

MOORE V. UNITED STATES

RADICAL EFFORT TO PREVENT TAXES ON BILLIONAIRES COULD UPEND THE TAX CODE

On December 5, 2023, the United States Supreme Court will hear what may be the “[most important tax case in a century](#).” While the case is formally about the constitutionality of an obscure one-time tax, it poses [broad risks](#) that could make an already profoundly unequal tax system even more favorable to corporations and the wealthy. *Moore v. United States* not only imperils important long-standing portions of the tax code and vital resources for public programs, but also represents a radical invitation to the Court to illegitimately weaponize a challenge to an existing law and bypass democratic processes in order to prevent possible taxes on the ultrawealthy.

HOW AN OBSCURE LAW AND \$15,000 COULD MAKE AN UNEQUAL TAX CODE WORSE

Charles and Kathleen Moore are challenging the constitutionality of the Mandatory Repatriation Tax (MRT), a one-time tax on offshore profits included in the 2017 Republican-enacted Tax Cuts and Jobs Act. Represented by anti-tax think tank Competitive Enterprise Institute and the law firm BakerHostetler, the Moores [filed](#) their case in 2019, seeking a refund for the [\\$14,729](#) they paid as a result of the MRT. Following losses at the federal district and appellate courts, the Moores, as well as a number of regressive anti-tax groups including the Cato Institute and the Manhattan Institute for Policy Research, [urged](#) the Supreme Court to hear the case. In June, it agreed.

Although the case is ostensibly about a one-time tax, depending on how the Court rules, a decision could not just invalidate the tax at issue, but also have [sweeping effects](#) on the existing tax system in ways that mainly [benefit high-income taxpayers](#). The Court could in effect [upend](#) current tax code by placing [provisions](#) that are similar to the MRT in jeopardy, including ones designed to more fairly tax [complex](#) financial arrangement. Just invalidating the MRT could result in an immediate corporate windfall estimated to exceed [\\$270 billion](#), meaning the US would lose out on hundreds of billions in resources needed to fund critical programs including in education, health, and social protection. These risks have resulted in broad opposition and the filing of amicus briefs in support of the government by an “[unusual alliance](#)” of tax experts, bipartisan former officials and

congressional staffers, academics, business groups, and others.

The case garnered attention in August, when Senators on the Judiciary Committee [wrote](#) to Chief Justice John Roberts seeking Justice Samuel Alito Jr.’s recusal due to his personal ties to one of the Moores’ attorneys, David Rivkin Jr. (Rivkin also [represents](#) Leonard Leo). Justice Alito [rejected](#) the request. Connections between the Moores, the individuals and groups supporting the case, and conservative billionaires who could be subject to a tax on the ultrawealthy have [drawn scrutiny](#) in the media. [Reporting](#) on seeming misrepresentations and inconsistencies in the Moores’ legal filings also drew [calls](#) for the their attorneys to correct the record.

THE REAL AGENDA: BLOCKING TAXES ON BILLIONAIRES

What’s the goal of the Moores and the anti-tax groups supporting their case? As our analysis shows, for many the real target is getting the Court to block hypothetical taxes on the wealth or unrealized gains of the very richest—taxes that do not currently exist.

To be clear, the MRT is a tax on offshore profits, not a wealth tax, and it works [very differently](#) than any of the leading proposals to tax the ultrawealthy. Yet, a key goal of the petitioners and many of their amici (those who filed “friend of the court briefs”) is persuading the Court that it can and should use this case to try to prevent policymakers from ever imposing such proposals.

Oxfam America analyzed the 32 legal briefs filed by petitioners and their supporters with the Court at the certiorari and merit stages.¹ The analysis reveals a concerted effort to focus the Court’s attention on proposals to tax the wealthy, despite the fact that they



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are neither before the Court nor existing law. Three quarters of the briefs (24) reference possible or proposed taxes on wealth and unrealized gains, and the vast majority of those (22) impliedly or explicitly urge the Court to rule in a way that the filers hope would frustrate such proposals.

YET A WEALTH TAX IS NOT BEFORE THE COURT

Several briefs evince a single-minded focus on the issue of possible tax reforms, even though they are not before the court. A number [extensively](#) discuss the possibility of taxes on wealth or unrealized gains. Briefs [reference](#) bills such as the [Ultra Millionaire Tax Act](#) introduced by Senator Warren and Representative Jayapal, as well as the [Billionaire Minimum Income Tax](#) proposed by President Biden, and the [work](#) of leading economists on inequality like Emmanuel Saez and Gabriel Zucman.

