

Is a Wealth Tax Constitutional? The *Moore* Case

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2023-2

A. Introduction

President Joe Biden, in his State of the Union address before Congress on February 7, 2023, proposed a wealth tax on “billionaires.” The lead editorial of The Wall Street Journal for February 11-12, 2023, at p. A12, captioned “Biden’s 2025 Tax Agenda” discussed the proposal and said:

Start with a reprise of his “billionaire minimum tax.” This is a version of Sen. Elizabeth Warren’s tax on wealth that voters rejected in the 2020 Democratic primaries. “No billionaire should pay a lower tax rate than a schoolteacher or a firefighter,” the President said with no further explanation. Allow us to fill in the details that Mr. Biden didn’t.

For starters, it isn’t a billionaire tax and it isn’t an income tax. It would apply to households worth more than \$100 million in accumulated assets, and its target is wealth. The version the President first proposed in his 2023 budget outline would claim a minimum of 20% from high earners’ “total income.” A contrived term that includes unrealized capital gains on top of actual asset sales.

This means that if your assets rise in value during a year, you will pay taxes on that increase even if you realized no actual gains through a sale. If you lack the ready cash, you might have to sell assets to pay the tax bill or pay later with interest. If your assets fell in value, you would not be able to deduct the full loss from your overall income. Heads, the government wins, tails, you lose.

The proposal also flouts the Constitution, which says Congress may only impose “direct taxes” if they are apportioned among the states according to their population. The Sixteenth Amendment lets Congress tax income that is “derived” from a “source,” which implies a realization. In precedents going back to 1920, the Supreme Court has never found that the income tax applies to unrealized gains.

The Treasury Department released on March 9, 2023, a “General Explanations of the Administration’s Fiscal Year 2024 Revenue Proposals” (the Treasury’s Green Book) which contained more details about the wealth tax proposal and other proposals for change which will be dealt with in a later issue.

B. Background

A three-judge panel of the Ninth Circuit Court of Appeals recently decided, *Moore v. United States*, 36 F. 4th 930 (9th Cir. 2022), which may have significance concerning the imposition of a wealth tax or a tax in a decedent’s estate on unrealized appreciation. It was discussed in an article on page A17 from The Wall Street Journal of January 26, 2023. Cox and Adler, *The Ninth Circuit Upholds a Wealth Tax*.

The taxpayers, husband and wife Charles and Kathleen Moore, purchased 11 percent of a small foreign corporation in 2005. They never received a distribution from the corporation. The amount at issue was modest, almost \$15,000. The Moores did not participate in the management of the corporation which never paid dividends. Nevertheless, they became liable for a tax bill under the new law which applied to

any shareholder with an interest of more than 10 percent. They contended that a new tax statute passed in 2017 which imposed a tax was unconstitutional under the Sixteenth Amendment to the U.S. Constitution. This argument was rejected by the panel. Part of the opinion is quoted below. The panel consisted of Judge Ronald M. Gould who wrote the opinion and Judges Jacqueline H. Nguyen and Mark J. Bennett. The taxpayers applied for a hearing en banc which was denied. An Order of the court quoted below contains a dissenting opinion written by Judge Bumatay, joined by Judges Ikuta, Callahan, and VanDyke, which disagreed with the decision not to have the full court review the panel decision. A copy of the Order and the dissent is quoted below. The Wall Street Journal article asserts that taxpayers plan to apply to the United States Supreme Court for *certiorari*.

C. IRC Sec. 965

Moore involved a provision in the 2017 Tax Cuts and Jobs Act, IRC Sec. 965, which imposed a retroactive and one-time tax on individual United States taxpayers and overseas corporate income repatriated to the United States through dividends. The 2017 Act eliminated this tax on overseas income. Under prior law, U.S. taxpayers paid taxes on overseas corporate income when the income was repatriated to the United States through dividends. The 2017 Act eliminated the tax on overseas income and brought the U.S. system in a consistent manner with those of other developed countries. However, it also introduced a “mandatory repatriation tax” (MRT) on the corporation’s undistributed income since 1986 payable by the shareholders but not the corporation. As a result, without selling their stock or receiving a dividend, United States taxpayers were deemed to have received “income” and became liable for the new tax.

D. Analysis

Under a heading “Discussion,” the panel opinion states:

The Moores raise two constitutional challenges to the MRT: (1) they contend that it violates the Apportionment Clause, and (2) they contend that it violates the Fifth Amendment’s Due Process Clause.

After an introduction, the court deals with Item 1 as follows:

I. The MRT does not violate the Apportionment Clause

The Constitution’s Apportionment Clause provides that “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.” U.S. CONST. art. I, §9, cl. 4. “This requirement means that any ‘direct Tax’ must be apportioned so that each State pays in proportion to its population.” *NFIB*, 567 U.S. at 570. The Apportionment Clause traditionally applied to only capitations and land taxes. See *id.* at 571 (“[D]irect taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate.” (quoting *Springer v. United States*, 102 U.S. 586, 602 (1881))). While the Supreme Court in *Pollock v. Farmers’ Loan & Tr. Co.*, held that income from personal property was subject to the Apportionment Clause, see 158 U.S. 601, 618 (1895), the Sixteenth Amendment overruled this result, further reinforcing the narrow reach of the Apportionment Clause, see *NFIB*, 567 U.S. at 571.

The Sixteenth Amendment, ratified in 1913, exempts from the apportionment requirement the expansive category of “incomes, from whatever source derived.” See U.S. CONST. amend. XVI. In *United States v. James*, we noted the difficulty of categorically defining everything that constitutes income. See 333 F.2d 748, 753 (9th Cir. 1964) (en banc) (“The courts have given a wide scope to the income tax, but have realized that the borderline content of ‘income’ must be determined case by case. Essentially the concept of income is a flexible one” (quoting Stanley S. Surrey & William C. Warren, *The Income Tax Project of the American Law Institute: Gross Income, Deductions, Accounting, Gains and Losses, Cancellation of Indebtedness*, 66 Harv. L. Rev. 761, 770–71 (1953))).

Despite the difficulty in defining income, courts have held consistently that taxes similar to the MRT are constitutional. In *Eder v. Commissioner of Internal Revenue*, the Second Circuit held that the inclusion of foreign corporate income under a statute predating Subpart F was

constitutional. See 138 F.2d 27, 28–29 (2d Cir. 1943). Thirty years later, the United States Tax Court upheld pre-MRT provisions of Subpart F against constitutional challenges, and the decisions were affirmed by the Second and Tenth Circuits. See *Whitlock's Est. v. Comm'r*, 59 T.C. 490, 508 (1972), *aff'd in part, rev'd in part*, 494 F.2d 1297, 1298–99, 1301 (10th Cir. 1974) (upholding constitutionality of Subpart F provision taxing “a corporation’s undistributed current income to the corporation’s controlling stockholders.”); *Garlock Inc. v. Comm'r*, 489 F.2d 197, 202 (2d Cir. 1973) (affirming Tax Court’s ruling that a CFC’s Subpart F income was attributable to shareholders even if that income had not been distributed and stating that the argument it is unconstitutional “borders on the frivolous in the light of [the Second Circuit’s] decision in *Eder*”).

Whether the taxpayer has realized income does not determine whether a tax is constitutional. In *Heiner v. Mellon*, the Supreme Court stated that whether or not a “partner’s proportionate share of the net income of the partnership” was distributable was not material to whether it could be taxed. 304 U.S. 271, 281 (1938). Similarly in *Eder*, the Second Circuit noted that “[i]n a variety of circumstances it has been held that the fact that the distribution of income is prevented by operation of law, or by agreement among private parties, is no bar to its taxability.” 138 F.2d at 28 (citing *Heiner*, 304 U.S. at 281; *Helvering v. Enright's Est.*, 312 U.S. 636, 641 (1941)). And, the Supreme Court has made clear that realization of income is not a constitutional requirement. See *Helvering v. Horst*, 311 U.S. 112, 116 (1940) (“[T]he rule that income is not taxable until realized . . . [is] founded on administrative convenience . . . and [is] not one of exemption from taxation where the enjoyment is consummated by some event other than the taxpayer’s personal receipt of money or property.”); see also *Helvering v. Griffiths*, 318 U.S. 371, 393–94 (1943) (explaining that *Horst* “undermined . . . the original theoretical bases” of a constitutional realization requirement).

What constitutes a taxable gain is also broadly construed. In *Helvering v. Bruun*, the Supreme Court determined that a lessee’s improvements to the land were a taxable gain when the lessor regained possession of the land. 309 U.S. 461, 469 (1940). The Court instructed that a taxable “[g]ain may occur as a result of exchange of property, payment of the taxpayer’s indebtedness, relief from liability, or profit realized from the completion of a transaction.” *Id.* We applied this precedent nearly half a century later, holding that the cancellation of indebtedness was a taxable gain. See *Vukasovich, Inc. v. Comm'r*, 790 F.2d 1409, 1415 (9th Cir. 1986) (“We have no doubt that an increase in wealth from the cancellation of indebtedness is taxable where the taxpayer received something of value in exchange for the indebtedness.”).

Further, there is no blanket constitutional ban on Congress disregarding the corporate form to facilitate taxation of shareholders’ income. In other words, there is no constitutional prohibition against Congress attributing a corporation’s income pro-rata to its shareholders. See, e.g., *Dougherty v. Comm'r*, 60 T.C. 917, 928 (1973) (noting that nothing “prevent[s] Congress from bypassing the corporate entity in determining the incidence of Federal income taxation.”). And here, there is no dispute that KisanKraft actually earned significant income, though all tax that the Moores’ owed the U.S. Government on their pro-rata share of KisanKraft was deferred until the MRT went into effect in 2017.

