No. 22-800

In The
Supreme Court of the United States

CHARLES G. MOORE and KATHLEEN F. MOORE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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The Federalist No. 21 (A. Hamilton) (Clinton Rossiter ed., 1961)..17

Bruce Ackerman, *Taxation and the Constitution*, 99 Colum. L. Rev. 1 (1999) 13

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3 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution (2d ed., 1836)..............................15

2 Alexander Hamilton, *Speech on the Revenue System*, in The Works of Alexander Hamilton (Henry Cabot Lodge ed., 1904)...............................17

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Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 Const. Commentary 355 (Summer, 2004)............22

Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 Colum. L. Rev. 2334 (December, 1997).................19

Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 Const. Commentary 295 (Summer, 2004) 13

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Landmark Legal Foundation ("Landmark") is a national public-interest law firm committed to preserving the principles of limited government, separation of powers, federalism, originalist construction of the Constitution and individual rights. Landmark has a unique perspective on this case. It was one of the very few *amici curiae* who raised the implications of the Apportionment Clause and Direct Tax Clause in the main challenge to the Affordable Care Act. Brief for Landmark Legal Foundation as *Amicus Curiae* in support of the Respondents (Minimum Coverage Issue) at 18-35, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (No. 11-393). This area had been largely ignored in the Government's briefs. Id. at 669 (Scalia, Thomas, Kennedy & Alito, JJ., dissenting).

Landmark urges this Court to reverse the ruling of the Court of Appeals for the Ninth Circuit because left undisturbed it threatens to eviscerate any meaningful limitation on Congress's taxing power.

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns whether Congress can redefine the text of the Sixteenth Amendment so that the Apportionment Clause and Direct Tax Clause are effectively removed from the Constitution. U.S. Const., amend. XVI; U.S. Const., art. I, § 2, cl. 3; U.S. Const., art. I, § 9, cl. 4. The Mandatory Repatriation Tax (MRT) of the Tax Cuts and Jobs Act of 2017, Public Law 115-97 (Dec. 22, 2017) (TCJA), treated the undistributed earnings of a controlled foreign corporation (CFC) that had accumulated over several years as income taxable to minority shareholders like the Moores in a single year. The MRT was not a tax of the Moores' income because the Moores realized no gain and received no income. Instead, the MRT acted as a direct tax on the Moores' property. The MRT violated the Constitution because this direct tax on shares of stock was not apportioned by population.

The Ninth Circuit's opinion below interpreted the taxing power too broadly and ignored the realization requirement in this Court's precedents such as *Eisner v. Macomber*, 252 U.S. 189 (1920), a case directly on point. Although the Sixteenth Amendment narrowed the scope of the Apportionment Clause and Direct Tax Clause, they are constitutional restrictions on taxation that remain in force and cannot be ignored just to maximize revenue.

The Court should uphold the Sixteenth Amendment's realization requirement and the Apportionment Clause and Direct Tax Clause.

ARGUMENT

I. Income must be realized before it may be taxed.

In the Ninth Circuit's view, which the Government urges this Court to adopt, there are almost no principled limits to what Congress can define as taxable income. If this reasoning were taken to its logical end, Congress would be free from one of the most important constitutional restraints on the taxing power residing in the Apportionment Clause and Direct Tax Clause. Although some deference to Congress's power may be due, the court below went too far. In their view, Congress can disregard the plain meaning of the text of the Sixteenth Amendment, define income as they see fit without interference from the Amendment or the Supreme Court, and thereby avoid Article I's apportionment requirement. This cannot possibly occur without raising separation-of-powers concerns under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). When this issue arose in *Eisner v. Macomber*, 252 U.S. 189 (1920), the Court wrote, "Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised." Id. at 206.

In the opinion below, the court justifies its holding by informing us that the concept of income itself is flexible. Pet. App. 11. Taxes like the MRT that deem realization of corporate income to shareholders have been upheld in circuit courts, we are reminded. Pet. App. 11-12. The court further states, "Whether the taxpayer has realized income does not determine whether a tax is constitutional"; taxable gain itself is broadly construed; and there has been no constitutional ban on the disregard of the corporate form to allow taxing shareholder income. Pet. App. 12-13. The court below even waved away this Court's longstanding precedents, *Eisner v. Macomber*, 252 U.S. 189 (1920), and *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426 (1955), establishing that the Sixteenth Amendment inherently requires an event when income is realized before it may be taxed. Pet. App. 14-16.

