No. 22-800

In the Supreme Court of the United States

CHARLES G. MOORE AND KATHLEEN F. MOORE,
PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Sixteenth Amendment states that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. Const. Amend. XVI. In 2017, Congress passed and President Trump signed the Tax Cuts and Jobs Act (TCJA), Pub. L. No. 115-97, Tit. I, 131 Stat. 2054. The TCJA included a one-time tax, which petitioners call the mandatory repatriation tax (MRT), to offset other tax benefits provided in the statute. The MRT increases certain income of a U.S.-taxpayer-controlled foreign corporation (CFC) in 2017 by the CFC's "accumulated post-1986 deferred foreign income." 26 U.S.C. 965(a). Under the MRT, a U.S. shareholder owning at least 10% of a CFC may owe a one-time tax due to his obligation to "include in his gross income * * * his pro rata share" of the CFC's relevant "income for such year." 26 U.S.C. 951(a)(1)(A). The question presented is:

Whether the MRT is a "tax[] on incomes, from whatever source derived," U.S. Const. Amend. XVI, within the meaning of the Sixteenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 36 F.4th 930. The order of the district court (Pet. App. 21-34) is unreported but is available at 2020 WL 6799022.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2022. A petition for rehearing en banc was denied on November 22, 2022 (Pet. App. 35-36). The petition for a writ of certiorari was filed on February 21, 2023, and was granted on June 26, 2023. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-34a.

STATEMENT

In 2017, consistent with our Nation's longstanding framework for taxing Americans who own certain foreign corporations, Congress enacted a one-time tax on U.S. shareholders' pro rata shares of undistributed corporate income, which petitioners call the Mandatory Repatriation Tax (MRT). Petitioners attack (Br. 3) the MRT as a "novelty" for lacking a rigid realization requirement that they contend is constitutionally required. But as early as 1864, just three years after the first federal income-tax law, Congress enacted unapportioned income taxes reaching individuals' pro rata shares of undistributed corporate earnings—and this Court upheld Congress's authority to impose those taxes. After this Court temporarily undermined that power by holding that most income taxes had to be apportioned by state population, the Sixteenth Amendment overturned that precedent and reinstated the income-tax authority that Congress had previously exercised. Congress immediately resumed taxing some kinds of undistributed corporate income, and it extended that practice in various other instances throughout the twentieth century—including with so-called pass-through entities like partnerships, S corporations, and U.S.-shareholder-controlled foreign corporations. Petitioners concede the constitutionality of all those previous taxes and argue the MRT alone crosses a constitutional line. But the court of appeals found no principled way to distinguish the MRT from various "other

tax provisions that have long been on the books." Pet. App. 16.

A. Legal Background

1. The lack of an effective taxing power under the Articles of Confederation "was one of the causes" prompting "adoption of the present Constitution." *Springer* v. *United States*, 102 U.S. 586, 595-596 (1881). The Constitution authorized Congress "[t]o lay and collect Taxes, Duties, Imposts and Excises," U.S. Const. Art. I, § 8, Cl. 1—an "authority" that "embraces every conceivable power of taxation." *Brushaber* v. *Union Pac. R.R. Co.*, 240 U.S. 1, 12 (1916).

The Constitution prescribes two "regulations" of that "plenary power." *Brushaber*, 240 U.S. at 13. First is "'the rule of uniformity as to duties, imposts, and excises.'" *Ibid.* (citation omitted); see U.S. Const. Art. I, § 8, Cl. 1. Second is "'[t]he rule of apportionment as to direct taxes.'" *Brushaber*, 240 U.S. at 13 (citation omitted); see U.S. Const. Art. I, § 9, Cl. 4. "[A]ny 'direct Tax' must be apportioned so that each State pays in proportion to its population." *National Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 570 (2012) (*NFIB*).

For over a century, this Court held that the only direct taxes were "capitation taxes" (*i.e.*, head or poll taxes) "and taxes on real estate." *Springer*, 102 U.S. at 602. During that time, Congress enacted several unapportioned income-tax laws, some of which taxed individuals on "the gains and profits * * * *whether divided or otherwise*" of companies in which they held stock. Act of June 30, 1864, ch. 173, § 117, 13 Stat. 282 (emphasis added). But in 1895, the Court held that taxes on income "derived from * * * real or personal property" were also direct taxes requiring apportionment. *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601, 618.

In 1913, *Pollock* "was overturned by the Sixteenth Amendment," *NFIB*, 567 U.S. at 571, which reinstated "the previous complete and plenary power of income taxation possessed by Congress from the beginning," *Stanton* v. *Baltic Mining Co.*, 240 U.S. 103, 112 (1916). The Amendment provides that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. Const. Amend. XVI.

2. To prevent Americans from avoiding U.S. taxes by keeping earnings offshore, Congress has long taxed some U.S. shareholders of foreign corporations on their pro rata portions of the corporations' undistributed income. In 1937, Congress taxed shareholders on the "undistributed * * * net income" of "foreign personal holding compan[ies]." Revenue Act of 1937, ch. 815, § 337(a), 50 Stat. 822. And in 1962, Congress expanded that approach by enacting Subpart F of the Internal Revenue Code, 26 U.S.C. 951 *et seq.* Revenue Act of 1962 (1962 Act), Pub. L. No. 87-834, § 12, 76 Stat. 1006-1031.

Subpart F applies to "United States shareholders" of a "'controlled foreign corporation'" (CFC). 26 U.S.C. 957(a). A CFC is "any foreign corporation" that is "more than 50 percent" owned "by United States shareholders." *Ibid.* And a "'United States shareholder'" is a "United States person" who owns at least 10% of a foreign corporation's shares. 26 U.S.C. 951(b).

Subpart F requires "United States shareholder[s]" to "include in [their] gross income * * * [their] pro rata share * * * of the [CFC's] subpart F income for [the] year." 26 U.S.C. 951(a)(1)(A). That requirement applies "even if the corporation does not distribute" the Subpart F income to its U.S. shareholders. 3 Boris I.

Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates and Gifts* ¶ 69.1, at 69-2 (3d ed. rev. 2005) (Bittker & Lokken). But Subpart F income does not include all of a "CFC's active business income attributable to the CFC's own business held offshore." Pet. App. 6. Thus, despite Subpart F, by 2015 CFCs had accumulated more than $2.6 trillion in offshore earnings that had not been subjected to federal taxation. *Id.* at 5-6.

3. In 2017, Congress passed and President Trump signed the Tax Cuts and Jobs Act (TCJA), Pub. L. No. 115-97, Tit. I, 131 Stat. 2054. As relevant here, the TCJA reduced the corporate tax rate from 35% to 21%, 26 U.S.C. 11, and contained two provisions "Establish[ing] [a] Participation Exemption System for Taxation of Foreign Income" earned by U.S. shareholders of foreign corporations. TCJA, Subtit. D, Pt. I, Subpt. A, 131 Stat. 2189 (emphasis omitted).

First, 26 U.S.C. 245A provides that when a domestic corporation owning at least 10% of a specified foreign corporation receives a dividend from the foreign corporation, the domestic corporation is allowed a 100% tax deduction on the portion of the dividend attributable to previously "undistributed foreign earnings." 26 U.S.C. 245A(c)(1)(A); see 26 U.S.C. 245A(a). Before the TCJA, a domestic corporation could have been taxed up to 35% upon the receipt of such a dividend. 26 U.S.C. 11(b)(1) (2012). Section 245A was projected to cost the government $224 billion over ten years. See Staff of the Joint Comm. on Taxation, 115th Cong., 1st Sess., *Estimated Budget Effects of the Conference Agreement for H.R.1, The Tax Cuts & Jobs Act*, JCX-67-17, at 6 (Dec. 18, 2017), https://perma.cc/NKU5-KKJ8.

Second, the TCJA includes a provision "[t]o avoid a potential windfall" for entities that deferred taxation through their ownership of foreign corporations and can now receive tax-free distributions of those foreign corporations' accumulated foreign income. H.R. Rep. No. 409, 115th Cong., 1st Sess. 375 (2017). That provision, entitled "Treatment of Deferred Foreign Income Upon Transition To Participation Exemption System Of Taxation," TCJA § 14103, 131 Stat. 2195 (capitalization modified; emphasis omitted), has been called the MRT.

The MRT requires a CFC with "accumulated post-1986 deferred foreign income" to include that income as part of its Subpart F income in its "last taxable year" beginning before 2018. 26 U.S.C. 965(a).[1] Thus, in that year, U.S. shareholders owning at least 10% of a CFC may owe more taxes due to the obligation under Subpart F to "include in [their] gross income * * * [their] pro rata share" of the CFC's "subpart F income for [the] year." 26 U.S.C. 951(a)(1)(A). To mitigate the burden of that one-time tax, however, the MRT provides substantial deductions, 26 U.S.C. 965(c), and allows payment in interest-free installments over eight years, 26 U.S.C. 965(h). The MRT was projected to generate approximately $340 billion in revenue, Pet. App. 7, thus offsetting the cost of Section 245A's tax deduction for dividends.

B. The Present Controversy

1. In 2005, petitioners' friend, Ravindra Kumar Agrawal, approached them with a plan to start a com-

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[1] The MRT also applies to "any foreign corporation with respect to which one or more domestic corporations is a [10%] shareholder." 26 U.S.C. 965(e)(1)(B); see 26 U.S.C. 951(b). Because this case concerns a CFC, the brief refers only to CFCs.

pany called KisanKraft Machine Tools Private Limited that would supply farmers in India. Pet. App. 70-71. Petitioners invested $40,000 in KisanKraft "at its inception," which was 11% of its "start-up capital." *Id.* at 71. In exchange, petitioners received 13% of KisanKraft's common shares. *Id.* at 74. Since KisanKraft's founding, petitioner Charles Moore has regularly spoken to Agrawal (the CEO) about KisanKraft's operations and visited India five times to tour operations. *Id.* at 72-73.

KisanKraft has generated profits every year since its founding. Pet. App. 5. But instead of distributing dividends to its shareholders, it has reinvested in the business. *Ibid.* As a result, from 2006 to 2017, neither petitioners nor KisanKraft paid U.S. taxes on the company's income. *Id.* at 23.

KisanKraft qualifies as a CFC because it is a foreign corporation majority-owned by U.S. persons who each own at least 10% of its shares. Pet. App. 5. Under the MRT, KisanKraft's 2017 Subpart F income was increased by its "accumulated post-1986 deferred foreign income." 26 U.S.C. 965(a). Petitioners' "pro rata share" of that income—which they were required to include in their 2017 "gross income," 26 U.S.C. 951(a)(1)—was $508,000. Pet. App. 74. "After receiving a deduction associated with the [MRT]," petitioners reported an additional $132,512 in 2017 taxable income and an additional $14,729 in taxes. *Ibid.*; see *id.* at 75.

2. Petitioners paid their MRT liability and then sued the government in the United States District Court for the Western District of Washington, seeking a refund. Pet. App. 85. Petitioners asserted that the MRT is an unapportioned direct tax, and that the MRT is impermissibly retroactive in violation of the Due Process Clause. *Id.* at 23-24.

The district court granted the government's motion to dismiss. Pet. App. 21-34. The court held that the MRT is an income tax under the Sixteenth Amendment. *Id.* at 25. It also rejected petitioners' due process claim, concluding that the MRT, with its 30-year "retroactive period," "is a rational means of [e]ffecting a legitimate legislative purpose." *Id.* at 31-32.

3. The court of appeals affirmed. Pet. App. 1-20. The court explained that "the Supreme Court has made clear that realization of income is not a constitutional requirement," but instead is "'founded on administrative convenience.'" *Id.* at 12 (quoting *Helvering* v. *Horst*, 311 U.S. 112, 116 (1940)). And the court of appeals emphasized that "there is no constitutional prohibition against Congress attributing a corporation's income pro-rata to its shareholders." *Id.* at 13.

Applying those principles, the court of appeals held that the MRT is an income tax under the Sixteenth Amendment. "[T]here is no dispute," the court explained, "that KisanKraft actually earned significant income." Pet. App. 13. And even "[b]efore the MRT, U.S. persons owning at least 10% of a CFC were already subject to certain taxes on the CFC's income." *Id.* at 14. Such shareholders "were, and after the passage of the MRT continue to be, treated as individuals who have some ability to control distribution." *Ibid.* "The MRT," the court reasoned, simply "builds upon these U.S. persons' preexisting tax liability attributing a CFC's income to its shareholders." *Ibid.*

The court of appeals also held that the MRT complies with due process, rejecting petitioners' contention that "the MRT's retroactive period" is unduly "long." Pet. App. 18.

4. The court of appeals denied rehearing. Pet. App. 36-37. Judge Bumatay dissented, joined by three other judges. *Id.* at 37-56.

SUMMARY OF ARGUMENT

I. The MRT is an income tax.

A. The Sixteenth Amendment authorizes Congress to tax shareholders' pro rata shares of undistributed corporate earnings as income. The Amendment's Framers understood its reference to "taxes on incomes," U.S. Const. Amend. XVI, as permitting taxes on undistributed corporate earnings. From 1864 through 1870, Congress repeatedly enacted income taxes of that nature—and this Court upheld its power to do so. *Collector* v. *Hubbard*, 79 U.S. 1, 18 (1871). Although the decision in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), temporarily undermined *Hubbard*, the Sixteenth Amendment overturned *Pollock*, thus reinstating Congress's power to impose the types of income taxes that predated *Pollock*.

Petitioners err in contending that the Sixteenth Amendment created a realization requirement. Realization was a well-established concept when the Sixteenth Amendment was adopted—yet the Amendment never references it. Petitioners cannot read that requirement into the term "income," which encompasses *all* economic gains. Nor can petitioners read that requirement into the phrase "from whatever source derived," U.S. Const. Amend. XVI, which was designed to overturn *Pollock*'s source-based analysis of income taxes, not to restrict Congress to taxing only realized gains.

