

No. 22-800

IN THE
Supreme Court of the United States

CHARLES G. MOORE, ET UX.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

**BRIEF OF AMICUS CURIAE SMALL
BUSINESS AND ENTREPRENEURSHIP
COUNCIL IN SUPPORT OF NEITHER PARTY**

JONATHAN C. BOND

Counsel of Record

MICHAEL J. DESMOND

LUCAS C. TOWNSEND

SAUL MEZEI

ANNE O. DEVEREAUX

AARON HAUPTMAN

GIBSON, DUNN & CRUTCHER LLP

1050 Connecticut Avenue, N.W.

Washington, D.C. 20036

(202) 955-8500

JBond@gibsondunn.com

Counsel for Amicus Curiae

QUESTION PRESENTED

In the Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017), Congress imposed a one-time tax on U.S. shareholders' pro rata share of the accumulated, untaxed earnings of certain controlled foreign corporations. § 14103, 131 Stat. at 2195 (26 U.S.C. § 965). Petitioners contend that the tax is not one "on incomes," U.S. Const. Amend. XVI—and therefore is not exempted by the Sixteenth Amendment from the Constitution's apportionment requirement, Art. I, § 2, Cl. 3; *id.* § 9, Cl. 4—because the tax is not limited to gains realized by the taxpayer in the relevant period. Amicus will address the following question:

Whether, if the one-time tax resulting from 26 U.S.C. § 965 on accumulated, untaxed earnings from controlled foreign corporations exceeds Congress's authority under the Sixteenth Amendment, the requirement to pay that one-time tax is severable from the remainder of the Internal Revenue Code.

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE.....	1
BACKGROUND	4
SUMMARY OF ARGUMENT.....	8
ARGUMENT	10
I. IF THE COURT HOLDS THE REPATRIATION TAX INVALID, IT SHOULD ADDRESS WHETHER THE INVALIDITY OF THAT TAX AFFECTS OTHER PROVISIONS	10
A. The Court Addresses In Appropriate Cases Whether An Invalid Provision Of A Statute Is Severable.....	11
B. Addressing Severability Would Be Appropriate In This Case.....	17
II. IF THE REPATRIATION TAX IS INVALID, IT IS SEVERABLE FROM THE TCJA AND THE INTERNAL REVENUE CODE	21
A. Severability Is Required When Congress So Provides, And Is Otherwise Presumed	22
B. The Code’s Severability Clause And The Presumption Of Severability Make Clear That The Repatriation Tax Is Severable	25
CONCLUSION	32

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Alaska Airlines, Inc. v. Brock</i> , 480 U.S. 678 (1987).....	9, 11, 23, 24
<i>Ayotte v. Planned Parenthood of Northern New England</i> , 546 U.S. 320 (2006).....	10
<i>Barr v. American Association of Political Consultants, Inc.</i> , 140 S. Ct. 2335 (2020).....	9, 11, 12, 17, 22, 23, 24, 26, 30
<i>Free Enterprise Fund v. Public Company Accounting Oversight Board</i> , 561 U.S. 477 (2010).....	12, 15, 23, 24
<i>Grosso v. United States</i> , 390 U.S. 62 (1968).....	24
<i>Marbury v. Madison</i> , 1 Cranch 137 (1803).....	23
<i>Marchetti v. United States</i> , 390 U.S. 39 (1968).....	9, 24, 25, 31
<i>Moritz v. Commissioner</i> , 469 F.2d 466 (10th Cir. 1972).....	27
<i>Murphy v. National Collegiate Athletic Association</i> , 138 S. Ct. 1461 (2018).....	15, 16, 24

Cases (continued)	Page(s)
<i>National Federation of Independent Business v. Sebelius</i> , 567 U.S. 519 (2012)	13, 14, 15, 16, 17, 23, 29
<i>Oklahoma Tax Commission v. Chickasaw Nation</i> , 515 U.S. 450 (1995)	18
<i>Pittston Co. v. United States</i> , 368 F.3d 385 (4th Cir. 2004)	26
<i>Pollock v. Farmers' Loan & Trust Co.</i> , 158 U.S. 601 (1895)	8, 10, 12, 13
<i>Regan v. Time, Inc.</i> , 468 U.S. 641 (1984)	31
<i>Seila Law LLC v. CFPB</i> , 140 S. Ct. 2183 (2020)	12, 16, 17, 22
<i>United States v. Arthrex, Inc.</i> , 141 S. Ct. 1970 (2021)	12, 16
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	12, 17
<i>United States v. Geneser</i> , 405 U.S. 93 (1972)	10, 18
<i>United States v. U.S. Coin & Currency</i> , 401 U.S. 715 (1971)	31

Constitutional Provisions	Page(s)
U.S. Const. Art. I, § 2, Cl. 3	11, 28
U.S. Const. Art. I, § 9, Cl. 4	10, 11, 28, 29
U.S. Const. Amend. XVI.....	2, 11
 Statutes	
Act to Reduce Tariff Duties and to Provide Revenue for the Government, Ch. 16, 38 Stat. 114 (1913)	26
Internal Revenue Code of 1939, Pub. L. No. 76-1, 53 Stat. 1.....	26
Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (42 U.S.C. § 18001 <i>et seq.</i>)	13
Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1992).....	15
Revenue Act of 1962, Pub. L. No. 87-834, 76 Stat. 960.....	4
Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017)	2, 26
26 U.S.C. § 245A.....	6, 19, 27, 31
26 U.S.C. § 951	4, 6

Statutes (continued)	Page(s)
26 U.S.C. § 951A.....	6
26 U.S.C. § 952	4
26 U.S.C. § 953	4
26 U.S.C. § 954	4
26 U.S.C. § 957	4
26 U.S.C. § 959	5, 7, 19
26 U.S.C. § 961	5, 7, 19
26 U.S.C. § 965(a).....	7, 28, 29
26 U.S.C. § 965(b)(4)	7, 19
26 U.S.C. § 965(c)	7
26 U.S.C. § 7852(a).....	9, 21, 26, 27, 29
28 U.S.C. § 3702	15
42 U.S.C. § 1303	14, 15
42 U.S.C. § 1396c.....	14
Other Authorities	
Business Roundtable, <i>Mutual Benefits, Shared Growth: Small and Large Companies Working Together</i> , https://bit.ly/45z5doe (last visited Sept. 6, 2023)	3

