No. 22-800

IN THE

Supreme Court of the United States

CHARLES MOORE ET UX.,
Petitioners,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE PROFESSORS OF TAX LAW, LEGAL HISTORY, AND COMPUTATIONAL SCIENCE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici comprise a group of academics who study tax law and its history, academics who apply computational methods to problems of textual interpretation, and scholars who do both. In all of these fields, amici rank among the most widely cited scholars working today. Amici are interested both in ensuring that crucial aspects of contemporary tax practice are not discarded based on a mistaken understanding of constitutional history, and also in helping the Court to consider the key assumptions that other amici have made in offering computationally-based interpretations of the historical record. Amici are listed in the appendix.

SUMMARY OF ARGUMENT

Petitioners' argument that a realization requirement is encompassed within the definition of "income" as used in the Sixteenth Amendment relies primarily on this Court's decision in *Eisner v. Macomber*, 252 U.S. 189 (1920). But *Macomber* was wrongly decided and should be overruled. Considering the Sixteenth Amendment in light of its original meaning, there is strong evidence that the Amendment's drafters understood "income" to include undivided corporate profits. The Congress that drafted the Sixteenth

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici and their counsel, made a monetary contribution intended to fund this brief's preparation or submission.

Amendment also adopted, months after its ratification, a tax on shareholders owning interests in corporations with undistributed corporate profits, and four pre-1913 "income" tax statutes did the same. Rejecting this evidence, the *Macomber* Court applied what the Court would today call a clear statement rule, reading the term "income" narrowly against the government. *Macomber*'s reasoning was in error, and the income tax schemes of its time were no different in any meaningful way from the Mandatory Repatriation Tax (MRT) imposed on petitioners here. The gains taxed by the MRT and in *Macomber* readily fall within the meaning of "income" under the Sixteenth Amendment.

Petitioners ignore a number of contrary sources from the time of the Sixteenth Amendment's ratification to conflate general policy preferences with constitutional principle. The fact that some sources in 1913 or earlier described "income" as generally consisting of realized gains has little significance. Those sources accurately described the statutory scheme Congress adopted in the income taxes of 1864, 1894, and 1913, which tied income to realization most of the time. But this does not mean that Congress, commentators, and state ratifiers understood realization to be a universal aspect of "income," rather than one that was usually—but not always—the most effective policy approach. Contrary practices in Wisconsin and many countries around the world, including England, belie petitioners' argument that the ordinary meaning of "income" *required* realization without exception. Petitioners also elide, with highly selective and at times outright misleading editing, the widespread sentiment among Amendment-era commentators that

there was no settled agreement in 1913 whether income always required realization.

Although a group of amici curiae supporting neither party assert that a corpus linguistics analysis supports the conclusion that the original meaning of "income" required realization, their analysis contains serious logical and factual flaws. Among other problems, those amici assume without explanation that voters during the Sixteenth Amendment's ratification period would have understood "income" based on its ordinary usage in popular, nonlegal sources. But it was widely known that the Amendment had a narrow technical purpose—to reverse the Court's decision in *Pollock v. Farmers' Loan & Trust Co.* (*Pollock II*), 158 U.S. 601 (1895), which struck down the income tax of 1894—and that purpose was clearly signaled by the Amendment's use of terms, such as "apportionment," that had no obvious common meaning. In any event, the evidence those amici unearth in fact is consistent with the idea that "income" was understood to include unrealized increases in value.

Additionally, *Macomber* was wrong not only about the meaning of "income," but also about the logically antecedent question whether the tax in that case was a "direct" tax that would have to be apportioned if it were not a tax on "income." Both prior and subsequent to *Macomber*, the Court has held that a "direct" tax was one that was imposed "merely because of ownership," *see, e.g.*, *Pollock II*, 158 U.S. at 627, while an indirect tax was one imposed upon the occurrence of a specific event or a particular use of an asset. By this standard, a tax upon the payment of a stock dividend

is an indirect tax—an excise on a particular occurrence—not a tax "merely because of ownership" of the underlying stock. *Macomber* also wrongly ignored prior cases holding that taxes on undistributed corporate profits are indirect taxes. This error further undermines *Macomber*'s precedential value.

Finally, *Macomber* already has been overruled in all but name. As early as 1943, members of this Court recognized that *Macomber*'s constitutional holding "dies a slow death." *Helvering v. Griffiths*, 318 U.S. 371, 404 (1943) (Douglas, J., dissenting); *see also id.* at 395 (op. for the Court) (recognizing that intervening cases had "undermined ... the original theoretical bases" of *Macomber*). That declaration was sound: Post-*Macomber* cases have turned away from the notion, core to *Macomber*'s holding, that an income tax can tax only what is "coming in" to a taxpayer, the severable and material "fruit" of a capital "tree," 252 U.S. at 206, recognizing instead that realization is a matter of simple administrative convenience.

In sum, *Macomber* was wrong when decided; it applied the wrong method of interpreting the Constitution and did even that unpersuasively. And subsequent events have left it at death's door. This Court should finally administer last rites.

ARGUMENT

I. *EISNER V. MACOMBER* SHOULD BE OVERRULED.

In *Eisner v. Macomber*, the Court held that a taxpayer who received a stock dividend that did not change the taxpayer's proportional ownership share of a corporation could not be subjected to an income tax on that dividend because "the stockholder received nothing out of the company's assets for his separate use and benefit" and so did not receive any income within the meaning of the Sixteenth Amendment. 252 U.S. at 195. Petitioners now rely heavily on *Macomber*, *see, e.g.*, Petrs' Br. 2–3, to argue that the Sixteenth Amendment includes a realization requirement within the constitutional definition of "income," such that they may not be taxed under the MRT on the reinvested profits of the corporation in which they own a substantial number of shares. Petitioners' reliance is misplaced.