B. Post-ratification practice shows that Congress may tax individuals on their pro rata shares of undistributed business earnings. Within months after the

Sixteenth Amendment's ratification, Congress included undistributed corporate earnings within certain shareholders' taxable income. That 1913 law also taxed partners on undistributed partnership income. And Congress soon applied the partnership-tax provision to personal service corporations.

Petitioners cannot distinguish Congress's longstanding method of taxing partners. From before the Sixteenth Amendment through today, many States have treated partnerships as entities separate from their partners—just as States have treated corporations as entities separate from their shareholders. Because Congress may (as petitioners concede) tax partners on undistributed partnership income, it likewise may tax shareholders on undistributed corporate income.

In the decades after the Sixteenth Amendment, Congress continued to enact income taxes that reached individuals' pro rata shares of undistributed business earnings. In 1937, for instance, Congress began taxing U.S. shareholders of foreign corporations on the corporations' undistributed income. And in 1962, it expanded that approach through Subpart F. Petitioners concede Subpart F's constitutionality but offer no principled distinction between Subpart F and the MRT.

C. This Court's precedents recognize Congress's power to tax individuals on their pro rata shares of undistributed business earnings. In arguing that the Sixteenth Amendment's grant of power somehow stripped Congress of the preexisting authority upheld in *Hubbard*, petitioners stake their case on dictum from *Eisner* v. *Macomber*, 252 U.S. 189 (1920). But that dictum was poorly reasoned and has been abrogated by many later decisions limiting *Macomber* to the stock-dividend context in which it arose. *Stare decisis* thus has no role

to play. Under this Court's precedents considering the decision's reach, *Macomber* is not controlling in this case.

D. The MRT taxes income. It taxes U.S. persons owning at least 10% of a CFC on their pro rata shares of the CFC's undistributed income—materially indistinguishable from Subpart F and numerous similar income taxes dating back to 1864. Petitioners' contention that the MRT is a tax on property cannot be squared with the MRT's terms or longstanding historical practice.

II. The MRT is independently constitutional as an excise tax. In *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911), the Court held that a tax on a corporation's income was "an excise upon the particular privilege of doing business in a corporate capacity." *Id.* at 151. The MRT can be similarly viewed as a tax upon the privilege of doing business through a CFC. At minimum, the Court should remand for the court of appeals to consider that argument in the first instance, rather than prematurely invalidating the MRT, which could cost the government hundreds of billions of dollars in revenue.

ARGUMENT

I. THE MRT IS AN INCOME TAX

The Sixteenth Amendment's text and history show that Congress may tax shareholders on their pro rata shares of undistributed corporate earnings. Because the MRT does just that, it is a constitutional income tax.

In arguing otherwise, petitioners advocate for a strict realization requirement. But petitioners concede the constitutionality of various taxes that appear to violate that requirement—without offering any principled basis for distinguishing them from the MRT. They also stake their case on dictum from *Eisner* v. *Macomber*,

252 U.S. 189 (1920), which this Court has long since limited to *Macomber*'s stock-dividend context. Petitioners' challenge to the MRT therefore fails.

A. The Sixteenth Amendment Authorizes Congress To Tax Shareholders' Pro Rata Shares Of Undistributed Corporate Earnings As Income

The Sixteenth Amendment empowers Congress to "lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States." U.S. Const. Amend. XVI. That authority encompasses taxes on a shareholder's pro rata share of undistributed corporate earnings. Congress had repeatedly laid such taxes before the Amendment's adoption, and the Amendment restored Congress's power as it existed before *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895). Petitioners' attempt to manufacture a realization requirement from various ratification-era sources lacks merit.

1. The Amendment's text and historical context show that it permits taxes on individuals' pro rata shares of undistributed corporate earnings

In the Internal Revenue Code, Congress has defined "gross income" in terms materially identical to the Sixteenth Amendment—as "all income from whatever source derived," 26 U.S.C. 61(a)—which this Court understands as encompassing "the full measure of [Congress's] taxing power," *United States* v. *Burke*, 504 U.S. 229, 233 (1992) (quoting *Helvering* v. *Clifford*, 309 U.S. 331, 334 (1940)). The Court has consistently read the statutory phrase as "sweep[ing] broadly," so as to include "any 'accession to wealth,'" *ibid.* (quoting *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955)) (brackets omitted), and "all economic gains not

otherwise exempted," *Commissioner* v. *Banks*, 543 U.S. 426, 433 (2005).

a. In light of Congress's earlier income-tax enactments, the Sixteenth Amendment's Framers necessarily understood its reference to "taxes on incomes," as permitting taxes on individuals' pro rata shares of undistributed corporate earnings. As this Court has explained, the Amendment reauthorized those "familiar" income taxes that "had been in actual operation within the United States before its adoption." *Burnet* v. *Sanford & Brooks Co.*, 282 U.S. 359, 365 (1931).

In 1864—only three years after the first federal income-tax law—Congress expanded that law to several specified categories of taxable "gains, profits, or income." Act of June 30, 1864 (1864 Act), ch. 173, § 117, 13 Stat. 281. The 1864 Act provided that "the gains and profits of all companies, whether incorporated or partnership * * * shall be included in estimating the annual gains, profits, or income of any person entitled to the same, *whether divided or otherwise*." § 117, 13 Stat. 282 (emphasis added). Congress enacted materially identical provisions in 1865, 1867, and 1870. See Act of Mar. 3, 1865, ch. 78, 13 Stat. 480; Act of Mar. 2, 1867, ch. 169, § 13, 14 Stat. 478; Act of July 14, 1870 (1870 Act), ch. 255, § 7, 16 Stat. 258.[2]

In 1871, this Court sustained Congress's power to enact those provisions. In *Collector* v. *Hubbard*, 79 U.S. 1 (1871), the Court enforced Congress's 1864 tax against

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[2] Those income-tax laws also reached other gains that do not appear to satisfy petitioners' rigid realization requirement. See, *e.g.*, 1864 Act § 117, 13 Stat. 282 (taxing as income certain forms of interest "*whether due and paid or not*, if good and collectable," as well as "the increased value of live stock, *whether sold or on hand*") (emphases added).

an individual shareholder who resisted inclusion of companies' undivided profits in his income. The Court held that "it is as competent for Congress to tax annual gains and profits before they are divided among the holders of the stock as afterwards, and it is clear that Congress did direct that all such gains and profits, whether *divided or otherwise*, should be included in estimating the annual gains, profits, or income liable to taxation under the provisions of th[e] act." *Id.* at 18. In so holding, the Court recognized that "the owner of a share of stock in a corporation holds the share with all its incidents," including "his proportional share of all profits not then divided." *Ibid.*

In 1895, *Pollock* temporarily undermined *Hubbard* by holding that taxes on income derived from property must be apportioned. 158 U.S. at 618. But the Sixteenth Amendment overturned *Pollock* in 1913, reinstating "the previous complete and plenary power of income taxation possessed by Congress," *Stanton* v. *Baltic Mining Co.*, 240 U.S. 103, 112 (1916)—which included the 1864 income tax upheld in *Hubbard*. Nothing suggests that the Amendment's Framers intended a narrower income-taxing power than Congress had exercised before *Pollock*.

b. Other authorities contemporaneous with the Sixteenth Amendment's adoption show that, as a textual matter, "income" was used to refer to "all economic gains." *Banks*, 543 U.S. at 433. Dictionaries defined "income" as "[g]ains, or private revenue, from business, labor, or the investment of property." 1 Stewart Rapalje & Robert L. Lawrence, *A Dictionary of American and English Law* 644 (1883); see Charles E. Chadman, *A Concise Legal Dictionary* 199 (1909) ("[t]he profit or gains from business[,] property[,] or other sources of

wealth"). And when interpreting the term "[i]ncome" under the Massachusetts Constitution, the Massachusetts Supreme Judicial Court explained that "[i]ts usual synonyms are 'gain,' 'profit,' [and] 'revenue.'" *Trefry* v. *Putnam*, 116 N.E. 904, 908 (1917).

Contemporaneous tax experts agreed. One prominent scholar, Professor Robert Murray Haig, defined income as "the money value of the net accretion to one's economic power between two points in time." *The Concept of Income—Economic and Legal Aspects* 7, reprinted in *The Federal Income Tax* (1921) (Robert Murray Haig ed.) (Haig) (emphasis omitted). That definition was "the one generally adopted as the definition of income in modern income tax acts" (*i.e.*, immediately after the Sixteenth Amendment). *Ibid.* Other scholars similarly defined income as "the flow of commodities and services accruing to an individual through a period of time and available for disposition after deducting the necessary cost of acquisition." William Wallace Hewett, *The Definition of Income and its Application in Federal Taxation* 22-23 (1925) (emphasis omitted).

2. Petitioners' ratification-era sources do not support their asserted realization requirement

Petitioners contend (Br. 40) that the Sixteenth Amendment created a "realization requirement." Under petitioners' asserted requirement, even if a corporation realizes income, Congress may not tax a shareholder on his pro rata share of that income unless he receives direct "payment" through a monetary dividend. Pet. Br. 1. The Amendment imposes no such requirement.

a. The Sixteenth Amendment does not reference realization, even though the concept was well established when the Amendment was adopted. Dictionaries de-

fined "realize" as "to convert any kind of property * * * into money, esp. rights or securities representing investments or speculations, as shares, bonds, etc." *Webster's New International Dictionary of the English Language* 1778 (1913) (*Webster's*); see Henry Campbell Black, *A Law Dictionary* 993 (2d ed. 1910) (*Black's*) (similar). And some previous income-tax provisions had taxed certain "profits *realized*." 1864 Act § 116, 13 Stat. 281 (emphasis added); see, *e.g.*, 1870 Act § 7, 16 Stat. 257-258. The Amendment's Framers thus easily could have authorized taxes only "on incomes *realized*." But they did not.

That omission is especially telling in light of the Treasury Department's contemporaneous understanding of "income" as including unrealized gains. In 1909, Congress enacted a corporate excise tax tied to the "net income" of covered corporations. Corporation Tax Act, ch. 6, § 38, 36 Stat. 112. Because the same Congress then proposed the Sixteenth Amendment, the Amendment's reference to "income" has "been taken to mean the same thing as used in" the 1909 excise-tax law, *Bowers* v. *Kerbaugh-Empire Co.*, 271 U.S. 170, 174 (1926). And the Treasury Department interpreted income under the 1909 excise-tax law to include an "increase in the value of [a corporation's] capital assets," an "increase in [the] value of unsold property," T.D. 1742, 14 Treas. Dec. Int. Rev. 127 (1911), and "an appreciation in the value of securities," T.D. 1706, 14 Treas. Dec. Int. Rev. 75 (1911).

Lacking any textual reference to realization, petitioners attempt (Br. 26-27) to read their asserted realization requirement into the word "incomes" and the phrase "whatever source derived." Those attempts are misconceived.

Petitioners cite definitions of "income" that reference gain that "proceeds from" or "derives from" particular sources, such as "labor, business, property, or capital." Br. 29 (citations omitted). Those phrases do not support a realization requirement. Rather, they simply clarify that to be income, a gain must come from a certain type of source that renders it economic in nature. Absent such clarification, the word "gain" could refer to non-economic gains that may not qualify as income. Thus, petitioners ultimately acknowledge that the phrase "gains . . . derived from" does not provide "any guidance" about whether the gains must be realized. *Id.* at 38 (citations omitted).

Petitioners also rely on a statement in *Black's Law Dictionary* that "'[i]ncome' means that which comes in or is received from any business or investment of capital, without reference to the outgoing expenditures." *Black's* 612; see Pet. Br. 29. But that statement is in an explanatory paragraph distinguishing "business" income from "profit." *Black's* 612. The statement therefore does not purport to capture the ordinary meaning of "income," which was separately defined as including "gains, profit, or private revenue." *Ibid.*[3] In any event, the MRT *does* tax earnings that "come[] in or [are] received from a[] business," *ibid.*—it simply taxes shareholders on those earnings, rather than the business itself.

Petitioners further err in suggesting (Br. 27) that the phrase "from whatever source derived," U.S. Const. Amend. XVI, establishes their asserted realization re-

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[3] Petitioners' cited (Br. 30) definition of income from Thomas Cooley's treatise likewise only distinguishes "business" income from "[*p*]*rofits*." Thomas M. Cooley, *Treatise on the Law of Taxation* 160 n.1 (1876).

quirement. That phrase is instead designed to overturn "the principle upon which the *Pollock Case* was decided"—*i.e.*, that a tax on income *derived* from property is direct—by "prevent[ing]" courts from assessing an income tax's constitutionality based on "the sources from which a taxed income was derived." *Brushaber* v. *Union Pac. R.R. Co.*, 240 U.S. 1, 18-19 (1916) (emphasis omitted); see *Stanton*, 240 U.S. at 113. In other words, the phrase *restores* Congress's pre-*Pollock* power to tax all income, "whatever" its source; it does not newly *restrict* Congress to taxing only realized gains.

Petitioners additionally contend (Br. 34-35) that without a realization requirement, Congress could "deem" "anything" income, thus "render[ing] Article I's apportionment requirement a dead letter." That is wrong. "In determining what constitutes income[,] substance rather than form is to be given controlling weight." *Kerbaugh-Empire Co.*, 271 U.S. at 174. To fall within the Sixteenth Amendment, a tax must in fact target income, as that term has long been understood.

