No. 20-36122

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES G. MOORE; KATHLEEN F. MOORE,

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA,

Defendant-Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

APPELLEE'S RESPONSE TO APPELLANT'S PETITION FOR PANEL AND EN BANC REHEARING

DAVID A. HUBBERT
Deputy Assistant Attorney General

FRANCESCA UGOLINI **(202) 514-3361**
MICHAEL J. HAUNGS **(202) 514-4343**
NATHANIEL S. POLLOCK **(202) 514-8139**
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

Of Counsel:
NICHOLAS W. BROWN
United States Attorney

TABLE OF CONTENTS

Page

Table of contents ... i
Table of authorities ... ii
Glossary ... iv
Introduction ... 1
Statement ... 2
Argument:

Rehearing en banc is not warranted because the panel decision correctly interprets and applies Supreme Court precedent and the precedent of this Court ... 6

A. The panel correctly rejected the Apportionment Clause challenge to the MRT ... 7

1. *Macomber* is not controlling ... 7

2. *Glenshaw Glass* is not controlling ... 11

3. The panel correctly interpreted the other decisions it relied on ... 13

4. The panel made no sweeping pronouncements about Congress's authority to tax property ... 15

5. The panel correctly determined that the MRT can be understood as a law that disregards the corporate form, which the Constitution does not preclude ... 16

B. The panel correctly rejected the Due Process challenge to the MRT ... 18

Conclusion ... 23
Certificate of compliance ... 24

TABLE OF AUTHORITIES

Cases: **Page(s)**

Commissioner v. Fender Sales, Inc.,
338 F.2d 924 (9th Cir. 1964) 10-11

Commissioner v. Glenshaw Glass Co.,
348 U.S. 426 (1955) 6, 11-13

Cottage Savings Ass'n v. Commissioner,
499 U.S. 554 (1991) 13-14

Dougherty v. Commissioner,
60 T.C. 917 (1973) 15

Eisner v. Macomber,
252 U.S. 189 (1920) 2, 6-11, 15-16

Helvering v. Bruun,
309 U.S. 461 (1940) 14

Helvering v. Griffiths,
318 U.S. 371 (1943) 14-15

Helvering v. Horst,
311 U.S. 112 (1940) 14

Moore v. United States,
No. C19-1539-JCC, 2020 WL 6799022
(W.D. Wash. Nov. 19, 2020) 4

Murphy v. United States,
992 F.2d 929 (9th Cir. 1993) 11

N.C. Dep't. of Revenue v. The Kimberley Rice Kaestner 1992 Fam. Tr.,
139 S. Ct. 2213 (2019) 20

Picazo v. Alameida,
366 F.3d 971 (9th Cir. 2004) 21

Pollock v. Farmers' Loan & Tr. Co.,
158 U.S. 601 (1895) 17

Prescott v. Commissioner,
561 F.2d 1287 (8th Cir. 1977) 7

Quarty v. United States,
170 F.3d 961 (9th Cir. 1999) 19-20

Quijano v. United States,
93 F.3d 26 (1st Cir. 1996) 13

Cases (cont'd): **Page(s)**

Simmons v. United States,
308 F.2d 160 (4th Cir. 1962) 13
Towne v. Eisner,
245 U.S. 418 (1918) 8-9
United States v. Carlton,
512 U.S. 26 (1994) 20
United States v. James,
333 F.2d 748 (9th Cir. 1964) (en banc) 7, 10-13
Whitlock's Estate v. Commissioner,
59 T.C. 490 (1972) 17

Statutes:

Internal Revenue Code (26 U.S.C.):

§ 245A 3, 18-19, 21-22
§ 951A 3, 22
§ 951A(c) 3
§ 959(a) 3-4
§ 965 .... 3, 21

Miscellaneous:

18 C.J.S. Corporations § 14 17

Federal Rules of Appellate Procedure:

Rule 35(a) 18

Kuntz & Peroni § A1.03 16

GLOSSARY

Acronym	Definition
CFC	Controlled foreign corporation
I.R.C.	Internal Revenue Code
IRS	Internal Revenue Service
MRT	Mandatory Repatriation Tax
TCJA	Tax Cuts and Jobs Act of 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-36122

