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

BRIEF FOR AMICI CURIAE TAX LAW CENTER AT NYU LAW AND PROFESSORS ARI GLOGOWER, DAVID KAMIN, REBECCA KYSAR, AND DARIEN SHANSKE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The Tax Law Center at NYU Law is a nonpartisan, nonprofit center dedicated to improving the integrity of the federal tax system. Its staff includes tax-law experts with experience in tax lawmaking, administration, and litigation. Professors Ari Glogower, David Kamin, Rebecca Kysar, and Darien Shanske are leading experts of tax law and policy, with decades of combined experience practicing, researching, and teaching tax law, as well as serving in government. Amici submit this brief to offer their perspective on the implications of this case for the federal tax system, including the substantial threats to tax administration that would result from a ruling in favor of petitioners.

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amici curiae and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Nor does this brief purport to represent the views, if any, of New York University School of Law. In addition, unless otherwise noted, all internal quotation marks, citations, alterations, brackets, and ellipses have been omitted from quotations throughout this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners frame the question presented in this case (at i) as whether the Sixteenth Amendment authorizes Congress to tax "unrealized sums" as income. But the statute at issue here, the mandatory repatriation tax (or MRT), does not tax unrealized sums. It taxes income that has unquestionably been realized at the corporate level. So the real question presented is not whether Congress may tax income that has not been realized. It is instead whether Congress may attribute the income realized by a corporation to its shareholders, rather than to the corporation itself, and tax them based on their attributable shares of that realized income.

In arguing that the answer is no, petitioners rely primarily on a 5-4 decision from the early 20th century, *Eisner v. Macomber*, 252 U.S. 189 (1920). Petitioners read *Macomber* as standing for the broad proposition that Congress may tax shareholders on a company's profits only if the profits are actually distributed to them. But *Macomber* addressed the issuance of stock dividends by a corporation that had already been taxed on its income. It did not involve a scenario where, as here, the corporation's income had not yet been taxed when it was attributed to the shareholders. In the 103 years since the case was decided, this Court has never used *Macomber* to invalidate a tax outside of stock dividends. Quite the opposite: The Court has repeatedly refused to extend *Macomber*'s reasoning beyond the specific context of that case. And for many decades since it was decided, Congress has legislated based on the understanding that *Macomber* is limited to that context. Petitioners' theory of realization cannot be reconciled with this understanding and would

imperil numerous tax provisions that have long been on the books.

Even petitioners cannot bring themselves to embrace the implications of their reading of *Macomber*. At the very back of their brief (at 44–53), they attempt to distinguish the MRT from various longstanding federal income-tax provisions, including other provisions that (like the MRT) govern controlled foreign corporations (or CFCs); the taxation of partnerships, S corporations, and other pass-through entities; and certain accrual-based taxes. In doing so, petitioners try to reassure this Court that the MRT is the one and only tax provision that is invalid under their view of the Sixteenth Amendment. Pet'rs Br. 2.

But petitioners offer no principled way to harmonize their theory of realization and their reading of *Macomber* with these longstanding tax provisions. Nor do they offer any principled way to distinguish these provisions from the MRT for purposes of the Sixteenth Amendment. To the contrary, in attempting to square their theory with these provisions, petitioners end up acknowledging a key point (at 51): that realization is ultimately a "legislative determination" for Congress to make based on policy judgments, not a constitutional limitation on legislative power whose meaning is fixed by federal judges.

Unable to distinguish the MRT from well-established features of the tax system, petitioners end up retreating to an argument that the MRT reaches too far back in time. But Congress's decision to end the deferral of taxation on income realized over multiple years does not somehow transform the taxation of that income into something other than an income tax. The underlying tax base is still income because it reaches net gain. That it was realized over multiple years is irrelevant. Indeed, petitioners'

fallback argument has little to do with the Sixteenth Amendment and nothing to do with realization. Rather, it is a repurposed Fifth Amendment argument about retroactivity—and one that petitioners made below, rightly lost under well-established doctrine, and then abandoned. Thus, this alternative claim is not before the Court in this case. The Court should decide only the narrow issue before it: whether Congress may attribute income realized at the corporate level to the corporation's shareholders and impose a tax on that income. Relying on decades of judicial precedent and congressional action permitting the attribution of income among related parties, this Court should answer yes.

ARGUMENT

I. This Court has never extended *Macomber* beyond the stock-dividend context, and for many decades, Congress has legislated on the understanding that *Macomber* is limited to its facts.

Petitioners purport to offer this Court a simple rule (at 1): that the Sixteenth Amendment authorizes Congress to tax only income "realized by a taxpayer." And they say that this rule applies even where (as in the MRT) income has been realized by a corporate entity, and Congress has chosen to disregard that entity for tax purposes and to instead lay the tax upon the entity's shareholders.

To support their position, petitioners lean heavily on *Macomber*, where a bare majority of the Court invalidated Congress's attempt in 1916 to treat stock dividends as taxable income. But *Macomber* cannot bear the weight that petitioners place on it. As we explain, in the decades immediately following the decision, this Court repeatedly refused to extend *Macomber* beyond the context of stock dividends, effectively confining the decision to its facts.