Other Authorities (continued)	Page(s)
Jane G. Gravelle & Donald J. Marples, Congressional Research Service, R45186, Issues in International Corporate Taxation: The 2017 Revision (2021).....	4
H.R. Rep. No. 409, 115th Cong., 1st Sess. (2017).....	6
International Monetary Fund & Organisation for Economic Co-operation & Development, Tax Certainty: IMF/OECD Report for the G20 Finance Ministers (2017), https://bit.ly/47RqQBK	18
Antonin Scalia & Bryan A. Garner, <i>Reading Law: The Interpretation of Legal Texts</i> (2012)	10
Small Business & Entrepreneurship Council, <i>Key Vote for Entrepreneurs: Tax Cuts and Jobs Act</i> (Dec. 1, 2017), https://bit.ly/3EgKUzG	2
U.S. Census Bureau, Department of Commerce, <i>2020 SUSB Annual Data Tables by Establishment Industry</i> , https://bit.ly/45NniOM (Mar. 2023)	3

IN THE
Supreme Court of the United States

No. 22-800

CHARLES G. MOORE, ET UX.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

**BRIEF OF AMICUS CURIAE SMALL
BUSINESS AND ENTREPRENEURSHIP
COUNCIL IN SUPPORT OF NEITHER PARTY**

INTEREST OF AMICUS CURIAE*

The Small Business and Entrepreneurship Council (SBE Council) is an advocacy, research, and education organization that works to promote entrepreneurship and protect small-business vitality and growth. For 30 years, SBE Council has promoted innovative initiatives and policies to enable startup activity, small-business competitiveness, and a policy

* Pursuant to this Court's Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

ecosystem that lowers barriers to entrepreneurial opportunity and success. Policy certainty, measures that encourage risk-taking and investment, and access to markets, capital, and opportunity are all critical to an ecosystem that supports healthy startup activity and small-business growth.

This case presents the question whether a special, one-time tax (the Repatriation Tax) imposed by Congress in the Tax Cuts and Jobs Act (TCJA), Pub. L. No. 115-97, § 14103, 131 Stat. 2054, 2195 (2017) (26 U.S.C. § 965), on certain foreign earnings exceeds Congress's authority under the Sixteenth Amendment to impose "taxes on incomes" exempt from the Constitution's apportionment requirement. U.S. Const. Amend. XVI; see Pet. Br. 2-3. SBE Council supports both the international-tax provisions of the TCJA, which created the Repatriation Tax, and many of its domestic provisions—including the lower corporate and individual income-tax rates, the deduction for qualified business income, and the 100 percent bonus-depreciation rules, among others. See Small Business & Entrepreneurship Council, *Key Vote for Entrepreneurs: Tax Cuts and Jobs Act* (Dec. 1, 2017), <https://bit.ly/3EgKUzG>. SBE Council takes no position on the constitutionality of the Repatriation Tax.

Instead, SBE Council respectfully submits this brief to explain uncertainties that might result if the Court were to hold the Repatriation Tax unconstitutional without addressing the effect of that holding on other provisions of the Internal Revenue Code of 1986 (Code). If the Court invalidates the Repatriation Tax, it would raise questions regarding whether other parts of the TCJA remain operative and how they and other Code provisions apply—including with respect to the pre-

2018 accumulated foreign earnings that would have been subject to the Repatriation Tax.

That uncertainty would be highly detrimental to small businesses and entrepreneurs. The vast majority of C Corporations (over 95%) are small businesses. U.S. Census Bureau, Department of Commerce, *2020 SUSB Annual Data Tables by Establishment Industry* (Mar. 2023), <https://bit.ly/45NniOM>. Many of those small businesses and entrepreneurs—including petitioners—engage in cross-border activities, and uncertainty about their tax obligations from those activities will inhibit small cross-border businesses from growing into larger ones and entrepreneurs from starting cross-border businesses. Nor would purely domestic small businesses and entrepreneurs be immune from the detrimental effects of uncertainty; collectively, they sell more than \$1.52 trillion worth of inputs to large multinational corporations that may be less able to purchase from small-business suppliers when confronted with uncertainty about their tax bills. Business Roundtable, *Mutual Benefits, Shared Growth: Small and Large Companies Working Together*, <https://bit.ly/45z5doe> (last visited Sept. 6, 2023).

If the Court sustains petitioners' challenge, it should avoid the deleterious effects of uncertainty by clarifying the scope of its ruling. Specifically, the Court should make clear that, if petitioners cannot constitutionally be compelled to pay the Repatriation Tax, the requirement to pay that Tax is severable from the remainder of the Internal Revenue Code, which continues to function whether or not the Repatriation Tax is paid.

BACKGROUND

The TCJA, enacted in 2017, substantially altered the United States’ international-tax regime. The TCJA moved the United States’ decades-old worldwide approach to taxation toward a more territorial framework. The Repatriation Tax at issue was part of the transition to the new regime.

1. Prior to the TCJA, the United States had a worldwide tax regime: U.S. individuals and corporations were taxed on income earned both in and outside of the United States. Jane G. Gravelle & Donald J. Marples, Congressional Research Service, R45186, Issues in International Corporate Taxation: The 2017 Revision, at 2 (2021). In addition, U.S. shareholders of foreign corporations could defer U.S. tax on those corporations’ earnings until those earnings were repatriated to the United States, typically in the form of dividends.

In 1962, Congress limited U.S. shareholders’ ability to defer taxes on foreign corporations’ earnings by enacting Subpart F of the Internal Revenue Code. See Revenue Act of 1962, Pub. L. No. 87-834, § 12, 76 Stat. 960, 1006-1031. Subpart F, which remains in effect following the TCJA, provides that U.S. shareholders who own at least 10 percent of the stock of a “controlled foreign corporation”—*i.e.*, a foreign corporation that is majority owned by U.S. shareholders—are taxed on certain categories of that corporation’s earnings in the year they are earned, regardless of whether (or when) those earnings are repatriated. See 26 U.S.C. § 951(a) (imposing the tax); *id.* § 957(a) (defining “controlled foreign corporation”). Sections 952-954 specify the categories of controlled foreign corporations’ earnings that are subject to this special Subpart F treatment.

Taxing a U.S. shareholder on a controlled foreign corporation's earnings before they are repatriated necessitates rules governing those foreign earnings, which are set forth in other provisions of Subpart F. To avoid double taxation, Subpart F provides that earnings that are included in gross income before they are repatriated will not again be included in gross income when later repatriated (typically as dividends) to U.S. shareholders. 26 U.S.C. § 959. A U.S. shareholder's basis in the stock of the controlled foreign corporation is also adjusted upwards to reflect that gross-income inclusion; the basis then is adjusted back down when the earnings are later repatriated. See 26 U.S.C. § 961.

