No. 22-800

IN THE

Supreme Court of the United States

CHARLES G. MOORE and KATHLEEN F. MOORE,

Petitioners,

v.

UNITED STATES,

Respondent.

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

BRIEF OF THE AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the States.

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The American College of Tax Counsel (the "College") respectfully submits this brief as *amicus curiae* in support of Respondent United States.[1]

INTEREST OF THE *AMICUS CURIAE*

The College is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions, and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The purposes of the College are:

- To foster and recognize the excellence of its members and to elevate standards in the practice of the profession of tax law;
- To stimulate development of skills and knowledge through participation in continuing legal education programs and seminars;
- To provide additional mechanisms for input by tax professionals in development of tax laws and policy; and
- To facilitate scholarly discussion and examination of tax policy issues.

The College is composed of approximately 700 Fellows recognized for their outstanding reputations and contributions to the field of tax law and is governed by a Board

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a 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. Michael J. Desmond is an officer of the College, but he did not participate in drafting or review of this brief.

of Regents consisting of one Regent from each federal judicial circuit, two Regents at large, the Officers of the College, and the last retiring President of the College.

This amicus brief is submitted by the College's Board of Regents and does not necessarily reflect the views of all members of the College.

The College is particularly concerned with the impact that the outcome of the case may have on the U.S. taxation system in general and the effects on a large number of U.S. taxpayers, including individuals, small businesses, and large multi-national businesses. The outcome of the case could seriously disrupt the sound administration of tax laws and encourage challenges to well-established tax law, flooding the court system. The College submits this *amicus curiae* brief because it believes that the Court has the power to prevent this disruption by narrowly deciding this case on its merits without addressing the issue of whether the Sixteenth Amendment requires realization or attempting to define the contours of such requirement.

SUMMARY OF ARGUMENT

The Sixteenth Amendment grants Congress the power to impose income taxes without apportionment. The term "income" as understood at the time the Sixteenth Amendment was ratified was broad enough to allow the taxing of business income earned indirectly by a U.S. person through an entity. Furthermore, an originalist interpretation of the Sixteenth Amendment is consistent with the imposition of tax on shareholders of a foreign corporation with respect to undistributed corporate earnings not otherwise subject to U.S. federal income tax. While Congress has generally chosen to impose income tax on the business income earned through a corporation on the corporation itself, Congress has the authority to instead impose the tax on the shareholders of the

corporation. Indeed, it has at times elected to do that, particularly in situations like the one in the present case, where the corporation in question is not otherwise subject to U.S. income tax and there is a legitimate concern that the income would otherwise escape taxation.

The tax imposed under Section 965 of the Internal Revenue Code is an income tax. Section 965 of the Internal Revenue Code was enacted as part of an integrated statutory reform converting the U.S. system from its historical worldwide tax model to a territorial system. The earnings and profits subject to tax under Section 965 of the Internal Revenue Code had always been subject to U.S. federal income tax – Congress had merely decided to allow the tax to be deferred until the corporation made a distribution to its U.S. shareholders. Section 965 of the Internal Revenue Code simply ended the deferral.

Petitioners erroneously claim that Section 965 of the Internal Revenue Code is a direct tax on the ownership of property and not income. However, Section 965 of the Internal Revenue Code specifically targets corporate income and not any other attribute of stock, including mere ownership of stock, changes in the value of stock, or the ownership of any property.

Petitioners further claim that Section 965 of the Internal Revenue Code does not constitute a tax on income under the realization principles of *Eisner v. Macomber*. There is no doubt that the income in question in Petitioners' case was realized by an Indian corporation (KisanKraft) while Petitioners were a more than 10-percent shareholder of KisanKraft. Furthermore, *Macomber* dealt with a domestic corporation that was subject to U.S. income tax on its business income directly,

whereas Petitioners are shareholders in a foreign corporation that is not subject to the direct imposition of U.S. income tax on its business income.

This Court can narrowly uphold Section 965 of the Internal Revenue Code as imposing a tax on realized income of the foreign corporation. Such narrow finding will spare the Court from the very difficult question of whether realization is required under the Sixteenth Amendment and further having to define realization. An opinion from this Court in favor of Petitioners would not only invalidate Section 965 of the Internal Revenue Code, but the reasoning that would necessarily be entailed would generate challenges to a wide range of other provisions of the tax law, unduly burdening the courts with needless litigation.

ARGUMENT

I. THE CONTEMPORANEOUS USAGE OF "INCOME" IN THE SIXTEENTH AMENDMENT IS CONSISTENT WITH INDIRECTLY TAXING BUSINESS INCOME.

A. The Terms "Income" and "Gain" Were Broadly Defined at the Time the Sixteenth Amendment Was Ratified to Include Business Income Earned Indirectly by a U.S. Person Through an Entity.