CHARLES G. MOORE; KATHLEEN F. MOORE,

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA,

Defendant-Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

APPELLEE'S RESPONSE TO APPELLANTS' PETITION FOR PANEL AND EN BANC REHEARING

INTRODUCTION

The panel correctly upheld the Mandatory Repatriation Tax (MRT). As the Tax Cuts and Jobs Act of 2017 (TCJA) generally ended tax deferral opportunities for U.S. shareholders of U.S. controlled foreign corporations (CFCs), the MRT was its means of taxing earnings already accumulated overseas but not yet taxed. The Moores mainly

contend that the panel's resolution of their Apportionment Clause challenge to the MRT was unprecedented. It was not. What would be unprecedented would be a first-in-a-century ruling that a tax Congress enacted is unconstitutional because it was not apportioned by state population (a practical impossibility). Following circuit precedent, the panel correctly rejected the claim that *Eisner v. Macomber*, 252 U.S. 189 (1920), prevents Congress from taxing gains until they have been realized for the taxpayer's separate use and benefit. The panel also relied on the fact that nothing in the Constitution prevents Congress from disregarding the corporate form and taxing shareholders on their corporation's earnings.

On the Due Process Clause issue, the Moores contend that the panel misapplied the law because it misunderstood the situation at hand. It did not. The panel correctly determined that – assuming the MRT applied retroactively – such application served a legitimate purpose by a rational means.

STATEMENT

The TCJA changed the tax-law incentives that led to a large amount of corporate earnings being kept offshore. Op. 5. The TCJA

expanded subpart F (described at Op. 5-6) by adding a provision that taxes U.S. shareholders on "global intangible low-taxed income" or "GILTI," which includes most of a CFC's current earnings (excluding, for example, a deemed return on tangible assets) that were not already taxable to the shareholder as "subpart F income" under other subpart F provisions. *See* I.R.C. § 951A(c). After the taxes are paid on CFC earnings – whether they are paid on GILTI under Section 951A or on other subpart F income – those earnings are not taxed again. *See* I.R.C. § 959(a). Further, for the relatively small portion of CFC earnings not taxed under Section 951A or other subpart F provisions, the TCJA gave domestic corporate U.S. shareholders (owners of at least 10% of the stock) of CFCs a 100% deduction for the foreign-source portion of dividends they receive. I.R.C. § 245A.

To transition to the new system that the TCJA helped usher in without effectively forgiving the tax deferred under the old system on accumulated CFC earnings held overseas, the TCJA included a mandatory repatriation tax (MRT). I.R.C. § 965. The MRT was a one-time tax, at reduced rates, on U.S. shareholders' pro-rata shares of CFCs' post-1986 accumulated earnings and profits (with certain

exclusions). Op. 6. Like CFC earnings taxed as GILTI or other subpart F income, earnings taxed under the MRT are not taxed again when distributed. *See* I.R.C. § 959(a). Without tax-avoidance reasons for holding accumulated earnings overseas, U.S. multinational enterprises "repatriated $777 billion in 2018" out of an estimated $1 trillion in offshore cash holdings.[1]

This lawsuit seeks to invalidate the MRT. The Moores sued for a refund of the roughly $15,000 MRT they owed because they are 11% shareholders of a CFC with accumulated overseas earnings. Op. 7. They argue that the MRT violates the Apportionment and Due Process Clauses. The district court rejected these arguments (*Moore v. United States*, No. C19-1539-JCC, 2020 WL 6799022 (W.D. Wash. Nov. 19, 2020)), as did a panel of this court.

The panel explained that the Apportionment Clause "traditionally applied to only capitations and land taxes" and, because of the Sixteenth Amendment, does not apply to "incomes, from whatever source derived." Op. 9-10. Noting this Court's instruction that the concept of income is flexible, the panel explained that "courts have held

---

[1] *See* https://perma.cc/XYP3-E3LK].

consistently that taxes similar to the MRT are constitutional." Op. 10-11 (citing cases). The panel determined that taxes on amounts not distributed to the taxpayer and thus not realized for the taxpayer's separate use and benefit have been upheld as valid income taxes. Op. 10-13. The panel rejected the Moores' contention that Supreme Court authority establishes that income must "be realized before it can be taxed." Op. 13-15. It also explained, alternatively, that "there is no blanket constitutional ban on Congress disregarding the corporate form to facilitate taxation of shareholders' income." Op. 12.