Thus, between 1962 and the enactment of the TCJA in 2017, the United States taxed foreign earnings in one of two ways. For the limited categories of earnings subject to Subpart F, U.S. shareholders were taxed annually, regardless of whether or when those foreign earnings were repatriated. For all other types of foreign corporations' earnings, U.S. shareholders were subject to U.S. tax only when those earnings were repatriated; U.S. shareholders thus could defer (but not avoid) U.S. tax liability on those other foreign earnings by retaining those earnings abroad.

2. Enacted in 2017, and building on legislative proposals dating back more than a decade, the TCJA moved the United States toward a more territorial system. Under that system, U.S. shareholders of foreign corporations are taxed on only certain categories of foreign earnings.

As before the TCJA, U.S. shareholders are taxed annually on the limited categories of controlled-foreign-corporation earnings enumerated in Subpart F. The TCJA also added a new, broader category of

controlled-foreign-corporation earnings—Global Intangible Low-Taxed Income—that is subject to similar treatment. 26 U.S.C. §§ 951, 951A. But for other categories of foreign-corporation earnings, the TCJA effectively eliminated U.S. tax. It did so by enacting a new Code provision, Section 245A, that allows U.S. shareholders to deduct from their gross incomes dividends they receive that are based on those other categories of foreign earnings. Congress made this change to align the United States’ international-tax policy with the majority of its industrialized trading partners, which follow territorial taxation systems, as well as to encourage repatriation of foreign earnings. See H.R. Rep. No. 409, 115th Cong., 1st Sess. 370 (2017).

Thus, under the TCJA, as before, certain specified types of controlled-foreign-corporation earnings are included in gross income (and subject to U.S. tax) even before they are repatriated. But such corporations’ other foreign earnings, though still included in gross income, are no longer subject to U.S. tax at all.

That policy change created a potential, one-off windfall for U.S. shareholders who, as of the TCJA’s effective date, had not yet received their controlled foreign corporations’ earnings (those not subject to the Subpart F rules)—and thus had not yet paid U.S. tax on those earnings. Before the TCJA, those taxpayers would ultimately have owed taxes on those earnings when those earnings were repatriated; their U.S. tax liabilities were simply delayed. By allowing U.S. shareholders to deduct dividends received from controlled foreign corporations from the U.S. shareholders’ gross incomes, the TCJA would enable a potential windfall.

To address that concern, the TCJA imposed the Repatriation Tax: a one-time tax on controlled-foreign-corporation earnings accumulated between 1986 and 2017 that had not yet been subject to U.S. tax. See 26 U.S.C. § 965(a). Section 965(a) provides that those earnings are included in a U.S. shareholder's Subpart F income. *Ibid.* Section 965(c) provides that retained earnings held in cash and cash equivalents are taxed at 15.5% and retained earnings held in non-cash assets are taxed at 8%. 26 U.S.C. § 965(c). By subjecting taxpayers' pre-2018 foreign earnings—which otherwise could be repatriated tax-free as dividends—to U.S. tax, the Repatriation Tax avoided the potential windfall.

As a result of the Repatriation Tax, many controlled foreign corporations have previously taxed foreign earnings that are subject to the technical provisions that already governed Subpart F earnings. Those earnings will not be taxed when they are repatriated as dividends, because they were previously included in the U.S. shareholders' gross incomes (and subject to U.S. tax). 26 U.S.C. § 959; see *id.* § 965(b)(4) (addressing the application of Section 959 to earnings subject to the Repatriation Tax). And a taxpayer's basis in the stock of a controlled foreign corporation is adjusted to reflect the inclusion of the earnings in gross income. See 26 U.S.C. § 961.

SUMMARY OF ARGUMENT

I. If the Court holds the Repatriation Tax invalid, its ruling will call into question whether other cross-border provisions of the TCJA and the Code remain operative. The Court should address severability to eliminate taxpayers' uncertainty about their obligations under those provisions.

A. When the Court holds unconstitutional a provision (or application) of a statute, it often also decides whether that unconstitutional provision (or application) can be severed from the rest of the statute. The Court frequently analyzes severability when necessary to determine the appropriate remedy. It also has reached severability to avoid needless and costly uncertainty about the effect of its rulings, especially when Congress has enacted a severability clause. The Court addressed severability when it invalidated the pre-Sixteenth Amendment income tax. See *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 635-636 (1895).

B. The Court should address severability here if it invalidates the Repatriation Tax. Because that tax served as part of the transition to a more territorial tax regime, its invalidation would otherwise leave unclear whether other provisions composing that new regime remain operative. It would also be uncertain how the existing Code provisions governing gross-income inclusions of foreign earnings would apply to earnings subject to the Repatriation Tax.

Applying severability principles would resolve that uncertainty. Severability also bears on whether the remedy for petitioners' asserted injury is limited to a tax refund or extends further. And, because Congress enacted a severability clause in the Code,

26 U.S.C. § 7852(a), addressing severability requires nothing more than giving effect to Congress’s express policy judgment in the Code.

II. The requirement to pay the Repatriation Tax is severable from the TCJA and the Internal Revenue Code.

A. When Congress enacts a severability clause, courts “appl[y] [it] to the extent dictated by [its] text.” *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335, 2349 n.6 (2020) (plurality opinion). Even absent a severability clause, courts presume an unconstitutional provision is severable and will not deem other provisions inoperative unless they are “incapable of functioning independently.” *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). The Court has applied similar principles in the tax context. See *Marchetti v. United States*, 390 U.S. 39 (1968).

B. The Repatriation Tax is severable under the Code’s express severability clause. 26 U.S.C. § 7852(a). Section 7852(a) makes clear that, if any “provision” or “application” of the Code “is held invalid, the remainder of the [Code]” and applications of it “shall not be affected thereby.” *Ibid.* If the Repatriation Tax is invalid, the “remainder” of the TCJA remains fully operative. *Ibid.* And because the constitutional defect petitioners assert concerns only a particular “application” (*ibid.*) of Section 965 and other provisions—*viz.*, to require payment of that tax—no other applications are affected, including the requirement to include the underlying accumulated foreign earnings in gross income. The presumption of severability and the Court’s tax-specific precedents yield the same result.

ARGUMENT**I. IF THE COURT HOLDS THE REPATRIATION TAX INVALID, IT SHOULD ADDRESS WHETHER THE INVALIDITY OF THAT TAX AFFECTS OTHER PROVISIONS**

Statutory provisions seldom exist in isolation. Instead, a statute “typically contains many interrelated parts that make up the whole.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012). Thus, “[a]fter finding an application or portion of a statute unconstitutional, [courts] must next ask” whether the unconstitutional provision is severable. *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 330 (2006).

