No. 09-520

JAN 13 2010

# In The
# Supreme Court of the United States

CSX TRANSPORTATION, INC.,

*Petitioner,*

v.

ALABAMA DEPARTMENT OF REVENUE and TIM RUSSELL, COMMISSIONER OF THE ALABAMA DEPARTMENT OF REVENUE,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether Alabama's generally applicable sales and use tax on diesel fuel, imposed on railroads, discriminates against railroads in violation of Section 301(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501(b)(4), when the State's overall excise tax structure imposes other, differently labeled, excise taxes on the railroad's direct competitors on the same taxable event.

TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

## STATEMENT OF THE CASE

### A. STATUTORY BACKGROUND

Congress' purpose in adopting the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act") was not to grant railroads preferential treatment, but to "remedy discrimination against the railroads and place them on an equal playing field with other state taxpayers." *See Atchison, Topeka, and Santa Fe Ry. v. State of Ariz.*, 78 F.3d 438, 442 (9th Cir. 1996) (*ASTF*) (*citing Ogilvie v. State Board of Equalization*, 657 F.2d 204, 210 (8th Cir. 1981), *cert. denied*, 454 U.S. 1086 (1991)). Therefore, a tax will only be discriminatory under (b)(4) of the 4-R Act "if it imposes a proportionately heavier tax on railroading than on other activities." *ASTF* at 441 (*quoting Burlington N.R.R. v. City of Superior*, 932 F.2d 1185, 1187 (7th Cir. 1991)). In fact, railroads have received preferential treatment by paying less tax per gallon of diesel fuel than their direct competitors.

The sale or consumption of petroleum products in Alabama is generally subject either to the various excise taxes imposed by Title 40, Chapter 17 of the Alabama Code ("motor fuels tax"), or to sales and use taxes imposed by Title 40, Chapter 23 of the Alabama Code ("sales and use tax"). Fuel subject to the motor fuels tax under Title 40, Chapter 17 is not subject to sales and use tax under Title 40, Chapter 23. Because the purchase and consumption of diesel fuel by railroads is not subject to motor fuels tax, railroads are subject to sales and use tax.

Alabama law provides a few narrow, specific exemptions to both motor fuel taxes and sales and use taxes. *See* Title 40, Chapter 17 and Title 40, Chapter 23 of the Ala. Code. However, it is important to note that simply because a taxpayer may receive an exemption from one excise tax does not mean that they are not taxed under a differently labeled excise tax on the exact same underlying transaction.

CSXT, for example, is exempt from the additional Article 6 excise tax on gasoline. Ala. Code § 40-17-220(c)(2). In other words, railroads pay gasoline tax at the rate of 12 cents per gallon, while motor carriers and the majority of other taxpayers pay gasoline tax at the rate of 16 cents per gallon. Ala. Code §§ 40-17-31(a) and 40-17-220. In addition, railroads are not subject to the 19 cents per gallon motor fuel tax on their purchases of diesel fuel. *See* Ala. Code §§ 40-17-2(1) (13 cents per gallon) and 40-17-220(e) (6 cents per gallon) paid by on-road motor vehicles ("motor carriers"), the principal competitors of railroads. Because railroads do not pay the motor fuels tax on their purchases of diesel fuel, these purchases are taxed at the lower 4% general rate of sales and use tax. *See* Ala. Code § 40-23-2(1).

## B. PROCEEDINGS BELOW

In the factually indistinguishable case of *Norfolk Southern Ry. v. Alabama Dept. of Revenue*, 550 F.3d 1306 (11th Cir. 2008), the Eleventh Circuit, in a unanimous decision, held that Alabama's generally

applicable sales and use tax on diesel fuel did not discriminate against railroads in violation of section 301(d) of the 4-R Act, 49 U.S.C. § 11501(b)(4). In rendering its decision, the Eleventh Circuit found this Court's analysis in *Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332 (1994) to be determinative of Norfolk Southern's appeal. *Norfolk Southern* at 1313.

Accordingly, immediately following the issuance of the *Norfolk Southern* opinion by the Eleventh Circuit, the district court in the instant case *sua sponte* entered an order on December 16, 2006, dissolving the preliminary injunction previously entered and dismissing CSX Transportation Inc.'s ("CSXT") case, citing *Norfolk Southern* as dispositive. Pet. App. 3a. CSXT appealed and sought an en banc hearing by the Eleventh Circuit, which was denied. Pet. App. 39a. Shortly after this denial the Eleventh Circuit affirmed the district court's dismissal of CSXT's case. Pet. App. 2a.