Given this background, we hold that the revised Subpart F is consistent with the Apportionment Clause. As modified by the MRT, Subpart F only applies to U.S. persons owning at least 10% of a CFC. The MRT builds upon these U.S. persons’ preexisting tax liability attributing a CFC’s income to its shareholders. Before the MRT, U.S. persons owning at least 10% of a CFC were already subject to certain taxes on the CFC’s income. Minority owners like the Moores were, and after the passage of the MRT continue to be, treated as individuals who have some ability to control distribution. See *id.* (“In subpart F, Congress has singled out a particular class of taxpayers . . . whose degree of control over their foreign corporation allows them to treat the corporation’s undistributed earnings as they see fit.”). Further, the MRT applies to taxable gains. Clearly, KisanKraft earned significant income, and the MRT assigns only a pro-rata share of that income to the Moores.

Relying on *Eisner v. Macomber*, 252 U.S. 189, 219 (1920), and *Glenshaw Glass*, 348 U.S. at 431, the Moores argue that the MRT is an unapportioned direct tax. Specifically, the Moores argue that *Macomber* and *Glenshaw Glass* require income to be realized before it can be taxed. They urge us to adopt and apply the purported definition of income used in *Glenshaw Glass*, which would require “[1] undeniable accessions to wealth, [2] clearly realized, and [3] over which the taxpayers have complete dominion.” 348 U.S. at 431. The Moores’ reliance on these cases is misplaced: the Supreme Court, our court, and other courts have narrowly interpreted *Macomber* and *Glenshaw Glass*, and *Glenshaw Glass*’s definition is not applicable here.

First, *Macomber* and *Glenshaw Glass* themselves foreclose the Moores' arguments. In *Macomber*, the Court was clear that it was only providing a definition of what "[i]ncome may be defined as," 252 U.S. at 207, not a universal definition. *Glenshaw Glass* reiterated the limited scope of *Macomber's* definition of income by emphasizing that, while the definition "served a useful purpose . . . , it was not meant to provide a touchstone to all future gross income questions." 348 U.S. at 431. *Glenshaw Glass* similarly cabined the definition of income it used, prefacing its definition of income by saying "[h]ere we have instances of," signaling that the Court was focused on the specific facts before it. See *id.* The Court in *Glenshaw Glass* never stated or suggested that the definition it used was a universal (or even broadly applicable) test. Realization was also not even disputed in *Glenshaw Glass*, explaining why the Court did not make more than a passing reference to realization. See *id.* at 428–29 (discussing how both taxpayers had realized damages and simply disputed their need to pay taxes on them).

Second, the Supreme Court has subsequently made clear that *Macomber* and *Glenshaw Glass* do not provide a universal definition of income. In *Horst*, the Supreme Court explained that the concept of realization is "founded on administrative convenience" and does not mean that a taxpayer can "escape taxation because he did not actually receive the money." 311 U.S. at 116. In *Griffiths*, the Supreme Court explicitly stated that this holding from *Horst* "undermined . . . the original theoretical bases of the decision in *Eisner v. Macomber*." 318 U.S. at 394. The Supreme Court recently reiterated *Horst's* statement that "the concept of realization is founded on administrative convenience," *Cottage Savings*, 499 U.S. at 559 (quoting *Horst*, 311 U.S. at 116), without adopting the test from *Glenshaw Glass* that the Moores urge upon us; in fact, the Court did not even cite to *Glenshaw Glass*.

Third, we have not adopted the definition of income the Moores advocate. In *James*, we cited a passage from *Glenshaw Glass* that included the definition of income the Moores favor, but we never adopted it then or later. See 333 F.2d at 752 (noting also that "insofar as [*Macomber*] purported to offer a comprehensive definition of the term income as used in the Sixteenth Amendment, it has been discarded."). Instead, we stated that there was no set definition of income under the Sixteenth Amendment. See *id.* at 752–53. Similarly, in *Comm'r v. Fender Sales, Inc.*, we did not cite to *Glenshaw Glass* or adopt the Moores' preferred definition when determining whether a tax was constitutional under the Sixteenth Amendment. See 338 F.2d 924, 927 (9th Cir. 1964) (noting also that "[i]n this context, *Eisner v. Macomber* . . . is not even apposite, let alone controlling.").

Finally, although it does not control our analysis, holding that Subpart F is unconstitutional under the Apportionment Clause would also call into question the constitutionality of many other tax provisions that have long been on the books. See Bruce Ackerman, *Taxation and the Constitution*, 99 Colum. L. Rev. 1, 52 (1999). We decline to do so today.

The opinion then determined that the MRT did not violate the Due Process Clause of the Fifth Amendment.

E. Court Order of November 22, 2022

This order states:

SUMMARY*

Tax

The panel denied a petition for panel rehearing and denied on behalf of the court a petition for rehearing en banc, in a case in which the panel affirmed the district court's dismissal of an action seeking to invalidate the Mandatory Repatriation Tax.

Judge Bumatay, joined by Judges Ikuta, Callahan, and VanDyke, dissented from the denial of rehearing en banc. Judge Bumatay stated that the panel erred in disregarding the realization requirement of the Sixteenth Amendment, by allowing an unapportioned direct tax on unrealized income—undistributed earnings of a foreign corporation owned by a U.S. taxpayer—without offering any other limiting principle; and that the

opinion opens the door to new federal taxes on other types of wealth and property being categorized as an “income tax” without the constitutional requirement of apportionment.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

ORDER

Appellants’ Petition for Panel Rehearing is DENIED.

The full court was advised of the Petition for Rehearing En Banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. Appellants’ Petition for Rehearing En Banc is also DENIED.

BUMATAY, Circuit Judge, joined by IKUTA, CALLAHAN, and VANDYKE, Circuit Judges, dissenting from the denial of rehearing en banc:

“[T]he ratification of the Constitution was the ultimate act of popular sovereignty.” *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 837 (2015) (Roberts, C.J., dissenting). Its provisions “reflect[] a compromise—a pragmatic recognition that the grand project of forging a Union required everyone to accept some things they did not like.” *Id.* And courts have “no power to upset such a compromise simply because we now think that it should have been struck differently.” *Id.* But our court’s decision does just that.

Under the original constitutional design, Congress could only levy “direct taxes” if such taxes were “apportioned among the several States.” U.S. Const. art. I, §2, cl. 3. The apportionment of direct taxes was to be set “in proportion to the census or enumeration” of the States’ populations. U.S. Const. art. I, §9, cl. 4. Thus, at the Founding, for a direct tax to be constitutional, the federal government had to collect the proceeds proportionally—meaning if one State had twice the population of another, it also had to contribute twice as much. Given this requirement’s heavy burden on federal taxing power, the Supreme Court narrowed the definition of “direct taxes” to encompass only certain taxes, such as capitations (head taxes), taxes on real property, taxes on personal property, and taxes on income from personal property. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 571 (2012) (simplified).

But the people changed that system. In 1913, the people created a limited exception to the apportionment requirement. By ratifying the Sixteenth Amendment, the people gave Congress the authority to “lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States.” U.S. Const. amend. XVI. So, today, Congress may enact a direct tax on “incomes”—and only on “incomes”—without apportioning the tax. The Sixteenth Amendment thus struck a delicate balance for federal taxing power—freeing Congress from the unwieldy requirement of apportionment, but only for taxes on “incomes.” Nothing in the Sixteenth Amendment relieved Congress of its duty to apportion other forms of direct taxation, such as a tax on property interests.

Now, more than a century after its ratification, our court upsets the balance reached by the people. We become the first court in the country to state that an “income tax” doesn’t require that a “taxpayer has realized income” under the Sixteenth Amendment. *Moore v. United States*, 36 F.4th 930, 935 (9th Cir. 2022). Instead, we conclude that the Sixteenth Amendment authorizes an unapportioned tax on unrealized gains because the “realization of income is not a constitutional requirement.” *Id.* at 936. We thus endorse the constitutionality of a federal tax on the share of *undistributed* earnings of a foreign corporation owned by a U.S. taxpayer—despite (in this case) the U.S. taxpayer being a minority shareholder of the foreign corporation. In other words, we allow a direct tax on the *ownership interest* of a taxpayer—even when the taxpayer has yet to receive any economic gain from the interest and has no ability to direct distribution of gain from the interest.

Neither the text and history of the Sixteenth Amendment nor precedent support levying a direct tax on unrealized gains. Ratification-era sources confirm that the prevailing understanding of “income” entailed some form of realization. And a hundred years of precedent establishes that only realized gains are taxable as “income” under the Sixteenth Amendment. While the Supreme Court has allowed flexibility in identifying “incomes,” it has never abandoned the core requirement that income must be realized to be taxable without apportionment under the Sixteenth Amendment. Simply put, as a matter of ordinary meaning, history, and precedent, an income tax must be a tax on realized income. And our court is wrong to violate such a common-sense tautology.

Worse yet, by dispensing with the realization requirement for income without offering any other limiting principle, we open the door to expansion of the federal taxing power beyond the limits placed by the Constitution. Indeed, without a realization requirement, it is hard to see what’s left of the constitutional apportionment requirement. Now, I fear, any tax on property or other interests can be categorized as an “income tax” and elude the requirement of apportionment. While the Sixteenth Amendment expanded the federal government’s taxing power, it did not dissolve other constitutional restrictions.