This Court should clarify that *Macomber* is no longer binding precedent. *Macomber* wrongly ignored the original meaning of the term "income" in the Sixteenth Amendment, instead substituting an unjustifiable presumption that "income" must be interpreted narrowly against the Government. Further, *Macom-*

ber was "a solitary departure from established law," *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996), offering unpersuasive and circular arguments for distinguishing prior cases. It has no remaining precedential force.

A. *Macomber* ignored clear evidence of the original meaning of the Sixteenth Amendment.

Congressional practice before and immediately after the Sixteenth Amendment establishes that the original meaning of "income" included unrealized gains. The Congress that drafted the Amendment also adopted, months after its ratification, a tax on shareholders owning interests in corporations with undistributed corporate income, and four pre-1913 "income" tax statutes similarly taxed investors on undistributed corporate profits. It is difficult to believe that the Congress that wrote the Sixteenth Amendment failed to comprehend the meaning of the language it had just drafted. *Macomber* therefore was wrongly decided. *See Burnet v. Sanford & Brooks Co.*, 282 U.S. 359, 365 (1931) (stating that the Sixteenth Amendment should be understood to permit "a scheme of taxation such as had been in actual operation within the United States before its adoption").

The modern income tax, introduced two months after ratification of the Sixteenth Amendment and adopted six months later, taxed unrealized gains. Individual income included "the share to which [the taxpayer] would be entitled of the gains and profits ... whether divided or distributed or not, of [certain] corporations." Tariff Act of 1913, Pub. L. 63-16, § II(a)(2),

38 Stat. 114, 166–67. This provision mirrored the approach of the original 1864 income tax, which provided that "the gains and profits of all companies, whether incorporated or partnership ... shall be included in estimating the annual gains, profits, or income of any person entitled to the same, *whether divided or otherwise*." Act of June 1864, ch. 173, § 117, 13 Stat. 223, 282 (emphasis added); *see also Collector v. Hubbard*, 79 U.S. 1, 17–18 (1870) (holding that the 1864 statute taxed undistributed profits even though the "stockholder has no title for certain purposes to the earnings"). Congress enacted essentially identical provisions three more times between 1865 and 1870. *See Helvering v. Griffiths*, 318 U.S. 371, 376–77 & n.11 (1943) (collecting statutes in which Congress taxed shareholders "on their pro rata share of corporate earnings"). Drafters of the income tax of 1894 considered a similar approach, but decided instead to adopt a tax directly on the corporation because they thought that method was simpler, Steven A. Bank, *A Capital Lock-In Theory of the Corporate Income Tax*, 94 Geo. L.J. 889, 916–17 (2006)—not because they saw an obstacle to taxing undistributed gains as "income." And this understanding was not limited to Congress; the Executive, too, understood "income" to include "[a]ny increase in the value of ... capital assets ... taken cognizance of ... in book entries." Treas. Dec. 1742 ¶ 48, 14 Treas. Dec. Int. Rev. 127 (1911) (interpreting corporate income tax of 1909).

Macomber failed to consider this evidence because it rejected original meaning in favor of what this Court would today call a clear statement rule. Reasoning from the view that the Direct Tax Clause has "an appropriate and important function" that must be

protected from encroachment, *Macomber* explained that the Sixteenth Amendment should "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." 252 U.S. at 206.[2] *Macomber* then relied on this interpretive principle to distinguish the views of the Massachusetts Supreme Court, which had recently concluded that stock dividends qualified as "income" under the Massachusetts Constitution. *Id.* at 216–17 (citing *Trefry v. Putnam*, 116 N.E. 904 (Mass. 1917)). The Massachusetts Court began its analysis with the "ordinary and popular" meaning of income and the "common meanings attached to it by lexicographers." *Trefry*, 116 N.E. at 907. *Macomber* rejected this approach, stating, "The Massachusetts court was not under an obligation, like the one which binds us, of applying a constitutional provision in the light of other constitutional provisions that stand in the way of extending it by construction." 252 U.S. at 217.

This Court should disavow *Macomber*. The tax provisions passed before and shortly after the ratification of the Sixteenth Amendment are not meaningfully distinguishable from the tax imposed on petitioners here. Like the MRT, the early income taxes required individual taxpayers to include in income their proportionate share of corporate profits that had not yet been "divided," or distributed as dividends. *See* Bank, *supra*, at 915 (describing the system as a

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[2] *Macomber* never explained what "important function" the Direct Tax Clause serves.

"passthrough or conduit" approach similar to partnership taxation). Thus, the MRT is consistent with how Congress has always understood the term "income." When considered properly in light of its original meaning, the plain evidence shows that the Sixteenth Amendment's drafters, and generations of Congress before them, considered the language of the Sixteenth Amendment to be consistent with the tax imposed in *Macomber*.

B. Other sources evidencing the original meaning of "income" do not suggest any consensus that income included a realization requirement.

Petitioners and their amici rely on highly selective quotations taken out of context to create the misimpression that there was a clear popular consensus that the term "income" required realization in all instances. This purported consensus did not exist; instead, there is strong evidence that, although realization was a common policy choice for imposing an income tax, it was not an inevitable feature of all forms of income at the time the Sixteenth Amendment was ratified.

