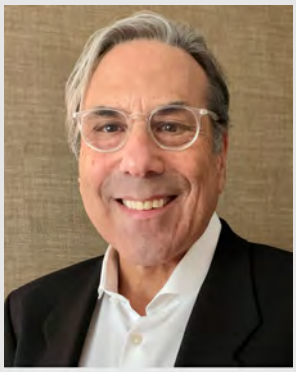
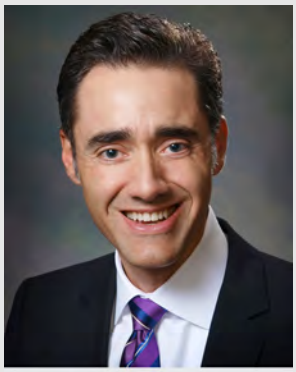
Moore: Now Can We Talk About Attribution?

by Donald B. Susswein, Ramon Camacho, and Joseph Wiener



Donald B. Susswein



Ramon Camacho

Joseph Wiener

Donald B. Susswein and Ramon Camacho are principals and Joseph Wiener is a senior manager in RSM US LLP's Washington National Tax office.

In this article, the authors analyze the oral arguments in *Moore* to assess what standard the Supreme Court may apply to determine when Congress can constitutionally attribute the realized but undistributed income of a corporation or other business entity to its owners.

The views expressed in this article are solely the authors' and are not tax advice or advice of any kind.

Based on the oral argument, many observers believe the Supreme Court is inclined to rule narrowly for the government in *Moore* — that is, narrowly uphold the constitutionality of the mandatory repatriation tax (MRT) but assume, and possibly reaffirm, that there is a constitutional realization requirement.[1] Under that view the Court would note that realization occurred at the entity level. It would then hold that the entity's realized income was properly attributed to the taxpayers.

Presumably, the Court will want to announce some standard or rule explaining why attribution is permissible. Otherwise, the same problems that some thought might arise with a vague realization requirement could arise with a vague attribution rule. Indeed, the oral argument included a discussion of whether Congress could constitutionally attribute the undistributed corporate earnings of a domestic corporation — like those comprising the S&P 500 — to their domestic shareholders. The discussion suggested, with some humor, that this might be politically implausible. It might not be implausible to imagine a proposal that required only some shareholders — perhaps just billionaires — to pay personal income taxes on their undistributed corporate earnings.

That might have some of the same political appeal as a wealth tax (which the oral argument suggested would be a direct tax and therefore practically impossible) or a tax on the unrealized capital gains on publicly traded assets of billionaires (which might also be unconstitutional). It would be ironic if the Court conveyed a message that taxing wealth would be unconstitutional — and that taxing billionaires on their unrealized capital gains on publicly traded corporate shares might well be unconstitutional — but taxing billionaires on their share of any

[1] *See* Transcript of Oral Argument, *Moore v. United States*, No. 22-800 (U.S. argued Dec. 5, 2023).

undistributed corporate earnings would be entirely permissible.

For that and other reasons, the Court might prefer to announce a rule to explain its standard for deciding that attribution was permissible. One standard for permissible attribution was proposed in the amicus brief submitted to the Court by L.E. Simmons.[2] Indeed, the Simmons brief may have been the only pro-government brief arguing that there was a constitutional realization requirement — that was why it also had to advance a standard for attributing the income realized by the entity in *Moore* to its owners.

The brief explained that the MRT income in *Moore* had been realized, constitutionally, at the entity level. The Simmons brief then provided a straightforward explanation of why it was permissible to attribute that income — an explanation that also explained the constitutionality of subpart F and the rules governing the treatment of partnerships, S corporations, and other passthrough entities. The only common denominator of those taxing regimes, the brief explained, is that no U.S. corporate-level tax is imposed on the income of those entities. They are singly taxed at the owner level, not double-taxed like a U.S. corporation.

