No. 22-9

In the Supreme Court of the United States

WHIRLPOOL FINANCIAL CORPORATION
& CONSOLIDATED SUBSIDIARIES, ET AL.,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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

AMICUS CURIAE BRIEF OF SILICON VALLEY TAX DIRECTORS GROUP, NATIONAL FOREIGN TRADE COUNCIL, INFORMATION TECHNOLOGY INDUSTRY COUNCIL, AND TECHNET IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the divided Sixth Circuit properly held—in conflict with precedent of this Court and settled administrative-law principles—that a statute that is conditioned on regulations delineating its reach may be enforced without regard to those regulations?

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INTEREST OF *AMICI CURIAE*[1]

Amici members include thousands of corporations primarily based in the United States with an aggregate market capitalization of over $10 trillion. Among them are many Fortune 500 companies and together *amici* members form a large portion of the U.S. economy. As multinational corporations, *amici* members have numerous international subsidiaries and in the regular course of business annually conduct billions of dollars of inter-company and third-party sales transactions potentially subject to 26 U.S.C. § 954(d)(2).

Because of their large international presence and their regular participation in these transactions, *amici* members have relied on Treasury's detailed regulations implementing § 954(d)(2) for almost 60 years. Based on these comprehensive regulations, *amici* members have chosen where and how to conduct their foreign supply chain operations. *Amici* member companies have also spent significant amounts of money and time conforming their manufacturing supply chains with new implementing regulations from 2008.

The Sixth Circuit majority's surprising decision to ignore those regulations in its opinion could have se-

[1] Pursuant to Rule 37.2, counsel of record for Petitioners and Respondent were timely notified of *amici*'s intent to file this brief. Counsel for Petitioners and Respondent provided *amici* with written consent. Pursuant to Rule 37.6, counsel for *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief and that no person other than *amici* and their counsel made such a monetary contribution.

vere adverse consequences for *amici* members and result in billions of dollars of unexpected tax liability. Despite their relevance to the dispute, the Sixth Circuit here chose to ignore the Treasury regulations implementing § 954(d)(2) and decide Whirlpool's tax liability based on the statutory provision alone—as if it did not explicitly incorporate Treasury's implementing regulations. The Sixth Circuit's decision to ignore the regulations upsets *amici* members' settled expectations and calls into question the extensive resources they have used to plan their operations in compliance with the regulations. *Amici* respectfully ask this Court to grant certiorari and reverse the erroneous decision of the Sixth Circuit.

*

SUMMARY OF ARGUMENT

The Sixth Circuit's radical interpretation of § 954(d)(2) to render superfluous its incorporation of implementing regulations is contrary to this Court's precedent and the text of the provision, as explained in the Petition. The decision also upsets settled expectations in an area of great domestic and international importance involving an especially complicated and consequential portion of the U.S. tax code.

This Court has recognized the need for stability in judicial interpretations of tax law, admonishing courts not to "depart from an interpretation of tax law which has been generally accepted when the departure could have potentially far-reaching consequences." *United States* v. *Byrum*, 408 U.S. 125, 135 (1972). This case proves the need for this rule. U.S. multination corporations like *amici* members conduct

billions of dollars of business through international corporate operations structured over many years in reliance on the § 954(d)(2) implementing regulations. The Sixth Circuit decision casts into doubt decades of corporate planning, including hundreds of millions of dollars in investments, and will handicap the ability of American companies to effectively compete in an increasingly global economy. Treasury itself has acknowledged that its updated § 954(d)(2) regulations were needed to ensure "continued competitiveness of U.S. businesses operating abroad." 73 Fed. Reg. 10716, 10718 (Feb. 28, 2008).

Indeed, the Sixth Circuit's decision creates significant uncertainty about the future applicability of the Treasury regulations, which include exceptions like the manufacturing exception—making clear that profits from manufacturing are not taxable as foreign sales income—and protections against double taxation. Because of the decision below, taxpayers can no longer rely on these nearly 60-year-old regulatory safeguards and risk crippling tax liability if they do.