The Sixteenth Amendment to the U.S. Constitution states that "Congress shall have power to lay and collect taxes on *incomes*, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."[2] The term "income" as understood at the time that the Sixteenth Amendment was proposed by the U.S. Congress (1909) and later ratified by the States (1913) was broad enough to allow the

[2] U.S. Const. amend. XVI (emphasis added).

taxing of business income earned indirectly by a U.S. person through an entity—whether that entity is a corporation, partnership or something else.[3]

Dictionaries in existence around 1913 clearly support that income at that time was commonly understood to include profits and gains from a business. Black's Law Dictionary of 1910 defined income as "[t]he return in money from one's business, labor, or capital invested; gains, profit, or private revenue"[4] and gain as "profits; winnings; increment of value."[5] Similarly, the Webster's Revised Unabridged Dictionary of 1913 defined income as "that gain which proceeds from labor, business, property, or capital of any kind"[6] and gain as "[t]hat which is gained, obtained, or acquired, as increase, profit, advantage, or benefit" and "[t]he obtaining or amassing of profit or valuable possessions; acquisition; accumulation."[7] Also, the Century Dictionary and Cyclopedia of 1899 defined income as "[t]hat which comes in to a person as payment for labor or services rendered in some office, or as gains from lands, business, the investment of capital, etc."[8] and gain as "[t]hat which is acquired or comes as a benefit; profit; advantage; opposed to loss."[9] Finally, the Dictionary of American and English Law (1883) defines income as "[g]ains, or private revenue, from business, labor, or the

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[3] *See* Robert E. More, *Stock Dividends as Income*, 16 Mich. L. Rev. 521 (1918); Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates & Gifts* § 1.2.4. (3d ed. rev. 2023).

[4] *Income*, *Black's Law Dictionary* 612 (2nd ed. 1910).

[5] *Gain*, *Black's Law Dictionary* 533 (2nd ed. 1910).

[6] *Income*, *Webster's Revised Unabridged Dictionary* (1913).

[7] *Gain*, *Webster's Revised Unabridged Dictionary* (1913).

[8] *Income*, *The Century Dictionary and Cyclopedia* 3040 (1899).

[9] *Gain*, *The Century Dictionary and Cyclopedia* 2429 (1899).

investment of property."[10] Each of these sources clearly reflect broad definitions of income, which plainly include profits and gains from a business. Moreover, none of these definitions make a distinction as to whether such business profits or gains are earned directly or indirectly through one's ownership in such a business. In fact, the Court has acknowledged that while it "is true that Congress cannot make a thing income which is not so in fact," Congress does have discretion to impose a tax on business income directly on the entity or indirectly on the owners of such entity.[11]

Contemporaneous tax scholars broadly defined income to include profits and gains from business, whether earned directly or through an entity. In his tax law treatise of 1876, Thomas Cooley defined income as "that which comes in and is received from any business or investment of capital . . . ."[12] Henry Campbell Black, author of Black's Law Dictionary, defined income in his tax treatise as "that gain which proceeds from labor, business, or capital of any kind[.]"[13]

All of these definitions are broad enough to encompass profits and gains from a business, including profits and gains earned indirectly through an entity. While Petitioners rely on the phrases "comes in" and "proceeds from" to claim that a shareholder must actually receive a dividend from a corporation before such shareholder can be taxed on income of the corporation, such reliance is misplaced:

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[10] *Income*, *Dictionary of American and English Law* 644 (1883).

[11] *Burk-Waggoner Oil Ass'n. v. Hopkins*, 269 U.S. 110, 114 (1925).

[12] Thomas M. Cooley, *A Treatise on the Law of Taxation Including the Law of Local Assessments* 160 n.1 (1876).

[13] Henry Campbell Black, *A Treatise on the Law of Income Taxation Under Federal and State Laws* 73 (1913).

none of these definitions require, or depend upon, direct physical receipt of money or property by a shareholder.

B. Statutes Enacted Around or Prior to the Ratification of the Sixteenth Amendment Imposed Taxes on Shareholder Income from Undistributed Earnings of a Corporation.

There is little discussion in the Congressional Record about the meaning of "income" when the language of the Sixteenth Amendment was being considered, proposed and finally approved by Congress.[14] Federal income taxes, however, had been imposed at various times by Congress since 1861. The various historical approaches to U.S. federal income taxation preceding the ratification of the Sixteenth Amendment should thus be considered strong evidence of the general concepts of "income" adopted by lawmakers and legal thinkers at the time—if a clear break from this historical approach was intended, presumably some discussion would appear or some indication would be present in the language of the Sixteenth Amendment itself.

Income tax statutes enacted since 1861 make it clear that a shareholder's share of the profits of a corporation was considered income of such shareholder.[15] Indeed,

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[14] The proposal of the Sixteenth Amendment and Congressional approval took place over various months in 1909. The Congressional Record shows various debates that took place on the legislative floor in connection with the language of the Amendment, but none of them focused on the definition of the term "income." *See* 44 Cong. Rec. 1351 (Apr. 15, 1909); 44 Cong. Rec. 3900 (Jun. 28, 1909); 44 Cong. Rec. 4108 (Jul. 5, 1909); 44 Cong. Rec. 4389 (Jul. 12, 1909).

