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 OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Congress may levy an income tax on a taxpayer who has not realized income.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests *amicus* because Congress must respect constitutional limits in exercising its taxing power. The Ninth Circuit's decision breaches the constitutional constraints that this Court has recognized for over a century. The decision below thus leaves the door open for Congress to further overstep the vital limits the Constitution places on Congress's power to tax.

[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

To be subject to income tax, a taxpayer must have income. The Mandatory Repatriation Tax (MRT)—enacted as part of the 2017 Tax Cuts and Jobs Act—deems certain holdings of taxpayers to be income and subject to a one-time tax. *See* I.R.C. § 965. But the MRT is levied on accumulated wealth and not on income. Therefore, the MRT is an unconstitutional tax on amounts that are not income. This sharply distinguishes it from existing taxes. As a result, finding for Petitioners here will not disturb the Tax Code in any other respects.

In 1913, the Sixteenth Amendment granted Congress the power to tax "incomes, from whatever source derived, without apportionment among the several States." U.S. Const. amend. XVI. This amendment excepted federal "income" taxes from the Constitution's requirement that "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to" a state's population. U.S. Const. art. I., § 9, cl. 4. Since the ratification of the Sixteenth Amendment, this Court has consistently interpreted "income" as referring to amounts that the taxpayer realizes in a particular accounting period (determined by reference to a twelve-month block of time). Therefore, this Court has consistently required that an amount be *realized* within such period for that amount to be treated as income.

In holding that the MRT is constitutional, the Ninth Circuit rejected this well-established principle and contradicted a century's worth of this Court's precedents. The Ninth Circuit's approach contorted the definition of "income" beyond recognition. That

reasoning would permit Congress to directly tax items that are not income without apportionment.

The experience of the Petitioners in this case demonstrates how the MRT imposed an "income" tax on taxpayers who simply did not realize anything. In 2006, Charles and Kathleen Moore invested $40,000 for a 13 percent stake in an Indian company, KisanKraft. KisanKraft provides basic tools to farmers in India's most impoverished regions, and it has reinvested all its earnings to pursue this aim. Accordingly, the Moores have never received any distribution, dividend, or payment from KisanKraft. And they have never sold or otherwise disposed of their KisanKraft shares. Indeed, the Moores lack the ability to demand a dividend or other distribution. *See* Pet. App. at 73.

The MRT, however, subjected the Moores to a tax on their *investment* in KisanKraft, based on their pro rata share of KisanKraft's earnings accumulated for over a decade. Because KisanKraft never distributed any of its accumulated earnings to the Moores, the Moores were taxed on their investment despite realizing *no income* from their investment. No tax in the Tax Code treats accumulated earnings, i.e., property, as income in this manner. For example, Subpart F deems only *current* year income as realized, not money earned by the company years in the past. The Ninth Circuit worried that Subpart F would be displaced if the court affirmed that realization is constitutionally required, but that fear was misplaced.

If a tax on unrealized investment holdings like the MRT can be treated as an "income" tax, then anything can be treated as an income tax. And if anything can be treated as an income tax, then the word "income" in the Sixteenth Amendment loses all meaning. Under

the Ninth Circuit's reasoning, Congress would have the power to tax anything it simply deems to be "income," without apportionment. This Court should reverse the Ninth Circuit and restore the meaningful limits to the Sixteenth Amendment that this Court has always recognized.

ARGUMENT

I. THE MRT WAS UNPRECEDENTED IN U.S. TAX LAW.

The 2017 Tax Cuts and Jobs Act (TCJA) was the most wide-ranging change in federal tax law since the Tax Reform Act of 1986. Part of the TCJA's transformation of the U.S. international tax system was the imposition of the one-time MRT. *See* I.R.C. § 965.

To understand the MRT, it is necessary to first understand the general structure of U.S. international tax law before the enactment of the TCJA. Before the TCJA, the income of a foreign corporation was generally not subject to U.S. taxation unless and until that income was distributed as a dividend to its shareholders who were U.S. taxpayers. *See, e.g.*, *Dave Fischbein Mfg. Co. v. Comm'r*, 59 T.C. 338, 353 (1972). This treatment was consistent with the general principle that a taxpayer is not subject to income tax until the taxpayer realizes income.

