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

AMICUS BRIEF OF THE STATES OF ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEW JERSEY, NEW YORK, OREGON, PENNSYLVANIA, VERMONT, WASHINGTON, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Contrary to the contention of *amici* states supporting Petitioners, the mandatory repatriation tax ("MRT") does not pose a threat to state tax bases or to the equilibrium of federal-state power. Rather, it is a one-time, transitional tax enacted to preclude permanent tax avoidance in the context of a sweeping tax reform package. And that is all we have here.

The below-signed *Amici* States (including the District of Columbia)—along with all other states—receive a significant portion of their annual revenue from the federal government. The vast majority of states also have state income taxes that are tethered closely to the Internal Revenue Code ("Code"), and for which they rely on the administrative and compliance support offered by federal tax authorities. *See, e.g.*, A.R.S. § 43-1001(2) ("'Arizona gross income' of a resident individual means the individual's federal adjusted gross income for the taxable year, computed pursuant to the internal revenue code."); O.R.S. § 316.048 (providing that "[t]he entire taxable income of a resident of this state is the federal taxable income of the resident as defined in the laws of the United States," subject to adjustments).

Some states, such as *Amicus* Oregon—along with several states supporting Petitioners—tax mandatory repatriation income in their state tax codes. Regardless, all states have a fundamental interest in the lawful, equitable, and reliable

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[1] Pursuant to Sup. Ct. R. 37.6, the *Amici* States state that no part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

maintenance of the federal tax base. The *Amici* States therefore urge the Court to reject shortsighted attacks—including by *amici* who were vocal supporters of the 2017 tax reform bill—on a provision that, like many similar provisions in the tax code, discourages or precludes destructive tax sheltering.

SUMMARY OF ARGUMENT

As former Speaker of the House Paul Ryan has said, Petitioners' lawsuit is a "misguided challenge" to a one-time tax intended to facilitate the transition to a territorial international taxation system.

The MRT is not a wealth tax. And contrary to contentions from Petitioners' *amici* supporters, it does not intrude into the balance of federal-state power or threaten states' ability to collect taxes. State tax codes generally rely on substantial uniformity with the federal tax code, which also allows states to piggyback on federal compliance efforts. And states receive over a third of their revenue directly from the federal government. Prolonged, rampant tax sheltering—not a law intended to mitigate tax sheltering—poses the true threat to states' fiscal health.

The United States has taxed a portion of undistributed foreign income for over sixty years through Subpart F. Undistributed income is also taxed as a matter of course in pass-through entities such as partnerships, S-corporations, and limited liability companies. In other contexts, such as futures trading, the federal tax code deems year-end gains to be realized and taxable.

Absent these and similar provisions in the federal tax code, the federal tax base—and thus state

tax bases—would be decimated by unchecked tax avoidance. It is thus not surprising that Petitioners and various *amici* concede the constitutionality of these provisions. *See, e.g.,* Brief of the Cato Institute as *Amicus Curiae* ("Cato Br.") at 17 (conceding the "constitutional robustness of Subpart F"); Brief for Petitioners ("Pet. Br.") at 50-53.

The accompanying efforts to distinguish the MRT from these similar, longstanding taxes—including the suggestion that there is a constitutional dimension to taxing earnings accumulated in prior years—are unavailing. The Code has long looked to "accumulated earnings" to assess whether distributions are taxable as dividends. And it has also long contained provisions using multi-year accounting periods, often—as with, for example, a provision permitting net operating losses over twenty years—to taxpayers' benefit. Further, the only constant in international tax—long a province of aggressive tax sheltering—has been change. The United States enacted Subpart F in 1962 to mitigate tax avoidance, and at other times the government has offered tax holidays to encourage repatriation. By 2017, many other countries had shifted to territorial taxation and there had been proposals for the U.S. to do so for years. With the adoption of a territorial taxation system, international investors—the vast majority of which are multinational corporations—had no reasonable expectation of permanent tax forgiveness on their accumulated international income.

The MRT is all the more reasonable because it is a one-time tax within the context of major tax reform that was generally designed to benefit large

multinational taxpayers. That is why *amici* such as the Cato Institute and the Chamber of Commerce—who now argue that the MRT is unconstitutional—enthusiastically supported the 2017 tax reform, including the international taxation provisions. And perhaps that is also why several *amici* states supporting Petitioners tax mandatory repatriation income at the state level in the wake of the MRT.

