No. 22-800

IN THE
Supreme Court of the United States

CHARLES G. MOORE, *ET UX.*,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
Ninth Circuit

BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in direct litigation and *amicus curiae* briefs upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce.

NTUF has provided tax expertise in filings to this Court before. *See*, *e.g.*, *Boechler v. Comm'r Int. Rev.*, 596 U.S. ___, 142 S.Ct. 1493 (2022); *CIC Services, LLC v. Int. Rev. Serv.*, 593 U.S. ___, 141 S. Ct. 1582 (2021). NTUF staff also educate on the unconstitutionality of wealth taxes. *See*, *e.g.*, Joe Bishop-Henchman, *Is a Wealth Tax Constitutional?* NTUF (Oct. 25, 2021), https://www.ntu.org/library/doclib/2021/10/Is-a-wealth-tax-constitutional.pdf. NTUF therefore holds an institutional interest in this Court's ruling in this case.

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[1] Pursuant to Supreme Court Rule 37, counsel for *Amicus* represents that none of the parties or their counsel, nor any other person or entity other than *Amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

NTUF defends taxpayers and good tax administration. We submit this brief in support of neither party to address both the Ninth Circuit's problematic opinion and the risks of a broad ruling in favor of the Moores, as well as explain the tax provisions at issue and offer possible directions that this Court's decision could take.

The chief danger of the Ninth Circuit's analysis below is that it posits that realization is *not* a Constitutional requirement before Congress may tax income. *See* App. 12. Combined with a general analysis that taxable gains are not always shielded by the corporate form, *see* App. 12-13, the Ninth Circuit's decision becomes the gateway to approving wealth taxes. This is error, and this Court ought to correct it and clarify that realization is still required before the government can tax "income."

But the Moores do not automatically win either. They invested in a business—KisanKraft—that *did* realize income. As a pass through, they as shareholders of KisanKraft pay the business's taxes as if it were a partnership. Since the 1960s, federal law permitted foreign corporation taxes to be deferred. The Tax Cuts and Jobs Act of 2017 ended the deferrals as the United States moved away a world-wide business tax system to a territorial business tax system, facilitating the transition by creating a one-time lower-rate Mandatory Repatriation Tax (MRT) on the accumulated owed, but deferred, tax. *See* 26 U.S.C. § 965. If the MRT is unconstitutional as

applied to the Moores, they may instead owe *more*, the higher pre-MRT deferred tax rate.

Because the MRT is one-time, the specific issue faced by the Moores is unlikely to reoccur. Therefore, if this Court does rule in favor of the Moores, such a ruling should be carefully limited. This Court should not disturb the international tax reforms of the TCJA, and hold that business payers are subject to the MRT as a constitutional indirect tax on doing business in the corporate form (including the foreign corporation form). Likewise, the structure of the TCJA should be maintained.

ARGUMENT

I. THE NINTH CIRCUIT'S BROAD ANALYSIS IS DANGEROUS TO TAXPAYERS.

This case presents the interplay between three Constitutional provisions. At the Founding, the Constitution required federal "Capitation, or other direct, Tax[es]" be "in Proportion to the Census or Enumeration." U.S. Const. art. I, § 9, cl. 4. But the Constitution also allows for Congress to levy indirect taxes without such apportionment: "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises," so long as such taxes "be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. And in response to this Court holding that income taxes are direct taxes, subject to apportionment, Congress proposed and the states ratified the Sixteenth Amendment to allow Congress "to lay and collect taxes on incomes, from whatever source derived, without apportionment." U.S. Const. amend. XVI; *Pollock v. Farmers' Loan & Tr. Co.*, 157 U.S. 429 (1895) (*Pollock I*) & *Pollock v. Farmers' Loan & Tr. Co.*, 158 U.S. 601 (1895) (*Pollock II*). The Sixteenth Amendment is therefore an exception to the apportionment requirement for direct taxes, which include but are not limited to capitation and land taxes.

Careful study of each provision reveals that (1) realization is essential before the government can tax "income," (2) therefore wealth taxes are unconstitutional as unapportioned direct taxes on property, but (3) businesses have long had to pay

indirect taxes that need not be apportioned, only uniform in application.

The opinion below did not follow this framework. Judges Bumatay, Ikuta, Callahan, and Vandyke rightly observed that the Ninth Circuit panel gave "unfettered latitude to redefine 'income'," App. 53, "dispense with the realization requirement," App. 54, and the reasoning "defies longstanding Supreme Court and Ninth Circuit caselaw," App. 56. The opinion below should therefore be vacated.