Petitioners and the amici supporting them raise the specter of taxes that Congress has not enacted. Petitioners emphasize (Br. 35) the possibility of taxes on "property * * * based on value," while amici highlight "a slurry of proposed wealth taxes," *e.g.*, Americans for Tax Reform Amicus Br. 20. "Under [this Court's] judicial tradition," however, "[it] do[es] not decide whether a tax may constitutionally be laid until [it] find[s] that Congress has laid it." *Helvering* v. *Griffiths*, 318 U.S. 371, 394 (1943).

In any event, a hypothetical tax on "the net value of all covered assets" at a particular point in time, Americans for Tax Reform Amicus Br. 20, would be fundamentally distinct from a tax on income. That hypothet-

ical tax would target "the amount of [property or] wealth which a person has on a fixed date." *Trefry*, 116 N.E. at 907; see *Webster's* 1089 (explaining that "[c]apital is a static conception independent of time"); Hewett 35 ("Capital is a stock of wealth in existence at a point of time."). By contrast, an income tax targets economic gain "between two points of time." Haig 7; see Hewett 35 ("Income is a flow of commodities and services through a period of time."); *Trefry*, 116 N.E. at 907 (explaining that income "involves time as an essential element of its measurement or definition"). It is those well-established principles—not petitioners' asserted realization requirement—that "distinguish[] income [taxes] from property tax[es]." Pet. Br. 36.

b. Petitioners also contend (Br. 27) that "[p]reratification precedent" supports their asserted realization requirement. But they ignore this Court's decision in *Hubbard*, which refutes that requirement. Petitioners instead rely on *Gray* v. *Darlington*, 82 U.S. 63 (1872), but *Gray* held as a matter of statutory interpretation that where a taxpayer sold bonds whose value increased over four years, that increase was not taxable because Congress "intended" to tax only gains "realized from a business transaction begun and completed during the preceding year." *Id.* at 65, 67. In reaching that conclusion, the Court observed that the "[m]ere advance in value" of the bonds did not constitute "income specified by the statute." *Id.* at 66. That observation does not suggest, however, that income requires realization—after all, realization was not at issue in *Gray* because gains there were "realized by th[e] sale" of the bonds. *Id.* at 65. Nor did *Gray* cite *Hubbard*, much less overrule it.

The lower-federal-court cases that petitioners cite (Br. 27-28) are equally unhelpful to them. Those cases indicate that "'income,' as used in revenue legislation," means "the receipt of actual cash as opposed to contemplated revenue due but unpaid, unless a contrary purpose is manifest from the language of the statute." *Maryland Casualty Co.* v. *United States*, 52 Ct. Cl. 201, 209 (1917). That principle does not apply to taxes (like the MRT) that target a corporation's "receipt of actual cash." *Ibid.* Regardless, the cases recognize that Congress *may* tax "contemplated revenue due but unpaid" as income so long as it makes that intent "manifest." *Ibid.*; see *United States* v. *Schillinger*, 27 F. Cas. 973 (C.C. S.D.N.Y. 1876) (No. 16,228) (approvingly citing such a provision).

Petitioners find no support in state authorities either. To the contrary, the Massachusetts Supreme Judicial Court's decision in *Trefry* interpreted income broadly under the state constitution, see p. 15, *supra*, and Virginia's 1898 income tax reached "the shares of the gains and profits of all companies * * * of any person who would be entitled to the same if divided, whether said profits have been divided or not." Acts of Assembly, ch. 496, § 1, 1897-1898 Va. Acts 527. Meanwhile, petitioners cite (Br. 28) a Massachusetts decision interpreting only what a "testator intended" under his will. *Minot* v. *Paine*, 99 Mass. 101, 112 (1868). And one amicus relies on a Wisconsin Supreme Court decision that upheld a provision of that State's income-tax law reaching unrealized imputed rental payments, thereby contradicting petitioners' conception of income. See Americans for Tax Reform Amicus Br. 13 (citing *State ex rel. Bolens* v. *Frear*, 134 N.W. 673, 691 (Wis. 1912), which relied on longstanding "English income tax laws"

counting a home's imputed rental value as "part of [the homeowner's] income").

c. Contemporaneous scholarship also undermines petitioners' asserted realization requirement. Professor Haig explained that to be income, the relevant gain "must be realizable," but need not be "realized" in the "narrow[]" sense of "actual physical separation." Haig 8. Professor Hewett likewise emphasized that "[t]he return from capital must be *realizable* to be considered income, but *realization* is unnecessary." Hewett 28. And one of petitioner's sources acknowledged that "[i]t is hardly accurate to state without reservation that unrealized appreciation is not taxable under an income tax law." Robert H. Montgomery, *Income Tax Procedure* 249 (1919).

Petitioners' other favored scholars sought to *move* the law in their preferred direction—while recognizing that their preferences did not accord with the status quo. For instance, Henry Campbell Black's treatise repeatedly posited what he thought "a proper definition of the word 'income' would be" in various scenarios, before acknowledging that actual practice had long been to the contrary. *A Treatise on the Law of Income Taxation Under Federal and State Laws* 78 (1913). Black argued that "a stockholder's interest in the undivided earnings or surplus of the corporation" should not "be called income," while conceding that "the United States income tax law of 1870" did precisely that. *Id.* at 119-120. And he argued that "the undivided earnings of a partnership" should "properly constitute income of the firm but not of the individual partners," while acknowledging that, "[n]evertheless," the statute "subject[ed] [earnings] to taxation in the names of the partners." *Id.* at 100.

Similarly, petitioners emphasize (Br. 31) a 1919 article making the arguments about stock dividends that the Court ultimately accepted in *Macomber*. Edwin R.A. Seligman, *Are Stock Dividends Income?*, 9 Am. Econ. Rev. 517. But as explained below, *Macomber*'s (and thus Seligman's) discussion of income has been *limited* to the stock-dividend context—which is not at issue here. Seligman, too, admitted that his views ran counter to Congress's 1860s and 1870s income-tax laws and this Court's decision in *Hubbard*. *Id.* at 532-533 n.6.

B. Post-Ratification Practice Shows That Congress May Tax Individuals On Their Pro Rata Shares Of Undistributed Business Earnings

This Court has "long looked to 'settled and established practice' to interpret the Constitution." *Moore* v. *Harper*, 143 S. Ct. 2065, 2086 (2023) (citation omitted). Even if the "constitutional text" were "ambiguous" as to whether income is limited by petitioners' realization requirement, such practice "offers strong support for [a] broad[er] interpretation" of that term. *NLRB* v. *Noel Canning*, 573 U.S. 513, 528 (2014).

1. Congress taxed undistributed earnings immediately after the Sixteenth Amendment's ratification

Contemporaneous practice provides "weighty evidence of the Constitution's meaning." *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2197 (2020) (citation omitted). Here, the laws that Congress enacted immediately following the Sixteenth Amendment's ratification reflect its understanding that taxable income can include individuals' pro rata shares of undistributed business earnings.

Congress's 1913 income-tax law—enacted eight months after the Amendment's ratification—included

undistributed corporate earnings within certain shareholders' taxable income. Specifically, the law taxed individuals on "the share to which [they] would be entitled of the gains and profits, if divided or distributed, *whether divided or distributed or not*, of all corporations, joint-stock companies, or associations," when they had been "formed or fraudulently availed of for the purpose of preventing the imposition of [a] tax through the medium of permitting such gains and profits to accumulate instead of being divided or distributed." Tariff of 1913 (1913 Act), ch. 16, § 2.A.2, 38 Stat. 166 (emphasis added). Congress enacted materially identical taxes in 1916 and 1918. See *Helvering* v. *National Grocery Co.*, 304 U.S. 282, 288 n.4 (1938). And the Court later described the taxes as establishing that "the sole owner of [a] business[] could not by conducting it as a corporation, prevent Congress, if it chose to do so, from laying on him individually the tax on the year's profits." *Id.* at 288.

Petitioners acknowledge the 1913 provision but emphasize its limitation to the context of "'fraudulent' abuse of the corporate form to avoid taxation." Br. 32 (citation omitted). But Congress's taxation of shareholders on undistributed corporate earnings *at all*—even in a targeted manner to combat tax avoidance—belies petitioners' categorical realization requirement. And it likewise refutes three Senators' suggestion during a 1913 floor debate that Congress could not tax shareholders on undistributed corporate earnings. See *ibid.* Those Senators never mentioned that Congress repeatedly enacted such taxes in the 1860s and 1870s, or that this Court upheld that power in *Hubbard*.

The 1913 law further provided that "persons carrying on business in partnership shall be liable for income

tax" based on "the share of the profits of [the] partnership to which [the] partner would be entitled if the same were divided, *whether divided or otherwise*." 1913 Act § 2.D, 38 Stat. 169 (emphasis added). Five years later, Congress broadened that provision to state that "the individual stockholders" of "[p]ersonal service *corporations* * * * shall be taxed in the same manner as the members of partnerships." Revenue Act of 1918, ch. 18, § 218(e), 40 Stat. 1070 (emphasis added). That is, "net income remaining undistributed at the close of [the] taxable year shall be accounted for by the stockholders of such corporation * * * in proportion to their respective shares." *Ibid.*

This Court upheld the validity of the partnership provision, rejecting an argument that partners' "respective shares" of profits "could not be deemed taxable income" because "no distribution of profits could lawfully have been made" to them under state law. *Heiner* v. *Mellon*, 304 U.S. 271, 280 (1938). The Court explained that the tax is "imposed upon the partner's proportionate share of the net income of the partnership, and the fact that it may not be currently distributable, whether by agreement of the parties or by operation of law, is not material." *Id.* at 281.

Seeking to distinguish Congress's longstanding method of taxing partners, petitioners assert (Br. 51) that "partnerships hav[e] no existence separate from their partners," which assertedly makes the partnership's income equivalent to the partners' income. But petitioners' premise is flawed.

The legal status of partnerships and corporations is not innate; it is governed by state law. Around the time of the Sixteenth Amendment's adoption, numerous States deemed "[a] partnership * * * just as distinct

and palpable an entity in the idea of the law, as distinguished from the individuals composing it, as is a corporation." *Walker* v. *Wait*, 50 Vt. 668, 676 (1878); see Francis M. Burdick, *Some Judicial Myths*, 22 Harv. L. Rev. 393, 395-396 (1909) (collecting authority from several States); *Forsyth* v. *Woods*, 78 U.S. 484, 486 (1870) (noting that a "partnership is a distinct thing from the partners themselves"). Today, many States still treat partnerships as entities separate from the partners. "Under California law," for instance, "a partnership maintains a separate identity from its general partners, and the partners are only secondarily liable for the tax debts of the partnership." *United States* v. *Galletti*, 541 U.S. 114, 116 (2004); see, *e.g.*, Kimberly S. Blanchard, *Cross-Border Tax Problems of Investment Funds*, 60 Tax. L. 583, 609 (2007) (explaining that because "most state laws[] treat the partnership as a separate entity, it is clear that the partners do not own undivided interests in partnership property").

Petitioners offer no contrary authority. They quote the reporter's paraphrase of the appellants' losing argument in *Goesele* v. *Bimeler*, 55 U.S. 589 (1853), that partners "*personally* 'own[] the property' of a partnership." Pet. Br. 41 (quoting 55 U.S. at 591, though the Court's opinion begins at 602). The Court determined, however, that the persons at issue had "no rights to the [entity's] property, except its use." *Goesele*, 55 U.S. at 607. And *Merchants' National Bank* v. *Wehrmann*, 202 U.S. 295 (1906), decided a question about national banks' powers, without suggesting that a partnership's property was necessarily that of its partners.

Because Congress may tax partners on undistributed partnership income—as petitioners concede (Br. 51)—there is no principled reason why Congress would

lack authority to tax shareholders on undistributed corporate income.

2. Congress continued to tax undistributed business earnings in the decades following the Sixteenth Amendment

This Court has treated post-ratification practice "as an important interpretive factor." *Noel Canning*, 573 U.S. at 525. In the decades after the Sixteenth Amendment, Congress continued—just as it had done before *Pollock*, and right after the Amendment's ratification—to enact income taxes that reached individuals' pro rata shares of undistributed business earnings.

a. Most relevant here, to prevent American taxpayers from using foreign corporations as a "tax avoidance device," Congress has long taxed U.S. shareholders of foreign corporations on the corporations' undistributed income. *Garlock, Inc.* v. *Commissioner*, 489 F.2d 197, 201 (2d Cir. 1973), cert. denied, 417 U.S. 911 (1974). The Revenue Act of 1937 provided that the "undistributed * * * net income of a foreign personal holding company shall be included in the gross income of" all of the company's U.S. shareholders. § 337(a), 50 Stat. 822. The Second Circuit upheld that provision under the Sixteenth Amendment, rejecting the "taxpayers' argument that inability to expend income in the United States, or to use any portion of it in payment of income taxes, necessarily precludes taxability." *Eder* v. *Commissioner*, 138 F.2d 27, 28 (1943). And this Court cited the statute approvingly as an example of Congress's taxing shareholders on a corporation's "undistributed net income." *National Grocery*, 304 U.S. at 288 n.4.

In 1962, Congress expanded that approach through Subpart F. 1962 Act, § 12, 76 Stat. 1006-1031. Subpart F requires a U.S. person owning at least 10% of a CFC's

shares to "include in his gross income * * * his pro rata share * * * of the corporation's subpart F income for [the] year"—even if that income has not been distributed to him. 26 U.S.C. 951(a)(1)(A). The Second Circuit upheld Subpart F under the Sixteenth Amendment, just as it had upheld the 1937 provision. *Garlock*, 489 F.2d at 202; accord *Estate of Whitlock* v. *Commissioner*, 494 F.2d 1297, 1301 (10th Cir.), cert. denied, 419 U.S. 839 (1974).