Finally, because the constitutionality of Subpart F and other pass-through taxes is uncontroverted, this Court has in this case only a narrow question on the facts presented by the parties. Nonetheless, commentators across the ideological spectrum have expressed concern that the Court, perhaps inadvertently, could call into question other taxes comprising trillions of dollars in the U.S. tax base, causing chaos across the U.S. financial system, including to state fiscal health. The Court should, in all events, avoid this result.

ARGUMENT

I. The MRT's opponents have mischaracterized its purpose, scope, and effect.

A. The MRT was a crucial transitional provision in a major tax reduction package.

The 2017 Tax Cuts and Jobs Act ("TCJA" or "the Act") was a major tax reduction and reform package that, among other things, lowered corporate and individual tax rates, increased exemptions for property transferred at death, and changed how foreign income is taxed. *See* John McClelland &

Jeffrey Werling, *How the 2017 Tax Act Affects CBO's Projections*, Congressional Budget Office (April 20, 2018).[2] In 2018, the Congressional Budget Office estimated that net of positive "economic feedback" effects, the Act would add approximately $1.45 trillion to the debt and increase debt-service costs by about $450 billion. *Id.*

The Act's foreign income provisions substantially eliminated taxation on distributions to U.S. companies by controlled foreign corporations ("CFCs") and certain other foreign corporations. 26 U.S.C. § 245A(a). As Petitioners have acknowledged, "[t]he TCJA transformed U.S. corporate taxation from a worldwide system, where corporations were generally taxed regardless of where their profits were derived, toward a territorial system, where corporations are generally taxed only on their domestic source profits." Petition for Writ of Certiorari ("Pet.") at 6; *see* H.R. Rep. No. 409, 115th Cong., 1st Sess. 370 (2017) (House Report).

Within this context, the Act provided that shareholders owning at least a ten-percent stake in a CFC must pay a one-time, pro-rata tax on the corporation's accumulated post-1986 income. 26 U.S.C. § 965(a)(1)-(2). And to mitigate the temporary hit from this one-time tax, the Act further provided that the MRT could be paid over eight years in interest-free installments at a reduced tax rate. 26 U.S.C. § 965(c), (h).

Because the Act substantially eliminates taxes on foreign dividends repatriated by controlled

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[2] *Available at* https://www.cbo.gov/publication/53787.

subsidiaries on an ongoing basis, accumulated foreign income would have escaped taxation forever absent a one-time tax of this nature. As former Speaker of the House Paul Ryan, the MRT's self-identified drafter, has explained,

> the goal was to finance a conversion from one system to another, and it wasn't to justify a wealth tax. … So I think [Petitioners' lawsuit is] a misguided challenge in my opinion. And the point of that was just a temporary conversion from worldwide to a territorial system. … [W]e probably tested this idea for a good six years before we put it into law.

Paul Ryan, *Taking on Tax: The Past, Present, and Future,* at 18:40 (September 27, 2023) (video) ("P. Ryan Remarks");[3] *see also, e.g.,* Christopher H. Hanna (former Senior Policy Advisor for Tax Reform to the U.S. Senate Committee on Finance), *Moore, the Sixteenth Amendment, and the Underpinnings of the TCJA's Deemed Repatriation Provision*, SMU Law Review Forum, at 3-4 (forthcoming) (September 7, 2023) ("Hanna") ("section 965 was viewed as a necessary piece of U.S. international tax reform and represented an effort to tax income that U.S. multinationals had earned but not repatriated in a fair, efficient, and simple manner").[4]

In the decades preceding the Act, international investment had long been a haven of aggressive tax

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[3] *Available at* https://www.hamiltonproject.org/event/upcoming/taking-on-tax-policy/.

[4] *Available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4582774.

sheltering. Up until 1962, even passive income went untaxed until repatriation, creating a powerful incentive for taxpayers to defer repatriation indefinitely. *See* S. Rep. No. 1881, 87th Cong., 2d Sess. 78 (1962). Subpart F then required investors to pay tax on undistributed passive income, partially negating the usefulness of foreign controlled subsidiaries as tax shelters. 26 U.S.C. § 951.

