

Supreme Court Urged To Consider Protest Of Utah Tax Policy

By **Maria Koklanaris**

Law360 (December 12, 2019, 9:01 PM EST) -- The Utah Supreme Court's blessing of a policy allowing credits for taxes paid on state income but not for taxes paid on foreign income is unconstitutional, a couple said Thursday in asking the U.S. Supreme Court to hear their case.



Veteran Supreme Court litigator Neal Katyal urged the justices to take up a case against a Utah policy allowing credits for taxes paid on state income but not for taxes paid on foreign income. (AP)

Utah residents Robert Steiner and Wendy Steiner-Reed told the justices that an Aug. 16 decision by the Utah Supreme Court violates the U.S. Constitution by discriminating in favor of domestic commerce. Because Utah allowed a credit for taxes paid on income to other states, but disallowed them a credit on taxes paid on foreign income to foreign countries, the domestic income was taxed once, but the foreign income was taxed twice, the couple said.

Such a policy should have been disallowed by the U.S. Supreme Court's precedents in the 1992 [Kraft General Foods Inc. v. Department of Revenue](#) and the 2015 [Comptroller of the Treasury v. Wynne](#), the couple said in a petition for certiorari filed by veteran Supreme Court litigator Neal Katyal of Hogan Lovells. In *Kraft*, the court found that states may not prefer domestic commerce over foreign commerce, and in *Wynne* it found that states may not prefer in-state commerce over out-of-state commerce, the couple's petition said.

Katyal and partner Sean Marotta, also representing the Steiners, were counsel for Brian and Karen Wynne in 2015.

Key to the Steiners' case, the petition contends, is that both cases apply commerce clause protection to individuals as well as corporations. The Utah Supreme Court's refusal to extend protection to individuals because there is no U.S. Supreme Court precedent explicitly doing so demonstrates "outright hostility to this court's commerce clause doctrine," the petition said.

"Two of this court's cases [*Kraft* and *Wynne*] should have easily resolved the Steiners' challenge in their favor," the petition said. "The Utah Supreme Court, however, disagreed. ... That approach cannot be squared with the [U.S. Supreme Court's] constitutional obligation to enforce federal law."

In an interview with Law360, Marotta said the Utah Supreme Court appeared to show the same

disdain for the commerce clause that is shared by Justice Clarence Thomas and that the late Justice Antonin Scalia was well known for. As a lower court, the Utah Supreme Court does not have that prerogative when interpreting the law of the land, Marotta said.

"You have an obligation to follow the majority," which accepted the commerce clause in *Wynne*, Marotta said. "I think the [U.S. Supreme Court] takes it really seriously that lower courts have to follow its precedent. It reserves for itself the right to revise or overturn its own case law."

William Adams of Fabian VanCott, the couple's Utah attorney, told Law360 he thought the justices would find especially compelling the opportunity to speak for foreign commerce clause protection of individuals, which the couple have made a centerpiece of their petition.

But in an emailed statement to Law360, John L. Valentine, chairman of the Utah State Tax Commission, predicted the justices would find that the Steiners' attempt to link their case with *Wynne* is misplaced.

"The United States Supreme Court's jurisprudence in the *Wynne* case, relied on by the taxpayers, has not been extended to foreign income passed through to Utah residents," Valentine said. "We are confident that the United States Supreme Court will uphold the ruling of the Utah Supreme Court in this case."

The decision by the Utah Supreme Court has proved in recent months to be one of the most disputed in state tax circles. State tax professionals have looked askance at its acceptance of allowing a tax credit on domestic income but not on foreign income.

"Nobody is saying you have to provide a tax credit, but you have to provide some remedy because this is a discriminatory tax," said Steven Wlodychak of EY.

State tax professionals have also been flummoxed by the Utah Supreme Court's contention that in the absence of specific case law, the foreign commerce clause could not be construed to protect individuals.

"Jurisprudentially, not to resolve a state case unless there is a U.S. Supreme Court precedent exactly on point is an abdication of your responsibility as a judge," Richard Pomp, professor of taxation at the University of Connecticut School of Law, told Law360.

Both Pomp and Bruce Ely of Bradley Arant Boult Cummings LLP noted that the element the Steiners' petition is missing is a lower-court split. But Ely said he thought the Utah Supreme Court had defied U.S. Supreme Court precedent strongly enough to overcome the lack of a split.

"There has to be a category for granting certiorari in a case like this," Ely said.

Robert Steiner and Wendy Steiner-Reed are represented by William H. Adams, Peter W. Billings, Nora Brunelle and David P. Billings of Fabian VanCott, and by Neal K. Katyal, Sean Marotta, Reedy C. Swanson and Alexander B. Bowerman of Hogan Lovells.

The Utah State Tax Commission is represented by Sean D. Reyes, Stanford E. Purser, Erin T. Middleton, John C. McCarrey and Mark E. Wainwright of the state Attorney General's Office.

The case is *Robert C. Steiner et ux. v. Utah State Tax Commission*, case number 19A426, in the U.S. Supreme Court.

--Editing by John Oudens.