to a third party in a foreign country." Pet. App. 6. Thus, notwithstanding Subpart F, by 2015 CFCs had accumulated more than $2.6 trillion in offshore earnings that had not been subjected to U.S. taxation. *Id.* at 5-6.

c. In 2017, Congress passed and President Trump signed the Tax Cuts and Jobs Act (TCJA or the Act), Pub. L. No. 115-97, 131 Stat. 2054. "The TCJA transformed U.S. corporate taxation from a worldwide system, where corporations were generally taxed regardless of where their profits were derived, toward a territorial system, where corporations are generally taxed only on their domestic source profits." Pet. App. 6; see H.R. Rep. No. 409, 115th Cong., 1st Sess. 370 (2017) (House Report).

As relevant here, that transformation involved two key elements. First, the Act provides that when certain foreign corporations, including CFCs, distribute their earnings as dividends to U.S. corporate shareholders, those earnings are generally no longer taxed.[1] See 26 U.S.C. 245A(a). Thus, the Act eliminates, on an ongoing basis, the prior taxes that would have applied to dividends distributed by a CFC to a U.S. corporate shareholder.

Second, "[t]o avoid a potential windfall for [CFCs] that deferred income" and can now distribute that income tax-free to U.S. corporate shareholders, the Act includes a one-time mandatory repatriation tax (MRT). House Report 375. The MRT classifies a CFC's "accumulated post-1986 deferred foreign income" as part of its Subpart F taxable income in 2017. 26 U.S.C. 965(a)(1)-(2). Correspondingly, under the MRT, U.S. shareholders owning 10% or more of a CFC could be required to pay a one-time tax due to their obligation to "include in [their 2017] gross income" their "pro rata share" of the CFC's relevant "income for such year." 26 U.S.C. 951(a)(1)(A). To mitigate the effect of that one-time tax on U.S. shareholders, however, the MRT provides those shareholders favorable rates on the tax, 26 U.S.C. 965(c), allows them to pay the tax in interest-free installments over an eight-year period, 26 U.S.C. 965(h), and permits them to repatriate Subpart F income without incurring any further tax, 26 U.S.C. 959(a).

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[1] The TCJA provisions relevant here apply to "specified 10-percent owned foreign corporations," 26 U.S.C. 245A(a), including CFCs. Because this case concerns a CFC, the brief refers to CFCs for simplicity.

The TCJA appears to be working largely as Congress envisioned. In 2018, following the Act's enactment, U.S. multinational enterprises distributed approximately $777 billion to U.S. shareholders. See Michael Smolyansky et al., Board of Governors of the Federal Reserve System, U.S. Federal Reserve, *U.S. Corporations' Repatriation of Offshore Profits: Evidence from 2018* (Aug. 6, 2019), https://www.federalreserve.gov/econres/notes/feds-notes/us-corporations-repatriation-of-offshore-profits-20190806.html. At the same time, the MRT is projected to generate approximately $340 billion in tax revenue. Pet. App. 7.

2. In 2005, petitioners invested $40,000 in KisanKraft Machine Tools Private Limited, a CFC that supplies modern tools to small farmers in India. Pet. App. 5. In exchange for their investment, petitioners received 11% of the company's common shares. *Ibid.* KisanKraft has generated profits every year since its founding. *Ibid.* But instead of distributing dividends to its shareholders, it has reinvested its earnings into the business. *Ibid.*

Under the MRT, KisanKraft's "accumulated post-1986 deferred foreign income"—amounting to approximately $508,000—was treated as its 2017 Subpart F income. 26 U.S.C. 965(a)(1)-(2); see Pet. App. 7. In turn, because petitioners owned more than 10% of KisanKraft's shares, they had an additional $132,512 in 2017 taxable income and owed an additional $14,729 in income taxes based on their pro rata share of KisanKraft's 2017 Subpart F income. Pet. App. 74-75; see 26 U.S.C. 951(a)(1).

3. Petitioners paid their tax liability and then sued the government in the United States District Court for the Western District of Washington, seeking to recover

the additional amount they paid because of the MRT. Pet. App. 23. As relevant, petitioners asserted that the MRT is unconstitutional because it imposes a direct tax that is not apportioned, rather than a permissible income tax. *Ibid.*

The district court granted the government's motion to dismiss. Pet. App. 21-34. The court held that the MRT is a "taxation of income" falling within Congress's power under the Sixteenth Amendment. *Id.* at 25. It rejected petitioners' reliance on *Eisner* v. *Macomber*, 252 U.S. 189 (1920), for the assertion that a shareholder must realize—or directly receive—income from a corporation before that income can be taxed. The court explained that the Supreme Court had "cabin[ed]" *Macomber* to the stock-dividend context, and there was therefore "no reason for th[e] Court to conclude that *Macomber* currently controls whether the MRT is an income tax." Pet. App. 28. The court also pointed to "numerous contemporary statutory regimes, outside of subpart F, that require the current taxation of unrealized income—none of which have been successfully challenged on *Macomber* grounds." *Ibid.*

4. The court of appeals affirmed. Pet. App. 1-20. The court held that the MRT is an income tax under the Sixteenth Amendment and thus "consistent with the Apportionment Clause." *Id.* at 13. It could "find no persuasive authority" to support petitioners' contrary position. *Id.* at 5.