Similarly, Treasury and the IRS implemented new regulations under § 954(d)(2) in 2008 and 2011 to broaden the definition of manufacturing to better fit the modern economic landscape. U.S. multinationals have spent hundreds of millions of dollars structuring their foreign manufacturing supply chain operations in response to these regulations. The Sixth Circuit's opinion also upsets reliance on these new 2008/2011 regulations, and it creates uncertainty about whether the agency has any ability to continue to refine regulations in this area going forward.

Taxpayers have also long relied on clear statutory and regulatory indications that foreign branches would be treated no worse under § 954(d)(2) than wholly owned foreign subsidiaries are treated under § 954(d)(1). Yet the Sixth Circuit's isolationist interpretation of § 954(d)(2) suddenly risks creating significantly more tax liability for branch activity than subsidiary activity. That change, likewise, will upset settled expectations and require massive overhauls to multinational corporate structures.

Finally, if left in place, the Sixth Circuit decision creates two different tax regimes governing foreign sales income—one in that circuit and one outside it. That result only compounds the uncertainty for U.S. taxpayers, further crippling their ability to compete on a global stage. The discrepancy also violates a fundamental principle recognized by this Court that uniform application of a nationwide taxation scheme is crucial to the proper functioning of the U.S. economy.

In sum, this Court's review and reversal of the Sixth Circuit's ruling is needed to protect U.S. multinational corporations' reliance interests on longstanding Treasury regulations and to avoid tax liability upheaval that will hamper the ability of American companies to effectively compete on a global scale. Congress explicitly called for implementing regulations in § 954(d)(2); Treasury almost immediately enacted those regulations; and the expert agency has continued to update those regulations with the changing economy. Companies have spent hundreds of millions of dollars restructuring their business in compliance

with these regulations. This Court's review is necessary to vindicate those reliance interests and preserve uniformity within the U.S. tax code.

*

ARGUMENT

I. The Sixth Circuit's unprecedented interpretation of § 954(d)(2) to impose tax liability with no reference to the binding Treasury regulations upsets nearly 60 years of taxpayer reliance.

Section 954(d)(2) of the Internal Revenue Code—also known as "the branch rule"—is a complex tax provision that explicitly delegates regulatory authority to the Secretary of the Treasury. It is broadly designed to provide, as limited by Treasury regulations, that certain transactions involving a Controlled Foreign Corporation (CFC) and its branches generate taxable Foreign Base Company Sales Income (FBCSI). Section 954(d)(2) contains two general conditions and two consequences that flow from these conditions. The first condition is that a branch must be "carrying on * * * activities outside of the country of incorporation of [a CFC]." This "carrying on" must also have "substantially the same effect as if such branch or similar establishment were a wholly owned subsidiary corporation deriving such income"—the second condition. If those conditions are met, the consequences are that "the income attributable to the carrying on of such activities of such branch or similar establishment shall be treated as income derived by a wholly owned subsidiary of the [CFC]" and that the income "shall constitute [FBCSI] of the [CFC]." 26 U.S.C. § 954(d)(2).

Importantly, both consequences are preceded by, and depend upon, the phrase "under regulations prescribed by the Secretary." *Ibid.* So, the relevant branch income shall be treated the same as income of a deemed CFC subsidiary and shall constitute FBCSI if, and only if, the Treasury regulations indicate as much. Consistent with the statutory command, Treasury has issued three lengthy sets of complex and carefully crafted regulations over the last 57 years to implement § 954(d)(2) and to aid U.S. businesses as they compete abroad. Countless corporations have for decades relied on Treasury's precise regulatory guidance to determine how to structure their international businesses and inter-company transactions.