The panel likewise rejected the Moores' Due Process Clause challenge. It first assumed "without deciding, that the MRT is retroactive." Op. 15. Noting that "retroactive tax legislation is often constitutional," the panel explained that the due process question is determined under "the 'deferential' standard of 'whether [the] retroactive application itself serves a legitimate purpose by rational means.'" Op. 15 (citation omitted). The panel determined that Congress enacted the MRT for the legitimate purpose of transitioning to a more territorial tax system without eliminating the taxes on CFCs' pre-2018 earnings. Op. 16. It concluded that having a single

repatriation date and using a 30-year period that coincided with other IRS reporting requirements achieved the legitimate legislative purpose by a rational means. Op. 16.

ARGUMENT

Rehearing en banc is not warranted because the panel decision correctly interprets and applies Supreme Court precedent and the precedent of this Court

The Moores double down on the two main arguments the panel rightly rejected: (1) that *Eisner v. Macomber*, 252 U.S. 189 (1920), established an inflexible constitutional bar to taxing income before it is realized for the taxpayer's separate use and benefit, and (2) that two words in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955), enshrined the alleged *Macomber* realization requirement. The Moores' criticism of the panel's treatment of other authorities is also not well founded. They fail to engage with alternative ground for the panel's ruling on the Apportionment Clause issue – that the MRT constitutionally disregards the corporate form. Finally, contrary to the Moores' apparent allegation, nothing suggests that the panel was confused when it (correctly) determined that any retroactive application of the MRT would – if it existed – be rationally based.

A. The panel correctly rejected the Apportionment Clause challenge to the MRT

1. *Macomber* is not controlling

The Moores insist that *Macomber* is controlling. It is not. The Moores ignore that (along with the Supreme Court and other courts of appeals[2]) this Court has already (1) cabined *Macomber*'s holding to a proposition that has no application here and (2) rejected *Macomber*'s broad statements about the constitutional meaning of income. In *United States v. James*, 333 F.2d 748 (9th Cir. 1964) (en banc), this Court explained that *Macomber* "is still good authority for the question it decided." *Id.* at 752. *James* narrowly defined *Macomber*'s precedential holding on that question to be: "that a stock dividend is not income to the shareholder, at least if the stock is of the same class and in the same corporation as that previously held by the taxpayer." *Id.* Thus, this Court considers *Macomber* good law *only* as to that narrow holding. And because this case does not concern taxation of a stock dividend, that narrow holding is inapplicable.

---

[2] *See, e.g.*, *Prescott v. Commissioner*, 561 F.2d 1287, 1293 (8th Cir. 1977) ("[T]he Supreme Court has found it necessary to abandon the attempt at an all-inclusive definition of income which it had undertaken in [*Macomber*].").

Macomber's determination that a stock dividend is not income did *not* depend on the conclusion that the Constitution requires gains to be realized (*i.e.*, to be available for the taxpayer's separate use, benefit, and disposal, *see* 252 U.S. at 207) before they can be taxed. The Supreme Court said as much in *Macomber* itself. The stock dividend in *Macomber* was like a modern-day stock split: because of the 50% stock dividend, Ms. Macomber "being the owner of 2,200 shares of the old stock, received certificates for 1,100 additional shares." 252 U.S. at 200-01. The Court explained that it would affirm the district court's ruling that Ms. Macomber could not be taxed on the stock dividend "[f]irst, because the question at issue is controlled by Towne v. Eisner," which, as the Court described, also addressed whether a stock dividend may be taxed. *Id.* at 201 (discussing *Towne v. Eisner*, 245 U.S. 418 (1918)).

Macomber explained that, in *Towne*, the Court's ruling turned on "the essential nature of a stock dividend." *Macomber*, 252 U.S. at 202. Then, quoting *Towne*, the Court explained that "[a] stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders" and thus, after a stock

dividend, "the corporation is no poorer and the stockholder is no richer than they were before." *Macomber*, 252 U.S. at 202-03 (quoting *Towne*, 245 U.S. at 426). Though *Towne* was interpreting a statute, its conclusion about income was general: trading one stock certificate worth $1000 for ten worth $100 is not income in any sense. *See Towne*, 245 U.S. at 426-27 (using that example). Thus, the *Macomber* Court was rightly "unable to see" why a stock dividend was also not income for Sixteenth Amendment purposes. 252 U.S. at 203. The Court conceded that it "might rest the present case" on adherence to *Towne* because *Towne*'s conclusion "as to the essential nature of a stock dividend necessarily prevents its being regarded as income in any true sense." *Macomber*, 252 U.S. at 205.