The court of appeals began by setting forth three longstanding principles. First, "[w]hether the taxpayer has realized income does not determine whether a tax is constitutional." Pet. App. 12 (citing *Helvering* v. *Horst*, 311 U.S. 112, 116 (1940)). Second, "[w]hat constitutes a taxable gain is also broadly construed." *Ibid.* (citing

Helvering v. *Bruun*, 309 U.S. 461, 469 (1940)). And third, "there is no blanket constitutional ban on Congress disregarding the corporate form to facilitate taxation of shareholders' income." *Id.* at 13.

Applying those principles here, the court of appeals determined that the MRT is a permissible income tax under the Sixteenth Amendment. "[T]here is no dispute," the court explained, "that KisanKraft actually earned significant income." Pet. App. 13. And even "[b]efore the MRT, U.S. persons owning at least 10% of a CFC were already subject to certain taxes on the CFC's income." *Id.* at 14. "The MRT," the court reasoned, simply "builds upon these U.S. persons' preexisting tax liability attributing a CFC's income to its shareholders" by "assign[ing] only a pro-rata share of that income to the [petitioners]." *Ibid.*

The court of appeals deemed petitioners' reliance on this Court's decisions in *Macomber* and *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955), "misplaced." Pet. App. 14. The court emphasized that neither decision on its own terms supports "a universal definition of income" that requires realization. *Id.* at 15. And the court cited later cases "ma[king] clear" that "the concept of realization is 'founded on administrative convenience' and does not mean that a taxpayer can 'escape taxation because he did not actually receive the money.'" *Ibid.* (quoting *Horst*, 311 U.S. at 116).

Finally, the court of appeals observed that "courts have held consistently that taxes similar to the MRT are constitutional." Pet. App. 11. And it warned that adopting petitioners' position would "call into question the constitutionality of many other tax provisions that have long been on the books." *Id.* at 16.

5. The court of appeals denied petitioners' petition for panel rehearing and rehearing en banc. Pet. App. 36-37. Judge Bumatay authored a dissent from denial of rehearing en banc, joined by three other judges. *Id.* at 37-56. Judge Bumatay would have read a "realization requirement" into the Sixteenth Amendment, *id.* at 53, even though the Amendment's text never references realization. And while he acknowledged that "*Macomber* does not establish a 'universal' meaning of 'income,'" he concluded that *Macomber* requires treating "realization as a definitional requirement" of income. *Id.* at 54.

ARGUMENT

Petitioners renew their contention (Pet. 9-16) that the MRT is not a permissible income tax, but instead an unconstitutional direct tax lacking apportionment. But the court of appeals correctly rejected that contention because it is unsupported by constitutional text, congressional practice, or this Court's precedent. Contrary to petitioners' submission (Pet. 16-17), the decision below does not conflict with the decision of any other court of appeals. In fact, no other court of appeals has even considered the MRT's constitutionality. And because the MRT is a one-time tax applicable only to pre-2018 income, the case lacks pressing prospective importance. This Court's review is unwarranted.

1. The court of appeals correctly held that the MRT is a "tax[] on incomes" falling within the Sixteenth Amendment. U.S. Const. Amend. XVI. Petitioners' contrary arguments run counter to constitutional text, congressional practice, and this Court's precedent.

a. The Sixteenth Amendment provides that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard

to any census or enumeration." U.S. Const. Amend. XVI. "It is clear on the face of this text that it does not purport to * * * limit and distinguish between one kind of income taxes and another," and "that the whole purpose of the Amendment was to relieve *all* income taxes when imposed from apportionment." *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1, 17-18 (1916) (emphasis added).