A. *Eisner v. Macomber* Has Not Been Overruled.

Almost immediately after the passage of the Sixteenth Amendment it became imperative to begin to define the scope of "income." In *Eisner v. Macomber*, 252 U.S. 189 (1920), this Court held that realization—actual control of cash or cash equivalents—was required before an income tax could be assessed. *Macomber* remains good law and the best understanding of the scope of the Sixteenth Amendment. The Ninth Circuit's attempt to cabin *Macomber*, App. 15, is reversible error.

In *Macomber,* Standard Oil split its stock and shareholders each received 50 percent more shares but no change in their proportion of ownership. The taxpayer at issue owned 2,200 shares and received another 1,100 shares as a dividend. *See id.* at 200–01. This Court rejected the government's claim that the additional shares were income, since the "proportional interest of each shareholder remains the same," and "the stockholder is no richer than they were before." *Id.* at 203. In determining whether this constituted

"income," the *Macomber* Court looked to dictionaries in common use at the time and held that income cannot be mere book gain of the stock price. *See id.* at 207. Instead, "income" must be

> a gain, a profit, something of exchangeable value, *proceeding from* the property, *severed from* the capital, however invested or employed, and *coming in*, being '*derived*'-that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal-*that* is income derived from property. Nothing else answers the description.

Id. (emphasis in original). That is, only by receiving value that is more than the same proportionate ownership as before—could it be income. *See id.* at 207; *see also Weiss v. Stearn*, 265 U.S. 242, 254 (1924) ("Something more is necessary-something which gives the stockholder a thing really different from what he theretofore had.").

Macomber's rationale, that realization is receiving value more than the same proportional share of a company's stock, has carried forward into the modern era. For example, in *Cottage Savings Association v. Commissioner of Internal Revenue*, 499 U.S. 554, 563 (1991), this Court upheld Treasury Regulation § 1.1001-1, which included "the gain or loss realized from the conversion of property into cash, *or from the exchange of property for other property differing materially either in kind or in extent*" as income (or loss). *Cottage Sav. Ass'n*, 499 U.S. at 560 (emphasis in original). This Court thus held that taxing like-kind exchanges is "consistent with our landmark precedents on realization." *Id.* at 561 (citing

Macomber and other cases). Yet the Ninth Circuit here outright rejects a realization requirement for income taxes and attempts to limit *Macomber* to its facts. *See* App. 12 ("Whether the taxpayer has realized income does not determine whether a tax is constitutional."); App. 15–16 ("*Macomber* and *Glenshaw Glass* do not provide a universal definition of income.... [T]here was no set definition of income under the Sixteenth Amendment."). The court below also recharacterized later case law as limiting *Macomber*'s realization requirement, even cases that still applied a realization requirement. *See id.* at 15 (discussing *Comm'r Int. Rev. v. Glenshaw Glass Co.*, 348 U.S. 426 (1955), which included realization as one of its three elements defining income). These were not minor decisions, but fundamental for the proposition cited by Petitioners: the definition of income.[2]

Macomber has not been overruled, no party here has asked for it to be overruled, and until that occurs the Ninth's Circuit's understanding that it is heavily

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[2] The court below cites *Helvering v. Griffiths*, 318 U.S. 371 (1943) as support for this Court rejecting *Macomber*'s realization requirement. *See* App. 12, App. 15–16. But the dissenters in that case concluded that the majority had reaffirmed *Macomber*, much to their chagrin. *See id.* at 404 (Douglas, J., dissenting) ("*Eisner v. Macomber* dies a slow death. It now has a new reprieve, granted under circumstances which compel my dissent."). The Ninth Circuit panel also stated that this Court in *Cottage Savings* not reciting *Glenshaw Glass*'s definition of income (which includes realization) must be evidence of silent overruling of that case as well. App. 16. But foundational cases can be just understood; this Court need not cite to *Marbury v. Madison* in every opinion.

cabined is unfounded.[3] Even if, *arguendo*, this Court has limited the reach of *Macomber*, it is not for the Court of Appeals to so declare. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("[W]e do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."); *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005) ("Courts of Appeals [must] adhere to our directly controlling precedents, even those that rest on reasons rejected in other decisions").

Realization is the key to differentiating income, the flow of gains and losses on which someone must pay taxes, from wealth, the stock at a given point in time that may not even be accessible to the taxpayer or assessable by the government. The Ninth Circuit improperly discarded *Macomber*.