To minimize unnecessary uncertainty, this Court often considers that question proactively and addresses whether a provision (or application) of a statute it has held unconstitutional is severable from the remainder. Providing prospective clarity is especially valuable in the tax context, where “certainty” is particularly “desirable” for all concerned. *United States v. Genesee*, 405 U.S. 93, 105 (1972). When this Court held in *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601 (1895), for example, that a pre-Sixteenth Amendment federal income tax violated the Constitution’s Apportionment Clause, Art. I, § 9, Cl. 4, the Court expressly addressed “the effect of that conclusion upon” the statutory scheme “as a whole.” 158 U.S. at 635; see *id.* at 635-636.

The Court should provide the same kind of prospective clarity here. Petitioners contend (Br. 14-15) that the Repatriation Tax, 26 U.S.C. § 965, exceeds Congress’s income-tax authority under the Sixteenth Amendment. That Amendment grants Congress the

“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—thus exempting “incom[e]” taxes (*ibid.*) from the apportionment requirement of Article I, Art. I, § 2, Cl. 3; *id.* § 9, Cl. 4. Petitioners contend (Br. 47) that the Repatriation Tax is not an “incom[e]” tax under the Amendment because it is imposed based on a taxpayer’s ownership of certain property—stock in a controlled foreign corporation—not on earnings the taxpayer realized in the relevant tax period. Petitioners argue that the Repatriation Tax violates Article I’s apportionment requirement—and so cannot validly be applied to them—because it is not apportioned among the States based on population. *Ibid.*

If the Court accepts petitioners’ contention and holds the Repatriation Tax unconstitutional, it should address whether the invalidity of that tax renders any other Code provisions inoperative. The Court should not leave the scope of its decision in doubt. It should make clear that, if the Repatriation Tax is invalid, it is severable.

A. The Court Addresses In Appropriate Cases Whether An Invalid Provision Of A Statute Is Severable

1. Because Congress often enacts statutory provisions as part of a larger framework, courts frequently address whether the invalidity of one provision (or application) of a statute bars the operation of the remainder. This Court has distilled “severability principles” for resolving such questions. *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335, 2349 (2020) (AAPC) (plurality opinion); see *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-686 (1987).

The Court has often applied those principles to determine whether an invalid provision or application is severable—for example, where necessary to resolve the scope and nature of relief. See, e.g., *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1986-1988 (2021) (plurality opinion) (addressing remedy for the unconstitutional manner of appointing Administrative Patent Judges); *AAPC*, 140 S. Ct. at 2352-2354 (plurality opinion) (addressing remedy for an unconstitutional content-based distinction in the Communications Act); *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2209 (2020) (opinion of Roberts, C.J.) (addressing remedy for unconstitutional removal protections for the director of the Consumer Financial Protection Bureau); *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 508-510 (2010) (addressing remedy for unconstitutional removal protections for the members of another agency); *United States v. Booker*, 543 U.S. 220 (2005) (addressing remedy for the unconstitutionality of the mandatory Sentencing Guidelines). In some instances, the Court has done so despite objections. See, e.g., *Arthrex*, 141 S. Ct. at 1990-1992 (Gorsuch, J., concurring in part and dissenting in part); *Seila Law*, 140 S. Ct. at 2219-2224 (Thomas, J., concurring in part and dissenting in part).

In appropriate cases, the Court has also applied severability principles beyond the context of crafting remedies, to provide clarity about the scope of its holding—thereby avoiding needless and costly uncertainty about the effect of its decisions. For example, in *Pollock*—decided before (and arguably precipitating) the Sixteenth Amendment—the Court held that a tax imposed by an 1894 statute on income from real and invested personal property, not apportioned among the States according to population, violated Article I’s

apportionment requirement. 158 U.S. at 617-635. The 1894 statute imposed, in addition to that invalid tax, numerous taxes on “professions, trades, employments, [and] vocations.” *Id.* at 637. The invalidity of the challenged income-tax portion of the 1894 statute would have left the status of those taxes uncertain.

Instead of leaving the status of those provisions in limbo, the *Pollock* Court expressly clarified the “effect of [its] conclusion” about the income tax on the 1894 statute’s remaining provisions. 158 U.S. at 635; see *id.* at 635-637. Applying then-prevailing severability precedents, the Court made clear that the bulk of the statute continued in force. *Id.* at 635. The Court concluded that only certain provisions of the 1894 statute (“sections 27 to 37”) closely intertwined with the invalid income tax could not be severed, because they were “mutually connected with and dependent on each other.” *Id.* at 635-636 (citation omitted). The Court stressed that “there [wa]s no question as to the validity of th[e] [1894] act” beyond those sections. *Id.* at 635. The Court thus provided both taxpayers and the government with certainty about the effect of its decision on taxpayers’ obligations and the government’s revenues going forward.

More recently, the Court has continued to provide prospective clarity about the severability implications of its holdings in a variety of other contexts. For example, in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) (*NFIB*), the Court addressed a provision of the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (42 U.S.C. § 18001 *et seq.*), that authorized the Secretary of Health and Human Services (HHS) to withhold all of a State’s Medicaid funding if it did not expand its Medicaid program as

contemplated by the ACA. See 42 U.S.C. § 1396c. A majority of the Court concluded that the provision was unconstitutional because it put States to a coercive choice between expanding Medicaid and losing even existing Medicaid funding. See 567 U.S. at 575-585 (opinion of Roberts, C.J.); *id.* at 671-689 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting (joint dissent)). That provision's invalidity cast doubt on the ongoing validity of other provisions of the Medicaid Act.

To resolve that uncertainty, the Court in *NFIB* directly confronted the question of the effect of Section 1396c's invalidity on other Medicaid Act provisions. A different majority of the Court held that the invalid provision (Section 1396c) was severable. See 567 U.S. at 585-588 (opinion of Roberts, C.J.); *id.* at 645-646 (Ginsburg, J., joined by Breyer, Sotomayor, and Kagan, JJ., concurring in part, concurring in the judgment in part, and dissenting in part). The Chief Justice explained that holding Section 1396c invalid "fully remedies the constitutional violation [the Court] ha[d] identified." *Id.* at 586. He further observed that "[t]he chapter of the United States Code that contains § 1396c includes a severability clause confirming that we need go no further." *Ibid.* (citing 42 U.S.C. § 1303). The Chief Justice explained that, having "determine[d], first, that § 1396c is unconstitutional when applied to withdraw existing Medicaid funds," the Court must "then follow Congress's explicit textual instruction to leave unaffected 'the remainder of the chapter, and the application of the challenged provision to other persons or circumstances.'" *Ibid.* (quoting 42 U.S.C. § 1303) (brackets omitted). The other Justices who joined the majority on that issue "agree[d] with [the Chief Justice] that the Medicaid Act's severability clause determine[d] the appropriate

remedy” and required leaving the remainder of the ACA unaffected. *Id.* at 645 (Ginsburg, J., joined by Breyer, Sotomayor, and Kagan, JJ., concurring in part, concurring in the judgment in part, and dissenting in part) (citing 42 U.S.C. § 1303).