Frequently, the briefs urge the Court to rule in a way that the filers believe would block such proposals to increase the progressivity of the tax code. The Moores implore the Court to “[head off](#)” such a possibility. The Landmark Legal Foundation encourages the Court to act “[before Congress passes wealth taxes](#).” The Manhattan Institute urges the Court to address Congress’ power to tax “[before the train has begun rolling unstopably down the hill](#).” The Pacific Research Institute warns, “absent judicial clarity on the point, [legislators will move](#),” and the “prudent course would be to [address the issue before](#) billions or trillions of dollars in taxes are at stake.”

This is despite the fact that, as one of the groups asking the Court to prevent a “[possible wealth tax](#)” acknowledges, “[the MRT is not a wealth tax](#).” And it is regardless of the fact that, even were the Court inclined to overreach and address such proposals, it would never be able to block them in this case because, as legal scholars have [set out](#), there are multiple ways to design taxes on the ultrawealthy that are constitutional and administratively feasible. Nonetheless, according to another amicus brief, filed by Atlantic Legal Foundation, the Court “[should examine the question presented...through a much wider lens](#).”

Many briefs engage in scaremongering and slippery-slope arguments about what will happen if the Court does *not* reach an issue that is not before it. They describe a “[slurry](#)” and “[slew](#)” of new taxes. Some mislead, describing proposals whose

very *raison d’être* is taxing the 1% as threats to the [middle class](#) or the [majority](#) of the population. Others mischaracterize progressive tax proposals as harmful to [women](#) and [upward mobility](#), despite [evidence](#) to the contrary.

DEMOCRACY AT STAKE

The Moores’ challenge raises profound concerns about democracy, which depends on respect for constitutional principles including the separation of powers between the judicial and legislative branches. Congress has the power to tax. By objecting to the MRT—essentially asking the Court to depart from a [century of precedent](#) and place many long-standing provisions of the existing tax code in jeopardy—the case represents a challenge to Congress’ constitutional authority over tax policy.

Moreover, to the extent that *Moore* is an effort to bypass democratic processes and misuse a challenge to existing law to circumscribe the choices of future policymakers in a way that would benefit economic elites, the case represents a particularly vicious attack on democracy. It’s an affront to Congress’ power to tax and to the peoples’ right to shape policy through their elected representatives. It also plainly flouts the constitutional requirement that the Court can only rule on actual [cases and controversies](#) before it.

THE ROLE OF OUR TAX SYSTEM IN DRIVING EXTREME INEQUALITY

Polls routinely show that the majority of Americans feel the wealthy don’t pay their [fair share](#) and support [higher taxes](#) for the richest. With good reason—the tax code is deeply unequal. Runaway economic [inequality](#), historic wealth concentration at the [very top](#), and persistent and unjust [racial](#) and [gender](#) disparities are, in part, the result of a skewed tax system that is exceedingly generous to the richest.

Following decades of tax cuts that largely [benefited](#) the wealthy, top billionaires pay a lower income tax rate than many in the [middle class](#) ([just 8.2%](#) according to a White House analysis). The tax system [contributes](#) to racial inequality, with tax [breaks](#) and [cuts](#) for the wealthy overwhelmingly going to white families (for example, they receive [92%](#) of the benefit of preferential rates for capital gains). The US lags [far behind](#) most of its economic peer countries in using its tax system to address inequality.

As a result, proposals to tax the wealth or unrealized gains of the absolute wealthiest have gained attention in recent years. Such taxes [could](#) raise hundreds of billions in revenue to invest in working families, narrow the [racial](#)



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wealth gap, advance [gender](#) equity, and help tackle the [climate](#) crisis. These proposals are also popular. A 2020 Ipsos/Reuters [poll](#) found a significant majority (64%) favored a wealth tax on the very rich.

These and any other potential reforms to the tax code should be the subject of public debate, and

tax policy choices should emanate from Congress, not the Court. In the context of such debate, it's perfectly legitimate for anti-tax groups to voice their opposition to policies that would make our tax system more fair. But it's unacceptable to abuse the Constitution and ask the Court to prevent that debate from ever occurring.

FIGHTING INEQUALITY TO BUILD A BETTER WORLD

Oxfam believes that poverty is a policy choice, and that the ultrawealthy and giant corporations have hijacked our systems to benefit a select few. We are working to redress the balance of power, putting it back in the hands of working families in the US and around the world.

ⁱ Oxfam America reviewed 32 briefs filed by the petitioners and their amici: 9 certiorari stage briefs (which tell the Court why it should or should not take the case) and 23 merits stage briefs (which tell the Court why a party should win).



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