The rest of *Macomber* is dicta. After recognizing that *Towne*'s determination about the nature of a stock dividend disposed of the case, the Court went on to discuss other matters. Namely, it discussed "at length" the constitutional meaning of income. That discussion was extraneous to *Macomber*'s narrow holding that *Towne*'s observation about the nature of a stock dividend controlled the outcome.

This Court emphasized that narrow basis for *Macomber* not only in *James* (see above) but also in *Commissioner v. Fender Sales, Inc.*, 338 F.2d 924 (9th Cir. 1964). In *Fender*, this Court again stressed that *Macomber* is good law only as to its narrow holding based on the nature of a stock dividend. This Court described *Macomber* as standing for the proposition that "a stock dividend is just a piece of paper and, when issued proportionately to all stockholders, represents nothing of value and does not result in the realization of taxable income." 338 F.2d at 927. This Court distinguished *Macomber* because the value of the new stock issued to the two shareholders in *Fender* corresponded to the discharge of debts the company owed those shareholders for unpaid salaries. *Id.* That is, the stock issued in *Fender* added value to the shareholders' stock investment (the increased net worth of the company due to the discharge of the debt), while the stock issued in *Macomber* did not. This difference is what led this Court in *Fender* to determine that the taxpayers had taxable income even though the transaction merely "augment[ed] the intrinsic worth" of their ownership interest. *Id.* at 929; *see also id.* at 930 (Barnes, J., concurring in part and dissenting in part) (criticizing the majority opinion for recognizing "a

realization of income by shareholders upon an increase in corporate net worth"); Op. 14-15 (noting that *Fender* did not adopt the Moores' realization-focused definition of income).

Using realization in the *Macomber* sense of availability for one's separate use and benefit, the Moores contend (Pet. 10-11) that *James* and *Fender* "recognized that Sixteenth Amendment income requires realization." In fact, those cases establish that *Macomber* is good law only for its narrow holding that a proportional stock dividend is not income because the new shares do not change the value of the investment. *James* and *Fender* thus avoided endorsing any broad realization rule. Nor did *Murphy v. United States*, 992 F.2d 929 (9th Cir. 1993), endorse a constitutional realization requirement. (*See* Pet. 11.) In *Murphy*, this Court declined to address whether the Constitution bars taxation prior to realization. *Id.* at 932. But the clue it gave about the answer to that question was to cite *James* for the proposition that the "concept of income is flexible." *Id.*

2. *Glenshaw Glass* is not controlling

The Moores' renewed effort to rest their Apportionment Clause challenge on two words in *Glenshaw Glass* also fails. They contend

(Pet. 10) that the words "clearly realized" (penned in a case in which realization was not at issue) set the constitutional standard for income. That is wrong. The panel decision correctly explains that the phrase immediately preceding the so-called definition of income in *Glenshaw Glass* – "[h]ere we have instances of" – signaled that the Supreme Court "was focused on the specific facts before it." Op. 13.

And, despite the Moores' unsupported contrary assertion (Pet. 10-11), this Court's decision in *James* determined that the so-called *Glenshaw Glass* definition does *not* establish the constitutional meaning of income. *James* quoted the *Glenshaw Glass* language the Moores rely on, but it then refuted any idea that that phrase captured the inherently flexible concept of income. It explained: (1) "The Supreme Court has recognized the futility of attempting to capture the concept of income and confine it within a phrase"; (2) "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"; and (3) "[T]he concept of income is a flexible one, with the result in a particular case being determined by the interplay of common usage, accounting

concepts, administrative goals, and finally judicial reaction to these forces." *James*, 333 F.2d at 753 (citations omitted).

