

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES G. MOORE, ET UX.,)
 Petitioners,)
 v.) No. 22-800
UNITED STATES,)
 Respondent.)

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v.) No. 22-800

UNITED STATES,)

Respondent.)

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Washington, D.C.

Tuesday, December 5, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES:

ANDREW M. GROSSMAN, ESQUIRE, Washington, D.C.; on behalf of the Petitioners.

GEN. ELIZABETH B. PRELOGAR, Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE ROBERTS: We will --
we'll hear argument this morning in Case 22-800,
Moore versus United States.

Counsel.

ORAL ARGUMENT OF ANDREW M. GROSSMAN

ON BEHALF OF THE PETITIONERS

MR. GROSSMAN: Mr. Chief Justice, and
may it please the Court:

The word "income" is not an inkblot.
"Income" was understood at the time of the
Sixteenth Amendment's adoption to refer to gains
coming into the taxpayer, like wages, rents, and
dividends. Appreciation in the value of a home,
a stock investment, or other property is not and
never has been taxed as income. The reason is
that a gain is not income unless and until it
has been realized by the taxpayer.

The Court squarely held as much in
Eisner versus Macomber just a few years
following adoption of the amendment, and the
Court's decisions have held that line for a
century.

That precedent makes easy work of this

1 case. It is undisputed that the Petitioners
2 realized nothing from their stock investment.
3 They were taxed not because they had any income
4 but because, in 2017, they happened to own
5 shares in a corporation carrying retained
6 earnings on its books.

7 This is a tax on the ownership of
8 property. It therefore must be apportioned.

9 Dispensing with the need for
10 realization sweeps away what the Framers
11 regarded as the essential check on Congress's
12 power to tax property. The government cannot
13 identify a single thing that Congress couldn't
14 tax as income under its position that
15 realization is unnecessary. Without
16 realization, there is no limiting principle.

17 Accepting the government's position on
18 income would make a hash of the current law.
19 The Tax Code's gateway definition of "gross
20 income" exerts the full measure of Congress's
21 taxing power under the Sixteenth Amendment by
22 reaching all income from whatever source
23 derived.

24 If the government's position in this
25 case is right, then current law already requires

1 taxpayers to report and pay tax on appreciation
2 in the value of all their assets, on corporate
3 earnings for any stocks that they own, and on
4 any paper gains from their contracts and loans.

5 That's not how the income tax has ever
6 worked going back to 1913. Again, the reason
7 the law doesn't work that way is the obvious
8 one. Unrealized gains are not income. The only
9 way to make sense of the income tax as it's
10 existed for a century is to stick with the
11 original meaning of the Sixteenth Amendment.

12 The Court should reaffirm that there
13 is no income without realization.

14 I welcome the Court's questions.

15 JUSTICE THOMAS: When you say
16 "realization," what -- do you have a definition
17 for that or an explanation as to exactly what it
18 is, and -- and how is it different from, say,
19 attribution?

20 MR. GROSSMAN: Thank you, Justice
21 Thomas. Realization in the main is going to be
22 receipt, but in other instances, it would be
23 other types of enjoyment of an economic gain
24 such that the taxpayer can put that gain to his
25 or her own uses and benefits. That might be

1 forgiveness of a loan or it might be assignment
2 of income to a third party.

3 CHIEF JUSTICE ROBERTS: Well, there
4 certainly is realization here by the
5 corporation, if not the taxpayers, right? It
6 isn't a case like appreciation of property where
7 nothing has happened. You know, you buy
8 property, you're holding it for 20 years, you
9 haven't sold it, nothing has happened. Here,
10 something has happened, and income has gone to
11 the corporation, isn't that right?

12 MR. GROSSMAN: Yes. The corporation
13 has income, and we -- we don't dispute that the
14 corporation realized income over the decade-plus
15 years that are being taxed by the MRT. But I --
16 I think it really is like the instance of simply
17 appreciation of property from the point of view
18 of the shareholders.

19 The shareholders' interest in the
20 corporation is solely a capital interest, a
21 property interest, and so the value of their
22 capital has increased. It has appreciated.
23 But, as shareholders, no, they have not realized
24 any income.

25 JUSTICE SOTOMAYOR: So tell me, what's

1 -- why do we permit taxing of individual
2 partners when either state law or their
3 partnership agreement doesn't realize the income
4 to them? In many states, a partner doesn't have
5 personal ownership, doesn't get the value of the
6 partnership, yet we've permitted that tax.

7 MR. GROSSMAN: Thank you, Justice
8 Sotomayor. A partnership is a fundamentally
9 different form of organization than a
10 corporation. The law has always recognized that
11 a corporation is a person separate from the
12 shareholders in that corporation. And there
13 simply isn't that separate personhood that
14 applies to partnerships. The partnerships are
15 simply a group of people who come together to
16 undertake a business activity, and when they do
17 so, the income that comes in to them is their
18 income directly. That's --

19 JUSTICE SOTOMAYOR: So what do you do
20 with Subpart F or Subpart S or all of the other
21 ways in which we have attributed corporate
22 income to individuals?

23 MR. GROSSMAN: The actual --

24 JUSTICE SOTOMAYOR: You don't
25 challenge -- you don't challenge the

1 constitutional of Subpart F.

2 MR. GROSSMAN: That isn't at issue in
3 this case.

4 JUSTICE SOTOMAYOR: But, in your
5 brief, you don't appear to be challenging it.

6 MR. GROSSMAN: We think that Subpart F
7 follows the commonly accepted method that
8 Congress has used to address situations when a
9 taxpayer has interposed a corporate structure
10 between themselves and income that is
11 otherwise theirs. It would be --

12 JUSTICE SOTOMAYOR: Well, but that's
13 the whole purpose of a corporate structure.
14 People do that all the time, particularly for
15 that purpose. You don't incorporate unless you
16 want the corporate shield. You don't
17 incorporate unless you want the benefits of the
18 corporate protection.

19 So, under your theory, Subpart F,
20 Subpart S -- these are longstanding taxing
21 mechanisms by the government -- your theory
22 would undermine those as well, wouldn't it?

23 MR. GROSSMAN: I don't think that's
24 right. Subpart F, again, works on simply
25 categories of income on a current basis where

1 those categories of income are properly viewed
2 as being -- and -- and Congress determined are
3 properly viewed as being earned by the
4 shareholders due to the nature of the categories
5 of income that are addressed under the statute.

6 JUSTICE SOTOMAYOR: Well, it seems --
7 I'm sorry. Go ahead.

8 JUSTICE BARRETT: I would -- so you
9 concede that Subpart F is constitutional? I
10 just want to be sure that I understand your
11 answer.

12 MR. GROSSMAN: We think that the
13 defect with the MRT doesn't really apply to
14 Subpart F. You know, Sub -- the Court has never
15 considered the constitutionality of Subpart F,
16 but, as we take it, we don't think that there's
17 a constitutional issue there.

18 JUSTICE BARRETT: So what is the
19 distinction? Is it just that other parts of
20 Subpart F, to the extent that they tax income,
21 do it on an annual basis and the MRT was a one
22 shot that went backwards?

23 MR. GROSSMAN: I think that's part of
24 it. But, again, I think what -- what it really
25 is is that the MR -- is that the MR -- is -- I'm

1 sorry -- is that Subpart F addresses this
2 fundamental income-shifting concept, whereas the
3 MRT doesn't, and that's so in two respects.

4 First of all, Subpart F operates on a
5 current basis while the corporation is subject
6 to the control of the controlling shareholders,
7 whereas the MRT takes no account of whether --

8 JUSTICE SOTOMAYOR: I -- I'm sorry.
9 There's no question that you meet the definition
10 of Subpart F. You need in Subpart F at least 10
11 percent of the company's share, and the company
12 has to be owned more than 50 percent by U.S.
13 owners. So it's identical in terms of the
14 percentage of ownership or the percentage of
15 shares.

16 MR. GROSSMAN: That's right, but
17 Subpart F, unlike the MRT, aligns the control
18 and the ability to redirect income with the year
19 that it is applicable to. The MRT takes account
20 --

21 JUSTICE SOTOMAYOR: Sounds to me that
22 what you're attacking is only a due process
23 issue of how long the tax is for, not the
24 ability to tax.

25 MR. GROSSMAN: I don't think that's

1 right for the reason that -- I -- I think
2 whether you owned a particular piece of property
3 on a given date, which is the question that the
4 MRT asks, is sort of the sine qua non of a tax
5 on property, whereas Subpart F looks at income
6 as it comes in while the controlling shareholder
7 has the ability to redirect that stream of
8 income.

9 JUSTICE BARRETT: But isn't that then
10 just a question of whether it's fair to
11 attribute -- fair from a due process point of
12 view, as Justice Sotomayor was saying, whether
13 it's fair to attribute the income generated by
14 KisanKraft to the Moores, which is a distinct
15 question of whether there was income within the
16 meaning of the Sixteenth Amendment, right?

17 MR. GROSSMAN: Well, I think it
18 ultimately comes down to a Sixteenth Amendment
19 question for the same reason that the Court
20 thought so in Macomber, which is that a
21 shareholder's interest in a corporation,
22 including in its income, is a capital interest
23 and therefore a property interest.

24 And so, if there is some reason to
25 look beyond that and attribute income to the

1 shareholder, that would necessarily raise a
2 question of income and why it is that the
3 shareholder isn't being taxed on what would
4 otherwise be a property interest.

5 So I think the Court has always
6 addressed this sort of question as a question of
7 income as a -- and that includes, for example,
8 all of the assignment-of-income cases that the
9 Court has decided over the years.

10 JUSTICE SOTOMAYOR: Can I go back to
11 square -- to first principles?

12 The concept of realization was very
13 well established at the time that the Sixteenth
14 Amendment was adopted, but the Amendment does
15 not reference realization. All that the
16 drafters had to do was add the word "realize"
17 after "income" to lay and collect taxes on
18 income realized, but they never used the word
19 "realize."

20 And then I look at the history both
21 before and after the ratification, as far back
22 as 1864, not so far back, Congress taxed -- from
23 the ratification -- Congress taxed "gains and
24 profits of all companies, whether incorporated
25 or partnerships, in" -- "in estimating the

1 annual gains, profits, or income of any person
2 entitled to the same, whether divided or
3 undivided."

4 In 1913, just eight months after the
5 ratification of the Sixteenth Amendment,
6 Congress included undistributed corporate
7 earnings to certain shareholders.

8 Your brief tries to distinguish all
9 these things, but I come back to the main point.
10 Both sides can point to congressional actions
11 that taxed some realized income, some -- or
12 didn't unrealize -- didn't tax unrealized
13 income, but we have examples of Congress taxing
14 realized -- unrealized income.

15 Why don't I take it that the plain
16 text of the amendment doesn't make reference to
17 realization?

18 MR. GROSSMAN: I think there are two
19 central features of the text of the amendment
20 that reflect that it does apply only to realized
21 gains.

22 The first is simply the use of the
23 word "income." I would particularly commend to
24 the Court's attention the amicus brief follow --
25 filed by the Professors of Law and Linguistics,

1 which analyzes the use of the word "income" in
2 period text --

3 JUSTICE SOTOMAYOR: As I go back, all
4 of this goes back and forth, because the
5 government has other definitions. We're --
6 we're -- we're back in square one if what we're
7 doing is weighing historical definitions.

8 MR. GROSSMAN: The weighing in this
9 case, Your Honor, is quite lopsided. The
10 government relies principally on two definitions
11 that were -- that were put forward by economists
12 in the years following the amendment's adoption,
13 and -- neither of which reflects the common
14 understanding at the time.

15 One of the economists recognized that
16 he was simply espousing his own economic views
17 divorced from any question of law or common
18 understanding, and the second economist
19 recognized that the common understanding of
20 "income" is what we say that it was, a realized
21 gain.

22 So far as the common understanding of
23 the term was concerned, the -- the only
24 indication that the Court has before it, aside
25 from dictionaries, which, again, lopsidedly

1 favor our position, is -- is the corpus
2 linguistics analysis of the Professors of Law
3 and Linguistics, which looks at how the word was
4 used in everyday language at that time, and it
5 concludes that unanimously, where it's possible
6 to distinguish, "income" meant realized gains.

7 There's also in the amendment the
8 language "from whatever source derived." As we
9 pointed out, "derived" was generally meant to
10 refer to concepts like receipts. And, indeed,
11 again, the amicus brief of the Professors of Law
12 and Linguistics recognize that when income was
13 described as being derived, it was always used
14 in that fashion.

15 JUSTICE KAGAN: I thought that --

16 JUSTICE KAVANAUGH: I guess I'm not
17 sure -- go ahead.

18 JUSTICE KAGAN: Go ahead.

19 JUSTICE KAVANAUGH: Go ahead.

20 JUSTICE KAGAN: I -- I thought that
21 that was just a response to Pollock, which had
22 distinguished between income on personal
23 property and other forms of income, and all that
24 the Sixteenth Amendment authors were -- were
25 doing is to say that distinction that Pollock

1 drew, we don't approve of that distinction.

2 MR. GROSSMAN: Right. I think that
3 what the Sixteenth Amendment did was remove the
4 necessity to consider whether income came from
5 one source, particularly property, versus other
6 types of sources. But, in so doing, it
7 necessarily required as a precedent that the
8 amounts -- that what was being taxed, in fact,
9 be income and not something else.

10 JUSTICE JACKSON: But why should we
11 take the common meaning of "income" rather than
12 the legal meaning given the context that Justice
13 Kagan points out?

14 I mean, if the Sixteenth Amendment was
15 specifically responding to this -- this Court's
16 legal precedent related to the meaning of
17 "income," I guess I'm curious as to why you
18 think that the common meaning of "income" is
19 what we should be focused on when we try to
20 understand what the Sixteenth Amendment meant
21 when it used that term.

22 MR. GROSSMAN: Well, that's certainly
23 the approach the Court typically takes in
24 addressing questions of original meaning, but
25 that aside, that's what the Court's -- Court's

1 cases have said for Merchants' Bank and Macomber
2 again and again, that -- that the Sixteenth
3 Amendment is to be construed according to its
4 ordinary meaning.

5 And I would note that if the Court
6 were to depart from that and say, for example,
7 that personal property was not subject to
8 apportionment, which I take it to be the thrust
9 of the -- the questions in this direction, taxes
10 on personal property, that is, that would more
11 -- that would upend pretty much the entire line
12 of the Court's Sixteenth Amendment jurisprudence
13 over the past century --

14 JUSTICE SOTOMAYOR: But why?

15 JUSTICE KAVANAUGH: Are we --

16 JUSTICE SOTOMAYOR: I'm sorry. I --
17 go ahead.

18 JUSTICE KAVANAUGH: No, go ahead.

19 JUSTICE SOTOMAYOR: All right. But
20 why? If what we do is to think about a
21 particular tax, which would -- seems to be what
22 we've been doing for over a hundred years, to
23 see whether that tax is -- is income as
24 understood by attribution or as an excise tax or
25 by other principles, we wouldn't have to give --

1 we would consider each tax on its own form.

2 You're asking us to just announce what
3 realization is out of context. And for the last
4 hundred years, we've been studiously avoiding
5 doing that because we recognize that it's
6 dangerous to do that. To -- to state a -- a
7 word like "realization," we then have to come up
8 with a working definition that applies to every
9 piece of property and every way in which people
10 gain wealth. It doesn't seem logical to me.

11 MR. GROSSMAN: Respect --

12 JUSTICE SOTOMAYOR: Why don't you just
13 concentrate on why Congress can't say that in
14 certain situations it's going to ignore the
15 corporate form and attribute to the individual
16 shareholders certain income? That's what it's
17 been doing all along. And, here, it doesn't
18 need realization because Congress has attributed
19 this to the individual owners of the
20 corporation.

21 MR. GROSSMAN: Respectfully, the Court
22 has already said in multiple occasions that
23 realization is, in fact, required for there to
24 be income under the Sixteenth Amendment. It's
25 not only Macomber. It's also MacLaughlin versus

1 Alliance Insurance. It's the Safety Car
2 Heating.

3 JUSTICE SOTOMAYOR: Yes, on certain
4 types of property but not all.

5 MR. GROSSMAN: It's Ivan Allen.

6 JUSTICE SOTOMAYOR: But we also said
7 that taxes can -- that partnerships can be taxed
8 individually even when the partners are not
9 receiving the property.

10 We have Subchapter F and S. We have
11 had all sorts of different forms of wealth that
12 we have attributed to individuals rather than to
13 the corporate -- to -- to the legal forms of
14 ownership.

15 MR. GROSSMAN: And all of those taxes
16 rely on the principle that the Court expressed
17 in cases like Horst and Banks, which is -- which
18 is that income should be taxed to he who earns
19 it and enjoys its benefits.

20 JUSTICE KAGAN: And putting aside,
21 Mr. Grossman, whether there's any realization
22 requirement at all, I mean, there is quite the
23 history in this country of Congress taxing
24 American shareholders on their gains from
25 foreign corporations, and you can see why,

1 right?

2 Congress -- the -- the U.S. Government
3 can't tax those foreign corporations directly,
4 and they wanted to make sure that Americans
5 didn't kind of stash their money in the foreign
6 corporations, watch their money grow, and never
7 pay taxes on them.