The Court also addressed the severability of a statutory provision it had held invalid—and reached a different result—in *Murphy v. National Collegiate Athletic Association*, 138 S. Ct. 1461 (2018). In *Murphy*, New Jersey contended that a provision of the Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, § 2, 106 Stat. 4227, 4227-4228 (1992)—which made it “unlawful” for a State to “license, or authorize” sports gambling—was unconstitutional under anti-commandeering principles. 138 S. Ct. at 1471. The Court agreed. *Id.* at 1478. That holding left uncertain whether the invalid provision was severable from other provisions of the Act that prohibited States and private actors from “‘advertising,’” “‘operating,’ ‘sponsoring,’ or ‘promoting’ sports gambling” such that those other provisions could remain in force. *Id.* at 1482-1484 (quoting 28 U.S.C. § 3702(1), (2)) (brackets omitted).

As in *Pollock* and *NFIB*, the Court in *Murphy* expressly addressed the effect of its holding on “the remainder of [the Act].” 138 S. Ct. at 1481; see *id.* at 1482-1484. Because the Act did not address severability, the Court examined “whether the law remain[ed] ‘fully operative’ without the invalid provisions.” *Id.* at 1482 (quoting *Free Enterprise Fund*, 561 U.S. at 509). The Court reasoned that prohibiting States from operating sports-gambling schemes that they could authorize or license would be “unusual,” *id.* at 1483, and that keeping only the prohibition for private actors would produce “perverse” results, *id.* at

1483. The Court thus proactively clarified the effect of its holding by addressing severability explicitly.

2. The Court's decisions suggest several criteria that counsel in favor of addressing severability.

First, the Court often addresses severability when failing to do so would create problematic uncertainty in a complex statutory framework. Although no statutory provision is an island, some challenged provisions are deeply enmeshed in intricate statutory schemes and more readily raise important questions about whether and how the remainder of the statute functions without the challenged provision. In *NFIB*, for example, it was critical for the government and public to understand whether and how the ACA would continue to function if States could not be compelled to expand Medicaid. See 567 U.S. at 539-543. It was similarly important for the Court in *Seila Law* to address whether the invalidity of restrictions on removing the agency head at issue doomed other provisions of the statute that established the agency and defined its authority. See 140 S. Ct. at 2207-2208 (opinion of Roberts, C.J.); *id.* at 2245 (Kagan, J., concurring in the judgment regarding severability and dissenting in part).

Second, as discussed above, the Court often addresses severability when uncertainty about the effect of its decision bears on the challenger's remedy. See p. 12, *supra*. For example, in *Arthrex*, the Court applied severability principles to conclude that "the appropriate remedy is a remand to the Acting Director," rather than "a hearing before a new panel of" patent judges. 141 S. Ct. at 1987-1988 (plurality opinion); *id.* at 1997 (Breyer, J., concurring in the judgment regarding severability and dissenting in part). And in *Booker*, the Court explained that the defendant was

entitled to a resentencing at which the sentencing court would consider the Sentencing Guidelines but would not be bound by them. 543 U.S. at 259.

Third, the Court’s decisions reflect that addressing severability is especially appropriate when Congress has directly spoken to the issue through an express severability clause. For example, in *AAPC*, the plurality explained that the severability clause in the Communications Act—which applied to later amendments to that Act—had to be “interpreted according to its terms” and made the severability inquiry straightforward. 140 S. Ct. at 2352 (plurality opinion); see also, e.g., *Seila Law*, 140 S. Ct. at 2209 (opinion of Roberts, C.J.). When a court clarifies the scope of its ruling by simply applying such a provision, it need not speculate which if any other portions of the statute Congress might have wished to remain in force. Instead, the court is merely “follow[ing] Congress’s explicit textual instruction” on the severability issue, *NFIB*, 567 U.S. at 586 (opinion of Roberts, C.J.), by making clear how its decision gives effect to the policy choice Congress explicitly made in the statute.

B. Addressing Severability Would Be Appropriate In This Case

As in *Pollock* and other cases, if the Court holds the challenged tax invalid, it should make clear the scope and effect of that ruling. All three considerations discussed above support addressing severability. The widespread uncertainty that would otherwise result from a decision invalidating the Repatriation Tax counsels strongly in favor of clarifying the scope of the Court’s decision up front. That uncertainty also concretely affects this case and bears on the scope of petitioners’ remedy. And Congress has enacted a

severability clause that governs; the Court need simply apply it.

1. The Court has repeatedly recognized the importance of predictability and certainty in tax law. See, e.g., *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 459-460 (1995) (crafting a rule that “accommodates the reality that tax administration requires predictability”); *Generes*, 405 U.S. at 105 (recognizing that “in tax law * * * certainty is desirable”). And for good reason. Predictability and certainty hold outsized significance in the tax context because of taxpayers’ need to plan their activities in advance. As the International Monetary Fund and the Organisation for Economic Co-operation and Development have jointly underscored, tax uncertainty has “adverse effects on investment and trade” and prevents governments from “seeking secure and reasonably predictable revenues.” International Monetary Fund & Organisation for Economic Co-operation & Development, *Tax Certainty: IMF/OECD Report for the G20 Finance Ministers* 6, 9 (2017), <https://bit.ly/47RqQBK>.

A decision from this Court holding the Repatriation Tax invalid *without* addressing whether other provisions of the TCJA or the Code remain in force would introduce substantial and unnecessary uncertainty, which the Court readily can and should avoid. In particular, a decision invalidating the Repatriation Tax would raise an array of questions about whether and how other parts of the international-tax regime continue to function. Those questions generally fall into two categories.

First, because the Repatriation Tax was enacted as part of the transition to the new, more territorial regime, see p. 7, *supra*, invalidating the requirement to pay that tax would raise questions of whether or to

what extent the other provisions of the new regime remain valid. Most importantly, it would not be clear whether the deduction for dividends received from controlled foreign corporations under Section 245A—the linchpin of the TCJA’s more territorial regime—remains in force.