Congress enacted the principal exception to this general rule through the regime known as Subpart F. Subpart F, enacted in 1962, singles out a specific class of U.S. taxpayers who own shares in foreign corporations (U.S. Shareholders). U.S. Shareholders are generally defined as U.S. persons, including entities, who own at least 10% of the shares of a foreign corporation and who collectively own more than 50% of the shares

of such corporation (known as a controlled foreign corporation, or CFC). *See* I.R.C. § 957(a). Subpart F taxes U.S. Shareholders on certain classes of a CFC's income *in the year the CFC earns that income*, regardless of whether the CFC distributes that income.[2] *See* I.R.C. § 951; *see also Dougherty v. Comm'r*, 60 T.C. 917, 928 (1973); Joint Comm. on Taxation, JCX-96-15, Present Law and Selected Proposals Related to the Repatriation of Foreign Earnings, 2 (2015).

Accordingly, taxation under the Subpart F regime is limited to only certain types of a CFC's current-year income (generally passive forms of income such as interest, or rental income). Under this rule, even a U.S. taxpayer who meets the definition of a U.S. Shareholder will not pay taxes on the undistributed income of a CFC that falls outside the express Subpart F categories. Thus, under the U.S. international tax regime in place before the TCJA, many CFCs had accumulated considerable earnings without distributing such amounts as dividends, and U.S. taxpayers therefore had generally never realized or paid taxes on those undistributed amounts.

The MRT, however, levied a one-time tax on U.S. Shareholders based on their pro rata share of a specified foreign corporation's (SFC)[3] earnings accumulated since 1987 and during the entire period that the

[2] For clarity, references to "Subpart F" refer to the Subpart F tax under I.R.C. § 951 that was in place before the enactment of the TCJA and which remains in place today. As used, it does not include the MRT. It also does not include the I.R.C. § 951A GILTI tax.

[3] An SFC is a corporation that is either a CFC or certain other types of foreign corporations that have U.S. owners.

taxpayers qualified as U.S. Shareholders.[4] Thus, rather than taxing a U.S. Shareholder on a SFC's current earnings (i.e., on its income) the MRT taxed a U.S. Shareholder on amounts the SFC earned up to 30 years earlier and did not distribute to the shareholder but rather used for investment or other corporate purposes. For example, the Moores held roughly 13 percent of KisanKraft shares in 2017. The Moores were therefore taxed *as if* KisanKraft (an SFC) had, in 2017, distributed to the Moores a dividend worth 13 percent of KisanKraft's total earnings since 2006, the year it first made, and reinvested, profits.

The MRT thus creates a fiction, treating an SFC *as if* it paid its U.S. Shareholders a dividend in 2017 based on its accumulated earnings going back years or even decades. It does so even if the U.S. Shareholders did nothing more than simply hold the shares. In fact, Congress included no provision to prevent U.S. Shareholders from including an SFC's accumulated earnings even if they bought their shares years after the SFC earned its income, meaning that U.S. Shareholders could potentially be taxed on earnings that didn't even accumulate during their holding period. The U.S. Shareholders are then subject to a one-time tax on this fictional dividend, whether or not the U.S. Shareholders actually received (or even *could* receive) a dividend

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[4] At various points in its analysis, the Ninth Circuit seemed to conflate the MRT with the Subpart F tax, which has been in the Tax Code for roughly 60 years. *See* Pet. App. 16 (suggesting that to invalidate the MRT on constitutional grounds would be to hold "that Subpart F is unconstitutional"). Although the MRT expands the Subpart F tax (as that term is used here), it is a distinct tax that raises unique constitutional issues not raised by the long-standing Subpart F tax. *See infra* Part III.

or other payment from the SFC. *See* I.R.C. § 965.[5] Indeed, a corporation's investment of its retained earnings does not always produce returns, and therefore it is possible that a corporation whose shareholders were subject to the MRT would have had no funds to pay to its shareholders.

II. THE SIXTEENTH AMENDMENT ONLY GRANTS CONGRESS THE POWER TO TAX INCOME, WHICH OTHER FEDERAL TAXES DO BUT THE MRT DOES NOT.