That standard, and perhaps that standard alone, ensures that the same realized income is not taxed to two different persons. A second tax is imposed in the case of a shareholder who receives a dividend from a domestic C corporation, but that is a tax on an actual distribution. That differs fundamentally from taxing the corporation, and simultaneously taxing the shareholders, on the same corporate income, without any distribution from the corporation to the shareholders.[3]

As the Simmons brief explained:

> The Mandatory Repatriation Tax (MRT) is constitutional because it is a tax on the realized operating income of a *de facto* pass-through entity. The MRT income of Petitioners' business is not subject to any United States corporate income tax at the entity level. It is taxed only at the owner level. That is the distinction between this case and *Eisner v. Macomber*, 252 U.S. 189 (1920), which involved the Standard Oil Company, a domestic corporation subject to the U.S. corporate income tax. For any entity whose operating income is not subject to U.S. corporate income tax at the entity level, such as partnerships or S corporations, this Court has correctly recognized that the Constitution allows that income to be taxed directly to the owners.
>
> Although the MRT is constitutional, the Ninth Circuit's opinion was overly broad and mistakenly stated that there are no constitutional limitations in *Macomber*. Because this Court's opinion may provide guidance beyond the MRT, this brief is intended to provide the Court with an outline of the constitutional holdings in *Macomber* and later cases that continue to limit the ability of Congress to tax "unrealized sums," but that do not apply to the MRT for the reason stated above.

Questions raised during the oral argument demonstrate the problems with every standard of attribution other than that in the Simmons brief. That would include a focus on legal entity status (which some justices questioned), on consent (which some justices questioned), and on control (which the oral argument at times suggested was a relevant factor, but at times was not).

Solicitor General Elizabeth Prelogar pointed out that the entity in *Moore* was a controlled foreign corporation, which has a 10 percent ownership threshold, as is the case under subpart F. But she also argued that control was irrelevant constitutionally in the partnership case the government cited as its strongest authority for permissible attribution of entity income to the entity's owners. In that case, the partners did not have actual control over the partnership's distribution policy. The only thing that

[2]Brief of Amicus Curiae L.E. Simmons in Support of Respondent, *Moore*, No. 22-800 (U.S. Oct. 11, 2023). The authors were consulted on the preparation of that brief, which cited several of their articles.

[3]The notion that one cannot, or at least should not, simultaneously tax the same income to two persons might seem obvious, but that might reveal only how fundamental the concept is. Even in the case of a married couple living in a community property state, each spouse is taxed on one-half of their community income, they are not each taxed on 100 percent of the community income.

partnership case does have in common with the MRT is the absence of a U.S. tax at the entity level.

At one point, it looked like Prelogar was indeed suggesting a position based on the absence of a U.S. tax on the taxpayer's foreign entity. Prelogar explained that the taxpayers' MRT income "has never been taxed at the corporate or entity level," and that the MRT tax "functions just like the passthrough taxes on partnerships, the taxes on other types of corporate shareholders, S Corporation shareholders, and, particularly in the context of foreign corporations, the tax under Subpart F of which the MRT is just a part."[4] This comment is similar to the explanation provided in the Simmons brief.

There is another benefit to this approach, if the Court is reluctant to overrule *Macomber*.[5] There is language in *Macomber* indicating that the existence of two-level corporate tax, in that case involving Standard Oil, was an important factor in that decision. The Simmons brief also noted that a similar observation about *Macomber* is in the Bittker and Lokken treatise.[6]

If the Court does not decide to rely exclusively on the foreign status of the entity (and the resulting absence of a U.S. corporate income tax on the entity's MRT or subpart F income), what standard will it adopt? Will the standard be control (not present in the partnership precedent relied on by the government), the risk of abuse (perhaps requiring some factual predicate), or some other vague notion of "relationship" to the income? In the case of the Moores, it has been alleged that they were directors of the corporation, friendly with the founders or other shareholders, and had previously lent money to the corporation.