## REASONS FOR DENYING THE PETITION

### I. THE ELEVENTH CIRCUIT CORRECTLY HELD THAT ALABAMA'S GENERALLY APPLICABLE SALES AND USE TAX DOES NOT DISCRIMINATE AGAINST RAILROADS IN VIOLATION OF THE 4-R ACT.

Not only is the Eleventh Circuit's unanimous decision in *Norfolk Southern* correctly decided and directly on point, the Eleventh Circuit applied this

Court's analysis in the case of *Dep't of Revenue v. ACF Indus. Inc.*, 510 U.S. 332 (1994). Conversely, the Eighth Circuit decisions cited by the Petitioner are distinguishable as the Eighth Circuit did not apply the *ACF Industries* analysis. Instead, it is the decisions of the Eighth Circuit that are in conflict with this Court's analysis, while the decision of the Eleventh Circuit is in accord with this Court's precedent.

In *Norfolk Southern*, the Eleventh Circuit held that Alabama's generally applicable sales and use tax on diesel fuel did not discriminate against railroads in violation of the 4-R Act. *Id.* at 1316. In reaching this holding, the Eleventh Circuit found this Court's decision in *ACF Industries* to be determinative of Norfolk Southern's appeal. *Norfolk Southern* at 1313.

In *ACF Industries*, this Court considered a challenge to Oregon's ad valorem tax on real and personal property on the ground that Oregon exempted various classes of commercial and industrial property while taxing railroad cars in full. *Id.* at 337. In rendering its decision, this Court held that "a State may grant exemptions from a generally applicable ad valorem property tax without subjecting the taxation of railroad property to challenge under the [4-R Act, § 11501(b)(4)]." *Id.* at 335. This Court further concluded that § 11501 "does not limit the States' discretion to exempt nonrailroad property, but not railroad property from ad valorem property taxes of general application." *Id.* at 347-48.

While the Eleventh Circuit acknowledged that Norfolk Southern's case dealt with exemptions to a sales and use tax, instead of an ad valorem tax as that considered in *ACF Industries*, it nevertheless found the Supreme Court's analysis to be "equally applicable," as the Eleventh Circuit could find nothing in the 4-R Act to indicate an "intent to reach exemptions for generally applicable sales and use taxes," and importantly, that this Court did not limit its conclusion in *ACF Industries* to ad valorem property taxes. *Norfolk Southern* at 1314-15. Finally, as with property tax exemptions, sales and use tax exemptions were in existence when the 4-R Act was drafted and Congress' silence on exemptions must reflect "a determination to leave such exemptions in place." *Norfolk Southern* at 1315. Therefore, the Eleventh Circuit correctly held that *ACF Industries* controlled its analysis. *Id.* at 1316.

## II. THE ELEVENTH CIRCUIT DISTINGUISHED ITS HOLDING AND FOUND ITS CONCLUSION CONSISTENT WITH PREVIOUS CASE LAW IN OTHER JURISDICTIONS.

Rather than acknowledge a conflict, the Eleventh Circuit instead joined "other courts that have applied the *ACF Industries*' analysis to state and local taxes analogous to Alabama's sales and use tax on diesel fuel." *Norfolk Southern* at 1315. While the Eleventh Circuit recognized that "some post-1994 courts ignored *ACF Industries*" and "instead scrutinized

exceptions to generally applicable *non*-property taxes," the Eleventh Circuit correctly pointed out that such decisions did "not even discuss *ACF Industries* or its influence on their analyses" and thus the Eleventh Circuit found such cases "unpersuasive." *Norfolk Southern* at 1315 & n. 15. Not unimportantly, the Eleventh Circuit also found that "these cases conflict with pre-1994 cases that have applied a similar analysis to that in *ACF Industries* to non-property taxes. *See, e.g., Burlington N.R.R. v. City of Superior*, 932 F.2d 1185, 1187-88 (7th Cir. 1991); *Ka. City S. Ry. v. McNamara*, 817 F.2d 368, 377 (5th Cir. 1987)." *Northern Southern* at 1315-16. Therefore, the Eleventh Circuit held that Alabama's generally applicable sales and use tax on diesel fuel does not target railroads within Alabama, and thus does not discriminate against railroads in violation of the 4-R Act. *Id.* at 1316.