The Moores contend (Pet. 11) that other courts have interpreted *Glenshaw Glass* to set out a constitutional realization requirement. But the cases they cite – *Simmons v. United States*, 308 F.2d 160 (4th Cir. 1962), and *Quijano v. United States*, 93 F.3d 26 (1st Cir. 1996) – do not help them. *Simmons* addressed taxation of fishing derby prize money. As in *Glenshaw Glass* (which addressed taxation of punitive damages), there was no question that the taxpayer realized the gain. *Simmons*, 308 F.2d at 167-68. And *Simmons* did not suggest, even in dicta, that realization is always required. *Id.* *Quijano* is merely an example of a case that seems to presume, without analysis, that the oft-quoted *Glenshaw Glass* description of the amount there at issue established a constitutional definition of income. This Court rejected that notion in *James*. 338 F.2d at 753.

3. The panel correctly interpreted the other decisions it relied on

The Moores' criticism (Pet. 11-12) of the panel's analysis of other Supreme Court authority also falls flat. To start, the Moores ignore *Cottage Savings Ass'n v. Commissioner*, 499 U.S. 554 (1991), and its

statement that "the concept of realization is 'founded on administrative convenience.'" *Id.* at 559 (quoting *Helvering v. Horst*, 311 U.S. 112, 116 (1940)). *Cottage Savings* relied on the administrative convenience foundation of the general realization requirement to reach its holding: it rejected the government's interpretation of the tax at issue because it "ill serve[d] the goal of administrative convenience that underlies the realization requirement." 499 U.S. at 565. *Cottage Savings* thus establishes that the realization requirement is born of administrative convenience and not constitutional necessity.

Additionally, the Moores' discussion (Pet. 11-12) of what counted as realization in *Helvering v. Horst* is beside the point. The point is that the Supreme Court founded the realization requirement not on the Constitution but on "administrative convenience." *Horst*, 311 U.S. at 116. And, despite the Moores' unsupported contrary assertion (Pet. 11), the Court's statement in *Helvering v. Griffiths*, 318 U.S. 371, 394 (1943), that later decisions, including *Horst*, "undermined further [*Macomber*'s] original theoretical bases" *did* concern the realization issue. Besides *Horst*, *Griffiths* cited *Helvering v. Bruun*, 309 U.S. 461 (1940), which it described as "reject[ing] the concept that taxable gain

could arise only when the taxpayer was able to sever increment from his original capital." *Griffiths*, 318 U.S. at 393.

The Moores misleadingly attempt to distinguish the subpart F cases as involving theories of "constructive realization." (Pet. 12.) Those cases typically recognized that the amounts being taxed were not realized in the *Macomber* sense of being available for the taxpayer's separate use and benefit. *See, e.g.*, *Dougherty v. Commissioner*, 60 T.C. 917, 930 (1973) (recognizing that a foreign company's investment in U.S. property – the trigger for U.S. taxation – does not actually separate and distribute anything to that company's U.S. shareholders).

4. The panel made no sweeping pronouncements about Congress's authority to tax property

The Moores assert (Pet. 1) that the panel opinion gives Congress a green light "to tax Americans on their stock holdings" and on "other property." This is false. The MRT did not tax U.S. shareholders of CFCs on the value of their stock. It taxed them on their pro-rata share of the CFC's accumulated earning and profits. In other words, it taxed the shareholders on pro-rata portion of the *income* of a company they own, not on the value of their ownership interest. Whether Congress may tax increases in the value of property a taxpayer owns was not at

issue here. The panel decision did not address the constitutionality of such a tax, and neither should the en banc Court.

5. The panel correctly determined that the MRT can be understood as a law that disregards the corporate form, which the Constitution does not preclude

Even if it were debatable whether the constitutional meaning of income requires realization in the *Macomber* sense, the correctness of the panel decision would not be in doubt. The panel decision accurately explains that nothing in the Constitution requires that Congress invariably respect the corporate form when it determines "the incidence of Federal income taxation." Op. 12 (citation omitted). The MRT can be understood either as a tax on the deemed repatriation to U.S. shareholders of CFC earnings *or* as a tax on CFC earning themselves. Considered as a tax on CFC earnings themselves, the MRT is simply an instance in which Congress has bypassed "the corporate entity" and taxed the shareholders directly on their share of the corporation's income. Op. 12. Consistent with this understanding, the pre-TCJA system of CFC taxation, in which the earnings were not currently taxed to U.S. shareholders, was regularly referred to as a "deferral" regime. *See, e.g.*, Kuntz & Peroni § A1.03.