[15] *See, e.g.*, Act of June 30, 1864, ch. 173, § 117, 13 Stat. 223, 281–82 ("[T]he gains and profits of all companies, whether incorporated or partnership, other than the companies specified in this section, shall be included in estimating the annual gains, profits, or income of any

Congress repeatedly imposed income taxes on the shareholder's share of the gains and profits of a corporation whether any of it had been distributed or not.[16] Even income tax statutes enacted shortly after the ratification of the Sixteenth Amendment show that lawmakers continued to believe that a shareholder's share of the profits of a corporation constituted income and could be taxed in the hands of the shareholders—although Congress did limit the circumstances as to when that would occur.[17]

Fundamentally, the Sixteenth Amendment permits Congress to tax all income. While, since enactment of the Income Tax Act of 1913, Congress has generally chosen to tax business income earned through a corporation to the corporation itself (rather than to its shareholders), many exceptions have been made over the years—Con-

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person entitled to the same, whether divided or otherwise."); Act of July 14, 1870, ch. 255, § 7, 16 Stat. 256, 257–58 ("[T]he share of any person of the gains or profits, whether divided or not, of all companies or partnerships, but not including the amount received from any corporations whose officers, as authorized by law, withhold and pay as taxes a per centum of the dividends made, and of interest or coupons paid by such corporations[.]").

[16] *Id.*

[17] *See, e.g.*, Tariff of 1913, ch. 16, § 2.A.2, 38 Stat. 114, 166 (imposing a tax on individuals that "formed or fraudulently availed of [the corporation] for the purpose of preventing the imposition of such tax through the medium of permitting such gains and profits to accumulate instead of being divided or distributed[.]"); Revenue Act of 1918, ch. 18, § 200, 40 Stat. 1057, 1058–59 (imposing tax on the shareholders of a personal service corporation).

gress has taxed shareholders directly on corporate income, particularly in cases in which the income is not subject to tax at the corporate level.[18]

Finally, it is critical to understand that at the time the Sixteenth Amendment was ratified, business activity was considered taxable generally—whether because it was income under the usual meaning of the term at the time (as explained above) or because it was considered an excise tax on profits. Specifically, prior to the ratification of the

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[18] *See, e.g.*, Tariff of 1913, § 2.A.1., 38 Stat. at 166 (taxing certain levels of accumulated corporate profits as if they were derived from a partnership); Revenue Act of 1918, § 230(a), 40 Stat. at 1075–76 (subjecting corporations that fraudulently accumulated earnings to the rules applicable to personal service corporations); I.R.C. §§ 531–532 (imposing an accumulated earnings tax on every corporation "formed or availed of for the purpose of avoiding the income tax with respect to its shareholders" by permitting profits to accumulate rather than dividing and distributing such profits to shareholders); *id.* § 541 (imposing tax on the undistributed income of a personal holding company); *id.* § 551 (including in the gross income of certain U.S. taxpayers the undistributed income of a foreign personal holding company (repealed by American Jobs Creation Act of 2004, § 413(a)(1), Pub. L. No. 108-357)); *id.* §§ 1291–1298 (imposing the payment of a deferral charge for the benefit of using tax-deferred funds).

Indeed, from time to time, various Congresses have considered legislation to integrate the corporate and individual income taxes, including methods that would tax shareholders on their share of corporate income in a manner virtually identical to the taxation of partners on their share of partnership income. *See, e.g.*, U.S. Dep't of the Treas., *Integration of the Individual and Corporate Tax Systems: Taxing Business Income Once* (1992); S. Fin. Comm., Republican Staff, *Comprehensive Tax Reform for 2015 and Beyond* (2014); S. Fin. Comm., *The Business Income Tax Bipartisan Tax Working Group Report* (2015). These proposals and studies demonstrated a widespread view that a corporation's income could constitutionally be taxed to the shareholders directly if no tax is imposed at the corporate level.

Sixteenth Amendment, this Court upheld the constitutionality of an unapportioned corporate income tax as an excise tax.[19]

II. SECTION 965 IMPOSES TAX ON DEFERRED BUSINESS INCOME, IT IS NOT A TAX ON PROPERTY OR ASSETS.

A. Background of Section 965.

The United States has, since the early days of the modern U.S. tax system, imposed federal income tax on the worldwide income of its citizens. The federal income tax was imposed on foreign earnings of a U.S. citizen, even earnings from ownership interests in foreign partnerships, and even if the citizen was a passive member of the partnership.[20] However, with respect to U.S. shareholders of foreign corporations, the United States generally adopted a much more advantageous structure—a deferral regime where the income of the foreign corporation would not be subject to U.S. federal income tax until the earnings were distributed or the stock sold.

This generous deferral regime eventually proved problematic, however, and in 1962 the Internal Revenue Code (the "Code") was amended to require immediate inclusion of certain earnings which became commonly known as Subpart F income. U.S. shareholders owning at least 10 percent of the stock of a "controlled foreign corporation" became subject to U.S. federal income tax on Subpart F income, which includes dividends, royalties, rents, and interest, as well as income from certain sales and services from transactions with related parties (and

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[19] *See Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911).