Furthermore, in rendering its decision, the Eleventh Circuit stated "[o]ur conclusion is consistent with previous case law in other jurisdictions," and concluded, "[g]enerally cases that have applied *ACF Industries* or a similar analysis, and have found taxes to target the railway industry, have involved taxes levied almost exclusively upon railroads." *Norfolk Southern* at 1316. In contrast, the Eleventh Circuit reasoned that taxes like those at issue in this case, "where a state taxes railroads along with many other businesses, but exempts certain discrete industries, have been found to be generally applicable and thus not discriminatory." *Id.* at 1316-17. Therefore, the

Eleventh Circuit concluded that Alabama's generally applicable sales and use tax on diesel fuel does not target railroads and thus does not discriminate in violation of the 4-R Act. *Id.*

The Ninth Circuit, in the case of *Atchison, Topeka, and Santa Fe Ry. v. State of Ariz.*, 78 F.3d 438 (9th Cir. 1996), also found this Court's logic advanced in *ACF Industries* to be "equally applicable to the context of transaction privilege tax and use tax exemptions." *ASTF* at 443. Therefore, the privilege tax and use tax exemptions at issue for motor carriers did "not violate the 4-R Act because the taxes at issue are generally applicable and railroads are treated fairly in comparison to other taxpayers subject to the Arizona taxes." *Id.* at 444.

Contrary to the holdings of the Eleventh and Ninth Circuits, the Eighth Circuit inexplicably ignored this Court's analysis in *ACF Industries. See Burlington Northern Santa Fe Ry. Co. v. Lohman*, 198 F.3d 984 (8th Cir. 1999); *Union Pacific R.R. Co. v. Minnesota Dept. of Revenue*, 507 F.3d 693 (8th Cir. 2007). Without this Court's analysis of *ACF Industries*, it is not surprising that the Eight Circuit reached a different conclusion than that of the Eleventh and Ninth Circuits by holding that Missouri and Minnesota's sales and uses taxes on fuel purchased by railroads violated the 4-R Act. *See Lohman*; *Union Pacific*. Importantly, the Eleventh Circuit was correct in holding as "these decisions do not even discuss *ACF Industries* or its influence on their

analyses," the Eighth Circuit decisions were not persuasive. *Norfolk Southern* at 1315 & n. 15.

## III. ALABAMA'S SALES AND USE TAX ON DIESEL FUEL DOES NOT DISCRIMINATE AGAINST RAILROADS AS THE STATE'S EXCISE TAX STRUCTURE IMPOSES DIFFERENTLY LABELED EXCISE TAXES ON THEIR DIRECT COMPETITORS ON THE SAME TAXABLE EVENT.

In a comprehensive, well-researched decision, the Eleventh Circuit correctly decided the factually indistinguishable case of *Norfolk Southern*. However, had the Eleventh Circuit not applied this Court's reasoning in *ACF Industries*, there are other grounds, not relied upon by the Eleventh Circuit, that demonstrate that its decision is correct. The excise tax structure that applies to the subject of the tax (use or consumption of diesel fuel) as compared to both the railroads and their direct competitors must be analyzed. It is well-settled law that the United States Supreme Court will give great weight to the characterization of a tax, or interpretation of state law emanating from the highest court of a state, but where a federal question is involved, the Supreme Court is not bound by the label attached to the tax or character ascribed by law, but must determine for itself the true nature of the tax by ascertaining its operation and effect. *See, e.g., Schuylkill Trust Co. v. Commonwealth of Pennsylvania*, 296 U.S. 113 (1935); *see also Lawrence v. State Tax Commission*, 286 U.S.

276, 280 (1932) (Court concerned only with a tax's practical operation, not its precise definition of descriptive words); *also Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 297 (1998) (when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the Court must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State.). An evaluation of the operation and effect of the relevant excise taxes, regardless of their descriptive labels, paid on the purchase and consumption of diesel fuel by the railroads and their direct competitors can logically and easily be reviewed by looking only at the applicable excise tax each party is subject to per gallon of diesel fuel.

There is nothing in the 4-R Act that requires a court evaluating whether a state tax results in tax discrimination against a railroad to ignore a tax structure that imposes a tax on the same taxable event (the use and/or consumption of a gallon of diesel fuel) but merely labels the tax differently. Instead, the 4-R Act requires a determination of whether the attendant tax on purchases of diesel fuel, regardless of its label, results in tax discrimination. Railroads, despite being part of the general class of taxpayers subject to a sales tax on their diesel fuel purchases,[1]

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[1] All taxpayers of the State of Alabama, who do not pay the motor fuel tax, and are not exempt from the sales and use tax by

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suffer no tax discrimination when compared to their direct competitors, who themselves pay a differently labeled, and higher, excise tax (motor fuels excise tax) on their purchases of diesel fuel, 19 cents per gallon for diesel fuel (motor fuel excise tax), regardless of the price paid per gallon.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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statute, pay the 4% general rate of sales and use tax on purchases of diesel fuel. Ala. Code § 40-23-2(1).