Or will the Court simply acknowledge that mere indirect ownership is enough? Under that standard, the undistributed corporate earnings of the S&P 500 could be attributed to their shareholders[7] — or perhaps exclusively to shareholders with income or wealth above some specified level. If wealth were not a permissible standard the tax on undistributed corporate earnings might apply only to individuals with income (including undistributed corporate earnings) greater than some specified level.

At times, Prelogar seemed to argue that history, not any specific constitutional standard, should be the guide. When asked what the Court's opinion should say, Prelogar replied: "Congress permissibly attributed the tax on that realized income to U.S. shareholders just as it has done in any number of passthrough taxes throughout our nation's history. The Court could say only that and affirm."[8] The Court, however, may be looking to set forth an actual rule, standard, or theory for attribution, and not simply to invoke historical precedent.

Prelogar persuasively and soundly argued that subpart F has been held constitutional by some lower courts. But that has not yet been ruled on by the Supreme Court, and the lower court decisions did not address *Macomber* or attempt to distinguish it. The Court might be looking for a principled distinction between the MRT and subpart F, on the one hand, and the attribution of a domestic corporation's income to its shareholders on the other. If the standard is the absence of a U.S. corporate income tax on the MRT income or subpart F income of a foreign corporation, that standard would also explain why attribution is permissible for passthrough

[4] Transcript of oral argument, *supra* note 1, at 66-67.

[5] Prelogar argued that *Macomber* should be limited to cases involving stock dividends or stock splits. Some justices seemed sympathetic, but no attention was given to a provocative question raised in the taxpayer's reply brief:

> Finally, the government's attempted cabining of *Macomber* to the taxation of "paper" stock dividends makes no sense. If Congress cannot income-tax recipients of such dividends because they realized nothing, what basis does it have to income-tax shareholders who haven't received even a piece of paper? The government has no explanation.

[6] The Bittker and Lokken treatise explains that *Macomber* "arose in a legislative context involving a separate corporate tax and might have been modified if corporate profits were not taxed to the corporation but only to its shareholders." Boris I. Bittker and Lawrence Lokken, *Federal Taxation of Income, Estates, and Gifts*, para. 1.2.4 (updated July 1993). The Simmons brief noted further that *Macomber* itself had noted the existence of a two-level corporate tax system as part of its rationale for not treating the corporation and its shareholders as a unity. It seemed that the Court, in *Macomber*, was asking how it could justify the second level of tax when an actual dividend was declared, since the same income had previously been taxed to the corporation and attributed to the shareholder without an actual distribution. *See* Donald B. Susswein and Ramon Camacho, "What Did *Macomber* Decide?" *Tax Notes Federal*, Oct. 16, 2023, p. 473.

[7] Some would argue that *Macomber* itself would make that unconstitutional, although others argue that such a tax would be unconstitutional only if it were accompanied by a stock dividend. *See* Susswein and Camacho, *id*.

[8] Transcript of oral argument, *supra* note 1, at 57.

entities even when there is no control and (arguably) no consent.

As a matter of policy, it is hard to see why the government would resist such an approach. At times, however, it seemed like the government was arguing against the articulation of *any* constitutional standard for permissible attribution, as if it were asking the Court to simply say, "We know permissible attribution when we see it."

If no standard is provided, that may leave an important issue unresolved, even outside of the business world. When can the income of one taxpayer be attributed to another — outside of the entity-owner situation? Can the income of an employee of Standard Oil be attributed to a different employee of Standard Oil or an employee of the Pennsylvania Railroad? Of course not — but where should the line be drawn?

If the Court does not wish to provide any standard, it could remand the case to determine what standard should apply and whether it has been satisfied. However, although the possibility of remand was discussed in the oral argument, a remand seems undesirable and unlikely. If the attribution standard is anything other than the entity's status as a company that is not subject to any entity-level U.S tax on its MRT income, it is far from clear what that standard will be and whether it can be applied to the facts of this case for the first time by the Supreme Court without a remand.