[20] *See, e.g.*, *Eder v. Commissioner*, 47 B.T.A. 235, 240 (1942) (citing *Heiner v. Mellon*, 304 U.S. 271, 271 (1942)).

certain other income). Such income was subject to U.S. tax when earned regardless of when and if those earnings are repatriated.[21]

Section 965[22] was enacted as part of an integrated statutory reform converting the U.S. system from its historical worldwide tax model to a territorial system, in which income earned outside the United States would be taxed in those jurisdictions and then subject to limited additional U.S. taxation, either currently or when repatriated.[23] Section 965 fulfilled two functions as part of this statutory reform. *First*, it ended the deferral of tax on certain previously-earned untaxed foreign income by requiring the previously-deferred amounts to be included in income and subject to tax, although at significantly lower rates. *Second*, ending the deferral on previously untaxed income raised much of the revenue needed to finance the conversion of the tax regime to a territorial system.

Congress could have chosen (as even Petitioners concede) to tax the income earned by a foreign corporation on a current basis. Instead, the statute permitted a deferral. Section 965 ended that deferral, thus resulting in tax being imposed in a different year on income that Congress clearly was authorized to subject to tax.

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[21] *See* I.R.C. §§ 951–964 (as of 2017 regarding the Subpart F regime in place before the enactment of the Tax Cuts and Jobs Act of 2017 or "TCJA").

[22] Unless otherwise indicated, all Section references herein are to the Internal Revenue Code of 1986, as amended.

[23] See I.R.C. §§ 951 to 965 for updated provisions of the Subpart F regime, which include § 951A (for the global intangible low-taxed income) and I.R.C. § 245A (allowing U.S. shareholders of a foreign corporation to deduct from their gross incomes dividends received based on all other categories of foreign earnings).

B. The Tax Under Section 965 Is Measured by Corporate Income and Not a Tax Based on Ownership of Property.

Section 965 specifically targets corporate *income* and not any other attribute of stock, including mere ownership of stock, changes in the value of stock, or the ownership of any property. As a threshold matter, Section 965 imposed a tax on a 10-percent shareholder's share of the "accumulated post-1986 deferred foreign income" of a foreign corporation either as of November 2, 2017 or December 31, 2017 (whichever was greater).[24] The "accumulated post-1986 deferred foreign income" was measured based on the post-1986 earnings and profits of the foreign corporation.[25] Earnings and profits are generally calculated based on the taxable income of the corporation, taking into account certain specified adjustments.[26] Petitioners contend that the Section 965 tax is a direct tax on the ownership of property, but this is not true. Section 965 actually imposes a tax on a deemed repatriation of accumulated earnings and profits, which is not correlated to the value or other attributes of stock.

While it is generally expected that the accumulated earnings and profits of a corporation will be reinvested into corporate assets, this does not necessarily correlate to an equivalent (or any) increase in stock value. Two sim-

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[24] I.R.C. § 965(a).

[25] *Id.* § 965(d).

[26] The term "earnings and profits" is not specifically defined in the Code; however, Treas. Reg. § 1.312-6(b) provides that "[a]mong the items entering into the computation of corporate earnings and profits for a particular period are . . . all items includible in gross income under section 61 . . . ."

ple examples demonstrate this point. Consider a hypothetical foreign corporation that has generated a large amount of income through its business operations and reinvested those earnings in assets that subsequently decline in value. While this would result in an income inclusion under Section 965 (due to the significant income generated by the foreign corporation), there would be little-to-no increase in the value of the corporation's stock (due to the decline in corporate assets). In contrast, consider a hypothetical foreign corporation that has generated no active business income and only owns a single asset—a raw tract of land, which skyrocketed in value. This scenario would result in no Section 965 inclusion (since the corporation had no income), yet there would be a substantial increase in the value of the stock (since the sole corporate asset has increased in value). The foregoing hypotheticals illustrate a concept that is critical to the *Moore* case—*i.e.*, Section 965 is tailored to impose a tax on corporate business *income.* The inherent fluctuations in value, appreciation/depreciation or other relevant attributes of the corporation, its stock, or its assets are simply not part of the calculation.

Although Petitioners make much of the fact that Section 965 permits the imposition of tax on income from a foreign corporation attributable to periods of time before a current shareholder held the stock, this is not inconsistent with or contrary to the original understanding of income or the *Macomber* decision. The concept of successor liability is a longstanding principle in the common law and was clearly present in the general legal understand-

ing at the time of the ratification of the Sixteenth Amendment.[27] A shareholder stepping into the shoes of a predecessor owner with respect to an existing or inherent income tax liability is not, in any logical or practical matter, different than being a successor to any other type of liability and is a common practice in the purchase of business entities. Contrary to Petitioners' assertion, succeeding to business and ownership liabilities from periods before ownership commences, or the risk of succeeding to such liabilities, is not a novel or inequitable concept.

Commentators (and some *amici* in support of Petitioners) have tried to draw a distinction between the taxation of *current* earnings of a foreign corporation, as provided under Subpart F, and the taxation of *accumulated* earnings of a foreign corporation, as provided under Section 965. These commentators claim that the taxation of *current* earnings may be appropriate under the Sixteenth Amendment because it rests on the attribution of the income realized by the foreign corporation to its shareholders. However, they claim, the taxation of *accumulated* earnings is inappropriate because that instead reflects unrealized amounts under *Macomber*.