Because we may not rebalance the limits of federal taxing power, I respectfully dissent from the denial of rehearing en banc.

I.

This case begins with a husband and wife’s investment in an overseas company formed to empower small-scale farmers in impoverished regions of India. Charles and Kathleen Moore own a 13% stake in KisanKraft Machine Tools Private Limited, a small company headquartered in Bangalore, India. KisanKraft was formed in 2006 by Charles’s friend and former coworker, Ravindra “Ravi” Kumar Agrawal, to import and distribute affordable farming equipment. Moved by Ravi’s vision for helping farmers, the Moores invested \$40,000 in KisanKraft and retained about 11% of the common shares in the company. Ravi and his wife moved to India to manage the company’s day-to-day operations as approximately 80% owners.

Under Ravi’s leadership, KisanKraft’s revenues grew each year from 2006 to 2017. True to the original business plan, Ravi reinvested everything in the company. By 2017, KisanKraft employed over 300 people across 14 regional offices, distributing agricultural equipment to thousands of dealers. The Moores received updates and annual financial statements, but they never exercised any control over the company’s earnings or operations, and never received any distributions, dividends, or other payments. They were content with supporting their friend’s “noble purpose . . . to improve the lives of small and marginal farmers in India.”

As the Moores would find out, no good deed goes unpunished. In 2018, they learned that under the Tax Cuts and Jobs Act of 2017, they were on the hook for their share of KisanKraft’s lifetime earnings and would owe a one-time tax amounting to \$14,729. This surprised the Moores, who had never received any income from KisanKraft and did not expect to pay income taxes just for owning a minority interest in the company. It’s undisputed that the Moores did not realize income from KisanKraft and lacked the authority to compel a dividend payment constituting realized income. Not only are the Moores minority owners, KisanKraft does not have sufficient cash to distribute its retained and reinvested earnings. But nonetheless, under the Act, the Moores were liable for income tax on income they never earned.

This was thanks to the Mandatory Repatriation Tax, a one-time “transition tax” to facilitate the repatriation of foreign earnings. See 26 U.S.C. §965. The Mandatory Repatriation Tax targeted U.S. shareholders who held 10% or more in a “controlled foreign corporation”—a foreign entity with over 50% American ownership, see 26 U.S.C. §967—that retained and reinvested its prior earnings overseas rather than distributing them to shareholders as dividends. *Moore*, 36 F.4th at 933. Previously, those shareholders would ordinarily only incur a tax liability when the foreign corporation distributes earnings and the shareholders repatriate those gains. *Id.* (citing 26 U.S.C. §951 (2007)). But the Mandatory Repatriation Tax adopted a “novel” approach—it simply deemed the foreign corporation’s retained earnings as the shareholders’ “income” and taxed them according to their proportional ownership stake. *Id.* at 933–34.

The Moores sued seeking a refund of their \$14,729 tax payment. Our court affirmed the denial of the refund. We held that the Mandatory Repatriation Tax did not violate the apportionment requirement. *Moore*, 36 F.4th at 935. According to our court, “[w]hether the taxpayer has realized income does not determine whether a tax is constitutional.” *Id.* Rather, we held that “the Supreme Court has made clear that realization of income is not a constitutional requirement.” *Id.* at 936. Based on the conclusion that unrealized gains qualify as income, we held that taxing the Moores based on their pro-rata share of KisanKraft’s retained profits was constitutional. *Id.*

II.

“The Sixteenth Amendment, like other laws authorizing or imposing taxes, is to be taken as written, and is not to be extended beyond the meaning clearly indicated by the language used.” *Edwards v. Cuba R. Co.*, 268 U.S. 628, 631 (1925). It is “settled doctrine . . . that the Sixteenth Amendment confers no power upon Congress to define and tax as income without apportionment something which theretofore could not have been properly regarded as income.” *Taft v. Bowers*, 278 U.S. 470, 481 (1929). Our task is to discern “the commonly understood meaning of [income] which must have been in the minds of the people when they adopted the Sixteenth Amendment.” *Merchants’ Loan & Tr. Co. v. Smietanka*, 255 U.S. 509, 519 (1921); see also *United States v. Safety Car Heating & Lighting Co.*, 297 U.S. 88, 99 (1936) (“Income within the meaning of the Sixteenth Amendment . . . [w]ith few exceptions, if any . . . is income as the word is known in the common speech of men.”). When searching for an Amendment’s original meaning, we look to its text, historical context, and early post-ratification interpretations. See *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2127–28 (2022).

A.

We start with the history. Before the Sixteenth Amendment, the Constitution spoke of two categories of taxes—direct and indirect. Indirect taxes, such as “Duties, Imposts and Excises,” were to be levied “uniform[ly] throughout the United States.” U.S. Const. art. I, §8, cl. 1. On the other hand, “direct Taxes” were to “be apportioned among the several States . . . according to their respective Numbers.” U.S. Const. art. I, §2, cl. 3. Thus, “[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.” U.S. Const. art. I, §9, cl. 4.

Understandably, the impracticalities and inequities of the apportionment requirement made it difficult for the federal government to impose a direct tax. See *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 179 (1796) (Paterson, J.). One way to deal with the difficulties was to limit the category of direct taxes. See *NFIB*, 567 U.S. at 571 (showing the history of limiting direct taxes to capitations, land taxes, and taxes on personal property and the income from personal property).

The Sixteenth Amendment arose in response to *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895). In that case, the Supreme Court struck down the income tax provisions of the Wilson Tariff Act of 1894 as unapportioned direct taxes. 158 U.S. at 637, 683. The Pollock decision noted that the “constitution divided federal taxes into two great classes—the class of direct taxes, and the class of duties, imports, and excises”—and sought to determine into which class the taxes on incomes belonged. *Id.* at 617–18. Examining the text of the relevant clauses in the Constitution and the circumstances of their adoption and ratification, the Court concluded that income taxes on real estate and personal property were invariably direct taxes requiring apportionment. *Id.* at 637. Chief Justice Fuller’s majority opinion added, “[i]f it be true that the constitution should have been so framed that a tax of this kind could be laid, the instrument defines the way for its amendment.” *Id.* at 635.

President William Howard Taft led the public charge for a constitutional amendment expressly authorizing a federal income tax. In a speech before both houses of Congress, he characterized the Pollock decision as “depriv[ing] the National Government of a power” which it “undoubtedly . . . ought to have” and which “might be indispensable to the nation’s life in great crises.” William H. Taft, *Message Regarding Income Tax* (June 16, 1909). Rather than passing legislation that would force the Supreme Court to reconsider its ruling in *Pollock*, President Taft urged the House and Senate to “propose an amendment to the Constitution conferring the power to levy an income tax upon the National Government without apportionment among the states in proportion to population.” *Id.*

When the Senate was weighing amending the Constitution to authorize an income tax, one member floated the possibility of simply striking the apportionment requirement altogether. 44 Cong. Rec. 3377 (1909). Instead, the drafters chose language meant to “confine [the changes] to income taxes alone.” *Id.* As a leading scholar of taxation and public finance explained:

[T]he simplest way out of the difficulty would be entirely to eliminate from the constitution the clause or clauses referring to direct taxes. [But] Congress, however, was unfortunately not much interested in the larger question. What gave it immediate concern was the disposition of the impending imbroglio. It was therefore decided to arrange the matter by an amendment to the constitution which would affect only the income tax. _____

Edwin R. A. Seligman, *The Income Tax: A Study of the History, Theory, and Practice of Income Taxation at Home and Abroad* 594–95 (1911).

Eventually, Congress settled on draft language and proposed the amendment for ratification by the States through a joint resolution. S.J. Res. 40, 61st Cong. (1909). After an arduous four-year process and extensive debates in the state legislatures, the Sixteenth Amendment was ratified in early 1913.

B.

We turn next to the text. The full text of the Sixteenth Amendment reads: “Congress shall have the 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.

Ratification-era dictionaries suggest that the ordinary meaning of “income” was confined to realized gains. One dictionary defined “income” as “that *gain* which *proceeds from* labor, business, property, or capital of any kind.” Webster’s Revised Unabridged Dictionary (1913) (emphasis added). According to another turn-of-the-century dictionary, “income” meant “[t]hat which comes in to a person as payment for labor or services rendered in some office, or as gain from lands, business, the investment of capital, etc.” The Century Dictionary and Cyclopedia (1901).

Ratification-era legal authorities made explicit what these dictionary definitions conveyed: only realized gains qualify as taxable income. The 1910 edition of Black’s Law Dictionary defined “income” to include “that which *comes in* or is *received from* any business or investment of capital.” Income, *Black’s Law Dictionary* (2d ed. 1910) (emphasis added). And Henry Campbell Black—of Black’s Law Dictionary fame—addressed the issue in a book-length commentary published within months of ratification. Black noted that an income tax “is not a tax upon accumulated wealth, but upon its periodical accretions.” Henry Campbell Black, *A Treatise on the Law of Income Taxation* 1 (1913). In his view, these accretions occurred only when gains were *realized*, not when an asset had merely increased in value:

When a bond which was purchased at a discount reaches par value in the market, the owner cannot be properly said to have made a profit; he is in a position where he can realize a profit if he sells the bond, but not otherwise. If he sells, then the sum gained may constitute a part of his income, but it cannot be so described while he continues to hold the security.

Id. at 76–77.