Finally, although attribution is the main issue before the Court, some may still ask how a general constitutional realization requirement, derived from the direct tax clause and the 16th Amendment, can be reconciled with exceptions for rules that address collusive or potentially manipulative schemes like those arising under sections 83, 1256, 475, 446, or 1272. As suggested by the government during the oral argument, those and similar rules intended to combat manipulation and abuse are no different from other exceptions to generally applicable constitutional principles, which permit flexibility and require the exercise of judgment in close cases. A good illustration of this type of constitutional judgment call in the tax area under the 16th and Fifth Amendments can be found in a series of constitutional challenges to the section 83 rule disregarding temporary restrictions in valuing compensatory stock grants.

In *Sakol*, the Second Circuit stated that "Congress is not required to take each and every restriction into account in combating tax-avoidance, or to make equally difficult individual evaluations which depend upon the parties' subjective intentions. Rather, the 16th and Fifth Amendments permit the line drawn to be a rough one, in the interest of realistically solving a practical problem."[9] Compare that with a Fifth Circuit dissent in *Pledger*: "*Sakol* allows the application of section 83 to privately created restrictions on stock transfer *only* because those restrictions may operate as tax avoidance schemes. The same cannot be said of *governmentally imposed restrictions* on stock transfer" such as the insider trading rules or letter stock provisions of the securities laws.[10] (Emphasis in original.)

A similar point was made by Justice Lewis F. Powell Jr. in his dissent from the Supreme Court's denial of certiorari in a related case: "Congress enacted 83 for the purpose of ending tax avoidance schemes using spurious restrictions [not sale restrictions imposed on the taxpayers by the securities laws which, Powell noted] results in a degree of unfairness that hardly could have been intended by Congress. The case merits plenary consideration by the Court."[11]

Judging from how the appellate courts have dealt with section 83 under the 16th and Fifth Amendments — not dismissing the realization requirement as the Ninth Circuit did in *Moore* but carefully adjudicating exceptions for rules properly enacted to address potentially manipulative schemes — there should be no problem reconciling a generally applicable constitutional realization rule with antiabuse or accounting method rules necessary to a workable tax system. Ideally, the Court will note that in its opinion. In the case before the Court, however, the plain vanilla operating income was clearly

[9] *Sakol v. Commissioner*, 574 F.2d 694 (1978).

[10] *Pledger v. Commissioner*, 641 F.2d 287 (5th Cir. 1981).

[11] *Kolom v. Commissioner*, 454 U.S. 1011 (1981). Perhaps in response to Powell's concern, the 1981 act changed section 83 to defer the taxation of stock covered by the temporary short swing trading restrictions of section 16(b) until those restrictions expired.

realized by the entity. Thus, the only issue truly presented to the Court is whether and how such realized entity income can be attributed to the entity's owners.

Appendix: Excerpts From the Oral Argument

Those looking to make an educated prediction regarding the Court's ultimate holding can analyze the briefs (and the authorities they cite) as well as the oral argument. To assist those looking for hints from the oral argument, we provide below what we believe to be the most relevant excerpts of discussions touching on a standard for attribution.

The Taxpayer's 'Worst Case' Scenario

At one end of the spectrum, of course, the taxpayer's counsel articulated the problem with allowing Congress to attribute any corporate income to any shareholder:

> ANDREW M. GROSSMAN: . . . The government's recalibrated position, as explained by my friend, is not narrow and the Court should not mistake it as such. The government's view that a corporation's earnings can simply be attributed to a — to any corporate shareholder is staggeringly broad.
>
> Corporations like Microsoft and Exxon Mobil have hundreds of billions of dollars of retained earnings on their books that they've invested in corporate assets, research and development, and — and other — and other activities. And in some cases, those retained earnings exceed the current value of shares.
>
> Under the government's view, and I think as demonstrated by the MRT, apparently Congress could simply tax backwards, reaching back as far as — as — as it would care to do so, to attribute those retained earnings going back many years to current shareholders, again, in some instances in excess of the value of the — of their current holdings.