And Congress took the cue: It enacted many important provisions of the modern tax code on the understanding that *Macomber* had been limited to its facts.

A. This Court has effectively cabined *Macomber* to its facts.

1. Start with *Macomber* itself. In 1916, Standard Oil announced a stock dividend whereby each shareholder would receive new shares in an amount equal to half their outstanding shares. 252 U.S. at 200. To issue the new stock, Standard Oil transferred profits from its surplus account to its capital stock account. These profits were taxed as income at the corporate level. The question in the case was whether the Sixteenth Amendment authorized Congress to impose a separate and subsequent tax on the stock dividends themselves, to be paid by their recipients.

The Court held that it did not. The Court took the view that the Sixteenth Amendment permits Congress to tax only income that is "severed from the capital" and "received" by a taxpayer for "his separate use"—not the "growth or increment of value in [an] investment" before a realization event. *Id.* at 207. The Court concluded that a stock dividend fell into this second category because it is "no more than a book adjustment." *Id.* at 210. It "does not alter the pre-existing proportionate interest of any stockholder," and "no part of the assets of the company is separated" and distributed to stockholders. *Id.* at 210–11. As a result, the Court held that a stock dividend is not "income" under the Sixteenth Amendment. *Id.* at 211.

In so holding, the Court made clear that it had "no doubt of the power or duty of a court to look through the form of the corporation" to decide whether a taxpayer has received income. *Id.* at 213. "But, looking through the form," the Court declined to regard "stockholders as

partners," and instead "treat[ed] the corporation as a substantial entity separate from the stockholder," for "it is only by recognizing such separateness" that Congress could tax both entities—the corporation, on its "income" in the first instance, and the stockholders, "separately and additionally" on their downstream dividends. *Id.* at 214.

Having made this observation, the *Macomber* Court then considered an alternative argument raised by the government: that the statute at issue should be construed so that the tax was imposed "not upon the stock dividend, but rather upon the stockholder's share of the undivided profits previously accumulated by the corporation." *Id.* at 217. The Court did not say how the statute could be read in this way. It simply opined that, "[i]f so construed," the statute would be unconstitutional because "what is called the stockholder's share in the accumulated profits of the company is capital, not income. As we have pointed out, a stockholder has no individual share in accumulated profits … prior to dividend declared." *Id.* at 217, 219.

Though broadly worded, these statements must be understood in the context in which they were made: where—unlike here—Congress had already taxed the corporation itself with respect to its realized income; and where Congress taxed a corporation's stock dividend to its shareholders, rather than directly attributing realized corporate-level income to the shareholders as the MRT does. The Court did not go so far as to hold that Congress could never look through the corporate form to attribute the income realized by a corporate entity to its

shareholders rather than to the entity itself, and to assess a tax based on their respective interests in the entity.[2]

2. Four Justices dissented. Justice Holmes, joined by Justice Day, contended that the majority had construed "income" too narrowly, rather than reading it in "a sense most obvious to the common understanding at the time of its adoption" seven years earlier. *Id.* at 219–20. "The known purpose of this Amendment," he explained, "was to get rid of nice questions" like these. *Id.* at 220. The Amendment was proposed for "public adoption" just a decade before, and Justice Holmes had no "doubt that most people not lawyers would suppose when they voted for it that they put a question like the present to rest." *Id.*

Justice Brandeis (joined by Justice Clarke) agreed with Justice Holmes that Congress had authority to tax cash dividends as income. He saw nothing "in the nature of [stock] dividends" that would justify a different result. *Id.* at 226. By imposing such a distinction, Justice Brandeis lamented, the Court was inviting "the owners of the most successful businesses in America" to "escape taxation on a large part of what is actually their income." *Id.* at 237. It was "inconceivable" to him that "such a result was intended by the people of the United States when adopting the Sixteenth Amendment." *Id.*

Justice Brandeis also addressed the government's alternative argument that Congress could "have taxed as income of the stockholder his pro rata share of [the] undistributed profits earned, even if no stock dividend

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[2] Nor would it have made sense at the time for this Court to so hold. In the Revenue Act of 1913—the very first revenue act passed after ratification of the Sixteenth Amendment—Congress looked through the corporate form to tax shareholders on excessive accumulations. Revenue Act of 1913, ch. 16, § 2(A), 38 Stat. 114, 166.

representing it had been paid." *Id.* at 230. In his view, the majority could not offer a principled distinction between corporations and partnerships as legal entities. *Id.* at 230–31. He elaborated on why: A "stockholder's interest in the property of the corporation differs, not fundamentally but in form only, from the interest of a partner in the property of the firm." *Id.* at 231. Even by 1920, "much authority" had established that a partnership "is just as distinct" an entity "as is a corporation." *Id.* Furthermore, Justice Brandeis could find nothing in the Sixteenth Amendment that would "limit[]" Congress to "the particular view of the relation of the stockholder to the corporation and its property which may, in the absence of legislation, have been taken by this court." *Id.* But, he concluded, the Court had "no occasion to decide the question whether Congress might have taxed to the stockholder his undivided share of the corporation's earnings" because that is not what Congress had done in the statute at issue in the case. *Id.*