While petitioners identify several sources expressing doubt that unrealized gains are income, they fail to note the numerous contrary examples. For example, petitioners claim that Henry Black's 1913 tax treatise deemed realization "essential" to taxable income. Petrs' Br. 30. But in fact Black concluded that, despite his own personal intuition, it is possible that as a matter of precedent "income" includes unrealized increases in the value of real estate, Henry Campbell

Black, *A Treatise on the Law of Income Taxation Under Federal and State Law* § 47, at 107–08 (1913), and that "it is probable that the same principle would apply to the increase in value of securities," *id.* at 108. Black also acknowledged that under Treasury interpretations of the 1909 corporate income tax, unrealized increases in the value of securities were already part of the federal taxable "income" of a corporation. *Id.* Edwin Seligman, the influential lawyer-economist, wrote that even in 1921 there was no consensus whether "income" required realization. Edwin R.A. Seligman, *Introduction*, The Federal Income Tax vii–viii (Robert M. Haig ed., 1921). Yet another illustration of this state of affairs is Roger Foster, *A Treatise on the Federal Income Tax Under the Act of 1913* (2d ed. 1915). Foster's treatise cites a series of examples, each time matching an example where income did not include unrealized gains with another where it did, and notably reaches no final conclusion. *Id.* at 190–96. Many leading constitutional scholars and tax lawyers at the time agreed with Justice Holmes's dissent in *Macomber* that the Sixteenth Amendment had put to rest technical definitions of income, thereby restoring Congress's wide-ranging powers to define taxable income. *See* 252 U.S. at 220; Ajay K. Mehrotra, Making the Modern American Fiscal State: Law, Politics, and the Rise of Progressive Taxation, 1877–1929, at 369–70 (2013).

In addition to these contrary examples, petitioners overlook the well-known practice of taxing imputed income from residential real estate. For example, the Wisconsin income tax of 1911 included in the definition of income "the estimated rental [value] of residence property occupied by the owner thereof." Wis.

Gen. L. 1911, ch. 489 § 2(a); *see also State ex rel. Bolens v. Frear*, 134 N.W. 673, 691 (Wis. 1912) (holding that estimated rental value was "income"). That is, Wisconsin taxed the owner-occupant of a residence on the value of the rent he could have, but did not, charge to a tenant. That is taxation without realization: There is no transfer by or to, or any receipt of actual payment by, the property owner. As a pamphlet prepared by the State explained, this provision was not an exotic one-off: "The income tax laws of Prussia, England, and many other countries contain[ed] similar provisions." Wisconsin State Tax Commission, *The Wisconsin Income Tax of 1911*, at 10 (1st ed. 1911).

In any event, the fact that some sources in 1913 or earlier describe "income" as generally reflecting realized gains, as petitioners argue, Petrs' Br. 32–33, has little significance. Those sources accurately describe the statutory schemes Congress adopted in 1864, 1894, and 1913, under which income would be tied to realization in most cases. But the fact that realization was the default approach applicable to most situations tells us little about whether Congress, commentators, and state ratifiers understood realization to be an inevitable and universal aspect of "income," rather than one that was usually—but not always—the most effective policy approach.

To further support their claim that income had "a settled legal meaning," Petrs' Br. 27, petitioners misleadingly quote case law. First, petitioners quote *Maryland Casualty Co. v. United States*, 52 Ct. Cl. 201, 209 (Ct. Cl. 1917) as stating that income was understood by "courts ... to include only the receipt of

actual cash as opposed to contemplated revenue due but unpaid." Petrs' Br. 27 (ellipses in original). But there is no period in the original sentence where petitioners place one. The full sentence in *Maryland Casualty* reads: "The courts have uniformly construed [income] to include only the receipt of actual cash as opposed to contemplated revenue due but unpaid, *unless a contrary purpose is manifest from the language of the statute*." 52 Ct. Cl. at 209 (emphasis added). Like most of the other sources petitioners identify, *Maryland Casualty* stands for the point that realization was a common, but not inevitable, feature of taxable income.

Petitioners then quote this Court's remark in *Gray v. Darlington*, 82 U.S. 63, 66 (1872), that "[m]ere advance in value in no sense constitutes ... income." Petrs' Br. 27. But "advance in value" in *Darlington* meant realized, not unrealized, gains. As the Court explained, "The question presented is whether *the advance in the value* of the bonds, during this period of four years, over their cost, *realized by their sale*, was subject to taxation as gains, profits, or income of the plaintiff for the year in which the bonds were sold." *Id.* at 65 (emphasis added). What the Court decided was that the taxpayer's realized profits were not taxable in the current tax year because those profits might have accrued in earlier years. *Id.* ("The advance in the value of property during a series of years can, in no just sense, be considered the gains, profits, or income of any one particular year of the series, although the entire amount of the advance be at one time turned into money by a sale of the property."). That is strange to a modern reader, but the concepts of capital gains and basis familiar to modern

taxation were not well developed in the United States until the turn of the century.