Multinational corporations nonetheless continued to hold massive amounts of investment dollars overseas, prompting various efforts to encourage repatriation. A "2004 tax holiday, which provided a temporary one-year reduction in the repatriation tax rate, resulted in $312 billion repatriated in 2005, of an estimated $750 billion held abroad." Michael Smolyansky, et al., *U.S. Corporations' Repatriation of Offshore Profits*, Federal Reserve (September 4, 2018) ("Smolyansky, et al.").[5] Still, "by the end of 2017, U.S. [multinational enterprises] had accumulated approximately $1 trillion in cash abroad, held mostly in U.S. fixed-income securities." *Id.*

By 2017, many other countries had already implemented a territorial system, and the United States had been evaluating territorial proposals for years. *See* Kyle Pomerleau, et al., *Anti-Base Erosion Provisions and Territorial Tax Systems in OECD*

[5] *Available at* https://www.federalreserve.gov/econres/notes/feds-notes/us-corporations-repatriation-of-offshore-profits-20180904.html.

Countries, Tax Foundation (July 7, 2021).[6] In conjunction with implementing the new territorial system, "Congress decided that the simplest and most equitable solution was to wipe accumulated earnings off of taxpayers' books, but without giving them a windfall." Hanna at 22; *see also, e.g.,* George Callas (former Senior Tax Counsel to the House Ways and Means Committee and Speaker Paul Ryan), *How the Supreme Court Case Moore v. United States Could Alter the Tax Landscape*, at 49:40 (September 22, 2023) (video) ("G. Callas Comments") (explaining that the MRT was not intended as a new tax, but rather as a transition from worldwide tax deferral leading to trapped earnings).[7]

The Act spurred the repatriation of over $300 billion in the first quarter of 2018, alone. Smolyansky, et al.

B. Attacks on the MRT are meritless and counterproductive.

In reaction to this temporary provision—which was designed by lawmakers to finance tax cuts and to shift to what proponents argued would be a more internationally competitive tax system—Petitioners and their supporting *amici* have posited a parade of horribles tumbling down a slippery slope, at the base of which is unfettered, tyrannical federal taxation power.

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[6] *Available at* https://taxfoundation.org/research/all/eu/anti-base-erosion-territorial-tax-systems/#:~:text=Appendix-,Introduction,generally%20exempt%20from%20domestic%20taxation.

[7] *Available at* https://www.youtube.com/watch?app=desktop&v=DHy7Obix55w.

West Virginia and other states warn, for example, that affirming the two lower courts would mean that "the federal government will be empowered to overrun traditional state authority over property and other ad valorem taxes while dangerously weakening state economies and fiscs." Brief of *Amici Curiae* West Virginia and 16 Other States ("WV Br.") at 16-17. These *amici* further claim that "heavy federal taxation diminishes the practical ability of States to collect their own taxes." *Id.* at 19-20 (internal quotation marks omitted). And ultimately, they argue that the "division of responsibilities" between the states and the federal government "would break down if suddenly the federal government can redefine 'income' to encompass even unrealized bumps in value." *Id.* at 19.

But these claims all miss the mark for many reasons. Most fundamentally, the MRT is not a property tax; rather, it is a tax on accumulated income that is indistinguishable from many other current provisions of the Code. And far from representing a federal grab at more taxes, the Act—including the foreign taxation provisions—implemented sweeping tax *cuts*. Attacking the MRT in isolation—notwithstanding the accompanying adoption of territorial taxation and overarching taxpayer relief—is like complaining about the cost of postage to claim a pot of gold.

From a policy perspective, one might expect groups that favor tax reform and lower taxes to be the Act's most ardent proponents. And indeed—outside of the courtroom—they have been just that. *See, e.g.,* J.D. Foster, *Tax Reform: The Triumph of Vision and*

Courage, U.S. Chamber of Commerce (December 21, 2017) ("The passage of the 2017 Tax Cuts and Jobs Act (TCJA) represents a triumph of ideas and of courage," and the embrace of territorial international taxation means that "[t]he United States will no longer be the land from which great companies flee, but increasingly the land to which companies around the world flock.");[8] Adam N. Michel, *Protecting American Families from Higher Taxes*, Cato Institute, Testimony Before the Committee on the Budget, United States Senate (May 17, 2023) (stating that "the 2017 Tax Cuts and Jobs Act (TCJA) was a success," with "significant changes" that included "overhaul[ing] the international tax rules").[9]

To now challenge the MRT in isolation is, in the short run, hypocritical. In the longer run, it is shortsighted and counterproductive insofar as it creates an impediment to healthy legislative compromise, even within the context of otherwise desired policy objectives. Lobbying for and achieving tax reform—and then *ex post* attacking a single disfavored transitional provision of that reform as unconstitutional—should be viewed with appropriate suspicion.

