To Sabotage Or Not Sabotage The Tax Code? For SCOTUS, That's The Question

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The Supreme Court may be poised to upend how the federal government has collected money for more than a century, with wide-reaching implications for Congress, policymakers, businesses, and those who hope to one day collect more from the wealthiest Americans.

The case has all the markers of what's become typical strategic placement: four Wall Street Journal opinion pieces to its name, eight amici briefs from right-wing and pro-business non-profits, and backing from a high-profile law firm.

Like some other recent right-wing legal cause célèbres, this one utterly lacks grounding in current law, experts say, and could unleash chaos in a relatively untouched area for the current, ideological high court: the country's tax system.

From one perspective, it's small potatoes: The two plaintiffs are asking the Supreme Court to upend more than a century of tax law to allow them to skate on a $14,729 tax bill.

But from another, the stakes are high. Conservative activists, two of whom are representing the plaintiffs, have said that the case could allow the court to achieve a recent dream of conservatives: preempting progressives from establishing the kinds of "billionaire taxes" they discussed in the last session of Congress.

To do that, conservatives — and the Moores — want the Supreme Court to redefine "income" in the tax code in a way that would break with more than a century of court decisions and which could undermine tax law written during that time. Corporate America would receive a multi-hundred billion dollar giveaway, while the Supreme Court would signal its hostility toward the type of wealth tax that progressive Democrats have urged in recent years.

The case is *Moore vs. United States*, and the question presented is whether the Constitution allows Congress to define certain kinds of unrealized gains as "income" for tax purposes.

At least some of the billionaire tax proposals discussed in Congress rely on taxing unrealized gains. Conservative proponents of the *Moore* plaintiffs see their lawsuit as a way to forever define income so narrowly that it would foreclose any future wealth or billionaire tax.

For nearly a century, the law has been moving in the other direction. The Supreme Court last held that certain kinds of unrealized gains do not constitute "income" in 1920, a decision that was whittled down in successive Supreme Court cases over the following decades. Several appellate and high court cases have instead held that money made from a business is subject to income taxation, whether it is realized or not — a concept that underpins much of the modern tax code.

Brian Galle, a professor of tax law at Georgetown, remarked to TPM that the Supreme Court typically wades into tax law when there's a split between various appellate courts — which is notably lacking in the case that they've agreed to hear this term.

"These claims are stupid and ridiculous and way beyond what any court has been willing to do for over a century," he said.

What is income, really?

Understanding *Moore*'s claims, and why the Supreme Court's decision to take them on has spooked tax policy experts, requires some background.

The case is almost comically strategic, with the two plaintiffs — Charles and Kathleen Moore — fighting a four-year-long court battle over a $14,729 tax bill.

According to a video the pair recorded with the Competitive Enterprise Institute, a right-wing economic think tank which represents the pair along with white shoe law firm Baker Hostetler, they decided to sue in 2019 after being hit with the unexpected bill.

Charles had, years before, invested in an Indian farm equipment supply company which is more than 50 percent owned by U.S. citizens. Charles owns more than 10 percent of the firm, meaning that he got hit by a one-time tax imposed by Trump's 2017 tax law.

The law, in an attempt to bring foreign corporate earnings back home, imposed a light, one-time transition tax on some repatriated foreign earnings. It was seen as a good deal for those affected because they paid significantly less than the standard corporate tax rate upon repatriation, and had the option of paying out the tax burden over eight years. But in 2019, Charles and his wife Kathleen sued.

The two claimed that the tax violated two provisions of the Constitution: one on how Congress defines "income" per the 16th Amendment, and another on whether a tax can be, in the lawsuit's words, "retroactive."

The Moores and their supporters have since mostly dropped the "retroactive" part of the claim, focusing instead on whether the undistributed gains can be taxed as income under the Constitution.

By 2021, two attorneys representing the Moores who also double as conservative commentators wrote an op-ed for the Wall Street Journal saying the case could be used to "shut the door to Elizabeth Warren's far more ambitious levy," referring to proposals in Congress at the time to enact a billionaire's tax to help pay for Joe Biden's policy agenda and reduce wealth inequality.

After losing at the 9th Circuit, the couple appealed to the Supreme Court in February. Two more opinion pieces urged the court to take on the case in a bid to head off progressive dreams of wealth taxation, including one June editorial, published six days before Justice Samuel Alito took to the same pages for a prebuttal against ProPublica. The next week, the Supreme Court agreed to hear the case.

Consequences

The Moore's issue is narrow, but it goes to the heart of whether the definition of "income" that Congress has used for taxing business proceeds for more than a century is constitutional.

Steve Rosenthal, a tax expert at Urban-Brookings, was surprised that the Supreme Court agreed to hear *Moore*.

Rosenthal helped draft tax legislation in the 1990s, including a 1993 law which imposed a mark-to-market (read: unrealized) taxation on broker-dealers in the securities industry.

Though Rosenthal said he believed the high court would be unlikely to issue a ruling which truly disrupted the tax code, he told TPM that it could leave room for other changes that would further chip away at currently existing taxes on capital.

"What it will do is both protect the billionaires on their unrealized gains as well as any capital holders who will avail themselves of loopholes to structure their investments," he said.

After the Moores moved for the court to hear the case the Chamber of Commerce and the Cato Institute, among others, filed friend-of-the-court briefs advocating for the court to take up the case.

One brief was filed by the Manhattan Institute, on whose board sits billionaire Paul Singer, who reportedly provided a trip for Justice Alito in 2006, and Kathy Crow, wife of Clarence Thomas friend Harlan Crow.

That brief suggested that the Supreme Court should take the Moore's case as a way to make future wealth taxes impossible.

“This case presents the Court with an ideal opportunity to clarify that taxes on unrealized gains, such as wealth taxes, are direct taxes that are unconstitutional if not apportioned among the states,” the brief reads.

But Galle, the Georgetown law professor, told TPM that limiting the definition of income could muddy questions of depreciation, business partnerships, and operating losses — all of which go into the valuation of a company.

He added that the odds of a chaos-inducing decision were “frighteningly high.”

“Why else would you grant cert?” he added.