C. The corpus linguistics analysis offered by other amici is seriously flawed.

The corpus linguistics analysis submitted by a group of law and linguistics professors as amici curiae also fails to support *Macomber*'s holding. *See* Br. Of Amici Curiae Professors of Law and Linguistics in Support of Neither Party ("Law and Linguistics Br."). These amici assert that a corpus linguistics analysis indicates that the original public meaning of the term "income" in the Sixteenth Amendment implied a realization requirement. *Id*. at 14–26. Their analysis rests on mistaken assumptions and ignores or misreads key evidence. Indeed, several of the examples the law and linguistics amici cite undermine *Macomber*'s and petitioners' conclusion that the public meaning of "income" required realization at the time of the ratification of the Sixteenth Amendment.

An essential premise of the law and linguistics amici's argument is that the proper understanding of "income" should rest on its "ordinary, everyday meaning" in 1913, not the definition of income in "a technical sense." *Id*. at 8–10. To recover that supposed everyday meaning, those amici analyze excerpts from the Corpus of Historical American English (COHA) in the period between 1900 and 1912. *Id*. at 14–16 (citing Thomas R. Lee et al., *Corpus Linguistics and the Original Public Meaning of the Sixteenth Amendment*, Duke L.J. Online __ (forthcoming 2023)).

The law and linguistics amici assert that this ordinary meaning is what controls because "the people who ratified the Sixteenth Amendment were not economists or tax lawyers." Law and Linguistics Br. 9. They concede, however, that technical meanings should control where "the context indicates that [the words] bear a technical sense." *Id.* at 8 (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 72 (2012)); *cf.* Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. Chi. L. Rev. 2193, 2209 (2017) ("In reading a statute as a lawyer would, a court is not betraying the ordinary people to whom it owes fidelity, but rather employing the perspective of the intermediaries on whom ordinary people rely.").

It is clear from context that the Sixteenth Amendment uses the term "income" in a technical sense. It was widely understood when the Amendment was proposed that its objective was to reverse the narrow holding of a particular decision of this Court. Congress in 1894 adopted a tax on "income," and the Court held that key portions of that statute were unconstitutional because they were "direct" taxes that were not properly apportioned as required by the Direct Tax Clause. *Pollock II*, 158 U.S. at 635; *see also* U.S. Const. Art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken."). In striking down the 1894 income tax, *Pollock II* expressly invited Congress to respond by amending the Constitution. 158 U.S. at 635. That decision was among the most widely-covered legal events of the nineteenth century. Sidney Ratner, American Taxation: Its History as a Social Force in

Democracy 214 (1942). *Pollock II*'s constitutional holding continued to be a salient issue into the twentieth century. The first two presidents of the 1900s supported an income tax, and both referred to the constitutional obstacles to its adoption at moments of great public attention. *See* Theodore Roosevelt, State of the Union, Dec. 3, 1907 ("I speak diffidently about the income tax because one scheme for an income tax was declared unconstitutional by the Supreme Court ... . Nevertheless, a graduated income tax of the proper type would be a desirable feature of Federal taxation ... ."); [3] William Howard Taft, Address Accepting the Republican Presidential Nomination, July 8, 1908 (supporting an income tax but arguing against a constitutional amendment as unnecessary); [4] *see also* Democratic Party Platform, July 7, 1908 ("We favor an income tax as part of our revenue system, and we urge the submission of a constitutional amendment specifically authorizing Congress to levy and collect a tax upon individual and corporate incomes ... ."). [5] The voting public at the time of the Sixteenth Amendment's adoption was, in short, highly aware that the amendment was intended to achieve a particular technical legal purpose: overturning the *Pollock II* decision.

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[3] Available at https://www.let.rug.nl/usa/presidents/theodore-roosevelt/state-of-the-union-1907.php.

[4] Available at https://www.presidency.ucsb.edu/documents/address-accepting-the-republican-presidential-nomination-0.

[5] Available at https://www.presidency.ucsb.edu/documents/1908-democratic-party-platform.

To the extent that ordinary people were unaware of this context, the text of the Amendment itself signals a technical meaning. In full, the Amendment states: "The Congress shall have 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. No ordinary person likely had an understanding of what "apportionment" was, nor why "income" in its ordinary usage should have any connection to the census. The use of this unfamiliar technical language would signal to the reader that the words in the amendment were being used in a particular legal sense. *See Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 17–18 (1916) ("It is clear on the face of this text that ... the whole purpose of the Amendment was to relieve all income taxes when imposed ... from a consideration of the source whence the income was derived."); Kevin Tobia, Brian G. Slocum, & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 Penn. L. Rev. 365, 402 (2023) (reporting experimental studies indicating that laypeople "understand legal texts to include terms with technical meanings, and understand technical terms as having technical meanings").

The law and linguistics amici err by ignoring this procedural background, despite its relevance to understanding how the text of the Sixteenth Amendment originally would have been understood by ordinary readers. Based on our own review of the underlying texts, COHA, the corpus on which those amici drew, does not appear to include U.S. legislative materials (though it does include some English-language sources describing Swiss law). *See* Law & Linguistics

Br. 18 (describing the analyzed corpus as fiction and non-fiction, including periodicals). Yet any ordinary person trying to understand how Congress was using the term "income" would surely begin with how that term had been used in the past *by Congress*. *See* Tobia et al., *supra*, at 410 (reporting experimental results indicating that "[w]hen a term appears in a legal source (e.g., a statute), people are much more inclined to understand it to take a technical legal meaning"). Thus, even if the technical meaning of "income" under the prior income tax statutes Congress enacted is not controlling, that meaning was at least relevant to how an ordinary reader would have understood "income." Yet the law and linguistics amici ignore legislative and regulatory usages entirely.