Likewise, whatever constitutional concerns states supporting Petitioners may have, those concerns did not deter several of them from taxing mandatory repatriation revenue at the state level. *See*

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[8] *Available at* https://www.uschamber.com/taxes/tax-reform-the-triumph-vision-and-courage.

[9] *Available at* https://www.cato.org/testimony/protectingamerican-families-higher-taxes.

Louisiana Revenue Information Bulletin No. 18-030, Changes to IRC Section 965 Repatriation (October 8, 2018);[10] Montana Corporate Income Tax Treatment of International Tax Provisions Under Tax Cuts and Jobs Act of 2017;[11] North Dakota Tax – International Tax Provisions;[12] 2022 Oklahoma Corporation Income and Franchise Tax Forms and Instructions, at 10;[13] *State Conformity to Federal Section 965 Transition Tax*, Intuit (surveying and summarizing state taxation of I.R.C. § 965 income).[14]

This is not to say that an unconstitutional provision would get a pass because it supports useful political compromise or is popular. Rather, it is to say that the MRT poses no genuine constitutional concerns whatsoever.

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[10] *Available at* https://revenue.louisiana.gov/LawsPolicies/RIB%2018-030%20Guidance%20on%20Louisiana%20State%20Tax%20Implications%20of%20the%20Tax%20Cuts.pdf.

[11] *Available at* https://mtrevenue.gov/wp-content/uploads/2019/10/Montana-Corporate-Income-Tax-Treatment-of-International-Tax-Provisions-under-Tax-Cuts-and-Jobs-Act-of-2017.pdf#:~:text=IRC%20%C2%A7965%20requires%20certain%20foreign%20corporations%20to%20add,the%20IRC%20%C2%A7965%20Inclusion%20Income%20%28IRC%20%C2%A7965%20Deduction%29.

[12] *Available at* https://www.tax.nd.gov/business/corporate-income-tax/international-tax-provisions.

[13] *Available at* https://oklahoma.gov/content/dam/ok/en/tax/documents/forms/businesses/corporate-income-tax/current/512-Pkt.pdf.

[14] *Available at* https://proconnect.intuit.com/support/en-us/help-article/state-taxes/state-conformity-federal-section-965-transition/L3cRyfXoR_US_en_US.

C. The MRT is substantively similar to other longstanding taxes.

As the United States observes, KisanKraft, the Indian company in which Petitioners invested, earned and accumulated the income subject to the MRT. Brief for the United States in Opposition to Petition for Writ of Certiori ("Pet. Opp.") at 23. The MRT is therefore best understood as a one-time pass-through tax on investors' pro-rata shares of realized corporate income to facilitate ongoing tax relief.

There is nothing objectionable, let alone unconstitutional, about taxes of this sort. Investors in partnerships, S-corporations, and limited liability companies are accustomed to pass-through taxation under long-established law. *See, e.g.,* 26 U.S.C. § 702; 26 U.S.C. § 1366(a)(1)(A). According to a study in the mid-2010s, approximately 95% of all businesses in the United States are pass-through entities. Aaron Krupkin & Adam Looney, *9 Facts About Pass-Through Businesses*, Brookings (May 15, 2017) ("Krupkin & Looney").[15] Thus, nobody—at least nobody who wants the country to maintain a viable tax base—questions the validity or necessity of these taxes.

Other investments have for many years been situationally taxed on a pass-through or mark-to-market basis without constitutional alarm. *See, e.g., Murphy v. United States*, 992 F.2d 929, 931 (9th Cir. 1993) (treating futures contracts as sold at end of year has "the effect of ending the 'use of futures for tax-

[15] *Available at* https://www.brookings.edu/articles/9-facts-about-pass-through-businesses/#fact1.

avoidance purposes'") (quoting S. Rep. No. 144, 97th Cong., 1st Sess. 156 (1981), 1981 U.S.C.C.A.N. 255).