8 So, you -- you know, there's a long
9 century-old history of these kinds of taxes on
10 gains from your holdings in a foreign
11 corporation. Why is this any different and why
12 shouldn't we understand that to be quite well
13 settled, that Congress can implement those taxes
14 and enforce those taxes for those purposes?

15 MR. GROSSMAN: The -- the taxes in
16 that area have -- have followed the pattern that
17 I described of simply a taxpayer interposing a
18 corporation between themselves and income that
19 would otherwise be theirs, and those provisions
20 from the beginning --

21 JUSTICE KAGAN: Well, that's this --

22 MR. GROSSMAN: Those --

23 JUSTICE KAGAN: -- isn't it?

24 MR. GROSSMAN: It isn't. Those
25 provisions from the beginning have typically --

1 JUSTICE KAGAN: These are the same
2 shareholders as in Subpart F.

3 MR. GROSSMAN: The difference is that
4 those provisions have typically addressed things
5 like passive income and related party
6 transactions that are properly attributable to,
7 say, a parent corporation.

8 In other words, a parent corporation
9 could own an income-generating asset itself, or
10 it could simply shift that into a corporation,
11 into a foreign corporation, and thereby avoid
12 the income.

13 And what the law has recognized is
14 that just as in cases like Horst and Banks,
15 that's effectively an assignment of income and
16 that -- and that it can be attributed to the --
17 to the person who -- the parent corporation for
18 that reason because the parent corporation is
19 the one that controls the flow of the income as
20 it's coming in.

21 The MRT, by contrast, operates as a
22 tax on property. It doesn't take account of any
23 power that the shareholder had over the income
24 as it was coming in the door to the corporation.
25 It only takes account of the ownership in 2017.

1 JUSTICE KAVANAUGH: That seems to be
2 an argument about timing. In other words, we
3 have realization in this case. The entity
4 realized income. The question then is
5 attribution, and we've long held that Congress
6 may attribute the income of the company to the
7 shareholders or the partnership to the partners,
8 and the only real wrinkle, I think, here is that
9 it goes back and captures prior years' income.

10 MR. GROSSMAN: I think there are two
11 -- two wrinkles. One is that, with respect to
12 those prior years, the statute doesn't require
13 that the shareholders being taxed had any
14 ability to control the disposition of the income
15 in those years. That's a fundamental
16 distinction.

17 The second is that Subpart F --

18 JUSTICE KAVANAUGH: That's not true
19 for the facts of this case, though, correct?

20 MR. GROSSMAN: It is not true for the
21 facts of this case, but -- but --

22 JUSTICE KAVANAUGH: But you're saying
23 generally. Yeah.

24 MR. GROSSMAN: Well, I think -- I
25 think it just demonstrates that this is a tax on

1 property. In other words, do you own something
2 on a particular date, as opposed to what do you
3 do with the past? Did you have that power in
4 the past?

5 But, second, the provisions --

6 JUSTICE KAVANAUGH: If it had been
7 taxed year by year, would that have been
8 permissible?

9 MR. GROSSMAN: No, and that's the
10 second wrinkle, so to speak.

11 In this -- the -- the MRT is sort --
12 is the inverse of what -- of its press -- of its
13 predecessors in the statutes. All the
14 predecessors, like the foreign personal holding
15 company provisions, as well as Subpart F, focus
16 on categories of income. They're susceptible to
17 being reassigned into the corporate form.

18 Congress has never reached so far as
19 to tax shareholders of foreign corporations on
20 the active business income of those
21 corporations, but --

22 JUSTICE KAVANAUGH: Well, why is --
23 why is that different analytically? I mean,
24 this was all part of a big change from a
25 worldwide tax system to a territorial tax

1 system, and this is one piece of that, but I
2 guess I'm not sure why the -- which kind of
3 income is at issue matters for the ultimate
4 analysis of whether the attribution is
5 permissible.

6 MR. GROSSMAN: Because all of these
7 attribution schemes going back to the very
8 beginning have focused on effectively the
9 fraudulent or improper availment of the
10 corporate form to avoid income, and they've
11 always done that historically by focusing on
12 particular categories of income that are
13 susceptible to that type of abuse.

14 Congress took that to the max as it
15 amended Subpart F over the years to capture more
16 and more types of that sort of income avoidance.

17 What's interesting is that Subpart F
18 says you've captured the field, now let's get
19 everything else, and the -- the "everything
20 else" is the active business income that's
21 attributable solely to the foreign corporation's
22 own legitimate business activities overseas.
23 And so a -- the shareholder in a foreign
24 corporation stands in no different position with
25 respect to that income than a shareholder in,

1 say, Microsoft or any other corporation.

2 This isn't the type of income that
3 that shareholder would, in the ordinary course
4 of affairs or as a matter of reality, be able to
5 shift around into a corporate form and thereby
6 avoid receiving it themselves.

7 I also want to address just the
8 difficulties that the government's
9 interpretation would raise with respect to the
10 current Tax Code.

11 As I noted, the Tax Code already --
12 already reaches the full extent of Congress's
13 authority under the Sixteenth Amendment. And if
14 the government is right, therefore, that certain
15 novel categories of income -- of -- of --
16 certain novel categories of what had heretofore
17 been regarded as unrealized income or unrealized
18 depreciation were -- were subject to taxation
19 under the Sixteenth Amendment, then those would
20 already be subject to taxation under existing
21 law.

22 JUSTICE JACKSON: Can I ask you a
23 question about your argument before you go on
24 with the government's?

25 So, if we agree with you that the

1 Sixteenth Amendment's use of income requires
2 realization and that the MRT does not meet the
3 realization requirement -- those are two, I
4 think, different steps of your analysis -- it
5 seems to me that all we've done is demonstrate
6 that the Sixteenth Amendment doesn't justify the
7 MRT.

8 Don't you still have to demonstrate
9 that the MRT is a direct tax in order to
10 establish that the Constitution has been
11 violated?

12 MR. GROSSMAN: Well, if the MRT is not
13 a tax on income, then I think it stands to
14 reason that it would be a tax on the ownership
15 of shares, because, otherwise, there's --

16 JUSTICE JACKSON: Well, the government
17 makes another argument in their -- in their
18 brief. For example, they offer that it could be
19 an excise tax. So I guess my point is just any
20 indirect tax I would think just has to be
21 uniform under the Constitution. So it seems
22 it's -- as though it's your burden, regardless
23 of this issue about realization, to -- to
24 establish that this tax is a direct tax in order
25 to sustain your constitutional argument.

1 Am I wrong about that?

2 MR. GROSSMAN: We alleged below that
3 it was a direct tax. The government filed a
4 motion to dismiss. It argued that it was, in
5 fact, a tax on income. It did not dispute --

6 JUSTICE JACKSON: So I appreciate that
7 people haven't argued this. But would we then
8 send it back to the Ninth Circuit to determine
9 this issue of whether or not it's a direct tax?

10 MR. GROSSMAN: I think --

11 JUSTICE JACKSON: Or is it your
12 argument that we can -- we can sustain its
13 constitutionality just because we haven't had
14 briefing on this particular aspect of it?

15 MR. GROSSMAN: Well, I -- I think what
16 the Court could do is answer the question
17 presented. As to whether or not there would be
18 anything left for remand, I think it's at the
19 Court's discretion as to whether it wishes to
20 reach the government's excise tax argument.

21 So far as that argument is concerned,
22 again, the bare text of the statute operates
23 based solely on ownership of a particular piece
24 of property on a particular date and takes no
25 account of any type of business operations of

1 the people whom it's taxing.

2 That is the sort of tax that Flint,
3 which I think is the high water mark -- mark of
4 the Court's excise tax jurisprudence, indicates
5 is, in fact, a tax on property and cannot be
6 sustained as an excise tax. So I think the
7 Court could very easily make short work of that
8 argument.

9 Go -- go -- going to the government's
10 position in regard --

11 JUSTICE ALITO: Is that argument
12 within the question presented?

13 MR. GROSSMAN: No, Your Honor.

14 JUSTICE ALITO: Was it preserved?

15 MR. GROSSMAN: No, Your Honor. It --
16 it was raised for the first time before this
17 Court.

18 So far as the government's position is
19 concerned, I mean, just think about, for
20 example, if someone has a contract to sell
21 widgets to a third party in a future year. If
22 the price of widgets goes down so that they're
23 less expensive to manufacture or acquire, then
24 necessarily that person has received an economic
25 gain. Under the government's position, that

1 would be taxable. Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas, anything further?

5 JUSTICE THOMAS: Would your case be
6 any different or your argument be any stronger
7 if you -- we were talking about real estate
8 rather than owning stocks in a corporation or an
9 interest in a corporation?

10 MR. GROSSMAN: No, Your Honor. Pretty
11 much all of the Court's Sixteenth Amendment
12 cases over the course of the last century have
13 concerned personal property in the form of
14 investments. I think it's well established at
15 this time that taxes on personal property --

16 JUSTICE THOMAS: Well, actually, what
17 I'm more interested in is not necessarily a
18 distinction between real and personal property
19 but rather being invest -- having an investment
20 in a corporate form or partnership where you can
21 actually -- there is an argument that -- that
22 the income had been realized by the corporation
23 or income hadn't been realized, as you've heard
24 this morning, by the partnership and whether or
25 not that should then be attributed to the --

1 those who invest in those -- in those companies,
2 whereas, in real estate, unless there is a
3 transaction, a sale or a lease or something,
4 there's no taxable transaction.

5 So would there be a difference between
6 a stake in a corporation or partnership, as
7 opposed to real estate or personal -- other
8 personal property?

9 MR. GROSSMAN: I don't think so. I
10 mean, the Court has applied the same principles
11 across the sweep of its Sixteenth Amendment
12 cases. Pretty much all of the early ones
13 applying the principle that we put forward did
14 involve corporate investments and different
15 types of corporate reorganizations that the
16 government argued resulted in income to the
17 shareholders.

18 But the Court applied the same
19 principles in cases like Horst, for -- I'm
20 sorry -- Bruun, for example, that involved real
21 property and recognized that in that instance
22 there equally had to be realization. Likewise,
23 in Blatts, the Court reached the opposite
24 results in Bruun with -- again, with respect to
25 an improvement made to real property.

1 So we don't think the constitutional
2 principles are any different. I think the only
3 difference perhaps with respect to corporate
4 shares is that the government might have an
5 argument that there is some type of constructive
6 realization under the -- under the statute that
7 imposes the tax.

8 JUSTICE THOMAS: But isn't that a --
9 as a -- just based on the questions this
10 morning, that seemed to be a vulnerability that
11 you would not have with real property, for
12 instance.

13 MR. GROSSMAN: I don't think it's a
14 vulnerability given that the -- given the
15 general principle that's required and given the
16 nature of this tax. I think it would be a more
17 difficult case if this tax were structured in an
18 entirely different fashion that didn't operate
19 in the way that it does, but that's obviously a
20 hypothetical that's not before the Court.

21 CHIEF JUSTICE ROBERTS: Justice Alito?

22 JUSTICE SOTOMAYOR: One last question.
23 Does your theory put at risk limited liability
24 companies, closely held corporations, limited
25 partnership corporations? I mean, there's all

1 sorts of corporate forms that are there. You --
2 your definition, I think, would affect the
3 government's ability to tax those individual
4 partners, no? Those individual shareholders.

5 MR. GROSSMAN: No, Your Honor.

6 JUSTICE SOTOMAYOR: Why not?

7 MR. GROSSMAN: We -- we don't think
8 that those provisions present any constitutional
9 difficulty whatsoever. Again, a corporation is
10 different. The Court's cases have recognized
11 that.

12 JUSTICE SOTOMAYOR: What -- I -- I
13 don't know why. Meaning, whether it's limited
14 liability or -- or closely held, it's still a
15 corporation.

16 MR. GROSSMAN: Well, first of all, I
17 mean, you've got -- distinguishing a corporation
18 from partnership, I mean, again, you have the
19 doctrine of corporate personhood that the Court
20 has long understood does make a difference in
21 these circumstances.

22 But so far as other types of
23 corporations like S corporations are concerned,
24 there is an election that is made by all of the
25 shareholders to those corporations to allow

1 pass-through taxation.

2 If somebody wants to come to the
3 government and say, I am earning income and
4 that's how I've organized my business and am
5 operating it, I think the government can accept
6 that as a concession.

7 JUSTICE SOTOMAYOR: We're going back
8 to whether attribution is legal. Thank you.

9 MR. GROSSMAN: I don't think it's a
10 question of attribution, Your Honor. I think
11 it's a question of a concession by the
12 shareholders.

13 JUSTICE SOTOMAYOR: Well, no, that's
14 exactly the point, which is: Why should they
15 get to choose and not the government where to
16 attribute the income?

17 MR. GROSSMAN: Well --

18 JUSTICE SOTOMAYOR: Thank you,
19 counsel.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?

21 JUSTICE KAGAN: So, at the risk of a
22 little bit repeating some of the discussion,
23 it -- it seems to me that there are four
24 principal -- there may be others, but there are
25 four principal kinds of taxation that Congress

1 has repeatedly countenanced and that this Court
2 certainly has done nothing to get in the way of
3 that you have to distinguish here, and I just
4 want to make sure I understand your distinctions
5 and whether there's a single distinction that
6 sort of covers all of these or whether each one
7 has a different explanation.

8 So here are my four. It's Subpart F,
9 it's S Corporations, it's partnerships, and it's
10 taxing on an accrual basis. So give me why it
11 is that you think we can decide for you without
12 putting any of those kinds of very established
13 taxation schemes at risk.

14 MR. GROSSMAN: At a 10,000-foot level,
15 Your Honor, they all hew to the realization line
16 as it's been developed in the Court's cases and
17 by historical precedent.

18 JUSTICE KAGAN: See, I would have
19 thought that none of them hewed to the
20 realization line.

21 MR. GROSSMAN: I -- I think that the
22 --

23 JUSTICE KAGAN: I mean, that's why
24 this is my question, I guess.

25 (Laughter.)

1 MR. GROSSMAN: Again, Subpart F uses
2 that familiar -- that familiar mechanism of
3 simply attributing income to the person who
4 earned it even if they've directed it somewhere
5 else, and it's long -- and taxes of that nature
6 have long been justified on that basis.

7 S corporations, again, are by election
8 of the shareholders. If they concede that this
9 is, in fact, their income and that's how they're
10 operating their business, I don't think that the
11 government would have any basis not to take them
12 at their word should the government choose to do
13 so.

14 So far as partnerships are concerned,
15 again, there's no separate person that sits
16 above the shareholders of -- of -- of a -- or,
17 I'm sorry, the partners of a partnership. And
18 those have always been treated differently going
19 back to -- I mean, gosh, going back to the
20 Dartmouth College case, and -- and -- where it
21 wasn't even new at that point.

22 But, with respect to income, going
23 back to Gibbons versus Mahon, which recognized
24 it as a well-established principle at that point
25 that corporations are different in that respect

1 from partnerships, indeed, that was the basis on
2 which Macomber rejected the same -- the same
3 argument.

4 And then, finally, with respect to
5 accrual, the Court already addressed that issue
6 in the Safety Car Heating & Lighting case, where
7 it held that standard Sixteenth Amendment
8 realization principles -- and -- and it cited,
9 among others, Macomber -- apply to the accrual
10 method of accounting.

11 So, you know, whatever question there
12 might be about that methodology and -- and its
13 constitutional status, I think, at this point,
14 that's been long established and is water under
15 the bridge.

16 JUSTICE KAGAN: Mm-hmm. And can I go
17 back to Justice Thomas's question, which is your
18 own definition of "realization"? And I'm just
19 going to give you Macomber's, and tell me if you
20 agree with it or disagree with it or think it
21 needs to be modified.

22 Macomber said, That which precedes
23 from the property is severed from the capital,
24 is received or drawn by the recipient, that is,
25 the taxpayer, for his separate use.

1 Is that your definition too?

2 MR. GROSSMAN: I think subsequent case
3 law has recognized that the separation concept
4 maybe doesn't necessarily apply in every
5 circumstance, although it does apply in the
6 circumstance of distinguishing shareholders
7 versus corporations.

8 JUSTICE KAGAN: Yeah. So, for
9 example, in Bruun, we've basically ignored the
10 separation requirement, correct?

11 MR. GROSSMAN: The Court said that it
12 was applicable in the corporate context but not
13 necessarily in other contexts, in that example,
14 for example, an improvement that was made to
15 land that was not severable from the land.

16 JUSTICE KAGAN: And that -- that
17 definition really wouldn't be very good to -- to
18 explain Subpart F, is that correct too?

19 MR. GROSSMAN: Well, I think what the
20 Court has recognized in subsequent cases is that
21 it's really the concept of realization as
22 opposed to, say, actual receipt that is
23 important.

24 I mean, look, it's going to --

25 JUSTICE KAGAN: So what you're saying

1 is basically we've left Macomber behind?

2 MR. GROSSMAN: No. I think the
3 Court's cases through Glenshaw Glass, you know,
4 up through as recently as, say, Indianapolis
5 Power & Light or Banks recognize that there is
6 something more that is need -- that is needed
7 than a mere economic gain.

8 JUSTICE KAGAN: No, no, no. I wasn't
9 suggesting that we've left entirely behind any
10 concept of realization. I mean, that's a
11 different question, but that we've left the
12 Macomber definition of "realization" behind.

13 MR. GROSSMAN: I don't think -- I -- I
14 think that Macomber's holding in that respect
15 remains good law. I don't think that it's been
16 left behind.