The Government's Dialogue on Attribution

There was a much more extensive discussion in Prelogar's opening remarks and in dialogue between Prelogar and various justices about the possible standards for deciding whether attribution of entity-realized income is constitutionally permissible. We highlight here some of the more pertinent and interesting statements from the oral argument transcript and include transcript page numbers.

In general, it appears the government at times suggested an approach based on the foreign status of the entity and at times based on control or some other relationship. Importantly, it seems the government argued that no constitutional or other standard should altogether be articulated because, in its view, Congress acted "fairly" in attributing the corporation's income to the taxpayers in this case. "Fair" sounds a little more demanding than merely "rational" or "not arbitrary," but what does it mean? A constitutional standard based on "fairness" could create as many problems as a vague requirement that income be "realized." The only clearly objective possible standard that the government kept revisiting was the fact that MRT income (or subpart F income) is realized by a foreign entity not subject to any U.S. income tax other than at the shareholder level.

Comments on due process, relationship, and history.

> PRELOGAR[12]: . . . there is a due process question in that context about the limits on Congress's ability to attribute income that was realized by one taxpayer to another taxpayer.
>
> . . . .
>
> PRELOGAR: Yes. The Court has looked at whether Congress has made an arbitrary choice, whether it's acted unreasonably. But I think that the Court's precedents reveal that the Court really has looked at whether the taxpayer who owes the tax liability has a relationship to the underlying —

[12]Transcript of oral argument, *supra* note 1, at 67-68.

. . . .

. . . the attribution question that we had been discussing about whether Congress can fairly attribute tax liability to one person for income that was earned at the entity level.

I recognize that maybe there are some complicated questions out there that could exist in this space, but the important point is that here we have an enormous amount of history and tradition on our side to support the idea that this particular attribution decision falls well within constitutional bounds.

On control in the partnership context.

PRELOGAR[13]: . . . I point to the Court's decision in Heiner versus Mellon, which considered the propriety of the tax on partners, even in a circumstance where they couldn't actually access the partnership income —

On whether the attribution issue was raised or preserved.

. . . .

NEIL GORSUCH[14]: You haven't made an argument that there was realization to this taxpayer, though, have you?

. . . .

GORSUCH: I'll take that as a yes.

. . . .

GORSUCH: [regarding permissible attribution] But we don't have that argument before us. What do we do about that? That argument hasn't been made.

PRELOGAR: Well, we certainly intended to make that argument, and I understand our briefing to focus on both aspects of this issue.

. . . .

GORSUCH: Let's — let's just say I don't see that argument. Then what do you want me to do? Am I supposed to vacate and remand if — for — for consideration of that question? Is it waived? You know, what — what would you have me do?

PRELOGAR: I — I certainly think that in our brief we argued that here, the taxpayers can properly be held accountable for the — the corporation's income and that the Court can say that in —

GORSUCH: I got that — I got that argument, General.

. . . .

GORSUCH: . . . If I'm working within this Court's precedents, if I don't consider them wholly misguided, okay, if I'm not willing to overturn a hundred years' worth of precedent, which you're asking us to do, and — and the question is, is it fair to say this — this taxpayer constructively or actually realized this income, should I vacate and remand?

On the fact that the income was realized by a foreign entity.

PRELOGAR[15]: No, you should affirm because, here, we made the argument that there is the same level of control and exactly the same relationship as in Subpart F. So we did make this argument, Justice Gorsuch. We made the point that if the Court is focused on things like control or influence, that there is no relevant distinction with Subpart F because this is taxing in precisely the same way as Subpart F operates.

. . . .

AMY CONEY BARRETT: And, General, what do you think is the significance of Petitioners' concession that Subpart F is constitutional to your point?

[13] *Id.* at 75.

[14] *Id.* at 75-80.

[15] *Id.* at 80-81.