In any event, even granting the contention that "income" in the Sixteenth Amendment expresses an "ordinary" rather than legal meaning, the evidence the law and linguistics amici provide does not support their claims. While they assert that "income was used universally to refer to an economic gain tied to a realization event," their data show that to be the case only about 29 percent of the time. They report 978 instances of "income," in which 280 of those uses are coded as a "determinate" use of "income" that included realization within its meaning. *Id.* at 18–19. That means, of course, that most of the time "income" appears in the corpus those amici selected, it may or may not imply realization. *See, e.g.*, Associated Press, *Senators to Fight for an Income Tax*, L.A. Times, June 17, 1909 ("The provision they favor treats large incomes exactly alike, whether received by corporations or individuals, and whether arising from interest, dividends, inheritances, or otherwise."). Thus, the law

and linguistics amici's data are entirely consistent with the possibility that in a large part of the sample, "income" was used in a sense not implying realization; there is simply not enough information from their corpus analysis to distinguish whether the 71 percent of indeterminate uses exclude a non-realization sense. The law and linguistics amici's conclusion that income universally referred to "an economic gain tied a realization event" is overstated.

Even granting those amici's exclusion of 71 percent of the data, the results do not provide a strong basis to conclude that the "ordinary meaning" of "income" in the early 1900s implied realization. The law and linguistics amici appeal to "a large corpus of more than 475 million words drawn from over 115,000 individual texts" (Br. at 18), but their actual analysis considers a much smaller sample of language: only 280 "determinate" instances of "income(s)." Within this small sample, there are also many repeated sources: Ten percent of the law and linguistics amici's total determinate data comes from language contained in just *six* works of fiction.[6] Those amici caution that "dictionary definitions themselves don't tell us what is ordinary." Br. 12. With respect to law's public meaning, the dictionary is not a fortress. But

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[6] Nine of these uses occur in *The Scarlet Feather* (listed as entries 186–94 in the appendix cited in the law and linguistics amici's brief); four in *True Loves Reward* (35–38), three in *Lion Mouse Story* (44, 46, 49), three in *Shuttle* (55, 57, 62), four in *Metropolis* (74, 77, 78, 80), and five in *The Fashionable Adventure of Joshua Craig* (89–91, 94, 95).

neither are historical works of fiction like *The Fashionable Adventure of Joshua Craig*.

Finally, the use of corpus linguistics in this particular inquiry has a significant flaw. The law and linguistics amici acknowledge that the most frequent use of words across many different contexts may fail to reveal the existence of a less common meaning in particular contexts. Law & Linguistics Br. 23–24; *see also* Kevin Tobia, *Testing Ordinary Meaning*, 134 Harv. L. Rev. 726, 770 (2020) (reporting that judicial uses of legal corpus linguistics often lead interpreters to overlook less common meanings). This is particularly problematic where, as in this case, the legal question is whether a word's meaning includes a relatively less common usage.

More broadly, frequency of usage in a corpus does not imply accurate frequencies about real-world occurrence or facts about ordinary meaning across contexts. Consider that in many corpora of ordinary language, "black sheep" is much more common than "white sheep," but this does not imply that the former are more common in the world. Yoav Goldberg, Neural Network Methods for Natural Language Processing 133–34 (Graeme Hirst ed., 2017). Indeed, we conducted an independent analysis of the COHA corpus, and found that for the years 1900 to 1901, 87 percent of references were to "black sheep," and only 13 percent were to "white sheep." As another example, consider that blue pittas are clearly birds, albeit rarely seen. Craig Robson, A Field Guide to the Birds of Thailand 150 (2020). The absence of the use of the word "bird" to refer to a "blue pitta" in a corpus should

not imply that the ordinary meaning of "bird" excludes blue pittas. Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 B.Y.U. L. Rev. 1311, 1315. Corpora, for various reasons, can either greatly overstate or entirely omit usages, suggesting that a frequency analysis alone is a poor tool for capturing ordinary meaning, particularly when the corpus contexts differ substantially from the legal one. Even if the law and linguistics amici's data supported the conclusion that most uses of "income" that they examined involved realization, the context of those uses (in novels, for example) differs meaningfully from the context of the Sixteenth Amendment.

In sum, even assuming that corpus linguistics can shed meaningful light on original meaning, the analysis presented by the law and linguistics amici is insufficient to support *Macomber*'s erroneously narrow definition in light of the existing historical evidence of the meaning "income" at the time of the Sixteenth Amendment's enactment.

D. *Macomber* wrongly assumed that a tax on stock dividends was a direct tax, further undermining its precedential value.

Macomber was wrong not only about the meaning of "income," but also about the logically antecedent question whether the tax in that case was a "direct" tax that would have to be apportioned if it were not a tax on "income." Only direct taxes are subject to apportionment. *Brushaber*, 240 U.S. at 19–20. If a tax is indirect, it is constitutionally irrelevant whether that

tax is a tax on "income" under the Sixteenth Amendment. This fundamental error further undermines *Macomber*'s precedential value in defining a constitutionally permissible tax.