This Court has consistently interpreted the phrase "gross income" under the Tax Code to "sweep[] broadly." *United States* v. *Burke*, 504 U.S. 229, 233 (1992); see 26 U.S.C. 61(a). The definition of "gross income," the Court has explained, includes "any 'accessio[n] to wealth,'" *ibid.* (quoting *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955)) (brackets in original), and thus "extends broadly to all economic gains not otherwise exempted," *Commissioner* v. *Banks*, 543 U.S. 426, 433 (2005). Because "Congress intended" the Tax Code's definition of "gross income" to stretch to "'the full measure of [Congress's] taxing power'" under the Constitution, the same broad definition of income applies under the Sixteenth Amendment. *Burke*, 504 U.S. at 233 (quoting *Helvering* v. *Clifford*, 309 U.S. 331, 334 (1940)). Indeed, the Code's definition of "gross income" is materially identical to the Sixteenth Amendment's language. Compare 26 U.S.C. 61(a) ("gross income means all income from whatever source derived"), with U.S. Const. Amend. XVI (applying to "incomes, from whatever source derived"); see Pet. 14 n.5 (agreeing that the "statutory definition of 'gross income'" tracks the Sixteenth Amendment).

Under that definition, the MRT plainly qualifies as a tax on income. It applies to U.S. shareholders owning at least 10% of a CFC that has "accumulated post-1986

deferred foreign *income*." 26 U.S.C. 965(a)(1)-(2) (emphasis added). Before the MRT, those same U.S. shareholders were already required to pay taxes on their "pro rata share" of a CFC's annual "subpart F income"—and were required to do so even when that income had not been distributed to the shareholders. 26 U.S.C. 951(a)(1)(A); see Pet. App. 14. Now, under the MRT, those same shareholders must simply pay taxes on their "pro-rata share" of the CFC's deferred income between 1986 and 2017. Pet. App. 14. "[T]here is no constitutional prohibition against Congress attributing a corporation's income pro-rata to its shareholders" in that manner, *id.* at 13—as Congress has long done in Subpart F. See *Helvering* v. *National Grocery Co.*, 304 U.S. 282, 288 (1938) (explaining that a business owner "could not by conducting it as a corporation, prevent Congress, if it chose to do so, from laying on him individually the tax on the year's profits").

Beyond Subpart F, the MRT is similar to other longstanding income taxes. See, *e.g.*, *Chiafalo* v. *Washington*, 140 S. Ct. 2316, 2326 (2020) ("'Long settled and established practice' may have 'great weight in a proper interpretation of constitutional provisions.'") (citation omitted). For instance, Congress has long taxed an individual partner's "proportionate share of the net income of [a] partnership," even where that share is not "currently distributable, whether by agreement of the parties or by operation of law." *Heiner* v. *Mellon*, 304 U.S. 271, 281 (1938); see *id.* at 277-281 (upholding such a tax against various statutory challenges); *United States* v. *Basye*, 410 U.S. 441, 453 (1973) ("[I]t is axiomatic that each partner must pay taxes on his distributive share of the partnership's income without regard to whether that amount is actually distributed to him.");

see also 26 U.S.C. 702(a). And for the 65 years since it recognized S corporations, Congress has imposed an analogous requirement on shareholders of S corporations. 26 U.S.C. 1366(a)(1)(A) (taxing "the shareholder's pro rata share of the corporation's * * * items of income"); see Subchapter S Revision Act of 1982, Pub. L. No. 97-354, § 2, 96 Stat. 1677; Technical Amendments Act of 1958, Pub. L. No. 85-866, § 64, 72 Stat. 1652. Nothing in the Sixteenth Amendment's text or history suggests that the undistributed income of a CFC must be treated differently from the undistributed income of a partnership or S corporation.

In addition, the Code includes several other income taxes that share common features with the MRT. For instance, U.S. citizens who relinquish their citizenship are taxed as if they had sold all their assets the day before expatriation—even though no realized gain from such a sale in fact took place. See 26 U.S.C. 877A(a). And numerous assets are taxed as if they had been sold for a realized gain at the end of a taxable year—even if they were not in fact sold—including regulated futures contracts, 26 U.S.C. 1256(a) and (b), securities held by securities dealers, 26 U.S.C. 475(a), and certain assets held by life insurance companies, 26 U.S.C. 817A(b). See *Murphy* v. *United States*, 992 F.2d 929, 931 (9th Cir. 1993) (rejecting the argument that Section 1256 "is unconstitutional because it taxes unrealized gains"). Those established taxes are materially comparable to the MRT, which taxes CFC shareholders on a CFC's post-1986 deferred income as if it had been earned in 2017. See 26 U.S.C. 965(a).

b. Petitioners contend (Pet. 10) that the MRT is unconstitutional because, in their view, the Sixteenth Amendment applies exclusively "to taxes on *realized*

gains." Yet even if that premise were correct, the MRT would be permissible because it applies to the post-1986 gains that *corporations* have realized. See 26 U.S.C. 965(a). Here, for instance, "there is no dispute that KisanKraft actually" realized gains. Pet. App. 13. Petitioners thus appear to take issue only with Congress's choice to tax *shareholders* on a corporation's realized gains, rather than taxing the corporation itself on those gains. But petitioners have identified no "constitutional ban on Congress disregarding the corporate form to facilitate taxation of shareholders' income," *ibid.*—as Congress has long done in Subpart F and similar contexts involving partnerships and S corporations, see pp. 10-11, *supra*.