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

On the difference between partnerships and corporations — but reverting to the point that this involved a foreign corporation.

PRELOGAR[16]: [regarding Heiner] It strongly supports the result in this case because, in Heiner, the Court confronted a situation where partners claimed they could not lawfully be taxed on partnership income on a passthrough basis because state law operated to preclude any distributions of that partnership income to them. So, by definition, under state law, the partners were not going to personally realize that income. State law prohibited the distribution.

And the Court rejected the claim from the partners and said that it didn't make a difference with respect to the permissibility of that passthrough tax from the partnership entity level to the partners themselves.

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

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

We also have good case law that governs Subpart F in the lower courts. This has been applied in numerous additional contexts involving passthrough taxation and corporations in particular, and it's not just the modern laws, Justice Kavanaugh, it is all of the history here.

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

BRETT KAVANAUGH: I — I agree with that history and your description of it. I was just isolating the — the case that's really kind of closest, I think, is Heiner, and I just wanted you to spell that out.

On constructive realization generally — but again reverting to the foreign status of the entity being outside the scope of U.S. taxing authority.

SAMUEL ALITO[17]: Now, if some sort of constructive realization or some test for attribution is required, what is your test? How far may Congress go in attributing income to someone who has not realized that income in the standard understanding of that term?

PRELOGAR: I would apply the test the Court used in Burnet versus Wells, which presents the most closely analogous situation. A taxpayer argued that because he had been the grantor of a trust, he couldn't be held liable for the gains in the trust, it couldn't properly be attributed to him because he had no continuing control and wouldn't personally enjoy those gains, which instead went to the beneficiaries.

This Court rejected that claim, and what it said is that Congress had not acted arbitrarily in making that attribution decision. It looked at the taxpayer's relationship to the underlying income and concluded that there was good reason to

[16] *Id.* at 86-88.

[17] *Id.* at 96-98.

tax the grantor in that circumstance, including to avoid shifting income to lower-income taxpayers.

But, if the Court were applying that kind of attribution analysis here, I think the MRT, like many passthrough taxes, is equally constitutional. Here, the income has never been taxed at the entity level, and there are real complications with trying to tax foreign corporations directly. So, in many respects, these large U.S. shareholders who, by definition, together collectively have a majority stake in a closely held corporation are in many senses the most suitable person or entity to tax.

On foreign entities presenting abuse potential.

ALITO[18]: Well, have we ever said — and maybe we should in this case say — that the Sixteenth Amendment applies differently to income or property that is obtained abroad than it does to income or property possessed within the United States?

PRELOGAR: The Court hasn't previously said that, but my friend himself suggests that in thinking about these issues, the Court should focus on the potential for tax avoidance or tax abuse. And I think that that concession just underscores the point that when you are using a foreign corporation, it provides a ready vehicle to shelter funds offshore, keep them out of the reach of U.S. taxing authorities, and, thus, complicate efforts to access those funds even when they have a really significant connection, as they do here, because these companies are majority owned by U.S. taxpayers.

And it's important to recognize too that this case is not the paradigmatic case of how the MRT applies. The overwhelming majority of taxpayers subject to this are domestic corporations, often parent companies of wholly owned foreign subsidiaries who have arranged their affairs to be able to keep this money offshore, to a period of long tax deferral. But I think that it would be anomalous to suggest that the money is forever out of the reach of U.S. taxing authority.

On constructive control and whether that argument was preserved.

GORSUCH[19]: You totally get what I'm saying. If we're talking about the same thing, you make a pretty persuasive argument that under the MRT, the Moores do have constructive control, that it is fairly attributable to them because they're a 10 percent stakeholder and some other facts.

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

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

GORSUCH: Sure.

PRELOGAR: — Petitioners say that the Subpart F regime is constitutional.

GORSUCH: I — I — I understand that, but — but —

PRELOGAR: Yeah.

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

PRELOGAR: If you think it hasn't been argued yet, I of course disagree on the facts —

[18] *Id.* at 97-98.