B. Wealth Taxes are Unconstitutional.

The Moores argue that the Mandatory Repatriation Tax is a type of wealth tax, since they have not realized—that is, cashed out—the value of their stock in KisanKraft. *See*, *e.g.* Pet. at 24–25; Op. Br. at 12. In ruling against them, the Ninth Circuit defines direct taxes too narrowly as only capitation and land taxes, App. 10, rejects a constitutional realization requirement, App. 12, and alarmingly urges deference to the government in "[w]hat constitutes a taxable gain," *id*. In short, anything goes

[3] There are some articles in the academic literature arguing that *Macomber* is a nullity, or should be overruled as outdated or inconvenient. But that is insufficient to overrule a Supreme Court precedent.

under their reasoning, including a proposed federal wealth tax. But the Ninth Circuit got it wrong: a federal wealth tax would be unconstitutional.

Ordinarily, all taxes paid primarily by persons who can shift the burden upon someone else, or who are under no legal compulsion to pay them, are considered *indirect* taxes, while direct taxes are those taxes whose incidence cannot be so shifted. *See*, *e.g.*, *Pollock I*, 157 U.S. at 558 ("Ordinarily, all taxes paid primarily by persons who can shift the burden upon someone else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes"); Thomas M. Cooley, A Treatise on the Law of Taxation at 5 (1876) ("[Direct taxes are] those which are assessed upon the property, person, business, income, etc. of those who are to pay them; and Indirect [are] those which are levied on commodities before they reach the consumer, and are paid by those upon whom they ultimately fall, not as taxes, but as part of the market price of the commodity."); Bishop-Henchman, *Is a Wealth Tax Constitutional?* at 2–3 (collecting cases and historical evidence).

A wealth tax would be an unapportioned direct tax and therefore unconstitutional. Without realization, taxes on book wealth—*i.e.* the value on paper of stocks and other securities that have not been cashed out—are not "income" within the purview of the Sixteenth Amendment. Book wealth is property, not income.

This Court has recognized that *Macomber*'s analysis continues to apply and "taxes on personal property [are] direct taxes," unchanged by the Sixteenth Amendment. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 571 (2012) (discussing *Macomber*). Most court decisions and observers over the past two centuries have conceded that a tax on land and property would be a direct tax. Because a wealth tax would encompass, assess, and levy on the value of land and property, such as homes, farms, and personal assets, a wealth tax falls within the category of direct taxes as well.

Further, taxing wealth is not taxing income, as evidenced by the necessity of a separate tax regime that more resembles property tax assessment mechanisms, the lack of realization events, and that the legal and economic incidence of a wealth tax falls on the same person. *See* Bishop-Henchman, *Is a Wealth Tax Constitutional?* at 6–7 (reviewing legislative proposals). Arguments to the contrary are cherry-picking and ahistorical. *See id.* at 7–9 (refuting claims that a federal wealth tax was envisioned by the Founders). Wealth taxes are unconstitutional direct taxes if unapportioned, and this Court has an opportunity in this case to note that.

C. Indirect Taxes on Business Activities are Constitutional.

But this case is not really about a wealth tax. Fundamentally, the tax in this case is a tax on the business activity of the corporation, even though the Moores ultimately pay the tax. It is an *indirect* tax on

the business's realized income, not a direct wealth tax subject to apportionment.

This Court has long held that a tax on businesses or retail transactions, which may be collected by one but the economic burden is ultimately borne by others, is an indirect tax.[4] In *Hylton v. United States*, 3 Dall. (3 U.S.) 171 (1796), this Court was first presented with the question, relating to a federal tax on carriages. All the participating justices[5] agreed the tax was a constitutional excise tax. Justice Chase believed that "because a carriage is a consumeable commodity; and such annual tax on it, is on the expence of the owner," then the federal tax was constitutional as an "indirect tax." *Id.* at 175 (Chase, J.). Justice Patterson found three species of tax under the constitution: "1. Direct taxes. 2. Duties, imposts, and excises. 3. All other classes of an indirect kind, and not within any of the

[4] This economic concept of incidence was known to the drafters and defenders of the Constitution. *See*, *e.g.*, THE FEDERALIST NO. 35 (Hamilton) at 168 (George W. Carey and James McClellan, eds. 2001) ("The maxim that the consumer is the payer is so much oftener true than the reverse of the proposition") (commas omitted). In *Veazie Bank v. Fenno*, 8 Wall. (75 U.S.) 533, 544 (1869), Chief Justice Samuel Chase also observed that those taxes identified by the Founders as direct taxes (capitation, land and improvements, valuation and assessment of personal property) were the taxes that states at the time depended upon.