The Constitution places significant limitations on Congress's taxing power. Specifically, Congress may not levy "direct" taxes without apportioning such taxes among the states based on their populations. U.S. Const. art. I, § 9, cl. 4. After this Court held that taxes on the income generated by personal property required apportionment, *see Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), the Sixteenth Amendment was ratified, providing that Congress may "collect taxes on incomes, from whatever source derived," without apportionment based on population. U.S. Const. amend. XVI. As this Court has recognized, "[t]he Sixteenth Amendment, like other laws authorizing or imposing taxes, is to be taken as written, and is not to be extended beyond the meaning clearly indicated by the language used." *Edwards v. Cuba R. Co.*, 268 U.S. 628, 631 (1925). And Congress has echoed the language of the Sixteenth Amendment in the federal Tax Code, providing that gross income subject to the

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[5] Although this is a somewhat simplified explanation of the MRT's mechanics, it is sufficient for understanding the constitutional question.

federal income tax "means income from whatever source derived." I.R.C. § 61.

This Court has consistently interpreted "income," as used in the Sixteenth Amendment, to require a realization event—that is, an event in which something of value is received by the taxpayer. This consistent approach, which treats a realization event as a *sine qua non* of "income," follows directly from the plain English definition of that word. *Merriam-Webster* defines "income" as "a coming in" and as "a gain or recurrent benefit usually measured in money that derives from capital or labor; also: the amount of such gain received in a period of time." "Income," *Merriam-Webster Online Dictionary*.[6] Without a realization event, nothing has "come in" to a taxpayer, no money has been derived from capital, and nothing has been received. Anyone who has bought a share of stock but didn't sell it when its price climbed only for the company to go bankrupt understands this fundamental concept.

In *Eisner v. Macomber*, 252 U.S. 189 (1920), this Court held that a transaction similar to a stock split did not result in "income" to stockholders. A corporation issued a prorated "stock dividend" to its shareholders, issuing each shareholder a number of newly created shares proportional to its shareholdings (for example, the shareholder in *Macomber* had held 2,200 shares and was issued an additional 1,100 shares). *Id.* at 200. Thus, each shareholder's total percentage ownership in the corporation did not change. Because there were 50 percent more total shares after the stock dividend, each individual share was worth only 66.7

[6] Available at http://tinyurl.com/bjj267u7 (last visited Mar. 18, 2023).

percent of what it had been worth immediately before the stock dividend. As the Court explained, a stock dividend "simply increase[s] the number of the shares, with consequent dilution of the value of each share." *Id.* at 211. For that reason, the Court held that "a stock dividend really take[s] nothing from the property of the corporation and add[s] nothing to that of the shareholder." *Id.* at 212.

Because the percentage interest held by the shareholder had not changed, the Court held that the stock dividend was not income and therefore could not be subject to federal income tax, given that the Sixteenth Amendment's exception to apportionment "applies to income only." *Id.* at 219.

And particularly relevant to the constitutional question at issue here, the Court also held that unless and until a corporation distributes its earnings, shareholders do not realize income merely from an increase in the value of their stock holdings.

The government had argued that the stock dividend should have been treated as income because the stock dividend was evidence that the value of the taxpayer's equity in the company rose due to "an antecedent increase in the value of the stockholder's capital interest resulting from an accumulation of profits by the company." *Id.* at 210. The government reasoned that stock dividends often are declared after a period of growth and profit for a company during which its share price rises and that the purpose of a stock dividend is often to bring the value of each share closer to its original value before such growth and profit occurred. But this theory of "income" was rejected by the Court.

The *Macomber* Court instead looked to the meaning of the word "income" and concluded that the mere increase in value of an asset is not income:

> The government [looking to a dictionary definition of "income"] . . . placed chief emphasis upon the word "gain," which was extended to include a variety of meanings; while the significance of the next three words was either overlooked or misconceived. "*Derived from capital*;" "the *gain-derived-from-capital*," etc. Here, we have the essential matter: *not* a gain *accruing to* capital; not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value, *proceeding from* the property, *severed from* the capital, however invested or employed, and *coming in*, being "*derived*"—that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal—*that* is income derived from property. Nothing else answers the description.

Id. at 207 (emphasis in original).

Accordingly, the Court unambiguously held that "enrichment through increase in value of capital investment is not income in any proper meaning of the term." *Id.* at 214–15. The Court explained rather that "the stockholder's share in the accumulated profits of the company is capital, not income." *Id.* at 219.

In *Macomber*, the Court concluded that "from every point of view, we are brought irresistibly to the conclusion that neither under the Sixteenth Amendment nor

otherwise has Congress power to tax without apportionment a true stock dividend made lawfully and in good faith, *or the accumulated profits behind it*, as income of the stockholder." *Id.* (emphasis added).