As shown below, the Ninth Circuit upheld the MRT by citing tax statutes based on constitutionally distinguishable theories of the constructive receipt of income. Yet, quite remarkably, they still would not cover shareholders like the Moores. The constructive receipt cases are often distinguished from this case due to the factor of control. Unlike the partners, individual trader, and shareholders of closely held corporations in these cases, the Moores did not have sufficient control of KisanKraft to compel distributions, which would supposedly justify the constructive receipt of income to the Moores. And unlike the tax statutes cited below,

the MRT applied to corporate earnings accumulated over a range of many years, far beyond the taxation attributed to a shareholder of a company's earnings in a current, single year under Subpart F. This comparison of the lower court's cases to the instant case shows why the MRT is vastly worse and should be struck down. The MRT is far more constitutionally suspect than the statutes in the constructive receipt cases because it applies merely to shareholder *ownership* of CFC shares in 2017, regardless of whether the shareholder had control when the corporation made the earnings being taxed.

The Sixteenth 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. From the beginning, this Court interpreted the Amendment to mean that a realization of gain is inherent to the taxation of income. In *Macomber*, the Court considered whether a shareholder's receipt of a corporate stock dividend constituted a taxable gain under or changed "only the form, not the essence," of his investment. *Macomber*, 252 U.S. at 210. "*Macomber* expressly rejected taxing accumulated earnings and profits to a corporation's shareholders in the absence of a distribution." Henry Ordower, *Abandoning Realization and the Transition Tax: Toward a Comprehensive Tax Base*, 67 Buff. L. Rev. 1371, 1392 (2019). Ultimately, the shareholder "received nothing out of the company's assets

for his separate use and benefit." *Macomber*, 252 U.S. at 211. The Court defined income as "the gain derived from capital, from labor, or from both combined." Id. at 207.

Macomber's core principle stands—realization is a requirement for the taxation of income. *Helvering v. Bruun*, 309 U.S. 461 (1940), cited by the court below to suggest the concept of taxable gain is malleable, also involved a realization event. The taxpayer "realized taxable gain from the forfeiture of a leasehold, the tenant having erected a new building upon the premises." Id. at 464. And in *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426 (1955), the Court devised a three-part description of income that is still commonly used: "instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." Id. at 431.

Realization involves a change in the taxpayer's rights to his property. "[A]s the Court has decided each case, it has held to the principles that realization is essential to the imposition of tax and that alteration of the taxpayer's aggregate rights with respect to the property is a condition of realization." Henry Ordower, *Revisiting Realization: Accretion Taxation, the Constitution, Macomber, and Mark to Market*, 13 Va. Tax Rev. 1, 29 (1993). Furthermore, "while the cases [refining *Macomber*] may have all wrangled with the outer limits of realization, they nevertheless required an

identifiable and actual event to occur." Rodney P. Mock & Jeffrey Tolin*, Realization and its Evil Twin Deemed Realization*, 31 Va. Tax Rev. 573, 598 (2012). In the instant case, the Government never disputed that the Moores realized nothing from their KisanKraft investment. Pet. Br. 7. But in most of the cases cited by the Ninth Circuit, the taxpayers did realize their income, or otherwise enjoy "an alteration of [their] relationship to the property" being taxed. Ordower at 44.

The court below counters the realization requirement by arguing that whether a taxpayer has "realized income does not determine whether a tax is constitutional." Pet. App. 12 (citing *Heiner v. Mellon*, 304 U.S. 271, 281 (1938)). *Mellon* does not provide any support for this argument. *Mellon* shows, they argue, that whether a partner's proportionate share of the partnership's net income was distributable to the taxpayer "was not material to whether it could be taxed." Pet. App. 12. That is technically true, but an oversimplification of the issues involved.