Petitioners concede (Br. 47) Subpart F's constitutionality because, in their view, it "rests on a theory of constructive realization of income by those being taxed." As an initial matter, petitioners' willingness to recognize such a theory shows that they do not genuinely believe the Constitution mandates a bright-line realization requirement. By acknowledging that the Sixteenth Amendment does not require actual "payment [or] exchange," Pet. Br. 1, petitioners effectively concede Congress's authority to draw reasonable lines about what constitutes taxable income.

In any event, Subpart F's constitutionality is best understood to rest not on constructive realization, but on "the history of U.S. income taxation show[ing] that Congress has for decades been drafting income tax statutes which have bypassed the corporate entity" and taxed shareholders on undistributed corporate income. *Estate of Whitlock* v. *Commissioner*, 59 T.C. 490, 507 (1972), aff'd in relevant part, 494 F.2d 1297 (10th Cir. 1974), cert. denied, 419 U.S. 839 (1974); see *Dougherty* v. *Commissioner*, 60 T.C. 917, 928 (1973). That historical pedigree is particularly strong as applied to the undistributed income of *foreign* corporations—presumably because Congress has generally avoided taxing foreign corporations and instead chosen to tax their U.S.

shareholders. See *Barclay & Co.* v. *Edwards*, 267 U.S. 442, 451 (1925).

By contrast, Subpart F does not naturally fit within petitioners' definition of constructive realization. According to petitioners, "the doctrine of constructive realization" allows Congress to "'treat[] as taxable income'" gains that are "'*unqualifiedly* subject to the demand of a taxpayer . . . , whether or not such income has actually been received in cash.'" Pet. Br. 47-48 (emphasis added; citation omitted). But petitioners admit that the 10% shareholders taxed by Subpart F and the MRT do not enjoy unqualified control over a corporation's income: Petitioners owned 13% of KisanKraft but disavow any ability to singlehandedly "force the company to issue a dividend." *Id.* at 12.

Petitioners attempt to defend their constructive-realization theory by asserting that Subpart F taxes only "'movable income' that could have been earned directly by domestic controlling shareholders." Br. 49 (citation omitted). But petitioners mention only three types of income taxed under Subpart F while omitting numerous others, such as income from "insuring risks outside the CFC's country of incorporation," "paying illegal bribes or kickbacks," "doing business in a country" under certain sanctions, and passive investments. 3 Bittker & Lokken ¶ 69.1, at 69-4; see 26 U.S.C. 952-954. Petitioners do not explain how any income taxed under Subpart F—let alone all forms of it—is subject to the "unqualified[]" control of a CFC's 10% shareholders. Pet. Br. 48 (citation omitted).

But if the Court were to recognize Subpart F's validity under some theory of constructive realization, the same theory would apply equally to the MRT. As elaborated below, the MRT and Subpart F's preexisting re-

gime share the same essential features. See pp. 42-43, *infra*. Thus, if "defer[ence]" is warranted for Congress's "legislative determination" in Subpart F—as petitioners contend (Br. 51)—then the same is true for Congress's legislative determination in the MRT.

b. Beyond the context of foreign companies, Congress has long used other "pass-through" mechanisms to "attribute[]" undistributed income of business entities to "individual[s]." *Bufferd* v. *Commissioner*, 506 U.S. 523, 525 (1993). As noted above, since 1913 it has been "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 26 U.S.C. 702(a) and (b). Ever since it recognized S corporations, Congress has imposed an analogous requirement on their shareholders. See 26 U.S.C. 1366(a) and (b); *Bufferd*, 506 U.S. at 524-525. And LLCs may similarly elect to be taxed as partnerships. See 26 C.F.R. 301.7701-3(a). Those longstanding pass-through mechanisms—in conjunction with Subpart F—raise substantial revenues for the federal government.

Petitioners accept (Br. 51) the constitutionality of the S-corporation regime because an entity needs shareholder consent to become an S corporation. 26 U.S.C. 1362(a). But if (as petitioners posit) a tax on undistributed corporate income were a direct tax requiring apportionment, then Congress could not impose the S-corporation tax, as shareholder "consent" could not "cure the constitutional difficulty." *CFTC* v. *Schor*, 478 U.S. 833, 851 (1986). Moreover, revoking S-corporation status requires the consent of "shareholders holding more than one-half of the shares." 26 U.S.C. 1362(d)(1)(B). So if holders of 49% no longer wish to

pay taxes on undistributed earnings, they still must do so. Consent thus cannot explain the S-corporation regime; instead, the explanation is that petitioners' realization requirement does not exist.

c. Although not directly analogous to the MRT, Congress has also taxed numerous other gains that do not appear to satisfy petitioners' rigid realization requirement, often enacting these regimes in response to abusive tax-avoidance behavior. See Noel B. Cunningham & Deborah H. Schenk, *Taxation Without Realization: A 'Revolutionary' Approach to Ownership*, 47 Tax. L. Rev. 725, 741-742 (1992). Beginning in 1916, for instance, Congress allowed individuals to pay taxes based on accounting methods "other than that of actual receipts and disbursements," so long as the chosen method "clearly reflect[s] [their] income." Revenue Act of 1916, ch. 463, § 8(g), 39 Stat. 763; see *Helvering* v. *Estate of Enright*, 312 U.S. 636, 643 (1941). Under accrual accounting, the mere "right to receive"—"not the actual receipt"—"determines the inclusion of the amount in gross income." *Spring City Foundry Co.* v. *Commissioner*, 292 U.S. 182, 184 (1934); see 26 U.S.C. 446(c)(2). In some circumstances, Congress has effectively *required* accrual accounting, and this Court has upheld such taxes as capturing "a fair reflection of income" even when the money had "not be[en] collected." *Estate of Enright*, 312 U.S. at 641, 645; see 26 U.S.C. 448(a) (prohibiting "cash receipts" accounting for certain corporations and partnerships).

In addition, Congress taxes those who relinquish U.S. citizenship as if they sold all their assets the day before expatriation, even though no gain from any such sale was realized. 26 U.S.C. 877A(a). Although "the time for payment" of the tax may be deferred un-

til the "year in which such property is disposed" if the taxpayer provides "adequate security," 26 U.S.C. 877A(b)(1) and (4)(A), the tax *liability* itself arises "on the day before the expatriation date," 26 U.S.C. 877A(a)(1)—*i.e.*, before any realization occurs.

Congress also taxes numerous assets as if they had been sold for a realized gain at the end of a taxable year—even if they were not in fact sold—including regulated futures contracts, 26 U.S.C. 1256(a) and (b); securities held by securities dealers, 26 U.S.C. 475(a); certain assets held by life-insurance companies, 26 U.S.C. 817A(b); and certain stock in passive foreign investment companies, 26 U.S.C. 1296(a). And Congress taxes holders of discounted debt instruments on imputed interest payments, even though no interest was actually paid, 26 U.S.C. 1272(a)(1)—a factor that drives prices in bond markets. Other examples abound. See, *e.g.*, 26 U.S.C. 305(c) (treating certain transactions, such as "a change in redemption price," as deemed distributions to shareholders); 26 U.S.C. 467(a) (taxing lessors on accrued rental payments, even if the payments are not made during the taxable year); 26 U.S.C. 1259 (taxing persons on gains based on "a constructive sale of an appreciated financial position"). Even if those taxes differ from the MRT, see Pet. Br. 52-53, they show that petitioners' asserted constitutional realization requirement is irreconcilable with much of the current Code. Adopting petitioners' realization requirement therefore could put at risk billions of dollars in revenue and reinvigorate the abusive tax-avoidance schemes that Congress has addressed.

3. Petitioners' congressional-practice argument lacks merit

Attempting their own congressional-practice argument, petitioners contend (Br. 37) that in "the aftermath" of the Court's 1920 decision in *Macomber*, Congress "observed the need for realization of taxable income" and has "consistently" taxed realized gains since. But any "reconfigur[ation]" (Pet. Br. 39) of income taxes after *Macomber* only confirms that *before* 1920, Congress did not view the Sixteenth Amendment as restricting its power to tax unrealized gains.

And as explained below, this Court subsequently limited *Macomber* to the stock-dividend context in which it arose. Once it became clear that *Macomber* did not create the rigid realization requirement that petitioners assert, Congress resumed enacting taxes that disregard that requirement, including Subpart F. While Congress has not "redefin[ed] the Tax Code's central 'gain or loss' provision to include unrealized appreciation in property," Pet. Br. 40, Congress's targeted decisions to tax unrealized appreciation demonstrate that it perceives no constitutional imperative—even as it often recognizes the "'administrative convenience'" of taxing gains upon realization, given the potentially "'cumbersome'" task "of valuing assets on an annual basis to determine whether the assets ha[ve] appreciated or depreciated in value." *Cottage Sav. Ass'n* v. *Commissioner*, 499 U.S. 554, 559 (1991) (citations omitted).

C. This Court Has Recognized Congress's Power To Tax Individuals On Their Pro Rata Shares Of Undistributed Business Earnings

Before the Sixteenth Amendment, *Hubbard* held that Congress may tax individuals' shares of undistributed corporate earnings as income. 79 U.S. at 18. Fol-

lowing the Amendment's adoption, this Court has consistently made clear that Congress may tax "all economic gains." *Banks*, 543 U.S. at 433. And the Court has emphasized that the Amendment empowers Congress to choose "how taxes may be laid" on such gains, so long as its choice is "neither unreasonabl[e] nor arbitrar[y]." *Taft* v. *Bowers*, 278 U.S. 470, 481, 483 (1929).

In arguing that the Sixteenth Amendment's *grant* of power somehow stripped Congress of a preexisting authority recognized in *Hubbard*, petitioners stake their case on dictum in *Macomber* implying that shareholders must receive monetary distributions of corporate earnings before being taxed on them. But *Macomber*'s dictum was poorly reasoned and has been abrogated by many later decisions. As it stands, this Court has limited *Macomber* to the stock-dividend context in which it arose.

1. **Macomber***'s dictum erroneously implied that Congress cannot tax shareholders on undistributed corporate earnings*

a. In *Macomber*, the Court considered whether a particular type of "stock dividend" was taxable income. 252 U.S. at 210. Standard Oil shareholders had received an additional 50% of their current number of common shares (*e.g.*, a shareholder with 2200 common shares received 1100 additional common shares). See *id.* at 200-201. As the Court explained, such a " 'stock dividend' " is a "book adjustment" that "does not alter the preexisting proportionate interest of any stockholder or increase the intrinsic value of his holding." *Id.* at 210-211. "The new [stock] certificates simply increase the number of the shares, with consequent dilution of the value of each share." *Id.* at 211.

The Court thus held that "the essential nature of a stock dividend necessarily prevents its being regarded as income in any true sense" under the Sixteenth Amendment. *Macomber*, 252 U.S. at 205. The Court recognized that it could have "rest[ed] the * * * case there." *Ibid.* But it proceeded to observe that "income" under the Sixteenth Amendment is "a gain, a profit, something of exchangeable value" that is *"received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit, and disposal." *Id.* at 207. According to petitioners (Br. 17-18), that dictum bars Congress from taxing shareholders on undistributed corporate income.

b. *Macomber*'s dictum was misconceived in multiple respects. The Court began from the premise that "[i]ncome may be defined as the gain derived from capital, from labor, or from both combined." *Macomber*, 252 U.S. at 207 (citation omitted). Citing no authority, it then read that definition of income to mean that the gain must be "*received* or *drawn* by the recipient (the taxpayer) for his *separate* use, benefit and disposal." *Ibid.* As Justice Holmes emphasized in dissent, that novel reading of income contradicted "the common understanding" of the term "'at the time of [the Amendment's] adoption.'" *Id.* at 220 (citation omitted); see *id.* at 237 (Brandeis, J., dissenting) (stating that the majority defied the "reasonable understanding" of what is fairly "regarded as income").

Petitioners err in asserting (Br. 19) that *Macomber*'s definition of income "was the logical consequence" of the Court's decisions in *Brushaber* and *Lynch* v. *Hornby*, 247 U.S. 339 (1918). *Brushaber* never attempted to define income; it held that the Sixteenth Amendment "prevent[ed]" courts from relying on "the sources from which a taxed income was derived" when

determining whether apportionment was required. 240 U.S. at 19. *Hornby* observed that "Congress was at liberty to treat [certain] dividends" as "income when they came to hand," without suggesting that Congress could tax shareholders *only* then. 247 U.S. at 344.

The *Macomber* Court also misunderstood the historical practice. It recognized that *Hubbard* had upheld taxes on shareholders' portions of undistributed corporate earnings, but it concluded that *Hubbard* "must be regarded as overruled by *Pollock*." *Macomber*, 252 U.S. at 218. That reasoning ignores that the Sixteenth Amendment overturned *Pollock* and "forbids" applying that decision to income taxes. *Brushaber*, 240 U.S. at 19. Under the *Macomber* Court's apparent view, the Sixteenth Amendment negated *Pollock*'s income-tax holding *except* as applied to the income taxes at issue in *Hubbard*. Nothing in the Amendment's text or history supports that understanding. To the contrary, the Sixteenth Amendment authorized precisely those income taxes—like those taxing undistributed corporate earnings from 1864 through 1871—that "had been in actual operation within the United States before its adoption." *Burnet*, 282 U.S. at 365.