A. The decision to ignore Treasury's regulations is contrary to the statutory text and this Court's case law.

The decision below upsets those settled expectations by imposing tax liability directly under a flawed reading of the statute without regard to the Secretary's limiting regulations. As the Petition makes clear, see Pet. at 21–23, the Sixth Circuit's interpretation of § 954(d)(2) is contrary to the statute's text and this Court's precedent. Despite Congress's explicit delegation of regulatory authority and Treasury's decades of implementing it, the Sixth Circuit viewed the statute as self-executing, stating without regard to any regulation that "the relevant command here—that Lux's sales income 'shall constitute foreign base company sales income of' Lux—could hardly be clearer." *Whirlpool Fin. Corp.* v. *Comm'r of Internal Revenue*, 19 F.4th 944, 953 (6th Cir. 2021); *id.* at 952–53 (refusing even to consider arguments regarding the

applicability of Treasury's regulations to Whirlpool's conduct).

That holding violates this Court's longstanding case law (and *amici* member companies' justified reliance on that case law). This Court has held for over a century that where, as here, Congress explicitly conditions the operation of a statutory provision on delegation to an agency, the provision is not self-executing and the agency's regulations are vital to implementing the provision. See *Dunlap* v. *United States*, 173 U.S. 65, 76 (1899) ("We think * * * it demonstrates the intention of congress to leave the entire matter to the treasury department, to ascertain what would be needed in order to carry the section into effect."). By reaching a decision contrary to this established precedent—in a manner that makes the phrase "under regulations prescribed by the secretary" superfluous in violation of other Supreme Court precedents, see *Corley* v. *United States*, 556 U.S. 303, 314 (2009)—the Sixth Circuit not only calls into question the interpretation of § 954(d)(2) but that of many other provisions in the Internal Revenue Code and outside it that similarly condition their application on an agency promulgating regulations. See Pet. at 32. Yet *amici* members and other corporations have long accepted this Supreme Court case law, and consequently have depended upon the Secretary's regulations as binding for many decades.

This reliance was well founded. The Secretary properly promulgated the regulations consistently with § 954(d)(2)'s clear instruction and this Court consistently recognizes that properly promulgated regulations have the force of law until they are invalidated

by a court or properly rescinded by the administrative agency. *United States* v. *Mead Corp.*, 533 U.S. 218, 226–27 (2001). Regulations with the force of law not only bind the regulated parties, but also the agency that issues them. *United States* v. *Caceres*, 440 U.S. 741, 751 n.14 (1979).

And despite the longstanding regulations, Congress has made no material changes to § 954(d)(2) since its 1962 enactment and has expressed no legislative dissatisfaction with the way that the Treasury has implemented the provision for decades. Indeed, Section 954(d)(2) was reenacted without change as part of the Tax Reform Act of 1986. Pub. L. No. 99-514, 100 Stat. 2085 (1986). "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Cottage Savings Ass'n* v. *Commissioner*, 499 U.S. 554, 561 (1991).

So, prior to the Sixth Circuit's ruling, not only were parties entitled to rely on the regulations because it was assumed that they properly delineated § 954(d)(2)'s scope, but a taxpayer could also expect the agency to apply the regulations in any administrative proceedings.

B. The Sixth Circuit's decision upsets stability in tax law interpretation and calls into doubt thousands of taxpayers' reliance on the Treasury regulations.

The Sixth Circuit decision upsets settled expectations in a particularly sensitive area of domestic and international tax law involving an especially complicated and consequential portion of the Internal Revenue Code. Indeed, this Court has recognized the need for stability in judicial interpretations of tax law, admonishing courts not to "depart from an interpretation of tax law which has been generally accepted when the departure could have potentially far-reaching consequences." *Byrum*, 408 U.S. at 135. That rule applies here: this provision of the tax code "is widely regarded as one of the most complex and difficult pieces of legislation in existence." J. Isenbergh, International Taxation, ¶ 70.9 (6th ed. 2021); see also Bittker & Eustice, Federal Income Taxation of Corporations and Shareholders, ¶ 17.31 at 17-14 (3rd ed. 1971) ("[T]he rules of subpart F reach and never leave a lofty plateau of complexity[.]"); Robert Goulder, Whirlpool: Have We Reinvented The Branch Rule?, 106 Tax Notes Int'l 155, 155 (Apr. 4, 2022) (Subpart F impacts "many" U.S. multinational corporations). Given the lack of clarity in *and* wide-sweeping consequences of the statute, Congress's decision to build in clarifying regulations—and corporations' good faith