Most pertinently, Subpart F has required that a portion of undistributed current-year income be taxed since the 1960s. 26 U.S.C. § 951. The *amici* states supporting Petitioners simply ignore this fact (*see* WV Br.), while other *amici* posit hollow distinctions as they concede Subpart F's constitutionality. The Cato Institute, for example, tries to distinguish Subpart F taxation on the basis that "Subpart F deems only *current* year income as realized, not money earned by the company years in the past." Cato Br. at 3; *see also id.* at 15 ("The constitutional basis of the other taxes that bear some resemblance to the MRT are not at issue here. Those taxes each tax income earned during the year it was realized."). Cato allows that "the same analysis that shows the constitutional robustness of Subpart F also applies to the annual tax on global intangible low-taxed income (GILTI), which was enacted as part of the TCJA." *Id.* at 17.

Petitioners similarly concede the constitutionality of provisions akin to the MRT, acknowledging that "'[t]his Court has recognized that 'income' may be realized by a variety of indirect means.'" Pet. Br. at 47 (quoting *Diedrich v. Comm'r*, 457 U.S. 191, 195 (1982)); *see also id.* at 50-53 (conceding the constitutionality of Subpart F, pass-through partnership and S-Corporation taxation, futures and security dealer mark-to-market taxation, and the expatriation tax).

Petitioners nonetheless argue that Subpart F's "provisions predating the MRT all target specific

events—like a foreign corporation's earning of investment income while being controlled by a small number of domestic shareholders—that Congress found resulted in constructive realization of income by controlling shareholders." Pet. Br. at 50-51.

But the earnings-accumulation period is not a meaningful, let alone constitutionally significant, distinction between Subpart F and the MRT. It would make little sense to argue that a tax on quarterly undistributed income is allowable but a yearly tax is unconstitutional—and it is equally misplaced to suggest that a constitutional dimension materializes over a longer period.

After all, income from previous accounting years does not turn into a pumpkin. The Code has, for example, long looked to accumulated earnings to assess whether certain corporate distributions are taxable as dividends. 26 U.S.C. § 316(a)(1). Indeed, taxpayers challenged the original income tax for taxing dividends derived from earnings accumulated before there was an income tax—and this Court rejected that challenge. *See Lynch v. Hornby*, 247 U.S. 339 (1918). Nor is there anything special about taxing income realized in the current year. Use of the taxable year is a convention, but there are many places in the Code that use longer accounting periods, often to taxpayers' benefit. If Congress can permit taxpayers to benefit from net operating losses for twenty years, *see* 26 U.S.C. § 172(b)(1), then how could there possibly be a constitutional impediment to taxing accumulated income over a similar time period?

Petitioners, like the Cato Institute, also fail to recognize that Subpart F operates just like the MRT,

insofar as taxpayers who acquire their holding late in the year must nonetheless report their pro-rata share of Subpart F income for the entire year. 26 U.S.C. § 951(a); *see also United States v. Phellis*, 257 U.S. 156, 171-72 (1921) (holding that shareholders acquire their interest subject to "the prospect of a dividend from the accumulations" predating their acquisition); Lawrence A. Zelenak, *Reading the Taxpayers' Brief in Moore*, Tax Notes Federal, Volume 181, 103-04 (October 2, 2023) (discussing *Phellis* and explaining Subpart F's operation).[16]

In short, Petitioners and their *amici* concede the constitutional underpinnings of constructive realization, while positing an immaterial distinction relating to the applicable taxation period. Petitioners, moreover, acknowledge that they invested in KisanKraft at the company's inception—and thus participated in all the company's earnings—negating any valid timing challenge on their part in any event. Pet. Br. at 11. It is therefore significant that Petitioners concede that "[t]he Court has historically deferred to th[e] sort of legislative determination [underlying Subpart F], so long as it is rational and does not transgress constitutional limitation." *Id.* at 51.

Nor can it escape notice that tax planners and those who generally prefer lower taxation typically favor and pursue tax deferral to the maximum possible extent; it is only now, when that deferred bill

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[16] *Available at* https://www.taxnotes.com/tax-notes-today-federal/litigation-and-appeals/reading-taxpayers-brief-moore/2023/10/04/7hd59.

comes due, that the deferral itself suddenly (in their telling) become constitutionally problematic.