Second, because controlled foreign corporations, as a result of Section 965, now have additional foreign earnings that were included in gross income and subject to U.S. tax but not repatriated, the statute also intersects with various pre-existing provisions of the Internal Revenue Code. See p. 7, *supra*. A decision invalidating the Repatriation Tax without addressing whether it is severable would create uncertainty regarding how those other provisions would apply to those earnings. For example, it would not be clear whether earnings that were included in gross income and would have been taxed under the Repatriation Tax should still be treated as having previously been included in gross income (and subject to U.S. tax), enabling them to be repatriated without being taxed under Sections 965(b)(4) and 959. Likewise, the question would arise whether a U.S. shareholder’s basis in controlled foreign corporation stock should still be adjusted under Section 961 to reflect the gross-income inclusion. Those provisions presuppose that a U.S. shareholder has included the earnings subject to the Repatriation Tax in gross income. A ruling that invalidates the Repatriation Tax without addressing severability would leave the status of those other provisions unclear.

If left unresolved, those questions could give rise to substantial and costly uncertainty. Small businesses and entrepreneurs that engage in cross-border activities—which are increasingly common in the

global economy—would face particular difficulty in planning their operations. Larger multinational businesses would face uncertainty of their own in planning their affairs, and that uncertainty would diminish their ability to rely on small businesses to supply and service them as they set funds aside for possible additional tax obligations. Businesses also would encounter questions of how to report income arising from their cross-border activities for U.S. tax purposes; the Internal Revenue Service would face corresponding questions regarding how to review that reporting. The government also would face increased unpredictability about the revenue it may collect going forward.

The Court can and should avoid creating such uncertainty by addressing whether the Repatriation Tax, if invalid, is severable from the rest of the TCJA and the Code. Resolving that question now would avoid the need for taxpayers, courts, and tax authorities to speculate about whether and how other portions of the TCJA and Code continue to operate.

2. That uncertainty is no mere abstraction. To the contrary, addressing severability could also have a bearing on the present dispute, by ameliorating uncertainty about the appropriate remedy for petitioners. The principal relief they sought below was a determination that the Repatriation Tax should not have been assessed against them and that they are entitled to a refund of taxes paid. Pet. App. 85. That remedy would seem to follow naturally if their challenge to the tax prevails on the merits. But their request for relief is not confined to those remedies. See *ibid.* And without clarification from this Court, it could be uncertain whether other actions taken pursuant to Section 965 should also be unwound. As

discussed below, severability principles provide the framework to answer that and other questions.

3. Addressing severability is appropriate because the inquiry is resolved by an express severability clause governing the entire Code. 26 U.S.C. § 7852(a). Resolving whether the Repatriation Tax is severable requires no more than making clear the result of Congress's judgment in enacting that provision. Doing so would respect Congress's decision to reserve for itself the complicated policy question of which if any other TCJA or Code provisions should be altered or eliminated if the Repatriation Tax cannot be applied.

II. IF THE REPATRIATION TAX IS INVALID, IT IS SEVERABLE FROM THE TCJA AND THE INTERNAL REVENUE CODE

If the Court holds the Repatriation Tax invalid, it should conclude that the requirement to pay that tax is severable. That conclusion follows from straightforward application of this Court's precedents. The Court has made clear that express severability provisions in federal statutes should be followed. The Code's severability provision, 26 U.S.C. § 7852(a), speaks directly to the severability issue here, embodying an explicit congressional judgment that the invalidity of one provision or application of the Code does not affect any other. Even beyond Section 7852, the strong presumption of severability that applies to federal statutes generally—and the Court's decisions in the tax context specifically—counsel decisively in favor of confining any remedy to the precise constitutional defect the Court identifies.

A. Severability Is Required When Congress So Provides, And Is Otherwise Presumed

The severability inquiry asks whether, given a judicial determination that one statutory provision (or application) is constitutionally impermissible, other provisions should be inoperative (or other applications prohibited) as well. The Court's decisions have distilled two basic principles that govern that inquiry.

First, when Congress enacts a statutory provision that speaks directly to the severability question, courts should follow it. See, *e.g.*, *AAPC*, 140 S. Ct. at 2349 (plurality opinion). Severability is ultimately a question of statutory interpretation, and an express statutory provision addressing severability “leaves no doubt about what the enacting Congress wanted.” *Ibid.* Congress often speaks to severability by including “a severability clause in the law, making clear that the unconstitutionality of one provision does not affect the rest of the law.” *Ibid.* (emphasis omitted). In those cases, “the judicial inquiry is straightforward.” *Ibid.* Although litigants may “nonetheless ask the Court to override the text of a severability or nonseverability clause,” those requests are properly rejected. *Ibid.* “That kind of argument may have carried some force back when courts paid less attention to statutory text as the definitive expression of Congress's will.” *Ibid.*; *cf. id.* at 2350 (noting “some isolated detours” in the Court's severability precedent, “mostly in the late 1800s and early 1900s”). “But courts today zero in on the precise statutory text and, as a result, courts hew closely to the text of severability or nonseverability clauses.” *Id.* at 2349. Thus, at least “absent extraordinary circumstances, the Court should adhere to the text of the severability” clause. *Ibid.*; see *Seila Law*, 140 S. Ct. at 2209 (opinion of Roberts,

C.J.); *NFIB*, 567 U.S. at 586 (opinion of Roberts, C.J.); *Alaska Airlines*, 480 U.S. at 686.

That principle applies with full force where, as here, “Congress enacts a law with a severability clause and later adds new provisions to that statute.” *AAPC*, 140 S. Ct. at 2349 n.6 (plurality opinion). In that circumstance, “the severability clause applies to those new provisions to the extent dictated by the text of the severability clause.” *Ibid.* By adding new provisions to an existing law that is already subject to an express severability directive, Congress makes a judgment that the same directive will apply. See *ibid.*; see also *NFIB*, 567 U.S. at 586 (opinion of Roberts, C.J.).