Mellon involved a partnership, a pass-through entity for tax purposes, not a corporation like KisanKraft. The partnership had been involved in the sale of alcohol, but dissolved after the death of a partner. The two surviving partners argued that they became liquidating trustees by operation of state law, so prior income earned from operations of the dissolved partnerships was income to the survivors only in their fiduciary positions as trustees. *Mellon*, 304 U.S. at 273. The Court rejected that argument because the state law could not control the federal law's determination that the income

went to the partnership and not the trust. Id. at 279. And the income tax required by federal law on partnership income was due whether the partners received their distributions or not. Id. at 279-81. How the assets were disposed of and how proceeds were applied might be a matter of state law, but however done, federal law required that taxes be paid in years when profits were made. Id. at 280.

Mellon is easily distinguished from the instant case. The past profitable sales of alcohol were realization events of income to the partnership and thus to the individual partners, because the partnership did not exist as a separate entity from the partners. Here, the Moores are minority corporate shareholders, not partners, and "it's undisputed that the[y] . . . lacked the authority to compel a dividend payment constituting realized income." Pet. App. 41. To suggest that *Mellon* allows the government to treat *corporate* income as constructively received and taxable to a shareholder the same way distributable *partnership* income is taxable to a partner is not defensible as a matter of first principles.

The court below also misapplies *Eder v. Comm'r of Internal Revenue*, 138 F.2d 27 (2d Cir. 1943), which it cites both for the idea that realization is not constitutionally required and as an example, along with *Garlock, Inc. v. Comm'r*, 489 F.2d 197 (2d Cir. 1973) and *Whitlock's Est. v. Comm'r*, 59 T.C. 490 (1972), *aff'd in part, rev'd in part*, 494 F.2d 1297 (10th Cir. 1974), of taxes like the MRT that have been upheld. *Eder* involved the taxation of a foreign personal holding

company under The Revenue Act of 1938, Pub. L. No. 75-554, 54 Stat. 447, while *Garlock* and *Whitlock's Est.* arose under Subpart F. The Government adds mark-to-market tax systems like 26 U.S.C. § 1256 for commodity futures contracts, at issue in *Murphy v. United States*, 992 F.2d 929 (9th Cir. 1993). Resp't's Br. 11.

In *Eder*, a taxpayer who, with his wife and two children, owned all the shares in a closely held foreign corporation was at first prohibited under Colombian exchange control laws and regulations from repatriating any of his firm's earnings to the United States, and then only in limited amounts per month. *Eder v. Comm'r*, 47 B.T.A. 235, 236-37 (1942). The taxpayer argued that his domestic taxable income should be reduced to reflect his inability to access those foreign funds. The Second Circuit ruled, however, that the "inability to expend income in the United States . . . by operation of law, or by agreement among private parties, is no bar to its taxability." *Eder v. Commissioner of Internal Revenue*, 138 F.2d 27, 28 (2d Cir. 1943). This situation, where a family-owned business was able to ensure the shareholders received distributions, is fundamentally different from the instant case, where the Moores have no power to compel KisanKraft to make distributions here or in India. And the tax statute at issue in *Eder* applied to a single year of the corporation's income, *Eder*, 47 B.T.A. at 238 n.1 (1942) (citing Revenue Act of 1938 § 337(b)), not the prior thirty-one years under the MRT. 26 U.S.C. § 965(a). This is not to suggest that the taxation of any year's gains in the

absence of realization is appropriate. It just once again underscores how the MRT's linkage of ownership of shares without a controlling interest to potentially decades of unrealized corporate gains is far more egregious in comparison.

As to the contention that laws similar to the MRT have been upheld in *Eder*, *Garlock* and *Whitlock's Est.*, these cases were addressed by the circuit courts, not this Court. And none of these cases actually claimed to discard the realization requirement. The taxes in question were tailored to circumstances where Congress determined that the taxpayers had achieved the "constructive receipt of income." *Garlock v. Comm'r*, 58 T.C. 423, 438 (1972). "Subpart F singles out a specific class of taxpayers—U.S. shareholders who have a substantial degree of control over a foreign corporation—and subjects them to immediate taxation on the grounds that they have the ability to treat the corporation's undistributed earnings as they see fit." Sean P. McElroy, *The Mandatory Repatriation Tax Is Unconstitutional*, 36 Yale J. on Reg. Bull. 69, 73 (2018). And the taxable income at issue in *Garlock* and *Whitlock's Est.*, both Subpart F cases, was limited in time to the corporation's annual earnings like in *Eder*, and not retroactive for over three decades like the MRT. See The Revenue Act of 1962, Pub. L. No. 87-834, § 951, 76 Stat. 1006. *Garlock* and *Whitlock's Est.* "all involved the current-year attribution of current earnings. They do not address the novel issue presented here, which is whether past, accumulated earnings are properly considered to be income to the 10-percent shareholders of a