Surely this distinction is not mandated by the Constitution. Consider the following: Taxpayer A, a U.S. shareholder owns 75 percent of controlled foreign Corporation X. In year 1, Corporation X generates $100 of current earnings. Under the commentators' (and *amici*'s) theory, it would be acceptable to tax Taxpayer A on the full $75 of current earnings allocated to Taxpayer A's ownership of Corporation X in year 1, but it would be unacceptable to

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[27] *See, e.g.*, *United States v. Union Pac. R. Co.*, 168 U.S. 505 (1897); *Gorham Mfg. Co. v. Wendell*, 261 U.S. 1 (1923); William W. Cook, *A Treatise on Stock and Stockholders, Bonds, Mortgages, and General Corporation Law* 49 (3d ed. 1894).

tax Taxpayer A on $37.50 in year 1 and $37.50 in year 2 because there is no realization in year 2. This argument is nonsensical, as realization took place in year 1 and Congress is simply choosing to defer taxation until year 2.

III. SECTION 965 IS CONSISTENT WITH *MACOMBER*.

Not surprisingly, Petitioners rely heavily on the seminal case of *Eisner v. Macomber* in their argument that Section 965 does not constitute a tax on income.[28] Contrary to Petitioners' argument, a finding that Section 965 is a tax on income would not be inconsistent with *Macomber*, based on a straightforward analysis of the context and language of *Macomber* and a correct understanding of Section 965.

In *Macomber*, the Standard Oil Company of California, a domestic corporation with substantial earnings, paid out a dividend to its shareholders solely in the form of common stock.[29] No change in economic position occurred, and no shareholder's interest in the corporation was altered.[30] The only consequence of the dividend was a mere internal accounting adjustment.[31] The Standard Oil Company—as a domestic corporation—had been accruing income over time and paying taxes on such income under the applicable income tax regime, and the only issue

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[28] *See* 252 U.S. 189 (1920).

[29] *Id.* at 200.

[30] *Id.* at 211.

[31] *Id.* The *Macomber* Court emphasized that Standard Oil's declaration to its shareholders of a half stock dividend "[d]id not alter the preexisting proportionate interest of any stockholder or increase the intrinsic value of his holding or of the aggregate holdings of the other stockholders as they stood before." *Id.*

was the timing of the *second* level of taxation on the shareholders of the Standard Oil Company with respect to the distribution of such income.[32]

In this context, the *Macomber* Court seemed particularly focused on the propriety of a second tax on corporate earnings triggered by a mere internal accounting adjustment, such as the pure stock dividend in question. This core concern of the Court in *Macomber* is reflected in the following passage from the majority opinion:

> We must treat the corporation as a substantial entity separate from the stockholder, not only because such is the practical fact but because it is only by recognizing such separateness that any dividend—even one paid in money or property—can be regarded as income of the stockholder. Did we regard corporation and stockholders as altogether identical, there would be no income except as the corporation acquired it; and while this would be taxable against the corporation as income under appropriate provisions of law, the individual stockholders could not be separately and additionally taxed with respect to their several shares even when divided, since if there were entire identity between them and the company they could not be regarded as receiving anything from it, any more than if one's money were to be removed from one pocket to another.[33]

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[32] *See id.*

[33] *Id.* at 195–96.

The foregoing quote plainly reflects the concern of the *Macomber* Court regarding the impropriety of a *second* tax on the same earnings of the Standard Oil Company in the absence of a trigger more substantial than a pure stock dividend that did not change anyone's economic position.

When examining the facts applicable to Petitioners in light of *Macomber*, one particular distinction jumps out as significant and obvious: Petitioners were stockholders of a *foreign* corporation whose income was not subject to tax while *Macomber* involved a domestic corporation whose income was already taxed by the United States. The issue in the present case is whether the indisputably realized business income of KisanKraft, a foreign corporation which had *no* income currently subject to U.S. federal income tax, may be taxed as allocated to the U.S. shareholders. *Macomber* concerned an entirely different kind of income, that which arises when a domestic corporation (already fully subject to U.S. income taxation) distributes property to its shareholders.

The enactment of Section 965 in connection with TCJA represents nothing more than the legislative decision to end the deferral of tax on the earnings of a foreign corporation such as KisanKraft—a tax that Petitioners would have had to pay on a current basis had they conducted the underlying business directly, or if KisanKraft had been a foreign *partnership* rather than a foreign corporation. Effectively, without a statute such as Section 965, significant U.S. shareholders of a foreign corporation would be able to choose whether and when (if ever) to pay U.S. tax on the income generated by the foreign corporation. While Congress could adopt a regime to forego or defer tax on business income of foreign corporations (and has done so, to some extent, in the past), surely such treatment is not mandated by the Constitution's limitations on Congress'

power to tax. Nor did *Macomber*, with its concerns of double taxation on previously taxed income and its focus on domestic corporations, create such a mandate.

IV. A RULING IN FAVOR OF THE MOORES COULD CAST INTO DOUBT THE VALIDITY OF MANY AREAS OF TAX LAW, INTRODUCE UNPRECEDENTED UNCERTAINTY, AND SPAWN MASSIVE LITIGATION.