The message is clear: to tax property *because of ownership* without apportionment is unconstitutional. *See id.* at 217. The legal fiction behind the MRT, though, does just that. This transforms the MRT from a tax on income to a tax on property. The MRT is levied on a U.S. Shareholder *solely* because such person is the owner of an asset (that is, stock in an SFC) that has accumulated foreign earnings for up to 30 years. Therefore, the MRT is in no sense an income tax—it is fundamentally a tax on property, levied at an entirely arbitrary date.

The other taxes that the Ninth Circuit worried about, especially Subpart F, do not run afoul of this principle. They do not, and never have, subjected taxpayers to taxation on *accumulated* earnings. Though Congress deemed current-year income to be realized in the context of CFCs, nothing in Congress's choice to do so, or the court decisions upholding that choice, extends that choice back to accumulated earnings.

Twenty years after *Macomber*, in *Helvering v. Horst*, the Court did not disturb "the rule that income is not taxable until realized." 311 U.S. 112, 116 (1940). *Horst* did not recognize an exception to this rule, but rather recognized that in some cases realization does not require actual receipt by the taxpayer. *Horst* concerned a father's gift to his son. Paul Horst had owned a bond from which the "interest coupons" could be detached and given to another, granting the recipient the right to collect specific interest payments on the bond. Horst gave two interest coupons to his son as gifts,

retaining for himself the bond and the right to receive the principal amount of the bond at maturity. *Id.* at 114. The question was whether the father could be taxed for the amount of interest paid to his son from the gifted interest coupons.

The Court held that the father could indeed be taxed for the interest payments to his son, establishing the now well-accepted principle that a taxpayer cannot escape taxation by assigning income that the taxpayer himself otherwise would have realized. *Id.* at 119. The Court held that when taxpayers have the right to enjoy the economic benefit of property "by some event other than the taxpayer's personal receipt of money or property," this event constitutes a "realization of the income." *Id.* at 116. In *Horst*, the "realization event" was the son's receipt of the interest. Thus, *Horst* held that a taxpayer cannot escape taxation by foisting off the realization event onto someone else, i.e., the taxpayer cannot escape taxation by assigning income.

And if there was any doubt after *Horst* that realization remained a prerequisite to the imposition of income tax, this Court dispelled that doubt in *Commissioner v. Glenshaw Glass*, 348 U.S. 426 (1955). In *Glenshaw Glass*, the Court held as explicitly as it ever has that "clear[] realiz[ation]" is a precondition for the imposition of income tax. The *Glenshaw Glass* Court thus crafted a three-part conjunctive test that, like the *Macomber* Court, defined "income." *Glenshaw Glass*'s now-landmark test asks whether the taxpayers have received "undeniable accessions to wealth, *clearly realized*, and over which the taxpayers have complete dominion." *Id.* at 431 (emphasis added).

The Ninth Circuit, however, jettisoned the clear realization requirement. The court forthrightly admitted

that under its approach, "Whether the taxpayer has realized income does not determine whether a tax is constitutional." Pet. App. 12. But this statement is irreconcilable with this Court's holdings in *Macomber*, *Horst*, and *Glenshaw Glass*, among others.

In reaching this conclusion, the Ninth Circuit severely misread this Court's decision in *Horst*. The Ninth Circuit erroneously interpreted *Horst* to hold that realization is not a constitutional requirement for income. *See* Pet. App. 12–16. But *Horst* addressed a narrow issue that has no bearing on this case: whether a person can escape taxation by assigning the right to a monetary payment that the assignor otherwise would have received. As explained above, the Court held that a person cannot escape income tax in this manner. *See Horst*, 311 U.S. at 117–18 ("To say that one who has made a gift . . . has never enjoyed or realized the fruits of his investment or labor . . . is to affront common understanding and to deny the facts of common experience.").

Further, *Horst* predated *Glenshaw Glass* by fifteen years. If *Horst* had eliminated the clear realization requirement, this Court would not have expressly included that requirement in its definition of income fifteen years later. Nowhere does the *Glenshaw Glass* opinion suggest that this definition is in any tension with *Horst*, because it is not.[7]

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[7] Nor is *Cottage Savings Association v. Commissioner*, 499 U.S. 554 (1991), in tension with either *Horst*'s or *Glenshaw Glass*'s mandate that income must be realized before being taxed under the Sixteenth Amendment. Like *Horst*, *Cottage Savings* addresses a narrow issue that is not relevant to this case: whether a realization event occurs when a taxpayer exchanges property