In any event, the Sixteenth Amendment does not restrict Congress to taxing only realized gains. By its terms, the Sixteenth Amendment applies to "taxes on incomes, from whatever source derived." U.S. Const. Amend. XVI. It says nothing about being limited to realized gains. And petitioners identify no reason to think that the Framers of the Sixteenth Amendment intended any such limit to be implicit—which would be a particularly unusual approach, since the Constitution elsewhere makes explicit its limits on Congress's taxing powers. See U.S. Const. Art. I, § 9, Cl. 5 ("No tax or duty shall be laid on Articles exported from any State."); U.S. Const. Art. I, § 8, Cl. 1 (requiring all "Duties, Imposts and Excises" to be "uniform throughout the United States").

Petitioners base their implicit limitation of income to realized gains primarily on this Court's decision in *Eisner* v. *Macomber*, 252 U.S. 189 (1920), which considered whether a "stock dividend" qualified as income under the Sixteenth Amendment. *Id.* at 210. There, Standard

Oil shareholders had received an additional 50% of their current number of shares (*e.g.*, a shareholder with 2200 shares received an additional 1100 shares). See *id.* at 200-201. As the Court explained, such a "stock dividend" is simply a "book adjustment" that "does not alter the pre-[e]xisting proportionate interest of any stockholder or increase the intrinsic value of his holding." *Id.* at 210-211. "The new [stock] certificates simply increase the number of the shares, with consequent dilution of the value of each share." *Id.* at 211. And the Court held that "the essential nature of a stock dividend necessarily prevents its being regarded as income in any true sense" for purposes of the Sixteenth Amendment. *Id.* at 205.

Although the Court recognized that it could have "rest[ed] the * * * case there," *Macomber*, 252 U.S. at 205, it went on to observe that "income" is best understood as "a gain, a profit, something of exchangeable value" that is "*received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit, and disposal," *id.* at 207. Justice Holmes dissented, concluding that because "the word 'incomes' in the Sixteenth Amendment should be read in 'a sense most obvious to the common understanding at the time of its adoption,'" it "justifies the tax" at issue. *Id.* at 219-220 (citation omitted); see also *id.* at 230-232 (Brandeis, J., dissenting) (similar).

Petitioners' reliance on *Macomber* is misplaced because later decisions have severely limited its relevance as a constitutional precedent. In *Helvering* v. *Bruun*, 309 U.S. 461 (1940), for instance, this Court made clear that the "expressions" in *Macomber* that petitioners here emphasize were simply "used to clarify the distinction between an ordinary dividend and a stock dividend"

and "to show that in the case of a stock dividend, the stockholder's interest in the corporate assets after receipt of the dividend was the same as and inseverable from that which he owned before the dividend was declared." *Id.* at 468-469; see *id.* at 468 n.8. The Court therefore deemed *Macomber* "not controlling" outside of the stock-dividend context. *Id.* at 469. And it held that a "business transaction" that "added an ascertainable amount to [the] value" of the taxpayer's land produced a "taxable gain" even though the taxpayer could not "sever the improvement begetting the gain from his original capital." *Ibid.*[2]

Other decisions also recognized that *Macomber*'s relevance as a Sixteenth Amendment precedent is limited to the stock-dividend context. In *Helvering* v. *Horst*, 311 U.S. 112 (1940), the Court held that a taxpayer's "economic gain" cannot "escape taxation" simply "because he has not himself received payment of it from his obligor." *Id.* at 116. And in *Helvering* v. *Griffiths*, 318 U.S. 371 (1943), the Court stated that both *Bruun* and *Horst* "undermined * * * the original theoretical bases of the decision in *Eisner* v. *Macomber*." *Id.* at 394; see also *id.* at 404 (Douglas, J., dissenting) ("*Eisner* v. *Macomber* dies a slow death.").

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[2] Petitioners cite (Pet. 11-12) four decisions between *Macomber* and *Bruun*. But each of them preceded *Bruun*'s recognition that *Macomber* is limited to the stock-dividend context. In any event, only one of those decisions invalidated a tax under the Sixteenth Amendment, and it simply applied *Macomber* to a transaction materially indistinguishable from the one in *Macomber* itself. See *Weiss* v. *Stearn*, 265 U.S. 242, 253-254 (1924). Each of the other three decisions *upheld* a tax's constitutionality. See *United States* v. *Safety Car Heating & Lighting Co.*, 297 U.S. 88, 99 (1936); *MacLaughlin* v. *Alliance Ins. Co.*, 286 U.S. 244, 250-251 (1932); *Taft* v. *Bowers*, 278 U.S. 470, 482-484 (1929).