3. The *Macomber* decision "was promptly and sharply criticized." *Helvering v. Griffiths*, 318 U.S. 371, 373 (1943). Even its defenders cautioned that the decision should not "be pressed to the extent of unduly hampering Congress," as when Congress "elects to adopt an entirely different theory of taxation and disregard entirely the corporate personality." Charles E. Clark, *Eisner v. Macomber and Some Income Tax Problems,* 29 Yale L. J. 735, 737 (1920) (noting that *Macomber* "does not settle" this point). And in the years that followed, *Macomber* was not in fact pressed to the extent of unduly hampering Congress. Far from it: This Court repeatedly limited *Macomber*'s reach, undercut its reasoning, and refused to apply the decision to invalidate the work of the people's representatives.

Only a year later, the Court revisited the definition of income in *United States v. Phellis*, 257 U.S. 156, 169 (1921). In an opinion written by Justice Pitney, the author of *Macomber*, the Court held that stock dividends received as part of a corporate reorganization qualified as income under *Macomber*. The Court reached this conclusion even though the corporation retained its same assets and the transaction had no effect on the market value of the stock interests, just as in *Macomber*. *Id.* at 167–68. The corporation had simply reincorporated in another state. Under a broad reading of *Macomber*, then, this change in form would have been insufficient to tax individual shareholders with respect to undistributed income realized and taxed at the corporate level. *See id.* at 176 (McReynolds, J., dissenting) (opining that *Macomber* was "in conflict" with the majority's decision because Congress had taxed a transaction that "produced no gain, no profit, and hence no income"). By authorizing the tax, the Court took a significant step back from *Macomber*.

The Court took another step back in *Koshland v. Helvering*, 298 U.S. 441 (1936). That case, like *Macomber*, considered whether a dividend of common stock was taxable as income. The Court distinguished *Macomber* on the grounds that the dividend in *Koshland* was issued to the holders of preferred stock—and not common stock, as was the case in *Macomber*. *Id.* at 445–46. So long as "a stock dividend gives the stockholder an interest different from that which his former stock holding represented," the Court explained, it "is taxable as income under the Sixteenth Amendment." *Id.* at 446. Only when a stock dividend is "precisely the same character," "work[s] no change in the corporate entity," and represents "the same interest in the same corporation" will it not qualify as income. *Id.* at 445. As the Court would later observe, that

unanimous holding gave *Macomber* "a narrow reading" and "in effect limited [it]." *Griffiths*, 318 U.S. at 375.

In 1940, two landmark cases "undermined further the original theoretical bases of … *Macomber*." *Id.* at 394. The first was *Helvering v. Bruun*, 309 U.S. 461 (1940). In that case, the Court held that a landowner realized taxable income when a building was abandoned on his land by a leaseholder—in other words, that the abandonment alone gave rise to taxable income in the amount of the building's value. *Id.* at 469. In doing so, the Court rejected the taxpayer's argument that, to constitute income under *Macomber*, "gain derived from capital must be something of exchangeable value proceeding from property, severed from the capital … and received by the recipient for his separate use, benefit, and disposal." *Id.* at 468. It explained that these "expressions" from *Macomber* were "used to clarify the distinction between an ordinary dividend and a stock dividend," and "are not controlling" outside "the case of a stock dividend." *Id.* at 468–69. Beyond that specific context, the Court clarified, "it is not necessary to recognition of taxable gain that [a taxpayer] should be able to sever the improvement begetting the gain from his original capital." *Id.* at 469; *Griffiths*, 318 U.S. at 393 (discussing *Bruun*).[3]

[3] Plucking out a sentence from the end of *Bruun*, petitioners seek to introduce a new standard for realization requiring an identifiable event or "transaction." *See* Pet'rs Br. 23 ("*Macomber*'s central holding [is] that Sixteenth Amendment 'income' requires 'realization of gain' through the 'exchange of property, payment of the taxpayer's indebtedness, relief from a liability, or other profit realized from the completion of a transaction.'"). But petitioners omit important words from the beginning of this sentence: "Gain *may occur* as a result of . . . ." *Bruun*, 309 U.S. at 469 (emphasis added). This passage was

The second landmark case was *Helvering v. Horst*, 311 U.S. 112 (1940). *Horst* considered whether Congress may tax a father on the income earned from bonds he had donated to his son—income that he himself did not receive. *Id.* at 114. The Court held that the son's income was still attributable and taxable to the father. Although the Court acknowledged that "the revenue laws" had long required some form of realization to constitute "taxable income," it explained that this realization requirement was ultimately "founded on administrative convenience." *Id.* at 115–16.