The IRS also might be wandering away from the clear realization requirement. The IRS has accurately quoted the *Glenshaw Glass* three-pronged conjunctive test in recent published rulings that evaluate whether taxable income exists. *See, e.g.*, I.R.S. Rev. Rul. 2019-24 (applying the three-pronged *Glenshaw Glass* test to determine whether a taxpayer had income in certain transactions involving digital assets); I.R.S. Rev. Rul. 2023-14 (same). However, Revenue Ruling 2023-14, the IRS's most recent ruling quoting *Glenshaw Glass*, appears to have discounted the realization requirement. In applying the *Glenshaw Glass* test to the facts it posits, the Ruling conspicuously ignores the "clearly realized" prong. The IRS's faulty analysis highlights the importance of this Court reaffirming what it has held for over a century—that realization is a necessary component of income.

This Court should thus correct the Ninth Circuit and reaffirm what this Court has always held—that realization is a constitutional requirement for the imposition of income tax.

III. OTHER IN-FORCE TAX LAWS WILL NOT BE IMPACTED BY THE COURT'S RULING HERE.

This Court need not be concerned about opening a Pandora's Box by reversing the Ninth Circuit. The Ninth Circuit was concerned that a contrary ruling would "call into question the constitutionality of many

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for materially similar property. There was no constitutional question at issue in *Cottage Savings*, nor any debate as to whether there had been a realization event. The question before the Court was whether that realization event was material enough to give rise to taxation. For amounts taxable under the MRT, by contrast, there was no realization event at all.

other tax provisions that have long been on the books." Pet. App. 16 (citing Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 52 (1999)). But this concern was misplaced. The constitutional basis of the other taxes that bear some resemblance to the MRT are not at issue here. Those taxes each tax income earned during the year it was realized. The MRT crosses a line that these other taxes do not cross. Simply put, the MRT does not tax income; it barely even purports to.

Congress's other enactments that tax shareholders of foreign corporations—most notably the Subpart F and GILTI regimes—have passed constitutional muster because, consistent with the Sixteenth Amendment, these taxes have always been imposed on income—amounts realized in a current taxable year.

This is the case not only for Subpart F and GILTI, but also for past repatriation taxes that Congress has imposed.

An old, now defunct, version of Section 965 of the Internal Revenue Code (Old Section 965) permitted U.S. Shareholders to pay tax on the accumulated earnings of CFCs at a reduced tax rate of 5.25 percent, rather than the then-standard 35-percent corporate rate. American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 422(a), 118 Stat. at 1514-15. However, for Old Section 965's reduced tax rate to apply, the CFC had to actually pay a dividend to its U.S. Shareholders in the single year when Old Section 965 was applicable (generally, during 2004). In other words, for the tax to apply with respect to a CFC's accumulated earnings, a

U.S. shareholder *had to realize income* through the actual receipt of a dividend.[8]

Accordingly, there was no question that Old Section 965 was constitutional; its very design reflected the constitutional requirement that income be "clearly realized." *Glenshaw Glass*, 348 U.S. at 431.

The MRT, by contrast, was imposed on U.S. Shareholders irrespective of whether a CFC paid a dividend to its U.S. Shareholders *and* irrespective of whether the CFC had the funds to pay a dividend.

The other principal tax on shareholders of foreign corporations that predates the MRT is Subpart F. As discussed above, Subpart F taxes U.S. Shareholders on certain classes of a CFC's income (generally, income that is passive in nature) *in the year* the CFC earns that income. *See* I.R.C § 951.

This Court has never considered the constitutionality of Subpart F. But when the constitutionality of Subpart F was challenged, the issue as framed by the Tax Court was whether a U.S. taxpayer could be subject to tax on its share of a foreign corporations' current-year income. *Whitlock's Est. v. Comm'r*, 59 T.C. 490, 506-07 (1972), *aff'd in part, rev'd in part*, 494 F.2d 1297 (10th Cir. 1974) (emphasis added) ("[W]hether Congress may constitutionally tax the *current* undistributed income of a corporation to the corporation's . . . stockholders."); *see also Garlock Inc. v. Comm'r*, 489 F.2d 197, 202 (2d Cir. 1973). Thus, lower courts'

[8] Old Section 965 also imposed several limitations on the ability of taxpayers to take advantage of the reduced rate. *See, e.g.*, *Analog Devices v. Comm'r*, 147 T.C. 429, 437 (2016). In part, these limitations were to ensure that actual cash was being repatriated to the United States.

analysis turned on whether Congress could tax a U.S. Shareholder on a particular realization event—a CFC's earning of *current-year* income.