17 Macomber goes on to recognize, for
18 example, regarding corporations that there may
19 be appropriate circumstances for the law to look
20 behind the corporate form to ascertain the true
21 right and actions of the shareholder with
22 respect to income.

23 And so I think take -- Macomber taken
24 as a whole does recognize this principle and it
25 used the best language that occurred to the

1 judges in the context of the case to express
2 that, look, in most cases, it's going to be
3 receipts, but in other cases, something else may
4 well qualify.

5 JUSTICE KAGAN: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch?

8 JUSTICE GORSUCH: I think the argument
9 we -- we've kind of heard from the other side
10 involves, okay, if there is a realization
11 requirement, it's met here because the
12 corporation realized the income, and then it
13 just becomes a question of attribution of that
14 realized income, and Congress has a free hand
15 there, and the Sixteenth Amendment says nothing.

16 Your response.

17 MR. GROSSMAN: My response is that
18 income is -- I mean, the Court has always looked
19 at questions of income from the point of view of
20 the shareholder. If you point to a Sixteenth
21 Amendment case or a case involving gross income
22 under -- under the Tax Code, the Court has
23 always looked at the individual circumstances of
24 the shareholder to ascertain whether or not
25 that -- that shareholder has actually realized a

1 gain.

2 And so, for example, Indianapolis
3 Power & Light, a 1990 case, the Court looked
4 specifically at the facts regarding certain
5 types of customer security deposits. It didn't
6 look at it as some sort of abstract inquiry
7 where things might be assigned and so forth. It
8 sought to address the question as to whether or
9 not that's shareholder income.

10 Macomber did exactly the same thing
11 with respect to shareholders of corporations. I
12 think the Court would certainly have to reverse
13 Macomber, which the government has not asked it
14 to do, to get beyond the idea that, you know, to
15 some free-floating notion of income is
16 sufficient for the government to point at
17 something and tax it to a particular individual
18 as their income.

19 JUSTICE GORSUCH: It -- it -- you're
20 saying, if I -- if I can put a fine point on it
21 if I understand it, the question is whether it's
22 income to the taxpayer who's being taxed?

23 MR. GROSSMAN: Yes, Your Honor.

24 JUSTICE GORSUCH: Okay. And then I'd
25 like for you to go back to a discussion you had

1 with Justice Jackson, and I understand your
2 point that the excise argument has been
3 forfeited or perhaps even waived in this case.

4 I just want your thoughts on it
5 generally as an original matter. You know, we
6 have the Hylton case from quite a long time ago,
7 carriages were thought perhaps not to be a
8 direct tax.

9 Could the government as an original
10 matter call this an excise tax?

11 MR. GROSSMAN: I think the answer
12 resoundingly would be no. The whole point of
13 the direct tax clauses was to make it difficult
14 for Congress to levy these types of taxes while
15 still leaving that authority available at -- you
16 know, in times of emergency.

17 And so far as taxes on personal
18 property and things like investments were
19 concerned, that was addressed extensively during
20 the ratification debates of the -- for the
21 Constitution, and it was really -- it was really
22 one of the primary arguments of the
23 anti-federalists against ratification of the
24 Constitution, was that permitting the
25 government -- permitting Congress to levy direct

1 taxes would simply be a step too far and would
2 -- and would allow Congress to destroy --
3 destroy the states and reach all the property
4 that was known to all families across the
5 country.

6 So, I mean, that was one of the
7 foremost concerns, and the way the -- the way
8 that the Framers addressed that was to render
9 these types of taxes specifically subject to
10 apportionment. I mean, this was addressed and
11 discussed at the Connecticut, the Pennsylvania,
12 and the Virginia ratifying convention by James
13 Madison, by Chief -- Chief Justice Marshall.

14 It was a central concern at the time.
15 And as a matter of original meaning, this sort
16 of investment, this sort of property, is
17 something that necessarily was subject -- taxes
18 on it was subject to apportionment.

19 JUSTICE GORSUCH: Sorry. One last
20 question returning to my first one. Apologies
21 to shift you about.

22 If the Court were to hold that the
23 only realization requirement is some realization
24 somewhere along the chain by a corporation
25 antecedent to the taxpayer, what would be the

1 consequences of a holding like that?

2 MR. GROSSMAN: The consequences would
3 be to open the door to taxation of practically
4 everything. I mean, all property that a person
5 owns is the fruit of income at some point in
6 time, whether it might be income, you know, that
7 they received long in the past.

8 I mean, ultimately, all property that
9 we have is made up of flows of income that have
10 then been invested. And so, if all that was
11 necessary was some level of income, then
12 Congress could simply point at anything and say,
13 well, at some point, this was income to some
14 person at some level and, therefore, can be
15 subject to taxation without apportionment.

16 JUSTICE GORSUCH: I suppose we could
17 and maybe would have to draw lines as to how far
18 back in -- in time one can go in assessing that
19 chain of realization.

20 MR. GROSSMAN: That's right. And I
21 don't really understand how the Court would do
22 that based on the constitutional text. The
23 government's definition of "income" is simply
24 the increase in a person's wealth between two
25 points in time.

1 Well, if the time is set at a person's
2 birth or many decades in the past, that could
3 reach some or potentially all of their property,
4 and I don't really understand what the limiting
5 principle would be.

6 JUSTICE GORSUCH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh?

9 JUSTICE KAVANAUGH: In your brief, to
10 distinguish Subpart F and S corps and
11 partnerships, you used the phrase "constructive
12 realization," and I would ask if you could
13 define what you mean by "constructive
14 realization."

15 MR. GROSSMAN: Sure. We use
16 "constructive realization" as a blanket term to
17 encompass such concepts as constructive
18 realization and assignment of income, and it
19 just generally -- it refers to the general
20 principle espoused in cases like Banks and like
21 Horst that income should be taxed to the person
22 who earns it and enjoys its benefits.

23 And Congress, when it has enacted
24 cases relying on that sort of doctrine, you
25 know, has approached it in that nature, in other

1 words, assessing whether the income at issue is
2 something that in the ordinary course of affairs
3 could be attributed to the person, to -- to the
4 particular taxpayer at issue regarding, say,
5 categories of income or abuse of the corporate
6 form and so forth.

7 JUSTICE KAVANAUGH: Okay. Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett?

10 JUSTICE BARRETT: Except there are
11 situations, you know, there are cases in which
12 state law said that partners couldn't have
13 control over the property or pull it out
14 unilaterally and which we've said it's okay for
15 that income to be attributed to the partner.

16 I understand that partnerships are a
17 different kind of form because, as an ownership
18 matter, the partners would own it equally, but I
19 guess I don't think our cases have established
20 control as the linchpin. Can you kind of point
21 me in the right direction if you disagree?

22 MR. GROSSMAN: With respect to
23 partnerships, if you accept the view that simply
24 a partnership's income is directly the income of
25 its partners, then restrictions on the use to

1 which partnerships may put their income, such as
2 distribution -- distributing it in certain
3 circumstances, is no different from a state law
4 preventing an individual from using their own
5 income in some particular fashion, spending it
6 on a particular item that they might wish to
7 purchase.

8 JUSTICE BARRETT: But I guess I just
9 mean that control -- you know, when we're
10 thinking about how to define "income," I'm just
11 questioning whether control can really be the --
12 the word to use, as opposed to just some sort of
13 distinction between capital and income, you
14 know, the, you know, seed and its fruit, right?
15 I mean, it -- it seems to me that control might
16 go a little bit too far.

17 MR. GROSSMAN: I don't -- well, I --
18 control has always been an essential element of
19 income attribution statutes because the general
20 idea has to be that the taxpayer at issue has
21 the ability to redirect that stream of income
22 somewhere else and thereby avoid it and avoid
23 taxes on it.

24 JUSTICE BARRETT: Why isn't that a due
25 process issue? I guess this goes back to

1 Justice Gorsuch's point about what would the
2 consequences be and we would have to draw lines.
3 You said that means that something that was
4 earned income anywhere along the line ultimately
5 lands in, you know, my bank account and then it
6 can be considered income to me.

7 But is that a Sixteenth Amendment
8 problem, or is that a due process problem where
9 we have to draw lines about when it's fair to
10 attribute one person's income to someone else?

11 MR. GROSSMAN: I think it can raise
12 issues under both, but the Court has
13 traditionally considered it to be a Sixteenth
14 Amendment issue not only in Macomber but in
15 trust cases like Corliss, where, again, the
16 Court considered it a question of did the
17 taxpayer have control over the -- over the --
18 its stream of income that he had in that case
19 redirected into a trust for the benefit of his
20 close family members.

21 And -- I mean, that's the way the
22 Court has always analyzed it, from the point of
23 view of the taxpayer and whether that taxpayer
24 has actually received income or not.

25 JUSTICE BARRETT: And last questions

1 about Subpart F. I just want to be sure that I
2 understand your position.

3 You say that income is about whether
4 the person has the ability to direct the income
5 stream. Am I accurately repeating what you said
6 when it's about attribution in these cases?

7 MR. GROSSMAN: I think that is a
8 necessary part of it, yes.

9 JUSTICE BARRETT: It's a necessary
10 part of it. And you've also said that Subpart F
11 corporations in general, of which, you know,
12 KisanKraft meets the definition, Subpart F
13 corporations and Subpart F do not pose the same
14 Sixteenth Amendment problem that you see here,
15 right?

16 MR. GROSSMAN: We -- we think that --
17 oh, you -- do you mean with respect to the
18 application of Subpart F aside from the MRT?

19 JUSTICE BARRETT: Yes.

20 MR. GROSSMAN: Yes.

21 JUSTICE BARRETT: Okay. And is that
22 because -- kind of going back to your point
23 about control, is the distinction then between
24 MRT and the rest of Subpart F this idea that in
25 the other context, the shareholders have some

1 more ability to direct the stream?

2 MR. GROSSMAN: Well, I think it's two
3 things. It's not that they have more ability;
4 it's that they have any ability, because, again,
5 under the terms of the statute, the MRT doesn't
6 take account as to whether or not a shareholder
7 exercised control while that stream of income
8 was coming in the door. It only focuses on
9 ownership in 2017.

10 But also, that degree of control has
11 also been -- has also been combined historically
12 with the question of whether or not the types of
13 income being taxed are those that are
14 susceptible to that sort of abuse such that
15 attribution is appropriate.

16 JUSTICE BARRETT: You mean so there's
17 some sort of like fraud overlay to this, like is
18 this really functioning as a tax shelter, as
19 Justice Kagan was pointing out?

20 MR. GROSSMAN: That's how Congress
21 addressed it in the very first --

22 JUSTICE BARRETT: And that's a
23 constitutional requirement?

24 MR. GROSSMAN: I think Congress --
25 Congress certainly viewed it that way in the

1 very first income tax statute. That provision
2 regarding fraudulent availment of corporations
3 to avoid income was specifically limited
4 specifically by many of the chief proponents of
5 the Sixteenth Amendment to avoid the precise
6 question that we're addressing -- the -- the
7 precise defect that we're addressing today.

8 Their view was that you could not
9 ordinarily attribute corporate income to
10 shareholders but could do so only in the
11 instance where there was some sort of fraudulent
12 abuse of a corporation to avoid income. And
13 that's --

14 CHIEF JUSTICE ROBERTS: Justice
15 Jackson?

16 JUSTICE JACKSON: Yes. I'm interested
17 in your conversation with Justice Gorsuch about
18 the sort of original meaning of the direct tax
19 clause, and I'm trying to understand whether
20 it's your position that as -- as an original
21 matter, the direct tax clause was interpreted to
22 include income and all sorts of things, or was
23 it narrow.

24 I had thought originally, as we said
25 in the Hylton case, that it was pretty narrowly

1 focused on capitations and taxes on land. Am I
2 wrong about that?

3 MR. GROSSMAN: The Hylton case had
4 three seriatim opinions. Two of them viewed it
5 as a consumption tax regarding conveyance of
6 persons. The third of them, by Justice Iredell,
7 adopted the view that, well, if it's difficult
8 to apportion something, then it should not be
9 subject to apportionment.

10 JUSTICE JACKSON: What about Justice
11 Patterson's explanation that this was a pretty
12 narrow clause and that it was designed to
13 protect southern states and slavery from federal
14 interference, that that was really what was
15 going on here, and, therefore, when you're
16 looking at direct taxes, you're talking about --
17 or direct, yeah, taxes, as opposed to indirect,
18 you're talking about certain kinds of things and
19 that it's not necessarily others, income and
20 that sort of thing?

21 MR. GROSSMAN: Well, I think, as a
22 matter of original meaning, that's incorrect.
23 But I would note in the context of that opinion
24 it was dicta. It certainly didn't stand for the
25 position of the Court.

1 JUSTICE JACKSON: Did the Court, until
2 Macomber, hold that income was direct?

3 MR. GROSSMAN: Not with respect so
4 much to income, Your Honor --

5 JUSTICE JACKSON: Or, I'm sorry,
6 Pollock is what I'm saying, Pollock.

7 MR. GROSSMAN: Well, prior -- I mean,
8 I think the -- the case that addressed this
9 issue prior to Pollock was Springer --

10 JUSTICE JACKSON: Mm-hmm.

11 MR. GROSSMAN: -- which did adopt the
12 narrower interpretation of the direct tax
13 clauses.

14 JUSTICE JACKSON: So, up until
15 Pollock, which was addressed by the Sixteenth
16 Amendment, we had a very narrow conception of
17 direct tax?

18 MR. GROSSMAN: For a 20-year period,
19 there was. Subsequent to that, as I -- as I
20 said, pretty much all of the Court's Sixteenth
21 Amendment cases over the past century have
22 concerned taxes on personal property in the form
23 of investments. So I think the Court would
24 really have to upend its jurisprudence if it
25 were to decide at this late date that the direct

1 tax clauses ought to be given some other
2 interpretation.

3 JUSTICE JACKSON: All right. Let me
4 ask you about realization, going back to Justice
5 Thomas -- Thomas's very first question, and what
6 the definition is.

7 I guess I'm trying to understand
8 whether you think Congress has the authority to
9 define what constitutes realization or not. Is
10 that something you are giving to the Court
11 through constitutional interpretation, or who --
12 who gets to decide what the realization line is?

13 MR. GROSSMAN: Well, I think, as an
14 initial matter, yes, I mean, Congress does get
15 deference on that. But it actually has to try
16 to do that, which is not what it did in this
17 case. I mean, again, the tax here on its face
18 turns on ownership of property on a particular
19 date, and it doesn't take into account it would
20 --

21 JUSTICE JACKSON: No, I guess I don't
22 understand your answer. If Congress -- could we
23 find that there is realization in this case,
24 that there is realization? Like, who -- who
25 makes the definition of "realization"? Could

1 the Court determine that there's realization
2 here under a definition that we are
3 appreciating?

4 MR. GROSSMAN: I mean, the government
5 has never argued that there's realization in
6 this case. The government has simply presented
7 its alternate -- the other argument that
8 realization is not required. So I think it
9 would be unusual for the Court to reach out and
10 decide a question of that import without the
11 government actually having addressed it.

12 JUSTICE JACKSON: But would -- are you
13 asking us to -- maybe I'm -- let me put it this
14 way. Are you asking us to adopt a particular
15 definition of "realization" under which your
16 client wins in this case? If we disagree with
17 you about what "realization" means, do you lose?

18 MR. GROSSMAN: We're simply asking the
19 Court to adopt -- to reaffirm the definition
20 that it's applied since nearly the dawn of the
21 Sixteenth Amendment. So I -- I don't think
22 we're asking --

23 JUSTICE JACKSON: Even though the
24 Sixteenth Amendment doesn't have realization in
25 it, you're saying that the implied realization

1 requirement has a definition that you're asking
2 the Court to adopt?

3 MR. GROSSMAN: We're simply asking the
4 Court to say that realization is necessary as
5 that concept has been espoused in the Court's
6 decisions over the course of a century.

7 JUSTICE JACKSON: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 General Prelogar.

11 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

12 ON BEHALF OF THE RESPONDENT

13 GENERAL PRELOGAR: Mr. Chief Justice,
14 and may it please the Court:

15 The MRT is firmly grounded in the
16 Sixteenth Amendment's text and history. The
17 amendment allows Congress to impose taxes on
18 incomes. That phrase had a well-established
19 meaning drawn from numerous preratification
20 income taxes that Congress enacted before this
21 Court's decision in Pollock.

22 Several of those taxes were like the
23 MRT in that they taxed shareholders on
24 undistributed corporate earnings, including the
25 income taxes in 1864, 1865, 1867, and 1870. And

1 this Court upheld Congress's power to impose
2 those taxes in Hubbard.

3 The Sixteenth Amendment's drafters,
4 therefore, would have understood taxes on
5 incomes to include taxes like the MRT.

6 That's confirmed by the very first
7 income tax Congress enacted under the Sixteenth
8 Amendment. That 1913 law taxed certain
9 shareholders on their pro rata shares of
10 undistributed corporate earnings. And the trend
11 of pass-through taxation has continued
12 throughout the next century from taxes on
13 partners to S Corporation shareholders, to
14 foreign corporation shareholders under
15 Subpart F.