As discussed above, the question of "realization" is simply not an issue here—KisanKraft indisputably realized income that was generated from its business operations in India. Petitioners concede that the U.S. shareholders' portion of such income may be subject to tax, and the only question is the timing of the recognition of that income, a matter in the discretion of Congress. The Court may uphold Section 965 on that straightforward basis. In contrast, an opinion from this Court in favor of Petitioners would not only invalidate Section 965, but the reasoning that would necessarily be entailed would generate challenges to a wide range of other provisions of the tax law, unduly burdening the courts with needless litigation.

This Court has recognized that actual receipt of income is not necessary to achieve realization and that "'income' may be realized by a variety of indirect means."[34] As Petitioners' brief itself recognizes, Subpart F,[35] Section 475(a), Section 1256, Section 817A, original issue discount,[36] Section 877A , Subchapters S[37] and K (addressing

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[34] *E.g.*, *Diedrich v. Commissioner*, 457 U.S. 191, 195 (1982).

[35] I.R.C. §§ 951–960.

[36] I.R.C. § 1272.

[37] I.R.C. §§ 1361–3179.

the taxation of partnerships and other flowthrough entities)[38] all trigger taxes on amounts that are not consistent with a strict and limited concept of realization, as in each case tax is imposed on amounts that do not necessarily relate directly to cash received or to assets sold or exchanged.[39] While Petitioners attempt to distinguish Section 965 from these other provisions, their distinctions are nonobvious, not particularly well-defined or convincing, and would result in near-endless arbitrary line-drawing by challengers raising opportunistic tax challenges. Furthermore, the Chamber of Commerce *amicus* brief in support of Petitioners emphasizes the importance of certainty and predictability in the tax law; yet a decision for Petitioners would produce unpredictability and chaos.[40]

Consider Subpart F. Petitioners try to distinguish Subpart F using the doctrine of constructive realization.[41] Under the doctrine of constructive realization, a taxpayer may be subject to tax on income that has not been received in cash—if a taxpayer has effectively received dominion and control over an amount of cash, then taxation can be triggered even prior to the actual receipt of the

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[38] I.R.C. §§ 701–771.

[39] Pet. Br. 47. There are additional areas that Petitioners did not mention that would also be implicated—for example, original issue discount (I.R.C. § 1272); GILTI (*id.* § 951A); branch profits tax (*id.* § 884); REMICs (*id.* §§ 860B, 860C); deferred compensation (*id.* § 409A); and others.

[40] Brief of *Amicus Curiae* The Chamber of Commerce of the United States of America in Support of Petitioners at 9 (Sept. 6, 2023).

[41] Pet. Br. 50.

cash.[42] The problem is that there is no particular or significant distinction between the types of income deemed included under Subpart F and the income included under Section 965. Petitioners point to a few features to try to differentiate Subpart F, such as the Subpart F tax being triggered by a foreign corporation earning investment (*i.e.*, fluid or easily mobile) income while controlled by a small number of domestic shareholders. But how would this analysis apply to a shareholder with a mere sliver over 10-percent ownership of a controlled foreign corporation with no control, influence, or other ability to control the activities of the corporation or whether any income is actually distributed (not at all unlike Petitioners' alleged situation with KisanKraft)?

Moreover, Petitioners focus on only a portion of Subpart F. Income inclusions can be triggered without anything *like* an investment in liquid or mobile income. Merely an investment in U.S. property can trigger an immediate income inclusion to a 10% shareholder of a foreign corporation, as can sales or services among related parties—hardly easily mobile income.[43] Post-2018, earning a sufficiently large amount of income in comparison to the tax basis of tangible property in a foreign corporation is sufficient to trigger tax inclusions (pursuant to the so-called "GILTI" rules of Section 951A).[44] How will the Court thread the needle between Section 965 and these particular aspects of Subpart F or GILTI? It may be pos-

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[42] *See, e.g.*, *Ross v. Commissioner*, 169 F.2d 483, 490 (1st Cir. 1948) ("The doctrine of constructive receipt treats as taxable income which is unqualifiedly subject to the demand of a taxpayer . . . whether or not such income has actually been received in cash.").

[43] I.R.C. §§ 954, 956.

[44] I.R.C. § 951A.

sible for Petitioners to come up with clever razor-thin differences and nitpicky nuances to explain why, maybe, some or all of the GILTI tax regime, or Section 956, or other aspects of Subpart F are consistent with their theory of realization while Section 965 remains outside the bounds of the Sixteenth Amendment. But these distinctions will not be compelling, and this Court will certainly see many clever challengers easily tearing apart such distinctions in multiple separate challenges to every aspect of the international tax anti-deferral regime the Code currently has in place.

Also consider Petitioners' attempt to differentiate the "mark-to-market" tax rules under Section 1256 with their proposed realization rule. Petitioners claim that Section 1256 is inconsistent with their rule on the basis that the taxpayer has a right to withdraw cash from their accounts on a daily basis, which amounts to realization even if the taxpayer chooses not to withdraw.[45] While owners of some regulated future contracts may have a right to withdraw cash, this is not *necessarily* true for all owners of any financial contracts that are subject to tax under Section 1256. Taxation under Section 1256 is simply not dependent on this requirement at all. And what happens if a financial instrument exists where a taxpayer has some limited ability to partially withdraw cash under certain conditions? Is marking this instrument to market constitutional, under Petitioners' arguments regarding most contracts under Section 1256, or unconstitutional, under the theory that there is insufficient realization (under Petitioners' arguments aimed at Section 965)? One can anticipate that there will be taxpayers strongly pushing a claim

[45] Pet. Br. 52.

that Section 1256 is unconstitutional under such a fact pattern—and that this Court will have to specifically address this.