Macomber misapplied this Court's precedents on the meaning of a "direct" tax. In *Macomber*, the Court rejected the idea that the tax at issue could be justified as a tax not on the stock dividend, but "upon the shareholder's share of the undivided profits previously accumulated by the corporation," because such a tax would qualify as a direct tax on property. 252 U.S. at 217. In reaching this conclusion, the Court appears to have believed that the government conceded that such a tax would in fact be a direct tax. *See Macomber*, 252 U.S. at 218–19 (rejecting the direct-tax argument on the basis that the government supposedly conceded this characterization).[7]

To the extent that *Macomber* reached any actual holding on whether stock dividends are direct taxes, that holding was mistaken and cannot be reconciled with both earlier and subsequent decisions of this Court. Direct taxes are those imposed "solely," *Flint v. Stone Tracy*, 220 U.S. 107, 150 (1911), "simply,"

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[7] It is possible that *Macomber*'s confusion rested on its misunderstanding of the government's briefing. While the government seems to have agreed that taxing undistributed profits might be "a direct tax on property," Brief for the United States, *Macomber*, No. 914, at 10, it did not agree that taxing a stock dividend was, Supplemental Brief for the United States, *Macomber*, No. 914, at 41 (suggesting that a tax on the "privilege of receiving a dividend" is an indirect excise). *Macomber* thus took the government's concession too far.

Knowlton v. Moore, 178 U.S. 41, 81 (1900), or "merely," *Pollock II*, 158 U.S. at 627, because the taxpayer owns real or personal property. A tax is not direct if it is triggered by "a particular occasion," *Knowlton*, 178 U.S. at 81, or "by specific circumstances," *Nat'l Fed'n Indep. Bus. v. Sebelius* (*NFIB*), 567 U.S. 519, 571 (2012). For example, a tax triggered by the issuance of bank notes, *Veazie Bank v. Fenno*, 75 U.S. 533, 546–57 (1869), the receipt of inherited property, *Knowlton*, 178 U.S. at 78–83, or the failure to obtain health insurance, *NFIB*, 567 U.S. at 571, is not a direct tax.

Before *Macomber*, this Court had already held that an 1864 tax on undistributed profits was an indirect tax that did not need to be apportioned. *Hubbard*, 79 U.S. at 18. Between *Hubbard* and *Macomber*, this Court also held that taxes on the income from an asset were indistinguishable from a tax on the asset itself. *Pollock II*, 158 U.S. at 627–28. *Macomber* concluded that under the *Pollock II* view, taxes on undistributed profits are direct, presumably on the theory that such profits were a form of income generated by ownership of the stock. 252 U.S. at 219.[8] But this Court has since rejected that *Pollock II* holding. *See Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 480 (1939) ("The theory ... that a tax on income is legally

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[8] *Macomber* also apparently concluded that *Pollock II* controlled the treatment of undistributed earnings, even though *Pollock II* was abrogated by the passage of the Sixteenth Amendment, because such earnings were not within the scope of "income" affected by the Sixteenth Amendment. 252 U.S. at 219.

or economically a tax on its source[] is no longer tenable."); *South Carolina v. Baker*, 485 U.S. 505, 520 (1988) ("The rationale underlying *Pollock* ... has been thoroughly repudiated ... ."). Thus, it is *Hubbard*'s conclusion that taxes on undistributed corporate profits are indirect, not *Pollock II* or the *Macomber* decision resting on it, that today remains good law.

Macomber's reliance on *Pollock II* to reject *Hubbard* was also misplaced because *Pollock II* did not actually reach the question whether a tax on business profits is the equivalent of taxing mere ownership of the business. Although the *Pollock* decisions held that taxes on income from some forms of personal property were the equivalent of taxing that property directly, the Court left in place earlier cases holding that taxes on business profits were indirect. *See Spreckels Sugar Refining Co. v. McClain*, 192 U.S. 397, 413 (1904) (stating that the status of a tax on business profits was "not ... decided in [the *Pollock*] cases"); *see also Pollock II*, 158 U.S. at 635 (declining to rule on whether taxes on "gains or profits from business" are direct). Both before and after the *Pollock* decisions, this Court held that taxes on business profits, whether distributed or not, are indirect. *Pac. Ins. Co. v. Soule*, 74 U.S. 433, 444 (1868); *Spreckels*, 192 U.S. at 412–13. Thus, *Pollock II* should not have been a basis for *Macomber* to treat taxes on business profits as taxes on mere ownership. Further, *Macomber*'s holding directly contradicts the ruling in *Spreckels* that a tax on business profits imposed on "persons," not only on business entities, is indirect. 192 U.S. at 411.

Under the overwhelming weight of this Court's caselaw, a tax upon the payment of a stock dividend is an indirect tax—an excise on a particular occurrence—not a tax "merely because of ownership" of the underlying stock. Individuals who owned shares of Standard Oil in other years, when no stock dividend was paid, were not taxed. *See Macomber*, 252 U.S. at 190–91 (noting that the challenged stock dividend was issued in 1916 from accumulated profits, including from prior years). Thus, taxation did not turn on mere ownership of Standard Oil, but instead upon the occurrence of particular events affecting owners.

Similarly, the tax imposed on petitioners here is indirect, because it taxes only undistributed, untaxed, post-1986 earnings and profits of a U.S.-controlled foreign company. *See* Christopher H. Hanna, Moore*, the Sixteenth Amendment, and the Underpinnings of the TCJA's Deemed Repatriation Provision*, S.M.U. L. Rev. F. __ (forthcoming 2023) (manuscript at 2) (describing operation of the MRT). It is, like the individual mandate in *NFIB*, effectively a tax on the failure to act, namely, the failure to pay tax on foreign profits or to receive dividends from a profitable foreign investment (or, put another way, a tax on the act of hiding profits in a foreign subsidiary). *See NFIB*, 567 U.S. at 572 (rejecting idea that taxing inactivity is unconstitutional). Because the taxes here and in *Macomber* are indirect, *Macomber*'s analysis of what constitutes "income" should not be treated as controlling.