controlled foreign corporation without any dividend being paid." McElroy at 78.

The constructive receipt of income in systems like Subpart F can only be justified if the shareholder has some measure of control over where to direct the receipt of current income and chooses to direct it to a corporation simply to avoid taxes. This concept of control was mentioned at the Tax Court level in both *Garlock* and *Whitlock's Est*. "In our opinion, the actual control of [Garlock] S.A. at all times rested in the petitioner as owner of the common stock. That was the intention, and it was effectively carried out." *Garlock, Inc. v. Comm'r*, 58 T.C. 423, 438 (1972). In *Whitlock's Est*., the Tax Court stated that *Macomber* could not be read "as denying to Congress the power to attribute a corporation's undistributed *current* income to the corporation's *controlling* stockholders." *Estate of Whitlock*, 59 T.C. at 508 (1972). It continued, "it is safe to say that the [*Macomber*] Court simply did not direct itself to the situation of the tightly controlled corporation where controlling stockholders are able to manipulate the corporation's profits and capital almost at will." Id. In *Murphy*, the circuit court held that, even though the commodities trader "did not sell his futures contracts, his gains could be treated as realized because he was entitled to withdraw those gains daily." *Murphy*, 992 F.2d at 931. The principle in these cases is best summarized by Justice Oliver Wendell Holmes: "The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be

taxed to him as his income, whether he sees fit to enjoy it or not." *Corliss v. Bowers*, 281 U.S. 376, 378 (1930).

Petitioners owned 13% of a controlled corporation (CFC). Pet. App. 5. The MRT's capture of income from shareholders with less than a controlling share of a corporation with no power to compel distributions in the absence of any realization of income is simply abusive to the Moores. Yet taxation imposed in the absence of realization is supposed to prevent abuse by taxpayers. Professor Henry Ordower observed that "[h]istorical departures from fundamental tax principles sometimes find their justification in a need to defend the integrity of the taxing system from avoidance and abuse." Ordower, *Revisiting Realization*, at 86. In *Garlock*, the Second Circuit ruled against a taxpayer who had taken intentional steps to avoid being classified as a CFC subject to Subpart F taxation. In that case, the court noted the significance of bringing in preferred shareholders who "understood both [the taxpayer's] motives and its situation" and "would have no interest in disturbing the taxpayer's continued control." *Garlock, Inc.*, 489 F.2d at 201. There is nothing in the record to indicate the Petitioners have engaged in such abuse that justifies treating KisanKraft's earnings as their own.

Finally, *Bruun* provides a hint as to why much of academia has doggedly tried to expand the concept of income and downplay the realization requirement for income. The *Bruun* Court noted that "economic gain is

not always taxable as income." *Bruun*, 309 U.S. at 469. Economic gain in the abstract, like the increase of the value of a stock portfolio or home, is broad and cannot be captured by a realization requirement. For supporters of a greater taxing power, realization is a frustrating impediment. For example, in Professor Calvin H. Johnson's view, "'Income' is . . . a malleable concept that the Court can use to avoid apportionment." Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 Const. Commentary 295, 351 (Summer, 2004). Furthermore, he wrote, "not only can the courts avoid apportionment by manipulative expansion of such terms as 'excise' and 'income,' but they have a duty to do so." Id. See also Bruce Ackerman, *Taxation and the Constitution*, 99 Colum. L. Rev. 1 (1999).

In short, some attempts to make income a malleable concept and to bypass the realization requirement are related to the effort to enact direct taxes on wealth without the inconvenience of apportionment. But under this Court's longstanding precedent, the MRT is not a tax of the Moores' income because the Moores received no income.