Black rejected the idea of taxing shareholders for undistributed corporate profits as being “contrary to all the weight of authority,” explaining:

In several of the cases on the subject, it is said that the word “income” is not broad enough to include things not separated in some way from the principal. It is not synonymous with “increase.” The value of corporate stock may be increased by good management, prospects of business, and the like, but such increase is not income. It may also be increased by the accumulation of a surplus fund. But so long as that surplus is retained by the corporation, either as a surplus or as increased stock, it can in no proper sense be called income. It may become income-producing, but it is not income.

Id. at 120. Black concluded that the Sixteenth Amendment “does not . . . enlarge the power of taxation previously possessed by Congress, but merely repeals certain parts of the existing Constitution which imposed a limitation upon the levying of . . . an income tax.” *Id.* at 11.

Other early commentators shared Black’s assessment. In 1919, a well-known authority on income tax and accounting explained that the Sixteenth Amendment only covered taxes on realized gains:

In the circumstances, no apology is needed for a close inquiry into the right of Congress or the Treasury Department to extend the taxation of income—which is permitted under the sixteenth amendment—to the taxation of capital—which is not permitted. And the inquiry naturally extends itself into the right to tax any transaction unless there is an actual realization of income, as distinguished from the apparent income which may be and often is due to the temporary fluctuations in values.”

Robert H. Montgomery, *Income Tax Procedure* 198 (1919).

Taken collectively, these sources reinforce the common-sense notion that “income” refers to the receipt of some economic benefit. And because this “commonly understood meaning” was “in the minds of the people when they adopted the Sixteenth Amendment,” *Smietanka*, 255 U.S. at 519, neither Congress nor our court may redefine income to include unrealized gains. See *Burk-Waggoner Oil Ass’n v. Hopkins*, 269 U.S. 110, 114 (1925) (“Congress cannot make a thing income which is not so in fact.”).

C.

Supreme Court precedent also confirms that the Sixteenth Amendment adopted the ordinary meaning of income—thus, it requires the realization of gain.

The Supreme Court first interpreted “income” under the Sixteenth Amendment in *Eisner v. Macomber*, 252 U.S. 189 (1920). There, the Court addressed whether a stockholder’s receipt of a stock dividend falls within the scope of “incomes, from whatever source derived,” for purposes of the Sixteenth Amendment. *Id.* at 207–08. After surveying authorities, the Court defined “income” as “the gain derived from capital, from labor, or from both combined.” *Id.* at 207. The Court further illuminated:

Here we have the essential matter: *not* a gain *accruing to* capital; *not* a *growth or increment* of value *in* the investment; but a gain, a profit, something of exchangeable value, *proceeding from* the property, *severed from* the capital, however invested or employed, and *coming in*, being ‘*derived*’—that is, *received or drawn* by the recipient (the taxpayer) for his *separate* use, benefit and disposal—that is income derived from property. Nothing else answers the description.

Id. at 207 (underline added). To the Court, this meaning was the “clear definition of the term ‘income,’ as used in common speech.” *Id.* at 206–07.

Applying the definition to a stock dividend, the Court concluded, “[t]he dividend normally is payable in money . . . and when so paid, then only . . . does the stockholder realize a profit or gain which becomes his separate property, and thus derive income from the capital that he or his predecessor has invested.” *Id.* at 209. Put simply, *Macomber* says that stock dividends do not constitute “income” until “realize[d]” as profit or gain. *Id.*

Macomber remains the seminal case establishing the realization requirement for “income” under the Sixteenth Amendment. See Edward T. Roehner & Sheila M. Roehner, *Realization: Administrative Convenience or Constitutional Requirement?*, 8 Tax L. Rev. 173, 174 (1953) (“[T]he Supreme Court has in no post-*Eisner v. Macomber* case indicated the slightest relaxation in the rule that realization is necessary before there can be taxable income.”). And more recently, the Court recognized *Macomber* as among its “landmark precedents on realization” and

observed that Congress codified *Macomber's* realization requirement in the Revenue Act of 1924. *Cottage Sav. Ass'n v. C.I.R.*, 499 U.S. 554, 561–62 (1991).

Since *Macomber*, the Court has consistently treated realization—in some form—as the critical component of taxable income. Twenty years after *Macomber*, the Court reiterated “the rule that income is not taxable until realized.” *Helvering v. Horst*, 311 U.S. 112, 116 (1940). There, the Supreme Court considered the case of a taxpayer who procured payment of interest as a gift to a family member. *Id.* Even though the taxpayer didn’t personally realize income, the “power to procure the payment of income to another is the enjoyment and hence the *realization* of the income.” *Id.* at 118 (emphasis added). In other words, the Court found no exemption from taxation when economic gain is enjoyed “by some event other than the taxpayer’s personal receipt of money or property.” *Id.* at 116.

In *C.I.R. v. Glenshaw Glass*, 348 U.S. 426 (1955), the Court said that punitive damages awards are taxable as income. *Glenshaw Glass* observed that *Macomber's* definition of income “served a useful purpose” by “distinguishing gain from capital,” but “was not meant to provide a touchstone to all future gross income questions.” *Id.* at 431. But *Glenshaw Glass* followed *Macomber's* lead in requiring realization—it held that the damages were taxable income because they were “undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.” *Id.*

Six years later, the Court concluded that embezzled funds are taxable as income to the embezzler. *James v. United States*, 366 U.S. 213 (1961). In doing so, it reiterated that the “full measure” of Congress’s power to tax incomes “encompass[es] all accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.” *Id.* at 218–19. As the Court explained, “[a] gain constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it.” *Id.* at 219 (simplified).

And until *Moore*, Ninth Circuit caselaw also treated realization as a requirement for taxable “income.” Back in 1964, for example, we held that employees realized a taxable gain when they accepted stock instead of salaries. *Comm’r v. Fender Sales, Inc.*, 338 F.2d 924, 929 (9th Cir. 1964). In that case, famous guitar innovator Leo Fender and his business partner Donald Randall were the sole stockholders of Fender Sales, Inc. *Id.* at 925. At a time when Fender Sales was cash-strapped, Fender and Randall agreed to each accept additional shares of stock instead of three years’ worth of unpaid salaries. *Id.* As the company’s “sole owners,” taking the stock instead of salaries caused Fender Sales to increase in value for Randall and Fender. *Id.* at 929. By “augmenting the intrinsic worth of the capital stock they held,” Fender and Randall “surely ‘realized’ for their own benefit the value of the obligations discharged.” *Id.* In other words, we maintained that some form of realization is required for Sixteenth Amendment purposes. There, we said that “the issuance of the corporation’s capital stock to the employee is a payment” that amounts to “realization of income by the employee in the amount of the fair market value of the stock.” *Id.*

Three decades later, we considered whether Congress exceeded its authority by enacting a tax on the short-term capital gains of investors in commodity futures contracts. *Murphy v. United States*, 992 F.2d 929, 931 (9th Cir. 1993) (analyzing 26 U.S.C. §1256). Before the enactment of §1256, futures traders could defer tax on short-term capital gains until a later year, when a lower long-term rate would be applied. *Id.* *Murphy* argued that Congress could not tax his unsold futures contracts, which he alleged were unrealized gains. *Id.* at 930. We disagreed because, under the “marked-to-market” accounting system, futures traders receive “any gain on [their] position in cash as a matter of right each trading day.” *Id.* at 931. *Murphy's* ability to withdraw cash, even if unexercised, meant he effectively realized his gains, subjecting them to Congress’s power to tax income. *Id.* *Murphy* thus illustrates the continuing vitality of the realization requirement—even though we found it satisfied by the right to withdraw funds, rather than requiring cash receipts; otherwise, realization would not have been dispositive in our analysis.

D.

Based on text, history, and precedent, our court erred in disregarding the realization requirement of the Sixteenth Amendment. Rather than hewing to plain meaning and Supreme Court rulings, we recast the very meaning of “income.” Without the guardrails of a realization

component, the federal government has unfettered latitude to redefine “income” and redraw the boundaries of its power to tax without apportionment.

The crux of our error is treating *Macomber* as merely an advisory example of what “income may be defined as.” *Moore*, 36 F.4th at 937. We essentially called *Macomber* a dead letter, emphasizing its “limited scope.” *Id.* While it may be true that *Macomber* does not establish a “universal” meaning of “income” for all situations and all cases, that does not mean we can disregard the Supreme Court’s core holding in that case. At bottom, the Court said that “income” is the “gain derived” from a variety of sources. *Macomber*, 252 U.S. at 207. While there may be edge cases that test the outer limits of what constitutes a realized gain, the term “income” still retains realization as a definitional requirement. And none of the later decisions that build on *Macomber* repudiate the ongoing requirement that gains must be “realized” in some form before they can be taxed.

Moore was also wrong to rely on a few words from *Horst* to dispense with the realization requirement. 36 F.4th at 936. While *Horst* noted that the realization requirement is “founded on administrative convenience,” 311 U.S. at 116, those words didn’t open the door for our court to redefine the meaning of “income.” Indeed, the realization requirement was assumed in *Horst*; the Court stated that “[t]he sole question for decision” was whether the gift of an interest payment constituted “the realization of income taxable to the donor.” *Id.* at 114. So *Horst* did not reject the realization requirement; it just held that a taxpayer can’t transfer the cash receipts to someone else and avoid taxation. *Id.* at 117.

Again, it is undisputed that the Moores have received no return on their investment in KisanKraft, and they have no power to direct a dividend payment or otherwise realize a gain. Thus, the Moores had no “control over” the company nor any “readily realizable economic value from it.” *James*, 366 U.S. at 219. Following precedent, we should have recognized that the Moores had not received “income” from KisanKraft under the Sixteenth Amendment. Instead, we embarked on a novel interpretation of the Amendment—one that seriously undermines the constitutional apportionment requirement.