[19] *Id.* at 116-118.

GORSUCH: No, I — I understand.

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

On fraud potential as a possible standard — but again reverting to keeping money offshore outside of U.S. taxing jurisdiction.

GORSUCH[20]: And are some of those factors that you look at whether they control the — the entity, whether there's some evidence of fraud in its use of the entity? What else would you add to that list?

PRELOGAR: I would look at the taxpayer's overall relationship to the income and the — and the entity. You know, I — I hesitate to try to put the gloss of control on it for a couple of different reasons. One is that I think that would incentivize taxpayers to try —

GORSUCH: Sure.

PRELOGAR: — to argue in an individual case they don't have control.

GORSUCH: I'm not suggesting that's necessary.

PRELOGAR: Right. That could be —

GORSUCH: I'm suggesting it might be sufficient.

PRELOGAR: Yes. I would absolutely agree that might be the sufficient — that might be sufficient to establish that Congress made a fair attribution decision in that case. I would just caution the Court away from constitutionalizing that or saying it's necessary in every case.

GORSUCH: Roger that. What — what other factors would you have us look at?

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

GORSUCH: Let me pause you there.

PRELOGAR: Yes.

GORSUCH: So the — the foreign aspect of it and — and the difficulty of otherwise obtaining some kind of tax on it should factor in our analysis you think?

PRELOGAR: Again, I think those are —

GORSUCH: Could.

PRELOGAR: — conditions that could be sufficient. I wouldn't want the Court to say they are absolutely —

GORSUCH: Necessary.

PRELOGAR: — necessary in every case.

GORSUCH: I got it.

PRELOGAR: And, of course, we have things like partnerships where there's not necessarily —

GORSUCH: Sure.

PRELOGAR: — any abuse. It's a convenient way to structure taxation with respect to certain types of entities.

. . . .

GORSUCH: . . . I'll stop, but the way I read our precedent at least is it's — it's fairly saying that this individual realized, gained control of, or could be reasonably adjudged to have done that by Congress. This person has control over these assets.

And you've given me a very helpful list of factors from this Court's history and practice, consistent with our precedent,

[20] *Id.* at 119-124.

rather than calling it all misguided, that might work. Fair enough?

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

GORSUCH: Right.

PRELOGAR: — they might have a 1 percent stake in the company —

GORSUCH: I — I — I —

PRELOGAR: — and not have any control.

On why it is 'fair' generally to attribute entity income to owners.

BARRETT[21]: I want to follow up on some of — on your factors to Justice Gorsuch.

So you've talked about how it could be fair, you know, Justice Kavanaugh just said, S Corps, partnerships, you know, an MRT, to — and the MRT tax, to say that this is attributable to the shareholders or to the partners or, you know, to the seller of the trust.

How do we know that? Is it because this is closely held? Because I assume what your friend on the other side is going to say is, well, they — they had 10 percent, they weren't majority holders, and so they couldn't force a distribution. So how — how would you articulate that when it can fairly be attributed?

BARRETT: If we're not talking due process, if we're talking about it from a Sixteenth Amendment point of view.

PRELOGAR: Yes. So I think at the outset, the Court could rely on the lessons to be drawn from history and tradition here. This functions like the early income taxes that I pointed to from the 1860s and 1870 that taxed shareholders on corporate income.

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

You know, at the end of the day I guess what I would say is that certainly we think it's a factor in our favor that this reaches relatively large U.S. shareholders. It's true it's 10 percent, so they don't have to have a majority stake, but the premise of Congress is that these kinds of large shareholders can usually work together with other shareholders in this closely held corporation. There aren't going to be that many of them to direct the company's policy or to force a distribution as the case may be. And that kind of threshold, 10 percent, appears throughout the law, not just in the tax code, but in the securities context, for example, there are additional obligations imposed on 10 percent shareholders of companies.

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

[21] *Id.* at 130-132.