Contrary to petitioners' submission (Pet. 13), the Court's decision in *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955), also demonstrates *Macomber*'s limited scope. There, the Court observed that *Macomber*'s understanding of income "served a useful purpose" "[i]n th[e] context" of "a corporate stock dividend." *Id.* at 430-431. "But," the Court recognized, that understanding "was not meant to provide a touchstone to all future gross income questions." *Id.* at 431. Petitioners emphasize (Pet. 13) the Court's statement that a punitive damages award constituted income because it involved an "undeniable accession[] to wealth, clearly realized, and over which the taxpayers have complete dominion." *Glenshaw Glass*, 348 U.S. at 431. But that statement simply listed elements that were sufficient to create income on the facts of that case—not necessary elements of income in every case. Pet. App. 15. Indeed, elsewhere in *Glenshaw Glass*, the Court emphasized the "sweeping" and "broad" definition of income, which includes "all gains except those specifically exempted." *Glenshaw Glass*, 348 U.S. at 429-430.[3]

To be sure, *Macomber* remains relevant when interpreting the *statutory* "concept of realization." *Cottage Sav. Ass'n* v. *Commissioner*, 499 U.S. 554, 559 (1991);

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[3] Petitioners cite (Pet. 13-14) three cases that quote *Glenshaw Glass*'s statement about realization, but none of those cases suggests that petitioners' understanding of realization is a *necessary* element of income. And each of them involved economic gains far afield from those at issue here. See *Commissioner* v. *Indianapolis Power & Light Co.*, 493 U.S. 203, 209 (1990) (holding that customer deposits were not income to a utility because the utility had an "express 'obligation to repay'" them) (citation omitted); *Commissioner* v. *Kowalski*, 434 U.S. 77, 83 (1977) (holding that "meal-allowance payments are income"); *James* v. *United States*, 366 U.S. 213, 219-220 (1961) (holding that embezzled funds are income).

see *id.* at 563 (relying on *Macomber*); Pet. 11. But that concept—which does not apply when Congress does not incorporate it—does not derive from the Code's definition of "gross income." Instead, it is rooted in separate Code provisions, such as one defining "'[t]he gain [or loss] from the sale or other disposition of property' as the difference between 'the amount realized' from the sale or disposition of the property and its 'adjusted basis.'" *Cottage Sav. Ass'n*, 499 U.S. at 559 (quoting 26 U.S.C. 1001(a)) (brackets in original). In those provisions, Congress has invoked the concept of realization for "'administrative convenience,'" because an "appreciation-based system of taxation" could require "'cumbersome'" annual assessments of whether "assets had appreciated or depreciated in value." *Ibid.* (quoting *Horst*, 311 U.S. at 116). Accordingly, the statutory concept of realization "only informs *when* income generally should be reported," without "defin[ing] what income is." Noel B. Cunningham & Deborah H. Schenk, *Taxation Without Realization: A "Revolutionary" Approach to Ownership*, 47 Tax L. Rev. 725, 741 (1992). And Congress's decision to invoke realization for *statutory* purposes in some contexts does not suggest that realization is a *constitutional* mandate.

Thus, tax scholars have long agreed that "the formalistic doctrine of realization proclaimed by [*Macomber*] is not a constitutional mandate." Stanley S. Surrey, *The Supreme Court and the Federal Income Tax: Some Implications of the Recent Decisions*, 35 Ill. L. Rev. 779, 791 (1941).[4] And other courts have, like the court of ap-

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[4] See, *e.g.*, Bruce Ackerman, *Taxation and the Constitution*, 99 Colum. L. Rev. 1, 52 (1999) ("[T]he modern scholarly consensus is clear—a good lawyer relies on *Macomber* at her peril."); Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates,*

peals below, recognized that *Macomber* retains limited relevance beyond the stock-dividend context. See, *e.g.*, *Commissioner* v. *Obear-Nester Glass Co.*, 217 F.2d 56, 60 (7th Cir. 1954) ("[*Macomber*] has been limited to its specific facts."), cert. denied, 348 U.S. 982 (1955); *The Florida Bar* v. *Behm*, 41 So. 3d 136, 145 n.8 (Fla. 2010) (per curiam) ("[*Macomber*] applies only to stock dividends.").