We should have taken this case en banc to correct these errors.

III.

Our court dislodged settled constitutional limits on federal taxation by aggrandizing Congress’s power to levy unapportioned taxes on unrealized gains. This holding conflicts with the Sixteenth Amendment’s original meaning and misconstrues binding precedents. And the consequences of our decision extend far beyond the Mandatory Repatriation Tax. Divorcing income from realization opens the door to new federal taxes on all sorts of wealth and property without the constitutional requirement of apportionment. Indeed, without a realization requirement to cabin the scope of “incomes,” it is hard to see how the apportionment requirement has any remaining relevance. And only the people have the power to declare a constitutional provision a dead letter.

Because our expansive gloss on the Sixteenth Amendment thwarts its design and defies longstanding Supreme Court and Ninth Circuit caselaw, I respectfully dissent from the denial of rehearing en banc.

F. *Certiorari* Application

Part of the Moores’ Petition for *Certiorari* reads as follows:

STATEMENT

This case presents a question of exceptional importance concerning Congress’s taxing power. Confronted with a “novel” new tax, App.8, the Ninth Circuit held for the first time ever that “realization of income is not a constitutional requirement” for Congress to impose a tax exempt

from apportionment under the Sixteenth Amendment, App.12. On that basis, it concluded that “there is no constitutional prohibition against Congress attributing a corporation’s income pro-rata to its shareholders” and then taxing them on it, as happened here. App.13.

That decision shatters what had been an unbroken judicial consensus dating back to *Eisner v. Macomber*, 252 U.S. 189 (1920), that the Sixteenth Amendment’s exemption from apportionment is limited to taxes on *realized* gains. That limitation is plain on the face of the Amendment’s text, which contemplates that “income” will be “derived” from a “source,” and is the only interpretation consistent with the universal understanding of “income” at the time of the Amendment’s adoption. The decision below is not only wrong, but dangerous, opening the door “to new federal taxes on all sorts of wealth and property without the constitutional requirement of apportionment.” App.55 (Bumatay, J., dissenting from denial of rehearing en banc).

This case provides a clean and timely vehicle for the Court to “solidify...the long-established norm of federal income taxation that a realization event is required before there is taxable ‘income’ in the constitutional sense.” Christopher Cox & Hank Adler, *The Ninth Circuit Upholds a Wealth Tax*, Wall St. J., Jan. 25, 2023. The time to do so is *now*, to provide certainty to families and businesses arranging their financial futures and to head off a major constitutional clash when Congress accepts the Ninth Circuit’s invitation to enact an unapportioned tax on property or wealth. The petition should be granted.

A. Factual and Legal Background

1. In 2006, Charles and Kathleen Moore made an investment to help launch an overseas company formed to empower India’s underserved rural farmers. App.70–71. Charles’s friend and former coworker, Ravindra “Ravi” Kumar Agrawal, saw that farmers in India’s most impoverished regions lacked access to even the most basic tools available in American hardware stores. App.70. To improve their livelihoods, he founded an India-based corporation, KisanKraft Machine Tools Private Limited, to import, manufacture, and distribute affordable farming equipment. App.70–71. Moved by Ravi’s vision, the Moores put up \$40,000—for them, a significant sum—and received about 13 percent of KisanKraft’s common shares. App.71. Ravi retained approximately 80 percent ownership and moved to India to manage the business. App.72; CA9.ER.36.

KisanKraft’s rapid growth confirmed that Ravi had identified a genuine need. It was profitable almost from the start, and its revenues increased every year since its founding. CA9.ER.38. True to Ravi’s original business plan, KisanKraft reinvested all its earnings to grow the business, which has expanded to serve farmers across India. App.71, 73; CA9.ER.37–38. By 2017, it employed over 350 representatives in 14 regional offices serving 2,500 local dealers. App. CA9.ER.38.

The Moores received regular updates from Ravi on KisanKraft’s activities, as well as annual financial statements. App.72. Charles visited India several times and was impressed with the difference that KisanKraft was making in the lives of India’s rural poor. App.72. The Moores never received any distributions, dividends, or other payments from KisanKraft. App.73. And as minority shareholders without any role in KisanKraft’s management, they had no ability to force the company to issue a dividend. App.73. For the Moores, it was payment enough that they were able to support KisanKraft’s “noble purpose...to improve the lives of small and marginal farmers in India” and see the good that it was doing. App.71.

Then came the tax bill. In 2018, the Moores learned from Ravi that, under the recently enacted “Mandatory Repatriation Tax,” they owed income tax on KisanKraft’s reinvested earnings going back to 2006. App.74. Specifically, the MRT deemed a portion of KisanKraft’s earnings for each year proportional to the Moores’ ownership stake in 2017 to be the Moores’ 2017 income—even though they hadn’t received a penny from the company and likely wouldn’t for some time, if ever. App.74. Ultimately, the Moores had to declare an additional \$132,512 as taxable 2017 income and pay an additional \$14,729 in tax. App.74–75.

2. The MRT was enacted as part of the Tax Cuts and Jobs Act of 2017 (TCJA). App.6. It targets U.S. shareholders who own 10 percent or more (by value or voting power) of foreign corporations that are primarily owned or controlled by U.S. persons. 26 U.S.C. §965; see also *id.* §957 (defining subject corporations). Prior to the MRT, these shareholders were usually taxed when the foreign corporation distributed its earnings. App.6. The MRT, however, simply deems the corporations’ retained earnings going back to 1986 to be the 2017 income of their U.S. shareholders in proportion to their ownership stakes in 2017. 26 U.S.C. § 965(a). The shareholders are then taxed on that deemed “income”—which, by definition, has not been distributed to them—at a rate based on how the corporation held the retained earnings in 2017: 15.5 percent for earnings held in cash or cash equivalents and 8 percent otherwise. *Id.* § 965(a), (c); see also *id.* §951(a).2

The MRT taxes shareholders irrespective of whether they owned shares at the time the corporation made the earnings on which they’re being taxed and irrespective of whether they could force the corporation to make a distribution. All that matters is that a given shareholder owned the requisite number of shares in 2017. *Id.* §§965(a), 951(a).

The principal legislative purpose of this one-time tax was to partially fund the TCJA’s shifting of U.S. corporate taxation from a worldwide system toward a territorial one—that is, one where U.S. corporations are taxed only on their domestic-source income. To accomplish this shift, the statute prospectively relieved U.S. corporations from paying taxes on most distributions received from foreign corporations, including subsidiaries. 26 U.S.C. §245A. That change was limited to corporate taxpayers, *id.*; individual taxpayers like the Moores remain liable for income tax on distributions they receive, *id.* §61(a)(7).

The MRT’s questionable constitutional status did not pass unnoticed. While approving of its policy, a leading tax scholar observed that the MRT “abandoned the realization requirement” and “disregard[s] the *Macomber* precedent.” Henry Ordower, *Abandoning Realization and the Transition Tax: Toward a Comprehensive Tax Base*, 67 Buff. L. Rev. 1371, 1393, 1396 (2019). Others concluded that it “goes well beyond” other taxes in abandoning realization and “ventures well beyond the limits” recognized by precedent. Berg & Feingold, *supra*, at 1353, 1355. It is, one analysis concluded, “best characterized as a direct tax on wealth” and therefore, being unapportioned, constitutionally invalid. Sean P. McElroy, *The Mandatory Repatriation Tax Is Unconstitutional*, 36 Yale J. Reg. Bull. 69, 82 (2019).

B. Procedural History

* * *

REASONS FOR GRANTING THE PETITION

The Sixteenth Amendment carves out a significant but narrow exemption from Article I’s apportionment clauses for “taxes on incomes.” Following the Amendment’s text, this Court’s precedents have always understood that exemption to be limited to taxes on gains *realized* by the taxpayer. While precedent has approved income taxes on constructively realized income, no decision until the Ninth Circuit’s in this case dispensed with the need for realization altogether. In so doing, the decision below sweeps away the essential restraint on Congress’s taxing power, opening the door to unapportioned taxes on property (as in this case) and anything else Congress might deem to be “income.” This case accordingly presents a constitutional question of the first order, one that warrants the Court’s review.

I. The Ninth Circuit’s Holding on Realization Plainly Conflicts with This Court’s Precedents and Those of Other Appeals Courts

In holding that “realization of income is not a constitutional requirement” for Sixteenth Amendment “taxes on incomes,” the decision below breaks with over a century of this Court’s decisions, which have uniformly held the opposite. That holding also conflicts with decisions of the Fourth and First Circuits following the lead of this Court’s decisions in recognizing that Sixteenth Amendment “income” requires realization.

A. From the very beginning, this Court has made clear that the Sixteenth Amendment’s exemption from the apportionment requirement is limited to taxes on *realized* gains. Even before that issue was squarely presented in *Macomber*, the Court had consistently defined “income” for

purposes of pre-Amendment taxes as “the gain *derived* from capital, from labor, or from both combined.” *Stratton’s Indep., Ltd. v. Howbert*, 231 U.S. 399, 415 (1913) (emphasis added); see also *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 185 (1918) (same). *Macomber*, in turn, regarded that definition’s focus on derived gains as identifying “the characteristic and distinguishing attribute of income” under the Sixteenth Amendment: that a “gain,” “profit,” or other thing of value must be “*received or drawn* by the recipient (the taxpayer) for his *separate* use, benefit and disposal.” 252 U.S. at 207 (emphases in original). Only “*that* is income derived from property. Nothing else answers the description.” *Id.* (emphasis in original).