II. Congress must retain flexibility to disincentivize noneconomic tax avoidance.

A. Pervasive tax sheltering harms state and federal tax bases.

With respect to the impact on states, on one side of the ledger, there is misguided speculation that today's one-time tax on accumulated foreign income—in service of broad tax reform—is tomorrow's "overrun [of] traditional state authority over property … dangerously weakening state economies and fiscs." WV Br. at 17.

On the other side of the ledger, there is the non-hypothetical, non-speculative reality that rampant tax avoidance weakens state fiscs *today*. Approximately fifteen states have conformed their codes to directly tax mandatory repatriation revenue. *See* Jerome Hellerstein & Walter Hellerstein, *State Taxation*, Thomas Reuters ("Hellerstein") § 7.19[1] (3d ed. August 2023); *see also supra* at 10-11. And all states receive substantial revenue from the federal government, giving them a keen interest in consistent and rational federal tax policy that discourages prolonged tax sheltering. *See, e.g., State and Local Revenues*, Urban Institute ("In 2020, 36 percent of state general revenue came from the federal government.").[17]

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[17] *Available at* https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-revenues.

The IRS reports that corporations with assets over $2.5 billion owe the vast bulk of MRT liability (95% in 2017). Melissa Costa & Caitlin McGovern, *Effect of IRC Section 965 Transition Tax on Domestic Corporations, Tax Year 2017*;[18] *see also* Smolyanksi, et al. (stating that "[t]he top 15 firms account for roughly 80 percent of total offshore cash holdings, and roughly 80 percent of their total cash (domestic plus foreign) is held abroad"). Two tax research institutes have estimated that 400 multinational corporations with US tax duties have paid $271 billion taxes under the MRT.[19] And another research institute has estimated that if the Court were to "strike[] down the entirety of the deemed repatriation for corporate and noncorporate taxpayers … this would reduce revenue by about $346 billion over the next 10 years, including a refund of tax payments made from 2018 to 2023." Daniel Bunn, et al., *How the Moore Supreme Court Case Could Reshape Taxation of Unrealized Income*, Tax Foundation (August 30, 2023) ("Bunn, et al.").[20] Only $3.5 billion of that $346 billion is attributable to individuals and pass-through firms. *Id.*

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[18] *Available at* https://www.irs.gov/pub/irs-soi/soi-a-co965-id2002.pdf.pdf.

[19] Matthew Gardner, et al., *Supreme Court Tax Giveaway: Who Would Benefit from the Roberts Court Striking Down the Mandatory Repatriation Tax?*, Institute on Taxation and Economic Policy (September 27, 2023) ("Gardner, et al."), *available at* https://itep.org/supreme-court-moore-v-us-mandatory-repatriation-tax-corporate-tax-avoidance/.

[20] A*vailable at* https://taxfoundation.org/research/all/federal/moore-v-united-states-tax-unrealized-income/.

It is ironic that *amici* supporting the Petitioners would identify the MRT—a provision that mitigates tax base erosion—as a singular threat to state tax bases, while ignoring the actual, real world impact of striking down the law.

To suggest, for example, that "Congress *could* impose an unapportioned tax on farmers or other landowners for unrealized appreciation to their property," Brief of *Amicus Curiae* the Buckeye Institute at 14, is to impute a force to this case that it cannot possibly possess. The United States has itself repudiated Petitioners' effort to characterize this case as an expansive test of the government's Sixteenth Amendment taxing power. Pet. Opp. at 22-23 (stating that "[t]his case would … be an unsuitable vehicle for addressing the question presented, which is '[w]hether the Sixteenth Amendment authorizes Congress to tax unrealized sums'" because the MRT applies to KisanKraft's realized, accumulated income). Instead, as previously discussed, the case concerns a question of deemed or pass-through taxation without constitutional dimension. *See id.* at 23. This is not the posture of a case threatening the family farm.

B. This Court should avoid the "chaos" outcome at all costs.

Petitioners have never argued that any tax apart from the MRT is unconstitutional. Indeed, they have stretched, unsuccessfully, to distinguish the MRT from other taxes. Their supporting *amici* have likewise explicitly avowed that they have no quarrel with any other taxes. *E.g.,* Cato Br. at 17 ("[L]ike Subpart F, GILTI is a tax only on a CFC's *current year income*" and "it clearly passes muster.")