2. This Court has abrogated **Macomber***'s dictum*

Macomber "was promptly and sharply criticised." *Griffiths*, 318 U.S. at 373 & n.4 (citing commentary). And the Court has steadily limited its reach. *Macomber* retains vitality only in its specific stock-dividend context and when Congress has expressly invoked realization.

a. One year after *Macomber*, the Court began limiting its force even in the stock-dividend context. In *United States* v. *Phellis*, 257 U.S. 156 (1921), the Court held that a stock dividend issued as part of a corporate

reorganization was income under the Sixteenth Amendment, *id.* at 175, over a dissent suggesting a "conflict with" *Macomber*, *id.* at 176 (McReynolds, J., dissenting). The Court later observed that *Macomber* had led to an "erroneous belief" by some (including in Congress) that "no stock dividend could be taxed." *Helvering* v. *Gowran*, 302 U.S. 238, 242 (1937). In fact, *Macomber* "affected only the taxation of dividends declared in the same stock as that presently held by the taxpayer," where "the preexisting proportionate interests of the stockholders remained unaltered." *Koshland* v. *Helvering*, 298 U.S. 441, 444-445 (1936). By contrast, a stock dividend that "gives the stockholder an interest different from that which his former stock holding represented" remained "taxable as income," *id.* at 446—even though such dividends are not "*received* or *drawn by* the recipient (the taxpayer) for his *separate* use" as *Macomber*'s dictum would have required, 252 U.S. at 207.

b. In the 1940s, the Court refused to apply *Macomber* beyond the stock-dividend context. In *Helvering* v. *Bruun*, 309 U.S. 461 (1940), a tenant erected a new building on a landlord's land and then defaulted on the lease. *Id.* at 462. When the government tried to tax the building's value as the landlord's income, he contended that the gain was not yet "realized within the meaning of the Sixteenth Amendment" and would become income "only upon [his] disposition of the asset." *Id.* at 467. The Court disagreed, holding that the term income was "broad enough to embrace the gain in question," even though the landlord could not "sever the improvement begetting the gain from his original capital." *Id.* at 468-469.

The *Bruun* Court reasoned that *Macomber*'s "expressions" about income being a gain "received by the recipient for his separate use" were simply "used to clarify the distinction between an ordinary [cash] dividend and a stock dividend." 309 U.S. at 468-469; see *id.* at 468 n.8. The Court therefore deemed *Macomber*'s understanding of income "not controlling." *Id.* at 469.[4]

In *Helvering* v. *Horst*, 311 U.S. 112 (1940), the Court more directly undermined *Macomber*'s dictum by deeming realization a "rule[] founded on administrative convenience" rather than constitutional imperative. *Id.* at 116. Thus, although *Horst* "addresses what counts as realization" in the context of a gift, Pet. Br. 42, *Horst* viewed its realization analysis as implementing statutory and administrative principles alone.

Three years later, in *Griffiths*, the Court was asked to overrule *Macomber* but avoided the question by holding that the relevant statute did not tax the type of dividends at issue in *Macomber*. 318 U.S. at 394, 404. Before reaching its statutory holding, the Court recounted *Macomber*'s erosion, explaining that *Bruun* and *Horst* had "undermined * * * the original theoretical bases of the decision," *id.* at 394, leaving *Macomber* "limited * * * to the kind of dividend there dealt with," *id.* at 375.

c. In 1955, the Court further vitiated *Macomber* in *Glenshaw Glass*, *supra*. There, the Court held that

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[4] Petitioners cite (Br. 20-24) decisions between *Macomber* and *Bruun*, but those decisions preceded the line of cases directly undercutting *Macomber*. In any event, the few cited decisions that invalidated taxes simply applied *Macomber* to transactions materially indistinguishable from the one in *Macomber*. See, *e.g.*, *Weiss* v. *Stearn*, 265 U.S. 242, 253-254 (1924). And the only cited decisions from outside of the stock-dividend context *upheld* the relevant taxes' constitutionality. See, *e.g.*, *Taft*, 278 U.S. at 482-484.

punitive-damages awards are taxable income, emphasizing that "income" refers to "all gains except those specifically exempted" by the Code. 348 U.S. at 430. The Court thus rejected the taxpayers' reliance on *Macomber*'s "characterization of income" as "the gain derived from capital, from labor, or from both combined." *Ibid.* (citation omitted). The Court explained that *Macomber* used that characterization when "determin[ing] whether the distribution of a corporate stock dividend constituted a realized gain to the shareholder, or changed 'only the form, not the essence,' of his capital investment." *Id.* at 430-431 (citation omitted). And while "the definition served a useful purpose" "[i]n that context," the Court made clear that "it was not meant to provide a touchstone to all future gross income questions." *Id.* at 431.

Petitioners emphasize (Br. 24) the statement in *Glenshaw Glass* that punitive-damages awards constituted income because they involved "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." 348 U.S. at 431. But that statement simply listed elements that sufficed to create income on the facts of that case—not necessary elements of income in every case. See *ibid.* (prefacing statement with "[h]ere we have instances of"). Having just explained that *Macomber*'s conception of realization was *not* "a touchstone to all future gross income questions," the Court was not treating realization as essential. *Ibid.*

Petitioners cite (Br. 25) three cases quoting *Glenshaw Glass*'s statement about realization, but none suggests that realization is a *necessary* element of income. Each involved economic gains far afield from those at issue here. See *Commissioner* v. *Indianapolis Power*

& Light Co., 493 U.S. 203, 209-210 (1990) (customer deposits); *Commissioner* v. *Kowalski*, 434 U.S. 77, 83 (1977) (meal-allowance payments); *James* v. *United States*, 366 U.S. 213, 218 (1961) (embezzled funds). And *Kowalski* recognized that *Glenshaw Glass* "is squarely at odds with" *Macomber*'s "definition of income." 434 U.S. at 94.

d. Finally, the Court's 1991 decision in *Cottage Savings Ass'n* reiterated that "the concept of realization is 'founded on administrative convenience.'" 499 U.S. at 559 (quoting *Horst*, 311 U.S. at 116). That realization concept—which applies only when Congress incorporates it—does not even derive from the statutory definition of "gross income." 26 U.S.C. 61(a). Instead, the Court explained, it is rooted in separate provisions, such as one defining "'the gain or loss from the sale or other disposition of property' as the difference between 'the amount realized' from the sale or disposition of the property and its 'adjusted basis.'" *Cottage Sav. Ass'n*, 499 U.S. at 559 (quoting 26 U.S.C. 1001(a)) (brackets omitted). In those provisions, the Court observed, Congress has invoked the concept of realization for the "administrative purpose[]" of streamlining income reporting. *Id.* at 565.

When applying the *statutory* "realization requirement in § 1001(a)," the Court looked to *Macomber*'s "treatment of realization." *Cottage Sav. Ass'n*, 499 U.S. at 563, 565. But it never suggested that that treatment flowed from the Sixteenth Amendment rather than "Section 1001(a)'s language" prescribing "realization." *Id.* at 559.

Lower courts have followed this Court's lead in recognizing that *Macomber* has been limited to the stock-dividend context. See, *e.g.*, *Commissioner* v. *Obear-*

Nester Glass Co., 217 F.2d 56, 60 (7th Cir. 1954) ("[*Macomber*] has been limited to its specific facts."), cert. denied, 348 U.S. 982 (1955). That is how courts have regarded *Macomber* when upholding Subpart F in particular. See *Garlock*, 489 F.2d at 203 n.5.

Similarly, since *Cottage Savings Ass'n*, "[t]he scholarly consensus" is that "[t]he realization requirement is not constitutionally mandated." Cunningham & Schenk, 47 Tax L. Rev. at 741 & n.69; see, *e.g.*, 1 Bittker & Lokken ¶ 5.2, at 5-19 (3d ed. 1999) (explaining that "realization remains largely intact as a rule of administrative convenience (or legislative generosity)" but has been "badly eroded, if not wholly undermined, as a constitutional principle"); Marvin A. Chirelstein & Lawrence Zelenak, *Federal Income Taxation* 59 (14th ed. 2018) (Chirelstein & Zelenak) ("[R]ealization is strictly an administrative rule and not a constitutional, much less an economic requirement, of 'income.' ").

Even scholars cited by petitioners (Br. 37-38) agree that "[t]he view that realization is constitutionally mandated has dissipated," and "[n]ow the realization requirement is generally regarded as a concession to the administrative burdens of * * * a system taxing asset appreciation as it occurs." Jeffrey L. Kwall, *When Should Asset Appreciation Be Taxed?*, 86 Ind. L.J. 77, 80 (2011). And scholars have explained that the statutory concept of realization is laden with "ambiguities," *id.* at 100, because "the Code contains no general rule or explicit set of criteria * * * [for] determin[ing] just when a realization has taken place," Chirelstein & Zelenak 101. The amorphous nature of realization further refutes petitioners' contention that it is a bedrock constitutional requirement.

Petitioners thus err in invoking (Br. 14, 26, 36) *stare decisis*. While *Macomber* still governs whether the type of stock dividends at issue there are income and informs application of the statutory concept of realization, this Court has already abrogated its broader relevance as a constitutional precedent. Accordingly, *Macomber* is not controlling here.

D. The MRT Taxes Income

The MRT accords with constitutional text, history, and precedent. Petitioners' specific objections to the MRT are baseless.

1. The MRT is an income tax. It taxes U.S. persons owning at least 10% of a CFC's shares on their pro rata shares of the CFC's "accumulated post-1986 deferred foreign *income*." 26 U.S.C. 965(a)(1) and (2) (emphasis added). As petitioners do not dispute, the MRT targets income that the CFC itself has plainly earned. And when a CFC has earned income, its 10% shareholders have enjoyed a corresponding "accession[] to wealth," *Glenshaw Glass*, 348 U.S. at 431, and "economic gain[]," *Banks*, 543 U.S. at 433; see Hewett 32 (explaining that a corporation's "reinvested earnings must be counted as income" to the "stockholder").

Foreign (or state) corporate laws may allow corporations to temporarily retain earnings, rather than immediately distribute them as dividends. And those laws may treat corporations as formally separate from their shareholders. But "the law of a particular [country or] State" cannot change the *fact* of the economic gain or restrict "the power of Congress to determine how * * * income * * * shall be taxed." *Burk-Waggoner Oil Ass'n* v. *Hopkins*, 269 U.S. 110, 114 (1925); see *PPL Corp.* v. *Commissioner*, 569 U.S. 329, 335 (2013) (explaining that foreign and state law are "generally not controlling in

[the] federal tax context"); *Mellon*, 304 U.S. at 279 & n.7. To the contrary, Congress has flexibility to target "*all* gain" and decide "how taxes may be laid thereon," so long as it "act[s] neither unreasonably nor arbitrarily." *Taft*, 278 U.S. at 481, 483 (emphasis added).

Far from being unreasonable or arbitrary, the MRT fits comfortably within Congress's consistent practice of taxing individuals on their shares of undistributed business earnings—and thereby accords with this Court's precedent holding that Congress is "competent" to tax an individual on "his proportional share of all [corporate] profits not then divided." *Hubbard*, 79 U.S. at 18. The MRT follows in the footsteps of the income-tax laws in 1864, 1865, 1867, 1870, and 1913. It accords with the way Congress has long taxed partners and S-corporation shareholders. And it tracks Subpart F's taxation of U.S. shareholders' pro rata portions of undistributed corporate income.

Petitioners treat (Br. 3) the MRT as a "novelty," but they cannot distinguish it from the decades-old Subpart F regime. They assert (Br. 50) that Subpart F applies only to "controlling U.S. shareholders." But the MRT, like Subpart F, applies to U.S. owners of 10% or more of a CFC's shares. 26 U.S.C. 951(b), 965(a). Under the MRT and Subpart F alike, those persons are taxed on undistributed corporate income "irrespective of whether they have the power to force the corporation to make a distribution." Pet. Br. 10.

There are only two genuine distinctions between the MRT and the Subpart F regime, but neither affects the Sixteenth Amendment analysis. First, the MRT and Subpart F tax different forms of income. See Pet. Br. 45. Whereas the MRT taxes "accumulated post-1986 deferred foreign income," 26 U.S.C. 965(a)(1) and (2),

Subpart F taxes various other categories of income, see p. 28, *supra*. Yet both taxes are equally consistent with the Sixteenth Amendment, which allows Congress to tax "incomes, from *whatever source derived*." U.S. Const. Amend. XVI (emphasis added).

Second, the MRT and Subpart F tax income earned over different time periods. Whereas the MRT applies once and taxes certain income earned and retained since 1986, 26 U.S.C. 965(a), Subpart F primarily taxes income earned annually, 26 U.S.C. 951(a)(1). Petitioners contend (Br. 51) that the MRT's 30-year time horizon renders it suspect. But they identify nothing in the Sixteenth Amendment's text or history suggesting that Congress must tax income at any particular frequency—or that Congress relinquishes its power to tax income that has been retained for some unspecified amount of time. See *PPL Corp.*, 569 U.S. at 341 (holding that a retroactive tax on several years of "actual, realized net income in hindsight" is an income tax). In theory, the MRT's time horizon could be relevant to an argument that it is an impermissibly "retroactive tax provision under the Due Process Clause." *United States* v. *Carlton*, 512 U.S. 26, 30 (1994). But petitioners made that argument in the Ninth Circuit, the court correctly rejected it, and petitioners did not seek certiorari on it. See Pet. App. 18-19. Petitioners cannot now repackage their failed retroactivity argument as a Sixteenth Amendment one.

2. The additional objections to the MRT offered by petitioners and amici lack merit.

a. Petitioners label (Br. 44) the MRT a tax on "property" because, in their view, "[t]he sole event that triggers MRT liability is ownership of specified property on a specific date in 2017." That is incorrect. To trigger

MRT liability, a CFC must have earned and retained income between 1986 and 2017, and a U.S. person must have owned at least 10% of the CFC on the relevant date. That shareholder is then taxed not on the "value" of any "property," Pet. Br. 35, but on his share of the CFC's deferred *income*. See *Dougherty*, 60 T.C. at 929 (upholding Subpart F's application to a shareholder's portion of a CFC's accumulated "income of a past year prior to the effective date of the statute").