II. The MRT is a direct tax on the Moores' shares of stock.

The next issue is whether the MRT is a direct or indirect tax under the Constitution. The early Supreme Court case considering the distinction between direct and indirect taxes, *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796) was once read to suggest a narrow interpretation of direct taxes, one limited to land and capitation taxes, despite the Constitution's broad reference to capitation "or other" direct taxes. U.S. Const., art. I, § 9, cl. 4. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 571 (2012) (citing *Springer v. United States*, 102 U.S. 586, 602 (1881)). But this narrow interpretation, rejected nearly a century later, conflicts with the original understanding of direct taxes. A tax on wealth is a direct tax.

Professor Robert G. Natelson shows that the term "direct taxes" had a broader meaning in the founding era than implied by *Hylton*. Robert G. Natelson, *What the Constitution Means by "Duties, Imposts, and Excises"—and "Taxes" (Direct or Otherwise)*, 66 Case W. Res. L. Rev. 297, 297, 308-18 (2015). His review of founding-era tax statutes reveals that taxes on several categories were considered direct taxes: "*Wealth employed in business and domestic life*," including taxes on "land, improvements to land, inventory (stock in trade), business equipment, and livestock"; "*Personal and business income*," including taxes on "rents, business profits, wages, interest, and other income"; "*Business enterprises*," including taxes on "business profits"; and "*Heads*," meaning poll taxes or capitations. Id. at

315-16 (internal notations omitted). Professor Natelson suggests that the reason many believe direct taxes were limited to land and capitation might be linked to the fact that Parliament and some American jurisdictions referred to their omnibus tax bills as "land taxes." Id. at 312. The dominant focus on land as a source of taxation makes sense since it was the overwhelming source of wealth in the founding era. See Diane Lindstrom, 56 Agricultural Hist. 588, 589 (1982) (reviewing *Alice Hanson Jones, Wealth of a Nation to Be: The American Colonies on the Eve of the Revolution*) (1980) ("Some two-thirds of nonhuman physical wealth was held in the form of land and structures, another 22 percent in producer's capital, 9 percent in consumer's durables and 1 percent in consumer perishables.").

But, as he demonstrated, direct taxes in the founding era targeted more than land. They included business capital. At the Virginia ratification convention, John Marshall said, "The objects of direct taxes are well understood. . . . Lands, . . . stock of all kinds, and a few other articles of domestic property." 3 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 229 (2d ed., 1836). In the ratification era, "stock" in a business context meant business capital, goods, and stock-in-trade. Dictionaries defined "stock" as "a fund of money or quantity of goods," T. Dyche & W. Pardon, A New General English Dictionary 512 (1781); "The principal; capital store; fund already provided," Samuel Johnson, A Dictionary of the English Language 512 (1792); "goods employed in trade," Barclay's Universal English

Dictionary (1792); "A fund; capital; the money or goods employed in trade, manufactures, insurance, banking, &e . . . ," Noah Webster, An American Dictionary of the English Language 794 (1828). Shares of stock, like the Moores' shares of KisanKraft, are merely units of ownership of the business and thus should be considered "objects of direct taxes."

The other type of taxes under the Constitution by implication are indirect taxes, which include duties, imposts, and excises. U.S. Const., art. I, § 8, cl. 1. They do not have to be apportioned, but they must be uniform. Id. In the founding era, these types of taxes were frequently laid on "consumption (especially of luxuries), domestic and foreign trade, and enumerated business and official transactions." Id. at 318. Luxury items were, in some instances, subject to an annual tax not just at the point of sale. Id. at 330. This blurs the line between direct and indirect taxes in *Hylton*. Professor Natelson argues that the distinction between direct taxes and indirect taxes "seems not to have been economic, but political and moral." Id. at 330. Excises and duties were more politically palatable than "the levies on persons and production" found in omnibus tax statutes. Id. He identifies three principles driving popular sentiment at the time. Id. at 330. People believed that it was better to tax consumption than "living or producing" and to tax the luxuries of the wealthy "than on the thrifty and productive or on the poor and 'middling folk.'" Id. at 331. They also believed it was appropriate to tax items of dubious social value like alcohol. Id.