By 1942, there was so much doubt surrounding *Macomber*'s continuing authority as a precedent of this Court that the government asked that it be formally overruled. *Griffiths*, 318 U.S. at 394. Although the Court "observed that the question of the constitutional validity of [] *Macomber* is plainly one of the first magnitude," it was able to resolve the case on statutory grounds and thus had no occasion to reach that important question. *Id.* In dissent, three justices observed that *Macomber* was dying "a slow death" and "should be overruled." *Id.* at 404, 409 (Douglas, J., dissenting).

From that point on, many taxpayers stopped relying on *Macomber* as a basis for challenging income taxes. But occasionally, the decision resurfaced. In 1955, for example, the recipient of an antitrust treble damages award argued that the award could not be taxed under *Macomber*'s definition of income ("the gain derived from capital, from labor, or from both combined"). *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 430 (1955). This Court disagreed.

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meant to illustrate the wide range of circumstances in which realization may occur—not to introduce a new prerequisite for realization.

It explained that the *Macomber* Court had "endeavor[ed] to determine whether the distribution of a corporate stock dividend constituted a realized gain to the shareholder," and that "the definition served a useful purpose" in "that context." *Id.* at 430–31. But, citing to *Bruun*, the Court again stated that *Macomber* was limited to its facts and that "it was not meant to provide a touchstone to all future gross income questions." *Id.* at 431.[4]

Finally, the Court once again revisited the definition of realization in 1991, this time in interpreting the term "amount realized" in 26 U.S.C. § 1001(a). *See Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 559 (1991). The Court considered whether an exchange of mortgages designed to be "substantially identical" economic interests was a "disposition of property" triggering taxation. *Id.* at 557–59. After confirming *Horst*'s recognition that realization is a rule of "administrative convenience," the Court defined realization for statutory purposes as requiring only the slightest difference in "legal entitlements that are different in kind or extent." *Id.* at 559, 565. That understanding of realization is consistent with cases like *Phellis* and *Koshland*, but not with *Macomber*'s requirement that a taxpayer receive a gain for his "separate use and benefit." 252 U.S. at 194.

[4] As petitioners note (at 24), this Court in *Glenshaw Glass* also observed: "Here we have instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." 348 U.S. at 431. But while these criteria are *sufficient* for Congress to impose the tax, the Court never suggested that they were *necessary*.

B. For decades, Congress has legislated on the shared interbranch understanding that *Macomber* is limited to its facts and does not prohibit pass-through or accrual taxation.

In the years before *Macomber*, Congress had written a number of provisions that taxed owners on income earned at the entity level for corporations and partnerships. *See, e.g.*, Revenue Act of 1913, ch. 16, § 2(A)(2), 38 Stat. 114, 166 (taxing shareholders on excessively accumulated earnings of a corporation, if to avoid income tax); § 2(D), 38 Stat. at 169 (taxation of partners on undistributed earnings). That tradition continued despite *Macomber*. Indeed, as this Court narrowed *Macomber* to its facts, Congress enacted new tax regimes that are incompatible with petitioners' reading of *Macomber*. *See Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) ("Long settled and established practice may have great weight in a proper interpretation of constitutional provisions."); *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (examining legal materials "through the end of the 19th century" to "determine the public understanding" of the Second Amendment in the decades "after its enactment or ratification").

1. In 1954, for example, Congress enacted subchapter K. Like the preexisting partnership tax regime, which dated to the first post-ratification income tax, subchapter K looks through the partnerships to tax partners on their share of income that is realized but not distributed by the entity.

This regime is well accepted. Today, it "is axiomatic that each partner must pay taxes on his distributive share of the partnership's income without regard to whether that amount is actually distributed to him." *United States*

v. Basye, 410 U.S. 441, 453 (1973); *see United States v. Woods*, 571 U.S. 31, 38 (2013) ("A partnership does not pay federal income taxes; instead, its taxable income and losses pass through to the partners," who "report their distributive shares of the partnership's tax items on their own individual returns."); *see also Burnet v. Leininger*, 285 U.S. 136, 142 (1932) (approving of the preexisting partnership regime). That the partnership's income "may not be currently distributable, whether by agreement of the parties or by operation of law, is not material." *Basye*, 410 U.S. at 454.[5]

Four years later, in 1958, Congress built upon the pass-through model for partnerships in enacting subchapter S. Subchapter S seeks "to eliminate tax disadvantages that might dissuade small businesses from adopting the corporate form and to lessen the tax burden on such businesses." *Bufferd v. Comm'r*, 506 U.S. 523, 524–25 (1993). It "accomplishes these goals by means of a pass-through system under which corporate income, losses, deductions, and credits are attributed to individual shareholders in a manner akin to the tax treatment of partnerships." *Id.* at 525. Whereas corporations generally pay taxes on their income and shareholders pay additional taxes on their dividends and capital gains, "S corporations permit shareholders to elect a 'pass-through' taxation system under which income is subjected to only one level of taxation." *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542, 546 n.1 (2015). For an S Corporation,

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[5] Subchapter K now covers other entities that have developed over time. For example, the subchapter also applies to Limited Liability Companies (or LLCs), which (like corporations) are separate legal entities from their shareholders and provide their shareholders with a liability shield. Rev. Rul. 88-76, 1988-2 C.B. 360 (1988).