16 Against all that history, Petitioners
17 stake their case on Macomber. But the Court has
18 limited Macomber to taxes on particular stock
19 dividends that are not at issue here. If the
20 Court now extended Macomber's discussion to
21 invalidate all taxes on undistributed business
22 earnings, it would cause a sea change in the
23 operation of the Tax Code and cost several
24 trillions of dollars in lost tax revenue.

25 Petitioners say that every other

1 provision of the Tax Code could be saved under a
2 theory of constructive realization, but they
3 don't provide a comprehensive definition of that
4 term or explain why it would rescue every
5 provision except the MRT.

6 My friend today said it's a blanket
7 term that's defined by the circumstances where
8 you can say that constructive realization
9 occurred. But that's simply circular.

10 And by conceding constructive
11 realization, they've acknowledged Congress's
12 power to draw reasonable lines about what counts
13 as income and who can be taxed on it, which is
14 exactly what Congress did in the MRT.

15 Finally, the Court doesn't actually
16 need to resolve any fundamental questions in
17 this case about whether the Sixteenth Amendment
18 requires realization. The MRT taxes income that
19 was actually realized by the foreign
20 corporations, and Congress permissibly
21 attributed the tax on that realized income to
22 U.S. shareholders just as it has done in any
23 number of pass-through taxes throughout our
24 nation's history. The Court could say only that
25 and affirm.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: When you say
3 "realized," "it has been realized," what do you
4 mean by that?

5 GENERAL PRELOGAR: I think that this
6 is a paradigmatic case of realization, Justice
7 Thomas, insofar as the thing that's being taxed,
8 the underlying tax base for the MRT, are the
9 earnings that actually were -- came into the
10 corporation, the foreign corporation's coffers.

11 So the tax base here was the
12 substantial ordinary business income that the
13 foreign corporation generated through its
14 operations in the foreign country and that has
15 to date been subject to tax deferral.

16 That income has never been taxed at
17 the corporate or entity level. Instead, what
18 Congress did in the MRT is enact a pass-through
19 tax that attributed the liability on that actual
20 income that was realized to the U.S.
21 shareholders.

22 JUSTICE THOMAS: Outside of that
23 context of the MRT, do you think that the --
24 just the -- the increase in value of real
25 property could be a taxable event?

1 GENERAL PRELOGAR: So I think that
2 that raises a more difficult question. This
3 presses on the idea of whether you can
4 characterize gains in the form of appreciation
5 as income that's taxable.

6 I think that there's a strong argument
7 that that falls within a definition of "income"
8 that looks to whether there have been economic
9 gains over time, and it's important to note that
10 Congress has at various time imposed taxes on
11 that kind of appreciation.

12 Some of the Civil War era income tax
13 laws that I pointed to at the beginning of my
14 introduction had appreciation-based taxation for
15 certain property like livestock, and still today
16 there are really important provisions of the Tax
17 Code that effects -- effectively tax individuals
18 on appreciation. For example, the
19 mark-to-market taxes that my friend has conceded
20 are constitutional treat a taxpayer as though
21 there was a realizable event at the end of the
22 tax year for certain futures contracts, for
23 certain life insurance holdings, securities
24 dealers holding, that mark the amount of the
25 value to the market price even in the absence of

1 any kind of sale.

2 So I think that there is strong
3 support for the idea that you can tax at least
4 certain forms of --

5 CHIEF JUSTICE ROBERTS: Well --

6 GENERAL PRELOGAR: -- appreciation.

7 JUSTICE KAVANAUGH: In -- in your --

8 CHIEF JUSTICE ROBERTS: Well, if
9 you're --

10 JUSTICE BARRETT: But --

11 CHIEF JUSTICE ROBERTS: -- there's
12 strong support -- I mean, you've -- you've
13 buried Macomber, I mean, and that takes away a
14 lot of the strong support for a pretty basic
15 proposition that the -- the government can't tax
16 as income to the property owner the appreciation
17 in value of the property.

18 So, I mean, what is left to defend
19 that proposition without Macomber?

20 GENERAL PRELOGAR: Well, Mr. Chief
21 Justice, I -- I disagree with the suggestion
22 that Macomber involved a tax on appreciation.
23 The Court there instead concluded --

24 CHIEF JUSTICE ROBERTS: Well, but I
25 mean I know your -- your argument that it's

1 limited to stock dividends, but it also has been
2 recognized as the -- at least in the beginning,
3 before it certainly narrowed over time, as
4 standing for the proposition that the government
5 cannot tax the appreciation in -- in property.

6 And you've taken that off the board in
7 your presentation today. So I -- wonder if you
8 can give us a little more view or assurance in
9 what's left to defend that proposition once
10 you've stabbed Macomber.

11 (Laughter.)

12 GENERAL PRELOGAR: Well, Mr. Chief
13 Justice, I want to say that we're invoking this
14 Court's own precedent about Macomber's scope and
15 reach. It's the Court itself that said that
16 Macomber is limited to the particular type of
17 stock dividend at issue there. And -- and that
18 type of stock dividend didn't actually represent
19 any kind of economic gain to the taxpayer.

20 In other words, in Macomber, the
21 taxpayer received additional shares in the
22 company, but it was a stock split and her shares
23 were diluted in a commensurate amount so that
24 the Court said, that from the taxpayer's
25 perspective, there was no difference in her

1 ownership stake in the company both before and
2 after the stock --

3 JUSTICE KAGAN: Well, I appreciate --

4 CHIEF JUSTICE ROBERTS: If you wanted
5 to -- if you wanted to defend the proposition
6 that the government cannot tax the appreciation
7 in property without -- without any other event
8 of realization, what would you cite given the
9 fact that Macomber is not on the table?

10 GENERAL PRELOGAR: Well, the thing
11 that I would cite if the Court were looking for
12 a limiting principle that takes appreciation off
13 the table at least in certain circumstances
14 would be history.

15 I -- I do think that there is a
16 different historical foundation for that type of
17 tax compared to what we have here, which is a
18 pass-through tax on actually realized corporate
19 income. So I think that the Court could reserve
20 judgment on whether there might be principled
21 lines based on the history of that type of tax
22 scheme to suggest that it wouldn't be what the
23 Framers of the Sixteenth Amendment had in mind.

24 But, again, I -- I do want to
25 emphasize the fundamental distinction between a

1 tax base that focuses on actually realized
2 income and then attributes it to a different
3 taxpayer, which is a prevalent feature of the
4 Tax Code and which involves many of the
5 provisions my friend today --

6 JUSTICE KAVANAUGH: And -- and your --
7 your --

8 GENERAL PRELOGAR: -- has conceded are
9 --

10 JUSTICE ALITO: One of your strongest
11 --

12 GENERAL PRELOGAR: --
13 constitutional --

14 JUSTICE ALITO: -- one -- one of your
15 -- the arguments that you press most strongly
16 and, certainly, it has resonated a lot in the
17 coverage of this case is that the adoption of
18 the Petitioners' arguments would have
19 far-reaching consequences, isn't that correct?

20 GENERAL PRELOGAR: That's correct.

21 JUSTICE ALITO: So do you think it is
22 fair then to explore what the consequences of
23 your argument would be?

24 GENERAL PRELOGAR: I am happy to talk
25 about the consequences of our argument, although

1 I -- I want to say at the outset I think that
2 the Court could resolve this case quite
3 narrowly.

4 JUSTICE ALITO: Now the -- the Ninth
5 Circuit held that "The Supreme Court has made
6 clear that realization of income is not a
7 constitutional requirement but is instead
8 founded on administrative convenience."

9 Is that correct?

10 GENERAL PRELOGAR: The Ninth Circuit
11 was referring to this Court's decision in
12 Cottage Savings, where the Court did say that
13 realization requirements are founded on
14 administrative convenience.

15 JUSTICE ALITO: Well, not -- not the
16 question whether that's a correct interpretation
17 of our prior precedents. Is it your position,
18 as I understand you to argue in your brief, that
19 realization is not required? The Sixteenth
20 Amendment simply permits the taxation of income
21 whether realized or not?

22 GENERAL PRELOGAR: We certainly think
23 that there is no bright-line realization rule or
24 requirement under the Sixteenth Amendment and
25 that Congress is permitted to tax certain forms

1 of unrealized gains.

2 I don't want to suggest that the Court
3 here needs to set out to define "income" for all
4 purposes or to announce any bright-line rules
5 about realization. I think it's sufficient here
6 for the Court to say that you have before you a
7 particular type of tax on undistributed
8 corporate earnings that were actually realized
9 and to look at the history and tradition that
10 demonstrates that that fits well within
11 Congress's --

12 JUSTICE GORSUCH: General -- General
13 --

14 GENERAL PRELOGAR: -- income tax
15 authority.

16 JUSTICE ALITO: Well, what I'm trying
17 to do is to understand the breadth of your
18 argument, just as we need to understand the
19 consequences of -- of Petitioners' argument.

20 So I take it what you've said is that
21 realization is not a requirement. You say that
22 explicitly in your -- in your brief, unless you
23 want to walk back from that.

24 GENERAL PRELOGAR: We think they're
25 wrong to say it always is a requirement.

1 JUSTICE KAVANAUGH: We don't have to
2 agree with you on that for you to prevail I
3 think you've said in your opening as well
4 because, even assuming or leaving open whether
5 realization is a constitutional requirement,
6 there was realized income here to the entity,
7 and then it's attributed to the shareholders in
8 a manner consistent with how Congress has done
9 that and this Court has allowed.

10 GENERAL PRELOGAR: That's correct,
11 Justice Kavanaugh. We think that here the
12 constitutional question is actually quite easy
13 and it doesn't require the Court to consider
14 some of the foundational questions about the
15 meaning of the Sixteenth Amendment in other
16 consequence -- other contexts because, here, we
17 have paradigmatic realized income at the entity
18 level, and this functions just like the
19 pass-through taxes on partnerships, the taxes on
20 other types of corporate shareholders,
21 S Corporation shareholders, and, particularly in
22 the context of foreign corporations, the tax
23 under Subpart F of which the MRT is just a part.

24 JUSTICE GORSUCH: Can -- General, if I
25 --

1 JUSTICE ALITO: So your answer is that
2 there need not be realization by the taxpayer;
3 it's sufficient if there's realization by some
4 other entity, correct?

5 GENERAL PRELOGAR: Under the Sixteenth
6 Amendment, that's correct, although there is a
7 due process question in that context about the
8 limits on Congress's ability to attribute income
9 that was realized by one taxpayer to another
10 taxpayer.

11 JUSTICE ALITO: All right. That --
12 the due process question and that's a question
13 of substantive due process.

14 GENERAL PRELOGAR: That's how this
15 Court has analyzed it in cases like Burnet
16 versus Wells, where it was looking at the limits
17 on Congress's ability to make that kind of
18 attribution decision.

19 JUSTICE ALITO: And anything under
20 substantive due process involving an economic
21 regulation like this, the only thing that would
22 need to be shown is that it was rational for
23 Congress to do what it did?

24 GENERAL PRELOGAR: Yes. The Court has
25 looked at whether Congress has made an arbitrary

1 choice, whether it's acted unreasonably. But I
2 think that the Court's precedents reveal that
3 the Court really has looked at whether the
4 taxpayer who owes the tax liability has a
5 relationship to the underlying income.

6 JUSTICE ALITO: Well, if this -- if
7 it's a rational basis review, then that's not
8 much, right? So we could say the 30-year
9 requirement here is a substantive due process
10 issue, so we don't have to grapple with it here.

11 But, to be honest, we would be saying,
12 you know, unless you can show it was irrational,
13 that would be sufficient.

14 GENERAL PRELOGAR: Well, I want to be
15 precise about the doctrine here. You mentioned
16 the 30-year lookback period. I think that that
17 actually has to do with retroactivity principles
18 under the Due Process Clause, and I think that
19 that's some -- somewhat different than the
20 attribution question that we had been discussing
21 about whether Congress can fairly attribute tax
22 liability to one person for income that was
23 earned at the entity level.

24 I recognize that maybe there are some
25 complicated questions out there that could exist

1 in this space, but the important point is that
2 here we have an enormous amount of history and
3 tradition on our side to support the idea that
4 this particular attribution decision falls well
5 within constitutional bounds.

6 JUSTICE ALITO: Well, I -- I -- I
7 understand you want to talk about this case,
8 and, ultimately, we have to talk about this
9 case, but I just want to understand how far your
10 argument goes, how far does it logically go.

11 So, under your argument, does the
12 Sixteenth Amendment allow the taxation -- it
13 allows the taxation of income, and you define
14 income as an increase in -- an economic gain
15 between two points in time.

16 So let's say that somebody graduates
17 from school and starts up a little business in
18 his garage, and 20 years later, 30 years later,
19 the person is a billionaire. Can Congress --
20 under your argument, can Congress tax all of
21 that on the ground that it's income?

22 GENERAL PRELOGAR: So, if that has
23 already been taxed, as I imagine it would
24 through annual income taxes, then it sounds to
25 me like the hypothetical is actually functioning

1 as a property tax --

2 JUSTICE ALITO: All right. Let me --

3 GENERAL PRELOGAR: -- insofar as
4 looking --

5 JUSTICE ALITO: -- let me change --
6 let me change this.

7 GENERAL PRELOGAR: -- at the total
8 value of the assets.

9 JUSTICE ALITO: The appreciation in
10 stock value over 20 or 30 years, could Congress
11 say we want to reach back and tax all of that?

12 GENERAL PRELOGAR: So I think that's a
13 -- a hard --

14 JUSTICE ALITO: That's economic gain
15 between two periods of time.

16 GENERAL PRELOGAR: Yes. I --

17 JUSTICE ALITO: Between two points in
18 time.

19 GENERAL PRELOGAR: I think that's a
20 harder question, and here's why. I do think
21 that that would fit within an ordinary
22 conception of income as covering economic gain
23 between two points of time and focusing on the
24 increment of gain, but we don't have the same
25 tradition to support Congress levying income

1 taxes in that manner.

2 JUSTICE GORSUCH: Well --

3 GENERAL PRELOGAR: Now the Court
4 might conclude if it was --

5 JUSTICE GORSUCH: -- General --
6 General, I'm sorry to interrupt, but on this
7 point, in -- in your brief at least, and I
8 understand your argument is a little bit
9 different here today, but in your brief at
10 least, you confronted the -- the -- the question
11 whether Congress could tax millions of Americans
12 who hold small amounts of stock in their
13 retirement investment accounts, and you say yes,
14 and you point to the 19 -- 1864 Civil War laws.
15 And then you say, but that would be
16 administratively unworkable.

17 So, as I understood at least in your
18 brief, the answer to Justice Alito's question, I
19 think, is, yes, that could happen.

20 GENERAL PRELOGAR: So I think this is
21 a really important point, Justice Gorsuch, and
22 let me clarify that that statement in the brief
23 was referring to the idea of pass-through
24 taxation on all large -- or -- or -- or all
25 corporate shareholders.

1 That would function like the MRT. The
2 basis for the tax would be the corporation's
3 earnings. And then the shareholders would be
4 responsible for a pro rata share of the
5 corporation's earnings. That's a different type
6 --

7 JUSTICE GORSUCH: I'm not sure --

8 GENERAL PRELOGAR: -- of
9 pass-through tax --

10 JUSTICE GORSUCH: -- that -- that --

11 GENERAL PRELOGAR: -- and I understood
12 --

13 JUSTICE GORSUCH: -- I'm not sure
14 that's clear. I -- it -- it seemed to me at
15 least that the argument was, that you were
16 dealing with, was the change in value over time
17 and stock prices increase. Could you tax that
18 unrealized -- otherwise what we'd consider
19 unrealized gain, treat that as a realized gain?
20 And -- and the answer is yes because they did
21 that in 1864 and because, if there's any
22 limitation, it has to do with administrative
23 workability.

24 GENERAL PRELOGAR: In 1864, they were
25 doing a pass-through tax on the corporate

1 earnings, and so the calculation of the tax was
2 not based on the appreciation in the shares but
3 rather was based on what the corporation had
4 actually earned as its income. I --

5 JUSTICE GORSUCH: Okay.

6 GENERAL PRELOGAR: And I don't want to
7 suggest that a tax on appreciation in stock
8 would necessarily be invalid. As I had
9 mentioned to Justice Thomas, there are
10 provisions on the books today that my friends
11 concede are constitutional.

12 But let me say that to the extent that
13 this question and Justice Alito's question is
14 pressing on the idea that maybe this kind of
15 appreciation should just be beyond the reach of
16 Congress's taxing power --

17 JUSTICE GORSUCH: No, I'm -- I'm just
18 asking what the limits of your argument are, and
19 -- and it -- it seems to me there are none.

20 GENERAL PRELOGAR: Well, I certainly
21 think that Congress has broad taxing power. And
22 what I was about to say is that here the
23 relevant question is not whether Congress has
24 the power to tax in the first place. The Court
25 has said Congress has plenary power. It can tax

1 people just for existing. The question is --

2 JUSTICE GORSUCH: And if I could --

3 GENERAL PRELOGAR: -- whether that's a
4 direct tax that has to be apportioned --

5 JUSTICE GORSUCH: Sure.

6 JUSTICE PRELOGAR: -- or whether it's
7 subject to the rule of uniformity as an indirect
8 tax.

9 JUSTICE GORSUCH: And if I might
10 address what I now perceive to be kind of a
11 backup argument, so the first argument, the
12 brief argument, is no realization requirement.
13 Today, I'm hearing, well, even if there is
14 realization, there was somewhere-in-the-chain
15 realization, and then Congress can attribute it
16 freely as it wishes.