What led *Macomber* to confront the constitutional question of realization was the Government’s contention—just as in this case—that the Sixteenth Amendment permits it to tax, without apportionment, ordinary shareholders on a corporation’s retained earnings. *Id.* at 214. To account for accumulated earnings, the corporation in question had issued a stock dividend in proportion to shareholders’ existing interests, without altering their ownership stakes. *Id.* at 200. The Government insisted that the dividend was taxable as a shareholder’s income because it “measure[d] the extent to which the gains accumulated by the corporation have made him the richer.” *Id.* at 214. The Court flatly disagreed: the shareholder has realized no income because he “has no individual share in accumulated profits, nor in any particular part of the assets of the corporation.” *Id.* at 219. Only upon distribution “does the stockholder realize a profit or gain which becomes his separate property, and thus derive income from the capital that he or his predecessor has invested.” *Id.* at 209. Absent such a distribution, the taxpayer has not realized income, so that taxing him on the corporation’s retained earnings would be “taxation of property because of ownership, and hence would require apportionment.” *Id.* at 217.

Recognized as a “landmark precedent[] on realization,” *Cottage Sav. Ass’n v. Comm’r*, 499 U.S. 554, 561 (1991), *Macomber* has been consistently understood by this Court to stand for the proposition that realization is an essential component of Sixteenth Amendment income. *Weiss v. Stearn*, 265 U.S. 242, 254 (1924), applied *Macomber*’s realization holding to a corporate reorganization, holding that shareholders had received no income because none had realized “a thing really different from what he theretofore had.” *Taft v. Bowers*, 278 U.S. 470, 481–82 (1929), relied on it in holding that the recipient of a gift of stock could be taxed on its appreciation prior to the donation because, “when through sale or conversion the increase was separated therefrom, it became income.” Citing *Macomber*, *United States v. Safety Car Heating & Lighting Co.*, 297 U.S. 88, 99 (1936), held essentially the same as to an award of profits earned by a patent infringer prior to the Sixteenth Amendment’s ratification, reasoning that realization is when a gain “may be taxed, though it was in the making long before.” Similarly, *MacLaughlin v. Alliance Ins. Co. of Philadelphia*, 286 U.S. 244, 249 (1932), held that the Revenue Act of 1928 lawfully taxed appreciation prior to its enactment that was realized thereafter because it is “a gain from capital investment which, when realized, by conversion into money or other property...has consistently been regarded as income within the meaning of the Sixteenth Amendment and taxable as such in the period when realized.” And *Helvering v. Bruun*, 309 U.S. 461, 468–69 (1940), while retreating from language in *Macomber* suggesting that gain must be severable from capital when received by the taxpayer, restated and applied its central holding that Sixteenth Amendment “income” requires “realization of gain” through the “exchange of property, payment of the taxpayer’s indebtedness, relief from a liability, or other profit realized from the completion of a transaction.” *Id.* at 469.

Helvering v. Horst, which the court below took to undercut *Macomber*’s realization holding, App.15, actually reiterated “the rule that income is not taxable until realized,” 311 U.S. 112, 116 (1940). It applied that rule to a taxpayer who had directed that interest on bonds be paid to a family member. *Id.* at 114. And that, it held, was constructive realization: the “power to procure the payment of income to another is the enjoyment and hence the realization of the income by him who exercises it.” *Id.* at 118.

The Court’s final refinement of the standard for Sixteenth Amendment “income” occurred in *Commissioner v. Glenshaw Glass*, 348 U.S. 426 (1955), which held punitive damages awards to be taxable income. The decision observed that *Macomber*’s language defining income as “the gain derived from capital, from labor, or from both combined” was “useful” in “distinguishing gain from capital” but “not meant to provide a touchstone to all future gross income questions.” *Id.* at 430–31. But it again reiterated *Macomber*’s holding on realization, reasoning that punitive damages are taxable as income because they are “undeniable accessions to wealth, *clearly realized*, and over which *the taxpayers have*

complete dominion." *Id.* at 431 (emphases added). The Court subsequently applied that formulation in *James v. United States*, 366 U.S. 213, 219 (1961) (holding that embezzled funds are taxable income), *Comm'r v. Kowalski*, 434 U.S. 77, 83 (1977) (holding that meal-allowance payments are taxable income), and *Comm'r v. Indianapolis Power & Light Co.*, 493 U.S. 203, 209 (1990) (holding that refundable customer deposits held by a utility were not taxable income because the utility never obtained "complete dominion" over them).⁵

The common thread running through the Court's Sixteenth Amendment decisions is this: the Amendment's exemption from Article I's apportionment requirement is limited to taxes on gains realized by the taxpayer.

B. The Ninth Circuit's decision in this case flatly contravenes *Macomber's* central holding on realization and that decision's progeny. Its attempt to distinguish *Macomber* and *Glenshaw Glass* into oblivion does not withstand scrutiny.

According to the decision below, *Macomber* is limited to its facts, providing no "universal definition" of "income." App.15. But whatever the status of *Macomber's* gain-derived-from-capital-or-labor definition, its *holding* is that only a "gain" "received or drawn by the recipient (the taxpayer) for his *separate* use, benefit and disposal" is taxable as income. 252 U.S. at 207 (stating that this "fundamental conception is clearly set forth in the Sixteenth Amendment" and its reference to "incomes, from whatever source derived"). Contrary to the decision below, App.15, *Glenshaw Glass* did not repudiate that holding, but *repeated* it. 348 U.S. at 431 (requiring that gains be "clearly realized" by taxpayers and reduced to their "complete dominion").

The Ninth Circuit's treatment of *Glenshaw Glass* was outright defiance. Unable to distinguish its holding, the decision below deems it limited to its facts because this Court neglected to declare "that the definition it used was [] universal." App.15. Under that approach, practically any decision of this Court could be evaded in like manner. In any event, this attempt to wave away *Glenshaw Glass's* holding is inconsistent with this Court's application of the same standard in *James*, *Kowalski*, and *Indianapolis Power & Light*. *James*, in particular, turned on the question of realization. *Compare* 366 U.S. at 219 (reasoning that an embezzler obtains "actual command over the property taxed," rendering it income) (quotation marks omitted) *with id.* at 248–52 (Whittaker, J., dissenting) (disputing that). In its haste to bury *Glenshaw Glass*, the Ninth Circuit skipped past the fact that this Court and others have repeatedly applied its realization requirement.

The Ninth Circuit's claim that *Horst* or *Helvering v. Griffiths*, 318 U.S. 371 (1943), *sub silentio* narrowed or overruled *Macomber's* and *Glenshaw Glass's* holdings on realization is difficult to take seriously. See App.15. To begin with, both *Horst* and *Griffiths* predate *Glenshaw Glass*, with its insistence that income be "clearly realized," by more than a decade. As noted, *Horst* repeated and applied "the rule that income is not taxable until realized." 311 U.S. at 116. It holds that directing payment to a third party *is realization*, no different that securing payment to oneself before gifting the money. *Id.* at 117–18. Not a word in *Horst* casts doubt on the need for realization; to the contrary, its entire analysis focuses on whether the taxpayer realized the gain in question. As for *Griffiths*, it expressly *refused* the Government's request to overrule *Macomber*. 318 U.S. at 404.

The Court's decisions are clear that realization is required for a taxpayer to have "income" taxable as such, and the Court has never deviated from that principle. Just as clearly, the decision below repudiates a century's worth of this Court's precedents.

C. The decision below also creates a conflict in authority among the courts of appeals. The First and Fourth Circuits have held *Glenshaw Glass* to set the standard for Sixteenth Amendment income, including that it must be "clearly realized." *Quijano v. United States*, 93 F.3d 26, 30–31 (1st Cir. 1996), applied that standard to hold that a sale that resulted in a dollar gain only because of currency appreciation produced "realized income, fully taxable under the Constitution" without apportionment.

Simmons v. United States, 308 F.2d 160, 167–68 (4th Cir. 1962), likewise applied the *Glenshaw Glass* standard to hold that taxation of prize money "comes within the Sixteenth Amendment" because "receipt of [the prize] constitutes an economic gain over which [the taxpayer] has complete control and...complete legal right." The "crucial factor," *Simmons* understood, "is the status in the recipient's hands of the money

being taxed.” *Id.* at 167. That understanding, which *Quijano* also embraced, squarely conflicts with the holding of the decision below that realization is unnecessary for Sixteenth Amendment income.

II. The Ninth Circuit’s Holding Clashes with the Sixteenth Amendment’s Text and Eviscerates Article I’s Apportionment Requirement

Not only does the decision below break with governing precedent, but it is also indefensible as a matter of constitutional interpretation.

B. Begin with the text. The Sixteenth Amendment’s exemption from apportionment is limited to “taxes on incomes, from whatever source derived.” As Macomber astutely observed, that text plainly contemplates that “incomes” must be realized: a gain is not income unless and until it has been “derived” by the taxpayer from some “source.” 252 U.S. at 207–08.