Additionally, Petitioners try to distinguish the mark-to-market rules under Sections 475 and 817A on the basis that these are not taxes on income but excise taxes imposed on the privilege of doing business in a certain way.[46] But why couldn't this rationale apply to the tax under Section 965, as explained above in Section I of this brief? And how would this distinction apply in many other situations? Would Section 965 be constitutionally applicable to some taxpayers (such as taxpayers that are actually involved in the foreign corporation's underlying business)? The Federal Reporter will be filled with cases dealing with the myriad factual distinctions that this analysis would entail.

This is just the tip of the iceberg. Any definition of realization would need to thoroughly consider an enormous number of scenarios and contexts that are interwoven throughout the tax law.[47] For instance, any definitional endeavor would need to consider the application of the realization requirement to situations involving recapitalizations, preferred stock dividends, stock-versus-cash

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[46] *Id.* at 52–53.

[47] Although we note that this issue is not before the Court, we point out that the implications for state and local income taxation could be far-reaching as well, and counsel for a very narrow approach to the issues in the instant case. An opinion in favor of Petitioners could stimulate significant litigation in State courts to challenge the validity of state tax provisions that conform to the federal tax code. On the other hand, a broad decision by the Court upholding Section 965, could challenge the Due Process requirement that the income attributed to the taxing State be rationally related to values connected with a taxpayer's state of residence. *See N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Fam. Tr.*, 139 S. Ct. 2213 (2019).

elections and the exchange of property for substantially identical property. Consider two of the most oft-utilized transactional forms in the corporate and partnership contexts—transfers of property to corporations under Section 351(a) and contributions of property to partnerships under Section 721(a).[48] The commonly cited rationale for allowing nonrecognition in connection with a transfer of property to a corporation or partnership, respectively, is that the transaction does not close the transferor's economic interest with finality to justify recognizing gain/loss on the transferred property.[49] Attempting to define the realization requirement could raise questions as to whether there is a realization event in connection with one of these basic formative transfers.

A ruling in favor of Petitioners will thus spawn numerous significant and serious challenges to a wide variety of Code provisions with exposure to significant revenue loss.[50] As historical precedent, consider *Macomber* itself. Years after the *Macomber* decision (which involved a pure

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[48] Section 351(a) provides nonrecognition treatment in connection with the transfer of property to a corporation solely in exchange for stock of the transferee corporation if the transferor(s) control the corporation immediately after the contribution. Similarly, in the Subchapter K context, Section 721(a) provides nonrecognition treatment to partners and the partnership in connection with a partner's contribution of property to the partnership in exchange for an interest in the partnership.

[49] *See, e.g.*, Treas. Reg. § 1.1002-1(c) ("The underlying assumption of these exceptions is that the new property is substantially a continuation of the old investment still unliquidated; and, in the case of reorganizations, that the new enterprise, the new corporate structure, and the new property are substantially continuations of the old still unliquidated.").

[50] *See* J. Comm. on Tax'n Letter to Hon. Richard E. Neal (Oct. 3, 2023), *https://taxprof.typepad.com/files/jct-on-moore-1.pdf.*

stock dividend), taxpayers were employing the opinion to challenge the taxation of many transactions of limited comparability, ranging from stock dividends payable in a different class of stock,[51] basic recapitalizations,[52] and even the receipt of cash in a lawsuit.[53] Ultimately this Court had to resolve such disputes.

Furthermore, judicial decisions have resulted in unexpectedly broad applications and threatened the stability of the tax system to the point where courts have had to vacate the decisions. For example, in 2016, the D.C. Circuit held that a Code provision that imposed income tax on an emotional distress recovery was unconstitutional.[54] Scholars and practitioners quickly criticized the decision.[55] "If an emotional-distress recovery were not in-

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[51] *Koshland v. Helvering*, 298 U.S. 441 (1936); *Helvering v. Gowran*, 302 U.S. 238 (1937).

[52] *United States v. Phellis*, 257 U.S. 156 (1921); *Rockefeller v. United States*, 257 U.S. 176 (1921); *Marr v. United States*, 268 U.S. 536 (1925).

[53] *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955).

[54] *Murphy v. IRS*, 460 F.3d 79, 92 (D.C. Cir. 2006), *vacated and reinstated on appeal*, 493 F.3d 170 (D.C. Cir. 2007) (considering the exclusion of damages in the context of Section 104(a)(2) and concluding that "damages received solely in compensation for a personal injury are not income within the meaning of that term in the Sixteenth Amendment" before vacating and restating the lower court opinion on the grounds that Section 104(a)(2) was an excise tax).