17 And I -- I understand that argument,
18 but I'm not sure how we fit it with our
19 precedent. If we ditch Macomber, I -- I
20 understand your argument. But let's assume
21 Macomber isn't completely misguided, okay? I
22 think those were your words, "misguided." I --
23 I look at Phellis, I look at Bruun, I look at
24 Horst, and it seems to me at least as I read
25 them that they're all trying to work within

1 Macomber's framework and talking about is it
2 fair to say that there was realization to the
3 taxpayer, not realization somewhere back in the
4 chain of history and income realized by the
5 corporation or a parent or a subsidiary or
6 whomever.

7 And -- just as a matter of precedent
8 now I'm talking, what -- what -- what's mistaken
9 about that?

10 GENERAL PRELOGAR: So, in those
11 subsequent cases, I wouldn't say that the Court
12 was mistaken there. It did happen to find a
13 realization on the facts of those particular
14 cases to the --

15 JUSTICE GORSUCH: For the taxpayer,
16 right?

17 GENERAL PRELOGAR: For the taxpayer.
18 Of course, they involved different types of tax.
19 None of those cases involved a pass-through tax.
20 And so I think, looking at what is maybe the
21 closest precedent to the situation that we have
22 here, I'd point to the Court's decision in
23 Heiner versus Mellon, which considered the
24 propriety of the tax on partners even in a
25 circumstance where they couldn't actually access

1 the partnership income --

2 JUSTICE GORSUCH: Sure.

3 GENERAL PRELOGAR: -- because state
4 law prohibited a distribution to them. And the
5 Court said --

6 JUSTICE GORSUCH: But you haven't
7 made an --

8 GENERAL PRELOGAR: -- that was
9 perfectly fine.

10 JUSTICE GORSUCH: -- you haven't made
11 an argument that there was realization to this
12 taxpayer, though, have you?

13 GENERAL PRELOGAR: But the whole
14 premise of pass-through taxation --

15 JUSTICE GORSUCH: I mean, just -- just
16 -- just answer that --

17 GENERAL PRELOGAR: Yeah.

18 JUSTICE GORSUCH: -- before you launch
19 off. You haven't made that argument, right?

20 GENERAL PRELOGAR: We don't think that
21 the tax's constitutionality depends on whether
22 these taxpayers get a distribution because this
23 is a pass-through tax just like the other
24 contexts I've been mentioning. And I think that
25 there are kind of two ways --

1 JUSTICE GORSUCH: I'll take --

2 GENERAL PRELOGAR: -- to think about
3 it.

4 JUSTICE GORSUCH: -- I'll take that as
5 a yes.

6 (Laughter.)

7 GENERAL PRELOGAR: Well, I was about
8 to say there are two ways to think about it.
9 One is to say that there was a realized income
10 at the entity level, and Congress can
11 permissibly attribute that to the taxpayer.

12 Another way to look at it would be to
13 say that the taxpayer has a close enough
14 relationship to that underlying income for
15 Congress to permissibly treat it as income to
16 the taxpayer itself.

17 JUSTICE GORSUCH: But we don't have
18 that argument before us. What do we do about
19 that? That argument hasn't been made.

20 GENERAL PRELOGAR: Well, we certainly
21 intended to make that argument, and I understand
22 our briefing to focus on both aspects of this
23 issue. We, of course, joined issue with
24 Petitioners on whether the Sixteenth Amendment
25 requires realization because that is a --

1 JUSTICE GORSUCH: To the taxpayer or
2 to anybody, and you say no, it doesn't require
3 realization, and now today you're saying maybe
4 it requires realization but not to the taxpayer.

5 The one argument that I'm missing is
6 that there was realization here to the taxpayer.
7 That's just not even in the briefs. It's not in
8 the argument today. What do I do about that?

9 GENERAL PRELOGAR: Well, I think we
10 did say that --

11 JUSTICE GORSUCH: If you think there
12 is realization to this taxpayer, why didn't --
13 why didn't -- why didn't you make that argument?

14 GENERAL PRELOGAR: We are not
15 suggesting that there's anything like strict
16 realization in the sense of the taxpayer having
17 received something in hand. But I don't even
18 understand Petitioners now to be saying that's
19 what's required because --

20 JUSTICE GORSUCH: Well, of course --

21 GENERAL PRELOGAR: -- they concede
22 that any number of other --

23 JUSTICE GORSUCH: -- not. And -- and
24 our -- our cases in -- in -- in Bruun and Horst
25 say that there can be something like a

1 constructive realization in a partnership
2 situation or a fraud situation or an
3 S Corporation situation. We -- we've been clear
4 about that, that -- that -- that there's some
5 enjoyment that the taxpayer has over that money,
6 some control. He may assign it elsewhere. He
7 may choose to keep it in the S Corp, whatever,
8 but he controls it.

9 And so there's some realization under
10 Macomber's framework that's enough. But that
11 argument that this taxpayer had that kind of
12 enjoyment isn't in the briefs before us.

13 GENERAL PRELOGAR: Just --

14 JUSTICE GORSUCH: And I'm just
15 wondering what do I do about that.

16 GENERAL PRELOGAR: Well, I think we
17 did make that argument because we made the point
18 that to the extent the Court goes down the road
19 of recognizing some theory of constructive
20 realization, then the MRT would fit within that
21 same framework because Petitioners haven't
22 identified any actual distinction between how
23 those other tax contexts operate and how the MRT
24 operates.

25 JUSTICE GORSUCH: Let's -- let's just

1 say I don't see that argument. Then what do you
2 want me to do? Am I supposed to vacate and
3 remand if -- for -- for consideration of that
4 question? Is it waived? You know, what -- what
5 would you have me do?

6 GENERAL PRELOGAR: I -- I certainly
7 think that in our brief we argued that here the
8 taxpayers can properly be held accountable for
9 the -- the corporation's income and that the
10 Court can say that in --

11 JUSTICE GORSUCH: I got that -- I got
12 that argument, General.

13 GENERAL PRELOGAR: Yes.

14 JUSTICE GORSUCH: I got the argument
15 that either there's no realization or, as a
16 backup, there's realization and fair
17 attribution. But, if I'm working within this
18 Court's precedents, if I don't consider them
19 wholly misguided, okay, if I'm not willing to
20 overturn a hundred years' worth of precedent,
21 which you're asking us to do, and -- and the
22 question is, is it fair to say this -- this
23 taxpayer constructively or actually realized
24 this income, should I vacate and remand?

25 GENERAL PRELOGAR: No, you should

1 affirm because, here, we made the argument that
2 there is the same level of control and exactly
3 the same relationship as in Subpart F.

4 So we did make this argument, Justice
5 Gorsuch. We made the point that, if the Court
6 is focused on things like control or influence,
7 that there is no relevant distinction with
8 Subpart F because this is taxing in precisely
9 the same way as Subpart F operates.

10 JUSTICE BARRETT: And, General, what
11 do you think is the significance of Petitioners'
12 concession that Subpart F is constitutional to
13 your point? If any?

14 GENERAL PRELOGAR: I think that that
15 is an incredibly significant concession here
16 because it demonstrates that even if the Court
17 were to apply a lens of control or influence, I
18 think the right word to use would be
19 relationship to the income, Petitioners have
20 acknowledged that 10 percent U.S. shareholders
21 have the requisite level of relationship in
22 order to properly have income attributed to
23 them.

24 Now my friend suggested that there's
25 some fundamental difference with Subpart F

1 because it taxes different types of income. I
2 think he said it's income where you can
3 interpose the corporate form.

4 I -- I -- I don't understand that
5 distinction because, of course, the Sixteenth
6 Amendment says that Congress can tax all income
7 from whatever source derived. So the Sixteenth
8 Amendment's text by its own terms makes clear
9 that the different forms of income being taxed
10 don't make a relevant constitutional difference.

11 And even if you look at it as a
12 factual matter, my friend's argument doesn't
13 withstand scrutiny because he suggested that,
14 for example, all of this income could have been
15 earned by the taxpayer himself. But that
16 doesn't explain many important features of
17 Subpart F, like ensuring risks outside the --
18 the country of incorporation for the CFC or
19 doing business in countries that are subject to
20 U.S. sanctions.

21 Those are parts of Subpart F income,
22 and I don't think that there is a relevant
23 distinction with respect to whether it could be
24 properly attributed to the taxpayer.

25 JUSTICE KAGAN: Justice Gorsuch said

1 you were asking us to overrule a hundred years
2 of our precedent. Sounds bad. Are you?

3 (Laughter.)

4 GENERAL PRELOGAR: I am not asking the
5 Court to overrule any precedent in this case.
6 I'm asking the Court to follow its precedent
7 that postdates Macomber and makes clear that the
8 discussion in that case was limited to the
9 particular type of stock dividend at issue
10 there.

11 I recognize that there is language in
12 Macomber that seemed to have broader sweep, but
13 this Court itself has already recognized that
14 that is not the right way to read the language
15 in --

16 JUSTICE KAVANAUGH: Which precedent --

17 JUSTICE GORSUCH: General -- General,
18 if I might, though, I mean, in -- in Macomber,
19 it said realization. You say that's misguided.
20 In Phellis, we said that we were following --
21 applying the tests laid down in Macomber. In
22 Bruun, we said that -- that -- that it was -- it
23 was following Macomber's understanding of
24 income. And in Horst, it said that -- that we
25 direct -- it said much the same thing. I -- I'm

1 not going to bother with the quote. But, in
2 each of those cases at least, it purported to be
3 faithfully following Macomber.

4 GENERAL PRELOGAR: Justice Gorsuch --

5 JUSTICE GORSUCH: Now -- now --

6 GENERAL PRELOGAR: -- I just --

7 JUSTICE GORSUCH: -- you just disagree
8 with that, I guess.

9 GENERAL PRELOGAR: I disagree with
10 that reading of those cases because I think, if
11 you look at each of the cases you mentioned, the
12 Court did find realization on the particular
13 facts there but using different standards than
14 Macomber itself had articulated.

15 Take, for example, Bruun. That was a
16 case where I think you said the Court was --
17 said it was faithfully applying its
18 interpretation of income, but -- but the Court
19 in Bruun specifically disavowed the aspect of
20 Macomber that said you have to be able to
21 separate the economic gain from the underlying
22 property.

23 JUSTICE GORSUCH: Certainly, it talked
24 about control, but -- but it -- it -- it -- it
25 spoke of applying Macomber. Now maybe you --

1 you think it was deluding itself, but that's how
2 the Court perceived what it was doing.

3 Shouldn't that count for something?

4 GENERAL PRELOGAR: But look at the
5 Court's statements in Griffiths. There, the
6 Court said that Macomber's theoretical bases had
7 been undermined, that it had "in effect been
8 limited to the particular type of stock dividend
9 at issue" there and that it didn't have
10 controlling weight even with respect to other
11 types of stock dividends --

12 JUSTICE KAGAN: So what --

13 GENERAL PRELOGAR: -- let alone other
14 types of economic gains.

15 JUSTICE KAGAN: -- so what do you
16 understand to be the current state of our
17 precedent? I mean --

18 JUSTICE GORSUCH: Yeah.

19 JUSTICE KAGAN: -- at a certain point,
20 you said, well, Macomber was confronting
21 something that that stock dividend had no
22 economic consequence whatsoever. And that was
23 true, and that could have been. I mean,
24 Macomber could have been decided in a paragraph
25 saying that, but that's not what the Court did.

1 Then, as you say, there are many cases
2 following Macomber which basically leave
3 Macomber's own theory of realization in the
4 dust, but what do you -- what do you take to be
5 the current state of our precedent that we need
6 to pay attention to?

7 GENERAL PRELOGAR: I think that if
8 this Court had before it another stock dividend
9 case that involved an economically substanceless
10 split, then Macomber would control. That's what
11 Griffiths said. Macomber's limited to that
12 particular type of stock dividend.

13 But the Court itself in any number of
14 follow-on cases had said that Macomber doesn't
15 have controlling weight outside that context.
16 The Court said in Glenshaw Glass the statements
17 in Macomber were not intended to provide a
18 touchstone for resolving all future gross income
19 questions that could arise.

20 So I think, to the extent that that
21 leaves Macomber as a bit of an island unto
22 itself, that is just the natural effect of this
23 Court's subsequent precedent, and we're asking
24 the Court to follow that precedent here.

25 JUSTICE KAVANAUGH: And the precedent

1 most on point for you I think you said is
2 Heiner, right, the partnership case?

3 GENERAL PRELOGAR: That's right. I
4 think it involved the most analogous tax to the
5 MRT.

6 JUSTICE KAVANAUGH: And why --
7 explain -- explain why that dictates the result
8 here or strongly supports the result here from
9 your perspective since you -- that's the one
10 you're relying on most, I think.

11 GENERAL PRELOGAR: It strongly
12 supports the result in this case because, in
13 Heiner, the Court confronted a situation where
14 partners claimed they could not lawfully be
15 taxed on partnership income on a pass-through
16 basis because state law operated to preclude any
17 distributions of that partnership income to
18 them. So, by definition, under state law, the
19 partners were not going to personally realize
20 that income. State law prohibited the
21 distribution.

22 And the Court rejected the claim from
23 the partners and said that it didn't make a
24 difference with respect to the permissibility of
25 that pass-through tax from the partnership

1 entity level to the partners themselves.

2 Now Petitioners have suggested that
3 partnerships can just be distinguished down the
4 line because they say that partnerships have a
5 different legal status than corporations.

6 But it's not like partnerships have an
7 innate legal status. Instead, they're creatures
8 of state law, and there are any number of states
9 out there that define a partnership as distinct
10 from the underlying partners themselves.

11 We also have good case law that
12 governs Subpart F in the lower courts. This has
13 been applied in numerous additional contexts
14 involving pass-through taxation and corporations
15 in particular, and it's not just the modern
16 laws, Justice Kavanaugh, it is all of the
17 history here.

18 For virtually the entirety of this
19 nation's experience with an income tax, there
20 have been laws on the book other than the brief
21 period when Pollock governed where Congress has
22 taxed corporate income at the shareholder level.
23 That is a classic pass-through tax and it's how
24 the MRT operates.

25 JUSTICE KAVANAUGH: I -- I agree with

1 that history and your description of it. I was
2 just isolating the -- the case that's really
3 kind of closest, I think, is Heiner, and I just
4 wanted you to spell that out.

5 JUSTICE BARRETT: Apart from -- Heiner
6 --

7 JUSTICE KAVANAUGH: What about the
8 fact -- I'm sorry.

9 JUSTICE BARRETT: Sorry, go ahead.

10 JUSTICE KAVANAUGH: Go ahead.

11 JUSTICE BARRETT: I -- I was just
12 going to ask you, if Heiner is closest on this
13 pass-through point, what's your best federal
14 case upholding a federal tax on appreciation, or
15 do you have one?

16 GENERAL PRELOGAR: So I don't have a
17 case from this Court that upholds a tax on
18 appreciation. I think there are some -- some
19 lower court cases that have considered things
20 like accrual accounting or other situations.
21 There are fewer taxes that reach appreciation.
22 I think the pass-through mechanism is the more
23 common one when we're thinking about gains that
24 aren't realized to the taxpayer himself. But
25 there are, I think, a variety of -- of taxes out

1 there and have been through history.

2 JUSTICE BARRETT: Like the
3 mark-to-market one you were referencing before?

4 GENERAL PRELOGAR: Exactly. And it's
5 really important to recognize the importance of
6 being able to tax in that context.

7 The situation that Congress confronted
8 that prompted it to enact these mark-to-market
9 taxes is the fact that taxpayers can often
10 manipulate realization events.

11 So, for example, they can enter into
12 offsetting futures contracts that don't really
13 have any economic substance to them but allow
14 the taxpayer to hold on to the one that has a
15 gain, to defer taxation, maybe get favorable
16 capital gains rates, and to sell the one that's
17 a loss and thereby immediately have a taxable
18 event. And Congress recognized that that was
19 a -- a loophole in the Tax Code that could
20 enable this kind of -- of abuse.

21 JUSTICE BARRETT: So there are taxes
22 like the mark-to-market one that tax based on
23 appreciation, but it's fair to say that we would
24 be doing something new if we accepted your
25 argument that income is any kind of economic

1 gain, appreciation included?

2 GENERAL PRELOGAR: I appreciate the
3 opportunity to clarify because we are not
4 actually asking the Court to define "income"
5 that way.

6 I think, if there is a lesson to be
7 drawn from Macomber, it's that there's a real
8 danger in trying to -- to, as an abstract
9 matter, define "income" for all purposes or to,
10 you know, as -- as Glenshaw Glass said, to
11 provide a touchstone for all future cases, in
12 part because our experience with the Tax Code is
13 that taxpayers often latch on to those
14 statements and use it as a basis to try to avoid
15 taxation going forward.

16 So I don't think that the Court needs
17 to approach this issue by adopting some global
18 or universal definition of "income." The
19 Internal Revenue Code itself doesn't define
20 "income." Instead, it says that income is all
21 income from whatever sources realized and then
22 gives some illustrative examples.