Second, even absent an express severability provision, courts presume “that an unconstitutional provision in a law is severable from the remainder of the law or statute.” *AAPC*, 140 S. Ct. at 2350 (plurality opinion). As the Court recognized as early as *Marbury v. Madison*, 1 Cranch 137 (1803), it is preferable to “salvage rather than destroy” a “law passed by Congress and signed by the President.” *AAPC*, 140 S. Ct. at 2350 (plurality opinion). That approach “allows courts to avoid judicial policymaking” and “reflects the confined role of the Judiciary in our system of separated powers.” *Id.* at 2351 (plurality opinion). It also “limit[s] the solution to the problem, severing any problematic portions while leaving the remainder intact.” *Free Enterprise Fund*, 561 U.S. at 508 (internal quotation marks omitted). For example, severing the ACA provision that allowed the Secretary of HHS to withhold all Medicaid funding “fully remedie[d] the constitutional violation” the Court identified while leaving the rest of the law intact. *NFIB*, 567 U.S. at 586 (opinion of Roberts, C.J.).

Applying that presumption, courts assume that separate provisions or applications of statutes are severable absent a strong showing to the contrary. A court should decline to sever an invalid provision only when other portions of the statute are “incapable of functioning independently,” *Alaska Airlines*, 480 U.S. at 684, or are not “‘fully operative’ without the invalid provisions,” *Murphy*, 138 S. Ct. at 1482 (quoting *Free Enterprise Fund*, 561 U.S. at 509). As the Court has recognized, that is a demanding test, for “it is fairly unusual for the remainder of a law not to be operative.” *AAPC*, 140 S. Ct. at 2352 (plurality opinion).

In the tax context specifically, though not invoking the presumption of severability as such, the Court has similarly made clear that courts should proceed cautiously and excise only what is essential to cure a constitutional defect. In *Marchetti v. United States*, 390 U.S. 39 (1968), and its companion case, *Grosso v. United States*, 390 U.S. 62 (1968), the Court confronted a constitutional challenge to taxes on taking wagers. *Marchetti*, 390 U.S. at 42. At the time, gambling was illegal in most States. *Id.* at 44. The defendants in *Marchetti* and *Grosso* were criminally charged with failing to pay the taxes, *id.* at 40-41; *Grosso*, 390 U.S. at 63, and failing to register as a business that would owe the tax, *Marchetti*, 390 U.S. at 41. They argued that the requirement to pay the tax violated their Fifth Amendment rights against self-incrimination. *Ibid.*

This Court sustained the defendants’ constitutional challenge but, critically here, remedied the violation through the narrowest available means. It declined to hold the underlying taxes themselves constitutionally invalid, underscoring Congress’s “power to tax activities which are, wholly or in part, unlawful.”

Marchetti, 390 U.S. at 58. Only criminally punishing a taxpayer for refusing to pay the tax violated the defendants’ right against self-incrimination—and even then only where the privilege against self-incrimination was “properly assert[ed].” *Id.* at 61. Instead of declaring that the “tax provisions are * * * constitutionally impermissible,” the Court adopted the more surgical approach of leaving the tax in place and holding “only that those who properly assert the constitutional privilege as to th[e] [tax] provisions may not be criminally punished for failure to comply with their requirements.” *Ibid.*; cf. *id.* at 58-60 & n.18 (rejecting an alternative remedy that would not solve the constitutional problem without “insert[ing] words that are not now in the statute”).

That ruling was sufficient, but went no further than necessary, to alleviate the constitutional infirmity the Court identified. *Marchetti*, like the presumption of severability, thus reflects the Court’s recognition that, in the tax context as elsewhere, courts should approach constitutional defects with a scalpel.

B. The Code’s Severability Clause And The Presumption Of Severability Make Clear That The Repatriation Tax Is Severable

Under this Court’s precedents, the severability inquiry here is straightforward. The Court’s decisions requiring faithful application of severability clauses compel the conclusion that the Repatriation Tax is severable. The Court’s cases reaffirming the strong presumption of severability, and similar principles in the tax context specifically, lead to the same answer.

1. The severability inquiry should begin and end with the Internal Revenue Code’s severability clause, 26 U.S.C. § 7852(a).

a. The Code—which the TCJA amended, and of which the Repatriation Tax is a part—contains a Code-wide severability clause. It states: “[i]f any provision of this title [*i.e.*, Title 26, the Internal Revenue Code], or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby.” 26 U.S.C. § 7852(a).

Section 7852(a) carries forward a long tradition in federal tax statutes. At least as far back as the Revenue Act of 1913, Congress has included a severability provision in federal tax laws. See Act to Reduce Tariff Duties and to Provide Revenue for the Government, ch. 16, § 4(T), 38 Stat. 114, 202 (1913). When Congress compiled the tax laws into a comprehensive Internal Revenue Code, it included a Code-wide severability clause. See Internal Revenue Code of 1939, Pub. L. No. 76-1, § 3802, 53 Stat. 1, 473. Congress has retained that Code-wide severability clause since. Current Section 7852(a) thus embodies a bedrock rule of federal tax law.

b. Section 7852(a)’s text requires severing the Repatriation Tax. Section 7852(a) applies to “any provision” or “application” of the Code, 26 U.S.C. § 7852(a), including later-enacted statutes, such as the TCJA, that amend the Code, *AAPC*, 140 S. Ct. at 2349 n.6. The TCJA enacted the Repatriation Tax directly into the Code. Pub. L. No. 115-97, §§ 11000(a), 14103(a), 131 Stat. 2054, 2054, 2195. Section 7852(a) thus applies to the Repatriation Tax. See *Pittston Co. v. United States*, 368 F.3d 385, 400-401 (4th Cir. 2004)

(applying Section 7852(a) to the Coal Act’s amendments to the Code). Section 7852(a) by its terms thus requires courts to deem the remainder of the Code unaffected by the invalidity of one provision. Cf. *Moritz v. Commissioner*, 469 F.2d 466, 470 (10th Cir. 1972) (remedying an unconstitutional tax provision in a manner that maximally preserves the provision and the Code).

c. Applying Section 7852(a) to the Repatriation Tax resolves uncertainty about both the ongoing validity of the TCJA’s more territorial regime and the operation of the Code’s pre-existing provisions.

First, applying the text of Section 7852(a) necessarily means that other provisions of the TCJA remain in full effect if the Repatriation Tax is held unconstitutional. The “invalid[ity]” of applying the TCJA “provision[s]” to require payment of that tax does not “affect[t]” any other provision or application of the TCJA. 26 U.S.C. § 7852(a). For example, the deduction authorized by Section 245A for dividends received from controlled foreign corporations based on the earnings would “not be affected.” *Ibid.*; see 26 U.S.C. § 245A. Although the Repatriation Tax was part of the transition to the TCJA’s more territorial regime, Congress judged that if one provision “is held invalid,” the others “shall not be affected.” 26 U.S.C. § 7852(a).