In *Whitlock's Estate v. Commissioner*, 59 T.C. 490, 507 (1972), the Tax Court rejected the argument that subpart F "violates the basic concept that a corporation is an entity separate and distinct from its stockholders." The court explained that "the history of U.S. income taxation shows that Congress has for decades been drafting income tax statutes which have bypassed the corporate entity." *Id.* Congress generally treats corporations as separate taxable entities when it imposes taxes. But it is farfetched to posit that a requirement of inviolable respect for the modern understanding of a corporation's separateness from its shareholders is etched into the Constitution. Indeed, state laws allow for piercing the corporate veil in a variety of circumstances. *See generally* 18 C.J.S. Corporations § 14.

When the MRT is understood as a statute that bypasses the corporate form, the realization issue does not come into play. The Sixteenth Amendment was thought necessary to make clear – after *Pollock v. Farmers' Loan & Tr. Co.*, 158 U.S. 601 (1895) – that Congress has the power to tax income *from property*. There was never any doubt that Congress can tax, without apportionment, gains from business. *See Pollock*, 158 U.S. at 635. So the panel's observation (Op. 12) that

Congress was free to bypass the corporate form and tax the Moores on their pro-rata share of CFC income resolves the apportionment issue in the government's favor independent of the realization dispute.

B. The panel correctly rejected the Due Process challenge to the MRT

The panel decision correctly determined that the MRT does not violate the Due Process Clause. The Moores argue that the panel misapplied the correct legal standard. That argument fails.

The Moores' contend that the panel wrongly believed that individual as well as corporate U.S. shareholders of CFCs could repatriate CFC earnings tax free after the TCJA.[3] But there is no reason to think that the panel was confused about this point. As the Moores concede (Pet. 16), the government's brief made clear that the dividends-received deduction (I.R.C. § 245A) applies only to domestic corporate shareholders. (*See, e.g.*, Gov't Br. 9 n.6.) The panel did not expressly point out that Section 245A applies only to corporate shareholders, but that does not indicate that it misunderstood Section 245A. It is correct that "if the MRT did not tax the undistributed

---

[3] Even if this were true, rehearing en banc would be unwarranted. *See* Fed. R. App. P. 35(a).

earnings, shareholders would have been able to avoid taxation indefinitely on pre-2018 earnings." Op. 16. To say that is not to say that *all* shareholders of CFCs would have been able to avoid taxation indefinitely on pre-2018 earnings.[4] The panel prefaced its statement about tax avoidance absent the MRT with the observation that the TCJA shifted to a more territorial tax system "in part because of *companies* offshoring roughly $2.6 trillion in profits." Op. 16 (emphasis added). That observation shows that the panel knew the concern about tax-free repatriation of pre-2018 accumulated earnings related to corporate shareholders of CFCs.

And that concern was relevant to the determination of whether the MRT serves a legitimate legislative purpose no matter if the Moores themselves stand to gain from Section 245A. The test for determining whether retroactive application of a tax law violates the Due Process Clause is whether such application "serves a legitimate purpose by rational means." *Quarty v. United States*, 170 F.3d 961, 965 (9th Cir.

[4] Even if that statement were taken to refer to *all* shareholders of CFCs, it would be accurate because individual shareholders would have been able to continue to avoid taxation on pre-2018 earnings indefinitely so long as the CFC continued to hold accumulated earnings offshore.

1999) (citing *United States v. Carlton*, 512 U.S. 26, 30 (1994)). Both *Quarty* and *Carlton* considered in general whether the retroactive application of a law served a legitimate legislative purpose. Neither case focused only on whether the law's retroactive application to the particular taxpayer before the court served a legitimate legislative purpose.[5] That kind of particularized focus differs from rational basis review. A law can have a legitimate legislative purpose even if it is not narrowly tailored to apply only in precisely the ways necessary to achieve that purpose.

Moreover, the Moores' contention that the MRT violates due process just as applied to individual (not corporate) CFC shareholders is new. The Moores' opening brief argued that the legislative purpose of the MRT was an illegitimate "cash grab." (Op. Br. 38-39.) It even argued that the MRT's application to minority shareholders was particularly problematic.[6] (Op. Br. 39.) It did *not* point to the

---

[5] And the Moores likewise emphasized the alleged 30-year retroactivity period even though their CFC did not exist for most of that period. (Op. Br. 37-38.)