Alexander Hamilton highlighted the disparity in popular feeling about taxes on consumption and production while addressing the New York legislature in 1787. "There is not a farmer in the State who would not pay a shilling in the voluntary consumption of articles on which a duty is paid, rather than a penny imposed immediately on his house and land." 2 Alexander Hamilton, Speech on the Revenue System, in The Works of Alexander Hamilton 191, 219 (Henry Cabot Lodge ed., 1904). In Federalist No. 21, Hamilton stressed that the voluntary nature of imposts, excises, and duties on articles of consumption would limit the excesses of such indirect taxes. The Federalist No. 21 at 142-43 (A. Hamilton) (Clinton Rossiter ed., 1961).

The boundaries of direct and indirect taxes came into focus with the passage of a "duty" on carriages for the conveyance of people, "kept by or for any person," either for his own use or to let out for hire by others. Act of June 5, 1794, ch. 45, 1 Stat. 373, 374 (1794). This duty was proposed by Treasury Secretary Alexander Hamilton to the third Congress. The duty was levied annually on carriages for transporting people and specifically exempted any carriage "usually and chiefly employed in husbandry, or for the transporting or carrying of goods, wares, merchandise, produce or commodities." Id. (Note that the duty was on possession, and was not imposed at purchase or transfer, diminishing its voluntary nature.) James Madison was appalled that the carriage duty passed as an *indirect* tax "in spite of the Constitution" and saw it as "breaking down the barriers of the Constitution." National

Archives, Founders Online, *Letter from James Madison to Thomas Jefferson* (May 11, 1794), available at https://founders.archives.gov/documents/Madison/01-15-02-0229.

A challenge arose to the carriage tax in Virginia. Former U.S. Senator John Taylor of Caroline, a Jeffersonian Republican, represented Daniel Hylton in the middle Circuit in the Virginia District in 1795. In a published argument, Taylor made the type of contention about Congress's use of language that would be relevant in this case, where Congress is trying to avoid the Direct Tax Clause and Apportionment Clause by calling accumulated assets "income." He accused Congress of avoiding the restrictions on direct taxes by just calling the carriage statute a duty. He suggested that it was "an evasion, which would leave Congress unrestrained upon the subject of taxation, in violation of the plainest words. They would only have to denominate every tax 'an excise or a duty' to invest themselves with, an unlimited power of taxation, over every article of human necessity." John Taylor, *An Argument Respecting the Constitutionality of The Carriage Tax* 8 (1795). He contended that the point of the American Revolution had been to bind taxation with representation and this principle had been a source of the constitutional distinction between direct and indirect taxes. Id. He linked the carriage tax to an excise passed on liquor and stills kept and made for a person's own use. He wrote that these taxes would set a precedent to allow Congress to tax "the fruits of [a man's] own manual labour" and every type of property he owned,

making apportionment meaningless. Id. In essence, Taylor argued that the taxation of a person's income or property is direct. This may explain James Madison's initial vehemence about the Act.

The Supreme Court upheld the constitutionality of the unapportioned carriage tax in *Hylton* in 1796 as a tax on consumption. But its weak reasoning diminishes its authority limiting direct taxes just to land and capitations. There are several unusual aspects about the case. Only four of the six justices participated in oral argument and only three issued opinions. Hylton stipulated owning 125 chariots for his personal use, an absurdly large number, in an apparent attempt to meet jurisdictional requirements that still should have failed. Erik M. Jensen, *The Apportionment Of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 Colum. L. Rev. 2334, 2351-52 (December, 1997).