reliance on those regulations—is exceedingly justified.[2] It also explains why no one has argued that § 954(d)(2) stood on its own and could be applied without the regulations. See Pet. at 24. That is, until the Sixth Circuit majority held as much (despite no party, including the Government, arguing for that holding).

Indeed, "[t]he Sixth Circuit's interpretation of Section 954(d)(2) is inconsistent with the uniform interpretation of that provision by the Treasury, the IRS, the Tax Court and tax professionals for over 50 years (as discussed in the dissenting opinion) and is not supported by the legislative history." Lowell D. Yoder et al., Implications of the Sixth Circuit's Whirlpool Opinion (Dec. 21, 2021); see also Andy Grewal, The Sixth Circuit Conjures Phantom Regulations, Yale J. on Reg.: Notice & Comment (Feb. 21, 2022) (noting "*Whirlpool* [] sows severe confusion into an already-confusing area of tax law" and expressing surprise that the regulations were ignored).

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[2] See, *e.g.*, S.R. Fimberg, The Foreign Base Company Engaged in Selling Activities: A Reappraisal of the Conduct of Foreign Business, 17 U.S.C. Tax Institute 237, 262 (1965) ("Because neither the statute nor the Committee Report explain at length the manner in which the branch rule is intended to operate, the Regulations are especially important in this regard.").

C. Upending widespread reliance on the § 954(d)(2) implementing regulations—both old and new—will have severe economic consequences.

The decision to ignore the regulations was not only unjustified and unprecedented; it is also hugely consequential. The question of whether taxpayers can rely on these regulations (and their regulatory exceptions) is of great importance. In the increasingly global economy, stability and clarity in tax regimes are essential for growth and innovation, while instability creates costs and stifles economic output.

The carefully reticulated regulations disregarded by the Sixth Circuit have been relied upon by thousands of corporations in structuring their international operations. Many of these structures have been in place for nearly 60 years, in reliance on the regulations issued immediately after § 954(d)(2) called for them. The regulations provide for a carefully designed, and consequently complex, means of calculating how income from sales transactions should be attributed between the branch and the "remainder" of the CFC. See 26 C.F.R. § 1.954-3(b)(i)(b). They also include important exceptions such as the manufacturing exception and rules designed to prevent double taxation.

The Sixth Circuit's disregard of the branch rule regulations upends taxpayers' well-placed reliance on these rules and exceptions, which prior to the decision below were universally understood to have the force of law. See Goulder, *supra*, at 155 (noting the Sixth Circuit ignored the manufacturing exception despite it

being "preferable to base such a significant decision on regulations that have been before the public for many years and are well known to taxpayers"). As the Sixth Circuit dissent explains, these regulatory exceptions are designed to ensure that the only branch income to be treated as FBCSI is sales income and not manufacturing income. See *Whirlpool Fin. Corp.*, 19 F.4th at 956 (Nalbandian, J., dissenting). So, the regulations include a "manufacturing exception," which generally provides that if a branch of the CFC derives income from its manufacturing of goods, and not simply their sale, this income is not FBCSI even if the other regulatory requirements are met.[3] *Ibid.* Yet companies can no longer rely with confidence on this exception, or any other aspects of the branch-rule regulations.