[6] The Moores briefly reprise this argument by citing the "uncertain ever to receive" language of *N.C. Dep't. of Revenue v. The Kimberley Rice Kaestner 1992 Fam. Tr.*, 139 S. Ct. 2213, 2221 (2019).
(continued…)

dividends-received deduction's application only to corporate CFC shareholders. The government's brief argued that "preventing large windfalls for corporate U.S. shareholders of CFCs" was part of the legitimate legislative purpose of the MRT. (Gov't Br. 64-65.) Yet, in its reply brief, the Moores made no argument about Section 245A's scope. In fact, neither brief cites Section 245A. We doubt this was accidental. More likely, this lawsuit's goal was full invalidation of the MRT, not just a ruling preventing its application to individual CFC shareholders. The Moores should not be permitted to shift the argument at this late date. *See, e.g.*, *Picazo v. Alameida*, 366 F.3d 971, 972 (9th Cir. 2004) (argument raised in petition for rehearing deemed waived).

In any event, Congress had legitimate legislative purposes for applying the MRT to individual U.S. shareholders of CFCs (who own 10% or more of the CFC's stock). As we explained, limiting Section 965's application only to corporate U.S. shareholders of CFCs would have created administrative difficulties like the need to monitor which

(Pet. 16.) That case deals with a minimum contacts test applicable to certain due process challenges to state taxes. It does not suggest that the federal government violates due process by taxing persons on gains they lack the independent power to control.

CFC earnings had been taxed. (Gov't Br. 9 n.6.) Also, if the MRT did not apply to individual U.S. shareholders of CFCs, that would have allowed enterprising taxpayers to avoid the MRT *and* benefit from Section 245A. Individual U.S. shareholders could have continued to hold their CFC shares as individuals during the years in which the MRT applied but later transferred their CFC shares to a domestic corporation that would benefit from the Section 245A dividends-received deduction. Additionally, the TCJA ushered in a system in which both individual and corporate U.S. shareholders generally pay taxes on current CFC earnings whether or not they are repatriated. *See* I.R.C. § 951A. This change largely eliminated the tax-law incentives that led to CFCs accumulating earnings offshore. So it made sense as part of the effort to begin the new system on a clean slate for Congress to also eliminate the tax-law incentives for retaining already accumulated CFC earnings offshore.

CONCLUSION

This Court should deny panel and en banc rehearing.

Respectfully submitted,

DAVID A. HUBBERT
Deputy Assistant Attorney General

/s/ Nathaniel S. Pollock

FRANCESCA UGOLINI (202) 514-3361
MICHAEL J. HAUNGS (202) 514-4343
NATHANIEL S. POLLOCK (202) 514-8139
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

SEPTEMBER 2, 2022

CERTIFICATE OF COMPLIANCE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 20-36122

I am the attorney or self-represented party.

This brief contains _4,198________ **words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[x] complies with the word limit of Cir. R. 40-1(a).

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  [ ] it is a joint brief submitted by separately represented parties;
  [ ] a party or parties are filing a single brief in response to multiple briefs; or
  [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated ______________.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature _s/Nathaniel S. Pollock___________ **Date** _September 2, 2022____
(use "s/[typed name]" to sign electronically-filed documents)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 15. Certificate of Service for Electronic Filing

Instructions for this form: http://www.ca9.uscourts.gov/forms/form15instructions.pdf

9th Cir. Case Number(s) **20-36122**

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Service on Case Participants Who Are Registered for Electronic Filing:

[ ] I certify that I served the foregoing/attached document(s) via email to all registered case participants on this date because it is a sealed filing or is submitted as an original petition or other original proceeding and therefore cannot be served via the Appellate Electronic Filing system.

Service on Case Participants Who Are NOT Registered for Electronic Filing:

[ ] I certify that I served the foregoing/attached document(s) on this date by hand delivery, mail, third party commercial carrier for delivery within 3 calendar days, or, having obtained prior consent, by email to the following unregistered case participants *(list each name and mailing/email address)*:

Description of Document(s) (required for all documents):

Appellee's response to appellant's petition for panel and en banc rehearing

Signature _s/Nathaniel S. Pollock_____________ **Date** _September 2, 2022___

(use "s/[typed name]" to sign electronically-filed documents)