The constitutionality of Subpart F is in no way implicated by the question here—whether there is income if there is no realization event. That is because Subpart F does not subject, and never has subjected, a U.S. Shareholder to taxation on a foreign corporation's *accumulated* earnings from prior years. Whether Congress can deem an amount corresponding to accumulated earnings as income without a realization event is the constitutional issue raised by the unique legal fiction underlying the MRT.

For example, the same analysis that shows the constitutional robustness of Subpart F also applies to the annual tax on global intangible low-taxed income (GILTI), which was enacted as part of the TCJA. *See* I.R.C. § 951A. The GILTI regime taxes the same U.S. Shareholders that are subject to tax on a CFC's Subpart F income. GILTI simply expands the types of a CFC's income on which its U.S. shareholders are subject to current-year tax. But like Subpart F, GILTI is a tax only on a CFC's *current-year income*. Therefore, a reversal of the Ninth Circuit would have no bearing on the constitutionality of GILTI—it clearly passes muster.

Any concerns that a reversal of the Ninth Circuit would overturn other areas of the tax law are even further afield. Congress has generally taken care to respect constitutional boundaries when imposing income tax. For example, even a tax commonly referred to as the "accumulated earnings tax," *see* I.R.C. §§ 531–537, doesn't tax accumulated earnings. It is a surtax on

current-year income to prevent the accumulation of earnings in certain closely held domestic corporations.[9]

Therefore a holding in favor of the taxpayer here can—and should—be simple and narrow: The MRT required taxpayers to treat amounts as income that they clearly did not realize, and to that extent it is unconstitutional. Such a holding would not affect any other provision of the tax law nor would it change this court's jurisprudence—it would simply reaffirm what this Court has held for over a century.

Finally, reframing the MRT as a *retroactive* income tax would not fix the constitutional problem. Significant Fifth Amendment due process concerns would be raised by treating amounts that came in during prior accounting periods as income in the current year. *See* Sean P. McElroy, *The Mandatory Repatriation Tax Is Unconstitutional*, 37 Yale J. Reg. Bull. 69 (2018). For that reason, this case squarely and unavoidably presents the question that the Ninth Circuit answered erroneously: whether clear realization is necessary to impose a federal income tax.

IV. RULING AGAINST PETITIONERS WOULD OVERTURN A CENTURY OF THIS COURT'S JURISPRUDENCE.

It is not a ruling in favor of Petitioners, but a ruling *against* Petitioners, that would be sweeping. Such a

[9] The Code imposes a 20 percent surtax on "accumulated taxable income." I.R.C. § 531 ("In addition to other taxes imposed by this chapter, there is hereby imposed for each taxable year on the accumulated taxable income . . . of each corporation . . . an accumulated earnings tax . . . ."). For this purpose, "accumulated taxable income" is simply "taxable income" (i.e., income earned in the current taxable year) subject to certain adjustments. *See* I.R.C. § 535.

ruling would jettison over a century of this Court's jurisprudence. And it would embolden Congress to use the Sixteenth Amendment as a cloak to unconstitutionally tax other amounts, without apportionment, that are not income.

Indeed, the question is foundational—is this Court's fundamental income tax jurisprudence still good law? Must an amount be clearly realized to be treated as "income" within the meaning of the Sixteenth Amendment? Whether an amount is properly characterized as income is an issue this Court has faithfully considered, using the same fundamental analysis, since the Sixteenth Amendment was enacted. *See, e.g.*, *Merchants' Loan & Tr. Co. v. Smietanka*, 255 U.S. 509, 519 (1921) (applying what the Court believed "to be the commonly understood meaning of the term [income] which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution.") (citing cases); *United States v. Safety Car Heating & Lighting Co.*, 297 U.S. 88, 99 (1936) (same).

If the Ninth Circuit's decision stands, Congress may be emboldened to unconstitutionally subject other amounts to the income tax. *See, e.g.*, U.S. Dep't of the Treasury, General Explanations of the Administration's Fiscal Year 2024 Revenue Proposals, at 78–82 (providing for a tax on unrealized capital gains); *see also* Pet. 25 (recounting recent proposals to enact a federal wealth tax).

CONCLUSION

For the foregoing reasons, and those described by Petitioners, the Court should reverse the Ninth Circuit.

Respectfully submitted,

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