"the corporation's profits pass through directly to its shareholders on a pro rata basis and are reported on the shareholders' individual tax returns." *Id.* And like partnerships, it does not matter whether the S Corporation's profits are distributed to the owners.

Soon thereafter, in 1962, Congress enacted subpart F. The regime seeks to prevent corporations from avoiding U.S. taxation of their global income by shifting certain forms of income to foreign subsidiaries. To accomplish this objective, subpart F looks through the corporate form to tax U.S. shareholders who own at least 10% of a CFC (defined as a foreign corporation that is more than 50% owned by 10% U.S. shareholders) on their pro rata share of certain forms of income earned by the CFC, and it does so even if that income has not been distributed to shareholders. Congress "legislatively determined" that this degree of control was sufficient to "bypass[] the corporate entity in determining the inciden[ce] of income taxation." *Whitlock's Estate v. Comm'r*, 59 T.C. 490, 507 (1972), *aff'd in part*, 494 F.2d 1297, 1301 (10th Cir. 1974), *cert. denied*, 419 U.S. 839 (1974), *reh'g denied*, 419 U.S. 1041 (1974). And in making the choice to look through their form, Congress generally does not tax CFCs at the entity level.

The MRT is closely related to subpart F, and is in fact embedded within this preexisting look-through system. Its enactment reflected the failure of subpart F and other parts of the international regime to sufficiently regulate the shifting of profits abroad to avoid U.S. income tax. Although the MRT applied to different forms of realized income than the income reached by subpart F, it used a similar mechanism to tax U.S. shareholders of CFCs:

looking through the entity to tax shareholders on the corporation's realized but undistributed income.[6]

In addition to the MRT, the 2017 tax law also introduced GILTI (short for Global Intangible Low-Taxed Income). GILTI establishes a minimum income tax rate on foreign profits to help address the challenge of profit-shifting to foreign jurisdictions. 26 U.S.C. § 951A; *see also, e.g.*, Cong. Budget Off., *The Budget and Economic Outlook: 2018 to 2028*, at 109 (2018), https://perma.cc/9Y39-TSB3; Letter from Thomas A. Barthold to the Honorable Kevin Brady and the Honorable Richard Neal, Joint Comm. on Tax'n (Aug. 31, 2016), https://perma.cc/RF48-3EVC (describing the extent of profit-shifting before 2017). Whereas the MRT looks backward, applying to previously realized income for which taxation had been deferred, GILTI looks forward, applying to income realized in subsequent years. As a result, pass-through taxation for corporations has now been embedded as one of the basic building blocks of the current system of international taxation. Like subpart F and the MRT, GILTI taxes the 10% U.S. shareholders of CFCs on income realized at the corporate level.

2. In legislating on the understanding that *Macomber* has been limited to its facts, Congress has done more than simply look through the corporate form and attribute corporate income to shareholders. It has also found that

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[6] Petitioners are U.S. shareholders of a CFC. We note, however, that the MRT also extends to 10% U.S. shareholders of any foreign corporation that has at least one domestic corporation as a 10% U.S. shareholder. 26 U.S.C. § 965(e)(1)(B). Though not implicated here, Congress's determination to look through the corporate entity in this scenario represents yet another way in which Congress has embedded different concepts of realization in different parts of the tax code. This brief evaluates the MRT as it applies to petitioners' CFC.

the accrual of income can itself be sufficient to treat the income as realized for tax purposes. Indeed, Congress has enacted accrual income taxation—that is, taxation based on the rise or fall in the value of an asset during a given period of time, without any further severance of the income from the capital—several times, largely in response to tax loopholes.

For instance, in 1969, Congress enacted provisions that impute and tax income annually to investors who purchase a debt instrument at a discount relative to its face value (known as original issue discount). Tax Reform Act of 1969, Pub. L. No. 91-172, § 413, 83 Stat. 609-12. These investors earn a return on their investment by eventually receiving the higher face value (rather than receiving annual interest payments during the life of the instrument). Congress's original-issue-discount provisions, however, prevent debtholders from being able to freely select when income is taxed—and thus from being able to effectively reduce their tax liability by deferring taxation and benefiting from the time value of money. The provisions were subsequently modified and expanded. Deficit Reduction Act of 1984, Pub. L. No. 98-369, §§ 41-44, 128, 98 Stat. 494, 531-562, 653-55.