[55] Paul L. Caron, *The Story of* Murphy*: A New Front in the War on the Income Tax*, Tax Stories 69 (2d ed. 2009).

come, then logically, it was argued, wages were not either."[56] Furthermore, legal analysts predicted that protesters would flood the court system to challenge the legitimacy of the income tax.[57] The pressure was enough that the D.C. Circuit vacated the decision, reheard the matter and reached the opposite conclusion (on different grounds).[58]

It may be true that some tax professionals would be delighted that the Court will now be much more deeply involved in interpreting the Code and forced to take many more tax cases to work out all of the various nuances applicable to a broad range of Code provisions. But the increased caseload that the federal courts would bear (and this Court itself would need to take up) will create great uncertainty in the administration of even routine aspects of the tax law.

V. THE COURT CAN PROPERLY UPHOLD SECTION 965 WITHOUT ADDRESSING THE CONSTITUTIONAL PARAMETERS OF YET-TO-BE-ENACTED WEALTH TAXES.

Although Petitioners assert that this case raises the specter of possible "wealth taxes," that issue is not before the Court.[59] This case does not involve a tax on the mere

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[56] Erik M. Jensen, Murphy v. Internal Revenue Service*, the Meaning of Income, and Sky-Is-Falling Tax Commentary*, 60 Case W. Rsrv. L. Rev. 751, 753 (2010).

[57] Allen Kenney, Murphy *a Boon for Protesters, Critics Say*, 112 Tax Notes 832 (2006); Sheryl Stratton, *Experts Ponder* Murphy *Decision's Many Flaws*, 112 Tax Notes 822 (2006).

[58] *Murphy v. IRS*, 493 F.3d 170 (D.C. Cir. 2007).

[59] *See, e.g.*, Brief of National Taxpayers Union Foundation as *Amicus Curiae* in Support of Neither Party at 8–11 (Sept. 6, 2023) (arguing that the Ninth Circuit got it wrong and that "a federal wealth tax would be unconstitutional"); Brief of *Amicus Curiae* Southern Policy

ownership of property but rather whether the Sixteenth Amendment provides a limitation on Congress' ability to impose tax on a U.S. shareholder's income earned indirectly through a foreign corporation when such income was not otherwise subject to U.S. federal income tax. There is therefore no need for the Court to address or consider the constitutional parameters of various taxes based on "wealth."

It is certainly the case that there have been recent proposals by members of Congress and others to enact some version of a wealth tax, but Congress has failed to enact any such proposals. Despite the current political climate and speculation regarding the possible application of the Court's decision in this case to the validity of wealth taxes, such taxes are not at issue and the Court can properly uphold Section 965 as constitutional without proactively weighing in on the constitutional parameters of wealth taxes.

The Court can correctly uphold the application of Section 965 to the facts of this case while being entirely consistent with *Macomber* and without issuing a ruling that prospectively upholds wealth taxes. For starters, and as emphasized above, there is no doubt that the foreign corporation at issue in *Moore* realized the income that is subject to U.S. federal income tax—*i.e.*, KisanKraft engaged

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Law Institute in Support of Petitioners at 1 (Sept. 5, 2023) (arguing that the Ninth Circuit's decision would lead to "accelerat[ing] the rise of an accretion tax system that taxes economic value and accrued wealth"); Brief *Amici Curiae* of The Manhattan Institute for Policy Research and Professors Erik M. Jensen and James W. Ely in Support of Petitioners at 3–4 (Sept. 6, 2023) (cautioning that "contorting the meaning of 'income' beyond recognition . . . opens the door to a federal taxation of wealth and property that would have been odious to the Founders and ratifiers of the Sixteenth Amendment alike").

in business activities in India and those efforts resulted in the corporation realizing income.[60] The only open questions are the timing of inclusion of the realized business income and the identity of the taxpayer(s) which must recognize the realized business income.

Beyond the clear satisfaction of a properly-conceived-of realization requirement, Section 965 is conceptually distinct from wealth taxes in important ways. Section 965 imposes tax on the accumulated and deferred income and earnings of an otherwise nontaxable foreign corporation, which is irrelevant to the constitutional propriety of a wealth tax that would apply to the mere ownership of an asset or the imposition of a tax based strictly on asset value (or some other attribute) determined without regard to underlying income. Petitioners' contention that the Section 965 tax is not a tax on income because it imposes tax based on "the ownership of specified property on a specific date" is without merit.[61] Section 965 does not tax the mere ownership of corporate stock, but rather targets the income earned by the foreign corporation that was not otherwise subject to tax.[62] This is made plain when considering that a U.S. shareholder of a foreign corporation that had no net earnings and profits would have no tax liability under Section 965.

An *actual* wealth tax could, in fact, raise many of the questions Petitioners raise here. Would an actual wealth tax really be said to be imposed on "income" within the meaning of the Sixteenth Amendment? Would an actual wealth tax be a "direct" tax under Article I, Section 2, clause 3 of the Constitution, subject to the apportionment

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[60] *See* Pet. Br. 11.

[61] *Id.* at 15.

[62] *See* Section II.B., *supra*.

requirement? These questions would likely turn on the specific details of the actual wealth tax before the Court, and it may be that such a wealth tax would in fact run afoul of the Constitution as being a direct tax that is not an income tax (and not apportioned amongst the States in accordance with population). But these are not the questions before the Court today.

CONCLUSION

For the foregoing reasons as well as the reasons set forth in the Brief for Respondent, the judgment of the Court of Appeals should be affirmed.

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Respectfully submitted,

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