[5] The Court's decision was *seriatim*. Chief Justice Ellsworth was sworn in on the morning of the decision and did not take part. *Id.* at 172 note. Justices Wilson and Cushing also did not attend the argument and declined to take part in the decision. *Id.* at 183–84.

classifications enumerated under the preceding heads." *Id.* at 176. The carriage tax was indirect.[6]

Indeed, of the justices who wrote opinions in the case, the consensus was that direct taxes were property taxes and capitation taxes, not excise taxes on purchases, use, or business activity. *See id.* at 175 (Chase, J., seriatim) ("It seems to me, that a tax on expence is an indirect tax; and I think, an annual tax on a carriage for the conveyance of persons, is of that kind; because a carriage is a consumable commodity; and such annual tax on it, is on the expence of the owner."); *id.* at 180 (Paterson, J., seriatim) ("Indirect taxes are circuitous modes of reaching the revenue of individuals, who generally live according to their income. In many cases of this nature the individual may be said to tax himself."). *See also* Annals of Congress, House of Representatives, 3rd Congress, 1st

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[6] Alexander Hamilton argued the case for the government. In his brief, he characteristically argued for extensive federal power, writing, "The following are presumed to be the only direct taxes. Capitation or poll taxes. Taxes on land and buildings. General assessments, whether on the whole property of individuals, or on their whole real or personal estate; all else must of necessity be considered as indirect taxes." Brief for the United States, *Hylton v. United States*, 3 Dall. (3 U.S.) 171 (1796). Hamilton's brief also ridiculed the notion of economic incidence for producing a result that carriages used by the owner would be direct taxes while carriages hired out would be indirect taxes, although that position contradicts his own pre-ratification writings in the Federalist Papers. The *Hylton* case was somewhat contrived: Hylton had "confessed" to owning 125 carriages for his personal use, with none hired out, to meet the $2,000 minimum damages for a federal court case (125 carriages multiplied by the $16 tax). *See* Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?* 97 COLUMBIA LAW REV. 2334, 2351–52 (Dec. 1997).

Session at 729–30 (May 1794) (statement of Rep. Fisher Ames) ("The [carriage] duty falls not on the possession, but the use."); *id.* at 646 (statement of Rep. Samuel Dexter) ("[A]ll taxes are direct which are paid by the citizen without being recompensed by the consumer").

In 1911, this Court approved the federal corporate income tax as a permissible indirect excise tax on corporations:

> "Within the category of indirect taxation, as we shall have further occasion to show, is embraced a tax upon business done in a corporate capacity, which is the subject matter of the tax imposed in the act under consideration. The *Pollock* case construed the tax there levied as direct, because it was imposed upon property simply because of its ownership. In the present case, the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed. The difference between the acts is not merely nominal, but rests upon substantial differences between the mere ownership of property and the actual doing of business in a certain way."

Flint v. Stone Tracy Co., 220 U.S. 107, 150 (1911). The *Flint* Court acknowledged that corporations were creations of state law but reasoned that, if corporations could not be taxed simply due to their status in state law, then "nearly all branches of trade and industry, could withdraw the legitimate objects of

Federal taxation." *Id.* at 157. The Court contrasted this with "a similar business when carried on by a partnership or a private individual" which would not benefit from the corporate form and therefore be "beyond the authority conferred upon Congress." *Id.* at 158. (The case was prior to the ratification of the Sixteenth Amendment.)

The *Flint* decision is consistent with using economic incidence to distinguish direct taxes from indirect taxes. A corporate income tax payment check may be signed by a corporate treasurer but the actual dollars of the tax are drawn (in some proportion) from shareholders in the form of profits lower than they otherwise would be, workers in the form of wages lower than they otherwise would be, or consumers in the form of prices higher than they otherwise would be. These are therefore indirect taxes because they can be passed to another to pay. *See*, *e.g.*, *Veazie Bank*, 8 Wall. (75 U.S.) at 547 (tax on circulation of bank notes an indirect tax); *Pac. Ins. Co. v. Soule*, 7 Wall. (74 U.S.) 433, 445 (1868) (tax on income of insurance companies not a direct tax).

While an unapportioned federal wealth tax on unrealized book value would be unconstitutional, taxes on business activities are constitutional indirect taxes. Corporations are treated as separate entities from their shareholders, and this Court has noted that non-C corporation income is a form of corporation income. *See, e.g.*, *Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. 542, 556 (2015) ("It would be particularly incongruous in the present case to disregard our prior decisions regarding the taxation of corporate income because the income at issue here is a type of corporate income, namely, the income of a

subchapter S corporation.”). Here, while the Moores may not have realized gain, the business indisputably did and the structure of pass-throughs require the shareholders to pay on the corporation’s behalf.