That “income” refers to the receipt of an economic gain was well understood at the time of the Sixteenth Amendment’s drafting and ratification. “The word ‘income’...has a settled legal meaning” and was “uniformly construed” by “courts...to include only the receipt of actual cash as opposed to contemplated revenue due but unpaid.” *Maryland Cas. Co. v. United States*, 52 Ct. Cl. 201, 209 (Ct. Cl. 1917); *see, e.g., Gray v. Darlington*, 82 U.S. 63, 65–66 (1872) (holding that appreciation in the value of securities was not income because it was not “realized” and so was “merely...increase of capital”); *Connecticut Gen. Life Ins. Co. v. Eaton*, 218 F. 188, 205 (D. Conn. 1914) (applying *Stratton’s Independence’s* definition of “income” and holding that taxpayer received no income on items listed as assets “until the same were paid or realized”); *Mut. Ben. Life Ins. Co. v. Herold*, 198 F. 199, 214–15 (D.N.J. 1912) (“[I]ncome...means what has actually been received, and not that which, although due, has not been received, but its payment for some reason deferred or postponed.”). *United States v. Schillinger*, 27 F. Cas. 973, 973 (C.C.S.D.N.Y. 1876) (“[I]ncome must be taken to mean money, and not the expectation of receiving it, or the right to receive it, at a future time.”); *cf. Gibbons v. Mahon*, 136 U.S. 549, 558 (1890) (explaining that a corporation’s accumulated earnings are, to shareholders, “capital, and not income”).

Contemporaneous dictionary definitions are to the same effect. The 1913 edition of *Webster’s* defined “income” as “that gain which *proceeds* from labor, business, property, or capital of any kind.” *Webster’s Revised Unabridged Dictionary* (1913) (emphasis added); *see also Webster’s American Dictionary of the English Language* (1889) (“That gain which proceeds from labor, business, or property of any kind.”). Likewise, the *Century Dictionary and Cyclopedia* (1901) defined “income” as “[t]hat which comes in to a person as payment for labor or services rendered in some office, or as gain from lands, business, the investment of capital, etc.” (emphasis added). *See also* Robert Hunter & Charles Morris, *Universal Dictionary of the English Language* (1897) (“That gain which a person derives from his labor, business, profession, or property of any kind.”); Joseph Worcester, *Dictionary of the English Language* (1875) (“Gain derived from any business or property.”).

Contemporaneous legal authorities similarly understood “income” to turn on realization. The 1910 edition of *Black’s Law Dictionary* defined “income” to include “that which comes in or is received from any business or investment of capital.” *Black’s Law Dictionary* (2d ed. 1910) (emphases added). *Black’s* author, Henry Campbell Black, also published a treatise on income tax shortly after ratification of the Sixteenth Amendment to address the new law. Henry Campbell Black, *A Treatise on the Law of Income Taxation Under Federal and State Laws* (1913). The very first page begins, “An income tax is distinguished from other forms of taxation” in that it is “levied...upon the acquisitions of the taxpayer arising from” trade and business. *Id.* at 1. *Black’s* treatise goes on to define “income” as “that gain which proceeds from labor, business, or capital of any kind.” *Id.* at 73 (emphasis added). Realization, he explained, is essential: when, for example, the owner of an appreciated security “sells, then the sum gained may be constitute a part of his income, but it cannot be so described while he continues to hold the security.” *Id.* At 77.

Edwin Seligman, a leading proponent of the Sixteenth Amendment and federal income tax, likewise recognized the necessity of realization in his influential *The Income Tax* (1911). Income, he explained, “is that which comes in to an individual above all necessary expenses of acquisition, and which is available for his own consumption.” *Id.* at 19 (emphases added). And that same understanding prevailed after the Amendment and federal income tax took effect. *See* Robert H. Montgomery, *Income Tax Procedure* 198 (1917) (stating that the federal government has no “right to tax any transaction unless there is an actual realization of income”).

In its insistence that “income” requires realization, *Macomber* followed “the commonly understood meaning of the term which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution.” *Merchants’ Loan & Trust Co. v. Smietanka*, 255 U.S. 509, 519 (1921). The decision below contradicts that original understanding.

B. The decision below also does great violence to constitutional structure, virtually eviscerating Article I’s apportionment requirement. The Sixteenth Amendment arose in response to *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601, 637 (1895), which held “taxes...on the income of personal property” to be direct taxes requiring apportionment. In drafting what became the Sixteenth Amendment, Congress considered and rejected the broader approach of striking the direct-tax clauses altogether. See Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of “Incomes,”* 33 *Ariz. St. L.J.* 1057, 1116 (2001). The Amendment’s principal author explained, “my purpose is to confine it to income taxes alone.” *Id.* (quoting 44 Cong. Rec. 3377 (June 17, 1909)).

The consequence of that decision was to retain the plenary requirement that direct taxes be apportioned among the states, subject to an exception only for “taxes on incomes.” See *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 18–19 (1916). “Nothing in the Sixteenth Amendment relieved Congress of its duty to apportion other forms of direct taxation, such as a tax on property interests.” App.38 (Bumatay, J., dissenting); see also *Nat. Fedn. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 571 (2012) (recognizing that the Court has “continued to consider taxes on personal property to be direct taxes” requiring apportionment).

The decision below effectively repeals what the Sixteenth Amendment preserved. By decoupling “income” from realization, it empowers Congress to deem practically anything “income” and tax it as such, without apportionment. That includes, as in this case, personal property in the form of stock, but the decision’s holding is by no means limited to stock: if taxpayers like the Moores can be income-taxed on sums they’ve never actually or constructively realized, then nothing prevents Congress from arbitrarily attributing “income” to any taxpayer as a basis for taxation. “[W]ithout a realization requirement, it is hard to see what’s left of the constitutional apportionment requirement.” App.39–40 (Bumatay, J., dissenting).

III. The Question of Congress’s Power To Tax Unrealized “Income” Without Apportionment Is Exceptionally Important and Warrants Review

The importance of the question presented cannot be overstated. This case presents a fundamental constitutional question concerning Congress’s core power of taxation. That question is not only politically important, but practically important, as American families and businesses plan their financial futures. The decision below upsets the heretofore settled expectation that federal taxation of property and wealth was effectively impossible, due to the difficulty of apportionment. The Court’s review is required to resolve this question of vast legal and practical significance, and this case is the ideal vehicle for the Court to do so.

A. The question of Congress’s power under the Sixteenth Amendment to tax persons on “incomes” they have not realized in any form is exceptionally important. In the proceedings below, neither the Government nor the Ninth Circuit identified any precedent approving an income tax that operates in the absence of realization. The reason is that, following *Macomber*, Congress refrained from overstepping the line this Court drew. See *Helvering v. Nat’l Grocery Co.*, 304 U.S. 282, 288 n.4 (1938) (describing evolution of tax treatment of corporations’ retained earnings); *Griffiths*, 318 U.S. at 389–93 (describing Congress’s care in following *Macomber*); see generally Henry Ordower, *Revisiting Realization: Accretion Taxation, the Constitution, Macomber, and Mark to Market*, 13 *Va. Tax Rev.* 1, 9 (1993) (describing the “*Macomber* effect” that deterred Congress from “tax[ing] the unrealized appreciation in a taxpayer’s property”) It abandoned that restraint with the MRT, which the decision below recognizes to be a “novel concept” in taxation. App.8. It is, at a minimum, a marked departure from Congress’s historic exercise of its taxing power.

As such, the MRT calls into question long-accepted limitations on that power. For example, following *Macomber* Congress ceased its brief experiment in taxing shareholders on corporations’ retained earnings. *Nat’l Grocery Co.*, 304 U.S. at 288 n.4. The MRT, however, conflicts with the long-held understanding that Congress lacks the power to levy such taxes without apportionment. And the decision below spells out what

the MRT implies, holding that nothing prohibits Congress from “attributing a corporation’s income prorata to its shareholders” and then taxing them on it. App.13.

The consequences of that alone are earth-shattering. Millions of Americans hold stock in their retirement and investment accounts or through mutual funds. Taken at its word, the decision below authorizes Congress to tax every single one of them on the retained earnings of the corporations in which they’ve invested. The tax would be practically indistinguishable from one on the shares themselves, given that every major corporation has funded its growth, to a large extent, through reinvestment of profits. For example, the retained earnings carried on Exxon’s books actually exceed its total shareholder equity. Under the logic of the decision below, Exxon’s shareholders could be deemed to have “income” that exceeds the value of their shares and then taxed on it.

More broadly, repudiating the requirement that taxable income be realized calls into question the longstanding consensus that Congress lacks the power to tax property without apportionment. This Court held as much in *Pollock*, 158 U.S. at 637 (“taxes on personal property...are [] direct taxes” requiring apportionment). But the MRT’s logic, as reflected in the decision below, suggests that *Pollock* turned only on Congress’s failure of imagination in taxing property in so many words; if, instead, it taxes property-owners on deemed “income,” then the apportionment requirement goes out the window. So while Congress cannot lay an unapportioned tax on farmland, it could very well tax farmers on the imputed rental value of their land, deeming that to be their “income.” Or “Congress could simply deem taxpayers to have sold all their assets” and tax them “on the income deemed to result.” Berg & Feingold, *supra*, at 1354 (discussing import of MRT); see also Ordower (2019), *supra*, at 1409 (arguing that the MRT provides a model for a one-time tax on *all* property). Without the need for income to be realized, there is no limit.