Consistent with its explicit statutory authority, the Treasury has also continued to implement *new* regulations, including a relatively recent change to the manufacturing exception in 2008. Treasury (and the IRS) issued in 2008 proposed regulations under §§ 954(d)(1) & (d)(2). 73 Fed. Reg. 10716. In the 2008 proposed regulations, the agency acknowledged

[3] The dissent in the Sixth Circuit determined that under the manufacturing exception, Whirlpool's entities did not generate FBCSI. See *Whirlpool Fin. Corp.,* 19 F.4th at 954 (Nalbandian J. dissenting). But what matters to *amici* is that the statue explicitly required the court to consult the regulations, and the majority's failure to do so upsets the settled expectations of companies whose activities comply with the regulations and yet may be liable for crippling tax assessments under the Sixth Circuit majority's decision. That aspect of the holding below should be reversed as quickly as possible.

changes in global manufacturing practices and the resulting need to update the regulations to aid the "competitiveness of U.S. businesses operating abroad." 73 Fed. Reg. at 10718. This decision to "modernize" the regulations shows the agency's continued attention to how this complex statutory scheme should be implemented in the changing global economy. *Ibid.* In particular, the new regulations took account of modern manufacturing processes and provided an additional way, other than performing "physical manufacturing," for a CFC's activities to be considered manufacturing activities (and thus not involving FBCSI)—through making a "substantial contribution" to the actual manufacture of the relevant product. See, *e.g.*, 26 C.F.R. § 1.954-3(a)(4)(ii). U.S. multinationals spent hundreds of millions of dollars structuring their foreign "manufacturing" supply chain operations so as not to fall foul of the complex, new § 954(d)(2) regulations, which went into effect in 2008 and 2011. 73 Fed. Reg. 79334 (Dec. 29, 2008); 76 Fed. Reg 78545 (Dec. 19, 2011). Indeed, Treasury acceded to comments by U.S. multinationals asking for a delayed effective date for the regulations to give enough time "to implement supply chain and structural changes." 73 Fed. Reg. at 79343.

Despite these massive structural changes in explicit reliance on the new regulations, the Sixth Circuit's disregard of Treasury regulations in imposing tax liability in this case undermines taxpayers' costly reliance on the new 2008/2011 regulations and injects substantial confusion about potentially billions of dollars of tax liability for these companies. The same is true for any future regulatory revisions the Secretary

may make in response to changing economic realities. The decision below casts considerable doubt on the impact and reliability of any future regulatory changes the Secretary may see fit to make—despite every indication Congress desires Treasury's regulations to control.

The Sixth Circuit's upending the status quo is detrimental to international investment and will have an enormous impact on corporate tax planning. Thousands of corporations have chosen where to locate their international subsidiaries, branches, and plants, and the form of those international entities, based on the Treasury's precise regulatory guidance.[4] These taxpayers have also made decisions about what work those entities do as well as the nature of the transactions between those entities and other subsidiaries. Not only are "Mexican maquiladora manufacturing structures of the type used by Whirlpool * * * common," but the Sixth Circuit's refusal to consult the regulations, including the manufacturing exception, "could apply to any separation of manufacturing and sales income when a corporation operates through a branch"—a structure that is "ubiquitous." Mindy

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[4] See 26 C.F.R. § 1.954-3(b) (containing precise, lengthy protocol for determining whether—for a CFC conducting activities through a branch outside its home country—the use of such branch has "substantially the same tax effect" as if the branch were a wholly-owned subsidiary corporation of the CFC). The panel majority replaced the scalpel-like precision of these regulations with a blunt hatchet—ignoring the detailed regulations including the "manufacturing branch tax rate disparity test," 73 Fed. Reg. at 10717, and asking simply whether the CFC's activities through a foreign branch "had a substantial tax-deferral effect." *Whirlpool Fin. Corp.*, 19 F.4th at 952.

Herzfeld, The Sixth Circuit Knows Subpart F Income When It Sees It—Or Does It?, 174 Tax Notes Fed. 316, 317 (Jan. 17, 2022). Thus, the holding below certainly will have "far-reaching consequences." *Byrum*, 408 U.S. at 135.