II. THE BUSINESS HERE CHOSE TO DEFER DISTRIBUTIONS, BUT BUSINESS PROFITS ARE STILL SUBJECT TO TAX.

The Moores benefitted from Congress allowing certain businesses to defer certain taxes temporarily until repatriation. Congress in 2017 ultimately ended further deferrals and overhauled the system of taxing international activity. The default in that situation (and was proposed by some in Congress) would be that the Moores and others would immediately owe the full 35 percent tax on all accumulated deferrals. But Congress instead enacted the MRT as a one-time transition. The MRT’s invalidity does not mean the Moores’ underlying business tax liability disappears; they and many other taxpayers would in fact likely be worse off.

A. The MRT Ended an Optional and Temporary Tax Deferral Program.

Historically, the United States had a “worldwide” tax on international income earned by U.S. residents, including realized but undistributed business profits held off shore. But the tax rate was quite high: 35 percent. The effect of this draconian system could be mitigated by having a wholly owned foreign subsidiary whose taxes were offset by credits and not required to be repaid until repatriation (typically via dividends paid to domestic entities). During the 1950s,

the situation became untenable as investors used tax shelters to shield investments from tax.

In response, President Kennedy sought reforms. *See* Pres. John F. Kennedy, Special Message to the Congress on Taxation (Apr. 20, 1961), https://www.presidency.ucsb.edu/documents/special-message-the-congress-taxation. As a *temporary* measure, President Kennedy "recommend[ed] that tax deferral be continued for income from investment in the developing economies." *Id.* (The Moores investing in India could be exactly the type of activity President Kennedy sought to encourage.) The enacted reforms—and the temporary deal to defer taxes already due—lasted for decades.

Since 1962, Subpart F (26 U.S.C. §§ 951–964), applies to certain income of "controlled foreign corporations."[7] Overall, Subpart F rules were

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[7] Petitioner claims not to control KisanKraft. Open Br. at 12 ("And as minority shareholders without any role in KisanKraft's management, they had no ability to force the company to issue a dividend."). But Congress has defined control differently for 60 years: "[i]n 1962, the ownership percentage was lowered from the original 50 percent to 10 percent" so long as "all U.S. shareholders would own more than 50 percent of the voting stock of the foreign corporation." Melissa Redmiles & Jason Wenrich, *A History of Controlled Foreign Corporations and the Foreign Tax Credit*, IRS, at 129 (2007), https://www.irs.gov/pub/irs-soi/historycfcftc.pdf. The MRT adopted the same 10 percent/50 percent definition but did not create it. The definition is Congress's judgment on how to balance competing goals: prevent tax avoidance by multiple shareholders who collectively own over 50 percent, while protecting genuine small investors from excessive burdens. The Moores would not owe the MRT if either (1) they owned less than 10 percent of KisanKraft, or (2) if U.S. shareholders owned less than 50 percent of KisanKraft's stock.

designed to negate the tax advantage from housing investment income in a controlled foreign corporation, particularly passive overseas income (like the Moores'). The 1960s law allowed payment for taxes on certain international investment profits to be deferred, at the option of the investor, until the income was repatriated to the United States. *See* Revenue Act of 1962, Pub. L. 87-834 § 12, 76 Stat. 960, 1013 (Oct. 16, 1962). It was never designed to be permanent, and indeed tax obligations such as the Moores' were always framed as a *deferral* of accumulated tax obligations, not an *excusal* of them.

For decades leading up to 2017, there were extended policy discussions on various proposals for a permanent replacement to this system. Reform was necessary in part because the "temporary" provisions of Subpart F became their own problem. Businesses and investors understandably resisted repatriating income. Indeed, just before the TCJA's passage, businesses were increasingly reorganizing overseas, or "inverting," to avoid the U.S. corporate income tax altogether. *See*, *e.g.*, Kevin Drawbaugh, *Burger King to save millions in U.S. taxes in 'inversion': study*, Reuters (Dec. 11, 2014) https://shorturl.at/cqrT5.