23 I don't think my friends are offering
24 the Court a definition of "income" because they
25 say income is realized gains or maybe some

1 category of unrealized gains that you can say
2 are constructively realized. I don't think it's
3 necessary for the Court to actually try to
4 comprehensively define it here.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel. I understood your answer to Justice
7 Barrett to be the same as the answer that you
8 gave me with respect to unrealized increase in
9 value from one time to another time in real
10 property, that you didn't have any authority to
11 support that.

12 GENERAL PRELOGAR: That's right. I'm
13 not pointing to a case from this Court that I
14 think would find that that's taxable. There's
15 also nothing from this Court, other than reading
16 Macomber for all it's worth, that I think would
17 necessarily rule that out.

18 CHIEF JUSTICE ROBERTS: And when you
19 just said that's the lesson of Macomber, you
20 mean that's the lesson of Macomber's demise?

21 GENERAL PRELOGAR: Yes, exactly, that,
22 ultimately, I think the Court recognized that
23 those statements which were rendered as an
24 abstract matter and opined on taxes that weren't
25 directly presented there had untenable

1 consequences and were also profoundly
2 ahistorical.

3 So I think there's a lot of wisdom in
4 following the approach the Court articulated in
5 Griffiths, where the Court said we don't rule on
6 the constitutionality of a tax until we find
7 that Congress has actually laid that tax. I
8 think the Court should take each tax as it comes
9 for purposes of resolving these questions.

10 CHIEF JUSTICE ROBERTS: Thank you.

11 Justice Thomas?

12 Justice Alito?

13 JUSTICE ALITO: General, I still want
14 to understand the limits of your argument. I am
15 quite concerned by the potential implications of
16 Petitioners' argument, and you stress that in
17 your brief. You say that if we rule in
18 Petitioners' favor, then large, important pieces
19 of the Tax Code will also logically fall. And I
20 think that's a fair argument. But I think it's
21 also a fair argument to do the same thing with
22 your position, and I want to understand the
23 limits of your position.

24 Now, coming in, I understood your
25 position to be that realization is not required

1 and that the Sixteenth Amendment -- realization
2 to the taxpayer is not required, and, therefore,
3 the Sixteenth Amendment allows the taxation of
4 income. And you seem to define "income" in your
5 brief as economic gain between two points in
6 time, and you say it is that -- those
7 well-established principles that distinguish
8 income taxes from property taxes.

9 So, if that is correct, then what
10 about the appreciation of holdings in securities
11 by millions and millions of Americans, holdings
12 in mutual funds over a period of time without
13 selling the -- the shares in those mutual funds?
14 Can those be taxed under the Sixteenth
15 Amendment?

16 GENERAL PRELOGAR: I think, if
17 Congress actually enacted a tax like that, and
18 it never has, that we would likely defend it as
19 an income tax. But you don't have to agree that
20 that tax would be valid in order to uphold the
21 MRT. So, if you think that --

22 JUSTICE ALITO: Well, I understand
23 that. And in order to rule for Petitioners, we
24 don't have to say anything about Subpart F or
25 S Corporations or partnerships or the accrual

1 method of taxation. But your answer is that
2 would probably -- you'll at least go that far --
3 that would probably be permissible under your
4 interpretation of the Sixteenth Amendment?

5 GENERAL PRELOGAR: I think it probably
6 would, but I think the Court could draw lines
7 based on history, and if there truly were a
8 widespread tax on all amount of appreciation for
9 every taxpayer, that wouldn't look like anything
10 Congress has done before. The Court has
11 sometimes used history like that to draw
12 principled lines.

13 Here, we have exactly the opposite
14 situation where Congress has enacted a tax that
15 looks exactly like any number of pass-through
16 taxes through history. So, here, I think
17 history functions as a rule of inclusion with
18 respect to the propriety of this tax.

19 JUSTICE ALITO: Now, as to the -- the
20 Chief Justice's question, how about the
21 appreciation in value of real property?

22 GENERAL PRELOGAR: I think it would be
23 subject to the same analysis that would fit
24 within a conception of income as economic gain
25 between two points in time. But Congress hasn't

1 traditionally taxed that, and so perhaps the
2 Court, if it were confronted with that
3 situation, would conclude that there is a
4 historical line or limiting principle here.

5 JUSTICE ALITO: So, unless history
6 rules that out, I'm not quite sure how
7 Congress's failure to enact a tax in the past
8 brings that outside the Sixteenth Amendment if
9 the tax would otherwise fall within the
10 Sixteenth Amendment, but you say that that
11 potentially is also taxable as income under your
12 theory?

13 GENERAL PRELOGAR: Yes. And I think
14 it's clearly taxable under the Constitution.
15 Again, this is not a question about Congress's
16 power. It's about the mode of taxation and
17 whether to apportion that tax or not.

18 JUSTICE ALITO: Now, if some sort of
19 constructive realization or some test for
20 attribution is required, what is your test? How
21 far may Congress go in attributing income to
22 someone who has not realized that income in the
23 standard understanding of that term?

24 GENERAL PRELOGAR: I would apply the
25 test the Court used in Burnet versus Wells,

1 which presents the most closely analogous
2 situation. A taxpayer argued that because he
3 had been the grantor of a trust, he couldn't be
4 held liable for the gains in the trust, it
5 couldn't properly be attributed to him because
6 he had no continuing control and wouldn't
7 personally enjoy those gains, which instead went
8 to the beneficiaries.

9 This Court rejected that claim, and
10 what it said is that Congress had not acted
11 arbitrarily. In making that attribution
12 decision, it looked at the taxpayer's
13 relationship to the underlying income and
14 concluded that there was good reason to tax the
15 grantor in that circumstance, including to avoid
16 shifting income to lower-income taxpayers.

17 But, if the Court were applying that
18 kind of attribution analysis here, I think the
19 MRT, like many pass-through taxes, is equally
20 constitutional. Here, the income has never been
21 taxed at the entity level, and there are real
22 complications with trying to tax foreign
23 corporations directly. So, in many respects,
24 these large U.S. shareholders who, by
25 definition, together collectively have a

1 majority stake in a closely held corporation are
2 in many senses the most suitable person or
3 entity to tax.

4 JUSTICE ALITO: Well, have we ever
5 said -- and maybe we should in this case say --
6 that the Sixteenth Amendment applies differently
7 to income or property that is obtained abroad
8 than it does to income or property possessed
9 within the United States?

10 GENERAL PRELOGAR: The Court hasn't
11 previously said to that, but my friend himself
12 suggests that in thinking about these issues,
13 the Court should focus on the potential for tax
14 avoidance or tax abuse.

15 And I think that that concession just
16 underscores the point that when you are using a
17 foreign corporation, it provides a ready vehicle
18 to shelter funds offshore, keep them out of the
19 reach of U.S. taxing authorities, and, thus,
20 complicate efforts to access those funds even
21 when they have a really significant connection,
22 as they do here, because these companies are
23 majority owned by U.S. taxpayers.

24 And it's important to recognize too
25 that this case is not the paradigmatic case of

1 how the MRT applies. The overwhelming majority
2 of taxpayers subject to this are domestic
3 corporations, often parent companies of wholly
4 owned foreign subsidiaries who have arranged
5 their affairs to be able to keep this money
6 offshore, to a period of long tax deferral. But
7 I think that it would be anomalous to suggest
8 that the money is forever out of the reach of
9 U.S. taxing authority.

10 JUSTICE ALITO: Now the -- the
11 Petitioners were in on the ground floor with
12 this corporation, but what if they had simply
13 bought into the company the day before the MRT
14 made taxes due? Wouldn't that look an awful lot
15 like a tax on capital rather than a tax on
16 income in any sense of the word?

17 GENERAL PRELOGAR: So I have three
18 reactions to that. I think that the underlying
19 nature of what's being taxed, which are the
20 realized earnings of the corporation, wouldn't
21 change. I do think that raises a harder
22 attribution question because that taxpayer would
23 have less of a direct relationship to the thing
24 that's being taxed, and so maybe someone in that
25 situation would have a better as-applied due

1 process claim. As you mentioned, the Moores
2 themselves aren't in that position.

3 The second thing I would say is that
4 if the Court is interested in exploring this
5 as-applied due process issue, it's important to
6 note that the MRT is not unique in this regard.
7 There are other taxes in other contexts where
8 the Court has recognized that someone can be
9 taxed on gain in property that happened before
10 the ownership stake was obtained. That was the
11 holding in Taft versus Bowers, where the Court
12 considered this issue with respect to the gift
13 tax. It's also how Subpart F itself can
14 operate. You can buy shares in the controlled
15 foreign corporation and be taxed under Subpart F
16 with respect to earnings that happened before
17 you bought your stake.

18 The third point I would make is that
19 as a factual matter, this situation is unlikely
20 to arise, and that's because Congress has
21 enacted other provisions of the code that
22 largely tie the gains to the person who owned
23 the shares at the relevant time. This is 26
24 U.S.C. Section 1248, and it taxes gains at the
25 time of sale. So, in your hypothetical, in --

1 in 2017, when the person is buying the -- the
2 share in the company, it taxes gains to the
3 seller as though they were paid out of the
4 retained corporate earnings.

5 And then there's a parallel provision
6 for the buyer under the MRT, 26 U.S.C.
7 965(d)(2)(B), that ensures that the buyer
8 doesn't have to include that in his income
9 through a cross-reference to Section 959.

10 JUSTICE ALITO: All right. One --

11 GENERAL PRELOGAR: So, in those ways,
12 I think that Congress was trying to attribute
13 the income to the person --

14 JUSTICE ALITO: Uh-huh. Okay.

15 GENERAL PRELOGAR: -- who owned the
16 shares at the relevant time.

17 JUSTICE ALITO: Thank you. One -- one
18 last subject. I'm sorry to go on so long on
19 this. Your brief makes an awful lot out of
20 Collector versus Hubbard, decided in 1871. To
21 what degree does your argument depend on that?

22 GENERAL PRELOGAR: Our argument
23 doesn't depend on Hubbard. You know,
24 ultimately, we think that what carries the day
25 here is the overwhelming history that

1 demonstrates that Congress has long taxed income
2 at the corporate level to shareholders.

3 Hubbard upheld that exercise of
4 authority, and so I think, if you're looking at
5 the text of the Sixteenth Amendment and what
6 those who drafted it would have in mind, they
7 would have been well aware of this pass-through
8 taxation and of the Hubbard precedent itself --

9 JUSTICE ALITO: Do you think that --

10 GENERAL PRELOGAR: -- but I --

11 JUSTICE ALITO: -- do you think
12 that -- I'm sorry to interrupt. Do you think
13 that Hubbard decided that the tax that was at
14 issue in Hubbard satisfied Article I, Section 2,
15 and Article I, Section 9, which draws a
16 distinction between direct and indirect taxes?
17 Do you think that the Court decided that
18 question in Hubbard?

19 GENERAL PRELOGAR: So Hubbard's
20 discussion of this issue is brief. I don't
21 think that it parsed the constitutional text
22 that way, although it did say that this was
23 within Congress's power to enact. So I
24 understand that to be a constitutional holding,
25 but I acknowledge that it didn't get into the

1 specific provisions of the Constitution or their
2 interpretation.

3 JUSTICE ALITO: Do you think it was
4 overruled in Pollock?

5 GENERAL PRELOGAR: So I think that --
6 I don't think it would be right to say that
7 Pollock was the last word on it, of course,
8 because, even if it was overruled in Pollock,
9 the Sixteenth Amendment came along and it
10 self-reversed Pollock.

11 JUSTICE ALITO: Well, do you think
12 that the Pollock court understood itself to be
13 overruling Hubbard?

14 GENERAL PRELOGAR: I think it's
15 possible that, yes, the Pollock court understood
16 itself to be overruling Hubbard. It was
17 obviously adopting an understanding of what
18 constitutes a direct tax. That was a sharp
19 departure from what had come before.

20 I guess what I would say, Justice
21 Alito, is that it seems to me implausible that
22 the drafters of the Sixteenth Amendment, in
23 seeking to overturn Pollock and fully revive
24 Congress's pre-existing income tax authority,
25 would have meant to do so with respect to all

1 the ways Congress had exercised that authority
2 except for the type of pass-through tax that
3 Hubbard specifically approved.

4 JUSTICE ALITO: Well, I mean, if the
5 Court in Hubbard thought that it was overruling
6 Pollock -- Hubbard -- I'm sorry, if the Court in
7 Pollock thought it was overruling Hubbard, what
8 do you make of the fact that it doesn't even
9 mention Hubbard, and, as far as I can tell,
10 Hubbard was never cited by the attorneys in that
11 case?

12 And, you know, I looked back at
13 Professor Fiss's volume in the Oliver Wendell
14 Holmes Devise of the Supreme Court on what he
15 has to say about Pollock, and he says, "Pollock
16 was a special ceremonial occasion for the Court.
17 The greatest lawyers of the day appeared for
18 both sides."

19 So the greatest lawyers for the day
20 didn't understand that there was Hubbard that
21 had supported -- you know, the -- the -- the --
22 the attorney arguing for the government just
23 didn't realize that they had Hubbard on the book
24 that supported their position?

25 GENERAL PRELOGAR: Well, maybe they --

1 JUSTICE ALITO: And the Court entirely
2 missed it?

3 GENERAL PRELOGAR: Maybe they missed
4 an opportunity to make a good argument in that
5 case. But I think, ultimately --

6 (Laughter.)

7 GENERAL PRELOGAR: -- the important
8 point is -- is that relying on Pollock and
9 trying to parse Pollock versus Hubbard ignores
10 the effect of the Sixteenth Amendment.

11 You know, this was -- this was an
12 amendment to the Constitution that was
13 specifically designed to restore a pre-existing
14 power, and the right way to look at how that --
15 what that power means is to look at how it had
16 actually been exercised before.

17 JUSTICE ALITO: All right. Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

20 JUSTICE SOTOMAYOR: I don't fault the
21 parties for shooting for the stars and -- and --
22 but I guess the tenor of the questions is that
23 nobody's happy with anybody's definition of
24 anything, okay?

25 (Laughter.)

1 JUSTICE SOTOMAYOR: You started by
2 suggesting a narrow ruling. I think there are
3 two ways to narrowly rule. Tell me why one is
4 better than the other if at all, okay, but,
5 first, we can say there is a realization
6 requirement, and, here, it was realized because
7 the corporation realized it. You have to deal
8 with Justice Gorsuch's concern that you waive
9 that argument. I may disagree with him, but
10 that we can work out among ourselves.

11 But the bottom line, we could rule
12 that way, or we could do it the way Justice
13 Kavanaugh started his question, which is we
14 assume that there's a realization requirement
15 and -- and it was met here.

16 So which of the two ways should we do
17 it and -- and how not -- and why not?

18 GENERAL PRELOGAR: It would be
19 critically important for the Court to do it
20 through Justice Kavanaugh's approach. That is,
21 I don't think the Court needs to resolve
22 anything about whether the Sixteenth Amendment
23 requires realization. Here, we happen to have
24 it, and this kind of tax corresponds to
25 pass-through taxes we've had through history,

1 and that suffices to resolve this case.

2 JUSTICE SOTOMAYOR: Does that --

3 GENERAL PRELOGAR: We have serious
4 concerns with the Court --

5 JUSTICE SOTOMAYOR: Does that -- the
6 history is that Congress can attribute that
7 realization?

8 GENERAL PRELOGAR: Correct, that
9 Congress can attribute that realization by the
10 corporation to the shareholders and there are
11 taxes that look like that at virtually all
12 points in our nation's history.

13 The reason why I would strongly
14 caution the Court away from adopting a
15 realization requirement is not only that we
16 think that it is inaccurate, profoundly
17 ahistorical, inconsistent with the text of the
18 Sixteenth Amendment, but it would also wreak
19 havoc on the proper operation of the Tax Code.

20 I think that there are pass-through
21 taxes that would withstand scrutiny if the Court
22 affirms the attribution holding, but, as I had
23 mentioned to Justice Barrett, there are a number
24 of critically important provisions of the code
25 that don't actually have that kind of

1 pass-through mechanism and don't turn on
2 realization at all.

3 That includes the mark-to-market
4 taxes, original issued discount on bonds that
5 drives prices in bond markets and avoids what
6 could otherwise be sheltering of income that
7 should be taxable. It includes the expatriation
8 tax when people renounce their United States
9 citizenship.

10 So I think that there are various ways
11 in which adopting any form of a realization
12 requirement would have profound practical
13 consequences, and it's unnecessary for the Court
14 to go down that road in light of the serious
15 legal arguments against that reading.

16 JUSTICE SOTOMAYOR: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?

18 JUSTICE KAGAN: And, General Prelogar,
19 just to take you back to the implications of
20 Mr. Grossman's argument, you know, he's made a
21 number of statements in his brief and today as
22 well about how he would distinguish this tax
23 from many others, from Subpart F, from
24 S Corporations, from partnerships, from accrual,
25 from you name it. There -- there might be more.

1 What do you worry about and why?

2 GENERAL PRELOGAR: I worry that none
3 of those proposals actually hold up and provide
4 a basis to distinguish the MRT. So, at first,
5 he suggests it has to do with control. But, as
6 I had explained to Justice Barrett before, the
7 level of control here is exactly the same as
8 under Subpart F.

9 These are 10 percent shareholders,
10 U.S. shareholders of closely held foreign
11 corporations, and so control cannot be the
12 relevant difference. It's also not the
13 difference with respect to partnerships and
14 S Corporation shareholders who might have even a
15 lower than 10 percent stake and nevertheless can
16 have income attributed to them.