Petitioners also contend (Br. 45) that the MRT impermissibly "imposes liability on shareholders" for income earned by the "corporation," suggesting that the tax could be imposed only on the corporation. But that argument does not sound in the Sixteenth Amendment. So long as there is income, the Sixteenth Amendment empowers Congress to tax it. See *Taft*, 278 U.S. at 481. The Due Process Clause limits Congress's power to "arbitrar[ily]" "attribut[e] to" one taxpayer "the income" of another. *Burnet* v. *Wells*, 289 U.S. 670, 679 (1933). But there is nothing arbitrary about attributing a pro rata portion of a corporation's income to a 10% shareholder. To the contrary, Congress has long adopted that approach with pass-through entities like partnerships, S corporations, and U.S.-controlled foreign corporations.

Petitioners additionally object (Br. 45) to the MRT's potential application to a shareholder who first acquired 10% of a CFC "in 2017, long after the corporation earned the sums being taxed." But Subpart F has the same feature: A shareholder who first acquired 10% of a CFC on the "last day" of the taxable year would be taxed on "his pro rata share * * * of the corporation's subpart F income for [that entire] year." 26 U.S.C. 951(a)(1). Petitioners concede Subpart F's constitution-

ality and raise no concerns about that aspect of it. Nor could they: "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." *Taft*, 278 U.S. at 484.

Even if petitioners' theory (Br. 45) had validity, it would apply only to persons who became 10% CFC shareholders "after the corporation earned the sums being taxed." Petitioners are not such persons: They say they have owned over 10% of KisanKraft "[s]ince its inception." Pet. App. 73. Because "litigants typically lack standing to assert the constitutional rights of third parties," *United States* v. *Hansen*, 143 S. Ct. 1932, 1939 (2023), petitioners cannot assert the rights of shareholders who were taxed on a CFC's prior earnings.

b. Some amici assert that upholding the MRT would necessarily allow Congress to tax the "millions of Americans" who hold small amounts of stock "in their retirement and investment accounts." Buckeye Inst. Amici Br. 15. Of course, Congress's 1864 income-tax law *did* tax individuals on the undistributed earnings of corporations in which they held stock—albeit at a time when corporations were smaller and shareholder control was greater than with most corporations today. See E. Merrick Dodd, Jr., *Statutory Developments in Business Corporation Law, 1886-1936*, 50 Harv. L. Rev. 27, 29-30 (1936).

In any event, that hypothetical tax—implausible in today's economy because it would be administratively unworkable—would present different questions because it would lack the same deep historical pedigree as the MRT. The MRT applies to the CFCs already cov-

ered by Subpart F, which are majority-owned by U.S. persons who themselves own at least 10% of the CFC's shares. 26 U.S.C. 951(b), 957(a), 965(a). Where a small number of U.S. shareholders have majority control of a foreign corporation, they can collectively "force dividend distributions" to help cover taxes imposed on them as U.S. shareholders. Julie A. Roin, *United They Stand, Divided They Fall: Public Choice Theory and the Tax Code*, 74 Cornell L. Rev. 62, 118 (1988).

In addition, the 10% share-ownership threshold in both the MRT and Subpart F ensures that the taxed shareholders generally possess a "degree of control over the corporation" that justifies imputing the corporation's income to them. *Estate of Whitlock*, 59 T.C. at 509; see H.R. Rep. No. 1447, 87th Cong., 2d Sess. 59 (1962). Here, for instance, petitioners were friends with KisanKraft's founder and CEO and "regularly" spoke to him "about KisanKraft and its business." Pet. App. 73. Congress reasonably decided to tax, on a one-time basis, undistributed business earnings corresponding to the ownership shares of shareholders in petitioners' position.

II. THE MRT IS INDEPENDENTLY CONSTITUTIONAL AS AN EXCISE TAX

Regardless of whether the MRT is an income tax, it is a valid excise tax, and the Court may affirm the decision below on that basis.[5]

A. The Constitution empowers Congress "[t]o lay * * * Excises," so long as they are "uniform throughout the United States." U.S. Const. Art. I, § 8, Cl. 1. An

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[5] Petitioners' certiorari reply brief incorrectly contended (at 13) that the government "forfeited" this alternative argument. See Gov't C.A. Br. 46-47.

excise is a tax on, *inter alia*, "privileges," "particular business transactions," *Thomas* v. *United States*, 192 U.S. 363, 370 (1904), or "a particular use or enjoyment of property," *Fernandez* v. *Wiener*, 326 U.S. 340, 352 (1945). See, *e.g.*, *Knowlton* v. *Moore*, 178 U.S. 41, 78-83 (1900).

After *Pollock*, this Court upheld excise taxes levied on the privilege of doing business in a particular capacity. In *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911), for example, the Court considered an excise tax on corporations earning more than a certain amount of income. *Id.* at 146. The Court deemed the tax "an excise upon the particular privilege of doing business in a corporate capacity, *i.e.*, with the advantages which arise from corporate or quasi-corporate organization." *Id.* at 151. And the Court rejected the argument that the tax was a direct tax "upon property solely by reason of its ownership." *Id.* at 150.

Regardless of whether the MRT is an income tax, it is a valid excise tax. It can be viewed as a tax "upon the particular privilege of doing business" through a CFC, "with the advantages which arise" from that arrangement, *Flint*, 220 U.S. at 151—namely, the long-established ability to defer taxes on a significant portion of foreign income. Like the tax in *Flint*, the "amount of tax" required under the MRT is "measur[ed]" by "the income of the corporation." *Stratton's Independence, Ltd.* v. *Howbert*, 231 U.S. 399, 414 (1913).

That the MRT is levied on a CFC's 10% U.S. shareholders, rather than on the corporation itself, does not preclude excise-tax status. After all, 10% shareholders presumptively possess a degree of control over the CFC and have enjoyed the privilege of deferring taxes on foreign income. The MRT's application to 10% sharehold-

ers is thus a reasonable means of taxing the privileges of "doing business" through a CFC, *Flint*, 220 U.S. at 151—particularly given the potential difficulties of taxing a foreign corporation itself.

Petitioners contend (Br. 44) that the MRT is a direct tax because "it taxes shareholders on ownership of property." But the correct standard is whether the MRT taxes "property *solely* because of its ownership." *Flint*, 220 U.S. at 150 (emphasis added). It does not. The MRT is not triggered by "the mere ownership of property," but by "the actual doing of business" through a CFC that earned and retained income abroad. *Ibid.* And the MRT is one element of the TCJA's broader scheme to afford new "advantages" to CFCs and their shareholders while taxing other "privilege[s]" they have long enjoyed. *Id.* at 150. Thus, the MRT is independently justified as "an excise tax," and "nothing in the Constitution requir[es] such taxes to be apportioned." *Id.* at 152. This Court may affirm the decision below on that basis.[6]

B. At minimum, the Court should remand for the court of appeals to determine whether the MRT may be sustained as an excise tax. Because the Ninth Circuit held that the MRT is an income tax, it had no occasion to consider the government's alternative argument. The Court often remands in similar circumstances. See,

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[6] Even if the MRT were not an excise tax when imposed on a CFC's *individual* shareholders (such as petitioners), it would at least be an excise tax when imposed on a CFC's *corporate* shareholders. That follows directly from *Flint*, which upheld an excise tax on corporations based solely "upon the particular privilege of doing business in a corporate capacity." 220 U.S. at 151. Here, the MRT taxes corporate shareholders on the additional privilege of earning and retaining income abroad.

e.g., *City of Austin* v. *Reagan Nat'l Adver. of Austin, LLC*, 142 S. Ct. 1464, 1476 (2022).

A remand would be particularly prudent here because of the disruptive consequences that would arise from holding the MRT unconstitutional. Invalidating the MRT could cost the government approximately $340 billion over the next decade, see p. 6, *supra*—and potentially far more if the Court were also to call into question longstanding regimes like Subpart F, partnership, and S-corporation taxes. It would disrupt the balance that Congress struck in the TCJA by taxing shareholders of foreign corporations on the one hand and granting them dividend deductions on the other hand. And it would also require the government to adjudicate a flood of MRT refund claims—many of which would raise complex statute-of-limitations and administrative-exhaustion issues since the MRT is a 2017 liability. See *United States* v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 14 (2008). Before unleashing those consequences, the Court should ensure consideration of all arguments for the MRT's constitutionality—including that it is a valid excise tax.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. U.S. Constitution Amend. XVI provides:

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

2. 26 U.S.C. 951 provides:

Amounts included in gross income of United States shareholders

(a) Amounts included

(1) In general

If a foreign corporation is a controlled foreign corporation at any time during any taxable year, every person who is a United States shareholder (as defined in subsection (b)) of such corporation and who owns (within the meaning of section 958(a)) stock in such corporation on the last day, in such year, on which such corporation is a controlled foreign corporation shall include in his gross income, for his taxable year in which or with which such taxable year of the corporation ends—

(A) his pro rata share (determined under paragraph (2)) of the corporation's subpart F income for such year, and

(B) the amount determined under section 956 with respect to such shareholder for such year (but

only to the extent not excluded from gross income under section 959(a)(2)).

(2) Pro rata share of subpart F income

The pro rata share referred to in paragraph (1)(A)(i) in the case of any United States shareholder is the amount—

(A) which would have been distributed with respect to the stock which such shareholder owns (within the meaning of section 958(a)) in such corporation if on the last day, in its tax-able year, on which the corporation is a controlled foreign corporation it had distributed pro rata to its shareholders an amount (i) which bears the same ratio to its subpart F income for the taxable year, as (ii) the part of such year during which the corporation is a controlled foreign corporation bears to the entire year, reduced by

(B) the amount of distributions received by any other person during such year as a dividend with respect to such stock, but only to the extent of the dividend which would have been received if the distribution by the corporation had been the amount (i) which bears the same ratio to the subpart F income of such corporation for the taxable year, as (ii) the part of such year during which such shareholder did not own (with-in the meaning of section 958(a)) such stock bears to the entire year.

For purposes of subparagraph (B) any gain included in the gross income of any person as a dividend under section 1248 shall be treated as a distribution received by such person with re-spect to the stock involved.

(b) United States shareholder defined

For purposes of this title, the term "United States shareholder" means, with respect to any foreign corporation, a United States person (as defined in section 957(c)) who owns (within the meaning of section 958(a)), or is considered as owning by ap-plying the rules of ownership of section 958(b), 10 percent or more of the total combined voting power of all classes of stock entitled to vote of such foreign corporation, or 10 percent or more of the total value of shares of all classes of stock of such foreign corporation.

(c) Coordination with passive foreign investment company provisions

If, but for this subsection, an amount would be included in the gross income of a United States shareholder for any taxable year both under subsection (a)(1)(A)(i) and under section 1293 (relating to current taxation of income from certain passive foreign investment' companies), such amount shall be included in the gross income of such shareholder only under subsection (a)(1)(A).

3. 26 U.S.C. 957 provides:

Controlled foreign corporations; United States persons

(a) General rule

For purposes of this title, the term "controlled foreign corporation" means any foreign corporation if more than 50 percent of—

(1) the total combined voting power of all classes of stock of such corporation entitled to vote, or

(2) the total value of the stock of such corporation,

is owned (within the meaning of section 958(a)), or is considered as owned by applying the rules of ownership of section 958(b), by United States share-holders on any day during the taxable year of such foreign corporation.

(b) Special rule for insurance

For purposes only of taking into account income described in section 953(a) (relating to insurance in-come), the term "controlled foreign corporation" includes not only a foreign corporation as defined by subsection (a) but also one of which more than 25 percent of the total combined voting power of all classes of stock (or more than 25 percent of the to-tal value of stock) is owned (within the meaning of section 958(a)), or is considered as owned by applying the rules of ownership of section 958(b), by United States shareholders on any day during the taxable year of such corporation, if the gross amount of premiums or other consideration in respect of the reinsurance or the issuing of insurance or annuity contracts not described in section 953(e)(2) exceeds 75 percent of the gross amount of all premiums or other consideration in respect of all risks.

(c) United States person

For purposes of this subpart, the term "United States person" has the meaning assigned to it by section 7701(a)(30) except that—

(1) with respect to a corporation organized under the laws of the Commonwealth of Puerto Rico, such term does not include an individual who is a bona fide resident of Puerto Rico, if a dividend received by such individual during the taxable year from such corporation would, for purposes of section 933(1), be treated

as income derived from sources within Puerto Rico, and

(2) with respect to a corporation organized under the laws of Guam, American Samoa, or the Northern Mariana Islands—

(A) 80 percent or more of the gross income of which for the 3-year period ending at the close of the taxable year (or for such part of such period as such corporation or any predecessor has been in existence) was derived from sources within such a possession or was effectively connected with the conduct of a trade or business in such a possession, and

(B) 50 percent or more of the gross income of which for such period (or part) was derived from the active conduct of a trade or business within such a possession,

such term does not include an individual who is a bona fide resident of Guam, American Samoa, or the Northern Mariana Islands.

For purposes of subparagraphs (A) and (B) of paragraph (2), the determination as to whether income was derived from the active conduct of a trade or business within a possession shall be made under regulations prescribed by the Secretary.

4. 26 U.S.C. 965 provides:

Treatment of deferred foreign income upon transition to participation exemption system of taxation

(a) Treatment of deferred foreign income as subpart F income

In the case of the last taxable year of a deferred foreign income corporation which begins before January 1, 2018, the subpart F income of such foreign corporation (as otherwise determined for such taxable year under section 952) shall be increased by the greater of—

(1) the accumulated post-1986 deferred foreign income of such corporation determined as of November 2, 2017, or

(2) the accumulated post-1986 deferred foreign income of such corporation determined as of December 31, 2017.