Second, applying Section 7852(a) means that, if petitioners prevail, only the requirement to *pay* the Repatriation Tax—*i.e.*, the application of Section 965 and other provisions to produce the tax liability petitioners challenge—should be invalid.

As noted above, invalidating the Repatriation Tax would raise questions of whether the application of other Code provisions that interact with the TCJA

provision that brought the Repatriation Tax into being and results in its application to petitioners—Section 965—should be altered. Section 965(a) immediately concerns the calculation of a taxpayer’s gross income. Section 965(a) requires the addition to a taxpayer’s Subpart F income of certain foreign earnings; in conjunction with pre-existing Code provisions, Section 965(a) results in additional tax liability. Thus, for example, invalidating the Repatriation Tax would raise the remedial question whether petitioners may obtain only the refund of the tax they paid, or may (or must) also exclude their portion of the controlled foreign corporation’s earnings from their 2017 gross income for other purposes.

Section 7852(a) answers that and similar questions. The constitutional defect petitioners allege arises solely from requiring them to *pay* the Repatriation Tax—*i.e.*, the application of the Code’s provisions to subject them to tax liability they would not otherwise face—not from the existence of Section 965(a) or from any other application of that provision, alone or in conjunction with other Code provisions. The question petitioners present is whether the Sixteenth Amendment “authorizes Congress *to tax* unrealized sums without apportionment.” Pet. Br. i (emphasis added). They contend that it does not and that the Ninth Circuit therefore erred when it “uph[e]ld their tax liability.” *Id.* at 3. As petitioners recount, they “alleged that the [Repatriation Tax] is an unapportioned direct tax in violation of the Constitution’s apportionment requirement, U.S. Const. Art. I, § 2, Cl. 3; *id.* § 9, Cl. 4, because it taxes them on ownership of personal property (their KisanKraft shares), not on income they had realized.” Pet. Br. 12. They accordingly sought relief from the requirement to pay the tax—*viz.*, a determination that the Repatriation Tax

was erroneously assessed against them and a refund of the tax they paid. Pet. App. 85.

If the Court agrees with petitioners, its decision would mean that the Repatriation Tax is not a “Tax” that constitutionally may be “laid” by Congress. U.S. Const. Art. I, § 9, Cl. 4. Such a ruling would mean that petitioners cannot validly be required to pay that tax. Section 965(a) thus could not be applied to require the inclusion in gross income of the disputed foreign earnings *for the purpose of imposing that tax* on petitioners.

But under Section 7852(a), such a ruling would not affect any other application of Section 965 or other provisions. Petitioners have not asserted any constitutional challenge beyond the validity of requiring them to pay the Repatriation Tax. Article I’s apportionment requirement and the Sixteenth Amendment’s exemption from that requirement concern only whether particular kinds of taxes may be imposed. They do not concern what constitutes “income” for any purpose other than laying and collecting tax. Petitioners, at any rate, have not identified any way in which the invalidity of the Repatriation Tax would in turn cause the application of any other Code provision to violate the Constitution. The constitutional violation they assert thus can be “fully remedie[d]” by declaring that Section 965 and other provisions cannot constitutionally be applied to require payment of the Repatriation Tax and refunding any tax paid. *NFIB*, 567 U.S. at 586 (opinion of Roberts, C.J.). Pursuant to the plain text of Section 7852(a), a decision establishing the “invalid[ity]” of “th[at] application” of the Code “shall not * * * affec[t]” any other “application” of the Code to other issues. 26 U.S.C. § 7852(a).

Applying Section 7852(a) to deem the requirement to pay the Repatriation Tax severable from all other provisions and applications of the Code would resolve many questions that a decision invalidating the tax would raise for other, pre-existing Code provisions. It would make clear that, although Section 965(a) could not be applied to create a tax liability, other Code provisions continue to apply unaltered. In other words, other provisions of the Code that relate to earnings subject to the Repatriation Tax would apply regardless of whether the tax was actually paid. More broadly, applying Section 7852(a) to sever the requirement to pay the Repatriation Tax from the remainder of the Code would not undermine Congress's overarching approach in enacting the TCJA. The United States' tax system would continue to operate based on the more territorial regime the TCJA instituted. Only the requirement to pay a one-time, retrospective tax would be affected. That outcome respects Congress's judgment in enacting a Code-wide severability clause and would provide certainty and stability for taxpayers and tax authorities alike.

2. Although unnecessary in light of the Code's express severability clause, the strong presumption of severability and the Court's tax-specific precedent lead to the same conclusion. The presumption of severability requires courts to treat invalid provisions as severable unless the remaining provisions would not be "capable of functioning independently" or "fully operative" alone. *AAPC*, 140 S. Ct. at 2352 (plurality opinion) (citation omitted). Holding the Repatriation Tax invalid and inoperative would not render any other provisions incapable of functioning independently and fully.

The more territorial regime ushered in by the TCJA can function fully without the Repatriation Tax. Section 245A's deduction for dividends from controlled-foreign-corporation earnings does not depend, as a technical matter, on the Repatriation Tax. And the preexisting provisions governing foreign earnings already included in gross income can fully operate without the Repatriation Tax's payment. Applying the presumption, the Court should therefore "refrain from invalidating more of the [Code and the TCJA] than is necessary." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984).

Marchetti supports the same result. In *Marchetti*, the constitutional problem did not arise from payment of the tax—but only from criminally punishing a taxpayer for refusing to pay. The *Marchetti* Court accordingly did not invalidate the requirement to pay the tax. 390 U.S. at 61. The Court acknowledged as much in dictum in a later decision, observing that the Internal Revenue Service could still enforce the tax in a civil action (but not a quasi-criminal forfeiture action). See *United States v. U.S. Coin & Currency*, 401 U.S. 715, 718 (1971).

Here, if the Court finds a constitutional violation, that violation would arise from requiring payment of the Repatriation Tax. Only that requirement, therefore, should be invalidated. Nothing else in the Code—such as the inclusion of the underlying foreign earnings in gross income and other provisions governing unrepatriated foreign earnings—would or should be affected.

CONCLUSION

SBE Council takes no position on whether the Ninth Circuit’s judgment should be affirmed or reversed. But if it is reversed, the Court should address whether the Repatriation Tax is severable, hold that it is, and explain the consequences of that holding.

Respectfully submitted,

JONATHAN C. BOND
Counsel of Record
MICHAEL J. DESMOND
LUCAS C. TOWNSEND
SAUL MEZEI
ANNE O. DEVEREAUX
AARON HAUPTMAN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
JBond@gibsondunn.com

Counsel for Amicus Curiae

September 6, 2023