In 1981, shortly after Congress first enacted the original-issue-discount provisions, Congress enacted section 1256 to address a different form of tax abuse: the problem of "futures" contracts that were regularly revalued, which in turn gave the taxpayer the ability to liquidate the position into cash. In effect, this instrument allowed taxpayers to convert gain on short-term trading, which would be taxed at higher ordinary rates, to long-term capital gain, which is taxed at preferential rates. Joint Comm. on Tax'n, 97th Cong., 1st Sess., General

Explanation of the Economic Recovery Tax Act of 1981, 294-95 (1981). Congress responded with section 1256, which provides for mark-to-market—or annual taxation based on the changes in market value—for these kinds of futures contracts. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 503(a), 95 Stat. 172, 327 (codified at 26 U.S.C. § 1256). Congress later expanded the rules in 1984 to cover other kinds of positions as well, such as foreign currency contracts. Pub. L. No. 98-369, § 102, 98 Stat. 620-27 (1984) (codified at 26 U.S.C. § 1256(b)). And, in 1993, Congress imposed mandatory mark-to-market accounting for securities dealers, requiring them to report gain and loss on their portfolios based on the annual change in market value. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13223(a), 107 Stat. 312, 481 (codified at 26 U.S.C. § 475(a)).

Under both the original-issue-discount and mark-to-market rules, then, Congress considers income taxable even when the investor does not sell or otherwise dispose of the investment. These decades-old provisions thus provide further evidence that *Macomber*'s core reasoning—that taxable income must be "severed" from capital and "received" by the taxpayer for "his separate use," 252 U.S. at 207—does not apply outside of stock dividends.

II. Petitioners offer no principled way to distinguish the MRT from other tax provisions for the purposes of the Sixteenth Amendment.

Petitioners do not contend that any of these pre-2017 laws—subpart F, subchapters K and S, and the provision for mark-to-market of certain investments—are unconstitutional. Rather, they concede that these laws are at least "facially valid" and argue that the MRT is the

"one" and only time since *Macomber* that Congress has violated the Sixteenth Amendment. Pet'rs Br. 2, 53; *see also id.* at 37 ("From the aftermath of *Macomber* until enactment of the MRT, Congress consistently observed the need for realization of taxable income."). But petitioners provide no coherent basis on which the Court could draw that distinction.[7]

A. Petitioners' only theories for distinguishing the MRT from subpart F do not offer any basis for treating the two regimes differently under the Sixteenth Amendment.

Petitioners offer two theories for distinguishing the MRT from subpart F under the Sixteenth Amendment: (1) that the MRT is a tax on property, whereas subpart F is a tax on income; and (2) that under the MRT, taxpayers lack sufficient control over the CFC's forms of taxable income for its income to be attributed to them. Neither proposed distinction withstands scrutiny.

1. The MRT is a tax on income, not property.

Petitioners first contend (at 44–47) that the MRT taxes property because it taxes the corporation's owners as of a specified date, covers income realized by the corporation in previous years, and uses a different rate based on the corporation's underlying investments. Each of these features, however, is common in our tax system, and is consistent with the MRT being a tax on income.

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[7] Although this Court has never addressed the constitutionality of subpart F, lower courts have universally upheld the statute. *See Garlock Inc. v. Comm'r*, 489 F.2d 197, 202–03 (2d Cir. 1973), *cert denied*, 417 U.S. 911 (1974); *Whitlock's Estate*, 59 T.C. at 509–10 & n.21; *Dougherty v. Comm'r*, 60 T.C. 917, 928–30 (1973).

Whenever the tax code elects to look through business entities, the allocation of income to its owners necessarily looks to ownership shares as of a specific date. Ownership as of that date will trigger a tax liability regardless of whether the owner actually owned their shares when the entity earned the income. *See Phellis*, 257 U.S. at 172 ("Whether a dividend made out of company profits constitutes income of the stockholder is not affected by antecedent transfers of the stock from hand to hand."); *Taft v. Bowers*, 278 U.S. 470, 484 (1929) ("There is nothing in the Constitution which lends support to the theory that gain actually resulting from the increased value of capital can be treated as taxable income in the hands of the recipient only so far as the increase occurred while he owned the property."). Basing an income tax on ownership shares as of a particular date simply determines who is responsible for paying the income tax. It doesn't mean that Congress is taxing something other than income.

Petitioners also suggest (at 51) that taxing income realized in previous years as opposed to the current year somehow transforms the MRT into something other than a tax on income. But Congress defines the accounting period over which changes in financial status are measured and taxed, and it is not uncommon for Congress to tax a shareholder on income accrued by a corporation in prior years. *See, e.g.*, 26 U.S.C. §§ 301(c), 316. Congress's decision to allow shareholders to defer taxation on certain corporate foreign income does not change the fact that the underlying tax base is still income within the meaning of the Sixteenth Amendment. A contrary view would not only lack support in the constitutional text and historical tradition but would perversely suggest that whenever Congress chooses to allow the deferral of realized income in an act of legislative

grace, it relinquishes its ability under the Constitution to ever tax that income in the future. Were this Court to impose such an odd and atextual rule, it might only compel Congress to tax all income as quickly as possible.