(b) Reduction in amounts included in gross income of United States shareholders of specified foreign corporations with deficits in earnings and profits

(1) In general

In the case of a taxpayer which is a United States shareholder with respect to at least one deferred foreign income corporation and at least one E&P deficit foreign corporation , the amount which would (but for this subsection) be taken into account under section 951(a)(1) by reason of subsection (a) as such United States shareholder's pro rata share of the subpart F income of each deferred foreign income corporation shall be reduced by the amount of such United States shareholder's aggregate foreign E&P deficit which is

allocated under paragraph (2) to such deferred foreign income corporation.

(2) Allocation of aggregate foreign E&P deficit

The aggregate foreign E&P deficit of any United States shareholder shall be allocated among the deferred foreign income corporations of such United States shareholder in an amount which bears the same proportion to such aggregate as—

(A) such United States shareholder's pro rata share of the accumulated post-1986 deferred foreign income of each such deferred foreign income corporation, bears to

(B) the aggregate of such United States shareholder's pro rata share of the accumulated post-1986 deferred foreign income of all deferred foreign income corporations of such United States shareholder.

(3) Definitions related to E&P deficits

For purposes of this subsection—

(A) Aggregate foreign E&P deficit

(i) In general

The term "aggregate foreign E&P deficit" means, with respect to any United States shareholder, the lesser of

(I) the aggregate of such shareholder's pro rata shares of the specified E&P deficits of the E&P deficit foreign corporations of such shareholder, or

(II) the amount determined under paragraph (2)(B).

(ii) Allocation of deficit

If the amount described in clause (i)(II) is less than the amount described in clause (i)(I), then the shareholder shall designate, in such form and manner as the Secretary determines

(I) the amount of the specified E&P deficit which is to be taken into account for each E&P deficit corporation with respect to the taxpayer, and

(II) in the case of an E&P deficit corporation which has a qualified deficit (as defined in section 952), the portion (if any) of the deficit taken into account under subclause (I) which is attributable to a qualified deficit, including the qualified activities to which such portion is attributable.

(B) E&P deficit foreign corporation

The term "E&P deficit foreign corporation" means, with respect to any taxpayer, any specified foreign corporation with respect to which such taxpayer is a United States shareholder, if, as of November 2, 2017—

(i) such specified foreign corporation has a deficit in post-1986 earnings and profits,

(ii) such corporation was a specified foreign corporation, and

(iii) such taxpayer was a United States shareholder of such corporation.

(C) Specified E&P deficit

The term "specified E&P deficit" means, with respect to any E&P deficit foreign corporation, the amount of the deficit referred to in subparagraph (B).

(4) Treatment of earnings and profits in future years

(A) Reduced earnings and profits treated as previously taxed income when distributed

For purposes of applying section 959 in any taxable year beginning with the taxable year described in subsection (a), with respect to any United States shareholder of a deferred foreign income corporation, an amount equal to such shareholder's reduction under paragraph (1) which is allocated to such deferred foreign income corporation under this subsection shall be treated as an amount which was included in the gross income of such United States shareholder under section 951(a).

(B) E&P deficits

For purposes of this title, with respect to any taxable year beginning with the taxable year described in subsection (a), a United States shareholder's pro rata share of the earnings and profits of any E&P deficit foreign corporation under this subsection shall be increased by the amount of the specified E&P deficit of such corporation taken into account by such shareholder under paragraph (1), and, for purposes of section 952, such increase shall be attributable to the same activity to which the deficit so taken into account was attributable.

(5) Netting among United States shareholders in same affiliated group

(A) In general

In the case of any affiliated group which includes at least one E&P net surplus shareholder and one E&P net deficit shareholder, the amount which would (but for this paragraph) be taken into account under section 951(a)(1) by reason of subsection (a) by each such E&P net surplus shareholder shall be reduced (but not below zero) by such shareholder's applicable share of the affiliated group's aggregate unused E&P deficit.

(B) E&P net surplus shareholder

For purposes of this paragraph, the term "E&P net surplus shareholder" means any United States shareholder which would (determined without regard to this paragraph) take into account an amount greater than zero under section 951(a)(1) by reason of subsection (a).

(C) E&P net deficit shareholder

For purposes of this paragraph, the term "E&P net deficit shareholder" means any United States shareholder if—

(i) the aggregate foreign E&P deficit with respect to such shareholder (as defined in paragraph (3)(A) without regard to clause (i)(Il) thereof), exceeds

(ii) the amount-which would (but for this subsection) be taken into account by such shareholder under section 951(a)(1) by reason of subsection (a).

(D) Aggregate unused E&P deficit

For purposes of this paragraph—

(i) In general

The term "aggregate foreign E&P deficit" means, with respect to any United States shareholder, the lesser of—

(I) the sum of the excesses described in subparagraph (C), determined with respect to each E&P net deficit shareholder in such group, or

(II) the amount determined under subparagraph (E)(ii).

(ii) Reduction with respect to E&P net deficit shareholders which are not wholly owned by the affiliated group

If the group ownership percentage of any E&P net deficit shareholder is less than 100 percent, the amount of the excess described in subparagraph (C) which is taken into account under clause (i)(I) with respect to such E&P net deficit shareholder shall be such group ownership percentage of such amount.

(E) Applicable share

For purposes of this paragraph, the term "applicable share" means, with respect to any E&P net surplus shareholder in any affiliated group, the amount which bears the same proportion to such group's aggregate unused E&P deficit as—

(i) the product of—

(I) such shareholder's group ownership percentage, multiplied by

(II) the amount which would (but for this paragraph) be taken into account under section 951(a)(1) by reason of subsection (a) by such shareholder, bears to

(ii) the aggregate amount determined under clause (i) with respect to all E&P net surplus shareholders in such group.

(F) Group ownership percentage

For purposes of this paragraph, the term "group ownership percentage" means, with respect to any United States shareholder in any affiliated group, the percentage of the value of the stock of such United States shareholder which is held by other includible corporations in such affiliated group. Notwithstanding the preceding sentence, the group ownership percentage of the common parent of the affiliated group is 100 percent. Any term used in this subparagraph which is also used in section 1504 shall have the same meaning as when used in such section.

(c) Application of participation exemption to included income

(1) In general

In the case of a United States shareholder of a deferred foreign income corporation, there shall be allowed as a deduction for the taxable year in which an amount is included in the gross income of such United States shareholder under section 951(a)(1) by reason of this section an amount equal to the sum of—

(A) the United States shareholder's 8 percent rate equivalent percentage of the excess (if any) of—

(i) the amount so included as gross income, over

(ii) the amount of such United States shareholder's aggregate foreign cash position, plus

(B) the United States shareholder's 15.5 percent rate equivalent percentage of so much of the amount described in subparagraph (A)(ii) as does not exceed the amount described in subparagraph (A)(i).

(2) 8 and 15.5 percent rate equivalent percentages

The term "8 percent rate equivalent percentage" means, with respect to any United States shareholder for any taxable year, the percentage which would result in the amount to which such percentage applies being subject to a 8 percent rate of tax determined by only taking into account a deduction equal to such percentage of such amount and the highest rate of tax specified in section 11 for such taxable year. In the case of any taxable year of a United States shareholder to which section 15 applies, the highest rate of tax under section 11 before the effective date of the change in rates and the highest rate of tax under section 11 after the effective date of such change shall each be taken into account under the preceding sentence in the same proportions as the portion of such taxable year which is before and after such effective date, respectively.

(A) 8 percent rate equivalent percentage

The term "8 percent rate equivalent percentage" means, with respect to any United States share-

holder for any taxable year, the percentage which would result in the amount to which such percentage applies being subject to a 8 percent rate of tax determined by only taking into account a deduction equal to such percentage of such amount and the highest rate of tax specified in section 11 for such taxable year. In the case of any taxable year of a United States shareholder to which section 15 applies, the highest rate of tax under section 11 before the effective date of the change in rates and the highest rate of tax under section 11 after the effective date of such change shall each be taken into account under the preceding sentence in the same proportions as the portion of such taxable year which is before and after such effective date, respectively.

(B) 15.5 percent rate equivalent percentage

The term "15.5 percent rate equivalent percentage" means, with respect to any United States shareholder for any taxable year, the percentage determined under subparagraph (A) applied by substituting "15.5 percent rate of tax" for "8 percent rate of tax".

(3) Aggregate foreign cash position

For purposes of this subsection—

(A) In general

The term "aggregate foreign cash position" means, with respect to any United States shareholder, the greater of—

(i) the aggregate of such United States shareholder's pro rata share of the cash position of each

specified foreign corporation of such United States shareholder determined as of the close of the last taxable year of such specified foreign corporation which begins before January 1, 2018, or

(ii) one half of the sum of—

(I) the aggregate described in clause (i) determined as of the close of the last taxable year of each such specified foreign corporation which ends before November 2, 2017, plus

(II) the aggregate described in clause (i) determined as of the close of the taxable year of each such specified foreign corporation which precedes the taxable year referred to in subclause (I).

(B) Cash position

For purposes of this paragraph, the cash position of any specified foreign corporation is the sum of—

(i) cash held by such foreign corporation,

(ii) the net accounts receivable of such foreign corporation, plus

(iii) the fair market value of the following assets held by such corporation:

(I) Personal property which is of a type that is actively traded and for which there is an established financial market.

(II) Commercial paper, certificates of deposit, the securities of the Federal government and of any State or foreign government.

(III) Any foreign currency.

(IV) Any obligation with a term of less than one year.

(V) Any asset which the Secretary identifies as being economically equivalent to any asset described in this subparagraph.

(C) Net accounts receivable

For purposes of this paragraph, the term "net accounts receivable" means, with respect to any specified foreign corporation, the excess (if any) of—

(i) such corporation's accounts receivable, over

(ii) such corporation's accounts payable (determined consistent with the rules of section 461).

(D) Prevention of double counting

Cash positions of a specified foreign corporation described in clause (ii), (iii)(I), or (iii)(IV) of subparagraph (B) shall not be taken into account by a United States shareholder under subparagraph (A) to the extent that such United States shareholder demonstrates to the satisfaction of the Secretary that such amount is so taken into account by such United States shareholder with respect to another specified foreign corporation.

(E) Cash positions of certain non-corporate entities taken into account

An entity (other than a corporation) shall be treated as a specified foreign corporation of a United States shareholder for purposes of determining such United States shareholder's aggre-

gate foreign cash position if any interest in such entity is held by a specified foreign corporation of such United States shareholder (determined after application of this subparagraph) and such entity would be a specified foreign corporation of such United States shareholder if such entity were a foreign corporation.

(F) Anti-abuse

If the Secretary determines that a principal purpose of any transaction was to reduce the aggregate foreign cash position taken into account under this subsection, such transaction shall be disregarded for purposes of this subsection.

(d) Deferred foreign income corporation; accumulated post-1986 deferred foreign income

For purposes of this section—

(1) Deferred foreign income corporation

The term "deferred foreign income corporation" means, with respect to any United States shareholder, any specified foreign corporation of such United States shareholder which has accumulated post-1986 deferred foreign income (as of the date referred to in paragraph (1) or (2) of subsection (a)) greater than zero.

(2) Accumulated post-1986 deferred foreign income

The term "accumulated post-1986 deferred foreign income" means the post-1986 earnings and profits except to the extent such earnings—

(A) are attributable to income of the specified foreign corporation which is effectively connected

with the conduct of a trade or business within the United States and subject to tax under this chapter, or

(B) in the case of a controlled foreign corporation, if distributed, would be excluded from the gross income of a United States shareholder under section 959.

To the extent provided in regulations or other guidance prescribed by the Secretary, in the case of any controlled foreign corporation which has shareholders which are not United States shareholders, accumulated post-1986 deferred foreign income shall be appropriately reduced by amounts which would be described in subparagraph (B) if such shareholders were United States shareholders.

(3) Post-1986 earnings and profits

The term "post-1986 earnings and profits" means the earnings and profits of the foreign corporation (computed in accordance with sections 964(a) and 986, and by only taking into account periods when the foreign corporation was a specified foreign corporation) accumulated in taxable years beginning after December 31, 1986, and determined—

(A) as of the date referred to in paragraph (1) or (2) of subsection (a), whichever is applicable with respect to such foreign corporation, and

(B) without diminution by reason of dividends distributed during the taxable year described in subsection (a) other than dividends distributed to another specified foreign corporation.

(e) Specified foreign corporation

(1) In general

For purposes of this section, the term "specified foreign corporation" means—

(A) any controlled foreign corporation, and

(B) any foreign corporation with respect to which one or more domestic corporations is a United States shareholder.

(2) Application to certain foreign corporations

For purposes of sections 951 and 961, a foreign corporation described in paragraph (1) (B) shall be treated as a controlled foreign corporation solely for purposes of taking into account the subpart F income of such corporation under subsection (a) (and for purposes of applying subsection (f)).

(3) Exclusion of passive foreign investment companies

Such term shall not include any corporation which is a passive foreign investment company (as defined in section 1297) with respect to the shareholder and which is not a controlled foreign corporation.

(f) Determinations of pro rata share

(1) In general

For purposes of this section, the determination of any United States shareholder's pro rata share of any amount with respect to any specified foreign corporation shall be determined under rules similar to the rules of section 95l(a)(2) by treating such amount in the same manner as subpart F income (and by treat-

ing such specified foreign corporation as a controlled foreign corporation).

(2) Special rules

The portion which is included in the income of a United States shareholder under section 951(a)(1) by reason of subsection (a) which is equal to the deduction allowed under subsection (c) by reason of such inclusion—

(A) shall be treated as income exempt from tax for purposes of sections 705(a)(1) (B) and 1367(a)(1) (A), and

(B) shall not be treated as income exempt from tax for purposes of determining whether an adjustment shall be made to an accumulated adjustment account under section 1368(e)(1)(A).