Analysts across the ideological spectrum have nonetheless expressed concern that this Court could inadvertently sow chaos across the country's financial system with an imprecise ruling in Petitioners' favor. *See, e.g.,* P. Ryan Comments at 19:20 ("I mean, a lot of the tax code would be unconstitutional if that thing [Petitioners' lawsuit] prevailed."); G. Callas Comments at 108:20 (explaining that the risk of uncertainty and chaos from a ruling in favor of Petitioners cannot be casually dismissed); Alan D. Viard, *The Supreme Court Should Not Enshrine the Realization Tax Principle in the Constitution*, American Enterprise Institute (September 12, 2023) ("A ruling in favor of the Moores would spark years of litigation over these, and other, provisions. Depending on the breadth of the ruling, many of the provisions might eventually be struck down, resurrecting abusive tax strategies and economic distortions.");[21] Bunn, et al. ("Depending on how the court rules, large portions of the U.S. tax base could quickly become legally uncertain, putting significant revenue at stake."); Gardner, et al. (opining that "a broad ruling" in Petitioners' favor would "put[] at legal jeopardy much of the architecture of laws that prevent corporations and individuals from avoiding taxes, and introduce[e] great uncertainty about our democracy's ability to tax large corporations and the most affluent").

Even a narrowly-crafted decision in Petitioners' favor could inflict serious harm on the states. If the

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[21] *Available at* https://www.aei.org/economics/the-supreme-court-should-not-enshrine-the-realization-tax-principle-in-the-constitution/.

Court were to strike down the MRT, taxpayers would, for example, likely argue that states that have taxed mandatory repatriation revenue would need to refund years of state tax revenue.

An even slightly broader ruling would likely destabilize the tax systems in the many states that conform to the provisions of the Code that are most similar to the MRT (such as GILTI and Subpart F) and that depend on federal administration to determine and collect taxes. *See* Hellerstein ¶ 7.19 n.780 (stating that more than a dozen states conform to each of these provisions). Undermining these anti-abuse provisions and sparking confusion about the enforceability of federal tax law would necessarily shrink the national income tax base.

A still broader ruling that implicated taxation of pass-through income would be cataclysmic for the national tax base. According to the Tax Foundation's study, "eliminating the taxation of pass-through and corporate retained earnings would reduce federal revenue by nearly $5.7 trillion over 10 years." Bunn, et al; *see also, e.g.* Krupkin & Looney ("In the early 1980s, C-corporations produced almost all business income," but "[o]wners of S-corporations and partnerships now earn about half of all income from businesses."). It is hard to fathom that the Court would intentionally call into question critical established taxes that all parties agree are constitutional. Nonetheless, even a smattering of imprecise language might spur years of senseless litigation that would be particularly devastating for states, given their limited resources and balanced budget laws. *See* Kim S. Rueben & Megan Randall,

Balanced Budget Requirements – How States Limit Deficit Spending, Urban Institute (November 27, 2017) (stating that forty states must sign balanced budgets).[22]

And if states were ultimately forced to untether themselves from the Code to mitigate the damage, that itself would bring a further torrent of administrative cost and mayhem. As a practical matter, states lack the resources to create, administer, and enforce wholly independent income tax codes. Among other salutary impacts, state conformity with the Code also "facilitates interstate commerce by reducing transaction costs for taxpayers with economic activities in more than one state …, reduces the risk to taxpayers of double state taxation," and discourages "protectionist provisions or provisions that discriminate against residents of other states." Ruth Mason, *Delegating Up: State Conformity with the Federal Tax Base*, 62 Duke L.J. 1267, 1269-70 (2013). If states are forced to fend for themselves, much of this benefit will be lost, at a significant cost to state fiscal stability.

The *Amici* States therefore urge the Court—above all else—to narrowly constrain its decision to the MRT on the facts presented by Petitioners' case, and thereby avoid the specter of financial chaos.

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[22] *Available at* https://www.urban.org/research/publication/balanced-budget-requirements.

CONCLUSION

For the foregoing reasons, the Court should affirm the Ninth Circuit's decision.

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Respectfully submitted,

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