II. EVEN IF *MACOMBER* WERE CORRECT WHEN DECIDED, SUBSEQUENT DECISIONS HAVE SO UNDERMINED IT THAT IT HAS NO REMAINING PRECEDENTIAL FORCE.

Macomber has already been overruled in all but name. This Court has appropriately abstained from directly overruling *Macomber* in previous cases where that determination was not necessary to the holding. But here *Macomber* is essential to petitioners' claims. *See* Petrs' Br. 17–24. The Court should now recognize that *Macomber* has lost any precedential value. *See Seminole Tribe*, 517 U.S. at 65–66 (overruling constitutional precedent where the prior decision was "wrongly decided," "was based upon ... a misreading of precedent," and was "a solitary departure from established law").

As early as 1943, this Court questioned the continuing vitality of *Macomber*. In *Helvering v. Griffiths*, 318 U.S. 371 (1943), the government asked the Court to overrule *Macomber*. The majority held that the Court did not need to reach the constitutional question because the tax in that case did not raise the issue presented in *Macomber*. *Id.* at 394. It acknowledged, however, that intervening cases had "undermined ... the original theoretical bases" of *Macomber*. *Id*. at 393–94. And the three members of this Court

writing in dissent declared that *Macomber*'s constitutional holding "dies a slow death." *Griffiths*, 318 U.S. at 404 (Douglas, J., dissenting).[9]

Macomber's constitutional holding was close to "death" in 1943 because this Court abandoned all of its underlying rationales in a series of cases following *Macomber*. First, as noted, *Macomber*'s interpretive touchstone was a presumption that "income" must be read narrowly against the government. That approach was a solitary departure from existing precedent. For example, prior to *Macomber*, the Court in *Knowlton*, 178 U.S. at 83, rejected the notion that it should engage in a "microscopic examination as to the purely economical or theoretical nature of the tax ... for the purpose of placing it in a category which would invalidate the tax." After *Macomber*, the Court once again rejected a narrow construction rule. *See Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 430 (1955) (giving "a liberal construction" to a tax law in light of Congress's intent "to tax all gains except those specifically exempted" (citing *Comm'r v. Jacobson*, 336 U.S. 28, 49 (1949), and *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87–91 (1934)); *White v. United States*, 305 U.S. 281, 292 (1938) ("We are not impressed by the argument that ... all doubts should be resolved in favor of the taxpayer."); *Sanford & Brooks Co.*, 282 U.S. at 365 (applying pre-Amendment historical practice to reject taxpayer's narrow definition of "income"). Tellingly, though petitioners claim

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[9] At a minimum, this back-and-forth undercuts petitioners' effort to claim that the cases leading up to 1943 in any way reaffirmed *Macomber*'s constitutional holding. *See* Petrs' Br. 22–24.

that the Court has "repeatedly" applied the *Macomber* principle, Petrs' Br. 35, they cite no case but *Macomber* where the Court actually did so.[10]

Second, as this Court explained in *Griffiths*, 318 U.S. at 393–94, the post-*Macomber* cases petitioners cite are a repudiation of *Macomber*, not an extension of it. *Macomber* held that realization is constitutionally required because an income tax can tax only what is "coming in" to a taxpayer, the severable and material "fruit" of a capital "tree." 252 U.S. at 206. To the extent this definition had any policy justification, *Macomber* suggested that only these kinds of assets were liquid enough to be used as a source of tax payment. 252 U.S. at 212–13. Later cases recognized that, as a policy matter, realization is also usually a more convenient time to value property. *See Cottage Savings Ass'n v. Comm'r*, 499 U.S. 554, 559 (1991) (quoting *Helvering v. Horst*, 311 U.S. 112, 116 (1940)). But the Court did not adopt *Macomber*'s rationale in these later cases, instead interpreting "income" to include instances where taxpayers gained some increment of economic resources, whether or not those resources were severable from some underlying source and regardless of whether those resources were actually

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[10] Instead, petitioners take out of context a statement from *Burk-Waggoner Oil Ass'n v. Hopkins*, a case in which this Court in fact took the opposite stance from petitioners' position, *see* 269 U.S. 110, 113 (1925) (finding "no room for applying the [taxpayer's] rule of construction" because Congress possessed broad constitutional authority), and one from *Taft v. Bowers*, a case in which the Court expressed no clear rule for interpreting "income," but rejected a narrow view of that term that would "defeat ... the purpose of Congress," 278 U.S. 470, 482–83 (1929).

easy to value, spendable, or liquid enough to be used to satisfy a tax bill.

For example, in *Helvering v. Bruun*, 309 U.S. 461 (1940), this Court held that if a tenant improves a leased property, the landlord receives income as soon as the lease ends, rather than when the improved property is ultimately sold for profit.[11] The taxpayer argued that under *Macomber*, the end of the lease was not a realization event, because the improvements were not severable from the underlying property and did not necessarily provide the landlord with any available cash or other item "of exchangeable value" to pay the tax bill. *Id*. at 468. The Court rejected these arguments. Instead, it interpreted *Macomber* as standing only for the proposition that there is no income when a taxpayer receives a stock dividend because the stockholder's interest in the corporation's assets is the same "after receipt of the dividend" as it was before. *Id*. at 468–69. In effect, *Bruun* limited *Macomber* to its facts. *See* Joseph M. Dodge, *The Story of* Glenshaw Glass, *in* Tax Stories 17, 20, 40 (Paul M. Caron ed., 2d ed. 2009) ("*Bruun* undermined the very core of *Macomber* ... ."). *Bruun* also implicitly rejected ease of valuation as a constitutional principle, since there is nothing about the end of a lease that provides new information about the value of the tenant's improvements.