17 Then he says maybe the answer is
18 consent, and he points to S Corporations and
19 says that turns on a theory of consent. But I
20 don't think that that works either because, to
21 the extent that there's any kind of realization
22 requirement out there in the Sixteenth
23 Amendment, consent couldn't cure that difficulty
24 or give taxpayers a basis to allow Congress to
25 tax things that are outside its authority, and

1 it doesn't even work as a descriptive matter
2 because the S Corporation shareholders might buy
3 their interest in the company and never
4 personally consent to pass-through taxation, or
5 they might change their minds and remove their
6 consent and say I don't want to be taxed on it
7 anymore, but if they have a minority stake in
8 the company, they're stuck with it and continue
9 to have pass-through taxation. So I don't think
10 consent works.

11 Then he says maybe it has something to
12 do with the type of income under Subpart F.
13 But, as I've explained before, we don't think
14 that the type of income matters under the
15 Sixteenth Amendment. And, here, this is
16 paradigmatic income. This is ordinary business
17 income, substantial earnings realized by the
18 company. And I think it would be a really
19 anomalous result to say this type of income
20 uniquely is exempt from pass-through taxation.

21 He also suggests that maybe it turns
22 on the potential for abuse and maybe that
23 explains some of these other taxes. But there
24 again, I think that the -- the MRT itself
25 responds to the concern that these domestic

1 corporations in the main, also some individual
2 shareholders, have been able to keep the money
3 offshore in the closely held foreign
4 corporations and thereby defer taxation on them.

5 So, with respect to every possible
6 point of difference, we just don't think it
7 holds up as a descriptive matter, and so there's
8 a real concern we have that if the Court goes
9 down one of these roads and nevertheless
10 invalidates the MRT, it's not a principled
11 distinction.

12 JUSTICE KAGAN: And then, with respect
13 to the furthest -- the implications of the
14 furthest reaches of your argument that Justice
15 Alito was asking about, and you said with
16 respect to a number of taxes, which we'll
17 probably never see in our lifetimes, but you
18 said, if we did see them, you would probably
19 defend them.

20 I mean, when you say that, that's your
21 job, right?

22 (Laughter.)

23 GENERAL PRELOGAR: Yes, we generally
24 defend the constitutionality of statutes.

25 JUSTICE KAGAN: Yeah. So -- so how

1 should we think about that set of possibilities?

2 GENERAL PRELOGAR: So I think the
3 important starting point is to recognize that
4 those are hypotheticals, as you mentioned, that
5 are unlikely to ever come to pass.

6 There's a really good reason that
7 Congress frequently chooses to tax based on
8 realization, and it's the administrative
9 practicalities of the situation. Otherwise,
10 it's complicated to track fluctuations in value
11 over time or to engage in a valuation analysis
12 for assets that might be hard to value.

13 So, in the main, Congress frequently
14 does choose to rely on realization, and I think
15 some of the hypotheticals about taxing all
16 people who have shares or taxing all home
17 appreciation are unlikely ever to come to pass.

18 But I also think that it's important
19 for the Court to not rely on concerns about
20 those types of far-fetched hypotheticals to
21 announce bright-line rules about what the
22 Sixteenth Amendment requires that could actually
23 take down critically important provisions of the
24 Tax Code and that respond to real-life concerns
25 and very legitimate exercises of the taxing

1 power.

2 In particular, many of the times when
3 Congress has chosen to tax in the absence of
4 realization, it's because taxpayers can abuse
5 the rules. They can manipulate realization
6 events, or they can make use of certain
7 structures or financial instruments to shield
8 assets from taxation. And any coherent or
9 proper administration of the Tax Code has to be
10 able to respond to that kind of taxpayer abuse.

11 JUSTICE KAGAN: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch?

14 JUSTICE GORSUCH: Would you agree,
15 General, that when the Court opens a door,
16 Congress tends to walk through it?

17 (Laughter.)

18 GENERAL PRELOGAR: I don't want to
19 overgeneralize on the back-and-forth between the
20 Court and Congress, but -- but, Justice Gorsuch,
21 if I am anticipating correctly where you're
22 going --

23 JUSTICE GORSUCH: I'm just -- maybe
24 you are, maybe you aren't. Probably are. You
25 usually are.

1 (Laughter.)

2 JUSTICE GORSUCH: But, if -- if the
3 only bar to Congress from enacting a tax on
4 millions of Americans' retirement accounts and
5 mutual funds is administratability, they're
6 pretty clever over there, aren't they?

7 GENERAL PRELOGAR: Well, Justice
8 Gorsuch, I think that this goes to the point --

9 JUSTICE GORSUCH: They -- they know
10 how to get around administration concerns pretty
11 well, don't they?

12 GENERAL PRELOGAR: I think that there
13 would be good reasons for them to avoid the
14 administrative complexities that would open up
15 --

16 JUSTICE GORSUCH: Oh, sure, as a
17 policy matter, but -- but, you know, isn't it --
18 isn't it the case that that would open a big
19 door?

20 GENERAL PRELOGAR: They -- that door
21 is already open. Congress can enact that tax.
22 They just --

23 JUSTICE GORSUCH: Right. No, I
24 understand your --

25 GENERAL PRELOGAR: -- might have to

1 appportion it.

2 JUSTICE GORSUCH: It's been open
3 forever in your view.

4 GENERAL PRELOGAR: Yes.

5 JUSTICE GORSUCH: Yeah. Right.

6 GENERAL PRELOGAR: That the
7 Constitution gives Congress the power --

8 JUSTICE GORSUCH: Okay.

9 GENERAL PRELOGAR: -- to tax that.

10 JUSTICE GORSUCH: And then, in terms
11 of your argument here as well about there's no
12 difference between income and that -- and that
13 kind of -- that -- that unrealized capital gain,
14 you're familiar with the, you know, the 1918 tax
15 cases obviously. The government's brief in that
16 case, one of my industrious law clerks pulled
17 it, and there, the government does draw that
18 distinction and says that that kind of capital
19 gain is not income because the individual
20 received, the taxpayer received, nothing, and
21 that's not income. It's a mere gain of or loss
22 of capital value. Are you familiar with that?

23 GENERAL PRELOGAR: I'm not sure
24 exactly which brief you're talking about. Do
25 you happen to know the case?

1 JUSTICE GORSUCH: Yeah. It's the 19
2 -- the Solicitor General's brief in the 1918
3 income tax cases, and it's pages 32 and 53.

4 GENERAL PRELOGAR: So I would have to
5 look at the particular issue that was being
6 considered there. There are a number of
7 statutory realization requirements that could
8 explain those statements. There have also been
9 a lot of evolution in the -- the thinking about
10 these issues following Macomber.

11 I recognize that the -- the government
12 has sometimes taken a broader view of Macomber
13 itself, for example, but that was in an era when
14 the Court itself had been unclear about the
15 reach of Macomber before the Court has sharply
16 limited it.

17 JUSTICE GORSUCH: Okay. And then I do
18 think there is room for some narrow ground, as
19 -- as Justice Sotomayor suggested. You -- you
20 -- if one thinks that the question is
21 attribution you call it -- I think your friend
22 on the other side would call it is it realized
23 by the taxpayer. You say is it fairly
24 attributed to the taxpayer. Potato/potato, I --
25 I sometimes wonder.

1 GENERAL PRELOGAR: I'm from Idaho, so
2 I -- I love that.

3 JUSTICE GORSUCH: You totally get
4 that.

5 (Laughter.)

6 JUSTICE GORSUCH: You totally get what
7 I'm saying. If we're talking about the same
8 thing, you make a pretty persuasive argument
9 that under the MRT, the Moores do have
10 constructive control, that it is fairly
11 attributable to them because they're a 10
12 percent stakeholder and some other facts.

13 Again, I may be missing it. I don't
14 see that argument in the brief. Assume --
15 assume that argument hasn't yet been made, okay?
16 What do I do?

17 GENERAL PRELOGAR: I agree, Justice
18 Gorsuch, that we haven't made the argument
19 expressly in terms of control because we don't
20 think that's the right standard. But we very
21 clearly did make the argument that the MRT is
22 constitutional for the very same reasons --

23 JUSTICE GORSUCH: Sure.

24 GENERAL PRELOGAR: -- Petitioners say
25 that the Subpart F regime is constitutional.

1 JUSTICE GORSUCH: I -- I -- I
2 understand -- I understand that, but -- but --

3 GENERAL PRELOGAR: Yeah.

4 JUSTICE GORSUCH: -- but just answer
5 my question. You know, if we -- if we think
6 that there's some constructive realization or
7 attribution requirement required, but that
8 hasn't been adjudicated yet, it hasn't been
9 argued yet, what should I do?

10 GENERAL PRELOGAR: If you think it
11 hasn't been argued yet, I, of course, disagree
12 on the facts --

13 JUSTICE GORSUCH: No, I -- I
14 understand.

15 GENERAL PRELOGAR: -- but the Court
16 can affirm on an alternative ground, even one
17 that the party didn't raise. The Court said
18 that in *Dahda versus United States*, for example.
19 So I think it would be open for the Court to
20 affirm on that ground because we do think it's a
21 very strong argument, and I would encourage the
22 Court to do so.

23 JUSTICE GORSUCH: Okay. And then you
24 -- you've argued that attribution is a feature
25 of due process rather than income under the

1 Sixteenth Amendment. But of all of our cases,
2 whether we're talking about partnerships or you
3 want to talk about S corps or -- or Schedule F,
4 have treated it as whether it's a form of income
5 to the taxpayer under the Sixteenth Amendment.
6 That's how we've grounded our analysis so far.
7 It would seem quite a change to move it over to
8 due process. Can you -- can you react to that?

9 GENERAL PRELOGAR: Sure. So I think,
10 actually, the Court's central case on
11 attribution was a due process case. This is
12 Burnet versus Wells. It involved the grantor of
13 a trust. And the Court there put it explicitly
14 in due process terms.

15 JUSTICE GORSUCH: Well, you mentioned
16 partnership earlier, and -- and I went back and
17 looked at that, and due process, those words
18 don't -- you said that's --

19 GENERAL PRELOGAR: Yes.

20 JUSTICE GORSUCH: -- the best case for
21 you. Those words just don't appear anywhere
22 in the -- in Justice Brandeis's opinion. It's
23 all about whether it's -- you can call it fairly
24 attributable or realized by the partner.

25 GENERAL PRELOGAR: And I think that

1 it's perfectly fine for the Court to look at
2 this through the lens of the Sixteenth Amendment
3 because you get to the same ultimate result,
4 which is that, ultimately, the question then
5 would be can Congress fairly attribute this
6 income to you, the taxpayer. And, here, we have
7 overwhelming history and tradition going all the
8 way back to the 1860s and 1870s demonstrating
9 that, yes, Congress can.

10 JUSTICE GORSUCH: And are some of
11 those factors that you'd look at whether they
12 control the -- the -- the entity, whether
13 there's some evidence of fraud in its use of the
14 entity? What else would you add to that list?

15 GENERAL PRELOGAR: I would look at the
16 taxpayer's overall relationship to the income
17 and the -- and the entity. You know, I -- I
18 hesitate to try to put the gloss of control on
19 it for a couple of different reasons. One is
20 that I think that would incentivize taxpayers to
21 try --

22 JUSTICE GORSUCH: Sure.

23 GENERAL PRELOGAR: -- to argue in an
24 individual case they don't have control.

25 JUSTICE GORSUCH: I'm not suggesting

1 that's necessary.

2 GENERAL PRELOGAR: Right. That could
3 be --

4 JUSTICE GORSUCH: I'm suggesting it
5 might be sufficient.

6 GENERAL PRELOGAR: Yes. I would
7 absolutely agree that might be the sufficient --
8 that might be sufficient to establish that
9 Congress made a fair attribution decision in
10 that case. I would just caution the Court away
11 from constitutionalizing that or saying it's
12 necessary in every case.

13 JUSTICE GORSUCH: Roger that. What --
14 what other factors would you have us look at?

15 GENERAL PRELOGAR: The other kinds of
16 factors the Court has looked at or the statement
17 it made in Burnet versus Wells was whether
18 Congress has made an attribution decision that's
19 unrelated to any privilege or benefit. I think
20 using that standard, it works for us here as
21 well because there are obvious benefits
22 associated with doing business through a
23 controlled foreign corporation which is closely
24 held and could keep the money offshore for all
25 of those years subject to tax deferral.

1 So I think the --

2 JUSTICE GORSUCH: Let me pause you
3 there.

4 GENERAL PRELOGAR: Yes.

5 JUSTICE GORSUCH: So the -- the
6 foreign aspect of it and -- and the difficulty
7 of otherwise obtaining some kind of tax on it
8 should factor in our analysis you think?

9 GENERAL PRELOGAR: Again, I think
10 those are --

11 JUSTICE GORSUCH: Could.

12 GENERAL PRELOGAR: -- conditions that
13 could be sufficient. I wouldn't want the Court
14 to say they are absolutely --

15 JUSTICE GORSUCH: Necessary.

16 GENERAL PRELOGAR: -- necessary in
17 every case.

18 JUSTICE GORSUCH: I got it.

19 GENERAL PRELOGAR: And, of course, we
20 have things like partnerships where there's not
21 necessarily --

22 JUSTICE GORSUCH: Sure.

23 GENERAL PRELOGAR: -- any abuse. It's
24 a convenient way to structure taxation with
25 respect to certain types of entities.

1 JUSTICE GORSUCH: This was very
2 helpful to me. Any other factors you'd have me
3 consider?

4 GENERAL PRELOGAR: I think you have
5 covered the waterfront of the things that have
6 already emerged in the case law. I guess, if I
7 step back to a 30,000-foot level, the one thing
8 I would say is that I would urge the Court not
9 to try to set down an explicit set of principles
10 to govern all cases for the very reasons I was
11 describing earlier, that we have seen taxpayers
12 latch onto that --

13 JUSTICE GORSUCH: Roger --

14 GENERAL PRELOGAR: -- and then seek to
15 avoid taxation.

16 JUSTICE GORSUCH: -- Roger that too,
17 okay?

18 (Laughter.)

19 JUSTICE GORSUCH: And that would take
20 care, though -- if -- if we wrote that that way,
21 it would take care of all of your concerns about
22 S corporation -- Schedule F or, you know, the --
23 the mark-to-market, and -- and -- and
24 potentially the MRT?

25 GENERAL PRELOGAR: Yes. I --

1 certainly, I think the MRT, in addition to all
2 of those other taxes, satisfy the -- the types
3 of criteria that the Court has looked at that
4 are relevant to this attribution question.

5 JUSTICE GORSUCH: Whether we call it
6 attribution or constructive realization?

7 GENERAL PRELOGAR: Yes.

8 JUSTICE GORSUCH: Potato/potato.

9 GENERAL PRELOGAR: Well, on that one,
10 I would -- I would shy away from constructive
11 realization just because I think it introduces
12 an additional layer of ambiguity in the code. I
13 mean, by definition, it means not actual
14 realization, and so I think that --

15 JUSTICE GORSUCH: Well, no, I --

16 GENERAL PRELOGAR: -- it's a term that
17 doesn't appear in the code itself that
18 Petitioners seem to --

19 JUSTICE GORSUCH: -- the way -- the
20 way I read our precedent maybe -- and I'll just
21 -- I'll stop, but -- but the way I read our
22 precedent at least is it's -- it's fairly saying
23 that this individual realized, gained control
24 of, or could be reasonably adjudged to have done
25 that by Congress, this person has control over

1 these assets.

2 And you've given me a very helpful
3 list of factors from this Court's history and --
4 and practice, consistent with our precedent,
5 rather than calling it all misguided, that might
6 work. Fair enough?

7 GENERAL PRELOGAR: I don't think that
8 it's right to say that this list of factors
9 gives the taxpayer sufficient control over the
10 assets just, again, because the concept of
11 control can be inherently confusing here if it
12 suggests a majority stake. You know, the
13 S corporation shareholders --

14 JUSTICE GORSUCH: Right.

15 GENERAL PRELOGAR: -- they might have
16 a 1 percent stake in the company --

17 JUSTICE GORSUCH: I -- I -- I --

18 GENERAL PRELOGAR: -- and not have any
19 control.

20 JUSTICE GORSUCH: Okay.

21 GENERAL PRELOGAR: So I think that's
22 -- that's where I have a little bit of
23 disagreement on how to describe what we're
24 discussing.

25 JUSTICE GORSUCH: Okay. That's very

1 helpful to me. Thank you, General.

2 GENERAL PRELOGAR: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh?

5 JUSTICE KAVANAUGH: You don't want us
6 to use the phrase "constructive realization"?

7 GENERAL PRELOGAR: Yes. I think that
8 that phrase is inherently amorphous. It doesn't
9 appear in the code.

10 JUSTICE KAVANAUGH: Right.

11 GENERAL PRELOGAR: It appears to be a
12 phrase that Petitioners have --

13 JUSTICE KAVANAUGH: Right.

14 GENERAL PRELOGAR: -- invented for
15 purposes of trying to save these other taxes.

16 JUSTICE KAVANAUGH: On the --

17 GENERAL PRELOGAR: And I think it
18 would open up immediate disputes about what
19 exactly it encompasses.

20 JUSTICE KAVANAUGH: Right. And on the
21 proverbial open door for Congress, members of
22 Congress want to get reelected.