c. Petitioners also contend (Pet. 17) that *Macomber*'s realization requirement accords with the ordinary meaning of "income" "at the time of the Sixteenth Amendment's drafting and ratification." But in fact, *Macomber* adopted an idiosyncratic understanding of "income" at the expense of the term's ordinary meaning. As Justice Holmes explained in his *Macomber* dissent, "the word 'incomes' in the Sixteenth Amendment should be read in a 'sense most obvious to the common understanding at the time of its adoption,'" and "most people not lawyers would suppose when they voted for it that they put a question like the present to rest." *Macomber*, 252 U.S. at 219-220 (citation omitted). The "known purpose of this Amendment was to get rid of nice questions as to what might be direct taxes," *id.* at

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and Gifts ¶ 5.2, 5-19 (3d ed. 1999) (explaining that "realization remains largely intact as a rule of administrative convenience (or legislative generosity)" but has been "badly eroded, if not wholly undermined, as a constitutional principle"); Marvin A. Chirelstein & Lawrence Zelenak, *Federal Income Taxation* 59 (14th ed. 2018) ("[R]ealization is strictly an administrative rule and not a constitutional, much less an economic requirement, of 'income.' "); Cunningham & Schenk 741 & n.69 (citing "[t]he scholarly consensus" despite *Macomber* that the "[t]he realization requirement is not constitutionally mandated" and that "Congress may treat gains as realized at any point").

220—not to invite technical debates about what constitutes "income."

Thus, a leading economist of the era defined income as "the money value of the net accretion to one's economic power between two points in time." Robert Murray Haig, *The Federal Income Tax* 7 (1921) (emphasis omitted) (Haig). That definition, Professor Haig explained, was "the one generally adopted as the definition of income in modern income tax acts," *ibid.*, and it remains "the most widely accepted" definition among economists and tax experts, Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates, and Gifts* ¶ 3.1.1, 3-2 (3d ed. 1999). In articulating that definition, Professor Haig criticized judicial decisions (like *Macomber*) involving "stock dividends" as "leading toward a definition of income so narrow and artificial as to bring about results which from the economic point of view are certainly eccentric and in certain cases little less than absurd." Haig 1.

At the very least, there was ambiguity when the Sixteenth Amendment was ratified about whether the ordinary meaning of the term "income[]" incorporated a realization requirement. Contra Pet. 17 (asserting that such a requirement "was well understood"). Although some contemporaneous dictionary definitions referenced gains that "'come[] in to a person,'" Pet. 18 (citation and emphasis omitted), those and others also referenced simply "gains, profit, or private revenue," Henry Campbell Black, *A Law Dictionary* 612 (2d ed. 1910); see also *Webster's New International Dictionary of the English Language* 1089 (1911) ("commercial revenue or receipts of any kind, including * * * the return on investments"); *The Century Dictionary and Cyclopedia* 3040 (1911) ("receipts or emoluments regularly accru-

ing"). Even petitioners' own preferred legal authorities (Pet. 19-20) admit that the term was ambiguous. One of those authorities explains that "[t]here [we]re wide variations in theory and practice * * * as to the proper meaning of the term income," "[p]articularly with reference to appreciations in the value of property." Robert H. Montgomery, *Income Tax Procedure* 250 (1919). Another observes that "no * * * precision can be attained" in distinguishing income from capital "for purposes of taxation." Edwin R. A. Seligman, *The Income Tax: A Study of the History, Theory, and Practice of Income Taxation at Home and Abroad* 19 (1911).

d. Finally, petitioners err in asserting (Pet. 20) that the decision below "virtually eviscerat[es] Article I's apportionment requirement." The decision below holds only that the MRT is not subject to apportionment because it qualifies as an income tax under the Sixteenth Amendment. See Pet. App. 13-14. It nowhere suggests that "a tax on property interests,'" would likewise fall outside Article I's apportionment requirement. Pet. 21 (citation omitted). Nor does it suggest that Congress can "deem practically anything 'income' and tax it as such." *Ibid.* Rather, as explained above, an income tax must at minimum target an "accessio[n] to wealth," as opposed to targeting property as such. *Burke*, 504 U.S. at 233 (quoting *Glenshaw Glass*, 348 U.S. at 431) (brackets in original).

If anything, it is petitioners' position that would upset the "constitutional structure." Pet. 20. The Sixteenth Amendment expressly empowers Congress "to lay and collect taxes on incomes, from whatever source derived, *without* apportionment among the several States." U.S. Const. Amend. XVI (emphasis added). And with the isolated exception of *Macomber*, courts

have consistently reaffirmed that power, allowing Congress to use income taxes to generate critical revenues for the public fisc. The court of appeals correctly rejected petitioners' effort to impose an artificial and atextual limit on that power.