The TCJA was designed to replace this temporary deal, and its attendant problems, with something permanent. It switched the United States from a worldwide system to a "territorial" one that only taxes income earned within the country's borders, lowered the overall corporate tax rate, and enacted the MRT to transition from the old system to the new. Businesses with accumulated overseas deferred taxes would be excused from having to repatriate assets or pay the full 35 percent tax owed, and instead could pay

a one-time preferentially lower tax rate (generally 15.5 percent on cash and 8 percent on noncash assets). Taxpayers such as the Moores need not sell their overseas holdings to qualify for this deal, are excused from paying most of the tax that would have been due under the old system, and corporate income earned going forward will now be free of U.S. tax.[8]

In short, the MRT is a three-step indirect tax that applies to realized but undistributed profits. The U.S. has imposed income tax on realized but undistributed business profits for decades. Subpart F in the 1960s allowed some investors, like the Moores, to defer payment of the tax as a temporary measure. Congress finally ended that by requiring payment of the tax, but in a way that leaves America with a more competitive tax system and the Moores better off (though they may not acknowledge that). This end of deferrals is not a "wealth tax" The taxes were always due on KisanKraft's gains, to be paid indirectly by the shareholders.

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[8] Petitioner correctly notes that the TCJA prospectively relieves corporations from paying taxes on internationally-sourced income, but deliberately does not do the same for individuals. *See* Pet. 6 (citing 26 U.S.C. § 61(a)(7)). This is unfair, but Congress in setting tax policy is often unfair.

If this Court were to conclude that it is *constitutionally* unfair, the differential treatment is a basis for limiting relief only to individuals and not disturbing the TCJA or MRT with respect to corporations.

B. KisanKraft Realized Taxable Gains, But the Moores Were Allowed to Defer Payment on Their Individual Return.

The Ninth Circuit, and the Moores, call the MRT a novel solution. App. 8; Open. Br. at 10 (using the word "novelty"). Not so. Such tax deferral structures in the tax code are common, and deferred taxes eventually become due. The Moores knew the business was profitable (they note the business reinvested its earnings, *see*, *e.g.*, Open. Br. at 11) and should have known that each year's profitability added to an accumulating tax bill that was deferred, not excused. In enacting the MRT, Congress asked for this bill to be paid.

The well-established "general rule [is that] a corporation and its stockholders are deemed separate entities and this is true in respect of tax problems." *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 442 (1934) (footnotes removed); *Moline Properties v. Comm'r of Int. Rev.*, 319 U.S. 436, 439 (1943) ("so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity") (collecting cases). Indeed, for the typical large corporation (*i.e.*, a C corporation), "earnings are subject to tax at two levels. First, there is the tax imposed upon the income of the corporation. Second, when the corporation, by way of a dividend, distributes its earnings to its shareholders, the distribution is subject to the tax imposed upon the income of the shareholders." *Ivan Allen Co. v. United States*, 422 U.S. 617, 624 (1975). No matter how the

ultimate payments are made, the *corporation* can generate taxable revenue, as KisanKraft did in India.

The incorporators of KisanKraft had various options on how to organize their business—as a C corporation, or a partnership, or (as they chose) a foreign corporation—and each option has attendant benefits and obligations. One obligation of partnerships and pass-throughs is that taxes on *business* profits appear on the *individual* tax returns of the shareholders. This is true not just of the Moores or those subject to the MRT, but of all partnerships, pass-throughs, and S corporations in the United States. *Compare* IRS, S Corporations, https://www.irs.gov/businesses/small-businesses-self-employed/s-corporations ("S corporations are corporations that elect to pass corporate income, losses, deductions, and credits through to their shareholders for federal tax purposes.") *with* IRS, Tax Information For Partnerships, https://www.irs.gov/businesses/partnerships (noting partnerships "'pass[] through' profits or losses to its partners. Each partner reports their share of the partnership's income or loss on their personal tax return").

This distinction is key as to why it *appears* the Moores are paying wealth taxes when *actually* they are paying taxes on income realized over the years by KisanKraft. The business is an independent entity, but the individuals invested in the corporation pay the taxes as a pass-through. Thus, it is not the *investor's* taxes at issue in this case. The Moores are paying the *business's* taxes at the same time they pay their personal taxes. This is the same structure applied to partnerships, one of the default business entities at

common law, where individual income and business income intermix on the same form. Too broad a ruling for the Moores could call into question the everyday taxes paid by partnerships.