One illustrative example concerns the potential for "double taxation." Let's say that CFC X, organized in country A, has branch Y, organized in country B, and that Y buys personal property and engages in activities that do not rise to the level of "manufacturing" under the regulatory manufacturing exception. If Y sells the property to X, which resells it to a related party for use outside country A, income derived from X's related-party sale would potentially be FBCSI under § 954(d)(1) because X does not satisfy the manufacturing exception of § 1.954-3(a)(4). Under the majority's interpretation of § 954(d)(2), income "attributable" to Y's activities, which would include X's sales income, would—if they are subject to deferral—*also* be FBCSI under § 954(d)(2). Put simply: the decision's logic would lead to double taxation in this circumstance, despite the strong presumption against double taxation. See, *e.g.*, *United States* v. *Supplee-Biddle Hardware Co.*, 265 U.S. 189, 195–96 (1924). The Treasury Regulations eliminate this risk by providing that if income derived by a branch "would be classified as [FBCSI] * * * under [§ 954(d)(1)]," the branch will not be treated as a separate corporation with respect to such income—in other words, that § 954(d)(2) would not apply. 26 C.F.R. § 1.954-3(b)(2)(ii)(f); see 73 Fed. Reg. at 10718 (noting the 1964 branch rule regulations "provide special rules to prevent double counting

of FBCSI"). But, as with all regulatory safeguards relied on by taxpayers for over fifty years, reliance on this protection against double taxation is now in doubt in the wake of the Sixth Circuit's decision.

* * *

In sum, the Sixth Circuit's decision threatens a seismic shift in the application of the branch rule. It is important for this Court to grant review, reverse the decision below, and reaffirm the preeminent role of Treasury's regulations in applying the branch rule as Congress intended.

II. The Sixth Circuit's decision to isolate § 954(d)(2) from the rest of § 954 upsets established expectations of the similar treatment of branches and wholly owned subsidiaries.

Beyond ignoring the congressional command to look to § 954(d)(2)'s implementing regulations, the Sixth Circuit majority opinion blows up settled expectations surrounding the branch rule in another way. It upends the foundational understanding that § 954(d)(2) is meant simply to treat certain branch income the same as *subsidiary* income, discussed in § 954(d)(1). Put another way, it has long been understood that, under § 954, "the results to a CFC [can] be no worse off as a result of using a branch than of using a wholly-owned subsidiary." Mary F. Voce, Foreign Base Company Sales Income: A Primer and An Update, 53 Tax Lawyer 327, 349 (2000). Yet the Sixth Circuit's interpretation ignored this framework and creates a disparity between the tax regimes for *sub-*

sidiaries and *branches*—such that certain branch income may be viewed as FBCSI even if that very same income would not be viewed as FBCSI if received by a subsidiary under § 954(d)(1). See *Whirlpool Fin. Corp.*, 19 F.4th at 956 (Nalbandian, J., dissenting).

Under the Sixth Circuit majority's reading of § 954(d)(2), if the provision's two conditions are met, then the income "shall constitute" FBCSI without reference to either the regulations *or* to any other section of § 954. By contrast, the dissent properly recognized that "the statutory structure only makes sense if (d)(2) transactions filter back through (d)(1)'s framework, including its Manufacturing Exception." *Whirlpool Fin. Corp.*, 19 F.4th at 956 (Nalbandian, J., dissenting); *id.* at 956–57 (§ 954(d)(2) is meant simply to treat certain branches as wholly owned subsidiaries, so "a (d)(2) transaction" does not create FBCSI tax liability unless there is also "a (d)(1) transaction" and "(d)(1)'s regulatory exceptions [do not] apply").