2. a. Petitioners also contend (Pet. 16-17) that the decision below conflicts with decisions from the First and Fourth Circuits. But neither of the cited decisions addressed the constitutionality of the MRT, or even a tax resembling the MRT. At the very least, then, this Court should await further percolation before resolving the MRT's constitutionality. And both decisions cited by petitioners held that the taxes at issue qualified as income taxes under the Sixteenth Amendment, so the dispositions in those cases are consistent with the outcome below. See *Quijano* v. *United States*, 93 F.3d 26, 30-31 (1st Cir. 1996), cert. denied 519 U.S. 1059 (1997); *Simmons* v. *United States*, 308 F.2d 160, 167-168 (4th Cir. 1962).

Moreover, the reasoning of those decisions is consistent with the reasoning of the decision below. In *Quijano*, the plaintiffs bought a residence with a foreign currency, and "the foreign currency increase[d] in value (as against the dollar) by the time the property [wa]s sold." 93 F.3d at 30. The court held that the "foreign-exchange 'gain' relating to the sale of their residence * * * plainly qualifies as realized income, fully taxable under the Constitution." *Id.* at 30-31. But the court did not suggest that the Sixteenth Amendment *requires* realized income in every case. Nor did it address whether income realized at the corporate level could be taxed pro rata at the shareholder level, see Pet. App. 13, since no corporation was involved in that case.

In *Simmons*, the plaintiff won a cash prize for catching a particular fish. 308 F.2d at 161-162. The court held that the cash prize was taxable under the Sixteenth Amendment because it "constitute[d] an economic gain over which [the plaintiff] has complete control and * * * complete legal right." *Id.* at 167-168. But as in *Quijano*, the court never embraced petitioners' proposed realization requirement under the Sixteenth Amendment. And the court cited *Macomber* only to note that it "was not meant to provide a touchstone to all future gross income questions." *Id.* at 168 n.27 (quoting *Glenshaw Glass*, 348 U.S. at 431).

b. Far from conflicting with decisions from other circuits, the decision below accords with the longstanding view of multiple circuits that taxes similar to the MRT—including Subpart F itself—are constitutional.

For instance, in *Garlock, Inc.* v. *Commissioner*, 489 F.2d 197 (1973), cert. denied, 417 U.S. 911 (1974), the Second Circuit upheld the constitutionality of Subpart F's requirement that "a United States shareholder of a CFC must include in income its pro rata share of the corporation's 'subpart F income,' * * * whether or not that income has been distributed to the shareholder." *Id.* at 198; see *id.* at 202-203. The court reasoned that the contrary argument "borders on the frivolous in light of" a Second Circuit decision upholding prior "foreign personal holding provisions of the income tax laws * * * permitting taxation of United States shareholders on the undistributed net income of Colombian corporations." *Id.* at 202 (citing *Eder* v. *Commissioner*, 138 F.2d 27, 28 (2d Cir. 1943)). And it observed that "[w]hatever may be the continuing validity of the doctrine of [*Macomber*]," it had "no validity" for purposes of the Subpart F challenge after this Court's holding in

Mellon that partners can be taxed on their pro rata shares of partnership income even when those shares are not presently distributable. *Id.* at 203 n.5; see p. 10, *supra* (discussing *Mellon*).

Likewise, in *Estate of Whitlock* v. *Commissioner*, 494 F.2d 1297 (1974), the Tenth Circuit followed the Second Circuit's decision in *Garlock*, holding that "the provisions of subpart F * * * constitute[] a constitutionally valid exercise of Congressional authority." *Id.* at 1301. "When the provisions of Article I of the Constitution, the Sixteenth Amendment," and this court's decisions in *Glenshaw Glass* and *Macomber* "are considered together," the court explained, "we find no merit to the contention that the increased earnings provision is contrary to the Constitution." *Ibid.*

Finally, in *Prescott* v. *Commissioner*, 561 F.2d 1287 (1977), the Eighth Circuit upheld the constitutionality of a law that "tax[ed] the increase in value of" businesses that previously "had fictional corporate status" and then "returned to taxation as proprietorships." *Id.* at 1293. The court explained that this Court had "abandoned the idea" from *Macomber* "that gain must be severed from capital to be taxable." *Ibid.* And the Eighth Circuit analogized the case to those in which courts had "sustained" the constitutionality of laws "tax[ing] the owners of a business entity on profits earned by the entity, although the profits have not been distributed." *Id.* at 1293 n.8.

There is accordingly no conflict between the decision below and the decisions of other courts of appeals.