This is no idle threat. The President has proposed a tax on appreciation in property, which the White House candidly describes as “unrealized income.” Press Release, The White House, President’s Budget Rewards Work, Not Wealth with new Billionaire Minimum Income Tax (Mar. 28, 2022). In the last Congress, legislation to establish a wealth tax was introduced in both the House and the Senate. Ultra-Millionaire Tax Act of 2021, H.R. 1459, 117th Cong. §2901(a) (2021) (“In the case of any applicable taxpayer, a tax is hereby imposed on the net value of all taxable assets of the taxpayer on the last day of any calendar year.”); S. 510 (same). Meanwhile, the Chairman of the Senate Finance Committee introduced a proposal to tax gains on stockholdings and other “tradeable assets” annually. Press Release, Wyden Unveils Billionaires Income Tax (Oct. 27, 2021). There is every reason for the Court to resolve the pivotal constitutional question of realization *now*, when its judgment can inform lawmakers and stands to head off a major constitutional clash down the line.

Finally, the interests of federalism also weigh in favor of review. To uphold the MRT, the Ninth Circuit had to unravel one of the central “compromises which made the adoption of the constitution possible” and continues to secure our “dual form of government.” *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, 583 (1895). The whole point of the apportionment requirement was “to prevent an attack upon accumulated property by mere force of numbers.” *Id.* Apportionment deters Congress from working “partiality or oppression” against localities through property taxes that have localized consequences unknown to remote Members of Congress. Federalist No. 36 (Hamilton); see also 2 Records of the Federal Convention of 1787, p. 307 (M. Farrand ed. 1911) (“Seize and sell their effects and you push them into Revolts.” (Gouverneur Morris)). Apportionment is not, as the court below viewed it, an archaism or mere formality to be circumvented through clever draftsmanship.

B. This case is an ideal vehicle for the Court to address the question presented. This case presents only that question, and it presents it squarely and cleanly. Whereas most other tax cases present a host of statutory and factual disputes, this case does not. It is undisputed that the Moores are subject to the MRT, and it is undisputed that the MRT taxes the Moores on sums they did not realize in any fashion. In particular, there is no question of constructive realization. The sole question is the constitutional one: whether an unapportioned income tax may be levied in the absence of any realized gain by the taxpayer. That question was pressed at every stage below, fully briefed by the parties, and decided by the court of appeals. Given the typical complexity of tax disputes, the Court is unlikely to ever see a cleaner or more straightforward vehicle to address this fundamental question.

The response to the United States Supreme Court petition by the Government is more professional and an improvement. It includes the following:

b. Petitioners contend (Pet. 10) that the MRT is unconstitutional because, in their view, the Sixteenth Amendment applies exclusively “to taxes on *realized* gains.” Yet even if that premise were correct, the MRT would be permissible because it applies to the post-1986 gains that *corporations* have realized. See 26 U.S.C. 965(a). Here, for instance, “there is no dispute that KisanKraft actually” realized gains. Pet. App. 13. Petitioners thus appear to take issue only with Congress’s choice to tax *shareholders* on a corporation’s realized gains, rather than taxing the corporation itself on those gains. But petitioners have identified no “constitutional ban on Congress disregarding the corporate form to facilitate taxation of shareholders’ income,” *ibid.*—as Congress has long done in Subpart F and similar contexts involving partnerships and S corporations, see pp. 10-11, *supra*.

In any event, the Sixteenth Amendment does not restrict Congress to taxing only realized gains. By its terms, the Sixteenth Amendment applies to “taxes on incomes, from whatever source derived.” U.S. Const. Amend. XVI. It says nothing about being limited to realized gains. And petitioners identify no reason to think that the Framers of the Sixteenth Amendment intended any such limit to be implicit—which would be a particularly unusual approach, since the Constitution elsewhere makes explicit its limits on Congress’s taxing powers. See U.S. Const. Art. I, §9, Cl. 5 (“No tax or duty shall be laid on Articles exported from any State.”); U.S. Const. Art. I, §8, Cl. 1 (requiring all “Duties, Imposts and Excises” to be “uniform throughout the United States”).

Petitioners base their implicit limitation of income to realized gains primarily on this Court’s decision in *Eisner v. Macomber*, 252 U.S. 189 (1920), which considered whether a “stock dividend” qualified as income under the Sixteenth Amendment. *Id.* at 210. There, Standard Oil shareholders had received an additional 50% of their current number of shares (e.g., a shareholder with 2200 shares received an additional 1100 shares). See *id.* at 200-201. As the Court explained, such a “stock dividend” is simply a “book adjustment” that “does not alter the pre-[e]xisting 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. And the Court held that “the essential nature of a stock dividend necessarily prevents its being regarded as income in any true sense” for purposes of the Sixteenth Amendment. *Id.* at 205.

Although the Court recognized that it could have “rest[ed] the * * * case there,” *Macomber*, 252 U.S. at 205, it went on to observe that “income” is best understood as “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. Justice Holmes dissented, concluding that because “the word ‘incomes’ in the Sixteenth Amendment should be read in ‘a sense most obvious to the common understanding at the time of its adoption,’” it “justifies the tax” at issue. *Id.* at 219-220 (citation omitted); see also *id.* at 230-232 (Brandeis, J., dissenting) (similar).

Petitioners’ reliance on *Macomber* is misplaced because later decisions have severely limited its relevance as a constitutional precedent. In *Helvering v. Bruun*, 309 U.S. 461 (1940), for instance, this Court made clear that the “expressions” in *Macomber* that petitioners here emphasize were simply “used to clarify the distinction between an ordinary dividend and a stock dividend” and “to show that in the case of a stock dividend, the stockholder’s interest in the corporate assets after receipt of the dividend was the same as and inseverable from that which he owned before the dividend was declared.” *Id.* at 468-469; see *id.* at 468 n.8. The Court therefore deemed *Macomber* “not controlling” outside of the stock-dividend context. *Id.* at 469. And it held that a “business transaction” that “added an ascertainable amount to [the] value” of the taxpayer’s land produced a “taxable gain” even though the taxpayer could not “sever the improvement begetting the gain from his original capital.” *Ibid.*

Other decisions also recognized that *Macomber*’s relevance as a Sixteenth Amendment precedent is limited to the stock-dividend context. In *Helvering v. Horst*, 311 U.S. 112 (1940), the Court held that a taxpayer’s “economic gain” cannot “escape taxation” simply “because he has not

himself received payment of it from his obligor." *Id.* at 116. And in *Helvering v. Griffiths*, 318 U.S. 371 (1943), the Court stated that both *Bruun* and *Horst* "undermined * * * the original theoretical bases of the decision in *Eisner v. Macomber*." *Id.* at 394; see also *id.* at 404 (Douglas, J., dissenting) ("*Eisner v. Macomber* dies a slow death.").

Contrary to petitioners' submission (Pet. 13), the Court's decision in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955), also demonstrates *Macomber's* limited scope. There, the Court observed that *Macomber's* understanding of income "served a useful purpose" "[i]n th[e] context" of "a corporate stock dividend." *Id.* at 430-431. "But," the Court recognized, that understanding "was not meant to provide a touchstone to all future gross income questions." *Id.* at 431. Petitioners emphasize (Pet. 13) the Court's statement that a punitive damages award constituted income because it involved an "undeniable accession[] to wealth, clearly realized, and over which the taxpayers have complete dominion." *Glenshaw Glass*, 348 U.S. at 431. But that statement simply listed elements that were sufficient to create income on the facts of that case—not necessary elements of income in every case. Pet. App. 15. Indeed, elsewhere in *Glenshaw Glass*, the Court emphasized the "sweeping" and "broad" definition of income, which includes "all gains except those specifically exempted." *Glenshaw Glass*, 348 U.S. at 429-430.

To be sure, *Macomber* remains relevant when interpreting the statutory "concept of realization." *Cottage Sav. Ass'n v. Commissioner*, 499 U.S. 554, 559 (1991); see *id.* at 563 (relying on *Macomber*); Pet. 11. But that concept—which does not apply when Congress does not incorporate it—does not derive from the Code's definition of "gross income." Instead, it is rooted in separate Code provisions, such as one defining "[t]he 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 in original). In those provisions, Congress has invoked the concept of realization for "'administrative convenience,'" because an "appreciation-based system of taxation" could require "'cumbersome'" annual assessments of whether "assets had appreciated or depreciated in value." *Ibid.* (quoting *Horst*, 311 U.S. at 116). Accordingly, the statutory concept of realization "only informs *when* income generally should be reported," without "defin[ing] what income is." Noel B. Cunningham & Deborah H. Schenk, *Taxation Without Realization: A "Revolutionary" Approach to Ownership*, 47 Tax L. Rev. 725, 741 (1992). And Congress's decision to invoke realization for statutory purposes in some contexts does not suggest that realization is a constitutional mandate.

Thus, tax scholars have long agreed that "the formalistic doctrine of realization proclaimed by [*Macomber*] is not a constitutional mandate." Stanley S. Surrey, *The Supreme Court and the Federal Income Tax: Some Implications of the Recent Decisions*, 35 Ill. L. Rev. 779, 791 (1941). And other courts have, like the court of appeals below, recognized that *Macomber* retains limited relevance beyond the stock-dividend context. See, e.g., *Commissioner v. Obeir-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); *The Florida Bar v. Behm*, 41 So. 3d 136, 145 n.8 (Fla. 2010) (per curiam) ("[*Macomber*] applies only to stock dividends.").

G. Conclusion

On June 26, 2023, the United States Supreme Court granted *certiorari* in the *Moore* case discussed above. Articles have already been written discussing the case and its estate planning significance. One of those articles is Sheppard, Tax Notes Federal, June 26, 2023, at 2113.

We will keep our readers informed concerning developments. A possibility exists which would permit the Supreme Court to dodge the constitutional issue.

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