The federal government giving taxpayers the option to defer their owed tax, as Subpart F did, should not raise any constitutional concern. Many people choose between deferral and immediate taxation every day—in their retirement savings. The difference between a Roth Individual Retirement Account and the traditional Individual Retirement Account is when the taxes are paid. *See* 26 U.S.C. § 408. For the Roth IRAs, taxes are paid now, and money grows in investment tax-free thereafter. *See* IRS, Roth IRA, https://www.irs.gov/retirement-plans/roth-iras. For traditional investment vehicles, taxes are deferred *today* but must be paid once the investor retires and receives disbursements. IRS, 401(k) Plan Overview, https://www.irs.gov/retirement-plans/plan-sponsor/401k-plan-overview; *see also* 26 U.S.C. § 817A (taxing certain financial assets on a mark-to-market basis); 26 U.S.C. § 877A (taxing U.S. citizens who relinquish their citizenship as if they had sold their assets the day before liquidation).

The Moores made choices that left them responsible to pay the business's taxes, eventually. The MRT was ultimately how Congress chose to collect. This was income, a flow realized by the business and reported on the financial statements though undistributed to the Moores, not "apparent income which may be and often is due to the temporary fluctuations in values" that is actually wealth. *See* App. 48, (Bumatay, J., dissenting from

denial of rehearing *en banc*) (quoting Robert H. Montgomery, *Income Tax Procedure* 198 (1919)).

The MRT is a one-time tax on these accumulated unrepatriated profits, as part of a move to a better, territorial tax system. The legislative tradeoffs involved should not be upset because one set of investors were unfortunately and perhaps understandably surprised that a temporary congressional program ended.

III. ANY RULING FOR THE MOORES SHOULD ENDEAVOR TO PRESERVE CONGRESS' TAX STRUCTURE.

Even if, *arguendo*, this Court finds the MRT is unconstitutional, it should limit its holding and analysis to the Moores, as-applied. While the Ninth Circuit's opinion below was far too broad, as the four dissenting judges rightly pointed out, erring too broadly the other way will do damage to America's tax system. Therefore, this Court should cabin any ruling favorable to the Moores or precisely sever the offending application from Congress' overall tax framework.

The Internal Revenue Code has a general savings clause that "[i]f any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby." 26 U.S.C. § 7852(a). This Court recently reaffirmed the "strong presumption of severability." *Barr v. Am. Ass'n of Political Consultants, Inc.*, 591 U.S. ___, 140 S. Ct. 2335, 2350 (2020) (collecting cases). That is

because “[f]rom *Marbury* v. *Madison* to the present… the Court’s remedial preference after finding a provision of a federal law unconstitutional has been to salvage rather than destroy the rest of the law passed by Congress.” *Id.* The Court uses “surgical severance,” *id.*, to find a “workable solution,” *id.* at 2351. Such care is needed now for the reliance interests of hundreds of millions of taxpayers and a carefully designed Tax Cuts & Jobs Act that overhauled the international tax system in a deliberate way.

The dollar difference between a broad or narrow ruling is substantial. The Tax Foundation estimates that invalidating the MRT for all taxpayers will result in refunds of approximately $346 billion over ten years.[9] *See* Daniel Bunn, Alan Cole, William McBride, and Garrett Watson, *How the Moore Supreme Court Case Could Reshape Taxation of Unrealized Income*, Tax Foundation (Aug. 30, 2023), https://shorturl.at/aLPY2. Invalidating the MRT only as-applied to pass-through businesses such as the Moores’ pass-through would result in refunds of approximately $3.5 billion over ten years. *See id.* An even narrower ruling in the Moores’ favor would presumably be less.

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[9] The Joint Tax Committee’s original revenue estimate in 2017 for the MRT was $339 billion over a slightly different ten-year period. *See* Joint Committee on Taxation, JCX-67-17, “Estimated Budget Effects of the Conference Agreement for H.R. 1, The ‘Tax Cuts and Jobs Act,’ Fiscal Years 2018–2027” at 6 (Dec. 18, 2017), https://www.jct.gov/getattachment/2f1d880c-ca26-429d-9044-63ac084d07cd/x-67-17-5053.pdf.

But if this Court's rationale, even in *dicta*,[10] is too broad, *other* provisions are at risk. For example, if this Court requires *actual* repatriation rather than "deemed repatriation," that could implicate the new Corporate Alternative Minimum Tax ("book tax") ($248 billion over ten years), TCJA's Global Intangible Low-Taxed Income (GILTI) provisions ($352 billion over ten years), and Subpart F generally ($78 billion over ten years). *See id.* And if all taxes on undistributed business (pass-through and C corporation) earnings were invalidated, that would total $5.68 *trillion* over ten years. *See id.*

There would also be large impacts in the states, as over 40 states automatically or regularly incorporate any federal tax changes into their state tax codes. *See, e.g.*, Nicole Kaeding & Kyle Pomerleau, *Federal Tax Reform: The Impact on the States*, Tax Foundation (Mar. 8, 2017) https://shorturl.at/eBY68. *All* states have undertaken tax changes following TCJA's enactment, including using adjustments to business and international provisions to reduce other taxes.