(g) Disallowance of foreign tax credit, etc.

(1) In general

No credit shall be allowed under section 901 for the applicable percentage of any taxes paid or accrued (or treated as paid or accrued) with respect to any amount for which a deduction is allowed under this section.

(2) Applicable percentage

For purposes of this subsection, the term "applicable percentage" means the amount (expressed as a percentage) equal to the sum of—

(A) 0.771 multiplied by the ratio of—

(i) the excess to which subsection (c)(1)(A) applies, divided by

(ii) the sum of such excess plus the amount to which subsection (c)(1)(B) applies, plus

(B) 0.557 multiplied by the ratio of—

(i) the amount to which subsection (c)(1)(B) applies, divided by

(ii) the sum described in subparagraph (A)(ii).

(3) Denial of deduction

No deduction shall be allowed under this chapter for any tax for which credit is not allowable under section 901 by reason of paragraph (1) (determined by treating the taxpayer as having elected the benefits of subpart A of part III of subchapter N).

(4) Coordination with section 78

With respect to the taxes treated as paid or accrued by a domestic corporation with respect to amounts which are includible in gross income of such domestic corporation by reason of this section, section 78 shall apply only to so much of such taxes as bears the same proportion to the amount of such taxes as—

(A) the excess of—

(i) the amounts which are includible in gross income of such domestic corporation by reason of this section, over

(ii) the deduction allowable under subsection (c) with respect to such amounts, bears to

(B) such amounts.

(h) Election to pay liability in installments

(1) In general

In the case of a United States shareholder of a deferred foreign income corporation, such United States shareholder may elect to pay the net tax liability under this section in 8 installments of the following amounts:

(A) 8 percent of the net tax liability in the case of each of the first 5 of such installments,

(B) 15 percent of the net tax liability in the case of the 6th such installment,

(C) 20 percent of the net tax liability in the case of the 7th such installment, and

(D) 25 percent of the net tax liability in the case of the 8th such installment.

(2) Date for payment of installments

If an election is made under paragraph (1), the first installment shall be paid on the due date (determined without regard to any extension of time for filing the return) for the return of tax for the taxable year described in subsection (a) and each succeeding installment shall be paid on the due date (as so determined) for the return of tax for the taxable year following the taxable year with respect to which the preceding installment was made.

(3) Acceleration of payment

If there is an addition to tax for failure to timely pay any installment required under this subsection, a liquidation or sale of substantially all the assets of the taxpayer (including in a title 11 or similar case), a ces-

sation of business by the taxpayer, or any similar circumstance, then the unpaid portion of all remaining installments shall be due on the date of such event (or in the case of a title 11 or similar case, the day before the petition is filed). The preceding sentence shall not apply to the sale of substantially all the assets of a taxpayer to a buyer if such buyer enters into an agreement with the Secretary under which such buyer is liable for the remaining installments due under this subsection in the same manner as if such buyer were the taxpayer.

(4) Proration of deficiency to installments

If an election is made under paragraph (1) to pay the net tax liability under this section in installments and a deficiency has been assessed with respect to such net tax liability, the deficiency shall be prorated to the installments payable under paragraph (1). The part of the deficiency so prorated to any installment the date for payment of which has not arrived shall be collected at the same time as, and as a part of, such installment. The part of the deficiency so prorated to any installment the date for payment of which has arrived shall be paid upon notice and demand from the Secretary. This subsection shall not apply if the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax.

(5) Election

Any election under paragraph (1) shall be made not later than the due date for the return of tax for the taxable year described in subsection (a) and shall be made in such manner as the Secretary shall provide.

(6) Net tax liability under this section

For purposes of this subsection—

(A) In general

The net tax liability under this section with respect to any United States shareholder is the excess (if any) of—

(i) such taxpayer's net income tax for the taxable year in which an amount is included in the gross income of such United States shareholder under section 951(a)(10 by reason of this section, over

(ii) such taxpayer's net income tax for such taxable year determined—

(I) without regard to this section, and

(II) without regard to any income or deduction properly attributable to a dividend received by such United States shareholder from any deferred foreign income corporation.

(B) Net income tax

The term "net income tax" means the regular tax liability reduced by the credits allowed under subparts A, B, and D of part IV of subchapter A.

(i) Special rules for S corporation shareholders

(1) In general

In the case of any S corporation which is a United States shareholder of a deferred foreign income corporation, each shareholder of such S corporation may elect to defer payment of such shareholder's net tax liability under this section with respect to such S corporation until the shareholder's taxable year which

includes the triggering event with respect to such liability. Any net tax liability payment of which is deferred under the preceding sentence shall be assessed on the return of tax as an addition to tax in the shareholder's taxable year which includes such triggering event.

(2) Triggering event

(A) In general

In the case of any shareholder's net tax liability under this section with respect to any S corporation, the triggering event with respect to such liability is whichever of the following occurs first:

(i) Such corporation ceases to be an S corporation (determined as of the first day of the first taxable year that such corporation is not an S corporation).

(ii) A liquidation or sale of substantially all the assets of such S corporation (including in a title 11 or similar case), a cessation of business by such S corporation, such S corporation ceases to exist, or any similar circumstance.

(iii) A transfer of any share of stock in such S corporation by the taxpayer (including by reason of death, or otherwise).

(B) Partial transfers of stock

In the case of a transfer of less than all of the taxpayer's shares of stock in the S corporation, such transfer shall only be a triggering event with respect to so much of the taxpayer's net tax liability under this section with respect to such S corporation as is properly allocable to such stock.

(C) Transfer of liability

A transfer described in clause (iii) of subparagraph (A) shall not be treated as a triggering event if the transferee enters into an agreement with the Secretary under which such transferee is liable for net tax liability with respect to such stock in the same manner as if such transferee were the taxpayer.

(3) Net tax liability

A shareholder's net tax liability under this section with respect to any S corporation is the net tax liability under this section which would be determined under subsection (h)(6) if the only subpart F income taken into account by such shareholder by reason of this section were allocations from such S corporation.

(4) Election to pay deferred liability in installments

In the case of a taxpayer which elects to defer payment under paragraph (1)—

(A) subsection (h) shall be applied separately with respect to the liability to which such election applies,

(B) an election under subsection (h) with respect to such liability shall be treated as timely made if made not later than the due date for the return of tax for the taxable year in which the triggering event with respect to such liability occurs,

(C) the first installment under subsection (h) with respect to such liability shall be paid not later than such due date (but determined without regard to any extension of time for filing the return), and

(D) if the triggering event with respect to any net tax liability is described in paragraph (2)(A)(ii), an election under subsection (h) with respect to such liability may be made only with the consent of the Secretary.

(5) Joint and several liability of S corporation

If any shareholder of an S corporation elects to defer payment under paragraph (1), such S corporation shall be jointly and severally liable for such payment and any penalty, addition to tax, or additional amount attributable thereto.

(6) Extension of limitation on collection

Any limitation on the time period for the collection of a liability deferred under this subsection shall not be treated as beginning before the date of the triggering event with respect to such liability.

(7) Annual reporting of net tax liability

(A) In general

Any shareholder of an S corporation which makes an election under paragraph (1) shall report the amount of such shareholder's deferred net tax liability on such shareholder's return of tax for the taxable year for which such election is made and on the return of tax for each taxable year thereafter until such amount has been fully assessed on such returns.

(B) Deferred net tax liability

For purposes of this paragraph, the term "deferred net tax liability" means, with respect to any taxable year, the amount of net tax liability pay-

ment of which has been deferred under paragraph (1) and which has not been assessed on a return of tax for any prior taxable year.

(C) Failure to report

In the case of any failure to report any amount required to be reported under subparagraph (A) with respect to any taxable year before the due date for the return of tax for such taxable year, there shall be assessed on such return as an addition to tax 5 percent of such amount.

(8) Election

Any election under paragraph (1)—

(A) shall be made by the shareholder of the S corporation not later than the due date for such shareholder's return of tax for the taxable year which includes the close of the taxable year of such S corporation in which the amount described in subsection (a) is taken into account, and

(B) shall be made in such manner as the Secretary shall provide.

(j) Reporting by S corporation

Each S corporation which is a United States shareholder of a specified foreign corporation shall report in its return of tax under section 6037(a) the amount includible in its gross income for such taxable year by reason of this section and the amount of the deduction allowable by subsection (c). Any copy provided to a shareholder under section 6037(b) shall include a statement of such shareholder's pro rata share of such amounts.

(k) Extension of limitation on assessment

Notwithstanding section 6501, the limitation on the time period for the assessment of the net tax liability under this section (as defined in subsection (h)(6)) shall not expire before the date that is 6 years after the return for the taxable year described in such subsection was filed.

(*l*) Recapture for expatriated entities

(1) In general

If a deduction is allowed under subsection (c) to a United States shareholder and such shareholder first becomes an expatriated entity at any time during the 10-year period beginning on the date of the enactment of the Tax Cuts and Jobs Act[1] (with respect to a surrogate foreign corporation which first becomes a surrogate foreign corporation during such period), then—

(A) the tax imposed by this chapter shall be increased for the first taxable year in which such taxpayer becomes an expatriated entity by an amount equal to 35 percent of the amount of the deduction allowed under subsection (c), and

(B) no credits shall be allowed against the increase in tax under subparagraph (A).

(2) Expatriated entity

For purposes of this subsection, the term "expatriated entity" has the same meaning given such term under section 7874(a)(2), except that such term shall

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[1] See References in Text note below.

not include an entity if the surrogate foreign corporation with respect to the entity is treated as a domestic corporation under section 7874(b).

(3) Surrogate foreign corporation

For purposes of this subsection, the term "surrogate foreign corporation" has the meaning given such term in section 7874(a)(2)(B).

(m) Special rules for United States shareholders which are real estate investment trusts

(1) In general

If a real estate investment trust is a United States shareholder in 1 or more deferred foreign income corporations—

(A) any amount required to be taken into account under section 951(a)(1) by reason of this section shall not be taken into account as gross income of the real estate investment trust for purposes of applying paragraphs (2) and (3) of section 856(c) to any taxable year for which such amount is taken into account under section 951(a)(1), and

(B) if the real estate investment trust elects the application of this subparagraph, notwithstanding subsection (a), any amount required to be taken into account under section 951(a)(1) by reason of this section shall, in lieu of the taxable year in which it would otherwise be included in gross income (for purposes of the computation of real estate investment trust taxable income under section 857(b)), be included in gross income as follows:

(i) 8 percent of such amount in the case of each of the taxable years in the 5-taxable year

period beginning with the taxable year in which such amount would otherwise be included.

(ii) 15 percent of such amount in the case of the 1st taxable year following such period.

(iii) 20 percent of such amount in the case of the 2nd taxable year following such period.

(iv) 25 percent of such amount in the case of the 3rd taxable year following such period.

(2) Rules for trusts electing deferred inclusion

(A) Election

Any election under paragraph (1)(B) shall be made not later than the due date for the first taxable year in the 5-taxable year period described in clause (i) of paragraph (1)(B) and shall be made in such manner as the Secretary shall provide.

(B) Special rules

If an election under paragraph (1)(B) is in effect with respect to any real estate investment trust, the following rules shall apply:

(i) Application participation exemption

For purposes of subsection (c)(1)—

(I) the aggregate amount to which subparagraph (A) or (B) of subsection (c)(1) applies shall be determined without regard to the election,

(II) each such aggregate amount shall be allocated to each taxable year described in paragraph (1)(B) in the same proportion as the amount included in the gross income of

such United States shareholder under section 951(a)(1) by reason of this section is allocated to each such taxable year.

(III) NO INSTALLMENT PAYMENTS.—The real estate investment trust may not make an election under subsection (g) for any taxable year described in paragraph (1)(B).

(ii) Acceleration of inclusion

If there is a liquidation or sale of substantially all the assets of the real estate investment trust (including in a title 11 or similar case), a cessation of business by such trust, or any similar circumstance, then any amount not yet included in gross income under paragraph (1)(B) shall be included in gross income as of the day before the date of the event and the unpaid portion of any tax liability with respect to such inclusion shall be due on the date of such event (or in the case of a title 11 or similar case, the day before the petition is filed).

(n) Election not to apply net operating loss deduction

(1) In general

If a United States shareholder of a deferred foreign income corporation elects the application of this subsection for the taxable year described in subsection (a), then the amount described in paragraph (2) shall not be taken into account—

(A) in determining the amount of the net operating loss deduction under section 172 of such shareholder for such taxable year, or

(B) in determining the amount of taxable income for such taxable year which may be reduced by net operating loss carryovers or carrybacks to such taxable year under section 172.

(2) Amount described

The amount described in this paragraph is the sum of—

(A) the amount required to be taken into account under section 951(a)(1) by reason of this section (determined after the application of subsection (c)), plus

(B) in the case of a domestic corporation which chooses to have the benefits of subpart A of part III of subchapter N for the taxable year, the taxes deemed to be paid by such corporation under subsections (a) and (b) of section 960 for such taxable year with respect to the amount described in subparagraph (A) which are treated as a dividends[2] under section 78.

(3) Election

Any election under this subsection shall be made not later than the due date (including extensions) for filing the return of tax for the taxable year and shall be made in such manner as the Secretary shall prescribe.

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[2] So in original.

(*o*) Regulations

Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the provisions of this section, including—

(1) regulations or other guidance to provide appropriate basis adjustments, and

(2) regulations or other guidance to prevent the avoidance of the purposes of this section, including through a reduction in earnings and profits, through changes in entity classification or accounting methods, or otherwise.