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[11] The Court had earlier held as a statutory matter that Congress did not intend to tax the value of improvements in the year those improvements were made. *Bruun*, 309 U.S. at 466 (citing *M.E. Blatt Co. v. United States*, 305 U.S. 267 (1938)).

Petitioners argue that the Court has not abandoned *Macomber*'s constitutional requirement of spendable "fruit," but instead transformed it into a requirement of "constructive realization." Petrs' Br. 48–49. Nothing in the reasoning of the Court's cases supports that view, and again, this Court's own unanimous view in 1943 was to the contrary. *Griffiths*, 318 U.S. at 393; *id.* at 410–11 (Douglas, J., dissenting) (citing a series of decisions explaining that "there may be 'income' though neither money nor property has been received by the taxpayer"); *see also Glenshaw Glass*, 348 U.S. at 431 (stating that *Macomber* was "not meant to provide a touchstone to all future gross income questions").[12] At best, petitioners' argument might help square *Macomber* with decisions such as *Horst*, where this Court held that a taxpayer had realized income when he transferred interest due on bonds the taxpayer owned and controlled—though, even there, the Court made clear that realization was a rule of "administrative convenience." 311 U.S. at

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[12] Petitioners point to *Glenshaw Glass* as support for their claim that the Court continued to recognize a constitutional realization requirement after *Bruun* and *Horst*. Petrs' Br. 43. But the Court's statement that *Macomber*'s supposed constitutional rule was not a "touchstone" is a strange way to describe what is, in petitioners' view, a supposedly bedrock constitutional principle. Likewise, if *Glenshaw Glass* reaffirmed a continuing constitutional realization requirement, it is difficult to understand why later cases would call realization a matter of "administrative convenience" and look to legislative history and administrative practice for guidance into what it requires. *Cottage Savings Assoc.*, 499 U.S. at 559–62.

116. But nothing in petitioners' "constructive realization" theory explains how *Macomber* can be made consistent with *Bruun*.

Petitioners offer another theory to reconcile *Macomber* and *Bruun*, but that fallback theory does not help them. Petitioners argue that *Bruun* is consistent with *Macomber*'s version of the realization rule because, they say, the end of the leasehold in *Bruun* was a "transaction" that constitutionally could trigger realization. Petrs' Br. 23, 42. If that is so, there is no logical limit to petitioners' definition of "transaction." No property changed hands in *Bruun*. The taxpayers already owned the property they were taxed on; the only "transaction" was the expiration of the tenants' right of entry. It is not clear under petitioners' theory why that event permits taxation while, say, the closing of KisanKraft's fiscal year, calculation of its earnings and profits for the year, and investors' accrual of new rights to distributions, would not. In *Macomber*, by contrast, only certain events qualified as realization: those that severed the fruit from the tree and thus provided new liquidity to the taxpayer. 252 U.S. at 212–13. Neither of those happened in *Bruun*, and that is why this Court was prepared to declare *Macomber* dead three years later. *See* Stanley S. Surrey, *The Supreme Court and the Federal Income Tax: Some Implications of the Recent Decisions*, 35 Ill. L. Rev. 779, 783-84, 791 (1941) (discussing why *Bruun* implies that "realization ... is not a constitutional mandate").

Petitioners' account also ignores the line of post-*Macomber* cases in which this Court concluded that rules regarding when to account for income for tax

purposes should be determined "only by legislation, not by courts." *Sanford & Brooks Co.*, 282 U.S. at 367; *see United States v. Kirby Lumber*, 284 U.S. 1, 3 (1931) ("We see nothing to be gained by the discussion of judicial definitions."). For example, the Court held that the Sixteenth Amendment permits Congress to define annual "income" to include transactions that on net lost money, but where the gross receipts and expenses were in different years. *Sanford & Brooks Co.*, 282 U.S. at 365. That result is difficult to square with *Macomber*'s insistence that Congress cannot tax "income" at a time when the shareholder lacks liquidity to pay the tax. 252 U.S. at 212–13. Similarly, the Court's holding that an issuer's repurchase of its bonds, at a discount to their face value, is income, *see Kirby Lumber*, 284 U.S. at 3, would likely fail under *Macomber*. *Macomber* would require that taxable income must provide the taxpayer with new resources to pay the tax, rather than, as in *Kirby Lumber*, arise at a time when the taxpayer is spending money, not receiving it. *Id.* at 3.

CONCLUSION

In sum, *Macomber* applied the wrong interpretive method to the meaning of the Sixteenth Amendment, neglected direct evidence that the original meaning of "income" encompassed undistributed corporate profits, and ignored prior decisions of this Court on grounds that were unpersuasive at the time and that this Court has since rejected. Later decisions have treated it as all but a dead letter. This Court should finally acknowledge that *Macomber* has no remaining precedential force and affirm the United States Court of Appeals for the Ninth Circuit's decision.

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[13] Amici's institutional affiliations are listed for identification purposes only. The opinions expressed are those of individual amici and do not represent the views of their affiliated institutions.