Changes to the MRT may also implicate treaty obligations. An internationally proposed 15 percent minimum tax on large multinational corporations, known as Pillar Two, has a backstop known as the

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[10] Lower courts deeply respect this Court's *dicta*. *See*, *e.g.*, *Peterson v. Martinez*, 707 F.3d 1197, 1210 (10th Cir. 2013) (stating that lower courts "are bound by Supreme Court *dicta* almost as firmly as by the Court's outright holdings, particularly when the *dicta* is recent and not enfeebled by later statements"); *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 452 (5th Cir. 2013) ("Even assuming it is dictum, however, we give serious consideration to this recent and detailed discussion of the law by a majority of the Supreme Court.").

Income Inclusion Rule. *See* Andrew Lautz, *Initial Reactions to the 130-Country, 15% Corporate Minimum Tax Agreement*, NTU (July 1, 2021) https://shorturl.at/ahxEL. This Rule acts as a "top-up" tax, authorizing other countries to impose additional tax on the difference between a country's effective rate and 15 percent; parent entities are allocated a share of tax regardless of whether that income is distributed. *See id.* A ruling against all taxes on business unrealized gains may therefore result in other countries' taxing every dollar that the U.S. doesn't tax on that same income. If a ruling forecloses Pillar Two entirely for the United States, it may be followed by retaliatory measures by other nations such as digital services taxes targeted at U.S. corporations. A delicate balance would be upended. *See, e.g.*, Mindy Herzfeld, *Limiting the Fallout from* Moore, 111 TAX NOTES 113 (July 10, 2023) ("A decision in *Moore* that overturns the GILTI and subpart F regimes would also have the effect of encouraging the very trends that the TCJA's enactment (by a Republican-led Congress) was designed to squash….").

This Court should uphold the MRT as it applies to income on business activity by all corporations, including foreign corporations. But there are also several options for a narrow ruling in favor of the Moores. *See id.* This Court could uphold the MRT for C corporations but excuse individuals such as the Moores. This Court could determine that the MRT does not violate the realization requirement because the business realized them even if the individuals did not receive a distribution. This Court could determine that the MRT violates realization only if taxpayers are

not in majority control of the foreign corporation, although the implications would still be far-reaching as many Americans are minority shareholders in foreign corporations. This Court could invalidate the MRT as it applies to accumulated past earnings but preserve other tax code provisions that tax current-year earnings.[11] This Court could also conclude that realization requirement is satisfied by constructive receipt by shareholders, which would generally preserve the existing tax system. These "alternative paths [would] curtail the fallout from a decision in *Moore* that wreaks havoc on the federal tax system and leaves taxpayers and the U.S. fisc scrambling." *Id.*

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[11] In upholding the MRT, the Ninth Circuit below held the MRT was retroactive, App. 17, but upheld it, stating that "retroactive tax legislation is often constitutional," App. 16. This misreads the precedents: this Court has viewed retroactive tax increases disfavorably and only allowed them in limited circumstances. *See, e.g., United States v. Carlton*, 512 U.S. 26, 32 (1994) (allowing retroactive increase where "Congress acted promptly and established only a *modest* period of retroactivity.") (emphasis added); *id.* at 37 (O'Connor, J., concurring) (stating her view that a retroactive tax increase beyond one year would violate the Due Process Clause); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) ("If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership."); *id.* at 558 (Breyer, J., dissenting) ("[A]n unfair retroactive assessment of liability upsets settled expectations, and it thereby undermines a basic objective of law itself."); *General Motors Corp. v. Romein*, 503 U.S. 181, 192 (1992) ("Retroactive legislation…can deprive citizens of legitimate expectations"). As explained *infra*, the MRT was a reduction of already-owed tax obligations, not an increase. But if the Ninth Circuit concluded this was a retroactive tax increase, they then analyzed its constitutionality incorrectly.

The TCJA is a careful balance of tax policy tradeoffs, international implications, and considerations weighed by Congress. On the whole, it benefited taxpayers by reducing tax burdens and boosting economic growth. If this Court rules for the Moores, it should be careful to be narrow in its application.

CONCLUSION

For the foregoing reasons, *Amicus* NTUF requests that this Court vacate the decision below, state that wealth taxes are unconstitutional, and uphold the international tax reforms of the Tax Cuts and Jobs Act.

Respectfully submitted,

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