More fundamentally, though, petitioners' timing concerns have nothing to do with realization and *Macomber*. According to the petitioners, if Congress had taxed only corporate income accrued in 2017, they would have less quarrel. It is because Congress went back thirty years in taxing income that it apparently ran afoul of constitutional limitations. But the time period and assessment date do not implicate realization. Rather, petitioners are instead trying to raise a different issue—the issue of retroactivity and whether Congress can change the treatment of previously deferred income. But retroactivity implicates an entirely different constitutional argument—a due-process argument under the Fifth Amendment—that petitioners pressed below, rightly lost, and abandoned in this Court. Having done so, they may not now try to smuggle in the same argument through the backdoor, claiming that it is a Sixteenth Amendment problem when it is not.

Petitioners' reliance on the MRT's rate structure (at 46–47) fails for similar reasons. The MRT is a tax on income in the classic sense because the taxable base is calculated by reference to the income earned by the corporation. Congress's decision to apply different tax rates to income earned from different types of property does not change the fact that income is being taxed—not property. Nor does the rate structure of a tax alter the character of the tax, or turn a constitutional tax into an unconstitutional one. *See Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 24 (1916) (finding that differential tax rates

do not render a tax a "confiscation of property" under the Fifth Amendment). Simply put, the Sixteenth Amendment does not mandate a uniform rate structure.

Indeed, Congress similarly taxes different forms of income, such as labor and capital income, at different rates. 26 U.S.C. § 1. Following petitioner's argument to its logical conclusion would mean that the preferential capital gains rate somehow recategorizes the capital gains tax from a tax on income to a tax on property. That cannot be correct. Instead, the bifurcated rate structure in the MRT was simply meant to address the liquidity concerns of taxpayers, by taxing earnings held in illiquid assets at a lower rate than liquid assets. *See* Christopher H. Hanna, *Moore, the Sixteenth Amendment, and the Underpinnings of the TCJA's Deemed Repatriation Provision* 6-7 (SMU Dedman School of Law Legal Stud. Rsch. Paper No. 622, 2023), https://perma.cc/6APW-3ULZ.

2. The Constitution does not require a degree of shareholder control or mobility of income before Congress can look through the entity.

Petitioners also seek to distinguish subpart F from the MRT by pointing to shareholder control. But there is no constitutional requirement that owners of a business entity "control" income before Congress can look through the entity to tax them on realized income. Thus, Congress is within its power to determine that 10% ownership constitutes "control" sufficient for current taxation, a threshold that petitioners here meet.

Nor does the degree to which a certain form of income is "mobile" matter. *Contra* Pet'rs Br. 45–46. The Sixteenth Amendment explicitly grants Congress the power to tax income "from whatever source derived," so the specific

type of income taxed is irrelevant to the analysis. Moreover, in arguing that U.S. shareholders have control over subpart F income but not MRT income, petitioners emphasize that subpart F applies only to categories of "movable income." Pet'rs Br. at 49. Subpart F, however, applies to other categories of income too, such as illegal bribes and kickbacks or income derived from sanctioned countries. 26 U.S.C. § 952(a)(4); U.S. Br. 28.

B. Petitioners' attempts to distinguish the MRT from partnerships, S corporations, and accrual taxes dissolve upon inspection.

Subpart F isn't the only problem for petitioners. They also must provide a plausible basis for distinguishing the MRT from other pass-through regimes like partnerships and S corporations, and from other taxes involving flexible concepts of realization, like certain accrual taxes. Petitioners do not come close to doing so.

Partnerships. Petitioners offer just one argument for why partnerships are different: "Partners are taxed on general partnership income," they say (at 51), "because it is *their* income, partnerships having no existence separate from their partners." That statement was dubious even in 1920, when *Macomber* was decided. *See Macomber*, 252 U.S. at 231 (Brandeis, J., dissenting); *see also New England Herald Dev. Grp. v. Town of Falmouth*, 521 A.2d 693, 697 (Me. 1987) (explaining that, by 1914, drafters of the Uniform Partnership Act divided over whether the Act should override the common-law "aggregate[]" doctrine, which did not distinguish between a partnership and its partners). Perhaps that is why petitioners' lead case on the point (at 41) is from 1852.

But today, the argument is plainly wrong. The Uniform Partnership Act of 1997 (which has been adopted

by 45 out of 53 tracked states, districts, and territories) endorsed the concept that a partnership is a distinct entity from its partners, despite retaining vestiges, including joint and several liability, from the common-law doctrine. Uniform Partnership Act §§ 201, 203 (1997), https://perma.cc/B3JQ-C8D6. Moreover, as the legal status of partnerships has evolved, entirely new business forms have developed that are taxed through subchapter K of the code—most notably LLCs, which first arose in the 1970s. LLCs shield members from liability in the same manner that corporations do and are, similarly, legally distinct from their members. For tax purposes, however, undistributed income realized by an LLC is passed through and taxed to its owners.

Petitioners also claim (at 42) that any "state law or contractual arrangement" that restricts "partners' use of their partnership income does not alter the fact that they realized it." But if petitioners are right about the distinction between corporations and partnerships, state law must matter. Domestic corporations are themselves products of state law and contractual arrangements that restrict shareholders' use of the business's income and shield shareholders from liability. It is unclear how the petitioners' principles could distinguish LLCs from other corporations, and therefore explain why Congress can look through the income of the former but not the latter. In short, petitioners make no attempt to reconcile their position with the modern understanding of partnerships and other business forms.