Amici members (and almost certainly many, many other U.S. multinational corporations) have relied on § 954(d)(1)—containing the general definition for FBCSI applicable to subsidiaries—and its regulatory exceptions under the exact theory articulated by the dissent below. But now, in the Sixth Circuit, those definitions and exceptions do not apply to transactions with branches that meet the two conditions of § 954(d)(2) without regard to the explicit statutory directive to consult the Treasury regulations, potentially creating more liability for branches than for other entities in the same circumstances for the first time despite the longstanding regulations stating the opposite. See 26 C.F.R. § 1.954-3(b)(2)(ii)(e) ("Income

derived by a branch or similar establishment * * * will not be [FBCSI] under paragraph (b) of this section if the income would not be [FBCSI] if it were derived by a separate controlled foreign corporation under like circumstances."). Indeed, the statutory provision itself provides that if its two conditions are met, then "the income attributable to the carrying on of such activities of such branch or similar establishment *shall be treated as income derived by a wholly owned subsidiary* of the [CFC]." 26 U.S.C. § 954(d)(2) (emphasis added). That language is a clear reference back to the subsidiary rules in § 954(d)(1), yet it has little import under the Sixth Circuit's reading.

That isolation of § 954(d)(2) from the rest of the statute, decoupling branch income from subsidiary income, upsets the fundamental reliance that taxpayers have placed on this understanding of the statutory structure and regulations. Corporate taxpayers have chosen what sorts of entities to form and how to treat and transact with those entities based on the reliance that application of the branch rule results in similar treatment between CFCs' use of branches and subsidiaries. Creating this disparity in the tax regimes applicable to both types of entities upsets these interests and creates further uncertainty about the impact of the Sixth Circuit's decision.

In sum, both the express intent of Congress and the long-held understanding of taxpayers has been that if a branch meets the first two conditions of the branch rule, then it would be treated no worse than a subsidiary. Consistent with its approach in *Byrum*, 408 U.S. at 135, this Court should review and reverse the Sixth Circuit's contrary decision.

III. The decision below produces considerable disparity in tax liability between taxpayers in the Sixth Circuit and those in the rest of the country.

As the Petition explains, the Sixth Circuit's decision to not consult Treasury's carefully calibrated regulations creates two different tax regimes. See Pet. at 33. In the Sixth Circuit, the two statutory conditions control with no regard to regulatory limitations. Outside of the Sixth Circuit, the assumption has been and will remain that the regulations are necessary for determining application of § 954(d)(2). The regulations have not been rescinded by the agency and have not been invalidated in any court, suggesting the agency would be bound by them in future proceedings. See, *e.g.*, *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 266–67 (1954).

This disparity creates uncertainty as to taxation of billions of dollars of sales transactions. Such disparity is particularly pernicious in the tax law field where this Court has stressed that uniformity of interpretation of the tax code is crucial. See, *e.g.*, *Dobson* v. *Comm'r of Internal Revenue*, 320 U.S. 489, 499 (1943) (discussing importance of "uniform" and "expeditious" tax administration); *United States* v. *Pelzer*, 312 U.S. 399, 402 (1941) ("[A]s we have often had occasion to point out, the revenue laws are to be construed in the light of their general purpose to establish a nationwide scheme of taxation uniform in its application."). And the lack of uniformity caused by the Sixth Circuit's decision here is based on nothing more than geography of tax court appeals.

This Court should alleviate this disparate treatment among taxpayers—or even the same taxpayer in different federal courts—by recognizing the importance of the clear statutory command that branch income "shall constitute" FBCSI only "under regulations prescribed by the Secretary [of the Treasury]." 26 U.S.C. § 954(d)(2). Restoring taxpayer reliance on those regulations is crucial for preserving Congress's desired uniform scheme and avoiding the upheaval of operations of essentially all CFC branches.

*

CONCLUSION

For the forgoing reasons, *amici* request that this Court grant the petition for certiorari and reverse the judgment of the Sixth Circuit.

Respectfully submitted,

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