3. This case would also be an unsuitable vehicle for addressing the question presented, which is "[w]hether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the

states." Pet. i. As explained above, the MRT applies to *realized* sums in the form of a corporation's "accumulated post-1986 deferred foreign income." 26 U.S.C. 965(a)(1)-(2); see Pet. App. 13 ("[T]here is no dispute that KisanKraft actually earned significant income."). The principal issue is whether Congress may tax certain U.S. shareholders on their pro rata share of those realized sums. And petitioners have identified no "constitutional ban on Congress disregarding the corporate form to facilitate taxation of shareholders' income." Pet. App. 13. Thus, this case does not implicate the question presented, and petitioners' lengthy argument (Pet. 10) about whether the Sixteenth Amendment "is limited to taxes on *realized* gains" largely misses the point (in addition to being incorrect). See Pet. 10-20.

Moreover, answering the question presented would fail to resolve the MRT's constitutionality for yet another reason. To the extent that the MRT were regarded as something other than an income tax under the Sixteenth Amendment, it would be best understood as a constitutional "[e]xcise[]" tax that is "uniform throughout the United States." U.S. Const. Art. I, § 8, Cl. 1; see Gov't C.A. Br. 45-47 (raising this argument in the alternative). The MRT can be viewed as a tax on a CFC's business gains since 1986. See 26 U.S.C. 965(a)(1)-(2). As the Court in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), observed, taxes "on gains or profits from business" had been "sustained" as excise taxes not subject to apportionment even before the Sixteenth Amendment's ratification. *Id.* at 635; see, *e.g.*, *Pacific Ins. Co.* v. *Soule*, 74 U.S. (7 Wall.) 433 (1868). *Pollock* expressly left that principle intact, as it "considered the [relevant] act only in respect of the tax on income derived from real estate, and from invested

personal property." 158 U.S. at 635. After *Pollock*, the Court upheld an excise tax on the "gross annual receipts" of sugar refineries, reasoning that the tax was not imposed on those receipts "as property, but only in respect of the carrying on or doing the business of refining sugar." *Spreckels Sugar Ref. Co.* v. *McClain*, 192 U.S. 397, 411 (1904). And the Court later upheld another tax "as an excise upon the particular privilege of doing business in a corporate capacity." *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 151 (1911).

Accordingly, the question presented here is largely academic in the context of the MRT. The MRT is constitutional, whether viewed as an income tax on shareholders based on their pro rata share of a CFC's 2017 income, or instead as an excise tax on CFCs. The Court should not grant review to issue what would effectively be an advisory opinion about whether the Sixteenth Amendment implicitly contains a realization requirement.

4. Finally, petitioners incorrectly assert that this case raises an "exceptionally important" issue. Pet. 22 (capitalization and emphasis omitted). The MRT was a one-time tax solely applicable in "the last taxable year of a [CFC] which beg[an] before January 1, 2018." 26 U.S.C. 965(a). It affected only a small class of U.S. taxpayers—those owning at least 10% of the shares of certain foreign corporations. See 26 U.S.C. 951(a) and (b) and 965(a). Petitioners do not cite a single court of appeals decision, other than the decision below, addressing a challenge to the MRT's constitutionality.

Unable to demonstrate the significance of the issue in *this* case, petitioners (and their amici) principally base their assertions of importance on *hypothetical* cases involving taxes that Congress has not enacted.

See, *e.g.*, Pet. 23, 25. They raise the specter, for instance, of Congress's enactment of "a wealth tax," Pet. 25—an action that Congress has not taken. See, *e.g.*, Americans for Tax Reform Amicus Br. 20 (emphasizing "a slurry of *proposed*"—but unenacted—bills to impose "wealth taxes") (emphasis added); Landmark Legal Found. Amicus Br. 13 (asserting that "Congress *may be* emboldened to pass direct taxes on wealth") (emphasis added). But "[u]nder [this Court's] judicial tradition [it] do[es] not decide whether a tax may constitutionally be laid until [it] find[s] that Congress has laid it." *Griffiths*, 318 U.S. at 394. Nor does the Court "exercise general legal oversight of the Legislative and Executive Branches" or "issue advisory opinions" on matters not before it. *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2203 (2021).

Indeed, petitioners' posited "wealth tax" is far afield from the MRT. Pet. 25. They speculate about a tax "on the net *value* of all taxable assets of the taxpayer on the last day of any calendar year." *Ibid.* (emphasis added; citation omitted). But the MRT does not tax the net *value* of anything; it taxes "accumulated post-1986 deferred foreign *income*." 26 U.S.C. 965(a)(1)-(2) (emphasis added). So the MRT's status as an income tax under the Sixteenth Amendment says little (if anything) about whether any so-called wealth tax would also fall within Congress's taxing power. Contra Pet. 25.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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