Although *Hylton* is cited for limiting direct taxes to capitation and land taxes, the justices' language on this point in dicta is heavily qualified. "*I am inclined to think, but of this I do not give a judicial opinion*, that the direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax . . . ; and a tax on LAND." *Hylton*, 3 U.S. (3 Dall.) at 175 (Chase, J.) (emphasis added). Justice Chase argued for a functional test for apportionment, as did the other justices. "The rule of apportionment is only to be adopted in such cases, where it can reasonably apply; and the subject taxed, must ever determine the application of the rule." Id. at 174. He raised the example of two states of equal population but with ten times

the number of carriages in one state than the other. This would require a carriage owner in the second state to pay ten times the tax paid by a carriage owner in the first, causing great injustice. But this diminishes the restraint that the apportionment requirement placed on Congress's taxing power. As Professor Jensen asked, "Why not read the apportionment requirement as an attempt to make impractical—and thus effectively to limit, if not forbid—direct taxes that cannot be easily apportioned?" Jensen at 2356. Furthermore, the parameters of indirect taxes were only lightly explored. Justice Chase wrote, "I believe some taxes may be both direct and indirect at the same time," 3 U.S. at 174, while Justice Paterson declared, "All taxes on expences or consumption are indirect taxes." Id. at 180.

In short, the justices' reasoning in *Hylton* was at times contradictory. See Jensen at 2354. The seriatim opinions issued in *Hylton* find little support from the Constitution's text. Its narrow interpretation of direct taxes as limited to land and capitation taxes was rightly rejected in *Pollock v. Farmers' Loan & Trust Co*., 158 U.S. 601 (1895).

III. The Apportionment Clause and Direct Tax Clause require direct tax schemes like the MRT to be apportioned by population.

The Sixteenth Amendment was ratified in response to two opinions from 1895 that rejected *Hylton* and its progeny. In the first, *Pollock v. Farmers' Loan & Trust Co*. (*Pollock I*), 157 U.S. 429 (1895), the Court

found that the taxation of income from real estate is unconstitutional. After rehearing, the Court expanded their reasoning to income from personal property and held that the entire income tax statute at issue was unconstitutional. *Pollock v. Farmers' Loan & Trust Co.* (*Pollock II*), 158 U.S. 601 (1895). Chief Justice Fuller further wrote that "taxes on personal property, or on the income of personal property, are likewise direct taxes." Id. at 637. The Ninth Circuit noted that the Sixteenth Amendment overruled the second *Pollock*'s holding that income from personal property was subject to the Apportionment Clause. This "reinforc[ed] the narrow reach of the Apportionment Clause" in their view. Pet. App. at 10. But the Sixteenth Amendment did not remove the requirement for personal property itself.

The *Macomber* Court cautioned about attempts to deny the reach of the Apportionment Clause and Direct Tax Clause altogether. "A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal." *Macomber*, 252 U.S. at 206. It continued, "This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts." Id. *Macomber* confirms that taxes on personal property should still be considered direct taxes. Id. at 217-19.

The Apportionment Clause and the Direct Tax Clause were part of an important compromise at the Constitutional Convention. Madison later wrote that the direct tax and apportionment system was "one of the safeguards of the Constitution." 4 Annals of Cong. 730 (1794). Professor Jensen has provided a strong defense of the clauses' continued vitality in several articles. First, and most obviously, "the Direct-Tax Clauses are in the Constitution, twice, and they can't be dispensed with just because they're inconvenient." Erik M. Jensen, *Interpreting The Sixteenth Amendment (By Way Of The Direct-Tax Clauses)*, 21 Const. Commentary 355, 368 (Summer, 2004). To those who claim that the clauses are difficult to implement, he responds that it is understandable because they intended direct taxes to be used sparingly, during emergencies. Erik M. Jensen, *Did The Sixteenth Amendment Ever Matter? Does It Matter Today?*, 108 Nw. U.L. Rev. 799, 804 (Spring, 2014). Ordinarily, the founders intended that the federal government would be financed by indirect taxes such as tariffs and excises. Id. Furthermore, "Apportionment was intended to make direct taxation difficult, particularly when the tax was aimed at a sectionally concentrated base, and it largely did so." Id. And Professor Jensen specifically addressed the attempts to read the clauses out of the Constitution by redefining direct taxes. "[T]he case for applying a substance-over-form principle is stronger when the result is to constrain, rather than to expand, congressional power." Id. at 820.

In summary, the Apportionment Clause and the Direct Tax Clause act in conjunction as an essential safeguard of the Constitution by linking taxation and representation. They should not be ignored to maximize revenue.

CONCLUSION

The ruling of the court below should be overruled.

Respectfully submitted,

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