S Corporations. Petitioners have even less to say about S Corporations. The most they can muster is that an S Corporation's owners "unanimously elect to be taxed on the business's income, 26 U.S.C. § 1362(a)(2), thereby

conceding that its income is theirs." Pet'rs Br. 51. But if Congress lacks the power to impose a tax, taxpayer consent may not change that. Article I and the Sixteenth Amendment define Congress's taxing powers, and nowhere do they grant taxpayers the ability to expand those powers simply by operation of their consent.

Accrual-based taxes. Petitioners do not address the impact of a decision on the original-issue-discount rules. On the treatment of regulated futures and other contracts subject to mark-to-market, they argue (at 52-53) that the income, unlike the income here, is realized—despite lacking a sale or disposition—because the investments can be converted into cash with ease. *See* Pet'rs Br. 53. But their understanding of realization does not comport with the understanding petitioners draw from *Macomber*, since the transactions involve no severance of income from the property. That they can often be easily converted into cash is not a distinguishing factor under *Macomber*. *See* Letter from Thomas A. Barthold to the Honorable Kevin Brady and the Honorable Richard Neal (suggesting petitioners' theories could "call into question the constitutionality of" accrual-based tax provisions). Rather, the ease of conversion is a factor that Congress considered in deciding when it was "administratively convenient" to tax gains and losses, absent a sale or disposition, to address abuse and measure income accurately. General Explanation of the Economic Recovery Tax Act of 1981, H.R. 4242, 97th Cong. 295 (1981).

III. In attempting to limit the consequences of their position, petitioners implicitly concede that *Macomber* does not control and that applying *Macomber* broadly would undermine the tax system.

Petitioners' concessions as to the validity of other tax statutes are doubly revealing. They show, first, that petitioners are unable to identify a principled way to rule in their favor without threatening these longstanding laws. But more than that, these concessions make plain that, even under petitioners' theory, this case is not controlled by *Macomber*.

Petitioners' argument under *Macomber* is that the Sixteenth Amendment requires taxpayer realization. By the end of their brief, however, petitioners concede that (1) realization has no fixed meaning, and (2) Congress may look through the corporate form and attribute realized corporate income to a corporation's shareholders in taxing that income. These are "legislative determination[s]" to which "the Court has historically deferred." Pet'rs Br. 51.

Then, petitioners' main fallback has nothing to do with realization or *Macomber* but instead is about the number of years of deferred income which Congress chooses to tax. But that argument fails too. *See* Part II.A.1.

Ultimately, petitioners' unintelligible theory of the Sixteenth Amendment's income requirement illustrates the danger of this Court building upon *Macomber* and attempting to define realization across the board for constitutional purposes. Because there is not a fixed definition of realization—in either the Internal Revenue Code or this Court's precedents—if the Court applies *Macomber* broadly or articulates another, new constitutional boundary on realization, it would generate substantial uncertainty as to the ongoing validity of a

number of existing income tax provisions, *see* Letter from Thomas A. Barthold to the Honorable Kevin Brady and the Honorable Richard Neal, produce a wave of litigation, and put at risk Congress's capacity to raise revenue to finance government activity. *See* Daniel Bunn *et al.*, Tax Found., *How the Moore Supreme Court Case Could Reshape Taxation of Unrealized Income* (Aug. 30, 2023), https://perma.cc/XR8D-K87P; Eric Toder, Tax Pol'y Ctr., Urb. Inst. & Brookings Inst., *The Potential Economic Consequences of Disallowing the Taxation of Unrealized Income* (Oct. 10, 2023), https://perma.cc/V3FN-H2NX.

IV. Because this case can be decided by attributing the corporation's income to its shareholders, this Court should not go any further.

Before closing, we emphasize again that this Court need not decide whether and to what extent the Sixteenth Amendment incorporates a realization requirement. As we have shown, and as the government's brief powerfully demonstrates, there is little doubt that Congress may look through the corporate form and attribute a corporation's realized, undistributed earnings directly to its owners. That is exactly what Congress did here: It taxed petitioners on KisanKraft's undisputedly realized income. So rather than tackling thorny questions that might implicate potential future hypothetical laws and many provisions in the current tax code, this Court need only hold that Congress may attribute income earned by an entity to the entity's owners, as Congress has done time and time again.

And because this Court need not decide more than that, it should not decide more than that. The fundamental principle of judicial restraint counsels that courts should neither "anticipate a question of constitutional law in

advance of the necessity of deciding it," nor "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring); *see also PDK Laboratories, Inc. v. U.S. Drug Enf't Agency*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) ("The cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further."). Accordingly, this Court should "avoid premature and unnecessary pronouncement[s] on constitutional issues," *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1585 (2020) (Thomas, J., concurring), and hold that the MRT falls squarely within Congress's power to tax an entity's owners with respect to the entity's undistributed but realized income.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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