23 (Laughter.)

24 JUSTICE KAVANAUGH: So some of the
25 hypos are -- are -- are --

1 GENERAL PRELOGAR: Yes, I think that
2 there are huge --

3 JUSTICE KAVANAUGH: -- that -- that's
4 why they're farfetched, although who knows how
5 things would change.

6 On some of Justice Alito's
7 hypotheticals, though, if -- if things came to
8 pass, I think you acknowledged, I just want to
9 confirm, that unlike this case, where you say
10 that historical practice supports this,
11 Congress's historical practice, the Court's
12 cases, if there were something novel, that lack
13 of historical support would at least be a strike
14 against it, not dispositive necessarily.

15 Is that an accurate summary of what
16 you said about that?

17 GENERAL PRELOGAR: Yes. I think that
18 the -- the point I was trying to make is that,
19 first, yes, there are huge practical and policy
20 reasons why these taxes wouldn't be enacted,
21 and, second, if it came to pass, then the Court
22 could assess that tax on its own terms and it
23 might look to history and think, huh, this is
24 something new.

25 I do want to be clear that we don't

1 think that the novelty alone would be
2 dispositive, as you mentioned. Certainly,
3 Congress has some power to enact taxes that it
4 hasn't enacted before, but it would certainly
5 provide a reason to scrutinize that tax a little
6 more carefully.

7 Here, the Court doesn't have to go
8 down that road because the history is all on our
9 side.

10 JUSTICE KAVANAUGH: One hypo of my own
11 just to make sure it's covered. I think it's an
12 easy one, but I want to make sure. If there
13 were a federal tax on the value of someone's
14 property, you agree that's a direct tax -- or --
15 or on the value of someone's holdings, you agree
16 that's a direct tax that would have to be
17 apportioned, correct or not?

18 GENERAL PRELOGAR: Exactly. That's a
19 quintessential tax on property because it's
20 looking at the total value of the asset and it's
21 doing it at a particular point of time. And
22 maybe you could even levy it again and again on
23 the same value, like any homeowner experiences
24 with a property tax bill for the home. That's
25 totally different from an income tax, where

1 you're taxing the increment of gain over time
2 and generally only doing it one time with any
3 future tax looking to a new increment of gain
4 over a new period of time.

5 JUSTICE KAVANAUGH: Okay. Last
6 question. Your position on the MRT, and you
7 cite Heiner and Subpart F and -- and S corps and
8 say this is all similar in kind.

9 The one wrinkle -- and I just want to
10 make sure we're on the same page -- is that this
11 goes back a lot of years and rolls in income
12 from many past years.

13 What should we say about that?

14 GENERAL PRELOGAR: So I have --

15 JUSTICE KAVANAUGH: And -- and let me
16 just add, and he says, ultimately, if you can
17 just roll in, I think, income at any point in
18 time, then that really becomes not much of a
19 limit at all.

20 GENERAL PRELOGAR: So let me react to
21 that in a couple of different ways. I think
22 that the length of the lookback period here
23 can't change the underlying character or
24 classification of what's being taxed as income.
25 This was actual earnings brought in by the

1 company, kept in their coffers.

2 If it was income in year one, then I
3 don't think there's any expiration date on
4 classifying it as income in a future year, and I
5 think it would be anomalous for Congress to lose
6 its ability to tax that as income just because
7 it's granted a period of tax deferral.

8 So, instead, I think that the lookback
9 period, instead of relating to the Sixteenth
10 Amendment or any fundamental questions about
11 what income constitutes, is instead a
12 retroactivity concern. It, I think, arises
13 under the Due Process Clause and would turn on
14 whether Congress had a legitimate purpose for
15 having this kind of lookback period and used
16 rational means.

17 Here, we think that that is clearly
18 satisfied. Petitioners raised a retroactivity
19 due process argument below. The court rejected
20 it in the Ninth Circuit. They haven't renewed
21 it here. And I think it's because it clearly
22 fails under precedent, like United States versus
23 Carlton, but, ultimately, I would urge the Court
24 to -- to recognize that that is not about the
25 proper characterization of the underlying tax

1 base.

2 JUSTICE KAVANAUGH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett?

5 JUSTICE BARRETT: I want to follow up
6 on some of -- on your factors to Justice
7 Gorsuch.

8 So you've talked about how it could be
9 fair, you know, Justice Kavanaugh just said
10 S corps, partnerships, you know, an MRT, to --
11 and the MRT tax, to say that this is
12 attributable to the shareholders or to the
13 partners or, you know, to the seller of the
14 trust.

15 How do we know that? Is it because
16 this is closely held? Because I assume what
17 your friend on the other side is going to say
18 is, well, they -- they had 10 percent, you know,
19 they -- they -- they weren't majority holders,
20 and so they couldn't force a distribution. So
21 how -- how would you articulate that when it can
22 fairly be attributed if we're not talking due
23 process, if we're talking about it from a
24 Sixteenth Amendment point?

25 GENERAL PRELOGAR: Yes. So I think,

1 at the outset, the -- the Court could rely on
2 the lessons to be drawn from history and
3 tradition here. This functions like the early
4 income taxes that I pointed to from the 1860s
5 and 1870 that taxed shareholders on corporate
6 income.

7 At that point in our nation's history,
8 corporations were generally closely held. There
9 were fewer Americans who owned stock, and so I
10 think that they -- they functioned quite
11 analogously to the MRT insofar as they reached a
12 distinctive category of shareholders generally
13 in those closely held corporations.

14 You know, at the end of the day, I
15 guess what I would say is that certainly, we
16 think it's a factor in our favor that this
17 reaches relatively large U.S. shareholders.
18 It's true it's 10 percent, so they don't have to
19 have a majority stake, but the premise of
20 Congress is that these kinds of large
21 shareholders can usually work together with
22 other shareholders in this closely held
23 corporation. There aren't going to be that many
24 of them to direct the company's policy or to
25 force a distribution as the case may be. And

1 that kind of threshold, 10 percent, appears
2 throughout the law, not just in the Tax Code,
3 but in the securities context, for example,
4 there are additional obligations imposed on 10
5 percent shareholders of companies.

6 So wherever the line might be drawn in
7 thinking about it from this relationship to the
8 funds and level of influence of the
9 corporation's policy, I think 10 percent falls
10 well within the line of what should be
11 recognized as permissible.

12 JUSTICE BARRETT: Okay. Thanks.

13 CHIEF JUSTICE ROBERTS: Justice
14 Jackson?

15 JUSTICE JACKSON: So are there
16 drawbacks to setting this up in the way that
17 Justice Gorsuch has articulated? I mean, I
18 guess I'm a little concerned because I heard you
19 respond to Justice Sotomayor by saying that one
20 of your primary concerns is that we not suggest
21 that realization is required.

22 And would -- would -- would taking the
23 approach that Justice Gorsuch has articulated
24 require us to do that, or could we assume -- or
25 how -- how do we get around the other caution

1 that you put forward?

2 GENERAL PRELOGAR: So, if I understood
3 Justice Gorsuch's approach -- and I hope I'm not
4 getting it wrong -- the idea behind this
5 approach would be to recognize that here we
6 actually have realized income, so the Court
7 doesn't need to resolve the status of that under
8 the Sixteenth Amendment and, instead, the
9 pressure point is whether Congress could enact a
10 pass-through tax on the 10 percent U.S.
11 shareholders --

12 JUSTICE JACKSON: But is that fairly
13 --

14 GENERAL PRELOGAR: -- that are subject
15 to this income.

16 JUSTICE JACKSON: -- is that fairly
17 encompassed by this question presented? I mean,
18 this sort of goes to your discussions with
19 Justice Alito, I think. I -- I thought the
20 question presented was about the extent to which
21 the Sixteenth Amendment requires realization.

22 So, if we're going now beyond that,
23 are we out of -- out of the territory that is
24 fairly encompassed here?

25 GENERAL PRELOGAR: I don't think so

1 because I think the answer to the question
2 presented would be we don't have to decide in
3 all contexts here there was a realization. And
4 so, as we said in our brief in opposition to
5 this case, we don't actually think that the case
6 presents the question presented because here
7 there was actual realization by the corporation.
8 And the real dispute between the parties is
9 whether Congress made a fair attribution
10 decision.

11 JUSTICE JACKSON: Let me ask you just
12 another question about the government's brief.
13 Why did the government make an argument about
14 excise taxes at the end?

15 GENERAL PRELOGAR: So we think that
16 the MRT is clearly constitutional on an excise
17 tax theory as well. There's been some -- some
18 suggestion at argument this morning that maybe
19 we didn't present that argument below, and that
20 is incorrect.

21 In the Ninth Circuit, we said that
22 even if the MRT isn't properly characterized as
23 an income tax, it's not a direct tax. And we
24 said that therefore, Congress had Article I
25 authority to enact it and pointed to the

1 Spreckels Sugar case, which is an excise tax
2 case.

3 So I think we did preserve the
4 argument. The Ninth Circuit didn't have
5 occasion to reach it because it ruled in our
6 favor on the primary income tax argument. But,
7 if this Court had any doubt about whether this
8 is a proper income tax, we think the Court could
9 affirm on the excise tax argument in particular.

10 And as I had mentioned in an earlier
11 response, one of the important things for the
12 Court to keep in mind is that 99 percent of the
13 tax owed under the MRT is owed by domestic
14 corporation shareholders, large U.S. companies,
15 for example, that have these foreign
16 subsidiaries where they've been holding money
17 overseas for a number of years. And this would
18 be a tax on the privilege of doing business with
19 those corporate relationships and in that
20 corporate form. So, at the very least, we'd
21 urge the Court not to invalidate the MRT and all
22 of its circumstances without proper
23 consideration of that argument.

24 JUSTICE JACKSON: And that's because
25 the constitutional question is whether or not it

1 is a direct tax, because that would be the
2 circumstance under which apportionment is
3 required?

4 GENERAL PRELOGAR: Yes, exactly. And
5 I think this relates to your earlier questions,
6 Justice Jackson, about the meaning of Hylton and
7 about whether this can in any sense properly be
8 considered a direct tax.

9 You know, ultimately, I think one of
10 the ways to understand the categories in the
11 Constitution is in relation to one another. And
12 at the very least, this is not a tax on land.
13 This is not a tax on personal property. It's
14 not a head tax. Therefore, it's not a direct
15 tax. And we think it's either an excise or an
16 income tax.

17 JUSTICE JACKSON: One final question
18 about Macomber. Why -- why shouldn't we take
19 this opportunity to just put an end to it? I
20 mean, if we were to apply the stare decisis
21 factors that the Court goes through when it
22 decides whether or not to formally overrule a
23 precedent, doesn't Macomber fail anyway?

24 GENERAL PRELOGAR: I agree that
25 Macomber would fail those factors in an

1 appropriate case. The reason we haven't asked
2 the Court to overrule Macomber here is because
3 we just think it's inapplicable by the terms of
4 subsequent precedent that have already said
5 Macomber only has controlling weight with
6 respect to that very specific type of stock
7 dividend.

8 And so I think the Court has already
9 done the work here of effectively leaving
10 Macomber limited --

11 JUSTICE JACKSON: But, if we disagree
12 with you and we applied the stare decisis
13 factors, you would say the government would
14 still win on its view that Macomber is not good
15 law or controlling this case?

16 GENERAL PRELOGAR: If -- if this Court
17 thought it were necessary to walk through the
18 stare decisis factors, then, yes, I think that
19 in each instance, Macomber was egregiously
20 wrong. It didn't grapple with the text of the
21 Sixteenth Amendment in a legitimate way or look
22 at all of the history that I think is relevant
23 to that question. It has been subsequently
24 eroded by any number of additional precedents.

25 And in the end, with reliance

1 interests, here, Congress has relied on those
2 subsequent precedents by enacting any number of
3 taxes that wouldn't satisfy Macomber's
4 realization framework. And Petitioners
5 themselves acknowledge that Macomber's
6 realization framework couldn't actually carry
7 the day because the taxes that they have said
8 are constitutional wouldn't survive under
9 Macomber.

10 JUSTICE JACKSON: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Rebuttal, Mr. Grossman?

14

15 REBUTTAL ARGUMENT OF ANDREW M. GROSSMAN

16 ON BEHALF OF THE PETITIONERS

17 MR. GROSSMAN: Thank you.

18 The government's recalibrated
19 position, as explained by my friend, is not
20 narrow and the Court should not mistake it as
21 such. The government's view that a
22 corporation's earnings can simply be attributed
23 to a -- to any corporate shareholder is
24 staggeringly broad.

25 Corporations like Microsoft and Exxon

1 Mobil have hundreds of billions of dollars of
2 retained earnings on their books that they've
3 invested in corporate assets, research and
4 development, and -- and -- and other -- and
5 other activities. And in some cases, those
6 retained earnings exceed the current value of
7 shares.

8 Under the government's view and I
9 think as demonstrated by the MRT, apparently,
10 Congress could simply tax backwards, reaching
11 back as far as -- as -- as it would care to do
12 so, to attribute those retained earnings going
13 back many years to current shareholders, again,
14 in some instances in excess of the value of the
15 -- of their current holdings.

16 But I think the Court should also keep
17 in mind that there is an impact to that
18 position, that purportedly narrower position,
19 under the existing code, which is that there is
20 no carveout for -- against taxing shareholders
21 in the current code on corporate earnings.

22 If those are Sixteenth Amendment
23 earnings, then -- I'm sorry, Sixteenth Amendment
24 income to shareholders, then they are already
25 subject to the income tax through the gateway

1 definition of gross in -- income that reaches
2 everything that is income under the Sixteenth
3 Amendment. So there's no carveout. Those would
4 already be subject to it.

5 I think this just demonstrates the way
6 that the government's position would make a hash
7 of existing law and cause enormous confusion
8 with respect to how our tax system functions.

9 By consequence -- by -- by contrast, I
10 -- I don't think that there are any serious
11 consequences of this realization principle that
12 we've put forward in this case because it is the
13 thread that runs through the Court's
14 jurisprudence going back over a century and is
15 the glue that holds together the Tax Code as it
16 exists today.

17 Every tax that my friend has mentioned
18 falls into one of two categories. Some of
19 those, particularly regarding the -- the abuse
20 of the corporate firm -- form, turn on theories
21 of constructive realization or you might say
22 assignment of income. I don't think there's
23 much of a distinction.

24 The remainder of them are
25 straightforward excise taxes that are supported

1 by the -- the long history -- long -- long
2 history of congressional practice. These
3 include, for example, the original issue
4 discount. It's simply an excise tax on the
5 transaction regarding the transfer of a bond.
6 Congress has been levying taxes like that for
7 over 130 years at this point.

8 Others, like the mark-to-market taxes,
9 are excise taxes, like in -- like in Spreckels,
10 on conducting business in a specified fashion.
11 Again, those sorts of taxes predate the
12 Sixteenth Amendment, and nobody has ever called
13 into question their constitutionality as such.

14 There's also case law. If it was
15 simply enough for the -- for the -- for -- if it
16 was simply enough to attribute income to anybody
17 with a close relationship to it, all of the
18 Court's corporate reorganization cases and cases
19 involving shareholder rights and really pretty
20 much all the Sixteenth Amendment cases involving
21 trusts and everything else would have been about
22 a sentence long because it wouldn't really take
23 much more than that for the Court simply to say,
24 well, there's a close enough relationship and so
25 who cares whether or not the person realized

1 income or not. Of course, that's not the
2 inquiry the Court has undertaken.

3 And so far as Macomber's rule is
4 concerned -- and the Court has applied the
5 dividing line recognized by Macomber as recently
6 as 1975 in *Ivan Allen* and it's carried forward
7 the same principle in cases like *Indianapolis*
8 *Power & Light* in 1990, as well as restating it
9 in *Cottage Savings* in 1991.

10 I don't think real -- real -- this
11 concept of realization is anything unfamiliar to
12 our law, and, indeed, it's the only way to
13 understand the current Tax Code.

14 Every -- Congress has -- has -- the --
15 the -- the anti-income, income avoidance
16 provisions of the Tax Code are long, lengthy,
17 reticulated. I don't envy anybody who's had to
18 spend their time reading Subpart F and practices
19 in that field. But the reason those are so
20 complicated and reticulated is because Congress
21 has tried to stay within the realization line.

22 It's done everything it can to fit
23 that framework, where it would have been the
24 easiest thing in the world, if -- if Congress
25 thought it had the power to do it, simply to

1 say, well, if you own shares in a foreign
2 corporation, whatever the ownership threshold,
3 simply pay taxes on those earnings.

4 That's not the way the tax -- that
5 these sorts of taxing provisions have ever
6 worked. Instead, they get at the idea who is
7 really earning the income and -- and -- and
8 receiving the benefit by it, and that person
9 should be the one to pay taxes on it. We think
10 they all fit that mold.

11 I'd like to briefly address the 1864
12 tax. The Court in Hubbard recognized that it
13 was a tax on property. Subsequently, in
14 Brushaber, the Court recognized that at the
15 time, that wasn't really considered or thought
16 about as being much of a defect with respect to
17 the direct tax clauses under sort of the
18 reasoning of Springer. And, of course, Macomber
19 rejected the exact same argument.

20 We would ask the Court to reverse.
21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel, General.

24 The case is submitted.

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1 (Whereupon, at 12:14 p.m., the case
2 was submitted.)
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